INDIAN CLAIMS COMMISSION

WILLIAMS LAKE INDIAN BAND VILLAGE SITE INQUIRY

PANEL

Commissioner Alan C. Holman (Chair)
Commissioner Daniel J. Bellegarde

COUNSEL

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To the Indian Claims Commission
John B. Edmond / Diana Kwan

March 2006

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SUMMARY

WILLIAMS LAKE INDIAN BAND
VILLAGE SITE INQUIRY
British Columbia

The report may be cited as Indian Claims Commission, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

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 A.C. Holman (Chair), Commissioner D.J. Bellegarde

British Columbia – Indian Settlements – Pre-emptions – Reserve Creation – McKenna-McBride Commission – Joint Indian Reserve Commission – Indian Reserve Commissioner – Village Sites; **Culture and Religion** – Winter Villages – Pithouses – Seasonal Round; **Fiduciary Duty** – Pre-Confederation – Post-Confederation – Pre-Reserve Creation; **Reserve** – Reserve Creation

THE SPECIFIC CLAIM
On February 8, 1994, the Williams Lake Indian Band submitted its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND), and, on August 23, 1995, the claim was rejected. On June 3, 2002, the Band requested that the Indian Claims Commission (ICC) review its rejected specific claim. At issue in this inquiry is the pre-emption of two village sites, one located at Missioner Creek, or Glendale, and the other located at the foot of Williams Lake.

BACKGROUND
The Williams Lake Indian Band has a long history in the Williams Lake area. The traditional way of life for its members was based on a seasonal round: they would move or camp in regular cycles, depending on the resources that were available in the area, and, each winter, they would return to their permanent villages, where they lived in sunken structures known variously as "pithouses," "kickwillie" houses, or "quigly" houses.

In the fall of 1859, Governor Douglas instructed the Gold Commissioner and Magistrate to reserve the sites of all Indian villages and lands. Douglas's instructions were formalized when *Proclamation No. 15* was issued on January 4, 1860. The pre-emption policy set out in this proclamation allowed settlers to acquire unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Sites constituting an Indian reserve or settlement were prohibited from being occupied or acquired.

The first pre-emptions at Williams Lake were recorded in 1860. In 1861, Gold Commissioner Philip Nind reported that the Williams Lake Indians were starving, and he asked about a reserve being marked out for them. In response, Douglas instructed Nind to set aside a 400- or 500-acre reserve. These instructions were not carried out. Around this time, as well, the Band succumbed to a smallpox epidemic, which decimated its population.

The pre-emptions in the Williams Lake area continued. By 1878, William Pinchbeck had acquired all the lots at Missioner Creek and at the foot of Williams Lake, and, in 1885, Crown grant no. 2923 for lots 71 and 72 was issued to William Pinchbeck Sr.

When British Columbia joined Confederation in 1871, the province retained control over its lands and resources, while acknowledging the Dominion of Canada's jurisdiction over Indians and their lands. The intention was for the province to convey to the dominion lands set aside for the use and benefit of Indians. However, this issue became the source of considerable conflict between the two levels of government. In

1875, British Columbia and Canada agreed to form the Joint Indian Reserve Commission (JIRC) to address the Indian land question and to allot reserves. It would have three members: a federal appointee, a provincial appointee, and an appointee agreed to by both levels of government. G.M. Sproat was the joint appointee on this commission. When the JIRC was dissolved in 1878, Sproat was retained as the sole Indian Reserve Commissioner. Neither the JIRC nor Sproat met with the Williams Lake Band.

In 1879, the Williams Lake Indian Band still did not have any land set aside for it. Justice of the Peace William Laing-Meason wrote twice to Sproat, advising him of the pre-emptions, the impact on the Band, and the fact that land still had not yet been set aside for the Band. Chief William wrote a letter to the editor of the *British Daily Colonist* describing the poverty of the Williams Lake Band and the effects of pre-emption on his people. His letter also requested land. In reporting to more senior officials, Sproat stated that the Band's situation was the fault of the province, not the dominion. In addition, Father C.J. Grandidier wrote to the Superintendent General of Indian Affairs in January 1880, documenting the Williams Lake Indian Band's history in the area from the 1850s and outlining how the pre-emptions had occurred. Father Grandidier also emphasized the need for an Indian Agent in the area.

Sproat's successor, Peter O'Reilly, was the sole Indian Reserve Commissioner from 1880 to 1898. During his tenure, he experienced difficulty working with the BC government. However, in June 1881, O'Reilly was able to visit the Williams Lake Band. In his report, he described the Chief's complaints regarding the delay in setting aside land for his people. He also noted the presence of an "old Indian Church," winter houses, and burial grounds at the Pinchbeck farm at Missioner Creek. O'Reilly set aside 14 reserves for the Williams Lake Indian Band. Three reserves were set aside for habitation and farming (reserves 1–3), three for fishing (reserves 4–6), and eight for graveyards (reserves 7–14). The total acreage of the reserves was 5,634 acres, including 1,464 acres of pre-empted land purchased from settlers. None of the allocated reserves were located in the two areas that are the subject of this inquiry. In 1894, an additional reserve (reserve 15) at Carpenter Mountain, consisting of 168.76 acres, was allotted.

In 1912, the McKenna-McBride Commission was established to address all of the outstanding Indian land issues between the dominion and the provincial governments. The McKenna-McBride Commission was intended to be definitive and, to this end, travelled throughout the province, setting aside lands for reserve purposes. In 1914, Chief Baptiste William appeared before the Commission, requesting that more land be allotted to the Band, owing to the rocky nature of the existing reserves, and outlining past grievances related to the pre-emption of its village sites. The McKenna-McBride Commission confirmed all 15 reserves for the Williams Lake Indian Band in 1915.

Provincial Order in Council PC 911, dated July 26, 1923, transferred the lands for the 15 reserves set aside for the Williams Lake Band to the federal Crown. By the time provincial Order in Council 1036 was passed in 1938, only reserves 1–6 and 15 for the Williams Lake Band were transferred for the Williams Lake Band. Reserves 7–14 (the graveyards) were deleted from the list and not allotted, because the burial sites were on pre-empted lands and the government was unwilling to purchase them. With respect to the relative locations of the reserves set aside and the village sites at issue in this inquiry, Indian Reserve (IR) 6 is located at the foot of Williams Lake, east of lot 71, and Indian Reserves 9–11 are south of lot 72.

Issues

In or about 1861 what lands, if any, did the Williams Lake Indians occupy as villages at: Missioner Creek, foot of Williams Lake, and north shore of Williams Lake? Were any of the villages "Indian Settlements" within the meaning of the colonial and provincial land ordinances and legislation? Was the pre-emption of the Indian Settlements in and around 1861 valid pursuant to pre-emption legislation? If not, would the Indian Settlements have been "lands reserved for the Indians" within the meaning of the *Terms of Union, 1871* and/or the *Constitution Act, 1867* and/or the *Indian Act*? If so, does the Band continue to have a reserved interest under the *Constitution Act, 1867* and/or the *Indian Act*? Did the Colony of British Columbia and

Canada have a fiduciary obligation to protect the Indian Settlements for the use and benefit of the Band? If so, was such an obligation breached?

FINDINGS

The panel concludes that the Williams Lake Indian Band occupied the village sites at Missioner Creek and the foot of Williams Lake at the time of pre-emption and that these village sites were "Indian settlements" within the meaning of the legislation in operation at the time. The claim for the village site on the north shore of Williams Lake has been withdrawn by the Band.

The panel concludes that the pre-emption of the Indian settlements around 1861 was not valid pursuant to the pre-emption legislation.

With respect to this issue, the panel finds that the Williams Lake Indian Band had an interest in the use and occupation of the village sites at Missioner Creek and the foot of Williams Lake prior to the pre-emptions and after the pre-emptions. The panel does not draw any conclusions on whether this interest falls under the definition of "lands reserved for Indians" and prefers to examine the Band's interest in its village sites in the context of a fiduciary analysis.

The panel concludes that Canada had a fiduciary obligation to the Williams Lake Indian Band. This fiduciary obligation is based on the interest the Band had in the village sites at Missioner Creek and at the foot of Williams Lake; it is a pre-reserve–creation fiduciary duty limited to the basic duties of loyalty, good faith, full disclosure, and ordinary prudence or diligence.

The panel finds that these duties were breached by Peter O'Reilly in 1881 and were not rectified by the allotment of more reserve lands than was originally intended. The panel concludes that these village sites should also have been set aside and recommended as possible reserves.

RECOMMENDATION

That Canada accept the village site claim of the Williams Lake Indian Band.

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

Farmer v. Livingstone, [1982] 8 SCR 13; *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816; *Delgamuukw v. B.C.*, [1997] 3 SCR 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Guerin v. The Queen*, [1984] 2 SCR 335; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 3 SCR 377; *R. v. Sparrow*, [1990] 1 SCR 1075; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Blueberry River Indian Band v. Canada* (1995), 130 DLR (4th) 193; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

ICC Reports Referred To

ICC, *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89; *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117; *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3.

Treaties and Statutes Referred To

Colonial Proclamation No. 15 (151), January 4, 1860; *Pre-emption Consolidation Act,* August 27, 1861; *Land Ordinance, 1865*, April 11, 1865; *Land Ordinance, 1870*; *Land Act, 1875*, April 22, 1875; *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, ss. 24, reprinted in RSC 1985, App. II, No. 5.

Counsel, Parties, Intervenors

C. Ostrove for the Williams Lake Indian Band; V. Russell for Canada; J.B. Edmond and D. Kwan to the Indian Claims Commission.

KEY HISTORICAL NAMES CITED

Barclay, Archibald, Secretary, Hudson's Bay Company for the colonial government, 1843–55

Carnarvon, Henry Howard Molyneux Herbert, 4th Earl of, Secretary of State for the Colonies, 1866–67

Douglas, Sir James, Chief Factor of the Hudson's Bay Company, 1849; Governor of Vancouver Island, 1851–64, and of British Columbia, 1858–64

Good, Charles, Colonial Secretary

Joint Indian Reserve Commission (1876–78)

- **Anderson, Alexander Caulfield**, Commissioner, Dominion of Canada
- **McKinley, Archibald**, Commissioner, Province of BC
- **Sproat, Gilbert Malcolm**, Commissioner, joint appointment

Laing-Meason, William, Justice of the Peace and local settler, Williams Lake, appointed July 1876

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

Lenihan, James, Indian Superintendent for Mainland BC, 1873–80

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

Macdonald, John A., Prime Minister of Canada, July 1, 1867 – November 5, 1873, October 17, 1878 – June 6, 1891; Superintendent General of Indian Affairs, 1878–87

Moody, Richard Clement, Chief Commissioner Lands and Works (CCLW) and Surveyor General, 1858–63

Newcastle, Henry Pelham Fiennes Clinton, 5th Duke of, Secretary of State for the Colonies, 1859–64

Nind, Philip, Gold Commissioner and Magistrate of BC, Cariboo District, appointed July 1860

O'Reilly, Peter, Indian Reserve Commissioner, 1880–98

Pearce, Benjamin William, Assistant Surveyor General, 1866–71; Chief Commissioner Lands and Works (CCLW) and Surveyor General, 1871–72

Powell, Israel Wood, Indian Superintendent (Vancouver Island and Northwest Coast) for the dominion government, 1872–80; Superintendent General for British Columbia (also known as Visiting Superintendent), 1880–89

Sproat, Gilbert Malcolm, Indian Reserve Commissioner (joint appointment),1878–80

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

Vankoughnet, L., Deputy Superintendent General of Indian Affairs, 1874–93

William, Chiefs of Williams Lake Indian Band, 1862–1927
- **William** the first (Weisemast), ?–1862
- **William** the second, 1862–84
- **Tomahusket**, 1884–88
- **William** the second, 1888–96
- **William** the third (Baptiste William), 1896–1917
- **William** the fourth (Adrian Williams, Tillian), 1918–1927

Young, William A.G., Colonial Secretary of British Columbia, 1859–63; Acting Colonial Secretary of Vancouver Island, 1859–66

PART I

INTRODUCTION

The Williams Lake Indian Band is descended from the Secwepemc people (also referred to as Shuswap), "who speak a dialect of the Interior division of the Salishan linguistic family."[1] The Williams Lake area was "the ethnohistoric territory of the Shuswap (Secwepemc people)."[2] Historical and archaeological data indicate that the Band occupied several settlements around Williams Lake. Three village sites of great cultural importance to the Williams Lake Indian Band were originally the subject of this inquiry: one at Missioner Creek, one at the foot of Williams Lake, and a third site on the north shore of Williams Lake. During the course of the inquiry into Canada's rejection of its claim to these sites, the Band decided not to pursue the north-shore claim.

In 1849, the colony of Vancouver Island was established by Britain. The Hudson's Bay Company (HBC) was granted proprietorial rights to the colony for 10 years,[3] and James Douglas, Chief Factor of the HBC, was appointed Governor in 1851.[4] When the Fraser Gold Rush hit in the spring of 1858, the area experienced an influx of prospectors and entrepreneurs.[5] In August 1858, the colony of British Columbia was established on the mainland as a result of the gold rush and an ongoing fear of American annexation.[6] Douglas was appointed Governor of this colony in addition to his responsibilities for Vancouver Island.

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1 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 6 (ICC Exhibit 9, p. 6).

2 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 6 (ICC Exhibit 9, p. 6).

3 Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 4.

4 Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 3; and Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1996), 53.

5 Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1996), 61.

6 Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 3; and Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1996), 69–71.

In January 1860, *Proclamation No. 15* was issued in the colony of British Columbia by Governor James Douglas. This legislation permitted settlers to pre-empt or claim up to 160 acres of unsurveyed land, but Indian reserves and settlements were exempted in the legislation from the lands available. Shortly after the *Pre-emption Consolidation Act, 1861*, was proclaimed, a non-Indian settler named Davidson recorded, as a pre-emption claim, the land at Williams Lake where the Indian settlements were located.

In 1861, Governor Douglas instructed Gold Commissioner Philip Nind to set apart a "400 or 500 acre" reserve for the Williams Lake Indians; Nind replied that "the greater portion of the available farming land has been pre-empted," and a reserve was never set apart.

In 1879, William Laing-Meason, Justice of the Peace in Williams Lake, sent a letter to Indian Reserve Commissioner Gilbert Malcolm Sproat on behalf of the Chief of the Williams Lake Band, complaining that the Band had no suitable land, and stating, "if proper land is not given to them they will take by force the land which they used to own and which they used to cultivate and which was taken from them by pre-emption in 1861 (about)."[7] Two years later, Indian Reserve Commissioner Peter O'Reilly set apart Indian Reserves (IR) 1 to 14 for the Band. O'Reilly admitted to the Band that a mistake had been made regarding the villages but warned that, "with respect to white men's rights they cannot interfere, they need not therefore ask for any land that has been sold by the Government."[8]

The village sites that are the subject of this inquiry were located in and around what is now known as lots 71 and 72, Lillooet District. On June 29, 1885, the province of British Columbia issued a Crown grant to William Pinchbeck for lots 71 and 72. Today, lots 71 and 72 comprise most of the townsite of Williams Lake.

On February 8, 1994, the Williams Lake Indian Band submitted its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND); the claim

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[7] William Laing-Meason, Justice of the Peace, Williams Lake, BC, to Gilbert Malcolm Sproat, Indian Commissioner, Victoria, BC, April 21, 1879, Library and Archives Canada (hereafter LAC), RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 154).

[8] Unidentified author, Williams Lake, BC, to unidentified recipient, June 7, 1881, LAC, RG 10, vol. 3663, file 9803, part 2 (ICC Exhibit 1a, p. 208).

was rejected on August 23, 1995. On June 3, 2002, the Band requested that the Indian Claims Commission (ICC) review its rejected specific claim.

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."[9] This Policy, outlined in DIAND'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.[10] 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.

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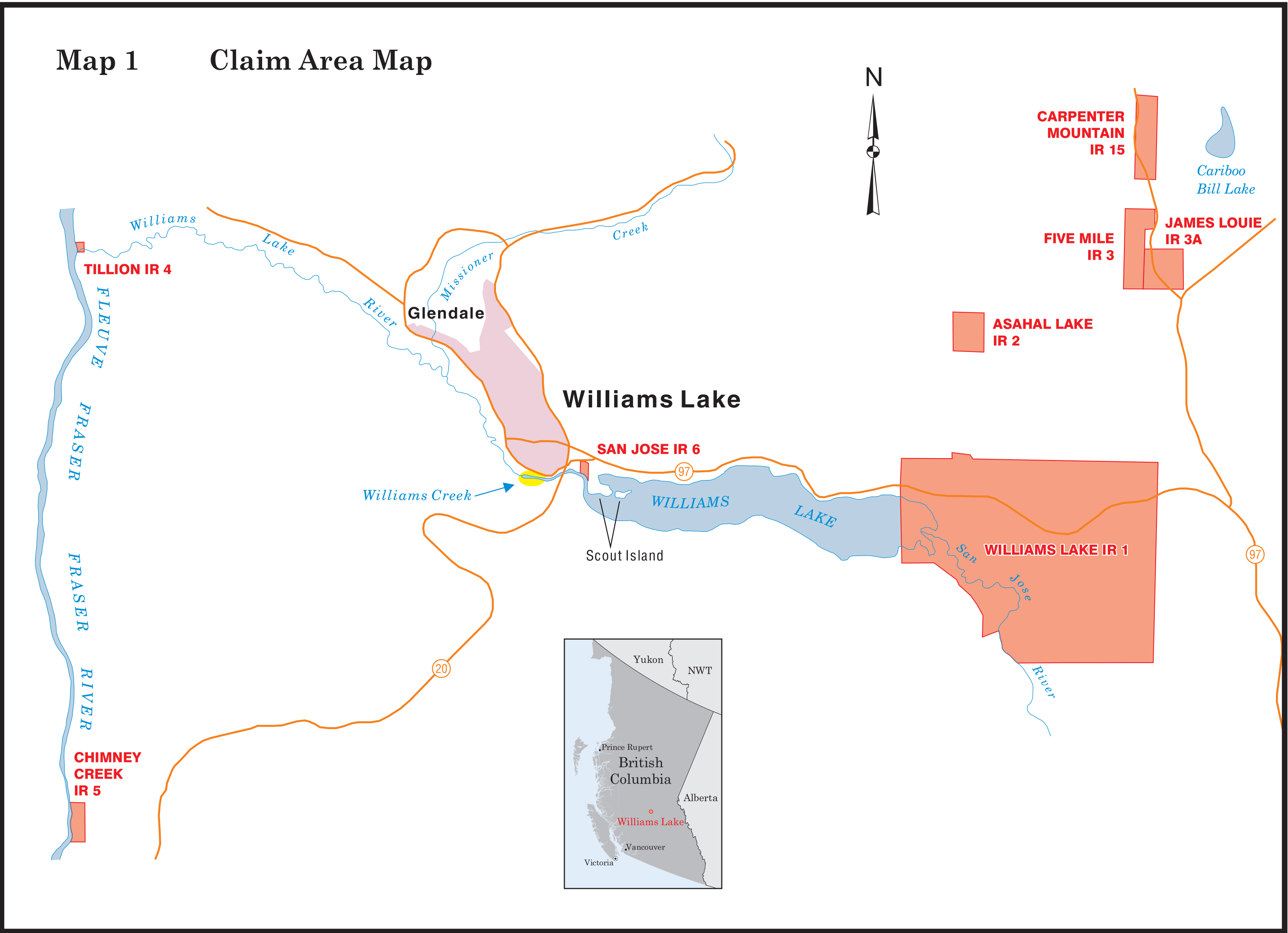
9 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

10 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 ICCP 171–85 (hereafter *Outstanding Business*).


Map 1 Claim Area Map
N
CARPENTER MOUNTAIN IR 15
Cariboo Bill Lake
FIVE MILE IR 3
JAMES LOUIE IR 3A
ASAHAL LAKE IR 2
Williams Lake
Glendale
Missioner
Creek
Williams Lake River
TILLION IR 4
FLEUVE FRASER
FRASER RIVER
CHIMNEY CREEK IR 5
SAN JOSE IR 6
97
Williams Creek
WILLIAMS LAKE
Scout Island
WILLIAMS LAKE IR 1
San Jose River
20
Yukon
NWT
Prince Rupert
British Columbia
Alberta
Williams Lake
Vancouver
Victoria

PART II
THE FACTS

The Williams Lake Indian Band, descendants of the Secwepemc or Shuswap people, have a long history in the Williams Lake area. The traditional Secwepemc way of life was based on a seasonal round that revolved around hunting, gathering, and salmon fishing. People would move or camp in regular cycles depending on what resources were available in the area, and each winter they would return to their winter villages. Thus, they would use and occupy specific areas of land for specific reasons at specific times of year. The winter village was marked by "pithouses," "kickwillie" houses, or "quigly" houses.

The year 1842 marks the first documented contact between a European Oblate missionary Father Modeste Demers, and the Williams Lake Band at the Glendale or Missioner Creek area. In his account, Father Demers described the houses built by the Band and a chapel that was jointly built in 1843.

The contact the Williams Lake Band had with settlers and missionaries would dramatically change over the next decades. In 1849, the colony of Vancouver Island was established by Britain, the HBC was granted proprietorial rights to the colony for 10 years, and in 1851 James Douglas, HBC Chief Factor, was appointed Governor. When the Fraser Gold Rush began in 1858, Douglas was also appointed Governor of the new mainland colony of British Columbia.

The gold rush led to mass settlement of British Columbia, and conflicts over lands occupied by Indian bands occurred throughout the colony. To balance seemingly conflicting interests, in fall 1859 Governor Douglas instructed the Gold Commissioner and Magistrate: "You will also 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 around such village for their especial use and benefit."[11] Douglas's instructions were formalized when *Proclamation No. 15* was issued on January 4, 1860. *Proclamation No. 15*, a pre-emption policy, allowed settlers to acquire unoccupied, unreserved, and

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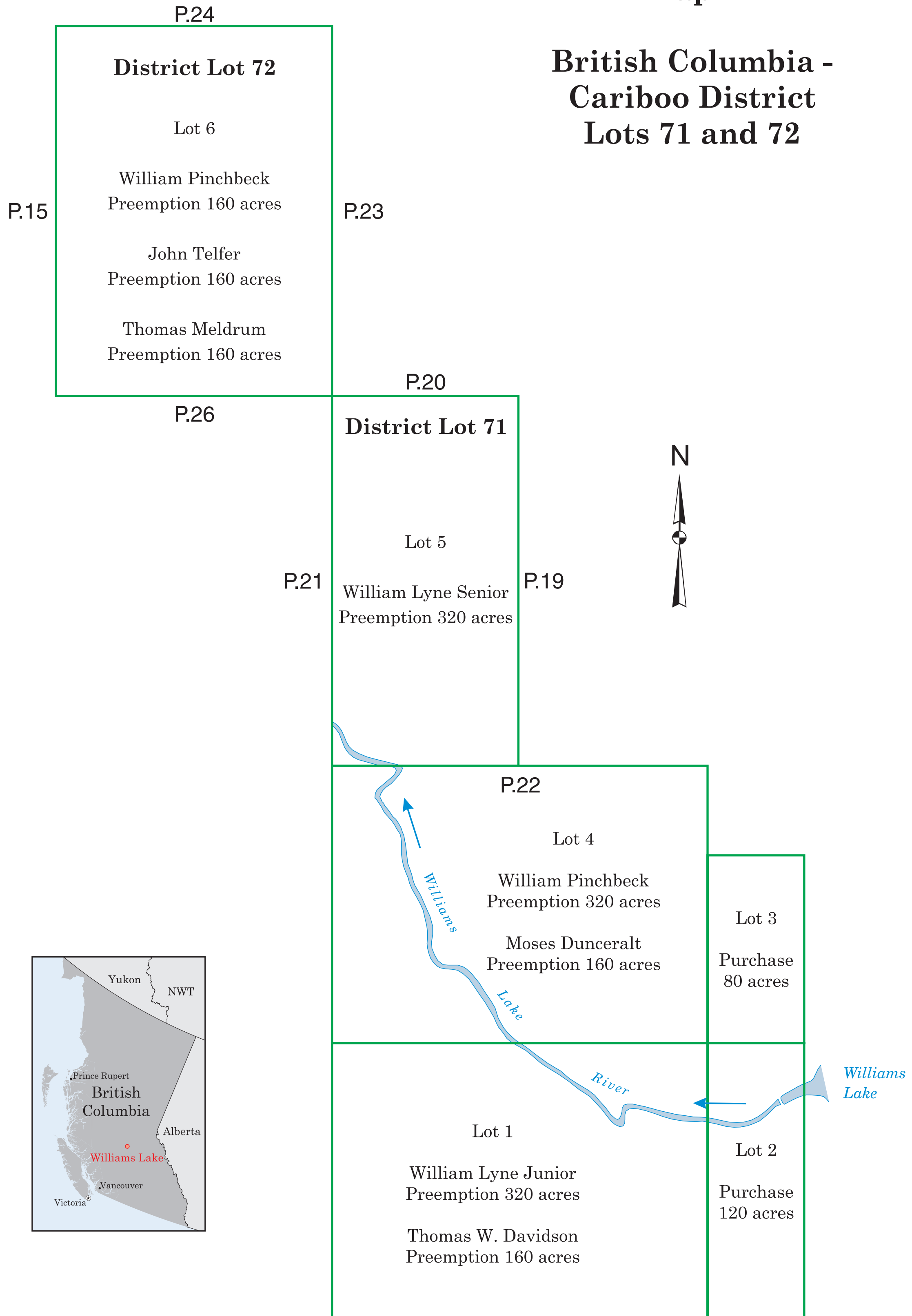
[11] James Douglas, Governor, to Gold Commissioner and Magistrate of British Columbia, October 7, 1859, British Columbia Archives (hereafter BCA), GR-1372, file 485 (Governor), microfilm B1325 (ICC Exhibit 1a, pp. 56–57).


Map 2
British Columbia -
Cariboo District
Lots 71 and 72
P.24
District Lot 72
Lot 6
William Pinchbeck
Preemption 160 acres
John Telfer
Preemption 160 acres
Thomas Meldrum
Preemption 160 acres
P.15
P.23
P.26
P.20
District Lot 71
Lot 5
William Lyne Senior
Preemption 320 acres
P.21
P.19
N
P.22
Lot 4
William Pinchbeck
Preemption 320 acres
Moses Dunceralt
Preemption 160 acres
Lot 3
Purchase
80 acres
Williams
Lake
River
Williams
Lake
Lot 1
William Lyne Junior
Preemption 320 acres
Thomas W. Davidson
Preemption 160 acres
Lot 2
Purchase
120 acres
Yukon
NWT
Prince Rupert
British
Columbia
Alberta
Williams Lake
Vancouver
Victoria

unsurveyed Crown land in British Columbia. Sites constituting an Indian reserve or settlement were prohibited from occupation and acquisition.[12]

Two village sites are the focus of this inquiry. One village site is located at Missioner Creek (also referred to as Glendale, district lot 72). In the Shuswap language, this area was referred to as Pelikehiki. The second village site is located at the foot of Williams Lake (also referred to as "Scout Island," district lot 71). In the Shuswap language, this area was referred to as Yucw or Yukw. At the time these village sites were pre-empted, they were designated lot numbers 1–6 in an unconfirmed land district. Lot numbers 1–5 (foot of Williams Lake village site) became lot 71, while lot number 6 became lot 72 (Missioner Creek village site).

The first pre-emptions at Williams Lake were recorded in 1860. Pre-emption rights (record no. 5) were granted to Moses Dunceralt on April 28, 1860, for 160 acres in lot 4, district lot 71, at the foot of Williams Lake.[13] The lots at Missioner Creek were pre-empted by John Telfer, who was issued a pre-emption record (record no. 4) for 160 acres in lot 6, district lot 72, on April 28, 1860.[14] In early December 1860, a pre-emption record was issued to Thomas W. Davidson for 160 acres at the foot of Williams Lake in lot 1, district lot 71.[15]

Apparently, some of those pre-empting land had contact with the Williams Lake Band. Davidson's pre-emption was described by Father C.J. Grandidier in a letter to the Superintendent General of Indian Affairs. Chief William occupied a house on the block of land that Davidson was interested in. Davidson offered Chief William 20 dollars for it, but the Chief refused the offer. Davidson pre-empted the land anyway. His pre-emptions were shown on a map dated c. 1860, as being west and slightly north of Williams Lake and east of the Fraser River. In addition, William

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[12] *Colonial Proclamation No. 15* (151), January 4, 1860, no file reference available (ICC Exhibit 1a, p. 68, and Exhibit 6b, p. 2).

[13] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

[14] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

[15] Field book 10/83 PH3, Lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

Pinchbeck Sr, another settler, described kickwillies built and lived in by Indians at Comer Ranch in district lot 72.[16]

The influx of settlers in the Williams Lake area disturbed the Band 's way of life. In 1861, Gold Commissioner Philip Nind reported that the Williams Lake Indians were starving and asked about marking out a reserve for them. In response, Douglas instructed Nind to set aside a 400- or 500-acre reserve. These instructions were not carried out. Around this time, as well, the Band began to suffer from smallpox, which decimated its population.

The pre-emptions in the Williams Lake area continued, subject to the *Pre-emption Consolidation Act, 1861*. A series of pre-emptions and transfers of pre-emptions occurred over the next decade. By 1878, Pinchbeck had acquired all the lots at Missioner Creek and at the foot of Williams Lake, and, in 1885, Crown grant no. 2923 for lots 71 and 72 was issued to William Pinchbeck Sr.

In March 1867, the *British North America Act, 1867* (also referred to as *Constitution Act, 1867*) bringing the Canadian Confederation into effect was passed, and section 91(24) specified federal jurisdiction over Indians and land reserved for Indians. The colony of British Columbia joined Confederation in 1871. According to the *Terms of Union*, the province retained control over its lands and resources, while acknowledging the Dominion of Canada's jurisdiction over Indians and their lands. It was intended that the province would convey lands set aside for the use and benefit of Indians to the dominion. However, this question would be the source of great conflict between the two levels of government.

In 1875, British Columbia and Canada agreed to form the Joint Indian Reserve Commission (JIRC) to address the Indian land question and allot reserves. The JIRC was to consist of a federal appointee, a provincial appointee, and an appointee agreed to by both levels of government. G.M. Sproat was the joint appointee on this commission. The Commissioners were given general guidelines to follow in carrying out their duties and had the authority to "fix and determine for each

[16] "Notes on William Pinchbeck's Onward Ranch, Williams Lake," unknown author, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, p. 1).

nation, separately, the number, extent and locality of the Reserve or Reserves to be allowed to it," after "full enquiry on the spot into all matters affecting the questions."[17]

The JIRC was dissolved in 1878 and Sproat was retained as the sole Indian Reserve Commissioner. Neither the JIRC nor Sproat met with the Williams Lake Band. It should be noted that, at this time, the Williams Lake Band still did not have any land set aside for it. In 1879, Justice of the Peace William Laing-Meason wrote twice to Sproat, advising him of the pre-emptions, the impact on the Band, and the fact that land still had not yet been set aside. Chief William wrote a letter to the editor of the *British Daily Colonist* describing the poverty of the Williams Lake Band and the effects of pre-emption. His letter also requested land. In reporting to more senior officials, Sproat stated that the Band's situation was the fault of the province, not the dominion.

In addition, Father Grandidier wrote to the Superintendent General of Indian Affairs in January 1880, documenting the Williams Lake Indian Band's history in the area from the 1850s and outlining how the pre-emptions had occurred. Father Grandidier also emphasized the need for an Indian Agent in the area. Sproat resigned from his post as Commissioner in March, without visiting the Williams Lake Band. He was succeeded by Peter O'Reilly in July 1880.

O'Reilly was the sole Indian Reserve Commissioner from 1880 to 1898. During his tenure, he experienced difficulty working with the BC government. However, in June 1881, O'Reilly was able to visit the Williams Lake Band. In his report, he described the Chief's complaints regarding the delay in setting aside land for them. He also noted the presence of an "old Indian Church," winter houses, and burial grounds at the Pinchbeck farm at Missioner Creek. O'Reilly set aside 14 reserves for the Williams Lake Indian Band. Three reserves were set aside for habitation and farming (reserves 1–3), three for fishing (reserves 4–6), and eight for graveyards (reserves 7–14). The total acreage of the reserves was 5,634 acres, including 1,464 acres of pre-empted land purchased from settlers. None of the allocated reserves were located in the two areas that are the subject of this inquiry. In 1894, an additional reserve (reserve 15) at Carpenter Mountain consisting of 168.76 acres was allotted.

[17] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 12 (ICC Exhibit 16a, p. 12).

In 1912, the McKenna-McBride Commission was established "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia."[18] The McKenna-McBride Commission was intended to be definitive and, to this end, travelled throughout the province, setting aside lands for reserve purposes. In 1914, Chief Baptiste William appeared before the Commission, requesting that more land be allotted to the Band owing to the rocky nature of the existing reserves and outlining past grievances related to the pre-emption of its village sites. The McKenna-McBride Commission confirmed all the Williams Lake Indian Band's reserves in 1915.

Provincial Order in Council PC 911, dated July 26, 1923, transferred the lands for the 15 reserves set aside for the Williams Lake Band to the federal Crown. By the time provincial Order in Council 1036 was passed in 1938, only reserves 1–6 and 15 were transferred for the Williams Lake Band. Reserves 7–14 (the graveyards) were deleted from the list and not allotted, because the burial sites were on pre-empted lands and the government was unwilling to purchase them. With respect to the relative locations of the reserves set aside and the village sites at issue in this inquiry, Indian Reserve (IR) 6 is located at the foot of Williams Lake, east of lot 71, and Indian Reserves 9–11 are south of lot 72.

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[18] Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia, September 24, 1912 (ICC Exhibit 1a, pp. 250–51).

PART III

ISSUES

The Indian Claims Commission is inquiring into the following four issues as agreed to by the parties:

1 In or about 1861 what lands, if any, did the Williams Lake Indians occupy as villages at:

i) Missioner Creek,
ii) foot of Williams Lake, and
iii) north shore of Williams Lake?

a) Were any of the villages "Indian Settlements" within the meaning of the colonial and provincial land ordinances and legislation?

2 Was the pre-emption of the Indian Settlements in and around 1861 valid pursuant to pre-emption legislation?

3 If not, would the Indian Settlements have been "lands reserved for the Indians" within the meaning of the *Terms of Union, 1871* and/or the *Constitution Act, 1867* and/or the *Indian Act*?

a) If so, does the Band continue to have a reserved interest under the *Constitution Act, 1867* and/or the *Indian Act*?

4 Did the Colony of British Columbia and Canada have a fiduciary obligation to protect the Indian Settlements for the use and benefit of the Band? If so, was such an obligation breached?

PART IV

ANALYSIS

ISSUE 1 VILLAGE SITES OF THE WILLIAMS LAKE INDIANS, 1861

In or about 1861 what lands, if any, did the Williams Lake Indians occupy as villages at:

i) Missioner Creek,
ii) foot of Williams Lake, and
iii) north shore of Williams Lake?

In this issue, the panel is being asked to make a finding of fact about whether villages existed at Missioner Creek and the foot of Williams Lake at the time of pre-emption. The Williams Lake Indian Band asserts that village sites existed at Missioner Creek, at the foot of Williams Lake, and on the north shore of the lake. The claim for the north-shore village site has been withdrawn. Canada has argued that the evidence of the existence of the village sites at the time of pre-emption is inconclusive.

Based on the oral history and the documentary evidence, the panel finds that the Williams Lake Indian Band occupied village sites at Missioner Creek and the foot of Williams Lake at and around the time of the 1860–61 pre-emptions.

Background

On January 4, 1860, Governor Douglas issued *Proclamation No. 15*, which allowed the acquisition of unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Sites constituting an Indian reserve or settlement were prohibited from occupation and acquisition.[19] This pre-emption policy, Governor Douglas explained,

> reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance of him, of being allowed to choose for himself and enter at once into possession of land without expense or

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[19] *Colonial Proclamation No. 15* (151), January 4, 1860, no file reference available (ICC Exhibit 1a, p. 68, and Exhibit 6b, p. 2).

> delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.[20]

The first pre-emptions at Williams Lake were recorded in 1860. Pre-emption rights (record no. 5) were granted to Moses Dunceralt on April 28, 1860, for 160 acres in lot 4, district lot 71, at the foot of Williams Lake.[21] The lots at Missioner Creek were pre-empted by John Telfer, who was issued a pre-emption record (record no. 4) for 160 acres in lot 6, district lot 72, on April 28, 1860.[22] In early December 1860, a pre-emption record was issued to Thomas W. Davidson for 160 acres at the foot of Williams Lake in lot 1, district lot 71.[23] This pre-emption was noted in a letter to the Superintendent General of Indian Affairs from Father C.J. Grandidier, who indicated that Davidson had had some interaction with the Williams Lake Indian Band concerning the same piece of land:

> A man named Davidson came early after 1859 to the father of the present Chief William and asked to be permitted to build a cabin and to cultivate a little garden on his land. The Chief offered no objection. Then this man Davidson had all the land occupied by the Indians, recorded as a preemption claim. On that land was a little chapel built by the first Catholic Missionary, the late Bishop [M.] Demers of Victoria, and also the cabin of the Chief. The chief was permitted to live in his cabin near the chapel, but the Indians were driven away. The Chief was offered twenty dollars by Davidson; but he refused to part with his father's land, and rejected the money, as I have been told by the man who acted as interpreter in this occasion. Shortly after the other part of the valley was pre-empted by other parties, and the Indians were driven away to the top of the hills, where cultivation is out of the question.[24]

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20 James Douglas, Governor, Victoria, to Duke of Newcastle, January 12, 1860, Papers Relating to British Columbia, pp. 90–91 (ICC Exhibit 1a, pp. 69–70).

21 Affidavit of William Pinchbeck, June 29, 1885, British Columbia Archives (hereafter BCA), GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

22 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

23 Field book 10/83 PH3, Lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

24 Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 183).

Davidson's pre-emptions were shown in a map dated circa 1860 as being west and slightly north of Williams Lake and east of the Fraser River.[25]

As for the use and occupation of the area by the Williams Lake Band, the traditional Secwepemc way of life was based on a seasonal round that revolved around the salmon fishery, gathering, and hunting. People would move or camp in regular cycles, depending on the availability of resources in the area, and would return to their winter village.[26] Based on the oral history presented at the community session, the traditional name of the area at Missioner Creek, also known as Glendale, is "Pelikekiki."[27] This area was a permanent winter village site with pithouses. "Pithouses," "kickwillie" houses, or "quigly" houses were primary winter residences that were established as winter villages.[28] Several of the Elders testified that the Missioner Creek site was a burial site for many band members who had died of smallpox.[29] Chief William was buried in this area around 1862.[30] Also, the Elders stated that many of the traditional residential sites are located in this area.[31] The Elders testified to the use of the site as a campground,[32] a hunting area,[33] and a location for berry picking.[34]

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25 Untitled map, unknown date, no file reference available (ICC Exhibit 7i).

26 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 47–48, 161–64, 257, 68, 295, Amy Sandy, Jean William, Charlie Gilbert, Lynn Gilbert, Sally Wynja).

27 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, p. 144, Jean William).

28 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 180–81, 198–99, Kristy Palmantier).

29 Transcripts of Williams Lake Elders' Interviews with Clothilde Thomas (ICC Exhibit 12d, p. 91).

30 Transcripts of Williams Lake Elders' Interviews with Clothilde Thomas (ICC Exhibit 12d, pp. 58, 91); ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 223, 118, 152, Agnes Anderson, Jean William).

31 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 40, 41, 48–49, 73, 118, Amy Sandy, Lynn Gilbert, Agnes Anderson).

32 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 117–18, Leonard English).

33 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 236, 37, 250, 150, Agnes Anderson, Leonard English, Charlie Gilbert, Jean William); Transcripts of Williams Lake Elders' Interviews with Clothilde Thomas and Lilly Alphonse (ICC Exhibit 12d, pp. 56, 91).

34 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, p. 150, Jean William); Transcripts of Williams Lake Elders' Interviews with Lilly Alphonse (ICC Exhibit 12d, p. 59).

Based on the oral history, the traditional name for the foot of Williams Lake is "Yucw." This area, now located in the present-day city of Williams Lake, was once considered to be "point central."[35] The area also includes Scout Island, where pit house sites and cache pits were observed.[36] Elders related memories of camping in various places within the territory,[37] haying activities in the vicinity of Scout Island,[38] and fishing and trapping on Scout Island.[39] The documentary record confirms the use and occupation of the area by the Williams Lake Band. A letter written by Justice of the Peace William Laing-Meason in 1879 describes Indian houses still visible at the foot of Williams Lake.[40] Also, in 1879, Chief William wrote a letter to the *British Daily Colonist* in which he describes the pre-emptions and the impact on the Band:

> The land on which my people lived for five hundred years was taken by a white man; he has piles of wheat and herds of cattle. We have nothing – not an acre. Another white man has enclosed the graves in which the ashes of our fathers rest, and we may live to see their bones turned over by his plough! Any white man can take three hundred and twenty acres of our land and the Indian dare not touch an acre. Her majesty sent me a coat, two ploughs and some turnip seed. The coat will not keep away the hunger; the ploughs are idle and the seed in useless because we have no land.[41]

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35 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 143, 255, 186–87, Jean William, Charlie Gilbert, Kristy Palmantier).

36 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 53, 87, 89, 92, Amy Sandy, Chris Wycotte, Charlie Gilbert, Lynn Gilbert).

37 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 219–21, 65, 187, 54–55, 111, 112–13, 147, 110, 103, 102, 111, 113, Irene Peters, Lynn Gilbert, Kristy Palmantier, Amy Sandy, Chris Wycotte, Lynn Gilbert, Jean William, Chris Wycotte, Virginia Gilbert, Chief Willie Alphonse, Chris Wycotte, Lynn Gilbert).

38 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 228, 29, 65, 96, 161–65, Agnes Anderson, Leonard English, Lynn Gilbert, Jean William).

39 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 91, 238, Chris Wycotte, Irene Peters); Transcripts of Williams Lake Elders' Interviews with Mrs Felissa (Plise) Wycotte (ICC Exhibit 12d, p. 15); "Williams Lake Indian Band – Village Claims/Specific Claims," Paragon Resource Mapping, June 10, 2003 (ICC Exhibit 7o).

40 William Laing-Meason, Justice of the Peace, to G.M. Sproat, Indian Land Commissioner, April 21, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 155).

41 Newspaper clipping, Chief William, Chief of the Williams Lake Indian Band, November 7, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 161).

Furthermore, William Pinchbeck Jr described in an interview what his father, William Pinchbeck Sr, experienced upon moving to Comer Ranch, located in the Missioner Creek area:

> In 1862 smallpox broke out among the Indians in Chilcotin and was very bad. When they took up Comer they were living near Indians who had been dying in the snow. These Indians lived in kickwillies. They would dig a hole in the ground out or choose a place where there was a natural hole, and put poles up for a roof and cover these with branches or matting, and had ladders down into them. There were many of them about here and the hollows can be seen still. There was a hole in the middle of the roof and the smoke came up through it. They would be from four to eight feet deep. For long after that they would come across the remains of Indians who had died in the snow, or sometimes a whole family would be found dead in their kickwillie.[42]

Band's Position

The Williams Lake Indian Band has relied on the specific documentary and oral history evidence to demonstrate the existence of village sites at the Missioner Creek site and at the foot of Williams Lake. The Band drew the panel's attention to specific written records establishing the Missioner Creek site as a village site at the time of pre-emption, notably:

- *Notes on William Pinchbeck* – an interview that indicates that Indians were living in pit houses located at the site of Comer Ranch within Missioner Creek, when the first homesteader (Pinchbeck) arrived around 1860.[43]
- An undated map c. 1875 notes an "old Indian church" located at the Pinchbeck farm in Glendale.[44]
- In 1881, Indian Reserve Commissioner Peter O'Reilly acknowledged the Band's occupation of the Pinchbeck farm located at Glendale and reported the remains of a number of winter houses.[45]

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[42] "Notes on William Pinchbeck's Onward Ranch, Williams Lake," author unknown, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, p. 1).

[43] "Notes on William Pinchbeck's Onward Ranch, Williams Lake," author unknown, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, p. 1).

[44] Old map of region west and north of Williams Lake, BC Ministry of Lands, reference no. 106749, c. 1875 (ICC Exhibit 7n).

[45] Indian Reserve Commissioner Peter O'Reilly to Superintendent General, Department of Indian Affairs, September 22, 1881, LAC, RG 10, vol. 1275, pp. 21–24 (ICC Exhibit 1a, p. 241).

The Band further presented archaeological evidence from 1989 that establishes the presence of the Williams Lake Band. Missioner Creek is the site of 33 "cairn burials,"[46] two historic foundations believed to be a house and a cellar, and various cultural remains.[47] The site is rather extensive, as similar cairns are located throughout Missioner Creek, including five foundations for historic buildings and a historic trail.[48] As well, the Band argues that archaeological evidence from a 1973 construction site survey at the foot of Williams Lake noted at least three, and possibly as many as 13, burial sites, which were removed and destroyed, as well as three pithouses. In summary, the Band argues that all this evidence indicates that the Williams Lake Band lived in the area at the time of the pre-emptions.

Canada's Position

Canada has made general arguments regarding the existence of village sites at Missioner Creek and at the foot of Williams Lake. Essentially, Canada's position is that none of the village sites existed at the time of pre-emption for the following reasons:

- There is no evidence regarding the extent and size of the alleged village sites.[49]
- The oral history presented by the Elders at the community session was inconsistent. Some Elders pointed to Glendale as being the permanent winter village, while others indicated that Glendale was the traditional hunting ground.[50] Some testified that the site was used for camping, which indicates less permanent usage.[51]

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46 Site Survey Form for Site No. FaRm 9, May 24, 1978 (ICC Exhibit 8b, p. 2).

47 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989 (ICC Exhibit 9, p. 20).

48 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989 (ICC Exhibit 9, pp. 20–22, 28–31, 44).

49 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 68.

50 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 50.

51 Written Submission on Behalf of the Government of Canada, February 9, 2004, paras. 50–51.

- The archaeological evidence at the sites is not conclusive that the remains found originate from the Fist Nation's ancestors, particularly since other evidence indicates that the Williams Lake area was used by other bands.[52] In addition, the archaeological evidence suggests pre-historic or pre-contact times, rather than the time of pre-emption.[53]

Findings re Village Sites

The panel is being asked to make a finding of fact in this issue. It is asked to determine whether villages existed at Missioner Creek and at the foot of Williams Lake at the time of pre-emption. To make this determination, we will look first at whether the Williams Lake Band lived in the area and how it used the area.

Both the documentary record and the oral history evidence confirm that the Band used the Williams Lake area. However, since Canada's arguments focus on the existence of the village sites at the time the pre-emptions took place, the panel's attention therefore turns to the time of the original pre-emptions.

The panel notes that the traditional way of life of the Williams Lake Band was based on a "seasonal round," where the Band would move or camp in regular cycles in the area and return to a winter village. Missioner Creek was a permanent winter village site, while the foot of Williams Lake was a gathering area. The original pre-emptions at Williams Lake took place between April and December 1860. Although the panel believes it quite likely that the winter villages were not occupied at the time the pre-emptions took place in the spring and summer, that possibility does not mean that the village sites were abandoned and available for pre-emption.

Furthermore, Father Grandidier's description of Davidson's pre-emption, which was recorded in December, provides strong evidence that villages existed at the time. Father Grandidier describes an encounter between Davidson and Chief William, in which Davidson specifically offers money for the land Chief William occupies. The priest also confirms that the Band was "driven away to the top of the hills."[54]

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52 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 54.

53 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 59.

54 Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 183).

Although no specific evidence points to the existence of the village sites at the exact time of a pre-emption, the panel believes that there is sufficient evidence to show that the Band lived in the area at the general time of the pre-emptions. On the balance of the evidence, the panel finds that the village sites existed at the time of the pre-emptions.

Issue 1a Were the Villages "Indian Settlements"?

Were any of the villages "Indian Settlements" within the meaning of the colonial and provincial land ordinances and legislation?

As the panel has found that village sites existed at Missioner Creek and at the foot of Williams Lake, the issue now turns to whether these village sites constituted "Indian settlements" as intended in the colonial and provincial legislation. Both the Williams Lake Indian Band and Canada agree that the definition of "Indian settlement" is not clear in the legislation; however, the parties disagree about how to define the term, and both parties have presented very specific legal arguments. In general, the Band asserts that the villages were Indian settlements as identified in legislation, which could not be pre-empted by settlers. Canada disagrees, and argues that the village sites were not Indian settlements. The panel believes it is helpful to set out the legislation and the history of its interpretation.

The Pre-emption Legislation

Proclamation No. 15, issued on January 4, 1860, allowed the acquisition of unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Governor Douglas explained that his pre-emption policy

> reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements and public rights.[55]

The legislation does not define "Indian settlement," and the panel acknowledges that some ambiguity surrounds this term. The panel believes that it may be instructive to look at what officials thought

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[55] *Colonial Proclamation No. 15* (151), January 4, 1860, no file reference available (ICC Exhibit 1a, p. 68, and Exhibit 6b, p. 2).

the term meant at the time of the pre-emptions. In March 1861, Governor Douglas wrote to the Secretary of State for the Colonies to advise that First Nations in British Columbia had

> 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.[56]

In 1862, Colonial Secretary William Young advised the Chief Commissioner of Lands and Works that

> [t]he land about the Indian villages, which is in no case open to pre-empt should be marked upon the official maps as distinctly reserved to the extent of 300 acres or more around each village.[57]

Young's instructions also indicate that Indian settlements include fields, habitation sites, and lands "recently" used.[58] In a letter written in 1874, Governor Douglas specified lands he believed were encompassed by the policy he implemented:

> 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.[59]

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[56] James Douglas, Governor, to Secretary of State, March 25, 1861, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 19 (ICC Exhibit 16b, p. 8).

[57] William Young to the Chief Commissioner of Lands and Works, March 4, 1862, no file reference available (ICC Exhibit 15e, p. 12).

[58] William Young to the Chief Commissioner of Lands and Works, March 4, 1862, no file reference available (ICC Exhibit 15e, p. 12).

[59] James Douglas to Indian Commission I.W. Powell, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 141).

Colonial and post-Confederation government officials had applied the terms "Indian village" and "Indian settlement" to the village and surrounding area used by the Indians, even on a seasonal basis. Indian Commissioner G.M. Sproat had offered some basic definitions of Indian settlement:

> "Indian Settlement" must mean, not only the soil, but also its natural adjuncts, and what is reasonably necessary to fit it for human habitation and industry ... The same remark applies to reserves, which are simply "settlements" that have been defined by the Government.[60]

Officials appear to have recognized Indian settlements as lands that were seasonally occupied or had been "recently" occupied.[61]

At the same time, in a December 1877 letter, Indian Commissioner Sproat acknowledged the ambiguity of what an Indian settlement may encompass :

> [I]t is illegal to pre-empt or purchase an "Indian settlement." This law had its origin, I suppose, in the necessity of protecting villages and fields of Indians who had no Reserves assigned to them or gazetted, which, even now, is the case of the majority of the Indian tribes in the Province. Nobody knows precisely what an "Indian settlement" is, nor what period of occupation of land by Indians gives it that character. Its nature and extent are entirely undefined, but dwellings and ploughed or fenced fields could hardly be excluded from any definition of a "settlement."[62]

Positions of the Parties

The Band argues strongly in favour of looking to what the officials at the time of the pre-emption understood the term "Indian settlement" to mean. Furthermore, the Band directs the panel's attention to the report prepared by Anne Seymour for this inquiry (hereafter the Seymour Report); it includes case studies dated from 1867 to 1885 where the Joint Indian Reserve Commission challenged pre-

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[60] Historical Document Index to Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004 (ICC Exhibit 16b, p. 122).

[61] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004 (ICC Exhibit 16a, p. 1012).

[62] Gilbert Malcolm Sproat, Joint Commissioner, Indian Reserve Commission, to Superintendent General of Indian Affairs, Ottawa, December 1, 1877, Second Condensed Report by the Joint Commissioners, 1 December 1877, LAC, RG 10, vol. 3613, file 375616 (ICC Exhibit 15c, p. 10).

emptions of land identified as an "Indian village" or "Indian settlement."[63] The Band argues that this evidence, even though not specific to Williams Lake, demonstrates how Indian settlements were perceived and defined at the relevant time period. As well, the Band argues that the nature of Indian settlements described in this evidence matches the nature of those at Williams Lake.

Canada, however, argues that, because "Indian settlement" is not defined in legislation, one must first look to the ordinary meaning of the words. The ordinary meaning of the words "Indian settlement" suggests areas where Indians were *currently* living or areas they had under cultivation. This definition is confirmed by Governor Douglas's statements of Indian settlements as "occupied village sites and cultivated fields." As a result, to constitute a settlement, there must be an element of permanency and present occupation. A previously occupied but abandoned area would no longer be a settlement.[64] Furthermore, Canada argues, the evidence must show that the village sites were occupied within the pre-empted lands at the time of the pre-emption. In this case, Canada argues that there is insufficient evidence to prove such occupancy.[65]

In addition, Canada argues that the purpose of the pre-emption legislation was to regulate the acquisition of land in the colony.

Findings re "Indian Settlements"

Are the Williams Lake village sites "Indian settlements" as set out in the pre-emption legislation? The panel concludes that the village sites at Missioner Creek and the foot of Williams Lake were Indian settlements at the time of pre-emption. In reaching this conclusion, the panel has referred to previous ICC reports on the definition of the term.

In the Mamaleleqala inquiry, the ICC examined the definition of "Indian settlement" in the context of the BC *Land Act*. The panel at that time concluded the following:

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[63] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004 (ICC Exhibit 16a, pp. 33–55).

[64] Written Submissions on Behalf of the Government of Canada, February 9, 2004, p. 13, para. 46.

[65] Written Submissions on Behalf of the Government of Canada, February 9, 2004, p. 13, paras. 48–49.

> Section 56 of the provincial *Land Act* expressly provided that no timber licences were to be granted "in respect of lands forming the site of an Indian settlement or reserve." Although we do not purport to offer any exhaustive definition of the term "Indian settlement," when section 56 was enacted it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether or not they were immediately adjacent to or in the proximity of other dwellings. Furthermore, it was not strictly necessary for there to be a permanent structure on the land, providing there is evidence of collective use and occupation by the band.
>
> In assessing whether any of the lands encompassed by the Band's McKenna-McBride applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamaleleqala Qwe'Qwa'Sot'Enox used the land and the type of houses they built and used during the early part of this century. Since one traditional house could house a number of families, the existence of even one house provides ample evidence that an Indian settlement existed at that location.[66]

Based on principles developed in the *Mamaleleqala* inquiry, the panel in this inquiry must take into consideration the distinctive way this Band used the land and the type of houses its members built. This Band traditionally used its lands on the basis of "seasonal rounds" in which specific areas of land were used for specific reasons at specific times. This way of life revolved around the salmon fishery, gathering, and hunting. People would move or camp in regular cycles depending on the availability of resources in the area and return to a winter village.[67] At the community session, Jean William discussed the importance of the seasonal habitation:

> Seasonal cycle is really, really important. In the spring, in about May, if you take a look at the – some of the texts today, it more or less explains some of the things. I think some of it is printed. But the month of May is Bethoolumwelloolum [phonetic]. That means the fishing month. So each month has an activity, a traditional activity attached to those. In the month of May, that's when the people went – like that's when – in the month of May and June, that's when the Bethhocheechum [phonetic], the fish start charging up, and that's what Téxelc means is when the fish start charging up. And it still happens today. It's still a traditional activity that still happens today. We still – our children, all our elders, all our people, that's a real

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66 ICC, *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 274.

67 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 47–48, 161–64, 257, 68, 295, Amy Sandy, Jean William, Charlie Gilbert, Lynn Gilbert, Sally Wynja).

> activity that still happens. We still fish in our creeks, in the San Jose River. And then they go into – there's the higher areas for root-gathering, wild potatoes, those type of things. Wood-gathering was year-round, but mostly in the fall. And then in around July, the end of June/July, everyone would start moving down to the river, to the Fraser River, for salmon fishing. We gathered berries there, and we did hunting, deer hunting. So we didn't only just dry salmon, we dried berries, we dried meat.
>
> ...
>
> And after we finished at the river, because we had hay meadows, we came home. We came back to the village here. And growing up in the summer, I was – we mostly camped in our meadows. We used to have three or maybe four areas where we camped. We didn't come right back into our cabin. We camped right out into our meadows. We did hay there. That was across here on this reserve here.[68]

Pithouses, kickwillie houses, or quigly houses were primary winter residences that were established as winter villages[69] and were described by William Pinchbeck Jr, the son of an early pre-emptor.

The panel believes that the traditional use and occupation of land by the Band does not accord with Canada's definition of present use and occupation. What informs the term "Indian settlement" is how the land is used and the type of houses built. By applying the principles from past ICC reports to the documentary and oral history evidence, the panel concludes that the village sites at Missioner Creek and the foot of Williams Lake were Indian settlements at the time of pre-emption.

Issue 2 Was the Pre-emption of Indian Settlements Valid?

Was the pre-emption of the Indian Settlements in and around 1861 valid pursuant to pre-emption legislation?

As the panel has concluded that the village sites at Missioner Creek and the foot of Williams Lake were Indian settlements, the question now turns to whether the pre-emption of the Indian settlements was valid according to the pre-emption legislation. To determine if there was a breach of pre-emption legislation, the panel must interpret the relevant legislation and its purpose.

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68 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 161–63, Jean William).

69 ICC Transcript, June 17, 2003 (ICC Exhibit 5a, pp. 180–81, 198–99, Kristy Palmantier).

The Pre-emption Legislation

Proclamation 15, issued on January 4, 1860, states:

> 1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple) under the following conditions:–
>
> 2. The person desiring to acquire any particular plot of land of the character aforesaid, shall enter into possession thereof and record his claim to any quantity not exceeding one hundred and sixty acres thereof, with the Magistrate residing nearest thereto, paying to the said Magistrate the sum eight of shillings for recording such claim. Such piece of land shall be of a rectangular form, and the shortest side of the rectangle shall be at least two-thirds of the longest side. The claimant shall give the best possible description thereof to the Magistrate with whom his claim is recorded, together with a rough plan thereof, and identify the plot in question by placing at the corners of the land four posts, and by stating in his description any other land marks on the said one hundred sixty acres, which he may consider of a noticeable character.
>
> 3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs, or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of ten shillings per acre.[70]

The *Pre-emption Consolidation Act, 1861*, repealed the 1860 Proclamation, but there was no significant change to the wording of the pre-emption clause:

> 3. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire the right to hold and purchase in fee simple unoccupied, and unsurveyed, and unreserved Crown Lands in British Columbia, not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or Settlement ...[71]

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70 *Colonial Proclamation No. 15* (151), January 4, 1860, no file reference available (ICC Exhibit 1a, p. 68, and Exhibit 6b, p. 2).

71 *Pre-emption Consolidation Act,* August 27, 1861 (ICC Exhibit 1a, p. 101, and Exhibit 6c, p. 2).

Governor Douglas described the purpose of the policy:

> 7. The object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition.
>
> 8. The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.[72]

In April 1865, the *Pre-emption Consolidation Act* was repealed and was replaced with the *Land Ordinance, 1865.*[73] Section 20 of this Act permitted a person already holding 160 acres to pre-empt up to 480 additional acres of unsurveyed and unoccupied land contiguous to the original pre-emption.[74]

The *Land Ordinance* was in turn amended in July 1870; however, section 3 still prohibited the pre-emption of Indian settlements.[75] After British Columbia joined Confederation in 1871, the BC provincial government attempted to pass its first post-Confederation *Land Act* in 1874.[76] However, the federal Crown disallowed the 1874 legislation as it made no provisions for First Nations.[77] In April 1875, the federal Crown approved British Columbia's revised *Land Act, 1875.*

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[72] James Douglas, Governor, Victoria, to Duke of Newcastle, January 12, 1860, Papers Relating to British Columbia, pp. 90–91 (ICC Exhibit 1a, pp. 69–70).

[73] *Land Ordinance, 1865*, April 11, 1865 (ICC Exhibit 1a, p. 101, and ICC Exhibit 6d, p. 1).

[74] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 6 (ICC Exhibit 16a, p. 6).

[75] *Land Ordinance, 1870* (ICC Exhibit 1a, p. 126, and Exhibit 6a, p. 2).

[76] Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 25 (ICC Exhibit 16b, p. 106).

[77] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 9 (ICC Exhibit 16a, p. 9).

This Act stipulated that a declaration be sworn by the pre-emptor that the land being pre-empted "is not an Indian Settlement."[78]

Williams Lake Indian Band's Position

The Band maintains that the pre-emptions were invalid, based on the pre-emption legislation, and that there was a statutory breach of the legislation based on two arguments:

- Because the village sites were Indian settlements, the sites should not have been pre-empted at all.
- Even if the village sites were not Indian settlements, the pre-emptions were not valid because the statutory conditions were not met.

These arguments are set out in further detail.

The Band argues that, at all material times, the pre-emption legislation exempted Indian settlements from lands available for pre-emption. As a result, all pre-emptions recorded on Indian settlements are void or voidable.[79] More specifically, *Proclamation No. 13, 1859,* asserted colonial ownership in fee of "all the lands in British Columbia,"[80] and *Proclamation 15, 1860*, established a process for settlers to acquire, based on terms and conditions, a right of pre-emption on unsurveyed agricultural lands that were not, *inter alia,* an Indian reserve or settlement.[81] In addition, the *Pre-emption Acts* and *Land Ordinances* in the period 1861–79 set out terms and conditions for pre-empting land.

The Band further argues that pre-emption was a statutory right of occupation, with title being perfected when statutory conditions were met and a Crown grant was issued.[82] At Williams Lake, contrary to pre-emption legislation, Thomas Davidson transferred his pre-emption on lot 1 before

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78 *Land Act, 1875*, April 22, 1875 (ICC Exhibit 6i, p. 18, and Exhibit 16b, p. 114).

79 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 290, 304.

80 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 264.

81 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 266.

82 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 291–92, 294, 296.

he received a certificate of improvement.[83] Also contrary to pre-emption legislation, the lands that were held on deposit were not contiguous to the claimed area.[84] At the time, both colonial and federal officials prohibited the pre-emption of Indian settlements and considered such pre-emptions to be unlawful. As a result, the pre-emption purchases of lots 1–6 were void or voidable and could have been cancelled.

The evidence in the Seymour Report reveals that the Indian Reserve Commissioners relied on the *Land Act* – and its requirement that pre-emptors hold only one pre-emption and reside upon the lands – to confirm their assertion that the pre-emption of Indian settlements was illegal.[85] On various occasions, Indian Reserve Commissioners recommended the cancellation of pre-emptions located on Indian settlements as "illegal," "invalid," or "not open to pre-emption" under the *Land Act.*[86]

The Band also notes that the grievance procedures in the legislation were never used. As well, previously cancelled pre-emptions provided precedents for Indian Reserve Commissioner Peter O'Reilly to cancel invalid pre-emptions, and there was no real reason why he could not act in Williams Lake.[87]

Canada's Position

Canada's position is that there were no Indian settlements at Williams Lake at the time of pre-emption, but, if the panel finds that settlements existed, then the pre-emptions that occurred were lawful and subject to challenge.[88]

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[83] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 304.

[84] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 304.

[85] Supplementary Submission to the Indian Claims Commission relating to the Joint Research Report of Anne Seymour, September 15, 2004, paras. 20–24.

[86] Supplementary Submission to the Indian Claims Commission relating to the Joint Research Report of Anne Seymour, September 15, 2004, para. 25.

[87] Supplementary Submission to the Indian Claims Commission relating to the Joint Research Report of Anne Seymour, September 15, 2004, para. 32.

[88] Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 73.

Canada argues that the legislation did not state that pre-emptions of Indian settlements were illegal or void, since there was no stated penalty[89] in the legislation. Colonial pre-emption legislation did not recognize an Indian interest in village sites,[90] nor did it provide a penalty for encroachment,[91] but the legislation did provide for a grievance procedure to dispute pre-emptions.[92] In addition, Canada argues that the legislation did not place a positive duty on the Crown to set apart any particular land as reserve.[93]

The Band did not challenge the pre-emptions through the grievance process outlined in the legislation. In the absence of challenge, pre-emptors and assignees were able to obtain valid fee simple interest when Crown grants were issued in 1885.[94]

Canada maintains that *Farmer v. Livingstone*,[95] a 1982 Supreme Court of Canada case, confirms its argument. In this case, an individual (Farmer) pre-empted land in Manitoba under pre-emption legislation. Livingstone challenged the pre-emption on the basis that Farmer failed to meet statutory conditions. Livingstone was then granted a pre-emption of the same land. Although the pre-emption had been challenged, a Crown grant was issued anyway. The Court held that Livingstone had no standing to set aside Farmer's pre-emption.[96]

Canada argues that, if the legislation was not followed by Davidson or Pinchbeck, then the issue had to have been dealt with as between the pre-emptors and the province; the Band had no standing to challenge the pre-emptions, and the federal Crown could not intervene. Although the grievance procedure in the legislation was limited, the procedure could be utilized to challenge the pre-emption. In this case, there is no evidence of any complaint filed by the Band.

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89 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 74.

90 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 37.

91 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 39.

92 Written Submission on Behalf of the Government of Canada, February 9, 2004, paras. 41, 74.

93 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 78.

94 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 77.

95 *Farmer v. Livingstone,* [1982] 8 SCR 13.

96 Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 78

Findings re Validity of Pre-emptions

In this issue, the panel is faced with two distinct approaches to the legislation. The Williams Lake Indian Band argues that the pre-emptions under discussion were not valid when the legislation is applied; Canada, however, argues from the perspective of the purpose of the legislation. Canada also points out that the pre-emptions at Williams Lake fall into two categories: first, the 1860 colonial pre-emptions as covered by the *Pre-emption Act, 1860*, and the *Pre-emption Consolidation Act, 1861*; and second, the post-colonial pre-emptions in 1883 as covered by the *Land Act, 1875*.[97] The wording of this issue forces the panel's attention to the purpose of the legislation and its effects.

The panel finds that *Farmer v. Livingstone* is distinguishable from this claim. The panel notes that British Columbia's pre-emption legislation had an extensive history, both before and after British Columbia joined Confederation. The general thrust of the legislation, based on Governor Douglas's statements, was to encourage rapid settlement of the area and to reserve certain lands to the Crown, lands including an "Indian Reserve or settlement." Canada has argued that the purpose of pre-emption legislation was to regulate the settlement of the land and not protect or preserve Indian settlements in order for them to become future reserves. Although the panel notes that setting aside an Indian settlement may not trigger an obligation for the Indian settlement to become a reserve, the panel cannot ignore the fact that the legislation exempted the pre-emption of Indian settlements. Given the colonial policies of the time, the exemption of the Indian settlements from the legislation, and the arrival of settlers in the area, the purpose of the legislation appears to be two-fold: to regulate the settlement of the area; and to ensure the co-existence of settlers and Indians in the same area.

In the previous issue, the panel found that village sites existed at the time of the pre-emptions and that those village sites were Indian settlements. Based on these findings, any pre-emptions of Indian settlements were automatically invalid. The panel concludes that the pre-emptions that took place at Williams Lake were invalid.

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[97] Written Submission on Behalf of the Government of Canada, February 9, 2004, para. 36.

ISSUE 3 INDIAN SETTLEMENTS AND FEDERAL LEGISLATION

If not, would the Indian Settlements have been "lands reserved for the Indians" within the meaning of the *Terms of Union, 1871* and/or the *Constitution Act, 1867* and/or the *Indian Act*?

Issue 3 asks, if the pre-emptions were not valid, would the Indian settlements have been "lands reserved for the Indians" within the meaning of the *Terms of Union* or *Constitution Act* or the *Indian Act*. Since the panel has concluded that the pre-emptions were not valid, the panel is specifically asked in this issue to consider whether the village sites that were invalidly pre-empted at Missioner Creek and the foot of Williams Lake were "lands reserved for Indians" as set out in article 13 of the *Terms of Union*, section 91(24) of the *Constitution Act*, or the *Indian Act*. At the oral session held on October 7, 2004, the Band confirmed that it was no longer pursuing the issue of whether the lands were Indian reserve lands under the *Indian Act.*[98] As a result, the panel will address only the *Terms of Union* and the *Constitution Act.*

Williams Lake Indian Band's Position

In this issue, the Band argues that, if the panel finds the pre-emptions invalid, then Indian settlements are "lands reserved for Indians" in either the *Terms of Union* or section 91(24) of the *Constitution Act*. Essentially, colonial policy and pre-emption legislation has acknowledged or created an Aboriginal interest in Indian settlements such that these Indian settlements are "lands reserved for Indians."

More specifically, the Band argues that article 13 of the *1871 Terms of Union* is a constitutional provision similar to section 91(24) of *Constitution Act, 1867*. Upon the union of British Columbia to Canada, article 13 provides for federal "trusteeship and management of lands reserved" for the Indians and that as liberal a policy as formerly pursued be continued by Canada.[99] The term "lands reserved" includes an Indian interest in lands that were recognized by Crown policy

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98 Oral session transcripts, p. 76, line 23.

99 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 372–73.

and law as being beyond the power of the colonial government to grant, including the claimed village sites.[100]

According to the Band, this argument is supported by *Delgamuukw v. B.C.,* which states that "lands reserved for the Indians" are not limited to lands specifically set aside or designated for Indian occupation, such as reserves.[101]

The Band argues that the failure by the colonial government and Canada to formally reserve the claimed village sites does not and cannot divest Canada of the responsibility to protect the Band's interest in these lands.[102]

Canada's Position

Canada argues that the village sites were not set aside or reserved under the *Indian Act, Terms of Union,* or *Constitution Act, 1867*. Neither the colonial policy nor the pre-emption legislation created reserves. The colonial policy distinguished between "settlements" and "reserves." An "Indian reserve" had to be staked out and then followed up with a formal survey.[103]

Canada further argues that the purpose of the pre-emption legislation was not intended to create or to purport to create reserves. Instead, the purpose of the legislation was to regulate the acquisition of land in the colony. If this legislation was intended to create reserves, then the legislation would have contained a provision with a process to convert lands that were set aside into reserves. This argument is supported by *Ross River*,[104] which states that the creation of a reserve is "confined to executive governmental power, whether federal or provincial. The extent of the authority can be abolished or limited by statute ..."[105] The pre-emption legislation did not establish

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100 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 374.

101 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 375.

102 Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 377.

103 Written Submissions on Behalf of the Government of Canada, February 9, 2004, p. 23.

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

105 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 98.

a reserve-creation process since there was no clear expression of Crown intention to create a reserve.[106]

Because the pre-emption legislation did not contain provisions to create reserves, the authority for setting apart reserves is retained by the Crown. The legal requirements for reserve creation were set out in *Ross River*:

> Thus, in the Yukon Territory as well as elsewhere in Canada, 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 ... 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. For example, this intention may be evidenced either by an exercise of executive authority such as an Order in Council, or on the basis of specific statutory provisions creating a particular reserve. 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. Thus, this analysis must be performed on the basis of the record. (Para 67)

Canada argues that, unless there is evidence of the exercise of the Crown prerogative, including preliminary steps such as staking out the settlement, then the lands were not reserved. In this case, Canada states that there is no evidence to show that any of these requirements were met with respect to the village sites at Williams Lake. In any event, the pre-emption of the lands and subsequent Crown grants negate the intention to create reserves.[107]

In response to the Band's argument regarding *Delgamuukw,* Canada states that this case is distinguishable on the basis that lands which fall under section 91(24) are already established as having Aboriginal title.[108]

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106 Written Submissions on Behalf of the Government of Canada, February 9, 2004, paras. 88, 91.

107 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 92.

108 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 94.

Canada also argues that the lands could not be "lands reserved for Indians" under article 13 of the *Terms of Union, 1871*, because the village sites were provincial Crown lands and not formally reserved. Nor could Canada administer these lands, because they were beyond its authority.[109]

Findings re "Lands Reserved for Indians"

In order to determine whether the village sites that were not validly pre-empted fall under the purview of section 91(24), the panel must first consider its meaning. It reads:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ...
>
> ...
>
> 24. Indians and Lands reserved for the Indians[110]

Both the Band and Canada have put forward arguments on this point.

The Band argues that Canada's jurisdiction is not limited to lands specifically set aside or designated for Indian occupation, such as reserves. The Band also argues that, although *Delgamuukw* addresses Aboriginal title, a similar analysis would apply in this situation to protect an Aboriginal interest in land. In other words, the Williams Lake Band had an interest in the village sites that fall under the definition of "lands reserved for Indians" in section 91(24). In contrast, Canada has argued that section 91(24) is limited to lands which have undergone a process of being "reserved," and that this process required joint federal and provincial cooperation.

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109 Written Submissions on Behalf of the Government of Canada, February 9, 2004, paras. 101–2.

110 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, ss. 24, reprinted in RSC 1985, App. II, No. 5 (ICC Exhibit 1a, p. 115).

In *Delgamuukw*,[111] the Supreme Court of Canada stated the following with respect to section 91(24):

> Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title. (Para. 174)

Later, in *Wewaykum*,[112] the Supreme Court of Canada stated:

> While the Department of Indian Affairs treated the "reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the *Constitution Act, 1867.* It was not until the Judicial Committee of the Privy Council decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46, that it was made clear that under s. 91(24) all "the Dominion had [was] a right to exercise legislative and administrative jurisdiction – while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province ..." (Para. 51)

The ICC has considered section 91(24) in past inquiries. In *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry*, the ICC stated the following regarding section 91(24):

> Although section 91(24) defines who, between the provincial and federal governments, has legislative power with respect to "Indians" and "Lands reserved for the Indians," it does not *per se* create a legal obligation to establish reserves.[113]

Also, in *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry*, the ICC concluded:

> After Confederation, section 91(24) of the *British North America Act, 1867*, vested exclusive legislative authority with respect to "Indians, and Lands reserved for the Indians" in the federal Crown. Legislation enacted by Parliament continued the

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111 *Delgamuukw v. B.C.*, [1997] 3 SCR 1010.

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

113 ICC, *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89 at 147.

> protective responsibility of the Crown by including provisions that prohibited the alienation of reserve lands by Indian bands except upon surrender to the Crown.[114]

More recently, in *Esketemc First Nation Inquiry*, the ICC stated:

> Canada had legislative jurisdiction over Indians and lands reserved for Indians under section 91(24) of the *Constitution Act, 1867*, but British Columbia owned the land, which could not be alienated without its approval and concurrence.[115]
> ...
> Moreover, we do not believe that section 91(24) imposes on Canada a positive obligation to acquire and set apart reserve lands, or to assist in doing so, at the request of a band.[116]

The content of section 91(24) has not been clearly defined; rather, there appears to be a spectrum of the implications of section 91(24). Based on Supreme Court of Canada case law, and previous principles followed by the ICC, the panel can confirm that section 91(24) does not create a legal obligation to establish reserves. Because British Columbia entered Confederation with control over its lands and natural resources, reserve creation was a joint process between federal and provincial officials. As a result, section 91(24) does not contain a legal obligation to establish a reserve.

However, section 91(24) grants the federal Crown the right of legislative and administrative authority over "Indians and lands reserved for Indians." At a minimum, "lands reserved for Indians" include lands that are actual reserves and lands specifically set aside to become reserves. Therefore, the federal Crown has legislative authority over lands that are actual reserves and lands specifically set aside to become reserves. Following this reasoning, the federal Crown's legislative authority would not be triggered until the lands are actual reserves or are specifically set aside to become reserves.

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[114] ICC, *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117 at 182.

[115] ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3 at 179–80.

[116] ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3 at 262.

In addition, based on *Delgamuukw,* "lands reserved for Indians" appear to include all land that could be the subject of Aboriginal title, which relates to the exclusive right to use and occupy the land. As a result, "lands reserved for Indians" may not be limited to reserve lands or lands specifically set aside as reserves. Furthermore, the federal Crown may have authority over lands that are the subject of Aboriginal title. In this inquiry, the Band has not argued that the village sites are subject to Aboriginal title, nor can we address the nature of Aboriginal title to these village sites. The Band is arguing that its interest in the village sites is contained in "lands reserved for Indians."

The panel agrees with the Band that it had an interest in these village sites based on their specific use and occupation. However, the panel will not draw any conclusions on whether this interest falls under the definition of "lands reserved for Indians." Instead, the panel prefers to examine this issue from the perspective of fiduciary analysis, and, more specifically, pre-reserve–creation fiduciary duties, in issue no. 4. The basis for this fiduciary analysis is the Band's interest in its village sites.

Issue 3a If so, does the Band continue to have a reserved interest under the *Constitution Act, 1867* and/or the *Indian Act*?

Issue 3a, restated, asks, if the pre-emption was valid, does the Band continue to have a reserved interest under the *Constitution Act, 1867*, and/or the *Indian Act*? Since the panel has concluded that the pre-emptions were not valid, the panel will not consider this issue.

ISSUE 4 INDIAN SETTLEMENTS AND FIDUCIARY OBLIGATION

Did the Colony of British Columbia and Canada have a fiduciary obligation to protect the Indian Settlements for the use and benefit of the Band? If so, was such an obligation breached?

This issue focuses on the fiduciary relationship between Canada and the Williams Lake Indian Band. Does this relationship give rise to fiduciary obligations with respect to the village sites, and, if there was a fiduciary obligation, was this obligation breached? The parties have presented arguments that look at pre-reserve–creation duties in two parts – before and after Confederation.

The Fiduciary Relationship between the Crown and First Nations

Both the Williams Lake Indian Band and Canada agree on the background to the fiduciary relationship between the Crown and First Nations. The fiduciary relationship between the Crown and First Nations was first acknowledged by the Supreme Court of Canada in *Guerin v. The Queen*.[117] In this case, the Musqueam Band surrendered reserve land for lease to a golf club; however, the Band later learned that the terms of the lease obtained by the Crown were significantly different from those the Band had agreed to and were less favourable. The Court unanimously found that, by unilaterally changing the terms of a lease originally agreed to by the Band, Canada had breached its duty to the Band. Dickson J, with the concurrence of Beetz, Chouinard, and Lamer JJ, stated the following regarding fiduciary principles:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[118]

In identifying a fiduciary relationship, Dickson J quoted Professor E.J. Weinrib's statement that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the

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

118 *Guerin v. The Queen*, [1984] 2 SCR 335 at 376.

mercy of the other's discretion."[119] This description has been supported in other Supreme Court of Canada judgments.[120]

The concept of a fiduciary duty in the context of the relationship between the Crown and Aboriginal peoples was further explained in *R. v. Sparrow*, [1990] 1 SCR 1075, to include Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982.* The case dealt with Aboriginal fishing rights, and whether a legislative restriction in the federal *Fisheries Act* was contrary to section 35 of the *Constitution Act, 1982*. Dickson CJ and La Forest J wrote:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R.114, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[121]

Although the courts have recognized that a fiduciary relationship exists between the Crown and Aboriginal people, they have also noted that not all aspects of the fiduciary relationship will give rise to fiduciary obligations.[122] To date, the Supreme Court of Canada has recognized certain fiduciary obligations on the Crown which arise prior to a surrender of reserve lands,[123] following a

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119 *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

120 *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574: dependency or vulnerability as an essential element indicating a fiduciary relationship. *Frame v. Smith*, [1987] 2 SCR 99: exercise of discretion or power; unilateral exercise of power; and vulnerability of the beneficiary. The beneficiary is subject to discretionary uses of power as another element characterizing a fiduciary relationship. *Hodgkinson v. Simms*, [1994] 3 SCR 377: reasonable expectations of one party expecting another party to act in their best interests may also characterize a fiduciary relationship.

121 *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108, [1990] 3 CNLR 160, Dickson CJ and LaForest J.

122 *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183; *M. (K) v. M. (H)* (1992) 96 DLR (4th) 289 at 326 (SCC).

123 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 (sub nom. *Apsassin*). In a concurring judgment, McLachlin J observed that, prior to consenting to a surrender proposed by an Indian Band, the Crown has a fiduciary duty limited to preventing exploitative bargains (at 371).

surrender of reserve lands,[124] before the expropriation of reserve lands,[125] or as a result of the regulation or infringement of a constitutionally protected Aboriginal or treaty right.[126] More recently, the Supreme Court of Canada has recognized the existence of a fiduciary duty in relation to reserve creation in *Ross River*, and more importantly, in *Wewaykum Indian Band v. Canada*.[127] Although the latter case deals specifically with reserve creation in British Columbia, this case is also the Supreme Court of Canada's most recent statement regarding the Crown/Aboriginal fiduciary relationship and when this relationship gives rise to a fiduciary duty.

In *Wewaykum*, two different bands claimed the other band's reserve or compensation from the Crown over the allocation of the reserves. The Supreme Court of Canada dismissed the appeals of both bands. In doing so, the Court said the following regarding fiduciary law:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
>
> 2. 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.
>
> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.[128]

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

125 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

126 *R. v. Sparrow*, [1990] 1 SCR 1075.

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

128 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

Essentially, the Supreme Court confirmed that the Crown/Aboriginal relationship is a fiduciary relationship, and "not all obligations existing between the parties to a fiduciary relationship are fiduciary in nature."[129] The Court also acknowledged that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[130] In *Wewaykum*, this specific Indian interest was identified as land.

An Indian band's interest in specific lands that are subject to the reserve-creation process and where the Crown acts as the exclusive intermediary with the province can trigger a fiduciary duty. The Court said the following with respect to the content of a pre-reserve–creation fiduciary duty:

> Here ... the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.[131]

The Court advised that consideration must be given to the context of the time at reserve creation and the likelihood of the Crown facing conflicting demands. The Crown is not an ordinary fiduciary and must balance the public interest with the Aboriginal interest:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and 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: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.).[132]

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129 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 288.

130 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286.

131 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 294.

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

Williams Lake Indian Band's Fiduciary Arguments

The Band argues that a pre-Confederation fiduciary duty exists. This duty was created by colonial policy and legislation that afforded protection to Indian lands and that was intended to be, and was, relied upon by the Indians.[133] The Band was vulnerable to the Crown's discretion because it did not have the right to pre-empt land itself; therefore, a fiduciary duty was triggered. This duty consists of the protection of the Indian interest in village sites while, at the same time, facilitating settlement by non-native settlers.[134] The Band argues that this duty was breached in the following ways:

- The colony acted unconscionably and in bad faith by compromising the Band's interests in favour of third-party interests.[135]
- Colonial officials violated the colony's policy and legislation by recording pre-emptions on the village sites they were mandated to protect and by permitting pre-emptions over more land than settlers were entitled to, according to the legislation. In 1861, Gold Commissioner Philip Nind built a courthouse and jail on the site of the Williams Lake village despite 1859 and 1861 instructions to mark off 400 to 500 acres as reserve.
- The duty of full disclosure was breached by not conveying to the Band the record of pre-emptions.[136]
- The duty to meet the Band's reasonable expectations, in which the colony would act in the Indians' best interest and protect settlements, was breached.[137]

The Band further argues that a post-Confederation fiduciary duty exists. In the reserve-creation process, the Crown unilaterally undertook to represent the Band. As a result, the Crown had basic duties of loyalty, good faith, full disclosure, and ordinary diligence or prudence. These duties were breached in the following ways:

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[133] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 324, 326–28.

[134] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 347.

[135] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 348.

[136] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 350.

[137] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 356.

- Through the *Land Act, 1874*, Canada had the means to inquire into and challenge the recorded pre-emptions on Indian lands which were in violation of colonial legislation, or to seek arbitration as outlined in the *Terms of Union*. The failure to act resulted in a breach of duty of good faith and loyalty.[138]

- In 1879, Indian Reserve Commissioner Sproat refused to visit Williams Lake and deferred responsibility to the province.[139]

- When Reserve Commissioner O'Reilly arrived in Williams Lake in 1880 to create reserves, legal title for pre-empted land had not yet been perfected. When advised that the pre-empted lands were on village sites, O'Reilly ought to have taken measures to restore the village sites to the Band. Instead, he chose to advise the Band that it had no recourse.[140]

- The duty of full disclosure was breached. In 1880, O'Reilly failed to advise the Band of the legislative regime that would enable the Band to challenge illegal pre-emption records that had not been granted by the Crown.[141]

- The Crown breached the duty to exercise ordinary prudence by allowing 10 years to pass before setting lands for reserves and addressing the legality of pre-emption and purchase records held by settlers.[142]

- The Crown breached the duty to meet the Band's reasonable expectations that the Crown would protect the Band's interest in its village sites by failing to intervene, prior to the issuance of Crown grant, to correct the illegal pre-emptions.[143]

Canada's Fiduciary Arguments

Canada has also presented both pre- and post-Confederation fiduciary arguments, based on *Wewaykum,* and the requirement of a cognizable Indian interest, which triggers pre-reserve–creation fiduciary duties. Throughout this inquiry, Canada has maintained its argument that there is no

[138] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 337, 348(c).

[139] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 348 (b).

[140] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, paras. 338–39.

[141] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 351.

[142] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 352.

[143] Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003, para. 358.

evidence that the village sites were used and occupied by the Band at the time of the pre-emptions; therefore, it argues, a cognizable interest does not exist and pre-reserve–creation duties do not apply. As a result, Canada's fiduciary arguments are framed as alternative arguments.

Canada's pre-Confederation fiduciary arguments can be summarized as follows:

- If the village sites were used and occupied at the time of the pre-emptions, these village sites had not been officially allotted to the Band or provisionally approved as reserves by the province. As a result, no reserve interest was created or recognized by colonial government policy or law.[144]

- The pre-emption legislation did not impose any obligation to act for the benefit of the Band; instead, the legislation provided a grievance procedure.[145]

- If the Band's interest in the village sites is a "cognizable Indian interest," then the Crown's fiduciary obligations are limited to pre-reserve–creation duties, as per *Wewaykum*. The Crown is further obliged to consider the competing interests of the settlers,[146] and the assessment of the discharge of these duties must have regard to the context of the times.[147]

- Canada argues that, in this case, the colony did not breach its duties because of the following circumstances:

  – there were few government officials to administer vast tracts of land;
  – it was not possible for the Crown to oversee pre-emptions so as to avoid conflict with Indian settlements;
  – the Crown was obliged to consider settler interests;
  – the Crown could not intervene when Indian settlements were pre-empted in the absence of a complaint from the Band;
  – there was no evidence of Band complaints regarding the encroachment of Indian settlements or village sites.[148]

- In the further alternative, Canada argues that, if the colony did breach any pre-reserve–creation duties by failing to set aside any land at Williams Lake, then such breaches

144 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 108.

145 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 113.

146 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 115.

147 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 116.

148 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 117.

> were rectified by Canada's actions in negotiating with the province to acquire reserve lands for the Band. The Band received more than 4,400 acres of reserve land, 10 times the amount of land that the colonial government would have reserved.[149]

Canada has also presented post-Confederation fiduciary duty arguments. If Canada has a fiduciary duty, this duty would have arisen in 1871 and would be limited to the pre-reserve–creation duties set out in *Wewaykum*. That is, Canada is obliged to act on behalf of the Band with loyalty, good faith, full disclosure, and ordinary diligence or prudence with a view to its best interests during Canada's negotiations with British Columbia and during the reserve-creation process.[150]

More specifically, Canada was under a duty to avoid a conflict of interest, to uphold the honour of the Crown, and to act with ordinary diligence or prudence during negotiations with British Columbia over the size, number, and location of the reserves. Canada's duty was qualified by the additional obligation to balance the interests of all affected parties, which was explained to the Band by O'Reilly on June 6, 1881.[151]

Canada's intervention was positive for the Band because the Band was consulted on land selection. Canada purchased what became the Sugarcane reserve, which was a pre-empted Indian village site. In total, the Williams Lake Indian Band received over 4,400 acres of reserve land, some of which included traditional lands. Canada notes that there is no indication that the instructions given to Nind in 1861 to mark out a reserve were final, and, even if Nind carried out the instructions, the Band would have received only 400 to 500 acres.[152] Canada argues that the difference in acreage is the result of the positive intervention by Canada. In addition, the Chief and band members expressed satisfaction with the land selection.[153]

Canada argues that there is no evidence that the Crown acted in bad faith, there was a conflict of interest, or the Crown's actions were less than ordinarily prudent. Ultimately, Canada argues, any

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149 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 118.

150 Written Submissions on Behalf of the Government of Canada, February 9, 2004, paras. 120–21, 123.

151 Written Submissions on Behalf of the Government of Canada, February 9, 2004, paras. 122–24.

152 Written Submissions on Behalf of the Government of Canada, February 9, 2004, paras. 128–30.

153 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 126.

breach of fiduciary duty that may have occurred was rectified when the Band was allotted 4,400 acres of reserve land.

Findings re Fiduciary Duties

The parties do not disagree that a fiduciary relationship exists between the Crown and the First Nation. However, the parties disagree over whether a breach of fiduciary duty occurred. More specifically, the parties disagree over the application of pre-reserve–creation fiduciary duties established in *Wewaykum.*

The panel must first determine whether a distinction exists between the pre-Confederation and post-Confederation period for the purposes of a pre-reserve–creation fiduciary analysis. The Band has argued that a pre-Confederation fiduciary duty exists, based on pre-emption legislation. Canada argues that no pre-Confederation fiduciary duty exists because the Band did not have a cognizable interest in the village sites at the time of pre-emption.

Because the panel has concluded that the village sites were Indian settlements at the time of pre-emption, a cognizable interest in the lands exists. This cognizable Indian interest in the land triggers the pre-reserve–creation fiduciary obligation. As a result, the panel believes that the distinction between the fiduciary duties that exist during the pre-Confederation and the post-Confederation period is unnecessary. The Crown owes the same pre-reserve–creation fiduciary duties during both periods. The issue then turns to whether the Crown's basic fiduciary duties were breached with respect to these lands, and, if there was a breach, at what point this breach occurred.

The Band argues that these basic fiduciary duties were breached when the Crown failed to prevent the pre-emptions, failed to challenge or cancel the pre-emptions, and failed to properly advise the Band. Canada has argued that all of the pre-reserve–creation fiduciary duties were fulfilled and, alternatively, if a breach occurred, then the breach was rectified.

In this inquiry, the fiduciary analysis may begin in the pre-Confederation period. As the Indian settlements constitute a cognizable Indian interest, the Crown is required to act with loyalty, good faith, full disclosure appropriate to the subject matter, and with "ordinary" diligence or prudence in what it reasonably regarded as the best interest of the beneficiaries. In 1861, Governor Douglas directed Nind to "mark out a Reserve of 400 or 500 acres for the use of the Natives in

whatever place they may wish to hold a section of land."[154] The panel notes that Nind himself requested instructions to set aside land as "during the winter the Indians at Williams Lake were in great distress from want of food."[155] Governor Douglas's instructions can be interpreted as the Crown undertaking to act on behalf of the Band. These instructions were never carried out, and the pre-emptions continued.

By the time British Columbia joined Confederation in 1871, the Band still did not have any land set aside for it. The context of the times is described by Canada in its written submissions: there were few government officials to administer vast tracts of land; it was not possible for the Crown to oversee pre-emptions so as to avoid conflict with Indian settlements; the Crown was obliged to consider settler interests; the Crown could not intervene when pre-emptions of Indian land occurred without a Band complaint; and there was no evidence of a Band complaint regarding the encroachment of Indian land.[156]

The panel notes that Canada's arguments hinge on whether there was evidence of complaint from the Band. In 1879, Justice of the Peace Laing-Meason wrote two letters on behalf of the Williams Lake Indian Band, advising of the pre-emptions and describing the impact on the Band. Chief William wrote a letter to the *British Daily Colonist* in 1879 describing the poverty of the Band and the effects of the pre-emptions and requesting land. Indian Commissioner Sproat acknowledged that wrong had been done to the Band:

> It is the case of a tribe or band of Indians to whom no land whatsoever has been assigned. On the contrary, the land and the water for irrigating it in the place which the Indians say is their old place have been long ago permitted to be acquired by a white settler and I have been told that there either is no other available land or no other available land that can be irrigated in the particular locality. The Dominion

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154 Charles Good, Acting Private Secretary, to Philip A. Nind, June 10, 1862, no file reference available (ICC Exhibit 1a, p. 99).

155 Philip A. Nind, [BC Gold Commissioner], Williams Lake, to [Charles Good], Acting Colonial Secretary, May 4, 1861, no file reference available (ICC Exhibit 1a, p. 93).

156 Written Submissions on Behalf of the Government of Canada, February 9, 2004, para. 117.

> Government has not done this alleged wrong; it has been done by the Government of British Columbia, and that Government should afford redress.[157]

Sproat, however, never did visit the area. In 1880, Father Grandidier wrote to the Superintendent General of Indian Affairs, providing a history of the Band and the pre-emptions. He also specifically outlined the need for an Indian Agent in the area:

> The law may be very stringent; but received no application because there is no one to see it carried out. I would think as a very advisable step the appointment of an Agent, to take the interests of the Indians in hand, to see the Law, if transgressed, also vindicated. This presence would also be necessary to defend the interests of the Natives against the encroachments, of their White neighbours. Complaints have been made repeatedly to me by the Indians, that their burial grounds have not been respected by the whites, but have been ploughed over; that the timber on their Reserves is being cut down by the whites; and that on appealing to the Justice of the Peace for redress, they are told that it is none of their business.[158]

Peter O'Reilly, the Reserve Commissioner who succeeded Sproat, visited Williams Lake in 1881 and reported on the Chief's complaints regarding the delay in setting aside land for them:

> The Chief in a long speech expressed his gratification at the late action of the Dominion Government but complained bitterly of the delay that has taken place in the adjustment of their land, during the whole of which the whites have been permitted to possess themselves of what should properly belong to his people.[159]

He noted the presence of an "old Indian Church," winter houses, and burial grounds at the Pinchbeck farm at Missioner Creek in his report of reserve allotments for the Williams Lake Indian Band.[160] However, this land was not allotted as a reserve. Fourteen reserves were set aside for the Williams

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157 Gilbert Sproat, Indian Land Commissioner, to Deputy Superintendent General, November 26, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 173–76).

158 Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, LAC, RG 10, vol. 3680, f. 12395-1 (ICC Exhibit 1a, p. 184).

159 Author not identified [Peter O'Reilly] to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, p. 21 (ICC Exhibit 1a, p. 239).

160 Author not identified [Peter O'Reilly] to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, p. 23 (ICC Exhibit 1a, p. 241).

Lake Indian Band. Three were reserved for habitation and farming (reserves 1–3), three were set aside for fishing (reserves 4–6), and eight were set aside as graveyards (reserves 7–14). The total acreage of the reserves was 5,634 acres, including 1,464 acres of pre-empted land purchased from settlers.[161]

When O'Reilly arrived to set aside land for reserves, legal title for pre-empted land had not yet been perfected. In other words, Crown grants had not yet been issued for the pre-empted lands. When advised that the pre-empted lands were on village sites, O'Reilly ought to have taken measures to restore these sites to the Band. There is no evidence that O'Reilly advised the Band of the legislative regime that would have enabled the Band to challenge the illegal pre-emption records filed by Pinchbeck and that had not yet been granted by the Crown. The panel notes that the disallowance by the federal Crown of British Columbia's 1874 *Land Act*, on the ground that it failed to exempt Indian settlements from pre-emption, was an implicit acknowledgment of the federal fiduciary duty to protect such settlements in some way. Having ensured that BC legislation protected Indian settlements, the federal Crown then had a corollary duty to protect such settlements against subsequent breaches of that protection. O'Reilly should have taken further actions to fulfill his basic fiduciary duties.

In 1914, Chief Baptiste William appeared before the McKenna-McBride Commission, and outlined all the past grievances related to the pre-emption of the Band's village sites. He also requested that more land be allotted to the Band owing to the rocky nature of the existing reserve.[162]

On the balance of the documentary evidence, the panel finds that Canada breached its basic fiduciary duties of loyalty, good faith, full disclosure, and ordinary diligence by failing to act when the Band needed land to be set aside for it. The breach of fiduciary duty can be said to have occurred in 1861: Nind was instructed to set aside land when the Band was starving; he did not do so, and the pre-emptions continued. The breach of fiduciary duty can also be said either to have continued or to have arisen in 1871, when British Columbia joined Confederation, and the Crown, again, failed

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161 J.I. Austin, Clerk of Records, Victoria, to P. O'Reilly, BC Reserve Commissioner, Department of Indian Affairs, Victoria, May 23, 1882, no file reference available (ICC Exhibit 1a, p. 243).

162 Transcript of Evidence at McKenna-McBride Commission, no file reference available (ICC Exhibit 1a, p. 270).

to set aside land for the Band. At this time, Canada was quite aware of its general responsibility to First Nations in British Columbia, as outlined in a letter from the Minister of the Interior, David Laird, to Joseph Trutch, the Lieutenant Governor of the province:

> The policy theretofore pursued by the Local Government of British Columbia toward the red men in the 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 the 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.[163]

The village sites should have been set aside so that they were included with the lands that were recommended to become reserves. The issue then turns to addressing whether this breach was rectified when the Williams Lake Indian Band was allotted its reserves by the McKenna-McBride Commission.

The Band has argued that the allotment of reserves was never accepted by the Band as compensation for village sites or as a rectification of the breach of the fiduciary duty that is alleged to have occurred. The Band has also argued that relief of a fiduciary breach is greater than a “remedy in contract or negligence.” In contrast, Canada has argued that, if a breach occurred, this breach was remedied by the allotment of more land than the amount lost.

The panel acknowledges that the Band received reserve lands in excess of what was originally intended to be marked out for them in 1860. However, the panel finds that the allotment of additional reserve lands does not rectify O’Reilly’s breach of fiduciary duty. The Band had an interest in the use and occupation of the village sites at Missioner Creek and the foot of Williams Lake prior to the pre-emptions and after the pre-emptions. This interest was recognized by O’Reilly, but he chose not to take action. If this interest had been recovered and protected, these lands probably

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[163] David Laird, Minister of the Interior, Ottawa, to the Privy Council, November 2, 1874, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen’s Printer, 1987), 151–55 (ICC Exhibit 16b, pp. 192–93).

would have been part of the lands recommended by the McKenna-McBride Commission to become reserves.

PART V

CONCLUSIONS AND RECOMMENDATION

The panel concludes as follows:

Issue 1: In or about 1861 what lands, if any, did the Williams Lake Indians occupy as villages at:

i) Missioner Creek,
ii) foot of Williams Lake, and
iii) north shore of Williams Lake?

a) Were any of the villages "Indian Settlements" within the meaning of the colonial and provincial land ordinances and legislation?

The panel concludes that the Williams Lake Indian Band occupied the village sites at Missioner Creek and the foot of Williams Lake at the time of pre-emption and that these village sites were "Indian settlements" within the meaning of the legislation in operation at the time. The claim for the village site on the north shore of Williams Lake has been withdrawn by the Band.

Issue 2: Was the pre-emption of the Indian Settlements in and around 1861 valid pursuant to pre-emption legislation?

The panel concludes that the pre-emption of the Indian settlements around 1861 was not valid pursuant to the pre-emption legislation.

Issue 3: If not, would the Indian Settlements have been "lands reserved for Indians" within the meaning of the *Terms of Union, 1871* and/or the *Constitution Act, 1867* and/or the *Indian Act*?

a) If so, does the Band continue to have a reserved interest under the *Constitution Act, 1867* and/or the *Indian Act*?

With respect to this issue, the panel finds that the Williams Lake Indian Band had an interest in the use and occupation of the village sites at Missioner Creek and the foot of Williams Lake prior to the pre-emptions and after the pre-emptions. The panel does not draw any conclusions on whether this

interest falls under the definition of "lands reserved for Indians" and prefers to examine the Band's interest in its village sites in the context of a fiduciary analysis.

Issue 4: Did the Colony of British Columbia and Canada have a fiduciary obligation to protect the Indian Settlements for the use and benefit of the Band? If so, was such an obligation breached?

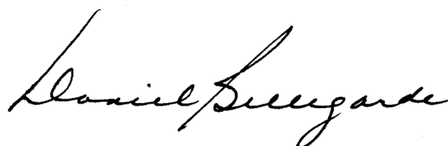
The panel concludes that Canada had a fiduciary obligation to the Williams Lake Indian Band. This fiduciary obligation is based on the interest the Band had in the village sites at Missioner Creek and at the foot of Williams Lake; it is a pre-reserve–creation fiduciary duty limited to the basic duties of loyalty, good faith, full disclosure, and ordinary prudence or diligence.

The panel finds that these duties were breached by Peter O'Reilly in 1881 and were not rectified by the allotment of more reserve lands than was originally intended. The panel concludes that these village sites should also have been set aside and recommended as possible reserves.

We therefore recommend to the parties:

THAT Canada accept the village site claim of the Williams Lake Indian Band.

FOR THE INDIAN CLAIMS COMMISSION



Alan C. Holman
Commissioner (Chair)

Daniel J. Bellegarde
Commissioner

Dated this 30th day of March, 2006

APPENDIX A

HISTORICAL BACKGROUND

WILLIAMS LAKE INDIAN BAND
VILLAGE SITE INQUIRY

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INTRODUCTION

The Williams Lake Indian Band[1] is descended from the Secwepemc people (also referred to as Shuswap), "who speak a dialect of the Interior division of the Salishan linguistic family."[2] In times past, Williams Lake was "the ethnohistoric territory of the Shuswap (Secwepemc people)."[3] Elder Kristy Palmantier stated: "We really are the northern Shuswap. Our territory extends from Soda Creek all the way down to Shuswap and Invermere. That's the extent of the Secwepemc, the Shuswap territory."[4] Elder Irene Peters explained that a number of First Nations constitute the Secwepemc: "Well, there's Soda Creek. That's where I originally was born, at Soda Creek, and here's Alkali Lake, Dog Creek, Canoe Creek, Canim Lake, Clinton, and then those beyond the Okanagan and the Kootenays."[5]

Consultants Ian C. Franck and Mike K. Rousseau have described the pre-contact history of the Shuswap people as follows:

> The ethnographic Shuswap were a semi-sedentary, egalitarian people who relied primarily on fishing, hunting and gathering for subsistence. A yearly settlement cycle of aggregation and dispersal allowed maximum efficient exploitation of important seasonally available food resources. In winter the Shuswap lived in pithouse villages centered around major salmon fisheries, where they subsisted mostly on stored foods, especially dried salmon. From early spring to late fall, winter villages split into smaller socioeconomic groups to exploit specific seasonally available plant and animal resources. Habitation structures used during this time of the year were simply constructed pole-framed lodges covered with bark, skins, or matting.[6]

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1 Also known as the Sugar Cane Band.

2 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 6 (ICC Exhibit 9, p. 6).

3 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 6 (ICC Exhibit 9, p. 6).

4 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 189, Kristy Palmantier).

5 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 242–43, Irene Peters).

6 I.C. Franck, P.S. Merchant, and M.K. Rousseau, "An Archaeological Impact Assessment for a Proposed Residential Subdivision on the North Shore of Williams Lake, B.C.," prepared for Stevenson Holdings Ltd., May 10, 1993 (ICC Exhibit 10, p. 3).

Today, the principal reserve of the Williams Lake Band is the Williams Lake Indian Reserve (IR) 1 (frequently referred to as the Sugarcane Reserve IR 1), located at the easterly end of Williams Lake, BC.

The claim of the Williams Lake Indian Band pertains to the alleged pre-emption and subsequent Crown grant, between 1861 and 1885, of two parcels of land within the traditional "Indian settlements" of the Band. It claims that the colonial government of British Columbia had a fiduciary obligation to protect the Band's settlements and graveyards for its own use and benefit, and the federal government assumed these obligations under the *Constitution Act, 1867*, and the *Terms of Union, 1871*. A claim submitted by the First Nation in 1994 was rejected in 1995, and, in June 2003, the First Nation requested that the Indian Claims Commission (ICC) conduct this inquiry.

Traditional Land Uses of the Williams Lake Indian Band: Seasonal Rounds

As briefly mentioned above, the Williams Lake Indian Band traditionally used its lands according to "seasonal rounds" that saw band members use specific areas of land for specific reasons at specific times. Community session evidence supports Franck's assertion that the Shuswap employed a system of "seasonal rounds or seasonal cycles" in their methods of habitation. Elder Amy Sandy stated:

> My mother told me that the chief, the hereditary chief of the time, would gather the people together and tell them they were going to go hunting or fishing and berry-picking and stuff like that. And he would assign somebody that had to stay on the reserve with the ones – the elderly who couldn't travel and the ones who were sick that couldn't travel, and then they would talk amongst themselves and decide whose land they were going to go on to – to hunt, for example, if they were gonna go out to Spokin Lake, they would – to Spokin's place, they would – maybe that's where they would go that year. Or, if they had gone there too many times, maybe they would go to old Jeannie's place, further up towards Horsefly. And then so he would decide, and then who was gonna go. I guess the people would talk about it, and then he would make a decision, and they would all travel together. And my mother talked about it, like how they – they started – during her time, they started from Sugar Cane, they went towards Horsefly, what's called Spokin Lake area. They went all through there, and they went towards Horsefly, and they came around, they went through Likely. And that was all hunting and berry-picking. And then they went down towards the river, and then they would camp probably down at the river for a couple of months. And sometimes they would camp like out towards Soda Creek area, or at Flatrock,

> on the other side up towards – kind of towards the Chilcotin now, I guess. And then they would come back, make their way back.[7]

Jean William also discussed the importance of the seasonal habitation at the community session:

> Seasonal cycle is really, really important. In the spring, in about May, if you take a look at the – some of the texts today, it more or less explains some of the things. I think some of it is printed. But the month of May is Bethoolumwelloolum [phonetic]. That means the fishing month. So each month has an activity, a traditional activity attached to those. In the month of May, that's when the people went – like that's when – in the month of May and June, that's when the Bethhocheechum [phonetic], the fish start charging up, and that's what Téxelc means is when the fish start charging up. And it still happens today. It's still a traditional activity that still happens today. We still – our children, all our elders, all our people, that's a real activity that still happens. We still fish in our creeks, in the San Jose River. And then they go into – there's the higher areas for root-gathering, wild potatoes, those type of things. Wood-gathering was year-round, but mostly in the fall. And then in around July, the end of June/July, everyone would start moving down to the river, to the Fraser River, for salmon fishing. We gathered berries there, and we did hunting, deer hunting. So we didn't only just dry salmon, we dried berries, we dried meat.
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> ...
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> And after we finished at the river, because we had hay meadows, we came home. We came back to the village here. And growing up in the summer, I was – we mostly camped in our meadows. We used to have three or maybe four areas where we camped. We didn't come right back into our cabin. We camped right out into our meadows. We did hay there. That was across here on this reserve here.[8]

Amy Sandy indicated that the First Nation "had a pattern, a seasonal pattern that they followed every year, and they generally went back to the same places. They generally chose places that had good water, you know, that was good for camping."[9]

The two locations subject to this inquiry are winter village sites of the First Nation.[10] The first village site is found at Missioner Creek (also referred to as Glendale in district lot 72). In the Shuswap language, this area was referred to as Pelikehiki. The second village site is located at the

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7 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 46–47, Amy Sandy).

8 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 161–63, Jean William).

9 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 58, Amy Sandy).

10 ICC Transcript of Oral Session, October 7, 2004, p. 16 (Cloe Ostrove).

foot of Williams Lake (also referred to as "Scout Island" in district lot 71). In the Shuswap language, this area was referred to as Yucw or Yukw.

When the pre-emption of the village sites occurred, the areas in question were designated lot numbers 1–6 in an unconfirmed land district. Some of the documentation refers to lot numbers 1–6 as the "old Cariboo lots." Those lot numbers were subsequently changed, although the ICC has not been able to confirm when or why. Lot numbers 1–5 (foot of Williams Lake village site) became lot 71 while lot number 6 became lot 72 (Missioner Creek village site).

The documentary record of this inquiry is unclear as to which land districts included the village sites in the past, at the time of pre-emption, and at present. The historical documentation from 1860 to 1885 rarely refers to a land district designation at all. In 1885, however, there are references to the Cariboo Land District.[11] Based on the documents submitted in this inquiry, it is assumed that the land district has always been Cariboo.

Despite the fact that lots were surveyed at Williams Lake, the area is treated as one large area in the documentation, with no distinction between the specific sites. At times in this history, the two village sites will be discussed separately because the evidence for each site is slightly different. There is also an added complication in locating the village sites at issue in this inquiry. The area has undergone extensive residential, industrial, recreational, and commercial development in recent years, all of which is part of the creation and evolution of the Williams Lake Townsite that now dominates the claim area.[12]

Pre-Contact Location of Indian Settlements

Foot of Williams Lake or Yukw (Lots 1–5, District Lot 71)

According to the First Nation, the village site at the foot of Williams Lake was traditionally used for farming, trapping, fishing, and camping.[13] Hayfields and meadows in the area were also routinely used. Elder Leonard English testified at the community session that the First Nation used to put up

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[11] Crown grant no. 2923 to William Pinchbeck, June 29, 1885, British Columbia Archives (BCA), GR-3097, vol. 0016 (ICC Exhibit 1c, p. 1).

[12] See ICC Exhibits 7o and 7q.

[13] Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, Indian Claims Commission, March 31, 2004 (ICC Exhibit 17, p. 3).

hay at the foot of Williams Lake, as well as using the area as pasture land.[14] Because it was the site of a village, Indian houses and pithouses were also located in this area.[15]

On October 10, 1973, the Province of British Columbia conducted an "Archeological Site Survey" at the foot of Williams Lake in preparation for the construction of a shopping centre.[16] At that time, officials of the British Columbia Heritage Conservation Branch, G. Roberts and B. Simonsen, identified at least three (and possibly 13) burial sites, as well as "3 housepit depressions" and "3 smaller depressions" in an area that was designated FaRm 8[17] by the investigating archaeologists.[18] The site survey form for FaRm 8 concluded that this site was traditionally used for habitation, camping, and burial, describing the area as "historically [the] territory of Interior Salish Shuswap."[19] As well, Chris Wycotte testified at the community session that bones had been uncovered at the Boitanio Mall.[20]

The village site at the foot of Williams Lake is the current location of the Boitanio Mall, Boitanio Park, Oliver Street, Elk's Hall, Mackenzie Avenue, Chilcotin Inn, and Lake City Ford, among other non-Aboriginal/commercial landmarks.[21] Elder Amy Sandy states:

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14 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 31–32, Leonard English).

15 Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, Indian Claims Commission, Ottawa, March 31, 2004 (ICC Exhibit 17, p. 3).

16 British Columbia Archaeological Site Survey Form, Site No. FaRm 8, October 10, 1973 (ICC Exhibit 8a, p. 1).

17 The designations FaRm or FaRn refer to the Borden numbering system, a national system used by archaeologists to record and manage archaeological sites based on latitude and longitude. Borden units crisscross the country, with the number following the Borden unit representing the appropriate site discovered within that particular unit. FaRm 5, therefore, would indicate 5th site containing artifacts which was recorded within the Borden block, and any sites with the FaRn prefix would be in the adjacent Borden block. There is no other significance to the designation other than the system used for managing or recording sites.

18 British Columbia Archaeological Site Survey Form, Site No. FaRm 8, October 10, 1973 (ICC Exhibit 8a, p. 1). See also Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, Indian Claims Commission, March 31, 2004 (ICC Exhibit 17, p. 4).

19 British Columbia Archaeological Site Survey Form, Site No. FaRm 8, October 10, 1973 (ICC Exhibit 8a, p. 1).

20 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 14, Chris Wycotte).

21 Letter from Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, ICC with attached list and explanation of sites, March 31, 2004 (added as exhibit at the oral session October 7, 2004) (ICC Exhibit 17, p. 3).

> My mother ... mentioned a place down at Boitanio Park, where Boitanio Mall and Boitanio Park is now. That was another place that the people used to be. And my Aunt Liz mentioned the village site down at the flats, down towards at the confluence of the Fraser River and Williams Creek, and they said how you could – how you could recognize these places was by markings on the trees, that the people actually marked the trees, or – you know, like maybe they were marked from – because they had to do with smoking their fish and smoking their meat.[22]

Missioner Creek/Glendale or Pelikehiki (Lot 6, District Lot 72)

According to the First Nation, the Missioner Creek village site was traditionally used as a burial ground, as well as a place for hunting and berry picking.[23] At the community session, Elder Leonard English stated:

> Around the Glendale area, that was a traditional hunting place, because like I said earlier, that was the trail the deer used when they migrated to their breeding ground over in Meldrum Creek, along the Fraser River there. Instead of having to go way back in the mountains, they would go and camp there, because that was part of their village anyway.[24]

There are also the normal attributes of a village on this site, including Indian houses and pithouses,[25]and evidence that the Williams Lake First Nation built a church there as early as the 1840s.[26] Elder Leonard English stated at the community session that Chief William is buried at Glendale.[27]

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22 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 48–49, Amy Sandy).

23 Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, Indian Claims Commission, March 31, 2004 (ICC Exhibit 17, p. 3). See also ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 24, Leonard English).

24 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 37, Leonard English).

25 Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, Indian Claims Commission, arch 31, 2004 (ICC Exhibit 17, p. 3).

26 Father Modeste Demers to the Bishop of Montreal, December 20, 1842, reproduced in Oregon Historical Society, *Notices & Voyages of the Famed Quebec Mission to the Pacific Northwest* (Portland, OR: Champoeg Press Inc., 1956), 161 (ICC Exhibit 1a, p. 10).

27 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 23–24, Leonard English).

The first known archaeological assessment of the Missioner Creek area was conducted by Paul Sneed in 1975.[28] In 1978, archeologists Carlos Germann and John Brandon visited the village site at Missioner Creek on behalf of Merrill-Wagner Logging Co. to re-record Sneed's observations. The accompanying site survey form identified "[a]t least 33 burial cairns ..., two historic features (foundations), one outside the Lease boundary, ... [and] 1 human ulna."[29] Germann and Brandon concluded that "the site area was once much larger than at present."[30] However, their archaeological findings were

> based solely on surface observations. No probing or test-pitting was conducted. Rock cairns, relatively undisturbed, were easily identifiable. Conspicuous areas of dense, but scattered rock as well as tight clusters of embedded rocks within these areas of scattered rocks were interpreted as heavily disturbed burial cairns and also included as part of the site area. It was impossible to determine how many features had originally been disturbed in areas of scattered rock. Disturbance is attributed to farming activity since 1967, and more recently from heavy machinery involved in logging activity.[31]

In 1989, the province authorized another archaeological impact assessment of Missioner Creek and the foot of Williams Lake areas. Mike Rousseau, a heritage resource consultant, provided an archaeological assessment report to Caribou Fibreboard Ltd. detailing the impact of a future fibreboard plant project within the Glendale area of Williams Lake. Rousseau located a total of five heritage sites, including an early historic Catholic mission, settlement, and cemetery site (FaRm 9)

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[28] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 17 (ICC Exhibit 9, p. 17).

[29] British Columbia Archaeological Site Survey Form, Site No. FaRm 9, May 24, 1978, no file reference available (ICC Exhibit 8b, p. 2).

[30] British Columbia Archaeological Site Survey Form, Site No. FaRm 9, May 24, 1978, no file reference available (ICC Exhibit 8b, p. 4).

[31] British Columbia Archaeological Site Survey Form, Site No. FaRm 9, May 24, 1978, no file reference available (ICC Exhibit 8b, p. 4).

and four prehistoric "lithic scatter"[32] sites (FaRm 21, FaRm 22, FaRm 23, and FaRm 36). However, Rousseau deemed the latter four sites to be of low or medium significance.[33]

FaRm 9 was located within the northern limits of the town of Williams Lake, in the northern half of lot 72 and most of lot 6483.[34] Rousseau states:

> The ethnic significance value of this site is also deemed to be high. As discussed above ... it was a focus of contact between local Native people and early Euro-Canadian settlers commencing about 1842. Native people should have a very strong interest in the site because it was once an early Native historic settlement, Chief William was responsible for constructing the Catholic mission for Father Modeste Demers in 1842, and most importantly, because there are many Native people reportedly buried there.[35]

According to Rousseau, "subsequent to the property being used as a Catholic Mission, it was a focus for local Euro-Canadian settlement commencing around 1859."[36] Rousseau was not able to locate the 33 burial cairns identified by Germann and Brandon in 1978. He wrote:

> During the present study, it was determined that many of these cairns have since been obscured by cultivation activities within the last ten years ... Consequently, it was

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32 "Lithic" refers to stone. The term "lithic scatter" refers to lithic tools or lithic artifacts (stone tools or debris of some sort, whether waste flakes from the making of tools or the tools themselves) that are found scattered on the ground. Archaeologists frequently find lithic artifacts at archaeological sites because humans used to make their tools out of stone before they used metal.

33 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. ii (ICC Exhibit 9, p. ii). See also British Columbia Archaeological Site Survey Form, Site No. FaRm 9, May 24, 1978, no file reference available (ICC Exhibit 8b).

34 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 1 (ICC Exhibit 9, p. 1). See also maps in ICC Exhibit 9, pp. 2, 4.

35 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 46 (ICC Exhibit 9, p. 46).

36 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 9 (ICC Exhibit 9, p. 9).

> difficult, if not impossible, to locate many of them. Most of those that could be located exist along the peripheries of the field.[37]

Rousseau reported that his research and interviews with local residents found that at least 13 and as many as 200 Aboriginal graves may have existed at FaRm 9.[38] He estimated that "50 to 100 graves could be comfortably accommodated there."[39] Many residents in the area, he noted, reported that at least three Williams Lake Indian Band members were buried in the Missioner Creek area after being executed in the 1860s.[40] On May 6, 1998, the remains of an Aboriginal adult and child were found on FaRm site 9.[41] It was concluded that the remains of the adult were of "Native origin."[42]

Rousseau also noted that "a trail originally established and used by local Native people and the Hudson's Bay Fur Company during the early and mid-1800's once passed through ... site FaRm 9 ... there is no intact section of the original trail existing today."[43] Four other prehistoric "lithic scatter

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37 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 20 (ICC Exhibit 9, p. 20).

38 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 21 (ICC Exhibit 9, p. 21).

39 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 24 (ICC Exhibit 9, p. 24).

40 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 24 (ICC Exhibit 9, p. 24).

41 Lindsay J. Oliver, L.R. Wilson Consulting Ltd., "Found Human Remains Burial 98-14B," May 1998, with attached Band Council Resolution granting Chris Wycotte authority to retrieve human remains held in trust at the Royal British Columbia Museum, November 30, 1995 (ICC Exhibit 11a, pp. 3–4).

42 Lindsay J. Oliver, L.R. Wilson Consulting Ltd., "Found Human Remains Burial 98-14B," May 1998, with attached Band Council Resolution granting Chris Wycotte authority to retrieve human remains held in trust at the Royal British Columbia Museum, November 30, 1995 (ICC Exhibit 11a, p. 4).

43 Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 44 (ICC Exhibit 9, p. 44).

sites (FaRm 21, FaRm 22, FaRm 23, and FaRm36)" were also identified in the Missioner Creek area.[44]

At the community session, Elder Amy Sandy explained how her people came to be alienated from these two village sites as well as the surrounding area. She stated: "[A]ll the elders told me that they were pushed out. When they went on their seasonal rounds, they would meet fences. They would come up to fences. They were fenced out. They weren't allowed to go into those places anymore. And that the white people were taking up the land."[45]

Colonial Era

Introduction of Settlement at Williams Lake

The rapid settlement of the Williams Lake area followed the local discovery of gold in the late 1850s and what came to be known as the Fraser Gold Rush. Settlements were established in the 1860s as the prospectors turned to ranching and logging.[46] This development represented a significant change for the First Nations in the area, whose only other previous contact with non–First Nation people had been related to the fur trade and with Catholic and Oblate missions.[47]

According to historical documentation, the first recorded encounter between the Williams Lake Indian Band and the white man took place in January 1842, when the Oblate missionary Modeste Demers visited the First Nation in its village at Missioner Creek – apparently on his second visit to the area. Reporting on this visit, Demers stated that the First Nation had been building houses

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[44] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. ii (ICC Exhibit 9, p. ii). See also British Columbia Archaeological Site Survey Form, Site No. FaRm 9, May 24, 1978, no file reference available (ICC Exhibit 8b).

[45] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 42, Amy Sandy).

[46] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 7 (ICC Exhibit 9, p. 7).

[47] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, pp. 7, 44 (ICC Exhibit 9, pp. 7, 44).

for the past several years and that its members had also built a chapel in time for his return.[48] Demers described the native chapel as being "41 feet in length by 19 in width."[49]

In 1849, the colonial government of British Columbia (administered by the Colonial Office in London) began to recognize that First Nations in the colony had land-related interests which needed to be addressed. In September, James Douglas, then Chief Factor of the Hudson's Bay Company (HBC), wrote to his superior in London, Archibald Barclay, Secretary of the HBC:

> Some arrangements should be made as soon as possible with the native Tribes for the purchase of their lands and I would recommend payment being made in the Shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benifit [*sic*] from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony that the Indians Fishere's [*sic*], Village Sitis [*sic*] and Fields should be reserved for their benifit [*sic*] and fully secured to them by law.[50]

Later in 1849, Chief Factor Douglas was instructed by Secretary Barclay to enter into treaty negotiations with the First Nations of Vancouver Island. Replying to Douglas's suggestion that land be set aside for the First Nations in British Columbia, Barclay stated:

> With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on at the time when the Island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purposes of colonization. Where any annual tribute has been paid by the natives to the chiefs, a fair compensation for such payment is to be allowed.

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[48] Father Modeste Demers to the Bishop of Montreal, December 20, 1842, reproduced in Oregon Historical Society, *Notices & Voyages of the Famed Quebec Mission to the Pacific Northwest* (Portland, OR: Champoeg Press Inc., 1956), 162 (ICC Exhibit 1a, p. 11).

[49] Father Modeste Demers to the Bishop of Montreal, December 20, 1842, reproduced in Oregon Historical Society, *Notices & Voyages of the Famed Quebec Mission to the Pacific Northwest* (Portland, OR: Champoeg Press Inc., 1956), 162 (ICC Exhibit 1a, p. 11).

[50] James Douglas, C.F., Hudson's Bay Company (HBC), Fort Victoria, to Archibald Barclay, Secretary, HBC, London, September 3, 1849, *Fort Victoria Letters, 1846–1851* (Winnipeg: Hudson's Bay Record Society, 1979), 43 (ICC Exhibit 1a, p. 26).

> In other colonies the scale of compensation adopted has not been uniform, as there are circumstances peculiar to each which prevented them all from being placed on the same footing, but the average rate may be stated at 1L [pound] per head of the tribe for the interest of the Chiefs, paid on signing the Treaty.
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> A Committee of the House of Commons, which sat upon some claims of the New Zealand Company, reported in reference to native rights in general that "the uncivilized inhabitants of any country have but a qualified Dominion over it, or a right of occupancy only, and that until they establish amongst themselves a settled form of government and subjugate the ground to their own uses by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason that they have not themselves any individual property in it."
>
> The principle here laid down is that which the Governor and Committee authorize you to adopt in treating with the natives of Vancouver's Island, but the extent to which it is to be acted upon must be left to your own discretion, and will depend upon the character of the tribe and other circumstances.[51]

These instructions resulted in 14 treaties – now known as the Douglas Treaties – being negotiated between 1850 and 1854 by Chief Factor (and Governor) Douglas with various First Nations occupying lands where Europeans wished to settle; 11 in the vicinity of Victoria, one at Nanaimo, and two at Fort Rupert.[52] Douglas was appointed Governor of the colony of Vancouver Island in 1851, and in 1858 he was given the additional duties of Governor of the new colony of British Columbia on the mainland.

The Making of British Columbia's Pre-emption Land Policy, 1860

In 1858 and 1859, James Douglas and Edward Bulwer-Lytton, Baron Lytton, Secretary of State for the Colonies, exchanged ideas on what the land policy should be towards First Nations and settlers. In July 1858, Secretary Lytton wrote:

> I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer,

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[51] A. Barclay, Secretary, Hudson's Bay House, London, to James Douglas, Fort Victoria, c. December 1849, BCA, M430 (ICC Exhibit 1a, pp. 36–37).

[52] Vancouver Island (Douglas) Treaties, c. 1850–1851, no file reference available (ICC Exhibit 1a, pp. 43–49).

> as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. The 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 humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in 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, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.[53]

In December 1858, Secretary of State Lytton asked Governor Douglas's opinion on whether to "settle [Indians] permanently in villages."[54] In March 1859, Governor Douglas responded:

> 3. As friends and allies the native races are capable of rendering the most valuable assistance to the Colony, while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony, than any other calamity to which, in the ordinary course of events, it would be exposed.
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> 4. ... the plan proposed [is] briefly thus:– that the Indians should be established on that reserve, and the remaining unoccupied land should be let out on leases at an annual rent to the highest bidder, and that the whole proceeds arising from such leases should be applied to the exclusive benefit of the Indians.
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> ...
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> 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.[55]

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[53] Sir E.B. Lytton to James Douglas, Governor of British Columbia, July 31, 1858, British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprinted, Victoria: Queen's Printer, 1987), 12 (ICC Exhibit 16b, p. 1).

[54] E.B. Lytton, London, to James Douglas, Governor of British Columbia, December 30, 1858, British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprinted, Victoria: Queen's Printer, 1987), 15 (ICC Exhibit 1a, p. 50).

[55] James Douglas, Governor, Victoria, BC, to Lytton, March 14, 1859, British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprinted, Victoria: Queen's Printer, 1987), 16–17 (ICC Exhibit 1a, pp. 53–54).

Governor Douglas's plan of setting aside First Nations' "cultivated fields and village sites" was approved by the Earl of Carnarvon (in Lytton's absence) in May 1859. The Secretary of State reminded Governor Douglas, however, that the establishment of Indian reserves in British Columbia must not interfere with the settlement and progress of colonists.[56]

On October 7, 1859, Governor Douglas instructed the Gold Commissioner and Magistrate of British Columbia as follows:

> 6. You will also 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 around such village for their especial use and benefit.
>
> 7. I will hereafter address you more in detail in respect to the proposed pre-emption law, and now read you these [*sic*] limits for your direction and that no time may be lost in the carrying out [of] this plan and in permitting British subjects to occupy sections of Land as soon as they arrive in the Country.[57]

On the same day, Governor Douglas informed British Columbia's Chief Commissioner of Lands and Works (CCLW), whose responsibility it was to reserve the land, of the policy regarding Indian reserves. Governor Douglas stated:

> I enclose herewith for your information the copy of a Circular which I addressed to the Gold Commissioners and Magistrates of British Columbia on the subject of pre-empting unsurveyed Crown Lands on certain conditions by persons who are British subjects, or who have recorded their intention of becoming such.
>
> ...
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> 5. You will also observe from the Circular in question that the Town sites, with the adjacent Suburban and Rural Land, and also the sites of all Indian Villages and the Land which they have been accustomed to cultivate, to the extent of several hundred acres round each village, have been reserved and are not to be subjected to the operations of the proposed pre-emption Law.[58]

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56 Sir E.B. Lytton to James Douglas, Governor of British Columbia, May 20, 1859 (signed by Carnarvon in absence of Lytton), copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprinted, Victoria: Queen's Printer, 1987), 18 (ICC Exhibit 16b, p. 7).

57 James Douglas, Governor, to Gold Commissioner and Magistrate of British Columbia, October 7, 1859, BCA, GR-1372, file 485 (Governor), Microfilm B1325 (ICC Exhibit 1a, pp. 56–57).

58 James Douglas, Governor, New Westminster, to Chief Commissioner Lands and Works (CCLW), October 7, 1859, BCA, GR-1372, file 485/8f (ICC Exhibit 1a, pp. 61–64).

On January 4, 1860, Governor Douglas issued the first incarnation of his land policy with the passing of *Proclamation No. 15*. This proclamation stated:

> 1. That from and after the date hereof, British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple) under the following conditions:–
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> 2. The person desiring to acquire any particular plot of land of the character aforesaid, shall enter into possession thereof and record his claim to any quantity not exceeding one hundred and sixty acres thereof, with the Magistrate residing nearest thereto, paying to the said Magistrate the sum eight of shillings for recording such claim. Such piece of land shall be of a rectangular form, and the shortest side of the rectangle shall be at least two-thirds of the longest side. The claimant shall give the best possible description thereof to the Magistrate with whom his claim is recorded, together with a rough plan thereof, and identify the plot in question by placing at the corners of the land four posts, and by stating in his description any other land marks on the said one hundred sixty acres, which he may consider of a noticeable character.
>
> 3. Whenever the Government survey shall extend to the land claimed, the claimant who has recorded his claim as aforesaid, or his heirs, or in case of the grant of certificate of improvement hereinafter mentioned, the assigns of such claimant shall, if he or they shall have been in continuous occupation of the same land from the date of the record aforesaid, be entitled to purchase the land so pre-empted at such rate as may for the time being be fixed by the Government of British Columbia, not exceeding the sum of ten shillings per acre.[59]

In discussing the proclamation in the joint research report prepared for this inquiry, Anne Seymour states, "[t]he intent of the [colonial] Government appears to have been to encourage settlement, but to limit the amount individuals could hold, so as not to have a few individuals controlling vast areas of land."[60]

Later in January 1860, Governor Douglas wrote to Henry Pelham-Clinton, Duke of Newcastle, Secretary of State for the Colonies, explaining his pre-emption policy:

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59 *Colonial Proclamation No. 15* (151), January 4, 1860, no file reference available (ICC Exhibit 1a, p. 68 and Exhibit 6b, p. 2).

60 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 6 (ICC Exhibit 16a, p. 6).

> 7. The object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition.
>
> 8. The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.
>
> ...
>
> 11. The district magistrates are authorized in all cases of dispute about land to proceed immediately in a summary way to settle boundaries, to restore possession, to abate intrusions, and to levy such costs and damages as they may think fit; a course which I believe will have the happiest effect in preventing litigation and private acts of violence; for the redress of grievances and to guard against injustice on the part of the magistrate; an appeal from his decision may be carried to the Supreme Court of the colony.[61]

First Pre-emptions at Williams Lake, 1860

The first pre-emptions at Williams Lake were recorded shortly after the publication of *Proclamation No. 15.* Pre-emption rights (record no. 5) were granted to Moses Dunceralt on April 28, 1860, for 160 acres in lot 4, district lot 71 (containing a total of 480 acres), at the foot of Williams Lake.[62] The lots at Missioner Creek were also soon pre-empted by settlers. On April 28, 1860, John Telfer was issued a pre-emption record (record no. 4) for 160 acres in lot 6, district lot 72 (containing a total of 480 acres). Telfer was granted a certificate of improvement on July 9, 1861.[63]

In early December 1860, a pre-emption record was issued to Thomas W. Davidson for 160 acres of the total of 480 acres at the foot of Williams Lake in lot 1, district lot 71.[64] Davidson received a certificate of improvement on November 2, 1868. This pre-emption was noted some years

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61 James Douglas, Governor, Victoria, to Duke of Newcastle, January 12, 1860, Papers Relating to British Columbia, pp. 90–91(ICC Exhibit 1a, pp. 69–70).

62 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

63 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016, (ICC Exhibit 1d, p. 1).

64 Field book 10/83 PH3, Lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

later in a letter to the Superintendent General of Indian Affairs from Father C.J. Grandidier, who indicated that Davidson had some interaction with the Williams Lake Indian Band concerning the same piece of land:

> A man named Davidson came early after 1859 to the father of the present Chief William and asked to be permitted to build a cabin and to cultivate a little garden on his land. The Chief offered no objection. Then this man Davidson had all the land occupied by the Indians, recorded as a preemption claim. On that land was a little chapel built by the first Catholic Missionary, the late Bishop [M.] Demers of Victoria, and also the cabin of the Chief. The chief was permitted to live in his cabin near the chapel, but the Indians were driven away. The Chief was offered twenty dollars by Davidson; but he refused to part with his father's land, and rejected the money, as I have been told by the man who acted as interpreter in this occasion. Shortly after the other part of the valley was pre-empted by other parties, and the Indians were driven away to the top of the hills, where cultivation is out of the question.[65]

Davidson's location is shown in a map dated circa 1860 as being west and slightly north of Williams Lake and east of the Fraser River.[66] Archaeologist Mike Rousseau has commented:

> Subsequent to the property being used as a Catholic Mission, it was a focus for local Euro-Canadian settlement commencing around 1859. At that time, Thomas William Davidson built a "Stopping House" (i.e., hotel), for the benefit of persons travelling the Native/Fur Brigade Trail passing through the property. In 1860, Gold Commissioner Philip Nind constructed a courthouse and jail near the Stopping House, and his associate, Mr. William Pinchbeck was appointed constable for the law. Davidson's Stopping House also served as the local post office, store, and bar. Several houses were also constructed around this time, and these belonged to Mr. Nind, Mr. Pinchbeck, Mr. Meldrum, and a few others ... In 1861 or 1862 the Stopping House was taken over from Mr. Davidson by Mr. W. Woodward and Mr. Thomas Menefee. During the early 1860's, the small community was the only Euro-

65 Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, Library and Archives Canada (LAC), RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 183).

66 Untitled map showing Begbie's trip, "Davidson's" indicated on map, November 14, 1860, no file reference available (ICC Exhibit 7i).

> Canadian settlement in the immediate Williams Lake area, and it is rightfully regarded as being the original townsite of "Williams Lake."[67]

British Columbia Land Policies, 1861–70

During 1861, Governor Douglas was still relaying instructions to various colonial officials to define Indian reserves according to the wants of the First Nations themselves. That March, Governor Douglas sent such instructions to the Chief Commissioner of Lands and Works through the Colonial Secretary. The letter reads:

> I am directed by His Excellency the Governor to request that you will take measures, so soon as may be practicable, for marking out distinctly the sites of the proposed Towns and the Indian Reserves throughout the Colony.
>
> 2. The extent of the Indian Reserves to be defined as they may be severally pointed out by the Natives themselves.[68]

Such instructions were expanded upon when the Chief Commissioner of Lands and Works relayed them to William Cox, his Assistant Commissioner. The CCLW informed Cox as follows:

> I have received instructions from His Excellency the Governor to communicate with you on the subject and 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 scrutinizing 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, the object of such persons being prospective personal advantages previously covertly arranged with the Indians. To instance this, I heard of men keeping Indian women inducing them or their relations

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[67] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, pp. 9–10 (ICC Exhibit 9, pp. 9–10).

[68] Charles Good, for Colonial Secretary, New Westminster, BC, to [R.C. Moody], Chief Commissioner of Lands and Works, March 5, 1861, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 21 (ICC Exhibit 1a, p. 80).

> to put forward claims in order that they (the white men) may so gain possession of the land.[69]

Governor Douglas was aware that First Nations in British Columbia had established concepts of land use that an effective land policy would have to address. In March 1861, he informed the Secretary of State for the Colonies that First Nations in British Columbia had

> 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.[70]

In April 1861, there was still considerable discussion on the specifics of Governor Douglas's land policy and how reserves would be laid out. Captain R.M. Parsons of the Royal Engineers wrote to R.C. Moody, CCLW, inquiring further into how reserves should be set aside for First Nations in British Columbia. The answers to Parsons's questions were noted in marginalia on his letter. Captain Parsons's first question was: "What extent of land is allowed for each Village? or what proportion is it to bear to the number of male occupants?"[71] The answer from the CCLW was: "What the [illegible word] of the village points out – (within reason). If anything extreme is asked for, postpone decision until further communication with me." Captain Parsons asked if both the summer and winter villages of First Nations were to be marked "appropriated," to which it was noted "[a]s they

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[69] R.C. Moody, Chief Commissioner of Lands and Works, New Westminster, BC, to W. Cox, Assistant Commissioner Lands and Works, March 5, 1861, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 21 (ICC Exhibit 1a, p. 81).

[70] James Douglas, Governor, to Secretary of State, March 25, 1861, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 19 (ICC Exhibit 16b, p. 8).

[71] R.M. Parsons, Captain, Royal Engineers, to R.C. Moody, Chief Commissioner of Lands and Works, April 15, 1861, Royal Engineers, Letterbook Correspondence Outward, 1859–1863, CAB/30.65/5 (ICC Exhibit 1a, p. 83).

claim."[72] Captain Parsons commented that "Indian Burial places are frequently isolated. How much ground will be allowed for each?" and was instructed to allot "[t]he immediate grounds."[73] Finally, Captain Parsons asked, "When the Posts or Marks are inserted in the ground is it to be explained to [the] village that the land so staked out is bona fide allotted to that settlement?" He was told "yes."[74]

A year and four months after *Proclamation No. 15* was enacted, Gold Commissioner Philip Nind reported to the Acting Colonial Secretary on the pre-emption situation at Williams Lake. Nind noted that "during the winter the Indians at Williams Lake were in great distress from want of food."[75] He also requested

> to be instructed on the subject of making a reserve for Indians at Williams Lake, the greater portion of the available farming land has been pre-empted and purchased and it is probable that before the summer is over it will all be taken up. The Indians here change their residence very frequently sometimes camping at the head of the lake sometimes at the foot of it and sometimes around Mr. Davidson's and the Government House. I respectfully suggest that if a Government surveyor were instructed to lay out this valley and others in this District that it would be beneficial in promoting permanent settlement.[76]

Gold Commissioner Nind's suggestion that a reserve be established for the Williams Lake Indian Band was answered by Charles Good, Acting Private Secretary to Governor Douglas, in June 1861. Good instructed Nind that "His Excellency desires you will mark out a Reserve of 400 or

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[72] R.M. Parsons, Captain, Royal Engineers, to R.C. Moody, Chief Commissioner of Lands and Works, April 15, 1861, Royal Engineers, Letterbook Correspondence Outward, 1859–1863, CAB/30.65/5 (ICC Exhibit 1a, pp. 83–84).

[73] R.M. Parsons, Captain, Royal Engineers, to R.C. Moody, Chief Commissioner of Lands and Works, April 15, 1861, Royal Engineers, Letterbook Correspondence Outward, 1859–1863, CAB/30.65/5 (ICC Exhibit 1a, p. 84).

[74] R.M. Parsons, Captain, Royal Engineers, to R.C. Moody, Chief Commissioner of Lands and Works, April 15, 1861, Royal Engineers, Letterbook Correspondence Outward, 1859–1863, CAB/30.65/5 (ICC Exhibit 1a, pp. 84–85).

[75] Philip A. Nind, [BC Gold Commissioner], Williams Lake, to [Charles Good], Acting Colonial Secretary, May 4, 1861, no file reference available (ICC Exhibit 1a, p. 93).

[76] Philip A. Nind, [BC Gold Commissioner], Williams Lake, to [Charles Good], Acting Colonial Secretary, May 4, 1861, no file reference available (ICC Exhibit 1a, pp. 95–96).

500 acres for the use of the Natives in whatever place they may wish to hold a section of land."[77] Nind was specifically instructed that "No survey is requisite nor anything beyond a distinct marking of the lines."[78] Good also stated: "His Excellency will however instruct the Chief Commissioner of Lands & Works to address you further on this subject."[79]

On August 27, 1861, the *Pre-emption Consolidation Act, 1861*, was proclaimed by Governor Douglas.[80] There was little variation from the 1860 ordinance, and no significant change to the status of the protection of Indian lands in the text of the pre-emption clauses.[81] Lands traditionally occupied by the Williams Lake Indian Band remained unreserved and pre-emption of land continued at Williams Lake, despite prohibitions against doing so in *Proclamation No. 15* and the subsequent *Pre-emption Consolidation Act, 1861*. On January 9, 1861, Thomas W. Davidson pre-empted an additional 200 acres of land in lots 2 and 3, district lot 71, at the foot of Williams Lake.[82] On July 1, 1861, Davidson pre-empted an additional 40 acres of land (record no. 103), bringing the total area of his pre-emptions in lots 2 and 3, district lot 71, to 240 acres.[83] On September 23, 1861, Davidson sold his pre-emption right to Thomas Menefee and D.G. Moreland.[84] This sale was part of a larger 720-acre conveyance.

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[77] Charles Good, Acting Private Secretary, to Philip A. Nind, June 10, 1862, no file reference available (ICC Exhibit 1a, p. 99).

[78] Charles Good, Acting Private Secretary, to Philip A. Nind, June 10, 1862, no file reference available (ICC Exhibit 1a, p. 99).

[79] Charles Good, Acting Private Secretary, to Philip A. Nind, June 10, 1862, no file reference available (ICC Exhibit 1a, p. 99).

[80] *Pre-emption Consolidation Act*, August 27, 1861 (ICC Exhibit 1a, pp. 101–4, and ICC Exhibit 6c).

[81] *Pre-emption Consolidation Act*, August 27, 1861 (ICC Exhibit 1a, p. 101, and ICC Exhibit 6c); *Land Ordinance, 1865*, 11 April 1865 (ICC Exhibit 1a, p. 111, and ICC Exhibit 6d); *Land Ordinance, 1870*, June 1, 1870 (ICC Exhibit 1a, p. 126, and ICC Exhibit 6g); and *B.C. Land Act, 1875*, April 22, 1875 (ICC Exhibit 1a, p. 146, and ICC Exhibit 6i); *B.C. Lands Amendment Act, 1879*, April 29, 1879 (ICC Exhibit 1a, p. 157, and ICC Exhibit 6j).

[82] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

[83] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

[84] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 2).

As mentioned above, lot 1, district lot 71, at the foot of Williams Lake, was pre-empted by Thomas W. Davidson in 1860. Davidson also sold this pre-emption to Thomas Menefee and D.G. Moreland on September 23, 1861.[85]

The chronology of transactions in lot 4, district lot 71 (comprising 480 acres at the foot of Williams Lake), is complicated, given that all the transfer records have been lost or destroyed.[86] It is surmised that Moses Danceralt transferred his original pre-emption right to 160 acres to Thomas W. Davidson in 1860 or 1861.[87] Davidson then sold the pre-emption right to Thomas Menefee and T.W. Woodward in December 1861.[88]

Lot 6, district lot 72, comprising 480 acres at Missioner Creek, was pre-empted in three separate transactions. As mentioned previously, a parcel of 160 acres was pre-empted by John Telfer on April 28, 1860.[89] Telfer pre-empted an additional 160 acres of an adjacent lot on July 1, 1861.[90] Telfer then sold his pre-emption rights to the 320 acres to Thomas W. Davidson.[91] Again, as mentioned, Thomas W. Davidson sold his newly acquired pre-emption rights to Thomas Menefee and D.G. Moreland on September 23, 1861.[92] The second pre-emption in lot 6, district lot 72, for another 160 acres, was by Thomas Meldrum on November 25, 1861.[93]

In 1862, the work of reserving "Indian villages, cultivated fields and other places of habitual use" continued. Few areas had been marked off at this point, although Governor Douglas seems to have been under the impression that this work would have been completed by 1862. In June 1862,

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85 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

86 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, pp. 2–3).

87 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 3).

88 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 3); and Field book 10/83 PH3, Lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

89 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

90 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

91 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

92 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 1).

93 Thomas Meldrum was issued a certificate of improvement on January 17, 1863. Field book 10/83 PH3, Lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 20).

William A.G. Young, Colonial Secretary, wrote to Chief Commissioner Moody relaying Governor Douglas's response to Moody's request for additional funds "for the purpose of marking out and surveying the spots occupied by Indians with their villages and isolated provision grounds."[94] Young wrote:

> 2. With reference thereto, I am to state that His Excellency would be glad of some further information on this subject, as he 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 April, 1861.
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> 3. His Excellency is not aware what necessity may exist for the present survey of these Indian Reserves, but unless the reasons are very weighty, His Excellency would not, under the existing heavy pressure on the resources of the Colony, feel justified in authorizing an outlay to the extent you mention, for it 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.[95]

According to Anne Seymour, the postponement of official surveys created a land policy which "relied upon the honesty and integrity of the pre-emptor and government agent to abide by both the letter and principle of the [land] ordinances."[96] Regarding the role of the pre-emptor and government agents in relation to the prohibition on pre-empting Indian settlements, Seymour states that "[l]ittle evidence had been found of constructive action taken by the colonial officials to protect the Indian interests."[97]

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[94] William A.G. Young, Colonial Secretary, to the Chief Commissioner of Lands and Works, June 9, 1862, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 24 (ICC Exhibit 1a, p. 105).

[95] William A.G. Young, Colonial Secretary, to R.C Moody, Chief Commissioner of Lands and Works, June 9, 1862, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 24 (ICC Exhibit 1a, p. 105).

[96] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 8 (ICC Exhibit 16a, p. 8).

[97] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 8 (ICC Exhibit 16a, p. 8).

Only one pre-emption was granted in the claim area in 1862. William Pinchbeck Sr pre-empted 160 acres of land in lot 6, district lot 72, on March 28, 1862 (thereby completing the pre-emption of all 480 acres of the lot) and received a certificate of improvement for this pre-emption on May 21, 1863.[98] As discussed below, Pinchbeck Sr eventually acquired all the lots at Missioner Creek and at the foot of Williams Lake.

In January 1864, Governor Douglas addressed the BC Legislative Council and reported on his policy in protecting the land of the First Nations. He stated:

> I have thought it incumbent on my Government to pursue, as a fixed policy, a course that would tend to the increase of population and encourage the settlement of the waste lands of the Crown, which are now unproductive alike to the Sovereign and to the people.
>
> With that view the public lands have been thrown open to actual settlers, on the most liberal terms of occupation and tenure, and I have endeavoured with even greater liberality to encourage Mining and every other species of enterprise, tending to develop the resources of the Country. The result of these measures has not been in all respects equal to my wishes. The influx of Capital and population has not been commensurate with the resources of the Colony, and the advantages offered; leaving the impression that these advantages are not fully appreciated abroad.[99]

Douglas went on to state:

> The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favourite 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 a perpetual possession.

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98 Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 3).

99 James Douglas, Governor, New Westminster, BC, to British Columbia Legislative Council, January 21, 1864, Journals of the Colonial Council of British Columbia, session 1864, p. 180 (ICC Exhibit 1a, p. 107).

> 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[;] 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, as other classes of Her Majesty's subjects; provided they in all respects comply with the legal conditions of tenure by which land is held in this Colony.[100]

Despite Governor Douglas's assertion that his "plan" had proven successful, none of the Williams Lake Indian Band's settlements at the foot of Williams Lake or at Missioner Creek, or its cultivated fields or places of resort, had been secured for its benefit.

Governor James Douglas retired in 1864. The administration and management of BC's land policy fell to Joseph Trutch in his position as Chief Commissioner of Lands and Works (1864) and, later, as Lieutenant Governor (1871–76). Anne Seymour states: "Trutch had no regard for any Indian claim to land. He re-shaped colonial and later provincial policy to accommodate settler interests. Interestingly, however, he never removed the prohibition on pre-empting Indian settlements from the land ordinances or, later, the *Land Act*."[101]

In April 1865, the *Pre-emption Consolidation Act* was repealed and was replaced with the *Land Ordinance, 1865*.[102] Seymour states:

> The 1865 Ordinance was very similar to that of 1861, with a few amendments which allowed for the acquisition of abandoned pre-emptions or land previously recorded. As well, under section 20 of the 1865 Ordinance, a person in possession of 160 acres could acquire the right to pre-empt and hold any further tract of unsurveyed and unoccupied land contiguous to the original pre-emption up to 480 acres ... upon the payment of two shillings and one penny per acre as an installment on the purchase

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[100] James Douglas, Governor, New Westminster, BC, to British Columbia Legislative Council, January 21, 1864, Journals of the Colonial Council of British Columbia, session 1864, pp. 180–81 (ICC Exhibit 1a, pp. 107–8).

[101] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 8 (ICC Exhibit 16a, p. 8).

[102] *Land Ordinance, 1865*, April 11, 1865 (ICC Exhibit 1a, p. 101, and ICC Exhibit 6d, p. 1).

> price of the land after it had been surveyed. The terms and conditions for receiving the certificate of improvement and subsequent title were essentially the same.[103]

Although settlers had been given the right to pre-empt adjacent land under the 1861 ordinance, the right to pre-empt an additional 480 acres of contiguous land appears only in the 1865 ordinance.

In March 1866, Thomas Meldrum transferred his pre-emption right to lot 6, district lot 72, at the foot of Williams Lake, which he had acquired in 1861, to William Pinchbeck Sr.[104]

On March 5, 1867, the *Indian Graves Ordinance* was passed, its purpose being to protect Indian graves from desecration by settlers. The Ordinance stated:

> II. From and after the passing of this Ordinance, if any person or persons shall steal, or shall, without the sanction of the Government, cut, break, destroy, damage, or remove any image, bones, article or thing, deposited on, in or near any Indian Grave in this Colony, or induce, or incite any other person or persons so to do, or purchase any such article or thing after the same shall have been so stolen, or cut, broken, destroyed or damaged, knowing the same to have been so acquired or dealt with; every such offender being convicted thereof before a Justice of the Peace in a summary manner, shall for every such offence be liable to be fined a sum not exceeding One hundred dollars, with or without imprisonment for any term not exceeding three calendar months for the first offence, in the discretion of the Magistrate convicting.[105]

The protection of their grave sites was a concern of many BC First Nations and of the Williams Lake Indian Band specifically. At the community session, Elder Irene Peters testified that the tradition of the Williams Lake Indian Band is to bury community members near their villages. When asked by Commission counsel if the First Nation "buried people inside or outside of a village," Ms Peters replied, "wherever they were, if they were in their hunting territory, fishing territory, gathering territory, if anyone had passed or something, I don't think it would be strange for

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[103] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 6 (ICC Exhibit 16a, p. 6).

[104] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, p. 3).

[105] *Indian Graves Ordinance*, 1867, SBC 1867, c. 5 (ICC Exhibit 1a, p. 114, and ICC Exhibit 6e, p. 1).

them to bury them there, because it was their land."[106] Expanding on this point, Elder Leonard English states:

> I think they buried them in their village site, because that's kind of the traditional way of the natives. And with the whole family, well, the whole family got buried at the same spot. I don't mean to say like if they all died together. I mean, you know, separate years and stuff, but they tried to have them all together.[107]

In March 1867, the *British North America Act* (currently referred to as the *Constitution Act*) was also passed, and section 91, subsection 24, gave the federal government complete jurisdiction over Indians and land reserved for Indians:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, – ...
>
> 24. Indians, and Lands reserved for the Indians. ...[108]

In August 1867, CCLW Trutch wrote to the Acting Colonial Secretary advising that Governor James Douglas's land policy did little to secure land for First Nations:

> 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.

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106 ICC Transcript, July 18, 2003 (ICC Exhibit 5a, p. 243, Irene Peters).

107 ICC Transcript, July 18, 2003 (ICC Exhibit 5a, p. 38, Leonard English).

108 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, ss. 24, reprinted in RSC 1985, App. II, No. 5 (ICC Exhibit 1a, p. 115).

> No reserves 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.
>
> In many cases, indeed, lands intended by the Governor to be appropriated to the Indians were set apart for that purpose and made over to them on the ground by himself personally; but these were for the most part of small extent, chiefly potato gardens adjoining the various villages.
>
> Previous to 1864 very few Indian Reserves had been staked off, or in any way exactly defined.[109]

In this letter, Trutch also expressed his firm opinion :

> The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government *or to individuals*.[110]

Despite Trutch's opinion of former Governor Douglas's pre-emption policy, it did protect Indian lands to some extent. In 1868, Trutch disallowed an application to pre-empt lands on the Soda Creek Indian Reserve, near Williams Lake. In that case, he stated: "[T]he Land Ordinance expressly precludes any portion of an Indian Reserve being taken up as a pre-emption claim. If therefore the land on which Mr. Adams has posted his notice is, as you inform me, a part of the Soda Creek Indian Reserve, he can have no right to occupy it."[111]

The *Land Ordinance* was again amended in July 1870, repealing previous land ordinances except section 3, which prohibited the pre-emption of Indian settlements. The right of First Nations

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[109] Joseph Trutch, Chief Commissioner of Land and Works, New Westminister, to Acting Colonial Secretary, August 28, 1867, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 41–43 (ICC Exhibit 1a, p. 117).

[110] Joseph Trutch, Chief Commissioner of Land and Works, New Westminister, to Acting Colonial Secretary, August 28, 1867, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 41–43 (ICC Exhibit 1a, p. 118). Original emphasis.

[111] Joseph Trutch, Chief Commissioner of Land and Works, New Westminister, to Reverend James A. McGucking, OMI, St Joseph's Mission, May 30, 1868, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 48–49 (ICC Exhibit 1a, p. 121).

peoples to pre-empt land under section 3 was also repealed, however, and they now required special permission from the Governor to do so.[112] As with all other colonial land ordinances, the *Land Ordinance, 1870*, provided that

> [t]he responsibility for the surveys of pre-empted land fell to the settler pre-empting it. There was no systematic survey of colonial lands. The decision of the colonial government not to survey the entire colony, but, rather to have settlers pay for the survey of the individual plots of land they purchased, made the correlation of surveyed and unsurveyed land difficult. The process relied upon the settler identifying land by geographic feature and/or land held by neighbouring settlers.[113]

Added Complications: European Disease and Settler Populations

The pre-emption process was challenged not only by its reliance on the settler, but also by the rapidly changing social conditions of the Williams Lake Indian Band. The influx of settlers into the region caused four major complications to the First Nation and, unavoidably, to colonial land policy.

First, the 1860s and 1870s were not an easy time for the First Nation. Since the 1830s, European diseases had decimated many First Nations in British Columbia, including Williams Lake.[114] Diseases like smallpox, malaria, fever, measles, and dysentery are estimated to have reduced the population of First Nations by 66 per cent between 1835 and 1890.[115] At the community session, Elder Amy Sandy spoke of the effect of European disease on the Williams Lake Indian Band:

> They talked about how they were told that – like when the first – there was what they called a flu sick. I don't know if they were talking about smallpox or tuberculosis. But Aunt Liz told me that when they had a flu sick and they lost about a thousand

[112] *Land Ordinance, 1870* (ICC Exhibit 1a, p. 126, and ICC Exhibit 6a, p. 2).

[113] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 7 (ICC Exhibit 16a, p. 7).

[114] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 9 (ICC Exhibit 16a, p. 9).

[115] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 9 (ICC Exhibit 16a, p. 9).

> people, and they buried those people in their underground houses and they never used those places again. She said that the priests that came around told them it was because they were using their – they were singing their songs and using their drums, and they were doing what they called the devil's work, and that they were causing the people to die. And that I guess the – and they were also told by the – like after that, they were told by the priest they couldn't use those things anymore and they couldn't practice [sic] their ways.[116]

Second, the rapid decrease of First Nation populations complicated the protection of "Indian settlements." It was difficult to decipher what land was an "Indian village or settlement" and, therefore, protected from pre-emption pending reserve allocation. Anne Seymour comments:

> There can be little doubt that depopulation as a result of disease severely hampered the ability of the First Nations populations from maintaining a presence in the settlements which they had traditionally occupied. Prior to the establishment of the Indian Reserve Commissions in 1876, there had been more than forty years of epidemic disease, culminating in the 1862 smallpox epidemic. The ramifications of this in conjunction with an increasing immigrant population inevitably led to disputes over land and resources.[117]

A third complication was that "[a]t the same time the Indian population was decreasing, non-Indian settlement was increasing."[118] For example, Seymour states that, in the Okanagan, the number of annual pre-emptions increased from 20, in the early 1870s, to 80, by 1880.[119]

The fourth complication, while not directly relevant to the issues of this inquiry, had just as much impact on the First Nation as did their "alienation" from the land. "Immigrating settlers arrived

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[116] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 42–43, Amy Sandy).

[117] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 4 (ICC Exhibit 16a, p. 4).

[118] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

[119] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

with their own belief structures and cultural principles."[120] However, "[w]hile laws may have been in place to protect the aboriginal population, socially, politically, and, to an extent, economically, this population was ostracized."[121] The settler population could not understand the First Nation's preference to live according to the seasonal rounds, on various areas of land and in various village sites, rather than a sedentary lifestyle. Settlers concluded that this nomadic lifestyle "was neither civilized nor a productive use of highly prized land."[122] Given the prevalent cross-cultural divide, "[d]ispossessing the First Nations populations of their land required little justification."[123]

All four of these factors worked together to create an atmosphere in which BC First Nations were, at best, misunderstood and, at worst, ignored by settlers, as well as by the dominion and provincial/colonial governments. Seymour comments:

> Even when the Indians did occupy and cultivate the soil, settlers often did not "see" the improvements. Houses, gardens, flumes and graves constructed by Natives went unacknowledged and were often encroached upon. A "Kee-kwilly" house, or a pit house, dug into the ground on a plain or at a hillside, would not necessarily be construed by a settler to be a "settlement," or even necessarily a house even though it would be both. Cultivated patches, not extensive fields, would have been the practice of the First Nations groups in areas where cultivation was possible. Drying racks and houses at fisheries would possibly be seen as abandoned by the non-Native, even though they were used seasonally by First Nations in the area. Regardless of the

[120] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

[121] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

[122] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

[123] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

> appearance, however, the land ordinances and later the *Land Act*, put the onus upon the settler and the surveyor to be cognizant of all forms of settlement.[124]

Post-Confederation Era

British Columbia Land Policy

In July 1871, the colony of British Columbia joined the Canadian Confederation. This event caused a shift in the jurisdictional responsibility for the administration and management of BC First Nations. The dominion government assumed responsibility for "Indians and land reserved for Indians" as specified in section 91(24) of the *British North America Act, 1867* (currently referred to as the *Constitution Act*). The *Terms of Union* confederating British Columbia to Canada stated:

> 10. The provisions of the "British North America Act, 1867" shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the colony of British Columbia had been one of the Provinces originally united by the said Act.
>
> ...
>
> 13. 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.[125]

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124 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 10 (ICC Exhibit 16a, p. 10).

125 British Columbia, *Terms of Union, 1871,* May 16, 1871 (ICC Exhibit 1a, pp. 134–35).

In 1874, Joseph Trutch, then the Lieutenant Governor of British Columbia, received a harshly written letter from then Minister of the Interior, David Laird, criticizing the manner in which "Indian Land question" had been administered in the province.[126] Laird stated that

> the present state of the Indian Land Question in our Territory West of the Rocky Mountains, is most unsatisfactory, and that it is the occasion, not only of great discontent among the aboriginal tribes but also of serious alarm to the white settlers.
>
> To the Indian, the land question far transcends in importance all others, and its satisfactory adjustment in British Columbia will be the first step towards allaying the wide-spread and growing discontent now existing among the native tribes of that Province.
>
> The adjustment of this important matter is not a little complicated, from the fact that its solution requires the joint action of the Dominion Government and the Government of British Columbia, and involves a possible reference to the Secretary of State for the Colonies.
>
> 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.[127]

Minister Laird went on to state:

> When the framers of the Terms of admission of British Columbia into the Union inserted the 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.[128]

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[126] David Laird, Minister of the Interior, Ottawa, to the Privy Council, November 2, 1874, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 151 (ICC Exhibit 16b, p. 192).

[127] David Laird, Minister of the Interior, Ottawa, to the Privy Council, November 2, 1874, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 151–55 (ICC Exhibit 16b, pp. 192–93).

[128] David Laird, Minister of the Interior, Ottawa, to the Privy Council, November 2, 1874, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 151–52 (ICC Exhibit 16b, p. 193).

Still contemplating how best to set aside village sites as reserves, Indian Superintendent I.W. Powell wrote to former Governor Douglas in October 1874 inquiring whether reserve acreage had been specified under the land policy he had helped create.[129] Douglas's reply to this question provides an explanation of his land policy in general:

> [I]n 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.
>
> Before my retirement from office, several of these reserves, chiefly in the lower districts of Fraser's River, and Vancouver Island, were regularly surveyed and marked out, with the sanction and approval of the several communities concerned, and, it was found, on a comparison of acreage with population, that the land reserved, in none of these cases, exceeded the proportion of 10 acres per family:– so moderate were the demands of the Natives.
>
> It was, however, never intended that they should be limited or restricted to the possession of ten acres of land; on the contrary, we were prepared, if such had been their wish, to have made for their use, much more extensive grants.
>
> ...
>
> Such is an outline of the policy and motives which influenced my Government when determining the principal [*sic*] on which these grants of land should be made.[130]

[129] I.W. Powell, Indian Commissioner, Victoria, BC, to James Douglas, Hudson's Bay, October 14, 1874, copy in LAC, RG 10, vol. 10031; reproduced in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 302–3 (ICC Exhibit 1a, p. 141).

[130] James Douglas, late Governor, British Columbia, to I.W. Powell, Indian Commissioner, Victoria, BC, October 16, 1874, copy in LAC, RG 10, vol. 10031; reproduced in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 302–3 (ICC Exhibit 1a, pp. 141–44).

Douglas went on to state:

> Moreover, as a safeguard and protection, to these Indian Communities, who might, in their primal state of ignorance and natural improvidence, have made away with the land, it was provided that, these Reserves should be the common property of the Tribe, and that the title should remain vested in the Crown, so as to be inalienable by any of their own acts.
>
> The policy of the Government was carried even a step beyond this point in providing for the future.
>
> Contemplating the probable advance of the Aborigines in knowledge and intelligence, and assuming that a time would certainly arrive, when they might aspire to a higher rank in the social scale, and feel the essential wants and claims of a better condition, it was determined to remove every obstacle from their path, by placing them in the most favorable circumstances for acquiring land, in their private and individual capacity, apart from the Tribal reserves.
>
> They were, therefore, legally authorized to acquire property in land, either by direct purchase at the Government Offices, or through the operation of the pre-emption laws of the Colony, on precisely the same terms and conditions, in all respects, as, other classes of Her Majesty's subjects.
>
> These measures gave universal satisfaction when they were officially announced to the native Tribes, and still satisfy their highest aspirations.
>
> A departure from the practice then adopted with respect to this class of native rights, will give rise to unbounded disaffection, and may imperil the vital interests of the Province.[131]

Later in 1874, the BC provincial government attempted to pass its first post-Confederation *Land Act,* which was intended to be a complete overhaul of its 1870 land policy.[132] As Anne Seymour comments, however, "[t]he Dominion government disallowed the proposed B.C. *Land Act* of 1874 because it made no provision for providing lands for the Indians."[133] According to author Robert E. Cail, the dominion government also objected to the proposed Act's definition of Crown

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131 James Douglas, late Governor, British Columbia, to I.W. Powell, Indian Commissioner, Victoria, BC, October 16, 1874, copy in LAC, RG 10, vol. 10031; reproduced in Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 302–3 (ICC Exhibit 1a, pp. 141–44).

132 Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 25 (ICC Exhibit 16b, p. 106).

133 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 9 (ICC Exhibit 16a, p. 9).

lands, which implied that First Nations in British Columbia had "original Indian sovereignty over its lands and thus the Crown as tenant by freehold."[134]

At Missioner Creek and the foot of Williams Lake, pre-emptions continued during that period. On April 17 and/or 21, 1874, Moreland and Menefee transferred all of their pre-emption holdings to William Pinchbeck Sr. This transfer included lot 1/71, lot 2 and 3/71, and 320 acres of lot 6/72.[135] On April 21, 1874, Moreland and Woodward also transferred their pre-emption rights to 160 acres in lot 4/71 to Pinchbeck Sr.[136]

In April 1875, the dominion government approved British Columbia's revised *Land Act, 1875*. Robert Cail comments that the revised *Land Act* still did not meet the standards of protection that the dominion government wanted applied to Indian lands. The only significant addition to British Columbia's land policy in the revised statute was "Form No. 2" – a declaration to be sworn by the pre-emptor that the land being pre-empted "is not an Indian Settlement."[137]

Joint Indian Reserve Commission, 1876–78

Concurrently, the federal and provincial governments agreed that a Joint Indian Reserve Commission (JIRC) was necessary to provide a "speedy and final adjustment" to the Indian land question in British Columbia.[138] In 1875 and early 1876, the governments were in negotiations regarding the commission's mandate, which came to be known as the *1875 Agreement*.

During these negotiations, it was agreed that the JIRC would consist of one Commissioner, Archibald McKinley, representing the Province of British Columbia, another Commissioner,

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[134] Robert E. Cail, *Land, Man and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974), 27 (ICC Exhibit 16b, p. 108).

[135] Affidavit of William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1d, pp. 1, 18).

[136] Field book 10/83 PH3, lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

[137] *Land Act, 1875*, April 22, 1875 (ICC Exhibit 6i, p. 18, and ICC Exhibit 16b, p. 114).

[138] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 12 (ICC Exhibit 16a, p. 12).

Alexander Caulfield Anderson, representing the Dominion of Canada, and a third Commissioner, Gilbert Malcolm Sproat, who was agreed upon jointly.[139]

The general mandate of the JIRC was to allot reserves for First Nations with no established reserves, or to adjust the acreage of reserves already secured if the size was deemed by the Commission to be too large or too little. Anne Seymour investigated the mandate of the Commission in relation to pre-emptions and commented that the JIRC was to

> establish reserves which included Indian settlements, villages and resource sites. Allotments of reserve lands were to be done with as little interference as possible with non-Indian setters. While not specifically stated, it appears to have been understood that allotments were to be made from unreserved and unoccupied Crown land. This understanding may have arisen from clause four of the 1875 agreement. Thus, any lands alienated by pre-emption or Crown Grant, by extension, were not to be included in reserve allotments. Based upon the provisions of the *Land Act*, the pre-emptions and/or Crown Grants should not have included any Indian settlements, therefore, in theory, there should not have been any overlap between a pre-emption or Crown Grant and an Indian settlement. The actual legal standing of a pre-emption was the subject of some discussion over the years, but, there appears to have been a tacit understanding that, barring any breach of the provisions of the *Land Act,* the Commissioners would not interfere with this type of land holding. ...
>
> The appointments and letters of instruction left a great deal of discretion in the hands of the Commissioners. The Dominion government, at least, appeared to recognize that it could not anticipate what the Commissioners might find during their visits and meetings with First Nations groups within B.C. The provincial government, in all likelihood, was more cognizant of the contentious land issues which would face the Commissioners, but, as far as possible they maintained a position of naivete.[140]

It is clear from the instructions and terms of reference given to the JIRC that it was expanding upon the land policy created by former Governor James Douglas during the Colonial era – a policy familiar to British Columbia. The establishment of Commissions to meet with First Nations on land-

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139 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 12 (ICC Exhibit 16a, p. 12).

140 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 13 (ICC Exhibit 16a, p. 13).

related issues was also familiar to the dominion government, since a similar style of Commission was sent to the then North-West Territories to sign the historical "numbered treaties" with the First Nations of the plains. However, as Anne Seymour comments, the role of British Columbia within the JIRC "added a problematic dimension in light of B.C.'s recalcitrant position with respect to the Indian population and their land claims."[141] It is notable that the JIRC never visited the Williams Lake Indian Band. After the JIRC was decommissioned in 1878, however, G.M. Sproat continued its work "as the sole Indian Reserve Commissioner."[142]

Gilbert Malcolm Sproat, Indian Reserve Commissioner, 1878–80

In order to understand Peter O'Reilly's work as Indian Reserve Commissioner in the years 1880–98, it is important to understand G.M. Sproat's role as his predecessor. After considering Sproat's experience on the JIRC, both the dominion and the provincial governments agreed to his appointment as the sole Indian Reserve Commissioner in 1878. Both governments shared the opinion that the work of the JIRC should continue, since there were First Nation communities that had not been visited.[143] Sproat's mandate as the sole Indian Reserve Commissioner was the same as it had been when he was a member of the JIRC – to allot and adjust reserves. Anne Seymour summarizes Sproat's view of his role:

> Sproat saw it as paramount that his decisions be accepted by both governments as absolute and final. He also believed that it was a requirement that they be made "on the spot." Sproat does not appear to have seen his job as that of allotting reserves, but rather "settling the Indian Land Question" or "adjust[ing] the land question." He was consistently of the opinion that matters would be best resolved if simply left in his hands. These "adjustments" were usually achieved through "compromise." ... Sproat

[141] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 12 (ICC Exhibit 16a, p. 12).

[142] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 18 (ICC Exhibit 16a, p. 18).

[143] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 18 (ICC Exhibit 16a, p. 18).

> saw it as within his authority to effect settlements of disputes between Indians and settlers.[144]

Seymour further states:

> The issue and extent of Sproat's authority remained somewhat contentious during the two years he worked as sole Indian Reserve Commissioner.
> ...
> A number of problems befell Sproat in the performance of his duty ... He persistently tested the extent of the authority of the position of commissioner. With his copious correspondence he gradually alienated both the federal and provincial governments.[145]

Like the JIRC before him, Indian Reserve Commissioner Sproat did not visit the Williams Lake Indian Band, nor did he secure land for it.

The Williams Lake Indian Band still had no land set aside for its benefit by 1879 – 19 years after *Proclamation No. 15* and former Governor Douglas's instructions to create reserves and 11 years after the first of the pre-emptions in question. On March 7, 1879, William Laing-Meason, Justice of the Peace and a local settler, wrote to Sproat at the request of the Williams Lake Indian Band and other First Nations in the area. According to Laing-Meason:

> At Williams Lake – There is no Indian Reserve and the Indians do not own a single acre of land. They are living on land belonging to the Catholic Mission at that place.
> ...
> All the above Indians are very discontented on account of the Commission not having visited them before this time.[146]

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144 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, pp. 18–19 (ICC Exhibit 16a, pp. 18–19).

145 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 19 (ICC Exhibit 16a, p. 19).

146 William Laing-Meason, Justice of the Peace, Lesser Dog Creek, BC, to Gilbert Malcolm Sproat, Indian Commissioner, Victoria, BC, March 7, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 150–51).

The statement that the Williams Lake Indian Band was forced to live on land belonging to the Catholic Mission was corroborated by Elder Agnes Anderson at the community session. Ms Anderson testified that the First Nation had indeed lived at the Mission during the time of her great-grandfather, Chief William. However, Ms Anderson was unable to explain how long they had stayed or why they had moved.[147]

Elder Amy Sandy was also asked about the time spent by the Williams Lake Indian Band at the Mission. Ms Sandy was asked where the Williams Lake Indian Band had moved from when they arrived at St Joseph Mission. She replied:

> They talked about a place up at – one place they were at, Chimney Creek, and I'm not clear whether that was the place we call Flatrock now. And another place down towards the river, the Fraser River and Williams Creek, called the flats, and another area, what I know as either the dairy farm or the dairy road, in Glendale. And the area they talked about – my mother talked about where the people used to be – it's a place across from the Columneetza High School. There's – well, a place that was an airport when I – or I knew as the old airport when I started high school, at Columneetza, and we had to play softball and stuff like that there. And my mother said that was the place the people used to be.[148]

In April 1879, Laing-Meason again wrote to Sproat, specifically at the request of the Chief of the Williams Lake Indian Band, and advised:

> 1. That unless you come up and give them land on or before two (2) moons from date – we may look out for trouble.
> 2. That his tribe has nothing to eat, in consequence of their having no land on which to raise crops.
> 3. That their horses & cattle have many of them died this winter because they had no place of their own on [which] to cut hay last summer. Their talk – I am well informed – is, that if proper land is not given to them, they will take by force the land [which] they used to own & [which] they used to cultivate, and [which] was taken from them by pre-emption in 1861 (about). This land is situate at the foot of

147 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 222–24, Agnes Anderson).

148 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 40–41, Amy Sandy).

> Williams Lake &, is now owned by Mr. Pinchbeck. There are Indian houses to be seen on it at the present time.[149]

The *Land Act, 1875*, was amended in April 1879, although the amendment made no significant changes regarding Indian settlements. Pre-emption of such land was still prohibited. Section 36 of the *Land Act, 1875*, was amended and settlers purchasing "[u]nappropriated, unoccupied and unreserved lands, the surveys of which have been duly made and confirmed by notice in the *British Columbia Gazette*, and which are not the sites of towns or the suburbs thereof, and not Indian Settlements" were required to pay one dollar per acre.[150]

In 1879, a meeting of Shuswap Chiefs was held at Williams Lake.[151] Prior to this meeting, Chief William of the Williams Lake Indian Band wrote a letter to the editor of the *British Daily Colonist*.[152] In his letter, Chief William protested against the conditions under which his people were being forced to live:

> I am an Indian chief and my people are threatened by starvation. The white men have taken all the land and all the fish. A vast country was ours. It is all gone. The noise of the threshing machine and the wagon has frightened the deer and the beaver. We have nothing to eat. We cannot live on the air, and we must die. My people are sick. My young men are angry. All the Indians from Canoe Creek to the headwaters of the Fraser say "William is an old woman, he sleeps and starves in silence". I am old and feeble and my authority diminishes every day. I am sorely puzzled. I do not know what to say next week when the chiefs are assembled in council. A war with the white man will end in our destruction, but death in war is not so bad as death by starvation. The land on which my people lived for five hundred years was taken by a white man; he has piles of wheat and herds of cattle. We have nothing – not an acre. Another white man has enclosed the graves in which the ashes of our fathers rest, and we may live to see their bones turned over by his plough! Any white man

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149 William Laing-Meason, Justice of the Peace, Williams Lake, BC, to Gilbert Malcolm Sproat, Indian Commissioner, Victoria, BC, April 21, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 154–55).

150 *Lands Act Amendment Act, 1879*, SBC 1879, c. 21, s. 3 and s. 5 (ICC Exhibit 1a, pp. 156–57, and ICC Exhibit 6j, pp.1–2).

151 Author unknown,"Williams Lake Indian Band Specific Claim – Settlements," January 1994, p. 13 (ICC Exhibit 2a, p. 13).

152 Author unknown,"Williams Lake Indian Band Specific Claim – Settlements," January 1994, p. 13 (ICC Exhibit 2a, p. 13).

> can take three hundred and twenty acres of our land and the Indian dare not touch an acre. Her majesty sent me a coat, two ploughs and some turnip seed. The coat will not keep away the hunger; the ploughs are idle and the seed in useless because we have no land. All my people are willing to work because they know they must work like the white man or die. They work for the white man. Mr. Bates was a good friend. He would not have a white man if he could get an Indian. My young men can plough and mow and cut corn with a cradle. Now, what I want to say is this – there will be trouble sure. The whites have taken all the salmon and all the land and my people will not starve in peace. [Good friends to the Indian say that her Majesty loves her Indian subjects and will do justice. Justice is no use for a dead Indian. They say "Mr. Sproat is coming to give you land." We hear he is a very good man, but he has no horse. He was at Hope last June and he has not yet arrived here. Her Majesty ought to give him a horse and let justice come fast to the starving Indians. Land, land, a little of our land, that is all we ask from her Majesty. If we had the deer and the salmon we could live by hunting and fishing. We have nothing now and here comes the cold and the snow. Maybe the white man can live on snow. We can make fires to make people warm – that is what we can do. Wood will burn. We are not stones.][153]

The oral history of the Williams Lake Indian Band indicates that it was at a loss to explain exactly how it came to be alienated from its traditional lands. At the community session, Elder Catherine McKenzie testified that "[w]e were just told by our grandparents that they always stressed that the land was taken away from them, and they couldn't understand why they couldn't go there anymore, and they couldn't understand how they could just take the land away."[154] Ms McKenzie went on to explain that the Williams Lake Indian Band had no understanding of the concept or process of pre-emption. She stated, "I've never heard that word [pre-emption] until just recently. All I heard was that they took the land away, but I didn't even know the meaning of 'preemption.'"[155]

However, in his testimony, Elder Leonard English did have a basic understanding of the concept. He explained that pre-emption was, "[w]ell, just like a homestead. If you couldn't afford to buy it, well, you pre-empted, and then done your assessment work. After you got your assessment

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153 Newspaper clipping, "Chief William, Chief of the Williams Lake Indian Band," November 7, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 161).

154 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 288, Catherine McKenzie).

155 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 288, Catherine McKenzie).

work done, then they give you the deed to the place. Then they started charging taxes then."[156]

The concept and process of pre-emption may not have had an equivalent in the Shuswap culture, but some members of the Williams Lake Indian Band did receive permission to pre-empt land in the area of Williams Lake.[157]

There is documentary evidence that settlers in the area not only knew that the Williams Lake Indian Band lived at the foot of Williams Lake and Missioner Creek, but witnessed, firsthand, the effects of European diseases on the First Nation's population. In an interview conducted by R.J. Hartley, Provincial Librarian and Archivist, William Pinchbeck Jr stated that his father first moved to the Comer Ranch (situated within the Glendale area) and found Indians residing in the vicinity.

> In 1862 smallpox broke out among the Indians in Chilcotin and was very bad. When they took up Comer they were living near Indians who had been dying in the snow. These Indians lived in kickwillies. They would dig a hole in the ground out or choose a place where there was a natural hole, and put poles up for a roof and cover these with branches or matting, and had ladders down into them. There were many of them about here and the hollows can be seen still. There was a hole in the middle of the roof and the smoke came up through it. They would be from four to eight feet deep. For a long after that they would come across the remains of Indians who had died in the snow, or sometimes a whole family would be found dead in their kickwillie.[158]

Chief William's letter to the editor caused many provincial and dominion government officials to defend and attempt to explain how the situation at Williams Lake became such a problem. Indian Superintendent James Lenihan wrote to the Deputy Superintendent General of Indian Affairs, L. Vankoughnet, enclosing a copy of the newspaper clipping for his information:

> I enclose herewith for the information of the Hon. the Superintendent General, an article from the British Colonist Newspaper of the 7th Instant, founded upon a letter received by the Editor of that paper purporting to have been written by

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156 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 21, Leonard English).

157 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 25, Leonard English), and author not identified to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, pp. 21–24 (ICC Exhibit 1a, pp. 241–42).

158 "Notes on William Pinchbeck's Onward Ranch, Williams Lake," unknown author, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, p. 1).

> William, Chief of the Williams Lake Band of Indians, complaining that Mr. Sproat has not visited them and that they had no land and were in a starving condition.
>
> This was the forth intimation which I received of their being in a starving condition. ...
>
> By referring to my letter to you of 12th May last, No. 245, you will observe that I then recommended that Mr. Sproat may be instructed to visit those Indians during the past summer.
>
> The letter of W. L. Meason, J.P. of Williams Lake, a copy of which I enclosed contained serious threats from those Indians if land was not allotted to them immediately.
>
> I wrote to Mr. Sproat on the 6th May last and was informed by him on the 7th May that he had received instructions from the Superintendent General to work on the coast during the past Season.
>
> I received no acknowledgment to my letter from you, but assumed that you had communicated with Mr. Sproat on the subject.
>
> As already explained in my Report dated 20th October 1877, I visited Williams Lake in September 1877 when I had a satisfactory interview with the Indians of Williams Lake ...
>
> They have resided since about the year 1866 upon a part of the lands belonging to the Roman Catholic Mission at Williams Lake, some of which they cultivated ...
>
> ...
>
> I explained to them that it was impossible for the Commissioners to visit all the Indians of this vast Province in one year, and that they must have patience that they would come in good time, but I could not say how soon. They appeared to understand my explanation and to be satisfied with what I said to them ...
>
> ...
>
> I believe there are no vacant Government Lands in the vicinity of Williams Lake, and, that if lands are to be given to this Band they must be purchased from some of the Settlers. I heard some time ago of a farm for sale near Soda Creek.[159]

A response to Chief William's complaints was similarly published in the newspaper, offering an explanation for the delay of Indian Reserve Commissioner Sproat and the government's failure to have reserves set aside for the Williams Lake Indian Band. The article read:

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[159] James Lenihan, Indian Superintendent, New Westminster, to L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, Ottawa, November 11, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 162–67).

> To William, Chief of Williams Lake Indians: – Sir: I noticed your letter in *The Weekly Colonist* Issue of the 12th inst., and I purpose for my own justification making a few remarks thereon in the columns of the *Colonist*.
>
> In the first place I know you will believe my words notwithstanding I have, through over-confidence in the word of others, unwittingly allowed myself to make promises to you and other Indians in this part of the country which have not been kept in any degree with good faith. When the joint Indian commission was in the Kamloops country I received letters from the Rev. Father McGuckin, and many other white men in this vicinity, stating that the Indians were anxious to be informed when they might expect us. I submitted such letters to my brother commissioners and they authorized me to state that the attention of the commission would be directed to this district as soon as the Shuswaps, Okanagan and Nicola Indians could be settled with. When I met you last July at the 150 Mile House I felt sure Mr. Sproat would soon be among you and I expressed myself accordingly; you believed me and went home satisfied. My surprise and mortification may be easily conjectured when I learned that after the promises made by himself and the other commissioners, through me, he only came as far as Lytton, and from thence retraced his steps and proceeded to the northwest coast, for what object no one can surmise.

The article went on to state:

> As soon as I heard of this wonderful move I proceeded to Victoria where I met a number of old wise men, friends to the Indian and to justice, and who were equally as indignant as myself at Mr. Sproat's proceedings. We addressed letters to the Provincial Government and the Government at Ottawa expressing our opinion and deprecating the miserable manner in which your tribe as well as others have been treated. In my report to the Provincial Government I endeavoured to show as clearly as possible the fact that few of the tribes from Cache Creek had anything like enough land to support them, and I mentioned your tribe in particular, who, to my certain knowledge, have not one inch they can call their own. Following is extracted from my report of 8th March, 1878, addressed to Hon. A.C. Elliot: "As I remarked in my former report the Indians from Yale to Spence's Bridge possess no land at all with the exception of a few acres at Spuzzum. Those on the Bonaparte, Canoe Creek, Dog Creek, Alkali lake and Soda Creek have only very small reserves at present of an extremely sterile soil and those of Williams Lake none whatever, and for my own part I really do not see where lands in these neighbourhoods are to be found and to give them without [illegible word; purchasing?] from white settlers. I have called your attention again to this subject and I think it a grave one. No doubt there is plenty

of land to be found, but the difficulty is to find it in such situations [purchasing] would be capable of being irrigated without great expense and labour."[160]

As a result of Chief William's protests and threats of violence in the fall of 1879, Indian Reserve Commissioner Sproat wrote to the Superintendent General of Indian Affairs. Sproat was quick to excuse the dominion government of any responsibility for the situation at Williams Lake, opting instead to place the blame on the provincial government.

> I am surprised that there has not been an outbreak by these Indians sooner, but on a review of the facts, I do not think that the Dominion Government can be blamed in any degree if such an unfortunate circumstance should take place.
>
> The case is perfectly well known in this country, and has been repeatedly brought by me to the notice of the Provincial Government though I have not had an opportunity of examining the locality.
>
> It is the case of a tribe or band of Indians to whom no land whatsoever has been assigned. On the contrary, the land and the water for irrigating it in the place which the Indians say is their old place have been long ago permitted to be acquired by a white settler and I have been told that there either is no other available land or no other available land that can be irrigated in the particular locality.
>
> The Dominion Government has not done this alleged wrong; it has been done by the Government of British Columbia, and that Government should afford redress.
>
> I have ventured to recommend that the Reserve Commission should not visit Williams Lake, because the effect would be that probably nothing new would be discussed and in the case of an outbreak the public might entangle the Dominion Government with some imaginary responsibility which would not properly be theirs. The facts should be allowed to stand out clear and each Government should take what responsibility belongs to it.
>
> ...
>
> I think that everything has been done which a humane Government could be expected to undertake. The Dominion Government have in effect said to the Provincial Government "Suggest any way in which we can help you in this matter. Lay down some rules for furthering the adjustment desired – this case is only one of others (examined and unexamined by the Commission) belonging to a class now quite understood, in which you have neglected to act, though action was your duty; and in regard to which, the Indians may become confused and connect us the Dominion Government with injustice – tell us what you will do about the water question or the land question at Williams Lake & other places and we will meet you halfway, though the responsibility is entirely your own – but do not, looking to the

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[160] Newspaper clipping, unknown author, November 20, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, p. 168).

> facts connected with other portions of this Indian adjustment, endeavour to force us to come under a barren expenditure in reference to this case, which would be entailed on us by the necessity of repeated visits to one locality; and, moreover, do not expect that we will permit ourselves to be associated in the Indians' mind with the injustice of which they complain at the hand of the Govt. of British Columbia.
>
> State what you will do at Williams Lake. Will you go with the Commissioner and examine with him, and agree as a Government to some action toward adjustment by compromise or compensation by the Govt., if necessary, to the white settler who, it is said, has been permitted to acquire land & water to the detriment of the Indians."[161]

Indian Reserve Commissioner Sproat went on to propose that the provincial government should compensate white settlers who would relinquish any land or grave sites that the First Nation claimed and that would eventually have to be set aside as reserves:

> The explanation, of course, is that in this, and some other cases, it would be necessary to compensate the white settler who, perhaps by no fault of his own, has been so unfortunate as to be the instrument of wrongdoing to the Indians, and this compensation would have to be the subject of a vote in the Provincial Assembly, which, owing to the state of feeling in this country with respect to Indians, would not pass.
>
> The question whether a moderate vote, or the repression of an Indian outbreak would involve most expenditure seems to be a question entirely for the Provincial Government as I imagine that public sentiment in Canada would not support any policy of harshness by Canadian forces against Indians who have neither land nor water assigned to them after the colony has been established for 20 years, and who say that their old place has been sold to a white man.[162]

As the First Nation's claim submission indicates, "there is no record that Sproat and his superiors considered the option of the Federal Government obtaining village and graveyards and compensating the settlers."[163]

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[161] Gilbert Sproat, Indian Land Commissioner, to Deputy Superintendent General, November 26, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 170–76).

[162] Gilbert Sproat, Indian Land Commissioner, to Deputy Superintendent General, November 26, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 177–78).

[163] Author unknown, "Williams Lake Indian Band – Specific Claim Settlements," January 1994, p. 16 (ICC Exhibit 2a, p. 16).

The fallout from Chief William's letter continued into December 1879, with Deputy Superintendent General Vankoughnet also blaming the provincial government for the First Nation's discontent. In a memo to Superintendent General John A. Macdonald, Vankoughnet wrote:

> The undersigned in submitting this letter from Mr. Sproat cannot but direct attention to the indifference displayed by the Government of British Columbia in connection with the Indian land matters in that Province, and he quite agrees with Mr. Sproat that, should there be an uprising of the Indians of "Williams Lake" or at other points where similar complications exist, that Government will have themselves alone to blame therefore.
>
> The undersigned takes this opportunity of reminding the Superintendent General that there are several most important questions affecting Indian Reserves and which interfere with the final adjustment thereof which remain unsettled owing to the indifference or unwillingness of the Government of British Columbia to arrange the same. Repeated protests have been sent to that Government on behalf of the Indians both by Mr. Sproat and through the Honourable the Secretary of State but nothing appears to have resulted therefrom.[164]

Historically, the relationship between the province of British Columbia and the dominion government with respect to creating reserves for First Nations has been conflicted. Under section 91(24) of the *British North America Act* (currently known as the *Constitution Act*), the dominion government was responsible for "Indians and lands reserved for Indians," but conveyance from British Columbia to Canada of the land being reserved was required before it could be set aside. Anne Seymour states:

> The province's position generally favoured settlers. There is evidence that even when violations of the provisions of the *Land Act* were admitted, the province would not acknowledge, or willingly correct, the error. Provincial authorities often claimed an ignorance of the locations of settlements and put the onus upon the Dominion government to identify the areas. The province was, by and large, non-responsive to requests from Dominion government officials and the Indian Reserve Commissioners to limit pre-emptions in areas where the Commissioners had not yet visited.

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164 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to John A. Macdonald, Superintendent General of Indian Affairs, Ottawa, December 27, 1879, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 179–81).

> Although the Indian Reserve Commissioners and other Dominion government officials disputed the action, or lack of action, of the provincial government, it was often to no avail.[165]

Seymour also notes:

> It should not be lost sight of that the community of officials in B.C. was very tight-knit. For example, Dr. Israel Wood Powell, the Indian Superintendent, was married to the sister of Forbes George Vernon, one-time Chief Commissioner of Lands and Works and a significant land holder in the Interior. Forbes George Vernon and Charles A. Vernon, an Assistant Land Commissioner in the interior of B.C. were brothers ... Joseph Trutch and his brother, John, were both surveyors. John Trutch married Zoe Musgrave, the sister of the last colonial governor, Sir Anthony Musgrave ... Peter O'Reilly, a Stipendiary Magistrate in the colonial era, businessman and later Indian Reserve Commissioner, was married to Joseph Trutch's sister, Caroline. O'Reilly's closest friend was Matthew Baillie Begbie.[166]

By January 20, 1880, the Williams Lake Indian Band still had no lands, settlements, cultivated fields, or places of resort set aside for it. At that time, Father C.J. Grandidier, Father Demers's replacement, wrote to the Superintendent General of Indian Affairs and informed him that pre-emptions were recorded for an Indian settlement at Missioner Creek in the vicinity of Williams Lake (in what is now known as Cariboo land district lot 72), which the First Nation used until the 1850s, when they were compelled to leave by white settlers. Father Grandidier wrote:

> Those poor Indians of William's [*sic*] Lake have been most shamefully despoiled of all their lands in direct opposition to the clauses of Her Majesty's proclamation in 1858, when she took formal possession of British Columbia and erected it into a British Colony. In that proclamation were reserved to the Natives the land where they had their houses, cemeteries, gardens, fisheries, etc. And yet the Provincial Government has sanctioned the alienation of those reserves at William's [*sic*] Lake and elsewhere. A man named Davidson came early after 1859 to the father of the present Chief William, and asked to be permitted to build a cabin and to

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165 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 4 (ICC Exhibit 16a, p. 4).

166 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, pp. 10–11 (ICC Exhibit 16a, pp. 10–11).

> cultivate a little garden on his land. The Chief offered no objection. Then this man Davidson had all the land occupied by the Indians recorded as a preemption claim. On that land was a little chapel built by the first Catholic Missionary, the late Bishop Demers of Victoria, and also the cabin of the Chief. The Chief was permitted to live in his cabin near the chapel, but the Indians were driven away. ... Their only refuge from starvation had been the R.C. Mission, where the Missionaries gave the Indians a part of the Mission Lands, to enable them to live. But it is a very small parcel of land for each family. By the provisions of Her Majesty's proclamation those Indians have a right to their land and they ought to have justice done to them.[167]

Father Grandidier went on to point out:

> The Law may be very stringent; but received no application, because there is no one to see it carried out. I would think as a very and advisable step the appointment of an Agent, to take the interests of the Indians in hand, to see the Law, if transgressed, also vindicated. His presence would also be necessary to defend the interests of the Natives against the encroachments of their White neighbours. Complaints have been made repeatedly to me by the Indians, that their burial grounds have not been respected by the whites, but have been ploughed over; that the timber on their Reserves is being cut down by the whites; and that, on appealing to the Justice of the Peace for redress, they are told that it is none of their business. Once I sent to Mr. Superintendent [illegible word] a complaint signed by a dozen families about the desecration of burial places. The only answer that was returned was to the effect, that a law existed in B.C. to protect Indian burial grounds and that the writers of the petition should make use of it in the Court. But the Indians need some one to do that for them. They have not always the necessary sum of money to carry their grievances into the Courts. An Agent is more and more urgently needed here amongs [*sic*] these Indians, for they have no one in authority to whom they can appeal. The Superintendent of New Westminster is too far away; besides he is almost unknown to them. They come to their Missionaries. But having no authority to protect them, we cannot be of great help to them, except in advising them.[168]

Peter O'Reilly, Indian Reserve Commissioner, 1880–98

On the recommendation of Joseph Trutch, Chief Commissioner of Lands and Works, and by Order in Council PC 1334 of July 19, 1880, Peter O'Reilly was appointed Indian Reserve Commissioner,

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[167] Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 182–83).

[168] Father C.J. Grandidier to Superintendent General of Indian Affairs, January 20, 1880, LAC, RG 10, vol. 3680, file 12395-1 (ICC Exhibit 1a, pp. 184–85).

replacing Gilbert M. Sproat, who resigned in March 1880.[169] Under Sproat, the primary duty of the Indian Reserve Commissioner was "ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the late Commission, & allotting available lands to them for tillage and grazing purposes."[170] As Order in Council 1334 stated, however, Mr O'Reilly's accountability as Indian Reserve Commissioner was significantly different from that of his predecessor:

> Mr. Trutch suggests that the Reserve Commissioner instead of being placed, as at present, under the direction of the Indian Superintendent for British Columbia, should act on his own discretion, in furtherance of the joint suggestions of the Chief Commissioner of Lands and Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established; and that the actions of the Reserve Commissioner should in all cases be subject to confirmation by those officers; and that, failing their agreement, any and every question at issue between them should be referred for settlement to the Lieutenant Governor, whose decision should be final and binding.[171]

Anne Seymour comments that the appointment and conduct of O'Reilly as Indian Reserve Commissioner were very much connected to Trutch's influence.[172] Commenting on the Order in Council quoted above, Seymour further states:

> There is a significant change in authority of the Indian Reserve Commissioner with the appointment of O'Reilly. Trutch, who had always wanted to have any allotments approved by the province, suggested, to Sir John A. MacDonald [*sic*] that the Commissioner, "should act on his own discretion in furtherance of the joint suggestions" of the CCLW [his former position] representing the province and the Indian Superintendent representing the Dominion, rather than being placed under the

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169 Order in Council PC 1334, July 19, 1880, LAC, RG 10, vol. 3716, 22195 (ICC Exhibit 1a, pp. 191–200).

170 Order in Council PC 1334, July 19, 1880, LAC, RG 10, vol. 3716, 22195 (ICC Exhibit 1a, p. 192).

171 Order in Council PC 1334, July 19, 1880, LAC, RG 10, vol. 3716, 22195 (ICC Exhibit 1a, pp. 193–94).

172 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 20 (ICC Exhibit 16a, p. 20).

> direction of the Indian Superintendent. Trutch further recommended that any dispute would be settled by the Lieutenant Governor, [also his former position] whose decision "should be final and binding." Upon approval, the PC order was to be transmitted to the Lieutenant Governor of B.C. for his approval. Interestingly, O'Reilly's initial appointment was for twelve months only.[173]

Seymour also notes that, in the Order in Council,

> both George Walkem, CCLW and I.W. Powell, Indian Superintendent, supported O'Reilly's appointment, which had been proffered by Joseph Trutch, formerly CCLW and Lieutenant Governor, now identified as "Confidential Agent at Victoria." ... It has also been remarked upon that Trutch and Sir John A. McDonald [*sic*] were friends and political allies and, at this time, McDonald [*sic*] was acting as the minister in charge of Indian Affairs.[174]

In August 1880, Peter O'Reilly was notified of his appointment. O'Reilly's duties allowed him to have much greater authority over how Indian lands in British Columbia were set aside as reserves. He was told:

> [Y]ou are not to be under the Indian Supt. at Victoria as Mr. Sproat lately was but are to act in your own discretion upon the joint suggestions of the Hon. the Chief Comr. of Lands & Works for British Columbia representing the Provincial Government and M. [*sic*] Powell [*sic*] esq. M.D., Indian Supt. for that Province representing the Dominion Government as to the points to be visited and reserves to be assigned by you to the Indians. In allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Government which contemplated a "liberal policy" being pursued towards the Indians. You should have a special regard to the habits, wants and pursuits of the Band, to the amount of Territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
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> ...

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[173] Order in Council PC 1334, July 19, 1880, LAC, RG 10, vol. 3716, 22195 (ICC Exhibit 1a, pp. 193, 198); and Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 20 (ICC Exhibit 16a, p. 20).

[174] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 20 (ICC Exhibit 16a, p. 20).

> The Government consider it of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings burial places and fishing stations occupied by them and to which they may be specially attached. Their fishing stations should be very clearly defined by you in your reports to the Dept. and distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point. You should in making allotments of lands for Reserves, make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.[175]

The letter also included documents for Indian Reserve Commissioner O'Reilly's information:

> You will observe also from the Copy of the Order in Council enclosed herein that your decisions as to Reserves allotted are subject to the joint approval of the Honble. the Comr. of Lands & Works for British Columbia and the Indian Supt. for that Province and in the event of their disagreement on any question, the same is to be referred to his Honor the Lt. Govr. of British Columbia whose decision is to be final.[176]

Anne Seymour comments:

> Included amongst the documents provided to O'Reilly were various reports, including Sproat's reports of progress. O'Reilly's instructions were almost verbatim to those issued to Anderson in 1876. Reference was made again to the original agreement of 1875, upon which the Dominion government continued to rely as a basis for the settlement of the land issue. The instructions also had the addition of new concerns put forward by Sproat with respect to water privileges. But these instructions also reflect a significant change in the reporting relationship between the Indian Reserve Commissioner and the two governments, which was clearly designed to benefit the provincial government. No specific instructions from the CCLW to O'Reilly have been located to date and none appear to be cited in other texts.

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[175] Unknown author, Department of Indian Affairs, Ottawa, to Patrick [*sic*] [Peter] O'Reilly, August 9, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 1a, pp. 201–3, and ICC Exhibit 16b, pp. 472–74).

[176] Unknown author, Department of Indian Affairs, Ottawa, to Patrick [*sic*] [Peter] O'Reilly, August 9, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 1a, pp. 204–5, and ICC Exhibit 16b, pp. 475–76).

> Indian Superintendent I.W. Powell, another colleague of Sir John A. McDonald's [*sic*], had numerous concerns regarding this new development in the process which he voiced in a lengthy letter to McDonald [*sic*] as the Superintendent General of Indian Affairs.[177]

Indeed, Indian Superintendent Powell had concerns that O'Reilly's expanded authority and the new reporting process would, in fact, perpetuate the trouble the dominion government was experiencing in getting the province to reserve lands for First Nations. Many First Nations, including Williams Lake, still had no reserve land secured for them at this time. Indian Superintendent Powell wrote:

> In regard to the Order in Council, I hesitate to question the desirability of the Hon. Mr. Trutch's recommendation which would appear to have had your concurrence, and which subjects all decisions of the new Commissioner for confirmation – firstly by the Chief Commissioner of Lands and Works and myself, and secondly, in case of failure to agree, to the Lieut. Governor. I might venture however, with great deference, to remark that the arrangement, if past experience [is] to be a criterion by which one may judge, will greatly tend to a renewal of the unsatisfactory condition of affairs which existed prior to the appointment of the first Commission. It is possible, that, as the portion of the Interior most thickly populated by whites has now been settled, the provision of the Order in Council I am referring to may be of less importance, than should otherwise have been, but I feel quite certain that the Yale District, which includes Nicola and Okanagan, could not have been settled satisfactorily to this Department upon the plan now arranged.
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> ...
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> It has been urged, that the Terms of Union provided, that the Indians should only be treated as liberally as before Confederation, i.e. "that tracts of land of such extent as it has hitherto been the practice of the British Columbia Gov't. to appropriate for that purpose shall from time to time be conveyed by the Local to the Dominion Gov't. etc. etc., but it has been often proved that in many localities the lands set aside by the Colonial Gov't. prior to confederation were insufficient – indeed lands, solemnly allotted, have been removed from the reserve and sold without the knowledge of the Indian – These are facts which any person can ascertain by proper inquiry, and afford conclusive proof that the reserves would have had to be adjusted upon a <u>more</u> liberal basis than are contained in the Terms of Union, even <u>if Confederation had not taken place</u>. It was a knowledge of this circumstance and of

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177 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 21 (ICC Exhibit 16a, p. 21).

> attendant evils that led to the appointment of an arbitrating Board (the Commission) hence I am of [the] opinion that the new Commissioner should not be instructed to adhere strictly to the Terms of Union, but rather that he should be a person of such judgement and discretion as to merit the confidence of both Governments and Indians.[178]

Indian Superintendent Powell was equally concerned that O'Reilly had not been given enough authority to deal directly with First Nations when meeting with them to secure lands. He continued:

> These characteristics should not then be hampered by a process of confirmation which delays – indeed as I have attempted to shew annuls the object and benefit of his appointment.
> ...
> But to send him [O'Reilly] to the field without the power of final adjustment is to destroy his influence among the Natives as an arbiter and to renew the unfortunate state of affairs which involved the great expense and appointment of the Reserve Commission in the first place. In this view I scarcely think a Commissioner needed at all.[179]

Indian Superintendent Powell further stated that "[a] competent Surveyor" could perform the duties of the Indian Reserve Commissioner if the Commissioner was not given the discretion to make decisions while visiting First Nation communities.[180] It was Powell's opinion that sending a surveyor to the community would be more appropriate because "the Indians would not expect him to make allotments, but would be aware that he merely visited them for the purpose of acquiring information

178 I.W. Powell, Indian Superintendent, Indian Office, British Columbia, Victoria, to Superintendent General of Indian Affairs, August 23, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 16b, pp. 479–83, 492–93). Original emphasis.

179 I.W. Powell, Indian Superintendent, Indian Office, British Columbia, Victoria, to Superintendent General of Indian Affairs, August 23, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 16b, pp. 484, 486, 493). Original emphasis.

180 I.W. Powell, Indian Superintendent, Indian office, British Columbia, Victoria, to Superintendent General of Indian Affairs, August 23, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 16b, pp. 486, 493).

to enable the white Chiefs to apportion their Reserves."[181] Powell concluded his letter by stating that he supported the appointment of Peter O'Reilly as Indian Reserve Commissioner.[182]

Seymour notes, "O'Reilly's appointment was slightly amended through OCPC 1881-532. His name was officially corrected ..., his salary was clarified and his appointment was made indefinite, but there was no indication of any change in the reporting structure."[183] Seymour further notes that Indian Superintendent Powell continued to protest the approval process attached to the position of the Indian Reserve Commissioner. After an investigation, Seymour concluded :

> No correspondence had been located to this point which indicates that the reporting structure was ever formally amended, however, it does not appear to have been quite the hindrance Powell anticipated. There is no indication of significant controversy or objections to O'Reilly's work by either the provincial or Dominion governments which required arbitration ... Based upon the correspondence reviewed, there is no indication of consistent interference with, or rejection of, O'Reilly's allotments by the CCLW. In the few instances where the CCLW tried to suggest to O'Reilly that he alter allotments, O'Reilly generally stood firm on his decision.
>
> ...
>
> It is difficult to judge from the correspondence if O'Reilly took greater direction from the Dominion government than from the B.C. government. While he was not the bellicose commissioner which Sproat had been, it is apparent in O'Reilly's correspondence that he was keenly aware of the problem of settlers encroaching upon and pre-empting lands rightfully claimed by the Indians.[184]

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181 I.W. Powell, Indian Superintendent, Indian office, British Columbia, Victoria, to Superintendent General of Indian Affairs, August 23, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 16b, pp. 487, 493).

182 I.W. Powell, Indian Superintendent, Indian office, British Columbia, Victoria, to Superintendent General of Indian Affairs, August 23, 1880, LAC, RG 10, vol. 3716, file 22195 (ICC Exhibit 16b, pp. 486, 489–90, 493–94).

183 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, pp. 21, 23 (ICC Exhibit 16a, pp. 21, 23).

184 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 21 (ICC Exhibit 16a, p. 21).

As expressed in the 1874 letter of the Minister of Interior, David Laird,[185] it seems that the provincial and dominion governments did, in fact, have different methods for achieving the settlement of British Columbia while having also to set aside land for First Nations, given the *Terms of Union, 1871*, and the *British North America Act, 1867* (currently known as the *Constitution Act*). This difference proved to be a great difficulty for the JIRC and for both the solitary Indian Reserve Commissioners, since the province was not approaching the establishment of First Nation reserves in a proactive manner. In Seymour's research, the province and the dominion were often at odds over how to set aside land for First Nations. She comments:

> The province did not take the initiative and provide pre-emption information. In all likelihood, the most current information would have been held in the local land offices. It appears that often the Commissioners would first locate the settlers and then investigate their title.
> ...
> O'Reilly ... frequently wrote to the SGIA about the difficulty he had in identifying available land, even in remote areas.[186]

Seymour continues: "Despite requests to the provincial government to withhold pre-emptions, there were instances when pre-emptions were allowed while the Commissioner was in the district, or just prior to his arrival."[187]

O'Reilly's predecessor, Indian Reserve Commissioner Sproat, had also complained about his difficulty working with the provincial government. Sproat reported to the Superintendent General:

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185 David Laird, Minister of the Interior, Ottawa, to the Privy Council, November 2, 1874, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 151–52 (ICC Exhibit 16b, pp. 192–93).

186 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 29 (ICC Exhibit 16a, p. 29).

187 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 30 (ICC Exhibit 16a, p. 30).

I am very sorry to feel after two years and a half of this Reserve Comn. work, constrained to say that the indifference and inaction of the Prov Govt. are great difficulties in this way.

It's up hill work to get anything whatever allotted ...

They will simply do nothing, but oppose a passive resistence. One Govt [BC] is the same as another. They all are manifestly influenced (I dare say unconsciously) by deep race prejudice, as is shown by the fact that prompt attention is given to any letter of a white settler and my report on it quickly required, while letter after letter from me on Indian matters of great importance are left for indefinite periods without answer or even acknowledgment.

This might be expected in Indian work, perhaps, but it may become serious if it should interfere with or unnecessarily prolong the efforts now being made by the Dom. Govt. to adjust these Indian questions.[188]

Anne Seymour concluded that "[t]he provincial government waited for complaints, it does not appear that it took steps to ensure that complaints could not be made. On more than one occasion, when faced with an improper pre-emption, they took no steps to correct the situation."[189]

O'Reilly finally arrived at Williams Lake on June 6, 1881.[190] He described this visit to the Superintendent General in Ottawa:

The Chief in a long speech expressed his gratification at the late action of the Dominion Government but complained bitterly of the delay that has taken place in the adjustment of their land, during the whole of which the whites have been permitted to possess themselves of what should properly belong to his people.

I explained to him in the presence of his tribe the desire of the Dominion Government to see them possessed of all the land necessary for agricultural, and pastoral purposes as instanced by the purchase of the farm now about to be handed over to them.[191]

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188 G. M. Sproat, Indian Reserve Commissioner, to Superintendent General, Department of Indian Affairs, Ottawa, November 26, 1878, federal collection, binder 1, pp. 301–2 (ICC Exhibit 16b, pp. 655–56).

189 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 32 (ICC Exhibit 16a, p. 32).

190 Author not identified [Peter O'Reilly] to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, p. 21 (ICC Exhibit 1a, p. 239).

191 O'Reilly set aside a portion of the "Bates Estate" as a reserve for the Williams Lake Indian Band. This reserve became what is now the Sugar Cane reserve outside the claim area. Author not identified [Peter O'Reilly] to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, p. 21 (ICC

O'Reilly also noted the historic presence of the Williams Lake Indian Band on pre-empted land in the area of Missioner Creek as evidenced by the following statement:

> West of their present reserve at a distance of 10 miles is the farm purchased by Mr. Pinchbeck from the Provincial Government and which at one time was occupied by the Indians, as is evident by the remains of a number of old winter houses. On this farm and within its enclosures, I have at the request of the Chief marked off no less than seven burial grounds.[192]

Within the documentary record for this inquiry, there is a draft letter dated June 7, 1881, the day after Indian Reserve Commissioner O'Reilly arrived at Williams Lake. Along with population figures and general information about the First Nation and the surrounding area, there is also a record of a conversation between the "Commissioner" (assumed from the content to be Indian Reserve Commissioner O'Reilly) and Chief William. It reads:

> William — Glad to see you. I will now tell you what is right. All my people are glad.
> Tommy Hasket said it is just the same as if we saw the Queen.
>
> Commissr. — Told them what he came for; the Govt. wishes to act justly & liberally by them, and considers them British subjects as much as white men; that in early days mistakes were made with the land, the Indians were engaged otherwise and did not care for the land, the consequence was the whites pre-empted it; that the Govt. wish to remedy this mistake as far as possible and has purchased a large and valuable tract of land which I am about to hand over to them. They must mutually assist in remedying the mistake. That he is here to give them as much land as is necessary for their requirements.
>
> That they will have to be reasonable with regard to white mans rights they cannot interfere, they need not therefore ask for any land that has been sold by the Govt, if the land purchased by the Govt should prove insufficient other land will be given to them and also a

Exhibit 1a, p. 239).

[192] Author not identified [Peter O'Reilly] to Superintendent General, Department of Indian Affairs, Ottawa, September 22, 1881, LAC, RG 10, vol. 1275, p. 23 (ICC Exhibit 1a, p. 241).

> sufficient quantity of water. He cannot make good land but if it is to be obtained it will be given them.[193]

It is apparent from this document that O'Reilly was not prepared to cancel the pre-emption of the lands at Missioner Creek or the foot of Williams Lake that the First Nation claimed. However, as quoted above and below, he did in fact purchase land from settlers which was to be reserved – namely, the Bates Estate (mentioned above); he also secured graveyard reserves on pre-empted land, although those were later deleted because they were on land granted by the Crown. In the pre-emption report she prepared for this inquiry, Anne Seymour found the following:

> Clearly, the focus of the correspondence in the Minutes of decision collections is related to reserve establishment. The sub-text of the correspondence, however, indicates that there were a vast number of cases of encroachment and alienation of Indian settlements and resource areas by settlers either through squatting, pre-emption or Crown Grant and that it was prevalent throughout the province ... The Indians believed they had a prior right of use and occupancy, if not possession, of these lands. In many cases the Indian Reserve Commissioners and Dominion government officials agreed with the Indians' position, but were either unable or unwilling to pursue the issue with the provincial government. The Indian Reserve Commissioners most often attempted to resolve land disputes through conciliation and compromise, but if that failed, they appear to have been prepared to initiate other proceedings, including recommending the cancellation of pre-emptions and, in rare situations, litigation.
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> ...
>
> The Indian Reserve Commissioners did not have explicit authority to cancel a pre-emption or a Crown Grant. They relied upon relevant legislation, specifically the *Land Act*, the tenor of the agreement between the province and the Dominion and their instructions, which stated among other things, that they were to set aside village sites and resource areas, such as fisheries, as reserves.[194]

[193] Unidentified author, Williams Lake, BC, to unidentified recipient, June 7, 1881, LAC, RG 10, vol. 3663, file 9803, part 2 (ICC Exhibit 1a, pp. 207–8).

[194] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, pp. 3–4 (ICC Exhibit 16a, pp. 3–4).

Allotment of Reserves, 1881

At time of Indian Reserve Commissioner O'Reilly's visit, 14 reserves were allotted to the Williams Lake Indian Band. Of those, three were reserved for habitation and/or farming purposes (reserves 1–3), three for fishing purposes (reserves 4–6), and eight were classified as graveyards (reserves 7–14). The total acreage of the reserves allotted in 1881 was 5,634.00 acres, including 1,464.00 acres of pre-empted land purchased from non-native settlers. The provincial government accepted these reserves on May 23, 1882.[195] An additional reserve of 168.76 acres at Carpenter Mountain was allotted in 1894 (reserve 15).[196] Neither claim submission provides information concerning the 1894 addition, which appeared in the 1902 Schedule of Indian Reserves.

According to Exhibit 7o of the documentary record, none of these reserves are in lots 71 or 72.[197] However, IR 6 is situated at the foot of Williams Lake, just east of lot 71, and Indian Reserves 9–11 are just south of lot 72.[198] It should be noted that the Williams Lake graveyard reserves 7–14 were struck off the list of reserves by the federal government because they had not been excepted in the Crown grants of surrounding lands and the government was not willing to purchase the land or finance the survey of such small lots.[199] The Band asserts that the graveyards formed part of its traditional settlements which should have been reserved by the colonial and federal governments, and that they are therefore included in the claim submission. As of May 2003, some of these "graveyard" claims were being negotiated as a separate specific claim by the federal

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[195] J.I. Austin, Clerk of Records, Victoria, to P. O'Reilly, BC Reserve Commissioner, Department of Indian Affairs, Victoria, May 23, 1882, no file reference available (ICC Exhibit 1a, p. 243).

[196] Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 92–93 (ICC Exhibit 1a, pp. 248–49).

[197] "Williams Lake Indian Band – Village Claims/Specific Claims," Paragon Resource Mapping, June 10, 2003 (ICC Exhibit 7o).

[198] "Williams Lake Indian Band – Village Claims/Specific Claims," Paragon Resource Mapping, June 10, 2003 (ICC Exhibit 7o).

[199] C.C. Perry, Assistant Indian Commissioner for BC, Department of Indian Affairs, Victoria, BC, to Secretary, Department of Indian Affairs, Ottawa, July 23, 1933 (ICC Exhibit 1a, pp. 319–21). See also H.B. Taylor, Indian Agent, Department of Indian Affairs, Williams Lake, to C.C. Perry, Assistant Indian Commissioner for BC, Department of Indian Affairs, February 24, 1933 (ICC Exhibit 1a, p. 322).

government and the Williams Lake Band.[200] It should be noted that none of the reserves listed on either schedule are included in the two locations which are the subject lands of this inquiry.

Clearly, Indian Reserve Commissioner O'Reilly was aware that there was a conflict between Indian settlements and pre-empted land at Williams Lake. He himself set aside graveyard reserves on pre-empted land for the benefit of the First Nation. However, he did not endeavour to cancel the pre-emption of William Pinchbeck. Despite O'Reilly's lack of authority to cancel pre-emptions at his own discretion, he had managed to bring about the cancellation of pre-emptions and reserve the land for First Nations in areas other than Williams Lake.[201]

As part of her research report for this inquiry, Anne Seymour was asked to provide case studies of the actions of the Indian Reserve Commissioners, including O'Reilly. Seymour discovered that, at the subtle direction of Indian Superintendent Powell, Indian Reserve Commissioner O'Reilly set aside a fishing reserve for the Indians at Kitlathala in 1882, despite an application to pre-empt.[202]

Seymour found another case from 1887 with circumstances very similar to those of the Williams Lake Indian Band:

> On making a trip to Cowichan Lake [in 1887] to set aside land for the Indians resident there, O'Reilly learned that two settlers had pre-empted land in the full knowledge that there were Indians residing on it. O'Reilly, finding adequate evidence of use and occupation by the Indians, took steps to have the pre-emptions cancelled. O'Reilly also set aside land within a timber lease [as] a resource site for the Indians.

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[200] C.C. Perry, Assistant Indian Commissioner for BC, Department of Indian Affairs, Victoria, BC, to Secretary, Department of Indian Affairs, Ottawa, July 23, 1933 (ICC Exhibit 1a, pp. 319–21), and unknown author, "Williams Lake Indian Band – Settlements Claim," January 1994, p. 1 (ICC Exhibit 2a, p. 1). See also H.B. Taylor, Indian Agent, Department of Indian Affairs, Williams Lake, BC, to C.C. Perry, Assistant Indian Commissioner for BC, Department of Indian Affairs, February 24, 1933 (ICC Exhibit 1a, p. 322).

[201] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 4 (ICC Exhibit 16a, p. 4).

[202] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 48 (ICC Exhibit 16a, p. 48).

> Although the reserve allotment was made with the consent of a settler, it was cancelled, seemingly without alternate land being set aside.[203]

In that case, it appears that Indian Reserve Commissioner O'Reilly took the initiative to ask the dominion government for authority to cancel the pre-emption. He visited the area, studied the field notes, and seemed to assess the land available to the First Nation outside the pre-empted areas before concluding that steps needed to be taken to cancel the pre-emption.[204] As a result of O'Reilly's actions, the pre-emptor was compensated for his improvements, and the land was reserved for the Cowichan First Nation.[205]

O'Reilly's adjustments with regard to pre-emptions of Indian settlement lands appear to have been inconsistent. Seymour describes O'Reilly's 1882 visit to the Tseshaht First Nation on Vancouver Island as follows:

> Although the Tseshaht and other Indians resident in the vicinity of Alberni historically claimed the area, it appears that when O'Reilly visited it in 1882, he required to be presented to him evidence which established any claim to pre-empted land. Without such evidence, it appears O'Reilly would not take steps to remove the settlers.[206]

In 1889, Indian Reserve Commissioner O'Reilly visited the Quatsino First Nation resident at Grass Point and Clienna. At both locations, O'Reilly concluded that pre-empted land, which had been granted by the Crown, rightfully belonged to the First Nation and that the pre-emption

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203 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 46 (ICC Exhibit 16a, p. 46).

204 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 47 (ICC Exhibit 16a, p. 47).

205 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 48 (ICC Exhibit 16a, p. 48).

206 Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, p. 49 (ICC Exhibit 16a, p. 49).

documents (surveys and the settlers' pre-emption declarations) failed to mention the pre-existing First Nation settlement. Indian Reserve Commissioner O'Reilly attempted to negotiate release of the surrender of the lands with the respective pre-emptors, but the settlers refused. These cases went to litigation and were eventually settled out of court.[207] From Seymour's findings, it appears that O'Reilly was not inclined to interfere with a settler's pre-emption until after his 1881 visit to Williams Lake.

Definition of Indian Settlement

Despite all the correspondence relating to the Indian land question in British Columbia, the various ordinances and legislation, the Joint Indian Reserve Commission, and the Indian Reserve Commissioners, the term "Indian settlement" had never been clearly defined. During the current ICC inquiry, the First Nation discovered three documents dealing with the Okanagan region that may clarify what colonial and dominion officials considered an Indian settlement between 1860 and 1885.

In May 1862, during the colonial era of BC land policy, Colonial Secretary William A.S. Young wrote to the Chief Commissioner of Lands and Works about a matter involving another First Nation. In that letter, the Chief Commissioner was instructed to grant pre-emption rights in the Bute Inlet area, with the stipulation that the pre-emptions "do not attach to lands at present or recently the site of Indian Villages or Fields."[208] Young also stipulated that "[t]he land about the Indian villages, which is in no case open to pre-emption, should be marked upon the official maps as distinctly reserved to the extent of 300 acres or more around each village."[209]

During the post-Confederation era of BC land policy, an attempt was made to define the term Indian settlement. In 1877, an unknown author commented to Thomas Wood: "We do not know if the nature of an Indian settlement has [ever] been defined, and we consider that the words should

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[207] Anne Seymour, "Alienation of Indian Settlements in British Columbia, 1875–1910," prepared for the Indian Claims Commission Inquiry into the Williams Lake Indian Band Village Site Claim, August 2004, pp. 50–53 (ICC Exhibit 16a, pp. 50–53).

[208] William A.G. Young, Colonial Secretary, BC, to Chief Commissioner of Lands and Works, May 14, 1862, no file reference available (ICC Exhibit 15d, p. 2).

[209] William A.G. Young, Colonial Secretary, BC, to Chief Commissioner of Lands and Works, March 1, 1862, no file reference available (ICC Exhibit 15e, p. 12).

be carefully interpreted; but there probably can be no doubt that the words cover, and were intended to cover, places long occupied, or actually cultivated, by Indians."[210]

Indian Reserve Commissioner Sproat similarly acknowledged this failure to define an Indian settlement when, in December 1877, he noted that

> it is illegal to pre-empt or purchase an "Indian settlement". This law had its origin, I suppose, in the necessity of protecting villages and fields of Indians who had no Reserves assigned to them or gazetted, which, even now, is the case of the majority of the indian [*sic*] tribes in the Provinces. Nobody knows precisely what an "Indian settlement" is, nor what period of occupation of land by Indians gives it that character. Its nature and extent are entirely undefined, but dwellings and ploughed or fenced fields could hardly be excluded from any definition of a "settlement."[211]

Williams Lake Land Transaction History

William Pinchbeck's Pre-emptions in the Williams Lake Area

In May 1883, a survey of lots 71 and 72 at Williams Lake was completed by W. Allan in preparation for the eventual Crown grant of the land (discussed below).[212] The field book of that survey also included a chronology of the pre-emptions of both lots to that date. The field book states that William Lyne Sr pre-empted all 320 acres of lot 5/71 on May 15 of that year.[213] One week later, on May 22, 1883, William Lyne Jr pre-empted 320 acres in lot 1/71.[214] William Pinchbeck Jr also pre-empted 320 acres of land on May 22, 1883, but in lot 4/71.[215] On June 29, 1885, William Pinchbeck received Crown grant 2923 for lots 1–5, Cariboo district lot 71, or the foot of Williams Lake, and

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210 Unidentified author to Thomas Wood, September 25, 1877, LAC, RG 10, vol. 3612, file 3756-16 (ICC Exhibit 15a, p. 3).

211 Gilbert Malcolm Sproat, Joint Commissioner, Indian Reserve Commission, to Superintendent General of Indian Affairs, December 1, 1877, Second Condensed Report by the Joint Commissioners, 1 December 1877, LAC, RG 10, vol. 3613, file 375616 (ICC Exhibit 15c, p. 10).

212 Unidentified author, "Williams Lake Indian Band – Specific Claim Settlements," January 1994, p. 11 (ICC Exhibit 2a, p. 11).

213 Field book 10/83 PH3, lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

214 Field book 10/83 PH3, lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

215 Field book 10/83 PH3, lots 71 and 72, surveyed by W. Allan, c. May 1883 (ICC Exhibit 1e, p. 19).

lot 6, Cariboo district lot 72, or Missioner Creek/Glendale in their entirety.[216] As discussed above, however, Pinchbeck was not the first "owner" of lots 71 and 72. In a 1929 interview, his son, William Pinchbeck Jr, explained how his father came to be at Williams Lake:

> My father William Pinchbeck first left England when he was about twenty and came out to the state of California at the time of the gold excitement ... As soon as the news of the strike on the Fraser got down to California he came up, he and William Lyne and Sam Simcock ... to Williams Lake early in 1860.[217]

Pinchbeck Jr went on to explain how his father came to be a prominent landholder at Williams Lake:

> My Father first took up a place at Boyd, across from the mill where a stream came down; he and Meldrum were partners. Then he went to the Comer place and Meldrum went across the river. Woods and Davidson had the Comer place, then Manifee and Davidson. Father bought them out, kept bar there several years, and had a distillery too at Comer. Of course, it was not called Comer then; Comer is a really recent name; it would be called Pinchbeck's I expect. About 1883 or 1884 he took up the lake place. That was the ground that is now occupied in part by the village of Williams Lake, and the old house is there yet.
> ...
> My father moved about 1890 from Comer. He owned the Bell place at the same time. He sawed lumber for all his farms on the Onward ranch ... He lived at Comer and myself at Williams Lake ...
> ...
> Old man William Lyne was together with father quite a bit and was taken into partnership till about 1886 or 1888, when they dissolved and Lyne went into the Ashcroft Hotel.[218]

[216] Crown grant 2923 to William Pinchbeck, June 29, 1885, BCA, GR-3097, vol. 0016 (ICC Exhibit 1c, p. 1).

[217] "Notes on William Pinchbeck's Onward Ranch, Williams Lake," unidentified author, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, p. 1).

[218] "Notes on William Pinchbeck's Onward Ranch, Williams Lake," unknown author, c. 1930, BCA, call no. EE P65 (ICC Exhibit 1f, pp. 1–4).

At that point, William Pinchbeck Sr became "the sole owner of the property."[219] The transaction history of lots 71 and 72 continued past 1885, however, and it is important to note the changes that occurred as the land passed from Pinchbeck to other owners.

> When William Pinchbeck died in 1893, Mr. Robert Borland bought the property, and then sold it to Mr. Mike Minton. Minton raised two nephews ... and a niece ... with the last name of Comer, and when he passed away around 1904, he left the property to the two nephews.[220]

The above explains how Pinchbeck's ranch came to be known as the "Comer Ranch" at Missioner Creek.

> The Comer brothers continued to use the property as a ranch until the early 1920's. The Comer house, which was the Stopping House and Mission Ranch house, was torn down for firewood in 1924 by Wilfred Graham. He owned the property after the Comers and constructed the farmhouse now standing on the immediate east side of Missioner Creek.[221]

The oral history of the Williams Lake Indian Band refers to Pinchbeck's presence at the foot of Williams Lake and at Missioner Creek. According to testimony at the community session, William Pinchbeck had a relationship with "an Indian woman" whom he may have married.[222] Elder Agnes Anderson indicated that this woman may have been Chief Tillion William's sister, Matilda.[223]

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[219] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 10 (ICC Exhibit 9, p. 10).

[220] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 10 (ICC Exhibit 9, p. 10).

[221] Mike K. Rousseau, "An Inventory, Impact Assessment and Management Plan for Heritage Resources within Cariboo Fibreboard Limited's Proposed Williams Lake Medium Density Fibreboard Plant Development Project Area," prepared for Cariboo Fibreboard Limited, December 31, 1989, p. 10 (ICC Exhibit 9, p. 10).

[222] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 226, Agnes Anderson). See also ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 272, Roberta Gilbert).

[223] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 227, Agnes Anderson).

Elder Leonard English testified that Pinchbeck married his great aunt Matilda.[224] Elder Roberta Gilbert believes that they had children together, but that Pinchbeck did not marry this Aboriginal woman.[225]

Elder English further stated that

> he had some land pre-empted there, just about where the longhouse is now. He had kind of a little store there, and he couldn't make a go of it ... And then they moved to Chimney Valley, what they call the old Pinchbeck place. That's on Dog Creek Road, I'd say about 10 miles out of Williams Lake, south.[226]

There are also stories of a Billy Pinchbeck having lived at Springhouse and being buried in the area, although it is not clear which Pinchbeck that was.[227]

Despite Pinchbeck's Crown grant and the subsequent development on the village site at the foot of Williams Lake, there is oral history indicating that the foot of Williams Lake and Missioner Creek had indeed been "the permanent Village sites, the fishing stations, & Burial Grounds, cultivated land & all the favorite resorts" of the Williams Lake Indian Band.[228] Elder Amy Sandy recalls that, historically, the First Nation lived

> around dairy road, dairy – that dairy farm area, around Columneetza area. [My mother] mentioned a place down at Boitanio Park, where Boitanio Mall and Boitanio Park is now. That was another place that the people used to be. And my Aunt Liz mentioned the village site down at the flats, down towards at the confluence of the Fraser River and Williams Creek, and they said how you could – how you could recognize these places was by markings on the trees, that the people actually marked the trees, or – you know, like maybe they were marked from – because they had to do with smoking their fish and smoking their meat.[229]

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[224] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 20, Leonard English).

[225] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 271, Roberta Gilbert).

[226] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 20, Leonard English).

[227] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 227, Agnes Anderson).

[228] James Douglas, James Bay, to I.W. Powell, Indian Commissioner, Victoria, BC, October 16, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, p. 141).

[229] ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 48–49, Amy Sandy).

ICC Exhibit 17, a chart categorizing landmarks according to lot location and explaining the evolution of place names in the area, indicates that Columneetza High School, Boitanio Mall, and Boitanio Park all refer to current development at the foot of Williams Lake.[230] Exhibit 17 also indicates that the Dairy Farm area is located at Missioner Creek – the same location as the Milk Ranch, Mission Ranch, Comer Ranch, and Pinchbeck Ranch.[231]

Elder Catherine McKenzie testified that the Williams Lake Indian Band used to pick berries and camp in the area at the foot of Williams Lake now marked by the Stampede Grounds.[232] Expanding on the traditional use of the Stampede Grounds, Elder Lynn Gilbert stated that the First Nation continued using these lands even into the mid-1900s:

> Back in the ’50s, before any of this development happened, there was thousands of camps. It was a beautiful, beautiful site. All around the rodeo grounds, there was camps. And at night, with all the campfires lit up, it was a beautiful, beautiful site. And it was kind of a gathering place for the natives to visit relatives they hadn’t seen for a long time, you know, do a little bit of socializing and watching some of the rodeo, even competing in it.
>
> And slowly, with all the development, the curling rink, the ball fields, the indoor arena, they needed money to construct all that and pay for the maintenance, I guess, so they started charging the native people. And with all this development, they left nothing for us – no place for us to camp. And especially the overpass there at Highway 20, that took the majority of the campgrounds. So we slowly got squeezed out.[233]

Elder Anderson spoke of how her father used the land at Scout Island, also located at the foot of Williams Lake, as a hay meadow “till they built that dam there. And it’s all flooded now.”[234]

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230 Letter from Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, ICC, with attached list and explanation of sites, March 31, 2004 (ICC Exhibit 17, pp. 3–4).

231 Letter from Clarine Ostrove, Counsel for the First Nation, to Candice Metallic, ICC, with attached list and explanation of sites, March 31, 2004 (ICC Exhibit 17, p. 4).

232 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 287–88, Catherine McKenzie).

233 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 112–13, Lynn Gilbert).

234 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 228, Agnes Anderson).

Elder Jean William testified at the community session that the Missioner Creek area, or Glendale as she referred to it, was used for hunting, fishing, and berry-picking.[235] She also commented that the first Chief William is buried at Missioner Creek and explained that "most of our people were buried at Glendale" after the epidemics.[236] While on the site tour of the Missioner Creek area, Elder Lynn Gilbert commented:

> Chief William is buried over in this area here. They're definitely pushing the boundaries, really pushing the boundaries. The site just over the hill here has an archaeological covenant placed on it, because there is a lot of burials over there and there's a lot of – like a lot of arch sites buried just on the other side there.
> ...
> They're definitely pushing the boundaries too. They keep infringing on – and I'm not too sure of anybody – if they came across a burial or an arch site of some type, whether or not they would even tell people nowadays, because it's getting really – it's quite a sensitive subject.[237]

Elder Kristy Palmantier testified that her mother told her that, in her parents' generation, the Williams Lake Indian Band was forced to move from its permanent village site at Missioner Creek to the St Joseph's Mission (Onward Ranch) because the land was being pre-empted by settlers.[238]

There is little documentation relating to this inquiry after 1885. It should be noted, however, that the province of British Columbia was still plagued by the Indian land question at the turn of the century. First Nations in British Columbia were still discontented with their reserves, or lack thereof. The Williams Lake Indian Band, for example, was still trying to have its village sites secured as reserves.

Confirmation of Reserves: McKenna-McBride Commission

During the fall of 1913, the Royal Commission on Indian Affairs for the Province of British Columbia (also known as the McKenna-McBride Commission) examined Indian reserves within the

235 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 150, Jean William).

236 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 151–52, Jean William).

237 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, p. 119, Lynn Gilbert).

238 ICC Transcript, June 18, 2003 (ICC Exhibit 5a, pp. 180–82, Kristy Palmantier).

province in order to achieve the "prompt and final settlement" of the Indian land question in the province.[239] The Commission had the authority to adjust reserve acreage: to cut off reserve lands that were not required (but only with the consent of the First Nation), to enlarge existing reserves where insufficient land had been set aside, or to allocate new reserves.[240] In July 1914, Chief Baptiste William spoke before the Commission, requesting that more land be allotted to the Band because of the rocky nature of the existing reserves.[241] The discussion between Chief William and the McKenna-McBride Commission centred on contemporary life on the reserves. Chief William attempted to set before the Commission the First Nation's historical grievances concerning the village sites that are now the subject of this inquiry. Chief William was told that these past grievances were already known by both governments because of previous conversations between Chief William, Commissioner McBride, and Sir Robert Borden.[242]

The minutes of decision of the McKenna-McBride Commission, dated February 28, 1916, confirmed

> that the several Indian Reserves of the Williams Lake Tribe or Band, Williams Lake Agency, described in the Official Schedule of Indian Reserves, 1913, at Pages 122 and 123 thereof, and numbered from One (1) to Fifteen (15), both inclusive, be confirmed as now fixed and determined and shewn on the Official Plans of Survey.[243]

Provincial Order in Council 911 of July 26, 1923, confirmed the findings of the McKenna-McBride Commission and attached a schedule of reserves, entitled "Confirmations of Reserves –

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239 R.W. Scott, Acting Minister of the Interior, to Privy Council, November 10, 1875, copy in British Columbia, *Papers Connected with the Indian Land Question, 1850–1875* (Victoria, 1875; reprint, Victoria: Queen's Printer, 1987), 163 (ICC Exhibit 16b, p. 189).

240 Memorandum of an Agreement arrived at between J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian Affairs in British Columbia, and the Honourable Sir Richard McBride, as Premier of the Province of British Columbia, September 24, 1912 (ICC Exhibit 1a, pp. 250–51).

241 Transcript of evidence at McKenna-McBride Commission, no file reference available (ICC Exhibit 1a, p. 270).

242 Transcript of evidence at McKenna-McBride Commission, no file reference available (ICC Exhibit 1a, p. 270).

243 Minutes of Decision, February 28, 1916, no file reference available (ICC Exhibit 1a, pp. 306–7).

Williams Lake Agency."[244] Of the 15 reserves listed for Williams Lake, the first six had a check mark beside their names and the others had an "X" beside them. Dominion Order in Council 1265 of July 19, 1924, confirmed the findings of the McKenna-McBride Commission and also attached a schedule of reserves. On that schedule, however, all 15 reserves listed for Williams Lake had a check mark beside their names.[245] By 1938, the Crown concluded that reserves 7–14, the graveyards, were located on private property and did not pursue recovery of these lands. As a result, these lands were not transferred in provincial Order in Council 1036, passed on July 29, 1938. Order in Council 1036 confirmed reserves 1–6 and 15 for the Williams Lake Indian Band.[246]

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[244] Order in Council 911, Province of British Columbia, July 26, 1923, DIAND, Indian Land Registry, Instrument no. 92925,(ICC Exhibit 1a, pp. 308–11).

[245] Order in Council 1265 (Canada), July 19, 1924, DIAND, Indian Land Registry, Instrument no. 12073 (ICC Exhibit 1a, pp. 312–18).

[246] Order in Council 1036, July 29, 1938, DIAND, Indian Land Registry, Instrument no. 8042 (ICC Exhibit 1a, pp. 324–32).

APPENDIX B

CHRONOLOGY

WILLIAMS LAKE INDIAN BAND: VILLAGE SITE INQUIRY

1 Planning conference — Vancouver, December 6, 2002

2 Community session — Williams Lake, BC, July 17–18, 2003

The Commission heard evidence from Elders Leonard English, Amy Sandy, Lynn Gilbert, Jean William, Kristy Palmantier, Chris Wycotte, Agnes Anderson, Irene Peters, Charlie Gilbert, Francis Gilbert, Roberta Gilbert, Virginia Gilbert, Catherine McKenzie, and Sally Wynja

3 Written legal submission

- Written Submissions on Behalf of the Williams Lake Indian Band, December 8, 2003
- Written Submissions on Behalf of the Government of Canada, February 9, 2004
- Reply on Behalf of the Williams Lake Indian Band, March 8, 2004
- Supplementary Submissions on Behalf of the Williams Lake Indian Band, September 15, 2004
- Supplementary Submissions on Behalf of the Government of Canada, September 24, 2004

4 Oral legal submissions — Vancouver, BC, October 7, 2004

5 Content of formal record

- the document collection, with annotated index (Exhibit 1)
- Exhibits 2–17 tendered during the inquiry
- transcripts of community session (1 volume) (Exhibit 5a)
- 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.