

INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION

OF THE

FORT PELLY AGENCY

PELLY HAYLANDS CLAIM NEGOTIATIONS

March 2008

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SUMMARY

FORT PELLY AGENCY PELLY HAYLANDS CLAIM MEDIATION Saskatchewan

The report may be cited as Indian Claims Commission, *Fort Pelly Agency: Pelly Haylands Claim Mediation* (Ottawa, March 2008).

*This summary is intended for research purposes only.
For greater detail, the reader should refer to the published report.*

Treaties – Treaty 4 (1874); **Reserve** – Reserve Creation – Alienation;
Mandate of Indian Claims Commission – Mediation; **Saskatchewan**

THE SPECIFIC CLAIM

For the purposes of this claim, three Saskatchewan First Nations – The Key, Keeseekoose, and Cote – joined together as the Fort Pelly Agency to collectively present their individual claims to a block of land which they alleged had been set apart for them in 1891 as a reserve under the *Indian Act* and which was later alienated without a surrender or consent from the First Nations. The claim was submitted to the Department of Indian Affairs and Northern Development (DIAND) in October 1997 and was accepted for negotiation in July 2000. The ICC monitored the progress of the claim during the review leading to acceptance, and was invited to facilitate the negotiations, which began in November 2000.

BACKGROUND

The ICC's involvement in this claim related only to its mediation mandate. As such, the ICC did not receive historical records or legal submissions from the parties.

The Key, Cote, and Keeseekoose First Nations adhered to Treaty 4 in 1874 and had their respective reserves in the Swan River–Fort Pelly region of eastern Saskatchewan between 1877 and 1883. All three reserves were confirmed by order in council in 1889. Hunting and fishing could not sustain the First Nations in their traditional ways, and they turned to agriculture, particularly stock raising, to improve their condition. In 1891, a 20-square-mile parcel of land in townships 30 and 31 in range 32, west of the 1st meridian (lying immediately west of the Keeseekoose and Cote Reserves, between the Assiniboine and White Sand Rivers) was surveyed to provide the hay required to maintain the cattle herds. On March 1, 1893, Order in Council 574 was passed under the *Dominion Lands Act*, ordering that townships 30 and 31 be “withdrawn from the sale and entry and vested in the Superintendent General of Indian Affairs to be held as haylands for the benefit of the Indians of the Pelly District.”

In 1898, the Pelly haylands in township 31 were inadvertently included in a block of land reserved for a Doukhobor settlement. Indian Affairs officials believed that a surrender of these lands was not necessary because they had not been set aside as a full reserve but simply as a reserve for hay purposes, and on March 15, 1899, Order in Council 759 was passed relinquishing township 31 from the Department of Indian Affairs to the Department of the Interior for the Doukhobor settlers.

In 1905, Cote First Nation surrendered a part of its reserve in exchange for the haylands in township 30. No surrender of the Pelly haylands was taken by The Key or Keeseekoose First Nations.

MATTERS FACILITATED

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for

meetings. The ICC coordinated land appraisals and loss-of-use studies concerning land appraisals, agriculture, minerals and forestry, traditional activities, social impact, special economic advantage, and water. The ICC also provided mediation to assist the three First Nations to reach agreement for the division of the settlement money.

OUTCOME

In October 2004, the parties reached an agreement in principle for a total compensation package of \$73.5 million plus negotiation and ratification costs. In April 2005, the three First Nations agreed on an equitable division of the money. Cote and Keeseekoose successfully ratified the proposed settlement in February and April 2006, respectively. Although The Key also ratified the agreement in April 2006, some members of The Key Band sought a judicial review of the ratification vote, and the case is still pending. The settlement agreement will not be implemented until the matter has been decided.

REFERENCES

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

PART I
INTRODUCTION

The Pelly Haylands specific claim, put forward by The Key, Keeseekoose, and Cote First Nations, relates to events dating back over 100 years. The Indian Claims Commission (ICC) was involved with this claim from its initial presentation to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) in 1997 to its successful resolution in 2006.

Cote, Keeseekoose, and The Key are Treaty 4 First Nations with three reserves bordering on the Assiniboine River, south of Fort Pelly in central Saskatchewan, close to the Manitoba border. Keeseekoose Indian Reserve (IR) 66 (currently 4,415.9 hectares) and Cote IR 64 (currently 8,088.2 hectares) adjoin each other, and The Key IR 65 (currently 6,404.8 hectares) is slightly farther west along the river. As of November 2007, the registered population of the three First Nations was:

	Total	On Reserve
Cote	3038	754
Keeseekoose	2106	659
The Key	<u>1107</u>	<u>280</u>
Grand Total	6251	1693¹

They joined together as the “Fort Pelly Agency” in 1997 to collectively present their individual claims to a separate block of land, designated as haylands for the Indians of the Fort Pelly District, which they alleged had been set apart for the three Bands in 1891 as a reserve under the *Indian Act* and which was later alienated without a surrender or consent from the First Nations.

This report will not provide a full history of the Pelly Haylands land claim but will summarize material submitted during the negotiations to provide the historical background. It will also summarize the events leading up to the settlement of the claim and describe the Commission’s role in the resolution process. In this case, the Commission’s involvement began when the claim was presented to the Specific Claims Branch in October 1997. At the request of the First Nations, the

¹ Canada, Indian and Northern Affairs Canada (INAC), First Nation Profiles, The Key, Keeseekoose, and Cote First Nations, <http://sdiprod2.inac.gc.ca/fnprofiles> (December 29, 2007).

Indian Claims Commission attended that initial meeting and agreed to monitor the progress of the claim through the Specific Claims Branch and Department of Justice processes. No further meetings were required in this capacity, only regular telephone communication to ensure continued progress by the parties. The claim was accepted for negotiation on July 28, 2000, and in October of the same year, the First Nations asked, and Canada agreed, to have the ICC facilitate the negotiation meetings.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council² on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into specific claims; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process. An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct

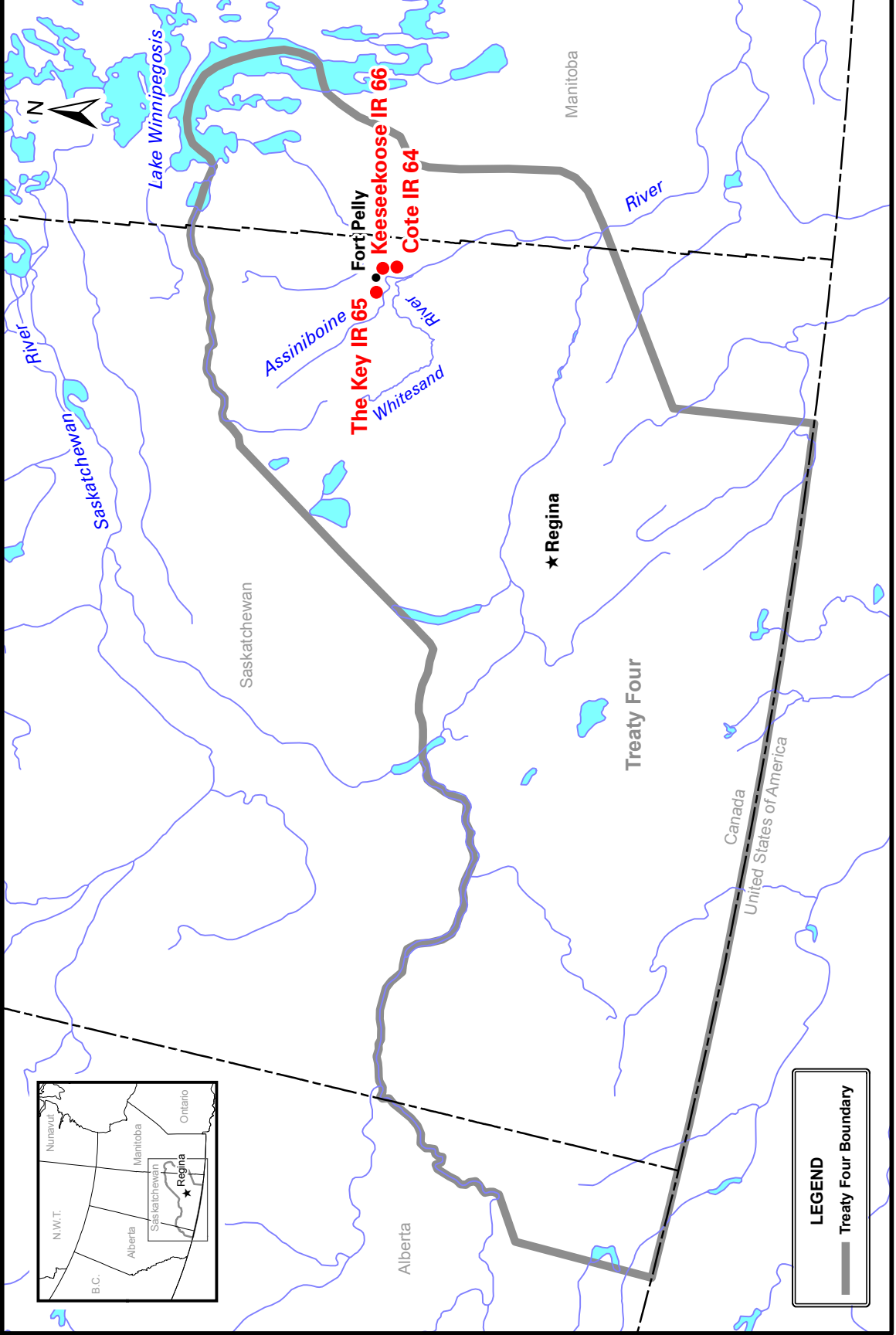
² The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, inter alia, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.

fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

The Commission provides broad mediation and facilitation services at the request of both the First Nation and the Government of Canada. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.

Map 1

Claim Area Map



PART II
A BRIEF HISTORY OF THE CLAIM

In September 1874, representatives of Her Majesty the Queen and Chiefs and Headmen of the Cree and Saulteaux tribes of Indians negotiated Treaty 4 at Fort Qu'Appelle. In exchange for the surrender of 195,000 square kilometres of land in what is now southern Saskatchewan and west central Manitoba, the Crown promised perpetual annuities, reserve lands, and agricultural assistance. The treaty specified that government officials and individual bands were to select the location of reserves to be surveyed based on a formula of one square mile for each family of five, that is, 128 acres per person, and that those reserves could only be sold by the Crown after the band had consented by way of a surrender:

And Her Majesty the Queen hereby agrees through the said Commissioners to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; ... and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.³

The agricultural assistance was in the form of tools, seed, and cattle ("one yoke of oxen, one bull, four cows" for each band) "for the encouragement of the practice of agriculture among the Indians."⁴

Chief Gabriel Coté or Mee-may (The Pigeon) played a prominent role at the negotiations at Qu'Appelle, being described by Lieutenant Governor Alexander Morris, one of the Treaty Commissioners, as the principal Chief of the Saulteaux⁵ and he was among the Chiefs who signed

³ Canada, *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6.

⁴ Canada, *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7.

⁵ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke & Co., 1880; facsim. reprint., Toronto: Coles Publishing Company, 1979), 80.

the treaty on September 15, 1874. IR 64, measuring 56.5 square miles on the left bank of the Assiniboine River about 10 miles southeast of Fort Pelly, was surveyed by William Wagner, Dominion Land Surveyor, in January 1877 for Chief Cote and his followers. It was confirmed by Order in Council PC 1151 dated May 17, 1889.⁶

On September 24, 1875, Chief Ow-tah-pee-ka-kaw (The Key) representing 27 families and Chief Kii-shi-kouse with 36 families met with Commissioners W.J. Christie and M.G. Dickieson at Shoal River (which runs between Swan Lake and Dawson Bay in Lake Winnipegosis) and signed an adhesion to Treaty 4, agreeing to the terms negotiated the previous year. It was noted at the time that both Bands had been settled on opposite sides of the Woody River near Swan Lake for some time and that they had cultivated land and owned cattle and horses.⁷ In 1878, Surveyor William Wagner surveyed two reserves in this area for The Key and Keeseekoose Bands, but two years later, an inspection found both reserves to be subject to annual flooding. Keeseekoose and his followers, and a part of The Key Band were persuaded to relocate to the Fort Pelly district (some 90 miles southwest of their original location) where Gabriel Cote was already established. In 1883, A.W. Ponton surveyed IR 66 for Keeseekoose's Band on the left bank of the Assiniboine River, adjacent to Cote's land, and IR 65 for The Key, on the same river but approximately 16 miles north and west of the other two reserves. Both of these reserves were confirmed by Order in Council PC 1151, on May 17, 1889.⁸

In the early years, the government did little to encourage these Bands to take up agriculture. Small plots were cultivated and some families kept cattle, but, for the most part, they continued to sustain themselves with their hunting, fishing, and gathering traditions. Since "these Indians have been, in the main, good hunters, and in good fur country,"⁹ this situation was not initially regarded

⁶ Order in Council PC 1151, May 17, 1889, Library and Archives Canada (hereafter LAC), RG 2, series 1, vol. 419.

⁷ Commissioners Christie and Dickieson to the Minister of the Interior, October 7, 1875, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1875*, xxv.

⁸ Order in Council PC 1151, May 17, 1889, LAC, RG 2, series 1, vol. 419.

⁹ [Hayter Reed], Indian Commissioner, Regina, to Superintendent General of Indian Affairs, September 6, 1888, LAC, RG 10, vol. 3805, file 51162, reel C-10140.

as a serious matter. In the late 1880s, however, the game in the area rapidly began to disappear and it became apparent that the First Nations would have to turn to agriculture to improve their living conditions. In 1888, an Indian Agent, William E. Jones, was assigned to reside near them to assist them in their transition to agriculture and stock raising.

On September 4, 1889, the Deputy Superintendent General of Indian Affairs asked the Department of the Interior to set apart certain lands as haylands for the Indians in the Fort Pelly area:

[I]n view of the difficulty of raising grain in the Fort Pelly District, it is considered very important that hay lands sufficient for the requirements of the Indians in that neighbourhood should be secured to them.¹⁰

A specific block of land, approximately 19 square miles in area, between the Assiniboine and Whitesand Rivers in townships 30 and 31, range 32, west of the 1st meridian, was identified as the lands to be set aside, and on May 5, 1890, the Department of Interior confirmed that Indian Affairs could take those lands over.¹¹ On May 14, 1890, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, acknowledged that Interior had consented “to this Dept. the right of taking over for use of the Fort Pelly Ind^{ns} for hay purposes the lands therein described.”¹²

In 1891, Surveyor A.W. Ponton was sent to survey these lands, which he then identified as measuring 15 square miles¹³ (although he later described them as containing 20.5 square miles.¹⁴) Surveyor Ponton described the land as “high, dry, scrubby prairie of excellent land,” suitable more

¹⁰ Draft letter, [Deputy Superintendent General of Indian Affairs] to A.M. Burgess, Deputy Minister of the Interior, September 4, 1889, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

¹¹ A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, May 5, 1890, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

¹² L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, May 14, 1890, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.

¹³ A.W. Ponton, Regina, to Hayter Reed, Indian Commissioner, January 9, 1892, LAC, RG 10, vol. 3575, file 215, reel C-10101.

¹⁴ A.W. Ponton, Ottawa, to Secretary [Department of Indian Affairs], December 28, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

for farming or grazing than for hay.¹⁵ Both the local Indian Agent and the Indian Commissioner defended the need for the additional land. In March 1892, Agent Jones wrote in response to a petition circulated by local settlers opposed to the reservation of the haylands that “this land was awarded to the Fort Pelly Indians in 1890, and is of the utmost value and importance to the Department and the Indians.”¹⁶ Commissioner Reed reinforced that opinion:

in my opinion it would not be possible to do without the additional Reserve, if any hope is to be entertained of relieving the Government of the permanent burden of supporting almost entirely the Indians concerned.

Much of the land on the Reserves is worthless, and the cultivation of wheat has proved a failure, and it is to the raising of stock, necessitating the possession of good grazing and hay lands, that we must look to enable the Indians to materially contribute toward their own maintenance.¹⁷

There was considerable correspondence on file about whether the existing reserves (IR 64, 65, and 66) should be expanded to include the haylands or whether reserve land should be surrendered in exchange for the required haylands. Until this matter could be resolved, the Indian Commissioner asked that the lands be granted to the Superintendent General to be held for the Indians of the Fort Pelly Agency.¹⁸ On March 1, 1893, Order in Council PC 574 was passed, ordering that the required lands in townships 30 and 31, range 32, “be withdrawn from sale or entry and vested in the Superintendent General of Indian Affairs to be held as hay lands for the benefit of the Indians of the Fort Pelly District.”¹⁹

¹⁵ A.W. Ponton, Regina, to Hayter Reed, Indian Commissioner, January 9, 1892, LAC, RG 10, vol. 3575, file 215, reel C-10101.

¹⁶ Memorandum for File No. 60759, extract from a letter from Mr Indian Agent Jones, March 22, 1892, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

¹⁷ Hayter Reed, Indian Commissioner, Regina, to the Secretary, Department of the Interior, May 9, 1892, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.

¹⁸ Hayter Reed, Commissioner, Ottawa, to A.M. Burgess, Deputy Minister of the Interior, February 11, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

¹⁹ Order in Council PC 574, March 1, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

In 1893, Inspector T.P. Wadsworth reported on the Pelly Agency and concluded that “stock raising is to be the great industry that will lead those Indians – if any business will – to solve successfully the great issue of self-support, other farming must be to them but secondary – profitable also, but small in comparison to that which stock-raising may become.”²⁰ For the next five or six years, Agent Jones reported on the progressive and successful increase in stock raising by the Fort Pelly Indians.²¹

In 1896, Wilfrid Laurier’s Liberals won a general election, and Clifford Sifton, the former Attorney General of Manitoba, was appointed Minister of the Interior, the department which also had responsibility for Indians. Sifton immediately removed the previous Deputy Minister of the Interior and Deputy Superintendent General of Indian Affairs, and replaced them with his friend and colleague from Brandon, Manitoba, James A. Smart who, as Deputy Minister of the Interior, would also have responsibility for the Indian Department. It soon became evident what the Minister and Deputy Minister of the Interior were most interested in:

Of the two departments over which Sifton and Smart presided, Indian Affairs was quite evidently regarded as of lesser importance. Sifton’s principal interest lay in the development of the Western prairies.

...

Instituting a widespread reorganization and expansion of the [Interior] Branch, he [Sifton] set about to effectively promote the immigration of farmers to Western Canada.²²

Under Sifton and Smart, Canada began actively to solicit new settlers from the United States and Europe. In 1898–99, the Department of the Interior supported the immigration application of a large group of Doukhobors, a sect of Russian dissenters who were being persecuted in their homeland because they rejected church liturgy and secular governments and preached pacifism. It

²⁰ Inspector T.P. Wadsworth, North-West Territories, to Superintendent General of Indian Affairs, July 1, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893*, 138.

²¹ See, especially, W.E. Jones, Indian Agent, Cote, to Secretary, Department of Indian Affairs, Ottawa, December 22, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

²² “The Spoils of Victory: Clifford Sifton Assumes Control of the Departments of Indian Affairs and Interior,” chapter 1 in Tyler, Wright & Daniel Ltd., “The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911: The St. Peter’s Reserve #1,” vol. 1, July 1979, pp. 25, 37.

was important to the Doukhobors that land be reserved in a block to accommodate their communal way of life. The only other stipulation was regarding the usual attributes of agricultural land:

Fred Fisher, an assistant to the Indian Agent at the Cote Reserve, who assisted in the search for land, noted: “They were looking for running water, wood and good soil, and they were not particular where it was as they intended to live within themselves.”²³

The Doukhobors eventually chose three blocks of land in the Yorkton–Swan River area. One of the blocks granted to them included the land set aside as the Pelly Haylands. On December 22, 1898, the Assistant Secretary of the Department of the Interior wrote to Indian Affairs, stating that, “by oversight,” the lands in township 30, range 32 “were included in a reserve recently made for settlement of the Doukhobors exclusively.” He went on to say:

Under the circumstances, I am to inquire whether such reservation is still required by the Indians, as, if not, it will be removed and the land made available for settlement by the Doukhobors.²⁴

Surveyor Ponton was adamant that most of the tract was unsuitable as a hay reserve,²⁵ and Agent Jones was equally convinced that the haylands were vital to the continued success of the three Bands’ cattle operations.²⁶ The Chief Surveyor for the Department of Indian Affairs, Samuel Bray, took a middle course and recommended that the land along the Assiniboine River, to a depth of one mile, be retained as haylands for the Indians and the remaining tract be relinquished to the

²³ Carl J. Tracie, *Toil and Peaceful Life: Doukhobor Village Settlement in Saskatchewan, 1899–1918* (Regina: Canadian Plains Research Centre, January 10, 1996), 11.

²⁴ Assistant Secretary, Department of the Interior, to Secretary, Department of Indian Affairs, December 22, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

²⁵ A.W. Ponton, Dominion Land Surveyor, Ottawa, to Secretary, [Department of Indian Affairs], December 28, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

²⁶ W.E. Jones, Indian Agent, Cote, to Secretary, Department of Indian Affairs, Ottawa, December 22, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

Department of the Interior for the Doukhobor settlement.²⁷ However, when Surveyor Hubbell inspected the lands, he disagreed with Mr. Bray. Hubbell wrote:

In my opinion it would be unfair to deprive Indians of these Townships which is their only supply for over 1100 stock; True they cut a small quantity of hay 7 or 8 miles East of Reserve but this with the hay cut on these Townships is not more than sufficient to supply stock; As Chief Cote says the cattle are their only means of livelihood, and they must have hay for same. There is not sufficient hay on Reserve for stock, and they have looked on this portion of land as their own since 1893.²⁸

As a compromise, he recommended that “Township 30, Range 32 be set apart entirely for the use of Indians, and will be satisfactory to them, although by relinquishing Township 31 they lose over four hundred tons of hay.”²⁹

On March 6, 1899, the Department of the Interior informed J.D. McLean, Secretary of Indian Affairs of the decision to retain township 30, and instructed him to take a surrender of township 31:

I am now directed to inform you that the Indians may retain the hay lands already reserved in Township 30, but that the portion of this reserve situated in Township 31 is to be surrendered for the Doukhobor colony.

The Deputy Minister wishes you to take the necessary steps at once to carry out the surrender of the latter lands.³⁰

Chief Surveyor Bray, however, was of the opinion that no surrender was required because the lands were set aside as haylands and were not added to any reserve; instead, “the lands might be simply

²⁷ S. Bray, Ottawa, to Secretary, Department of Indian Affairs, January 23, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

²⁸ E.W. Hubbell, Dominion Land Surveyor, Yorkton, to E. Deville, Surveyor General, Ottawa, February 15, 1899, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.

²⁹ E.W. Hubbell, Dominion Land Surveyor, Yorkton, to E. Deville, Surveyor General, Ottawa, February 15, 1899, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.

³⁰ Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, March 6, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

relinquished under an O.C. [Order in Council].”³¹ As a result, on May 15, 1899, an Order in Council was passed relinquishing township 31 from the Department of Indian Affairs and vesting it again with the Department of the Interior.³² There was no surrender of this land by any of the Indians in the Pelly District. The remaining hayland, township 30, was directly across the river from the Cote Reserve.

In 1902, Inspector of Indian Agencies, Alexander McGibbon, reported that the Cote Band was willing to surrender part of its reserve in order secure the haylands on the opposite side of the Assiniboine River:

6. They [Cote Band] are anxious that the hay lands on the western side, or end of the Reserve now reserved for them, should be kept, as it is the only place they can depend on for a supply of hay and if they lose this they would have to part with some of the cattle.

& &

8. In regard to the hay land referred to in item No. 6 the Indians are willing to surrender a portion of the Reserve equal to the hay sections.³³

A surrender was allegedly obtained on December 14, 1905, by which Cote surrendered some 20,000 acres on IR 64, of which 6,000 acres were to be exchanged for part of the Pelly haylands.³⁴ Neither The Key nor Keeseekoose First Nations surrendered their interest in township 30.

³¹ [S. Bray] to Secretary, December 30, 1898, and March 7, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

³² Order in Council PC 503, May 15, 1899, LAC, RG 2, vol. 778, file 2008C; copy LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

³³ Extract from report of Alexander McGibbon, Inspector of Indian Agencies, Pelly Agency, June 25, 1902, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

³⁴ Surrender, December 14, 1905, LAC, RG 10, vol. 4011, file 260260-1, reel C-10,172. Note that this surrender is the subject of a separate claim by the Cote First Nation, one of a number of claims currently being negotiated by the Cote First Nation as part of the Cote First Nation Pilot Project, a confidential process also being facilitated by the ICC.

PART III
NEGOTIATION AND MEDIATION OF THE CLAIM

In the late 1990s, the Specific Claims Branch (SCB) was experimenting with different methods of processing land claims so that they could be resolved in a more expeditious manner. In a number of cases, including the Pelly Haylands claim, the Indian Claims Commission was asked to join the process at an early stage. In this instance, at a meeting chaired by the Commission held in Ottawa on October 7, 1997, the three First Nations jointly presented their Pelly Haylands specific claim to the Director General of the Specific Claims Branch, and asked the Indian Claims Commission to monitor the progress of the SCB review of the claim. Specific Claims analysts expedited its assessment of the claim and on December 23, 1997, sent it to the Department of Justice's Specific Claims Legal Services unit for advice as to whether this claim gave rise to an outstanding lawful obligation under Specific Claims Policy. No meetings or conference calls were held: the primary role of the ICC was to make periodic phone calls to ensure that the legal opinion was completed with as little delay as possible and to report to the First Nations as requested.

The claim was accepted for negotiation by the Minister of Indian Affairs in July 2000, on the basis that the Pelly Haylands "was set aside as a reserve, within the meaning of the *Indian Act*, by an 1893 Order in Council" and that the lands had been disposed without a surrender.³⁵ The three First Nations asked that the ICC remain involved in the negotiation process as a neutral facilitator, and Canada agreed. Negotiations began in November 2000.

For the most part, facilitation focussed on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. In its mediation and dispute resolution role, the Commission enabled the three First Nations to reach agreement on an issue they were unable to decide among themselves. The ICC also assisted the parties in arranging for subsequent meetings and coordinating any research undertaken by the parties to support negotiations.

³⁵ Order in Council PC 574, March 1, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055, and Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief James Severight, Cote First Nation, June 28, 2000 (ICC 2107-37-1M, vol. 1).

Although the Commission is not at liberty based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, it can be stated that the three First Nations and representatives of the DIAND worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at mutually acceptable resolution of the Pelly Haylands claim.

Elements of the negotiation included agreement by the parties on a negotiation protocol; the nature of the Commission's role in the negotiations; agreement on haylands acreage; identification of damages and compensation criteria; land appraisals and loss-of-use-studies; compensation to bring forward historical losses; consideration of reserve creation and acquisition costs; negotiation and ratification expenses; and, finally, settlement issues and agreements, division of the settlement money among the three First Nations, communications and ratification plans and processes.

In order to properly assess the First Nations' losses arising from the illegal taking of the claim lands, the negotiating teams decided that Canada and the First Nations would jointly commission two land appraisals, as well as loss-of-use studies relating to agriculture, minerals, and forestry. The First Nations also decided that they would unilaterally contract for loss-of-use studies relating to traditional activities, social impact, special economic advantage, and water. The Commission was asked to coordinate these studies, monitor their progress, schedule meetings, arrange for a series of consultant interviews with community Elders, and facilitate communications among the parties – in other words, take on extensive and time-consuming duties and responsibilities in undertaking and completing these studies that the parties would otherwise have had to perform over and above the challenge of negotiating a claim of this size and importance.

All of these studies were completed by the end of 2003 and there followed several months of offers and counter-offers, culminating in an agreement in principle in October 2004 for a total compensation package of \$73.5 million plus negotiation and ratification costs. Canada did not make any recommendations to the First Nations as to how they should divide the compensation, leaving the First Nations to come to an agreement among themselves. The three First Nations were able to agree to an equal split among them with respect to the land component and the debt to be repaid; however, for several months, the three First Nations met to try to agree on an equitable division of the settlement moneys, without success. They wanted some combination of a per capita distribution

to band members, with an equal division of part of the remainder and a per capita division of the rest, but could not agree on certain elements of these choices. In April 2005, they asked the Indian Claims Commission to mediate this matter, and meetings were subsequently held on April 12 and April 13, when the matter was successfully resolved. By agreement, Cote First Nation would receive \$28 million; The Key, \$21.8 million; and Keeseekoose \$23.7 million.

While Canada went through its own approval processes, legal counsel for each of the three First Nations worked on the documents required for the agreement. Settlement agreements were initialled in October 2005, and ratification votes in each of the three First Nations were scheduled. In February 2006, Cote First Nation ratified the agreement in a first vote. The voter turnout at Keeseekoose was too low in the first vote to establish a quorum, but the agreement was ratified at a second vote on April 8, 2006. Again, due to low voter turnout in the first vote, The Key also required two votes before the agreement was ratified on April 29, 2006; in June 2006, however, some members of The Key Band sought a judicial review of the ratification vote. The courts have not yet heard this case, and, until all three First Nations have completed the ratification process, the settlement of this claim will not be implemented.

PART IV

CONCLUSION

ICC ROLE IN MONITORING THE CLAIM REVIEW

First Nations are often frustrated because they hear nothing about the progress of their claims in the SCB process until they receive an acceptance or rejection letter. The ICC was pleased to support the parties in ensuring that the review of the Pelly Haylands claim was completed as quickly as possible. Regular phone calls to monitor progress helped to ensure that the claim did not get lost in the process.

ICC FACILITATION

The Pelly Haylands negotiation is a case where meeting facilitation by experienced Commission staff was of fundamental importance. The parties to the negotiation of this claim involved representatives of each of the three First Nations, sometimes with their own legal counsel and technical experts, as well as members of the federal negotiating team. The usual attendance at meetings was between 20 and 25 people, and it sometimes swelled to 40 or more when interested community members attended. Through experience and skilful time management, ICC facilitators were able to chair scheduled meetings, ensure all parties had the required information, and enable all who wanted to contribute to meetings, and still accomplish everything set out in the agenda.

ICC STUDY COORDINATION

The Pelly Haylands claim negotiations were completed in less than six years, and most of that time was taken up with the very time-consuming land appraisals, loss-of-use studies, and other studies necessary to establish the financial losses on which to base compensation. The ICC's role in this case was substantial. Jointly, the negotiating parties required two land appraisals and three loss-of-use studies, relating to agriculture, minerals, and forestry. In addition to these five major studies, the ICC coordinated a number of additional studies for the First Nations including traditional activities, social impact, special economic advantage, and water. The ICC's work in providing study coordination services and support ensured that the contractors had what they needed to complete their work in a

timely manner and that the negotiating parties were kept informed about the progress of the reports and any problems that needed to be addressed along the way.

ICC MEDIATION

Commission staff who chair negotiation meetings over a long period of time become knowledgeable about the issues involved, and a mutual respect and trust develops between them and the parties at the table. The development of this relationship allows the Commission chairperson to facilitate the resolution of other disputes and, in this case, enabled the three First Nations to reach resolution on the distribution of the settlement moneys among them.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis, C.M., *Ad.E.*
Chief Commissioner

Date this 18th day of March, 2008.