

OFFICE OF THE TREATY COMMISSIONER  
706 S.J. Cohen Building  
119 - 4th Avenue South  
Saskatoon, Saskatchewan S7K 5X2  
Telephone: (306) 975-6131 Fax: 975-6141

INFORMATION BULLETIN

In referring to the establishment of the Office of the Treaty Commissioner, Chief Roland Crowe stated:

"When we talk about the bilateral process, the Treaty Commissioner, . . . that will be the stepping stone and the guarantee to us as Treaty Nations in this province, in other provinces, in other regions, that we took the first step; we took the opportunity; we had the drive and the desire to do something for ourselves."

In September, in explaining the role of the Treaty Commissioner, the Minister of DIAND stated:

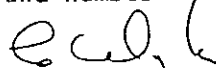
"The Office of the Treaty Commissioner will be an independent body with a mandate to review and investigate the unresolved treaty issues and to make recommendations to the Federal Government and FSIN."

The Office of the Treaty Commissioner was opened during the second week of December 1989. This office was established by the Federation of Saskatchewan Indian Nations and the Minister of Indian Affairs and Northern Development, the Honourable Pierre Cadieux. As Treaty Commissioner, I will be making recommendations to the Executive Council of FSIN and to the Minister of Indian Affairs and Northern Development in order to facilitate the resolution of treaty issues referred to the Office of the Treaty Commissioner.

In order to enable me to make sound recommendations that are based on historical and current factual information, the office, managed by Emil Korchinski, Executive Director, has research, information gathering, as well as analytical capability. With Chuck Thomas as a part of the team, we enhanced the liaison and communication capability with the FSIN and their member bands.

My initial mandate is to proceed with the two major issues of Treaty Land Entitlement and Post Secondary Education. Research on both these topics has now commenced.

My office, which is independent of the FSIN and the Government of Canada, has the responsibility to facilitate the delivery of all Federal obligations and commitments for treaty fulfillment by the Government of Canada. At the earliest possible date, I plan to meet with Chiefs and others at the District Chiefs' Tribal Council level at their invitation. Arrangements can be made by contacting Chuck Thomas at 975-6135 or 241-0083 or Emil Korchinski at 975-6134. These meetings will help us establish a rapport and initiate a working agenda. It will also enable me to understand the issues more clearly, and most importantly, begin developing a relationship and a knowledge base which will allow us to achieve our goals. If you wish to contact me, I can be reached at 975-6131. If I'm not in, leave your name and number and I will return your call.

  
Cliff Wright

Treaty Commissioner

20/01/12





P.C. 1990-883  
15 May, 1990

PARLEMENT DU CANADA • CONGRESSO DO BRASIL

(T.B. Rec. 813561)

WHEREAS a Tripartite Council consisting of representatives of the Government of Canada, the Government of Ontario and the Indian Chiefs of Ontario, herein referred to as the Chiefs of Ontario, was established on March 16, 1978, for the purpose of identifying, clarifying, negotiating and resolving matters of mutual concern to the Government of Canada, the Government of Ontario and the Status Indians residing in Ontario;

WHEREAS on September 28, 1978 Mr. Justice E. Patrick Hartt was appointed to a commission, named the Indian Commission of Ontario, by the Governments of Canada and Ontario under Order in Council P.C. 1978-3044 of September 28, 1978 and Provincial Order in Council 2838/78 and a resolution by the Executive Council of the Chiefs of Ontario in August of that year; which appointment was extended to December 1985 by Orders in Council P.C. 1980-3/2996 of October 30, 1980, P.C. 1981-4/255 of January 29, 1981, P.C. 1982-1/3156 of October 14, 1982 and P.C. 1983-3069 of September 30, 1983;

WHEREAS the Government of Canada, by Order in Council P.C. 1985-3117 of October 10, 1985, and the Government of Ontario and the Chiefs of Ontario agreed to appoint Roberta Louise Jamieson, of the Six Nations Indian Reserve, as Commissioner of the Indian Commission of Ontario for a period of six months commencing October 1, 1985 and terminating March 31, 1986; and which appointment was extended to March 31, 1989 by Order in Council P.C. 1986-4/767 of March 26, 1986 with certain terms of reference;

- 2 -

WHEREAS the Government of Canada, by Order in Council P.C. 1989-1/625 of April 13, 1989, the Government of Ontario and the Chiefs of Ontario agreed to extend the Indian Commission of Ontario for a period of twelve months commencing April 1, 1989 and terminating March 31, 1990, and to extend the appointment of Roberta Louise Jamieson for a period of two months commencing April 1, 1989 and terminating May 31, 1989;

AND WHEREAS the Government of Canada, by Order in Council P.C. 1989-1248 of June 23, 1989, and the Government of Ontario, by Order in Council OC 1584/89, and the Chiefs of Ontario agreed to appoint Harry S. LaForme of Toronto, Ontario, as Commissioner of the Indian Commission of Ontario for a period of ten months commencing June 1, 1989 and terminating March 31, 1990;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development and the Treasury Board, is pleased hereby:

- (a) to extend the appointment of Harry S. LaForme of Toronto, Ontario, as Commissioner of the Indian Commission of Ontario for a period effective April 1, 1990 and terminating March 31, 1995; and
- (b) to extend the functions and duties of the Indian Commission of Ontario, as outlined in Annex "A" hereto, for a period terminating March 31, 1995, with the provision that a review of the Commission's mandate be completed by March 31, 1993.

APPROVED TO BE A TRUE COPY OF THE ORIGINAL COPY  
  
APPROVED TO BE A TRUE COPY OF THE ORIGINAL COPY

## ANNEX A

### Functions and Duties of the Indian Commission of Ontario

#### 1. MISSION STATEMENT

The objective and responsibility of the Indian Commission of Ontario is to facilitate negotiations and discussions to establish First Nation self-government and negotiations and discussions relating to matters and arrangements with respect to the exercise of jurisdiction and powers by First Nations' governments in Ontario, and to resolve land claims. (In these Orders in Council "First Nation" has the same meaning as "band", as defined by the Indian Act, RSC 1985, c. 1-5)

#### 2. FUNCTIONS

- 2.1 To provide a forum for the negotiation of self-government issues;
- 2.2 To facilitate the examination and bring about resolution of any issue of mutual concern to the federal government and provincial government, or either of them, and to all or some of the First Nations in Ontario, which the Tripartite Council refers to the Commission by formal direction or as otherwise requested by the parties as hereinafter described; and
- 2.3 Under the general direction of the Tripartite Council, to acquaint the residents of Ontario with the activities of the Commission and with the nature and progress of the matters before it.

#### 3. DUTIES

- 3.1 To perform in accordance with this Order, all functions, duties and activities assigned by way of a formal direction of the Tripartite Council referring a matter for examination and resolution to the Commission and which direction shall confirm the agreement of the parties as to:
  - a) the nature of the matter;
  - b) the objective of the matter being referred to the Commission;
  - c) the process to be implemented;

- d) the resources to be allocated to the First Nations by the Government of Canada and the Government of Ontario;
  - e) a schedule for completion;
- 3.2 To facilitate the resolution of any matter of concern to one or more First Nations-or communities and one or both of the Government of Canada and Ontario, at the request of all the parties involved in that matter, where the Commissioner believes assistance would be appropriate, and subject to the following conditions:
- a) The Commissioner shall forthwith notify the members of a Senior Steering Committee consisting of Senior Officials appointed by each of the Parties (hereafter called the "Senior Steering Committee"), of the involvement of the Commission for consideration at a meeting of the Steering Committee;
  - b) If it is the consensus of the Senior Steering Committee that the Commission should not be involved in the matter, the Commission shall cease its involvement in the matter forthwith, subject always to further review of the matter by the Tripartite Council;
  - c) Upon review and consensus of the Tripartite Council, the involvement of the Commission in a matter may be confirmed or otherwise regulated;
- 3.3 To convene a mutually agreed-upon number of meetings of the Tripartite Council during each calendar year;
- 3.4 To act as Secretariat to the Tripartite Council with respect to any process or mechanism, including the process of mediation, in which the Commission is involved as in accordance with this Order;
- 3.5 To provide a chairperson for all Tripartite activities in which the Commission is involved who shall be the Commissioner or such other person agreed upon by the parties involved;
- 3.6 To provide progress reports to the Tripartite Council on a quarterly basis one of which shall be an annual report, the reports to include a summary description of outstanding issues or concerns and a

summary of the Commission's on-going and proposed activities; and

- 3.7 To assist the Tripartite Council in the identification, examination and resolution of matters of mutual concern to the Tripartite Council, including land claims.

#### 4. POWERS AND AUTHORITIES

- 4.1 To grant to the Commission the powers and authorities listed below which are required to enable it to deal effectively with the matters, including land claims, referred to it;
- 4.2 To convene and adjourn meetings in consultation with representatives of the Government of Canada, the Government of Ontario, and the First Nations in Ontario and upon reasonable notice;
- 4.3 Should the Tripartite Council be required to consider a matter on an urgent basis, to convene a meeting at its sole discretion upon 30 days notice at which alternate representation of the parties would be acceptable;
- 4.4 To convene and adjourn meetings to consider the financial requirements of one or more of the parties;
- 4.5 To meet separately or jointly with representatives of the Government of Canada, the Government of Ontario or the First Nations in Ontario;
- 4.6 To request any representatives to the Tripartite Council, upon reasonable notice:
  - a) to deliver to the Commission any document or information available to that party. However, nothing in this Order shall be construed as a requirement of any party to make available information that is privileged or would in court proceedings give rise to a right to receive from the court an order providing exemption from disclosure or is, in the case of information in the possession of Canada, a record for which an exemption is provided in the Access to Information Act, R.S.C. 1985, c.A1, as amended and as it may be amended from time to time, or is, in the case of information in the possession of Ontario, a record for which an exemption is

provided in the Freedom of Information and Protection of Privacy Act, S.O., 1987 c. 25, as it may be amended from time to time;

- b) to make available any person in the employ of any of the parties for the purpose of assisting the Commission in its efforts to facilitate the resolution of an issue, provided, however, that should the Government of Canada, the Government of Ontario, the First Nations in Ontario, or any one or more of them be unable to comply with any such request, the reasons for being unable to comply with that request shall be provided in writing to the Commission, and to representatives of the Government of Canada, the Government of Ontario and the First Nations in Ontario, as the case may be;
- 4.7 After due consultation with the parties, to impose deadlines for the completion of any process, or any stage of any process, being facilitated, examined or otherwise by or before the Commission;
- 4.8 To set questions and to request responses from the parties, and in consultation with the party concerned, set a reasonable time period for receipt of the response;
- 4.9 To present verbally or in writing, at its discretion or at the request of the Tripartite Council, to any or all of the parties, suggestions for their consideration and response with a view to alleviating adverse effects and with a view to arriving at a mutually acceptable resolution of any matter which is the subject of negotiation;
- 4.10 After consultation with the representatives of the Government of Canada, the Government of Ontario and the First Nations in Ontario to the Tripartite Council, to suspend any of the Tripartite processes created by the Tripartite Council, on the condition that the suspension and the Commission's reasons in writing for such suspension shall be discussed and either confirmed or rejected at the next scheduled meeting of the Tripartite Council. Failure by the Tripartite Council to achieve agreement on the issue shall be treated as confirmation of the suspension;
- 4.11 With the consent of the Tripartite Council, to facilitate the reference of any issue, or any



element of any matter, to a court of competent jurisdiction or to any tribunal, body or person;

- 4.12 With the agreement of the parties to a matter which has been referred to the Commission for examination and resolution, to act as or arrange for a mediator or arbitrator on any issue or any element of any matter;
- 4.13 On the application of a party in a matter which is before the Commission, to determine whether an impasse in the negotiations has occurred. If in the opinion of the Commission an impasse has occurred, the Commission may suggest alternative dispute resolution mechanisms to resolve the impasse, and require the parties to attend one mediation, or other meeting to attempt to resolve the impasse;
- 4.14 To recommend to the Tripartite Council the appointment of a commission under The Inquiries Act, R.S.C. 1985, c.I-11, the Public Inquiries Act, R.S.O. 1980, c.411, or any other appropriate legislation, to inquire into such matters as the Commission considers necessary. Subject to section 4.5 herein, where a party decides not to follow the recommendation of the Commission to establish a commission of inquiry that party shall state its reasons for doing so in writing to all other parties and the Commission within thirty days of the date of the refusal;
- 4.15 To engage the services of such counsel, clerks and advisors as may be required to carry out the functions and duties of the Commission within its budgetary limits;
- 4.16 The authority, to be exercised by the Commissioner, to disburse the funds provided to meet the expenses of the Commission, subject to such terms and conditions as are approved by the federal Treasury Board and by the Ontario Management Board of Cabinet and subject to audit in accordance with the provisions of the Audit Act, R.S.O. 1980, c 35; and
- 4.17 To agree that all the expenses of the Commission be shared equally among the Government of Canada, the Government of Ontario and the First Nations in Ontario, with Canada's share being subject to approval of the federal Treasury Board and Ontario's share being subject to approval by the Ontario

Management Board of Cabinet on the recommendation of  
the Minister Responsible for Native Affairs.

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1. TERMS OF REFERENCE AND ROLE OF  
THE OFFICE OF THE TREATY COMMISSIONER

1.1 By Memorandum of Agreement of June 8, 1989 the Federation of Saskatchewan Indian Nations and the Minister of Indian Affairs and Northern Development established the "Office of the Treaty Commissioner", as "an independent office" and one "which shall have a mandate and terms of reference to be mutually agreed upon. The appropriate powers include the directing of the process of the resolution of issues and the making of recommendations to the Minister and the Treaty Indians."

1.2 The mandate and terms of reference were so established by a separate Memorandum of Understanding of June 8, 1989. This Memorandum defined the office objectives, functional terms of reference and the issues requiring the immediate consideration of the Commissioner.

1. OBJECTIVES OF THE OFFICE

- (a) The objectives of the office include making progress on matters related to Treaties by directing the process of resolution on the issues and by making recommendations to the Minister and the Treaty Indians. To do so, both parties - the Treaty Indians and the Federal Government - will be required to articulate their respective positions on Treaty issues. The Commissioner will be required to identify common ground and differences in making recommendations address matters impeding settlements.
- (b) The Commissioner will also undertake to make recommendations concerning rules for application in interpreting the terms of the Treaty.

## 2. FUNCTIONAL TERMS OF REFERENCE

The Commissioner will, as may be required:

- (a) Arrange, sponsor, chair and report upon meetings involving Treaty Indian Nations, representatives of the Federal Government, and other parties as appropriate.
- (b) Establish and direct working groups, joint or otherwise, to undertake specific activities and reviews.
- (c) Initiate and conduct historical, and any other relevant research or investigations. In this, he/she will receive full cooperation from all employees of the Government of Canada, and have adequate access to documents held by that Government. This will include the authority to call federal and Indian officers regarding procedural, timing, or informational items.
- (d) Make representations to the public and/or respond to information requests from Indian public groups.
- (e) Make recommendations to the Minister and the Treaty Indians or Treaty Indian Nations which might lead to progress on the specific issues under review.
- (f) Follow any other terms of reference which might be mutually agreed upon by the Minister and the Treaty Indians.

## 3. AREAS OF INTEREST

- (a) The parties hereto agree that two areas for immediate consideration by the Commissioner will be Land Entitlement and Education under Treaty.
- (b) In deliberations concerning Treaty Land Entitlement, the Commissioner is required, in making recommendations, to consider the views, policies and positions of the federal and provincial governments and Treaty Indian Nations on such matters as third party interests, tax base loss, water rights, management of wildlife, mineral rights, purchase policy and land quantum.

1.3 This report concerns the matter of treaty land entitlement. Its purpose is to recommend to the co-creators of the Office of the Treaty Commissioner ways whereby the difficulties which beset the settlement of treaty land entitlements in Saskatchewan might be overcome. Unlike the 1982 Manitoba Treaty Land Entitlement Commission, this Commission is not a body whose task it is to conduct public hearings into what

policies a government should adopt to deal with the issue. Rather the work of this Commission, as determined by its Terms of Reference, is to try to understand why the 1976/77 "Saskatchewan Formula" settlement of treaty land entitlement, announced at the time by all parties concerned with such great hope, has largely failed in implementation and to recommend practical solutions for those problems which caused that failure. To arrive at such recommendations, the Commissioner has studied the interpretations of Treaty advanced by the parties to the Treaties and, where these are at variance from one another, has suggested in this report ways by which the differing interpretations might be reconciled. The Commissioner cannot emphasize too strongly that, ultimately, it is the two parties to the Treaties, Canada and the Treaty Indians, that must decide how the Treaties are to be interpreted.

- 1.4 Since the opening of the Office of the Treaty Commissioner at the beginning of December 1989, the Commissioner and his staff have had the opportunity of meeting, both formally and informally, with Chief Roland Crowe and executive members and research staff of the Federation of Saskatchewan Indian Nations (FSIN) representatives of the Battlefords Treaty No. 6 Tribal Council, the Department of Indian Affairs (DIAND), Specific Claims Branch and Regional Lands, Revenues and Trusts and the provincial Indian and Native Affairs Secretariat, and a number of Band Chiefs and Councillors. The views expressed at these meetings were augmented by written statements most notably the Principles in the Settlement of Treaty Land Entitlements in Saskatchewan by the Entitlement Chiefs Policy Committee, formally presented to the Commissioner on the occasion of the official opening of the Commission, March 24, 1990 and a detailed statement from the Battleford Treaty No. 6 Tribal Council dated March 29, 1990. In addition, Office of the Treaty Commissioner's staff conducted an extensive review of the written record concerning treaty land entitlement in Saskatchewan, particularly the period 1975-1989.

A supplementary report listing the documents, reports, newspaper clippings, books and articles so reviewed will be forthcoming at a later date.

1.5 The Commissioner notes with considerable satisfaction and great appreciation the cooperation extended by officials of the FSIN, the Battlefords Treaty No. 6 Tribal Council, DIAND's Specific Claims Branch and Regional Lands, Revenues and Trusts Program, Statistics Canada, the Saskatchewan Indian and Native Affairs Secretariat and the Saskatchewan Rural Development's Rural Municipal Finance and Advisory Services. Every request for information was complied with promptly and much thoughtful advice was given by these officials. This report would not have been possible without the help and the information they provided. The Commissioner is also very grateful for the assistance and advice given by the Treaty Land Entitlement Section of DIAND Manitoba Region's Lands, Revenues and Trusts Program and the Treaty and Aboriginal Rights Research Centre of Manitoba, both of which have a great interest in the fate of treaty land entitlement in Saskatchewan.

2.0 THE "SASKATCHEWAN FORMULA" - ITS RISE, FALL, AND PRESENT STATE

2.1 On August 18, 1975 the Minister of Indian Affairs, the Honourable J. Buchanan wrote to Saskatchewan Premier Blakeney requesting the Province's cooperation under the 1930 Saskatchewan Natural Resources Act in order that land entitlements still due Indian Bands pursuant to treaty could be finally fulfilled. The 1930 Act had provided for the transfer of the ungranted land and natural resources from Dominion to provincial control, subject to certain conditions. One of these was that the province would transfer out of the unoccupied Crown lands received sufficient lands to Canada to enable Canada to fulfil its treaty obligations to the Indian people. The Saskatchewan Minister assigned the responsibility for dealing with treaty land entitlement, the Honourable T.

will surely be a bitter end, and an exceedingly expensive process for both parties, through the Courts.

2.15 The Office of the Treaty Commissioner is of the view that the best way to provide that focus is to return to the beginnings - the treaties - and to examine the various issues surrounding the entitlement matter based on the principles of treaty interpretation as enunciated by the Courts and derived from the historical record of treaty implementation efforts of the federal and Indian governments.

3.0 PRINCIPLES OF TREATY INTERPRETATION CONSIDERED BY THE OFFICE OF THE TREATY COMMISSIONER.

3.1 There are six principles of treaty interpretation which have guided the Commissioner's examination of the outstanding treaty land entitlement issue:

1. The treaty should be given a fair, large and liberal construction in favour of the Indians.
2. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.
3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.
4. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.



5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.
6. The treaty was made with Indians not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.

These principles are taken verbatim from the British Columbia Court of Appeal decision in Claxton v. Saanichton Marina Ltd. (1989) 3 C.N.L.R., p. 50 and the Federal Court (Trial Division) decision in The Queen v. Blackfoot Band of Indians et al. (1982) 3 C.N.L.R., p. 53.

The B.C. Court of Appeal further noted that, with reference to the first five of these principles, their expression is to be found in:

Nowegijick v. R. (1983) 1 S.C.R. 29, 144 D.L.R. (3d) 193, 46 N.R. 41, (1983) 2 C.N.L.R. 89, (1983) C.T.C. 20, 83 D.T.C. 5041.

Simon v. The Queen, (1985) 2 S.C.R., 387, 24 D.L.R. (4th) 390, (1986) 1 C.N.L.R. 153

R. v. Bartleman, supra; Taylor v. The Queen (1981), 34 O.R. (2d) 360 at 367, 62 C.C.C. (2d) 227, (1981) 3 C.N.L.R. 114 (Ont. C.A.)

- 3.2 Each of the issues associated with treaty land entitlement, namely, land quantum, purchase policy, third party interests municipal tax loss, water rights and wildlife, were analyzed on the basis of these six interpretation principles as were the positions taken by federal, provincial and Indian governments and SARM.

3.3 The Commissioner is aware of certain criticisms concerning the use of these principles. These criticisms are likely to be advanced by the provincial and federal Justice Departments. They are that as none of the court decisions cited deal specifically with treaty land obligations, their use in the entitlement context is "dubious". (see, for example, letter of Mr. B. Calder to Mr. E. Korchinski or March 16, 1990). With all due respect, this Commission is neither a court of law nor a quasi-judicial body with powers of arbitration. It is a non-legal advisory body whose task is to recommend principles which the parties to the Treaties might adopt in their efforts to agree on rules of Treaty interpretation. In the view of the Commissioner, and considering the role of this Office, the application of these principles to Treaty land entitlement makes eminent sense: if the courts have used these principles to consider hunting and fishing clauses of treaties then surely they are sound enough to apply to the land clauses.

#### 4.0 CONCERNS IDENTIFIED

4.1 From file research, meetings and conversations with federal, provincial and Indian government officials, the Commissioner was able to identify eleven principal concerns regarding the treaty land entitlement matter. These may be summarized as follows: