

INDIAN CLAIMS COMMISSION

STURGEON LAKE FIRST NATION INQUIRY

RED DEER HOLDINGS AGRICULTURAL LEASE

PANEL

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PART I

INTRODUCTION

BACKGROUND TO THE CLAIM

In 1994, the Sturgeon Lake First Nation (First Nation), located near Prince Albert, Saskatchewan, submitted a claim to the Minister of Indian Affairs concerning a failed lease of reserve land to Red Deer Holdings Ltd (RDH) in 1982. The First Nation argued that the federal Crown breached its lawful obligations arising out of its administration of Indian lands by, among other things, permitting cropping and harvesting of part of the reserve without an agricultural permit as required by the *Indian Act*. The result was an alleged loss to Sturgeon Lake of some \$73,000.¹

On October 23, 1995, the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) responded to the First Nation's claim. After internal consultations on the matter, the Specific Claims Branch informed Chief Earl Ermine that it would not consider the grievance under the Specific Claims Policy for the following reason:

[Specific Claims West] concludes that it is not appropriate to process this matter as a specific claim. This decision reflects the fact that the events on which the grievance is based are recent. The Specific Claims process is intended to address longstanding historical grievances. . . .²

In response to a letter from Chief Ermine on November 1, 1995, requesting clarification from Canada on why the Specific Claims Policy was limited to "longstanding grievances," when no such limitation is expressly set out in the policy, the Director of Specific Claims West, Mr A.J. Gross, clarified Canada's position in a letter dated April 12, 1996:

The practice of SCW [Specific Claims West] has been to interpret the Specific Claims Policy as intending the application of the program's resources to the

¹ Balfour Moss, Barristers & Solicitors, Sturgeon Lake Claim Submission ([Red Deer Holdings] Agricultural Lease), [1994] (hereinafter Sturgeon Lake Claim Submission).

² Greg Morgan, Research Analyst, Specific Claims West, to Chief Earl Ermine and Council, Sturgeon Lake First Nation, October 23, 1995, DIAND file BW 8260/SK360-C.1 (ICC Planning Conference Information Kit, tab 9).

processing of claims that are based on long standing historical grievances, rather than those that are recent in nature.³

Although Mr Gross emphasized that Canada had not rejected the grievance, the effect was essentially the same as a rejection, since Canada declined to consider the claim on its merits and the file was closed.

On May 21, 1996, Chief Ermine forwarded a Band Council Resolution from the Sturgeon Lake First Nation requesting that the Commission conduct an inquiry into the claim.⁴

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established as an interim body in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The mandate of the Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries and report on whether Canada properly rejected a specific claim:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), 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; and
- b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.⁵

³ A.J. Gross, Director, Specific Claims West, to Chief Earl Ermine and Council, Sturgeon Lake First Nation, April 12, 1996, DIAND file BW8260/SK360-C.3 (ICC Planning Conference Information Kit, tab 8).

⁴ Chief Earl Ermine, Sturgeon Lake First Nation, to Indian Claims Commission, May 21, 1996, and Band Council Resolution 1996-97/011, dated May 9, 1996, ICC file 2107-31-01 (ICC Planning Conference Information Kit, tab 7).

⁵ 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 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

This Policy, outlined in the 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.⁶

The process outlined in *Outstanding Business* contemplates that a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The First Nation begins the process by submitting a clear and concise statement of claim, along with a comprehensive statement of the historical and factual background on which the claim is based. The claim is referred to the Specific Claims Branch (formerly Office of Native Claims), which usually conducts its own confirming research into a claim, makes research findings relative to the claim available to the claimant, and consults with the First Nation during the review process. After all the necessary information has been gathered, the facts and documents are referred by Specific Claims to the Department of Justice for advice on whether the federal government owes an outstanding lawful obligation to the First Nation. If Canada’s review determines that the claim is valid, Specific Claims will offer to enter into compensation negotiations with the First Nation.

In this case, the Sturgeon Lake First Nation submitted a claim that was simply not considered by Canada under the Specific Claims Policy on the grounds that it was not a “longstanding grievance” and therefore fell outside the intended scope of the Policy. Although its claim had not been rejected on its merits, the First Nation took the position that the Commission could conduct an inquiry into the claim because Canada’s refusal to consider it amounted to a rejection. In order to determine whether the Commission had a mandate to conduct an inquiry into the claim, representatives of the Sturgeon Lake First Nation and Canada were invited to attend a planning conference, convened and chaired by the Indian Claims Commission, on July 11, 1996.

THE COMMISSION’S PLANNING CONFERENCES

The Commission has developed a unique inquiry process. During the course of an inquiry, representatives of the claimant First Nation and Canada are brought together for planning conferences that are usually chaired and facilitated by Commission Counsel or the Commission’s

⁶ DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

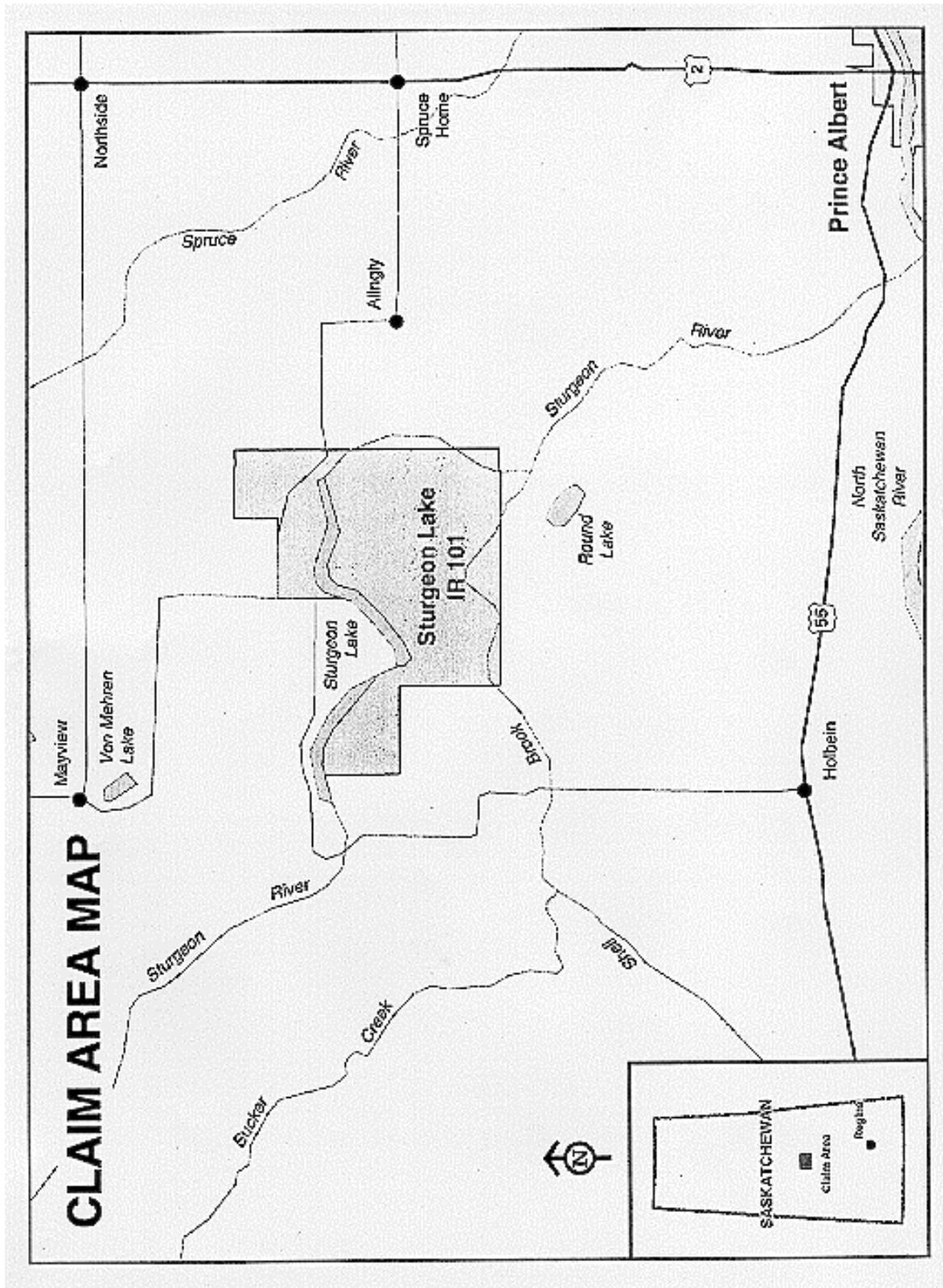
Mediation and Legal Advisor. The purpose of the planning conference is to plan jointly the inquiry process on a cooperative basis. Briefing material is prepared by the Commission and sent to the parties in advance to facilitate discussion of the issues. The main objectives of the planning conference are to identify the relevant historical and legal issues, to discuss openly the positions of the parties on the issues, to discuss which historical documents the parties intend to rely on, to determine whether parties intend to call elders, community members, or experts as witnesses, and to set time frames for the remaining stages of the inquiry. In cases like the present one, the planning conference also affords the parties an opportunity to meet and to discuss whether there are any threshold issues regarding the mandate of the Commission that require resolution before deciding how to proceed.

The planning conferences have been key to the success of the Commission because of the opportunities they afford the parties to resolve issues through open dialogue. This report into the Sturgeon Lake First Nation's claim further illustrates what can be achieved by Canada and First Nations in a process facilitated by a neutral third party. Throughout the discussions of parties at the planning conference held on July 11, 1996, and subsequent conference calls, the Department of Justice continued to maintain that the Specific Claims Policy was intended to address only long-standing historical claims and that the Department could not provide an opinion on the merits of the claim to its client, Indian Affairs, because 15 years had not elapsed since the claim had arisen. However, since this 15-year period would soon expire, Canada invited Sturgeon Lake to resubmit the claim when that mile post was reached. The First Nation agreed and resubmitted the claim in March 1997.⁷ Canada agreed to expedite its legal review of the claim, and the claim was accepted for negotiation in August 1997.

Although the Sturgeon Lake First Nation has not yet expressed its intention to enter into negotiations with Canada, we are pleased that the constructive dialogue between the parties encouraged by the Commission led to their cooperation and to Canada's acceptance of this claim under the Specific Claims Policy. It was this constructive dialogue which avoided a full inquiry into the claim.

⁷ Chief Earl Ermine, Sturgeon Lake First Nation, to Belinda Cole, Specific Claims Branch, March 24, 1997, ICC file 2107-31-01.

In view of Canada's decision to accept the claim for negotiation, we wish to emphasize that no further steps have been taken by the Commission to inquire into the First Nation's claim involving the Red Deer Holdings agricultural lease. Since the Commission did not complete its inquiry into the historical and legal basis of the claim, we do not purport to make any findings of fact or law whatsoever in this report. Rather, this report contains a brief summary of the First Nation's claim and is intended only to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy. In the course of relating the events leading up to the acceptance of this claim, however, we wish to offer our own views on the policy rationale behind the "15-year rule" upon which Canada relied in refusing to consider the claim when it was initially submitted by the First Nation.



PART II

HISTORICAL BACKGROUND

This brief summary of the historical background for the claim is based almost entirely on the Sturgeon Lake Claim Submission and attached documents submitted to Specific Claims in 1994. This summary of events does not represent findings of fact on the part of the Commission. It is intended only to provide general background information on the nature of the First Nation's claim to provide a context for the events leading up to Canada's acceptance for negotiation and a discussion of the policy behind the 15-year rule.

NATURE OF THE CLAIM

The people of the Sturgeon Lake First Nation are descended from Cree Chief Ah-yah-tus-kum-ik-im-am⁸ and his four head men (Oo-sahn-us-koo-nee-kik, Yay-yah-too-way, Loo-sou-am-ee-kwakn, and Nees-way-yak-ee-nah-koos) who signed Treaty 6 near Fort Carlton on August 23, 1876. According to the Department of Indian Affairs' records, the band was usually referred to as William Twatt's Band after the Chief's English name. In about 1963, the name was changed to the Sturgeon Lake Band and, later, to the Sturgeon Lake First Nation.

In the fall of 1878, a 34.4-square-mile reserve was surveyed by E. Stewart at Sturgeon Lake, about 25 miles northwest of Prince Albert, in what is now the province of Saskatchewan. Identified as Sturgeon Lake Indian Reserve (IR) 101, it was confirmed by Order in Council PC 1151 on May 17, 1878, and removed from the operation of the *Dominion Lands Act* by Order in Council PC 1694 of June 12, 1893.⁹

For a period of time in the 1970s, all cultivated farmland on the Sturgeon Lake Reserve was used for the operation of a band-operated farm, except for some small areas farmed by individual band members. During this time, no agricultural permits were issued to third parties. After the band farm ceased to operate, however, the Band Council began to lease reserve land to non-band members.¹⁰

⁸ In the 1889 Order in Council confirming the reserve, this name is spelled: "Ayoytus Cumicamin *alias* William Twatt" (Sturgeon Lake Claim Submission, document 2).

⁹ Sturgeon Lake Claim Submission, documents 2 and 3.

¹⁰ Sturgeon Lake Claim Submission, document 7.

In the spring of 1981, the Sturgeon Lake Band entered into a lease arrangement with a person for approximately 1600 acres of reserve land. When the “Lessee” declared bankruptcy in the fall of 1981, Red Deer Holdings (RDH), a limited company, paid up the arrears of \$31,000 and offered to enter into a similar lease arrangement with the Band.¹¹ On May 21, 1982, and June 9, 1982, the Sturgeon Lake Band issued two Band Council Resolutions to request formally that Indian Affairs issue an agricultural permit to RDH under subsection 28(2) of the *Indian Act*¹² for a lease of reserve lands for the period January 1, 1982, to December 31, 1984, subject to payment of \$45,000 on November 1, 1982, and subsequent payments of \$22,500 on April 1 and November 1 of each year.¹³

Following a request for assistance from the Chief and Council of the Band to the District Office of Indian Affairs, the Regional Office prepared a draft agricultural permit between RDH, as permittee, and the Department of Indian Affairs and Northern Development, on behalf of Her Majesty the Queen in right of Canada.¹⁴ The draft permit provided for the use of some 1813 acres of reserve land based on the terms and payment schedule set out in the Band Council Resolutions referred to above.

On June 11, 1982, the Head of Land Transactions for the Saskatchewan Regional Office of Indian Affairs asked the Prince Albert District Manager to review the Band Council Resolutions and draft permits with the Band Council and RDH and, if the agreement was satisfactory to both, to “have the document executed in the usual manner and the affidavit completed.”¹⁵ On July 7, 1982, Indian Affairs wrote RDH to ask that a representative of RDH contact the Prince Albert District

¹¹ Cherkewich, Pinel & Bockus, Barristers, Prince Albert, to Pat MacLean, Department of Justice, Saskatoon, December 1, 1982 (Sturgeon Lake Claim Submission, document 17).

¹² Subsection 28(2) of the *Indian Act*, RSC 1970, c. I-6, states that “[t]he Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.”

¹³ Band Council Resolution, Sturgeon Lake Band Council, May 21, 1982, and Band Council Resolution, Sturgeon Lake Band Council, June 9, 1982 (Sturgeon Lake Claim Submission, document 8).

¹⁴ Sturgeon Lake Claim Submission, documents 7 and 10.

¹⁵ W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, to District Manager, Prince Albert District, June 11, 1982 (ICC Documents, p. 56).

office to sign the permits.¹⁶ On August 18, 1982, departmental officials wrote another letter to RDH attempting to arrange for the permits to be signed.¹⁷ The principal of RDH did not, however, make arrangements with Indian Affairs to sign the documents. Instead, RDH asked for an amendment to the proposed agreement to include a clause giving RDH the right to cancel the permit if it wished.¹⁸

In the meantime, RDH had already entered on reserve land and planted crops without an executed agricultural permit. At the end of October 1982, a representative of RDH met with the Band Council and asked to renegotiate the fall payment because frost had wiped out the rape crop and the company's insurance would not cover the loss.¹⁹ Sturgeon Lake consulted its lawyer, who advised in a letter dated November 1, 1982, that it was the responsibility of Indian Affairs to collect the moneys owing by RDH:

Since these leases are undertaken by the Department of Indian Affairs on behalf of the Band, it would be the Department of Indian Affairs' responsibility to deal with the Permittee with respect to payments received under the lease. The Band looks to the Department of Indian Affairs for monies under the lease and in turn, of course, Indian Affairs looks to the permit holder. On the face of the leases in question, the Band has no involvement whatsoever with the Permittee. If the Permittee does not make his payments that is a problem for the Department of Indian Affairs to resolve. Indian Affairs is accountable to the Band for the monies from the lease. If the monies are not forthcoming Indian Affairs must exercise its remedies under the permit.²⁰

The Chief and Council therefore wrote to Indian Affairs on November 30, 1982, asking for assurances that the money due from Red Deer Holdings would be collected and deposited to the

¹⁶ A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Red Deer Holdings Ltd., Prince Albert, July 7, 1982 (Sturgeon Lake Claim Submission, document 11).

¹⁷ A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Red Deer Holdings Ltd., Prince Albert, August 18, 1982 (Sturgeon Lake Claim Submission, document 12).

¹⁸ A. Folk, Acting Superintendent, Reserves & Trusts, Prince Albert District, to Edith Owen, Acting Head, Land Transactions, Saskatchewan Region, September 1, 1982 (Sturgeon Lake Claim Submission, document 16).

¹⁹ Minutes of a Sturgeon Lake Band Council Meeting, October 25, 1982 (ICC Documents, p. 155)

²⁰ Cherkewich, Pinel & Bockus, Barristers, to Chief and Council, Sturgeon Lake Band, November 1, 1982 (ICC Documents, p. 66).

Band's trust account. In the letter, the Council clearly stated that it held the Department entirely responsible:

the Band Council is entitled to assume that the Dept. of Indian Affairs would act reasonably in protecting the interests of the Band in dealing with Reserve lands. It appears that Red Deer Holdings Ltd. was allowed to go on to the land and farm the land without a completed lease in place. This would appear to be an unforgivable error on the part of the Dept. of Indian Affairs. Furthermore, this problem created by the Dept. of Indian Affairs in allowing Red Deer Holdings Ltd. to begin farming without a written lease was compounded by the fact that there was still no lease in place when the harvest was completed. As a result of the Dept. of Indian Affairs' inattention to this matter, Red Deer Holdings Ltd. was allowed to harvest and remove all the crops from land freeing Red Deer Holdings of any hold that the Dept. of Indian Affairs might normally have with respect to forcing a complete lease.²¹

According to the Band's legal counsel, the amount in arrears was \$73,000 as of November 1, 1982. In an effort to enforce payment of the outstanding balance owed to the Band, their legal counsel informed the Department of Justice that information received by the Band and Indian Affairs confirmed that there was a pending Saskatchewan Crop Insurance payment to be paid to the principal of RDH for losses incurred during the 1982 crop year.²²

At the request of Indian Affairs, the Department of Justice wrote to the principal of RDH on December 9, 1982, pressing for the execution of the permits and assignment of insurance moneys to the Band. These efforts, however, were not successful. In February 1983, the Department of Justice informed the First Nation that it could do nothing more; rather, it suggested that the Band itself should take action directly against RDH. The Band, however, reminded officials of the advice of its legal counsel that "the only action the Band can take is against the Dept. of Indian Affairs who in turn will have to take action against Red Deer Holdings Ltd.," and it demanded that the outstanding balance be paid by the Department of Indian Affairs.²³

²¹ Chief and Council, Sturgeon Lake Band, to Wayne Gray, Department of Indian Affairs, Prince Albert, November 30, 1982 (ICC Documents, pp. 75-76).

²² Cherkewich, Pinel & Bockus, Barristers, Prince Albert, to Pat MacLean, Department of Justice Canada, December 1, 1982 (Sturgeon Lake Claim Submission, document 17).

²³ H.A. Martyn, Management Consultant to the Chief and Council, Sturgeon Lake Band, to Clifford Supernault, District Manager, Department of Indian Affairs, Prince Albert, February 21, 1983 (ICC Documents, p. 115). The legal opinion was reinforced by one given by W. Roy Wellman, of Wellman & Andrews, Regina, to the Department of Indian Affairs, June 29, 1983 (ICC Documents, pp. 185-90).

In March 1983, the Department of Justice agreed to commence legal action to recover the overdue rent, but there were difficulties over who should be named in the suit because the company did not hold any assets and its principal was not a party to the failed agricultural permit. A payment of \$20,000 was offered as a settlement by the principal of RDH on March 5, 1983, but the Chief and Council for Sturgeon Lake were not prepared to accept the offer at that time.²⁴ In October 1983, the Department of Justice decided to launch court action against both Red Deer Holdings Ltd and its principal. A statement of claim was filed in the Saskatchewan Court of Queen's Bench on November 25, 1983.²⁵ The principal filed a statement of defence in March 1984 but RDH did not respond.²⁶ After conducting examinations for discovery in March 1985, legal counsel for the Department of Justice advised Indian Affairs: "In view of the results of the discovery I am very reluctant to proceed further lest we incur substantial costs as I feel there is no real probability of success."²⁷ Mr A.J. Gross, Director of Reserves and Trusts for the Saskatchewan Regional Office of Indian Affairs, concurred and recommended that Justice "cease all actions in this regard."²⁸

When the litigation was abandoned, the Sturgeon Lake Band sought compensation from the Department of Indian Affairs for the principal sum of the lease arrears plus other related expenses.²⁹ The Band's request was turned down by the Regional Director General of Indian Affairs, Dan Goodleaf, on October 3, 1985:

²⁴ Sturgeon Lake Claim Submission, document 7.

²⁵ Statement of Claim, Attorney General of Canada vs. Red Deer Holdings Ltd., Saskatchewan Queen's Bench file no. 1335, November 25, 1983 (ICC Documents, pp. 227-32).

²⁶ L.P. MacLean, Group Head, Civil Litigation, Department of Justice, to C. Chetty, Barrister, Prince Albert, June 26, 1984 (ICC Documents, p. 250). Statement of defence not included in documents provided to the ICC, but reference is made in the covering letter of Philip E. West, West-Wilcox, Barristers, Prince Albert, to L. Patton-MacLean, Department of Justice, March 19, 1984 (ICC Documents, p. 241)

²⁷ L.P. MacLean, Counsel, Department of Justice, to W.P. Bernhardt, Manager, Lands, Department of Indian Affairs, Regina, May 16, 1985 (Sturgeon Lake Claim Submission, document 21).

²⁸ A.J. Gross to L.P. MacLean, Department of Justice, July 4, 1985 (ICC Documents, p. 263).

²⁹ Band Council Resolution 1985-86/019, c. September 17, 1985 (Sturgeon Lake Claim Submission, document 23).

I have reviewed the records and appreciate the fact that your Band suffered financial losses as a result of farming operations undertaken by Red Deer Holdings. Based on the circumstances, however, the Department is not in a position to provide the compensation you request.³⁰

This decision was reviewed again in October 1986, March 1987, and March 1988, with no change in the outcome.³¹

In 1994, the Sturgeon Lake First Nation submitted a specific claim to the Minister of Indian Affairs, alleging that the Crown breached its lawful obligations with respect to the administration of its reserve land by: (1) failing to do a background check to determine what authority the principal had within RDH and what the financial position of the company was; (2) failing to obtain a personal guarantee from the principal of RDH; and (3) failing to have the agricultural permit signed by RDH.³²

³⁰ Dan E. Goodleaf, Regional Director General, Saskatchewan Region, to Chief Wesley Daniels, Sturgeon Lake Band, October 3, 1985 (Sturgeon Lake Claim Submission, document 24).

³¹ H.J. Ryan, Acting Director, Lands Directorate, Department of Indian Affairs, to Chief Wesley Daniels, Sturgeon Lake Band, April 2, 1986 (ICC Documents, p. 283); Kenneth C. Kirby, Director of Operations, Regina, to Chief Daniels, March 16, 1987 (ICC Documents, p. 286); and W.F. Bernhardt memo to Dan Goodleaf, March 8, 1988 (ICC Documents, pp. 291-94).

³² Sturgeon Lake Claim Submission, pp. 3-4.

PART III

THE ISSUES

The essential issues identified by the Sturgeon Lake First Nation for the purposes of an inquiry by the Indian Claims Commission were:

- 1 Does the Department of Indian Affairs' Specific Claims Policy apply only to "historical grievances"?
- 2 Did Canada breach its lawful obligation by failing to comply with provisions of the *Indian Act* in leasing Sturgeon Lake reserve lands around 1982?³³

Since Canada has accepted the claim for negotiation, it is not strictly necessary for the Commission to address either question. In this instance, however, the first issue was avoided only because the First Nation decided to put its request for an inquiry into abeyance and resubmit the claim after the 15-year time limit imposed by Canada had lapsed. In our view, this does not resolve the underlying problem, and we intend to address what we consider to be the real question in this matter:

Is there a valid justification for Canada's refusal to address specific claims until 15 years have passed since the claim arose?

³³ Chief Earl Ermine, Sturgeon Lake First Nation, to the Indian Claims Commission, May 21, 1996, and Band Council Resolution 1996/97-01 1, dated May 9, 1996, ICC file 2 107-31 -1

PART IV

THE INQUIRY

On July 11, 1996, the Indian Claims Commission convened and chaired a planning conference in Ottawa with representatives of the Sturgeon Lake First Nation and Canada in attendance. As a preliminary issue, Bruce Becker, counsel for Canada, advised that he would need to seek instructions from his client, Indian Affairs, about challenging the Commission's mandate to inquire into the agricultural lease claim because it had never been reviewed by the Specific Claims Branch and had not, therefore, been rejected. Mr Becker agreed, however, with the suggestion of Commission Counsel that all efforts should be made to explore whether the claim could be settled without the need for a full inquiry. Given that the First Nation was claiming compensation for lost revenues of only approximately \$73,000 in 1982, it might be more cost-effective for Canada to attempt to resolve this as a "fast-track" claim (an expedited option under the Specific Claims Policy to settle claims of \$500,000 or less) rather than opposing the claim and requiring all parties, including the Commission, to invest the considerable time and expense involved in an inquiry. In view of the circumstances, all parties recognized that the cost of conducting an inquiry could ultimately exceed the costs of a settlement. Mr Becker agreed to seek instructions on whether Indian Affairs was willing to review the claim and submit it to the Department of Justice for an opinion on whether an outstanding lawful obligation was owed to the First Nation. The parties agreed that the Commission's inquiry process (i.e., the staff visit, community session, written and oral submissions) would be held in abeyance pending a review of the claim.³⁴

A conference call involving representatives of Canada, the First Nation, and the Commission was arranged on August 14, 1996. During the conference call, Beverly Lajoie, Senior Claims Officer with Specific Claims Branch, advised that the Sturgeon Lake First Nation's claim relating to the agricultural lease would be considered under the Specific Claims Policy as a fast-track claim. Canada would not undertake further research, but departmental files would be reviewed and any documents added to those included in the claim submission would be provided to the First Nation and the Commission. Assuming that the review could be completed by the end of October, a conference call

³⁴ Summary, ICC Planning Conference, Sturgeon Lake First Nation Agricultural Lease, Ottawa, Ontario, July 11, 1996, and David Knoll, Davis & Company, to Kathleen Lickers, Indian Claims Commission, July 26, 1996, ICC file 2107-31-01.

was scheduled for November 1, 1996, to discuss Canada's review of the claim. Ms Lajoie confirmed this commitment in a letter to Chief Earl Ermine dated August 15, 1996, advising that Justice would be asked "whether, based on all of the material assembled, the facts give rise to an outstanding lawful obligation under the Specific Claims Policy."³⁵ On October 7, 1996, Ms Lajoie sent Chief Ermine the document collection and index for this claim and informed him that the file had been sent to the Department of Justice.³⁶

A conference call was held on November 1, 1996, but Canada advised that it had not completed its legal review of the claim. Since it was not likely to be complete before the end of November, another conference call was arranged for December 6, 1996. On that date, Ms Belinda Cole, Specific Claims Advisor, explained that Indian Affairs was willing to recommend that this claim be accepted for negotiation but that this recommendation would have to be deferred until March 1997 to comply with the Department's 15-year rule. The Sturgeon Lake First Nation agreed, therefore, to resubmit the claim after March 1, 1997, on the understanding that Indian Affairs would consider the claim "expeditiously, in light of the work done to date by the SLRN [Sturgeon Lake First Nation], the Department of Justice and SCB [Specific Claims Branch]."³⁷ Although the parties had agreed that an inquiry was no longer required, the First Nation requested that the Commission remain involved to monitor the progress of this claim.³⁸

On March 24, 1997, Chief Ermine wrote to Indian Affairs to "request that the Red Deer Holdings claim submission and supporting materials be resubmitted as a specific claim."³⁹ The file, with a recommendation for acceptance, was immediately transferred to the Department of Indian

³⁵ Beverly A. Lajoie, Senior Claims Officer, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, August 15, 1996, and Kathleen Lickers, note to file, August 15, 1996, ICC file 2107-31-01.

³⁶ Beverly A. Lajoie, Senior Claims Officer, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, October 7, 1996, ICC file 2107-31-01.

³⁷ Belinda Cole, Specific Claims Advisor, Specific Claims Branch, to David Knoll, Davis & Company, and Kathleen Lickers, Indian Claims Commission, December 17, 1996; Kathleen Lickers to David Knoll and Belinda Cole, December 11, 1996, ICC file 21070-31-01.

³⁸ Kathleen Lickers, note to file, December 6, 1996, ICC file 2107-31-01.

³⁹ Chief Earl Ermine, Sturgeon Lake First Nation, to Belinda Cole, Specific Claims Branch, March 24, 1997, ICC file 2107-31-01.

Affairs Negotiations Directorate for review and acknowledgement.⁴⁰ On August 28, 1997, Michel Roy, Director General of the Specific Claims Branch, wrote to Chief Ermine accepting the claim for negotiation under the fast track process:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer to accept for negotiation of a settlement the Sturgeon Lake First Nation specific claim concerning the Red Deer Holdings Ltd. agricultural lease mismanagement. The claim is to be addressed through the fast-track process. Fast-track claims are claims in which compensation is restricted to a monetary limit of \$500,000 or less.

For the purposes of negotiations, Canada accepts that the First Nation has sufficiently established that Canada has an outstanding lawful obligation, within the meaning of the Specific Claims Policy, to provide compensation for the failure to pursue properly the defaulted amounts on the Red Deer Holdings Ltd. agricultural leases.⁴¹

At the time of writing this report, the Sturgeon Lake First Nation had not yet confirmed its intention to enter into negotiations with Canada on this basis, but it is hoped that Mr Roy's letter will provide a foundation for a negotiated settlement between the parties.

THE 15-YEAR RULE

We wish now to consider the principal issue identified in this inquiry, which is restated below:

Is there a valid justification for Canada's refusal to address specific claims until 15 years have passed since the claim arose?

It is significant to note that Canada took the position in this inquiry that it had not rejected the Sturgeon Lake First Nation's claim regarding mismanagement of the Red Deer Holding agricultural lease. Instead, it simply refused to review it under the Specific Claims Policy until 15 years after the claim first arose. In response to a request from the Commission's staff for clarification

⁴⁰ Ian D. Gray, Senior Negotiator, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, April 11, 1997, ICC file 2107-31-01.

⁴¹ Michel Roy, Director General, Specific Claims Branch, to Chief Earl Ermine, Sturgeon Lake First Nation, August 28, 1997, ICC file 2107-31-01.

of Canada's 15-year rule, the following explanation was received from Michel Roy, Director General of Specific Claims, on November 21, 1997:

The Specific Claims Policy was introduced to address First Nations' historic grievances relating to a variety of circumstances outlined in the policy. As a result, Canada applies this fifteen year rule of thumb, considering only those claims which arise from breaches of the Crown's lawful obligation which occurred at least 15 years before the date a claim is submitted.

This fifteen year restriction was approved by the government as part of the Specific Claims Policy. However, the Specific Claims Policy does not make specific reference to this restriction, but includes, instead, only general statements that the Policy was designed to address historic grievances.⁴²

We have serious reservations about the policy rationale behind the 15-year rule. Mr Roy's explanation seems to imply that Canada's 15-year rule is likely based on a cabinet directive or decision by the government that the policy was intended to address only "long standing historical grievances." Regardless of its origin, what is important is that no such rule or policy is expressed in the Specific Claims Policy as set out in *Outstanding Business*. The letter states that the Specific Claims Policy was "introduced to address First Nations' historic grievances" and, while acknowledging the absence of any reference to a 15-year restriction in *Outstanding Business*, Indian Affairs maintains that it contains "general statements that the Policy was designed to address historic grievances."

We have reviewed the text of *Outstanding Business* and agree with Mr Roy that there is no express reference to a 15-year rule. We did find one instance of the use of the term "longstanding grievances":

Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches.⁴³

⁴² Michel Roy, Director General, Specific Claims Branch, to Donna Gordon, Research Director, Indian Claims Commission, November 21, 1997, ICC file 2107-31-01.

⁴³ *Outstanding Business*, 21

Later, in the guidelines for the submission and assessment of specific claims, the Policy refers to only two factors relating to time:

- 5) The government will not refuse to negotiate claims on the grounds that they are submitted too late (statutes of limitation) or because the claimants have waited too long to present their claims (doctrine of laches).
- ...
- 8) No claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.⁴⁴

There is no reference to any waiting period and there is no express statement that only “historic grievances” will be addressed.

To the extent that there are general references in the policy to “historic grievances” or similar terminology, we disagree that these references have any real bearing on the scope of the Policy. In our view, *Outstanding Business* was intended to address specific claims that are “based on lawful obligations” or which “disclose an outstanding ‘lawful obligation’” and which “relate to the administration of land and other Indian assets and the fulfillment of Indian treaties.”⁴⁵ The definition of “lawful obligation” in *Outstanding Business*, set out below, contains no reference to any time limits:

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.

⁴⁴ *Outstanding Business*, 30

⁴⁵ *Outstanding Business*, 7, 13, 19, 20.

The policy also addresses the following types of claims which fall under the heading “Beyond Lawful Obligation”:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.⁴⁶

If Canada intended to impose a 15-year waiting period before First Nations could bring claims under this Policy, it could have stated this intention in clear and express terms in *Outstanding Business*. The fact that Canada omitted such an express reference in *Outstanding Business* should not prejudice the legitimate claims of First Nations, who may have no other recourse but to bring a claim under this Policy for alleged breaches of the Crown’s legal and equitable obligations.

While Canada’s interpretation of the Policy is not borne out by a careful examination of *Outstanding Business*, we also have concerns about the underlying rationale of imposing a 15-year waiting period. In our view, a fair reading of *Outstanding Business* suggests that there is no room for such a rule in the Policy because it was intended to address all outstanding claims “between Indians and government which for the sake of justice, equity and prosperity now must be settled *without further delay*.”⁴⁷ Indeed, the Policy expressly acknowledges that delay in the resolution of claims has long been a concern to both the government and First Nations:

It is clear however that the rate at which specific claims have been resolved does not correspond with the expectations of the Government of Canada or the Indian claimants. This fact plus the estimated hundreds of other claims which are being withheld pending clarification and resolution of the existing claims policy underscores the seriousness with which the government views the current situation and has led to the reevaluation of its policy on specific claims.⁴⁸

A 15-year waiting period is wholly at odds with the stated objective of *Outstanding Business*.

⁴⁶ *Outstanding Business*, 20.

⁴⁷ John C. Munro, Foreword, *Outstanding Business*, 3 (emphasis added).

⁴⁸ *Outstanding Business*, 14.

The need to deal with the First Nations' claims expeditiously is as compelling in 1998 as it was in 1982 when Canada published *Outstanding Business*. All indications since 1982 have been that the number of specific claims has increased and will continue to do so. According to a recent study completed by an independent consultant for the Government of Canada and the Assembly of First Nations, approximately 840 claims have been submitted to Specific Claims Branch for consideration, and only 174 have been settled to date.⁴⁹ There are a further unspecified number of claims currently backlogged in the process, which have yet to be reviewed. The reason for the backlog can be attributed, at least in part, to the fact that the government has not allocated sufficient resources to assess the validity of claims or to respond to the Commission's reports and recommendations.

An arbitrary waiting period before a claim can be reviewed under the Policy is counterproductive to the settlement process. Imposing such a delay is tantamount to asking the First Nation to assume the risk that first-hand knowledge, salient evidence, and important documents may be lost. A First Nation claiming an outstanding legal obligation under the Policy would have no other option but to pursue litigation. This option would increase both the time and costs dramatically. It is directly contrary to the objective of *Outstanding Business*, which was specifically designed to avoid unnecessary litigation.

Finally, we point out that the Policy itself was introduced to foster a "new approach" in addressing First Nations' claims. In Part Two of *Outstanding Business*, under the heading, "The Policy: A Renewed Approach to Settling Specific Claims," it states:

In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.⁵⁰

An arbitrary 15-year rule is inconsistent with a "liberal approach" to claims resolution and with the goals of "justice, equity and prosperity" the Policy was intended to achieve.

⁴⁹ These figures were obtained from a draft study completed by Fiscal Realities entitled "Assessing the Fiscal Impacts of Settling Specific Claims," presented to the Assembly of First Nations and the Department of Indian Affairs and Northern Development (final draft dated January 21, 1998). The Commission cannot confirm whether these figures represent an accurate picture of the number of claims currently in the specific claims process, but it is expected that the Department of Indian Affairs will be presenting updated statistics on the status of specific claims in April 1998.

⁵⁰ *Outstanding Business*, 19.

PART V

RECOMMENDATION

After a careful consideration of the intended purpose of the Specific Claims Policy as presented in *Outstanding Business*, the Commission makes the following recommendation:

That Canada withdraw the “15-year rule” and notify any First Nation claimants whose claims have been refused for consideration on this basis.

FOR THE INDIAN CLAIMS COMMISSION

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

Carole T. Corcoran
Commissioner

Dated this 5th day of March, 1998

APPENDIX B

APPENDIX B

GOVERNMENT OF CANADA'S ACCEPTANCE OF CLAIM



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

Objet: Référence

Objet: Référence

WITHOUT PREJUDICE

2007 2 8 1997

Chief Earl Ermine
Sturgeon Lake First Nation
Comp. 8, Site 12, R.R. #1
SHELLBROOK, SK S0J 2E0

Dear Chief Ermine:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy, I offer to accept for negotiation of a settlement the Sturgeon Lake First Nation specific claim concerning the Red Deer Holdings Ltd. agricultural lease mismanagement. The claim is to be addressed through the fast-track process. Fast-track claims are claims in which compensation is restricted to a monetary limit \$500,000 or less.

For the purposes of negotiations, Canada accepts that the First Nation has sufficiently established that Canada has an outstanding lawful obligation, within the meaning of the Specific Claims Policy, to provide compensation for the failure to pursue properly the defaulted amounts on the Red Deer Holdings Ltd. agricultural leases.

The settlement will be in accordance with Canada's Specific Claims Policy, as explained in the booklet "Outstanding Business." As for the elements of the claim accepted for negotiations, compensation will be based on criteria 1 and 10, which are explained in the booklet. The value of the compensation will take into account all the relevant criteria. No individual criterion will be viewed in isolation.

The steps of the fast-track claim process which will follow include agreement on compensation, the development of a settlement agreement, concluding and ratifying the agreement and finally, implementing it.

Throughout the process, Canada's files and documentation are subject to the Access to Information and Privacy legislation in force.

.../2

Canada

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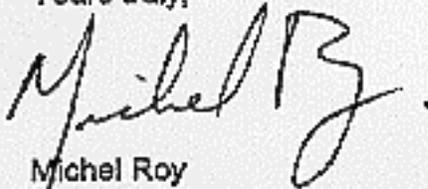
All negotiations will be conducted on a "without prejudice" basis. Canada and the First Nation acknowledge that all communications, oral, written, formal or informal are made with the intention of encouraging settlement of the dispute between the parties only and are not intended to constitute admissions of fact or liability by any party.

The acceptance of the claim for negotiation is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a formal settlement is reached, Canada will require from the First Nation a final and formal release on this claim.

A federal negotiator, Mr. Ian D. Gray has been designated to work with you on resolving this claim. I send my best wishes and am confident that a fair settlement can be reached.

Yours truly,



Michel Roy
Director General
Specific Claims Branch