INDIAN CLAIMS COMMISSION

INTERIM RULING

Kluane First Nation Inquiry
Kluane Game Sanctuary and
Kluane National Park Reserve Creation

PANEL

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To the Indian Claims Commission
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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 O*utstanding 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 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:

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

[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.

> 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]

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

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[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.

[5] Chief Robert Johnson, Kluane First Nation, to David E. Osborn, Commisson Counsel, Indian Claims Commission, October 4, 1999.

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]

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

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[6] Jeffrey A. Hutchinson, Counsel, DIAND Legal Services, Department of Justice Canada, to Ralph Keesickquayash, Associate Counsel, Indian Claims Commission, January 28, 2000. Underlined emphasis in original.

(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:

> 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 govemment 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

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[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*).

[9] *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 179.

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

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.

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

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

12 ICC Transcript, September 12, 2000, pp. 139-40 (Dave Joe).

13 ICC Transcript, September 12, 2000, pp. 100-1 (Dave Joe).

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 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

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[14] ICC Transcript, September 12, 2000, pp. 154-56 (Aly Alibhai).

[15] ICC Transcript, September 12, 2000, p. 175 (Aly Alibhai).

[16] DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993).

[17] ICC Transcript, September 12, 2000, pp. 139-40 (Dave Joe).

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 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

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[18] ICC Transcript, September 12, 2000, p. 150 (Dave Joe).

[19] ICC Transcript, September 12, 2000, p. 142 (Dave Joe).

[20] DIAND, *Umbrella Final Agreement, Council for Yukon Indians* (Ottawa, 1993), 15-16.

> informed that the negotiator acting for the government side has always maintained ... that this is in the nature of a Comprehensive Claim.[21]

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

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21 ICC Transcript, September 12, 2000, pp. 159-60 (Aly Alibhai).

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

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

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

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.

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

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

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.

[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 p. 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 A.C. 401, at pp. 410-11 (the *Star Chrome* case)."

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 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.

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

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, 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.

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]

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

[29] DIAND, *In All Fairness: A Native Claims Policy* (Ottawa, 1981), 19 and 21. Emphasis added.

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 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.

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30 ICC Transcript, September 12, 2000, p. 132 (Dave Joe).

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

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 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 that 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

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

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 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, that Part Two of the

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[33] *Outstanding Business*, 7, 9, 11, and 13; reprinted (1994), 1 ICCP 171 at 174-76.

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 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

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

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?

O*utstanding 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]

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:

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

[36] ICC Transcript, September 12, 2000, p. 10 (Aly Alibhai).

> **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]

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

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37 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3. Emphasis added.

38 *Rupert's Land and North-Western Territory Order*, June 23, 1870.

39 *Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

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]

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

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[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).

[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.

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 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]

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

[46] Indian Claims Commission, *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.

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 fiduciary duty as a separate cause of action in the context of the Crown-aboriginal relationship. It is therefore understandable that fiduciary duty was not expressly referred 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 Northem 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

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

> 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]

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.*

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[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).

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.

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

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 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

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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).

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 unextinguished 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]

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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.

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.

> 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 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,

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[64] Indian Claims Commission, *Long Plain First Nation Inquiry, Loss of Use Claim* (Ottawa, February 2000), 28-29.

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.