

# INDIAN CLAIMS COMMISSION PROCEEDINGS



(1998) 7 ICCP

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## Reports

'Namgis First Nation  
Cormorant Island Claim Inquiry

Nak'azdli First Nation  
Aht-Len-Jees Indian Reserve No. 5 Inquiry

'Namgis First Nation  
McKenna-McBride Applications Claim Inquiry

Mamaleleqala Qwe'Qwa'Sot'Enox Band  
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A PUBLICATION OF  
**THE INDIAN CLAIMS COMMISSION**



(1998) 7 ICCP

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

## **COMMISSIONERS**

Roger J. Augustine  
Carole T. Corcoran  
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Available in Canada through

your local bookseller

or by mail from

Canada Communication Group — Publishing

Ottawa, Canada K1A 0S9

Catalogue No. RC12-1-1998-7E

ISSN 1195-3586

ISBN 0-660-17407-3

The Indian Claims Commission Proceedings is a continuing series of official reports, background documents, articles, and comment published by the Indian Claims Commission (Canada).

For information about subscriptions and extra copies or to request the French edition, *Actes de la Commission des Revendications des Indiens*, please contact

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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 you with our seventh volume of the *Indian Claims Commission Proceedings*. Included in this volume are four reports of the Commission's inquiries into the claims of First Nations from the province of British Columbia.

The first report was released in March 1996 and relates to the claim of the 'Namgis First Nation respecting the allocation of a reserve on Cormorant Island.

The Commission has conducted two separate inquiries into claims arising out of the applications of First Nations for reserve lands before the McKenna-McBride Commission. The McKenna-McBride Commission was established on September 24, 1912, by agreement between the Government of Canada and the Province of British Columbia in an effort to resolve the long-standing controversy over the establishment of Indian reserves in British Columbia. The claimants in these two inquiries were the 'Namgis First Nation (report released in February 1997) and the the Mamaleleqala Qwe'Qwa'Sot'Enox Band (report released in March 1997).

Completing this volume of the *Proceedings* is a report released in March 1996. It describes how the Nak'azdli First Nation's claim to the alienation of 300 acres of land set apart as Aht-Len-Jees Indian Reserve 5 was accepted for negotiation by Canada without the need for a full inquiry. This report illustrates how the Commission's unique inquiry process offered an opportunity for Canada to reconsider its position after hearing the oral testimony of the elders on the historical basis for the claim.

Daniel J. Bellegarde  
Co-Chair

P.E. James Prentice, QC  
Co-Chair



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# ABBREVIATIONS

ACWS	All Canada Weekly Summaries
BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CCC	Canadian Criminal Cases
CCLT	Canadian Cases on the Law of Torts
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
CTC	Canada Tax Cases
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DSGLA	Deputy Superintendent General of Indian Affairs
ETR	Estates and Trusts Reports
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
HL	House of Lords
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
Man. R.	Manitoba Reports
NA	National Archives of Canada
<i>NEB</i>	<i>National Energy Board</i>
NR	National Reporter

## ABBREVIATIONS

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ONC	Office of Native Claims
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
SBC	Statutes of British Columbia
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
UTLJ	University of Toronto Law Journal
WWR	Western Weekly Reports

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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE CORMORANT ISLAND CLAIM OF THE 'NAMGIS FIRST NATION**

### **PANEL**

Commission Co-Chair P.E. James Prentice  
Commission Co-Chair Daniel J. Bellegarde  
Commissioner Aurélien Gill

### **COUNSEL**

For the 'Namgis First Nation  
Stan H. Ashcroft

For the Government of Canada  
Bruce Becker / Rosemarie Schipizky

To the Indian Claims Commission  
Kim Fullerton / Isa Gros-Louis Ahenakew / Donna Jordan

**MARCH 1996**



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# PART I

## INTRODUCTION

In January 1880 Indian Reserve Commissioner G.M. Sproat allocated more than 1000 acres of Cormorant Island as a reserve for the 'Namgis First Nation. This allocation was disallowed two years later by the Chief Commissioner of Lands and Works for the province of British Columbia, one of the grounds being that the entire island had been leased since 1870 to a group of white settlers. On October 20, 1884, Indian Reserve Commissioner Peter O'Reilly, Mr. Sproat's successor, reallocated two reserves on Cormorant Island. These reserves, however, ultimately encompassed only 48.12 acres.

In September 1987 the 'Namgis First Nation submitted a specific claim to the Office of Native Claims. It contended, among other things, that Canada had acted improperly in failing to refer the disallowance of Mr. Sproat's allocation to a judge of the British Columbia Supreme Court, as was provided in the Order in Council and in related documentation appointing Mr. Sproat as Indian Reserve Commissioner. Canada rejected the claim in April 1994. As a result, the 'Namgis First Nation turned to the Indian Claims Commission "for appeal purposes." In March 1995 the Commission agreed to conduct an inquiry into the rejection of the Cormorant Island claim.

The Indian Claims Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Our task in this inquiry was to examine the claim of the 'Namgis First Nation and to assess its validity on the basis of Canada's Specific Claims Policy.

This report sets out our findings and recommendations to the First Nation and to Canada. The structure of the report is as follows: Part II outlines 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 findings and recommendation.

The Commission has been assisted in its task by legal counsel for the First Nation and for Canada, who provided detailed written and oral submissions on the evidence and the law. We wish to thank them for their careful

preparation of the arguments and materials. We also wish to express our gratitude to the people of the 'Namgis First Nation for the warm welcome extended to us and our staff during our visit to their community and for the facilities they made available for the conduct of this inquiry.

## PART II

### THE COMMISSION MANDATE AND 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.<sup>1</sup>

This is an inquiry into a claim that has been rejected. The claimant is the 'Namgis First Nation, formerly known as the Nimpkish Indian Band. A brief synopsis of how the claim came before this Commission follows.

On September 3, 1987, Chief Pat Alfred submitted band council resolutions for four specific claims to the Office of Native Claims. One of these claims related to the Cormorant Island Reserve.<sup>2</sup> On April 5, 1994, Nola Landucci, Specific Claims Negotiator, Indian and Northern Affairs Canada, wrote to Stan Ashcroft, legal counsel for the claimant, and confirmed that Canada had rejected the Cormorant Island claim:

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<sup>1</sup> 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.

<sup>2</sup> Chief Pat Alfred, Nimpkish Band Council, to Manfred Klein, Negotiator, Specific Claims, Office of Native Claims, September 3, 1987 (ICC Documents, p. 308).

It would be accurate to advise your client that Canada's analysis of this matter does not support negotiation of any probable breach of obligation under the Specific Claims policy. The claim can therefore accurately be described as rejected.<sup>3</sup>

By letter dated November 4, 1994, Mr. Ashcroft, on the instructions of the Chief and Council of the 'Namgis First Nation, submitted the Cormorant Island claim to the Indian Claims Commission "for appeal purposes."<sup>4</sup> A planning conference was held on January 31, 1995, followed by the Commissioners' review of the claim in early March 1995. On March 3, 1995, Daniel Bellegarde and James Prentice, Co-Chairs of the Indian Claims Commission, wrote to the Chief and Council of the First Nation, to the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and to the Honourable Allan Rock, Minister of Justice and Attorney General, advising that the Commissioners had agreed to conduct an inquiry into the rejection of the Cormorant Island Claim.<sup>5</sup>

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 'Namgis First Nation 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*.<sup>6</sup> Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

#### Scope of the Specific Claims Policy

Although the Commission is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada concentrated

3 Nola Landucci, Specific Claims Negotiator, Department of Indian and Northern Affairs, to Stan Ashcroft, April 5, 1994 (ICC Documents, p. 413).

4 Stan H. Ashcroft to Kim Fullerton, Chief Legal Counsel, Indian Claims Commission, November 4, 1994 (ICC file 2109-05-1).

5 Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nimpkish Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, March 3, 1995 (ICC file 2109-05-1).

6 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*].



on three passages in particular.<sup>7</sup> First, the opening sentence in *Outstanding Business*:

The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.<sup>8</sup>

Second, the definition of the term “specific claims” on page 19 of the Policy:

As noted earlier the term “specific claims” refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.<sup>9</sup>

Third, the discussion of the concept of “lawful obligation” on page 20:

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.<sup>10</sup>

It is Canada’s position that the Cormorant Island claim does not fall within the scope of the Specific Claims Policy. We will address this issue in Part V below.

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7 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 21-22.

8 *Outstanding Business*, 3.

9 *Outstanding Business*, 19.

10 *Outstanding Business*, 20.

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## PART III

### THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the 'Namgis First Nation. Our investigation into this claim included the review of two volumes of documents submitted by the parties, as well as numerous exhibits, including two large binders of materials relating to the West Coast Indian reserve allotments of Commissioner Sproat.<sup>11</sup> In addition, the Commission held an information-gathering session in the community of Alert Bay, British Columbia, on April 20 and 21, 1995, where we heard evidence from six witnesses. On September 20 and 21, 1995, legal counsel for both parties made oral submissions in Vancouver, British Columbia. Details of the inquiry process and the formal record of documents and testimony considered in this inquiry can be found in Appendix A.

### THE CLAIMANT AND THE CLAIM AREA

The people of the 'Namgis First Nation are part of the Kwakwaka'wakw, which is the Kwak'wala language group.<sup>12</sup> They have been referred to by several names historically, including Nimkeesh, Nimkish, and Nimpkish. Their traditional territory is on the northeastern coast of Vancouver Island, bounded by the watershed of the Nimpkish River and the adjacent marine environment.

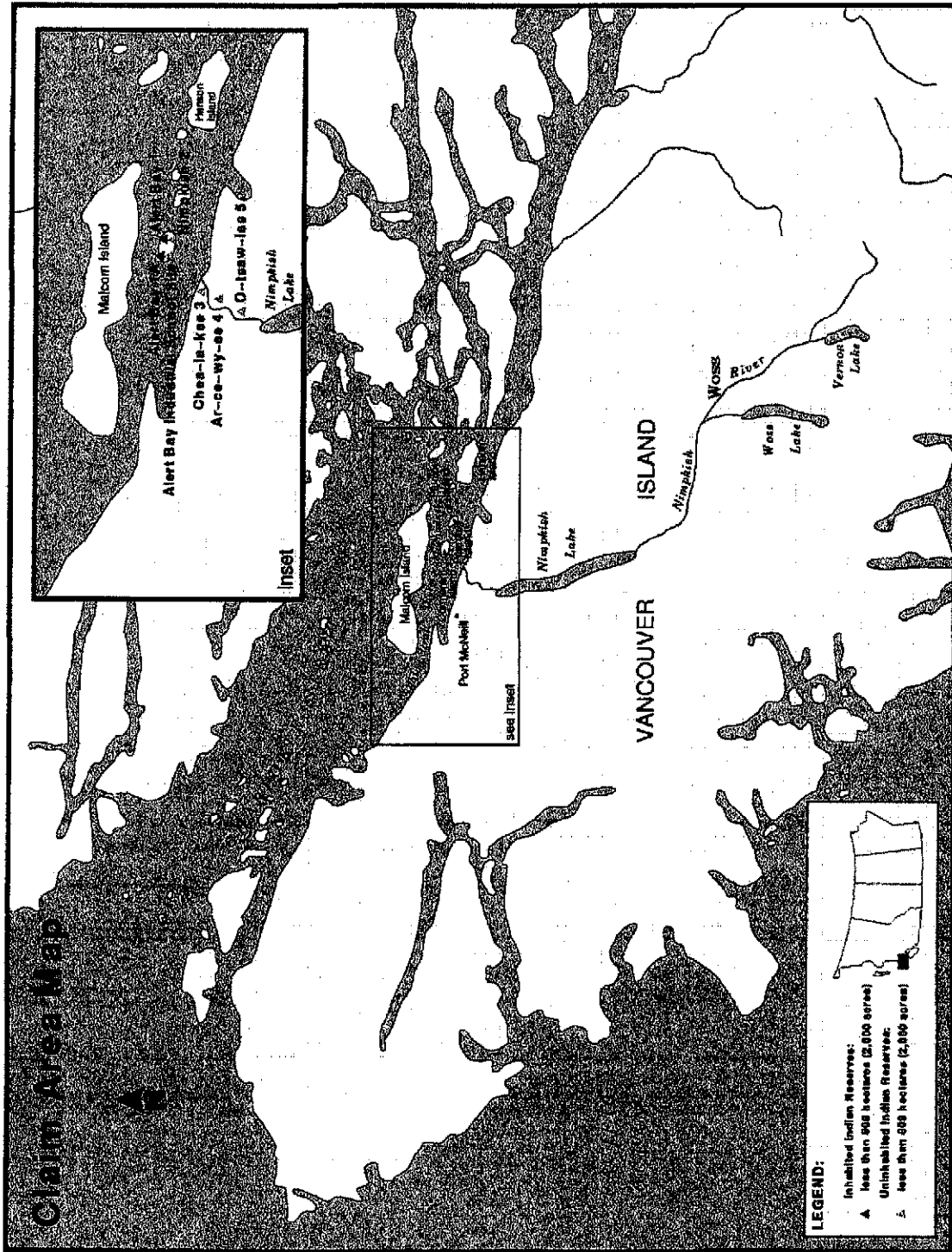
This particular claim relates to a reserve allocation on Cormorant Island, which is located in the Queen Charlotte Strait, between Vancouver Island and the mainland. In the language of the 'Namgis First Nation, Cormorant Island is called "Yalis," which means "safe haven."<sup>13</sup>

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11 Blake Evans, "Gilbert Malcolm Sproat; Indian Reserve Commissioner for British Columbia. West Coast Indian Reserve Allotments (1879-80)," vols. 1 and 2, July 19, 1995 (ICC Exhibit 2).

12 Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 14.

13 ICC Transcript, April 21, 1995, p. 2 (George Cook).



## Historical Background

One of the primary allegations in this claim is that Canada failed to adhere to the terms of the Order in Council appointing Mr. Sproat as Indian Reserve Commissioner. Therefore, by way of background, we will first briefly review the Orders in Council and some of the other salient documents relating to the creation and operation of the various Indian Reserve Commissions in the 1870s and 1880s. We will then discuss the specific circumstances surrounding the reserve allocation on Cormorant Island.

## The Indian Reserve Commission

In 1871 the colony of British Columbia entered the nascent Canadian Confederation. The British Columbia *Terms of Union, 1871*, was the document by which the colony joined Canada. Article 13 of the *Terms of Union* specifically addressed the matter of Indians and Indian lands:

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.<sup>14</sup>

In the years following British Columbia's entry into Confederation, the Indian land question would prove to be one of the more contentious issues between the two levels of government, as each sought to impose its view of Indian land requirements on the other. In 1875, in response to a proposal put forward by William Duncan, a missionary at Metlakatla, the two governments agreed to the formation of a joint commission to resolve the problem of reserve allotment in British Columbia.<sup>15</sup>

In a memorandum of November 5, 1875, R.W. Scott, Acting Minister of the Interior, recommended:

<sup>14</sup> RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

<sup>15</sup> Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing Co., 1972), 183. See also Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 175-99.

1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.

2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.

3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.

4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. . . .<sup>16</sup>

Acting upon Scott's recommendations, the dominion government authorized the creation of the Joint Reserve Commission by Order in Council 1033, dated November 10, 1875.<sup>17</sup> On January 6, 1876, the provincial government, concurring with the creation of the Joint Reserve Commission, issued a reciprocal Order in Council.<sup>18</sup> The commission was composed of A.C. Anderson, representing Canada, A. McKinlay, representing British Columbia, and G.M. Sproat, who served as Joint Commissioner.<sup>19</sup>

Unfortunately, the Joint Reserve Commission was a short-lived venture, for the province argued that it was too expensive and too time consuming. In January 1877 A.C. Elliott, Provincial Secretary for British Columbia, wrote to the Minister of the Interior suggesting that the activities of the Joint Reserve Commission be restricted:

I should recommend that, whilst the Commission as now constituted be allowed for the present to persevere, their labours should be entirely confined to places where

<sup>16</sup> Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, pp. 42-48).

<sup>17</sup> Federal Order in Council PC 1033, November 10, 1875 (ICC Documents, p. 49a).

<sup>18</sup> Provincial Order in Council No. 1138, January 6, 1876 (ICC Documents, pp. 50-51).

<sup>19</sup> Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 189.

the Whites and Natives are living in close proximity, and to those localities where the Indians are dissatisfied with the area of land of which they now hold possession.<sup>20</sup>

He also suggested that the commission, which he described as "elaborate and cumbersome," be dissolved towards the close of the then current year. Mr. Elliott recommended that, in the future, the Superintendents of Indian Affairs in their respective localities be responsible for apportioning all the lands remaining unallotted or unreserved. He continued:

The lands thus apportioned should however be subject to the approval of the Chief Commissioner of Lands and Works, acting on behalf of the Provincial Government before being finally Gazetted as Indian Reserves. In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendents of Indian Affairs as to size or extent of lands to be allotted to any Indian Tribe, the matter could be referred to one of the Judges of the Supreme Court, whose decision should be final.<sup>21</sup>

Elliott's letter was followed by a provincial Order in Council, dated January 30, 1877, adopting his recommendations.<sup>22</sup>

Initially, Canada agreed to Elliott's suggested arrangement and on February 23, 1877, it passed an Order in Council endorsing his proposals. The federal Order in Council reads, in part:

[A]fter the dissolution of the Commission the Superintendents of Indian Affairs in their respective localities should apportion as soon as practicable all the lands remaining unallotted or unreserved by the present Commission, such apportionment to be subject to the approval of the Chief Commissioner of Lands and Works of British Columbia acting on behalf of the Local Government, and in the event of any difference between the Superintendents and the Chief Commissioner as to the extent or locality of the lands to be allotted, the matter might be referred to one of the Judges of the Supreme Court of that Province whose decision should be final.<sup>23</sup>

British Columbia responded with another Order in Council on February 4, 1878:

20 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, National Archives of Canada [hereinafter NA], RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

21 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

22 Provincial Order in Council, January 30, 1877 (ICC Documents, p. 56).

23 Federal Order in Council, February 23, 1877 (ICC Documents, pp. 59-61).

[T]he Indian Land Commissioners . . . have nearly completed their season's work and as the Commission is very expensive and under existing circumstances unnecessary he [the Provincial Secretary] recommends that the following telegram be transmitted by His Excellency the Lieutenant Governor to the Secretary of State for the Dominion of Canada.

"Government wish arrangement approved by order Privy Council 23<sup>rd</sup> February last respecting Indian Land Commissioners to take effect now."<sup>24</sup>

It appears, however, that David Mills, Minister of the Interior, was reluctant to endorse Elliott's proposals and, instead, lobbied to have Commissioner Sproat retained as sole Commissioner. In a memorandum to the Privy Council Office on March 7, 1878, he stressed the good work that had been done by the Joint Commission and concluded by recommending that Commissioner Sproat be appointed to allot Indian reserves in British Columbia:

It is therefore recommended that instead of assigning the task of primarily allotting the Reserves to the Indian Superintendents in their respective Superintendencies, as proposed by that [Federal] Order in Council of the 23<sup>rd</sup> February 1877, the present Joint Commissioner Mr. Sproat be appointed to discharge that important duty subject to the approval of the Commissioner of Lands and Works of British Columbia and in the event of any difference between the Commissioner and Mr. Sproat the matter to be referred to one of the Judges of the Supreme Court as provided by that Order in Council.<sup>25</sup>

The dominion government accepted Mr. Mills's recommendation, and Mr. Sproat was appointed sole Indian Reserve Commissioner by dominion Order in Council 170, dated March 8, 1878. The Order in Council reads as follows:

The Committee have had before them the Memorandum hereunto annexed from the Hon. the Minister of the Interior having reference to the proceedings of the Joint Commission of the Government of the Dominion and that of British Columbia for the Settlement of the Indian Land difficulties in that Province and to the contemplated reconstruction of that Commission in pursuance of the terms of the Order in Council of the 23<sup>rd</sup> February 1877, and they submit their concurrence in the recommendations contained in the said Memorandum & advise that they be approved and acted on.<sup>26</sup>

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24 Provincial Order in Council, February 4, 1878 (ICC Documents, pp. 62-63).

25 Memorandum of David Mills, Minister of the Interior, March 7, 1878 (ICC Documents, pp. 64-73).

26 Federal Order in Council, March 8, 1878 (ICC Documents, p. 74).

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A week later the Minister of the Interior informed the Lieutenant Governor of British Columbia of the dominion government's decision, and requested that British Columbia "carry out order of February seventy seven respecting Indian Comm. substituting Sproat for Indian Supt."<sup>27</sup>

By letter dated March 18, 1878, Commissioner Sproat advised the Superintendent General of Indian Affairs that on the 16th he had been "informed by His Honour the Lieutenant Governor of my appointment to the office proposed to be held by the Indian Superintendents according to the Canadian Order in Council 23rd Feby 1877."<sup>28</sup> Thus, while Mr. Sproat's appointment seems to have been accepted by both levels of government, the federal Order in Council of March 8, 1878, was not immediately reciprocated by a provincial order. This gap left questions regarding the range and scope of Mr. Sproat's authority, an issue that would dominate correspondence among Mr. Sproat and the two levels of government throughout the remainder of 1878 and into 1879.

In a second letter to the Superintendent General on March 18, 1878, Mr. Sproat raised the matter of expenses:

I have today had an interview with the Hon. Mr. Elliott, and, finding that his impression was that under the Order in Council of Feby 23 1877 – which now governs my action – the Provincial Government would be at no expense, I said that I was not at present prepared to assent to that view, though no doubt further discussion might result in an agreement as to procedure under the order.

The approval of the Chief Commissioner of Lands & Works mentioned in said order must, I think, be given on the spot at the time; otherwise the effect will be that I shall be idle in my tent for more than half my time, which means that at each reserve, the Dominion Government will be fined from \$500 to \$1000, being the expense of the Commissioner while waiting for an answer from Victoria. . . .

Nothing is said in the Order in Council as to who is to pay the Judge of the Supreme Court, who might be called in. It is not likely that such an officer could be got to do the work, and if he did, the cost would be so much that it should be clearly understood who is to pay it. . . .<sup>29</sup>

He also added this thoughts regarding his authority: "I am not without a hope that I can arrange the matter with the Provincial Government in some such way as shall leave the matter virtually in my hands, with an apparent control

27 David Mills, Minister of the Interior, to A.N. Richards, Lieutenant Governor of British Columbia, March 15, 1878 (ICC Exhibit 5).

28 G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 75-78).

29 G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 79-84).



exercised by the Land Office to satisfy the sentiment of the public in the Province."<sup>30</sup>

On March 25, 1878, the Superintendent General of Indian Affairs informed Mr. Sproat that any actions he might take as Indian Reserve Commissioner were subject to approval by the Chief Commissioner of Lands and Works.<sup>31</sup> Specifically, he outlined the following conditions under which Mr. Sproat was to operate:

. . . subject as provided by that Order [Order in Council of February 23, 1877] to the approval of the Commissioner of Lands & Works of British Columbia and with the right of reference in case of differences between the Commissioner and yourself to one of the Judges of the Supreme Court of that Province. . . .

You will of course understand that you are not to take any action under this letter until notified that the Local Government has approved of the scheme submitted to their consideration by the Government of the Dominion.<sup>32</sup>

In a subsequent effort to clarify Mr. Sproat's authority, the Minister of the Interior telegraphed the Lieutenant Governor of British Columbia in April 1878 and asked if the provincial government would "regard Sproat's allotment of Reserves as final with an apparent control by the Land Office."<sup>33</sup> The Minister went on to explain that if this arrangement was acceptable to the province, Canada would pay "all expenses"; if it was not acceptable, "Commissioner of Lands and Works must accompany Sproat at expense of Province, and in case Referee is required his expenses must be shared equally."<sup>34</sup> By Order in Council dated April 17, 1878, the province responded to the Minister's offer:

Government are not prepared to regard settlement of Reserves made by Sproat as final, but will not interfere with his action except in extreme cases. The Dominion Government to pay all expenses of Sproat and half the cost of referee. Answer.<sup>35</sup>

Lieutenant Governor Richards relayed the province's position to Ottawa on April 18, 1878.<sup>36</sup>

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30 G.M. Sproat to Superintendent General of Indian Affairs, March 18, 1878 (ICC Documents, pp. 79-84).

31 Superintendent General of Indian Affairs to G.M. Sproat, March 25, 1878 (ICC Documents, pp. 85-89).

32 Superintendent General of Indian Affairs to G.M. Sproat, March 25, 1878 (ICC Documents, pp. 85-89).

33 D. Mills to Lieutenant Governor Richards, April 4, 1878 (ICC Documents, pp. 90-91).

34 D. Mills to Lieutenant Governor Richards, April 4, 1878 (ICC Documents, pp. 90-91).

35 Provincial Order in Council, April 17, 1878 (ICC Documents, pp. 92-93).

36 A.N. Richards, Lieutenant Governor of British Columbia, to R.W. Scott, Secretary of State, April 18, 1878 (ICC Exhibit 2, vol. 1, tab 7).

The dominion government accepted the province's proposal in a letter dated April 24, 1878.<sup>37</sup> Two days later, the province passed Order in Council 615 relating to the finality of Mr. Sproat's decisions in the Yale district: "all Mr. Sproat's decisions regarding Indian land questions in the Electoral District of Yale be regarded as final, excepting those of which he shall have received notice from either Mr. Teague or Mr. Usher, Government Agents, to lay over."<sup>38</sup>

During the months that followed, Mr. Sproat pressed to have this type of formal authority extended beyond the District of Yale. On April 29, 1878, he wrote to the Superintendent General of Indian Affairs arguing that the Indian Reserve Commissioner should be independent of provincial control. In commenting on the situation in British Columbia, Mr. Sproat wrote:

[I]t is admittedly difficult to reconcile the necessities of a Provincial Government dependent upon parliamentary support, and the requirements of a single Commissioner undertaking this land adjustment, but after considering the whole question fully, I made up my mind that the occasion required that my decisions should be final in all cases with the exception of those which the Government Agents in the districts might, on examination, request me to lay over for the opinion of the Provl Government.

I stated this view to the Provincial Government, and after tedious negotiations, thought that they would agree to it, but it appears that without notifying me they sent a telegram to you stating that "they would not interfere with my actions except in extreme cases." I have since been told by Mr. Elliott that your Government have approved this arrangement, but I have not seen your telegram. . . .

After some delay I have today obtained the following copy of a Report of a Committee of the Hon. The Executive Council approved by His Excellency The Lieut. Governor on the 26 Apl 1878 . . . [here follows the contents of Provincial Order in Council 615].

The electoral district of Yale is nearly the whole southern interior of the mainland. When I go to other districts, my powers must be similarly extended. . . .

The limitation of the Prov Govt interference to "extreme cases" would mean nothing. These matters have to be looked at practically. A letter to the Land office from a settler would, with any Provl Govt, transform any case into an "extreme case."<sup>39</sup>

While Mr. Sproat got on with the business of being Commissioner, officials from the Department of Indian Affairs continued to seek ways of resolving the land question in British Columbia. On January 20, 1879, I.W. Powell, Indian

37 R.W. Scott to Lieutenant Governor of British Columbia, April 24, 1878 (ICC Documents, p. 95).

38 Provincial Order in Council, No. 615, April 26, 1878 (ICC Documents, pp. 96-97). Cormorant Island is not in the Yale district.

39 G.M. Sproat to Superintendent General of Indian Affairs, April 29, 1878 (ICC Documents, pp. 99-110).

Superintendent for British Columbia, wrote to the Superintendent General of Indian Affairs about the growth of the fisheries on the coast. Mr. Powell explained that this situation could lead to friction between natives and whites, and he suggested that the land and fishing rights of the coast tribes be "settled and defined as quickly as possible."<sup>40</sup> He noted that if the present Reserve Commissioner continued in the interior, it would be two to three years before he could go to the coast, a delay that he considered to be "unfortunate and inadvisable." Mr. Powell felt it necessary that "some qualified Commissioner . . . undertake the settlement of the Reserves for the Coast Indians during the coming season."<sup>41</sup>

In the meantime, Commissioner Sproat continued to draw criticism from the settler society. On February 19, 1879, he wrote to the Chief Commissioner of Lands and Works in an attempt to answer these charges:

Having seen in the newspapers a notice of questions to be put to you by Mr. Bennett, from which it might be inferred that the Indian Reserve Commission has assigned for Indian purposes lands held legally by settlers, I beg respectfully to express a wish that, when it may be in your power, you will have the goodness to cause me to be informed of the particulars of any case to which Mr. Bennett refers, so that any mistake may be promptly rectified.

The Reserve Com<sup>er</sup> has no power to do what Mr. Bennett complains of, and no attempt has been made to exercise powers which the Commission does not possess.

Though the total cost of the Commission is paid by the Dominion Government, fully one half of the whole time of the Com<sup>er</sup> is spent examining and protecting not only the rights of white settlers, but the customary advantages and fair expectations of their position as settlers.

When doubtful questions arise, or questions of extreme difficulty, such as are some of those which now have for a long time been before the Provincial Government, it is the practice to refer them to both Governments for an authoritative opinion.<sup>42</sup>

When the province continued to be evasive about the scope of his authority, Commissioner Sproat again wrote to the Chief Commissioner of Lands and Works on March 17, 1879:

I have the honour to request that, in pursuance of the existing arrangement between the two governments embodied in the Order in Council under which I, lately, have been acting . . . you will cause me to be furnished with the requisite authority from

40 I.W. Powell to Superintendent General of Indian Affairs, January 20, 1879 (ICC Documents, pp. 114-16).

41 I.W. Powell to Superintendent General of Indian Affairs, January 20, 1879 (ICC Documents, pp. 114-16).

42 G.M. Sproat to the Chief Commissioner of Lands and Works, February 19, 1879 (ICC Documents, pp. 117-18).

the Provincial Government, so far as they are concerned, for prosecuting the adjustment of the Indian Land question in the districts not yet examined.<sup>43</sup>

While Commissioner Sproat was trying to obtain clarification on the scope of his authority from the province, he received further instructions on April 18, 1879, from the Superintendent General of Indian Affairs "to proceed with the allotment of Reserves on the Coast of British Columbia, leaving the Reserves for the Indians in the northern portion of the Interior until the important question of water for irrigating the same is settled."<sup>44</sup> As a result, Commissioner Sproat wrote to the Chief Commissioner of Lands and Works on May 5, 1879, asking that his authority as Indian Reserve Commissioner be extended to include the coastal areas of British Columbia.<sup>45</sup>

In response to Mr. Sproat's request, the provincial authorities advised him that "the Government is not at present able to say whether the suggestion to take up the West Coast Reserves is good or not."<sup>46</sup> When the Superintendent General repeated his request that Mr. Sproat move to the coast,<sup>47</sup> the Chief Commissioner of Lands and Works corresponded with Commissioner Sproat as follows:

I have examined the Orders in Council & correspondence relating to the Indian Reserve Commission as at present constituted, and do not find that it is necessary for the Provincial Government to [act] by Order in Council when [desirous] of indicating the [sections] of the Province to which the labours of the Commission might most usefully be directed.

From the representations recently made by well informed persons, who can hardly be classed as alarmists, I think it would be very advisable that the Indian reserves in the Interior, in the vicinity of Clinton and as far North as Soda Creek, should be defined before any work on the Coast is undertaken. The Irrigation question offers no more embarrassment in the Lillooet or Cariboo sections of the Province than was met with in Yale or New Westminster.<sup>48</sup>

Commissioner Sproat immediately wrote to the Superintendent General of Indian Affairs, apprising him of his correspondence with the province. With respect to the matter of his authority he noted:

43 G.M. Sproat to the Chief Commissioner of Lands and Works, March 17, 1879 (ICC Documents, pp. 119-20).

44 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to G.M. Sproat, April 18, 1879 (ICC Exhibit 2, vol. 1, tab 11).

45 G.M. Sproat to the Chief Commissioner of Lands and Works, May 5, 1879 (ICC Documents, pp. 121-22).

46 W.S. Gore, Surveyor General, to G.M. Sproat, May 7, 1879 (ICC Documents, p. 123).

47 Letter of May 19, 1879, cited in G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 (ICC Documents, pp. 137-38).

48 G.A. Walkem to G.M. Sproat, May 28, 1879 (ICC Documents, p. 124).

You will observe that the Com<sup>r</sup>. of Lands does not consider that any Provincial Order in Council is required to empower me. I presume he considers that as single Commissioner, succeeding by agreement to the three Commissioners, I have the powers which they had by the original agreement between the two govts contained in the proposals sent by the Secy of State to the Lt Governor 15 Dec 1875 . . .<sup>49</sup>

On May 29, 1879, Mr. Sproat sent a confirming letter to the Chief Commissioner of Lands and Works:

I have received your letter . . . following my letters of 5 May and 17 March last, and I note that my authority, as far as the Prov. Gov. is concerned, is sufficient without the Order in Council which I had supposed might have been necessary . . .<sup>50</sup>

Two months later, Mr. Sproat reiterated his understanding of the province's position in a letter to the Deputy Superintendent General of Indian Affairs:

Mr. Walkem's government, on my asking for full powers to enable me to work effectively in other districts than Yale stated . . . that my powers were ample . . . and no further Orders in Council were needed – that is to say I had simply succeeded the three Commissioners. My decisions are made on the spot unless I choose to hold them over and they are not subject to the approval of the Chief Commissioner of Lands, and as a consequence there is no referee.<sup>51</sup>

Believing that, in the absence of specific orders stating otherwise, the province intended him to continue under the guidelines of the former Joint Reserve Commission, Mr. Sproat planned to start working outside of the interior. However, on August 7, 1879, the Chief Commissioner of Lands and Works, wary of the imminence of rebellion in the interior, protested Mr. Sproat's upcoming visit to the province's coastal areas:

I am informed that as Indian Commissioner you are about to visit some of the tribes of Indians living on the Coast. I protest against such a visit as I have every reason to believe that it would at present be most impolitic, and do more harm than good, and on behalf of the Government I must further object to your leaving the Indian land question as it affects the Interior in its present unsettled condition.<sup>52</sup>

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49 G.M. Sproat to Superintendent General of Indian Affairs, May 28, 1879 (ICC Documents, pp. 125-28).

50 G.M. Sproat to the Chief Commissioner of Lands and Works, May 29, 1879 (ICC Documents, p. 129).

51 G.M. Sproat to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, July 29, 1879 (ICC Documents, pp. 130-32).

52 G.A. Walkem, Chief Commissioner of Lands and Works, to G.M. Sproat, August 7, 1879 (ICC Documents, p. 133).

In his answer to the Chief Commissioner, Mr. Sproat explained that he thought that the Superintendent General's instructions to proceed to the coast were reasonable and not "most impolitic," and that in the past six months he had had "as urgent messages and reminders sent to [him] from Indians on the Coast as from Indians in the Interior."<sup>53</sup> He also pointed out that the provincial government still had not settled the water question in the interior.<sup>54</sup>

Commissioner Sproat was later to confirm for himself the urgency of the "messages and reminders" sent from the coastal Indians when he began the task of allotting reserves on the coast. On November 11, 1879, he wrote to Dr. Powell, Indian Superintendent, from the schooner *Thornton* harboured in Alert Bay. In that letter, he stated:

I now know the condition and requirements of the Indians from the south of Vancouver Island to its extreme north, including the Mainland Coast up to Cape Caution, and my opinion is the same as that expressed by Mr. VanKoughnet in his official report last year, to the effect that in the Coast Superintendency, as in the Fraser Superintendency, the arrangements are not suitable to the circumstances.

This statement may be made without unkind criticism, but it is a most grave matter that the condition of so many Indians within easy reach of Victoria and in the heart of the Coast Superintendency should be in the unsatisfactory condition in which they are, and which is worse than any group of Indians which came under my examination in the Interior of the Province. . . .

I have not been in any part of the Province where, under all the circumstances, an adjustment of land matters was more necessary . . .<sup>55</sup>

53 G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 (ICC Documents, pp. 134-39).

54 Although the Indian Reserve Commission was created specifically to deal with land, Sproat, as Reserve Commissioner, recognized that in many areas of the province land rights and water rights were inseparable. This was particularly true in the interior, which would best be defined as semi-arid. It was also in this area that Indians and Europeans were in direct competition for access to water, as both needed a reliable water supply for their stock: see Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 195. In an effort to address this problem, Sproat often took it upon himself to allocate water rights as part of his Minutes of Decision on reserve establishment. This decision did not sit well with the provincial authorities, who felt that Sproat was overstepping the bounds of his responsibilities. When it became clear that the province was reluctant to recognize his allocations, Sproat sought to involve the dominion government. He informed Indian Affairs that to proceed with reserve allotments in the interior without making provision for Indian access to water for irrigation would lead to further embarrassment and expense for the dominion government. It appears that Sproat's decision to visit the coast and Vancouver Island was arrived at through his frustration over the province's refusal to take steps to resolve the water issue. (Sproat's attitude to the water rights question is touched upon in the following documents: G.M. Sproat to Superintendent General of Indian Affairs, May 28, 1879 [ICC Documents, pp. 125-28], G.M. Sproat to the Chief Commissioner of Lands and Works, August 29, 1879 [ICC Documents, pp. 134-39].)

55 G.M. Sproat to Dr. Powell, Indian Superintendent, November 11, 1879 (ICC Exhibit 2, vol. 1, tab 35).

A short while after making these observations, Commissioner Sproat submitted his resignation as Indian Reserve Commissioner on March 3, 1880.<sup>56</sup> He was succeeded in the post by Peter O'Reilly, a Provincial County Court Judge and Stipendiary Magistrate, who was appointed Indian Reserve Commissioner by authority of dominion Order in Council 1334, dated July 19, 1880.<sup>57</sup>

### **Cormorant Island and the Huson Lease**

On his trip along the coast, Commissioner Sproat met with a variety of aboriginal nations, including the "Nimkish" of Cormorant Island. Several years before Mr. Sproat arrived at Cormorant Island, a group of white settlers, A.W. Huson, E.T. Huson, U. Nelson, and E.A. Wadhams, had obtained a renewable 21-year lease covering the whole of the island. More particularly, the lease related to:

All that piece or parcel of land and situate in Broughton Straits on the east coast of Vancouver Island and being known on the official Map as Cormorant Island and containing six hundred acres more or less as the same is more particularly described on the plan hereunto annexed . . .<sup>58</sup>

Although the lease described the area involved as 600 acres (whereas Cormorant Island is in actual fact closer to 1500 or 1600 acres), the annexed plan included the whole island.

The lease, dated August 3, 1870, was signed by B.W. Pearse, Assistant Surveyor General, acting on behalf of the government of British Columbia in the temporary absence of the Chief Commissioner of Lands and Works and Surveyor General, Joseph Trutch. It contained a number of terms, including the following:

- Rent of \$40 per annum was to be paid semi-annually on June 30 and December 31 each year.
- The lessees could not assign the lease without the consent in writing of the Chief Commissioner of Lands and Works.

<sup>56</sup> G.M. Sproat to Superintendent General of Indian Affairs, March 3, 1880 (ICC Exhibit 2, vol. 1, tab 45).

<sup>57</sup> Federal Order in Council 1334, July 19, 1880 (ICC Documents, pp. 179-85).

<sup>58</sup> Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

The government retained the right to resume possession of any portion of the leased lands with two months' notice in writing.<sup>59</sup>

There is evidence that the 'Namgis First Nation had an established village on Cormorant Island before the lease was granted. In 1870 the Royal Navy was active on the coast and, in a report of his activities, Commander Mist of the HMS *Sparrowhawk* noted that on March 22, 1870, he went with interpreters "to the Nimkish winter village at Alert Bay."<sup>60</sup>

When Commissioner Sproat visited the area in 1879 he took note of the Huson lease at Cormorant Island and wrote to the Chief Commissioner of Lands and Works as follows:

I find much anxiety respecting their lands on the part of all the Indians I have visited – the Klah-hoose, Sliammon, Homalthko, Euclataw and the various Kwawkewlth tribes.

Pending the results of the investigation which I am now actively making, I respectfully mention that it would appear to be very undesirable that lands not ascertained to be Indians Lands, or required as such, should be alienated by the Provincial Government in this quarter, particularly at Nimkish, Salmon River, Beaver Cove, or around Fort Rupert and at Campbell River . . .

Mr. Wes Huson has applied for land at Nimkish, but it is essential that no sales should be made there until the Indians reasonable requirements are ascertained.

From 1,200 to 1500 Indians look to Nimkish mainly for their support.<sup>61</sup>

He also wrote to the Superintendent General of Indian Affairs, informing him that:

The whole of Cormorant Island, including so far as I can ascertain, a settlement of the Nimkish Indians, where they still reside, has been released by the Provincial Government to a Mr. Huson for a long term of years.<sup>62</sup>

In the wake of these observations, Commissioner Sproat issued a Minute of Decision on January 2, 1880, allotting all of Cormorant Island, with the exception of 320 acres, to the Nimkeesh Indians. The Minute of Decision reads as follows:

59 Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

60 Commander H.N. Mist to Captain Algermon Lyons, April 1, 1870 (ICC Documents, pp. 5-15).

61 G.M. Sproat to the Chief Commissioner of Lands and Works, October 28, 1879 (ICC Documents, pp. 152-53).

62 G.M. Sproat to Superintendent General of Indian Affairs, November 11, 1879 (ICC Documents, pp. 154-56).



A Reserve consisting of the whole of the Island described in the Admiralty Chart as Cormorant Island, Broughton Strait, opposite the mouth of Nimkeesh River with the exception of the following portions of land, also shown on sketch; namely 160 acres of land on a portion of which Mr. A. Wesly Huson has his improvements, said 160 acres not to have more frontage on Alert Bay than from the north boundary of his small potatoe [sic] patch (lying on the north side of a small stream between the stream and the Indian houses) southerly along shore to within two chains of the most northerly Indian grave and excepting also 160 acres of land applied for to the Government by Mr. Hall, which last named portion is not to have more than 10 chains frontage on Alert Bay, running westerly from the spot — known as the “Cedars” — the Indians to have prior right to water for household and necessary purposes from all sources of water supply on the Island.<sup>63</sup>

The Mr. Hall mentioned in the Minute of Decision was Reverend Hall — a missionary who wished to establish a mission on Cormorant Island.

On January 4, 1881, a year after Commissioner Sproat had allotted the island as a reserve, A.W. Huson wrote to the Chief Commissioner of Lands and Works giving his approval for Reverend Hall’s application for “a portion of land North West of the Indian Village at Alert Bay.”<sup>64</sup> Reverend Hall subsequently made formal application to pre-empt 160 acres of Cormorant Island on March 10, 1881. Included in Reverend Hall’s application was a sketch map indicating that the remainder of the island, other than his 160-acre application and Mr. Huson’s 160 acres, was “Indian Reserve.”<sup>65</sup>

A.W. Huson again raised the matter of his lease on Cormorant Island in November 1881 when he wrote to the Chief Commissioner of Lands and Works to inform him that he had purchased the interest of E.J. Huson, U. Nelson, and E.A. Wadhams in the lease. Expressing a desire to build a fish cannery and to secure an unquestionable title to the land, Mr. Huson asked for either a Crown grant of 160 acres or the cancellation of Commissioner Sproat’s reserve allotment. He complained that owing to Mr. Sproat’s actions, “[t]he Indians are consequently now in possession of the land for which I am paying a yearly rental of \$40.”<sup>66</sup>

It became clear, however, that the province had no intention of granting Mr. Huson’s request for a Crown grant, and, instead, it turned its attention to cancelling Commissioner Sproat’s allotment. On January 28, 1882, G.A.

63 G.M. Sproat, Indian Reserve Commissioner, Minute of Decision, January 2, 1880 (ICC Documents, pp. 176-78).

64 A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, January 4, 1881 (ICC Documents, p. 186).

65 A.J. Hall, Application to Record, March 10, 1881, British Columbia, Department of Lands (ICC Documents, pp. 187-89).

66 A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, November 24, 1881 (ICC Documents, pp. 191-96).

Walkem, the Chief Commissioner of Lands and Works, informed I.W. Powell, Indian Superintendent for British Columbia, that the province would not recognize the reserve set apart by Mr. Sproat on Cormorant Island for two reasons:

1stly. Owing to his [Commissioner Sproat's] having been informed by letter of the 7th August 1879 from me, that the local Government would not accept any Indian reservations made by him on the North West Coast, and would therefore have to protest again his then intended purpose of proceeding up the Coast at a useless cost.

2ndly. As the whole Island has been leased ever since August 3rd 1870 (prior to Confederation) by the Government to Messrs. Huson and others, at a yearly rental which has been regularly paid up to the present time.

Mr. Sproat also undertook to lay off a plot of 160 acres out of this leasehold for the Revd. Mr. Hall for Church Missionary purposes. This extraordinary proceeding is only one of several instances of his reckless indifference to the instructions given to him as Indian Commissioner.<sup>67</sup>

Mr. Powell's reaction to the province's decision was to write to the Superintendent General of Indian Affairs, giving his understanding of Mr. Sproat's actions: "Mr. Sproat informed me at the time that the reserve he made at Cormorant Island was subject to the conditions of the lease referred to by Mr. Walkem, and was not intended to interfere in any way with the same until its time limit had expired."<sup>68</sup> He went on to describe the circumstances of the island:

It is also desirable to inform you that a large tribe of Indians have a village on Cormorant Island upon the land leased to Mr. Huson.

Cormorant Island is just opposite the mouth of the Nimpkish River, which although small, has always been a most important fishing stream for the Indians. . . . The Nimpkish river is however a small stream at best, but as a large number of Indians derive their supply of food from there, it is all the more necessary to protect

<sup>67</sup> G.A. Walkem, Chief Commissioner of Lands and Works, to Lieutenant Colonel Powell, Indian Superintendent, January 28, 1882 (ICC Documents, pp. 197-98). It should be noted that the Chief Commissioner's allegation that rental payments were regularly made by the lessees is a point of contention in the historical documents. On October 17, 1873, the Chief Commissioner of Lands and Works for British Columbia wrote to A.W. Huson requesting \$100 in lease payments owing from January 1, 1871, to June 30, 1873: Chief Commissioner to A.W. Huson, October 17, 1873 (ICC Documents, p. 41). There exists no further record of the province requesting payment for arrears due. Mr. Huson, himself, in a letter dated November 24, 1881, alleged that he had "regularly paid the yearly rental": A.W. Huson to G.A. Walkem, Chief Commissioner of Lands and Works, November 24, 1881 (ICC Documents, pp. 191-96). However, in 1884 Reverend Hall claimed that while the lease money was paid, "till Mr. Gill Sproat's action in 1880 . . . [Huson] never paid a cent after that date": A.J. Hall to W. Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

<sup>68</sup> I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201).

not only their fishing rights, but to make suitable reservations for them which in the future may be free from encroachments.

In view of the prospective establishment of other Canneries, the statement communicated to Mr. Sproat in August 1879 and now referred to in the enclosed letter i.e. that the reserves made by Mr. Sproat on the North West Coast would not be recognized by the Provincial Government should have, in my opinion, immediate consideration, and the necessary steps taken to provide a satisfactory solution to the apparent difficulty.<sup>69</sup>

While Mr. Powell waited for a reply from the Superintendent General, Mr. Nelson and Mr. Wadhams wrote to the Chief Commissioner of Lands and Works on February 6, 1882, notifying him that they had assigned and transferred their interests in the Cormorant Island lease to A.W. Huson.<sup>70</sup>

In response to Mr. Powell's letter, the Deputy Superintendent General instructed Mr. Powell to obtain the opinion of J.W. Trutch, by this time John A. Macdonald's "Confidential Agent on Indian Affairs and Railways Matters."<sup>71</sup> By memorandum dated May 5, 1882, Mr. Trutch dealt with the two objections raised by the Chief Commissioner of Lands and Works in his letter of January 28, 1882. With regard to the first objection (that Mr. Sproat had been informed that the province would not accept any reservations on the Northwest Coast), Mr. Trutch argued that the objection was of questionable validity because the Chief Commissioner's letter of August 7, 1879, to Mr. Sproat conveyed "only an expression of opinion on behalf of the Provincial Government that it would be impolitic for Mr. Sproat . . . to visit the Indians on the North West Coast."<sup>72</sup> However, Mr. Trutch did find the Chief Commissioner's second objection (that the whole island was leased) "clearly valid and insurmountable":

I cannot understand upon what grounds Mr. Sproat could have assumed discretion to appropriate any portion of this Island as an Indian Reservation, if he was aware of the fact that the whole of the Island had been long previously placed under lease right, which was then still existing . . .

All the conditions and agreements have been observed, and performed by the Lessees, and there is no question that this Leaserright is now in full force. . . .

69 I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201).

70 Uriah Nelson and E.A. Wadhams to the Chief Commissioner of Lands and Works, February 6, 1882 (ICC Documents, p. 202).

71 Deputy Superintendent General to I.W. Powell, Indian Superintendent, February 23, 1882 (ICC Documents, pp. 203-04).

72 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

Power is indeed reserved to the Government of British Columbia in the Indenture of Lease to resume possession of the whole or any portion of the premises thereby demised, upon giving two (2) months notice to the Lessees. But the exercise of this right is entirely in the discretion of that Government, and was certainly not intended to be, and doubtless will not be taken advantage of except on grounds of the requirements of the public interests, and upon payment of just compensation to the Lessee's; and it is evident from the letter of the Chief Commissioner of Lands and Works now under consideration that such requirements are not held by the Government of British Columbia to exist, in connection with Mr. Sproat's unauthorized appropriation of Cormorant Island as an Indian Reservation.<sup>73</sup>

In January 1884 the lease on Cormorant Island was transferred from A.W. Huson to T. Earle and S. Spencer, two men who wished to operate a cannery on the island.<sup>74</sup> The transfer of the lease marked the beginning of the next phase in the controversy over the Sproat allotment. On February 14, 1884, George Blenkinsop, the Indian Agent for the Kwawkewlth Agency, informed Indian Superintendent Powell that Mr. Spencer had renewed the lease for Cormorant Island. With regard to the Sproat allotment, Mr. Blenkinsop observed:

There is . . . abundant evidence to prove, both by living testimony and by the remains and relics of by-gone days, that Alert Bay was, formerly, the home of a large Indian population. In fact, they abandoned the place only in 1837-1838, on the first appearance of smallpox, when great numbers of them perished. . . .

The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects.

The present occupants are surely bound by this action of Mr. Huson.<sup>75</sup>

Mr. Powell, in turn, wrote to Commissioner O'Reilly to apprise him of the situation on Cormorant Island. Mr. Powell offered the opinion that:

In view of the correspondence between the two Governments in regard to the former lease held by Mr. Huson, and the fact that a large Indian Village existed on the land, I am at a loss to understand any reason for regranteeing the lease to another applicant.<sup>76</sup>

73 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

74 The date is taken from A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

75 George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

76 I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

He concluded by suggesting that, if the statement made to Indian Agent Blenkinsop (that the lease had been granted to Spencer) was correct, "the matter might be referred to the Right Hon Superintendent General for settlement with the Hon Chief Commissioner of Lands and Works while the latter gentleman is in Ottawa."<sup>77</sup>

Indian Superintendent Powell also wrote to the Superintendent General of Indian Affairs, enclosing Agent Blenkinsop's letter and pointing out that there was a clause in the original lease that permitted the Chief Commissioner of Lands and Works to terminate the lease by giving two months' notice or to amend it by taking any portion of the leased land that might be desirable. He warned:

The right which Mr. Spencer assumes by virtue of the lease of controlling a large Indian Village or of inviting other tribes to settle on land allotted to and claimed by Nimpkish Indians would soon occasion serious difficulties.

Alert Bay is a central location more convenient than Fort Rupert for the headquarters of the agent of the Department and it is not desirable that Mr. Spencer should have the leasehold of more land on the Island than is absolutely essential for Cannery purposes, and, in any event, all doubt should be removed as to the right he claims to exercise over the Nimpkish Village and reserve.

Upon inquiry at the land office, it would appear that Mr. Huson has transferred his right to the lease to Mr. Spencer but so far as the Surveyor General is aware no official sanction has as yet been given by Mr. Smithe to the conveyance.<sup>78</sup>

Commissioner O'Reilly reported to the Superintendent General that any action would be inopportune until the province consented "to re enter, and take possession of such portions of the Island as are necessary for the Indians."<sup>79</sup> He stated that the province had the power to take such steps under the terms of the lease, and added further that "a portion of the land under consideration is the site of a large Indian village, and as such should never have been included in the lease granted to Mr. Huson."<sup>80</sup>

In March 1884 Reverend Hall, apparently learning that the Huson lease had been transferred to Mr. Spencer, wrote to the Chief Commissioner of Lands and Works expressing concern over the security of his pre-emption on the island, since Mr. Spencer had informed him that he might now be a

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77 I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

78 I.W. Powell, Indian Superintendent, to Superintendent of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

79 P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

80 P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

trespasser. As with Indian Agent Blenkinsop before him, Reverend Hall argued that the whole situation was the result of Mr. Huson's actions. Reverend Hall asserted that it was Mr. Huson who had proposed cancelling his (Huson's) lease in exchange for a free grant of 160 acres, and then making the balance an Indian reserve.<sup>81</sup>

The province, however, maintained that the difficulty at Cormorant Island was "entirely the creation of the Indian Reserve Commissioner who without any right, legal or otherwise, to do so assumed authority to place under reservation land which was at the time of action under lease to Messrs. Huson and others."<sup>82</sup> Accordingly, the Chief Commissioner of Lands and Works, William Smithe, resisted any suggestion that the province should terminate the lease.

Early in June 1884, Commissioner O'Reilly suggested that he go to Cormorant Island and ascertain what quantity of land was necessary for the Indians.<sup>83</sup> Chief Commissioner Smithe accepted Mr. O'Reilly's offer, stating that he could "see no reason why, if properly undertaken, the requirements of the Indians and the interest of the lessees may not be severally conserved."<sup>84</sup> After receiving the approval of the Chief Commissioner, Mr. O'Reilly approached the Deputy Superintendent General, who also endorsed his visit.<sup>85</sup>

Commissioner O'Reilly travelled to Cormorant Island in the fall of 1884, and on October 20, 1884, he set out two reserves on Cormorant Island for the Nimkeesh Indians: a "Reserve of fifty (50) acres, situated on Alert Bay, Cormorant Island," and a "Burial ground, containing two (2) acres."<sup>86</sup> He then submitted the Minutes of Decision for the reserves to the Chief Commissioner of Lands and Works and the Deputy Superintendent General of Indian Affairs for their approval.<sup>87</sup> In his letter to the Chief Commissioner, Mr.

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81 A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

82 William Smithe, Chief Commissioner of Lands and Works, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, April 12, 1884 (ICC Documents, pp. 232-39).

83 P. O'Reilly to the Chief Commissioner of Lands and Works, June 4, 1884 (ICC Documents, pp. 240-41).

84 William Smithe, Chief Commissioner of Lands and Works, to P. O'Reilly, June 13, 1884 (ICC Documents, p. 242).

85 P. O'Reilly to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, October 4, 1884 (ICC Documents, p. 243); L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to P. O'Reilly, October 20, 1884 (ICC Documents, pp. 245-46).

86 P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, October 20, 1884 (ICC Documents, pp. 247-55).

87 P. O'Reilly to the Chief Commissioner of Lands and Works, November 29, 1884 (ICC Documents, p. 256). It is not clear when Commissioner O'Reilly submitted the Minutes of Decision to the Deputy Superintendent General of Indian Affairs. The latter acknowledged receipt of the Minutes on February 26, 1885: L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to P. O'Reilly, February 26, 1885 (ICC Documents, p. 258).

O'Reilly indicated that he had conferred with Mr. Spencer, the lessee, before setting out the reserves, and that Mr. Spencer had given his support for the proposed reserves.<sup>88</sup> The Chief Commissioner gave his approval on December 2, 1884: "The reserve proposed seems to me to be reasonable and with Mr. Spencer on behalf of the lessees of the Island consenting as you report, I am very glad to approve."<sup>89</sup>

Commissioner O'Reilly visited the Nimkeesh Indians again in 1886, at which time he allotted an additional three reserves. By Minutes of Decision dated September 21, 1886, he allotted:

IR 3: "Ches-la-kee, a reserve of three hundred and thirty five (335) acres, situated at the mouth of Nimkeesh river, Broughton Strait, and south of and adjoining Section six (6) Rupert district."

IR 4: "Arse-ce-wy-ee, a reserve of forty two (42) acres, situated on the left bank of the Nimkeesh river, about two and a half miles from its mouth."

IR 5: "O-tsaw-las, a reserve of fifty (50) acres, situated on the right bank of Nimkeesh river, half a mile from the outlet of Karwutseu Lake."<sup>90</sup>

These three reserves were approved by the Chief Commissioner of Lands and Works on July 27, 1888.<sup>91</sup>

There are discrepancies between the acreage figures set out in Commissioner O'Reilly's Minutes of Decision and the figures appearing in subsequent documentation. The 1913 Schedule of Indian Reserves in the Dominion lists the following acreage figures for the five reserves:

1 Alert Bay . . .	46.25 (acres)
2 Burial ground . . .	1.87
3 Ches-la-kee . . .	302.87
4 Ar-ce-wy-ee . . .	41.30
5 O-tsaw-las . . .	53.25 <sup>92</sup>

88 P. O'Reilly to the Chief Commissioner of Lands and Works, November 29, 1884 (ICC Documents, p. 256).

89 William Smithe, Chief Commissioner of Lands and Works, to P. O'Reilly, December 2, 1884 (ICC Documents, p. 257).

90 P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 21, 1886 (ICC Documents, pp. 250-55).

91 Plan of the Nimkeesh Indian Reserves (ICC Documents, p. 259).

92 Schedule of Indian Reserves in the Dominion, 1913 (ICC Documents, p. 267).

These figures are consistent with those confirmed in the Minutes of Decision of the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission) on August 14, 1914,<sup>93</sup> and with the amount of land transferred to the federal government by provincial Order in Council 1036 on July 29, 1938.<sup>94</sup> Thus, the 'Namgis First Nation was ultimately allotted 46.25 acres for Alert Bay (IR 1), and 1.87 acres for the burial ground (IR 2), for a total of 48.12 acres on Cormorant Island.

### ORAL TESTIMONY: OCCUPATION AND USE OF CORMORANT ISLAND

During the community session at Alert Bay, we heard the evidence of several elders and community members that the 'Namgis people historically used (and, to a certain extent, still use) the whole of Cormorant Island. For example, George Cook described in some detail the food- and wood-gathering activities that took place throughout the island:

[W]e also had our food supply on this island [Cormorant Island], we used to get wood on the southern portion of the island, also picked seaweed there for our livelihood, and Chinese slippers. And all this was all – this was on the southern portion of the island, and also on the northern portion of the island we had clam beds there also.

...

And I think the cemetery on the island, it gives a good indication that the whole island belonged to Nimpkish, and until the island was divided up and the B.C. Packers came in and came in the middle of the island and separated the reserve from the cemetery so that there was a block put in there, in reality there was a trail from the reserve, as it's called in the English language. So to our people, the clear indication is that the whole island still belongs to Nimpkish. Also that on the top of the island that there was – our people used to go and also pick salalberries, huckleberries, all these, and they used to dry them and put them away for the winter. So there's a clear indication that the whole island was made use by our ancestors.

And even today we still go at the top of the island and I think – where you came in yesterday, in the airport, there's still huckleberries there and things like that – still there, which we still use for our supply.

...

This on the chart is Gordon Bluff here, and this is what I was talking about where we picked our seaweed, and they still do that today all along here, and also that all along in here, there's a small clam bed here. And on top of the island here where you

93 Royal Commission on Indian Affairs for the Province of British Columbia, Minutes of Decision, August 14, 1914 (ICC Documents, p. 293).

94 Schedule of Reserve Allotment in Kwakwewlth Agency attached to Provincial Order in Council 1036, July 29, 1938 (ICC Documents, p. 295).



landed yesterday, this is where we still pick berries, salmonberries and huckleberries and salalberries, all these are all foods up here . . .

. . .

Also on the Gordon Bluff on Cormorant Island that the sea eggs here also that we used for food.<sup>95</sup>

– George Cook

In addition to food- and wood-gathering, the elders recalled that a number of areas were used as burial sites.<sup>96</sup> George Cook gave us the following information:

MS. GROS-LOUIS AHENAKEW: Do you remember any burial sites on this island or any other island in question?

GEORGE COOK: Yes, there's a cemetery on the island, and also that – it was passed down to me there's also a custom that they buried in large trees that we had on the island. And they're – just up until a few years ago that these boxes of our dead were – how shall I put that, now? – the boxes fell down, but they were scattered all across the island. They had to pick certain trees and they had to be sturdy trees and have a lot of branches. So they to my knowledge didn't pick specific spots. It had to go by the tree.

And yes, we also have a cemetery here, and I think there also has been a lot of harm done to our ancestors that have been buried there. The museum is built on some of our past leaders and great people, and today that's still very hard to take for our people that they know. They even have the names of the people at – where the museum is today, the museum was built right on top of it. The museum is down on the southern end of the island.<sup>97</sup>

– George Cook

Bill Cranmer<sup>98</sup> provided similar evidence:

I understand that there were different trees selected right throughout Cormorant Island for burial sites.<sup>99</sup>

– Bill Cranmer

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95 ICC Transcript, April 21, 1995, pp. 2-6 (George Cook). See also the testimony of Ethel Alfred (ICC Transcript, April 20, 1995, pp. 16-18, 27) and Peggy Svanvik (ICC Transcript, April 20, 1995, p. 33).

96 See the testimony of Mary Hanuse (ICC Transcript, April 20, 1995, p. 10) and Ethel Alfred (ICC Transcript, April 20, 1995, p. 25).

97 ICC Transcript, April 21, 1995, p. 10 (George Cook).

98 At the time of the community session, Bill Cranmer was the Director of the U'mista Cultural Centre, and he is currently the Chairman of the Board of the Centre. He was elected Chief of the 'Namgis First Nation on May 10, 1995.

99 ICC Transcript, April 21, 1995, p. 15 (Bill Cranmer).

Many of the witnesses at the community session spoke of the hardship faced by the 'Namgis people after the reserves were allocated on Cormorant Island. They explained to the Commission that they were severely restricted by the amount of land provided for their use:

It's such a small place that we never had a place to play. We used to just play in front of the long houses.

...  
 So there's a lot of things that from now on, from my generation down, they're having a hardship for the recreation and stuff, like for the kids, because this island is too small. They should have given them more space, you know, to build things and stuff.<sup>100</sup>

– Mary Hanuse

So it was – we didn't have no place to play.

...  
 So it was pretty hard growing up. We had no places to go to, you know, after they must have divided – the government must have divided the island and said that we didn't need any big place to be, you know.<sup>101</sup>

– Ethel Alfred

But the idea that the whole island belonged to them, and it was only when a decision came down that they allotted – was it 50 acres or whatever it was to the Nimpkish to live there, that there was – I think it was also mentioned yesterday how crowded that the Nimpkish were in that small village, and they don't think at that time when the 50 acres was allotted that it's always customary that all our homes were all along the waterfront. But when you give 50 acres to people – to the Nimpkish, I should say – and the limited shoreline that was left to them, the hardships that our people went through and our children also at that time, there was no room for them to play or anything of that sort.<sup>102</sup>

– George Cook

Several of the elders also told us about the inadequacies of their water supply:

We did have a hard time, because I knew I had to pack water when it's kind of a dry season, because we never had water until later on, in the '50s, I guess, when they started finding the well for this reserve anyway.<sup>103</sup>

– Mary Hanuse

100 ICC Transcript, April 20, 1995, pp. 12-13 (Mary Hanuse).

101 ICC Transcript, April 20, 1995, pp. 16 and 19 (Ethel Alfred).

102 ICC Transcript, April 21, 1995, p. 8 (George Cook).

103 ICC Transcript, April 20, 1995, p. 13 (Mary Hanuse).

And it used to be very hard for us. . . . We had no water, running water. We had a well, and I used to empty that well we had. It used to kind of dry up, and I'd go inside it and scrub it because it was used for every day. Boys had to pack water every day. . . .<sup>104</sup>

– Ethel Alfred

I was born in time to be packing water too. We didn't have running water at home. There was a well further up from where Ethel lived where we used to go and pack water, and there was just a trail going up there that we used to pack water when we were children.<sup>105</sup>

– Peggy Svanvik

[N]o consideration was taken that their water supply was only surface water and the water that they were drinking, what I was told was that there was coloured water. It wasn't clear water, which would mean that it either ran through cedar that's laying on the ground or rain water, and this was their water supply at that time.

. . .

[W]hen the B.C. Packers moved in and they built a dam and further cut off the water supply to the village, and also that the effect of a cannery, how it affected our people, was all the guts and heads, whatever, that these all drifted along the beach.<sup>106</sup>

– George Cook

[M]y mother has also said that it appears that our people were just slowly pushed away from the traditional water supply that they used to have, which is the swamp, as they call it, that had a creek running down – it's now called Gater Gardens – and that supply was lost to our people.

. . .

. . . our people were slowly pushed away from the creek that used to be the major water supply on the island, which was taken over by B.C. Packers for their cannery.<sup>107</sup>

– Bill Cranmer

Thus, we heard evidence that, historically, the whole of Cormorant Island was used by the 'Namgis people for such purposes as food- and wood-gathering and for burials. Despite this use of the entire island, only a small portion of the island was ultimately confirmed as reserves for the 'Namgis people. As a result, they were left with a severe shortage of space and with an inadequate supply of water.

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104 ICC Transcript, April 20, 1995, pp. 15 (Ethel Alfred).

105 ICC Transcript, April 20, 1995, p. 34 (Peggy Svanvik).

106 ICC Transcript, April 21, 1995, pp. 8 and 36-7 (George Cook).

107 ICC Transcript, April 21, 1995, pp. 15 and 18 (Bill Cranmer).

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## PART IV

### ISSUES

The central question this Commission has been asked to inquire into and report on is whether Canada properly rejected the Cormorant Island claim of the 'Namgis First Nation.<sup>108</sup> In other words, does Canada owe an outstanding lawful obligation, as defined in *Outstanding Business*, to the 'Namgis First Nation? This overarching question can be broken down into the following subsidiary issues:

- 1 Did Canada have a mandatory obligation pursuant to the Order in Council (and related documentation) appointing Mr. Sproat as Indian Reserve Commissioner to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?
- 2 Did Canada have a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?
- 3 In the alternative, did Canada have an obligation pursuant to Article 13 of the *Terms of Union, 1871*, to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to the Secretary of State for the Colonies?
- 4 If the answer to Issue 2 or 3 is yes, did Canada fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion?
- 5 If the rejection of Commissioner Sproat's allotment of Cormorant Island had been referred to a Judge of the British Columbia Supreme Court, would Commissioner Sproat's allotment have been upheld?

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<sup>108</sup> We note that there was no agreement between the parties as to the specific issues to be addressed by the Commission in this inquiry.

- 6 Was Canada negligent in not referring the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court or to the Secretary of State for the Colonies?
- 7 Does this claim fall within the scope of the Specific Claims Policy?

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# PART V

## ANALYSIS

### ISSUE 1

Did Canada have a mandatory obligation pursuant to the Order in Council (and related documentation) appointing Mr. Sproat as Indian Reserve Commissioner to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

#### **The Orders in Council**

As discussed in Part III above, the Order in Council by which Mr. Sproat was appointed sole Indian Reserve Commissioner was dominion Order in Council 170. It was passed by the dominion government on March 8, 1878, and essentially adopted the recommendations contained in the annexed memorandum of David Mills, Minister of the Interior, dated March 7, 1878. For ease of reference, we repeat the relevant portion of Mr. Mills's memorandum (and, by extension, Order in Council 170) here:

It is therefore recommended that instead of assigning the task of primarily allotting the Reserves to the Indian Superintendents in their respective Superintendencies, as proposed by that Order in Council of the 23rd February 1877, the present Joint Commissioner Mr. Sproat be appointed to discharge that important duty subject to the approval of the Commissioner of Lands and Works of British Columbia and in the event of any difference between the Commissioner and Mr. Sproat the matter *to be referred* to one of the Judges of the Supreme Court as provided by that Order in Council.<sup>109</sup>

The "Order in Council of the 23rd February 1877" mentioned in Mr. Mills's memorandum outlines a similar procedure for resolving disputes between

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<sup>109</sup> Memorandum of David Mills, Minister of the Interior, March 7, 1878 (ICC Documents, pp. 64-73). Emphasis added.

the Commissioner of Lands and Works and Mr. Sproat but uses slightly different language:

... after the dissolution of the [Joint] Commission the Superintendents of Indian Affairs in their respective localities should apportion as soon as practicable all the lands remaining unallotted or unreserved by the present Commission, such apportionment to be subject to the approval of the Chief Commissioner of Lands and Works of British Columbia acting on behalf of the Local Government, and in the event of any difference between the Superintendents and the Chief Commissioner as to the extent or locality of the lands to be allotted, the matter *might be referred* to one of the Judges of the Supreme Court of that Province whose decision should be final.<sup>110</sup>

The impetus for the Order in Council of February 23, 1877, was a letter sent to the Minister of the Interior from the Provincial Secretary, A.C. Elliott. That letter, embodied in a provincial Order in Council dated January 30, 1877, provides a third variation in language:

After the dissolution of the present Indian Commission, the Superintendents of Indian Affairs, in their respective localities, should apportion as soon as possible, all the lands remaining unallotted or unreserved by the present Commission.

The lands thus apportioned should however be subject to the approval of the Chief Commissioner of Lands and Works, acting on behalf of the Provincial Government before being finally Gazetted as Indian Reserves. In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendents of Indian Affairs as to size or extent of lands to be allotted to any Indian Tribe, the matter *could be referred* to one of the Judges of the Supreme Court, whose decision should be final.<sup>111</sup>

Thus, we have three Orders in Council – one saying any difference between the Commissioner of Lands and Works and Mr. Sproat is “to be referred” to one of the Judges of the Supreme Court (dominion Order in Council 170); one saying any difference “might be referred” to one of the Judges of the Supreme Court (federal Order in Council of February 23, 1877); and one saying any difference “could be referred” to one of the Judges of the Supreme Court (provincial Order in Council of January 30, 1877).

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<sup>110</sup> Federal Order in Council, February 23, 1877 (ICC Documents, pp. 59-61). Emphasis added.

<sup>111</sup> A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1). Emphasis added.

### **Submissions of the Parties**

Canada argues that it did not have a mandatory obligation to refer “differences” between Commissioner Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. It emphasizes that direct reference is made in dominion Order in Council 170 to the federal Order in Council of February 23, 1877. Therefore, Canada submits, it is necessary to consider the wording of the latter Order in Council to determine the circumstances under which a reference was to be made to a Judge of the Supreme Court. The Order in Council of February 23, 1877, provides that references in the event of “any difference” “might” be made to one of the Judges of the Supreme Court. In addition, the provincial Order in Council of January 30, 1877, provides that references in the event of “any differences” “could” be made to one of the Judges of the Supreme Court. Relying on the dictionary definitions of “might,” “could,” and “can” – definitions that suggest an overriding theme of possibility or permission – Canada concludes that a referral of differences to a Judge of the Supreme Court was a discretionary rather than a mandatory process.<sup>112</sup>

The claimant submits that, despite the word “might” in the Order in Council of February 23, 1877, it was mandatory that Canada refer the rejection of Commissioner Sproat’s allotment to a Judge of the Supreme Court. In support of its position, the claimant argues that there are a number of cases in which the courts have interpreted enabling or empowering words (such as “may”) as mandatory.<sup>113</sup>

### **Terms of Dominion Order in Council 170**

If one views the terms of dominion Order in Council 170 in isolation, the referral of “differences” to a Judge of the Supreme Court seems to be imperative. Instead of a term expressing a possible or permissible referral, such as “could” or “might,” Order in Council 170 uses the mandatory phrase “to be referred.” One could argue, therefore, that the change in wording between Order in Council 170 and the previous Orders in Council signalled a change from a discretionary to a mandatory dispute resolution process.

However, as Canada points out, Order in Council 170 makes direct reference to the Order in Council of February 23, 1877: “in the event of any difference between the Commissioner and Mr. Sproat the matter to be

<sup>112</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 36-39.

<sup>113</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 19-22.



referred to one of the Judges of the Supreme Court *as provided by that Order in Council* [Order in Council of the 23rd February 1877]” (emphasis added). Therefore, it appears that at least part of the Order in Council of February 23, 1877, was incorporated into Order in Council 170, but which part? One possibility is that the words “as provided by that Order in Council” relate only to the identification of the referee – one of the Judges of the Supreme Court. A second possibility is that the words “as provided by that Order in Council” relate to the whole dispute-resolution process.

We tend to think that the second possibility is the most plausible and that the words “might be referred” were incorporated into Order in Council 170. This approach is supported by later correspondence which indicates that the procedure described in the Order in Council of February 23, 1877, was meant to govern the actions of Commissioner Sproat. For example, after the dominion government passed Order in Council 170 appointing Mr. Sproat as sole Indian Reserve Commissioner, the Minister of the Interior sent a telegram to the Lieutenant Governor of British Columbia stating as follows: “Please carry out order of February seventy seven respecting Indian Comm. substituting Sproat for Indian Supt.”<sup>114</sup>

### Case Law

Even if the words “might be referred” were incorporated into Order in Council 170, we have yet to consider the circumstances in which the courts have construed empowering words, such as “might,” as mandatory. One of the seminal cases in this area of the law is the House of Lords decision in *Julius v. Lord Bishop of Oxford*.<sup>115</sup> In that case, four judges considered whether the words “it shall be lawful” in the *Church Discipline Act* imposed a duty rather than a discretion to act. (We note that the words “it shall be lawful” are equivalent to the word “may.”) In his reasons for judgment, Lord Chancellor Earl Cairns outlined the following principles of interpretation:

The words “it shall be lawful” are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in

<sup>114</sup> David Mills, Minister of the Interior, to A.N. Richards, Lieutenant Governor of British Columbia, March 15, 1878 (ICC Exhibit 5).

<sup>115</sup> *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 (HL).

the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. . . . And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.<sup>116</sup>

Lord Penzance and Lord Selbourne, similar to the Lord Chancellor, stressed the importance of context:

[Lord Penzance:] The words "it shall be lawful" are distinctly words of permission only – they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled – to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred – they do, or do not create a duty in the person on whom it is conferred, to exercise it.<sup>117</sup>

. . .

[Lord Selbourne:] The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.<sup>118</sup>

Lord Blackburn held as follows:

. . . enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned than where the alleged right is in the public only, and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. . . . I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power.<sup>119</sup>

116 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 222-23 (HL).

117 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 229-30 (HL).

118 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 235 (HL).

119 *Julius v. Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at 244 (HL).

In his written submissions, legal counsel for the claimant states that “[t]he linchpin of the test is the determination of whether the enabling words ‘effectuate a legal right’ or not.”<sup>120</sup> He argues that, in this case, the Federal Crown had the ability to ‘effectuate a legal right’ by referring the matter to a judge of the Supreme Court.”<sup>121</sup>

Canada takes the position that there was no “legal right” to effectuate. In his oral submissions, Mr. Becker, counsel for Canada, explained as follows:

Now, in this case we are dealing with, again, a process by which the provincial and federal governments were attempting to set aside reserves for bands. . . . it’s our submission that there is no private right to have reserve land set aside in any particular quantum or location. That . . . is entirely a subject matter for the exercise of the royal prerogative.

Accordingly, it’s our submission that these cases [the cases cited by the claimant including *Julius*] are inapplicable as there is no underlying right which would be effected in this case. In other words, the decision whether to refer the disagreement to the judge, that decision was not required to effectuate a legal right because there was no legal right to effectuate.<sup>122</sup>

The claimant referred us to the British Columbia Supreme Court decision in *Re Shaughnessy Golf and Country Club*,<sup>123</sup> which provides some assistance in determining whether the object of the power granted to Canada in the Order in Council was to effectuate a legal right. In the *Shaughnessy* case, section 395A(10) of the *Vancouver Charter* provided that the City Council “may enter into an agreement with Shaughnessy Golf and Country Club fixing the amount that shall be deemed to be the assessed value of the latter’s interest in the land presently maintained as Shaughnessy Golf and Country Club.” The issue before Mr. Justice Verchere was whether the word “may” was permissive or mandatory. As the claimant notes, the absence of any term in the legislation pertaining to the resolution of disputes was central to his finding that the word was permissive:

. . . the power granted here was only the power to enter into, that is to say become a party to, an agreement and the statute is silent on what can, should or must occur if an agreement is not reached. Neither Council nor Shaughnessy is required to capitulate.

120 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 20.

121 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 22.

122 ICC Transcript, September 21, 1995, pp. 131-32.

123 *Re Shaughnessy Golf and Country Club* (1967), 61 DLR (2d) 245 (BCSC).

late and accept the amount proposed by the other; neither of them is required to accept adjudication or arbitration in the event of dispute; furthermore, neither of them is required to commence bargaining on notice from the other or to make reasonable effort to conclude an agreement. If the Legislature had intended to give Shaughnessy the right to an agreed assessed value of its golf-course lands it would, in my opinion, have provided for some of those conditions or for other similar ones which would make the alleged right capable of being recognized, asserted and enforced by specific performance.

In my opinion Shaughnessy has failed to demonstrate that the object of the power granted to Council by s. 395A(10) was to create or effectuate a legal right on its part to the assessment of its golf-course lands . . . In particular, it has failed to demonstrate the existence of a legal right on its part by which Council is required to agree to an amount that shall be deemed to be the assessed value of those lands.<sup>124</sup>

The circumstances of the 'Namgis case, of course, are quite different. Unlike the *Shaughnessy* case, Canada and British Columbia had agreed upon a dispute-resolution process in the event of a difference between Mr. Sproat and the Commissioner of Lands and Works. By expressly providing for adjudication by a Judge, arguably both levels of government, to use the words of Mr. Justice Verchere, "intended to give" the 'Namgis and other First Nations "the right" to a reserve.

In any event, in our view, the question of whether the word "might" should be construed as discretionary or obligatory is to be answered from the context and object of the relevant Orders in Council. This was the general approach advocated by several of the judges in *Julius* and an approach which we find particularly useful here.

Mr. Becker addressed the matter of context briefly in his oral submissions:

Now, it's also interesting to note that these orders-in-council were not formally drafted documents, but in fact some of these orders-in-council were basically incorporated by reference letters and telegraph messages. I mean, these orders-in-council did not go through the serious rigorous drafting process, and I think that's important here as well in terms of looking at the context.

<sup>124</sup> *Re Shaughnessy Golf and Country Club* (1967), 61 DLR (2d) 245 at 252-53 (BCSC). As acknowledged by the claimant, Mr. Justice Verchere relied on section 23 of the *Interpretation Act*, RSBC 1960, c. 199, which provides:

23. In construing this or any Act of the Legislature, unless it is otherwise provided, or there is something in the context or other provisions thereof indicating a different meaning, or calling for a different construction, (a) the word "shall" is to be construed as imperative, and the word "may" as permissive.

However, Mr. Justice Verchere equated section 23 with the principles established in *Julius*: ". . . it is necessary, as Earl Cairns, L.C. [in *Julius*], stated above, and as the words of the *Interpretation Act* indicate, to canvass the nature and object of the legislation and the conditions under which the thing provided for is to be done" (252).

These orders-in-council often merely reflected a letter that had been sent back and forth and had been incorporated by reference. I think that it goes quite far to suggest that using a word like “might” or “could” in ordinary language in a letter that is subsequently appended to the – or incorporated by a reference to the order-in-council would suggest anything other than the ordinary meaning of “might” or “could,” which, again, is one of permissiveness.<sup>125</sup>

We take a broader view of context than the physical drafting process for the Orders in Council. As we see it, the key consideration is the goal Canada was attempting to achieve by Mr. Sproat’s appointment and by the creation of the whole reserve commission process.

The Joint Reserve Commission was established “with a view to the speedy and *final adjustment* of the Indian Reserve question in British Columbia on a satisfactory basis.”<sup>126</sup> This finality was emphasized by Mr. Scott, Acting Minister of the Interior, in his memorandum of November 5, 1875: “the undersigned submits that no scheme for the settlement of this question can be held to be satisfactory which does not provide for its prompt and final settlement.”<sup>127</sup> These sentiments were reiterated by British Columbia in its Order in Council of January 6, 1876:

With respect to the appointment of Commissioners, as suggested instead of Agents, the Committee feel that strictly speaking the Province should not be responsible for any portion of the expense connected with the charge or management of Indian affairs which are entrusted by the Terms of Union to the Dominion Government; but regarding a *final settlement* of the land question as most urgent and most important to the peace and prosperity of the Province they are of opinion and advise that all the proposals . . . should be accepted.<sup>128</sup>

There is no reason to think that the objective of “finally settling” the land question changed with the dissolution of the Joint Commission and the appointment of Mr. Sproat as sole Indian Reserve Commissioner.

To prevent a potential stalemate between Mr. Sproat and the Commissioner of Lands and Works, Canada and British Columbia agreed that the decision of a Judge of the Supreme Court “should be final.” In fact, the two governments went further and agreed that they would share the cost of the

125 ICC Transcript, September 21, 1995, pp. 128-29.

126 Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, p. 46), adopted by federal Order in Council PC 1033, November 10, 1875 (ICC Documents, p. 49a). Emphasis added.

127 Memorandum of R.W. Scott, Acting Minister of the Interior, November 5, 1875 (ICC Documents, p. 46). Emphasis in the original.

128 Provincial Order in Council 1138, January 6, 1876 (ICC Documents, pp. 50-51). Emphasis added.

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referee. It would therefore seem strange if Canada, when it drafted Order in Council 170, did not intend a reference to be made to a Judge of the Supreme Court in the event of a difference between Mr. Sproat and the Commissioner of Lands and Works. Without such a reference, there would be no way of ensuring that the dispute would be resolved to the satisfaction of both levels of government and the matter “finally settled” in a timely way. For example, if Mr. Trutch had concurred with Mr. Sproat’s allotment, it is not at all certain that British Columbia would have accepted his opinion. The only dispute-resolution mechanism to which *both* Canada and British Columbia had agreed was a reference to a Judge of the Supreme Court (with the possible exception of a reference to the Secretary of State for the Colonies pursuant to Article 13 of the *Terms of Union, 1871*).

In short, given the underlying objective of the reserve commission process, we find that the word “might” in the Order in Council of February 23, 1877, should be construed as mandatory. However, it is important to keep in mind that the obligation to refer a matter to a Judge only arose in the event of a “difference” between Mr. Sproat and the Chief Commissioner of Lands and Works.

### **Existence of a “Difference”**

It is almost indisputable that there was a “difference” between Mr. Sproat and the Chief Commissioner of Lands and Works, and also between Canada and the Chief Commissioner of Lands and Works. Canada did not accept without question the latter’s decision to disallow Mr. Sproat’s allotment on Cormorant Island, as is evident from the fact that it referred the matter to Mr. Trutch for his opinion. Even after Mr. Trutch gave his opinion in support of the disallowance, officials from the Department of Indian Affairs continued to voice their dissatisfaction with British Columbia’s position on the Cormorant Island allotment. For example, Indian Agent George Blenkinsop, on learning that Mr. Spencer had renewed the lease on Cormorant Island, wrote to Indian Superintendent Powell as follows:

I have . . . the honor to bring to your notice the unfortunate position in which we are placed by [the provincial] Government ignoring the decision of the late Reserve Commissioner, Mr. G.M. Sproat.

The Indians are now here by sufferance, only, according to Mr. Spencer’s view of the case.

There is, however, abundant evidence to prove, both by living testimony and by the remains and relics of by-gone days, that Alert Bay was, formerly, the home of a large Indian population. . . .

The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects.

The present occupants are surely bound by this action of Mr. Huson.<sup>129</sup>

Indian Superintendent Powell, in turn, expressed concern with the regranting of the lease to Mr. Spencer in view of the fact that a large Indian village existed on the land.<sup>130</sup>

Considering the lingering discontent with the situation on Cormorant Island, and given our legal and factual analysis as set out above, we find that Canada had a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court.

## ISSUE 2

Did Canada have a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court?

### Submissions of the Parties

The claimant submits that even if Canada did not have a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court, it had a fiduciary obligation to do so:

Even if the language [of the Order in Council] is not seen to be mandatory, this obligation existed, given the fiduciary relationship. In other words, it was either mandatory or, alternatively, it was discretionary and the Crown, owing a fiduciary duty to the Band, was obliged to exercise that discretion and refer the matter.<sup>131</sup>

In support of its position, the claimant states that there are numerous recent court decisions which set forth the proposition that "the Federal Crown, and perhaps also the Provincial Crown, owes a fiduciary duty to Indians."<sup>132</sup> Applying the characteristics of a fiduciary relationship enunciated by Madam Justice Wilson in *Frame v. Smith*, and by Mr. Justice La Forest in *Hodgkin-*

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129 George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

130 I.W. Powell, Indian Superintendent, to Peter O'Reilly, February 26, 1884 (ICC Documents, p. 223).

131 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 22.

132 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 15.

*son v. Simms*, the claimant argues that Canada had sole discretion to protect the claimant's interests: "the only way the Band could have had Mr. Sproat's allotment of most of Cormorant Island to it upheld was by the Federal Crown exercising its discretion and having the matter referred to a Judge of the Supreme Court, as had been contemplated, or alternatively to the Secretary of State for the Colonies pursuant to Article 13 of the Terms of Union between Canada and British Columbia."<sup>133</sup> Since Canada was not required to obtain the province's agreement to such a referral, the claimant maintains that Canada had the power and ability to exercise its discretion unilaterally. Finally, the claimant submits that it was vulnerable to the exercise of Canada's discretion, since a referral to a Judge of the Supreme Court was the only dispute-resolution mechanism available when the Commissioner of Lands and Works disallowed the allotment, other than a referral to the Secretary of State for the Colonies, which would have been more cumbersome.<sup>134</sup>

Canada denies that it had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court. It submits that there was no statute, agreement, or unilateral undertaking that it would act for, on behalf of, or in the best interests of the claimant in the circumstances of this claim. More specifically, Canada argues that:

- The relevant Orders in Council, which set out the process to allot reserves for Indian bands in British Columbia, were not statutes, but an exercise of the Royal Prerogative.
- The Orders in Council were not an agreement between the claimant and Canada or, even more generally, between Indian bands in British Columbia and Canada since there is no evidence that the claimant or the Indian bands were consulted in the formation of the Orders in Council or even knew of the existence of the terms of the Orders in Council at the time of the reserve allotments.
- There was no mutual understanding between the claimant and Canada that Canada had relinquished its own self-interest and had agreed to act solely on behalf of the claimant; in other words, there was no unilateral undertaking. In particular:

<sup>133</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 17.

<sup>134</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 17.



- as mentioned above, there is no evidence that Indian bands were consulted in the formation of the Orders in Council or even knew of the existence of the terms of the Orders in Council;
- the allotting of reserves for Indian bands in British Columbia was a joint political process between the federal and the provincial governments;
- the Orders in Council required Mr. Sproat to take into account the claims of white settlers as well as the habits, wants, and pursuits of the Indians; and
- the Orders in Council did not require Canada to challenge rejections by the Chief Commissioner of Lands and Works or to refer “differences” to a Judge of the Supreme Court.

Moreover, Canada maintains that it did not have the power or the discretion unilaterally to affect the claimant’s legal or practical interests. Rather the creation of reserves in British Columbia was a political process that required a joint decision by both the federal and the provincial governments.

In any event, Canada submits that reserve creation in British Columbia is in the nature of a public law duty, not a private law duty, and therefore does not give rise to legally enforceable fiduciary duties.<sup>135</sup>

### **Public versus Private Law Duty**

At the outset, we do not accept Canada’s argument that reserve creation in British Columbia is in the nature of a public law duty and therefore does not give rise to legally enforceable fiduciary duties. The issue of public versus private law duties was discussed by Mr. Justice Dickson (as he then was) in *Guerin v. R.*<sup>136</sup> He held as follows:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the “political trust” cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians’ behalf does not of itself remove the Crown’s obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians’ interest in land is an independent legal interest.

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<sup>135</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 3-5, 30-39.

<sup>136</sup> *Guerin v. R.* (1984), 13 DLR (4th) 321 (SCC).

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It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is none the less in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.<sup>137</sup>

Earlier in his decision, Mr. Justice Dickson discussed in more depth the "political trust" cases mentioned above:

The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *A.-G. Que. v. A.-G. Can.* (1920), 56 D.L.R. 373 at pp. 378-9, [1921] 1 A.C. 401 at pp. 410-11 (the *Star Chrome* case).<sup>138</sup>

Canada argues that these passages in *Guerin* do not help the claimant in this case. Mr. Becker explained as follows in his oral submissions:

Now, in [*Guerin*] they were dealing with surrendered reserve lands, and while [Justice Dickson] does not distinguish between surrendered reserve lands and aboriginal titled lands, we have to here. We're [sic] don't have before us any information in terms of whether the band has an aboriginal title to these lands, and in fact we're not really entitled to deal with it in this process in any event.

Now –

THE CHAIRPERSON [COMMISSIONER PRENTICE]: So you're saying that the duty to set up reserves is a public law duty? Once the reserves are set up, the band has an interest and it becomes a private law duty at that point?

MR. BECKER: Yes, it becomes, as Justice Dickson says, it becomes in the nature of a private law duty, yes.

Now, again, I would like to emphasize, and I'm sure the point's been made by now, but these lands were merely proposed to be reserve. I mean, Sproat went out and allotted them, but that allotment was subject to confirmation by the B.C. govern-

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<sup>137</sup> *Guerin v. R.* (1984), 13 DLR (4th) 321 at 341 (SCC).

<sup>138</sup> *Guerin v. R.* (1984), 13 DLR (4th) 321 at 336-37 (SCC).

ment. That confirmation did not ever arrive. It was disallowed by the B.C. government. Therefore these lands never became reserve. They never achieved the status that would have afforded them the same sort of analysis that Dickson gives these surrendered reserve lands in *Guerin* where it's analogous or in the nature of a private law duty.

So in light of that state of affairs, it's difficult to conceive, and we submit that there is no basis to hold, that there is a duty to refer disagreements between Sproat and the provincial government to a judge.

Since the underlying act of setting aside reserve lands is in the nature of a public law duty and there is no right of the band to compel Canada to set aside the lands in the first place, there's similarly no right which would compel Canada to seek the intervention of this judge, the possibility for which was provided for in these orders-in-council.<sup>139</sup>

And later in his oral submissions:

THE CHAIRPERSON: Why do you say that — I'll go back to this question of private duties, public law duties. Why do you say there was no duty on the part of Canada to submit the matter to arbitration as per the reciprocal orders-in-council?

MR. BECKER: Well, it's fundamentally premised on the fact that there's no pre-existing right of the band to which Canada would be compelled to act for their benefit. I mean, if this was reserve land already and the band had an established interest in the land as a reserve and there was some kind of analogous process that Canada was required to take, it would very likely be a different story. But these are lands, again, putting aside the aboriginal title issue, these are lands that were provided — were going to be provided by Canada if all things had gone well, and were allotted by Sproat, but to which the band, other than through some aboriginal rights type claim had no legal claim.<sup>140</sup>

The difficulty we have with Canada's argument is that it is based on the premise that a band has an "interest" only after a reserve has been created. This is inconsistent with Mr. Justice Dickson's statement in *Guerin* that the Indians' interest in their lands "is a pre-existing legal right" and that this interest is the same whether one is concerned with the interest of a band in a reserve or with unrecognized aboriginal title in traditional tribal lands. In other words, as we understand Mr. Justice Dickson's reasons, there is an independent legal interest in the land even before the reserve is created. Any obligation with respect to this interest is in the nature of a private law duty. We find, therefore, that it is possible for an enforceable fiduciary obligation

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<sup>139</sup> ICC Transcript, September 21, 1995, pp. 125-27.

<sup>140</sup> ICC Transcript, September 21, 1995, p. 135.

to arise in the reserve creation process. The remaining question is whether Canada, in fact, had a fiduciary obligation in this case.

### **Determining the Existence of a Fiduciary Obligation**

In coming to the conclusion that it did not have a fiduciary obligation in the circumstances of this case, Canada uses the following test:

In order to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:

- (a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;
- (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
- (c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.<sup>141</sup>

Canada cites the cases of *Guerin v. R.* and *Frame v. Smith* (approved by *Hodgkinson v. Simms*) in support of its test.<sup>142</sup>

With respect to the term "undertaking," Canada elaborates as follows:

In *Hodgkinson v. Simms*, La Forest, J. gives some indication of when an undertaking may give rise to a fiduciary obligation. He states at 629 and 632:

In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. . . .

In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal or practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "There is no substitute in this branch of the law for a 'meticulous examination of the facts'"; see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831.<sup>143</sup>

141 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 31.

142 *Guerin v. R.* (1984), 13 DLR (4th) 321 at 341 (SCC); *Frame v. Smith* (1987), 42 DLR (4th) 81 at 99 (SCC) (approved *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), per La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666).

143 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 32. Underlining added by Canada.

Canada concludes that “the existence of an undertaking by the Crown giving rise to fiduciary duties is determined on the basis of the *mutual understanding* of both the Crown and the Indians that Canada has *relinquished its own self-interest* and agreed to act *solely* on behalf of the Indians.”<sup>144</sup>

In our view, Canada’s test confuses the case law. The basic structure for Canada’s test comes from the decision of Madam Justice Wilson in *Frame v. Smith*.<sup>145</sup> She proposed the following three-part analysis for the identification of relationships that presumptively give rise to fiduciary obligations:

... 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.<sup>146</sup>

Unlike the first element in Canada’s test, Madam Justice Wilson did not specify that a “statute,” “agreement,” or “unilateral undertaking” must be present in order for the relationship to be one in which a fiduciary obligation will be imposed.

We assume that Canada derived the first element of its test from the *Guerin* case, where Mr. Justice Dickson held as follows:

Professor Ernest Weinrib maintains in his article “The Fiduciary Obligation,” 25 U.T.L.J. 1 (1975), at p. 7, that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal’s interests can be affected by, and are therefore dependent on, the manner in which

<sup>144</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, p. 32. Emphasis added by Canada.

<sup>145</sup> *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

<sup>146</sup> *Frame v. Smith* (1987), 42 DLR (4th) 81 at 98-99 (SCC). Although Wilson J. wrote in dissent, her list of characteristics was adopted by a majority of the Supreme Court of Canada in subsequent cases. See, for example, *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC), per La Forest J. at 29, and per Sopinka J. at 62-63; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), per La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666.

the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. 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.<sup>147</sup>

In essence, Canada substitutes part of the *Guerin* analysis for the first characteristic in Madam Justice Wilson's "rough and ready guide," and then implies that this one amalgamated test must be satisfied for a fiduciary obligation to arise. We have difficulty with this approach for a number of reasons. First, the fact that Mr. Justice Dickson was careful to state in *Guerin* that he was making "no comment upon whether this description is broad enough to embrace all fiduciary obligations" indicates that he did not intend his remarks to form an exhaustive test. Second, Madam Justice Wilson did not include the criteria of "statute," "agreement," or "unilateral undertaking" in the first element of her "rough and ready guide" even though Mr. Justice Dickson's decision in *Guerin* was available to her when she wrote her decision in *Frame v. Smith*. We also note that in a more recent case, *M. (K.) v. M. (H.)*, Mr. Justice La Forest, after referring to Mr. Justice Dickson's reasons in *Guerin*, 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."<sup>148</sup> Therefore, in our opinion, the proper approach in the circumstances of this claim, is that set out in *Frame v. Smith*. In other words, the first element should be the "scope for the exercise of some discretion or power," and not the existence of "a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person."

We also have difficulty with Canada's use of Mr. Justice La Forest's comments in *Hodgkinson v. Simms*, in support of its statement that "the existence of an undertaking by the Crown giving rise to fiduciary duties is determined on the basis of the mutual understanding of both the Crown and the Indians that Canada has relinquished its own self-interest and agreed to act solely on behalf of the Indians." Mr. Justice La Forest's comments, in

<sup>147</sup> *Guerin v. R.* (1984), 13 DLR (4th) 321 at 340-41 (SCC).

<sup>148</sup> *M. (K.) v. M. (H.)* (1992), 14 CCLT (2d) 1 at 41 (SCC).

context, were part of a discussion concerning two different uses of the term “fiduciary.” He summarized the first use of the term, as follows:

The first [use of the term fiduciary] is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.’s three-step analysis [in *Frame v. Smith*] is a useful guide.<sup>149</sup>

Mr. Justice La Forest then moved into a description of the second use of the term “fiduciary”:

As I noted in [*International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term “fiduciary,” viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see *supra*, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.<sup>150</sup>

Contrary to Canada’s suggestion, we do not see Mr. Justice La Forest’s statement regarding a “mutual understanding that one party has relinquished its own self-interest . . .” as defining the circumstances in which an “undertaking” will give rise to a fiduciary obligation in the context of a *Guerin*-type or *Frame v. Smith*-type analysis. Rather, this statement is an elaboration of the second use of the term “fiduciary.” As we understand Mr. Justice La Forest’s reasons, fiduciary obligations may arise where *either* the first use *or* the second use of the term is involved. Therefore, if the relationship falls within the *Frame v. Smith* analysis (in other words, it falls within the first

<sup>149</sup> *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

<sup>150</sup> *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

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use of the term), it is unnecessary to establish that there is a “mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.”

### **Application of the *Frame v. Smith* Guide**

We turn, then, to an application of the *Frame v. Smith* “rough and ready guide.” In our view, it is readily apparent that the three characteristics identified by Madam Justice Wilson are satisfied in the circumstances of this claim. Assuming for the moment that the relevant Orders in Council did not create a mandatory obligation to refer “differences” between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court, they at least created a discretion or a power to do so. The exercise of this discretion had the capacity to affect the extent and locality of the lands to be held in trust for the use and benefit of the claimant and, thus, the claimant’s legal and practical interests.

We disagree with Canada that its discretion could not be exercised unilaterally so as to affect the claimant’s interests. As we see it, the issue in this case is not whether Canada had unilateral discretion to set apart reserves in British Columbia, but whether Canada had unilateral discretion to refer disputes to a Judge of the Supreme Court. Although a joint decision by both the federal and the provincial governments may have been required to create a reserve, a joint decision was not required to refer a matter to a Judge. Canada could unilaterally exercise its discretion in this regard; a referral did not depend on either the province’s or the claimant’s approval.

Furthermore, Canada seems to have overlooked the fact that the process in question, a referral to a Judge of the Supreme Court, was approved by both levels of government. As such, there is a strong argument that whatever the decision of the Judge, both parties would have respected and considered themselves bound by it. Therefore, if the Judge had decided in favour of Commissioner Sproat’s allotment, the reserve on Cormorant Island would have encompassed most of the island, since the province would have been obliged to implement the Judge’s decision.

Finally, there can be no doubt that the requisite vulnerability is present. The claimant, itself, did not have the power to refer a difference between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. Under the process established by the Orders in Council, Canada’s intervention was required. We might also point out that it was virtually impossible for the claimant to pre-empt land under the provisions of the



provincial *Land Act* in force at the time.<sup>151</sup> As a result, the claimant was powerless to set apart lands for its use and benefit without Canada's assistance.

In sum, taking into account the factual circumstances of this case and the indicia of a fiduciary relationship set out in *Frame v. Smith*, we find that Canada had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the Supreme Court.

### ISSUE 3

In the alternative, did Canada have an obligation pursuant to Article 13 of the *Terms of Union, 1871*, to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to the Secretary of State for the Colonies?

At the oral hearing, Canada objected to the inclusion of the claimant's alternative argument that Canada ought to have referred the rejection of Commissioner Sproat's allotment to the Secretary of State for the Colonies pursuant to the *Terms of Union, 1871*. Mr. Becker advised that this argument was not one of the claimant's original arguments and that he had become aware that it was being pursued only when he received the claimant's written submissions.

Mr. Ashcroft clarified that the claimant's argument in relation to the *Terms of Union, 1871*, was an alternative or buttressing position and that, from the claimant's perspective, it was unnecessary to go beyond the fact that there was an outstanding lawful obligation to refer the matter to a Judge of the Supreme Court.

It was agreed at the hearing that if the Commission felt it necessary to hear further on this issue, counsel for both parties would be given an opportunity to provide additional submissions.<sup>152</sup> However, given our findings in Issues 1 and 2 that Canada had an obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court, we do not consider it necessary to address whether an obligation also arose from Article 13 of the *Terms of Union, 1871*.

<sup>151</sup> Sections 3 and 24 of the *Land Act, 1875*, SBC 1875, No. 5, provided that the right to record unsurveyed land or to pre-empt surveyed land did not extend "to any of the Aborigines of this Continent, except to such as shall have obtained permission in writing . . . by a special order of the Lieutenant-Governor in Council."

<sup>152</sup> ICC Transcript, September 21, 1995, pp. 60-65, 158.

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**ISSUE 4**

If the answer to Issue 2 or 3 is yes, did Canada fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion?

**Submissions of the Parties**

Although Canada maintains that it was not required to take any steps following the rejection of Commissioner Sproat's allotment, it submits that it nonetheless acted reasonably to investigate the "difference" between Commissioner Sproat and the Chief Commissioner of Lands and Works by obtaining an opinion from its confidential agent, Joseph Trutch. When attention was once again drawn to the situation on Cormorant Island two years later, Canada argues that it acted in a reasonable manner by agreeing that Commissioner O'Reilly should proceed to the Island to allot reserve lands for the claimant.<sup>153</sup>

The claimant submits that the referral of the matter to Mr. Trutch did not fulfil Canada's duty to the claimant. Sending the matter to Mr. Trutch did not accord with the dispute-resolution mechanism already in place and, since Mr. Trutch was the Chief Commissioner of Lands and Works for the province at the time the lease was signed, he was not an appropriate person to make recommendations in this case.<sup>154</sup>

**Reasonableness of Canada's Actions**

The Order in Council appointing Commissioner Sproat delineates a specific dispute-resolution process – a referral to a Judge of the Supreme Court. Of significance here is the fact that the Order in Council does not provide a discretion as to the referee; it clearly states that the matter is to be referred to a Judge of the Supreme Court and not some other person chosen unilaterally by Canada. As discussed above in Issue 1, this was the procedure to which both Canada and British Columbia agreed.

It is interesting to note that an earlier version of the Provincial Secretary's letter of January 27, 1877, left some latitude for the selection of a referee other than a Judge. In a letter dated January 20, 1877, the Provincial Secretary wrote:

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<sup>153</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 5, 39-41.

<sup>154</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 22-24.

In the event of any differences existing between the Chief Commissioner of Lands and Works and the Superintendent of Indian Affairs as to size or extent of Lands to be allotted to any Indian tribe the matter could be referred to one of the Judges of the Supreme Court *or other person agreed upon*, whose decision should be final.<sup>155</sup>

The Provincial Secretary's letter of January 27, 1877, omitted the words "or other person agreed upon."<sup>156</sup> It was this letter of January 27, 1877, that formed the foundation for the provincial Order in Council of January 30, 1877, and the federal Order in Council of February 23, 1877. Thus, we can surmise that the option of an alternative referee was considered and rejected.

In light of the above considerations, it seems to us that Canada was obliged to follow the procedure set out in the Order in Council appointing Commissioner Sproat. As the claimant points out, Mr. Trutch did not have power to do anything other than offer his views on the situation to Sir John A. Macdonald.<sup>157</sup>

The wisdom of referring the matter to Mr. Trutch is also worthy of examination. Canada maintains that it was reasonable for it to ask Mr. Trutch to review the rejection of Commissioner Sproat's allotment since Mr. Trutch was very knowledgeable in Indian matters and, therefore, was able to complete his review in an expedited manner, taking less than one week after he received the relevant documents.<sup>158</sup> We disagree with Canada's assessment. While Mr. Trutch, as confidential agent, may have been a logical choice for such a task in ordinary circumstances, in our view he was not a logical choice in these circumstances. At issue was the validity of the objections raised by the provincial government with respect to Commissioner Sproat's allotment on Cormorant Island. As discussed earlier in this report, the Chief Commissioner of Lands and Works opposed the allotment on two grounds: first, he had informed Mr. Sproat that the local government would not accept any Indian reservations made by Mr. Sproat on the northwest coast; and second, the whole island had been leased since August 3, 1870, to Mr. Huson and others. The lease to Mr. Huson was signed by Benjamin William Pearse, Assistant Surveyor General, "acting on behalf of the Government of British Columbia in the temporary absence of the Honorable Joseph William Trutch the Chief

155 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 20, 1877 (ICC Documents, pp. 52-55). Emphasis added.

156 A.C. Elliott, Provincial Secretary, to Minister of the Interior, January 27, 1877, NA, RG 10, vol. 3641, file 7567 (ICC file 2109-05-1).

157 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 23.

158 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 40.

Commissioner of Lands and Works and Surveyor General.”<sup>159</sup> Since Mr. Trutch was the Chief Commissioner of Lands and Works at the time the lease was signed, it was imprudent, in our opinion, for Canada to solicit his views on the second ground raised by the province. We recognize that Mr. Pearse, and not Mr. Trutch, signed the lease. However, it is likely that the two men had a working, if not a reporting, relationship. Therefore, the ability of Mr. Trutch to evaluate the status of the lease objectively was at least questionable. A person with a more neutral mind might have been more disposed to challenge the validity of the lease and to discover whether there were circumstances under which the lease could be terminated.

Mr. Trutch’s former position as Chief Commissioner of Lands and Works is particularly troublesome when one takes into account that his opinion hinged on the status of the lease as opposed to the other objection raised by the province. In other words, while we accept that Mr. Trutch was able to provide an impartial opinion on the province’s first ground for rejecting the allotment on Cormorant Island, this first ground did not carry the day; he found it to be “of questionable validity.” It was the province’s second ground – the existence of a lease over the whole island – that Mr. Trutch found to be “clearly valid and insurmountable.”

There is evidence, however, that the province’s second objection was not “insurmountable.” There were a number of ways in which the lease could have been terminated. For instance, the lease itself provided a mechanism for its termination by virtue of the following clause:

Provided always and it is hereby agreed and declared that if at any time during the continuance of the tenancy hereby created it shall be considered desirable by the Government for the time being to resume possession of that portion of the hereditaments and premises hereby demised already reserved and situate at the western end of the said Island and colored red on the said plan hereunto annexed or of any other portion of the said hereditaments and premises hereby demised or intended so to be The said Joseph William Trutch or other the Chief Commissioner of Lands and Works and Surveyor General for the time being shall give to the said Alden Wesley Huson – Elijah Tomkins Huson – Uriah Nelson and Edmund Abraham Wadhams their executors administrators or assigns two Calendar months notice of such intention in writing by either leaving such notice with them or by posting such notice on some conspicuous part of the premises at the expiration of which notice it shall be lawful for the said Joseph William Trutch as Chief Commissioner of Lands and Works or other the Chief Commissioner of Lands and Works for the time being to enter upon and possess

<sup>159</sup> Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

himself on behalf of the Crown of the land mentioned in such notice — Provided that in every such case there shall be a proportionate deduction of the rent hereby reserved proportioned to the amount of land so entered upon and repossessed by the Chief Commissioner for the time being on behalf of the Crown as aforesaid . . .<sup>160</sup>

It is clear that Canada was aware of this clause in the lease. Mr. Trutch discussed it in his memorandum of May 5, 1882, and it was drawn to the attention of the Superintendent General of Indian Affairs in February 1884 by both Commissioner O'Reilly and the Indian Superintendent, I.W. Powell.<sup>161</sup> It is true that Mr. Trutch gave very little weight to the clause. In his memorandum he stated:

Power is indeed reserved to the Government of British Columbia in the Indenture of Lease to resume possession of the whole or any portion of the premises thereby demised, upon giving two (2) months notice to the Lessees. But the exercise of this right is entirely in the discretion of that Government, and was certainly not intended to be, and doubtless will not be taken advantage of except on grounds of the requirements of the public interests, and upon payment of just compensation to the Lessee's; and it is evident from the letter of the Chief Commissioner of Lands and Works now under consideration that such requirements are not held by the Government of British Columbia to exist, in connection with Mr. Sproat's unauthorized appropriation of Cormorant Island as an Indian Reservation.<sup>162</sup>

However, the Province's position, and Mr. Trutch's acceptance of it, is problematic. The allotment of reserves did involve "the requirements of the public interests." Mr. Trutch implied as much when he wrote to Sir John A. Macdonald in May 1880 regarding possible replacements for Commissioner Sproat:

Either Mr. Ball or Mr. O'Reilly I consider particularly adapted from personal qualifications, and long experience in administrative capacities in connection with Indians and Indian Affairs in this Province to discharge with advantage to *the public interests* the important and somewhat difficult duties of Indian Reserve Commissioner.<sup>163</sup>

160 Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

161 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15); P. O'Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27); I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

162 Memorandum of J.W. Trutch, Confidential Agent, May 5, 1882 (ICC Documents, pp. 210-15).

163 Joseph W. Trutch to Sir John A. Macdonald, May 19, 1880 (ICC Exhibit 2, vol. 2, tab 50). Emphasis added.

The “public interest” nature of reserve creation was also recognized by the province in its Order in Council approving the establishment of the Joint Reserve Commission: “. . . regarding a final settlement of the land question as most urgent and most important to the peace and prosperity of the Province they [the Committee] are of opinion and advise that all the proposals . . . should be accepted.”<sup>164</sup>

As we see it, the lease was not, and should not have been seen to be, an “insurmountable” problem unless the province had some cogent reason for refusing to exercise its resumptive powers under the lease. It would have taken very little analysis on Canada’s part to realize that the reasons provided by Mr. Trutch were less than compelling.

Another clause in the lease prohibited assignments of the lease without the consent in writing of the Chief Commissioner of Lands and Works.<sup>165</sup> There is evidence that the lease was assigned at least twice. On February 6, 1882, U. Nelson and E.A. Wadhams notified the Chief Commissioner of Lands and Works that they had assigned and transferred their interests in the lease to A.W. Huson.<sup>166</sup> A.W. Huson, in turn, transferred the lease to T. Earle and S. Spencer in January 1884.<sup>167</sup>

Canada submits that there is no evidence that the assignments of the lease would have been known to the Department of Indian Affairs or that the consent of the Chief Commissioner of Lands and Works was not obtained.<sup>168</sup> We disagree. On February 27, 1884, Indian Superintendent Powell wrote to the Superintendent General of Indian Affairs as follows:

Upon inquiry at the land office it would appear that Mr. Huson has transferred his right to the lease to Mr. Spencer but so far as the Surveyor General is aware no official sanction has as yet been given by Mr. Smithe [the Chief Commissioner of Lands and Works] to the conveyance.<sup>169</sup>

Thus, at least with respect to the second assignment, there is clear evidence that the Department of Indian Affairs knew that the assignment had taken

<sup>164</sup> Provincial Order in Council 1138, January 6, 1876 (ICC Documents, pp. 50-51).

<sup>165</sup> Lease between B.W. Pearse, Assistant Surveyor General, and A.W. Huson et al., August 3, 1870 (ICC Documents, pp. 20-27).

<sup>166</sup> Uriah Nelson and E.A. Wadhams to the Chief Commissioner of Lands and Works, February 6, 1882 (ICC Documents, p. 202).

<sup>167</sup> Date is taken from A.J. Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

<sup>168</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, p. 56.

<sup>169</sup> I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224).

place and that written consent had not been obtained from the Chief Commissioner of Lands and Works as of February 27, 1884.

But, argues Canada, even if the consent of the Chief Commissioner was not obtained for the assignment of the lease, the province was "estopped" (in other words, precluded) from claiming that the lease was invalid since it continued to treat the lease as valid after it was aware of the assignment to Mr. Spencer: "It would be inequitable for the Province to claim that the lease was invalid on grounds which it was aware of and which it consented to by reason of continuing to treat the lease as valid. The assignees of the lease relied on the Province continuing to treat the lease as valid."<sup>170</sup> Further, argues Canada, even if the province was not estopped from claiming that the lease was invalid, the lessee's failure to obtain the Chief Commissioner's consent rendered the lease at most voidable and not void. In other words, the province had the discretion to elect how to treat the lessee's assignment of the lease. Although the province could have treated the assignment of the lease as void, instead it chose to continue to treat the lease as valid.

We find Canada's argument unconvincing. Canada learned of the assignment to Mr. Spencer within weeks of its occurring. If Canada had taken immediate action (such as referring the matter to a Judge of the Supreme Court), we doubt whether Mr. Spencer would have yet "relied" to such an extent that it would have been inequitable for the province to claim that the lease was invalid.

In addition, in our view the question is not so much whether the province *did* continue to treat the lease as valid, but rather whether it *had to* continue treating the lease as valid. The point here is that the province used the lease as its excuse for disallowing Mr. Sproat's allotment. This was not a legitimate excuse if it was within the province's means to terminate the lease. In other words, unless the province was obligated to continue treating the lease as valid, it was unreasonable for it to rely on the existence of the lease to disallow the allotment on Cormorant Island.

The claimant attacked the validity of the lease on a number of other grounds. In particular, the claimant argued that:

- The lands purportedly leased by Messrs. Huson, Wilson, and Wadhams were presumably for pastoral purposes pursuant to the *Land Ordinance* of B.C., yet they were not used for those purposes. Mr. A.W. Huson apparently ultimately built a cannery. The *Land Ordinance* also permitted the lands to

<sup>170</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, p. 56.

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become “reserve” with merely a proportionate decrease in rent. In addition, the lands that were purportedly leased were clearly an Indian settlement and thus exempted from pre-emption or lease.

- The lease became void as a result of the lessee’s failure to pay rent.
- The lease was vague and inconsistent as to the area of the land which was encompassed by it (the whole of Cormorant Island or only 600 acres).<sup>171</sup>

We do not find it necessary to review these arguments here. After analysis and reflection, we have come to the view that the two terms of the lease and the circumstances discussed above gave Canada ample warning that Mr. Trutch’s opinion was open to challenge. In addition, Canada was not limited to Mr. Trutch’s opinion. As mentioned in Issue 1, Canada’s own public servants, Indian Agent Blenkinsop and Indian Superintendent Powell, suggested that there were difficulties with the province’s position in regard to the Cormorant Island allotment. Even Commissioner O’Reilly informed the Superintendent General of Indian Affairs that a portion of the land at issue was “the site of a large Indian village, and as such should never have been included in the lease granted to Mr. Huson.”<sup>172</sup> We find, therefore, that Canada, armed with all this information, did not fulfil its fiduciary obligation simply by obtaining the opinion of Mr. Trutch. Canada ought to have referred the matter to a Judge of the Supreme Court as it was entitled to and obligated to pursuant to the Order in Council appointing Commissioner Sproat. By failing to do so, Canada breached its fiduciary obligation to the claimant.

## ISSUE 5

If the rejection of Commissioner Sproat’s allotment of Cormorant Island had been referred to a Judge of the British Columbia Supreme Court, would Commissioner Sproat’s allotment have been upheld?

### **Submissions of the Parties**

Canada asserts that even if the steps it took to deal with the “difference” between Commissioner Sproat and the Chief Commissioner of Lands and Works were not reasonable, there is no evidence that the decision of a Judge of the Supreme Court would have differed from the lands eventually allotted

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<sup>171</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, p. 24.

<sup>172</sup> P. O’Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).



to the claimant by Commissioner O'Reilly. On this point, Canada notes that before becoming Indian Reserve Commissioner, Mr. O'Reilly had been a stipendiary magistrate and later a county court judge.<sup>173</sup>

The claimant submits that the overwhelming weight of the evidence would have militated against the position of the Chief Commissioner of Lands and Works and in favour of Commissioner Sproat's allotment. Therefore, if Canada had referred the matter to a Judge of the Supreme Court, the claimant would have received approximately 1250 acres of Cormorant Island as a reserve or, at the very least, much larger portions than the 52 acres it was allotted by Commissioner O'Reilly.<sup>174</sup>

### **Outcome of a Referral to a Judge**

We are unpersuaded by Canada's suggestion that a Judge would have come to the same conclusion as Commissioner O'Reilly. Even though Commissioner O'Reilly had been a county court judge, he was not acting in that capacity when he made his allotments on Cormorant Island. We assume that the purpose of choosing a Judge of the Supreme Court as referee was to obtain the decision of an impartial third party free from political influence. In his role as Indian Reserve Commissioner, Commissioner O'Reilly was not free from political influence.

The truth of the matter is that we cannot know with certainty what a Judge would have done if Canada had followed the dispute resolution process set out in the various Orders in Council anymore than we can know with certainty what a Judge will do in modern-day litigation. Until a case is heard and judgment rendered, the result is in question. We make no attempt to determine what the outcome of a referral to a Judge would have been. In the circumstances of this claim Canada's duty was to refer the matter to a Judge, not to second guess the outcome of such a referral.

However, we do wish to comment briefly on some of the submissions made by the parties. In addition to the arguments mentioned above regarding the validity of the lease and the grounds for its termination, the claimant alleges that the following facts would have been before the Judge:

- The province had agreed that it would interfere with Mr. Sproat's allotment only "in extreme cases." No evidence had been put forth by the province that this was an "extreme case."

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173 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 41.

174 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 23-24.

- Both levels of government had agreed to Mr. Sproat acting as sole Reserve Commissioner. While the Chief Commissioner of Lands and Works protested Mr. Sproat visiting and allotting reserves on the northwest coast of British Columbia, this was, as even Mr. Trutch noted, “of questionable validity” and an “expression of opinion.”
- The federal and provincial governments had agreed to share the costs of the “Referee”; as such, only half of the economic burden would fall on the federal government.
- Cormorant Island had been a traditional village of the Band and had been reduced in size only because of the decimation caused by the smallpox epidemic of 1837-38.
- The population of the Band was expanding and they needed additional land as a result. This need was exacerbated by its dependence on the fishery. The land ultimately allotted to the Band was insufficient for its purposes.
- Mr. Sproat had taken into account the fact of the lease and had negotiated with Mr. Huson and Reverend Hall. Both Mr. Huson and Reverend Hall had agreed to Mr. Sproat’s allotment premised upon their obtaining the Crown grants of the 160 acres that they each sought. In fact, Mr. Sproat’s allotment was based upon what Mr. Huson suggested.<sup>175</sup>

Although we do not propose to analyze the validity of each and every point in detail, we find the following arguments persuasive and supported by the evidence:

First, as explained above, it was within the province’s power to terminate the lease. Second, there was evidence from various sources that a large Indian village existed on the leased land and that Alert Bay was the traditional home of a large Indian population.<sup>176</sup> Canada admits that it is likely that a winter village existed on the island at the time the lease was signed. It argues, however, that the claimant has not shown that its winter village extended

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<sup>175</sup> Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 17-18, 23-24.

<sup>176</sup> See, for example, Commander H.N. Mist to Captain Algermon Lyons, April 1, 1870 (ICC Documents, pp. 5-15); I.W. Powell, Indian Superintendent, to the Superintendent General of Indian Affairs, January 31, 1882 (ICC Documents, pp. 199-201); George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22); I.W. Powell, Indian Superintendent, to P. O’Reilly, February 26, 1884 (ICC Documents, p. 223); I.W. Powell, Indian Superintendent, to Superintendent General of Indian Affairs, February 27, 1884 (ICC Documents, p. 224); P. O’Reilly to Superintendent General of Indian Affairs, February 28, 1884 (ICC Documents, pp. 225-27).

beyond the areas which were allotted by Commissioner O'Reilly and which today form the reserves on the island.<sup>177</sup> We do, however, have the evidence of the elders in this inquiry that the whole of Cormorant Island was used, not only for food- and wood-gathering but also for burials. Presumably similar evidence would have been available to Canada in the 1880s on proper investigations.

Third, there was evidence from both Indian Agent Blenkinsop and Reverend Hall that the lessee, Mr. Huson, had consented to the allotment proposed by Commissioner Sproat. Indian Agent Blenkinsop stated as follows: "The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish these objects."<sup>178</sup> This interpretation of events was supported by Reverend Hall:

In 1880 the Church Miss<sup>n</sup> Society proposed establishing a Mission for the Indians on Cormorant Island with the consent and invitation of AW Huson then the lessee of the island. At this time Mr G Sproat was laying off Indian reserves in our neighbourhood and I informed him of my desire to commence a mission on the island. Mr Huson proposed to Mr Gilbert Sproat that the Government should cancel his lease, give him a free grant of 160 acres and make the balance an Indian Reserve. In Mr Gill Sproat's map of the island two sections of 160 acres each were marked off as land to be applied for by AW Huson & AJ Hall.<sup>179</sup>

Therefore, far from interfering with the claims of the white settlers on Cormorant Island, Commissioner Sproat's allotment specifically took their interests into account. Canada argues, however, that Commissioner Sproat did not have the authority to bind the province to give a Crown grant to Mr. Huson.<sup>180</sup> We acknowledge that Commissioner Sproat could not compel the province to give Mr. Huson a Crown grant. However, by entering into the reserve commission process, the province had expressed its willingness to resolve the Indian land question. Commissioner Sproat devised a solution which could have been implemented by the province and which would have satisfied the white settlers on Cormorant Island. The province did not offer any valid reason for its refusal to issue the Crown grant.

177 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 58-59.

178 George Blenkinsop, Indian Agent, to I.W. Powell, Indian Superintendent, February 14, 1884 (ICC Documents, pp. 220-22).

179 Alfred James Hall to William Smithe, Chief Commissioner of Lands and Works, March 27, 1884 (ICC Documents, pp. 228-31).

180 Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 45-46.

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Although, strictly speaking, it was unnecessary for the establishment of a valid specific claim, we find that the claimant has provided sufficient evidence to show that Canada could have presented a strong case to a Judge of the Supreme Court. As such, if Canada had fulfilled its obligation to the claimant, there is every reason to believe that Canada might have succeeded in having Commissioner Sproat's allotment upheld, or at least in obtaining a larger portion of land than 48.12 acres.

### ISSUE 6

Was Canada negligent in not referring the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court or to the Secretary of State for the Colonies?

As an additional argument, the claimant submits that Canada was negligent. More specifically, the claimant argues that

- (a) Commissioner Sproat's allotment of most of Cormorant Island was an operational decision rather than a policy decision, and is therefore subject to a claim in tort;
- (b) Canada owed a duty of care to the claimant;
- (c) there are no considerations that might negate or limit the scope of the duty or the class of persons to whom it was owed; and
- (d) Canada's failure to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court or to the Secretary of State for the Colonies directly caused the claimant the loss of most of its settlement on Cormorant Island.<sup>181</sup>

Given our conclusions in Issues 1 and 2 above that Canada had either a mandatory or a fiduciary obligation to refer the matter to a Judge of the Supreme Court, we do not find it necessary to explore the claimant's added allegation of negligence.

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<sup>181</sup> Written Submissions on Behalf of the Nangis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 25-28.

## ISSUE 7

Does this claim fall within the scope of the Specific Claims Policy?

### Submissions of the Parties

Canada contends that this claim does not relate to obligations of the federal government undertaken under treaty, requirements spelled out in legislation, or responsibilities regarding the management of Indian assets and, therefore, does not fall within the subject matter of a specific claim as set out in the Specific Claims Policy.<sup>182</sup> In particular, Canada argues that this claim does not relate to any of the four circumstances enumerated on page 20 of *Outstanding Business*.<sup>183</sup> For convenience, we repeat the relevant passage here:

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.<sup>184</sup>

First, Canada submits that there is no treaty or agreement between Canada and the claimant First Nation. Second, the Orders in Council which set out the process to allot reserves for Indian bands in British Columbia and under which Commissioner Sproat operated are not a statute; rather, they are an exercise of the Royal Prerogative. Finally, the third and fourth circumstances do not apply: "As the Band's claim relates to lands which were not set apart as reserve for the Band, they are not an Indian asset under the policy nor are they Indian lands."<sup>185</sup>

Canada adds that, if the claimant is alleging that those portions of Cormorant Island allotted by Commissioner Sproat but not subsequently allotted by Commissioner O'Reilly are nonetheless Indian assets or Indian lands owing to the traditional use of the lands by the claimant, the appropriate manner to deal with the claim is through the British Columbia Treaty Commission pro-

<sup>182</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, p. 22. Canada's submission echoes the opening words of the Foreword on p. 3 of *Outstanding Business*.

<sup>183</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, pp. 22-23.

<sup>184</sup> *Outstanding Business*, 20.

<sup>185</sup> Submissions on Behalf of the Government of Canada, September 11, 1995, p. 23.

cess.<sup>186</sup> Ms. Schipizky, counsel for Canada, noted in her oral submissions that the Specific Claims Policy specifically excludes claims based on unextinguished aboriginal title.<sup>187</sup>

The claimant submits that its claim relates to all four of the circumstances enumerated on page 20 of *Outstanding Business*. First, Commissioner Sproat, in making his allotment, reached an agreement that was an accommodation among the claimant, Mr. Huson, and Reverend Hall. The claimant asserts that Mr. Sproat, as the authorized representative of Canada, entered into the agreement with the implicit if not the express consent of Canada. Canada was therefore bound to do everything in its power to ensure that the agreement was effected. Second, the claimant submits that the claim relates to the breach of an obligation arising out of "other statutes pertaining to Indians and the regulations thereunder":

The Federal Crown breached an obligation to protect the lands occupied by the Band from pre-emption or lease pursuant to the *Land Ordinance, 1865* and Section 91(24) of the *Constitution Act, 1867*. Although the Specific Claims policy only mentions the "*Indian Act* or other statutes pertaining to Indians and the regulations thereunder," it is submitted that this should be broad enough to cover Orders in Council relating to Indians. For example, the Order in Council whereby Mr. Sproat was appointed and the referral to a Judge of the Supreme Court was mentioned arose out of the effective appointment of Commissioner Sproat pursuant to the *Federal Enquiries Act* under which the prior Joint Reserve Commission had been appointed. Similarly, Article 13 of the Terms of Union, which is part of the Order of Her Majesty in Council admitting British Columbia into the Union, arose out of the provisions of the *British North America Act, 1867*, now the *Constitution Act, 1867*. Thus, when viewed as a whole, the Orders in Council putting into force the statutory provisions must be looked to and, it is submitted, clearly show an obligation to act in the best interests of the Band, which said obligation was breached in this instance.<sup>188</sup>

Third, the claimant argues that upon Commissioner Sproat's allotment, the lands to be reserved became an asset of the claimant, most of which was lost when the reserve area was reduced from approximately 1250 acres to approximately 52 acres. Fourth, the claimant maintains that there was an "illegal disposition of Indian land." The claimant points out that the "lawful obligation" section of the Specific Claims Policy refers to "Indian land," whereas the next portion of the Policy, "beyond lawful obligation," refers to

186 Submissions on Behalf of the Government of Canada, September 11, 1995, p. 23.

187 ICC Transcript, September 21, 1995, p. 118. Ms. Schipizky referred to pp. 7 and 30 of *Outstanding Business*.

188 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 34-35.

“reserve lands.” As such, the claimant submits, the lands in question did not formally have to be reserve lands in order for there to be an obligation. The claimant argues that the lands in this case were Indian lands, in that they were used and occupied by the claimant.<sup>189</sup>

### Scope of “Lawful Obligation”

As we have indicated in past reports,<sup>190</sup> it is our position that the four enumerated circumstances on page 20 of *Outstanding Business* are only examples of Canada’s lawful obligations and are not intended to be exhaustive. We feel fortified in this opinion by the principles of interpretation enunciated by the Supreme Court of Canada in *National Bank of Greece (Canada) v. Katsikonouris*.<sup>191</sup> Mr. Justice La Forest, speaking for a majority of the Court, stated as follows:

Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, it is logical to infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part.<sup>192</sup>

Here, of course, a general term (lawful obligation) precedes an enumeration of specific examples (the four enumerated circumstances). Therefore, following the reasoning of Mr. Justice La Forest, it is logical to infer that the purpose of providing the four specific examples was to remove any ambiguity as to whether those examples were included in the category of “lawful obligation.”

It is not surprising that fiduciary obligations were not specifically listed as lawful obligations in the Specific Claims Policy. The Policy was, after all, written two years before the Supreme Court of Canada’s decision in *Guerin* – the

189 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 7, 1995, pp. 34-35.

190 ICC, *Homalco Band Inquiry Report*, December 1995, 85; ICC, *Primrose Lake Air Weapons Range II*, September 1995, 15.

191 *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 DLR (4th) 197 (SCC).

192 *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 DLR (4th) 197 at 203 (SCC). See also, *Fegol v. N.M. Tilley Realty Ltd.* (1995), 99 Man. R. (2d) 41 (Man. QB).

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watershed case in terms of the Crown's fiduciary relationship to aboriginal peoples. What we do find surprising, however, is Canada's continued resistance to include such obligations within the ambit of the Policy in light of the Policy's underlying purpose. Our understanding is that the Policy was intended to provide for the settlement of legitimate, long-standing grievances, such as the matters at issue in this claim. Thus we find that this claim falls within the scope of the Specific Claims Policy.

### **Status of the Orders in Council**

In any event, in our view, this claim falls within the circumstances enumerated on p. 20 of *Outstanding Business*.

We accept that Canada may be correct in its assertion that the Orders in Council under which Commissioner Sproat operated arose from an exercise of the Royal Prerogative. We certainly have found no clear indication in the Orders in Council that the effective appointment of Commissioner Sproat was "pursuant to the *Federal Enquiries Act*" as contended by the claimant. Even so, we agree with the claimant that the second circumstance enumerated under the Policy – "[a] breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder" – should be broad enough to cover the Orders in Council at issue in this claim.

Orders in Council have, at times, been equated with statutes. In their text, *Administrative Law: A Treatise*, R. Dussault and L. Borgeat write as follows:

The purely conventional character of the Cabinet at the constitutional level does not mean that it can escape the obligation, in fulfilling the role of Governor General in Council or Lieutenant-Governor in Council, of resorting to the signature of the Queen's representative in order to validate certain acts of a legislative nature. These acts, once initialled, bear the name *Orders-in-Council*. They are generally published in the *Gazette* (in Quebec or at the federal level) and **are granted the same status as statute law before the courts**. Although the Order-in-Council is usually adopted pursuant to a statute which provides expressly for it, it may occur that the Cabinet, on its own authority, makes a decision by Order-in-Council without any resort to an enabling statute, pursuant to "the theory of its general powers" [Tr.]. . . .<sup>193</sup>

We note as well that in a previous inquiry before this Commission, Canada itself blurred the line between Orders in Council and "legislation." In our inquiry into the claim of the Homalco Indian Band, we examined the Order

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<sup>193</sup> R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1985), 1: 61. Bold emphasis added.



in Council appointing Commissioner O'Reilly which is of the same general type as the Orders in Council now under consideration in this inquiry.<sup>194</sup> In its written submissions for the Homalco Inquiry, Canada referred to Commissioner O'Reilly's Order in Council as "the legislation empowering O'Reilly."<sup>195</sup> Thus, at least for the purposes of the specific claims process, the difference between "legislation" (which normally includes statutes and regulations) and the Orders in Council empowering Sproat and O'Reilly is extremely slight.

We simply cannot countenance Canada's attempt to use the subtle distinction between a statute and a prerogative Order in Council to reject an otherwise valid claim. Therefore, in our opinion, the second circumstance enumerated under "Lawful Obligation" on page 20 of *Outstanding Business* must be interpreted to include obligations arising out of Orders in Council of the type at issue here. As found in Issue 1, Canada had a mandatory obligation pursuant to the Order in Council appointing Commissioner Sproat to refer the rejection of Sproat's allotment to a Judge of the Supreme Court. Accordingly, Canada's failure to follow this procedure was a "breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians." At the very least, it was the omission of a requirement "spelled out in legislation," to use the words of the former Minister of Indian Affairs and Northern Development in the "Forward" of *Outstanding Business*.<sup>196</sup>

### **Interpretation of the Policy**

In his oral submissions, Mr. Ashcroft spoke of the frustrations engendered by a technical, narrow reading of the Specific Claims Policy:

Now, I should say at this stage that I find it disturbing that the federal government would seem to be trying to hide behind what it says are specific policies or specific criteria in the specific claims policy. It seems to me that a lawful obligation means just that.

If, in a court or something similar, it could be found that the Crown breached a lawful obligation, breached a fiduciary duty, was negligent, or whatever, towards an Indian band, then they should be liable. They shouldn't say, oh, well, we're only going to be held liable for this specific type of specific policy. I mean, if they want to be that restrictive, it's a complete farce.<sup>197</sup>

194 Commissioner O'Reilly's Order in Council is included in the documents for this inquiry: Federal Order in Council, No. 1334, July 19, 1880 (ICC Documents, pp. 179-85).

195 See ICC, *Homalco Indian Band Report*, December 1995, 62, footnote 137.

196 *Outstanding Business*, 3.

197 ICC Transcript, September 21, 1995, p. 54.

We are in essential agreement with Mr. Ashcroft's position. In our view, any technical, narrow interpretation of the Policy which would hinder the resolution of long-standing disputes should be avoided if other interpretations giving effect to the Policy's underlying purpose are equally plausible. Therefore, in our opinion, Canada's obligations under the Order in Council appointing Commissioner Sproat, and Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

## PART VI

### FINDINGS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada properly rejected the Cormorant Island claim submitted by the 'Namgis First Nation. In assessing the validity of this claim for negotiation under Canada's Specific Claims Policy, we have considered a number of specific legal and factual issues. Our findings can be summarized as follows:

- Although the Order in Council appointing Commissioner Sproat (dominion Order in Council 170) states that any difference between the Commissioner of Lands and Works and Mr. Sproat is "to be referred" to one of the Judges of the Supreme Court, it also makes direct reference to the Order in Council of February 23, 1877, which states that the matter "might be referred" to one of the Judges of the Supreme Court. Therefore, it is likely that the words "might be referred" were incorporated into Order in Council 170. However, given the underlying objective of the reserve commission process – the speedy and final adjustment of the Indian reserve question in British Columbia – the word "might" in the Order in Council of February 23, 1877, should be construed as mandatory. As there was clearly a "difference" between Mr. Sproat and the Chief Commissioner of Lands and Works, and also between Canada and the Chief Commissioner of Lands and Works, with respect to the allotment on Cormorant Island, Canada therefore had a mandatory obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court.
- Canada also had a fiduciary obligation to refer the rejection of Commissioner Sproat's allotment to a Judge of the Supreme Court. Canada had unilateral discretion to refer "differences" between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court. The exercise of this discretion had the capacity to affect the extent and locality of the lands to be held in trust for the use and benefit of the

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claimant and, thus, the claimant's legal and practical interests. Since the claimant could not, itself, refer disputes to a Judge of the Supreme Court or otherwise set apart lands for its use and benefit, it was vulnerable to the exercise of Canada's discretion.

- Canada did not fulfil its obligation by asking Mr. Trutch to review the matter and provide his opinion. The dispute-resolution process to which both Canada and British Columbia agreed was to refer "differences" between Mr. Sproat and the Chief Commissioner of Lands and Works to a Judge of the Supreme Court, and not to some other person chosen unilaterally by Canada. In any event, it was imprudent for Canada to ask Mr. Trutch to review the province's objection that a lease existed over the whole of Cormorant Island because Mr. Trutch had been the Chief Commissioner of Lands and Works at the time the lease was signed. Moreover, Canada had other evidence and opinions that there were difficulties with the province's rejection of Mr. Sproat's allotment and that, contrary to Mr. Trutch's opinion, the lease was not an insurmountable problem. Therefore, Canada ought to have referred the matter to a Judge of the Supreme Court. By failing to do so, Canada breached its fiduciary obligation to the claimant.
- The claimant has provided sufficient evidence to show that Canada could have presented a strong case to a Judge of the Supreme Court. As such, if Canada had fulfilled its obligation to the claimant, there is every reason to believe that Canada might have succeeded in having Commissioner Sproat's allotment upheld, or at least in obtaining a larger portion of land than 48.12 acres.
- The four enumerated circumstances under "Lawful Obligation" on p. 20 of *Outstanding Business* are examples only and are not intended to be exhaustive. Other circumstances such as the breach of Canada's fiduciary obligation should be included in the general category of "lawful obligation." In addition, the second circumstance enumerated under "Lawful Obligation" on p. 20 of *Outstanding Business* - "[a] breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder" - should be interpreted to include obligations arising out of Orders in Council of the type at issue in this claim. Since Canada had a mandatory obligation pursuant to the Order in Council appointing Commissioner Sproat to refer the rejection of Sproat's allotment to a Judge of the Supreme Court, Canada's failure to follow that procedure was a breach of an obligation arising out of a statute pertaining to Indians.


We therefore make the following recommendation to the parties:

—————  
**That the claim of the 'Namgis First Nation with respect to Cormorant Island be accepted for negotiation under the Specific Claims Policy.**  
—————

FOR THE INDIAN CLAIMS COMMISSION



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



Daniel J. Bellegarde  
Commission Co-Chair



Aurélien Gill  
Commissioner

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# APPENDIX A

## THE 'NAMGIS FIRST NATION CORMORANT ISLAND INQUIRY

- |   |                                    |                       |
|---|------------------------------------|-----------------------|
| 1 | <b>Decision to conduct inquiry</b> | March 2, 1995         |
| 2 | <b>Notices sent to parties</b>     | March 3, 1995         |
| 3 | <b>Planning conference</b>         | January 31, 1995      |
| 4 | <b>Community session</b>           | April 20 and 21, 1995 |

The Commission heard from the following witnesses: Mary Hanuse, Ethel Alfred, Peggy Svanvik, George Cook, Bill Cranmer, Agnes Cranmer. The session was held at the U'mista Cultural Centre, Alert Bay, BC.

- |   |                                     |                           |
|---|-------------------------------------|---------------------------|
| 5 | <b>Legal argument</b>               | September 20 and 21, 1995 |
| 6 | <b>Content of the formal record</b> |                           |

The formal record of this inquiry comprises the following:

- Documentary record (2 volumes of documents)
- 6 Exhibits
- Transcripts (3 volumes, 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.

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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE CLAIM OF THE NAK'AZDLI FIRST NATION**

### **PANEL**

Commissioner Carole T. Corcoran  
Commissioner Aurélien Gill

### **COUNSEL**

For the Nak'azdli First Nation  
Eric Woodhouse

For the Government of Canada  
Bruce Becker / Vicki Cox

To the Indian Claims Commission  
Kim Fullerton / Grant Christoff / Kathleen Lickers

**MARCH 1996**





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# PART I

## INTRODUCTION

On September 25, 1995, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim of the Nak'azdli First Nation.<sup>1</sup> The claim concerns the alienation of 300 acres of land set apart as Aht-Len-Jees Indian Reserve (IR) 5 for the Nak'azdli First Nation. The reserve had been confirmed in the final report of the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission) in 1916. It was "disallowed" as a result of the Ditchburn-Clark Commission, appointed by both the federal government and the provincial government of British Columbia to review the McKenna-McBride final report, in 1923. The First Nation maintains that the disallowance was unlawful and therefore forms the proper basis of a specific claim.

In their report, Commissioners Ditchburn and Clark noted that the First Nation had requested that Aht-Len-Jees IR 5 (comprising 300 acres) be exchanged for Lot 4724 (comprising 640 acres) and recommended that this exchange be implemented. Aht-Len-Jees IR 5 was thereby disallowed as an Indian reserve by Order in Council, and Lot 4724 became a new reserve for the Band under the title Uzta (or Nahounli Creek) IR 7A by Order in Council.<sup>2</sup>

On June 15, 1993, the Nak'azdli First Nation forwarded its Statement of Claim to the Department of Indian Affairs and Northern Development (DIAND) pursuant to the government's Specific Claims Policy of 1982, alleging that Canada had failed to protect its interest in Aht-Len-Jees IR 5. The Ditchburn-Clark Commission, the Band claimed, had acted beyond its legislated mandate, found in the *British Columbia Land Settlement Act*, in its

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1 Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nak'azdli First Nation, and to the Ministers of Justice and Indian Affairs and Northern Development, September 25, 1995 (ICC file 2109-20-1). Earlier variations of the Nak'azdli First Nation's name are the Necoslie or Necausley Indian Band and the Stuart Lake Tribe.

2 British Columbia Order in Council 911/1923, July 26, 1923 (ICC Documents, pp. 233-43); Canada Order in Council 1265/1925 (ICC Documents, pp. 244-50).

purported disallowance of Aht-Len-Jees IR 5. Consequently, the First Nation alleged, "the federal government breached its lawful obligation to the Nak'azdli Band by failing to protect the Band's interest in IR 5."<sup>3</sup> Indian Affairs rejected the claim on the basis that it disclosed no outstanding lawful obligation of the federal government.<sup>4</sup> By letter of May 17, 1995, Indian Affairs, through its representative Dr. John Hall, stated that "Canada's actions were done in accordance with existing legislation and were therefore lawful."<sup>5</sup> On June 20, 1995, counsel for the Nak'azdli First Nation requested that the Indian Claims Commission conduct an inquiry into the rejection of its claim.<sup>6</sup>

The task before this Commission was to assess the Nak'azdli First Nation's specific claim, having regard to the Specific Claims Policy, and to determine the validity of its claim. The sole issue, agreed by the parties, was whether Aht-Len-Jees IR 5 ceased to be a reserve as a result of its disallowance by the Ditchburn-Clark Commission.

At the request of a First Nation, the Indian Claims Commission can conduct an inquiry into a rejected specific claim pursuant to the *Inquiries Act*. The Commission's mandate to conduct inquiries states, in part:

... 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 ...<sup>7</sup>

Pursuant to this mandate, the Indian Claims Commission has developed a unique inquiry process. As part of this process, the "community session" provides a forum that enables the First Nation to present historical evidence, including that which may not be admissible in a court of law, in its oral tradition directly to the panel of Commissioners conducting the inquiry. The

<sup>3</sup> Eric Woodhouse, Counsel for the Band, Claim Submission, June 1993 (ICC Documents, pp. 306-23).

<sup>4</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Robert Antoine, May 17, 1995 (ICC file 2109-20-1). A claim is valid under the Specific Claims Policy, set out in Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), if it discloses an outstanding lawful obligation on the part of the Government of Canada.

<sup>5</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Robert Antoine, May 17, 1995 (ICC file 2109-20-1).

<sup>6</sup> Eric Woodhouse, Counsel for the Band, to Indian Claims Commission Chair, June 20, 1995 (ICC file 2109-20-1).

<sup>7</sup> 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.

community session therefore permits the First Nation to present its rendering of events, which is often missing from the written documentation of a claim.

The Commission inquiry process and, in particular, the oral statements given at the community session caused Canada to reconsider the rejection of this claim and, ultimately, to offer to accept it for negotiation – an offer that the First Nation has accepted. Canada's willingness to negotiate was "as a result of additional information that has come to our [Canada's] attention through the Indian Specific Claims Commission inquiry, and in particular, the oral evidence from three band elders at the community session on November 21, 1995."<sup>8</sup>

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<sup>8</sup> John Hall, Specific Claims, Office of Native Claims, to Chief Harold Prince, January 16, 1996 (ICC file 2109-20-1), included at Appendix C.

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## PART II

### A BRIEF HISTORY OF THE CLAIM

#### BACKGROUND

On September 30, 1892, Indian Reserve Commissioner Peter O'Reilly allotted seven reserves around Stuart Lake in central British Columbia to the 136-member Nak'azdli Indian Band.<sup>9</sup> Together, these reserves represented 2830 acres, or 20.8 acres per member. Most of the land was of dubious value. Generally, the reserves were "worthless, small portions only being suitable for cultivation, swamp from which hay can be obtained or fishing stations. . . ." <sup>10</sup>

Aht-Len-Jees IR 5 was no exception; it was a source of hay and some timber, but was not suitable for cultivation. Commissioner O'Reilly even prescribed improvements for Aht-Len-Jees IR 5 when he informed Indian Affairs about the reserves he had set out for the Nak'azdli Band:

No. 5. Ahtlenjees, a reserve about six miles from Fort St. James, on the trail to Stony Creek. It contains 270 acres, about one half of which is swamp. A well-constructed ditch one hundred yards in length would render the whole of this swamp available for a meadow. About ten tons of hay are produced here annually. Good timber for fencing is plentiful on this reserve.<sup>11</sup>

O'Reilly submitted his Minutes of Decision and sketches for the seven Necoslie reserves to F.G. Vernon, Chief Commissioner of Lands and Works for British Columbia, in March 1893 for approval.<sup>12</sup> Mr. Vernon granted

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9 Peter O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 30, 1892 (ICC Documents, pp. 56-59).

10 Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vernon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, p. 65).

11 Peter O'Reilly to Deputy Superintendent General, Indian Affairs, March 25, 1893 (ICC Documents, p. 62).

12 Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vernon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, pp. 64-70).

approval on April 14, 1893.<sup>13</sup> A year later, in April 1894, Mr. O'Reilly directed F.A. Devereux, the land surveyor employed by the Indian Reserve Commission, to survey the seven reserves.<sup>14</sup> No documentation has been found to show what transpired between 1894 and 1898. In 1898, however, the surveyor produced "Plan No. 2 of the Necoslie Indian Reserves," showing Aht-Len-Jees IR 5 comprising 300 acres. C.B. Semlin, British Columbia's Chief Commissioner of Lands and Works, and A.W. Vowell, the Indian Reserve Commissioner and Indian Superintendent for British Columbia, approved the plan on January 11, 1899.<sup>15</sup>

### BAND APPLIES FOR ADDITIONAL LAND, 1913-15

On September 24, 1912, the federal government and the government of British Columbia arrived at an agreement towards the "final adjustment of all matters relating to Indian Affairs in the province of British Columbia."<sup>16</sup> This agreement established the Royal Commission on Indian Affairs for the Province of British Columbia, commonly referred to as the McKenna-McBride Commission. It gave Canada's Special Commissioner, J.A.J. McKenna, and British Columbia Premier, Richard McBride, the power to determine if sufficient land had been set aside for Indians. If the Commissioners found that insufficient land had been allotted, they had the authority to "fix the quantity that ought to be added"<sup>17</sup> (that is, they had the power to adjust the acreage of Indian reserves in British Columbia). Canada approved the agreement by Order in Council 3277 on November 27, 1912, and British Columbia likewise approved by Order in Council 1341 on December 18, 1912.<sup>18</sup>

The establishment of the McKenna-McBride Commission gave bands the opportunity to apply for additional lands.<sup>19</sup> In June 1913 the McKenna-McBride Commission visited Fort St. James, where the Commissioners heard

13 Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vernon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, pp. 64-70), marginalia: "Approved April 14th 1893, F.G. Vernon, C.C.L.W."; O'Reilly to Deputy Superintendent General of Indian Affairs, April 17, 1893 (ICC Documents, p. 71).

14 Peter O'Reilly, Indian Reserve Commissioner, to F.A. Devereux, Surveyor of Indian Reserves, Victoria, April 20, 1894 (ICC Documents, pp. 72-73).

15 F.A. Devereux, BCLS, 1898, "Plan No. 2 of the Necoslie Indian Reserves, BC 105," approved January 11, 1899 (ICC Documents, pp. 74-77). The "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902," published in Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, shows seven Necoslie reserves allotted in 1892, surveyed in 1898, and confirmed in 1899. It lists them as: Necoslie IR 1 (734 acres); Tat-sel-a-was IR 2 (136 acres); Sow-chea IR 3 (225 acres); Uzta IR 4 (960 acres); Ahldenjees IR 5 (300 acres); Chesday IR 6 (360 acres); and Kwot-ket-quo IR 7 (160 acres).

16 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 80-81).

17 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, p. 80).

18 Canada, Order in Council 3277, November 27, 1912 (ICC Documents, pp. 88-89); British Columbia, Order in Council 1341, December 18, 1912 (ICC Documents, pp. 90-91).

19 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 80-81).

from Chief Jimmy of the Nak'azdli Band regarding the use of reserve lands and the need for additional reserves.

In his application for additional land, the Chief testified about the conditions at the Necoslie reserves, noting that the circumstances of the Band were poor: members depended on hunting and, with difficulty, they were attempting fishing and agriculture; they lacked paid employment, medical attention, and schooling for their children; and they were in need of food for themselves and hay for their horses and cattle.<sup>20</sup> There was no reference, in his testimony, to reducing the size of Aht-Len-Jees IR 5 or alienating it from the Band.

The Nak'azdli Band applied for a 40 acre meadow adjacent to Uzta I.R. No. 4.

The McKenna-McBride Commission named this "Application No. 131":

Taking up the land applications of the Band; the first was for one mile square, the desired location being Lot 4724, [which adjoined the northeast corner of Uzta No. 4] covered by application to purchase No. 12134.

[Indian] AGENT McALLAN [Stuart Lake Agency]: Application was made for 40 acres in the northwest corner of Lot 4724 and Lot 4723. These lots appear to be in good standing.

MR. COMMISSIONER SHAW: The Commissioners are sorry but they cannot get that place for the Indians, it having already been taken up by a white man.

The second application was for a mile square, to the west of [Uzta] Reserve No. 4 ; that was good land and the trail ran through the place. The location would be described as Lots 4749 and 4324, apparently open and available. The application was for 240 acres in all.

MR. COMMISSIONER SHAW: The Commission will try and get that for your Band and thinks it may be able to do so.<sup>21</sup>

The Chief also applied for a number of fishing stations. He observed: "If these applications are granted the Band will have sufficient land for its requirements."<sup>22</sup>

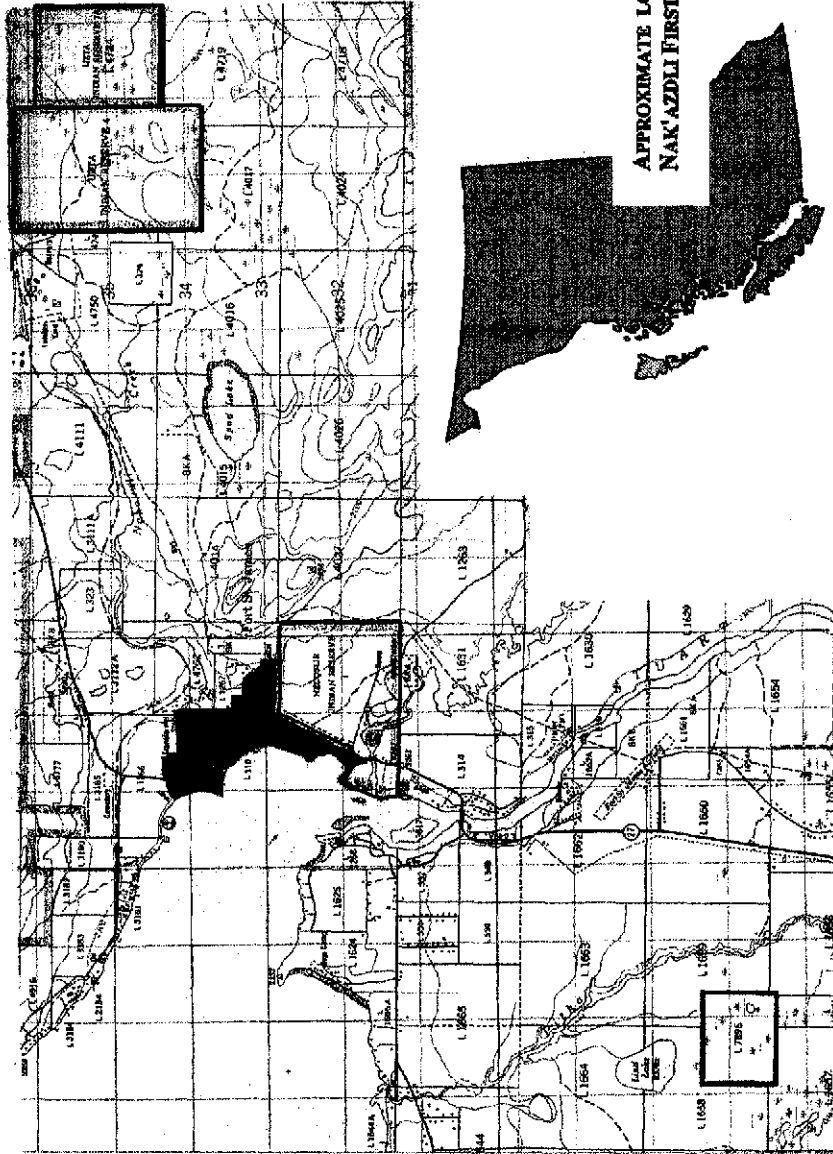
20 Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, pp. 106-11).

21 Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, pp. 114-15, 123).

22 Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, p. 127).



**CLAIM AREA**



Source: Department of Energy, Mines and Resources - Surveys and Mapping Branch - Fort St. James 93K/8 Edition 2

On November 15, 1915, in Victoria, British Columbia, Indian Agent McAllan addressed the McKenna-McBride Commission about the applications for additional lands by the Nak'azdli Band. No one from the First Nation was present on this occasion, and Agent McAllan answered the Commissioners' questions about the Band's circumstances and habits. He told them that Uzta IR 4 was "very important" to the Band. "[T]hey are starting in to plow a little of it now and in the years to come when they learn more about agriculture that will be one of the most important sources of sustenance."<sup>23</sup> By putting in drainage ditches, the Indians had made Lots 4723 and 4724, adjoining the northeast corner of Uzta IR 4, into "a nice meadow to clear with a mowing machine," he said. They had been using the land for 10 or 15 years, but it was owned by Neil Gething, whom the Indians claimed "had stated that he was ignorant of the fact of Indian improvements . . . when he took it up." Agent McAllan claimed he had no other knowledge of this situation, and the Commissioners then turned their attention to Aht-Len-Jees IR 5.<sup>24</sup>

The Commissioners established that no one lived at Aht-Len-Jees IR 5 and that, out of the 300 acres, about 40 or 50 acres were a meadow where the Indians cut hay. To the question, "Is that land reasonably required?" Agent McAllan answered: "Yes."<sup>25</sup> Given that Reserves 3 to 7 were mostly hay meadows, Commissioner Shaw asked whether they were "capable of being extended by very little work." Agent McAllan replied: "Yes, in some cases they are – particularly on No. 4, Uzta." He agreed it would be reasonable to say that the reserve could be doubled. Asked if that would apply to Aht-Len-Jees IR 5, he simply replied: "On several of these reserves the area could be materially increased."<sup>26</sup> Agent McAllan's plan was to encourage the Band members "to clear up their own meadows" and to discourage them from cutting hay off the reserves.<sup>27</sup>

Regarding Application 131, which involved the status of Lots 4723 and 4724, Agent McAllan recommended that the Commission obtain the 40 acres of "Gething's property" for the Band. Only one Indian family, by the name of Sagilan, was making use of it.<sup>28</sup>

23 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 145).

24 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 146).

25 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 146).

26 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 149).

27 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 149).

28 Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, pp. 150-51).

### APPLICATION 131 (LOTS 4723 AND 4724) DENIED, 1916

In its final report in 1916, the McKenna-McBride Commission denied Application 131, "originally for 40 acres each in N.W. corners of Lots 4724 and 4723," and identified by the Royal Commission as for "[o]ne mile square, being Lot 4724, R. 5, Coast District." The land applied for had been "[a]lienated by an Application to Purchase in good standing."<sup>29</sup> The Deputy Minister of British Columbia's Department of Lands, R.A. Renwick, confirmed that Lots 4723 and 4724 were both covered by applications to purchase.<sup>30</sup>

The Royal Commission report confirmed all seven pre-existing reserves at the acreage listed in the official "Schedule of Indian Reserves" for 1913.<sup>31</sup> Consequently, on January 22, 1916, Aht-Len-Jees IR 5 was confirmed at 300 acres. Thus, the McKenna-McBride Commission neither cut off acreage from, nor added acreage to, Aht-Len-Jees IR 5.

### ROYAL COMMISSION'S WORK QUESTIONED, 1920

The governments of British Columbia and Canada had to take legislative steps to implement the recommendations of the 1916 final report of the McKenna-McBride Commission, and in 1919 British Columbia passed the *Indian Affairs Settlement Act*. This legislation empowered the Lieutenant Governor in Council for the purpose of "giving effect to the report of the said Commission, either in whole or in part . . . [and to] carry on such further negotiations . . . as may be found necessary for a full and final adjustment of the differences between . . . the Governments."<sup>32</sup> Canada likewise passed the *British Columbia Land Settlement Act* in 1920, adopting almost identical language with the following exception: the Governor in Council was empowered to "order such reductions or cut-offs [from reserves] to be effected without surrenders."<sup>33</sup>

29 "Additional Lands Applications," in *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria, 1916) (ICC Documents, p. 170).

30 R.A. Renwick, Deputy Minister of Lands, British Columbia, to C.H. Gibbons, Secretary of the Royal Commission, April 25, 1916 (ICC Documents, pp. 175-78). The British Columbia Lands Department possessed a typeset schedule that showed Application 131 as being "Alienated by A.P. in good standing" together with "Allowed: Twenty (20) acres, more or less, in N.E. [not N.W.] quarter (1/4) of Lot No. 4724 and in N.W. quarter (1/4) of Lot No. 4723." In the margin, beside this entry, are stamped the words "entered on," with an illegible date.

31 These were the reserves allotted by O'Reilly and surveyed by Devereaux. Peter O'Reilly, Indian Reserve Commissioner, to F.A. Devereux, Surveyor of Indian Reserves, Victoria, April 20, 1894 (ICC Documents, pp. 72-73). The acreage confirmed in 1913 was the same acreage listed in 1902. Schedule of Indian Reserves in the Dominion, 1913 (ICC Documents, pp. 34-40).

32 British Columbia, Legislative Assembly, *Sessional Papers*, "Indian Affairs Settlement Act," 1919 (ICC Documents, pp. 182-83).

33 Canada, Parliament, *Sessional Papers*, "British Columbia Land Settlement Act," 1920 (ICC Documents, pp. 194-95).

British Columbia's Minister of Lands, T.D. Patullo, was convinced that there were "innumerable errors" in the Royal Commission's report and that "a large number of additions . . . were selected for the strategic or controlling location and not that they will actually be required by the Indians for settlement purposes." In 1920, he wrote to the Minister of Indian Affairs, Arthur Meighen, suggesting a thorough review of the entire report.<sup>34</sup>

Mr. Patullo had been influenced in his position by J.W. Clark, then Superintendent of Soldier Settlement in British Columbia. In an April 1, 1920, memorandum to Mr. Patullo, he had said that the Royal Commission's report failed to provide a basis for "the final adjustment of all matters relating to Indian Affairs in the Province of British Columbia." Mr. Clark therefore proposed the creation of a "standing joint Commission for British Columbia with expropriation and other necessary powers on behalf of the Indians and for the progress of the white settlers. . . ."<sup>35</sup>

Mr. Clark feared that widely scattered additions to reserve land would make it harder to "uplift" the Indians. Moreover, he opposed any additions to reserves that would inhibit the progress of white settlers:

Had the Royal Commission followed the policy of Sir James Douglas in 1859 . . . which called for treatment of the Indians with justice and forbearance, rigidly protecting their civil and agrarian rights, locating them in native villages for their protection and civilization, and exercising due care to avoid checking, at a future day, the progress of the white Colonists, we should not now be witnessing the present unsatisfactory state of affairs. In many cases the additions recommended are so widely scattered that it would be impossible to extend educational facilities, etc. to the occupants of such reserves, and again the additions recommended are often situate at strategic points in the topography of the country, which, if approved, will establish a decided check to the progress of white settlers in the localities concerned.<sup>36</sup>

For ideological reasons, Mr. Clark favoured centralization by expropriating lands adjoining reserves:

Education, with facilities for agricultural and later technical training in industrial occupations, is well known to be the only equitable and honourable solution of the

34 T.D. Patullo, Minister of Lands, British Columbia, to Arthur Meighen, Superintendent General of Indian Affairs, April 21, 1920 (ICC Documents, pp. 191-92).

35 J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 186).

36 J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 186).

Indian Question in this Province, and to make such solution feasible procedure must necessarily be towards concentration rather than segregation.<sup>37</sup>

On October 20, 1920, W.E. Ditchburn, the Chief Inspector of Indian Agencies, notified Mr. Patullo that he had been appointed by the Superintendent General of Indian Affairs to work alongside a provincial representative to review the recommendations made by the McKenna-McBride Commission.<sup>38</sup> Five days later, Mr. Clark informed Mr. Ditchburn of his instructions from Mr. Patulla to commence a review of the report of the McKenna-McBride Commission and to act as the provincial representative for the Department of Lands in that review.<sup>39</sup>

W.E. Ditchburn and J.W. Clark were appointed as "representatives of the two governments . . . for the purpose of adjusting, readjusting, confirming and generally reviewing the report and recommendations of the Royal Commission."<sup>40</sup> This joint commission is commonly called the "Ditchburn-Clark Commission."

### PROPOSED SURRENDER OF AHT-LEN-JEES IR 5, 1923

For the Stuart Lake Agency, which encompassed Aht-Len-Jees IR 5, Mr. Clark recommended a number of modifications and adjustments to the cut-offs and additions recommended earlier by the McKenna-McBride Commission. Among the situations that demanded special attention was the Nak'azdli Band's Application 131. For this request, Mr. Clark suggested that the Band *surrender* Aht-Len-Jees IR 5 and that Lot 4724, adjacent to Uzta IR 4, become reserve land:

. . . it having been shown that application No. 131, though disallowed by the Royal Commission has been used by the Indians for more than 40 years and was staked for them by Judge C. O'Reilly over 30 years ago, and whereas No. 5 [Ahtlenjees] Reserve confirmed by the Royal Commission is situated about 9 miles from the home Reserve and on this account is of very little use to the Indians, it is therefore requested that Lot 4724, which is now available, be allowed and confirmed as a Reserve, in return for which the Indians will surrender No. 5 to the Provincial Government. I would

37 J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 187).

38 W.E. Ditchburn, Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, October 20, 1920 (ICC Documents, p. 196).

39 J.W. Clark, Superintendent of Soldier Settlement, to W.E. Ditchburn, Inspector of Indian Agencies, October 25, 1920 (ICC Documents, p. 197).

40 Mr. Clark was appointed pursuant to the province's *Indian Affairs Settlement Act, 1919*, and Mr. Ditchburn was appointed pursuant to the *British Columbia Indian Land Settlement Act, 1920*.

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recommend that the request be granted following the surrender of No. 5 Reserve, and that Lot 4724 be allowed and confirmed as a Reserve accordingly.<sup>41</sup>

Mr. Clark's 1923 "Review of Report of Royal Commission . . ." recommended that the 640-acre Lot 4724 be allowed and confirmed as a reserve in exchange for the surrender of IR 5 which he felt was an impediment to development:

Application No. 131 for Lot 4724 Stuart Lake Band, 640 acres which is now available to be allowed and confirmed as a Reserve in return for the surrender of No. 5 Reserve which was confirmed by the Royal Commission but is of little use to the Indians, being 9 miles from their home reserve, but on the other hand will interfere considerably with the development of Block A, Stuart River District.<sup>42</sup>

### EXCHANGE OF AHT-LEN-JEES IR 5 FOR LOT 4724, 1923

Commissioner Ditchburn did not oppose Commissioner Clark's recommendation,<sup>43</sup> but suggested an *exchange* instead of a *surrender* of Aht-Len-Jees IR 5. In his report to D.C. Scott, Deputy Superintendent General of Indian Affairs, Commissioner Ditchburn proposed that the 300-acre Aht-Len-Jees IR 5 be exchanged for the addition of 640 acres in Lot 4724 as reserve land:

Exchange: The Necoslie Band, under App. No. 131, asked the Commission for Lot 4724, Range 5, Coast District, containing 640 acres, but as it was covered by an application to purchase the request could not be complied with. It is now available and has been recommended to be constituted a reserve for this Band in exchange for Ahtlenjees Reserve No. 5 confirmed. The Indians have asked that this exchange should be made. The reserve (new) will adjoin Old Reserve No. 4 while Old Reserve No. 5 is over nine miles distant. I have given my approval for this exchange.<sup>44</sup>

This passage is questionable given that the Band's original request — Application 131 — was for additional land, not an exchange of land. In any event, Canada did not take a formal surrender of Aht-Len-Jees IR 5.

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41 J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, "Progress Report of the Indian Reserve Question as at January 1st 1923," January 16, 1923 (ICC Documents, p. 204).

42 J.W. Clark, Superintendent, Immigration Branch, to T.D. Patullo, Minister of Lands, March 1, 1923 (ICC Documents, p. 217).

43 W.E. Ditchburn, Indian Commissioner, to G.R. Naden, Deputy Minister, Lands, March 26, 1923 (ICC Documents, pp. 221-22).

44 W.E. Ditchburn, Indian Commissioner, to D.C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, p. 231).

By British Columbia Order in Council 911, July 26, 1923, and Canada Order in Council 1265, July 19, 1924, the Ditchburn-Clark amendments to the 1916 report of the McKenna-McBride Commission were “approved and confirmed as constituting full and final settlement of all differences in respect thereto between the Governments of the Dominion and the Province.”<sup>45</sup> Indian Affairs followed through in April 1925 by giving specific instructions for surveying the Stuart Lake Agency reserves in accordance with these amendments.<sup>46</sup>

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<sup>45</sup> British Columbia Order in Council 911, July 26, 1923 (ICC Documents, pp. 233-35); Canada Order in Council 1265, July 21, 1924 (ICC Documents, pp. 244-47).

<sup>46</sup> J.D. McLean, Assistant Deputy Superintendent General of Indian Affairs, to V. Schjelderup, British Columbia Land Surveys, April 21, 1925 (ICC Documents, pp. 253-55).

## PART III

### THE ISSUE

The Nak'azdli First Nation requested that the ICC inquire into the rejection of its claim on June 20, 1995. The issue before the Commission was framed as follows:

Did Aht-Len-Jees I.R. No. 5 cease to be constituted as a "reserve" by virtue of its "disallowance" by Commissioners Ditchburn and Clark, acting under the ostensible authority of the *British Columbia Land Settlement Act*, S.C., 1920, 10-11 Geo. 5, c. 51?



## PART IV

### THE INQUIRY

A planning conference was held on September 13, 1995, in Vancouver with representatives of the Nak'azdli Band, Canada, and the ICC. The planning conference was devised by the Commission to involve the parties to a claim where practicable in planning the inquiry, and also as a means of settling claims whenever possible without the need for an inquiry. It is an informal meeting convened by Commission staff shortly after the inquiry begins. Representatives of the parties, usually with their legal counsel, meet with the Legal and Mediation Advisor for the Commission to review and discuss the claim, identify the issues raised by the claim, and plan the inquiry on a cooperative basis.

Following this first meeting, Commission staff visited the Nak'azdli First Nation on October 19, 1995, to prepare for the more formal community session, which was held on November 21, 1995. As mentioned earlier, the community session provides a unique opportunity for members of the First Nation to speak directly to the Commissioners conducting the inquiry, based on their oral tradition, regarding their rendering of events. The session is always held at the First Nation, subject to available facilities, and is attended by representatives of Canada, the First Nation, and the Commission. Out of respect for the elders, and in recognition of the cultural values of First Nations, elders and community members who address the Commissioners are not required to testify under oath, nor is cross-examination permitted.

The day's proceedings are recorded by a court reporter and result in a transcript for use by the Commission and the parties in proceeding with the inquiry. The transcript serves a secondary purpose in that it provides the First Nation with a written record of its history as it was communicated to the Commission.

At the Nak'azdli Community Session the Commissioners heard from elders Betsy Leon, Nicholas Prince, and Francesca Antoine. The elders explained that they were not aware of an "exchange" of Aht-Len-Jees IR 5. Their

account seems to contradict the words of Commissioners Ditchburn and Clark that they were acting to exchange Aht-len-Jees, since “[t]he Indians have asked that this exchange should be made,” as the exchange between Commission Counsel and Elder Betsy Leon attests.

### TESTIMONY OF ELDER BETSY LEON

MR. CHRISTOFF: . . . Did you ever hear any stories or any information about IR 7A being exchanged or being swapped for Ahtlenjees?

BETSY LEON: Well, you know, what I could say is, like I said, the Indians didn’t understand very much, and then this Indian Nation, DIA or whatever you call them there, they explain, maybe they use big words to them and they don’t understand it. They didn’t even know what’s going on. This land used to be so precious for them, you know, they use it very much all the time, and they didn’t know what happened, what’s going on, until later in the years. And our Elders, now they all died. We’re the only ones that lived.

MR. CHRISTOFF: Okay. But you’ve never heard about any exchange?

BETSY LEON: No. No.<sup>47</sup>

### TESTIMONY OF ELDER NICHOLAS PRINCE

Elder Nicholas Prince, who was Chief at Nak’azdli in 1967, also stated that not much was or is known about the exchange of reserves. He did, however, confirm the use of Aht-Len-Jees IR 5 as a hay meadow:

MR. CHRISTOFF: . . . [W]hat use did the band put to Ahtlenjees?

NICHOLAS PRINCE: . . . [T]here was a big garden growing in there . . . (continuing). . . it was used for hay and vegetables . . .<sup>48</sup>

Elder Prince reiterated that the exchange of reserves went largely unknown by anyone at Nak’azdli. When asked by Commission counsel if he knew “why Nak’azdli stopped using Ahtlenjees,” he replied:

What happened with that was when that was taken away under the McKenna/McBride Commission, one reserve up in Nehoonli, #7, or one of them, anyway, was given to us

47 Indian Claims Commission, Nak’azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 16-17.

48 Indian Claims Commission, Nak’azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 21-22.

when that was taken away. And there was no reason why it was exchanged except that it was good agricultural land.<sup>49</sup>

...

MR. CHRISTOFF: Is there any information which you have that you gained from either your elders or other people in the community which may – that there was any information about an exchange for IR 7A and IR 5 within the community; did anybody ever talk about anything like that?

NICHOLAS PRINCE: I don't know. I never hardly ever talk about it.<sup>50</sup>

Later Mr. Prince continued:

[I]n respect of why reserves were cut off from our reserve lands, we do not know why they were taken back . . . the cutoff of these reserves somewhat made it difficult for our people to continue our traditional practices, because these lands were very important to our people . . .<sup>51</sup>

Canada reconsidered its position in light of the statements of these elders, and has obviously concluded that the request for an exchange of land Commissioners Ditchburn and Clark relied upon was false.

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49 Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 22-23.

50 Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, p. 27.

51 Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, p. 33.

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## PART V

### CONCLUSION

The statements of these elders motivated Canada to reverse its original position and to offer to negotiate the Nak'azdli claim if the Nak'azdli First Nation would agree to put the Indian Claims Commission process in abeyance.<sup>52</sup> The Nak'azdli Band Council agreed to accept Indian Affairs' offer of negotiations within the fast-track framework.<sup>53</sup>

Canada has acknowledged that its offer to negotiate the Nak'azdli claim resulted from statements made by the elders at the community session. This opportunity for community members to speak directly to the Commissioners and to representatives of Canada, is unique to the Indian Claims Commission inquiry process. The success of this claim reinforces the need to continue with the distinctive information-gathering stage that the community session has to offer. It has proven to be a means of supplementing an existing historical written record with the oral tradition of First Nation communities, and, in this instance, has resulted in an accepted claim.

FOR THE INDIAN CLAIMS COMMISSION



Carole T. Corcoran  
Commissioner



Aurélien Gill  
Commissioner

---

<sup>52</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Prince, January 16, 1996, (ICC file 2109-20-01).

<sup>53</sup> Chief Harold Prince to John Hall, Research Manager, Specific Claims, Office of Native Claims, January 31, 1996 (ICC file 2109-20-1), included at Appendix D.

# APPENDIX A

## THE NAK'AZDLI FIRST NATION INQUIRY

- |          |                                    |                    |
|----------|------------------------------------|--------------------|
| <b>1</b> | <b>Decision to conduct inquiry</b> | September 22, 1995 |
| <b>2</b> | <b>Notice sent to parties</b>      | September 25, 1995 |
| <b>3</b> | <b>Planning conference</b>         | September 13, 1995 |
| <b>4</b> | <b>Community session</b>           | November 21, 1995  |

The Commission heard from the following witnesses: Betsy Leon, Nicholas Prince, and Francesca Antoine. The session was held at Nak'azdli First Nation.

- |          |   |                  |
|----------|---|------------------|
| <b>5</b> | <b>Canada's offer to negotiate</b>                      | January 16, 1996 |
| <b>6</b> | <b>Nak'azdli First Nation's acceptance to negotiate</b> | January 31, 1996 |

## APPENDIX B

### THE RECORD OF THE INQUIRY

The formal record for this inquiry comprises the following:

- Documentary record (1 volume of documents and annotated index)
- 1 Exhibit at community session
- 1 Exhibit submitted after community session
- Transcripts (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the record for this inquiry.

## APPENDIX C



Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

Specific Claims West  
650 West Georgia Street, Suite 2600  
P.O. Box 11602, Vancouver, BC V6B 4N9  
Tel: (604) 666-8711 Fax: (604) 666-8535

### WITHOUT PREJUDICE

January 16, 1996

Your file    Votre référence

Our file    Notre référence

BW8260/BC614-C2

Sent Via Fax: 1-604-996-8010

Chief Harold Prince  
Nak'Azdli First Nation  
Box 1329  
FORT ST. JAMES, B.C. V0J 1P0

Dear Chief Prince:

Regarding the Nak'Azdli First Nation's specific claim concerning I.R. No. 5 (Ahtlenjees), we have reconsidered our position on this claim as a result of additional information that has come to our attention through the Indian Specific Claims Commission inquiry, and, in particular, the oral evidence from three band elders at the community session on November 21, 1995.

Having considered this additional evidence carefully in the context of this claim and reviewed all other aspects of the claim, we are now of the view that the band has demonstrated that an outstanding lawful obligation exists within the meaning of the Specific Claims Policy.

As a result of this review, we are willing to recommend to our Minister that this claim be accepted for negotiation under the Government of Canada's Specific Claims Policy, on a fast-track basis, if the Band is willing to put the Indian Specific Claims Commission process in abeyance while negotiations are underway.

Under the terms of this offer, Compensation for the band's loss of I.R. No. 5 would be based on Compensation Criterion 3. This criterion provides for either the return of the lands or the payment of the current, unimproved value of the lands, and, where it can be established, an amount based on the net loss of use of the lands. Compensation Criteria 8, 9, and 10 will also apply. As part of the settlement, the Government of Canada will require an indemnity and final release ensuring that the issues in this claim cannot be reopened. In addition, to ensure finality of this claim, a formal, absolute surrender of these lands according to the *Indian Act* may also be required.

I and the Department of Justice legal representatives on this claim, Victoria Cox and Bruce Becker, are available to meet with you, your council, and your legal advisors and the Indian Specific Claims Commission to discuss this offer in more detail, if you would like,

.../2

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and to agree on the next steps in the process. If you also think that such a meeting would be useful, please give me a call. My telephone number is 666-5290.

This letter is written on a "without prejudice" basis and is not an admission of fact or liability by the Crown. In the event that this matter becomes the subject of litigation, the Government of Canada reserves the right to plead all defences available to it.

Sincerely,

*John L. Hall*

Dr. John L. Hall  
Research Manager - B.C. and Yukon

cc: Eric Woodhouse, Cook Roberts  
Kathleen Lickers, Indian Specific Claims Commission



## APPENDIX D



### NAK'AZDLI BAND COUNCIL

P.O. Box 1329, Fort St. James, B.C. V0J 1P0  
Telephone 996-7171  
Fax 996-8010

January 31, 1996

John Hall  
Specific Land Claims West  
650 West Georgia Street, Suite 2600  
P.O. Box 11602  
Vancouver, B.C.  
V6B 4N9  
Fax: # (604) 666-6536

Dear Dr. Hall,

We thank you for your letter of January 16, 1996 regarding Aht-Len-Jees I.R. #5.

We are impressed by your Department's recognition of the contribution of our elders to the fact base surrounding the alienation of I.R. #5, and wish to accept your offer of negotiations within the fast-track process. We wish to commence these negotiations as soon as possible. To make arrangements for the meeting please contact either myself, or our negotiator Linda Vanden Berg. We would prefer to have the sessions at Nak'azdli.

Sincerely,

NAK'AZDLI BAND COUNCIL

  
CHIEF HAROLD PRINCE

HP/pmp

c.c. Eric Woodhouse  
Linda Vanden Berg  
~~Christoff~~



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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE MCKENNA-McBRIDE APPLICATIONS CLAIM OF THE 'NAMGIS FIRST NATION**

### **PANEL**

Commission Co-Chair P.E. James Prentice, QC  
Commission Co-Chair Daniel J. Bellegarde  
Commissioner Aurélien Gill

### **COUNSEL**

For the 'Namgis First Nation  
Stan H. Ashcroft

For the Government of Canada  
Bruce Becker / Rosemarie Schipizky

To the Indian Claims Commission  
Ron S. Maurice / Kim Fullerton / Isa Gros-Louis Ahenakew

**FEBRUARY 1997**



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## EXECUTIVE SUMMARY

### BACKGROUND

In September 1912 an agreement was negotiated between representatives of both the federal and British Columbia governments to establish the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission). The Commission had power, subject to approval from the two levels of government, to adjust the acreage of Indian reserves in British Columbia. As part of its operations, the Commission travelled throughout the province meeting with representatives from the various tribes and bands.

On Monday, June 1, 1914, the McKenna-McBride Commission met with representatives of the principal tribes of the Kwawkwalth Nation. It quickly became apparent that the tribes were not adequately prepared for the meeting. Several of the Chiefs stated that they had received the plans of their lands only a short time earlier. The Chairman of the Commission noted that the plans had been lying in the office of the Indian Agent, W.M. Halliday, who had failed to distribute them to the tribes as he ought to have done.

The following day, the Commission met specifically with the Nimpkish Band (now known as the 'Namgis First Nation). Chief Lageuse submitted seven applications for additional reserve lands (later numbered 72 through 78). Included in these applications was a request for 100 acres in the area around Woss (Application 73), three large islands in the Plumper Island group (Application 76), and all of the islands in the Pearse Island group (Application 77). These three applications are at issue in this inquiry.

On June 24, 1914, the Commission met separately with Agent Halliday in Victoria, where he was asked to provide his recommendations in relation to the land applications from the Kwawkwalth Agency. With regard to the seven applications put forward by the Nimpkish Band, Agent Halliday recommended "that the application for Plumper Islands be granted, with a maximum allowance of 100 acres," and "that the smaller Islands of the [Pearse] group, lying on the eastern side and containing fifty or sixty acres be

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granted." He also recommended that 500 acres of Application 72 (extension of Indian Reserve 3) be granted, although he noted that the land was apparently covered by a timber limit. Agent Halliday recommended that the remaining four applications be rejected. With respect to Application 73 at Woss, Agent Halliday stated that "the land was so isolated that it would never be used."

A few months later, in October 1914, the Commission dispatched Mr. Ashdown Green, variously described as technical officer and surveyor to the Commission, to Alert Bay. He visited both the Plumper and Pearse Island groups in one day and, in his report, provided details regarding the most southwesterly island of the Plumper group, containing "about 70 acres," and the most northeasterly island of the Pearse group containing "about 60 acres."

By the summer of 1915 it was apparent to the Commission that much of the land requested by the Kwawkewlth tribes was alienated and unavailable. As a result, the Secretary to the Commission wrote to Agent Halliday on July 28, 1915, asking him if he wished to reconsider some of the applications that he had originally rejected. Agent Halliday responded that, since Application 72 had been rejected, he strongly recommended that the Nimpkish be given all the Pearse Islands, except the large island lying to the southwest of the group.

The Commission issued its final report on Indian affairs in British Columbia on June 30, 1916. It allowed Applications 76 and 77 in part and ordered the creation of two new reserves for the "Nimkeesh Tribe": Ksui-la-das Island, the southwesterly island of the Plumper group, containing an area of approximately 70 acres; and Kuldeksuma Island, the most northerly of the Kuldeksuma or Pearse group, containing an area of approximately 60 acres. The Commission rejected Application 73 at Woss on the ground that it was "not reasonably required."

## ISSUES BEFORE THE COMMISSION

### Fiduciary Duty

- 1 Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:



- a) Application 73
  - b) Application 76
  - c) Application 77
- 2 Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's applications for additional reserve lands? If so, did they breach that duty in relation to:
- a) Application 73
  - b) Application 76
  - c) Application 77

### **Negligence**

- 3 Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?
- 4 If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:
- a) Application 73
  - b) Application 76
  - c) Application 77
- 5 If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:
- a) Application 73
  - b) Application 76
  - c) Application 77

### **Specific Claims Policy**

- 6 Does this claim fit within the parameters of the Specific Claims Policy?

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## CONCLUSIONS

### Issue 1

#### *Fiduciary Duty prior to the McKenna-McBride Hearings*

Prior to the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to prepare the Band for the process by providing basic information and advice. A failure to do so was a breach of that obligation. We are mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. This failure was evident from the words of both Chief Willie Harris, at the general meeting of the principal tribes on June 1, 1914, and the Chairman of the McKenna-McBride Commission, who noted that the plans of the Chiefs' lands were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done."

We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkwewlth Agency as a whole, the Nimpkish had a per capita average of only 4.2 acres, even after receiving 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group. Considering that the Nimpkish Band "was one of the few in the Agency increasing numerically . . . and required room for expansion," it seems reasonable to conclude that the Band was left with insufficient lands.

It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

***Fiduciary Duty during the McKenna-McBride Hearings***

During the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. In our view, Agent Halliday's failure to consult with the Band and make appropriate investigations into its present and future land needs constitutes a breach of the Agent's fiduciary obligation. As before, however, we are mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably

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required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.

On the basis of the evidence before us, we are of the view that, if Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77 (the Pearse Islands) were actively used by the Band and were of importance to them. We therefore find that a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all the lands encompassed by Application 76 were "open and available." Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission's notations with respect to Application 77 state that the lands were "*partially* open and available." Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary precondition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

The situation with respect to Application 73 (Woss) is more complex. Given the evidence of Chief Lageuse that the area around Woss had not been used for a number of years, we can see why a reasonable person acting in good faith might have made the same recommendation as Agent Halliday if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. The area around Woss was an old village site, important for food gathering and trade, and significant in terms of 'Namgis culture and traditions; it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. Therefore, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72. However, it is unclear whether the lands encompassed by Application 73 were unalienated. If it can be shown that the lands were unalienated, it should be presumed that the Commission would have allotted some or all of them as additional reserve lands.

***Fiduciary Duty after the McKenna-McBride Hearings***

When the McKenna-McBride Commission returned to Agent Halliday after the hearings and asked if he wished to reconsider his opinion with regard to any of the applications he had not endorsed, we are of the view that Agent Halliday had, at the very least, the same fiduciary obligation as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

In the circumstances of this claim, Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday believed that the Band required room for expansion, a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this acreage would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available." The same should be presumed with respect to Applications 73 and 77 if the Band can provide evidence that the lands sought in its specific claim were unalienated.

It is unnecessary for us to decide whether Agent Halliday was restricted to the original applications of the Band when he made his revised recommendations for any such restriction would simply return us full circle to his obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

**Issue 2**

***Fiduciary Duty of the McKenna-McBride Commission and Its Agents***

In *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147 (SCC), Mr. Justice Iacobucci stated that "[t]he courts must be careful not to compromise the independence of *quasi-judicial* tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty." Although commissions of inquiry set up under Part I of the *Inquiries*

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*Act* (such as the McKenna-McBride Commission) are not courts and are not, generally speaking, quasi-judicial tribunals, there is substantial support for the position that they are independent bodies. Therefore, in our view, the reasoning of Mr. Justice Iacobucci can logically be extended to a commission such as the McKenna-McBride Commission. Accordingly, we find that the McKenna-McBride Commission and its agent, Ashdown Green, did not owe a fiduciary duty to the Band.

### **Issues 3, 4, and 5**

#### ***Negligence of Indian Agent Halliday***

Issues 3, 4, and 5 all deal with the First Nation's alternative claim that Agent Halliday was negligent in failing to protect and further the best interests of the Band. Given our findings and conclusions with respect to fiduciary duty in Issue 1, we do not find it necessary to consider these issues.

### **Issue 6**

#### ***Scope of the Specific Claims Policy***

As we discussed at some length in our report into the Cormorant Island claim of the 'Namgis First Nation, in our view the four enumerated circumstances of "lawful obligation" on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

As we see it, a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions.

Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

## **RECOMMENDATIONS**

Given our findings and conclusions as summarized above, we make the following recommendations to the parties:

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### **RECOMMENDATION 1**

**That the McKenna-McBride Applications Claim of the 'Namgis First Nation, with respect to lands included in Application 76 only, be accepted for negotiation under the Specific Claims Policy.**

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### **RECOMMENDATION 2**

**That the 'Namgis First Nation's claims related to Applications 73 and 77 not be accepted for negotiation under the Specific Claims Policy.**

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### **RECOMMENDATION 3**

**That the 'Namgis First Nation and Canada conduct further research to determine whether there were unalienated lands available which the Band could have applied for during the 1914 McKenna-McBride hearings. Specific research should also be conducted with respect to lands included in Applications 73 and 77 to determine whether such lands were unalienated and available. At the request of the parties, the Commission is willing to offer its assistance in the completion of additional research.**

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# PART I

## INTRODUCTION

In June 1914 representatives from the Nimpkish Band, now known as the 'Namgis First Nation, attended hearings before the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Commission). The McKenna-McBride Commission was jointly created by the Government of Canada and British Columbia to resolve a number of disputes over the allocation of Indian reserves in the province. During the McKenna-McBride hearings, the Nimpkish Band presented seven applications for additional reserve lands. Of these seven applications, four were rejected because they contained areas that were already alienated, two were approved in part, and one was rejected outright because it was deemed to have exceeded what was reasonably required by the Band. All the applications were considered in light of the opinion of the local Indian Agent, William Halliday.

On September 3, 1987, Chief Pat Alfred submitted Band Council Resolutions for four specific claims to the Office of Native Claims (now the Specific Claims Branch of the Department of Indian Affairs and Northern Development). One of these claims related to the rejection, or partial rejection, of three of the applications for additional reserve lands which the Nimpkish Band had presented to the McKenna-McBride Commission in June 1914.<sup>1</sup> The First Nation contended that Canada's officials owed a fiduciary obligation or duty of care in relation to the applications for reserve land and that these duties were not properly discharged. As will be discussed more fully below in Part II, the relevant applications were numbered 73, 76, and 77.

On February 10, 1994, Nola Landucci, Specific Claims Negotiator, Indian and Northern Affairs Canada, wrote to Stan Ashcroft, legal counsel for the First Nation, advising that Canada had decided to reject the claim:

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<sup>1</sup> Chief Pat Alfred, Nimpkish Band Council, to Manfred Klein, Negotiator, Specific Claims, Office of Native Claims, September 3, 1987 (ICC Documents, p. 217).



Further to our recent discussions concerning the extent to which Canada is prepared to negotiate the above claim based on the Nimpkish Band's submissions, please be advised that we are not prepared to recommend that Applications #76 & 77 be accepted for negotiation. Canada's position is that the evidence and submissions provided are not sufficient to establish that Canada breached its lawful obligation to the Band regarding these Applications.

As you are aware, we were willing to accept Application 73 for negotiation on a limited basis if the acreage referred to in application 73 were available when the McKenna McBride Commission was making its decisions. Our subsequent research indicates that these lands were not available at that time.

However, we are prepared to review any further evidence which the Band may wish to present indicating that the Band would have proposed alternative available lands to the Commission in lieu of the Application 73 lands. I must advise you, however, that without further evidence, we are also rejecting Application 73.<sup>2</sup>

By letter dated November 4, 1994, Mr. Ashcroft, on the instructions of the Chief and Council of the 'Namgis First Nation, submitted the "McKenna-McBride or Royal Commission Specific Claim" to the Indian Claims Commission (ICC) "for appeal purposes."<sup>3</sup> A planning conference was held on January 31, 1995, followed by the Commissioners' review of the request in early March 1995. On March 3, 1995, Commission Co-Chairs Daniel Bellegarde and James Prentice wrote to the Chief and Council of the First Nation, 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 Canada's rejection of the claim.<sup>4</sup>

For clarification, the ICC has already conducted a separate inquiry into the Cormorant Island claim of the 'Namgis First Nation.<sup>5</sup> That claim dealt with an 1880 reserve allotment encompassing almost the whole of Cormorant Island. In that inquiry, we concluded that Canada had an outstanding lawful obligation to the 'Namgis First Nation as a result of its failure to refer the province's disallowance of the reserve allotment to a judge of the British Columbia Supreme Court for a determination of the issue. In this inquiry, we are asked to consider whether Canada has a separate outstanding lawful obligation as a

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2 Nola Landucci, Specific Claims Negotiator, Indian and Northern Affairs Canada, to Stan Ashcroft, February 10, 1994 (ICC Documents, p. 218).

3 Stan H. Ashcroft to Kim Fullerton, Chief Legal Counsel, Indian Claims Commission, November 4, 1994 (ICC file 2109-05-1).

4 Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nimpkish Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, March 3, 1995 (ICC file 2109-05-1).

5 The findings and recommendations of the Commission in regard to this claim are set out in the report entitled *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996).

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result of certain events that transpired several years later during the investigations and deliberations of the McKenna-McBride Commission.

### MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of the ICC 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.<sup>6</sup>

This is an inquiry into the rejected claim of the 'Namgis First Nation, formerly known as the Nimpkish Indian Band.

### THE SPECIFIC CLAIMS POLICY

The ICC 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*.<sup>7</sup> Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

Although the ICC is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada drew our attention to three passages in particular.<sup>8</sup> First, the opening sentence in *Outstanding Business*:

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6 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.

7 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*].

8 Submissions on Behalf of the Government of Canada, September 6, 1995, pp. 11-12.

The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.<sup>9</sup>

Second, the definition of the term “specific claims” on page 19 of the Policy:

As noted earlier the term “specific claims” refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.<sup>10</sup>

Third, the discussion of the concept of “lawful obligation” on page 20:

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.<sup>11</sup>

It is Canada’s position that this claim does not fall within the scope of the Specific Claims Policy. We will address this issue in Part IV below.

### **THE COMMISSION’S REPORT**

This report sets out our findings and recommendations to the First Nation and to Canada. Part II of the report summarizes the facts disclosed in the inquiry and the historical background for the claim; Part III sets out the relevant legal issues addressed by the parties; Part IV contains our analysis of the facts and the law; and Part V provides a succinct statement of our findings and recommendations.

As in the Cormorant Island inquiry, we wish to thank legal counsel for the First Nation and for Canada for their assistance throughout the inquiry

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<sup>9</sup> *Outstanding Business*, 3.

<sup>10</sup> *Outstanding Business*, 19.

<sup>11</sup> *Outstanding Business*, 20.

process, and we also wish to express our sincere gratitude to the people of the 'Namgis First Nation for their hospitality during our visit to their community.

## PART II

### THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the 'Namgis First Nation. Our investigation into this claim included the review of one volume of documents submitted by the parties as well as several exhibits and supplementary submissions. In addition, the ICC held an information-gathering session in the community of Alert Bay, British Columbia, on April 20 and 21, 1995, where we heard evidence from six witnesses. On September 20, 1995, legal counsel for both parties made oral submissions in Vancouver, British Columbia. Details of the inquiry process and the formal record of documents and evidence considered in this inquiry can be found in Appendix A.

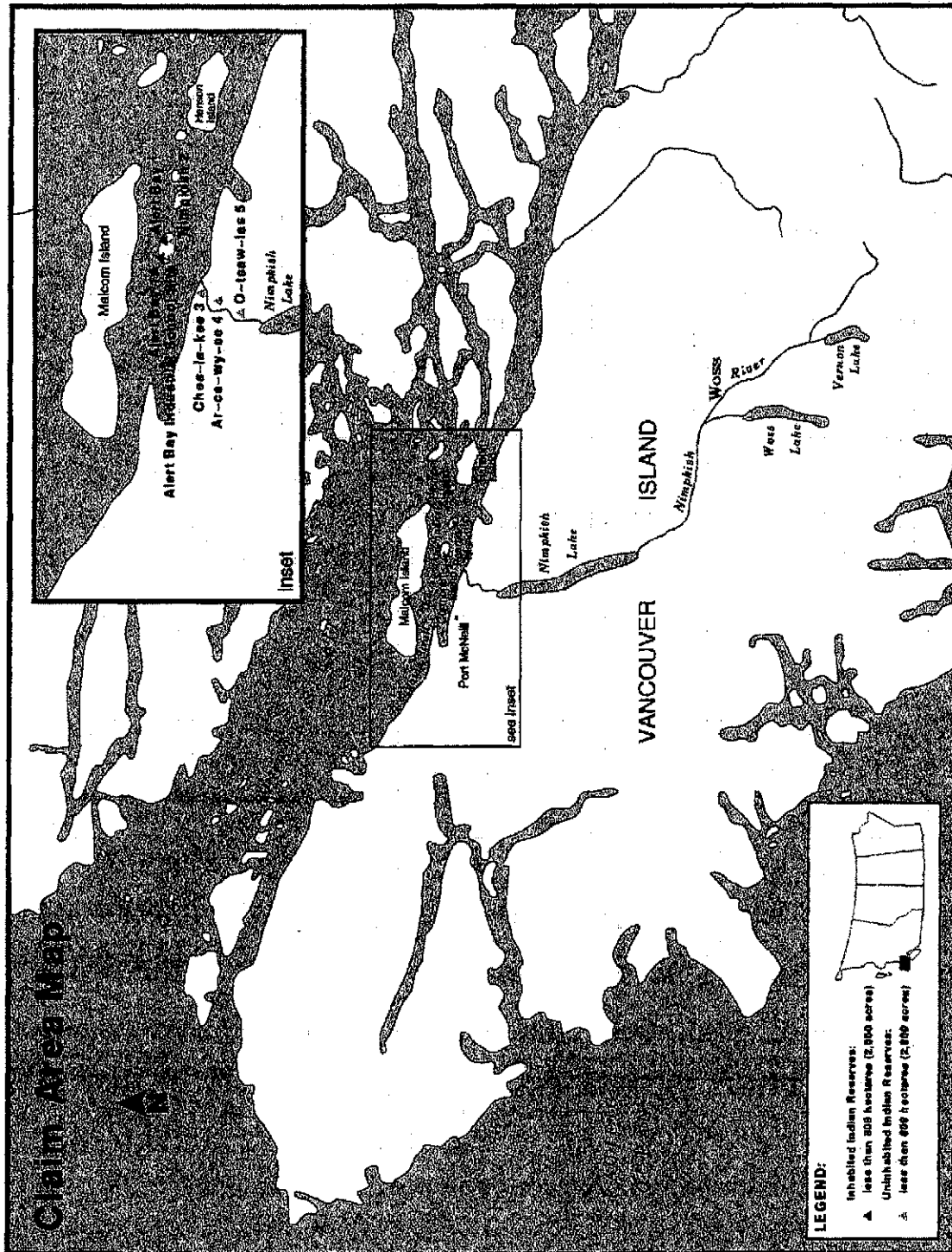
### THE CLAIMANT AND THE CLAIM AREA

The people of the 'Namgis First Nation are part of the Kwakwaka'wakw, which is the Kwak'wala language group.<sup>12</sup> Their traditional territory is on the northeastern coast of Vancouver Island, bounded by the watershed of the Nimpkish River and the adjacent marine environment. This particular claim relates to lands in the Plumper and Pearse Island groups and in the area around Woss. Map 1 on page 128 shows the relevant area of British Columbia and identifies a number of specific sites that are of particular importance in this claim.

The 'Namgis First Nation has, historically, been referred to by several names, including Nimkeesh, Nimkish, and Nimpkish. In their written and oral submissions, legal counsel for both parties referred to the claimant predominantly as the "Band" rather than the "First Nation." These terms will be used interchangeably throughout this report depending on the context. However, once again, we wish to emphasize and acknowledge that the claimant is now known as the 'Namgis First Nation.

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<sup>12</sup> Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 14.



## HISTORICAL BACKGROUND

Apart from small areas of land in the northeast corner of the province and around Victoria on Vancouver Island, no major treaties have been signed with the First Nations of British Columbia. The absence of treaties has contributed to British Columbia's long and, at times, contentious history in relation to the allocation of reserve lands. Even before the turn of the century, differences of opinion over the needs of the province's native population strained relations between British Columbia and Canada. As a result, a number of joint commissions were created, each with the hope that it would be able to find a solution to what was termed the "Indian land question" in British Columbia.

The first Indian Reserve Commission was created in 1875 and was a response to the acrimony over Indian issues that had evolved since British Columbia's union with Canada in 1871. When representatives from British Columbia negotiated the colony's entry into Confederation, they argued for the inclusion of a special clause in the Terms of Union which would ultimately have a long-lasting impact on the evolution of Indian land policy in the new province. This clause, Article 13, stated:

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.<sup>13</sup>

Given the ambiguous wording contained in Article 13, it is hardly surprising that the Indian land question would prove to be one of the more contentious issues between the two levels of government. The dominion government sought to have reserve size set at an average of 80 acres per family, while the province fought to limit the acreage to 10 acres per family — an amount, it argued, that continued its "liberal" pre-Confederation policy. Ultimately, the

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<sup>13</sup> RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

two levels of government agreed on a compromise figure of 20 acres per family but, when the province insisted that this amount apply only to future reserves, the fragile agreement collapsed.<sup>14</sup> In 1875, acting on a proposal put forward by William Duncan, an influential missionary based in Metlakatla, Canada and British Columbia agreed to the formation of a Joint Reserve Commission to address the matter of Indian reserve allotment in British Columbia. The original Joint Reserve Commission consisted of three members, but it was soon dissolved. In its stead, G.M. Sproat was appointed sole Reserve Commissioner in 1878.<sup>15</sup>

Commissioner Sproat visited the Nimpkish in 1879. On January 2, 1880, he issued a Minute of Decision reserving almost the whole of Cormorant Island (an area comprising approximately 1500 to 1600 acres of land) for their use. The reserve allotted by Commissioner Sproat met with considerable opposition and was disallowed by the provincial government.<sup>16</sup> In the autumn of 1884 his successor, Commissioner Peter O'Reilly, travelled to Cormorant Island to review the Band's need for reserve land. In Minutes of Decision dated October 20, 1884, Commissioner O'Reilly allotted two reserves on Cormorant Island. The first was at Alert Bay, comprising 50 acres, and the second was a small graveyard, comprising two acres, located close to the reserve at Alert Bay. This allotment gave the Nimpkish a total reserve acreage of 52 acres.

Commissioner O'Reilly visited the Nimpkish again in 1886, at which time he allotted an additional three reserves. By Minutes of Decision dated September 21, 1886, he allotted:

- IR 3: Ches-la-kee, a reserve of 335 acres situated at the mouth of the Nimkeesh River, Broughton Strait.
- IR 4: Ar-ce-wy-ee, a reserve of 42 acres situated on the left bank of the Nimkeesh River, about 2 1/2 miles from its mouth.
- IR 5: O-tsaw-las, a reserve of 50 acres situated on the right bank of the Nimkeesh River, 1/2 mile from the outlet of Karwutseu Lake.<sup>17</sup>

14 Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 182-83; Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), 183.

15 Robin Fisher, *Contact and Conflict*, 2d ed. (Vancouver: UBC Press, 1992), 188-94.

16 See Indian Claims Commission, *Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), for an examination of the facts and issues involved in that claim.

17 P. O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 21, 1886. There are discrepancies between the acreage figures set out in Commissioner O'Reilly's Minutes of Decision and the figures appearing in



The Indian Reserve Commission remained in operation until 1908, at which time its work was brought to an abrupt halt by the province.<sup>18</sup>

### McKenna-McBride Commission

In the period after the province's decision to withdraw from the Reserve Commission process, pressure continued to mount for a full and proper settlement of the controversy surrounding Indian land rights. It was finally decided that a Royal Commission would be the best method of finding a solution acceptable to both levels of government.<sup>19</sup> The resulting commission was based on an agreement negotiated in 1912 between J.A.J. McKenna, Special Commissioner appointed by the dominion government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, Premier of British Columbia.

The purpose of the McKenna-McBride Agreement was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia."<sup>20</sup> It was proposed that the Commission be composed of five members: two commissioners named by Canada, two commissioners named by British Columbia, and one chairman selected by the four named commissioners. The powers of the Commission in relation to the settlement of land issues were defined as follows:

2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:

(a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians,

subsequent documentation. The 1913 Schedule of Indian Reserves lists the following acreage figures for the five reserves:

1	Alert Bay	46.25 (acres)
2	Burial ground	1.87
3	Ches-la-kee	302.87
4	Ar-ce-wy-ee	41.30
5	O-tsaw-las	53.25

These figures are consistent with those confirmed in the Minutes of Decision of the Royal Commission on Indian Affairs for the Province of British Columbia on August 14, 1914. See, Minutes of Decision, Royal Commission on Indian Affairs for the Province of British Columbia, August 14, 1914 (ICC Documents, p. 163).

18 Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 227.

19 Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974), 232-34.

20 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48). See also the preamble of the *Indian Affairs Settlement Act*, SBC 1919, c. 32, and *The British Columbia Indian Lands Settlement Act*, SC 1920, c. 51.

as required by the *Indian Act*, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

(b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.<sup>21</sup>

With regard to the creation of reserves, the Agreement called for the province to "take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians."<sup>22</sup> As an interim measure to assist the Commissioners in their task, section 8 of the Agreement provided:

8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. . . .<sup>23</sup>

The McKenna-McBride Agreement was formally approved by a federal Order in Council dated November 27, 1912, subject to the further provision that:

notwithstanding anything in the Agreement contained, the acts and proceedings of the Commission shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the Reports, whether final or interim, of the Commission, with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose.<sup>24</sup>

A concurrent provincial Order in Council was issued on December 18, 1912.<sup>25</sup>

After an initial period of organization, the Royal Commission on Indian Affairs for the Province of British Columbia, also known as the McKenna-McBride Commission, travelled throughout the province meeting with

21 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

22 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

23 McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 47-48).

24 Federal Order in Council 3277, November 27, 1912 (ICC Documents, p. 49).

25 Provincial Order in Council 1341, December 18, 1912 (ICC Exhibit 6).

representatives from all the various tribes and bands. At these community meetings, the Commissioners explained the object and scope of the Commission and heard the Indians' views on their land requirements and other topics of concern. Band representatives were typically examined under oath on matters connected with the work of the Commission. The Commissioners were accompanied on their travels by the District Inspectors of the Department of Indian Affairs and the Indian Agents, who provided local knowledge of persons and places.<sup>26</sup>

In addition to hearing testimony from representatives of the individual bands, it was the practice of the Commission after visiting the reserves to call the Inspector of the Agency and the Indian Agent to Victoria to examine them under oath.<sup>27</sup> There is no indication in the record that band members were present at these meetings.<sup>28</sup> The Commission also heard representations from public bodies, such as municipal councils and boards of trade, where friction appeared to exist or where a request for a hearing was made.<sup>29</sup>

### **Role of the Indian Agent**

As is evident from the above description of the Commission's operations, the Commission collected information from many sources, including the Indian Agent. The interest of the Commission in obtaining the Agent's views is understandable when one considers the role he typically played within his agency and the nature of his responsibilities vis-à-vis the bands in the agency.

In British Columbia, as elsewhere in Canada, the Indian Agent had a substantial impact on band affairs and controlled many aspects of the day-to-day lives of the Indians under his jurisdiction. The duties of the Agent were not conclusively defined, but in a memorandum to a newly appointed Agent at Metlakatla, the Indian Superintendent for British Columbia, A.W. Vowell, provided the following instructions:

#### INSTRUCTIONS TO INDIAN AGENTS.

The duties of Agents mainly consist in advising the Indians, and in protecting them in the possession of their farming, grazing and woodlands, fisheries or other rights, and preventing trespass upon or interference with the same . . .

. . .

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26 General Report, Royal Commission on Indian Affairs for the Province of British Columbia, p. 18 (ICC Exhibit 6).

27 Progress Report No. 1, November 26, 1913, contained in General Report, Royal Commission on Indian Affairs for the Province of British Columbia, pp. 145-46 (ICC Exhibit 6).

28 ICC Transcript, September 20, 1995, pp. 66-67 (Bruce Becker).

29 General Report, Royal Commission on Indian Affairs for the Province of British Columbia, p. 18 (ICC Exhibit 6).

As the Department has no treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the system of giving presents to them there will be little other responsibilities attaching to the position of Indian Agent than the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those of other nationalities [sic]. The Agent should constantly advise and instruct the Indians in the beneficial use and occupations of their farming, grazing and woodland, fisheries or other privileges or industries possessed or pursued by them; and they, the Agents, should take measures to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc. . . .

Each Agent should make himself acquainted with each individual of the tribe, or tribes, under his charge and to familiarize himself with the special character and habits etc., educational and technical requirements of any kind possessed [by] each member of the tribe or tribes in his Agency.

In order to carry out these instructions it is absolutely necessary that the Agent should make periodical visits to the various bands of Indians in his Agency.<sup>30</sup>

Although the above memorandum was sent specifically to the Indian Agent at Metlakatla, correspondence from Indian Superintendent Vowell to the Secretary of the Department of Indian Affairs in March 1910 confirms that the same instructions were customarily sent to Indian Agents in British Columbia on their appointment.<sup>31</sup>

Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, further outlined the responsibilities of Indian Agents in a set of instructions issued in 1913. In the preface to his instructions, Mr. Scott summarized the duties of the Indian Agent as follows:

TO INDIAN AGENTS, -

These instructions are issued in brief and practical form as an aid to the efficient management of the agencies under the care of Indian Agents in Canada. . . .

The officers of the Department are reminded of their responsibilities as guardians of the Indians entrusted to their immediate care.

It is felt that the very nature of this relation should have the effect of calling forth an Agent's most conscientious endeavours.

30 A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to J.A. McIntosh, Indian Agent, covering letter along with memorandum entitled "Instructions to Indian Agents," December 22, 1909 (ICC Documents, pp. 26-27).

31 A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to Secretary, Department of Indian Affairs, March 17, 1910 (ICC Documents, p. 46).

While the duty of an Agent is first of all to protect the interests of the Indians under his charge, the rights of the citizens should be respected and the courtesy which is due to the public should always be observed.<sup>32</sup>

These, then, were some of the directives which Indian Agents were instructed to follow in the early 1900s.

### **Indian Agent Halliday and the McKenna-McBride Commission**

When the McKenna-McBride Commission turned its attention to the reserve requirements of the Nimpkish Band, W.M. Halliday had been the Indian Agent for the Kwawkwalth Agency (more or less encompassing the traditional territory of the Nimpkish Band) since 1906. In preparation for the Commission's visit to the Kwawkwalth Agency, J.G.H. Bergeron, Secretary to the Royal Commission, wrote to Agent Halliday on December 19, 1913, requesting that he prepare a tabulated list of the Indian reserves in his Agency.<sup>33</sup> Agent Halliday complied with this request and forwarded his comments to the Royal Commission in early 1914. As a general comment, he noted "that many of the reserves are very small and that the whole acreage of the Agency is very unevenly divided between the different tribes."<sup>34</sup>

Almost a month later, in February 1914, Agent Halliday was visited by a delegation of Indians. They presented him with a letter, which they wished him to forward to the Department of Indian Affairs in Ottawa. The letter stated:

We have been informed that the Indian Commission is coming to us in April. Therefore we beg to let you know what our wishes are on this matter.

We have heard that the Commission intend to go to every villiage where there are only a few people as all the Kuagutl agency indians are as one man & all there interest is one.

We beg to ask that you suggest to the Commission for us that they allow all the band chiefs of these different tribes be allowed to meet at Alert Bay at the date the Commission is expected there that after inquiry the Commission could to the differnt villages in the agency to see the Reserves.

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32 Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Indian Agents, October 25, 1913 (ICC Documents, p. 56).

33 Secretary, Royal Commission on Indian Affairs, to W.M. Halliday, Indian Agent, December 19, 1913 (ICC Documents, p. 57a).

34 W.M. Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, January 27, 1914 (ICC Documents, p. 62).

Also we earnestly pray you to let us have our own interpreters whom we can trust to tell the Commission our desires & who will make both Indians & Commission to understand what will be said.<sup>35</sup>

When reporting on this incident to Mr. Bergeron, Agent Halliday advised:

I informed the Indians that the object of the Commission was to deal with the land question and that each tribe would have to stand on its own merits in that respect but I did not think there would be any objection on the part of the Commission to a general meeting when we reached Alrt [sic] Bay.<sup>36</sup>

### **McKenna-McBride Commission and the Kwawkewlth Agency**

Agent Halliday was accurate in his prediction that the Commission would not object to a general meeting at Alert Bay. On Monday, June 1, 1914, the Commissioners met with representatives of the "principal Tribes of the Kwawkwelth [sic] Nation" before meeting with each tribe individually.

It quickly became apparent that the tribes were not adequately prepared for their meeting with the Commissioners. The first witness to address the Commission was Chief Owahagaleese, head chief of the Kwawkewlth Nation. In the course of his opening remarks, he stated:

I want to bring to your notice the plan of my land that I have here in my hand. It was only given to me on Saturday night, and according to this plan my land is too little; and I don't understand why the plan was given to me – Is it a sign of ownership, if it is, the land is too small.<sup>37</sup>

The Chairman of the Commission asked to see the plan and then responded:

In respect to these plans that have just been handed to us; I might say that in every place that we have so far visited, the Chiefs of all the different Reserves have plans such as you have just handed in showing on them the land that has been reserved for them – For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took steps to have them distributed so that the Chiefs could see

35 Indians to Superintendent of Indian Affairs, February 20, 1914, reproduced in Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, February 23, 1914 (ICC Documents, p. 64).

36 Halliday, Indian Agent, to J.G.H. Bergeron, Secretary, Royal Commission on Indian Affairs, February 23, 1914 (ICC Documents, p. 64).

37 Chief Owahagaleese, Head Chief of the Kwawkewlth Nation, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 85 (ICC Documents, p. 76).

what lands they had — Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.<sup>38</sup>

Chief Willie Harris of the Nimkish Tribe likewise blamed Agent Halliday for the chiefs' lack of preparation:

It seems that all these people do not know that they have an Indian Agent — They don't understand why they have an Indian Agent — They don't know whether it is good or otherwise. . . .

He [Halliday] is neither bad or good; but I cannot tell you what Mr. Halliday is just now . . . we ought to have an Agent here who will tell the people here what the mind of the Government is and if there is any privileges. The Indians ought to have been fully instructed about these things — The few minutes that we have been listening to you our eyes have been opened, and the Indian Agent ought to have told us about all those things. You ought to have seen us in the general meeting this morning before you came — We had the plans, and one would say [Referring to the Indian Reserves on the plans] “where is it” “whose is it” and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.<sup>39</sup>

In response to the criticisms of Agent Halliday, the Chairman outlined the duties of the Indian Agent:

The Indian Agent's [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights — to visit the Reserves from time to time and see that no one is interfered with them in their privileges; To be their friend and to give them good advice; To tell them what it is best for them to do and to look after them as a father would his children. It is also his duty to prevent them from disobeying the laws; To prevent them if possible from doing what is wrong; To explain the law to them and see that it is enforced and to keep them informed as to the mind of the Government. As to these charts, we may tell you, that the Indian Chiefs wherever we have been value these very much indeed, because it shows them what land have been reserved to them, and it is the duty of you Indians that if anyone trespasses on your Reserves you should go and complaine [sic] to the Indian Agent and tell him so that he may be able to do something for you.<sup>40</sup>

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38 Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 86 (ICC Documents, p. 77).

39 Willie Harris, Chief of the Nimkish Tribe, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, pp. 88-89 (ICC Documents, pp. 79-80).

40 Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80).

Johnnie Scow of the Kwicksitaneau Band shared Chief Harris's view that the tribes had received the plans of the area too late to be properly prepared for the hearings:

Another thing we want to tell you about is that you have seen how confused we are over those papers – We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head nor tail of it. They can't get to learn those plans in three days – they don't know what they are, why they are or where they are.<sup>41</sup>

The Chairman answered that the commissioners would probably be able to explain the plans better when they met with each tribe. Johnnie Scow pointed out that he had often asked for a plan of his land, but he had been unable to obtain one. To the Chairman's question, "Who did you ask?" Mr. Scow replied:

Mr. Halliday the Indian Agent. The only answer that I have ever got is "I know what you say and I know all about it." He told me that "there was no need of my knowing it" – That I will bring up when my Tribe is being examined. Of course there is no reserve or plan for my Tribe – There is no plan there on the Commissioners table of my Tribe and all the other tribes have one.<sup>42</sup>

Despite their lack of preparation, several representatives of the Kwawkewlth Nation took the opportunity to express their concerns on a variety of issues, with particular attention being given to the loss of their traditional lands and fishing rights. On behalf of the Nimkish Band, Chief Lageuse stated:

If you should feel that I have asked for too much, I want you to understand that I have not. I ask for the exclusive right for all the people what I have to keep me in food, and that is where I get all that I have, and I want to have these rivers, and I want to have the exclusive right that I may be able to sell the fish after I have used what I want myself.<sup>43</sup>

41 Johnnie Scow, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 92 (ICC Documents, p. 83).

42 Johnnie Scow, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 92 (ICC Documents, p. 83).

43 Chief Lageuse, Nimkish Band, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 87 (ICC Documents, p. 78).



The first day's session concluded with a lengthy discussion of the potlatch ban and its application to the Kwawkwalth tribes. The potlatch law amply demonstrates the level of control exercised by the Indian Agent over the lives of the Pacific coast tribes that practised this ceremony. It is apparent from the testimony of the 'Namgis people during both the McKenna-McBride Commission's hearings and this Commission's hearings that the potlatch ban evoked considerable tension between the Nimpkish and Agent Halliday. In light of the strong feelings that persist even to this day among members of the First Nation, we provide a brief description of the potlatch and Agent Halliday's strict enforcement of the prohibition in Appendix B to this report.

### **McKenna-McBride Commission and the Nimpkish Band**

On Tuesday, June 2, 1914, the second day of the hearings at Alert Bay, the Commission met specifically with the Nimpkish Band. Presentations to the Commission were made by Chief Alf Lageuse and other members of the Band, including Moses Alfred and Ned Harris. The Chief began his remarks by stressing that the land belonged to him and his people. He stated that "it would not be right for the Provincial Government not to treat me right in my own country where I was born and my forefathers were born."<sup>44</sup> He went on to review the history of settlement in the Nimpkish territory:

I know that the whiteman only borrowed the little pieces that they made their homes and their business places on. It belonged to the Tribes that lived on this Island. I and my people did not know that these whitemen were not true to us that they were claiming the land because the Island belonged to the whole of us; the majority of the Kwawkwalth Agency. . . . When the first whitemen came here they saw where our village sites were; they were all cleared, and he came along and built his house on these cleared pieces and claimed the land. At the present time, under the circumstances, the people cannot make their living on this land because it is not big enough for the use of my people and myself.<sup>45</sup>

Chief Lageuse pointed out that the land applications he wished to put forward represented less than one-quarter of the total number of village sites that originally belonged to his ancestors:

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<sup>44</sup> Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 137 (ICC Documents, p. 87).

<sup>45</sup> Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 138 (ICC Documents, p. 88).

I have a few villages that belonged to my forefathers not one-quarter that is on this list, but I have put some places that I would like to be reserved for my Tribe to be picked from. They belong to us, but in order to make it short for you, I have just put on this list the villages that we want reserved for us . . . and that is why I want you to tell me straight and I will be straight with you – I want to know how many months or years before you can let us know when you can let me have all these lands, and that is why I particularly ask that the Government that is selling the land around here will reserve that list that I have given you until it is settled what land I am to own.<sup>46</sup>

In answer to Chief Lageuse's question, the Chairman of the Commission explained that they were travelling all over the province and that when they finished their examination of the situation they would write a report that would go before the two governments. With respect to the lands that Chief Lageuse wanted reserved, the Chairman stated that the Commission would send a list of those lands to the provincial government and that, if they had not been sold, they would be held by the provincial government until the whole matter was decided. The Chairman's remarks prompted the following exchange:

THE CHIEF: I ask that the land be reserved until the time the Government is prepared.

THE CHAIRMAN: Only the pieces that are open will be granted; but the pieces that are already disposed of, of course we cannot do anything with that.

THE CHIEF: I am told that it is all taken up, and I want to ask the Royal Commission where am I going to get the land . . .

THE CHAIRMAN: No, it is not all taken up. Some of these lands are not only sold, but they have timber limits for a certain number of years, and after the timber is cut off, then it might be possible they can get a piece of these lands.

THE CHIEF: The land would not be useless, but it is for the timber that we want the land for the young people to work at.

THE CHAIRMAN: We are willing and anxious to do the best we can, but our powers are limited. Where the land has been sold we cannot do anything with it.

THE CHIEF: This is very serious to me, that it has never in my mind gone out of my hand – I never gave it to the Government; I expected and claimed it as my own all along. I want every man to get 200 acres and a title to the same.<sup>47</sup>

46 Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 138 (ICC Documents, p. 88).

47 Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 139 (ICC Documents, p. 89).

When Chief Lageuse finished his opening remarks, he was asked to provide sworn testimony regarding the social and economic conditions of the Nimpkish people. Moses Alfred and Ned Harris were then placed under oath and questioned about the use that was made of the existing Nimpkish reserves.

In the next stage of the proceedings, Chief Lageuse was examined on the seven land applications he had submitted to the Commission. These applications (referred to as "Additional Lands Applications") were later numbered 72 through 78 and, to avoid confusion, these numbers will be used throughout this report. Chief Lageuse's description of, and comments on, the lands applied for were as follows:

**Application 72** (Extension of IR No. 3 past No. 4 to No. 5, to where the river broadens into the lake [Woksamak])

MR. COMMISSIONER MCKENNA: . . .

They want this Reserve (No. 3) extended past No. 4 and beyond No. 5 to where the river broadens out into the lake. . . .

- A. [Chief Lageuse] We want it for the timber and the land, as well as the right to fish.
- Q. That land appears to be all taken up; either crown-granted or covered with timber licences — there appears to be on this old map some pieces vacant. The best the Commission can do is to carefully enquire if there is any land available there, and then do the best they can under the circumstances.
- A. If it is timber limits after they have cut the timber off, we are prepared to take the land then.<sup>48</sup>

**Application 73** (1/2 mile on each side of Nimpkish river from Klanck to Wilkiamayi)

- Q. [Commissioner McKenna] No. 2 application, is there an Indian house there?
- A. [Chief Lageuse] Yes.
- Q. An old one?
- A. Yes.
- Q. How long is it since anyone lived there?
- A. It takes two days poling up the river that empties into the lake.
- MR. COMMISSIONER MCKENNA: It takes eight or nine days poling up the river, and this place takes about two days poling up the river.

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<sup>48</sup> Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 153-54 (ICC Documents, pp. 103-04).

- Q. How much land do you want there?  
 A. 100 acres.  
 Q. What do you want it for?  
 A. For the land, the timber and the hunting.  
 Q. Do you intend to farm there, is it wanted for farming purposes?  
 A. It is for farming and gardening.  
 Q. You said there was an old village there?  
 A. Yes, there are signs of it there yet.  
 Q. Is it an old village of this Tribe?  
 A. Yes.  
 Q. Was it cleared?  
 A. Yes, by the Indians, and there is grass there – that is a valued site.  
 Q. Is it a long time since any Indians occupied that place?  
 A. Yes, it is quite a while – before I was born. It is about 50 years since we had a permanent village there.  
 Q. Have they used it in the meantime for any purpose?  
 A. No.  
 Q. As to this, we cannot identify what property has been disposed of, but we will investigate the matter and consider the application.<sup>49</sup>

**Application 74** (Duhdahyilesdamis)

- Q. [Commissioner McKenna] Now we come to application No. 3, at Port McNeill – you ask for half a mile there on each side of the river or creek – That land is all crown granted.  
 A. [Chief Lageuse] There was an Indian clearing there. Mr. Hall the missionary took this place and sold it to Chambers. . . .<sup>50</sup>

**Application 75** (Strip of land 1/2 mile in from Beaver Cove to a small lake [Wadsu] midway and on the east side of Nimpkish Lake)

- Q. [Commissioner McKenna] Now we come to application No. 4 for a strip of land half a mile from Beaver Cove to a small lake about midway on the east side of Nimpkish lake for a trapping and hunting ground. . . . Do you get deer there?  
 A. [Chief Lageuse] Yes, but the game is pretty scarce there now.  
 Q. Do the Indians go there to trap now?  
 A. Yes, two or three of them. . . .

49 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 154 (ICC Documents, pp. 104).

50 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 154-55 (ICC Documents, pp. 104-05).

- Q. There appears to be some land vacant in that vicinity, and the matter will be carefully gone into.<sup>51</sup>

**Application 76** (Ksuiladas or Plumper Islands)

- A. [Chief Lageuse] They want the three large Islands in the Plumper Island group. They are the only ones large enough to put erections on.
- Q. [Commissioner McKenna] What do you want those Islands for?
- A. For halibut fishing station, so that we can catch them and cure them there. . . .
- MR COMMISSIONER MCKENNA: It would appear that these Islands are "open" as far as we can see now, and the matter will receive careful consideration.<sup>52</sup>

**Application 77** (Kuldekuma or Pearse Islands)

- Q. [Commissioner McKenna] Now we come to Application No. 6, to what is known as Pearce Islands. . . How much do they want there?
- A. [Chief Lageuse] They want all of the Pearse Islands.
- Q. What do you want those Islands for?
- A. We want them for a halibut fishing station, also for the fir trees that are there.<sup>53</sup>

**Application 78** (Enlargement of Alert Bay IR)

- Q. [Commissioner McKenna] Application No. 8 that is for an extension of the Alert Bay Indian Reserve. About half the width of the Reserve runs the depth of Section 4 Rupert District, and the other half only runs about one-third of what you ask. You want the south and east lines to be extended until they intersect . . .
- A. [Chief Lageuse] Yes.
- Q. And that would be about 20 acres — and that would take in the slough and the source of the creek from which they want to secure their domestic water supply.
- INDIAN AGENT HALLIDAY: That all belongs to the Cannery.
- MR. COMMISSIONER MCKENNA: That appears to be alienated and to be now owned by the cannery. . . .<sup>54</sup>

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51 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 155 (ICC Documents, p. 105).

52 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 155 (ICC Documents, pp. 105).

53 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, pp. 155-56 (ICC Documents, pp. 105-06).

54 Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 156 (ICC Documents, p. 106).

The Chief concluded this part of his testimony by thanking the commissioners for their patience and hard work "in trying to settle up the affairs of my Band."<sup>55</sup>

Following their meeting with the tribes of the Kwawkewlth Agency, the commissioners returned to Victoria, where they met with Indian Agent Halliday on June 24, 1914. Although the official transcript of this interview is not available, we do have a précis report from the records of the Royal Commission describing the interview with Agent Halliday and noting his recommendations with respect to the land applications from his Agency. According to the précis report, Agent Halliday began by explaining that he had been the Agent for the Kwawkewlth Agency for eight years and that he "had a fair knowledge of all the reserves in the Agency."<sup>56</sup> After commenting on the general state of affairs in the Kwawkewlth Agency, Agent Halliday reviewed the Additional Lands Applications put forward by the various tribes in his Agency. With regard to the applications by the Nimpkish Band, Agent Halliday made the following observations and recommendations:

**Application 72** (extension of IR 3): This application "was apparently all covered [by a timber limit]. If possible, however, he would recommend that this land be given to the Indians after the timber thereon had been removed. . . . His recommendation was for the granting of about 500 acres."<sup>57</sup>

**Application 73** (1/2 mile on each side of Nimpkish river from Kla-anck to Wilkiamayi): "As for Kla-anck, applied for by Chief Willie Harris on the ground that his forefathers had had a village there, he would not recommend this application as the land was so isolated that it would never be used."<sup>58</sup>

**Application 74** (Duhdahyilesdamis): He would not recommend the application for Duhdahyilesdamis, "the land affected being found to be alienated."<sup>59</sup>

**Application 75** (strip of land 1/2 mile in from Beaver Cove to a small lake [Wadsu] midway and on the east side of Nimpkish Lake): "The application

55 Chief Alf Lageuse, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, June 2, 1914, p. 158 (ICC Documents, p. 108).

56 Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 129).

57 Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

58 Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

59 Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

for land from Beaver Cove to Wadsu Lake was not recommended, as unnecessary; the Indians might hunt and trap in that locality without interference, and if granted them, they would make no other use of this land.”<sup>60</sup>

**Application 76** (Ksuladas or Plumper Islands): He recommended “that the application for Plumper Islands be granted, with a maximum allowance of 100 acres.”<sup>61</sup>

**Application 77** (Kuldekduma or Pearse Islands): “The Pierce [sic] Islands had long been used by the Indians as a fishing station, and he recommended that the smaller Islands of the group, lying on the eastern side and containing fifty or sixty acres be granted; these Islands were small and rocky and used only as basis [sic] for fishing operations.”<sup>62</sup>

**Application 78** (enlargement of Alert Bay IR): “He did not recommend the application for an extension of Reserve No. 1, the lands affected being found to be already alienated.”<sup>63</sup>

The précis report also contained the following general note concerning the status of the reserve lands available to the Nimpkish:

At present more land was not required by this Band, but it was one of the few in the Agency increasing numerically, and also one of the most progressive, and required room for expansion.<sup>64</sup>

Despite this comment, Agent Halliday still supported only three of the Nimpkish applications (72, 76, 77) with modifications, and recommended that the other four be rejected. Application 72 was requested for the timber and fishing, and Applications 76 and 77 were intended to be used as fishing stations. Applications 73 and 78 were requested for settlement purposes to allow for future expansion of the Band, but were not recommended by Halliday because the former was too remote and the latter was already alienated.

<sup>60</sup> Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

<sup>61</sup> Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

<sup>62</sup> Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

<sup>63</sup> Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 131).

<sup>64</sup> Royal Commission on Indian Affairs for the Province of B.C., Précis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

The Commissioners had not forgotten that the tribes of the Kwawkewlth Nation had been considerably disenchanted with Agent Halliday during the Commission's visit to the Kwawkewlth Agency, and they asked Agent Halliday if he wished to make any statement in relation to the complaints they had heard about him. Agent Halliday explained that the Commission had come into his Agency just after he had completed a number of prosecutions under the anti-potlatch law. He felt sure that, "[i]f it had not been for his action against the potlatch . . . no complaints against him would have been expressed."<sup>65</sup>

In July 1914 W.E. Ditchburn, Inspector of Indian Agencies for British Columbia, submitted his report for the months of May and June to the Department of Indian Affairs. In his report he included a description of his tour of the West Coast and Kwawkewlth Agencies with the McKenna-McBride Commission. Inspector Ditchburn noted that while the Indians on the West Coast were very moderate in their requests for additional reserve lands, the Indians of the Kwawkewlth Agency had "asked for very extensive tracts of land, each tribe asking for from five to twenty new large allotments."<sup>66</sup> He observed that, since most of the land in the Agency had already been alienated by the Crown, it was doubtful whether the Commission would be able to fulfil the wants of the Indians.<sup>67</sup>

### **McKenna-McBride Commission's Recommendations for Additional Lands**

In October 1914 the Commission dispatched Ashdown Green, variously described as technical officer and surveyor to the Commission, to Alert Bay. Mr. Green forwarded his report to the Commission in December 1914, at which time he commented on his activities on the coast of Vancouver Island:

[O]n 3rd October I arrived at Alert Bay. The Agent, Mr. Halliday, was away for a few days and did not return until the 6th, in the meantime I had the engine of the launch repaired and took on oil, fuel and stores.<sup>68</sup>

65 Royal Commission on Indian Affairs for the Province of B.C., *Precis Report of Agent Halliday's Testimony*, June 24, 1914 (ICC Exhibit 6).

66 W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, July 1914 (ICC Documents, p. 135).

67 W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, July 1914 (ICC Documents, p. 135).

68 Ashdown H. Green, BCLS, to Secretary, Royal Commission on Indian Affairs, December 21, 1914 (ICC Documents, p. 136).



Green visited both the Plumper and Pearse Island groups on October 15, 1914, and, in his report, he gave the following details about them:

Ksui la das, the most southwesterly island of the Plumper group contains about 70 acres. It is a well sheltered spot with a good gravel beach. Some five or six acres might be made into gardens, the remainder of the island is rocky. The Indians say they carry the timber to Alert Bay for firewood, but its principal use is as a fishing station.

Kul de kdusna, situated about 4 miles east of Alert Bay, is the most northeasterly island of the Pearse group. It contains about 60 acres, the whole of which is rock. With the exception of a small cove on the southern shore the waterfront is steep, and on the northern portion precipitous. The timber is small and principally hemlock, though there is a limited quantity of fir which the Indians use for fuel. One dilapidated house is the only sign of Indian occupation; it is used when halibut or coho fishing.<sup>69</sup>

By the summer of 1915, the Commission had obtained further information regarding the availability of land in the Kwawkewlth Agency. When it became apparent that much of the land requested by the Kwawkewlth tribes was unavailable, the Secretary to the Royal Commission wrote to Agent Halliday to apprise him of the situation. In a letter, dated July 28, 1915, the Secretary explained that out of a total of 195 applications submitted from the Kwawkewlth Agency, Agent Halliday had endorsed 73, rationalizing the rejection of the others on the grounds that he "thought the requirements of the Indians would be sufficiently met by the granting of the lands applied for which [he] did recommend."<sup>70</sup> However, of these 73 recommendations, the lands had been reported alienated and unavailable in 46 cases.<sup>71</sup> The Secretary went on to ask whether Agent Halliday, in light of the unavailability of these lands, wished to reconsider some of the applications he had originally rejected. The Secretary gave the following specific directions:

[T]he Commission would be glad to know if you desire to reconsider your opinion with regard to any of the applications which were not endorsed, in order that alternative lands may possibly be obtained under such applications to meet the requirements of the Indians which would otherwise not be met.

I have therefore to request that you go over such applications carefully and report in detail your views thereon to the Commission, accurately describing such alternative

69 Ashdown H. Green, BCLS, to Secretary, Royal Commission on Indian Affairs for the Province of B.C., December 21, 1914 (ICC Documents, p. 137).

70 Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, p. 144).

71 Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, p. 144).

lands as you may see fit to recommend, assuring yourself that such lands are vacant and available . . .<sup>72</sup>

In response to the Commission's request for a revised set of recommendations, Agent Halliday replied:

Application 76 [sic] Kuldekduma or Pierce [sic] Islands.

When Mr. Green visited these islands it was thought sufficient to give the most north easterly island of the Pearce [sic] group but as application 71 [sic] has been rejected I would strongly recommend that they be given all the Pearce [sic] group excepting the large one lying to the south west of the group.<sup>73</sup>

On September 1, 1915, the Secretary to the Commission informed Agent Halliday that his report on the additional lands applications of the Kwawkewlth Agency met the requirements of the Commission and, therefore, it would be unnecessary for him to be re-examined.<sup>74</sup>

Early in 1916 R.A. Renwick, Deputy Minister of Lands for British Columbia, advised the Secretary to the Commission that the lands recommended by the Commission for Applications 76 and 77. (the applications relating to the Plumper and Pearse Islands) were "apparently vacant and available for Indian purposes subject to survey."<sup>75</sup> A short time later, the commissioners met to review the evidence before them and compile their final report. In a meeting on February 25, 1916, they approved, in part, the Nimpkish applications for additional lands numbered 76 and 77.<sup>76</sup>

The Commission issued its final report on Indian Affairs in British Columbia on June 30, 1916. Included in the report were Minutes of Decision, dated August 14, 1914, which confirmed the five reserves allotted to the Nimpkish

72 Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, July 28, 1915 (ICC Documents, pp.144-45).

73 W.M. Halliday, Indian Agent, to C. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of B.C., August 11, 1915 (ICC Documents, p.149). It should be noted that Agent Halliday's reference to Application 71 is a mistake; it should be Application 72. Similarly, the Pearse Islands application should be 77 and not 76 as indicated here.

74 Secretary, Royal Commission on Indian Affairs for the Province of B.C., to W.M. Halliday, Indian Agent, September 1, 1915 (ICC Documents, p.151).

75 R.A. Renwick, Deputy Minister of Lands, British Columbia, to C.H. Gibbons, Secretary, Royal Commission on Indian Affairs for the Province of B.C., February 21, 1916 (ICC Documents, p. 152).

76 Minutes of Meeting, Royal Commission on Indian Affairs for the Province of B.C., February 25, 1916 (ICC Documents, p.157).

by Reserve Commissioner O'Reilly in the 1880s.<sup>77</sup> Also included in the report was a table summarizing the Commission's decisions with respect to the seven applications for additional lands submitted by the Nimpkish Band. In regard to Applications 73, 76, and 77, which are at issue in this inquiry, the report states:

**Application 73:**

LAND APPLIED FOR: "1/2 mile on each side of Nimpkish river from Kla-anck to Wilkiamayi . . ."

STATUS OF LAND DESIRED: –

DECISION OF COMMISSION: "Not entertained, as not reasonably required."

**Application 76:**

LAND APPLIED FOR: "Ksuiladas or Plumper Islands – three large islands of the Plumber [sic] Group."

STATUS OF LAND DESIRED: "Reported by Lands Committee as open and available."

DECISION OF COMMISSION: "Allowed: Ksui-la-das, the southwesterly island of the Plumper group . . . approximately seventy (70) acres, subject to survey and to any rights under the 'Mineral Act' which may have been acquired prior to constitution as a Reserve."

**Application 77:**

LAND APPLIED FOR: "Kuldekduma or Pearse Islands."

STATUS OF LAND DESIRED: "Reported by Lands Committee as partially open and available."

<sup>77</sup> Minutes of Decision, Royal Commission on Indian Affairs for the Province of B.C., August 14, 1914 (ICC Documents, p. 163). The Minutes provide:  
 ORDERED: That the Indian Reserves of the Nimkeesh Tribe, numbered from 1 to 5, both inclusive, described in the Official Schedule of Indian Reserves, 1913, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:  
 "No. 1 - Alert Bay, 46.25 acres;  
 No. 2 - Burial Ground, 1.87 acres;  
 No. 3 - Ches-la-kee, 302.87 acres;  
 No. 4 - Ar-ce-wy-ee, 41.30 acres, and  
 No. 5 - O-tsaw-las, 53.25 acres."

DECISION OF COMMISSION: "Allowed: Kuldekduma Island, the most northerly of the Kuldekduma or Pearse group . . . approximately sixty (60) acres, subject to survey and to any rights under the 'Mineral Act' which may have been acquired prior to constitution as a Reserve."<sup>78</sup>

Based on this information, the Commission ordered that only two new reserves be created for the "Nimkeesh Tribe":

[Application 76] ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Nimkeesh Tribe, Ksui-la-das Island, the south-westerly island of the Plumper Group, as per sketch plan of Ashdown H. Green, B.C.L.S., . . . containing an area of Seventy (70) acres, more or less . . .

[Application 77] ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Nimkeesh Tribe, Kuldekduma Island, the most northerly of the Kuldekduma or Pearse Group, as per sketch plan of Ashdown H. Green, B.C.L.S., . . . containing an area of Sixty (60) acres, more or less . . .<sup>79</sup>

It is useful to note that action on the Additional Lands Applications of the Kwawkewlth Agency resulted in the creation of 29 new reserves, comprising an area of 1902.29 acres, which made the net total of the Agency increase 1761.43 acres. The Agency now had 118 reserves of an aggregate area of 18,228.06 acres, or 15.43 acres per capita.<sup>80</sup> In contrast to the Agency average, the Nimpkish had received an additional 130 acres, raising their total reserve acreage to approximately 575 acres, or an average of 4.2 acres per Band member.<sup>81</sup>

The Commission's recommendations, of course, were not binding on either the federal or the provincial governments. According to the terms of the Orders in Council approving the McKenna-McBride Agreement, both governments had to endorse the Commission's report before action could be taken on its proposals. It was not until 1919 that the province passed legisla-

78 Kwawkewlth Agency - Additional Lands Applications (ICC Documents, p. 1).

79 ICC Documents, p. 163a.

80 Final Report, Royal Commission on Indian Affairs for the Province of British Columbia, June 30, 1916 (ICC Documents, p. 160).

81 When the McKenna-McBride Commission examined Agent Halliday on June 24, 1914, he reported that the population of the Nimpkish Band was 137: see Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday's Testimony, June 24, 1914 (ICC Documents, p. 130).

tion enabling it to give effect to the Commission's report and to carry on further negotiations.<sup>82</sup> The federal government passed reciprocal legislation a year later.<sup>83</sup>

In 1920 British Columbia proposed that a joint review of the complete report be carried out. This inquiry was conducted by W.E. Ditchburn, representing Canada, and J.W. Clark, who acted on behalf of the province. They finished their inquiry by March 19, 1923. With regard to the reserves created for the Nimpkish, they upheld the proposals contained in the original report of the McKenna-McBride Commission.

The recommendations of the McKenna-McBride Commission as amended by Messrs Ditchburn and Clark were formally accepted by provincial Order in Council 911 on July 26, 1923. Canada followed suit with federal Order in Council 1265 on July 19, 1924. The reserves were finally transferred to the administration and control of Canada under the authority of provincial Order in Council 1036 on July 29, 1938.<sup>84</sup>

### ORAL HISTORY

During the community session at Alert Bay, several elders and community members provided evidence that the lands at issue in this inquiry were, and continue to be, very important to the 'Namgis people. They also shared with us some of their feelings about Agent Halliday and the devastating impact his actions had on their community.

#### **Application 73: Woss**

Included in Application 73 was the area around Woss. Bill Cranmer<sup>85</sup> described at some length the use that was made of this area:

Woss Lake is the major spawning lake for the sockeye salmon. At one time the Nimpkish River was the third largest sockeye producer on the B.C. coast, and the sockeye would come in for the Woss around June. They'd travel up the Nimpkish system. And at one time our people used to go up there to dry the salmon after they'd spawned. And they did that for a reason that when they reached that area they'd used up most of the oil and the fat from their body and it would preserve better for drying and to provide the food for the winter.

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82 *Indian Affairs Settlement Act*, SBC 1919, c. 32.

83 *The British Columbia Indian Lands Settlement Act*, SC 1920, c. 51.

84 E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 148-49, 160.

85 At the time of the community session, Bill Cranmer was the director of the U'mista Cultural Centre. He is currently the chairman of the board of the Centre and was elected Chief of the 'Namgis First Nation on May 10, 1995.

And my mother said that my father had a smokehouse there right up to the time the logging companies were starting to get established there, and his smokehouse was demolished by the logging companies.

So our people used that area for the gathering of the sockeye salmon. And there was another distinct sockeye salmon run that went up to Vernon Lake, which is a lake even further up the valley. And the whole of the Nimpkish River system was used for food gathering. It's a well known fact that the Nimpkish were a very wealthy tribe at one time because of the resources of the river.

As a matter of fact, one of our creation stories for the Nimpkish is that in the early days when the Creator came around, they asked one of the early Nimpkish what he wanted to be, if he wanted to be something else. And they asked him if he wanted to be a mountain, and he said no. "Do you want to be a tree?" He said no, that he wanted to be a river so he could flow forever and provide our people with fish. And the name of the river is Gwani. So even far back as that our people recognized the importance of the river, Gwani River, to supply the resources that kept our people alive and in those early days kept them a very wealthy people, that allowed them to carry on their traditions, the potlatch traditions.

MS. GROS-LOUIS AHENAKEW: Do you know if Woss was used for other purposes than fishing activities?

BILL CRANMER: Woss was the point where they would travel to the west coast for trading with the west coast people. I was told also that a lot of our people could speak the language of the west coast. I was listening to a tape recording that my father made that said his dad could speak the west coast language because of the amount of trade that was done through the Grease Trail, as they called it.

MS. GROS-LOUIS AHENAKEW: Could you explain to us why it was called the Grease Trail?

BILL CRANMER: Well, on the coast of British Columbia there's very few places where they made the oolichan grease. It is quite a treasured commodity. It was used by our people as flavouring for the food that we ate. It was believed to have medicinal purposes. I can remember when I was little and I used to get sick, my mother used to spoon feed the klina, which is what we call it, into me to make me better.

But in the early days – even now there are only two rivers in this whole area that the oolichans go to spawn. That's in the Kingcome Inlet and the Knight Inlet. And in the Knight Inlet area all of our tribes had traditional spots where they could fish for oolichans and prepare oolichans on what they call the Klina-Klina River now. And they would come back to their villages and that would be a major trade item because of the scarcity of other rivers that provided oolichans.<sup>86</sup>

– Bill Cranmer

George Cook provided similar evidence:

it [Woss] was a home for our people and they dried sockeye up at Woss. And also that the west coast and we – there's a trail that was used and it's called the Grease

<sup>86</sup> ICC Transcript, April 21, 1995, pp. 18-21 (Bill Cranmer).

Trail that comes through Woss and comes into the Nimpkish, and it was used for trading – trading, and it was very important at Woss. There's a piece of land up there which was used for trading, and this is why that Woss was important to our people.

The Grease Trail, I think to my knowledge that there's still some type of remains at Woss when they – they didn't abandon it. So you can see the importance of Woss and also that I think I recall that it only just didn't stop at Woss, that there was another village further up in there called Vernon Lake. There was another village there also. So Woss was very important to us also.<sup>87</sup>

– George Cook

We also heard evidence that, at one time, people stayed at Woss:

MS. GROS-LOUIS AHENAKEW: Did people stay there [at Woss]?

ETHEL ALFRED: Yeah. My husband used to tell me that they used to stay there, eh, but I never went up there to Woss. He always did talk about it when you going towards the island, we always mentioned, you know, that the white people has taken away that from us. He said that they claim that we don't own it. It's called Wa'as in Indian, Wa'as, and that's why the white people call it Woss . . .

MS. GROS-LOUIS AHENAKEW: Was there any sign of permanent living there? Was there houses? Was there something to shelter the people on these islands?

ETHEL ALFRED: Yeah, he said there were houses there. He used to say that there used to be houses there. . . .<sup>88</sup>

– Ethel Alfred

Despite the fact that the Woss area played an important role in the history and culture of the 'Namgis people, Agent Halliday did not support the Band's application for that land because he considered this area to be too remote from Alert Bay. During this Commission's inquiry, Mr. Bill Cranmer suggested that Mr. Halliday was motivated primarily by a desire to prevent the 'Namgis people from practising the potlatch:

The name of Mr. Halliday has been brought up, and one can only assume that his master plan was to try to keep the Namgis here in Alert Bay, especially when he recommended that this be one of the lands that be increased to accommodate the Namgis, and the minimal recommendations that he made for the outlying islands would prevent the Namgis from travelling too far from Cormorant Island. I would see the same thing in the Nimpkish River system, where his comment was that it would be too far for the Namgis to travel to gather their traditional resources.

. . . .  
And again, you'd wonder what the master plan of Indian Agent Halliday, when he was instrumental in changing the *Indian Act* in the early 1900s to the point in 1921

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87 ICC Transcript, April 21, 1995, pp. 7-8 (George Cook).

88 ICC Transcript, April 20, 1995, pp. 24-25 (Ethel Alfred).

when they arrested all the people that attended my father's potlatch in Village Island, where he could act as the judge at the trials of our people, where it was already demonstrated that he was working for the years before that in trying to stamp out the potlatch. There were many people arrested prior to that in 1921, but the judges at the time who tried these cases would dismiss the cases because the Act was not clear. But Mr. Halliday was instrumental in changing the *Indian Act* so that he alone could be the judge and thereby arresting and sending our old people to prison.

So we can just imagine what his master plan was for the Namgis and the other Kwakwala-speaking peoples, is to keep them in one small confined area. . . .<sup>89</sup>

– Bill Cranmer

### Applications 76 and 77: Plumper and Pearse Islands

The lands covered by Applications 76 and 77 were in the Plumper and Pearse Island groups, respectively. Ethel Alfred and Peggy Svanvik described the food-gathering activities that took place there:

My father used to fish a lot, jig, and he used to bring a lot of cod home that my mother used to smoke and dry sometimes and we would just eat it or salt it. And it was all around the little islands, the surrounding islands, like I suppose Plumper and Pearse, and we used to go to Haddington Island as well for all of the things that the people have mentioned – clams and fish, and like here on this island, seaweed.<sup>90</sup>

– Peggy Svanvik

MS. GROS-LOUIS AHENAKEW: . . . I'd like a little more information about Plumper Island and what kind of activity took place around that island, if you remember.

ETHEL ALFRED: Well, they used to go fishing for halibut, to dry halibut there, and dry clams, and that's when they used to go there, when halibut season is on when they come around. So that's what the people, they used to have houses there. . . .<sup>91</sup>

– Ethel Alfred

MS. GROS-LOUIS AHENAKEW: . . . You mentioned that the people used to fish, and they still do, but did they also hunt?

ETHEL ALFRED: Oh, yes.

PEGGY SVANVIK: Yes.

MS. GROS-LOUIS AHENAKEW: Where did the hunting take place?

PEGGY SVANVIK: All over. I remember like Cracroft Island and different places like Pearse and all. My father used to do a lot of hunting, and he hunted all over.<sup>92</sup>

– Ethel Alfred and Peggy Svanvik

89 ICC Transcript, April 21, 1995, pp. 14, 16-17 (Bill Cranmer).

90 ICC Transcript, April 20, 1995, p. 33 (Peggy Svanvik).

91 ICC Transcript, April 20, 1995, p. 38 (Ethel Alfred).

92 ICC Transcript, April 20, 1995, pp. 39-40 (Ethel Alfred and Peggy Svanvik).



Mary Hanuse told us that the Pearse Islands were used for shelter: “I know that was a place where people, if you’re caught in the storm you go inside the Pearse Island. There were some houses there.”<sup>93</sup>

George Cook echoed much of the evidence given by the other witnesses and provided further details:

And on our claim, which is the Pearse Island group, that that was also used as a safe haven because the waters surrounding the Pearse Island group was – this is where even today that we still fish for cod, halibut. And also on the Pearse Island that we pick seaweed even today. That goes back in history. And also we picked sea eggs there, which we used also, and Chinese slippers they’re called. These were all on Pearse Island. And also on Pearse Island, there’s deer on that island and it was passed down to me that – whenever there was a storm or anything that they had to stay there to wait out the storm or things like that, that there was always meat and a food supply from Pearse Island. Pearse Island was very important.

And also the passes and the other islands also, that because the abundance of halibut in the area, especially at this time of the year, that they used that place to dry halibut, and it was kind of – it was used like a station, I think it’s called, or it was just a home. So all of the islands that are concerned here is very important, and it was well used even way back as time began.

. . . since our food supply was here in the surrounding waters adjacent to Pearse Island and the Plumper Islands . . . we needed to have these islands as our safe havens and for purposes of drying. And you have to realize that our people, when they went to these islands and stayed here instead of – them days we only had canoes, what I was told, canoes, and so they just stayed on these islands and did drying, what we call kawashtay (phonetic) is dried halibut that – they can dry it and they can – it lasts us just the same as on the Prairies you have jerky. And so that’s what they did here, and the food supply can last all winter once this was all dried.<sup>94</sup>

– George Cook

### **Indian Agent Halliday**

Several witnesses spoke of the hardship caused by Indian Agent Halliday:

I remember him [Agent Halliday]. He wasn’t a very nice man. Yeah, he wasn’t very good to us, I don’t think. . . .

. . . He used – well, he used to – I don’t think he treated our people very nice, Mr. Halliday. I knew his secretary very well. We used to have meetings together because we had a group that we used to call “Young Mothers,” and I really used to enjoy going with his secretary.

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93 ICC Transcript, April 20, 1995, p. 8 (Mary Hanuse).

94 ICC Transcript, April 21, 1995, pp. 4-7 (George Cook).

So he didn't treat our people right, I know that for a fact. And I was fortunate enough, you know. I never went to the Indian Agent for – I never went on welfare, so that I was fortunate . . .

So I can't say anything too nice about – I don't want to talk about Mr. Halliday because he wasn't nice to us. And I was about 11 when our potlatch system was taken away from – 1921. It was my auntie and my uncle that had the potlatch, and our people were put in jail for that. My inlaws were part of it because they took part in that potlatch, eh. It's hard to explain how things go, and my dad was a part of it for my aunt. He had quite a bit to do with that. That's why they took all our regalias away.<sup>95</sup>

– Ethel Alfred

MS. GROS-LOUIS AHENAKEW: You mentioned that your parents were sent to jail.

PEGGY SVANVIK: My grandparents.

. . .

MS. GROS-LOUIS AHENAKEW: For a potlatch.

PEGGY SVANVIK: For participating in a potlatch, yeah.

MS. GROS-LOUIS AHENAKEW: Who sent them to jail?

PEGGY SVANVIK: Well, I guess Mr. Halliday.<sup>96</sup>

– Peggy Svanvik

. . . to our people, fighting for land and trying to establish our original claim that we own these territories, these islands, has been a very slow process, and it's also very hard to understand why certain people, especially I guess that you're going to speak of Mr. Halliday, that claims, making decisions after being here for – I think it was eight years – and made a decision on Pearse Island and the Plumper groups. And it's always our intention and it's always in our history that before you make a decision that you have to walk in his moccasins, walk in his shoes. Eight years of living in Alert Bay, to have a knowledge of what our ancestors had is unrealistic for Mr. Halliday at that time to make a decision such as he made concerning the Pearse Islands and the Plumper groups and also the Cormorant Island.

. . .  
Mr. Halliday was one of the instigators of the stopping of our potlatches, and I think that Mr. Halliday was not acting in the best interests of anyone in this territory, especially Nimpkish. And everything that – according to what was passed down to me is that everything was self-interest, that decisions that were made were not made for the good of the community or any of our villages. I think it was also mentioned yesterday by Mrs. Alfred that he wasn't a very nice man, and when you take that into – coming from an elder and coming from Mrs. Alfred, that these are harsh words, as harsh as can be said in reflection to Mr. Halliday. So you can see the effects that his decision on this village has been quite devastating. And even though that he was here

95 ICC Transcript, April 20, 1995, pp. 29-30 (Ethel Alfred).

96 ICC Transcript, April 20, 1995, pp. 35-36 (Peggy Svanvik).

supposedly for the benefit of our Nimpkish people, that was not so. This is what was all passed down to me.<sup>97</sup>

– George Cook

MS. GROS-LOUIS AHENAKEW: Can she [Agnes Cranmer] remember anything about the claim in question, the use of the land?

AGNES CRANMER: (Remarks in Kwakwala)

BILL CRANMER: She remembers at the time that this is when our people suffered a great deal because of the actions of the white people, I guess especially Halliday, in the banning of the potlatch.

AGNES CRANMER: (Remarks in Kwakwala)

BILL CRANMER: And it wasn't only the chiefs of the Namgis that suffered. It was the chiefs of the other tribes also.

AGNES CRANMER: (Remarks in Kwakwala)

BILL CRANMER: A lot of the lives of our chiefs were ruined because of that action.<sup>98</sup>

– Agnes Cranmer

Thus, it is clear from the words of the witnesses that the lands covered by Applications 73, 76, and 77 were of critical importance to the 'Namgis people. It is also evident from the community testimony that Agent Halliday was strongly perceived as acting contrary to the interests and aspirations of the people he had responsibility for as Indian Agent.

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97 ICC Transcript, April 21, 1995, pp. 11-12 (George Cook).

98 ICC Transcript, April 21, 1995, p. 22 (Agnes Cranmer).

## PART III

### ISSUES

Counsel for the Band framed the issues as follows:

#### **FIDUCIARY DUTY**

- 1 Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:
  - a) Application 73
  - b) Application 76
  - c) Application 77
- 2 Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's applications for additional reserve lands? If so, did they breach that duty in relation to:
  - a) Application 73
  - b) Application 76
  - c) Application 77

#### **NEGLIGENCE**

- 3 Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?
- 4 If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:
  - a) Application 73
  - b) Application 76

- c) Application 77
- 5 If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:
- a) Application 73
  - b) Application 76
  - c) Application 77

### **SPECIFIC CLAIMS POLICY**

- 6 Does this claim fit within the parameters of the Specific Claims Policy?
- Counsel for Canada did not formulate their own statement of the issues; rather, they simply summarized and responded to the arguments advanced by the First Nation.

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# PART IV

## ANALYSIS

### FIDUCIARY DUTY

#### Issue 1

Did Indian Agent Halliday owe a fiduciary duty to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands? If so, did he breach that duty in relation to:

- a) Application 73
- b) Application 76
- c) Application 77

#### *Submissions of the Parties*

The First Nation submits that Indian Agent Halliday owed the Band a fiduciary duty which consisted "of honesty, good faith, and putting the interests of the Band first and foremost."<sup>99</sup> Moreover, the First Nation asserts that Agent Halliday owed a duty to protect and pursue the best interests of the Indians and bands of the Kwawkewlth Agency, based on "the Federal government's position and policies as set forth in the instructions given to Indian Agents, including Mr. Halliday, the trust-like position of the Indian Agent as set forth in the relevant provisions of the *Indian Act* then in force and in the statements made by members of the McKenna McBride Commission."<sup>100</sup> The First Nation contends that Agent Halliday was obliged not only to protect the existing rights of the Band but also to further its interests in obtaining the additional reserve lands sought by the Band, or, at the very least, those areas that were needed.

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99 Written Submissions on Behalf of the Namgis First Nation, Formerly Known as the Nimpkish Indian Band, September 6, 1995, p. 28 (hereinafter referred to as "Nangis Written Submissions").

100 Namgis Written Submissions, p. 29.

In support of its position, the First Nation maintains that the criteria for a fiduciary relationship identified by Madam Justice Wilson in *Frame v. Smith* and by Mr. Justice La Forest in *Hodgkinson v. Simms* (discussed more fully below) are met in this case. First, Agent Halliday had the scope for the exercise of some discretion or power in relation to all the Band's affairs. He was appointed by the dominion to oversee the affairs of Indians within his Agency, and he had the powers and authority of an *ex officio* magistrate. More specifically, he made recommendations to the McKenna-McBride Commission which were very influential in view of his position as Indian Agent, and he arranged the Commission's and Mr. Ashdown Green's trips to areas within the Kwawkwalth Agency, thus controlling who they met and what they saw.<sup>101</sup> Second, Agent Halliday "was in a unique position in relation to what was put forth to the McKenna McBride Commission. . . . [He] had kept [the Chiefs] in the dark as to what they could seek as new reserves and, rather than forcefully supporting their positions, made them appear disorganized and greedy."<sup>102</sup> Third, the Band was peculiarly vulnerable to Agent Halliday, as is evidenced by the contempt of the Band members towards him, particularly in relation to his involvement with the potlatch trials and the confiscation of valuable artifacts. The First Nation concludes that, "[a]s a result of his powers under the *Indian Act* and given the policies of the Department of Indian Affairs, Indian Agent Halliday could do virtually what he wished in relation to the interests of the Band and its members."<sup>103</sup>

The First Nation goes on to argue that Indian Agent Halliday breached his fiduciary duty in relation to each of the applications at issue in this inquiry. With respect to Application 73, the First Nation submits that the compelling testimony of Chief Lageuse before the McKenna-McBride Commission, and the evidence of the elders before the ICC on April 20 and 21, 1995, demonstrated the importance of the Woss area to the 'Namgis people. This evidence belies the reason given by Agent Halliday for his refusal to recommend this application – namely, that "the land was so isolated . . . it would never be used." The First Nation submits that Agent Halliday either failed to represent the interests of the Band or, if his statement was made out of ignorance, failed in his duty to inform himself as to the true state of affairs before making his recommendation. In this regard, the First Nation argues that "a crucial part of the fiduciary obligation owed by Indian Agent Halliday to the

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101 Namgis Written Submissions, p. 29.

102 Namgis Written Submissions, p. 29.

103 Namgis Written Submissions, pp. 29-30.

Band was a duty to consult the Band before making representations to the McKenna-McBride Commission.”<sup>104</sup> By failing to consult with the Band, and by failing to protect its interests to obtain reserve land, the First Nation submits that Agent Halliday breached the fiduciary duty that he owed to the Band:

There simply was no valid reason for Indian Agent Halliday to put forth the position that he did with respect to this application for the McKenna McBride Commission. There were no competing interests of the Crown which needed to be considered, nor does it appear from the record that he had heard any other objections to the reserve allocation. If the land was unavailable, he should have said so. If that were the case, which there is no evidence to suggest that it was, his duty would have been to advise the Band in order that they could adjust their requests to the McKenna McBride Commission.<sup>105</sup>

With respect to Application 76, the First Nation asserts that Agent Halliday acted against the Band’s best interests and breached his fiduciary duty by recommending that a maximum of 100 acres be allotted in relation to three large islands requested by the Band in the Plumper Island group. The First Nation argues that Agent Halliday was aware that the Band had an increasing population at the time and would need additional land. Given that the lands were vacant and adjacent to the main village at Alert Bay, the First Nation submits that Agent Halliday should have considered the Band’s needs as pre-eminent and pressed for the reserve allotment sought by the Band.<sup>106</sup> Instead, Agent Halliday sought to limit the Band’s allotment in the Plumper Island group and was, ultimately, successful.

Finally, with respect to the Pearse Island group covered by Application 77, the First Nation maintains that the evidence of the elders confirms that the Band used and needed these islands. Yet there is no evidence that Agent Halliday fulfilled his duty to consult with the Band regarding its request for the Pearse Islands. On the contrary, the First Nation submits that the evidence of the Chiefs at their meeting with the McKenna-McBride Commission on June 1, 1914, tends to indicate that he ignored their pleas and left them to fend for themselves before the Commission. Similar to its argument with

104 Namgis Written Submissions, p. 30. The First Nation cites the following decisions of the British Columbia Supreme Court in support of the proposition that, depending on the circumstances, the Crown may owe a fiduciary duty to consult with Indians before taking any action which might adversely affect their interests: *Delgamuukw v. British Columbia*, [1991] 3 WWR 97 (BCSC), rev’d [1993] 5 WWR 97 (BCCA), and *Ryan v. British Columbia (Ministry of Forests - District Manager)*, [1994] BCJ No. 2642 (SC).

105 Namgis Written Submissions, p. 31.

106 Namgis Written Submissions, pp. 31-32.



respect to Application 76, the First Nation submits that there is no reason why Agent Halliday should not have supported the Band's application, considering that the lands were vacant. The First Nation also submits that, "despite what Indian Agent Halliday may have viewed as his role, based upon the term of his appointment, it was not his duty to be neutral but, rather, to put forth the best interests of the Band, particularly when their 'farming, grazing and woodlands, fisheries or other rights' would be adversely affected, as was the case here."<sup>107</sup>

Canada submits that reserve creation in British Columbia is a public law duty, not a private law duty, and therefore does not give rise to a fiduciary relationship. The political process employed for the purposes of reserve creation was not capable of being supervised by the courts of equity and could not give rise to an enforceable obligation.<sup>108</sup> Furthermore, Canada denies that any fiduciary obligations arose from the Indian Agent's instructions and his representations before the McKenna-McBride Commission. It claims that there was no statute, agreement, or unilateral undertaking by Canada to act for, on behalf of, or in the best interests of the Band in the circumstances of this claim. More specifically, Canada argues that:

- The instructions to Indian agents did not constitute a statute but an internal government directive, which, on their own, did not create fiduciary obligations by Canada towards Indian bands.
- The instructions to Indian agents did not constitute an agreement between the Band and Canada since there is no evidence that the Band was aware of the instructions or agreed with them.
- The instructions to Indian agents did not create a unilateral undertaking on the part of Canada to protect non-reserve lands or to obtain additional reserve lands for the Band. In particular:
  - There is no evidence that the Band knew of or agreed to the instructions in order to create a mutual understanding that the Crown would act solely on behalf of the Band.
  - The instructions do not disclose an intention by Canada to relinquish its own self-interest and to act solely on behalf of the Band. Rather, the

<sup>107</sup> Namgis Written Submissions, p. 33.

<sup>108</sup> Submissions on Behalf of the Government of Canada, September 6, 1995, pp. 2, 16-17 (hereinafter referred to as "Canada's Written Submissions").

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instructions required the Indian agent to do a variety of tasks (for example, enforce section 149 of the *Indian Act* prohibiting Indian festivals, dances, or other ceremonies) which were not performed solely on behalf of the Band.

- The reserve-creation process in British Columbia was a political process which required a joint decision of both the provincial and federal governments to allot lands for Indian bands.
- The instructions were not broad enough to encompass non-reserve lands, and did not require the Indian agent to take any action with respect to non-reserve lands.<sup>109</sup>

In any event, Canada contends that it did not have the power or discretion to unilaterally affect the Band's legal or practical interests. First, as mentioned above, the creation of reserves in British Columbia required a joint decision by both the provincial and the federal governments. Second, Canada could not "control" the Commission's decisions – the Commission treated Agent Halliday as a witness to the Commission, in the same way that it treated Band members as witnesses to the Commission. Third, Agent Halliday's recommendations were largely ignored by the Commission. Fourth, the Band was able to voice its views on its applications for additional reserve lands directly to the Commission. Fifth, the Commission asked for submissions from Agent Halliday only on lands that were originally requested by the Band.<sup>110</sup>

Finally, Canada argues that, since the Band was able to make its own representations before the McKenna-McBride Commission, it did not rely or depend on Agent Halliday to present its views to the Commission, nor was it vulnerable to him in this regard.<sup>111</sup>

In response to Canada's position on this issue, the First Nation submits that the whole purpose of the McKenna-McBride Commission was to settle finally the Indian land question and to establish the true needs of the various bands. Given the constitutional jurisdiction of the federal Crown in relation to Indians and lands reserved for the Indians in subsection 91(24) of the *Constitution Act, 1867*,<sup>112</sup> and Article 13 of the Terms of Union, Canada had an

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<sup>109</sup> Canada's Written Submissions, pp. 18-22.

<sup>110</sup> Canada's Written Submissions, pp. 22-26.

<sup>111</sup> Canada's Written Submissions, pp. 26-27.

<sup>112</sup> Subsection 91(24) of the *Constitution Act, 1867*, assigns exclusive legislative authority for "Indians, and Lands reserved for the Indians," to the Parliament of Canada.

obligation to press for the establishment of reserves, the size, location, and number of which were sufficient for the present and future needs of the Band. While the First Nation acknowledges that the creation of reserves required a joint decision by the provincial and federal governments, it submits that the discretion exercised by Canada inhibited and prevented any possibility of most of the lands in question becoming reserves, particularly in relation to Applications 76 and 77, which were available to the Band. Finally, the First Nation maintains that, even if the Band was given an opportunity to present its views to the McKenna-McBride Commission, these views were given short shrift and, moreover, that Agent Halliday prevented the Band from ably making its case. Even though Agent Halliday was supposed to represent the interests of the Indians, his statements to the McKenna-McBride Commission were to the effect that they did not need the Woss lands under Application 73 and that they needed less than they asked for under Applications 76 and 77. Since great weight was placed on these statements, the First Nation argues that it was vulnerable to Agent Halliday's representations to the Commission.<sup>113</sup>

***Public versus Private Law Duty***

In the Cormorant Island claim of the 'Namgis First Nation, Canada advanced a similar argument to that advanced here – namely, that reserve creation in British Columbia is in the nature of a public law duty, not a private law duty, and therefore does not give rise to legally enforceable fiduciary duties. We rejected that argument in our report into the Cormorant Island claim in light of the comments made by Mr. Justice Dickson (as he then was) in *Guerin v. The Queen*.<sup>114</sup> In that case, Mr. Justice Dickson acknowledged that public law duties do not typically give rise to a fiduciary relationship. This exception did not mean, however, that the Crown's obligation could never come within the scope of the fiduciary principle. Mr. Justice Dickson stated that the Indians' interest in their lands is an independent legal interest created by neither the legislative nor the executive branches of government. As a result, the Crown's obligation to the Indians with respect to that interest is not a public law duty, but rather "in the nature of a private law duty." He concluded that, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. Mr. Justice Dickson also stated that the Indian interest in the land is the same

113 Namgis Written Submissions, pp. 38-40.

114 *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC).

whether it is the interest of an Indian band in a reserve or unrecognized aboriginal title in traditional tribal lands.<sup>115</sup>

We said in our Cormorant Island report that we understood Mr. Justice Dickson to be saying that there is an independent legal interest in the land even before a reserve is created. Any obligation with respect to that interest is in the nature of a private law duty. We found, therefore, that it was possible for an enforceable fiduciary obligation to arise in the reserve creation process.<sup>116</sup> We adopt the same reasoning here. The question that remains to be answered is whether Canada, in fact, had a fiduciary obligation in the circumstances of this claim.

### ***Nature and Scope of Fiduciary Obligations***

In arguing that Agent Halliday owed a fiduciary duty to the Band in relation to his recommendations to the McKenna-McBride Commission, the First Nation refers to a number of court decisions which discuss the fiduciary relationship between the Crown and the Indians: *Guerin v. The Queen*; *Kruger v. The Queen*; *R. v. Sparrow*; and *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*.<sup>117</sup> The First Nation also cites and applies some of the principles enunciated by Madam Justice Wilson in *Frame v. Smith* and by Mr. Justice La Forest in *Hodgkinson v. Simms*.<sup>118</sup>

In *Frame v. Smith*, Madam Justice Wilson proposed the following “rough and ready guide” to identify relationships where it is appropriate to impose fiduciary obligations:

... 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.

115 *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 336-37 and 341.

116 ICC, *Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 68.

117 *Guerin v. The Queen*, [1984] 2 SCR 335; *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA); *R. v. Sparrow* (1990), 70 DLR (4th) 385 (SCC); *Apsassin v. Canada (Department of Indian Affairs and Northern Development)* (1993), 100 DLR (4th) 504 (FCA).

118 *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC).

- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>119</sup>

In *Hodgkinson v. Simms*, Mr. Justice La Forest elaborated further on the approach proposed by Madam Justice Wilson. He there discussed three “uses” of the term “fiduciary,” two of which are relevant for the purposes of this inquiry. Mr. Justice La Forest characterized the first use of the term “fiduciary” as follows:

The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.’s three-step analysis [in *Frame v. Smith*] is a useful guide.<sup>120</sup>

Although the First Nation refers only to the first use, the second use of the term “fiduciary” is described as follows by Mr. Justice La Forest:

As I noted in [*International Corona Resources Ltd. v. IAC Minerals Ltd.*, [1989] 2 SCR 574], however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term “fiduciary,” viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see *supra*, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.<sup>121</sup>

119 *Frame v. Smith*, [1987] 2 SCR 99 at 136. Although Wilson J. wrote in dissent, her list of characteristics was adopted by a majority of the Supreme Court of Canada in subsequent cases. See, for example, *IAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC), per La Forest J. at 29, and per Sopinka J. at 62-63; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC), per La Forest J. at 628, and per Sopinka and McLachlin JJ. at 666.

120 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

121 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 629 (SCC).

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Citing *Guerin v. The Queen* and *Frame v. Smith* (approved by *Hodgkinson v. Simms*), Canada sets out the law relating to fiduciary obligations in a slightly different manner from the First Nation:

In order to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:

- (a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;
- (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
- (c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.<sup>122</sup>

With respect to the term "undertaking," Canada emphasizes particular words used by Mr. Justice La Forest in *Hodgkinson v. Simms* in support of its (Canada's) argument that "the existence of a *unilateral undertaking* by the Crown giving rise to fiduciary duties is determined on the basis of the *mutual understanding* of both the Crown and the Indians that Canada has *relinquished its own self-interest* and agreed to act *solely* on behalf of the Indians."<sup>123</sup>

Canada offered the same test to determine whether a fiduciary obligation arose in the Cormorant Island inquiry of the 'Namgis First Nation. However, we stated in that report that Canada's formulation of the appropriate test confused the case law.<sup>124</sup> As we saw it, the proper approach in the circumstances of that claim was to apply Madam Justice Wilson's "rough and ready guide" set out in *Frame v. Smith*. In other words, the first element of the three-part analysis was properly the "scope for the exercise of some discretion or power," and not the existence of "a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person."<sup>125</sup> We also had difficulty with Canada's argument that the existence of an "undertaking" was determined on the basis of a mutual understanding by both the Crown and the Indians that Canada had relinquished its own self-interest and agreed to act solely on behalf of the Indians. We stated:

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122 Canada's Written Submissions, pp. 14-15.

123 Canada's Written Submissions, p. 15. Emphasis added by Canada.

124 ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 70.

125 ICC, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 73.

Contrary to Canada's suggestion, we do not see Mr. Justice La Forest's statement [in *Hodgkinson v. Simms*] regarding a "mutual understanding that one party has relinquished its own self-interest . . ." as defining the circumstances in which an "undertaking" will give rise to a fiduciary obligation in the context of a *Guerin*-type or *Frame v. Smith*-type analysis. Rather, this statement is an elaboration of the second use of the term "fiduciary." As we understand Mr. Justice La Forest's reasons, fiduciary obligations may arise where *either* the first use *or* the second use of the term is involved. Therefore, if the relationship falls within the *Frame v. Smith* analysis (in other words, it falls within the first use of the term), it is unnecessary to establish that there is a "mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party."<sup>126</sup>

In our view, the same comments are equally fitting in the context of this claim. We therefore decline to follow the approach suggested by Canada for the existence of a fiduciary relationship.

As a starting point, it is important to bear in mind that the Supreme Court of Canada and other courts have characterized the relationship between the Crown and the aboriginal peoples of Canada as fiduciary in nature. Mr. Justice Iacobucci stated this view in clear and succinct terms in the Supreme Court of Canada decision of *Quebec (Attorney-General) v. Canada (National Energy Board)*:

It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6. None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.<sup>127</sup>

Thus, it would appear that the Supreme Court of Canada accepts the basic premise that the relationship between Canada and First Nations is inherently fiduciary in nature. In this sense, the Crown-aboriginal relationship falls within the established categories of fiduciary relationship such as trustee-beneficiary and agent-principal and gives rise to a rebuttable presumption that one party has a duty to act in the best interests of the other. However, Mr. Justice Iacobucci was also clear that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obliga-

<sup>126</sup> ICC, *Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 74.

<sup>127</sup> *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at p. 147 (SCC).

tion . . . The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.”<sup>128</sup>

The task before us, then, is to delineate the scope and content of Indian Agent Halliday’s fiduciary duties to the Band, based on the particular facts of this claim. To assist in this task, we find it useful to examine the factual circumstances of this claim in accordance with the three general characteristics of fiduciary relationships identified in *Frame v. Smith*. We also find it helpful to examine the nature of the relationship from the perspective of three different points in time. Therefore, we have focused on the relationship between the Indian Agent and the Band prior to, during, and after the McKenna-McBride hearings to determine whether any particular fiduciary duties arise under the circumstances of this claim.<sup>129</sup>

### ***Fiduciary Duty prior to the McKenna-McBride Hearings***

One of the prominent features of the Commission’s operations was its meetings throughout British Columbia with all or most of the province’s tribes and bands. It was at these community meetings that the tribes and bands were afforded the opportunity to tell the Commissioners first hand their views on a number of matters and to submit their applications for additional reserve lands. At the risk of stating the obvious, it stands to reason that the more prepared the bands were for the Commissioners’ visit, the greater their ability to present thorough and compelling applications for reserve land. It is in this regard that the Indian Agent had the capacity to play a pivotal role.

One of the primary responsibilities of the Indian Agent was to provide advice to the bands under his charge. Superintendent Vowell’s “Instructions to Indian Agents” in 1909 bear witness to this important responsibility:

The duties of Agents mainly consist *in advising the Indians*, and in protecting them in the possession of their farming, grazing and woodlands, fisheries or other rights, and preventing trespass upon or interference with the same . . .

<sup>128</sup> *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at p. 147 (SCC). Further support for this view can be found in Mr. Justice La Forest’s statement in *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 632 (SCC), that “the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, *‘There is no substitute in this branch of the law for a “meticulous examination of the facts”* . . .” Emphasis added.

<sup>129</sup> The reference to “the McKenna-McBride hearings” includes both the Commission’s hearings with the tribes of the Kwawkwalth Nation on June 1 and 2, 1914, and the Commission’s hearings with Indian Agent Halliday on June 24, 1914.



As the Department has no treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the system of giving presents to them there will be little other responsibilities attaching to the position of Indian Agent than the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those of other nationalities [sic]. The Agent should constantly *advise and instruct the Indians* in the beneficial use and occupations of their farming, grazing and woodland, fisheries or other privileges or industries possessed or pursued by them; and they, the Agents, should take measures to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc. . . .<sup>130</sup>

The Chairman's remarks during the Commission's general meeting with the principal tribes of the Kwawkewlth Nation on June 1, 1914, affirm the importance of the Indian Agent's advisory role:

The Indian Agent's [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights — to visit the Reserves from time to time and see that no one is interfered with them in their privileges; *To be their friend and to give them good advice; To tell them what it is best for them to do and to look after them as a father would his children.* It is also his duty to prevent them from disobeying the laws; To prevent them if possible from doing what is wrong; To explain the law to them and see that it is enforced and to keep them informed as to the mind of the Government. . . .<sup>131</sup>

It is true that the 1909 Instructions and the Chairman's description of the Indian Agent's duties do not explicitly say that the Indian Agent was to provide advice in relation to the McKenna-McBride process. However, given the critical importance of land and the impact of the process on the Band's present and future interests, it defies common sense to suggest that the Indian Agent's general advisory role stopped short of providing the bands with information and assistance vital to their effective participation in the process.

In the language of the "rough and ready guide" in *Frame v. Smith*, Agent Halliday had a unilateral discretion or power to do a number of things prior to the Commission's visit to Alert Bay. First, he could have distributed the plans of the Band's lands that were lying in his office to the Chief and councillors prior to the hearings. Second, he was in a position to determine which lands were alienated and to relay this information to the Band. Third, he

<sup>130</sup> A.W. Vowell, Superintendent of Indian Affairs, British Columbia, to J.A. McIntosh, Indian Agent, covering letter along with memorandum entitled "Instructions to Indian Agents," December 22, 1909 (ICC Documents, pp. 26-27). Emphasis added.

<sup>131</sup> Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80). Emphasis added.

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could have told the Band about the process (what the Commission was doing, why the Commission was coming to the community, what lands the Band could seek) and he could have advised Band members on how to participate most effectively in the process. If the Band had been furnished with this advice and information, it would have been in a much better position to assert its own interests. The Band would have been able to compile a thorough list of available lands and to make persuasive arguments that specific lands were important for the Band's present and future needs. Although it would not have been an onerous task to provide the Band with this information and advice, the evidence is that Agent Halliday did none of these things to assist the Band in preparing its applications for submission to the Commission.

Under the circumstances, it is clear that the Band was peculiarly vulnerable to the exercise of Agent Halliday's discretion. On the evidence before us, it appears that the Band had no other reasonable and practical way of obtaining information about its lands and the process. We acknowledge that the Commission, itself, provided information to the Band once it arrived in Alert Bay. However, it is important to remain cognizant of the amount of time available to the Band to digest and make sense of the information provided by the Commission. The evidence of Chief Owahagaleese was that he received the plan of his land on Saturday night. The Commission commenced its first day of hearings on the following Monday. Assuming that all the bands in the Kwawkwalth Agency received information about the process at the same time as Chief Owahagaleese, the Nimpkish Band barely had a full day to prepare. In our view, this information was too little, too late, to be of any real benefit to the Band.

But could the exercise of Agent Halliday's discretion affect the Band's legal or practical interests? In our view, the exercise of Agent Halliday's discretion could and, in fact, did affect the legal and practical interests of the Band. It is clear that Agent Halliday's failure to disclose information that was readily available to him, and to provide advice to the Band on its available options, had the potential to affect the breadth and quality of the Band's applications for additional reserve lands and, thus, its ability to receive favourable recommendations from the Commission.

If Agent Halliday had properly prepared the Nimpkish Band for the process, it is likely that Chief Lageuse would have requested other lands which were not alienated to third-party interests and that he would have provided greater detail regarding the use and importance of the lands to justify these

applications. This is a fair inference, since Chief Lageuse stated that his land applications represented less than one-quarter of his ancestors' village sites. If other lands were available and reasonably required by the Band, there is every reason to believe that the Commission would have allotted the lands as additional reserve lands. The mandate of the Commission was, after all, to set aside a sufficient quantity of land for the present and future needs of the Indians. In this sense, we are of the view that Agent Halliday did have a fiduciary obligation to prepare the Band for the McKenna-McBride process. A failure to do so was a breach of that obligation. We are mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. The words of Chief Willie Harris at the general meeting of the principal tribes on June 1, 1914, are particularly telling:

... we ought to have an Agent here who will tell the people here what the mind of the Government is and if there is any privileges. The Indians ought to have been fully instructed about these things — The few minutes that we have been listening to you

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our eyes have been opened, and the Indian Agent ought to have told us about all those things. You ought to have seen us in the general meeting this morning before you came – We had the plans, and one would say (Referring to the Indian Reserves on the plans) “where is it” “whose is it” and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.<sup>132</sup>

Even the Chairman of the McKenna-McBride Commission noted Agent Halliday’s shortcomings in this regard, stating that the plans of the Chiefs’ lands were “lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done.”<sup>133</sup>

We are also satisfied that additional lands were reasonably required by the Band. The McKenna-McBride Commission stated in its report that the reserves of the Kwawkewlth Agency, as described in the Official Schedule of 1913, numbered 91, with an aggregate area of 16,600.99 acres. This gave a per capita average of 14.03 acres for the Agency population of 1183.<sup>134</sup> In contrast, the Nimpkish had a per capita average of 3.4 acres.<sup>135</sup> Even after the Band received 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group, it still had a per capita average of only 4.2 acres. Considering that the Nimpkish Band “was one of the few in the Agency increasing numerically . . . and required room for expansion,”<sup>136</sup> it seems reasonable to conclude that the Band was left with insufficient lands.

It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

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132 Willie Harris, Chief of the Nimpkish Tribe, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 89 (ICC Documents, p. 80).

133 Chairman, Royal Commission, June 1, 1914, Royal Commission on Indian Affairs for the Province of B.C., Transcript of Proceedings, p. 86 (ICC Documents, p. 77).

134 Final Report, Royal Commission on Indian Affairs for the Province of British Columbia, June 30, 1916 (ICC Documents, p. 160).

135 Kwawkewlth Agency - Additional Lands Applications (ICC Documents, p. 1).

136 Royal Commission on Indian Affairs for the Province of B.C., Precis Report of Agent Halliday’s Testimony, June 24, 1914 (ICC Documents, p. 130).

### ***Fiduciary Duty during the McKenna-McBride Hearings***

A second prominent feature of the Commission's operations was its separate interview with the local Indian Agent after visiting the reserves in his agency. At this interview, the Agent was asked to review the applications of the various tribes and bands and to provide his recommendations. The First Nation takes the position that it was not Agent Halliday's duty to be independent during this process, but rather to act as an advocate on behalf of the Band.<sup>137</sup> Canada disagrees. Mr. Becker stated as follows in his oral submissions:

The Indians were able to make submissions directly to the McKenna-McBride Commission. They did not need the Indian Agent to represent them before the Commission, and in fact the Commission obviously intended that the Indian Agent speak of the Indian Agent's personal opinions. Otherwise why would they even have called the Indian Agents in? I mean, they already knew what the bands wanted. They had heard directly from the bands: we want application x, y, z. They wanted to hear independently from the Indian Agent in terms of what the Indian Agent thought.

This is not the context where anyone expected the Indian Agent to go in and effectively parrot what the band wanted. That would have added nothing.<sup>138</sup>

We agree with Canada that Agent Halliday did not have a duty to "parrot" the Band's submissions, even if he did not agree with them. His evidence was given under oath, which demanded that he tell the truth and provide his honest opinion on what the present and future land needs of the Band were when he was making his recommendations. This does not mean, however, that Agent Halliday did not have any obligations in relation to the Band. Given the nature of his responsibilities as the Indian Agent, Mr. Halliday should have informed himself about the Band's true land requirements so that he could provide reasonable and well-informed recommendations to the Commission. In order to inform himself of the Band's *bona fide* land requirements, Agent Halliday would have been required to consult with the Band and conduct investigations into the quality, availability, and potential use of various lands.

Canada contends, however, that Agent Halliday could not unilaterally affect the Band's legal or practical interests. It argues that Agent Halliday, like the Band, was simply a witness in the process; the Commission and ultimately the two levels of government were the decision makers and, in some cases, Agent Halliday's recommendations were not followed. We agree that Agent Halliday

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<sup>137</sup> ICC Transcript, September 20, 1995, pp. 19 and 99 (Stan Ashcroft).

<sup>138</sup> ICC Transcript, September 20, 1995, p. 64 (Bruce Becker).

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was not the final decision maker. However, in our view, Canada's position improperly minimizes the importance attached to Agent Halliday's testimony and his actual influence over the final decision of the Commission.

Following oral submissions in this inquiry, both parties submitted further reports analyzing the correlation between Agent Halliday's recommendations and the Commission's decisions for the entire Kwawkwalth Agency.<sup>139</sup> After carefully studying these reports, it appears to us that most, if not all, of Agent Halliday's negative recommendations resulted in the Commission rejecting the application, even if it did not always reject the application for the same reason as Agent Halliday. In addition, it appears that a substantial majority of Agent Halliday's positive recommendations (in relation to lands that were available) resulted in the Commission allotting *some* land, even if it did not always allot the same amount of land recommended by Agent Halliday. These results lead us to conclude that Agent Halliday did, in fact, wield considerable influence in the process. This conclusion is strengthened by the fact that the Commission returned to Agent Halliday for further recommendations after it was discovered that some of the lands he recommended in the initial applications were alienated. It stands to reason that the Commission must have placed some weight on Agent Halliday's opinions; otherwise, there would have been no need to ask him for further recommendations.

Canada also contends that the Band was not vulnerable to the exercise of Agent Halliday's power or discretion because it was able to make its own representations before the Commission. We cannot accept this argument. Even though the Band was able to speak on its own behalf, it was still vulnerable, owing to its lack of preparation for the process. In other words, the fact that the Band was able to address the Commission directly did not mean that it was able to represent its needs and interests in an effective way. In effect, Agent Halliday's failure to prepare the Band for the Commission's hearings tainted the whole process. In addition, as discussed above, it appears that the Commission was reluctant to allot lands without some endorsement from the Agent. Surely this record indicates that the Band was vulnerable to the exercise of the Agent's discretion.

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<sup>139</sup> Stan H. Ashcroft to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, October 12, 1995, enclosing report prepared by Dr. John Pritchard (ICC file 2109-5-1); Rosemarie Schipizky to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, March 12, 1996, enclosing report prepared by Specific Claims West, DIAND, entitled, "The McKenna-McBride Commission: A Review of the Land Applications of the First Nations within the Kwawkwalth Agency, 1914-1916" (ICC file 2109-5-2).

In sum, it is apparent that Agent Halliday had considerable influence in the process, given his role as the Indian Agent for the Kwakewlth Agency. He was expected to inform himself about prevailing social conditions, band population figures, land quality and availability, land areas presently used and occupied by the bands, and lands they might reasonably require in the future. Under the circumstances, we are of the view that he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. A failure to do so was a breach of that obligation. Simply put, Agent Halliday's failure to inform himself had an adverse impact on the Band's applications for land, and the consequences have been felt for generations among the 'Namgis people.

As before, we are mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore propose the following guidelines for determining whether or not the Band has a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.

On the basis of the evidence given by Chief Lageuse on June 2, 1914, and the evidence given to us at the community session on April 20 and 21, 1995, we are of the view that, if Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77 (the Pearse Islands) were actively used by the Band and were of importance to them. We therefore find that a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all of the lands encompassed by Application 76 were "open and available." Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission's notations with respect to Application 77 state

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that the lands were "*partially* open and available." Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary precondition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

The situation with respect to Application 73 (Woss) is more complex. We heard evidence at the community session that the area around Woss was important for gathering and preserving fish and for trading. Presumably, if Agent Halliday had consulted with the Band, he would have obtained similar information. However, we also have the evidence of Chief Lageuse that it had been approximately 50 years since Band members had had a permanent village there and that they had not used it in the meantime for any purpose. Given the evidence of Chief Lageuse that the area had not been used for a number of years, we can see why a reasonable person acting in good faith might have made the same recommendation as Agent Halliday if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. Not only was the area around Woss an old village site and important for food gathering and trade but the evidence confirms that it was also significant in terms of 'Namgis culture and traditions. Therefore, it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. In our view, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72.

Having said that, we think it is unclear whether the lands encompassed by Application 73 were unalienated. Just prior to the oral hearing, Canada submitted evidence that they were not. The Band was unwilling to accept Canada's evidence without further research.<sup>140</sup> We recommend that the Band undertake that research and, if it can be shown that the lands encompassed by Application 73 were unalienated, it should be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

### ***Fiduciary Duty after the McKenna-McBride Hearings***

As mentioned above, when the Commission became aware that many of the lands recommended by Agent Halliday were alienated, the Commission returned to him and asked if he wished to reconsider his opinion with regard

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<sup>140</sup> ICC Transcript, September 20, 1995, pp. 6-13 (Stan Ashcroft, Bruce Becker, Rosemarie Schipizky).



to any of the applications he had not endorsed. As we see it, Agent Halliday had, at the very least, the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. If anything, the Band's vulnerability was more acute at this stage, since the Commission returned only to Agent Halliday for further representations and did not seek the input of the Band on alternative land applications.

In determining whether or not Agent Halliday's recommendations were reasonable at this stage, it is crucial to take into account that he now had more information. Clearly, he was aware that many of the lands he had recommended were alienated and unavailable. Thus, even if a particular recommendation was reasonable in June 1914 when Agent Halliday first appeared before the Commission, it cannot be automatically assumed that it was still a reasonable recommendation in the context of this new information.

In the circumstances of this claim, Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday, himself, believed that the Band required room for expansion, one would think that a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, as discussed above, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available." The same should be presumed with respect to Applications 73 and 77, if the Band can provide evidence that the lands sought in its specific claim were unalienated.

Before leaving this issue, we would like to address briefly Canada's argument that Agent Halliday was restricted in the lands he could recommend at this stage of the process. Canada contends that, "[w]hen the Commission became aware that one of the Band's application [sic] which the Indian Agent had recommended was alienated, the Commission *only* requested the Agent's views on the *original applications of the Band* which he had not endorsed in the first instance. . . . The Commission did not give the Indian Agent free reign to recommend lands which the Band had not applied for."<sup>141</sup>

<sup>141</sup> Canada's Written Submissions, p. 26. Emphasis added by Canada.

It is not clear on the evidence whether Agent Halliday was, in fact, restricted to the original applications of the Band. Even if Canada is correct, however, it is unnecessary for us to decide this point, for it simply returns us full circle to Agent Halliday's obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

## Issue 2

Did the McKenna McBride Commission or its agent Ashdown Green owe a fiduciary duty to the Band in relation to their deliberations and investigations with respect to the Band's applications for additional reserve lands? If so, did they breach that duty in relation to:

- a) Application 73
- b) Application 76
- c) Application 77<sup>142</sup>

The First Nation submits that the McKenna-McBride Commission and its agent, Ashdown Green, owed a fiduciary duty to the Band "to closely examine what were in the best interests of the Band and, if there were no competing interests which should be given pre-eminence, then they should have given priority to the requests of the Band."<sup>143</sup> It bases this argument on the following documents: (1) Article 13 of the *Terms of Union, 1871*; (2) the McKenna-McBride Agreement of September 24, 1912 (in particular, subsection 2(b)); and (3) the federal Order in Council of November 27, 1912, which confirmed the McKenna-McBride Agreement.<sup>144</sup>

Canada denies that the McKenna-McBride Commission and those working for it, such as Mr. Ashdown Green, owed a fiduciary duty to the Band. It relies on the decision of the Supreme Court of Canada in *Quebec (Attorney-General) v. Canada (National Energy Board)*<sup>145</sup> in support of its position.<sup>146</sup>

In the *National Energy Board (NEB)* case, the Supreme Court of Canada was asked to consider whether the National Energy Board owed a fiduciary

<sup>142</sup> Although this issue was raised in the First Nation's written submissions, it was not raised in the First Nation's earlier summary of the claim or at the planning conference. At the oral hearing, Canada requested and was granted an opportunity to provide further written submissions on this portion of the First Nation's argument.

<sup>143</sup> Namgis Written Submissions, p. 33.

<sup>144</sup> Namgis Written Submissions, pp. 33-34.

<sup>145</sup> *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC).

<sup>146</sup> Supplementary Submissions on Behalf of the Government of Canada, October 31, 1995.

duty to the Grand Council of the Crees (of Quebec) and the Cree Regional Authority (the “appellants”) when the Board granted licences to Hydro-Québec for the export of electrical power. The appellants argued that the fiduciary duty owed to aboriginal peoples by the Crown extended to the Board, as an agent of government and a creation of Parliament, in the exercise of its delegated powers. They contended that this duty applied whenever the decision made pursuant to a federal regulatory process was likely to affect aboriginal rights, and that it included the duty to ensure the full and fair participation of the appellants in the hearing process and the duty to take into account their best interests when making decisions.

The Supreme Court of Canada rejected the appellants’ argument. Mr. Justice Iacobucci, speaking for the Court, stated:

It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6. None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of *quasi*-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is *quasi*-judicial: *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at p. 728, [1978] 1 S.C.R. 369, 9 N.R. 115. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludabl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver Registry No. A922935, unreported; and *Dick v. The Queen*, F.C.T.D., June 3, 1992, Ottawa Court File No. T-951-89, unreported [now reported [1993] 1 C.N.L.R. 50, 33 A.C.W.S. (3d) 1029 *sub nom. Wewaikai Indian Band v. Canada*]. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the

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application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose super-added requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.<sup>147</sup>

The First Nation argues that the situation at issue in this claim is very different from that at issue in the *NEB* case:

In this case, the McKenna McBride Commission was not a quasi-judicial Board or tribunal with competing interests to examine. On the contrary, it was to look at the needs of the Indians, both for the present and the future pursuant to its mandate. In the *Cree [NEB]* case, the National Energy Board's decisions only impacted upon the Band's aboriginal interests in land indirectly, whereas in this case, the decisions made by the McKenna McBride Commission impacted directly upon the Namgis First Nation's rights to land. As well, unlike the National Energy Board, which is an independent decision-making body pursuant to statute, the McKenna McBride Commission was set up to specifically deal with the Indian land question pursuant to the *Enquiries Act* of Canada. As well, its decisions were subject to a final decision being rendered by the Federal and Provincial governments.<sup>148</sup>

It is true that there are some distinctions between the McKenna-McBride Commission and the tribunal at issue in the *NEB* case. As Canada and the First Nation both note, the McKenna-McBride Commission was set up as a commission of inquiry under Part I of the *Inquiries Act*, RSC 1906, c. 104. This is clear from the federal Order in Council of November 27, 1912, which confirmed the McKenna-McBride Agreement. It states in part:

The Minister of Justice . . . observes that the Agreement contemplates the constitution of a Commission with certain powers, and confirmation of the proceedings of the Commission by the two Governments;

That the statutory authority of your Royal Highness-in-Council to constitute this Commission is to be found in Part 1 of the Enquiries [sic] Act, Revised Statutes of Canada, 1906, Chapter 104, and it appears to the Minister that in view of the Statutory provisions the proceedings of the Commission must be subject to approval.<sup>149</sup>

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<sup>147</sup> *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at pp. 147-48 (SCC).

<sup>148</sup> Namgis Written Submissions, pp. 36-37.

<sup>149</sup> Federal Order in Council, November 27, 1912 (ICC Documents, p. 49).

Commissions of inquiry are not courts<sup>150</sup> and, according to a number of authorities, are not (generally speaking) quasi-judicial tribunals.<sup>151</sup>

Canada acknowledges that the Supreme Court of Canada was dealing with a quasi-judicial tribunal in the *NEB* case. However, it submits that a commission set up under Part I of the *Inquiries Act* (such as the McKenna-McBride Commission) is an independent body which no more owes fiduciary duties to Indian bands than do quasi-judicial tribunals or the courts.<sup>152</sup>

Canada provided us with several articles in support of its position that a commission of inquiry is an independent body. For example, in a paper delivered to a conference prior to his appointment to the Supreme Court of Canada, Mr. Justice Iacobucci made the following comments in relation to commissions of inquiry:

The basic structure of federal commissions of inquiry is established by Part I of the *Inquiries Act* . . . . Legislative provision is now made for such inquiries in the provinces as well.

Under the various legislative schemes, the objective of commissions of inquiry is to respond to the needs of the executive branch of government by investigating and advising independently and impartially on assigned issues.<sup>153</sup>

Similar statements can be found in an article written by Professor A. Wayne MacKay:

The mandates of commissions of inquiry are as varied as the orders in council or other legal mechanisms used to establish them. Some of the tasks to be carried out would normally include: ascertaining the facts, identifying the relevant issues, researching problems, educating the public on certain issues and making recommendations on matters of public policy. While created by government, one of the major attractions of an inquiry as an instrument of public policy is its independence from the governments of the day. They are special creations of the executive branch but are not answerable to it, as is a regular government department. Terms of reference for

150 See, for example, Frank Iacobucci, QC, "Commissions of Inquiry and Public Policy in Canada," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 24; Russell J. Anthony and Alastair R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985), 3; Gordon F. Henderson, QC, "Abuse of Power by Royal Commissions," in Special Lectures of the Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (Toronto: Richard De Boo Limited, 1979), 500.

151 See, for example, Russell J. Anthony and Alastair R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985), 155; Gordon F. Henderson, QC, "Abuse of Power by Royal Commissions," in Special Lectures of the Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (Toronto: Richard De Boo Limited, 1979), 527.

152 Supplementary Submissions on Behalf of the Government of Canada, October 31, 1995, p. 5.

153 Frank Iacobucci, QC, "Commissions of Inquiry and Public Policy in Canada," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 23.

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commissions of inquiry are usually broadly stated and governments have little control over the shape or direction of the inquiry.<sup>154</sup>

We note, as well, the observations of Mr. Gerald Le Dain who, at the time of his remarks, was the Chairman of the Commission of Inquiry into the Non-Medical Use of Drugs, but who later became a Justice of the Supreme Court of Canada:

A commission of inquiry established under Part I of the federal Inquiries Act is an independent body which, as a matter of formal relation, is on an equal footing with the other institutions of government. Once appointed it is not subject to anyone's direction or supervision. It is not under any degree of ministerial control although it is dependent on the government for its finances and, in theory, its mandate could be revoked by order in council. In practice it is allowed to peter out.

...  
Because of its independent status it is neither necessary nor appropriate that a commission of inquiry be subject to political influence or pressure. . . . Of course, at the end of the day, its independence is what the commission makes of it. The true extent of its independence in practice will depend very much on the personalities of its members.

What should be the attitude of the government towards responsibility for the work of a commission and its report? The government is responsible for the decision to establish a commission, but it should not act as if it is responsible for its report. The report is the act of an independent body. The government should simply allow it to be made public and reserve its judgment. . . . The government's political judgement in appointing a commission may be called in question, but if the commission has been truly independent of government, as it should be, I fail to see why government should assume responsibility for its acts.

To whom then is a commission of inquiry accountable? It must develop some sense of its ultimate responsibility. The order in council appointing it requires it to report to the government or to a designated minister. Ultimately, I believe, it is accountable to the public. This is particularly true where it has been appointed because of a matter of public concern. Its function is to inform the public, to clarify the issues, and to promote understanding of a problem. It really speaks to the public through its report to the government.<sup>155</sup>

From our reading of the *NEB* case, one of the key elements behind Mr. Justice Iacobucci's decision was the National Energy Board's status as an "independent" body "operating at arm's length from government." Given the

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154 A. Wayne MacKay, "Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry," in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990), 34.

155 Gerald E. Le Dain, "The Role of the Public Inquiry in Our Constitutional System," in Jacob S. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973), 81-82.

independent nature of commissions of inquiry (as illustrated by the authorities cited above), we agree with Canada that the reasoning of the *NEB* case can logically be extended to a commission such as the McKenna-McBride Commission. Accordingly, we find that the McKenna-McBride Commission and its agent, Ashdown Green, did not owe a fiduciary duty to the Band.

## **NEGLIGENCE**

### **Issue 3**

Did Indian Agent Halliday owe a duty of care to the Band in relation to his recommendations to the McKenna McBride Commission respecting the Band's applications for additional reserve lands?

### **Issue 4**

If so, was Indian Agent Halliday negligent in failing to fulfil that duty in relation to:

- a) Application 73
- b) Application 76
- c) Application 77

### **Issue 5**

If Indian Agent Halliday was negligent, did his actions or inaction cause the loss of the lands sought by the Band pursuant to:

- a) Application 73
- b) Application 76
- c) Application 77

Issues 3, 4, and 5 all deal with the First Nation's alternative claim that Indian Agent Halliday was negligent in failing to protect and further the best interests of the Band. Given our findings and conclusions with respect to fiduciary duty in Issue 1, we do not find it necessary to consider these issues.

## **SPECIFIC CLAIMS POLICY**

### **Issue 6**

Does this claim fit within the parameters of the Specific Claims Policy?

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Canada contends that this claim does not relate to obligations of the federal government undertaken under treaty, requirements spelled out in legislation, or responsibilities regarding the management of Indian assets and, therefore, does not fall within the subject matter of a specific claim as set out in the Specific Claims Policy.<sup>156</sup> In particular, Canada argues that this claim does not relate to any of the four circumstances enumerated on page 20 of *Outstanding Business*.<sup>157</sup> For convenience, we repeat the relevant passage here:

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.<sup>158</sup>

First, Canada submits that this claim does not relate to a treaty or an agreement between the Indians and the federal Crown. Second, it argues that the Instructions to Indian Agents were an internal government directive and do not form the basis of a statutory instrument. Finally, Canada maintains that the third and fourth circumstances do not apply: "As the Band's claim relates to lands which were not set apart as reserve for the Band, they are not an Indian asset under the policy nor are they Indian lands."<sup>159</sup>

Canada adds that, if the Band is alleging that Application 73 and the rejected parts of Applications 76 and 77 are nonetheless Indian assets or Indian lands, owing to the traditional use of the lands by the Band, the appropriate manner to deal with the claim is through the British Columbia Treaty Commission process.<sup>160</sup> Ms. Schipizky, counsel for Canada, noted in her oral submissions that the Specific Claims Policy specifically excludes claims based on unextinguished native title.<sup>161</sup>

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<sup>156</sup> Canada's Written Submissions, p. 12.

<sup>157</sup> Canada's Written Submissions, p. 12.

<sup>158</sup> *Outstanding Business*, 20.

<sup>159</sup> Canada's Written Submissions, p. 12.

<sup>160</sup> Canada's Written Submissions, pp. 12-13.

<sup>161</sup> ICC Transcript, September 20, 1995, p. 57. Ms. Schipizky referred to p. 30 of *Outstanding Business*.



The First Nation submits that its claim falls under the first two enumerated circumstances on page 20 of *Outstanding Business*. First, the First Nation argues that the McKenna-McBride Agreement, and the subsequent hearings conducted under the Agreement, constituted an “agreement between Indians and the Crown.” It contends that Canada “failed to fulfil its part of the bargain by having an Indian Agent who, rather than represent its interests, gave testimony which, in fact, was detrimental to its interests.”<sup>162</sup> Second, the First Nation asserts that its claim relates to the second enumerated circumstance: “the position and role of Indian Agents were established in the *Indian Act* and their duties and obligations were, pursuant to the *Indian Act*, set forth in the various instructions to Indian Agents. Indian Agent Halliday failed to fulfil these duties and obligations.”<sup>163</sup>

In our report into the Cormorant Island claim of the 'Namgis First Nation, we discussed at some length our position that the four enumerated circumstances of “lawful obligation” on page 20 of *Outstanding Business* are only examples of Canada’s lawful obligations and are not intended to be exhaustive. More specifically, we found that Canada’s fiduciary obligations are “lawful obligations” within the meaning of the Policy.<sup>164</sup> We see no reason to change our position here.

Taking into account the broad object and purpose of the Specific Claims Policy, the most reasonable interpretation of “lawful obligation” is that it includes claims based on a breach of fiduciary obligation. The preamble to the definition of “lawful obligation” in *Outstanding Business* states that:

The government has clearly established that its primary objective with respect to specific claims is to discharge its *lawful obligation as determined by the courts* if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.<sup>165</sup>

When the policy was published in 1982, the Supreme Court of Canada in *Guerin v. The Queen* had not yet recognized breach of fiduciary duty as a separate cause of action in the context of the Crown-aboriginal relationship. It is therefore understandable that fiduciary duty was not expressly referred

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162 Namgis Written Submissions, p. 45.

163 Namgis Written Submissions, p. 45.

164 ICC, *Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 96-97, 100.

165 *Outstanding Business*, 19.

to in the policy. However, the policy defines "lawful obligation" as "an obligation derived from the law on the part of the federal government." It is now well settled that the Crown's fiduciary relationship with First Nations can provide a distinct source of legal or equitable obligation.

Since Canada intended to create a process that would allow it to settle specific claims without the involvement of the courts, it stands to reason that the four delineated examples of "lawful obligation" were not intended to be exhaustive. They are simply illustrations of the types of claims that can be dealt with under the Policy. Two notable exceptions are expressly excluded under the Policy: (1) claims based on unextinguished native (or aboriginal) title; and (2) claims based on events prior to Confederation in 1867. Since 1991, however, Canada has allowed pre-Confederation claims under the Policy.

Therefore, a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions. Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

## PART V

### FINDINGS AND RECOMMENDATIONS

#### FINDINGS

We have been asked to inquire into and report on whether the Government of Canada properly rejected the McKenna-McBride Applications Claim submitted by the 'Namgis First Nation. In assessing the validity of this claim for negotiation under Canada's Specific Claims Policy, we have considered a number of specific legal and factual issues. Our findings can be summarized as follows:

#### **Fiduciary Duty prior to the McKenna-McBride Hearings**

- The Band has a valid specific claim if it can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.
- In the circumstances of this claim, we are satisfied that Agent Halliday failed to disclose material information and to provide basic advice to the Nimpkish Band to assist it in its preparations for the McKenna-McBride hearings. Although this information was readily available to Agent Halliday and would not have been an onerous task on his part, he offered little or no information to the Band to assist it during this important process. This failure was evident from the words of both Chief Willie Harris, at the general meeting of the principal tribes on June 1, 1914, and the Chairman of

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the McKenna-McBride Commission, who noted that the plans of the Chiefs' lands were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done."

- We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkewlth Agency as a whole, the Nimpkish had a per capita average of only 4.2 acres, even after receiving 70 additional acres in the Plumper Island group and 60 additional acres in the Pearse Island group. Considering that the Nimpkish Band "was one of the few in the Agency increasing numerically . . . and required room for expansion," it seems reasonable to conclude that the Band was left with insufficient lands.
- It is unclear, however, whether there were unalienated lands available in 1914 which the Band could have applied for. Since, on the evidence before us, the Band has not established a *prima facie* case that such lands were available, in our view it has not established that it has a valid specific claim on this basis. If supplementary research can confirm that such lands were available in 1914, it should be presumed that the McKenna-McBride Commission would have allotted additional reserve lands. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter which could provide a valid basis for negotiations under the Specific Claims Policy.

### **Fiduciary Duty during the McKenna-McBride Hearings**

- The Band has a valid specific claim if it can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut the presumption on a balance of probabilities.
- If Agent Halliday had consulted with the Band before making his recommendations to the Commission, he would have discovered that all the lands encompassed by Application 76 (the Plumper Islands) and Application 77

(the Pearse Islands) were actively used by the Band and were of importance to them. Therefore, a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the Band. According to the notations made by the Commission, all the lands encompassed by Application 76 were “open and available.” Accordingly, it should be presumed that the Commission would have allotted some or all of the two Plumper islands that were not included in its final decision. The Commission’s notations with respect to Application 77 state that the lands were “*partially* open and available.” Again, the Band has not provided sufficient evidence that the particular lands sought in its specific claim in relation to Application 77 were unalienated. This is a necessary pre-condition before it can be presumed that the Commission would have allotted some or all of the lands as additional reserve lands.

- Given the evidence of Chief Lageuse that the area around Woss had not been used for a number of years, a reasonable person acting in good faith might have made the same recommendation as Agent Halliday in relation to Application 73 if it was absolutely clear that the Commission would allot the lands sought under Application 72 to extend the area of Indian Reserve 3. However, this outcome was not at all clear, since the lands requested under Application 72 were covered by a timber limit. The area around Woss was an old village site, important for food gathering and trade, and significant in terms of 'Namgis culture and traditions, so it is a reasonable likelihood that the Band would have used the area since it was unable to obtain the lands sought under Application 72. Therefore, a reasonable person acting in good faith would have recommended Application 73 at Woss in addition to, or at least in the alternative to, Application 72. However, it is unclear whether the lands encompassed by Application 73 were unalienated. If it can be shown that the lands were unalienated, it should be presumed that the Commission would have allotted some or all of them as additional reserve lands.

### **Fiduciary Duty after the McKenna-McBride Hearings**

- Agent Halliday had the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

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- Agent Halliday knew at the time he was making his revised recommendations that the Commission was unwilling or unable to allot the lands encompassed by Application 72. Since Agent Halliday believed that the Band required room for expansion, a reasonable person would have attempted to match as closely as possible the lost acreage from Application 72 (500 acres). In terms of the Band's original applications, this acreage would have required a revised recommendation that included all or most of Applications 73, 76, and 77, depending on the total acreage in the Plumper and Pearse Island groups. Therefore, it should be presumed that the Band has a valid claim for negotiation with respect to Application 76 since the lands were "open and available." The same should be presumed with respect to Applications 73 and 77 if the Band can provide evidence that the lands sought in its specific claim were unalienated.
  - It is unnecessary for us to decide whether Agent Halliday was restricted to the original applications of the Band when he made his revised recommendations, for any such restriction would simply return us full circle to his obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

### **Fiduciary Duty of the McKenna-McBride Commission and Its Agents**

- Given the independent nature of commissions of inquiry, the reasoning of Mr. Justice Iacobucci in *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC), can logically be extended to a commission such as the McKenna-McBride Commission. Therefore, the McKenna-McBride Commission and its agent, Mr. Ashdown Green, did not owe a fiduciary duty to the Band.

### **Scope of the Specific Claims Policy**

- The four enumerated circumstances of "lawful obligation" on page 20 of *Outstanding Business* are only examples of Canada's lawful obligations and are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy.

- A claim falls within the Specific Claims Policy (1) if it is based on a cause of action recognized by the courts; (2) if it is not based on unextinguished aboriginal rights or title; and (3) if it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If these conditions are met, Canada should consider the claim under the Policy in the interests of avoiding protracted, costly, and adversarial court actions.
- Given our conclusion in Issue 1 that Agent Halliday breached his fiduciary obligation to the Band, we find that this claim fits within the parameters of the Specific Claims Policy.

### **RECOMMENDATIONS**

We therefore make the following recommendations to the parties:

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#### **RECOMMENDATION 1**

**That the McKenna-McBride Applications Claim of the 'Namgis First Nation, with respect to lands included in Application 76 only, be accepted for negotiation under the Specific Claims Policy.**

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#### **RECOMMENDATION 2**


**That the 'Namgis First Nation's claims related to Applications 73 and 77 not be accepted for negotiation under the Specific Claims Policy.**

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#### **RECOMMENDATION 3**

**That the 'Namgis First Nation and Canada conduct further research to determine whether there were unalienated lands available which the Band could have applied for during the 1914 McKenna-McBride hearings. Specific research should also be conducted with respect to lands included in Applications 73 and 77 to determine whether such lands were unalienated and available. At the request of the parties, the Commission is willing to offer its assistance in the completion of additional research.**

FOR THE INDIAN CLAIMS COMMISSION



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



Daniel J. Bellegarde  
Commission Co-Chair



Aurélien Gill  
Commissioner



## APPENDIX A

### 'NAMGIS FIRST NATION MCKENNA-MCBRIDE APPLICATIONS CLAIM INQUIRY

- |   |                                    |                       |
|---|------------------------------------|-----------------------|
| 1 | <b>Decision to conduct inquiry</b> | March 2, 1995         |
| 2 | <b>Notices sent to parties</b>     | March 3, 1995         |
| 3 | <b>Planning conference</b>         | January 31, 1995      |
| 4 | <b>Community session</b>           | April 20 and 21, 1995 |

The Commission heard from the following witnesses: Mary Hanuse, Ethel Alfred, Peggy Svanvik, George Cook, Bill Cranmer, Agnes Cranmer. The session was held at the U'mista Cultural Centre, Alert Bay, BC.

- |   |                                     |                    |
|---|-------------------------------------|--------------------|
| 5 | <b>Legal argument</b>               | September 20, 1995 |
| 6 | <b>Content of the formal record</b> |                    |

The formal record of this inquiry comprises the following:

- Documentary record ( 1 volume of documents)
- 6 exhibits
- Transcripts (3 volumes, 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.

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# APPENDIX B

## THE POTLATCH AND INDIAN AGENT HALLIDAY

The potlatch was, and remains, a central part of the culture and traditions of many native societies along British Columbia's northwest coast. In addition to feasts, dancing, and songs, one of the key elements in the ceremony was the exchange of gifts and the redistribution of property. Indian Agents and missionaries expressed concerns about the perceived negative effects of the potlatch and the distribution of great wealth in ceremonies that could be up to five months in duration.<sup>1</sup> As a result of these views and the perceived evils of the ceremony, the federal government outlawed the potlatch in 1884. Attempts were made to prosecute Indians for violating the potlatch law in the late 1880s and 1890s, but the charges were usually dismissed. By the turn of the century, however, the Department of Indian Affairs was exhibiting a renewed interest in eliminating the ceremony, an interest that coincided with the appointment of William Halliday as Indian Agent to the Kwawkwalth Agency in 1906.

Like many of his contemporaries, Agent Halliday was opposed to the potlatch. In his memoirs, he described the potlatch as a "particularly wasteful and destructive custom, and [sic] created ill-feeling, jealousy and in most cases great poverty." He commented that the "good obtained from it was small, and the evils associated with it were so great."<sup>2</sup> On other occasions, Halliday complained to his superiors that the potlatch was "the great stumbling block in the way of progress."<sup>3</sup>

Agent Halliday first attempted to enforce the potlatch law in 1913, one year before the McKenna-McBride Commission hearings at Alert Bay. He made a series of arrests, but, as in earlier attempts at enforcement, he was unable to secure a conviction. In the wake of this failure, he wrote to his superiors and expressed the opinion that "it would very much simplify matters if the Indian Agent would [sic] summarily deal with this indictable offence."<sup>4</sup> In 1918 the Department of Indian Affairs, under the control of Duncan Campbell Scott, acted on Agent Halliday's recommendation and amended the potlatch law to empower the Indian Agent as both judge and jury in cases involving potlatch trials.<sup>5</sup> Once he knew of his new,

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1 *Potlatch: A Strict Law Bids Us Dance*, 1975 (video produced by U'mista Cultural Centre).

2 W.M. Halliday, *Potlatch and Totem and the Recollections of an Indian Agent* (Toronto: J.M. Dent and Sons Ltd., 1935), 4-5.

3 Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), 95.

4 Cole and Chaikin, *Iron Hand upon the People*, 101.

5 Cole and Chaikin, *Iron Hand upon the People*, 103.

expanded powers, Agent Halliday adopted increasingly harsh methods of enforcement and punishment. A series of arrests and convictions followed which soured relations between Agent Halliday and the Indians of Alert Bay, including the Nimpkish.<sup>6</sup>

In 1919 Agent Halliday gained a powerful ally in the war against the potlatch. An RCMP detachment was posted to Alert Bay, and the sergeant in charge of the detachment, Ernest Angermann, was like Agent Halliday, a vehement opponent of the potlatch. The following year Sergeant Angermann made eight arrests related to the potlatch, all of which were tried before Agent Halliday. In each of these cases, Agent Halliday sentenced the convicted potlatch participants to two months' imprisonment, the minimum penalty for violating the law.<sup>7</sup>

In December 1921 Dan Cranmer, a high-ranking Nimpkish from Alert Bay, organized and held a potlatch. The ceremony was witnessed by Sergeant Angermann, who took careful note of the proceedings, and in February 1922, arrested 45 of the participants. Many of those arrested were high-born members of Nimpkish society. In the trial that followed, Agent Halliday acted as magistrate and found all 45 defendants guilty. Some of the sentences were suspended on condition that the potlatch participants and the villages they came from surrendered all their potlatch regalia and promised never to practise the potlatch again. Among those convicted, Agent Halliday sentenced 22 Indians to terms of two to six months to be served at Okala prison near Vancouver.<sup>8</sup>

In the wake of these arrests and convictions, Agent Halliday believed that he had all but succeeded in eradicating the potlatch among the Nimpkish. The confiscated materials, mainly ceremonial masks, costumes, and coppers, were put on display at Alert Bay. While on display, they were viewed by an American collector, who agreed to purchase 35 pieces of material for \$291. The remainder were shipped to Ottawa, where they were ultimately sold to the Victoria Memorial Museum (now the Canadian Museum of Civilization) and the Royal Ontario Museum for \$1456. Although the proceeds from the sale were deposited in the Band's trust account, the ceremonial coppers alone were estimated to be worth \$36,000 by their original owners.<sup>9</sup>

There is no doubt that Agent Halliday's prosecution of the potlatch law was both rigid and severe. The more difficult question is whether Agent Halliday's fierce opposition to the potlatch had any bearing on his conduct in relation to the 'Namgis applications for additional reserve land and the proceedings involving the McKenna-McBride Commission. Although Agent Halliday's enforcement of the potlatch ban undoubtedly soured relations between him and the people he was entrusted to represent, the fact that most of these prosecutions took place after the McKenna-McBride hearings in 1914 raises serious doubts about whether his rigorous efforts at enforcement had any direct bearing on his conduct during the Commission's hearings. In any event, since the Indian Claims Commission has found that Agent

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6 Cole and Chaikin, *Iron Hand upon the People*, 94-98.

7 Cole and Chaikin, *Iron Hand upon the People*,

8 *Potlatch: A Strict Law Bids Us Dance*, 1975.

9 *Potlatch: A Strict Law Bids Us Dance*, 1975.

Halliday breached certain fiduciary duties owed to the 'Nangis people which could lead to a valid claim on different grounds, it is not strictly necessary to consider whether Agent Halliday's enforcement of the potlatch law had a direct bearing on the McKenna-McBride hearings.

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# **INDIAN CLAIMS COMMISSION**

## **INQUIRY INTO THE MCKENNA-McBRIDE APPLICATIONS CLAIM OF THE MAMALELEQALA QWE'QWA'SOT'ENOX BAND**

### **PANEL**

Commission Co-Chair Daniel J. Bellegarde  
Commissioner Roger J. Augustine  
Commissioner Carole T. Corcoran

### **COUNSEL**

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C. Allan Donovan

For the Government of Canada  
Bruce Becker / Sarah Kelleher

To the Indian Claims Commission  
Ron S. Maurice / Isa Gros-Louis Ahenakew

**MARCH 1997**



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# PART I

## INTRODUCTION

### MAMALELEQALA QWE'QWA'SOT'ENOX BAND

The members of the Mamaleleqala Qwe'Qwa'Sot'Enox Band are Kwakwaka'wakw, or speakers of the Kwak'wala language, who traditionally used and occupied lower Knight Inlet on the British Columbia mainland and the islands at its mouth opposite northeastern Vancouver Island.<sup>1</sup> The Band's lengthy name represents an amalgamation of the Mamaleleqala (or Mah-ma-lilli-kulla) with a smaller number of Qwe'Qwa'Sot'Enox (Kwiksootainuk, Kwich-so-te-nos, or Kwickswo'taineuks) who had come to live with them on Village Island before any reserves were set aside. Other shifts in settlement occurred during the last half of the nineteenth century, but Village Island was clearly the heart of Mamaleleqala territory in the 1880s when reserves were first set out for the Band.

Traditionally, Indians of this region "farmed" the woods, shores, salmon streams, and seas.<sup>2</sup> Reliance on their territory's resources required the Mamaleleqala Qwe'Qwa'Sot'Enox to move from one location to another in pursuit of eulachon, salmon, halibut, whales, clams, berries, and deer. Some resource sites were hereditary and others were communally owned.<sup>3</sup> Social organization and type of settlement varied according to the stage of the annual cycle. Local groups or lineages, descended from a common ancestor, were the basic units of social, political, and economic life.<sup>4</sup> Kin who lived in

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- 1 Kwak'wala, Oweekeno, and Nuu-chah-nulth are the three dialects of the Wakashan family of languages. Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-23 and 153-55. Until the 1980s non-native scholars listed the linguistic affiliation of the Kwakwaka'wakw as "Kwakiutl." Now considered incorrect as a term to encompass the numerous Kwak'wala-speaking bands, the word "Kwakiutl" nevertheless may be more familiar to some readers.
  - 2 Helen Codere, "Kwakiutl: Traditional Culture," in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990), 364.
  - 3 Helen Codere, "Kwakiutl: Traditional Culture," in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990), 364.
  - 4 Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-27.

the same winter village usually controlled the region in which the village was situated. The chief of the highest-ranking lineage in the village tended to perform the function of village chief.<sup>5</sup>

The incursion of Europeans into the region in the 1800s brought the fur trade, new trade goods, missionaries, smallpox, and, eventually, seasonal work. For the Mamaleleqala Qwe'Qwa'Sot'Enox, paid seasonal work in the commercial fishery and in canning began as a supplement to, rather than as a substitute for, harvesting their own food.<sup>6</sup> Their rich cultural life included the potlatch tradition.

The federal government's Kwawkewlth Indian Agency was established at Fort Rupert in 1881. It was responsible for the dozen or so Kwak'waka-speaking tribes then termed "Kwakiutl." Reserves were not a fact of life for the Mamaleleqala Qwe'Qwa'Sot'Enox until Indian Reserve Commissioner Peter O'Reilly visited their lands in 1886. In 1896 the Agency office moved to Alert Bay on Cormorant Island, west of Mamaleleqala territory.<sup>7</sup>

Today, the Chief and Council have an office at Campbell River on Vancouver Island. The Mamaleleqala Qwe'Qwa'Sot'Enox Band has approximately 300 members. About 20 per cent of the members live on Crown land or on reserve; about 80 per cent live off reserve, mainly at locations on Vancouver Island or on the British Columbia mainland.<sup>8</sup> The Band's reserves are Mahmalilikullah Indian Reserve (IR) 1 (175.8 hectares) on Village Island; Apsagayu IR 1A (0.9 hectares) on Gilford Island; and Compton Island IR 6 (56.2 hectares), being all of Compton Island.<sup>9</sup>

### **McKenna-McBride Applications Claim**

The Mamaleleqala Qwe'Qwa'Sot'Enox Band's claim arises out of applications for reserve lands made in 1914 to the Royal Commission on Indian Affairs for the Province of British Columbia, commonly referred to as the McKenna-McBride Commission. The Band applied to have several of its traditional sites recognized as reserve lands. Except for its applications involving Compton

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- 5 Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-25; and John Price, *Indians of Canada: Cultural Dynamics* (reprint; Salem, Wisconsin: Sheffield Publishing, 1988), 197-98.
  - 6 Helen Codere, "Kwakiutl: Traditional Culture," in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990), 364.
  - 7 Helen Codere, "Kwakiutl: Traditional Culture," in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990), 363.
  - 8 Department of Indian Affairs and Northern Development (DIAND), Departmental Statistics, Indian Register, December 31, 1996. According to the 1996 Indian Register, there are 243 members off reserve, 37 on reserve, and 26 on Crown land, for a total of 396 members.
  - 9 DIAND, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), 103.

Island, the rest of the Band's applications were not entertained because the lands the Band sought were deemed unavailable.

Through the McKenna-McBride process in 1914, the Mamaleleqala chiefs learned for the first time that most of the lands they applied for had been alienated through the granting of provincial timber leases and licences. The Chiefs explained to the Commissioners that the Indian Agent had failed to inform them that some of their traditional village sites had been previously alienated. Moreover, they challenged the right of the government to sell such lands without consulting them. The Commission subsequently invited the Indian Agent to recommend alternatives to these applications, but no alternative proposals were made to the Commission.

The role of the Indian Agent is at issue in this claim. To what extent was the Agent responsible for protecting the Band's traditional settlements from unlawful encroachment? And to what extent was the Agent responsible for representing the Band's interests before the McKenna-McBride Commission? In presenting its rejected claim to the Indian Claims Commission (the Commission) for investigation, the Mamaleleqala Qwe'Qwa'Sot'Enox Band also asks whether this claim fits within the scope of Canada's Specific Claims Policy.<sup>10</sup>

The Mamaleleqala Qwe'Qwa'Sot'Enox Band submitted its McKenna-McBride Applications claim to the Department of Indian Affairs and Northern Development (DIAND) on December 8, 1993.<sup>11</sup> The claim was rejected four times in ensuing correspondence with DIAND's Specific Claims West: on August 17, 1994; November 18, 1994; May 26, 1995; and August 1, 1995.<sup>12</sup> On July 24, 1995, the Band formally asked the Indian Claims Commission to conduct an inquiry into the rejection of the claim by Indian Affairs.<sup>13</sup> On October 4, 1995, the Commission asked Canada to transfer all relevant documents to the Commission.<sup>14</sup>

10 Enclosure, "List of Issues," with letter from A. Donovan to Indian Claims Commission (ICC), December 8, 1995 (ICC file 2109-21-1).

11 Allan Donovan, Counsel for Band, to Manfred Klein, Specific Claims West (SCW), Indian Affairs, December 8, 1993, enclosing September 1993 Report by John Pritchard, "Applications for Additional Reserves Made before the Royal Commission, 1914, by the Mamalilikulla Tribe"; legal analysis by Donovan, December 6, 1993; Band Council Resolution, October 28, 1993 (ICC Documents, pp. 226-61.)

12 John Hall, SCW, to Chief Sewid, August 17, 1994 (ICC Documents, pp. 291-93); John Hall, SCW, to Chief Sewid, November 18, 1994 (ICC Documents, p. 301); John Hall, SCW, to Chief Sewid, May 26, 1995 (ICC Documents, pp. 331-40); and John Hall, SCW, to Alan Donovan, August 1, 1995 (ICC Documents, p. 348).

13 Band Council Resolution, July 24, 1995.

14 K. Fullerton, Legal Counsel, Indian Claims Commission, to M. Bouliane, A/DG, Specific Claims, DIAND, and W. Elliot, Senior Legal Counsel, Legal Services, DIAND, October 4, 1995.

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## MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of the 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.<sup>15</sup>

This report is an inquiry into the rejected McKenna-McBride Applications claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band.

### SPECIFIC CLAIMS POLICY

The 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 and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.<sup>16</sup> Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

Although the Commission is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada drew our attention to a number of specific passages in the Policy.<sup>17</sup> First, the opening sentence in *Outstanding Business*:

The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.<sup>18</sup>

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15 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.

16 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter *Outstanding Business*].

17 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 11-12.

18 *Outstanding Business*, 3.

Second, the elaboration of the term “specific claims” on pages 7 and 19 of the Policy:

The term “specific claims” with which this booklet deals refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.<sup>19</sup>

As noted earlier the term “specific claims” refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.<sup>20</sup>

Third, the discussion of “lawful obligation” and “beyond lawful obligation” on page 20:

### 1) Lawful Obligation

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.

### 2) Beyond Lawful Obligation

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.<sup>21</sup>

It is Canada’s position that the McKenna-McBride Applications claim of the Mamaleleqala Qwe’Qwa’Sot’Enox Band does not fall within the scope of the Specific Claims Policy. We will address this issue in Part IV below.

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<sup>19</sup> *Outstanding Business*, 7.

<sup>20</sup> *Outstanding Business*, 19.

<sup>21</sup> *Outstanding Business*, 20.

**THE COMMISSION'S REPORT**

This report sets out our findings and recommendations to the Band and to Canada. Part II of the report summarizes the facts disclosed in the inquiry and the historical background for the claim; Part III sets out the relevant legal issues addressed by the parties; Part IV contains our analysis of the facts and the law; and Part V provides a succinct statement of our findings and recommendations.

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## PART II

### THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band. Our investigation into this claim included the review of two volumes of documents submitted by the parties as well as numerous maps and exhibits. In addition, the Commission visited Village Island on May 22, 1996, and held an information-gathering session in the community of Alert Bay, British Columbia, on May 23, 1996, where we heard evidence from six witnesses. On August 29, 1996, legal counsel for both parties made oral submissions in Vancouver, British Columbia. A chronology of the Commission inquiry and a brief description of the formal record of the inquiry can be found in Appendix A.

### HISTORICAL BACKGROUND

#### **Establishment of Reserves**

When British Columbia joined Canada in 1871 only a few reserves had been established in the colony under Governor James Douglas. They were located on Vancouver Island. As a new province, British Columbia refused to recognize the existence of aboriginal title, which meant that, unlike the prairie provinces, there was no post-Confederation treaty-making process to guide the establishment of reserves.<sup>22</sup> Establishing Indian reserves in British Columbia therefore became the task of several successive reserve commissions, all of which lacked clear guidelines for the establishment of Indian reserves because the Terms of Union by which British Columbia joined Canada were vague on this question.

A special clause in the 1871 Terms of Union, which dealt with the respective obligations of the federal and provincial governments towards aboriginal

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<sup>22</sup> In 1899, the northeast corner of British Columbia was covered by Treaty 8, which also covers northern Alberta, northwest Saskatchewan, and a relatively small area of the Northwest Territories.

peoples, actually impeded the evolution of Indian land policy in the province because it did not provide a clear formula for the allocation of reserves and it was too open to interpretation. Known as Article 13, this clause stated:

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.<sup>23</sup>

The equivocal wording, "as liberal as that hitherto pursued by the British Columbia Government," would provide the source of protracted debate and controversy between the federal and provincial governments over the size and location of reserves in British Columbia.

Early on, the dominion government sought to have reserve size set at an average of 80 acres per family. The province fought to limit the acreage to 10 acres per family – an amount, it argued, that continued its "liberal" pre-Confederation policy. At one point, the two levels of government agreed to a compromise figure of 20 acres per family, but, when the province insisted that this amount apply only to future reserves, the fragile agreement collapsed.<sup>24</sup>

In the absence of agreement on a formula to determine the size of reserves, the provincial and federal governments attempted to address the matter of Indian reserve allotment through the establishment of a Joint Commission for the Settlement of Indian Reserves in the Province of British Columbia in 1876. Its three members included G.M. Sproat, who, by 1878, was the sole Indian Reserve Commissioner. Some of the reserves Commis-

<sup>23</sup> *Order of Her Majesty in Council Admitting British Columbia into the Union. At the Court at Windsor, the 16th day of May, 1871*, in Derek G. Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663-1972*, Carleton Library Number 87 (Toronto: McClelland & Stewart, 1975), 81; and ICC Exhibit 17.

<sup>24</sup> Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2d ed. (Vancouver: UBC Press, 1992), 182-83; Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), 183.



sioner Sproat laid out were later reduced by Peter O'Reilly, who replaced Sproat in 1880.<sup>25</sup>

It was Reserve Commissioner O'Reilly who initiated the establishment of reserves for the Mamaleleqala Qwe'Qwa'Sot'Enox by visiting their territory in 1886. He noted that the 165 members of the Mah-ma-lilli-kulla Band were living on Village Island together with the smaller Kwich-so-te-nos Band, who numbered 50 members. Having met with Principal Chief Wy-chas and some other members of the Band and finding their principal occupation to be fishing, Commissioner O'Reilly set out five reserves as follows:

No. 1 Mah-ma-lilli-kullah, a reserve on the Western shore of Village Island, contains three hundred and thirty-three acres[;] for the most part it is worthless, being both rocky and hilly. A small patch of land at the back of the houses is clear and might be used for gardens, and eight or nine acres close to the southern boundary can be cleared for cultivation without much labor. Two islands immediately in front of the village are included in this reserve; on them are several graves. There is a sufficient quantity of timber for fuel, and other purposes on this land.

No. 2 Mee-tup, eighteen acres have been reserved at the head of Viner Sound, Gilford Island. It is only of value as a salmon stream.

No. 3 Ah-ta, a fishing station at the mouth of the Ahta River, at the head of Bond Sound. It contains twenty-seven acres, three or four of which may be cultivated. Besides the fish obtained from this stream the Indians collect a large quantity of roots and berries on the land included in this reserve.

No. 4 Kaw-we-ken [sic], at the head of Thompson Sound, twelve acres have been reserved at this point as a fishing station, about one acre of which may be converted into a garden without much labour.

No. 5 Dead Point, on the North shore of Harbledown Island, Beware Passage; contains sixty-five acres[;] a portion of this land was cleared by some whitemen, and abandoned many years since. It is now occupied by a family of Indians who cultivate about half an acre. Twenty acres more are covered with Alder and may be easily cleared and cultivated.<sup>26</sup>

On July 27, 1888, the surveys and plans of these reserves, completed in 1887 and 1888, were approved by Commissioner O'Reilly and F.G. Vernon, Chief Commissioner of Lands and Works for British Columbia. Upon survey, their acreages became Mahmalillikullah IR 1, 434.25 acres; Meetup IR 2,

25 Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 50-51.

26 P. O'Reilly, Reserve Commissioner for B.C., to Superintendent General of Indian Affairs, Ottawa, October 26, 1886 (ICC Documents, pp. 17-20).

15.75 acres; Ahta IR 3, 17.5 acres; Kakwekan IR 4, 10 acres; and Dead Point IR 5, 97 acres.<sup>27</sup> They were listed at these acreages in 1902 in the "Schedule of Indian Reserves in the Dominion."<sup>28</sup>

It is clear from the submissions that were later made to the McKenna-McBride Commission in 1914 that the allotment of these reserves did not protect all the traditional villages of the Mamaleleqala people.

### **Granting of Timber Leases and Licences over Indian Settlements**

About the time that reserves were being established for the Mamaleleqala Qwe'Qwa'Sot'Enox, the provincial legislature passed *An Act to Amend and Consolidate the Laws affecting Crown Lands*. Commonly referred to as the British Columbia *Land Act*, it provided at least some measure of protection for Indian settlements and reserves in the rules that governed the way notice would be given for leases and licences to Crown Lands.

The *Land Act*, passed in 1888 and amended in subsequent years, is discussed in greater detail in Part IV of this report. The relevant provisions are reproduced in Appendix B. Generally speaking, the procedures for applying for a lease included giving 30 days' notice to all concerned parties through the *British Columbia Gazette* and "some newspaper circulating in the district." In the absence of any valid objection, the Chief Commissioner of Lands and Works issued the requested lease.<sup>29</sup> The procedures for applying for timber licences also required 30 days' notice. The *Land Act* specifically prohibited the granting of licences, leases, and pre-emptions over "the site of an Indian settlement or reserve."<sup>30</sup>

In the McKenna-McBride Applications claim, the Mamaleleqala Qwe'Qwa'Sot'Enox Band provided evidence to show that Commissioner O'Reilly had taken action to correct the sale of another band's traditional lands which should have been protected by the terms of the *Land Act*.<sup>31</sup> In this example, two men, Thomas Pamphlet and Cornelius Booth, had purchased land that included a known Indian village named Clienna and other

27 Plan BC 45 and Tracing TBC 45, "Plan of Village Island Indian Reserves, Coast District, British Columbia" (ICC Documents, pp. 26-29).

28 Canada, Parliament, *Sessional Papers*, 1903, No. 27a, "Schedule of Indian Reserves in the Dominion, Supplement to Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, Kwawkwalth Agency, British Columbia," p. 70 (ICC Documents, pp. 42-43).

29 Excerpt from *An Act to Amend and Consolidate the Laws affecting Crown Lands* (ICC Documents, pp. 21-25).

30 Excerpt from *An Act to Amend and Consolidate the Laws affecting Crown Lands* (ICC Documents, pp. 21-25).

31 Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

Indian improvements.<sup>32</sup> Indeed, Messrs Pamphlet and Booth's 1883 application had actually mentioned the village,<sup>33</sup> and its existence was also noted later by the surveyor.<sup>34</sup> When the province completed the sale to Messrs Pamphlet and Booth in 1884, it ignored these factors. Commissioner O'Reilly therefore wrote to the Commissioner of Lands and Works in September 1889 asking that the purchasers be induced to relinquish 50 acres to be included in the Indians' reserves. In this example, which occurred a year after the reserves for the Mamaleleqala Qwe'Qwa'Sot'Enox were approved by the provincial government, Commissioner O'Reilly explained that the Quatsino Indians were still using the site.<sup>35</sup>

Notwithstanding that the *Land Act* was provincial legislation, the province refused to grant the Commissioner's request on behalf of the Quatsino Indians, stating its position that the federal government was responsible for protecting Indian lands and settlements:

The object of publishing a notice of intention to apply to purchase land is to notify any person who may consider he has a prior claim to make the same known.

No protest to these applications was made by the Indian Department on behalf of their Wards.

No intimation had been received from the Indian Department that they claimed any part of the lands at or prior to the conveyance to Mr. Booth. [sic]

My recollection is that Mr. Stephens [the surveyor] reported that the Indians had quite abandoned the site.

The Lands & Works Department cannot guard the interests of the Indians until after the Indian Department have clearly defined the exact position of their Reserves.<sup>36</sup>

At least while reserves were being established, the province placed the onus on the federal Indian Department to respond to notices of applications under the *Land Act* which were detrimental to Indian lands. Commissioner O'Reilly

32 Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

33 Notice [in *British Columbia Gazette?*] by Thomas Pamphlet and Cornelius Booth, April 18, 1883 (ICC Documents, p. 9). An application to purchase 640 acres "[c]ommencing at stake twenty chains east of the Quatsino Indian village, at high water mark, and running north, eighty chains, to a stake thence west, eighty chains to a stake; thence south, eighty chains, to a stake placed at high water mark, thence east, as near as may be along the shore line at high water mark, to the place of beginning."

34 Surveyor's Sketch, no date, indicating "Old Indian Village" on Winter Harbour (ICC Documents, p. 10). O'Reilly's September 23, 1889, letter states: "[T]he surveyors notes shew the position of the village to be on the land surveyed by him."

35 Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

36 Department of Lands & Works, Memorandum, October 2, 1889 (ICC Documents, p. 35).

became aware of the questionable ownership of Quatsino land in 1889 when he was first allotting reserves in the area.<sup>37</sup>

A few years later, in 1905 and 1907, applications for timber leases and licences were made in the vicinity of the Mamalelegala Qwe'Qwa'Sot'Enox Band's reserves and traditional villages.<sup>38</sup> In 1907, the Vancouver Timber and Trading Company applied for a special timber licence for lands at Lull Bay and elsewhere in the Coast District, Range 1. Notices of a survey around Lull Bay and the application for the licence appeared in the *British Columbia Gazette* on November 7, 1907.<sup>39</sup> No evidence has been submitted to the Commission showing that any of these applications were challenged by Indian Affairs or by the Band on the grounds that the applications covered lands included in an Indian reserve or settlement. However, it would later be revealed that many of the Band's applications before the McKenna-McBride Commission could not be entertained since they had been alienated by the granting of these timber leases and licences.

### **Role of the Indian Agent**

The extent to which Indian Agents were responsible for overseeing the interests of the Indians in British Columbia is an issue that is relevant to the present inquiry. The scope of an Indian Agent's responsibilities can be determined, at least in part, by reference to the job description for British Columbia Indian Agents which existed for many years before reserves were established for the Mamalelegala Qwe'Qwa'Sot'Enox. This job description was known, at least, to the highest departmental official in the province as well as to various officials at Indian Affairs' headquarters in Ottawa.

On December 30, 1879, Deputy Superintendent General of Indian Affairs L. Vankoughnet appointed Israel Powell Indian Superintendent for British Columbia. Superintendent Vankoughnet advised Mr Powell of the duties of the local Indian Agents or subagents, "who shall act under the instructions of the Superintendent and communicate with the Department through him," and he directed Mr Powell to supervise "by frequently visiting different parts of

37 The Commission has no other information on the outcome of the Pamphlet and Booth situation involving the Indian village of Clienna.

38 *British Columbia Gazette*, Notice, January 26, 1905 (ICC Documents, p. 56); *British Columbia Gazette*, Notice, November 2, 1905 (ICC Documents, pp. 63-64); *British Columbia Gazette*, Notice, November 7, 1907 (ICC Documents, pp. 84-85).

39 *British Columbia Gazette*, November 7, 1907 (ICC Documents, pp. 84-85).

the Province[, to] see that the Agents are discharging their duties satisfactorily and that the Indians are protected in their rights.”<sup>40</sup>

According to Superintendent Vankoughnet, Indian Agents were to advise Indians; to protect their lands and rights – that is, “their farming, grazing and wood lands, fishing or other rights and preventing trespasses upon or interference with the same”; and to act on the Indians’ behalf. Agents were also to prohibit liquor, the potlatch and other “demoralizing” practices, and to promote agriculture where Indians wanted it. Since there were no treaty payments or presents for agents to distribute in British Columbia, Superintendent Vankoughnet observed:

[T]here will be little other responsibility attaching to the position of Indian Agent than the ordinary care of the interests of the Indians and their protection from wrongs at the hands of those of other nationalities . . . *he should nevertheless possess such qualifications as will adapt him for properly and intelligently advising the Indians and acting energetically on their behalf . . .*<sup>41</sup>

Judging by this instruction, passivity was not condoned by Indian Affairs headquarters. Mr Powell, as Indian Superintendent for British Columbia, certainly was aware that Indian Agents in the province were expected to exert themselves in their work of protecting Indian interests.

Two years after reserves had been approved for the Mamaleleqala Qwe’Qwa’Sot’Enox, headquarters reiterated the same list of duties to Powell’s successor, A.W. Vowell. Mr Vowell was also required to make periodic visits to both the Indians and the Indian Agencies throughout the province to ensure that agents were discharging their duties in a satisfactory manner and that Indians were protected in their rights. Vowell’s 1890 instructions were almost identical to those given to Mr Powell in 1879 except that, where protecting the Indians in possession of their farming, grazing, and wood lands

40 L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, National Archives of Canada [hereinafter NA], RG 10, vol. 3701, file 17514-1 (ICC Documents, pp. 1-8). Initially, the position was termed “Visiting Indian Superintendent for British Columbia”; Powell later requested and got the shorter title, “Indian Superintendent for British Columbia.”

41 L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17,514-1, (ICC Documents, pp. 1-8). Emphasis added. ICC Exhibit 9 is a transcript of this document, which, on page 3, reads “intelligently arousing” instead of “intelligently advising.” During Oral Submissions on August 29, 1996, Counsel for the Band identified the word “arousing” as a typographical error. See page 15 of the transcript.

was concerned, the phrase “& of the valuables therein and thereon” was added.<sup>42</sup>

Throughout the 1890s R.H. Pidcock was the Agent for the “Kwawkewlth Indians.” He was responsible for Mamaleleqala Qwe’Qwa’Sot’Enox from his office which, for the first half of the decade, was in Fort Rupert and, for the last three years of his tenure, in Alert Bay.<sup>43</sup> There may have been no Agent at Alert Bay from 1899 until 1903, when G.W. DeBeck was appointed. After roughly three years under DeBeck, W.M. Halliday took over the Kwawkewlth Agency and remained there for approximately 26 years, from 1906 to his retirement in 1932. Afterwards, the position was vacant again for two years until it was filled in 1935 by Murray S. Todd, also based at Alert Bay.<sup>44</sup>

Enclosing a copy of the “Instructions to Agents” in the letter notifying Agent Halliday of his appointment, Superintendent Vowell asked Agent Halliday to “pay particular attention to the rules, etc., therein laid down for your guidance.”<sup>45</sup> Agent Halliday’s initial instructions in 1906 were the same as those of his predecessor. Beyond the directives aimed at “improving” the Indians, the Agent’s main duties were to advise the Indians and to protect them in the possession of their farming, grazing, woodlands, fisheries, or other rights. Agent Halliday was to exercise “the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those other nationalities.” He was to visit the various bands in his agency and to acquaint himself with each individual in his charge. Through reading agency files, he was expected to be familiar with the instructions issued to his predecessors and to ask questions of headquarters when necessary.<sup>46</sup>

A more elaborate set of instructions was issued to all Indian Agents by Duncan Campbell Scott, the new Deputy Superintendent General of Indian Affairs, in 1913. Scott sent 92 points of detailed instructions with a covering note that concluded: “While the duty of an Agent is first of all to protect the interests of the Indians under his charge, the rights of citizens should be

42 Draft of letter, Secretary, Indian Affairs, to A.W. Vowell, Visiting Indian Superintendent for B.C., Victoria, January 24, 1890, NA, RG 10, vol. 3829, file 61939 (ICC Documents, pp. 36-41).

43 Helen Codere, “Kwakiutl: Traditional Culture,” in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990), 363.

44 “Department of Indian Affairs,” *Canadian Almanac and Miscellaneous Directory*, for years 1890 to 1935 (Toronto: Copp Clark, 1890-1935).

45 A.W. Vowell to W.M. Halliday, June 12, 1906, NA, RG 10, vol. 11139, Shannon file 3, 1906 (ICC Documents, pp. 65-66).

46 Although the enclosed “Instructions” were not found in the Agency’s file with Vowell’s June 12, 1906, letter to Halliday, Vowell gave much the same direction to the Indian Agent at Metlakatla in a 1909 letter that also enclosed the Instructions. The statements in this paragraph are based on the Instructions with the 1909 letter: A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, pp. 86-95).

respected and the courtesy which is due to the public should always be observed.”<sup>47</sup>

### **Establishment of the McKenna-McBride Commission**

Indian Commissioner O'Reilly retired in 1898. Mr Vowell, who by then had served as Canada's Indian Superintendent for British Columbia for eight or nine years, took on the additional duties of the Indian Reserve Commissioner. This amalgamation of offices under Mr Vowell was “with a view to a more economical arrangement in connection with the allotment and defining of Indian Reserves in British Columbia.”<sup>48</sup> By 1909, however, he was 68 years old and felt he was “not equal to anything bordering on rough trips or exposure.”<sup>49</sup> Being unwell, he was granted a leave of absence. On his retirement in 1910, both positions were abolished.

After 37 years of work by the Joint Commissioners, Messrs Sproat, O'Reilly, and Vowell, many issues surrounding the Indian land question in British Columbia were still unresolved.<sup>50</sup> The federal government had responsibility for Indians, but provincial officials and the non-Indian public in British Columbia were generally unwilling to accommodate the Indians' interests. To address these difficult problems, the Royal Commission on Indian Affairs in the Province of British Columbia, known as the McKenna-McBride Commission, was created in 1912.

An agreement between the federal and British Columbia governments towards the “final adjustment of all matters relating to Indian Affairs in the province of British Columbia” established the Commission on September 24, 1912. Subject to the approval of the federal and provincial governments, five commissioners, including Canada's Special Commissioner, J.A.J. McKenna, were empowered to adjust the acreage of Indian reserves in the province. The relevant provisions in the agreement read as follows:

2. The [McKenna-McBride] Commission . . . shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:

(a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the

47 D.C. Scott, DSGIA, to Indian Agents, Department of Indian Affairs, October 25, 1913 (ICC Documents, pp. 100-16).

48 Order in Council, January 31, 1898, appended to Mr. Stewart's January 1903 Memorandum.

49 Vowell, Indian Office, Victoria, to Secretary, Indian Affairs, Ottawa, November 10, 1909, NA, RG 10, vol. 3829, file 61939.

50 Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), p. 183.

Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the *Indian Act*, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

(b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

...

8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect.<sup>51</sup>

This general purpose of this arrangement, which contemplated additions to or reductions of existing reserves and the creation of new reserves, was intended to resolve the ongoing land question by providing for the present and future requirements of Indians in the province.<sup>52</sup>

### **Applications to the McKenna-McBride Commission**

Despite the protracted struggle between British Columbia and Canada over reserve lands in British Columbia, the McKenna-McBride Commission provided an opportunity for bands to apply for additional lands to be allocated as reserves. On June 2, 1914, the Commissioners heard the Mamaleleqala's request for additional lands at a meeting that took place in Alert Bay with Indian Agent Halliday present. The Band applied for several additional reserves, some of which included old village sites,<sup>53</sup> but learned for the first

51 McKenna-McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 96-97).

52 Establishment of the McKenna-McBride Commission was approved by Canada's Order in Council 3277 on November 27, 1912, and British Columbia's Order in Council 1341 on December 18, 1912.

53 Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 160.



time that many of these lands were already taken up by others.<sup>54</sup> The Commission took the position that it would see what land it could acquire for the Indians “wherever the land is open.”<sup>55</sup>

In his opening remarks on June 2, 1914, Chief Negai of the “Mahwalillikullah” welcomed the opportunity “to speak and give the location of the places that had been the homes of his ancestors and which he and his Band desired to retain. . . .” In addition to the formal applications, he pointed out that the Mamaleleqala once had a location on Cormorant Island which was now occupied by white settlers. The minutes of this meeting report that “[t]he Indian[s] of the Tribe for which he spoke wanted no more Indian reserves, but that all the land should be cut up and divided.”<sup>56</sup> Ultimately, Chief Negai requested that 200 acres, to be selected from lands for which the Band was applying, be allocated for each man in the Band. Chief Negai delegated Mr Harry Mountain to speak to the details of the applications.<sup>57</sup>

The Commissioners began by inquiring into the general state of conditions for the Mamaleleqala Band. At the time of their applications, most Band members were spending about six months of the year at Village Island. The rest of the time they were either fishing at islands and other locations of lower Knight Inlet or working in canneries. The cannery work produced a very small amount of net cash. Trapping was not lucrative either, as many others were engaged in it and access to the trapping lands was limited. Logging on and off Indian land was problematic because of the requirement for permits or licences. Logging camps were reluctant to hire Indians.<sup>58</sup> There was no work as guides for prospectors or surveyors.<sup>59</sup>

There were no schools on the Mamaleleqala reserves in 1914. Only four children were attending the industrial school. The Band wanted either a day school on the reserve or a boarding school to accommodate the 30 or so children of school age. No missionary had visited the Band for years. Traditional marriage practices were still followed. For medical attention, Band members had to travel to Alert Bay, as no doctor had ever visited the Band's

54 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

55 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

56 Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 135).

57 Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 136).

58 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

59 Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 137).

reserves. Transportation consisted of the Band's 28 canoes, 3 sailboats, and 4 gasoline boats.<sup>60</sup>

The Commissioners then asked representatives of the Mamaleleqala Band about their five existing reserves. The Band's main concern was that "[w]hite people are encroaching all the time on the Reserves we have. . . ." On their main reserve, Village Island Indian Reserve No. 1, they had timber and some "good ground for farming." They grew potatoes and cultivated fruit trees. The four other reserves were heavily timbered and used for fishing. Three of the Mamaleleqala's five reserves were regarded by them as belonging to Kwickswotaineuks or another tribe.<sup>61</sup>

Finally, the Commissioners asked questions relating to the Mamaleleqala's applications for additional land. The lengthy exchange about the specific applications reads as follows in the transcript:

Q. [Commissioner Shaw] Now we will come to the applications for additional land.

No. 1 is Owakglala – will you show us on the map where this place is?

A. [Harry Mountain] He points it out on the map, and it is called Lull Bay.

Q. How much land do you want at Lull Bay?

R. At that place there is a river there, and we want enough room on that river on both sides of it to enable us to do what we want to do there.

Q. What is that?

A. Trapping and Fishing.

Q. That location is half a mile on each side of the river for the whole length of it. (Marked A on the map.)

MR. COMMISSIONER SHAW: This land is all covered by timber limits owned and paid for by whitemen, and in that case we can't give you the land you are asking for. We would like, however, to know just what improvements you have there, and what land would be necessary to carry on your fishing operations there.

CHIEF DAWSON of the Mahmalillikullah Tribe: From whom was the land purchased?

MR. COMMISSIONER SHAW: We don't know – all we know is that our map here shows that it has been purchased, and therefore we cannot give it to anyone else although we might possibly make some arrangements with the owners by which you could get a small piece of land, say five or ten acres on which your houses are built – We might be able to recommend that if you wish to state what improvements are on it.

A. We can't allow the place to go that way – We never sold it, and we want the place.

Q. How many houses have you at this point?

A. One.

Q. And do the Indians go there every year?

A. Yes.

Q. For what purpose?

<sup>60</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

<sup>61</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

A. Fishing and hunting.

Q. That is catching and drying the fish?

A. Yes.

Q. Is it a base for hunting operations?

A. Yes. The country does not belong to the Government, and they have no business to sell it. What business has anyone to go and sell that land without asking if I had no more use for it. What right have they got to sell it before I was through with it because I was the owner of it. I want to ask the Royal Commission if it is in their power to find out who sold this land without first asking me.

MR. COMMISSIONER SHAW: The Government has sold this land legally, and it is not for this Commission to question the legality of that sale.

THE CHAIRMAN: The Government is over us as well as over you, and therefore we have no right to question what they have done. They have claimed the land and granted it, and therefore we cannot meddle with that — but as Mr. Shaw has just told you we might be able to secure for you a certain amount of land there, say five or six acres where your houses are that you might use.

A. Do you mean five acres for each one of us?

Q. No, five acres in the whole block.

A. This land to us is valuable.

MR. COMMISSIONER SHAW: Now then No. 2 application, that is on Heeya Sound. (the witness points it out on the map) Are there any houses there?

A. No house there, but we have been living there.

Q. What area do you want there?

A. We want half a mile from a point marked 2 to a point marked 2A along the shore on Knight Inlet.

Q. That is already Reserve No. 4 (4). Now then we come to application No. 3 Apsagayu on Shoal Harbour — are there any houses there? (marked 3 on the Agency map).

A. There are two houses there.

Q. What is it wanted for?

A. For salmon fishing.

Q. What amount of land are they asking for there?

A. Half a mile around the Bay and up the river to its source.

Q. This land is also covered by a pulp lease.

A. We claim that place as belonging to us, and therefore we ask that it be reserved for us.

Q. The next application is No. 4 Kuthkala on Swanson Island — are there any houses there?

A. There are no houses there.

Q. What part of this Island do they want?

A. We want the whole of Swanson Island.

Q. Part of this Island is covered by a timber limit, and part of it is free, and we are in a position to recommend that they get the part that is not covered by a timber limit.

KUTWAPALAS: Who was it that told you that this is taken up by whitemen — was it Mr. Halliday?

[A. Commissioner Shaw?] We have a map here that shows every timber limit that is taken, and this map here shows that part of this land that you are asking for is already covered by a timber limit.

WITNESS: We think that Mr. Halliday ought to have given us this information – this is the first time we ever heard of it being taken up by whitemen for the timber. The charts were only given to us the other day, and we didn't know anything about it.

MR. COMMISSIONER SHAW: The plans that Mr. Halliday gave the Indians the other day does not show any of the land outside of what the Government recognizes as Indian Reserves.

A. Then why were they not given to us before this?

MR. COMMISSIONER SHAW: I want to say that these maps that show the timber limits, Mr. Halliday bought himself and he has them in his office – They don't belong to the Department, and he has asked me to say that if at any time the Indians want to know anything about the land, if they will come into his office, he will be very glad and willing to give them all information regarding the different lands.

WITNESS: If all the lands are taken up in that vicinity, where am I going to choose the 200 acres for each man?

MR. COMMISSIONER SHAW: We have not suggested to these Indians that each man is going to get 200 acres – If we do make that recommendation it will have to be taken from outside of lands already taken up by whitemen.

WITNESS: I want the Commission to tell us the one that sold it, and they should remember that the Indians have a law among themselves just as the whitemen have – and no one is allowed to take another man's land without first finding out who the land belongs to. We can't go to Mr. Halliday because we know what he is to us. The experience we have had with him in matters of that kind; he just turns us out.

MR. COMMISSIONER SHAW: Now the next is No. 5 – on Compton Island. What do they want on Compton Island?

A. We would like to get the whole of the Island.

Q. Have they any houses on this Island?

A. Yes

Q. It is used for what purpose?

A. For the halibut, trolling for salmon and for the clams.

Q. The next is No. 6, Harbledown Island. What is wanted there?

A. Half a mile on each side of the river (marked 6 on map) The part the Indians are asking for is taken up by timber limits. No. 7 is Lewis Island – They want the whole of the Island. Lewis Island is apparently open. [transcript is unclear as to who is speaking here]

Q. What do they want this for?

A. For hunting, for the clams that are there and the timber. It is pretty good for gardens too.

Q. No. 8 application is Mataltsym.

A. It is an old Indian village, and same is covered by application No. 2.

Q. No. 9, Kliquit, is the same as application No. 2.

A. We ask for an addition of 2 and 2A for half a mile along Knights Inlet, then across the Inlet on the southern shore of Gilford Island half a mile to Port Elizabeth to a point marked 2B. We want it for the timber, fishing and the clams.

Q. This area includes ten villages.

A. This last application is practically all taken up by timber limits.

CHIEF OF DAWSON [sic]: We expect that the Royal Commission will do the fair thing by us. We have given you the list, and we are sorry to hear that some of the land is already taken up by the whites. We are sorry that this Commission did not come long ago when we could have had the choice of our own land as we wish today. We beg this Royal Commission to do the best thing they can for us.

MR. COMMISSIONER SHAW: Some of the lands that have been applied for appears to be open land, and wherever the land is open, we will do the best we can and be as fair as we can for the Indians.

CHIEF: The young men of this Tribe wish to be allowed to cut the timber off the land that is not yet taken up by the whitemen outside of the Reserves without a licence.

MR. COMMISSIONER SHAW: They must have a licence to cut timber, and if at any time they wish to procure a licence, they can make application to the Government Agent or to Mr. Halliday your Indian Agent; but they must not on any account cut timber on any land without a licence.

WITNESS: We don't want to do it on a big scale — just a stick here and there for our own use. I would like the Royal Commission to know that there is no section (timber section) left big enough to make it worth while for a young man to buy a licence to cut any timber.<sup>62</sup>

The day before the Commission held this separate meeting with the Mamaleleqala on June 2, 1914, it held a general meeting with “the principle Tribes of the Kwawkwelth Nation.” At that June 1, 1914, meeting several chiefs voiced their concern that they had not been adequately prepared by Agent Halliday for the McKenna-McBride hearings. Agent Halliday had neglected to distribute plans of their reserve lands which had been available for him to distribute before the Commissioners' visit. The Chiefs did not receive the plans until the Commissioners arrived in Alert Bay. The Chairman of the Commission commented:

I might say that in every place that we have so far visited, the Chiefs of all the different Reserves have plans . . . showing on them the land that has been reserved for them — For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took stops [sic] to have them distributed so that the Chiefs could see what lands they had — Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.<sup>63</sup>

<sup>62</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 129-34).

<sup>63</sup> Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

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On June 1, 1914, the Chief of the Nimkish Tribe drew attention to the difficulties caused by the chiefs' late receipt of the plans:

You ought to have seen us in the general meeting this morning before you came – We had the plans, and one would say (referring to the Indian Reserves on the plans) “where is it” “whose is it” and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.<sup>64</sup>

Johnnie Scow of the Kwicksitaneau Band echoed this view:

Another thing we want to tell you about it that you have seen how confused we are over those papers – We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head or tail of it. They can't get to learn those plans in three days – they don't know what they are, why they are or where they are.<sup>65</sup>

Chief Negai attended the June 1, 1914, meeting.<sup>66</sup> Although there is no record of him commenting on Halliday's failure to distribute the maps in advance of the meeting, he must have been in the same predicament as the other chiefs.

On June 24, 1914, Agent Halliday was summoned to meet with the Commissioners in Victoria “for examination as to the reserves and conditions in his Agency.” By then he had been in charge of the Kwakewlth Agency for eight years. According to the Commission's precis of the meeting, Agent Halliday conceded that the Mamaleleqala Band needed some additional reserve land. He therefore recommended that a small amount be granted this Band, which he characterized as being “fairly well off for land as compared with other bands”:

... with respect to the application for Gwakulala, a timber limit covered a portion of the land applied for, but he would nevertheless recommend that five acres be granted out of the Timber Limit 10033, as these Indians went every year for fishing. With respect to Nalakglala, on Hoeya Sound, on the shoreline of Knights Inlet: A river came in at that point and the fish were very plentiful there. He therefore recommended that five acres be granted out of Timber Limit 10023. The Indians also made use of Apsu-

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64 Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

65 Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

66 Chief Negai, Mahwililikullah or Village Island, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, pp. 89-90, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

gayu as a fishing station, and he recommended that five acres be granted to them on the north shore of Shoal Harbor, in Pulp Lease No. 482. That place was used annually by the Indians while fishing for salmon and they had their small houses on the Bay where it was recommended that this 5 acres be granted. With respect to Kutlgakla, Swanson Island, part of the land covered by this application was now under Timber Limit and part was an old preemption that had apparently lapsed as no one was now in occupancy. He recommended that the portion of the Island found to be free be granted; this would be approximately 400 to 500 acres. There were 85 Indians in the Band with 477 acres in all their reserves. The Mahmalillikullah were fairly well off for land as compared with other bands, but nevertheless required some additions to their Reserves. . . . As for Nuhdana, on White Beach, Compton Island . . . [where] the Indians had four houses . . . . [h]e recommended that the tract of land be confirmed as a reserve, giving the entire island of about 50 acres to these Indians. The applications for Kakwaes and for Kutlgakla (Lewis Island) were not recommended the lands concerned being found to be alienated. The application for Kliquit (No. 9) was found to be covered by Application No. 2, while the additional application of this Band was not recommended, as the lands affected were not regarded as reasonably required by these Indians.<sup>67</sup>

The "Applications for Additional Lands as Recommended by Agent Halliday" therefore were drafted by the Royal Commission to read:

1. Gwak-gla-la, on Lull Bay:

Recommended that five (5) acres be granted if possible, as a hunting and fishing base out of T.L. [Timber Limit] No. 10033.

2. Ne-late-glala, Hoeya Sound, on the shoreline of Knights Inlet:

Recommended that five (5) acres be granted as a fishing station out of T.L. No. 10023.

3. Ap-su-ga-yu, Shoal Harbour:

Recommended that five (5) acres be granted as a salmon fishing station, on the north shore of Shoal Harbour on Pulp Lease No. 482. This place is used by the Indians annually and the five acres recommended should be given where the Indian houses stand, on a small bay.

4. Kutl-gakla, Swanson Island:

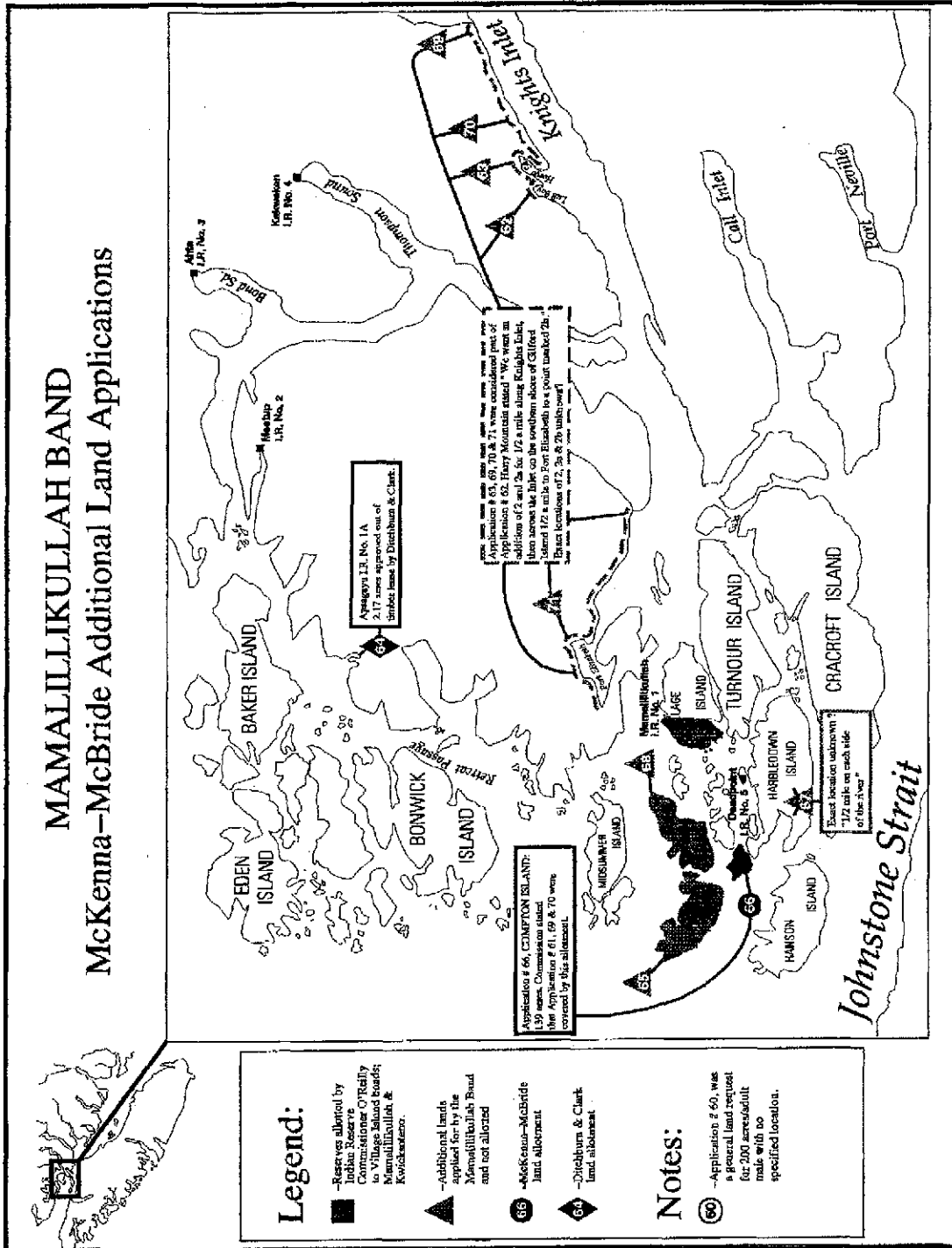
Recommended that as a part of the island appears to be available (in certain lapsed preemptions) such part be granted, to the extent of 400 or 500 acres. (NOTE: Further note in re. a subsequent application)

5. Nudhana, White Beach, comprising the whole of Compton Island:

(NOTE: In the blueprints the west half of this island is marked "I.R." although such reserve does not appear in the Schedule nor in any of the Departmental survey plots.

67 Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, pp. 146-49).

**MAMAILLIKULLAH BAND  
McKenna-McBride Additional Land Applications**





The Indians regard it as a reserve and have four houses there.) Recommended that this be confirmed as an Indian reserve as it appears on the blueprint — the entire island of approximately 60 acres.<sup>68</sup>

In August 1914 the Royal Commission confirmed the Band's original five reserves at the acreages shown in the 1913 schedule.<sup>69</sup> The Commission's surveyor, directed to report on the additional lands applied for by the Band, reported in December 1914 on why he thought the whole of Compton Island should be made a reserve:

Nudhana, on Compton Island, is claimed by the Mahmalilikullah (Village Island) tribe. The eastern portion of the island containing about 60 acres is all that is necessary for the Indians, the remainder is absolutely worthless, but as the survey would cost far more than the value of the land it is a question whether it would not be better to make the whole island, about 155 acres, a reserve. With the exception of a few old gardens the land is high and rocky and there is no timber of commercial value upon it. The village consists of four houses with a good clam beach in front of it; it is said to be a favorite fishing station.<sup>70</sup>

In July 1915 the Commission wrote to Agent Halliday in connection with the applications for additional lands for Kwawkewlth Agency Bands. The applications were summarized and forwarded to Agent Halliday in a tabular form. He was urged to review and respond to this summary and to provide any further recommendations.<sup>71</sup> The Secretary wrote:

You will remember that when you were examined as to the various applications and were asked for your opinion as to whether or not the land in each case applied for were necessarily and reasonably required by the applicant Indians, you in certain instances endorsed the applications, stating the respective areas in your opinion required. In numerous other instances you declined to endorse the applications, giving as a reason that other applications previously recommended would in your opinion reasonably provide for the necessities of the applicant Indians.<sup>72</sup>

68 Royal Commission, Kwawkewlth Agency, "Applications for Additional Lands as Recommended by Agent Halliday," no date, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 151-58).

69 Minutes of Decision, Royal Commission, August 14, 1914 (ICC Documents, p. 159).

70 Secretary, Royal Commission, to Ashdown Green, Land Surveyor, August 17, 1914, NA, RG 10, vol. 11022, file 571A (ICC Documents, p. 160), and Ashdown Green to Secretary, December 21, 1914, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 161-66).

71 Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

72 Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

Of the 195 applications for additional lands filed in his Agency, Agent Halliday had recommended approximately 73. Of these 73, however, only 27 were possible, because the other 46 proved to be alienated and therefore unavailable lands.<sup>73</sup> For the Mamaleleqala, Agent Halliday had recommended, in whole or in part, just six of their 12 applications, of which only one was available.

It is clear from the minutes of the June 2, 1914, meeting that Agent Halliday had more access to this information than Band members did at the time: "The status of these lands was shown on blueprints which Agent Halliday had himself bought and paid for out of his own pockets [sic], but the Indians might see them at any time if they desired to do so."<sup>74</sup> At the hearing, Chief Dawson said the Indians had no previous knowledge of the timber limits. He said they had seen the reserve maps only "a few days ago."<sup>75</sup>

Because so many of the lands Halliday had recommended were unavailable, the Secretary asked him to revisit the question and to describe accurately "such alternative lands as you may see fit to recommend . . .":

Inasmuch as your recommendation of a number of the applications which you did not endorse was stated by you to be withheld because you thought the requirements of the Indians would be sufficiently met by the granting of the lands applied for which you did recommend; and inasmuch as many of these are now found to be unavailable, the Commission would be glad to know if you desire to reconsider your opinion with regard to any of the applications which were not endorsed, in order that alternative lands may possibly be obtained under such applications to meet the requirements of the Indians which would otherwise not be met.<sup>76</sup>

For the whole Agency, Agent Halliday recommended a few alternative lands, but his August 11, 1915, response offered little to the Mamaleleqala Band. In connection with their applications 60 to 70, inclusive, he stated: "With the exception of application 65 which includes application 60, all lands recommended are apparently alienated. The whole of Compton Island is recommended."<sup>77</sup> In other words, Agent Halliday supported the only appli-

73 Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

74 Minutes, June 2, 1914, Meeting, Mahmalilikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 144).

75 Minutes, June 2, 1914, Meeting, Mahmalilikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 143).

76 Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

77 Agent Halliday to Secretary, Royal Commission, August 11, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 169-73).

cation for land which had not been alienated by timber lease or licence. He did not recommend any alternative sites as a substitute for the other applications for lands that had already been alienated. Correspondence from the McKenna-McBride Commission indicates that Agent Halliday's overall response met "the requirements of the Commission" to the extent that Halliday was relieved of the necessity of visiting Victoria "for re-examination as at first proposed."<sup>78</sup> On February 25, 1916, the Commission ordered that Compton Island be made an Indian Reserve:

The Commission having under consideration Kwawkweth [sic] Agency Application No. Sixty-six (66) of the Village Island or Mahmalilikullah Tribe, for Compton Island (Kuthdana or White Beach), for Fishing Station purposes, it was

ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant . . . Compton Island, in its entirety, . . . One Hundred and Fifty (150) acres, more or less, subject to survey and to any rights under the "Mineral Act" which may have been acquired prior to constitution of the same as a Reserve.<sup>79</sup>

In the 1916 *Final Report* of the McKenna-McBride Commission,<sup>80</sup> the applications numbered 60 to 71 are listed as follows:

Tribe or Band	Land Applied for	Status of Land Desired	Decision of Commission
60. Mahmalilikullah Tribe. (Village Island).	200 ac., undefined land, for each adult male of the Tribe.		Not entertained, as not reasonably required.
61. Do [Ditto]	Village, Nuhdana or Compton Island.		Covered in fifth following application for Compton Island, Item 66 allowed.
62. Do	Kwakglala, Lull Bay: 1/2 mile on each side of the river for its total length.	Reported by Lands Committee as alienated.	Not entertained, land applied for not being available.

78 Secretary, Royal Commission, to Agent Halliday, September 1, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, p. 175).

79 Minutes of Decision, Royal Commission, February 25, 1916 (ICC Documents, p. 178).

80 Royal Commission on Indian Affairs for the Province of British Columbia, *Final Report* (Victoria, 1916) (ICC Documents, pp. 176-77).

INDIAN CLAIMS COMMISSION PROCEEDINGS

Tribe or Band	Land Applied for	Status of Land Desired	Decision of Commission
63. Do	Nalakglala, Hoeya Sound, 1/2 mile from point marked "2" to point marked "2a," along the shore to Knight's Inlet.	Do	Do
64. Do	Apsagayu, Shoal Harbour: 1/2 mile around the bay and up the river to its source.	Do	Do
65. Do	Kutlgakla or Swanson Island. (See special note on last of the Tanockteuch applications.)	Do	Do
66. Do	Compton Island (Kuthdana or White Beach).	Apparently vacant and available.	Allowed: Compton Island in its entirety, approximately 150 acres . . . .
67. Do	Harbledown Island: Kahwaes, 1/2 mile on each side of the river, marked "6" on Agency map.	Alienated.	Not entertained, land applied for not being available.
68. Do	Kuhglaka or Lewis Island.	Do	Do
69. Do	Matalsyn.		Covered by allowance of Compton Island, Item 66.
70. Do	Kliquit.		Do
71. Do	One half mile along Knight's Inlet, thence across the Inlet to the southern shore of Gilford Island and 1/2 mile to Point Elisabeth to the point marked "2B" on the map. Including 10 ancient villages.	Covered by sundry Timber licences. Alienated.	Not entertained, land applied for not being available.

### Ditchburn-Clark Adjustments

The 1916 final recommendations of the McKenna-McBride Commission received only qualified approval a few years later in the form of provincial and federal legislation that paved the way for further negotiations and adjustments. British Columbia passed the *Indian Affairs Settlement Act* in 1919, which empowered the Lieutenant Governor in Council to give effect to the Report of the Royal Commission and to “carry on such further negotiations . . . as may be found necessary for a full and final adjustment of the differences between . . . the Governments.”<sup>81</sup>

The province’s Minister of Lands, T.D. Patullo, was convinced there were “innumerable errors” in the Commission’s Final Report and that “a large number of additions . . . were selected for the strategic or controlling location and not that they will actually be required by the Indians for settlement purposes.” He therefore approached the Minister of Indian Affairs, Arthur Meighen, in April 1920 to propose a thorough review of the whole Report.<sup>82</sup>

Canada passed legislation in 1920 acknowledging the 1916 recommendations of the McKenna-McBride Commission but permitting the Governor in Council to order reductions or cut-offs from reserves. The *British Columbia Indian Lands Settlement Act* states:

3. For the purpose of adjusting, readjusting or confirming the reductions or cut-offs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the *Indian Act* to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.<sup>83</sup>

This process was carried out through the vehicle of a joint commission co-chaired by W.E. Ditchburn, Canada’s Chief Inspector of Indian Agencies in British Columbia,<sup>84</sup> and J.W. Clark, Superintendent of Soldier Settlement in British Columbia, the province’s representative from the Department of

81 British Columbia, Legislative Assembly, *Sessional Papers*, 1919, “Indian Affairs Settlement Act” (ICC Documents, pp. 181-82).

82 Patullo to Meighen, April 21, 1920, cited in Indian Claims Commission, *Nak’azdli First Nation Report on Abt-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, pp. 191-92).

83 Canada, Parliament, *Sessional Papers*, 1920, “British Columbia Indian Lands Settlement Act” (ICC Documents, pp. 183-84).

84 Ditchburn to Patullo, October 20, 1920, cited in Indian Claims Commission, *Nak’azdli First Nation Report on Abt-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, p. 196).

Lands. Correspondence from Mr Clark to Mr Patullo reveals that Clark was opposed in principle to any widely scattered additions to reserve lands. He believed they would interfere with the “progress of white settlers” and with the education of Indians.<sup>85</sup>

For the Mamaleleqala Band, the result of the Ditchburn-Clark review was that the Band received two reserves: Compton Island, thought to be approximately 150 acres, under Application 66; and Apsagayu, approximately 2 acres, under Application 64.<sup>86</sup> This recommendation was confirmed by a British Columbia Order in Council in July 1923 and a federal Order in Council in July 1924.<sup>87</sup>

### **Reserve Lands Conveyed to the Federal Crown**

In 1938, when the title to Indian Reserve lands was conveyed by the British Columbia government to the federal Crown, the accompanying list included the Mamaleleqala Band’s five original reserves with the acreages unchanged. The newer reserves were shown at their surveyed acreages: Apsagayu IR 1A, Lot 1514, 2.17 acres subject to a pulp lease of November 30, 1906, to Canadian Industrial (Lot 482); and Compton Island IR 6, Lot 1508, 139 acres.<sup>88</sup>

Indian Affairs’ “Schedule of Reserves” for the year ending March 31, 1943, lists only three reserves for the Band: Mahmalilikulla IR 1, Apsagayu IR 1A, and Compton Island IR 6.<sup>89</sup> The Commission has no information about the other reserves that evidently were lost to the Band between 1938 and 1943.

### **TESTIMONY FROM THE COMMUNITY SESSION**

Several members of the Mamaleleqala Qwe’Qwa’Sot’Enox Band had the opportunity, on May 23, 1996, to speak to these events when the Commission held a community session on the rejection of the Band’s McKenna-McBride claim at the U’mista Cultural Centre in Alert Bay. The elders’ comments that relate to issues in this claim are summarized here.

<sup>85</sup> Clark to Minister of Lands, April 1 1920, cited in Indian Claims Commission, *Nak’azdli First Nation Report on Abt-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, pp. 185-87).

<sup>86</sup> W.E. Ditchburn, Chief Inspector of Indian Agencies, to D.C. Scott, DSGIA, March 27, 1923 (ICC Documents, pp. 197-206); J.W. Clark to Minister of Lands, n.d. 1923 (ICC Documents, pp. 185-86).

<sup>87</sup> British Columbia, Order in Council 911, July 26, 1923 (ICC Documents, pp. 207-11), and Canada, Order in Council 1265, July 21, 1924 (ICC Documents, pp. 212-17).

<sup>88</sup> British Columbia, Order in Council 1036, July 29, 1938 (ICC Documents, pp. 218-21). Compton Island, described before survey as “approximately 150 acres,” amounted to only 139 acres after survey.

<sup>89</sup> Canada, Department of Mines and Resources, Indian Affairs Branch, Schedule of Indian Reserves in the Dominion of Canada, to March 31, 1943 (ICC Documents, pp. 223-24).

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Ethel Alfred remembered Indian Agent Halliday and his reputation. Through an interpreter, she said that Agent Halliday treated all native people very badly – people in her tribe as well as others. She said the Chiefs and the Mamaleleqala people were scared of Agent Halliday because he would not cooperate with or listen to them.

Agent Halliday told Ethel Alfred's newly married sister that she could not build a house on Village Island because the village would soon be gone. He wanted all the members of various bands in his Agency "to move here [Alert Bay], to be one, to amalgamate, to move to Alert Bay, and he promised them that there would be one people, they would have one office, and they would work together . . . ." She went on to say that "one of the major reasons why William Halliday wanted all of the people to move here was because the Indian Agent office was located in Alert Bay, because at that time, that's when they stopped the potlatching, and he wanted them close by so he could keep an eye on them and he wanted this to be the centre. And he encouraged people to leave their villages and move here, and promised them things which he never ever kept." As Ms. Alfred put it, Agent Halliday "built, with his influence and the missionaries," the girls' school that later became a residential school.

Ms. Alfred, who was a schoolgirl in 1925, moved to Alert Bay from Village Island in 1927 when she married. Her parents had no formal education and did not speak much English. There were no newspapers in her Village Island home, and she did not see any when she first moved to Alert Bay.<sup>90</sup>

Vera Neuman, who was born in 1944, knew of Agent Halliday from her grandparents, who she said feared him and white people in general. Her grandmother spoke no English and her grandfather only "very broken English." Newspapers were not read on Village Island by either her parents or her grandparents.<sup>91</sup>

Chief Robert Sewid, who was born in 1935 and now lives on the Campbell River Reserve, also moved from Village Island to Alert Bay as a child. His father had been Chief before him. Agent Halliday is known to Robert Sewid as "an awful man" whom his people feared. Chief Sewid attributed the eventual forced move from Village Island to Alert Bay to Agent Halliday and his successors, Mr. Todd and Mr. Findlay. "[T]hey cut the school off" at Village Island and used the schools and hospital on Cormorant Island as the incentive to move to Alert Bay on Cormorant Island. In general, Chief Sewid felt

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<sup>90</sup> ICC Transcript, May 23, 1996, pp. 10-26 (Ethel Alfred).

<sup>91</sup> ICC Transcript, May 23, 1996, pp. 26-42 (Vera Neuman).

that the agents pressured people like his father to move from villages like Village Island to Cormorant Island. "It's full now," he said, "there's no more space."

Before most of the Mamaleleqala came to live on Village Island, they had five or six clans that lived in various locations within their territory. "I don't know if it was the work of Halliday at that time," said Chief Sewid, but "everybody got together on Village Island and lived." The other localities were "where our homesteads were, the different clans, different chiefs and their own clan used to live there. And they'd get together in the wintertime and they'd have a potlatch in one place. That's why we say that belongs to us and that belongs to us, because we had Mamaleleqala different clans there." During the community session, Chief Sewid pointed out some of these locations on a map, as well as those of various smokehouses.<sup>92</sup>

Today, the Mamaleleqala people are scattered. Chief Sewid told the Commissioners they are at Alert Bay, Port Hardy, Campbell River, Victoria, Vancouver, and "all over the place." He spoke of a 50-year effort "to get relocation," the difficulties of bringing the people together, and the Band's lack of land.<sup>93</sup>

David Mountain, the last person to move from Village Island to Cormorant Island, also spoke at the community session. Born on Village Island, he observed that it was not until he left Village Island that he had to eat "the white man's food" such as hamburger and bologna. "I never used to eat that before because I used to eat fish. Fish or deer meat, everything." His grandparents did not speak English. His feelings about Agent Halliday and government officials in general were dislike and distrust.<sup>94</sup>

Harry Mountain, 75 years old and one of the Hereditary Chiefs from Village Island, also spoke. He emphasized the "complete control" that Agent Halliday had over their lives. Harry Mountain's father spoke a little English, but his mother did not know any English. He does not remember seeing any newspapers in their home, and he gave evidence that only his native language was spoken on Village Island when he left in 1929 to attend school on Cormorant Island.<sup>95</sup>

Bobby Joseph, presently Band manager but not a member of the Band, also appeared because he is very familiar with the history and circumstances of the Mamaleleqala people. He came to the school at Alert Bay in 1946 not

92 ICC Transcript, May 23, 1996, pp. 42-56 (Chief Robert Sewid).

93 ICC Transcript, May 23, 1996, pp. 42-56 (Chief Robert Sewid).

94 ICC Transcript, May 23, 1996, pp. 56-70 (David Mountain).

95 ICC Transcript, May 23, 1996, pp. 70-73 (Harry Mountain).



knowing English, but has “worked now for almost 30 years politically with my people, with Mamalelegala, [and] other tribes.” He stated that the now rootless Mamalelegala “were the second highest ranking tribe of the 18 tribes.” He believes that Agent Halliday would have preferred not to give the Mamalelegala any land at all. He asked: “So if he was intent on breaking their spirit, in taking away their foundation of their societies, how could he be at all interested before the McKenna-McBride Commission in saying we want this for their well-being? He would sooner dismiss all of those places, the sacred places I talked about where the first ancestors transformed, dismissed them out of hand and dismissed out of hand in the interest of forest companies or logging interests, settlements where there were [sic] evidence of harvesting places and smokehouses.”<sup>96</sup>

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<sup>96</sup> ICC Transcript, May 23, 1996, pp. 74-81 (Bobby Joseph).

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## PART III

### ISSUES

To facilitate the Commission's review of this claim, legal counsel for the Band and for Canada<sup>1</sup> agreed on the following list of issues relevant to this inquiry:

1. Does the Claim fall within the scope of the Specific Claims Policy?
  - a. Has the claimant established an outstanding "lawful obligation" or "beyond lawful obligation" owed by the Crown to the Mamaleleqala Qwe'Qwa'Sot'Enox Band?
  - b. Is the list of types of claim found at page 20 of the Government of Canada's booklet *Outstanding Business* exhaustive, or simply a list of examples of outstanding lawful obligation?
2. Did Canada, through its Indian Agent for Kwawkewlth Agency, have a fiduciary duty to protect the Band's interests, if any, in the settlement lands?
  - a. Are these lands "settlement lands" within the meaning of the *Land Act*?
3. If Issue 2 is answered in the affirmative, did Canada, through its Indian Agent, breach this duty? Specifically,
  - a. Did the Indian Agent fail to make himself aware of the location of the Band's settlement lands within his Agency, and, if so, was this a breach of Canada's duty?
  - b. Did the Indian Agent fail to make himself aware of the applications for timber leases over Indian settlements within his agency, and, if so, was this a breach of Canada's duty?

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<sup>1</sup> C. Allan Donovan to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, February 15, 1996 (ICC file 2109-21-1); Sarah Kelleher, Counsel, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, February 22, 1996 (ICC file 2109-21-1).

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- c. Did the Indian Agent fail to take steps to protect the Band's settlement lands from illegal alienation, and, if so, was this a breach of Canada's duty?
4. Alternatively, if these lands are not "settlement lands" within the meaning of the *Land Act*, did Canada, through its Indian Agent, nonetheless owe a fiduciary obligation to the Band?
5. Did Canada, through its Indian Agent, have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission?
6. If Issue 5 is answered in the affirmative, did Canada, through its Indian Agent, breach this fiduciary duty? Specifically,
- a. Did the Indian Agent fail to assist the Band in developing its application to the McKenna-McBride Commission for additional reserves, and, if so, was this a breach of Canada's duty?
  - b. Did the Indian Agent fail to provide the Band with information in his possession necessary for the Band's preparation of successful applications, and, if so, was this a breach of Canada's duty?
  - c. Did the Indian Agent undermine the Band's claim by recommending a land base that was significantly reduced from what the Band applied for, and, if so, was this a breach of Canada's duty?
  - d. Was the Indian Agent's statement to the McKenna-McBride Commission that the Band was "fairly well off for land as compared with other Bands" a misrepresentation, and, if so, was this a breach of Canada's duty?
  - e. Did the Indian Agent fail to consult with the Band to prepare alternative recommendations after being advised by the Commission of the rejection of the original applications and being invited to submit alternative recommendations, and, if so, was this a breach of Canada's duty?
  - f. Did the Indian Agent fail to submit alternative land applications to the Commission, and, if so, was this a breach of Canada's duty?
  - g. Did the Indian Agent fail to recommend any alternative arrangements with respect to lands alienated for timber purposes, and, if so, was this a breach of Canada's duty?
7. If Canada is found to have breached a fiduciary duty to the Band, did such breach result in damage to the Mamaleleqala Band?
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8. In the alternative, does Canada owe a duty to care to the Band? If so, do the allegations of breach of fiduciary duty set out above establish a breach of Canada's duty of care, through its Indian Agent, owed to the Band?

We will respond to the issues raised by the parties by addressing four main questions as follows:

ISSUE 1 Did Canada have a fiduciary obligation to protect the Band's settlement lands, and, if so, was there a breach of this obligation?

ISSUE 2 Did Canada have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission and, if so, was there a breach of this obligation?

ISSUE 3 In the alternative, does Canada owe a duty of care to the Band?

ISSUE 4 Does Canada owe an outstanding lawful obligation to the Band in accordance with the Specific Claims Policy?

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## PART IV

### ANALYSIS

#### ISSUE 1 FIDUCIARY OBLIGATION TO PROTECT INDIAN SETTLEMENT LANDS

Did Canada have a fiduciary obligation to protect the Band's settlement lands, and, if so, was there a breach of this obligation?

The essence of the Band's argument is that Canada owed a fiduciary obligation to the Band to protect its interests in the settlement lands. In *Guerin v. The Queen*,<sup>98</sup> the Supreme Court of Canada held that "the Crown has historically assumed both a power over Indian interests in land, and the role of protector of those interests."<sup>99</sup> Mr Donovan, on behalf of the Band, submitted that a fiduciary relationship exists between the Crown and aboriginal peoples which

... finds its roots in the earliest expression of colonial policy, and has existed since at least the date of the *Royal Proclamation of 1763*. The Crown therefore has owed, and continues to owe Indian peoples an obligation at law to protect their interests in land, whether that interest be in reserve lands or "unrecognized aboriginal title in traditional lands".<sup>100</sup>

The Band submits that the content of the duty owed to the Band, which varies from case to case depending on the circumstances, was for the Crown to exercise its discretion "honestly, prudently and for the benefit of the Indians."<sup>101</sup> Counsel for the Band submitted that the duty of care described by

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98 *Guerin v. The Queen*, [1984] 2 SCR 335.

99 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 12.

100 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 12.

101 *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (Fed. CA). Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 13.

Addy J in the trial decision of *Blueberry River Band v. Canada*<sup>102</sup> (endorsed by Marceau JA in the Federal Court of Appeal) applies to the facts in this case:

I must hasten to state, however, that, wherever advice is sought or whenever it is proffered, regardless of whether or not it is sought or where action is taken, *there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians*. Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course 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 expected to be aware. Since this situation exists in the case at bar, *the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies*.<sup>103</sup>

Thus, the Band argues that the instructions issued to Indian Agents “to protect [aboriginal peoples] in the possession of lands and rights, to be responsible for the ordinary care of their interests, to intelligently advise them and to act energetically on their behalf” provided a reasonable standard on which to measure the conduct of the Indian Agents.<sup>104</sup>

Finally, Mr Donovan argued that the Crown’s fiduciary obligation towards the Band was “further enhanced by the reality that the Mamaleqala people, at the time, did not possess the requisite schooling, experience, or literacy to defend their interests against third party encroachment or before the McKenna-McBride Commission.”<sup>105</sup> To substantiate this factual premise, the Band pointed to evidence that there was no school at the Village Island reserve (although four children did attend an industrial school in Alert Bay); the Mamaleqala people did not speak much English and received little, if any, formal education; and the community of Village Island was, and continues to be, isolated.<sup>106</sup> In view of these circumstances, the Band argued that “the Indian Agent was the only bulwark of the Mamaleqala people against alienation of their settlements and their only advisor with respect to the McKenna-McBride process. To paraphrase Justice Wilson [in *Frame v. Smith*],

102 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [also referred to as *Apsassin v. Canada*], [1988] 1 CNLR 73, 14 FTR 161 (Fed. TD); [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA); [1996] 2 CNLR 25 (SCC).

103 *Apsassin*, [1993] 3 FC 28 (Fed. CA) at 79. Emphasis added.

104 Submissions of the Mamaleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry, p. 16.

105 Submissions of the Mamaleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry, p. 16.

106 ICC Transcript, May 23, 1996, pp. 17, 18, 41 and 70; ICC documents, p. 122.

the Mamaleleqala, and their practical and legal interests, were peculiarly vulnerable to the exercise of the Agent's discretion."<sup>107</sup>

Canada argues that, if the Band had or has any "interest" in the settlement lands, it arose or arises out of an aboriginal right or title to the lands in question, a matter outside the scope of the Specific Claims Policy.<sup>108</sup> Moreover, Canada argues that the Band has not established that the lands at issue in this claim were "Indian settlements" within the meaning of the provincial *Land Act* at the time timber licences were granted over the lands.<sup>109</sup> However, even if some or all of the lands were "Indian settlements" at the relevant time, Canada contends that it did not have a fiduciary duty to protect the lands.

Canada submits that there was no statute, agreement, or unilateral undertaking on the part of Canada which gave rise to an obligation to act on behalf of the Band in protecting the Band's "settlement" lands.<sup>110</sup> According to Canada, a general fiduciary duty in relation to aboriginal interests in non-reserve lands cannot be extracted from the Supreme Court of Canada's decision in *Guerin*. In addition, the instructions to Indian Agents were not a statute or an agreement between the Band and Canada, and they did not create a unilateral undertaking on the part of Canada.

In the alternative, Canada argues that, if the instructions to Indian Agents did constitute an agreement or a unilateral undertaking, they did not require Canada to act on the Band's behalf with respect to non-reserve lands, since Canada did not have any jurisdiction or control over provincial lands. Canada also notes that the trespass provisions in the 1886 and 1906 versions of the *Indian Act* did not require the Indian Agent to seek out trespassers. It submits that "given that the Crown did not have a proactive duty to seek out trespassers in respect of reserve lands, there was certainly no such duty with respect to the Band's 'settlement' lands."<sup>111</sup>

Canada goes on to argue that it did not have any unilateral power or discretion with respect to the granting of timber licences or other interests over provincial Crown lands. It submits that it only had the ability, in common with the Band and others, to protest the inclusion of an Indian settlement in a timber licence. Canada states:

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107 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 17.

108 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 15.

109 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 15-18.

110 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 24-26.

111 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

The fact that the Band could have taken the same action which it is asserted Canada ought to have taken, indicates that such power or discretion was not unilateral vis-a-vis the Band. Further, it indicates that the Band was not vulnerable to any power or discretion which Canada might have had in this situation.<sup>112</sup>

Finally, Canada argues that even if it did have an obligation to protect the Band's interests in its "settlement lands," these interests were not affected by the reserve creation process in British Columbia. Accordingly, it cannot be said that Canada, through its Indian Agents, breached its duty to protect any interests that may have existed.<sup>113</sup>

### **Statutory Protection of Indian Settlement Lands**

Although the British Columbia government refused to recognize the existence of aboriginal title or to enter into treaties with the Indians after joining Confederation in 1871, section 56 of the provincial *Land Act* provided at least some measure of protection for Indian settlement lands:

56. No timber licence shall be granted in respect of lands forming the site of an Indian settlement or reserve, and the Chief Commissioner may refuse to grant a licence in respect of any particular land if, in the opinion of the Lieutenant-Governor in Council, it is deemed expedient in the public interest so to do.<sup>114</sup>

Unfortunately, the term "Indian settlement" is not expressly defined in the Act. Therefore, it is necessary to interpret this section by reference to external sources and other sections of the Act which help shed light on the legislative intention of this provision.

The Band relies on subsection 4(12) of the *Land Act* to assist in interpreting the term "Indian settlement." Section 4 of the Act sets out various instructions for land surveyors, including instructions for their field-books. Subsection 4(12), in particular, stipulated that "Indian villages or settlements, houses and cabins, fields or other improvements, shall be carefully noted."<sup>115</sup> The Band concludes that these instructions confirm that the legislature contemplated the protection of a broad range of Indian habitation.<sup>116</sup>

112 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

113 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 15 and 27.

114 *Land Act*, RSBC 1897, c. 113, s. 56. Although section 56 refers only to timber licences, both parties appeared to accept for the purposes of this inquiry that both leases and licences were prohibited over an Indian settlement. See, for example, Mr Becker's comments at ICC Transcript, August 29, 1996, p. 60: "settlement lands are basically, the idea came from the *Lands Act* where the Province . . . provided that certain companies and individuals could . . . get timber leases or licenses over areas but not over Indian settlement lands."

115 *Land Act*, RSBC 1897, c. 113, s. 4(12).

116 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 28.



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Canada relies on a number of sources external to the *Land Act* to define the term “settlement.” First, Canada’s submissions cite a number of selected dictionary definitions for the words “settlement” and “settle” as follows:

The Concise Oxford Dictionary provides a number of meanings for the word “settlement,” the most relevant being:

“settlement” – The act or instance of settling; the process of being settled. The colonization of a region. A place or area occupied by settlers. A small village.

The 1944 edition of the Shorter Oxford English Dictionary includes in the definition of a “settlement” the following:

Establishment in a permanent abode. The act of settling as colonists or newcomers; the act of peopling or colonizing a new country, or of planting a colony. An assemblage of persons settled in a locality. A community of the subjects of a state settled in a new country; a tract of country so settled, a colony. In the outlying districts of America and the Colonies: A small village or collection of houses.

Additionally, the following definitions of the word “settle” may be found:

“settle” – Establish or become established in a more or less permanent abode or way of life (The Concise Oxford Dictionary)

“settle” – To fix or establish permanently (one’s abode, residence, etc). To lodge, come to rest, in a definite place after wandering. To establish a permanent residence, become domiciled (Shorter Oxford English Dictionary)<sup>117</sup>

Second, Canada refers to a number of statements and documents made by government officials in the latter part of the nineteenth century. In correspondence dated 1874, James Douglas, former Governor of British Columbia, was asked whether there was any particular basis of acreage used in setting apart Indian reserves during the period of his governorship. He replied that the surveying officers had instructions

to meet [the Indians’] wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations, and Burial Grounds, cultivated land and all the favorite resorts of the Tribes; and, 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 labor.<sup>118</sup>

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117 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 16.

118 James Douglas to Lt. Col. Powell, Indian Commissioner, October 14, 1874, NA, RG 10, vol. 10031 (ICC Exhibit 15).

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Less than two years later, the provincial and federal governments established the Joint Reserve Commission. In his report “for the year ended 30th June, 1876,” David Mills, Minister of the Interior, stated that the Commissioners

were officially enjoined as little as possible to interfere with any existing tribal arrangements; and, particularly, that they were to be careful not to disturb the Indians in the possession of any villages, fishing stations, fur trading posts, settlements or clearings which they might occupy, and to which they might be specially attached.<sup>119</sup>

Similar instructions were given to Commissioner O’Reilly in 1880:

[Y]ou should . . . 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 . . .<sup>120</sup>

Canada submits that the above statements and documents may assist in determining the meaning of “Indian settlement” and the intent of the *Land Act*.<sup>121</sup>

Finally, Canada suggests that portions of Chief Justice McEachern’s decision in *Delgamuukw v. B.C.*<sup>122</sup> may help in interpreting the meaning of the word “settlement.” In his decision, Chief Justice McEachern quotes from an address made by Governor Douglas to the House of Assembly on February 5, 1859. Governor Douglas stated that the Indians “were to be protected in their original right of fishing on the coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields.”<sup>123</sup> Chief Justice McEachern also quotes from a dispatch dated October 9, 1860, in which Governor Douglas described his visit at Cayoosh with a large number of Indian tribes. Governor Douglas said that he “*explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much*

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119 Sarah Kelleher, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Specific Claims Commission, May 8, 1996, enclosing Report of the Department of the Interior, for the Year Ended 30th June, 1876, p. xvi, January 15, 1877 (ICC file 2109-21-1).

120 Letter to Patrick [sic] O’Reilly, Indian Reserve Commissioner, August 9, 1880 (ICC Exhibit 13).

121 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 16.

122 *Delgamuukw v. B.C.* [1991] 5 CNLR 1 (BCSC).

123 *Delgamuukw v. B.C.* [1991] 5 CNLR 1 at 101 (BCSC).

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*land in the vicinity of each as they could till, or was required for their support . . .*<sup>124</sup>

Based on these references, Canada submits that an “Indian settlement” under the *Land Act* can best be described as

1. dwellings in the proximity of each other which are occupied by a group of Indians;
2. land immediately adjacent to such dwellings that the Indians used for their support including cooking and daily living and for their animals; and
3. fields cultivated by the Indians immediately adjacent to or in the proximity of such dwellings.<sup>125</sup>

The term “settlement” can, of course, have many different meanings. The task before us, however, is to ascertain which lands would or could have been protected under section 56 of the *Land Act* at the time leases and licences were being granted over Crown lands in the late 1800s and early 1900s. In other words, our task is to determine the intention of the legislature at the time section 56 was enacted. We agree with Canada that statements made by government officials in the nineteenth century provide some evidence of the legislature’s intention. However, we find Canada’s three-point definition of “Indian settlement” too restrictive. The sources provided by Canada do not, for instance, indicate that cultivated fields had to be “immediately adjacent to” or “in the proximity of” dwellings to qualify as settlement lands. Canada’s proposed definition also fails to take into account the unique forms of land use and occupation practised by aboriginal peoples on the British Columbia coast.

Given the limited amount of information available to us on this inquiry, we do not purport to offer any exhaustive definition of the term “Indian settlement.” However, as we see it, when section 56 was enacted it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether they were immediately adjacent to or in the proximity of other dwellings. Furthermore, in our view, it was not strictly necessary for there to be a permanent structure on the land for it to constitute an “Indian settlement,” providing there is evidence of collective use and occupation by the Band. The question that remains to be answered is

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<sup>124</sup> *Delgamuukw v. B.C.* [1991] 5 CNLR 1 at 105 (BCSC). Emphasis in original.

<sup>125</sup> Submissions on Behalf of the Government of Canada, August 22, 1996, p. 18.

whether any of the lands at issue in this claim were, in fact, Indian settlement lands.

### **Settlement Lands of the Mamaleleqala Qwe'Qwa'Sot'Enox Band**

In its written submissions, the Band states that out of the 12 applications submitted by the Band to the McKenna-McBride Commission, "only ten were site-specific enough to be considered by the Commission. Of these ten, two were seen to be redundant because they related to areas already contained within a prior application. Accordingly, a total of eight effective applications were made."<sup>126</sup> According to the Band, these eight effective applications were

1. Kwakglala / Lull Bay (Application 62);
2. Nalaklaia / Hoeya Sound (Application 63);
3. Apsagayu / Shoal Harbour (Application 64);
4. Kutlgakla on Swanson Island (Application 65);
5. Compton Island (Application 66);
6. Kahwaes at Harbledown Island (Application 67);
7. Kuklaga / Lewis Island (Application 68); and
8. Knights Inlet (Application 71).<sup>127</sup>

The Band goes on to state:

Of the eight applications, four (Lull Bay, Hoeya Sound, Shoal Harbour, and Knight's Inlet) were for areas which either had houses standing on them, or were inhabited in some way. They were, therefore, "Indian settlement lands" and fell within the protection of the *Land Act*. The Commission, however, rejected applications for at least three of these settlements (Lull Bay, Shoal Harbour and Knight's Inlet) on the basis that they were covered by timber leases.<sup>128</sup>

In assessing whether any of the lands encompassed by the Band's applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamaleleqala Qwe'Qwa'Sot'Enox used the land and the type of houses they built and used during the early part of this century. As the Band points out in its written submissions, "[o]ne traditional house could house a number of families."<sup>129</sup> Therefore, in our view, the exist-

<sup>126</sup> Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 18-19.

<sup>127</sup> Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 19-24.

<sup>128</sup> Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 27.

<sup>129</sup> Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 28.

tence of even one house provides ample evidence that an Indian settlement existed at that location.

In terms of the Band's applications, we have evidence from the McKenna-McBride hearings on June 2, 1914, that one house existed at Lull Bay (Application 62),<sup>130</sup> two houses existed at Apsagayu on Shoal Harbour (Application 64),<sup>131</sup> and 10 villages existed in the area encompassed by Application 71 ("half a mile along Knights Inlet, then across the Inlet on the southern shore of Gilford Island half a mile to Port Elizabeth to a point marked 2B").<sup>132</sup> In our opinion, these improvements provide concrete evidence that an Indian settlement existed at each of these locations.

In his oral submissions, Mr Becker, counsel for Canada, argued that it was unclear whether any of the 10 villages in the Knight's Inlet area belonged to the Band.<sup>133</sup> On this point, we agree with Mr Donovan, counsel for the Band, who stated that it would have been entirely out of character for the Band to claim another band's villages.<sup>134</sup> The testimony of Mr Harry Mountain before the McKenna-McBride Commission lends credence to the Band's reply. When Mr Mountain gave evidence about the Band's existing reserves, he explicitly disclaimed ownership of IR 3:

[COMMISSIONER SHAW:] No. 3, Do you know that Reserve?

[HARRY MOUNTAIN:] We don't claim this. That place is called Ahta – That belongs to another Tribe.

Q. Does the man that lives on that Reserve, is he a member of that Mahmalilikullah Tribe?

A. No, he belongs to another Tribe.

Q. Do you know anything regarding that Reserve – have you ever been there?

A. Yes, our people often go there – but we don't claim it as belonging to us.<sup>135</sup>

In addition, there is evidence that Agent Halliday identified lands claimed by other bands where there was potential for competing claims to the same lands.<sup>136</sup> Since Canada has not offered any cogent evidence to support the

<sup>130</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, pp. 131-32 (ICC Documents, pp. 129-30).

<sup>131</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 133 (ICC Documents, p. 131).

<sup>132</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 135 (ICC Documents, p. 133).

<sup>133</sup> ICC Transcript, August 29, 1996, pp. 73-74 (Bruce Becker).

<sup>134</sup> ICC Transcript, August 29, 1996, p. 163 (C. Allan Donovan).

<sup>135</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 130 (ICC Documents, p. 128).

<sup>136</sup> When Commissioner Shaw asked Harry Mountain for information regarding IR 2, Agent Halliday interjected: "With respect to Meetup Reserve No. 2 – while this is on the Agency map and in the Schedule as belonging to the Village Island or Mahmalilikullah Tribe, it and two other of the Reserves are also claimed by the Kwickswoitaneuks, who are here to press their claims": Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 129 (ICC Documents, p. 127).

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allegation that these lands may have belonged to another band, in our view the evidence on balance favours the conclusion that the 10 villages did, in fact, belong to the Mamaleleqala.

With respect to Application 63 (Hoeya Sound), Harry Mountain testified that, although there were no houses, the Band had been living there.<sup>137</sup> The fact that the Band had been living in the area suggests a certain degree of settlement. This conclusion is strengthened by Harry Mountain's testimony for Mataltsym (Application 69). He said that Mataltsym was "an old Indian village" and that it was "covered by application No. 2" (i.e., the application for Hoeya Sound).<sup>138</sup> Since Mataltsym was included in the application for Hoeya Sound, it stands to reason that the "old Indian village" was also included in the application for Hoeya Sound.

Canada, in its written submissions, takes issue with the fact that the evidence available to us for the lands described above comes from the testimony of Band members during the McKenna-McBride hearings in 1914. The timber leases and licences covering those lands were granted several years earlier. Canada asserts that the Band's testimony "provides us with little or no information on what use the Band was making of the land when the timber licence was granted." Canada also contends that "the Band [has not] provided any other evidence to establish that the lands constituted an 'Indian settlement' at the time the timber licenses were granted."<sup>139</sup> In our view, however, the Band has established that the lands included within these applications were Indian settlements when the timber leases and licences were granted. With respect to Application 71, it is important to observe that the 10 villages along Knight's Inlet were described in the 1916 Final Report of the McKenna-McBride Commission as "ancient villages," which lends credence to the Band's argument. With respect to the other applications, the Band has met this argument, since it is reasonable to assume that, if particular tracts of land were being used by the Mamaleleqala as "Indian settlements" in 1914, they were also being used as "Indian settlements" when the timber leases or licences were granted over them. In our view, the record establishes that there were traditional villages located at these sites, and Canada has not provided evidence to the contrary.

In sum, we agree with the Band that the lands encompassed by the Band's applications for Lull Bay (Application 62), Hoeya Sound (Application 63),

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137 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 133 (ICC Documents, p. 131).

138 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 135 (ICC Documents, p. 133).

139 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 18.

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Shoal Harbour (Application 64), and Knight's Inlet (Application 71) included Indian settlements. Since the Band did not specifically argue that the four remaining "effective" applications included Indian settlements, we make no findings with respect to those applications.

It is important to keep in mind, however, that it was *only* the Band's "Indian settlements" and "reserves" that were protected by section 56 of the *Land Act*. Therefore, it is necessary to consider how much of the lands encompassed by Applications 62, 63, 64, and 71 were Indian settlement lands at the time the leases and licences were granted. Unfortunately, we have very little evidence on this point. With respect to Application 64 (Shoal Harbour), Mr Becker argued as follows:

[I]n the case of [Application] 64 these lands, while not given by the McKenna-McBride Commission, I understand that 2.17 acres were in fact provided as reserve for the Band by the Ditchburn-Clark Commission, which succeeded the McKenna-McBride Commission, and therefore while I don't have positive information I submit that it's likely that the area of the settlement comprising the houses was, in fact, turned into reserve in the case of Application 64.<sup>140</sup>

We take from Mr Becker's comments that, according to Canada, the Band's settlement lands covered only 2.17 acres. However, Agent Halliday's testimony before the McKenna-McBride Commission on June 24, 1914, suggests that the Band's settlement might have covered a larger area:

The Indians also made use of Apsagayu as a fishing station, and he [Halliday] recommended that five acres be granted them on the north shore of Shoal Harbor, in Pulp Lease No. 482. That place was used annually by the Indians while fishing for salmon and they had their small houses on the Bay where it was recommended that this 5 acres be granted.<sup>141</sup>

Thus, it appears that Agent Halliday was of the opinion that 5 acres were required to protect the Band's settlement. Although we acknowledge that it is unclear how large the Indian settlement would have been, we assume that if Agent Halliday was prepared to recommend 5 acres, the settlement would have covered at least that amount of acreage. Accordingly, without further evidence, we find that the Band's settlement lands at Shoal Harbour were, at a minimum, 5 acres rather than 2.17 acres.

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<sup>140</sup> ICC Transcript, August 29, 1996, p. 71 (Bruce Becker).

<sup>141</sup> Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

Similarly, Agent Halliday recommended that 5 acres be granted out of Applications 62 (Lull Bay) and 63 (Hoeya Sound).<sup>142</sup> Therefore, without the benefit of further evidence on the extent of the settlements at Lull Bay and Hoeya Sound, it is reasonable to conclude that the Band's settlement lands at each location were at least 5 acres in size.

Agent Halliday did not make a positive recommendation with respect to Application 71 (Knight's Inlet). However, the fact that 10 villages were included in the application suggests a fairly large area. Since Agent Halliday made no reference to the area covered by the 10 villages, it would not be prudent for the Commission to make any conclusions with respect to the size of the Band's settlements at these locations. Rather, it is our view that this is a matter that is better left for resolution between the parties through further research and negotiation.

### **Existence of a Fiduciary Obligation to Protect Indian Settlements**

Given our finding that the Band had Indian settlement lands in the areas of Lull Bay, Hoeya Sound, Shoal Harbour, and Knight's Inlet, the question is whether Canada, through its Indian Agents, had a fiduciary obligation to protect those settlements from encroachment caused by the granting of timber licences and leases. The Band submits that it did. In support of its position, the Band relies on Madam Justice Wilson's reasons for judgment in *Frame v. Smith*<sup>143</sup> and on several court decisions relating specifically to the Crown-aboriginal relationship.<sup>144</sup>

Canada denies that it had a fiduciary obligation to protect the Band's settlement lands. In reaching this conclusion, Canada proposed the following test to determine whether the facts in this claim support the existence of a fiduciary relationship between the Crown and the Band:

[I]n order for Canada to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:

- (a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;
- (b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and

<sup>142</sup> Precs of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

<sup>143</sup> *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

<sup>144</sup> Cases cited by the Band include the following: *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 56 CCC (3d) 264 (SCC); and *R. v. Van der Peet*, [1996] 4 CNLR 177 (SCC).



- (c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.<sup>145</sup>

Canada proposed the same test in two of our other inquiries: the *Cormorant Island Claim of the 'Namgis First Nation* and the *McKenna-McBride Applications Claim of the 'Namgis First Nation*. As we discussed in those inquiries, we are not convinced that every element of Canada's test must be satisfied in order for a fiduciary obligation to arise. Even if we were to accept Canada's proposed test, we are of the view that a fiduciary relationship exists between the Crown and the Band in the circumstances of this claim.

First of all, the very fact that Canada posted Indian Agents in the various agencies, combined with the nature of their instructions, provides strong evidence of a unilateral undertaking to act for, on behalf of, or in the interests of the Indians in the protection of their settlement lands. As early as 1879, the duties of the Indian Agents were described in the following terms:

The duties of the Agents will mainly consist in advising the Indians and in protecting them in the possession of their farming, grazing and wood lands; fishing or other rights; and protecting trespasses upon or interference with the same. . . .

As the Department has no Treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the system of giving presents to them there will be little other responsibility attaching to the position of Indian Agent than the ordinary care of the interests of the Indians and their protection from wrongs at the hands of those of other nationalities . . .<sup>146</sup>

Substantially the same language was still being used 30 years later in the general instructions issued, on their appointment, to Indian Agents.<sup>147</sup> Thus, as we see it, the whole tenor of the Indian Agents' instructions reflected an underlying commitment or undertaking on the part of Canada to protect, or at least to assist in protecting, Indian settlement lands from unlawful intrusions.

Canada argues, however, that there is no evidence that the Band knew of the instructions, or that they had been provided to the Band. It submits that "it is difficult to conceive of an undertaking which is not communicated to

<sup>145</sup> Submissions on Behalf of the Government of Canada, August 22, 1996, p. 23.

<sup>146</sup> L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17,514-1 (ICC Documents, pp. 4, 6-7).

<sup>147</sup> A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360,377 (ICC Documents, pp. 86-90).

the recipient giving rise to any obligations.”<sup>148</sup> We are not persuaded by Canada’s argument because it is clear from the Supreme Court of Canada’s decision in *K.M. v. H.M.*<sup>149</sup> that an undertaking need not be communicated to the recipient for a fiduciary obligation to arise. The specific issue considered by the Court in the *K.M.* case was whether or not incest constitutes a breach of fiduciary duty by a parent. Mr Justice La Forest held that it does. After suggesting that fiduciary obligations may be imposed in some situations even in the absence of a unilateral undertaking, he went on to say that, in the case before him, it was “sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature.”<sup>150</sup> It almost goes without saying that parents do not typically communicate their undertaking to their children. Yet parents still have a fiduciary obligation to refrain from incestuous assaults on their children, since there is a tacit understanding that parents will act in the best interests of their children.

We find the reasoning in *K.M.* particularly useful in the circumstances of this claim, considering the nature of the relationship between the Indian Agent and the Indians under his charge. It is also important to observe that the relationship between the Indian Agent and the Band was characterized by the McKenna-McBride Commission as similar to that of a parent and child:

The Indian Agent’s [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights – to visit the Reserves from time to time and see that no one is interfered with them in their privileges; To be their friend and to give them good advice; To tell them what it is best for them to do *and to look after them as a father would his children.*<sup>151</sup>

We acknowledge that these comments were made in 1914, but there is no evidence to suggest that the relationship was different in any material respect before 1914 and during the time when timber leases and licences were being granted over the Band’s settlement lands. In fact, the protective role of the federal Crown with respect to Indians was articulated in the 1871 Terms of Union between Canada and British Columbia in Article 13, which states: “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 Govern-

148 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 26.

149 *K.M. v. H.M.* (1992), 142 NR 321 (SCC).

150 *K.M. v. H.M.* (1992), 142 NR 321 at 383 (SCC).

151 Chairman, Royal Commission, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 89, in Submissions of the Mamaleleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry, Tab 2. Emphasis added.

ment, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.”<sup>152</sup> Therefore, just as Mr Justice La Forest found that “being a parent comprises a unilateral undertaking that is fiduciary in nature,” there is considerable merit in Mr Donovan’s argument that, in view of the Indian Agent’s instructions to provide advice and look after the Indians “as a father would his children,” being an Indian Agent comprised a unilateral undertaking that was fiduciary in nature.<sup>153</sup> Obligations could arise from that undertaking whether or not it was communicated to the Band.

Canada also argues that, even if the Indian Agents’ instructions were a unilateral undertaking, they did not require Canada to act on the Band’s behalf with respect to non-reserve lands, since Canada did not have any jurisdiction or control over provincial Crown lands.<sup>154</sup> The difficulty we have with Canada’s argument is that it ignores the fact that, under the Terms of Union, Canada assumed “the trusteeship and management of the lands reserved for [the Indians’] use and benefit” as well as “[t]he charge of the Indians.” Furthermore, the Terms of Union suggest not only that Canada had a trust-like responsibility with respect to reserve lands but that it would also pursue a “liberal” policy by requesting additional reserve lands from the province on behalf of the Indians. In light of the broad wording contained in the Terms of Union, it is only reasonable to conclude that Canada’s “charge of the Indians” included a duty to use available options for the protection of Indian settlement lands, particularly when the reserve creation process was still incomplete. In any event, the instructions clearly stipulated that the Indian Agent was to protect the Indians “in the possession of their farming, grazing and wood lands; fishing or other rights.” The instructions did not, by their terms, limit the Indian Agent’s duties to reserve lands. Nor do we accept that Canada was completely powerless to protect the Band’s settlement lands, because the provincial *Land Act* provided a clear statutory mechanism for the protection of these lands. Accordingly, we find that the first element of Canada’s test for the existence of a fiduciary obligation is met, since there was, in essence, a unilateral undertaking on the part of the federal Crown and its agents to protect Indian lands and to pursue a liberal policy on behalf

<sup>152</sup> *Order of Her Majesty in Council Admitting British Columbia into the Union. At the Court at Windsor, the 16th day of May, 1871*, in Derek G. Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663-1972*, Carleton Library Number 87 (Toronto: McClelland & Stewart, 1975), 81; and ICC Exhibit 17.

<sup>153</sup> ICC Transcript, August 29, 1996, pp. 173-74 (C. Allan Donovan).

<sup>154</sup> Submissions on Behalf of the Government of Canada, August 22, 1996, p. 26.

of Indians in the allocation of additional reserve lands required for their use and benefit.

We are also satisfied that the second element of Canada's test is met ("power or discretion can be exercised unilaterally to affect that person's legal or practical interests"). As part of its review, the Commission has before it documentary evidence of notices from the *British Columbia Gazette* for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas. At the time these *Gazette* notices appeared in 1905, section 41 of the provincial *Land Act* provided that leases of Crown lands could be granted by the Chief Commissioner of Lands and Works for any purpose for a maximum of 21 years (a 10-year limit applied to leases granted for the purposes of cutting hay). However, any person who wanted to lease Crown lands had to satisfy a number of procedural steps before such leases could be granted. First, before entering into possession of the applicable land, the lease applicant had to place a stake or post at one angle or corner of the land. The post had to be at least 4 inches square and it had to stand not less than 4 feet above the surface of the ground. On the post, the applicant had to inscribe his name and the angle represented by the post; for example, "A.B.'s N.E. corner" (meaning northeast corner). The applicant was also required to notify interested parties of his intention to apply for the lease through a number of methods: (1) he had to post a written or printed notice on some conspicuous part of the land and on the Government Office (if any) in the district for 30 clear days; and (2) he had to publish a notice for 30 days in the *British Columbia Gazette* as well as in some newspaper published and circulating in the district. After the expiration of the 30 days' notice, and within two months from the date of its first publication in the *British Columbia Gazette*, the lease applicant was required to apply in writing to the Chief Commissioner of Lands and Works for a lease over the land. If there appeared to be no valid objection to the lease, the Chief Commissioner of Lands and Works could issue it, provided the applicant had the land surveyed within six months.

Pursuant to sections 44 and 45 of the Act, any person who wished to object to the granting of the lease could do so by filing written reasons with the Commissioner of the District before the day fixed by the notice in the *British Columbia Gazette* or within some other appointed time. If any

objection was entered, the Chief Commissioner of Lands and Works had power to settle the matter.<sup>155</sup>

In addition to the *Gazette* notices mentioned above for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas, the Band also submitted a *Gazette* notice dated 1907 for a special timber licence in the Lull Bay area. The procedure for obtaining a special timber licence at that point in time was similar to the procedure outlined above for leases.<sup>156</sup>

In short, the provisions of the *Land Act* clearly provided a process for the Indian Agent to raise a conscientious objection to the grant of a timber lease or licence to Indian settlement lands. In this sense, the Indian Agents could have exercised their power or discretion to inform themselves of impending leases or licences by checking the notices in the *British Columbia Gazette* or in local newspapers and, if any of the leases or licences were likely to interfere with an Indian settlement, to enter an objection. The Act, of course, did not impose any restrictions as to who could enter an objection, but clearly an ability to exercise this power or discretion was contingent on some knowledge and understanding of the process — a knowledge and understanding more likely to be held by Indian Agents than by Band members.

In tandem with the procedural provisions of the *Land Act*, section 56, it will be recalled, prohibited the granting of timber licences over an Indian settlement or reserve. In his oral submissions, Mr Becker agreed that it should be assumed that the province would have complied with its own statute and that, if the province determined that certain lands were in fact settlement lands, it would not have provided timber licences over those areas.<sup>157</sup> If this protective provision had been used by Indian Agent Halliday, it is reasonable to assume that the provincial Chief Commissioner of Lands and Works would have properly exercised his discretion and excluded the Indian settlement lands from the area included in the timber lease or licence. Accordingly, it seems to us that the exercise of the Indian Agents' discretion had the potential to affect the Band's interests, since, as will be discussed below, the Band's ability to have its settlement lands set aside as reserve lands in the McKenna-McBride process was profoundly limited by the existence of timber leases and licences over those lands.

Canada argues, however, that the Band as well as Canada could have protested the inclusion of an Indian settlement within a timber licence. It

155 For the full text of the relevant provisions of the provincial *Land Act*, see Appendix B of this report.

156 See sections 50-52 of the provincial *Land Act* in Appendix B of this report.

157 ICC Transcript, August 29, 1996, p. 61 (Bruce Becker).

contends that, since the Band could have taken the same action as Canada, any power or discretion that Canada might have had was not unilateral vis-à-vis the Band.<sup>158</sup> In our opinion, Canada's argument completely ignores the practical reality of the situation. Any power or discretion the Band might have had was illusory, considering that its members did not have the requisite knowledge, experience, or literacy to effectively protect the Band's interests.

The third element of Canada's test is vulnerability. There can be little doubt that the Band was vulnerable. Witnesses at the community session told us that their parents and grandparents could speak and read little, if any, English and had little, if any, formal education. This evidence is consistent with the testimony of Harry Mountain in 1914. He told the McKenna-McBride Commission that there were no schools on the Band's reserves and that only four of the Band's children were attending the industrial school at Alert Bay.<sup>159</sup>

We also heard evidence that, even if the Mamaleleqala people had been able to read English during the time that leases and licences were being granted over their settlement lands, newspapers were unavailable to them. Clearly, the Mamaleleqala people were in no position to monitor the notices in the *British Columbia Gazette* and in newspapers and, as a result, they could not protect their settlement lands without the assistance of the Indian Agent. Furthermore, there is no evidence that the Mamaleleqala people were even aware of the British Columbia *Land Act*, the process for obtaining leases and licences under the Act, or the fact that they had a right to object when such leases and licences included Indian settlement lands.

When viewed from a broader perspective, it should be noted that it was virtually impossible for Indians to pre-empt land under the provisions of the *Land Act*. The pre-emption provisions of the Act were designed to encourage settlement of the province by allowing settlers to acquire up to 160 acres of unoccupied Crown lands for a nominal sum of money, providing that improvements were made to the land and that certain residency requirements were met. However, section 5 of the Act provided that the right to record land for the purposes of pre-emption did not 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."<sup>160</sup> Such permission was rarely forthcoming. Professor Robin Fisher's study of

158 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

159 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 124 (ICC Documents, p. 122).

160 *Land Act*, RSBC 1897, c. 113, s. 5.

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Indian land policy in British Columbia notes that the ability of Indians to pre-empt land was restricted in 1866 and, although Indians could, in theory, pre-empt lands with the written permission of the Governor, “*there was only a single subsequent case of an Indian pre-empting land under this condition.*”<sup>161</sup>

Unlike ordinary citizens, the aboriginal peoples of British Columbia could not effectively obtain lands through the generous pre-emption provisions of the *Land Act*. Nor were there any treaties with the Indians which provided a clear formula or agreement for the allocation of reserve lands. Instead, the Indians were forced to rely on the goodwill of the provincial and federal governments and the effectiveness of reserve creation processes like the McKenna-McBride Commission to ensure that they obtained an adequate land base for their present and future development. In such circumstances, there can be little doubt that the Band was vulnerable. Accordingly, we find that Canada, through its Indian Agents, had a fiduciary obligation to protect the Band’s settlement lands from unlawful encroachments by objecting to the granting of leases and licences over those lands. We appreciate that this conclusion implies that the Indian Agents had a positive duty to examine the notices in the *British Columbia Gazette* on a regular basis and to be aware of the operative provisions of the *Land Act*. However, in our opinion, these would not have been unduly onerous responsibilities, given the skills and qualifications required of Indian Agents. It is to be remembered that they had magisterial powers under the *Indian Act*. Thus, if they had the ability to interpret and apply the provisions of the *Indian Act* and other Acts respecting Indians, they must surely have had the ability to comprehend the provisions of the *Land Act* and notices in the *Gazette*. To suggest that the Agent also had a duty to file an objection where the circumstances warranted this approach is not to place an unduly onerous responsibility on the federal Crown, which had accepted the “charge of the Indians” in the 1871 Terms of Union.

We have not forgotten Canada’s argument regarding the comparative obligations of the Indian Agents in relation to acts of trespass on reserve lands. Canada points out in its written submissions that neither the 1886 or the 1906 versions of the *Indian Act* required the Indian Agents to seek out trespassers in an active way, but only to respond to a trespass when it was

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<sup>161</sup> Robin Fisher, “Joseph Trutch and Indian Land Policy,” in W. Peter Ward and Robert A.J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver: Douglas & McIntyre 1981), 161. Emphasis added.

brought to their attention. Section 22 of the 1886 *Indian Act* provided as follows:

22. If any person, or Indian other than an Indian of the band, without the license of the Superintendent General (which license he may at any time revoke), settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh, or fishes in any marsh, river, stream or creek on or running through a reserve, or settles, resides upon or occupies any such road, or allowance for road, on such reserve, – or if any Indian is illegally in possession of any land in a reserve – the Superintendent General, or such officer or person as he thereunto deposes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises . . .<sup>162</sup>

Section 34 of the 1906 Act was virtually identical.<sup>163</sup> Canada submits that, “given that the Crown did not have a proactive duty to seek out trespassers in respect of reserve lands, there was certainly no such duty with respect to the Band’s ‘settlement’ lands.”<sup>164</sup> We disagree. In our view, there was a qualitative difference between the activities described in the trespass provisions of the *Indian Act* and an application for a lease or a licence. The activities described in section 22 were all overt activities and, as a consequence, they would have been visible to the Mamaleleqala people as an encroachment on the Band’s lands. In contrast, an application for a lease or a licence (as opposed to the actual timber operations) would not have been visible or readily identifiable as an encroachment. It is true that an applicant for a lease or a licence was required to post a written or printed notice of his intention to apply for the lease or a licence on some conspicuous part of the land. However, without an ability to read English, the posting of such a notice would have been of little help to the Mamaleleqala people.

It is also true that the applicant was required to place a stake or post at one angle or corner of the land. It is unclear, however, whether the Mamaleleqala people would have appreciated the significance of such a stake being posted on the land (i.e., that it represented an alienation of the land). In fact, the evidence leads us to the opposite conclusion. When Harry Mountain submitted the Band’s application for land at Lull Bay, Commissioner Shaw stated that the land was “all covered by timber limits owned and paid

<sup>162</sup> *The Indian Act*, RSC 1886, c. 43, s. 22.

<sup>163</sup> *Indian Act*, RSC 1906, c. 81, s. 34.

<sup>164</sup> Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.



for by whitemen . . .”<sup>165</sup> The exchange that ensued with Chief Dawson suggests that the Band did not realize that the land had been alienated:

CHIEF DAWSON of the Mahmalilikullah Tribe: From whom was the land purchased?

MR COMMISSIONER SHAW: We don’t know — all we know is that our map here shows that it has been purchased, and therefore we cannot give it to anyone else although we might possibly make some arrangements with the owners by which you could get a small piece of land, say five or ten acres on which your houses are built — We might be able to recommend that if you wish to state what improvements are on it.

A. We can’t allow the place to go that way — We never sold it, and we want the place.

. . .  
 . . . The country does not belong to the Government, and they have no business to sell it. What business has anyone to go and sell that land without asking if I had no more use for it. What right have they got to sell it before I was through with it because I was the owner of it. I want to ask the Royal Commission if it is in their power to find out who sold this land without first asking me.<sup>166</sup>

Presumably the land would have been staked as required under the provisions of the *Land Act*, yet clearly the Band was unaware that the land had been alienated. Therefore, it is not unreasonable to apply a different standard between acts of trespass and applications for leases and licences (assuming that Canada did not, in fact, have a proactive duty to seek out trespassers in respect of reserve lands, a matter on which we express no opinion). In our view, a proactive duty to protect Indian settlement lands from unlawful leases and licences is consistent with the Indian Agents’ instructions. The 1879 description of the Indian Agents’ duties stated that the Indian Agent “should . . . possess such qualifications as will adapt him for properly and intelligently advising the Indians and *acting energetically on their behalf* in the respects described in the previous part of this letter . . .”<sup>167</sup> Presumably the phrase “in the respects described in the previous part of this letter” included the Agent’s duty to protect the Indians “in the possession of their farming, grazing and wood lands; fishing or other rights; and protecting trespasses upon or interference with the same.” The instructions issued to newly appointed Indian Agents in 1909 did not specify that the Agents were to act energetically on behalf of the Indians, but they did provide that the Agents

165 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 132 (ICC Documents, p. 130).

166 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 132 (ICC Documents, p. 130).

167 L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17514-1 (ICC Documents, p. 7). Emphasis added.

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were to “*take measures* to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc.”<sup>168</sup>

Finally, we note in passing that it appears to have been the province’s understanding that Canada would act on behalf of the Indians if any leases, licences, or other forms of land alienation were likely to interfere with an Indian settlement. In the case of an 1883 purchase application involving some of the traditional lands of the Quatsino Indians, Commissioner O’Reilly attempted to reverse, in part, a sale of land that had occurred over an old Indian village named Clienna. The land had been purchased in 1884 by Thomas Pamphlet and Cornelius Booth. When O’Reilly discovered that the Quatsino Indians were still using the land, he wrote to the Commissioner of Lands and Works in September 1889 to request that the purchasers be induced to relinquish 50 acres to be allocated as Indian reserve.<sup>169</sup> The province, in its reply to Commissioner O’Reilly, placed full responsibility for the protection of the Indians’ interests on the shoulders of the federal government:

The object of publishing a notice of intention to apply to purchase land is to notify any person who may consider he has a prior claim to make the same known.

*No protest to these applications was made by the Indian Department on behalf of their Wards.*

No intimation had been received from the Indian Department that they claimed any part of the lands at or prior to the conveyance to Mr. Booth. . . .<sup>170</sup>

In our view, the province’s perception of the respective roles of the federal and provincial governments gives added weight to our conclusion that Canada had an obligation to protect Indian settlement lands from unlawful encroachments. Anything less than this interpretation defies common sense. Moreover, it does not do honour to the Crown to suggest that the Indian Agent was entitled to do nothing while third parties encroached on the traditional settlements and villages of the Mamaleleqala Qwe’Qwa’Sot’Enox.

### **Breach of Fiduciary Obligation**

As part of their duties, Indian Agents were instructed to “make periodical visits to the various bands of Indians” in their Agencies and to give particular

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168 A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, p. 89). Emphasis added.

169 Peter O’Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

170 Department of Lands & Works, Memorandum, October 2, 1889 (ICC Documents, p. 35).

attention “to the sanitary condition of the Indians villages and camps.”<sup>171</sup> It is therefore reasonable to assume that Agent Halliday and his predecessor, G.W. DeBeck, were, or ought to have been, aware of the locations of the Band’s settlement lands. In fact, Mr Becker stated in his oral submissions that he was “confident that Agent Halliday knew where the major settlements of this Band were, and to that extent was aware of where the Indian settlements were.”<sup>172</sup>

Given that the Agents were, or ought to have been, aware of the locations of the Band’s settlement lands, there was virtually no excuse for their failure to review the notices in the *British Columbia Gazette* and local newspaper and to protest the granting of timber leases and licences over those lands. However, the Band’s researcher, Dr. John Pritchard, was unable to find any letters of protest emanating from the Kwawkwalth Agency during the time period in question.<sup>173</sup> We therefore find that Canada, through its Indian Agents, breached its fiduciary obligation to the Band in respect of those leases and licences that (1) covered Indian settlement lands, and (2) were gazetted during the tenure of Agents Halliday and DeBeck (or one of their predecessors in office).

As stated earlier in this report, without further evidence we are of the view that the Band’s settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The Band also had settlement lands in the Knight’s Inlet area (Application 71), but the precise area has yet to be determined.

The *Gazette* notices submitted by the Band in this inquiry appear to cover

- the Band’s settlement lands in Application 62 (Lull Bay);<sup>174</sup>
- the Band’s settlement lands in Application 64 (Shoal Harbour);<sup>175</sup> and

171 A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, pp. 89-90).

172 ICC Transcript, August 29, 1996, p. 89 (Bruce Becker).

173 Submissions of the Mamaleleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry, p. 27.

174 Agent Halliday recommended that “five acres be granted out of Timber Limit 10033. . .”: Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148). Presumably the lands described in the *Gazette* notice dated November 7, 1907, included Lot 641, which appears to have encompassed T.L. 10033. See ICC Documents, pp. 82 and 85.

175 Agent Halliday recommended that “five acres be granted . . . on the north shore of Shoal Harbor, in Pulp Lease No. 482”: Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148). The *Gazette* notice dated January 26, 1905, pertained to a pulp lease over Lot 482. See ICC Documents, p. 56.

- some of the Band's settlement lands in Application 71 (Knight's Inlet).

We therefore find that the Band has a valid claim for negotiation for

- a minimum of 5 acres in the Lull Bay area;
- a minimum of 2.83 acres in the Shoal Harbour area (5 acres minus the 2.17 acres eventually made into a reserve on the recommendation of the Ditchburn-Clark Commission); and
- the Band's settlement lands in the Knight's Inlet area which were included in Application 71 and which are covered by the *Gazette* notices submitted by the Band.

With respect to the Band's settlement lands in Application 63 (a minimum of 5 acres in the Hoeya Sound area) and the Band's remaining settlement lands in Application 71, we are of the opinion that there is insufficient evidence in this inquiry to establish that a *Gazette* or newspaper notice appeared during the time that an Indian Agent was assigned responsibility for the Indians in those areas.<sup>176</sup>

## **Issue 2 Fiduciary Obligation to Represent Band's Interests**

Did Canada have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission and, if so, was there a breach of this obligation?

The Band submits that Indian Agent Halliday further breached his fiduciary obligations to the Band by failing to represent its interests adequately before the McKenna-McBride Commission. It divides the Crown's breaches of duty into the following categories:

- failure to assist the Band in formulating its applications;
- failure to adequately represent the Band's needs; and

<sup>176</sup> We note that there may be *some* evidence that the lease/licence over the Band's settlement lands in Application 63 (Hoeya Sound) was gazetted in 1907. Agent Halliday recommended that "five acres be granted out of Timber Limit 10023": *Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914* (ICC Documents, p. 148). The Band submitted a document that lists "T.L. 10.023" as coming under "Lot 632." Under the column "Date Gazetted as Surveyed," the date "1.Nov.1907" is noted: ICC Documents, p. 80. However, the Band did not submit a *Gazette* notice dated November 1, 1907, as part of its documentary evidence in this inquiry.

- further breaches of fiduciary obligation, including Agent Halliday's failure to consult with the Band and to provide alternative recommendations after he was advised by the Commission that most of the Band's original applications had been rejected.<sup>177</sup>

Canada contends that it did not have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission. It therefore does not consider it necessary to examine whether Canada, through its Indian Agent, breached any fiduciary duty.<sup>178</sup>

We considered the same issues in our inquiry into the *McKenna-McBride Applications Claim of the 'Namgis First Nation*. In our report into that claim, we examined the nature of the relationship between Agent Halliday and the Nimpkish Band (now known as the 'Namgis First Nation) from the perspective of three different points in time – prior to, during, and after the McKenna-McBride hearings – to determine whether any particular fiduciary duties arose under the circumstances of that claim. Given the similarities in the claims, we adopt the same approach and the same reasoning in the context of this claim.

### **Fiduciary Duty prior to the McKenna-McBride Hearings**

In our report into the 'Namgis claim, we were of the view that, prior to the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to prepare the Band for the McKenna-McBride process by providing basic information and advice. A failure to do so was a breach of that obligation. We were mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we proposed the following guidelines for determining whether the Band had a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the same approach applies in this case. Therefore, Canada breached a fiduciary duty to the Band prior to the McKenna-McBride hear-

177 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 29-37.

178 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 3, 28-33.

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ings if the Band can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

Applying the same guidelines to this claim, we are satisfied that Agent Halliday failed to prepare the Mamaleleqala for the McKenna-McBride process. As we discussed in our 'Namgis report, the Commission held a general meeting with "the principal Tribes of the Kwawkwalth Nation" on Monday, June 1, 1914 (the day before the Commission held its separate meeting with the Mamaleleqala). At that meeting, several Chiefs expressed concern that they were not adequately prepared for the McKenna-McBride hearings. Although plans of their reserve lands were available for distribution before the Commissioners' visit, they did not actually receive these plans until the Commissioners arrived in the community. The Chairman of the Commission blamed Agent Halliday for the mix-up, stating:

I might say that in every place that we have so far visited, the Chiefs of all the different Reserves have plans . . . showing on them the land that has been reserved for them — For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took stops [sic] to have them distributed so that the Chiefs could see what lands they had — Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.<sup>179</sup>

Chief Willie Harris of the Nimkish Tribe discussed the difficulties caused by the chiefs' late receipt of the plans:

You ought to have seen us in the general meeting this morning before you came — We had the plans, and one would say (Referring to the Indian Reserves on the plans) "where is it" "whose is it" and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.<sup>180</sup>

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179 Chairman, Royal Commission, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

180 Willie Harris, Chief of the Nimkish Tribe, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 89, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

Johnnie Scow of the Kwicksitaneau Band held similar views:

Another thing we want to tell you about is that you have seen how confused we are over those papers – We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head nor tail of it. They can't get to learn those plans in three days – they don't know what they are, why they are or where they are.<sup>181</sup>

Chief Negai “of the Mahwalillikullah” did not, himself, comment on the havoc wreaked by Agent Halliday's failure to distribute the plans. He was, however, in attendance at the general meeting.<sup>182</sup> Given the general nature of the comments made by the Chiefs and the Chairman of the Commission, it is safe to say that the Mamaleleqala were in the same predicament as the other Kwawkewlth bands.

In addition to the plans of the Band's reserve lands, there is evidence that Agent Halliday failed to disclose information in his possession regarding the various timber limits in the area. During the Commission's meeting with the Mamaleleqala on June 2, 1914, Commissioner Shaw stated that the Commissioners had a map showing every timber limit that was taken up. The map indicated that part of the land sought by the Band on Swanson Island was already covered by one of these timber limits. To this the Band representative replied: “We think that Mr. Halliday ought to have given us this information – this is the first time we ever heard of it being taken up by whitemen for the timber. The charts were only given to us the other day, and we didn't know anything about it.”<sup>183</sup> Commissioner Shaw clarified that the plans given to the Band “the other day” only showed the land recognized by the government as Indian reserves. The maps showing the timber limits were bought by Agent Halliday himself and did not belong to the Department. He continued: “[Mr. Halliday] has asked me to say that if at any time the Indians want to know anything about the land, if they will come into his office, he will be very glad and willing to give them all information regarding the different lands.”<sup>184</sup>

As the Band points out in its written submissions, Agent Halliday's comment must be taken in context and “balanced against the Mamaleleqala per-

181 Johnnie Scow, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 92, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

182 Chief Negai, Mahwalillikullah or Village Island, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, pp. 89-90, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox'Band: McKenna-McBride Applications Inquiry, Tab 2.

183 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

184 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

spective on Agent Halliday's open door policy."<sup>185</sup> The Band representative explained to Commissioner Shaw: "We can't go to Mr. Halliday because we know what he is to us. The experience we have had with him in matters of that kind; he just turns us out."<sup>186</sup> We heard similar evidence at the Commission's community session on May 23, 1996:

MS. GROS-LOUIS AHENAKEW: . . . has anybody told you or do you know if the people, the Mamaleleqala people, would have then felt comfortable asking the help of the Indian agent for such things as preparation of the applications at the McKenna-McBride in terms of determining – if they wanted help from Agent Halliday, determining which lands were available, which land they wanted, do you think there was enough cooperation between the two people that they could have done that?

MS. ALFRED: (Through Interpreter) No, the Chiefs and the people of the Mamaleleqala were scared of him because he would not cooperate with them. Anything that they asked him, he made it very difficult for the Native people of Village Island.<sup>187</sup>

It is also useful to remember that, in the early 1900s, Agent Halliday was deeply involved in a campaign to stamp out the potlatch, a campaign that further alienated him from the bands under his charge. Thus, Agent Halliday's declared willingness to provide information to the Mamaleleqala was less than helpful, given his strained relationship with the Band at the time. Considering the importance of the McKenna-McBride process and the fact that it was, in effect, the last realistic opportunity the Band would have for several decades to acquire additional reserve lands, Agent Halliday should have been proactive in taking reasonable steps to ensure that the Band received information about the timber limits and he should have taken these steps well in advance of the McKenna-McBride hearings.<sup>188</sup>

We are also satisfied that additional lands were reasonably required by the Band. As we noted in the 'Namgis inquiry, the reserves of the Kwawkwalth Agency, as described in the Official Schedule of 1913, numbered 91, with an aggregate area of 16,600.99 acres. This gave a per capita average of

185 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 30.

186 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

187 ICC Transcript, May 23, 1996, p. 11 (Ethel Alfred).

188 In oral submissions, Canada took the position that the McKenna-McBride Commission was not the last opportunity for the Band to obtain an adequate land and resource base since there is currently a comprehensive treaty negotiation process under way; ICC Transcript, August 29, 1996, p. 96. In our view, this is beside the point since we are not concerned with whether the Band has some recourse available through the British Columbia treaty process; rather, the issue before us is whether the Crown breached its fiduciary obligations in relation to the McKenna-McBride hearings, which took place in 1914.



14.03 acres for the Agency population of 1183. In contrast, the Mamaleleqala had a per capita average of 6.75 acres.<sup>189</sup> Even after the Band received 150 additional acres on Compton Island, it still had a per capita average of only 8.52 acres.<sup>190</sup> Thus, given the disparity between the Band's per capita acreage and that of the Agency as a whole, it seems reasonable to conclude that the Band was left with insufficient lands.

Finally, it appears that there were unalienated lands available for which the Band could have applied. During the course of the Inquiry, the Band submitted a map showing numerous areas of land that were available at the time of the McKenna-McBride hearings.<sup>191</sup> Counsel for Canada indicated that they were "in substantial agreement with the information as reproduced on the map."<sup>192</sup> Therefore, we find that there is sufficient evidence to establish that Canada breached its fiduciary obligations towards the Band as a result of Agent Halliday's conduct *prior to* the McKenna-McBride hearings. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter that could provide a valid basis for negotiations under the Specific Claims Policy.

### **Fiduciary Duty during the McKenna-McBride Hearings**

In our report into the 'Namgis claim, we found that, during the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. A failure to do so was a breach of that obligation. As before, however, we were mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore outlined the following guidelines for determining whether or not the Band had a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. In our view, Canada breached a fiduciary duty to the Band during the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) a reasonable person acting in good faith would have

189 Royal Commission on Indian Affairs for the Province of British Columbia, *Final Report* (Victoria, 1916) (ICC Documents, p. 176). In fact, 6.75 acres may be an overly generous estimate of the Band's per capita acreage. At the McKenna-McBride hearings, Agent Halliday told the Commissioners that Meetup Reserve No. 2 and two of the Band's other reserves were claimed by the Kwickswoitaneuks: Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 129 (ICC Documents, p. 127). If the acreage of these three reserves is subtracted from the Band's total reserve acreage, its average per capita acreage was even less.

190 When the McKenna-McBride Commission examined Agent Halliday on June 24, 1914, he reported that the population of the "Mahmahlilikullahs" was 85: see Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

191 See ICC Exhibit 4.

192 Sarah Kelleher, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Specific Claims Commission, May 8, 1996 (ICC file 2109-21-1).

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provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut this presumption on a balance of probabilities.

The difficulty in this claim relates to the second requirement outlined above (i.e., "the relevant lands were unalienated"). The Band states in its written submissions that, of the eight effective applications made by the Band, "seven were turned down on the basis that the land was unavailable."<sup>193</sup> The one remaining "effective" application was the Band's application for Compton Island, which Agent Halliday recommended, and the Commission allowed, in its entirety. Therefore, the Band has not established that Canada breached its fiduciary obligations by virtue of Agent Halliday's conduct *during* the McKenna-McBride hearings, since the lands in question were not available in any event.

### **Fiduciary Duty after the McKenna-McBride Hearings**

When the McKenna-McBride Commission returned to Agent Halliday after the hearings and asked if he wished to reconsider his opinion with regard to any of the applications he had not endorsed, we found in the 'Namgis inquiry that Agent Halliday had, at the very least, the same fiduciary obligation as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

In the circumstances of this claim, we are left with the same difficulty as that discussed above if Agent Halliday was restricted to the Band's original applications when making his revised recommendations; namely, a lack of available lands. None of the relevant lands were unalienated with one, possibly two, exceptions: (1) Compton Island, which Agent Halliday recommended; and (2) the undefined lands in the Band's general application for a per capita acreage allotment (200 acres for each adult male of the tribe). Although, as argued by Mr Donovan in his oral submissions,<sup>194</sup> it may have been possible for Agent Halliday to carve additional recommendations out of

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193 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 25.

194 ICC Transcript, August 29, 1996, p. 154.

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the Band's general application, it appears that the Commission was reluctant to entertain such applications. Commissioner Shaw cautioned at the McKenna-McBride hearings on June 2, 1914: "We have not suggested to these Indians that each man is going to get 200 acres – If we do make that recommendation it will have to be taken from outside of lands already taken up by whitemen."<sup>195</sup> Therefore, it is unlikely that the Commission would have been willing or able to allow any of the original applications of the Band (except for Compton Island), even if Agent Halliday had changed his mind and endorsed the applications in full. In addition, it would not have been a reasonable and well-informed recommendation for Agent Halliday to suggest alienated lands for reserve status, given the Commission's position on the issue of alienated lands.

There was considerable debate during oral submissions about whether Agent Halliday was, in fact, restricted to the Band's original applications when making his revised recommendations, or whether he could submit new applications.<sup>196</sup> We found it unnecessary to decide this point in the 'Namgis inquiry and, for the same reason, we find it unnecessary to do so here. Even if Agent Halliday could only make revised recommendations in relation to the Band's original applications, this simply returns us full circle to his obligation to prepare the Band for the McKenna-McBride process to ensure that the Band was in a position to apply for lands which were available for reserve purposes. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

### ISSUE 3 NEGLIGENCE

In the alternative, does Canada owe a duty of care to the Band and, if so, was there a breach of this duty of care?

As an alternative argument, the Band submits that the facts set out in support of its argument for breach of fiduciary obligation also establish a claim in negligence. Given our findings and conclusions with respect to fiduciary obligation above, we do not consider it necessary to address whether the Band has a valid claim based on negligence.

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<sup>195</sup> Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).  
<sup>196</sup> ICC Transcript, August 29, 1996, pp. 103-10, 131-34, 154-55.

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## ISSUE 4 CANADA'S SPECIFIC CLAIMS POLICY

Does Canada owe an outstanding lawful obligation to the Band in accordance with the Specific Claims Policy?

In several of our past reports, we have taken the position that the four enumerated examples of "lawful obligation" in *Outstanding Business* are not intended to be exhaustive. More specifically, we have found that Canada's fiduciary obligations are "lawful obligations" and that a claim based on a breach of fiduciary duty or obligation falls within the scope of the Policy.<sup>197</sup> For ease of reference, we repeat the relevant passage from *Outstanding Business* here:

### 1) Lawful Obligation

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.

### 2) Beyond Lawful Obligation

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.<sup>198</sup>

In this claim, Canada argues that the words "lawful obligation" are not, in and of themselves, the scope of the Specific Claims Policy. In other words,

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<sup>197</sup> See, for example, Indian Claims Commission, *Homalco Indian Band Report on Aupe Indian Reserves No. 6 & 6A Inquiry* (December 1995), 7; Indian Claims Commission, *Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 96-97, 100; and Indian Claims Commission, *Namgis First Nation Report on McKenna-McBride Applications Inquiry* (February 1997), 92-94.

<sup>198</sup> *Outstanding Business*, 20.

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the fact that Canada may have a lawful obligation is not enough to bring the claim within the scope of the Policy. Canada explains as follows in its written submissions:

For example, Canada may be found to have a “lawful obligation” in the case of a claim based upon aboriginal title, yet it is clear that this claim does not fall within the policy. The policy is also intended to deal with claims of bands, rather than claims of individuals. Yet in either case, Canada may have a “lawful obligation”.

This analysis does not distinguish between claims arising out of a motor vehicle accident in 1965 in which the Crown is at fault, and an historical claim arising from the “administration of land and other Indian assets and to the fulfilment of Indian treaties”. Finally, the specific claims policy is not limited to dealing with matters for which there is a “lawful obligation” inasmuch as the policy expressly deals with two specific situations expressed to be “beyond lawful obligations”.

Clearly, there must be more to finding a claim to be within the scope of the policy than a finding that a “lawful obligation” is owed by the Crown.<sup>199</sup>

Canada appears to find this something “more” in certain passages extracted from the Policy which refer to the term “specific claims” as “those claims which relate to the administration of land and other Indian assets and to the fulfilment of treaties.” Thus, as we understand Canada’s argument, a claim will fall within the Policy if it discloses an outstanding lawful obligation (or beyond lawful obligation) *and* it relates to the “administration of land and other Indian assets and to the fulfilment of treaties.”

In our view, the type of claim at issue in this inquiry *is* contemplated under the Specific Claims Policy. The opening sentence on page 20 of *Outstanding Business* clearly states that the government “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.” These words do not, on their face, indicate that the claim must *also* “relate to the administration of land and other Indian assets and to the fulfilment of treaties.” Even if there is ambiguity in the Policy as to the matters falling within its scope, in our opinion the ambiguity should be resolved in favour of the claimants, given that the underlying purpose of the Policy, as we understand it, is remedial in nature and is intended to settle legitimate, long-standing grievances without resort to the courts.

We are not deterred by Canada’s argument that claims based on aboriginal title do not fall within the Policy. In our view, this argument actually supports

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<sup>199</sup> Submissions on Behalf of the Government of Canada, August 22, 1996, p. 13.

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a broad interpretation of the Policy rather than detracting from it. Claims based on aboriginal title are explicitly excluded from the Policy on page 30 of *Outstanding Business*. If the scope of the Policy was meant to be as restrictive as Canada suggests, there would have been no need to exclude explicitly such claims from the Policy. Similarly, the Policy clearly spells out that claims must be brought by a band or a group of bands, thus excluding claims by individuals.<sup>200</sup> In other words, as we see it, it is not so much that a “lawful obligation” is insufficient to bring a claim within the scope of the Policy, but that Canada has explicitly carved specific exceptions out of an otherwise broad policy.

We also have difficulty with Canada’s argument that our analysis in past reports does not distinguish between a claim arising out of a motor vehicle accident in recent years and a historical claim arising from the “administration of land and other Indian assets and to the fulfillment of treaties.” As Mr Donovan pointed out in his oral submissions, Canada’s approach does not make such a distinction either, if the motor vehicle in question is considered an Indian asset. We can do no better than to repeat his comments:

If the Crown by breach of lawful obligation, by negligence or fiduciary breach, destroyed band assets or destroyed, in that case a car – I mean, in that case maybe it would be within the policy as Mr. Becker outlines it because it would be an asset.

So ironically the car accident in 1951, according to Mr. Becker’s description of the policy, would be within the policy, whereas a breach of fiduciary obligation that fundamentally undercut the Band’s reserve base and prevented it from getting an adequate reserve base on which to live and prosper, that would be outside.<sup>201</sup>

Finally, the fact that the Policy deals with two specific situations expressed to be “beyond lawful obligation” is of no consequence. It is not our position that *only* lawful obligations fall within the scope of the Policy, but that *at least* lawful obligations fall within the scope of the Policy.

Accordingly, we maintain our position that Canada’s fiduciary obligations are “lawful obligations” and that a claim alleging a breach of those obligations falls within the scope of the Policy. As we stated in our inquiry into the McKenna-McBride Applications Claim of the ‘Namgis First Nation, “a claim

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<sup>200</sup> See, for example, Guidelines 1 and 2 on p. 30 of *Outstanding Business*:

Guidelines for the submission and assessment of specific claims may be summarized as follows:

- 1) Specific claims shall be submitted by *the claimant band* to the Minister of Indian Affairs and Northern Development.
- 2) The claimant bringing the claim shall be *the band* suffering the alleged grievance, or *a group of bands*, if all are bringing the same claim. [Emphasis added.]

<sup>201</sup> ICC Transcript, August 29, 1996, p. 157 (C. Allan Donovan).

falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy."<sup>202</sup> Given our conclusions above that Canada, through its Indian Agents, breached its fiduciary obligations to the Band, we find that this claim falls within the scope of the Policy.

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<sup>202</sup> Indian Claims Commission, *Namgis First Nation Report on McKenna-McBride Applications Inquiry* (February 1997), 94.

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# PART V

## FINDINGS AND RECOMMENDATIONS

### FINDINGS

We have been asked to inquire into and report on whether the Government of Canada properly rejected the McKenna-McBride Applications Claim submitted by the Mamaleleqala Qwe'Qwa'Sot Enox'Band. Our findings in relation to the issues raised by the parties in this inquiry are set out below:

#### **Indian Settlement Lands**

- Section 56 of the provincial *Land Act* expressly provided that no timber licences were to be granted "in respect of lands forming the site of an Indian settlement or reserve." Although we do not purport to offer any exhaustive definition of the term "Indian settlement," when section 56 was enacted it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether or not they were immediately adjacent to or in the proximity of other dwellings. Furthermore, it was not strictly necessary for there to be a permanent structure on the land, providing there is evidence of collective use and occupation by the band.
- In assessing whether any of the lands encompassed by the Band's McKenna-McBride applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamaleleqala Qwe'Qwa'Sot'Enox used the land and the type of houses they built and used during the early part of this century. Since one traditional house could house a number of families, the existence of even one house provides ample evidence that an Indian settlement existed at that location.



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- We agree with the Band that the lands encompassed by the Band's applications for Lull Bay (Application 62), Hoeya Sound (Application 63), Shoal Harbour (Application 64), and Knight's Inlet (Application 71) included Indian settlements. Since the Band did not specifically argue that the four remaining "effective" applications included Indian settlements, we make no findings with respect to those applications.
  - It is important to keep in mind that it was only the Band's "Indian settlements" and "reserves" that were protected by section 56 of the *Land Act*. Therefore, it is necessary to consider how much of the lands encompassed by Applications 62, 63, 64, and 71 were Indian settlement lands at the time the leases and licences were granted. Without further evidence, we find that the Band's settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The size of the Band's settlement lands at Knight's Inlet (Application 71) is a matter that is better left for resolution between the parties through further research and negotiation.

#### **Fiduciary Obligation to Protect Indian Settlement Lands**

- Canada, through its Indian Agents, had a fiduciary obligation to protect the Band's settlement lands from unlawful encroachments by objecting to the granting of leases and licences over those lands.
- Agent Halliday and his predecessor, G.W. DeBeck, were, or ought to have been, aware of the locations of the Band's settlement lands. However, no evidence was presented in this inquiry that they ever objected to the granting of leases and licences over those lands. Therefore, Canada, through its Indian Agents, breached its fiduciary obligation to the Band in respect of those leases and licences which (1) covered Indian settlement lands, and (2) were gazetted during the tenure of Agents Halliday and DeBeck (or one of their predecessors in office).
- As stated earlier, without further evidence, the Band's settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The Band also had settlement lands in the Knight's Inlet area (Application 71), but the precise area has yet to be determined. The *Gazette* notices submitted by the Band in this inquiry appear to cover
  - the Band's settlement lands in Application 62 (Lull Bay);

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- the Band's settlement lands in Application 64 (Shoal Harbour); and
  - some of the Band's settlement lands in Application 71 (Knight's Inlet).
  - Therefore, the Band has a valid claim for negotiation for
    - a minimum of 5 acres in the Lull Bay area;
    - minimum of 2.83 acres in the Shoal Harbour area (5 acres minus the 2.17 acres eventually made into a reserve on the recommendation of the Ditchburn-Clark Commission); and
    - the Band's settlement lands in the Knight's Inlet area which were included in Application 71 and which are covered by the *Gazette* notices submitted by the Band in this inquiry.
  - With respect to the Band's settlement lands in Application 63 (a minimum of 5 acres in the Hoeya Sound area) and the Band's remaining settlement lands in Application 71, there is insufficient evidence in this inquiry to establish that a *Gazette* or newspaper notice appeared during the time that an Indian Agent was assigned responsibility for the Indians in those areas.
  - Although it was raised as an issue whether Canada, through its Indian Agents, nonetheless owed a fiduciary obligation to the Band if the lands were not "settlement lands" within the meaning of the *Land Act*, this line of argument was not strenuously pursued by the Band. Our conclusion that Canada, through its Indian Agents, had a fiduciary obligation to protect the Band's settlement lands was strongly influenced by the fact that the provincial *Land Act* specifically protected Indian settlements from alienation and provided a mechanism for such protection. The Indian Agents, therefore, had a defined process within which they could protect the Band's settlement lands. On the submissions before us, we do not see a similar situation with respect to non-settlement lands.

### **Fiduciary Duty prior to the McKenna-McBride Hearings**

- In our view, Canada breached a fiduciary duty to the Band prior to the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Com-

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mission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

- In the circumstances of this claim, we are satisfied that Agent Halliday failed to prepare the Band for the McKenna-McBride process. At the McKenna-McBride Commission's general meeting with the principal Tribes of the Kwawkwalth Nation on June 1, 1914, several chiefs expressed concern that they were not adequately prepared for the McKenna-McBride hearings. Although plans of their reserve lands were available for distribution before the Commissioners' visit, they did not actually receive these plans until the Commissioners arrived in the community. The Chairman of the McKenna-McBride Commission noted that the plans were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done." Moreover, there is evidence that Agent Halliday failed to disclose information in his possession regarding the various timber limits in the area.
- We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkwalth Agency as a whole, the Mamaleleqala had a per capita average of only 8.52 acres even after receiving 150 additional acres on Compton Island. Given the disparity between the Band's per capita acreage and that of the Agency, it seems reasonable to conclude that the Band was left with insufficient lands.
- Finally, we are satisfied that there were unalienated lands available for which the Band could have applied. Therefore, there is sufficient evidence to establish that Canada breached its fiduciary obligations towards the Band as a result of Agent Halliday's conduct *prior to* the McKenna-McBride hearings. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter that could provide a valid basis for negotiations under the Specific Claims Policy.

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### **Fiduciary Duty during the McKenna-McBride Hearings**

- In our view, Canada breached a fiduciary duty to the Band during the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent, if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut this presumption on a balance of probabilities.
- The difficulty in this claim relates to the second requirement outlined above. Of the eight “effective” applications made by the Band, seven were rejected because the land was unavailable. The one remaining “effective” application was the Band’s application for Compton Island, which Agent Halliday recommended, and the Commission allowed, in its entirety. Therefore, the Band has not established that Canada breached its fiduciary obligations by virtue of Agent Halliday’s conduct *during* the McKenna-McBride hearings.

### **Fiduciary Duty after the McKenna-McBride Hearings**

- Agent Halliday had the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.
- If Agent Halliday was restricted to the Band’s original applications when making his revised recommendations, we are left with the same difficulty as that discussed above in relation to his duty *during* the McKenna-McBride hearings; namely, a lack of available lands.
- It is unnecessary for us to decide whether Agent Halliday was restricted to the Band’s original applications when making his revised recommendations, for any such restriction simply returns us full circle to his obligation to prepare the Band for the process. If the Band had been properly

prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

- Canada's breaches of fiduciary duty did result in damage to the Band. If Canada had taken proper steps to protect the Band's settlement lands and taken reasonable steps to provide the Band with basic information and advice during the McKenna-McBride Commission process, we are confident that the Band would have received additional reserve land. These breaches resulted not only in a loss of additional reserve lands, but also in a loss of resources and economic opportunities.

### **Negligence**

- Given our findings and conclusions with respect to fiduciary obligation above, we do not consider it necessary to address whether the Band has a valid claim based on negligence.

### **Scope of the Specific Claims Policy**

- The four enumerated examples of "lawful obligation" in *Outstanding Business* are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" and a claim based on a breach of fiduciary duty or obligation falls within the scope of the Policy.
- Given our conclusions that Canada, through its Indian Agents, breached its fiduciary obligations to the Band, this claim falls within the scope of the Policy.

## **RECOMMENDATIONS**

We therefore make the following recommendations to the parties:

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### **RECOMMENDATION 1**

**That the McKenna-McBride Commission claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band be accepted for negotiation under the Specific Claims Policy for**

- a minimum of 5 acres in Application 62 (Lull Bay);
- a minimum of 2.83 acres in Application 64 (Shoal Harbour); and
- the Band's settlement lands in Application 71 (Knight's Inlet) which are covered by the *British Columbia Gazette* notices submitted by the Band as evidence in this inquiry.

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**RECOMMENDATION 2**

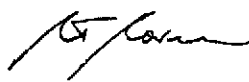
That the McKenna-McBride Commission claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band be accepted for negotiation under the Specific Claims Policy as a result of Canada's breach of fiduciary obligations towards the Band prior to the McKenna-McBride hearings.

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FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commission Co-Chair



Carole T. Corcoran  
Commissioner



Roger J. Augustine  
Commissioner

Dated this 27th day of March, 1997

## APPENDIX A

### MAMALELEQALA QWE'QWA'SOT'ENOX BAND MCKENNA-MCBRIDE APPLICATIONS CLAIM INQUIRY

- 1 **Planning conference** December 13, 1995
- 2 **View and community session** May 22-23, 1996

The Commission viewed Village Island on May 22. On May 23 the Commission heard from the following witnesses at the U'mista Cultural Centre in Alert Bay, British Columbia: Ethel Alfred, Vera Neuman, Chief Robert Sewid, David Mountain, Chief Harry Mountain, and Chief Bobby Joseph.

- 3 **Legal argument** August 29, 1996
- 4 **Content of the formal record**

The formal record of this inquiry comprises the following:

- documentary record
- exhibits (18 documents)
- transcripts (2 volumes, including transcript of legal argument)

This report of the Indian Claims Commission and letters of its transmittal to the parties complete the record for this Inquiry.

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## APPENDIX B

### RELEVANT PROVISIONS OF THE BRITISH COLUMBIA *LAND ACT*

When notices appeared in the *British Columbia Gazette* in 1905 for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas, sections 41, 44, and 45 of the provincial *Land Act* provided as follows:

41. (1.) Leases (containing such covenants and conditions as may be thought advisable) of Crown lands may be granted by the Chief Commissioner of Lands and Works for the following purposes:

- (a.) For the purposes of cutting hay thereon, for a term of not exceeding ten years:
- (b.) For any purpose whatsoever, except cutting hay as aforesaid, for a term not exceeding twenty-one years.

(2.) Any person desirous of procuring a lease for any of the purposes referred to above, shall before entering into possession of the particular part of said lands he or they may wish to acquire, place at one angle or corner of the land to be applied for a stake or post at least four inches square, and standing not less than four feet above the surface of the ground, and upon such initial post he shall inscribe his name, and the angle represented thereby, thus: "A.B.'s N.E. corner" (meaning north-east corner), or as the case may be, and shall cause a written or printed notice of his intention to apply for such lease to be posted on some conspicuous part of the land applied for by him, and on the Government Office, if any, in the district, for thirty clear days. He shall also publish a notice of his intention to apply for such lease thirty days in the *British Columbia Gazette*, and in some newspaper published and circulating in the district where such land is situate, or, in the absence of such newspaper, in the one nearest thereto.

(3.) After the expiration of the thirty days' notice, and within two months from the date of its first publication in the *British Columbia Gazette*, he shall make application in writing to the Chief Commissioner of Lands and Works for a lease over such land. Such application shall be in duplicate, and shall be illustrated by plans and diagrams showing approximately the position thereof and shall give the best practicable written description of the plot of land over which the privilege is sought. The Chief Commissioner of Lands and Works may, if there appears to be no valid objection, give notice to such applicant that a lease will issue as desired, provided the applicant has the



land surveyed in a legal manner within six months from the date of such notification: . . .<sup>1</sup>

44. Any person desirous of objecting to the granting of any lease under this Act shall give his written reasons therefor, addressed to the Commissioner of the District within which the lands affected are situate before the day fixed by the notice in the British Columbia Gazette for the application to the Commissioner for such lease, or within such further or other time as the Commissioner may appoint, and the Commissioner shall, as soon as possible, forward the same, with his report thereon, to the Chief Commissioner of Lands and Works.<sup>2</sup>

45. In the event of any objections being entered as provided for above, the Chief Commissioner of Lands and Works shall have power to hear, settle, and determine the rights of the adverse claimants, and to make such order in the premises as he may deem just.<sup>3</sup>

When a *Gazette* notice appeared in 1907 for a special timber licence in the Lull Bay area, sections 50-52 of the provincial *Land Act* provided as follows:

50. The Chief Commissioner of Lands and Works may grant licences, to be called special licences, to cut timber on Crown lands . . .<sup>4</sup>

51. Any person desirous of obtaining such special licence shall comply with the following provisions:—

(a.) He shall first place at one angle or corner of the limit he wishes to acquire a legal post and upon such post he shall inscribe his name and the angle represented thereby, thus: "A.B.'s N.E. corner," meaning north-east corner (*or* as the case may be), and shall cause a written or printed notice to be posted thereon giving a description, in detail, of the length and direction of the boundary lines of the claim and date of location, and of his intention to apply for permission to obtain the special licence. Such notice shall be in the following form:—

"I, A.B., intend to apply for a special licence to cut timber upon acres of land bounded as follows:—Commencing at this post; thence north chains; thence east chains; thence south chains; thence west chains (*or* as the case may be).

"Name (*in full*).

"Agent for (*name in full*).

"

"Date

1 *Land Act*, RSBC 1897, c. 113, s. 41, as am. SBC 1899, c. 38, s. 6, SBC 1901, c. 30, s. 6, SBC 1903, c. 15, s. 2.

2 *Land Act*, RSBC 1897, c. 113, s. 44.

3 *Land Act*, RSBC 1897, c. 113, s. 45.

4 *Land Act*, RSBC 1897, c. 113, s. 50, as am. SBC 1903-4, c. 30, s. 5.

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Land may be staked or located by an agent under this section. After the land is so staked and marked the applicant shall, within thirty days of the location thereof, if located within ten miles of the office of the Commissioner, post a notice in writing, in the office of the Commissioner for the district in which the land is situate, of his intention to apply for such licence. One additional day shall be allowed for posting such notice for every additional ten miles, or fraction thereof. Such notice shall be in the Form No. 13 of the Schedule hereto, and shall describe as accurately as possible the land over which he seeks to obtain such licence, especially with reference to the nearest known point, or to some creek, river, stream or other water, and shall state the name of the land district within which the said land is situate, the boundaries and extent of such land, the date of location, and the name, residence and occupation of the applicant. The applicant shall also make a declaration, in duplicate, in the Form No. 12 of the Schedule hereto attached, and deposit the same with the Commissioner at the time of posting the notice hereinbefore referred to. Within thirty days after the staking of the said land, or within such further period as the Commissioner may, under special circumstances, determine, the applicant shall commence the publication of the notices in said Form No. 13, at his own expense, for the period of one month, in the British Columbia Gazette and in a local newspaper published and circulating in the district in which the land is situated, or in the absence of such local newspaper in the one nearest thereto. The applicant shall, within two months from the date of the first publication in the British Columbia Gazette, make application, in duplicate, to the Commissioner for such special licence, which application shall be made upon the printed form supplied, and shall conform to all the requirements of said form, and the applicant shall also file a statutory declaration, in duplicate, of the publication of the notice, and shall deposit with the Commissioner the licence fee provided by section 53 of this Act. The Commissioner shall forward one copy of the application and declarations, together with his report thereon, to the Lands and Works Department, Victoria.

- (b.) The Commissioner for each Land District shall keep a register of all applications filed under the provisions of this section. Such register shall be indexed as to names of applicants and localities, and every such application shall be numbered and such number shall be registered. Such register shall be open for search by the public during office hours, and a fee of twenty-five cents shall be charged for such search.
- (c.) The applicant shall, within two months from the date of the first publication in the British Columbia Gazette, deposit with the Commissioner the licence fee provided by section 53 of this Act, and also file a statutory declaration, in duplicate, that he has published the notices required under this section. Such deposit may be held and dealt with by the Commissioner as hereinafter provided, provided there is no objection filed against the said application; and if any objection has been filed, provided the same is settled as hereinafter provided. The Commissioner shall forthwith forward one copy of the application and declaration as to

publication of notices and deposit of licence fee, together with his report thereon, to the Lands and Works Office at Victoria. All deposits of licence fees under this section shall be made by cheque, which shall be certified and payable at par at Victoria.<sup>5</sup>

52. The Chief Commissioner shall take into consideration any objections, protests, or adverse claims that may be lodged with him, and shall decide whether such applicant is entitled to the first right to obtain such licence. In case of any dispute as to the staking and location of the land under the provision of section 51, the right to completion of the application shall be recognised according to priority of such location, subject to the applicant having complied with the terms and conditions relating to application.<sup>6</sup>

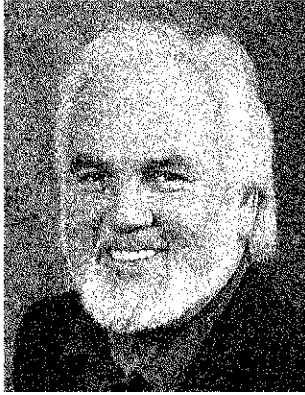
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5 *Land Act*, RSBC 1897, c. 113, s. 51, as am. SBC 1903-4, c. 30, s. 6, SBC 1906, c. 24, s. 11, SBC 1907, c. 25, s. 15.

6 *Land Act*, RSBC 1897, c. 113, s. 52, as am. SBC 1903-4, c. 30, s. 7, SBC 1907, c. 25, s. 16.



## THE COMMISSIONERS



**Roger J. Augustine** is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was president of the Union of NB-PEI First Nations from 1988 to January 1994. He is president of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products. He has been honoured for his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr Augustine was appointed a director to the National Aboriginal Economic Development Board. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed Commissioner to the Indian Claims Commission in 1992.



**Daniel J. Bellegarde, Co-Chair**, is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, he worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, Mr Bellegarde 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. He was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.



**Carole T. Corcoran** is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She has served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed as a Commissioner to the Indian Claims Commission in July 1992.



**Aurélien Gill** is a Montagnais from Mashteuiatsh (Pointe-Bleue), Quebec, where he served as Chief for nine years. He has helped found many important Aboriginal organizations, including the Conseil Atikamekw et Montagnais, the Conseil de la Police amérindienne; the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (now the Assembly of First Nations). Mr Gill served as Quebec Regional Director in the Department of Indian Affairs and Northern Development, and is a member of the National Aboriginal Economic Development Board. Mr Gill is a member of several boards, including those of the Université du Québec à Chicoutimi and the Northern Engineering Centre at the Université de Montréal. He is a member of the Environmental Management Boards for the federal government and for the Province of Quebec. In 1991 he was named to the Ordre national du Québec. Mr Gill was appointed Commissioner of the Indian Claims Commission on December 8, 1994.



**P.E. James Prentice, QC, Co-Chair**, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.