
INDIAN CLAIMS COMMISSION

**REPORT ON THE MEDIATION
OF THE
FISHING LAKE FIRST NATION
1907 SURRENDER CLAIM**

MARCH 2002

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PART I

INTRODUCTION

This is a report on how a claim – which had been outstanding for over 90 years, pursued actively under the Government of Canada’s specific claims process for seven years, and rejected by Canada twice – was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

The report will not provide a full history of the Fishing Lake First Nation claim. The Commission has discussed the issues involved in the 1907 surrender claim and the inquiry process in its March 1997 publication *Fishing Lake First Nation 1907 Surrender Inquiry*.¹ This report is primarily intended to summarize the events leading up to settlement of the claim and to illustrate the role of the Commission in the resolution process. Although other Commission personnel were involved at various points along the way, it fell to Ralph Brant, as Director of Mediation, to lead the negotiating process.

The Fishing Lake First Nation formally submitted its claim to the Minister of Indian Affairs on April 23, 1989.² It argued that the claim should be validated under the federal government’s Specific Claims Policy based on allegations that the Fishing Lake surrender of August 9, 1907, was made under duress, undue influence, and through an “unconscionable” surrender bargain. The First Nation further alleged a breach of lawful obligation because Canada failed to comply strictly with the requirements of the *Indian Act* in the manner by which it obtained the surrender.³

The claim was rejected on February 12, 1993, on the basis that it failed to establish an outstanding lawful obligation to the Fishing Lake Indian Band as

1 Indian Claims Commission, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219.

2 Fishing Lake Band, Band Council Resolution, April 23, 1989 (ICC Documents, p. 521), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 223.

3 Fishing Lake Band Land Claim: Legal Submission, delivered by Balfour Moss Milliken Laschuk & Kyle, Barristers and Solicitors (ICC Documents, p. 531), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 223.

defined in the Specific Claims Policy.⁴ In response, the First Nation submitted a supplemental submission on September 29, 1994, updating each of the issues raised in its original submission and raising a new issue of “misrepresentation.”⁵ The First Nation asserted that the Crown “negligently misrepresented the circumstances surrounding the surrender by failing to properly advise the First Nation members and as a result the First Nation agreed to the Alleged Surrender of 1907.”⁶ On January 31, 1995, the First Nation submitted a second supplemental submission, arguing that the consent required under Treaty 4 had not been obtained prior to the separation of the Fishing Lake, Nut Lake, and Kinistino reserves and the surrender of 13,170 acres from Fishing Lake Indian Reserve (IR) 89.⁷

After reviewing the supplemental submissions, Canada continued to maintain its position that the First Nation did not provide sufficient evidence to establish a lawful obligation on behalf of the Crown with respect to the surrender.⁸

At the time it submitted its supplemental submissions to the Minister of Indian Affairs, the First Nation also asked the Indian Claims Commission to review Canada’s original rejection of its claim.⁹ In response, and pursuant to its mandate under the *Inquiries Act*, the Commission proceeded to an inquiry, and the parties were brought together to discuss the claim and to clarify the many related issues, evidence, and opposing legal positions. The Commission’s process also allowed for the exchange of documents and provided a forum for full and open discussion.

The inquiry process afforded Fishing Lake First Nation with the opportunity to submit new evidence and arguments, which ultimately caused Canada

4 Correspondence from Jack Hughes, Research Manager, Specific Claims West, Department of Indian Affairs and Northern Development, to William J. Pillipow (ICC Documents, p. 653), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 223–24.

5 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 688–795), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 224.

6 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 756–57), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 224.

7 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, January 31, 1995, tabled at ICC Planning Conference, February 2, 1995 (ICC file 2107-23-1), paraphrased from ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 224.

8 Jack Hughes, Research Manager, Prairie Specific Claims, to Chief Michael Desjarlais and Counsel, June 14, 1995 (ICC file 2107-23-1), paraphrased from ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 224.

9 Stephen M. Pillipow to Commissioners, Indian Claims Commission, October 13, 1994, enclosing, inter alia, Fishing Lake First Nation, Band Council Resolution, September 28, 1994 (ICC file 2107-23-1), as quoted in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 224.

to reconsider the claim and accept it for negotiation. Confirmation of that recommendation of acceptance followed in an August 27, 1996, letter, which stated:

This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*.¹⁰

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

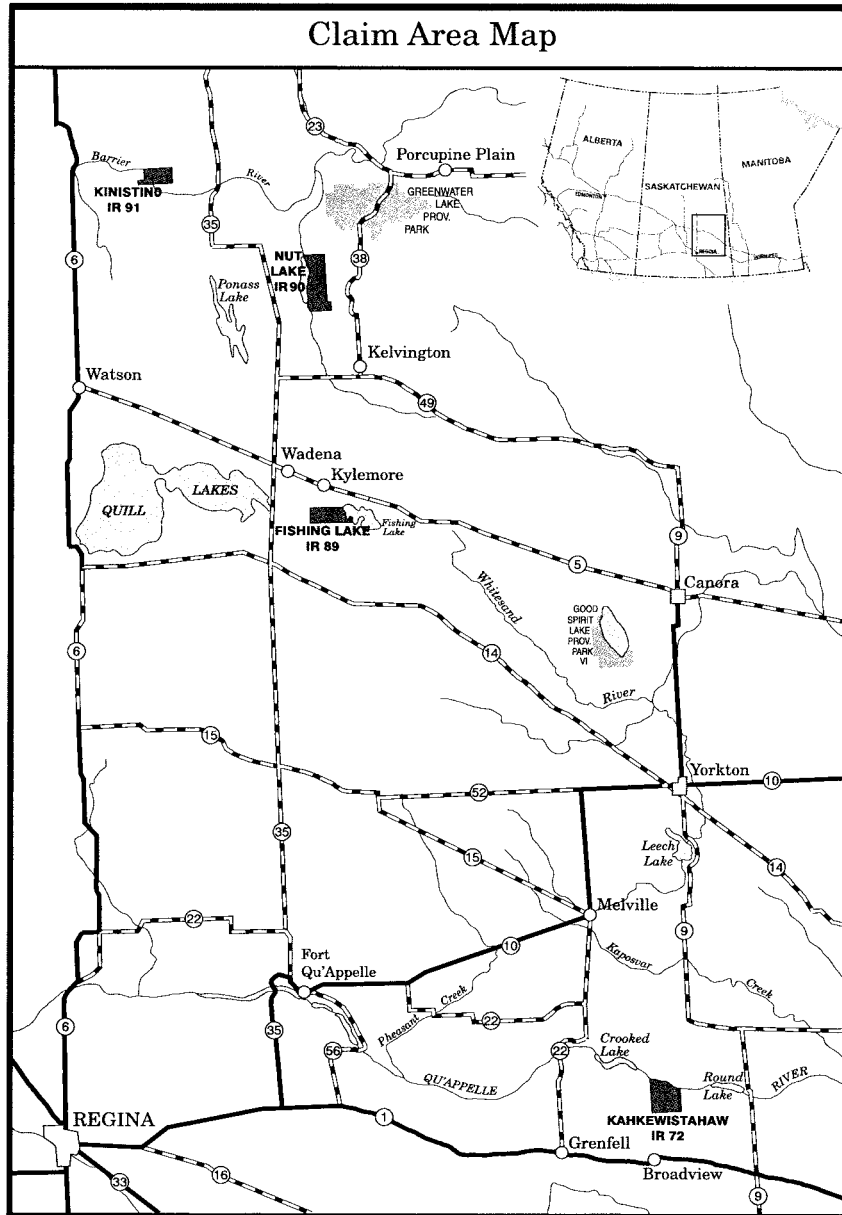
THE COMMISSION'S MANDATE AND MEDIATION PROCESS

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

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

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

¹⁰ Jack Hughes, Research Manager – Prairie Provinces, to Chief Michael Desjarlais and Council, May 7, 1996, included in Kim Kobayashi, Counsel, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, May 28, 1996, and reproduced as Appendix B in ICC, *Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998), 6 ICCP 219 at 242–43.



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

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

PART II

A BRIEF HISTORY OF THE CLAIM

The historical context of this claim has been described at length in the March 1997 *Fishing Lake First Nation 1907 Surrender Inquiry Report* of the Commission.¹¹ A brief summary will suffice here. On August 24, 1876, at Fort Pelly in what was then the North-West Territories, the Yellow Quill Band adhered to Treaty 4. In September 1881, John C. Nelson, Dominion Land Surveyor, surveyed reserves for the Band at Fishing Lake and Nut Lake.

Soon after the last reserve was surveyed, the Canadian Northern Railway applied for, and was granted, a right of way over a portion of the Fishing Lake reserve. In 1905, the company requested that the northern end of the Fishing Lake Reserve be opened for settlement. After a preliminary review of the status of the Fishing Lake reserve, the Department of Indian Affairs agreed to pursue the railway company's request and dispatched the Reverend Dr John McDougall of Calgary to do "special work for the Department in negotiating the surrender of portions or the whole of certain Indian reserves," in this case Fishing Lake.

Records indicate that the Reverend Dr McDougall (accompanied by Indian Agent H.A. Carruthers) met with the Fishing Lake First Nation in October 1905 and again in July 1906. McDougall's report of the latter meeting offers no indication of the position of the Fishing Lake First Nation on the matter of surrender, but it does reveal how the implementation of a proposed amendment to the *Indian Act* would allow the department to offer 50 per cent of the anticipated proceeds of sale to the First Nation as an inducement to the surrender. Records also show that there were very few members of the First Nation on the reserve at the time of McDougall's first visit and point to an attempted meeting with members of Nut Lake, which was not successful because most were not on the reserve at the time of the visit.

¹¹ Full documentation of the details summarized here is found in ICC, *Fishing Lake First Nation Report on 1907 Surrender Inquiry* (Ottawa, 1997), reported (1998), 6 ICCP 219.

In the end, McDougall's proposed surrender was rejected at a subsequent meeting with Fishing Lake on August 2, 1906, primarily on the basis that the department had also attempted to have members of the adjacent Nut Lake and Kinistino First Nations share equally in the proceeds received from the sale of the surrendered property at Fishing Lake. Fishing Lake First Nation claimed that the people on each reserve viewed themselves as independent from the others while Canada continued to deal with them as one band.

With the Canadian Northern's request still outstanding, the department moved to finalize the land allotments provided to the three reserves under Treaty 4 on the understanding that, once this work was completed, efforts would begin to establish them into three separate and distinct bands with exclusive rights to their own reserves.

By August 1907, following the signing of "separation agreements" to split the Fishing Lake, Nut Lake, and Kinistino Bands, the department secured the surrender of 13,170 acres from Fishing Lake First Nation, and each band member was paid \$100 (nine members affixed their marks to the surrender document). Of note is the fact that Inspector W.M. Graham, tasked with obtaining the surrender on behalf of the department, reported to his superiors that he was "surprised they (members of Fishing Lake) were not at all anxious to sell. In fact, I had given up hope of getting the surrender, till just before starting for home a number of the Band came over and said they were willing to sign the surrender. A meeting was called and the whole Band voted for the surrender."

The surrender and proposed sale of the land was approved by Order in Council on September 7, 1907, and most of the land was sold at three public auctions in 1909 and 1910.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

The Commission's role in the process of settling the claim would normally have ended as soon as its inquiry was completed and the claim of the First Nation accepted for negotiation by Canada. On September 30, 1996, however, counsel for the First Nation wrote to the Commission asking if it would consider acting as a facilitator for the negotiations.¹² In December 1996, the Commission offered to assist as a neutral facilitator, providing Canada agreed.

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

Although the Commission is not at liberty to disclose the discussions during the negotiations, it can be stated that Fishing Lake First Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Loss-of-use studies and land appraisals were conducted to provide the information required for a claim valuation and subsequent negotiations. Specifically, independent consultants assessed the losses of use from traditional activities, agriculture, forestry, and mining to estimate the net economic losses to the First Nation as a result of the 1907 surrender. The

¹² Stephen M. Pillipow, Counsel for Fishing Lake First Nation, to Ron Maurice, Commission Counsel, Indian Claims Commission, September 30, 1996 (ICC file 2107-23-01).

traditional activities practised and the burial site on the land in question, the amount of compensation for the losses, and the final payment schedule were all issues that needed to be resolved between the parties.

After intense and elaborate negotiations, Canada made an offer to settle.¹³ The First Nation accepted, and a Settlement Agreement was finalized following much correspondence, conference calls, meetings, and revised drafts.

On January 17, 2001, the Settlement Agreement was initialled by the parties and members of Fishing Lake First Nation voted to ratify their settlement on March 12, 2001.

¹³ A.J. Gross, Chief Federal Negotiator, Department of Indian Affairs and Northern Development, Specific Claims Directorate, to Chief Allen Paquachan, Fishing Lake First Nation, August 21, 2000 (ICC file 2107-23-01).

PART IV

CONCLUSION

The Fishing Lake First Nation claim, in a pattern similar to the majority of specific land claims outstanding in Canada, took some 10 years to resolve. Although the Commission was involved as mediator, it has no authority to force a settlement or to impose one. The credit for settling this claim belongs to the parties. However, the outcome of the negotiations indicates the Commission's potential to advance the settlement of claims. For approximately seven years, efforts by the First Nation to have its claim validated and settled were unsuccessful. The Commission's inquiry process was able to produce movement to the extent that the First Nation, encouraged by the results of that process in the advancement of its claim, asked the Commission to maintain an ongoing role in the negotiation.

That added value is critical in a process that continues to be plagued by the inability of the parties at the table to maintain consistency in negotiations, an inability caused in part by high turnover rates in negotiators and legal counsel. The Commission's mediation service helps the parties keep the focus and momentum in the negotiations, and can also serve as an essential "corporate memory" at the table.

Within the context of the Fishing Lake claim, the Commission was also able to help counsel for the parties resolve stalemates involving the interpretation of legal principles and case law – issues that often contribute to delays or breakdowns in the negotiations. This assistance provides further indication of the Commission's capability of fulfilling an important role beyond

actual mediation at the table, not as an advocate for either side, but for the negotiations themselves.

FOR THE INDIAN CLAIMS COMMISSION

A handwritten signature in black ink, appearing to read 'Phil Fontaine', written in a cursive style.

Phil Fontaine
Chief Commissioner

Dated this 27th day of March, 2002.