

INDIAN CLAIMS COMMISSION

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS NESKONLITH DOUGLAS RESERVE INQUIRY

PANEL

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SUMMARY

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS NESKONLITH DOUGLAS RESERVE INQUIRY British Columbia

The report may be cited as Indian Claims Commission, *Neskonlith, Adams Lake, and Little Shuswap Indian Bands: Neskonlith Douglas Reserve Inquiry* (Ottawa, June 2008).

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

Panel: Commissioner S.G. Purdy (Chair), Commissioner D.J. Bellegarde,
Commissioner J. Dickson-Gilmore

British Columbia – Reserve Creation – Indian Settlement – Pre-emption – Joint Indian Reserve Commission; **Pre-Confederation Claim** – Reserve Creation; **Reserve** – Reserve Creation; **Fiduciary Duty** – Pre-Confederation Claim – Reserve Creation

THE SPECIFIC CLAIM

In March 1996, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that a reserve had been legally created for them in 1862 by the British Crown which was later unlawfully reduced. The federal government rejected the claim in March 1999. In May 2003, the Bands requested that the Indian Claims Commission (ICC) conduct an inquiry into their rejected claim. Following a planning conference, the ICC panel conducted a community session and site visit in July 2005. The panel issued an interim ruling in July 2006, declining to strike an expert report from the record, and later that month convened a hearing to examine the expert evidence of both parties. Having filed written submissions, the parties presented their legal arguments on June 19, 2007.

BACKGROUND

James Douglas was Governor of the mainland colony of British Columbia between 1858 and 1864, in the period prior to British Columbia's entry into Confederation. In 1860, Governor Douglas implemented a pre-emption law allowing settlers to acquire up to 160 acres of unoccupied Crown land. The law exempted from pre-emption any land that was an Indian reserve or settlement, a town site, or available for mining. At about the same time, Douglas embarked on a plan to settle the Indian tribes on reserves in the vicinity of their villages. He ordered officials to mark out the area and extent of the land as pointed out by the Indians.

In October 1862, William Cox, an Assistant Commissioner of Lands and Works (ACLW), travelled to the Kamloops region to investigate a complaint regarding settlers encroaching on an Indian's cultivated fields. After completing his task but prior to leaving Kamloops, Cox was asked by Douglas to mark out all the Indian reserves in the neighbourhood. Chiefs Neskonlith and Gregoire of the Shuswap tribe northeast of the Kamloops area asked Cox to do the same for them because of settler encroachment. Cox later reported that he could not do so, but chalked out a reserve and gave the Chiefs notices to put up.

In 1865, Chief Neskonlith told an official that Cox had given them the authority to take up the land and had given them papers. After consulting with Cox, senior officials learned that they had no information at all on the location or size of the Shuswap reserve. When surveyor Walter Moberly was dispatched to the Shuswap area to investigate the Indians' claim, the Indians told him that the land staked out was theirs, but Moberly also learned that Chief Neskonlith had placed most of the boundary stakes himself, in the absence of Cox. Officials questioned whether Cox had promised those boundaries to them and whether his agency

was binding on the government, but concluded that the Shuswap reserve, as staked out by Chief Neskonlith, was entirely disproportionate to the numbers or requirements of the Indians. In 1866, the colonial government surveyed a number of reserves for the Shuswap tribe and gave public notice that the claim had been adjusted. In the summer of 1874, three years after British Columbia entered into Confederation, a delegation of Chiefs told the provincial Indian Commissioner about their land grievances. Chief Neskonlith complained that the good piece of land given to the Shuswap tribe by Cox had been replaced by smaller reserves. The federal government brought pressure on the BC government to provide more than 10 acres of reserve land per family; however, the province refused to enlarge any existing reserves, although it did agree to a formula of 20 acres per family for future reserves.

The Joint Indian Reserve Commission was established in 1875 to inquire into the Indians' land grievances. After interviewing Shuswap Chiefs and band members, and reviewing Douglas's instructions and Cox's actions, the Commission determined that the colonial government had decided that the Shuswap reserves were too large, that Cox's actions were not binding on the Crown, and that the government had the power to reduce reserves in any event. In addition to the reserves surveyed in 1866, the Commission added 11 more reserves. They were all confirmed as reserves in 1930 by Order in Council.

ISSUES

Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?

If a colonial reserve was created, was it reduced by the colonial administration? If the reserve was created and then reduced, did the colonial Crown or the federal Crown breach the honour of the Crown or any fiduciary duty, trust duty, statutory duty, or duty of care to the Bands?

FINDINGS

On the central question of whether a reserve was created for the Bands in 1862, the panel finds that a reserve was not created by the colonial government. The law on reserve creation identifies the factors determining whether a reserve was legally created: the land must have been set apart for the Indians; the Crown must have intended to create a reserve, and that intention must be possessed by Crown agents with authority to bind the Crown, or who are reasonably seen by the band as having that authority; and, the band must have accepted the setting apart and started using the land.

Was the land set apart? Crown official William Cox did not mark out the Shuswap reserve lands after his meeting with Chiefs Neskonlith and Gregoire in 1862. It was Chief Neskonlith who alone placed the stakes defining the boundaries of the reserve. Cox, however, could not delegate this task to a person who did not represent the Crown. It was only in 1865 that Crown officials, including Cox, had any knowledge of the boundaries created by Chief Neskonlith. Although the Shuswap people knew the location of the land they used and occupied, there could be no setting apart of the land without both parties having knowledge and certainty regarding the boundaries.

Did the British Crown intend to create a reserve? Although Governor Douglas had the delegated authority to create reserves in the colony and intended to do so, he did not intend that the job of marking out land to identify its location and boundaries would constitute the only step in reserve creation. The marking out of Indian settlements protected land from pre-emption, but it was only the first of several steps to be taken in the reserve-creation process. Governor Douglas could exercise the royal prerogative to legally create reserves and did so, but his commission did not permit him to delegate to subordinate officials the power to confirm land as a reserve. Thus, Cox, an Assistant Commissioner of Lands and Works, could not bind the Crown to create legal reserves.

The meeting between Cox and the Chiefs in 1862 was initiated by the Chiefs, who approached him looking for protection from settlers encroaching on their lands. It was in this context that Cox gave the Chiefs

notices to put up. Cox also made it clear that he could not do the marking out at that time. In these circumstances, it would not be reasonable for Chief Neskonlith to believe that Cox could bind the Crown to create a reserve and that, by staking out the boundaries himself, the Chief could create that reserve.

The panel finds that the British Crown, through Governor Douglas, did not intend to create a reserve in 1862, and that it would not have been possible to form that intention without knowing the boundaries. From the outset, there was no meeting of the minds or common intention, either to create a reserve by marking out lands in 1862, or to create a reserve of the size claimed by Chief Neskonlith.

Did the Indians accept the land set apart and did they start using it? Having found that the Crown did not mark out or set apart the land in any respect, the question of the Bands' acceptance of the land as set apart by the Crown becomes moot. There is no doubt, however, based on the Elders' evidence, that the Shuswap people had a long history of using the territory demarcated by Chief Neskonlith.

Having found that a reserve was not legally created in 1862, the panel is not required to address the remaining issues in this inquiry.

RECOMMENDATION

That the claim of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands regarding the Neskonlith Douglas Reserve not be accepted for negotiation under Canada's Specific Claims Policy.

REFERENCES

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

Cases Referred To

Ross River Dena Council Band v. Canada, [2002] 2 SCR 816; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *R. v. Sioui*, [1990] 1 SCR 1025; *Montana Band v. Canada*, [2006] 3 CNLR 70 (FCTD); *Attorney General of British Columbia v. Attorney General of Canada*, [1906] AC 552 (PC).

Treaties and Statutes Referred To

Proclamation No. 11 (131), December 2, 1858, RSBC 1871, App., 55; *Proclamation No. 13* (166), February 14, 1859, RSBC 1871, App., 55; Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871 (British Columbia, *Terms of Union*), May 16, 1871; Proclamation by His Excellency James Douglas, Governor of British Columbia, January 4, 1860, in RSBC 1871, App., 63.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Dorothy Kennedy, "The Evolution of Colonial Reserves and Trutch Relations," Specific Claims West Office, DIAND, November 1994; North Shuswap Historical Society, *Shuswap Chronicles* (Celista, BC, 1989).

COUNSEL, PARTIES, INTERVENORS

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KEY HISTORICAL NAMES CITED

Adam, Chief, identified as Chief of the Adams Lake Band (part of the Shuswap Tribe), c. 1866

Anderson, Alexander Caulfield, Commissioner, Dominion of Canada, Joint Indian Reserve Commission, 1876–78

Birch, Arthur, Colonial Secretary, c. 1864–65; Officer administrating the government of the colony of British Columbia, c. 1866 – date unknown

Carnarvon, [Henry Howard Molyneux Herbert], Earl of, Secretary of State for the Colonies, 1866–67

Cox, William Geo., Assistant Commissioner of Lands and Works (ACLW), Justice of the Peace, and Magistrate at Rock Creek, c. 1860–65

Dewdney, Edgar, surveyor, Royal Engineers, c. 1866 – date unknown

Douglas, Sir James, Chief Factor of the Hudson's Bay Company at Fort Vancouver and Fort Victoria; Governor of the colony of Vancouver Island, 1851–64; and Governor of the colony of British Columbia, 1858–64

Gregoire, Antoine, Chief, identified one of the Chiefs of the Shuswap Tribe and father of Chief Leon Neskonlith, c. 1862

Joint Indian Reserve Commission (1876–78)

Anderson, Alexander Caulfield, Commissioner, Dominion of Canada

McKinlay, Archibald, Commissioner, Province of British Columbia

Sproat, Gilbert Malcolm, Commissioner, joint appointment

Laird, David, Minister of the Interior and Superintendent General of Indian Affairs, Dominion of Canada, 1873–76

Lenihan, James, Indian Superintendent for mainland British Columbia for the dominion government, 1873–80

Lytton, Edward Bulwar-Lytton, 1st Baron, Secretary of State for the Colonies, 1858–59

McColl, William, Sergeant, Royal Engineers, and land surveyor, [1860–64]

McKinlay, Archibald, Commissioner, Province of BC, Joint Indian Reserve Commission, 1876–78

Moberly, Walter, Assistant Commissioner of Lands and Works, 1864 – date unknown

Moody, Richard Clement, Colonel, Royal Engineers [dates unknown]; Chief Commissioner of Lands and Works (CCLW) and Surveyor General, 1858–63

Neskonlith, Leon, Chief, identified as Chief of the Neskonlith Band (part of the Shuswap Tribe), c. 1862

Newcastle, [Henry Pelham Fiennes Clinton], Duke of, Secretary of State for the Colonies, 1859–64

Nind, Philip, Gold Commissioner and Magistrate of British Columbia, Cariboo District

Parsons, R.M., Captain, Royal Engineers, c. 1861

Powell, Israel Wood, Indian Superintendent (Vancouver Island and North West Coast) for the dominion government, 1872–80; Superintendent General for British Columbia, 1880–89

Seymour, Frederick, Governor of the colony of British Columbia, 1864–66; Governor of the united colonies of Vancouver Island and British Columbia, 1866–69

Trutch, Joseph, Chief Commissioner of Lands and Works and Surveyor General, 1864–71; Lieutenant Governor, 1871–76; Dominion Agent, 1880–89

Young, William A.G., Colonial Secretary, for the colony of Vancouver Island, 1859–66, and the colony of British Columbia, 1859–64; Colonial Secretary for the united colonies of Vancouver Island and British Columbia, 1866–67

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

The British colony of mainland British Columbia, established in 1858, was governed by James Douglas. Governor Douglas, who was also Governor of the colony of Vancouver Island, embarked on a plan to settle the Indian tribes on reserves in the vicinity of their villages. To that end, Douglas ordered officials to mark out the boundaries of these reserves. One of those officials visited the Kamloops area in October 1862, where he was asked by two Chiefs from the Shuswap area to mark off their lands to protect them from some settlers. The official stated that he could not comply with their request at the time but chalked out a sketch and gave the Chiefs notices to put up. Chief Neskonlith staked out the boundaries of the Shuswap reserve himself.

The Bands claim that a lawful colonial reserve was created for the Shuswap people in October 1862. They further assert that this reserve was unlawfully reduced in size in 1866. Canada maintains that marking out the boundaries was the first step in Governor Douglas's reserve-creation plan, that his approval was required to constitute a legally created reserve, and that neither Douglas nor his successors approved a reserve or the boundaries as staked out by Chief Neskonlith. The historical background to this claim is set out in Appendix A of this report.

On March 14, 1996, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that a lawful reserve based on Chief Neskonlith's boundaries had been created in 1862. Canada rejected the claim by letter dated March 24, 1999. In May 2003, the Bands requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim, which the ICC agreed to do. The ICC conducted a planning conference with the parties in November 2004. The panel attended a site visit and community session to take the testimony of Elders on July 6 and 7, 2005. Following the Bands' objection to the admissibility of a report by Canada's land surveyor, the panel issued an interim ruling on July 3, 2006 (Appendix B), declining to strike the report from the record. On July 19, 2006, the panel convened a hearing in Vancouver to examine the expert evidence of surveyors Patrick Ringwood (for the Bands) and Blair Smith (for Canada) on questions related to maps and historical sketches on the record. By agreement of the parties, the panel also received the testimony of an Elder at this session.

The Bands' written submission was provided on March 20, 2007; Canada's submission on May 15, 2007; and the Bands' reply on May 29, 2007. The panel heard legal arguments in Vancouver on June 19, 2007. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set out in Appendix D.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal orders in council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."¹ This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.² The term "lawful obligation" is defined in *Outstanding Business* as follows:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.³

¹ 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.

² Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

³ *Outstanding Business*, 20; reprinted in (1994) 1 ICPP 179.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

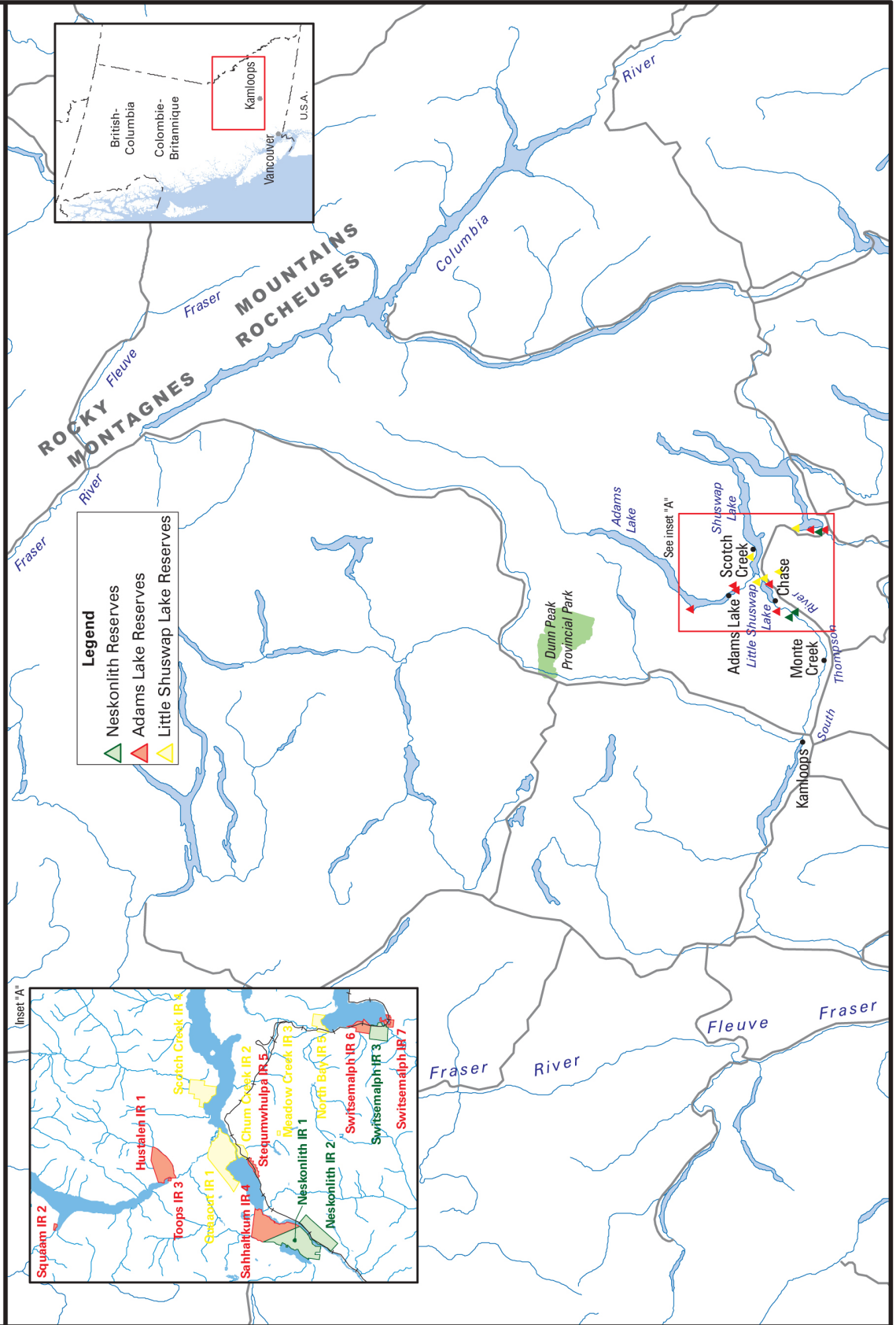
- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.⁴

⁴

Outstanding Business, 20; reprinted in (1994) 1 ICCP 180.

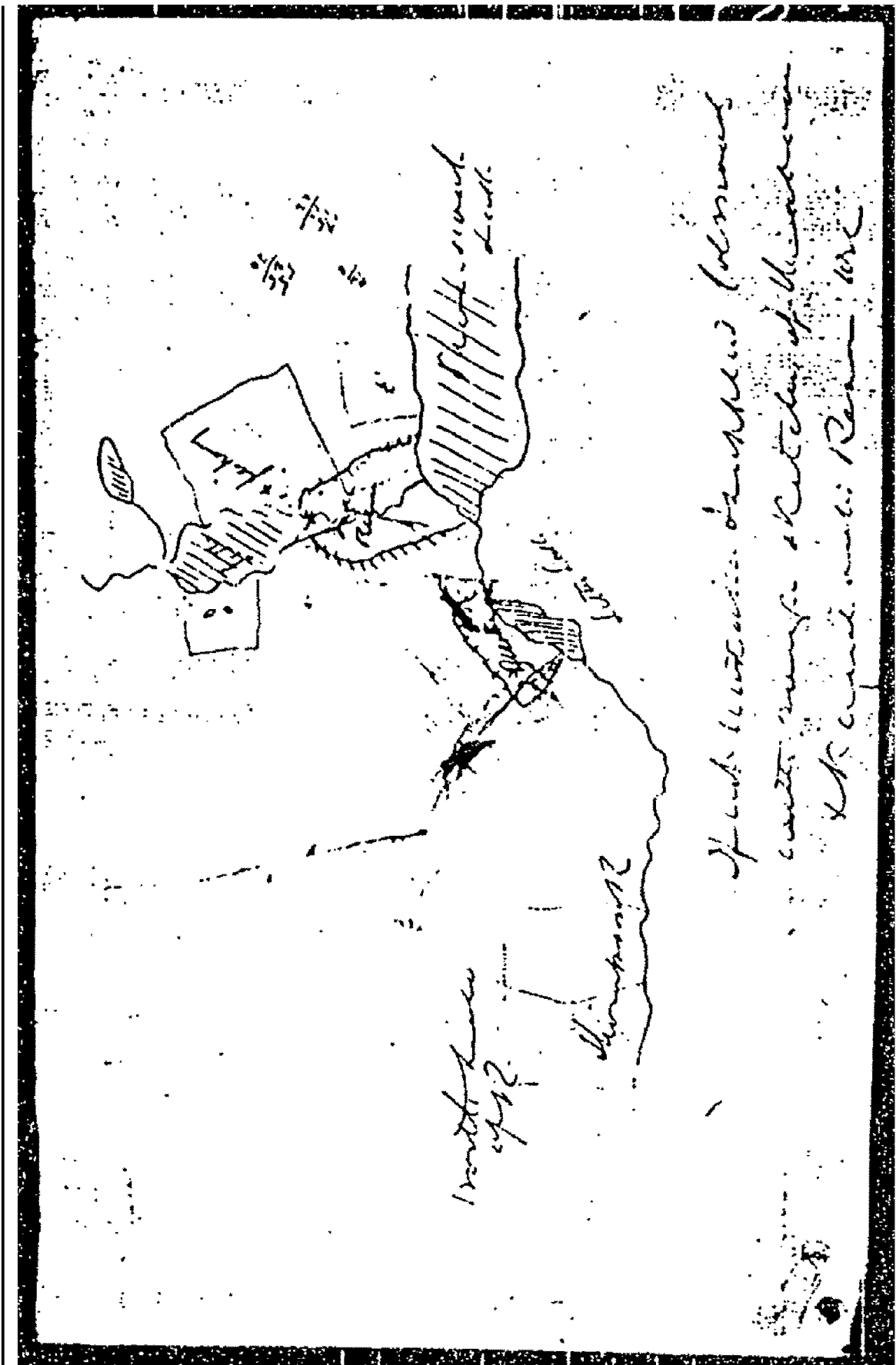
Claim Area Map

Map 1



Map 2

Sketch by W.G. Cox, c. 1865



PART II

THE FACTS

The Neskonlith, Adams Lake, and Little Shuswap Indian Bands belong to the Shuswap Nation in British Columbia. The Bands are located northeast of Kamloops, along the Thompson River, Little Shuswap Lake, Shuswap Lake, and Adams Lake.

In May 1851, the British Imperial Government appointed James Douglas as Governor of the colony of Vancouver Island. He was given full authority to make laws for the colony, subject only to the instructions of the British Secretary of State, E.B. Lytton. In the spring of 1858, gold was discovered in the Fraser River, leading to an increase in hostilities among the Indian population, settlers, and miners over land. In August 1858, the British government created the colony of British Columbia on the mainland, naming Douglas as Governor of this colony in addition to Vancouver Island. Almost immediately, Douglas issued a proclamation giving himself the authority to grant Crown land on the mainland to any person.

In February 1859, Douglas issued another proclamation dealing with land, declaring that all the land, mines, and minerals in British Columbia belonged to the Crown, and granting the Executive the right to reserve unoccupied Crown land for any purpose. At the same time, Douglas planned to implement a law permitting British subjects to acquire or pre-empt up to 160 acres of unoccupied, unreserved, and unsurveyed Crown land in the colony. The *Pre-emption Act* was passed the following year.

In February 1859, Douglas told Lytton that he planned to create “anticipatory reserves” for the Indians. He proceeded to implement a plan to settle the Indian tribes on reserves at the location of their village sites, cultivated fields, and land in the vicinity required by them. These areas were to be staked out for the Indians’ use and benefit and, like other lands reserved by the government, were excluded from pre-emption under the Act.

In March 1861, Governor Douglas gave R.C. Moody, the Chief Commissioner of Lands and Works (CCLW), responsibility for marking out all the proposed towns and Indian reserves in the colony. He also directed Moody to give instructions to the newly appointed Assistant Commissioner of Lands and Works (ACLW), William Cox, who was to carry out this work in the Rock Creek District. In addition, Douglas communicated directly with Cox, telling him that he would receive instructions from Moody to mark out the limits of Indian reserves according to the boundaries the

inhabitants pointed out. Moody followed up with similar orders to Cox and also ordered him to scrutinize the Indians' claims carefully. In April 1861, Douglas sent further instructions to Moody, requiring that the position and extent of all lands set apart as government and Indian reserves be published in three different places in the district and in local newspapers.

Cox started marking out Indian and other government reserves in the Okanagan in the summer of 1861. In October 1862, he was sent to the Kamloops region to investigate an Indian's complaint of settlers encroaching on his cultivated fields. Later, when Cox was about to leave the area, Douglas requested that he mark out all the Indian reserves in the neighbourhood. After marking out the Kamloops reserve, Cox was approached by Chief Neskonlith and Chief Gregoire, from the Shuswap territory northeast of Kamloops, to do the same for them, as some settlers were encroaching on their land. Cox said he could not do so at that time, but he did chalk out the position and extent of a reserve and gave the Chiefs notices to post that warned persons not to cut timber, interfere, or meddle with the rights of the Indians on this reserve.

In January 1864, Governor Douglas addressed the Legislative Council on the subject of Indian reserves, explaining that the areas had been partially defined and set apart, and in no case exceeded 10 acres per family. Shortly thereafter, Douglas retired as Governor.

Magistrate Philip Nind was in the interior in 1865 when he met up with Chief Neskonlith, who told him that Cox had given the Indians authority to take up the land and also some papers. Nind in turn wrote to Cox asking him to explain his actions, which he did on July 16, 1865. Cox recounted his 1862 travels to the Kamloops area, provided Nind with a sketch of the reserve from memory, and remarked that his papers had probably been removed and the land allowed by him greatly increased. Nind immediately wrote to the Colonial Secretary, Arthur Birch, to tell him of the Shuswap Indians' claim.

Joseph Trutch replaced Moody as CCLW and Surveyor General in 1864. When Trutch was asked for his opinion on the size of the Shuswap reserve, he replied that his department was without any information on its location or extent. Surveyor Walter Moberly was dispatched to the Shuswap area in November 1865 to investigate and was told by band members that their ground had already been marked off by Cox pursuant to Governor Douglas's instructions, and that Chief Neskonlith had placed stakes himself at Great Shuswap Lake and at the north end of Adams Lake. Moberly's report

included a sketch of the land claimed by Chief Neskonlith, showing stakes at Scotch Creek, Monte Creek, and north of Adams Lake, as well as a northern boundary near Dunn Peak.

In January 1866, Trutch advised the Colonial Secretary that the reserves at Shuswap Lake were entirely disproportionate to the numbers or requirements of the Indians. He asked whether Cox's agency in the matter was binding on the government, and whether the boundaries as claimed were those that Cox had promised them.

In the fall of 1866, Surveyor Edgar Dewdney, accompanied by the Chiefs, surveyed three reserves for the Bands, two for the Shuswap Indian Band and one reserve plus a small fishing station for the Adams Lake Indian Band. The Gazette notice of October 5, 1866, indicated that the claims of the Shuswap and Kamloops tribes had been adjusted, that new reserves would be surveyed, and that the remaining land would be opened up for pre-emption on January 1, 1867.

In 1871, British Columbia entered into Confederation pursuant to the *British Columbia Terms of Union*. The Indian Commissioner for the new province, I.W. Powell, wrote to the federal Minister of the Interior in 1873 about the unsatisfactory condition of many Indian reserves, noting in his letter that no Indian reserves had been made on the mainland except on the Fraser River, as well as in the Shuswap area, where they were incomplete.

In the summer of 1874, Powell met with some Chiefs assembled at Kamloops, including Chief Neskonlith, in order to hear their grievances regarding the size of their reserves. Chief Neskonlith added that Cox had given them a good piece of land but the surveyor replaced it with a smaller piece. When Powell asked former Governor Douglas if he had used a formula for acreage when setting apart Indian reserves, Douglas replied that he had not insisted on a specific number of acres, but that none of the reserves on the lower Fraser and Vancouver Island exceeded 10 acres per family. Regarding the Thompson River area, Douglas stated that the reserves had only been roughly traced out on the ground. He added that they were laid out on a large scale to allow sufficient range for cattle.

In late 1874, federal Superintendent James Lenihan advised the BC Secretary of the discrepancies in size among some of the Fraser River reserves, ranging from 14 acres per family to 92 acres per family. Lenihan recommended that the province adopt a more liberal and uniform policy, especially toward Indians in the interior, who had large herds of cattle. He proposed a limit

of 80 acres per family plus sufficient land for livestock. Minister of the Interior, David Laird, also criticized the former colonial government's allowance of 10 acres per family, compared to the 80 or more acres per family allowed by the dominion.

In 1874, the federal government took its criticism of British Columbia's Indian land policy to arbitration by the Secretary of State for the Colonies. Ultimately, the BC government agreed to transfer land equal to 20 acres per family to the dominion to be set aside for future reserves but refused to enlarge any existing reserves, relying on Governor Douglas's 1864 statement that he had allotted 10 acres per family.

In February 1875, Powell sent a petition to the Minister of the Interior from the Chiefs of several tribes, including the Shuswap. The petitioners complained that their reserves were too small to support their families and animals, and that they had been laid out without their agreement.

In 1875, the BC and federal governments agreed to establish the Joint Indian Reserve Commission (JIRC) to inquire into the grievances related to Indian reserves. Its objective was to determine the number, size, and location of the reserves to be allowed to the Indians in British Columbia. The JIRC spent two months in 1877 interviewing Chiefs and members of the Shuswap Bands. After reviewing Douglas's instructions and Cox's actions in 1862, the JIRC concluded that the colonial government had apparently decided that the Shuswap reserves were too large, that Cox's actions did not bind the Crown, and that, in any event, the government had the power to reduce reserves. The JIRC confirmed the three Shuswap reserves as set aside by Dewdney in 1866, and set aside a further 11 reserves for the three Bands. They were all confirmed as reserves in 1930 by Order in Council.

PART III

ISSUES

The Indian Claims Commission's inquiry concerns these issues, as agreed to by the parties:

- 1 Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?
- 2 If a colonial reserve was created, was it reduced by the colonial administration?
- 3 If a colonial reserve was created, then reduced by the colonial administration,
 - i did the colonial Crown breach the honour of the Crown, or any fiduciary duty, trust duty, statutory duty, or duty of care to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands?
 - ii has the federal Crown breached any such duty?
- 4 In the circumstances of this claim, is there an outstanding lawful obligation on the part of Canada?

PART IV
ANALYSIS

ISSUE 1 CREATION OF THE NESKONLITH DOUGLAS RESERVE

1 Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?

The central issue in this inquiry is whether a reserve was legally created in 1862, one that was binding on the British Crown and the Neskonlith, Adams Lake, and Little Shuswap Indian Bands. As there existed no executive order or other instrument confirming the land as a lawful reserve, this question can only be answered by examining in detail the facts and context of the times.

Background Facts

Use of “Reserve” in Pre-Confederation British Columbia

The word “reserve” and its variations were used in pre-Confederation British Columbia in a variety of circumstances by Crown officials. Governor Douglas’s 1859 *Proclamation*, for example, permitted the Executive to “reserve” portions of unoccupied Crown land for any purpose that it deemed advisable, including “Indian Reserves” and other “Government Reserves,” such as proposed towns and school lands.⁵ In some documents, Crown land was referred to as having been “reserved” to signify that it was not available for pre-emption or purchase by private citizens. When discussing the facts, this report uses the word “reserve” as it was used in the historical documents.

Governor Douglas’s Authority

The reserve-creation process at issue here was taking place in pre-Confederation British Columbia in the early 1860s, when the colony was still under British control. This process predated, and therefore was not governed by, the 1871 British Columbia *Terms of Union*⁶ or Canada’s *Indian Act*.⁷

⁵ *Proclamation No. 13* (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p. 1).

⁶ Order of Her Majesty in Council admitting British Columbia into the Union (British Columbia *Terms of Union*), May 16, 1871, no file reference available (ICC Exhibit 6j, p. 6).

⁷ The first federal statute concerning Indians to apply to British Columbia after 1871 was *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c. 6 (32–33 Vict.).

The British Imperial Government appointed James Douglas Governor of the colony of Vancouver Island in 1851, with “full power and authority to make constitute[,] and ordain laws, statutes and ordinances, for the public peace, welfare, and good government”⁸ of Vancouver Island. In 1858, the Secretary of State for the Colonies, E.B. Lytton, wrote from London instructing Governor Douglas to consider the most humane means of dealing with the Indians of Vancouver Island, and to use his knowledge and experience to resolve any problems. Lytton further suggested that, when Douglas was striking bargains or treaties with the Indians for the cession of land, subsistence should be supplied to them.⁹

The year 1858 also saw the appointment of Douglas as Governor of the newly created colony of British Columbia on the mainland. He was empowered to pass laws by proclamation, subject only to the direction of Secretary of State Lytton. Of importance here are two proclamations that Douglas issued almost immediately upon his appointment. *Proclamation No. 11* in 1858 vested in Douglas the authority to grant any Crown land in the colony to any person,¹⁰ and *Proclamation No. 13* in 1859 declared that the Executive had the power “to reserve” unoccupied Crown land for such purposes as the Executive deemed advisable.¹¹

Douglas’s Policy on Reserve Creation

Governor Douglas was operating in the late 1850s and early 1860s under increasing pressure from settlers and miners for land rights, which in turn led to the threat of hostilities between the Indian and settler populations. When Lytton requested advice on settling the tribes permanently in villages for their protection and civilization, Douglas proposed a plan:

⁸ Transcript of Letters Patent, Her Majesty of the United Kingdom of Great Britain and Ireland to James Douglas, Vancouver’s Islande, May 16, 1851, British Columbia Archives (hereafter BCA), CO 381/77, pp. 81–103 (ICC Exhibit 1a, p. 30).

⁹ E.B Lytton to Governor Douglas, July 31, 1858, BCA, CO 410/1, pp. 147–59; Library and Archives Canada (hereafter LAC), RG 10, vol. 11028, file SRR-1 (ICC Exhibit 1a, p. 68).

¹⁰ *Proclamation No. 11* (131), December 2, 1858, RSBC 1871, App., 55 (ICC Exhibit 6a, p. 1).

¹¹ *Proclamation No. 13* (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p. 1).

8. *Anticipatory reserves* of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.¹²

Lytton agreed with Douglas's plan for the Indian tribes, but cautioned him:

whilst making ample provision, under the arrangements proposed, for the future sustenance and improvement of the Indian Tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves so as to avoid checking at a future day, the progress of the white colonists.¹³

In 1860, Douglas had an opportunity to spell out his plans for reserves to some Indian bands while visiting the Okanagan and Lytton areas. When he returned, Douglas provided a lengthy report to the Duke of Newcastle, repeating the message he gave to bands along the way:

I also explained to them that the Magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields, and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the Lakes and Rivers, and of hunting over all unoccupied Crown Lands in the Colony ...¹⁴

Thus, prior to the events of 1862, Governor Douglas had formulated a plan to establish, in his own words, "anticipatory reserves" wherever Indian tribes lived, to include village sites, cultivated fields, and all the land in the vicinity that could be tilled or was required for their support. He also acknowledged their right to fish and hunt on all unreserved and unoccupied Crown lands.

¹² James Douglas, Governor, Victoria, Vancouver Island, to E.B. Lytton, March 14, 1859, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 16–17 (ICC Exhibit 1a, pp. 253–54). Emphasis added.

¹³ Carnarvon for E.B. Lytton, May 20, 1859, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 18 (ICC Exhibit 1a, pp. 264–65).

¹⁴ James Douglas to Duke of Newcastle, October 9, 1860, BCA, CO 60/8, pp. 196–226 (ICC Exhibit 1a, pp. 358–59).

In later years, Governor Douglas spoke about his plan for setting apart Indian reserves. He addressed the Legislative Council in 1864, explaining that “[t]he areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned ...”¹⁵ Ten years later, Douglas clarified that, “in laying out Indian reserves, no specific number of acres was insisted on.”¹⁶ In addition to repeating the instructions given to officials at the time, Douglas added that they were “to include every piece of ground, to which [the Indians] had acquired an equitable title, through continuous occupation, tillage, or other investment of their labor.”¹⁷

Douglas’s Actions

Concurrent with Governor Douglas’s plan to establish Indian reserves was his decision to introduce a pre-emption law that would enable British subjects and those having sworn allegiance to Her Majesty to lawfully acquire up to 160 acres of unoccupied, unreserved, and unsurveyed Crown land. Douglas issued a Circular in 1859 to gold commissioners and magistrates, directing them to “cause to be reserved, the Sites of all Indian villages, and the land they have been accustomed to cultivate, to the extent of several hundred acres round each village, for their special use and benefit.”¹⁸

We note that, at around the same time, Douglas visited and personally approved of a reserve comprising 20 acres of land adjacent to the Yale town site. This reserve may have been the first reserve created on the mainland, although as governor of the colony of Vancouver Island, Douglas had created reserves pursuant to treaties negotiated in the period between 1850 and 1854 (the Douglas Treaties).¹⁹

¹⁵ James Douglas, Governor, to Legislative Council, January 21, 1864, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 180–81 (ICC Exhibit 1a, pp. 733–34).

¹⁶ James Douglas, late Governor of British Columbia, to Lt. Col. Powell, Indian Commissioner, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 1302).

¹⁷ James Douglas, late Governor of British Columbia, to Lt. Col. Powell, Indian Commissioner, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 1302).

¹⁸ James Douglas to T. Elwyn, October 1, 1859, BCA, C/AB/30.1J/2, pp. 103–5 (ICC Exhibit 1a, pp. 269–71).

¹⁹ Dorothy Kennedy, “The Evolution of Colonial Reserves and Trutch Relations,” Specific Claims West Office, DIAND, November 1994 (ICC Exhibit 3b, pp. 4–5); ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 23–24.

Douglas's objective in setting apart Indian lands, townsites, and other public lands was driven in part by the desire to encourage newcomers to settle and take up farming. In early 1860, Douglas implemented his pre-emption policy when he enacted the *Pre-emption Act*. The lands available for pre-emption specifically excluded any "site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement ..."²⁰ In order to implement this law, and thereby reduce the conflicts between the Indian population and the settlers and miners, the colonial government needed to know which land was not available for pre-emption. Although surveys would have provided that certainty, Douglas and R.C. Moody, Chief Commissioner of Lands and Works (CCLW), agreed that they could delay the surveys until the colony had more money.

In 1861, Douglas initiated the process of having his subordinates stake out Indian reserves with a series of letters setting out his instructions. On March 5, Douglas sent a letter to William Cox, a newly appointed Assistant Commissioner of Lands and Works (ACLW):

You will receive instructions from the Chief Commissioner of Lands & Works to *mark out the limits of the Indian Reserves according to the boundaries the inhabitants of each village and Settlement may point out*, which is to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.²¹

On the same day, Douglas asked Moody to communicate with Cox, and:

give him any instructions as you may deem necessary in reference to the disposal of Crown Lands, and that you will furnish him with such information on this subject, as may enable him to work in perfect harmony with yourself ...²²

Douglas clearly trusted Moody to oversee the work of this new ACLW and to instruct him as Moody saw fit.

²⁰ Proclamation by His Excellency James Douglas, Governor of British Columbia, January 4, 1860, in RSBC 1871, App., 63.

²¹ Charles Good, Acting Private Secretary, New Westminster, BC, to William Cox, March 5, 1861, BCA, C/AB/30.1J/3, pp. 232–34 (ICC Exhibit 1a, pp. 433–35). Emphasis added.

²² Charles Good, Acting Private Secretary, New Westminster, to Chief Commissioner of Lands and Works, March 5, 1861, BCA, GR 1372, file 650(1)/4c3; BCA, C/AB/30.1J/9, pp. 95–96 (ICC Exhibit 1a, pp. 436–40). Emphasis added.

In a marginal note on the same letter Douglas told Moody to instruct Cox “to mark out distinctly all the Indian Reserves in his District and to define their extent as they may be severally pointed out by the Indians themselves.”²³ This Moody did on March 6th when he wrote to Cox:

I have recd instructions from H.E. the Gov. to communicate with you on the subject & to request that “you will mark out distinctly all the Indian Reserves in your District and define their extent as they may be severally pointed out by the Indians themselves.” I would at the same time beg of you to *be particular in scrutinising the claims of the Indians* as I have every reason to believe that others (white persons) have in some instances influenced the natives in asserting claims which they would not otherwise have made ...²⁴

Moody’s direction to Cox “to scrutinize the claims of the Indians” is entirely consistent with Governor Douglas’s orders to Moody to provide instructions to Cox in marking off land.

On April 5, Douglas sent further instructions to Moody on setting apart land for all types of reserves. He advised Moody that “the position and extent of all spots of land, now set apart as Government or Indian Reserves, are to be forthwith published in three different places”²⁵ in the relevant district and also in the local newspapers. Douglas also made it clear in the same letter that he anticipated circumstances that would render it “expedient to relinquish any such reserve,”²⁶ in which case a two-month notice would be required prior to sale or occupation of the land. This statement speaks to Douglas’s assumption that, as Governor, he had the right to reverse the protected status of lands marked off as government or Indian reserves without undergoing a formal process.

Further, Governor Douglas exercised the right to unilaterally change boundaries of land marked out for reserves. On April 27, 1863, for example, Douglas wrote to Moody relaying the

²³ Charles Good, Acting Private Secretary, New Westminster, to Chief Commissioner of Lands and Works, March 5, 1861, BCA, GR 1372, file 650(1)/4c3; BCA, C/AB/30.1J/9, pp. 95–96 (ICC Exhibit 1a, pp. 436–40).

²⁴ R.C. Moody, Chief Commissioner of Lands and Works, New Westminster, BC, to William Cox, Assistant Commissioner of Lands and Works, Rock Creek, BC, BCA, GR 2900, vol. 2, pp. 144–45 (ICC Exhibit 1a, pp. 443–45). Emphasis added.

²⁵ William A.G. Young, Colonial Secretary, to Chief Commissioner of Lands and Works, April 5, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 457).

²⁶ William A.G. Young, Colonial Secretary, to Chief Commissioner of Lands and Works, April 5, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 457).

request of Indians in the Coquitlam River area to enlarge their reserve, even though it had been laid out following the wishes of the Indians themselves. Douglas instructed Moody “to inquire into such complaints and to enlarge all the Indian Reserves between New Westminster and the mouth of Harrison River,”²⁷ before the surrounding land could be occupied by non-Indians.

Much of the work of marking or staking out Indian reserves was centered initially in the lower mainland and the Okanagan, where land pressures were greatest. Captain R.M. Parsons of the Royal Engineers was dispatched up the Fraser River in the spring of 1861 on orders from Moody, to “lay out the ‘Boundaries of Lands claimed by Indians’ from the Harrison River to the Sea.”²⁸ Parsons was unsure what the task entailed, including the amount of land to mark off at villages, and what to do with burial sites and potato patches, and so asked Moody’s advice. Moody repeated Douglas’s directions to do what the Indians pointed out, adding that it had to be “within reason. If anything extreme is asked for postpone decision until further communication with me.”²⁹ Moody also confirmed that Parsons could inform the Indians that the land as staked out was “bona fide allotted to that settlement.”³⁰ When Parsons delegated this job to his subordinate, Lieutenant-Corporal Turner, he clarified these instructions by saying that the Indians, not Turner, were to put down the stakes but that Turner was to look at them and report to Parsons the position and quantity of the land claimed.³¹

Governor Douglas further articulated his plan in March 1862, in a reply to Colonel Moody, who was asking him for greater clarity regarding the government’s power to retake pre-empted land

²⁷ James Douglas, Governor, to Chief Commissioner of Lands and Works, April 27, 1863, BCA, C/AB/30.1J/9, pp. 397–98 (ICC Exhibit 1a, pp. 585–86).

²⁸ R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).

²⁹ R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).

³⁰ R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).

³¹ R.M. Parsons, Captain, Royal Engineers, to Lieutenant-Corporal Turner, [April 30, 1861], BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 466–67).

from a settler if it was required for public purposes.³² Douglas took this opportunity to remind Moody of the orders for marking out distinctly the sites of proposed towns and Indian reserves:

it being obviously of the utmost importance that *the exact position* of every Reserve should be known to the public at large that there may be *no uncertainty* as to the land open for pre-emption ...³³

Douglas reiterated that the boundaries were to be marked out by corner and intermediate posts and public notice given. He also required that in all cases reserves were to be marked on official maps of Moody's department "as accurately as possible," and, in particular, that the land around the Indian villages at North Bentinck Arm near the coast "be marked upon the official maps as distinctly reserved, to the extent of [300] acres or more, at each Village ..."³⁴ Finally, he reminded Moody that the ACLWs were to make all reserves of public land "at whatever points and to the extent you may deem necessary ..."³⁵

Douglas did not spell out a formula for the extent of lands to be marked off, but the record contains numerous examples of the type of land or acreage Douglas contemplated. His 1859 Circular to magistrates specified that the Indians' cultivated lands be included up to several hundred acres around each village. In 1862 he quantified the size of the land around the North Bentinck Arm Indian villages at 300 acres or more. Douglas also instructed that 1,000 acres of country land be added to the Indian village sites adjacent to the town of Hope. In his 1864 speech to the Legislative Council explaining his plan of forming Indian reserves, Douglas spoke about the areas as "partially defined

³² R.C. Moody, Colonel, Royal Engineer, and Chief Commissioner of Lands and Works, New Westminster, to Colonial Secretary, December 31, 1861, BCA, F929[-10] (ICC Exhibit 1a, pp. 502–3).

³³ William Young, Colonial Secretary's Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19). Emphasis added.

³⁴ William Young, Colonial Secretary's Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).

³⁵ William Young, Colonial Secretary's Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).

and set apart,”³⁶ in no case exceeding 10 acres per family. Ten years later, however, Douglas clarified that he had no specific number of acres in mind, leaving the selection of land to the Indians, but that he envisaged reserves consisting of village sites, cultivated lands, fishing stations, burial grounds, and every piece of land to which they had acquired equitable title through continuous occupation, tillage, or other investment of labour. He referred to reserves along the Thompson River as being large-scale to include grazing lands.³⁷

It was in the context of Douglas’s policy and actions that William Cox travelled to the Kamloops area in October 1862.

Cox’s Actions

William Cox was a Magistrate who was appointed in late 1860 as Justice of the Peace and Assistant Gold Commissioner for the District of Rock Creek, in the southern interior of British Columbia. In early 1861, Cox was also appointed Assistant Commissioner of Lands and Works (ACLW) for Rock Creek. Cox received a December 17, 1860, Circular from Governor Douglas, directing him and six others, in their capacity as ACLW, “to follow each instruction as may be conveyed to you by the Chief Commr. [Moody] with respect to the sale or disposition of the Crown Lands, and you are to make all reports to him direct ...”³⁸ Cox was ordered by Douglas to mark out distinctly all the Indian reserves in his district, define their extent as pointed out by the Indians themselves, and report back to Moody. Cox was also ordered by Moody to scrutinize their claims carefully.

William Cox started the task of marking out townsites, Indian reserves, and other public reserves north of Okanagan Lake shortly after his appointment as ACLW.³⁹ Cox appeared to

³⁶ James Douglas, Governor, to Legislative Council, January 21, 1864, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 180–81 (ICC Exhibit 1a, pp. 733–34).

³⁷ James Douglas, late Governor British Columbia, to Lt. Col. Powell, Indian Commissioner, October 14, 1874 LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 1302).

³⁸ William Young to P. O’Reilly, December 17, 1860, BCA, British Columbia, Colonial Secretary, Correspondence Outward, July 1860–September 1861 (miscellaneous letters), pp. 153–54 (ICC Exhibit 1a, pp. 426–27).

³⁹ William Cox, Assistant Commissioner of Lands, Rock Creek, to Chief Commissioner of Lands and Works, June 17, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).

understand his instructions and was gaining experience prior to his eventful trip to the Kamloops area in October 1862. In June 1861, for example, Cox reported to CCLW Moody that he had marked out an “Indian Reservation” at the north end of Lake Okanagan, the Indians “having selected the ground themselves & also named the Extent desired by them ...”⁴⁰ Cox also noted that on his next visit, he hoped to report on the extent of the reservation, as he was not in a position to do so at the time. Cox added that the defining stakes were distinctly and prominently placed and that he was enclosing a rough sketch of the boundaries. On July 4, 1861, a letter was sent by an unidentified person, most probably Cox, reporting that he had succeeded in marking off an “Indian Reserve” in the Okanagan, the Indians having selected the location and pointed out where they wished the boundary stakes to be. The record includes a sketch showing the boundary lines of an Indian reserve adjacent to the north end of Okanagan Lake.⁴¹ This was likely the same reserve whose limits Cox had only roughly defined the previous month. Further, we know from Young’s letter to Moody on March 4, 1862, that, by the next spring, Cox had also marked out reserves for the Rock Creek Townsite, Shimilkameen Revenue Station, Prince Town, and a town at Ance de Sable, in addition to several Indian reserves.⁴²

In October 1862, Cox was sent north, pursuant to Douglas’s instructions, to investigate the complaint of Shimitikum, an Indian living on the Cerise River west of Kamloops, whose cultivated fields were under threat by two settlers.⁴³ Cox was asked to mark out Shimitikum’s lands and inform the settlers that they could not encroach. Cox did so and also, marked off with posts some reserves on the Bonaparte River northwest of Kamloops.

What happened next, from the government’s perspective, is only explained three years later, in a copy of part of a letter and a sketch from Cox to Philip Nind, the Magistrate and Gold

⁴⁰ William Cox to Chief Commissioner of Lands and Works, June 17, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).

⁴¹ [Author not identified] to [recipient not identified], July 4, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 481–83).

⁴² William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).

⁴³ J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, October 6, 1862, BCA, C/AB/30.1J/4, pp. 316–17 (ICC Exhibit 1a, pp. 555–56); J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, Assistant Chief Commissioner, October 6, 1862, BCA, C/AB/30.1J/4, p. 316 (ICC Exhibit 1a, p. 557).

Commissioner for the Cariboo District. Cox explained that just before leaving Kamloops he received instructions from Douglas to mark out all the Indian reserves in the neighbourhood. On October 31, he gave Kamloops Chief Petite Louis⁴⁴ a notice describing the “Kamloops Indian Reserve” bounded by the North and Thompson Rivers, as per the stakes and notices that defined the boundaries and warned persons not to encroach on the rights of the Indians.

Cox’s letter states that the Shuswap tribes called upon him to do the same thing for them, as some Frenchmen were encroaching on their grounds:

I could not mark off their boundaries at that time on the ground, but *chalked out the position and extent* of the Shouswap Reserve at Kamloops, for the Chief and gave him papers to post up. There could be no mistake. I shall send you herewith a sketch of same as well as I can recollect it. *The probability is that the papers have been removed, and the ground allowed by me greatly added to.*⁴⁵

There is no explanation in the record of the term “chalked out.”⁴⁶ It is also not certain whether Cox chalked out the Shuswap Reserve while he was at Kamloops, as Cox stated, or whether he travelled east along the Thompson River with the Chiefs. This is because Cox provided Chief Neskonlith with a notice dated October 31, 1862, at “Shuswap,” warning persons “not to cut timber, interfere, or meddle in any way with the rights of the Indians on this Reserve.”⁴⁷ Further, Cox’s statement that he prepared the sketch “at Kamloops” to give to the Chief conflicts with a later account by the Shuswap Indians that in 1862 Cox had come up the river to a point on the little lake,⁴⁸ likely a reference to Little Shuswap Lake.

⁴⁴ Also called “Che Louis.”

⁴⁵ William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854). Emphasis added.

⁴⁶ The term “chalk out” is defined as “sketch or plan a thing to be accomplished”: *The Canadian Oxford Dictionary*, ed. Katherine Barber (Toronto, Oxford University Press, 1998).

⁴⁷ Copy of Notice, W.G. Cox, P. Magistrate, Shuswap, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 568).

⁴⁸ Walter Moberly, Surveyor General’s Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 40).

In any event, unlike the Kamloops notice, the Shuswap notice given to Chief Neskonlith did not refer to any stakes or boundaries. Although Cox purportedly attached a sketch of the “Neskonlith, Little Shuswap and Adams Lake Reserves”⁴⁹ in his October 31, 1862, report to Moody, he did not include a written description, whereas he did provide the details of the four other reserves he had marked out, including the Kamloops reserve. Cox’s record book, however, does contain the following entry:

45
 Indian Reserve
 Shouswap Lake but not inspect [?] marked out.⁵⁰

This entry did not describe any boundaries.

Chief Neskonlith’s Role

The Neskonlith, Adams Lake, and Little Shuswap Indian Bands traditionally comprised one Secwepemc⁵¹ or Shuswap “tribe” which belonged to the larger Secwepemc Nation.⁵² The latter is composed of many Secwepemc tribes, which acknowledge their relationship to the others and speak a common Secwepemc language, although some have developed their own dialect.⁵³ The 1989 *Shuswap Chronicles* describes the structure of the Secwepemc Nation based on a report by ethnographer James Teit, who interviewed Elders in the late 1800s. Teit described the Shuswap people as organized into seven divisions, each with two to seven bands. The Shuswap Lake division

⁴⁹ The 1862 sketch has not been located.

⁵⁰ Record of William Cox in “British Columbia Department of Land and Works, Record of land claims, government reservations, &c., by William George Cox Esq., Magistrate, Rock Creek, BC; sheriff’s book, Lytton, 1897, copied from original in Public Archives of British Columbia, 1988, BCA, GR 0857 (ICC Exhibit 1a, pp. 579–82).

⁵¹ Secwepemc means “people of the spilling waters” or “people who travel far,” ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 91, J.S. Michel).

⁵² ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 107, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr M. Thomas).

⁵³ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 90–91, J.S. Michel).

was made up of three bands – the Adams Lake Band or people of the Syxste’lln, the South Thompson Band or people of Hala’ut, and the Shuswap Band or people of Sxotcame’lp.⁵⁴

The *Shuswap Chronicles* informs us that Chief Adam, who died in 1867, was a hard bargainer who commanded respect from his people. Chief Antoine Gregoire, who died the following year and who was likely Adam’s eldest son, was equally powerful in the community. His son was Chief Leon Neskonlith.⁵⁵ According to the Elders today, members of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands recognized Chief Neskonlith as their leader.⁵⁶ Elder Joseph Michel of Adams Lake stated that Chief Neskonlith was “appointed as ... main spokesman of the people in negotiations with governments.”⁵⁷ The oral history of the Bands also informs us that they were traditionally one Band but were later divided into three separate Bands (Neskonlith, Adams Lake, and Little Shuswap) by the Department of Indian Affairs.⁵⁸

Moberly’s Investigation

It was not until 1865 that Crown officials became aware of the location of the boundaries or the extent of the area staked by Chief Neskonlith. That year the Gold Commissioner and Magistrate for the Cariboo District, Philip Nind, was travelling in the interior when he met up with Chief Neskonlith, who told him that Cox had given them authority in 1862 to take up the land and had also given them some papers.

When Nind later asked Cox to provide an explanation of his trip, the latter wrote back on July 16, 1865, as we have noted, stating that he could not mark off their boundaries at that time. Cox included in his letter a sketch (1865 Cox sketch) based on his recollections, showing among other markings, a reserve at Little Shuswap Lake, a second reserve on both sides of the Adams River, and

⁵⁴ North Shuswap Historical Society, *Shuswap Chronicles* (Celista, BC, 1989) (ICC Exhibit 8a, pp. 5–6).

⁵⁵ North Shuswap Historical Society, *Shuswap Chronicles* (Celista, BC, 1989) (ICC Exhibit 8a, p. 6).

⁵⁶ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, pp. 21–22, S. Denault).

⁵⁷ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 101, J.S. Michel).

⁵⁸ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 34, E. Philip); ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 112, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr M. Thomas); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 21, S. Denault).

a fishery at the south end of Adams Lake.⁵⁹ It soon became clear that Cox's sketch bore little resemblance to the area Chief Neskonlith had described as having been reserved by Cox.

Nind immediately alerted Colonial Secretary Arthur Birch in a letter dated July 17, 1865:

That branch of the Shuswap tribe which live on the Upper Thompson and Shuswap Lakes, numbering I am informed less than five hundred souls claim the undisputed possession of all the land on the north side between the foot of the Great Shuswap Lake and the North River a distance of nearly fifty miles ...⁶⁰

Nind's letter was forwarded to Joseph Trutch, who was by then the Chief Commissioner of Lands and Works; he replied on September 20, 1865, that he could supply no data, "as this Department is entirely without official information as to the location or extent of any Indian reserves ..."⁶¹ Trutch recommended an inquiry throughout the colony to find out "what lands are claimed by Indians. What lands have been authoritatively reserved and assured to the various tribes, and to what extent such reserves can be modified with the concurrence of the Indians,"⁶² with or without compensation. The Colonial Secretary balked at such a wide-ranging inquiry but allowed Trutch to send Walter Moberly, the colonial surveyor, to the Shuswap and Kamloops areas. He was to reduce the reserves if he could do so "without much dissatisfaction to the Indians."⁶³ At the very least, Moberly was to collect as much information as possible so that the government would have "some data to go by"⁶⁴ in making a decision.

⁵⁹ William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854); Sketch by W.G. Cox, c. 1865 (ICC Exhibit 7a, p. 3). See Map 2.

⁶⁰ Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, pp. 855–57).

⁶¹ Joseph W. Trutch, CCLW and Surveyor General, to Colonial Secretary, September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11). Emphasis added.

⁶² Joseph W. Trutch, CCLW and Surveyor General, to Colonial Secretary, September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11).

⁶³ Charles Good for the Colonial Secretary to Chief Commissioner of Lands and Works, September 26, 1865, BCA, file 942; GR 1372, file 334(2) (ICC Exhibit 1a, pp. 916–19).

⁶⁴ Charles Good for the Colonial Secretary to Chief Commissioner of Lands and Works, September 26, 1865, BCA, file 942; GR 1372, file 334(2) (ICC Exhibit 1a, pp. 916–19).

Moberly's trip notes describe his meetings with Chief Neskonlith and others at Little Shuswap Lake in November 1865. These notes and his report to Trutch provide some insight into Cox's actions in 1862 and Chief Neskonlith's role. Moberly was told by the Chief and other Indians present that:

they did not wish me to mark off the ground, that it had been marked off by Mr. Cox who told them he had been instructed by Govr. Douglas to mark it off in the manner in which it was staked out ... [from the narrow strip of government land] to a point on the n. side of Gt. Shouswap Lake about 1 or 1 ½ miles in an easterly direction from the mouth of Adams Lake creek he had given to Nesquinnilth & had also had a stake put in at the northerly end of Adams Lake.⁶⁵

When Moberly, however, asked if Cox had been to these lands himself:

the indians informed me he had not as he only came up the river to [illegible] point [illegible] the little lake. I then learnt from the indians that *Nesquinnilth had placed the stakes himself*, that Mr. Cox had told them that other lands not actually cultivated w[d.] do for them to raise cows and that no person cd. intrude on them & that Gov. Douglas had told Mr. Cox to tell them so.⁶⁶

In addition, Moberly noted that some of the Indians present told him that "they also thought Mr. Cox had not laid off the ground as Gov. Douglas intended ..."⁶⁷

When Moberly visited the people at the south end of Adams Lake the next day, he was told that they did not agree with Chief Neskonlith's stakes and believed that those stakes would not protect their gardens from settlers. They asked Moberly to mark off their lands so as to include their

⁶⁵ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4-18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40, 48).

⁶⁶ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4-18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40, 48). Emphasis added.

⁶⁷ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4-18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 49).

potatoes and also told him that they wanted to stay put, and not move down to Neskonlith's area. Moberly commented that these "indians do not like Nesquinnilth."⁶⁸

Moberly told the Indians he would not mark off any lands until he had ascertained what Mr. Cox had told them, which stakes Cox had placed, and what Governor Douglas had authorized him to do.⁶⁹ He did, however, draw a sketch (1865 Moberly sketch) based on Chief Neskonlith's description of the boundaries. It contains the words "Sketch Showing Indian Claims on the North and Shouswap Rivers ..."⁷⁰ Moberly reported the Indians' information to Trutch on December 22, 1865, noting as well that the area of the reserves claimed by the Shushwap Chiefs was approximately 600 square miles.⁷¹ Moberly concluded that after comparing the Indians' description of the boundaries with Cox's sketch, he was at a loss to draw any conclusions."⁷²

These facts form the background to the panel's findings on the question of whether a reserve was legally created in 1862 in the Shuswap area.

⁶⁸ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 45, 49).

⁶⁹ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 45, 49).

⁷⁰ "Sketch showing Indian Claims on the North and Shouswap Reserves to accompany my report on the same date," W. Moberly, December 22, 1865, no file reference available (ICC Exhibit 7e, p. 1). See Map 3. The sketch shows both Chief Neskonlith's claim and the claim of Che Louis, Chief of the Kamloops Band. It also incorrectly names the Thompson River as the "Shouswap River."

⁷¹ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40–41, 48).

⁷² Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40–41, 48).

The Law on Reserve Creation

The parties agree that the 2002 Supreme Court of Canada judgments in *Ross River Dena Council Band v. Canada*⁷³ and *Wewaykum Indian Band v. Canada*⁷⁴ represent the leading jurisprudence on the legal requirements for reserve creation.

Ross River concerns a claim by a Yukon band that its village of Ross River was a legal reserve under the federal *Indian Act* and, therefore, the band members were exempt from taxation. Instead, the Court found that, although lands had been set aside for the Band, the Crown did not intend to create a reserve. Consequently, no reserve was created. There are several differences between the *Ross River* case and this inquiry, in that the claim before us concerns bands in pre-Confederation British Columbia that were not governed by the *Indian Act*. The most significant difference, however, lies in the fact that the issues in *Ross River* did not include a dispute over boundaries or whether the land in question had been set apart. Nevertheless, the judgment lays down several principles for reserve creation applicable to this inquiry.

LeBel J, writing for the majority,⁷⁵ confirmed that the source of the Crown's authority to create an Indian reserve is the royal prerogative, but this power, accorded by the common law to the Executive, may be limited in scope by statute.⁷⁶ The Court went on to apply an intention-based test for reserve creation:

Under the *Indian Act*, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve.⁷⁷

⁷³ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816.

⁷⁴ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

⁷⁵ The Court was unanimous in finding that no reserve had been created but differed on whether the royal prerogative had been limited by statute in this case.

⁷⁶ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 843–44, para. 52, and 844–45, para. 54.

⁷⁷ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 843, para. 50.

The Court concluded that, in general:

there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves ... Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown ... Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis.⁷⁸

In determining the critical question of whether there was an intention to create a reserve on the part of persons with authority to bind the Crown, LeBel J explained:

To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land ... The key question remains whether there was an intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.⁷⁹

On the question of whether the Crown agent could reasonably have been seen to have the authority to bind the Crown, the Court in *Ross River* relied on the Supreme Court's judgment in *R. v. Sioui*:

he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.⁸⁰

⁷⁸ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 850–51, para. 67.

⁷⁹ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 69.

⁸⁰ *R. v. Sioui*, [1990] 1 SCR 1025 at 1040, cited in *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 849, para. 64.

Although the *Sioui* case dealt with creation of a treaty, LeBel J found the principle relevant to reserve creation. Further, he acknowledged that the honour of the Crown is at stake when representations are made to a First Nation to induce it to accept a parcel of land. He cautioned the parties, however, that “not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other.”⁸¹

Ross River also stands for the proposition that the act of setting apart the land is not synonymous with legally creating a reserve. LeBel J concluded that “what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created.”⁸² The recent case of *Montana Band v. Canada* also referred to this distinction: “according to the [*Ross River*] decision ... the setting aside land for the use of an Indian band is not synonymous with setting the land apart as a reserve for that band.”⁸³

The decision of the Supreme Court in *Wewaykum Indian Band v. Canada*, released shortly after *Ross River*, expanded on the content of the Crown’s fiduciary duty prior to reserve creation. The *Wewaykum* case concerned two BC bands that claimed each other’s reserve land. Although this decision concerned BC bands, it dealt with reserve creation long after British Columbia had joined Confederation. The Court in *Wewaykum* confirmed the legal requirements for reserve creation as set out in *Ross River*, but also addressed the Crown’s fiduciary duty. Justice Binnie, on behalf of a unanimous Court, stated:

Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.⁸⁴

⁸¹ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 850, para. 66.

⁸² *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 854, para. 77.

⁸³ *Montana Band v. Canada*, [2006] 3 CNLR 70 at 237, para. 648 (FCTD).

⁸⁴ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289, para. 86.

Binnie J emphasized, however, that in exercising its public law function prior to reserve creation, the federal Crown is “obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting ...”⁸⁵ He went on to state that “[a]n assessment of the Crown’s discharge of its fiduciary obligations at the reserve-creation stage must have regard to the context of the times.”⁸⁶

The Test to Be Applied

The factors governing the reserve-creation process are those articulated in *Ross River* and *Wewaykum*. *Ross River* confirmed that there is no single procedure for creating reserves, although an order in council has been the most common and clearest procedure used to date. Absent a clear instrument creating the reserve, the evaluation of the legal effect of the reserve-creation process “turns on a very contextual and fact-driven analysis.”⁸⁷

Then, these are the key factors to consider in determining whether the Crown in 1862 legally created a reserve for the bands in the Shuswap area:

- 1 Steps must be taken in order to set apart land for the benefit of Indians. In particular, the Indian party must show that land had been set apart for them.
- 2 The Crown must intend to create a reserve, and that intention must be possessed by Crown agents with authority to bind the Crown, or those reasonably seen by the First Nation as having that authority.
- 3 The band must accept the setting apart and have started making use of the lands.

Position of Neskonlith, Adams Lake, and Little Shuswap Indian Bands

The Bands take the position that the British Crown, through Governor Douglas and his delegate William Cox, created a reserve referred to as the “Neskonlith Colonial Reserve” in the Shuswap territory in 1862. An important consideration, the Bands argue, were the representations made by

⁸⁵ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 293, para. 96.

⁸⁶ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295, para. 97.

⁸⁷ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 67.

Cox, and the Indians' reliance on those representations to conclude that he could bind the Crown in creating a reserve. In particular, say the Bands, their predecessors relied on Cox's undertaking that the reserve would be protected for their exclusive use and benefit, they accepted the land as staked out, and they were using the land.

Position of Canada

Canada argues that the Crown did not intend to create a legal reserve through its actions in 1862; rather, Douglas took an intermediary step to protect Indian lands from purchase or pre-emption by settlers. In order to set apart land for the use of the Bands, states Canada, it would have been necessary for William Cox to see and define the location and extent of the lands, and the Crown to have published those details. Without seeing the boundaries as staked out by Chief Neskonlith, there could be no certainty in the Crown as to what land was set apart and, thus, no common intention to create a reserve. Canada further asserts that Cox did not have the power to exercise the royal prerogative and was authorized only to mark out Indian reserves; Douglas's subsequent approval was required to create a reserve.

Panel's Reasons

Was the Land Set Apart in 1862?

The majority in *Ross River* directed that "steps must be taken" by the Crown to set apart the land, and the Indian party must "show at least that land had been set apart for them." The Court did not examine this issue further, as the boundaries of the Ross River Band's village site were not in issue and the parties agreed that the land had been set aside pursuant to an administrative process. What they disagreed on was whether the process had resulted in a legally created reserve.

In this inquiry, the question of whether William Cox set apart the land is squarely before the panel. In the absence of an executive instrument, Governor Douglas's approval, or other clear evidence confirming the status of the land, we take the language of *Ross River* as meaning that, at the very least, Cox's actions must have had the effect of setting apart the land.

The record is clear that Cox was given the authority to mark out government and Indian reserves. Cox's authority to bind the Crown and his representations to Chief Neskonlith will be

addressed, but first we must decide whether Cox fulfilled the requirements that Douglas had laid down for marking out Indian reserves in the colony.

The Bands argue that Cox met the requirement of taking steps to set apart the land for the Indians on or about October 31, 1862, in accordance with Governor Douglas's instructions. In particular, Cox gave Chief Neskonlith notices to post to protect the reserve from encroachment and stakes to mark the boundaries, personally witnessed the placement of a stake at Monte Creek, and recorded the reserve in his land register.⁸⁸ Canada, in contrast, argues that Cox only "chalked out" the Shuswap boundaries, and that his entry in the record book suggests he neither marked out nor inspected any lands in the area of the Shuswap lakes. According to Canada, "Cox would have had to take the preliminary step of defining the extent of Indian lands 'as they may be severally *pointed out* by the Indians themselves.'"⁸⁹

At the outset, it is important to note that Cox was in the Kamloops area in October 1862 for reasons unrelated to marking off all the reserves in the area. He was sent there to investigate a complaint of settler encroachment on land cultivated by an Indian at the Cerise River and to mark off that land to avoid any further encroachment upon it. The request to mark off other reserves came from Douglas just before Cox was leaving Kamloops. When Chief Neskonlith and Chief Gregoire asked Cox to mark off their land as well, to protect it from "some frenchmen,"⁹⁰ it is conceivable that he did not have the time or resources to travel into the Shuswap hinterland. The fact that Cox made an entry for "Shuswap" in his record book, noting that he had not marked out, and possibly had not inspected,⁹¹ the land, is consistent with this version of events. So, too, is other evidence, namely the notices given to the Chiefs on October 31, which are silent on boundaries, and Cox's report to

⁸⁸ Written Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, March 20, 2007, p. 145, para. 442. It should be noted that the record is not clear that Cox gave stakes as well as notices to Chief Neskonlith, that Cox travelled up the Thompson River from Kamloops in October 1862, or that Cox saw a stake at Monte Creek.

⁸⁹ Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 24, paras. 63, 65. Emphasis original.

⁹⁰ William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850-1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854).

⁹¹ The word "inspect" in Cox's statement "Shouswap Lake but not inspect [?] marked out." is partially illegible.

Moody the same day that omits a written description of the Shuswap reserve. Even if Cox had travelled up the Thompson River to Little Shuswap Lake, he would have seen only the area claimed between Monte Creek and Little Shuswap Lake. Whether he viewed a stake at Monte Creek, as the Bands assert, is uncertain, but the record is patently clear that Cox did not see at least two of the three stakes, or three of the four stakes if a stake at Dunn Peak existed, placed in the ground by Chief Neskonlith.

When Cox explained in 1865 that he had only “chalked out” the position and extent of the land for the Chiefs, it is possible that he did just that, used chalk to draw a sketch based on their description. In any case, the record does not indicate that Cox saw any of the area claimed along Adams River, Scotch Creek, or Adams Lake. There is also no evidence from 1862 identifying a northern boundary, although Moberly’s sketch in 1865 shows that Chief Neskonlith claimed Dunn Peak as the northwest boundary, a view corroborated by the Elders’ testimony.

In order to set apart an area of land for any purpose, the identification of the boundaries is the first priority. The Bands acknowledge that in the context of the Shuswap reserve creation, Douglas’s policy required that “the settlers ... know clearly what land was available for pre-emption and what lands were not available for pre-emption. And that’s why Chief Neskonlith had papers to post ...”⁹² Canada is even more explicit on the question of boundaries:

the personal viewing of stakes by a Crown official, “as pointed out by the Indians themselves,” was fundamental to the process of marking out the “position and extent” of lands claimed by Indian bands. In the absence of a survey or other viewing, it was impossible for the Crown to form the necessary intent to set apart land for the use of any band.⁹³

In our view, even though the notices posted by Chief Neskonlith may have been sufficient to keep settlers off the Shuswap land, we are doubtful that the steps taken by Chief Neskonlith alone would have been sufficient to set apart the land for a reserve or for any other purpose.

Although Douglas’s policy of reserve creation did not require surveys, it did require certainty on the Crown’s part. Douglas himself insisted in his instructions to Moody on March 5, 1861, that

⁹² ICC Transcript, June 19, 2007, p. 39 (Clarine Ostrove).

⁹³ Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 25, para. 68.

Cox mark out “distinctly” all the reserves in his district and “define their extent.” Given Douglas’s instructions to Moody to identify the marked-off reserves on official maps, that too may have been one of the required steps in reserve creation. We agree with Canada that, without the personal inspection of a Crown official, “there was no way to adjudicate disputes or to have any real certainty to guide the parties in terms of what land was available for pre-emption and what wasn’t.”⁹⁴ Cox did not achieve even the minimum level of certainty required to set apart land when he met with the Chiefs in 1862.

Even if Cox had been given the authority to bind the Crown in any respect, he did not carry out the most basic step necessary to set apart land for a reserve. Cox was not a neophyte, having already marked out several government and Indian reserves in the Okanagan and Rock Creek areas in 1861. Presumably Cox continued to mark out more lands in the summer of 1862 in response to Douglas’s March 1862 instructions to “make any other reserves of land which you may deem necessary.”⁹⁵ Yet, despite Douglas directly telling Cox to mark out reserves distinctly and define their extent – in other words the boundaries – as pointed out to him by the Indians, Cox did not carry out those instructions in this case. He left the task of placing the stakes entirely up to Chief Neskonlith. Except for a sketch that has never been found, Cox’s report to Moody contained no information on the position, boundaries, or size of the Shuswap Reserve, nor did he arrange to have notice of the reserved land and its boundaries published in three places in the district and in the newspapers. These tasks could not have been completed by Cox; he had no knowledge of the boundaries or the size of the reserved lands, as he had not been present when Chief Neskonlith staked the boundaries and had not at any time inspected those stakes.

Finally, Cox conducted no follow-up, either revisiting the area to identify the boundaries or warning Moody of what had transpired. In comparison, when Cox marked out a reserve at the north end of Okanagan Lake after the Indians identified the area, and stakes were placed, he sent a rough

⁹⁴ ICC Transcript, June 19, 2007, p. 90 (Brian Willcott).

⁹⁵ William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).

sketch of the boundaries to Moody to give him an idea of its form and bearings, stating that he would make another trip to the region and report back on the extent of that reserve.⁹⁶

Even though Cox had experience on the ground marking out reserves, his failure to see and define the boundaries as agent for the Crown leads us to the conclusion that Cox acted outside his authority. The reasons why Cox failed to meet the minimum requirements for setting apart the land are not apparent. It may have been the onset of winter and the rough terrain that prevented him from carrying out his normal procedures. Alternatively, the simple explanation may be that Cox had not planned to mark out all the reserves near Kamloops or in the Shuswap on that trip and was thus ill prepared when asked by Douglas at the last minute to do so for the bands “in the neighbourhood.” Cox may have reasoned that, in those circumstances, he did what was possible by chalking out the Shuswap reserve and giving the Chiefs notices to post as a warning to settlers. Whatever the reason, the process broke down at the first step, and he did nothing to rectify it except to note in his record book that the reserve had not been marked out.

When Cox was asked by Nind in 1865 to explain the size of the reserve claimed by Chief Neskonlith, Cox believed that his papers had probably been removed and the area allowed by him “greatly added to.” Although the Bands question Cox’s memory and credibility, we do not find any evidence that Cox was under pressure to change his story or that his memory had failed after three years.

We find that Cox erred in not following the orders of his superiors and in thinking he could transfer the Crown’s role in setting apart land to a person who did not represent the Crown. In the end, Cox did not succeed in marking out or in any way setting apart the Shuswap lands. This finding could be interpreted as fatal to the Bands’ claim, given the *Ross River* principle that claimants must “show at least that land had been set apart for them.”⁹⁷ However, as the question of setting apart land was not an issue in *Ross River* and as the case did not concern reserve creation in the context of pre-Confederation British Columbia, it is important that we answer the fundamental question posed by the Court; was there Crown intention to create a reserve in 1862?

⁹⁶ William Cox, Assistant Commissioner of Lands, Rock Creek, to Chief Commissioner of Lands and Works, June 17, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).

⁹⁷ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 69.

Did the Crown Intend to Create a Reserve in 1862?

Ross River emphasizes that if the land had been set apart, “[t]he key question remains whether there was an intention to create a reserve ...”⁹⁸ Proving Crown intention in the context of the times demands that we look to the evidence in several quarters: did Douglas have authority to bind the Crown?; did he intend to create reserves in the colony of British Columbia?; what were Douglas’s intentions in “marking out” lands?; did Cox have authority to bind the Crown?; and, did Chief Neskonlith have a reasonable belief that Cox could bind the Crown to create a reserve?

Did Douglas Possess Authority to Bind the Crown?

In our view, there is no doubt that the British Crown delegated to Governor Douglas the authority to grant or reserve portions of Crown land as he saw fit. Douglas was required to heed the advice of one person, Secretary of State Lytton, whose only caution was that Douglas exercise “due care” in laying out reserves to avoid slowing the progress of settlers. In general, Lytton did not question Douglas’s proclamations asserting the Executive’s authority to make any laws in the public interest. On the contrary, Lytton made it clear to Colonel Moody, when he approved Moody’s appointment as Chief Commissioner of Lands and Works, that Governor Douglas inspired his complete confidence and it was “essential for the public interests that all powers and responsibilities should centre in [Douglas] exclusively.”⁹⁹

We find that Governor Douglas, as a representative of the British Crown, had the authority to bind the Crown in land transactions in the colony.

Did Douglas Intend to Create Reserves by Marking Out the Land?

When Governor Douglas embarked on the creation of Indian and government reserves, he did not utilize legal instruments for the most part, and, for financial reasons, did not order surveys to confirm the boundaries of lands set aside. Had Douglas taken these steps, they may have been persuasive of the Crown’s intention to create particular reserves. Instead, Douglas set about to create, in his own

⁹⁸ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 69.

⁹⁹ E.B. Lytton, Principal Secretary of State, to R.C. Moody, Colonel, Royal Engineers, October 29, 1858, BCA, GR 1327, file 1149a/2 (ICC Exhibit 1a, p. 207).

words, “anticipatory reserves” for the Indians that would include their cultivated fields, village sites, and sufficient land for grazing their animals. In a report to the Duke of Newcastle, Douglas clarified that the Indians should have as much land in the vicinity of the villages and fields as they could till or was needed for their support.

Douglas did not define what he meant by “anticipatory reserves”; however, he was about to implement a pre-emption law to encourage colonists to take up agricultural Crown land in the colony, and he knew that conflicts had arisen between settlers and Indians over land. In order to implement his pre-emption law, Douglas had to act quickly to exempt certain Crown lands needed for public uses, townsites, and Indian reserves. Once identified, those lands had to be publicized as unavailable to prospective purchasers.

In addition, Douglas took for granted his authority to reverse the status of land that had been reserved, when he advised Moody that circumstances could arise in which reserved land would need to be relinquished. If so, he stated, two months’ notice would be sufficient before the land could be sold. In a similar vein, Douglas unilaterally enlarged some of the Indian reserves marked off on the lower Fraser River when he realized that the Indians had requested or were given, too little land.

With the authority to bind the Crown in land transactions in the colony, there is no reason to believe that Douglas could not legally create Indian reserves. In fact, he intended to accomplish that objective over time. The question is whether Douglas intended that marking out a reserve would be sufficient to legally create a reserve.

In order to protect certain Crown lands from pre-emption, they first had to be identified. William Cox and other ACLWs were instructed by Douglas to “mark out” both government and Indian reserves “distinctly” and to “define their extent.” It was only practical, in our view, that Cox and other officials undertaking the work of marking out land would be told to ask the Indians to point out their villages, burial grounds, cultivated fields, gardens, pastures, and other land in the vicinity of their villages that they needed. Moody, who was Cox’s superior and answerable to Douglas, repeated Douglas’s instructions to Cox and added that he should scrutinize the Indians’ claims carefully.

The evidence is persuasive that Douglas intended “marking out” to be the first step in reserve creation, not the only step. Douglas retained the power to confirm, deny, or alter the boundaries of reserved lands or to reverse their status altogether, which probably explains why he was somewhat

cavalier in letting the Indians point out the extent of the land they wanted. The initial step of marking out the land was to be followed by a report to CCLW Moody, further investigation if the reserve appeared unreasonable; and, public notice on the ground and in newspapers; identification on official maps; and, evidence of some type of public approval or confirmation by Governor Douglas. Although the reserve-creation process in pre-Confederation British Columbia was less well defined than later on, when surveys became standard practice for setting apart land, the evidence indicates that Douglas intended his officials to follow a procedure that started with the marking out of the land.

While it is true that Chief Neskonlith and other members of the Shuswap tribe could readily identify their interest in the land and knew full well where they lived, travelled, and carried on traditional pursuits, in the important matter of Indian reserve creation, there had to be a meeting of minds. In this case, the parties' expectations regarding the steps required to create a reserve were very different.

The parties were also far apart in their respective understanding of the extent of traditional territory that was to be encompassed by a reserve. Based on the available evidence, we are satisfied that Douglas did not intend to create reserves of the size claimed by Chief Neskonlith. Notwithstanding Douglas's remarks in 1864, he did not insist on a per capita formula of 10 acres per family. Still, all the evidence points to reserves described as being in the range of 20 acres to several thousands of acres, but not in the hundreds of thousands of acres, as claimed by Chief Neskonlith. When Moody ordered that the lands be marked out "within reason," he was acting within the authority delegated to him by Douglas.

We conclude that, although Douglas intended that reserves be legally created for the Indians in the colony, he did not intend that they be created by the actions of his subordinates in marking out the land or comprise the extent of land claimed by Chief Neskonlith.

Did Cox Have the Authority to Bind the Crown?

Even though Governor Douglas intended that reserve creation in the colony involve a process, it was not Governor Douglas but William Cox who interacted with Chief Neskonlith and Chief Gregoire in October 1862.

As Assistant Commissioner of Lands and Works, Cox was a subordinate of the Chief Commissioner, Colonel Moody, who reported directly to Governor Douglas. In addition to giving

general directions on marking off reserve lands, Douglas advised Cox that if he (Douglas) personally gave him any instructions, Cox was to report them to Moody and take Moody's direction on the steps to be taken. It is obvious that Cox was at least two levels junior to Douglas in the colonial hierarchy. Furthermore, Cox was not the only ACLW, there being at least six others engaged in the task of marking off government and Indian reserves throughout the colony.

Could Cox bind the Crown in reserve creation? Cox was an intermediate official sent into the field to mark off the grounds. Once the land was set apart, its status as a legal reserve had to be approved by someone with the authority to bind the Crown. In pre-Confederation British Columbia, that person was Governor Douglas, who had been given the explicit authority by the British Crown to create Indian and public reserves on Crown land. The parties do not disagree strongly on this point, but Canada emphasizes that, although Douglas had the authority to reserve Indian lands from pre-emption through the exercise of the royal prerogative, there is insufficient evidence that he exercised that authority in this case, or intended to create a reserve on the Shuswap lands in 1862.¹⁰⁰

The parties do disagree, however, on whether the creation of lawful reserves on Crown land, being an exercise of executive authority, could be further delegated to a more junior official, in this case, an ACLW. Douglas himself could exercise the royal prerogative to create a reserve, states Canada, giving as an example his order approving Indian reserves at the mouth of the Coquihalla River and at Cornish Bar on the Fraser River.¹⁰¹ Still, Canada argues, Douglas's authority as Governor was limited to his commission, which did not confer upon him the right to delegate the prerogative power to create a reserve. Consequently, "unless a power is expressly or impliedly indicated to be capable of delegation, such as the ability to make appointments and discipline public officers, it could not be delegated."¹⁰² The Bands take the position that Douglas could delegate his reserve-creation power to Cox, relying on the case of *Attorney-General of British Columbia v.*

¹⁰⁰ Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 27, para. 81.

¹⁰¹ Written Submission on Behalf of the Government of Canada, May 15, 2007, pp. 28–29, para. 85, citing E. Howard Sanders, Yale, to Colonial Secretary, Victoria, November 2, 1863, BCA, GR 1372, file 1556 (ICC Exhibit 1a, pp. 611–12).

¹⁰² Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 35, para. 94.

Attorney-General of Canada,¹⁰³ a 1906 decision of the Privy Council regarding the establishment of a military reserve in the 1860s on Deadman's Island in Burrard Inlet.

The Deadman's Island case states three propositions of interest to us: the case confirms that Douglas had autocratic power to reserve land in the colony; Douglas could also act through Moody to create a reserve; and Corporal Turner, who was engaged in survey work in the area and reported to Moody, had no power to make a reserve.¹⁰⁴ The Bands argue that Governor Douglas could exercise the power of reserve creation through Cox in the same way that Douglas acted through Moody in the Deadman's Island case.¹⁰⁵ We respectfully disagree with this interpretation and instead understand Cox's role as an ACLW sent out to mark off lands to be equivalent to that of the surveyor, Corporal Turner, not that of Moody. Moody was not only the head of the Lands Department but also, according to the Deadman's Island case, the vice-governor of the colony in the absence of the governor.¹⁰⁶ Consequently, we do not agree that this case supports the Bands' position that Douglas could exercise his autocratic power to create a reserve through the person of Cox. Canada's interpretation, that Cox was a "lesser official" acting pursuant to the instructions of both Douglas and Moody, and who was relied on to do the preliminary work of meeting with bands and marking off the ground, makes more sense.

In conclusion, Cox did not have the authority to bind the British Crown. He did have the authority to mark off the land for the benefit of the Indians, but Douglas could not delegate to him the prerogative authority to create a reserve.

Did Chief Neskonlith Reasonably Believe Cox Could Bind the Crown?

We have found that Governor Douglas could not delegate to Cox the authority to create reserves. Nevertheless, according to the *Ross River* case, we must examine Cox's actions in 1862 because he was the official representing the Crown in an important matter involving Indian lands. If Chief

¹⁰³ *Attorney General of British Columbia v. Attorney General of Canada*, [1906] AC 552 (PC).

¹⁰⁴ *Attorney General of British Columbia v. Attorney General of Canada*, [1906] AC 552 at 557 (PC).

¹⁰⁵ Written Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, May 29, 2007, p. 6, para. 13.

¹⁰⁶ The possibility that Moody could exercise the royal prerogative to create reserves in addition to Governor Douglas was not explored in this inquiry.

Neskonlith had a reasonable belief that Cox could bind the Crown, and if Cox represented to him that he was responsible for creating permanent reserves, it would constitute some evidence of Crown intention to create a reserve. *Ross River* acknowledges the impact of the fiduciary duty in reserve creation in light of the *sui generis* nature of native land rights but does not examine the fiduciary duty in detail.¹⁰⁷ *Wewaykum*, however, squarely addresses the duty in a pre-reserve-creation context, recognizing that it may exist and, if so, is “limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.”¹⁰⁸

The language of *Ross River* suggests that, if Cox had made representations to Chief Neskonlith that would cause him to reasonably believe that Cox could create a reserve binding on the Crown, the honour of the Crown would turn on its willingness to live up to those representations. We are also mindful of LeBel J’s caution that “not just any Crown agent will do,” and that many minor officials can hardly be said to bind the Crown.

In *Ross River*, no evidence was tendered to prove that Crown agents made representations that they had authority to create reserves.¹⁰⁹ In contrast, the Bands in this inquiry argue that it was reasonable for Chief Neskonlith to believe that Cox had authority to create a reserve for them; for example, Cox gave the Chief notices to put up warning people not to interfere “with the rights of the Indians on this Reserve.”¹¹⁰ Further, Moberly reported in 1865 that the Indians told him that:

they claim these lands by virtue of certain papers given them by Mr. W.G. Cox, who they say told them at the time he made the above reservations that he was acting under instructions received by him from Governor Sir James Douglas ...¹¹¹

¹⁰⁷ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 68.

¹⁰⁸ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289, para. 86.

¹⁰⁹ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at 851, para. 68.

¹¹⁰ Copy of Notice, W.G. Cox, P. Magistrate, Shuswap, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 568).

¹¹¹ Walter Moberly, New Westminister, to Joseph Trutch, Chief Commissioner of Lands and Works, New Westminister, December 22, 1865, BCA, GR 1372, file 1145b (ICC Exhibit 1a, p. 951–52).

Even though William Cox was not at the top of the colonial hierarchy, it stands to reason that Indians who only occasionally met with Crown officials would believe that Cox, as ACLW, had the power at least to protect their land from outsiders. Unfortunately, the record does not confirm whether Cox explained to the Chiefs what exactly he was authorized to do. We also cannot assess whether Chief Neskonlith understood the difference between protecting Indian land by marking it off and creating a reserve approved by the Crown. The crux of the question, however, is the manner in which Cox represented his authority and his job to Chief Neskonlith.

To answer this question, it is important to understand the reason why Chief Neskonlith and Chief Gregoire decided to approach Cox in 1862. They must have heard that Cox was in the Kamloops area marking off land for the Indians and decided to meet with him. The only record explaining their trip is found in Cox's 1865 account, in which he states that the Shuswap tribes asked him to do the same for them as he had done for others, "as some frenchmen were encroaching upon their grounds."¹¹² At the very least, it suggests that the Shuswap lands were under immediate threat from some settlers, and the Chiefs were looking to the government for protection of their lands. They may well have been disappointed that Cox did not spend the necessary time in Shuswap territory to mark out a reserve, but, at that moment, it appears that their priority was to get notices posted warning settlers not to encroach on their territory.

Based on the scant information available to us, it is impossible to know if the Chiefs believed Cox was creating lawful reserves or merely marking out the land, pursuant to Douglas' instructions. We are not convinced, however, that Cox misrepresented his authority or the task with which he was charged. It was the Chiefs who approached him, asking for protection for their land, not Cox attempting to induce the Indians to agree to a land transaction. Although Cox erred in not completing the job then or later, he did provide the Chiefs with the minimum necessary to warn settlers to stay off the land.

It is also important that the Indians themselves told Moberly that Cox had not seen two of the stakes for the Shuswap reserve and that Chief Neskonlith had put down the stakes himself. In our estimation, if Chief Neskonlith had thought he could protect the Shuswap land from encroachment

¹¹² William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854).

by marking out the land himself, that would be a mistaken but reasonable belief. But if Chief Neskonlith also believed that he alone was responsible for defining the permanent boundaries of a reserve and that his placement of boundary stakes, unknown even to Cox, would be sufficient to create the reserve, we must conclude that it was not a reasonable belief in the circumstances of this claim.

We find that the Crown did not intend to create a reserve at Shuswap in 1862. Although Governor Douglas could legally create reserves in the colony and intended to achieve that objective by means of a defined process, he did not intend that the actions of his Assistant Commissioners of Lands and Works would result in legally created reserves when he ordered them to mark out the lands. Nor did Douglas intend to create reserves of the extent claimed by Chief Neskonlith. Further, ACLW William Cox did not have authority to bind the Crown to create reserves, and, although the record is deficient on the question of whether Chief Neskonlith had a reasonable belief that Cox could bind the Crown in reserve creation, the fact that he sought out Cox to ask him to protect his lands from settlers is some indication that his immediate priority was to safeguard the Indian lands from encroachment. If Chief Neskonlith believed that he alone could legally create a reserve by placing stakes in places unknown to the Crown, it would not be a reasonable belief.

Did the Bands Accept the Setting Apart and Had They Started Using the Lands?

The panel has found that Cox failed in the fundamental task of seeing and defining the boundaries of the Shuswap reserve in 1862, and that the lands therefore could not have been set apart by the Crown. Chief Neskonlith could not set apart the lands unilaterally by placing boundary stakes and posting notices without Crown oversight. Consequently, the question of the Bands accepting the lands as set apart by the Crown becomes moot. The record suggests some dissension between the Adams Lake and Neskonlith people regarding placement of the stakes, but the Elders testified that in those days they were one people under the leadership of Chief Neskonlith.

Before leaving Issue 1, the panel wishes to comment on the Bands' use of the lands as demarcated by Chief Neskonlith.

Oral Testimony on Land Use

In this inquiry the panel heard very extensive evidence of the historical use of the lands encompassed by the boundaries claimed by Chief Neskonlith and illustrated in the Moberly sketch. Several Elders provided detailed descriptions of their travels and those of their ancestors throughout this territory, as well as their connection to the land beyond their village sites, cultivated fields, gardens, and fishing stations; lands that were used for hunting, trapping, gathering, spiritual ceremonies, or grazing cattle. Elders also displayed an impressive knowledge of the Secwepemctsin or Shuswap words for significant landmarks.

Our task was to determine several narrow questions relating to the Shuswap territory, the first of which was, did the British Crown create a lawful reserve in 1862 when William Cox was instructed to mark off lands for a reserve? We have concluded that the Crown did not intend to create a reserve that was legally binding on the Crown in 1862. This is not to say, however, that the panel questions or dismisses the importance of the Elders' testimony of their ancestors' use and knowledge of the lands encompassing Monte Creek, Scotch Creek, Adams Lake, and north to Dunn Peak.

Ernie Philip of the Little Shuswap Band testified about his people's connection to the waterways and the mountains:

Waters [were] very, very sacred with our Native people in the past. And again water is our way of travelling at one time. It was just like a big highway, right?

...

Tod Mountain is very sacred and very spiritual with our people in the past. You know, it's so sacred [for] even the animals, the birds and anything in that area. And Tod Mountain was used a lot of times what we call *Estska*⁷, training people to go out there among them to cleanse themselves."¹¹³

Dr. Mary Thomas of the Neskonlith Band also spoke eloquently about how the mountains and valleys got their Indian names, and that Tod Mountain is now the location of Sun Peaks ski resort. The range leading from the mountain down to the Thompson River near Monte Creek is called Tsqwmemek or Pregnant Belly Mountain. She remembered her father working with his brother in their large fields near Chase, ploughing and seeding corn, peas, beans, and potatoes. Dr. Thomas also recalled that the Indians had a lot of cattle and horses in the place called Skunk Hollow, now

¹¹³

ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 32–33, Ernie Philip).

Neskonlith Flats, which, she testified, was used for rodeos and gathering places for her people. Dr. Thomas had many other stories, including people finding arrowheads at Tum Tum Lake, north of Adams Lake, and people going to Bear Creek on Adams Lake to pick huckleberries.¹¹⁴

Jimmy Arnouse from Little Shuswap Band testified that he often went hunting or fishing with his father Bill Arnouse near Tum Tum Lake, to the west of Adams Lake, Tod Mountain, Seymour Arm, and in the Scotch Creek area. It was in this context that Mr Arnouse discussed seeing two cairns, one at an old bridge north of Adams Lake and one at Scotch Creek.¹¹⁵

Joe Michel of Adams Lake Band pointed out settlements at Adams Lake Point and Squaam Bay, where his grandfather Alex Michel had a plot of land. His grandfather also had a trapline in the Gannett Lake Valley and spent a great deal of time trapping there and in the Cayenne Valley northeast of Adams Lake. Mr Michel also confirmed that the majority of his people used to live at Adams Lake, and that, before 1860, Squaam Bay was their principal settlement and headquarters of their chiefs.¹¹⁶

Sarah Denault also spoke at length about the long history of her people's connection to Tod Mountain, Baldy Mountain, and Pregnant Woman mountain range near the southwest corner of the claim area.¹¹⁷

It is apparent from the oral history testimony that the Shuswap tribe made use of the lands demarcated by Chief Neskonlith's boundaries and also lands outside those boundaries. In some cases, primarily near the southern boundary, there is ample evidence regarding settlements, gardens, fields, and spiritual areas, although the record regarding the location of grazing lands and the size of the Bands' herds at the time remains unclear. Also, the oral history and the documentary record do not present a clear picture of how frequently the remote northern area of the reserve claimed by Chief Neskonlith was used, but the Elders did speak of hunting and trapping northwest of Adams Lake, and no doubt their ancestors travelled throughout the whole territory.

¹¹⁴ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 123–26, 127, 131–33, Dr. Mary Thomas).

¹¹⁵ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 55–66, Jimmy Arnouse).

¹¹⁶ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 86, 89, Joe Michel).

¹¹⁷ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, pp. 42–44, Sarah Denault).

These and other Elders who spoke to the panel provided valuable testimony on the traditional and modern uses of the land.

Conclusion

In answer to Issue 1, whether a reserve was created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862, the panel concludes that a reserve was not legally created in 1862.

ISSUE 2 REDUCTION OF THE NESKONLITH DOUGLAS RESERVE

2 If a colonial reserve was created, was it reduced by the colonial administration?

The panel has concluded that a colonial reserve was not created. It is, therefore, not necessary to respond to this question.

We note, however, that the reserve-creation process and the process of confirming the location, acreage, and boundaries of Indian reserves in British Columbia continued for decades after the province joined Confederation in 1871. The record indicates that the Joint Indian Reserve Commission (JIRC), in existence between 1876 and 1878, was empowered “to fix and determine the number, extent, and locality of the Reserve or Reserves to be allowed to the Indians of British Columbia”¹¹⁸ In particular, the JIRC confirmed the Bands’ three reserves as surveyed by Edgar Dewdney in 1866, and assigned 11 additional reserves to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands.¹¹⁹ The record in this inquiry does not describe the later reserve commissions, in particular, the McKenna-McBride Commission, in effect from 1912 to 1916, and the Ditchburn-

¹¹⁸ Minutes of Decision, Alexander Anderson, Archibald McKinlay, and G.M. Sproat, Joint Indian Reserve Commissioners, Indian Reserve Commission, August 13–16, 1877, no file reference available (ICC Exhibit 1a, pp. 1540–41).

¹¹⁹ British Columbia, *Sessional Papers*, 4th Parl., 3rd Sess., “Return of Indian Reserves,” February 20, 1885, 894–95 (ICC Exhibit 1a, pp. 1638–39). Appendix C is a chart prepared by the ICC summarizing the JIRC allotments described in the Returns from 1885.

Clark Commission in the early 1920s, and their role, if any, in reviewing the Shuswap reserves, as questions related to these later commissions were not before the panel.¹²⁰

ISSUE 3 BREACH OF FIDUCIARY DUTY OR HONOUR OF THE CROWN

3 If a colonial reserve was created, then reduced by the colonial administration:

- i did the colonial Crown breach the honour of the Crown, or any fiduciary duty, trust duty, statutory duty, or duty of care to the Neskonlith, Adams Lake and Little Shuswap Indian Bands?**
- ii has the federal Crown breached any such duty?**

As the panel has concluded that a colonial reserve was not created, it is not necessary to respond to these questions.

The panel notes that the Bands raised an alternative claim in their written submission that had not been agreed to by the parties. The Bands state that if the ICC finds that a reserve was not lawfully established, the colonial Crown nevertheless had a fiduciary duty to complete the reserve-creation process. Further, the federal Crown had a fiduciary duty to ensure the reserve was confirmed as a reserve or was liable for the colonial Crown's failure to do so.¹²¹ Canada objected to the introduction of this issue, arguing that it was outside the mandate of the ICC to consider an issue not before Canada when the claim was rejected.¹²² At the oral hearing, the panel did not strike the Bands' arguments;¹²³ however, after reviewing all the submissions, the panel concludes that this issue was not canvassed by both parties in sufficient detail to permit the panel to make findings.

¹²⁰ The Historical Background to this report makes reference to other ICC inquiries into BC specific claims in which the recommendations of the McKenna-McBride and Ditchburn-Clark commissions were in issue.

¹²¹ Written Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, March 20, 2007, pp. 181–82, paras. 590, 594.

¹²² ICC Transcript, June 19, 2007, pp. 141–45 (Brian Willcott); Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 54, para. 152.

¹²³ ICC Transcript, June 19, 2007, p. 153 (Commissioner Dickson-Gilmore).

ISSUE 4 OUTSTANDING LAWFUL OBLIGATION**4 In the circumstances of this claim, is there an outstanding lawful obligation on the part of Canada?**

As a result of the panel's findings in Issue 1, this question is answered in the negative.

PART V
CONCLUSIONS AND RECOMMENDATION

In answer to Issue 1, whether a reserve was created for the pre-Confederation predecessor(s) of the Neskonalith, Adams Lake, and Little Shuswap Indian Bands in or about 1862, the panel concludes that a reserve was not legally created in 1862.

The first step in the creation of a legally binding reserve is the setting apart of the lands by the Crown. We find that Assistant Commissioner of Lands and Works (ACLW), William Cox, did not mark out the lands on behalf of the Crown in 1862. Consequently, the Crown had no knowledge of the boundaries staked by Chief Neskonalith. Although the Shuswap people knew where the boundary stakes were located, and the extent of the land they used and occupied, there could be no setting apart of the land without certainty by both parties as to the location of the boundaries.

The second factor in reserve creation is determining whether the Crown intended to create a reserve in 1862. Governor Douglas had the delegated authority to exercise the royal prerogative to legally create reserves, and intended to accomplish that objective, but his immediate priority was the identification of Indian and certain other Crown lands to protect them from pre-emption. Marking out lands by Assistant Commissioners of Lands and Works was the first of several steps in reserve creation, the most important of which was some evidence of Douglas's approval of the land as a reserve. This approval could not be delegated to a subordinate official at the rank of ACLW. William Cox had the authority to mark off the lands but he did not have authority to legally create reserves. Moreover, he could not delegate his authority to a person not representing the Crown, in this case Chief Neskonalith. Without the Crown knowing the boundaries, there was no meeting of the minds or common intention to create a reserve.

The Chiefs sought out Cox in 1862 to ask him to do for their people what he was doing for other bands. Their immediate priority appeared to be to safeguard their lands from encroachment by some settlers. In these circumstances, it would not be reasonable for Chief Neskonalith to believe that by placing boundary stakes without the presence of a Crown official, a permanent reserve, binding on the Crown, would be created.

As the lands were not set apart and the Crown did not intend to create a lawful reserve in 1862, it is not necessary to address other aspects of reserve creation, including acceptance by the Bands of the land set apart by the Crown and proof that they started to use that land.

Based on the panel's conclusion that a reserve was not created in 1862, it is unnecessary to address the remaining issues in this inquiry.

We therefore recommend to the parties:

That the claim of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands regarding the Neskonlith Douglas Reserve not be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



Sheila G. Purdy
Commissioner (Chair)



Daniel J. Bellegarde
Commissioner



Jane Dickson-Gilmore
Commissioner

Dated this 24th day of June, 2008.

APPENDIX A

HISTORICAL BACKGROUND

**NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS:
NESKONLITH DOUGLAS RESERVE INQUIRY**

Indian Claims Commission

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INTRODUCTION

The reserves of the Neskonlith, Adams Lake,¹ and Little Shuswap Indian Bands are located approximately 50 to 60 kilometres northeast of Kamloops, along the shores of the South Thompson River, Adams Lake, and Little Shuswap Lake in south-central British Columbia.

The Neskonlith, Adams Lake, and Little Shuswap Indian Bands comprise one Secwepemc,² or Shuswap “tribe,” which belongs to the larger Secwepemc Nation.³ The Secwepemc Nation is composed of several tribes, which acknowledge their relation to the others and speak a common Secwepemc language, although some have developed their own dialect.⁴ At a community session held in July 2005, the then Chief of the Adams Lake Indian Band, Ron Jules, described the contemporary Secwepemc Nation as follows: “[T]oday we are 17 tribes left in the Secwepemc Nation. From Williams Lake to Cache Creek, Bonaparte to Invermere, over toward Jasper and back to Williams Lake, and there are 17 Chiefs.”⁵

Traditionally, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, as one tribe, divided the lands they occupied among family groupings in a number of “settlement areas.”⁶ The oral history of the community indicates that, during the period with which this inquiry is concerned, the members of that tribe recognized Chief Leon Neskonlith as their leader.⁷ Furthermore, oral history indicates that the Shuswap tribe was later divided into three separate bands (Neskonlith, Adams Lake, and Little Shuswap) by the Department of Indian Affairs.⁸

¹ Also known as Cstelnec, meaning “the people of Adams Lake,” ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 187, Chief R. Jules).

² Secwepemc means “people of the spilling waters” or “people who travel far,” ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 91, J.S. Michel).

³ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 107, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr. M. Thomas).

⁴ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 90–91, J.S. Michel).

⁵ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 204, Chief R. Jules).

⁶ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 111–12, J.S. Michel).

⁷ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, pp. 19, 21, S. Denault).

⁸ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 34, E. Philip; p. 112, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr. M. Thomas); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 21, S. Denault).

Before British Columbia joined Confederation in 1871, administration of the lands within the region occupied by the Neskonlith, Adams Lake, and Little Shuswap Indian Bands was the responsibility of the mainland colony of British Columbia, which was created in 1858 primarily to deal with increasing settlement resulting from the Fraser River gold rush.⁹ For the most part, no treaties were negotiated with the resident tribes by either the government of the colony of British Columbia or, after 1871, the Canadian government, and traditional band lands were never formally surrendered or ceded. Furthermore, no systematic survey of the colony was undertaken by the colonial government, despite steady settlement. This situation culminated in what has been referred to as the “Indian Land Question,” which, simply put, was: how to manage Bands and their lands while encouraging and accommodating the settlement of the colonies.

COLONIAL BRITISH COLUMBIA AND THE INDIAN LAND QUESTION

Douglas and the Colony of Vancouver Island

The establishment of the colony of Vancouver Island preceded development of the colony of British Columbia on the mainland. On May 16, 1851, Sir James Douglas was appointed Governor of Vancouver Island by the British government.¹⁰ Governor Douglas was informed that:

Her Majesty’s Gov’t especially rely on your knowledge and experience obtained in your long service under the Hudson’s Bay Co. You may rely on their support in the execution of such reasonable measures as you may desire for the protection of the Natives, the regulation of their intercourse with the Whites ...¹¹

Governor Douglas was granted:

full power and authority to make constitute and ordain laws, statutes and ordinances, for the public peace, welfare, and good government of Our said Island and its

⁹ Indian Claims Commission, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006), 1.

¹⁰ Transcript of Letters Patent, Her Majesty of the United Kingdom of Great Britain and Ireland to James Douglas, Vancouver Island, May 16, 1851, British Columbia Archives (hereafter BCA), CO 381/77, pp. 81–103 (ICC Exhibit 1a, p. 28).

¹¹ E.B. Lytton to James Douglas, Governor, August 14, 1858, BCA, CO 60/1, pp. 38–49 (ICC Exhibit 1a, pp. 79–80).

dependencies, and the people and inhabitants thereof ... which said laws, statutes and Ordinances are not to be repugnant, but as near as may be agreeable to the laws and statutes of this Our United Kingdom of Great Britain and Ireland.¹²

On July 31, 1858, Governor Douglas was instructed by the Secretary of State for the Colonies, E.B. Lytton, “to consider the best and most humane means of dealing with the Native Indians” in the colony of Vancouver Island, while cautioning that “[t]he feelings of this Country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them.”¹³ Lytton was of the opinion that:

this question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened [*sic*] humanity can suggest. Let me not omit to observe that it should be an invariable condition to all bargains or treaties with the Natives for the cession of Lands possessed by them, that subsistence should be supplied to them in some other shape ...¹⁴

On March 14, 1859, Governor Douglas reported as follows:

I have the honour to acknowledge the receipt of your Despatch ... containing many valuable observations on the policy to be observed towards the Indian tribes of British Columbia, and moreover your instructions directing me to inform you if I think it would be feasible to settle those tribes permanently in villages;

...

8. Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.

¹² Transcript of Letters Patent, Her Majesty of the United Kingdom of Great Britain and Ireland to James Douglas, Vancouver Island, May 16, 1851, BCA, CO 381/77, pp. 81–103 (ICC Exhibit 1a, p. 30).

¹³ E.B. Lytton to Governor Douglas, July 31, 1858, BCA, CO 410/1, pp. 147–59; Library and Archives Canada (hereafter LAC), RG 10, vol. 11028, file SRR-1 (ICC Exhibit 1a, p. 67).

¹⁴ E.B. Lytton to Governor Douglas, July 31, 1858, BCA, CO 410/1, pp. 147–59; LAC, RG 10, vol. 11028, file SRR-1 (ICC Exhibit 1a, p. 68).

9. In forming settlements of natives, I should propose, both from a principle of justice to the state and out of regard to the well-being of the Indians themselves, to make such settlements entirely self-supporting ...¹⁵

Douglas and the Colony of British Columbia

The discovery of gold in the Fraser River in the spring of 1858 and the gold rush that ensued prompted the establishment of a government presence in the area.¹⁶ On August 2, 1858, *An Act to Provide for the Government of British Columbia* was passed which, in part, established a separate government under British law in the new colony (previously known as New Caledonia), set out its boundaries, and exempted the colony of Vancouver Island from the Act.¹⁷ On September 2, 1858, an Order of the Queen in Council was issued “empowering the Governor of British Columbia to make Laws and to provide for the Administration of Justice in the said Colony.”¹⁸

In November 1858, James Douglas was appointed Governor of the colony of British Columbia. Douglas also retained his commission as Governor of Vancouver Island, but the two colonies were administered separately until 1866. On November 27, 1858, at a ceremony held in the community of Langley, BC, Governor Douglas proclaimed “English Law to be the law of the Colony” of British Columbia, and also proclaimed *An Act to Provide for the Government of British Columbia* to be in effect.¹⁹ On December 2, 1858, Governor Douglas issued *Proclamation No. 11*, vesting in himself the authority, as Governor, “to grant to any person or persons any Land belonging to the Crown in the ... Colony [of British Columbia].”²⁰ A short time later, in February 1859, Governor Douglas issued *Proclamation No. 13*, which declared that “[a]ll the lands in British

¹⁵ James Douglas, Governor, Victoria, Vancouver Island, to E.B. Lytton, March 14, 1859, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 16–17 (ICC Exhibit 1a, pp. 253–54).

¹⁶ E.B. Lytton to James Douglas, Governor, August 11, 1858, BCA, CO 60/1, pp. 38–49 (ICC Exhibit 1a, pp. 90–91).

¹⁷ *An Act to Provide for the Government of British Columbia*, August 2, 1858 (ICC Exhibit 6b).

¹⁸ Order in Council, September 2, 1858, BCA, CO 381/18 (ICC Exhibit 1a, p. 102).

¹⁹ James Douglas, Governor, to Edward Bulwar Lytton, Secretary of State, November 27, 1858, BCA, CO 60/1, pp. 437–39 (ICC Exhibit 1a, pp. 233–35). Also see *An Act to Provide for the Government of British Columbia*, August 2, 1858 (ICC Exhibit 6b).

²⁰ *Proclamation No. 11* (131), December 2, 1858, RSBC 1871, App., 55 (ICC Exhibit 6a, p. 1).

Columbia, and all the mines and minerals therein, belong to the Crown in fee”²¹ and that the Executive had the authority to “reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.”²²

Cox, Assistant Commissioner of Lands and Works

William Cox, who was a Magistrate, Justice of the Peace, and Assistant Gold Commissioner for the Rock Creek District,²³ was appointed Assistant Commissioner of Lands and Works (ACLW) at Rock Creek in February 1861.²⁴ Cox received a circular containing the following instructions:²⁵

I have to communicate to you by direction of His Excellency the Governor the following rules and regulations for your guidance in your capacity as Assistant Commissioner of Lands, and in your dealings in that capacity with the Chief Commissioner.

1st. You are on all occasions to follow such instructions as may be conveyed to you by the Chief Commr. with respect to the sale or disposition of the Crown Lands, and you are to make all reports to him direct, furnishing him with such returns as he may from time to time require.²⁶

In a letter to Assistant Commissioner Cox dated March 6, 1861, R.C. Moody, the Chief Commissioner of Lands and Works (CCLW), wrote:

²¹ *Proclamation No. 13* (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p.1).

²² *Proclamation No. 13* (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p.1).

²³ The present-day community of Rock Creek is located approximately 300 kilometres southeast of Kamloops, between the towns of Osoyoos and Greenwood in the southern Okanagan region, near the international boundary. Historical documents indicate that Rock Creek was the base of Cox’s operations.

²⁴ William Cox, Assistant Commissioner of Lands and Works (ACLW), Rock Creek, BC, to Colonel Moody, Chief Commissioner of Lands, February 12, 1861, BCA, GR 1372, file 375/3a (ICC Exhibit 1a, p. 429).

²⁵ These instructions were addressed to Peter O’Reilly on December 17, 1860 (referenced at footnote 23), who was similarly appointed. A marginal note on the document states that a “Similar Circular to the above sent to ... W.[G]. Cox Rock Creek.”

²⁶ William Young to P. O’Reilly, December 17, 1860, BCA, British Columbia, Colonial Secretary, Correspondence Outward, July 1860–September 1861 (miscellaneous letters), pp. 153–54 (ICC Exhibit 1a, pp. 426–27).

I have recd. instructions from H.E. the Gov'r. to communicate with you on the subject & to request that "you will mark out distinctly all the Indian Reserves in your District and define their extent as they may be severally pointed out by the Indians themselves."²⁷

Although Assistant Commissioner Cox had not yet marked out any reserves in the Rock Creek area, his superior, R.C. Moody issued instructions to Captain R.M. Parsons of the Royal Engineers, explaining how reserves were to be marked out on the ground. Moody instructed that reserves were to be "Mark[ed] out successively [and] as early as practicable by posts [and] in any other clear [and] permanent ways Boundaries of Lands claimed by Indians."²⁸ R.M. Parsons replied to the CCLW on April 15, 1861, asking a number of specific questions. Parsons's questions and Moody's answers are quoted at length below:

With reference to your Order to lay out the "Boundaries of Lands claimed by Indians" from the Harrison River to the Sea. I have the honor to ask information on the following points.

1. What extent of land is allowed for each Village? or what proportion is it to be as to the number of male occupants?

[Marginalia/answer –] What the [illegible word] of the village points out – within reason. If anything extreme is asked for postpone decision until further communication with me.

2. Many Indian families having Summer and Winter residences widely separated in what way should the land be appropriated?

[Marginalia/answer –] As they claim.

...

4. Indian Potato patches are likewise scattered [but] most portions of tolerably open grounds, when these are in groups and manifestly are in occupation by a neighboring village what allowance is to be made for them?

[Marginalia/answer –] As claimed.

5. When the Posts or Marks are inserted in the ground is it to be explained to [illegible] village that the Land so staked out is [bona] fide allotted to that settlement?

[Marginalia/answer –] [yes]

[6.] How much money [do] you place at my [dis]posal for the purpose [of] carrying out this order?

²⁷ R.C. Moody, Chief Commissioner of Lands and Works (CCLW), to William Cox, ACLW, March 6, 1861, BCA, GR 2900, vol. 2, pp. 144–45 (ICC Exhibit 1a, pp. 443–45).

²⁸ R.C. Moody, Colonel Royal Engineers and CCLW, to Parsons, Captain, Royal Engineers, April 13, 1861, BCA, C/AB/30.6J/7 (ICC Exhibit 1a, p. 458).

[Marginalia/answer –] In this you must use your own discretion and the greatest Economy communicating [to me] from time to time.²⁹

Parsons then instructed his subordinates to do the same, with one addition. Captain Parsons stated: “Colonel Moody desires that the Indians *shall put down the Stakes themselves* and that you look at them and report to him the position and quantity of the land claimed.”³⁰

LAND POLICIES REVISITED

As those instructions were being issued, Governor Douglas continued to work toward his preferred permanent solution to the Indian land question, which was to purchase Aboriginal interest in lands. In March 1861, Governor Douglas wrote to the Duke of Newcastle, explaining his vision for the settlement of the colony of Vancouver Island and the setting aside of reserves for Indian bands:

I have the honour of transmitting a Petition from the House of Assembly of Vancouver Island to Your Grace, praying for the aid of Her Majesty’s Government in extinguishing the Indian Title to the public lands in this Colony; and setting forth, with much force and truth, the evils that may arise from the neglect of that very necessary precaution.

2. As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain Districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary Tribes, as national wrongs, and the sense of injury might produce a feeling of irritation against the Settlers, and perhaps disaffection to the Government that would endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice, up to the year 1859, to purchase the Native rights in the land, in every case, prior to the settlement of any District: but since that time in consequence of the termination of the Hudson’s Bay Company’s Charter, and the want of funds, it has not been in my power to continue it. Your Grace must indeed be well aware that I have, since then, had the

²⁹ Captain R.M. Parsons, Royal Engineers, to Colonel Moody, Royal Engineers and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).

³⁰ Captain R.M. Parsons, Royal Engineers, to Lieutenant-Corporal Turner, [April 30, 1861], BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 466–67). Original emphasis. Captain Parsons issued similar instructions to Sapper Turnbull; see R.M. Parsons, Captain, Royal Engineers, to Turnbull, Sapper, [Royal Engineers], May 1, 1861, BCA, GR 2900, vol. 2, pp. 186–87 (ICC Exhibit 1a, pp. 468–69).

utmost difficulty in raising money enough to defray the most indispensable wants of Government.³¹

Governor Douglas went on to propose that the imperial government fund the purchase of Indian lands through a loan to the colony of £3,000, eventually to be repaid through the sale of the colony's Crown lands.³²

The British government apparently concurred with Governor Douglas's opinion that the Indians' interest in the land should be extinguished by payment of monetary consideration, but it disagreed with the Governor's proposal that the imperial government fund such purchases, either through a loan or other means. A marginal note found on Governor Douglas's proposal reads as follows:

The early settlement of this matter is of much importance. I frequently am called upon to see at this office persons of all [classes] desirous of settling in V.C. Isl. or B. Columbia, and one of the questions proposed to me is generally how the claims of the natives to Land are arranged. To which I have had to [ans.] that I concluded they w[ould] have to be bought up. But this has not been quite satisfactory to an enquiring settler ... Therefore if these Indian claims c[ould] be fairly extinguished the arrangement w[ould] facilitate immigration. But [buying] them by means of a loan from the British Exchequer is probably questionable. I do not see why a loan sh[ould] not be raised in the Colony, the amount wanted being only £3000.³³

On June 12, 1861, a second appeal was made to the imperial government to provide the estimated £3,000 required to purchase the Indians' interest in lands in the colony. In a letter originating from the Immigration Office, J.W. Murdoch stated:

The assembly represent that nearly three years ago many Colonists purchased land over which the Native Title has not yet been extinguished, at the rate of £1 per acre that the natives, being well aware of the sum paid to other natives for the

³¹ James Douglas, Governor, to Duke of Newcastle, March 25, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, pp. 446–49).

³² James Douglas, Governor, to Duke of Newcastle, March 25, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, pp. 450–52).

³³ Marginalia to Mr Eliot found on James Douglas, Victoria, Vancouver Island, to Duke of Newcastle, March 25, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 455).

extinction of their title refuse to allow the Colonists to take possession of the Land that any attempt to do so by force would produce collisions and render the natives, who are numerous and warlike, hostile to settlers, and that the existence of the native title has deterred many persons from settling in the Island. The House of Assembly express an opinion that the Imperial Government is bound to extinguish the Native Title, and pray that early steps may be taken for that purpose.³⁴

Again, marginalia recorded on this letter indicates that the imperial government agreed that underlying Aboriginal interests should be extinguished, although officials were reluctant to commit the imperial government to the costs associated with the extinguishment.³⁵

By October 1861, a decision was reached regarding Governor Douglas's proposal that the imperial government spend the requisite £3,000 to purchase Aboriginal lands in the colony. In a letter dated October 4, 1861, the decision of the Treasury was communicated:

[I]t appears that the Lords Commissioners of the Treasury to whom the matter had been submitted, are not prepared to purchase up the native Title at the expense of this Country and do not view the present application as one for a loan, since the House of Assembly had asserted the liability of the Home Government to bear the charge of extinguishing the Title. Their Lordships moreover consider that the Governor's best course would be to follow his previous practice of purchasing the native rights over such land only as was immediately required for settlement, and not on so large a scale at once as to require that a loan should be raised for the purpose.³⁶

On October 19, 1861, the Duke of Newcastle informed Governor Douglas that his application of March 25, 1861, was rejected and that the colonial legislature should not expect financial assistance from the imperial government.³⁷

³⁴ J.W. Murdoch, Immigration Office, Lands, Vancouver Island, to Sir Frederic Rogers, June 12, 1861, BCA, B390/B408, CO 305/18 (ICC Exhibit 1a, pp. 470–72).

³⁵ See marginalia on J.W. Murdoch, Immigration Office, Lands, Vancouver Island, to Sir Frederic Rogers, June 12, 1861, BCA, B390/B408, CO 305/18 (ICC Exhibit 1a, p. 477).

³⁶ Walcott, Emigration Office, [author not identified further], to Sir Frederic Rogers, [Undersecretary of State for the Colonies], October 4, 1861, BCA, B390-408, CO 305/18 (ICC Exhibit 1a, pp. 492, 493–95).

³⁷ Newcastle to Governor James Douglas, October 19, 1861, [BCA, file reference unavailable] (ICC Exhibit 1a, pp. 500–1).

SETTLEMENT OF THE CLAIM AREA

Settlement activity in the Rock Creek District continued into 1862, although William Cox had not yet set aside any land for the Neskonlith, Adams Lake, and Little Shuswap Indian Bands.³⁸ On June 9, 1862, Colonial Secretary William A.G. Young wrote to R.C. Moody, CCLW, stating that Governor Douglas:

was under the impression that the work of marking out (*not surveying*) the Indian Reserves had been long ago carried out, where requisite, under the instructions conveyed to you by His Excellency on the 5th March, 1861. ... [I]t appears to His Excellency that for all present purposes, the marking of such Reserves by conspicuous posts driven into the ground would be sufficient, and that the survey thereof could be postponed until the Colony can better afford the expense.³⁹

In the fall of 1862, William Cox was sent to the Kamloops area to investigate a complaint by an Indian, Shimitikum, that settlers were encroaching on his cultivated fields, and to mark out the lands.⁴⁰ On that trip, Cox also met with “Petite Louis, Chief of Kamloops Indians,”⁴¹ and Chiefs “Care-goire [Gregoire] & son Nesquimilth” of the Shuswap tribe. During this visit, Cox provided them with “Notices” reading as follows: “All persons are hereby cautioned not to cut timber, interfere, or meddle in any way with the rights of the Indians on this Reserve.”⁴² Unlike those given to the Kamloops Chief, however, the notice given to Chiefs Gregoire and Neskonlith contained no description of the boundaries. Cox’s record book from 1862 records that Indian Reserve (IR) 45 at

³⁸ R.C. Moody, Colonel, Royal Engineers, and CCLW, to Colonial Secretary, March 12, 1862, [BCA, file 390] (ICC Exhibit 1a, pp. 530–31).

³⁹ William A.G. Young, Colonial Secretary, to CCLW, June 9, 1862, BCA, C/AB/30.1J/9, pp. 267–68 (ICC Exhibit 1a, pp. 548–49). Original emphasis.

⁴⁰ J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, October 6, 1862, BCA, C/AB/30.1J/4, pp. 316–17 (ICC Exhibit 1a, pp. 555–57).

⁴¹ Notice, W.G. Cox, Justice of the Peace, Kamloops, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 570). See also Notice, W.G. Cox, Justice of the Peace, Kamloops, October 31, 1862, BCA, GR 1372, file 377/256 (ICC Exhibit 1a, p. 567).

⁴² Notice, W.G. Cox, Justice of the Peace and Magistrate, Shuswap, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 568).

Shuswap Lake was “not inspect [?] marked out” and again failed to describe the boundaries.⁴³ Cox reported the locations of some of the newly reserved lands in a letter to the CCLW Moody, dated October 31, 1862, but he did not mention a reserve being set aside at Shuswap Lake.⁴⁴

In 1863, complaints made by bands at Coquitlam River drew Governor Douglas’s attention to the fact that some bands were dissatisfied with the size of their reserves and, as well, the possibility that the Governor’s policy was not being implemented according to instructions. In that instance, Governor Douglas agreed that the Coquitlam reserves were indeed too small and took the opportunity to reiterate his policy regarding setting out reserves. Douglas wrote to the CCLW on April 27, 1863, stating:

Notwithstanding my particular instructions to you, that in laying out Indian Reserves the wishes of the Natives themselves, with respect to boundaries, should in all cases be complied with, I hear very general complaints of the smallness of the areas set apart for their use.

I beg that you will take instant measures to inquire into such complaints, and to enlarge all the Indian Reserves between New Westminster and the mouth of Harrison River, before the contiguous lands are occupied by other persons.⁴⁵

In his reply to the Governor’s letter, Colonel Moody, CCLW, disagreed with the complaints of the Bands:

The reserve in question was most carefully laid out, the Indians being present, and after they had *themselves* marked according to their own wishes the bounds, the area was further enlarged. I resisted the appeal of the neighbouring settler, and acceded to the amplest request of the Indians.

....

I have never yet rec[eived], nor heard from any source whatever, a complaint from the Indians in reference to the extent of their boundaries. In fact, in every case the wishes of the Indians are carefully consulted, and the bounds are widely extended beyond the limits marked out by themselves.

⁴³ Notes, William George Cox, Magistrate, Rock Creek, BC, c. 1862, BCA, GR 0857 (ICC Exhibit 1a, p. 582).

⁴⁴ William George Cox, Kamloops, to R.C. Moody, Colonel and CCLW, October 31, 1862, BCA, GR 1372, file 377/25b (ICC Exhibit 1a, pp. 572–77).

⁴⁵ James Douglas, Governor, to CCLW, April 27, 1863, BCA, C/AB/30.1J/9, pp. 397–98 (ICC Exhibit 1a, pp. 585–86).

Any statement, contrary to the above, made to [Your Excellency] from whatsoever quarter is absolutely without foundation. ... The interests of the Indian population are scrupulously, I may say jealously, regarded by myself and every officer and man under my command.⁴⁶

Replying to Moody, Governor Douglas reiterated the policy to which he expected complete adherence by his staff:

2. In reply thereto I am to acquaint you that His Excellency considers that the instructions contained in his letters to you of 5th March and 5th April, 1861, and 27th April, 1863, cover the whole question, and he requests that those instructions may be carried out to the letter, and in all cases where the land pointed out by the Indians appears to the officer employed on the service to be inadequate for their support, a larger area is at once to be set apart.⁴⁷

James Douglas retired as Governor of both the colony of British Columbia and the colony of Vancouver Island in April 1864. In one of his last addresses to the Legislative Assembly, Governor Douglas proudly recounted the colony's accomplishments with regard to setting aside Indian reserves:

The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favorite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the natives. The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.

The Indians themselves have no power to sell or alienate these lands, as the Title will continue in the Crown, and be hereafter conveyed to Trustees, and by that means secured to the several Tribes as perpetual possession.

That measure is not however intended to interfere with the private rights of individuals of the Native Tribes, or to incapacitate them, as such, from holding land;

⁴⁶ R.C. Moody, Colonel, Royal Engineers, and CCLW, to Governor, April 28, 1863, BCA, GR 2900, vol. 9, pp. 282–83 (ICC Exhibit 1a, pp. 589–90). Original emphasis.

⁴⁷ William A.G. Young, Colonial Secretary's Office, to CCLW, May 11, 1863, BCA, GR 1372, file 331[4] (ICC Exhibit 1a, pp. 596–97). Young handled Governor Douglas's correspondence.

on the contrary, they have precisely the same rights of acquiring and possessing land in their individual capacity, either by purchase or by occupation under the Pre-emption Law ...

I have been influenced in taking these steps by the desire of averting evils pregnant with danger to the peace and safety of the Colony, and of confirming by those acts of justice and humanity, the fidelity and attachment of the Native Tribes to Her Majesty's rule.⁴⁸

A NEW INDIAN LAND POLICY FOR THE COLONY

Following the retirement of Governor Douglas, the imperial government appointed Frederick Seymour as Governor of the colony of British Columbia and Edward Kennedy as Governor of the colony of Vancouver Island.⁴⁹ Shortly after Governor Seymour's appointment, the Legislative Council of the colony of British Columbia unanimously passed a resolution which contrasted significantly with the address Douglas made before the council five months earlier. The resolution, dated May 3, 1864, reads as follows:

Resolved, That whereas certain reservations in the valley of Chilwayhook and elsewhere throughout the Colony are being made for the benefit of the Indians, and whereas said reservations are considered to be unnecessarily large (10 acres to each family), and in several instances including lands already pre-empted and improved by actual settlers, thereby seriously interfering with the development of the agricultural resources of the Colony; be it resolved that His Excellency be respectfully requested to give the matter his consideration at as early a date as convenient, in order to avoid difficulties between the Settlers and the Indians.⁵⁰

⁴⁸ James Douglas, Governor, to Legislative Council, January 21, 1864, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 180–81 (ICC Exhibit 1a, pp. 733–34).

⁴⁹ Jacques Siegrist, "Establishment and Reduction of the Pre-Confederation Neskonlith, Adams Lake, and Little Shuswap Lake Band[s] Indian Reserves," Specific Claims Branch Historical Review, undated, p. 3; edited from Dorothy Kennedy, "The Establishment and Reduction of Cox Reserves in the Shuswap Area," for the BC Indian Language Project (ICC Exhibit 3a, p. 4).

⁵⁰ Legislative Council, Minutes, May 3, 1864, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 237 (ICC Exhibit 1a, p. 755).

In an address to the Legislative Council on May 4, 1864, the new Governor stated “[y]our resolution of yesterday’s date ... respecting the Indian Reserves, shall have, as it deserves, my anxious consideration. I have not yet sufficient experience to deal with the question.”⁵¹

Two days later, on May 6, 1864, Governor Seymour appointed Joseph William Trutch as Surveyor General for the colony of British Columbia, replacing R.C. Moody.⁵² Trutch also held the position of Chief Commissioner of Lands and Works (CCLW).⁵³

REDUCTION OF NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP RESERVES

Cox’s 1862 Meeting with Chief Neskonlith Revisited

In the summer of 1865, the Gold Commissioner and Magistrate for the Cariboo District, Philip Nind, travelled through the Rock Creek region to investigate the sale of alcohol to Indian persons,⁵⁴ as well as to attempt to capture a fugitive.⁵⁵ After meeting with Chief Neskonlith during his travels,⁵⁶ Nind wrote to William Cox, inquiring about the reserves Cox “set aside” for Chief Neskonlith in 1862:

The Indians in support of their claim say that you gave them authority to take up this land and that they hold papers from you wh. however I have not seen. Can you give me any information on this point as I see there will be a good deal of trouble ahead when this part of the country comes to be settled. These Indians seem to be well disposed now, but I think they might prove troublesome & formidable.⁵⁷

On July 16, 1865, Cox responded to Nind, recounting his 1862 travels through the area:

⁵¹ Legislative Council, Minutes, May 4, 1864, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 242 (ICC Exhibit 1a, p. 767).

⁵² Frederick Seymour, Governor, Colony of BC, to unidentified recipient, May 6, 1864, BCA, GR 1372, file 939 (ICC Exhibit 1a, pp. 768–70).

⁵³ Arthur Birch, Colonial Secretary, Colonial Secretary’s Office, to Joseph W. Trutch, May 12, 1864, BCA, C/AB/30.1J/10 (ICC Exhibit 1a, p. 771).

⁵⁴ Philip Nind to A. Birch, July 12, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, p. 842).

⁵⁵ P.H. Nind to William Cox, July 3, 1865, BCA, GR 1372, file 1256/6 (ICC Exhibit 1a, p. 841).

⁵⁶ Philip Nind to A. Birch, July 12, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, p. 843).

⁵⁷ P.H. Nind to William Cox, July 3, 1865, BCA, GR 1372, file 1256/6 (ICC Exhibit 1a, p. 841).

Just before leaving Kamloops, I received instructions from Governor Douglas to mark out all the Indian Reserves in the neighbourhood. ... The Shouswap tribes called upon me to do the same for them, as some frenchmen were encroaching upon their grounds. I could not mark off their boundaries at that time on the ground, but chalked out the position and extent of the Shouswap Reserve at Kamloops, for the chief, and gave him papers to post up. There could be no mistake.⁵⁸

Cox went on to state: "I shall send you herewith a sketch of same as well as I can recollect it. The probability is that my papers have been removed, and the grounds allowed by me greatly added to."⁵⁹

On July 17, 1865, following the receipt of Cox's sketch and report, Nind wrote to Arthur Birch, Colonial Secretary and officer in charge in Governor Seymour's absence, informing him as follows:

That branch of the Shuswap tribe which live on the Upper Thompson and Shuswap Lakes numbering I am informed less than five hundred souls claim the undisputed possession of all the land on the north side between the foot of the Great Shuswap Lake and the North River a distance of nearly fifty miles where lie thousands of acres of good arable and pasture land admirably adapted for settlement.

...

Another branch of the same tribe not so numerous as the first claim all the available land on the North River, extending northward many miles above the mouth, which also possesses attraction to the settler. These Indians do nothing more with their land than cultivate a few small patches of potatoes here and there – they are a vagrant people, who live by fishing, hunting and bartering skins, as the cultivation of the ground contributes no more to their livelihood than a few days digging of wild roots but they are jealous of their possessory rights, and are not likely to permit settlers to challenge them with impunity; nor, such is their spirit and unanimity would many settlers think it worth while to encounter their undisguised opposition. This then has the effect of putting a stop to settlement in these parts. Already complaints have arisen from persons who have wished to take up land in some of this Indian territory, but who have been deterred by Indian claims. At present all the land pre-empted is on the south side of Thompson Valley for no other cause than this. ...

⁵⁸ William George Cox to Philip Nind, July 16, 1865, in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854).

⁵⁹ William George Cox to Philip Nind, July 16, 1865, in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854). Sketch by W.G. Cox, c. 1865 (ICC Exhibit 7a, p. 3). See Map 2.

It seems to me undesirable that the principle of a settler purchasing or acquiring his right to land from the natives should ever be admitted. I assume that this is the prerogative of the Government of the Colony which should alone be able to confer an indefeasible [*sic*] title to its lands. Certainly what one man might obtain by influence over a chief or intermarriage with a tribe or other means more questionable might be refused to another who yet carried out all the requirements of the law. One would live in security; the other would always be subject to molestation and danger.⁶⁰

Nind went on to recommend that:

the only method of settling this matter satisfactorily and with equity to both Indians and whites will be for the Government to extinguish the Indian claims, paying them what is proper for so doing and giving them certain reservations for their sole use. These Indians are now quiet and not ill-disposed to the whites but they are capable of giving a good deal of trouble if they imagine their rights are invaded.⁶¹

Following the receipt of Nind's letter, the Colonial Office asked the CCLW and Surveyor General, Joseph Trutch, for his opinion on the size of the Shuswap reserves. On September 20, 1865, Trutch wrote:

I have the honor to state that the settlement of the boundaries of Indian Reserves is, in my opinion, a question of very material present and prospective importance, and should engage immediately the attention of all interested.

I quite concur in Mr. Nind's remarks on the Kamloops and Shuswap Reserves, taking for granted that the premises in which they are founded are correct, but as this Department is entirely without official information as to the location or extent of any Indian Reserves, I am unable to supply any exact data on this subject.

It appears most advisable that it should be at once constituted the definite province of some person or persons, duly authorized for that purpose, to make a thorough enquiry into this subject throughout the Colony. To ascertain as exactly as practicable what lands are claimed by Indians. What lands have been authoritatively reserved and assured to the various tribes, and to what extent such Reserves can be modified with the concurrence of the Indians interested in them – either with or without money or other equivalent.

⁶⁰ Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, pp. 855–57).

⁶¹ Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, p. 857).

I am satisfied from my own observation that the claims of Indians over tracts of land, on which they assume to exercise ownership, but of which they make no real use, operate very materially to prevent settlement and cultivation, in many instances besides that to which attention has been directed by Mr. Nind, and I should advise that these claims should be as soon as practicable Enquired into and defined.⁶²

Moberly's Trip to the Shuswap Area, 1865

The Colonial Secretary concurred with the recommendation that the Shuswap reserves be reduced, but was not willing to commit to a systemic review of the acreages of reserves in the colony. On September 26, 1865, Trutch was informed that:

His Honor is fully impressed with the importance of defining these Reserves throughout the Colony, but he is not prepared at this late season of the year to commence a General System such as you recommend. His Honor however thinks it very desirable that the Shouswap and Kamloops Reserves should be reduced, without further delay, to reasonable limits As it would perhaps be a matter of greater difficulty to settle the affair should the route to Kamloops become the main thoroughfare to the Columbia River, I am therefore to request you to inform Mr. Moberly that the Governor is very desirous of reducing the reserves to which Mr. Nind makes allusion in his letter of the 17th July, last, and of which I forward a Copy for your information and guidance and that you will authorize Mr. Moberly to make enquiries on his way down, and to reduce these reserves if he is of opinion that it can be effected without much dissatisfaction to the Indians. If however he should be of opinion that difficulty will arise from such a course his duty will be to collect on the spot all the information he can on the subject, and furnish you with a full Report thereon, in order that the Government may have some data to go by in coming to a decision in the matter.

His Honor further suggests that Mr. Nind be at once requested to furnish Mr. Moberly with a Copy of a Report from Mr. Cox on this subject ...⁶³

In accordance with those instructions, Walter Moberly, Assistant Commissioner of Lands and Works,⁶⁴ was provided with a copy of the 1865 Cox sketch and the report from Nind on October 5,

⁶² Joseph W. Trutch, CCLW and Surveyor General, Department of Lands and Works, to Colonial Secretary, September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11).

⁶³ Charles Good for the Colonial Secretary to CCLW, September 26, 1865, BCA, file 942; GR 1372, file 334(2) (ICC Exhibit 1a, pp. 916–19).

⁶⁴ Walter Moberly, *The Rocks and Rivers of British Columbia* (London: Blacklock & Company, 1885), 36, 39–41, 46–49, 60–63 (ICC Exhibit 1a, p. 967).

1865.⁶⁵ Following this, on October 10, 1865, Moberly received the following instructions from Joseph Trutch, CCLW and Surveyor General:

The Indian Reserves at Kamloops and Sushwap laid out by Mr. Cox being considered entirely disproportionate to the numbers and requirements of the Indians residing in those Districts His Honor has instructed me to direct you to make an investigation of the subject on your way back from the Columbia and to report on your return to this place whether in your opinion arrangements can be made to reduce the limits of these Reserves, so as to allow part of the lands now uselessly shut up in these Reserves to be thrown open to Preemption.⁶⁶

Moberly arrived at the Indian reserve at Shuswap Lake in November 1865. The first meeting between Moberly and Chief Neskonlith occurred on November 7, 1865. Moberly recounted this initial visit as follows:

I explained to them that I had rec[eived] instructions from the Gov[ernment] to ascertain where they had lands cultivated and then if agreeable to them that I would mark them off at once so that they should always know which were their lands where no other persons could intrude. They appeared quite willing that I sh[ould] do so & having learnt from them that there were several Indian gardens on Adams Lake I told them I should go there & see them in order to know definitely what to do so that *all* their grounds should be properly marked off & secured to them at the same time.⁶⁷

On November 8, 1865, Chief Neskonlith and some other band members told Moberly “that they did not wish me to mark off the ground, that it had been marked off by Mr. Cox who told them he had been instructed by Govr. Douglas to mark it off in the manner in which it was staked out.”⁶⁸

This entry in Moberly’s notebook continued as follows:

⁶⁵ Philip Henry Nind, Lytton, to W. Moberly, October 5, 1865, BCA, GR 1372, file 1259/42 (ICC Exhibit 1a, pp. 928–29).

⁶⁶ Joseph W. Trutch, New Westminster, to W. Moberly, October 10, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, pp. 930–31).

⁶⁷ Walter Moberly, Surveyor General’s Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 39). Original emphasis.

⁶⁸ Walter Moberly, Surveyor General’s Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 40).

On my enquiring if Mr. Cox had been to see these lands the Indians informed me he had not as he only came up the river to [illegible] point [illegible] on the little lake. I then learnt from the Indians that Nesquinilth had placed the stakes himself, that Mr. Cox had told them the lands not actually cultivated w[ould] do for them to raise cows on & that no person c[ould] intrude on them & that Gov[ernor] Douglas had told Mr. Cox to tell them so.⁶⁹

Moberly then explained to the Band:

that if the Gov[ernor] authorized any officer to mark out grounds that it was the duty of the officer to see the grounds & also the stakes & that they were properly placed and that no officer c[ould] give lands unless sanctioned by the Gov[ernor] that it was my opinion that Gov[ernor] Douglas had authorized Mr. Cox to lay out reserves for them but that Mr. Cox had not laid them out as Gov[ernor] Douglas intended they should be & if so that the stakes as placed at present would amount to nothing. I also told them that the wish of the Gov[ernment] was to preserve to them all lands that they at present cultivated & to have them properly marked so that both Indian & white should know wh[ich] were Indian lands & wh[ich] were not, that at present the Gov[ernment] did not know, that the Indians were in doubt, and that the whites also were in doubt, that as the Indians did not wish me to lay off their lands I sh[ould] not do so at present until I had definitely ascertained what Mr. Cox had told all the Indians, what status he had placed & what Gov[ernor] Douglas had authorized him to do. ... some of the Indians told me they also thought Mr. Cox had not laid off their ground as Gov[ernor] Douglas intended & they seemed quite convinced that what I told them about an officer first actually seeing the land & then seeing the stakes actually [placed] was as it ought to be & that he s[hould] not give lands he had never seen.⁷⁰

On November 9, 1865, Moberly visited with band members at Adams Lake. Moberly reported that he:

showed them Mr. Cox's sketch & explained that what he described in his sketch & note did not at all agree with the stakes set up by Nesquinilth & that therefore their garden here and on the opposite side & north end of Lake were not secured to them

⁶⁹ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4-18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 40).

⁷⁰ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4-18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40-41).

except by Nesquinilth's stake which w[ould] not prevent the whites taking them. They told me Nesquinilth wanted them very much to move down to his place but they wanted to stay where they had always lived. I told them to stop then & that I w[ould] see the Gov[ernor] & have arrangements made so that their lands sh[ould] not be intruded upon until properly staked out. ... They wished me to mark off their grounds as I showed them so as to include their potatoes & having told me this they hoped I w[ould] [illegible] them done. I explained to them that I wished to see all the Indians as far as Kamloops & let them all thoroughly understand what I wanted to do & what the status of plans by me would mean & then I w[ould] have their lands marked off.⁷¹

Walter Moberly reported on his November visit to the Kamloops and Shuswap Indian Reserves in a letter to CCLW Joseph Trutch, dated December 22, 1865:

When in possession of the above information and such as I gathered from the different letters and papers I enclose, as I found that Mr. Cox's sketches and descriptions did not agree with the position of the marks set up I was quite at a loss what conclusion to arrive at with regard to them.⁷²

With his letter, Moberly enclosed a copy of a sketch he prepared during his visit, depicting the lands staked and claimed by Chief Neskonlith and his followers as their reserve.⁷³ Walter Moberly did not stake out any lands for any of the Bands at that time,⁷⁴ but he explained to Chief Neskonlith and his followers that "their lands as now circumstanced w[ould] not be intruded upon until staked out & that when staked out they would have permanent & undisturbed possession of them."⁷⁵ In his

⁷¹ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 45).

⁷² Walter Moberly, New Westminster, to Joseph Trutch, CCLW, New Westminster, December 22, 1865, BCA, GR 1372, file 1145b (ICC Exhibit 1a, pp. 952–53). See also Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40–41).

⁷³ "Sketch showing Indian Claims on the North and Shuswap Reserves to accompany my report of the same date," W. Moberly, December 22, 1865, no file reference available (ICC Exhibit 7e, p. 1).

⁷⁴ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 41).

⁷⁵ Walter Moberly, Surveyor General's Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p. 45).

notebook, Moberly recorded that Chief Neskonlith “told me the Indians did not want to be deprived of the lands where they were.”⁷⁶

STAKES PLACED BY CHIEF NESKONLITH

The sketch provided by Walter Moberly in 1865 shows the locations of three stakes: one at Scotch Creek, one at Monte Creek, and the third at the north end of Adams Lake.⁷⁷ At the community session, testimony was heard regarding the placement of stakes⁷⁸ by Chief Neskonlith.

Elder Isaac James Arnouse, appearing on behalf of the Little Shuswap Indian Band, testified that, while hunting and fishing with his father as a child, he had regularly viewed rock cairns at the north end of Adams Lake, although not where the stake is commonly marked on maps, and another at Scotch Creek.⁷⁹ Elder Arnouse testified that he understood that the pins were placed under the cairns,⁸⁰ although he never actually saw the stakes at either of these locations. Testimony was heard explaining that the rock cairns were erected to symbolize locations of special significance and protect the pins.⁸¹ The cairns were later cemented by William (Bill) Arnouse for further protection.⁸²

Elders Emery and Elton Arnouse, on behalf of the Little Shuswap Indian Band, also told of stories they had heard as children about a pin at Scotch Creek.⁸³ Elder Emery Arnouse testified that

⁷⁶ Walter Moberly, Surveyor General’s Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865, Royal Engineers Collection, tray 1, vol. 2, book 3, Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, p . 46).

⁷⁷ “Sketch showing Indian Claims on the North and Shuswap Reserves to accompany my report of the same date,” W. Moberly, December 22, 1865, no file reference available (ICC Exhibit 7e, p. 1).

⁷⁸ Also referred to as “pins,” “posts,” or “pegs” in the community session testimony.

⁷⁹ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 55–60, I.J. Arnouse).

⁸⁰ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 57, 58, I.J. Arnouse).

⁸¹ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 16, 73, E. Arnouse).

⁸² ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 60, I.J. Arnouse).

⁸³ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 17–18, E. Arnouse; pp. 73–74, E. Arnouse).

he had the opportunity to view the pin before the cairn was erected. He described it as a “square pin ... [a]bout a half inch ... [made of] Metal [or] steel...flush to the ground.”⁸⁴

Elder Elton Arnouse testified that he often visited a rock cairn at the north end of Adams Lake as a child and was repeatedly told by his grandfather “to remember this place because some day somebody’s going to be asking you about it.”⁸⁵ Elder Elton Arnouse testified that he had never seen the pin which he believes lies beneath the rock cairn and which, until it was washed away, was located at the north end of Adams Lake.⁸⁶

Elder Jones Ignace, appearing on behalf of the Adams Lake Band, testified that he had heard stories about a stake in the neighbourhood of Monte Creek, on the north side of the Thompson River.⁸⁷ Elder Ignace further stated that Elder Anthony August:

talked about that in the Douglas Reserve where the stakes were put in by Governor Douglas’s men. The two stakes, one in Scotch Creek and one in Monte Creek, that one I just mentioned. And the two that were supposed to be put in, were supposed to be put in by our people back in – way back in areas back, I guess it would be north, I guess.

...

The top end of Adams Lake.⁸⁸

At the community session, Chief Ron Jules of the Adams Lake Band testified that the north corner of Chief Neskonlith’s reserve is located at Dunn Peak.⁸⁹ Chief Jules described the boundary as follows:

across from the mouth of Monte Creek straight up north is right dead in line with Dunn Peaks, or Dunn Peak, which is one of the highest peaks in that mountain range.

⁸⁴ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 17–18, E. Arnouse).

⁸⁵ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 72–73, E. Arnouse).

⁸⁶ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 73, E. Arnouse).

⁸⁷ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 177, J. Ignace).

⁸⁸ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 178, J. Ignace).

⁸⁹ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 196, Chief R. Jules).

I'm not sure what mountain range. From there it goes over to the North Adams, and then down to Scotch Creek.⁹⁰

Browne Johnson Land Surveyors were hired during the inquiry to locate the three iron stakes identified by Moberly. With the assistance of James and Emery Arnouse from the Little Shuswap Band, Joe Johnson attempted “to locate the positions of petroforms and the location of stakes identified by members of the First Nation and to provide ... coordinates of these locations for mapping purposes.”⁹¹ Johnson found no evidence of an iron post, or of a rock cairn at the Adams Lake location.⁹² Evidence of a rock cairn was found at the Scotch Creek location; however, no evidence of an iron post was found.⁹³ At Monte Creek, the third and final location, no evidence of a rock cairn or iron post was found; however, a petroform was located at this site.⁹⁴

Elder Sarah Denault, appearing on behalf of the Neskonlith Indian Band, stated that when Chief Neskonlith staked out the reserve for his followers, he did so for all three Bands.⁹⁵ Furthermore, Elder Denault testified that, when Chief Neskonlith staked out the reserve, he “was not alone because he had other chiefs, you know, like – you know, saying yes, you need this, that’s good.”⁹⁶ Elder Denault also testified that “the surveyor was there” as well, although she was unable to identify the surveyor.⁹⁷ According to Elder Denault, Chief Neskonlith understood that he was

⁹⁰ ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 196, Chief R. Jules).

⁹¹ Patrick Ringwood, BCLS, CLS, “Report on Various Survey and Mapping Issues Relating to the Neskonlith Claim,” report prepared for the Bands, 2006 (ICC Exhibit 10b, p. 12).

⁹² Joe Johnson, BCLS, CLS, Browne Johnson Surveyors, Salmon Arm, BC, to Patrick Ringwood, undated, attached to Patrick Ringwood, BCLS, CLS, “Report on Various Survey and Mapping Issues Relating to the Neskonlith Claim,” report prepared for the Bands, 2006 (ICC Exhibit 10b, p. 12).

⁹³ Joe Johnson, BCLS, CLS, Browne Johnson Surveyors, Salmon Arm, BC, to Patrick Ringwood, undated, attached to Patrick Ringwood, BCLS, CLS, “Report on Various Survey and Mapping Issues Relating to the Neskonlith Claim,” report prepared for the Bands, 2006 (ICC Exhibit 10b, pp. 12–13).

⁹⁴ Joe Johnson, BCLS, CLS, Browne Johnson Surveyors, Salmon Arm, BC, to Patrick Ringwood, undated, attached to Patrick Ringwood, BCLS, CLS, “Report on Various Survey and Mapping Issues Relating to the Neskonlith Claim,” report prepared for the Bands, 2006 (ICC Exhibit 10b, p. 13).

⁹⁵ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 22, S. Denault).

⁹⁶ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 25, S. Denault).

⁹⁷ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 37, S. Denault).

staking out the boundaries of a reserve.⁹⁸ During the community session, considerable testimony was heard from Elders about the Bands' use of the area staked by Chief Neskonlith.⁹⁹

DEWDNEY SURVEY, 1866

On January 17, 1866, Joseph Trutch, CCLW and Surveyor General, wrote to the Colonial Secretary, reporting the results of Moberly's visit. Trutch stated that the reserves at Shuswap Lake are "entirely disproportionate to the numbers or requirements of the Indian tribes."¹⁰⁰ In advancing plans to reduce the reserves, Trutch advised as follows:

Two points remain to be determined. 1st. Whether or not Mr. Cox's agency in the matter is binding on the Government; and Secondly, Are the boundaries of the Reserves now claimed by the Indians, those which Mr. Cox really gave them assurance of?

On the first point I cannot form an opinion as I am without any information as to the instructions given to Mr. Cox on the subject, but on the second I think there is reason to believe from what Mr. Cox stated to Mr. Birch in my presence, in August last at Richfield, and from the rough sketch furnished in his own handwriting, a copy of which is enclosed – that the extent of one at least, of these Reserves, that of the Shuswap tribe, has been largely added to, by the changing of the position of the boundary stakes by the Indian claimants.¹⁰¹

Trutch suggested, however, that if the government decided:

that Mr. Cox's Reserves are to be observed, and that the tracts claimed by the Indians are only those which were actually made over to them by him, there will remain only

⁹⁸ ICC Transcript, July 19, 2006 (ICC Exhibit 10e, pp. 37–38, S. Denault).

⁹⁹ ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 63–64, I.J. Arnouse; p. 14, E. Arnouse; p. 78, E. Arnouse; pp. 26–28, 32–33, E. Philip; pp. 82, 89, J. S. Michel); ICC Community Session, Map of Neskonlith Douglas Reserve area with reference numbers, prepared by Steve Murphy, GIS Analyst, Natural Resources Department, Adams Lake Indian Band (ICC Exhibit 5b, p. 1); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 162–73, J. Ignace; pp. 192–93, Chief R. Jules); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 43, S. Denault).

¹⁰⁰ Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 982).

¹⁰¹ Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, pp. 983–84).

to be determined whether it is advisable to purchase back from them such portions of these lands as are valuable for settlement.¹⁰²

The next day, January 18, 1866, Arthur Birch, the officer in charge in the absence of the governor, addressed the Legislative Council, at which Joseph Trutch was present, on the issue of the Executive's power regarding various matters, including Indian reserves. Birch stated:

Unforeseen obstacles have retarded the Government in carrying out the Resolution, adopted by this Council, as regards the Survey of Pre-empted Lands throughout the Colony. Arrangements are, however, in progress which will, I trust, enable the Chief Commissioner of Lands and Works to undertake this work without further delay. Measures will, at the same time, be taken to alter the present unsatisfactory system of Indian Reserves. I am in no way convinced of the necessity of any Legislative enactment for this purpose. In all matters connected with the Native Race a large discretionary power must necessarily, in my opinion, be left in the hands of the Executive.¹⁰³

The Legislative Council acknowledged Birch's address and, in concurring with his statements, replied: "We wait with much pleasure the determination expressed by Your Honor to carry out an early and definitive survey and settlement of our agricultural lands and to adjust the Indian Reserves."¹⁰⁴ One month later, the Legislative Council requested the Executive Council officials "inform this Council what steps have been or are to be taken with reference to the extensive Indian Reserves on the Okanagan Lake and Thompson River" as set aside by William Cox.¹⁰⁵ The *British Columbian* newspaper recounted the Acting Colonial Secretary's response as follows:

The hon. the Acting Colonial Secretary said that under a previous administration, large tracts of land had been laid off as Indian Reserves in the districts alluded to. The

¹⁰² Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 985).

¹⁰³ Arthur Birch, officer administering the government, January 18, 1866, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 330 (ICC Exhibit 1a, p. 1003).

¹⁰⁴ Legislative Council, January 18, 1866, BCA, C/AB/20.1A/1, p. 236 (ICC Exhibit 1a, p. 999).

¹⁰⁵ Legislative Council, Minutes, February 12, 1866, in James E. Hendrickson, ed., *Journals of the Colonial Legislatures of the Colonies of Vancouver Island and British Columbia, 1851–1871*, vol. IV (Victoria: Public Archives of British Columbia, 1980), 346 (ICC Exhibit 1a, p. 1019).

present Government considered these reserves excessive ... With respect to the Thompson River country, very large reserves had also been made and a surveyor was sent out last summer with instructions to reduce them, if it could be accomplished in a quiet and peaceable way. It was found, however, that these Indian[s] conceived that what had been granted to them by Sir James Douglas was irrevocably theirs, and they evinced no disposition to cede any portion of it to the Government, so that it was not deemed prudent to press the matter.¹⁰⁶

By July 1866, reports of hostilities between the Indians and settlers and prospectors were received by the colonial government. A.G. Pemberton, a settler on the South Thompson River, wrote that the First Nations in that district “will not allow anyone to do anything on the land they claim, which is most inconvenient to intending settlers. They prevented us from even cutting down trees, and say they don’t want anything to be done until they see you.”¹⁰⁷ On July 27, 1866, CCLW and Surveyor General Joseph Trutch reported that Surveyor Edgar Dewdney would be in the area of Kamloops, Shuswap, and Adams Lakes during the fall of 1866.¹⁰⁸ Trutch also planned to visit the Shuswap reserves personally.¹⁰⁹

The documentary record indicates that CCLW and Surveyor General Trutch visited the Shuswap reserves sometime between July and September 1866.¹¹⁰ Although no official report penned by Trutch regarding this visit is included in the record of this inquiry, reference is made to it in subsequent correspondence.

¹⁰⁶ *British Columbian*, February 14, 1866 (ICC Exhibit 1a, pp. 1020–21).

¹⁰⁷ A.G. Pemberton to CCLW, July 26, 1866, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 37 (ICC Exhibit 1a, p. 1034)

¹⁰⁸ Joseph W. Trutch, CCLW and Surveyor General, Department of Lands and Works, to A.C. Elliott, Lillooet, July 27, 1866, BCA, GR 2900, vol. 6, p. 65 (ICC Exhibit 1a, p. 1035).

¹⁰⁹ A.R. Howse, Lands and Works Department, New Westminster, to Pemberton, August 4, 1866, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 37 (ICC Exhibit 1a, p. 1036).

¹¹⁰ Jacques Siegrist, “Establishment and Reduction of the Pre-Confederation Neskonlith, Adams Lake, and Little Shuswap Lake Band[s] Indian Reserves,” Specific Claims Branch Historical Review, undated, p. 6; edited from Dorothy Kennedy, “The Establishment and Reduction of Cox Reserves in the Shuswap Area,” for the BC Indian Language Project (ICC Exhibit 3a, p. 7).

In September 1866, Edgar Dewdney, accompanied by the Chiefs, surveyed three reserves for the Shuswap and Adams Lake Indian Bands. The Shuswap Indian Band received two reserves; Shuswap Indian Reserve 1 located on the South Thompson River, and Shuswap IR 2 on “Little Lake,” now referred to as Little Shuswap Lake.¹¹¹ The Adams Lake Indian Band received one reserve on Adams Lake and an additional “15 chains square of land situated on the West shore of Lake about 12 miles from the outlet of Adams River.”¹¹² In his report, however, Dewdney stated that he “gave them fifteen square chains,” without either distinguishing between the meanings of the two phrases or clarifying his intent. Dewdney also wrote that he did not survey the allotment, but gave the band members a marker stating “Adams Lake Indian Reserve 15 square chains.”¹¹³

On October 5, 1866, a Gazette notice was issued which stated:

The Officer Administering the Government desires it to be notified that the claims of the Kamloops and Shuswap Indian Tribes to the tract of land extending for over forty miles along the right bank of the South Branch of Thompson River, from Kamloops to the Great Shuswap Lake, have been adjusted, and three portions thereof appropriated as reserves for the use of these tribes, viz:—

...

For the Shuswap Tribe—Two tracts of land.

The first tract reserved is situated at the locality known as the Two-Creeks, about twenty-nine miles from Kamloops up the South Branch of Thompson River, extending two miles along the right bank of said river from the upper of the Two-Creeks, and about two miles back from the bank of the river to the shore of a large lake.

The second reserve is situated at the upper end of the Little Shuswap Lake on its north shore, and extends about two miles eastward from a small creek running into the lake half a mile west of the Indian Village, and about one mile back from the shore, including the Village Chapel and graveyard.

The Indian Reserves above described will be exactly surveyed and staked off immediately, and the remainder of the land hitherto claimed by the Indians along the north bank of the South Branch of Thompson River will be open to pre-emption from

¹¹¹ Edgar Dewdney, New Westminster, to CCLW and Surveyor General, November 8, 1866, BCA, GR 1372, file 461/17 (ICC Exhibit 1a, pp. 1059–60).

¹¹² Edgar Dewdney, New Westminster, to CCLW and Surveyor General, November 8, 1866, BCA, GR 1372, file 461/17 (ICC Exhibit 1a, p. 1061).

¹¹³ Edgar Dewdney, New Westminster, to CCLW and Surveyor General, November 8, 1866, BCA, GR 1372, file 461/17 (ICC Exhibit 1a, p. 1053).

the 1st of January, 1867, before which date however no pre-emption records thereon will be received.¹¹⁴

In 1866, the imperial government united the colonies of Vancouver Island and British Columbia.

REDUCTIONS ON THE LOWER FRASER

The Legislative Council continued to complain about the size of Indian reserves into the year 1867. At its February 11, 1867, meeting, the Legislative Council resolved that the Governor be addressed, “urging the desirability of having the Indian Reserves of the Colony reduced to what is necessary for the actual use of the Natives, and to have such Reserves properly defined, the remainder to be thrown open for settlement.”¹¹⁵ At the same meeting, the Council amended this resolution to specifically refer to the reserves “on the Lower Fraser,”¹¹⁶ instead of the entire colony. The *Daily British Colonist* reported that the resolution was opposed by the Chief Commissioner of Lands and Works and others on the “grounds of expense and not being urgent.”¹¹⁷ Another newspaper, the *British Columbian*, reported that the complaints of the Legislative Council did not pertain to the reservations made in the Thompson River country and praised the “success” in reducing the size of those reserves during the preceding year.¹¹⁸

¹¹⁴ Public Notice, Joseph W. Trutch, CCLW and Surveyor General, October 5, 1866, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 164 (ICC Exhibit 1a, p. 1047). It is not clear why the Adams Lake reserve and additional lands were not included in this Gazette notice.

¹¹⁵ Legislative Council, Minutes, 4th Session, February 11, 1867, BCA, C/AB/20.1A/1 (ICC Exhibit 1a, p. 1068).

¹¹⁶ Legislative Council, Minutes, 4th Session, February 11, 1867, BCA, C/AB/20.1A/1 (ICC Exhibit 1a, p. 1068).

¹¹⁷ *Daily British Colonist*, February 12, 1867 (transcript), no file reference available (ICC Exhibit 1a, p. 1075).

¹¹⁸ *British Columbian*, February 13, 1867 (ICC Exhibit 1a, p. 1079).

On February 14, 1867, a petition signed by over 70 Chiefs, primarily from the Fraser River area, was forwarded by Governor Frederick Seymour to the Earl of Carnarvon, Secretary of State for the Colonies.¹¹⁹ The petition asked, among other things, that their lands not be reduced.

On August 28, 1867, CCLW and Surveyor General Joseph Trutch, wrote to the Acting Colonial Secretary regarding the surveys of Indian reserves in the lower Fraser area. The official who had marked out these reserves with stakes in 1864 as pointed out by the Indians was Land Surveyor William McColl. Trutch blamed the “unsatisfactory” situation of Indian reserves on the lower Fraser on the policies of former Governor James Douglas, which were in effect during Cox’s visit with Chief Neskonlith in 1862. Trutch stated:

The subject of reserving lands for the use of the Indian tribes does not appear to have been dealt with on any established system during Sir James Douglas’ administration.

The rights of Indians to hold lands were totally undefined, and the whole matter seems to have been kept in abeyance, although the Land Proclamations specially withheld from pre-emption all Indian Reserves or settlements.

No reserve of lands specially for Indian purposes were made by Official Notice in the Gazette and those Indian Reserves which were informally made seem to have been so reserved in furtherance of verbal instructions only from the Governor, as there are no written directions on this subject in the correspondence on record in this Office.¹²⁰

Trutch recommended:

that the extent of the Indian Reserves along the lower Fraser River should be definitely determined, and the boundary lines thereof surveyed and exactly marked out on the ground as soon as possible ...¹²¹

¹¹⁹ Petition to Governor Frederick Seymour, c. February 1867, BCA, CO 60/27 (ICC Exhibit 1a, pp. 1092–93); Frederick Seymour to Earl of Carnarvon, February 14, 1867, BCA, CO 60/27 (ICC Exhibit 1a, pp. 1086–88).

¹²⁰ Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit a, pp. 1096–97).

¹²¹ Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, pp. 1096, 1100).

Trutch compared his recommended actions to the colonial government's disavowal of Cox's authority to set aside large areas in the Thompson River district, following which colonial officials reduced those reserves in 1865. Trutch presented two options to the colonial government to settle the matter of the extensive reserves marked out by McColl: to disavow absolutely his authority to make these reserves, or to buy back some of the land from the Indians.¹²² Trutch used the government's reduction of the Kamloops and Shuswap reserves in 1865 as an example of the first option, stating:

The former of these systems was carried out last year in the reduction of the Kamloops and Shuswap Indian Reserves where tracts of land of most unreasonable extent were claimed and held by the local tribes under circumstances nearly parallel to those now under discussion; and I think that a similar course may be very fairly and expediently adopted in this case.¹²³

On November 6, 1867, Governor Seymour ordered that the reserves on the lower Fraser be reduced in size. The Governor ordered:

5. All those Reserves that have been laid out of excessive extent should be reduced as soon as may be practicable. The Indians have no right to any land beyond what may be necessary for their actual requirement, & all beyond this should be excluded from the boundaries of the Reserves. They can have no claim whatever to any compensation for any of the land so excluded, for they really have never actually possessed it, although perhaps they may have been led to view such land as a portion of their Reserve through Mr. McColl so loosely reserving such large tracts of land, out of which at some future day the various Indian Reserves would have to be accurately defined.¹²⁴

The CCLW and Surveyor General, Joseph Trutch, followed these instructions to the point of meeting with Chiefs of bands on the lower Fraser to discuss the reduction of their reserves, but

¹²² Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, p. 1100).

¹²³ Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, p. 1100).

¹²⁴ William A. Young, Colonial Secretary's Office, to CCLW, November 6, 1867, BCA, C/AB/30.1J/10, pp. 194–95 (ICC Exhibit 1a, pp. 1113–14).

did not effect the reduction.¹²⁵ On November 19, 1867, Trutch reported that he told each band that “McCull had no authority for laying off the excessive amounts of land included by him in these reserves, and that his action in this respect was entirely disavowed.”¹²⁶

In late 1869 and early 1870, the colony of Vancouver Island was criticized by a Mr William Sebright Green, in a letter to the Aborigines’ Protection Society for, in his opinion, not implementing an Indian policy.¹²⁷ Responding to this criticism in January 1870, Joseph Trutch acknowledged that no such policy existed but explained, among other things, the colonial government’s approach to setting apart land for Indian reserves:

The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has ... set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each Tribe, and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.¹²⁸

CONFEDERATION, 1871

Sir Anthony Musgrave was appointed Governor of the colony of British Columbia in 1869, following the death of Governor Seymour, and the focus of British Columbia’s political discourse shifted from settlement of the colony to the colony’s union with the Dominion of Canada. British Columbia entered into Confederation in 1871. Section 13 of the Order of Her Majesty in Council admitting British Columbia into the Union (otherwise known as the British Columbia *Terms of Union*) stated:

¹²⁵ Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, November 19, 1867, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 45–46 (ICC Exhibit 1a, pp. 1117–18).

¹²⁶ Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, New Westminster, BC, to Colonial Secretary, November 19, 1867, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 46 (ICC Exhibit 1a, p. 1118).

¹²⁷ W.S. Sebright Green, Victoria, BC, to F.W. Chesson, Secretary, Aborigines’ Protection Society, June 24, 1869, BCA, CO 60/37 (ICC Exhibit 1a, p. 1170).

¹²⁸ Memorandum, Joseph W. Trutch, CCLW, January 29, 1870, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877*, app. B (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 11 (ICC Exhibit 1a, p. 1185).

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.¹²⁹

Consequently, the dominion began to consider its role within the new province's system of allotting Indian reserves, the "liberal" Indian land policy it had inherited upon union, and the ensuing controversy regarding management of Indian reserves in British Columbia.

On October 14, 1872, Joseph Trutch, by then Lieutenant Governor of British Columbia, wrote to Prime Minister Sir John A. Macdonald, offering his opinion on how the dominion government should set aside Indian reserves in the province and administer Indian policy generally:

I am of opinion – and that very strongly that for sometime to come at least the general charge and direction of all Indian affairs in B.C. should be vested in the Lt. Governor – if there is no constitutional objection to such arrangement ...

Then as to Indian policy I am fully satisfied that for the present the wisest course would be to continue the system which has prevailed hitherto only providing increased means for educating the Indians – and generally improving their condition moral and physical. The Canadian system as I understand it will hardly work here. We have never bought out any Indian claims to lands nor do they expect we should – but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to the lands of B.C. – you would go back of all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the districts now settled and farmed by white people equally with those in the more remote and uncultivated portions. Our Indians are sufficiently satisfied and had better be left alone as far as a new system towards them is concerned ...

...

¹²⁹ Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871 (British Columbia, *Terms of Union*), May 16, 1871, no file reference available (ICC Exhibit 6j, p. 6).

[B]y such a course you would secure through the Lt. Governor the benefit of the experience of those who during the past 13 or 14 years have managed the Indian affairs of the country.¹³⁰

In 1872, Israel Wood Powell was appointed Indian Commissioner responsible for the administration of federal Indian legislation in the province of British Columbia. On December 3, 1873, Powell wrote to the Minister of the Interior outlining the resources required by his office. With respect to Indian reserves, Powell stated:

The Reservations of the Province are at present most unsatisfactory to the Indians – in many instances inadequate to the needs of the occupants and a fruitful source of dispute among them. No regular system seems to have been followed in setting them aside – no individual allotment has ever been made and no census of Indian population by which a correct knowledge of their just requirements in regards to land might be ascertained, has been procured. [Some] uniform plan of dividing existing Reserves and giving each occupant of an allotment or his heirs a right to hold the same would be productive of much good and highly satisfactory to all concerned.¹³¹

Powell went on to note that the reserves “in the Shuswap Neskonlith ... are incomplete. There is therefore constant employment for a competent Surveyor for some time to come.”¹³²

The dominion government and the provincial government disagreed on how best to administer Indian land policy in the new province and, by 1874, came to adopt different approaches to setting aside Indian reserves. On February 4, 1874, Indian Commissioner Powell, having already reported on the unsatisfactory condition of Indian reserves in the province, stated:

Again meddlesome white people have informed these Indians of the very liberal concessions made the Manitoba Indians in the late treaties with them by the Dominion Government and as British Columbia Indians were now under the same authority, they were entitled on demand to similar considerations. The late Colonial Government never made any treaty with the Indians of the Province nor am I aware

¹³⁰ Joseph Trutch, Government House, Victoria, to Sir John A. Macdonald, October 14, 1872, no file reference available (ICC Exhibit 1a, pp. 1219–23).

¹³¹ I. W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, December 3, 1873, LAC, RG 10, vol. 3604, file 2521 (ICC Exhibit 1a, pp. 1233–34).

¹³² I. W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, December 3, 1873, LAC, RG 10, vol. 3604, file 2521 (ICC Exhibit 1a, pp. 1234–35).

of any assistance or encouragement that has ever been extended them. On the contrary their prior rights to land have always (except by the Hudson [*sic*] Bay Company) been ignored and they were told instead that they were British Subjects, though the full rights of such have never been granted them.

... When I had the honor last June, to make application to the local Government for 80 acres of land to be set aside for each Indian family, attention was called to the fact that the Dominion Government by the Terms of Union was not called upon to treat the Indians more liberally in this respect than they had been treated by the Colonial Government and the quantity was decreased to “20 acres for each family of five” persons.¹³³

In the summer of 1874, Powell met with a number of Chiefs assembled at Kamloops, including Chief Neskonlith and Chief Louis of the Kamloops First Nation. At that time, the Indian Commissioner heard their grievances regarding the size of their reserves and lack of general and specific assistance from the colonial, and then the provincial, governments.¹³⁴ Chief Neskonlith told the Indian Commissioner:

that his people were given a good piece of land by Mr. Cox (then stipendiary magistrate) but some white people thought it was too good and the Surveyor came and a smaller piece between whites was given me instead. These whites also took half of my Creek which was given me by the Governor ... We want you to give us some of the adjoining land, or make a Reserve in another place ...¹³⁵

In the fall of 1874, Indian Commissioner Powell wrote to former Governor James Douglas inquiring if Douglas had decreed “any particular basis of acreage used in setting apart Indian reserves.”¹³⁶ Douglas replied that:

¹³³ I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, February 4, 1874, LAC, RG 10, vol. 3604, file 2813 (ICC Exhibit 1a, pp. 1242–44).

¹³⁴ I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, July 27, 1874, BCA, CO 42/730 (ICC Exhibit 1a, pp. 1261–64).

¹³⁵ I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, July 27, 1874, BCA, CO 42/730 (ICC Exhibit 1a, pp. 1267–68).

¹³⁶ James Douglas, late Governor BC, to Lt. Col. Powell, Indian Commissioner, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 1302).

in laying out Indian Reserves, no specific number of acres was insisted on – The principle followed in all cases, was to leave the extent and selection of the land, entirely optional with the Indians, who were immediately interested in the Reserve – The surveying Officers having instructions to meet their wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations; and Burial Grounds, cultivated land, and all the favorite resorts of the Tribes; and, in short, to include every piece of ground, to which they had acquired an equitable title, through continuous occupation, tillage, or other investment of their labor. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint, on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide, as far as possible, against the occurrence of agrarian disputes with the white settlers.¹³⁷

Douglas went on to mention that:

The Indian Reserves in the pastoral country east of the Cascades, especially in the Lytton and Thomson's [*sic*] River districts, where the natives are wealthy, (having in many instances, large numbers of horses and cattle), were, on my retirement from office, only roughly traced out upon the ground by the Gold Commissioners of the day:– the regular surveys not having been completed.

These latter Reserves were, necessarily, laid out on a large scale, commensurate with the wants of these Tribes, to allow sufficient space and range for their cattle at all seasons.¹³⁸

On October 15, 1874, James Lenihan, the dominion government's newly appointed Superintendent of the Fraser (Mainland) Superintendency in British Columbia, wrote to the Provincial Secretary, responding to specific statements made by the government of British Columbia in defence of its Indian land policy and its responsibility for setting aside Indian reserves since joining Confederation:

You are also pleased to say, "In the meantime I desire to call your attention to the fact that all that is 'reasonable and just' to demand from the Provincial Government is, that the 13th Section of the Terms of Union Act should be faithfully observed."

¹³⁷ James Douglas, late Governor BC, to Lt. Col. Powell, Indian Commissioner, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 1302).

¹³⁸ James Douglas, late Governor BC, James Bay, to Powell, Indian Commissioner, Victoria, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, pp. 1302–3).

The Section referred to sets forth – “That the charge of the Indians, and the Trusteeship and management of the lands reserve for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.”

...

A careful reading of this section, taken and considered in connection with all the other sections of the Terms of Union Act, and taking into account the very liberal provisions and stipulations of the same in favour of British Columbia, leads me to the conviction that the most liberal and enlightened interpretation should be given to the spirit and meaning of this particular section.¹³⁹

Lenihan compared the size of reserves allotted to two bands in the Fraser River district, and stated that British Columbia’s “‘policy and practice’ which has hitherto been observed” in setting aside Indian reserves “has been neither well defined, uniform, or regular.”¹⁴⁰ Lenihan concluded:

Therefore, in view of these facts, I most respectfully submit that a more liberal, well defined, and uniform “policy” should be adopted by the Government of British Columbia on the question of Indian Reserves, and more especially towards those Indians of the interior of the Mainland having a large number of horses and cattle, and with whom it appears no treaty has yet been made to extinguish the titles to their lands, which justice and equity should secure to them as the original owners and occupants of the soil.¹⁴¹

One month later, the Minister of the Interior, David Laird, penned a memorandum addressed to the Governor General, outlining the “the present unsatisfactory state of the Indian Land question in the Province of British Columbia.”¹⁴² Laird explained:

¹³⁹ James Lenihan, Victoria, to Provincial Secretary, October 15, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 148 (ICC Exhibit 1a, p. 1304).

¹⁴⁰ James Lenihan, Victoria, to Provincial Secretary, October 15, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 149 (ICC Exhibit 1a, p. 1305).

¹⁴¹ James Lenihan, Victoria, to Provincial Secretary, October 15, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 149 (ICC Exhibit 1a, p. 1305).

¹⁴² Memorandum, David Laird, Minister of the Interior, to unknown recipient, Ottawa, November 2, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 151 (ICC Exhibit 1a, p. 1307).

The policy heretofore pursued by the Local Government of British Columbia toward the red men in that Province, and the recently expressed views of that Government in the correspondence herewith submitted, fall far short of the estimate entertained by the Dominion Government of the reasonable claims of the Indians.

...

When the framers of the Terms of admission of British Columbia into the Union inserted this provision, requiring the Dominion Government to pursue a policy as *liberal* towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policies which had, up to that time, prevailed in Canada and British Columbia respectively.

Whereas in British Columbia, ten acres of land was the maximum allowance for a family of five persons, in old Canada the minimum allowance for such a family was eighty acres: and a similar contrast obtained in regard to grants for education and all other matters connected with Indians under the respective Governments. Read by this light, the insertion of a clause guaranteeing the aborigines of British Columbia the continuance by the Dominion Government of the liberal policy heretofore pursued by the Local Government, seems little short of a mockery of their claims.¹⁴³

Minister Laird went on to state that Section 13 of the *Terms of Union* was “plainly altogether inadequate to satisfy the fair and reasonable demands of the Indians” and recommended the dominion and local governments “be governed in their conduct towards the aborigines by the justice of their claims, and by the necessities of the case.”¹⁴⁴

Eventually, the dominion government decided to seek arbitration by the Secretary of State for the Colonies. On December 2, 1874, the Earl of Dufferin, Governor General of Canada, wrote to the Earl of Carnarvon, describing the dilemma as follows:

6. ... the conception formed by the Dominion and the Provincial Governments as to the rights and requirements of the natives, as well as of their own obligations towards them, appears to be fundamentally opposed.

7. In Canada the accepted theory has been that while the sovereignty and jurisdiction over any unsettled territory is vested in the Crown, certain territorial

¹⁴³ Memorandum, David Laird, Minister of the Interior, to unknown recipient, November 2, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 152 (ICC Exhibit 1a, p. 1308). Original emphasis.

¹⁴⁴ Memorandum, David Laird, Minister of the Interior, to unknown recipient, November 2, 1874, reprinted in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875, 1877* (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 154 (ICC Exhibit 1a, p. 1310).

rights, or at all events rights of occupation, hunting, and pasture, are inherent in the aboriginal inhabitants.

8. As a consequence the Government of Canada has never permitted any lands to be occupied or appropriated, whether by corporate bodies, or by individuals, until after the Indian title has been extinguished, and the Districts formally surrendered by the Tribes or bands which claimed them for a corresponding equitable consideration.

9. In British Columbia this principle seems never to have been acknowledged. No territorial rights are recognized as pre-existing in any of the Queen's Indian subjects in that locality.¹⁴⁵

A letter dated December 26, 1874, from an unidentified author to Lord Carnarvon, described the controversy which had arisen between the provincial and dominion governments:

[T]he inconsiderate manner in which the terms of union were framed they only provide *in fact* that the Dominion government shall use towards the Indians a policy *as liberal* as that previously pursued by British Columbia (namely an illiberal policy—) and that the Province shall for this purpose furnish *tracts of land of such extent as it has hitherto been the practice to appropriate* for Indian purposes (namely small and inadequate tracts of land.) – And the Secretary of State is to decide any disagreement between the Dominion and the Provincial Governments respecting the quantity of such land to be granted.

It appears to me therefore that if the province is determined to be illiberal and to refuse to compromise, it may argue that the Secretary of State cannot require it to give larger grants of land per family than used to be given before the union. But the only wise course would be to give considerably larger grants; and consequently there may be necessity to put some moral pressure on British Columbia to accept an award not strictly within the terms of arbitration.¹⁴⁶

The Secretary of State for the Colonies opted to await British Columbia's response to the dominion government's criticisms before intervening in the matter.¹⁴⁷

Meanwhile, on February 12, 1875, the Indian Commissioner for British Columbia, I.W. Powell, forwarded a petition from the "Chiefs of the Indian tribes of Adams Lake, Shuswap Lake,

¹⁴⁵ Earl of Dufferin, Government House, Ottawa, to Earl of Carnarvon, December 4, 1874, BCA, CO 42/730, pp. 182–83 (ICC Exhibit 1a, pp. 1321–23).

¹⁴⁶ Unidentified author [illegible signature] to Lord Carnarvon, December 26, 1874, BCA, CO 42/730 (ICC Exhibit 1a, pp. 1352–53). Original emphasis.

¹⁴⁷ E.B., [author not identified further], to Herbert, [recipient not identified further], January 28, 1874, BCA, CO 42/730 (ICC Exhibit 1a, p. 1360).

South Thompson River, Kamloops, Deadman's Creek, Bonaparte River, North Thompson river" to the Minister of the Interior, in which the Chiefs again protested the size of their reserves, saying "we consider ourselves as having been wronged in the way our reservations have been laid out, it has generally been done without our agreement."¹⁴⁸

In August 1875, the Government of British Columbia officially responded to the dominion government's criticism of its Indian land policy and provided its interpretation of section 13 of the *Terms of Union*. In a report by Attorney General George A. Walkem, the discontent of BC bands and the "unsatisfactory" state of reserves set aside for them was blamed on the dominion government, which he said had not comprehended "the physical structure of this country and of the habits of the Indians."¹⁴⁹ Walkem went on state that, during negotiations between the provincial and federal governments to settle the Indian land question:

it would appear that [the provincial officials] were fully justified in hesitating to accede to propositions [made by the Dominion Government] which might not only retard the future settlement of the Province, but prove to be both ill-judged and ill-timed in the interests of the present settlers and of the Indians themselves.¹⁵⁰

Although few details are known of these negotiations, the provincial government agreed to transfer, in the future, larger tracts of land (amounting to 20 acres per family of five) to the dominion to be set aside as Indian reserves. However, the provincial government refused to enlarge any existing reserves, including the Neskonlith, Adams Lake, and Little Shuswap Reserves.¹⁵¹

¹⁴⁸ Petition attached to I.W. Powell, Indian Commissioner, Indian Office, BC, to Minister of the Interior, February 12, 1875, LAC, RG 10, vol. 3617, file 4590C (ICC Exhibit 1a, p. 1373).

¹⁴⁹ Memorandum of Geo. Walkem in "Report of the Government of British Columbia on the Subject of Indian Reserves," August 18, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1875*, Special appendix F, li (ICC Exhibit 1a, p. 1382).

¹⁵⁰ Memorandum of Geo. Walkem in "Report of the Government of British Columbia on the Subject of Indian Reserves," August 18, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1875*, Special appendix F, lii (ICC Exhibit 1a, p. 1383).

¹⁵¹ Memorandum of Geo. Walkem in "Report of the Government of British Columbia on the Subject of Indian Reserves," August 18, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1875*, Special appendix F, lii–liii (ICC Exhibit 1a, pp. 1382–83).

Regarding the provincial government's interpretation of section 13 of the *Terms of Union*, it is recorded:

it remains for the Provincial Government to consider what assistance in the shape of land they will give to the Dominion Government to carry out their Indian policy. The 13th Article binds the Province to give the same quantity of land as in practice the Crown Colony gave. This quantity seems to have been settled at ten acres to each Indian family, as appears by ... the Speech of Governor Douglas to the Legislative Council in 1864.¹⁵²

JOINT INDIAN RESERVE COMMISSION, 1876–78

Although the documentary record for this inquiry does not indicate if the Secretary of State for the Colonies ever intervened between the provincial and dominion governments in the matter of Indian reserves in British Columbia, the two governments came to an agreement, later in 1875, on the “Indian land question.” As part of that agreement, a Joint Indian Reserve Commission (JIRC) was established and charged with inquiring into bands’ grievances related to their reserves.¹⁵³ The Commission consisted of A.C. Anderson, appointed by the dominion government; Archibald McKinlay, appointed by the provincial government; and, Gilbert Malcolm Sproat, appointed as Joint Commissioner by both governments.

The JIRC visited the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in late July and early August 1877.¹⁵⁴ Joint Commissioner Gilbert Malcolm Sproat reported on the JIRC’s role with the Bands as follows:

The question of the Land Reserves for the Shuswaps has been bungled in times gone by, as you will see by reference to the Papers on The Indian Land Question in British Columbia, published by the Provincial Government in 1875 (pages 26, 29 and following). A Mr. Cox, who then was in the service of the Colonial Government gave them reserves of such an extravagant extent as would practically have for the most

¹⁵² Memorandum of Geo. Walkem in “Report of the Government of British Columbia on the Subject of Indian Reserves,” August 18, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1875*, Special appendix F, lii (ICC Exhibit 1a, p. 1383).

¹⁵³ Indian Claims Commission, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006), 8–9.

¹⁵⁴ Diary of Archibald McKinlay, Commissioner, Joint Indian Reserve Commission, July 30 – August 17, 1877, BCA, no file reference available (ICC Exhibit 1a, pp. 1525–39).

part, been useless to the Indians and have totally prevented white settlement in a place which from its good climate, and central position may have a considerable future before it.

The reserves were afterwards reduced to what may have been apparently sufficient for the people, but which the Commissioners now find is insufficient, considering the possible increase of their numbers, the industrial progress they have achieved and the probable numbers of their stock in a few years.¹⁵⁵

The JIRC confirmed Neskonlith IR 1, Shuswap IR 2, and the Adams Lake Indian Reserve, as set aside by Edgar Dewdney in 1866, with some slight deviation.¹⁵⁶ The JIRC also set aside 11 other reserves for the use and benefit of the three Bands.¹⁵⁷ In total, the JIRC assigned 14 reserves to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands.

LATER RESERVE COMMISSIONS

The record in this inquiry does not extend to the joint reserve commissions in British Columbia that followed the JIRC; however, a number of ICC reports can provide the reader with the details of the McKenna-McBride Commission and the Ditchburn-Clark Commission, both of which were concerned with resolving the serious differences between the federal and BC governments respecting Indian reserves.

The ICC report in *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* describes the mandate of the 1912 McKenna-McBride Commission as securing

[a]n agreement between the federal and British Columbia governments towards the “final adjustment of all matters relating to Indian Affairs in the province of British Columbia”¹⁵⁸ ... Subject to the approval of the federal and provincial governments,

¹⁵⁵ Gilbert Malcolm Sproat, Joint Commissioner, Joint Indian Reserve Commission, to Superintendent General of Indian Affairs, August 27, 1877, LAC, RG 10, vol. 3653, file 8701 (ICC Exhibit 1a, pp. 1512).

¹⁵⁶ British Columbia, *Sessional Papers*, 4th Parl., 3rd Sess., “Return of Indian Reserves,” February 20, 1885, 894–95 (ICC Exhibit 1a, pp. 1638–39).

¹⁵⁷ British Columbia, *Sessional Papers*, 4th Parl., 3rd Sess., “Return of Indian Reserves,” February 20, 1885, 894–95 (ICC Exhibit 1a, pp. 1638–39).

¹⁵⁸ McKenna-McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 96–97), quoted in ICC, *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 217.

five commissioners, including Canada's Special Commissioner, J.A.J. McKenna, were empowered to adjust the acreage of Indian reserves in the province.¹⁵⁹

The *Esketemc First Nation: Indian Reserve 15, 17, and 18 Inquiry* report informs us that in spite of the agreement by both governments to implement, as they considered reasonable, the McKenna-McBride recommendations, they decided instead to launch a joint review of the Commission's work by W.E. Ditchburn and J.W. Clark. This step was taken largely owing to British Columbia's dissatisfaction with the McKenna-McBride recommendations.¹⁶⁰

The Ditchburn-Clark review, commonly called the Ditchburn-Clark Commission, was comprised of "representatives of the two governments ... for the purpose of adjusting, readjusting, confirming and generally reviewing the report and recommendations of the [McKenna-McBride] Royal Commission."¹⁶¹ The end result was a report that was "in general agreement and largely confirmed the report of the Royal Commission 'with a few amendments, additions and deductions to the Reserves confirmed, cut-offs and new reserves.'"¹⁶²

The final step in the reserve-creation process for the Neskonlith, Adams Lake, and Little Shuswap Indian Bands was confirmation of their reserves by Order in Council 208, dated February 3, 1930.¹⁶³

¹⁵⁹ ICC, *Mamalelegala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 217.

¹⁶⁰ See discussion of the background to the decision to strike a review of the McKenna-McBride Commission report in ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3 at 86–95, in particular citing T.D. Patullo, Minister of Lands, to Arthur Meighen, Superintendent General of Indian Affairs, April 21, 1920, LAC, RG 10, vol. 3820, file 59335, part 3 (ICC Documents, pp. 388–91) at 95.

¹⁶¹ ICC, *Nak'azdli First Nation: Aht-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81 at 95.

¹⁶² T.D. Patullo, Minister of Lands, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, April 6, 1923, British Columbia Ministry of Lands, file 02676 (ICC Documents, p. 461), quoted in ICC, *Esketemc First Nation: Indian Reserve 15, 17 and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3 at 110.

¹⁶³ Order in Council PC 208, February 3, 1930, no file reference available (ICC Exhibit 1a, pp. 1679, 1681–83).

APPENDIX B

**Neskonlith, Adams Lake & Little Shuswap Indian Bands: Neskonlith Douglas Reserve
Inquiry – Interim Ruling, Blair Smith Report, July 3, 2006**

July 3, 2006

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Dear Counsel:

**Re: Neskonlith, Adams Lake and Little Shuswap Indian Bands
Neskonlith-Douglas Reserve Claim
ICC File: 2109-32-01**

The panel has considered the objections made on behalf of the Bands to the report of Mr. Blair Smith, BCLS, CLS, dated March 13, 2006, and offered on behalf of Canada. I am directed to convey to you their ruling on these objections.

The panel has considered the submission on behalf of the Bands dated May 18, 2006; the submissions in response on behalf of Canada dated June 2, 2006, and the reply submissions on behalf of the Bands dated June 8, 2006.

Objections:

The Bands' objections to Mr. Smith's report were summarized in their submissions as follows:

1. Mr Smith has stepped outside the scope of his expertise, namely, that of a professional surveyor and mapper;
2. Mr. Smith has provided opinions and made determinations of fact on matters that include some of the ultimate issues before the Panel;

3. Mr. Smith has demonstrated bias and lack of objectivity and has therefore disqualified himself as an expert witness; and,
4. Mr. Smith has failed to state the facts and assumptions that he relied upon in arriving at the conclusions in his Report and it is not possible to determine with any certainty how he arrived at the opinions stated in that report.

The Bands ask that the report be ruled inadmissible in its entirety. In the alternative, they request the following remedy:

- That the first full paragraph on page 2, all of page 4 and all of page 5 be ruled inadmissible and excised from the report, and,
- That the panel direct Mr. Smith to revise his report so as to outline all the facts and assumptions he relied upon in arriving at his interpretations and opinions, and indicate how his interpretations and opinions relate to these facts and assumptions.

Disposition:

The panel notes that it has consistently been held that commissions of inquiry are not bound by the strict rules of evidence that apply in the courts. For example, Mr. Justice Cory, speaking for a unanimous Supreme Court in *Canada (Attorney General) v. Canada (Commission of Inquiry on The Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 34., approved the following passage in the decision of the Federal Court of Appeal in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:

A public inquiry is not equivalent to a civil or criminal trial. . . . In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court.

Guided by this principle, the panel is not prepared to grant the remedies sought by the bands. The panel considers that, with the benefit of cross-examination, it will give appropriate weight to the various elements of Mr. Smith's report, and disregard, if necessary, any portions for which it is established that Mr. Smith is not qualified or that are otherwise inappropriate. The panel does not intend to allow its role as fact-finder to be usurped, but is also not prepared to rule the report or any portion of it inadmissible on the basis of the submissions made. The panel does intend, however, to require the experts' qualifications to be presented to them at the hearing, and to hear any objections to, or proposed limitations on, their respective expertise to be briefly made at that time.

With respect to the third remedy proposed by the Bands, that Mr. Smith be required to revise his report so as to set out more fully the facts and assumptions he relies upon, the panel is mindful of the significant delays in obtaining the now agreed-on date of July 19, 2006, for this report and other evidentiary matters to be heard. While the panel accepts that the remedy proposed might relieve the

Bands of some burden, it does not believe that the Bands will be unduly prejudiced by the need to conduct a more exhaustive cross-examination in this regard. Any slight prejudice in this regard is more than offset by the desirability of moving on with this inquiry with reasonable dispatch.

Accordingly, the panel directs me to advise that the remedies sought by the Bands are denied. The procedure for the presentation of the evidence of the experts in this inquiry will be as follows:

- Qualification of expert by counsel presenting expert;
- Opportunity for objection to qualifications by counsel for other party(ies);
- Examination in chief of expert;
- Cross-examination;
- Examination in reply;
- Questions from Commission Counsel;
- Questions from Panel.

Submissions as to weight may of course be included in the subsequent written submissions of the parties.

Yours truly,



John B. Edmond
Commission Counsel

c.c. Anne Cullingham, Mandell Pinder
Richard Yen, DIAND, Specific Claims Branch
Chief Arthur Anthony, Neskonlith Indian Band
Chief Nelson Leon, Adams Lake Indian Band
Chief Felix Arnouse, Little Shuswap Indian Band

APPENDIX C

JOINT INDIAN RESERVE COMMISSION ALLOTMENTS DESCRIBED IN THE RETURNS FROM 1885¹

Name of Tribe, and Location of Reserve	Name of Reserve*	Approximate Acreage	Date of Indian Commissioner's Decision	Surveyed or Unsurveyed	Remarks
South Thompson [Neskonlith Indians] – South Thompson River (right bank)	Nis-kamilth No. 1	3164	August 13, 1877	Surveyed	Old reserve confirmed**
South Thompson [Neskonlith Indians] – South Thompson River (left bank)	Nis-kamilth No. 2	2489	August 13, 1877	Surveyed	
South Thompson [Neskonlith Indians], Little Shuswap and Adams' Lake [in common] – Great Shuswap Lake	Shuswap Lake	not given	August 13, 1877	Unsurveyed	Old reserve confirmed
South Thompson [Neskonlith Indians], Little Shuswap and Adams' Lake [in common] – West shore of Great Shuswap Lake, about 12 miles from outlet of Adams River	Shuswap Lake	abt. 22.50	August 13, 1877	Unsurveyed	Old reserve confirmed
Adams Lake – Adams River – Point formed by the lake and Adams River	Adams River	not given	August 13, 1877	Unsurveyed	
Adams Lake – At junction of Adams River and Shuswap Lake	Adams River	abt. 15.00	August 13, 1877	Unsurveyed	Fishing station
Adams Lake – South Thompson River	Sabbahltkum	not given	August 13, 1877		

¹ Chart prepared by the Indian Claims Commission, see: British Columbia, *Sessional Papers*, 4th Parl., 3rd Sess., “Return of Indian Reserves,” February 20, 1885, 894–95 (ICC Exhibit 1a, pp. 1638–39).

Name of Tribe, and Location of Reserve	Name of Reserve*	Approximate Acreage	Date of Indian Commissioner's Decision	Surveyed or Unsurveyed	Remarks
Adams Lake - Little Shuswap Lake (north-east corner)	Timber Land	not given	August 13, 1877	Unsurveyed	
Little Shuswap – Little Shuswap Lake	Little Shuswap	not given	August 14, 1877	Unsurveyed	
Little Shuswap – Northwest corner of Little Lake	Little Shuswap	not given	August 14, 1877	Unsurveyed	
Little Shuswap – Jim's Creek	Jim's Creek	abt. 20.00	August 14, 1877	Unsurveyed	
Little Shuswap – Scotch Creek (at mouth)	Scotch Creek	not given	August 14, 1877	Unsurveyed	
Little Shuswap – Salmon Arm of Great Shuswap Lake (mouth of Salmon River)		not given	August 16, 1877	Unsurveyed	
Little Shuswap – E. side of Salmon Arm, about 7 miles from mouth of Salmon River		not given	August 16, 1877	Unsurveyed	

* The names and locations of some of the reserves have since changed.

** Minutes of Decision, Alexander Anderson, Archibald McKinlay, and G.M. Sproat, Joint Indian Reserve Commissioners, Indian Reserve Commission, August 13–16, 1877, no file reference available (ICC Exhibit 1a, p. 1542).

7 Content of formal record

The formal record of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands: Neskonlith Douglas Reserve Inquiry consists of the following materials:

- Exhibits 1 – 10 tendered during the inquiry
- Transcripts of community session (3 volumes) (Exhibit 5a and 10e)
- Transcript of evidentiary hearing (1 volume) (Exhibit 10e)
- Transcript of oral session (1 volume)

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