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# **INDIAN CLAIMS COMMISSION**

## **PRIMROSE LAKE AIR WEAPONS RANGE REPORT II**

**Joseph Bighead First Nation Inquiry  
Buffalo River First Nation Inquiry  
Waterhen Lake First Nation Inquiry  
Flying Dust First Nation Inquiry**

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# PART 1

## INTRODUCTION

In 1954, the Government of Canada took up a 4490-square-mile parcel of land in northern Alberta and Saskatchewan, roughly centred on Primrose Lake, for an air force bombing and gunnery range. The Primrose Lake Air Weapons Range (PLAWR) lands were part of the traditional hunting and trapping territory of the First Nations in the area. The Buffalo River, Joseph Bighead, Waterhen Lake, and Flying Dust First Nations maintain that they depended on this territory for their livelihoods, and that Canada's action in taking up this land, with no provision for compensation or economic rehabilitation, amounts to a breach of Treaties 6 and 10 and a breach of fiduciary duty.

In 1975, the First Nations filed claims under the Specific Claims Policy for losses resulting from the creation of the range.<sup>1</sup> Canada rejected the claims.<sup>2</sup> In June 1993<sup>3</sup> and February 1994<sup>4</sup> the Indian Claims Commission (ICC) agreed to conduct inquiries into the rejection of these claims.

The Commission has already reported on the claims of the Cold Lake First Nations and the Canoe Lake Cree Nation, which too were based on loss of access to the PLAWR. The conclusion of that report, the Primrose Lake Air Weapons Range Report,<sup>5</sup> was that, although Canada had the right under the treaties to take up land from time to time for settlement or other purposes, Canada breached its treaty obligations by taking up such a large tract of land

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1 Claim submission, April 1, 1975 (ICC Documents, pp. 356-59). The claim was made by a number of Bands, including the Peter Pond Lake Band (Buffalo River) and the Waterhen Lake Band, and by the Federation of Saskatchewan Indians, representing other First Nations, including Joseph Bighead and Flying Dust.

2 Judd Buchanan, Minister of Indian Affairs, to Richard Price, Indian Association of Alberta, December 4, 1975 (ICC Documents, p. 455).

3 Harry S. LaForme, Chief Commissioner, to Chief and Council, Buffalo River and Waterhen Lake First Nations, and to the Ministers of Justice and Indian and Northern Affairs, June 30, 1993 (ICC Exhibits 9, 10, 11, and 12).

4 Harry S. LaForme, Chief Commissioner, to Chief and Council, Flying Dust First Nation and Joseph Bighead First Nation, and to the Ministers of Justice and Indian and Northern Affairs, February 2, 1994 (ICC Exhibits 13, 14, 16, and 17).

5 [1994]1 Indian Claims Commission Proceedings (ICCP) [hereinafter PLAWR Report, cited to ICCP].

so abruptly, decimating the economy of the Canoe Lake and Cold Lake people, and destroying their way of life. This breach of the treaties, and the failure to provide sufficient compensation or economic rehabilitation, constituted a breach of fiduciary duty. The Commission recommended that the claims be accepted for negotiation.<sup>6</sup>

The claimants assert that, like those of the Canoe Lake and Cold Lake people, their communities were devastated by the creation of the range. Furthermore, they are signatories to the same treaties as the Cold Lake and Canoe Lake First Nations. The claimants submit that the Commission should therefore find, consistent with the PLAWR Report, that their claims are valid and should be accepted for negotiation.

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<sup>6</sup> *Ibid.*, 12, 151.

## PART II

### THE INQUIRIES

The Commission held information-gathering sessions in the claimants' communities during the summer of 1994. The details of these sessions are set out in Appendices A, B, C, and D to this report. In total, the Commission heard from 48 witnesses. Legal arguments were heard on November 2 and 3, 1994, in Saskatoon.

The evidence examined in these inquiries includes the testimony of elders at the community sessions, several volumes of documentary material compiled by Commission research staff, documents submitted by the parties, and various maps and other exhibits. An outline of the record for these inquiries is found in Appendix E.

### THE TREATIES

#### **Treaty 6<sup>7</sup>**

The Flying Dust, Joseph Bighead, and Waterhen Lake First Nations are parties to Treaty 6, which they signed between 1878 and 1921. In 1876, the government entered into Treaty 6 with the Plains and Cree Indians at Fort Carleton, Fort Pitt, and Battle River. The government's purpose in entering into the treaty was to make the land available for settlement. This is evident from the recital:

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her

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<sup>7</sup> See also PLAWR Report, 65-68, for a discussion of Treaty 6 and the circumstances surrounding its negotiation.

Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.<sup>8</sup>

Under the terms of Treaty 6, the Indians agreed to

cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits

[description of treaty area]

And also, all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.

In return, the Indians were given annuities, reserves to be set aside for their own use, and agricultural implements. They were also assured, in the following terms, hunting, trapping, and fishing rights over the ceded territory:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes . . .

During the treaty negotiations, Lieutenant-Governor Alexander Morris, the Treaty Commissioner, explained to the Indians his vision of their future under the treaty:

All along that road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen's Commissioners to purchase clothing for their children; at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen's gift in addition.<sup>9</sup>

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8 The numbered treaties and adhesions have been reprinted in booklets by the Queen's Printer, Ottawa. *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964), cat. no. R33-0664.

9 A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979), 231.

Chief Ko-pat-a-wa-ke-num of the Flying Dust First Nation signed an adhesion to Treaty 6 on September 3, 1878, through which the terms of the treaty were extended to the Band in return for the relinquishment of its aboriginal right and title to lands within the treaty boundaries. On June 25, 1913, the Joseph Bighead First Nation adhered to Treaty 6. In the discussion before signing, Chief Joseph Bighead raised the issue of restrictions on hunting and fishing. He expressed the Band's wishes that it be accorded the right of hunting and fishing throughout the tract surrounding the Lac des Îles at all seasons. In his report, W.J. Chisolm, Inspector of Indian Agencies, stated that he referred the Chief to the text of the treaty, where hunting and fishing are guaranteed subject to regulation, and explained

the necessity for their remembering that they must continue, as they have been in the past, subject to all the laws that may be enacted by either the Dominion Parliament or Provincial Legislature, just as white citizens are. . . . I explained at some length how the laws for the protection of fish and game are framed in their interest . . . since it makes for the permanency of their chief industry and source of livelihood.<sup>10</sup>

Chief Running Around, on behalf of the Waterhen Lake First Nation, signed an adhesion to Treaty 6 on November 8, 1921. In a report of the proceedings held with the Waterhen Lake First Nation, the Indian Agent noted that the Chief wanted to be assured that the traditional way of life of his people would be protected. The Indian Agent indicated that he would inform the government of the Chief's request.<sup>11</sup>

### **Treaty 10<sup>12</sup>**

On August 28, 1906, Chief Raphael Bedshidekkge signed Treaty 10 for the Clear Lake Band, which later became the Buffalo River First Nation.<sup>13</sup> The Order in Council creating the Treaty Commission stated that:

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10 W.J. Chisolm, Inspector of Indian Agencies, North Saskatchewan Inspectorate, Prince Albert, to the Secretary, Department of Indian Affairs, Ottawa, August 16, 1913, National Archives [hereinafter NA], RG 10, vol. 4072, file 429/511 (ICC Exhibit 3, documents appended).

11 W.R. Taylor, Indian Agent, "Proceedings of a meeting held with the Waterhen Lake Indians at Waterhen Lake on the 7th day of November 1921, with the object of getting these Indians to enter Treaty," NA, RG 10, vol. 4072, file 429/511, pt. 1 (ICC Exhibit 3, documents appended).

12 See also PLAWR Report, 16-18, for a discussion of the circumstances surrounding the negotiation of Treaty 10.

13 The Clear Lake Band was later known as the Peter Pond Band. On November 16, 1972, the Minister of Indian Affairs approved the division of the Peter Pond Band into the Turnor Lake Band and the Buffalo River Band.

It is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines.<sup>14</sup>

More specifically, the “public interest” in entering into the treaty was to open up the north for resource development and settlement.

The treaty followed the usual form (that is, it was based on other numbered treaties), and included the following standard hunting, trapping, and fishing rights clause:

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

According to the report of the Treaty Commissioner, J.A.J. McKenna, the Indians feared that if they signed the treaty their hunting and fishing privileges would be curtailed. The Commissioner assured them that the treaty would not lead to any forced interference with their way of life:

The Indians seemed afraid, for one thing, that their liberty to hunt, trap and fish would be taken away or curtailed, but were assured by me that this would not be the case, and that the Government would expect them to support themselves in their own way, and, in fact, that more twine for nets and more ammunition were given under the terms of this treaty than under any of the preceding ones; this went a long way to calm their fears.<sup>15</sup>

### **TRADITIONAL USE OF THE RANGE LANDS**

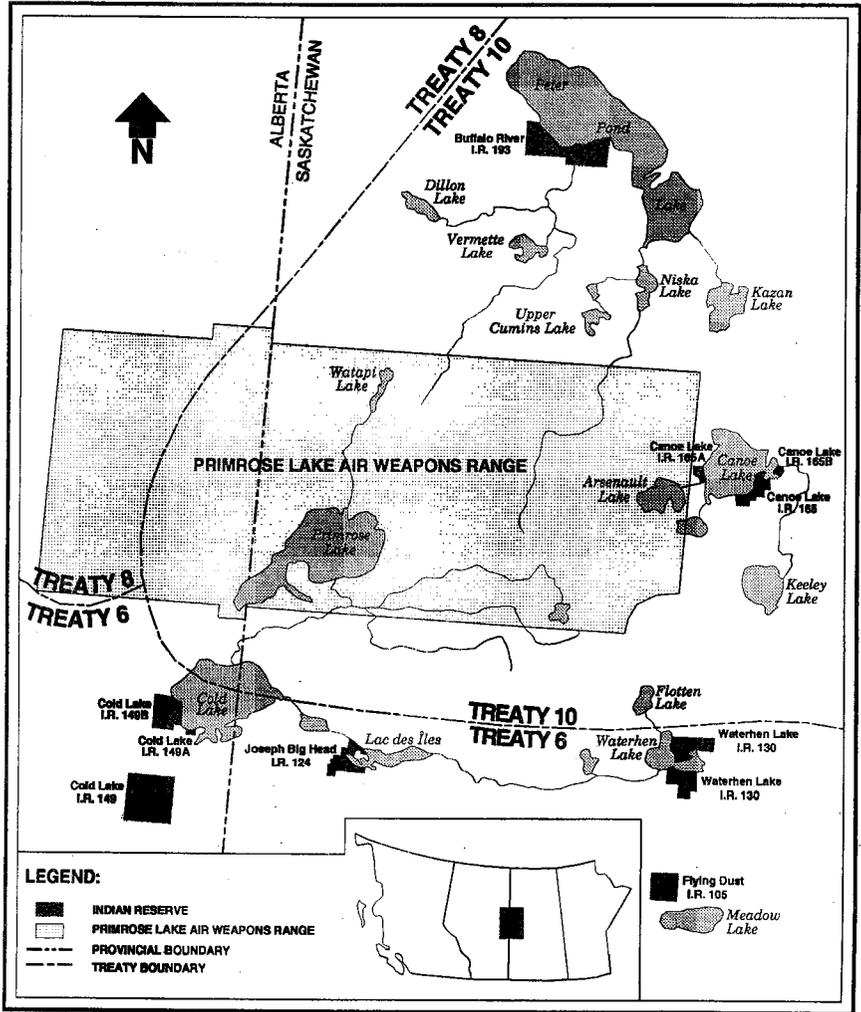
At the community sessions, the elders explained to the Commission that portions of the PLAWR represent their traditional hunting, trapping, and fishing grounds. The following summarizes the evidence as to traditional land uses in the area of the range. (Map 1, on page 57, is provided for reference.)

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14 PC 1459 (July 12, 1906). The Order in Council is reproduced in *Treaty No. 10 and Reports of Commissioners* (Ottawa: Queen's Printer, 1966).

15 Quoted in *R. v. Sikyea* (1964), 43 DLR (2d) 150 (NWT CA) at 158-59.

# CLAIM AREA



- The Joseph Bighead First Nation went north of its reserve to hunt, trap, and fish in and around Primrose Lake.
- The Buffalo River First Nation used to trap and hunt around Watapi Lake, which is just inside the range lands. In addition to their value for food harvesting, the range lands were important to the Buffalo River people because they travelled by road across those lands to meet their relatives at Cold Lake.
- The Waterhen Lake First Nation hunted and trapped in the area around Lost Lake, and would go as far as Primrose Lake to hunt and fish. Flotten Lake also figured prominently in the elders' discussion of hunting and trapping patterns at the Waterhen Lake community session; the area west and north of Flotten Lake was described as the "old hunting ground."<sup>16</sup> Another significant harvesting area was the area around Keeley Lake. As is apparent from the map, both Flotten Lake and Keeley Lake fall outside the range.
- The Flying Dust First Nation used the areas around Lost Lake and Arsenault Lake, just inside the eastern boundary of the range, for hunting and trapping. The elders also identified the Flotten Lake area as an important hunting and trapping ground.<sup>17</sup>

### FUR CONSERVATION AREAS

In 1946, under a federal-provincial agreement<sup>18</sup> and regulations under *The Fur Act*,<sup>19</sup> a large portion of northern Saskatchewan (the entire area north of the agricultural belt) was designated a "fur block" for the purpose of managing and conserving fur resources in the province. This initiative followed a precipitous decline in the muskrat population between 1933 and 1938. The plan was to allow fur-bearing animal populations to stabilize by restricting trapping privileges to local (primarily Indian and Métis) residents in the north. The governments were concerned to restore the integrity of the

16 ICC Waterhen Lake Transcript, vol. 1, p. 140 (Fred Martell).

17 See also ICC, Flying Dust Documents, tab 1, which indicates that the Flying Dust First Nation got most of its moose meat from the area of Flotten Lake.

18 Saskatchewan Archives Board, Saskatoon, Department of Natural Resources, NR 1/4, file 431B (ICC, Research regarding Fur Conservation Areas (FCAs), tab 12).

19 RSS 1940, c.252.

fur industry, as it was the basis of the Indians' livelihood and subsistence economy.<sup>20</sup>

The fur block was divided into smaller community sections known as Fur Conservation Areas (FCAs). Each community was to elect a council of five members to be responsible for adjusting boundaries between its sections and those of other communities.<sup>21</sup> The community sections could be further divided into family, group, or individual traplines, depending on the circumstances.<sup>22</sup>

Under this regime, each of the claimants had a designated FCA. Initially, the claimants' FCAs were communally trapped, and any community licence-holder had the right to trap anywhere in the FCA. As noted above, the community could agree to divide FCAs into smaller sections to be allotted to families, groups, or individuals, by agreement of the community, and "special licences" would then be issued.<sup>23</sup> Under the regulations, licence-holders from one FCA were not permitted to trap in another FCA. Although this regulation would prove to be unconstitutional,<sup>24</sup> there is some evidence that FCA boundaries were respected, in terms of trapping.<sup>25</sup>

This FCA regime was in place when the air weapons range was established in 1954. The Buffalo River First Nation had been allocated FCA A-21, which extended southward from the reserve. The southern edge of A-21 ran parallel to the range border, approximately three miles into the range. The Flying Dust and Waterhen Lake First Nations shared FCA A-37, and approximately 325 square miles of it fell inside the boundary of the range, in the southeast

20 See Press Statement issued by the Minister of Mines and Resources, in NA, RG 10, vol. 6758, file 420-11-1, pt. 1 (ICC, Research regarding FCAs, tab 2). See also a Minute of the Executive Council of Saskatchewan, June 6, 1959, which describes the purpose of the agreement as "enabling the inhabitants of that area [that northern portion of the province beyond the agricultural section] who rely on those resources for livelihood to become and to remain self-sustaining" (ICC, Research regarding FCAs, tab 3).

21 Draft Regulations Governing Northern Saskatchewan Fur Conservation Block, in NA, RG 10, vol. 6758, file 420-11-1, pt. 2 (ICC, Research regarding FCAs, tab 12). See also the *Globe and Mail* article dated July 10, 1946, which states that "Indian chiefs, with the aid of interpreters, are marking on maps boundaries of areas in which their bands may have trapped in past years, so that districts may be set up giving sole trapping right to those living in the area" (ICC, Research regarding FCAs, tab 11).

22 Draft Regulations Governing Northern Saskatchewan Fur Conservation Block, in NA, RG 10, vol. 6758, file 420-11-1, pt. 2 (ICC, Research regarding FCAs, tab 12).

23 *Ibid.*

24 Section 8(2) of *The Fur Act*, RSC 1953, c. 324, provided that fur conservation areas, registered traplines, provincial parks, etc., "shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access." As Mr. Jodouin pointed out in oral argument, an equivalent provision of *The Game Act* was held to be *ultra vires* the province in *R. v. Strongquill* (1953), 8 WWR (NS) 247 (Sask. CA), as legislation dealing with Indians. This ruling was confirmed in *R. v. Sutherland*, [1980] 3 CNLR 71 (SCC), which dealt with a similar deeming provision in a Manitoba statute.

25 See, for example, ICC Buffalo River Transcript, vol. 1, p. 34.

corner. The Joseph Bighead First Nation used FCA B-38, which was entirely outside the range, to the south.

### EXCLUSION FROM THE RANGE

In April 1954, the range lands were taken up for the exclusive use of the Department of National Defence. The government did permit periodic access to the range for hunting and fishing, usually during the Christmas and Easter holidays.<sup>26</sup> Otherwise, the Indians were absolutely excluded from the bombing range from 1954 on.

The Buffalo River First Nation, which was trapping in FCA A-21 and the Kazan Game Preserve, lost access to a 3-by-35-mile strip on the southern edge of A-21, or approximately 15 percent of its trapping area. The Flying Dust and Waterhen Lake First Nations lost access to approximately one-third of their shared trapping area, FCA A-37. The Joseph Bighead First Nation lost none of its FCA when the range was created.

### COMPENSATION

In 1951, Saskatchewan and Canada had entered into an agreement under which the range was created. The agreement provided as follows:

2. (a) Canada will assume responsibility for payment of compensation to persons or corporations having rights in the area, including rights in respect of timber . . . trapping, fur farming or land settlement; . . .<sup>27</sup>

The government carried out an “intensive study and survey” of who would be displaced by the creation of the PLAWR, and provided compensation to certain individuals who had trapping and fishing rights in the range.<sup>28</sup> More particularly, those who had fixed registered traplines located within the PLAWR, or whose communal trapping rights could not be absorbed

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26 Memorandum from H.M. Jones, Director, Indian Affairs Branch, to the Deputy Minister, September 17, 1954 (ICC Documents, p. 131); Memorandum prepared by H.H. Stack, January 13, 1969 (ICC Documents, pp. 331-32).

27 Memorandum of Agreement between Canada and the Province of Saskatchewan, August 4, 1953 (ICC Documents, pp. 106-11).

28 E.B. Armstrong, Deputy Minister of National Defence, to F.L. Dunbar, Solicitor for the Waterhen Lake Indians, June 19, 1963, in Department of National Defence, HQ, file 54-C49, vol. 17 (ICC Documents, p. 302).

elsewhere within the communal FCA, received compensation.<sup>29</sup> The Canoe Lake Cree Nation and Cold Lake First Nations received some compensation under this scheme.<sup>30</sup> In contrast, it appears that few members (perhaps one or two) of the claimant First Nations received compensation.<sup>31</sup> It appears that the claimants were never the subject of any comprehensive compensation or economic rehabilitation program, because the government did not consider them to be “directly or materially affected” by the creation of the range.<sup>32</sup>

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29 The “study” of Indians affected was compiled by Indian Affairs field staff on the basis of provincial trapping records: E.L. Paynter, Game Commissioner, Saskatchewan Department of Natural Resources, to J.W. Churchman, Assistant Deputy Minister, April 26, 1951, in Department of Natural Resources file 811D1 (ICC, Research regarding FCAs, tab 14); R.G. Young, Chief Resources and Industrial Division, Indian Affairs, to Regional Director of Indian Affairs, Saskatchewan, December 6, 1965, Department of Indian Affairs and Northern Development (DIAND), file 1/20-9-5, vol. 9 (ICC Documents, p. 326).

30 See PLAWR Report, pp. 24-62, 76-118, for a discussion of compensation and economic rehabilitation for the Cold Lake and Canoe Lake First Nations.

31 See Agreed Statement of Facts between Canada and Flying Dust (ICC Exhibit 19). There are numerous references in the transcripts of community sessions to the lack of compensation; selected examples are: Buffalo River Transcript, vol. 1, pp. 29-30, 42, 115, 126; vol. 2, p. 181; Waterhen Lake Transcript, vol. 1, pp. 40, 175, 180; vol. 2, pp. 240-42; Joseph Bighead Transcript, vol. 1, pp. 15, 48, 60, 75, 112.

32 J.P.B. Ostrander, Superintendent of Welfare, to the Director, Indian Affairs Branch, Ottawa, March 21, 1955, NA, RG 10, vols. 7334-36, file 1/20-4-5 (ICC Documents, pp. 146-47). During oral argument, Mr. Becker, counsel for Canada, stated that it was his understanding that Canada did nothing vis-à-vis the claimants in the way of compensation or rehabilitation because there was no indication, at that time, that they were significantly affected by the creation of the range (ICC Submission Transcript, vol. 2, pp. 220-21).

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## PART III

### ISSUES

This Commission has the mandate to inquire into and report on whether a claimant Indian Band has a valid claim for negotiation under the Government of Canada's Specific Claims Policy, where that claim has been rejected by the Minister.<sup>33</sup> The Specific Claims Policy provides that any claim disclosing an outstanding lawful obligation on the part of the federal government will be accepted for negotiation.<sup>34</sup> A lawful obligation may arise in any number of circumstances, such as breach of treaty or statute, breach of fiduciary duty, or illegal disposition of Indian lands.<sup>35</sup>

Therefore, the issue in this inquiry is whether Canada has an outstanding lawful obligation towards the claimants arising from the creation of the range. The subsidiary issues are as follows:

- 1 Did Canada breach its treaty obligations?
- 2 Did Canada have a fiduciary duty towards the claimants, and did it breach that duty?

Canada's "statement of issues" includes an additional issue: "Were there oral agreements made collateral to Treaty No. 6 or Treaty No. 10 and, if so, what are their effects?" In the PLAWR Report, the issue was whether Canada had the right, pursuant to Treaties 6 and 10, to take up the range lands, given the impact of the range on the treaty rights of the Cold Lake and Canoe Lake First Nations. The treaties addressed this matter as follows: They guaranteed to the Indians the right to continue their avocations of hunting,

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33 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) (ICC Exhibit 8).

34 DIAND, *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*].

35 *Outstanding Business*, 20, sets out examples of circumstances under which a lawful obligation may arise.

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trapping, and fishing in the territory surrendered, subject to regulation and “saving and excepting such tracts as may be required or as may be taken up from time to time . . . .” This Commission held that statements made by the Treaty Commissioners when the treaties were being negotiated, and in particular their assurances to the Indians that they would be able to continue their traditional way of life, were relevant in interpreting the treaties. Indeed, the statements provided necessary clarification of the parties’ understanding of the “taking-up” clause.

In admitting the Treaty Commissioners’ statements, we relied on guideline 6 of the Specific Claims Policy, which states: “All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law.”<sup>36</sup> Furthermore, we emphasized that this Commission is not a court of law. Rather, it is a Commission of Inquiry, with the mandate to ensure fairness in the resolution of longstanding grievances between Canada and First Nations.

Canada continues to argue, as it did in the Cold Lake and Canoe Lake Inquiries, that this Commission should not consider the Treaty Commissioners’ statements. According to this argument, guideline 6 is meant to address the constraints of technical rules of evidence, such as the hearsay rule; it is not meant to modify the legal principle of treaty interpretation, articulated by the Supreme Court of Canada in *Horse v. R.*<sup>37</sup> and *R. v. Sioui*,<sup>38</sup> that extrinsic evidence is not admissible in the absence of an ambiguity on the face of the treaty. Furthermore, Canada maintains, the courts have already decided that the treaty provision at issue is not ambiguous. This renders the evidence irrelevant, and therefore the guideline does not apply. Canada also relies on guideline 9, which stipulates that treaties are not open to renegotiation.

We remain unpersuaded by Canada’s argument. Even if we accept a narrow reading of guideline 6, as put forward by Canada, we reject the remainder of the argument and Canada’s challenge to our interpretation of the treaties in the PLAWR Report. We continue to hold the view that the treaty provision at issue is ambiguous, and, following from *Horse*, we may properly take extrinsic evidence into account in interpreting the treaty provision.

Canada asserts that the courts have already determined that the treaty provision is not ambiguous. But an analysis of the cases Canada cites in

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<sup>36</sup> *Ibid.*, 30.

<sup>37</sup> [1988] 1 SCR 187, 2 CNLR 112.

<sup>38</sup> [1990] 1 SCR 1068, 3 CNLR 127.

support of this submission indicates that this is not so. The first of the supporting cases is *R. v. Sundown*.<sup>39</sup> Canada says that, in *Sundown*, the court held that the words in the treaties at issue here are not of doubtful meaning or ambiguous. The problem is that *Sundown* dealt with the regulation clause in the treaty (that is, “the . . . Indians . . . shall have the right to pursue their usual avocations of hunting and fishing . . . subject to such regulations as may from time to time be made by the government . . .”) rather than the taking-up clause. Since the regulation clause is not at issue here, the case cannot assist us. The same is true for another of Canada’s authorities, *Steinhauer v. R.*,<sup>40</sup> which was also limited to the regulation clause.

The other case that Canada relies on is *Horse v. R.*<sup>41</sup> In that case, the Supreme Court of Canada did consider the taking-up clause, and Estey J., for the majority, stated that “there is no ambiguity which would bring in extraneous interpretive material.”<sup>42</sup> It is important to appreciate, however, that the issue in *Horse* was whether a “joint use” concept was embodied in Treaty 6 – that is, whether the treaty permitted the Indians to hunt on private land subject to the interests of the property holder. With respect to that issue, the taking-up clause was clear: it retained for the Indians the right to hunt within the tract surrendered, with the explicit exception of land taken up for settlement. But one cannot say that the Supreme Court of Canada thus ruled that there will never be an ambiguity in the interpretation and application of the taking-up clause in any context or on any facts.<sup>43</sup> The only issue of interpretation was the effect of the taking up – that is, whether, under the terms of the treaty, the Indians still had access to land once it was taken up by settlement; the Justices did not turn their minds to the matter of the extent and timing of the taking up of land permitted under the treaty. Therefore, contrary to Canada’s assertion, the issue of ambiguity has not been settled by the courts.

On the question of ambiguity, then, we are left with the text of the treaties. The treaties do not stipulate to what extent, and over which periods, land within the treaty boundaries may be taken up for settlement or other

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39 [1988] 4 CNLR 116 (Sask. QB).

40 [1985] 3 CNLR 187 (Alta. QB).

41 Note 37 above.

42 *Ibid.*, at 203.

43 As Professor Pierre-André Côté notes, with respect to statutes, “a provision may seem plain in some applications and obscure in others. An enactment restricting access by vehicles to public parks is clear when applied to automobiles but less so when it comes to roller skates.” Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1992), 240.

purposes. All that the treaties say is that land may be taken up “from time to time.” Does this mean that the power of the government to take up land is virtually unrestricted, or were limits on this power contemplated at the time of treaty? The answer is not clear from the text. In our view, because the words of the treaty are ambiguous, the question of whether the taking up of land for the creation of the range was permissible is one that can be answered only by reference to the larger historical context. Therefore, the Treaty Commissioners’ statements are relevant, and we are directed, under guideline 6 of the Policy, to consider this evidence.

Furthermore, there are other principles of treaty interpretation that require us to consider the statements. For example, the Supreme Court of Canada has stated that

treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians . . . . In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties “must . . . be construed, not according to the technical meaning of their words . . . but in the sense in which they would naturally be understood by the Indians.”<sup>44</sup>

Thus, treaty interpretation should reflect the Indians’ understanding of the treaty. Yet as Wilson J. explained in *R. v. Horseman*, it is unlikely that their understanding will be apparent from the text:

These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party’s understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.<sup>45</sup>

In our view, the statements of the Treaty Commissioners are a valuable source of information about what the Indians understood the treaties to mean.

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<sup>44</sup> *Nowegijick v. R.*, [1983] 1 SCR 29 at 3. This passage was relied on by the Supreme Court of Canada again in *Stoui*, note 38 above, at 1049, and *Simon v. R.*, [1985] 2 SCR 387 at 402.

<sup>45</sup> [1990] 1 SCR 901, 3 CNLR 95 at 907.

Another established principle of treaty interpretation is that one must consider the circumstances surrounding the treaty signing. In *R. v. Taylor and Williams*, the Ontario Court of Appeal stated that

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.<sup>46</sup>

*Taylor and Williams* was cited with approval by the Supreme Court of Canada in *R. v. Sparrow*.<sup>47</sup>

This principle of sensitivity to historical context is simply a derivative of common sense and fairness. That is why even in *Horse* the evidence of what transpired in the treaty negotiations was admitted. After determining that there was no ambiguity in the treaty that would bring in extraneous interpretive material, Estey J. nevertheless went on to consider that material:

... I am prepared to consider the Morris text... as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context. ... From the record of the negotiations included in the Morris text... one can see that any guarantee of such hunting rights was not intended nor understood to extend to land occupied by settlers.<sup>48</sup>

The Supreme Court of Canada has made it clear that treaties are to be interpreted in their proper historical context. In the light of this jurisprudence, we must reject Canada's argument that the oral statements made by the Treaty Commissioners are irrelevant and cannot be used for the purpose of interpreting the treaties.

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46 (1988), 34 OR (2d) 360 (CA), 62 CCC (2d) 227.

47 [1990] 1 SCR 1075, 3 CNLR 160 at 1107-08.

48 Note 37 above, 203.

# PART IV

## ANALYSIS

### 1 BREACH OF TREATY

#### **The Right at Issue**

The right at issue here is the treaty right, merged and consolidated in the *Natural Resources Transfer Agreement* (NRTA),<sup>49</sup> to hunt, trap, and fish *for food*. Paragraph 12 of the NRTA provides as follows:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

It was established in *Horseman v. R.*<sup>50</sup> that this provision took away the right of the treaty Indians in Alberta and Saskatchewan to hunt, trap, and fish commercially, in return for an enlargement of the treaty food-harvesting right, in that all unoccupied Crown lands, as opposed to unoccupied lands within the treaty boundaries, became available for food harvesting. According to *Horseman*, therefore, commercial harvesting is not a treaty right. In the PLAWR Report, the Commission accepted that the claim for breach of Treaties 6 and 10 was limited to the food-harvesting right.<sup>51</sup>

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49 SS 1930, c. 87 [confirmed by the *Constitution Act, 1930*].

50 Note 45 above.

51 PLAWR Report, 139.

### **The “Test” for Breach of Treaty from the PLAWR Report**

The following passages from the PLAWR Report set out the circumstances under which the government’s exercise of its right to take up land will amount to a breach of treaty:

The question is whether this right to “take up” traditional lands is so broad as to permit the government *to take away in one stroke the entirety of the area relied upon by the Indian people for hunting, fishing, and trapping purposes*.<sup>52</sup>

Government’s right to take up lands for settlement and other purposes is certainly contemplated in the language of the treaties. However, in our view, government cannot rely on such language in a treaty *to completely frustrate the rights of the Indians* which are guaranteed in the same document. . . . Counsel for Canada submitted that the express rights of government to take up lands, and of Indians to hunt, trap, and fish as they had before, “must be interpreted in such a way as to reconcile the competing interests of the parties.” We do not need to look beyond the treaty itself to identify the nature of these interests or to conclude, as we have, that the one cannot be permitted to overwhelm the other *so completely and so suddenly* as was done here. . . . We find that the Crown did not have the right, under the terms of the treaties, to do what was done here. The scale of their project is too large, the lands concerned are too valuable to the claimant First Nations, and the damage done to their economies and to the way of life of their communities is too great.<sup>53</sup>

Counsel for the claimants said that “complete and sudden” destruction of community and livelihood was the test for breach of treaty. They argued that the range “destroyed,” “decimated,” or at least “severely impaired” the economies of the First Nations they represent.<sup>54</sup> Their position was that the impact on the claimants was as significant and substantial as the impact on, if not the Cold Lake people, at least the Canoe Lake people.

Mr. Becker, counsel for Canada, took the position that the threshold to be met here is not necessarily complete devastation. In oral argument, he noted that the Commission may not have articulated a test of general application in the PLAWR Report.<sup>55</sup> The case of the Cold Lake and Canoe Lake First Nations was so clear, their communities practically destroyed by the range, that there was no need to entertain fine questions of where to draw the line between the right of the government to take up land from time to time and the right of the

52 Ibid., 128-29. Emphasis added.

53 Ibid., 135. Emphasis added.

54 See Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, p. 237, and Submission on Behalf of the Flying Dust First Nation, November 2-3, 1994, p. 20.

55 ICC Transcript, vol. 2, p. 178.

Indians to continue to pursue their avocations of hunting, trapping, and fishing. Mr. Becker suggested that what is required for a breach of treaty is an *immediate and substantial* impact on the treaty right to hunt, trap, and fish for food. Counsel for the claimants did not take issue with this characterization of the test.<sup>56</sup>

Canada accepts that the exclusion of the claimants from the air weapons range was immediate and that, in terms of timing, their case is exactly the same as the case of the Cold Lake and Canoe Lake First Nations. Therefore, the only issue is whether the interference with the claimants' food-harvesting right was substantial enough to amount to a breach of the treaties.

As we see it, the legal "test" for breach of treaty evokes something of a balancing exercise, between the Indians' harvesting right and the government's right to take up land. Because the government's right to occupy land is, on the face of the treaties and the NRTA, unlimited, the threshold for breach of treaty will be high and will occur where the government's taking up of land overwhelms the food-harvesting right. This approach is consistent with the tenor of the PLAWR Report.

### **Were the Treaties Breached?**

We have carefully considered all the evidence before us. From the testimony of the elders, we know that the claimant First Nations suffered hardship because they were excluded from the range lands. We are of the view, however, that the magnitude of that hardship was not so great as to give rise, in law, to a breach of treaty.

The claimants argued that they suffered as much harm as the Cold Lake and Canoe Lake people, that their communities were decimated, and that their way of life was destroyed. The evidence shows, however, that, unlike the case of the Cold Lake and Canoe Lake First Nations, the claimants were able to carry on their traditional activities after the range lands were taken up.

The reason they were able to do so is that all the claimants were left with significant areas within their traditional hunting grounds on which to exercise their treaty food-harvesting right. For example, the Waterhen Lake and Flying Dust First Nations relied on the Lost Lake area for food harvesting, and this area was taken up by the range. Other principal hunting grounds, however – the Flotten Lake and Keeley Lake areas – were not taken up. We note, as well, that, by the 1950s, the Flying Dust First Nation was becoming

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<sup>56</sup> See Mr. Jodouin in reply, ICC Submission Transcript, vol. 2, p. 257.

established in agriculture.<sup>57</sup> Members of the Joseph Bighead First Nation traditionally travelled north to hunt – into the area around Primrose Lake – and were excluded from this area when the range was created. Yet they still had access to the entirety of their FCA. Moreover, the evidence suggests that once the FCAs were created, some of the trappers stayed within the FCA boundaries.<sup>58</sup> Similarly, the Buffalo River First Nation had only a small portion of its FCA taken up.

It should be noted that there was some argument over the relevance of the FCAs to the issue of harm caused by the range. Mr. Becker suggested that a reasonable measure of the impact of the range is “percentage of FCA lost.” This approach is reasonable, according to Mr. Becker, because we can infer that a certain amount of land will support a certain amount of harvesting activity, taking into account significant disparities in resources. The principal advantage of this approach, he argued, is that it concerns the potential for food harvesting, and thus does not depend on unreliable statistics of actual use – that is, numbers of trappers who actually used the range lands prior to the lands being taken up.

Counsel for the claimants objected to the use of FCAs as a means of quantifying the impact because the right at issue is the food-harvesting right, not a commercial trapping right. They maintain that the FCAs are irrelevant; the treaty right could be exercised outside the fur blocks and was in fact exercised outside the fur blocks.<sup>59</sup> At the same time, Mr. Jodouin also said that the hunters were the trappers and the trappers were the hunters, and that the trapped animals were used for food.<sup>60</sup> He went on to submit that evidence that the range had the best trapping areas should be viewed as confirmation of a very strong reliance on the range as a food source.<sup>61</sup> This argument seems to suggest that trapping is relevant to food-harvesting activity.

As we understand it, if a person was trapping in an area, then that is also where he would hunt, for the most part. Hunting excursions also took place – in which the hunters would go outside the fur blocks and perhaps into the range lands – but the activities were often combined. In addition, the trapped

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57 P.B. Reader, Fur Supervisor, to J.P.B. Ostrander, Regional Supervisor, Indian Affairs Branch, March 17, 1952, NA, RG 10, vols. 7334-36, file 1/20-9-5 (ICC Documents, pp. 53-54).

58 See note 25 above.

59 The elders did indicate that they went outside the trapping blocks to hunt; see Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, vol. 2, pp. 187-88, quoting various passages from the transcripts of community sessions.

60 ICC Submission Transcript, vol. 1, p. 16.

61 ICC Submission Transcript, vol. 1, p. 32.

animals would be eaten. Furthermore, it appears that from 1946, when the FCAs were introduced, at least some of the claimants had confined their trapping to their own block.<sup>62</sup> This pattern would make sense, since the First Nations had some part in delineating the FCA boundaries. In other words, the process was designed so that the FCAs would reflect, to the extent possible, the First Nations' traditional hunting and trapping areas. In the light of all these considerations, it is our view that the FCAs do provide an indication of the land available for food harvesting, and that the amount or proportion of FCA land taken is therefore a useful measure of the impact of the range on the food-harvesting right.

In support of his argument that the claimants suffered harm comparable to the harm suffered by the Canoe Lake people, Mr. Jodouin provided the Commission with a chart in which he set out the number of people who hunted and trapped inside the range, calculated this number as a percentage of the total population of the First Nations, and compared the result with the percentage figure for Canoe Lake. His intention was to demonstrate that the proportion of the population directly affected by the creation of the range was greater for the claimants than for Canoe Lake. Mr. Becker, in his oral argument, spent a considerable amount of time attacking the accuracy of the numbers and the usefulness of this information generally.

Although we appreciate Mr. Jodouin's efforts to assist us, we cannot rely on the chart. Besides questions of accuracy,<sup>63</sup> the "percentage of population" figures are potentially misleading as an indicator of the degree of reliance on the range. There is no way, for instance, to account for the varying degrees of activity of trappers, yet this activity will have a significant bearing on the question of reliance and the further question of harm caused by the creation of the range.

At the end of the day, the question we are faced with is whether Canada, in exercising its right to take up land under the treaties, so overwhelmed the right of the claimants to continue to pursue their traditional avocations of

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<sup>62</sup> See note 25 above.

<sup>63</sup> There is virtually no documentary evidence on the specific numbers of people from the claimant First Nations who were using the range for food harvesting. (In the case of Canoe Lake and Cold Lake, numbers were compiled by the government.) We have some evidence of the number of trappers from Waterhen Lake and Flying Dust trapping in A-37 in 1952 in a letter from the Fur Supervisor to Indian Affairs (ICC Documents, pp. 53-54). It is not clear, however, how the numbers were determined; if they were based on licences, they would be understated because the licence system was not strictly followed. Based on the testimony at the community sessions, some of the members of the Flying Dust and Waterhen Lake First Nations simply used their treaty cards to hunt and trap. There is also a memorandum (ICC Documents, p. 146) that sets out the "affected population" of the Buffalo River and Waterhen Lake First Nations, but the figures actually represent total Band population. Therefore, the numbers do not reflect the direct impact of the range.

hunting, trapping, and fishing for food as to upset the balance of rights embodied in the treaties. The evidence indicates that the claimants were able to continue to exercise their food-harvesting right in a meaningful way after the range was created. This is not to say that the claimants suffered no hardship as a result of the creation of the range. It is clear that they did lose important food-harvesting areas. Still, the right guaranteed in the treaties is not the right to hunt, trap, and fish within the range lands specifically; rather, it is a more general right to continue the avocations of hunting, trapping, and fishing within the tract surrendered, and it is subject to the Crown's right to take up land. Moreover, we cannot accept the claimants' contention that they were affected to the same extent as the Cold Lake and Canoe Lake First Nations. We conclude, therefore, that there was no breach of treaty.

## 2 BREACH OF FIDUCIARY DUTY

### Summary of Arguments

The claimants' primary argument was that the Crown breached the treaties, and that this in turn amounts to a breach of fiduciary duty. They relied on the PLAWR Report for the proposition that, if the Crown fails to live up to a treaty obligation, it thereby breaches its fiduciary obligation to the First Nation.<sup>64</sup>

Mr. Beckman, for Flying Dust, argued in the alternative that the Crown has a general fiduciary duty towards aboriginal peoples, which gave rise, in 1954, to a duty to compensate Flying Dust for loss of access to the PLAWR, or to provide the people with some other vocation. Moreover, Canada explicitly agreed that compensation would be paid to anyone who had an interest in the range lands. Since no compensation was paid, and Flying Dust was simply overlooked, Canada breached its fiduciary duty.

Mr. Jodouin tied his fiduciary duty argument to the breach of treaty, but also argued, following from the PLAWR Report, two other bases for breach of fiduciary duty.<sup>65</sup> He asserted, first, that the relationship between the First Nations and the Crown is inherently fiduciary; this, he submitted, is sufficient to establish a fiduciary duty to compensate the claimants for their loss of access to the range. It is also clear that the specific nature of the relationship

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<sup>64</sup> PLAWR Report, 140, quoting *Ontario (AG) v. Bear Island Foundation*, [1991] 2 SCR 570.

<sup>65</sup> The Commission held, in the PLAWR Report, 139-41, that there were three bases on which the Crown was a fiduciary in its dealings with the Cold Lake and Canoe Lake people: (1) the nature of the relationship between the Crown and aboriginal people is fiduciary; (2) the breach of treaty; and (3) the Department of Citizenship and Immigration's unilateral undertaking to act on behalf of the Indians. Furthermore, the Commission stated, at page 141, that any of these grounds would be sufficient to establish the Crown's fiduciary obligation.

between the Crown and the claimants here was fiduciary, because the required elements of discretion and vulnerability were present. Secondly, he maintained that the Department of Citizenship and Immigration unilaterally undertook to negotiate on the claimants' behalf; this unilateral undertaking is also sufficient, in and of itself, to establish a fiduciary obligation.

Canada argued that it had no fiduciary obligation to compensate the claimants. Although the relationship between the Crown and aboriginal peoples may be characterized as fiduciary, not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation. This principle was articulated in the recent case, *Quebec (AG) v. Canada (National Energy Board)*.<sup>66</sup> (In that case, it was argued that the National Energy Board, as an emanation of the Crown, had a fiduciary duty towards aboriginal parties appearing before it. The Supreme Court of Canada rejected that proposition, because the Board, as an adjudicative body, has a duty to be impartial.) The fiduciary relationship between the Crown and Indians generates certain obligations – for example, with respect to surrendered or expropriated reserve land. But, Canada argued, the fiduciary relationship does not give rise to a duty to preserve, or compensate for the reduction in, native hunting, fishing, and trapping rights. Canada further submitted that in *Horseman*<sup>67</sup> the Supreme Court of Canada rejected the contention that treaty hunting rights could not be reduced or abridged in any way without some form of compensation.

Canada's final point was that there is nothing in the treaties or in the evidence of surrounding circumstances to indicate that Canada unilaterally undertook or agreed to compensate the Bands with respect to hunting, trapping, or fishing rights as a result of Crown lands being occupied.

### **Breach of Treaty**

Although a breach of treaty will constitute a breach of fiduciary duty, our conclusion as set out above is that there was no breach of treaty. Therefore, the claimants cannot rely on breach of treaty as the basis for their breach of fiduciary duty argument.

Even if there was no breach of treaty, however, there remain two possible grounds for breach of fiduciary duty: (1) a fiduciary relationship; and (2) a unilateral undertaking to compensate. The claimants suffered a reduction in

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<sup>66</sup> (1994), 112 DLR (4th) 129 (SCC).

<sup>67</sup> Note 45 above.

their food-harvesting opportunities resulting from loss of access to the range, as well as a loss of certain commercial harvesting rights, when portions of their FCAs were taken up. The question then is whether Canada had an obligation, as a fiduciary, to compensate the claimants for these losses.

### **Compensation for the Reduction in Food Harvesting**

Canada argues that there is no duty to compensate for a reduction in the right to hunt, trap, and fish for food because the right is guaranteed *subject to limitation*. Paragraph 12 of the NRTA defines the nature of the consolidated right by reference to unoccupied Crown land; thus, the right is by definition defeasible. Furthermore, the treaties themselves contemplate that lands will be taken up from time to time. Thus, Mr. Becker asks, if the right itself is limited by the NRTA and the treaties – that is, it is a right to hunt, etc., *subject to* the Crown’s right to occupy unoccupied Crown lands, or to take up land from time to time – then what is the basis for compensation when land is taken up? What right has been taken away or abridged? In addition to this analysis, Canada relies on *Horseman* as authority for the proposition that there is no obligation on the Crown to compensate for any loss of access to land on which to exercise the food-harvesting right.

We have some difficulty with Canada’s reliance on *Horseman* here, because the issue of compensation was not raised as an independent matter in that case. Mr. Horseman argued before the Supreme Court of Canada that the “traditional rights granted to Indians by Treaty 8 could not be reduced or abridged in any way without some form of compensation or quid pro quo for the reduction in hunting rights.” The Court held that there was actually a quid pro quo, that commercial hunting rights were taken away in return for an expanded right to hunt, trap, and fish for food; the Court did not speak further to the issue of compensation. Therefore, as we see it, *Horseman* does not stand for the principle that there is no right to compensation for a reduction in the food-harvesting right. It may even suggest that some sort of quid pro quo is appropriate.

Furthermore, the lack of a compensation clause in the treaties or the NRTA does not rule out the possibility of compensation. As the Commission noted in the PLAWR Report: “The Natural Resources Transfer Agreements make no provision for compensation when unoccupied Crown lands are occupied in a manner prejudicial to Indian harvesting rights. Nor is there any provision which would exclude compensation in an appropriate case.” The

same can be said for the treaties.<sup>68</sup> Thus, there is nothing that specifically precludes the possibility of compensation for a reduction in the food-harvesting right.

The question, then, is whether this is an appropriate case for compensation. In our view, it is not; we find that there is no breach of fiduciary duty that would entitle the claimants to compensation. We may begin with the proposition, articulated by the Supreme Court of Canada in the *National Energy Board* case, that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada.<sup>69</sup> The Supreme Court has gone on to distinguish between a fiduciary relationship and a fiduciary duty: although there is a general fiduciary relationship between the Crown and the aboriginal peoples, this is not the same as a general, all-embracing fiduciary duty.<sup>70</sup> A fiduciary obligation must be shown to arise in the specific circumstances of the relationship between the Crown and the claimants, because “[t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.”<sup>71</sup> Thus, although the relationship may presumptively give rise to a fiduciary duty, one cannot assume that a fiduciary attaches to every aspect of the dealings between the Crown and aboriginal peoples.

We agree with Mr. Jodouin that the relationship between the Crown and the claimants was characterized by vulnerability and dependence, such that the actual circumstances could give rise to a wide-ranging fiduciary duty on the Crown. At the same time, however, we recognize that the treaties are also part of the relationship between the Crown and the claimants. A treaty is a solemn agreement which defines a set of specific, mutually binding rights and obligations.<sup>72</sup> Therefore, with respect to any matter addressed in a treaty, such as the taking up of land, the treaty must govern.

Treaties 6 and 10 conferred on the government the right to take up land for settlement and other purposes. As this Commission held in the PLAWR Report, that right is not unlimited: it cannot be exercised so as to destroy the subsistence economy and traditional way of life of a First Nation. But this limit is derived from the treaties themselves, through the competing right of the Indians to continue their traditional hunting, trapping, and fishing

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68 The Commission also dealt with the silence of the treaties on the matter of compensation and held that it did not preclude compensation if a breach occurred (PLAWR Report, 138).

69 Note 66 above, citing *Guerin v. R.*, [1984] 2 SCR 335.

70 *Ibid.*, at 65.

71 *Ibid.*

72 *Stoui*, note 38 above, at 139 (cited to CNLR).

practices. Although the notion of fiduciary duty can be used to hold the Crown to a high standard of conduct in meeting its treaty obligations, we do not think that it can be applied to alter the terms of the treaty.

With respect to the claimants, the government's action in taking up land for the range was consistent with the terms of the treaty. There was no further, fiduciary-based limitation on the government's power to take up land. Nor was there any constitutional limitation on the government's power to take up land. Constitutional limitations on the government's power to affect treaty rights are embodied in section 35(1) of the *Constitution Act, 1982*; there was no constitutional protection of treaty rights until 1982.<sup>73</sup>

Of course, a unilateral undertaking on the part of the government to arrange compensation for the claimants would give rise to a fiduciary duty, regardless of the terms of the treaty. In other words, as we stated in the PLAWR Report, a unilateral undertaking is a free-standing ground for a fiduciary duty. Mr. Jodouin submits that there was a unilateral undertaking on the part of the Department of Citizenship to negotiate with the Department of National Defence on behalf of the claimants, and that this gave rise to a fiduciary duty on the Crown to provide compensation.

Canada does not dispute this proposition of law – that a fiduciary duty can arise as a result of a unilateral undertaking to act as a fiduciary – but it argues that there was never any undertaking on the part of the government to negotiate on behalf of the claimants. Mr. Jodouin, for his part, provides no clear evidence in support of his assertion; he simply maintains that, when Indian Affairs chose to become involved in the matter of the creation of the range, it chose to act for First Nations in general.<sup>74</sup>

We have found no evidence of such an undertaking. The Department of Citizenship undertook to act only for the five First Nations it determined were affected by the creation of the range, namely Cold Lake, Canoe Lake, Heart Lake, Beaver Lake, and Goodfish Lake.<sup>75</sup> Two of the claimants, Waterhen Lake

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73 In oral argument, Mr. Beckman submitted that if the government is going to interfere with rights or benefits conferred under a treaty, it is constrained by the guidelines set out in *R. v. Sparrow*, [1990]1 SCR 1108. Therefore, the government must, for example, consult with the aboriginal people affected, attempt to minimize the infringement, and, in the case of an expropriation, provide fair compensation. The problem with this analysis is that *Sparrow* is about section 35 of the *Constitution Act, 1982* in which existing (meaning unextinguished) aboriginal and treaty rights are recognized and affirmed. This protection for treaty rights did not exist in 1954. Mr. Beckman did acknowledge that his argument had certain technical difficulties, but maintained that the reasoning is generally applicable to an interference with treaty rights. Unfortunately, we find the technical problems insurmountable.

74 See Submission on Behalf of the Joseph Bighead, Buffalo River, and Waterhen Lake First Nations, November 2-3, 1994, pp. 239-41.

75 Note 32 above.

and Buffalo River, were not considered to be “directly and materially” affected by the creation of the range.<sup>76</sup> It appears that the government did not even contemplate how the circumstances of the other claimants, Flying Dust and Joseph Bighead, would be affected.

Obviously, it would be incongruous if Canada could be relieved of its fiduciary duty by declining to act on behalf of, or simply ignoring, a First Nation. As we understand it, this is what Mr. Jodouin is actually trying to get at: that Canada had a fiduciary duty to undertake to negotiate on behalf of all First Nations who were in fact affected by the PLAWR.<sup>77</sup> But if there was no fiduciary duty to compensate the claimants for lost food-harvesting rights, we cannot see how there would be a fiduciary duty to undertake to negotiate on their behalf for compensation. Therefore, the case for breach of fiduciary duty on the basis of a unilateral undertaking to compensate for lost food-harvesting rights has not been made out.

Mr. Kovatch, counsel for the three First Nations, put forward a further argument for compensation based on an analogy between the claimants’ food-harvesting right and a *profit à prendre*. According to Mr. Kovatch, the right of the Indians to go onto the land and take fish and wild animals for food is a *profit à prendre*, which is, of course, a common law property right. In excluding the claimants from the range, the Crown thus expropriated a property right for which compensation should have been paid.

In our view, the analogy between the claimants’ right to hunt, trap, and fish for food and a *profit à prendre* is inapt. The claimants’ right is a treaty right, a right that is *sui generis* and defined by the terms of the treaty, rather than common law doctrine. The treaties gave the Crown the right to take up land for settlement and the Indians the right to continue to hunt, trap, and fish until they were displaced by occupation. This means that the right was limited from the outset, being subject to the right of the Crown to occupy land from time to time. The food-harvesting right is therefore not exactly like a simple *profit à prendre*, but a *profit à prendre* that is defeasible or subject to termination if a certain event takes place (that is, a permissible taking up of land by the Crown).

This does not end the matter of compensation, however. Two rights were affected by the exclusion of the claimant First Nations from the PLAWR: (1)

<sup>76</sup> Ibid.

<sup>77</sup> Mr. Kovatch clarified this point in oral argument: “The undertaking to act on behalf of First Nations arises not from an express undertaking to act as it would between a lawyer and a client, for example; it arises because of the historical relationship between Canada and the First Nations. There’s the undertaking, and it’s from that that we attach the obligations” (Submission Transcript, vol. 2, pp. 276-77).

the treaty food-harvesting right; and (2) the commercial rights, such as those derived from individual licences or communal privileges under the provincial *Fur Act*. The remaining issue is whether there was a fiduciary obligation on the Crown to compensate the claimants for the loss of, or injury to, their rights to trap and fish *commercially*.

### **Compensation for Commercial Losses**

Under a Memorandum of Agreement between Canada and Saskatchewan dated August 4, 1953, Canada agreed to assume responsibility for payment of compensation to “persons or corporations having rights in the [PLAWR] area, including rights in respect of timber . . . trapping, fur farming, fishing or land settlement.” Furthermore, in announcing the creation of the range, the Minister of National Defence had assured the House of Commons in 1951 that “there are no settlements in the area, and compensation will be paid for any property rights in trap lines, etc., affected.”<sup>78</sup> The question is whether Canada had a fiduciary obligation to ensure that all Indian people, whose rights in respect of trapping or fishing were taken or adversely affected, obtained compensation.<sup>79</sup>

The concept of “fiduciary expectation,” which was set out in *Lac Minerals v. International Corona Resources*,<sup>80</sup> is relevant here. La Forest J. explained the principle by quoting the following comment of Professor Finn:

What must be shown, in the writer’s view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The crucial matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exists for the “fiduciary expectation.”<sup>81</sup>

Note that the claimants’ lack of knowledge of the undertaking to compensate at the time it was made does not mean that they could have no fiduciary

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<sup>78</sup> House of Commons, *Debates*, April 19, 1951, 2173-74.

<sup>79</sup> The position of the government was that none of the Indians affected by the PLAWR had any right to compensation; it was provided on an *ex gratia* basis (ICC Documents, pp. 150-51).

<sup>80</sup> [1989] 2 SCR 574.

<sup>81</sup> *Ibid.*, at 648.

expectation. There need not be an actual expectation; rather, the expectation may be judicially prescribed if “the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardize its perceived social utility.”<sup>82</sup>

Therefore, the relevant issue is whether, given the specific circumstances of the relationship between the Crown and the claimants, it was reasonable for the claimants to expect the Crown to act in their interests. It is apparent that, in the early 1950s, the relationship between the claimants and the government had incidents perhaps of trust (in the honour of the Crown), but certainly of influence, vulnerability, and dependence. Indian Affairs had discretion and power over the lives of the Indians; as elder Fred Martell told the Commission, “Indian Affairs controlled everything.”<sup>83</sup> These conditions were the product of the historical powers and responsibility assumed by the Crown, and are the hallmarks of a fiduciary relationship.<sup>84</sup>

In our view, the government so implicated itself in the claimants’ affairs that it generated a fiduciary expectation. That expectation attached to the government promise to provide compensation to anyone whose traplines, etc., were affected. In other words, there was a fiduciary duty on the government to ensure that its general commitment to provide compensation was fulfilled as far as the Indian people were concerned.

In assessing whether there was a breach of fiduciary duty, we must consider all the circumstances. As Addy J. noted in *Apsassin v. Canada*, “among those circumstances, one must include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be aware. . . .”<sup>85</sup> We note that the claimants were hardly in a position to press a claim for compensation: not only were they vulnerable and without resources, but they had virtually no idea of the PLAWR plan, or the possibility of obtaining compensation, until well after the fact. This prejudiced their ability to prove to the satisfaction of the government that they had actually used the range.<sup>86</sup>

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82 Ibid.

83 Waterhen Lake Transcript, vol. 1, p. 154.

84 *Frame v. Smith*, [1987] 2 SCR 99 at 136.

85 [1988] 1 CNLR 73 (FCTD) at 93.

86 See J.G. McGilp, Regional Director, Indian Affairs Branch, to Superintendent, Meadow Lake Indian Agency, December 9, 1965, stating that “[t]o substantiate these claims it would be necessary for the Indians concerned to prove actual use and occupation of the trapping areas in question, prior and up to the time the Weapons Range was established.” DIAND, file 1/20-9-5, vol. 9 (ICC Documents, pp. 328-29).

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In our view, the government had a duty to inform the Indians of the possibility of compensation, to inquire into the matter of entitlement, and to ensure that any Indian who had commercial trapping or fishing rights under the provincial licensing regime, whether individual or communal, was duly compensated for any reduction in those rights. This is consistent with the Minister's statement that "compensation will be paid for any property rights in trap lines, etc., affected [by the creation of PLAWR]."<sup>87</sup>

As noted earlier, only one or two members of the claimant First Nations received compensation. The evidence is clear, however, that a significant number of people were affected when they were no longer able to trap in the portions of their Fur Conservation Areas lost to the PLAWR. Therefore, we conclude that the government failed to discharge its duty with respect to the claimant First Nations that lost commercial harvesting rights when the range was created. This represents an outstanding lawful obligation on the part of the Government of Canada towards the Flying Dust, Buffalo River, and Waterhen Lake First Nations. The Joseph Bighead First Nation did not lose commercial harvesting rights when the range was created, and, therefore, there is no outstanding lawful obligation on the part of Canada to this claimant.

As noted above, in the analysis of the issue regarding breach of treaty, the impact of the creation of PLAWR on these claimant First Nations was dramatically different from the impact on the Cold Lake and Canoe Lake First Nations. In the PLAWR Report this Commission found:

that the creation of the Primrose Lake Air Weapons Range had such a profound impact on the community that, within one generation, a self-reliant and productive group of people became largely dependent upon welfare payments. The cumulative impact was to destroy the community as a functioning social and economic unit.<sup>88</sup>

We make no such findings with respect to devastation regarding the present claimants. They clearly suffered hardship, but on a much reduced scale than Canoe Lake Cree Nation and the Cold Lake First Nations. The compensation that they are entitled to is for lost commercial rights to trap, not for the destruction of their communities. It was clear from the evidence that all the present claimant First Nations were able to continue to follow their

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<sup>87</sup> House of Commons, *Debates* (April 19, 1951), 2173-74.

<sup>88</sup> PLAWR Report, 64 (speaking of the Canoe Lake Cree Nation); our finding for the Cold Lake First Nations was the same (120).

traditional way of life after the creation of PLAWR. What the Flying Dust, Buffalo River, and Waterhen Lake First Nations could not do, once PLAWR was created, was to trap within the range. They should have been compensated by Canada for that loss at that time.

## PART V

### CONCLUSIONS AND RECOMMENDATIONS

In creating the PLAWR, the Crown did not breach its treaty obligations towards the claimant First Nations. The area over which the claimants could exercise their treaty food-harvesting rights was reduced after the range was created, but not to the extent that they were unable to continue their traditional food-harvesting activities. We do not agree that these claimants were harmed to the same degree as the Cold Lake and Canoe Lake people.

Canada did breach its fiduciary duty by failing to ensure that First Nations people were compensated for lost commercial harvesting rights, consistent with its undertaking to compensate all those whose “property rights in trap lines, etc.,” were affected by the creation of the range. Thus, Canada has an outstanding lawful obligation towards those claimants who had portions of their FCAs taken up by the range.

We therefore make the following recommendations to the parties:

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#### RECOMMENDATION 1

**That the claim of the Flying Dust, Buffalo River, and Waterhen Lake First Nations, with respect to lost commercial harvesting rights only, be accepted for negotiation pursuant to the Specific Claims Policy.**

#### RECOMMENDATION 2

**That the claim of the Joseph Bighead First Nation was properly rejected by the Minister pursuant to the Specific Claims Policy.**

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FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commission Co-Chair



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

September 1995

# APPENDIX A

## THE JOSEPH BIGHEAD FIRST NATION INQUIRY

- 1 **Decision to conduct inquiry** February 2, 1994
- 2 **Notices sent to parties** February 2, 1994
- 3 **Planning conference** April 6, 1994
- 4 **Community sessions**

*June 24, 1994, Joseph Bighead Reserve*

The Commission heard from the following witnesses:

Philip Kahpeepatow, Harvey Kahpeepatow, William Bearinahole, Alex Sandfly, Adolphus Peeweeyneese, George Kahpeepatow, Nancy Kahpeepatow, Peter Sandfly, Ernest Piche.

*July 13, 1994, Meadow Lake, Saskatchewan*

The Commission heard from witness Albert Ocheschayoo.

- 5 **Legal argument** November 2 and 3, 1994,  
Saskatoon

## APPENDIX B

### THE BUFFALO RIVER FIRST NATION INQUIRY

1 **Decision to conduct inquiry** June 30, 1993

2 **Notices sent to parties** June 30, 1993

3 **Planning conference** April 6, 1994

4 **Community sessions**

*June 20-21, 1994, Dillon, Saskatchewan*

The Commission heard from the following witnesses: Antoine Francois, George Billette, Alfred Billette, Norbert Billette, Arson Neroche, Magloire Benjamin, Cyril Sylvestre, Alex Billette, Mary Francois, Leon Billette, and Pierre Muskego.

*July 13, 1994, Meadow Lake, Saskatchewan*

The Commission heard from the following witnesses: Edward Francois and Pierre Noltcho.

5 **Legal argument** November 2 and 3, 1994,  
Saskatoon

## APPENDIX C

### THE WATERHEN LAKE FIRST NATION INQUIRY

- 1 **Decision to conduct inquiry** June 30, 1993
- 2 **Notices sent to parties** June 30, 1993
- 3 **Planning conference** April 6, 1994
- 4 **Community sessions**

*June 22-23, 1994, Waterhen Lake Reserve*

The Commission heard from the following witnesses: John Larocque, Thomas Blackbird, Charlie Lasas, George Lasas Sr., Fred Martell, Baptiste Martell, Pete Roller, Peter Fiddler, Virginia Vincent, Bruno Fiddler, Albert Fiddler, Pete Martell, George Larocque, Joe Fiddler, and Edwin Martell.

- 5 **Legal argument** November 2 and 3, 1994,  
Saskatoon

## APPENDIX D

### THE FLYING DUST FIRST NATION INQUIRY

- 1 **Decision to conduct inquiry** February 2, 1994
- 2 **Notices sent to parties** February 2, 1994
- 3 **Planning conference** July 8, 1994
- 4 **Community session**

*August 29, 1994, Flying Dust Reserve*

The Commission heard from the following witnesses: Glecia Bear, Clarence Derocher, Flora Gladue, Thomas Merasty, Adele Derocher, Joseph Derocher, Leon Matchee, Joe Fiddler, Babe Stonehawker, and Bruno Fiddler.

- 5 **Legal argument** November 2-3, 1994, Saskatoon

# APPENDIX E

## THE RECORD OF THE INQUIRIES

The formal record for these inquiries comprises the following:

- Documentary record (2 volumes of documents, annotated index, and volume entitled “Research Regarding Fur Conservation Area”)
- Exhibits
- Transcripts (8 volumes, including the transcript of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record for these inquiries.