

# Landmark

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

Ernest Benedict, Mohawk Elder  
Akwasasne, Ontario  
June 1992

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

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## Oral History – ICC a Pioneer

**F**irst Nations across what is now Canada used many different ways to memorize and explain events, laws and other knowledge accurately and fully. Although First Nations now use written English, French and aboriginal languages to record important information, the spoken word retains more importance than the written word.

One of the Indian Claims Commission's (ICC) proudest achievements is the inclusion of a First Nation's oral history and tradition as part of the Commission's inquiry process. In fact, the Commission is a pioneer in this area. Since its inception in 1991, the Commission has accepted verbal testimony from the elders of a community as well as that community's oral tradition—found in songs, myths, stories, artwork and other symbolic creations—as important sources of evidence in specific land claims.

No surprise, then, that the Commission was delighted with the Supreme Court of Canada's 1997 Delgamuukw decision which placed oral history on an equal footing with written history. Up to that point, the courts had always relied on written history—land titles, documents, certificates, letters, contracts, historical records—and dismissed verbal accounts as hearsay. The Court noted that it would put an impossible burden of proof on aboriginal peoples if it refused to consider oral history since that was the way First Nations kept records. Oral history is now examined and weighed as rigorously as written history before being accepted as proof. Recently, Federal Court Justice, Douglas Campbell declared in an unequivocal ruling on Benoit v. Canada that oral promises may equate to treaty terms. The court gave weight to the oral evidence of the time of signing



Left: Canupawakpa First Nation Elder Eva McKay testifying during an inquiry with Commission Counsel Kathleen Lickers

Treaty 8 and found that the Crown was understood to have made promises to the aboriginal people of the day, which "constitutes an enforceable treaty right."

Commissioners hear directly from elders and other members of a First Nation during the community session, a distinct and integral part of the inquiry process. The community session, held on the First Nation's home ground, encourages a much greater level of participation by the First Nation and is conducted in a manner that is respectful of the community's language, culture and traditions. The testimony of the elders is recorded and transcribed and used to supplement historical documents. Commissioners and their legal counsel pose questions but no cross-examination of elders is allowed.

"This kind of setting serves to make elders feel more at ease," notes Chief Commissioner Phil Fontaine. "It is not an adversarial environment like a courtroom where questions are fired at the witnesses. It also helps all parties involved to see things from the First Nation's point of view and that can only promote greater understanding."



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# ICC Recommends Canada Accept Esketemc Claim for Negotiation

In December 2000, the Indian Claims Commission recommended that the federal government accept for negotiation a land claim by the Esketemc First Nation, (descendants of the Alkali Lake Band, located about 290 kilometres north-east of Vancouver). The First Nation maintains that certain lands in BC's Alkali Lake area were either wrongfully disallowed or improperly reduced in size by the federal and provincial governments in 1923. The claim was submitted to Canada in 1992, but was rejected, as were further submissions over the next seven years. The First Nation asked the ICC to inquire into the rejection in June 1999. Commissioners Daniel Bellegarde, Carole Corcoran and Sheila Purdy formed the panel that received written arguments and heard oral submissions from the Esketemc First Nation and the Government of Canada. The final report, however, reflects the opinions of only two of the commissioners, Commissioner Corcoran having passed away in February 2001.

"This claim and the issues it raises — in particular reserve creation and the fiduciary relationship between Canada and non-treaty First Nations of BC — is rooted in a period of tremendous uncertainty in relations among the BC government, federal government and First Nations," observed Commissioner Sheila Purdy.

## BACKGROUND

When BC became a colony in 1858, settlers could obtain land before surveys of reserves were completed, a policy which differed from that followed elsewhere in Canada. The danger to First Nations was obvious: because few Indian lands had been surveyed prior to the influx of land-hungry settlers, it became exceedingly difficult to protect aboriginal lands.

In 1875, the federal and provincial governments agreed to appoint Reserve Commissioners to set aside reserve lands for BC bands. Between 1881 and 1895, 14 reserves totalling 8,347.5 acres were created for the Alkali Lake Band. The policy for setting aside reserve lands in BC however, differed from the rest of Canada. In BC, once surrendered, reserve lands could be (and were) sold or leased for the benefit of the province and not the individual band. This provincial interest in surrendered and sold reserve land gave rise to mounting First Nation disapproval until, in 1908, the reserve creation process broke down.

## THE MCKENNA-MCBRIDE COMMISSION

In the fall of 1912, Prime Minister Robert Borden established the McKenna-McBride Commission to identify BC's reserve land requirements and resolve outstanding issues. By the summer of 1914, the Chief of the Alkali Lake Band had informed the Commissioners that their allotted reserve land was insufficient and additional ranch land was required. The Commission responded in early 1916 by confirming all 14 of the Band's reserves, then two days later rescinded the 1,200 acre IR 6. Two days after that it issued orders allowing six new reserves, including IR 15, 17 and 18, the land at the heart of the present claim. In all, the Royal Commission recommended a net increase to the Band's reserves of 4,685 acres.

The McKenna-McBride Commission's final report was released in May 1916. However, a new provincial government under Premier John Oliver convinced the federal government to review the Commission's work before accepting the report.

## THE DITCHBURN – CLARK REVIEW

Canada appointed W.E. Ditchburn and provincial representative J. W. Clark to conduct the review. The Esketemc First Nation had been willing to pin its hopes on the Royal Commission's findings but, unknown to the First Nation, Ditchburn and Clark dashed such hopes in their 1923 review by eliminating IR 15 and 17 and reducing IR 18 from 3,992 acres to 640 acres. Although the marginally useful 1,230 acres in IR 6 were restored to the Band by Ditchburn and Clark, a total of 4,952 acres recommended by the Royal Commission were disallowed. It was only decades later that members of the Esketemc First Nation learned that the two governments had agreed not to confirm the lands in question as reserves.

In 1926, after much lobbying by an organization referred to as the Allied Tribes, the federal government agreed to create a Special Joint Committee of the Senate and House of Commons to investigate, among other things, the Royal Commission's recommendations, Ditchburn and Clark's review and the Indians' dissatisfaction with the state of aboriginal title. BC declined to participate. The committee refused to reopen the reserve question, denied the existence of aboriginal title and would not support a judicial reference on the issue. The federal government drove the point home by enacting section 141 of the *Indian Act*, which made it an offence for Indians to raise funds for the prosecution of government actions against their interests. All that remained to be done to conclude BC's land title question was to survey the reserves and convey title from the province to the federal government. Yet for another ten years, new issues continued to thwart this process.

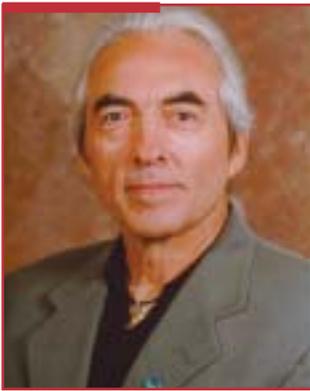


The question was finally settled in August 1938, following many discussions and much compromise. The ultimate effect of the McKenna-McBride Commission's report, as amended by Ditchburn and Clark, was to increase the Alkali Lake Band's reserve holdings by 1,116 acres. However, it is the additional 4,952 acres in IR 15, 17 and 18, disallowed by Ditchburn and Clark, that are at issue in the present claim.

### ICC FINDINGS

The ICC found that, when the government of Canada agreed with BC's proposal in the Ditchburn-Clark review to disallow IR 15, 17, and reduce IR 18 in 1923, it failed to adequately scrutinize the proposal from the Band's point of view, to inform the Band of the proposal or to provide it with information as to the alternatives. Although Canada knew that the proposal would not be acceptable to the Band, it neglected to seek its instructions as to how to respond. The Commission

concluded that the proposal was improvident and that the federal government breached its fiduciary obligation to the Band by approving it. "We base our conclusion on fiduciary principles," commented Commissioner Bellegarde. "We believe that Canada breached its obligations to the ancestors of the present-day Esketemc First Nation when, in the circumstances that followed the Report of the McKenna-McBride Commission, the government failed to act in the best interests of the First Nation and ensure that its needs for reserve lands were met."



Chief Commissioner Phil Fontaine

## Phil Fontaine Appointed Executive Co-Chair of the 2002 North American Indigenous Games

Chief Commissioner Phil Fontaine has been named Executive Co-Chair of the 2002 North American Indigenous Games (NAIG). The Games will be held in Winnipeg from July 25 to August 4, 2002, and are expected to draw up to 7,000 aboriginal athletes.

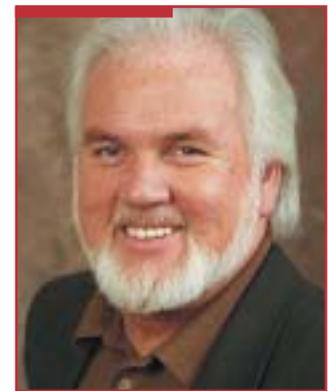
"I am very excited by this opportunity to serve as Executive Co-Chair for the 2002 North American Indigenous Games. This is a chance for aboriginal people from throughout North America to come together, engage in healthy competition and to share our unique cultures. I invite everyone to join with us in celebration," said Chief Commissioner Fontaine.

## Commissioner Augustine Appointed to Burnt Church Panel

In mid-January 2002, then-federal Fisheries Minister, Herb Dhaliwal, appointed Commissioner Roger Augustine to a two-member panel intended to break the impasse between aboriginal and non-aboriginal fishers in the Miramichi Bay area. The other panel member is New Brunswick jurist, Guy André Richard. The Community Relations Panel's report is expected in the early spring.

Violent clashes between aboriginal and non-aboriginal lobster fishers have occurred every year since the Supreme Court of Canada's 1999 ruling that aboriginal people have the right to earn a moderate livelihood from fishing, hunting and gathering year-round.

Commissioner Augustine admitted the panel's deadline is tight but expressed optimism: "People are tired of fighting and I think they're ready to talk."

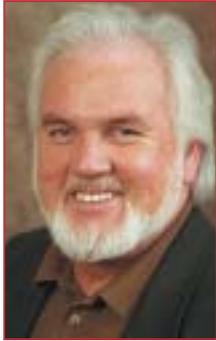


Commissioner Roger J. Augustine



# Ten Years: The Veterans

As we mark the 10<sup>th</sup> anniversary of the Commission, it is appropriate to acknowledge the dedication of those Commissioners and staff who have helped guide the ICC from the beginning. Here, then, are the people who have weathered the storms of challenges and growth and contributed to the achievements of the ICC during the past decade.



Commissioner Roger J. Augustine (1992)



Commissioner Daniel J. Bellegarde (1992)

Ginette Delorme: Administration (1991)  
Fred Isaac: Legal/Research (1992)  
Audrey Larivière: Liaison (1992)  
Bill Montgomery: Administration (1992)

Donna Gordon: Legal/Research (1992)  
Denis Lafrance: Administration (1991)  
Jean Mathieu: Administration (1992)  
Jo-Ann Smith: Legal/Research (1992)



Left to right: Ginette Delorme, Denis Lafrance, Jean Mathieu, Fred Isaac, Audrey Larivière  
(absent: Donna Gordon, Bill Montgomery and Jo-Ann Smith)

## RSVP

We have found that many questions from the public have common themes. In this feature of Landmark, we publish some of the questions we receive and answer them. To ask a question, you can e-mail us at [mgarrett@indianclaims.ca](mailto:mgarrett@indianclaims.ca) or call us at (613) 947-3939.

*“Where does the money come from to compensate First Nations for specific land claims settlements?”*

**Robin L. Crossno**

First of all, Canada negotiates land claims under two different policies: specific and comprehensive. A specific claim is a claim based on a legal obligation of Canada to a First Nation. This type of claim arises when treaty rights, the *Indian Act* or other formal agreements are breached, or when improper administration of lands or other assets described in the *Indian Act* or other formal agreements has occurred.

Compensation resulting from the negotiated settlement of a claim might include payment or provision of land, assets and other benefits to a First Nation. The money to compensate First Nations in specific claims settlements comes directly from the federal government, which obtains the funds from Canadian taxpayers. Once the federal government and the First Nation have successfully negotiated a claim, agreed upon compensation and ratified a settlement agreement, funds are transferred to the First Nation according to the terms of the settlement agreement.



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# New Staff

## **KRISTEN FAULKNER – RESEARCH ASSISTANT**

Kristen Faulkner joined the ICC research staff in January 2002. She recently moved to Ottawa from Vancouver and is enjoying the new challenges presented to her in Research. In 1998, she received her BA in international studies with a minor in history from Trinity Western University in Langley, BC. Since then, she has worked and volunteered for non-profit organizations, most recently focussing on global education and work with refugees. Ms Faulkner is looking forward to furthering her research skills and contributing to the Commission's work. She will be responsible for managing inquiry exhibits and supporting research projects.



Left to right: Cheryl King, Steven Price, Kristen Faulkner

## **CHERYL KING – LIAISON ASSISTANT**

Cheryl King is an Algonquian from the Timiskaming Band in Quebec. She has studied at the Université du Québec in Hull, majoring in education and has worked as an elementary school substitute teacher. Ms King joined the ICC as a summer student in May 2001 and was hired full-time as Liaison Assistant in December 2001. Her primary responsibility is to update and create First Nations community profiles. She assists Liaison with travel arrangements for Commissioners, management and staff, scheduling for the Commissioners and management and preparing kits for Commission meetings.

## **STEVEN PRICE – MEDIATION ASSISTANT**

Steven Price joined the ICC in December 2001, after working in Ottawa for the past six years as an administrator. Mr Price is a Haisla from the northwest coast of BC. After leaving his home in BC 11 years ago, he studied recreation facilities management as well as aboriginal studies at Algonquin College. He is involved in various competitive team sports, not only as an athlete, but also as executive committee member, technical director and coach. His role is to support the Mediation Unit in their visits to various First Nation communities by making travel arrangements, maintaining files and organizing meetings.

### **MOVING? NEW ADDRESS?**

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**mgarett@indianclaims.ca**  
or  
**PO Box 1750 Station B Ottawa  
Ontario K1P 1A2**



## CLAIMS IN INQUIRY

- Alexis First Nation (Alberta) – TransAlta Utilities right-of-way
- Beardy's & Okemasis First Nations (Saskatchewan)
- Canupawakpa Dakota First Nation (Manitoba) – Turtle Mountain surrender
- Chippewa Tri-Council (Ontario) – Coldwater Narrows Reserve
- Conseil de bande de Betsiamites (Quebec) – Betsiamites River bridge
- Conseil de bande de Betsiamites (Quebec) – Highway 138 and Betsiamites Reserve
- Cumberland House Cree Nation (Saskatchewan) – claim to Indian Reserve 100A
- James Smith Cree Nation (Saskatchewan) – Chakastaypasin land claim
- James Smith Cree Nation (Saskatchewan) – Peter Chapman Band and claim to Cumberland House Indian Reserve 100A
- James Smith Cree Nation (Saskatchewan) – treaty land entitlement
- Kluane First Nation (Yukon) – Kluane National Park Reserve and Kluane Games Sanctuary
- Mississaugas of the New Credit First Nation (Ontario) – Toronto Purchase

- Ocean Man First Nation (Saskatchewan) – treaty land entitlement
- Paul Indian Band (Alberta) – Kapisawin Townsite claim
- Peepeekisis First Nation (Saskatchewan) – File Hills Colony claim
- Roseau River Anishinabe First Nation (Manitoba) – 1903 surrender
- Sandy Bay Ojibway Nation (Manitoba) – treaty land entitlement
- Siksika Nation (Alberta) – 1909 surrender
- \*Stanjikoming First Nation (Ontario) – treaty land entitlement
- Sto:Lo Nation (British Columbia) – Douglas Reserve claim
- Wolf Lake First Nation (Quebec) – Reserve lands claim

## CLAIMS WITH REPORTS PENDING

- Chippewas of the Thames (Ontario) – Clench defalcation
- Fishing Lake First Nation (Saskatchewan) – 1907 surrender
- Mistawasis First Nation (Saskatchewan) – 1911, 1917, 1919 surrenders

## CLAIMS IN FACILITATION OR MEDIATION

- Blood Tribe/Kainaiwa (Alberta) – Akers surrender
- Chippewas of the Thames (Ontario) – Clench defalcation
- Cote First Nation (Saskatchewan) – pilot project - 1905 surrender
- Fort Pelly Agency (Saskatchewan) – Pelly Hay lands
- Fort William First Nation (Ontario) – pilot project
- Kahkewistahaw First Nation (Saskatchewan) – 1907 surrender
- Lac Seul First Nation (Ontario) – flooding
- Michipicoten First Nation (Ontario) – pilot project
- Moosomin First Nation (Saskatchewan) – 1909 surrender
- Qu'Appelle Valley Indian Development Authority (Saskatchewan) – flooding
- Standing Buffalo First Nation (Saskatchewan) – flooding
- Thunderchild First Nation (Saskatchewan) – 1908 surrender, loss of use
- Touchwood Agency (Saskatchewan) – 1920-1924 - mismanagement

\* placed in abeyance at the request of the First Nation

## GET THE FACTS ON CLAIMS



What are Indian land claims? What is a TLE claim? What is a surrender claim? How many times have you been asked these questions only to spend 20 minutes answering? Specific claims are based in history, law, and policy and are often complex. The Indian Claims Commission has a series of fact sheets called **The Facts on Claims** to explain the basics behind specific claims. They are available free of charge as a useful public education tool for any organization or First Nation with an interest in claims. To get the Facts on Claims, call (613) 947-3939 or e-mail <mgarrett@indianclaims.ca>.