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

CONTENTS

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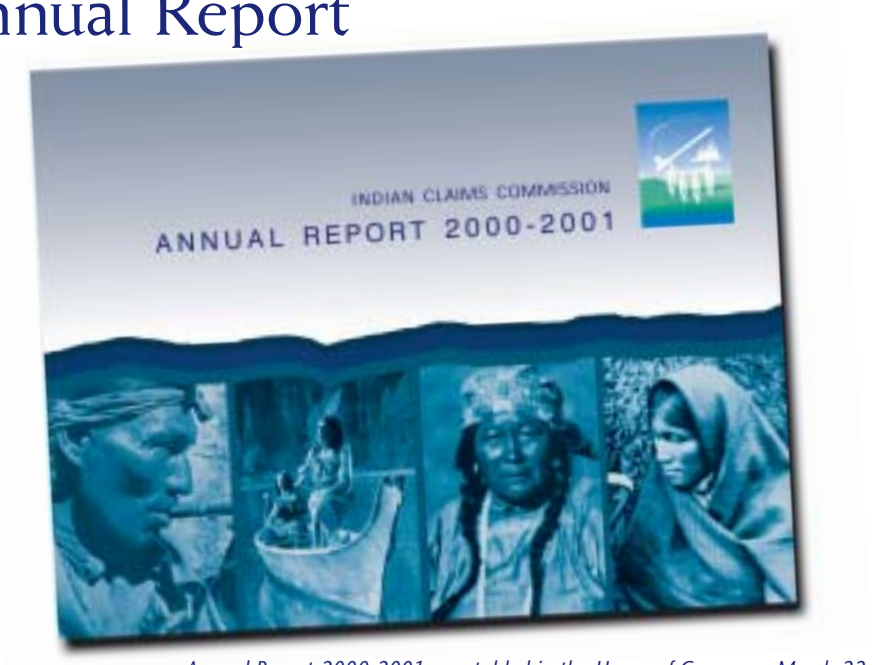
Landmark will now be cited by volume, number, season and year.

Indian Claims Commission Releases its 2000-2001 Annual Report



Annual Report 2000-2001 was tabled in the House of Commons March 22, 2002.

The Indian Claims Commission's Annual Report for the year 2000-2001, tabled in the House of Commons earlier this spring, makes five recommendations for improving the specific land claims process.

The new set of recommendations urges both Canada and First Nations to set up formal negotiations training for their respective negotiators; calls upon Canada to make greater use of the Commission's mediation services; advocates the establishment of a database that would contain common information applicable to similar claims, eliminating the need for land appraisals and loss-of-use studies for each and every claim; suggests that Canada review pilot projects chaired by the Commission and incorporate their positive aspects into the current claims process; and finally, urges Canada to do more to become a committed and active party in the land claims settlement process.

Commenting on the call for establishment of an independent claims body, Commissioner Dan Bellegarde

said that there is an onus on both parties to move expeditiously in this area: "Pursuant to the partnering efforts of the Joint First Nations/Canada Working Group on Specific Claims and a mutual desire for justice and fairness in the settlement of land claims, it is also incumbent on First Nations leadership to cooperate with government."

The report renews the call for establishment of an independent claims body which would "remove the bottleneck created by the current policy and go a long way towards settling the hundreds of existing and future land claims in a just and equitable manner." It notes that the settlement of specific claims remains "a painfully slow process" and does not hold out much hope for change in the future, stating that "we have little reason to believe that this situation will improve." On June 13, 2002, the federal government tabled Bill C-60, the *Specific Claims Resolution Act*, calling for the creation of the Canadian Centre for the Independent Resolution of First Nations Specific Claims.

A key message is the need for more public awareness on the land claims issue. "Clearly, the Commission and the federal government need to do more to educate and inform the public about the history of specific claims, the law governing these and their impact on Canadian society." It points out that the Commission itself is trying to improve the situation by taking every opportunity to talk to the public about its work.

The Commission completed three inquiries and issued five reports in 2000-2001. The report states that since 1991, the Commission has completed 55 inquiries and reported on 52 of these. Of the 55 inquiries completed, 23 were settled or accepted for negotiation.

One of the more significant reports was on the claim by Manitoba's Roseau River Anishinabe First Nation. This is the first time a claim of this nature has come to the Commission. Roseau River is unique in that it questions whether Canada is lawfully obligated to compensate the First Nation for having deducted payments for medical aid from the band's trust account. "The subject of medical aid deserves a comprehensive review by both Canada and First Nations", say the Commissioners in their message to legislators.

PUBLICATIONS

The Indian Claims Commission has revised its *Information Guide*, geared toward commonly asked questions about the inquiry process, that outlines how the Commission functions. This booklet is a good starting point for First Nations, First Nation organizations, government, students or anyone interested in the area of specific land claims. To receive a copy, contact Communications at:

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Speakers Bureau

TAKING THE COMMISSION'S MESSAGE TO THE PUBLIC

Spring has been a busy time in terms of speaking appearances by Commissioners. As part of the Commission's attempt to increase public awareness of its role in the settlement of specific land claims, Commissioners have been bringing the ICC's message to various university, business, and professional organizations across the country.

Chief Commissioner Phil Fontaine spoke to law students at the University of Ottawa in early March about the need to honour treaties between First Nations and the Government of Canada. He pointed out that one of the Commission's most valuable roles is to help bring First Nations and government representatives together to talk about each claim. "Essentially, our work is very much about helping government and First Nations honour the treaty and trust relationships that were founded hundreds of years ago," he told the students. "The treaties have been upheld in modern courts as legally binding. Specific claims are therefore based in law – they are outstanding legal obligations that must be met."

Also in March, Commissioner Dan Bellegarde represented the ICC at a conference on aboriginal law held in Vancouver by the Continuing Legal Education Society of British Columbia. He emphasized the urgent need to settle land claims as quickly as possible, given the harmful impact on both First Nations and the Canadian economy of dragging out settlements over long periods of time. Some settlements have taken up to 15 years or more, he said. The government recently denied a claim by the Kamloops First Nation, 13 years after it was submitted: "It's a simple fact that the cost of claims settlements will spiral dramatically from year to year and from generation to generation if we delay meeting our obligations."

"Let there be no doubt about it: rapid settlement of specific claims will contribute to the prosperity of all Canadians," said Commissioner Bellegarde at the Aboriginal Law Conference 2002 held in Vancouver in March.

In the ICC's ongoing efforts to inform the public, Chief Commissioner Phil Fontaine and Commission Counsel Kathleen Lickers met with the editorial board of the Calgary Herald.

Chief Commissioner Fontaine has also been meeting with media representatives, either for interviews or in more formal editorial board settings. He addressed the Nelson Rotary Club, and then met with a reporter from the local newspaper, which ran a front-page story on the Commission's meeting in the town located in the British Columbia interior. "I think one would be wrong to underestimate the importance of the ICC in terms of one major challenge that we face as a country," the Chief Commissioner told the *Nelson Daily News*, "and that is the eradication of poverty among aboriginal people. I think the Commission can play an important role in that process."

During the Commission's meeting in Calgary at the end of March, the Chief Commissioner met with an editorial board of the *Calgary Herald*. He said that the current specific land claims process is unfair, constituting a clear conflict of interest on the part of the government, and called for an improved, speedier process. The government has stated its intention to establish an independent claims body to replace the ICC, but "we need a body that has some teeth, we need a body that is independent as well as neutral, and we need a body that can make decisions," he declared, adding that the federal government had previously promised First Nations that it would set up "an independent claims commission to facilitate the resolution of all claims."

Commission's TLE Work Sparked Key Policy Change

Fort McKay – Treaty Land Entitlement

Since its inception in 1991, the Indian Claims Commission has made significant contributions to the specific claims process and it continues to do so today. The Commission's reports have contributed to an evolving area of policy on aboriginal and treaty rights and the nature of the Crown's fiduciary relationship with First Nations. The Commission's 1995 report on the Fort McKay First Nation's claim, for example, stands out as an illustration of this ability to bring about necessary change.

Among the Commission's proudest achievements, the Fort McKay decision caused the government to amend its policy on treaty land entitlement (TLE). The new policy essentially changed the manner in which Indians belonging to a band were counted in order to determine how much land was owed to the band. It took into account the migration that once marked the survival lifestyle of First Nations people by including in the count those persons who had married into the band, transferred to the band from other bands, or new adherents to treaty, none of whom had previously received treaty land with any other band.

The Fort McKay First Nation is located 105 km north of Fort McMurray, Alberta, in an area known for its rich oil sands. As a result of the 1896 Klondike gold rush, itinerant prospectors and traders encroached upon the territory of Cree and Dene peoples in the area who depended upon unrestricted access to the resource base of the vast boreal forest.

In 1899, to reduce potential conflict between the aboriginal peoples and the growing numbers of white settlers in the region and to pursue Canada's growing interest in the vast resources of the north, the federal government negotiated Treaty 8. Traditional lifestyles of aboriginal peoples in the area centred on small family groups, not bands; in fact, the very concepts of bands and property were unknown to the Cree and Chipewyan people of that period.

Through Treaty 8, the Indians surrendered their interest in almost 325,000 square miles of land. They were assured that reserves of land, based on a formula of 640 acres for a family of five, would be set aside for each band. To make treaty payments easier, both geographically and administratively, the government arbitrarily placed all Indians of the area on a single paylist, creating the Cree-Chipewyan Band of Fort McMurray. By 1925, with the passage of time and the growing numbers of people receiving annuity payments, problems had developed and it became necessary to break up the grouping. The Cree-Chipewyan Band of Fort McMurray was again divided in 1950, creating the present-day Fort McKay and Fort McMurray Bands.

Until 1993, government policy dictated that each treaty Indian band was entitled to an amount of land based on the number of its members. If the amount of land it received was less than what it was entitled to under the terms of the treaty, then an outstanding treaty land entitlement existed. This entitlement is referred to as a "shortfall."

In 1993, based on a new interpretation by Canada of its lawful obligation, latecomers to a band and landless transfers were excluded from the entitlement. This policy rejected what was thought to be the established principle that *every treaty Indian* is entitled to be included in an entitlement calculation. The government based its

Created by the government in 1899 to simplify administration, then divided in 1950, the Cree-Chipewyan Band of Fort McMurray became the present-day Fort McKay and Fort McMurray Bands. Finalizing one-time census of these people was an issue the ICC had to tackle in its inquiry. Treaty 8 covers an area of 840,000 sq. km.

calculation of the amount of land owed to Fort McKay First Nation on a count of about 105 band members and therefore maintained that it owed the band 13,465 acres. The First Nation claimed that the landless transferees the Department of Indian Affairs added to its membership list had not been counted at date of first survey in 1915.

The First Nation's request for additional reserve lands for the shortfall in reserve acreage was rejected by the government of Canada. In 1994, the First Nation asked the Commission to conduct an inquiry into its rejected claim, maintaining that the additional band members had not received any allocation of land under Treaty 8 either before or after their transfer to Fort McKay.

In their report, issued in December 1995, then-Commissioners Jim Prentice and Carole Corcoran recommended that Canada negotiate a settlement with Fort McKay First Nation. They stated that the population for TLE purposes must include those on the paylist, as well as absentees, late adherents, and landless transfers as per date of first survey of the reserve in 1915, totalling 135. This meant that the government owed the band an additional 3,815 acres of reserve land. The report pointed out that the Fort McKay First Nation had absorbed a number of new members since its reserves had first been surveyed and noted: "None of these treaty Indians had ever had land set aside for them in a treaty land entitlement calculation for a band. If they are not counted for the entitlement of Fort McKay First Nation, then they will never be counted anywhere, ever."

"Because of the many TLE disputes across the Prairies, the Commission attempted to define principles which will assist in the settlement of other TLE cases in Canada."

In releasing the Fort McKay report, then-Commissioner Prentice sounded an optimistic note when he said: "Because of the many TLE disputes across the Prairies, the Commission attempted to define principles which will assist in the settlement of other TLE cases in Canada." He was proven to be correct. In April 1998, then-Minister of Indian Affairs and Northern Development, Jane Stewart, wrote to the Commission, thanking it "for your reports on TLE, which assisted Canada during the TLE policy review and permitted Canada to reconsider its position on TLE validation criteria."

What's New

JOANNE CAMERON-LARSEN
FINANCIAL OFFICER

Ms Cameron-Larsen is from Buckingham, Quebec. She has worked in various areas of finance for 13 years, 11 in the private sector and two as finance clerk for Elections Canada. Prior to joining the ICC last March, she worked for the Canadian Human Rights Commission as well as the Law Commission of Canada. In her new job as Financial Officer for the ICC, Ms Cameron-Larsen will be handling accounts payable, and preparing monthly financial management and audit trail reports, as well as financial status reports.

DENIELLE BOISSONEAU-THUNDERCHILD
ASSOCIATE LEGAL COUNSEL

Ms Boissoneau-Thunderchild is a citizen of two First Nations. On her mother's side she is Ojibway from the Garden River First Nation. Her father is Nehiyew (Plains Cree) from the Thunderchild First Nation in Saskatchewan. Consequently, she spent half her life growing up in Ontario and half in Saskatchewan. She received her undergraduate degree in human justice from the University of Regina, and graduated in law from the University of Toronto in 2000. She was called to the Bar on February 14, 2002. Ms Boissoneau-Thunderchild had articled with the ICC and has chosen to return as Associate Legal Counsel.

CANDICE S. METALLIC
ASSOCIATE LEGAL COUNSEL

A Mi'kmaq from the Listuguj Mi'kmaq Nation in Quebec, Ms Metallic joined the ICC in February as Associate Legal Counsel. After receiving her bachelor of arts degree in political science at Saint Mary's University in Halifax, she studied law at the University of British Columbia. Ms Metallic was called to the Bar in 1997 and practised aboriginal and treaty rights litigation with Blake Cassels & Graydon LLP in Vancouver. During that time, she worked on several important cases regarding aboriginal and treaty rights, most notably the *Delgamuukw* case.

Left to right: Joanne Cameron-Larsen, Denielle Boissoneau-Thunderchild, Candice Metallic, Tanya Parent, Antonio Dalpra (absent).

TANYA J. PARENT
LIBRARY ASSISTANT

Tanya J. Parent joined the ICC as Library Assistant in March 2002. In 1999 she graduated with honours from the Archives Technician Program at Algonquin College in Ottawa. Since graduating, Ms Parent has worked in administration for Health Canada, Fisheries and Oceans, and most recently, Solicitor General. She will be responsible for retaining and distributing information, keeping track of all periodicals, legal records and other files.

ANTONIO DALPRA
SPECIAL ASSISTANT TO THE CHIEF COMMISSIONER

Mr Dalpra, a Guarani from Argentina, has been involved in the design, management and monitoring of international and domestic community-based development projects – including training programs aimed at capacity building and community strengthening – for the past 15 years. He received his BA in economics, International Public Relations, from the *Universidad de Buenos Aires* in Argentina. Mr Dalpra joined the Commission as special assistant to the Chief Commissioner in April 2002.

ICC BIDS FAREWELL TO FORMER CO-CHAIR AND COMMISSIONER

Commissioners took time out from their meeting in Calgary on March 26 to bid farewell to Jim Prentice, former Co-Chair of the Commission who resigned as Commissioner last December. Commissioners Dan Bellegarde (seated centre) and Roger Augustine (right) listen as Mr Prentice (left) thanks the Commission for his parting gift, a wooden West Coast bent box.

CLAIMS IN INQUIRY

- Alexis First Nation (Alberta) - TransAlta Utilities Rights of Way
- Canupawakpa Dakota First Nation (Manitoba) - Turtle Mountain Surrender
- Chippewa Tri-Council (Ontario) - Coldwater-Narrows Reservation
- Conseil de bande de Betsiamites (Quebec) - Highway 138 and Betsiamites Reserve
- Conseil de bande de Betsiamites (Quebec) - Betsiamites River bridge
- 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
- James Smith Cree Nation (Saskatchewan) - Treaty Land Entitlement
- *Kluane First Nation (Yukon) - Kluane Games Sanctuary and Kluane National Park Reserve Creation
- Mississaugas of the New Credit First Nation (Ontario) - Toronto Purchase
- *Ocean Man First Nation (Saskatchewan) - Treaty Land Entitlement
- Paul Indian Band (Alberta) - Kapasawin Townsite
- Peepeekisis First Nation (Saskatchewan) - File Hills Colony
- Roseau River Anishinabe First Nation (Manitoba) - 1903 Surrender
- Sandy Bay Ojibway First Nation (Manitoba) - Treaty Land Entitlement
- Siksika First Nation (Alberta) - 1910 Surrender
- *Stanjikoming First Nation (Ontario) - Treaty Land Entitlement
- Sto:lo Nation (British Columbia) - Douglas Reserve
- Wolf Lake First Nation (Quebec) - Reserve Lands
- U'mista Cultural Society (British Columbia) - The Prohibition of the Potlatch

CLAIMS IN FACILITATION OR MEDIATION

- Blood Tribe/Kainaiwa (Alberta) - Akers Surrender
- Chippewas of the Thames (Ontario) - Clench Defalcation
- Cote First Nation No.366 (Saskatchewan) - Pilot Project
- Cote, Keeseekoose and Key First Nations (Saskatchewan) - Pelly Haylands
- Fort William First Nation (Ontario) - Pilot Project
- Kahkewistahaw First Nation (Saskatchewan) - 1907 Surrender
- Michipicoten First Nation (Ontario) - Pilot Project
- Moosomin First Nation (Saskatchewan) - 1909 Surrender
- Qu'Appelle Valley Indian Development Authority (Saskatchewan) - Flooding
- Standing Buffalo First Nation (Saskatchewan) - Flooding
- Thunderchild First Nation (Saskatchewan) - 1908 Surrender
- Touchwood Agency (Saskatchewan) - Mismanagement

** placed into abeyance at the request of the First Nation*

R.S.V.P.

"I would like to know what aboriginal rights, recognized by the Canadian Charter of Rights and Freedoms and the 1982 Constitution, apply to the Mi'kmaq."

Annie Duke, Sudbury, Ontario

Commissioner Renée Dupuis answers:

The Canadian Constitution was significantly altered in 1982 to recognize explicitly, for the first time, the rights of First Nations. Section 35 of the *Constitution Act, 1982*, embodies one such amendment. It recognizes and affirms two categories of rights specific to aboriginal peoples: aboriginal rights (deriving from the occupation and use of Canadian lands prior to the arrival of Europeans), and treaty rights (deriving from historical treaties or more recent treaties, such as land claims agreements). It also specifies that the aboriginal peoples of Canada include three groups: the Indians (which is the group to which the Mi'kmaq belong), the Inuit, and the Métis.

Another amendment introduced by the *Constitution Act, 1982*, relates to the *Canadian Charter of Rights and Freedoms* (which is Part I of the *Act*). Section 25 of the *Charter* ensures that, in interpreting the rights guaranteed under the *Charter*, the courts shall not infringe on any recognized constitutional right of aboriginal peoples of Canada.

These newly recognized rights were to have been defined in more concrete terms through a series of constitutional conferences held between 1983 and 1987 in which aboriginal representatives took part. The participants failed to reach a consensus on the practical interpretation of these rights (except to stipulate that rights deriving from land claims agreements enjoy the same guarantees as treaty rights). This political vacuum has meant that the courts (primarily the Supreme Court of Canada) have had to decide on a case-by-case basis what qualifies in concrete terms as an aboriginal or treaty right. Thus, in the *Marshall* decision, the Supreme Court held that Mi'kmaq have a treaty right to fish eel and to trade their catch for sustenance (as opposed to large-scale commercial fishing). The Supreme Court can only rule on the circumstances specific to the individual case it hears. Therefore, one cannot assume that the *Marshall* decision would apply to any other species of fish or shellfish, or that the rights recognized under the *Marshall* decision would automatically apply to all Mi'kmaq. In addition to *Marshall*, the Supreme Court has handed down a dozen or so judgments since 1990, dealing with the constitutional rights of the First Nations of Quebec, British Columbia, and Ontario.

Given the present situation, it is impossible to give a general answer regarding the constitutional rights of the Mi'kmaq. It is up to the Mi'kmaq to prove to a court that they hold aboriginal or treaty rights, in accordance with the criteria established by the Supreme Court, in each instance where they want to ensure that their rights prevail over federal and provincial legislation.

(Commissioner Renée Dupuis is a lawyer, author, essayist and lecturer, specializing in human rights and the rights of Canada's aboriginal peoples. She is the recipient of the 2001 Governor General's Literary Award, French Non-fiction, as well as Le prix du concours juridique 2001, Catégorie monographie, from the Fondation du Barreau du Québec. Renée Dupuis has had a private law practice in Quebec City since 1973. She was appointed Commissioner in March 2001).