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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.

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 . . .[1]

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.[2] These decisions were later adopted by the Supreme Court of Canada in the benchmark case of *St. Catherine's Milling*.[3]

The remnants of this policy are still around today and can be found in the surrender provisions of the *Indian Act*.[4] The Supreme Court of Canada has confirmed that the surrender provisions have their origins in the *Royal Proclamation*.[5] 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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[1] *Royal Proclamation of 1763*.
[2] *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).
[3] *St Catherine's Milling and Lumber Company v. The Queen* (1888), 14 AC 46 (PC), 4 Cart. BNA 107, 2 CNLC 541, 58 LJPC 54, 60 LT 197, 5 TLR 125.
[4] *Indian Act*, RSC 1985, c.32, ss.37-41.
[5] *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.[6] 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.[7] In addition, a guardian/ward relationship existed between the federal government and the First Nations.[8] 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.[9]

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[6] Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Department of Indian Affairs and Northern Development, 1980), 194-95.
[7] *Indian Act*, RSC 1927, c.98. s.141.
[8] Daniel, *History*, note 6 above, 200.
[9] 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.[10]

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.[11] 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.[12] 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.[13] 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."[14]

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

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10 Ibid., 215.
11 Canada, House of Commons, *Debates*, June 21, 1950, 3974.
12 Ibid., March 16, 1951, 1354.
13 Daniel, *History*, note 6 above, 137.
14 Ibid., 143-44.

approval to the proposed legislation,[15] 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.[16] As a result of these consultations, approximately 300 submissions were received by the government.[17]

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*[18] 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

15 Ibid.
16 Ibid., 147.
17 Ibid.
18 (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."[19]

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*[20] 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.[21] 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

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

20 *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].

21 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.[22] Moreover, it demanded finality in every settlement – that any settlement rendered would be the end of the matter.[23]

The policy relating to specific claims was published in 1982 under the title *Outstanding Business*.[24] Here, again, the federal government reiterated its belief that its main objective was to discharge lawful obligations.[25] 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.[26]

This policy predated the Supreme Court's decision of *Guerin et al. v. R.*[27] 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.[28] The question to be asked is, Why the distinction? If the government was willing to waive its rights during negotiation,

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22 Department of Indian Affairs and Northern Development (DIAND), *In All Fairness: A Native Claims Policy* (Ottawa: Ministry of Supply and Services, 1981), 12.
23 Ibid., 19.
24 DIAND, *Outstanding Business: A Native Claims Policy; Specific Claims* (Ottawa: DIAND, 1982).
25 Ibid., 19.
26 Ibid., 20.
27 [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.
28 *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*.[29] 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.[30] 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.

[29] Ibid., 23-25.
[30] 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.[31]

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.[32] 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.[33]

31 Ibid., 31-32.
32 Canada, *Comprehensive Land Claims Policy* (Ottawa: Queen's Printer, 1986).
33 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.[34] 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.[35]

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."[36] 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.[37] While it welcomed the Minister's proposal to provide additional resources, it rejected the notion of arbitrarily fixed annual ceilings or claims settlements.[38]

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";

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34 Ibid., 12.
35 Ibid.
36 Reprinted in [1994] 1 *Indian Claims Commission Proceedings* (ICCP) 187.
37 Reprinted ibid., 202.
38 Attachment to letter from Chief Manny Jules and Harry LaForme to Minister Tom Siddon, March 21, 1991, 2.

(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."[39]

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.[40]

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

[39] Ibid., 3-4.
[40] 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.[41]

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.[42]

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.[43] 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.[44] The second recommendation calls on the government departments involved in a claim to mediate seriously early on in the inquiry.[45] The third requests that the ONC be present at Commission Planning Conferences,[46] while the fourth asks that government departments more fully recognize the Commission's mandate.[47] The fifth recommendation asks that government departments expedite the transfer of historical documents requested of them by the Commission.[48] The sixth is a specific recommendation that a commissioner be appointed from Quebec to fill the vacancy there.[49]

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41 Letter from Chief Ovide Mercredi to Prime Minister Brian Mulroney, September 20, 1991.
42 [1994] 1 ICCP *xv*.
43 Indian Claims Commission, *Annual Report 1991-1992 to 1993-1994* (Ottawa: ICC, [1994], 10.
44 Ibid., 12.
45 Ibid., 13.
46 Ibid., 14.
47 Ibid.
48 Ibid., 15.
49 Ibid.

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.[50]

[50] 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).

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[51] 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.[52] 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.[53] Close to 100 special jurisdictional Acts were allowed by Congress, granting individual Indian tribes access to the Court of Claims.[54]

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.[55] 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.[56] 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.

51 H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York: Garland Publishing, 1990), 10.
52 S. 9, 12 Stat. 765, March 3, 1863.
53 Rosenthal, *Their Day in Court*, note 51 above, 15.
54 R.L. Barsh, "Indian Land Claims Policy in the United States" (1982) 58 North Dakota L. Rev. 7 at 10.
55 Rosenthal, *Their Day in Court*, note 51 above, 24.
56 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.[57] Gratuities were defined as the cost of annuity goods beyond treaty stipulation which had been expended for the benefit of the tribe.[58] 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.[59] 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.[60] 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.[61]

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.[62] 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.[63] 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.

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57 Barsh, "Indian Land Claims Policy," note 54 above.
58 Rosenthal, *Their Day in Court*, note 51 above, 29.
59 Ibid.
60 Ibid., 30.
61 Ibid.
62 (1823), 8 Wheaton 543, 21 US 240, 5 L.Ed. 681 (USSC).
63 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.[64]

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.[65] There were a total of 169 appeals to the Court of Claims, of which about one-third were allowed.[66]

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.[67]

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."[68] 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.[69]

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

64 J. Vance, "Indian Claims: The U.S. Experience" (1974) 38 Sask. L. Rev. 1 at 6.
65 Ibid.
66 Barsh, "Indian Land Claims Policy," note 54 above, 7.
67 Ibid., 16.
68 Ibid., 18.
69 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.[70] 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.[71]

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*[72] 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."[73]

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.[74]

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.[75]

70 Ibid., 22.
71 Ibid., 23.
72 85 Stat. 688, December 18, 1971.
73 Note 54 above, 48.
74 Ibid., 49.
75 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.[76] He concludes that the tribunal cannot do much in the way of reparative justice, which is what the Maori want.[77] 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.[78]

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.[79] All this changed in the next few years, and by March 1989 there was a backlog of 180 claims awaiting hearing.[80] 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

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76 Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Arguments in the 1980s* (Oxford: Oxford University Press, 1990).
77 Ibid., 74.
78 Ibid., 74-75.
79 Ibid., 76.
80 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.[81]

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,[82] but they were largely ignored in Wellington. Moreover, not all Maori agreed that the tribunal should have adjudicative powers,[83] including the tribunal's Judge E. Tachakurei Durie, who at that time was Chief Justice of the Maori Land Court.[84]

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.[85] For one thing, the tribunal is made up of both Maori and *Pakeha*[86] 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."[87] 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.[88]

In attaining this bicultural approach, the tribunal adopts the legal mores and procedural protocols of both Maori and Pakeha culture.[89] 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.[90] In consequence, the parties are not strictly held to their pleadings. Moreover, some hearings are held on *marae*,[91] where the Maori procedure is adopted.[92] Under this procedure, the cross-examination of elders is restricted.[93] The tribunal asks the opposing counsel to state their questions and concerns, and the tribunal itself attempts to elicit a reply from the elders.[94] In some instances it

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81 Ibid., 79.
82 Ibid., 96.
83 Ibid.
84 E.T. Durie and G.S. Orr, "The Role of the Waitangi Tribunal" (1990-91) 14 NZ Univ. L. Rev. 62 at 64.
85 Ibid.
86 *Pakeha* is the Maori word for European.
87 Durie and Orr, "The Role of the Waitangi Tribunal," note 84 above, 63.
88 Ibid.
89 Ibid., 64.
90 Ibid., 65.
91 *Marae* is the Maori word for the spiritual centre of tribal affairs.
92 Durie and Orr, "The Role of the Waitangi Tribunal," note 84 above, 63.
93 Ibid., 68.
94 Ibid., 67.

allows group evidence and some discussion, as tribal members help elders in the recall of evidence and oral tradition.[95] It dispenses with sworn testimony in some evidence (fact and opinion), considering that the presence of kinfolk sanctions against errors and slanted evidence.[96] 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.[97]

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.[98]

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.[99] 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,[100] 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.[101]

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.[102] 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

95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid., 70.
99 Ibid., 71.
100 Other examples are: the *Pitjantjatjara Land Rights Act*, 1981; the *Maralinga Tjarutja Land Rights Act*, 1984; and the *Aboriginal Land Rights Act*, 1984.
101 M. Gumbert, *Neither Justice nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights* (St Lucia: University of Queensland Press, 1984), 40-41.
102 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*[103] 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."[104] 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.[105]

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.[106]

The tribunal can also hear applications for the revocation or variation of an approved determination of native title.[107] 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.[108]

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."[109]

103 *Mabo v. Queensland* (No 2) (1992), 175 CLR 1, 107 ALR 1.
104 R.S. French, "The National Native Title Tribunal – Early Directions" (1994) Australian Dispute Resolution Journal 164 at 166.
105 Ibid.
106 Ibid., 168.
107 Section 13(1) of the Act.
108 French, "The National Native Title Tribunal," note 104 above, 169.
109 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.[110]

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.[111]

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.[112] An applicant need not establish a *prima facie* case to have the application accepted.[113] 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.[114] If the application is referred to a presidential member, then this member will decide within 14 days if the application should be accepted.[115] 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.[116]

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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110 Ibid., 170.
111 Ibid., 176.
112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid., 179.
116 Ibid., 177.

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.[117]

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.[118] 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.[119]

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

[117] J.M. Nolan-Haley, *Alternative Dispute Resolution* (St Paul: West Publishing, 1992), 13.
[118] Ibid., 13-14.
[119] 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.[120]

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.[121] Two types of mediation have been identified: rights-based and interests-based.[122] 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.[123]

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.[124] 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.

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120 Ibid., 20-24.
121 Ibid., 56-57.
122 Ibid., 57.
123 Ibid., 60-61.
124 Ibid., 130.

Sometimes parties agree to what is known as final-offer arbitration.[125] 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.[126]

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.[127] 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."[128] 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."[129]

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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125 Ibid.
126 Ibid., 200-01.
127 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.
128 Ibid., 343.
129 Ibid., 346.

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.[130]

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

130 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.

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.[131]

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.[132] It promised to undertake a major overhaul of claims policy on a national basis.[133] In addition, it proposed that an independent Indian claims commission be established.[134]

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

131 Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), 103.
132 Aboriginal Peoples' Commission of the Liberal Party of Canada, *Renewing the Partnership: Aboriginal Peoples' Policy Platform* (Ottawa 1994), 11.
133 Ibid.
134 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.[135] 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.

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.

135 Priority resolution 23, Liberal Party Biennial Convention, 1992.

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.[136]

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.

136 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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