



# LANDMARK

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*"I have heard the elders say that when the terms of the treaties were deliberated the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."*

Ernest Benedict, Mohawk Elder  
Akwesasne, Ontario  
June 1992

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Landmark is published by the Indian Claims Commission to inform readers of Commission activities and developments in specific claims. Landmark and other ICC publications are also available on our website at: [www.indianclaims.ca](http://www.indianclaims.ca)

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## CHARTING THE CLAIM INQUIRY PROCESS: HOW THE ICC'S SYSTEM WORKS



The ICC travels to the First Nation community during its inquiry process. The community session promotes a broader understanding of the claim from the First Nation's perspective. In 1995, ICC staff were honoured to attend the opening of the Longhouse at 'Namgis First Nation (BC).

Over the years, readers have called the Indian Claims Commission (ICC) to inquire about the Commission's process. Many have wanted to know what is involved in submitting a request for inquiry to the Commission. This article outlines the stages involved in an inquiry, from the moment a First Nation makes contact with the ICC to the point at which the Commission issues its report on the claim. A future issue of *Landmark* will contain more in-depth information about ICC's mediation services.

# THE ICC'S INQUIRY PROCESS

# 1

## STAGE ONE REQUEST FOR INQUIRY

A First Nation with a rejected or stalled claim writes to the Commission to request an inquiry. The Commission assesses the claim.

# 2

## STAGE TWO PREPARATION FOR INQUIRY

The Commission brings representatives of the First Nation and government together face-to-face, often for the first time, to discuss the rejected claim, plan research, clarify legal issues.

# 3

## STAGE THREE COMMUNITY SESSION

Commissioners visit the First Nation to hear oral testimony from elders and community members.

# 4

## STAGE FOUR WRITTEN AND ORAL SUBMISSIONS

Lawyers for the First Nation and government provide submissions on facts and law.

# 5

## STAGE FIVE FINAL INQUIRY REPORT

Based on the evidence presented during the inquiry, Commissioners release their findings and recommendations to the federal government, the First Nation, and the public.

## ICC'S DUAL MANDATE: INQUIRIES AND MEDIATION

It is important to keep in mind that the Commission has two basic functions: inquiries and mediation. Inquiries may take place—at the request of a First Nation—when one of the following two conditions are met: (1) the Minister of Indian and Northern Affairs Canada (INAC) has rejected the First Nation's claim, or (2) the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

Mediation refers to any form of dispute resolution service the Commission provides to assist the parties in settling a dispute by mutual agreement. It is a flexible and informal process that can be provided or arranged by the Commission, with the consent of both parties, to advance negotiations at any point during the specific claims process. The First Nation and Canada can ask the Commission to assist in mediating any issue relating to a specific claim.

## STARTING THE INQUIRY PROCESS

To start the inquiry process, the First Nation simply contacts the Commission (see address at the end of this article). Typically, the Chief or the First Nation's counsel will write to Commission Counsel (the lawyer employed by the Commission who heads its legal and research unit and is responsible for all legal matters) formally asking for an inquiry. The request must include the following documents:

- a Band Council Resolution (BCR) requesting the inquiry and authorizing the release of relevant documents to the Commission from Canada
- a copy of the original claim submission to the Minister
- a copy of the Minister's letter of rejection (in the case of a rejected claim)
- a copy of the Minister's letter of acceptance, in the case of an accepted claim in which compensation criteria are at issue



Once a request for inquiry has been accepted, a panel of Commissioners is struck. The panel hears evidence and usually travels to the community to hear from the First Nation's elders.

It is a mistake, however, to think that submitting these documents guarantees an inquiry. It does not. No claim is automatically accepted by the Commission. If a request for an inquiry is denied, Commission Counsel informs the First Nation of Commissioners' decision to reject the request.

Once Commission Counsel receives the documents, he or she asks the research unit to prepare a Claim Assessment Report (CAR) on which the Commission Counsel bases his or her recommendation to the Commissioners as to whether to proceed with the request. The CAR includes background information, related to the inquiry, assembled to help Commissioners arrive at a decision.

When the Commissioners have decided to proceed with an inquiry, the Chief Commissioner signs a notice that is sent to the First Nation, the Minister of Indian Affairs and the Minister of Justice. The notice informs the parties that an inquiry has been requested of, and agreed to by, the Commission. The First Nation and INAC are then asked to provide copies of the documents relevant to the claim. All documents received are organized in chronological order,

compiled digitally in CD-ROM format and distributed to the parties. Commission staff assist in identifying any gaps in the historical documents that may need further research.

At the same time, Commissioners establish a panel from among themselves to conduct the inquiry, that is, hear evidence, review submissions and make a final report on their findings. A standard panel consists of three members.

A second letter is sent out shortly after the notice previously referred to. One copy goes to the First Nation or its legal counsel; the other goes to legal counsel involved in specific claims, both at INAC and at the Department of Justice.

The purpose of these letters is to obtain the names of lawyers representing each side, as well as all documentation relevant to the claim. At this point in the process, the inquiry moves into a series of four distinct stages: preparation for the inquiry; community session to hear the evidence; written and oral submissions by counsel on behalf of the parties; and preparation of a report by the panel of Commissioners.

## PREPARATION FOR INQUIRY

The first stage following the initial request for an inquiry is known as the preparation for inquiry.

This is the planning stage, the point at which the First Nation should expect to become involved in the inquiry. It is important to note that, throughout the planning stage, Commission counsel reminds the parties of the possibility of using mediation or of other opportunities to resolve the inquiry or issues within it.

The inquiry process is planned jointly. To facilitate discussion, Commission staff prepare information and background materials that are sent to the parties in advance. Lawyers for each of the parties are asked to state what issues they think the inquiry should address. Commission staff, consulting with the parties, work to draw up a single list of issues.

Commission Counsel arranges and chairs a planning conference at which the parties meet, usually for the first time. The conference is scheduled about 12 weeks after the Commission has accepted a request for inquiry.

The main purposes of the planning conference are to identify the relevant historical and legal issues; openly discuss the positions of the parties on the issues; and attempt to come up with a single set of issues to be addressed in the inquiry. If this last goal is not possible, issues will be referred to the panel for its decision. The referral of the decision may be done in writing, or the panel may ask for oral submissions, that is, the panel asks to hear the parties' arguments at another planning conference. Except for cases such as this, the panel does not attend planning conferences. Only in exceptional circumstances are more than two planning conferences held in a single inquiry.

Other objectives of the planning conference are to discuss the historical documents the parties intend to rely on to make their respective cases; determine whether parties intend to call elders, community members or experts as witnesses; and set time frames for any outstanding commitments and the remaining stages of the inquiry.



Commissioner Sheila Purdy (middle) at an Esketemc First Nation (BC) site visit in 2000.

A site visit can be requested so Commissioners and the parties better understand the evidence presented in the community session.

When further research is needed, the Commission encourages the parties to agree on joint research, rather than having each side conduct separate research on the same matter, which is an unnecessary duplication of effort and costs.

Unless there is a reasonable prospect of resolving the dispute at this stage, Commission staff prepares for a staff visit to the community to inform the First Nation's membership about the process; to ask the First Nation for guidance on the role of elders and the culture and traditions of the community; to meet with elders to get summaries of their evidence (called "willsays"); and to make arrangements for the next stage, the community session.

## COMMUNITY SESSION

The primary purpose of a community session is to obtain oral history evidence from elders of the First Nation. The First Nation determines who is an elder for the purpose of the inquiry. This step in the ICC's process is both unique and important. It is unique because it allows for Commissioners and staff to travel to the First Nation community to hear directly from elders and other members of that community, rather than (a) expect the First Nation to travel to Ottawa to meet with the Commission, or (b) conclude the inquiry without having heard the First Nation's witnesses. It is important because it enables the ICC to ensure that the testimony and oral tradition of the elders are recorded, transcribed and used to supplement available written historical documents.

The ICC broke new ground in this field when it gave careful consideration in its deliberations to the spoken word, significant because First Nations did not record their histories in writing but passed them on verbally from one generation to the next.

At times, a site visit to the First Nation community may be necessary to enable the panel and the parties to understand better the evidence to be presented. The site visit may be held at the request of one of the parties or at the discretion of the panel.

The community session encourages a much greater level of participation by the First Nation and is carried out in a manner that is respectful of the First Nation's language, culture and traditions. It promotes a broader understanding of the claim from the First Nation's perspective. Community members may speak to the panel in one of the two official languages or in their aboriginal language. The Commission provides translation services in both English and French at Commission hearings when required. Where testimony is to be given in an aboriginal language, the ICC will use an interpreter provided by the First Nation to translate simultaneously for the panel.

Only Commissioners and the Commission's counsel can ask questions at this session and no cross-examination of elders is allowed. The legal counsel for a party may, however, put questions to the elder through the Commission's counsel. Counsel for the Commission also consults with both parties before and during the session to establish what questions and lines of inquiry will be permitted. In some instances, expert witnesses may present evidence in a separate session, provided they have supplied a written report in advance and Commissioners have asked that they attend in person. Unlike elders, expert witnesses are subject to cross-examination.



During the community session, Commissioners and staff hear directly from elders and other members of the community, as was done at Waterhen Lake First Nation in June 1994 as part of the inquiry into the Primrose Lake Air Weapons Range.

## WRITTEN AND ORAL SUBMISSIONS

Once information has been gathered from elders, community members, expert witnesses and historical documents, the process moves on to the fourth stage. Legal counsel for the parties are asked to provide written and oral submissions to the Commissioners on the facts and on the law to assist the panel in determining whether the Crown owes an outstanding lawful obligation to the First Nation. The oral session normally takes a day and is held in a neutral location near the First Nation community. These submissions are recorded and transcribed – copies are sent to the parties – to help the panel make its decision.

## COMMISSIONERS' REPORT

The last stage of the ICC's process is the preparation of the panel's report. After a careful review of the evidence and the legal arguments made during the inquiry, the Commission panel deliberates and reports on its findings. It is these

findings that will ultimately lead to the Commission's recommendation(s) concerning the question of whether the Crown has an outstanding lawful obligation to the First Nation.

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*The Commissioners' recommendations are not binding on either Canada or the First Nation but the report is intended to assist in resolving the dispute.*

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The Commissioners' final report is released in both official languages to the parties involved in the claim and to the public. The Commissioners' recommendations are not binding on either Canada or the First Nation but the report is intended to assist in resolving the dispute. The release of the report marks the end of the inquiry.

For more information, please call or write to:

**Indian Claims Commission**

P.O. Box 1750, Station B, Ottawa, ON, K1P 1A2

Telephone: (613) 943-2737 Fax: (613) 943-0157

Website: [www.indianclaims.ca](http://www.indianclaims.ca)



The ICC sometimes holds a press conference upon the release of an inquiry report, as it did in 2000 for the release of the *Long Plain First Nation: Loss of Use Inquiry* report.

# FACTS ON CLAIMS:

## WHAT IS A SURRENDER CLAIM?

This is the second in our continuing series designed to help readers understand some of the terms that define the work of the Commission. In the last issue, we looked at Indian land claims. In this issue, we examine surrender claims.

The *Indian Act* defines a surrender as an agreed-upon transfer of Indian land to the Government of Canada, usually for money. Under the *Indian Act*, reserve land can only be sold to the federal government, which may then sell or lease the land on behalf of the Indian band or First Nation.

These surrender rules date back to the *Royal Proclamation of 1763* when King George III of England directed that Indian land could not be sold directly to private individuals but only to the Crown through the agreement of the Indian band at a public meeting. This requirement was to prevent “great frauds and abuses,” and it created within government an ongoing fiduciary, or trust-like, responsibility to protect Indians and Indian lands.

## TWO TYPES OF SURRENDER CLAIMS

Land surrender claims are **specific claims**. According to the 1973 federal Specific Claims Policy, they arise if the land surrender was taken incorrectly. Surrender claims may arise if there was a **technical breach** of the *Indian Act* or if the surrender was not in the best interests of the First Nation – that is, if there was a **fiduciary breach** of the government’s obligation.

### TECHNICAL BREACH

According to the *Indian Act*, to be valid a land surrender must be approved by a majority of Indian band members eligible to vote at a public meeting called for that purpose. Until 1951, only men over 21 years of age could vote.

*Example: Blood Tribe/Kainaiwa of Alberta*  
– 1889 surrender

In 1889, Canada accepted a surrender of 440 acres of land reserved under Treaty 7 without a public vote or payment. In April 1998, Canada agreed that it had taken the land in breach of the *Indian Act*, and it agreed to negotiate compensation. The land could not be returned because it is now privately owned.

### FIDUCIARY BREACH

According to the law, surrender claims may arise if, for example, the First Nation asserts that the surrender was not in its best interest or if the land was obtained through “tainted” dealings in breach of the federal government’s fiduciary obligation to First Nations.

*Example: Moosomin First Nation of Saskatchewan*  
– 1909 surrender

Canada took, against the First Nation’s express wishes, a surrender of 15,360 acres of prime agricultural land, reserved under Treaty 6, for sale to non-aboriginal farmers. As a result, the community was moved to land that was not suitable for farming, and its livelihood was destroyed. In December 1997, the government agreed that it had not acted in the First Nation’s best interests and accepted this claim for negotiation of a settlement. In October 2003, Canada and the First Nation signed a settlement agreement for \$41 million in compensation.

Background: Signed by King George III, the *Royal Proclamation of 1763* formalized a process through which only the Crown could obtain Indian lands through agreement with or by purchase from First Nations.

## PRAIRIE SURRENDERS: THE HISTORY OF MANY SURRENDER CLAIMS

Between 1871 and 1921, Canada and First Nations signed 11 treaties covering much of western and northern Canada. The government sought clear title to the land to open the west to settlement in exchange for reserves and other promises. For First Nations, reserves were crucial to protecting their way of life. For Canada, reserves provided a way of converting First Nations from hunting to farming.

Yet, between 1886 and 1911, about 21 per cent of reserve land was surrendered back to Canada. By the 1930s, Canada had taken more than 100 surrenders of reserve land on the Prairies. Most surrender claims now filed with Indian and Northern Affairs Canada originate from these land deals.

At the turn of the century, many settlers had come to see Indians and Indian reserves as standing in the way of “progress.” Farmland in Ontario, Quebec and the Maritimes was hard to come by, and people there saw reserve land in the Prairies as a “waste.” Land speculators bought cheap land in blocks, reselling it at a profit. Often these speculators pressured the government to seek the surrender of reserve land for sale on the open market; in many cases, speculators sought land that First Nations were already farming



In October 2003, Canada and the Moosomin First Nation signed a settlement agreement for \$41 million in compensation. Chief Mike Kahpeysawat (left), and Chief Federal Negotiator Silas Halyk (right).

successfully. Speculators were bankers, lawyers and businessmen; others were government employees with a knowledge of the reserve land’s agricultural value.

Many First Nations, suffering from disease, the end of the buffalo hunt and federal policies that restricted their freedom of movement and access to legal advice, could not prevent the surrender of their reserve land. In some cases, it is questionable whether First Nations understood what government officials meant when they asked for the surrender of reserve land, because of difficulties in translating European concepts of ownership of land into aboriginal languages. Many land surrenders from this period have been proven unlawful under the federal government’s 1973 Specific Claims Policy, and Canada and First Nations continue to deal with this legacy.



Glenbow Archives NA-1954-1

Adhesion to Treaty 6, Rocky Mountain House, Alberta.



## ICC APPOINTS EXECUTIVE DIRECTOR

Alan Winberg was appointed Executive Director of the Indian Claims Commission on December 1, 2004.

In making the announcement, Chief Commissioner Renée Dupuis said the Commission would benefit from his extensive experience as a manager and an administrator: “Mr Winberg brings to the Commission a deep knowledge of government operations and a track record of working successfully with stakeholders, central agencies and departments to achieve results.”

Mr Winberg’s 27-year career in the public sector includes his most recent position as Senior Visiting Fellow, Management Practices, at the Canada School of Public Service, previously known as the Canadian Centre for Management Development.

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*“Mr Winberg brings to the Commission a deep knowledge of government operations and a track record of working successfully with stakeholders, central agencies and departments to achieve results.”*

Chief Commissioner Renée Dupuis

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He has held numerous senior positions in the federal government, including that of Assistant Deputy Minister, Finance and Administration, at Human Resources Development. He has also had responsibility for advancing government-wide initiatives and management policies at the Treasury Board Secretariat and for policy development, planning and evaluation in several departments including the National Energy Board and Natural Resources Canada.



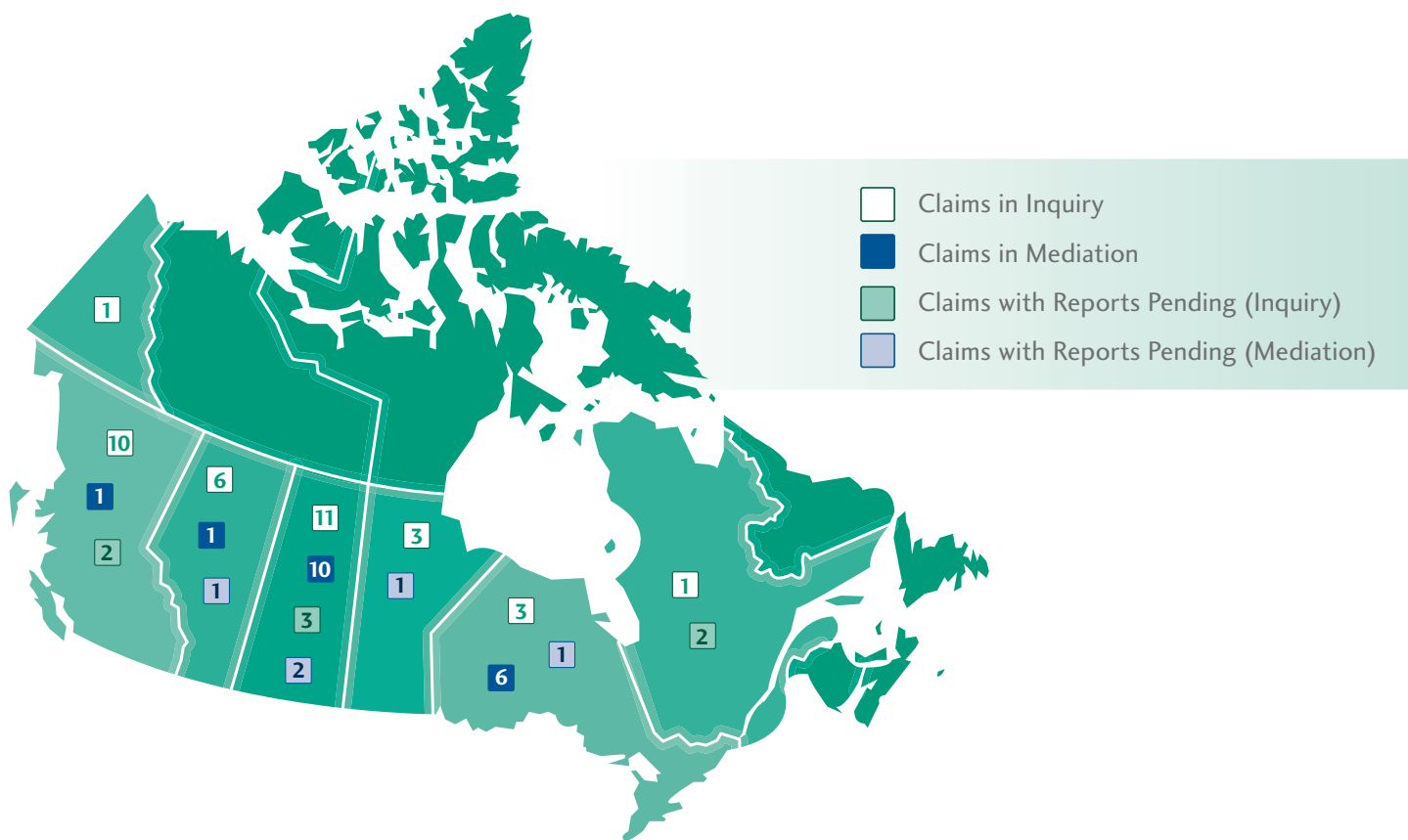
Alan Winberg, ICC's Executive Director.

From 1986 to 1989, Mr Winberg headed the Evaluation Directorate of Indian and Northern Affairs Canada, recommending ways to improve program management, program design, accountability and allocation of resources.

Prior to entering the public service, Mr Winberg was Professor in the Faculty of Administration at the University of Ottawa. He is a frequent, invited speaker at seminars and workshops in North America, Europe and Central America and has numerous publications on management and management practices to his credit.

Mr Winberg earned his Bachelor's degree in political science at the University of Pennsylvania and his doctoral degree in economics at the London School of Economics.

# CLAIMS CURRENTLY BEFORE THE ICC



## CLAIMS IN INQUIRY

Athabasca Chipewyan First Nation (Alberta)  
– Compensation criteria agricultural benefits

Blood Tribe/Kainaiwa (Alberta) – Big Claim

Carry the Kettle First Nation (Saskatchewan)  
– 1905 surrender

Cowessess First Nation (Saskatchewan)  
– 1907 surrender - phase II

Esketemc First Nation (British Columbia)  
– Wright’s meadow pre-emption claim

James Smith Cree Nation (Saskatchewan)  
– Treaty land entitlement

\* Kluane First Nation (Yukon)  
– Kluane Park and Kluane Game Sanctuary

Lheidli T’enneh Band (British Columbia)  
– Surrender Fort George IR 1

Little Shuswap Indian Band, Neskonlith First Nation and Adams Lake First Nation (British Columbia)  
– Neskonlith reserve

Lower Similkameen Indian Band (British Columbia)  
– Victoria, Vancouver and Eastern Railway right of way

Lucky Man Cree Nation (Saskatchewan)  
– Treaty land entitlement - phase II

\* Mississaugas of the New Credit First Nation (Ontario)  
– Crawford purchase

\* Mississaugas of the New Credit First Nation (Ontario)  
– Gunshot Treaty

Muskowekwan First Nation (Saskatchewan)  
– 1910 and 1920 surrender

Nadleh Whut’en Indian Band (British Columbia)  
– Lejac School

\* Ocean Man Band (Saskatchewan)  
– Treaty land entitlement

\* *in abeyance*

Opaskwayak Cree Nation (Manitoba) – Streets and lanes

Pasqua First Nation (Saskatchewan) – 1906 surrender

Paul First Nation (Alberta) – Kapasawin townsite

Red Earth and Shoal Lake Cree Nations (Saskatchewan)  
– Quality of reserve lands (agriculture)

Roseau River Anishinabe First Nation (Manitoba)  
– 1903 surrender

Sakimay First Nation (Saskatchewan)  
– Treaty land entitlement

Sandy Bay Ojibway First Nation (Manitoba)  
– Treaty land entitlement

Siksika First Nation (Alberta) – 1910 surrender

Stanjikoming First Nation (Ontario)  
– Treaty land entitlement

\* Stó:lō Nation (British Columbia) – Douglas reserve

Sturgeon Lake First Nation (Saskatchewan)  
– 1913 surrender

Touchwood Agency (Saskatchewan)  
– Mismanagement (1920-1924)

Treaty 8 Tribal Association [Blueberry River and Doig  
River First Nations] (British Columbia)  
– Highway right of way - IR 72

Treaty 8 Tribal Association [Saulteau First Nation]  
(British Columbia)  
– Treaty land entitlement and land in severalty claims

Treaty 8 Tribal Association [seven First Nations]  
(British Columbia) – Consolidated annuity

U'Mista Cultural Society (British Columbia)  
– Prohibition of the Potlatch

Whitefish Lake First Nation (Alberta)  
– Agricultural benefits Treaty 8

\* Whitefish Lake First Nation (Alberta)  
– Compensation criteria - agricultural benefits Treaty 8

Wolf Lake First Nation (Quebec) – Reserve lands

## CLAIMS IN FACILITATION OR MEDIATION

Blood Tribe/Kainaiwa (Alberta) – Cattle claim

Chippewa Tri-Council (Ontario)  
– Coldwater-Narrows reserve

Cote First Nation (Saskatchewan) – Pilot project

Cowessess First Nation (Saskatchewan) – Flooding

Fort Pelly Agency (Saskatchewan) – Pelly Haylands

Fort William First Nation (Ontario) – Pilot project

Gordon First Nation (Saskatchewan)  
– Treaty land entitlement

Michipicoten First Nation (Ontario) – Pilot project

Missanabie Cree First Nation (Ontario)  
– Treaty land entitlement

Mississaugas of the New Credit First Nation (Ontario)  
– Toronto purchase

Mohawks of the Bay of Quinte (Ontario)  
– Culbertson tract

Muscowpetung First Nation (Saskatchewan)  
– Flooding claim

Muskoday First Nation (Saskatchewan)  
– Treaty land entitlement

Nekaneet First Nation (Saskatchewan) – Treaty benefits

Pasqua First Nation (Saskatchewan) – Flooding claim

Skway First Nation (British Columbia)  
– Schweyey Road claim

Sturgeon Lake First Nation (Saskatchewan)  
– Treaty land entitlement

TLE Common Table (Saskatchewan)  
– Treaty land entitlement

\* *in abeyance*

## CLAIMS WITH REPORTS PENDING (INQUIRY)

- Conseil de bande de Betsiamites (Quebec)
  - Bridge over the Betsiamites River
- Conseil de bande de Betsiamites (Quebec)
  - Highway 138 and Betsiamites reserve
- Cumberland House Cree Nation (Saskatchewan)
  - Claim to IR 100A
- James Smith Cree Nation (Saskatchewan)
  - Chakastaypasin IR 98
- James Smith Cree Nation (Saskatchewan)
  - Peter Chapman IR 100A
- Taku River Tlingit First Nation (British Columbia)
  - Wenah specific claim
- Williams Lake Indian Band (British Columbia)
  - Village site

## CLAIMS WITH REPORTS PENDING (MEDIATION)

- Blood Tribe/Kainaiwa (Alberta) – Akers surrender
- Chippewas of the Thames First Nation (Ontario)
  - Clench defalcation
- Keeseekoowenin First Nation (Manitoba)
  - 1906 lands claim
- Qu'Appelle Valley Indian Development Authority (Saskatchewan) – Flooding claim
- Touchwood Agency (Saskatchewan)
  - Mismanagement 1920-1924

\* *in abeyance*

## PUBLICATIONS

The ICC has recently published volume 17 of the *Indian Claims Commission Proceedings* [(2004) ICCP 17]. It includes the following inquiry reports and responses from the Minister of Indian and Northern Affairs Canada:

**Reports:** Kahkewistahaw First Nation, 1907 Surrender Claim (Mediation); Alexis First Nation Inquiry, TransAlta Utilities Rights of Way Claim; Chippewa Tri-Council Inquiry (Beausoleil First Nation, Chippewas of Georgina Island First Nation, Chippewas of Mnjikaning (Rama) First Nation), Coldwater-Narrows Reservation Surrender Claim; Mississaugas of the New Credit First Nation Inquiry, Toronto Purchase Claim; Canupawakpa Dakota First Nation Inquiry, Turtle Mountain Surrender Claim.

**Responses:** Responses of the Minister of Indian Affairs and Northern Development to the Lax Kw'alaams Indian Band Inquiry, to the Friends of the Michel Society 1958 Enfranchisement Inquiry, and to the Roseau River Anishinabe First Nation Medical Aid Inquiry.

To request a copy, call (613) 943-2737, or fax (613) 943-0157, or e-mail: [feedback@indianclaims.ca](mailto:feedback@indianclaims.ca)

