

# **INDIAN CLAIMS COMMISSION**

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## **INQUIRY INTO THE CLAIM OF THE NAK'AZDLI FIRST NATION**

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### **PANEL**

**Commissioner Carole T. Corcoran  
Commissioner Aurélien Gill**

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**March 1996**

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## PART I

### INTRODUCTION

On September 25, 1995, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim of the Nak'azdli First Nation.<sup>1</sup> The claim concerns the alienation of 300 acres of land set apart as Aht-Len-Jees Indian Reserve (IR) 5 for the Nak'azdli First Nation. The reserve had been confirmed in the final report of the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission) in 1916. It was “disallowed” as a result of the Ditchburn-Clark Commission, appointed by both the federal government and the provincial government of British Columbia to review the McKenna-McBride final report, in 1923. The First Nation maintains that the disallowance was unlawful and therefore forms the proper basis of a specific claim.

In their report, Commissioners Ditchburn and Clark noted that the First Nation had requested that Aht-Len-Jees IR 5 (comprising 300 acres) be exchanged for Lot 4724 (comprising 640 acres) and recommended that this exchange be implemented. Aht-Len-Jees IR 5 was thereby disallowed as an Indian reserve by Order in Council, and Lot 4724 became a new reserve for the Band under the title Uzta (or Nahounli Creek) IR 7A by Order in Council.<sup>2</sup>

On June 15, 1993, the Nak'azdli First Nation forwarded its Statement of Claim to the Department of Indian Affairs and Northern Development (DIAND) pursuant to the government's Specific Claims Policy of 1982, alleging that Canada had failed to protect its interest in Aht-Len-Jees IR 5. The Ditchburn-Clark Commission, the Band claimed, had acted beyond its legislated mandate, found in the *British Columbia Land Settlement Act*, in its purported disallowance of Aht-Len-Jees IR 5. Consequently, the First Nation alleged, “the federal government breached its lawful obligation to the Nak'azdli Band by failing to protect the Band's interest in IR 5.”<sup>3</sup> Indian Affairs rejected the

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<sup>1</sup> Daniel Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Nak'azdli First Nation, and to the Ministers of Justice and Indian Affairs and Northern Development, September 25, 1995 (ICC file 2109-20-1). Earlier variations of the Nak'azdli First Nation's name are the Necoslie or Necausley Indian Band and the Stuart Lake Tribe.

<sup>2</sup> British Columbia Order in Council 911/1923, July 26, 1923 (ICC Documents, pp. 233-43); Canada Order in Council 1265/1925 (ICC Documents, pp. 244-50).

<sup>3</sup> Eric Woodhouse, Counsel for the Band, Claim Submission, June 1993 (ICC Documents, pp. 306-23).

claim on the basis that it disclosed no outstanding lawful obligation of the federal government.<sup>4</sup> By letter of May 17, 1995, Indian Affairs, through its representative Dr. John Hall, stated that “Canada’s actions were done in accordance with existing legislation and were therefore lawful.”<sup>5</sup> On June 20, 1995, counsel for the Nak'azdli First Nation requested that the Indian Claims Commission conduct an inquiry into the rejection of its claim.<sup>6</sup>

The task before this Commission was to assess the Nak'azdli First Nation’s specific claim, having regard to the Specific Claims Policy, and to determine the validity of its claim. The sole issue, agreed by the parties, was whether Aht-Len-Jees IR 5 ceased to be a reserve as a result of its disallowance by the Ditchburn-Clark Commission.

At the request of a First Nation, the Indian Claims Commission can conduct an inquiry into a rejected specific claim pursuant to the *Inquiries Act*. The Commission’s mandate to conduct inquiries states, in part:

. . . that our Commissioners on the basis of Canada’s Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . . <sup>7</sup>

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<sup>4</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Robert Antoine, May 17, 1995 (ICC file 2109-20-1). A claim is valid under the Specific Claims Policy, set out in Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), if it discloses an outstanding lawful obligation on the part of the Government of Canada.

<sup>5</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Robert Antoine, May 17, 1995 (ICC file 2109-20-1).

<sup>6</sup> Eric Woodhouse, Counsel for the Band, to Indian Claims Commission Chair, June 20, 1995 (ICC file 2109-20-1).

<sup>7</sup> 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.

Pursuant to this mandate, the Indian Claims Commission has developed a unique inquiry process. As part of this process, the “community session” provides a forum that enables the First Nation to present historical evidence, including that which may not be admissible in a court of law, in its oral tradition directly to the panel of Commissioners conducting the inquiry. The community session therefore permits the First Nation to present its rendering of events, which is often missing from the written documentation of a claim.

The Commission inquiry process and, in particular, the oral statements given at the community session caused Canada to reconsider the rejection of this claim and, ultimately, to offer to accept it for negotiation – an offer that the First Nation has accepted. Canada’s willingness to negotiate was “as a result of additional information that has come to our [Canada’s] attention through the Indian Specific Claims Commission inquiry, and in particular, the oral evidence from three band elders at the community session on November 21, 1995.”<sup>8</sup>

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<sup>8</sup> John Hall, Specific Claims, Office of Native Claims, to Chief Harold Prince, January 16, 1996 (ICC file 2109-20-1), included at Appendix C.

## PART II

### A BRIEF HISTORY OF THE CLAIM

#### BACKGROUND

On September 30, 1892, Indian Reserve Commissioner Peter O'Reilly allotted seven reserves around Stuart Lake in central British Columbia to the 136-member Nak'azdli Indian Band.<sup>9</sup> Together, these reserves represented 2830 acres, or 20.8 acres per member. Most of the land was of dubious value. Generally, the reserves were “worthless, small portions only being suitable for cultivation, swamp from which hay can be obtained or fishing stations. . . .”<sup>10</sup>

Aht-Len-Jees IR 5 was no exception; it was a source of hay and some timber, but was not suitable for cultivation. Commissioner O'Reilly even prescribed improvements for Aht-Len-Jees IR 5 when he informed Indian Affairs about the reserves he had set out for the Nak'azdli Band:

No. 5. Ahtlenjees, a reserve about six miles from Fort St. James, on the trail to Stony Creek. It contains 270 acres, about one half of which is swamp. A well-constructed ditch one hundred yards in length would render the whole of this swamp available for a meadow. About ten tons of hay are produced here annually. Good timber for fencing is plentiful on this reserve.<sup>11</sup>

O'Reilly submitted his Minutes of Decision and sketches for the seven Necoslie reserves to F.G. Vernon, Chief Commissioner of Lands and Works for British Columbia, in March 1893 for approval.<sup>12</sup> Mr. Vernon granted approval on April 14, 1893.<sup>13</sup> A year later, in April 1894, Mr.

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<sup>9</sup> Peter O'Reilly, Indian Reserve Commissioner, Minutes of Decision, September 30, 1892 (ICC Documents, pp. 56-59).

<sup>10</sup> Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vemon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, p. 65).

<sup>11</sup> Peter O'Reilly to Deputy Superintendent General, Indian Affairs, March 25, 1893 (ICC Documents, p. 62).

<sup>12</sup> Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vemon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, pp. 64-70).

<sup>13</sup> Peter O'Reilly, Indian Reserve Commissioner, to Forbes George Vemon, Chief Commissioner of Lands and Works, March 28, 1893 (ICC Documents, pp. 64-70), marginalia: “Approved April 14th 1893, F.G. Vernon, C.C.L.W.”; O'Reilly to Deputy Superintendent General of Indian Affairs, April 17, 1893 (ICC Documents, p. 71).

O'Reilly directed F.A. Devereux, the land surveyor employed by the Indian Reserve Commission, to survey the seven reserves.<sup>14</sup> No documentation has been found to show what transpired between 1894 and 1898. In 1898, however, the surveyor produced "Plan No. 2 of the Necoslie Indian Reserves," showing Aht-Len-Jees IR 5 comprising 300 acres. C.B. Semlin, British Columbia's Chief Commissioner of Lands and Works, and A.W. Vowell, the Indian Reserve Commissioner and Indian Superintendent for British Columbia, approved the plan on January 11, 1899.<sup>15</sup>

### **BAND APPLIES FOR ADDITIONAL LAND, 1913-15**

On September 24, 1912, the federal government and the government of British Columbia arrived at an agreement towards the "final adjustment of all matters relating to Indian Affairs in the province of British Columbia."<sup>16</sup> This agreement established the Royal Commission on Indian Affairs for the Province of British Columbia, commonly referred to as the McKenna-McBride Commission. It gave Canada's Special Commissioner, J.A.J. McKenna, and British Columbia Premier, Richard McBride, the power to determine if sufficient land had been set aside for Indians. If the Commissioners found that insufficient land had been allotted, they had the authority to "fix the quantity that ought to be added"<sup>17</sup> (that is, they had the power to adjust the acreage of Indian reserves in British Columbia).

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<sup>14</sup> Peter O'Reilly, Indian Reserve Commissioner, to F.A. Devereux, Surveyor of Indian Reserves, Victoria, April 20, 1894 (ICC Documents, pp. 72-73).

<sup>15</sup> F.A. Devereux, BCLS, 1898, "Plan No. 2 of the Necoslie Indian Reserves, BC 105," approved January 11, 1899 (ICC Documents, pp. 74-77). The "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902," published in Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, shows seven Necoslie reserves allotted in 1892, surveyed in 1898, and confirmed in 1899. It lists them as: Necoslie IR 1 (734 acres); Tat-sel-a-was IR 2 (136 acres); Sow-chea IR 3 (225 acres); Uzta IR 4 (960 acres); Ahtlenjees IR 5 (300 acres); Chesday IR 6 (360 acres); and Kwot-ket-quo IR 7 (160 acres).

<sup>16</sup> McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 80-81).

<sup>17</sup> McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, p. 80).

Canada approved the agreement by Order in Council 3277 on November 27, 1912, and British Columbia likewise approved by Order in Council 1341 on December 18, 1912.<sup>18</sup>

The establishment of the McKenna-McBride Commission gave bands the opportunity to apply for additional lands.<sup>19</sup> In June 1913 the McKenna-McBride Commission visited Fort St. James, where the Commissioners heard from Chief Jimmy of the Nak'azdli Band regarding the use of reserve lands and the need for additional reserves.

In his application for additional land, the Chief testified about the conditions at the Necoslie reserves, noting that the circumstances of the Band were poor: members depended on hunting and, with difficulty, they were attempting fishing and agriculture; they lacked paid employment, medical attention, and schooling for their children; and they were in need of food for themselves and hay for their horses and cattle.<sup>20</sup> There was no reference, in his testimony, to reducing the size of Aht-Len-Jees IR 5 or alienating it from the Band.

The Nak'azdli Band applied for a 40 acre meadow adjacent to Uzta I.R. No. 4.

The McKenna-McBride Commission named this "Application No. 131":

Taking up the land applications of the Band; the first was for one mile square, the desired location being Lot 4724, [which adjoined the northeast corner of Uzta No. 4] covered by application to purchase No. 12134.

[Indian] AGENT McALLAN [Stuart Lake Agency]: Application was made for 40 acres in the northwest corner of Lot 4724 and Lot 4723. These lots appear to be in good standing.

MR. COMMISSIONER SHAW: The Commissioners are sorry but they cannot get that place for the Indians, it having already been taken up by a white man.

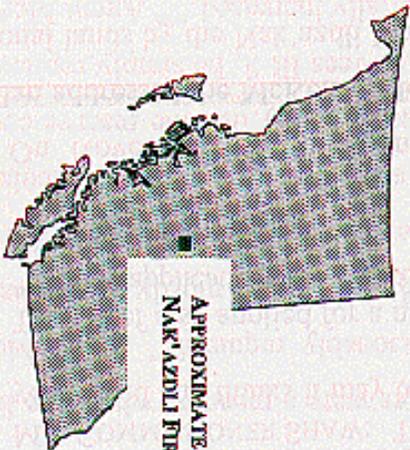
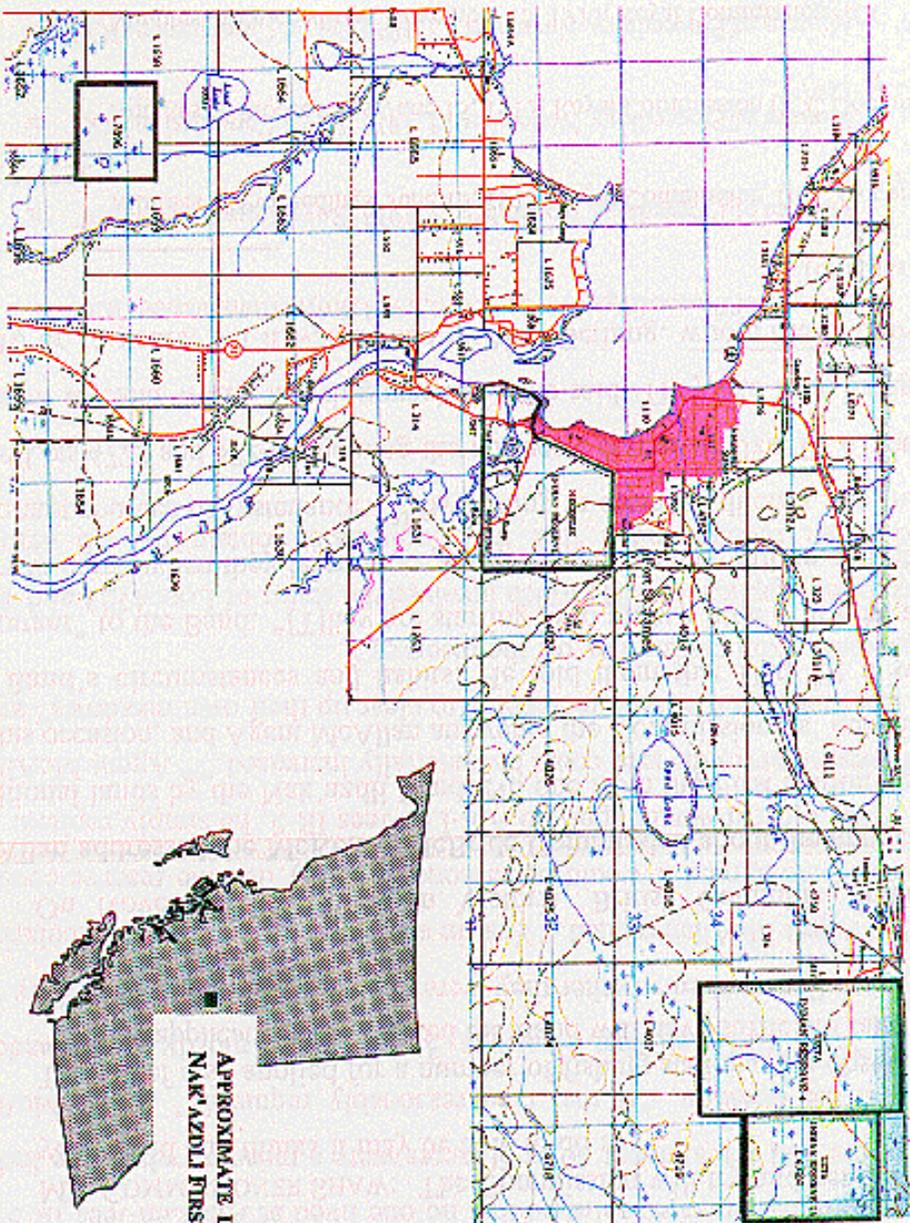
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<sup>18</sup> Canada, Order in Council 3277, November 27, 1912 (ICC Documents, pp. 88-89); British Columbia, Order in Council 1341, December 18, 1912 (ICC Documents, pp. 90-91).

<sup>19</sup> McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 80-81).

<sup>20</sup> Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, pp. 106-11).

# CLAIM AREA



APPROXIMATE LOCATION  
NAK'AZDILI FIRST NATION

Source: Department of Energy, Mines  
and Resources - Surveys and Mapping  
Branch - Fort St. James 93K/8 Edition 2

The second application was for a mile square, to the west of [Uzta] Reserve No. 4 ; that was good land and the trail ran through the place. The location would be described as Lots 4749 and 4324, apparently open and available. The application was for 240 acres in all.

MR. COMMISSIONER SHAW: The Commission will try and get that for your Band and thinks it may be able to do so.<sup>21</sup>

The Chief also applied for a number of fishing stations. He observed: “If these applications are granted the Band will have sufficient land for its requirements.”<sup>22</sup>

On November 15, 1915, in Victoria, British Columbia, Indian Agent McAllan addressed the McKenna-McBride Commission about the applications for additional lands by the Nak'azdli Band. No one from the First Nation was present on this occasion, and Agent McAllan answered the Commissioners' questions about the Band's circumstances and habits. He told them that Uzta IR 4 was “very important” to the Band. “[T]hey are starting in to plow a little of it now and in the years to come when they learn more about agriculture that will be one of the most important sources of sustenance.”<sup>23</sup> By putting in drainage ditches, the Indians had made Lots 4723 and 4724, adjoining the northeast corner of Uzta IR 4, into “a nice meadow to clear with a mowing machine,” he said. They had been using the land for 10 or 15 years, but it was owned by Neil Gething, whom the Indians claimed “had stated that he was ignorant of the fact of Indian improvements . . . when he took it up.” Agent McAllan claimed he had no other knowledge of this situation, and the Commissioners then turned their attention to Aht-Len-Jees IR 5.<sup>24</sup>

The Commissioners established that no one lived at Aht-Len-Jees IR 5 and that, out of the 300 acres, about 40 or 50 acres were a meadow where the Indians cut hay. To the question, “Is that land reasonably required?” Agent McAllan answered: “Yes.”<sup>25</sup> Given that Reserves 3 to 7 were

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<sup>21</sup> Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, pp. 114-15, 123).

<sup>22</sup> Minutes of Proceedings, June 15, 1913, Royal Commission (ICC Documents, p. 127).

<sup>23</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 145).

<sup>24</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 146).

<sup>25</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 146).

mostly hay meadows, Commissioner Shaw asked whether they were “capable of being extended by very little work.” Agent McAllan replied: “Yes, in some cases they are – particularly on No. 4, Uzta.” He agreed it would be reasonable to say that the reserve could be doubled. Asked if that would apply to Aht-Len-Jees IR 5, he simply replied: “On several of these reserves the area could be materially increased.”<sup>26</sup> Agent McAllan’s plan was to encourage the Band members “to clear up their own meadows” and to discourage them from cutting hay off the reserves.<sup>27</sup>

Regarding Application 131, which involved the status of Lots 4723 and 4724, Agent McAllan recommended that the Commission obtain the 40 acres of “Gething’s property” for the Band. Only one Indian family, by the name of Sagilan, was making use of it.<sup>28</sup>

#### **APPLICATION 131 (LOTS 4723 AND 4724) DENIED, 1916**

In its final report in 1916, the McKenna-McBride Commission denied Application 131, “originally for 40 acres each in N.W. corners of Lots 4724 and 4723,” and identified by the Royal Commission as for “[o]ne mile square, being Lot 4724, R. 5, Coast District.” The land applied for had been “[a]lienated by an Application to Purchase in good standing.”<sup>29</sup> The Deputy Minister of British Columbia’s Department of Lands, R.A. Renwick, confirmed that Lots 4723 and 4724 were both covered by applications to purchase.<sup>30</sup>

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<sup>26</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 149).

<sup>27</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, p. 149).

<sup>28</sup> Minutes of Proceedings, November 15, 1913, Royal Commission (ICC Documents, pp. 150-51).

<sup>29</sup> “Additional Lands Applications,” in *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria, 1916) (ICC Documents, p. 170).

<sup>30</sup> R.A. Renwick, Deputy Minister of Lands, British Columbia, to C.H. Gibbons, Secretary of the Royal Commission, April 25, 1916 (ICC Documents, pp. 175-78). The British Columbia Lands Department possessed a typeset schedule that showed Application 131 as being “Alienated by A.P. in good standing” together with “Allowed: Twenty (20) acres, more or less, in N.E. [not N.W.] quarter (1/4) of Lot No. 4724 and in N.W. quarter (1/4) of Lot No. 4723.” In the margin, beside this entry, are stamped the words “entered on,” with an illegible date.

The Royal Commission report confirmed all seven pre-existing reserves at the acreage listed in the official “Schedule of Indian Reserves” for 1913.<sup>31</sup> Consequently, on January 22, 1916, Aht-Len-Jees IR 5 was confirmed at 300 acres. Thus, the McKenna-McBride Commission neither cut off acreage from, nor added acreage to, Aht-Len-Jees IR 5.

### ROYAL COMMISSION’S WORK QUESTIONED, 1920

The governments of British Columbia and Canada had to take legislative steps to implement the recommendations of the 1916 final report of the McKenna-McBride Commission, and in 1919 British Columbia passed the *Indian Affairs Settlement Act*. This legislation empowered the Lieutenant Governor in Council for the purpose of “giving effect to the report of the said Commission, either in whole or in part . . . [and to] carry on such further negotiations . . . as may be found necessary for a full and final adjustment of the differences between . . . the Governments.”<sup>32</sup> Canada likewise passed the *British Columbia Land Settlement Act* in 1920, adopting almost identical language with the following exception: the Governor in Council was empowered to “order such reductions or cut-offs [from reserves] to be effected without surrenders.”<sup>33</sup>

British Columbia’s Minister of Lands, T.D. Patullo, was convinced that there were “innumerable errors” in the Royal Commission’s report and that “a large number of additions . . . were selected for the strategic or controlling location and not that they will actually be required by the Indians for settlement purposes.” In 1920, he wrote to the Minister of Indian Affairs, Arthur Meighen, suggesting a thorough review of the entire report.<sup>34</sup>

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<sup>31</sup> These were the reserves allotted by O’Reilly and surveyed by Devereaux. Peter O’Reilly, Indian Reserve Commissioner, to F.A. Devereux, Surveyor of Indian Reserves, Victoria, April 20, 1894 (ICC Documents, pp. 72-73). The acreage confirmed in 1913 was the same acreage listed in 1902. Schedule of Indian Reserves in the Dominion, 1913 (ICC Documents, pp. 34-40).

<sup>32</sup> British Columbia, Legislative Assembly, *Sessional Papers*, “Indian Affairs Settlement Act,” 1919 (ICC Documents, pp. 182-83).

<sup>33</sup> Canada, Parliament, *Sessional Papers*, “British Columbia Land Settlement Act,” 1920 (ICC Documents, 194-95).

<sup>34</sup> T.D. Patullo, Minister of Lands, British Columbia, to Arthur Meighen, Superintendent General of Indian Affairs, April 21, 1920 (ICC Documents, pp. 191-92).

Mr. Patullo had been influenced in his position by J.W. Clark, then Superintendent of Soldier Settlement in British Columbia. In an April 1, 1920, memorandum to Mr. Patullo, he had said that the Royal Commission's report failed to provide a basis for "the final adjustment of all matters relating to Indian Affairs in the Province of British Columbia." Mr. Clark therefore proposed the creation of a "standing joint Commission for British Columbia with expropriation and other necessary powers on behalf of the Indians and for the progress of the white settlers. . . ."<sup>35</sup>

Mr. Clark feared that widely scattered additions to reserve land would make it harder to "uplift" the Indians. Moreover, he opposed any additions to reserves that would inhibit the progress of white settlers:

Had the Royal Commission followed the policy of Sir James Douglas in 1859 . . . which called for treatment of the Indians with justice and forbearance, rigidly protecting their civil and agrarian rights, locating them in native villages for their protection and civilization, and exercising due care to avoid checking, at a future day, the progress of the white Colonists, we should not now be witnessing the present unsatisfactory state of affairs. In many cases the additions recommended are so widely scattered that it would be impossible to extend educational facilities, etc. to the occupants of such reserves, and again the additions recommended are often situate at strategic points in the topography of the country, which, if approved, will establish a decided check to the progress of white settlers in the localities concerned.<sup>36</sup>

For ideological reasons, Mr. Clark favoured centralization by expropriating lands adjoining reserves:

Education, with facilities for agricultural and later technical training in industrial occupations, is well known to be the only equitable and honourable solution of the Indian Question in this Province, and to make such solution feasible procedure must necessarily be towards concentration rather than segregation.<sup>37</sup>

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<sup>35</sup> J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 186).

<sup>36</sup> J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 186).

<sup>37</sup> J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, April 1, 1920 (ICC Documents, p. 187).

On October 20, 1920, W.E. Ditchburn, the Chief Inspector of Indian Agencies, notified Mr. Patullo that he had been appointed by the Superintendent General of Indian Affairs to work alongside a provincial representative to review the recommendations made by the McKenna-McBride Commission.<sup>38</sup> Five days later, Mr. Clark informed Mr. Ditchburn of his instructions from Mr. Patulla to commence a review of the report of the McKenna-McBride Commission and to act as the provincial representative for the Department of Lands in that review.<sup>39</sup>

W.E. Ditchburn and J.W. Clark were appointed as “representatives of the two governments . . . for the purpose of adjusting, readjusting, confirming and generally reviewing the report and recommendations of the Royal Commission.”<sup>40</sup> This joint commission is commonly called the “Ditchburn-Clark Commission.”

### **PROPOSED SURRENDER OF AHT-LEN-JEES IR 5, 1923**

For the Stuart Lake Agency, which encompassed Aht-Len-Jees IR 5, Mr. Clark recommended a number of modifications and adjustments to the cut-offs and additions recommended earlier by the McKenna-McBride Commission. Among the situations that demanded special attention was the Nak'azdli Band's Application 131. For this request, Mr. Clark suggested that the Band *surrender* Aht-Len-Jees IR 5 and that Lot 4724, adjacent to Uzta IR 4, become reserve land:

. . . it having been shown that application No. 131, though disallowed by the Royal Commission has been used by the Indians for more than 40 years and was staked for them by Judge C. O'Reilly over 30 years ago, and whereas No. 5 [Ahtlenjees] Reserve confirmed by the Royal Commission is situated about 9 miles from the home Reserve and on this account is of very little use to the Indians, it is therefore requested that Lot 4724, which is now available, be allowed and confirmed as a Reserve, in return for which the Indians will surrender No. 5 to the Provincial Government. I would recommend that the request be granted following the surrender

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<sup>38</sup> W.E. Ditchburn, Inspector of Indian Agencies, to T.D. Patullo, Minister of Lands, October 20, 1920 (ICC Documents, p. 196).

<sup>39</sup> J.W. Clark, Superintendent of Soldier Settlement, to W.E. Ditchburn, Inspector of Indian Agencies, October 25, 1920 (ICC Documents, p. 197).

<sup>40</sup> Mr. Clark was appointed pursuant to the province's *Indian Affairs Settlement Act, 1919*, and Mr. Ditchburn was appointed pursuant to the *British Columbia Indian Land Settlement Act, 1920*.

of No. 5 Reserve, and that Lot 4724 be allowed and confirmed as a Reserve accordingly.<sup>41</sup>

Mr. Clark's 1923 "Review of Report of Royal Commission . . ." recommended that the 640-acre Lot 4724 be allowed and confirmed as a reserve in exchange for the surrender of IR 5 which he felt was an impediment to development:

Application No. 131 for Lot 4724 Stuart Lake Band, 640 acres which is now available to be allowed and confirmed as a Reserve in return for the surrender of No. 5 Reserve which was confirmed by the Royal Commission but is of little use to the Indians, being 9 miles from their home reserve, but on the other hand will interfere considerably with the development of Block A, Stuart River District.<sup>42</sup>

#### **EXCHANGE OF AHT-LEN-JEES IR 5 FOR LOT 4724, 1923**

Commissioner Ditchburn did not oppose Commissioner Clark's recommendation,<sup>43</sup> but suggested an *exchange* instead of a *surrender* of Aht-Len-Jees IR 5. In his report to D.C. Scott, Deputy Superintendent General of Indian Affairs, Commissioner Ditchburn proposed that the 300-acre Aht-Len-Jees IR 5 be exchanged for the addition of 640 acres in Lot 4724 as reserve land:

Exchange: The Necoslie Band, under App. No. 131, asked the Commission for Lot 4724, Range 5, Coast District, containing 640 acres, but as it was covered by an application to purchase the request could not be complied with. It is now available and has been recommended to be constituted a reserve for this Band in exchange for Ahtlenjees Reserve No. 5 confirmed. The Indians have asked that this exchange should be made. The reserve (new) will adjoin Old Reserve No. 4 while Old Reserve No. 5 is over nine miles distant. I have given my approval for this exchange.<sup>44</sup>

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<sup>41</sup> J.W. Clark, Superintendent of Soldier Settlement, to T.D. Patullo, Minister of Lands, "Progress Report of the Indian Reserve Question as a January 1st 1923," January 16, 1923 (ICC Documents, p. 204).

<sup>42</sup> J.W. Clark, Superintendent, Immigration Branch, to T.D. Patullo, Minister of Lands, March 1, 1923 (ICC Documents, p. 217).

<sup>43</sup> W.E. Ditchburn, Indian Commissioner, to G.R. Naden, Deputy Minister, Lands, March 26, 1923 (ICC Documents, pp. 221-22).

<sup>44</sup> W.E. Ditchburn, Indian Commissioner, to D.C. Scott, Deputy Superintendent General of Indian Affairs, March 27, 1923 (ICC Documents, p. 231).

This passage is questionable given that the Band's original request – Application 131 – was for additional land, not an exchange of land. In any event, Canada did not take a formal surrender of Aht-Len-Jees IR 5.

By British Columbia Order in Council 911, July 26, 1923, and Canada Order in Council 1265, July 19, 1924, the Ditchburn-Clark amendments to the 1916 report of the McKenna-McBride Commission were “approved and confirmed as constituting full and final settlement of all differences in respect thereto between the Governments of the Dominion and the Province.”<sup>45</sup> Indian Affairs followed through in April 1925 by giving specific instructions for surveying the Stuart Lake Agency reserves in accordance with these amendments.<sup>46</sup>

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<sup>45</sup> British Columbia Order in Council 911, July 26, 1923 (ICC Documents, pp. 233-35); Canada Order in Council 1265, July 21, 1924 (ICC Documents, pp. 244-47).

<sup>46</sup> J.D. McLean, Assistant Deputy Superintendent General of Indian Affairs, to V. Schjelderup, British Columbia Land Surveys, April 21, 1925 (ICC Documents, pp. 253-55).

**PART III**  
THE ISSUE

The Nak'azdli First Nation requested that the ICC inquire into the rejection of its claim on June 20, 1995. The issue before the Commission was framed as follows:

Did Aht-Len-Jees I.R. No. 5 cease to be constituted as a “reserve” by virtue of its “disallowance” by Commissioners Ditchburn and Clark, acting under the ostensible authority of the *British Columbia Land Settlement Act*, S.C., 1920, 10-11 Geo. 5, c. 51?

## PART IV

### THE INQUIRY

A planning conference was held on September 13, 1995, in Vancouver with representatives of the Nak'azdli Band, Canada, and the ICC. The planning conference was devised by the Commission to involve the parties to a claim where practicable in planning the inquiry, and also as a means of settling claims whenever possible without the need for an inquiry. It is an informal meeting convened by Commission staff shortly after the inquiry begins. Representatives of the parties, usually with their legal counsel, meet with the Legal and Mediation Advisor for the Commission to review and discuss the claim, identify the issues raised by the claim, and plan the inquiry on a cooperative basis.

Following this first meeting, Commission staff visited the Nak'azdli First Nation on October 19, 1995, to prepare for the more formal community session, which was held on November 21, 1995. As mentioned earlier, the community session provides a unique opportunity for members of the First Nation to speak directly to the Commissioners conducting the inquiry, based on their oral tradition, regarding their rendering of events. The session is always held at the First Nation, subject to available facilities, and is attended by representatives of Canada, the First Nation, and the Commission. Out of respect for the elders, and in recognition of the cultural values of First Nations, elders and community members who address the Commissioners are not required to testify under oath, nor is cross-examination permitted.

The day's proceedings are recorded by a court reporter and result in a transcript for use by the Commission and the parties in proceeding with the inquiry. The transcript serves a secondary purpose in that it provides the First Nation with a written record of its history as it was communicated to the Commission.

At the Nak'azdli Community Session the Commissioners heard from elders Betsy Leon, Nicholas Prince, and Francesca Antoine. The elders explained that they were not aware of an "exchange" of Aht-Len-Jees IR 5. Their account seems to contradict the words of Commissioners Ditchburn and Clark that they were acting to exchange Aht-len-Jees, since "[t]he Indians have asked that this exchange should be made," as the exchange between Commission Counsel and Elder Betsy Leon attests.

### **TESTIMONY OF ELDER BETSY LEON**

Mr. Christoff: . . . Did you ever hear any stories or any information about IR 7A being exchanged or being swapped for Ahtlenjees?

Betsy Leon: Well, you know, what I could say is, like I said, the Indians didn't understand very much, and then this Indian Nation, DIA or whatever you call them there, they explain, maybe they use big words to them and they don't understand it. They didn't even know what's going on. This land used to be so precious for them, you know, they use it very much all the time, and they didn't know what happened, what's going on, until later in the years. And our Elders, now they all died. We're the only ones that lived.

Mr. Christoff: Okay. But you've never heard about any exchange?

Betsy Leon: No. No.<sup>47</sup>

### **TESTIMONY OF ELDER NICHOLAS PRINCE**

Elder Nicholas Prince, who was Chief at Nak'azdli in 1967, also stated that not much was or is known about the exchange of reserves. He did, however, confirm the use of Aht-Len-Jees IR 5 as a hay meadow:

Mr. Christoff: . . . [W]hat use did the band put to Ahtlenjees?

Nicholas Prince: . . . [T]here was a big garden growing in there . . . (continuing) . . . it was used for hay and vegetables . . .<sup>48</sup>

Elder Prince reiterated that the exchange of reserves went largely unknown by anyone at Nak'azdli. When asked by Commission counsel if he knew "why Nak'azdli stopped using Ahtlenjees," he replied:

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<sup>47</sup> Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 16-17.

<sup>48</sup> Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 21-22.

What happened with that was when that was taken away under the McKenna/McBride Commission, one reserve up in Nehoonli, #7, or one of them, anyway, was given to us when that was taken away. And there was no reason why it was exchanged except that it was good agricultural land.”<sup>49</sup>

...

Mr. Christoff: Is there any information which you have that you gained from either your elders or other people in the community which may – that there was any information about an exchange for IR 7A and IR 5 within the community; did anybody ever talk about anything like that?

Nicholas Prince: I don’t know. I never hardly ever talk about it.<sup>50</sup>

Later Mr. Prince continued:

[I]n respect of why reserves were cut off from our reserve lands, we do not know why they were taken back . . . the cutoff of these reserves somewhat made it difficult for our people to continue our traditional practices, because these lands were very important to our people . . .”<sup>51</sup>

Canada reconsidered its position in light of the statements of these elders, and has obviously concluded that the request for an exchange of land Commissioners Ditchburn and Clark relied upon was false.

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<sup>49</sup> Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, pp. 22-23.

<sup>50</sup> Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, p. 27.

<sup>51</sup> Indian Claims Commission, Nak'azdli First Nation Community Session, Transcript of Proceedings, November 21, 1995, p. 33.

**PART V**  
**CONCLUSION**

The statements of these elders motivated Canada to reverse its original position and to offer to negotiate the Nak'azdli claim if the Nak'azdli First Nation would agree to put the Indian Claims Commission process in abeyance.<sup>52</sup> The Nak'azdli Band Council agreed to accept Indian Affairs' offer of negotiations within the fast-track framework.<sup>53</sup>

Canada has acknowledged that its offer to negotiate the Nak'azdli claim resulted from statements made by the elders at the community session. This opportunity for community members to speak directly to the Commissioners and to representatives of Canada, is unique to the Indian Claims Commission inquiry process. The success of this claim reinforces the need to continue with the distinctive information-gathering stage that the community session has to offer. It has proven to be a means of supplementing an existing historical written record with the oral tradition of First Nation communities, and, in this instance, has resulted in an accepted claim.

**FOR THE INDIAN CLAIMS COMMISSION**

**Carole T. Corcoran**  
**Commissioner**

**Aurélien Gill**  
**Commissioner**

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<sup>52</sup> John Hall, Research Manager, Specific Claims, Office of Native Claims, to Chief Prince, January 16, 1996, (ICC file 2109-20-01).

<sup>53</sup> Chief Harold Prince to John Hall, Research Manager, Specific Claims, Office of Native Claims, January 31, 1996 (ICC file 2109-20-1), included at Appendix D.

## APPENDIX A

### THE NAK'AZDLI FIRST NATION INQUIRY

- |   |                                    |                    |
|---|------------------------------------|--------------------|
| 1 | <u>Decision to conduct inquiry</u> | September 22, 1995 |
| 2 | <u>Notice sent to parties</u>      | September 25, 1995 |
| 3 | <u>Planning conference</u>         | September 13, 1995 |
| 4 | <u>Community session</u>           | November 21, 1995  |

The Commission heard from the following witnesses: Betsy Leon, Nicholas Prince, and Francesca Antoine. The session was held at Nak'azdli First Nation.

- |   |   |                  |
|---|---|------------------|
| 5 | <u>Canada's offer to negotiate</u>                      | January 16, 1996 |
| 6 | <u>Nak'azdli First Nation's acceptance to negotiate</u> | January 31, 1996 |

## **APPENDIX B**

### THE RECORD OF THE INQUIRY

The formal record for this inquiry comprises the following:

- Documentary record (1 volume of documents and annotated index)
- 1 Exhibit at community session
- 1 Exhibit submitted after community session
- Transcripts (1 volume)

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

## APPENDIX C

### APPENDIX C



Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

Specific Claims West  
650 West Georgia Street, Suite 2800  
P.O. Box 11802, Vancouver, BC V6B 4N9  
Tel: (604) 666-8711 Fax: (604) 666-8535

#### WITHOUT PREJUDICE

January 16, 1996

Chief Harold Prince  
Nak'Azdli First Nation  
Box 1329  
FORT ST. JAMES, B.C. V0J 1P0

Dear Chief Prince:

Regarding the Nak'Azdli First Nation's specific claim concerning I.R. No. 5 (Ahtlenjees), we have reconsidered our position on this claim as a result of additional information that has come to our attention through the Indian Specific Claims Commission inquiry, and, in particular, the oral evidence from three band elders at the community session on November 21, 1995.

Having considered this additional evidence carefully in the context of this claim and reviewed all other aspects of the claim, we are now of the view that the band has demonstrated that an outstanding lawful obligation exists within the meaning of the Specific Claims Policy.

As a result of this review, we are willing to recommend to our Minister that this claim be accepted for negotiation under the Government of Canada's Specific Claims Policy, on a fast-track basis, if the Band is willing to put the Indian Specific Claims Commission process in abeyance while negotiations are underway.

Under the terms of this offer, Compensation for the band's loss of I.R. No. 5 would be based on Compensation Criterion 3. This criterion provides for either the return of the lands or the payment of the current, unimproved value of the lands, and, where it can be established, an amount based on the net loss of use of the lands. Compensation Criteria 8, 9, and 10 will also apply. As part of the settlement, the Government of Canada will require an indemnity and final release ensuring that the issues in this claim cannot be reopened. In addition, to ensure finality of this claim, a formal, absolute surrender of these lands according to the *Indian Act* may also be required.

I and the Department of Justice legal representatives on this claim, Victoria Cox and Bruce Becker, are available to meet with you, your council, and your legal advisors and the Indian Specific Claims Commission to discuss this offer in more detail, if you would like,

.../2

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and to agree on the next steps in the process. If you also think that such a meeting would be useful, please give me a call. My telephone number is 666-5290.

This letter is written on a "without prejudice" basis and is not an admission of fact or liability by the Crown. In the event that this matter becomes the subject of litigation, the Government of Canada reserves the right to plead all defences available to it.

Sincerely,



Dr. John L. Hall  
Research Manager - B.C. and Yukon

cc: Eric Woodhouse, Cook Roberts  
Kathleen Lickers, Indian Specific Claims Commission

APPENDIX D

APPENDIX D



NAK'AZDLI BAND COUNCIL

P.O. Box 1329, Fort St. James, B.C. V0J 1P0  
Telephone 996-7171  
Fax 998-8010

January 31, 1996

John Hall  
Specific Land Claims West  
650 West Georgia Street, Suite 2600  
P.O. Box 11602  
Vancouver, B.C.  
V6B 4K9  
Fax: # (604) 666-6536

Dear Dr. Hall,

We thank you for your letter of January 16, 1996 regarding Aht-Len-Jees I.R. #5.

We are impressed by your Department's recognition of the contribution of our elders to the fact base surrounding the alienation of I.R. #5, and wish to accept your offer of negotiations within the fast-track process. We wish to commence these negotiations as soon as possible. To make arrangements for the meeting please contact either myself, or our negotiator Linda Vanden Berg. We would prefer to have the sessions at Nak'azdli.

Sincerely,

NAK'AZDLI BAND COUNCIL

*Harold Prince*  
CHIEF HAROLD PRINCE

HP/pmp

c.c. Eric Woodhouse  
Linda Vanden Berg  
~~Eric Woodhouse~~