INDIAN CLAIMS COMMISSION PROCEEDINGS

(1996) 4 ICCP

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Sumas Inquiry
Indian Reserve No. 6 Railway Right of Way Claim

Primrose Lake Air Weapons Range II
Joseph Bighead Inquiry / Buffalo River Inquiry
Waterhen Lake Inquiry / Flying Dust Inquiry

Homalco Indian Band
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Responses of the Minister of Indian Affairs and Northern Development
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A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION

(1996) 4 ICCP

CO-CHAIRS

Daniel J. Bellegarde
P.E. James Prentice, QC

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FROM THE CO-CHAIRS

On behalf of the Commissioners and the staff of the Indian Claims Commission, we are pleased to present the fourth volume of the *Indian Claims Commission Proceedings*. Included in it are three reports of inquiries, one special report, and two responses from the Minister of Indian Affairs and Northern Development.

The Sumas Inquiry: Report on Indian Reserve No. 6 Railway Right of Way Claim was released in February 1995. It was undertaken at the request of the Sumas First Nation of southern British Columbia and relates to a parcel of land which was expropriated in 1910 for use as a railway right of way and abandoned in 1927. The First Nation submitted that the land in question should have been returned to reserve status upon abandonment by the railway.

In September 1995, the Commission released Primrose Lake Air Weapons Range II: Report on Joseph Bighead Inquiry, Buffalo River Inquiry, Waterhen Lake Inquiry, and Flying Dust Inquiry. This is our second report relating to the land appropriated for this weapons range in northern Alberta and Saskatchewan, and to the First Nations' loss of access to their traditional hunting and trapping territory located within its boundaries. In the course of the four inquiries covered in this report, the Commission held five information-gathering sessions in the communities at which 48 community members spoke.

The Commission's Report of the Homalco Indian Band Aupe Indian Reserves 6 and 6A Inquiry was released on December 14, 1995, and it deals with the circumstances surrounding the creation of these reserves between 1888 and 1994.

Also included in this volume is a Special Report on the Treaty Harvesting Rights of the Fond du Lac, Black Lake, and Hatchet Lake First Nations, released on November 30, 1995. This report summarizes the Commission's views of the Athabasca Denesųłiné's claims to treaty harvesting rights north of 60° latitude.

Since volume 3 of the *ICCP* was published, we have received two responses to Commission reports from the Minister of Indian Affairs and Northern Development. We reproduce here the initial response to the Sumas Inquiry and to the Athabasca Denesuline Special Report.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

AFN	Assembly of First Nations
BCARS	British Columbia Archives and Records Service
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CCC	Canadian Criminal Cases
CCLT	Canadian Cases on the Law of Torts
CLSR	Canada Land Survey Records
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Report
FCA	Federal Court Appeal Division
FCA	Fur Conservation Area
FCTD	Federal Court Trial Division
FSIN	Federation of Saskatchewan Indian Nations
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
ONC	Office of Native Claims
OR	Ontario Reports
QB	Court of Queen's Bench
RSC	Revised Statutes of Canada

RSS	Revised Statutes of Saskatchewan
SBC	Statutes of British Columbia
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SS	Statutes of Saskatchewan
WWR	Western Weekly Reports

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INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE SUMAS BAND

PANEL

Commissioner Daniel Bellegarde
Commissioner Carole T. Corcoran
Commissioner James Prentice, QC

COUNSEL

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For the Government of Canada
Bruce Becker / Louise Senechal

To the Indian Claims Commission
Kim Fullerton / Robert F. Reid, QC / Diana Belevsky

FEBRUARY 1995

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PART I

INTRODUCTION

On January 24, 1994, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the claim of the Sumas Band.[1] The claim concerns a railway right of way across Sumas Indian Reserve No. 6 which was expropriated in 1910. The railway company used the right of way until 1927, when it abandoned the line. At that time, Chief Ned of the Sumas Band wrote to the Indian Agent asking that the Band be allowed to reacquire the land taken. The Band was permitted to purchase only a third of the right of way, and the rest was sold to non-Indian third parties. This land has remained in the hands of non-Indians.

In March 1984, the Sumas Band submitted a specific claim to the Department of Indian and Northern Affairs.[2] Under the government's Specific Claims Policy, published in 1982, claims that disclose an outstanding lawful obligation on the part of the federal government would be accepted for negotiation.[3] The Band's position was that the *Railway Act* and the *Indian Act* permitted the railway company to acquire only a limited interest in Indian lands; thus, the right of way should have been restored to reserve status when it was no longer used for railway purposes. Additional legal arguments in support of the claim were submitted in 1986.[4] Indian and Northern Affairs

1 Harry S. LaForme, then Chief Commissioner, to Chief and Council, Sumas First Nation, and to the Ministers of Justice and Indian and Northern Affairs, January 24, 1994 (ICC Exhibit 4).

2 Submission of the Sumas Band, March 30, 1984 (ICC Exhibit 3, attachment).

3 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*]. On page 20, the pamphlet specifies:

> A lawful obligation may arise in any of the following circumstances:
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

4 Leslie Pinder, counsel for the Band, to Manfred Klein, Senior Negotiator, BC, Indian and Northern Affairs Canada, June 6, 1986 (ICC Documents, pp. 534-42).

rejected the claim in 1988, on the basis that the expropriation had terminated the Indian interest in the right of way, and therefore the government had no legal obligation to restore it to reserve status.[5] The Band's subsequent efforts to have the matter reconsidered were unsuccessful.[6] By letter dated September 16, 1993, counsel for the Sumas Band requested that the Commission conduct an inquiry into the rejection of its claim.[7]

The function of this Commission is to assist First Nations and Canada in the resolution of specific claims. Our mandate provides, in part:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; . . .[8]

Thus, our task here is to examine the claim of the Sumas Band and to assess its validity on the basis of the Specific Claims Policy. In other words, the question before us is whether Canada has an outstanding lawful obligation, as defined in the Policy, towards the Sumas Band. This report sets out our findings and recommendations to the claimant First Nation and to the government.

5 Manfred Klein, Indian and Northern Affairs Canada, to Leslie Pinder, August 11, 1988. See also letter from Manfred Klein to Leslie Pinder, June 20, 1985, setting out the Department of Justice's legal opinion on this claim. ICC Exhibit 2.

6 Leslie Pinder to Manfred Klein, July 29, 1992 (ICC Documents, pp. 581-83). At a meeting on January 7, 1993, with Specific Claims West, DIAND, the Band was advised orally that the claim would not be accepted for negotiation; Leslie Pinder to Donna Gordon, October 20, 1993.

7 Leslie Pinder to Chief Commissioner LaForme, September 16, 1993 (ICC Exhibit 3).

8 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329 (July 15, 1991) (ICC Exhibit 1).

PART II

THE INQUIRY

In this section of the report, we examine the historical evidence relevant to the claim of the Sumas Band. We considered an extensive documentary record; the knowledge of the elders, which was shared with the Commission at an information-gathering session held in the community on September 23, 1994; and the balance of the record of this Inquiry. Details of the inquiry process and the formal record are set out in Appendix A to this report.

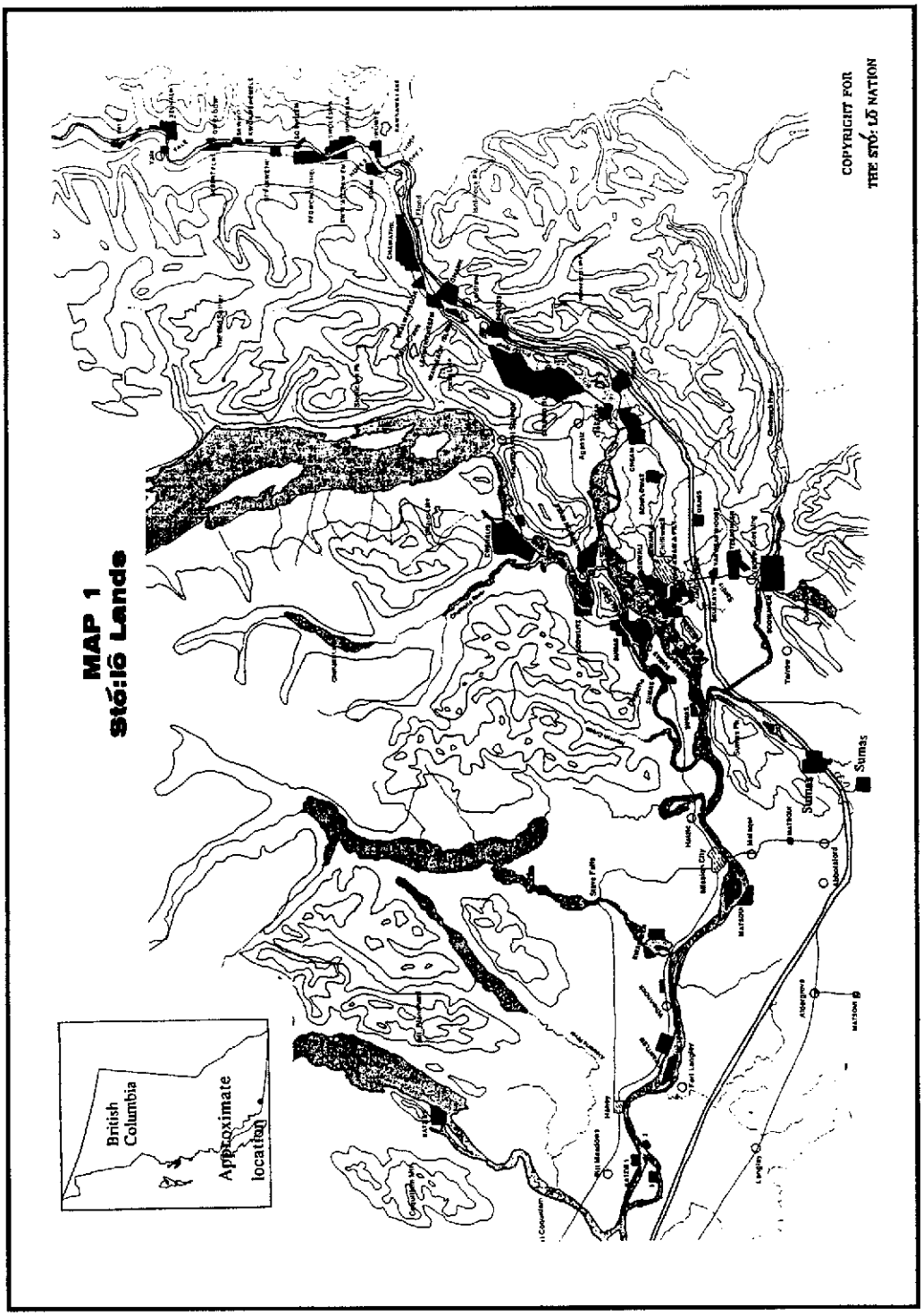
BACKGROUND

The Sumas Band is part of the Stó:lõ Nation, a division of the Coastal Salish language group, whose traditional lands are in British Columbia between Fort Langley and Yale. Map 1 shows the Stó:lõ lands (see page 10). Stó:lõ means "the river people"; the literal translation of Sumas is "a big level opening."

By decision dated May 15, 1879, Indian Reserve Commissioner G.M. Sproat established seven reserves for the "Somass River Indians."[9] In 1946 members of the Sumas Band signed a declaration stating that they had no interest in Reserves Nos. 1 to 5: "We own only Reserve No. 6, as Reserve No. 7 was sold some years ago." (IR No. 7 was sold to the Soldier Settlement Board in 1919.) Reserves 1 to 5 were taken up by the Lakahahmen Band, and in 1953 an Order in Council was passed confirming the various reserves to the two separate Bands.[10]

9 Decision of G.M. Sproat, Indian Reserve Commissioner, May 15, 1879 (ICC Documents, pp. 1-2).

10 Declaration of Sumas Band, October 1, 1946, and Declaration of Lakahahmen Band, November 1, 1946, National Archives of Canada [hereinafter NA], RG 10, vol. 7326, file 987/20-7-11-5, pt. 1; Memorandum from Minister of Citizenship and Immigration to the Governor General in Council, August 24, 1953, DIAND file 987/30-0, vol. 1 (ICC Exhibit 5, tab 1).


MAP 1
Stó:lō Lands
British Columbia
Approximate location
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THE STÓ: LŌ NATION

THE VV & E RIGHT OF WAY

The Vancouver, Victoria and Eastern Railway and Navigation Company (VV & E), a subsidiary of the Great Northern Railway Company located in Seattle, Washington, was incorporated by an Act of the British Columbia legislature in 1897. Its mandate was "to construct, equip and operate a line of railway from some point of Burrard Inlet or English Bay to New Westminster; thence eastward through the valley of the Fraser River and the southern part of British Columbia, by the most direct and feasible route, to the town of Rossland . . ."[11]

Sometime during the first quarter of 1910, VV & E began construction on that part of its line from Abbotsford to Kilgard. In response to an inquiry from Chief Ned of the Sumas Band in March 1910, Indian Agent R.C. McDonald stated that his office had not yet received an application from the railway company for a right of way through the reserve, but he assured the Chief "that the company cannot do any construction work on the reserve until they receive permission from the Department at Ottawa."[12] On July 5, 1910, F.S. and J.C. Maclure applied for land on the Sumas Reserve to construct a clay brick and pipe factory; the location of this factory was directly linked to the railway line, and the right of way was indicated on the plan submitted to the Department of Indian Affairs with the Maclures' application.[13] Later that month, VV & E forwarded survey plans to Indian Affairs showing a 41.95-acre railway right of way across Sumas IR No. 6, along with a request to "allow the Company to proceed with the work at once."[14]

In a memorandum to the Governor in Council on July 26, 1910, the Superintendent General of Indian Affairs noted that the Chief Engineer of the

11 Petition of Wm. Templeton, Wm. Nicol, and John T. Bethune to British Columbia Legislative Assembly, Victoria, BC, February 17, 1897, BC, Legislative Assembly, *Journals*, 1897 (ICC Documents, p. 17).

12 Indian Agent R.C. McDonald, Department of Indian Affairs, New Westminster, BC, to Chief Ned, Sumas Band, March 21, 1910 (ICC Documents, p. 44).

13 Bowser Reid & Wallbridge, solicitors for the Maclures, to Secretary, Department of Indian Affairs, July 5, 1910 (ICC Documents, pp. 55-56). By resolution dated December 19, 1910, and by Surrender for Lease on February 20, 1911, the Sumas Band consented to a 21-year lease to the Maclures: Resolution of the Sumas Band, December 19, 1910, NA, RG 10, vol. 8094, file 987/32-30-5, pt. 1 (ICC Documents, pp. 103-04), and Sumas Band Surrender for Lease, February 20, 1911 (ICC Documents, pp. 134-38). The lease was assigned three times during the next decade: on December 20, 1912, from the Maclures to the Kilgard Fire Clay Co. Ltd (ICC Documents, pp. 156-60); on June 27, 1917, from Kilgard to Evans Coleman & Evans Limited (ICC Documents, pp. 245-49); and on June 11, 1918, from Evans Coleman to Clayburn Brick Company (ICC Documents, pp. 252-57). Ultimately, in the late 1970s and early 1980s, the Band took back the land and now manufactures clay bricks through its own company, Sumas Clay Products.

14 Andrew Haydon, McGiverin Haydon & Greig, Barristers and Solicitors, to J.D. McLean, Department of Indian Affairs, July 22, 1910, NA, RG 10, vol. 8094, file 987/32-30-6-5, pt. 1 (ICC Documents, p. 59).

Department of Railways and Canals had certified that "the lands applied for are actually required for railway purposes and are such as the Company should be allowed to acquire under section 46 of the Indian Act."[15] Section 46 of the *Indian Act* provided: "No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council . . ."[16] Order in Council PC 1585, dated August 1, 1910, approved the recommendation that "under the said section 46 of the Indian Act," VV & E "be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way above referred to, upon such terms as may be agreed upon."[17]

On July 25, 1910, Indian Agent McDonald was instructed to determine the value of lands and Indian improvements affected by the right of way.[18] In order that "fair and satisfactory valuations" could be obtained as quickly as possible, a company representative was to be invited to accompany the agent during this process. The Assistant Deputy Superintendent General of Indian Affairs stressed: "It is understood that in all cases of rights of way the Indians interested are to be consulted with the view of obtaining their concurrence in such reasonable valuations as you may arrive at."[19]

Agent McDonald notified the Sumas Band that he intended to be at the reserve on August 8 to value the land and the improvements. He asked Chief Ned "to have all the men belonging to Upper and Lower Sumas, on hand on that day, say about 9 o'clock in the forenoon, as I want to get through the business as soon as possible and return the same day. Mr. Simons, the Right of Way Agent of the Company, will go up with me."[20] On August 8, 1910, the Sumas Band passed a resolution stating that

> we the undersigned being a majority of the male members of the Sumas band of Indians of the full age of twenty one years, do hereby consent to the Department of Indian Affairs selling to the Vancouver, Victoria and Eastern Railway and Navigation Co. 41.95 acres for right of way through the Sumas Indian Reserve No. 6, as shown on blueprint copy of a plan sent from the Department, on the following conditions, viz:-

15 Memorandum from Superintendent General of Indian Affairs to Governor General in Council, July 26, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 65).
16 *Indian Act*, RSC 1906, c. 81.
17 NA, RG 2, 1, vol. 998 (ICC Documents, p. 67).
18 J.D. McLean, Department of Indian Affairs, to Indian Agent McDonald, July 25, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 64).
19 Ibid.
20 Agent McDonald to Chief Ned, August 2, 1910 (ICC Documents, p. 68).

1) The said company to pay to the Department for the land (41.95 acres) the sum of $5,663.25 which amount we wish placed to the credit of our interest account so that it may be available when we need to purchase farming implements or other articles . . .[21]

The total valuation amounted to $12,668.25:

41.95 acres @ $135.00 / acre	5663.25
Clearing 28.6 acres @ $200.00 / acre	5720.00
Building, fruit trees, etc.	1285.00
	$12668.25[22]

The company, however, objected to the valuations, charging that they were "largely in excess of those made by any of the other property owners for right of way over similar lands."[23] The Indian Agent defended his figures:

> The large area which the Company proposes to take from the best part of the reserve, and on which the Indians have so much improvements, together with the bad severance, is a most serious question for the Indians interests, and I consider the Company should be compelled to pay the compensation mentioned in the Resolution passed by the Indians otherwise it will not be satisfactory to them.[24]

To prepare for possible arbitration in this matter, Department of Indian Affairs staff in Ottawa asked the Inspector of Indian Agencies, W.E. Ditchburn, to review the valuations. He was "to make no change in Mr. McDonald's valuations of Indian improvements unless in any case of a valuation being excessive in your opinion, any reduction should be made in the value of the land only. In all valuations of this nature it is desired that the Indians should be consulted and you should endeavour to obtain their consent to such final valuations as you may arrive at. . . ."[25]

When the company's agent, Mr. Simons, met with Inspector Ditchburn on September 22, he brought with him a revised plan of right of way. Along almost the entire length of the right of way, the width had been reduced –

21 Sumas Band Resolution, August 8, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 69-71).

22 Andrew Haydon to Secretary, Department of Indian Affairs, August 22, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 76-77).

23 J.L. Snapp, Right of Way Agent, Great Northern Railway Company, to Agent McDonald, August 15, 1910 (ICC Documents, p. 72).

24 Agent McDonald to Secretary, Department of Indian Affairs, August 17, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 73-75).

25 J.D. McLean, Department of Indian Affairs, to W.E. Ditchburn, Inspector of Indian Agencies, August 26, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 78-80).

from 400 feet to 250 feet in one section and from 200 feet to 150 feet in another – so that the acreage required was reduced from 41.95 acres to 28.83 acres. On account of these changes, Inspector Ditchburn had all the individual holdings of the Indians remeasured. He agreed with Agent McDonald that the land was worth $135.00 per acre, but he thought that the amount set for cleared land was excessive:

> This portion of the reserve cannot be considered as cleared land; in fact it is only half cleared, and I have changed the valuation in this respect from $200.00 to $150.00 per acre for the amount of clearing that has been done and the damage by severance to the property.[26]

The new price for the land was $3892.05 (28.83 acres at $135.00 per acre), plus $4302.05 for individual clearings and improvements. There is no Band Council Resolution on file consenting to the amended area or valuations, but Inspector Ditchburn reported that "the Indians have all agreed to the above amounts. . . ."[27]

The company remitted $8194.55 on January 5, 1911. The Sumas Band's capital account was credited with $3892.05, and, on January 23, eight Indians were sent cheques for their improvements. By telegram dated January 14, 1911, VV & E was permitted to enter onto the Sumas Reserve No. 6 to begin construction.[28]

The amended survey plan had been forwarded to Ottawa on October 29, 1910.[29] On February 11, 1911, letters patent were issued by Her Majesty the Queen to VV & E.[30]

DISPOSITION OF THE ABANDONED RIGHT OF WAY

In 1927 VV & E ceased to use the right of way for railway purposes and removed the tracks on Sumas Reserve No. 6. On July 20, 1927, VV & E applied to the Provincial Secretary for the Province of British Columbia for

26 W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, October 4, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 87-90).

27 Ibid.

28 Andrew Haydon to Deputy Superintendent General of Indian Affairs, January 5, 1911; deposit receipt for $8194.55, January 9, 1911; and telegram from J.D. McLean to Agent McDonald, January 14, 1911, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 108, 109, 111).

29 Andrew Haydon to Secretary, Department of Indian Affairs, October 29, 1910, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 97).

30 Letters Patent, February 11, 1911 (ICC Documents, pp. 128-33).

the registration of its crown grant to the 28.83-acre right of way.[31] On August 29, 1927, the crown grant was registered, and a certificate of title was granted to VV & E on September 26, 1927.[32]

On December 20, 1927, Chief Ned of the Sumas Band wrote to Indian Agent Daunt regarding the railway land: ". . . I just found out this land is on sale. We don't want any white man to live between our Reserve because it will be quite useless for us to pass over this property. Because this land is right between our Reserve, they should give us the first chance to buy this land. . . ."[33] In forwarding Chief Ned's letter to Ottawa, Agent Daunt reported:

> The Railway Company have discontinued their line and taken up the tracks, prior to selling the right of way. The Indians wish to buy this back from their Funds. Some of the land concerned has already been sold, and was bought by Mr. Samuel MacLure. This man is willing to sell approximately 2,500 feet of right of way, 150 feet wide and amounting to about nine acres, which is the piece the Indians apparently desire, at forty dollars an acre.
>
> I would recommend that under the circumstances their request be acceded to if Funds are available, as the land in question, lies between the rest of the Reserve and the clay deposits. It can be seen, therefore, that the Transportation Company having given up the ground, complications might arise if a white man entered into occupation of the strip in question.[34]

The railway company had already contracted, on September 23, 1927, to sell 12.08 acres of the 28.83-acre right of way to Samuel Maclure for $300.00. A certificate of title was issued to Maclure on February 28, 1928, and the land was subdivided into three lots on March 1, 1928.[35]

On March 31, 1928, A.F. MacKenzie, on behalf of the Assistant Deputy and Secretary of the Department of Indian Affairs, wrote to VV & E's lawyers:

> We are now informed that the railway company has discontinued its line and taken up the tracks prior to selling the right of way. As the right of way cuts through the Indian

31 A.H. MacNeill, Barrister and Solicitor, to Provincial Secretary, British Columbia, July 20, 1927 (ICC Documents, p. 264); Memorandum from Superintendent of Lands, British Columbia, August 1, 1927 (ICC Documents, p. 266).

32 Provincial Order in Council, August 29, 1927, registering the Crown grant (ICC Documents, pp. 267-68); Certificate of Title No. 73953E, September 26, 1927 (ICC Documents, pp. 211-12).

33 Chief Ned, Sumas Band, to Agent O'N. Daunt, December 20, 1927, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, pp. 273-74).

34 Agent O'N. Daunt to Assistant Deputy and Secretary, Department of Indian Affairs, December 21, 1927, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 275).

35 Indenture between VV & E and Samuel Maclure, September 23, 1927 (ICC Documents, pp. 269-70); Certificate of Title No. 76565E, February 25, 1928 (ICC Documents, p. 279); Certificate of Title No. 76622E, March 1, 1928 (ICC Documents, pp. 280-81).

> reserve, it is desired that it should be re-incorporated as part of the Indian reserve. . . . Please state what part of the right of way remains in possession of your Company and at what price you are willing to sell to this Department. I should also like to have a list of the areas you have sold, with the names and addresses of the purchasers and a plan showing the parcels as sold.[36]

In reply, VV & E stated that 12.08 acres had been sold to Sam Maclure and the balance was to be turned over to the Clayburn Brick Company (which operated on the reserve as assignee of the Maclures' 1910 lease) as soon as the agreement between the two companies had been executed. A certificate of title for 28.83 acres less 12.08 acres was issued to the Clayburn Company Limited on October 30, 1928.[37]

In the interim, on January 23, 1928, the Sumas Band had passed a resolution petitioning the Department of Indian Affairs to purchase "approximately 2500 feet of abandoned right of way" (approximately 9 acres) from Samuel Maclure for $40.00 per acre. Indian Agent Daunt did not forward this application for purchase to Ottawa until March 16, 1928.[38]

On June 22, 1928, the Department of Indian Affairs in Ottawa asked Indian Agent Daunt why only part of Maclure's 12.08 acres was included in the proposed purchase by the Sumas Band.[39] On June 29, 1928, Agent Daunt replied:

> I beg to inform you that the outstanding portion of 3.50 acres, not included in the proposed purchase, is not desired by the Indians, and I do not consider that it would be of any use to them. As a matter of fact were it not for the fact that private ownership of the 8.58 acre parcel would cut the Reserve in two, and interfere with communications, I would not have recommended the repurchase of any of the land.
>
> This piece, however, while of no particular value in itself, allows the Reserve to remain in one piece, but no useful purpose would be served by repurchasing the odd 3.50 acres, and I do not recommend that it be entertained.
>
> I understand some parties have acquired it as a speculation, and I have no doubt that we shall be pressed to consider it in the near future.[40]

36 A.F. MacKenzie, Department of Indian Affairs, to McGiverin, Haydon & Emms, March 31, 1928 (ICC Documents, p. 284).

37 A.H. MacNeill, Barrister, to McGiverin Haydon & Ebbs, June 14, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 290); Certificate of Title No. 80481E, October 30, 1928 (ICC Documents, pp. 305-06).

38 Resolution of Sumas Band, January 23, 1928 (ICC Documents, p. 277), and letter from Agent O'N. Daunt to Assistant Deputy and Secretary, Department of Indian Affairs, March 16, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 282).

39 A.F. MacKenzie, Department of Indian Affairs, to Agent O'N. Daunt, June 22, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 292).

40 Agent O'N. Daunt to Assistant Deputy, Department of Indian Affairs, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 293).

On July 30, 1928, a certificate of title for Lot 1 of the 12.08-acre portion of the abandoned right of way on the Sumas Reserve was issued to the Department of Indian Affairs. The Band paid $343.00 for this land. It was not until August 18, 1965, that Order in Council PC 1965-1501 confirmed this land as part of IR No. 6. Lot 2 (0.3 acres) was retained by Mr. Maclure.[41] Lot 3 (3.20 acres) was sold to Allan C. Keeping.[42]

EFFECT OF THE RIGHT OF WAY

The evidence indicates that the injurious effect of the right of way was apparent to the Department of Indian Affairs. Indian Agent McDonald had noted at the valuation stage that the right of way was to be taken "from the best part of the reserve."[43] Most of the Band's improvements, its houses and buildings, were on this portion of land. So too was a burial ground; elder Hugh Kelly told the Commission that the right of way went through the middle of the cemetery, and that his father helped remove the bones.[44]

Furthermore, there was very little good land on the reserve to begin with. As indicated on Map 2 (on page 18), Sumas IR No. 6 is mostly flood plain, and the right of way cut through the small segment of the reserve that lies above the flood plain. Thus, the true effect of the appropriation was not simply that it deprived the Sumas Band of some of its best land; it deprived the Band of a substantial tract of the only good land it had. The "bad severance" of which Agent McDonald spoke is also evident from the map. The right of way severed the core of the reserve into two.

This situation continues to be problematic. The map shows that approximately two-thirds of the right of way has remained out of the hands of the Sumas Band. Chief Lester Ned explained to the Commission the effect this has had:

> It directly affects my people here because it cuts our reserve in half, the residential part of it, and so any developments we try to do, it's next to impossible because they're right in the heart of Sumas Indian reserve.[45]

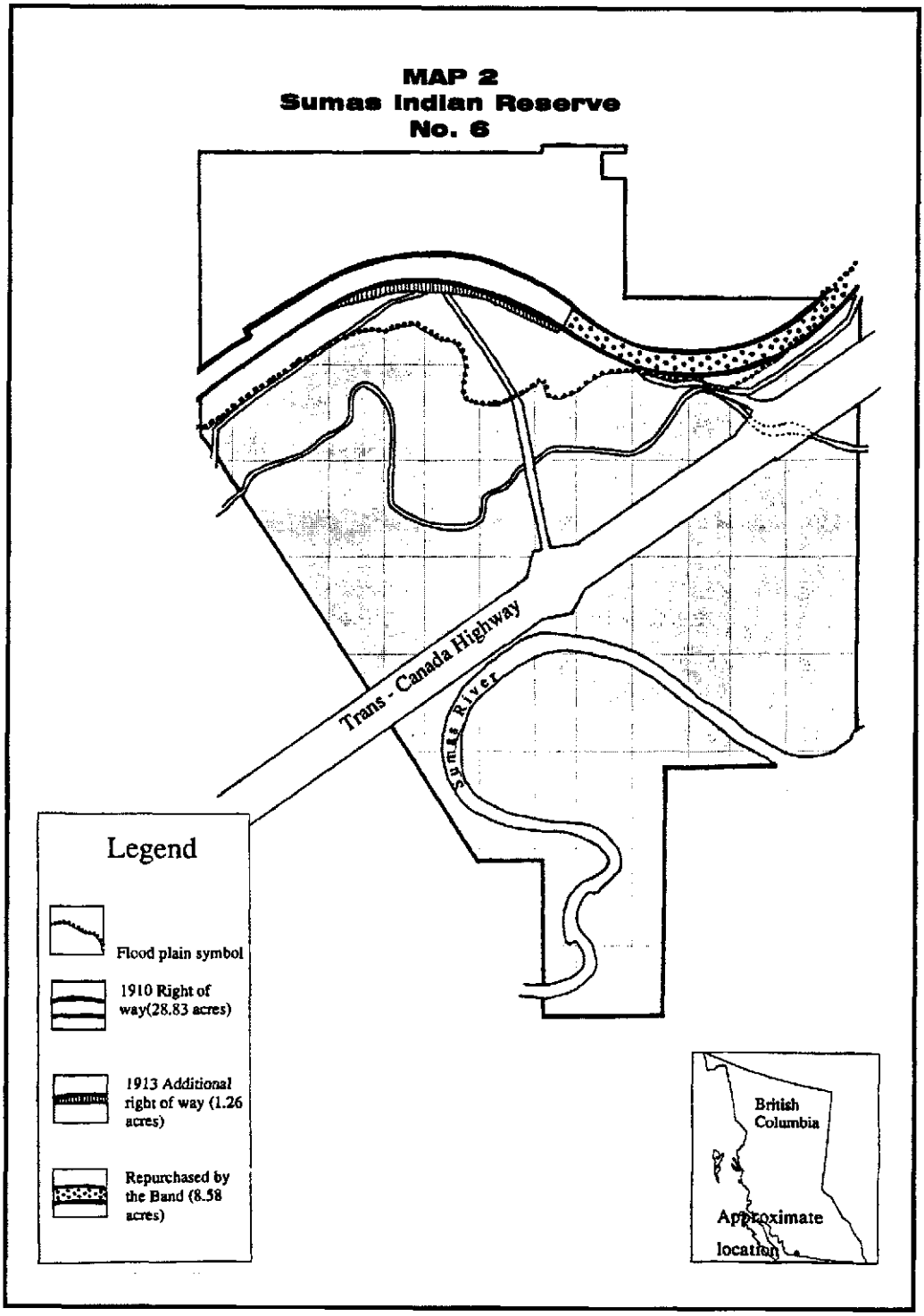
41 Certificate of Title No. 78827E, July 30, 1928 (ICC Documents, p. 294); Trust Account Voucher, August 18, 1928, NA, RG 10, vol. 8086, file 987/31-2-30-6, VV & EN, pt. 1 (ICC Documents, p. 298); Order in Council PC 1965-1501, August 18, 1965, DIAND, Land Registry # X012972 (ICC Documents, pp. 371-73).

42 Certificate of Title No. 79682E, September 26, 1928 (ICC Documents, p. 304).

43 Note 24 above.

44 ICC Transcript, pp. 38-39.

45 ICC Transcript, p. 43.


MAP 2
Sumas Indian Reserve
No. 6
Trans - Canada Highway
Sumas River
Legend
Flood plain symbol
1910 Right of way(28.83 acres)
1913 Additional right of way (1.26 acres)
Repurchased by the Band (8.58 acres)
British Columbia
Approximate location

The alienated land lies above the flood plain, and thus is land that could have been used for residential development. The capacity for such development on the Sumas reserve is restricted. In explaining the problems of limited residential land and an expanding population on the reserve, Chief Ned remarked: "we'll have to start building highrises if we want more houses here."[46]

Agent Daunt's observation in 1928 that "complications might arise if a white man entered into occupation of the strip in question" has also proved true. On part of the alienated portion of the right of way, there are houses belonging to non-Indians. On another part there is the Flexlox plastic pipe manufacturing plant. This is a noxious use, situated in the midst of residential land, over which the Band has no control. The Commission heard complaints of traffic, fumes, and hazardous materials being transported through the reserve and dumped on the Flexlox site.[47]

1.26-ACRE ADDITIONAL RIGHT OF WAY

In 1913 VV & E acquired an additional 1.26 acres of Sumas IR No. 6, for railway purposes pursuant to the *Indian Act* and the *Railway Act*. The 1.26-acre addition to the VV & E right of way was part of the claim submitted by the Sumas Band to the Department of Indian Affairs in 1984. After reviewing the facts of this particular claim, the Office of Native Claims informed the Band's lawyers as follows:

> . . . apart from that portion of land transferred to the municipality for road purposes, the Indian interest in the 1.26 acre parcel was not legally taken, and the land continues to be legally part of the reserve. . . .
>
> We have therefore been advised that, at least with respect to the land not transferred to the municipality, the Indian interest was not lawfully taken and, although the railway company (or its successors) may have some interest in the land or at least a claim against the Crown, the land is still legally part of the reserve.
>
> The Office of Native Claims is prepared to recommend to the Minister that this claim be accepted on the basis outlined above. . . .[48]

The Sumas Band came to the Indian Claims Commission in September 1993, and in January 1994 its counsel requested that the 1.26-acre claim be

46 ICC Transcript, p. 74.
47 See testimony of Chief Lester Ned and Ray Silver (ICC Transcript, pp. 47-53).
48 Manfred Klein to Leslie Pinder, note 5 above.

considered by the Commissioners with the rest of the package.[49] At an ICC Planning Conference held in Vancouver on March 18, 1994, both Canada and the Sumas Band agreed that "there was some misunderstanding between the parties relating to the grounds on which the 1.26 acre claim had been accepted for negotiation. To clarify this, the parties agreed to discuss, on March 25, 1994, the grounds on which the 1.26 acres had been or could be accepted for negotiation."[50] On April 28, 1994, Specific Claims West wrote to Chief Lester Ned with a cash settlement offer, which the Band could accept without prejudice to its claim to the 28.83-acre property.[51] The 1.26 acres, then, is no longer a consideration in this Inquiry.

49 Clarine Ostrove to Indian Claims Commission, January 12, 1994, ICC file 2109-13-1.
50 Summary of ICC Planning Conference, March 18, 1994, ICC file 2109-13-1.
51 Peter Vranjokovic, Specific Claims West, DIAND, to Chief Lester Ned, Sumas Band, April 28, 1994, ICC file 2109-13-1.

PART III

ISSUES

This Commission has the mandate to inquire into and report on whether a claimant Indian Band has a valid claim for negotiation under the Government of Canada's Specific Claims Policy. As noted earlier, the Policy states that the government will recognize claims which disclose an outstanding lawful obligation on the part of the federal government. A lawful obligation is defined as "an obligation derived from the law"; it may arise, for example, as a result of an illegal disposition of Indian land, non-fulfilment of a treaty, or other breach of obligation.[52]

Thus, the question before the Commission is whether Canada has an outstanding lawful obligation towards the Sumas Band, with respect to the appropriation of 28.83 acres for a railway right of way across Sumas IR No. 6. There are a number of specific legal issues concerning the effect of the taking and the subsequent disposition of the right-of-way lands. These issues have been framed as follows:

1 What interest in IR No. 6 was taken by VV & E, and what interest, if any, remained in the Band or Canada?

2 What obligation, if any, did Canada have when it learned that VV & E no longer needed the right of way for railway purposes?

3 If VV & E did acquire absolute title to the right of way, did Canada breach its fiduciary obligation to the Sumas Band by executing the Order in Council or issuing letters patent to the railway company?

4 In the alternative, was the Order in Council valid only for the taking of the 41.95-acre parcel as set out in the original plan of right of way, and did

52 *Outstanding Business*, note 3 above, 20.

Canada therefore breach section 46 of the *Indian Act* by failing to obtain the consent of the Governor in Council for the taking of 28.83 acres of IR No. 6?

PART IV

ANALYSIS

BACKGROUND

The Statutory Scheme

The relevant sections of the *Railway Act* and the *Indian Act* are set out below.

Railway Act, RSC 1906, c. 37.

172. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

2. Any company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

3. The company may not alienate any such lands so taken, used or occupied.

4. Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose of trust.

. . .

175. No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.

2. When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

Indian Act, RSC 1906, c. 81.

> **46.** No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and, if any railway, road, or public work passes through or causes injury to any reserve, or, if any act occasioning damage to any reserve is done under the authority of an Act of Parliament or of the legislature of any province, compensation shall be made therefor to the Indians of the band in the same manner as is provided with respect to the lands or rights of other persons.
>
> 2. The Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation.
>
> 3. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured.

The Order in Council and Letters Patent

Section 175 of the *Railway Act* and section 46 of the *Indian Act* require that the Governor in Council consent to the taking of reserve lands. The consent to the taking of the right of way across the Sumas reserve is found in Order in Council PC 1585, dated August 1, 1910:

> . . . The Minister observes that the Chief Engineer of the Department of Railways has certified on the plans of right of way that the lands applied for are actually required for railway purposes and are such as the company should be allowed to acquire under section 46 of the Indian Act.
>
> . . . The Minister, therefore, recommends that under the said section 46 of the *Indian Act* the Vancouver, Victoria & Eastern Railway & Navigation Company be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way above referred to, upon such terms as may be agreed upon. The Committee submit the same for your approval.

Note that the right of way to which reference is made is that set out in the original plan, comprising 41.95 acres.

The letters patent, issued to VV & E on February 11, 1911, include the following terms:

> . . . whereas We have thought fit to authorize the sale and disposal of the lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, in such manner as we shall be pleased to direct from time to time.

And whereas The Vancouver Victoria and Eastern Railway and Navigation Company have contracted and agreed to and with Our Superintendent General of Indian Affairs, duly authorized by Us in this behalf, for the absolute purchase at and for the price and sum of eight thousand and one hundred and ninety four dollars and fifty five cents.

. . . We, by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever; all that Parcel or Tract of land situate, lying and being in the Sumas Indian Reserve number 6 . . . comprising all the right, title, estate, interest and demand whatsoever of the said Indians of, in or to or out of the Right of way of the Vancouver Victoria and Eastern Railway through said Reserve.

Containing twenty eight acres and eighty three hundredths of an acres more or less.

SUMMARY OF ARGUMENTS

The Band's Argument

The Band argues that VV & E acquired only an easement, and not ownership in fee simple of the right of way across IR No. 6. The only way that the Band's interest in the reserve land could be alienated absolutely, it maintains, is by way of surrender to the Crown. Furthermore, the legislative scheme taken as a whole (in particular, the protections for reserve land in the *Indian Act* and the public-purpose limitation in the *Railway Act*) reveals Parliament's intention that any appropriation for railway purposes should infringe the rights of the Band as little as possible.

The Band further maintains that, even if VV & E took more than an easement, the most the company could have acquired was a right to use the land for railway purposes, with a reversionary interest to the Band. Section 172 of the *Railway Act* permits a railway company to "take and appropriate" lands, provided that the lands are required for the use of the railway and its works; in addition, the section expressly prohibits alienation of appropriated lands. Therefore, when no longer used for railway purposes, the right of way should have reverted to the Crown for the sole use and benefit of the Band. If the appropriation did result in VV & E obtaining the absolute fee simple in the right of way, the Band submits that the Crown breached its fiduciary duty in giving up more of an interest in the reserve than was necessary for the purpose of running a railway.

As an alternative argument, the Band submits that the Governor in Council's consent to the appropriation, which was based on the original plan of right of way showing 41.95 acres, did not apply to the 28.83-acre parcel

actually taken. Since the statutory requirement of Governor in Council consent was not met, the appropriation was invalid and VV & E acquired no legal interest in the right of way.

Canada's Argument

Canada argues that VV & E acquired a fee simple interest in the right-of-way lands, and that the appropriation terminated the Band's interest in the right of way. The words "take and appropriate" in section 172 of the *Railway Act,* counsel for Canada maintain, indicate that the railway company was empowered to acquire a fee simple interest. Canada provides various definitions and judicial interpretations of "appropriate" which suggest that appropriation confers absolute dominion. Canada also argues that the Order in Council and letters patent are evidence of the Governor in Council's intention to convey a fee simple interest to VV & E. The Order in Council and letters patent do not place any conditions on the transfer.

Since the Band had no ongoing reserve interest in the right of way, Canada maintains that there was no obligation to restore the right of way to the Band when it ceased to be used by the railway. Any fiduciary obligation owed to the Sumas Band was satisfied when the Band received adequate compensation. Furthermore, Canada had no discretion to ensure a form of conveyance to VV & E that would have created a reversionary interest in the Band, because the *Railway Act* became operative once consent was given and the right of way was taken in accordance with the provisions of that Act. Canada therefore had no fiduciary duty in this regard. Finally, Canada argues that the Governor in Council's consent to the taking of the 41.95-acre right of way applied to the taking of the included 28.83-acre portion.

ISSUE 1: WHAT INTEREST WAS TAKEN?

1 What interest in IR No. 6 was taken by VV & E, and what interest, if any, remained in the Band or Canada?

The general approach to determining what interest was taken is set out in *Canadian Pacific Limited v. Paul.*[53] In *Paul,* the Supreme Court of Canada was faced with conflicting claims to the use of a railway right of way across a reserve. In resolving this conflict, it was necessary to establish the nature of a

53 [1988]2 SCR 654, [1989] 1 CNLR 47.

railway company's interest in the right of way. The Court's approach to the question was to "look to the language of the statutes, to any agreements between the original parties and to subsequent actions and declarations of the parties."[54] The key factor in determining the railway's interest was the interpretation of the legislation under which it acquired the right of way.[55]

In undertaking this exercise, we are guided by *A.G. Canada v. Canadian Pacific Limited and Marathon Realty Company Limited*,[56] which provides an interpretation of the applicable statutes. The *Marathon Realty* case also concerned a railway right of way across a reserve. The right of way was appropriated in 1927 by Canadian Pacific Railway Company (CP), pursuant to the *Indian Act* and the *Railway Act*. The Governor in Council consented to the appropriation, and the Order in Council attached no conditions to the sale. CP subsequently conveyed the land to Marathon Realty.

Canada sought return of the right-of-way lands to the Crown, since the lands were no longer used for railway purposes. Mr. Justice Meredith held that section 189(3) of the *Railway Act* (identical to section 172(3) of the 1906 Act) prohibited a railway company from alienating any lands taken under that section. The plain wording of the section dictated this result: "The company may not alienate any such land so taken, used or occupied."[57] Thus, the purported alienation to Marathon Realty was illegal. Furthermore, both the *Railway Act* and section 48(1) of the 1927 *Indian Act* (substantially the same as section 46 above) allowed the appropriation of reserve land only if it was necessary for railway purposes.[58] This statutory requirement was echoed in the Order in Council, which predicated consent to the taking on certification that "the Canadian Pacific Railway Company requires the land herein described for a railway right of way . . . ." By necessary implication, land no longer used for railway purposes "must be restored to the Crown."

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54 Ibid., at 53 (cited to CNLR).

55 Ibid., at 57.

56 [1986]1 CNLR 1 (BCSC), aff'd BCCA, May 14, 1986 (unreported), hereinafter *Marathon Realty*.

57 This inalienability proviso applies only to Crown land. In general, the railway company was empowered to take land and to alienate it when it is no longer needed, pursuant to section 151 of the *Railway Act*, RSC 1906, c. 37:

151. The company may, for the purposes of the undertaking, subject to the provisions in this and the Special Act contained, . . .

(c) purchase, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway, and also alienate, sell or dispose of, any lands or property of the company which for any reason have become not necessary for the purposes of the railway; . . .

58 Under section 189(2) of the *Railway Act* (equivalent to section 172(2)), a company could take and appropriate "for the use of its railway and works" as much Crown land "as is necessary for such railway." Similarly, the *Indian Act* contemplated expropriation "for the purposes of any railway."

Marathon Realty therefore disposes of the argument that VV & E acquired the full fee simple; we know that, upon abandonment of the railway, appropriated land is properly restored to the Crown. Mr. Becker, counsel for Canada, stated in oral argument that he was not trying to distinguish *Marathon Realty*, and thus he acknowledged that upon discontinuance of the railway line the land "went back to the Crown."[59] We also note that the authorities cited in Canada's written submission for the proposition that a railway company acquires a fee simple absolute on expropriation all contain the qualifier that the "absolute" fee simple is only in the company as long as the lands are used for railway purposes.[60]

While the case law establishes that the Crown has, in effect, a reversionary interest, it does not establish that the land reverts to the Crown "*for the sole use and benefit of the Band*," as the Band asserts.[61] In other words, the question that *Marathon Realty* leaves open is whether the Band's interest must also be restored. Canada says that there can be no reversionary interest in the Band because the statutes, Order in Council and letters patent, and subsequent conduct of the parties show that the Band was fully divested of its interest.

It is clear from *Marathon Realty* that the reversionary interest in the Crown exists because of the railway-purposes limitation and the inalienability proviso in section 172 of the *Railway Act*. It is unclear why the statute would

59 ICC Transcript, pp. 203-04.

60 Two specific examples illustrate this point. In support of his argument, Mr. Becker cites *Metropolitan Realty Company v. Fowler*, [1893] AC 416. Although the Court of Appeal decided that the railway company had exclusive title to the land surrounding a tunnel, Lord Watson also remarked as follows: "It may be that if their railway undertaking was wholly abandoned their statutory title to the subsoil of the highways would cease, and the land which they possess by virtue of it would revert to the original owner." Lord Watson further noted that the company has all the right to the land in perpetuity, which is what defines a fee simple, *if* they choose to avail themselves of it – i.e., if the land is used for railway purposes. Until abandonment actually takes place, the railway has what is practically identical to a fee simple absolute.

In *Norton v. London and Northwestern Railway Co.* (1878), 9 Ch.D. 623, Vice Chancellor Mallins considered what rights railway companies acquire in land which they take for the purposes of constructing a railway. At 627, he stated the following:

> That they acquire the absolute fee simple of the land is not in dispute. I am clearly of the opinion that every railway company taking land for the purpose of constructing, maintaining, and using their railway, have the fee simple of all the land which they are authorized to take, and they have a right to exclude all other persons entering upon that land without permission; but they have it in a qualified manner in which land taken for particular purposes is taken.

He continued as follows at 632:

> . . . though they have an absolute and unqualified fee simple, they can only use the land for the purpose for which they acquired the land . . . . Their property and their purposes are altogether of a limited character.

With respect, the Vice Chancellor used the term absolute rather loosely; it is not clear how the company can have an absolute fee simple and a "property . . . of a limited character." He appears to have meant that the fee simple is subject to the condition that the land is used for railway purposes. At the time, however, this distinction was practically irrelevant because it was assumed that the railways would be operating in perpetuity.

61 Note that, in *Marathon Realty*, Canada sought an order returning a right of way to the Crown. The Penticton Band was not a party.

not have the same effect on the Indian interest in reserve lands. If anything, the case for a reversionary interest in the Band is stronger: we are dealing not with unoccupied Crown lands, but with lands set aside for Indians. Furthermore, there is nothing in sections 172 or 175 of the *Railway Act* to suggest that the Indian interest in reserve lands may be taken absolutely, while the Crown's ultimate title is preserved. The railway-purposes limitation and inalienability proviso apply generally. Since the legal nature of reserve lands is that the Crown holds the underlying title for the use and benefit of the Indians, it stands to reason that the land should revert to the Crown on this basis, with the beneficial interest intact.

Canada argues that this, however, is not the end of the matter; to be consistent with *Paul*, we must look not only to the statutes, but to any other relevant documents or actions that speak to the intention of the parties. First, there is the Order in Council, which recommends that VV & E "be allowed to acquire from the Department of Indian Affairs the Indians' interest in the right of way . . . ." The letters patent are even stronger: they grant to VV & E an interest "comprising all the right, title, estate, interest and demand whatsoever of the said Indians" in the right-of-way lands. The letters patent *per se* operate as an outright grant of the land. Thus, the argument is that the Indian interest was taken absolutely, without condition, so that no reversionary interest was left. The Governor in Council granted to VV & E the entire Indian interest in the right of way.

We have some difficulty with this argument. The *Railway Act* permits the taking and appropriation of Crown land, including Indian reserve land, for railway purposes. The railway-purposes limitation is imposed by statute, but an absolute grant would allow the railway company to use the land for any purpose. An absolute grant also conflicts with the inalienability proviso in the Act. Canada's position seems to be that the Governor in Council could have conveyed any interest, regardless of the clearest statutory restrictions. It is an established principle of constitutional law, however, that executive action cannot be inconsistent with a statute.[62]

One way of applying this principle is to treat the grant as incorporating the statutory limitations, as was done in *Marathon Realty*. In that case the defendants argued that, since no conditions were attached to the "sale" to CP, the company obtained absolute title to the expropriated reserve lands. Accordingly, as full owner, it was entitled to alienate the property. The Court

62 See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), 571, n.10.

rejected this argument; it was unnecessary for the Governor in Council to attach conditions to the sale, since the terms and conditions (of inalienability and restoration upon non-user) were already set out in the *Railway Act*. The grant was not illegal or void, but it was subject to conditions that would bring it into line with the governing statute. Applying this principle here, we conclude that the letters patent were not effective in transferring the entire Indian interest.

Similarly, the Order in Council does not advance Canada's argument, because it too must conform to the applicable statutes. At any rate, in this case the consent to the appropriation contained in the Order in Council was predicated on the chief engineer's certification that the lands "are actually required for railway purposes." There was, therefore, an underlying condition on the consent given by the Governor in Council, and the transfer of the subject lands to VV & E was subject to that condition.

Canada also relies on the Band's consent to the "sale" of the right of way (as stated in the Band Council Resolution), and Chief Ned's assumption that the Band would have to buy the land back after VV & E abandoned the railway line.[63] Thus, the Indians themselves understood that they no longer had any interest in the right of way. We are not persuaded by this line of argument. The term "sale" does not necessarily imply a fee simple absolute; clearly, one can sell a fee simple subject to a condition that the lands be used for railway purposes. We also hesitate to rely on Chief Ned's assumption that the Sumas Band would have to repurchase the right of way, given that he did not have the benefit of legal counsel on what is obviously a complex legal question. Moreover, a Band Council Resolution and a letter from the Chief, whatever their contents, cannot supersede a statute.

Canada raised the further matter of compensation. The Band was compensated for the full value of the lands, which presumably means the value of the fee simple interest. Furthermore, section 175 of the *Railway Act* specifically provides for compensation if reserve lands are taken, but no compensation is mandatory for the taking of other lands vested in the Crown. This might suggest that the reversion should not attach to the Band, because the Band gave up its entire interest and was paid accordingly. We are of the view, however, that the fact of adequate compensation for the land taken does not preclude us from finding a reversionary interest in the Band. A fee simple determinable (that is, a fee simple that may end if a specified

63 Letter from Chief Ned, note 33 above.

terminating event occurs) may in theory be valued as a fee simple, depending on the uncertainty of when and if the terminating event will occur. It is likely that in 1910 most thought the railway would continue operating in perpetuity. Under that assumption, a fee simple determinable is equivalent in value to a fee simple absolute.

Having considered all the arguments, we find that the most that VV & E could have taken was a fee simple determinable. This conclusion follows from the clear terms of the statute and the *Marathon Realty* case. We further find that the Band was left with some property interest in the right of way in the nature of a reversion. This kind of interest does not revert automatically from the third party to the Band upon the terminating event.[64] Rather, the Crown assumes its traditional role as intermediary, and the land reverts to the Band *through* the Crown.[65]

The Band argues that the railway company acquired even less than a fee simple determinable, that it acquired an easement. This is the Band's primary argument, and it is advanced on a number of grounds. One ground, asserted in oral argument, is that the "take and appropriate" language in section 172(2) of the *Railway Act*, upon which Canada relies to show that VV & E acquired a fee simple, does not even apply to the taking of reserve lands for railway purposes. Instead, the operative language is "take possession of, use or occupy" found in section 175, which deals specifically with the taking of Indian lands. Section 175 therefore provides that a railway company is empowered to take only a right of possession or occupation – that is, an easement – from reserve lands.

In our view, however, section 175 may be read as adding to the general provision, section 172, by specifying that compensation is to be paid for the taking of reserve land. (There is no provision for compensation in section 172, except for Crown land held for a special purpose or subject to a trust.) The general provision still applies, however, because reserve lands are lands "vested in the Crown." Thus, section 175 is not an alternative section, but

64 As would a possibility of reverter in real property law.

65 This classification of the interest left in the Band follows from the *sui generis* nature of the Indian interest in reserve land. If what the Band had in the first place was a *sui generis* interest in the reserve, then, properly speaking, anything carved out of this interest that remained in the Band would also have to be a *sui generis* interest. This view is supported by the case of *St. Mary's Indian Band v. City of Cranbrook*, [1994] 3 CNLR 187 (BCSC). That case concerned the legal effect of a surrender qualified in the following way: ". . . And that should at any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge." The Court held that this qualification did not give rise to a reversion, as it is known in English real property law. Instead, it gave rise to a *sui generis* reversionary interest, which in turn placed a fiduciary obligation on the Crown to restore the Band's interest if the land ceased to be used for public purposes.

one that is to be applied in conjunction with section 172 as applying to a particular type of Crown lands. Furthermore, section 46 of the *Indian Act*, which also applies, provides that reserve land may be "taken." We are not convinced that there is any significant difference between "take" and "take and appropriate." We also appreciate that the Court in *Marathon Realty* applied section 172 to the taking of reserve land. This judicial authority conflicts with the Band's submission that section 175 alone governs the taking of reserve lands.

Another of the Band's arguments is that the Order in Council supports the easement model, in that it speaks to the acquisition of the Indians' interest in the *right of way*. In our view, this language is not conclusive, because "right of way" may refer to the strip of land in the plan of right of way – that is, to a physical space – rather than to the legal nature of the interest.

Counsel for the Band also urged us to consider the taking within the larger context of the *Indian Act* and, in particular, the surrender provisions. Under section 48 of the *Indian Act*, reserve lands are protected in that they cannot be alienated unless there is a surrender. Thus, they maintain, the only way that the Sumas Band's reserve interest in the right of way could have been given up is by way of a surrender. In our view, this argument must be rejected. A taking is a separate mechanism and is by definition a non-consensual process that favours public purposes over the protection of Indian lands.

This is not to say, however, that the protections for reserve lands contained in the *Indian Act* are irrelevant to this issue. Ms Pinder, counsel for the Band, asserted in oral argument that section 46 of the *Indian Act* and section 172 of the *Railway Act* should be construed so as to release the smallest reserve interest possible. Given the special status and protection afforded reserve land under the *Indian Act*, and bearing in mind the principle that all statutes should be taken as a coherent whole,[66] she urged us to conclude that Parliament intended to confer on VV & E the power to take from reserves nothing more than the minimum required for railway

66 See P.A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1992), 288.

purposes. A right to exclusive occupation to the strip of land required for railway purposes, that is, a statutory easement, was all that VV & E required.[67]

Although this argument has some merit, it fails to address the case law holding that, when a railway company expropriates, it acquires a fee simple as long as the land is used for railway purposes. The weight of judicial authority suggests that, generally speaking, the extent of rights required by a railway makes its interest in land appropriated more akin to a fee simple than to an easement. The railway has the right to possess and use the land exclusively, to alter it, remove earth and timber, and to manage it generally. At a certain point, the railway's interest may lose its resemblance to an easement.

It is true that the Supreme Court of Canada held in *Paul* that CP acquired a statutory easement in the nature of a right of way. One can draw a distinction, however, between the facts of that case and the facts here: the terms of CP's incorporating statute clearly differentiated between the "owner" of the land and the railway company. The statute provided that the railway company could remove and use any earth, gravel, stone, or timber "without any previous agreement with the owner or owners. . . ." As the Court noted, such a provision would be meaningless if the company had obtained a fee simple. In addition, the Crown subsequently granted to another company the fee simple in other rights of way across the reserve that were created under the same statute; accordingly, the fee simple could not have been granted in the first place. There are no similar factors militating against a grant of a qualified fee simple here.

We find, therefore, that VV & E acquired more than an easement, that it acquired a fee simple in the right of way across the Sumas reserve as long as it was used for railway purposes. We further find that the taking did not extinguish the Band's interest in the right-of-way lands. Both the Band and Canada had the right to have their interest in the right of way restored on termination of the railway's interest.

67 We note that, when the Band's counsel argue that all VV & E got was an easement, they must mean a statutory easement, rather than an easement as the term is generally used in real property law. The term "statutory easement" is used to describe a right that originates in a statute and resembles an easement. A right of way for the operation of a railway resembles an easement but is not actually an easement, because "no right will be recognized as an easement which is in effect a claim to exclusive or joint user of the servient tenement": E.H. Burn, *Cheshire & Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988), 499-500. By laying down tracks and running the railway, VV & E claimed possession of the land, to the exclusion of the Sumas Band; this kind of right does not fall within the definition of an easement at common law.

ISSUE 2: THE CROWN'S OBLIGATION UPON ABANDONMENT OF THE RAIL LINE

2 What obligation, if any, did Canada have when it learned that VV & E no longer needed the right of way for railway purposes?

The Band argues that the Crown had a fiduciary duty to protect the Indians' beneficial interest in the right of way and to enforce the condition of non-alienability by VV & E. Presumably this means that, upon VV & E's abandonment of the line, the Crown was under an obligation to have the right of way restored for the use and benefit of the Band.

Canada starts with the proposition that the effect of the appropriation was to divest the Indians of their interest in the subject lands. Canada maintains that there is no legislation, agreement, or undertaking obliging Canada to return the lands to reserve status once they were abandoned by the railway company. In fact, the Band consented to the taking, was compensated for the value of the land and improvements, and never expected the right of way to be returned automatically.

Furthermore, Canada submits that it had no fiduciary duty to restore the right of way to the Band. In oral argument, Mr. Becker stated that the legal criteria for a fiduciary obligation did not arise in this case, because there is no "corpus" or subject matter of the obligation.[68] Canada, having statutorily imposed itself as an intermediary, is obliged to act as a fiduciary with respect to reserve lands. But if the Band has no reserve interest left, if the reserve interest to which a fiduciary duty will attach is extinguished, there is no basis for a fiduciary obligation. A fiduciary duty would have to be predicated on an ongoing Indian interest in the land.

Given our finding that the Band had a reversionary interest in the right of way, it follows from Mr. Becker's own argument that Canada had a fiduciary obligation to restore the use and benefit of the land to the Band. In our view, there was an ongoing Indian interest in the land, and Canada, in its role as intermediary with respect to reserve lands, had an obligation to act on behalf of the Band to restore its interest.[69] Therefore, we find that Canada breached its fiduciary obligation to restore the right of way to the Band. Furthermore,

68 ICC Transcript, p. 175.

69 In addition, the *St. Mary's Indian Band* case, note 65 above, supports the conclusion that where a Band has some sort of reversionary interest in a reserve, the interest gives rise to a fiduciary duty on the Crown to ensure that the property is restored to the Band.

even if we were to accept that the entire Indian interest in the right of way was taken, we would nevertheless find that the Crown had a fiduciary obligation to restore the right of way to the Band.

Kruger v. R.[70] established that the Crown has a fiduciary duty in the context of an expropriation of reserve land. In *Kruger*, the Crown expropriated portions of a reserve for airport purposes. The Federal Court of Appeal held that the principles articulated in *Guerin v. R.*[71] in the context of a surrender of reserve lands also apply to an expropriation of reserve lands. Mr. Justice Urie (Stone J. concurring) stated that the precise obligation on the Crown was to ensure that "the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians. . . ."[72] Mr. Justice Heald, concurring in the result, explained the nature of the duty as follows:

> . . . I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one – that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians . . . [73]

Mr. Becker notes in his written submission that the adequacy of compensation has not been raised as an issue in this Inquiry. The suggestion seems to be that, in an expropriation, the fiduciary duty on the Crown continues up to the point of compensation; if adequate compensation is secured, any fiduciary obligation on the Crown is fulfilled.

Ms Ostrove, for the Band, pointed out in oral argument that *Kruger* involved an expropriation, but not a subsequent abandonment of the use for which the land was taken. The Court was not asked to consider what obligation might arise if the land ceased to be used for public purposes, upon which event there is a right in the Crown to have title restored. Thus, it does not follow from *Kruger* that we need look no further than the fact of adequate compensation, because the case of the Sumas Band is different.

70 [1985]3 CNLR 15 (Fed. CA), 17 DLR (4th) 591.
71 [1984]2 SCR 335, [1985] 1 CNLR 120.
72 Note 70 above, at 41.
73 Ibid., at 61.

We agree with counsel for the Band that the issue of fiduciary duty is not closed at the point of compensation. It is clear from *Kruger* that, when reserve land is taken, a fiduciary duty takes hold to regulate the Crown's exercise of discretion. If there is a reversionary interest in the Crown, however, it is possible to view the expropriation process as continuing past the point of compensation. A taking might end at the point of compensation, or the process may be ongoing where a proprietary element remains in the Crown, as in this case.

Indeed, Canada suggests as much in its admission that the Crown had discretion over the right of way after the line was abandoned: "the power to re-establish the subject lands as reserve remained within the discretion of the Governor in Council. Such discretion was not exercised in favour of the Band in this case, excepting with respect to the parcel re-acquired out of Band funds."[74] Mr. Becker was asked during oral argument whether this discretion would give rise to a fiduciary duty. He replied that it would not because the Crown has a discretion over any land that it owns, and it cannot be reasonable to suggest that Canada thus has a fiduciary duty to turn all Crown land into reserve land.[75]

We find this answer unsatisfactory because it ignores the context and the history of the subject lands. The right of way was once reserve land, so it is not like all other Crown land. The special status of reserve land reflects the historic responsibility that the Crown has assumed towards Indian lands. In the case of an appropriation, the protection generally afforded reserve land is superseded by a greater public purpose, and the lands are taken from the reserve on that basis. The Crown has ended up with discretion because it consented to reserve lands being taken for public purposes, and those purposes have come to an end. In other words, it is through its intermediary role in dealings with reserve lands that the Crown acquired discretion and control over the right of way at issue here.

Is this a sufficient basis for a fiduciary duty? Mr. Becker says no: there must be some ongoing Indian interest, some "corpus" on which to base the fiduciary duty. We note that this characterization of the threshold for a fiduciary duty uses the language of trusts. But in *Guerin*, the Supreme Court of Canada emphasized that trust principles were not applicable to the relationship between the Crown and aboriginal peoples with respect to

74 Submission on Behalf of the Government of Canada, p. 17 (ICC Exhibit 8).
75 ICC Transcript, pp. 204-05.

reserve land. Mr. Justice Dickson (as he then was) addressed this point as follows:

> . . . the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of surrender. . . . An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision [*Smith v. The Queen*, [1983] 1 S.C.R. 554] makes clear, *upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although *the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation*, neither an express nor an implied trust arises upon surrender.[76] [Emphasis added.]

It is clear, therefore, that there is no need for a trust corpus. In *Guerin*, there was a fiduciary duty on the Crown even though *the Indians' right in the land had disappeared.*

The principles of fiduciary law articulated by the courts give rise, in our view, to the following proposition: if reserve land taken for public purposes is no longer used for those purposes and may be restored to the Crown, the Crown thereby has a discretion over the land, and a fiduciary obligation takes hold to regulate the exercise of that discretion.

Whether the fiduciary obligation was met will depend on the particular facts of each case. Based on the facts here, we find that the Crown breached its fiduciary duty to the Sumas Band. It is clear that in this case the taking of reserve land resulted in substantial harm. The right of way took up a large portion of a very limited area of valuable land and cut the remainder of the reserve into two. The Department of Indian Affairs was fully cognizant of this harm, and of the likelihood of further harm if the land was alienated to third parties.

We heard from the Sumas people about the effect of the appropriation on their community. They spoke of the way that the alienated portion impedes residential development on the reserve, and told us of their concerns about living in the midst of a plastics manufacturing operation. Their evidence confirms what was apparent to the Department of Indian Affairs in 1927: the "bad severance," the limited amount of useful land on the reserve, and the

76 Note 71 above, at 386.

possibility that "complications might arise if a white man enters into occupation of the strip in question." We want to emphasize that we are not relying on hindsight for our finding that the Crown should have exercised its discretion to restore the right of way to the Sumas Band. It is simply that the problems evident 65 years ago endure.

Another fact to consider is that the Sumas Band wanted the right of way restored to the reserve, and this was communicated to Indian Affairs. Chief Ned wrote to the Indian Agent in 1927 to request that the right-of-way lands be returned to the Band. He had learned that VV & E was no longer using the land for its railway, and he did not want VV & E to sell to third parties and thus to have white men living on the reserve.[77] In fact, that portion of the right-of-way land that was not reacquired by the Sumas Band is occupied by non-Indians, and has been ever since it was sold by VV & E.

We have also considered the matter of compensation in the context of the Crown's discretion to restore the land to the Band. We appreciate that the Band received full compensation for the right-of-way lands, but we are of the view that this is not a factor to be taken into account in assessing the Crown's exercise of discretion here. In other words, there is no issue of double compensation. The Band received compensation only for VV & E's exclusive use of the right of way as long as it was used for railway purposes. As we see it, the railway company took the risk of having the interest terminated at an early point.

In our opinion, therefore, the Crown was under a fiduciary obligation to restore the right of way to the Sumas Band when it learned that the right of way would no longer be used for railway purposes. After the rail line was abandoned, Indian Affairs' only action was to allow the Band to purchase an 8.58-acre portion of the right of way, which amounted to allowing the Indians to buy back what was already legally theirs. Such action was insufficient to discharge the Crown's fiduciary obligation to the Sumas Band.

77 Indian Agent Daunt later wrote to Indian Affairs to explain why the Sumas Band was going to reacquire only 8.58 of the 12.08 acres sold to Sam Maclure (note 40 above). Agent Daunt stated that the 3.5 acres "was not desired by the Indians." During oral argument, the issue arose as to whether this, or the letter from Chief Ned asking for the entire right of way, accurately represented the Band's desires. In our view, this letter is evidence that the Band did not want the 3.5-acre parcel *at $40 per acre*. It does not contradict the evidence, found in Chief Ned's letter, that the Band's preference was to have the entire right of way restored.

ISSUE 3: FIDUCIARY DUTY AND THE GRANT TO VV & E

3 If VV & E did acquire absolute title to the right of way, did Canada breach its fiduciary obligation to the Sumas Band by executing the Order in Council or issuing letters patent to the railway company?

The Band submits that, if the company acquired absolute title to the land, as Canada maintains, the Crown breached its fiduciary duty by: (1) failing to protect the interests of the Band in its reserve lands; (2) failing to obtain a surrender before the right-of-way lands were alienated to third parties; and (3) failing to ensure that the documents executed by the Crown provided for the right of way to revert to the Band. In other words, even if we assume that an absolute taking was consistent with the *Railway Act*, Canada nevertheless had an obligation to grant to VV & E only that interest required for the purposes of running a railway.

As we understand it, the Band is asserting that the Crown breached its fiduciary duty not by consenting to VV & E's acquisition of a right of way, but by allowing the Band's interest to be divested entirely. Although the appropriation was not in the best interests of the Sumas Band, the Crown was under an obligation to consider the larger public interest as well, and the extent to which that interest would be furthered by the taking.[78] The fact that the right of way took a very large area from the best part of the reserve is a cause for concern, but the Band did not argue that, for example, consenting to VV & E's taking an easement across the reserve would have amounted to a breach of fiduciary duty. According to the Band, the breach of duty arose in granting title to the right-of-way lands to VV & E.

Canada's rejoinder is that the Band consented to the taking and was paid full compensation. Furthermore, once the Governor in Council gave its consent, the *Railway Act* became operative and the right of way was taken in accordance with the provisions of that statute (the assumption for the purposes of this issue being that an absolute taking was consistent with the *Railway Act*). Canada maintains that, whatever the effect of the Act, the Crown no longer had any discretion on which to base a fiduciary duty. The issuance of letters patent to the railway company flowed from the Act.

Canada is right only if the Governor in Council had no discretion. This in turn would be the case only if the *Railway Act* mandated that the railway

78 See *Kruger*, note 70 above, at 42-43, per Urie J., quoting with approval the reasons of the trial judge.

company acquire absolute title to any land taken. In our view, that is not so: section 172 allows the Governor in Council to give consent "upon such terms as the Governor in Council prescribes." This confers on the Governor in Council a discretion to place conditions on the appropriation, including a condition that the land revert to the Band upon discontinuance of the railway. Therefore, we reject Canada's argument.

Was there a breach of fiduciary duty in the failure to exercise this discretion to grant less than the full fee simple? The Crown had an obligation to consider the public interest in a railway, as well as the interests of the Sumas Band. An expropriation of land will not be in the best interests of a Band; therefore, a "best interests" standard is not applicable. In our view, the obligation on the Crown in this context is to do as little injury as possible to the Indians' interests. The public interest could have been satisfied by a grant of a right of way as long as the land was needed by the railway. Any grant beyond that did not further the public purpose, and was nothing more than a gratuitous disposition of Indian lands in favour of the railway company. We thus find that, if the letters patent were effective to transfer absolute title to VV & E, the Crown failed in its fiduciary duty by granting the right-of-way lands without a railway-purposes limitation.

The Band's consent to the sale of the right of way to VV & E, contained in the Band Council Resolution, does not alter this conclusion. In our view, given the role of the Indian Agent in the lives of the Sumas people at that time, and the lack of any independent legal advice for the Band, the appropriation process was fundamentally non-consensual. Nor does the fact of adequate compensation relieve the Crown of its fiduciary duty. The Crown had an obligation to ensure that the Band was compensated for the loss of its land and improvements for the duration of the grant, as well as an obligation to place a limitation on the grant.

We cannot agree, however, that the Crown breached its fiduciary duty in failing to obtain a surrender before the land was alienated to third parties. As discussed above, a surrender and a taking are different processes. Furthermore, the surrender provision in the *Indian Act*,[79] section 48, provides that "except as in this part otherwise provided" no reserve shall be alienated, etc., without a surrender. What is included "in this part" is the expropriation provision, section 46. In *Kruger*, the Court undertook this same analysis and all three judges concluded that compliance with the

79 RSC 1906, c. 81.

surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under the equivalent to section 46.

ISSUE 4: THE VALIDITY OF THE ORDER IN COUNCIL

4 In the alternative, was the Order in Council valid only for the taking of the 41.95-acre parcel as set out in the original plan of right of way, and did Canada therefore breach section 46 of the *Indian Act* by failing to obtain the consent of the Governor in Council for the taking of 28.83 acres of IR No. 6?

The position of the Band is that the taking was not authorized because the Governor in Council consented to the appropriation of the larger 41.95-acre right of way, not the 28.83-acre parcel. The principle of protection of Indian lands, which underlies the requirement for Governor in Council consent, means that the Governor in Council must consider the specifics of each application for an expropriation of reserve land. The Band cites *St. Ann's Island Shooting and Fishing Club Ltd. v. R.*[80] in support of the assertion that Governor in Council authorization is a strict requirement.

Our difficulty with this argument is that the 28.83-acre right of way was included in the original 41.95-acre plan for which the consent of the Governor in Council was obtained. The right of way was simply reduced in width; there were no other changes to the plan, and no other circumstances changed to affect the substance of the taking. It is reasonable, in our view, for the original consent to operate for the taking of a smaller, included area. In other words, the original consent included consent to the taking of any portion of the 41.95 acres.

The Band argues that the reduction in the width of the right of way might have aroused suspicion in the Governor in Council about whether the land was really required for railway purposes, and that this might have affected the Governor in Council's decision to consent to the reduced area if such an application had been placed before it. Since the suggestion that the railway acted with improper motives was not established, we decline to consider this argument.

We are also of the view that the *St. Ann's Shooting and Fishing Club* case does not assist the Band. In that case, the Supreme Court of Canada held that

80 [1950]SCR 211, DLR 225.

an Order in Council consenting to the surrender and lease of reserve lands did not authorize Indian Affairs to enter into further leases of the same land. But the rationale was not a technical one: as Mr. Justice Taschereau stated, the Order in Council cannot "be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly fifty years later, and in which can be found different conditions."[81] The efficacy of the original consent was exhausted by the expiration of the original lease, the passage of fifty years, and the change in circumstances over that period. None of these factors, or anything similar, applies to the taking of the right of way here. The Order in Council was dated August 1, 1910, and the new plan of right of way was forwarded to Indian Affairs on October 29, 1910. There is no evidence that anything changed materially in this intervening period so as to take the new plan outside the confines of the original application.

For these reasons, we find that the consent to the taking was valid.

81 Ibid., at 216.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

This Commission has been asked to inquire into and report on whether the claim of the Sumas Band discloses an outstanding lawful obligation on the part of the federal government. We have given careful consideration to a number of specific legal issues concerning the taking of the railway right of way across the Sumas reserve. The issues are complex, but the essence of the matter is whether the Band retained any legal interest in the right of way, and whether Canada had any obligation to have the lands restored to the Band when the railway discontinued its line. Our conclusions are summarized below.

The Effect of the Taking

- The legal interest the railway company acquired when it appropriated the right of way was a fee simple *as long as the lands were used for railway purposes*. The *Railway Act* allowed a railway company to appropriate land held by the Crown, including reserve land, if that land was required for railway purposes. A further stipulation in the *Railway Act* was that the company could not sell or otherwise alienate any appropriated Crown land. Thus, by statute the company could take only a limited property interest in the reserve.
- The Band and Canada retained a reversionary interest in the right of way. This means that, when the land ceased to be used for railway purposes, it should have been returned to the original owner – the Crown for the use and benefit of the Indians. There is nothing in the *Railway Act* to suggest that the Indian interest in reserve lands may be taken absolutely while the Crown's interest in its ultimate or underlying title is preserved.

- The Governor in Council did issue letters patent to VV & E, which purport to grant to the company full and absolute ownership of the right of way. But the letters patent could not give VV & E absolute ownership of the right of way when the *Railway Act* permitted the company to take land only to operate a railway, and prohibited the company from selling or otherwise alienating such land. Therefore, the conditions of use for railway purposes and inalienability must be read into the grant to make it consistent with the statute.

The Obligation of the Crown on Abandonment of the Line

- When the right of way ceased to be used for railway purposes, Canada had a fiduciary duty to protect the Indians' reversionary interest, or, in other words, to ensure that the land was restored to reserve status. By failing to do so, Canada breached its fiduciary duty to the Sumas Band.
- Even if the taking resulted in the termination of the Band's interest in the right of way, as Canada asserts, the Crown had a fiduciary obligation to the Sumas Band to restore the lands for its use and benefit. If the Indian interest was extinguished, then the reversion was in the Crown, giving the Crown discretion over the subject lands when the railway ceased to use the right of way. A fiduciary obligation, derived from the historic responsibility that the Crown has assumed towards Indian lands, took hold to regulate the exercise of that discretion. Although Indian Affairs allowed the Band to repurchase 8.58 acres of the right of way, such action was insufficient to discharge the Crown's fiduciary duty.

The Letters Patent and the Crown's Fiduciary Obligation

- Assuming that the taking did extinguish the Band's interest in the right of way (if the letters patent were effective to transfer full ownership to the railway company), the Crown breached its fiduciary duty to the Band in failing to transfer to VV & E only that interest necessary to operate the railway. The Crown had an obligation to do as little injury as possible to the Indians' interest in the reserve, and the public interest in having an effective rail system could have been satisfied by a grant with a railway-purposes limitation.

The Validity of the Order in Council

- The Order in Council, through which the Governor in Council consented to the taking of the 41.95-acre parcel set out in the original plan of right of way, was valid for the taking of the included 28.83-acre parcel.

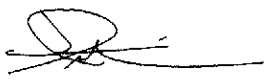
RECOMMENDATION

Having found that Canada failed by all accounts to meet its fiduciary obligations to the Sumas Band, we recommend:

That the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-chair



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

Carole T. Corcoran
Commissioner

February 1995

APPENDIX A

THE SUMAS INQUIRY

1 **Decision to conduct inquiry** January 20 and 21, 1994

2 **Notices sent to parties** January 24, 1994

3 **Planning conference** March 18, 1994

A planning conference was held in Vancouver with representatives of the Sumas Band, Canada, and the Commission. Matters discussed included the scope of the Inquiry, dates for the community session and legal argument, and other matters related to the conduct of the inquiry.

4 **Community session** September 23, 1994

The Commissioners heard from the following members of the community: Chief Lester Ned, Hugh Kelly, Larry Ned, and Kenneth Ned. The session was held on the Sumas reserve.

5 **Legal argument** September 23, 1994

Legal arguments were made in the community immediately after the testimony of the community members.

6 **Content of the formal record**

The formal record for the Sumas Inquiry consists of the following materials:

- Documentary record ("History of the Sumas Indian Band" and 3 volumes of documents)
- Exhibits
- Transcripts of oral submissions (1 volume, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record of this Inquiry.

INDIAN CLAIMS COMMISSION

PRIMROSE LAKE AIR WEAPONS RANGE REPORT II

Joseph Bighead First Nation Inquiry
Buffalo River First Nation Inquiry
Waterhen Lake First Nation Inquiry
Flying Dust First Nation Inquiry

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SEPTEMBER 1995

CONTENTS

PART 1

INTRODUCTION

In 1954, the Government of Canada took up a 4490-square-mile parcel of land in northern Alberta and Saskatchewan, roughly centred on Primrose Lake, for an air force bombing and gunnery range. The Primrose Lake Air Weapons Range (PLAWR) lands were part of the traditional hunting and trapping territory of the First Nations in the area. The Buffalo River, Joseph Bighead, Waterhen Lake, and Flying Dust First Nations maintain that they depended on this territory for their livelihoods, and that Canada's action in taking up this land, with no provision for compensation or economic rehabilitation, amounts to a breach of Treaties 6 and 10 and a breach of fiduciary duty.

In 1975, the First Nations filed claims under the Specific Claims Policy for losses resulting from the creation of the range.[1] Canada rejected the claims.[2] In June 1993[3] and February 1994[4] the Indian Claims Commission (ICC) agreed to conduct inquiries into the rejection of these claims.

The Commission has already reported on the claims of the Cold Lake First Nations and the Canoe Lake Cree Nation, which too were based on loss of access to the PLAWR. The conclusion of that report, the Primrose Lake Air Weapons Range Report,[5] was that, although Canada had the right under the treaties to take up land from time to time for settlement or other purposes, Canada breached its treaty obligations by taking up such a large tract of land

1 Claim submission, April 1, 1975 (ICC Documents, pp. 356-59). The claim was made by a number of Bands, including the Peter Pond Lake Band (Buffalo River) and the Waterhen Lake Band, and by the Federation of Saskatchewan Indians, representing other First Nations, including Joseph Bighead and Flying Dust.

2 Judd Buchanan, Minister of Indian Affairs, to Richard Price, Indian Association of Alberta, December 4, 1975 (ICC Documents, p. 455).

3 Harry S. LaForme, Chief Commissioner, to Chief and Council, Buffalo River and Waterhen Lake First Nations, and to the Ministers of Justice and Indian and Northern Affairs, June 30, 1993 (ICC Exhibits 9, 10, 11, and 12).

4 Harry S. LaForme, Chief Commissioner, to Chief and Council, Flying Dust First Nation and Joseph Bighead First Nation, and to the Ministers of Justice and Indian and Northern Affairs, February 2, 1994 (ICC Exhibits 13, 14, 16, and 17).

5 [1994]1 Indian Claims Commission Proceedings (ICCP) [hereinafter PLAWR Report, cited to ICCP].

so abruptly, decimating the economy of the Canoe Lake and Cold Lake people, and destroying their way of life. This breach of the treaties, and the failure to provide sufficient compensation or economic rehabilitation, constituted a breach of fiduciary duty. The Commission recommended that the claims be accepted for negotiation.[6]

The claimants assert that, like those of the Canoe Lake and Cold Lake people, their communities were devastated by the creation of the range. Furthermore, they are signatories to the same treaties as the Cold Lake and Canoe Lake First Nations. The claimants submit that the Commission should therefore find, consistent with the PLAWR Report, that their claims are valid and should be accepted for negotiation.

6 Ibid., 12, 151.

PART II

THE INQUIRIES

The Commission held information-gathering sessions in the claimants' communities during the summer of 1994. The details of these sessions are set out in Appendices A, B, C, and D to this report. In total, the Commission heard from 48 witnesses. Legal arguments were heard on November 2 and 3, 1994, in Saskatoon.

The evidence examined in these inquiries includes the testimony of elders at the community sessions, several volumes of documentary material compiled by Commission research staff, documents submitted by the parties, and various maps and other exhibits. An outline of the record for these inquiries is found in Appendix E.

THE TREATIES

Treaty 6[7]

The Flying Dust, Joseph Bighead, and Waterhen Lake First Nations are parties to Treaty 6, which they signed between 1878 and 1921. In 1876, the government entered into Treaty 6 with the Plains and Cree Indians at Fort Carleton, Fort Pitt, and Battle River. The government's purpose in entering into the treaty was to make the land available for settlement. This is evident from the recital:

> And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her

7 See also PLAWR Report, 65-68, for a discussion of Treaty 6 and the circumstances surrounding its negotiation.

> Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.[8]

Under the terms of Treaty 6, the Indians agreed to

> cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits
>
> [description of treaty area]
>
> And also, all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.

In return, the Indians were given annuities, reserves to be set aside for their own use, and agricultural implements. They were also assured, in the following terms, hunting, trapping, and fishing rights over the ceded territory:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes . . .

During the treaty negotiations, Lieutenant-Governor Alexander Morris, the Treaty Commissioner, explained to the Indians his vision of their future under the treaty:

> All along that road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen's Commissioners to purchase clothing for their children; at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen's gift in addition.[9]

8 The numbered treaties and adhesions have been reprinted in booklets by the Queen's Printer, Ottawa. *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964), cat. no. R33-0664.

9 A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979), 231.

Chief Ko-pat-a-wa-ke-num of the Flying Dust First Nation signed an adhesion to Treaty 6 on September 3, 1878, through which the terms of the treaty were extended to the Band in return for the relinquishment of its aboriginal right and title to lands within the treaty boundaries. On June 25, 1913, the Joseph Bighead First Nation adhered to Treaty 6. In the discussion before signing, Chief Joseph Bighead raised the issue of restrictions on hunting and fishing. He expressed the Band's wishes that it be accorded the right of hunting and fishing throughout the tract surrounding the Lac des Îles at all seasons. In his report, W.J. Chisolm, Inspector of Indian Agencies, stated that he referred the Chief to the text of the treaty, where hunting and fishing are guaranteed subject to regulation, and explained

> the necessity for their remembering that they must continue, as they have been in the past, subject to all the laws that may be enacted by either the Dominion Parliament or Provincial Legislature, just as white citizens are. . . . I explained at some length how the laws for the protection of fish and game are framed in their interest . . . since it makes for the permanency of their chief industry and source of livelihood.[10]

Chief Running Around, on behalf of the Waterhen Lake First Nation, signed an adhesion to Treaty 6 on November 8, 1921. In a report of the proceedings held with the Waterhen Lake First Nation, the Indian Agent noted that the Chief wanted to be assured that the traditional way of life of his people would be protected. The Indian Agent indicated that he would inform the government of the Chief's request.[11]

Treaty 10[12]

On August 28, 1906, Chief Raphael Bedshidekkge signed Treaty 10 for the Clear Lake Band, which later became the Buffalo River First Nation.[13] The Order in Council creating the Treaty Commission stated that:

10 W.J. Chisolm, Inspector of Indian Agencies, North Saskatchewan Inspectorate, Prince Albert, to the Secretary, Department of Indian Affairs, Ottawa, August 16, 1913, National Archives [hereinafter NA], RG 10, vol. 4072, file 429/511 (ICC Exhibit 3, documents appended).

11 W.R. Taylor, Indian Agent, "Proceedings of a meeting held with the Waterhen Lake Indians at Waterhen Lake on the 7th day of November 1921, with the object of getting these Indians to enter Treaty," NA, RG 10, vol. 4072, file 429/511, pt. 1 (ICC Exhibit 3, documents appended).

12 See also PLAWR Report, 16-18, for a discussion of the circumstances surrounding the negotiation of Treaty 10.

13 The Clear Lake Band was later known as the Peter Pond Band. On November 16, 1972, the Minister of Indian Affairs approved the division of the Peter Pond Band into the Turnor Lake Band and the Buffalo River Band.

> It is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines.[14]

More specifically, the "public interest" in entering into the treaty was to open up the north for resource development and settlement.

The treaty followed the usual form (that is, it was based on other numbered treaties), and included the following standard hunting, trapping, and fishing rights clause:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

According to the report of the Treaty Commissioner, J.A.J. McKenna, the Indians feared that if they signed the treaty their hunting and fishing privileges would be curtailed. The Commissioner assured them that the treaty would not lead to any forced interference with their way of life:

> The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and that the Government would expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears.[15]

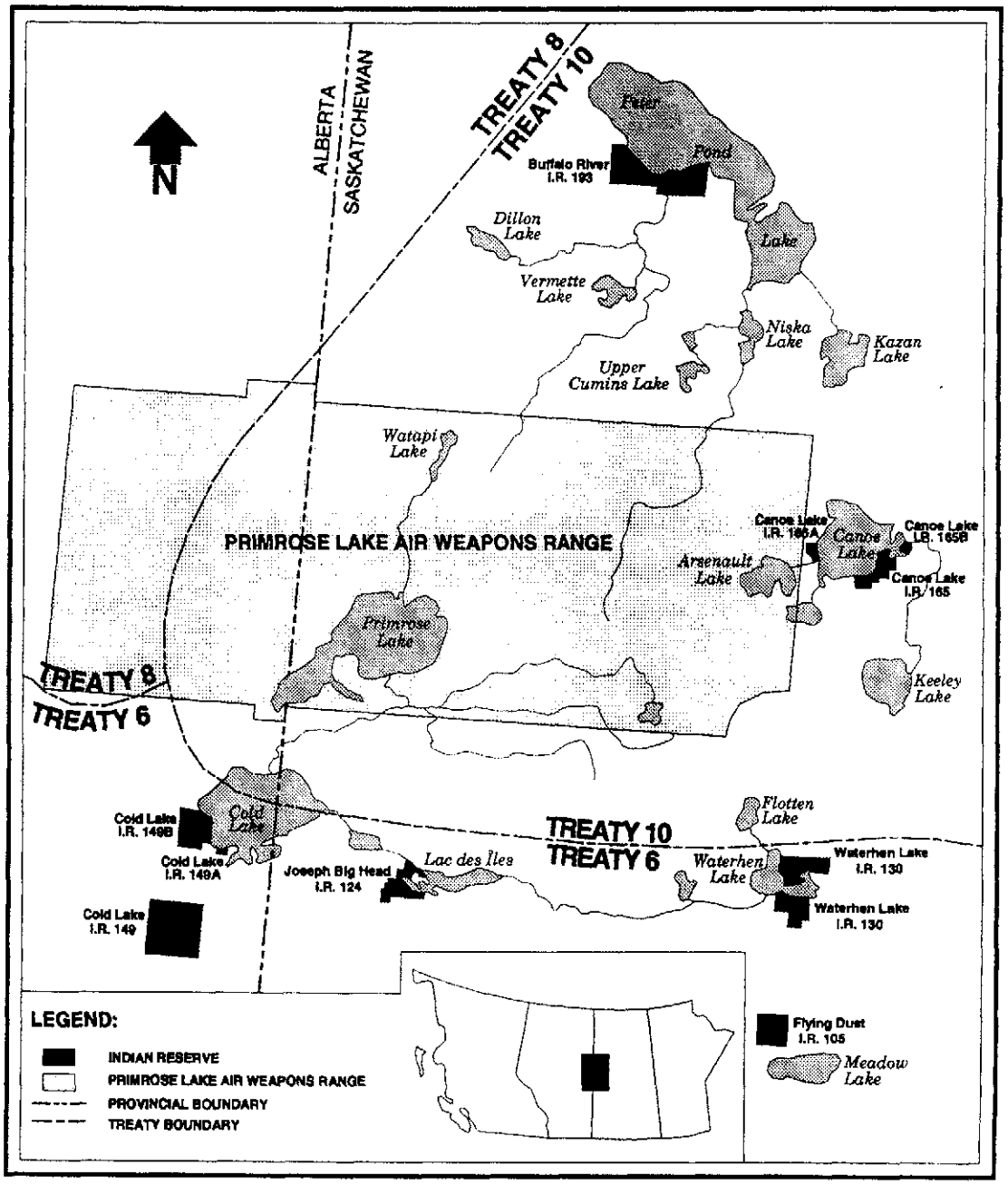
TRADITIONAL USE OF THE RANGE LANDS

At the community sessions, the elders explained to the Commission that portions of the PLAWR represent their traditional hunting, trapping, and fishing grounds. The following summarizes the evidence as to traditional land uses in the area of the range. (Map 1, on page 57, is provided for reference.)

14 PC 1459 (July 12, 1906). The Order in Council is reproduced in *Treaty No. 10 and Reports of Commissioners* (Ottawa: Queen's Printer, 1966).

15 Quoted in *R. v. Sikyea* (1964), 43 DLR (2d) 150 (NWT CA) at 158-59.

CLAIM AREA


N
ALBERTA
SASKATCHEWAN
TREATY 8
TREATY 10
TREATY 8
TREATY 6
TREATY 10
TREATY 6
PRIMROSE LAKE AIR WEAPONS RANGE
Buffalo River I.R. 193
Dillon Lake
Vermette Lake
Upper Cumins Lake
Niska Lake
Kazan Lake
Watapi Lake
Primrose Lake
Arsenault Lake
Canoe Lake I.R. 165A
Canoe Lake
Canoe Lake I.R. 165B
Canoe Lake I.R. 165
Keeley Lake
Cold Lake I.R. 149B
Cold Lake
Cold Lake I.R. 149A
Cold Lake I.R. 149
Joseph Big Head I.R. 124
Lac des Iles
Flotten Lake
Waterhen Lake
Waterhen Lake I.R. 130
Waterhen Lake I.R. 130
Flying Dust I.R. 105
Meadow Lake
LEGEND:
INDIAN RESERVE
PRIMROSE LAKE AIR WEAPONS RANGE
PROVINCIAL BOUNDARY
TREATY BOUNDARY

- The Joseph Bighead First Nation went north of its reserve to hunt, trap, and fish in and around Primrose Lake.
- The Buffalo River First Nation used to trap and hunt around Watapi Lake, which is just inside the range lands. In addition to their value for food harvesting, the range lands were important to the Buffalo River people because they travelled by road across those lands to meet their relatives at Cold Lake.
- The Waterhen Lake First Nation hunted and trapped in the area around Lost Lake, and would go as far as Primrose Lake to hunt and fish. Flotten Lake also figured prominently in the elders' discussion of hunting and trapping patterns at the Waterhen Lake community session; the area west and north of Flotten Lake was described as the "old hunting ground."[16] Another significant harvesting area was the area around Keeley Lake. As is apparent from the map, both Flotten Lake and Keeley Lake fall outside the range.
- The Flying Dust First Nation used the areas around Lost Lake and Arsenault Lake, just inside the eastern boundary of the range, for hunting and trapping. The elders also identified the Flotten Lake area as an important hunting and trapping ground.[17]

FUR CONSERVATION AREAS

In 1946, under a federal-provincial agreement[18] and regulations under *The Fur Act*,[19] a large portion of northern Saskatchewan (the entire area north of the agricultural belt) was designated a "fur block" for the purpose of managing and conserving fur resources in the province. This initiative followed a precipitous decline in the muskrat population between 1933 and 1938. The plan was to allow fur-bearing animal populations to stabilize by restricting trapping privileges to local (primarily Indian and Métis) residents in the north. The governments were concerned to restore the integrity of the

16 ICC Waterhen Lake Transcript, vol. 1, p. 140 (Fred Martell).
17 See also ICC, Flying Dust Documents, tab 1, which indicates that the Flying Dust First Nation got most of its moose meat from the area of Flotten Lake.
18 Saskatchewan Archives Board, Saskatoon, Department of Natural Resources, NR 1/4, file 431B (ICC, Research regarding Fur Conservation Areas (FCAs), tab 12).
19 RSS 1940, c.252.

fur industry, as it was the basis of the Indians' livelihood and subsistence economy.[20]

The fur block was divided into smaller community sections known as Fur Conservation Areas (FCAs). Each community was to elect a council of five members to be responsible for adjusting boundaries between its sections and those of other communities.[21] The community sections could be further divided into family, group, or individual traplines, depending on the circumstances.[22]

Under this regime, each of the claimants had a designated FCA. Initially, the claimants' FCAs were communally trapped, and any community licence-holder had the right to trap anywhere in the FCA. As noted above, the community could agree to divide FCAs into smaller sections to be allotted to families, groups, or individuals, by agreement of the community, and "special licences" would then be issued.[23] Under the regulations, licence-holders from one FCA were not permitted to trap in another FCA. Although this regulation would prove to be unconstitutional,[24] there is some evidence that FCA boundaries were respected, in terms of trapping.[25]

This FCA regime was in place when the air weapons range was established in 1954. The Buffalo River First Nation had been allocated FCA A-21, which extended southward from the reserve. The southern edge of A-21 ran parallel to the range border, approximately three miles into the range. The Flying Dust and Waterhen Lake First Nations shared FCA A-37, and approximately 325 square miles of it fell inside the boundary of the range, in the southeast

20 See Press Statement issued by the Minister of Mines and Resources, in NA, RG 10, vol. 6758, file 420-11-1, pt. 1 (ICC, Research regarding FCAs, tab 2). See also a Minute of the Executive Council of Saskatchewan, June 6, 1959, which describes the purpose of the agreement as "enabling the inhabitants of that area [that northern portion of the province beyond the agricultural section] who rely on those resources for livelihood to become and to remain self-sustaining" (ICC, Research regarding FCAs, tab 3).

21 Draft Regulations Governing Northern Saskatchewan Fur Conservation Block, in NA, RG 10, vol. 6758, file 420-11-1, pt. 2 (ICC, Research regarding FCAs, tab 12). See also the *Globe and Mail* article dated July 10, 1946, which states that "Indian chiefs, with the aid of interpreters, are marking on maps boundaries of areas in which their bands may have trapped in past years, so that districts may be set up giving sole trapping right to those living in the area" (ICC, Research regarding FCAs, tab 11).

22 Draft Regulations Governing Northern Saskatchewan Fur Conservation Block, in NA, RG 10, vol. 6758, file 420-11-1, pt. 2 (ICC, Research regarding FCAs, tab 12).

23 Ibid.

24 Section 8(2) of *The Fur Act* , RSS 1953, c. 324, provided that fur conservation areas, registered traplines, provincial parks, etc., "shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access." As Mr. Jodouin pointed out in oral argument, an equivalent provision of *The Game Act* was held to be *ultra vires* the province in *R. v. Strongquill* (1953), 8 WWR (NS) 247 (Sask. CA), as legislation dealing with Indians. This ruling was confirmed in *R. v. Sutherland*, [1980] 3 CNLR 71 (SCC), which dealt with a similar deeming provision in a Manitoba statute.

25 See, for example, ICC Buffalo River Transcript, vol. 1, p. 34.

corner. The Joseph Bighead First Nation used FCA B-38, which was entirely outside the range, to the south.

EXCLUSION FROM THE RANGE

In April 1954, the range lands were taken up for the exclusive use of the Department of National Defence. The government did permit periodic access to the range for hunting and fishing, usually during the Christmas and Easter holidays.[26] Otherwise, the Indians were absolutely excluded from the bombing range from 1954 on.

The Buffalo River First Nation, which was trapping in FCA A-21 and the Kazan Game Preserve, lost access to a 3-by-35-mile strip on the southern edge of A-21, or approximately 15 percent of its trapping area. The Flying Dust and Waterhen Lake First Nations lost access to approximately one-third of their shared trapping area, FCA A-37. The Joseph Bighead First Nation lost none of its FCA when the range was created.

COMPENSATION

In 1951, Saskatchewan and Canada had entered into an agreement under which the range was created. The agreement provided as follows:

> 2. (a) Canada will assume responsibility for payment of compensation to persons or corporations having rights in the area, including rights in respect of timber . . . trapping, fur farming or land settlement; . . .[27]

The government carried out an "intensive study and survey" of who would be displaced by the creation of the PLAWR, and provided compensation to certain individuals who had trapping and fishing rights in the range.[28] More particularly, those who had fixed registered traplines located within the PLAWR, or whose communal trapping rights could not be absorbed

26 Memorandum from H.M. Jones, Director, Indian Affairs Branch, to the Deputy Minister, September 17, 1954 (ICC Documents, p. 131); Memorandum prepared by H.H. Stack, January 13, 1969 (ICC Documents, pp. 331-32).

27 Memorandum of Agreement between Canada and the Province of Saskatchewan, August 4, 1953 (ICC Documents, pp. 106-11).

28 E.B. Armstrong, Deputy Minister of National Defence, to F.L. Dunbar, Solicitor for the Waterhen Lake Indians, June 19, 1963, in Department of National Defence, HQ, file 54-C49, vol. 17 (ICC Documents, p. 302).

elsewhere within the communal FCA, received compensation.[29] The Canoe Lake Cree Nation and Cold Lake First Nations received some compensation under this scheme.[30] In contrast, it appears that few members (perhaps one or two) of the claimant First Nations received compensation.[31] It appears that the claimants were never the subject of any comprehensive compensation or economic rehabilitation program, because the government did not consider them to be "directly or materially affected" by the creation of the range.[32]

29 The "study" of Indians affected was compiled by Indian Affairs field staff on the basis of provincial trapping records: E.L. Paynter, Game Commissioner, Saskatchewan Department of Natural Resources, to J.W. Churchman, Assistant Deputy Minister, April 26, 1951, in Department of Natural Resources file 811D1 (ICC, Research regarding FCAs, tab 14); R.G. Young, Chief, Resources and Industrial Division, Indian Affairs, to Regional Director of Indian Affairs, Saskatchewan, December 6, 1965, Department of Indian Affairs and Northern Development (DIAND), file 1/20-9-5, vol. 9 (ICC Documents, p. 326).

30 See PLAWR Report, pp. 24-62, 76-118, for a discussion of compensation and economic rehabilitation for the Cold Lake and Canoe Lake First Nations.

31 See Agreed Statement of Facts between Canada and Flying Dust (ICC Exhibit 19). There are numerous references in the transcripts of community sessions to the lack of compensation; selected examples are: Buffalo River Transcript, vol. 1, pp. 29-30, 42, 115, 126; vol. 2, p. 181; Waterhen Lake Transcript, vol. 1, pp. 40, 175, 180; vol. 2, pp. 240-42; Joseph Bighead Transcript, vol. 1, pp. 15, 48, 60, 75, 112.

32 J.P.B. Ostrander, Superintendent of Welfare, to the Director, Indian Affairs Branch, Ottawa, March 21, 1955, NA, RG 10, vols. 7334-36, file 1/20-4-5 (ICC Documents, pp. 146-47). During oral argument, Mr. Becker, counsel for Canada, stated that it was his understanding that Canada did nothing vis-à-vis the claimants in the way of compensation or rehabilitation because there was no indication, at that time, that they were significantly affected by the creation of the range (ICC Submission Transcript, vol. 2, pp. 220-21).

PART III

ISSUES

This Commission has the mandate to inquire into and report on whether a claimant Indian Band has a valid claim for negotiation under the Government of Canada's Specific Claims Policy, where that claim has been rejected by the Minister.[33] The Specific Claims Policy provides that any claim disclosing an outstanding lawful obligation on the part of the federal government will be accepted for negotiation.[34] A lawful obligation may arise in any number of circumstances, such as breach of treaty or statute, breach of fiduciary duty, or illegal disposition of Indian lands.[35]

Therefore, the issue in this inquiry is whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range. The subsidiary issues are as follows:

1 Did Canada breach its treaty obligations?

2 Did Canada have a fiduciary duty towards the claimants, and did it breach that duty?

Canada's "statement of issues" includes an additional issue: "Were there oral agreements made collateral to Treaty No. 6 or Treaty No. 10 and, if so, what are their effects?" In the PLAWR Report, the issue was whether Canada had the right, pursuant to Treaties 6 and 10, to take up the range lands, given the impact of the range on the treaty rights of the Cold Lake and Canoe Lake First Nations. The treaties addressed this matter as follows: They guaranteed to the Indians the right to continue their avocations of hunting,

33 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730 (July 27, 1992), amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329 (July 15, 1991) (ICC Exhibit 8).

34 DIAND, *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*].

35 *Outstanding Business* , 20, sets out examples of circumstances under which a lawful obligation may arise.

trapping, and fishing in the territory surrendered, subject to regulation and "saving and excepting such tracts as may be required or as may be taken up from time to time . . . ." This Commission held that statements made by the Treaty Commissioners when the treaties were being negotiated, and in particular their assurances to the Indians that they would be able to continue their traditional way of life, were relevant in interpreting the treaties. Indeed, the statements provided necessary clarification of the parties' understanding of the "taking-up" clause.

In admitting the Treaty Commissioners' statements, we relied on guideline 6 of the Specific Claims Policy, which states: "All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law."[36] Furthermore, we emphasized that this Commission is not a court of law. Rather, it is a Commission of Inquiry, with the mandate to ensure fairness in the resolution of longstanding grievances between Canada and First Nations.

Canada continues to argue, as it did in the Cold Lake and Canoe Lake Inquiries, that this Commission should not consider the Treaty Commissioners' statements. According to this argument, guideline 6 is meant to address the constraints of technical rules of evidence, such as the hearsay rule; it is not meant to modify the legal principle of treaty interpretation, articulated by the Supreme Court of Canada in *Horse v. R.*[37] and *R. v. Sioui*,[38] that extrinsic evidence is not admissible in the absence of an ambiguity on the face of the treaty. Furthermore, Canada maintains, the courts have already decided that the treaty provision at issue is not ambiguous. This renders the evidence irrelevant, and therefore the guideline does not apply. Canada also relies on guideline 9, which stipulates that treaties are not open to renegotiation.

We remain unpersuaded by Canada's argument. Even if we accept a narrow reading of guideline 6, as put forward by Canada, we reject the remainder of the argument and Canada's challenge to our interpretation of the treaties in the PLAWR Report. We continue to hold the view that the treaty provision at issue is ambiguous, and, following from *Horse*, we may properly take extrinsic evidence into account in interpreting the treaty provision.

Canada asserts that the courts have already determined that the treaty provision is not ambiguous. But an analysis of the cases Canada cites in

36 Ibid., 30.
37 [1988] 1 SCR 187, 2 CNLR 112.
38 [1990] 1 SCR 1068, 3 CNLR 127.

support of this submission indicates that this is not so. The first of the supporting cases is *R. v. Sundown*.[39] Canada says that, in *Sundown*, the court held that the words in the treaties at issue here are not of doubtful meaning or ambiguous. The problem is that *Sundown* dealt with the regulation clause in the treaty (that is, "the . . . Indians . . . shall have the right to pursue their usual avocations of hunting and fishing . . . subject to such regulations as may from time to time be made by the government . . .") rather than the taking-up clause. Since the regulation clause is not at issue here, the case cannot assist us. The same is true for another of Canada's authorities, *Steinhauer v. R.*,[40] which was also limited to the regulation clause.

The other case that Canada relies on is *Horse v. R.*[41] In that case, the Supreme Court of Canada did consider the taking-up clause, and Estey J., for the majority, stated that "there is no ambiguity which would bring in extraneous interpretive material."[42] It is important to appreciate, however, that the issue in *Horse* was whether a "joint use" concept was embodied in Treaty 6 – that is, whether the treaty permitted the Indians to hunt on private land subject to the interests of the property holder. With respect to that issue, the taking-up clause was clear: it retained for the Indians the right to hunt within the tract surrendered, with the explicit exception of land taken up for settlement. But one cannot say that the Supreme Court of Canada thus ruled that there will never be an ambiguity in the interpretation and application of the taking-up clause in any context or on any facts.[43] The only issue of interpretation was the effect of the taking up – that is, whether, under the terms of the treaty, the Indians still had access to land once it was taken up by settlement; the Justices did not turn their minds to the matter of the extent and timing of the taking up of land permitted under the treaty. Therefore, contrary to Canada's assertion, the issue of ambiguity has not been settled by the courts.

On the question of ambiguity, then, we are left with the text of the treaties. The treaties do not stipulate to what extent, and over which periods, land within the treaty boundaries may be taken up for settlement or other

39 [1988] 4 CNLR 116 (Sask. QB).
40 [1985] 3 CNLR 187 (Alta. QB).
41 Note 37 above.
42 Ibid., at 203.
43 As Professor Pierre-André Côté notes, with respect to statutes, "a provision may seem plain in some applications and obscure in others. An enactment restricting access by vehicles to public parks is clear when applied to automobiles but less so when it comes to roller skates." Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1992), 240.

purposes. All that the treaties say is that land may be taken up "from time to time." Does this mean that the power of the government to take up land is virtually unrestricted, or were limits on this power contemplated at the time of treaty? The answer is not clear from the text. In our view, because the words of the treaty are ambiguous, the question of whether the taking up of land for the creation of the range was permissible is one that can be answered only by reference to the larger historical context. Therefore, the Treaty Commissioners' statements are relevant, and we are directed, under guideline 6 of the Policy, to consider this evidence.

Furthermore, there are other principles of treaty interpretation that require us to consider the statements. For example, the Supreme Court of Canada has stated that

> treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians . . . . In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties "must . . . be construed, not according to the technical meaning of their words . . . but in the sense in which they would naturally be understood by the Indians."[44]

Thus, treaty interpretation should reflect the Indians' understanding of the treaty. Yet as Wilson J. explained in *R. v. Horseman*, it is unlikely that their understanding will be apparent from the text:

> These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.[45]

In our view, the statements of the Treaty Commissioners are a valuable source of information about what the Indians understood the treaties to mean.

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44 *Nowegijick v. R.*, [1983] 1 SCR 29 at 3. This passage was relied on by the Supreme Court of Canada again in *Sioui*, note 38 above, at 1049, and *Simon v. R.*, [1985] 2 SCR 387 at 402.

45 [1990] 1 SCR 901, 3 CNLR 95 at 907.

Another established principle of treaty interpretation is that one must consider the circumstances surrounding the treaty signing. In *R. v. Taylor and Williams*, the Ontario Court of Appeal stated that

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.[46]

Taylor and Williams was cited with approval by the Supreme Court of Canada in *R. v. Sparrow*.[47]

This principle of sensitivity to historical context is simply a derivative of common sense and fairness. That is why even in *Horse* the evidence of what transpired in the treaty negotiations was admitted. After determining that there was no ambiguity in the treaty that would bring in extraneous interpretive material, Estey J. nevertheless went on to consider that material:

> . . . I am prepared to consider the Morris text . . . as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context. . . . From the record of the negotiations included in the Morris text . . . one can see that any guarantee of such hunting rights was not intended nor understood to extend to land occupied by settlers.[48]

The Supreme Court of Canada has made it clear that treaties are to be interpreted in their proper historical context. In the light of this jurisprudence, we must reject Canada's argument that the oral statements made by the Treaty Commissioners are irrelevant and cannot be used for the purpose of interpreting the treaties.

46 (1988), 34 OR (2d) 360 (CA), 62 CCC (2d) 227.
47 [1990] 1 SCR 1075, 3 CNLR 160 at 1107-08.
48 Note 37 above, 203.

PART IV

ANALYSIS

1 BREACH OF TREATY

The Right at Issue

The right at issue here is the treaty right, merged and consolidated in the *Natural Resources Transfer Agreement* (NRTA),[49] to hunt, trap, and fish *for food*. Paragraph 12 of the NRTA provides as follows:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

It was established in *Horseman v. R.*[50] that this provision took away the right of the treaty Indians in Alberta and Saskatchewan to hunt, trap, and fish commercially, in return for an enlargement of the treaty food-harvesting right, in that all unoccupied Crown lands, as opposed to unoccupied lands within the treaty boundaries, became available for food harvesting. According to *Horseman*, therefore, commercial harvesting is not a treaty right. In the PLAWR Report, the Commission accepted that the claim for breach of Treaties 6 and 10 was limited to the food-harvesting right.[51]

49 SS 1930, c. 87 [confirmed by the *Constitution Act, 1930*].
50 Note 45 above.
51 PLAWR Report, 139.

The "Test" for Breach of Treaty from the PLAWR Report

The following passages from the PLAWR Report set out the circumstances under which the government's exercise of its right to take up land will amount to a breach of treaty:

> The question is whether this right to "take up" traditional lands is so broad as to permit the government *to take away in one stroke the entirety of the area relied upon by the Indian people for hunting, fishing, and trapping purposes.*[52]

> Government's right to take up lands for settlement and other purposes is certainly contemplated in the language of the treaties. However, in our view, government cannot rely on such language in a treaty *to completely frustrate the rights of the Indians* which are guaranteed in the same document . . . . Counsel for Canada submitted that the express rights of government to take up lands, and of Indians to hunt, trap, and fish as they had before, "must be interpreted in such a way as to reconcile the competing interests of the parties." We do not need to look beyond the treaty itself to identify the nature of these interests or to conclude, as we have, that the one cannot be permitted to overwhelm the other *so completely and so suddenly* as was done here. . . . We find that the Crown did not have the right, under the terms of the treaties, to do what was done here. The scale of their project is too large, the lands concerned are too valuable to the claimant First Nations, and the damage done to their economies and to the way of life of their communities is too great.[53]

Counsel for the claimants said that "complete and sudden" destruction of community and livelihood was the test for breach of treaty. They argued that the range "destroyed," "decimated," or at least "severely impaired" the economies of the First Nations they represent.[54] Their position was that the impact on the claimants was as significant and substantial as the impact on, if not the Cold Lake people, at least the Canoe Lake people.

Mr. Becker, counsel for Canada, took the position that the threshold to be met here is not necessarily complete devastation. In oral argument, he noted that the Commission may not have articulated a test of general application in the PLAWR Report.[55] The case of the Cold Lake and Canoe Lake First Nations was so clear, their communities practically destroyed by the range, that there was no need to entertain fine questions of where to draw the line between the right of the government to take up land from time to time and the right of the

52 Ibid., 128-29. Emphasis added.

53 Ibid., 135. Emphasis added.

54 See Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, p. 237, and Submission on Behalf of the Flying Dust First Nation, November 2-3, 1994, p. 20.

55 ICC Transcript, vol. 2, p. 178.

Indians to continue to pursue their avocations of hunting, trapping, and fishing. Mr. Becker suggested that what is required for a breach of treaty is an *immediate and substantial* impact on the treaty right to hunt, trap, and fish for food. Counsel for the claimants did not take issue with this characterization of the test.[56]

Canada accepts that the exclusion of the claimants from the air weapons range was immediate and that, in terms of timing, their case is exactly the same as the case of the Cold Lake and Canoe Lake First Nations. Therefore, the only issue is whether the interference with the claimants' food-harvesting right was substantial enough to amount to a breach of the treaties.

As we see it, the legal "test" for breach of treaty evokes something of a balancing exercise, between the Indians' harvesting right and the government's right to take up land. Because the government's right to occupy land is, on the face of the treaties and the NRTA, unlimited, the threshold for breach of treaty will be high and will occur where the government's taking up of land overwhelms the food-harvesting right. This approach is consistent with the tenor of the PLAWR Report.

Were the Treaties Breached?

We have carefully considered all the evidence before us. From the testimony of the elders, we know that the claimant First Nations suffered hardship because they were excluded from the range lands. We are of the view, however, that the magnitude of that hardship was not so great as to give rise, in law, to a breach of treaty.

The claimants argued that they suffered as much harm as the Cold Lake and Canoe Lake people, that their communities were decimated, and that their way of life was destroyed. The evidence shows, however, that, unlike the case of the Cold Lake and Canoe Lake First Nations, the claimants were able to carry on their traditional activities after the range lands were taken up.

The reason they were able to do so is that all the claimants were left with significant areas within their traditional hunting grounds on which to exercise their treaty food-harvesting right. For example, the Waterhen Lake and Flying Dust First Nations relied on the Lost Lake area for food harvesting, and this area was taken up by the range. Other principal hunting grounds, however – the Flotten Lake and Keeley Lake areas – were not taken up. We note, as well, that, by the 1950s, the Flying Dust First Nation was becoming

56 See Mr. Jodouin in reply, ICC Submission Transcript, vol. 2, p. 257.

established in agriculture.[57] Members of the Joseph Bighead First Nation traditionally travelled north to hunt – into the area around Primrose Lake – and were excluded from this area when the range was created. Yet they still had access to the entirety of their FCA. Moreover, the evidence suggests that once the FCAs were created, some of the trappers stayed within the FCA boundaries.[58] Similarly, the Buffalo River First Nation had only a small portion of its FCA taken up.

It should be noted that there was some argument over the relevance of the FCAs to the issue of harm caused by the range. Mr. Becker suggested that a reasonable measure of the impact of the range is "percentage of FCA lost." This approach is reasonable, according to Mr. Becker, because we can infer that a certain amount of land will support a certain amount of harvesting activity, taking into account significant disparities in resources. The principal advantage of this approach, he argued, is that it concerns the potential for food harvesting, and thus does not depend on unreliable statistics of actual use – that is, numbers of trappers who actually used the range lands prior to the lands being taken up.

Counsel for the claimants objected to the use of FCAs as a means of quantifying the impact because the right at issue is the food-harvesting right, not a commercial trapping right. They maintain that the FCAs are irrelevant; the treaty right could be exercised outside the fur blocks and was in fact exercised outside the fur blocks.[59] At the same time, Mr. Jodouin also said that the hunters were the trappers and the trappers were the hunters, and that the trapped animals were used for food.[60] He went on to submit that evidence that the range had the best trapping areas should be viewed as confirmation of a very strong reliance on the range as a food source.[61] This argument seems to suggest that trapping is relevant to food-harvesting activity.

As we understand it, if a person was trapping in an area, then that is also where he would hunt, for the most part. Hunting excursions also took place – in which the hunters would go outside the fur blocks and perhaps into the range lands – but the activities were often combined. In addition, the trapped

57 P.B. Reader, Fur Supervisor, to J.P.B. Ostrander, Regional Supervisor, Indian Affairs Branch, March 17, 1952, NA, RG 10, vols. 7334-36, file 1/20-9-5 (ICC Documents, pp. 53-54).

58 See note 25 above.

59 The elders did indicate that they went outside the trapping blocks to hunt; see Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, vol. 2, pp. 187-88, quoting various passages from the transcripts of community sessions.

60 ICC Submission Transcript, vol. 1, p. 16.

61 ICC Submission Transcript, vol. 1, p. 32.

animals would be eaten. Furthermore, it appears that from 1946, when the FCAs were introduced, at least some of the claimants had confined their trapping to their own block.[62] This pattern would make sense, since the First Nations had some part in delineating the FCA boundaries. In other words, the process was designed so that the FCAs would reflect, to the extent possible, the First Nations' traditional hunting and trapping areas. In the light of all these considerations, it is our view that the FCAs do provide an indication of the land available for food harvesting, and that the amount or proportion of FCA land taken is therefore a useful measure of the impact of the range on the food-harvesting right.

In support of his argument that the claimants suffered harm comparable to the harm suffered by the Canoe Lake people, Mr. Jodouin provided the Commission with a chart in which he set out the number of people who hunted and trapped inside the range, calculated this number as a percentage of the total population of the First Nations, and compared the result with the percentage figure for Canoe Lake. His intention was to demonstrate that the proportion of the population directly affected by the creation of the range was greater for the claimants than for Canoe Lake. Mr. Becker, in his oral argument, spent a considerable amount of time attacking the accuracy of the numbers and the usefulness of this information generally.

Although we appreciate Mr. Jodouin's efforts to assist us, we cannot rely on the chart. Besides questions of accuracy,[63] the "percentage of population" figures are potentially misleading as an indicator of the degree of reliance on the range. There is no way, for instance, to account for the varying degrees of activity of trappers, yet this activity will have a significant bearing on the question of reliance and the further question of harm caused by the creation of the range.

At the end of the day, the question we are faced with is whether Canada, in exercising its right to take up land under the treaties, so overwhelmed the right of the claimants to continue to pursue their traditional avocations of

62 See note 25 above.

63 There is virtually no documentary evidence on the specific numbers of people from the claimant First Nations who were using the range for food harvesting. (In the case of Canoe Lake and Cold Lake, numbers were compiled by the government.) We have some evidence of the number of trappers from Waterhen Lake and Flying Dust trapping in A-37 in 1952 in a letter from the Fur Supervisor to Indian Affairs (ICC Documents, pp. 53-54). It is not clear, however, how the numbers were determined; if they were based on licences, they would be understated because the licence system was not strictly followed. Based on the testimony at the community sessions, some of the members of the Flying Dust and Waterhen Lake First Nations simply used their treaty cards to hunt and trap. There is also a memorandum (ICC Documents, p. 146) that sets out the "affected population" of the Buffalo River and Waterhen Lake First Nations, but the figures actually represent total Band population. Therefore, the numbers do not reflect the direct impact of the range.

hunting, trapping, and fishing for food as to upset the balance of rights embodied in the treaties. The evidence indicates that the claimants were able to continue to exercise their food-harvesting right in a meaningful way after the range was created. This is not to say that the claimants suffered no hardship as a result of the creation of the range. It is clear that they did lose important food-harvesting areas. Still, the right guaranteed in the treaties is not the right to hunt, trap, and fish within the range lands specifically; rather, it is a more general right to continue the avocations of hunting, trapping, and fishing within the tract surrendered, and it is subject to the Crown's right to take up land. Moreover, we cannot accept the claimants' contention that they were affected to the same extent as the Cold Lake and Canoe Lake First Nations. We conclude, therefore, that there was no breach of treaty.

2 BREACH OF FIDUCIARY DUTY

Summary of Arguments

The claimants' primary argument was that the Crown breached the treaties, and that this in turn amounts to a breach of fiduciary duty. They relied on the PLAWR Report for the proposition that, if the Crown fails to live up to a treaty obligation, it thereby breaches its fiduciary obligation to the First Nation.[64]

Mr. Beckman, for Flying Dust, argued in the alternative that the Crown has a general fiduciary duty towards aboriginal peoples, which gave rise, in 1954, to a duty to compensate Flying Dust for loss of access to the PLAWR, or to provide the people with some other vocation. Moreover, Canada explicitly agreed that compensation would be paid to anyone who had an interest in the range lands. Since no compensation was paid, and Flying Dust was simply overlooked, Canada breached its fiduciary duty.

Mr. Jodouin tied his fiduciary duty argument to the breach of treaty, but also argued, following from the PLAWR Report, two other bases for breach of fiduciary duty.[65] He asserted, first, that the relationship between the First Nations and the Crown is inherently fiduciary; this, he submitted, is sufficient to establish a fiduciary duty to compensate the claimants for their loss of access to the range. It is also clear that the specific nature of the relationship

64 PLAWR Report, 140, quoting *Ontario (AG) v. Bear Island Foundation*, [1991] 2 SCR 570.

65 The Commission held, in the PLAWR Report, 139-41, that there were three bases on which the Crown was a fiduciary in its dealings with the Cold Lake and Canoe Lake people: (1) the nature of the relationship between the Crown and aboriginal people is fiduciary; (2) the breach of treaty; and (3) the Department of Citizenship and Immigration's unilateral undertaking to act on behalf of the Indians. Furthermore, the Commission stated, at page 141, that any of these grounds would be sufficient to establish the Crown's fiduciary obligation.

between the Crown and the claimants here was fiduciary, because the required elements of discretion and vulnerability were present. Secondly, he maintained that the Department of Citizenship and Immigration unilaterally undertook to negotiate on the claimants' behalf; this unilateral undertaking is also sufficient, in and of itself, to establish a fiduciary obligation.

Canada argued that it had no fiduciary obligation to compensate the claimants. Although the relationship between the Crown and aboriginal peoples may be characterized as fiduciary, not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation. This principle was articulated in the recent case, *Quebec (AG) v. Canada (National Energy Board)*.[66] (In that case, it was argued that the National Energy Board, as an emanation of the Crown, had a fiduciary duty towards aboriginal parties appearing before it. The Supreme Court of Canada rejected that proposition, because the Board, as an adjudicative body, has a duty to be impartial.) The fiduciary relationship between the Crown and Indians generates certain obligations – for example, with respect to surrendered or expropriated reserve land. But, Canada argued, the fiduciary relationship does not give rise to a duty to preserve, or compensate for the reduction in, native hunting, fishing, and trapping rights. Canada further submitted that in *Horseman*[67] the Supreme Court of Canada rejected the contention that treaty hunting rights could not be reduced or abridged in any way without some form of compensation.

Canada's final point was that there is nothing in the treaties or in the evidence of surrounding circumstances to indicate that Canada unilaterally undertook or agreed to compensate the Bands with respect to hunting, trapping, or fishing rights as a result of Crown lands being occupied.

Breach of Treaty

Although a breach of treaty will constitute a breach of fiduciary duty, our conclusion as set out above is that there was no breach of treaty. Therefore, the claimants cannot rely on breach of treaty as the basis for their breach of fiduciary duty argument.

Even if there was no breach of treaty, however, there remain two possible grounds for breach of fiduciary duty: (1) a fiduciary relationship; and (2) a unilateral undertaking to compensate. The claimants suffered a reduction in

66 (1994), 112 DLR (4th) 129 (SCC).
67 Note 45 above.

their food-harvesting opportunities resulting from loss of access to the range, as well as a loss of certain commercial harvesting rights, when portions of their FCAs were taken up. The question then is whether Canada had an obligation, as a fiduciary, to compensate the claimants for these losses.

Compensation for the Reduction in Food Harvesting

Canada argues that there is no duty to compensate for a reduction in the right to hunt, trap, and fish for food because the right is guaranteed *subject to limitation*. Paragraph 12 of the NRTA defines the nature of the consolidated right by reference to unoccupied Crown land; thus, the right is by definition defeasible. Furthermore, the treaties themselves contemplate that lands will be taken up from time to time. Thus, Mr. Becker asks, if the right itself is limited by the NRTA and the treaties – that is, it is a right to hunt, etc., *subject to* the Crown's right to occupy unoccupied Crown lands, or to take up land from time to time – then what is the basis for compensation when land is taken up? What right has been taken away or abridged? In addition to this analysis, Canada relies on *Horseman* as authority for the proposition that there is no obligation on the Crown to compensate for any loss of access to land on which to exercise the food-harvesting right.

We have some difficulty with Canada's reliance on *Horseman* here, because the issue of compensation was not raised as an independent matter in that case. Mr. Horseman argued before the Supreme Court of Canada that the "traditional rights granted to Indians by Treaty 8 could not be reduced or abridged in any way without some form of compensation or quid pro quo for the reduction in hunting rights." The Court held that there was actually a quid pro quo, that commercial hunting rights were taken away in return for an expanded right to hunt, trap, and fish for food; the Court did not speak further to the issue of compensation. Therefore, as we see it, *Horseman* does not stand for the principle that there is no right to compensation for a reduction in the food-harvesting right. It may even suggest that some sort of quid pro quo is appropriate.

Furthermore, the lack of a compensation clause in the treaties or the NRTA does not rule out the possibility of compensation. As the Commission noted in the PLAWR Report: "The Natural Resources Transfer Agreements make no provision for compensation when unoccupied Crown lands are occupied in a manner prejudicial to Indian harvesting rights. Nor is there any provision which would exclude compensation in an appropriate case." The

same can be said for the treaties.[68] Thus, there is nothing that specifically precludes the possibility of compensation for a reduction in the food-harvesting right.

The question, then, is whether this is an appropriate case for compensation. In our view, it is not; we find that there is no breach of fiduciary duty that would entitle the claimants to compensation. We may begin with the proposition, articulated by the Supreme Court of Canada in the *National Energy Board* case, that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada.[69] The Supreme Court has gone on to distinguish between a fiduciary relationship and a fiduciary duty: although there is a general fiduciary relationship between the Crown and the aboriginal peoples, this is not the same as a general, all-embracing fiduciary duty.[70] A fiduciary obligation must be shown to arise in the specific circumstances of the relationship between the Crown and the claimants, because "[t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."[71] Thus, although the relationship may presumptively give rise to a fiduciary duty, one cannot assume that a fiduciary attaches to every aspect of the dealings between the Crown and aboriginal peoples.

We agree with Mr. Jodouin that the relationship between the Crown and the claimants was characterized by vulnerability and dependence, such that the actual circumstances could give rise to a wide-ranging fiduciary duty on the Crown. At the same time, however, we recognize that the treaties are also part of the relationship between the Crown and the claimants. A treaty is a solemn agreement which defines a set of specific, mutually binding rights and obligations.[72] Therefore, with respect to any matter addressed in a treaty, such as the taking up of land, the treaty must govern.

Treaties 6 and 10 conferred on the government the right to take up land for settlement and other purposes. As this Commission held in the PLAWR Report, that right is not unlimited: it cannot be exercised so as to destroy the subsistence economy and traditional way of life of a First Nation. But this limit is derived from the treaties themselves, through the competing right of the Indians to continue their traditional hunting, trapping, and fishing

68 The Commission also dealt with the silence of the treaties on the matter of compensation and held that it did not preclude compensation if a breach occurred (PLAWR Report, 138).
69 Note 66 above, citing *Guerin v. R.*, [1984] 2 SCR 335.
70 Ibid., at 65.
71 Ibid.
72 *Sioui* , note 38 above, at 139 (cited to CNLR).

practices. Although the notion of fiduciary duty can be used to hold the Crown to a high standard of conduct in meeting its treaty obligations, we do not think that it can be applied to alter the terms of the treaty.

With respect to the claimants, the government's action in taking up land for the range was consistent with the terms of the treaty. There was no further, fiduciary-based limitation on the government's power to take up land. Nor was there any constitutional limitation on the government's power to take up land. Constitutional limitations on the government's power to affect treaty rights are embodied in section 35(1) of the *Constitution Act, 1982*; there was no constitutional protection of treaty rights until 1982.[73]

Of course, a unilateral undertaking on the part of the government to arrange compensation for the claimants would give rise to a fiduciary duty, regardless of the terms of the treaty. In other words, as we stated in the PLAWR Report, a unilateral undertaking is a free-standing ground for a fiduciary duty. Mr. Jodouin submits that there was a unilateral undertaking on the part of the Department of Citizenship to negotiate with the Department of National Defence on behalf of the claimants, and that this gave rise to a fiduciary duty on the Crown to provide compensation.

Canada does not dispute this proposition of law – that a fiduciary duty can arise as a result of a unilateral undertaking to act as a fiduciary – but it argues that there was never any undertaking on the part of the government to negotiate on behalf of the claimants. Mr. Jodouin, for his part, provides no clear evidence in support of his assertion; he simply maintains that, when Indian Affairs chose to become involved in the matter of the creation of the range, it chose to act for First Nations in general.[74]

We have found no evidence of such an undertaking. The Department of Citizenship undertook to act only for the five First Nations it determined were affected by the creation of the range, namely Cold Lake, Canoe Lake, Heart Lake, Beaver Lake, and Goodfish Lake.[75] Two of the claimants, Waterhen Lake

73 In oral argument, Mr. Beckman submitted that if the government is going to interfere with rights or benefits conferred under a treaty, it is constrained by the guidelines set out in *R. v. Sparrow*, [1990]1 SCR 1108. Therefore, the government must, for example, consult with the aboriginal people affected, attempt to minimize the infringement, and, in the case of an expropriation, provide fair compensation. The problem with this analysis is that *Sparrow* is about section 35 of the *Constitution Act, 1982*, in which existing (meaning unextinguished) aboriginal and treaty rights are recognized and affirmed. This protection for treaty rights did not exist in 1954. Mr. Beckman did acknowledge that his argument had certain technical difficulties, but maintained that the reasoning is generally applicable to an interference with treaty rights. Unfortunately, we find the technical problems insurmountable.

74 See Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, pp. 239-41.

75 Note 32 above.

and Buffalo River, were not considered to be "directly and materially" affected by the creation of the range.[76] It appears that the government did not even contemplate how the circumstances of the other claimants, Flying Dust and Joseph Bighead, would be affected.

Obviously, it would be incongruous if Canada could be relieved of its fiduciary duty by declining to act on behalf of, or simply ignoring, a First Nation. As we understand it, this is what Mr. Jodouin is actually trying to get at: that Canada had a fiduciary duty to undertake to negotiate on behalf of all First Nations who were in fact affected by the PLAWR.[77] But if there was no fiduciary duty to compensate the claimants for lost food-harvesting rights, we cannot see how there would be a fiduciary duty to undertake to negotiate on their behalf for compensation. Therefore, the case for breach of fiduciary duty on the basis of a unilateral undertaking to compensate for lost food-harvesting rights has not been made out.

Mr. Kovatch, counsel for the three First Nations, put forward a further argument for compensation based on an analogy between the claimants' food-harvesting right and a *profit à prendre*. According to Mr. Kovatch, the right of the Indians to go onto the land and take fish and wild animals for food is a *profit à prendre*, which is, of course, a common law property right. In excluding the claimants from the range, the Crown thus expropriated a property right for which compensation should have been paid.

In our view, the analogy between the claimants' right to hunt, trap, and fish for food and a *profit à prendre* is inapt. The claimants' right is a treaty right, a right that is *sui generis* and defined by the terms of the treaty, rather than common law doctrine. The treaties gave the Crown the right to take up land for settlement and the Indians the right to continue to hunt, trap, and fish until they were displaced by occupation. This means that the right was limited from the outset, being subject to the right of the Crown to occupy land from time to time. The food-harvesting right is therefore not exactly like a simple *profit à prendre*, but a *profit à prendre* that is defeasible or subject to termination if a certain event takes place (that is, a permissible taking up of land by the Crown).

This does not end the matter of compensation, however. Two rights were affected by the exclusion of the claimant First Nations from the PLAWR: (1)

76 Ibid.

77 Mr. Kovatch clarified this point in oral argument: "The undertaking to act on behalf of First Nations arises not from an express undertaking to act as it would between a lawyer and a client, for example; it arises because of the historical relationship between Canada and the First Nations. There's the undertaking, and it's from that that we attach the obligations" (Submission Transcript, vol. 2, pp. 276-77).

the treaty food-harvesting right; and (2) the commercial rights, such as those derived from individual licences or communal privileges under the provincial *Fur Act*. The remaining issue is whether there was a fiduciary obligation on the Crown to compensate the claimants for the loss of, or injury to, their rights to trap and fish *commercially*.

Compensation for Commercial Losses

Under a Memorandum of Agreement between Canada and Saskatchewan dated August 4, 1953, Canada agreed to assume responsibility for payment of compensation to "persons or corporations having rights in the [PLAWR] area, including rights in respect of timber . . . trapping, fur farming, fishing or land settlement." Furthermore, in announcing the creation of the range, the Minister of National Defence had assured the House of Commons in 1951 that "there are no settlements in the area, and compensation will be paid for any property rights in trap lines, etc., affected."[78] The question is whether Canada had a fiduciary obligation to ensure that all Indian people, whose rights in respect of trapping or fishing were taken or adversely affected, obtained compensation.[79]

The concept of "fiduciary expectation," which was set out in *Lac Minerals v. International Corona Resources*,[80] is relevant here. La Forest J. explained the principle by quoting the following comment of Professor Finn:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The crucial matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation."[81]

Note that the claimants' lack of knowledge of the undertaking to compensate at the time it was made does not mean that they could have no fiduciary

78 House of Commons, *Debates*, April 19, 1951, 2173-74.

79 The position of the government was that none of the Indians affected by the PLAWR had any right to compensation; it was provided on an *ex gratia* basis (ICC Documents, pp. 150-51).

80 [1989] 2 SCR 574.

81 Ibid., at 648.

expectation. There need not be an actual expectation; rather, the expectation may be judicially prescribed if "the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardize its perceived social utility."[82]

Therefore, the relevant issue is whether, given the specific circumstances of the relationship between the Crown and the claimants, it was reasonable for the claimants to expect the Crown to act in their interests. It is apparent that, in the early 1950s, the relationship between the claimants and the government had incidents perhaps of trust (in the honour of the Crown), but certainly of influence, vulnerability, and dependence. Indian Affairs had discretion and power over the lives of the Indians; as elder Fred Martell told the Commission, "Indian Affairs controlled everything."[83] These conditions were the product of the historical powers and responsibility assumed by the Crown, and are the hallmarks of a fiduciary relationship.[84]

In our view, the government so implicated itself in the claimants' affairs that it generated a fiduciary expectation. That expectation attached to the government promise to provide compensation to anyone whose traplines, etc., were affected. In other words, there was a fiduciary duty on the government to ensure that its general commitment to provide compensation was fulfilled as far as the Indian people were concerned.

In assessing whether there was a breach of fiduciary duty, we must consider all the circumstances. As Addy J. noted in *Apsassin v. Canada*, "among those circumstances, one must include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be aware. . . ."[85] We note that the claimants were hardly in a position to press a claim for compensation: not only were they vulnerable and without resources, but they had virtually no idea of the PLAWR plan, or the possibility of obtaining compensation, until well after the fact. This prejudiced their ability to prove to the satisfaction of the government that they had actually used the range.[86]

82 Ibid.
83 Waterhen Lake Transcript, vol. 1, p. 154.
84 *Frame v. Smith*, [1987] 2 SCR 99 at 136.
85 [1988] 1 CNLR 73 (FCTD) at 93.
86 See J.G. McGilp, Regional Director, Indian Affairs Branch, to Superintendent, Meadow Lake Indian Agency, December 9, 1965, stating that "[t]o substantiate these claims it would be necessary for the Indians concerned to prove actual use and occupation of the trapping areas in question, prior and up to the time the Weapons Range was established." DIAND, file 1/20-9-5, vol. 9 (ICC Documents, pp. 328-29).

In our view, the government had a duty to inform the Indians of the possibility of compensation, to inquire into the matter of entitlement, and to ensure that any Indian who had commercial trapping or fishing rights under the provincial licensing regime, whether individual or communal, was duly compensated for any reduction in those rights. This is consistent with the Minister's statement that "compensation will be paid for any property rights in trap lines, etc., affected [by the creation of PLAWR]."[87]

As noted earlier, only one or two members of the claimant First Nations received compensation. The evidence is clear, however, that a significant number of people were affected when they were no longer able to trap in the portions of their Fur Conservation Areas lost to the PLAWR. Therefore, we conclude that the government failed to discharge its duty with respect to the claimant First Nations that lost commercial harvesting rights when the range was created. This represents an outstanding lawful obligation on the part of the Government of Canada towards the Flying Dust, Buffalo River, and Waterhen Lake First Nations. The Joseph Bighead First Nation did not lose commercial harvesting rights when the range was created, and, therefore, there is no outstanding lawful obligation on the part of Canada to this claimant.

As noted above, in the analysis of the issue regarding breach of treaty, the impact of the creation of PLAWR on these claimant First Nations was dramatically different from the impact on the Cold Lake and Canoe Lake First Nations. In the PLAWR Report this Commission found:

> that the creation of the Primrose Lake Air Weapons Range had such a profound impact on the community that, within one generation, a self-reliant and productive group of people became largely dependent upon welfare payments. The cumulative impact was to destroy the community as a functioning social and economic unit.[88]

We make no such findings with respect to devastation regarding the present claimants. They clearly suffered hardship, but on a much reduced scale than Canoe Lake Cree Nation and the Cold Lake First Nations. The compensation that they are entitled to is for lost commercial rights to trap, not for the destruction of their communities. It was clear from the evidence that all the present claimant First Nations were able to continue to follow their

87 House of Commons, *Debates* (April 19, 1951), 2173-74.

88 PLAWR Report, 64 (speaking of the Canoe Lake Cree Nation); our finding for the Cold Lake First Nations was the same (120).

traditional way of life after the creation of PLAWR. What the Flying Dust, Buffalo River, and Waterhen Lake First Nations could not do, once PLAWR was created, was to trap within the range. They should have been compensated by Canada for that loss at that time.

PART V

CONCLUSIONS AND RECOMMENDATIONS

In creating the PLAWR, the Crown did not breach its treaty obligations towards the claimant First Nations. The area over which the claimants could exercise their treaty food-harvesting rights was reduced after the range was created, but not to the extent that they were unable to continue their traditional food-harvesting activities. We do not agree that these claimants were harmed to the same degree as the Cold Lake and Canoe Lake people.

Canada did breach its fiduciary duty by failing to ensure that First Nations people were compensated for lost commercial harvesting rights, consistent with its undertaking to compensate all those whose "property rights in trap lines, etc.," were affected by the creation of the range. Thus, Canada has an outstanding lawful obligation towards those claimants who had portions of their FCAs taken up by the range.

We therefore make the following recommendations to the parties:

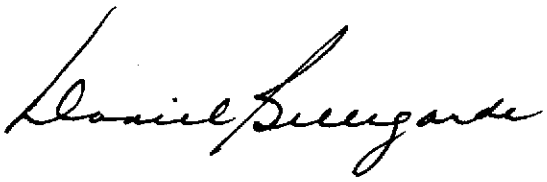
RECOMMENDATION 1

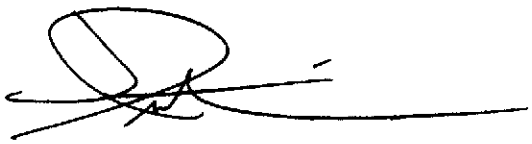
That the claim of the Flying Dust, Buffalo River, and Waterhen Lake First Nations, with respect to lost commercial harvesting rights only, be accepted for negotiation pursuant to the Specific Claims Policy.

RECOMMENDATION 2

That the claim of the Joseph Bighead First Nation was properly rejected by the Minister pursuant to the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION





Daniel J. Bellegarde
Commission Co-Chair

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

September 1995

APPENDIX A

THE JOSEPH BIGHEAD FIRST NATION INQUIRY

1	**Decision to conduct inquiry**	February 2, 1994
2	**Notices sent to parties**	February 2, 1994
3	**Planning conference**	April 6, 1994
4	**Community sessions**	

June 24, 1994, Joseph Bighead Reserve
The Commission heard from the following witnesses:
Philip Kahpeepatow, Harvey Kahpeepatow, William Bearinahole, Alex Sandfly, Adolphus Peeweeyneese, George Kahpeepatow, Nancy Kahpeepatow, Peter Sandfly, Ernest Piche.

July 13, 1994, Meadow Lake, Saskatchewan
The Commission heard from witness Albert Ocheschayoo.

5	**Legal argument**	November 2 and 3, 1994, Saskatoon

APPENDIX B

THE BUFFALO RIVER FIRST NATION INQUIRY

1 **Decision to conduct inquiry** June 30, 1993

2 **Notices sent to parties** June 30, 1993

3 **Planning conference** April 6, 1994

4 **Community sessions**

June 20-21, 1994, Dillon, Saskatchewan
The Commission heard from the following witnesses: Antoine Francois, George Billette, Alfred Billette, Norbert Billette, Arson Neroche, Magloire Benjamin, Cyril Sylvestre, Alex Billette, Mary Francois, Leon Billette, and Pierre Muskego.

July 13, 1994, Meadow Lake, Saskatchewan
The Commission heard from the following witnesses: Edward Francois and Pierre Noltcho.

5 **Legal argument** November 2 and 3, 1994, Saskatoon

APPENDIX C

THE WATERHEN LAKE FIRST NATION INQUIRY

1	**Decision to conduct inquiry**	June 30, 1993
2	**Notices sent to parties**	June 30, 1993
3	**Planning conference**	April 6, 1994
4	**Community sessions**	

June 22-23, 1994, Waterhen Lake Reserve
The Commission heard from the following witnesses: John Larocque, Thomas Blackbird, Charlie Lasas, George Lasas Sr., Fred Martell, Baptiste Martell, Pete Roller, Peter Fiddler, Virginia Vincent, Bruno Fiddler, Albert Fiddler, Pete Martell, George Larocque, Joe Fiddler, and Edwin Martell.

5	**Legal argument**	November 2 and 3, 1994, Saskatoon

APPENDIX D

THE FLYING DUST FIRST NATION INQUIRY

1 **Decision to conduct inquiry** February 2, 1994

2 **Notices sent to parties** February 2, 1994

3 **Planning conference** July 8, 1994

4 **Community session**

August 29, 1994, Flying Dust Reserve
The Commission heard from the following witnesses: Glecia Bear, Clarence Derocher, Flora Gladue, Thomas Merasty, Adele Derocher, Joseph Derocher, Leon Matchee, Joe Fiddler, Babe Stonehawker, and Bruno Fiddler.

5 **Legal argument** November 2-3, 1994, Saskatoon

APPENDIX E

THE RECORD OF THE INQUIRIES

The formal record for these inquiries comprises the following:

- Documentary record (2 volumes of documents, annotated index, and volume entitled "Research Regarding Fur Conservation Area")
- Exhibits
- Transcripts (8 volumes, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record for these inquiries.

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE HOMALCO INDIAN BAND

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Aurélien Gill

COUNSEL

For the Homalco Indian Band
Donna L. Kydd / Steven M. Kelliher

For the Government of Canada
Bruce Becker / Sarah Kelleher

To the Indian Claims Commission
Robert F. Reid, QC / Kim Fullerton
Isa Gros-Louis Ahenakew / Donna Jordan

DECEMBER 1995

CONTENTS

EXECUTIVE SUMMARY

BACKGROUND

In the summer of 1888, Reserve Commissioner Peter O'Reilly and Surveyor Ashdown Green consulted with the Chief and most members of the Homalco Indian Band regarding the lands the Homalco wished to have allotted as reserves around Bute Inlet (on the coast of British Columbia north of Powell River and opposite Campbell River on Vancouver Island). O'Reilly allotted six parcels of land, which were enumerated in Minutes of Decision on August 10, giving an acreage and a metes-and-bounds description for each. One of these parcels of land was Aupe Indian Reserve (IR) 6. O'Reilly and Green prepared separate field sketches for this reserve; a notation on O'Reilly's sketch described it as 25 acres. This reference to 25 acres echoed the Minute of Decision for Aupe IR 6, which also described the reserve as 25 acres. The following day the Minute of Decision and O'Reilly's sketch were forwarded to a surveyor, E.M. Skinner, who used them in November of that year as instructions for his survey of the reserve. The resulting plan accords with the metes-and-bounds description in the Minute of Decision, but differs markedly from the acreage description in the Minute of Decision and from O'Reilly's field sketch as well as Green's, with the result that only 14 acres were ascribed to Aupe IR 6.

Despite this discrepancy in the amount of land, the allotment was approved by both Commissioner O'Reilly and provincial authorities with no indication that the acreage figures were considered problematic. This approval was also given in spite of a letter of warning about Skinner's qualifications from the President of the Association of Dominion Land Surveyors which was sent to the Superintendent General of Indian Affairs in March 1889, two years before British Columbia approved the reserve and 13 years before it was listed in Canada's Schedule of Indian Reserves.

The first part of the Homalco Indian Band's specific claim arises out of these circumstances. The Band alleges that Aupe IR 6 was to comprise 25

acres, as indicated in the acreage description in Commissioner O'Reilly's Minute of Decision.

The second part of this claim relates to a request that the Band made in September 1907 for an additional 80 acres of reserve land. The request was for a specific parcel of land adjoining Aupe IR 6 which was more suitable than the reserve for agriculture and which also contained the Band's graveyard. The request was forwarded by Indian Agent R.C. McDonald to Indian Superintendent A.W. Vowell on November 16, but McDonald wrote back to the Band with news of a denial in a little over a week: "the Indian Department is not in a position to make further allotments of land for Indian purposes, and . . . your request cannot therefore be favorably considered." It is unclear from the evidence whether Vowell ever took action on the Band's behalf other than to deny summarily the request.

The third part of this claim relates to the pre-emption claim of the Band's schoolteacher. In 1908 William and Emma Thompson arrived at Aupe to operate the Band's day school. The Band had built a schoolhouse at considerable expense, believing that it was within the boundaries of Aupe IR 6. Shortly after the Thompsons arrived, they began inquiring about pre-emption procedures. In February 1910, Thompson submitted his formal application to pre-empt 160 acres of land adjoining Aupe IR 6. In his application, he stated that the lands were unoccupied and unreserved Crown lands, not part of an Indian settlement, and not timber lands (within the meaning of the *Land Act*). He also provided a sketch on the back of his application which failed to show that the school and the Band's fenced-in graveyard were included in his request. To obtain a Crown grant, Thompson was required to live on the land for at least six months out of every year for three years; he intended to use his residence at the school to satisfy this requirement.

The Homalco immediately asked Indian Agent McDonald to stop Thompson from securing the land. Nevertheless, that spring, Thompson received his pre-emption for the 160 acres.

In the fall of 1910, the Inspector of BC Indian Schools visited Aupe and reported back to the Department of Indian Affairs that the Band's school and graveyard were included in Thompson's pre-emption claim. It was his opinion that the pre-emption would not have been recorded if the Commissioner of Lands had known the true facts. The Department of Indian Affairs notified provincial officials that the school and graveyard were on the pre-empted land and that Thompson was aware of that fact when he made

his application. In May 1911, the Deputy Minister of Lands threatened Thompson with a cancellation of his pre-emption, or at least the exclusion of the school and graveyard lands, and demanded an explanation for Thompson's misleading statements that these were not Indian settlement lands. In response, Thompson denied any deliberate wrongdoing and suggested that he had not intended to interfere with the school and graveyard, assuming that the government would settle the matter after the land had been surveyed. He pointed out that the Indians had earlier been refused this same land, and suggested that they nevertheless had built the school, "knowing they were off the reserve." Meanwhile, the Deputy Minister assured the Chief of the Homalco Band that Thompson would not acquire title to the school and graveyard lands and he forwarded a sketch to the Chief, indicating the lands which, subject to survey, he proposed to exclude from the pre-emption. When Thompson saw the sketch, he protested that he would lose 40 acres of "the best of the land, including the whole waterfront, and the land on which I have built my house."

Tensions continued to mount. Band members withdrew their children from the school, seized school supplies, threatened Thompson, and interfered with an attempted survey. Finally, in February 1912, a survey was successfully completed by surveyor Henry Rhodes shortly before Thompson's employment as teacher was terminated that spring. Thompson was asked to return his pre-emption record so that an amendment excluding the surveyed land (measuring 10 by 30 chains) could be made. He steadfastly refused to comply with this request.

In September 1912, the McKenna-McBride Royal Commission was established to adjust the acreage of Indian reserves in British Columbia. The Royal Commission visited Church House and heard submissions from the Homalco and from Thompson. Interim Report No. 84, issued by the Commission on August 12, 1915, resolved that a 29.7-acre parcel of land be constituted a reserve for the Homalco Band.

In February 1916, the federal government forwarded Order in Council 388 to the Premier of British Columbia; it recommended adoption of the McKenna-McBride Commission's ruling. The province, however, never issued a concurrent Order in Council. Emma Thompson, who had inherited her husband's pre-emption rights in 1915, continued to hold out for a greater amount of land. After further investigations, the province proposed a final settlement of 20 acres. Mrs. Thompson suggested a still smaller exclusion from her pre-emption, but, eventually, when the province refused to reopen

the matter, she relented, and on November 29, 1922, her full payment for 145 acres was recorded. She received title to the land on October 1, 1924. With the passing of the Province's Order in Council 911 on July 26, 1923, and Canada's Order in Council 1265 on July 21, 1924, the 20-acre exclusion and the small 0.08-acre graveyard became Aupe Indian Reserve 6A.

ISSUES BEFORE THE COMMISSION

1 Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

2 Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

3 Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

CONCLUSIONS

ISSUE 1

Neither the acreage description in the Minute of Decision, as a pre-survey estimate, nor the metes-and-bounds description, as a technical method foreign to the members of the Homalco Band, offers a definitive description of the intentions of the parties as to the extent of the reserve. Therefore, it is doubtful that both parties could have intended *either* type of description to be the sole identification of the boundaries. Further, the Minute of Decision itself was not a stand-alone document; there were also sketches and notes produced to assist in recording the two parties' intentions. The sketches of O'Reilly and Green, however, differ both from each other and from the survey plan. Given the inconclusive nature of all of this evidence as to the intentions of the parties, it is necessary to refer to other documents made in conjunction with the sketches.

Green's notes and O'Reilly's report to the Superintendent General of Indian Affairs refer to the inclusion of 10 small houses and timber for fuel. Therefore, it is clear that the intentions of the parties were to set apart enough land for houses and for firewood. The purpose of both the acreage

and the metes-and-bounds descriptions was to ensure that the physical features pointed out by the Chief and the Homalco people were included in the reserve. In the end it did not matter whether the reserve was of 25 acres or as described by metes and bounds; what counted was that the land the parties agreed to was included in the final survey. From the Band's subsequent actions, it intended the reserve boundaries to encompass at least the area of the future schoolhouse, since Band members apparently believed this actually to be the case. It is worth noting that O'Reilly's sketch and Green's sketch, although dissimilar in many ways, both have the north/south easterly boundary well back of the mouth of the creek. It is also worth noting that they were both present at the time of the agreement with Chief Timothy and the Homalco. Before Commissioner O'Reilly approved the survey of the reserve, he should have compared Mr. Skinner's survey with his notes and with Mr. Green's sketch. Had he done so, he would have noticed the discrepancy. This ought to have resulted in a fresh survey that would have put the future schoolhouse within the boundaries of the reserve.

Although on the evidence before us it is not possible to determine conclusively the intentions of both the Band and O'Reilly with respect to the reserve boundaries, in our opinion a more professional handling of this affair would have involved the submission of the acreage discrepancy to some process of investigation and resolution. There is no evidence on the record before us that the discrepancy was the subject of any discussion at any point during the allocation and subsequent confirmation process. In addition, there is no evidence that the Indian Superintendent ever confirmed O'Reilly's actions in relation to Aupe IR 6. We find that, in the particular circumstances of this claim, the Indian Superintendent's failure to fulfil his supervisory obligation as set out in the Order in Council appointing O'Reilly constituted "a breach of an obligation arising out of [a statute] pertaining to Indians [or] the regulations thereunder" within the meaning of Canada's Specific Claims Policy.

We are still left, however, with the question of compensation or damages. Even assuming that all parties intended to allot the full 25 acres of land for Aupe IR 6 (and we have made no such finding), the missing 11 acres were in any event contained within the 20.08 acres allotted to the Band in 1923-24 as Aupe IR 6A. Furthermore, compensation for loss of use is not readily apparent in this case, as the Band used the area in dispute for a schoolhouse, graveyards, and other improvements.

We do, however, see one way in which the Band suffered a loss as a result of the Indian Superintendent's failure to review the actions of Commissioner O'Reilly. If he had examined all the documents and had discovered that Mr. Skinner's survey plan did not reflect the true intentions of the Band and Commissioner O'Reilly, he ought to have taken action to adjust the survey plan. A properly adjusted survey plan would have placed the Band's future schoolhouse within the boundaries of Aupe IR 6. In such circumstances, Mr. Thompson would not have been able to use the school to satisfy his pre-emption residency requirements. The loss to the Band resulting from this pre-emption will be discussed in greater detail under Issue 3.

ISSUE 2

We do not find that Canada had a legal obligation under section 91(24) of the *Constitution Act, 1867*, to acquire 80 additional acres of reserve land when Band members requested the land in 1907, nor, under the particular circumstances at that time, was Canada under a fiduciary obligation to do so. In addition, on the basis of the little information available to us at this point, and the uncertainty surrounding its meaning, we cannot conclude that an obligation to provide the Band with this land arose under Article 13 of the British Columbia *Terms of Union, 1871*. We wish to emphasize, however, that we are speaking here only of duties which fall within the ambit of the Specific Claims Policy and not of duties which may or may not arise from the existence of aboriginal rights or title and which may be pursued through other avenues of redress.

ISSUE 3

The facts surrounding the Thompsons and their pre-emption application are very disturbing. In our opinion, the false declarations made by Mr. Thompson in his application constitute fraud. Specifically, he falsely declared that:

i) the lands were being taken up for agricultural purposes, and could not be classified as timber lands within the meaning of the *Land Act*; and

ii) the lands were unoccupied and not part of an Indian settlement.

Under the Specific Claims Policy, Canada is prepared to acknowledge claims based on "[f]raud in connection with the acquisition or disposition of Indian

reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated." Mr. Thompson was an employee of the federal government, and his fraudulent misrepresentation was in connection with the acquisition of Indian land. It is true that the land was Indian settlement land and not reserve land. However, to exclude this aspect of the claim on this basis would work at opposite purposes to the policy as a whole, which is meant to address the settlement of legitimate, long-standing grievances. Further, the specific circumstances enumerated in the policy under which Canada will acknowledge claims are examples and are not considered exhaustive. Similar to treaties, the policy should be given a fair and liberal construction in favour of the Indians, and it should be construed not according to the technical meaning of its words but in the sense in which it would naturally be understood by the Indians.

In the alternative, we have also considered the Band's argument that Canada breached its fiduciary obligation to the Band in relation to Mr. Thompson's pre-emption. In our view, Canada had a duty to protect the Band's Indian settlement lands. It breached that duty by failing to dismiss Thompson at an early date, thus preventing him from using the school to fulfil his pre-emption duties. In our opinion, if the Thompsons had been prevented from pursuing their pre-emption claim and from interfering ceaselessly with the Band's attempts to protect its settlement lands, the Homalco would have received 29.7 acres as recommended by the McKenna-McBride Royal Commission. Given that they received 20.08 acres in 1924, then the loss to the Band is 9.62 acres.

FINDINGS AND RECOMMENDATION

Under the mandate of this Commission, we can make or withhold a recommendation that a claim referred to us should be accepted for negotiation pursuant to the Specific Claims Policy. Having full regard to that policy, and having found that this claim discloses

- in Issue 1, a breach of an obligation arising out of the Order in Council appointing Commissioner O'Reilly;
- in Issue 3, fraud by an employee of the Department of Indian Affairs;
- in the alternative in Issue 3, a breach of Canada's fiduciary obligation to the Band;

and, having found that as a result the loss to the Band is 9.62 acres, we therefore recommend to the parties:

That the claim of the Homalco Indian Band with respect to Aupe IR 6 and Aupe IR 6A be accepted for negotiation under Canada's Specific Claims Policy.

PART I

INTRODUCTION

On July 6, 1994, the Indian Claims Commission (ICC) agreed to conduct this inquiry into the specific claim of the Homalco Indian Band. This claim relates to lands allotted to the Band at Aupe Indian Reserve (IR) 6 and the adjoining reserve Aupe IR 6A. The Band claims that, for various reasons, the land set apart at both reserves was insufficient and inadequate.

When the boundaries of Aupe IR 6 were first considered in August 1888, the Indian Reserve Commissioner's Minute of Decision described "Aup" as being 25 acres. The subsequent survey, however, produced a reserve of only 14 acres. The 11-acre discrepancy between the acreage description in the Minute of Decision and the present size of Aupe IR 6 is one aspect of this claim.

In 1907 the Band requested an additional 80 acres of reserve land adjoining Aupe IR 6. The Band's request was denied but shortly thereafter the Band's teacher, William Thompson, applied for a pre-emption involving the same land. Over the protests of the Band and despite Canada's representations to the province of British Columbia on the Band's behalf, the Thompson family succeeded in acquiring 145 acres in the area by 1924. Around the same time, Aupe IR 6A was set aside adjacent to Aupe IR 6, but it encompassed only 20.08 acres.

In July 1992 the Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in relation to Aupe IR 6 and Aupe IR 6A. Canada rejected the claim on March 15, 1994. The Band's subsequent efforts to obtain the details of the legal opinion upon which Canada relied were unsuccessful. As a result, the Band requested that this Commission inquire into the rejection of its claim.

This Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. One aspect of our mandate is to inquire into and report on specific claims that have been

rejected by Canada. Thus, our task here is to examine the claim of the Band and to assess its validity on the basis of Canada's Specific Claims Policy.

This report sets out our findings and recommendation to the Band and to Canada. The structure of the report is as follows: Part II relates to the mandate of the Commission; Part III summarizes the inquiry and the historical background; Part IV sets out the issues; Part V contains our analysis of the facts and the law; and Part VI states our recommendation.

PART II

THE COMMISSION MANDATE AND THE SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[1]

This is an inquiry into a claim that has been rejected. A brief synopsis of how it came before this Commission follows.

On July 6, 1992, Donna L. Kydd, counsel for the Homalco Indian Band, filed a Specific Claim Submission entitled "Aupe Indian Reserve #6 and Aupe Indian Reserve #6A" with the Specific Claims West Branch of the Department of Indian Affairs and Northern Development (DIAND).[2] By letter dated July 30, 1993, Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, informed Chief Richard Harry of the Homalco Indian Band that, as a result of its preliminary legal review, the branch was of the view that there was no outstanding lawful obligation on the part of the Government of Canada with regard to the Band's claim. Accordingly, Specific Claims West

1 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

2 Donna L. Kydd to Department of Indian Affairs and Northern Development, Specific Claims West, July 6, 1992 (ICC file 2109-14-1; ICC Documents, pp. 535-659).

was not prepared to recommend that the claim be accepted for negotiation. However, Dr. Hall stated that this was a preliminary legal opinion only and he invited the Homalco Band and its legal counsel to submit further information before a final recommendation was made to the Minister. Dr. Hall also advised that, although he was not permitted to give out the legal opinion itself, he and Sarah Kelleher from the Department of Justice were available to discuss in more detail the basis of this preliminary legal opinion.[3]

On September 24, 1993, Dr. Hall, at the request of Chief Harry,[4] provided a brief outline of the reasons behind Specific Claims West's recommendation that the Aupe claim be rejected. Dr. Hall reiterated that this was a preliminary position and that their legal advisers would consider further information submitted by the Band and its legal counsel.[5] Chief Harry, on behalf of the Homalco Indian Band Council, responded to Dr. Hall's letter of September 24, 1993, advising that the reasons provided in the letter did not provide the Band with "enough information to make a proper, sound or reasoned response."[6] He also requested that more comprehensive reasons or the preliminary justice opinion be provided.

Following a meeting between Donna Kydd and Sarah Kelleher, Dr. Hall wrote to Ms Kydd on March 15, 1994, informing her that the additional points and arguments she raised did not indicate any outstanding lawful obligation on the part of the Government of Canada to the Homalco Band. He suggested that the options open to the Band included a submission to this Commission.[7]

On May 6, 1994, Chief Harry wrote to the Commissioners of the Indian Claims Commission stating that the Band could not prepare an informed, well-reasoned response without the particulars of the Department of Justice's legal opinion: "As a result of this apparent impasse, we wish to place our Claim before the Indian Claims Commission . . . for review and inquiry."[8]

On July 6, 1994, Daniel Bellegarde and James Prentice, Co-Chairs of the Indian Claims Commission, wrote to the Chief and Council of the Homalco

3 Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Chief Richard Harry, July 30, 1993 (ICC Documents, p. 813).

4 Chief Richard Harry to Dr. John L. Hall, Specific Claims West, DIAND, August 27, 1993 (ICC Documents, p. 814).

5 Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Chief Richard Harry, September 24, 1993 (ICC Documents, pp. 815-17).

6 Chief Richard Harry to Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, October 8, 1993 (ICC Documents, pp. 820-21).

7 John Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Donna Kydd, March 15, 1994 (ICC Documents, pp. 822-24).

8 Chief Richard Harry to the Commissioners, Indian Claims Commission, May 6, 1994 (ICC file 2109-14-1).

Indian Band, the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and the Honourable Allan Rock, Minister of Justice and Attorney General, advising that the Commissioners had agreed to conduct an inquiry into this rejected claim.[9]

Under its mandate, the purpose of the Commission in conducting this inquiry is to inquire into and report on whether, on the basis of Canada's Specific Claims Policy, the Homalco Indian Band has a valid claim for negotiation.

THE SPECIFIC CLAIMS POLICY

The Indian Claims Commission is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by the Department of Indian Affairs entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[10] Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

The Issue of "Lawful Obligation"

Although the Commission is directed to look at the entire Policy in its review of rejected claims, the focal point of its inquiry, in the context of this claim, is found in the following passage:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.
>
> . . .

9 Dan Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Homalco Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, July 6, 1994 (ICC file 2109-14-1).

10 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*].

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[11]

In our view, the list of examples enumerated under the policy is not intended to be exhaustive. For example, we have found in past reports that a lawful obligation may arise from a breach of fiduciary duty.

11 *Outstanding Business*, 20.

PART III

THE INQUIRY

In this section of the report, we examine the historical evidence relevant to the claim of the Homalco Indian Band. Our investigation into this claim included the review of several volumes of documentary material submitted by the parties, two expert reports by Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada,[12] one expert report by Gordon B. Gamble, Canada and British Columbia Land Surveyor,[13] various maps, and other exhibits. In addition, the Commission had the privilege of visiting Aupe on April 18, 1995, to view the lands at issue in this inquiry. Cross-examination of Mr. Gamble and oral submissions from legal counsel were heard on June 9, 1995, in Vancouver, British Columbia. An outline of the record for this inquiry is found in Appendix A.

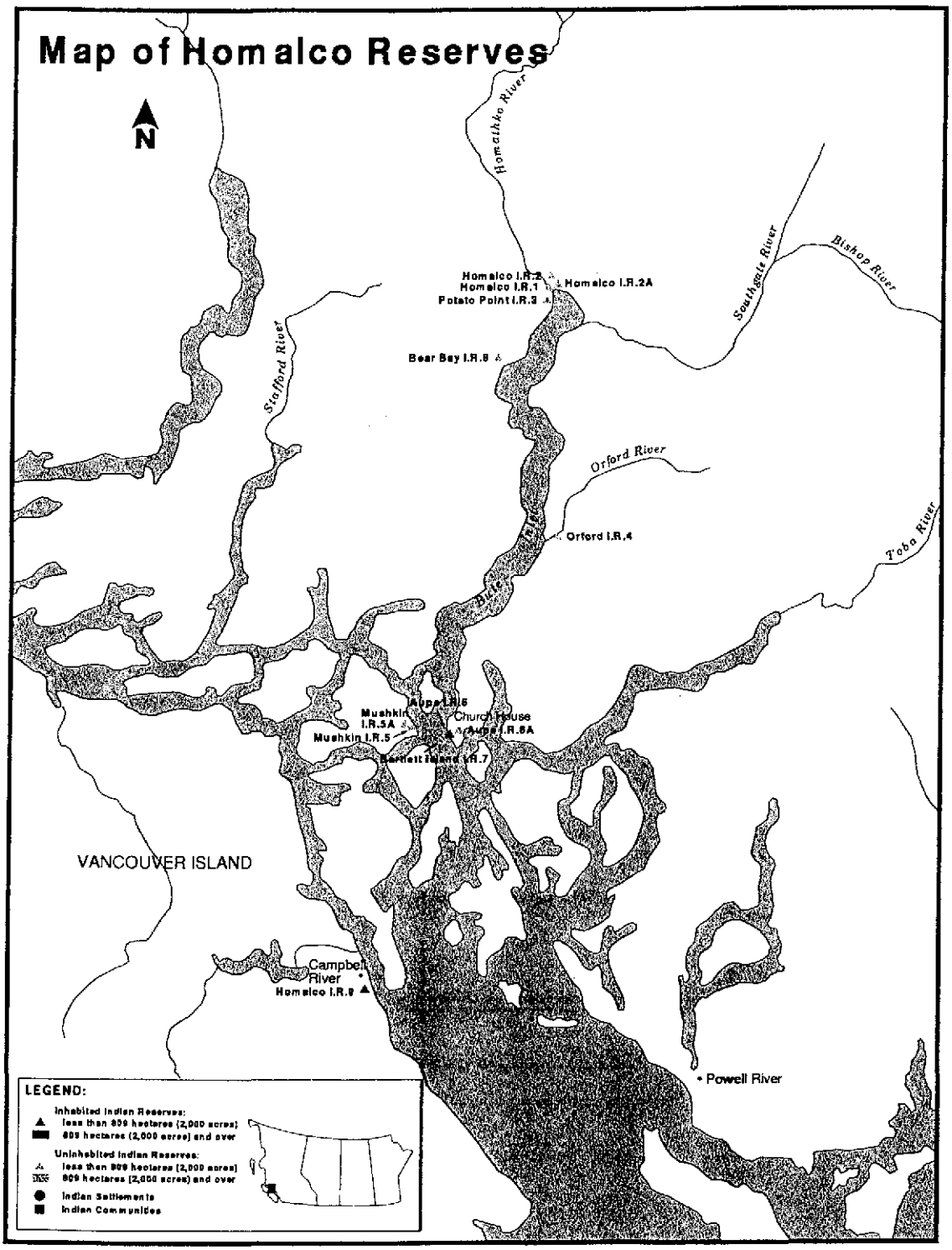
CLAIM AREA

The traditional territory of the Homalco Indian Band surrounds Bute Inlet on the British Columbia coast north of Powell River and opposite Vancouver Island's Campbell River.[14] Today, the Homalco Indian Band has 12 reserves at nine locations (see map of claim area on page 108). Except for the newest reserve at Campbell River, the rest are around Bute Inlet. None of the Band's reserves were created under treaty. Aupe IR 6 and adjoining Aupe IR 6A together comprise a 34.08-acre area of reserve land at the mouth of Bute Inlet. Both centre on the community of Church House, but they were established decades apart in time and under different circumstances. This claim relates to the circumstances of their creation.

12 Both reports take the form of letters to Sarah Kelleher, Counsel for Specific Claims West, DIAND, the first dated December 6, 1994 (ICC Exhibit 2), the second dated April 11, 1995 (ICC Exhibit 3).

13 Gordon B. Gamble, "Report on Acreage Discrepancy: Aupe Indian Reserve No. 6," June 1, 1995 (ICC Exhibit 4).

14 Dorothy Kennedy and Randy Bouchard, *Sliammon Life, Sliammon Lands* (Vancouver: Talon Books, 1983), 14 (ICC Documents, p. 515).


Map of Homalco Reserves
N
Homathko River
Southgate River
Bishop River
Stafford River
Orford River
Toba River
Homalco I.R.2
Homalco I.R.1
Potato Point I.R.3
Homalco I.R.2A
Bear Bay I.R.8
Orford I.R.4
Mushkin I.R.5A
Church House
Mushkin I.R.5
Bartlett Island I.R.7
VANCOUVER ISLAND
Campbell River
Homalco I.R.9
Powell River
LEGEND:
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Uninhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Indian Settlements
Indian Communities

HISTORICAL BACKGROUND

O'Reilly Charged with Setting Out Homalco Reserves

In July 1880 Peter O'Reilly replaced G.M. Sproat as Indian Reserve Commissioner for the Province of British Columbia. He was charged with:

> ascertaining accurately the requirements of the Indian Bands . . . to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes.[15]

Unlike Commissioner Sproat, Commissioner O'Reilly was not placed under the direction of Canada's Indian Superintendent for British Columbia. However, it is clear that his actions were subject to confirmation by officials from both the provincial and the federal governments:

> the Reserve Commissioner instead of being placed, as at present, under the direction of the Indian Superintendent for British Columbia, should act on his own discretion, in furtherance of the joint suggestions of the Chief Commissioner of Lands & Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established; and that the action of the Reserve Commissioner should in all cases be subject to confirmation by those officers; and that, failing their agreement, any and every question at issue between them should be referred for settlement to the Lieutenant Governor, whose decision should be final and binding.[16]

In a letter dated August 9, 1880, the Department of Indian Affairs sent Commissioner O'Reilly the following further instructions:

> . . . In allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued towards the Indians. You should have special regard to the habits wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of their Reserves as well as in all other matters; informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scale so as ultimately to enjoy all the privileges and advantages enjoyed by their White fellow subjects.

15 Order in Council, July 19, 1880 (ICC Documents, pp. 21-23).
16 Ibid.

> With regard to the views of the Govt. on the land question, I have the honor to refer you to the documents in relation to this matter printed with the Annual Report of the Dept. of the Interior for 1875; and I have the honor to request that you will act in the spirit thereof.
>
> The Government consider it of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places, and fishing stations occupied by them and to which they may be specially attached. . . . You should in making allotments of lands for Reserves make no attempt to cause any violent, or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.[17]

Commissioner O'Reilly was also directed to make "ample provision of water" for the Indians.[18]

Establishment of Aupe IR 6, 1888

In carrying out his instructions, Commissioner O'Reilly, accompanied by Surveyor Ashdown Green, journeyed to Bute Inlet in August 1888 and met with Chief Timothy and most of the Homalco tribe. The Homalco pointed out to Commissioner O'Reilly the lands they wished to have reserved.[19] Mr. Green prepared a sketch of Aupe IR 6 with brief notes dated August 9, 1888.[20]

On August 10, 1888, Commissioner O'Reilly wrote Minutes of Decision to reserve six parcels of land for the Homalco; these parcels became Homalco IR 1, Homalco IR 2, Potato Point IR 3, Orford Bay IR 4, Mushkin IR 5, and Aupe IR 6. The Minute of Decision for Aupe reads:

> No. 6 Aup [sic], a reserve of twenty-five (25) acres, situated on the Eastern shore of Bute Inlet, near Bartlett Island.

17 Copy of letter from Indian Affairs, Ottawa, to P. O'Reilly, August 9, 1880, National Archives of Canada [hereinafter NA], RG 10, vol. 3716, file 22195 (ICC Documents, pp. 24-28).

18 Ibid.

19 P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

20 Canada Land Survey Records [hereinafter CLSR], Field Book BC 457, in Gordon B. Gamble, "Report on Acreage Discrepancy," note 13 above, tab 5.

> Commencing at a Fir marked Indian Reserve, and running North twenty (20) chains; thence West to the seashore, and thence following the coast in a Southerly direction to the point of commencement.[21]

Attached to the Minutes of Decision is a thumbnail sketch of Aupe IR 6, describing it as 25 acres.

By letter dated August 11, 1888, Commissioner O'Reilly sent the Minutes and "rough sketches" to surveyor E.M. Skinner for "information and guidance." He advised that "[t]he sketches indicate the lands intended to be given to the different tribes," and he thought that Skinner would "have no difficulty in carrying out" the surveys. While he offered further thoughts on Orford Bay and Potato Point, for Aupe IR 6 the Minute of Decision and the accompanying sketch for "25 acres" were the extent of O'Reilly's instructions to Skinner.[22]

Mr. Skinner surveyed Aupe IR 6 on November 1 and 2, 1888, but he did not finish surveying the rest of the Homalco's reserves until May 1889.[23] In the meantime, Commissioner O'Reilly forwarded a report, Minutes of Decision, and sketches for 21 reserves in the New Westminster Agency to the Superintendent General of Indian Affairs. His report, dated December 8, 1888, explains that he had met Chief Timothy and most of the Indians of the Homalco tribe (population 74) on August 10, 1888:

> They were much pleased at the prospect of having their reserves defined and took great interest in pointing out the several places they wished to have secured for their use. With their assistance I made the following reserves viz
>
> No. 1 Homalco . . . at the head of Bute Inlet. . . . This is the only reserve, and I believe the only place in the district where agriculture can be carried on extensively with any prospect of success. . . .
>
> . . .
>
> No. 6 Aup, a well sheltered spot at the entrance to Bute Inlet, near Bartlett Island, upon which ten small houses stand. There is plenty of timber for fuel, in other respects it is valueless. This reserve contains 25 acres.
>
> The few white men resident in this district speak highly of the Sliammon, Klahoose, and Homalco tribes. They are industrious, and find employment readily in

21 P. O'Reilly, Minutes of Decision, DIAND, Reserves and Trusts, book 23, pp. 19-21 (ICC Documents, pp. 29-31).
22 P. O'Reilly to E.M. Skinner, August 11, 1888, NA, RG 10, vol. 1277 (ICC Documents, pp. 32-33).
23 Gordon B. Gamble, "Report on Acreage Discrepancy," note 13 above, p. 6 (ICC Exhibit 4); and E.M. Skinner to P. O'Reilly, May 8, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 835).

> the logging camps, and also in the canneries on the Fraser River. Their fisheries and hunting grounds are of great value to them. This district is however very barren, and there is no possibility of procuring agricultural land except the small quantity at Homalco [No. 1] previously referred to. Otherwise I had no difficulty in assigning the several reserves set apart for these tribes. The Indians expressed themselves highly satisfied with the allotments made for their use, and the prospect of the reserves being speedily surveyed.[24]

Commissioner O'Reilly also wrote to F.G. Vernon, Chief Commissioner of Lands and Works, on December 13, 1888, and January 2 and 10, 1889, enclosing sketches and Minutes of Decision respecting lands reserved and allotted by him for the use of the Sliammon, Klahoose, and Homalco tribes. By January 16, 1889, Chief Commissioner Vernon had given provincial approval for the allotments pertaining to these three tribes.[25]

While Mr. Skinner was still completing his survey plan, the President of the Association of Dominion Land Surveyors wrote the Minister of Interior and Superintendent General of Indian Affairs to complain about W.S. Jemmet and E.M. Skinner being employed by the Department of Indian Affairs to survey reserves in British Columbia. Although they had been listed as Dominion Land Surveyors in the Department's 1888 Annual Report, Jemmet and Skinner had no standing as surveyors. They had not received any commission to practise from the Board of Examiners for Dominion Land Surveyors. Moreover, they were not otherwise authorized to practise in British Columbia or any other province. Urging the exclusive employment of duly qualified provincial land surveyors for surveying Indian reserves outside the Railway Belt in British Columbia, the President of the Association warned of the risks of relying on those with lesser qualifications:

> It is not necessary to point out the great trouble which may, and is quite likely to arise owing to faulty surveying of Indian Reserves by those who, as far as is known, are not legally or professionally qualified to make such surveys, and who have given no bonds for the due performance of their duties.[26]

24 P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

25 F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, January 16, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 834).

26 President, Association of Dominion Land Surveyors, to Minister of Interior and Superintendent General of Indian Affairs, March 27, 1889, in Gamble, "Report on Acreage Discrepancy," note 13 above, tab 9 (ICC Exhibit 4).

Notwithstanding this admonition, it appears that Mr. Skinner was allowed to continue his work. On May 8, 1889, he wrote to Commissioner O'Reilly informing him that he had "finished the Homalco Reserves."[27] Skinner's Field Book documents his survey of Aupe IR 6 and provides a tiny sketch at a scale of 20 acres to the inch.[28] His "Plan of Ho-mal-ko Indian Reserves," drawn in 1888-89, describes Aupe IR 6 as "14 acres."[29]

On May 26, 1890, Commissioner O'Reilly sent the reserve plans for the Homalco and eight other bands to the Chief Commissioner of Lands and Works.[30] Almost a year elapsed before Chief Commissioner Vernon approved, on April 28, 1891, Skinner's 1888-89 survey plan which showed 14 acres for Aupe IR 6. Commissioner O'Reilly and Surveyor F.C. Green also signed Mr. Skinner's plan.[31]

On May 4, 1891, Commissioner O'Reilly acknowledged Chief Commissioner Vernon's approval of the survey for the Homalco.[32] That same day, he wrote to the Deputy Superintendent General of Indian Affairs enclosing Vernon's letter of approval.[33] If Commissioner O'Reilly forwarded the field books and tracings to the Deputy Superintendent General, the apparent discrepancy between his own Minute of Decision – setting out 25 acres for Aupe No. 6 – and Mr. Skinner's official plan – indicating only 14 acres for Aupe No. 6 – does not seem to have been noticed or questioned by anyone at Indian Affairs headquarters. Nor was reference made to it in any correspondence concerning provincial approval of the reserves.

In 1893, almost two years later, Commissioner O'Reilly forwarded tracings "of the original plots of Reserves finally approved" by Chief Commissioner Vernon to the Indian Superintendent for British Columbia, A.W. Vowell, "for transmission to the local Agents."[34]

27 E.M. Skinner to P. O'Reilly, May 8, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 835).
28 CLSR, E.M. Skinner, 1888-89 Field Book BC 290 (ICC Documents, p. 47).
29 Plan TBC 30, DIAND, Survey Records, bears the notation "Approved April 28th 1891 sigd F.G. Vernon, C.C.L.W." (ICC Documents, p. 48).
30 O'Reilly to Vernon, May 26, 1890, British Columbia, Department of Lands, Crown Lands, box 4, 1533/90 (ICC Documents, p. 52).
31 Vernon to O'Reilly, April 28, 1891, British Columbia Archives and Records Service [hereinafter BCARS], GR 440, vol. 36, January 28, 1891 - June 9, 1891 (ICC Documents, pp. 53-54).
32 O'Reilly to Vernon, May 4, 1891, BC, Crown Lands, box 4, 1610/91 (ICC Documents, pp. 55-56).
33 O'Reilly to Vankoughnet, Deputy Superintendent General for Indian Affairs, May 4, 1891, NA, RG 10, vol. 1277 (ICC Documents, pp. 57-58).
34 O'Reilly to A.W. Vowell, March 3, 1893, NA, RG 10, vol. 1278, mfm C-13900 (ICC Documents, p. 59).

Aupe IR 6 was listed as being 14 acres in Canada's published "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902." The "Remarks" column next to the Aupe No. 6 entry was blank.[35]

Homalco's Request for 80 Acres at Aupe Denied, 1907

On September 6, 1907, during Indian Agent R.C. McDonald's visit to Aupe IR 6, the Homalco there asked him for an "addition" to the reserve. McDonald's trip diary records that he "[i]nspected land adjoining Aupe Reserve, asked for by the Indians for agricultural purposes."[36] Ten weeks later, on November 16, 1907, the Agent presented the request to Indian Superintendent Vowell:

> I . . . enclose herewith a plan . . . showing a piece of land, about 80 acres in extent, adjoining the Aupe Indian reserve No. 6 . . . which the Homalco Indians ask to have reserved for them.
>
> Their village is on the Aupe reserve which contains very little land suitable for cultivation, being mostly of rock formation, and they wish to acquire the 80 acres adjoining, which is much better land, so as to clear it for cultivation.
>
> Their grave-yard, as shown on the plan, is on the land applied for, and has, they informed me, been there for the past fifteen or sixteen years. The timber has already been cut from this land, which, being near their village, would be useful for them for gardens.
>
> I advised these Indians to surrender 80 acres from one of their other reserves in exchange for this piece, but they would not consent to do so.
>
> If the whole of the land applied for cannot be acquired for them, then there should, if possible, be at least a few acres reserved for them where their graveyard is situated.[37]

On November 25, 1907, Indian Agent McDonald tersely conveyed to Chief William at Church House the only official answer the Homalco were to receive in response to their request for an addition to Aupe IR 6. In its entirety, the Agent's letter read:

35 Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, p. 38 (ICC Documents, pp. 61-62).

36 R.C. McDonald, Trip Diary, September 6, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 63).

37 Agent to Vowell, November 16, 1907, New Westminster Agency Letterbook for 1907-1908, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 65). ICC does not have the 80-acre plan; but 80 acres echoed Canada's 1873 and 1874 requests to the province that there be an 80-acre standard for all reserves. In 1874 56 Coast Salish chiefs petitioned the Indian Commissioner in support of 80 acres per family. They noted that they could be reached "through Rev. Father Durieu, at New Westminster." Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), 46-48, 53-54.

> With regard to your request to have about 80 acres of land adjoining the reserve on which your village is situated set apart as an additional reserve for the Homalco band of Indians, I beg to inform you that I am now advised by the Indian Superintendent that the Indian Department is not in a position to make further allotments of land for Indian purposes, and that your request cannot therefore be favorably considered.[38]

If Agent McDonald, Indian Superintendent Vowell, or Indian Affairs headquarters' staff were involved in any discussions or actions concerning the Homalco's request for additional land at Aupe, the Indian Claims Commission has not received documents that show the substance of these. No reply to the Agent's November 16, 1907, letter to Indian Superintendent Vowell has been found, although, in 1910, Agent McDonald indicated that Vowell had replied on November 21.[39] The Indian Claims Commission has nothing which conclusively confirms that Indian Superintendent Vowell submitted the request to Indian Affairs headquarters or representatives of the province.[40] Agent McDonald's November 16, 1907, letter to the Indian Superintendent therefore remains the only indicator of action on the Homalco's behalf. His November 25, 1907, letter to the Chief stands as the only evidence of Indian Affairs' rejection of the request.

William and Emma Thompson Arrive at Aupe, 1908

Late in 1907 Chief William sent his people's petition for a teacher directly to the Department of Indian Affairs. Indian Agent McDonald reported back to the Department on the matter as follows:

> [T]hese Indians have, for several years, been anxious to have a school established on their reserve. They have about 30 children of school age, none of whom have as yet attended any school. I have on several occasions, requested them to send some of their children to the Sechelt school, and others to the Squamish Mission school . . . but they did not wish to send their children away from home; and, as they would not consent to send their children to any of the schools already established in the Agency; I advised them that they should join with the Klahoose and Sliammon Indians, who are also anxious for schools, and erect a building on some reserve conveniently situated for the three bands, but they would not consent to this proposal either, as they wanted a school on their own reserve. I may add that the Rev. Father

38 R.C. McDonald to Chief William, November 25, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 66).

39 R.C. McDonald to Secretary, Indian Affairs, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

40 In 1910 McDonald enclosed the November 21, 1907, reply from Vowell (No. 409 G5) in a letter to headquarters (McDonald to Secretary, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 [ICC Documents, pp. 140-41]), but ICC does not have a copy of the reply from Vowell.

> Chirouse, Missionary to these Indians, advised them in this matter along the same lines as myself.
>
> About a year ago, without consulting anyone, they commenced the erection of a school building on their Aupe reserve, where their village is situated. When I visited them in the month of September last, the building was then not quite completed and there were no furnishings in it. . . .
>
> . . . [T]hey would like to have a teacher holding a public school certificate, a man with wife and family preferred, but, as their school is in a very isolated locality, there being no white settlers within twenty miles of the village, and passing steamers calling there only once a week, I fear it will hardly be possible to secure the services of a public school teacher to go to such an out of the way place, as there is a scarcity of such teachers even for the public schools of the province.
>
> In discussing the matter with the Rev. Father Chirouse, he informed me that he can secure the services of a gentleman (I have forgotten his name) who has had several years' experience teaching in the Indian schools of Vancouver Island, and who, with his wife, would be willing to take charge of this school, provided the remuneration were sufficient. . . .[41]

Agent McDonald endorsed the arrangement suggested by Father Chirouse and recommended it "to the favourable consideration of the Department."[42]

In May 1908 Agent McDonald wrote to Father Chirouse advising him that the Department had "sanctioned this arrangement" and asking him to communicate with "the teacher you had in view."[43] A few weeks later, Agent McDonald informed Indian Superintendent Vowell that "Mr. William Thompson has been engaged, subject to the approval of the Department, to take charge of the [Homalco Indian Day School] for a year at a salary of $600 . . ."[44]

William Thompson and his wife, Emma, were at Aupe or Church House by August 1908.[45] It quickly became apparent that Thompson had more in mind than his duties as teacher. On arrival, he questioned Agent McDonald about procedures for pre-empting land. Agent McDonald's reply suggests that, from the start, Thompson may have been hoping to avoid certain requirements connected with obtaining the right of pre-emption:

41 McDonald to J.D. McLean, Secretary, Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] (ICC Documents, pp. 70-72).
42 Ibid.
43 McDonald to Chirouse, May 15, 1908, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 78).
44 McDonald to Vowell, June 9, 1908, NA, RG 10, vol. 1468, mfm C-14272 (ICC Documents, p. 81).
45 McDonald to Vowell, August 7, 1908, NA, RG 10, vol. 1469 (ICC Documents, p. 83).

> The declaration in connection with the pre-emption must be made before a Commissioner or Justice of the Peace, and according to the act, there seems no way of getting around it.[46]

Within the Thompsons' first year they acquired an assistant to help with children in residence at the school, and a post office was established in the school at Church House at their request.[47]

William Thompson Applies to Pre-empt 160 Acres, 1910

On February 15, 1910, William Thompson gave official notice that he wanted the right to pre-empt 160 acres adjoining Aupe IR 6:

> I William Thompson intend to apply for a pre-emption record of 160 acres of land, bounded as follows. Commencing at this Post, thence East 40 chains; thence South 40 chains; thence West 40 chains; or to the shoreline; thence in a Northerly direction along the shore to the Southeast corner of the Indian Reserve thence North along the Eastern line of the Indian Reserve to the point of commencement, containing one hundred and sixty acres more or less.[48]

A formal application, with a sketch on the back, followed on February 21, 1910. The sketch of these 160 acres did not show any Indian settlements, graveyards, or improvements. His application stipulated that the lands were

> unoccupied and unreserved Crown lands (not being part of an Indian Settlement) situate in the vicinity of East side of the entrance to Bute Inlet. . . . [T]he land is not timber land within the meaning of the Act.[49]

The *Land Act* application form Thompson signed read, in part:

> My application to record is not made in trust for or on behalf of, or in collusion with any other person or persons but honestly on my own behalf for settlement and occupation for agricultural purposes and I also declare that I am duly qualified under

46 McDonald to Thompson, September 25, 1908, NA, RG 10, vol. 1469, mfm C-14273 (ICC Documents, p. 85).

47 McDonald to Vowell, March 22, 1909, NA, RG 10, vol. 1470, mfm C-14273 (ICC Documents, pp. 98-100); McDonald to Vowell, March 26, 1909, NA, RG 10, vol. 1470 (ICC Documents, p. 101); McDonald to Thompson, May 3, 1909, NA, RG 10, vol. 1470 (ICC Documents, p. 106); McDonald to Vowell, January 17, 1910 (ICC Documents, p. 109); McDonald to J.O. McLeod, Post Office, Vancouver, [October 9, 1908], NA, RG 10, vol. 1469, mfm C-14273 (ICC Documents, p. 87); McDonald to Thompson, April 7, 1909, NA, RG 10, vol. 1470, mfm C-14273 (ICC Documents, p. 103); and McDonald to J.D. McLean, April 9, 1919, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23).

48 Thompson, Notice of Pre-emption, February 15, 1910, NA, RG 10, vol. 11021, file 520C, mfm T3958 (ICC Documents, p. 113).

49 Thompson, Application for Pre-emption Record, February 21, 1920, British Columbia, Department of Lands, Roll 2236 (ICC Documents, pp. 114-16).

> the said Act to record the said land and I make this solemn declaration, conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.[50]

There were immediate protests from the Homalco. Agent McDonald informed Thompson that the Indians had asked him to stop Thompson from securing the land. The Agent wrote that he had heard from Band member Billy Blainey that

> you [Thompson] had purchased the land adjoining their reserve, and that, in future, when they wish to bury anybody in their graveyard, they would have to pay you $5.00 for each grave; also that you would not allow them to cut any firewood for the school on the land adjoining the reserve. . . . Billy Blainey also stated that you did not keep the school open more than two hours a day. . . .[51]

Such allegations were easily dissipated by Thompson's denial of them. Agent McDonald obsequiously wrote back to Thompson:

> It was my opinion at the time that you never made such statements to the Indians in regard to the wood and graveyard. There is no use in taking these reports seriously. . . .[52]

Nevertheless, complaints about Thompson "neglecting his work" and running a store in the school reached Ottawa.[53] Agent McDonald assured headquarters that Thompson had not been neglecting his duties. He defended Mrs. Thompson's retailing efforts as "a convenience to the Indians." The likely source of the complaint, Billy Blainey and Alex Paul, "are not classed as the best members of the band," wrote McDonald.[54]

Despite the Homalco's complaints, on April 22, 1910, the Deputy Commissioner of Lands sent Thompson Certificate of Pre-emption Record No. 2851 for 160 acres.[55] However, the Homalco continued their efforts. On behalf of the Church House Indians, the Vancouver law firm of Dickie and

50 Ibid.
51 McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118).
52 McDonald to Thompson, March 15, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 120).
53 McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23).
54 McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28.)
55 Deputy Commissioner of Lands to Thompson, c/o Government Agent, Cumberland, BC, April 22, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 124). The right of pre-emption is a privilege accorded by the British Columbia government to settlers who, by virtue of their settlement and cultivation of a certain parcel of public land, gain the right to purchase that land to the exclusion of all others.

DeBeck advised the province's Chief Commissioner of Lands on November 15, 1910:

> We wish to enter a protest against this preemption on the ground that it is not an unreserved, unoccupied, [illegible] Indian Settlement, within the meaning of the Act. If a hearing is to be had for the disposal of this matter, we should like some weeks notice, in order to obtain our witnesses from Church House.[56]

A few days latter the Inspector of BC Indian Schools, A.S. Green, reported on problems related to the pre-emption:

> I informed Mr. Thompson of the complaints of the Indians . . . He admitted that the Indian building and graveyard are on the land he has pre-empted . . .
>
> The school building is not more than one hundred yards from the last Indian House, at the south end of the village. About two hundred or two hundred and fifty yards further south in line with the school, is the graveyard (fenced in). I counted about fifty graves (there may be more) inside the fence, and there are some outside. About two or three hundred yards straight down from the graveyard near the beach Mr. Thompson has built a small house.
>
> The land where the school is built, the graveyard site, and just a few acres around have been partly cleared by the Indians, the trees cut down, and grass growing. Their few cattle graze here. Those are all included in Mr. Thompson's pre-emption claim. By living in the school building he intends to fulfil his pre-emption duties, which require him to live on the land six months in each year for three years, before getting the Crown grant.
>
> When I inspected this school on October 8, 1909, Mr. Thompson and the Indians assured me that the building was on the Reserve. I recalled this, and Mr. Thompson said that at the time of my visit he had thought so, but when he found it was not so, he recorded the land for himself.
>
> I believe, that, if the Commissioner of land at Victoria, had known, when application was made that the Indian School House and graveyard were covered by this pre-emption the recording of it would not have been permitted.
>
> I asked the Indians to take no action in the matter but to send the children to school as before. . . .
>
> I would respectfully but urgently recommend that Mr. Inspector Ditchburn, and Mr. Reserve Surveyor Green, go as soon as possible and look into this, and that the matter be brought by your Department to the notice of the B.C. Authorities.
>
> I am inclined to think that one corner of the school is on the reserve, but this is hard to tell unless surveyed.[57]

56 Dickie & DeBeck to Chief Commissioner of Lands, November 15, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 134).

57 A.S. Green to J.D. McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37).

Around the same time, the Surveyor General of the province, E.B. McKay, was writing to the Deputy Commissioner that:

> The pre-emption of William Thompson is situated entirely to the east of this Indian Reserve . . . and is entirely clear of it. The sketch on the back of his application to pre-empt is correct and covers vacant Crown Land.[58]

For his part, Agent McDonald said he was "well aware" the graveyard was outside the reserve. Two or three years earlier he had taken the matter up with Indian Affairs through Indian Superintendent Vowell's office, but at that time the province was opposed to extending the reserve. Agent McDonald expected Mr. Thompson to "make over to the Indians that portion on which the graveyard is situate. . . ." On the other hand, he was surprised to hear the school was on the pre-emption claim.[59] As a solution Agent McDonald suggested an arrangement with the province "to exclude five or ten acres from Mr. Thompson's pre-emption."[60]

J.D. McLean, the Assistant Deputy and Secretary of the Department of Indian Affairs, wrote Deputy Commissioner Renwick on December 1, 1910, supplying reasons why the pre-emption should be cancelled:

> [T]he pre-emption . . . has been granted by your Department evidently without knowledge of the fact that an expensive schoolhouse had been built on the land and that a large Indian graveyard was also situated on it, although Mr. Thompson appears to have ascertained their positions before making his application. Under these circumstances . . . it would appear to be just that the said preemption should be cancelled and that this Department should be given the opportunity of acquiring for the Indians the land on which this school building and graveyard are situated.[61]

It is not known whether Deputy Commissioner Renwick received this letter before he rejected the Dickie and DeBeck protest as follows:

58 E.B. McKay to Deputy Commissioner of Lands, November 23, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 138).

59 McDonald to Rev. A.W. Green, Inspector of Schools, November 29, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, p. 139).

60 McDonald to Secretary, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

61 J.D. McLean to Charles Renwick, Deputy Commissioner of Lands, December 1, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 142).

> As indicated on the application and as shown on the official plans of this Department this preemption does not encroach in any manner upon the Church House Indian Reserve, and in the opinion of this Department, the record is properly issued.[62]

Dickie and DeBeck responded that the basis of their protest was "not that the land was part of the Indian Reserve, but that it was not unoccupied land as mentioned in the Act" and that "at the time Mr. Thompson made his application, he knew every detail in connection with the occupation by the Indians."[63]

Province Threatens to Cancel Pre-emption, 1911

Early in 1911, citing an urgent petition from the Band, Indian Affairs again pressed the Lands Department to inquire into the matter.[64] The Inspector of Indian Agencies observed: "If the pre-emption can be stopped it will no doubt have the effect of pacifying the Indians. . . ."[65]

The provincial Deputy Minister of Lands wrote Thompson threatening to cancel the pre-emption:

> [Y]ou misled this Department and apparently have made a false declaration in so far as you have declared that the lands embraced within said record form no part of an Indian settlement and are unoccupied lands of the Crown. . . . [T]he said Record includes a school house built by the Indians of the Homalco Band at an expense of $4000.00, and also that the said record includes two Indian burial grounds. The Minister has now under consideration the cancellation of the record held by you or the amendment of the same so as to exclude the lands on which the school house stands, as well as the lands occupied as burial grounds. Before dealing with the matter finally the Minister will be pleased to have your explanation for your misleading statement . . .[66]

On the same day, the Deputy Minister also assured Chief Harry that "no person will be allowed to acquire title to the lands occupied by the School house or the Cemeteries." His letter included a tracing upon which, subject to survey, was indicated the section he proposed to have eliminated from the

62 Renwick to Dickie & DeBeck, December 7, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 143).
63 Dickie & DeBeck to Chief Commissioner of Lands, December 14, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 144).
64 McLean to Renwick, January 20, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 145-46).
65 W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Indian Affairs, February 4, 1911, NA, RG 10, vol. 1312 (ICC Documents, p. 153).
66 Deputy Minister, Lands, to Thompson, c/o Government Agent, Cumberland, BC, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 158).

pre-emption.[67] Deputy Minister Renwick wrote to the Secretary, Indian Affairs, requesting that Indian Affairs complete the survey and informing him that "the Minister [of Lands] cannot recognize [the Indians'] claim to any more lands than is actually covered by the site of the school house and the graveyard."[68]

Thompson responded to the Deputy Minister's demand for an explanation as follows:

> I have not knowingly made any false statement . . . the way I understand it, is, that I have taken up no land belonging to the Indians. I put my post alongside of the Indian Reserve post marked I.R. 1888 which was shown me by an Indian he also showed me the line of the Indian Reserve. In regards to the School House and graveyard (proper) I did not intend to interfere with that, but to let that matter for the Government to settle, after the land had been surveyed. I have sent you a copy of a letter from the Indian Agent to the Chief of this band, at that time, which will show you, that the Indians were refused this same land for any purpose, they afterwards built their School, knowing they were off the Reserve. The fact of the Schoolhouse and graveyard being part of an Indian settlement I did not look at it in that light. . . .[69]

He asked the Deputy Minister to "send a surveyor as soon as you can," pleading:

> In the position I am in I am not able to do anything and expect every time I go to clear a piece of land to find another grave, they have already taken about one acre more to enlarge their graveyard after knowing that I have a record for the land and I do not know what they will take next. . . .[70]

On receiving Thompson's explanation, the Deputy Minister informed him that a survey was about to be made to exclude the schoolhouse and burying grounds from the pre-emption. If Thompson would not agree to this amendment, "the Department will have no other course open than to cancel your record in its entirety."[71]

As soon as Thompson saw the plan Chief Harry had received from the Deputy Minister, he protested to the Deputy Minister that the Indians would get 40 acres from the pre-emption which would "take in all the best of the

67 Deputy Minister, Lands, to George Harry, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 159-61).
68 Deputy Minister, Lands, to Secretary, Indian Affairs, May 17, 1911, DIAND, Region E5673-552 (ICC Documents, p. 162).
69 Thompson to Deputy Minister, Lands, May 25, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 163).
70 Ibid.
71 Deputy Minister, Lands, to Thompson, June 12, 1911, BC, Lands, Roll, 2236 (ICC Documents, p. 164).

land, including the whole waterfront, and the land on which I have built my house."[72]

Survey for Indian Reserve, 1912

The Homalco were so unhappy with their teacher and his attempts to pre-empt the land adjoining their reserve that they withdrew their children from the school, seized school supplies, threatened Thompson, and interfered with the survey attempted late in 1911.[73] Evidently, the surveyor's instructions from Indian Affairs were to survey less land than appeared to have been suggested by the Department of Lands in the tracing sent to the Chief.[74] The Homalco wanted the "whole strip of 10 x 40 chains." W.E. Ditchburn, Inspector of Indian Agencies, recommended instead that a piece of land, "10 chains wide and 30 chains deep," be surveyed. He concluded this would do "no particular injustice" to Mr. Thompson, who "if he is not prepared to accept the pre-emption as finally surveyed . . . need not take it up."[75] Accordingly, Henry Rhodes, British Columbia Land Surveyor, ran survey lines for a "New Indian Reserve" in February 1912.[76]

After April 1, 1912, Thompson's employment as a teacher was terminated. However, trouble continued. He refused to move out of a house he had built some years earlier on the land surveyed by Mr Rhodes and he agitated to have the foreshore remain part of his pre-emption.[77] For Indian Affairs, Special Commissioner J.A.J. McKenna reported, in August 1912, that the Minister of Lands had agreed to eliminate from Mr. Thompson's pre-emption the Indian schoolhouse and the two graveyards. He noted that, according to the plan furnished by the Deputy Minister of Lands to the Homalco, the whole of the waterfront would have been taken from Mr. Thompson's pre-emption, but "on representations subsequently made by Mr. Thompson, it was

72 Thompson to Deputy Minister, Lands, October 28, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 173).

73 Agent Peter Byrne to A.W. Green, Inspector of Schools, November 25, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 175); Byrne to Secretary, December 12, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 180-82); Byrne to Thompson, January 4, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 184); Byrne to Secretary, January 8, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 185-86); Henry Rhodes, Field Diary, December 14, 1911, BC, Ministry of Environment, Lands and Parks, Surveyor General's Branch (ICC Documents, p. 207).

74 Byrne to W.E. Ditchburn, Inspector of Indian Agencies, January 12, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 190-92).

75 Ditchburn to Secretary, Indian Affairs, January 19, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp. 193-95).

76 CLSR, Rhodes, Field Book BC 259 (ICC Documents, pp. 204-06); Plan TBC 132 "Aupe Indian Reserve," Indian Affairs Survey Record (ICC Documents, p. 203).

77 Byrne to Secretary, Indian Affairs, July 11, 1912, NA, RG 10, vol. 1476, mfm C-14276 (ICC Documents, p. 229); Ditchburn to Renwick, August 1, 1912, BC, Lands, Roll 2236 (ICC Documents, pp. 234-37).

arranged that a portion of the water-front should remain as part of his pre-emption, and a survey of the amended addition has been made by the Department of Indian Affairs. . . ." He wrote Deputy Minister Renwick about this, concluding: "I shall be pleased to hear that the land has been eliminated from the pre-emption and added to the Reserve."[78]

But Deputy Minister Renwick had no intention of adding this land to the reserve at that time because, for the previous few years, the province had had a policy of not allowing any public lands to be made into Indian Reserves.[79] He therefore instructed the Surveyor General merely to eliminate the land from the pre-emption, if Rhodes's survey was satisfactory.[80] Thompson was asked to return his pre-emption record so the amendment excluding the parcel of land (10 by 30 chains) could be made.[81]

A month later, in September 1912, representatives of Canada and British Columbia entered into an agreement whereby the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna/McBride Royal Commission) was established to adjust the acreage of Indian reserves in the province.[82]

Thompson never did return his pre-emption record for amendment. The school burned to the ground on February 25, 1913.[83] Thompson opposed the reconstruction of the school on the old site and appealed to the Royal Commission in November 1913.[84] Although the Royal Commission considered the subject of Thompson's protest beyond the scope of its authority, it was drawn into the dispute.[85]

Royal Commission Report and Death of William Thompson, 1914-15

After some investigation the Royal Commission advised the Provincial Secretary of British Columbia, in January 1914, that it had "specified" a 30-acre (more or less) tract of land, "subtracted from the pre-emption of Wm.

78 McKenna to Renwick, August 10, 1912, BC, Lands, Roll 2236 (ICC Documents, pp. 238-39).
79 Ditchburn to Byrne, August 31, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp. 246-47).
80 Renwick to Surveyor General, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 242).
81 Deputy Minister, Lands, to Thompson, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 243).
82 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, p. 253).
83 Agent Peter Byrne to Secretary, Indian Affairs, March 19, 1913, NA, RG 10, vol. 1477, mfm C-14276 (ICC Documents, p. 260).
84 Copy of Thompson to Byrne, November 4, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 277).
85 J.G.H. Bergeron, Secretary, Royal Commission, to Thompson, November 8, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 279); J.D. McLean, Secretary, Indian Affairs, to Bergeron, November 20, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, pp. 281-82).

Thompson," as land which should be reserved for the Homalco "as an addition of the Aupe Indian Reserve No. 6."[86] At about the same time, a notice appeared in the *British Columbia Gazette* listing the lands surveyed by Mr. Rhodes as "Lot 430, Coast District, Range 1." Persons considering their rights adversely affected were requested in the notice to state their contention to the Minister of Lands within 60 days.[87]

In February 1914, Deputy Minister Renwick finally followed up on his 1912 letter to Thompson instructing him to return the pre-emption record for amendment: "I do not find that you have complied . . . unless you do so forthwith your Pre-emption Record will be cancelled."[88] Thompson steadfastly refused, suggesting that an even smaller amount be subtracted from the 160 acres:

> I am well satisfied that by taking 15 or 20 x 10 chains, for School House and Grave Yard, would be satisfactory both to me, and the Indians, which would leave me with my improvements, and the Post Office, where I am, without doing any injustice to anyone.
>
> . . . Please send a surveyor, and have the land surveyed, that I may know what is left me out of the 160 acres, called for in Preemption Record No. 2851.
>
> Please hurry up before the Indian Department finds any more old graves. The woods are full of them.[89]

Although Deputy Minister Renwick did not receive the pre-emption record, he did remind Thompson later that month that "it has been decided to eliminate a parcel measuring 10 x 30 chains as surveyed on the ground by Mr. Rhodes." He advised Thompson to "govern yourself accordingly."[90]

In a letter to the Royal Commission, Deputy Minister Renwick summarized the status of the approximately 30 acres as follows:

> An addition to Aupe Reserve No. 6. Graves and schoolhouse. This parcel of land has been surveyed and is known as Lot No. 430, Range 1, Coast District, consisting of 29.7 acres. The disposition of the same will be held pending the decision of the Commission.[91]

86 Secretary, Royal Commission, to H.E. Young, Provincial Secretary, January 23, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, pp. 289-90).
87 G.H. Dawson, Surveyor General, *British Columbia Gazette*, January 29, 1914 (ICC Documents, p. 292).
88 Deputy Minister, Lands, to Thompson, February 3, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 297).
89 Thompson to Deputy Minister, Lands, February 10, 1914, BC, Lands, Roll 2236 (ICC Documents, pp. 299-300).
90 Deputy Minister, Lands, to Thompson, February 20, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 301).
91 Deputy Minister, Lands, to J.G.H. Bergeron, Secretary, Royal Commission, April 21, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 307).

Commissioners from the Royal Commission visited Church House, where Chief Harry explained why the Homalco should have the land that Thompson refused to give up. Outlining events since 1909, the Chief appealed to the Commission to order Thompson off the land. "Furthermore," the Chief said, "we think that we are entitled to some payment from him." The Homalco wanted $300 rent for the schoolhouse from the time the Thompsons set up the post office and store.[92]

While the province was awaiting a ruling from the Royal Commission on the affair, William Thompson died. His wife wrote Deputy Minister Renwick: "my husband died on . . . 21st of June . . . I am left everything . . . his preemption No. 2851 should pass to my name. . . ."[93] Only three months before his death, William Thompson had anxiously reminded the Deputy Minister of the imminent expiry of his right to pre-empt the land:

> you know that my Preemption Record No. 2851, runs only to the 13th of April, 1915. Something must be done, I will do all I can to comply with the Law, if you will give me your instructions.[94]

If any special steps were taken by the province to deal with the April 13, 1915, expiry, they are not evident from the available record. It appears Deputy Minister Renwick simply reminded Emma Thompson that his Department would have to receive a survey of the pre-emption arranged by her (or her late husband) showing the exclusion of the 10-by-30-chain parcel of land before it could settle the case.[95]

Interim Report No. 84, issued by the Royal Commission on August 12, 1915, resolved that close to 30 acres be eliminated from Thompson's 160 acres:

> . . . a parcel of land containing an area of twenty-nine and seven one hundredths [later corrected to "tenths"] (29.7) acres, which has been subtracted by the Department of Lands . . . from Preemption Record No. 2851 . . . be constituted a

92 Chief George Harry, February 23, 1915, Royal Commission, Transcript of Proceedings, pp. 310-22 (ICC Documents, pp. 320-34).
93 Mrs. Thompson to Deputy Minister, Lands, July 3, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 337).
94 Thompson to Deputy Minister, Lands, March 17, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 335).
95 Deputy Minister, Lands, to Mrs. Thompson, July 10, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 338).

> Reserve for the use and purposes of the Indians of the said Homalco Tribe, of the New Westminster Agency.[96]

Mrs. Thompson's immediate reaction was to start building a house on the disputed property. Indian Agent Byrne urged her "not to invite the ill will of the Indians living on the Aupe Reserve, by doing anything on the land in dispute until the question of title is settled."[97] He urged Chief George Harry to advise his people not to take "the law into their own hands."[98]

Canada Recommends 29.7 Acres for Indian Reserve, 1916

By Order in Council PC 388, February 22, 1916, the federal government recommended that close to 30 acres become available to the Band:

> 29.7 acres, which have been subtracted by the Department of Lands of the province of British Columbia, at the request of the Commission, from pre-emption record No. 2851 issued in the name of William Thompson ... be constituted as an Indian Reserve for the ... Homalco tribe ... upon the consent of the Lieutenant Governor of the said province ...[99]

As required under the agreement setting up the Royal Commission, the federal government turned the matter over to the province.

In forwarding the Order in Council to Premier W.J. Bowser, the Deputy Superintendent General of Indian Affairs pointed out that Thompson's widow not only remained on the subject land but had been building on it. He called for "early action" to terminate this "unsatisfactory condition" and requested "a concurrent Order in Council" so Indian Affairs could deal with the matter.[100]

While Mrs. Thompson exhibited what Indian Agent Byrne described as a "defiant attitude towards the Governments," the province of British Columbia

96 Minutes of Proceedings, August 12, 1915, Royal Commission, Book of Proceedings, 1914-1915, vol. 2 (March 23, 1914 - December 30, 1915), DIAND, Indian Lands Registry, (ICC Documents, pp. 838 and 340-42); Royal Commission, Report, August 12, 1915, DIAND, Region, E5673-552 (ICC Documents, p. 339); McLean, Indian Affairs, to Gibbons, Royal Commission, January 11, 1916, NA, RG 10, vol. 4063, file 406,521, pt. 2, mfm C-10182 (ICC Documents, p. 352).

97 Byrne to Mrs. Thompson, September 15, 1915, NA, RG 10, vol. 1482 (ICC Documents, p. 347).

98 Byrne to Chief Harry, September 15, 1915, NA, RG 10, vol. 1482 (ICC Documents, p. 348).

99 Order in Council PC 388, February 22, 1916, Governor General in Council, Privy Council Office, BCARS, GR 672, box 2, file 35 (ICC Documents, pp. 359-60).

100 D.C. Scott, Indian Affairs, to W.J. Bowser, Premier, BC, February 24, 1916, DIAND, Region E5673-552 (ICC Documents, pp. 361-62).

proved almost as intransigent as the Thompsons.[101] It never issued a matching Order in Council to make the 29.7 acres reserve land.

Province Recommends 20 Acres for Indian Reserve, 1917

On February 14, 1917, the province accepted a second payment of $40 on the lands described by Pre-emption Record No. 2851, land being purchased by "Wm. Thompson."[102] In the spring, Mrs. Thompson asked the Department of Lands to survey the 160 acres as soon as possible because her "brother-in-law and his sons [were] anxious to begin clearing the land for agricultural purposes . . ."[103]

A new Deputy Minister of Lands, G.R. Naden, reported in May 1917 that the matter was still unresolved:

> Mr. Thompson refused to return his record for [amendment], and so far the elimination [of 29.7 acres] has not been actually made, although the survey of the parcel has been gazetted . . . [104]

He felt "there is nothing further to be done" other than to cut off the 10-by-30-chain portion, "the survey of the Thompson pre-emption to be confined to the remaining ground covered by his record."[105] Mrs. Thompson was so advised and told to make arrangements with a "duly authorized surveyor" whom she was to have contact the Department of Lands for instructions.[106] Before this could occur, however, Chief Forester W. Ross Flumerfelt undertook further investigations for the province.

Flumerfelt's September 1917 report was favourable to Mrs. Thompson's position, even though she said little to Flumerfelt and lacked the documents to back up her case. Flumerfelt cast doubt on "the Indians' story," writing that "their statements are not to be relied upon." He recommended that the boundary be just south of the large graveyard, partly because the question of the small graveyard further south is "dubious." If the Indians were unwilling to move their graves or to have access to the small graveyard only by water,

101 Byrne to Chief Harry, March 24, 1916, NA, RG 10, vol. 1483 (ICC Documents, p. 365).
102 Certificate of Purchase, February 14, 1917, signed by J. Mahony, Government Agent, BC, Lands, Roll 2236 (ICC Documents, p. 375).
103 Mrs. Thompson to T.D. Pattullo, Minister of Lands, April 24, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 377).
104 G.R. Naden, Deputy Minister, Lands, to Pattullo, Minister, Lands, May 23, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 383-87).
105 Ibid.
106 Deputy Minister, Lands, to Mrs. Thompson, June 13, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 388).

as Mrs. Thompson suggested, then Flumerfelt thought the small graveyard "should be disregarded."[107]

On December 4, 1917, Deputy Minister of Lands Naden advised Indian Affairs and Mrs. Thompson that the "final settlement" would be to eliminate 20 acres:

> it has been decided to reduce the area in the said Lot 430 by shortening the North and South boundaries thereof to 20 chains, thus eliminating from the preemption a parcel measuring 10 x 20 chains, the south boundary of which will run approximately between your dwelling and the larger Indian burial ground.
>
> . . . The above decision will leave your store building and other improvements on the lands to be allotted in the Preemption Record and eliminate the same from the parcel claimed by the Indians. In addition the small burial ground lying further south will be surveyed separately and also eliminated from the preemption . . .
>
> It must be understood that this is a final settlement of the difficulty and the surveys on the ground must be carried out accordingly.[108]

This was how the province reconciled itself to the elimination of acreage from the Thompson pre-emption.

Reaction to 20-Acre Settlement, 1918-22

The Lands Department's December 4, 1917, letter conveying its "final" 20-acre solution prompted Mrs. Thompson to forward a sketch showing "all I can spare" which, of course, was a still smaller area.[109] The Chief Inspector of Indian Agencies accepted the outcome:

> [T]he arrangement arrived at early in the month of December is quite satisfactory, and it is now understood that the addition to this reserve shall consist of a portion measuring ten chains in width along the northerly limit of the said reserve and twenty chains in depth, also a small lot to the south on the shore line of the Inlet to include the small Indian cemetery.[110]

Mrs. Thompson's attempts to have the final decision overturned revealed that she intended to utilize timber on the land. She complained that the 10-by-20-

107 Flumerfelt, Report, c. September 5, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 394-400).

108 Deputy Minister, Lands, to Mrs. Thompson, December 4, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 409-10).

109 Mrs. Thompson to Deputy Minister, Lands, January 15, 1918, BC, Lands, Roll 2236 (ICC Documents, pp. 414-15).

110 Ditchburn, Indian Affairs, to Nadon, Deputy Minister, Lands, February 1, 1918, and Ditchburn to Secretary, Indian Affairs, January 19, 1918, BC, Lands, Roll 2236 (ICC Documents, pp. 416-18).

chain area would block "the only right of way to the back of the Claim."[111] She begged for a survey as soon as possible to allow her to dispose of timber.[112]

A survey of the pre-emption and future reserve lands – Lot 1835 adjoining Aupe 6 and Lot 1836 for the small graveyard – was completed September 24, 1918.[113] Mrs. Thompson refused to sign the required approval forms. She returned the plan to the surveyor, indicating on it "the only way I would be willing to surrender the so called Indian Settlement." She wanted it understood that

> the small grave yard (or lot 1836) will be return [sic] to Pre-empt. Record 2851 as soon as arrangement can be made to remove the bodies to where they should be in the main Grave yard.[114]

Nevertheless, Lots 1834, 1835, and 1836 were gazetted together on June 19, 1919.[115]

In 1922 Mrs. Thompson finally took steps to clear up the balance owing on Pre-emption Record 2851. Previous to this, she had been ignoring requests to complete the payment on Lot 1835.[116] In November 1922 her lawyers forwarded all but $6.25 of the balance owing. This gesture was because Mrs. Thompson was "holding out" for a grant of one and a half chains "of her garden." She thought this would "not be objectionable to the Indians."[117] The province refused to reopen the matter, however, and full payment was recorded on November 29, 1922.[118] The completed certificate of purchase shows a total of $180.20, including interest, received on Pre-emption Record No. 2851 for 145 acres.[119]

111 Mrs. Thompson to Surveyor General, BC, June 23, 1918, BC, Lands, Roll 2236 (ICC Documents, p. 422).
112 Mrs. Thompson to Surveyor General, BC, July 3, 1918, BC, Lands, Roll 2236 (ICC Documents, p. 424).
113 H.H. Roberts, BCLS, Field Notes, September 24, 1918, and Affidavit, November 8, 1918, BC, Ministry of Environment, Surveyor General's Branch (ICC Documents, pp. 429-32).
114 Mrs. Thompson to H.H. Roberts, January 10, 1919, BC, Lands, Roll 2236 (ICC Documents, p. 433).
115 J.E. Umbach, Surveyor General, *British Columbia Gazette*, June 19, 1919, p. 1981 (ICC Documents, p. 439).
116 Government Agent, Lands, to Superintendent of Lands, June 13, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 460).
117 O'Brian & McLorg to Government Agent, Lands, November 28, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 471).
118 Superintendent of Lands to Government Agent, Lands, December 9, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 473).
119 Certificate of Purchase No. 640, signed by J. Mahony for Lands, December 14, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 474).

Indian Reserve 6A and Thompson Grant, 1924

Provincial Order in Council 911, July 26, 1923, amended the acreage for Aupe IR 6A from the Royal Commission's original suggested acreage of 29.7 acres to a final figure of 20.08 acres.[120] Canada passed reciprocal Order in Council 1265, July 21, 1924, approving 20.08 acres.[121] The figure 20.08 acres for Aupe IR 6A represents the 10-by-20-chain area adjoining Aupe IR 6 plus the separate small cemetery containing 0.08 acres.[122]

On October 1, 1924, Emma Thompson acquired title to the 145 acres in Lot 1835 by Crown Grant No. 2759/498.[123] The 145 acres represented 91 percent of the 160 acres which William Thompson originally applied for in 1910.[124]

120 Schedule of New Reserves, Ditchburn-Clark, BC Order in Council 911, July 26, 1923, p. 48 (ICC Documents, p. 476).

121 Canada Order in Council 1265, July 21, 1924.

122 W.J. McGregor, Land Administration Officer, to Chief Wilson Ambrose, Church House, September 22, 1972, DIAND, Region E5673-552 (ICC Documents, pp. 509-10).

123 BC, Land Act, Grant No. 2759/478 (ICC Documents, pp. 494-95).

124 The percentage is rounded from 90.625 percent.

PART IV

ISSUES

The overall question which this Commission has been asked to inquire into and report on is whether Canada properly rejected the claim of the Homalco Indian Band. In other words, does Canada have an outstanding lawful obligation, as set out in *Outstanding Business*, to the Band? To facilitate the Commission's review of this matter, counsel for the Band and Canada attempted to agree on a list of the specific issues relevant to this inquiry. Unfortunately, they were unable to agree on how the issues should be framed. The statement of issues suggested by counsel for each party is attached to this report as Appendix B.

Although we appreciate the work of both counsel, we prefer to state the issues as follows:

1 Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

2 Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

3 Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

PART V

ANALYSIS

ISSUE 1

Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

Much of the controversy surrounding the original allotment of Aupe IR 6 arises from the inconsistencies between the various sketches and written descriptions of the reserve and from the inconsistencies in Commissioner O'Reilly's Minute of Decision itself.

The Band submits that Commissioner O'Reilly's Minute of Decision of August 10, 1888, was the legal instrument which allotted the Aupe No. 6 reserve. By that Minute of Decision, Aupe No. 6 was to comprise 25 acres; the description of 25 acres was determinative. In other words, any inconsistencies in the Minute of Decision between the acreage description and the metes-and-bounds description were governed by the former. The Band maintains that the Minute of Decision was approved by both the Deputy Superintendent General of Indian Affairs and the Chief Commissioner of Lands and Works of British Columbia in January 1889. It argues that Mr. Skinner's subsequent 14-acre survey plan was tantamount to a wrongful alienation of 11 acres from Aupe IR 6.

Canada submits that the reference to "twenty-five (25) acres" in Commissioner O'Reilly's Minute of Decision was not the determining factor in defining the size of the proposed reserve. Rather, the determining factor was the metes-and-bounds description which was also contained within the Minute of Decision. Canada supports its conclusion by analogy to caselaw dealing with the interpretation of descriptions in deeds or grants. Canada maintains that, since Mr. Skinner followed the metes-and-bounds description, his survey of 14 acres for Aupe IR 6 accurately defined the size of the reserve. In any event, Canada argues that Commissioner O'Reilly's Minute of

Decision did not, itself, create Aupe IR 6. The reserve could not have been "created" until a survey was completed in accordance with the instructions contained in the Minute of Decision and then approved by the Chief Commissioner of Lands and Works for the Province and the Indian Superintendent for the Dominion Government. Canada argues that the reserve was never approved as being 25 acres by both levels of government, as was required by the legislation empowering Commissioner O'Reilly. As a result, a reserve was never established of that acreage, and there was consequently no alienation, unlawful or otherwise, of 11 acres.

TABLE 1

AREAS OF RESERVES ALLOTTED BY O'REILLY FOR THE SLIAMMON, KLAHOOSE, AND HOMALCO BANDS, AUGUST 2 TO 12, 1888, IN ACRES

Reserve	Estimated area according to Minute of Decision	Area by Survey
	Sliammon Band August 6, 1888	
Sliammon 1	1930.00	1924.50
Harwood Island 2	2075.00	2095.00
Paukeanum 3	200.00	200.00
Tokwana 4	430.00	395.50
Tokenatch 5	50.00	53.00
Kahkaykay 6	36.00	45.00
	Klahoose Band August 12, 1888	
Klahoose 1	2395.00	2280.00
Quaniwsom 2	1.50	0.75
Salmon Bay 3	200.00	200.00
Siakin 4	8.00	7.00
Deep Valley 5	70.00	61.00
Quequa 6	6.00	4.00
Tork 7	650.00	698.00
Squirrel Cove 8	43.00	39.00
Ahpokum 9	70.00	62.00
	Homalko Band August 10, 1888	
Homalko 1	1100.00	710.80
Homalko 2	32.00	9.50
Potato Point 3	0.50	0.40
Orford Bay 4	680.00	671.30
Mushkin 5	10.00	10.50
Aupe 6	25.00	14.00

Source: Blair Smith, Manager, Survey Program, Energy Mines and Resources Canada, to Sarah Kelleher, Counsel, Specific Claims West, April 11, 1995 (ICC Exhibit 3).

To determine the true quantity of land allotted by Commissioner O'Reilly, the appropriate approach in our view is to focus on the intentions of the parties at the time of the allotment rather than on technical rules of interpretation. In other words, what land did Commissioner O'Reilly intend to set apart for the Homalco people? And what land did the Homalco people expect to receive?

In taking this approach, we agree with Canada that the acreage description in the Minute of Decision is not *necessarily* determinative of the size of the reserve. During his trip in August 1888, in addition to Aupe No. 6, Commissioner O'Reilly allotted a number of other reserves for the Sliammon, Klahoose, and Homalco tribes.[125] It appears that the acreage quoted by Commissioner O'Reilly for these reserves typically did not accord with their metes-and-bounds descriptions. This is amply illustrated in Table 1, which Blair Smith provided in his second report.

As Table 1 demonstrates, the actual area by survey was sometimes more and sometimes less than the area described by Commissioner O'Reilly. Given the frequent discrepancy between the acreage and the metes-and-bounds descriptions in Commissioner O'Reilly's Minutes of Decision, it seems reasonable to assume that his mention of 25 acres with respect to Aupe No. 6 was only an estimate of the actual quantity of land allotted. We accept that Commissioner O'Reilly likely could not have stated with absolute certainty the acreage of the reserve until after the survey was completed.

Although we agree that the acreage description does not, by itself, determine the size of the reserve, we find it difficult to accept Canada's narrow argument that the metes-and-bounds description must always govern. We take this position for two reasons. First, it is unlikely that the Homalco people held a complete understanding of European land measurement. This is reflected in notes kept by Surveyor Green during Commissioner O'Reilly's visit with the Homalco at Orford Bay. He recorded as follows:

> Homalco Indians
> Orford Bay Aug 8th, 1888
>
> *William Chief*. . . . I am Chief of all the tribes, Klahoose, Sliammon and Homalco. There are 35 males here now. Our potatoes are a mile up the river. I am sorry my land is not surveyed. That's why I am glad to see you. I want a large piece as we

125 P. O'Reilly to the Superintendent General of Indian Affairs, December 8, 1888 (ICC Documents, pp. 34-41).

always stop here. I have plenty of children and if I do not have a large piece they will be poorly off.

I want the mountain base to be my boundary and from a point where I am working to another about (blank) miles north.

I want four miles back from the coast.

Commissioner I intend to give you the good land about your houses, but what is the use of giving you these bare rocks. I don't want to limit you, but I don't think you know what four miles are.[126]

Therefore, it is doubtful that both parties could have intended either a metes-and-bounds or an acreage type of description to be the sole identification of the boundaries of Aupe IR 6. Secondly, Commissioner O'Reilly's Minute of Decision was not a stand-alone document. Sketches and notes were also produced in 1888 to record the intentions of Commissioner O'Reilly and the Homalco people. The descriptions of Aupe IR 6 in the Minute of Decision must be considered in conjunction with this other evidence.

Sketches of Aupe IR 6

We turn first, then, to the sketches. Surveyor Green produced a sketch of the proposed reserve on August 9, 1888, as shown in Figure A. Commissioner O'Reilly also prepared a sketch of the area in question which accompanied his Minute of Decision dated August 10, 1888. It is reproduced here as Figure B. Finally, for purposes of comparison, Figure C shows Mr. Skinner's survey plan which ultimately left Aupe IR 6 with 14 acres. Mr. Smith indicates in his reports that Mr. Skinner surveyed the reserve precisely as described by the metes-and-bounds description in the Minute of Decision, starting from the fir tree marked by Commissioner O'Reilly (located in the bottom right-hand corner of the survey sketch).[127]

Green's Sketch

Mr. Green's sketch (Figure A) depicts the westerly boundary of the reserve as rectilinear and clearly shows the length of the north boundary as 20 chains. If we compare Mr. Green's sketch with Mr. Skinner's survey plan (Figure C), a discrepancy is immediately apparent. Not only do they differ geographically,

126 Reproduced in Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada, to Sarah Kelleher, Counsel, Specific Claims West, April 11, 1995, p. 9 (ICC Exhibit 3).

127 Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada, to Sarah Kelleher, Counsel, Specific Claims West, December 6, 1994 (ICC Exhibit 2); Blair Smith to Sarah Kelleher, April 11, 1995 (ICC Exhibit 3).

the north boundary on Mr. Skinner's survey plan is substantially less than 20 chains. The contrast is more clearly seen if we take Mr. Green's sketch, rotate it and then overlay it on Mr. Skinner's survey plan as shown in Figure D.

There are at least four possible explanations for the discrepancy between Mr. Green's sketch and Mr. Skinner's survey plan:

1) Mr. Green mistook the location of north.

2) Mr. Green misjudged the shape of the seashore. More specifically, he presumed that the configuration of the seashore was such that the north boundary could be 20 chains in length, whereas, in reality, the north boundary intersected the seashore at 12.4 chains from the northeast corner.[128]

3) When the fir tree was marked signifying the point of commencement for the survey, Commissioner O'Reilly misjudged the point of intersection of the east boundary of the reserve with the shoreline and so chose the wrong starting point for his allotment.[129]

4) When Mr. Skinner surveyed the reserve, he made an error in the calculation of declination (the difference between geomagnetic and true north) resulting in the north/south easterly boundary cutting across the mouth of the creek, rather than being well back of the mouth, as it was in both O'Reilly's sketch (Figure B) and Green's sketch (Figure A). Figure D would then be, in our opinion, a likely representation of the intention of the parties.

At this point in time, over 100 years later, we can only speculate as to why Mr. Skinner's survey diverged so drastically from Mr. Green's sketch of August 9, 1888. We note, however, that concerns were raised about Mr. Skinner's professional qualifications by the President of the Association of Dominion Land Surveyors, which leads us to the fourth explanation outlined above.[130]

128 Blair Smith to Sarah Kelleher, December 6, 1994 (ICC Exhibit 2).
129 Gamble, "Report on Acreage Discrepancy," note 13 above, p. 4 (ICC Exhibit 4).
130 President, Association of Dominion Land Surveyors, to Minister of the Interior and Superintendent General of Indian Affairs, March 27, 1889, in ibid., tab 9 (ICC Exhibit 4).

Figure A Green's sketch of August 9, 1888

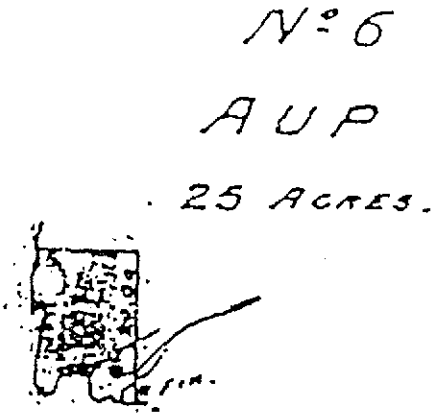


Figure B Sketch accompanying O'Reilly Minute of Decision dated August 10, 1888

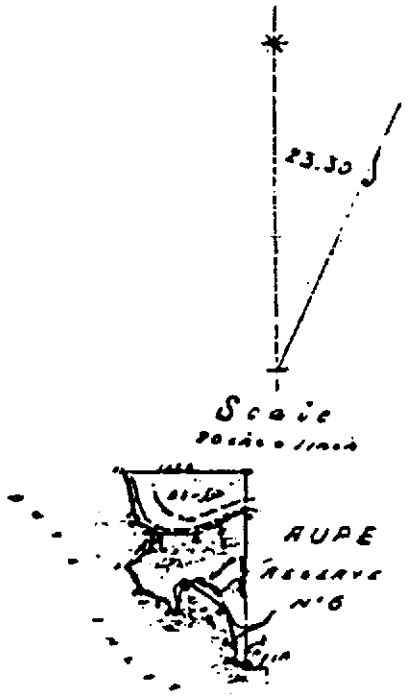


Figure C Skinner's survey of November 1 and 2, 1888

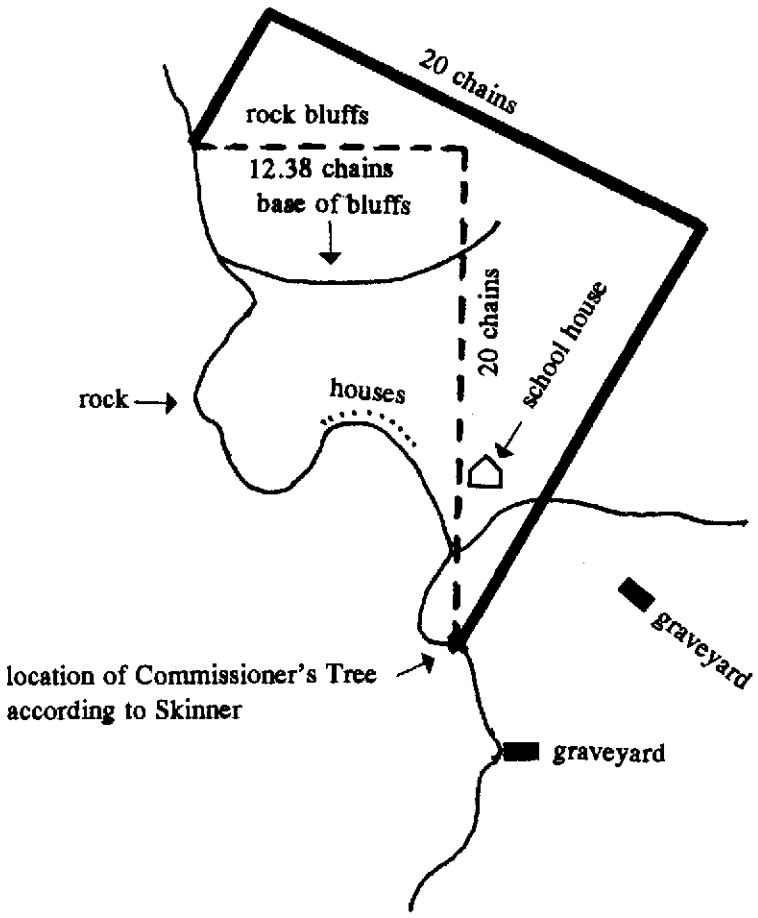


Figure D Sketch plan showing physical features of Aupe IR 6 in August 1888, overlaid with sketch plans of Skinner's survey and Green's Sketch.

Sketch plan: Green's sketch of August 9, 1888

Sketch plan: Skinner's survey of November 1 and 2, 1888

O'Reilly's Sketch

Commissioner O'Reilly's sketch (Figure B) provides another contrast to Mr. Green's sketch of August 9, 1888 (Figure A). The north boundary on Commissioner O'Reilly's sketch is of unspecified length. However, the east boundary is clearly identified as being 20 chains. In addition, the westerly boundary appears to include the coastline instead of a rectilinear boundary. We have no evidence that Commissioner O'Reilly ever compared his sketch with that of Mr. Green before sending it to Mr. Skinner along with instructions to carry out the survey of the Homalco reserves. Furthermore, it appears that Commissioner O'Reilly did not send Mr. Green's sketch to Mr. Skinner along with his surveying instructions. What remains abundantly clear is that Mr. Skinner's ultimate survey plan does not visually correspond to either Commissioner O'Reilly's or Mr. Green's sketch. It should be noted that both Mr. Green's sketch and Mr. O'Reilly's sketch show the north/south easterly boundary as well back of the mouth of the creek. They were both present at the time the agreement was entered into with Chief Timothy and the Homalco.

Other Documents

Given the discrepancies between the sketches, they provide inconclusive evidence of the intentions of the parties as to the boundaries of Aupe IR 6. Hence, we must turn to other documents.

In addition to his sketch, Mr. Green made the following notes on August 9, 1888:

> 10 houses
> Winter Village
> Near Bartlett Island
> Nothing but the houses. No land.
> Fire wood only[131]

The reference to 10 houses and the firewood is supported by comments made in Commissioner O'Reilly's report to the Superintendent General of Indian Affairs on December 8, 1888:

131 CLSR, Field Book BC 457, in Gamble, "Report on Acreage Discrepancy," note 13 above, tab 5 (ICC Exhibit 4).

> No. 6 Aupe, a well sheltered spot at the entrance to Bute Inlet, near Bartlett Island, upon which ten small houses stand. There is plenty of timber for fuel, in other respects it is valueless. This reserve contains 25 acres.[132]

As discussed above, the reference to 25 acres was likely an estimate. However, it is clear that the intentions of the parties were to set apart enough land for 10 small houses and timber for fuel. The purpose of both the acreage and the metes-and-bounds descriptions was to ensure that the physical features pointed out by Chief Timothy and the Homalco people were included in the reserve. In the end it did not matter whether the reserve was of 25 acres or as described by metes and bounds; what counted was that the land that the parties agreed to was included in the final survey. This could have been 25 acres, it could have been more, or it could have been less. We would note that from our visit to Aupe IR 6 on April 18, 1995, it is unlikely that the reserve as surveyed represented the wishes of the Homalco, in that Skinner's survey includes a large piece of unusable rockface that they were unlikely to have requested and that would have been useless for "timber for fuel."

From the subsequent actions of the Homalco, one could argue that they intended the reserve boundaries to encompass at least the area of the future schoolhouse. There is considerable evidence that they believed this building was on reserve until Mr. Thompson applied to pre-empt the land upon which it was situated.[133]

Whether this understanding of the reserve boundaries accorded with that of Commissioner O'Reilly is difficult to say. We do not agree that Commissioner O'Reilly's approval of Mr. Skinner's survey plan inevitably leads to the conclusion that his agreement with the Homalco people on August 9-10, 1888, pertained to only 14 acres of land. The best evidence that we have as to O'Reilly's intentions is his own sketch, which, as we pointed out above, shows the north/south easterly boundary well back of the mouth of the creek. If this had been the boundary as surveyed by Mr. Skinner, the schoolhouse clearly would have been on the reserve, as can be seen from

132 P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

133 A.S. Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); R.C. McDonald, Indian Agent, to Secretary, Department of Indian Affairs, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41); J.D. McLean, Secretary, to Charles Renwick, Deputy Commissioner, Lands Department, January 20, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 145-46). The Band was not alone in its belief that the school was on reserve land. There is evidence that departmental officials held the same belief; see, for example, A.S. Green to J.D. McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37).

Figure D above. It is unclear whether he was aware of the discrepancy between the acreage description in the Minute of Decision and the acreage shown on the survey plan. Following the production of these two documents, there should have been a chain of events which provided answers as to the land that Aupe IR 6 was meant to include. Instead, the unprofessional conduct of those involved has insured that there are now more questions than answers.

Mr. Skinner surveyed the land, but his survey did not turn out to be 25 acres and it did not resemble Commissioner O'Reilly's sketch. Realizing that there was a discrepancy, Mr. Skinner should have notified Commissioner O'Reilly and, logically, there should be some record of the exchange between the two. Furthermore, before Commissioner O'Reilly approved the survey of the reserve, he should have compared Mr. Skinner's survey with his notes and with Mr. Green's sketch. Had he done so, he would have noticed the discrepancy. This ought to have resulted in a fresh survey that would have put the schoolhouse within the boundaries of the reserve.

Actions of Indian Superintendent

Perhaps of equal or greater importance is the lack of recorded action on the part of the Indian Superintendent for British Columbia. It is clear from the Order in Council appointing Commissioner O'Reilly that the Indian Superintendent was meant to play an important supervisory role in the reserve allotment process:

> the Reserve Commissioner . . . should act on his own discretion, in furtherance of the joint suggestions of the Chief Commissioner of Lands & Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established; *and that the action of the Reserve Commissioner should in all cases be subject to confirmation by those Officers;* and that, failing their agreement, any and every question at issue between them should be referred to the Lieutenant Governor, whose decision should be final and binding.[134] [Emphasis added.]

We have found no evidence that the Indian Superintendent ever confirmed the action of Commissioner O'Reilly in relation to Aupe IR 6. It appears that

134 Order in Council, July 19, 1880 (ICC Documents, pp. 21-23). The term "Indian Superintendent" used here is somewhat ambiguous; however, it appears from later correspondence that it meant "Indian Superintendent for British Columbia" (Department of Indian Affairs to Patrick O'Reilly, August 9, 1880 [ICC Documents, pp. 24-28]).

the only document involving the Indian Superintendent was a letter from Commissioner O'Reilly to the Indian Superintendent in March 1893 forwarding tracings of the original plots of reserves finally approved by the Chief Commissioner of Lands and Works.[135]

Canada suggests that the approval required by Canada under the Order in Council was given by Commissioner O'Reilly on May 4, 1891, and the Band submits that it was given by the Deputy Superintendent General of Indian Affairs on January 4, 1889.[136] However, in our view, the approval of neither Commissioner O'Reilly nor the Deputy Superintendent General automatically absolved the Indian Superintendent from also reviewing the action of Commissioner O'Reilly. Indeed, it would be quite incongruous if the Indian Superintendent could completely abdicate to Commissioner O'Reilly his responsibilities in this regard, considering that the latter's actions were the very actions that he was meant to monitor.

While we express no opinion on whether the Indian Superintendent's involvement was essential in every case, we find that, in the circumstances of this case, the Indian Superintendent's failure to fulfil his supervisory obligation as set out in the Order in Council constituted a "breach of an obligation arising out of . . . [a statute] pertaining to Indians [or] the regulations thereunder" within the meaning of Canada's Specific Claims Policy.[137] In this instance there was a large discrepancy between the acreage and the metes-and-bounds descriptions in the Minute of Decision, there was a complaint about Mr. Skinner's qualifications before the final survey plan was complete, and there were discrepancies between Mr. Skinner's survey plan and the sketches prepared by Mr. Green and Commissioner O'Reilly. Particularly when questions were raised about the surveyor's qualifications,

135 P. O'Reilly to A.W. Vowell, Indian Superintendent, March 3, 1893, NA, RG 10, vol. 1278, mfm C-13900 (ICC Documents, p. 59).

136 We have some reservations about whether the Deputy Superintendent General of Indian Affairs, L.J. Vankoughnet, approved the Minutes of Decision on January 4, 1889. Vankoughnet acknowledged receipt of the "minutes of decision and sketches showing the Reserves defined by you for the tribes of Indians inhabiting portions of the North West Coast" (L.J. Vankoughnet to P. O'Reilly, January 4, 188[9] [ICC Exhibit 6]). It is unclear whether this acknowledgement constituted approval of the Minutes.

137 *Outstanding Business*, 20. In our view, the Order in Council appointing Commissioner O'Reilly can be encompassed within the term "statute" or "regulation." R. Dussault and R. Borgeat write that Orders in Council "are granted the same status as statute law before the courts" (*Administrative Law: A Treatise*, 2d ed. [Toronto: Carswell, 1985], 1: 61). In addition, when *Outstanding Business* was published in 1982, the *Interpretation Act* then in force (RSC 1970, c. I-23, s. 2(1)) included Orders in Council within the definition of "regulation." In any event, we note that in its written submission before this Commission, Canada referred to the Order in Council as "the *legislation* empowering O'Reilly" [emphasis added] (Submissions on Behalf of the Government of Canada, March 31, 1995, p. 9). Page 3 of *Outstanding Business* states: "The claims referred to in this booklet deal with specific actions and omissions of government as they relate to . . . requirements spelled out in *legislation* . . ." [emphasis added].

one would expect the Indian Superintendent to have been careful in reviewing the survey plan and in resolving any inconsistencies before confirming the reserve allocation.

It may be argued that the Superintendent General, and not the Indian Superintendent, received O'Reilly's report, Minutes of Decision, sketches, and complaint regarding Mr. Skinner's qualifications; therefore, the Indian Superintendent had no knowledge and no reason for alarm. However, given our understanding of the relationship between the Superintendent General and the Indian Superintendent, we are of the view that the Indian Superintendent had or ought to have had all the relevant information.[138] If the information was not relayed to him, we are left with yet another example of the unprofessional handling of this file. Considering that the Order in Council expressly stated that the actions of Commissioner O'Reilly were subject to confirmation by the Indian Superintendent, the Superintendent General should have shared all information germane to the Indian Superintendent's task.

Question of Compensation

Although we find that Canada breached an obligation to review the actions of O'Reilly arising out of the Order in Council appointing O'Reilly, we are still left with the question of compensation or damages. Even assuming that it was the intention of all parties to allot the full 25 acres of land for Aupe IR 6 (and we have made no such finding), the missing 11 acres were in any event contained within the 20.08 acres allotted to the Band in 1923-24 as Aupe IR 6A. In its written submissions, the Band stated that, "[o]f the 20.08 acres finally confirmed in 1923, 11 acres were those same lands unlawfully alienated from Aupe #6 by means of survey in 1888-1889."[139] Thus, any wrongdoing in this regard was eventually remedied. Furthermore, compensation for loss of use is not readily apparent in this case, as the Band

138 The definitions of "Superintendent General" and "Agent" in the *Indian Act*, RSC 1886, c. 43, suggest that there was a reporting relationship between the Superintendent General and the Indian Superintendent for British Columbia:

> 2. In this Act, unless the context otherwise requires, -
>
> (*a*) The expression "Superintendent General" means the Superintendent General of Indian Affairs, and the expression "Deputy Superintendent General" means the Deputy Superintendent General of Indian Affairs;
>
> (*b*) The expression "Agent," or "Indian Agent," means and includes a commissioner, assistant commissioner, *superintendent*, agent or other officer *acting under the instructions of the Superintendent General* [emphasis added].

139 Brief of the Homalco Indian Band, March 31, 1995, p. 11, paragraph 73. See also, Brief of the Homalco Indian Band, March 31, 1995, p. 14, paragraph 80, and Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, June 6, 1995, p. 13, paragraph 15.

used the area in dispute for a schoolhouse, graveyards, and other improvements.

We do, however, see one way in which the Band suffered a loss as a result of the Indian Superintendent's failure to review the actions of Commissioner O'Reilly. If he had examined all the documents and had discovered that Mr. Skinner's survey plan did not reflect the true intentions of the Band and Commissioner O'Reilly, he ought to have taken action to adjust the survey plan. A properly adjusted survey plan would have placed the Band's future schoolhouse within the boundaries of Aupe IR 6. In such circumstances, Mr. Thompson would not have been able to use the school to satisfy his pre-emption residency requirements. The loss to the Band resulting from Mr. Thompson's pre-emption claim will be discussed in greater detail later in this Part, under Issue 3.

ISSUE 2

Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

Whether the original allotment of Aupe IR 6 was meant to be 14 or 25 acres, it is clear that, by 1907, the Band wished to extend its reserve boundaries. In September 1907 it requested 80 additional acres of reserve land immediately adjacent to Aupe IR 6. Canada's negative response to this request was the subject of the second issue raised before us.

The Band submits that its request for 80 additional acres of land was logical and necessary, particularly in light of the generally rocky topography of Aupe IR 6 and the Band's use and occupation of the adjacent lands both historically and in 1907. As we understand the Band's argument, Canada had a constitutional and fiduciary obligation to act in the best interests of the Band and to meet the Band's request for additional reserve lands. This obligation flowed from Article 13 of the *Terms of Union, 1871*, and from the unique historical relationship existing between the aboriginal peoples of Canada and the Crown. In addition, although it is not expressly stated, the

Band appears to suggest that an obligation to acquire additional lands also arose from section 91(24) of the *Constitution Act, 1867*.[140]

The Band maintains that Canada did not fulfil its obligation to it. Although the Band's request for 80 additional acres was forwarded by Indian Agent McDonald to the Indian Superintendent on November 16, 1907, there is no documentary evidence to demonstrate that

(a) this request was ever submitted by the Indian Superintendent to representatives of British Columbia;

(b) there was ever any meeting or other communication between the Indian Superintendent and British Columbia in relation to the request; or

(c) there was ever any specific decision made in relation to the request by British Columbia or between British Columbia and the Indian Superintendent.

At the very least, the Band asserts that Canada should have taken steps to purchase the 80 acres on behalf of the Band as there were no competing interests in relation to those lands in 1907.

Canada denies that it owed a fiduciary obligation to the Band to provide additional reserve lands upon request. It argues that Article 13 of the *Terms of Union* did not impose an obligation on the federal Crown in connection with the creation of reserves such that a request for additional reserve lands had to be fulfilled. With respect to there being any other form of agreement or undertaking on the part of the federal Crown, Canada maintains that there is no evidence that it either expressly or impliedly undertook to ensure that the Band would be provided with additional lands. Canada emphasizes that it could not have fulfilled a request for additional reserve lands without provincial cooperation; therefore, it could not have made any unilateral commitments in that regard.

140 The Band submits at page 12 of its "Evidentiary & Legal Synopsis," dated February 15, 1995, that the statement contained in Indian Agent McDonald's letter to Chief William that the Crown was not in a position to make further allotments of land for Indian purposes "does not reflect the constitutional / legal / equitable obligations of the Crown with respect to 'Indians,' 'Indian Lands,' 'Lands reserved for Indians' or 'reserves'" (Brief of the Homalco Indian Band, March 31, 1995, tab D). Section 91(24) of the *Constitution Act, 1867*, assigns exclusive legislative authority for "Indians, and Lands reserved for the Indians" to the Parliament of Canada.

In the alternative, if it did owe a fiduciary duty to provide additional reserve lands, Canada submits that it fulfilled its obligation. It argues that, since British Columbia held title to the lands in question, the only "power" or "discretion" it could have exercised was to request the province to grant the lands to Canada, and for Canada to have added them to the Band's reserve. According to Canada, the evidence suggests that it did, in fact, make such a request but that it was refused. Furthermore, in his oral submissions, Mr. Becker argued that if an obligation did exist for Canada to acquire additional lands for the Band, that obligation extended only to the settlement lands (that is, the lands being used by the Band for its school and grave sites). Any fiduciary obligation which Canada might have had in relation to those lands was satisfied, as they were ultimately acquired for the Band.[141]

In our view, the pivotal question here is whether Canada had a positive obligation to acquire and set apart reserve lands when requested by the Band (or at least to assist in doing so).

Section 91(24) of the *Constitution Act, 1867*

At the outset, we have difficulty with the Band's implicit suggestion that such an obligation arose from section 91(24) of the *Constitution Act, 1867*. Although section 91(24) defines who, between the provincial and federal governments, has legislative power with respect to "Indians" and "Lands reserved for the Indians," it does not ***per se*** create a legal obligation to establish reserves. This point was briefly addressed by Mr. Justice Addy in *Apsassin v. Canada*.[142] In discussing the Crown's fiduciary duty in that case, he remarked as follows:

> Finally, the provisions of our Constitution are of no assistance to the plaintiffs on this issue. The Indian Act was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by s. 91(24) of the Constitution Act, 1867. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians anymore than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.[143] [Emphasis added by Addy J.]

141 ICC Transcript, June 9, 1995, pp. 60, 75-76.
142 *Apsassin v. Canada* (1987), [1988] 1 CNLR 73 (FCTD).
143 Ibid. at 93. The Federal Court of Appeal did not address this point on appeal: *Apsassin v. Canada*, [1993] 2 CNLR 20 (FCA).

Thus, although there may have been a moral or political duty for Canada to provide additional reserve lands for the Band, section 91(24) of the *Constitution Act, 1867*, did not create a legal obligation to do so.

Crown's Special Historical Relationship

We also have some difficulty relying on the Crown's special historical relationship, in and of itself, as the basis of a specific duty to obtain and convert lands to reserve status whenever requested by a band. As we mentioned in our *Primrose Lake Air Weapons Range Report II*, there is a distinction between a fiduciary relationship and a fiduciary duty:

> We may begin with the proposition, articulated by the Supreme Court of Canada in [*Quebec (AG) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC)], that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada. The Supreme Court has gone on to distinguish between a fiduciary relationship and a fiduciary duty: although there is a general fiduciary relationship between the Crown and the aboriginal peoples, this is not the same as a general, all-embracing fiduciary duty. A fiduciary obligation must be shown to arise in the specific circumstances of the relationship between the Crown and the claimants, because "[t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed." Thus, although the relationship may presumptively give rise to a fiduciary duty, one cannot assume that a fiduciary attaches to every aspect of the dealings between the Crown and aboriginal peoples.[144]

Thus, we must consider whether a fiduciary obligation arose in the specific circumstances of the relationship between Canada and the Band as a result of the Band's request for an additional 80 acres of land.

We are not persuaded that a request by a band for more land automatically generates a fiduciary obligation for Canada to acquire and set apart that land as reserve land. There must be some compelling reason for Canada to provide the land before Canada is fixed with a fiduciary obligation to take action. In this case, the Band suggests a number of reasons why Canada should have acquired 80 additional acres of reserve land when the Band made its request in 1907:

- Aupe IR 6 was rocky and unsuitable for cultivation, as was reflected in the statements of Commissioner O'Reilly in 1888 and Indian Agent McDonald

144 ICC, *Primrose Lake Air Weapons Range Report II*, September 1995, 35.

in 1907 (that is, the lands set apart as a reserve at Aupe IR 6 were insufficient and inadequate).

- Additional acreage was required to sustain and facilitate the natural growth and development of the Homalco community at Aupe IR 6.
- The lands adjacent to Aupe IR 6 included existing Indian settlements of the Band. In particular, additional acreage was required to protect the Band's grave sites and gardens, which had existed on those lands for at least 15 or 16 years.
- The requested lands were lands which the Homalco had used and occupied long before the advent of any non-Indians in the area of Bute Inlet.

It is true that Aupe IR 6 was rocky and unsuitable for cultivation. As the Band points out, Commissioner O'Reilly recognized its limited value when he visited Aupe in 1888. However, Commissioner O'Reilly allotted five other reserves in addition to Aupe 6. At least one of these reserves, Homalco IR 1, was suitable for cultivation.[145] No explanation was given to us as to why the Band could not use one or more of its other reserves for agricultural purposes or for the growth and development of its community. We do know that Indian Agent McDonald advised the Band to surrender 80 acres from one of its other reserves in exchange for the land sought. We also know that the Band refused to follow the Indian Agent's advice.[146] However, no information was provided explaining the basis of the Band's decision. This is not to say that the Band did not have a valid reason for its position that it needed more land in addition to its six reserves. For example, it may be that all the available agricultural land on all its reserves was being used. However, we did not hear any argument that the *total* lands set apart for the Band were insufficient and inadequate to meet the needs of the Band in 1907.

With respect to the Band's argument that additional acreage was required to protect the Band's grave sites and gardens, we note that, in 1907, an addition to Aupe 6 was not strictly necessary to protect the settlement lands of the Band and to ensure the Band's continued use of those lands. Before

145 P. O'Reilly to Superintendent General of Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

146 Indian Agent to A.W. Vowell, November 16, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 65).

Mr. Thompson arrived, there was no threat of encroaching settlers,[147] and it appears that the Band was free to use the land for its graveyards, gardens, and other improvements. Therefore, given the circumstances in 1907 when the Band made its request, we do not find that Canada had a fiduciary obligation *at that time* to acquire and set apart additional reserve lands for the Band.

We appreciate the Band's position that the lands adjacent to Aupe IR 6 were lands to which they had a special, long-standing attachment. However, we are restricted in our ability to consider arguments based on traditional use and occupation. If a claim arises solely from unextinguished aboriginal rights or title, the matter is characterized as a "comprehensive claim" rather than as a "specific claim" and it falls outside the scope of the Specific Claims Policy.

Interpretation of Article 13 of the *Terms of Union, 1871*

Finally, we turn to the third ground raised by the Band for Canada's obligation to acquire additional reserve lands: Article 13 of the *Terms of Union, 1871*. When British Columbia joined Canada in 1871, Article 13 of the *Terms of Union* provided as follows:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[148]

The difficulty with relying upon Article 13 is that it contains ambiguous language. In particular, it states that Canada is to continue "a policy as liberal as that hitherto pursued by the British Columbia Government" and the Local Government is to convey "tracts of land of such extent as it has hitherto been

147 In 1908 Indian Agent McDonald wrote that there were "no white settlers within twenty miles of the village" (R.C. McDonald to J.D. McLean, Secretary, Department of Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] [ICC Documents, p. 72]).

148 RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

the practice of the British Columbia Government to appropriate for that purpose." Thus, as a first step, we must examine the "policy" of the British Columbia government and the extent of land that it was its "practice" to appropriate.

We agree with the statement made by Professor Jack Woodward in his book *Native Law* that Article 13 is a difficult provision to interpret:

> In pre-Confederation British Columbia . . . it is arguable that two different policies concerning the allocation of Indian lands were operating: the generous and liberal policy of Governor Douglas, and the restrained policies of his successors. Since the British Columbia Terms of Union constitutionalized a policy "as liberal" as that pursued by the colony, it is an awkward provision to interpret.[149]

Unfortunately, other than Canada's reference to an article by Robert Exell entitled "History of Indian Land Claims in B.C.,"[150] the parties did not discuss the meaning and scope of Article 13 in their written or oral submissions.

There is support in the academic literature for the view that the policy followed by Governor James Douglas in the 1850s and early 1860s was, indeed, generous and liberal.[151] Robert Exell writes that Douglas "introduced a policy of asking the Indians to indicate the extent of the lands they required, and of setting aside these lands for them."[152] However, Professor Paul Tennant suggests that this view does not give sufficient weight to Indian complaints regarding the size of their reserves.[153] There is also continuing debate over the actual acreage formula, if any, applied by Governor Douglas.[154] He, himself, referred to allotments of 10 acres per family. Professor Tennant explains as follows:

> In one of his last speeches as governor, as he opened the first session of the mainland legislature, Douglas summarized his Indian policy and said about reserves:
>
> The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favourite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for

149 Woodward, *Native Law*, 234.

150 Robert Exell, "History of Indian Land Claims in B.C." (1990), 48 The Advocate 866.

151 See, for example, Woodward, *Native Law*, 234; Robin Fisher, "Joseph Trutch and Indian Land Policy," in W.P. Ward and R.A.J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver: Douglas & McIntyre, 1981), 155.

152 Exell, "History of Indian Land Claims in B.C.," note 150 above, 867.

153 Tennant, *Aboriginal Peoples and Politics*, note 37 above, 32.

154 Paul Tennant, "The Historical and Legal Dimensions," in Frank Cassidy, ed., *Reaching Just Settlements* (Lantzville, BC: Oolichan and Institute for Research on Public Policy, 1991), 30.

> ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the Natives. *The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned*, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.[155] [Emphasis added by Professor Tennant.]

Professor Tennant rationalizes the limited reserve acreage granted under Governor Douglas with the fact that he also implemented legislation allowing Indians to pre-empt land.[156] Further, Professor Tennant notes that, despite Governor Douglas's words, some reserves contained more than 10 acres per family.[157] To add to the confusion, there is evidence that Governor Douglas's words were misconstrued. In a letter written in 1874, he described his policy as follows:

> . . . in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases, was to leave the extent & selection of the land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular & to include in each reserve the permanent Village sites, the fishing stations, & Burial grounds, cultivated land & all the favourite resorts of the Tribes, & in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, & to provide against the occurrence of Agrarian disputes with the white settlers.
>
> Before my retirement from Office several of these Reserves, chiefly in the lower districts of Fraser River & Vancouver's Island, were regularly surveyed & marked out with the sanction & approval of the several communities concerned, & it was found on a comparison of acreages with population that the land reserved, in none of these cases exceeded the proportion of 10 acres per family, so moderate were the demands of the natives.

155 Tennant, *Aboriginal Peoples and Politics*, note 37 above, 33-34. It may be that the Homalco Band already had 10 acres per family before it made its request for an additional 80 acres of land in 1907. According to the official census (as reported by Commissioner O'Reilly) on August 10, 1888, the population of the Homalco tribe was 74 (P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 [ICC Documents, p. 39]). Assuming that all 74 people represented a family, the "ten-acre" formula would have allowed 740 acres. Canada's published "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902" shows that the total acreage of the six reserves of the Homalco was 1416.50 acres (Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, p. 38 [ICC Documents, pp. 61-62]).

156 Tennant, *Aboriginal Peoples and Politics*, note 37 above, 34-37.

157 Ibid., 34.

> It was however never intended that they should be restricted or limited to the possession of 10 acres of land, on the contrary, we were prepared, if such had been their wish to have made for their use much more extensive grants.[158]

Whatever the policy of Governor Douglas, it is clear that after his retirement in 1864, the policy of the Chief Commissioner of Lands and Works, Joseph Trutch, was not so generous. Robert Exell writes that "[o]ne of [Trutch's] first acts was to put a halt to the 'generous' reserve allocation policy of Douglas. Existing reserves were cut back and, in some cases, pre-emptions were granted to whites of lands that had originally been reserved for Indians."[159] Moreover, in 1865 a colonial ordinance made it unlawful for Indians to pre-empt land except with the permission of the Governor.[160]

One thing is evident to us from the research which we have been able to do thus far: the meaning and scope of Article 13 is controversial and open to several different interpretations. We are mindful of the statement made by Mr. Justice Dickson (as he then was) in *Jack v. The Queen* that, "if [Article 13] can be said to be ambiguous, it should be so interpreted as to assure the Indians, rather than to deny them, any liberality which the policy of the British Columbia government may have evinced prior to Union."[161] However, we note that Mr. Justice Dickson was the minority in that case. In addition, the *Jack* case was concerned with British Columbia's policy with respect to Indian fishing. Mr. Justice Dickson stated as follows:

> The next issue to be considered is whether Indian fishing can properly be regarded as within the "policy" to which reference is made in the first paragraph of auticle [sic] 13 and, if so, what content can be given to the pre-Confederation policy of the Colony. It is not correct to advert to the post-Confederation Indian policy in order to determine the content of "policy" for our purposes. In this appeal we are concerned with the application of the minimum standard of pre-Confederation policy to the federal government after Confederation. *As the appellants state in their factum – and there is much historical evidence to support them – "Given the limited and ungenerous policies of British Columbia prior to Confederation, this standard will only rarely be able to be invoked against the federal government. It may be that it cannot be invoked in any area but that of fisheries."*[162] [Emphasis added.]

158 James Douglas to I.W. Powell, Provincial Commissioner of Indian Affairs, October 14, 1874, BCARS, F/S2/D74.
159 Exell, "History of Indian Land Claims in B.C.," note 150 above, 869.
160 Ibid., 868.
161 *Jack v. The Queen*, [1979] 2 CNLR 25 at 30 (SCC).
162 Ibid. at 33.

This suggests that the relevant pre-Confederation *land* policy of British Columbia may *not* have been generous. Given the difficulty in construing Article 13 and the lack of decisive information available to us at this point, we cannot find that Article 13 of the *Terms of Union, 1871*, imposed a duty on Canada to provide additional land in 1907.

In sum, on the basis of the evidence and arguments presented to us, we are unable to find that Canada had a positive duty to acquire 80 additional acres of land for the Band. We emphasize again that we are speaking only of duties which fall within the ambit of the Specific Claims Policy and not of duties which may or may not arise from the existence of aboriginal rights or title and which may be pursued through other avenues of redress.

ISSUE 3

Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

Pre-emption of Land

The facts surrounding Mr. Thompson and his pre-emption application are very disturbing. He was clearly motivated by self-interest and had little regard for the interests of the Band. Even before he submitted his pre-emption application, the evidence shows that he was primarily concerned with obtaining advantages for himself. For example, shortly after his arrival to Aupe, Mr. Thompson used space in the school to set up a post office. He and his wife then proceeded to establish a store in the school, which, at least initially, was in violation of the *Indian Act*.[163] While the Thompsons' retail and postal activities were portrayed as a convenience to the Band, at least some members of the Band were not pleased with this use of the school.[164]

163 Section 42 of the *Indian Act*, RSC 1906, c. 81, provided as follows:

> **42.** No official or employee connected with the inside or outside service of the Department of Indian Affairs, and no missionary in the employ of any religious denomination, or otherwise employed in mission work among Indians, and no school teacher on an Indian reserve, shall, without the special license in writing of the Superintendent General, trade with any Indian, or sell to him directly or indirectly, any goods or supplies, cattle or other animals.
>
> 2. The Superintendent General may at any time revoke the license so given by him.

When the Thompsons first opened the store they did not have the required licence; see, for example, R.C. McDonald to J.D. McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 128); R.C. McDonald to J.W.L. Browne, May 14, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 130).

164 See, for example, McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); McDonald to J.W.L. Browne, May 14, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 130); Chief George Harry, Transcript, February 23, 1915, Royal Commission on Indian Affairs for the Province of British Columbia, Proceedings, pp. 312-13 (ICC Documents, pp. 322-23).

Apart from the Thompsons' opportunistic use of the school for the post office and store, of most direct relevance to us here is Mr. Thompson's dishonesty in relation to his pre-emption application. At the time that he submitted his application, the legislation governing pre-emptions expressly protected Indian settlements from pre-emption:

Pre-emption of Crown Lands.

> **5.** Except as hereinafter appears, any person being the head of a family, a widow, or single man over the age of eighteen years, and being a British subject, . . . may for agricultural purposes record any tract of *unoccupied and unreserved Crown Lands (not being an Indian settlement)* not exceeding one hundred and sixty acres in extent: Provided, that such right shall only extend to lands bonâ fide taken up for agricultural purposes, and shall not be held to extend to any of the aborigines of this continent, except to such as shall have obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council: Provided also, that such right shall not extend to the foreshore, tidal lands, the bed of the sea, or lands covered by any navigable water.[165] [Emphasis added.]

In his oral submissions, Mr. Becker assisted us in understanding the meaning of the term "settlement":

> MR. BECKER: The term "settlement lands" is in fact a term that was used in provincial legislation to deal with lands that were being used by Indians, and the term is not defined in the provincial legislation, but the idea was that no one can pre-empt lands that are settlement lands. There should not be any Indian settlement lands within a pre-emption.
>
> [. . .]
>
> THE CHAIRPERSON: Just to conclude this part of the discussion then, explain to me when you talk about settlement lands what you thought was intended to be in fact settlement lands. . . .
>
> MR. BECKER: Our position in terms of the meaning of "settlement lands" are those lands that are actively being used by the band either as areas of cultivation, graveyards, areas where they are residing, basically areas of active use by the band that probably would not extend to areas where they would go to hunt or to trap in terms of – that would encompass a much wider area. We're talking about areas that they were settled on and actively using.[166]

165 *Land Act*, SBC 1908, c. 30, s. 5.
166 ICC Transcript, June 9, 1995, pp. 77 and 84.

Canada does not dispute that there were Indian settlement lands contained within the 160-acre area Mr. Thompson sought to pre-empt. At the very least the Band's school and grave sites were contained within that area.[167]

As part of the application process, the applicant was required to enclose a full description of the land and a sketch plan. The applicant was also required to make a declaration before a justice of the peace, notary public, or commissioner.[168] Mr. Thompson made such a declaration and in it he solemnly declared, among other things, that he was applying for "a pre-emption record of One hundred and Sixty acres of unoccupied and unreserved Crown lands (not being part of an Indian Settlement) . . ." His accompanying sketch plan did not identify any Indian settlements, grave sites, or improvements.[169]

Mr. Thompson's declaration was clearly false and misleading. As mentioned above, the Band's school and grave sites were on the lands. In other words, the lands were *not* "unoccupied" and they *were* "part of an Indian Settlement." There is evidence that Mr. Thompson was fully aware of the Band's use and occupation when he made his declaration. For example, in December 1910, the Assistant Deputy and Secretary of the Department of Indian Affairs notified the Deputy Commissioner of the Lands Department that "the pre-emption obtained by Mr. William Thompson has been granted by your Department evidently without knowledge of the fact that an expensive school-house had been built on the land and that a large Indian grave-yard was also situated on it, *although Mr. Thompson appears to have ascertained their positions before making his application*" (emphasis added).[170] Indeed, Mr. Thompson used his living arrangement in the Homalco school to satisfy his occupancy requirements for the pre-emption.[171]

When he was later questioned about his declaration, Thompson gave the feeble excuse that he did not knowingly make any false statements:

> the way I understand it, is, that I have taken up no land belonging to the Indians. I put my post alongside of the Indian Reserve post marked I.R. 1888 which was shown me by an Indian he also showed me the line of the Indian Reserve. In regards to the School House and grave yard (proper) I did not intend to interfere with that, but to

167 Mr. Becker stated as much in his oral submissions (ICC Transcript, June 9, 1995, p. 77).
168 *Land Act*, SBC 1908, c. 30, s. 7(2).
169 Thompson, Application for Pre-emption Record, February 21, 1920, BC, Lands, Roll 2236 (ICC Documents, pp. 114-16).
170 McLean to Renwick, December 1, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 142).
171 A.S. Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 136).

> let that matter for the Government to settle, after the land had been surveyed. . . . The fact of the Schoolhouse and graveyard being part of an Indian Settlement I did not look at it in that light.[172]

The fact that Thompson may not have regarded the school and graveyard as part of an "Indian settlement" does not explain his declaration that the land was unoccupied. Nor does it explain why none of these improvements were shown on the sketch map. In addition, his explanation rings hollow considering the extent of the Band's improvements when the pre-emption application was made.[173]

As if that was not enough, it became evident later that Mr. Thompson made a false declaration in relation to another aspect of his pre-emption application. The provincial pre-emption legislation explicitly specified that the land had to taken up for *agricultural purposes*:

> **31.** No pre-emption record shall be granted except for land taken up for agricultural purposes, and the Chief Commissioner may cancel any such record when it shall be shown to his satisfaction that the same has been obtained for other than agricultural purposes. Timber lands, as specified in sub-section (5) of section 34 of this Act, shall not be open for pre-emption.[174]

In Thompson's application for a pre-emption record, he solemnly declared that the land was "not timber land within the meaning of the Act" and that his application was "for settlement and occupation, for agricultural purposes."[175] However, he subsequently told the Inspector of Indian Agencies that "it was a timber claim he had and not agricultural land."[176] It then came to light in October 1923 that the land carried timber "considerably in excess of the statutory limit."[177]

172 Thompson to Deputy Minister, May 25, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 163).

173 When the Inspector of BC Indian Schools visited the Band in November 1910, he found that "[t]he land where the school is built, the grave yard site, and just a few acres around have been partly cleared by the Indians, the trees cut down, and grass growing. Their few cattle graze here. These are all included in Mr. Thompson's pre-emption claim." A.S. Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 136).

174 *Land Act*, SBC 1908, c. 30, s. 31. "Timber lands" were described in s. 34(5) as "lands which contain milling timber to the average extent of eight thousand feet to the acre west of the Cascades, and five thousand feet per acre east of the Cascades, to each one hundred and sixty acres."

175 Thompson, Application for Pre-emption Record, February 21, 1920, BC, Lands, Roll 2236 (ICC Documents, pp. 114-16).

176 Ditchburn, Inspector of Indian Agencies, to Renwick, Deputy Minister of Lands, August 1, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 236).

177 Memos, BC, Lands, October 8, 1923 (ICC Documents, p. 483).

Specific Claims Policy and Fraud

In our view, Mr. Thompson's actions with respect to his pre-emption application constitute fraud. The criteria for proving fraud were described by Viscount Haldane L.C. in *Nocton v. Lord Ashburton*:

> Fraud must be proved by shewing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by shewing that it was made under an honest impression that it was true.[178]

Given the considerable use the Band was making of the lands within Mr. Thompson's pre-emption claim, it seems reasonable to conclude that he either knowingly made a false representation that the lands were unoccupied and not an Indian settlement, or he made the representation recklessly without caring whether it was true or false. The same holds true for his declaration that the lands were not timber lands.

Under the Specific Claims Policy, Canada is prepared to acknowledge claims which are based on "[f]raud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated."[179] We find that Mr. Thompson was an employee of the federal government[180] and that his fraudulent misrepresentation was in connection with the acquisition of Indian land.

It is true as Canada has argued that the land was Indian "settlement" land, not Indian "reserve" land as set out in the Policy. However, despite this

178 *Nocton v. Lord Ashburton*, [1914] AC 932 at 947 (HL). See also, *Canadian Encyclopedic Digest (Western)*, 3d ed. (Toronto: Carswell, 1995), vol. 15, Title 67, "Fraud and Misrepresentation," § 1.

179 *Outstanding Business*, 20.

180 The Band throughout its written argument consistently refers to Thompson as an "employee of Indian Affairs." See, for example, Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, part V, para. 10 (b). At no point in its written or oral argument did Canada challenge this assertion. We find that there is sufficient documentary evidence to support a finding that Thompson was an employee of Indian Affairs between 1908 and 1912. For instance, in January 1908, the Indian Agent recommended "to the favorable consideration of the Department" the suggestion of Father Chirouse that Thompson and his wife be hired (R.C. McDonald to J.D. McLean, Secretary, Department of Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] [ICC Documents, pp. 70-72]). In a subsequent letter dated June 9, 1908, the Indian Agent informed the Indian Superintendent that "Mr. William Thompson has been engaged, *subject to the approval of the Department*, to take charge of the [Homalco Indian Day School] for a year at a salary of $600 . . ." [emphasis added] (R.C. McDonald to A.W. Vowell, Indian Superintendent, BC, June 9, 1908, NA, RG 10, vol. 1468, mfm C-14272 [ICC Documents, p. 81]). Finally, in February 1915, Mr. Thompson stated that he worked with and was discharged from the "Indian Department": "Now I have been twenty-five years with the Indian Department as a schoolteacher - I opened the first school here, and took up this pre-emption in consequence of which I was discharged from the Indian Department . . ." (Mr. Thompson, Transcript, February 23, 1915, Royal Commission, Proceedings, p. 323 [ICC Document, p. 332]).

distinction, in our opinion the Band's claim comes within the scope of the Specific Claims Policy. As mentioned in Part II of this report, we do not view the list of examples enumerated under the policy as exhaustive. In addition, we perceive the underlying purpose of the policy to be the settlement of legitimate, long-standing grievances. To deny a claim simply because the fraud of an employee is connected to "settlement" lands rather than "reserve" lands is hair-splitting and completely counter to the purpose of the policy. The Supreme Court of Canada has found that treaties should be given a fair and liberal construction in favour of the Indians and that treaties should be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.[181] We are of the opinion that the policy should be interpreted in the same fashion.

On the basis set out above, we find that Thompson's activities with respect to the pre-emption constitute fraud within the meaning of the policy and are the proper basis for a specific claim. We will discuss the loss to the Band flowing from Mr. Thompson's pre-emption claim later in this report.

Canada's Fiduciary Obligation

In the alternative, we will now consider the argument raised by the Band that Canada breached its fiduciary obligation to the Band in relation to Mr. Thompson's pre-emption claim. As in Issue 2 above, the Band appears to base Canada's fiduciary obligation on the special historical relationship between the aboriginal peoples of Canada and the Crown. Distilled down to its basics, the Band's argument as we understand it is that Canada breached its fiduciary obligation to the Band by failing or neglecting to protect the Homalco Indian settlement lands, and by failing or neglecting to prevent the Thompsons from:

- using the school to operate a post office and a store without a licence from the Superintendent General as required by the *Indian Act*;
- using the school to satisfy their residency requirements under the provincial pre-emption legislation;
- falsely portraying the Homalco's tribal lands and Indian settlements as being confined to the school and two grave sites;

181 See *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC) at 94, as followed in *Simon v. The Queen* [1986] CNLR 153 (SCC) at 167.

- pre-empting the Homalco Indian settlement lands, given that Mr. Thompson was in fundamental breach of express provisions of the provincial pre-emption legislation; Mr. Thompson continuously lied, misled, or misrepresented the facts to the Department of Indian Affairs and the province; he was an employee of the Department of Indian Affairs; and he was in a unique position of trust in relation to the Band as the teacher of the Homalco children.

The Band suggests in its written submissions that Canada should have taken steps to cancel Thompson's pre-emption claim.[182] This argument is problematic because, as Mr. Becker pointed out in his oral submissions, it is unclear whether Canada had any power to cancel the pre-emption, since pre-emptions involved provincial lands and provincial legislation.[183] However, it became clear after Mr. Kelliher's oral submissions that the Band's position is that Canada should have commenced legal proceedings against Thompson or removed him from the school, thereby undermining his pre-emption application.[184]

Canada argues that there was no obligation on Canada to protect the Band's settlement lands, being those portions of the lands upon which the school and graveyards were located. It submits that there was no agreement or general undertaking to protect lands that might be subject to an Indian interest, nor was there a general duty to protect traditional lands from the actions of others. Canada adds that it had no jurisdiction or authority to deal with the lands in question as they were owned by and were under the control and administration of British Columbia. Therefore, Canada did not possess the "power" or "discretion" to prevent the province from allowing pre-emptions of portions of the lands. In the alternative, Canada maintains that, if it did owe a fiduciary duty to protect the Band's settlement lands, it discharged its duty. Not only did Canada advise the province that the pre-emption included settlement lands and request that such lands be eliminated from the pre-emption, but it also successfully had the settlement lands eliminated from the pre-emption and added to the Band's reserve.

Unlike the circumstances in 1907, the settlement lands of the Band were threatened by an encroaching settler, namely William Thompson, and

182 Brief of the Homalco Indian Band, March 31, 1995, pp. 8, 11, 13, and tab F, p. 3; Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, June 6, 1995, p. 2.
183 ICC Transcript, June 9, 1995, p. 86.
184 Ibid., 102.

Thompson did interfere with the Band's use of the lands.[185] Therefore, to begin this analysis, it is necessary to examine whether the specific circumstances of the relationship between Canada and the Band gave rise to a fiduciary obligation to protect the settlement lands of the Band after Mr. Thompson submitted his pre-emption claim.

In coming to the conclusion that Canada did not have such a fiduciary obligation, Canada uses the following test:

> A fiduciary obligation may exist where three elements are present:
>
> 1. an undertaking or agreement to act for, on behalf of, or in the interests of another person;
>
> 2. power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
>
> 3. reliance or dependence by that person on the undertaking or agreement, and vulnerability to the exercise of power or discretion.[186]

Canada cites the cases of *Guerin v. The Queen*[187] and *Frame v. Smith*[188] in support of its test.

Undertaking or Agreement

With respect to the first element listed above, Canada submits that, in circumstances such as these where reserve lands are not involved, a duty to act in the interests of a band may arise "where the Crown has . . . assumed a duty of a fiduciary character by agreement or express undertaking."[189] In our view, Canada has taken too narrow a view of the law in asserting that an "agreement or *express* undertaking" must be shown for a fiduciary obligation to arise. We assume that Canada derived the first element of its test from the *Guerin* case, where Mr. Justice Dickson (as he then was) said:

185 For example, as early as March 1910, a member of the Band complained to the Indian Agent that Thompson had informed them that he "had purchased the land adjoining their reserve, and that, in future, when they wish to bury anybody in their grave-yard, they would have to pay [Thompson] $5.00 for each grave; also that [Thompson] would not allow them to cut any fire-wood for the school on the land adjoining the reserve" (McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 [ICC Documents, p. 118]).

186 Submissions on Behalf of the Government of Canada, March 31, 1995, p. 10.

187 *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC).

188 *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

189 Submissions on Behalf of the Government of Canada, March 31, 1995, pp. 11, 14.

> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[190]

However, Mr. Justice Dickson did not say that an undertaking must be "express." Nor did Madam Justice Wilson refer to an "express" undertaking in *Frame v. Smith*. In that case, she provided the following guidelines:

> there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[191]

In a still later case, Mr. Justice La Forest, after referring to Mr. Justice Dickson's comments in the *Guerin* case, said that he "would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."[192]

Even if a unilateral undertaking to protect Indian settlement lands is required, we are of the view that such an undertaking existed as is reflected, at least by May 19, 1911, in section 37A of the *Indian Act*. Section 37a was amended on May 19, 1911, to read as follows:

> **37A.** If the possession of any lands reserved or claimed to be reserved for the Indians, *or of any lands of which the Indians or any Indian or any band or tribe of*

190 *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 341 (SCC).

191 *Frame v. Smith* (1987), 42 DLR (4th) 81 at 98-99 (SCC). Madam Justice Wilson's approach was approved in *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC) by La Forest J. at 29, and by Sopinka J. at 62-63, and in *Hodgkinson v. Simms* (1994), 97 BCLR (2d) 1 (SCC) by La Forest J. at 21-22, and by Sopinka and McLachlin JJ. at 60.

192 *M.(K.) v. M.(H.)* (1992), 14 CCLT (2d) 1 at 40-41 (SCC).

Indians claim the possession or any right of possession, is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians *or Indian or band or tribe of Indians*, or the conflicting claims may be adjudged and determined or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians *or Indian* or of the band or tribe of Indians *entitled to or* claiming *the* possession *or right of possession* or entitled to *or claiming* the declaration, relief or damages.

2. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.

3. Any such action may be instituted by information of the Attorney General of Canada upon the instructions of the Superintendent General of Indian Affairs.

4. Nothing in this section shall impair, abridge or in anywise affect any existing remedy or mode of procedure provided for cases, or any of them, to which the section applies.[193] [Italics added.]

The italicized words were not contained in the previous version of section 37A(1). The House of Commons *Debates* reveal that the amendment was intended to protect lands which were occupied by Indians but which were not reserves:

MR. OLIVER. This Bill [(No. 177) to amend the Indian Act] is made up of four sections each independent of the other and each intended to meet a condition now existing in connection with the administration of Indian Affairs. . . . Several provisions are considered desirable owing to the changed conditions resultant from pressure of population. . .

[. . .]

On section 4, subsection 5,

MR. DOHERTY. What is the change effected in the law by this section?

MR. OLIVER. This is a substitution for 37A which was the principal amendment of the Act of last session. Possession is nine points of the law, and it was found that previous to the passing of this provision there was serious difficulty in removing trespassers from Indian lands. This legislation made it possible to facilitate the removal of settlers from lands that were held as Indian reserves. We have found, however, that Indians in occupation of lands that are not specially reserved have not the protection it is desirable they should have. In the Yukon there are no reserves, and the efforts of the missionaries and others are directed to getting the Indians to enter on the permanent

193 *Indian Act*, RSC 1906, c. 81, as am. by SC 1910, c. 28, s. 1, SC 1911, c. 14, s. 4.

> occupation of the land, and we think it is right they should have that protection which this amendment proposes to give them.
>
> MR. DOHERTY. I understand the minister to say that this extends to land which the Indians claim.
>
> MR. OLIVER. Exactly.[194]

We do not see Mr. Oliver's reference to the Yukon as limiting the geographical scope of Canada's undertaking; the actual words of the amendment are much more broad and general. In this case, the conditions specified in section 37A(1) were met: the "lands of which [the Band] claim[ed] the possession or [a] right of possession" (that is, the Band's settlement lands) were adversely occupied or claimed by Mr. Thompson. Section 37A implies an undertaking on the part of Canada to protect such lands.

Unilateral Discretion

However, did Canada have a power or discretion which could be exercised unilaterally to affect the Band's interests? In our opinion it did. We disagree with Canada's position that, since the lands in question were owned by British Columbia, Canada had no "power" or "discretion" to exercise in this matter. We agree that Canada did not have the power or discretion to cancel Mr. Thompson's pre-emption outright; that power belonged to British Columbia. However, that does not mean that Canada was immediately free of any fiduciary obligation. In the *Guerin* case, Mr. Justice Dickson stated that limitations on a fiduciary's discretion do not eliminate a fiduciary obligation:

> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. . . . A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.[195]

Thus, the fact that Canada did not have complete power to cancel Mr. Thompson's pre-emption does not mean that it did not have *any* discretion

194 Canada, House of Commons, *Debates* (April 26, 1911), 7825, 7867.
195 *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 343 (SCC).

or power which could give rise to a fiduciary obligation. As we see it, Canada did have a discretion to make representations to the province on the Band's behalf, to request that the Band's settlement lands be eliminated from the pre-emption claim, and to request that the settlement lands be made into reserve land. Coupled with this, Canada had a discretion to take action against Mr. Thompson directly. Mr. Thompson was an employee of the Department of Indian Affairs (that is, Canada). As his employer, Canada had the power to fire him. The Band's interests were affected by the exercise of this power because Mr. Thompson's use of the Band's school was dependent upon his continued employment as teacher. As will be discussed more fully below, Mr. Thompson's ability to live in the school had important implications for his pre-emption claim.

Vulnerability

Finally, with respect to the third element identified by Canada for the existence of a fiduciary obligation, in our opinion the Band was vulnerable to the exercise of Canada's discretion. Under the provincial *Land Act* in force at the time, it was virtually impossible for the Band to pre-empt or purchase land.[196] Accordingly, the Band, itself, was powerless to prevent the encroachment of white settlers on its settlement lands. The Band was also vulnerable to the decisions that Canada made with respect to Mr. Thompson. In her book *Languages and Their Roles in Educating Native Children*, Barbara Burnaby writes that, from the middle or late 19th century until after the Second World War, "[n]ative parents had no voice in decision making in [native] schools."[197] Although she is speaking of the historical situation in Ontario, it appears that the same comment could be made about the Band's situation in the early 1900s. The documents are riddled with complaints from

196 "Aborigines" could only pre-empt or purchase land with the permission of the Lieutenant Governor in Council (*Land Act*, SBC 1908, c. 30, ss. 5 and 34(14)).

197 Barbara Burnaby, *Languages and Their Roles in Educating Native Children*, Informal Series 16 (Ontario: Ontario Institute for Studies in Education Press, 1980), 39.

the Band about Mr. Thompson's work and his pre-emption application.[198] Considering the level of the Band's discontent, one can only assume that the Band members were powerless to fire Mr. Thompson by themselves. In essence, Canada assumed an intermediary role in the hiring and firing of the Band's teacher. By interposing itself between the Band and Mr. Thompson, Canada, in our view, assumed an obligation to act in the Band's best interests in its dealings with Mr. Thompson.

Taking into account all the above circumstances, we find that Canada was subject to a fiduciary obligation.

Breach of Fiduciary Obligation

The next question is whether Canada breached this obligation. We are satisfied that Canada acted reasonably and responsibly in its dealings with the province; it was diligent and persistent in its attempts to have the school and graveyards eliminated from Mr. Thompson's pre-emption claim and, in the end, it was successful in its efforts. However, we find Canada's inaction with respect to Mr. Thompson puzzling. He himself said that he was ultimately discharged because of his pre-emption claim.[199] We cannot help but wonder why this was not done sooner. The correspondence shows that, by the end of November 1910, officials from the Department of Indian Affairs were aware of the following:[200]

198 See, for example, McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118); McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); McDonald to Secretary, Department of Indian Affairs, January 31, 1911, NA, RG 10, vol. 14274, mfm C-14274 (ICC Documents, pp. 149-50); Indian Agent to Secretary, Department of Indian Affairs, October 24, 1911, NA, RG 10, vol. 1475 (ICC Documents, p. 172); Indian Agent to Green, November 25, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 175); Indian Agent to Secretary, Department of Indian Affairs, December 12, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 180-82); Indian Agent to Secretary, Department of Indian Affairs, January 8, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 185-86); Indian Agent to Ditchburn, January 12, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 190-92).

199 Mr. Thompson, Transcript, February 23, 1915, Royal Commission, Proceedings, p. 323 (ICC Document, p. 332). Thompson's position as teacher of the Band ended March 31, 1912 (Indian Agent to Ditchburn, February 6, 1912, NA, RG 10, vol. 1475, mfm C-14275 [ICC Documents, p. 198]).

200 Indian Agent to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118); McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); McDonald to Secretary, Department of Indian Affairs, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

- William Thompson had applied to pre-empt land adjoining Aupe IR 6.
- In the fall of 1907, the Band had asked to have some of the same land set apart as a reserve.
- The Band's school, graveyard, and other improvements were located on the land.
- Mr. Thompson knew that the school and graveyard were included in his pre-emption claim, but failed to provide this information in his pre-emption application.
- The Band had previously believed that the school was located within the boundaries of the Aupe Reserve.
- Mr. Thompson intended to fulfil his pre-emption duties by living in the Band's school.
- The Thompsons were (or had been) operating a store in the school without a licence from the Superintendent General.
- Members of the Band had complained to the Department that Mr. Thompson had been neglecting his work.

It seems to us that the totality of these factors provided Canada with sufficient cause to dismiss Mr. Thompson. In our view, Canada's tardy action in this regard amounted to a breach of its fiduciary duty to the Band.

Loss to the Band

Regardless of whether this claim is based in fraud or breach of fiduciary, the identifiable loss to the Band is the same. If Canada had removed Mr. Thompson promptly after it became aware of the factors listed above, his pre-emption claim would have been jeopardized. On November 19, 1910, the Inspector of BC Indian Schools wrote to the Secretary of the Department of Indian Affairs that, "[b]y living in the school building [Mr. Thompson] intends to fulfil his pre-emption duties, which require him to live on the land six months in each year for three years, before getting the Crown grant."[201] Although the exact date of Mr. Thompson's arrival at Aupe is unclear, it

201 Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 136). In their oral submissions, counsel for both parties also referred to a three-year timeframe (ICC Transcript, June 9, 1995, pp. 78, 100). We have been unable to find the statutory source for this three-year occupancy requirement.

appears to have been around July 17, 1908.[202] Applying the three-year criteria to this date, Mr. Thompson was required to live on the land six months in each year until approximately July 17, 1911. This means that, if Canada had fired Mr. Thompson immediately, he would have been forced to leave the school before the completion of his residency requirements. We acknowledge that, by November 1910, Mr. Thompson had built a small house "[a]bout two or three hundred yards straight down from the graveyard near the beach."[203] Therefore, at least theoretically, Mr. Thompson could have moved into his house and qualified for a Crown grant in any event. It is questionable, however, whether he was willing or able to fulfil his residency requirements other than by living in the school. In March 1912, when the termination of his employment was imminent, the Indian Agent wrote to Mr. Thompson informing him that he had "nearly a month in which to provide a dwelling on your own place to move into."[204] This warning suggests that Mr. Thompson's house may not have been readily available for long-term occupation. Mr. Thompson's reply to the Indian Agent's letter adds to the uncertainty:

> I am in receipt of a letter from Mr. Thompson, teacher of the Indian day school, Aupe reserve (Church House, B.C.), stating that while he is prepared to vacate the school as teacher on the 1st of April next, he cannot see how it is possible for him to leave the building as he has no other place to go as the recent survey takes in the house which he had erected on his pre-emption, and further stating that the recent survey does not deprive him of his right to live in the school-house which is not, as you know, located on the old Indian reserve.[205]

Mr. Thompson's great reluctance to move out of the school leaves the impression that he might not have completed his pre-emption duties if he had been fired at an earlier stage.

In short, we find that, if Canada had fulfilled its obligation to the Band and responded quickly in dismissing Mr. Thompson, in all likelihood his pre-emption would have been thwarted. However, considering that the Band's graveyards and school were ultimately eliminated from the pre-emption, we ask the question, would the Band have been in any different position today if the Thompsons had not been able to pre-empt the land? The Band's position

202 McDonald to Rev. Father Chirouse, June 9, 1908, NA, RG 10, vol. 1468, mfm C-14272 (ICC Documents, p. 80).
203 Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-36).
204 Indian Agent to Thompson, March 14, 1912, NA, RG 10, vol. 1476, mfm C-14275 (ICC Documents, p. 210).
205 Indian Agent to Ditchburn, March 21, 1912, NA, RG 10, vol. 1476, mfm C-14275 (ICC Documents, p. 211).

is that it would and, as part of its submissions, it suggests that, if Canada had fulfilled its obligations to the Band, it would have acquired: "40 acres per representations by the Province in 1911"; "30 acres per Rhodes' survey in 1912"; "or 29.7 acres in 1915 per Interim Report No. 84 of the Royal Commission."[206]

If Mr. Thompson's pre-emption had been stopped, it seems doubtful to us that Canada would have been able to secure 40 additional acres of land. On May 17, 1911, the Deputy Minister of Lands wrote to Chief George Harry stating that the lands occupied by the school and Indian cemeteries would be excepted from Mr. Thompson's pre-emption if the Department of Indian Affairs surveyed the lands and submitted satisfactory field notes to the province. He enclosed a tracing which depicted a 40-acre parcel of land. However, he was careful to state that the tracing provided a *suggestion* as to the lands which might be excepted from the pre-emption, and he emphasized the importance of a survey:

> Upon the tracing has been suggested the manner in which the school house and cemeteries might be excepted from the Pre-emption Record, but in the absence of survey it is impossible to say whether the exception as indicated upon the tracing would accomplish your purpose in securing the lands on which the school house stands as well as the cemeteries.
>
> This can only be done by survey, and upon survey, as before advised, steps will be taken to see that no alienation of the said lands is made by this Department.[207]

That same day, the Deputy Minister of Lands wrote to the Secretary of the Department of Indian Affairs advising him to conduct a survey and clarifying that, "the Minister cannot recognize [the Indians'] claim to any more lands than is actually covered by the site of the school house and the grave yard."[208] Thus, while the tracing sent to Chief Harry suggested the possibility of a 40-acre parcel of land, it appears that the province was prepared to except from the pre-emption only the lands occupied by the school and the graveyard.

However, following the completion of Mr. Rhodes's survey in 1912, the province expressed its intention to remove a parcel of land measuring 30 by

206 Brief of the Homalco Indian Band, March 31, 1995, p. 14. See also Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, June 6, 1995, pp. 13-14.

207 Deputy Minister of Lands to George Harry, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 159-61).

208 Renwick to Secretary, Department of Indian Affairs, May 17, 1911, DIAND, Region E 5673-552 (ICC Documents, p. 162).

10 chains from Mr. Thompson's pre-emption.[209] This parcel of land, later designated as Lot 430, Range 1, consisted of 29.7 acres.[210] The Royal Commission subsequently recommended that this same quantity of land be constituted a reserve for the use and purposes of the Band.[211]

Unfortunately, Mrs. Thompson continued to complain that the reduction in her pre-emption claim would deprive her of the site of her dwelling house and the best water frontage.[212] Considering the province's earlier willingness to eliminate 29.7 acres from the pre-emption, it seems reasonable to conclude that the final settlement of 20.08 acres for Aupe IR 6A was a direct result of the Thompsons' unending interference. Thus, in our opinion, if it were not for the Thompsons' pre-emption claim, the Band would have received 29.7 acres as recommended by the Royal Commission. Given that it received 20.08 acres in 1924, then the loss to the Band is 9.62 acres.

209 Deputy Minister of Lands to J.A.J. McKenna, August 21, 1912, DIAND, Region E 5673-552 (ICC Documents, p. 241); Deputy Minister of Lands to Surveyor General, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 242); Deputy Minister of Lands to William Thompson, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 243); Ditchburn to Byrne, August 31, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp. 246-47); Deputy Minister of Lands to William Thompson, February 20, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 301); Deputy Minister of Lands to Mrs. William Thompson, June 13, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 388).

210 Surveyor General to Deputy Minister of Lands, January 22, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 288); Renwick to J.G.H. Bergeron, April 21, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 307).

211 Royal Commission, Report, August 12, 1915, DIAND, Region E5673-552 (ICC Documents, p. 339).

212 Deputy Minister of Lands to Chief Forester, June 20, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 389-90).

PART VI

FINDINGS AND RECOMMENDATION

Under the mandate of this Commission, we can make or withhold a recommendation that a claim referred to us should be accepted for negotiation pursuant to the Specific Claims Policy. Having full regard to that policy, and having found that this claim discloses

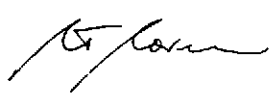
- in Issue 1, a breach of an obligation arising out of the Order in Council appointing Commissioner O'Reilly;
- in Issue 3, fraud by an employee of the Department of Indian Affairs;
- in the alternative in Issue 3, a breach of Canada's fiduciary obligation to the Band;

and, having found that as a result the loss to the Band is 9.62 acres, we therefore recommend to the parties:

That the claim of the Homalco Indian Band with respect to Aupe IR 6 and Aupe IR 6A be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair



Carole T. Corcoran
Commissioner

Aurélien Gill
Commissioner

December 1995

APPENDIX A

THE HOMALCO INDIAN BAND INQUIRY

1	**Decision to conduct inquiry**	July 5, 1994
2	**Notices sent to parties**	July 6, 1994
3	**Planning conferences**	September 29, 1994 December 9, 1994 February 24, 1995
4	**Viewing**	April 18, 1995

The Commissioners visited the Aupe Indian Reserves to view the site.

5	**Legal argument**	June 9, 1995

Legal arguments were heard in Vancouver.

6 **Content of the formal record**

The formal record for this inquiry comprises the following:

- Documentary record (3 volumes of documents and annotated index plus an addendum: annotated index and documents)
- Exhibits
- Transcripts (1 volume of legal submissions)

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

APPENDIX B

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CANADA AND THE HOMALCO INDIAN BAND

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CANADA

In its written submissions,[1] Canada proposed the following statement of issues:

1 Was there an unlawful alienation of 11 acres of land?

2 Did Canada have any obligation to provide additional reserve lands when requested by the Band?

3 Did Canada have any obligation to protect settlement lands from pre-emption and, if so, did Canada fulfil those obligations?

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR THE HOMALCO INDIAN BAND

The Band set out its view of the issues in a number of documents submitted to Specific Claims West and this Commission. In its written "Brief,"[2] it formulated the issues as follows:

The issues pertaining to Aupe #6 are, amongst others, that:

1 Canada alienated 11 acres from Aupe #6 without the consent of the Homalco and without lawful authority;

2 Canada engaged in a course of conduct adverse to the best interests of Homalco and in breach of its lawful obligations by failing or neglecting to:
   (i) restore such lands to Aupe #6; and
   (ii) compensate Homalco for such unlawful acts or omissions.

1 Submissions on Behalf of the Government of Canada, March 31, 1995, pp. 1-2.
2 Brief of the Homalco Indian Band, March 31, 1995, pp. 10-12.

The issues pertaining to Homalco's application for additional lands in 1907 are, amongst others, that Canada was in breach of its lawful obligations to the Homalco by failing or neglecting to take such steps as were necessary to:

1 acquire the said lands in 1907, either by agreement or outright purchase from the Province. By such acts or omissions, Canada caused the Homalco to suffer damages, in particular:
   (i) Canada interfered with Homalco's rights, interests or title to their Indian reserve and Indian Settlement lands (i.e., the Homalco's land assets);
   (ii) dispossessed the Homalco from such lands; and
   (iii) permitted those lands to be purchased by an adverse third party in whom a trust was reposed by virtue of his status as a teacher at the Homalco Indian Day School and as an employee of Indian Affairs.

2 effect the cancellation of William Thompson's pre-emption application from the outset, and, in particular, to prevent both Thompsons from:
   (i) acquiring by pre-emption a significant portion of the Homalco Indian Settlement lands applied for by Homalco in 1907, while at the same time being an employee of Indian Affairs;
   (ii) acting in a fraudulent or otherwise unlawful manner to acquire such lands, Thompson's transgressions being fully within the knowledge of Indian Affairs at all material times; and
   (iii) being unjustly enriched by their unlawful acts, the Thompsons not being *bona fide* purchasers without notice, given their unique position of trust both as teacher at the Homalco Indian Day School and as an employee of Indian Affairs.

The issues pertaining to the establishment of Aupe #6A are, amongst others, that:

1 of the 80 acres of Indian Settlement lands requested by Homalco in 1907, Canada ultimately only acquired 9.08 "new" acres. Of the 20.08 acres finally confirmed in 1923, 11 acres were those same lands unlawfully alienated from Aupe #6 by means of survey in 1888-1889.

2 at a minimum, Canada ought to have acquired 29.7 acres as Aupe #6A as set out in Interim Report No. 84 of the Royal Commission in 1915, as lands additional to the 25 acres allotted for Aupe #6.

3 Canada's acts or omissions further facilitated the acquisition of the balance of the lands by the Thompsons. Such conduct is in breach of Canada's lawful obligations to Homalco. In short, Canada permitted the Thompsons to acquire 70.92 aces of the 80 acres requested by the Homalco in 1907.

The issues pertaining to the acts or omissions of Canada subsequent to the allotment of Aupe #6A are, amongst others, that:

1 in 1975, Indian Affairs was offered the opportunity to purchase a 60-acre parcel of the lands pre-empted by Thompson for the sum of $19,000.00.

2 by failing or neglecting to acquire such lands on that occasion and at that price, Canada caused the Band to continue to suffer damages.

3 in January 1993, the lands pre-empted by the Thompsons, including the 60-acre parcel described above, were offered for purchase to the Band for the sum of $250,000. The Band accepted that offer and purchased the said lands, more particularly known as Lot 1835, Range 1, Coast District, B.C.

4 as a consequence of the foregoing, Canada has continued to follow a course of action adverse to Homalco, including:
   (i) its failure or neglect to act in the best interests of the Homalco in relation to Indian Reserve and Indian Settlement lands; and
   (ii) its breach of lawful obligations to the Homalco, the particulars of which are set out in [Appendix "D" of the *Brief of the Homalco Indian Band*, March 31, 1995].

INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINE SPECIAL REPORT

on the Treaty Harvesting Rights of the Fond du Lac, Black Lake, and Hatchet Lake First Nations

Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC

NOVEMBER 30, 1995

CONTENTS

INTRODUCTION

In December 1993, the Indian Claims Commission (ICC) concluded its inquiry into the Athabasca Denesųłiné's claim for formal recognition of treaty harvesting rights north of the 60th parallel.[1] Although the facts presented did not technically disclose a specific claim because there was no claim for compensation or damages, the Commission nevertheless concluded that the Denesųłiné have treaty rights to hunt, fish, and trap north of the 60th parallel and recommended that Canada formally recognize the existence of these rights to ensure that they are afforded full constitutional protection as existing treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982*.

The Minister of Indian Affairs provided a formal response to the Commission's report in a letter to the Co-Chairs dated August 5, 1994. Minister Irwin stated that, although the traditional harvesting activities of the Denesųłiné were protected under Article 40 of the Nunavut Agreement, "we have seen nothing in the Commission's report which would make the Government of Canada change its view that the claimant bands do not have, under Treaties 8 and 10, treaty rights in the Nunavut Settlement Area."[2] In subsequent correspondence with the Athabasca Denesųłiné, Minister Irwin reiterated Canada's position on the legal effect of the blanket extinguishment clauses in Treaties 8 and 10.[3]

Despite Canada's position on the treaties, Minister Irwin agreed to appoint the Hon. Jack Anawak, MP, to facilitate negotiations between the Denesųłiné and Inuit on future harvesting activities in the Keewatin district of Nunavut. Canada initiated a dialogue between the Denesųłiné and Inuit in March 1994, but in July 1994 the Keewatin Inuit Association withdrew from the discussions, stating that "there is no need for further deliberations on the issue of land overlap" with the Denesųłiné.[4] The position of the Inuit is that they will not enter into an overlap agreement or co-management arrangement with the Denesųłiné unless and until Canada, or the courts, formally

1 The claim area is depicted in Map 1 (Appendix A).
2 Hon. Ronald A. Irwin to Indian Specific Claims Commission, August 5, 1994 (Appendix B).
3 In a letter from Hon. Ronald A. Irwin, Minister of Indian Affairs, to Vice-Chief John Dantouze, Prince Albert Grand Council, dated May 11, 1995 (Appendix C), the Minister states that Canada recognizes that the Denesųłiné used, and continue to use, land in the Keewatin area for harvesting purposes, but stated that "the treaty area, and any treaty rights to hunt, fish and trap that the bands have under the treaties, are limited to lands below the 60th parallel." It is not clear whether Minister Irwin intended to suggest that the Denesųłiné have no treaty rights to hunt, fish, and trap in the portion of Treaty 8 which lies above the 60th parallel and borders the south shore of Great Slave Lake.
4 Resolution of the Keewatin Inuit Association, undated.

recognize that the Denesųłiné have existing treaty rights in the Nunavut Settlement Area.[5]

In light of the Inuit refusal to negotiate with the Denesųłiné, Vice-Chief Dantouze appealed to the Commission to help resolve this impasse, stating that "We will never abandon our struggle to have our Inherent and Treaty rights, throughout our traditional homeland, recognized by Canada and our aboriginal neighbours."[6] On June 26, 1995, the Denesųłiné met to consider their options. Although the Denesųłiné decided to continue efforts to obtain recognition of their treaty rights through negotiations, it is clear that they are prepared to proceed with their action in the Federal Court if these negotiations prove futile.[7]

ANALYSIS

In the interests of assisting Canada in its legal review – and minimizing the risk of costly and protracted litigation – the Commission offers the following summary of its report and recommendations into the Athabasca Denesųłiné claim to treaty harvesting rights north of 60° latitude and a brief supplementary legal analysis on the merits of the claim. For a more detailed examination of these issues, please refer to the Commission's report into the Athabasca Denesųłiné Inquiry dated December 21, 1993.[8]

SUMMARY OF COMMISSION'S REPORT

The Denesųłiné have a special relationship with their traditional territories and the "barren lands" which are located on the open tundra almost entirely north of the 60th parallel. The Denesųłiné often referred to themselves as the *Ethen-eldeli* or "caribou-eaters," and it is on the barren lands that the caribou are most plentiful. According to historical and anthropological evidence, the caribou "was of overwhelming importance . . . structuring their seasonal cycle, seasonal distribution, socioterritorial organization, and technology; it was the focus of religious beliefs and oral literature."[9]

5 Letter of Understanding between Tungavik Federation of Nunavut and Athabasca Denésųłiné, June 1, 1993 (Appendix D).
6 Vice-Chief Dantouze to Commissioner Corcoran, ICC, June 19, 1995.
7 See "Chronology of Events" relating to the Denesųłiné's efforts to obtain recognition of their treaty harvesting rights (Appendix E).
8 *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations* [hereinafter *Athabasca Report*], [1995] 3 Indian Claims Commission Proceedings (ICCP) 3.
9 *Athabasca Report*, [1995] 3 ICCP 3 at 24.

Accordingly, the very identity and existence of the Denesųłiné people are inextricably linked to the barren lands and to their pursuit of the caribou herds.

Both Canada and the Inuit acknowledge that the Denesųłiné have hunted, fished, and trapped on lands north of the 60th parallel since time immemorial and that they continue to do so today. Moreover, anthropological evidence confirms that the Denesųłiné historically used and occupied the barren lands, because many of the lakes and rivers in that area have Dene place names as opposed to Inuit names.

On July 25 and 27, 1899, predecessors of the Black Lake and Fond du Lac Bands signed adhesions to Treaty 8. On August 22, 1907, the forefathers of the Hatchet Lake Band signed an adhesion to Treaty 10. The written texts of both treaties provide for the extinguishment of aboriginal interests in specified tracts of lands in exchange for certain rights, including the right to hunt, fish, and trap "throughout the tract surrendered as heretofore described."

The Crown's main purpose in entering into the treaties was to obtain a surrender of specified tracts of lands. In the case of Treaty 8, the Crown wished to accommodate the mining industry, maintain peaceful relations between the Indians and non-Indians, and minimize its expenses and obligations to the Indians. With respect to Treaty 10, the Crown's main purpose was to clear the title over lands situated inside the newly created provinces of Saskatchewan and Alberta.

When the Treaty Commissioners negotiated Treaty 8, the Denesųłiné were extremely apprehensive about signing the treaties because they feared their traditional way of life based upon hunting, fishing, and trapping would be curtailed. After several days of negotiations, the Denesųłiné agreed to sign only after the Treaty Commissioners assured them that they "would be as free to hunt and fish after the treaty as they would be if they never entered into it." In Treaty 10, the Denesųłiné agreed to sign the treaty only after the Treaty Commissioners promised that "they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and . . . that they had the privilege of hunting and fishing as before."

There was no evidence before the Commission that the treaty harvesting rights of the Denesųłiné were ever expressly limited to the geographic area defined by the metes-and-bounds descriptions in the treaties. Nor were they informed that the blanket extinguishment clause in the treaties was intended to extinguish their rights to hunt, fish, and trap north of 60°. The Denesųłiné

understood that the treaties protected their rights to hunt, fish, and trap throughout all their traditional territories, without regard to the metes-and-bounds descriptions in the treaties.

After the treaties were signed, the Denesųłiné continued to hunt, fish, and trap as they always had. There were periodic enactments of hunting and fishing regulations that curtailed the harvesting activities of the Denesųłiné. However, the Department of Indian Affairs, and other federal departments, promoted and encouraged the claimants' harvesting activities in the Northwest Territories. The government of Canada, almost without exception, defended their exercise of these traditional rights and stated that any interference with these rights effectively "contravenes the treaty." The Denesųłiné continued to believe they had treaty rights to hunt, fish, and trap north of the 60th parallel until 1989, when Canada advised them, for the first time, that their rights to their traditional lands north of 60° had been surrendered pursuant to the blanket extinguishment clauses in the treaties.

Based on the evidence before the Commission, which was not disputed, we found that the Denesųłiné have existing treaty rights to hunt, fish, and trap throughout their traditional territories and that these rights are not limited to the strict boundaries of the treaties. The evidence is clear that the Denesųłiné would not have deliberately surrendered rights to their traditional territory in return for harvesting rights over a smaller area contained in the treaty boundaries, because they lived primarily in the barrens where they hunted caribou. It is unreasonable to think that a people known as the "caribou-eaters" would have agreed to such an arrangement. While the subsequent conduct of the parties is not conclusive, nonetheless it is consistent with our interpretation of the treaties.

Accordingly, the Commission found that the Denesųłiné have treaty rights in their traditional territories and that Canada must, at a minimum, formally recognize the existence of these treaty harvesting rights and seek to ensure that they are protected and fulfilled within the meaning of section 35(1) of the *Constitution Act, 1982*.

LEGAL ANALYSIS

During the course of our inquiry, the Commission relied heavily upon the contemporaneous statements made by the parties during the treaty negotiations as evidence that the parties did not intend to extinguish Denesųłiné harvesting rights in their traditional lands. Given the importance of this land to the Denesųłiné, it is inconceivable that they would have agreed

to sign the treaty if they had been informed that the effect of the blanket extinguishment clause was that they were surrendering their rights to hunt, fish, and trap in the barren lands north of 60°.

Legal counsel for both parties made extensive submissions on whether oral assurances made by the Treaty Commissioners during the negotiations and the subsequent conduct of the parties should be considered by the Commission to assist in interpreting the treaties. Canada submitted that, while the historical context may be relevant, the oral assurances of the Treaty Commissioners constituted extrinsic evidence which should not be used to interpret the terms of a treaty. Extrinsic evidence can be used only where the wording of the treaty is ambiguous or would lead to a result which is manifestly absurd: *Horse v. R.*[10] The Denesųłiné submitted that, where the interpretation of a treaty is involved, the general principle established by the courts is that the broad historical context should be considered as an aid to interpreting the treaty: *R. v. Taylor and Williams*[11] and *R. v. Sioui*.[12]

The Commission considered this evidence because: (1) the Specific Claims Policy directs the Commission to consider all relevant historic evidence without regard to technical rules of admissibility; and (2) as a matter of legal principle, it was necessary to consider the broad historical evidence of the treaties because there was a patent ambiguity on the face of the treaty. Based on the wording and construction of the treaties, it is not clear whether the clause which guaranteed rights to hunt, fish, and trap applies only to those lands contained within the metes-and-bounds description or whether it also applies to all land surrendered by the Denesųłiné, including that part of their traditional territory which lies outside the treaty boundaries in the Northwest Territories.[13]

In light of these conflicting interpretations, the Commission considered the broad historical context and concluded that the parties did not intend to extinguish the rights of the Denesųłiné to hunt, fish, and trap north of 60° when Treaties 8 and 10 were signed. Such an interpretation is not consistent with what the Denesųłiné were told by Canada's representatives and would lead to an absurd result – namely, that the Denesųłiné would have knowingly surrendered their rights to hunt caribou in the barren lands because this

10 *Horse v. R.*, [1988] 1 SCR 187, 2 CNLR 112.
11 *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (Ont. CA).
12 *R. v. Sioui*, [1990] 1 SCR 1068, 3 CNLR 127.
13 The essence of the claimant's argument is that, if the effect of the blanket extinguishment clause is to extinguish the Denesųłiné's aboriginal title to all of their traditional lands, the treaty harvesting rights clause applies to all lands surrendered by the Denesųłiné and is not limited to the treaty boundaries.

would have undermined their very survival. It must be remembered that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[14]

Even assuming that the treaties are not ambiguous and that Canada's interpretation of the written terms supports its argument, there is a secondary question of whether it would be unconscionable for Canada as a fiduciary to rely upon such a narrow interpretation of the treaties. During the negotiations for Treaty 8, Canada's representatives assured the Denesųłiné that "they would be as free to hunt and fish after the treaty as they would be if they never entered into it."[15] This is consistent with the evidence of Denesųłiné elders, who said that the Treaty Commissioners assured them that for "as long as the sun shines, as long as the rocks do not move, these rights would last forever . . ."[16] The Supreme Court of Canada in *Guerin v. The Queen*[17] held that it would be unconscionable for a fiduciary to rely upon the terms of a written document where oral assurances to the contrary have been made to the Indians. In *Guerin*, Mr. Justice Dickson expounded on the Crown's obligations in a case relating to the surrender of a reserve for lease as a golf course:

> . . . the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.[18]

This statement is applicable to the facts in this case. In our view, it would be unconscionable for the Crown to rely upon such a narrow and technical interpretation of the treaty in the face of compelling and uncontroverted evidence that the Treaty Commissioners assured the Denesųłiné that their harvesting rights would be respected for "as long as the sun shines and the rivers flow." To use the words of Madam Justice Wilson in *Guerin*, "Equity

14 *Nowegijick v. The Queen* [1983], 1 SCR 29 at 36 (per Dickson J.).
15 *Athabasca Report* , 24. Similar statements were made by the Treaty Commissioners during the negotiation of Treaty 10 (*Athabasca Report*, 33).
16 *Athabasca Report* , 35 (excerpt from testimony of Jimmy Dzeylion).
17 *Guerin v. R.*, [1984] 2 SCR 335, 13 DLR (4th) 321, [1985] 1 CNLR 120.
18 *Guerin*, at 388.

will not permit the Crown in such circumstances to hide behind the language of its own document."[19]

OTHER CONSIDERATIONS

In correspondence between the Denesųłiné and Minister Irwin, it has been suggested that it is not necessary for Canada to recognize treaty rights north of 60° in order for the Inuit and Denesųłiné to enter into overlap agreements. Canada has stated that Article 40 of the Nunavut Agreement provides protection to the Denesųłiné Bands, who "may harvest wildlife for personal, family or community consumption and may trap wildlife within areas of the Nunavut Settlement Area which they have traditionally used and continue to use for those purposes . . ."[20] Although we appreciate that Article 40 may provide some level of comfort to the Denesųłiné, it is important to observe that the harvesting rights granted under this agreement are not on the same legal footing as existing aboriginal or treaty rights which have constitutional protection under section 35(1) of the *Constitution Act, 1982*. If that is the case, the harvesting activities referred to in Article 40 are not protected by the rigorous justificatory standard for regulation set out in *R. v. Sparrow*[21] and can be unilaterally extinguished by a simple Act of Parliament or by the parties to the Nunavut Agreement.

We accept that Canada may have legitimate concerns about the implications of recognizing Denesųłiné treaty rights in the Nunavut Settlement Area. However, the formal recognition of treaty rights in the Nunavut area would not be counter to the terms of the Nunavut Agreement signed with the Inuit because Article 40 contemplates that other First Nations may have pre-existing treaty or aboriginal rights in the same area. Therefore, if Canada recognizes the existence of Denesųłiné treaty rights in the NWT, the Inuit have stated that they are prepared to enter into negotiations with the Denesųłiné to provide for the joint ownership of lands; the sharing of wildlife and other benefits; and joint participation in wildlife management, land use planning, impact assessment, and water management.[22]

19 *Guerin*, at 354.
20 *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, Article 40.5.2.
21 *R. v. Sparrow*, [1990] 1 SCR 1075.
22 Letter of Understanding between Tungavik Federation of Nunavut and Athabasca Denésųłiné, June 1, 1993 (Appendix D).

The Commission recognizes Canada's efforts to facilitate bilateral negotiations between the Inuit and Denesųłiné, but it appears that meaningful discussions on an overlap agreement will not commence until Canada or the courts have confirmed that the Denesųłiné have treaty rights which stand on the same legal footing as the rights of the Inuit under the Nunavut Act. Furthermore, Canada's active participation in these discussions is critical because it is doubtful that the Inuit and Denesųłiné have the legal capacity to enter into a bilateral agreement to define the nature and extent of Denesųłiné treaty harvesting rights, as only the federal government can enter into "land claim agreements" with the Denesųłiné for the purposes of section 35 of the *Constitution Act, 1982*.

Our assessment of the matter suggests that recognition of Denesųłiné harvesting rights in their traditional territories would not give rise to any major implications for the following reasons. First, any questions or uncertainty regarding the extent of the Denesųłiné traditional land use area can be clarified in an overlap agreement between Canada and two aboriginal groups with coexisting aboriginal and treaty rights. Second, recognition of Denesųłiné treaty harvesting rights outside the treaty boundaries is confined to the specific facts of this case and is not intended to create a precedent of general application to other First Nations. Third, the formal recognition of Denesųłiné treaty rights to hunt, fish, and trap north of 60° could be achieved by executing a simple agreement which expressly states that such rights are recognized and affirmed for the purposes of section 35(1) of the *Constitution Act, 1982*.

In the event that the parties are unable to reach a negotiated settlement of this matter, litigation appears to be inevitable because this is a matter of principle and fundamental importance to the Denesųłiné people. Before resorting to litigation, which is an expensive, protracted, and unnecessarily adversarial method of resolving grievances between First Nations and the Crown, we encourage the Denesųłiné, Inuit, and Canada to explore every possible avenue to resolve this outstanding dispute in a manner that accommodates the competing interests and concerns of all interested parties.

RECOMMENDATION

We recommend that the Ministers of Indian Affairs and Justice formally recognize that the Athabasca Denesųłiné have unextinguished rights to hunt, fish, and trap throughout their

traditional territories pursuant to Treaties 8 and 10. In the alternative, if Canada is not prepared to recognize the existence of Denesųłiné treaty rights north of 60°, we would recommend that Canada provide litigation funding to the Denesųłiné to facilitate a resolution of the issue in the Federal Court.

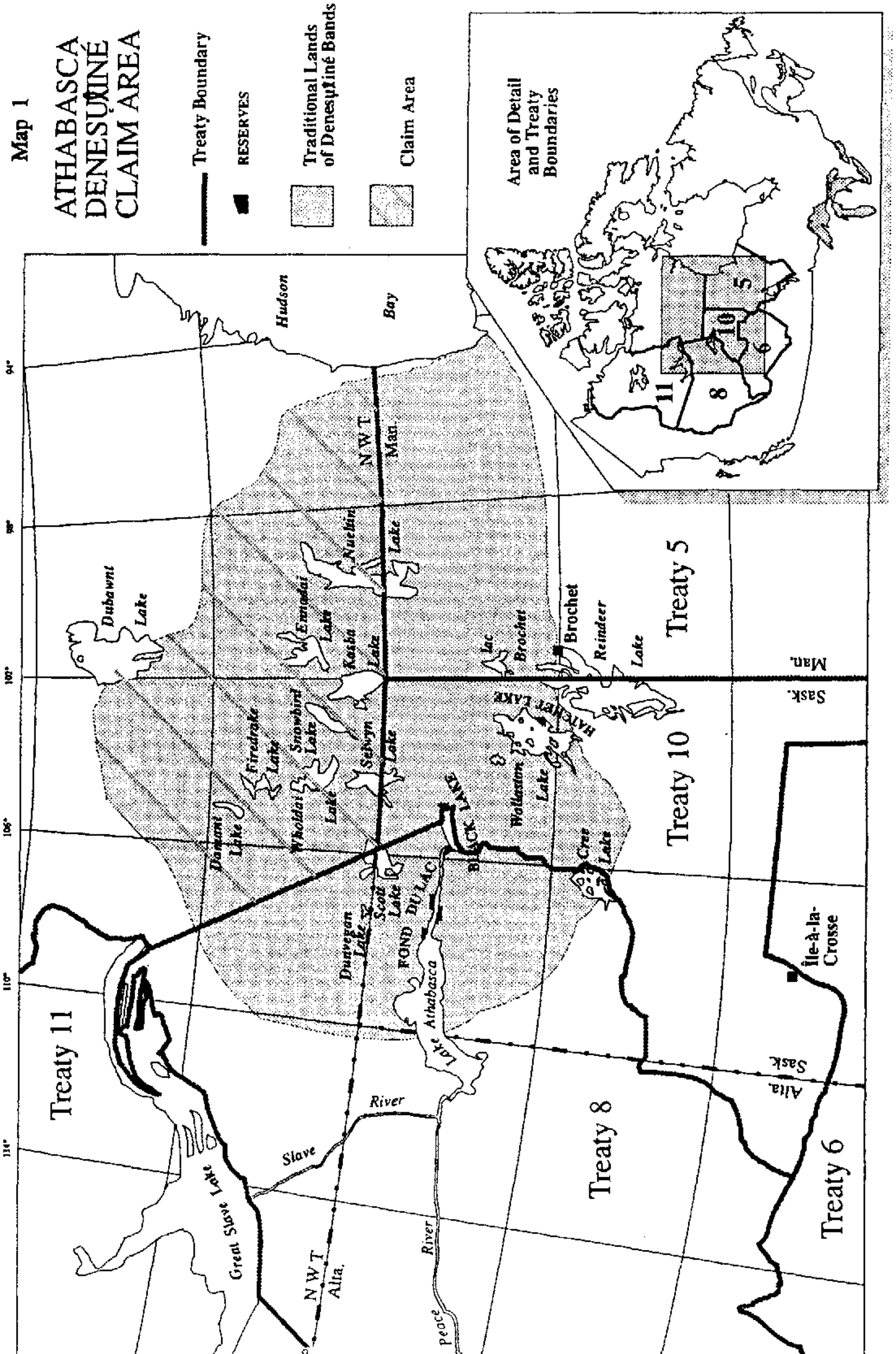
FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair

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

November 1995

APPENDIX A


Map 1
ATHABASCA
DENESUŁINÉ
CLAIM AREA
Treaty Boundary
RESERVES
Traditional Lands of Denesułiné Bands
Claim Area
Area of Detail and Treaty Boundaries
Treaty 11
Treaty 8
Treaty 10
Treaty 5
Treaty 6
Hudson
Bay
Dubawnt Lake
Nueltin Lake
Ennadai Lake
Kasba Lake
Firedrake Lake
Snowbird Lake
Selwyn Lake
Wholdaia Lake
Damant Lake
Dunvegan Lake
Scott Lake
Wollaston Lake
Cree Lake
Lac Brochet
Brochet
Reindeer Lake
HATCHET LAKE
BLACK LAKE
FOND DU LAC
Lake Athabasca
Great Slave Lake
Slave River
Peace River
Île-à-la-Crosse
N W T
Man.
Sask.
Alta.
60°

APPENDIX B

AUG - 5 1994
AOÛT

Co-chairmen
Indian Specific Claims Commission
1701 - 110 Yonge Street
TORONTO ON M5C 1T4

Dear Messrs. Prentice and Bellegarde:

This is in response to a letter dated December 21, 1993 from the Indian Specific Claims Commission concerning its report entitled *Athabasca Denesuline Inquiry*.

As mentioned in the letter, in preparing the report, the Commission reviewed over 2,300 pages of documents, held an information-gathering session at Fond du Lac, Saskatchewan, and heard 18 elders from three claimant First Nations of Fond du Lac, Black Lake and Hatchet Lake. I compliment you and the Commission on the attention given to this matter.

It is interesting to note that the Commission recommends that the matters at issue in this case could only be resolved outside the Specific Claims Policy. This coincides with the preliminary assessment of the Government of Canada, which was that the issues, as presented by the claimant bands, and the remedy sought, fall outside the scope of the Specific Claims Policy.

The Commission has recommended that the claims of the First Nations be addressed by way of administrative referral, and I quote:

> "Outstanding Business does not strictly allow for the negotiation of this claim. However, other processes for negotiation of similar issues have been established by Canada, one of which is described as "Administrative Referral". As soon as possible, the parties should commence negotiations of the claimant's grievance pursuant to that process."

.../2

Ottawa Canada K1A 0H4

While the Government of Canada agrees that the Athabasca Denesuline residing in northern Saskatchewan may continue their traditional harvesting activities in the Nunavut Settlement Area, and indeed, these activities have been safeguarded under article 40, parts 1 and 5, of the Nunavut Land Claims Agreement, we have seen nothing in the Commission's report which would make the Government of Canada change its view that the claimant bands do not have, under Treaties 8 and 10, treaty rights in the Nunavut Settlement Area.

I have asked my Parliamentary Secretary, Mr. Jack Anawak, to meet with all Aboriginal parties interested in this matter, to see if practical solutions can be found to the concerns of the Athabasca Denesuline. Mr. Anawak's discussions include the Inuit, from whom the Commission did not hear, who of course represent the other significant user group of these lands. Mr. Anawak advises me that he had a preliminary meeting with representatives of the Saskatchewan and Manitoba Dene and Inuit in March 1994, which culminated in a Resolution of Understanding declaring the desire of the Dene and Inuit to continue their discussions with the objective of reaching understandings and agreements. In the meantime, the Denesuline's traditional harvesting activities continue to be safeguarded under Article 40, parts 1 and 5, of the Nunavut Land Claims Agreement.

I believe that the exercise being conducted by Mr. Anawak also constitutes an appropriate response to the recommendation of your Commission's Report on the Athabasca Denesuline Inquiry, which was to have this matter addressed in processes other than the specific claims process.

Yours truly,

Ronald A. Irwin, P.C., M.P.

c.c.: The Honourable Allan Rock, P.C., M.P.
Mr. Jack Anawak
Chief George Fern
Chief Daniel Robillard
Chief Joe Tsannie

APPENDIX C

MAY 1 1 1995

Mr. John Dantouze
Vice Chief
Prince Albert Grand Council
First Nation Governments of Saskatchewan
P.O. Box 2350
PRINCE ALBERT SK S6V 6Z1

Dear Mr. Dantouze:

This is in response to your letters of September 20, 1994 and March 16, 1995 raising a number of important concerns which the Denesuline Bands in northern Saskatchewan and Manitoba would like the Government of Canada to address.

After thoroughly considering the various issues presented in your correspondence, I have prepared the following comments which I trust will be of assistance to the Denesuline people. As a starting point, I would like to acknowledge the frustrations you express regarding the apparent impasse preventing continued discussions between the Denesuline and the Inuit of Keewatin. I share your frustration and disappointment at the lack of progress, over the past months, in working out practical solutions to the concerns of the Denesuline. In particular, I am most disappointed by the apparent unwillingness of the Keewatin Inuit Association (KIA) to continue discussions.

As you are aware, it was with the highest expectations that I originally asked my Parliamentary Secretary, Mr. Jack Anawak, to meet with representatives of the Denesuline and Inuit peoples in an effort to facilitate understanding and agreement on future harvesting activities in the Nunavut Settlement Area of the Northwest Territories. In this regard, I was most encouraged by the initial meetings chaired by Mr. Anawak in March 1994, that resulted in a Resolution of Understanding between the Denesuline and the Inuit resolving to "continue with discussions" with the objective of "reaching understandings and agreements." This resolution

Canada

.../2

was, of course, in addition to the earlier Letter of Understanding signed by the Dene and the Inuit in June 1993. However, as you accurately acknowledge, there has been little progress made since the KIA passed a resolution taking the position that there is no need for further "deliberations" or "negotiations" with the Dene pertaining to overlap issues. In an effort to resolve this impasse, you request action on the part of the Government of Canada to help bring the Inuit back into the discussion process.

In response to your request, I would like to assure you that I fully support your efforts to resume discussions with the Inuit. It has been my firm belief throughout our work together, that practical ways to safeguard Denésųłiné harvesting activities in the Northwest Territories, will only be achieved through the joint efforts of the Aboriginal peoples using the Keewatin lands. To assist in overcoming the present impasse, on February 1, 1995 I wrote to Mr. Kusugak, President of Nunavut Tunngavik Inc. urging the Inuit to give serious consideration to resuming the dialogue with the Denésųłiné. In this letter (copy attached), I pointed out that the opportunities available through continuing discussions with the Denésųłiné are likely to outweigh the risks that accompany uncertain, protracted and costly litigation. In particular, I emphasized that resuming discussions could provide opportunities for the two Aboriginal peoples to develop mutually acceptable approaches for the future management of the harvesting resources. Above all, I urged the Nunavut Tunngavik Inc., as well as the Nunavut Wildlife Management Board, to become directly involved in the discussion process being facilitated by Mr. Anawak.

Although I have not yet received a response to my letter to Mr. Kusugak, I still hope that the Nunavut Tunngavik Inc. and the Nunavut Wildlife Management Board can provide the Denésųłiné with important, alternate forums for discussion not presently available with the KIA.

You conclude that the only "productive" basis for commencing discussions with the Inuit, is a recognition by the Government of Canada of the "rights of the Athabasca Denesuline in the N.W.T." For the sake of certainty, I would like to set out below the Crown's position on this matter.

The Government of Canada recognizes that the Denesuline Bands in northern Saskatchewan (Fond du Lac, Black Lake and Hatchet Lake Bands) and in northern Manitoba (Northland and Churchill Bands) used, and continue to use, the Keewatin area north of the 60th parallel for harvesting activities. Any Aboriginal

.../3

rights these Bands may have had to hunt, fish or trap in the Northwest Territories were surrendered at the time of the signing of the treaties and/or adhesions to the treaties (Treaty 5, 8 and 10). Upon a proper reading of the treaties, Canada maintains that the treaty area, and any treaty rights to hunt, fish and trap that the Bands have under the treaties, are limited to lands below the 60th parallel. As such, any harvesting rights the bands may have under the treaties do not apply in, or extend to, the Northwest Territories. Although the Denesuline have neither treaty nor Aboriginal rights north of the 60th parallel, the Government of Canada does recognize that the harvesting activities of the Denesuline are protected by article 40 (parts 4.2 and 5.2) of the Nunavut Land Claims Agreement (NLCA). In particular, the agreement provides that the members of the Bands "may harvest wildlife for personal, family or community consumption, and trap wildlife within areas of the Nunavut Settlement Area which they have traditionally used and continue to use for those purposes, on a basis equivalent to Inuit ...."

You state that the present impasse with the Inuit can only be resolved by Canada recognizing Denesuline "treaty rights" and "Aboriginal rights" in the Northwest Territories. This is a conclusion I do not share. I believe that it is important for the Denesuline and the Inuit to continue discussions in order to achieve a better understanding of the new wildlife management regime under the NLCA. It is only through such discussions that one can determine the various ways in which the Nunavut regime does, or does not, safeguard the harvesting activities of the Bands. While Canada does not accept the Denesuline legal position on the existence of Denesuline treaty or Aboriginal harvesting rights in Nunavut, there could be useful discussion between the Denesuline and the Inuit to clarify, at a practical level, how Denesuline harvesting activities will be accommodated in the new wildlife management system. Such a dialogue between the Denesuline and the Inuit could include the creation of mutually acceptable protocols for co-management that parallel co-management regimes being developed south of the 60th parallel. Also, such a dialogue could explore various arrangements regarding where and when members of the two Aboriginal peoples will exercise permissable harvesting activities. In addition, such discussions could be very useful in explaining to the Denesuline the various changes brought to the wildlife management regime since the agreement was approved by Parliament. In this regard, I suggest that the Nunavut Wildlife Management Board would be a valuable source of information for the Denesuline.

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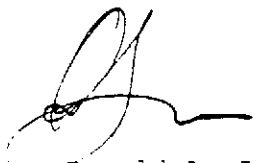
You clarify that the Denesuline are prepared to "re-activate" their court challenges should the option of continuing the discussions be rejected by the Inuit. As you are aware, litigation is a slow and costly process. The outcome may produce losers, as well as winners, and may not provide real or effective solutions for either the Denesuline or the Inuit. For this reason, I believe that the discussion table, rather than the court room, is a more expeditious forum for the achievement of mutually acceptable and lasting solutions.

Despite the delays and set backs experienced by those involved in the "Anawak process," I still hold the belief that the Dene and Inuit can resolve this dispute through agreements between their respective peoples. To assist in this process, I offer my continuing support for Mr. Anawak's efforts in facilitating discussion and understanding between the Denesuline and Inuit people.

I trust that the above comments are of assistance in responding to the important matters raised in your letters. To ensure that Mr. Anawak is aware of the matters discussed in our recent correspondence, I will be forwarding copies of your letter and my response to him.

Yours truly,



Ronald A. Irwin, P.C., M.P.

Encl.

c.c.: Mr. Jack Anawak, M.P.

APPENDIX D

Letter of Understanding

June 1, 1993

Vice-Chief John Dantouze,
Denésuline First Nation,
Prince Albert Tribal Council

Dear Chief Dantouze,

I appreciated the opportunity to meet with you and other Saskatchewan Denésuline representatives this morning.

Based on our discussions I would like to reiterate the position of the Inuit of Nunavut on a number of topics of mutual interest and concern:

1. the Inuit of Nunavut recognize that Saskatchewan Denésuline have traditionally used and continue to use certain lands north of the sixtieth parallel based on their Treaty or Aboriginal rights.

2. the Inuit of Nunavut have included Part 5 of Article 40 of the Nunavut Final Land Claim Agreement in an effort to provide some recognition of traditional and current use of certain lands within the Nunavut Settlement Area by Saskatchewan Denésuline

3. the Inuit of Nunavut restate that sections 40.1.1 and 40.1.2 provide some legal protection against any application or interpretation of the Nunavut Final Land Claim Agreement in a way that prejudices any treaty or aboriginal rights of the Saskatchewan Denésuline north of the sixtieth parallel

4. the Inuit of Nunavut acknowledge that Saskatchewan Denésuline are fully entitled to invoke the protection of sections 40.1.1 and 40.1.2 of the Nunavut Final Land Claim Agreement

5. the Inuit of Nunavut agree not to amend, except by written agreement with the Saskatchewan Denésuline, sections 40.1.1, 40.1.2 and Part 5 of Article 40 of the Nunavut Final Agreement in relation to Saskatchewan Denésuline

6. the Inuit of Nunavut restate that section 40.1.3 and 2.13.1 of the Nunavut Final Land Claim Agreement allows an expeditious

method of amendment of the Nunavut Agreement in the event there is agreement on more detailed overlap arrangements outside the judicial process

7. in the event that the Government of Canada is prepared to recognize that the Saskatchewan Denésųłiné have treaty rights in the Nunavut Settlement Area or to enter into negotiations on Saskatchewan Denésųłiné rights in the Nunavut Settlement Area, or in the event that such rights are recognized in the judicial process, the Inuit of Nunavut shall participate in negotiations in good faith, which negotiations shall include negotiations on the following topics:

a) provisions for the continuation of harvesting by the Saskatchewan Denésųłiné and Inuit in all areas traditionally and currently used, occupied by them, regardless of land claims agreement boundaries;

b) identify areas of exclusive or equal, joint or overlapping use and occupancy between the Saskatchewan Denesuline and Inuit to provide for:

i) joint ownership of lands;
ii) sharing of wildlife and other benefits;
iii) joint participation in regimes for wildlife management,. land use planning, impact assessment and water management;

8. the Inuit of Nunavut support the efforts of the Denésųłiné of Saskatchewan to obtain a fair and full hearing of their assertions of treaty and aboriginal rights in the NWT by Canada.

Yours sincerely,

Paul Quassa
President

On this basis, the Saskatchewan Denésųłiné withdraw any opposition to the immediate ratification of the Nunavut Final Land Claim Agreement, including the enactment of legislation by Parliament.

Vice-Chief John Dantouze

APPENDIX E

CHRONOLOGY OF EVENTS

1970s – Negotiations commence between Canada and NWT Dene Nations after *Paulette* decision acknowledges existence of land rights.

1970s – Denesųłiné agree not to pursue treaty land selection in NWT on assurance that Dene Nations would respect their treaty rights and traditional territory.

1989 – Canada rejects Denesųłiné claim on grounds that they surrendered aboriginal rights north of 60th parallel.

1991 – Minister of Indian Affairs reaffirms position on rejection, but assures Denesųłiné that their traditional harvesting activities would be protected in any Nunavut or Denendeh agreements.

1992 – Statement of Claim filed in Federal Court seeking declaration of existing aboriginal or treaty rights; injunction proceedings to postpone ratification of Nunavut Agreement fails, but action remains in the courts; ICC agrees to conduct inquiry in December 1992.

1993 – Denesųłiné appear before Standing Committee on Aboriginal Affairs and attempt to delay passage of *Nunavut Act*.

June 1, 1993 – Letter of Understanding between Inuit and Denesųłiné in which Denesųłiné agree to withdraw opposition to *Nunavut Act* and Inuit agree to negotiate revisions to the settlement agreement if Canada recognizes Denesųłiné treaty rights within Nunavut area, or if such rights are recognized through judicial process.

December 1993 – Commission finds that the Denesųłiné have existing treaty rights to hunt, fish, and trap outside the treaty boundaries north of 60th parallel and throughout their traditional territories; although this did not constitute a specific claim, because Denesųłiné harvesting activities had

not been infringed upon, ICC recommended that Canada formally recognize and protect Denesųłiné treaty harvesting rights.

January 1994 – Jack Anawak, MP, appointed to facilitate negotiations between Inuit and Denesųłiné to reach a resource management agreement within Nunavut (i.e., overlap agreement).

March 1994 – Joint Inuit-Manitoba-Denesųłiné meeting in Churchill, Manitoba.

August 5, 1994 – Minister Irwin formally responds to Commission's recommendations, stating that Denesųłiné rights were surrendered under the treaties and "we have seen nothing in the Commission's report that would make the Government of Canada change its view."

August 1994 – Keewatin Inuit Association rejects any "further negotiations on the issue of land overlap" and terminates negotiations with Denesųłiné on grounds that all land claim negotiations must be finalized with the Government of Canada.

September 1994 and March 1995 – Denesųłiné urge Minister to recognize treaty rights as only option available to reopen negotiations with Inuit.

May 11, 1995 – Minister Irwin reiterates that any aboriginal rights to hunt, fish, and trap north of 60° were surrendered under Treaties 5, 8, and 10 and that Denesųłiné harvesting activities are protected under Article 40 of *Nunavut Act*; despite Inuit withdrawing from negotiations, Minister Irwin continues to encourage parties to negotiate resource management agreements to protect Denesųłiné interests.

June 26, 1995 – Denesųłiné elders meet in Fond du Lac to explore options and possibility of litigation in light of impasse; sought commitment from FSIN to support litigation if necessary.

July 21, 1995 – Meeting between Vice-Chief Dantouze and Jack Anawak, MP; Mr. Anawak acknowledges that the Denesųłiné traditionally used and occupied lands in the Nunavut Settlement Area, but the legal advice provided to the Minister of Indian Affairs from the Department of Justice is that any aboriginal rights they had to that area were surrendered under the treaties.

August 23, 1995 – Meeting between Vice-Chief Dantouze and Minister Irwin, who agrees to request that Justice review their legal position on the

rights issue; if Justice changes its position, he agrees to appoint a federal negotiator on this matter to enter into discussions on harvesting rights.

September 12, 1995 – FSIN Chief Blaine Favel and Vice-Chief Dantouze meet with Justice Minister Allan Rock, who agrees to review the matter with the Assistant Deputy Minister of Justice.

RESPONSES

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

JAN 17 1996

Mr. Daniel Bellegarde
Mr. P.E. James Prentice
Co-Chairs
Indian Claims Commission
427 Laurier Avenue West, Suite 400
OTTAWA ON K1P 1A2

Gentlemen:

Thank you for your letter of November 30, 1995 enclosing your Special Report on Treaty Harvesting Rights of the Athabasca Denesuline.

This information will certainly be useful in the review of the Athabasca Denesuline claim to treaty harvesting rights that the Department of Justice has agreed to undertake.

I have, as yet, received no word from counsel at the Department of Justice as to when the review of past opinions on this subject may occur. I will be sure to keep you informed on the matter as developments arise.

Yours truly,

Ronald A. Irwin, P.C., M.P.

c.c.: The Honourable Allan Rock, P.C., M.P.

Canada

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

DEC 20 1995

Mr. Daniel Bellegarde
Mr. James Prentice
Indian Claims Commission
P.O. Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Messrs. Bellegarde and Prentice:

My officials and those from the Department of Justice have reviewed the Commission's report regarding the Sumas Indian Reserve No. 6 specific claim.

The issues raised in the report are currently before the courts in several railway actions, including the *Mathias* case.

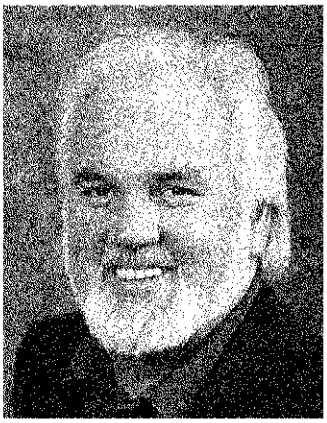
In light of the fact that these complex legal issues are before the courts in well advanced litigation involving other parties and given the ramifications that a decision on these issues may have for other First Nations and third parties, the Government of Canada is of the view that judicial guidance is appropriate prior to substantively responding to your recommendations. Once the courts provide some direction with respect to these issues, Canada will be pleased to consider your recommendations further.

Yours truly,

Ronald A. Irwin, P.C., M.P.

Canada

THE COMMISSIONERS



Roger J. Augustine, a MicMac, has been Chief of the Eel Ground First Nation of New Brunswick since 1980; he served as president of the Union of New Brunswick-Prince Edward Island First Nations from 1988 to January 1994. Chief Augustine is active in promoting economic development among First Nations peoples, and is chairman of the Aboriginal Business Circle, and founder and chairman of the Micmac Maliseet Development Corporation and the Eagle Board Trust. He has been honoured for his efforts in founding and fostering the Eel Ground Drug and Alcohol Education Centre, as well as the Native Alcohol and Drug Abuse Rehabilitation Association.

Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation situated in Southern Saskatchewan. From 1982 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988 he has held the position of first vice-chief of the Federation of Saskatchewan Indian Nations. On March 17, 1994, he was appointed Co-Chair of the Indian Claims Commission.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Reserve in northern British Columbia. Mrs Corcoran has extensive experience in Aboriginal government and politics at the local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91 and a Commissioner to the British Columbia Treaty Commission from April 1993 until March 31, 1995. She was appointed a Commissioner to the Indian Claims Commission in 1992 and a member of the Board of Governors of the University of Northern British Columbia in November 1993.

Aurélien Gill, a Montagnais of Mashteuiatsh (Pointe-Bleue), Quebec, graduated from Université Laval with a degree in education. A teacher, he served as the founding president of the Conseil Atikamekw et Montagnais before becoming Chief of the Mashteuiatsh (Pointe-Bleue) Montagnais community. He helped found the Institut culturel et éducatif Montagnais, the Corporation de Dévelopement Économique Montagnaise, and the National Indian Brotherhood (today the AFN), among other associations. Mr. Gill also held positions within the federal government, including Director General, Quebec Region, Indian and Northern Affairs Canada. In 1991, he was named to the Ordre national du Québec

P.E. James Prentice, QC, is a lawyer with the Calgary firm of Rooney Prentice. He has an extensive background in land matters, including his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that resulted in the Sturgeon Lake Indian Claim Settlement of 1989. He also has experience in the administrative law field, having served as legal counsel on many land acquisition, expropriation, arbitration, and valuation matters in Alberta since 1981. From 1985 to 1992, Mr. Prentice chaired a quasi-judicial tribunal in Alberta. On March 17, 1994, he was named Co-Chair of the Indian Claims Commission.