

INDIAN CLAIMS COMMISSION

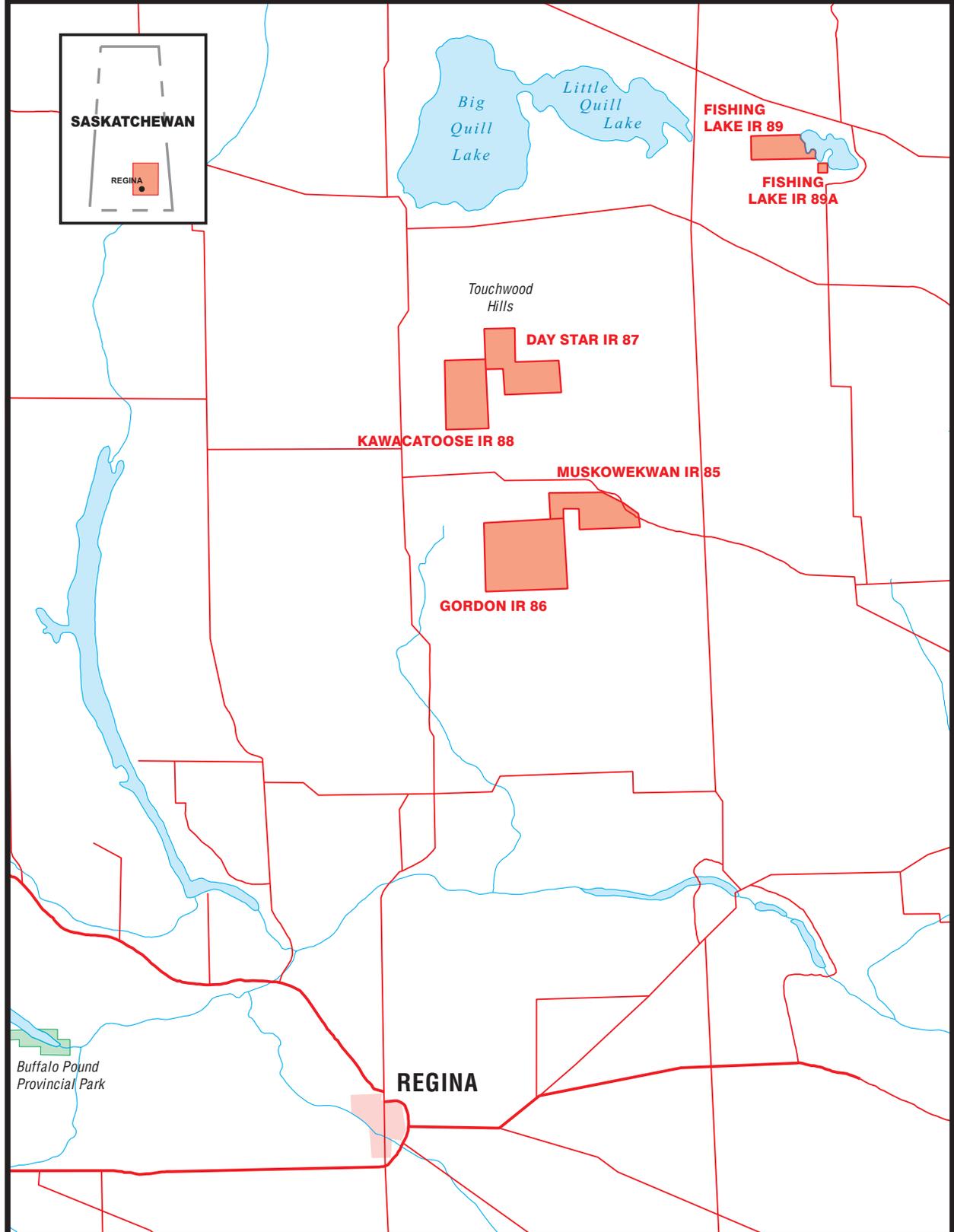
**REPORT ON THE MEDIATION
OF THE
TOUCHWOOD AGENCY
MISMANAGEMENT (1920–24) CLAIM
NEGOTIATIONS**

August 2005

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Claim Area Map



PART I
INTRODUCTION

This report outlines the unsuccessful negotiation of a claim that has been in the Specific Claims system for 12 years. Based on events during the 1920s, the claim was conditionally accepted for negotiation, but, despite the assistance of the Mediation Unit of the Indian Claims Commission (ICC), the parties were unable to reach a settlement agreement. The First Nations have since asked the ICC to conduct an inquiry into the unresolved issues.

The report will not provide a full history of the Touchwood Agency claim, but, to provide the historical background, will summarize material submitted during the negotiations. The Indian Claims Commission must report its activities to the public, but, owing to the confidential nature of negotiations, the process and any problems or roadblocks can be referred to only in generalities.

For the purposes of this claim, five Saskatchewan First Nations – Day Star, Fishing Lake, Gordon, Kawacatoose, and Muskowekwan – reconstituted themselves as the Touchwood Agency Tribal Council. The First Nations claim that they suffered considerable financial losses because of the mismanagement of the Touchwood Agency from about 1920 to 1923, when J.B. Hardinge was employed as Indian Agent for the Agency. The claim was submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) in March 1993. On March 5, 1998, John Sinclair, Assistant Deputy Minister, Claims and Indian Government, “conditionally” accepted the claim for negotiation on the grounds that the First Nations had

sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy, with regard to the claim. However, further research is required prior to entering into formal negotiations in order to identify the beneficiaries of the claim and to assess the compensation owing to the First Nations. If this process establishes that no compensation is owing with respect to one or more of the Touchwood Agency First Nations, then Canada will not proceed to formal negotiation with that First Nation.¹

¹ John Sinclair, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada, to Chief Cameron Kinequon, Day Star First Nation, March 5, 1998, attached to Stephen Pillipow to Indian Claims Commission, March 5, 2004 (ICC file 2107-43-1M).

In a letter of clarification regarding this conditional acceptance, the department stated that it had no objection to the five Touchwood Agency First Nations acting as a single beneficiary to the claim and determining how an eventual settlement would be allocated. The conditional nature of the acceptance

was intended to reflect the fact that further joint research would be required prior to proceeding to formal negotiations. This research will clarify the nature and extent of the financial mismanagement which took place at the Touchwood Agency between 1920 and 1924 and establish the extent of the losses which may or may not have been suffered by the Gordon, Fishing Lake, Day Star, Muskowekwan and Kawacatoose First Nations. Compensation will be negotiated based on the losses which are established.²

The First Nations and the department met on June 17, 1998, to discuss the conditional acceptance, and at that time the question of using the Indian Claims Commission as facilitator was discussed. The department's negotiator, Larry Ostola, had no objection to the ICC's involvement but "preferred for the present time to work directly with the First Nations" to avoid adding another layer, "which might make it even more difficult to coordinate schedules."³ The ICC was asked to participate in September 2000, after the necessary forensic audit was completed and negotiations could commence.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was

² Larry Ostola, Negotiator, Specific Claims Branch, Department of Indian and Northern Affairs, to Chief Lloyd Kinequon, Day Star First Nation, July 28, 1998, attached to Stephen Pillipow to Indian Claims Commission, March 5, 2004 (ICC file 2107-43-1M).

³ Summary of Negotiation Meeting with Touchwood Agency, June 17, 1998, attached to Stephen Pillipow, Woloshyn & Company, to Indian Claims Commission, March 22, 2004 (ICC file 2107-43-1M, vol. 1).

appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative.

The Commission's mandate is twofold: it has the authority, first, to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and, second, to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or instances where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the Commission's work. The Commission is mandated to review thoroughly a rejected claim and the reasons for its rejection with both the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and, if necessary, subpoena evidence. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs that a claim be accepted.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of the parties. From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II
A BRIEF HISTORY OF THE CLAIM

Indian affairs in the Prairie provinces in the 1920s was administered locally by various levels of supervision. Most reserves had a farming instructor who lived nearby and who oversaw the day-to-day activities of the Indians who were working the land. He reported to an Indian Agent, who was in charge of a number of reserves and bands in his particular agency. The Agent had a great deal of responsibility and power, for he was usually the local justice of the peace, and all the Indians in his agency had to go through him to buy or sell farm goods or to travel off the reserve. The agency usually employed a clerk to assist the Agent, especially with the bookkeeping. An Inspector was charged with travelling from agency to agency within his inspectorate to audit the books and to report on the administration of the agency. An Indian Commissioner, based in Regina, oversaw all the agencies and inspectorates.

The Touchwood Agency, located in Saskatchewan north of Regina, included the following reserves: Muscowequan (now Muskowekwan) Indian Reserve (IR) 85; Gordon IR 86; Day Star IR 87; Poor Man (now Kawacatoose) IR 88; and Yellow Quill (Fishing Lake) IR 89. The Agency office was located near Punnichy, Saskatchewan, which was centrally located to four of the reserves in the Agency (the Fishing Lake reserve was about 80 kilometres to the northeast).

On June 6, 1920, John B. Hardinge was hired as Agent at Touchwood, but, owing to some administrative confusion, he was not confirmed in that position until January 1923, retroactive to December 14, 1922.⁴ Commissioner W.M. Graham dismissed the other eight applicants for the Agent's position in January 1923 and recommended Hardinge as the best candidate:

Of the nine applicants I have been asked to consider, Mr. Hardinge only in my opinion has the necessary qualifications. He has been acting in the capacity of Agent for 2½ years, and his experience with Indians covers even a longer period. His constant personal contact with Indians, during the past 2½ years particularly, places

⁴ D.C. Scott, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Indian Commissioner, Regina, January 23, 1923.

him far higher than the other candidates, and furthermore he served with distinction overseas. I have no hesitation in recommending him for the appointment.⁵

Just four months later, however, in April 1923, Commissioner Graham asked Inspector Mindy Christianson to visit the Touchwood Agency to investigate complaints that Agent Hardinge had made about his clerk, Robert Hick. After interviewing both men together, Christianson learned that the source of the problem was that Hardinge, according to Hick, did not always follow the department's financial regulations, and the Agent resented Hick's comments:

Mr. Hick made no charge whatever against the Agent and further stated that he had never made any kind of charge in regard to his Agent, but that what had caused friction was that certain regulations set down by the Department in regard to the handling of the business in the office had not been carried out and that on several occasions he had spoken to Mr. Hardinge regarding this matter and at last the Agent told him that it was none of his business and that he was running the Agency and not the clerk. As Mr. Hick stated, he was laying no charge whatever, all he wanted was a square deal and the necessary information to enable him to intelligently enter up his books. The matter which he referred to was the handling of certain cash which he knew should have been entered in the books but was handled otherwise by Mr. Hardinge without the clerk knowing what had become of the money.⁶

Christianson referred to three specific cases, with amounts totalling \$472, where the Agent had not followed the regulations and had not given the clerk sufficient information to make the proper bookkeeping entries. The Inspector had been to the reserve the previous December, and the clerk had found a way to solve his problem, without bringing charges against the Agent, simply by asking "whether all monies received by the Agency should go through the books or not." Christianson had "emphatically" answered in the affirmative, and, since January, Christianson was told, all moneys received had been entered in the agency books.⁷ Christianson "gave him [Hardinge] a good talking

⁵ W.M. Graham, Indian Commissioner, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 5, 1923, Library and Archives Canada (LAC), RG 10, vol. 9153, file 312-4, part 1.

⁶ M. Christianson, Inspector of Indian Agencies, Regina, to W.M. Graham, Indian Commissioner, Regina, April 20, 1923, LAC, RG 10, vol. 9153, file 312-4, part 1.

⁷ M. Christianson, Inspector of Indian Agencies, Regina, to W.M. Graham, Indian Commissioner, Regina, April 20, 1923, LAC, RG 10, vol. 9153, file 312-4, part 1.

to,” and Commissioner Graham followed up with a letter of reprimand,⁸ but there was no further inquiry into the finances of the Agency at that time.

In June 1923, Hardinge again wrote that his clerk, Robert Hick, was being insubordinate, and, in September of that year, the farming instructor on the Poor Man (Kawacatoose) reserve resigned, at least in part because “things had not been running harmoniously between himself and the Indian Agent.”⁹ Commissioner Graham once again called on Inspector Christianson to inspect the Agency and investigate the complaints.

Christianson began his inspection on September 24. His first stop was the Fishing Lake reserve, where he found the farming operations and reserve in very poor shape. When he arrived at the Agency office and looked through the books, he quickly discovered that there was a serious problem:

Immediately I commenced checking the cash book and ledger I was aware that things were not right although the figures in the cash book agreed with the figures in the ledger.¹⁰

He noted that no debts were recorded in the books and that Hardinge assured him that all the debts to merchants were paid up. Christianson knew this reply to be false because merchants had been complaining to the Regina office. After interviewing the shopkeepers in nearby Lestock, he found that the Touchwood Indians owed money to practically every business in that town. Hardinge continued to lie about the debt, even after he admitted that the books were not accurate:

The following day he came back to me and apologized saying that he knew he had done wrong and was aware that things were in a terrible mess there and if I would only give him one more chance he would give me a true statement of everything as

⁸ M. Christianson, Inspector of Indian Agencies, Regina, to W.M. Graham, Indian Commissioner, Regina, April 20, 1923, and copy of a personal letter from W.M. Graham, Indian Commissioner, to J.B. Hardinge, April 25, 1923, both in LAC, RG 10, vol. 9153, file 312-4, part 1.

⁹ W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, September 20, 1923, LAC, RG 10, vol. 9153, file 312-4, part 1.

¹⁰ M. Christianson, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, January 8, 1924, p. 2, LAC, RG 10, vol. 5193, file 312-4, part 1.

he wanted a clean sheet if he left the Agency. After allowing him this privilege I found that when he finally had the statement prepared he was still lying to me.¹¹

On October 6, Christianson returned to Regina to confer with the Commissioner. Inspector Christianson said's opinion that it was necessary to go back to the beginning of Hardinge's administration to see what had taken place. Commissioner Graham agreed, and Christianson returned to the Touchwood Agency to conduct a thorough review of the Agency accounts. Headquarters, however, did not wait until the investigation was complete to relieve Hardinge of his position. According to the Order in Council, his services were dispensed with effective November 8, 1923,¹² but the Auditor General's Report for that year indicated that he was paid only to September 30.¹³

Christianson found that the "manner in which the financial administration of the agency has been handled is the most terrible mix-up that could be imagined."¹⁴ Funds intended for the five Bands in the Agency, or their individual members, were repeatedly diverted to pay accounts simply to make the books balance, without any authority from either the Indians or headquarters. As well, during Hardinge's administration, band debt skyrocketed. When he took over the Agency in 1920, the total debt was approximately \$15,000, but, one and a half years later, it had risen to almost \$43,000. This debt was retired by loans from the Bands, to be repaid by the individual band members over five years. From 1922 until his dismissal in 1923, Hardinge had made purchases from merchants on credit, accumulating a debt of nearly \$60,000. Only half of this amount was supported by written orders or notes signed by Hardinge, and the department recognized only these debts.¹⁵

¹¹ M. Christianson, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, January 8, 1924, p. 3, LAC, RG 10, vol. 5193, file 312-4, part 1.

¹² Order in Council, PC 2571, December 24, 1923, T108634B.

¹³ Touchwood Agency, Salaries, in Canada, Auditor General's Report, 1923-24, Part I, Indian Affairs Department, p. I-26.

¹⁴ M. Christianson, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, January 8, 1924, p. 4, LAC, RG 10, vol. 5193, file 312-4, part 1.

¹⁵ Balfour Moss, Legal Submission, Touchwood Agency Mismanagement (1920-23), c. 1993, p. 5.

The department refused to honour any of the debts incurred by Hardinge, putting the onus for the Agency debt on the Bands and their members. Nor did it reimburse any of the interest payments and other money that Hardinge had diverted.

In October 1924, Commissioner Graham asked four of the Bands in the Touchwood Agency to pass Band Council Resolutions (BCRs) requesting that money be advanced from their capital funds “for the purpose of liquidating indebtedness of individual members of the Band to merchants and others from whom they have received credit on written orders given by the Indian Agent.” Gordon’s Band had only a nominal sum to its credit, but the other four Bands – Muscowequan, Poor Man (Kawacatoose), Day Star, and Fishing Lake – all signed the BCRs and, on December 1, 1924, the Privy Council approved the use of the capital funds of Muscowequan, Poor Man, and Fishing Lake (but was silent as to Day Star) for this purpose.¹⁶ In a later letter to the Deputy Superintendent General of Indian Affairs, Commissioner Graham summarized the situation:

You are aware of the fact that we had to borrow money from the Indians to pay bona fide indebtedness, and it was with difficulty we were able to get this money from them, as many of them contributed money to pay accounts for which they were not responsible.¹⁷

¹⁶ See Balfour Moss, Legal Submission, *Touchwood Agency Mismanagement (1920–23)*, c. 1993, pp. 7–9.

¹⁷ W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 17, 1925, as quoted in Balfour Moss, Legal Submission, *Touchwood Agency Mismanagement (1920–23)*, c. 1993, p. 9.

PART III
NEGOTIATION AND MEDIATION OF THE CLAIM

Beginning in September 1998, Canada and the five First Nations of the Touchwood Agency Tribal Council worked together to commission the forensic audit and historical research necessary to clarify the nature and extent of the financial mismanagement that took place at the Touchwood Agency under Agent Hardinge's administration and to establish the actual extent of the losses suffered by the Bands in the Agency. Together they developed the terms of reference for the project, selected the experts who would undertake the research and evaluation, and reviewed the various draft reports.

On September 20, 2000, the final report was tabled, and on September 28, the parties met and invited the Indian Claims Commission to attend. At this meeting there was formal agreement to ask the ICC to facilitate the negotiations. For the most part, facilitation focused on matters relating to process: the Commission chaired negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes if requested to do so by the parties, to assist in arranging further mediation, and to coordinate any further research that might be required by the parties to support the negotiations.

The Commission is not at liberty to disclose the discussions during the negotiations, which are privileged. Generally, discussion focused on issues such as individual versus collective losses, non-financial losses, and establishing present-day values for historical losses. By far the biggest issue, however, was determining the amount of losses. The expert report outlined three categories of losses: identified losses, probable losses, and potential losses, and, even though both parties wanted to deal with the losses in a global matter, they simply could not reach agreement on a compensation amount to settle the claim.

Despite the best efforts of both parties, the issues could not be resolved, and, on March 20, 2002, Canada advised that the negotiations were concluded without a satisfactory resolution. On August 26, 2003, the Touchwood Agency Tribal Council asked the Indian Claims Commission to conduct an inquiry into the unresolved issues. That inquiry is ongoing.

PART IV
CONCLUSION

The Commission is not at liberty to disclose the discussions during the negotiations. However it is worth noting why the negotiations were unable to produce a settlement.

The Commission, through its Mediation Unit, provides coordination services for loss-of-use studies to a negotiation table. These services, in part, ensure that reports commissioned by outside experts adhere to the terms of reference developed by the parties to the negotiations. In this case, the Commission was not involved until the experts' report had been completed, and certain expectations were created which could not be met or addressed at the negotiating table.

In addition, despite creative solutions put forward by the parties, they were unable to get past the existing policies governing the resolution of specific claims.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis
Chief Commissioner

Dated this 2nd day of August, 2005.