Landmark

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"I have heard the elders say that when the terms of the treaties were deliberated the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."
Ernest Benedict, Mohawk Elder
Akwesasne, Ontario
June 1992

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Landmark is published by the Indian Claims Commission to inform readers of Commission activities and developments in specific claims. Landmark and other ICC publications are also available on our web site at: www.indianclaims.ca

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This special edition contains a pull-out poster,* One Decade!, *depicting the history of the ICC.

Message from the Commissioners
On The 10th Anniversary Of The ICC

This year, the Indian Claims Commission (ICC) celebrates its tenth anniversary. During the past decade, the ICC has served as a "last resort" for First Nations who have had their claims rejected by the federal government. Except for the courts, the Commission provides First Nations with a final opportunity to have their claims reviewed.

The ICC was born out of the 1990 Oka crisis. Following that event, the government asked First Nations Chiefs to recommend ways to improve the claims process. One of the 27 recommendations made by the Chiefs was to create an "independent and impartial claims body with authority to ensure expeditious resolution of claims". In July 1991, the ICC was established temporarily as a Royal Commission of Inquiry, pending the creation of a permanent, independent claims body (ICB).

Since its inception, the Commission has completed 55 inquiries of 75 requests for inquiries received. Of these, 26 were settled or accepted for negotiation. This is an impressive track record; however, it is only a fraction of the 631 claims currently in the entire claims system, 408 of which are under review by the federal government. Add to this the 61 new claims that are added on average to the system every year and it becomes clear that there is a problem. This log-jam grows against the backdrop of repeated ICC recommendations either that an ICB be created or that the Commission be given power to reject or accept a claim in the first instance.

The credibility of the ICC rests entirely upon solid and dispassionate legal decisions. However, close examination of historic documents often reveals injustices that need to be addressed on moral grounds. In some instances, government actions which were conducted according to the letter of the law resulted in unfair outcomes for First Nations. Every effort must be made to try to redress such unfortunate situations. One way to do this is to increase awareness of the issues involved in specific claims. Recently, the

ICC was invited to appear before the House of Commons Standing Committee on Aboriginal Affairs to discuss its work and to share its concerns with Committee members. Our lead story in this special issue is an account of that presentation.

Even though the ICC's recommendations are not binding they can often be a motivating force for government to negotiate settlement of a claim. They can even effect change in government policy; as is far too often the case, though, the recommendations are simply ignored. Readers can easily judge for themselves the outcomes of the many recommendations made by the Commission over the last ten years, by consulting the 1999-2000 ICC Annual Report*.

Another more recent aspect of the ICC's work may well prove to be one of the Commission's most significant contributions. The ICC mediation and facilitation unit is growing in popularity and effectiveness. Alternative dispute resolution is a viable method of reducing the process and cost of negotiating the settlement of land claims and most often results in a win/win situation for both parties. For these reasons, mediation has been widely accepted by First Nations as an effective negotiation tool. This issue contains an interview with ICC's Director of Mediation, Ralph Brant.

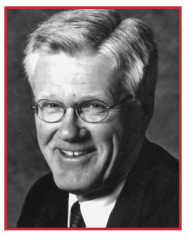
From the aftermath of the Oka crisis to this summer of 2001, the ICC has accomplished much and learned even more over the course of its inquiries. The research, historical and legal analyses and community sessions have resulted in a national overview that is perhaps unique to the ICC. We once again call upon the federal government to expedite creation of a permanent, independent claims body.

** For more information on our publications, see our addresses at the begining of this publication.*

Two New Commissioners Appointed

The ICC was very pleased to welcome the appointment of Commissioners Renée Dupuis and Alan Holman in March 2001.

Renée Dupuis has had a private law practice in Quebec City since 1973. From the outset, she focussed largely on human rights and specifically on the rights of Canada's aboriginal peoples. From 1972 to 1975, she served as lawyer for the Association of Indians of Quebec and beginning in 1978, acted as legal advisor to the three Attikamek and nine Montagnais bands in her home province, representing the bands in their land claims negotiations with the federal, Quebec and Newfoundland governments and in the constitutional negotiations. From 1989 to 1995, Mme Dupuis served two terms as Commissioner of the Canadian Human Rights Commission. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles and lectured extensively on human rights, administrative law and aboriginal rights. Mme Dupuis is a graduate in law from l'Université Laval and holds a master's degree in public administration from l'École nationale d'administration publique.



Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, P.E.I.; editor-publisher of a weekly newspaper in rural P.E.I.; a radio reporter with CBC in Inuvik, N.W.T.; and a reporter for the Charlottetown Guardian, Windsor Star and Ottawa Citizen. From 1980 to 1986, he was Atlantic Parliamentary Correspondent for CBC-TV news in Ottawa. In 1987, he was appointed Parliamentary Bureau Chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become Principal Secretary to then-P.E.I. Premier, Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the P.E.I. Department of Development. Since the fall of 2000, Mr. Holman has worked as a freelance writer and broadcaster. He was educated at Kings College School in Windsor, N.S. and Prince of Wales College in Charlottetown, where he makes his home.

Human Rights, Justice and the Need for an Independent Claims Body:

Co-Chairs Brief House of Commons Standing Committee on Aboriginal Affairs

On May 29, 2001, the Indian Claims Commission was invited to appear before the House of Commons Standing Committee on Aboriginal Affairs to discuss the ICC's latest annual report and to respond to questions from Committee members on specific claims.

Co-Chairs Daniel Bellegarde and James Prentice represented the ICC at the Committee table during a presentation that lasted almost two hours. Commissioners Roger Augustine, Renée Dupuis and Sheila Purdy were also in attendance, along with ICC staff.

Co-Chairs Bellegarde and Prentice with Nancy Karetak-Lindell, Chair of the House Standing Committee on Aboriginal Affairs

Commissioner Prentice thanked Committee Chair Nancy Karetak-Lindell (Nunavut - Lib.) for the opportunity to share the ICC's views on specific land claims and the pressing need for a fundamental reform of this process. The ICC's appearance, he said, was meaningful because of the important historical relationship between the work of the Committee and the Indian Claims Commission, the current Committee's predecessors having been "one of the primary parliamentary architects on the subject of the independent claims body." In 1947, 1958 and 1990, he reminded members, the Committee advocated creation of an independent claims body to adjudicate specific claims fairly and justly.

Continuing in that vein, Commissioner Prentice pointed out that the resolution of specific claims in Canada is a justice issue and a human rights issue and that "at the end of the day, our society shall be measured and judged by how we have dealt with these claims."

The process, he said, does not measure up to the standards of the just society envisioned by former Prime Minister, the late Pierre Elliott Trudeau: "In our view, both aboriginal and non-aboriginal Canadians expect and are deserving of much better. In fact, in the absence of immediate institutional change, the specific claims process will continue to limp along towards an inevitable collapse."

The ICC's brief outlines the long history of the specific claims process in Canada—"a fifty-year saga of incomplete attempts to grapple with the longest-standing grievances in our nation"—drawing to Committee members' attention the fact that in each of its annual reports from 1994 through 1998, the ICC has recommended that Canada and the First Nations create an independent claims body with the legislative authority to make binding decisions.

The document goes on to say that First Nations increasingly are frustrated by the federal government's specific claims process, a frustration that on occasion has erupted in violence; witness the 1990 Oka crisis. The ICC—the "only independent body in Canadian history mandated to investigate and report upon specific claims"— was born in 1991 out of the ashes of Oka. Commissioner Prentice noted that the ICC has had a direct impact on the resolution of a number of claims as well as on the redefinition of federal government policy.

He highlighted the ICC's 1996 decision in the Fort McKay case which resulted in the federal government's reversing its policy position regarding Treaty Land Entitlement. The government's current policy, he said, is based entirely on the Commission's report.

Citing statistics that show how incredibly slow the process of resolving a specific claim is—a First Nation can expect its claim to take ten to fifteen years in the government process prior to resolution—the ICC brief states that "the clear conclusion to be drawn is that Canada is not allocating sufficient resources to the Departments of

Justice and Indian Affairs to adequately address the hundreds of claims submitted to it pursuant to its own policy. In our view, history will judge the current process very harshly. There is no other area of public policy in Canada, or perhaps in any other western democracy, which operates in this manner."

Committee member John Finlay (Oxford - Lib.) asked what the reason was for the gridlock in setting up an independent body. Commissioner Prentice replied that he believed it was the inability of both the government and the Assembly of First Nations to agree upon what a new independent claims body would look like.

"The problem with the current system is that in the absence of some binding tribunal, the system has no policeman. There is no one who can push the parties along. It may be that at the end of the day, only 10% of claims actually go before a new tribunal for adjudication; however, it's the fact that this is possible that, in a sense, drives the whole system and makes it work. That is what is missing now and why, at the present time, the system isn't working."

In responding to questions from Committee member Richard Marceau (Charlesbourg–Jacques Cartier - BQ), as to why the ICC's recommendations have either been set aside, shelved or forgotten by the federal government, Commissioner Daniel Bellegarde pointed to repeated refusals by the government both to create an independent claims body and to augment resources to allow for the rapid settlement of claims found to be valid. "The results speak to a lack of political will, perhaps on both sides of the issue." The ICC's brief points out that in 1998, a Joint Task Force including representation from the federal government and the Assembly of First Nations submitted a report calling for creation of an independent specific claims commission and tribunal. The recommendations have never been acted upon.

Asked by Mr. Marceau whether requesting creation of an independent tribunal with power to make binding decisions was tantamount to admitting that the current negotiation process is a failure, Commissioner Bellegarde agreed that it was: "I would suggest that the specific claims policy is indeed a failure and this is evident throughout our submission to this committee." The main issue, he continued, is "the kind of injustice present within the policy, whereby the claims brought against Canada are judged by the Government of Canada itself. It is a clear conflict of interest."

Commissioner Prentice reminded members of the Committee of the important role they have to play in the area of specific claims process reform. "If institutional reform is to come in this country, it will only come with the encouragement and the wisdom of parliamentarians such as yourselves." He concluded, "Once the harsh light of disclosure has been shone on a historical grievance and thereby exposed an inequity, justice is inevitable. Perhaps it will arrive quickly, perhaps it will arrive slowly, but justice is nonetheless inevitable because in a democracy governed by the rule of law, there is eventually no place to hide."

* *This presentation is available on our Web site:* www.indianclaims.ca *, or by contacting us at the address at the beginning of this publication.*

Speakers Bureau

Commissioners were busy fulfilling speaking engagements across the country this past spring. As part of the ICC Speakers Bureau public education initiative, three commissioners spoke to widely-different audiences about the ICC, its role and its responsibilities.

In March, Commissioner Roger Augustine met with University of New Brunswick Law School students and faculty in Fredericton.

During the same month, Commissioner Daniel Bellegarde spoke to students at Brandon University and to members of the Halifax North West Rotary Club. In May, Commissioner Bellegarde took part in a panel discussion organized by the Calgary Chamber of Commerce. The event, part of Native Awareness activities, was entitled "Myths and Misconceptions of Current Aboriginal Issues". The distinguished panel included author and teacher Dr. Harold Cardinal, founder of the National Aboriginal Achievement Awards, John Kim Bell and Aboriginal Times publisher Rolland Bellerose.

Co-Chair Bellegarde addressing the Calgary Chamber of Commerce

Commissioner Sheila Purdy addressed the largest youth forum in Canada, Encounters With Canada, in Ottawa in March. Over 100 students from across the country with an interest in the law and law enforcement peppered Commissioner Purdy with thoughtful questions about aboriginal issues following her presentation. In May, she travelled to London, Ontario on two separate occasions to speak to members of the Forest City Kiwanis Club and the Business Club of London.

Plans for speaking engagements for the fall are now underway.

INTERVIEW
with Ralph Brant, Director of Mediation

Recently, Ralph Brant, ICC Director of Mediation, sat down with Landmark to talk about the Commission's mediation process and its role in the settlement of claims.

Landmark: *Is mediation's role in the negotiation process increasing?*

Ralph Brant: Mediation is a form of alternative dispute resolution that seems to be a growing alternative to the courtroom. You'll find that lawyers in all walks of life are into mediation in one way or another. In some provinces like Saskatchewan, it's mandatory to have mediation before you get into a civil law suit. Mediation can take place at any stage in negotiations—at the beginning, midway or at the end. We've experienced all three. Mediation can be requested for a rejected claim or one that has been accepted in the first instance. At the ICC, we provide mediation services in two situations. First of all, our primary mandate is to provide mediation services when a claim is being negotiated for settlement. This is done at the request of both the federal government and the First Nation. Last year, for instance, I chaired 45 negotiation sessions and 35 conference calls. Secondly, part of my job is to chair planning conferences. That's when a First Nation comes to ICC and asks us to hold an inquiry into their claim. It's an important aspect of the mediation function. It's the first meeting between the parties, and having three lawyers there—ICC counsel, the federal government's lawyer and the First Nation's lawyer—can become a legal free-for-all and that's not what it's intended to be. It's meant to be an opportunity for the government and the First Nation to sit down and talk about the issues. My role is to try to get agreement on what those are.

Landmark: *Is interest in mediation the same between First Nations and the federal government?*

Ralph Brant: Nearly all the requests for our mediation services have come from First Nations. I think that is the case because they see the ICC as an independent body that can assist them in moving the negotiation process along.

Landmark: *How do you persuade the government to give mediation a try?*

Ralph Brant: Well, it's one of those things where you just have to keep at it. I have made some inroads. For instance, some federal government negotiators see the advantage in having an independent person chairing the meetings, so we can keep it on track, keep out all the fluff that surrounds the negotiations and stick to the agenda. That's my job—to keep the parties focussed—but it's going to take time. The federal negotiators see some benefit in having the ICC there but by the same token, they don't want to lose control of how quickly they will proceed with these negotiations. I think they feel that if they give too much to ICC, they're sort of losing control of their own process. In fact, it's the exact opposite: we help them with the process, we don't push them beyond what they can handle.

Landmark: *How do you rank mediation as an option: is it the only way to go?*

Ralph Brant: There are two other things First Nations can do. They can negotiate with the federal government on their own or they can go to court, and court is a long, drawn-out, expensive proposition. So mediation is not the only choice but it is an option that's proving to be very successful.

Landmark: *What do you like most about the process?*

Ralph Brant: The most positive aspect is that we take away all the extraneous conversations that usually occur in these situations. We set the agenda. We consult with both the First Nations and the federal government but we control the agenda, we control the time. For me, controlling the process is probably the best part of it. We don't leave it to one side or the other: it's somebody neutral controlling the process.

Landmark: *What would you change about the process if you could?*

Ralph Brant: Personally, I would make mediation mandatory for all land claims negotiations. Once a land claim has been accepted, I think mediation should be mandatory. In some cases, I would want to go farther and make mediation binding. We don't have that now. At present, the ICC cannot make binding recommendations but if the ICC had a mediation department and an arbitration department, we would have it covered.

Landmark: *Do you think ICC is able to accommodate the needs of both First Nations and the government?*

Ralph Brant: The First Nations want to get on with it and get the claims settled quickly because in most instances, they've been waiting for a hundred or more years. They want to get it solved and get on with their lives. The federal government takes a long time to solve these claims, they have a very protracted process that's made even lengthier by the huge backlog of cases waiting to be heard. In addition, the federal government only has so much money every year to spend on claims and the first roadblock is the amount of money they can spend on research. They have a budget of about $5 million a year; well, in this day and age, researchers and lawyers don't come cheaply. First Nations don't have the ability to do that work themselves so, as we saw this past fiscal year, that budget can be used up very quickly. In some cases, we couldn't begin negotiations because there was no more money to fund First Nations to carry on negotiations.

Landmark: *Have First Nations themselves accepted the process wholeheartedly?*

Ralph Brant: No. We've only had a separate mediation function for about two years and it takes time for the notion that we're doing something good to get out. It's spread very quickly in Saskatchewan and it's starting to spill over into other provinces now. We haven't had very much business in Ontario, for example, because the Indian Commission of Ontario was acting as facilitator/mediator for most of the claims in that province. But it was shut down a year ago, and First Nations in Ontario may not be aware of the mediation services we can provide. We're looking to do a mailing of our brochure to First Nations in Ontario to let them know what we do.

Landmark: *Can you give an example of the effectiveness of mediation?*

Ralph Brant: Kahkewistahaw comes to mind. This was a land surrender. The ICC first did an inquiry on the 1907 surrender and right after that, the First Nation asked us to act as a mediator. Here we have an example of a model claim: it was rejected by INAC and submitted to the ICC by the First Nation for inquiry. The ICC recommended acceptance and the federal government agreed to this recommendation. We were able to establish a good rapport with the First Nation, with the federal negotiator and with the law firm for the First Nation, so we've had a very good working relationship. We were there from the start to help them develop the terms of reference for the land appraisals and the loss-of-use studies and to act as coordinator for these studies. The studies, of course, become the basis for negotiating a settlement.

Landmark: *So prior to ICC, there was no common sharing of the information needed by First Nations and government in order to negotiate?*

Ralph Brant: Well, what traditionally happened was that the federal government would accept a claim and agree what the compensation criteria would be, including loss of use or value of land. The First Nation would do loss-of-use studies, the federal government would also do loss-of-use studies and of course they would be significantly different. We're now doing joint loss-of-use studies so we can agree at the outset on what loss of use is. Then we can go to the next step of negotiating the settlement. In the past, when each party did their own separate studies, it simply didn't work. We coordinate the studies for each party so that the First Nation doesn't have to worry and the government doesn't have to worry. We deal with the contractors and make sure all the work is done when it is supposed to be done.

"We're getting more and more requests for our services."

— Ralph Brant, Director of Mediation

Landmark: *How do you view the ICC's mediation role in the future?*

Ralph Brant: A lot depends on what the federal government is going to do about setting up an independent claims body (ICB), which the ICC has been advocating for some time. If there is an ICB, mediation is going to be an essential component of it. If there is no ICB, I think this present mediation unit will continue to grow. We're getting more and more requests for our services. I think both parties are beginning more and more to see the benefits of having the ICC provide its mediation services to the negotiations process. We are neutral and our focus is to help the parties reach an agreement that is acceptable not only to the negotiating teams but to the First Nation community and to the federal government.

Specific Land Claims Statistics

Indian and Northern Affairs Canada

- Total specific claims received by Canada **1071**
- Total claims currently in the system:
  - Claims under review.....408
  - Claims under negotiation 115
  - Claims in active litigation 47
  - Claims under review by ICC.....61
  - TOTAL **631**
- Claims settled **223**
- Claims resolved through administrative remedy.....**28**
- Files closed **80**
- Claims in which no lawful obligation was found **109**
- Average since 1991: 61 new specific claims per year, and 18 specific claims resolved yearly.

Indian Claims Commission

Inquiries

- Requests for inquiries received 75
- Inquiries completed with reports 55
- Reports where recommendations were rejected 9
- Claims settled or accepted for negotiation 26

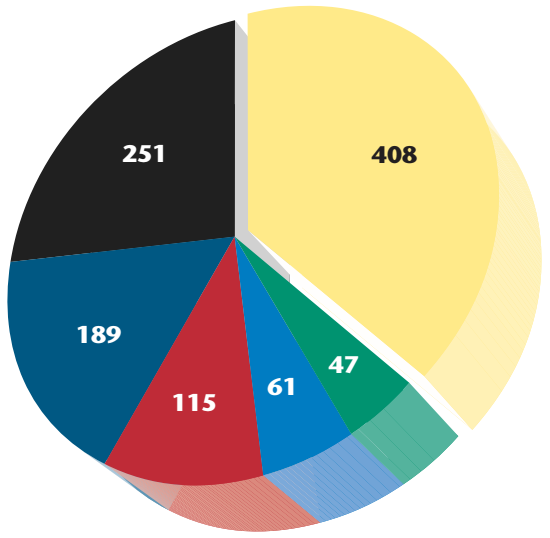
Mediation / Facilitation

- Requests for Mediation/Facilitation 14
- Claims settled through Mediation 4

Administration

- ICC budget .....$5.7 million
- Staff (approximately 50% Aboriginal) 37

Breakdown of 1071 claims in the Specific Claims process



Additional Information

- Avg time to resolve disputed claim, beginning to end .....10 to 15 years
- Avg cost (legal and associated) to settle one claim* .....$2 million
- Potential savings by expediting claims over the next 40 years .....$16 to $75 billion

*(From a report by Fiscal Realities, Kamloops, BC, Jan. 1998)

As of May 2001

- "Under review"
- Active Ligitation
- Before the ICC
- In Negotiation
- Rejected / Closed / No further action by Band
- Settled

CLAIMS IN INQUIRY

- Alexis First Nation (Alberta) - Trans-Alta Utilities right of way
- Canupawakpa Dakota First Nation (Manitoba) - Turtle Mountain surrender
- Chippewas of the Thames (Ontario) - Clench defalcation
- Chippewa Tri-Council (Ontario) - Coldwater-Narrows Reserve
- Conseil de bande de Betsiamites (Quebec) - Highway 138 and Betsiamites Reserve
- Conseil de bande de Betsiamites (Quebec) - Betsiamites River bridge
- Cumberland House Cree Nation (Saskatchewan) - claim to Indian Reserve 100A
- James Smith Cree Nation (Saskatchewan) - Chakastaypasin land claim
- James Smith Cree Nation (Saskatchewan) - treaty land entitlement
- James Smith Cree Nation (Saskatchewan) - Peter Chapman Band and claim to Cumberland House Indian Reserve 100A
- Kluane First Nation (Yukon) - Kluane National Park Reserve and Kluane Games Sanctuary
- Mississaugas of the New Credit First Nation (Ontario) - Toronto Purchase
- Ocean Man Band (Saskatchewan) - treaty land entitlement
- Paul Indian Band (Alberta) - Kapasawin Townsite
- Peepeekisis First Nation (Saskatchewan) - File Hills Colony
- Roseau River Anishinabe First Nation (Manitoba) - 1903 surrender
- Sandy Bay Ojibway Nation (Manitoba) - treaty land entitlement

CLAIMS IN FACILITATION OR MEDIATION

- Blood Tribe/Kainaiwa (Alberta) - Akers surrender 1889
- Cote First Nation (Saskatchewan) - pilot project - 1905 surrender
- Fishing Lake First Nation (Saskatchewan) - 1907 surrender
- Fort William First Nation (Ontario) - pilot project
- Fort Pelly Agency (Saskatchewan) - Pelly haylands
- Kahkewistahaw First Nation (Saskatchewan) - 1907 surrender
- Michipicoten First Nation (Ontario) - pilot project
- Moosomin First Nation (Saskatchewan) -1909 surrender
- Muskowpetung First Nation and Standing Buffalo Dakota First Nation (Saskatchewan) - IR 80B
- Qu'Appelle Valley Indian Development Authority (Saskatchewan) - flooding
- Standing Buffalo First Nation (Saskatchewan) - flooding
- Thunderchild First Nation (Saskatchewan) - 1908 surrender
- Touchwood Agency (Saskatchewan) - 1920-24 - mismanagement

CLAIMS WITH REPORTS PENDING

- Esketemc First Nation (British Columbia) - IR, 15, 17 and 18
- Mistawasis First Nation (Saskatchewan) - 1911, 1917, 1919 surrender
- Mistawis First Nation (Saskatchewan) - compensation criteria

GET THE FACTS ON CLAIMS

What are Indian land claims? What is a TLE claim? What is a surrender claim? How many times have you been asked these questions only to spend 20 minutes answering? Specific claims are based in history, law, and policy and are often complex. Now, the Indian Claims Commission has launched a series of fact sheets called ***The Facts on Claims*** to explain the basics behind specific claims. They are available free of charge as a useful public education tool for any organization or First Nation with an interest in claims. To get the Facts on Claims, call (613) 947-3939 or email <mgarrett@indianclaims.ca>.