
INDIAN CLAIMS COMMISSION

**REPORT ON THE MEDIATION
OF THE
ROSEAU RIVER ANISHINABE
FIRST NATION
TREATY LAND ENTITLEMENT CLAIM**

MARCH 1996

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PART I

INTRODUCTION

In February 1995, the Indian Claims Commission (ICC) agreed to sponsor the mediation of the Roseau River Anishinabe's treaty land entitlement claim.¹ The parties to the mediation made a joint request for the assistance of the Honourable Mr. Robert F. Reid. He was asked to assume the role of mediator. The Commission, as sponsor to the mediation, agreed to offer Mr. Reid's assistance.

Although the history of this claim reaches back to the 1880s, the Roseau River Anishinabe First Nation first filed a specific claim, in concert with the Manitoba Indian Brotherhood (MIB), to the Department of Indian Affairs and Northern Development (DIAND) in March 1978.² The Roseau River Anishinabe First Nation³ contended that the Crown had not fulfilled its obligation under Treaty 1 to set apart land for its use and benefit along the banks of the Roseau River. Claims such as this are known as "treaty land entitlement" (TLE) claims. The Specific Claims Policy, published in 1982, provides that any claim disclosing an outstanding lawful obligation on the part of the government will be accepted for negotiation.⁴ The treaty land entitlement claim of the Roseau River Anishinabe First Nation was ultimately accepted by the federal government for negotiation.

For more than 100 years the Anishinabe of the Roseau River watershed in southeastern Manitoba have pursued their treaty land entitlement claim stemming from Treaty 1 of 1871, and the events preceding, surrounding, and

1 Roseau River Anishinabe First Nation to The Honourable Ronald A. Irwin, Minister of Indian Affairs and Northern Development, February 10, 1995.

2 In 1977 the MIB formed the Manitoba Treaty Land Entitlement Committee, which, as part of its mandate, promoted and continued research to document treaty land entitlement claims for Manitoba First Nations and helped to initiate the settlement negotiation process. On March 1, 1978, the MIB submitted several First Nations' treaty land entitlement claims; one of the submissions was devoted to Roseau River Reserve 2 and Roseau Rapids Reserve 2A.

3 The Roseau River Anishinabe First Nation is the successor to the followers of Na-na-wa-nan, Ke-we-tayash, and Wa-ko-wush, who were signatories to Treaty 1.

4 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: DIAND, 1982), 20.

subsequent to it. Complaints of failure to fulfil the treaty and its collateral promises, including failure to establish the promised reserve and to protect reserve lands against depredation, arose immediately after the treaty was signed. Although some adjustments were made over the years, the complaints were never satisfied. The information made available to the Commission suggests that, while the claim was not actively pursued at all times throughout this lengthy history, it was never abandoned by the Roseau River First Nation.

The First Nation submitted its treaty land entitlement claim in 1978; however, five years elapsed before it was finally accepted for negotiation. On November 5, 1982, the Honourable John Munro, then Minister for Indian Affairs and Northern Development, accepted the Roseau River Anishinabe First Nation's claim in the following terms:

[T]he claim which has been under consideration for some time, has been the subject of detailed historical and legal review and extensive discussion with your representatives. After reviewing the available facts and related evidence, I wish to advise you that the Roseau River Band has a valid treaty land entitlement claim . . .⁵

With this letter, a period of negotiation over compensation began that became increasingly marked by misunderstanding and acrimony. Finally, when the parties recognized that they had reached a complete impasse, they turned to the Indian Claims Commission for assistance by way of mediation. The Commission agreed, and the mediation proved successful. Within a few months an Agreement in Principle was achieved that soon thereafter was ratified by the First Nation.

⁵ The Honourable John C. Munro to Chief Felix Antoine, November 5, 1982.

PART II

A BRIEF HISTORY OF THE CLAIM⁶

As the Commission's involvement in this claim related to the mediation mandate, we did not have the benefit of historical records or detailed legal submissions from the parties setting out the basis of the claim. Accordingly, the Commission makes no findings of fact in this report.

The Anishinabe Ojibway occupied the Roseau River district of present-day Manitoba before the arrival of white settlers (*Roseau* is a French word meaning water reed). When settlers began to arrive in the area in the early 1800s, there was increasing pressure on Anishinabe lands, already occupied and cultivated by them. This pressure led to concern among the Anishinabe Chiefs and, soon after Confederation, the Chiefs demanded a treaty.

When Wemyss Simpson was appointed Indian Commissioner by the Privy Council in 1871, he was charged with the responsibility of entering into negotiations with the Indians of what is now Manitoba for the purpose of concluding Treaty 1 – the first of the “numbered treaties” in Canada. After arriving in Winnipeg in July of that year, he issued proclamations inviting the various local Bands to negotiate.⁷ On July 27, 1871, Mr. Simpson, together with the Lieutenant Governor of Manitoba and the North-West Territories, A.G. Archibald, met with several hundred of the “Chippewas” and “Swampy Cree” Indians at Lower Fort Garry.⁸ The Lieutenant Governor opened the proceedings with an address in which he said:

[Y]our Great Mother [the Queen], therefore, will lay aside for you “lots” of land to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun

⁶ Because this process was a mediation, the Commission did no research and made no findings. The following brief history draws on information and documents submitted to the mediator by the parties during the course of the mediation.

⁷ Canada, Parliament, *Sessional Papers*, 1872, vol. 7, no. 22, 10.

⁸ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991), 26.

shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house or till his land. . . .⁹

Among the provisions of Treaty 1 were the terms by which the various tribes, as signatories, were to have land apportioned and set aside for their exclusive use and enjoyment:

[H]er Majesty the Queen, and her successors for ever, hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians, the following tracts of land . . . and for the use of the Indians of whom Na-sha-ke-penias, Na-na-wan-nan, Ke-we-tayash and Wa-ko-wush are the Chiefs, so much land on the Roseau River as will furnish *one hundred and sixty acres for each family of five*, or in that proportion for larger or smaller families, *beginning at the mouth of the river . . .* it being understood however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians.¹⁰

On behalf of the Chippewa and Swampy Cree, their Chiefs affixed their marks to Treaty 1 at Lower Fort Garry on August 3, 1871.

Immediately following the signing of Treaty 1, the Anishinabe Chiefs expressed their concern about the level of protection that the agreement was providing over their lands. Dissatisfaction mounted over the delay in surveying the promised reserve, the continuing encroachment of settlers on their land, and timber permits being granted on lands that the Anishinabe understood had been promised to them. The Anishinabe wanted to have a reserve that straddled the Roseau River and that ran along its length. It was not until 1874 that a proposed site was marked off at the mouth of the Roseau River. This was not, however, the final survey. The official survey did not occur until 1887, when a plan was prepared by the Dominion Land Surveyor. What was surveyed, however, was a *block-shaped reserve* that extended back from the river, not along its length.

The lands that eventually became the reserve (or reserves) were not set out until 1887 and 1888. By this time much of the land desired by the Anishinabe, and which they understood to be theirs, had already been alienated. Consequently, the designated reserve lands were in a different location from the reserve that the Anishinabe had understood would run along the

⁹ Morris, *Treaties*, 28.

¹⁰ Morris, *Treaties*, 314-15. Emphasis added.

river. In the end, the Roseau River Anishinabe First Nation asserted that Canada did not fulfil its promise to the Band to set aside the reserve promised to it by the terms of Treaty 1.

This historical complaint formed the basis of its specific claim and the subsequent negotiations that arose between Canada and the Roseau River Anishinabe First Nation more than 100 years later. When the negotiations eventually stalled, the First Nation made a request to the Indian Claims Commission for mediation. The mediation process resulted in a settlement agreement between the parties which was ultimately ratified by the First Nation.

PART III

THE COMMISSION'S MANDATE AND MEDIATION PROCESSES

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

Its mandate to conduct inquiries under the *Inquiries Act* is set out in a commission issued under the Great Seal of Canada, which states:

that our Commissioners on the basis of Canada's Specific Claim 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 of the applicable criteria.

Thus, at the request of a First Nation, the ICC can conduct an inquiry into a rejected specific claim or a dispute over compensation. The policies of the federal government differentiate between "comprehensive" and "specific" claims. The former are claims based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between Indians and the federal government. The latter are claims involving a breach of treaty obligations, or where the Crown's lawful obligations have been otherwise unfulfilled, such as breach of an agreement or a dispute over compensation or the *Indian Act*, and include claims of fraud.

Although the Commission has no power to accept or force acceptance of a claim rejected by the government, it has 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, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant band, it may recommend to the Minister of Indian and Northern Affairs that a claim be accepted.

In addition to conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the Commission is authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement.

The claim of the Roseau River Anishinabe First Nation was dealt with under the Commission's mediation mandate.

MEDIATION MANDATE

The Commission has a mandate to furnish mediation services. This mandate is spelled out in the Commission's terms of reference as follows:

And we do hereby a) authorize our Commissioners

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- (iii) to provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim.

From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts, which are inherently adversarial in nature. 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.

Mediation is today a widely used method in Canada and throughout North America for the resolution of disputes without litigation, or of disputes already in litigation. It has grown immensely popular in the last few years, in light of its advantages over the uncertainty – and the unacceptable delays and costs – of the traditional litigation system. With considerable prescience,

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those responsible for the creation of the Commission ensured that it would have the authority to exercise this facility, the value of which is demonstrated here. In our view, it remains underutilized, a situation we regard as unfortunate for all, and which, as can be seen in the Recommendation below, we have striven to correct.

PART IV

THE NEGOTIATIONS AND SUBSEQUENT MEDIATION

THE COMPENSATION NEGOTIATIONS

Although the Minister of Indian Affairs accepted the First Nations' entitlement claim in 1982, substantive negotiations did not begin until 1993. The central issues were the amount of compensation offered by Canada and the actual acreage to be set aside as reserve in fulfilment of the First Nation's outstanding treaty land entitlement. By March 1993, the parties had reached agreement on only a few specific points. Unfortunately, the parties were unable to reach agreement on the outstanding issues, and the talks failed.

Frustrated over the lack of progress, the Roseau River Anishinabe First Nation commenced litigation in November 1993 against Canada in the Federal Court action, *Alexander v. Her Majesty*. A caveat was filed over lands that the First Nation regarded as rightfully belonging to it, though the caveat was eventually lifted. In February 1994, after reviewing their positions, the parties began to explore the possibility of reopening negotiations. By agreement, the litigation was discontinued.

Negotiations resumed in October 1994 and continued until November, with the major areas of discussion still the land quantum and compensation issues. Eventually, however, disagreements arose and negotiations again came to an impasse. Given the inability of the parties to continue to negotiate through direct discussions, it became obvious that negotiations would not resume without outside assistance.

THE MEDIATION ¹¹

On January 4, 1995, Juliet Balfour, negotiator for Canada, wrote to the counsel for the Roseau River Anishinabe First Nation as follows:

¹¹ Since mediation discussions are confidential, no more than an outline of the course they took can be given here.

It appears that we have reached an impasse in these negotiations. . . . At this point . . . it may be helpful to have an impartial third party involved, in the hope of finding a solution to our current impasse. . . . it is my suggestion that our next meeting take place in the presence of a mediator provided by the Indian Specific Claims Commission to assist in finalizing this settlement. . . .

The First Nation approached the Honourable Ron Irwin, Minister of Indian and Northern Affairs, in January and February 1995 to discuss the prospect of mediation. These discussions resulted in the First Nation's endorsement of mediation sponsored by the Indian Claims Commission. Together, the parties proposed that the Honourable Robert Reid (a former judge who practises as an independent professional mediator and who acts as Legal and Mediation Advisor to the Commission) be asked to assume the role of mediator. The Commission agreed to offer Mr Reid's assistance.

On his appointment in early February 1995, Mr Reid began an immediate assessment of the situation. On February 10, Mr Rhys Jones, counsel for the Roseau River Anishinabe First Nation, asked Mr Reid to meet with his client's representatives on February 14 in Winnipeg. Mr Reid had been asked to give this matter high priority, and the meeting took place as requested.

Following the meeting, Mr Reid held telephone discussions with the representatives of the parties, having first cleared away the communications block. Since the reasons for the impasse were still not immediately apparent, he requested detailed written statements from each party setting out their respective positions.

These statements took some time to prepare, but by early April 1995, both parties had complied. After further telephone conferences with the representatives for the parties, Mr Reid arranged for a mediation meeting to take place in Winnipeg on May 19, 1995. On the preceding day, Mr Reid met with the parties individually, and the meetings lasted well into the evening.

The first face-to-face discussions between the parties took place on the following morning, with Mr Reid as Chair. They continued throughout the day and, in light of the history of the talks, they were remarkably productive. Indeed, by the end of the day all major areas of dispute appeared to have been resolved, and the parties shook hands on an agreement.

This was not, however, the end of the story. Serious problems arose when counsel sat down to express in writing the agreement that had apparently been reached at the negotiation table.

At the urgent request of the parties, Mr Reid returned to Winnipeg on July 11, 1995, to convene a further meeting. Having again spoken to the parties

separately, he opened the meeting by identifying 12 points of serious disagreement. Again, everyone set to work, and by the end of the day only a few issues remained outstanding. Unfortunately, among these issues was an apparently fundamental disagreement over what had been agreed. This problem would obviously require further thought on both sides. The session closed at the end of the day with a date set for what it was hoped would be the final meeting.

On July 24, 1995, the parties met again and, by the end of the day, agreement had been reached on all points, and the parties shook hands on what appeared finally to be a complete resolution of all problems.

SETTLEMENT AND RATIFICATION

Counsel again sat down to draw up the agreement, and this time they were successful. A 160-page Agreement in Principle was initialled on August 7, 1995. Members of the First Nation voted to ratify it on November 23, 1995.

Thus, a claim which had been pursued for more than 100 years, and which appeared to have become hopelessly mired in protracted discussion, was resolved in a few months. Those months were not always easy, and the deliberations were not always calm. Several times it appeared they might fail yet again. Yet one difficulty after another was resolved in discussions that were not only intense but, on occasion, dramatic.


The parties deserve great credit for their persistence and their forbearance in the mediation discussions. The agreement could not have been achieved without sincerity and good will on both sides, and the shared desire to resolve a long-standing grievance in a fair and just manner.

PART V

RECOMMENDATION

We have been disappointed with the federal government's reluctance to take advantage of the Commission's mediation capability, and have expressed this disappointment both in meetings with representatives of government and in our reports (see particularly the Commission's *Annual Report, 1994/95*). We would like again to remind parties to specific claims of the value of mediation, which is now widely used for dispute resolution in the public sector. In particular, we recommend to the Government of Canada that it amend its present policies so as to include mediation as a normal aspect of the Specific Claims Process. We further recommend that Canada instruct departmental counsel and other representatives engaged in matters before the Commission to seek opportunities for mediation or to agree to participate meaningfully in mediation when it is sought by claimants.

FOR THE INDIAN CLAIMS COMMISSION



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