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A FAIR, EXPEDITIOUS, AND
FULLY ACCOUNTABLE
LAND CLAIMS PROCESS

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PREFACE

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

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

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

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

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

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

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

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

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

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

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

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

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

INTRODUCTION

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

While the shortcomings of existing land claims policies and procedures have been widely recognized in the past 20 years,⁸ progress on new approaches and innovation in dispute-resolution strategies have been slow. The federal government's comprehensive and specific land claims policies⁹ ostensibly serve to resolve disputes over lands, resources, and related grievances. However, these policies have numerous deficiencies, which will be explored in this article and which lead one to question whether minor or tinkering reforms are sufficient to address the evident defects. While these policies call for a negotiation

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

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

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

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

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

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

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

The only significant national policy development on claims has been the creation of the Indian Claims Commission in 1991¹⁰ to deal with specific land claims disputes.¹¹ The federal government divides land claims into three categories: specific claims, comprehensive claims, and "claims of another kind." There are no firm definitions of these three categories, and they have been criticized as unworkable and artificial in practice. Specific land claims are said to be claims that stem from treaties and the application of the *Indian Act* (i.e., reserve lands, surrenders, etc.). Comprehensive claims are claims based on traditional native use and occupancy (ownership) of the land. "Claims of another kind" are claims based on traditional use and occupancy (ownership) by First Nations that have entered into treaties (pre-Confederation treaties), where the terms of the treaties do not deal explicitly with land. The Indian Claims Commission was established to deal only with specific claims, which encompass the majority of claims submitted to the federal government.¹²

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

¹⁰ Established by Order in Council PC 1991-1329, amended by Order in Council PC 1992-1730.

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

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

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

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

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

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

¹⁴ A more complete discussion of the Indian Claims Commission appears below.

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

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

both specific and comprehensive land claims. However, the substantive policy framework cannot be divorced from issues of process and dispute resolution. Recent experience with the Indian Claims Commission seems to reinforce this point: institutional reform of process, without policy reform of claims criteria, funding, and negotiation guidelines, may temporarily divert conflicts away from the Department of Indian Affairs and Northern Development (DIAND), but not resolve them. The Indian Claims Commission has begun the process of establishing its credibility in the review of claims issues and has shown promise in embracing alternative dispute-resolution processes in the claims process. It is my view that process reform does aid substantive policy change by providing specific contexts in which to assess the fairness of policies and the application of substantive criteria. For example, a panel of the Indian Claims Commission in its inquiry into the Athabasca Denesuline Treaty Harvesting Rights complaint¹⁶ had to consider whether the specific claims policy permitted claims arising from interference with treaty harvesting activities. The position of the federal government was that such harvesting rights cannot be the subject of a Commission inquiry unless specific breaches can be shown (i.e., no declaratory power in the Commission). The panel found that the policy extended to treaty harvesting activities and that concerns regarding these rights could properly form the subject of a specific claim. At the level of process, this decision aided in clarifying a much disputed aspect of the policy. In other words, a good process will open up substantive problems with policy. In this article, some attention will be given to matters of substance and policy, but further consideration of extinguishment and other contentious substantive matters is beyond its scope.¹⁷

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

¹⁶ [1994] 1 ICCP 159.

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

REVIEWING THE FEDERAL GOVERNMENT'S COMMITMENTS

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

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

¹⁸ *Aboriginal Peoples*, note 5 above.

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

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

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

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

BROADER OBJECTIVES FOR OVERHAULING FEDERAL CLAIMS POLICY

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

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

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

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

²² *Aboriginal Peoples*, note 5 above, 2.

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

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

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

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

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

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

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

²⁴ *Aboriginal Peoples*, note 5 above, 2.

²⁵ *Ibid.*, 10.

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

DETAILS OF THE PLATFORM: SUBSTANTIVE AND PROCEDURAL PROPOSALS

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

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

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

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

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

²⁶ Ibid., 11.

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

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

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

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

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

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

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

²⁷ Ibid., 12.

²⁸ Ibid., 11.

²⁹ Ibid.

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

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

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

PROVINCIAL INVOLVEMENT

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

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

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

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

³⁰ *Ibid.*, 12.

³¹ *Creating Opportunity*, note 5 above, 103.

PROBLEMS WITH CURRENT LAND CLAIMS POLICIES AND PROCESSES

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

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

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

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

³³ *Calder v. British Columbia (Attorney General)*, note 7 above.

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

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

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

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

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

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

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

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

INDIAN CLAIMS COMMISSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INSTITUTIONAL AND BUREAUCRATIC CHALLENGES

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

⁴² *Annual Report*, note 11 above, 10.

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

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

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

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

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

WORKING PRINCIPLE FOR REFORM: FULL COMPLIANCE WITH CROWN FIDUCIARY DUTIES

The experiences to date on land claims policy reform indicate that, without a clear commitment at the political level to a new approach, matters can quickly become derailed onto legal issues and confrontation. It seems that the Liberty Party platform will now provide this missing ingredient of political commitment. The commitment to self-government, the independent claims commission, the elimination of the two categories of claims, and the repudiation of the notion of extinguishment should move the process ahead quickly. Many First Nations' claimants criticize both the process and the substance of the existing claims policies on the basis of their inconsistency with the federal government's fiduciary obligations to Indian peoples. The notion of fiduciary duties⁴⁵ is relatively new to aboriginal-Canadian legal disputes, and it has been developed and applied to the First Nations-Crown relationship because of litigation over the handling of specific claims. A full appreciation of the federal government's fiduciary obligations, which represent a considerable and serious duty to act in the interests of First Nations, has been the glaring omission in the claims process.

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

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

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

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

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

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

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

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

⁴⁶ Bryant, "Aboriginal Self-Government," note 45 above, 20.

⁴⁷ *Sparrow v. R.*, [1990] 1 SCR 1075 at 1117.

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

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

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

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

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

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

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

⁵¹ (1984), 13 DLR (4th) 321 (SCC).

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

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

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

⁵⁵ (1990), 70 DLR (4th) 385 (SCC).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶³ McMurtry and Pratt, "Indians and the Fiduciary Concept," note 45 above, 19.

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

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

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

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

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

This opinion is also accepted by Alan Pratt:

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

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

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

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

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

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

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

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

⁶⁷ *Guerin*, note 51 above, 337.

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

⁶⁹ Emond, "Case Comment," note 45 above, 71.

⁷⁰ [1988] 2 SCR 654 at 677.

⁷¹ [1991] 3 CNLR 79 (SCC).

⁷² (1986), 3 FTR 80.

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

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

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

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

⁷³ *Mentuck*, note 72 above, 95.

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

⁷⁵ *Roberts v. R.*, note 74 above, 208.

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

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

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

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

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

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

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

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

⁸⁰ (1987), 11 FTR 75.

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

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

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

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

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

⁸¹ *R. v. Sioui*, [1990] 1 SCR 1025 at 1063.

⁸² *Sparrow*, note 47 above, 406.

⁸³ *Ibid.*, 408.

⁸⁴ *Ibid.*, 409.

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

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

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

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

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

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

⁸⁷ McTavish, “Fiduciary Duties of The Crown,” note 45 above, 181.

⁸⁸ *Sparrow*, note 47 above, 416-17.

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

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

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

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

⁸⁹ *Delgamuukw*, note 76 above, 233.

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

⁹¹ Morris/Rose/Ledgett, note 8 above, 188.

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

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

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

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

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

⁹³ McTavish, "Fiduciary Duties of The Crown," note 45 above, 194.

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

⁹⁵ *Ibid.*, 109.

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

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

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

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

OPTIONS FOR A NEW PROCESS

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

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

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

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

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

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

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

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

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

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

⁹⁸ Slattery, "Understanding Aboriginal Rights," note 45 above, 744-45.

⁹⁹ *Calder*, note 7 above, 346.

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

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

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

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

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

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

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

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

¹⁰⁰ See McCallum, "Dispute Resolution Mechanisms," note 8 above, 157.

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

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

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

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

BUILDING ON THE INDIAN CLAIMS COMMISSION

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

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

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

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

TRANSITIONAL ISSUES: THE DIALOGUE ON REFORM

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

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

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

CONCLUSION

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

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

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

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

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

APPENDIX A

Draft only

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

This protocol made this _____ day of _____, 1995.

BETWEEN:

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

AND:

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

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

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

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

INDIAN CLAIMS COMMISSION PROCEEDINGS

THEREFORE THE ASSEMBLY AND CANADA AGREE AS FOLLOWS:

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

TURPEL / FAIR, EXPEDITIOUS, AND ACCOUNTABLE PROCESS

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

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

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

National Chief of the Assembly

Minister of Indian Affairs
and Northern Development

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