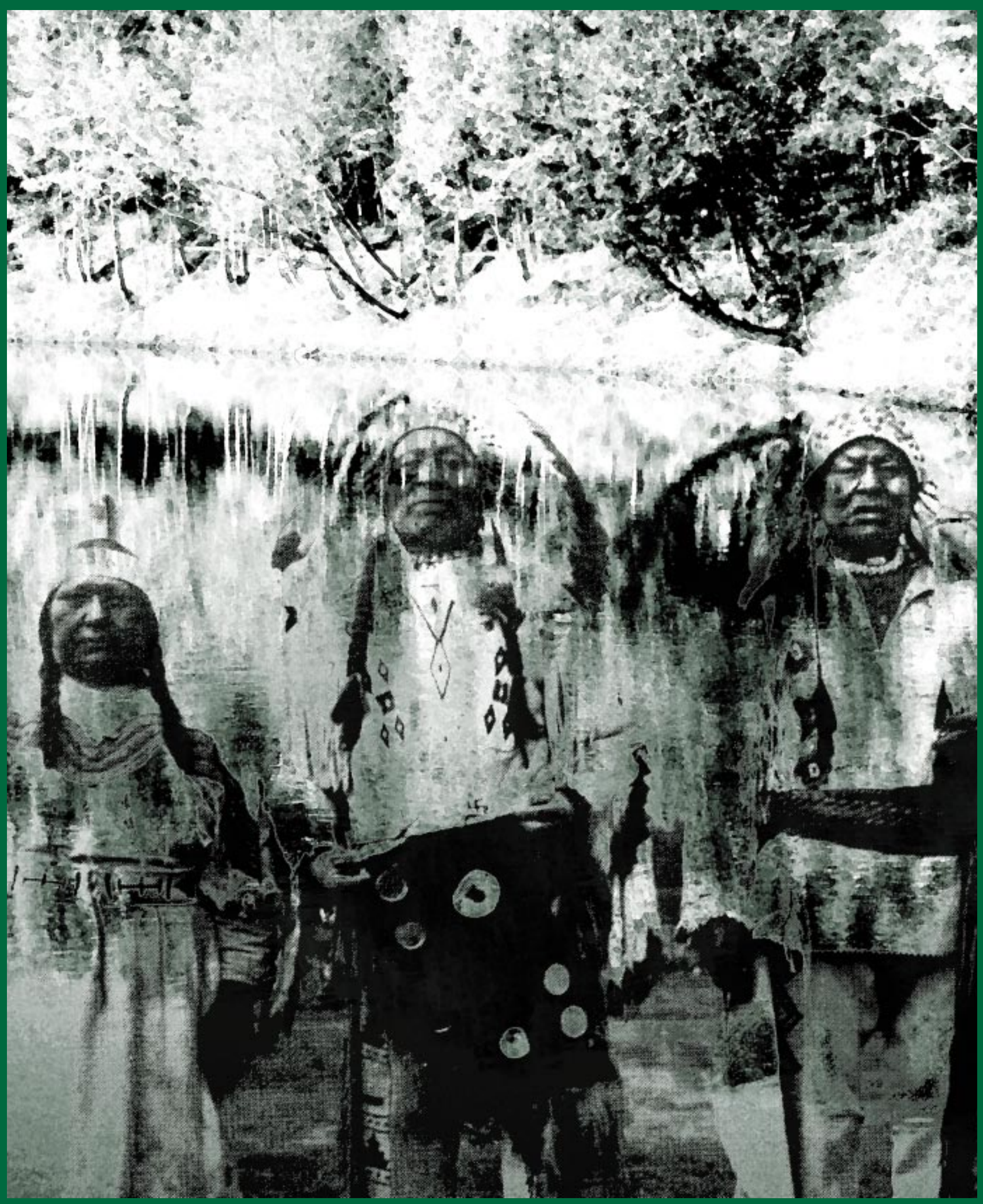
INDIAN CLAIMS COMMISSION



ANNUAL REPORT
1997/1998

INDIAN CLAIMS COMMISSION

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Cover photo includes image
Indian celebrations during Scottish games at Banff, Alberta,
photo B.R. MacKay, 1927 (#70308)

Text Photos

Chipewyan encampment on Taltson River at mouth of Pierrot Creek, Northern Alberta,
photo by F. Harper, 1914 (#30049)

Big Bear's camp (Cree Indian) Maple Creek, Saskatchewan,
photo by G.M. Dawson, 1883 (#467)

To His Excellency
The Governor General in Council

MAY IT PLEASE YOUR EXCELLENCY

In 1997/98, the Indian Specific Claims Commission completed and released seven reports into twelve claims. As of April 1, 1998, inquiries into thirty-nine claims have been completed and reported, and a further three reports are in progress. It has been a productive year for the Commission, and this report provides a summary of our major achievements and activities in relation to specific claims.

As in our previous Annual Reports, we take this opportunity to make important recommendations with regard to, first, an independent claims body; second, the adoption of previous reports and recommendations of the Commission; third, mediation and alternative dispute resolution (ADR); fourth, increased resources to deal with specific claims; fifth, oral histories and traditions; and, sixth, development of a claims inventory. In addition, we continue to encourage Canada and First Nations to use the Commission's mediation and alternative dispute resolution services to help in the timely settlement of specific claims.

It is with pleasure that we submit our Annual Report for 1997/98.

Yours truly,

Daniel J. Bellegarde
Commission Co-Chair

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

November 1998

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MESSAGE FROM THE COMMISSIONERS

We are pleased to present the Annual Report of the Indian Claims Commission (ICC) for 1997/98. Over the past year, the Commission has released seven reports into twelve completed inquiries. Of those seven reports, one covered a claim presented to the Commission jointly by six individual First Nations, requiring six individual inquiries. To date, our Commission has inquired into or mediated 43 First Nations claims, and many others are in different stages of our process.

The Indian Claims Commission is an interim Commission set up in 1991 to resolve First Nations' claims. Concurrently, Canada and First Nations intended to work towards establishing a permanent claims body. During the last year, Canada and the First Nations renewed their efforts to establish the new claims body and claims policy. We look forward to their efforts becoming a reality in the coming months.

We believe the experience and knowledge we have gained over the years can help the new claims regime. The Indian Claims Commission has developed an innovative approach emphasizing open discussion and cooperation between First Nations and Canada through all stages of the claims process. We have seen real results.

For example, two of the claims we reported on this year — the Chippewa Tri-Council inquiry and the Sturgeon Lake First Nation inquiry — were accepted at an early stage in the ICC's process. In both cases, bringing the parties together at an early stage led to a better understanding of the issues at hand and cleared the path to a successful resolution. The surrender claim of the Kahkewistahaw First Nation was accepted this year, based on our recommendation. We were also pleased to see that the Canoe Lake First Nation, the subject of one of our earliest inquiry reports, has completed negotiations with Canada and a settlement has been reached. To date, 16 First Nations' claims have been accepted for negotiation or settled completely as a result of the Commission's inquiry and mediation processes.

A number of our recommendations this year are designed to highlight the lessons of our success. We are calling for greater use of alternative dispute resolution in the claims process. Mediation and facilitation are approaches which reduce the confrontational aspects of claims discussions and foster a cooperative approach. The use of oral testimony in researching and evaluating claims is another important and innovative aspect of our process. Not only is using such testimony respectful of First Nations' culture and values, but oral testimony provides crucial information that is often missing from the written records. The Supreme Court of Canada's decision in the *Delgamuukw* case announced earlier this year recognizes the importance and value of First Nations' oral traditions. We are proud to say that the use of oral history has been a requirement in our inquiry process since day one. *Delgamuukw* confirms our belief that oral tradition cannot be ignored.

As we begin our eighth year of work, our primary concern is to set the stage for a new claims body. We are continuing to inquire into First Nations' claims, and we want to ensure that our recommendations — and the First Nations involved — are acknowledged and receive a response. To this end, we are recommending that Canada provide more resources to examine, evaluate, and respond to our reports. In addition, we believe a new claims body should adopt any outstanding ICC recommendations. We do not want our hard work, and that of First Nations and Canada, to fall through the gaps. First Nations have come to the Commission in the expectation that they will get a fair hearing. Good faith and fairness should be the hallmarks of any new claims process.

It is in this spirit that we present the Indian Claims Commission's Annual Report for 1997/98.

COMMISSION'S RECOMMENDATIONS TO GOVERNMENT, 1997/98

RECOMMENDATION 1

INDEPENDENT CLAIMS BODY

In each of the Commission's last three Annual Reports, we have recommended that Canada and the First Nations create an independent claims body with legislative authority to make binding decisions with regard to both the Crown's lawful obligations towards First Nations and the fair compensation when those obligations have been breached. We continue to believe that this initiative is one of the most important to be undertaken by Canada and First Nations. A permanent, independent body, with authority to mediate claims, conduct inquiries, and make binding decisions, can address many of the inequities in the current system and resolve the backlog of First Nations' claims in a timely and just manner.

The Commission has made a number of suggestions in previous Reports on the structure and powers of an independent claims body. In particular, we have recommended that:

- to ensure legitimacy in the claims process and subscription to the principles of fair claims resolution, the independent claims body should be established by an Act of Parliament and ratified by the Chiefs of the Assembly of First Nations;
- to overcome the Commission's perceived lack of credibility and Canada's lack of response to our Reports — both of which, in our view, arise from the non-binding nature of our recommendations — the new independent claims body should be vested with binding authority to make decisions with regard to the liability of the Crown and the quantum of compensation;
- to ensure confidence in the resolution of claims, the independence of the new claims body should be assured through joint appointment of its members by Parliament and the Assembly of First Nations, subject to judicial review for jurisdictional issues, but also with explicit provision for judicial deference to the specialized expertise of the independent claims body in evaluating evidentiary and historical issues;

- to remove the perception that Canada is both judge and advocate in specific claims proceedings, and, concurrently, to eliminate the lengthy negotiations and costly infrastructure involved in the present process for "validating" or accepting claims for negotiation, the responsibility for this process should be transferred from Canada to the independent claims body; and
- the new independent claims body should have the power to use mediation and other dispute resolution mechanisms to permit the effective negotiated resolution of claims, while retaining the powers of a specialized tribunal to arbitrate the unique circumstances of specific claims where negotiations prove unsuccessful.

We recognize and applaud the efforts of the Joint First Nations–Canada Task Force on Claims Policy Reform (the Joint Task Force) which was established in the spring of 1997 to work cooperatively towards these goals. The Joint Task Force is making progress, and the Commission does not underestimate the many and varied issues that must be addressed. However, we also wish to emphasize the need for Canada and First Nations to continue actively to pursue and finalize these discussions and to begin the legislative process necessary to create the new independent claims body. The Commission was created in 1991 as an interim measure to deal with claims while these discussions took place, and it is now approaching the outer limit of its mandate. We encourage the parties to continue their efforts to conclude the discussions in a timely manner, and we are willing to assist these efforts in any way possible that the parties might request.

The Commissioners, First Nations, and all Canadians anxiously anticipate the beginning of a new regime with a fresh approach to resolving First Nations' claims.

RECOMMENDATION 2

ADOPTION OF PREVIOUS REPORTS AND RECOMMENDATIONS OF THE COMMISSION

Although the Commission cannot be more vigorous in its recommendation that Canada and First Nations should move expeditiously towards the creation of a new independent claims body, it is equally important that the Reports, recommendations, and accumulated experience and expertise of the existing Indian Claims Commission — the product of some seven years' work — should not be lost. This conveyance can be accomplished in two ways:

- First, where the Commission has issued a Report and recommendations that have not yet received a substantive response from Canada, we recommend that Canada should move as quickly as possible to issue a formal response. In this way, the new independent claims body can commence with a fresh mandate and without the need to sort out a backlog of unfinished business.
- Second, should Reports and recommendations still remain without a response when the new independent claims body begins operation, the claims body should, on the application of a First Nation, and where the claims body considers it appropriate to do so, be able to adopt the Commission's earlier recommendations. Similarly, where the Commission's Report and recommendations have been rejected by Canada, the new claims body should have the authority, on resubmission of the claim by the First Nation, and subject to the submission of additional evidence, to adopt the Commission's Report and recommendations or to permit the First Nation to commence a new claim.

RECOMMENDATION 3

ENCOURAGEMENT OF MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

In its Annual Reports for 1994/95 and 1995/96, the Commission commented that Canada and the First Nations should rely to a greater extent on the Commission's mandate and abilities in mediation and other forms of assisted negotiation. Led by skilled and experienced mediators such as Mr Robert F. Reid, QC, the Commission's Legal and Mediation Advisor, the parties can embark on frank and open discussions that will allow them to avoid or resolve impasses and to achieve claims settlements. In appropriate circumstances, the mediation process can be more constructive and effective than the courts or even the Commission's own inquiries, both of which are, by their nature, adversarial.

We note that one of the pillars on which the new independent claims body is intended to stand is a continuation of the Commission's mediation function. In support of this proposal, we recommend that the mandate of the new claims body be extended to include the "validation" or acceptance of claims for negotiation. Because mediation is a consensual process — that is, both parties must request it — and because claims are currently validated based on the legal opinions of the Department of Justice, mediation under the present regime is often scuttled before it begins by the conclusion of Canada's lawyers that no outstanding lawful obligation exists. Moreover, as we stated in our 1994/95 Annual Report, "counsel representing Indian Affairs in mediation attempts have no authority to discuss or negotiate on the basis of risk assessment, or to consider any other factors, outside the existing legal opinion, which might justify reconsideration." This means that Canada's willingness to participate in mediation and other assisted negotiations is generally restricted to negotiations following acceptance of the claim, and does not extend to negotiating acceptance of the claim in the first place.

By implementing a cooperative approach at an early stage in the process, both parties can work together to research a claim and come to a clear

understanding of its nature and the issues involved. In many cases, this awareness may be enough to encourage resolution, since the dispute may have stemmed from the parties' different perceptions of the facts underlying the claim or a misunderstanding of each other's positions. In any case, mediation can foster a more open and productive atmosphere and lead to a settlement that is more satisfactory to both parties than a similar result imposed through arbitration. A mediated process, taken to a fair and equitable conclusion, can build stronger bonds between the parties by re-establishing and reinforcing the elements of trust and integrity that characterized the relationship of Canada and First Nations at the time of treaty.

RECOMMENDATION 4

INCREASE OF RESOURCES TO DEAL WITH SPECIFIC CLAIMS

In each of its Annual Reports, the Commission has stressed the need for Canada to commit more resources within both the Department of Indian Affairs and Northern Development and the Department of Justice to deal with, assist in, and respond to the Commission's work. However, the advantages of the Commission's process, which is less costly and less adversarial than litigation, can be seriously undermined when Canada fails to address, quickly and substantively, both First Nations' claims and the Commission's Reports and recommendations. If resolving these claims is a priority, it must be reflected in the resources devoted to their resolution.

In our view, Canada should devote sufficient manpower and funds:

- to eliminate the current backlog of specific claims and permit future inquiries to proceed in a timely and effective manner;
- to participate effectively in the Commission's mediation efforts, to enable the Commission to work proactively with government departments to resolve claims issues, and, most important, to settle claims; and
- to respond to the Commission's outstanding Reports and recommendations, to which no substantive responses have yet been forthcoming.

These resources are especially needed as the Commission winds down and a new independent claims body emerges, so that the latter can commence its mandate with a minimal backlog of unresolved claims.

In particular, if the Joint Task Force successfully shepherds the new claims body and process into being, additional resources will be necessary in any event to respond to the work that the new body generates. Assuming that the new claims body is clothed with the jurisdiction of a quasi-judicial tribunal to make binding decisions, Canada will be obliged to answer to the new claims body's verdicts in the same peremptory manner that it must currently respond to rulings of the courts and other tribunals.

In the meantime, timely responses to the Commission's work would contribute to the perception of fairness and justice in the negotiation and resolution of specific claims. For this reason, we recommend that Canada now allocate the resources to participate fully and cooperatively in the resolution of claims, commencing at the outset with mediation and other forms of assisted negotiation, and carrying through the entire claims process to ultimate settlement.

RECOMMENDATION 5

RECOGNITION OF ORAL HISTORIES AND TRADITIONS

The Commission has always viewed its community sessions as essential to the integrity and effectiveness of its inquiry process. Community sessions provide First Nations with the opportunity to share their oral histories in a manner that respects Indian traditions. They also provide a uniquely aboriginal perspective on historical developments that have typically been documented solely from the Government's viewpoint.

The Commission's process has received at least tacit vindication in the recent reasons of the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010. Chief Justice Lamer remarked that, although "[m]any features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court [taking] a traditional approach to the rules of evidence[,] . . . aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples." He concluded that the laws of evidence must be adapted on a case-by-case basis so that oral history can be "accommodated and placed on an equal footing" with the types of historical evidence, largely documentary, with which courts are familiar. As Dickson CJ commented in *Simon v. The Queen*, [1985] 2 SCR 387, given that most aboriginal societies "did not keep written records," the failure to do so would "impose an impossible burden of proof" on aboriginal peoples and "render nugatory" any rights they have.

In the context of these statements of principle, the challenge that lies ahead for Canada, First Nations, the Commission, and any new independent claims body is to establish a process for defining, receiving, assessing, and weighing oral history in a manner that respects the culture and traditions of First Nations while concurrently satisfying Canada that the evidence has been reliably and authoritatively delivered and properly tested. The Commission recognizes that, although its process of receiving oral history in community sessions satisfies the spirit of Delgamuukw, there may be opportunities to

work cooperatively with Canada and First Nations to further refine that process and thereby lend even greater weight to the testimony of elders and other key members of aboriginal communities. This refinement should be one of the priorities in developing the mandate of any new claims body that might be struck to succeed the Commission.

RECOMMENDATION 6

DEVELOPMENT OF A CLAIMS INVENTORY

To facilitate the Commission's efforts, and to allow any new independent claims body to begin its work immediately and effectively, the Commission recommends that First Nations and Canada should work together to establish an inventory of all existing claims, classified by category of claim. If possible, the parties should strive to enter into agreements that will permit claims raising similar issues to be dealt with jointly, and with provincial involvement where required. An example is the Saskatchewan Treaty Land Entitlement Framework Agreement, cultivated in the wake of the recommendations of the Office of the Treaty Commissioner for Saskatchewan, which developed the "equity formula" as a fair and reasonable means of resolving the outstanding treaty land entitlement claims of the participating First Nations. In the Commission's view, processing the many pending specific claims can be greatly expedited if Canada and the First Nations can agree to deal with similar claims simultaneously, while concurrently retaining the right to deal with a claim separately in the event that the facts of a particular case make it unique. If the goal is to resolve the huge backlog of claims quickly, fairly, and consistently, we believe that such an approach has much to commend it.

Response to Last Year's Recommendations

The Commission made five recommendations to the Government of Canada in its 1996/97 Annual Report. Although there has been no formal response from the government on these recommendations, there has been progress on the recommendation to create an independent claims body.

As discussed previously, the Joint Task Force was created and is continuing its work with the goal of establishing a legislative framework for the new independent claims body.

The other recommendations from 1996/97 were that any breach of fiduciary duty should be confirmed as a lawful obligation; alternatives to monetary compensation should be allowed; the resources devoted to specific claims resolution should be increased; and the Specific Claims Policy directive stating that specific claims must be at least 15 years old should be removed.

ICC Activities for 1997/98

CARRYING OUT THE MANDATE

INQUIRIES AND REPORTS

This section provides 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 39 inquiries and one mediation. For more detailed information on the reports and claims listed here, see Appendix A.

Overview

39	Completed inquiries and reports
1	Mediation report
3	Reports in progress
17	Inquiries in various stages of process
1	Inquiry in abeyance or closed
10	Claims in mediation/facilitation
16	Claims settled or accepted for negotiation

MEDIATION AND FACILITATION

Since its inception, the Indian Claims Commission has seen 16 specific claims settled or accepted for negotiation by Canada. These successes are a result of the Commission's unique inquiry process and its ability to provide mediation assistance when requested by the First Nation and Canada.

In ideal situations, claims are accepted early in the ICC process. There is then no need to go through a full inquiry, and the parties save time, money, and energy. To date, seven claims have been accepted for negotiation at an early stage of the process. One of the keys to this success is the effectiveness of the Commission's planning conference, which brings the First Nation and Canada together at an early stage to discuss the claim in an open and informal environment. In some instances, planning conferences have evolved into a mediation rather than a full inquiry.

Under the mediation mandate, the Commission has undertaken a number of initiatives and has applied the concept of open, face-to-face dialogue in

resolving claims. The Michipicoten Pilot Project marks the first time that federal government and First Nation officials have worked cooperatively to conduct joint research and to formulate a joint claims submission. To date, the project has been successful and both parties are pleased with the progress.

The Commissioners continue to recommend in their Annual Reports that Canada and the First Nations should increasingly rely on the Commission's mandate and capacity in mediation and other forms of assisted negotiations.

SPECIAL PROJECTS AND INITIATIVES

ORAL TRADITIONS STUDY

On December 5, 1997, the Commission hired a contractor to complete a research study on the use of oral history and tradition, both in the conduct of an inquiry and as a means of introducing knowledge of the past into the existing documentary record of the specific claim under review. The Commission will consider the results of this research in its evaluation of its own process and with a view to publishing a guide to assist claimant First Nations in preparing for the review of their rejected specific claims by the Commission.

The contractor has been asked to review the literature and the law, especially in light of *Delgamuukw*; to provide advice on alternatives available to the Commission, as an inquiry body, on gathering traditional knowledge of the past; and to advise the Commission on ways to apply this traditional knowledge in its review of claims.

ASSISTANCE TO THE JOINT TASK FORCE

When the Joint Task Force was formed in the spring of 1997, the Commission offered to assist with any activities related to the organization or procedure for the start-up of the new independent claims body. As part

of that assistance, we contracted an expert to prepare a study of the structural options and administrative implications of this new body. The study was presented to the Joint Task Force in March 1998.

Commission Counsel was invited to participate in the Joint Task Force as an impartial resource person in the joint legislative drafting process. The Commission Administrator also provided advice on structural, organizational, and resource issues.

The Commission participated in meetings dealing with communications and assisted in the development of material to promote a general understanding of the history of land claims.

PRAIRIE LAND SURRENDERS PROJECT

The study by Dr Peggy Martin-McGuire, "First Nation Land Surrenders on the Prairies, 1896-1911," is currently in the final stage of production. It was designed to identify the federal legislative and policy framework that prevailed from 1896 to 1911, and the extent to which social, economic, political, and cultural factors influenced the practices of key government officials and agencies in the surrender of Indian reserves. Although only limited information was available to Dr Martin-McGuire on First Nations' understandings, attitudes, and values relating to surrenders, the report relates the perspective of the First Nations where possible.

PLANS FOR 1998/99

TRANSITIONAL ISSUES: AN OVERVIEW

The 1998/99 fiscal year will be a transitional period for the Indian Claims Commission. During this transition, the Commission will provide direction and assistance when requested by the Joint Task Force. The experience, expertise, and corporate memory of the Commission can help to facilitate a smooth transition. The Commission will continue to inquire into and provide mediation on specific claim disputes. In addition, research will be made available, an inventory of claims will be prepared, and studies will be conducted in areas such as gathering and using oral evidence. We will also provide information on administrative implications of transitional issues, and facilitate public education and awareness about land claims and the claims process.

CONCLUSION

In 1997/98, the Commission's activities have again highlighted many complex and difficult issues that will require significant time and resources for government to address. Many of these issues have been outstanding for decades and most assuredly will not go away. Aggrieved First Nations are passionately committed to having their claims addressed, and government must 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 show how willingness, flexibility, and a joint commitment to problem-solving can facilitate effective discussion.

The Commission's knowledge of and experience in claims settlements continue to expand and improve, and we will persist in seeking better ways to help the parties reach mutually acceptable agreements. In the upcoming year, 1998/99, we will continue to work with all parties by providing independent research and information for a joint and expeditious review of claims. As part of its ongoing commitment to fairness in claims review, the Commission will support Canada, the Assembly of First Nations, and the Joint Task Force in their efforts in the coming year.

APPENDICES

APPENDIX A

STATUS OF CLAIMS AS OF MARCH 31, 1998

OVERVIEW OF INQUIRIES AND MEDIATION/FACILITATION

39	Completed inquiries and reports
1	Mediation report
3	Reports in progress
17	Inquiries in various stages of process
1	Inquiry in abeyance or closed
10	Claims in mediation/facilitation
16	Claims settled or accepted for negotiation

STATUS OF COMPLETED INQUIRIES, 1992-1998

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
1 **Athabasca Chipewyan:** W.A.C. Bennett Dam and environmental damage to IR 201 *Recommended claim be accepted for negotiation*	March 1998	None	No response from Canada	
2 **Athabasca Denesuline:** Aboriginal and treaty harvesting rights north of 60th parallel *Recommended Canada acknowledge treaty rights*	December 1993	August 1994	Canada rejected recommendations made in December 1993 report — *No response* to Supplementary Report submitted by ICC in November 1995	
3 **Buffalo River:** Primrose Lake Air Weapons Range — loss of commercial and treaty harvesting rights *Part of claim recommended for negotiation*	September 1995	None	No response from Canada	
4 **Canoe Lake:** Primrose Lake Air Weapons Range — breach of treaty and fiduciary obligations *Recommended claim be accepted for negotiation*	August 1993	March 1995	Accepted on qualified basis — no breach of treaty or fiduciary obligation but need to improve economic and social circumstances	Settled June 1997
5 **Chippewas of Kettle and Stony Point:** 1927 Surrender *Recommended claim be accepted for negotiation*	March 1997	None	No response — Supreme Court of Canada is hearing appeal on Ontario Court of Appeal decision re: validity of 1927 surrender	
6 **Chippewa Tri-Council:** Collins Treaty *Accepted with assistance of Commission*	March 1998	None required	No substantive response required from Canada because claim accepted	Accepted March 1998
7 **Chippewas of the Thames:** Unlawful surrender of reserve *Settled with assistance of Commission*	December 1994	None required	No substantive response required from Canada because claim settled	Settled January 1995

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
8 Cold Lake: Primrose Lake Air Weapons Range — breach of treaty and fiduciary obligations *Recommended claim be accepted for negotiation*	August 1993	March 1995	Accepted on qualified basis — no breach of treaty or fiduciary obligation but need to improve economic and social circumstances	Accepted March 1995
9 Cowessess: QVIDA flooding claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
10 Eel River Bar: Eel River Dam *Recommended claim not be accepted for negotiation*	December 1997	None required	No substantive response from Canada required — ICC considering First Nation's request for reconsideration	
11 Fishing Lake: 1907 surrender *Canada accepted claim for negotiation after considering evidence revealed during ICC community session*	March 1997	None required	No substantive response required from Canada because claim accepted for negotiation	Accepted August 1996
12 Flying Dust: Primrose Lake Air Weapons Range — loss of commercial and treaty harvesting rights *Part of claim recommended for negotiation*	September 1995	None	No response from Canada	
13 Fort McKay: Treaty land entitlement *Recommended that Canada owed outstanding entitlement of 3,815 acres to Band*	December 1995	None	No response from Canada	
14 Friends of the Michel Society: 1958 enfranchisement *No lawful obligation found, but recommended that Canada grant special standing to submit specific claims*	March 1998	None	No response from Canada	

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
15 Homalco: Alleged that Canada owed statutory or fiduciary obligation to obtain 80 acres of land from province of BC *Part of claim recommended for negotiation: re: 10 acres*	December 1995	December 1997	Canada rejects ICC recommendation as being outside scope of specific claims policy	
16 Joseph Bighead: Primrose Lake Air Weapons Range — loss of commercial and treaty harvesting rights *Recommended claim not be accepted for negotiation*	September 1995	None required	No substantive response from Canada required	
17 Kahkewistahaw: Treaty land entitlement *Recommended claim not be accepted for negotiation*	November 1996	None required	No substantive response from Canada required	
18 Kahkewistahaw: 1907 Surrender *Recommended claim be accepted for negotiation*	February 1997	December 1997	Canada accepts ICC recommendation under specific claims policy	Accepted December 1997
19 Kawacatoose: Treaty land entitlement *Recommended that Canada owed shortfall of 8,576 acres to Band, subject to confirming research*	March 1996	None	No response from Canada	
20 Lac La Ronge: Treaty land entitlement *Recommended claim not be accepted for negotiation*	March 1996	None required	No substantive response required from Canada	
21 Lax Kw'alaams: Demand for absolute surrender as pre-condition to settlement *Recommended that Canada exclude aboriginal rights from scope of surrender clause*	June 1994	None	No substantive response from Canada — parties continue to meet in attempt to reach a settlement agreement	

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
22 Lucky Man Cree: Treaty land entitlement *Recommended parties undertake further research to establish the proper treaty land entitlement population*	March 1997	May 1997	Canada accepts ICC recommendation for further research. Canada completed research February 1998, indicating no TLE shortfall. First Nation reviewing work and conducting own research	
23 Mamaleleqala Qwe'Qwa'Sot'Enox: McKenna-McBride Applications *Recommended claim be accepted for negotiation*	March 1997	None	No response from Canada	
24 Micmacs of Gesgapegiag: Pre-Confederation claim to 500-acre island *No substantive recommendations made because Canada agreed to reconsider merits of claim*	December 1994	None required	No substantive response required — March 1995, Canada acknowledged receipt of report and advised claim was in abeyance pending outcome of related court case	
25 Mikisew Cree: Economic entitlements under Treaty 8 *Canada accepted claim for negotiation after planning conference session*	March 1997	None required	No substantive response required from Canada because claim accepted for negotiation	Accepted December 1996
26 Moosomin: 1909 Surrender *Recommended claim be accepted for negotiation*	March 1997	December 1997	Canada accepts ICC recommendation under specific claims policy	Accepted December 1997
27 Muscowpetung: QVIDA flooding claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
28 Nak'azdli: Aht-Len-Jees IR 5 and Ditchburn-Clark Commission *Canada accepted claim for negotiation after considering evidence revealed during ICC community session*	March 1996	None required	No substantive response required from Canada. Claim accepted for negotiation	Accepted January 1996

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
29 'Namgis: Cormorant Island *Recommended claim be accepted for negotiation based on breach of obligation under order in council and fiduciary obligation*	March 1996	None	No response from Canada	
30 'Namgis: McKenna-McBride Applications *Recommended that part of claim be accepted for negotiation*	February 1997	None	No substantive response from Canada — September 1997, Michel Roy wrote that Canada has commissioned additional research to assist in establishing broader context for claims relating to McKenna-McBride	
31 Ochapowace: QVIDA flooding claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
32 Pasqua: QVIDA flooding claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
33 Sakimay: QVIDA flooding claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
34 Standing Buffalo: QVIDA Flooding Claim *Recommended claim be accepted for negotiation*	February 1998	None	No response from Canada	
35 Sturgeon Lake: Agricultural lease *Accepted for negotiation with assistance of Commission*	March 1998	None required	No substantive response required from Canada because claim accepted for negotiation	Accepted August 1997

ICC Report, Nature of Claim and *Recommendation*	Date of Report	Date of Response	Nature of Response to Recommendation	Accepted/ Settled
36 Sumas: IR 6 railway right of way and reversionary rights of Band *Recommended claim be accepted for negotiation*	February 1995	December 1995	No substantive response — Canada rejected it on grounds that claim involved issues which are before the courts in other cases	
37 Sumas: 1919 Surrender of IR 7 *Recommended joint research undertaken to determine fair market value of surrendered land*	August 1997	January 1998	Canada willing to explore possibility of joint research to determine if evidence exists for a claim	
38 Waterhen Lake: Primrose Lake Air Weapons Range — loss of commercial and treaty harvesting rights *Recommended part of claim be accepted for negotiation*	September 1995	None required	No response from Canada — First Nation has requested meeting to discuss concerns re: findings of Commission	
39 Young Chipeewayan: Unlawful surrender claim *Recommended that claim not be accepted for negotiation but that further research be undertaken by parties re: surrender proceeds*	December 1994	February 1995	Funding proposal submitted by Band for research and consultation under consideration by Indian Affairs	

SUMMARY OF CLAIMS AS OF MARCH 31, 1998

In 1997/98, the Commission released seven reports into 12 completed inquiries. A summary of the findings and recommendations made by the Commission in each report is set out below.

Completed Inquiry Reports, 1997/98

Athabasca Chipewyan First Nation [W.A.C. Bennett Dam and damage to IR 201], Alberta

The ancestors of the present-day Athabasca Chipewyan First Nation were traditional hunters and trappers who were not predisposed to agricultural pursuits. The fur trade flourished in the delta of the Peace, Athabasca, and Birch Rivers, and the aboriginal population was also well supplied with game, fish, and waterfowl. With the discovery of gold in the Yukon in 1896, large numbers of non-Indians began passing through the area on their way north, and this activity spurred the signing of Treaty 8 in 1899. Although the treaty provided for reserves "not to exceed in all one square mile for each family of five," it was widely recognized at the time of treaty that most residents of the area were less concerned with immediately selecting reserves than with protecting their traditional way of life based on hunting, fishing, and trapping.

By 1918, railways and steamers provided easy access to the area for non-native and Métis trappers. In 1922, in response to escalating competition for increasingly scarce resources, the Indians began to seek exclusive rights to a sufficient area to "make a living on, in hunting, trapping and fishing." Eventually, reserves were set apart in 1931, including the main reserve (IR 201) as well as seven small sites where the Chipewyan had houses, gardens, cemeteries, and fishing grounds. Because of concerns raised by Alberta, IR 201 was not finalized until 1935. Owing to its marshy nature, it was made larger than the treaty requirements had to be and was defined by natural water boundaries rather than a more typical survey.

The complex flood regime of the Peace-Athabasca Delta meant that the peak spring flows of the Peace River created a natural hydraulic dam that flooded the delta every two to three years. This process recharged the wetlands and "perched basins," providing an exceptional habitat for muskrat and

other fur-bearing species. The Chipewyan relied heavily on these resources for a "good living."

In 1957, Premier W.A.C. Bennett and the British Columbia government announced plans to develop a large-scale hydroelectric project to harness the immense power-generating potential of the Peace River. Construction of the dam 965 kilometres upstream of the Peace-Athabasca Delta commenced in 1962, before the institution of mandatory environmental assessment procedures. When BC Hydro began regulating the flow levels of the Peace River to fill the reservoir in 1968, no formal warning of the flow reduction had been given to downstream residents, and no environmental or social studies had been undertaken to determine the effects of the dam.

The impact of the dam on wildlife habitat in the delta was "immediate and severe," since the natural water regime was effectively reversed to provide the high flows required in winter to supply the Lower Mainland's power demands. Although the federal government had been aware of the dam's potential impact downstream by 1959, it chose not to enforce the requirement that British Columbia obtain approval under the *Navigable Waters Protection Act (NWPA)*. Meetings requested by Canada and Alberta to address the problem were ignored or rebuffed by British Columbia. A lawsuit commenced by the First Nation and others in 1970 did not proceed because of a lack of resources. Steps were initiated to mitigate the damages through a variety of works in the delta, but they either had limited effectiveness or caused other flooding problems and had to be removed. The inescapable conclusion is that the construction and operation of the Bennett Dam caused the First Nation and IR 201 to sustain significant environmental damage as the delta dried out. The reserve now has been rendered almost valueless to the members of the First Nation.

Although not every aspect of the Crown's fiduciary relationship with aboriginal peoples gives rise to an enforceable fiduciary duty, the Commission applied the "rough and ready guide" established in *Frame v. Smith* for determining whether a fiduciary obligation should exist in a given case. As early as the *Royal Proclamation of 1763*, the federal Crown undertook the general responsibility to protect and preserve Indian reserve land. With specific regard to Treaty 8, Canada had provided assurances that the Indians could continue to hunt and trap as they had before the treaty, and

this was the critical guarantee that had induced them to accept the treaty. Moreover, when large numbers of trappers began to compete with the Indians in the delta area, IR 201 had been set apart because its rich resources would secure a stable source of income for the First Nation. No reasonable interpretation of Treaty 8 would allow Canada or a province to prevent a First Nation from exercising its treaty harvesting rights, to destroy the economies on which the Indians' signing of Treaty 8 was premised, or to allow substantial interference with treaty rights on reserve land. The Crown had both a duty and a significant power to exercise its constitutional jurisdiction over navigation, federal proprietary interests, and Indian lands, and to protect the First Nation's reserve lands and treaty rights. The First Nation was and is entitled to expect the Crown to take reasonable steps to prevent, mitigate, or seek full compensation for destruction of its livelihood, damages to IR 201, and substantial infringement on its treaty harvesting rights.

The *Indian Act* provides the Minister with extensive powers to control and manage reserve land. In this case, the Crown's fiduciary responsibilities with regard to these lands were not narrowed by the devolution of its control and management powers to the First Nation. Although the First Nation exercised some measure of autonomy by commencing legal action against British Columbia, the Crown also had scope to exercise its powers unilaterally to protect the First Nation pursuant to its regulatory authority under the *NWPA*. BC Hydro argued that this Act was inapplicable because the Peace River was not navigable at the dam site, the whole body of water must be considered to determine navigability. The approval of the federal Minister of Public Works was required for all dams constructed on navigable waters, and, since the Peace River is navigable, Canada had considerable leverage to intervene in the construction and operation of the dam. Although Canada argued at the inquiry that intervention for purposes other than navigation would be improper, the Supreme Court of Canada in *Friends of the Oldman River Society* held that it is appropriate for the Minister to consider the environmental impacts of a work on other federal areas of jurisdiction, including reserve lands. The Court also found that the Crown has a positive duty to exercise its regulatory authority under the *NWPA*.

The First Nation was peculiarly vulnerable to the Crown's unilateral exercise of discretion in failing to take steps to protect the First Nation's

interests. The Crown had the regulatory authority with regard to the dam's construction, and had the resources to prevent, mitigate, or seek compensation for damages caused to IR 201. The Crown was also required to take reasonable steps and exercise ordinary prudence to protect the reserve and the First Nation's livelihood, but it failed to meet this standard of care. The steps taken by Canada to mitigate were simply too little, too late. The situation cried out for intervention on behalf of aboriginal peoples and Canadians in general, but Canada failed to act, notwithstanding its responsibilities for, among other things, national parks, navigation, riparian rights, and Indian lands. In so doing, Canada breached its fiduciary obligations towards the First Nation. The Commission therefore recommended that the First Nation's claim be accepted for negotiation under the Specific Claims Policy.

Chippewa Tri-Council [Collins Treaty], Ontario

The specific claim was submitted to the Department of Indian Affairs in 1986 by the Chippewa Tri-Council, composed of the Chippewas of Beausoleil First Nation, the Chippewas of Rama First Nation, and the Chippewas of Georgina Island First Nation. Indian Affairs rejected the claim in October 1993, and the Tri-Council brought the claim to the Indian Claims Commission shortly thereafter.

The Chippewa Tri-Council claim was originally based on traditional use and occupation of certain lands in the province of Ontario by the Chippewa people. The lands at issue were roughly described in the statement of claim as falling within the following townships in Simcoe County: Oro, Medonte, Orillia, Matchedash, and Tay.

In the 18th century, the British became interested in this area because of its strategic military importance for communication, trade, and travel. In 1785, John Collins, then Deputy Surveyor General, was asked to survey the route and report on what lands might be required from the Indians in the region. Collins reported in August of that year that he had entered into an agreement with Chiefs of the Mississauga Nation (the Mississauga and Chippewa Indians were both part of the Ojibwa Nation and were often mistaken for each other). A memo written by Collins at the time seemed

to indicate that the agreement was for a right of passage or right of way. This agreement came to be known as the "Collins Purchase."

The nature of the agreement was an important issue in the claim. There was some question as to whether the agreement actually constituted a treaty; whether it allowed a right of passage or was actually a purchase or surrender of the land; whether Collins had the authority to enter into a treaty; and what, if any, compensation was due. The issues were further complicated by the fact that the Collins Treaty lands were included in the 1923 Williams Treaty, which provided for the surrender of three large tracts of land in southern Ontario. The relationship between the Collins Treaty and the Williams Treaty raised more issues in the claim, including alleged breaches of Canada's fiduciary responsibilities and resulting damages to the Chippewa Tri-Council nations.

With the Commission's involvement, the parties managed to clarify and focus these issues and arrive at a mutual agreement. The Commission's inquiries begin with planning conferences – meetings chaired by the ICC at which Canada and the First Nation jointly discuss the issues and their positions. The unique process used by the Indian Claims Commission involved bringing the parties together to discuss the merits of the claim face to face in an informal, open manner on several occasions. In this instance, Canada agreed to accept the Chippewa Tri-Council claim under its Specific Claims Policy, and, when the parties arrived at a basis for a settlement, there was no need to proceed with a full inquiry. A claim by three Ontario First Nations that had remained unsettled for almost 12 years has now been accepted by Canada, and an agreement in principle has been reached for a settlement. The Commission released its report into this inquiry in March 1998.

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

The ancestors of the Eel River Bar First Nation were parties to the 1779 Treaty of Peace and Friendship, in which the Crown promised that the Indians "shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing." A reserve was initially set aside for

the First Nation in 1807, and, by 1962, the reserve comprised 434.67 acres. The Order in Council first setting apart the reserve provided that land at the mouth of the Eel River, "including the Eel Fishery," be reserved to the Indians. Because the land base was unsuited for agriculture, the First Nation came to rely on the clam harvest as the mainstay of its economy.

In 1962, the New Brunswick Water Authority (NBWA) sought to erect a dam at the mouth of the Eel River to secure a supply of fresh water to attract industry to the Town of Dalhousie. Indian Affairs recognized that the project could have an impact on the First Nation's clam flats and retained Dr J.C. Medcof of the Fisheries Research Board to study the problem. Although Dr Medcof was at first unable to provide a firm opinion on the effects of damming the river, Indian Affairs pursued the First Nation's position that an upstream site would be preferable to the NBWA's favoured location at the river's mouth. Eventually, in part because of the costs associated with the river mouth location, the upstream site was selected. Owing to time constraints in attracting Canadian Industries Limited to the area, the First Nation passed a Band Council Resolution (BCR) in 1963 authorizing the Town of Dalhousie to proceed with construction subject to compensation of $4000 for the land to be flooded, compensation on a volume basis for loss of clam and smelt production (not to exceed $50,000), and assistance in creating a trout fishing pool as a tourist attraction. The compensation for loss of production could be reduced by 5 per cent for every male Indian obtaining alternative employment providing remuneration of not less than $2000 before September 1, 1967.

Indian Affairs was uncertain whether the First Nation had a legally enforceable claim for loss of income from the fishery, and the potential losses were difficult to assess pending release of Dr Medcof's survey. The dam was completed by November 1963 without an agreement on compensation or any formal authorization under the *Indian Act*. Negotiations continued until 1968, but the First Nation and the NBWA were unable to reach agreement on terms concerning employment and the value of the clam fishery. Whether due to systemic discrimination, high unemployment, or otherwise, the Town of Dalhousie did not prove successful in securing alternative employment opportunities for the Indians. As negotiations foundered, senior officials of Indian Affairs became involved. Since the idea of employment had proven

unworkable, the First Nation pressed for full financial compensation. Dr Medcof's final report, completed in late 1967, forecast "great and long-lasting" effects from the dam and recommended that the Town of Dalhousie share with the First Nation the considerable benefits to be derived from the project.

In 1968, the NBWA sought to increase the storage capacity of the reservoir, and the province assumed the town's position in the settlement discussions. During the negotiations, the First Nation passed a BCR instructing the Minister of Indian Affairs to issue a one-year permit to the province to permit work to be undertaken until a formal agreement could be negotiated. In March 1970, the Band Council passed another BCR accepting terms proposed by the NBWA, but Indian Affairs took steps to negotiate better terms to limit the NBWA's rights of access and to reserve the First Nation's right to claim compensation for future damages. Ultimately, following considerable bargaining, and despite Indian Affairs' ongoing concern that the First Nation did not have any special claim or treaty rights to the area, the final agreement of May 14, 1970, provided that, in exchange for the necessary lands, the NBWA would pay $15,000 for some 115 acres of land, $25,000 for damage and losses caused by the works, and an initial amount of $9591.12, plus $10,000 to $27,375 per year for 20 years, based on the quantity of water pumped. The agreement provided that the NBWA would acquire the headpond area by expropriation, and the areas required for a pipeline, pumphouse, and access road under a permit pursuant to section 28(2) of the Indian Act. It contained no employment provisions, however. In 1995, new pumping fees were negotiated at significantly higher rates than for the first 20 years.

The Commission concluded that, while the First Nation had treaty fishing rights under the treaty of 1779, it was open to Canada, before the *Constitution Act, 1982*, to infringe upon those rights, provided it expressed a clear intention to do so. Canada did infringe upon those rights, but the issue is whether it had lawful authority, by statute or agreement with the First Nation, to do so. In accordance with the Supreme Court of Canada authority in *Opetchesaht Indian Band v. Canada*, the section 28(2) permit was properly granted, having regard for the length of its term, the ascertainability of its termination, and the nature of the interest granted. As for the headpond area, the Governor in Council authorized this expropriation under section

35(3) of the *Indian Act*, meaning that it was not necessary for the NBWA to comply with the formal expropriation requirements of the provincial statute. Although the First Nation consented to the expropriation, this agreement did not alter the fact that the acquisition was essentially compulsory, and thus it could not be claimed that there can be no expropriation where the owner consents to the taking. Moreover, a surrender is not required where reserve lands are acquired by expropriation.

The consent or agreement of the First Nation as expressed in the 1963 BCR was void because no permit has been issued under section 28(2) of the *Indian Act*. There was a trespass on reserve land from 1963 to 1970, the extent of which was narrowed by the 1968 permit, since the permit did not authorize use of the headpond lands. However, no lawful obligation flowed from this trespass because the 1970 agreement compensated for losses and damages arising from the project.

Regard must be had to the twin principles of autonomy and protection in dealing with the disposition of Indian interests in reserve land. Although the Crown has a statutory and fiduciary duty to protect Indian bands from unlawful dispositions, the autonomy of the band to make decisions regarding its land and resources must be respected. Different levels of autonomy and protection apply, depending on the nature of the rights granted. Accordingly, the Commission concluded that Canada discharged its fiduciary obligations to the First Nation. Canada ensured that the First Nation was fully informed and received expert advice. Canada was also a strong advocate in obtaining significant commitments from the NBWA, notwithstanding its own concerns regarding the nature and extent of the First Nation's interest in the fishery. Canada's representatives had no conflicting interests or inappropriate motives that would have "tainted" the dealings. Since the First Nation did not cede its decision-making power to Canada, its decision should be honoured and respected. Moreover, the 1970 agreement was not foolish, improvident, or exploitative such that Canada should have withheld its consent. In the result, the Commission recommended that the First Nation's claim not be accepted for negotiation under the Specific Claims Policy.

Friends of the Michel Society [1958 enfranchisement claim], Alberta

The fundamental question before the Commission in this inquiry was whether the "enfranchised" descendants and former members of the Michel Band were entitled to be recognized as a band under the *Indian Act*. Enfranchisement is the process by which Indians or bands lose their registered Indian status and band membership in return for the full rights of Canadian citizenship — for example, the right to vote. Voluntary enfranchisement first received legislative expression in the *Gradual Civilization Act of 1857*, which contemplated that, if an Indian could function in mainstream society, he should be able, and indeed encouraged, to do so, since the government's ultimate aim was full absorption of Indian people into Canadian society. However, given that voluntary enfranchisement had proven unpopular among Indians, the *Indian Act* of 1876 and subsequent amendments added new measures to hasten the assimilation process. Any Indian who became a doctor, lawyer, or clergyman, or who obtained a university degree, for instance, or any Indian woman who married a non-Indian, and any children of the marriage, would lose Indian status. These policies remained reflected in the *Indian Act* until 1985.

After the Michel Band entered into Treaty 6 in 1878, a reserve (IR 132) of 40 square miles was surveyed in 1880 near St Albert, Alberta, northwest of Edmonton. Over the years, a number of individual members of the Band were voluntarily or involuntarily enfranchised. Finally, in 1958, further to the recommendations of a Committee of Inquiry appointed under section 112 of the 1952 *Indian Act*, the entire Band was enfranchised. By 1962, all reserve lands and assets of the Michel Band had been distributed to its enfranchised members. In 1985, the discriminatory enfranchisement provisions were removed from the *Indian Act* by means of the Bill C-31 amendments, which reinstated Indian status, and in some cases band membership, to most people who were enfranchised. As a result of these amendments, some 660 individuals who are former members or descendants of the Michel Band — primarily people who were enfranchised before 1958 — have regained Indian status and are currently listed on the Indian Register.

The Society claimed that the 1958 enfranchisement of the Michel Band was invalid, and that various land surrenders prior to the band enfranchisement were improper. Before the merits of these claims can be considered by the

Commission, however, it was necessary as a preliminary matter to determine whether the Bill C-31 amendments created an obligation on Canada to recognize the former members and descendants of the Michel Band as a "band" within the meaning of the *Indian Act* and the Specific Claims Policy. Canada took the position that the Band ceased to exist as a result of the 1958 enfranchisement, that the Society is not entitled to be recognized as a band under the *Indian Act*, and that it therefore has no standing to bring a claim.

For the purposes of the inquiry, the parties and the Commission assumed, on a "without prejudice" basis, that the Michel Band ceased to exist as a band under the *Indian Act* in 1958 as a result of the band enfranchisement. Notwithstanding this assumption, the Society argued that Canada is statutorily required to maintain a band list for each band and to record additions and deletions to the list, even if all the names have been deleted from it. Canada responded that a band list is only to be maintained where a band exists. The Commission concluded that, although Canada's argument is inconsistent with the purpose of Bill C-31 to reinstate Indian status and, in some cases, band membership, the language of the statute does not support the Society's position where a band no longer exists. A list of deleted names of members of a band that no longer exists ceases to be a band list. Since the Michel Band ceased to exist in 1958, there is no longer any obligation on Canada to maintain a band list for the Michel Band.

Although band enfranchisement grew out of the same assimilationist and colonial policy as individual enfranchisement, the 1985 amendments to the *Indian Act* do not include band enfranchisees among those entitled to regain Indian status. Moreover, although the 1985 amendments provide that certain individuals reinstated to Indian status are entitled to have their names added to a band list maintained by Indian Affairs, there is no band list on which to reinstate former members and descendants of the former Michel Band. The act of creating or reconstituting bands or band lists is governed by specific sections of the *Indian Act*, and does not result from the operation of the 1985 amendments. If Parliament had intended such a result, it could have stated that intention in clear and simple language. Although the Commission can go beyond the written words of a statute to render explicit that which is implicit, it is not possible for the Commission to interpret a statute so as to usurp Parliament's legislative role.

Contending that its members constitute a band because they are a "body of Indians" who had reserve lands set aside for them at one time, the Society argued that the Michel Band did not cease to exist simply because it is without reserve land. Alternatively, if its claim ultimately proves successful, the Society suggested that its members would meet the definition of "band" by virtue of Canada holding moneys and lands in trust for them. The Commission concluded that a band is a body of Indians which has had land set aside and continues to hold those lands. The Commission declined to find that a band exists on the basis of the possibility that the claim regarding moneys in trust would prove successful.

Because the Commission concluded that Canada has no obligation to recognize the former members and descendants of the Michel Band as a band, the Society is ineligible to bring a claim under the Specific Claims Policy. The Policy does not afford individuals or groups of individuals redress unless they are a "band" within the meaning of the Policy. It was outside the agreed scope of the inquiry to determine whether the Society constitutes a band at common law.

However, the Commission felt constrained to exercise its discretion to make a supplementary recommendation to the Minister of Indian Affairs where "the policy was implemented correctly but the outcome is nonetheless unfair." Although Canada has no legal obligation to reconstitute the Michel Band, and the Society has no standing to bring a claim, the Society's lack of recourse would result in manifest unfairness if the Society is correct in its assertions that certain surrenders of land by the Michel Band in the early 1900s were improper and invalid. Although the Commission is not prepared to make findings on the merits of the Society's claims, its lack of recourse means that Canada might be able to ignore its obligations and not have to account for damages suffered by the Band and its descendants even if those claims are legitimate. The Commission concluded that it would be inappropriate for Canada to stand on a technical legal advantage derived from the combination of band enfranchisement, the strictures of the Specific Claims Policy, and a possible gap in the Bill C-31 amendments. Canada should deal with the claims of the Michel Society on their merits. Failure to do so would be inconsistent with the Specific Claims Policy, the Crown's fiduciary relationship with aboriginal peoples, and the spirit of the Bill C-31 amendments.

Qu'Appelle Valley Indian Development Authority [Flooding], Saskatchewan

Muscowpetung First Nation, Pasqua First Nation,
Standing Buffalo First Nation, Sakimay First Nation,
Cowessess First Nation, Ochapowace First Nation

This inquiry arose from the construction of dams by the Prairie Farm Rehabilitation Administration (PFRA) on Echo Lake, Crooked Lake, and Round Lake along the Qu'Appelle River in the early 1940s. The dams were built to store water for agricultural purposes following the severe drought conditions experienced in many areas of the Prairie Provinces during the preceding decade. Although the dams achieved their purpose, they also had the effect of flooding and damaging reserve lands of the six Qu'Appelle Valley Indian Development Authority (QVIDA) bands participating in this inquiry: the Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations.

Before the dams were built, Indian Affairs sent out an engineer, P.A. Fetterly, to assess the damages that the dams would cause, and negotiated compensation to be paid to the affected bands on the basis of that assessment. However, although it was recognized that their reserves would be damaged, no compensation was paid to the Muscowpetung or Pasqua Bands at that time. Standing Buffalo also did not receive compensation, since it was not foreseen that the Band's reserve lands would be affected by the dams. The remaining three bands received compensation totalling $3270, and a wooden bridge was constructed to replace a natural ford that had previously been used by the Sakimay Band. It is clear that none of the bands were consulted or consented to the construction of the dams. Ultimately, the flooding, together with associated capillary action and salinization, had serious negative effects on the bands' economic, social, and cultural activities in the Qu'Appelle Valley. In particular, the flooding destroyed much of their haylands.

In late 1972, the PFRA determined that it had not compensated either Muscowpetung or Pasqua for damages caused by the Echo Lake dam, and it had become clear that Standing Buffalo too had suffered adverse effects. Negotiations commenced in September 1973, and on November 16, 1976, the Bands offered to accept a lump-sum settlement of $265,000, in consideration for a permit authorizing future use and occupation of reserve lands for

flooding purposes as well as a release of past, present, and future damages caused by the structure. After initially objecting to this proposal, the PFRA concluded that the sum of $265,000 could be justified, and the Bands passed Band Council Resolutions confirming the settlement. The settlement was approved on July 7, 1977, and payments were deposited to the credit of the respective Bands.

Eventually, all three Bands reversed their positions and issued rescinding Band Council Resolutions on the basis that the "perpetual" nature of the settlement amounted to a surrender. Moreover, the Department of Regional Economic Expansion, which had assumed responsibility for the PFRA, and Indian Affairs were unable to agree on the lands contemplated by the settlement, and flooding permits were never issued. Nevertheless, the evidence showed that the Muscowpetung, Pasqua, and Standing Buffalo Bands had spent all or virtually all of the sums paid to them under the settlement. The Sakimay, Cowessess, and Ochapowace First Nations were also dissatisfied with their treatment and particularly with the PFRA's stated intention to continue using the dam sites on Crooked and Round Lakes, as well as flooded reserve lands, without the First Nations' consent. To lend greater force to their concerns, the six First Nations, together with the Piapot and Kahkewistahaw First Nations, formed QVIDA and submitted a claim to Indian Affairs.

In its report issued in February 1998, the Commission concluded that, even if section 34 of the 1927 *Indian Act* enabled the Superintendent General of Indian Affairs to authorize the use and occupation of reserve land for flooding purposes, the rights actually conveyed, based on the reasoning of the Supreme Court of Canada in *Opetchesaht Indian Band v. Canada*, were too extensive, exclusive, and permanent to be authorized under the section. That being the case, the PFRA trespassed on the reserve lands of all six participating bands from the early 1940s until at least 1977, and continues to trespass on the Sakimay, Cowessess, and Ochapowace reserves to this day.

For the same reasons that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 Indian Act, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. The 1977 settlement was void from the beginning under subsection 28(1) of the

Indian Act, either entirely or at a minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves *after* 1977. The question of whether any pre-1977 trespasses were settled depends on whether the band councils had the power to enter into binding settlements with respect to the unauthorized use and occupation of reserve lands and whether the release clause in the 1977 Band Council Resolutions can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*.

The Commission recommended that, unless Canada chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, it should immediately commence negotiations to obtain, whether by surrender or expropriation, the interests in land it requires for flooding purposes from all six reserves. Canada should also commence negotiations to determine the remaining compensation, if any, payable to the Sakimay, Cowessess, and Ochapowace First Nations for flooding damages since the 1940s, taking into account the $3270 received by those First Nations as compensation in 1943. Similarly, Canada should commence negotiations to determine the remaining compensation, if any, payable to the Muscowpetung, Pasqua, and Standing Buffalo First Nations for flooding damages to those reserves, again taking into account the compensation of $265,000 paid to the three First Nations under the terms of the 1977 settlement. Whether the settlement entered into by the Band Councils in relation to damages prior to 1977 is binding on the respective Bands, and whether this part of the agreement can be severed and can operate independently to settle the damages arising during that period, are issues the Commission recommended the parties should negotiate.

The rescission of the 1977 Band Council Resolutions by Muscowpetung, Pasqua, and Standing Buffalo is academic if the 1977 settlement was entirely void. However, to the extent, if any, that the 1977 settlement can be severed and remain enforceable in relation to pre-1977 damages for trespass, it would be contrary to basic principles of contract law to permit the First Nations to unilaterally withdraw from the settlement without the concurrence of the PFRA.

Sturgeon Lake First Nation [Red Deer Holdings agricultural lease claim], Saskatchewan

The Sturgeon Lake First Nation's claim in this inquiry arose from a leasing arrangement with Red Deer Holdings Ltd. (RDH) in relation to some 1813 acres of the First Nation's reserve (IR101). During the early stages of the Commission's inquiry process, Canada agreed to accept the claim for negotiation, so the Commission was not required to complete its inquiry into the legal and historical basis of the claim. The Commission did issue a report containing a brief summary of the claim based on the First Nation's submission, however, and commented on Canada's "15-year rule" in relation to specific claims.

After the First Nation ceased its own farming operations in the late 1970s, it entered into a lease of reserve land in the spring of 1981 with a person who subsequently declared bankruptcy. When RDH paid up the arrears of $31,000 and offered to enter into a similar lease arrangement, the First Nation issued Band Council Resolutions on May 21 and June 9, 1982, requesting Indian Affairs to issue an agricultural permit to RDH under subsection 28(2) of the Indian Act for a lease of the reserve land for the period January 1, 1982, to December 31, 1984, subject to payment of $45,000 on November 1, 1982, and subsequent payments of $22,500 on April 1 and November 1 of each year.

Although Indian Affairs prepared a draft agricultural permit between RDH, as permittee, and the Department, on behalf of the Crown, as permittor, RDH sought an amendment allowing it to terminate the permit if it wished, and, ultimately, it never signed the document. Nevertheless, RDH commenced operations without a permit. When frost destroyed the crop and RDH's insurance would not cover the loss, a representative of RDH met with the Band Council to renegotiate the fall payment under the permit. However, the First Nation obtained legal advice that it should look to Indian Affairs for moneys under the permit, and that it was Indian Affairs' responsibility to deal with RDH to obtain those payments. Accordingly, Indian Affairs was advised that the First Nation considered the Department responsible for the failure to finalize the permit and for allowing RDH to farm the land, as well as harvest and remove crops from it, without taking appropriate steps to protect the First Nation's interest. The arrears owing to the First Nation as of November 1, 1982, were claimed to be $73,000. The First Nation

further informed the Department that there was a pending Saskatchewan Crop Insurance payment to be made to the principal of RDH for losses incurred during the 1982 crop year.

The Department of Justice agreed to commence legal action to recover the overdue rent, but there were difficulties over who should be named in the suit. RDH did not hold any assets, and its principal was not a party to the failed agricultural permit. Ultimately, the litigation was abandoned because of concerns that substantial costs would be incurred with no real probability of success.

The First Nation looked to Indian Affairs to compensate it for the lease arrears plus other related expenses, but its repeated requests were rejected in October 1985, October 1986, March 1987, and March 1988. In 1994, the First Nation submitted a specific claim to the Minister of Indian Affairs alleging that the Crown breached its lawful obligations with respect to the administration of the First Nation's reserve land by failing to do a background check to determine what authority the principal had within RDH and what the financial position of the company was, failing to obtain a personal guarantee from the principal of RDH, and failing to have the agricultural permits signed by RDH.

Indian Affairs did not reject the claim outright. Instead, the Department's Specific Claims Branch responded that it was "not appropriate" to consider the grievance because the events giving rise to it were recent and "[t]he Specific Claims process is intended to address longstanding historical grievances."

In May 1996, the First Nation requested that the Indian Claims Commission conduct an inquiry into the claim. During a planning conference convened by the Commission on July 11, 1996, and in subsequent conference calls, the Department of Justice continually maintained that the Specific Claims Policy was intended to address only longstanding historical claims. The Department further contended that it could not provide an opinion on the merits of the claim to Indian Affairs because 15 years had not elapsed since the claim had arisen. However, since the 15-year period was soon to expire, Canada invited the First Nation to resubmit the claim when that anniversary was reached. The First Nation agreed and resubmitted the claim in March 1997. Canada agreed to expedite its legal review of the claim, and the claim was accepted for negotiation in August 1997.

Although Canada accepted the claim for negotiation, making it unnecessary to complete the inquiry, the Commission felt compelled to comment on the "15-year rule." No such rule or policy is expressed in the Specific Claims Policy as set out in *Outstanding Business*. In the Commission's view, *Outstanding Business* was intended to address specific claims which are "based on lawful obligations" or "disclose an outstanding 'lawful obligation,'" and which "relate to the administration of land and other Indian assets and the fulfillment of Indian treaties." There is no reference to time limits in *Outstanding Business*, and, if Canada had intended to impose such a 15-year limit, it could and should have done so in clear and express terms.

Moreover, the underlying rationale of the 15-year rule is not supported by *Outstanding Business*, which was intended to address all outstanding claims "between Indians and government which for the sake of justice, equity and prosperity must be settled without further delay." The Commission concluded that an arbitrary waiting period before a claim can be reviewed under the Specific Claims Policy is counterproductive to the settlement process and risks the loss of first-hand knowledge, salient evidence, and important documents. A First Nation's only other option is to pursue litigation. This course of action would increase both time and costs, and would run counter to *Outstanding Business*, which was specifically designed to avoid litigation. The Commission recommended that the 15-year rule be withdrawn and that any First Nations whose claims have been refused for consideration on this basis be notified.

Sumas Indian Band [1919 Surrender of IR 7], British Columbia

The Sumas Band received its reserves (IR 6 and 7) when the Joint Reserve Commission of Canada and British Columbia set apart land in 1879. IR 7 originally comprised 160 acres of land, which was rich, seldom flooded, and well suited to cultivation, but which was heavily wooded and would require considerable clearing before it could be used for farming. Most band members resided on the 610-acre IR 6, of which two-thirds was unsuited to cultivation.

At the request of the McKenna-McBride Royal Commission, Indian Agent Peter Byrne estimated the value of IR 7 in 1916 to be $13,000

(including $1000 for improvements). In 1919, the Soldier Settlement Board (SSB) became interested in acquiring IR 7 for the use of eight soldiers who had applied to homestead the "unoccupied" reserve. Byrne was instructed to meet with SSB Commissioner F.B. Stacey to "agree upon a fair and reasonable valuation for this reserve." Although Byrne believed the land to be worth $100 per acre, based on "the opinion of the settlers in the vicinity," the agreed price was $80 per acre. Stacey himself had been prepared to offer $85 per acre, but "considered $80.00 per acre a good price for it."

The Band was "divided" over the surrender and, in May 1919, Byrne was doubtful whether the majority would support it. Following approval of the deal by the SSB in July, Byrne was authorized to submit the surrender to the Band and was provided with $4500, to be distributed on a per capita basis to band members should they agree to the surrender. After reporting in July and September that it would be difficult to obtain a surrender, Byrne managed in October 1919 to obtain consent to the surrender from all nine members on the Band's voting list. Eight signed the surrender document. The evidence did not indicate why the Band changed its position.

Title was transferred to the SSB by Order in Council on December 1, 1919, at which time the balance of the purchase price ($7780) was paid to the Band. When the SSB inspected and surveyed the land in 1920 for the purposes of subdivision, it concluded that, after deductions for a Vancouver Power right of way, roads, and the Sumas River, only 135.9 acres of the reserve were available for settlement. Moreover, having regard for the costs of clearing, the land was considered to be worth not more than $50 per acre. The SSB approached Indian Affairs about the possibility of an adjustment in price. In 1923, the SSB and Indian Affairs finally agreed that the former should pay for only 139.9 acres, and $1088 was refunded. There is no evidence that the Band was consulted or even aware of these negotiations.

The SSB also became concerned that the land was unsuited to returning veterans who might be unaccustomed to agriculture and unprepared for the extensive clearing required to permit cultivation. The SSB faced further difficulties in conveying title arising from a dispute with the province of British Columbia regarding taxes on SSB lands. Indian Affairs was approached with the idea of taking the land back, but nothing came of this. Following the resolution of differences between Canada and the province by the

McKenna-McBride Commission in 1924, the SSB eventually sold the lands between February 1927 and July 1930 to purchasers including non-veterans, at prices ranging from $74 to $139 per acre, with an average of $81 per acre.

On reviewing the evidence, the Commission concluded that the surrender complied with the technical requirements of the *Indian Act*. Therefore, the Band could not challenge the validity of the surrender, but might still be able to claim compensation if Canada breached fiduciary duties, if any, owed to the Band in the circumstances of this case. However, not every aspect of the Crown's fiduciary relationship with Indian bands will give rise to a specific fiduciary obligation.

Bands are autonomous actors whose decisions must be respected and honoured. This definition negates the contention that the Crown must act in a band's best interests unless the band has ceded its decision-making power to the Crown. Although Byrne's persistence in seeking the surrender warrants close scrutiny, there is insufficient evidence to indicate that the Sumas Band was pressured or that it ceded its decision-making power to the Crown in this case. Similarly, there is no evidence suggesting that Crown officials "tainted" the transaction in such a way that it would be unsafe to rely on the surrender as an expression of the Band's true understanding and intention. Moreover, although under section 49(4) of the 1906 *Indian Act* the Crown is obliged to withhold its consent to a surrender that is foolish, improvident, or exploitative, the evidence again did not disclose that the surrender was any of these things.

Having regard for the fact that Indian Affairs undertook to negotiate on the Band's behalf, and in doing so did not consult the Band or inform it that the land might be worth more than $80 per acre, the Commission concluded that the Crown had a fiduciary duty to protect the Band's interests by taking reasonable steps to ensure that the Band received fair value for the land it was being asked to surrender. It is not clear that this duty was met. First, the Crown was arguably in a conflict of interest, since the SSB's mandate was to obtain land for returning soldiers at the lowest possible price. Second, Byrne was instructed to cooperate with Stacey, and it is not certain that he actively pursued a fair price. Third, it does not appear that Indian Affairs was even alert to its duty to the Band. Fourth, Byrne took no steps to obtain an independent valuation of the land. Fifth, Byrne failed to advise the Band

that it might be able to obtain a price higher than $80 per acre. Finally, the Band was not given independent legal or expert advice. However, it is not clear that $80 per acre failed to represent fair value for the land. If it was fair value, the Band may not have suffered any damage. The Commission recommended that the parties undertake joint research on this issue, with the Band to receive compensation if a higher value is established.

The concepts of undue influence and duress are irrelevant in establishing the validity of a surrender under the *Indian Act*, although they may be considered in determining a breach of fiduciary obligation. However, there is no evidence that Canada applied undue influence or duress to obtain the surrender. As for the $4500 cash inducement, this practice was specifically permitted by statute, and the evidence does not indicate that it was used in any way to taint the process. Nor is it evident that the payment of the cash inducement fettered the Governor in Council's assessment of whether the surrender was foolish, improvident, or exploitative.

After the surrender, the Crown was not obliged to reacquire the land when it was offered by the SSB, since the conveyance of the land to the SSB was absolute and unconditional, not "inadvertent." Moreover, Indian Affairs did not breach any legislation, the terms of the surrender, or its fiduciary duty in acquiescing in the SSB's disposal of the land to persons other than returning veterans since the land was by then beyond the Department's control. The refund of $1088 was admittedly an unauthorized payment, and Canada has already agreed to negotiate this issue.

Inquiries

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 second community session was held at Wabasca, Alberta, in July 1997 to hear elders of Calling Lake, Chipewyan Lake, and any who missed the first community session held in Desmarais in October 1996. A final community session for elders of Trout Lake and Peerless Lake was held in December 1997 at Peerless Lake. Written submissions are due from the parties in mid-April 1998, and oral argument is expected to take place in Edmonton in mid-May 1998.

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.

On April 28, 1997, the First Nation requested that its claim be reactivated, after being dormant while negotiations took place on another aspect of this claim. A planning conference was held in Calgary on August 1, 1997, followed by a community session on October 22 and 23, 1997, in Standoff, Alberta. Because of time restraints, a second planning conference was held on December 2, 1997, also in Standoff, Alberta.

On December 19, 1997, Anne-Marie Robinson, Director, Specific Claims Branch, informed Commissioners Prentice, Corcoran, and Bellegarde that the Department of Justice would review the claim in light of new case development and evidence gathered at the community sessions.

On February 28, 1998, the Commission was informed by the Department of Justice that the legal review had been completed, and it will be considered by the Claims Advisory Committee on March 11, 1998.

Carry the Kettle Band [1905 Surrender], Saskatchewan

The Band claims that a 1905 surrender of 5760 acres of the Assiniboine reserve is invalid because no record of the band membership vote was taken by the Department of Indian Affairs and because there is insufficient evidence with regard to the outcome of the surrender meeting. Oral argument was postponed at the request of the Band, which is awaiting the production of a research study it commissioned.

Carry the Kettle Band [Cypress Hills], Saskatchewan

The claimant alleges that a 340-square-mile block of land north of the Cypress Hills was established as a reserve for the Band, and that the land was subsequently taken by the Crown without following the surrender provisions of the *Indian Act*. A pre-hearing conference was held in April 1997, and community sessions followed in May and October 1997. In February 1998, Canada supplied a research report it had prepared on the subject. Because Canada had agreed, in May 1997, to cooperate with any ICC decision to call new evidence, the Band indicated that it needed to complete certain research before dates for written submissions and oral arguments could be set.

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 on November 4 and December 10, 1996. On April 2, 1997, the First Nation submitted a legal question, that the Department should examine in reconsidering the claim. The parties agreed to a third planning conference, which was to be held in Ottawa on December 15, 1997. They also agreed that further research was needed to clarify certain issues relating to the claim. The terms of reference were drafted and approved by the parties. The contracted research began in February 1998.

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

The claim, which was initially brought to the Commission in July 1996, was limited to the sale of lands surrendered by the Cote First Nation in 1905. In April 1997, a newly elected Chief and Council requested that the inquiry be put in abeyance and that the Commission participate in a joint research project with Canada and the First Nation. The research would compile existing work and complete the information required on all reserve expropriations, surrenders, exchanges, land restorations, and farm-land and townsite sales, so that all land transactions for the First Nation could be dealt with in a comprehensive manner. The parties agreed that the first stage of the research would be an assessment of the various reports and document collections done on these topics in the past 25 years. To that end, the ICC assisted in the development of terms of reference for the project and hired a contractor to compile and index the material that Canada, the First Nation, and the Federation of Saskatchewan Indians presented. That work was completed, to the satisfaction of all parties, in February 1998. The Commission is currently assisting in developing terms of reference for the second stage of the research, which will focus on a 1903 expropriation of land for railway purposes and a subsequent 1904 surrender of land for station grounds and a townsite.

Cowessess Nation [1907 Surrender], Saskatchewan

The claimant alleges that the 1907 surrender of 20,704 acres of reserves land is invalid owing to non-compliance with the *Indian Act*. The claimant also argues that the Crown breached its pre-surrender fiduciary duty to the First Nation and that the surrender was an unconscionable bargain. An initial planning conference was held on October 24, 1996. Counsel for the claimant filed a Statement of Claim at the Court of Queen's Bench in November 1997. A community session was conducted on March 11, 1998, at which time written submissions and oral arguments were tentatively scheduled for September 1998.

Key Band
[1909 Surrender], Saskatchewan

The claimant argues that the 1909 surrender of 11,500 acres of the Key reserve was invalid owing to non-compliance with the *Indian Act*. The Band further argues that the Crown breached its pre-surrender fiduciary obligation in obtaining the surrender, and that the Crown used undue influence to secure the Band's agreement. The claim was closed in September 1996; it was reopened in April 1997 after the issuance of a Band Council Resolution. After a planning conference in June 1997, the Commission conducted a second community session in November 1997. A third community session followed in March 1998. The parties are currently working to finalize the issues before proceeding to the next stage of the inquiry process.

Long Plain First Nation
[Treaty land entitlement loss of use], Manitoba

The First Nation claims compensation for loss of use of lands which it was entitled to under the treaty, but which it did not receive until 1994. Throughout May, June, and July 1997, the Commission participated in a number of conference calls to assist the parties in reaching agreement on a Statement of Facts. Written submissions were received from the First Nation in August 1997 and from Canada in September 1997. The First Nation submitted a written rebuttal in October 1997. The Commissioners heard legal counsels' oral arguments on October 17, 1997, in Winnipeg. The report on this inquiry is currently being drafted.

Mississaugas of the New Credit First Nation
[Toronto Purchase], Ontario

The First Nation claims that certain lands were never properly surrendered because the Crown's instructions on the negotiation and conclusion of treaties were not followed.

Mississaugas of the New Credit First Nation
[Crawford Purchase], Ontario

The First Nation claims that compensation was never paid for lands taken improperly in 1783. Furthermore, it is alleged that the Crown breached its

fiduciary duty in relation to possession of these lands, and that the First Nation suffered damages from misrepresentation and equitable fraud.

Mississaugas of the New Credit First Nation
[Gunshot Treaty], Ontario
The First Nation claims damages for loss of certain lands and rights to fish, hunt, and trap in the area east of Toronto. It blames both the non-binding nature of the 1788 Gunshot Treaty, under which the land was surrendered, and the Crown's breach of its fiduciary duty to protect the First Nation in its possession of these lands.

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 the land in view of British promises made to the Pottawatomi in the 1830s. No community session was required. The parties differed on whether the subject of the land base of the First Nation arose as a new issue. The Commission advised the parties, in January 1998, that the inquiry would proceed, with this matter being dealt with in its report. Oral arguments are scheduled for April 8, 1998, in the community.

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, annual payments, and program and other funding. 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.

Ocean Man Band
[Treaty land entitlement], Saskatchewan
The First Nation alleges that the Crown owes the Ocean Man Band an additional 7680 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. Because the claim remained inactive, the parties were asked on September 5, 1997, if they wished to proceed with an inquiry or have the file closed. The First Nation responded that it wanted the claim to proceed. The Department of Indian Affairs, Legal Services, responded and suggested that additional research was needed to complete the analysis of this claim.

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 that 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 was held in Winnipeg on April 9, 1997, to discuss the TLE claim. The parties agreed that further research was required to determine the circumstances relating to the St Peter's Reserve surrender and the effect it may have had on the First Nation's TLE claim. The research report prepared by the Department of Indian Affairs was sent to the parties on December 8, 1997.

Roseau River Anishinabe First Nation [Medical aid], Manitoba

This claim relates to issues arising from the management of band funds used to pay for medical care between 1909 and 1934. The First Nation made a settlement offer at a planning conference that was held in Ottawa on November 27, 1997. Canada considered the matter, but, after review,

did not accept it. In conference calls in February and March 1998, Canada requested time to investigate whether the federal government was authorized to deduct medical expenses from trust accounts. To this end, Canada hired a contractor to conduct the necessary research, after input from both the First Nation and the Commission on the terms of reference. That research is ongoing and is expected to be completed in April 1998.

Sturgeon Lake First Nation [1913 Surrender], Saskatchewan

At issue is whether a majority of eligible voters participated in a 1913 surrender vote. The claim was originally given to the Specific Claims Branch in 1993, and the First Nation was notified in 1995 that Canada considered the surrender valid. In August 1996, the First Nation brought the claim to the ICC, and, in September 1996, delivered supplementary research on the eligibility of certain voters. Canada requested time to research and confirm the supplemental findings. That work was completed in May 1997. The ICC chaired a meeting with the parties in Saskatoon in June 1997 to discuss the findings of the research. The claim was sent to the Department of Justice for review in July 1997. That review was completed in February 1998 and returned to Specific Claims for internal review. No decision has been reported.

Walpole Island First Nation [Boblo Island], Ontario

This claim concerns the alleged surrender of Boblo Island in 1786. The parties agreed to postpone oral arguments in the community pending the results of joint research, which was eventually completed in November 1997. In February 1998, Canada began to express concerns about jurisdictional issues. Meanwhile, the First Nation alluded to other research that could have a bearing on the claim. Providing jurisdictional questions can be resolved, an oral arguments session will likely be scheduled in 1998.

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 Pelee Island was not formally surrendered, but argues that the claim falls outside the scope of the Specific Claims Policy. The request for an inquiry remained in abeyance throughout 1997/98.

Mediation and Facilitation

Fishing Lake First Nation [1907 Surrender], Saskatchewan

In 1907, approximately 13,170 acres of land were surrendered from the Fishing Lake Reserve. On April 23, 1989, the First Nation provided a submission to Canada under Canada's Specific Claims Policy challenging the validity of the surrender. The First Nation maintained that the surrender is invalid and not binding on the First Nation owing to non-compliance with the requirements of the *Indian Act*. It also maintained that the government breached its trust, or the fiduciary obligations owed to the First Nation, in obtaining the surrender.

The government concluded that it has a lawful obligation to the First Nation under the 1982 Specific Claims Policy. In August 1996, the Government of Canada agreed to enter into negotiations for compensation with the Fishing Lake First Nation.

In December 1996, the First Nation and Canada requested that the Indian Claims Commission act as facilitator in the negotiation process. Commissioner James Prentice and Legal Counsel Ron Maurice serve as co-chairs in the role of facilitator.

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 on behalf of both parties. The parties, with the assistance of the Commission, developed Terms of Reference for the various studies that were to be needed in the compensation negotiations.

A preliminary meeting with the consultants was held in Fishing Lake in May 1997. Public and Band information sessions have been held in connection with the general table meetings. The consultants completed their preliminary reports and have submitted them to the parties for their review. Meetings were held in September and October 1997 to review the preliminary reports with the consultants. The parties have requested that the consultants' basic facts about the claim should be consistent in the various reports.

The consultants have been asked to provide their draft final reports in January 1998. Each of the consultants will then present a draft final report in March and April 1998.

The parties have been working together to solve problems and create solutions, with the assistance of the Commission. 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.

Fort William First Nation [Pilot project], Ontario

On February 23, 1998, the Fort William First Nation (Ontario) proposed that the Commission participate in a pilot project to facilitate the resolution of six specific claims identified through its independent research. The claims involve surrenders and expropriations of reserve land for settlement, railway, right-of-way, mining, and military purposes. Only one of these claims was in the Specific Claims process; the others had not yet been submitted.

Meetings to discuss the proposal and develop a strategy, if implemented, were held at the ICC offices on February 27 and March 30, 1998. In attendance were representatives of the First Nation and its legal counsel, representatives of DIAND's Specific Claims Branch, the Research Funding Division and Negotiation Directorate, legal counsel from the Department of Justice, and staff from the ICC.

All parties agreed to attempt to settle the historical and legal issues cooperatively at the table. Meetings of the full table group are to be held every two months.

Michipicoten First Nation [Pilot project], Ontario

In October 1996, the First Nation submitted a proposal to Minister Irwin to develop jointly a process for the timely and just resolution of a number of outstanding Specific Claims. The process that was suggested was unique in that it proposed joint historical research, joint identification of issues, coordinated legal research, and, if required, joint presentation of submissions to the Department of Justice.

A meeting was arranged with the parties in December 1996 to discuss details of the Pilot Project proposal. The Commission had been requested by the parties to act as a facilitator for the process. In January 1997, the Commission, Michipicoten First Nation, and Canada met to discuss the development of joint terms of reference for research into the nine claims, and the drafting of a negotiation protocol agreement.

The Commission met with the parties several times in February and March to draft and finalize the Protocol Agreement and the Terms of Reference. On March 25, 1997, the Michipicoten Pilot Protocol Agreement was signed

by the parties and the Commission. Since then, Canada has been researching the various claims and has prepared a draft historical report for the periodic review of the table group.

In August 1997, the First Nation submitted the first two claims that were completed within the Pilot Project. Another three surrender claims will be ready for October 31. A newsletter was also released in the last week of August which explained the purpose of the September community session, as well as providing an update on table activities. The newsletter has been crucial in keeping concerned parties informed about what the Michipicoten Pilot Project is all about.

The Michipicoten Pilot Project held a community session in Michipicoten September 9 and 10 which was convened by Commissioner Augustine. Following the session, it was decided that all the oral, documentary, and audio/visual material would be incorporated directly into the historical record that is being compiled by the researcher.

The Michipicoten Pilot Project represents a new phase in the ongoing dialogue between Canada and the First Nations. It 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 facilitation and mediation are helping to bridge the gap that has existed for years between Canada and the First Nations. The Michipicoten Pilot Project represents a test of that principle, one that is proving successful.

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, were a breach of the Crown's fiduciary duty to the First Nation, were obtained without compliance with the *Indian Act*, and 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 issue of costs. The Commission offered its mediation services to the parties to assist them in resolving this matter. The Commission met with the parties as an impartial observer at the end of 1995 as they tried to reach some understanding about the progress of the claim. In May 1996, discussions stalled again, and the ICC continued throughout the year to make efforts to assist the parties in restarting the process. In December 1997, the Commissioners congratulated the Osoyoos First Nation on its settlement agreement with Canada and British Columbia.

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. When the claim was first presented to Canada in 1982, it dealt only with the compensation arising from the government management of land sales following a 1903 surrender. In a December 1993 planning conference at the ICC, the First Nation also advanced as an issue the validity of the surrender. In November 1996, the parties agreed to conduct tripartite (Canada, First Nation, ICC) research on the validity issue and then to resubmit the claim to the Specific Claims Branch. The terms of reference for the joint project were finalized in February 1997. The Commission monitored the work of the contractor throughout the research. The report was completed in September 1997 and the parties met at the ICC office in October 1997 to discuss the findings. Once counsel for the First Nation completes his legal opinion, the claim will be given to the Department of Justice for review.

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 Mr Robert F. Reid of the ICC. In May 1996, Canada rejected this proposal. The Commission continues to keep apprised of the situation.

Squamish First Nation
[Capilano IR 5 - Bouillon Claim], British Columbia

This claim concerns the alleged pre-emption of Squamish Capilano IR 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 Commission's legal and mediation advisor, Mr 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 sessions have continued throughout this fiscal year.

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 Commission's involvement was requested by Canada's negotiator, who advised that the Treaty 8 Tribal Council had expressed an interest in having the Commission facilitate negotiations. Information material was sent to Canada's negotiator so he could explore the possibility of having the ICC at a joint meeting of the parties in Lutsel K'e in September 1997. After further discussion within DIAND's Comprehensive Claims Branch, Canada advised that there is some reticence in involving the Commission at this stage because it is not clear that the issues fall within the scope of the Specific Claims Policy. The Commission continues to monitor the situation.

APPENDIX B

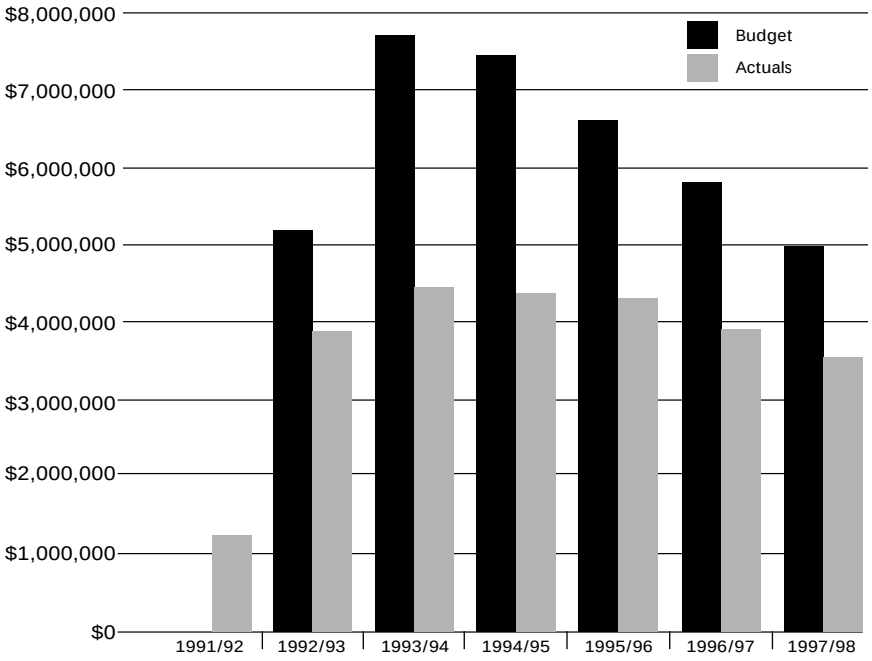
OPERATIONAL OVERVIEW

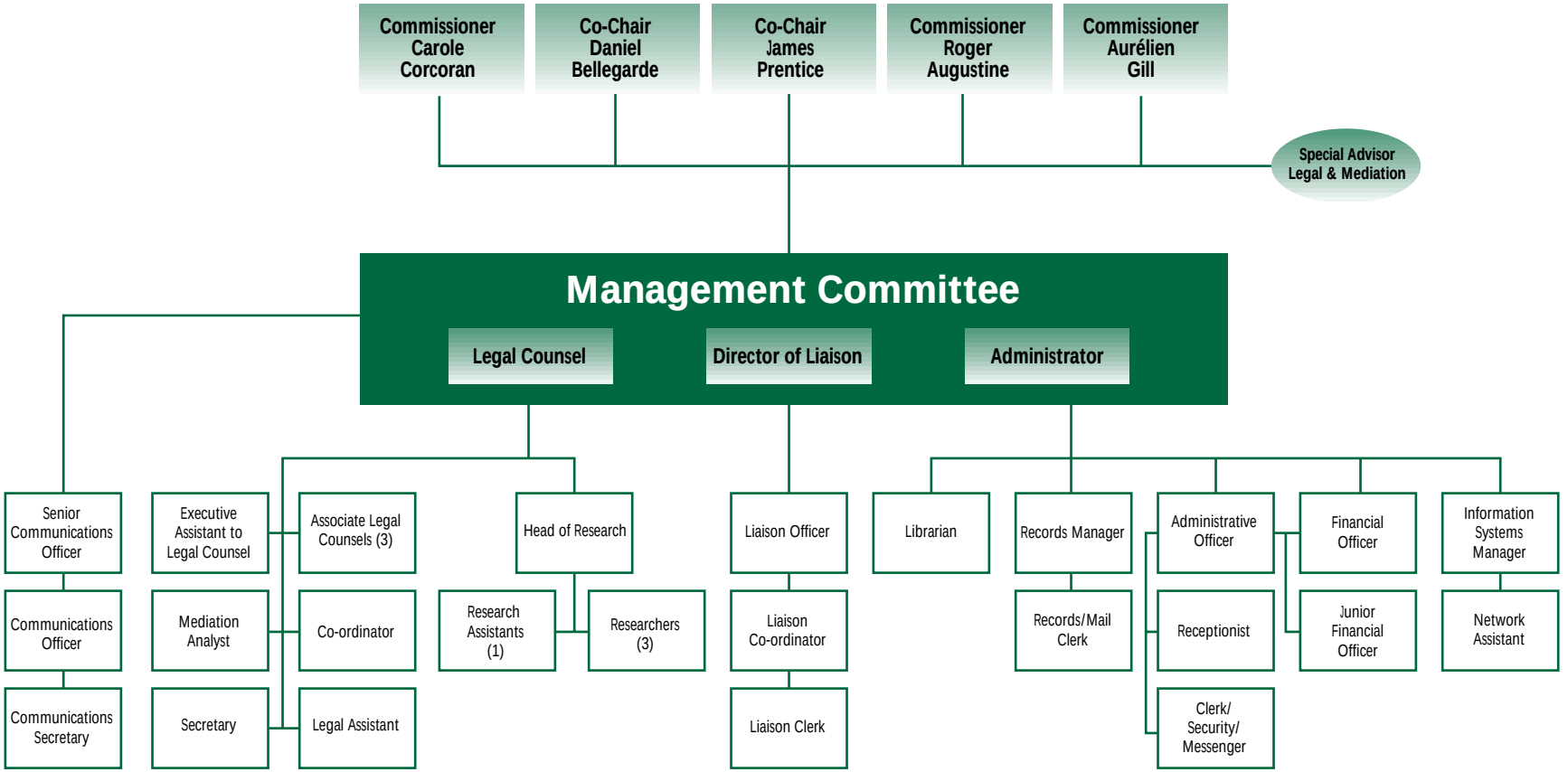
The Indian Claims Commission maintains a staff of 40 people, 50 per cent of whom are aboriginal. The Commission has a Management Committee, consisting of its Administrator, Legal Counsel, and Director of Liaison. The Management Committee oversees the operations of the Commission. This committee reports 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 figure below represents the amounts budgeted and the actual amounts expended by the Commission since its inception. In 1997/98, the Commission expended $3.5 million against an approved budget of $4.9 million, for an additional savings of approximately $1.4 million. The total accumulated savings since the beginning of the Commission now represent some $13.2 million.

Commission Overall Multi-Year

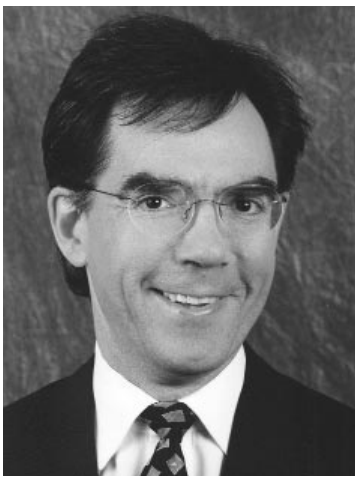



Commissioner Carole Corcoran
Co-Chair Daniel Bellegarde
Co-Chair James Prentice
Commissioner Roger Augustine
Commissioner Aurélien Gill
Special Advisor Legal & Mediation
Management Committee
Legal Counsel
Director of Liaison
Administrator
Senior Communications Officer
Communications Officer
Communications Secretary
Executive Assistant to Legal Counsel
Mediation Analyst
Secretary
Associate Legal Counsels (3)
Co-ordinator
Legal Assistant
Head of Research
Research Assistants (1)
Researchers (3)
Liaison Officer
Liaison Co-ordinator
Liaison Clerk
Librarian
Records Manager
Records/Mail Clerk
Administrative Officer
Receptionist
Clerk/ Security/ Messenger
Financial Officer
Junior Financial Officer
Information Systems Manager
Network Assistant

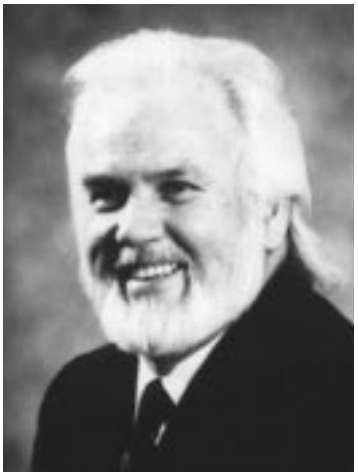
APPENDIX C

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, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socioeconomic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first vice-chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is now a management and governance consultant. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

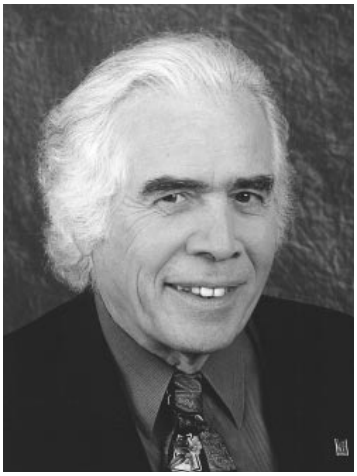


Co-Chair P.E. James Prentice, QC, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement 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.



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, and completed his term in January 1994. He is currently President of Black Eagle Management Enterprises, a member of the Management Board of Eagle Forest Products, and Chairman of the EFP Environment and Communications Advisory Committee. He received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. 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 a Commissioner of 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 served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed as a Commissioner of the Indian Claims Commission in July 1992.



Aurélien Gill is a Montagnais from Mashteuiatsh (Pointe-Bleue), Quebec, where he served as Chief for nine years. He 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. He serves as a member of several boards, including that of the Université du Québec in Chicoutimi and that of the Northern Engineering Centre at the Université de Montréal. He is a member of the Environmental Management Boards for both the federal government and the province of Quebec. In 1991 he was named to the Ordre national du Québec. Mr Gill was appointed a Commissioner of the Indian Claims Commission on December 8, 1994.