INDIAN CLAIMS COMMISSION

KLUANE FIRST NATION
KLUANE NATIONAL PARK AND
KLUANE GAME SANCTUARY INQUIRY

PANEL

Commissioner Alan C. Holman
Commissioner Sheila G. Purdy

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To the Indian Claims Commission
John B. Edmond

February 2007

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SUMMARY

KLUANE FIRST NATION: KLUANE NATIONAL PARK AND KLUANE GAME SANCTUARY INQUIRY
Yukon

The report may be cited as Indian Claims Commission, *Kluane First Nation: Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007).

This summary is intended for research purposes only.
For a complete account of the inquiry, the reader should refer to the published report.

Panel: Commissioner A.H. Holman, Commissioner S.G. Purdy

Mandate of Indian Claims Commission – Aboriginal Title; **Specific Claims Policy** – Comprehensive Claim – Indian Land; **Park** – Indian Land; **Fiduciary Duty** – Indian Land – Consultation – Compensation; **Yukon**

THE SPECIFIC CLAIM

The Kluane First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in October 1996, alleging that Canada breached its fiduciary obligations to it by establishing the Kluane Game Sanctuary and, later, the Kluane National Park and by denying it access to its traditional territory in these areas. In March 1999, DIAND rejected the claim on the grounds that the claim was based on the assertion of unextinguished native or aboriginal title. The First Nation requested that the Indian Claims Commission (ICC) convene an inquiry into the claim, and the ICC accepted the claim for inquiry in October 1999. In February 2000, Canada requested a hearing to address whether the ICC had the mandate to inquire into the Kluane claim. The ICC received written submissions from the parties and conducted a hearing in September 2000. In December 2000, the ICC ruled that the subject matter of the Kluane claim fell within the scope of the Specific Claims Policy and, therefore, the ICC had the mandate to inquire into the claim: see (2003) 16 ICCP 75. The ICC conducted a community session in February 2002. Prior to completing the ICC inquiry, the subject of this inquiry was resolved by the Kluane First Nation Final and Self-Government Agreements, which came into effect in February 2004.

BACKGROUND

Traditionally, the Kluane people covered hundreds of square kilometres in their seasonal round of hunting, fishing, and trapping, and, from time immemorial, a part of this traditional territory has included the land between the Slims River and the White River in what is now the Yukon Territory of Canada. The area was not included in any of the numbered treaties (1 to 11). The discovery of gold in the area in 1903 and the construction of the Alaska Highway in 1942 significantly changed the traditional lifestyle of the Kluane people. To protect and conserve the unique wildlife in the area, the 1938 *Yukon Game Ordinance* was amended in 1943 to establish the Kluane Game Sanctuary, with the Alaska Highway as its northern boundary. The area was proclaimed as a National Park in 1972. Until 1983, no one, including the Kluane people, was allowed to hunt within the limits of the Game Sanctuary or Park except by special permit to alleviate hardship within the Kluane community. In 1983, the Yukon Court of Appeal acquitted two Kluane hunters on the grounds that the prohibition against hunting in the sanctuary did not apply to Indians hunting for food.

ISSUES

Did the Kluane First Nation specific claim fall within the Specific Claims Policy? Did Canada owe an outstanding legal obligation in respect of breaches of fiduciary duty to the Kluane First Nation? Were the Kluane park lands "Indian lands" within the meaning of the Specific Claims Policy and the common law? Did Canada breach an obligation by failing to consult with the Kluane First Nation in the establishment of the Park and Game Sanctuary or by failing to disallow the Yukon Government legislation establishing the Kluane Game Sanctuary? Did Canada breach a fiduciary obligation by failing to compensate the Kluane First Nation?

OUTCOME

The ICC made no findings. Prior to completion of the inquiry, the subject of the inquiry was resolved by the completion of the Kluane First Nation Final and Self-Government Agreements in February 2004.

REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

Cases Referred To

Delgamuukw v. British Columbia, [1997] 3 SCR 1010; *R. v. Michel*, [1984] 1 CNLR 157.

Treaties and Statutes Referred To

Rupert's Land and North-Western Territory Order, June 23, 1870; *Yukon Territory Act*, SC 1898; *Yukon Game Ordinance*, May 2, 1938, amended April 1943; *Yukon Game Ordinance*, July 17, 1947.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994) 1 ICCP 171–85; Luigi Zanasi, "Kluane National Park and Reserve Economic Impact Study: Economic History of the Kluane Region Background Paper," March 3, 2005; "Alcan Highway: A Brief History of the Alaska Highway," in Bill Surface, The "Surface" of Alaska, 1996.

COUNSEL, PARTIES, INTERVENORS

D. Joe for Kluane First Nation; J. A. Hutchinson for the Government of Canada; J.B. Edmond to the Indian Claims Commission.

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

This report outlines an Indian Claims Commission (ICC) Inquiry that concluded when the claimant, the Kluane First Nation, withdrew its claim because it had reached a settlement with Canada through comprehensive claim negotiations.

The people of the Kluane First Nation (formerly the Burwash Indian Band) are of Athapascan ancestry and belong to the Southern Tutchone linguistic group. For many generations, they have made their living in their traditional territory surrounding Kluane Lake in the southwest corner of the Yukon Territory, hunting caribou, moose, and sheep and fishing for whitefish, trout, and dog salmon. ("Kluane" is the English derivative of the Southern Tutchone name meaning "Big Whitefish Lake.") There are approximately 200 Kluane First Nation members, about half of whom live in Burwash Landing, a community located on the Alaska Highway 284 kilometres (176 miles) west of Whitehorse.[1]

On October 2, 1996, the Kluane First Nation submitted a claim to the Specific Claims Branch of the Department of Indian Affairs alleging that Canada breached its fiduciary obligations to it by establishing the Kluane Game Sanctuary and, later, the Kluane National Park and by denying it access to its traditional territory in these areas. On July 27, 1998, Chief Robert Johnson clarified the claim, stating that it was supported by the decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[2] The claim was rejected by a letter from the Director General of the Specific Claims Branch dated March 25, 1999, on the grounds that the claim was "based on the assertion of unextinguished native or aboriginal title" and fell outside the Specific Claims Policy.[3]

The First Nation forwarded a copy of its claim submission to the Indian Claims Commission on October 4, 1999, with a request that the Commission convene an inquiry into the claim. The ICC

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1 Indian and Northern Affairs Canada (INAC), "Backgrounder, Kluane First Nation, Final and Self-Government Agreements," online: www.ainc-inac.gc.ca/nr/prs/s-d2003/0204bk_3.html (accessed November 3, 2005).

2 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

3 Paul Cuillerier, Director General, Specific Claims Branch, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, INAC file BW8260/YK503-C2 (ICC file 2111-2-1, vol. 1).

reviewed and accepted the First Nation's request on October 27, 1999. Canada objected to the Commission holding this inquiry, on the ground that the claim was not a "specific claim" within the meaning of the Specific Claims Policy, and brought a mandate challenge, in which the panel ruled that the subject matter of the claim was within the Policy.[4]

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[5] This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[6] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> 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.[7]

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[4] *ICC, Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Claim Inquiry – Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75, see: Appendix A.

[5] 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.

[6] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[7] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

PART II
HISTORICAL BACKGROUND

The people of the Kluane First Nation are descended from the Copper Indians who, according to oral tradition and archaeological studies, migrated from northern Asia to the Yukon around 11,000 BC. (Anglican priests in the Yukon Diocese in the early 1900s noted that "many of their ordinary words such as those for fire and water are the same as in the dialects of Northern China.")[8] Traditionally, the Kluane people covered hundreds of square kilometres in their seasonal round of hunting, fishing, and trapping, and from time immemorial a part of this traditional territory has included the land south of the Alaska Highway from where the highway crosses the Slims River to the White River.[9]

The area now called the Yukon Territory was part of the "North Western Territory" that was transferred to the Dominion of Canada by British Imperial Order on July 23, 1870. From that date, the Parliament of Canada had "full power and Authority to legislate for the future welfare and good government of the said Territory,"[10] specifically including the settlement of native claims. In 1898, the Yukon Territory was established as a separate territory with an executive council, but administered under federal authority.[11] In the 1940s, the Yukon was governed by a controller, appointed by and reporting to the federal government, plus a three-member elected council. It had no authority over natural resources except wildlife. In 1951, there were five elected councillors, but they had no control over the federally appointed chief executive officer (now called "Commissioner") who ran the territorial civil service and reported directly to Ottawa. It was not until 1979 that power was transferred from the commissioner to the leader of the majority group in the Council.

Non-native explorers, fur traders, and missionaries began arriving in various parts of the Yukon territory in the mid-1700s, and trapping and trading were gradually incorporated into the seasonal round of the various First Nations in the area. In 1897–98, gold was discovered in the

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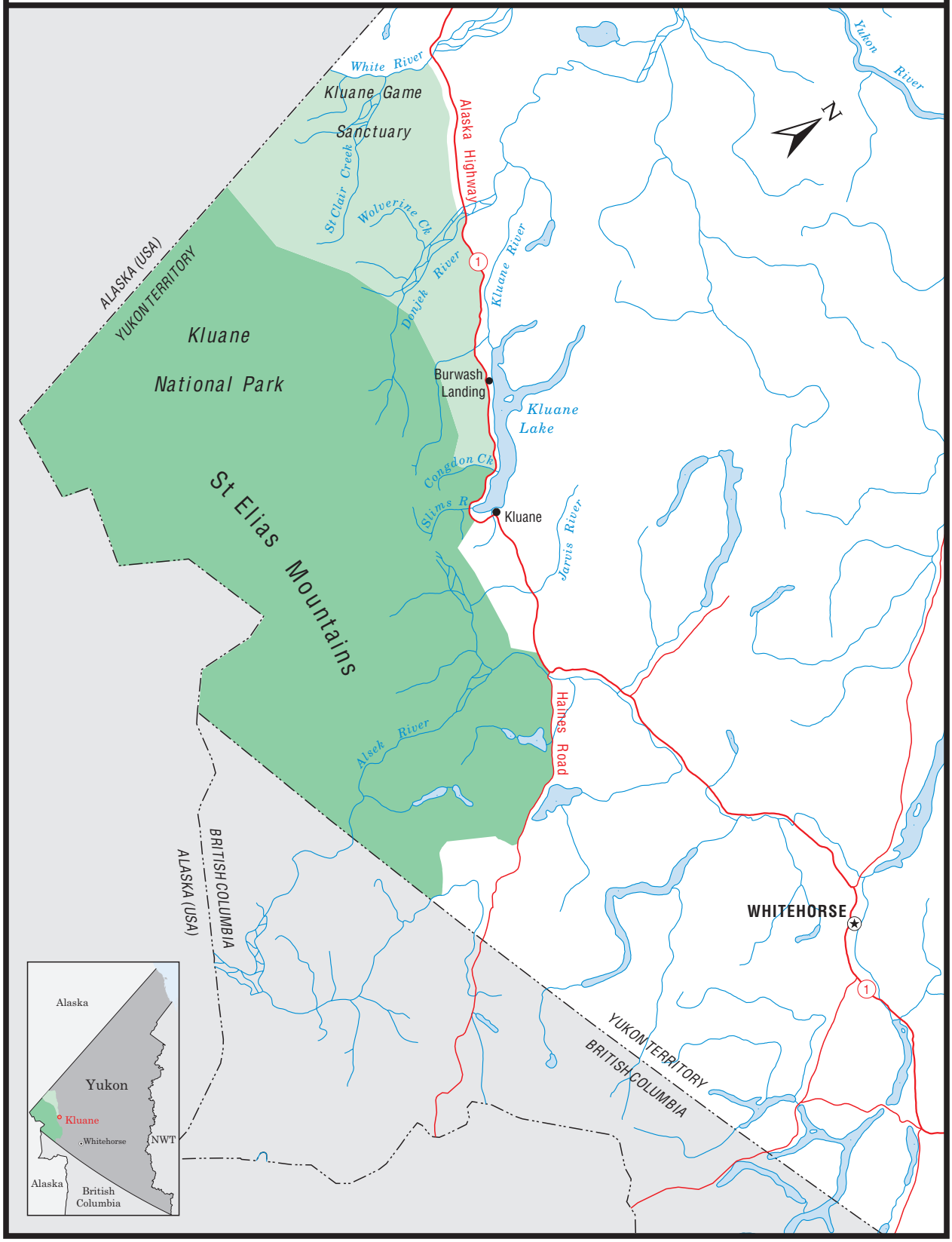
[8] Report from the Dioceses of Yukon, July 1908, Yukon Archives, Anglican Church, New Series, file 3 (ICC Exhibit 1, p. 21).

[9] Dave Joe, Legal Counsel, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 1 (ICC Exhibit 2a, p. 1).

[10] *Rupert's Land and North-Western Territory Order*, June 23, 1870 (ICC Exhibit 9).

[11] *Yukon Territory Act*, SC 1898, c. 6.

Map 1 **Claim Area Map**



Klondike, and hundreds of men and women trekked into the North, hoping to make their fortunes. In 1902, Jim Boss (Hunde-aelth), the hereditary Chief of the Southern Yukon Indian Tribes, asked a lawyer in Whitehorse to write to the Superintendent General of Indian Affairs "respecting the rights of the Yukon Indians to compensation because of the taking possession of their lands and hunting grounds by white people." He stated that, since the arrival of the white man, the Indians had been starving because they could not get enough game for their survival, and he estimated that the native population had gone from "several thousand to less than one thousand" in eight years.[12] In response to this letter, the Department of Indian Affairs immediately instructed the North-West Mounted Police to "issue necessary assistance for the relief of destitute Indians in the Yukon territory, and to also render medical assistance when necessary."[13] Nothing, however, was offered in compensation and no treaty negotiations were contemplated. In fact, until the 1980s, there was no action to deal with the Yukon Indians' Aboriginal title.

In July 1903, the first payable gold in the Kluane district was found on a tributary of the Jarvis River, setting off a gold rush in that area that lasted for approximately two years.[14] To supply the influx of prospectors, the brothers Eugene and Louis Jacquot established a trading post in 1904 at what is now Burwash Landing, about six miles from one of the traditional native summer fishing camps located on the west shore of Kluane Lake. The "rush" faded quickly, but the Jacquots remained and established themselves as big-game outfitters, attracting rich trophy hunters from the United States and elsewhere. For some time, the Kluane people maintained the nearby fish camp as a base camp and continued in their seasonal round through their traditional lands. The Jacquots' trading post made their lives easier because they no longer had to go to Fort Selkirk or Coffee Creek on the Yukon River for supplies, and some of them earned extra money as guides or cooks on the outfitters' hunting trips. It was not until the 1930s, however, when the Roman Catholic Church

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[12] T.W. Jackson, Barrister, Whitehorse, to the Superintendent General of Indian Affairs, January 13, 1902, Library and Archives Canada (LAC), RG 10, vol. 4037, file 317050 (ICC Exhibit 1, pp. 1–2).

[13] S. Stewart, Assistant Secretary, Department of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, October 19, 1904, LAC, RG 10, vol. 4037, file 317050 (ICC Exhibit 1, p. 8).

[14] Luigi Zanasi, economist, Inukshuk Planning and Development, "Kluane National Park and Reserve Economic Impact Study: Economic History of the Kluane Region Background Paper," March 3, 2005, online: www.yukonomics.ca/reports/kluane/KNP_EIA_Background_3_Econ_History.PDF (accessed November 11, 2005).

established a small mission and school at Burwash Landing for the Indians, that the people began to settle in more permanent homes in that community.[15]

THE ALASKA (OR ALCAN) HIGHWAY, 1942

The United States had proposed a road to Alaska as early as 1930, but it was the bombing of Pearl Harbor in December 1941, the resulting war with Japan, and the perception that Alaska was vulnerable to Japanese invasion that made such a road a military priority. Within about nine months of the United States' entry into World War II, some 10,000 men from the U.S. Army Corps of Engineers and more than 7,500 civilian workers completed a rough but passable road from Dawson Creek, British Columbia, to Fairbanks, Alaska – a total of 2,457 kilometres (1,520 miles).[16]

Until the Alaska Highway was built, Burwash Landing was remote and difficult to access, the primary transportation route in the Yukon up to that point being the Yukon River. Opening up the area had a major impact on the resident Indians, and the changes were not usually beneficial:

> The impact of the highway construction boom on First Nation peoples was largely negative. Although some took up the high paying work available on the project, the economic gains were dwarfed by the negative social and environmental impacts that resulted. ...
>
> Instead of the traditional pattern of following resource availability, First Nation people altered their seasonal activities to take on support jobs for the construction of the highways.[17]

The influx of thousands of new people resulted in social disruption, increased drinking and violence, a series of epidemics, and a greater demand on game. There were several reports about construction workers' excessive slaughter of animals and waste of meat. The simple addition of a large number

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[15] ICC Transcript, February 7, 2002 (ICC Exhibit 5A, vol. II, p. 129, Robin Bradasch); Dave Joe, Legal Counsel, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 2 (ICC Exhibit 2a).

[16] "Alcan Highway: A Brief History of the Alaska Highway," in Bill Surface, The "Surface" of Alaska, 1996, online: www.esu11.k12.ne.us/projects/alaska/alcan.html (accessed November 13, 2005).

[17] Luigi Zanasi, economist, Inukshuk Planning and Development, "Kluane National Park and Reserve Economic Impact Study: Economic History of the Kluane Region Background Paper," March 3, 2005, p. 10, online: www.yukonomics.ca/reports/kluane/KNP_EIA_Background_3_Econ_History.PDF (accessed November 11, 2005).

of people in a short time could have but a negative effect on the big-game population, whether the animals were being hunted for food or for sport.

BOUNDARIES OF KLUANE NATIONAL PARK AND KLUANE GAME SANCTUARY, 1943–72

On July 20, 1942, Harold Ickes, the United States Secretary of the Interior, wrote to Canada's Minister of Mines and Resources to outline the Americans' plan to establish a temporary 34 kilometre (20-mile) conservation zone on either side of the highway in Alaska, an area where development would be regulated and hunting controlled. In this letter, Ickes pointed out that "the Canadian-Alaskan Highway will touch, or make fairly accessible, several fine areas within the British Columbia–Yukon wilderness. ... West of Whitehorse, from Kluane Lake to the Alaska boundary, are the highest mountains in Canada and some of its most famous wildlife."[18]

When forwarding this letter to the Yukon authorities, the Director of the federal Lands, Parks and Forests Branch instructed them to consult with the Liaison Officer for the highway project regarding which type of protected reservation should be made in the Yukon. He listed the different types of protections available:

> (1) The National Park, which is administered under the National Parks Act and Regulations (copy enclosed). You will notice that in the National Parks Act and Regulations there is no provision for the development of the mineral or forest resources for industrial purposes. There is no hunting and trapping, excepting only in one park – Wood Buffalo Park, where a considerable number of natives and half-breeds were at the time the park was established.
> (2) The Game Sanctuary – such as the Thelon Sanctuary in the Northwest Territories. (See Northwest Game Regulations enclosed). No one can enter such a sanctuary without a permit.
> (3) A Native Game Preserve (See Northwest Game Regulations). In such an area the only people, other than natives, who can hunt and trap are those who were established in the area at the time it was created.[19]

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[18] Harold Ickes, Secretary of the Interior, Washington, to T.A. Crerar, Minister of Mines and Resources, Ottawa, July 20, 1942, LAC, RG 85, vol. 13990, file 406-11, pt 1 (ICC Exhibit 1, pp. 25–26).

[19] R.A. Gibson, Director, Lands, Parks and Forests Branch, Department of Mines and Resources, Ottawa, to G.A. Jeckell, Controller of Yukon Territory, July 29, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 27).

In August 1942, federal and territorial officials met to consider these options. Admitting that they did not have all the information needed to make a final decision, they were inclined to agree that only the area in the Kluane Lake / St Elias Mountain range was sufficiently exceptional to be considered for national park purposes, and that no game sanctuaries were necessary except for some small areas in British Columbia.[20] In October 1942, the Advisory Board on Wild Life Protection, which included bureaucrats from both the territorial and federal governments, recommended the establishment of a national park in the Kluane district; until that could be done, "the Controller and Council of the Yukon Territory should be requested to establish the aforesaid area as a game sanctuary without delay, so as to preserve its exceptional game population in spite of its having been made suddenly accessible."[21]

In the next few months there was considerable discussion about whether to include Kluane Lake in the reserved area. Those in favour sited its potential for tourism and recreation, while those against spoke of the interests of local miners and outfitters. The former prevailed, and, when Order in Council PC 11142 was issued on December 8, 1942, the 4,100 hectares (10,130 acres) reserved "from entry or other disposal in order that it may be available in its present condition for establishment as a National Park" included all the area to the north bank of Kluane Lake.[22]

To protect and conserve the unique wildlife until an act of Parliament would actually create the park, the *Yukon Game Ordinance* (May 2, 1938) was amended in April 1943 to establish the Kluane Game Sanctuary, with boundaries identical to those of the proposed national park, including Kluane Lake. The game ordinance was further amended on July 7, 1943, to restrict hunting for 1.6 kilometres (one mile) on either side of the Alaska Highway for the entire length of the road, not just in the area of the park reservation:

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[20] C.K. LeCapelain, Liaison Officer, Whitehorse, to R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa, September 1, 1942, LAC , RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 29–30).

[21] [Minutes of meeting of the Advisory Board on Wild Life Protection, October 20, 1942], attached to letter, Hoyes Lloyd, Secretary, to E.M. Dennis (for R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa), October 23, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 59).

[22] Order in Council PC 11142, December 8, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 69–70).

> (2) No person shall hunt, trap, kill, shoot at, wound, injure, or molest in any manner any wild life within an area extending a distance of one mile on either side of the centre line of the Alaska Highway.[23]

The inclusion of Kluane Lake within the park boundaries was unpopular. Immediately, there was a call to have the lake excluded from the reserved area on the basis that it was "too large for small boats" and the water was "cold and dangerous,"[24] so had little value for tourism. In addition, the point was made that the area was valuable for mineral development and important to "guides, outfitters, sportsmen and others who have been established for many years in one particular area."[25] On September 15, 1944, Order in Council PC 7101 amended the boundaries of the area reserved for the park "by deleting therefrom Kluane Lake and the mineralized area along the Alaska Highway and the White River and to include in the area the land in the Yukon Territory lying south of the Alaska Highway and between the Alsek River and the Haines Road."[26] This amendment effectively moved the boundary about 17 kilometres (10 miles) south of the road.

In the amended description, the northern boundary of the park between Congdon Creek and White River was just a line on a map. There was no natural physical boundary and, in that particular terrain, it was impossible to survey and mark out a distinctive line. As a result, it was difficult for either hunters or game wardens to know where hunting was legal and where it was not.[27] Officials in Ottawa were not inclined to request another Order in Council to redefine the boundaries. Instead, they suggested that Yukon officials increase the area of the game sanctuary so that the restricted hunting zone had a physical boundary:

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[23] Special Game Regulations, July 7, 1943, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 85).

[24] Controller, National Parks Bureau, Ottawa, to R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa, September 30, 1943, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 94).

[25] R.A. Gibson, Director, Lands, Parks and Forests Branch, to G.A. Jeckell, Controller, Yukon Territory, June 28, 1944, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 148).

[26] Order in Council PC 7101, September 15, 1944, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 152–53).

[27] G.A. Jeckell, Controller of Yukon Territory, Dawson, to R.A. Gibson, Director, Parks and Forests Branch, Ottawa, November 27, 1945, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 157–59).

> However, it has occurred to me that the Yukon Game Ordinance could again be amended to readjust the boundaries of the Kluane Game Sanctuary so that the portion lying between Congdon Creek and the White River would be of a natural, physical and easily recognizable character such as the right of way of the Alaska Highway. Whereas, it is convenient to have the same boundaries for both the Kluane Park Reserve and the Kluane Game Sanctuary, it is not considered imperative that they should coincide.[28]

The territorial government complied and, without any local consultation, amended the *Yukon Game Ordinance* on April 26, 1946, so that the Game Sanctuary ran to the Haines Highway in the east and the Alaska Highway in the north.[29] Four months later, on August 27, the amendment was disallowed by federal Order in Council after guides, outfitters, and the Indians of Burwash Landing complained and protested this change.[30] Nothing, however, was done to address the root problem of patrolling an area with no natural boundary. It soon became obvious that the distance from the road also made it easy for hunters to go into the actual park, with little fear of being caught – a situation that Louis Jacquot apparently took advantage of:

> This area which was cut out of the original park is not particularly good game county, particularly now, but it enables Jacquot to take his trophy hunters practically anywhere he likes in the park as long as no government authority is equipped with horses to follow him.[31]

After much discussion, the July 17, 1947, *Yukon Game Ordinance* included a provision that, effective October 15, 1949, "the boundaries of the Kluane Game Sanctuary shall be extended to include the ten mile strip lying south and west of the Alaska Highway and the five mile strip south

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[28] R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa, to G.A. Jeckell, Controller, Yukon Territory, Dawson, December 8, 1945, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 160–61).

[29] Yukon, Bill 5, "An Ordinance to Amend the Yukon Game Ordinance," April 26, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, pp. 162–64).

[30] Order in Council PC 3518, August 27, 1946, LAC, 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 181).

[31] Hugh S. Bostock, Geological Survey, Department of Mines and Resources, Ottawa, to R.A. Gibson, Director, Lands, Parks and Forest, Ottawa, November 26, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 186).

of the White River."[32] The Alaska Highway was once again the northern boundary of the game sanctuary. These boundaries remained the same when the Kluane National Park was officially proclaimed in January 1972.

NATIVE HUNTING AND TRAPPING IN THE GAME SANCTUARY AND THE NATIONAL PARK

When the American government first proposed the conservation corridor along the Alaska Highway in 1942, British Columbia officials stated that they needed time to conduct further studies on how a game preserve would affect the local population, including Indians, before it could make a decision:

> Were a game reserve to be established as suggested by Mr. Ickes without investigating local conditions, there is likelihood that the Indians and white trappers and miners, in addition to loss of means of livelihood, would be deprived of a source of food supply. I do not think, under the circumstances, that any steps should be taken in this connection without first having a proper investigation made in order to obtain definite information as to the conditions prevailing in that region, and the possible effect of such reservations.[33]

The Minister of Mines and Resources responded to that letter by referencing native game preserves in the Northwest Territories and agreeing that "Indians and others already established in the district through which the Canadian-Alaskan Military Highway is located should be protected in the matter of their source of livelihood."[34]

When the proposed Kluane park and game sanctuary boundaries were discussed in that same year, however, there was no extensive public consultation, and the effect of the reserves on the social and economic life of the resident native population was hardly considered. Although English was

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[32] *Yukon Game Ordinance*, July 17, 1947, sec. 80(2), LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 216).

[33] A. Wells Gray, Minister of Lands, Government of British Columbia, Victoria, to Thomas A. Crerar, Minister of Mines and Resources, Ottawa, September 16, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 44).

[34] Thomas A. Crerar, Minister of Mines and Resources, to A. Wells Gray, Minister of Lands, British Columbia, September 25, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 46).

not generally spoken by the Kluane people at the time, the records show that at least one Kluane resident, Jimmy Joe, knew English and would have been a valuable source of information:

> Jimmy Joe of Kluane Lake, was our guide to the upper Donjek and White River area. His father, Copper Joe, who died in 1943, was a grown man when the change from bows to guns was completed, and before his death he often made copper knives for the tourist trade. Jimmy learned English by himself, and can read fairly complicated stuff. A few years ago he bought the first truck to operate on the tote-road from Kluane to Whitehorse and put the teamsters out of business.[35]

No officials asked Jimmy Joe or, according to the elders, any other Kluane people for their suggestions. It is not even known whether they spoke to the Jacquot brothers, although their long-time trading and outfitting interests were considered. Jean Jacquot's son Hank, who had been born in 1934, testified at the ICC community session that nobody consulted his father about the park, which, in fact, he opposed.[36]

Instead, officials asked G.A. Jeckell, the Controller of the Yukon Territorial Government. In October 1942, Mr. Jeckell stated that no Indians were "regularly resident" within the proposed park boundaries and that they seldom hunted there:

> When Mr. Jeckell was asked about Indians, half-breeds, and squatters in the vicinity of Burwash Landing, which is on the west side of Kluane Lake, in the area proposed for establishment of a National Park, he replied that at times there are a number of such people there, but that it is not their fixed abode. He said that these people are a nomadic population that visit Burwash Landing from time to time, chiefly for the purpose of trade. They seldom go or hunt southwest of Burwash Landing. The areas in which they chiefly hunt lie northeast of Kluane Lake. These people often go northeast to Carmack and Selkirk and trade there. There are no Indians regularly resident in the big game country proposed for inclusion in a National Park.[37]

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[35] Dr C.H.D. Clarke, "Biological Reconnaissance of the Alaska Military Highway with Particular Reference to the Yukon Territory and the Proposed National Park Therein," January 1944 (ICC Exhibit 1, p. 110).

[36] ICC Transcript, February 7, 2002 (ICC Exhibit 5a, vol. II, p. 243, Hank Jacquot).

[37] Attachment to letter of October 23, 1942, Hoyes Lloyd, Secretary, Advisory Board on Wild Life Protection, Lands, Parks and Forests Branch, Ottawa, to F.M. Dennis, for R.A. Gibson, Directory, Lands, Parks and Forests Branch, Ottawa, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 59).

The Order in Council in December 1942 which reserved the area for a proposed park stated that the region "contains very little alienated land."[38]

In June 1946, after the Alaska Highway was declared to be the northern boundary of the game sanctuary and hunting had also been prohibited for 1.6 kilometres (one mile) north of the highway, the Indians of Burwash Landing and their missionary, Father Morisset, sent a petition to their Indian Agent at Dawson City, stating that they did indeed hunt south of the highway and that hunting elsewhere imposed considerable hardship on them:

> As you are aware, those who have proposed this park or sanctuary have taken with it's [sic] limits all of our village as well as the part of our territory more easily reached and where the game is more abundant, that is to say, the territory situated on the western side of the Alaskan Highway and one mile on the northern side.
>
> ...
>
> We most firmly protest against these conditions forced upon us. For we are thus deprived of our means of subsistence and development; we, the natives of this country, are being driven away like a pack of useless dogs.
>
> In the portion of our territory not included in the limits of the park or sanctuary, it may be possible to live for a time without starving; but on considering the difficulty of transportation in some seasons, the scarcity of game in that district, and also the distance from the village, the store, the mission and the school for our children, one must admit that such a solution would be disastrous for us.[39]

The Burwash Landing Indians knew that the Indians who had lived in Wood Buffalo National Park before its boundaries were fixed were allowed to hunt and trap in the park. Now they asked that a similar provision be made for them at Kluane.[40]

Although Order in Council PC 3518 disallowed the changes to the sanctuary boundaries, two of its clauses admitted that the Indians did hunt in the area and that there was confusion as to whether the various territorial ordinances applied to Indians:

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[38] Order in Council PC 11142, December 8, 1942, LAC, RG 85, vol. 1390, file 406-11, pt 1 (ICC Exhibit 1, p. 69).

[39] Rev. Fr. E. Morisset, OMI, and 16 Indians from Burwash Landing to J.E. Gibben, Indian Agent, Yukon Agency, Dawson City, June 23, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 165).

[40] Rev. Fr. E. Morisset, OMI, and 16 Indians from Burwash Landing to J.E. Gibben, Indian Agent, Yukon Agency, Dawson City, June 23, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 165–67).

> Whereas by an Ordinance amending the Yukon Game Ordinance passed in the 1946 Session of the Yukon Council ... a certain area in the Yukon Territory between the area reserved for consideration as a national Park and the Alaska Highway was created a game sanctuary;
>
> AndWhereas the Indians who hunted in this particular area are now in doubt as to whether they have the right to continue their hunting operations there and the wording of the Ordinance does not make this clear;[41]

F.H.R. Jackson, a forest engineer with the Department of Mines and Resources in Whitehorse, and Hugh S. Bostock, an employee with the Geological Survey in Ottawa, immediately protested this admission. Mr Jackson reported that the Indians did not regularly hunt in the 16 kilometre (10-mile) strip between the highway and the boundaries of the proposed park, and, although there was an area within the proposed park itself that they favoured, they respected the law and did not hunt there. He had had no direct complaints from them, he stated, but if there was indeed hardship, a strictly regulated permit system might be put in place:

> The ten mile strip between this boundary and the Alaska Highway, I understand, is not looked upon as good hunting country by the Indians and therefore does not include their former hunting grounds which is contrary to the text of the Order in Council P.C. 3518. The area most abundant in game and favoured by Indians and big game outfitters alike is that which lies west of the Donjek River between Wolverine, St Clair and Harris Creeks, all well within the present Sanctuary. Since the inclusion of this area within the Sanctuary, the Indians, as far as I know, have respected the law and refrained from hunting in that section. Also since the Sanctuary was first created in 1943 no direct complaint has been received by the Territorial Agent or, as far as I can ascertain, by the R.C.M. Police from any Indians regarding the curtailment of their hunting activities in that area.
>
> ...
>
> ... Furthermore from 1943 to 1945 this ten mile strip was included within the Sanctuary during which time no question was raised as to the Indians' hunting rights in that area....
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> ...
>
> ... If the creating of the Sanctuary has actually proven a hardship on Indians who formerly hunted there then I would suggest that they be allowed to obtain meat sufficient for their own needs from within the area but under a permit system

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[41] Order in Council PC 3518, August 27, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 181).

> whereby a check can be maintained on their movements and the amount of game killed.[42]

Mr Jackson did not indicate his source of information about the hunting patterns of the Indians.

Mr Bostock had camped near Burwash Landing in 1945, and his conversations with Eugene Jacquot convinced him that the big game had to be protected from Jacquot's trophy hunters. Bostock said little about the Indians except that he "believe[d] that before Jacquot came the Indians seldom hunted in the park area south of the Highway so that establishment [of the park] does not deprive them of a main hunting ground."[43] This statement of belief is quoted on at least three occasions in subsequent correspondence justifying the Alaska Highway as the northern boundary of the game sanctuary.

The *Yukon Game Ordinance* of July 17, 1947, which finally set the northern boundary of the game sanctuary at the Alaska Highway, stipulated that the ordinance applied to all Indians, "except as herein otherwise provided,"[44] and spelled out the limitations and consequences:

> No person may hunt, trap, take, kill, shoot at, wound, injure, or molest any game, or take, destroy, or molest the eggs or nests of birds in any game sanctuary at any time of the year. The possession of game or the nests of eggs of birds by any person within a game sanctuary shall be prima facie evidence of the guilt of such person and the onus of proof to the contrary shall rest upon him.[45]

On August 21, 1949, Father Morisset once again asked the Department of Indian Affairs to leave the 16 kilometre (10-mile) strip adjacent to the highway open as a "preserve for the exclusive benefit of the native Indians of this village."[46] He reported that most of the adults in the community were

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[42] F.H.R. Jackson, Forest Engineer, Lands, Parks and Forests Branch, Whitehorse, to R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa, September 12, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 182–83).

[43] Hugh S. Bostock, Geological Survey, Ottawa, to R.A. Gibson, Director, Lands, Parks and Forests Branch, Ottawa, November 28, 1946, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 186).

[44] *Yukon Game Ordinance*, July 17, 1947, s. 66 (1) (ICC Exhibit 1, p. 211).

[45] *Yukon Game Ordinance*, July 17, 1947, s. 80(3) (ICC Exhibit 1, p. 216).

[46] Rev. Fr. E. Morisset, OMI, Burwash Landing, to Richard J. Meek, Superintendent, Yukon Agency, Whitehorse, August 21, 1949, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 221).

women and that there were, in fact, only two men (Jimmy Joe and Sam Johnson) hunting and providing meat for the community. They also worked along the highway, and their jobs would be at stake if they had to go farther afield for game. He added that "the area contained in the ten mile strip has always been, even long before the construction of the highway, the normal trapping and fishing country of the Burwash Indians, because of its natural resources in game, fur and fish in their reach; and since there are fewer men and more women self-supporting than before it has become a vital asset to them."[47]

The Indian Superintendent for the Yukon, Richard J. Meek, went to Burwash Landing in March 1950. He reported that the Burwash Band at the time had a population of 32, including six adult single women and four men, and he stated that the whole Kluane Sanctuary, not just the 16 kilometre strip, "was formerly used extensively for trapping and hunting by Indians of the Champagne, Burwash and Snag Bands."[48] He advanced a proposal that an area which the Burwash Indians claimed as their traditional ratting ground, about 37 kilometres (22 miles) in length from Edith Creek to the White River, and about 9 kilometres (5 miles) in depth from the Alaska Highway to the Elias Mountains, be opened to destitute Indians to trap muskrat, but only under supervision.[49]

A copy of this letter was sent to Father Morisset, who, in turn, sent his own letters to the Department of Indian Affairs in Ottawa, with a copy to the local Member of Parliament, to complain about the way the Indians were treated. To the Department he wrote:

> I wish to call your attention to the severe and undue hardships caused to the Indians of this village by the recent inclusion of their traditional hunting and trapping grounds in the forbidden area of the Kluane Game Sanctuary, and which covers some ten thousand square miles.
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> As a result of the Regulations forced on them, the Indians had very little meat last winter. (Mr. Meek sent out some three hundred pounds of beef from Whitehorse.) They do not have any more hides from which to make moccasins and

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[47] Rev. Fr. E. Morisset, OMI, Burwash Landing, to Richard J. Meek, Superintendent, Indian Affairs Branch, Yukon Agency, Whitehorse, August 21, 1949, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 221).

[48] R.J. Meek, Superintendent, Indian Agency, Whitehorse, to Indian Affairs Branch, Ottawa, March 15, 1950, LAC, RG 10, vol. 6742, file 420-6-1-1 (ICC Exhibit 1, p. 222).

[49] R J. Meek, Superintendent, Indian Agency, Whitehorse, to Indian Affairs Branch, Ottawa, March 15, 1950, LAC, RG 10, vol. 6742, file 420-6-1-1 (ICC Exhibit 1, p. 222).

> bead work which is the main source of income to widows supporting families, also many self-supporting women. All that is left is occasional woodcutting work even to the women. That they do on a diet of rice, lard and flour since canned food is too expensive and staple groceries very high in price. Also they are not sure to get even woodcutting work in the future. At present they have no work as trapping muskrat and beaver on their grounds is not allowed. On what are these Indians expected to live on?
>
> An impartial inquiry would prove that the Indians have never killed in excess of more than about fifteen moose, five mountain sheep, and two or three Osborn Caribou per year in the area as now existing which comes to the immediate boundary of the village. This is such a small number that it would not seriously interfere with game preservation in the large sanctuary as at present constituted.
>
> ...
>
> These Indians firmly protest against the unbearable living conditions being imposed on them. With a little goodwill[,] ways could be found to safeguard their rights and vital interests over the claimed area by restoring to them their trapping and hunting ground as in previous years and, at the same time[,] protect the breeding stocks of game and fur for future years.[50]

In April 1950, federal officials justified the sanctuary as the only means of preserving the game, believing that, as their numbers increased within the reserve, the animals would overflow into the surrounding areas. Despite this decision, officials in Ottawa indicated a desire to find a solution for the Kluane people, either through "a relaxing of the regulations concerned with the Kluane Game Sanctuary in order that the Indians may retain their original right to hunt game animals for food"[51] or a compromise such as had been reached in a similar situation in Quebec, where the area along a new highway was "converted to what might be termed a native game refuge in which the Indians were allowed to trap as freely as before the erection of the park but where in return for this trapping privilege they promised full co-operation in the program of rehabilitating the big game."[52]

Officials in the Yukon did not agree. In June 1950, the Commissioner for the Yukon reported that the Yukon Council had discussed the matter and decided that the boundaries of the sanctuary

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[50] Rev. Fr. E. Morisset, OMI, Burwash Landing, to Indian Affairs Branch, Ottawa, April 11, 1950, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 223–24).

[51] H.M. Jones, Superintendent, Welfare Services, Indian Affairs Branch, to R J. Meek, Superintendent, Indian Agency, Whitehorse, May 5, 1950, LAC, RG 10, vol. 6742, file 420-6-1-1 (ICC Exhibit 1, p. 230).

[52] Hugh R. Conn, Fur Supervisor, Indian Affairs Branch, Ottawa, to R J. Meek, Superintendent, Indian Agency, Whitehorse, May 22, 1950 [no file reference] (ICC Exhibit 1, p, 234).

should remain as they were and that the area should remain closed to trapping and hunting for one to three years.[53] Richard J. Meek, the Indian Superintendent for the Yukon Agency, was also opposed to making any concessions for Indian hunting or trapping in the sanctuary. According to him, the Kluane people had left "their ancestral home on the north arm of Kluane Lake" about forty years before to "squat" on the land pre-empted by the Jacquot brothers. He added that the Indians had passed up opportunities to fish and garden and that the "food problem due to the closing of the ten-mile strip will not work any particular hardship on these Indians" because "there is an abundance of hunting ground to the north side of Kluane Lake which has a reputation of being a good game country." Meek may have spoken to "senior members of the Band" (his reference to them is only in relation to a proposal to move their community about a mile from Burwash Landing), but his primary interviews were with federal civil servants and Father Morisset. The only compromise that might be considered was "that in a few years a limited number of animals might be shot under supervision or some form of control."[54]

Father Morisset and his Bishop continued to lobby on behalf of the Indians to have the government give them hunting and trapping privileges in the sanctuary, while territorial and federal officials headquartered in the Yukon continued to oppose any change. The Commissioner of the Yukon Territorial Government was "satisfied definitely that there is no local hardship";[55] the Game Director and his assistant were "very strongly in favor of a rigid enforcement of the preserve regulations";[56] and the Park Superintendent was "naturally opposed to hunting in the Park."[57] Indian Agent Meek supported these views:

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[53] J.E. Gibben, Commissioner of Yukon Territory, Dawson, to R.A. Gibson, Director, Development Services Branch, Ottawa, June 19, 1950, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 239).

[54] R J. Meek, Superintendent, Indian Agency, Whitehorse, and R. Kendall, Fur Supervisor for BC and Yukon, to H. R. Conn, Fur Supervisor, Indian Affairs Branch, Ottawa, June 20, 1950, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 240–41).

[55] A.H. Gibson, Commissioner of Yukon Terriotory, Dawson, to H.A. Young, Deputy Minister, Department of Natural Resources, January 5, 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 260).

[56] Copy of report, "Burwash Landing Indian Band," A.H. Gibson, no date, c. January 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 265).

[57] Copy of report, "Burwash Landing Indian Band," A.H. Gibson, no date, c. January 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 265).

(a) he observes the scarcity of game and realizes the desirability of protecting it
(b) he is impatient with this particular band of Indians because they are not energetic or progressive
(c) it would simplify contact with the Indians if they were removed from this settlement and it must be admitted that if the Indians were forced to rely more on themselves, it would likely have good results.[58]

In January 1951, at the suggestion of the federal government, however, the territorial government did agree to allow two Kluane hunters to go into the park, in the current year only, to take up to 12 moose, four caribou, and three sheep for the use only of the band.[59]

In June 1951, A.W.F. Banfield, the Chief Mammalogist of the Canadian Wildlife Service, was sent to investigate the problems reported relating to the Kluane Game Sanctuary. He concluded that hunting and trapping should not be permitted in the sanctuary and that the Alaska Highway should remain as the northern boundary. He reported that he "found no signs of hardship among the Burwash Indians."[60] Widows were getting rations and/or family allowance, and "suitable employment is available for both men and women."[61] As proof that there was no hardship, he stated that when the Indians had been allowed to hunt in the sanctuary that year, they had taken only a fraction of what they were allowed:

> Although the Yukon Territorial Government, at the request of the federal authorities, gave a permit late in 1950 that would allow two hunters from Burwash to take 12 moose, 4 caribou and 3 sheep in Kluane Game Sanctuary, under the supervision of Father Morisset, the local missionary priest, to meet what was said to be an emergency, the only animals taken under this permit were 2 moose. About 10 other moose were obtained by the Burwash people outside the Game Sanctuary. Good opportunities for fishing and gardening exist at Burwash, but are not utilized.

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[58] Copy of report, "Burwash Landing Indian Band," A.H. Gibson, no date, c. January 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 265).

[59] A.H. Gibson, Commissioner of Yukon Territory, Dawson, to H.A. Young, Deputy Minister, Department of Resources and Development, Ottawa, January 29, 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, p. 267).

[60] Harrison F. Lewis, Chief, Canadian Wildlife Service, Ottawa, to J. Smart, Director, National Parks Branch, Ottawa, November 13, 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 269–70).

[61] Harrison F. Lewis, Chief, Canadian Wildlife Service, Ottawa, to J. Smart, Director, National Parks Branch, Ottawa, November 13, 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 269–70).

> Although all suitable local officials were interviewed by Mr. Banfield, he received no complaints of destitution or unfairness with respect to trapping and hunting privileges from anyone except Father Morisset.[62]

Again, there is no indication that Mr Banfield spoke with any of the First Nation people at or around Burwash Landing.

The question of the right of Indians to hunt for food in the Kluane Game Sanctuary was resolved in 1983 when Henry Michel and Edward Johnson, status Indians charged in 1977 for killing a bull caribou for food, were acquitted by the Yukon Court of Appeal on the grounds that the prohibition against hunting in the sanctuary did not apply to Indians hunting for food. The court noted in passing, "The game sanctuary is not part of the adjoining Kluane National Park where Indians are permitted to hunt."[63]

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[62] Harrison F. Lewis, Chief, Canadian Wildlife Service, Ottawa, to J. Smart, Director, National Parks Branch, Ottawa, November 13, 1951, LAC, RG 85, vol. 1390, file 406-11, pt 1A (ICC Exhibit 1, pp. 269–70).

[63] *R. v. Michel*, [1984] 1 CNLR 157 at 158.

PART III

ISSUES

The issues identified by the First Nation are as follows:

i) whether the Kluane First Nation Specific Claim falls within the Specific Claims Policy;

ii) whether Canada owes an outstanding legal obligation in respect of breaches of fiduciary duty to Kluane First Nation;

iii) whether the Kluane Park Lands are "Indian lands" within the meaning of the Specific Claims Policy and the common law;

iv) whether Canada breached an obligation by failing to consult with the Kluane First Nation in the establishment of the Park and Game Sanctuary or by failing to disallow the Yukon Government legislation establishing the Kluane Game Sanctuary; and

v) whether Canada breached a fiduciary obligation by failing to compensate the Kluane First Nation and whether that form of compensation was sufficient to redress the loss of Aboriginal Rights in the Kluane Park and Game Sanctuary.[64]

With respect to item (i), Canada took the position in a letter to the First Nation dated March 25, 1999, that the claim was "based on the assertion of unextinguished native or aboriginal title" and that the First Nation had not "established that an outstanding lawful obligation exists on the part of Canada, within the meaning of the Specific Claims Policy."[65]

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[64] Dave Joe, Legal Counsel for Kluane First Nation, to Indian Claims Commission, January 28, 2000 (ICC file 2111-2-1, vol. 1).

[65] Paul Cuillerier, Director General, Specific Claims Branch, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, INAC file BW8260/YK503-C2; see also James F. Bishop, Chief Federal Negotiator, to Chief Bob Johnson, Kluane First Nation, September 15, 1999; and Jeffery A. Hutchinson, Counsel, DIAND Legal Services, to Indian Claims Commission, January 28, 2000 (all in ICC file 2111-2-1, vol. 1).

PART IV

THE INQUIRY

As a second step in the inquiry process, the Indian Claims Commission schedules a planning conference to bring the parties together to reach agreement on the issues to be considered and to set dates for the other stages of the inquiry. In January 2000, before such a meeting could be convened, Canada reiterated its position that the Kluane First Nation's claim fell outside the Specific Claims Policy, that it was in fact a comprehensive claim, and that "the ICC should decline to hear the matter given our concerns."[66] On February 4, 2000, Canada requested a hearing to address whether the Indian Claims Commission had the mandate to inquire into the Kluane claim:

> As you are already aware, it is Canada's view that the Kluane First Nation specific claim falls outside the Outstanding Business Policy and the jurisdiction of the Indian Claims Commission ("ICC"). My instructions are to refrain from engaging in a discussion of the issues raised in the claim or Canada's corresponding positions until the issue of the ICC's jurisdiction with regard to this matter has been addressed.[67]

The parties met at a planning conference in Vancouver on February 11, 2000, to schedule the submissions for this mandate challenge. They submitted written arguments to the Commission in March, April, and May 2000 and made oral presentations in Vancouver on September 12, 2000. The Commission ruled on December 14, 2000, that "the subject matter of the claim as alleged by the First Nation falls within the scope of the Specific Claims Policy."[68] In explaining its decision, the Commission stated that

> where a claim involves a grievance arising out of Canada's *conduct* in a specific, isolated incident, the presence of unextinguished aboriginal rights or title is merely *incidental* to the overall claim. In such circumstances, in our view, the claim cannot be said to be *based on* unextinguished aboriginal rights or title and will not fall within the exclusive purview of the Comprehensive Claims Policy. The very essence

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[66] Jeffery A. Hutchinson, Counsel, DIAND Legal Services, to Indian Claims Commission, January 28, 2000 (ICC file 2111-2-1, vol. 1).

[67] Jeffery A. Hutchinson, Counsel, DIAND Legal Services, to Indian Claims Commission, February 4, 2000 (ICC file 2111-2-1, vol. 1).

[68] ICC, *Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Claim Inquiry – Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75 at 109.

> of the Specific Claims Policy is the resolution of these types of historical grievances.[69]

Accordingly, the Commission ruled that it had jurisdiction to hear the claim.

In February 2001, the First Nation informed the Commission that it was involved in active discussions with Canada and the Yukon Territory to include this claim as part of its on-going comprehensive claim negotiations.[70] The claim was placed in abeyance, but by August 3, 2001, those talks had broken down, and the First Nation asked the Commission to reactivate the inquiry.[71] Canada declined to participate. It disagreed with the Commission's reasons for rejecting the mandate challenge and continued to see this as an issue to be dealt with under the Comprehensive Claims policy:

> Canada fundamentally disagrees with this [the ICC's] interpretation of the *Outstanding Business* [Specific Claims] and *In All Fairness* [Comprehensive Claims] policies. With all due respect to the Commission, from Canada's perspective the policies are unequivocal in the exclusion of issues related to traditional land use and occupation of land from the *Outstanding Business* policy and, by extension, the Specific Claims Process. Canada continues to hold the view that the Kluane claim is not a specific claim and not the proper matter for an inquiry by this Commission. As a result of careful consideration of the policies and the Commission's ruling, we have been instructed to advise you of Canada's position to decline to participate further as a party to this inquiry.
>
> Canada remains willing to address the Kluane First Nation's grievance in the context of comprehensive claim negotiations.[72]

The Minister of Indian Affairs, Robert D. Nault, reiterated this position in a letter to the ICC's Chief Commissioner, Phil Fontaine, received by the Commission on January 2, 2002.

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[69] ICC, *Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Claim Inquiry – Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75 at 108. Emphasis in original.

[70] Kathleen Lickers, Commission Counsel, ICC, Notes to file, February 26, 2001, February 28, 2001, March 5, 2001, March 29, 2001, and April 3, 2001 (ICC file 2111-2-1, vol. 1).

[71] Kathleen Lickers, Commission Counsel, ICC, Note to file, August 3, 2001 (ICC file 2111-2-1, vol. 1).

[72] Jeffery A. Hutchinson, Counsel, DIAND Legal Services, to Indian Claims Commission, October 5, 2001 (ICC file 2111-2-1, vol. 1).

Counsel for the First Nation took issue with Canada's "willingness" to address this matter in the comprehensive claim negotiations:

> I am advised by my client that we have been willing to meet to address this issue in the context of comprehensive claim negotiations and Canada has not yet demonstrated its willingness to conclude this matter by confirming dates for our negotiations.[73]

The First Nation asked that the inquiry continue, and a planning conference was held in Vancouver on October 18, 2001, with no representation from Canada. Dates were set for an ICC staff visit to the Kluane community and a community session to gather oral testimony from the elders.[74]

The staff visit was held at Burwash Landing on December 29, 2001. It was an informal meeting to prepare for the upcoming community session and an opportunity for the ICC staff to gather will-say evidence from elders and community members who wished to provide information on the claim.

COMMUNITY SESSION[75]

On February 6, 7, and 8, 2002, the three-member panel of Commissioners[76] and ICC staff convened the community session at Burwash Landing. The proceedings began with the recounting of one of the few extant traditional stories, about the mountains and the glaciers still existing within the community, and the children singing one of the songs about the park and game sanctuary area. After the storytelling, nearly 30 men and women from the Kluane area, ranging in age from 22 to 82, came forward to speak, and an expert gave evidence based on the findings of anthropologists who have worked in the area for the last 50 years. They also provided a heritage map of the trails, burial sites,

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[73] Dave Joe, Counsel for Kluane First Nation, to Jeffery A. Hutchinson, Counsel, DIAND Legal Services, October 5, 2001 (ICC file 2111-2-1, vol. 1).

[74] Kathleen Lickers, Commission Counsel, ICC, to Dave Joe, Counsel for Kluane First Nation, and Jeffery Hutchinson, Counsel, DIAND Legal Services, October 22, 2001 (ICC file 2111-2-1, vol. 1).

[75] All the information in this section is taken from ICC Transcripts, February 6, 7, and 8, 2002, in three volumes (ICC Exhibit 5a).

[76] The original inquiry panel was Phil Fontaine, Chief Commissioner; Alan Holman, Commissioner; and Sheila Purdy, Commissioner. Chief Commissioner Fontaine resigned in June 2003.

campsites, hunting grounds, and seasonal travelling grounds within their traditional land in what is now the Kluane National Park and Game Sanctuary, a land they call "Asi Keyi" or "our grandfathers' country."

The community spoke about their ancestors, the Lu'an Mun Dun people, who have inhabited the area since before anyone can remember, moving from place to place as they made their seasonal round of hunting, fishing, gathering, and, later, trapping. In the mountains and along the glaciers and rivers, they hunted mountain goat, sheep, moose, caribou, bear, gophers, groundhogs, and rabbits, and, from these animals, they had food, clothing, shelter, tools, and utensils. They were primarily a meat-eating people, but in the fall they gathered at summer camps on the shores of Kluane Lake to catch and dry the fish they needed to feed their dogs and give themselves an occasional change of diet. They gathered mushrooms, berries, and roots to make their medicines, passing down from one generation to the next the knowledge about the specific elevations, creek beds, or muskeg bogs where these plants could be found. For trade, they took copper from the White River area and obsidian from near the Slims River, and they trapped animals for their fur.

Those elders of the Kluane community who were children and young adults when the Alaska Highway was built reminisced about hunting and camping in the mountains with their parents and grandparents, but mostly they spoke of how they were affected by the building of the highway and the establishment of the game sanctuary. The road removed them from isolation, but, with that access, came alcohol, abuse, and new diseases such as tuberculosis; the government and the churches came and took their children away to residential schools, and then denied them access to the lands of their grandfathers south of the highway. The establishment of the game sanctuary affected them economically, socially, and culturally.

Hunting on the north side of the road was more difficult. Kluane Lake was deep and dangerous, and they had no boats large enough to take them across, so hunting there was confined to the winter, when the lake was frozen over. Much of the land between the highway and the lake to the north of Burwash Landing was swampy and difficult to traverse.

The establishment of the park and sanctuary turned strong and proud people, whose bearing in 1899 had "excited the admiration of those who first met them,"[77] into fearful people, hiding in the bushes. They felt harassed and intimidated by the RCMP and the game wardens, who had the power to confiscate their firearms and vehicles, as well as any meat they might find in their caches or in their homes.If they ever shot a moose in the sanctuary, they had an elaborate system of hiding and sneaking the meat back to the community. As Mary Easterson said:

> [W]e grew up a generation of young people afraid of the law. A way of life, a way of thinking, and a way of our ancestors, became criminal in every manner. Hunting, which was a way of life for my mom and dad, became a criminal activity.
>
> As a child, I can still remember hiding in the bushes whenever anyone from the village shot a moose "on the park side," as the elders referred to the game sanctuary.[78]

Whether through fear or a respect for the law, the Kluane people mostly stayed out of the game sanctuary. The old trails became overgrown and difficult to find, and the stories and legends that belonged to these trails became lost as elders grew old and forgot, and then died, never able to pass on their knowledge to their children and grandchildren.

But at the community session, the people also spoke about their strength and resiliency. When they could not go across the highway into the park and the sanctuary to hunt, they found ways to get to the areas north of the lake. They got jobs as guides, cooks, and wranglers with the outfitters, and the women sewed moccasins, mitts, and fur hats to sell to the tourists. And they ate fish:

> My great grandmother, Copper Lilly, said in one interview that she wasn't "supposed to be a Seagull and eat fish all the time", when she was speaking about the park. And I've heard stories that Jimmy Joe once said that the government was trying to make him into an otter, and eat fish from the lake all the time. Although fish was part of their diet, they did not consider themselves "fish eaters". The Kluane people were hunters, they sustained on meat.[79]

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[77] Quoted in Dr C.H.D. Clarke, "Biological Reconnaissance of the Alaska Military Highway with Particular Reference to the Yukon Territory and the Proposed National Park Therein," January 19, 1944, p. 7 (ICC Exhibit 1, p. 110).

[78] ICC Transcripts, February 8, 2002 (ICC Exhibit 5a, vol. III, p. 364, Mary Easterson).

[79] ICC Transcripts, February 7, 2002 (ICC Exhibit 5a, vol. II, pp. 135–36, Robin Bradasch).

The people are now returning to Asi Keyi, the land of their grandfathers. Through the research and negotiations of their comprehensive claim, they have talked to the elders to map the old trails and to try to bring back some of the old stories and songs. Robert Johnson, who was born in 1962, is looking for the old trails with his children:

> So I've been taking my kids up into the game sanctuary for a number of years. We've been up Wolverine Creek, up the Arch Creek, way up the Donjek Glacier, up to Steele Glacier. We've been way up the Duke, up to the head of Burwash Creek.
>
> And so, for my kids, I tried to tell my kids that it's okay to go into the park, and to go and come with me, I'll show them the trails, I'll show them the evidence that people have lived there.[80]

Mary Jane Johnson stressed how important it was that this generation was beginning to rediscover the traditional knowledge of the area and the trails, and she gave everyone a message of hope:

> The stories, the place-names, the songs, will probably never come back, but we're going to have to make our own. And I think that's what you're talking about now, is that rediscovery.[81]

The transcripts of the community session were sent to both Canada and the First Nation in March 2002.

KLUANE FIRST NATION FINAL AND SELF-GOVERNMENT AGREEMENTS

On March 31, 2002, the Kluane First Nation signed a Memorandum of Understanding with the federal and territorial governments, "acknowledging that the negotiation of the Kluane First Nation Final and Self-Government Agreements was substantially complete."[82] As a result, on April 8, 2002, Dave Joe, counsel for Kluane First Nation, asked the ICC to hold the inquiry in abeyance, pending

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[80] ICC Transcripts, February 6, 2002, vol. I, p. 91 (Robert Johnson).

[81] ICC Transcripts, February 6, 2002, vol. I, p. 98 (Mary Jane Johnson).

[82] INAC, "Backgrounder, Kluane First Nation Final and Self-Government Agreements," in http://www.ainc-inac.gc.ca/nr/prs/s-d2003/02404bk_e.html (accessed November 3, 2005).

successful ratification of the agreements.[83] The Kluane people ratified the agreements in August 2003, and, at a signing ceremony held at Burwash Landing on October 18, 2003, representatives of the Kluane First Nation and the federal and territorial governments signed the Kluane First Nation Final and Self-Government Agreements, both of which came into effect on February 2, 2004.[84]

The agreements included provisions for the establishment of Special Management Areas within Kluane National Park in which the Kluane First Nation has special wildlife harvesting rights, as well as the right to harvest for subsistence throughout its traditional territory at all times of the year. There are also provisions to preserve the Southern Tutchone language for the benefit of future generations and for the identification of heritage routes within the traditional territory, to ensure that future planning considers the cultural and heritage significance of these routes.[85]

The specific claim that was the subject of this inquiry was resolved by an agreement between the Kluane First Nation and Canada dated October 18, 2003, collateral to the Final Agreement. On May 5, 2004, the Kluane First Nation asked that the inquiry be removed from abeyance and that it be terminated.[86]

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[83] Kathleen Lickers, Commission Counsel, ICC, Note to file, April 8, 2002 (ICC file 2111-2-1, vol. 2).

[84] INAC, "Backgrounder, Kluane First Nation Final and Self-Government Agreements," online: www.ainc-inac.gc.ca/nr/prs/s-d2003/02404bk_e.html (accessed November 3, 2005).

[85] INAC, "Backgrounder, Kluane First Nation Final and Self-Government Agreements," online: www.ainc-inac.gc.ca/nr/prs/s-d2003/02404bk_e.html (accessed November 3, 2005).

[86] Dave Joe, Legal Counsel to the Kluane First Nation, to John B. Edmond, Commission Counsel, ICC, May 5, 2004 (ICC file 2111-2-1, vol. 2).

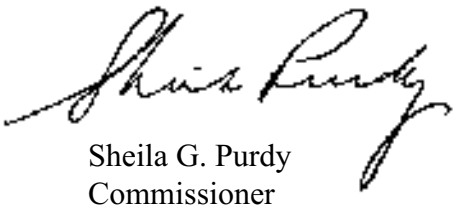
PART V

CONCLUSION

Accordingly, on July 14, 2006, this inquiry was declared concluded.

FOR THE INDIAN CLAIMS COMMISSION

Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

Dated this 21st day of February 2007.

APPENDIX A

INTERIM RULING ON MANDATE

INDIAN CLAIMS COMMISSION

INTERIM RULING: KLUANE FIRST NATION INQUIRY KLUANE GAME SANCTUARY AND KLUANE NATIONAL PARK RESERVE CREATION CLAIM

RULING ON GOVERNMENT OF CANADA OBJECTIONS*

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran

COUNSEL

For the Kluane First Nation
Dave Joe

For the Government of Canada
Jeffrey A. Hutchinson / Aly Alibhai

To the Indian Claims Commission
David E. Osborn, QC / Thomas A. Gould

DECEMBER 2000

* ICC, *Kluane First Nation, Interim Ruling: Kluane Game Sanctuary and Kluane National Park Reserve Creation* (Ottawa, December 2000).

CONTENTS

BACKGROUND

This preliminary ruling arises from a challenge by the Government of Canada to the jurisdiction of the Indian Claims Commission to hear a claim advanced before the Commission by the Kluane First Nation.

The claim was submitted by the First Nation to Canada on October 2, 1996, pursuant to Canada's Specific Claims Policy, outlined in the Department of Indian Affairs and Northern Development's pamphlet entitled *Outstanding Business: A Native Claims Policy*. In its claim, the First Nation alleges that the Government of Canada breached certain fiduciary obligations owed to the Kluane people at the time the Kluane Game Sanctuary and the Kluane National Park Reserve (the "Parks") were created by the governments of Yukon and Canada. The essence of the First Nation's complaint is that the creation of the Parks in the 1940s denied the First Nation and its members access to a large portion of their traditional territory, thereby adversely affecting their livelihood. The First Nation alleges that it is owed an "outstanding lawful obligation" under the Specific Claims Policy.

Canada questions whether this claim can be properly characterized as a "specific claim" and its jurisdictional objection is advanced on that basis. Indeed, as early as March 6, 1998, a representative of the Indian Affairs' Specific Claims Branch wrote to the First Nation seeking clarification on the "source" of the alleged outstanding lawful obligation.

On July 27, 1998, Chief Robert Johnson replied that the basis of the First Nation's claim was the reasoning of the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[1] The First Nation's position, he pointed out, was that Canada's actions in the creation of the Parks constituted a breach of fiduciary obligation and an outstanding lawful obligation under the Specific Claims Policy since "[t]he Kluane First Nation was not consulted and

1 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

did not grant their consent before their traditional hunting, fishing, and trapping lands were included" within the Parks.[2]

Canada completed its review of this claim during the spring of 1999 and responded to the First Nation on March 25, 1999. In that response, Paul Cuillerier, the Director General of Indian Affairs' Specific Claims Branch, advised Chief Johnson that the department was not prepared to recommend acceptance of the claim for negotiation under the Specific Claims Policy:

> In our view, the lands in question do not constitute "Indian lands" within the context of the Specific Claims Policy. The Policy addresses claims relating to reserve lands governed by the *Indian Act* and specifically excludes "claims based on unextinguished native title."
>
> It is our view that the [First Nation's] claim is based on the assertion of unextinguished native or aboriginal title to the lands in the Kluane Game Reserve and the Kluane National Park Reserve. The fiduciary obligations that the [First Nation] maintains were owed by Canada to the [First Nation] relate to the protection and advancement of the [First Nation's] interests in lands to which unextinguished aboriginal title is claimed. The [First Nation's] claim does not relate to actions or omissions on the part of Canada with respect to the administration of land or assets under the *Indian Act* or the fulfilment of Indian treaties. The [First Nation's] claim does not come within the types of claims recognized under the Specific Claims Policy as giving rising [sic] to a lawful obligation.
>
> For these reasons, it is our position that the [First Nation] has not established that an outstanding lawful obligation exists on the part of Canada, within the meaning of the Specific Claims Policy, with respect to the establishment of the Kluane National Park Reserve or the Kluane Game Sanctuary.[3]

Mr Cuillerier then laid out the options available to the First Nation in the wake of Canada's rejection of the claim, including the following:

> I should also point out that *you have the option to submit a rejected claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection.* This letter will serve as evidence, for the purposes of the Commission that the [First Nation's] claim is not being recommended for negotiation.[4]

2 Chief Bob Johnson, Kluane First Nation, to Dr John Hall, Research Manager – British Columbia and Yukon Territory, Specific Claims Branch – Vancouver, July 27, 1998.

3 Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2.

4 Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2. Emphasis added.

The First Nation first approached the Commission in the summer of 1999 and, on October 4, 1999, the First Nation forwarded a copy of its October 2, 1996, submission to the Commission with a request that the Commission convene an inquiry into the claim. At that time, Chief Johnson wrote, making reference to certain agreements the First Nation was in the process of negotiating with Yukon and Canada:

> Kluane First Nation is in the process of completing its Final and Self-Government Agreements and the only remaining issues are financial compensation and these outstanding Specific Claims. The "certainty" clauses of our Final Agreement would vitiate these Specific Claims and my First Nation citizens are adamant that these issues must be dealt with prior to ratification of these agreements.[5]

The Commission reviewed and accepted the First Nation's request for an inquiry on October 27, 1999, and, with the objective of proceeding to a hearing, the Commission scheduled a planning conference for February 11, 2000. However, on January 28, 2000, Jeffrey Hutchinson, counsel for Canada, advised the Commission of his intention to challenge the Commission's jurisdiction to proceed:

> After having reviewed the submissions of the Kluane First Nation, we wish to confirm our view that every aspect of the claim is premised on the First Nation's claim of unextinguished aboriginal title to land. As you are aware, the Outstanding Business Policy explicitly states that claims based "on traditional Native use and occupancy of land" are designated as comprehensive claims. It is our reading of the policy that comprehensive claims are to be dealt with by means other than the Outstanding Business Policy. We are, of course, reinforced in this view by the guideline found in Part Three of the Policy which states, "Claims based on unextinguished native title shall not be dealt with under the specific claims policy."
>
> We are advised that Kluane First Nation has been involved in extensive comprehensive claim negotiations with Canada and the Government of Yukon. We are also advised that Kluane First Nation was advised some time ago of Canada's position expressed above.
>
> In light of the foregoing, we are not at present in a position to set out or address the issues raised by the claim. We believe the ICC [Indian Claims Commission] should decline to hear the matter given our concerns raised above.[6]

5 Chief Robert Johnson, Kluane First Nation, to David E. Osborn, Commisson Counsel, ICC, October 4, 1999.
6 Jeffrey A. Hutchinson, Counsel, DIAND Legal Services, Department of Justice Canada, to Ralph Keesickquayash, Associate Counsel, ICC, January 28, 2000. Underlined emphasis in original.

This jurisdictional challenge was brought before the Commission at a hearing in Vancouver, on September 12, 2000. The panel hearing the oral submissions of Canada and the First Nation consisted of Commissioners P.E. James Prentice, QC, Carole T. Corcoran, and Elijah Harper.

The parties had agreed to submit written arguments to the Commission in support of their respective positions on these issues, and at the September 12 hearing the Commissioners therefore had before them Canada's written submissions of March 31, 2000, the First Nation's brief of April 20, 2000, and Canada's reply of May 11, 2000.

Following the hearing, but before the Commission had issued this ruling, Commissioner Harper resigned from the Commission and Commissioners Prentice and Corcoran agreed, with the concurrence of both parties, that they would render this decision as a two-member panel.

THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued 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 of the applicable criteria.[7]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[8] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the provisions of *Outstanding Business*, which states:

7 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 (Consolidated Terms of Reference).

8 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171 (hereafter *Outstanding Business*).

> 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.[9]

The Specific Claims Policy itself defines "lawful obligation" in this manner:

> **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 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.[10]

THE ISSUE

The issue before the Commission at this time is whether the claim being put forward by the Kluane First Nation can be properly said to be a "specific claim" within the meaning of Canada's Specific Claims Policy.

Canada submits that this claim is not a specific claim and that the Commission lacks the requisite jurisdiction to consider it at all. Canada contends that this claim is wholly based on the traditional native use and occupancy of lands, with the result that the claim falls within the scope of the Comprehensive Claims Policy and beyond the mandate of the Commission.[11] The First Nation, conversely, insists that, because the claim grew out of a specific, historical incident – the creation of the Parks without Canada first consulting the First Nation or properly accounting for the First Nation's "livelihood interests" – it is quite properly characterized as a breach of fiduciary obligation, and thus constitutes an outstanding lawful obligation under the Specific Claims Policy. The First Nation acknowledges the fact that its interest in the lands dedicated for Park purposes was, at the time, aboriginal in nature but argues that the fundamental character of the claim is a breach of fiduciary obligation.

9 *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 179.
10 *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.
11 ICC Transcript, September 12, 2000, pp. 8, 17, and 26 (Aly Alibhai).

We must address two preliminary matters before ruling on this question.

PRELIMINARY MATTERS

Estoppel

At the hearing on September 12, 2000, the Kluane First Nation implied that Canada's conduct should estop it from raising a jurisdictional challenge to the authority of this Commission – on the basis that Canada's representatives had rejected the claim and had, in fact, encouraged the First Nation to proceed before the Commission.[12] Moreover, in the First Nation's view, the Commission has wide powers to review Canada's reasons for rejecting a claim, and, once a claim has been rejected and the Commission has exercised its power to conduct an inquiry, it is open to the Commission to fulfill its function.[13]

Certainly, it is true that the Director General of the Specific Claims Branch, Paul Cuillerier, advised the First Nation on March 25, 1999, that it had "the option to submit a rejected claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection."

Is it now open to Canada to argue that the Commission lacks the jurisdiction to hear this claim?

Canada asserts that it is not inconsistent for its representatives to first inform the First Nation of the option of proceeding to the Commission, and then to take the position, once the First Nation has requested such a review, that the Commission does not have jurisdiction to hear the matter. Indeed, Canada submits that it is *obliged* to bring the Commission's availability to the First Nation's attention, and that those First Nations who are represented by counsel should be fully aware that it is always open to Canada to challenge the Commission's mandate.[14] Moreover, by agreeing to review the claim, the Commission is not bound, in Canada's view, to conduct an inquiry.[15]

The Commission agrees that Canada is not estopped from challenging the Commission's jurisdiction, nor is the Commission able to proceed if we should determine that this issue is beyond our mandate. The Commission is nonetheless disturbed by the fact that Canada would, on the one hand, encourage a claimant First Nation to seek redress at this Commission and, on

12 ICC Transcript, September 12, 2000, pp. 139-40 (Dave Joe).
13 ICC Transcript, September 12, 2000, pp. 100-1 (Dave Joe).
14 ICC Transcript, September 12, 2000, pp. 154-56 (Aly Alibhai).
15 ICC Transcript, September 12, 2000, p. 175 (Aly Alibhai).

the other, assert that the Commission lacks the required mandate to hear the case once the First Nation proceeds. The unfairness to the First Nation from this change in Canada's position is self-evident. We believe that, unless Canada is prepared to assume the full costs of abortive claims to the Commission, it should revisit the form of its rejection letters with a view to making it clear to claimant First Nations that, although they may proceed to the Commission as a matter of right once their claims have been rejected, Canada may well contest the Commission's jurisdiction in those cases where Canada believes that the claim falls outside the scope of the Specific Claims Policy.

The Yukon Umbrella Final Agreement

A second aspect of this case requiring preliminary comment is the Yukon Umbrella Final Agreement. An important aspect of Canada's application challenging the Commission's mandate to hear this claim is the First Nation's ongoing comprehensive claim negotiation with Canada and the Yukon Territorial Government arising out of the Yukon Umbrella Final Agreement signed May 29, 1993 (the "Umbrella Agreement").[16]

Under the terms of that agreement, Canada, Yukon, and 14 Yukon First Nations – represented by the Council for Yukon Indians – agreed to negotiate individual final agreements that would incorporate the general terms of the Umbrella Agreement, as well as more specific provisions that would apply to individual First Nations. The parties concur that negotiations are ongoing and that certain issues remain outstanding, including the question of compensation for the creation of the Parks.

During oral argument, counsel for the First Nation contended that, in the course of the comprehensive claims negotiations, Canada's negotiators had advised the First Nation to refrain from pursuing compensation for the Parks issue since the compensation criteria in the Umbrella Agreement did not contemplate claims of that nature.[17] According to Kluane's counsel, although Canada's representatives may not have stated expressly that the Parks issue should be addressed under the Specific Claims Policy, they "certainly implied that."[18] Counsel further submitted that the Parks issue has not been factored into the level of compensation payable to the First Nation under the Umbrella Agreement.[19] He acknowledged, however, that, in his view, the certainty

16 DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993).
17 ICC Transcript, September 12, 2000, pp. 139-40 (Dave Joe).
18 ICC Transcript, September 12, 2000, p. 150 (Dave Joe).
19 ICC Transcript, September 12, 2000, p. 142 (Dave Joe).

clause of the Umbrella Agreement would preclude the First Nation from pursuing compensation for the Parks issue, whether as a comprehensive claim or a specific claim, once a final agreement had been signed. To date that has not happened.

The certainty clause in the Umbrella Agreement states:

> **2.5.0 Certainty**
> 2.5.1 In consideration of the promises, terms, conditions and provisos in a Yukon First Nation's Final Agreement:
> ...
> 2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,
> (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2,
> (b) any aboriginal claim, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future, or
> (c) any claim, right or cause of action described in 2.5.1.3.[20]

For its part, Canada takes the position that the question of the compensation, if any, to which the First Nation should be entitled for the creation of the Parks was squarely before the negotiators in the comprehensive claims process and should remain on that table. As counsel stated:

> I can say, Mr. Chairman and counsel, that what I've been told very clearly is that it is not, in fact, the position of the negotiator for the Government of Canada at the Comprehensive Claims table that this is a Specific Claim.
>
> In fact I could say unequivocally that the negotiator acting on behalf of Canada has not encouraged the First Nation to submit this as a Specific Claim. I can't say whether he has discouraged it, but certainly I am informed that the negotiator has not encouraged it, and I am also further informed that the negotiator acting for the government side has always maintained ... that this is in the nature of a Comprehensive Claim.[21]

20 DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993), 15-16.
21 ICC Transcript, September 12, 2000, pp. 159-60 (Aly Alibhai).

In fact, it is Canada's view that the compensation offered to the First Nation is sufficient to compensate the First Nation for all claims on the table in the comprehensive claims process, including the Parks issue.[22] In essence, Canada's position is that, in addition to the Parks issue being a comprehensive claims matter and therefore beyond the scope of the Commission's mandate, the claim has already been addressed and the First Nation should not be given the opportunity to reopen it by "forum shopping."

In our view, Canada and the First Nation disagree on whether the issue before the Commission has formed part of their comprehensive claims negotiations. We would in any event question whether the basis on which the parties have been negotiating is relevant to the issue of whether the Commission has jurisdiction under the Specific Claims Policy. Certainly, had the parties successfully negotiated an agreement that had the effect of resolving the present dispute, that agreement would be relevant and would presumably preclude the Commission from exercising jurisdiction. However, we do not understand that to be the case, and, for that reason, the Commission will determine, without having regard for those negotiations, whether the Parks claim falls within the scope of the Specific Claims Policy.

THE NATURE OF THE ABORIGINAL RIGHTS OF THE FIRST NATION

From Canada's perspective, for the First Nation to establish a breach of duty arising from the creation of the Parks, it must demonstrate an interest in those lands that Canada would have been duty-bound to protect. Counsel argues that the lands do not constitute "reserves" within the meaning of that term in the *Indian Act*, and for the First Nation to suggest that they *are* reserves would likely constitute a new claim. The only basis on which the First Nation can claim an interest, according to counsel, is by virtue of traditional use and occupancy of those lands – in other words, aboriginal title or rights – which the First Nation has not yet proven and Canada has not yet recognized or acknowledged. To put forward a claim of the type currently being made by the First Nation requires, in counsel's view, a "huge assumption" that aboriginal title in the Park lands has been established.[23] Nevertheless, even if the First Nation *could* establish aboriginal title or rights to the Park lands, Canada contends that it is precisely such native use and occu-

22 ICC Transcript, September 12, 2000, p. 85 (Aly Alibhai).
23 ICC Transcript, September 12, 2000, p. 55 (Aly Alibhai).

pancy that the Specific Claims Policy identifies as being beyond its scope and to be dealt with under the Comprehensive Claims Policy.[24]

We are troubled by Canada's view that aboriginal peoples cannot assert aboriginal rights unless Canada has recognized those rights or the courts have ruled that those rights exist. There is no doubt in the Commission's mind that the Kluane are aboriginal people. It seems evident that they resided in the Parks area and used it to gain their livelihood before settlers arrived. Similarly, it appears to be without question that the creation of the Parks has resulted in members of the First Nation being deprived of some or all of the areas they traditionally used and occupied for such purposes. Notwithstanding Canada's expression in clause 2.6.4 of the Umbrella Agreement that it does not *admit* to the First Nation having "any aboriginal rights, title or interests anywhere within the sovereignty or jurisdiction of Canada," neither is there anything in the record before us to indicate that Canada *denies* the First Nation's residence on, and use and occupancy of, the Park lands. Indeed, a reading of Canada's comprehensive claims policy, *In All Fairness*, indicates that Canada conducts comprehensive negotiations with those First Nations who are assumed to have unextinguished aboriginal rights or title, notwithstanding that Canada, presumably for reasons of preserving its legal position, does not admit that fact in specific cases. Canada has been negotiating with the Kluane First Nation for more than 20 years, and it would be dishonourable for Canada to now deny the *prima facie* claim of the Kluane people to the area in question.

The real question is whether the facts of this case as alleged can be said to constitute a specific claim.

For the purposes of the present application regarding the scope of our mandate, it is unnecessary for the First Nation to *prove* or the Commission to *assume* the validity of aboriginal rights or title in the Park lands. In our view, it is sufficient to say that *the basis on which the claim is being put forward* is Canada's failure to consult the First Nation on the creation of the Parks or to compensate it for its loss. At this stage of the proceedings, we are concerned only with whether it is open to us to consider a claim of the type that the First Nation has placed before us, not with whether the First Nation has been able to fully establish its claim. That remains to be determined at a hearing on the merits, should such a hearing be required.

24 ICC Transcript, September 12, 2000, pp. 29-30 (Aly Alibhai).

DOES THIS CLAIM FALL WITHIN *OUTSTANDING BUSINESS* OR *IN ALL FAIRNESS*?

The essential question to be determined in this case is whether the claim being put forward by the Kluane First Nation can properly be said to be a "specific claim" within the meaning of Canada's Specific Claims Policy. If it is not, this Commission lacks the requisite jurisdiction to address it.

Canada submits that this claim is based on traditional native use and occupancy of lands and accordingly falls within the scope of the Comprehensive Claims Policy and beyond the mandate of the Commission.[25] In contrast, the First Nation insists that, because the claim grew out of a specific, historical incident – the creation of the Parks without Canada first consulting the First Nation or properly accounting for the First Nation's "livelihood interests" – the claim is more properly characterized as a breach of fiduciary obligation. In the First Nation's view, the fact that its interest in the lands dedicated for Park purposes may have been aboriginal in nature is purely ancillary, given that "the Supreme Court of Canada has held that the Indian interest in the land is the same for reserve lands and aboriginal title lands."[26]

For the Commission to be able to characterize this claim properly, it is essential to have careful regard for the terms of the two claims policies. In doing so, we must consider not only what each policy says about its *own* scope, but also what each policy says about the scope of the *other* policy.

The Comprehensive Claims Policy

The booklet outlining the Comprehensive Claims Policy, *In All Fairness*, was the first to appear, in 1981. Its foreword contains a broad statement of the kinds of claims contemplated by the policy and distinguishes specific claims for which the government intended to issue another policy in the near future:

> **FOREWORD**
>
> Essentially what is being addressed here are claims based on the concept of "aboriginal title" – their history, current activities surrounding them, and our proposals for dealing with them in the future. *While this statement is concerned with*

25 ICC Transcript, September 12, 2000, pp. 8, 17, and 26 (Aly Alibhai).

26 Dave Joe, Legal Counsel, Kluane First Nation, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 9. Although the First Nation did not identify the Supreme Court of Canada decision to which it was referring, we presume that it was citing *Guerin v. The Queen*, [1984] 2 SCR 335, in which Dickson J (as he then was) stated at 379: "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 *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 AC 401, at 410–11 (the *Star Chrome* case)."

claims of this nature it does not preclude government consideration of claims relating to historic loss of lands by particular bands or groups of bands. Indeed, the government, in consultation with Indian organizations across Canada, is currently reviewing its policy with respect to specific claims over a wide spectrum of historic grievances – unfulfilled treaty obligations, administration of Indian assets under the Indian Act and *other matters requiring attention*. A further statement on government intentions in the area of specific claims will be issued upon completion of that review process.[27]

Part One of the Comprehensive Claims Policy provides a general overview of Canada's intentions regarding the "recognition of Native land rights" and the negotiation of "fair and equitable settlements":

INTRODUCTION

Indian and Inuit people through their associations have presented formal land claims to the Government of Canada for large areas of the country. In response to their claims, the government has three major objectives:

1. To respond to the call for recognition of Native land rights by negotiating fair and equitable settlements;
2. To ensure that settlement of these claims will allow Native people to live in the way they wish;
3. That the terms of settlement of these claims will respect the rights of all other people.

The present policy statement is meant to elaborate the Government of Canada's commitment to the Native people of Canada in the resolution of these claims. Comprehensive land claims relate to the traditional use and occupancy and the special relationships that Native people have had with the land since time immemorial.

RECENT HISTORY

Prior to 1973 the government held that aboriginal title claims were not susceptible to easy or simple categorization; that such claims represented, for historical and geographical reasons, such a bewildering and confusing array of concepts as to make it extremely difficult [for] either the courts of the land or the government of the day to deal with them in a way that satisfied anyone. Consequently, it was decided such claims could not be recognized.

However, by early 1973 the whole question of claims based on aboriginal title again became a central issue; the decision of the Supreme Court of Canada in the Calder Case, an action concerning the right of assertion of Native title by the Nishga Indians of British Columbia, established the pressing importance of this matter. Six of the judges acknowledged the existence of aboriginal title. The court itself, however,

27 DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 3. Emphasis added.

while dismissing the claim on a technicality, split evenly (three-three) on the matter raised: did the native or aboriginal title still apply or had it lapsed? At the same time, the Cree of James Bay and the Inuit of Arctic Québec were trying to protect their position in the face of the James Bay Hydro Electric project.

It is from these actions that the current method of dealing with Native claims emerged.

A policy statement in 1973 covered two areas of contention. *The first was concerned with the government's lawful obligations to Indian people. By this was meant the questions arising from the grievances that Indian people might have about fulfillment of existing treaties or the actual administration of lands and other assets under the various Indian Acts.*

The policy statement acknowledged another factor that needed to be dealt with. Because of historical reasons – continuing use and occupancy of traditional lands – there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests. *Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits, in exchange for a release of the general and undefined Native title, such claims came to be called comprehensive claims.*

In short, the statement indicated two new approaches in respect to comprehensive claims. The first was that the federal government was prepared to accept land claims based on traditional use and occupancy and second, that although any acceptance of such a claim would not be an admission of legal liability, the federal government was willing to negotiate settlements of such claims.[28]

Part Two of the Comprehensive Claims Policy sets forth Canada's view of "the essential factors necessary for the achievement of comprehensive land claims settlements":

BASIC GUIDELINES

When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future. In other words, any land claims settlement will be final. The negotiations are designed to deal with non-political matters arising from the notion of aboriginal land rights such as, lands, cash compensation, wildlife rights, and may include self-government on a local basis.

The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits.

28 DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 7 and 11-12. Emphasis added.

ALTERNATIVES CONSIDERED

> ... There are a number of compelling advantages to the negotiation process, as the federal government sees it. *The format permits Natives not only to express their opinions and state their grievances, but it further allows them to participate in the formulation of the terms of their own settlement. When a settlement is reached, after mutual agreement between the parties, a claim can then be dealt with once and for all. Once this is achieved, the claim is nullified.*[29]

In our view, the general intent of *In All Fairness* is to establish a framework for the negotiation of settlements of aboriginal land claims in Canada. The policy refers repeatedly to the essence or "thrust" of comprehensive claims being the exchange of "general and undefined Native title" and "undefined aboriginal land rights" for "concrete rights and benefits." It seems apparent from our review of the policy as a whole that comprehensive claims encompass those issues arising as a matter of *the existence and content of aboriginal rights or title* rather than grievances resulting from *Canada's past conduct*. We agree with counsel for the First Nation when he comments that Canada developed the Comprehensive Claims Policy to deal with the exchange of rights, and then dealt with the residual conduct-related claims in *Outstanding Business*.[30]

We are also of the view that the Comprehensive Claims Policy itself contemplates the possibility that certain historical grievances should be addressed within the context of the Specific Claims Policy, even though the factual or legal underpinning of those claims is based, in part, upon the aboriginal status of a band or upon the relationship of its members with the land upon which they reside. For example, the phrase "claims relating to historic loss of lands by particular bands or groups of bands" in the foreword clearly contemplates claims that would fall *not* within the Comprehensive Claims Policy but within the then yet-to-be-released Specific Claims Policy.

We appreciate that Canada does not necessarily agree with the Commission's interpretation in this respect. In arguing that not "every single historic loss of any kind whatsoever falls within the Specific Claims Policy," Canada contends that the historical losses referred to in the Comprehensive Claims Policy do not relate to losses of *traditional* territory but rather to only the types of losses contemplated by the four categories of lawful obligation set

29 DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 19 and 21. Emphasis added.
30 ICC Transcript, September 12, 2000, p. 132 (Dave Joe).

forth in the Specific Claims Policy.[31] We disagree with that submission, primarily because we do not agree that the Specific Claims Policy itself is limited in the manner that Canada suggests.

For the moment, we would only observe that we see no reason why the words "historic loss of lands," without further qualification, would not equally permit consideration under the Specific Claims Policy of losses of aboriginal lands as well as losses of reserve lands.

We do not wish to be taken as suggesting that historical grievances should not be resolved within the context of comprehensive negotiations. Clearly it is in the interests of both Canada and a First Nation to resolve both past grievances and future issues at the comprehensive claims table. Although the primary thrust of the Comprehensive Claims Policy is the *exchange* of undefined aboriginal land rights for concrete rights and benefits, there is room within its ambit to deal with compensation for past grievances arising from governmental incursions into aboriginal rights and title. We would fully expect that such grievances would often be aired and addressed at the comprehensive claims table, just as the Parks issue was, at least to some extent, discussed by the parties in this case.

The issue before our Commission, however, is not whether this particular historical grievance should or should not be addressed within the context of comprehensive claims negotiations, but rather whether the First Nation is precluded from advancing the claim as a specific claim under the Specific Claims Policy. It is that Policy to which we now turn.

The Specific Claims Policy

What remains to be determined, then, is whether the present claim also falls within the scope of the Specific Claims Policy. Can an historical grievance of the nature alleged in these proceedings be the subject matter of a comprehensive claims negotiation as well as an outstanding lawful obligation under the Specific Claims Policy?

The foreword to *Outstanding Business* is an important place to begin:

> **FOREWORD**
>
> *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*. They have represented, over a long period of our history, outstanding

31 ICC Transcript, September 12, 2000, pp. 54 and 85 (Aly Alibhai).

business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay.[32]

Part One of *Outstanding Business* discusses the scope of the Specific Claims Policy and contrasts the policy against the Comprehensive Claims Policy, *In All Fairness*:

INTRODUCTION

The federal government's policy on Native claims finds its genesis in a statement given in the House of Commons on August 8, 1973 by the Minister of Indian Affairs and Northern Development. Since that time experience and consultations with Indian bands and other Native groups and associations have prompted the government to review and clarify its policies with respect to the *two broad categories of claims: comprehensive claims and specific claims*.

The term "comprehensive claims" is used to designate claims which are based on traditional Native use and occupancy of land. Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope including, for example, land, hunting, fishing and trapping rights and other economic and social benefits.

The government has already made public its policy on comprehensive claims in a booklet entitled *In All Fairness*, published in December 1981. *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*.

...

INDIAN TREATIES

Treaties play a significant part in the heritage of Canada's Indians and are central to many of their existing claims. As far back as the Royal Proclamation of 1763, the British sovereign recognized an Indian interest in the lands occupied by various Indian tribes which could only be ceded to, or purchased by, the Crown. This policy led to the tradition of making agreements, or treaties as they were later called, with the Indians.

...

THE INDIAN ACT

As well as being concerned with the fulfillment of Indian treaties, specific claims relate to the administration of land and other assets under the Indian Act. Such land and other assets, mainly in the form of money, were derived in large measure from the treaties and earlier Indian agreements with the Crown or found their origin in colonially established Indian reserves and funds. Again, in some cases, they came from what had been church administered holdings. All were brought within the aegis

32 *Outstanding Business*, 3; reprinted (1994), 1 ICCP 171 at 173.

of a series of post-Confederation Acts beginning in May 1868, with legislation giving the Secretary of State control over the management of Indian lands and property and all Indian funds. The first *Indian Act* of 1876 and its several subsequent versions maintained the principle of government responsibility for the management of Indian assets.

The two principal categories of Indian assets which fall under federal government management are Indian reserve lands and Indian band funds and hence are most often at the centre of Indian claims where breach of an obligation arising out of government administration is asserted. In turn, land-related claims have to date been most frequently raised. The latter may find their origin in such areas as the taking of reserve lands without lawful surrender by the band concerned or failure to pay compensation where lands were taken under legal authority.

...

RECENT HISTORY

Over the years following the signing of the treaties, Indians concluded that the government had not fulfilled all of its commitments to them. Some Indians maintained that the government had reneged on some of its promises under treaty. Others charged that the government had deliberately disposed of their reserve lands without first securing their permission. Claims of mismanagement of band funds and other assets were presented to government.

Faced with an increase of such claims and a growing discontent among the Indian population, the government determined to give careful consideration to each of these claims in order to determine their validity and its responsibility.

In 1969 the Government of Canada stated as public policy that its lawful obligations to Indians, including the fulfillment of treaty entitlements, must be recognized. This was confirmed in the 1973 *Statement on Claims of Indian and Inuit People*. *The 1973 statement recognized two broad classes of native claims – "comprehensive claims": those claims which are based on the notion of aboriginal title; and "specific claims": those claims which are based on lawful obligations.*[33]

As can be seen from the foregoing section entitled The *Indian Act*, the *principal* – but by no means the *only* – categories of Indian assets falling under the Specific Claims Policy are Indian *reserve lands* and Indian band funds. However, the words of the Introduction contain no language limiting the scope of specific claims to matters arising under the *Indian Act* and no wording restricting "claims that relate to the administration of land" to reserve lands. We can only conclude that Canada's intention in referring to "reserve lands" in some instances and "lands" in others is meant to differentiate between the two terms. It is particularly significant, in our view,

33 *Outstanding Business*, 7, 9, 11, and 13; reprinted (1994), 1 ICCP 171 at 174–76. Emphasis added.

that Part Two of the Specific Claims Policy, which establishes the concept of "lawful obligation," makes no mention of reserves at all:

> **THE POLICY: A RENEWED APPROACH TO SETTLING SPECIFIC CLAIMS**
>
> *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.
>
> 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.*
>
> **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.[34]

It is this concept of "lawful obligation" that is the essence of the Specific Claims Policy. It is, by definition, a fluid and evolving concept because the nature and scope of those obligations which are, in law, owed to First Nations will continue to evolve through the process of judicial determination in Canada. Our Commission has said previously that the inherent wisdom of the Specific Claims Policy resides in its reliance upon an evolving definition of that which is lawful and owing. There is justice in such an approach.

The Specific Claims Policy was created with the idea of providing a practical remedy to legitimate, long-standing grievances. It is also remedial in the sense that the concept of lawful obligation is not only an evolving one, but also one that is very broad in nature – essentially it provides a "catch-all" for

34 *Outstanding Business*, 19-20; reprinted (1994), 1 ICCP 171 at 179. Emphasis added.

dealing with virtually all conduct-related historical grievances. In that spirit, and with a view to achieving the "justice, equity and prosperity" that the Policy itself references, we are of the view that the Policy should be given a broad interpretation befitting its remedial nature.

The Commissioners have concluded that the claim brought forth by the Kluane First Nation does fall within the scope of the Specific Claims Policy and that it is therefore within the mandate of this Commission to review Canada's rejection of this claim. We do not suggest that the claim is valid *per se*, for that determination has not yet been made. We are, however, confident that the claim is in the nature of a specific claim. We say so because we are of the opinion that a claim of the nature advanced by the Kluane First Nation falls within the Specific Claims Policy in three demonstrable ways:

- the essence of the claim is an allegation of a breach of fiduciary obligation, which is arguably an "outstanding lawful obligation" within the general language at page 20 of the Policy;
- the claim involves an allegation of a breach of an obligation in a statute pertaining to Indians – namely, the *Rupert's Land and North-Western Territory Order* – and such a matter arguably falls within the specific ground enumerated as item (ii) at page 20 of the Policy; and
- the claim involves an allegation of an illegal disposition of Indian land, and such a matter arguably falls within the specific ground enumerated as item (iv) at page 20 of the Policy.

Our reasons follow.

Does a Claim of This Sort Fall within One of the Four Listed Categories of Lawful Obligation?

Outstanding Business enumerates four categories of lawful obligation. These are:

> 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.[35]

35 *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.

Canada submits that the First Nation does not have and never has had a treaty with Canada or the United Kingdom,[36] and the First Nation has not taken issue with this statement. Nor has the First Nation alleged the existence of an agreement, the breach of which gives rise to this claim, or a breach of an obligation arising out of government administration of Indian funds or other assets. We would concur that the first and third categories of lawful obligation which are listed above are therefore irrelevant.

Breach of Statutory Obligation

The Kluane people argue that, when Canada permitted the creation of the Parks without consulting or compensating them, it breached an obligation arising out of a statute pertaining to Indians. The First Nation's submission on this point is based on the Order in Council admitting Yukon into Canada. That Order in Council is premised on section 146 of the *Constitution Act, 1867*, which states:

> **146.** *It shall be lawful for the Queen*, by and with the Advice of Her Majesty's Most Honourable Privy Council, ... on Address from the Houses of the Parliament of Canada *to admit Rupert's Land and the North-western Territory, or either of them, into the Union*, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; *and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.*[37]

Shortly after Confederation, the Senate and House of Commons by joint address issued a request to the British Crown seeking the union of Rupert's Land and the North-Western Territory with the rest of Canada. By means of an Order in Council dated June 23, 1870, which has come to be known as the *Rupert's Land and North-Western Territory Order*, this request was granted, subject to, among other things, the following condition:

> upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[38]

36 ICC Transcript, September 12, 2000, p. 10 (Aly Alibhai).
37 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3. Emphasis added.
38 *Rupert's Land and North-Western Territory Order*, June 23, 1870.

The *Rupert's Land and North-Western Territory Order* has gained constitutional status by virtue of section 52 of the *Constitution Act, 1982*, which provides as follows:

> **52.**(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
> (a) the *Canada Act* 1982, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).[39]

The *Rupert's Land and North-Western Territory Order* is the third item in Schedule I.

It seems apparent to the Commission that, given its constitutional nature and the wording of section 146 of the *Constitution Act, 1867*, the *Rupert's Land and North-Western Territory Order* must be considered a statute pertaining to Indians within the meaning of the second category of lawful obligation in *Outstanding Business*.

The *Rupert's Land and North-Western Territory Order* certainly does give rise to a number of very difficult aboriginal and constitutional law questions, both generally and in the context of this specific claim. For example, what are "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines"? In the First Nation's view, this constitutional obligation should be interpreted in accordance with the principles of interpretation applicable to statutes relating to Indians.[40] The First Nation also argues that "the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines" are those principles captured in the provisions of the *Royal Proclamation of 1763* which, by virtue of being incorporated by reference in the *Rupert's Land and North-Western Territory Order*, should apply to the Park lands. In contrast, Canada takes the position that the *Royal Proclamation* is irrelevant because it simply forms the basis for surrenders and designations of reserve lands whereas this claim does not deal with reserve lands at all.[41]

39 *Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
40 Dave Joe, Legal Counsel, Kluane First Nation, "Specific Claim for the Kluane First Nation," October 2, 1996, p. 23.
41 ICC Transcript, September 12, 2000, pp. 40-41 and 70 (Aly Alibhai).

In our view, it is unnecessary for us to decide these issues at this time. For the purposes of this jurisdictional challenge, it is necessary only that we satisfy ourselves that the question of whether Canada failed to compensate the Kluane people or to have regard for their interests in the creation of the Parks is, at least in part, a question arising from an alleged breach of an obligation arising out of a statute pertaining to Indians. In our view, it is, and accordingly we find that the claim qualifies to be heard under the second listed category of lawful obligation in *Outstanding Business*.

Illegal Disposition of Indian Land

With regard to the fourth category of lawful obligation, the First Nation submits that the term "Indian land" in the Specific Claims Policy is not restricted to reserves under the *Indian Act*.[42] By implication, it is the First Nation's position that, when Canada allowed third parties or other government departments to "encroach" on the First Nation's traditional territories, Canada permitted an illegal disposition of Indian land.

Canada submits that the lands in question are not reserve lands under the *Indian Act* and, for this reason, they do not constitute "Indian land" under the Specific Claims Policy.[43] In addition, if the First Nation should seek to assert that the Park lands *were* reserve lands under the *Indian Act*, then, in Canada's view, it would have to do so explicitly, and that would likely comprise a new claim.[44] Moreover, as Canada argues, there is nothing in *Outstanding Business* to suggest that it is intended to apply to all lands coming within the scope of Canada's jurisdiction in section 91(24) of the *Constitution Act, 1867*, to legislate with regard to "Indians, and Lands reserved for the Indians" since the Specific Claims Policy expressly excludes aboriginal titled lands from the operation of the Policy.[45]

For the purposes of this application, the Commission agrees with the First Nation that limiting the term "Indian land" to reserves under the *Indian Act* is too restrictive and that specific claims can be brought forward on a wider basis. As we have already stated, the Specific Claims Policy contains explicit references to reserve lands in some instances but it uses the more general term "Indian land" in the fourth category of lawful obligation. If Canada had

42 Written Submission on Behalf of the Kluane First Nation, April 20, 2000, p. 11.

43 Paul Cuillerier, Director General, Specific Claims Branch, Indian and Northern Affairs Canada, to Chief Robert Johnson, Kluane First Nation, March 25, 1999, p. 2; Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 8; ICC Transcript, September 12, 2000, p. 7 (Aly Alibhai).

44 Rebuttal Submission on Behalf of the Government of Canada, May 11, 2000, pp. 1-2.

45 Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 8.

intended *Outstanding Business* to apply only to lawful obligations arising in relation to reserve lands, it could have expressly said so, but it did not. We decline to adopt the narrower interpretation.

We acknowledge the argument by counsel for Canada that guideline 7 in Part Three of the Specific Claims Policy precludes claims involving aboriginal titled lands, and we will return to that argument below.

Does a Breach of Fiduciary Duty Give Rise to an Outstanding Lawful Obligation?

The Commission has consistently held that its jurisdiction is not exhausted by the four categories of lawful obligation enumerated in *Outstanding Business*. In a number of reports, we have expressed the view that the four categories are merely *examples* of circumstances in which a lawful obligation may arise.[46] More specifically, we have found that Canada's fiduciary obligations to First Nations are lawful obligations and that a claim based on a breach of fiduciary duty falls within the scope of the Specific Claims Policy. We see no reason to change our position here.

In our opinion, 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:

> 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 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.[47]

When the Policy was published in 1982, the Supreme Court of Canada, as it was to do in *Guerin v. The Queen*,[48] had not yet recognized breach of fiduci-

46 ICC, *Primrose Lake Air Weapons Range Report II* (Ottawa, September 1995), reported (1996), 4 ICCP 47 at 62, n35; ICC, *Inquiry into the Claim of the Homalco Indian Band* (Ottawa, December 1995), reported (1996), 4 ICCP 89 at 106 and 159; ICC, *Inquiry into the Cormorant Island Claim of the 'Namgis First Nation* (Ottawa, March 1996), reported (1998), 7 ICCP 3 at 73; ICC, *Inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation* (Ottawa, February 1997), reported (1998), 7 ICCP 109 at 187; ICC, *Inquiry into the McKenna-McBride Applications Claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band* (Ottawa, March 1997), reported (1998), 7 ICCP 199 at 271.

47 *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 179. Emphasis added.

48 *Guerin v. The Queen*, [1984] 2 SCR 335.

ary 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 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, a process that would evolve in an orderly way over time, it stands to reason that the four delineated examples of "lawful obligation" were not intended to be exhaustive. They simply illustrate the types of claims that can be dealt with under the Policy.

We appreciate that the Department of Indian Affairs and Northern Development – including, it would seem, the Minister of that department – does not agree with the Commission on this interpretation. Most recently in the context of the Commission's reports on the McKenna-McBride applications of the 'Namgis and Mamaleleqala First Nations, the Hon. Robert Nault expressed the following view to the Commission:

> The [Indian Claims Commission] has recommended a portion of each of these claims be accepted for negotiation. In the [Commission's] view, liability on the part of the Crown existed pursuant to the "Lawful Obligation" clause of *Outstanding Business*, Canada's Specific Claims Policy....
>
> After careful consideration of the Commission's report, I regret that I am unable to accept the [Commission's] recommendation.... Canada's response to each of the [Commission's] findings is as follows:
>
> (1) Canada rejects the [Commission's] finding that the enumerated examples of "lawful obligation" outlined in *Outstanding Business* were not intended to be exhaustive. Canada is of the view that outside the circumstances outlined in the "lawful obligation" and "beyond lawful obligation" clauses of *Outstanding Business* (i.e., a treaty obligation, statutory requirement and/or responsibility for management of Indian land or assets), fiduciary obligations are not "lawful obligations" within the meaning of the Specific Claims Policy. Only those fiduciary obligations arising within the context of lawful obligations (as defined in the policy) may fall within the scope of *Outstanding Business*.
>
> (2) Canada takes the position that: (a) there is no general fiduciary duty in relation to Aboriginal interests in non-reserve lands; and (b) the necessary elements required to establish a fiduciary obligation (i.e., a statute, agreement or unilateral undertaking to act for or in the interests of the First Nation; unilateral power to affect the First Nation's interests; and/or vulnerability on the part of the First

> Nation to the exercise of that power) were not present on the facts of these claims.
>
> (3) Canada's position remains, as has been articulated in response to other British Columbia specific claims dealing with the issue of Indian settlement lands [e.g., Homalco], that there is no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments.[49]

With respect, the Minister is wrong.

In the context of the present inquiry, the issue is admittedly more difficult. Canada argues that the four categories in *Outstanding Business* are exhaustive but, even if they are not, claims based on breach of fiduciary obligation must still feature the same "pith and substance" as those categories. In other words, according to counsel, a claim of breach of fiduciary obligation will be acceptable and in keeping with the Specific Claims Policy where it relates to the administration of Indian assets under the *Indian Act* and treaty obligations – "the things that are at the core of a specific claim in its pure sense." Canada's counsel adds that construing the policy in the manner proposed by the First Nation would be inconsistent with the substance of *Outstanding Business* and indeed would undermine the policy by blurring the distinction between comprehensive and specific claims.[50] Although it may be "a given" that "a fiduciary duty or obligation can form the basis of a claim under the policy," counsel submitted that a claim "inextricably bound up in an assertion [of] aboriginal title or rights" does not fall within the scope of *Outstanding Business*.[51] Although it may appear to the First Nation that Canada is unfairly "pigeonholing" claims, Canada takes the position that the division of claims into the comprehensive and specific categories falls within its discretion as a matter of Crown prerogative. In making this division, counsel submits, Canada has excluded claims based on unextinguished native title from the Specific Claims Policy, and, although the First Nation deserves to have full consideration of its claim arising out of the creation of the Parks, that consideration should take place – and, in Canada's view, *has* taken place – in the context of comprehensive claims negotiations.[52]

49 Robert D. Nault, Minister of Indian Affairs and Northern Development, to Daniel J. Bellegarde and James Prentice, QC, Co-Chairs, Indian Claims Commission, December 8, 1999.
50 ICC Transcript, September 12, 2000, pp. 79-81 (Aly Alibhai).
51 ICC Transcript, September 12, 2000, p. 19 (Aly Alibhai).
52 ICC Transcript, September 12, 2000, pp. 58-59 (Aly Alibhai).

The Commission finds that, although the Specific Claims Policy suggests "a more liberal approach eliminating some of the barriers to negotiations" of specific claims, Canada's position reflects neither the flexibility nor the remedial nature which the very wording of *Outstanding Business* demands. Canada's position effectively stultifies the Policy and certainly prevents its continued evolution as an instrument of justice and fairness in the resolution of claims. Most importantly, Canada's interpretation of the Policy is wilfully blind to the continuing evolution of Canada's lawful obligations to aboriginal peoples as articulated by the Supreme Court of Canada in cases since *Guerin*.

In our view, as we said in our reports on the McKenna-McBride application claims of the 'Namgis and Mamaleleqala First Nations, 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.

As to the first of these criteria, Canada argues that "there is no general fiduciary duty in relation to aboriginal interests in non-reserve lands" and "no general fiduciary obligation to protect traditional Indian settlement lands from the actions of other individuals or governments." Although we do not yet have the facts before us to determine whether a fiduciary duty was breached in this case, we do not see how, in the wake of *Delgamuukw*, the existence of a fiduciary duty with regard to the protection of aboriginal interests in traditional, non-reserve lands can be doubted. As Lamer CJ stated:

> First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put.... This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith,

> and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put.... Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.[53]

In our view, the cause of action alleged by the Kluane First Nation, if sustained by the evidence at a hearing on the merits, is one that has been recognized by the courts. Accordingly, we find that the First Nation has satisfied the first criterion for deciding whether a claim falls within the Specific Claims Policy.

As for the third criterion – "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" – we believe, as we have already discussed, that the alleged cause of action, even if not founded on a breach of fiduciary obligation, can be sustained, given the requisite evidence, under the second and fourth categories of lawful obligation in *Outstanding Business*.

Having reached this conclusion, we must now determine whether the claim is "based on unextinguished aboriginal rights or title" such that it is to be excluded from consideration under the Specific Claims Policy by guideline 7.

Is the First Nation's Claim Excluded from the Specific Claims Policy by Guideline 7?

Part Three of *Outstanding Business* states:

> **GUIDELINES**
>
> In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an*

53 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1113-14, Lamer CJ.

> *integral part of the government's policy on specific claims*, they are set out separately in this section for ease of reference.
>
> **SUBMISSION AND ASSESSMENT OF SPECIFIC CLAIMS**
>
> Guidelines for the submission and assessment of specific claims may be summarized as follows:
>
> ...
>
> 7) *Claims based on unextinguished native title shall not be dealt with under the specific claims policy*.[54]

What is the meaning of guideline 7? According to Canada, when guideline 7 and the introduction to *Outstanding Business* are read together with the Specific Claims Policy as a whole, it is evident that claims based on traditional use and occupancy of land are not to be dealt with under the Policy, whereas claims based on breach of the *Indian Act* or breach of treaty form the Policy's *substance* and *can* be heard by the Commission.[55] The guideline, in Canada's view, is clear and unambiguous and precludes the First Nation from bringing this claim.[56] Since the paragraph headed "Guidelines" states that "the guidelines form an integral part of the government's policy on specific claims," counsel for Canada would have the Commission treat the guidelines as mandatory rather than merely directory in nature.[57] Moreover, since principles of interpretation direct that specific terms in a document will prevail over more general terms, in Canada's view the specific guideline 7 should therefore be given precedence over the more general concept of lawful obligation.[58]

In reply, the First Nation contends that "Guideline 7 is exactly that, it's a guideline"[59] – in other words, guideline 7 should be considered merely directory and, to the extent that it conflicts with the general characterization of lawful obligation in Part Two of *Outstanding Business*, Part Two should be paramount and, by implication, the guideline can be ignored.[60] The First Nation further asserts that, in any event, guideline 7 should not operate as a bar where a claim is based on a breach of lawful obligation and unex-

54 *Outstanding Business*, 29-30; reprinted (1994), 1 ICCP 171 at 183-84. Emphasis added.
55 ICC Transcript, September 12, 2000, pp. 77-78 (Aly Alibhai).
56 Rebuttal Submission on Behalf of the Government of Canada, May 11, 2000, pp. 1 and 3.
57 Written Submission on Behalf of the Government of Canada, March 31, 2000, p. 4; ICC Transcript, September 12, 2000, pp. 15 and 176 (Aly Alibhai).
58 ICC Transcript, September 12, 2000, pp. 78-79 (Aly Alibhai).
59 ICC Transcript, September 12, 2000, p. 131 (Dave Joe).
60 Chief Bob Johnson, Kluane First Nation, to Dr John Hall, Research Manager – British Columbia and Yukon Territory, Specific Claims Branch – Vancouver, July 27, 1998.

tinguished native title is only incidentally involved in giving rise to the breach.[61] In the First Nation's view, Canada is seeking to have it both ways – first, by requiring the First Nation to prove unextinguished aboriginal title before Canada will accept that it might have an obligation to protect that interest, and then, once an assertion of aboriginal title is made, by arguing that the existence of aboriginal title takes the claim outside the Specific Claims Policy. In any event, guideline 7 may not apply to this case, according to counsel, because there has been no finding in law that the creation of the Parks has left the First Nation's interest in the Park lands unextinguished.[62]

The Commission has recently considered the legal effect of these guidelines in Part Three of the Specific Claims Policy in its report on the loss of use claim of the Long Plain First Nation. Although our attention in that case focused on guideline 3, we believe that the principles expressed there apply with equal force in the present circumstances. We stated:

> Part Three of the Specific Claims Policy, in which paragraph 3 is found, is, in any event, simply entitled "Guidelines." The use of that term suggests to us that, as a guideline, paragraph 3 is intended to be interpretive only. In fact, the introductory paragraph to the "Guidelines" suggests as much:
>
> > In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an integral part of the government's policy on specific claims*, they are set out separately in this section for ease of reference.[63]
>
> The "Guidelines" represent statements of policy and do not purport to define in an exhaustive manner the "legal principles" upon which compensation is to be determined. As noted previously, the wisdom and strength of the Specific Claims Policy is derived from its clear reliance upon "lawful obligation" as an evolving concept. In circumstances in which an analysis of the law leads to a clear conclusion that "loss of use" may be claimed as part of the "lawful obligation" owed by Canada to a First Nation, we are not prepared to elevate the "Guidelines" in *Outstanding Business* – especially ones of uncertain application such as paragraph 3 – to a position where they will override the clear application of the Specific Claims Policy.[64]

Is the present claim *based on* unextinguished native title? Canada's position would treat any claim involving aboriginal rights or title in the same

61 Written Submission on Behalf of the Kluane First Nation, April 20, 2000, para. 12.
62 ICC Transcript, September 12, 2000, p. 106 (Dave Joe).
63 *Outstanding Business*, 29; reprinted (1994), 1 ICCP 171 at 183. Emphasis added.
64 ICC, *Long Plain First Nation Inquiry, Loss of Use Claim* (Ottawa, February 2000), 28-29; reported (2000) 12 ICCP 269 at 300.

manner, regardless of whether "unextinguished native title" is the real issue in the inquiry or a mere incident of the claim. We disagree with this position. In our opinion, where a claim involves a grievance arising out of Canada's *conduct* in a specific, isolated incident, the presence of unextinguished aboriginal rights or title is merely *incidental* to the overall claim. In such circumstances, in our view, the claim cannot be said to be *based on* unextinguished aboriginal rights or title and will not fall within the exclusive purview of the Comprehensive Claims Policy. The very essence of the Specific Claims Policy is the resolution of these types of historical grievances.

Historical grievances of this nature are to be distinguished from cases in which the parties are exchanging undefined aboriginal land rights for concrete rights and benefits. In such cases, which turn on *the existence and content of aboriginal rights or title*, the claims can be said to be "*based on* unextinguished native title" within the meaning of guideline 7, and on this basis they lie *outside* the Specific Claims Policy – meaning that the comprehensive claims process is clearly at play. Such claims are based upon unextinquished native title because they involve, at least to some extent, the surrender or relinguishment of all or some aspects of the First Nation's undefined aboriginal land rights – including perhaps the First Nation's traditional use and occupancy of some parts of the land – in exchange for the sort of concrete rights and benefits contemplated by agreements like the Yukon Umbrella Agreement and its band-specific final agreements.

We do not agree with Canada's contention that, just because the Commission draws a different line between comprehensive and specific claims than the one proposed by Canada, guideline 7 is thus rendered meaningless. The settlement of comprehensive claims is of undeniable importance in Canada, and it is certainly not the Commission's place to oversee the surrender and exchange of aboriginal rights in those negotiations. That being said, the resolution of historical grievances and past injustices arising out of Canada's conduct is the responsibility of the Commission and we see no reason why it should not be possible for the Commission to address issues of "outstanding lawful obligation" that involve ancillary issues of aboriginal rights and title. Finally, we wish to indicate that we do not believe it is in the interests of either Canada or the First Nation to have to resort to two different policies or forums to resolve their differences. If the parties can agree to address and resolve past injustices arising out of Canada's conduct within their comprehensive claims negotiations, neither the Commission nor the Specific Claims Policy need be engaged. However, as we

have stated, we are not in a position to determine whether that is the case here; we find merely that the claim put forward by the Kluane First Nation is a specific claim within the meaning of that policy.

CONCLUSION

For the reasons set forth above, the Commission finds that the subject matter of the claim as alleged by the First Nation falls within the scope of the Specific Claims Policy. Accordingly, the Commission has jurisdiction to hear the claim. The parties are directed to submit all relevant documents to the Commission, and a planning conference to discuss the merits of the claim will be convened as soon as possible. The Commission remains ready to assist the parties wherever possible to find a resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION

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

Carole T. Corcoran
Commissioner

Dated this 1st day of December, 2000.

APPENDIX B

DECLARATION

Kluane First Nation:
Kluane National Park and Kluane Game Sanctuary Inquiry

Première Nation de Kluane :
enquête relative au parc national de Kluane et à la réserve faunique de Kluane

DECLARATION

On October 2, 1996, The Kluane First Nation submitted a claim to the Minister of Indian Affairs and Northern Development respecting the establishment of Kluane National Park and Kluane Game Sanctuary in its traditional territory.

On March 25, 1999 the claim was rejected.

By letter dated October 4, 1999, followed by a Band Council Resolution dated October 27, 1999, the Chief and Council requested that this Commission conduct an inquiry into this rejected claim.

On October 27, 1999, the Commission accepted this request.

DÉCLARATION

Le 2 octobre 1996, la Première Nation de Kluane a présenté une revendication au ministre des Affaires indiennes et du Nord canadien en ce qui a trait à l'établissement du parc national de Kluane et de la réserve faunique de Kluane dans son territoire traditionnel.

Le 25 mars 1999, la revendication a été rejetée.

Dans une lettre datée du 4 octobre 1999, puis dans une résolution du conseil de bande datée du 27 octobre 1999, le chef et les conseillers ont demandé à la présente Commission de mener une enquête au sujet de cette revendication rejetée.

Le 27 octobre 1999, la Commission a accepté la demande.

In February 2000, Canada requested a hearing to address the jurisdiction of the Indian Claims Commission in this matter. A hearing was held on September 12, 2000, and the Commission ruled on December 14, 2000, that the claim fell within the scope of the Specific Claims Policy and, as such, the Commission had jurisdiction to hear it.

In February 2001, the First Nation asked that the inquiry be held in abeyance while the parties attempted to find ways to include the claim in on-going comprehensive claim negotiations. The Inquiry resumed in August 2001 at the request of the First Nation. Canada gave notice that it continued to hold the view that this was not a proper matter for an inquiry by this Commission and declined to participate.

A Community Session was held in February 2002. Canada was not in attendance.

On March 31, 2002, the Kluane First Nation signed a Memorandum of Understanding with the federal and territorial governments acknowledging that negotiations on its Final and Self-Government Agreements were substantially complete. The agreements, including a "Memorandum Regarding Kluane National Park Reserve and Kluane Game Sanctuary", were signed on October 18, 2003.

On May 5, 2004, the Kluane First Nation asked that the ICC Inquiry be terminated.

En février 2000, le Canada a demandé la tenue d'une audience afin d'examiner la compétence de la Commission des revendications des Indiens en la matière. Une audience a eu lieu le 12 septembre 2000, et la Commission a rendu une décision le 14 décembre 2000 à savoir que la revendication s'inscrivait dans le cadre de la *Politique des revendications particulières* et, par conséquent, qu'elle avait compétence pour entendre la revendication.

En février 2001, la Première Nation a demandé que l'enquête soit mise en suspens pendant que les parties tentaient de trouver différents moyens d'intégrer la revendication aux négociations de revendication globale en cours. L'enquête a repris en août 2001 à la demande de la Première Nation. Le Canada a avisé qu'il percevait toujours ce dossier comme ne relevant pas de la compétence de la présente Commission, et a refusé de participer à l'enquête.

Une audience publique a eu lieu en février 2002. Le Canada n'était pas présent.

Le 31 mars 2002, la Première Nation de Kluane a signé un protocole d'entente avec les gouvernements fédéral et territorial, reconnaissant que les négociations ayant trait à son entente définitive et à son entente sur l'autonomie gouvernementale étaient essentiellement terminées. Les ententes, notamment le *Protocole d'entente concernant la réserve de parc national de Kluane et la réserve faunique de Kluane*, ont été signées le 18 octobre 2003.

Le 5 mai 2004, la Première Nation de Kluane a demandé que la CRI mette fin à l'enquête.

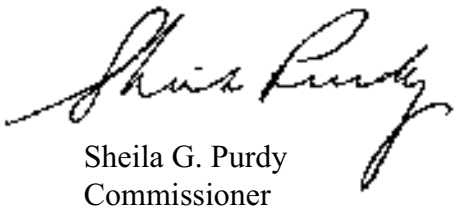
Since the specific claim has been dealt with within the comprehensive claim negotiations, the ICC finds that there are no longer any matters to be inquired into.

THIS COMMISSION THEREFORE DECLARES AS FOLLOWS:

The inquiry into this specific claim is hereby concluded.

At Ottawa, Ontario, this 14th day of July, 2006.

Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

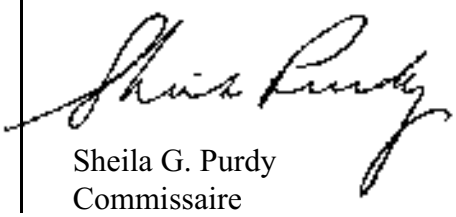
Puisque la revendication particulière a été traitée dans le cadre des négociations de revendication globale, la CRI estime qu'il n'y a plus lieu de mener enquête dans ce dossier.

LA COMMISSION DÉCLARE PAR CONSÉQUENT CE QUI SUIT :

Par la présente, l'enquête sur cette revendication particulière est close.

Fait à Ottawa (Ontario), le 14 juillet 2006.

Alan C. Holman
Commissaire



Sheila G. Purdy
Commissaire

APPENDIX C

CHRONOLOGY

KLUANE FIRST NATION:
KLUANE NATIONAL PARK AND KLUANE GAME SANCTUARY INQUIRY

1 **Planning conference** — Vancouver, February 11, 2000
Vancouver, October 18, 2001

2 **Community session** — Burwash Landing, Yukon, February 6, 7, and 8, 2002

The Commission heard from Deputy Chief Robin Bradasch, Ron Chambers, Alexander Dickson, Dennis Dickson, Gerald Dickson, Richard Dickson, Mary Easterson, Hank Jacquot, Agnes Johnson, Dorothy Johnson, Edward Johnson, George Johnson, Gloria Johnson, Grace Johnson, Joseph Johnson, Kathleen Johnson, Keith Johnson, Kirk Johnson, Lena Johnson, Luke Johnson, Mary Jane Johnson, Robert Johnson, Sam Johnson, Jr, Simon Johnson, Sharon Kabanak, Monique Martin, Justina Michel, Chief Dan Tlen, and Sam White.

Expert testimony — Burwash Landing, Yukon, February 8, 2002

The Commission heard from Dr Julie Cruikshank.

3 **Written and oral legal submissions**

Mandate challenge

- Submission on Behalf the Government of Canada, March 31, 2000
- Submission on Behalf of the Kluane First Nation, April 20, 2000
- Rebuttal Submission on Behalf of the Government of Canada, May 11, 2000
- Oral legal submissions, Vancouver, September 12, 2000
- Ruling, December 1, 2000

4 **Content of formal record**

The formal record of the Kluane National Park and Kluane Game Sanctuary Inquiry consists of the following materials:

- Exhibits 1–20 tendered during the inquiry
- transcripts of community session (3 volumes) (Exhibit 5A)

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