Summary

Given its constitutional jurisdiction over Indians and all lands set aside for them, whether or not these be reserves, the federal government recognized 30 years ago that it can be held to its responsibility under certain circumstances: breach of an obligation arising out of a treaty or a statute; illegal surrender of lands; mismanagement of Indian band funds or assets. The disputes to which they give rise are called specific claims. To date, more than 1296 specific claims have been filed with the federal government, very few of which are from Quebec. Lawyers, however, play a crucial role in these disputes. Compensation settlements reaching tens of millions of dollars have been awarded to First Nations for the violation of their rights. Here is a field of practice that, in Quebec, is misunderstood and uncharted; it is a situation of concern to us as lawyers.

Introduction

Who today remembers that the Indian Specific Claims Commission was created in the wake of the Oka crisis? Yet the creation of this federal commission of inquiry,[1] known as the Indian Claims Commission, was outlined in the action plan developed by the Government of Canada to respond to the Oka crisis. The plan was published in the fall of 1990 by then-Prime Minister Brian Mulroney.

The Indian Claims Commission exercises its mandate pursuant to Part I of the federal *Inquiries Act*. The Commission is supplementary to an administrative process for the review of Indian bands' specific claims that was established more than 15 years prior to the Commission, by an internal policy of the federal Department of Indian Affairs and Northern Development. It is a quasi-judicial mechanism for the review of certain decisions made by the Minister.

The Canadian Constitution stipulates that Indians and the lands set aside for them fall under federal jurisdiction. Having such jurisdiction, the then-Minister of Indian Affairs,

[1] Order-in-Council P.C. 1991-1329, amended by Order-in-Council P.C. 1992-1730

Jean Chrétien, in a statement given in the House of Commons in 1973, announced that the government was committed to begin negotiating two broad categories of claims: "comprehensive" claims and "specific" claims.

Comprehensive claims are those claims based on existing aboriginal title (title which has never been surrendered or extinguished), as in the current tripartite negotiations, begun in 1979, with the Innu and Attikamekw First Nations (in northeastern and northwestern Quebec, respectively). The government's comprehensive claims policy was laid out in a document entitled "In All Fairness"[2] published in 1981.

Specific claims, on the other hand, arise out of the non-fulfillment of a lawful obligation as a result of certain circumstances set out in the Specific Claims Policy, "Outstanding Business",[3] published in 1982. We are referring here to disputes that, in most cases, have been outstanding for several decades. Failure to resolve these disputes is no doubt largely due to a provision included in the *Indian Act*[4] between 1927 and 1951, prohibiting First Nations from hiring lawyers to bring proceedings to assert their rights, without the prior written authorization of the federal government. Anyone seeking or receiving fees in violation of this provision was subject to a maximum fine of $200 or a maximum jail term of 2 months.

Today's discussion will focus on specific claims, which form the substance of the Indian Claims Commission's mandate. Bear in mind that the Commission came into being in a volatile political climate and a completely new legal context, quite different from the situation that existed in 1973 when the federal policy was formulated.

It is also important to note a significant precedent in constitutional status terms created by the *Constitution Act, 1982*, which for the first time recognized and affirmed two types of existing rights for Canada's aboriginal peoples:

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[2] *In All Fairness: A Native Claims Policy, Comprehensive Claims*, Department of Supply and Services, 1981.
[3] *Outstanding Business: A Native Claims Policy, Specific Claims*, Department of Supply and Services, 1982.
[4] *Indian Act*, R.S. 1927, c. 98, s. 141.

- aboriginal rights (on which comprehensive claims are based); and
- treaty rights arising from treaties concluded with Indian, Inuit and Métis peoples.

Treaties are at the heart of the special trust relationship between the Crown and aboriginal peoples. Another major precedent was set in 1984 with the *Guerin*[5] decision, in which the Supreme Court of Canada deemed the relationship between the Crown and Indians to be a fiduciary relationship which, in certain circumstances, created a fiduciary duty, breach of which is subject to action before the courts. In 1990, the Supreme Court ruled in *Sparrow*[6] that this fiduciary relationship exists not only between the Crown and Indians, but that it extends to all aboriginal peoples (including Inuit and Métis).

The Commission's mandate

The Indian Claims Commission is mandated to conduct inquiries and make recommendations in two specific contexts:

1. To assess the validity of a specific claim that has been rejected by the Minister of Indian and Northern Affairs Canada; and

2. To determine which compensation criteria apply in negotiation of a specific claim settlement, where a claimant First Nation disagrees with the Minister's determination on the applicable criteria.

The Specific Claims Policy stipulates ten compensation criteria for losses incurred and damages suffered as a result of a breach of the Crown's obligations. Compensation is paid in monetary form. Where a claim is based on events prior to 1867 and concerns lands within a provincial boundary, Canada requires that the province in question pay a portion of the compensation. The settlement of a claim must take into account third party rights and interests.

[5] *Guerin* v. *The Queen* [1984] 2 S.C.R. 335
[6] *R.* v. *Sparrow* [1990] 1 S.C.R. 1075

In addition, the Commission may, with the consent of the parties (the claimant First Nation and the Department of Indian Affairs), provide mediation services to facilitate the settlement of any issue relating to a specific claim.

The First Nation may obtain funding (in the form of a grant or loan) from the Department of Indian Affairs, based on certain criteria established by the government. This funding is available both for the preparation and submission of a claim to the Department and for the Commission's inquiry or mediation services.

The Commission intervenes only after a claim has been rejected; that is, after the Department of Indian Affairs has refused to acknowledge any responsibility, having determined on the strength of a legal opinion from the Department of Justice that there is no outstanding obligation. The First Nation does not necessarily have legal representation or assistance when it files its claim with Indian Affairs. In weighing the merits of such cases, the Department does not have the benefit of legal arguments in support of the First Nation's position. Moreover, since only documentary evidence is weighed at this stage, the First Nation does not have the opportunity to introduce oral testimony from witnesses.

This lack of legal representation raises doubts as regards the preservation of a First Nation's rights and interests and on a broader scale, the administration of justice. Should it not be necessary to ensure that a First Nation has obtained independent legal advice before negotiating a claim that could adversely affect its rights, or at least to ensure that the First Nation has been apprised of the benefits of seeking such advice? Experience has shown that claims prepared by researchers without legal qualifications are ultimately rejected. It is not until the course of the Commission's subsequent inquiry or upon publication of its report that Canada has agreed to reconsider its rejection, after having heard legal arguments from the First Nation's lawyer(s).

This process has been harshly criticized because the Department is perceived as acting as both judge and party in these disputes, which places it in a conflict of interest: the Minister, on behalf of Canada, weighs the claim and decides, on the strength of

confidential advice from the Department of Justice (which is not shared with the First Nation concerned), whether or not Canada failed to fulfil an obligation to this First Nation, and if so, whether the Minister will agree to negotiate settlement of the claim. Should the Minister determine there is no outstanding lawful obligation, the claim is rejected.

The Commission's inquiry process

Neutrality and impartiality are fundamental qualities in the work of the Commission. The Commission does not act as advocate or spokesperson for any party appearing before it, be it Canada or a First Nation.

The Commission's inquiry process allows for and values oral evidence from community members, often elders, which is heard on their reserve. The Commission travels to all parts of Canada to gather such evidence. This is one of the novel aspects of the inquiry process, providing what is often the first opportunity for a First Nation and its witnesses to state their positions and perspectives with respect to their claim.

Oral history is a valuable source of evidence in weighing the merits of specific claims. The Commission has broken new ground by admitting a First Nation's oral history and tradition and making it an integral component of its inquiry process. In a 1997 ruling, the Supreme Court of Canada recognized the material value of oral evidence, despite the fact that such out-of-court statements conflict with the general rule against the admissibility of hearsay:

> *Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.*[7]

[7] *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R.1010, para. 87

Historical documents are most often silent on the perspective and contribution of Canada's aboriginal peoples to the history of this country. It is this failing that the *Delgamuukw* ruling and the Commission's inquiry process are intended to rectify. Oral evidence supplements the historical analysis conducted by the Commission's researchers on the basis of the record submitted by the First Nation and Canada. This is one of the Commission's most important contributions to a better understanding of history, both by the First Nations themselves and by Canadians in general.

The first stage of an inquiry consists of a planning conference, during which Commission counsel and counsel for the parties narrow the issues of law and of the facts in dispute and plan the inquiry process. In the event the parties disagree on the issues around the claim, the inquiry panel (usually composed of three commissioners) determines which issues will be considered. Often, this is the first opportunity that the First Nation's representatives and their lawyer have had to discuss the claim with federal representatives. This is a crucial phase in the process because it allows the parties to clarify their respective positions and fosters mutual understanding.

Commission counsel then visits the community to gather will says from the community members who are serving as witnesses for the First Nation and sends a summary of these will says to counsel for Canada. Both parties may also file reports from experts, who can then be called to testify and be cross-examined by the inquiry panel, if the panel deems it necessary.

Next, a community session is held during which the witnesses are examined by Commission counsel. Cross-examination of witness community members is not permitted, but lawyers for the First Nation and for Canada may question them through Commission counsel. Many unique challenges are encountered in these sessions – for example, the interpretation of testimony given by elders in their aboriginal mother tongue.

After both parties have filed their written arguments and presented them orally to the inquiry panel, the panel deliberates and then publishes a report of its conclusions and recommendations regarding the validity of the claim. If the panel finds the claim is valid, it recommends that the Minister of Indian Affairs reconsider the initial decision to reject the claim and negotiate a settlement. In some cases, Canada decides to reconsider its initial position during the course of the inquiry or upon publication of the panel's report at the conclusion of the inquiry.

The legal basis for specific claims

The federal policy states that the federal government will recognize its responsibility if an outstanding lawful obligation is shown to exist in the following circumstances:

1. The non-fulfillment of a treaty or agreement between Indians and the Crown. The terms "treaty" and "agreement" are not defined. This category includes claims based on the non-fulfillment of historical treaties between the Crown and Indians, in particular the so-called "numbered" treaties involving the surrender by First Nations of their territorial rights to lands stretching from Ontario to British Columbia and a portion of the Northwest Territories. For example, the claim of Manitoba's Long Plain First Nation was settled in 1994 for $16.5 million in compensation for a shortfall in its treaty land entitlement under the terms of Treaty 1, signed in 1871. Also, in 2000, the federal government paid compensation of $23 million to the Kawacatoose First Nation[8] in Saskatchewan, for a shortfall in its land entitlement in accordance with the terms of Treaty 4, to which the Nation adhered in 1874. In both cases, the settlement was reached after a Commission inquiry recommended that the federal government reconsider its initial position.

2. A breach of an obligation arising out of the *Indian Act* or other statutes and regulations pertaining to Indians. For example, during an inquiry conducted by the Commission in 2003, the federal government recognized its responsibility arising from the fact that it had

[8] *Kawacatoose First Nation Treaty Land Entitlement Inquiry, Indian Claims Commission Proceedings,* (1996) 5 ICCP

allowed a bridge and a provincial highway to be constructed, in violation of the *Indian Act*, within the boundaries of the Betsiamites Montagnais-Innu reserve on the North Shore of the St. Lawrence River in Quebec in the 1930s. Also, a claim concerning the unlawful surrender in 1904 of the Quarante Arpents reserve belonging to the Huron-Wendat in the Quebec City region, was settled for $12 million.

3. A breach of an obligation arising out of government administration of band funds or other assets. For example, in 1988 the federal government recognized its responsibility for losses incurred by the Blood Tribe / Kainaiwa in Alberta as the result of errors in the description of land surveyed for their reserve in accordance with the terms of Treaty 7, signed in 1877.[9]

4. An illegal disposition of Indian land.

Under the heading "beyond legal obligation", the policy lists two more circumstances in which the federal government will recognize its responsibility:

1. Failure to provide compensation for reserve lands taken by the federal government or an agency under its authority.

2. Fraud committed by employees or agents of the government in connection with the acquisition or disposition of Indian reserve land.

It is important to note that the policy clearly states that statutes of limitation or the common law doctrine of laches do not apply to specific claims.

The fiduciary responsibility as defined by the Supreme Court of Canada since *Guerin* has added an important element in the analysis of the federal government's responsibility and the Crown's lawful obligations as regards specific claims. Since *Guerin* in 1984, First

[9] *Blood Tribe / Kainaiwa Inquiry, 1889 Akers Surrender, Indian Claims Commission Proceedings,* (2000) 12 ICCP

Nations are able to argue that breaches of these lawful obligations constitute non-fulfillment of the Crown's fiduciary obligation, a concept that did not exist when the federal Specific Claims Policy was adopted. The federal government itself recognized this concept by including non-fulfillment of its fiduciary obligation as a basis for recourse to the new Centre for the Independent Resolution of First Nations Specific Claims, which is to be created under an Act passed by Parliament in November 2003.[10]

Furthermore, the Supreme Court specified in two rulings handed down in November 2004, the Haida Nation[11] and the Taku River Tlingit First Nation[12] decisions, that the provincial Crown (but not third-party project proponents or contractors) has a duty to consult and accommodate deriving from the principle of the Crown's honour in its relationship with Aboriginal peoples, even prior to their rights being established.

Settlements reached through mediation by the Commission

The Commission ensures that mediation services are offered at every stage of its specific claim process. The parties to a claim may, by mutual consent, resort to mediation at any point. Mediation may take place while the inquiry is ongoing, or the inquiry may be suspended and referred to mediation. The Commission has conducted several dozen mediations since its creation, ranging from simple matters involving a single issue in dispute and only two parties (one First Nation and the federal government), to highly complex matters involving several issues in dispute, several aboriginal parties and several levels of government (federal, provincial, municipal), not to mention private third parties.

Another feature of the Commission's mediation services is the focus on joint processes, or the pooling of efforts in conducting research, analysing and defining the issues, hiring

[10] This Act has received royal assent but has not yet come into force, because the Department of Indian Affairs and Northern Development has decided to renew talks with the Assembly of First Nations in an effort to overcome the latter's opposition to the legislation. The Centre being created by the Act will serve as an umbrella organization consisting of a mediation commission and a special tribunal that will have ultimate jurisdiction in specific claims.
[11] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73
[12] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74

researchers and narrowing their mandate, etc., which results in considerable cost savings. By cooperating in this manner, the parties can avoid financial and other costs associated with duplication of effort and delays incurred. An example would be when both the federal government and a First Nation conduct studies to determine the value in current dollars of the loss of use of land through illegal disposition in the late 19th century in the Toronto area, and when a debate ensues in the event their studies disagree.

Given that all this is financed by federal funds and that cooperation is more easily developed between the parties through such joint processes, the Commission firmly believes that mediation presents definite advantages in claims settlement. As with any mediation process, the lawyers for the parties must adjust by relinquishing strategies based strictly on rights and legal positions in favour of strategies that advance the interests of the parties to reach a settlement.

The Commission's inquiries and mediations have led to major settlements, in particular with the First Nations of Saskatchewan. For example, the federal government paid $41 million to the Moosoomin First Nation and $53 million to the Thunderchild First Nation in 2003, as well as $94.5 million to the Kahkewistahaw First Nation[13] in 2002, as compensation for the unlawful surrender of lands on their respective reserves.

Statistics that speak for themselves

As of December 31, 2004, 1,296 specific claims had been submitted to Indian and Northern Affairs Canada, of which First Nations in Quebec filed only 103. At that same date, 266 claims had been settled, of which only 17 came from Quebec. There is no reason to expect the number of claims to decline any time soon – in fact, quite the opposite. The increased access to government administrative records made possible today by access to information legislation will probably mean that the number of claims will increase compared with what we have seen over the past 30 years.

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[13] *Kahkewistahaw First Nation 1907 Surrender Claim (Mediation), Indian Claims Commission Proceedings*, (2004) 17 ICCP

Since 1991, the Commission has received more than 124 requests for inquiries and 42 requests for mediation. In almost half of the 65 inquiries completed to date, the Commission's recommendations were accepted by the federal government, leading to the opening of negotiations and, in some cases, to settlement. More than one third of the mediations culminated in a settlement.

Conclusion

First Nations specific claims raise highly complex and fascinating legal issues. This is a field of law that has been evolving for the past 30 years and will continue to evolve in coming decades. In this connection, the contribution of lawyers and other legal practitioners is crucial. It is an area of responsibility and opportunity that cannot but elicit the interest of the legal profession.

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