

# INDIAN CLAIMS COMMISSION PROCEEDINGS



(1995) 2 ICCP

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## **Special Issue on Land Claims Reform**

INDIAN CLAIMS COMMISSION  
A Fair and Equitable Process:  
A Discussion Paper on Land Claim Reform

Authur Durocher  
Land Claims Reform

Mary Ellen Turpel  
A Fair, Expeditious, and Fully Accountable Land Claims Process

Neutral Draft of Recommendations / Joint Working Group of  
the Federal Government and the Assembly of First Nations  
June 25, 1993

Indian Commission of Ontario / Discussion Paper Regarding  
First Nation Land Claims, September 24, 1990

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**THE INDIAN CLAIMS COMMISSION**



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## FROM THE CO-CHAIRS

On behalf of the commissioners and staff of the Indian Claims Commission, we are pleased to present this second volume of the *Indian Claims Commission Proceedings*. Part of our mandate is to offer "advice and information" to the Joint Assembly of First Nations/Canada Working Group. The Joint Working Group on Specific Land Claims was set up to review and make recommendations on changing the land claims policy and process; a protocol describing its role was signed in July 1992, and its mandate expired in July 1993 with no agreement reached. Since that time there has been no special forum to discuss land claims issues, and no progress appears to have been made in reforming policy or process. The Commission is now in its fourth year of operation, and, as a result of the planning conferences, community sessions, and inquiries, we have acquired much valuable information and understanding of both policy and process. We should like to ensure that we all benefit from that knowledge.

In October 1993, a few months after the Joint Working Group's mandate expired, a new government was elected on a platform that included land reforms for First Nations. For many reasons, an opportunity now exists for a meeting of minds; therefore, this volume is devoted to the issue of land claims reform. We urge all to read and consider the material contained in these pages so that we can move on to new and workable solutions.

The issue begins with a paper prepared by the Commission which traces the path that has brought us where we are today. It sets out the historical background to land issues, describes the origins and activities of the Commission, and discusses the failure of the Joint Working Group to achieve its task. It is followed by independent papers written by lawyers Art Durocher and Mary Ellen Turpel for this Special Issue. They discuss the different processes available for settling land disputes, drawing on examples from different parts of the world, and the legal issues involved in the land claims process. We should like to thank Ms Turpel and Mr. Durocher for their contributions to this debate.

Reprinted in this issue are two other documents. The "Draft Recommendations Prepared by Neutral," dated June 25, 1993, sets forth the Joint Working Group's discussions and indicates where and how the parties disagreed. The "Discussion Paper Regarding First Nation Land Claims," dated 24 September 1990, was prepared by the Indian Commission of Ontario and it sets out the issues at that time.

Much discussion concerning the reform of the Specific Claims Policy has taken place over recent years; little of fundamental importance has been accomplished. We hope that these materials will promote a resumption of debate, and debate at a knowledgeable and useful level. There is an urgent need for reform of the Specific Claims Process to provide a fair and accountable land claims process for First Nations and indeed for all Canadians.

Daniel J. Bellegarde  
Co-Chair

P.E. James Prentice, QC  
Co-Chair





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# ABBREVIATIONS

AC	Law Report Appeal Cases (Eng.)
AFN	Assembly of First Nations
AIAI	Association of Iroquois and Allied Indians
ALR	Australian Law Review
Alta L.R.	Alberta Law Reports
Alta L. Rev.	Alberta Law Review
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCSC	British Columbia Supreme Court
CA	Court of Appeal
Can. Bar Rev.	Canadian Bar Review
Can. J. Law & Jur.	Canadian Journal of Law and Jurisprudence
CBA	Canadian Bar Association
CBAO	Canadian Bar Association of Ontario
CCC	Canadian Criminal Cases
CHRYB	Canadian Human Rights Year Book
CJC	Chief Justice of Canada
CLR	Commonwealth Law Reports (Aus.)
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Report
ETR	Estates and Trusts Reports
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCJ	Federal Court Judgments
FCTD	Federal Court Trial Division
Fed. L. Rev.	Federal Law Review
FG	Federal Government
FN	First Nations
FTR	Federal Trial Reports
Georgia L. Rev.	Georgia Law Review
Harv. L. Rev.	Harvard Law Review
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
ICO	Indian Commission of Ontario
JWG	Joint Working Group
L. Soc. Gaz.	Law Society Gazette (Law Society of Upper Canada)

## ABBREVIATIONS

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L.Ed.	Lawyer's Edition Supreme Court Reports (U.S.)
LJPC	Law Journal Reports, Privy Council (Eng.)
LT	Law Times Reports
McGill L.J.	McGill Law Journal
NA	National Archives of Canada
New York Univ. L. Rev.	New York University Law Review
New Zealand Univ. L. Rev.	New Zealand University Law Review
North Dakota L. Rev.	North Dakota Law Review
NR	National Reporter
NWT Terr. Ct.	Northwest Territories Territorial Court
Ohio State L.J.	Ohio State Law Journal
ONC	Office of Native Claims
OR	Ontario Reports
Osgoode Hall L.J.	Osgoode Hall Law Journal
Ottawa L. Rev.	Ottawa Law Review
PC	Privy Council
Queen's L.J.	Queen's Law Journal
RSC	Revised Statutes of Canada
Sask. L. Rev.	Saskatchewan Law Review
Sask. R.	Saskatchewan Reports
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
TARR	Treaty and Aboriginal Rights Research Centre
TD	Trial Division
TLR	Law Times Reports
UBC L. Rev.	University of British Columbia Law Review
UCLA L. Rev.	University of California at Los Angeles Law Review
Univ. of W. Aust. L. Rev.	University of Western Australia Law Review
UOI	Union of Ontario Indians
USR	United States Reports
USSC	United States Supreme Court
UTLJ	University of Toronto Law Journal
UWO L. Rev.	University of Western Ontario Law Review
Wash. L. Rev.	Washington Law Review
WWR	Western Weekly Reports
Yale L.J.	Yale Law Journal
YJ	Yukon Judgments

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**SPECIAL ISSUE ON LAND CLAIMS REFORMS**

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**A FAIR AND  
EQUITABLE PROCESS**

**A DISCUSSION PAPER ON  
LAND CLAIM REFORM**

**PREPARED BY THE  
INDIAN CLAIMS COMMISSION**

**SEPTEMBER 1994**

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## INTRODUCTION

This discussion paper is meant to stimulate discussion. The Indian Claims Commission is concerned that, since the mandate of the Joint Working Group (JWG) of the Assembly of First Nations and the federal government expired in July 1993, no specialized forum has existed for First Nations and Canada to discuss the reform of land claims policies and processes. As a result, little progress has been made on these issues for some time.

In an attempt to revive serious consideration of these critical issues, we have commissioned two papers on land claims reform, one from Mary Ellen Turpel and one from Art Durocher. Both papers are included in this volume of the *Proceedings*, along with critical background material: the Indian Commission of Ontario's 1990 *Discussion Paper Regarding First Nations Land Claims*, and Neutral's Draft Recommendations from the JWG. The 1990 *First Nations Submission on Claims* was reprinted in volume 1 of the *Proceedings*.

This Commission has a mandate at present to provide advice and guidance to Canada and First Nations on how to reform and improve the existing system. In our view, we can assist Canada and First Nations in the land claims reform process by facilitating negotiations, providing advice based on our experience to date, and by mediating when and if required. If we are to avoid further violence and bloodshed over unsettled land claims in Canada, we must act now, *before* the next confrontation.

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# PART I

## BACKGROUND

### HISTORY

#### Contact

Land disputes between North American Indians and European immigrants developed shortly after the arrival of the first settlers and continue to this day. The settlers found organized, self-governing communities that were using the lands and resources of this continent in a sustainable way, in harmony with nature. Many of these communities were, in some ways, more sophisticated than the so-called civilized newcomers. The government of the Five Nations Confederacy (now Six Nations), with its complicated system of checks and balances, was studied by Benjamin Franklin and used, in part, as the model for the government of the United States.<sup>1</sup> Similar examples of the sophistication of First Nations are numerous but, unfortunately, not well known.

What the Indians did not have was gunpowder, iron and steel, alcohol, and, most disastrously, any resistance to European diseases. Estimates of the population of North America prior to contact are in the vicinity of 18 million. After the arrival of the Europeans, approximately 95 per cent of North American Indians died, over 130 years, of diseases such as measles and tuberculosis.<sup>2</sup> Waves of epidemics swept the continent, leaving the First Nations decimated and vulnerable to European powers bent on colonization. The impact of disease should not be underestimated in the taking of North America.

Another important consideration in the history of Indian and settler land dealings is the huge cultural gap between the participants to the various treaties and land "sales." Although it is improper to generalize about First Nations' cultures, as they are all unique, most First Nations had no concept of land "ownership" as such. They believed that they were placed upon the land by the creator to care for the land and those things that cannot speak for themselves. How can one sell something one does not own? It would appear that First Nations more often believed they were entering into agreements to *share* the land with the newcomers.

#### The Royal Proclamation

By the mid 1700s, as the European powers fought each other for control of North America (with various Indian tribes playing strategic roles as military allies), the colonies in New

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<sup>1</sup> A.M. Gibson, *The American Indian* (Heath and Company, 1980), 580.

<sup>2</sup> Thomas R. Berger, *A Long and Terrible Shadow* (Vancouver: Douglas & McIntyre, 1991), 33.



England and New France began to expand. Problems developed over the haphazard, and often fraudulent, way in which settlers acquired land from the Indians. Things came to a head during the summer of 1763, when the Ottawa warrior Pontiac led a series of devastating raids on interior trading posts in which more than 2000 people were killed.<sup>3</sup>

Quebec had fallen in 1759, and the French had capitulated to the British at Montreal the following year. At the conclusion of the Seven Years' War, the European powers signed the Treaty of Paris in 1763. Britain gained control of most of the continent, east of the Mississippi, from Hudson Bay to the Gulf of Mexico. In response to the new situation, King George III issued the *Royal Proclamation of 1763*. That proclamation, which dealt with the administration of Britain's new lands, also set aside most of the interior of North America as Indian Territory. In addition, the *Royal Proclamation* established a procedure for the surrender of Indian lands which is still in place today (in a modified form, set out in the *Indian Act*<sup>4</sup>). That process was established to prevent the "great Frauds and Abuses . . . committed in purchasing Lands of the Indians"<sup>5</sup> by forbidding private persons from purchasing Indian land. Instead it required the following procedure:

if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; . . .<sup>6</sup>

This process effectively interposed the Crown between the settlers and the Indians by preventing the sale of Indian lands to anyone other than the Crown. It was, therefore, the beginning of the Crown's fiduciary obligations to the Indians,<sup>7</sup> and of the treaty process as well.

### Treaties

Most of the treaties in the Maritime provinces and in Quebec are "peace and friendship" treaties, more concerned with military alliance than land. There are more than 30 different treaties covering the Great Lakes basin entered into between 1763 and 1850. The prairies were settled through the "numbered" treaties, entered into between 1870 and 1921. The adhesion to Treaty 9, covering most of northern Ontario, was entered into in 1929. For several reasons, including a reluctance to pay for Indian land, most of British Columbia is not covered by treaties. A modern treaty-making process commenced in British Columbia in 1992 with the creation of the British Columbia Treaty Commission. The current

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<sup>3</sup> Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester & Orpen Dennys, 1987), 194.

<sup>4</sup> *Indian Act*, RSC 1985, c. I-5, ss. 37-41.

<sup>5</sup> *Royal Proclamation*, as set out in *The Annotated Indian Act, 1994*, ed. Donna Lea Hawley (Toronto: Carswell, 1993), 180.

<sup>6</sup> *Ibid.*, 180.

<sup>7</sup> For a detailed analysis of the Crown's fiduciary obligations to Indians, please refer to Mary Ellen Turpel's paper included in this volume.

negotiation of comprehensive claims in the Northwest Territories and the Yukon are also examples of modern treaty-making.

The Crown did well by this special process. It purchased Indian land at low value, and then resold it to speculators, who in turn sold it for a further profit. What little land had been "reserved" for the Indians pursuant to the treaties was also coveted by the settlers. Utilizing the surrender provisions of the *Indian Act*, vast tracts of land were taken away from First Nations reserves all across Canada, especially during the period from the introduction of the *Indian Act* in 1876 to the Second World War. Many people profited during this period; few (if any) were Indians:

Significant Crown revenues were generated by the purchase of Indian lands at minimal cost and subsequent resale to speculators. However, Indian lands were often improperly taken and sold; Indian moneys too often went missing or were invested in improvident schemes; treaty promises were ignored (always excepting, of course, the Indians' promise to cede the land).<sup>8</sup>

### Confederation

Prior to Confederation, Indian claims could only be advanced by petition to the Crown, with no right of appeal. After 1867, First Nations could do little more, except complain to their Indian agent. There were various commissions and boards, which looked into issues regarding Indian lands. Most dealt with federal-provincial jurisdictional disagreements. Some of those, like the *St Catherine's Milling*<sup>9</sup> case, ended up in the highest Court in the land (then the Judicial Committee of the Privy Council in Britain). This case was the most important Indian land rights decision in Canada for decades, even though no Indians were before the Court.

As a result of this case, the provinces of Canada obtained control of all the lands within their boundaries that the Indians had ceded by way of treaty to the federal Crown, or to the British Crown before 1867. Those treaties contained solemn promises made to the Indians regarding the right to hunt and fish and the right to continue their traditional pursuits, for "as long as the sun shines and the rivers flow." It was not long, however, before the provinces were enacting game and fish laws that abrogated treaty rights (as decisions such as *Sparrow*<sup>10</sup> have determined).

Following the First World War, returning Indian veterans began to demand justice on land issues. A growing number of court applications sought to redress the way in which Indian land had been taken. This led the federal government to amend the *Indian Act* in 1927 to make it illegal for an Indian Band to raise funds to retain legal counsel to litigate a land claim. These provisions remained in effect until 1951.

<sup>8</sup> Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: ICO, September 24, 1990), 6.

<sup>9</sup> *St Catherine's Milling and Lumber Company v. R.* (1888) 14 AC 46 (PC).

<sup>10</sup> *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR 160.

### **First Attempts at Claims Resolution Process**

After the Second World War, Canada recognized that it must address “the Indian problem.” For over 100 years, law and policy directed towards Indians had been built upon the premise that Indians were a disappearing race, doomed to extinction as a result of disease and assimilation. By this time it was becoming apparent that this premise was mistaken.

Joint committees of the Senate and the House of Commons, in 1946–48 and again in 1958–61, recommended the creation of an Indian Claims Commission. Draft legislation was prepared and tabled in 1963 and again in 1965. Like the American Indian Claims Commission, this commission would have had courtlike powers and would have been able to “hear and consider” five classes of claims.<sup>11</sup> The draft bills died on the order paper.

### **The White Paper**

In 1969 the federal government tabled a White Paper.<sup>12</sup> It maintained that aboriginal title claims were “too vague and undefined” to be dealt with. Treaty rights were to be abolished, along with the concept of a “status” or “treaty” Indian. Only *lawful obligations* of the Crown would be fulfilled, with the assistance of an Indian Claims Commissioner.

The White Paper was not well received by Indians. The backlash it sparked helped to solidify the growing Indian rights movement of the time and assisted in the development of the National Indian Brotherhood, now the Assembly of First Nations. The government backed away from most of the recommendations contained in the White Paper.

### **Development of Current Policy**

It was not until after the 1973 Supreme Court of Canada decision in *Calder*<sup>13</sup> that Canada began to take native claims seriously. In a 3-3-1 split decision, three justices found that “aboriginal title” was a legal entity that had to be addressed by Canada. Shortly thereafter, negotiations commenced on “comprehensive claims” (those claims dealing primarily with unextinguished aboriginal title). The James Bay Agreement in 1975 was the first settlement of its kind.

The Office of Native Claims (ONC) was established in 1974 to negotiate land claims settlements with First Nations. It is part of the Department of Indian Affairs and Northern Development (DIAND), and reports to the deputy minister. Over time, policies with respect to native claims were developed in a piecemeal fashion by Canada. During the 1970s and early 1980s many approaches were considered and many reports were written. In a report commissioned by and for the ONC in 1979, Gerald V. La Forest, QC (now a justice with the Supreme Court of Canada) recommended that an administrative tribunal be created

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<sup>11</sup> Bill C-123, *An Act to Provide for the Disposition of Indian Claims*, 3rd Sess., 26th Parl., 1965.

<sup>12</sup> Department of Indian Affairs and Northern Development (DIAND), [The White Paper] *Statement of the Government on Indian Policy* (Ottawa: Queen's Printer, 1969).

<sup>13</sup> *Calder v. British Columbia (Attorney General)*, [1973] SCR 313.

through legislation to deal with specific land claims (those relating to the administration of Indian land and assets and the fulfilment of treaties):

This independent body should for all practical purposes be a specialized court, but with power to adopt procedures and practices suitable to its particular functions. Its jurisdiction should extend beyond claims now enforceable in a court of law to encompass those arising out of the honourable treatment that should be accorded the Indians by the government. In addition, a number of technical rules, such as limitation periods and certain rules regarding the admissibility of evidence, should be removed or relaxed to permit substantial justice in the settlement of Indian Claims.<sup>14</sup>

The government did not establish an independent body. Instead, Canada retained the practice of party-to-party negotiations, amalgamated its various policies on land claims, and then published two booklets, one in 1981 and the other in 1982, delineating government policies and procedures for dealing with native claims. The first was *In All Fairness*, setting out the policy on comprehensive claims. The second was *Outstanding Business: A Native Claims Policy*, dealing with specific claims. Despite more than two decades of relentless criticism, both policies remain in effect today, almost unchanged.

#### LAND CLAIMS POLICY: DIFFICULTIES AND INEQUITIES

For a comprehensive examination of the problems with the 1982 policy *Outstanding Business* (the Policy), please see the September 1990 *Discussion Paper Regarding First Nation Land Claims* prepared by the Indian Commission of Ontario (printed below), and the December 1990 *First Nations Submission on Claims*, prepared by the Chiefs Committee on Claims (reprinted in ICCP 1). The following is a brief overview of the major difficulties and inequities that have been identified to date.

#### Artificial Distinction between Comprehensive and Specific Claims

From its creation, the distinction between the two types of claims has caused great controversy:

A fundamental difference between the federal government and First Nation perceptions of claims is the artificial division of federal policies into "specific" and "comprehensive" claims. Two narrowly defined policies have been developed which are inadequate to meet the needs and priorities of First Nations. Most First Nations view their claims within the greater context of constitutionally protected aboriginal and treaty rights, and their political relationship with the rest of Canada.<sup>15</sup>

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<sup>14</sup> Gerald V. La Forest, "Report on Administrative Processes for the Resolution of Specific Land Claims" (Ottawa: DIAND, 1979) [unpublished].

<sup>15</sup> Assembly of First Nations, *AFN's Critique of Federal Government Land Claims Policies* (Ottawa: AFN, August 21, 1990).

Canada has recognized difficulties with the distinction and has developed a third category, "claims of a third kind," to deal with claims that do not fit neatly into either category. The federal Liberals, in their 1993 Red Book, promised to do away with the distinction between claims.<sup>16</sup>

### **Conflict of Interest**

There are many distinct conflicts of interest inherent in the present claims policy. Most of these arise from the fact that, when a claim is brought forward, Canada is the accused, the banker, and the judge and jury. To further complicate matters, Canada stands in a fiduciary relationship to the claimants. It is difficult to imagine a better example of the meaning of the phrase "conflict of interest," as David Knoll pointed out in 1986:

[T]he most fundamental criticism of the 1982 claims policy is that Canada still remains the ultimate adjudicator of claims made against it. This has been a constant criticism of the Federal Government's native claims policy which they have repeatedly ignored. The Federal Government remains the ultimate determiner of what claims will be funded, validated and accepted for negotiation. No appeal is available except to commence an action through the Courts. There is not even the least effort to preserve the image of neutrality. This situation, more than any other, is what condemns this policy and process to be viewed as biased, arbitrary and unfair.<sup>17</sup>

Any meaningful reform of the system must address this fundamental flaw. The federal Liberals have promised to create an independent claims body. Properly structured with an appropriate mandate, it could solve some or all of the perceived problems with respect to conflict of interest.

### **Lawful Obligation**

The concept of lawful obligation originated in the 1969 White Paper and found its way into the Policy, as the central concept:

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.<sup>18</sup>

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<sup>16</sup> Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993) [known as the Red Book].

<sup>17</sup> David Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (1986) [unpublished], 15.

<sup>18</sup> *Outstanding Business*, 20.

The policy is prepared to go "beyond lawful obligation" only in the following rather narrow circumstances:

- 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.<sup>19</sup>

"Lawful obligation" as the basis for a valid claim falls short of the test of a fiduciary, as is now set out in law, as was stated by the AFN:

federal land claims policy criteria are inconsistent with the developing law on aboriginal rights in this country. Landmark cases such as the recent *Guerin* (1984) and *Simon* (1985) decisions are ignored in the criteria for its comprehensive claims policy. . . . In *Sparrow* (1990) the Supreme Court of Canada said that Section 35 of the *Constitution Act*, 1982 is a solemn commitment to aboriginal peoples which must be given meaningful content by government legislation, practices and policies. The federal government has yet to respond in any sufficient manner to the requirements delineated in these decisions.<sup>20</sup>

The above criticism was written in August 1990. More than four years later it is still valid. The basis for the policy must be brought up to date with current law.

### **Fiduciary Obligations**

The topic of fiduciary obligations is considered at length in Mary Ellen Turpel's paper. Many critics would seem to prefer this concept, rather than "lawful obligations," as a basis for a claims policy.

### **Compensation Negotiations**

Even when a First Nation is able to convince Canada that it is owed a lawful obligation, the present process for negotiating compensation, as well as the compensation criteria themselves,<sup>21</sup> leave much to be desired. The criticisms of process and criteria include: the "discounting" of claims in ways that many believe are arbitrary; the refusal to recognize "special value" to a claimant; the way in which the negotiations are funded; the length of time the negotiations can take; "take it or leave it" offers; and the amendment of the Policy to include the concept of "technical breach" in a way that could lead one to conclude it was done to defeat a particular (expensive) claim.<sup>22</sup>

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<sup>19</sup> Ibid.

<sup>20</sup> *AFN's Critique*, 6.

<sup>21</sup> *Outstanding Business*, 30-31.

<sup>22</sup> See *ICO Discussion Paper*, 44ff, regarding the claim of the Mississaugas of the New Credit.

### Summary

A considerable body of material details the shortcomings of the present Policy and its attendant process. Nearly all of it points towards the need to broaden the basis upon which Canada accepts its responsibilities to the First Nations:

In light of the need for a satisfactory resolution for all parties, the case is argued for a broad definition of the obligations upon the federal government which are "lawful" in the truest sense of the word. This issue is by far the most complex to be dealt with in developing a new model, yet it is obviously fundamental.<sup>23</sup>

Again, most reports and papers emphasize the need for an independent body to administer or oversee the land claims process and the way in which the Policy is administered.

### THE INDIAN CLAIMS COMMISSION

For a succinct history of the Indian Claims Commission (the Commission), including Inquiries conducted and Reports submitted, please see our Annual Report, 1991-1992 to 1993-1994, issued in July 1994. Here we will give only the details regarding the creation of the Commission from the period 1990-91, in relation to the other reforms initiated during that same period.

The Commission is a product of over 200 years of frustration and the tumultuous events of 1990, including the Supreme Court of Canada decision in *Sparrow*<sup>24</sup> released in May, the blocking of the Meech Lake accord by Elijah Harper in June, the violence at Akwesasne that spring over gambling, and the "Mohawk summer" at Oka.

### 1990

The Assembly of First Nations (AFN) released a detailed critique of government land claim policies in August 1990. At a special meeting of the Tripartite Council on August 23, convened to address the crisis in Oka and the failure of negotiated solutions, the Indian Commission of Ontario (ICO) gave a commitment to government and Indian leaders to produce a discussion paper on land claims reform within 30 days. That influential paper (included in this volume) was released on September 24 and contained 38 recommendations, including the creation of an independent claims body. It also systematically detailed the problems with the 1982 policy *Outstanding Business*.

On September 25 the government announced its "Native Agenda" based on the "Four Pillars." The first was to accelerate the pace of land claim settlements so that they would all be concluded by the end of the decade. On October 10 and 11 the Minister of Indian Affairs met with 20 Indian leaders from across the country to discuss changes to the federal

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<sup>23</sup> Brad Morse, ed., *Indian Claims in Canada* (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians Walpole Island Research Centre, 1981), 9.

<sup>24</sup> Note 10 above.

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land claim policies. A working group of Indian leaders was established, co-chaired by Chief Clarence T. (Manny) Jules of Kamloops First Nation and Harry S. LaForme, then Commissioner of the ICO. This working group became known as the Chiefs Committee on Claims (CCC) and produced the paper *First Nations Submission on Claims*, which was presented to the Minister on December 14. The *First Nations Submission on Claims* had already received support in principle at a special Chiefs assembly of the AFN, held in Ottawa on December 11. It contained 27 recommendations, including the creation of an independent claims body and the creation of a joint working group to develop policy reform.

### **A New Federal Initiative**

After a period of negotiation, involving proposals and counter proposals between the Chiefs Committee on Claims and the Minister, the federal government announced a new initiative on specific claims on April 23, 1991, which included:

- 1 *Increased Resources:* Funds available for settlements were increased from \$15 million to \$60 million annually, and DIAND and the Department of Justice (Justice) were provided with additional staff.
- 2 *Administrative Policy Changes:* The size of claim the Minister could approve without Treasury Board authority was increased from \$1 million to \$7 million; a "fast track" process was created to deal with claims under \$500,000; no limit was placed on the number of claims that could be negotiated at one time; and legal costs of claimants were no longer subject to the review and approval of Justice lawyers.
- 3 *Pre-Confederation Claims:* The ban on pre-Confederation claims was lifted.
- 4 *Creation of the Joint Working Group:* A joint First Nation/government working group was proposed to review and make recommendations regarding the Policy and the process (the JWG will be discussed in more detail in Part II).
- 5 *Creation of the Indian Claims Commission:* On an interim basis, an independent claims body was proposed to review specific claims, to provide mediation to the parties upon request, and to provide input to the JWG on reforming the policy and process.

These reforms were considered "modest" at best and drew the following response from the AFN:

Although the above measures fall far short of establishing the independent claims resolution process called for by both First Nations and Independent observers, (indeed these initiatives will further expand the existing Specific Claims Branch and Dept. of Justice bureaucracies) the Minister maintains there will be an opportunity for the longer term policy and process issues to be dealt with through the proposed Joint Working Group.



In any event, it is obvious that the government intends to move forward on these initiatives. Therefore the First Nations must respond with a united voice and make clear to the government of Canada what is expected for the future in terms of resolving claims and land rights issues.<sup>25</sup>

### **Indian Claims Commission Created**

The government went ahead and implemented the reforms. The Indian Claims Commission (sometimes referred to as the Indian *Specific* Claims Commission by the federal government) was established by Order in Council on July 15, 1991, and Harry S. LaForme was named as Chief Commissioner. The wording of the Order in Council immediately became an issue, as it merely reiterated the wording of the Policy. It was also contrary to the recommendations of the Chiefs Committee on Claims, and the committee passed a resolution calling for "major changes."<sup>26</sup>

After a delay of one year, and much debate involving the Commission, the AFN, the CCC, the JWG, and the government, a second Order in Council was issued which amended the mandate of the Commission to its present form. The Commission is a federal Royal Commission, mandated under the Great Seal of Canada and Part I of the *Inquiries Act* to perform the following functions:

- inquire into and report on: (a) the rejection of a specific claim by the Minister; or (b) "which compensation criteria apply in negotiation of a settlement";
- provide "advice and information" to the JWG;
- submit an annual report and such other reports as the Commissioners consider required to the Governor in Council (the federal Cabinet); and
- provide mediation to the parties where both parties request it.<sup>27</sup>

The Commission is what has been referred to as a "soft adjudicative tribunal,"<sup>28</sup> like New Zealand's Waitangi Tribunal,<sup>29</sup> in that the recommendations of the Commission are not binding on the parties but are only advisory in nature. This means that at the completion of an Inquiry, the First Nation involved, and/or the government, may choose to ignore the recommendations of the Commission.

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<sup>25</sup> Assembly of First Nations, *The Proposed Federal Initiatives on Specific Claims, A Brief Appraisal in Light of the Principles of the First Nations Submission on Claims* (Ottawa, June 4, 1991).

<sup>26</sup> AFN, "Resolution," August 7, 1991.

<sup>27</sup> Orders in Council PC 1991-1329 and PC 1992-1730.

<sup>28</sup> Joseph Williams, *New Zealand's Waitangi Tribunal: An Alternate Dispute Resolution Mechanism* (Canadian Bar Association, 1988).

<sup>29</sup> See ICO, *Discussion Paper*, 78, for a discussion of the Waitangi Tribunal.

### Commissioners Named

On September 1, 1992, a third Order in Council was issued naming six additional Commissioners to the Commission. Three were selected from a list submitted by the AFN: Chief Roger Augustine, Chief of Eel Ground First Nation of New Brunswick; Dan Bellegarde, First Vice Chief with the Federation of Saskatchewan Indian Nations (FSIN); and Carole Corcoran from the Fort Nelson Indian Band in northern British Columbia, who is also a Commissioner with the BC Treaty Commission. Three Commissioners were appointed by the federal government: Charles Hamelin (who passed away on July 29, 1993); Carol Dutchshen (who resigned to take another position in May 1994); and Jim Prentice, QC, a lawyer knowledgeable and experienced in land claim matters with the Calgary firm of Rooney Prentice.

### A Change in Leadership

In February 1994 the Chief Commissioner of the Commission, Harry S. LaForme, was appointed to the Ontario Court of Justice (General Division). On March 17, 1994, Commissioners Dan Bellegarde and Jim Prentice were appointed Co-chairs of the Commission. Native businessman Aurélien Gill (former Chief of Mashteuiatsh First Nation) was appointed Commissioner by the federal government in December 1994.

For the purposes of this discussion paper it is important to note that the Commission was created as an interim step only, not as a permanent body. It was part of an overall process of reform that was to rely heavily on the recommendations of the JWG to effect substantial change to the Policy and process. The Commission was to play a role in the JWG, as set out in the Commission's Order in Council and the Protocol for the JWG:

8. Having regard to the reporting duty of the Indian Specific Claims Commission as determined by the Governor in Council, the Co-chairpersons of the Joint Working Group may request from time to time that the Chief Commissioner of the Indian Specific Claims Commission provide the Joint Working Group with such information, or attend such meetings, as may be considered necessary in its discussions.<sup>30</sup>

The Commission was established to perform two functions. The first was to provide input into the overall reform process as performed by the JWG. The second was to oversee the *existing* Policy and process, as an *interim* measure, until such time as substantial reforms were realized:

To oversee the management of the current policy we agreed to establish the Indian Specific Claims Commission to assure that claimant bands would have access to a third party to

<sup>30</sup> Protocol for the Joint First Nations/Canada Working Group on Specific Claims, July 22, 1992.

pursue any concerns they might have about the fairness of the *existing* process. The order-in-council establishing the commission therefore reflects the policy components and criteria of the existing policy, adjusted as agreed to provide *interim* improvements.<sup>31</sup>

The failure of the JWG (as discussed in Part II) and the subsequent lack of negotiations have prevented the Commission from advising on reform of the present system. Thus, in an attempt to fulfil this aspect of our mandate, the Commission has begun this current process. This involves the production of this discussion paper (and attached materials) so that the important issue of land claims reform can once again be addressed.

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<sup>31</sup> The Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, to H.S. LaForme, Chief Commissioner, ICC, Ottawa, November 8, 1991. Emphasis added.

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## PART II

# A FAILED PROCESS OF REFORM: THE JOINT WORKING GROUP

As noted in Part I, Canada proposed the creation of the Commission and the Joint Working Group at the same time, as part of an overall set of reforms. The reforms were kept modest because the government had decided to delay fundamental change until after the JWG had deliberated and made recommendations. This strategy was set out by the Minister in a letter to the National Chief in 1991:

the Chiefs' Committee on Specific Claims had accepted that only some issues could be dealt with immediately and others, especially policy issues which tend to be inherently complex, would be the subject of a serious review over the medium term. That is why the chiefs suggested, and why I agreed to, the Joint Indian/Government Working Group on Specific Claims. This group would review the criteria for both validation and compensation and whatever other policy issues members agree upon. It is the recommendations of this group as well as the joint evaluation of the Commission which will form the basis of proposals to Cabinet regarding more fundamental policy changes.<sup>32</sup>

The JWG was made up of political representatives and technical advisers from the eight AFN regions for First Nations and by three officials from DIAND and Justice for the federal government. It was co-chaired by Chief Clarence T. (Manny) Jules and John Graham, Director General, Policy Development Branch, DIAND. Its mandate was to review all aspects of the specific claims policy and process. The JWG first met in February 1992, and a protocol describing the role of the JWG and the working relationship among its members was signed in July 1992 by the National Chief and the Minister.

The JWG met a total of 13 times between February 1992 and June 1993. A wide range of issues was discussed, from the nature of a claim to the form and structure of an independent claims body. The parties retained the services of an independent facilitator, Bonita Thompson, who produced what is generally referred to as "Neutral's Draft"<sup>33</sup> (included in this volume). This document outlined the areas of agreement, and disagreement, between the parties. Progress was made in several areas. In particular, significant agreement was reached on the details of an independent claims body.

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<sup>32</sup> The Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, AFN, Ottawa, November 9, 1991.

<sup>33</sup> Bonita J. Thompson, "Draft Recommendations Prepared by Neutral," June 25, 1993.

The mandate of the JWG expired in July 1993. The parties were unable to reach agreement on an extension of the JWG's mandate, and the process ended. No recommendations were made. The AFN has made several criticisms of the JWG process, including the following:

the Working Group's mandate was unduly limited to only "specific" claims. Federal representatives were not given sufficient authority to make significant changes. Inadequate resources were provided to First Nations for their full participation, particularly at the regional level.

First Nation representatives on the Joint Working Group strongly felt that the federal representatives were more concerned with defending the current policy, rather than making fundamental and necessary changes to it.<sup>34</sup>

A letter from John Graham to Manny Jules in July 1993 clearly demonstrates that the government felt it had demonstrated significant "movement" within the JWG process in the following areas, by agreeing to the following:

1. *the development of an independent claims process* where a neutral body has real "teeth" to manage the negotiation process and where the "acceptance" decision is ultimately in the hands of independent panels with an appeal to the courts;
2. *the funding of First Nations to participate in an ongoing process as a partner with the federal government to review the operation of the independent process and to work on improvements;*
3. *the administration of research and loan funding by a body outside of the federal government;* and
4. *the removal of existing compensation criteria as a precondition to begin negotiations.*<sup>35</sup>

However, at the same time there remained 12 or 14 outstanding issues involving fundamental disagreement. Fourteen are set out in Neutral's Draft, and 12 were attached as an annex to the above letter from John Graham to Manny Jules:

1. Limitation and Laches
2. Without Prejudice
3. Negotiation Loans vs. Grants
4. Issues Revolving around the Definition of a Claim
5. Onus of Proof
6. "Technical" Legal Defences

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<sup>34</sup> AFN, "Background and Approach to Changing the Federal Claims Process," draft, May 19, 1994.

<sup>35</sup> John Graham, Director General, Policy Development Branch, DIAND, to Chief Clarence T. (Manny) Jules, Ottawa, July 9, 1993.

7. Suspension of Limitation Periods
8. Dispossession
9. Compensation Based On Legal Principles
10. Overall Operating Costs
11. Compelling Provincial Involvement
12. Releases<sup>36</sup>

There may have been some "movement" with respect to four issues, but clearly, by the end of the JWG process, substantial areas of disagreement were still outstanding. Indeed, it would appear that there was not even agreement on what constituted a claim. The JWG process came to a close in July 1993, and since that time no specialized forum has existed for First Nations and Canada to discuss reform of land claims policies and processes.

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<sup>36</sup> Ibid., attached Annex.

## PART III

### NEXT STEPS

The federal Liberal party took office in October 1993. Prior to its election, it made a number of promises with respect to aboriginal issues generally and to land claims reform in particular. These are contained in their Red Book and in a number of important speeches and statements. They are well documented in the papers included in this volume by Mary Ellen Turpel and Art Durocher. Our concern at this point is how to begin the process of implementing these promises, promises that echo the calls for reform made by the First Nations for decades.

In the spring of 1994 the federal government agreed to provide funding for a meeting of the Chiefs Committee on Claims. That meeting was held in Winnipeg on June 1 and 2, 1994. It was chaired by the National Chief. All four Commissioners (now five) of the Indian Claims Commission were invited to speak to the assembled Chiefs regarding the Commission. The Chiefs present expressed concern that the Commission lacked "teeth," since its decisions were not binding. Also expressed was the concern that, to date, the federal government had not responded to any of the recommendations made by the Commission.<sup>37</sup> The Chiefs felt strongly that an independent body must be involved in the claims process from start to finish:

There must be an independent body involved in facilitating claims throughout the entire process, from research and development, submission of claims and implementation of settlements.<sup>38</sup>

The resolution passed at the conclusion of the meeting called for: "a bilateral forum (First Nations/Canada) to prepare recommendations on acceptable policies and processes to resolve First Nation land and resource rights issues. . . ."<sup>39</sup> The resolution also called for adequate funding of the CCC to facilitate the development of a national policy. Unfortunately this resolution could not be put before the AFN General Assembly in July 1994, and therefore has not yet received formal support.

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<sup>37</sup> The Commission received its first response from the federal government on August 5, 1994. That response was to the *Athabasca Denesuline Inquiry*, released to the parties on December 21, 1993. Responses to the *Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range) Inquiries*, *Young Chippewyan Inquiry*, *Micmacs of Gesgapegiag Inquiry*, and *Chippewas of the Thames Inquiry* were received in February and March 1995.

<sup>38</sup> AFN, "Draft Summary, Chiefs Committee on Claims Meeting," Winnipeg, June 1 and 2, 1994.

<sup>39</sup> Chiefs Committee on Claims, "Resolution," Winnipeg, June 2, 1994.

As it stands, the Commission has no knowledge of any formal negotiations or discussions taking place at this time, although both First Nations and Canada have stated their desire to overhaul the existing land claims system. How then do the parties move towards fundamental reform of both the Policy and the process? There are a number of options open to the parties at this point, including (in no particular order):

- 1 The JWG could be reconstituted and the attempt to find a consensus on reform continued.
- 2 Direct negotiations could take place between Canada and the AFN and/or the CCC.
- 3 The AFN/CCC could prepare an updated proposal on land claim reform followed either by negotiations, or by Canada preparing draft reforms based on the updated proposal.
- 4 Canada could prepare draft reforms based on the materials at present available and the Red Book promises, followed by negotiations.
- 5 Canada could take unilateral action to implement reform after a process of "consultation."
- 6 The concept of a national policy could be abandoned altogether and regional solutions pursued, perhaps based on treaties or "Nations."
- 7 Nothing is done and the present system is left in place, or minor amendments and adjustments are made from time to time.

Option 7 would lead to disaster and most likely another Oka. Option 6 has potential and may also be the "default" option: if none of the other options is pursued, then this will be. It also contains the inherent risk of a "balkanization" of the claims process and the end of national standards for claims. There is an important role for regional bodies, such as the ICO, to play in negotiations, but even the ICO recognizes the need for an independent claims body with "teeth" to make the process work.<sup>40</sup>

Option 5 runs the risk of First Nations' rejecting whatever reforms are implemented (regardless of merit), based on opposition to the process. Option 4 runs a similar risk in that any proposals prepared by Canada prior to negotiations could also be criticized more because of process than content.

Option 3 has the First Nations make the first proposal, with Canada responding to those recommendations. The AFN and the CCC would require special funding to produce the proposal, but this process should be more acceptable to First Nations than options 4 to 7.

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<sup>40</sup> ICO, *Discussion Paper*, 99.



The viability of options 2 and 1 would depend primarily upon the way in which the negotiations were structured, as well as upon the goals that were established. It is our position that there exists at present a broad consensus between First Nations and Canada on the need for at least *some* fundamental reforms, such as:

- the creation of an Independent Claims Body (ICB);
- the validation of claims by some other body (such as the ICB), so as to remove the conflict of interest that exists for Canada in the present system;
- the facilitation of claims negotiations by the ICB (or some other body like the ICO) to ensure fairness in the process;
- the need for the ICB (or some other body) to possess the authority to break impasses in negotiations regarding compensation.

It is our submission that it may not be necessary (or possible) to reach consensus on all details of fundamental reform at this time. Instead the parties could consider implementing *now* those reforms where substantial consensus exists, while simultaneously establishing a permanent process to consider ongoing reforms to the new system. This would have parallels to the reforms that were instituted in 1991 with these differences: (1) the ICB would be a truly independent claims body (not an interim body established to oversee the existing system); and (2) the body or forum established to consider ongoing reform of the system would be permanent (not established through a one-year protocol agreement as was the JWG).

Regardless of what option the parties select, this Commission believes that we have a role to play in the reform process. Our Orders in Council require us to provide advice and guidance to Canada and First Nations on how to reform and improve the present system. We can assist Canada and First Nations by providing input to the reform process. That input would be based on what we have learned by conducting Inquiries and from travelling to First Nations to hear directly from elders, and others, the problems associated with the current Policy and process. In addition, we can facilitate negotiations and provide mediation, when and if required.

Everything that this Commission has learned to date indicates that it is imperative to commence the process of reform immediately, before it is too late. The return of native land is central to any real progress on the wide range of problems that face First Nations today. Meaningful self-government, and true economic self-sufficiency, depend on an adequate land base. It is time for a fair and equitable process.



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**ARTHUR DUROCHER\***

**LAND CLAIMS REFORM**

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## INTRODUCTION

Indian claims of one sort or another have been around since the time of first contact between Europeans and First Nations, and they have been expressed in various forms. The earliest attempts to resolve claims were not usually successful, and many different dispute-resolution mechanisms have been employed over the centuries. The best known of these mechanisms were treaties, which were entered into across Canada, except in British Columbia. By the terms of these treaties, the Indian Nations were given certain rights in exchange for the extinguishment of their Indian title to the land. Since the time the original treaties were made, there have been numerous changes in the processes and policies of settling outstanding grievances and claims between First Nations and the Crown. The First Nations have consistently opposed the solutions put forward by successive federal governments. It is safe to say that those mechanisms and policies have generally been disappointing in their results.

What changes should be made to better accommodate the disputes? Although this article makes some recommendations, it is mainly intended for discussion purposes. It begins with a brief history of Canada's land claim policies and processes, and proceeds with a comparative look at other land claim processes in the United States, New Zealand, and Australia. Next, it explores alternative dispute-resolution mechanisms. The article ends with an analysis of the mechanisms used in these other countries and of alternative dispute-resolution mechanisms in general. It explores the applicability of these mechanisms to a new process in Canada.

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# HISTORY OF LAND CLAIMS IN CANADA

## THE EARLY PERIOD

The first official statement of Crown policy in recognition of any process of extinguishment of aboriginal title can be found in the *Royal Proclamation of 1763*. In part, the *Royal Proclamation* reads:

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable causes of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie . . .<sup>1</sup>

The *Proclamation* sets out the process by which Indian peoples could alienate their lands to the incoming Europeans. It dictated that the Indians could sell only to the Crown, and only at a special public meeting attended by the Indians concerned and called specifically for that purpose. This policy was first embodied in law in the early 1800s in the famous Marshall court decisions in the United States.<sup>2</sup> These decisions were later adopted by the Supreme Court of Canada in the benchmark case of *St. Catherine's Milling*.<sup>3</sup>

The remnants of this policy are still around today and can be found in the surrender provisions of the *Indian Act*.<sup>4</sup> The Supreme Court of Canada has confirmed that the surrender provisions have their origins in the *Royal Proclamation*.<sup>5</sup> The policy as enunciated in the Proclamation was to some degree followed in the treaties that were made between the Crown and the First Nations of Canada.

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<sup>1</sup> *Royal Proclamation of 1763*.

<sup>2</sup> *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheaton 543, 5 L. Ed. 681 (1823); *Cherokee Nation v. Georgia*, 5 Peters 1, 8 L. Ed. 25 (1831); *Worcester v. Georgia*, 31 U.S. 530, 8 L. Ed. 483, 6 Peters 515 (1832).

<sup>3</sup> *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 AC 46 (PC), 4 Car. BNA 107, 2 CNLC 541, 58 LJPC 54, 60 LT 197, 5 TLR 125.

<sup>4</sup> *Indian Act*, RSC 1985, c.32, ss.37-41.

<sup>5</sup> *Easterbrook v. R.*, [1931] SCR 210 [Exch.] at 214-15.

At least in the numbered treaties, negotiations were usually carried on with the Indians at a gathering called for that purpose. Whether the policy was followed strictly or loosely, or not at all, remains a point of contention for many First Nations. They argue that there were in fact no real negotiations and that many of the Indians did not fully comprehend the purpose of the gathering, nor the drastic legal consequences of signing the treaties. However, that issue is not within the mandate of this article.

The fact that the extinguishment policy is found in the *Proclamation* illustrates that it existed early on and that it was officially recognized. It is important to note the source of the policy. Policies are usually born out of principles and the recognition of some substantive right or obligation. The policy is then implemented in an attempt to respond to and to satisfy the right or obligation demanded by the principle. In this instance, the right or obligation dictating the policy is aboriginal title. The Crown recognized that the First Nations had some interest in the land, that it amounted to a right, and that it placed an obligation on the Crown. It is the discharge of this obligation that forms the basis of Indian land claims – whether we are speaking of a specific claim or a comprehensive claim. Specific claims arise out of the Crown's erroneous discharge of its obligation, and comprehensive claims arise out of the Crown's failure or refusal to recognize its obligation with regard to aboriginal title.

First Nations have been pressing their claims in one form or another since the days of treaty. For various reasons, most of the activity, however, has occurred since 1969.

### PRE-1969

It appears that any claims before 1969 were dealt with on an individual basis and that there was no general policy concerning land claims.<sup>6</sup> Claims by Indians were usually brought forward with the help of an individual, particularly by missionaries who had formal education. In some instances, especially in the eastern region of the country, the advocates were lawyers.

There are several reasons for the relatively few claims prior to 1969, none of which pertains to any lack of legitimate claims. Until 1951, for example, it was an offence under the *Indian Act* for an Indian band to engage a lawyer to pursue any claim relating to land.<sup>7</sup> In addition, a guardian/ward relationship existed between the federal government and the First Nations.<sup>8</sup> The government was responsible for the welfare of First Nations and controlled the moneys that the First Nations needed to survive. Intimidation is certainly a factor when one of the parties to a dispute controls the financial affairs of the other. In addition, this relationship led to confusion over who should be sued and who should do the suing.<sup>9</sup>

<sup>6</sup> Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Department of Indian Affairs and Northern Development, 1980), 194-95.

<sup>7</sup> *Indian Act*, RSC 1927, c.98, s.141.

<sup>8</sup> Daniel, *History*, note 6 above, 200.

<sup>9</sup> *Ibid.*, 194.

Perhaps another reason for the relatively few claims before 1969, particularly in the West, was that in British Columbia, the provincial government did not recognize aboriginal title; yet, in most of the province, aboriginal title to the land had not been extinguished by the treaty process as in the rest of Canada. This meant that First Nations in British Columbia could not press their claims as forcefully as in other areas, since the province would not recognize any kind of formal process to deal with claims relating to aboriginal title.

Because no consistent policy was in effect, it sometimes created an opportunity for individuals to influence the direction of a claim or grievance. As Richard Daniel states:

The general lack of a consistent claims policy also left many opportunities for an individual civil servant or government appointee to determine the course of a particular claim. Although this factor is difficult to evaluate, our research found many instances in which the federal government's disposition towards a claim had the appearance of having been altered to a significant degree by a change in personnel associated with the case.<sup>10</sup>

It appears that it was not until the end of World War II that any serious consideration was given to forming a general national process for the resolution of Indian land claims. This interest was sparked in part by the American decision in 1945 to create an Indian Claims Commission.

As early as 1950, John Diefenbaker argued while he was still in opposition for an independent commission.<sup>11</sup> However, this idea was rejected a year later by W.E. Harris, Minister of Citizenship and Immigration, who was responsible for the Indian Affairs Branch.<sup>12</sup> In 1959 a joint committee was established for the review of Indian Affairs policy. This committee lasted until 1961 and, before disbanding, it recommended that an Indian Claims Commission be established for Canada. A similar recommendation had been made 10 years previously by another joint committee. This time, however, the Diefenbaker government was in power, and it was more receptive to the idea. Ellen Fairclough, the minister in charge of the Indian Affairs Branch at that time, initiated some discussion with the Department of Justice in the hope of drafting legislation for a commission.<sup>13</sup> According to Daniel, "The first draft of legislation to establish an Indian Claims Commission in Canada was completed within the Indian Affairs Branch of the Department of Citizenship and Immigration and then modified, during the winter of 1961-1962, as a result of consultation between senior officials of that Department and the Department of Justice."<sup>14</sup>

On February 6, 1962, the proposal reached cabinet in the form of a memorandum signed by both Fairclough and E.D. Fulton, Minister of Justice. By March, the cabinet had given

<sup>10</sup> Ibid., 215.

<sup>11</sup> Canada, House of Commons, *Debates*, June 21, 1950, 3974.

<sup>12</sup> Ibid., March 16, 1951, 1354.

<sup>13</sup> Daniel, *History*, note 6 above, 137.

<sup>14</sup> Ibid., 143-44.



approval to the proposed legislation,<sup>15</sup> but it was not introduced into Parliament. A general election was called for that fall, and although the Diefenbaker government was returned to power, it was a minority government and was defeated in the House of Commons before it had a chance to introduce the legislation. It was then defeated in the general election in April 1963 by the Liberals, led by Lester B. Pearson.

As is often the case, a change in government meant that initiatives by the previous administration were stalled and were examined by the new administration. After consulting with the Americans about their process, the Liberals introduced and gave first reading to Bill C-130, the Indian Claims Commission Bill, on December 14, 1963. This legislation was based on the American model, in that the commission would actually render decisions and not be limited to making recommendations, as the Diefenbaker government's plan had suggested.

This Liberal proposal also included an appeal process for questions of jurisdiction to both the Exchequer Court and the Supreme Court. Appeals concerning the unreasonableness of an award or the failure to grant an award could be made to an Indian Claims Appeal Court. This court was to be composed of judges from the Exchequer Court.

After the first reading, the government began a series of consultations with Indian groups. A conference was held in June 1964.<sup>16</sup> As a result of these consultations, approximately 300 submissions were received by the government.<sup>17</sup>

The Bill was finally reintroduced into Parliament as Bill C-123, the Indian Claims Bill, on June 21, 1965. Bill C-123 was an amended version of Bill C-130. Among the most notable differences were provisions that one of the five commissioners should be an Indian, and that financial assistance should be provided to the claimants. It appears that the submissions by the Indians were partly responsible for these changes.

At the same time that Bill C-123 was introduced in the House of Commons, the case of *R. v. White and Bob*<sup>18</sup> came before the Supreme Court of Canada. This case focused on the issue of aboriginal rights and was of great importance to Indians across Canada – in particular, to the First Nations of British Columbia. The British Columbia Native Brotherhood therefore requested a delay in the passing of the legislation, and its request was acceded to. That is where the matter stood when the infamous White Paper was introduced by the Trudeau government in 1969.

The 1969 White Paper contained proposals to make Indians “equal citizens.” The government felt that the unique status of Indian people was more of a burden than an aid, that it made the Indians “second-class citizens.” The White Paper proposed to do away with this unique status and to have the Indians join the rest of Canada. In addition, the White Paper outlined the government's position that aboriginal title did not exist, since it had been extinguished long before. The response of the First Nations to the White Paper was

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 147.

<sup>17</sup> Ibid.

<sup>18</sup> (1965), 52 DLR (2d) 481, affirming 52 WWR 193, 50 DLR (2d) 613 (SCC).

not surprising, and it was attacked by aboriginal groups from all parts of Canada. Despite the negative aspects of the White Paper, however, it did have at least one positive attribute: it succeeded in uniting aboriginal groups across the country as they had never been united before. The groups protested vehemently and persuaded the government to scrap the proposals contained in the White Paper.

While the government refused to acknowledge aboriginal title, it did recognize some specific claims. On December 19, 1969, by Order in Council 1965-2405, it appointed a Commission to look at specific claims and to explore mechanisms for dealing with them. Lloyd Barber was named Commissioner. The body was an advisory one and did not have any powers to determine claims. The "Commission was established under the Public Inquiries Act to consult with Indian People and to inquire into the claims arising out of treaties, formal agreements and legislation. The Commissioner would then indicate to the Government what classes of claims were judged worthy of special treatment and recommended means for their resolution."<sup>19</sup>

### POST-1969

The reaction to the Indian Claims Commission and its Commissioner from First Nations was initially very negative. It was denounced by the National Indian Brotherhood and by numerous other Indian organizations and leaders. This reaction was due mainly to the fact that the Commission was seen as a product of the White Paper. Initially, the government stood firm on its position and wouldn't give in to Indian demands to alter its policy. This approach changed in 1973, however, after the *Calder*<sup>20</sup> case, which confirmed the existence of common-law aboriginal title in Canada. This decision forced the government to rethink its policy of non-recognition of aboriginal title as enunciated in the White Paper. On August 8, 1973, a new policy statement was issued by the Minister of Indian Affairs and Northern Development. A new category of comprehensive claims, based on traditional use and occupation of the land, was now to be recognized.<sup>21</sup> This shift in policy was directly related to the *Calder* case and the ongoing litigation in the Mackenzie Valley region and the James Bay region.

The James Bay and the Mackenzie Valley disputes were handled by the Office of Native Claims (ONC) within the Department of Indian Affairs and Northern Development. This office had been created in 1974, chiefly in response to the growing number of claims that were being submitted to the federal government.

In 1975, pursuant to an agreement between the National Indian Brotherhood and the federal government, a Joint National Indian Brotherhood/Cabinet Committee was

<sup>19</sup> Indian Claims Commission, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Indian Claims Commission, 1975), 22.

<sup>20</sup> *Calder v. British Columbia* (Attorney General), [1973] SCR 313, [1973] 4 WWR 1, 34 DLR (3d) 145, affirming 74 WWR 481, 13 DLR (3d) 64 [BC].

<sup>21</sup> Canada, Department of Indian and Northern Affairs, *Native Claims: Policy Processes and Perspectives*, opinion paper prepared by the Office of Native Claims for the Canadian Arctic Resources Committee Second Annual National Workshop, Edmonton, February 20-22, 1978 (Ottawa: Queen's Printer, 1978).

formed. From this joint committee, a subcommittee called the Canadian Indian Rights Commission was set up, with a mandate to discuss the principles and parameters of mechanisms to make settlements. This committee was in operation until January 1979. One of the issues that the joint committee had to consider was whether there should be a national approach to the resolution of land claims.

There was no other significant change in government policy until 1981, when the Liberal government published its policy on comprehensive claims. It was basically a restatement of the policy enunciated in 1973. It reaffirmed the distinction between comprehensive and specific claims made in the 1973 policy statement. Again, as in 1973, the federal government took the position that acceptance of a claim did not mean an admission of legal liability on its part.<sup>22</sup> Moreover, it demanded finality in every settlement – that any settlement rendered would be the end of the matter.<sup>23</sup>

The policy relating to specific claims was published in 1982 under the title *Outstanding Business*.<sup>24</sup> Here, again, the federal government reiterated its belief that its main objective was to discharge lawful obligations.<sup>25</sup> In addition, the federal government stated that it would go beyond lawful obligation and acknowledge a claim based on:

- (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 lands by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>26</sup>

This policy predated the Supreme Court's decision of *Guerin et al. v. R.*<sup>27</sup> After *Guerin*, it seemed obvious that the above two categories were indeed lawful obligations based on a fiduciary obligation.

The federal government emphasized that it preferred negotiation over the alternative of going to court. Perhaps partly in an attempt to encourage First Nations to agree to negotiation, the government took the position that it would not rely on any statutes of limitation or the doctrine of laches. It did, however, reserve the right to rely on them if the First Nations decided to litigate the claim in court.<sup>28</sup> The question to be asked is, Why the distinction? If the government was willing to waive its rights during negotiation,

<sup>22</sup> Department of Indian Affairs and Northern Development (DIAND), *In All Fairness: A Native Claims Policy* (Ottawa: Ministry of Supply and Services, 1981), 12.

<sup>23</sup> *Ibid.*, 19.

<sup>24</sup> DIAND, *Outstanding Business: A Native Claims Policy; Specific Claims* (Ottawa: DIAND, 1982).

<sup>25</sup> *Ibid.*, 19.

<sup>26</sup> *Ibid.*, 20.

<sup>27</sup> [1984] 2 SCR 335, [1984] 6 WWR 481, 36 RPR 1, 20 ETR 6, 13 DLR (4th) 321, [1985] 1 CNLR 120, 55 NR 161, reversing [1983] 2 FC 656, [1983] 2 WWR 686, 13 ETR 245, 143 DLR (3rd) 416, [1983] 1 CNLR 20, 45 NR 181.

<sup>28</sup> *Outstanding Business*, note 24 above, 21.

why did this not extend to court proceedings as well? Such a distinction was tantamount to blackmailing the First Nations into negotiation.

A five-stage process is described in *Outstanding Business*.<sup>29</sup> The first stage is the presentation of the claim by the First Nations to the Minister of Indian Affairs and Northern Development. At the second stage, the ONC reviews the submission at the direction of the Minister. It is also at this stage that the findings of the ONC are sent to the Department of Justice for legal advice. The third step is to send the review and the legal opinion to the Minister. Based on the legal opinion, the Minister decides whether to accept or to reject the claim. This decision is based solely on whether the Department of Justice thinks that Canada owes a lawful obligation. If the claim is accepted, it goes to the fourth stage, which is resolution of the claim. The resolution of the claim is negotiated between the claimants and the ONC. The fifth stage concerns rejected claims: they can be resubmitted at a later date if new evidence or legal arguments can be presented.

The policies announced in 1980 and 1981 were in place until 1986, when a further revision to the policy was made by the Mulroney government in response to the report of the Task Force to Review Comprehensive Claims Policy (the Coolican Task Force). According to the report, a major stumbling block to reaching land claims settlements was the federal government's insistence that all aboriginal rights be extinguished in any comprehensive claim settlement. This approach leaves the claimants with two options: one is to sign the agreement and to allow aboriginal rights to be extinguished; the other is to do nothing and accept existing legal rights, as the lesser of two evils. The report proposed a third option which would allow for flexible agreements that, among other things, would recognize and affirm aboriginal rights.<sup>30</sup> The task force also recommended 15 guiding principles that should be included in any new comprehensive claims policy:

1. Agreements should recognize and affirm aboriginal rights.
2. The policy should allow for the negotiation of aboriginal self-government.
3. Agreements should be flexible enough to ensure that their objectives are being achieved. They should provide sufficient certainty to protect the rights of all parties in relation to land and resources, and to facilitate investment and development.
4. The process should be open to all aboriginal peoples who continue to use and to occupy traditional lands and whose aboriginal title to such lands has not been dealt with either by a land-cession treaty or by explicit legislation.
5. The policy should allow for variation between, and within, regions based on differences in historical, political, economic and cultural differences.
6. Parity among agreements should not necessarily mean that their contents are identical.

<sup>29</sup> *Ibid.*, 23-25.

<sup>30</sup> DIAND, Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements* (Ottawa: DIAND, December 1985).

7. Given the comprehensive nature of agreements and the division of powers between governments under the Canadian Constitution, the provincial and territorial governments should be encouraged to participate in negotiations. The participation of the provinces will be necessary in the negotiation of matters directly affecting the exercise of their jurisdiction.
8. The scope of negotiations should include all issues that will facilitate the achievement of the objectives of the claims policy.
9. Agreements should enable aboriginal peoples and the government to share both the responsibility for the management of land and resources and the benefits from their use.
10. Existing third-party interests should be dealt with equitably.
11. Settlements should be reached through negotiated agreements.
12. The claims process should be fair and expeditious.
13. An authority independent of the negotiating parties should be established to monitor the process for fairness and progress, and to ensure its accountability to the public.
14. The process should be supported by government structures that separate the functions of facilitating the process and negotiating the terms of agreements.
15. The policy should provide for effective implementation of agreements.<sup>31</sup>

The Mulroney government officially responded to the Coolican Task Force recommendations in the House of Commons in December 1985, and published its responses and changes to comprehensive claims policy in 1986.<sup>32</sup> The government ignored the task force recommendations of not insisting on extinguishment of aboriginal rights. In its published report on policy, the government still insisted on finality of settlement agreements and extinguishment of aboriginal rights:

The purpose of settlement agreements is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where aboriginal title has not been dealt with by treaty or superseded by law. Final settlements must therefore result in certainty and predictability with respect to the use and disposition of lands affected by the settlements. When the agreement comes into effect, certainty will be established as to ownership rights and the application of laws. Predictability will be established for the future as to how the applicable provisions may be changed and in what circumstances. In this process the claimant group will receive defined rights, compensation and other benefits in exchange for relinquishing rights relating to the title claimed for all or part of the land in question.<sup>33</sup>

<sup>31</sup> *Ibid.*, 31-32.

<sup>32</sup> Canada, *Comprehensive Land Claims Policy* (Ottawa: Queen's Printer, 1986).

<sup>33</sup> *Ibid.*, 9.

The government did state that, in certain circumstances, it would look at alternatives to extinguishment, provided that certainty with respect to lands and resources would be established.<sup>34</sup> The government defined two acceptable options:

1. the cession and surrender of aboriginal title throughout the settlement area in return for the grant to the beneficiaries of defined rights in specified or reserved areas and other defined rights applicable to the entire settlement area; or
2. the cession and surrender of aboriginal title in non-reserved areas, while:
  - allowing any aboriginal title that exists to continue in specified or reserved areas;
  - granting to beneficiaries defined rights applicable to the entire settlement area.<sup>35</sup>

For the most part, however, the recommendations of the Coolican Task Force were ignored by the Mulroney government. This response resulted in a deterioration in the relationship between the government and First Nations.

### RECENT HISTORY

The next significant development in land claim policy came in 1991 with the establishment of the Indian Claims Commission. The Commission was the result of negotiations between the federal government and the Assembly of First Nations (AFN). In response to a request by Tom Siddon, Minister of Indian Affairs and Northern Development, for advice on land claims, the AFN established a national committee of chiefs, which held nationwide consultations. The committee forwarded its recommendations on December 14, 1990, in a document entitled "First Nations Submissions on Claims."<sup>36</sup> Early in 1991, Siddon responded to the committee's recommendations. He outlined five areas in which he proposed to make immediate recommendations to cabinet. The Chiefs Committee on Claims responded to the Minister in March 1991.<sup>37</sup> While it welcomed the Minister's proposal to provide additional resources, it rejected the notion of arbitrarily fixed annual ceilings or claims settlements.<sup>38</sup>

The Chiefs Committee agreed that an independent claims commission should be established, but that it would be a positive step only if certain conditions were attached to it:

- (1) it must be able to review both the validation and the determination of the form and the amount of compensation;
- (2) the commission "must have capacity to break the impasses";

<sup>34</sup> Ibid., 12.

<sup>35</sup> Ibid.

<sup>36</sup> Reprinted in [1994] 1 *Indian Claims Commission Proceedings* (ICCP) 187.

<sup>37</sup> Reprinted *ibid.*, 202.

<sup>38</sup> Attachment to letter from Chief Manny Jules and Harry LaForme to Minister Tom Siddon, March 21, 1991, 2.

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- (3) the commission "must be adequately financed";
  - (4) the order in council has to specify that the conduct of the commission in any of its appeal or review process is "without prejudice to the right of the claimants to proceed to court" and to retain all other rights they may have;
  - (5) "the mandate of the Commission should be consistent with its independence from the parties."<sup>39</sup>

The committee also accepted Siddon's proposal to consider the negotiation of pre-Confederation claims. This had been an arbitrary barrier ever since land claims were first pursued after Confederation.

The Chiefs Committee was in agreement with the establishment of a Joint Working Group (JWG). It felt, however, that a JWG required the following:

- (1) a mandate wide enough "to review all outstanding issues of claims resolution policy and process";
- (2) a "reasonable" time-frame for completion of the group's work;
- (3) "a commitment from Canada to implement" its recommendations;
- (4) adequate funding;
- (5) appointment of its members jointly by the First Nations and Canada;
- (6) a chair who was knowledgeable and experienced in the areas of claims negotiations and consensus decision making. The chair should preferably be an Indian.<sup>40</sup>

On July 15, 1991, Order in Council PC 1991-1329 was approved. It established an Indian Claims Commission, appointed Harry LaForme as Chairman, and stipulated that the Commission would be effective as of August 5, 1991.

The Commission was met with some reserve by the Assembly of First Nations. The AFN had problems in particular with the wording of the Order in Council. Those concerns were spelled out by National Chief Ovide Mercredi in a letter dated September 20, 1991, to Prime Minister Mulroney. The first problem, Mercredi explained, was that the terms of reference were derived from existing claims policy:

This Commission, established under Part 1 of the Inquiries Act, derives most of its terms of reference directly from the federal government's specific claims policy. As you and your government should be aware, this is the same policy which the First Nations have sought to replace for many years. It has been one source of the profound mistrust and animosity

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<sup>39</sup> Ibid., 3-4.

<sup>40</sup> Ibid., 4-6.

which First Nations have in dealing with Canada. If such offensive policy frameworks are now being elevated to the status of law in Canada, such a trend can only be a major step backwards in efforts to improve Canada's relationship with First Nations.<sup>41</sup>

The AFN had envisioned that the Commission would move in a new direction, away from existing claims policy. The second problem was that the AFN felt that the government had gone ahead and set the terms of reference of the Commission without adequate consultation with the First Nations.

As a result of those concerns and further negotiations, Order in Council 1991-1329 was amended on July 27, 1992, by Order in Council 1992-1730. This is the mandate under which the Commission is operating at present. The Commission's mandate is restricted to specific claims. Its terms of reference authorize the Commission to 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.<sup>42</sup>

The Commission has also undertaken, on its own initiative, to develop an alternative dispute-resolution process. It has focused on mediation in its efforts to get some First Nations and the federal government to reach settlements.<sup>43</sup> In its first annual report, the Commission made recommendations on matters that it admitted were beyond the scope of its mandate. The first is a recommendation of a response protocol whereby the parties to an inquiry conducted by the Commission would respond to the Commission's report within 60 days.<sup>44</sup> The second recommendation calls on the government departments involved in a claim to mediate seriously early on in the inquiry.<sup>45</sup> The third requests that the ONC be present at Commission Planning Conferences,<sup>46</sup> while the fourth asks that government departments more fully recognize the Commission's mandate.<sup>47</sup> The fifth recommendation asks that government departments expedite the transfer of historical documents requested of them by the Commission.<sup>48</sup> The sixth is a specific recommendation that a commissioner be appointed from Quebec to fill the vacancy there.<sup>49</sup>

<sup>41</sup> Letter from Chief Ovide Mercredi to Prime Minister Brian Mulroney, September 20, 1991.

<sup>42</sup> [1994] 1 ICCP xv.

<sup>43</sup> Indian Claims Commission, *Annual Report 1991-1992 to 1993-1994* (Ottawa: ICC, [1994], 10.

<sup>44</sup> *Ibid.*, 12.

<sup>45</sup> *Ibid.*, 13.

<sup>46</sup> *Ibid.*, 14.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 15.

<sup>49</sup> *Ibid.*



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As of March 1, 1995, 97 claims had been submitted to the Commission. Twenty-nine of these had been accepted for inquiry, 6 had been reported on and 5 reports were in process with inquiries completed, 2 were resolved without inquiry, 3 were in abeyance and 13 were in progress. In addition 16 requests were in preliminary stages, 36 queries did not proceed to an inquiry, and 16 went to mediation. The Commission has submitted seven reports to the federal government.<sup>50</sup>

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<sup>50</sup> The reports are *Primrose Lake Air Weapons Range: Report on: Canoe Lake Inquiry, Cold Lake Inquiry* (ICC, August 1993); *Athabasca Denesuline Inquiry: Report on Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations* (ICC, December 1993); *Lax Kw'alaams Indian Band Inquiry: Report on Claim of the Lax Kw'alaams Indian Band* (ICC, June 1994); *Young Chipeewayan Inquiry: Inquiry into the Claim of the Stoney Knoll Indian Reserve No. 107* (ICC, December 1994); *Sumas Inquiry: Report on Indian Reserve #6 Railway Right of Way Claim* (ICC, February 1995); *Micmacs of Gesgapegiag Inquiry: Report on Claim to Horse Island* (ICC, December 1994); and *Chippewas of the Thames Inquiry: Report on Muncey Land Claim* (ICC, December 1994).

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## EXPERIENCE IN OTHER COUNTRIES

### UNITED STATES

Unlike their Canadian counterparts, First Nations in the United States have an extensive history of having their claims heard by a third party in an adjudicative setting. From 1855 on, the Indians had access to the Court of Claims, although in a limited sense. The Court of Claims was set up in 1855 to hear any claims against the United States that were founded on any law of Congress of any contract, express or implied, with the government of United States.<sup>51</sup> Some of the tribes filed claims with the Court of Claims. Not one of these claims had been dealt with by 1863, when Congress had amended the Act setting up the Court of Claims to exclude Indians from the court.<sup>52</sup> The section expressly forbids the court to hear any claims arising out of any treaty with foreign nations or with the Indian tribes. The Court of Claims remained closed to the Indian tribes until 1881, when Congress allowed Indian access to the Court of Claims through special jurisdictional Acts. The first to use this special avenue were the Choctaws, who had been pressing their claims for 50 years.<sup>53</sup> Close to 100 special jurisdictional Acts were allowed by Congress, granting individual Indian tribes access to the Court of Claims.<sup>54</sup>

The Indians' experience in the Court of Claims was not successful. In the period 1881-1946, 219 claims were filed with the Court of Claims, of which only 35 were granted awards. These 35 awards totaled \$77.3 million.<sup>55</sup> The process of obtaining a jurisdictional Act and then arguing the claim in the Court of Claims was a long, drawn-out process. It has been suggested that it took an average of 15 years from the time a jurisdictional Act was granted to the time there was an actual decision in the Court of Claims.<sup>56</sup> This estimate does not include the amount of time it would have taken for a tribe to get a jurisdictional Act. It would have been very distressing for the tribes to spend so much time and energy getting a jurisdictional Act, only to wait an average of 15 years before the case was decided on in the Court of Claims.

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<sup>51</sup> H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York: Garland Publishing, 1990), 10.

<sup>52</sup> S. 9, 12 Stat. 765, March 3, 1863.

<sup>53</sup> Rosenthal, *Their Day in Court*, note 51 above, 15.

<sup>54</sup> R.L. Barsh, "Indian Land Claims Policy in the United States" (1982) 58 North Dakota L. Rev. 7 at 10.

<sup>55</sup> Rosenthal, *Their Day in Court*, note 51 above, 24.

<sup>56</sup> *Ibid.*, 19-20.

Even when the tribes did win an award from the Court of Claims, in most cases the award was reduced by offsets that the United States government determined. Beginning in 1920, these offsets were authorized in the jurisdictional Acts and included the cost of goods and services gratuitously supplied by the United States to the tribe.<sup>57</sup> Gratuities were defined as the cost of annuity goods beyond treaty stipulation which had been expended for the benefit of the tribe.<sup>58</sup> This definition allowed for a wide range of expenditures to be deducted, depending on how "annuity goods" and expenses for the "benefit of the tribe" were interpreted by the Court of Claims.<sup>59</sup> This practice proved to be devastating to the tribes. For example, in a six-year period ending in 1935 where a recovery had been awarded based on a jurisdictional Act that authorized the offsets, all but two of the approved claims were rejected because their recovery was exceeded by the offsets.<sup>60</sup> Rosenthal describes the example of the Blackfeet, who won their claim and were awarded \$6 million. Offsets reduced this award to \$622,000. Included in the offsets were payments to Indian agents, interpreters, and teachers, costs of repair and maintenance of buildings, and purported expenses for the education of Indian children at various institutions even when there was no proof that these children had ever attended the institutions.<sup>61</sup>

These jurisdictional Acts giving the tribes access to the Court of Claims continued until 1946, when the Indian Claims Commission was established. Most of these Acts only accepted claims that were based on lands held under title which was recognized by treaty, agreement, or law. A small number had authorized claims based on aboriginal title, but none of these claims were successful in obtaining awards, even though Indian title had been recognized since 1832 by the Supreme Court of the United States in the *Johnson* case.<sup>62</sup> This was the situation until 1946, when the U.S. Supreme Court upheld the Court of Claims award to the Alcea Band of Tillamooks, whose claim had been based on aboriginal title. Thereafter, it seemed that a huge obstacle to compensation based on aboriginal title had been removed. In this same year the Indian Claims Commission was established, thereby eliminating the need for the Indian tribes to be granted a special jurisdictional Act to pursue their claims.

The establishment of a body to deal exclusively with the claims of the Indian tribes had been recommended as early as 1928 by the Meriam Report.<sup>63</sup> However, it was not until August 13, 1946, that the *Indian Claims Commission Act* was signed into law. The original Act provided for a chief commissioner and two associate commissioners and a life of ten years. The Act was subsequently amended to provide for two additional commissioners and to extend the life of the Commission to 1977.

<sup>57</sup> Barsh, "Indian Land Claims Policy," note 54 above.

<sup>58</sup> Rosenthal, *Their Day in Court*, note 51 above, 29.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 30.

<sup>61</sup> *Ibid.*

<sup>62</sup> (1823), 8 Wheaton 543, 21 US 240, 5 LEd. 681 (USSC).

<sup>63</sup> Lewis Meriam *et al.*, *The Problems of Indian Administration* (Baltimore: Institute for Government Research, Johns Hopkins University Press 1928).

August 31, 1951, was the termination date for which claims could be filed. Although 370 claims were filed by that date, they expanded to 611 different docket claims because many of the claims contained more than one cause of action.<sup>64</sup>

Congress had stopped short of creating an Indian Claims Court and had created an Indian Claims Commission. However, the Commission did have some adjudicative functions in that it could approve compromise claims and determine claims. It alone decided the validity of the claims. That determination was taken out of the hands of the legislature and the executive branch of the government. The Commission did not perform any independent investigation of the claims, but relied on the submissions of the Indian tribes and the Department of Justice.

Even with the establishment of the Indian Claims Commission, the dreaded Court of Claims was not entirely out of the picture. The Court of Claims had appeal jurisdiction over the Indian Claims Commission. This appeal jurisdiction was not limited to question of law, since the Court of Claims was authorized to determine whether findings of fact by the Commission were supported by substantial evidence.<sup>65</sup> There were a total of 169 appeals to the Court of Claims, of which about one-third were allowed.<sup>66</sup>

The Claims Commission did not perform as it was hoped and expected. The original expectation had been that it could complete its mandate of determining all tribal claims within 10 years. This time period proved to be quite inadequate for hearing the claims. Many reasons have been given for the delay, but three main ones were identified by the Commission. First, the Justice Department's Indian Claims unit was overwhelmed by the workload. Second, staff shortages at the General Accounting Office drastically reduced its ability to provide the Commission with audits of tribal moneys and property held by the United States. Third, many of the records that were crucial to the claims were held by the Bureau of Indian Affairs and were in a chaotic state.<sup>67</sup>

According to the Indian tribes, besides the delays, there were other problems with the Commission. The first was the fact that it measured damages in most claims according to the market value of the land at the time of taking. There was no consideration of interest on the damages or adjustment for inflation. As one writer concluded: "Consequently, Commission awards frequently represented less than one percent of the real value of the damages suffered by tribal claimants."<sup>68</sup> The second problem identified by Indian tribes was the practice of gratuitous offsets in some of the claims. Although the use of offsets was not as extensive as it was with the Court of Claims, it did occur.<sup>69</sup>

The Indian Claims Commission was allowed to expire in 1978, after four extensions of its mandate. It had been in existence for 32 years, yet it had failed to resolve many

<sup>64</sup> J. Vance, "Indian Claims: The U.S. Experience" (1974) 38 Sask. L. Rev. 1 at 6.

<sup>65</sup> *Ibid.*

<sup>66</sup> Barsh, "Indian Land Claims Policy," note 54 above, 7.

<sup>67</sup> *Ibid.*, 16.

<sup>68</sup> *Ibid.*, 18.

<sup>69</sup> *Ibid.*, 20.

of the claims it had originally intended to resolve in 10 years. When it disbanded, it left nearly 100 unresolved claims for the Court of Claims to consider.

The adjudicative nature of the Commission meant that lawyers were necessarily involved on both sides. In an extensive study, Russell Barsh concludes that, on average, the tribes paid about 9.8 per cent of their awards in legal fees.<sup>70</sup> He also concludes that this adversarial forum led to delays and that it resulted in a high cost to the U.S. government – a cost that could have been reduced dramatically if compensation had been given at the time the Commission was constituted:

Requiring tribes to prosecute, and the United States to defend these claims in a judicial forum also significantly delayed payment. After thirty years of continuous litigation, tribal claimants had won the equivalent of about 1,000,000,000 1978 dollars at the cost of more than 1,200,000,000 1978 dollars to the United States. Thus, tribes would have been as well off financially had the United States simply transferred \$150,000,000 to their trust accounts in 1946, and allowed them to reap thirty years' intervening interest.<sup>71</sup>

The settlement of the native claims in Alaska was accomplished in neither the Court of Claims nor the Indian Claims Commission. Settlement was imposed by legislation after some negotiation between the government of the United States and Alaskan native groups. The *Alaska Native Claims Settlement Act*<sup>72</sup> was enacted in 1971. Under the settlement, "[n]atives receive nearly \$1,000,000,000, \$462,000,000 contributed by federal taxpayers, and \$500,000,000 generated by a two percent temporary royalty on federal and state development of Alaska lands. Natives also select 40,000,000 acres: 22,000,000 for villages at a rate of approximately 400 acres per villager; 16,000,000 for regional corporations allocated by regions' geographic areas, together with the subsurface rights to village selections; and 2,000,000 for individuals and groups not sharing in the village entitlements."<sup>73</sup>

The fact that this claim was dealt with outside the Court of Claims and the Indian Claims Commission did not mean that it was void of problems. Barsh has identified eight major problems within the settlement, four of which he refers to as those of federal law and administration. These four problems are: administrative discretion, delays in land management, taxation of native lands, and alienability of shares. The other four problems are organizational: overlapping local organization, village-region conflicts, conflict among regions, and élites and value conflicts.<sup>74</sup>

In addition to the Alaska Native Claims, other claims were settled by legislation. The *Maine Indian Claims Settlement Act* of 1980, for example, basically awards the Maine Indians \$54 million to purchase land, as well as the income from a \$27 million trust fund.<sup>75</sup>

<sup>70</sup> Ibid., 22.

<sup>71</sup> Ibid., 23.

<sup>72</sup> 85 Stat. 688, December 18, 1971.

<sup>73</sup> Note 54 above, 48.

<sup>74</sup> Ibid., 49.

<sup>75</sup> Ibid., 63-64.

## NEW ZEALAND

New Zealand is much smaller than Canada in both geography and population. The significant difference between Canada and New Zealand in terms of land claims is that in New Zealand, only one treaty was signed – the Treaty of Waitangi of 1840. This treaty covers most of New Zealand and was signed with one group of aboriginal people, the Maori. In Canada, in contrast, a multitude of aboriginal groups signed treaties with the Crown.

There were no formal land claims processes in New Zealand until 1975, when the *Treaty of Waitangi Act* was enacted. This Act was a response to growing discontent among the Maori with what they perceived to be breaches of the treaty. The Maori wanted justice and reparation of past and ongoing wrongs. The Waitangi Tribunal was set up to settle disputes, but it has serious impediments if it is to meet the demands of the Maori people. Because the tribunal can only consider events that followed its enactment, it cannot look to what happened between 1840 and 1975. This problem, along with others, is examined by Andrew Sharp in his study of the Maori in New Zealand.<sup>76</sup> He concludes that the tribunal cannot do much in the way of reparative justice, which is what the Maori want.<sup>77</sup> Nor can it be effective:

It was given no power of legal determination save that of the “exclusive authority to determine the meaning and effect of the Treaty”: yet that power was limited in application. Any determination of meaning and effect would apply only to matters cognizable under the Treaty of Waitangi Act – the Act which constituted it. And in that Act its other powers were solely those of “hearing and enquiring” into cases and of “reporting and recommending” on them to the executive arm of Government. They were neither powers of determining distributions of legal rights and duties, nor powers of legal enforcement. It was not even as though the Tribunal was to specify Treaty *rights* and request the government to enforce them; it was rather to turn its attention to the “practical applications of the principles” of the Treaty. And the “practical applications of principles” is not the enforcement of rights.<sup>78</sup>

Perhaps because of these problems, the tribunal had little activity in its first nine years. By July 1984, it had received only 14 claims, of which three had been dealt with, three had been withdrawn, three had been referred back to the claimants, and five were somewhere in the process.<sup>79</sup> All this changed in the next few years, and by March 1989 there was a backlog of 180 claims awaiting hearing.<sup>80</sup> The great boom in claims was due to amendments to the Act in 1985 and 1988 in response to Maori demands for reform. The most important changes were in the membership and the jurisdictional scope of the tribunal. When it was set up in 1975, the tribunal had three members, one of whom was

<sup>76</sup> Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Arguments in the 1980s* (Oxford: Oxford University Press, 1990).

<sup>77</sup> *Ibid.*, 74.

<sup>78</sup> *Ibid.*, 74-75.

<sup>79</sup> *Ibid.*, 76.

<sup>80</sup> *Ibid.*, 77.

the Chief Judge of the Maori Land Court. By 1988 it had been expanded to 16 members, of whom seven were Maori Land Court judges available to sit as presiding officers. Most significant was the amendment in 1985, which allowed the tribunal to examine Maori claims that pre-dated its own establishment.<sup>81</sup>

In regard to the Waitangi Tribunal's limited power of making recommendations, there were calls to expand its authority to include adjudication. These calls came mainly from the Maori people,<sup>82</sup> but they were largely ignored in Wellington. Moreover, not all Maori agreed that the tribunal should have adjudicative powers,<sup>83</sup> including the tribunal's Judge E. Tachakurei Durie, who at that time was Chief Justice of the Maori Land Court.<sup>84</sup>

Another contributing factor to the tribunal's increasing workload was its adoption of a bicultural approach. E.T. Durie and G.S. Orr have pointed to a number of the tribunal's attributes and activities that they believe are unique and that contribute to its bicultural character.<sup>85</sup> For one thing, the tribunal is made up of both Maori and *Pakeha*<sup>86</sup> personnel: "Few treaties (if any) between native and settler groups fail to be interpreted by a body representative of both sides and so the constitution of the Tribunal itself reflects an important principle."<sup>87</sup> In addition, the tribunal feels that it is important to accommodate the Maori and their traditions:

In considering the accommodation of Maori in the law, the Tribunal was faced with various options, including legal pluralism, and the division of legal services to provide separate units for Maori. It chose instead what might be described as a single jural order with bicultural capabilities as the option most expressive of the Treaty and best suited to the New Zealand milieu.<sup>88</sup>

In attaining this bicultural approach, the tribunal adopts the legal mores and procedural protocols of both Maori and Pakeha culture.<sup>89</sup> It permits expansion, amendment, and the substitution of claims as research, sometimes carried out by the tribunal itself, uncovers new or different grounds for the claims.<sup>90</sup> In consequence, the parties are not strictly held to their pleadings. Moreover, some hearings are held on *marae*,<sup>91</sup> where the Maori procedure is adopted.<sup>92</sup> Under this procedure, the cross-examination of elders is restricted.<sup>93</sup> The tribunal asks the opposing counsel to state their questions and concerns, and the tribunal itself attempts to elicit a reply from the elders.<sup>94</sup> In some instances it

<sup>81</sup> Ibid., 79.

<sup>82</sup> Ibid., 96.

<sup>83</sup> Ibid.

<sup>84</sup> E.T. Durie and G.S. Orr, "The Role of the Waitangi Tribunal" (1990-91) 14 NZ Univ. L. Rev. 62 at 64.

<sup>85</sup> Ibid.

<sup>86</sup> *Pakeha* is the Maori word for European.

<sup>87</sup> Durie and Orr, "The Role of the Waitangi Tribunal," note 84 above, 63.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid., 64.

<sup>90</sup> Ibid., 65.

<sup>91</sup> *Marae* is the Maori word for the spiritual centre of tribal affairs.

<sup>92</sup> Durie and Orr, "The Role of the Waitangi Tribunal," note 84 above, 63.

<sup>93</sup> Ibid., 68.

<sup>94</sup> Ibid., 67.

allows group evidence and some discussion, as tribal members help elders in the recall of evidence and oral tradition.<sup>95</sup> It dispenses with sworn testimony in some evidence (fact and opinion), considering that the presence of kinfolk sanctions against errors and slanted evidence.<sup>96</sup> The tribunal does not limit itself to hearings in a fixed location. It listens to evidence at the historic sites themselves because the elders can better remember and relate at the sites.<sup>97</sup>

Even when the hearings are held off *marae*, the proceedings are not conducted in a strictly adversarial fashion. This approach is in keeping with the large quantity of historical and scholarly opinion that is received in these types of claims. In one particular claim, only limited questions of clarification were put at the end of the evidence. The opposing side was invited to send in written questions and comments, to which there would be a reply and leave to recall witnesses.<sup>98</sup>

At these hearings, interpretation is not carried out sentence for sentence, because the Maori custom does not allow speakers to be interrupted. Instead, the interpreters keep a written record of what was said and submit it at a later time. The usual difficulties in translation apply between English and Maori as between any two languages whose underlying thought processes are not the same.<sup>99</sup> One advantage of the tribunal is that there are Maori-speaking members who understand the evidence given in Maori and who can interpret it for the non-Maori members.

#### AUSTRALIA

Compared with Canada, New Zealand, and the United States, Australia is unique in that it did not sign any treaties whatsoever with the original indigenous inhabitants. Because Australia did not recognize a common-law source of aboriginal title, any recognized aboriginal title has its source in legislation. The *Aboriginal Land Rights (NT) Act* of 1976,<sup>100</sup> for example, which entitled Aborigines of the Northern Territory to hold lands originally reserved for them, also allowed them to claim and hold vacant Crown land to which they could demonstrate a connection of traditional ownership.<sup>101</sup>

The Act automatically gave (in trust) the Aborigines of the Northern Territory lands that had already been reserved for them. These lands comprised approximately 18 per cent of the Northern Territory.<sup>102</sup> The act also appointed an Aboriginal Land Commissioner, whose function was to conduct land claims hearings (claims based on some form of traditional ownership) and to report his recommendations to the Commonwealth Minister for

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid., 70.

<sup>99</sup> Ibid., 71.

<sup>100</sup> Other examples are: the *Pitjantjatjara Land Rights Act*, 1981; the *Maralinga Tjaritja Land Rights Act*, 1984; and the *Aboriginal Land Rights Act*, 1984.

<sup>101</sup> M. Gumbert, *Neither Justice nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights* (St Lucia: University of Queensland Press, 1984), 40-41.

<sup>102</sup> Ibid., 110.



Aboriginal Affairs. The Commissioner's role was advisory only, and it was the Minister who made the final decisions.

Under Australia's constitutional arrangements, much of the jurisdiction over land remains with the state governments. Each state has jurisdiction over lands, whether they are aboriginal or not. Consequently, there is no uniform process for the recognition of aboriginal title.

The practice of non-recognition of common-law aboriginal title has continued until recently. The Australians' belief that there exists no common-law aboriginal title was dealt a severe legal blow by the landmark *Mabo*<sup>103</sup> case. Australians now have to deal with a High Court decision that recognizes common-law aboriginal title. In response to this decision and in anticipation of claims from Aborigines based on aboriginal title, the Australian government has set up a National Native Title Tribunal under the authority of the *Native Title Act 1993* (Cth). According to the President of this tribunal, "proof of native title recognized by the common law can require exhaustive, detailed and time consuming inquiry of traditional laws and customs, their content and application to the subject land and the history of communal association with the land. And even where native title is established on these criteria the question of extinguishment can arise."<sup>104</sup> He believes that one of the primary purposes of the tribunal is to avoid or diminish these problems of proof by providing a mechanism for mediation and conciliation.<sup>105</sup>

The tribunal is empowered to consider applications for the determination of native title. An application under this heading must be initiated by claimants. There are two categories of claimants: first, those who seek to have native title declared on land they claim; second, those who seek a determination that native title does not exist on a particular piece of land.<sup>106</sup>

The tribunal can also hear applications for the revocation or variation of an approved determination of native title.<sup>107</sup> Applications can be made by the registered native title body corporate, the Commonwealth Minister, or the State or Territory Minister. The application can be made on two grounds: first, that a change in events has caused the determination no longer to be correct; and second, that the interests of justice require either the variation or the revocation of the determination.<sup>108</sup>

In addition, the tribunal is authorized to hear applications relating "... to compensation for certain classes of past acts attributable to Commonwealth, State or Territory governments which may have affected native title. They may also relate to future acts, including compulsory acquisition of native title rights or interests."<sup>109</sup>

<sup>103</sup> *Mabo v. Queensland* (No 2) (1992), 175 CLR 1, 107 ALR 1.

<sup>104</sup> R.S. French, "The National Native Title Tribunal - Early Directions" (1994) *Australian Dispute Resolution Journal* 164 at 166.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, 168.

<sup>107</sup> Section 13(1) of the Act.

<sup>108</sup> French, "The National Native Title Tribunal," note 104 above, 169.

<sup>109</sup> *Ibid.*

The tribunal also has an arbitrary function in regard to applications brought to it under section 75(1). There are two categories under this section: objections to processing by a government party of permissible future acts without negotiation; and applications for determination in relation to the doing of a permissible future act. The former relates to mining rights, compulsory acquisitions and other designated acts by the Minister, acts that do not require negotiation but can be objected to. The latter refers to applications where negotiation is either being followed or is required under the act. The applicant can apply for a determination that the act either not be done or be done with or without conditions.<sup>110</sup>

When the tribunal is asked to determine whether there is native title, it sees its primary role as that of mediator and conciliator. When an application for determination is made, it can be unopposed or opposed, or a determination can be made by agreement. If an application is unopposed or there is agreement, the tribunal is required to hold an inquiry into the application.<sup>111</sup>

The process under the *Native Title Act* starts with the applicant sending an application to the registrar. Once the registrar receives it, a case officer is appointed to look into the application and to prepare a short submission whether the application should be accepted or not.<sup>112</sup> An applicant need not establish a *prima facie* case to have the application accepted.<sup>113</sup> It is expected that, in most cases, the registrar will either accept the application or refer it to a presidential member within one month of receipt of the application.<sup>114</sup> If the application is referred to a presidential member, then this member will decide within 14 days if the application should be accepted.<sup>115</sup> If the member does not accept, the applicant is notified and given at least 14 days to reply. Once the applicant has replied, the presidential member will again make a decision within 14 days.<sup>116</sup>

Once accepted, the registrar gives notice to all parties whose interests might be affected. If, after notice, the application is unopposed or a settlement has been reached, an inquiry will be made into the application. If the inquiry proves satisfactory, the tribunal will make a determination on the application.

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<sup>110</sup> *Ibid.*, 170.

<sup>111</sup> *Ibid.*, 176.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, 179.

<sup>116</sup> *Ibid.*, 177.

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# ALTERNATIVE DISPUTE-RESOLUTION MECHANISMS

Methods other than litigation are available to settle disputes. Litigation is increasingly being seen as only one option in settling disputes. There are basically three types of alternative dispute-resolution mechanisms: negotiation, mediation, and arbitration. In addition, there are hybrid dispute-resolution mechanisms, a mixture of any of the three mechanisms mentioned above. Examples include mediation-arbitration, use of an ombudsman, a mini-trial, a summary jury trial, recourse to a rent-a-judge or private courts, and neutral expert finding.

## NEGOTIATION

Negotiation is a consensual bargaining process in which the parties in a dispute attempt to come to some kind of agreement. Each party exercises some degree of autonomy, in the sense that each is trying to reach agreement without the intervention of a third party.<sup>117</sup>

There are two types of negotiations: dispute negotiation and transactional negotiation. In the former, the parties are in conflict over an event that has occurred already, while in the latter the parties are looking to a future event over which they are in dispute.<sup>118</sup> In addition, negotiation can be further classified into distributive and integrative bargaining. Distributive bargaining exists where there are limited resources to divide between the parties. In other words, all parties are going for the same pie, and the more one party gets, the less the other party is left with. In integrative bargaining, the parties are not necessarily at odds with each other, so mutual gain is possible.<sup>119</sup>

In general, there are two approaches to negotiation: adversarial and problem-solving. Usually, an adversarial approach will be adopted where the parties want to maximize individual gain. This approach almost necessarily involves positional bargaining, in which the party adopts a position and attempts to stick to it without giving ground. Usually, concessions are made and a compromise is reached. This type of negotiation invites the parties to start at a position which is not their bottom line and to move towards that bottom line as concessions are made. In contrast, a problem-solving approach is concerned with joint

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<sup>117</sup> J.M. Nolan-Haley, *Alternative Dispute Resolution* (St Paul: West Publishing, 1992), 13.

<sup>118</sup> *Ibid.*, 13-14.

<sup>119</sup> *Ibid.*, 15-16.

gain, rather than individual gain. The dispute is perceived as a mutual problem, which, if solved, will mean gain for both parties. The process is facilitative and is based on interest bargaining as opposed to position bargaining.<sup>120</sup>

### MEDIATION

Mediation involves a third party who attempts to help the parties to a negotiation to come to a mutual agreement. This approach is often resorted to when the parties have been unsuccessful in negotiations. The mediator does not dictate a result to the parties, but offers an objective voice to help steer the parties to an agreement. Unlike adjudication where only the law is referred to, mediation may involve other values or concepts such as fairness, morals, and ethical concerns.<sup>121</sup> Two types of mediation have been identified: rights-based and interests-based.<sup>122</sup> In the rights-based model, the process is influenced by what the parties believe would be available to them in a court of law. Interest-based mediation is more focused on the underlying conflict between the parties.

The main activity of the mediator is one of information exchange and bargaining. This can be done with joint meetings or with private sessions, or with a combination of both. There must be a degree of trust and rapport between the mediator and the parties for the process to work effectively. If the mediator is not trusted by one or both sides, the process will break down. The mediator may assist in defining and drafting the agreement.<sup>123</sup>

### ARBITRATION

Of all the alternative dispute-resolution mechanisms, arbitration is the most courtlike. The parties present their cases to a neutral third-party person or panel who has the power to render a decision that is binding on the parties. It is also the oldest form of alternative dispute resolution and has been used particularly in the commercial sector. While arbitration is similar to court proceedings, it has several advantages over a court. It is faster and less expensive than the courts. Although courts are generally limited to considerations of law, arbitration can involve other considerations if agreed to by both parties. Procedures are also controlled by the parties, and can be more flexible than in a court of law. Another significant benefit is that it is the parties who select the arbitrator(s).

Arbitration can be classified as either interest arbitration or rights arbitration.<sup>124</sup> Interest arbitration involves disputes about the terms and conditions of a contract or another relationship between the parties. Rights arbitration is concerned with the violation or breach of an existing contract or relationship. An arbitrator looks at both positions and offers a judgment that is binding on both sides. The judgment can be a compromise of both positions, or it can favour one position more than the other.

<sup>120</sup> Ibid., 20-24.

<sup>121</sup> Ibid., 56-57.

<sup>122</sup> Ibid., 57.

<sup>123</sup> Ibid., 60-61.

<sup>124</sup> Ibid., 130.

Sometimes parties agree to what is known as final-offer arbitration.<sup>125</sup> The parties each make a final offer to the other and the arbitrator then chooses one of the offers over the other. The arbitrator cannot impose a compromise. This procedure forces the parties to be generally reasonable and realistic in their final offer.

### HYBRID MECHANISMS AND MEDIATION-ARBITRATION

"Med-arb" is a combination of mediation and arbitration. The process begins as a mediation, but if a settlement is not reached, the mediator becomes the arbitrator. It is seen as a process that gives the parties the extra incentive to settle because they know that the mediator will become the arbitrator if settlement is not reached.<sup>126</sup>

### LABOUR RELATIONS

The labour field is an area where a lot of disputes and grievances develop. It is not surprising, then, that it is an area that has seen a lot of developments in alternative dispute-resolution mechanisms, including negotiation, mediation, arbitration, and hybrid forms. Professor Brad Morse has analyzed the alternative dispute resolution of labour management and has applied his findings within the Indian claims context.<sup>127</sup> He concludes: "Virtually all of the existing labour-relations mechanisms could be adopted and adapted so as to be viable components of an overall policy of seriously rectifying the injustices of the past and the present. Arbitration, fact finding, mediation, conciliation, final offer selection and legislated settlements could be utilized as parts of any new claims process."<sup>128</sup> Morse points to some current examples of those mechanisms already being used in the land claims context: "It should . . . be clear from these experiments that it is realistic to conceive of utilizing labour relations techniques in settling these very unique grievances."<sup>129</sup>

History has shown that these alternative dispute-resolution mechanisms have been relatively successful in the labour relations field, and, as Morse has concluded, they would appear to be viable alternatives for the land claims field.

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<sup>125</sup> Ibid.

<sup>126</sup> Ibid., 200-01.

<sup>127</sup> Bradford W. Morse, "Labour Relations Dispute Resolution Mechanisms and Indian Land Claims," in Bradford W. Morse, ed., *Indian Land Claims in Canada* (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty #3, and Union of Ontario Indians, Walpole Island Research Centre, 1981), 293.

<sup>128</sup> Ibid., 343.

<sup>129</sup> Ibid., 346.

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# ANALYSIS

## U.S. EXPERIENCE

Of all the countries looked at in this article, the United States has the system of settling land claims disputes that is most oriented towards arbitration. The Indian Claims Commission was, for all intents and purposes, a court that conducted hearings, heard evidence, and rendered judgments. The fact that it rendered judgments and made awards gave the process some finality – a positive characteristic. However, because it was like a court, claimants faced a win-or-lose situation, which meant that, in a lot of the cases, they ended up with nothing. Because it was so courtlike, its procedures were strictly legal and adversarial. This did not help the relationship between the tribes and the federal government.

## NEW ZEALAND EXPERIENCE

Unlike the United States Indian Claims Commission, the New Zealand Waitangi Tribunal does not have final decision-making powers. It merely recommends settlements to the government after it conducts its hearings. The most unusual aspect of the Waitangi Tribunal is its adoption of a bicultural approach. One of the Commissioners suggested that it is precisely because the tribunal was not a final decision-making body that it was possible to implement the bicultural approach. If it had been given an adjudicative role, it would have had to adopt strict legal rules of procedure and evidence which would have effectively ruled out the bicultural approach.<sup>130</sup>

The bicultural approach is an appealing idea. There are great differences between New Zealand and Canada, however, and these differences figure prominently in any move to a bicultural approach in Canada. There is only one aboriginal group in New Zealand, while in Canada there are a multitude of First Nations, with differing languages, cultures, and procedures. It would be a massive undertaking to become completely bicultural in Canada, but it would not be impossible.

## AUSTRALIAN EXPERIENCE

The National Native Title Tribunal in Australia has the power to determine native title. There are several unique characteristics to this tribunal, including the power to determine

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<sup>130</sup> Durie and Orr, "The Role of the Waitangi Tribunal," note 84 above, 64-65.

if native title does not exist in a particular area and the right to hear those claims from non-aboriginal persons. Another unique characteristic is the tribunal's power to revoke or vary a determination of title that it has previously made. It is suggested that characteristics such as those, and the rationale behind them, would never be acceptable to the First Nations in Canada.

Despite its shortcomings, the National Native Title Tribunal does have at least one useful component: it has time limits set on applications and on responses to these applications. These limits should speed up the process, and should avoid the unnecessary delays that seem to be inevitable in any land claims process.

### **NEGOTIATION**

The negotiation process is often the best means of settling disputes where there is a strong desire to maintain an amicable relationship between the parties. It is the least adversarial of all dispute-resolution mechanisms, and, since it does not involve a win-or-lose situation, both parties can gain some ground without completely destroying the other party's position.

While negotiation is desirable, it is not necessarily compatible with land claims disputes for a number of reasons. First, negotiation can only work where both parties have relatively equal bargaining powers and where both parties have something to gain along with something to lose. There is no real incentive to negotiate unless you have something at stake. The present relationship between the First Nations and the government is not one of two parties with equal bargaining powers. The First Nations have the most to lose, and the government has little or nothing to lose. The First Nations are being asked to negotiate away their legal rights (among other rights), while the government is being asked to negotiate cost. A further problem is that a fiduciary relationship exists between the First Nations and the government, where the government owes a fiduciary obligation to the First Nations. Such a relationship is not conducive to negotiation.

Second, in land claims negotiations generally, there is no third-party involvement to provide some external pressure to reach a settlement. It is extremely difficult to reach a settlement between two opposing parties where there is no outside involvement. The policy of negotiation has not worked well, given the lack of settlements reached since the policy of negotiation was initiated.

### **MEDIATION**

The mediation process involves a third party who attempts to help the parties reach a settlement, so it is probably more suited to the land claims context. In addition to being a liaison between the parties in narrowing down their differences, the third party can act as a sounding board for the frustrations of either side and can eliminate the need for the parties to vent their frustrations face to face. Like negotiation, mediation is not necessarily

a win-or-lose situation where the winner takes all. Again, like negotiation, mediation works best where there is equal bargaining power on both sides; it is therefore not best suited to the land claims process, given the unequal relationship between the First Nations and the federal government.

### **ARBITRATION**

The arbitration process would definitely work in the land claims context. If it were set up properly, it could prove to be the fastest process of settling claims, while at the same time giving the settlements some degree of finality. The biggest drawback is that arbitration is a win-or-lose situation where the winner takes all. It is also the least amenable to a bicultural approach, since an adversary system is inherent in strict arbitration. To accommodate the bicultural approach that would be more acceptable to First Nations, one would have to reshape the conventional arbitration model so as to lessen its reliance on adversarial procedures.



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## CONCLUSIONS AND RECOMMENDATIONS

There are many problems associated with the present land claims policies and processes. Claims are backlogged and there is a general dissatisfaction on the part of the First Nations. Changes have to be implemented as soon as possible because the longer the impasse drags on, the more difficult it will become to break. It is important that any changes be done in consultation and in partnership with the First Nations. It is more desirable to have the consent and blessing of the First Nations before changes are made than to try to convince the aboriginal people that changes are needed after they have been implemented. This has been a major impediment to successful First Nation participation in land claims processes in the past.

Another major stumbling block to meaningful progress in land claims has been the lack of political will on the part of past governments. There has to be sufficient political will by the federal government to make any process viable. Perhaps the timing is right, since the present government in its campaign before the last election indicated its desire to make significant change in land claims policy:

The current process of resolving comprehensive and specific claims is simply not working. A Liberal government will implement major changes to the current approach. A Liberal government will be prepared to create, in cooperation with Aboriginal peoples, an independent claims commission to speed up and facilitate the resolution of all claims. This commission would not preclude direct negotiations.<sup>131</sup>

In addition, when the Liberal Party released its aboriginal platform in September 1993, it recognized that, although there had been major developments in aboriginal and treaty rights since 1982, there had been no corresponding changes in government policy.<sup>132</sup> It promised to undertake a major overhaul of claims policy on a national basis.<sup>133</sup> In addition, it proposed that an independent Indian claims commission be established.<sup>134</sup>

As well, the Liberal Party passed a resolution at its 1992 biennial convention which, among other things, promised that the party would include self-government negotiations

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<sup>131</sup> Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), 103.

<sup>132</sup> Aboriginal Peoples' Commission of the Liberal Party of Canada, *Renewing the Partnership: Aboriginal Peoples' Policy Platform* (Ottawa 1994), 11.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, 12.

in claims, delete the requirement of extinguishment from claims based on aboriginal title, remove the notion that claims based on aboriginal title can be superseded by law, and abolish the defences of the statutes of limitation and the doctrine of laches.<sup>135</sup> The commitment to establish an independent commission was also included in that resolution.

It appears, then, that there is a strong political will on the part of the present government to make effective change in land claims policy. If changes are to be meaningful and productive, First Nations will have to play a significant role in them.

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## RECOMMENDATIONS

### **1 The power of validation of claims should be taken out of the hands of the Office of Native Claims.**

In any dispute, it is illogical to have the opposing party decide whether or not the claim against it is valid. In addition, the parties are already in a legal relationship that is fiduciary by nature.

### **2 Any new policy or process must contain a means of accommodating a bicultural approach.**

A bicultural process would go a long way in making First Nations feel they are part of the process. If the proper steps were taken, they would encourage elders to be more trusting of the process and, thereby, they would make an immense contribution to the process. A closer examination of the Waitangi Tribunal would be helpful.

### **3 Self-government should be an option in any claims arising out of aboriginal title.**

Self-government aspirations of First Nations are not going to disappear. The parties could speed up the process of self-government if it were included in land claims agreements.

### **4 The government should be required to bargain in good faith.**

This requirement would ensure that negotiations are not stalled because the government feels it has nothing to lose by prolonging the process.

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<sup>135</sup> Priority resolution 23, Liberal Party Biennial Convention, 1992.

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**5 The government should set up a trust fund to help pay for the cost of settling land claims.**

The government should immediately apportion some money that is specifically targeted to pay for land claims. The money should be placed in an interest-bearing account so that the interest could be used to offset some of the cost. As one writer has suggested, the United States government could have saved a large sum of money had it set up a fund when the Indian Claims Commission was established and had it earn interest until the Commission wrapped up.<sup>136</sup>

**6 The requirement for the extinguishment of aboriginal rights in claims based on aboriginal title should be removed.**

This requirement is a major impediment to resolving comprehensive claims.

**7 An independent Indian Claims Commission should be established immediately, or the mandate of the present Indian Claims Commission should be expanded.**

Any new commission should be constituted so as to accommodate the first five recommendations above. The commission should, at a minimum, have the following features:

- a) A mandate to make findings of fact and to make awards in regard to all claims, whether they are comprehensive, specific, or otherwise.
- b) A mandate to provide alternative dispute-resolution mechanisms such as negotiation, mediation, and conciliation, along with the authority to set time frames within these mechanisms.
- c) Authorization to dispense with the strict rules of legal evidence and procedures when it conducts hearings. This flexibility will allow for a bicultural approach.
- d) The Commission should be a national body with strong regional representation, to mirror the different First Nations across the country.
- e) Sufficient Commissioners should be appointed to allow for more than one hearing at a time. Each Commissioner would be designated to a specific region.
- f) Commissioners must be knowledgeable in the field of land claims and its related aspects. They should be appointed by both the federal government and the First Nations on an equal basis.

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<sup>136</sup> Barsh, "Indian Land Claims Policy," note 54 above, 20.

- g) The Commission must be given sufficient funds and resources to carry out its mandate and to provide financial resources to the claimants.
  - h) The Commission must take an active role in the alternative dispute-resolution forums.
  - i) There should be an avenue of appeal to superior courts based on the same criteria as an appeal from an administrative law tribunal.
  - j) The Commission should possess an investigative division to research the factual background of claims.
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**MARY ELLEN TURPEL\***

**A FAIR, EXPEDITIOUS, AND  
FULLY ACCOUNTABLE  
LAND CLAIMS PROCESS**

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## PREFACE

A Liberal government, in consultation with Aboriginal peoples, would undertake a major overhaul of the federal claims policy on a national basis. The objective of a Liberal government regarding land and resource rights would be to uphold the honour of the Crown by settling these matters through a fair and equitable process.<sup>1</sup>

This short discussion paper was prepared for the Indian Claims Commission. It is intended to encourage a dialogue on the process for implementing the commitment made by the Liberal Party of Canada to overhaul land claims policy and practice. It is premised on the widely accepted view that the current land claims process is not working well and that the pace and conditions for the resolution of land claims conflicts are inadequate.<sup>2</sup>

Land claims policies have not been revised significantly since the early 1980s.<sup>3</sup> During this period many developments have taken place, including important new legal pronouncements on aboriginal and treaty rights by the courts. Land claims policies have not kept pace with these advances, nor are they consistent with the recognition of the inherent right of self-government. Apart from the creation of the Indian Claims Commission in 1991 and a brief period of discussion between First Nations Chiefs and federal officials on specific claims policy reform in 1992-93, there has been little innovation in the land claims area. Even where agreements have been reached, the status of those agreements (as treaties) and the implementation of agreements raise issues beyond the current policy framework. The collective challenge we face is to implement the political commitment to fundamental reform in a manner that is mindful of the developments of the past decade and supportive of a respectful and enduring relationship between aboriginal peoples and the government of Canada.

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<sup>1</sup> Statement of Liberal leader Jean Chrétien, "The Aboriginal Peoples of Canada," issued in Saskatoon in September 1993.

<sup>2</sup> This view is supported by the Report of the Royal Commission on Aboriginal Peoples, "Treaty-Making in the Spirit of Co-Existence: An Alternative to Extinguishment in Comprehensive Land Claims Agreements" (Ottawa: Supply and Services, 1995).

<sup>3</sup> The federal comprehensive claims policy was issued in Department of Indian Affairs and Northern Development (DIAND), *In All Fairness* (Ottawa: Ministry of Supply and Services, 1981), in December 1981, and the specific claims policy was issued in DIAND, *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: DIAND, 1987, as revised), in May 1982 (see [1994] 1 ICCP 171) [hereinafter *Outstanding Business*]. Some minor changes were introduced to those policies, especially to the comprehensive claims policy in 1986 following the Task Force Report on Comprehensive Claims.

One of the specific challenges I faced in preparing this paper was to reflect and to accommodate the diversity of aboriginal peoples. First Nations (both status and non-status Indians), Métis, and Inuit peoples have all advanced land claims that reflect a diversity of cultures, histories, and geographies. Indeed, some of these claims overlap and raise sensitive inter-aboriginal issues of territorial boundaries and rights.<sup>4</sup>

In implementing land claims reform, it is important to address this diversity in order to ensure that the process is both fair and responsive to the circumstances of various aboriginal peoples and aboriginal governments. A diversified process, with separate processes for Métis, Inuit, and First Nations claims, may well be inevitable. The focus here is primarily on the resolution of First Nations claims, given that the majority of claims outstanding are of this kind. This focus also reflects my own difficulty with conceptualizing a "one-for-all" implementation process. This is not to say that additional work is unnecessary on diversity issues, since it is most certainly required. However, sufficient work has been done on First Nations claims to allow for the immediate implementation of reform in this area. At the same time, issues of diversity should be discussed with Métis and Inuit peoples, and reforms designed to reflect their unique circumstances.

There is one additional challenge of diversity in land claims reform, one that is internal to First Nations peoples. First Nations leaders from numbered treaty areas have repeatedly articulated the need for a treaty-specific process in order to implement existing treaties and to address grievances on a treaty-by-treaty basis. A treaty-specific process may well be the long-term direction for reform, and it should not be rejected in favour of an issue-specific model of dispute resolution, such as a land claims process. While this direction for change is being explored, issue-specific processes, if only as a transition method, may be needed in areas such as land claims because the needs here are urgent. Of course, recourse to any process should be at the discretion of the First Nation leadership in consultation with First Nations citizens, and no First Nation should be forced into any process without its informed consent and without a consideration of all available options. The important point at this stage is that implementation of the commitment to overhaul land claims policies and procedures is vital and must be connected to wider changes. These changes are detailed in the Liberal Party of Canada's platform for policy reform on aboriginal issues, and include treaty matters.

One additional development relevant to the overhaul of land claims is the increased regionalization of the process. The creation of specific processes in the provinces of Ontario and British Columbia is a significant innovation, one worthy of careful consideration and analysis. Developments in Manitoba may lead to regional processes on land issues for First Nations in that province. To some extent, however, these provincial developments are the product of the failure of the national land claims processes. The federal position in these regional processes has raised concerns; henceforth, the discussion on land claims reform at the national level should ensure that the policy advances achieved at the

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<sup>4</sup> The territorial conflicts between the Dene and Inuit which came to light during the ratification of the Nunavut Final Agreement are a case in point.

regional level must influence the national reform project, just as any new changes at the national level should be extended to regional initiatives. While the pressure for political change stems from strong regional dissatisfaction with current policies, a national reform effort is not inconsistent with this fact.

This article is, by design, brief, and is not by any means a comprehensive treatment of the land claims policy or the claims process reform agenda. More questions are raised than are analyzed, and no definitive "answers" are provided. The search for answers or the implementation of land claims reform must be the product of a joint effort between aboriginal peoples and the government at a common table. Options are explored in this article, but the implementation decisions must be the product of a jointly conceived and managed implementation process. In other words, this article is geared towards opening a dialogue on reform. Where that conversation leads is the responsibility of First Nations' and government leaders.

## INTRODUCTION

The Liberal Party of Canada's election policy platform, *Creating Opportunity*, includes important commitments for charting a new course in federal government relations with aboriginal peoples.<sup>5</sup> Since its election in October 1993, the Liberal government has restated on numerous occasions its intention to renew and improve relationships with First Nations.<sup>6</sup> One of the critical components of this platform is the settlement of disputes over lands and resources. These disputes arguably represent the most longstanding and embittering failures of Crown policy. Only since 1973 has the federal government acknowledged a willingness to resolve disputes over lands and resources, and that opening was won through litigation.<sup>7</sup>

While the shortcomings of existing land claims policies and procedures have been widely recognized in the past 20 years,<sup>8</sup> progress on new approaches and innovation in dispute-resolution strategies have been slow. The federal government's comprehensive and specific land claims policies<sup>9</sup> ostensibly serve to resolve disputes over lands, resources, and related grievances. However, these policies have numerous deficiencies, which will be explored in this article and which lead one to question whether minor or tinkering reforms are sufficient to address the evident defects. While these policies call for a negotiation

<sup>5</sup> Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* [Red Book] (Ottawa, 1993) [hereinafter *Creating Opportunity*]; and *The Aboriginal Peoples of Canada* (Ottawa, September 1993) [hereinafter *Aboriginal Peoples*].

<sup>6</sup> The paper uses the expression "aboriginal peoples" when referring collectively to First Nations, Métis, and Inuit peoples. The expression "First Nations" is used interchangeably with "Indians," a term that is also used where appropriate. I will use the expression "First Nations" throughout, since the paper is specifically focused on First Nations land claims processes (see explanation in preface, above).

<sup>7</sup> Notably, the recognition of aboriginal title in *Calder v. British Columbia* (Attorney General), [1973] SCR 313, which led to the development of a federal land claims policy.

<sup>8</sup> There have been numerous studies, reports, and proposals for land claims policy reform. These include DIAND, Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements* (Ottawa: DIAND, December 1985); Canadian Bar Association, Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: CBA, 1988); Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: ICO, 1990); Roberta Jamieson, "Resolution of Issues Involving First Nations and Governments: An Ontario Experience" (draft paper prepared for the Special Committee on Native Justice of the Canadian Bar Association, 1988); Karen Leghorn, *Planning for Fairness: An Evaluation of the Canadian Native Claims Settlement Process*, UBC Planning Papers (Vancouver: School of Community and Regional Planning, August 1985); Andrea McCallum, "Dispute Resolution Mechanisms in the Resolution of Comprehensive Land Claims: Power Imbalance between Aboriginal Claimants and Governments" (draft paper prepared for the Royal Commission on Aboriginal Peoples, May 1993); and Morris/Rose/Ledgett, "Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives" (draft paper prepared for the Royal Commission on Aboriginal Peoples, April 1994). For additional sources, see Select Bibliography, below.

<sup>9</sup> The policies can be found in *Outstanding Business*, note 3 above, and DIAND, *Living Treaties: Lasting Agreements*, note 8 above.

process for claims resolution, in the past 20 years we have seen a massive increase in litigation over claims, even though almost everyone involved in claims recognizes that litigation is not the best method for addressing land disputes. The rise in litigation is a by-product of a failed dispute-resolution process in the claims area, and has served to reinforce an adversarial approach on the part of the Crown and the First Nations in dealing with these disputes. It appears that the First Nations and the federal government are headed towards further confrontation and hostility. The only remedy is a reworking of federal claims policies and the establishment of an appropriate and effective process for the resolution of disputes between First Nations and government over lands and resources.

The literature on claims, along with the positions taken by the First Nations' leaders, supports the creation of a dispute-resolution process which is independent from government, jointly established by government and First Nations, and expeditious, yet affording all incidents of procedural and substantive fairness; which ensures that the federal government fully discharges its fiduciary obligations during all phases of claims resolution and after settlement; and which does not require aboriginal peoples to extinguish or sever their historic and spiritual connections with their traditional territories. There is a wide gulf between this vision and the existing arrangements.

The only significant national policy development on claims has been the creation of the Indian Claims Commission in 1991<sup>10</sup> to deal with specific land claims disputes.<sup>11</sup> The federal government divides land claims into three categories: specific claims, comprehensive claims, and "claims of another kind." There are no firm definitions of these three categories, and they have been criticized as unworkable and artificial in practice. Specific land claims are said to be claims that stem from treaties and the application of the *Indian Act* (i.e., reserve lands, surrenders, etc.). Comprehensive claims are claims based on traditional native use and occupancy (ownership) of the land. "Claims of another kind" are claims based on traditional use and occupancy (ownership) by First Nations that have entered into treaties (pre-Confederation treaties), where the terms of the treaties do not deal explicitly with land. The Indian Claims Commission was established to deal only with specific claims, which encompass the majority of claims submitted to the federal government.<sup>12</sup>

While the new Commission has shown promise in reviewing disputes over claims negotiation, it has significant institutional limitations given that it has been working within a policy framework that is considered inhospitable to claims resolution.<sup>13</sup> Moreover, the inquiries it has conducted to date have produced well-reasoned and well-supported

<sup>10</sup> Established by Order in Council PC 1991-1329, amended by Order in Council PC 1992-1730.

<sup>11</sup> See Indian Claims Commission, *Annual Report 1991-1992 to 1993-1994* (Ottawa, [1994]).

<sup>12</sup> As of February 1993, of the 578 specific claims submitted since 1973, no more than 44 have been settled; *Aboriginal Peoples*, note 5 above, 11.

<sup>13</sup> The Assembly of First Nations, in their critique of federal land claims policies, *AFN's Critique of Federal Government Land Claims Policies* (Ottawa: AFN, August 21, 1990), has suggested that: "In summary, the federal government's specific claims policy is inadequate in almost every respect. Its criteria, process and costs have resulted in very few settlements, causing some First Nations to reject it as a viable mechanism to address their grievances. Many others, who are into the process at one stage or another, get discouraged waiting for progress on even relatively minor claims" (13).

recommendations that have been submitted to government for action. Unfortunately, there has been no action by government to date and, given that the federal government is under no obligation whatsoever to respond to recommendations, this silence has called into question the very purpose of the inquiry process itself.\* This has led many to question the effectiveness of the Commission's existing mandate in resolving disputes on claims, given it is limited only to making recommendations to governments and does not have binding jurisdiction in any formal sense.<sup>14</sup> The other significant development, albeit regional and not national, was the creation in 1992 of the British Columbia Treaty Commission to deal with comprehensive claims in the province.<sup>15</sup>

The British Columbia Treaty Commission is a First Nations, provincial, and federal government initiative undertaken after the province of British Columbia recognized continuing aboriginal land rights in 1990. The commission has been in the formative phase since 1992 and has yet to commence negotiations. While a trilateral process (First Nations/two levels of government) has guided the creation of the commission and the establishment of protocol on process and negotiations, the British Columbia Treaty Commission is working within the national policy framework. Many encouraging developments have come from this trilateral process, such as the appointment of both aboriginal and non-aboriginal commissioners. Approximately 40 claims have been submitted for negotiation at the time of writing, although no decisions have yet been made on priorities. However, it seems likely that once negotiations are under way, disputes will arise that will face the same potential of being stalemated as have disputes from other regions which operate under existing policies (i.e., disputes over extinguishment, independent resolution of conflicts, etc.). Because the treaty commission process is new and is in the formative phase, it is difficult to assess progress to date. It is an open question whether national policies will continue to inform the process in British Columbia, and what effect this will have on progress once negotiations commence. This reservation in no way detracts from the progress in establishing a regional institution to move negotiations ahead. The British Columbia initiative on comprehensive claims is significant, and policy innovation at the national level should incorporate the advances achieved here. It is clear, however, that a more comprehensive national policy overhaul is required to bring policy and practice in line with the commitments the federal government has made, and to ensure that these commitments are extended to existing regional processes such as the British Columbia Treaty Commission.

The changes to land claims policy that have been proposed by the Liberal Party of Canada have been widely supported by numerous studies, reports, and articles during the past 10 years. This article will focus specifically on process issues, and on ways to reform the process for resolving disputes over the acceptance, negotiation, and implementation of

<sup>14</sup> A more complete discussion of the Indian Claims Commission appears below.

<sup>15</sup> Established after the *Report of the British Columbia Task Force* (Vancouver: Queen's Printer, June 28, 1991).

\* Editor's Note: Since Ms Turpel wrote this paper, the government has sent several responses (see p. 21 n. 37).

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both specific and comprehensive land claims. However, the substantive policy framework cannot be divorced from issues of process and dispute resolution. Recent experience with the Indian Claims Commission seems to reinforce this point: institutional reform of process, without policy reform of claims criteria, funding, and negotiation guidelines, may temporarily divert conflicts away from the Department of Indian Affairs and Northern Development (DIAND), but not resolve them. The Indian Claims Commission has begun the process of establishing its credibility in the review of claims issues and has shown promise in embracing alternative dispute-resolution processes in the claims process. It is my view that process reform does aid substantive policy change by providing specific contexts in which to assess the fairness of policies and the application of substantive criteria. For example, a panel of the Indian Claims Commission in its inquiry into the Athabasca Denesuline Treaty Harvesting Rights complaint<sup>16</sup> had to consider whether the specific claims policy permitted claims arising from interference with treaty harvesting activities. The position of the federal government was that such harvesting rights cannot be the subject of a Commission inquiry unless specific breaches can be shown (i.e., no declaratory power in the Commission). The panel found that the policy extended to treaty harvesting activities and that concerns regarding these rights could properly form the subject of a specific claim. At the level of process, this decision aided in clarifying a much disputed aspect of the policy. In other words, a good process will open up substantive problems with policy. In this article, some attention will be given to matters of substance and policy, but further consideration of extinguishment and other contentious substantive matters is beyond its scope.<sup>17</sup>

The discussion has been organized into four sections: first, a review of the federal government's (Liberal Party of Canada's) commitments to reform land claims policies at the national level, along with an overview of existing policies and institutions; secondly, a discussion of fiduciary duties, and reasons why full observance of fiduciary obligations should inform a discussion of the implementation of broad reforms in the land area; thirdly, specific options for revising the claims settlement process, with an emphasis on the Indian Claims Commission as an institution that could be built upon in the reform process; and fourthly, a discussion of a transition process, to ensure that the dialogue on claims reform begins and that it does so in a manner consistent with the other commitments government has made to aboriginal peoples, such as the commitment to implement the inherent right of self-government.

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<sup>16</sup> [1994] 1 ICCP 159.

<sup>17</sup> P. Joffe and M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, 3 vols. (Ottawa: Royal Commission on Aboriginal Peoples, November 17, 1994).

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## REVIEWING THE FEDERAL GOVERNMENT'S COMMITMENTS

The Liberal Party of Canada has prepared a detailed statement of policy on issues relating to aboriginal peoples.<sup>18</sup> This policy platform squarely addresses the overhaul of federal land claims policy. The commitments made in this statement deserve close attention because they represent an agenda for reform that departs substantially from existing policies and practices. Moreover, while some very specific commitments have been made, the implementation of these proposals in the land and resources areas requires further discussion in order to provide a detailed plan of action. Since forming the new government of Canada,<sup>19</sup> Liberal ministers have advanced some regional or local proposals as "experiments" with First Nations.<sup>20</sup> However, no concrete plans for implementing the land claims commitments have been developed either by First Nations or by the Government of Canada. At this point, land claims policy and practice across the country are in a peculiar situation: commitments to reform are on the table, yet there are no discussions on the implementation of those commitments. Consequently, claims are being addressed as if those commitments had not been made, and frustrations continue to grow.

The article has accepted at face value the commitment of the Government of Canada to a new relationship with aboriginal peoples and, in particular, its proposals to overhaul completely the federal land claims policy. While the substance of the federal government's commitments on land claims is not new and is widely supported in the literature,<sup>21</sup> the fact that the Liberal government has committed itself to fundamental reform in order to address the longstanding criticism of policy in this area is a truly significant development, and we must take it as a sincere and profound opening for change. These commitments will be clearly described at the outset so that any recent variances can be addressed. It is important to note that without progress on land claims issues, the sincerity of the commitments of the new government on other issues will soon be called into question.

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<sup>18</sup> *Aboriginal Peoples*, note 5 above.

<sup>19</sup> While the policy agenda described in this section is that of the Liberal Party of Canada, I will refer to the Government of Canada interchangeably with the Liberal Party of Canada, since the Government of Canada has confirmed on numerous occasions its intention to proceed with the implementation of its policy platform.

<sup>20</sup> The agreement between the Minister of Indian Affairs and the Assembly of Manitoba Chiefs to wind down the Department of Indian Affairs in that province is probably the most ambitious of the regional proposals announced to date. The framework agreement was signed on 7 December 1994.

<sup>21</sup> DIAND, *Living Treaties: Lasting Agreements*, note 8 above; CBA, *Aboriginal Rights in Canada*; Chiefs Committee on Claims, "First Nations Submission on Claims, December 14, 1990," reprinted [1994] 1 ICCP 174. For other general sources, see Select Bibliography, below.



The commitments on land claims reform can be broken down into three broad areas: first, commitments that stem from the overall objective or political rationale for revamping federal aboriginal policy generally, such as implementing the recognition of the inherent right of self-government and promoting economic self-sufficiency; secondly, specific proposals on land claims policy reform, including both process and substance issues such as reconceptualizing claims and establishing an independent process to facilitate the settlement of disputes; and, thirdly, commitments by the federal government to work closely with provincial governments to ensure that land claims can be settled with the cooperation of provincial governments, given their jurisdiction over lands and resources in the province – in other words, commitments relating to intergovernmental relations. Each of these areas will be described in turn so that a clear picture of the commitments we are working with can emerge and we can assess the challenges and options for implementation.

### **BROADER OBJECTIVES FOR OVERHAULING FEDERAL CLAIMS POLICY**

Two overriding objectives anchor the federal government's commitment to a new land claims policy: self-government and economic self-sufficiency. The land claims process has made it difficult to progress on either objective in the past decades. The Liberal Party has committed itself to these objectives, and has expressed the connection between progress on land claims and the achievement of these objectives in the following terms:

The framework within which a Liberal government and Aboriginal peoples will move ahead will be the recognition that Aboriginal peoples have the inherent right of self-government within Canada. Within this context, a Liberal government will assist Aboriginal peoples to become self-sufficient and self-governing through initiatives that promote Aboriginal community development and a sound economic base for the future.<sup>22</sup>

Claims resolution is central to the economic and political development of First Nations because the reserve system has never been adequate to provide for the economic and social needs of First Nations peoples. Moreover, it certainly has not respected the land rights of First Nations.

Land claims resolution is also pivotal for progress on the inherent right of self-government and the development of a more trusting and respectful relationship between First Nations and the federal government. It is difficult to imagine progress on the implementation of the inherent right of self-government while First Nations territories remain in dispute. Without resolving these conflicts, the territorial jurisdiction of First Nations governments will be a source of ongoing friction in relations among governments and in implementing discussions on self-government.

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<sup>22</sup> *Aboriginal Peoples*, note 5 above, 2.

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The clear delineation of First Nations rights to land and resources is a crucial foundation for the long-term success of self-government. But it is also important for non-Aboriginal Canadians and for governments, because certainty of ownership and rights will allow economic development to proceed and will help put Canadians to work.<sup>23</sup>

Arguably, without progress on the resolution of land claims, all other aspects of the Liberal Party platform will be called into question. As the party has acknowledged:

If Aboriginal communities are to become self-sufficient, they must have an adequate land and resource base upon which to grow. That is why a Liberal government is committed to overhauling the land claims policy in ways that will make the process more fair, more efficient, and less costly.<sup>24</sup>

The restoration of land and resource base sufficient to sustain Aboriginal societies, through the equitable resolution of land claims, is the key to the future and long-term cultural and economic success of self-government. The dispossession of their traditional territories is one of the root causes of the contemporary social and economic ills and inequities that exist amongst Aboriginal peoples in Canada.<sup>25</sup>

The recognition of the need to restore aboriginal societies' land and resource base as a key to the long-term success of self-government is important because it is premised on the recognition of rights. The current policy framework is based on an odd position of not recognizing land rights from the outset, but negotiating land issues based on an attitude of munificence rather than entitlement. What makes this seem even more odd in practice is that, although the federal claims policy does not start from a position of recognition of rights, it requires the claimant to accept an eventual extinguishment of any rights that might exist. This new framework of recognition, economic self-sufficiency, and self-government is a dramatic and welcome departure from the existing policy backdrop.

The acceptance of the inherent right of self-government as a general policy objective is important for claims reform because self-government requires power-sharing in the process of policy development and in the creation of new institutions for resolving disputes. In the past, policies and processes have been put in place unilaterally by the federal government and there has been little or no respect for the participation and consent of First Nations. Self-government requires this participation and consent at every level. It also means that, like the British Columbia Treaty Commission model, new institutions should reflect both First Nations and non-aboriginal (government) membership and values. The old model of imposing policies and bureaucratic visions of what is right or workable has been jettisoned

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<sup>23</sup> Hon. Ron. Irwin, Minister of Indian Affairs, Speech (Canadian Bar Association seminar, Halifax, February 12, 1994) [unpublished].

<sup>24</sup> *Aboriginal Peoples*, note 5 above, 2.

<sup>25</sup> *Ibid.*, 10.

in favour of power-sharing and rebuilding better working relationships between First Nations and governments. This is a welcome departure, and it will assist the development of a fair and respectful land claims policy.

#### **DETAILS OF THE PLATFORM: SUBSTANTIVE AND PROCEDURAL PROPOSALS**

In order to realize the twin objectives of self-government and economic self-sufficiency, a major shift in policy is required. The shift is required at two connected levels: first, an overhaul of the substantive aspects of land claims policy, such as the criteria for validation of claims, and a reconsideration of the scope of negotiations (whether, for example, they should be extended to include issues of self-government jurisdiction); and secondly, a new process for the implementation of the policy and the resolution of conflicts at all stages from pre-validation to post-settlement. The current policy envisions no appeal process, no procedure to deal with conflicts (outside the recent Indian Claims Commission), and little of the rudiments of fundamental justice and fairness that have come to be expected in Canadian law when government decisions have dramatic impact on rights and property. The Liberal Party of Canada has made numerous important and broad-sweeping proposals on both levels of reform.

The first commitment relates to substantive reform. The federal government has stated explicitly that land claims processes will no longer be premised on the blanket extinguishment of aboriginal and treaty rights and that other approaches will be explored which do not require aboriginal peoples to sever their historic relationship to lands.

Claims negotiations have been difficult in part due to the strong objections by Aboriginal people to certain aspects of the current policy, in particular extinguishment and the reluctance of the federal government to negotiate self-government as part of claims. Negotiations have been unduly protracted, resulting in the accumulation of massive amounts of debt for claimants. Problems in the implementation of some land claims agreements also give cause to reconsider the merits of the existing policy . . . In order to be consistent with the Canadian Constitution which now "recognizes and affirms" Aboriginal and treaty rights, a Liberal government will not require blanket extinguishment for claims based on Aboriginal title.<sup>26</sup>

From this statement we can presume that blanket extinguishment will be repudiated. This opens up the process for significant progress, since the extinguishment requirement has prevented many First Nations from entering into, progressing with, or concluding claims negotiations. First Nations view their extinguishment as culturally unacceptable and as a renunciation of their unique relationship with their traditional territories.

The second proposal relates to both the substantive and the procedural aspects of the existing policy. The federal government is committed to eliminating the distinction between specific and comprehensive land claims.

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<sup>26</sup> Ibid., 11.

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Many have criticized the artificial distinction between specific and comprehensive claims in the current claims policies. Instead of separate specific and comprehensive claims, we propose a general policy encompassing all claims. Under a Liberal government, the negotiation of claims relating to Aboriginal and treaty rights could include the right of self-government.<sup>27</sup>

While this statement is silent on the mysterious category of "claims of another kind," it seems logical that all claims would be part of a general policy and that fitting one's claim into a bureaucratic category would not be required in order to commence discussions on claims.

The third proposal relates to the substance of claims policy. The Liberal Party platform recognizes that while there have been no significant changes in policy since 1980, the new policy and process need to catch up to developments that occurred because of litigation, some of which was the by-product of the ineffective claims process.

Major reforms are now needed to these claims policies and processes. First, they are out of step with the legal and political evolution of Aboriginal and treaty rights. There have been no fundamental changes to federal claims policy since the last major review by a Liberal government in 1980. Yet, there have been major legal and political developments since then. In April 1982, existing Aboriginal and treaty rights were recognized and affirmed in section 35 of the Constitution Act, 1982. There have also been no less than five important decisions of the Supreme Court of Canada . . . All of these decisions affect claims.<sup>28</sup>

The Liberal Party has recognized that the land claims process is not expeditious and that the resolution of conflicts by litigation has caused unnecessary expense and delay. It proposes the establishment of an independent claims commission, jointly created with First Nations so that the process can be fair and timely, and the conflicts of interests that plague the current process can be remedied.

[C]urrent claims policies have not resulted in an expeditious resolution of land claims . . . One of the most costly aspects of current claims process has been the length of time to settle claims and the litigation that results when negotiations are stalled . . . A Liberal government will create, in cooperation with Aboriginal peoples, an independent Claims Commission for both specific and comprehensive claims . . . It is expected that the Independent Claims Commission will lead to speedier settlements and lower costs for both Aboriginal claimants and the federal government . . . The existing land claims process has also created a conflict of interest for the federal government in deciding whether to accept or reject claims against itself.<sup>29</sup>

Unfortunately, First Nations have had to resort to litigation because of the deficiencies with the land claims processes. This point is significant because it encourages us to consider

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<sup>27</sup> Ibid., 12.

<sup>28</sup> Ibid., 11.

<sup>29</sup> Ibid.

processes for resolving conflicts other than through litigation. It is here that the Indian Claims Commission experience is instructive.

The Commission, composed of members jointly selected by Aboriginal peoples and the federal government, could have the following features – to report regularly to Parliament; to facilitate claims negotiations; to establish time frames; to develop material for validating claims; to inquire into the need to clarify or renovate treaties to make their express terms consistent with their spirit and intent; and to have an ongoing role in the implementation of claims agreements . . . The Commission will not replace direct negotiations between the federal government and claimants. It will instead facilitate and bring fairness to the negotiation process.<sup>30</sup>

The idea of an independent commission that would not supplant the negotiation process, but would oversee that process and deal with disputes arising from all aspects of claims (from validation to settlement implementation), is crucial for progress. The government's commitment to move on this issue is long overdue and worthy of support.

#### PROVINCIAL INVOLVEMENT

The involvement of provinces in the resolution of land claims disputes has been a sensitive issue ever since the inception of the federal claims policy in 1973.

Most Crown land in Canada south of 60 degrees is held by the provinces. A Liberal government would engage the provinces in redressing the grievances of Aboriginal peoples over land and resource rights, including negotiating agreements for co-management and resource revenue-sharing. We will also promote co-management agreements between Aboriginal peoples and federal, provincial and territorial governments.<sup>31</sup>

Many First Nations view the transfer of lands and resources to the provinces in section 109 of the *Constitution Act, 1867*, along with the Prairie Provinces Natural Resources Transfer Agreements, as a violation of their treaties with the federal government. Moreover, some treaty First Nations do not want a tripartite land claims process because they believe it will compromise their historic relationship with the federal Crown. The Liberal Party seems to have sidestepped this issue somewhat by proposing that it will engage the provinces in redressing grievances over land, possibly through a separate process or within a negotiation, subject to the consent of the First Nations party.

It is essential that work proceed on both the levels identified above – substantive policy reform and dispute-resolution processes. This article, however, will focus on dispute-resolution and mediation processes.

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<sup>30</sup> *Ibid.*, 12.

<sup>31</sup> *Creating Opportunity*, note 5 above, 103.

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**PROBLEMS WITH CURRENT LAND CLAIMS POLICIES AND PROCESSES**

There are two land claims policies in place at present: a comprehensive claims policy and a specific claims policy.<sup>32</sup> Both look to negotiations to resolve claims once a claim has been "validated" by government. This validation process causes many disputes, since the government has set out broad criteria and often interprets them in narrow and unpredictable ways, often withholding legal reasons from First Nations claimants on the basis of Crown privilege. Both claims policies were established after the Supreme Court of Canada accepted the notion of aboriginal title in 1973 in *Calder*.<sup>33</sup> All claims policies have been unilaterally developed and occasionally revised by the federal government without substantial input by First Nations.<sup>34</sup>

The comprehensive claims policy process works as follows: claimants prepare a statement of their claim, with supporting material demonstrating that they can satisfy a test for the existence of aboriginal title to lands. They must show that they are an organized society, that they have occupied a certain territory since time immemorial, that their occupation and use was continuous, and that they have excluded other aboriginal peoples in the pursuit of traditional customs within the territory. The proof of these criteria requires substantial documentation. The issue of occupation since time immemorial can be a ludicrous requirement for some claimants, when early colonial history is fragmentary and the claimants' culture is based on oral tradition – yet when oral evidence is not accepted in the claims process. This is true especially in Atlantic Canada.

If a claim meets the criteria, it is placed on a list awaiting negotiations. Until recently, the number of claims negotiated at any given time was limited to six. Even now that this limit has been lifted, there are still concerns about political interference in prioritizing claims. Negotiations proceed to the stage where a framework agreement is in place which outlines the detailed process for negotiating the claim to the stage of an agreement-in-principle. The agreement-in-principle is like a final agreement, and it becomes final when it is enacted into legislation and passed by Parliament. The claimant group must also ratify the agreement-in-principle prior to legislative ratification. The agreement may or may not receive constitutional protection as a treaty, depending on whether the federal government is willing to agree to a clause in the agreement and the implementing legislation to that effect. For example, in the recent Yukon Land Claims Settlement, the federal government withheld this status.<sup>35</sup>

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<sup>32</sup> For an overview of the process, which has only been slightly modified, see DIAND, Land Claims Policy Fact Sheet, July 1990, and, more recently, DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, March 1993).

<sup>33</sup> *Calder v. British Columbia (Attorney General)*, note 7 above.

<sup>34</sup> Perhaps with the exception of those claims submitted to the Indian Claims Commission. See below.

<sup>35</sup> Peter Hogg and I question whether this withholding prevents such agreements from being constitutionally shielded as aboriginal rights, in "Implementing the Aboriginal Self-Government: Constitutional and Jurisdictional Issues," forthcoming (1995) *Can. Bar Rev.* (unpublished manuscript on file with author). We also call for a reversal of the policy of preventing self-government agreements from having treaty status.

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The specific claims process works in a similar manner. Claims submitted stem from the administration of lands and Indian assets and the fulfilment of treaties with First Nations. The claimant must first research a potential claim and then submit an application to the Department of Indian Affairs with supporting documentation suggesting that a lawful obligation of the Minister or the department has been breached in a particular instance. The process is focused on legal liabilities, and legal arguments are encouraged in the validation process. If the Department of Justice agrees, a claim is accepted and it proceeds to the negotiation phase. This phase involves discussing the basis of the claim ("clarification process") and compensation guidelines.

No overview description of the claims process can do justice to the actual workings of a claims submission. In practice, the process is not expedient and it has not won the support of claimants, many of whom continue to litigate differences because of the breakdown of the claims process. Some of the most significant problems with the existing federal policies can be summarized as follows.<sup>36</sup>

- The policies were unilaterally created by the federal government and are not the product of a joint process with First Nations. Revisions to the policies have proceeded without significant or full First Nations participation and consent.
- The policies are based on non-recognition of rights and on a test for validation that is beyond the jurisprudence, thereby requiring claimants at great expense to provide detailed submissions that in some cases go beyond what would be required in litigation.
- The federal government's primary objective is to extinguish aboriginal and treaty rights to lands and resources.
- The acceptance of claims is based on decisions by officials in the Department of Indian Affairs – the very party that will be negotiating for the Crown from a position of limiting any rights recognized. This situation inevitably raises significant questions about conflict of interest.
- The approval of negotiation mandates not only takes an inordinate amount of time but results in continual wrangling over mandates.
- Most treaty rights grievances, such as hunting, trapping, and taxation, cannot be addressed in the specific claim process because of the narrowness of criteria and the application of criteria by federal officials.

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<sup>36</sup> The Assembly of First Nations has produced three documents that detail criticisms of the land claims policies: *AFN's Critique of Federal Government Land Claims Policies*, note 13 above; *Doublespeak of the 90's: A Comparison of Federal Government and First Nation Perceptions of the Land Claim Process* (Ottawa: AFN, August 1990); and "Land Claims Reform Process: Towards an Adequate First Nation Land and Resource Base" (Ottawa: AFN, August 1994).

- The clarification process of discussing the legal merits of a claim is so arduous, because of the restrictive approaches by federal officials to aboriginal and treaty rights, that claimants would fare better in the courts.
- Specific claims are “discounted” by federal officials, based on the chances of the claim being successfully litigated, thereby reducing the compensation awarded.
- Pressure tactics are used in the negotiation process, and the power imbalance between the parties is used to force agreements or to put claims on the backburner.
- Funding for submission and negotiation is inadequate, owing to the fact that loans and funding decisions rest with the department. This situation raises significant questions about conflicts of interest.
- The scope of negotiations is limited by the federal government agenda, and there is no consideration of jurisdiction and self-government issues.
- While the negotiation process is slowly working its way, there is no protection for the interests of claimants. They must seek redress before the courts in order to prevent the destruction of the lands and resources they claim.
- Numerous problems arise at the implementation stage, and federal and provincial governments are often in non-compliance. However, First Nations seldom have an effective remedy against such inaction.
- Reasons for decisions to reject validation are not always provided, and, when they are, legal opinions and the substantiation for decisions are not disclosed to First Nations claimants.
- There are no timelines for negotiations and no incentives for settlement on the Crown side. Consequently, negotiations linger on with no foreseeable prospects of settlement.
- When the process breaks down – either by inertia or because of a negative decision on a claim by federal officials – litigation is the only alternative (with the exception of the recently established Indian Claims Commission).
- There is no appeal process, and there is no right to a hearing, to make submissions, or to a decision by an independent party after an official administering the policy has made a decision.

The problems identified with the existing policies are numerous, and the flaws are fatal to progress. One innovation introduced in 1991 to address some of these concerns was the Indian Claims Commission.



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## INDIAN CLAIMS COMMISSION

In 1990, as part of the fallout from the Oka crisis, the Minister of Indian Affairs met with 20 First Nations leaders to discuss the settlement of specific claims. The First Nations leaders in attendance proposed the creation of a working group of leaders, and this body came to be known as the Chiefs Committee on Claims. In December 1990 the committee presented a report to the Minister, with several recommendations on claims issues.<sup>37</sup>

These included a recommendation that the federal government eliminate the artificial distinction between specific and comprehensive land claims and, jointly with First Nations, create an independent process for claims resolution.

Most of the recommendations that came forward in December 1990 were ignored by the federal government, which proceeded unilaterally in April 1991 with an initiative on specific claims that included the creation of the Indian Claims Commission. The Commission had a mandate to review disputes between claimants and the federal government so as to determine under the existing policy whether lawful obligations were established and compensation criteria were appropriate. While the Commission had the authority to convene inquiries into disputes, it had the power only to make recommendations to government after the conclusion of its hearings. It was also given the mandate of mediating disputes, when both parties agreed. After some revisions to its order in council in 1992, the Indian Claims Commission began reviewing disputes arising from the specific claims policy. To date it has released reports on six matters and has received numerous other submissions requesting its involvement in the resolution of disputes.

Until recently, the Commissioners were jointly selected by First Nations and the federal government. The first Chief Commissioner, Mr. Justice Harry S. LaForme, was selected with the agreement of First Nations' leaders. Six additional commissioners were appointed in 1992, three from a list provided to the Minister of Indian Affairs by the Assembly of First Nations. The Indian Claims Commission was seen as a transitional measure. In order to review the effectiveness of its mandate, the federal Minister of Indian Affairs and the National Chief of the Assembly of First Nations struck a Joint First Nations/Canada Working Group on Specific Claims by a protocol signed in 1992. The purpose of the Joint Working Group was to consider the Indian Claims Commission and the implementation of an independent claims commission, as well as improvements or revisions to the specific claims policy. The mandate of the Joint Working Group expired in July 1993 and, after 13 sessions, no final report was prepared.<sup>38</sup> The success (or lack thereof) of the Joint Working Group should be instructive for any renewed effort to revise claims policy, and two key lessons can be learned from studying that experience. First, maintaining the artificial distinction between comprehensive and specific claims will stalemate the process; fortunately, the Liberal Party of Canada platform has abandoned that position. Second, a working group

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<sup>37</sup> Chiefs Committee on Claims, "First Nations Submission on Claims, December 14, 1990," note 21 above.

<sup>38</sup> By protocol signed July 22, 1992, which expired in July 1993 after certain changes were made to the Order in Council establishing the Indian Claims Commission.

comprised of Chiefs and federal officials without significant political input on the federal government side is doomed to failure.

Federal officials working with the Joint Working Group exhibited an astounding degree of conservatism towards revising the specific claims policy and constantly indicated that they lacked instructions or mandates to proceed with any innovations in policy. The records of the meetings of the group demonstrate that the federal officials assigned to work with the Chiefs on the Joint Working Group had little appreciation for fair process and policy innovation, and little sympathy for the land rights and resources of First Nations. The Joint Working Group did bring in a neutral party to prepare a draft report with recommendations for a new policy and process, but even a cursory review of this report illustrates the number of objections that federal officials raised to reform proposals and the long list of outstanding issues that the parties could not resolve during their brief mandate.<sup>39</sup>

The Indian Claims Commission has been remarkably effective, even with its present limited mandate. It helped to reopen negotiations on six claims, and it has engaged federal officials in training on mediation and negotiation in a cross-cultural setting: training which is long overdue and which has been superbly handled by the expert First Nations' staff the Claims Commission has attracted.<sup>40</sup> It has released seven reports and transmitted recommendations to the Minister for action.<sup>41</sup> The Commission also has 5 inquiries completed with reports in progress and 13 other inquiries in progress; in addition to inactive claims, 16 other claims are being assessed to determine whether they should be accepted as inquiries, and 16 claims have gone to mediation.

Already in its brief history, the Commission has shown a capacity for neutrality, fairness, and expertise on claims issues. The inquiries held to date have been convened in First Nations' communities, and a more appropriate approach to viva voce evidence has allowed First Nations' claimants, and elders in particular, to share their views of the claim without the strictures of hearsay rules. This is one of the most impressive accomplishments of the Commission's work. As the first annual report notes:

From its inception, the Commission focused on research, mediation and liaison. It has constantly been concerned to discover relevant historical facts, using expert assistance to assess verbal and written statements pertaining to claims. The Commission laid emphasis on

<sup>39</sup> This report known as "Neutral's Draft" is reprinted below, 117.

<sup>40</sup> See Mark Dockstater, "A Comprehensive Framework of Understanding: Explaining Contemporary Developments in Dispute Resolution in a Comparative Context of Land Claims," Indian Claims Commission, April 19, 1994.

<sup>41</sup> The reports are *Primrose Lake Air Weapons Range: Report on Canoe Lake Inquiry, Cold Lake Inquiry* (ICC, August 1993); *Athabasca Denesuline Inquiry: Report on Claim of the Fond du Lac Black Lake and Hatchet Lake First Nations* (ICC, December 1993); *Lax Kw'ádaams Indian Band Inquiry: Report on Claim of the Lax Kw'ádaams Indian Band* (ICC, June 1994); *Young Chipeewayan Inquiry: Inquiry into the Claim of the Stoney Knoll Indian Reserve No. 107* (ICC, December 1994); *Micmacs of Gesgapegiag Inquiry: Report on Claim to Horse Island* (ICC, December 1994); *Chippewas of the Thames Inquiry: Report on Muncey Land Claim* (ICC, December 1994); and *Sumas Inquiry: Report on Indian Reserve #6 Railway Right of Way Claim* (ICC, February 1995).

cultural issues. To this end, it developed an alternative dispute resolution process. Its successful use of mediation has respected claimants' traditions and culture by avoiding the bruising exchanges characteristic of an adversarial courtroom process. In all its endeavours, the Commission has constantly maintained liaison with both First Nations and government.<sup>42</sup>

The Minister of Indian Affairs has not responded to each of the reports submitted to the department, and the effectiveness of the Indian Claims Commission has thus been undermined. Indeed, continued delays or the absence of a response may erode the credibility the Commission has worked hard to establish.<sup>43</sup> In its first annual report, the Commission proposed five modest changes in policy and in its mandate. These proposals include a response protocol requiring the parties to an inquiry to respond within 60 days to a report; recognition by government of the importance of mediation early in the inquiry process so as to avoid a full inquiry; government participation in planning conferences for inquiries so that mediation can be reviewed; recognition by government departments of the mandate of the Commission; and quicker production of documents by government departments.

It would appear that more dramatic reforms are required for the Commission to become a fully independent and functional dispute-resolution body for the claims process. The appointment process is government-controlled, calling into question its independence and distance from government. The need for reform is discussed below, but the order-in-council basis of the Commission compromises its independence, even though in the first two years of operation a great deal of credibility has been established by the Commissioners.

### INSTITUTIONAL AND BUREAUCRATIC CHALLENGES

The challenges of reform are considerable, and a great deal of flexibility and ongoing political commitment will be required to ensure not only that the promises are implemented but also that they are implemented in a timely manner. Already more than a year has passed in the federal government's term and no progress has been made on this front. One specific challenge not identified in the Liberal Party's platform, or seldom addressed in the literature on claims, is the fact that the relationship between government and First Nations, and especially the administrative branch of the federal government (DIAND), is now primarily adversarial. The introduction of alternative philosophies of dispute resolution is difficult when the environment has been poisoned by an adversarial attitude and distrust. The innovative work being done by the Indian Claims Commission on mediation in a cross-cultural context needs to be focused on and expanded as part of the process of reversing this climate of hostility and confrontation. Indeed, many of the recommendations in the Indian Claims Commission's first annual report are addressed to the bureaucratic

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<sup>42</sup> *Annual Report*, note 11 above, 10.

<sup>43</sup> The Commission has an impressive communications strategy and has widely disseminated information about its mandate and the claims process.

climate: the failure of government to take the issues seriously, to attend meetings, to consider mediation, and to produce documents in a timely manner.

The fact that claims resolution policies have never been sensitive to the cross-cultural nature of the endeavour has arguably created the climate of hostility and adversarialism. This defect needs to be corrected in redrafting claims policies and processes. Negotiation, mediation, arbitration, and even litigation models have not been fully developed to reflect the cross-cultural nature of their function when disputes are being addressed between First Nations and government. The litigation model has been severely criticized as flawed in this respect.<sup>44</sup>

The adversarial bureaucratic climate is a profound challenge in any attempt to redraft land claims policies and processes. Intensive education and retraining are required for anyone working in claims, in order to change this climate of conflict and suspicion. This is a further reason for increased independence from government in claims resolution. It is necessary to create processes that reflect both aboriginal and non-aboriginal philosophies of dispute resolution. Without independence from government and upfront sensitivity to aboriginal philosophies of dispute resolution, we run the risk of retrenching a policy that has reduced relations between First Nations and government to conflict and hostility. This formidable challenge should infuse all the discussion that follows. It can, however, be met by ensuring that the process of changes called for in the Liberal platform is a joint creation of First Nations and governmental political leaders.

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<sup>44</sup> See James Youngblood Henderson, "Aboriginal Rights in Western Legal Tradition," in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985); and Sheilah L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 30.

## WORKING PRINCIPLE FOR REFORM: FULL COMPLIANCE WITH CROWN FIDUCIARY DUTIES

The experiences to date on land claims policy reform indicate that, without a clear commitment at the political level to a new approach, matters can quickly become derailed onto legal issues and confrontation. It seems that the Liberty Party platform will now provide this missing ingredient of political commitment. The commitment to self-government, the independent claims commission, the elimination of the two categories of claims, and the repudiation of the notion of extinguishment should move the process ahead quickly. Many First Nations' claimants criticize both the process and the substance of the existing claims policies on the basis of their inconsistency with the federal government's fiduciary obligations to Indian peoples. The notion of fiduciary duties<sup>45</sup> is relatively new to aboriginal-Canadian legal disputes, and it has been developed and applied to the First Nations-Crown relationship because of litigation over the handling of specific claims. A full appreciation of the federal government's fiduciary obligations, which represent a considerable and serious duty to act in the interests of First Nations, has been the glaring omission in the claims process.

What are fiduciary duties, and how should they guide the development and implementation of a new claims process? Bryant has suggested that:

By using fiduciary principles to govern Crown-aboriginal relations and incorporating those principles into constitutional protections, the Supreme Court of Canada adopted the most

<sup>45</sup> Along with a description of the fiduciary character of the relationship between the Crown and aboriginal peoples in this paper, principles stemming from the specific duties a fiduciary bears will be included. These are important because of their specificity and guidance on process. The scholarly literature on fiduciary obligations has expanded since the decision of the Supreme Court of Canada in *Guerin*. See, for a sampling, Richard Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 302; Richard Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v. The Queen*" (1984-85) 49 Sask. L. Rev. 367; W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning" (1990) 15 Queen's L.J. 217; M. Bryant, "Aboriginal Self-Government and the Crown's Fiduciary Duties: The Phantom of Fiduciary Law" (1993) 27 UBC L. Rev. 19; D. Paul Emond, "Case Comment: *Guerin v. R.*" (1986) 20 ETR 61; John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*" (1985) 30 McGill L.J. 559; Ralph W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy toward Indians" (1991) 66 Wash. L. Rev. 643; Darlene M. Johnston, "A Theory of Crown Trust towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 307; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; William R. McMurtry and Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective" [1986] 3 CNLR 19; Wilson A. McFavish, "Fiduciary Duties of The Crown in Right of Ontario" (1991) 25 Law Soc. Gaz. 181; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727; Donovan W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989).

compelling and effective means within the existing law to achieve justice in the area of aboriginal rights. There is no other mechanism currently operating in law or equity that contains the breadth and flexibility – at least with respect to the *sui generis* relationship between the Crown and aboriginal peoples.<sup>46</sup>

As a caveat, we should be cautious about applying wholesale any legal notion to claims reform, since we know that the legal process is not reflective of First Nations' culture and values. By restricting ourselves to Canadian legal principles, we run the risk of imposing a one-sided image of how the process should proceed. However, the notion of fiduciary duties has been introduced, among other things, to police the power imbalances in the relationship and to ensure that the conduct of the Crown conforms to a standard of fairness and honour; in this way it ensures that First Nations' rights are not compromised. Fiduciary obligations have been articulated in the jurisprudence on aboriginal and treaty rights precisely because the Crown has a special legal and constitutional duty not to affect First Nations adversely. As the Supreme Court of Canada stated in *Sparrow*:

... the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government *vis-à-vis* aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.<sup>47</sup>

Some legal history on the law of fiduciaries may be helpful, even if it is a product of the Canadian legal system and has not embraced First Nations' values and culture. The principles that have been developed on the duties of fiduciaries should, as a minimum, inform the discussion process on implementing claims reform. Prior to 1984, the nature of the relationship between the Crown and First Nations was relatively unclear from a Canadian legal or constitutional perspective. First Nations had an understanding of the nature of the Crown's obligations, particularly in relation to treaties and unceded lands; however, it was difficult to get judicial review of Crown behaviour. The whole issue of First Nations' legal and constitutional status was viewed as political rather than justiciable in nature. Since 1984 this understanding has been completely rethought. The responsibilities the Crown bears towards First Nations are now seen as analogous to those of a fiduciary. These recent developments are critical, since land claims policies have not kept pace with them.

The concept of fiduciary responsibilities is well known to Canadian law, and its relevance and nature *vis-à-vis* the Crown and First Nations is now firmly established. Several early cases recognized the legal accountability of the Crown towards First Nations.<sup>48</sup> In addition, a number of judgments accepted, in *obiter*, an obligation on the Crown to fulfil its promises to First Nations. Since the liability of the Crown over its failure to fulfil such

<sup>46</sup> Bryant, "Aboriginal Self-Government," note 45 above, 20.

<sup>47</sup> *Sparrow v. R.*, [1990] 1 SCR 1075 at 1117.

<sup>48</sup> Bartlett, "The Fiduciary Obligation of the Crown to the Indians," note 45 above.

promises was not directly at issue in early cases, the exact nature of the obligation was left unexplored.<sup>49</sup>

Some writers have argued, from a review of the early jurisprudence, that the Crown's responsibility towards First Nations was seen, prior to 1984, to entail only political obligations "in the execution of which the state must be free from judicial control."<sup>50</sup> While many would suggest this was a misdirected approach to the Crown's obligations, especially in light of the *Royal Proclamation of 1763*, it was the approach adopted by the courts before 1984. *Guerin et al. v. The Queen*<sup>51</sup> was a turning-point in this regard. The Supreme Court of Canada departed from the "political trust" approach and recognized instead a judicially enforceable fiduciary obligation on the part of the Crown towards "Indians."<sup>52</sup>

Despite *Guerin*, the fiduciary relationship between the Crown and First Nations is still being more specifically detailed as caselaw develops. Although many writs alleging breaches of fiduciary obligation have been filed,<sup>53</sup> many of which stem from claims, few of these actions have yet worked their way through the system to the decision stage. There is no doubt that there are many unidentified fiduciary obligations which will be clarified in the years ahead. Any discussion of claims policy should take a forward-looking approach to fiduciary issues and not confine the legal tests and standards to those articulated by the courts to date.<sup>54</sup> A fundamental shift in the jurisprudence is under way, as is apparent from the leading constitutional case on aboriginal rights, *Sparrow v. R.*<sup>55</sup>

An understanding of each dimension of the Crown's fiduciary obligations does not need to be derived from the caselaw, and First Nations should not have to litigate over every alleged breach of fiduciary responsibility. The Supreme Court of Canada has provided some general principles in *Guerin* and *Sparrow* which can be used to scrutinize the Crown's behaviour in its relations with First Nations.<sup>56</sup> These general principles should be extrapolated and generously applied to scrutinize the behaviour of the Crown in all its relations with First Nations, especially in the claims area. When fiduciary principles are examined, and considered in the context of the Crown's relations with First Nations, it is clear that

<sup>49</sup> *Smith v. The Queen*, [1983] 3 CNLR 161 (SCC).

<sup>50</sup> Waters, "New Directions in the Employment of Equitable Doctrines," note 45 above, 413. Waters is quoting Taschereau J. in *St. Catherines Milling and Lumber Co. Ltd. v. R.* (1887), 13 SCR 577, affirmed (1888), 14 AC 46 (PC).

<sup>51</sup> (1984), 13 DLR (4th) 321 (SCC).

<sup>52</sup> It is important to note that *Guerin* involved a fact-situation with "Indians" and "Indian bands," as defined in the *Indian Act*. The extent to which the judicially enforceable fiduciary obligation extended to Inuit and Métis, and to non-status "Indians," was not addressed and is a matter of speculation.

<sup>53</sup> Waters, for example, estimates that, prior to 1989, more than 300 writs had been filed in Federal Court alone. Waters, "New Directions in the Employment of Equitable Doctrines," note 45 above, 420.

<sup>54</sup> The basis for the open-endedness of fiduciary obligation is the inherent flexibility on which fiduciary doctrine is based. Duties arise in specific contexts, not according to prescribed categories. See L. Rotman, "Fiduciary Duties and The Honour of the Crown" (LLM thesis, Osgoode Hall Law School, 1994).

<sup>55</sup> (1990), 70 DLR (4th) 385 (SCC).

<sup>56</sup> See also *Nowegijick v. R.* (1983), 144 DLR (3d) 193 (SCC), which articulated preferential rules for statutes and treaties in favour of Indian understandings. This approach has been extended to the fiduciary context: *R. v. Vincent*, [1993] 2 CNLR 165 (Ont. CA).

the theory of Crown fiduciary responsibility is one of the most significant constitutional doctrines in Canada today.

The fiduciary responsibility was constitutionalized in *Sparrow* and, while it will undoubtedly be developed further, its implications for land claims reform are nothing short of vast. Courts can now review legislation and governmental action affecting First Nations against a set of principles arising from the law of fiduciaries. The rationale behind the fiduciary principle in Canadian law, and in equity, is relatively straightforward. As Finn states, "fiduciary law's concern is to impose standards of acceptable conduct on one party to a relationship for the benefit of the other where the one has a responsibility for the preservation of the other's interest."<sup>57</sup> The standards of acceptable conduct are imposed on the fiduciary to ensure that its use of the power and opportunities provided by its position are proscribed and that it is acting on behalf of, and in the interest of, its principal.

The strict standards of conduct that attach to fiduciaries in Canadian law are an outgrowth of the law's acknowledgment that the fiduciary relationship is such that "one party is at the mercy of the other's discretion."<sup>58</sup> The categories of fiduciary are seen, like the categories of negligence, to be open and dynamic. The initial recognition by the judiciary of the fiduciary relationship between the Crown and First Nations arose in the context of the subordination of First Nations' land interests to the Crown's so-called ultimate title in *Guerin*. While this is a troubling aspect of the law of Crown fiduciary obligations towards First Nations,<sup>59</sup> it could be overcome if the presumption of the Crown's ultimate title was critically examined, or examined at all, by the courts. In the United States, the notion of fiduciary responsibilities is seen as existing within a non-hierarchical structure. Even in Canadian law, it is not imagined that the fiduciary relationship necessarily attaches because one party is vulnerable or subordinate to the other.<sup>60</sup> It is not a concept of wardship – it is a set of doctrines developed to protect parties whose interests are vulnerable to a stronger party.<sup>61</sup>

The landmark case on fiduciary responsibilities is *Guerin*. In *Guerin*, the Musqueam Indian Band alleged that the federal Crown was in breach of its trust responsibilities arising from the leasing of 162 acres of surrendered reserve land. The Band had agreed to the surrender and lease of the 162 acres, based on certain terms and conditions. The lease

<sup>57</sup> P.D. Finn, "The Fiduciary Principle," in Youdan, ed., *Equity, Fiduciaries and Trusts*, note 45 above, 2.

<sup>58</sup> E. Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1 at 7.

<sup>59</sup> As Chief Justice Dickson suggested in *Mitchell v. Peguis Indian Band et al.* (1980), 71 DLR (4th) 193 (SCC) at 209: "That relationship began with pre-Confederation contact between the historic occupiers of North American lands (the aboriginal peoples) and the European colonizers (since 1763, "The Crown"), and it is this relationship between aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown."

<sup>60</sup> Although this debate is an interesting one, it is outside the scope of this article. Suffice it to say that I do not see the recognition of self-government as implying that fiduciary obligations would disappear. Federal and provincial legislation will continue to be scrutinized to determine whether fiduciary obligation unreasonably interferes with aboriginal and treaty rights protected in section 35 of the *Constitution Act, 1982*. The nature of this review process may change with the advent of self-government, but the fiduciary concept will remain.

<sup>61</sup> See J. Singer, "Well Settled? The Increasing Weight of History in American Indian Land Claims" (1994) 28 Georgia L. Rev. 481.



actually negotiated by DIAND did not reflect the Band's understanding of the terms and conditions and, in fact, contained some terms that had not been disclosed to the Band. The lease was not provided to the Band until 12 years after it was executed. At trial, Mr. Justice Collier found the Crown liable for breach of trust with respect to the surrendered lands and awarded \$10 million in damages. On appeal, Mr. Justice Le Dain overturned the decision at trial, finding that the Crown's responsibilities under the *Indian Act* and the terms of surrender created a political trust only, one enforceable in Parliament but not in the courts. On further appeal, the Supreme Court of Canada reversed the Federal Court of Appeal decision and restored the trial judge's award of damages. In overturning the decision, three different judgments were offered, two of which (Wilson and Dickson JJ.) are based on the recognition of a fiduciary obligation on the part of the Crown to the Indians.<sup>62</sup>

The judgments of Mr. Justice Dickson and Madam Justice Wilson share a number of similarities, but they also diverge in important respects. A complete understanding of the fiduciary relationship therefore requires an analysis of both decisions. Since it is the decision of Dickson J. which is generally considered to set out the *ratio* in *Guerin*, it will be analyzed first in each of the areas considered. This retracing of the reasoning in *Guerin* is essential to an understanding of the legal theory of fiduciary responsibility adopted later in *Sparrow*, and for broader speculation regarding the implications and scope of the fiduciary concept. According to Dickson J. (Beetz, Chouinard, and Lamer JJ. concurring), the Crown's fiduciary relationship is founded on two bases; exactly which two bases is ambiguous in his reasons for judgment. In particular, while Dickson J. clearly accepts as one base for the fiduciary responsibility the unique nature of Indian title, he puts forth at various places in his judgment three differing choices for the second base: the statutory framework established for disposing of Indian land; the surrender requirement necessitated by the nature of Indian title; and the discretion over the management and disposition of reserve lands which section 18(1) of the *Indian Act* confers on the Crown. While the importance of discretion for the fiduciary obligation has been emphasized,<sup>63</sup> most scholarly commentary on Dickson's judgment, as well as later cases, focuses on the surrender requirement as the crucial second base.<sup>64</sup> The rationale of Dickson's judgment is therefore generally seen to be that the fiduciary obligation arises only upon the surrender of Indian reserve land.

Writing for Mr. Justice Ritchie and Mr. Justice McIntyre in *Guerin*, Wilson J. also finds the source of the fiduciary obligation in aboriginal title and in the historic responsibility and powers that the Crown assumed to protect that title. In particular, section 18(1) of the *Indian Act* was seen as recognizing this responsibility but not creating it. The Crown holds reserve lands subject to the fiduciary obligation to protect and preserve the Band's

<sup>62</sup> Estey J. decided the case on the issue of agency. In the views of most commentators, however, this characterization fails to acknowledge the historic relationship between the Crown and the Indians with respect to reserve lands. Bartlett, "You Can't Trust the Crown," note 45 above, 367.

<sup>63</sup> McMurtry and Pratt, "Indians and the Fiduciary Concept," note 45 above, 19.

<sup>64</sup> Hurley, "The Crown's Fiduciary Duty and Indian Title," note 45 above, 559; Johnston, "A Theory of Crown Trust towards Aboriginal Peoples," note 45 above.

interest in such lands. Contrary to Dickson J., therefore, Wilson J. is willing to find that the Crown's fiduciary obligation *exists prior to surrender* and that it crystallizes upon surrender into an express trust.

Dickson J. defines the obligation that arises upon surrender as *sui generis*. Like most First Nations' interests at common law, from aboriginal title to treaty rights, fiduciary obligations owed to First Nations introduce unique dimensions to the law of fiduciaries. Dickson J. (as he then was) draws useful analogies to both the law of trusts and the law of agency. Most instructively, Dickson J. states that while the fiduciary obligation is not a trust, it is "trustlike" in character and is subject to principles "very similar" to those governing the law of trusts. In general, the fiduciary's duty may be described as one of "utmost loyalty" to its principal. For her part, Wilson J. finds that, prior to surrender, the Crown's duty is to protect and preserve the Band's interest from invasion or destruction.

The *Guerin* case involved actions by the federal Crown in breach of standards expected of a fiduciary. The question of whether such obligations are owed by the provincial Crown, Crown corporations, or other institutions that are emanations of the Crown was not canvassed in this matter. Given that the Crown is divisible in Canada, with provincial and federal incarnations, it is arguable that the provincial Crown also bears fiduciary obligations. As Professor Slattery suggests:

The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather, these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals.<sup>65</sup>

This opinion is also accepted by Alan Pratt:

Each level of government has an independent constitutional role and responsibility. . . . Both are, however, subject to the demands of the honour of the Crown, and this must mean, at a minimum, that the aboriginal people to whom the Crown in all its emanations owes an obligation of protection and development, must not lose the benefit of that obligation because of federal-provincial jurisdictional uncertainty.<sup>66</sup>

Although clearly a landmark decision and a significant departure from the political trust doctrine, the decision of the Supreme Court of Canada in *Guerin* left a number of questions unanswered. For example, does the fiduciary obligation pertain only to reserve lands, or does it apply to all Indian lands? The language used in the judgments of both Dickson and Wilson JJ. strongly supports the view that the fiduciary obligation applies to all Indian lands, not just reserve lands. Subsequent caselaw supports extending the obligation to all Indian lands.

<sup>65</sup> Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 274.

<sup>66</sup> Alan Pratt, "Federalism in the Era of Aboriginal Self-Government," in David C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989), 53.

In the first place, according to Dickson J., the Indian interest in land is the same whether one is discussing the interest in reserve lands or the unrecognized aboriginal title in traditional tribal lands.<sup>67</sup> Second, if the Crown's responsibility was first recognized in the *Royal Proclamation*,<sup>68</sup> then that responsibility presumably continues to apply to all lands to which the *Royal Proclamation* applies, provided, of course, that the Indian interest has not been extinguished.<sup>69</sup> Finally, there is no real reason not to extend the obligation to all surrenders of aboriginal title, including those made pursuant to a treaty or land claim agreement. The object in both instances is to ensure that the benefits of surrendering aboriginal land accrue to its aboriginal title holders.

The Supreme Court of Canada has recognized that there is no significant distinction between the surrender of reserve lands and the surrender of aboriginal title lands, or even between reserve lands and traditional territories. In *Canadian Pacific Ltd. v. Paul et al.*,<sup>70</sup> for example, the Court stated in broad *obiter* language that "[i]n *Guerin* this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them." Similarly, in *Ontario (A.G.) v. Bear Island Foundation*,<sup>71</sup> the Supreme Court of Canada accepted that fiduciary obligations arise with respect to the enforcement of treaty conditions. The failure of the Crown to ensure that the promises were honoured was conceded, in *Bear Island*, to constitute a breach of the Crown's fiduciary obligations. Although it may be argued that the fiduciary principle expressed in *Guerin* is confined to the surrender of reserve lands, there is no clear reason why the obligation would not extend beyond surrenders and, in particular, to non-land dealings between the Crown and Indians. It was not clear early on, however, just how far the Court would be willing to extend the principle. The decision of Mr. Justice McNair in *Mentuck v. Canada*,<sup>72</sup> for example, illustrates the early reluctance of courts to stray too far from the facts of *Guerin*.

In *Mentuck*, the plaintiff moved off the reserve after representatives of the Minister of Indian Affairs led him to believe he would receive compensation for his relocation and re-establishment costs. When the Crown refused to pay those costs, Mentuck sued for breach of contract and, in the alternative, breach of fiduciary obligation. In the end, McNair J. found for Mentuck on the basis of breach of contract. With respect to the alleged breach of fiduciary duty, however, McNair J. stated that:

It is one thing to say that the plaintiff's position vis-à-vis the defendant is susceptible of raising some equity in his favour, having regard to the *sui generis* relationship between Indians and the Crown, and quite another to assert that such position by its very nature automatically

<sup>67</sup> *Guerin*, note 51 above, 337.

<sup>68</sup> It is my position that it did not create new rights, but affirmed old ones. See *R. v. Koonungnak*, [1963-64] 45 WWR 282 (NWT Terr. Ct.).

<sup>69</sup> Emond, "Case Comment," note 45 above, 71.

<sup>70</sup> [1988] 2 SCR 654 at 677.

<sup>71</sup> [1991] 3 CNLR 79 (SCC).

<sup>72</sup> (1986), 3 FTR 80.

invokes the concomitant law of fiduciary obligation . . . The plaintiff's claim for breach of trust within the meaning of the *Guerin* principle is not sustainable by any reckoning.<sup>73</sup>

Even prior to the decision in *Sparrow*, it can be argued that a broad scope for the fiduciary principle was adopted by the decision of Wilson J. in *Roberts v. Canada*,<sup>74</sup> a case in stark contrast to McNair J.'s decision in *Mentuck*. The *Roberts* case involved a dispute between two Bands over the exclusive use and occupation of reserve lands. The matter came before the Supreme Court of Canada on the preliminary issue of want of jurisdiction. In deciding that the Federal Court did have the jurisdiction to hear the claim, Wilson J. found that the provisions of the *Indian Act*, while not constitutive of the obligations owed to the Indians by the Crown, did codify the pre-existing duties of the Crown towards the Indians.<sup>75</sup> This decision significantly expanded the scope of the fiduciary responsibilities outside the land-surrender context.

In *Guerin*, the majority of judges recognized a fiduciary obligation on the part of the Crown towards First Nations. It is not certain, however, whether all the traditional elements of the law of fiduciaries are encompassed by the *sui generis* relationship between the Crown and First Nations. Arguably, all the traditional aspects of the fiduciary concept, as understood at private law, are present, along with those extra principles arising from the special nature and history of the relationship between the Crown and aboriginal peoples. In the trial decision by the British Columbia Supreme Court in *Delgamuukw*, Chief Justice MacEachern suggested that "the categories of fiduciary, like those of negligence, should not be considered closed."<sup>76</sup> Fiduciary principles would certainly apply to conflicts of interest, a matter that has been considered by the Federal Court of Appeal.

In *Kruger*, one of the main issues was whether there was a conflict between the Department of Indian Affairs and the Department of Transport over how the Indian occupants of the expropriated lands should be dealt with. Mr. Justice Heald found that a clear conflict of interest existed. In his opinion, a fiduciary must act *exclusively* for the benefit of its principal, putting its own interests completely aside. The federal Crown could not, therefore, "default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government."<sup>77</sup> Heald J. also held that, if a conflict of interest does exist, the onus is on the fiduciary to show that the principal acted with full knowledge and was in possession of all relevant information.<sup>78</sup> Since this burden was not met, he found a breach of fiduciary obligation. Heald J. went on to find, however, that the plaintiffs' claim was barred by statute.

<sup>73</sup> *Mentuck*, note 72 above, 95.

<sup>74</sup> (*Sub nom Dick et al. v. The Queen et al.*) (1989), 57 DLR (4th) 197 (SCC).

<sup>75</sup> *Roberts v. R.*, note 74 above, 208.

<sup>76</sup> *Delgamuukw v. British Columbia*, [1991] 5 CNLR at 233 (BCSC) at 232.

<sup>77</sup> *Kruger et al. v. The Queen* (1985), 17 DLR (4th) 591 at 608 (FCA).

<sup>78</sup> The position put forth by Heald J. was accepted by Addy J. in *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.* (1987), 14 FTR 161 (*sub nom Joseph Apsassin et al. v. The Queen*, [1988] 3 FC 20, *sub nom Apsassin et al. v. Canada*, [1988] 1 CNLR 73), currently on appeal to the Supreme Court of Canada.

Mr. Justice Urie (Stone J. concurring) adopted a somewhat different view. Assuming that the rule of conflict of interest applied to fiduciaries, Urie J. found that there was no breach based on the alleged conflict between the two departments. First, Indian Affairs did act as a strong spokesperson for the Indians and did have an impact on the compensation received by them. Furthermore, the duty owed by other departments to the Canadian public as a whole, including the Indians, must also be taken into account. Finally, the Department of Transport was seen to have recognized the value of the lands to the Indians, and it was found that the department had disclosed all information to them.

It is not clear whether there is a significant difference between the two positions. Heald J., for example, stated that he would have reached a different conclusion had he felt that the Governor in Council had given careful consideration and due weight to the pleas of Indian Affairs. Urie J. felt this consideration did occur. In other words, the difference between Heald J. and Urie J. appears to be a disagreement over the facts, not a disagreement over the law: neither appears to believe that there will be a conflict every time more than one department is involved with aboriginal peoples.

In general, a fiduciary is obliged to disclose fully all relevant information to its principal. The courts' concern over this rule is clearly illustrated in *Guerin and Kruger*. In each case, the finding of a fiduciary breach hinged partly on this fact. In *Guerin*, for example, the Band had not been made aware of the changed terms and conditions in the lease. Similarly, in *Kruger*, Heald J., who found a fiduciary breach, held that the Band had not been made aware of the Department of Justice's legal opinion that Indian lands could not be expropriated. Drawing on the decisions of Wilson and Dickson JJ. in *Guerin*, it also appears that the Crown has a duty to consult with its principal and to respect the instructions it receives from that principal. After *Guerin*, the Crown's duty to consult with First Nations was also endorsed by the Supreme Court of Canada in the *Sparrow* case within the context of fishing conservation measures. This duty was later adopted in the Ontario Court of Appeal in *Skerryvore Ratepayers' Ass'n v. Shawanaga Indian Band*.<sup>79</sup>

One of the *sui generis* aspects of the fiduciary relationship between the Crown and the First Nations may be the obligation of the Crown to provide funding for litigation or for processes in which First Nations must defend their interests. In *Ominayak and Lubicon Lake Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*,<sup>80</sup> for example, the Indian Bands were engaged in ongoing actions with respect to the plaintiffs' rights to certain lands in northern Alberta. The Bands sought a declaration in Federal Court that the Crown had a fiduciary duty to advance them money to enable them to pursue litigation brought in protection of their aboriginal or treaty rights. An order of mandamus against the Minister and Her Majesty to pay the amount stated was also requested. The Court denied mandamus relief, but refused to strike the request for the declaration, since

<sup>79</sup> (1993), 16 OR (3d) 390 (Ont. CA) 400, citing Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), 681n.

<sup>80</sup> (1987), 11 FTR 75.

it might be possible to extrapolate from the principles set out in *Guerin* and *Kruger* a general obligation on the Crown to provide such funding.

Although it has yet to be fully argued, a strong argument can be advanced that treaties give rise to very strict fiduciary responsibilities on the federal and provincial Crown. Mr. Justice Lamer, in his reasons in *Sioui*, hints at this when he states, granted in *obiter*, that “the very definition of a treaty . . . makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.”<sup>81</sup> Consequently, any provincial or federal Crown action, or even the actions of Crown corporations, which would infringe on treaty rights could invite judicial scrutiny unless prior aboriginal consent for Crown action has been obtained. The fiduciary obligation to uphold the obligations agreed to in the treaties is arguably a duty of strict adherence and faithfulness on the part of the Crown. Any deviation from the treaty should have the consent of the descendants of the aboriginal signatories. In the case of the numbered, post-Confederation treaties, the impact of the Natural Resources Transfer Agreements on treaty rights may have to be reconsidered in this light.

The nature of the fiduciary obligation owed by the Crown was extended and constitutionalized by the Supreme Court of Canada in the watershed *Sparrow* decision. In that case, Chief Justice Dickson and Mr. Justice LaForest, who wrote for a unanimous Court, offered three propositions grounding a constitutional entrenchment of Crown fiduciary responsibilities in section 35 of the *Constitution Act, 1982*.

- (1) Section 35(1) . . . affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case.<sup>82</sup>
- (2) *Guerin*, together with *R. v. Taylor and Williams* . . . ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginal peoples is “trust-like,” rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>83</sup>
- (3) [T]he words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.<sup>84</sup>

These three path-breaking statements in the Supreme Court of Canada’s decision represent a significant expansion of the fiduciary relationship in at least three distinct ways. Indeed, W.I.C. Binnie, who acted for the Crown, has termed the decision in *Sparrow* a “quantum-leap forward.”<sup>85</sup>

<sup>81</sup> *R. v. Sioui*, [1990] 1 SCR 1025 at 1063.

<sup>82</sup> *Sparrow*, note 47 above, 406.

<sup>83</sup> *Ibid.*, 408.

<sup>84</sup> *Ibid.*, 409.

<sup>85</sup> In his remarks on a panel at the Annual Meeting of the Indigenous Bar Association, November 3, 1991.

Following the language of the Court in *Sparrow*, the fiduciary obligation has been constitutionalized within section 35(1) of the *Constitution Act, 1982*. The Court has stated that the fiduciary responsibility is a general guiding principle for section 35 – part of the framework of section 35 itself, as opposed to an aboriginal “right.” This is significant, because aboriginal claimants will not have to establish that the fiduciary obligation is an “existing aboriginal or treaty right” in a particular action. This is not to say that the specific nature or scope of the fiduciary obligation will not vary by context. It certainly will. However, the general fiduciary responsibility is part of the structure of section 35 and therefore part of the fabric of the Constitution of Canada.

In addition, the language used by the court, in particular the statement that the Crown must act in a “fiduciary capacity” with respect to First Nations, suggests that the Court has discarded its earlier “land” limitation on the fiduciary concept. It now appears that the Supreme Court of Canada has recognized and constitutionalized a general fiduciary obligation on the Crown with respect to the totality of its relations with aboriginal peoples; this would arguably extend to the policy formation and dispute-resolution aspects of the relationship as much as the land-based obligations. Binnie, for example, suggests that, in light of *Sparrow*, the Supreme Court of Canada has clearly imposed the fiduciary obligation not only on the Crown but also on the Crown’s exercise of legislative authority.<sup>86</sup> According to some commentators, the imposition of this duty with respect to the law-making function appears to encompass a positive duty on the legislatures to act. In particular, McTavish asserts that the Supreme Court of Canada has imposed a positive duty to negotiate in good faith.<sup>87</sup> The duty of good faith as a fiduciary obligation (i.e., enforceable in the courts) must be reflected in federal land claims policy.

The Supreme Court of Canada has articulated a view of section 35 which envisions, in the presence of a fiduciary obligation, that an assessment must be made whether limitations on aboriginal or treaty rights are unreasonable, whether they impose undue hardship, and whether such limitations deny First Nations the preferred means of exercising their rights. The Court has also suggested additional factors to consider in determining whether the honour of the Crown has been upheld in a particular case. These factors include whether fair compensation has been offered in expropriation situations and whether consultation has occurred.<sup>88</sup> Arguably, the duty of fair compensation can be applied outside expropriation situations, and this approach should influence the formation of new claims policy. These specific areas represent unique fiduciary duties, in addition to all the usual duties a fiduciary bears at Canadian law.

Nevertheless, considering the reach of the Supreme Court of Canada’s decision in *Sparrow*, there is a paucity of jurisprudence in this area. The majority of decisions to date

<sup>86</sup> Binnie, “The Sparrow Doctrine,” note 45 above, 217. However, the fiduciary obligation may not go as far as compelling the legislators to enact legislation at a particular point in time. See *Bruno v. Canada*, [1991] 2 CNLR 22 (FCTD), also known as *Alexander Indian Band No. 134 v. Canada*.

<sup>87</sup> McTavish, “Fiduciary Duties of The Crown,” note 45 above, 181.

<sup>88</sup> *Sparrow*, note 47 above, 416-17.

have generally been within the realm of litigation over hunting and fishing rights and have primarily focused on the justification process under section 35(1). In the one case found outside this area, the Court considered *Sparrow* unhelpful because its factual basis was grounded in the regulation of fishing. Of course, there is the trial court decision of the British Columbia Supreme Court in *Delgamuukw*,<sup>89</sup> which seriously restricted the principles developed in *Sparrow* in both the area of extinguishment of aboriginal rights and in the fiduciary responsibility.<sup>90</sup> This case is under appeal, and until the Supreme Court of Canada assesses it (if they eventually do), we should probably not read too much into it. The principles from the law of fiduciaries are critical, but a general approach should be taken because the retreat into static legal positions has been one strategy in the claims area which has undermined progress. As one commentator suggests:

[S]ubstantive criteria under a new policy developed may need to go beyond the present state of Canadian law. A just and fair resolution of a dispute on its own merits may require a consideration of fairness and equity of certain actions from a principled point of view and with regard to the full historical circumstances. Anything less will not address the primary goal of dealing with grievances in such a way that it ceased to be an impediment to peaceful Crown-Aboriginal relations. Any tribunal created will no doubt become expert in its field and will probably end up leading rather than following Canadian law.<sup>91</sup>

After *Sparrow*, the Department of Indian Affairs issued an internal memorandum which outlined the implications of the decision and solicited views from each sector of the department on fiduciary responsibilities.<sup>92</sup> The memorandum acknowledged that fiduciary responsibilities arise in the context of the department's administration of legislation, regulations, programs (including negotiations), and policies, as well as through its practices. In other words, virtually every action taken at the Department of Indian Affairs admittedly has a fiduciary connection. The document did not suggest that fiduciary obligations were owed in the relationship between the Crown and aboriginal peoples during litigation, but that may be a reflection of the fact that the memorandum was written by Justice officials who had not turned their mind to this question.

The fiduciary obligations that the department and the Crown bear in all their relations with First Nations are considerable, and they are now constitutional in nature. Even in

<sup>89</sup> *Delgamuukw*, note 76 above, 233.

<sup>90</sup> Despite limiting the Crown's fiduciary responsibility to permission to allow the plaintiffs to use unoccupied or vacant Crown lands for subsistence purposes, subject to the general laws of the province, until those lands were dedicated to another purpose, the trial court's decision in *Delgamuukw* held that the Crown's fiduciary duty was binding both upon the federal and provincial Crowns. The nature of the fiduciary obligation raised at trial was not discussed by the British Columbia Court of Appeal; see (1993), 104 DLR (4th) 470 (BCCA).

<sup>91</sup> *Morris/Rose/Ledgett*, note 8 above, 188.

<sup>92</sup> This document is not dated. It was obtained by the author (and is on file with the author) from the Assembly of First Nations. On February 6, 1991, it was transmitted by the National Chief, Georges Erasmus, to all Chiefs for their review.



the relatively cautious memorandum circulated by the Department of Indian Affairs, it was accepted that officials must consider in each instance whether an aboriginal or treaty right is affected by that action. If aboriginal and treaty rights are affected (and it is unlikely that they would not be, given the nature of the Department of Indian Affairs' responsibility), then officials must ask whether the interference is reasonable, whether it imposes undue hardship, whether it denies the exercise of rights, and whether the purpose or effect of the restriction unnecessarily infringes the rights protected.

As noted above, *Sparrow* provides unequivocal support for the view that the fiduciary relationship attaches to both the provincial Crown and the federal Crown. As McTavish questions, in light of *Sparrow*, "[W]ill the Provincial Crown be held liable to the Aboriginal Peoples for failure to perform the positive fiduciary duty apparently vested at law in the Attorney General?"<sup>93</sup> This question appears to have been answered affirmatively by Dickson C.J., in his concurring judgment in *Mitchell v. Peguis Indian Band et al.*<sup>94</sup> As mentioned earlier, Dickson C.J. accepts that "[f]rom the aboriginal perspective, any federal-provincial divisions which the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations."<sup>95</sup> Hence, the division of legislative power by the *Constitution Act, 1867*, and the assignment of jurisdiction over Indians and lands reserved for the Indians to the federal government do not divest the provincial Crown of its fiduciary obligations.

The direction forward from *Sparrow* must lead to a complete reconfiguration of the relationship between the Crown and aboriginal peoples. We have yet to meet this challenge in the land claims policy area. It is an encouraging sign that the Liberal Party of Canada in its platform recognizes that claims policy has not kept pace with important legal developments like *Sparrow*. In my opinion, the legal community, and federal government lawyers in particular, have been slow to embrace the extent to which section 35 represents a break with the past as well as a new paradigm for relations between First Nations and Canada. As the Supreme Court of Canada accepted in *Sparrow*, the significance of section 35 extends beyond the constitutional protection for the rights of First Nations:

Section 35 calls for a just settlement for aboriginal peoples. *It renounces the old rules of the game* under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.<sup>96</sup>

<sup>93</sup> McTavish, "Fiduciary Duties of The Crown," note 45 above, 194.

<sup>94</sup> *Mitchell v. Peguis Indian Band et al.*, [1990] 2 SCR 85.

<sup>95</sup> *Ibid.*, 109.

<sup>96</sup> *Sparrow*, note 47 above, 416 (quoting from Professor N. Lyon). Emphasis added.

A generous approach to the law of fiduciaries should inform the implementation of a new claims policy. The Crown's duties as a fiduciary must ground the process of claims reform. These duties include, among other things:

- the obligation to avoid conflicts of interest;
- the duty to disclose information;
- the duty to fund the defence of land rights; and
- the obligation to give a priority to aboriginal interests over other competing interests.

Indeed, these obligations, and others stemming from the fiduciary relationship, should be the guiding principles in the claims policy implementation process.

## OPTIONS FOR A NEW PROCESS

The guiding principles of fiduciary relations suggest several options for new developments on the process side of land claims policy and the resolution of disputes. Building on these principles, as well as on the new political commitments described earlier, the following critical departures are required in claims policy:

- Independence from government in the dispute-resolution process so as to avoid conflicts of interest, to ensure neutrality, and to allow First Nations the security of protection from adverse action by the Crown.
- A jointly created (First Nations/government) institution, operating under a jointly defined protocol, which can employ all dispute resolution strategies to ensure that negotiations are successful. It will also prevent adversarial encounters, which are inconsistent with a fiduciary's obligations, over rights. The role of this institution will include mediation, binding and non-binding arbitration, and adjudication.
- A new substantive claims policy that repudiates extinguishment, unifies the definition and criteria for claims, emphasizes the honour of the Crown and full compliance with fiduciary duties, and recognizes aboriginal and treaty rights.

From a dispute resolution or process perspective, the real issue seems to be whether courts should deal with land claims issues at all. This is obviously a political decision, but arguably there are many good reasons to suggest that the policy reforms imagined should stream claims and disputes over claims away from the courts and into a fairer and more expedient expert independent body. The independent dispute-resolution tribunal should not be viewed as an add-on to an otherwise flawed policy. While immediate progress can be made by improving the procedures for claims disputes, the policy-making and negotiation process must be infused with respect for the rights of First Nations, fiduciary principles, and independent decision-making.

The principles derived from the law of fiduciaries as well as the numerous studies and reports and the recent Liberal Party platform all endorse a non-adversarial process for resolving land claims disputes. Moreover, the recognition of the inherent right of self-government calls for power-sharing in creating institutions to deal with conflicts and jointly calling into existence such institutions. The courts are still one-sided institutions. They do not reflect this kind of power-sharing or a sensitivity to a bicultural approach.

They are premised on the adversarial system, with little or no openings for alternative philosophies of dispute resolution such as arbitration or mediation.<sup>97</sup> As the work of the Indian Claims Commission illustrates, a unique approach to evidence is required when Indian claims are addressed. The oral tradition of First Nations and the fragmentary nature of Canadian historical records necessitate a different approach to evidence and fact-finding. The "legal" principles are evolving.

First Nations' legal principles have not been reflected in the mainstream Canadian legal system. A bicultural sensitivity in the analysis and application of norms is absolutely essential for fair claims resolution. New principles, and even a new process of resolving conflicts, need to be developed, ideally by an expert body that can reflect in its composition and mandate the history, culture, and sensibilities of both aboriginal and non-aboriginal traditions. As noted above, such an expert body would most likely lead, and not simply follow, the law. This leadership is essential, since the law in this area is not simply Anglo-American law. As Professor Brian Slattery has observed:

The doctrine of aboriginal land rights does not originate in English or French property law, and it does not stem from native custom. It is an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them. As Dickson J. recognizes in the *Guerin* case, aboriginal land rights are thus *sui generis*.<sup>98</sup>

Such an approach might cause discomfort on the part of government, which would like a sense of certainty in a process – a knowledge of what principles will be applied in advance. However, as the Supreme Court of Canada accepted in *Sparrow*, we are in a period of reworking the rules of the game. Many of the old norms and philosophies applied to First Nations need to be re-examined critically, even abandoned. In one sense, we are in a significant period of change and re-evaluation of an entire area of the law. Fiduciary principles alone would suggest that this re-evaluation should not permit the Crown to hide behind old jurisprudence and notions that reflect a period of caselaw which few are proud to be associated with today. As Mr. Justice Hall suggests in his seminal decision in *Calder*:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge, disregarding ancient concepts formulated when an understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.<sup>99</sup>

<sup>97</sup> For a good discussion of dispute-resolution philosophies, although without a treatment of First Nations traditions, see McCallum, "Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims," note 8 above.

<sup>98</sup> Slattery, "Understanding Aboriginal Rights," note 45 above, 744-45.

<sup>99</sup> *Calder*, note 7 above, 346.

In my view, the only way to avoid the assessment of claims based on antiquated notions or mistaken perceptions of First Nations peoples and their histories is to ensure that the institution assessing a dispute is representative of both First Nations and non-aboriginal peoples. The courts cannot provide this diversity, nor is their history or discourse well suited to such innovation. We need to develop for this unique purpose a dispute-resolution process that can supplant to a large extent the jurisdiction of the courts. I realize that any tribunal or even claims court established would not be able to shield itself entirely from judicial review by a superior court. It should, however, be able to ensure that findings of fact and mixed issues of fact and law are dealt with at the tribunal level, thereby increasing the chances for greater sensitivity at the appeal level to the bicultural nature of the claims enterprise.

Until we make the step and establish an independent tribunal that can facilitate negotiations, mediate disputes in the negotiations, and, if all else fails, adjudicate disputes, we will not see a genuine claims resolution process. First Nations will continue to be forced into litigation because of an impossibly slow and manifestly unfair negotiation policy. A tribunal needs “teeth” to work – it has to be binding on the parties – but it also has to be a joint creation of the federal government and First Nations. The role of the provinces in the creation of such a tribunal is a serious issue, owing to the constitutional transfer of lands and resources to the provinces in the *Constitution Act, 1867*. Provincial involvement in establishing the tribunal may well be required, although section 35 would seem to allow some creative approaches even to the judicature sections of the *Constitution Act, 1867*.

Serious consideration should be given to an independent claims commission, one with a capacity to facilitate negotiations (such as setting timetables for progress and arranging logistics when needed), to mediate when disagreements start to harden, and ultimately to adjudicate disputes. The techniques of dispute resolution, drawing on developments in alternative dispute resolution, need to be tailored to the specific bicultural context of First Nations/Crown relations. An expert body can develop new techniques by drawing on the best in dispute-resolution literature and by experimenting with these techniques until they reflect the history and context of the disputes. The impressive early work undertaken by the Indian Claims Commission has convinced me that an independent claims body requires flexibility and support to develop this knowledge and to apply it to claims disputes.

An independent claims commission needs a legislative basis to be independent – and the legislation should first be approved by First Nations and then be captured in a protocol signed by both the federal government and First Nations leaders. Without a legislative base, the claims body could be abolished by one party – the federal government (or the executive if it is cancelled by order in council) – and this constant threat would have a chilling effect on its work. It would not be independent under these circumstances, since it would be dependent on continued executive support for its future. An independent claims commission must have a degree of insulation from the vicissitudes of federal politics if it is to provide the perspective and independence on disputes needed to ensure fair treatment and neutrality in the process. While a political act is necessary to create the institution,

it must be one that is fully mindful of Crown fiduciary duties and the need to end conflicts of interest, as well as the manifest unfairness in the current policy framework. Another useful feature of jointly sponsored (federal-AFN) legislation is that provisions for appointments and remuneration of commissioners can be fixed in a manner similar to the provision for judges' salaries and independence in the *Constitution Act, 1867*.

The option of creating a claims court is obviously available to First Nations and the federal government. However, many arguments would seem to be stacked against this alternative: the need to move away from adversarialism, to develop a unique approach to evidence, and to foster a cultural sensitivity about the principles to be applied in the resolution of disputes. A court might be an option as a specific appeal body for a tribunal, and such a configuration should be considered. However, as discussed above, a court by itself would not seem capable of addressing the manifold problems with the current policy and the institutional setting for claims. An expert tribunal might be seized with a continuum of jurisdiction responsibility, with an emphasis on procedural flexibility.

This body that is established needs to be able to report annually on progress to both Parliament and the First Nations and to make suggestions for improvements in the process. Its decisions need to be binding on the parties; if it is not a mandatory process, the parties will slip back into an adversarial relationship. The experience in New Zealand with the Waitangi Tribunal is relevant here, although policy reform in Canada must reflect the unique experiences of this country. First Nations peoples in Canada are different from the Maori. Until 1988, the Waitangi Tribunal, like the current Indian Claims Commission, possessed only the power to make recommendations to government. Many of its decisions were ignored or its recommendations were rejected by government. Even now it has binding jurisdiction only over some disputes; because the degree to which a decision is binding is based on public acceptability, the rights of the Maori can seriously be compromised.<sup>100</sup> Public acceptability can mean that the rights of the Maori, a numerical minority in New Zealand, are simply rejected by the majority after a media campaign. This kind of process is not appropriate in Canada, where the Crown bears fiduciary obligations to First Nations. If an opinion poll in this country were to support the elimination of aboriginal and treaty rights, any government action to implement such a view would be challenged as a breach of both its fiduciary duty and the constitutional protections in section 35.

In addition to creating this independent body, other essential reforms are required. The issue of historical research and funding for claims requires greater independence as well. Although the past several years have witnessed the development of Treaty and Aboriginal Rights Research Centres across the country, research budgets, for the most part, are maintained within government, as is critical research into claims. This positioning raises concerns about conflicts of interest. Measures need to be considered to introduce independence into the research process. An independent claims commission might need to house a research capacity for claims disputes, and, without supplanting the Treaty and

<sup>100</sup> See McCallum, "Dispute Resolution Mechanisms," note 8 above, 157.

Aboriginal Rights Research Centres, to involve an independent body of scholars to oversee work in this area, perhaps adopting guidelines for ethics in research similar to those developed by the Royal Commission on Aboriginal Peoples in 1993.

Funding issues are also crucial, and the current arrangements have been widely criticized. Funding is given in the form of loans against eventual settlements, and the Department of Indian Affairs tightly controls these budgets almost to the point of dictating what kind of research or professional service a claimant can access to prepare its submission. Independence in funding decisions must be introduced. Although the department has been criticized for the conflicts of interest that are apparent in its funding of test cases, no measures have been taken to remove decisions on funding of test cases to an independent agency. An independent claims commission should also have responsibility for funding decisions and should ensure that these decisions are divorced from assessments of the merits of particular claims. Access to the claims process by all potential claimants is an important objective. It would seem plausible that many claims have not been submitted to date because of the control the department has over funding the preparation of submissions.

An independent claims commission would need to perform a variety of other functions. Some of these were identified by the Joint First Nations-Federal Government Working Group on Specific Claims in its neutral draft recommendations. These additional functions would include:

- providing a database of past settlements;
- educating the public about the claims process and the importance of fair claims resolution;
- monitoring the alienation of lands and resources during negotiations;
- translating materials into First Nations languages;
- identifying sources of information and training on negotiation skills and dispute resolution; and
- dealing with disputes arising from the implementation of settlements.

#### **BUILDING ON THE INDIAN CLAIMS COMMISSION**

The Indian Claims Commission has been an important new institution and, even with only two years' experience, it has established credibility and developed expertise on cross-cultural mediation and negotiation. Its effectiveness, however, has been undermined by government inaction on its recommendations and the appearance of control by government, especially on appointments. The Commission is not sufficiently independent to make binding decisions and its mandate is too narrow. It does not have a legislative basis, which would be necessary for it to operate with a range of powers, including that of a quasi-judicial tribunal. Moreover, it would appear that its mediation capacity is being

overlooked because it has no "teeth" to supervise negotiations except by the consent of the parties. The government has been slow to avail itself of this option. This situation will continue unless the supervisory authority of the Commission is strengthened.

What is required in the way of an independent commission is an institution that will have mandatory jurisdiction over the progress of claims from the validation stage through to the settlement implementation phase. An independent commission could be established with a phased-in jurisdiction; for example, with a mandate for validation and settlement review for an initial period, followed by a larger role in supervising negotiations. Perhaps the Indian Claims Commission as it is now mandated is the first step in a process leading to the establishment of a fully independent claims process.

An independent claims process requires a legislative basis rooted in a joint protocol between First Nations and the federal government. Such a protocol would require legislation passed by Parliament and by an appropriate mechanism (resolution) by First Nations. The Indian Claims Commission is an institution to build on, rather than to begin the process anew and potentially lose the expertise the Commission has cultivated in terms of Commissioners' knowledge, professional staff, and emerging protocol. This option should be seriously considered by government and by First Nations' leaders. The work done by the Joint Working Group, while focused at the time only on specific claims policy, is also useful for initiating the dialogue. Its proposals on independent assessment panels and dispute resolution are good starting positions, although its recommendations do not go far enough to support a fully independent commission with jurisdiction over claims negotiation.



## TRANSITIONAL ISSUES: THE DIALOGUE ON REFORM

The consensus for an independent claims commission is evident. However, concentrated effort and goodwill are needed to take the proposal for such a commission from the stage of political consensus to one of policy implementation in a legislative framework. It cannot be done unilaterally by government. Implementing these proposals will require a process whereby First Nations' leaders and federal ministers come together over a short period of time to decide on an implementation strategy, to draft a protocol, and to develop legislation and resolutions. This process should take no more than a few months, with concerned political effort and the assignment of officials to complete the administrative tasks and drafting required.

Because progress on claims is intimately tied to progress on such other issues as self-government and economic self-sufficiency, there is good reason to give claims resolution a special priority. It provides an opportunity to develop a better working relationship between government and First Nations. Rebuilding trust and enduring peaceful relationships is long overdue. I do not see any significant theoretical, legal, or constitutional obstacles in the path of implementing an independent claims commission. It does mean change, but change that will bring the conduct of the Crown more in line with its fiduciary duties to First Nations. Again, this is long overdue. As the Liberal Party of Canada acknowledges in its platform, land claims policies have not kept pace with developments in the jurisprudence. The jurisprudence has reached a point where, after *Sparrow*, it is recognized that the rules of the game have to be reconfigured with the full participation of First Nations; policy now needs to be brought into line with this reality.

I believe there may be a role to be played by the Indian Claims Commission in facilitating the process towards implementing a new policy. The Commission has an effective communication strategy, and expertise on existing policies and reform options. Even if its current mandate is limited, it has the services of skilled mediators, and it could provide "friendly offices" to facilitate the discussion process that needs to start immediately if First Nations and governments are to begin a process of implementing the Liberal platform.

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## CONCLUSION

This article has not addressed claims policy in an exhaustive manner. Additional work is required, but it is not theoretical or academic work. What is needed is for Chiefs and federal politicians and officials to meet around a common table to chart an agenda for implementing the commitments made in the Liberal Party platform. The Joint Working Group process needs to be reactivated with a broader mandate: to include both specific and comprehensive claims policy, and to craft an independent claims process. A draft protocol for establishing a new Joint First Nations/Canada Working Group on an Independent Claims Commission has been attached for discussion (Appendix A).

A definite time-frame for implementing the proposals discussed in this article, as well as those developed in the draft protocol prepared by the previous Joint Working Group, needs to be set. Otherwise, as we have too often witnessed in the past, sincere goodwill and intent will evaporate if the process is placed in the hands of officials who are operating without incentives for reform. In the meantime, the Indian Claims Commission could play a role in facilitating this dialogue, if the players believe this process would be useful. It could also improve the process during a one- or two-year period during which a more fully independent process, in keeping with fiduciary obligations, is developed. For example, all claims rejected at the validation stage could now be referred to the Indian Claims Commission for automatic review so as to ensure that rudiments of administrative fairness are being afforded to claimants.

The agenda for land claims reform is stalled at present. This is a tragic situation, given that so many options are available for immediate progress and all parties in the political process have identified a common set of problems and made a commitment to reform. If we continue to delay the process of land claims reform, we face further hostility as the prospects for an enduring peaceful relationship between First Nations and the Crown grow dimmer. Moreover, if we are to move forward on an agenda of fostering self-sufficiency and economic recovery in First Nations communities, land claims policies must be considered a priority. As the Royal Commission on Aboriginal Peoples suggests:

For much of human history, the key to self-sufficiency has been land, the genesis of all resources, and the basis of all ways of living, from traditional to industrial. Control of land is still at the centre of many of the efforts being made by Aboriginal people to unlock the doors of economic development in their communities.<sup>101</sup>

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<sup>101</sup> Royal Commission on Aboriginal Peoples, *Focusing the Dialogue* (Ottawa: Supply and Services, 1993), 42.

## APPENDIX A

Draft only

**PROTOCOL FOR THE JOINT FIRST NATIONS/CANADA WORKING GROUP ON AN INDEPENDENT CLAIMS COMMISSION**

This protocol made this \_\_\_\_\_ day of \_\_\_\_\_, 1995.

**BETWEEN:**

The Assembly of First Nations representing the Chiefs of First Nations Communities in Canada, as represented by the National Chief (the "Assembly")

**AND:**

The Government of Canada, as represented by the Minister of Indian Affairs and Northern Development ("Canada")

**WHEREAS** the Assembly has worked diligently to achieve an honourable resolution of all land claims in order to ensure the peaceful settlement of disputes between First Nations and Canada and in order to ensure the restoration of First Nations lands and resources as an important requirement for genuine self-government;

**AND WHEREAS** the Government of Canada has recognized the significance of a major overhaul of federal land claims policy and specifically the creation of an independent claims commission to deal with all disputes arising from land claims disputes;

**AND WHEREAS** this Protocol is intended to establish a joint process to develop a fully independent, fair and effective claims commission which would ensure that the mutual commitments of the Assembly and Canada can be realized;

**THEREFORE THE ASSEMBLY AND CANADA AGREE AS FOLLOWS:**

1. The Assembly and Canada hereby formally establish a Joint Political Working Group and a Joint Technical Working Group, comprised of the members and alternates listed in Schedule "A" attached hereto [to be added].
2. The function of the Joint Political Working Group is to begin immediately discussions on the implementation of Government proposal for a fully independent claims commission. Support for the work of the Joint Political Working Group will be provided by a Joint Technical Working Group.
3. The existing Indian Claims Commission can be called upon by both or either of the parties to this protocol to provide facilitation, administrative or other support considered necessary for the discussions leading toward the establishment of an independent claims commission.
4. The independent claims commission will be designed by the Joint Political Working Group and draft federal legislation prepared to give expression to the commission, in addition to the appropriate resolutions of affirmation and support to be placed before the Chiefs-in-Assembly.
5. The independent claims commission will be a joint creation of Canada and the Assembly and the composition, mandate, and membership of the proposed commission will reflect this commitment to political equality and joint decision-making.
6. The independent claims commission will be designed with a view to the full compliance by the federal government of all fiduciary obligations owed to First Nations and with an emphasis on alternative disputes-resolution techniques to encourage negotiated settlements of claims, such as mediation, arbitration, and only as a last result, adjudication. Moreover, the Joint Political and Technical Working Groups will incorporate in the design of the independent claims commission First Nations dispute-resolution traditions.
7. Members of the Joint Political Working Group will make every effort to achieve consensus on recommendations or drafts and can engage the services of independent experts, from time to time, in order to encourage the discussion or facilitate a consensus.
8. The Joint Political Working Group will present a report on its activities, including the draft legislation and Assembly resolutions before January 1, 1996, in order to ensure that the independent claims commission can be put in place before June 1, 1996.
9. The Assembly and Canada agree that there will be no public or media announcements respecting the independent claims commission until the work of the Joint Political Working Group is completed and then by prior agreement of the National Chief of the Assembly and the Minister.
10. The Assembly and Canada agree that in addition to the mandate to propose a fully independent claims commission, members of the Joint Political Working Group can also make any other recommendations for the renovation or reform of the federal land claims policies. However, it is acknowledged by both parties that progress on an independent claims commission seized with a mandate to resolve conflicts arising out of all claims is a first priority for policy reform.
11. Canada will provide financial resources to the Assembly for proper participation in the Joint Political and Technical Working Groups, as detailed in a budget for the Groups, attached as Schedule "B" [to be added].

12. The Assembly and Canada will make available to the Joint Working Groups such information in their control as is necessary for the proper conduct of deliberations of the Joint Working Group, subject to rules on confidentiality and privilege and statutory restrictions on access to information.

13. This Protocol shall be effective for a period of one (1) year from the date that the Joint Political Working Group first meets under this Protocol, and may be extended by written agreement from the Assembly and Canada.

**IN WITNESS WHEREOF** the National Chief of the Assembly and the Minister have hereunto set their hands on behalf of the Assembly and Canada respectively.

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National Chief of the Assembly

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Minister of Indian Affairs  
and Northern Development

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**DRAFT RECOMMENDATIONS  
PREPARED BY  
NEUTRAL**

June 25, 1993  
Neutral's Draft

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NEUTRAL'S NOTE

This document is the latest draft of the progressive draft of the work of the Joint Working Group which I have prepared based upon discussions which have taken place at the meetings of the Joint Working Group from November, 1992 to June 25, 1993.

Throughout these recommendations the term "Protocol" is used. This term is intended to describe the Independent Claims Process as a whole and as reflected in these recommendations. It is intended that this Protocol would be implemented through the signing of an agreement signed by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.

There are certain issues which remain outstanding and which require further discussion before consensus is reached. These issues are listed in the attached Schedule and are marked throughout the draft in square brackets and identified as follows:

1. proposals made by the Federal Government are identified in bold faced type: e.g. [(FG) **and that will increase the overall cost to the Federal Government...**];
2. proposals made by First Nations are identified in bold faced italics: e.g. [(FN) *While it is not intended that this process...*]

Bonita J. Thompson, Q.C.  
June 30, 1993

June 25, 1993  
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**DRAFT RECOMMENDATIONS PREPARED BY NEUTRAL**  
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## INTRODUCTION

In October, 1990, a group of First Nation leaders met with Minister Siddon to discuss ways to improve the specific claims policy and process. Following this meeting the Chiefs' Committee on Claims was formed. This Committee was co-chaired by Chief Clarence T. Jules and Mr. Harry LaForme and was open to all interested First Nation leaders across Canada.

In December, 1990, the Chiefs' Committee submitted to Minister Siddon a report detailing First Nation concerns about the specific claims Policy and process. The report emphasized the following three criticisms:

- I. Not enough funds were available for settlements.
- II. The settlement process was inherently biased as the Federal Government attempted to fulfil its fiduciary obligations to Indian people at the same time it was defending the interests of the Crown.
- III. The Policy was too restrictive.

In April of 1991, the Federal Government responded to these concerns by: increasing settlement funds from approximately \$15 million to \$60 million per year; establishing the Indian Specific Claims Commission under the *Inquiries Act* to provide, on an interim basis, an independent review of government decisions relating to specific claims; removing the pre-Confederation bar from the policy; and creating a joint working group to review all aspects of the specific claims policy and process.

The Joint First Nations/Government Working Group on Specific Claims began meeting in February, 1992. It consisted of 8 First Nation representatives and 3 Federal Government representatives. A Protocol describing the role of the Joint Working Group and the working relationship among its members was signed in July, 1992 by Mr. Ovide Mercredi, the National Chief of the Assembly of First Nations and Mr. Tom Siddon, Minister of Indian Affairs and Northern Development.

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The Joint Working Group has met on 13 occasions over the past year and a half. It has reviewed all aspects of the specific claims policy and process.

This Joint Working Group report, signed by Chief Clarence T. Jules and John Graham as Co-chairs, recommends a number of changes for the consideration of the First Nations and the Federal Government. Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties [(FG) and that will not increase the overall cost to the Federal Government of the process of reaching settlements.] The Group has been sensitive to the importance of the continuing relationship between claimant bands and the Federal Government.

Great importance has been placed on introducing a large degree of independence into the claims resolution system. To this end it is proposed that an Independent Claims Body be established by an Act of Parliament. It is intended that this independent claims body would in time replace the Indian Specific Claims Commission.

*[(FN) While it is not intended that this process will deal with comprehensive aboriginal title negotiations or bilateral treaty implementation negotiations, particularly in view of the other processes presently in place or contemplated to deal with those negotiations, it is recognized that aboriginal title or treaty rights could be elements of claims in this process.]*

The following recommendations represent hard work and compromise by both parties in the sincere attempt to establish an effective, fair and equitable claims resolution system.

## OVERVIEW

Throughout these recommendations the term "Protocol" is used. This term is intended to describe the Independent Claims Process as a whole and as reflected in these recommendations. It is intended that this Protocol would be implemented through the signing of an agreement signed by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.

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### **THE OBJECTIVE**

The objective of the Independent Claims Process, which shall be referred to as the "Protocol", is to settle claims brought by First Nation claimants against the Federal Government and, in some cases, provincial and territorial governments. The process for reaching settlements should be simple, clearly understood, accessible, flexible, creative, efficient, timely, and fair and equitable to the parties. The process must include ongoing impartial and independent assistance and review. The settlements reached should be clearly understood, final with respect to the issues resolved, fair and just, satisfactory to the parties, and capable of being implemented effectively.

### **THE GUIDING PRINCIPLES**

The Protocol should

1. be consistent with the Crown's fiduciary relationship with First Nations and ensure that the Federal Government conducts itself in a manner that maintains the honour of the Crown,
2. ensure that First Nation claimants have access to resources to research and negotiate claims in an effective manner,
3. be compatible with the Federal Government and First Nations dealing with each other on a government to government basis,
4. be consistent with the Crown's Treaty relationship with First Nations and facilitate resolution of claims for non-fulfilment of treaty obligations,
5. encourage and facilitate negotiated settlements of First Nations' claims,
6. provide that, where appropriate, compensation not be limited to solely monetary considerations but also include land and resources,
7. take into account the historical, political, economic, social and cultural variations among the First Nations,

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8. be capable of being easily modified from time to time and contain a built-in process for ongoing review,
9. ensure that First Nations are significantly involved in the development of proposed changes to the Protocol.
10. encourage and facilitate the participation of provincial and territorial governments, where appropriate.

### **INDEPENDENT CLAIMS PROCESS**

There is an important role for an Independent Claims Body to play in the process for the resolution of claims made by First Nations against the Federal Government. An Independent Claims Body should be established which should

- be guided by the same objective and principles upon which the Protocol is based with specific guidance provided by the implementing agreement and legislation;
- have sufficient legislative authority and resources to ensure the expeditious resolution of the claims submitted to it;
- have assisting, monitoring and decision-making functions to assist the parties to the process to finally resolve any disputed issues;
- have a role to play in helping to ensure the implementation of claims settlements;
- have appointments to its membership made in accordance with the objective and principles upon which the Protocol is based.

The Protocol should be sensitive to regional concerns and the value of existing independent bodies performing similar functions as those recommended for the Independent Claims Body is recognized.

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**1. INDEPENDENT CLAIMS BODY**

**A. *STRUCTURE***

The Independent Claims Body should consist of three individuals:

- (a) one part-time member appointed by the Assembly of First Nations,
- (b) one part-time member appointed by the Federal Government, and
- (c) one full-time member, the Chair and the Chief Executive Officer of the Independent Claims Body appointed by both the Federal Government and the Assembly of First Nations.

The members should be appointed for a term of five years subject to removal for cause. The qualifications of these individuals should be commensurate with the duties to be performed and the level of confidence necessary to perform these functions properly.

The Independent Claims Body should be responsible for the management and administration of the independent claims process as described in this Protocol.

**B. *STAFF***

The Independent Claims Body should have sufficient staff to carry out its functions properly and to provide the necessary degree of continuity in its operations, but care should be taken not to overstaff the Independent Claims Body and cause cost inefficiencies. The Independent Claims Body staff should be knowledgeable in First Nation issues and claims against the Federal Government and in the functions and operations of government and should have special skills to allow them to discharge the case management functions of the Independent Claims Body, in particular, skills in dispute resolution techniques and effective communication.

**C. *INDEPENDENT ASSESSMENT PANELS***

An Independent Assessment Panel should be responsible for assessing a claim made by First Nation claimants to determine if the Federal Government and First Nation claimants should commence negotiations to resolve the claim under the independent claims process. A Panel

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should consist of three members constituted from time to time by the Independent Claims Body as necessary to assess a particular claim and in the following manner:

- (a) one member to be appointed from a standing roster of not less than 11 individuals named by the Assembly of First Nations;
- (b) one member to be appointed from a standing roster of not less than 11 individuals named by the Federal Government;
- (c) one member to be appointed from a standing roster of not less than 4 individuals jointly named by the Federal Government and the Assembly of First Nations. This member should be Chair of the Panel.

No individual should accept an appointment to a Panel if circumstances exist that give rise to justifiable doubts as to the individual's independence or impartiality in the particular claim to be assessed. The Panel members should have qualifications commensurate with the duties to be performed and the level of confidence necessary to perform these functions properly. It is considered desirable to have the individuals on the standing rosters named from representative regions of Canada. The Panels could request the Independent Claims Body to act as secretariat for these Panels or to provide any necessary technical support; however, the Panels should be totally independent of the Independent Claims Body.

The members of the standing roster jointly appointed by the Federal Government and Assembly of First Nations should be provided with funds to enable the members to meet on a regular basis as they determine necessary for the purpose of

- (a) discussing process issues,
- (b) sharing relevant information, and
- (c) promoting consistency of procedure and decision-making.

The Panels should have the necessary powers to carry out their responsibilities. These powers should provide flexibility to enable the Panel and the parties to conduct the proceedings in the most expeditious and appropriate manner and in accordance with the rules of natural justice. An assessment proceeding could be conducted on the basis of documents or with an oral hearing. The Panel should have the power to subpoena witnesses and documents to facilitate the proceedings for a particular matter.

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The Panel's consideration should be limited to the issues and evidence which were referred to in the submission of the claim by the First Nation claimants and the response of the Federal Government. This limitation is intended to ensure that the process is conducted in a fair and expeditious manner and is not intended to prevent the First Nation from raising new issues and evidence but rather that if such issues and evidence are raised that the Federal Government should first have the opportunity to consider those additional matters before they are raised before an Independent Assessment Panel.

**D. FUNDING**

Funding for the Independent Claims Body should be secured through a 5 year funding agreement signed by the Federal Government, the Assembly of First Nations and the Independent Claims Body. Funding for the Independent Claims Body should be limited to its operations, including the costs of the Independent Assessment Panels, and should not include any funding to be provided to First Nations for research, negotiation or litigation.

**2. THE PROCEDURE**

**A. OPTIONAL ACCESS**

First Nation claimants should have the option to commence the claims process by submitting their claim directly to the Federal Government or by submitting their claim through the independent claims process managed by the Independent Claims Body.

**B. SUBMISSION OF CLAIM**

**(i) Submission Directly to the Independent Claims Body**

On submission of a claim to the Independent Claims Body, the Body shall review the submission to verify that

- (a) the claimant is a First Nation,
- (b) the submission is described in such a way as to fall within the definition of a claim as described in the Protocol, and

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- (c) the claim is not in litigation or if it is in litigation that the parties have agreed to submit the claim to the Protocol.

The Independent Claims Body may advise and assist the First Nation claimants and the Federal Government at the submission stage.

The Independent Claims Body will register the claim and convey it to the Federal Government.

The Independent Claims Body will constitute an Independent Assessment Panel to assess the claim unless the parties file with the Independent Claims Body an agreement to proceed with negotiation of the claim.

If the decision of the Independent Assessment Panel is not acceptable to either party, proceedings may be commenced in court to determine the matter. If proceedings are commenced because

- (a) the Federal Government does not accept the Panel's decision, the Federal Government will provide litigation funding, including funding for appeals, to the First Nation claimants, in accordance with any guidelines administered by the body or organization retained for that purpose (for further details see "Funding for First Nation Participants"), or
- (b) the First Nation claimants do not accept the Panel's decision, the Federal Government will not provide any litigation funding to the First Nation claimants.

*[(FN) The Federal Government may not rely upon any technical legal defences such as limitation periods or the doctrine of laches in these court proceedings.]*

*[(FG) The Federal Government may rely on any defences available to it in these court proceedings.]*

Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, *[(FN) including the extent to which the negotiations will be conducted on a "without prejudice" basis,]* if they proceed to negotiate the claim. *[(FN) Issues relating to communications with the general public should also be dealt with in the negotiation protocol].* All negotiations shall be conducted in good faith.

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[(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol as it relates to a particular claim shall be considered confidential matters between the parties].

(ii) *Submission directly to the Federal Government*

If the First Nation submits the claim directly to the Federal Government:

- (a) the Federal Government shall advise the Independent Claims Body of details of the claim made to permit the Independent Claims Body to act as a registrar of such claims;
- (b) the Federal Government shall advise the First Nation claimants and the Independent Claims Body if it will accept or reject the claim for negotiation of a settlement agreement and on what basis;
- (c) the First Nation claimants may appeal a rejection decision of the Federal Government to the Independent Claims Body which shall appoint an Independent Assessment Panel to assess the claim;
- (d) if the decision of the Independent Assessment Panel is not acceptable to either party, proceedings may be commenced in court to determine the matter. If proceedings are commenced because
  - (i) the Federal Government does not accept the Panel's decision, the Federal Government will provide litigation funding, including funding for appeals, to the First Nation claimants, in accordance with any guidelines administered by the body or organization retained for that purpose (for further details see "Funding for First Nation Participants"), or
  - (ii) the First Nation claimants do not accept the Panel's decision, the Federal Government will not provide any litigation funding to the First Nation claimants.

If negotiations commence, the Federal Government shall advise the Independent Claims Body. Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, [(FN) *including the*

*extent to which negotiations will be conducted on a "without prejudice" basis.] [(FN) Issues relating to communications with the general public should also be dealt with in the negotiation protocol]. All negotiations shall be conducted in good faith.*

**[(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol as it relates to a particular claim shall be considered confidential matters between the parties.]**

On request of both parties, the Independent Claims Body will perform any functions within its mandate to assist the parties in their negotiations and in the implementation of the settlement agreement.

**C. POWERS OF THE INDEPENDENT CLAIMS BODY**

If, after submission to the Independent Claims Body, the parties commence negotiation of the claim, the Independent Claims Body should, unless the parties agree otherwise,

- (a) monitor, assist and facilitate the negotiations to help to ensure that they proceed in good faith and in a timely manner,
- (b) recommend and facilitate conciliation or mediation to resolve all or any part of the claim,
- (c) facilitate binding arbitration, if agreed by the parties,
- (d) recommend and facilitate obtaining independent expert opinions and fact finding services, if and when needed, and
- (e) encourage the parties to conduct their negotiation process in accordance with the terms of reference which they have agreed to and, if necessary, require a party to provide an explanation of any failure to do so and give a direction requiring the party to remedy the failure.

To monitor the negotiations may include: following the proceedings; liaising between the parties and providing information to each of them; reviewing progress of the negotiations; acting as a

neutral chair in the negotiation sessions - recording agreements; requiring confidential presentation of rationales for settlement offers and rejections of offers.

To assist the negotiations may include: intervening when the process breaks down; conducting independent or directed research topics required to conduct the Independent Claims Body's other functions or conducting other research as requested by the parties to a claim; assisting the parties to a claim to obtain simultaneous interpretation services, where appropriate; assisting the parties to prepare protocols or terms of reference for negotiations and to prepare realistic negotiation timetables; on request of a party, reviewing a settlement agreement.

The Independent Claims Body should have sufficient power and access to sanctions to move the negotiation process along in a timely and efficient manner. Such sanctions should be exercised judiciously and appropriately taking into account all of the circumstances after consultation with both parties to a claim. The Independent Claims Body should have all the necessary powers to enable it

- (a) to make reports at any time to the First Nations and the Federal Government on any matter requiring the urgent attention of the Federal Government or the First Nations,
- (b) to penalize a party for failing to participate in the negotiations in good faith, including, but not limited to, assessing costs against a party, and
- (c) to conduct inquiries into the conduct of the parties in the negotiation process.

*D. UNSUCCESSFUL NEGOTIATIONS*

If negotiations have not successfully resolved all the issues in a claim, either party may apply to the Independent Claims Body to refer the disputed or unresolved issue to an Independent Assessment Panel for a non-binding recommendation. If the Independent Claims Body considers the application appropriate, it will appoint a Panel to make the recommendation or may make any other recommendation it considers appropriate in the circumstances to try to assist the parties to resolve the issue.

**E. SUCCESSFUL NEGOTIATIONS**

The Independent Claims Body will monitor and report on the implementation of the settlement agreements. To monitor the implementation of the settlement agreement may include: confirming timely payments of settlement amounts; confirming transfers of land or additions to reserves; encouraging prompt passage of required legislation; confirming establishment of required administrative processes, bodies or tribunals. Monitoring does not include any overseeing of how First Nation claimants utilize any settlement amounts received under the agreement.

**F. ACCESS TO INDEPENDENT CLAIMS BODY DURING LITIGATION**

At any time First Nation claimants may take a claim submitted to this independent claims process directly to the courts and in that event, the claim is considered to have been withdrawn from the process unless the parties agree otherwise.

If a claim is before the courts but the parties have agreed to attempt to settle the claim, the parties may request the Independent Claims Body to assist the parties to reach a negotiated settlement.

**G. ADDITIONAL FUNCTIONS**

The Independent Claims Body should have the following additional functions:

- (a) provide a data base of past settlement agreements;
- (b) educate the general public on the claims process, including developing visual and written materials on the process for use in First Nation communities;
- (c) monitor alienation of lands or resources during negotiations;
- (d) translate the Independent Claims Body's documentation as necessary in order to provide easier access to the Independent Claims Body's process;
- (e) identify the sources of information and training relating to negotiation skills, effective socio-economic development plans, etc.

### **3. FUNDING FOR FIRST NATION PARTICIPATION**

#### **A. *FUNDING FOR RESEARCH AND NEGOTIATION OF CLAIMS***

The Independent Claims Body should not be involved in the administration or allocation of this funding; however, the Independent Claims Body should provide advice directly to the Joint Committee on Claims (see page 23 for a discussion of this Committee), and by means of its annual report on the funding levels required to permit First Nations to participate effectively under the Protocol.

The Joint Committee on Claims should, as part of the implementation stage of the Protocol, recommend guidelines to the Federal Government and First Nations on appropriate methods for allocating funds for these purposes and for accountability on use of those funds. The Committee may make recommendations to the Federal Government on annual funding requirements for these purposes after consultation with the Independent Claims Body.

**[(FG) If a settlement agreement is reached, loans made available to First Nation claimants for funding negotiation participation should be reimbursed by the Federal Government based upon a pre - set formula. This formula should be developed by the Joint Committee on Claims as an implementation issue. First Nation claimants may make an application to the Independent Claims Body to increase the amount of reimbursement available under the formula where the circumstances would make it appropriate to do so. (FN) *Funds made available to First Nation claimants to participate in negotiations should be provided as grants and not loans. These grants should be based on the needs of the First Nation claimants. First Nation claimants who have received a negotiation grant may make an application to the Independent Claims Body to increase the amount of the grant where the circumstances would make it appropriate to do so.*]**

#### **B. *FUNDING FOR BODY REPRESENTING FIRST NATIONS***

In order to permit the Protocol to work effectively the **[(FN) *Assembly of First Nations*]** should be funded **[(FG) *by means of a grant*]** in order to provide policy support and a liaising function between the Joint Committee on Claims and First Nations.

The Assembly of First Nations should make appointments to the Independent Claims Body, the Joint Committee on Claims and any applicable rosters for Independent Assessment Panels established under the Protocol after any consultations it considered appropriate. A secretariat

may be required to assist these ongoing functions. Funding would be part of a 5 year funding agreement agreed to by the Assembly of First Nations and the Federal Government.

COMMENT: The way in which the First Nations choose their representation in this process has an indirect impact on the Federal Government. Principles 1, 4 and 9 speak to the relationship between the Federal Government and First Nations. The Federal Government is not clear how it would fulfil the intent of these principles to those First Nations not represented by the Assembly of First Nations.

**C. LITIGATION FUNDING**

The Joint Committee on Claims should develop eligibility criteria and guidelines for the litigation funding to be provided by the Federal Government under this Protocol.

**D. ADMINISTRATION OF FUNDING**

The Joint Committee on Claims should retain an independent person or organization on contract who shall

- (a) administer the research, negotiation and litigation funds, and
- (b) allocate them in a manner consistent with any eligibility criteria and guidelines adopted by the Committee.

**CLAIMS TO WHICH THIS PROTOCOL WILL APPLY**

**A. DEFINITION**

A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where [(FG) the claimants have established an outstanding obligation / (FN) an outstanding obligation is established] which is derived from the law (common law, civil law, equity or statute) on the part of the Federal Government, including any [(FN) duties and] obligations that [(FN) may] arise from the fiduciary relationship between the First Nation claimants and the Crown. For the purposes of the Protocol [(FN) and without limiting the generality of the foregoing], an outstanding obligation arises in the following circumstances:

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- (a) the breach or non-fulfilment of a treaty or agreement between the Crown and the First Nation claimants;
- (b) a breach of an obligation arising out of the *Indian Act* or provisions of other statutes [(FN) *affecting Indians* / (FG) relating specifically to Indians] or lands reserved for Indians;
- (c) a breach of an obligation arising out of failure of the Federal Government to properly administer Indian funds, lands, resources or other assets, or
- (d) an illegal disposition of Indian land.

~~[(FN) The Protocol should also recognize claims where [the First Nation claimants establish/it is established] that:~~

- ~~(e) the Federal Government has lawfully damaged or disposed of Indian lands without providing [(FN) full] compensation, or~~
- ~~(f) an employee or agent of the Federal Government has acted in fraudulently in respect of any circumstances described in paragraphs (a) to (d).]~~

~~(FG) The Protocol should also recognize claims where [the First Nation claimants establish/it is established] that:~~

- ~~(e) the Federal Government has lawfully damaged or disposed of Indian lands without providing [(FN) full] compensation, or~~
- ~~(f) an employee or agent of the Federal Government has acted in fraudulently in respect of any circumstances described in paragraphs (a) to (d).]~~

COMMENT: The First Nations representatives wished clarification of the meaning or application of paragraph (e) and expressed the view that the issues in paragraphs (e) and (f) were included as obligations arising at law in any event. In response the Federal Government indicated that they would agree to delete the two paragraphs but that this should not be taken as any indication that they agreed that these two issues were included in the definition of the claim. They also indicated that they could not recall an instance of where paragraph (e) had been used.

[(FG) It is not intended that this Protocol deal with claims based upon aboriginal title or claims which would require the renegotiation of treaties. It is recognized that aboriginal title claims are being dealt with under other claim processes. It is also recognized that a

joint process for treaty clarification is under consideration by First Nations and the Federal Government.]

It is acknowledged that the interpretation of the application of the Protocol may be disputed by the Federal Government and First Nations. It is recognized that from the perspective of First Nations the appropriate interpretation to be given may be broader than that which the Federal Government may be inclined to take.

**B. RECOMMENDATION FOR GRIEVANCES OUTSIDE PROTOCOL**

There may be occasions when First Nation claimants make a submission to the process which may not be considered by the Federal Government or an Independent Assessment Panel to be a matter to which the Protocol strictly applies.

If the Independent Assessment Panel determines that the Protocol does not apply to a submission of a First Nation, the Panel should be encouraged to express an opinion on whether or not the circumstances of the submission would compel a reasonable and fair minded person to conclude that the circumstances necessitate some form of redress and to make recommendations on the process which might be followed to facilitate that discussion. It is also recognized that in exceptional cases it may be appropriate for an Independent Assessment Panel to recommend that some form of independent inquiry into the circumstances be held.

In circumstances clearly not referable to the Protocol in the first instance, it is recommended that First Nations as well as individuals or groups of individuals have access to and be encouraged to apply to an existing body, such as the Canadian Human Rights Commission, for consideration of their grievance if other available processes or avenues have been exhausted.

It is recommended that the Joint Committee on Claims closely monitor the circumstances which are not covered by the process to determine if further steps need to be taken to address these issues.

**WHO MAY MAKE A CLAIM UNDER THE PROTOCOL**

This process applies to First Nations.

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Where a claim is made against the Federal Government, the representatives of the claimants should be clearly identified and should clearly indicate any collective body and all those persons for whom those representatives are acting.

At an early stage in any settlement negotiations, the parties should discuss ratification requirements which should be incorporated into any settlement agreement.

The Federal Government and the representatives of the claimants should make all reasonable efforts to resolve any differences arising between them on any authority issues relating to research, negotiation or ratification of a claim, without unduly delaying consideration of the claim.

### EXCHANGE OF INFORMATION

The Federal Government and First Nations claimants should communicate openly at all times to help to establish a cooperative environment which will encourage the settlement of claims.

#### A. *FEDERAL GOVERNMENT DISCLOSURE*

The Federal Government shall provide copies of all relevant historical and factual documents, of which the Federal Government is aware, as well as any historical or factual summaries prepared by the Specific Claims and Treaty Land Entitlement Branch which are relevant to a claim. The Federal Government shall provide copies of all relevant appraisals and other studies

- (a) which were commissioned before the Federal Government received notice of the claim, or
- (b) which have been commissioned after both parties agreed or were required to attempt to negotiate a settlement to the claim and upon which the Federal Government intends to rely.

Disclosure of documents shall take place within a reasonable time after the documents become available to the Federal Government.

These obligations are subject to any restrictions imposed by common law, legislation or regulation, e.g. the *Privacy Act*; the *Access to Information Act*.

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**B. FIRST NATION DISCLOSURE**

First Nation claimants shall provide copies of all relevant historical and factual documents of which the First Nation claimants are aware, as well as any historical reports and factual summaries which are relevant to a claim.

The First Nation claimants shall provide copies of all relevant appraisals and other studies

- (a) which were not commissioned in anticipation of making a claim or in anticipation of litigation in respect of a claim, or
- (b) upon which the claimants intend to rely.

Disclosure of documents shall take place within a reasonable time after the documents become available to the First Nations.

These obligations are subject to any restrictions imposed by common law, legislation or regulation.

**C. OBLIGATION TO DISCLOSE**

If the Federal Government or the First Nation claimants have relevant documents which they are not required to disclose under this Protocol, the non-disclosing party should provide a list describing all of the undisclosed documents and the reasons for their non-disclosure to the other party.

**SETTLEMENT PRINCIPLES**

The following principles should be applied to settlement negotiations conducted under the Protocol:

1. There should be no reliance on [(FN) *any technical legal defences such as*] limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol. All relevant evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law. [(FN) *Limitation periods should be suspended while the parties are engaged in the independent claims process.*] (FG) First Nation claimants are encouraged to take any action necessary to protect the loss of their legal rights due to the

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expiration of a limitation period while the parties are engaged in the independent claims process.]

2. The parties should identify and take any agreed upon steps, including maintaining confidentiality, to help to ensure that the price of any land which is subject of settlement negotiations does not become inflated by reason of those very settlement negotiations.

The Joint Committee on Claims should consider and recommend additional methods which could be used to help to avoid inflation of land values e.g. taking options to purchase on the land in question at a very early stage in the process.

3. Compensation should be [(FG) in accordance with recognized legal principles. / (FN) in amounts or forms which are consistent with the objectives and guiding principles of the Protocol.]

COMMENT: First Nation representatives also indicated that it was an option for consideration to delete paragraph 3 altogether.

4. The parties should make all reasonable efforts to ensure that the elements of any settlement agreement reached are most appropriate for the specific circumstances of the submission.

The Federal Government and First Nations encourage flexibility, innovation and creativity in addressing the matter of suitability of settlement proposals. Spiritual and cultural elements associated with unresolved issues should be addressed. [(FG) Usual forms of compensation, such as money or land, may not adequately address these spiritual or cultural issues.] These issues could perhaps be addressed in some cases by focusing on forms of healing - ceremonial or otherwise, statements of reaffirmation of relationships, dedication of monuments or meaningful symbols,\* or public acknowledgement of wrongs committed.

It is recognized that innovative approaches may be the best or most appropriate way to address [(FG) losses relating to off reserve resource management issues] e.g. hunting, fishing, gathering, etc. In these cases, serious consideration will be given to joint management of resource agreements, revenue sharing agreements or economic development agreements as methods to deal with these complex issues.

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It was also recognized that it would be necessary and desirable in certain circumstances to involve the provinces or territories in many of these situations before they would be feasible. It is recognized that, where appropriate, provincial and territorial participation in the settlement of claims respecting resource issues be encouraged.

Resource management issues are not being adequately addressed at the present time but it is acknowledged that the following developments should facilitate progress in the near future:

- there is increased evidence of use of joint agreements to manage resources
- judicial decisions are providing clearer guidance to the parties on how loss of resources must be dealt with
- discussions on self-government may facilitate these types of settlement agreements
- current treaty-making processes are likely to address many of these issues in an innovative way.

5. Agreement on compensation principles should not be required as a condition to beginning settlement negotiations. **[(FG) The parties should agree on compensation principles as early in the negotiation process as possible to avoid delays and frustration in the negotiation process.]**

It is acknowledged that the Federal Government will develop negotiation instructions or guidelines for their negotiators across the country and that the guidelines to be used by First Nations may well be different from those used by the Federal Government. Before adoption or variation of any negotiating guidelines, the Federal Government shall provide the Joint Committee on Claims with copies of the draft guidelines for review and comment. These negotiating policies or guidelines will not be part of the agreement of the Protocol but they should be consistent with the objective and principles upon which the Protocol is based.

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## PROCEDURAL RECOMMENDATIONS

### A. *INTERGOVERNMENTAL CONSULTATIONS*

During negotiations and during the implementation stage of a settlement agreement every reasonable effort should be made to ensure that any necessary inter-agency or inter-governmental consultations take place in order to avoid unnecessary delays in implementation, in order to provide First Nation communities with practical information on realistic timetables for implementation of their agreement, and in order to avoid any unexpected surprises or internal conflicts at a late stage of the negotiations.

### B. *VISITING CLAIMANT COMMUNITIES*

The Federal Government should continue its policy of visiting the aggrieved communities and becoming familiar first-hand with the concerns of the members of the communities. The more involved a community is in the actual preparation and negotiation of its submission the more likely the community will find the process acceptable and the settlement agreeable. If appropriate, negotiations should take place in the claimants' community. If appropriate, after taking into account the costs and benefits of doing so, Independent Assessment Panels should visit claimants' communities.

### C. *BETTER INFORMATION TO FIRST NATIONS*

First Nations claimants should be given the opportunity to be more fully informed about the Protocol at a very early stage in their consideration of making a submission. Visual and written materials should be developed by the Independent Claims Body and disseminated by [(FG) the Assembly of First Nations] to assist First Nations communities to have a realistic appreciation of what they may expect out of the process and to have information

- about the experience of other communities in the process - where they were successful and where they had problems,
- how the process works and in what order steps must be taken,
- about how to manage human and financial resources effectively,
- about when and how to retain consultants and legal counsel, and
- about where additional information and support is available.

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**D. BETTER PREPARATION FOR IMPLEMENTATION**

Where planning takes place in advance in a community and where the community has a vision of how it wishes to utilize settlement proceeds, the degree of satisfaction with the settlement increases and the level of long term benefit to the community also increases. Such advance planning is encouraged. The question of appropriate implementation should be an item on the negotiating protocol to be dealt with at the beginning of the settlement negotiation process. The Independent Claims Body should ensure that the question of implementation has been identified and considered as part of the preparation of the negotiation protocol but the Independent Claims Body should not be given any authority on how the question is to be dealt with by a First Nation.

**E. DATA BASE OF INFORMATION**

A repository of information about submissions made, negotiation protocols developed and settlement and implementation agreements and protocols reached under the old policy and the new process should be developed by the Independent Claims Body and made available for inspection and study.

**THIRD PARTY INTERESTS**

First Nation claimants have no responsibility for third party interests affected by their claim unless responsibility for such interests has been accepted by the First Nation claimants through negotiations with the Federal Government.

Where land is part of the settlement and is owed by the Federal Government to First Nation claimants, the Federal Government acknowledges that it has responsibility for and will deal with any affected third party interests. In balancing any competing interests between First Nation claimants and third party interests, the Federal Government will give appropriate weight to its fiduciary relationship with First Nations.

The process for settlement of any claims should be flexible enough to permit the participation of third parties where the First Nation claimants and the Federal Government agree to such participation and agree that it is critical to settlement. The nature of that participation will be

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determined on a case by case basis by both parties. The Independent Claims Body may facilitate the participation of these third parties in the settlement process.

Where appropriate, provincial and territorial participation in the settlement of claims respecting resource issues should be encouraged.

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, [(FN) *If requested by the First Nation claimants, the Federal Government will take all steps within its powers to ensure that the relevant provincial or territorial government participates in the negotiation process, particularly where*], especially where land or resources are at issue and the province or territory has

- (a) benefitted from a breach of an obligation arising at law,
- (b) has itself acted in such a way as to bring about a breach of an obligation arising at law to First Nation claimants, or
- (c) has been unjustly enriched as a result of juridical interpretation of historical events and constitutional division of powers.

COMMENT: The Federal Government representatives noted that the government will wish to give assurances to the public that as a general rule, their interests in land will not be disturbed by claims settlements negotiated between First Nations and the Federal Government.

## EVALUATION

### A. CHANGES TO THE INDEPENDENT CLAIMS PROCESS

First Nations and the Federal Government should

- (a) cooperate in the ongoing evaluation of Protocol,
- (b) make all reasonable efforts to reach consensus on any amendments or changes to a policy of the Federal Government respecting matters in the Protocol in order to achieve the Protocol's stated objective,

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- (c) subject to the following provisions, no changes shall be made to the agreement which forms part of this Protocol unless these changes are agreed to by the parties and recorded in writing, and
- (d) subject to any mandatory legislative requirements, the parties to a particular claim may agree to changes in the Protocol for the purposes of settling that particular claim.

**B. JOINT COMMITTEE ON CLAIMS**

The Joint Committee on Claims should be established to carry out these joint evaluation activities and any other functions referred to in these recommendations. This Committee will consist of a small group of members appointed in equal numbers by the Federal Government and the Assembly of First Nations. The Committee will be co-chaired by one representative of each of the two appointing agencies.

The Committee will meet once in each calendar year or more often at the discretion of the co-chairs. This Committee will not have a permanent secretariat or facilities.

**C. THE EVALUATION METHOD**

The ongoing evaluation shall be conducted as follows:

1. the Independent Claims Body shall publish an annual report covering the following topics:
  - a factual summary of claims activity over the past year, i.e. claims submitted, accepted, negotiated, resolved, etc.;
  - impacts of settlements on affected communities;
  - adequacy, allocation and availability of resources for an effective and efficient process;
  - performance and participation of the parties in the process;
  - recommendations for improvements including criteria for establishing any necessary priorities for resolving claims and for minimizing or removing any backlogs in claims.

The Minister of Indian Affairs must present a copy of the annual report of the Independent Claims Body to Parliament at the earliest opportunity after its publication.

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A copy of the annual report must be presented by the Independent Claims Body to the Assembly of First Nations at the earliest opportunity after its publication.

2. the Independent Claims Body shall attend a meeting annually with the Joint Committee on Claims to present the annual report and to discuss its finding. The meeting will be called and chaired by the co-chairmen of the Joint Committee;
3. the First Nations and the Federal Government through the Joint Committee on Claims will cooperate in the conduct of an evaluation of the effectiveness of any claims research function 3 years after the Protocol has been implemented;
4. the First Nations and the Federal Government through the Joint Committee on Claims will cooperate in the conduct of a full evaluation of the effectiveness of the Protocol no later than 5 years after the Protocol have been implemented.  
The funding required to conduct these stages of the evaluation process will be included in the budget of the Independent Claims Body.
5. it is recognized that the law is in an active state of evolution and that there may be additional matters which ought to be included in the Protocol as time passes. The Joint Committee on Claims should review annually, and more frequently if necessary, any changes in the law or other relevant developments in order to assess whether the Protocol ought to be amended or revised.

## IMPLEMENTATION

### A. *STRUCTURE OF THE PROTOCOL*

The independent claims process proposed in this Protocol should be implemented through the signing of an agreement by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy. The issues in the Protocol which are to be addressed specifically in the agreement, legislation and policy should be determined and recommended at the implementation stage. The agreement, legislation and policy used to implement this Protocol should be consistent with the stated objective of the Protocol and the principles upon which the Protocol is based.

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The method of implementing the independent claims process is not intended in any way to crystallize or codify any legal rights which are evolving in the current legal environment.

**B. STEPS IN IMPLEMENTATION**

1. With agreement in principle on this Protocol, the Federal Government and the Assembly of First Nations should make their respective appointments to the Joint Committee on Claims.
2. The Joint Committee on Claims should perform the following duties:
  - (a) to determine and recommend the appropriate location for the issues in the Protocol in an agreement, in legislation or in government policy;
  - (b) to prepare and recommend a written agreement for execution by the Federal Government and the Assembly of First Nations;
  - (c) to [(FG) recommend the substance of proposed legislation];
  - (d) to prepare and recommend the five year funding agreements.
3. The Federal Government and the Assembly of First Nations should make the necessary appointments to
  - (a) the Independent Claims Body, and
  - (b) the rosters for the Independent Assessment Panels.
4. The Joint Committee on Claims should perform the following duties:
  - (a) to select and retain an independent person or organization to administer the funding for research, negotiation and litigation;
  - (b) to develop the guidelines and eligibility criteria for funding for research, negotiation and litigation.

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**SUMMARY OF UNRESOLVED ISSUES  
AS REPRESENTED BY FEDERAL GOVERNMENT**

[Listed Randomly]

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**1. UNRESOLVED ISSUE: Cost of the Independent Claims Process**

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**FEDERAL GOVERNMENT:**

Page 2 Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties [(FG) and that will not increase the overall cost to the Federal Government of the process of reaching settlements.]

**FIRST NATIONS:**

Page 2 Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties.

---

**2. UNRESOLVED ISSUE: Are technical defences available to the Federal Government in court proceedings?**

---

**FIRST NATIONS:**

Page 8 [(FN) *The Federal Government may not rely on any technical legal defences such as limitation periods or the doctrine of laches in these court proceedings.*]

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FEDERAL GOVERNMENT:

Page 8 [(FG) The Federal Government may rely on any defences available to it in these court proceedings.]

---

3. UNRESOLVED ISSUE: To what extent should the independent claims process be "without prejudice"?

---

FIRST NATIONS:

Page 8 Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, [(FN) *including the extent to which the negotiations will be conducted on a "without prejudice" basis,*] if they proceed to negotiate the claim.

FEDERAL GOVERNMENT:

Page 9 [(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol it relates to a particular claim shall be considered confidential matters between the parties].

---

4. UNRESOLVED ISSUE: Dispossession of Third Parties

---

FIRST NATIONS:

Page 8 [(FN) *Issues relating to communications with the general public should also be dealt within the negotiation protocol.*]

FEDERAL GOVERNMENT:

Page 23 Comment: The Federal Government representatives noted that the government will wish to give assurances to the public that as a general rule, their interests in land will not be disturbed by claims settlements negotiated between First Nations and the Federal Government.

---

5. UNRESOLVED ISSUE: Funding for Negotiation of Claims

---

FEDERAL GOVERNMENT:

Page 13 [(FG) **If a settlement agreement is reached, loans made available to First Nation claimants for funding negotiation participation should be reimbursed by the Federal Government based upon a pre - set formula. This formula should be developed by the Joint Committee on Claims as an implementation issue. First Nation claimants may make an application to the Independent Claims Body to increase the amount of reimbursement available under the formula where the circumstances would make it appropriate to do so.**]

FIRST NATIONS:

Page 13 [(FN) *Funds made available to First Nation claimants to participate in negotiations should be provided as grants and not loans. These grants should*]

*be based on the needs of the First Nation claimants. First Nation claimants who have received a negotiation grant may make an application to the Independent Claims Body to increase the amount of the grant where the circumstances would make it appropriate to do so.]*

---

6. UNRESOLVED ISSUE: Body Representing First Nations

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FIRST NATIONS:

Page 13 In order to permit the Protocol to work effectively the [(FN) *Assembly of First Nations*] should be funded [(FG) ~~by means of a grant~~] in order to provide policy support and a liaising function between the Joint Committee on Claims and First Nations.

Page 21 Visual and written materials should be developed by the Independent Claims Body and disseminated by [(FN) *the Assembly of First Nations*] to assist First Nations communities to have a realistic appreciation of what they may expect out of the process...

FEDERAL GOVERNMENT:

Page 13 COMMENT: The way in which the First Nations choose their representation in this process has an indirect impact on the Federal Government. Principles 1, 4 and 9 speak to the relationship between the Federal Government and First Nations. The Federal Government is not clear how it would fulfil the intent of these principles to those First Nations not represented by the Assembly of First Nations.



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7. UNRESOLVED ISSUE: **Burden of Proof**

---

FIRST NATIONS:

Page 14 A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where (FN) *an outstanding obligation is established* which is derived from the law (common law, civil law, equity or statute) on the part of the Federal Government, including any [(FN) *duties and*] obligations that [(FN) *may*] arise from the fiduciary relationship between the First Nation claimants and the Crown.

FEDERAL GOVERNMENT:

Page 14 A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where [(FG) *the claimants have established an outstanding obligation* which is derived from the law (common law, civil law, equity or statute)...

---

8. UNRESOLVED ISSUE: **Limiting Outstanding Obligations derived from Law to a specified list.**

---

FIRST NATIONS:

Page 14 For the purposes of the Protocol [(FN) *and without limiting the generality of the foregoing*], an outstanding obligation arises in the following circumstances:...

FEDERAL GOVERNMENT:

Page 14 For the purposes of the Protocol, an outstanding obligation arises in the following circumstances:...

---

9. **UNRESOLVED ISSUE: Claims based on Aboriginal Title or requiring Renegotiation of Treaties**

---

**FEDERAL GOVERNMENT:**

Pages 15  
and 16

**[(FG) It is not intended that this Protocol deal with claims based upon aboriginal title or claims which would require the renegotiation of treaties. It is recognized that aboriginal title claims are being dealt with under other claim processes. It is also recognized that a joint process for treaty clarification is under consideration by First Nations and the Federal Government.]**

**FIRST NATIONS:**

Page 2

**[(FN) While it is not intended that this process will deal with comprehensive aboriginal title negotiations or bilateral treaty implementation negotiations, particularly in view of the other processes presently in place or contemplated to deal with those negotiations, it is recognized that aboriginal title or treaty rights could be elements of claims in this process.]**

---

10. **UNRESOLVED ISSUE: Exception of Technical Legal Defences during Negotiations**

---

**FIRST NATIONS:**

Page 18

**There should be no reliance on [(FN) any technical legal defences such as] limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol.**

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FEDERAL GOVERNMENT:

Page 18      There should be no reliance on limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol.

---

11. UNRESOLVED ISSUE:    **Compensation in accordance with Recognized Legal Principles**

---

FEDERAL GOVERNMENT:

Page 19      Compensation should be [(FG) in accordance with recognized legal principles.

FIRST NATIONS:

Page 19      Compensation should be [(FN) *in amounts or forms which are consistent with the objectives and guiding principles of the Protocol.*]

COMMENT:      First Nation representatives also indicated that it was an option for consideration to delete paragraph 3 altogether.

---

12. UNRESOLVED ISSUE:    **Suspension of Limitation Period during Negotiations**

---

FIRST NATIONS:

Page 18      [(FN) *Limitation periods should be suspended while the parties are engaged in the independent claims process.*]

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FEDERAL GOVERNMENT:

Pages 18  
and 19

**[(FG) First Nation claimants are encouraged to take any action necessary to protect the loss of their legal rights due to the expiration of a limitation period while the parties are engaged in the independent claims process.]**

---

13. **UNRESOLVED ISSUE: Responsibility of Federal Government for Provincial Involvement**

---

FIRST NATIONS:

Page 23

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, **[(FN) *If requested by the First Nation claimants, the Federal Government will take all steps within its powers to ensure that the relevant provincial or territorial government participates in the negotiation process, particularly where*], especially where land or resources are at issue and the province or territory has...**

FEDERAL GOVERNMENT:

Page 23

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, especially where land or resources are at issue and the province or territory has...

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14. **UNRESOLVED ISSUE: Releases/Surrenders**

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NO DRAFT FOR CONSIDERATION TO DATE

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**NEUTRAL'S NOTE:**

**There remain unresolved issues identified throughout the draft which are not outlined above. These issues were not included in the summary of Federal Government representatives as significant issues for resolution. First Nation representatives did not summarize what they considered to be significant issues for resolution.**

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**INDIAN COMMISSION OF ONTARIO**

**DISCUSSION PAPER REGARDING  
FIRST NATION LAND CLAIMS\***

**COMMISSIONER**  
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A. Rodney Bobiwash / Dianna Wheatley / Georgette Howard

**SEPTEMBER 24, 1990**

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"Will there be a Wounded Knee in Canada?" a newspaper reporter in the summer of 1973, asked George Manuel, President of the National Indian Brotherhood. He replied:

"Not if the Canadian people as a whole are able to understand the Indian's problems, negotiate with us in good faith and support us in their solution.

Otherwise, the young Indians will certainly take matters into their own hands."<sup>1</sup>

Justice will come to Athens only when those who are not wronged feel as indignant as those who are.

Thucydides

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<sup>1</sup> Quoted in W.T. Badcock, *Who Owns Canada – Aboriginal Title and Canadian Courts* (Ottawa and Toronto: Canadian Association in Support of Native People, Contemporary Native Themes, 1976).



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## FOREWORD

This discussion paper on Indian claims was prepared by the Indian Commission of Ontario pursuant to a commitment given to governments and Indians at a special tripartite meeting held in Toronto on August 23, 1990.

The time limit accepted for this project – 30 days – has shaped the format of the final product with all of its strengths and weaknesses. The editorial approach taken has been to canvass the existing literature relating to claims issues and to quote extensively from what was available on short notice. The intent of this approach is to demonstrate that current issues are not new, nor are they contrived. They have been identified for many years and from many sources, including government sources.

At the same time, we are grateful for the comments and suggestions we have received from the parties to the negotiation process, and especially to the Assembly of First Nations, Grand Council Treaty #3, Six Nations of the Grand River, the Union of Ontario Indians, the Walpole Island First Nation, and the Ontario Native Affairs Directorate, all of whom provided the Commission with written submissions. As well, the Commissioner has personally met with and reviewed this project with representatives of the Assembly of First Nations, the Treaty and Aboriginal Rights Research Office of the Indian Association of Alberta, the Treaty & Aboriginal Rights Research Centre of Manitoba and their legal counsel Rod McLeod, the Indian Rights & Treaties Research Office of the Federation of Saskatchewan Indians, and the federal Department of Justice. Their input and participation was invaluable and greatly appreciated. Finally, we acknowledge with thanks the assistance of the following persons in the preparation of this discussion paper: Alan Grant, Ian Johnson, Alan Pratt, Paul Williams, and, in particular, Bill Henderson. Needless to say, the responsibility for all judgments and (especially) any errors in the paper is the Commission's alone.

Special mention is also due of the contributions made by the law librarians at Blaney, McMurtry, Stapells who obtained many of the background documents for this paper and to Dianna Wheatley and Georgette Howard whose heroic typing and editing efforts made it possible to meet the deadlines.

The discussion paper begins with a discussion of the nature of Indian claims and it shows that current policies are out of step both with Indian expectations of the process and with existing law. Addressing this problem may require a profound re-evaluation of the policies themselves.

The next section of the paper is a summary of the history of Indian claims processes. It is intended to provide a quick reference for those unfamiliar with the evolution of the current processes and with the role of the Indian Commission of Ontario in facilitating some claims settlements in this province.

The lengthiest section of the paper is a commentary on existing policy and processes. Because of the emphasis on the Ontario experience the focus is on the structure and workings of the specific claims policy.

The next chapter deals with the court process as an alternative to claims negotiations. It concludes that the courts are not a realistic alternative to negotiations. It is suggested that the courts could be used to supplement negotiations and make them more effective.

This is followed by an exploration of other alternatives, both structural and procedural, as well as of administrative changes that will be required regardless of what model is adopted. The basic choice is between some form of adjudication and some process of assisted negotiation. This section also briefly sets out the positions of the parties regarding the various alternatives, where known.

The final and perhaps most important chapter presents a series of recommendations intended, as a basis for discussion, to open up the settlement process and make it work.

The tone of the analysis in the paper is frequently critical. To some extent, this reflects the preponderance of views in the literature relied upon. Largely, it reflects the fact that the current claims processes are not now working in Ontario. We are optimistic regarding the future of First Nations rights and claims if the conclusions and recommendations contained in this discussion paper are given careful consideration and result in action.

Everyone agrees that changes are needed. It is hoped that this discussion paper will serve as a catalyst for substantial evaluation of what those changes should be and how and when they can be implemented.

INDIAN COMMISSION OF ONTARIO  
September 24, 1990

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## INTRODUCTION

So we've had to accept the fact that we did not properly settle with the First Nations, with the native people of Canada. And the treaties that were entered into have not always been honoured. And some other legal commitments were made or land was taken without compensation. So the resolution of these questions, and the understanding by all Canadians of the fact that there is a remaining injustice, is at the heart of the challenge facing all governments – federal, provincial and municipal.<sup>2</sup>

The events of the summer of 1990 have given unprecedented publicity to the truth that all is not well in the relationship between Canada's governing institutions and its aboriginal peoples. The stand-off at Oka, the solidarity expressed by natives across the country with the cause of the Mohawks of Kanesatake, and the wave of Indian protests and blockades carried out by native men, women and children across Canada, have given rise to concern and, in many cases, puzzlement among non-native Canadians about the causes of that frustration.

That same puzzlement does not exist among Indians or among government officials involved in Indian affairs. They have known for years that Canadian law and Canadian government policy do not begin to meet Indian aspirations. They know that, apart from the courts, there is no adequate forum which can give effect to Indian treaty rights or which even permits meaningful discussion of Indian claims of sovereignty or inherent rights, nor (as this paper will confirm) is there a fair process for defining and resolving Indian land rights. They know that because of legal precedent developed without Indian participation, because of legislation developed in the past expressly to limit Indian rights, and because of statutes of limitation and the inability of most Indian Bands to afford protracted legal battles, the courts are generally not a realistic alternative.

They also know that for at least 40 years independent bodies from parliamentary committees to claims commissioners to human rights commissions, to the Supreme Court of Canada and the Canadian Bar Association have all recommended fundamental reform of the way in which Canadian governments deal with the rights of aboriginal people. And they know that land rights issues (as Indian leaders in Ontario expressed very forcefully to government ministers at an emergency meeting convened by this Commission on August 23, 1990) are a central focus of past grievances and of independent criticism.

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<sup>2</sup> T. Siddon, Minister of Indian Affairs, Global TV interview, 2 September 1990.

The majority of the Canadian public, however, has not been aware (at least until this summer) either of the depth of the existing problem (described in the most recent report of the Canadian Human Rights Commission as a "national tragedy") or of the degree to which the Canadian legal system has failed Indians in the past. Few Canadians are aware that when Europeans first came to North America they and the "Indian nations" which they found here developed relations based on mutual interdependence. While some are aware that most of the land which is now Ontario was acquired through treaties with its Indian inhabitants, many wrongly believe that Indian First Nations are conquered peoples and that Indians, instead of agreeing to share the land in return for certain solemn commitments, somehow forfeited their rights through military defeat.

Canadian governments have made little effort to inform the public that Indian land claims are not vague grievances arising from the fact that aboriginal society has been "overtaken by progress," or that the basis of aboriginal land rights is recognized at common law and enshrined in the Constitution. While many Canadians probably suspect, as the Supreme Court of Canada recently recognized in *R. v. Sparrow*,<sup>3</sup> that Canadian governments have long ignored Indian legal rights, most would be shocked to learn that as recently as 1951 a lawyer could be jailed if he was hired by an Indian or an Indian Band to press a land claim in the courts. (Today, despite that history, when a land claim is brought to court, governments will argue that even if the claim is otherwise valid in law, it should be rejected on the grounds that statutes of limitation have expired!) Similarly, most Canadians would surely greet with incredulity the fact that while land in the Canadian prairies was being given away to European immigrants, special legislation made it illegal for the Indians (the prairies' first inhabitants) to receive land under the same policy.

Finally, the Commission believes that most Canadians would not be proud to learn that, although Indians were advised to sign land surrender treaties on the basis of solemn promises that the Crown's obligations would be honoured "as long as the rivers flow," Canadian courts have found that basic principles of contract law cannot be enforced by Indians with respect to those treaties; and that the Crown's promises can be unilaterally abrogated by the governments (although the governments are permitted to keep the benefits of the treaties) – all without consultation or compensation.

As noted above, the current Minister of Indian Affairs, like several of his predecessors, recognizes that Canada's current policy for dealing with Indian land claims in Ontario has proved unsatisfactory. In conceding that, the Minister echoes the unanimous conclusions of independent commentators, a conclusion which will be confirmed in this discussion paper.

Canada is clearly at a crossroads today in government-Indian relations. Ultimately, it is the conscience of individual Canadians that will determine whether their governments will use this opportunity to take immediate, practical steps to improve those relations and to bring justice to the land claims process, and to aboriginal peoples generally.

<sup>3</sup> [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] 3 CNLR 160.

Without a policy and a process which is able to provide fair and expeditious resolution of Indian land claims, we can expect to see recurrences of the desperate alternative we have witnessed occurring at Oka and elsewhere. Confrontation and violence should not be part of the Canadian experience, and every reasonable measure must be explored to ensure that real alternatives exist. It has been said repeatedly, particularly over the last several months, that Canada is a country which lives under the rule of law. If indeed that is true, and if it is to be a concept embraced by Indian people, then the law and those who enforce it must meet the legitimate aspirations of First Nations. There is no better time than now to demonstrate that the rule of law provides a viable and fair means to resolve the deep and enduring grievances of this country's first inhabitants. None of us should settle for less.

## A BRIEF HISTORY OF LAND CLAIMS PROCESSES

Indian land claims find their genesis in the arrival of European settlers upon Turtle Island (North America) where they found organized societies of Indians. The Indians lived in organized communities and were self-sustaining, self-governing, and in occupation of the land which the Europeans were seeking for settlement. As this settlement commenced, the settlers found it necessary, in the interests of survival, to establish with the Indians relationships of trust and goodwill. In Canada this relationship was one clearly based upon respect and predicated on mutual needs and interests of the settlers and the Indians.

However, as the colonies in North America developed they inevitably came into conflict with the tenure of the indigenous peoples occupying the land. Conflicts developed, and although they were eased from time to time by intervening events such as disease and tribal warfare, it was apparent to the Crown that a system based upon mutual co-existence had to be developed and implemented in colonial legislation. This realization gave rise to the Royal Proclamation of 1763, establishing a policy of non-intrusion on Indian lands and formalizing a process to be used when the British government and settlers dealt with the Indian peoples and their lands.

In Ontario, it can be said that Indian claims processes began with the Royal Proclamation of 1763, intended by the British Crown to recognize Indian title and to prevent the "Great Frauds and Abuses" causing ferment on the frontier.

Arising out of the proclamation was a process that interposed the Crown between Indians and the developers of the time, with the clear intent that the Indians would be dealt with justly. In Canada, the treaty process did lead to peaceful settlement of the land, but it did not always lead to justice for Indians.

Significant Crown revenues were generated by the purchase of Indian lands at minimal cost and subsequent resale to speculators. However, Indian lands were often improperly taken and sold; Indian moneys too often went missing or were invested in improvident schemes; treaty promises were ignored (always excepting, of course, the Indians' promise to cede the land). Through much of the last century, Indian claims could only be addressed by humble petition to the Crown, and there was no appeal.

After Confederation, the new dominion government attempted to order its constitutional responsibilities for "Indians and Lands reserved for the Indians." Some Indian claims were directed through the 1880s and 1890s to an arbitration board established for the purpose of adjusting financial accounts between Canada and Ontario. Most fell by the wayside and were not resolved.



At the same time, courts in Canada and Britain were making important rulings about Indian land rights in cases such as *St. Catherines Milling*<sup>4</sup> and *Ontario Mining Co. v. Seybold*.<sup>5</sup> However the Indians whose rights were at issue in those cases were not involved in the litigation. These were federal-provincial disputes, and the Indians were incidental to the constitutional issues.

Early in this century, a unique procedure of international arbitration enabled the Cayuga Indians living at Six Nations to recover treaty annuities from the U.S. government unpaid after the War of 1812. This claim was lodged in 1882. An arbitration panel was set up in 1910. It was not settled until 1926 when Canada took control of a \$100,000 trust fund on behalf of the Cayugas, intended to provide the \$5000 annuity they had been awarded.

The Williams Treaties of 1923 represented another effort to investigate and resolve the land rights of the Mississauga Nation and Chippewa Tri-Council north of 45 degrees latitude. This created many continuing grievances. The Indians were denied independent legal representation, the treaty commissioners misrepresented their mandate, and then exceeded it by extinguishing lands and rights in the treaty which they were not authorized to deal with. There is no historical evidence that any of this was explained to the Indians. The claims continue.

The 1924 Ontario Lands Agreement was legislated by Canada and the province in that year to adjust federal and provincial rights and responsibilities with respect to Indian lands. Indians, of course, did not participate in the negotiations or agree to the terms of adjustment. Subsequent problems of interpretation and implementation led to a 17-year round of negotiations culminating in the 1986 Ontario Lands Agreement, negotiated through the offices of the Indian Commission of Ontario and finally proclaimed in 1990.

The new legislation provides for tripartite negotiations between First Nations, Ontario, and Canada to deal with issues arising out of the 1924 legislation: principally, mineral revenues and reserve lands surrendered, but not sold, as of 1924. Some First Nations have expressed concern that negotiation under this open-ended process may lead to quid pro quo exchanges of one set of rights for another that they never agreed to give up in the first place. It is, however, too early to tell how this untested process will work.

By 1927, the federal government reacted to a growing number of claims submissions by making it illegal, under the *Indian Act*, for First Nations to retain legal counsel to prosecute a claim.<sup>6</sup> The superintendent general of Indian affairs could give permission for such retainers, but this was rarely, if ever, done.

Land claims languished for want of a process and a body of supportive law until after World War II. In 1946-48, and again in 1958-61, joint committees of the Senate and House of Commons recommended establishment of an Indian commission. Legislation was prepared that would have created a tribunal to hear five types of claims arising out of acts or omissions of the Crown, including the British Crown, but not the Crown in right

<sup>4</sup> *St. Catherine's Milling and Lumber Company v. The Queen* (1888) 14 App. Cas. 46, 2 CNLC 541.

<sup>5</sup> [1903] AC 73, 3 CNLC 203.

<sup>6</sup> *Indian Act*, RSC 1927, c. 98, s. 141.

of any province. This legislation was actually introduced in Parliament in 1963 and, in a slightly modified form, in 1965. Both bills died on the order paper.

The next initiative to settle claims arose out of the 1969 White Paper. That policy stated that aboriginal title claims were "too vague and undefined" to be taken seriously. Unfulfilled treaty obligations would be resolved, but continuing treaty rights were to be terminated. An Indian claims commissioner would be appointed to assist government in meeting its lawful obligations. The commissioner was appointed: Dr. Lloyd Barber of Saskatchewan. His work, however, was frustrated by Indian rejection of all aspects of the 1969 policy, including his appointment. Despite this limitation, he was able to assist in the resolution, or the negotiation, of several claims in western and northern Canada. He was also able to provide thoughtful comment upon the nature of Indian claims and various claims processes that might be used to address them.

The year 1973 was when government seriously began to address claims issues in the wake of the Supreme Court of Canada's *Calder* decision.<sup>7</sup> This opened the door for negotiation of aboriginal title, or comprehensive claims. The James Bay Cree and Northern Quebec Inuit were the first to negotiate a comprehensive claims settlement.

In 1974 the Office of Native Claims (ONC) was established as a separate entity within the Department of Indian and Northern Affairs, reporting to the deputy minister. Piecemeal policies were developed to deal with diverse issues such as comprehensive claims, "cut-off lands" in British Columbia, reserve lands taken improperly or without compensation, and unfulfilled treaty obligations including land entitlements.

The policies of the ONC for the negotiation of claims were set out in two booklets published in 1982: *In All Fairness* deals with "comprehensive," or aboriginal title, claims; *Outstanding Business*<sup>8</sup> deals with "specific," post-Confederation claims involving treaty entitlements, reserve and surrendered lands, and Indian moneys. These policies have not been amended since 1982.

Federal officials of Canada, and more specifically the Office of Native Claims, have stated on many occasions that the process of dealing with specific claims needs improvement. Indeed, their own documentation is testimony to this fact. It states that from 1974 to the present, First Nations across Canada have submitted over 530 specific claims. Of those submitted, 43 have been settled and 21 have been suspended, with the balance being somewhere within the process of the ONC. Settlement of specific claims is achieved within all of the present processes at a rate of less than three claims per year. It is doubtful that anyone could disagree that such a pace is totally unacceptable and would not be tolerated in any other area by any other interest group with like issues.

For its part, the Ontario government has never published an Indian land claims policy. Ontario has participated in negotiations with several First Nation claimants, on the stated basis that Ontario will deal with land claims arising out of breach of its past obligations

<sup>7</sup> *Calder v. British Columbia (Attorney General)*, [1973] SCR 313, 34 DLR (3d) 145, 7 CNLC 91.

<sup>8</sup> Reprinted in [1994] 1 ICCP 171.

according to criteria of fairness and legal principles. To date, however, Ontario has been able to achieve only one settlement agreement.

While most specific claims are negotiated through bilateral negotiations between the claimant First Nation and Canada or Ontario, some claimants have attempted to have their claims resolved through negotiations involving the offices and assistance of the Indian Commission of Ontario (ICO). Certainly the thinking of the claimants, and perhaps to a lesser degree the governments, is that their claim will be dealt with more fairly and expeditiously through this structured and formalized process.

The ICO is an independent authority which was established in 1978 to assist Canada, Ontario, and First Nations in Ontario to identify, clarify, negotiate, and resolve issues which they agree are of mutual concern. The mandate, powers of the Commission, and the appointment of the Commissioner are accomplished through joint orders in council by the governments of Ontario and Canada and confirmed by the Chiefs of the First Nations in Ontario. The mandate of the ICO includes a variety of powers to assist in the resolution of the issues before it, including land claims. These powers include non-binding arbitration, binding arbitration, formal mediation, and reference of an issue to court. In the exercise by the Commission of any of these powers of dispute resolution, however, the parties must all give their prior consent. And, in the area of land claims in particular, Canada and Ontario have not always displayed a willingness to give their consent even though the First Nations have been prepared to. The previous ICO commissioner, Roberta Jamieson, in her 1987 annual report articulated reasons as to why such mechanisms should not only be considered but by implication suggested they should be binding on the parties. In her report she states:

There are . . . reasons why it is important that parties make more frequent use of such to break an impasse. Settlement compromise, and knowledge that nonbinding arbitration or other independent review is unlikely encourages officials to maintain positions since they see no reason to compromise. If the parties do from time to time accept arbitration, officials will then know that their positions might be put to the test of outside opinion, rather than taking comfort in the knowledge that their positions will never be challenged by an independent evaluation.<sup>9</sup>

There would not appear to be any reason today to take issue with or disagree with that rationale. In fact, examining the history of the land claims being dealt with within the process of the ICO reveals that the opportunities for meaningful and expeditious results can no more be expected there than in any other process presently used to negotiate their settlement.

Since 1979, 12 specific claims have been accepted by the parties for settlement negotiations within the ICO process. The most recent of these was submitted for negotiation just over four years ago. To date two claims have been settled, one is being considered by

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<sup>9</sup> Indian Commission of Ontario, *Annual Report* (Toronto: ICO, 1987), 18.

the claimant First Nation for acceptance, while the remaining nine continue to be mired in the process with no apparent settlement in sight. In the view of the Commission, virtually all the active claims problems arise from government negotiators' failure to respond quickly or fairly to issues or requests arising in the negotiations (or their simple non-attendance at meetings). The issues are not apparently resolved by having them addressed through the ICO because of its inability to break impasses or move the issues along or to compel cooperation. As a result, claims being negotiated through the ICO process have historically not had any greater degree of success than those being negotiated outside it.

One need only consider the example of the Batchewana First Nation's validated claim to Whitefish Island to demonstrate the point. This claim has been within the ICO process since 1982. Since that time many meetings have been facilitated by the ICO, technical work respecting valuation of the claim has been carried out, and the First Nation has tabled a detailed proposal for settlement which the federal negotiator described as the best such submission he had ever heard. Notwithstanding the federal negotiator's appraisal of the First Nation's offer, however, there has been no formal response to it by the ONC since the offer was tabled approximately one year ago; indeed the federal government has refused to attend a single formal meeting with the Band to discuss the proposal. This is despite persistent efforts and prodding by representatives of the First Nation and the ICO. Indeed, because the federal negotiator has since taken ill and because there are apparently no other negotiators available to continue, the First Nation currently has no option but to continue to wait – if it wishes to remain in the negotiation process. And since the Commission has no powers to compel performance or attendance, or to make decisions in respect of the circumstances, the matter remains in limbo and the First Nation suffers. [The Whitefish Island claim was settled in 1992-93. *The Editor*]

If negotiation is to be an alternative to actions of violence and confrontation, such as those at Oka and other areas including some in Ontario, surely it is incumbent upon those who care to ensure that the alternative is one that works. History shows clearly that at this point it can only be said that the present processes and policy for dealing with Indian land claims have been an exercise falling far short of anything resembling success. If we agree with the Canadian Bar Association's committee answer of "yes" to its question: "Can it be said . . . that the aboriginal peoples of Canada have faced and continue to face, injustice within the legal and justice systems?" then we must surely agree with and be prepared to respond immediately to the additional comment that "it is not enough that Canadians merely recognize past injustices. More important is that we remedy current ones."<sup>10</sup>

<sup>10</sup> Canadian Bar Association (CBA), Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: CBA, 1988) [hereinafter *Aboriginal Rights*], 14.

## THE NATURE OF CLAIMS

Will Native claims make a difference? They will, but only if there is a change of attitudes as well as a change of policy. Our tendency to dismiss Native culture led us in the past to dismiss the notion of Native claims. Now that we have accepted our responsibility to negotiate a settlement of Native Claims there must be a change in attitude toward Native history, Native culture, and Native rights. We shall have to accept that a settlement of Native claims will be a beginning, not an end.<sup>11</sup>

First Nations and the Government of Canada do not view claims in the same way. While First Nations need a claims process which will result in the proper recognition of their rights, the federal government continues to impose completely inappropriate policies, designed to minimize the implementation or limit the recognition of aboriginal and treaty rights. The policy approach of the federal government in the area of native claims reflects this government's intent to limit any expansion of federal responsibility towards Indians, especially with regard to expenditures.

A fundamental difference between the federal government and First Nation perceptions of claims is the artificial division of federal policies into "specific" and "comprehensive" claims. Two narrowly defined policies have been developed which are inadequate to meet the needs and priorities of First Nations. Most First Nations view their claims within the greater context of constitutionally protected aboriginal and treaty rights, and their political relationship with the rest of Canada.<sup>12</sup>

Many of the problems with land claims policies can be attributed to the fact that they address government's needs and expectations to extinguish existing duties and obligations at minimum cost with minimal disruption to the Canadian polity. Each of these elements is fundamentally at odds with Indian needs and expectations. Given the volume of comment to this effect from Indians and observers alike over the years, it is distressing that this needs to be explained again.

Indians do not view land claims settlements as terminating some aspect of their relationship with the Crown. They see the potential for renewal of historic commitments in a modern context.

<sup>11</sup> T. Berger, "Native Rights and Self-Determination: An Address to the Conference on the Voices of Native People, September 25, 1983" (1984) 22 U.W.O. L. Rev. 9.

<sup>12</sup> Assembly of First Nations (AFN), *AFN's Critique of Land Claims Policies* (Ottawa: AFN, August 1990) [hereinafter *AFN's Critique*], 13-14.

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Indians do not see their rights as being for sale. They expect recognition of their rights to lead to the continuing exercise of those rights with implications for self-sufficiency and self-determination.

Many witnesses asserted that land claims settlements were essential to the exercise of self-government, in that they would provide an economic base.

Until our land claim is recognized and until the government of Canada recognizes our land base and our territorial jurisdiction, Indian self-government will be an illusion. The government of Canada must seriously undertake to negotiate our land claims so that our people will have a land base upon which to build our Indian self-government. (Kanesatake Mohawk Nation, Special 30:136)

Without land, without resources, there is no self-sufficiency; and without being self-sufficient, there is no Indian government. So it is our premise that we have to have the land before we can actually make the advancements in the resource development to attain that self-sufficiency. (Association of Iroquois and Allied Indians, Special 16:32)<sup>13</sup>

It is significant that current land claims policies, while paying some service to economic self-sufficiency, do not contemplate negotiation of the continuing exercise of aboriginal and treaty rights, of services promised in treaty negotiations, or of self-government in the context of claims negotiations.

In Ontario, the problem is aggravated because the policies exclude any claims arising from aboriginal title or treaties or other transactions concluded prior to Confederation. These limitations mean that many, perhaps most, claims in Ontario will never be addressed as matters now stand.

This arbitrary division of claims into two limited policy frameworks excludes many claims from the process. They simply fall between the cracks, not fitting neatly within either policy. The policies also fail to address rights issues which clearly have a basis in law. There is little recourse for First Nations which find their claims in this situation beyond pursuing costly litigation or developing direct action strategies.<sup>14</sup>

Exclusion of treaty rights issues is one of the major examples of Indian rights which clearly have a basis in law, but currently fall between the cracks. Despite Supreme Court

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<sup>13</sup> K. Penner, Chairman, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Ministry of Supply and Services, 1983) [hereinafter Penner Report], 113.

<sup>14</sup> *AFN's Critique*, note 12 above, 14.

pronouncements in cases such as *Simon*<sup>15</sup> and *Sparrow*,<sup>16</sup> claims policies still reflect the attitudes described by a parliamentary committee:

Indian people view treaties as reaffirmations of their sovereignty and rights and as to allow settlement in certain areas; non-Indians regard treaties as an extinguishment of rights, an acceptance of the supremacy of the Crown, and a generous gift of land to the Indians so they might have land of their own. Indian people see Canadians respecting their own traditions and ancient doctrines such as Magna Carta, while at the same time regarding the Royal Proclamation as antiquated and Indian tradition as inappropriate for modern times.<sup>17</sup>

Fundamental change in the relationship between First Nations and the institutions of the Crown was wrought by section 35 of the *Constitution Act, 1982*, which recognized and affirmed the existing aboriginal and treaty rights of the aboriginal peoples of Canada. At one point, the federal government seemed to recognize this fact.

It is an important task that Canada embarked on in 1982, when three articles were included in the *Constitution Act* dealing specifically with the aboriginal peoples. In doing so, a commitment was made that we were going to engage in fundamental, substantial, and positive change respecting aboriginal peoples.<sup>18</sup>

Claims policies do not incorporate that commitment. Nor do they incorporate processes to deal with legal rights of, and lawful obligations to, Indians. For that reason they are seriously out of step with Indian needs and expectations.

Key to any understanding of the Indian perception of claims is an understanding of the essential relationship between Indian peoples and the land and the environment. One writer attributes much of the Indian reality today to severance of that relationship.

History demonstrates that there is a strong correlation between the loss of traditional lands and the marginalization of native people. Displaced from the land which provides both physical and spiritual sustenance, native communities are hopelessly vulnerable to the disintegrative pressure from the dominant culture. Without land, native existence is deprived of its coherence and its distinctiveness.<sup>19</sup>

In the Indian view, land is not a commodity to be traded on the market, nor is its true value to be determined on that basis. Unfortunately, Indian policy over the years and land claims policies today ignore this basic fact.

<sup>15</sup> *Simon v. The Queen*, [1985] 2 SCR 387, 24 DLR (4th) 390, [1986] 1 CNLR 127.

<sup>16</sup> Note 3 above.

<sup>17</sup> Penner Report, note 13 above, 12.

<sup>18</sup> B. Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples," cited in M. Boldt and A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1987), 158.

<sup>19</sup> D. Johnston, "Native Rights as Collective Rights: A Question of Group Preservation" (1989) 2 Can. J. Law & Jur. 32.

It is undoubtedly true that federal/provincial agreements and the 1867 constitutional compact limit Canada's ability to deal with land and resources in the provinces today. That simply underscores the need for provinces to acknowledge their obligation to participate in claims settlements today as a dimension of past benefits received. To Indians, of course, the question is irrelevant: their historic relationship is with the Crown, in all its forms:<sup>20</sup>

This has led to a great deal of frustration on the part of First Nations which are left with no alternative but to address their grievances either through the courts or by direct action. The courts have often not been found to be a reasonable course of action for many due to the prohibitive costs and the fact that many Native people feel the courts are likely to be biased against them or are simply an alien forum which cannot address their concerns properly. A growing number of native communities have found that they must take direct action on the ground, through roadblocks or other forms of protest, in order to get governments to take notice of their concerns.<sup>21</sup>

Unless the kinds of attitudinal change suggested by Berger and the AFN are brought to bear on land claims policies, it is foreseeable that neither government nor First Nations will ultimately achieve by way of negotiated agreements the objectives each brought to the table.

The Federal Government must meet the challenge and deal with First Nations on common ground in a spirit of cooperation as declared by the Supreme Court of Canada. The objectives and First Nations must be respected if solutions amenable to all parties are to be found. For there to be fair and just settlements, there must be a recognition of the inseparable connection land claims have with the greater framework of aboriginal and treaty rights in Canada.<sup>22</sup>

Many political – as distinct from policy – statements of various governments seem to acknowledge the need to deal with Indian values and expectations in a realistic way. The statement of Prime Minister Mulroney quoted above is one example. Here is another:

At a time when our country is struggling to redefine itself, to determine what kind of a future we want for everyone in this land, we in all fairness pay particular attention to the needs and aspirations of Native people without whose good faith and support we cannot fulfil the promise that is Canada.<sup>23</sup>

<sup>20</sup> See A. Pratt, "Federalism in the Era of Aboriginal Self-Government," in D. Hawkes, ed., *Aboriginal Peoples and Government Responsibility* (Montreal and Kingston: McGill-Queen's University Press, 1990).

<sup>21</sup> *AFN's Critique*, note 12 above, 3.

<sup>22</sup> *Ibid.*, 15.

<sup>23</sup> Department of Indian Affairs and Northern Development (DIAND), *In All Fairness* (Ottawa: Ministry of Supply and Services, 1981), 4.



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These sentiments, however, are not reflected in First Nations' day-to-day dealings with claims officials under existing policies. A severe review of those policies is in order.

Experience shows that attempts to address First Nations concerns within federal claims policies are consistently doomed to failure as long as the fundamental issues involved are ignored. Government officials and bureaucrats do not have the authority to deal with matters of this nature. It is only through a political process that the rights of First Nations can be effectively implemented. Half-measures, such as the present claims policy approach, only leave more questions to be dealt with later.<sup>24</sup>

The nature of Indian claims, and the new constitutional reality of aboriginal and treaty rights, argue for public education about the needs and aspirations of Indian peoples across a broad range of issues. Change must come, but there must also be a climate for change. The Penner Committee anticipated this need.

The view of history held today by most non-Indian Canadians and the perspective held by most Indian people are almost mirror images. Indian people consider the "discoverers" and "explorers," in whose memory monuments are erected and postage stamps issued, to have been intruders in a land already well known to the nations that inhabited it. Indian people know their nations to have been productive, cultured, spiritual, intelligent civilizations comparable to those in Europe at the time of first contact. But they are portrayed instead as savages and pagans, unknowing of religion and needing instruction in simple tasks. Because only a one-sided, negative portrayal has been widely disseminated, non-Indian Canadians are poorly prepared to understand the perspective held by Indian people and to comprehend the background behind the distressing and unacceptable situation of Indian people in Canada today. This often leads to confrontation.<sup>25</sup>

Federal, provincial, and First Nations governments share the responsibility to create this climate for change. And in that climate, the true range of Indian expectations of land claims processes can, and must be, dealt with.

At the time the federal government was developing its new claims policies in light of the 1973 *Calder* decision,<sup>26</sup> the Indian claims commissioner of the day advised upon the nature of Indian claims:

In the final analysis it must be realized that the process of Indian Claims settlement involves not just the resolution of a simple contracted dispute, but rather the very lives and being of the people involved. Desire for settlement does not only concern the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people . . .

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<sup>24</sup> *AFN's Critique*, note 12 above, 14.

<sup>25</sup> Penner Report, note 13 above, 12.

<sup>26</sup> Note 7 above.

After all, much of our current difficulty stems from the rigidity and inflexibility of positions established ages ago.<sup>27</sup>

First Nations look to claims policies and processes to deal with their aboriginal and treaty rights because, for many issues of importance to all segments of society, there are no alternative forums.

There are few options available for dealing with matters which so clearly have an impact on both the history and future development of not only Indian communities, but Canada as a whole. First Nations want a settlement of their outstanding grievances through a process which is based on principles of fairness and justice. Most of the Canadian public support this objective. It can only be accomplished through a process which takes account of the importance First Nations attach to the recognition and implementation of aboriginal and treaty rights already recognized in the Constitution.<sup>28</sup>

Rigid and inflexible positions of the past have led government to unilaterally define native claims in a restrictive manner. This has resulted in policies and processes that are out of step with the very nature of the issues they are supposed to resolve. Without fundamental reassessment and attitudinal change, the inevitable consequence will be to perpetuate the situation we see today: part of a job, poorly done.

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<sup>27</sup> L. Barber, "Indian Claims Mechanisms" (1974) 38 Sask. L. Rev. 15.

<sup>28</sup> *AFN's Critique*, note 12 above, 14.

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# PROBLEMS WITH THE CLAIMS PROCESS

## INTRODUCTION

To date progress in resolving specific claims has been very limited indeed. Claimants have felt hampered by inadequate research capabilities and insufficient funding; government lacked a clear, articulate policy. The result, too often, was frustration and anger. This could not be allowed to continue.<sup>29</sup>

For more than two decades the problems presented by Indian claims have bedeviled the Government of Canada and Indian peoples themselves. Millions of dollars, and the energy of hundreds of people, have been expended, and yet satisfactory solutions seem no closer today than they ever did. This is not to say that nothing worthwhile has been accomplished. Much more is now known about the issues which have to be faced.<sup>30</sup>

In the nearly ten years since these statements were made, frustration and anger have escalated to the boiling point. At the same time, we continue to learn more about the issues as courts give constitutional dimension to "aboriginal and treaty rights," the "honour of the Crown," and its "fiduciary duties."

What has not changed are the issues themselves or governments' unwillingness to deal with them. This section of the discussion paper will show that what all the intervening review, comment, and recommendations have most in common is the fact that they have all been ignored.

In Ontario, the focus must be on the specific claims policy since there is no general acknowledgment by the two levels of government that any title to land remains unextinguished. While the correctness of that position is now before the Supreme Court of Canada in the *Bear Island* case,<sup>31</sup> it leaves little scope for operation of the federal comprehensive claims policy. Claims of the Golden Lake Algonquins and non-signatories to the

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<sup>29</sup> DIAND, *Outstanding Business: A Native Claims Policy* (Ottawa: Ministry of Supply and Services, 1982) [hereinafter *Outstanding Business*], 3.

<sup>30</sup> K. Tyler, "A Modest Proposal for Legislative Reform to Facilitate the Settlement of Specific Land Claims," [1981] 3 CNLR 1 at 1.

<sup>31</sup> Editor's note: See *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570, 83 DLR (4th) 381, [1991] 3 CNLR 79 (SCC).

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Robinson Superior Treaty are not in any formal process at the present time. Problems with the specific claims policy on treaty issues were recently described by the Canadian Bar Association:

The specific claims process has not proved to be an effective process or forum in which the treaty issues can be addressed. An obvious deficiency is the fact that it is limited as to its scope. Clearly, matters such as hunting and fishing rights and issues pertaining to social, economic and political subject-matter are not provided for in this forum. As a result, the specific claims policy is restricted to treaty land entitlements and monetary compensation.

The policy as presently constituted was developed unilaterally by the federal government with little aboriginal consultation. This unilateral approach to devising policy has always been a major grievance with the aboriginal peoples since it departs from the bilateral nature of the treaties.<sup>32</sup>

In fact, the specific claims policy booklet does refer to some Indian views, which can be summarized as follows:

- the narrowness of the lawful obligation criterion
- the need to deal with pre-Confederation claims
- the need to deal with treaty harvesting and resource rights
- the nature of the governments' trust responsibility to Indians
- relaxed rules for relevant evidence
- technical defences not applying to evaluation of claims
- Indian access to Justice Canada legal opinions
- abolishing the federal Office of Native Claims
- funding of court actions
- increased funding at all stages of the claims process
- equitable principles of compensation, including restoration of lands held by third parties.<sup>33</sup>

With the exception of funding increases, it is not apparent that any of the Indian views itemized above found their way into actual policy or practice. And, as will be seen, all of them are still issues.

The basic message in this section of the discussion paper is that the problems of policy and process have long been known. Failure to deal with them has caused the frustration and delay that have ground claims settlements in Ontario to a virtual halt.

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<sup>32</sup> *Aboriginal Rights*, note 10 above, 54.

<sup>33</sup> *Outstanding Business*, note 29 above, 15-16.

The first three sections of this chapter highlight the three most vital issues that must be addressed in order to achieve a functional claims policy: the concept of lawful obligation, the role of the Crown as fiduciary, and government's invidious conflict of interest throughout the process.

This is not to say that the other issues discussed are unimportant: they are the bitter aloes on which the parties feed daily and, over the short term, are the most amenable to change. In fact, there is no element of the current process that could not be improved. The question in each instance is how much improvement, how soon.

### LAWFUL OBLIGATIONS

These problematic words date from the 1969 White Paper which proposed termination of Indian status, treaties, and reserves. In proposing these devastating actions, the federal government did say that its "Lawful obligations [to Indians] must be recognized."

To Indian people, the phrase "lawful obligations," from its inception, has been a cause both of confusion and controversy. Many regard it as an unsatisfactory guide – in practice, if not in theory – by which to measure the validity of their claims.<sup>34</sup>

For years, all concerned have wrestled with the relationship between "lawful," "legal," "equitable," and "fair." In April of 1982, the term "constitutional" also became relevant. But just the following month, the federal government issued its specific claims policy which attempted, within the limits of "guidelines," to define lawful obligations.

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-fulfilment 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.<sup>35</sup>

<sup>34</sup> M. Bossin, "Beyond Lawful Obligations," in B. Morse, ed., *Indian Land Claims in Canada* (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians, Walpole Island Research Centre, 1981), 65.

<sup>35</sup> *Outstanding Business*, note 29 above, 20.

It will readily be seen that the Indian views noted above did not find their way into the concept of lawful obligations especially if it is noted that pre-Confederation claims are not considered, nor are treaty promises of resource harvesting or services. This is especially important to Ontario First Nations since there are more treaties in the Great Lakes watershed by far than in all the rest of Canada. Almost all date from the pre-Confederation period.

As a result, crucial issues such as self-government, education and health services, hunting, fishing, and trapping rights – to name only a few – cannot be negotiated as “lawful obligations” of the Crown.

The Government views treaties as setting out limited legal obligations, being those arising from the written terms of the treaties, and certainly not those implicit in the “spirit and intent” of treaties as well. In some cases, in line with the courts, the Government has said that reasonable understandings and/or verbal promises which were not included in the final text of treaties should be respected as well.

...  
From the government perspective of respecting lawful obligations arising under the written terms of the treaties, most obligations have been met and in many cases exceeded. Admittedly, there are outstanding issues with respect to treaty land entitlements. As well, hunting, fishing and trapping rights under treaties have not been clearly and satisfactorily resolved.<sup>36</sup>

The essential element to a functional claims policy is express acknowledgment that, in assessing government conduct past and present, the appropriate standard to be met is that of a trustee or fiduciary. This has been articulated twice by the Supreme Court of Canada: *Guerin*<sup>37</sup> and *Sparrow*<sup>38</sup> (1990). But the policy deals with these concepts only obliquely, in a section headed “Beyond Lawful Obligation”:

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- 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.<sup>39</sup>

<sup>36</sup> *Aboriginal Rights*, note 10 above, 53-54.

<sup>37</sup> *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, [1985] 1 CNLR 120.

<sup>38</sup> Note 3 above.

<sup>39</sup> *Outstanding Business*, note 29 above, 20.

At least one claimant was able to use these provisions effectively:

The commitment to settle claims considered to be beyond lawful obligations did result in probably the most significant settlement to date, namely, the White Bear in Saskatchewan . . . The government was prepared to accept this claim for negotiation based on certain improprieties involved in the sale of Indian lands by government officials.<sup>40</sup>

Even so, the concept of "beyond lawful obligation" falls far short of the mark of full fiduciary responsibility. One might say that all equitable rules are outside the policy and this is not a fine legal point. In the *Guerin* case, for example, the court found "equitable fraud," but not common law or "legal" fraud. Would that claim fall within the specific claims policy today? Does government accept fiduciary responsibility for its dealings with Indian rights, resources, lands, and other assets? The perception is that it does not, and this issue is discussed further below.

In fact, the Indian view is that the claims policy operates with general disregard of existing law. *Miller v. The King*,<sup>41</sup> a Supreme Court of Canada decision from 1950, held that the federal government can be liable for Indian moneys as far back as 1840, but the policy does not accept claims dating prior to 1867. In Ontario, that makes a big difference since the administration of Indian funds between 1840 and 1867 was a continuing scandal of the time.

Since 1982, the policy has not changed to incorporate emerging rules of law:

The fact is, federal land claims policy criteria are inconsistent with the developing law on aboriginal rights in this country. Landmark cases such as the recent *Guerin* (1984) and *Simon* (1985) decisions are ignored in the criteria for its comprehensive claims policy. For instance, the *Guerin* decision confirmed the federal government's fiduciary duty to aboriginal peoples and the responsibility it has for protecting aboriginal and treaty rights. In *Sparrow* (1990) the Supreme Court of Canada said that Section 35 of the *Constitution Act, 1982* is a solemn commitment to aboriginal peoples which must be given meaningful content by government legislation, practices and policies. The federal government has yet to respond in any significant manner to the requirements delineated in these decisions.<sup>42</sup>

The result is that government takes a very narrow view of what claims might qualify within its own definition of lawful obligation. And government has recognized all along that this would be a source of difficulty. In some cases, notably the BC "Cut-Off Lands," its own policy was not followed.

<sup>40</sup> D. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (1986) [unpublished], 15.

<sup>41</sup> [1950] SCR 168, [1950] 1 DLR 513, 5 CNLC 298.

<sup>42</sup> *AFN's Critique*, note 12 above, 6.

In practice, the government has entered into some settlements on the advice of the Minister of Justice where a lawful obligation could probably not have been enforced by the courts. This is certainly the case with the B.C. "Cutoffs" claim in which questionable alienations of reserve land were confirmed by federal and provincial statutes. At the same time, there has been considerable caution about establishing precedents incapable of consistent application, primarily because of cost.

This caution has been countered by Indian groups' contentions that the government should go beyond compensation for legal wrongs to recognize the social and moral aspects of claims. In this context, early twentieth century alienation of approximately 700,000 acres of fertile land from various Indian reserves on the prairies is cited as an example. Although Indian consent was obtained, the means of doing so (e.g., spot cash payments authorized by statute) are often difficult to justify in light of over-population and poverty on some Indian reserves today.

It is clear that Indian expectations of what the claims process should achieve in righting past wrongs goes far beyond what the government has hitherto been prepared to consider.<sup>43</sup>

Even the provincial officials in British Columbia had difficulty with the definition of lawful obligation as set out in the policy:

However, even getting Canada to agree with itself on the definition of a specific claim is problematic. The "Outstanding Business" policy statement identifies B.C.'s cut-off claims as specific claims, as does the recent federal status report. But a document sent to the Province of British Columbia seeking clarification about the nature of specific claims says, "Differences Between Specific and Cut-off Land Claims." Strictly speaking, cut-off claims are not specific claims.<sup>44</sup>

The problem in BC is that the cut-off lands were taken legally, by statute, but immorally in all the circumstances. No parallel exception has been extended to Ontario where, for example, a 1924 statute deprived most First Nations of one-half of the value of their mineral resources. The rules should be the same for everybody. And the rules should be broader rather than narrower.

Even before the specific claims policy was formalized in 1982, it was obvious to all concerned that the threshold standard of obligation would govern the utility of the entire process.

In light of the need for a satisfactory resolution for all parties, the case is argued for a broad definition of the obligations upon the federal government which are "lawful" in the truest sense of the word. This issue is by far the most complex to be dealt with in developing a new model, yet it is obviously fundamental.<sup>45</sup>

<sup>43</sup> DIAND, "Office of Native Claims Reference Book" [unpublished] [hereinafter "ONC Reference Book"], 18.

<sup>44</sup> E. Denhoff, "Specific Land Claims: How Does a Tribunal Deal with Them?" in "Native Land Issues (See You in Court)" (Canadian Bar Association Symposium, Winnipeg, April 1979) [hereinafter "Native Land Issues"], 9.

<sup>45</sup> Morse, ed., note 34 above, 9.



All the current problems of denied access, grudging validation procedures, arbitrary principles of compensation, frustration, and repeated delays can be traced to problems with the concept of lawful obligation as set out in the specific claims policy. Fortunately, there is another standard available.

### THE CROWN'S FIDUCIARY OBLIGATIONS TO INDIANS

Much learned debate has centred on the appropriate standard of fairness that the Crown should have observed in its dealings with Indian rights, lands, and resources. To many, the legal standards imposed on a formal trustee seemed appropriate, but government resisted.

Many Indian claims will probably remain outstanding until the legal nature of the historical Indian-government relationship is clarified. The underlying contention in such claims is that the federal government is the Indians' legal trustee and that particular actions taken by the government over the years have breached this trust responsibility by not being in the best interest of Indians. In litigation where this issue has been raised, the government has taken the position that it does not have a responsibility for Indians or Indian lands. The term "trust" is perhaps better defined as a "political" or "administrative" trust which, in effect, is merely another way of expressing federal constitutional responsibilities for Indians.<sup>46</sup>

Government's aversion to trust responsibility, enforceable by the courts, can be attributed to several considerations: the desire to limit liability, to exclude court direction on appropriate conduct, continued reliance on limitation periods, and, above all, a fear that past conduct might be measured by current morality.

Others felt that the duties of a trustee had not changed so much that past transactions should avoid scrutiny by modern principles of equity. Ken Tyler recommended that the standard be legislated retrospectively.

Contemporary morality would not be anachronistically applied to past events if it were now enacted that all Indian reserve lands, monies, and other assets which were, at any time, held by the Crown for the use and benefit of any Indian or Indians, be deemed to have been held on an express trust.<sup>47</sup>

At the same time, many First Nations had to put the issue before the courts since, without an appropriate legal standard of conduct, they would have no cause of action against the Crown. The *Guerin* case,<sup>48</sup> arising out of an improvident leasing transaction on the Musqueam Reserve in Vancouver, was the first to reach the Supreme Court of Canada.

<sup>46</sup> "ONC Reference Book," note 43 above, 21.

<sup>47</sup> Tyler, note 30 above, 25.

<sup>48</sup> Note 37 above.

For policy purposes, still others examined a standard of fairness not overburdened by strict principles of law. Gerard La Forest, then a law professor and now justice of the Supreme Court of Canada, made such a proposal to the Office of Native Claims in 1979:

... we are not so much concerned with a *legal obligation* in the sense of enforceable in the courts as with a *government obligation of fair treatment* if a lawful obligation is established to its satisfaction. Consequently, technical rules of evidence that have a place in ordinary actions should not be relevant. Similarly, lapse of time should afford no defence to liability by the Crown.<sup>49</sup>

This proposal may have been drawn from the U.S. experience with the Indian Claims Commission. The 1946 act establishing the commission directed it to hear, in addition to legal and equitable claims, claims of a moral nature based upon the principle of "fair and honourable dealings."<sup>50</sup>

In practice, claims based only on their moral nature rarely succeeded before the U.S. commission. But the U.S. Court of Claims, sitting in review of the commission, did give substance to the clause:

In any event, the United States is held liable under the "fair and honourable dealings" clause, not because it has title to the property [i.e. as trustee] but because, by its own acts, it has undertaken special duties which it has failed to fulfil.<sup>51</sup>

None of these principles found their way into the specific claims policy, but they were soon reconciled as part of Canadian law: by the Supreme Court of Canada in its 1984 watershed decision in *Guerin*.<sup>52</sup>

The *Guerin* decision did not answer all possible questions about Crown obligations to Indians. But it did examine standards of conduct and, in connection with the land surrender at issue, came down in favour of the fiduciary standard in preference to the express trust. The reasoning of the majority in our Court sounds very much like the U.S. Court of Claims:

Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself

<sup>49</sup> G. La Forest, "Report on Administrative Processes for the Resolution of Specific Indian Claims" (Ottawa: DIAND, 1979) [unpublished], 14.

<sup>50</sup> See S. Henderson and R. Barsh, "Indian Land Claims Policy in the United States," in Morse, ed., note 34 above, 183.

<sup>51</sup> *Lipan Apache Tribe v. U.S.*, 180 Ct.Cl. 487, at 502 (1967).

<sup>52</sup> Note 37 above.

where the Indians best interests really lie . . . This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.<sup>53</sup>

Some writers suggest that even this formulation would not exclude an express trust in another case where specific personality is in issue. For example:

Another issue concerns Indian assets other than reserve lands. Is the Crown still a trustee with established trusteeship powers over Indian moneys held by the Crown for Indians or . . . is the Crown now but a significant fiduciary with powers not yet delineated?<sup>54</sup>

Clearly the Court preferred the more flexible and unique (*sui generis*) fiduciary relationship to the formalized structure of the express trust. While the analysis was weak in the case, and some would say wrong with respect to the American precedents, the result was unmistakable: where the Crown assumes, or Parliament imposes, duties with respect to Indians and lands reserved for the Indians, and the performance of those duties involves an exercise of discretion, the courts will impose and enforce the standards of a fiduciary upon and against the Crown.

In terms of developing claims policy, the only real question was how far the "blunt tool" of fiduciary obligation would be extended beyond the facts of *Guerin*. We now know the answer to that question.

Initially, Justice Canada took the position that *Guerin* only applied in reserve land surrender situations. The Federal Court of Appeal quickly moved to correct that error by extending the fiduciary obligation to expropriations of reserve land: *Kruger v. The Queen*.<sup>55</sup>

One writer has noted that the Supreme Court itself went beyond its narrower ruling in *Guerin* when it later had occasion to comment on the case:

"[I]n *Guerin* this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them." The Court would seem to have moved to discount a distinction between surrendered and unsurrendered reserve lands.<sup>56</sup>

<sup>53</sup> *Guerin v. R.*, [1984] 2 SCR at 383, [1984] 6 WWR at 500, [1985] 1 CNLR at 137 (Dickson, J).

<sup>54</sup> D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989), 421-22.

<sup>55</sup> [1986] 1 FC 3 (CA), 17 DLR (4th) 591, [1985] 3 CNLR 15 (Fed. CA).

<sup>56</sup> R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301 at 325, quoting and commenting on *Canadian Pacific Ltd. v. Paul* [1988] 2 SCR 654 at 676, 53 DLR (4th) 487 at 503, [1989] 1 CNLR 47 at 59.

By this point, the only large issue was what the courts might do about treaty obligations which are not proprietary or compensatory in nature. In general terms, the United States again provides a lead:

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of Court, it has charged itself with moral obligations of the highest responsibility, as disclosed in the acts of those who represent it in dealings with the Indians, and should therefore be judged by the most exacting fiduciary standards.<sup>57</sup>

Would these principles extend to treaty promises of hunting, fishing, wild rice harvesting, education, etc.? One writer thought that the fiduciary's duty of loyalty made such extensions necessary.<sup>58</sup>

It has, however, been section 35 of the *Constitution Act, 1982*, which has turned the key and opened wide the door. In *Sparrow v. The Queen*, the Supreme Court of Canada has ruled that the Crown's fiduciary obligations extend to the aboriginal and treaty rights of the aboriginal peoples of Canada.

In our opinion, *Guerin* together with *R. v. Taylor and Williams* . . . ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginal is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historical relationship.<sup>59</sup>

The Court also notes that "the honour of the Crown is at stake in dealings with aboriginal peoples."<sup>60</sup> Clearly the Court anticipates the legal consequences of a fiduciary relationship over a broad range of aboriginal and treaty rights issues. Yet it also recognized a role for political resolution of these issues.

Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.<sup>61</sup>

It is not possible at this point to say with precision what the exact nature of the Crown's fiduciary obligations will be in each individual fact situation of the 600 to 800 known claims, much less those which can be anticipated on the basis of recent court rulings.

<sup>57</sup> *Seminole Nation v. U.S.*, 316 U.S. 286 at 196-7 (1942).

<sup>58</sup> D. Johnston, "A Theory of Crown Trust towards Aboriginal People" (1986) 18 Ottawa L.R. 331.

<sup>59</sup> Note 3 above, [1990] 1 SCR at 1108, 70 DLR (4th) at 408, [1990] 3 CNLR at 180.

<sup>60</sup> [1990] 1 SCR at 1114, 70 DLR (4th) at 413, [1990] 3 CNLR at 183.

<sup>61</sup> Note 59 above.

It is, however, necessary to say that any claims policy which does not now incorporate fiduciary obligations over a broad range of transactions, including treaty promises, will be so far distanced from the law of the land that no one could repose any faith in its capacity to resolve claims in a fair and equitable manner.

And once that fundamental principle is built in to claims policy, it will be much easier to address the second most common complaint: government's role as judge of its own conduct.

### THE CONFLICT OF INTEREST ISSUE

One of the most obvious criticisms of the process is the conflict of interest the federal government has in attempting to deal with these matters. On the one hand the federal government has a fiduciary or trust-like responsibility towards aboriginal peoples to act in their best interest, while at the same it seeks to act in its own best interests. Clearly the interests of the two parties are not the same and often directly conflict. Therefore, how can one party to resulting disputes control the resolution process and expect the others to perceive that the process results in fair and just settlements?

Through these policies the federal government sets itself up as the judge and jury in dealing with claims against itself. It sets the criteria, decides which claims are acceptable, and controls the entire negotiation process, including funding support.

Clearly, in the democratic world there are few examples of such a grievance procedure being so totally controlled by one party to a dispute. Seventeen years of experience have shown this to be an inadequate dispute resolution mechanism.<sup>62</sup>

The current process whereby the Office of Native Claims and the Department of Justice ascertain the historical and legal merits respectively of a claim has been criticized as inequitable and requiring modification by the presence of an impartial third party.<sup>63</sup>

The issue of conflict of interest arises at several levels in the claims process.

#### 1. Historical

Except in rare cases of honest error or oversight, most claims are based on fact situations where the Crown has advanced its own, or some other party's, interest at the expense and to the detriment of Indians. The concept of fiduciary obligation provides an equitable standard to determine which of these claims should have access to a resolution process.

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<sup>62</sup> *AFN's Critique*, note 12 above, 3.

<sup>63</sup> "ONC Reference Book," note 43 above, 17.

## 2. Submission of a Claim

The claims policy puts the burden on the claimant to establish a valid claim. This is inconsistent with the legal duty of a fiduciary, or a trustee, to account for the management of assets. Thus, for most claims admissible under the current policy, government has imposed an obligation on claimants which conflicts with its own duty to demonstrate the legality, propriety, and fairness of impugned transactions.

## 3. Validation of a Claim

This has proven most problematic. Without acknowledging any fiduciary obligation at any level, the fiduciary of today assesses the conduct of the fiduciaries of the past and determines, in secrecy, the validity of every claim submitted according to criteria which are an undisclosed mix of legal, political, and budgetary considerations. There is little doubt, however, that the greatest single factor in determining validation is the Justice opinion.

The Specific Claims Branch of DIAND has responsibility to research claims and present them to the Department of Justice for an opinion as to whether there are outstanding "lawful obligations." If a claim is judged "valid" by the Department of Justice and accepted by DIAND for negotiation, the Specific Claims Branch has the additional mandate of negotiating the claim to determine compensation. DIAND also has the responsibility to determine what monies should be provided to the Indian bands for research to develop and negotiate claims.

Aboriginal leaders have expressed many times their perceptions of numerous situations of conflict of interest that the Specific Claims Branch may be in.<sup>64</sup>

The Union of Ontario Indians has described the role of the Department of Justice in providing legal opinions:

The legal analysis takes two to four years to complete. This usually means that there are between two and five lawyers who bear primary responsibility for an opinion, since the average time a lawyer remains in that part of the Department of Justice is less than two years. When an opinion is given, it must still pass through the "Native Law" section of the Department of Justice – a process that takes between six months and two years, and which result[s] in the initial opinion being sent back for more work. It has never been made clear whether the role of the Department of Justice is that of an objective "judge" or that of lawyers defending a client. In trying to fulfil both functions, Justice lawyers have a clear conflict – usually resolved in favour of the government.<sup>65</sup>

Part of the validation process is an invitation to the claimants to submit the legal basis of their claim; in effect, to disclose their legal advice. There is, of course, no reciprocity since Justice Canada's advice is treated as confidential between solicitor and client. The

<sup>64</sup> *Aboriginal Rights*, note 10 above, 54-55.

<sup>65</sup> Union of Ontario Indians, "Land Claims Policy Development," submitted to the Indian Commission of Ontario by the UOI, 19 September 1990 [hereinafter UOI, "Land Claims Policy"], 3.

client, DIAND, has given no indication of waiving confidentiality, probably because Justice lawyers have said that it can't. One reason for this reticence can be inferred from documented instances where Justice opinions are inconsistent on the same point of law.

David Knoll provides an example of inconsistent legal opinions leading to different results in the validation of two similar claims.

[T]he autonomy of Justice lawyers has led to us getting opinions on different claims which are blatantly contradictory. For example, the question of when precisely is a reserve created is a factor in many claims. In the case of Brokenhead Band, the reserve was surveyed in 1874 and 1876, but the Reserve was not confirmed (with boundaries as amended by the surrender) by Order-in-Council until 1916. The opinion of one Justice lawyer was that the reserve did not exist until the Order-in-Council was passed . . . In the case of the Gamblers Band and Waywayseecappo Band, a reserve had first been surveyed for the combined Band in 1877, but the location of it was not acceptable to the majority of the Band, and caused the Band to split into parts. The Orders-in-Council confirming [the new] reserves in 1880 referred to the boundaries as amended by the 1877 agreement. The opinion of the assigned Justice lawyer in this case was that an Order-in-Council was not required to create a reserve, and that it was the boundary surveyed in 1877 which should count for claims purposes. Thus, one Justice lawyer is saying that an Order-in-Council is necessary before a reserve "exists" . . . while another says that such an Order-in-Council is not necessary . . .<sup>66</sup>

Inconsistencies and other technical problems that exist include: the validation process is based on legal principles, but the involvement of the Minister of Indian and Northern Affairs in the final determination of the claim as to validity and compensation points to the political nature of the process; the concept of "lawful obligation" is not specifically defined; the available jurisprudence gives limited guidance, thereby allowing great latitude for individual lawyers' opinions to govern the decision on validity; and Department of Justice opinions are kept secret by the Government so that an Indian claimant never knows why a particular claim has been accepted or rejected.<sup>67</sup>

[T]he most fundamental criticism of the 1982 claims policy is that Canada still remains the ultimate adjudicator of claims made against it. This has been a constant criticism of the Federal Government's native claims policy which they have repeatedly ignored. The Federal Government remains the ultimate determiner of what claims will be funded, validated and accepted for negotiation. No appeal is available except to commence an action through the Courts. There is not even the least effort to the image of any sense of neutrality. This situation, more than any other, is what condemns this policy and process to be viewed as biased, arbitrary and unfair.<sup>68</sup>

<sup>66</sup> Treaty and Aboriginal Rights Research Centre (TARR), *Discussion Paper: Specific Claims Policy and Process* (Winnipeg: TARR, 1986), 2-3.

<sup>67</sup> *Aboriginal Rights*, note 10 above, 55.

<sup>68</sup> Knoll, note 40 above, 15.

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The Penner Committee, travelling across Canada to investigate Indian self-government, encountered much comment on Indian claims policy, including the well-known allegation of conflict of interest in the claims process:

The process was condemned by Indian witnesses for its lack of independence from the Federal Government and for its unilateral imposition of conditions. Although many claims have been filed since the Office of Native Claims was established, few have been settled:

"The federal government right now is judge, jury, executor. They are everything rolled one, and that is specifically the problem now. When negotiations break down there is no way we can arbitrate that situation. It is totally in the hands of the government to determine what they want to do with that process if we do not want to negotiate any further or if we fail to come to an agreement on negotiation. So anything where we could take some of the authority away from the federal government in that delaying would be of benefit. It would be a positive step." (Association of Iroquois and Allied Indians, Special 16:25)

"It is a strange rationale to allow a bureaucrat to have the power to decide on what is and what is not a legitimate land claim. In the policy established for the settlement of specific land claims, it is the lawyers of the Department of Indian Affairs and Northern Development and Justice who determine the merit of the claim. In this way, they are both defendant and judge. To further complicate matters, the opinions they write regarding the claims are confidential. Therefore it is safe to state that they have taken on the role of protecting the federal government and the provinces from claims that may be filed by the First Nations. Claims that they feel have merit they will negotiate out of court, although the compensation they would award would be in proportion to the strength of the claim. So in this case it would be best to go to court in order to ensure fair treatment." (Restigouche Band, Special 22:10).<sup>69</sup>

Not much more need be said about the nature of this problem. Everyone who has attempted to validate a claim has his or her anecdotes about the process. Some are amusing; many are frightening. The fears of the academic writers are, if anything, magnified in practice.

The experience of the Mississaugas of New Credit bears mention here. That First Nation found that validation of their claim was revoked, three years after the fact, at a time when they were led to believe they were close to a negotiated settlement. It is difficult to give credence, good faith, time, and effort to a process so patently arbitrary.

#### **4. Compensation Negotiations**

For many claimants, validation is the easy part of the process. It is when the claim is accepted for negotiation that the real problems begin.

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<sup>69</sup> Penner Report, note 13 above, 14.



The process of settling claims is often a complex one, depending on the nature of the claim and the type of compensation being sought. Specific claim settlements can vary, but most often consist of such elements as cash, land or other benefits. The criteria for calculating compensation may also vary from claim to claim according to the particular issues and obligations established in the claim and to the strength of the claim.<sup>70</sup>

The specific claims process is nasty, brutish, and long, very, very long. Correspondence and documents sit on bureaucrats' desks for extended periods of time without reply to letters and concerns of the claimants.<sup>71</sup>

The Departmental policy as opposed to the Government policy appears to be one of avoiding negotiations and therefore settlement, at all cost.<sup>72</sup>

To begin with, there is little doubt that claims are validated, in part, on the basis that they can be settled within foreseeable time and within the claims budget. Assuming that there is some rational appreciation of the nature of the claim, there should be no reason for failing to reach such agreement. But there are many reasons for the many failures which occur.

First, the Justice lawyer who may have to get the claim rejected at the first level is now the "expert" on that claim and comes to the fore as adversary/defendant/negotiator defending the public purse. And Justice lawyers do control the negotiation process.

In the negotiations, the Department of Justice lawyers tend to take control, rather than the Indian Affairs negotiators. This is because the crucial questions of validity and compensation are seen by Canada as legal questions. Though Canada tends to say that negotiations allow maximum control and participation by Band Councils, in fact the legalism of the standards and processes used by Canada makes the Councils into spectators while lawyers argue over fine legal points. Instead of participation, the process's legalism offers Chiefs and Councils frustration and bitterness over its unfairness.

Once the federal government adopts a legalistic stance, all the other parties are compelled to counter that by bringing in their lawyers and legal arguments. We might as well be in court, where at least there is a judge to keep order, and a set of rules everyone lives by.<sup>73</sup>

Second, all the elements which are supposed to be "history" by the time a claim reaches negotiation are still on the table. Was the land reserve land? Could the claim succeed in court? Would limitation periods apply? Does the First Nation have credible witnesses? Et cetera. Et cetera. In the extreme case, new information (or a new lawyer looking at old information) appears and the First Nation is back to square one, or shoved off the board altogether.

<sup>70</sup> *Outstanding Business*, note 29 above, 24.

<sup>71</sup> V. Savino, "The Blackhole' of Specific Claims in Canada: Need It Take Another 500 Years?" in "Native Land Issues," note 44 above, 14.

<sup>72</sup> Allen Ruben, quoted by Savino, note 71 above, 14.

<sup>73</sup> UOI, "Land Claims Policy," note 65 above, 8.

Third, claimants are invited to accept the unacceptable. In some cases, this will imply taking money instead of land the First Nation clearly wanted returned. On other occasions, claimants are asked for a release of obligations that are not part of the claim at hand. Such positions can delay negotiations for so long that claimants seriously wonder why the claim was accepted for negotiation in the first place.

Fourth, monetary compensation is often offered in unrealistically low amounts. This is understandable in terms of "opening positions," but those positions do not generally change as negotiations progress: they become entrenched. There are many examples of claims that languished at the \$100,000-\$300,000 level for years, only to be settled in a final rush for \$2 million plus. Frequently, the government position on compensation ranges from the intransigent to the irrational. Two examples come from the files of the ICO and are summarized here.

### ***Mohawks of Gibson***

After this claim was rejected and litigation was commenced, the federal government agreed to negotiate settlement. The First Nation obtained a professional appraisal which, they felt, put potential settlement within their expectations.

At a negotiation session, the appraised value was decimated by the ONC representative. When asked for the basis of his appraisal, he indicated that he had made a few phone calls to realtors in the area and decided to substitute his valuation for the professional appraiser's. Negotiations immediately broke down as the First Nation did not expect that the process could meet their expectations.

### ***Batchewana Band***

When the federal government finally agreed to return Whitefish Island to reserve status – an issue that had stalled the claim for several years – the opening offer was zero compensation.

Counsel for Batchewana pointed out that the accepted basis for the claim was that the island had been undervalued at the time it was taken, allegedly for railway purposes. Accordingly, compensation should, in part, be based on placing the difference in value into the trust account at the relevant time and letting it earn interest as prescribed by regulation to the date of settlement.

The federal government's response, backed by a Justice opinion, was that 20 per cent of the interest should be taken out of the calculation each year in order to generate a "proper" settlement figure. The First Nation remains unconvinced that government should be able to deprive them of fair value in the first instance and then reward itself with 20 per cent of the interest that the trust moneys would have earned every year since.

In addition to these specific examples, there are dozens of others in Ontario – perhaps hundreds nationally – of deadlines missed, meetings cancelled, undertakings not performed, and the eternal search for a "mandate to settle." All of this occurs despite the fact that a mandate to settle had apparently been given when the claim was accepted for negotiation.

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In cases where the Minister accepts a claim as negotiable in whole or in part, the Office of Native Claims is authorized to negotiate a settlement with the claimant on behalf of the Minister and the federal government.<sup>74</sup>

While all this unfolds, First Nations are obliged to sustain their efforts towards settlement by taking out loans from the federal government which will eventually be a first charge against settlement funds. Thus delays are not only frustrating, they are expensive, and it is frequently the claimants who pay.

No one expects that validation of a claim will give a First Nation open access to the federal treasury. Everyone, however, expects that even in the clearly adversarial atmosphere of claims negotiations, First Nations will have the opportunity to negotiate a reasonable settlement in good faith and in the foreseeable future. That this is not happening in Ontario points to an immediate need to reconcile policy and practice.

The more profound issues of conflict of interest must also be addressed to assure First Nations that their claims are being fairly assessed. There is grave suspicion that this is not happening now.

#### **VAGUE WORDING: ARBITRARY INTERPRETATION**

Some observers think that the "Guidelines" in the specific claims policy have more legislative force in this country than section 35 of the Constitution. Until recently they certainly had more impact.

Yet the policy contains many terms which are arbitrarily defined and redefined without obviously improving the claims resolution process. Some of the guidelines are simply offensive and contrary to commonly accepted principles of law and equity.

#### **Degree of Doubt**

An example of arbitrary definition is the term "degree of doubt."

The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the *degree of doubt* will be reflected in the compensation offered.<sup>75</sup>

"Degree of doubt" was originally incorporated into the validation process where an individual claim was considered to be weak, or where there was an issue over the reserve status of land. Normally, this doubt would be expressed in the validation letter and negotiations would proceed, with the consent of the claimant, on the basis that compensation would be discounted.

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<sup>74</sup> *Outstanding Business*, note 29 above, 24.

<sup>75</sup> *Ibid.*, 31 [emphasis added].

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After 1985, as part of an internal “toughening” of the process, degree of doubt became a lurking spectre that might crop up at any stage of the process.

One of the more disconcerting changes brought in at that time was the concept of “discounting” with regard to calculating compensation. Discounting is done by the Indian Affairs in conjunction with the Department of Justice and involves reducing the amount of compensation to be offered on a claim by a percentage equal to the federal government’s assessment of the chances for success a claim would have if submitted to the courts. Therefore, if a claim was assessed as having a fifty percent chance of being successfully litigated, the government would cut the compensation by fifty percent.

This ludicrous concept is just an example of the confounding impediments First Nations run into when attempting to resolve claims under this policy. This new more “rigorous” interpretation of the policy has failed to significantly improve the paltry annual average of claims settled.<sup>76</sup>

The Mississaugas of New Credit suffered from this, when at the last formal negotiation meeting the Office of Native Claims for the first time indicated that they had a 50 per cent degree of doubt that would affect settlement. But this was merely a prelude to government’s withdrawal from negotiations shortly afterward.

As the Assembly of First Nations indicates, the perception is that degree of doubt is a budgetary measure perpetrated by Justice lawyers who “guesstimate” a claim’s chances of success in court. It is seen as having little to do with factual weakness of the claim or with legal precedent – many of the issues are untested in court – or with any realistic assessment of prospects in court, unless these are based on technical defences supposedly irrelevant to the claims process.

All of this is betrayed by the actual calculation Justice makes: usually a 50 per cent degree of doubt. The reasons for the actual calculation are never conveyed to the claimant, leaving the impression that the calculation was in fact arbitrary.

### **Compensation: Special Value to Owner**

If the concept of “degree of doubt” is arbitrary, other guidelines for compensation are offensive. An example of the latter is the concept of “special value to owner.”

Compensation shall not include any additional amount based on “special value to owner,” unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.<sup>77</sup>

This principle is completely out of step with Indian views about land. First, it might reasonably be said that all reserve lands have special value when it is virtually impossible

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<sup>76</sup> *AFN’s Critique*, note 12 above, 12.

<sup>77</sup> *Outstanding Business*, note 29 above, 31.

to replace them under existing land acquisition policies. Second, special value is limited to economic value, which gives little or no regard to truly unique sites such as Whitefish Island or to sites of spiritual significance such as the burial ground at Oka or the Toronto Islands. Such considerations may be difficult to quantify, but certainly not impossible. In the Whitefish Island claim, for example, the proposal (presumably rejected) was for establishment of a trust fund to promote traditional use of the site.

**Compensation: Loss of Use**

Similar problems arise with respect to loss of use which, in fact, rarely forms part of compensation packages.

Compensation may include an amount based on the loss of use of the lands in question, where it can be established the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.<sup>78</sup>

One would think that in situations where a First Nation has been wrongfully excluded from possession or use of its land, the nature of the loss is obvious even if its dollar value is not. Yet, time and again, the federal government approaches compensation as though loss of use only applies in special cases. That approach is fundamentally wrong.

The Government of Canada accepts the principle that being deprived of the use of land can and should lead to compensation to the Band. But the Government of Canada fails to follow the law as set out in the *Guerin* case: it tends to seek what the band use of the land would have been, rather than what reasonable use of the land would have been.<sup>79</sup>

There is an apparent gulf between Indian and government views of what legal principles of compensation do, or should, apply to native claims. With an understanding of Indian views of their relationship to the land and the realities of securing additional reserve land today, it should be possible to develop acceptable principles and resolve claims based upon those principles.

**Costs of Negotiation**

A further perceived injustice results from the approach taken to costs of negotiation.

Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.<sup>80</sup>

<sup>78</sup> Ibid., 31.

<sup>79</sup> UOI, "Land Claims Policy," note 65 above, 9.

<sup>80</sup> *Outstanding Business*, note 29 above, 32.

In all cases of validated claims, a reasonable portion of the costs of negotiation would be 100 per cent, especially in view of the fact the First Nations have to borrow from government to cover those costs in the first place. That is a concern for First Nations.

Their legal advisers are troubled by the review of their fees by the Department of Justice, whose staff are not always familiar with the realities of private practice. In some cases, the impression may be received that if the lawyers are "good guys" and make the government look good, their fees will be covered on a generous scale. This, of course, has serious implications for the clients.

Again, as with comprehensive claims, financial support is provided through loans which the claimant is expected to repay from eventual compensation. Claimants are at a disadvantage because they do not have the financial, administrative or legal resources to draw upon, except through this loan funding, which is very closely monitored and controlled by the department. Meanwhile the federal government has the resources of the entire federal bureaucracy to draw upon. Often, another round of wrangling takes place over how much of the claimants negotiation loans will be reimbursed if a settlement agreement is reached.<sup>81</sup>

One suggestion for change would be that a separate group, inside or outside of government, should deal with approval of negotiation costs and legal fees. Standard retainer agreements for legal services could be worked out in advance so that lawyers and clients both know what the payment will be and both will know that such payment will *not* come from negotiated settlement funds.

As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.<sup>82</sup>

As a general rule, a fiduciary who breaches fiduciary obligations will be required to fully indemnify the beneficiary. Both legal and equitable principles apply, but they are not applied now in claims negotiations.

### **Additional Defences**

In addition to the uncertainty of the guidelines for compensation, other concepts have crept into the process since these guidelines were published in 1982. The most notorious of these is the so-called "technical breach," which is used by government to avoid the guidelines that a First Nation has relied upon in advancing and negotiating a claim in the first place.

In Ontario, this concept was invoked to invalidate – years after validation – the claim of the Mississaugas of New Credit to 200 acres of valuable land on the Credit River reserved to them by treaty and never surrendered.

<sup>81</sup> *AFN'S Critique*, note 12 above, 12.

<sup>82</sup> *Outstanding Business*, note 29 above, 30.

The guidelines, in such a case, are quite clear:

Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.<sup>83</sup>

Long after this claim had been validated, and hundreds of thousands of dollars were expended on negotiation costs, the federal government decided that the guidelines did not apply since the breach was only "technical." This apparently meant that, although the taking was wrongful, the First Nation did receive some compensation, so no real damage was done. No consideration is apparently given in such cases to the question of whether or not payment for the land was adequate, or collected in a timely manner.

It should not be necessary to point out that dozens of claims involve the taking of lands where some compensation was paid. Many of these have been validated and some settled. Why the New Credit claim is different from the others may never be known. One suspects that the cost of settlement was the determining factor.

The common thread running through most, if not all, of the post-1982 glosses on the claims policy is that they do not pretend to promote claims settlement. Instead they frustrate or forestall claims settlements. Both policy and practice need immediate review.

#### **LACK OF AUTHORITY TO SETTLE**

The most disconcerting element of claims negotiation for claimant First Nations is the lack of apparent authority of the civil servants sent to the bargaining table. The history of negotiation is full of examples of commitments and undertakings dishonoured by anonymous bureaucrats back in Ottawa, and "done deals" set aside by higher authority.

In many cases, effective presentations at the bargaining table are wasted because the right people do not hear them. The bargaining table becomes a show that decision-makers do not see.

The unfairness of this to Indian claimants is obvious. Not so apparent is the toll it takes on government employees of a department whose greatest single self-identified problem is morale.

In 1987, the Director and most of the staff of the Specific Claims Branch either quit their jobs or asked for transfers. There was hope expressed in some quarters that the "new boys on the block" or "class of 88" could begin to cut through the pitfalls.<sup>84</sup>

Since 1987, more transfers have been sought and at least two negotiators have received medical treatment for job-related stress.

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<sup>83</sup> Ibid., 31.

<sup>84</sup> Savino, "The Blackhole," note 71 above, 15.

It is simple justice to all concerned that the negotiators have authority to do their job and that everyone knows the rules of the game. The "absence of mandate factor" must be eliminated or the sense of futility will continue indefinitely.

### THE EXTINGUISHMENT FACTOR

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that negotiation on the same claim cannot be reopened at some time in the future.<sup>85</sup>

This provision of the policy goes beyond the need for certainty and finality in claims negotiations. It implies, and experience has shown, that claims settlements are structured to ensure that no continuing obligations of government remain.

The Indian perception is that extinguishment is an echo of the 1969 White Paper which would have settled claims as part and parcel of a termination policy. Continuing obligations as part of claims settlements at that time would have clearly been inconsistent with the main objectives of the policy. It is not apparent, however, why continuing obligations should not be recognized now.

One reason why they are not in practice is that claims based on interference with the exercise of treaty rights, or the failure to extend services pursuant to treaty promises, are not admitted to the process at all. This has been much criticized as out of step with constitutional realities.

First Nations in Canada have had their aboriginal and treaty rights recognized and affirmed within Canada's Constitution since 1982. The accumulation of case law by the Supreme Court of Canada has assisted in defining the federal government's responsibilities toward the aboriginal peoples. Section 35 of the *Constitution Act, 1982*, requires that all laws and policy in Canada must be consistent with the recognition and affirmation of aboriginal and treaty rights. Despite this legal foundation, the federal government's approach to aboriginal matters has remained fundamentally unchanged and continues to be a source of frustration for the aboriginal peoples of this country.

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The underlying source of this contradiction is to be found in the opposing objectives of aboriginal peoples and the government of Canada. Whereas the First Nations have sought to have their rights recognized and implemented, the federal government's primary goal has always been to extinguish the "burden" of aboriginal rights and minimize its legal obligations.<sup>86</sup>

The Specific Claims Branch would never consider a claim, for example, based on one of the "outside" promises of the treaty, or even an elaboration of an inside promise in the negotiations leading up to the treaty.

<sup>85</sup> *Outstanding Business*, note 29 above, 24.

<sup>86</sup> *AFN's Critique*, note 12 above, 2.



For example, Treaty 3's wild rice as a treaty right claim could not be considered in the Specific Claims process as it now exists. Nor could the claim that education is a treaty right.<sup>87</sup>

Apart from the threshold issue of admission to the process – obviously designed to limit continuing obligations – the extinguishment factor separates negotiated settlements from future use of the land, especially where third parties are involved. First Nations can, presumably, acquire money by many means, but how can they replace unique parcels of land or the loss of rights to use land?

The Penner Committee commented on this problem:

Over the years Canadian governments have responded negatively to land claims made by Indians, often maintaining that there is no unsettled land available or going to great lengths to rebut the rationale for the claims. Unfortunately this negative attitude to Indian land rights has been shared by too many Canadians.

It is essential to point out the false premise and injustice of this response. While Canadian governments have been slow to find land to settle the Nishga claim, the B.C. cut-off claims, the Prairie entitlements, and many others, they have had no trouble finding land for much larger national parks, defence bases, hydro developments, airports and resource projects. Canada has set aside 130,168 square kilometres for national parks, yet only 26,335 square kilometres for Indian reserves. The Committee does not dispute the need for parks, defence bases and airports; but surely the land rights of the original inhabitants of this continent deserve as much or more attention. Canadians who consider themselves just and fair must reconsider their views on this matter.

The government should commit itself to this endeavour with at least the same effort it devotes to finding land for government.<sup>88</sup>

At some point, policy and practice will have to incorporate recognition of Indian rights as a source of continuing obligation and provide a forum for negotiation. For Indian harvesters, for example, no such forum exists today. The claims process could and should be adapted to address issues of economic harm in the past and future exercise of rights. In some cases, that may imply a drastic change from current policy.

Other elements of the resolution process need to be addressed, and not in the context of extinguishment.

Settlement of their claims ought to offer the Native people a whole range of opportunities: the strengthening of the hunting, fishing, and trapping economy where that is appropriate; the development of the local logging and lumbering industry; the development of the fishing industry, and of recreation and conservation.<sup>89</sup>

<sup>87</sup> Savino, "The Blackhole," note 71 above, 13.

<sup>88</sup> Penner Report, note 13 above, 112.

<sup>89</sup> Berger, "Native Rights," note 11 above, 9.

In the past the federal government has been slow in settling claims. The time has come to change this attitude by adopting an explicit policy of settling claims in a fair, just and prompt manner. Behind the policy should be the principle that Canada is obligated to restore a strong economic base to those who have shared their land and resources. Such an acknowledgement would recognize the original contribution of Indian people to the growth and development of Canada.<sup>90</sup>

And all of this implies, in appropriate claims, self-government issues currently excluded from the claims process. Certainly the land and economic elements of claims are closely related, from the First Nations' perspective, to the self-determination issue. But to pursue that at present, claimant First Nations can only apply to negotiate self-government under another, untested process and policy which may very well duplicate the claims experience over the course of the next few years.

Clearly, the rationale for extinguishment – and for all the limiting factors that flow from extinguishment – needs to be rethought in light of existing law and the realities of Indian communities. What should emerge is a vital and dynamic process that recognizes the continuing existence of those communities, distinct in their own right, and occupying a valued place in Confederation.

#### **LACK OF APPEAL MECHANISMS**

Assuming that a claimant First Nation has invested considerable time, effort, and expense towards the claims process, it will probably not be quick to abandon the process in favour of litigation. But when the process rejects their claims, there is no independent review of that decision.

The adversarial nature of native claims puts the government in a poor position when it attempts to control the exclusive arena for negotiated settlements of First Nation grievances and outstanding matters. The federal government has not attempted to provide for appeal mechanisms when claims are reflected or negotiations fail. Over the years First Nations have unsuccessfully proposed that arbitration or mediation mechanisms be put in place as part of the process. Clearly this is one policy area requiring fundamental review with a view to making it consistent with the current aspirations of First Nations and the constitutional rhetoric of the federal government.<sup>91</sup>

The policy does make provision for "Further Review" of a claim, but the essential element of independence from the original decision makers is conspicuous in its absence.

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<sup>90</sup> Penner Report, note 13 above, 116.

<sup>91</sup> *AFN's Critique*, note 12 above, 13.

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.<sup>92</sup>

This fundamental issue goes to the very credibility of the claims process. Methods of addressing the problem are discussed later in this paper.

### THE ROLE OF THE PROVINCE

A federal decision to pursue a speedy settlement of claims would require the federal government to deal with the provinces. There should be every effort to involve the provinces where appropriate in co-operative efforts to settle claims. The claims process should also include periodic joint reviews so that new situations can be accommodated as they arise.<sup>93</sup>

Provincial participation would be limited to those topics involving provincial lands or jurisdiction. However, refusal of a province to participate should not preclude reaching settlements with aboriginal groups or implementing the terms of such agreements to the fullest extent of federal constitutional authority. While negotiations continue, groups asserting aboriginal title should be fully consulted by federal and provincial governments well in advance of any proposed actions respecting the claimed lands or rights that might prejudice or otherwise affect the course of the negotiations.<sup>94</sup>

In Ontario, provincial involvement in claims operates at several levels. Primarily, the province was the beneficiary of the treaty process without, after Confederation, any obligation to honour or pay for treaty promises.

After 1900, this situation changed and Ontario was obliged to carry the expense of subsequent treaties concluded between Indians and Canada. Its responsibility to protect the exercise of treaty rights remained uncertain.

In 1924, Ontario became, by statute, the intended beneficiary of one-half of mineral royalties derived from most Indian reserves in the province. It may also have become (on its reading of the law) the unfettered owner of all unsold surrendered lands as of that date. Indians hotly contest the latter position and resent the former.

Under fundamental principles of constitutional law, Ontario owns and, for the most part, manages all Crown lands and resources in the province. It also regulates, *de facto*, fishing even though fishing is a federal responsibility.

This brief description illustrates many key areas where provincial involvement may be desirable or necessary in the claims process if a broad range of settlement options is to be negotiated. Provincial involvement is not needed where payment of compensation is the only issue, nor would it be needed if Canada were willing to expropriate lands to settle claims (which it is not willing to do).

<sup>92</sup> *Outstanding Business*, note 29 above, 25.

<sup>93</sup> Penner Report, note 13 above, 116.

<sup>94</sup> *Aboriginal Rights*, note 10 above, 28.

In some claims, federal validation is contingent upon provincial participation. In others, the province sits in on negotiations and may "top up" settlement funds where the province has acquired road or shore allowances from Indians without compensation. In one recent case, Ontario negotiated compensation for land rights on Manitoulin and adjacent islands without any federal involvement.

The province of Ontario has no formal claims policy, preferring to adopt instead an ad hoc approach which the government states is based on a combination of fairness and legal considerations.

There is, however, a role for the province in claims negotiated under the auspices of the Indian Commission of Ontario. That is a tripartite process and, in a sense, "belongs" to Ontario as much as it does to Canada and the Indians. Provincial involvement and commitment is both desirable and necessary if the ICO claims process is going to work effectively.

### SUMMARY

To reiterate the theme of this chapter, none of the points addressed here is new. Most were anticipated and commented upon prior to publication of the specific claims policy in 1982.

Indian representatives all stated, in the strongest of terms, that Indian views must be considered in the development of any new or modified claims policy. It was also pointed out, in nearly every case, that any national policy for claims resolution should take account of regional variations in the nature of claims and in the circumstances.<sup>95</sup>

It is apparent that regional realities in Ontario have not been accommodated in the policy. To the extent that the existence of aboriginal rights and aboriginal title is denied, and pre-Confederation claims are excluded from the process, large numbers of claims are not being dealt with at all.

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<sup>95</sup> *Outstanding Business*, note 29 above, 16.

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# THE COURT ALTERNATIVE

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.<sup>96</sup>

## INTRODUCTION

From the above quotation, it might appear that the resources of the courts are intended to supplement negotiation by deciding contentious issues of liability. Such use of the courts might be desirable in some instances, answering as it would the need for independent review and impartial judgment.

That scenario, however, forms no part of the claims process. There is no mechanism and no funding to facilitate court references as part of claim negotiations. Officially, government's position is that when litigation begins, negotiations end. Unofficially, several claims were put into the process by threatened or actual litigation: the cut-off lands issues in British Columbia, the Mohawks of Gibson claim, and the Sturgeon Lake settlement in Alberta are examples of negotiations prompted by litigation.

For most claimants, however, litigation is neither a supplement to negotiations nor a particularly effective threat that will bring government to the table. It is a distinctly alternative process to be resorted to only when all else has failed.

This chapter will review the difficulties attendant upon litigation as a means of settling claims. And the question of using the courts as a supplement to negotiations will be addressed.

## ARE THE COURTS A REAL ALTERNATIVE?

It should be noted that Indian claimants generally do not regard the courts as a vehicle for providing a satisfactory alternative. Rules of evidence, limitation periods, and the non-native foundations of the European and Canadian legal traditions are all factors which, from the Indian perspective, make the courts unappreciative of the Indian viewpoint which is provided in an oral culture with different conceptions of time and property.<sup>97</sup>

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<sup>96</sup> *Ibid.*, 19.

<sup>97</sup> "ONC Reference Book," note 43 above, 17.

Our general conclusion is that the Canadian legal system has not responded well in the past to aboriginal issues and that this problem is ongoing.

The difficulties with the legal system are particularly acute because in many ways the political process is also failing. Until *Calder*<sup>98</sup> aboriginal people were only involved in litigation in cases which were not of their own choosing. Aboriginal people were either bystanders, victims, criminal defendants, or not present at all. It is useful here to recall that the leading Canadian case on aboriginal title is still *St. Catherine's Milling*<sup>99</sup> where aboriginal people were not represented at all. It is only in very recent times that aboriginal peoples have begun to assert their rights as plaintiffs. They are seriously disadvantaged in this, in that they are effectively asking the courts to overturn 100 years of legal precedent that involved an entirely different view of Canadian history.<sup>100</sup>

Those quotations, from non-Indian sources, illustrate the fundamental problems of litigating native claims: the demonstrable fact that courts are inherently conservative institutions, drawing their analytical framework from precedents of the past, rather than as instruments of change. Furthermore, few judges have any training in the specialized body of law relating to native peoples and claims. These observations may seem strange in light of the Supreme Court's recent pronouncements, and unfair to judges of the lower courts who have brought considerable legal skills to bear to ensure that aboriginal peoples can exercise their aboriginal and treaty rights. Therefore, it must be put in context.

Prior to 1982, the courts upheld, sometimes reluctantly, Parliament's power to abrogate aboriginal and treaty rights, without any suggestion that compensation or other remedies ought to follow.

For example, it was way back in the early 1960's when the Supreme Court ruled that the government had *breached* the treaties in the enactment of the *Migratory Birds Convention Act*.<sup>101</sup>

[F]rom time to time Canadian courts have acknowledged that the federal government's curtailment of Indian treaty rights amounts to a breach of faith by Canada. The courts, in failing to accord the treaties superior status over federal legislation, have simply characterized the inconsistency as a situation in which the treaties were overlooked, or a case of the left hand having forgotten what the right hand had done.<sup>102</sup>

By this reasoning, treaty breaches were merely unfortunate accidents. But the courts ratified the breaches, not the treaties. One action for breach of contract based on promises

98 Note 7 above.

99 Note 4 above.

100 *Aboriginal Rights*, note 10 above, 25.

101 Savino, "The Blackhole," note 71 above, 4.

102 *Aboriginal Rights*, note 10 above, 53.

of fishing rights in an 1850 treaty was barred, in part, on the ground that the six-year limitation period had expired.<sup>103</sup>

[T]here can be no doubt that over the years the rights of Indians were often honoured in the breach . . . As McDonald J. stated in *Pasco v. Canadian National Railway Co.* [1986] 1 C.N.L.R. 35, AT P. 37 (B.C.S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."<sup>104</sup>

After 1982, the situation changed dramatically with respect to aboriginal and treaty rights. It should be noted, however, that all the cases – *Simon, Sioui, Sparrow* – which have emerged from the Supreme Court were based on prosecutions of Indians. In dealing with these cases, the Court has fashioned an effective defence based on section 35(1) of the *Constitution Act, 1982*, and has returned harvesting issues to the political arena as "a solid constitutional basis upon which subsequent negotiations can take place."<sup>105</sup>

Land claims cases have not fared nearly so well. With the exception of *Guerin*, which shaped the cause of action and remedies flowing from fiduciary obligations, the law reports are virtually devoid of Indian successes in lawsuits based on land claims issues.

There are many reasons for this. One of the more obvious is that many First Nations prefer to work within a fully funded negotiation process, no matter how unwieldy or unsatisfactory, rather than face the fears, time, expense, legal uncertainties, inequities, technicalities, and finality of the court process.

All these factors merit brief review and comment. Unless they are addressed, and some changes implemented, the courts are **not** and cannot become a real alternative when negotiations break down. This furthers the very real perception that native claimants do not have meaningful access to justice in Canada.

### CONSTITUTIONAL TIMES ARE CHANGING

There can now be no doubt that the Supreme Court has in recent years been developing its native law with a direct or sidelong glance at section 35. It said as much in *Sparrow*:

[I]t is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*.<sup>106</sup>

<sup>103</sup> *Pawis v. The Queen* (1980), 102 DLR (3d) 602 (FCTD).

<sup>104</sup> *R. v. Sparrow*, note 3 above, [1990] 1 SCR at 1103, 70 DLR (4th) at 404, [1990] 3 CNLR at 177.

<sup>105</sup> Note 3 above, [1990] 1 SCR at 1105, 70 DLR (4th) at 406, [1990] 3 CNLR at 178.

<sup>106</sup> *Ibid.*

It can also be said that the Indian successes in the Supreme Court can, in part, be attributed to governments' failure to posit reasonable alternatives to "all or nothing" interpretations of Indian rights:

As recently as *Guerin v. The Queen*, [1984] . . . the federal government argued that any federal obligation [with respect to Indian land rights] was of a political [and legally unenforceable] character.<sup>107</sup>

What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.<sup>108</sup>

Had the Court accepted either of these arguments, section 35 would be virtually meaningless and land claims litigation virtually hopeless. On the other hand, had the government position been somewhat more reasonable, then *Guerin* and *Sparrow* might have resulted in defeat for the native parties, and an encouraging body of law might have been stillborn. The irony is inescapable. The point is that the Crown's intransigence in litigation has contributed substantially to the current state of the law. This does not mean that more subtle and sophisticated arguments in future will not erode some of the present gains. And even that "uncertainty" overlooks the fact that the court has *not* yet dealt with two important issues in land claims litigation.

### INDIAN PROPERTY RIGHTS

The Supreme Court in *Sparrow* did not deal with any issue of aboriginal title. In fact, the Court has not heard a case on aboriginal title since *Calder* in 1973, where the real issue was the test of extinguishment. As a result, the nature of those rights and the protection that will extend to them today remain uncertain:

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgement in *Guerin* . . . referred to as the "*sui generis*" nature of aboriginal rights.<sup>109</sup>

It is noteworthy that section 35 does not expressly protect "aboriginal title," it protects "existing aboriginal and treaty rights." But in the above passage the Court uses the term "aboriginal rights" to refer to an earlier discussion, in *Guerin*, which dealt only with title.

<sup>107</sup> Ibid.

<sup>108</sup> Note 3 above, [1990] 1 SCR at 1095, 70 DLR (4th) at 399, [1990] 3 CNLR at 172.

<sup>109</sup> Note 3 above, [1990] 1 SCR at 1112, 70 DLR (4th) at 411, [1990] 3 CNLR at 172.



In Ontario, some of this uncertainty may be removed when the Supreme Court of Canada decides the *Bear Island* appeal which may be decided, as it was in the Court of Appeal, on treaty issues.<sup>110</sup> In the meantime, uncertainty remains.

### INDIAN SELF-GOVERNMENT RIGHTS

In *Sparrow*, the Court also sidestepped the issue of Indian jurisdiction over the exercise of their aboriginal rights.<sup>111</sup> Traditionally, the courts have not respected Indian rights of self-government.<sup>112</sup> Yet First Nations regard self-determination as an essential component of land claims settlements.

At the present time, neither the land claims process nor the courts seem prepared to deal with this fundamental issue. Indeed, it is difficult to conceive of a satisfactory set of facts which might give rise to a judicial determination of this issue. As mentioned previously, most aboriginal and treaty rights decisions result from prosecutions, and even land claims litigation seldom results in helpful decisions.

### TWO COURTS: TWO ACTIONS

Any First Nation in a province which wishes to assert a claim involving Crown land or natural resources faces the inherent difficulty that there is no choice of forum: there are two forums in which full relief must be sought.

Actions involving natural resources in a province must be pursued in the superior courts of the province. In Ontario, that would involve an action in the General Division of the Ontario Court of Justice. Such action may declare or secure a First Nation's rights in provincial Crown lands or resources.

Relief against the federal government, including declarations and payment of damages, must be sought in the Federal Court of Canada, an entirely different court with different jurisdiction and different rules and procedures.

This anomaly, which may involve double the time and expense, is well known.<sup>113</sup> And fortunately, there is some legislative effort being made to resolve it.

Bill C-38, introduced in Parliament in September 1989, would enable Indian claimants to pursue all their remedies, including remedies against the federal government, in the provincial court system. It will not, however, resolve all problems of choosing a forum. There may be valid reasons for initiating action in the Federal Court, but those proceedings could be frustrated if Canada elects to claim over against a province or other third party.<sup>114</sup>

<sup>110</sup> See note 31 above.

<sup>111</sup> Note 3 above, [1990] 1 SCR at 1103, 70 DLR (4th) at 404, [1990] 3 CNLR at 177.

<sup>112</sup> See, for example, *Attorney General of Ontario v. Bear Island Foundation* (1984), 49 OR (2d) 353, 15 DLR (4th) 321, [1985] 1 CNLR 1 (HC).

<sup>113</sup> See *Gardner v. Ontario*, 45 OR (2d) 760, 7 DLR (4th) 464, [1984] 3 CNLR 72 (Ont. HC).

<sup>114</sup> See J. Evans and B. Slattery, "Case Comment: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 840ff.

## CAUSES OF ACTION

The cause of action is the legal basis of a lawsuit. As noted above, without *Guerin*, there would be no cause of action for many claims. And government is always ready to attempt to defeat court actions on the basis of "no cause of action." A recent, and unsuccessful, attempt was made to defeat the Métis' action in Manitoba based on their land rights.

The usual tactic of the Federal Government in the ten provinces ... is to claim that it has no responsibility in regard to land rights asserted by the Native Peoples. Essentially, the Federal Government attempts to abdicate its fiduciary responsibilities whenever and wherever it can, callously ignoring its constitutional responsibility under section 91(24) of the *Constitution Act, 1867* and the *Guerin* decision.

It has attempted to do this in the *Gitk'san Wet'suwet'en* case, in the *Lubicon* legal proceedings and in the Temagami legal proceedings, to name a few.<sup>115</sup>

More surprisingly, two land claim actions have failed to date, while the higher courts suggested that they might have succeeded on different causes of action.<sup>116</sup> This creates the kind of uncertainty that is, perhaps, the hallmark of an emerging area of law. At the same time, it strongly inclines claimants away from the courts until such time as the law is more settled.

## TESTIMONIAL FACTORS

The trial of a native claim can be an unfamiliar and unnerving one for the native participants. Judges unfamiliar with cultural characteristics may find witnesses to be evasive and unconvincing, especially when translation is involved.<sup>117</sup>

In extreme cases, judicial suspicion extends to expert witnesses and others appearing in support of the native cause.

[They] were typical of persons who have worked closely with Indians for so many years that they have lost their objectivity when giving evidence.<sup>118</sup>

Furthermore, the written record of events is almost always comprised of government documents, and the oral native record, despite certain favourable rules of evidence, can often only be considered if the Crown's written version contains an ambiguity.<sup>119</sup> In sum,

<sup>115</sup> J. O'Reilly, "Comprehensive Native Land Claims Litigation," in "Native Land Issues" (CBA symposium), note 44 above, 39.

<sup>116</sup> See *Canadian Pacific Ltd. v. Paul*, note 56 above; *Attorney General of Ontario v. Bear Island Foundation*, 49 OR (2d) 353, 15 DLR (4th) 321, [1985] 1 CNLR 1, affirmed [1989] 2 CNLR 73 (CA).

<sup>117</sup> See, for example *Apsassin v. The Queen* (1987), 14 FC 161, [1988] 1 CNLR 73 (FCTD); generally see R. Ross, "Ontario's Northern Indians: A Lawyer Glimpses the Gulf," in "Practicing Law for a Native Clientele," *C.B.A.O. Annual Institute* (Toronto, 1986).

<sup>118</sup> *Bear Island*, note 116 above, 49 OR (2d) at 390, 15 DLR (4th) at 358, [1985] 1 CLNR at 37 (Ont. HC).

<sup>119</sup> See, for example, *R. v. Horse*, [1988] 1 SCR 187, [1988] 2 WWR 289, [1988] 2 CNLR 112 (SCC).

the court alternative is not attractive for the reasons set out, although this may change with increased judicial training and response to the lead given by the Supreme Court of Canada.<sup>120</sup>

### TECHNICAL DEFENCES

The acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, *laches* and lack of admissible evidence.<sup>121</sup>

Lack of admissible evidence has not proven to be a problem in claims litigation, although the weight given to evidence and the inferences drawn from it are recurring nightmares for Indian litigants. That, however, is not the focus of this section on technical defences.

Defences are technical when they do not deal with the merits of a claim, but can nonetheless defeat it. In this category, government frequently relies on various statutes imposing limitation periods and on the legal doctrines of estoppel, acquiescence, and *laches* (delay).

These are offensive to claimants for several reasons:

- If the merits of the claim are not heard and judged, there is no sense of justice being done.
- Delay in getting to court is not the fault of the claimants. Twenty years ago there was little access to documents, no funding and no body of law to sustain such actions, and until 1951 any action to further native claims was prohibited.
- Where there was no recognized "cause of action" until recently, there are no limitation statutes dealing with that cause of action.
- Where Indians had no legal authority or discretion to authorize certain transactions, they cannot be estopped from challenging them or be said to have acquiesced in them.
- Where a claim is based on breach of statutory duty, no estoppel can be set up as a defence.<sup>122</sup>
- *Laches*, or delay in bringing action, should not apply in favour of the government – which has always had the power to deal with claims – although *laches* may have some application where the rights of innocent third parties are involved.

<sup>120</sup> For a general discussion of these problems, see Ross, note 117 above; O'Reilly, note 115 above; and W. Henderson, "Litigating Native Claims" (1985) 19 L. Soc. Gaz. 174, and "Problems of Proof in Native Litigation," in "Practicing Law for a Native Clientele," *C.B.A.O. Annual Institute* (Toronto, 1986).

<sup>121</sup> *Outstanding Business*, note 29 above, 30.

<sup>122</sup> *St. Ann's Island Shooting & Fishing Club Ltd. v. The King*, [1950] SCR 211, [1950] 2 DLR 225, 5 CNLC 608.

The Supreme Court in *Sparrow* made it clear that for a lengthy period in our history native rights were simply not recognized, and clearly the bringing of a native claim would have been futile.

Several writers have commented on the inappropriateness of technical defences to claims litigation.

There are also other factors to be considered, not the least of which is that for much of this century, and all of the last, native peoples have been dependent upon government to maintain records, inform them of their rights and act on their behalf. As *Guerin* shows, that situation was no accident; until recently it was firm policy. Furthermore, during the period 1927-1952 it was an offence under the *Indian Act* to attempt to raise money for the prosecution of an Indian claim. As these factors are taken in context by the courts, it is hoped that just claims will not be unjustly foreclosed by statutory bars.<sup>123</sup>

Parties to land claims litigation should confront fundamental issues respecting claims and title rather than relying only on technical defences.<sup>124</sup>

Others have proposed legislative reform.

Many of these problems could be avoided if, instead of abandoning its commitment to abide by its lawful obligations, the government enacted a few reforms which would extend its liability in native claims cases. In the first place, section 24 of the *Crown Liability Act* could be repealed, and the liability of the Crown in right of Canada in tort could be made retroactive. Insofar as the Indians of Manitoba are concerned it would likely be sufficient if this liability were extended back to 1870, but the historical circumstances in other parts of Canada would lead one to the conclusion that this retroactive liability should extend to the date of the assertion of British sovereignty in each region of the country. In this way, valid Indian claims in Ontario, Quebec, the Maritime Provinces, and British Columbia could also be accommodated.

Secondly, claims on behalf of any Indian band or tribe against the Crown in right of Canada could be exempt from the operations of any statute of limitations. When one considers the past history of the immunity of the Crown from suit, and the legal and economic disabilities under which Indian people formerly laboured, the justice of such a reform seems clear.<sup>125</sup>

Legislation could remove many of the limitations of the courts as a mechanism for resolving claims. The laws of evidence could be modified in their application to claims, norms of honourable conduct associated with the Crown's relation to Indians could be articulated in legislation, and defences respecting limitation periods (insofar as these may be relevant) could be abolished.<sup>126</sup>

<sup>123</sup> Henderson, "Litigating Native Claims," note 120 above, 191.

<sup>124</sup> *Aboriginal Rights*, note 10 above, 28.

<sup>125</sup> Tyler, note 30 above, 24.

<sup>126</sup> La Forest, note 49 above, 20.

This would have the obvious result of having the courts deal with historical grievances on the merits of each case rather than dealing with the obscurities of limitation statutes which differ from province to province. In fact, the higher courts have been reluctant to deal with the limitations issue.

In *Guerin*, for example, the Supreme Court ruled that no limitation applied, but did so on the basis of "equitable fraud," leaving the question open as to whether any limitation period *could* apply. In *Bear Island*, the First Nation's claim to the land was defeated, in part, by application of a limitation period at trial, but the Court of Appeal did not rule on the point. In *C.P.R. v. Paul*, the trial judge similarly applied a limitation period against the Woodstock First Nation. The Supreme Court, however, in suggesting that other causes of action might have been more appropriate, did not suggest that these might be statute-barred.

Following *Sparrow*, it is almost certain that limitation statutes cannot bar a claim based on an "existing aboriginal or treaty right." While this offers some relief, it creates new uncertainties and anomalies. For example, provincial limitation statutes vary widely in their approach to extinguishing rights which are statute-barred. Thus, if those statutes applied prior to 1982, many claims may now be barred in some provinces but not others. In addition, the scope of section 35 rights remains undetermined. If an aboriginal or treaty right was extinguished without consent prior to 1982, is the right to claim damages protected by the *Constitution Act, 1982*?

In Ontario, and elsewhere in Canada, the uncertainty remains and, for most claims dating back before 1927 – to choose an almost random date – remains a major obstacle to claims litigation as an alternative to negotiation.

It appears clear that the intent of the claims policy is that this should be so. The question, for purposes of this discussion paper, is whether that policy is now either desirable or tenable.

### JUDICIAL REMEDIES

Assuming that all of the above obstacles are overcome, or may not apply in particular native claims cases, the successful litigant must anticipate what the court will provide by way of remedies. The answer is, very little.

The most that an average claimant can hope for is:

- A declaration of rights, which may lead to negotiated and lengthy transfers of land rights between federal and provincial governments.
- Monetary damages payable to the First Nation based on the Court's assessment, which may include, in very rare cases, punitive damages (*Guerin* didn't).
- An order of the Court directing the Minister or some official to perform his or her duty, or directing or preventing some course of conduct.
- Legal costs, which may only be a fraction of the actual costs of preparation and trial.

This is a fairly limited range of remedies given the scope of land claims and the legitimate expectations of claimants, especially if a larger land base or resource rights are claimed in the first instance.

Tyler notes

the desire of many bands to obtain a greater area of reserve lands as compensation. The Courts would only be in a position to award monetary damages. Even if land were purchased with the money, reserve status could be imparted to it only by the actions of the federal government. Thus, bands that wish to expand their reserve holdings will find negotiation much more attractive than litigation.<sup>127</sup>

Here again, reform has been suggested:

It is recommended that serious study be given to making judicial remedies more effective in ensuring that both government policies and judicial decisions are fully implemented in relation to aboriginal rights and claims. This would require making injunctive relief available against the Crown, enabling remedies *in rem* to be given against the Crown, empowering the courts to require the Government to enter into good faith negotiations, and employing positive injunctive relief – the so-called structural injunction – in appropriate cases.<sup>128</sup>

The message is that Canadian courts operate on a principle of judicial restraint which, however desirable it may be in other areas of law, leaves little scope for satisfactory resolution of claims issues. That factor alone, even with modest reform, will always make negotiation of the settlement package more attractive than existing judicial remedies.

The one great disadvantage of these proposals is that they do seem to contemplate more legal action, which is often very expensive and far removed from the concerns and understanding of the Indian people who put forward the claims. To some extent this is inevitable so long as the federal government maintains its policy of viewing claims from the perspective of its lawful obligations. But if those obligations are altered in the manner suggested here, it may well be that many more claims could be settled at the negotiating table than is now possible, and recourse to the legal system would be far less frequent than might be imagined. Indeed, there are strong reasons which would still operate to keep hands out of the courts.<sup>129</sup>

Among those reasons, he lists the limited scope of remedies quoted above. Another reason remains, for most First Nations, the most common: lack of funding.

<sup>127</sup> Tyler, note 30 above, 27.

<sup>128</sup> *Aboriginal Rights*, note 10 above, 28.

<sup>129</sup> Tyler, note 30 above, 26-27.

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### LACK OF FUNDING

The federal Government should financially support the establishment of an independently administered aboriginal rights and title litigation fund.<sup>130</sup>

The time and expense of litigation need no elaboration. A single claim of aboriginal title to traditional lands can cost millions of dollars on the Indian side alone.

In the specific claims area, costs are more modest but can run to hundreds of thousands of dollars if a great volume of historical evidence or a number of experts are involved. Of course, claims negotiations can cost hundreds of thousands of dollars as well. The difference is that funding is available for negotiations (on a loan basis), but not for litigation, except in limited cases.

If governments regard the courts as a serious alternative to negotiations, as the policy quoted at the beginning of this chapter seems to affirm, then several measures are possible.

- funding should be available on the same basis to claimants as for negotiations
- issues should be limited to keep costs down and get negotiations back on track
- facts and evidence should be agreed upon as far as possible; ideally issues could be referred as stated cases
- pre-trial proceedings should be kept to a minimum
- technical defences should be set aside for the limited purposes of issues referred to the courts; ideally they would not be relied upon at all
- funding should be extended to cover cases dealing with the exercise of aboriginal and treaty rights.

A particular problem in Ontario is the illegality of contingency fees, which might encourage meritorious claims by typically cash-poor claimants. The availability of such arrangements in other provinces has shown, however, that this is far from a complete answer.

It seems important, however, that the issues of funding not be addressed in isolation. Financial access to the courts will be of little value unless the legal process is better used to accomplish perhaps more limited objectives. Otherwise, this observation will remain accurate:

It is discomfoting to think that we may not be any better prepared than now to deal with these claims. It is equally discomfoting to think that the enormous energies invested in taking the cases through the courts would be dissipated rather than harnessed by the court to oversee, guide and, where necessary, prod the parties to settlement of their disputes.<sup>131</sup>

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<sup>130</sup> *Aboriginal Rights*, note 10 above, 28.

<sup>131</sup> *Ibid.*, 86.

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### SPECIAL CASES

Special cases are cases for which the court cannot be an alternative to negotiations, and *vice versa*.

First among those are the moral and political claims where there may be many reasons for negotiating a settlement other than strict legal liability. For those, the courts are no option at all.

Many other native claims, which have been the source of a genuine and acute sense of grievance may lack legal merit even if the claimants were allowed to present their entire case under very liberal rules of evidence. Clearly, the courts would be of little utility in resolving such claims.<sup>132</sup>

The second category involves resource and land developments in claim areas or threatening land entitlements or the exercise of aboriginal and treaty rights. In such case, First Nations may not have negotiations as a real alternative. They may be forced to go to court to seek interim injunctions to prevent irreparable harm. A good example of this type of case is *Saanichton Marina*.<sup>133</sup>

The third category involves the hundreds, if not thousands, of prosecutions brought against individuals claiming aboriginal and treaty rights. These people did not choose to go to court and there is no negotiation process in place for them. Their communities often lack the financial resources to defend them and many plead guilty out of an uninformed sense of futility. Their needs must be addressed by both levels of government.

The absence of inexpensive, speedy, fair and effective mechanisms by which Canada's aboriginal peoples may pursue their rights and titles is contrary to the standards expected of a democratic society which respects the rule of law.<sup>134</sup>

If the courts and negotiations are to be mutual alternatives as part of a coherent land claims policy, these special cases must be taken into account.

### SUMMARY

Despite recent successes in the courts, there is a strong reluctance to litigate native claims out of a lingering fear that the justice system will legitimize past actions rather than correct them. The very culture of the law and its judicial institutions are too often blind to the basic fact that many legal rules, presumptions, and procedures apply only **by analogy**

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<sup>132</sup> R.C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979*, prepared for the Department of Indian Affairs and Northern Development (Ottawa: DIAND, 1983), 239.

<sup>133</sup> *Saanichton Marina Ltd. v. Claxton* (1989) 36 BCLR (2d) 79, 57 DLR (4th) 161, [1989] 3 CNLR 46 (BC CA).

<sup>134</sup> *AFN Critique*, note 12 above, 15.



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to native claims. When one examines the Ontario Court of Appeal decision in *Bear Island*,<sup>135</sup> which undercut the very foundations of Indian title and treaty law, it is difficult to say that the apologist tendency of the courts is a phenomenon of the past.

Part of the problem is that judges have not been trained or used to best advantage.

Moreover, most judges are not particularly familiar with the terrain. It takes some time and experience to get the "feel" of the law relating to Indians.<sup>136</sup>

Part of the problem is institutional in terms of rules and procedures. Part of the problem is excessive reliance on technical defences. Part of the problem is that we can all do better, and haven't.

Certainly part of the problem is funding, although one must assume that even the notable losses in court were adequately funded somehow. Besides, there is little point – apart from the special cases – of funding a process that will not work.

In sum, the court is really only an alternative for non-Indian governments and a highly desirable one for them. It enables Department of Justice lawyers to "bring out all the guns"; government funding for its own participation comes from a different and almost unlimited budget; and the courts have traditionally favoured government in claims cases. The courts are not a real alternative for First Nations now.

Ideally, the courts would not function as a complete alternative to negotiations but as a supplement when negotiations are blocked at key decision points. This is Jim O'Reilly's view:

It seems preferable to consider the Courts as one of a number of potential remedies to redress grievances. In many cases, the Courts can be used as part of a series of actions having as an objective the recognition of land rights. Nonetheless, recourse should not be had to the Courts if there is no intention of proceeding. The Federal Government in particular seems to be quite content to have aboriginal groups sue as much as they want, because this puts off the day of reckoning and is fundamentally a more propitious and friendly arena for governments.<sup>137</sup>

The objective should be, as the Canadian Bar Association committee has recommended, to use the courts effectively, in the manner cited above – "to oversee, guide and, where necessary, prod the parties to settlement of their disputes" – as an integral part of an overall claims policy, not as an alternative to it.

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<sup>135</sup> Note 116 above.

<sup>136</sup> La Forest, note 49 above, 20.

<sup>137</sup> O'Reilly, note 115 above, 39.

# EXPLORING ALTERNATIVES

## INTRODUCTION

At this point we must take it as a given that all parties (First Nations and non-Indian governments alike) recognize that the current practice of attempting to settle claims has been demonstrated to be a failure. It is axiomatic to note that it is much less difficult to criticize than to posit realistic alternatives. Over the last 17 years much has been written detailing the shortcomings of the current practice. Most observers have offered suggestions as to how to improve upon existing process and/or policy.

The general thrust of the commentary to date has been towards several critical ends:

- 1 the process must be expedited, as justice delayed is justice denied (it may already be too late to satisfy this maxim, but that is not a reason not to try);
- 2 the process must be made to be fair and to be perceived to be fair by all of the participants; and
- 3 the policy must be expanded to include a fiduciary obligation on the part of the federal government to First Nations and their obligation to act in such a way as to preserve the honour of the Crown.

The process of exploring alternatives is complicated by the fact that current practice is a blend of process, policy, law, and politics, and further complicated by the fact that many observers make recommendations regarding one, some, or all the aspects that go into current practice. The simplest alternative to examine, although it is in and of itself very complex, is one that presently exists and is utilized as an alternative to the current claims resolution process: the courts.

## THE COURT ALTERNATIVE

As set out in the earlier section, The Court Alternative, the courts, as presently structured, have serious drawbacks as a mechanism for dispute resolution regarding First Nation rights and claims. The Conclusions section of this discussion paper will set out specific recommendations as to how the courts could be made a better alternative for this type of dispute resolution. We would strongly recommend that those suggestions be given serious

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consideration, as the courts will likely always have an important, and often precedent-setting, role to play in the resolution of these issues: witness the *Guerin* and *Sparrow* decisions from the Supreme Court of Canada. But we do not believe that anyone has put forward the proposition that the proper way to resolve all the outstanding issues is to litigate each and every one of them, for the simple reasons that it would be far too costly and by far too time consuming. The courts have an important role to play in these matters, but as indicated earlier they are probably not the forum of first choice.

## STRUCTURAL CHANGES

### (a) Adjudicative Tribunals

To the extent that it is possible, this section will attempt to distinguish between **process** and **policy** (and will attempt to ignore the fact that the current process is itself a policy). This section is further complicated by the fact that the current practice incorporates process and policy regarding two logically distinct phases of the process, which are not in fact always clearly demarcated:

- 1 validation, and
- 2 compensation negotiations.

(By way of illustration, the federal practice of discounting claims is clearly a way of bringing validation into compensation negotiations.) As will become apparent in the Conclusions section, it would appear that there is merit in approaching validation and compensation differently, but it should be noted that most commentators do not do so.

In terms of process alternatives, there are two main broad categories that have been advanced over the years:

- 1 some sort of tribunal or commission that is structured along the lines of either an administrative tribunal or a simplified court; and
- 2 a reworked negotiation process with some form of mediation and/or arbitration to assist the parties through impasses.

The recommendation to move to some form of adjudication is really a suggestion that there needs to be a fundamental change in the structure of the process. The structural change to adjudication (from the present practice of negotiation) is generally advanced as a solution to the previously discussed concern regarding fairness, in that if an independent body is hearing and determining claims, then the governments are no longer the accused, as well as the judge and the jury.

This was the process established by the United States in 1946 when it established the Indian Claims Commission with the following broad jurisdiction:

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribes, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

1. claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
2. all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
3. claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
4. claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of such lands of compensation agreed to by the claimant; and
5. claims based upon "fair and honourable dealings that are not recognized by any existing rule of law or equity."<sup>138</sup>

Note that the Commission's mandate was to "hear and determine" claims, in other words: adjudicate.

Draft legislation similar to this was reintroduced in the Canadian Parliament in 1965 (it had first been introduced in December 1963) for a similar sort of tribunal and with a similarly broad mandate:

Subject to this Act, the Commission shall hear and consider every claim that is brought before it as provided in this Act and that comes within any of the following classes of claims, namely:

- a) that lands in any area that now forms part of Canada were taken from Indians by the Crown or by an officer, servant or agent of the Crown on behalf thereof without any agreement or undertaking to give compensation therefor;
- b) that lands set apart for the use and benefit of Indians in any area that now forms part of Canada were granted, sold or otherwise disposed of by the Crown or by any officer, servant or agent to the Crown and no compensation was given in respect thereof to such Indians or the compensation given was so inadequate as to be unconscionable;

<sup>138</sup> La Forest, note 49 above, quoting Public Law No. 726, 79th Congress, 2nd session, s.2.

- c) that moneys held by the Crown for Indians living in any area that now forms part of Canada were improperly used by the Crown or by any officer, servant or agent of the Crown on behalf thereof;
- d) that the Crown failed to discharge any obligation to Indians living in any area that now forms part of Canada, arising under any treaty, agreement or undertaking, or
- e) that the Crown or any officer, servant or agent of the Crown on behalf thereof, in any transaction or dealing with Indians in any area that now forms part of Canada, other than a transaction or dealing relating to lands, failed to act fairly or honourably with those Indians and thereby caused injury to them.<sup>139</sup>

Again note that the proposed Indian Claims Commission was designed to adjudicate – “hear and consider every claim that is brought before it.” The Canadian tribunal was derailed by the 1969 White Paper and has never been implemented.

The concept of an administrative tribunal was thoroughly explored by Gerard V. La Forest, Q.C. (as he then was, he is now a justice of the Supreme Court of Canada) in “Report on Administrative Processes for the Resolution of Specific Land Claims” in 1979, a report commissioned by and for the federal Office of Native Claims. In his conclusions he recommended that an independent administrative tribunal be established through legislation:

This independent body should for all practical purposes be a specialized court but with power to adopt procedures and practices suitable to its particular functions. Its jurisdiction should extend beyond claims now enforceable in a court of law to encompass those arising out of the honourable treatment that should be accorded the Indians by the government. In addition, a number of technical rules, such as limitation periods and certain rules regarding the admissibility of evidence should be removed or relaxed to permit substantial justice in the settlement of Indian claims.<sup>140</sup>

La Forest’s recommendations were not followed by the federal government when the specific claims policy was reworked in 1982, as set out in *Outstanding Business: A Native Claims Policy*.

The Canadian Bar Association Special Committee on Native Justice, in its 1988 report entitled *Aboriginal Rights in Canada: An Agenda for Action*, has also recommended that a tribunal should be created through legislation to adjudicate specific claims:

Recommendation 24: Specific Claims Tribunal

After thorough consultation with aboriginal people, perhaps with the utilization of a Task Force such as was used to develop the new policy on comprehensive claims, the federal Government should proceed with the creation of a legislatively based Specific Claims Tribunal with a clearly defined mandate to adjudicate the resolution of specific claims.<sup>141</sup>

<sup>139</sup> Bill C-123, *An Act to Provide for the Disposition of Indian Claims*, 3rd Sess., 26th Parl, 1965.

<sup>140</sup> La Forest, note 49 above, 64-65.

<sup>141</sup> *Aboriginal Rights*, note 10 above, 83.

In the commentary that follows, the CBA Committee Report notes that the sheer number of specific claims makes the courts an impractical alternative and adds that a tribunal could be useful:

The fact that the issues are relatively more specific than in claims involving aboriginal title suggests that an administrative tribunal with a clearly defined mandate, expert adjudicators, and simplified procedures could be used to expedite a clearing of part of the backlog of these important claims.<sup>142</sup>

Many other commentators have recommended that an independent tribunal be established, with the authority to adjudicate claims. One interesting mode, which has not been advanced to our knowledge to date, is the Private Court. It is a form of alternate dispute resolution that was developed in the United States which is now operating in Ontario, established initially by corporations with a desire to reduce the costs and time of protracted commercial litigation. In Ontario it has been expanded to include family litigation, personal injury and insurance litigation, and some special fields such as sports and entertainment. Panels of adjudicators have been assembled who are recognized experts in their field (and are generally lawyers). The parties are assigned an adjudicator, but are free to agree upon another. The process is essentially a simplified and expedited court:

The Private Court operates on a two-step system. The first step is a moderated settlement conference at which an adjudicator attempts to resolve the dispute. If that is unsuccessful, the second step is a private trial.

To remedy the problems faced in the public court system, the Court provides:

- a) early and repeated settlement conference;
- b) full disclosure;
- c) early hearings;
- d) decisions within 30 days;
- e) flexibility;
- f) confidentiality;
- g) informality;
- h) choice of adjudicator;
- i) fixed dates.

Through these means, the Private Court will reduce the overall cost of litigation. *In the United States, private courts have cut the cost of litigation by 50%.*<sup>143</sup>

<sup>142</sup> Note 10 above, 84.

<sup>143</sup> *The Private Court: How It Works*, pamphlet (Toronto, 1990), 1.

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The parties agree in writing to be bound by the rules of the Private Court and that any order is an "award" enforceable under the *Arbitration Act*. Settlement conferences, similar to pre-trial conferences in the public court system, are mandatory, with the adjudicator attempting to mediate the dispute. If the parties fail to reach a settlement, a second adjudicator will be appointed to hear the trial, unless the parties and the first adjudicator agree to have the first adjudicator hear the trial.

This is an intriguing alternative that bears closer examination as a model for settling First Nations claims. It also in some ways incorporates some aspects of the next alternative to be discussed, in that assisted negotiation is an integral part of the Private Court system, accomplished through settlement conferences with the adjudicator.

There are a myriad of questions to be answered regarding any tribunal that would be established to adjudicate First Nations claims: jurisdiction, mandate, procedure, rules, appeals, forms of evidence, style of tribunal (passive or inquisitorial), parties, modes of representation, enforceability of awards, etc. These important details lie outside of the scope of this discussion paper, but it should be noted that many detailed recommendations are extant, which would greatly assist the parties in designing an adjudicative tribunal should this alternative be selected.

#### **(b) The "Soft Adjudicative" Tribunal**

This fascinating descriptive terminology comes from a study done for the Canadian Bar Association Special Committee on Native Justice, entitled "New Zealand's Waitangi Tribunal: An Alternate Dispute Resolution Mechanism," written by Joseph Williams in 1988. The Waitangi Tribunal was established by legislation in 1975 to adjudicate claims arising from the Treaty of Waitangi signed in 1840 between the British Crown and Maori Chiefs in New Zealand.

It is a "soft adjudicative" tribunal because its decisions are not binding in nature, but are rather recommendations made to the Minister of Maori Affairs and the Cabinet. The government is free to accept or reject the recommendations and the claimants must rely on political or societal pressure to ensure that the recommendations are acted upon by the government. The Waitangi Tribunal has achieved a great measure of success for a number of reasons, but certainly an important factor has been its ability to adopt the protocols and procedures of the Maoris in the hearing of claims. This, plus the fact that the chairman is a Maori and the chief judge of the Maori Land Court, has given the tribunal a high level of credibility in the Maori world.

The following is a brief overview of the New Zealand legislation creating the Waitangi Tribunal:

##### Salient Features of the Treaty of Waitangi Act 1975 (and subsequent amendments)

- Claimants must be Maori or of Maori descent, Claims must be brought by an individual who may in turn claim on behalf of a group.
- The Waitangi Tribunal can only hear against the Crown.

- The claim must explain how the Maori or a group of Maori people have been or are likely to be prejudicially affected:
  - by any ordinance or Act passed on or after 6 February 1840; or
  - by any regulations or other statutory instrument made on or after 6 February 1840; or
  - policy or practice adopted or proposed to be done or omitted, by or on behalf of the Crown on or after 6 February 1840.
- The Act says that the Tribunal is a Commission of Inquiry. This means it can:
  - order witnesses to come before it;
  - order material or documents to be produced before it;
  - actively search out material and facts to help it decide on a claim. (Courts are much more limited in doing this.)
- The Tribunal must send copies of its recommendations (if any) to the claimant, the Minister of Maori Affairs, other Ministers of the Crown that the Tribunal sees as having an interest in the claim and other persons as the Tribunal sees fit.
- The Tribunal has the right to refuse to inquire into a claim if it considers it too trivial, or if there is a more appropriate means by which the grievance can be solved.
- The Tribunal may receive as evidence any statement, document, or information which it feels may assist it to deal effectively with the matter before it.<sup>144</sup>

A similar body would solve some, but certainly not all, of the problems plaguing the present process in Ontario.

### PROCEDURAL CHANGES

The present specific claims process in Ontario is essentially a form of unassisted negotiation. The parties to the process enter into negotiations by themselves in an attempt to reach a settlement of a First Nation claim. For a number of reasons discussed earlier in this paper, this process is not working. This part of this section will deal with the types of procedural changes that could be made to the current practice in order to make it meet its stated goals.

The Assembly of First Nations has noted that negotiations are the First Nations preferred mode of dispute resolution.

There can be no doubt that current policy frameworks are inconsistent with existing case law, and with the reality of the situation. Negotiations have always been the First Nation's preferred method of resolving outstanding matters, but what is needed are realistic and equitable rules of the game for such negotiations.<sup>145</sup>

<sup>144</sup> *The Treaty of Waitangi and the Waitangi Tribunal*, pamphlet (Wellington, N.Z.: Waitangi Tribunal, 1992), 10-11.

<sup>145</sup> AFN, "Draft: Alternative Approaches to First Nations Interest, Aboriginal and Treaty Rights in Canada" (Ottawa, 1990) [unpublished], 5.



But it is also clear from this quotation that the present unstructured and unassisted negotiations are not the preferred method. What then can be added to the present negotiation process to make it work?

**a) Facilitated Negotiations**

One present attempt to facilitate the negotiations process is the Indian Commission of Ontario (ICO). It is an independent body created by joint orders in council from Canada and Ontario, ratified by the First Nations of Ontario in assembly. Its functions, as set out in the orders in council, are as follows:

*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 herein after 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.

Essentially the ICO acts as a facilitator in the sense of convening and chairing meetings, preparing reports and generally assisting the parties in meeting and negotiating, and as an informal mediator in attempting to assist the parties in reaching settlements. But the ICO lacks the ability to compel the parties to do much of anything, without their express consent. Regarding the 10 or so specific land claims that have been brought into the ICO process in the last 12 years, only two have reached final settlement. With respect to the types of problems with the process that are identified in the section Problems with the Claims Process in this discussion paper, it is the present opinion of the Indian Commission of Ontario that we are incapable of properly rectifying them at the present time. The simple addition of facilitating non-binding mediation (although perhaps preferable to nothing at all) does not appear to break the logjam in the specific claims process. Perhaps the most telling comment on the ICO process and its success, or lack thereof, comes from the previous commissioner, Roberta Jamieson, as set out in the 1988 Canadian Bar Association Committee Report:

In comments provided by Roberta Jamieson, the current Commissioner, the presence of sustained political commitment to actually resolve issues is cited as the determining factor for the success of negotiations.<sup>146</sup>

<sup>146</sup> *Aboriginal Rights*, note 10 above, 75.

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Certainly if the sustained commitment referred to above was present, **and** demonstrated by adequate levels of staff and adequate levels of resources to actually settle large numbers of claims, then the ICO-type process of facilitated negotiations could be more successful.

**b) Negotiations with Binding or Non-Binding Arbitration**

In 1981, the Association of Iroquois and Allied Indians, Grand Council Treaty #3, and the Union of Ontario Indians made a joint presentation to the then Minister of Indian Affairs, the Honourable John Munro. In it, they explained that the Indian Commission of Ontario process as then (and presently) structured was not satisfactory, but that it could be remedied with the addition of certain powers:

*Summary:*

There is a process for the resolution of Indian claims in Ontario that contains many of the characteristics of the process we are proposing. We suggest that, at least in the interim, the process involving the Indian Commission of Ontario be modified to accept some of these changes.

*The ICO process today includes:*

- clearly established independence;
- reference to negotiation, conciliation, mediation and arbitration with the consent of the parties involved;
- a secretariat function for the parties in co-ordinating meetings and documentation on the claims;
- a separation in process between determination of validity and agreement on compensation;
- a possibility of designing specific bodies, or assigning specific individuals, to mediation or arbitration of any claim.

*What is required to accommodate the changes we seek:*

*1. By adding to the Order in Council;*

- the power to investigate complaints of a breach of the duty to bargain in good faith;
- the power to hold hearings on these allegations;
- the power to investigate these allegations;
- the power to make declarations, or order to furnish information, convene or attend meetings, or perform specific duties;
- the power to examine documents and to determine whether they are privileged;
- the provision for reference to binding arbitration by the claimant.

2. *By agreement between the parties:*

- the recruitment and training of mediators and arbitrators and other “outside assistance” personnel;
- the acceptance of claims into the process at the initiative of the claimant without the necessity of approval by the parties being claimed against.<sup>147</sup>

The proposal was based loosely on the labour relations model of negotiation – conciliation – mediation – arbitration – decision, with agreement being the preferred outcome of each stage and advancing to the next stage only when agreement could not be reached in the previous stage. The advantage of this type of model is that it allows the facilitator and the parties to break impasses which can frustrate either simple negotiations or facilitated negotiations.

Arbitration can be used as an impasse-breaking tool in many different ways and at different stages of the process. For example, in compensation negotiations impasses can be reached on valuations of loss of use, the value to be placed on the property at the time of loss, how to translate the value of the loss into current figures, among a host of others. Specific issues that have reached an impasse can be referred out for arbitration without necessarily having to arbitrate the whole compensation claim, although that is also an alternative.

Arbitration can be binding or non-binding, and the arbitrator can be allowed to determine amounts, or final offer arbitration can be used whereby the arbitrator is forced to select one as between the final positions of the parties. Final offer arbitration has the benefit of compelling the parties to be realistic in putting forward final offers, rather than assuming “bargaining positions” with the knowledge that they will be cut down by the arbitrator.

The selection of arbitrators can be an issue, obviously with agreement among the parties being the preferred mode, but failing that the choice can be left to the facilitator of the negotiators. The number of arbitrators can also be an issue with the basic options being a single arbitrator agreed to or selected, or a panel of three (or more depending on the number of parties) with one appointee from each party and an agreed-upon chair.

All of these issues must be addressed and answered if negotiation assisted by arbitration is to be adopted by the parties to the specific claims process.

### ADMINISTRATIVE CHANGES

Put in very simple terms, regardless of what process is selected, there is a need for more people and more money in order to make any model work. This is true for all of the parties to the process: Canada, Ontario, and the First Nations. Any system can be effectively choked off if insufficient staff are available or insufficient resources are present to reach settlements.

<sup>147</sup> Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians, *A New Proposal for Claims Resolution in Ontario*, Submission to the Minister of Indian Affairs, 11 April 1981 [hereinafter *New Proposal*], 3-4.

If we are to look at an Ontario-specific solution, we suggest that it would be appropriate for Canada to establish an Ontario-specific office to deal with First Nations rights and claims, with an Ontario-specific budget. As well, Ontario should look to creating an office and full-time staff to deal specifically with these issues, again with their own budget. Again, all of this will come to naught if the First Nations are not provided with adequate resources to research and pursue settlements of their claims. Generally, the acid test of "sustained political commitment" is the provision of sustained resources for the process. To be blunt, political will equals people and dollars.

### COMMENTARY

The basic choice among the alternatives available is adjudication versus negotiation. It should again be noted that different aspects of claims may be more appropriate for one dispute resolution mechanism than another, for example "validation" as opposed to "compensation." As well, many commentators have pointed out that a full range of options should be available to the parties:

Our proposal includes the creation of a new method of settling out-standing claims. This method is strictly intended to lead to the establishment of a new approach to resolving Indian grievances. It must *not* be viewed as being the only avenue available to Indian governments who wish to settle their claims, but instead be seen as a new alternative. Existing options within Canada, such as the courts, and outside Canada, such as the United Nations or international tribunals, must and will continue to be open to Indian governments.<sup>148</sup>

The Canadian Bar Association special committee report closely examines the relative merits of both options. Regarding negotiations they wrote:

In comments provided to this committee, Roberta Jamieson and Murray Coolican have convincingly argued their preference for negotiated settlements rather than adjudicated outcomes in the case of aboriginal claims.

The advantages of negotiation in most contexts are stated to be:

- aboriginal people are accorded an equal position at the bargaining table, which they perceive to be consistent with their understanding of their original relationship with the Government;
- the agenda can include political and other public interest concerns as well as legal ones;
- they are more adaptable to third party involvement;
- adversary positions can be tempered;
- the parties design their own solutions rather than face an "all or nothing" outcome;

<sup>148</sup> Ibid., 19.

- outcomes can be partial and incremental;
- the parties can agree on their own framework and timetable for negotiations;
- the parties can be assisted by facilitators or mediators;
- the parties are more likely to be on an equal footing so far as resources are concerned, because the policy in Canada in recent years is for government to fund the negotiation of claims, whereas litigation funding is infrequently provided;
- there is a stronger commitment to implementation of the resulting agreement.

Nevertheless, it should be noted that the negotiation process in Canada is encountering serious obstacles. The specific claims process is failing to make significant inroads into the backlog of "lawful obligation" claims against the federal Government. In the non-treaty regions of Canada the comprehensive claims policy seems to have stalled.<sup>149</sup>

The CBA goes on to conclude that, although negotiations are preferable regarding the specific claims process, adjudication seems necessary and, as previously noted, it recommends the creation of a Specific Claims Tribunal, utilizing a task force with members from all the parties. It recommends that negotiation continue to be the preferred mode of resolution for comprehensive claims, but also recommends the creation of an Aboriginal Rights Commission to assist the parties in those negotiations.

Dr. Lloyd Barber, then head of the Canadian Indian Claims Commission, in a paper published in 1974 examined the full range of options including:

- 1 the judicial process;
- 2 the legislative process;
- 3 the special tribunal or quasi-judicial approach; and
- 4 the straight administrative negotiation process.

He then concluded:

It seems to me that all of these mechanisms have their place and that in one form or another all will be used in Canada before the backlog of grievances has been dealt with. I believe that it is important that the mechanisms available for settlement be as efficient and effective as possible because I believe that the process used and the experience with the process can have an important bearing on the satisfaction which is derived from the settlement. Settlements which leave a lingering bad taste are not settlements at all and simply set the stage for future strife.<sup>150</sup>

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<sup>149</sup> *Aboriginal Rights*, note 10 above, 80-81.

<sup>150</sup> Barber, note 27 above, 15.

Vic Savino, in a paper presented to the Canadian Bar Association Continuing Legal Education Seminar in Winnipeg in 1989 entitled "The Blackhole' of Specific Claims in Canada: Need It Take Another 500 Years?" concludes:

It must be noted that the matter of specific claims is "a fundamental point of honour to which we have been indifferent." This indifference can only lead to a compounding of injustice upon injustice. It is time that the grievances of Canada's aboriginal peoples are addressed by this nation. The establishment of an independent claims tribunal is an absolute necessity in addressing those grievances. Surely, after 40 years of its own advisors telling it that a tribunal is necessary the Federal government does not need another study.<sup>151</sup>

There is a real and present concern by the First Nations that any tribunal that may be established not model itself too closely on the practices and procedures of a court of law. This would appear to be the most common complaint regarding the United States Indian Claims Commission in that it followed the adversary system and played a wholly passive role of weighing evidence. First Nations do not have the same degree of faith in, and respect for the judicial process as does the average Canadian, for good reasons as pointed out in the section entitled The Court Alternative. Grand Council Treaty #3 in its submission for this discussion paper gives a succinct statement of this lack of faith:

First Nations in Grand Council Treaty #3 were direct victims of the notorious *St. Catherines Milling* case, by which the Victorian judiciary stripped Indians of land rights to placate Ontario government demands. The land involved in that case was on Wabigoon Lake at the centre of our traditional territory. It has taken more than 100 years to begin to undo that in the courts through recent judgements at the Supreme Court level. However, substantial settlements based on either the federal or provincial claims processes have not occurred.<sup>152</sup>

There is some cautious optimism on the part of some First Nations regarding the concept of a claims tribunal, but it is guarded as evidenced by the submission from the Union of Ontario Indians to this discussion paper:

There has been much discussion of the idea of a tribunal of some kind to deal with the claims. The idea of some formal body to address the problems is a good one – for some things.

...  
A tribunal that would simply extend the present legalistic approach would be a mistake.

A tribunal that would enforce a code of procedural fairness, and ensure that parties negotiated in good faith, would be helpful.

<sup>151</sup> Savino, "The Blackhole," note 71 above, 34-35.

<sup>152</sup> Grand Council Treaty #3, "Comments for Discussion Paper on Proposed Changes to the Specific Claims Policy and Process" (1990) [unpublished] at 4.

A tribunal that would address specific questions and then return the matters to the bargaining table would be helpful, while a tribunal that would take the entire claims and resolve all issues would remove control from the community. Such a tribunal would be attractive to the governments, since it would be quicker and simpler, but (especially if the tribunal became legalistic and stiff on its own procedure) would quickly be avoided by the Indian parties. If any party to a claim had the power to take the issues to such a tribunal, the governments would do so all the time. That is why only the claimant should be allowed to take matters of substance to a tribunal – while issues of procedure should be open to any party to take to the tribunal for enforcement.<sup>153</sup>

Six Nations of the Grand River, in its submission to this discussion paper, recommends that the claims process in Ontario at the Indian Commission of Ontario be explored with a view to supplementing the power of the ICO to improve the process:

Based on the foregoing, we submit the following to the I.C.O.:

1. Individual Bands within Ontario should be allowed better access to the Tripartite Process as opposed to the restriction of Indian Associations;
2. Indian Associations who are representing Indian Bands in support and with authority from the Bands they represent should be able to make binding commitments on behalf of the said Bands;
3. Both the federal and provincial government representatives should likewise have authority to make binding commitments on behalf of their Governments;
4. Time frames for the development stage of issues should be established on the introduction of each issue with an overall date stated for its finalization. This time factor should be by mutual consent of all concerned parties and enforced by the Commissioner throughout the negotiations;
5. The claim requiring resolution should be presented by all concerned parties in a form similar to a "Stated Case" before the Commissioner/Arbitrator;
6. As to the credentials of the Commissioner and with no disrespect to the present I.C.O. Commissioner, experience on the legal bench such as past I.C.O. Commissioner Justice Patrick Hartt would add credence to decisions;
7. In the event of the Tripartite Forum failing to resolve an issue, the Commissioner/Arbitrator should be given the proper authority to make final decisions, awards, or whatever is deemed necessary for a major step toward finality; and
8. Assurances must be given by the Governments and Indians concerned for the acceptance of the Commissioner/Arbitrator's decisions as being the settlement of the issue.<sup>154</sup>

This would appear to support a facilitated negotiation approach with time frames and the addition of some form of binding arbitration.

<sup>153</sup> UOI, "Land Claims Policy," note 65 above, 12.

<sup>154</sup> Six Nations of the Grand River Council, "Draft Position Paper No. 1 on 'Specific Land Claims' in Ontario," submitted to the Indian Commission of Ontario, 20 September 1990, 9-10.

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Grand Council Treaty #3, in its submission to this discussion paper, comments on its perception as to the problems it has experienced with the ICO process:

Since 1980, two Grand Council Treaty #3 First Nations, Rat Portage and Lac La Croix, have participated in a claims facilitation process, with Canada and Ontario jointly, undertaken by the Indian Commission of Ontario. This process, while it has rendered considerable technical and administrative assistance, has also been unproductive of results. The mandate of the Commission has also been limited to facilitation; breach of promises by Ontario since 1984, for example, to deliver a written position within a time limit, have proven that the ICO is limited by the good faith of the parties. In the case of the Ontario government party, however, good faith has been noticeably deficient. Due to the constraints of a facilitation process, the ICO has been unable to enforce procedural standards, leading, for example, to continued suspension of the Rat Portage claim. This failure is the direct result of a lack of provincial claims policy which binds Ontario, in a procedurally fair manner, to resolve outstanding claims. The result has been 10 years of interminable discussion and delay, without a settlement with Ontario.<sup>155</sup>

Earlier in their submission Grand Council Treaty #3 stand by the joint submission, made by them and AIAI and the Union of Ontario Indians in 1981 (quoted earlier). The above quote also underlines the necessity of Ontario being formally brought into whatever process is established and the need for a provincial claims policy.

The Ontario Native Affairs Directorate, in its submission to this discussion paper, makes the following suggestion regarding the Indian Commission of Ontario process:

The Directorate would like to see the ICO take a more pro-active role in the resolution of land claims than has been the case in the past. It is our view that all these functions – prioritiation, joint research, establishment of time frames, fact finders, mediators/facilitators, non-binding arbitration – could best be accomplished under the authority extended to the ICO by orders-in-council. In addition, it might be beneficial to the process for the federal government to open an office for Land Claims in Ontario.<sup>156</sup>

To conclude on an agreeable note, we suggest that all parties would subscribe to the following quotation from R.C. Daniel in his comprehensive review of the native claims process in Canada from 1867 to 1979, prepared for the Research Branch of the Department of Indian and Northern Affairs in 1980:

Whatever might be said about the relative merits of various mechanisms for dealing with native claims prior to World War II, one must conclude that, on the whole, they were not effective. In fact, the particular nature of the relationship between Indian people and the government seems to have provided a fertile ground for creating claims and no mutually

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<sup>155</sup> Grand Council Treaty #3, "Comments," note 152 above, 4.

<sup>156</sup> Letter to Commissioner H. LaForme from Mark Krasnick, 13 September 1990, 6-7.



acceptable mechanisms for resolving them, with the possible exception of the treaties. Since the war, there has been a growing awareness of a backlog of claims and of the need for a more definite native claims process.<sup>157</sup>

The situation is now at a crossroads, with one path leading to more Okas and continued unrest, the other path leading to the just settlement of First Nations rights and claims. This discussion paper is an attempt to clear the path – to sweep it clean of rocks and twigs – so that the second alternative can become a reality and the first alternative a memory.

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<sup>157</sup> Daniel, note 132 above, 215-16.

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## CONCLUSIONS AND RECOMMENDATIONS

They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and river flows.' That promise must never be broken.<sup>158</sup>

In issuing its revised specific claims policy in 1982, the federal government stated that the objective of the policy was to discharge the government's historical "lawful obligation" to Indian First Nations "in a fair and equitable manner." Further, the government stated, the revised policy was intended to accelerate the claims settlement process which, it recognized, had not been producing settlements at an acceptable rate. Measuring the policy by either of those goals, it must be considered an utter failure.

The current Minister of Indian Affairs, like several of his predecessors, has publicly conceded that the specific claims process is not satisfactory. This discussion paper, we hope, has made it clear that the failure of the current process is not an unfortunate accident; on the contrary, the seeds of failure have been built into the process itself. The intense frustration expressed in recent months by Indians across Canada was not only known to Indians and non-Indians alike involved in the claims process, but could have been predicted **and in fact was predicted** by every independent review of the process over the past decade of which the Commission is aware.

Nor, in the view of the Commission, is the problem that the stated goal of the process – fair and equitable honouring of the Crown's obligations within a reasonable timeframe – is too ambitious. Canadian governments, as well as the Supreme Court of Canada, have correctly acknowledged that governments have significant legal obligations towards Indian First Nations, grounded in history, common law, the treaty-making process, and the Canadian Constitution, to say nothing of moral grounds. Unless Canadians are prepared to ignore history, refuse to respect fundamental principles of common law simply because they would benefit Indians, and amend the Constitution, those obligations of the Crown must surely be honoured.

Independent and respected commentators, from Dr. Lloyd Barber, former federal Indian Claims Commissioner, to the Supreme Court of Canada and the Canadian Bar

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<sup>158</sup> Lord Denning, *R. v. Secretary of State for Foreign and Commonwealth Affairs* [1982] 2 All E.R. 118, [1981] 4 CNLR 86 (CA).

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Association, have concluded that Canada has for too long been indifferent to the legal rights of Indians. Surely it is axiomatic that Canadian governments should not only face up to their obligations to Indian First Nations, but should also actively ensure that those obligations are fulfilled. In the view of the Commission, to do so would be in the interest of all Canadians, not only because it would help avoid future angry confrontations but, more importantly, because Canadian society is based on the premise of respect for legal principles and justice for all. Further, in the view of the Commission, the Canadian public, if it were fully aware of the tragic history of Canadian justice as it has applied to Indian land and treaty rights, would support a decision by governments in Canada to ensure that their solemn legal and historical obligations are fulfilled.

In the view of the Commission, in order to determine and give effect to Indian rights in Ontario, the governments of Canada and Ontario should provide a claims resolution process that is at once **fair, expeditious, and comprehensive**, as well as having some measure of **finality** – in the sense that all parties and, in particular, Indian First Nations, should be left with the knowledge that the substance of their grievances has been addressed. The Commission's conclusions regarding the existing specific claims process and its recommendations for change will be set out with those objectives in mind.

The Commission's conclusions and recommendations, set forth first in relation to the claims policy and second in relation to the claims process, are as follows:

### **THE SPECIFIC CLAIMS POLICY**

#### **A. The Validation Decision**

*Conclusion* While the Supreme Court of Canada has affirmed that fair dealing and honour of the Crown in its relations with Indian First Nations, together with the fiduciary obligation of the federal government towards Indians, should be touchstones of the governments' legal obligations with respect to Indian land rights, the federal specific claims policy does not acknowledge the relevance of any of these factors. One must question why neither fairness nor equity are included in the criteria for determining whether a claim is valid or in determining compensation for a valid claim if indeed the object of the specific claims policy is to achieve a fair and equitable result.

Further, in this regard, the policy should be contrasted with criteria used by the U.S. Indian Claims Commission and the criteria originally set out in 1965 for the proposed Canadian Indian Claims Commission.

The intent should be that all existing land, treaty, and aboriginal rights issues should have access to a claims process that is objectively fair and equitable, operating under principles which are generally acceptable and evenly applied. While this will lead to a broader range of claims that might be submitted, it does not mean that validation criteria need become hopelessly complex.

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RECOMMENDATION NO. 1

The criteria for validation of claims should be simplified. The policy should be expressed in general terms to ensure that principles of fairness and equity underlie the validation decision and that the application of the validation criteria will take into account evolving legal standards as set out by the courts (for example, "honour of the Crown").

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**Conclusion** Respected commentators, including the Canadian Bar Association committee and Gerard La Forest, have noted that government reliance on technical defences to refuse to negotiate compensation even where the government has clearly acted in violation of established legal principles is both unfair and counterproductive, in that it fails to deal with the underlying causes of an Indian land claim. Reliance on statutes of limitation, the immunity of the Crown against civil actions, the supposed defence (unknown in law) of "mere technical breach," and the refusal to consider the full range of solemn undertakings which accompanied treaties are all examples of technicalities which prevent the achievement of a fair resolution of land claims.

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RECOMMENDATION NO. 2

The validation criteria should state explicitly that technical defences, such as laches, limitation periods, and Crown immunity prior to 1951, shall not be taken into account in the validation or in the compensation process.

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**Conclusion** The arbitrary rule in the federal specific claims policy that claims based on Crown commitments made prior to Confederation will not be reviewed, even where governments continue to benefit from the breach of those commitments, is unfair. This is particularly true in Ontario where the majority of Indian treaties were signed prior to 1867. Refusal to fulfil the terms of such treaties is especially odious in light of the fact that British courts have concluded that those treaties are the responsibility of Canadian governments. The Commission is aware of no justification for this distinction.

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RECOMMENDATION NO. 3

The validation criteria should not exclude pre-Confederation claims.

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**Conclusion** Currently, decisions with respect to the validity of a claim are made in relative secrecy. Federally, Justice lawyers provide the government with a legal opinion as to whether, on the evidence presented, the government has breached a lawful obligation to the claimant. That legal opinion is then reviewed by the Minister of Indian Affairs, who has the final decision (presumably based on political considerations as well) whether or not to accept the claim. At the end of this process, which may take up to eight years, the claimant is not given access to the legal opinion on which the validation decision was presumably based. Thus, the claimant may be unable to understand the reasons for the validation decision or to identify inconsistencies with other opinions on similar issues, much less to question the basis of that decision. To the frustration of a Band whose claim is rejected in this summary way must be added the frustration of other claimants who find their claims accepted only in part, or accepted subject to a 50 per cent "discount" on the basis that a secret Justice opinion had questioned the chances of the claim's success in court. Thus, the negotiation process ignores a generally accepted principle of natural justice, namely that an applicant is entitled to examine the reasons for an administrative decision. That this policy of secrecy has been vehemently criticized and has given rise to a lingering sense of injustice among claimants is both predictable and justified.

**Analysis** Any system of secret judgments over the validity of land claims will be open to suspicion of arbitrariness and disregard for law. It is difficult to understand why a government which wishes to deal with land claims fairly would be unwilling to permit the reasons for its decisions to be disclosed. Further, in cases where a land claim is validated in whole or in part, the failure to disclose the basis of that validation makes it extremely difficult to provide rational criteria for the compensation negotiations which will follow.

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#### RECOMMENDATION NO. 4

Detailed reasons, including legal reasons, supporting the decision to accept or reject a land claim should be provided to the claimant and to all other parties.

**Conclusion** The current separation of the claims processes offered by Canada and Ontario, combined with the fact that many claims involve both Canada and Ontario as "defendants," unfairly renders Indian claimants subject to disputes between Canada and Ontario regarding their respective responsibilities for a particular claim.

**Analysis** There seems to be no reason why Canada and Ontario should not deal with Indian claims in this province on the same basis and in the same process.

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RECOMMENDATION NO. 5

Ontario should be bound by the same validation criteria as Canada.

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**Conclusion** A strong criticism of the existing claims policies of Canada and Ontario is that they were developed without serious regard to First Nations recommendations.

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RECOMMENDATION NO. 6

The general validation criteria, which would thereafter be applied on a case-by-case basis, should be formulated through consultation between representatives of First Nations, Ontario, and Canada.

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**Conclusion** In focusing solely on claims relating to lands, the current federal interpretation of its specific claims policy excludes consideration of other aboriginal and treaty issues, such as self-government and claims for compensation for abrogated hunting, trapping, or fishing rights and the continuing exercise of those and other treaty rights. The fact that claims of aboriginal title are dealt with through an entirely separate process has also been criticized on the basis that many aboriginal claims do not fit neatly into the criteria established by existing federal policies. In Ontario, there is no reasonable expectation that claims based on unextinguished Indian title will be dealt with in the foreseeable future.

**Analysis** Inclusion of self-government negotiations would be difficult within the contemplated land claims process. However, claims for compensation for abrogation of hunting, trapping, or fishing rights, while difficult to quantify, should nonetheless be recognized as compensable claims. Similarly, the process should deal with treaty promises of services, immunities, etc. Such claims could be conveniently dealt with in the process contemplated by these recommendations.

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RECOMMENDATION NO. 7

In Ontario, the validation criteria should be sufficiently broad to permit resolution of all Indian land claims, including claims of aboriginal title to lands and Crown management of Indian assets and Indian rights. While self-government issues may be too broad to be dealt with in the context of specific claims, Indian management of continuing rights arising out of such claims should be negotiated.

**B. Compensation**

**Conclusion** With respect to the stated federal criteria for compensation, arbitrary principles which restrict compensation, such as non-recognition of “special value to the owner” and non-compensation for unlawful breach of individual hunting, trapping, or fishing rights (unless the claimant Band historically exercised those rights through some form of collective), contradict generally accepted principles of law.

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**RECOMMENDATION NO. 8**

The compensation criteria should be simplified to provide that claimants will be compensated for all losses reasonably established to have been caused by the acts which gave rise to validation. Arbitrary criteria which limit compensation in a manner inconsistent with legal and equitable principles should be discarded.

**RECOMMENDATION NO. 9**

Pre-judgment interest should be a recognized element of compensation. In appropriate cases, the interest rate would be as historically prescribed for Indian trust moneys.

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**Conclusion** The federal policy of “discounting” validated claims creates lingering resentment among claimants even after settlement. In addition, the discount calculation is invariably arbitrary and incapable of reasoned justification in any given case. The Commission notes the frustration that would arise in the court system if plaintiffs, whose claims have been upheld in court, were to see their compensation arbitrarily reduced on the basis that their claim had been “weak.” Finally, the process of discounting claims which have been validated creates an impression that the government is seeking only to minimize its financial liability through the claims negotiation process rather than to deal with claims in a fair and equitable manner.

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**RECOMMENDATION NO. 10**

The current federal guideline which indicates that compensation shall be reduced to reflect “degree of doubt” should be abolished.

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## THE PROCESS

### A. Independence

**Conclusion** An essential principle underlying the Canadian justice system is that justice should not only be done, but should be seen to be done. Not only are the current claims negotiation processes seen by First Nations as unfair, but they are unfair. These processes ensure that governments act not only as defendants with respect to alleged wrongdoing, but also act as judge and jury, as banker to the claimant, and, at least in the case of the federal government, as a fiduciary legally charged with protecting the rights of the claimant. This fundamental conflict of interest is inherent in the existing process and ensures that even where settlements are agreed to by Indian First Nations (perhaps because they have no reasonable financial alternative) a perception of unfairness is likely to linger.

In the majority of cases where an agreed settlement is not easy to reach, if the government simply refuses to address an issue or even to negotiate at all, the claimant has no recourse apart from the courts. The claimant simply has no way to resolve an impasse where the parties disagree on an issue. However, resort to the courts is not a realistic option for most claimants for financial and other reasons.

**Analysis** All parties to the negotiations should be subject to an independent authority mandated to assist them in resolving differences and breaking impasses and generally to ensure that the negotiation process is fair. The authority should have greater powers than the Indian Commission of Ontario whose consensual powers are ineffective where one party is intransigent.

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### RECOMMENDATION NO. 11

An independent body should supervise the validation and negotiations. In this context "independent" means that the supervisory body must have real and perceived independence.

### RECOMMENDATION NO. 12

The role of the supervisory body should be to monitor, facilitate, and keep a record of negotiations. It should also include the right to set timeframes and deadlines. While a possible model for the powers of such an independent authority is set out in recommendation no. 25, the powers of this body should be greater than those currently vested in the Indian Commission of Ontario.



**B. Resources**

**Conclusion** A fundamental precept of common law is that justice delayed is justice denied. With more than 500 specific claims filed and with settlement agreements reached at a rate of three per year, it is apparent that the outstanding claims will not be settled within any reasonable timeframe. Canada has a national settlement budget for specific claims of only \$15 million per year, while its own officials have estimated that settlement of the remaining claims will cost some \$700 million. In addition, the dearth of government personnel at all levels ensures that negotiations are subject to unacceptable delays. At present, the Ontario government has no full-time land claims negotiator or research staff. The federal government has only one negotiator who attempts to deal with the more than 60 specific claims submitted in Ontario. The obvious consequence is that all too frequently the entire claims process grinds to a halt.

As the Ontario government's submission to this Commission points out, the existing negotiation processes in fact provide incentives to governments to delay settling valid claims. By doing so, governments are able to defer payments and to save interest costs.

**Analysis** Perhaps more than any other factor, the refusal of governments to assign resources to the negotiated settlement of land claims has caused intense frustration among claimants. Any changes to the specific claims policy or process will be futile if not accompanied by a massive injection of resources at all levels.

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**RECOMMENDATION NO. 13**

Governments and claimants should have access to a dramatic increase in the resources needed to deal with existing and anticipated claims.

**RECOMMENDATION NO. 14**

There should be no pre-determined annual budget for the provision of compensation to claimants. Governments should be prepared to provide the aggregate funds necessary in any given year.

**RECOMMENDATION NO. 15**

The independent authority which supervises the negotiation process should be adequately funded.

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**Conclusion** The funding for First Nations' research and negotiation costs is provided by Canada. This process suffers from the same conflict of interest as described above and encourages a similar perception of unfairness. Further, the existing system of providing for claimants' negotiation costs through loans unfairly renders claimants financially dependent on the result of the negotiations and the good faith of employees of the Department of Indian Affairs.

The Commission notes that the repayment of claimants' negotiation costs does not in fact appear to have been carried out generally in an unreasonable fashion. However, the system of having one party fund the other's negotiation costs remains unfair for the reasons described above and, predictably, it has given rise to much criticism from claimants.

**Analysis** Fairness in negotiation funding is essential to the achieving of a fair result in negotiations. As long as the negotiation costs of Indian claimants are funded primarily through government loans, a reasonable apprehension that the claimants are subject to undue influence in the course of negotiations will continue to exist.

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#### RECOMMENDATION NO. 16

Funding to claimants should be provided through grants. Where there is a dispute, the amounts of such grants should be reviewed by an independent funding authority. The claimant would be accountable for proper expenditure of the grants.

#### RECOMMENDATION NO. 17

Provision should be made for an independent panel to approve awards of negotiation, legal, and other costs associated with the research, submission, validation, and negotiation of a claim. Offsets for granted funds may form part of the panel's net award to the claimant.

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### C. Consenting to the Process

**Conclusion** The current claims negotiation process is often ineffective simply because either the government of Ontario or of Canada unilaterally refuses to agree to negotiate or decides to terminate negotiations prior to settlement.

RECOMMENDATION NO. 18

From the time of initial submission of a claim until completion of the negotiations for compensation, all parties should submit to the negotiation process, including:

- complying with reasonable deadlines,
- being bound by admissions, and
- negotiating in good faith.

RECOMMENDATION NO. 19

Parties to the process should include the claimant, and either Canada or Ontario, or both if they are necessary to resolution of the claim.

**Conclusion** The fact that many land claims involve both governments as respondents has the result that each government may assign responsibility for settlement to the other government. Thus, even in cases where both governments agree that a land claim is valid, the claimant may be unable to obtain settlement and compensation.

RECOMMENDATION NO. 20

Where the claims process determines that Ontario may be liable in respect of the claim, the federal government should be jointly liable. To the extent that Ontario refuses to accept its compensation obligations as determined in the claims process, Canada should be required to deliver such compensation, with a claim over against Ontario. The resolution of internal questions of governmental responsibility should not be permitted to prejudice a native claimant. The appropriate arbitration process for determining such responsibility should be agreed to by Canada and Ontario.

RECOMMENDATION NO. 21

To facilitate the development and implementation of a process which involves Ontario, Canada should establish a separate claims division for Ontario, reporting to a deputy minister.

**Conclusion** It is the current general policy of Canada to terminate specific claims negotiations upon the commencement of court proceedings by the claimant. This is contrary to general litigation practice and is unfair to claimants who are forced to place their legal rights in abeyance in favour of negotiations which may prove illusory.

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RECOMMENDATION NO. 22

The initiation of court proceedings by the claimant should not affect the negotiation process unless a court judgment is obtained.

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**D. Management of the Process (Details)**

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RECOMMENDATION NO. 23

The precise mechanics by which the independent body would supervise the negotiation process should be determined through consultation between the representatives of First Nations, Ontario, and Canada.

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RECOMMENDATION NO. 24

The method by which the negotiation of compensation is supervised should ensure that flexible remedies can be fashioned in order to meet the claimant's needs and aspirations.

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RECOMMENDATION NO. 25

The following two-stage model is submitted for consideration by the parties:

(i) Validation

- Upon submission of a claim, the validation process should be subject to supervision of an independent authority charged with ensuring that validation is a timely and fair process.
- Timeframes should then be established which would provide for governments' detailed response to the statement of claim (e.g. six months from submission), followed by an informal pre-adjudication to examine and encourage agreement.
- If the parties are unable to agree on the terms of validation, including the reasons therefore, final adjudication would be determined by an independent adjudicator or panel of adjudicators.

- Rules of procedure and evidence should be flexible and research and statements of fact should be encouraged wherever possible. Decisions will be based upon materials and evidence submitted.

(ii) Compensation

- Where a claim is validated, the process for determining appropriate remedies should encourage the parties to develop remedies consistent with the claimant's needs and with the rights of third parties and other governmental constraints.
- An independent authority should facilitate and monitor these negotiations and should have the power to order fact-finding or arbitration where impasses develop and to set deadlines for responses to positions.
- If one party fails to provide documents or responses in accordance with the deadlines established and is unable to satisfy the independent authority that such failure is justified (for reasons, in the case of government parties, other than lack of resources), such fact-finding or arbitration would be decided on the basis of the submissions received.

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### **E. Scope of the Process**

**Conclusion** If it is agreed that the claims policy and process are to be amended in accordance with the recommendations herein, it would be unfair not to permit the resubmission of claims which were previously filed and rejected by governments under the existing policy (which, as demonstrated throughout this paper, fails to give effect to fundamental principles of law and equity).

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### **RECOMMENDATION NO. 26**

All claims which have not previously been settled and ratified by the claimant should be eligible for reconsideration under the new claims policy and process.

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### **F. Finality**

**Conclusion** While a claims policy and process which achieves results that satisfy all parties in every case is clearly impossible, a policy and process which is fair and is perceived to be fair by the parties is essential to the establishment of a lasting, harmonious relationship between Indian and non-Indian governments. A policy and process arrived at through consultation among all the parties is most likely to achieve this result.

However, given the past experience of Indian claimants with the ineffectiveness of claims negotiations processes, they could not reasonably be expected to forego their existing right to litigate claims. Given the nature of the relationship between Indian claimants and non-Indian governments, the rules governing the binding nature of the settlement process could and should be unequal. It should be more difficult for governments to withdraw from the process and governments should be bound by the results of the process to a greater degree than Indian claimants.

It should be noted that finality is not used here in the sense of extinguishment or termination, but as noted above in the sense that all parties be left with the knowledge that the substance of the claim has been addressed in a fair and equitable manner consistent with existing law.

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**RECOMMENDATION NO. 27**

Indian claimants should not be required to surrender their right to litigate in the event that they are not satisfied with the results of the negotiation process, unless they so agree.

**RECOMMENDATION NO. 28**

The results of the negotiation process should be binding on Ontario and Canada. In all cases of settlement the Indian claimant should have to advise within six months of completion of the process as to whether it accepts the settlement.

**RECOMMENDATION NO. 29**

Implementation of the terms of settlement should be reported to the independent authority supervising the negotiations.

**RECOMMENDATION NO. 30**

The independent authority which supervises the claims process should report to the provincial legislature and federal Parliament regularly on progress in the negotiations and failures or refusals by governments to comply with decisions reached within the process.

**RECOMMENDATION NO. 31**

Non-parties should not be directly bound by decisions made within the claims and should not participate.

**RECOMMENDATION NO. 32**

Permanence should be provided to the claims process by having the First Nations, Canada, and Ontario confirm the essential elements of the process in a manner binding upon them.

**G. Alternatives to the Claims Process**

**Conclusion** The history of the legal and financial disabilities of First Nations with respect to the advancement of land and treaty claims renders unfair the application of the technical defences of limitation periods and former Crown immunity. While the courts are not now an adequate substitute for a properly functioning negotiation process, in the interest of promoting fair and honest negotiation they should be made a real alternative for the just resolution of claims.

**RECOMMENDATION NO. 33**

Applicable legislation should be amended to ensure that the Crown may not rely on laches, statutes of limitation, or Crown immunity as a defence to an Indian land or treaty claim.

**RECOMMENDATION NO. 34**

A litigation fund should be established, similar to the current fund established for applications under the Charter of Rights, to enable Indians to pursue their claims in the courts.

**RECOMMENDATION NO. 35**

Judges should be given specialized training, perhaps sponsored by the Judicial Council of Canada in conjunction with Indian organizations, before being assigned to an Indian case.

**RECOMMENDATION NO. 36**

A panel should be commissioned to review the recommendation of the Canadian Bar Association which anticipates a more active role for the courts in awarding and implementing a broader range of remedies for claimants.

**Conclusion** There is currently no alternative, apart from the courts, to adjudicate and resolve claims independent of government. While it is hoped that the recommendations proposed here will, in the first instance, obviate the need for further alternative processes and, second, make the courts better able to deal with claims issues, it is far too early to predict the ultimate achievement of either goal. Accordingly, it would be prudent to plan now for a "third alternative" should that become necessary. Many models, including those used in other jurisdictions, are described in this discussion paper, and it may well be that only a Canadian analogue can achieve in policy and practice the reasonable goal of resolving all claims within the lifetimes of those who saw the beginning of the modern era in 1973.

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RECOMMENDATION NO. 37

A tripartite task force should be commissioned to develop a model for an Ontario Indian Claims Tribunal as a "third alternative" for resolution of claims in this province. The work of this task force should not delay or defer implementation of any of the other recommendations set out here, nor should it proceed on the assumption that such a tribunal will ultimately be created. The model should be in place if and when the need becomes apparent.

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**H. Implementation and Workplan**

*Conclusion* It is the view of the Commission that this discussion paper represents a broad enough range of input that the parties to the Ontario Tripartite Process should be able to react and provide positive input to an implementation process within a fairly limited period of time. For discussion purposes, we posit a deadline of October 31, 1990, to take the next logical step.

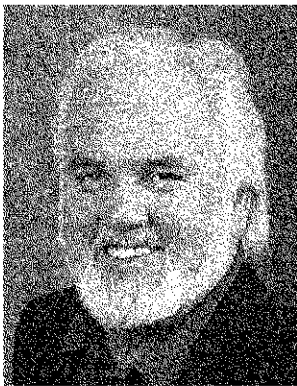
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RECOMMENDATION NO. 38

The Indian Commission of Ontario should convene a meeting of the parties on or before October 31, 1990, to discuss reaction to the recommendations made in this paper and to develop and implement a workplan to deal with the issues substantively. Interim comment and suggestions will be distributed by the ICO in advance of the meeting.



## THE COMMISSIONERS



**Roger J. Augustine**, a MicMac, has been Chief of the Eel Ground First Nation of New Brunswick since 1980; he served as president of the Union of New Brunswick-Prince Edward Island First Nations from 1988 to January 1994. Chief Augustine is active in promoting economic development among First Nations peoples, and is chairman of the Aboriginal Business Circle, and founder and chairman of the Micmac Maliseet Development Corporation and the Eagle Board Trust. He has been honoured for his efforts in founding and fostering the Eel Ground Drug and Alcohol Education Centre, as well as the Native Alcohol and Drug Abuse Rehabilitation Association.



**Daniel J. Bellegarde** is an Assiniboine/Cree from the Little Black Bear First Nation situated in Southern Saskatchewan. From 1982 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988 he has held the position of first vice-chief of the Federation of Saskatchewan Indian Nations. On March 17, 1994, he was appointed Co-Chair of the Indian Claims Commission.



**Carole T. Corcoran** is a Dene from the Fort Nelson Indian Reserve in northern British Columbia. Mrs. Corcoran is a lawyer with extensive experience in aboriginal government and politics at the local, regional, and provincial levels. She served as a commissioner on the Royal Commission on Canada's Future (in 1990/91). She was appointed as a Commissioner to the Indian Claims Commission in July 1992, as a Commissioner to the British Columbia Treaty Commission in April 1993, and to the Board of Governors of the University of Northern British Columbia in November 1993.



**Aurélien Gill**, a Montagnais of Mashteuiatsh (Pointe-Bleue), Quebec, graduated from Université Laval with a degree in education. A teacher, he served as the founding president of the Conseil Atikamekw et Montagnais before becoming Chief of the Mashteuiatsh (Pointe-Bleue) Montagnais community. He helped found the Institut culturel et éducatif Montagnais, the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (today the AFN), among other associations. Mr. Gill also held positions within the federal government, including Director General, Quebec Region, Indian and Northern Affairs Canada. In 1991, he was named to the Ordre national du Québec.



**P.E. James Prentice, QC**, is a lawyer with the Calgary firm of Rooney Prentice. He has an extensive background in land matters, including his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that resulted in the Sturgeon Lake Indian Claim Settlement of 1989. He also has experience in the administrative law field, having served as legal counsel on many land acquisition, expropriation, arbitration, and valuation matters in Alberta since 1981. From 1985 to 1992, Mr. Prentice chaired a quasi-judicial tribunal in Alberta. On March 17, 1994, he was named Co-chair of the Indian Claims Commission.