

INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

KAHKEWISTAHAW FIRST NATION

1907 SURRENDER CLAIM

January 2003

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PART I

INTRODUCTION

The resolution of an Indian claim can take many years and outlast many of the individuals and elders who identified most intensely with the loss. This report deals with such a claim. The Kahkewistahaw First Nation's claim, outstanding for almost 95 years, had been pursued actively under the Government of Canada's specific claims process for 13 years, and it was rejected twice. In 2002, with the assistance of the Indian Claims Commission (ICC), the claim was successfully resolved.

This report will not provide a full history of the Kahkewistahaw First Nation claim. The Commission has discussed the issues involved in the 1907 surrender claim and the inquiry process in its February 1997 publication *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry*.¹ The goal of this report is to summarize the events leading up to settlement of the claim and to outline the role of the Commission in the resolution process. Ralph Brant, Director of Mediation, led the negotiation process assisted by other Commission personnel at various points along the way.

On March 2, 1989, the Kahkewistahaw First Nation formally submitted its claim seeking "recognition of [its] claims and compensation for the losses and damage sustained" as a result of the 1907 surrender.² It argued that the claim should be validated under the federal government's Specific Claims Policy based on its allegations that the Kahkewistahaw surrender of January 28, 1907, was made under duress, undue influence, and negligent misrepresentation, and because the surrender bargain was unconscionable. The First Nation also alleged that the surrender was invalid because Canada failed to comply strictly with the requirements of the *Indian Act*, breached its fiduciary obligation to the First Nation by the manner in which it obtained the surrender, and violated a requirement of Treaty 4 by failing to obtain the consent of all Kahkewistahaw members interested in the reserve.

¹ Indian Claims Commission, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3.

² William J. Pillipow, Barrister & Solicitor, to P. Cadieux, Minister, Department of Indian Affairs, March 2, 1989 (ICC Documents, p. 465), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

In response to the First Nation's submission, the Specific Claims Branch of Indian Affairs undertook a review of the claim, which was completed in January 1992.³ That research was presented to Kahkewistahaw in a meeting on April 14, 1992, following which the First Nation submitted an update to its position.⁴

Two years later, on being advised of Canada's preliminary position – that the 1907 surrender did not give rise to a lawful obligation to Kahkewistahaw – the First Nation formally asked the Commission to conduct an inquiry into this claim. Although Kahkewistahaw provided Canada with a further supplemental submission in response to the preliminary rejection of the claim,⁵ Canada reiterated that it had breached no duties to the First Nation.⁶

Ultimately, on August 31, 1994, the Commission decided to conduct an inquiry⁷ pursuant to its mandate under the *Inquiries Act*. The parties were brought together to discuss the claim and to clarify the many related issues, evidence, and opposing legal positions. The Commission's process also allowed for the exchange of documents and provided a forum for full and open

³ Department of Indian Affairs, "Specific Claims Branch Review of Kahkewistahaw Band's Claim Concerning the 1907 Surrender," January 1992 (ICC Documents, pp. 649–752), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

⁴ William J. Pillipow, Pillipow & Company, to Jeannie Jeffers, Specific Claims Branch West, April 28, 1992, enclosing "Summary of Legal Position of Band," undated (ICC Documents, pp. 754–72), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

⁵ Stephen Pillipow, Pillipow & Company, to Jack Hughes, Specific Claims West, June 30, 1994, enclosing Pillipow & Company, "Supplemental Submission to the Minister of Indian Affairs and Northern Development, Kahkewistahaw First Nation Specific Claim – Land Surrender of 1907," June 1994 (ICC Documents, p. 860), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

⁶ Jack Hughes, Senior Claims Advisor, Specific Claims West, to Chief Louis Taypotat and Council, Kahkewistahaw First Nation, August 10, 1994 (ICC Documents, pp. 858–59); Stephen Pillipow, Pillipow & Company, to Jack Hughes, Senior Claims Advisor, Specific Claims West, August 11, 1994 (ICC Documents, p. 860); Jack Hughes, Senior Claims Advisor, Specific Claims West, to Stephen Pillipow, Pillipow & Company, August 25, 1994 (ICC Documents, p. 861), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

⁷ Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994, as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 10.

discussion. The inquiry process gave Kahkewistahaw First Nation the opportunity to put forward new evidence and arguments, and the Commission concluded:

we agree with the Kahkewistahaw First Nation that the Government of Canada breached fiduciary obligations owed to these aboriginal people. The government not only failed in its obligation to protect the Kahkewistahaw Band but served in fact as a cunning intermediary in procuring a surrender that can only be described as unconscionable and tainted in its concept, passage and implementation.⁸

Canada ultimately reconsidered and accepted the Kahkewistahaw First Nation claim for negotiation,⁹ as recommended by the ICC.

With the letter of acceptance, the process of negotiating a settlement began. At the joint request of the First Nation and Canada, the Commission agreed to act as facilitator.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. It was established by Order in Council on July 15, 1991, followed by the appointment of Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, as Chief Commissioner. The ICC became fully operative with the appointment of six Commissioners in July 1992.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and (2) to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims

⁸ ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 11.

⁹ Jane Stewart, Minister of Indian Affairs and Northern Development, to Commissioners James Prentice and Roger Augustine, December 18, 1997, as reported in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 371.

generally involve a breach of treaty obligations or a situation where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the ICC's work. Although the Commission has no power to accept or force acceptance of a claim rejected by Canada, it does have the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government within the forum of an inquiry. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of parties in negotiation. From its inception, the Commission has interpreted its mandate broadly, as it has been encouraged to do, and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II
A BRIEF HISTORY OF THE CLAIM

The present report relates only to the Commission's fulfilment of its mediation mandate. It should be noted, however, that, as a result of the previous inquiry, the Commission had the benefit of historical records and detailed legal submissions from the parties setting out the basis of the claim. This knowledge was relied upon only to the extent that background information may have been required by Commissioners or Commission staff. Accordingly, the Commission makes no findings of fact in this report.

The historical context of this claim has been described at length in the Commission's February 1997 report, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry*.¹⁰ Only a brief summary will be found here.

Chief Kahkewistahaw (or "He Who Flies Around") was one of 13 chiefs who signed Treaty 4 at Fort Qu'Appelle on September 15, 1874, representing the ceding of Indian rights over a 75,000-square-mile area of the most fertile lands in southern Saskatchewan. In August 1881, John C. Nelson, Dominion Land Surveyor, surveyed a reserve for the Band south of the Qu'Appelle River between Crooked and Round Lakes (Indian Reserve [IR] 72).

The Band gradually began to succeed at farming their lands over the next few years, evolving from almost complete dependence on government assistance and rations to a relatively self-sustaining mixed farming operation, which included growing wheat and raising livestock. Both dairy and beef cattle herds became a prominent part of the Band's overall agricultural efforts, markets for which were more readily available than for their grain.

Raising livestock required good hay lands, something that Kahkewistahaw had in abundance on the southern part of its reserve. The sloughs at the south end of the reserve were not only sufficient for the Band's hay needs but also yielded an excess that could be sold on the market for profit even in dry years. Hay production increased from 85 tons in 1882 to 350 tons by 1895. These very fertile and profitable lands were ultimately targeted for surrender.

The 1905 appointment of Frank Oliver as Minister of the Interior and Superintendent General of Indian Affairs came as rapid economic development was becoming a governmental priority.

¹⁰ Full documentation of the details summarized here is found in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, 1997), reported (1998), 8 ICCP 3.

Oliver, a former editorial writer for the Edmonton *Bulletin*, had long campaigned to free up reserve land for settlement. Of note was Oliver's public expression of his view: "of course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for."¹¹ This attitude quickly pervaded the department and was reflected in subsequent government policy and legislation aimed at reducing in size or eliminating Indian reserves. For example, a 1906 amendment to the *Indian Act*¹² increased to 50 per cent the proceeds of a surrender and sale that could be distributed immediately to band members. Previous to this amendment, the per capita distribution had been limited to 10 per cent.

These factors combined to give the federal government the result it wanted: the surrender in 1907 of over 90,000 acres from Kahkewistahaw and two other local reserves. The Kahkewistahaw surrender finally came about after many locally based surrender requests and petitions (1885, 1886, 1891, 1899, 1902, and 1904), as well as two surrender meetings presided over by Inspector of Indian Agencies William Graham. A cash distribution of \$94 per person was made immediately following the second, and successful, surrender vote. When it was over, Kahkewistahaw IR 72 had surrendered 33,281 acres of land to the Crown for sale out of the over 46,720 acres it possessed as a result of Treaty 4. This represented more than 70 per cent of the band's original treaty lands. Of the 13,439 acres left following the surrender, most of it was significantly inferior to the lands surrendered, in both percentage and quality of arable land.

The surrender and proposed sale of the land was approved by Order in Council on March 4, 1907, and the vast majority of the land was sold in two sales held on November 25, 1908, and June 15, 1910. The small amount of remaining surrendered land was disposed of following the end of the First World War through the Soldier Settlement Board.

¹¹ Canada, House of Commons, *Debates* (March 30, 1906), 947–50, as noted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 40.

¹² SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization as long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.

PART III
NEGOTIATION AND MEDIATION OF THE CLAIM

Following the Minister of Indian Affairs' acceptance of the First Nation's surrender claim in December 1997, substantive negotiations began in the fall of 1998. The central issues were the amount of compensation offered by Canada for the value of the land improperly surrendered and the loss of its use from 1907 to the present day.

The Commission's role in the process normally would have ended once the inquiry was completed and the claim of the First Nation accepted for negotiation by Canada. Early in the negotiation process, however, the Commission received a letter written jointly by the Kahkewistahaw First Nation and the Government of Canada, asking if the Commission would act as facilitator for the negotiations. The Commission agreed, Ralph Brant, Director of Mediation, assuming responsibility.

Facilitation focused almost entirely on matters relating to process. The Commission's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. At the request of the parties, the ICC was also responsible for mediating disputes, assisting the parties in arranging for further mediation, and acting as a coordinator for the various studies undertaken by the parties to support negotiations.

Although the nature of the negotiations is confidential to the negotiating parties and cannot be disclosed by the Commission, it can be stated that Kahkewistahaw First Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, and these helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Progress in the negotiations was slow but steady over the next few years. As negotiations proceeded, loss-of-use studies and land appraisals were conducted to provide the information required for a claim valuation and subsequent negotiations. Independent consultants assessed the losses of use from traditional activities, agriculture, forestry, and mining to estimate the net economic losses to the First Nation as a result of the 1907 surrender. In addition, two independent land appraisals were completed.

Up to this point in time, the role of the ICC in claims negotiations generally had been limited to facilitating the negotiations. With the Kahkewistahaw claim, however, the Commission, at the request of the negotiation table, took on the added responsibility of acting as study coordinator. This enhanced role required the Commission to monitor the progress and completion of the studies, coordinate meetings, help eliminate duplications and inconsistencies between studies, provide a coordinated summary of all the studies, and facilitate communications between the consultants and the negotiating teams made up of representatives from the First Nation and Canada. The Commission successfully completed this undertaking, both for the studies undertaken jointly by Canada and the Kahkewistahaw First Nation, as well as for several additional studies undertaken solely by the First Nation, including a Special Economic Advantage and Disturbance Cost Study, an Acquisition Costs and Reserve Creation Costs Study, and a Present Value Study. Independent of this process, the Band also completed land sales and trust account research.

As is the case with most claim negotiations, the negotiating parties were frustrated by delays. There were delays in getting the research and loss-of-use studies completed. Other delays were caused by staff turnovers at the Department of Indian Affairs and Northern Development and the Department of Justice. At times, negotiations were virtually at a standstill.

After intense and elaborate discussions, however, Canada made an offer to settle.¹³ The First Nation ultimately accepted, and a Settlement Agreement was finalized following the exchange of much correspondence, many conference calls, meetings, and revised drafts.

On November 25, 2002, the Kahkewistahaw First Nation successfully ratified the proposed settlement of \$94.65 million as compensation for the surrender and loss of use of 33,248 acres of reserve land taken in 1907.

¹³ A.J. Gross, Chief Federal Negotiator, Department of Indian Affairs and Northern Development, Specific Claims Directorate, to Chief Louis Taypotat, Kahkewistahaw First Nation, January 14, 2002 (ICC file 2107-23-01).

PART IV
CONCLUSION

The Kahkewistahaw First Nation claim, like most specific land claims outstanding in Canada, took years to resolve, in this case over 13. Although the Commission was involved as facilitator/mediator, it had no authority to force a settlement nor to impose one. The credit for settling this claim belongs to the parties. However, the outcome of the negotiations indicates the Commission's potential to advance the settlement of claims. For eight years, efforts by the First Nation to have its claim validated and settled were unsuccessful. The Commission's inquiry process was able to produce movement to the extent that the First Nation and Canada agreed on the value of having the Commission continue to be involved in the negotiation.

The Commission's continued presence in the negotiation adds value to a process that is plagued by the inability of the parties at the table to maintain consistency in negotiations. This inability is caused in part by high turnover rates in negotiators and legal counsel. The Commission's mediation service not only helps the parties keep the focus and momentum in the negotiations, but can also serve as an essential "corporate memory" at the table.

Much to the parties' credit, however, is the fact that they were able to work together to complete land appraisals and loss-of-use studies. At many past negotiation tables, studies undertaken independently by each party, did not lead to a better understanding or greater likelihood of a final agreement. The Commission's role as study coordinator in this process proved to be extremely helpful in moving the negotiation forward.

FOR THE INDIAN CLAIMS COMMISSION



Phil Fontaine
Chief Commissioner

Dated this 21st day of January, 2003.