
INDIAN COMMISSION OF ONTARIO

**DISCUSSION PAPER REGARDING
FIRST NATION LAND CLAIMS***

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"Will there be a Wounded Knee in Canada?" a newspaper reporter in the summer of 1973, asked George Manuel, President of the National Indian Brotherhood. He replied:

"Not if the Canadian people as a whole are able to understand the Indian's problems, negotiate with us in good faith and support us in their solution.

Otherwise, the young Indians will certainly take matters into their own hands."¹

Justice will come to Athens only when those who are not wronged feel as indignant as those who are.

Thucydides

¹ Quoted in W.T. Badcock, *Who Owns Canada – Aboriginal Title and Canadian Courts* (Ottawa and Toronto: Canadian Association in Support of Native People, Contemporary Native Themes, 1976).

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FOREWORD

This discussion paper on Indian claims was prepared by the Indian Commission of Ontario pursuant to a commitment given to governments and Indians at a special tripartite meeting held in Toronto on August 23, 1990.

The time limit accepted for this project – 30 days – has shaped the format of the final product with all of its strengths and weaknesses. The editorial approach taken has been to canvass the existing literature relating to claims issues and to quote extensively from what was available on short notice. The intent of this approach is to demonstrate that current issues are not new, nor are they contrived. They have been identified for many years and from many sources, including government sources.

At the same time, we are grateful for the comments and suggestions we have received from the parties to the negotiation process, and especially to the Assembly of First Nations, Grand Council Treaty #3, Six Nations of the Grand River, the Union of Ontario Indians, the Walpole Island First Nation, and the Ontario Native Affairs Directorate, all of whom provided the Commission with written submissions. As well, the Commissioner has personally met with and reviewed this project with representatives of the Assembly of First Nations, the Treaty and Aboriginal Rights Research Office of the Indian Association of Alberta, the Treaty & Aboriginal Rights Research Centre of Manitoba and their legal counsel Rod McLeod, the Indian Rights & Treaties Research Office of the Federation of Saskatchewan Indians, and the federal Department of Justice. Their input and participation was invaluable and greatly appreciated. Finally, we acknowledge with thanks the assistance of the following persons in the preparation of this discussion paper: Alan Grant, Ian Johnson, Alan Pratt, Paul Williams, and, in particular, Bill Henderson. Needless to say, the responsibility for all judgments and (especially) any errors in the paper is the Commission's alone.

Special mention is also due of the contributions made by the law librarians at Blaney, McMurtry, Stapells who obtained many of the background documents for this paper and to Dianna Wheatley and Georgette Howard whose heroic typing and editing efforts made it possible to meet the deadlines.

The discussion paper begins with a discussion of the nature of Indian claims and it shows that *current policies are out of step both with Indian expectations of the process and with existing law.* Addressing this problem may require a profound re-evaluation of the policies themselves.

The next section of the paper is a summary of the history of Indian claims processes. It is intended to provide a quick reference for those unfamiliar with the evolution of the current processes and with the role of the Indian Commission of Ontario in facilitating some claims settlements in this province.

The lengthiest section of the paper is a commentary on existing policy and processes. Because of the emphasis on the Ontario experience the focus is on the structure and workings of the specific claims policy.

The next chapter deals with the court process as an alternative to claims negotiations. It concludes that the courts are not a realistic alternative to negotiations. It is suggested that the courts could be used to supplement negotiations and make them more effective.

This is followed by an exploration of other alternatives, both structural and procedural, as well as of administrative changes that will be required regardless of what model is adopted. The basic choice is between some form of adjudication and some process of assisted negotiation. This section also briefly sets out the positions of the parties regarding the various alternatives, where known.

The final and perhaps most important chapter presents a series of recommendations intended, as a basis for discussion, to open up the settlement process and make it work.

The tone of the analysis in the paper is frequently critical. To some extent, this reflects the preponderance of views in the literature relied upon. Largely, it reflects the fact that the current claims processes are not now working in Ontario. We are optimistic regarding the future of First Nations rights and claims if the conclusions and recommendations contained in this discussion paper are given careful consideration and result in action.

Everyone agrees that changes are needed. It is hoped that this discussion paper will serve as a catalyst for substantial evaluation of what those changes should be and how and when they can be implemented.

INDIAN COMMISSION OF ONTARIO
September 24, 1990

INTRODUCTION

So we've had to accept the fact that we did not properly settle with the First Nations, with the native people of Canada. And the treaties that were entered into have not always been honoured. And some other legal commitments were made or land was taken without compensation. So the resolution of these questions, and the understanding by all Canadians of the fact that there is a remaining injustice, is at the heart of the challenge facing all governments – federal, provincial and municipal.²

The events of the summer of 1990 have given unprecedented publicity to the truth that all is not well in the relationship between Canada's governing institutions and its aboriginal peoples. The stand-off at Oka, the solidarity expressed by natives across the country with the cause of the Mohawks of Kanesatake, and the wave of Indian protests and blockades carried out by native men, women and children across Canada, have given rise to concern and, in many cases, puzzlement among non-native Canadians about the causes of that frustration.

That same puzzlement does not exist among Indians or among government officials involved in Indian affairs. They have known for years that Canadian law and Canadian government policy do not begin to meet Indian aspirations. They know that, apart from the courts, there is no adequate forum which can give effect to Indian treaty rights or which even permits meaningful discussion of Indian claims of sovereignty or inherent rights, nor (as this paper will confirm) is there a fair process for defining and resolving Indian land rights. They know that because of legal precedent developed without Indian participation, because of legislation developed in the past expressly to limit Indian rights, and because of statutes of limitation and the inability of most Indian Bands to afford protracted legal battles, the courts are generally not a realistic alternative.

They also know that for at least 40 years independent bodies from parliamentary committees to claims commissioners to human rights commissions, to the Supreme Court of Canada and the Canadian Bar Association have all recommended fundamental reform of the way in which Canadian governments deal with the rights of aboriginal people. And they know that land rights issues (as Indian leaders in Ontario expressed very forcefully to government ministers at an emergency meeting convened by this Commission on August 23, 1990) are a central focus of past grievances and of independent criticism.

² T. Siddon, Minister of Indian Affairs, Global TV interview, 2 September 1990.

The majority of the Canadian public, however, has not been aware (at least until this summer) either of the depth of the existing problem (described in the most recent report of the Canadian Human Rights Commission as a "national tragedy") or of the degree to which the Canadian legal system has failed Indians in the past. Few Canadians are aware that when Europeans first came to North America they and the "Indian nations" which they found here developed relations based on mutual interdependence. While some are aware that most of the land which is now Ontario was acquired through treaties with its Indian inhabitants, many wrongly believe that Indian First Nations are conquered peoples and that Indians, instead of agreeing to share the land in return for certain solemn commitments, somehow forfeited their rights through military defeat.

Canadian governments have made little effort to inform the public that Indian land claims are not vague grievances arising from the fact that aboriginal society has been "overtaken by progress," or that the basis of aboriginal land rights is recognized at common law and enshrined in the Constitution. While many Canadians probably suspect, as the Supreme Court of Canada recently recognized in *R. v. Sparrow*,³ that Canadian governments have long ignored Indian legal rights, most would be shocked to learn that as recently as 1951 a lawyer could be jailed if he was hired by an Indian or an Indian Band to press a land claim in the courts. (Today, despite that history, when a land claim is brought to court, governments will argue that even if the claim is otherwise valid in law, it should be rejected on the grounds that statutes of limitation have expired!) Similarly, most Canadians would surely greet with incredulity the fact that while land in the Canadian prairies was being given away to European immigrants, special legislation made it illegal for the Indians (the prairies' first inhabitants) to receive land under the same policy.

Finally, the Commission believes that most Canadians would not be proud to learn that, although Indians were advised to sign land surrender treaties on the basis of solemn promises that the Crown's obligations would be honoured "as long as the rivers flow," Canadian courts have found that basic principles of contract law cannot be enforced by Indians with respect to those treaties; and that the Crown's promises can be unilaterally abrogated by the governments (although the governments are permitted to keep the benefits of the treaties) – all without consultation or compensation.

As noted above, the current Minister of Indian Affairs, like several of his predecessors, recognizes that Canada's current policy for dealing with Indian land claims in Ontario has proved unsatisfactory. In conceding that, the Minister echoes the unanimous conclusions of independent commentators, a conclusion which will be confirmed in this discussion paper.

Canada is clearly at a crossroads today in government-Indian relations. Ultimately, it is the conscience of individual Canadians that will determine whether their governments will use this opportunity to take immediate, practical steps to improve those relations and to bring justice to the land claims process, and to aboriginal peoples generally.

³ [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] 3 CNLR 160.

Without a policy and a process which is able to provide fair and expeditious resolution of Indian land claims, we can expect to see recurrences of the desperate alternative we have witnessed occurring at Oka and elsewhere. Confrontation and violence should not be part of the Canadian experience, and every reasonable measure must be explored to ensure that real alternatives exist. It has been said repeatedly, particularly over the last several months, that Canada is a country which lives under the rule of law. If indeed that is true, and if it is to be a concept embraced by Indian people, then the law and those who enforce it must meet the legitimate aspirations of First Nations. There is no better time than now to demonstrate that the rule of law provides a viable and fair means to resolve the deep and enduring grievances of this country's first inhabitants. None of us should settle for less.

A BRIEF HISTORY OF LAND CLAIMS PROCESSES

Indian land claims find their genesis in the arrival of European settlers upon Turtle Island (North America) where they found organized societies of Indians. The Indians lived in organized communities and were self-sustaining, self-governing, and in occupation of the land which the Europeans were seeking for settlement. As this settlement commenced, the settlers found it necessary, in the interests of survival, to establish with the Indians relationships of trust and goodwill. In Canada this relationship was one clearly based upon respect and predicated on mutual needs and interests of the settlers and the Indians.

However, as the colonies in North America developed they inevitably came into conflict with the tenure of the indigenous peoples occupying the land. Conflicts developed, and although they were eased from time to time by intervening events such as disease and tribal warfare, it was apparent to the Crown that a system based upon mutual co-existence had to be developed and implemented in colonial legislation. This realization gave rise to the Royal Proclamation of 1763, establishing a policy of non-intrusion on Indian lands and formalizing a process to be used when the British government and settlers dealt with the Indian peoples and their lands.

In Ontario, it can be said that Indian claims processes began with the Royal Proclamation of 1763, intended by the British Crown to recognize Indian title and to prevent the "Great Frauds and Abuses" causing ferment on the frontier.

Arising out of the proclamation was a process that interposed the Crown between Indians and the developers of the time, with the clear intent that the Indians would be dealt with justly. In Canada, the treaty process did lead to peaceful settlement of the land, but it did not always lead to justice for Indians.

Significant Crown revenues were generated by the purchase of Indian lands at minimal cost and subsequent resale to speculators. However, Indian lands were often improperly taken and sold; Indian moneys too often went missing or were invested in improvident schemes; treaty promises were ignored (always excepting, of course, the Indians' promise to cede the land). Through much of the last century, Indian claims could only be addressed by humble petition to the Crown, and there was no appeal.

After Confederation, the new dominion government attempted to order its constitutional responsibilities for "Indians and Lands reserved for the Indians." Some Indian claims were directed through the 1880s and 1890s to an arbitration board established for the purpose of adjusting financial accounts between Canada and Ontario. Most fell by the wayside and were not resolved.

At the same time, courts in Canada and Britain were making important rulings about Indian land rights in cases such as *St. Catherines Milling*⁴ and *Ontario Mining Co. v. Seybold*.⁵ However the Indians whose rights were at issue in those cases were not involved in the litigation. These were federal-provincial disputes, and the Indians were incidental to the constitutional issues.

Early in this century, a unique procedure of international arbitration enabled the Cayuga Indians living at Six Nations to recover treaty annuities from the U.S. government unpaid after the War of 1812. This claim was lodged in 1882. An arbitration panel was set up in 1910. It was not settled until 1926 when Canada took control of a \$100,000 trust fund on behalf of the Cayugas, intended to provide the \$5000 annuity they had been awarded.

The Williams Treaties of 1923 represented another effort to investigate and resolve the land rights of the Mississauga Nation and Chippewa Tri-Council north of 45 degrees latitude. This created many continuing grievances. The Indians were denied independent legal representation, the treaty commissioners misrepresented their mandate, and then exceeded it by extinguishing lands and rights in the treaty which they were not authorized to deal with. There is no historical evidence that any of this was explained to the Indians. The claims continue.

The 1924 Ontario Lands Agreement was legislated by Canada and the province in that year to adjust federal and provincial rights and responsibilities with respect to Indian lands. Indians, of course, did not participate in the negotiations or agree to the terms of adjustment. Subsequent problems of interpretation and implementation led to a 17-year round of negotiations culminating in the 1986 Ontario Lands Agreement, negotiated through the offices of the Indian Commission of Ontario and finally proclaimed in 1990.

The new legislation provides for tripartite negotiations between First Nations, Ontario, and Canada to deal with issues arising out of the 1924 legislation: principally, mineral revenues and reserve lands surrendered, but not sold, as of 1924. Some First Nations have expressed concern that negotiation under this open-ended process may lead to quid pro quo exchanges of one set of rights for another that they never agreed to give up in the first place. It is, however, too early to tell how this untested process will work.

By 1927, the federal government reacted to a growing number of claims submissions by making it illegal, under the *Indian Act*, for First Nations to retain legal counsel to prosecute a claim.⁶ The superintendent general of Indian affairs could give permission for such retainers, but this was rarely, if ever, done.

Land claims languished for want of a process and a body of supportive law until after World War II. In 1946-48, and again in 1958-61, joint committees of the Senate and House of Commons recommended establishment of an Indian commission. Legislation was prepared that would have created a tribunal to hear five types of claims arising out of acts or omissions of the Crown, including the British Crown, but not the Crown in right

⁴ *St Catherine's Milling and Lumber Company v. The Queen* (1888) 14 App. Cas. 46, 2 CNLC 541.

⁵ [1903] AC 73, 3 CNLC 203.

⁶ *Indian Act*, RSC 1927, c. 98, s. 141.

of any province. This legislation was actually introduced in Parliament in 1963 and, in a slightly modified form, in 1965. Both bills died on the order paper.

The next initiative to settle claims arose out of the 1969 White Paper. That policy stated that aboriginal title claims were "too vague and undefined" to be taken seriously. Unfulfilled treaty obligations would be resolved, but continuing treaty rights were to be terminated. An Indian claims commissioner would be appointed to assist government in meeting its lawful obligations. The commissioner was appointed: Dr. Lloyd Barber of Saskatchewan. His work, however, was frustrated by Indian rejection of all aspects of the 1969 policy, including his appointment. Despite this limitation, he was able to assist in the resolution, or the negotiation, of several claims in western and northern Canada. He was also able to provide thoughtful comment upon the nature of Indian claims and various claims processes that might be used to address them.

The year 1973 was when government seriously began to address claims issues in the wake of the Supreme Court of Canada's *Calder* decision.⁷ This opened the door for negotiation of aboriginal title, or comprehensive claims. The James Bay Cree and Northern Quebec Inuit were the first to negotiate a comprehensive claims settlement.

In 1974 the Office of Native Claims (ONC) was established as a separate entity within the Department of Indian and Northern Affairs, reporting to the deputy minister. Piecemeal policies were developed to deal with diverse issues such as comprehensive claims, "cut-off lands" in British Columbia, reserve lands taken improperly or without compensation, and unfulfilled treaty obligations including land entitlements.

The policies of the ONC for the negotiation of claims were set out in two booklets published in 1982: *In All Fairness* deals with "comprehensive," or aboriginal title, claims; *Outstanding Business*⁸ deals with "specific," post-Confederation claims involving treaty entitlements, reserve and surrendered lands, and Indian moneys. These policies have not been amended since 1982.

Federal officials of Canada, and more specifically the Office of Native Claims, have stated on many occasions that the process of dealing with specific claims needs improvement. Indeed, their own documentation is testimony to this fact. It states that from 1974 to the present, First Nations across Canada have submitted over 530 specific claims. Of those submitted, 43 have been settled and 21 have been suspended, with the balance being somewhere within the process of the ONC. Settlement of specific claims is achieved within all of the present processes at a rate of less than three claims per year. It is doubtful that anyone could disagree that such a pace is totally unacceptable and would not be tolerated in any other area by any other interest group with like issues.

For its part, the Ontario government has never published an Indian land claims policy. Ontario has participated in negotiations with several First Nation claimants, on the stated basis that Ontario will deal with land claims arising out of breach of its past obligations

⁷ *Calder v. British Columbia (Attorney General)*, [1973] SCR 313, 34 DLR (3d) 145, 7 CNLC 91.

⁸ Reprinted in [1994] 1 ICCP 171.

according to criteria of fairness and legal principles. To date, however, Ontario has been able to achieve only one settlement agreement.

While most specific claims are negotiated through bilateral negotiations between the claimant First Nation and Canada or Ontario, some claimants have attempted to have their claims resolved through negotiations involving the offices and assistance of the Indian Commission of Ontario (ICO). Certainly the thinking of the claimants, and perhaps to a lesser degree the governments, is that their claim will be dealt with more fairly and expeditiously through this structured and formalized process.

The ICO is an independent authority which was established in 1978 to assist Canada, Ontario, and First Nations in Ontario to identify, clarify, negotiate, and resolve issues which they agree are of mutual concern. The mandate, powers of the Commission, and the appointment of the Commissioner are accomplished through joint orders in council by the governments of Ontario and Canada and confirmed by the Chiefs of the First Nations in Ontario. The mandate of the ICO includes a variety of powers to assist in the resolution of the issues before it, including land claims. These powers include non-binding arbitration, binding arbitration, formal mediation, and reference of an issue to court. In the exercise by the Commission of any of these powers of dispute resolution, however, the parties must all give their prior consent. And, in the area of land claims in particular, Canada and Ontario have not always displayed a willingness to give their consent even though the First Nations have been prepared to. The previous ICO commissioner, Roberta Jamieson, in her 1987 annual report articulated reasons as to why such mechanisms should not only be considered but by implication suggested they should be binding on the parties. In her report she states:

There are . . . reasons why it is important that parties make more frequent use of such to break an impasse. Settlement compromise, and knowledge that nonbinding arbitration or other independent review is unlikely encourages officials to maintain positions since they see no reason to compromise. If the parties do from time to time accept arbitration, officials will then know that their positions might be put to the test of outside opinion, rather than taking comfort in the knowledge that their positions will never be challenged by an independent evaluation.⁹

There would not appear to be any reason today to take issue with or disagree with that rationale. In fact, examining the history of the land claims being dealt with within the process of the ICO reveals that the opportunities for meaningful and expeditious results can no more be expected there than in any other process presently used to negotiate their settlement.

Since 1979, 12 specific claims have been accepted by the parties for settlement negotiations within the ICO process. The most recent of these was submitted for negotiation just over four years ago. To date two claims have been settled, one is being considered by

⁹ Indian Commission of Ontario, *Annual Report* (Toronto: ICO, 1987), 18.

the claimant First Nation for acceptance, while the remaining nine continue to be mired in the process with no apparent settlement in sight. In the view of the Commission, virtually all the active claims problems arise from government negotiators' failure to respond quickly or fairly to issues or requests arising in the negotiations (or their simple non-attendance at meetings). The issues are not apparently resolved by having them addressed through the ICO because of its inability to break impasses or move the issues along or to compel cooperation. As a result, claims being negotiated through the ICO process have historically not had any greater degree of success than those being negotiated outside it.

One need only consider the example of the Batchewana First Nation's validated claim to Whitefish Island to demonstrate the point. This claim has been within the ICO process since 1982. Since that time many meetings have been facilitated by the ICO, technical work respecting valuation of the claim has been carried out, and the First Nation has tabled a detailed proposal for settlement which the federal negotiator described as the best such submission he had ever heard. Notwithstanding the federal negotiator's appraisal of the First Nation's offer, however, there has been no formal response to it by the ONC since the offer was tabled approximately one year ago; indeed the federal government has refused to attend a single formal meeting with the Band to discuss the proposal. This is despite persistent efforts and prodding by representatives of the First Nation and the ICO. Indeed, because the federal negotiator has since taken ill and because there are apparently no other negotiators available to continue, the First Nation currently has no option but to continue to wait – if it wishes to remain in the negotiation process. And since the Commission has no powers to compel performance or attendance, or to make decisions in respect of the circumstances, the matter remains in limbo and the First Nation suffers. [The Whitefish Island claim was settled in 1992-93. *The Editor*]

If negotiation is to be an alternative to actions of violence and confrontation, such as those at Oka and other areas including some in Ontario, surely it is incumbent upon those who care to ensure that the alternative is one that works. History shows clearly that at this point it can only be said that the present processes and policy for dealing with Indian land claims have been an exercise falling far short of anything resembling success. If we agree with the Canadian Bar Association's committee answer of "yes" to its question: "Can it be said . . . that the aboriginal peoples of Canada have faced and continue to face, injustice within the legal and justice systems?" then we must surely agree with and be prepared to respond immediately to the additional comment that "it is not enough that Canadians merely recognize past injustices. More important is that we remedy current ones."¹⁰

¹⁰ Canadian Bar Association (CBA), Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: CBA, 1988) [hereinafter *Aboriginal Rights*], 14.

THE NATURE OF CLAIMS

Will Native claims make a difference? They will, but only if there is a change of attitudes as well as a change of policy. Our tendency to dismiss Native culture led us in the past to dismiss the notion of Native claims. Now that we have accepted our responsibility to negotiate a settlement of *Native Claims* there must be a *change in attitude toward Native history, Native culture, and Native rights*. We shall have to accept that a settlement of Native claims will be a beginning, not an end.¹¹

First Nations and the Government of Canada do not view claims in the same way. While First Nations need a claims process which will result in the proper recognition of their rights, the federal government continues to impose completely inappropriate policies, designed to minimize the implementation or limit the recognition of aboriginal and treaty rights. *The policy approach of the federal government in the area of native claims reflects this government's intent to limit any expansion of federal responsibility towards Indians, especially with regard to expenditures.*

A fundamental difference between the federal government and First Nation perceptions of claims is the artificial division of federal policies into "specific" and "comprehensive" claims. Two narrowly defined policies have been developed which are inadequate to meet the needs and priorities of First Nations. Most First Nations view their claims within the greater context of constitutionally protected aboriginal and treaty rights, and their political relationship with the rest of Canada.¹²

Many of the problems with land claims policies can be attributed to the fact that they address government's needs and expectations to extinguish existing duties and obligations at minimum cost with minimal disruption to the Canadian polity. Each of these elements is fundamentally at odds with *Indian needs and expectations*. Given the volume of comment to this effect from Indians and observers alike over the years, it is distressing that this needs to be explained again.

Indians do not view land claims settlements as terminating some aspect of their relationship with the Crown. They see the potential for renewal of historic commitments in a modern context.

¹¹ T. Berger, "Native Rights and Self-Determination: An Address to the Conference on the Voices of Native People, September 25, 1983" (1984) 22 U.W.O. L. Rev. 9.

¹² Assembly of First Nations (AFN), *AFN's Critique of Land Claims Policies* (Ottawa: AFN, August 1990) [hereinafter *AFN's Critique*], 13-14.

Indians do not see their rights as being for sale. They expect recognition of their rights to lead to the continuing exercise of those rights with implications for self-sufficiency and self-determination.

Many witnesses asserted that land claims settlements were essential to the exercise of self-government, in that they would provide an economic base.

Until our land claim is recognized and until the government of Canada recognizes our land base and our territorial jurisdiction, Indian self-government will be an illusion. The government of Canada must seriously undertake to negotiate our land claims so that our people will have a land base upon which to build our Indian self-government. (Kanesatake Mohawk Nation, Special 30:136)

Without land, without resources, there is no self-sufficiency; and without being self-sufficient, there is no Indian government. So it is our premise that we have to have the land before we can actually make the advancements in the resource development to attain that self-sufficiency. (Association of Iroquois and Allied Indians, Special 16:32)¹³

It is significant that current land claims policies, while paying some service to economic self-sufficiency, do not contemplate negotiation of the continuing exercise of aboriginal and treaty rights, of services promised in treaty negotiations, or of self-government in the context of claims negotiations.

In Ontario, the problem is aggravated because the policies exclude any claims arising from aboriginal title or treaties or other transactions concluded prior to Confederation. These limitations mean that many, perhaps most, claims in Ontario will never be addressed as matters now stand.

This arbitrary division of claims into two limited policy frameworks excludes many claims from the process. They simply fall between the cracks, not fitting neatly within either policy. The policies also fail to address rights issues which clearly have a basis in law. There is little recourse for First Nations which find their claims in this situation beyond pursuing costly litigation or developing direct action strategies.¹⁴

Exclusion of treaty rights issues is one of the major examples of Indian rights which clearly have a basis in law, but currently fall between the cracks. Despite Supreme Court

¹³ K. Penner, Chairman, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Ministry of Supply and Services, 1983) [hereinafter Penner Report], 113.

¹⁴ *AFN's Critique*, note 12 above, 14.

pronouncements in cases such as *Simon*¹⁵ and *Sparrow*,¹⁶ claims policies still reflect the attitudes described by a parliamentary committee:

Indian people view treaties as reaffirmations of their sovereignty and rights and as to allow settlement in certain areas; non-Indians regard treaties as an extinguishment of rights, an acceptance of the supremacy of the Crown, and a generous gift of land to the Indians so they might have land of their own. Indian people see Canadians respecting their own traditions and ancient doctrines such as Magna Carta, while at the same time regarding the Royal Proclamation as antiquated and Indian tradition as inappropriate for modern times.¹⁷

Fundamental change in the relationship between First Nations and the institutions of the Crown was wrought by section 35 of the *Constitution Act, 1982*, which recognized and affirmed the existing aboriginal and treaty rights of the aboriginal peoples of Canada. At one point, the federal government seemed to recognize this fact.

It is an important task that Canada embarked on in 1982, when three articles were included in the *Constitution Act* dealing specifically with the aboriginal peoples. In doing so, a commitment was made that we were going to engage in fundamental, substantial, and positive change respecting aboriginal peoples.¹⁸

Claims policies do not incorporate that commitment. Nor do they incorporate processes to deal with legal rights of, and lawful obligations to, Indians. For that reason they are seriously out of step with Indian needs and expectations.

Key to any understanding of the Indian perception of claims is an understanding of the essential relationship between Indian peoples and the land and the environment. One writer attributes much of the Indian reality today to severance of that relationship.

History demonstrates that there is a strong correlation between the loss of traditional lands and the marginalization of native people. Displaced from the land which provides both physical and spiritual sustenance, native communities are hopelessly vulnerable to the disintegrative pressure from the dominant culture. Without land, native existence is deprived of its coherence and its distinctiveness.¹⁹

In the Indian view, land is not a commodity to be traded on the market, nor is its true value to be determined on that basis. Unfortunately, Indian policy over the years and land claims policies today ignore this basic fact.

¹⁵ *Simon v. The Queen*, [1985] 2 SCR 387, 24 DLR (4th) 390, [1986] 1 CNLR 127.

¹⁶ Note 3 above.

¹⁷ Penner Report, note 13 above, 12.

¹⁸ B. Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples," cited in M. Boldt and A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1987), 158.

¹⁹ D. Johnston, "Native Rights as Collective Rights: A Question of Group Preservation" (1989) 2 Can. J. Law & Jur. 32.

It is undoubtedly true that federal/provincial agreements and the 1867 constitutional compact limit Canada's ability to deal with land and resources in the provinces today. That simply underscores the need for provinces to acknowledge their obligation to participate in claims settlements today as a dimension of past benefits received. To Indians, of course, the question is irrelevant: their historic relationship is with the Crown, in all its forms:²⁰

This has led to a great deal of frustration on the part of First Nations which are left with no alternative but to address their grievances either through the courts or by direct action. The courts have often not been found to be a reasonable course of action for many due to the prohibitive costs and the fact that many Native people feel the courts are likely to be biased against them or are simply an alien forum which cannot address their concerns properly. A growing number of native communities have found that they must take direct action on the ground, through roadblocks or other forms of protest, in order to get governments to take notice of their concerns.²¹

Unless the kinds of attitudinal change suggested by Berger and the AFN are brought to bear on land claims policies, it is foreseeable that neither government nor First Nations will ultimately achieve by way of negotiated agreements the objectives each brought to the table.

The Federal Government must meet the challenge and deal with First Nations on common ground in a spirit of cooperation as declared by the Supreme Court of Canada. The objectives and First Nations must be respected if solutions amenable to all parties are to be found. For there to be fair and just settlements, there must be a recognition of the inseparable connection land claims have with the greater framework of aboriginal and treaty rights in Canada.²²

Many political – as distinct from policy – statements of various governments seem to acknowledge the need to deal with Indian values and expectations in a realistic way. The statement of Prime Minister Mulroney quoted above is one example. Here is another:

At a time when our country is struggling to redefine itself, to determine what kind of a future we want for everyone in this land, we in all fairness pay particular attention to the needs and aspirations of Native people without whose good faith and support we cannot fulfil the promise that is Canada.²³

²⁰ See A. Pratt, "Federalism in the Era of Aboriginal Self-Government," in D. Hawkes, ed., *Aboriginal Peoples and Government Responsibility* (Montreal and Kingston: McGill-Queen's University Press, 1990).

²¹ *AFN's Critique*, note 12 above, 3.

²² *Ibid.*, 15.

²³ Department of Indian Affairs and Northern Development (DIAND), *In All Fairness* (Ottawa: Ministry of Supply and Services, 1981), 4.

These sentiments, however, are not reflected in First Nations' day-to-day dealings with claims officials under existing policies. A severe review of those policies is in order.

Experience shows that attempts to address First Nations concerns within federal claims policies are consistently doomed to failure as long as the fundamental issues involved are ignored. Government officials and bureaucrats do not have the authority to deal with matters of this nature. It is only through a political process that the rights of First Nations can be effectively implemented. Half-measures, such as the present claims policy approach, only leave more questions to be dealt with later.²⁴

The nature of Indian claims, and the new constitutional reality of aboriginal and treaty rights, argue for public education about the needs and aspirations of Indian peoples across a broad range of issues. Change must come, but there must also be a climate for change. The Penner Committee anticipated this need.

The view of history held today by most non-Indian Canadians and the perspective held by most Indian people are almost mirror images. Indian people consider the "discoverers" and "explorers," in whose memory monuments are erected and postage stamps issued, to have been intruders in a land already well known to the nations that inhabited it. Indian people know their nations to have been productive, cultured, spiritual, intelligent civilizations comparable to those in Europe at the time of first contact. But they are portrayed instead as savages and pagans, unknowing of religion and needing instruction in simple tasks. Because only a one-sided, negative portrayal has been widely disseminated, non-Indian Canadians are poorly prepared to understand the perspective held by Indian people and to comprehend the background behind the distressing and unacceptable situation of Indian people in Canada today. This often leads to confrontation.²⁵

Federal, provincial, and First Nations governments share the responsibility to create this climate for change. And in that climate, the true range of Indian expectations of land claims processes can, and must be, dealt with.

At the time the federal government was developing its new claims policies in light of the 1973 *Calder* decision,²⁶ the Indian claims commissioner of the day advised upon the nature of Indian claims:

In the final analysis it must be realized that the process of Indian Claims settlement involves not just the resolution of a simple contracted dispute, but rather the very lives and being of the people involved. Desire for settlement does not only concern the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people . . .

²⁴ *AFN's Critique*, note 12 above, 14.

²⁵ Penner Report, note 13 above, 12.

²⁶ Note 7 above.

After all, much of our current difficulty stems from the rigidity and inflexibility of positions established ages ago.²⁷

First Nations look to claims policies and processes to deal with their aboriginal and treaty rights because, for many issues of importance to all segments of society, there are no alternative forums.

There are few options available for dealing with matters which so clearly have an impact on both the history and future development of not only Indian communities, but Canada as a whole. First Nations want a settlement of their outstanding grievances through a process which is based on principles of fairness and justice. Most of the Canadian public support this objective. It can only be accomplished through a process which takes account of the importance First Nations attach to the recognition and implementation of aboriginal and treaty rights already recognized in the Constitution.²⁸

Rigid and inflexible positions of the past have led government to unilaterally define native claims in a restrictive manner. This has resulted in policies and processes that are out of step with the very nature of the issues they are supposed to resolve. Without fundamental reassessment and attitudinal change, the inevitable consequence will be to perpetuate the situation we see today: part of a job, poorly done.

²⁷ L. Barber, "Indian Claims Mechanisms" (1974) 38 Sask. L. Rev. 15.

²⁸ *AFN's Critique*, note 12 above, 14.

PROBLEMS WITH THE CLAIMS PROCESS

INTRODUCTION

To date progress in resolving specific claims has been very limited indeed. Claimants have felt hampered by inadequate research capabilities and insufficient funding; government lacked a clear, articulate policy. The result, too often, was frustration and anger. This could not be allowed to continue.²⁹

For more than two decades the problems presented by Indian claims have bedeviled the Government of Canada and Indian peoples themselves. Millions of dollars, and the energy of hundreds of people, have been expended, and yet satisfactory solutions seem no closer today than they ever did. This is not to say that nothing worthwhile has been accomplished. Much more is now known about the issues which have to be faced.³⁰

In the nearly ten years since these statements were made, frustration and anger have escalated to the boiling point. At the same time, we continue to learn more about the issues as courts give constitutional dimension to "aboriginal and treaty rights," the "honour of the Crown," and its "fiduciary duties."

What has not changed are the issues themselves or governments' unwillingness to deal with them. This section of the discussion paper will show that what all the intervening review, comment, and recommendations have most in common is the fact that they have all been ignored.

In Ontario, the focus must be on the specific claims policy since there is no general acknowledgment by the two levels of government that any title to land remains unextinguished. While the correctness of that position is now before the Supreme Court of Canada in the *Bear Island* case,³¹ it leaves little scope for operation of the federal comprehensive claims policy. Claims of the Golden Lake Algonquins and non-signatories to the

²⁹ DIAND, *Outstanding Business: A Native Claims Policy* (Ottawa: Ministry of Supply and Services, 1982) [hereinafter *Outstanding Business*], 3.

³⁰ K. Tyler, "A Modest Proposal for Legislative Reform to Facilitate the Settlement of Specific Land Claims," [1981] 3 CNLR 1 at 1.

³¹ Editor's note: See *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570, 83 DLR (4th) 381, [1991] 3 CNLR 79 (SCC).

Robinson Superior Treaty are not in any formal process at the present time. Problems with the specific claims policy on treaty issues were recently described by the Canadian Bar Association:

The specific claims process has not proved to be an effective process or forum in which the treaty issues can be addressed. An obvious deficiency is the fact that it is limited as to its scope. Clearly, matters such as hunting and fishing rights and issues pertaining to social, economic and political subject-matter are not provided for in this forum. As a result, the specific claims policy is restricted to treaty land entitlements and monetary compensation.

The policy as presently constituted was developed unilaterally by the federal government with little aboriginal consultation. This unilateral approach to devising policy has always been a major grievance with the aboriginal peoples since it departs from the bilateral nature of the treaties.³²

In fact, the specific claims policy booklet does refer to some Indian views, which can be summarized as follows:

- the narrowness of the lawful obligation criterion
- the need to deal with pre-Confederation claims
- the need to deal with treaty harvesting and resource rights
- the nature of the governments' trust responsibility to Indians
- relaxed rules for relevant evidence
- technical defences not applying to evaluation of claims
- Indian access to Justice Canada legal opinions
- abolishing the federal Office of Native Claims
- funding of court actions
- increased funding at all stages of the claims process
- equitable principles of compensation, including restoration of lands held by third parties.³³

With the exception of funding increases, it is not apparent that any of the Indian views itemized above found their way into actual policy or practice. And, as will be seen, all of them are still issues.

The basic message in this section of the discussion paper is that the problems of policy and process have long been known. Failure to deal with them has caused the frustration and delay that have ground claims settlements in Ontario to a virtual halt.

³² *Aboriginal Rights*, note 10 above, 54.

³³ *Outstanding Business*, note 29 above, 15-16.

The first three sections of this chapter highlight the three most vital issues that must be addressed in order to achieve a functional claims policy: the concept of lawful obligation, the role of the Crown as fiduciary, and government's invidious conflict of interest throughout the process.

This is not to say that the other issues discussed are unimportant: they are the bitter aloes on which the parties feed daily and, over the short term, are the most amenable to change. In fact, there is no element of the current process that could not be improved. The question in each instance is how much improvement, how soon.

LAWFUL OBLIGATIONS

These problematic words date from the 1969 White Paper which proposed termination of Indian status, treaties, and reserves. In proposing these devastating actions, the federal government did say that its "Lawful obligations [to Indians] must be recognized."

To Indian people, the phrase "lawful obligations," from its inception, has been a cause both of confusion and controversy. Many regard it as an unsatisfactory guide – in practice, if not in theory – by which to measure the validity of their claims.³⁴

For years, all concerned have wrestled with the relationship between "lawful," "legal," "equitable," and "fair." In April of 1982, the term "constitutional" also became relevant. But just the following month, the federal government issued its specific claims policy which attempted, within the limits of "guidelines," to define lawful obligations.

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government. A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfilment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.³⁵

³⁴ M. Bossin, "Beyond Lawful Obligations," in B. Morse, ed., *Indian Land Claims in Canada* (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians, Walpole Island Research Centre, 1981), 65.

³⁵ *Outstanding Business*, note 29 above, 20.

It will readily be seen that the Indian views noted above did not find their way into the concept of lawful obligations especially if it is noted that pre-Confederation claims are not considered, nor are treaty promises of resource harvesting or services. This is especially important to Ontario First Nations since there are more treaties in the Great Lakes watershed by far than in all the rest of Canada. Almost all date from the pre-Confederation period.

As a result, crucial issues such as self-government, education and health services, hunting, fishing, and trapping rights – to name only a few – cannot be negotiated as “lawful obligations” of the Crown.

The Government views treaties as setting out limited legal obligations, being those arising from the written terms of the treaties, and certainly not those implicit in the “spirit and intent” of treaties as well. In some cases, in line with the courts, the Government has said that reasonable understandings and/or verbal promises which were not included in the final text of treaties should be respected as well.

From the government perspective of respecting lawful obligations arising under the written terms of the treaties, most obligations have been met and in many cases exceeded. Admittedly, there are outstanding issues with respect to treaty land entitlements. As well, hunting, fishing and trapping rights under treaties have not been clearly and satisfactorily resolved.³⁶

The essential element to a functional claims policy is express acknowledgment that, in assessing government conduct past and present, the appropriate standard to be met is that of a trustee or fiduciary. This has been articulated twice by the Supreme Court of Canada: *Guerin*³⁷ and *Sparrow*³⁸ (1990). But the policy deals with these concepts only obliquely, in a section headed “Beyond Lawful Obligation”:

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.³⁹

³⁶ *Aboriginal Rights*, note 10 above, 53-54.

³⁷ *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, [1985] 1 CNLR 120.

³⁸ Note 3 above.

³⁹ *Outstanding Business*, note 29 above, 20.

At least one claimant was able to use these provisions effectively:

The commitment to settle claims considered to be beyond lawful obligations did result in probably the most significant settlement to date, namely, the White Bear in Saskatchewan . . . The government was prepared to accept this claim for negotiation based on certain improprieties involved in the sale of Indian lands by government officials.⁴⁰

Even so, the concept of "beyond lawful obligation" falls far short of the mark of full fiduciary responsibility. One might say that all equitable rules are outside the policy and this is not a fine legal point. In the *Guerin* case, for example, the court found "equitable fraud," but not common law or "legal" fraud. Would that claim fall within the specific claims policy today? Does government accept fiduciary responsibility for its dealings with Indian rights, resources, lands, and other assets? The perception is that it does not, and this issue is discussed further below.

In fact, the Indian view is that the claims policy operates with general disregard of existing law. *Miller v. The King*,⁴¹ a Supreme Court of Canada decision from 1950, held that the federal government can be liable for Indian moneys as far back as 1840, but the policy does not accept claims dating prior to 1867. In Ontario, that makes a big difference since the administration of Indian funds between 1840 and 1867 was a continuing scandal of the time.

Since 1982, the policy has not changed to incorporate emerging rules of law:

The fact is, federal land claims policy criteria are inconsistent with the developing law on aboriginal rights in this country. Landmark cases such as the recent *Guerin* (1984) and *Simon* (1985) decisions are ignored in the criteria for its comprehensive claims policy. For instance, the *Guerin* decision confirmed the federal government's fiduciary duty to aboriginal peoples and the responsibility it has for protecting aboriginal and treaty rights. In *Sparrow* (1990) the Supreme Court of Canada said that Section 35 of the *Constitution Act, 1982* is a solemn commitment to aboriginal peoples which must be given meaningful content by government legislation, practices and policies. The federal government has yet to respond in any significant manner to the requirements delineated in these decisions.⁴²

The result is that government takes a very narrow view of what claims might qualify within its own definition of lawful obligation. And government has recognized all along that this would be a source of difficulty. In some cases, notably the BC "Cut-Off Lands," its own policy was not followed.

⁴⁰ D. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (1986) [unpublished], 15.

⁴¹ [1950] SCR 168, [1950] 1 DLR 513, 5 CNLC 298.

⁴² *AFN's Critique*, note 12 above, 6.

In practice, the government has entered into some settlements on the advice of the Minister of Justice where a lawful obligation could probably not have been enforced by the courts. This is certainly the case with the B.C. "Cutoffs" claim in which questionable alienations of reserve land were confirmed by federal and provincial statutes. At the same time, there has been considerable caution about establishing precedents incapable of consistent application, primarily because of cost.

This caution has been countered by Indian groups' contentions that the government should go beyond compensation for legal wrongs to recognize the social and moral aspects of claims. In this context, early twentieth century alienation of approximately 700,000 acres of fertile land from various Indian reserves on the prairies is cited as an example. Although Indian consent was obtained, the means of doing so (e.g., spot cash payments authorized by statute) are often difficult to justify in light of over-population and poverty on some Indian reserves today.

It is clear that Indian expectations of what the claims process should achieve in righting past wrongs goes far beyond what the government has hitherto been prepared to consider.⁴³

Even the provincial officials in British Columbia had difficulty with the definition of lawful obligation as set out in the policy:

However, even getting Canada to agree with itself on the definition of a specific claim is problematic. The "Outstanding Business" policy statement identifies B.C.'s cut-off claims as specific claims, as does the recent federal status report. But a document sent to the Province of British Columbia seeking clarification about the nature of specific claims says, "Differences Between Specific and Cut-off Land Claims." Strictly speaking, cut-off claims are not specific claims.⁴⁴

The problem in BC is that the cut-off lands were taken legally, by statute, but immorally in all the circumstances. No parallel exception has been extended to Ontario where, for example, a 1924 statute deprived most First Nations of one-half of the value of their mineral resources. The rules should be the same for everybody. And the rules should be broader rather than narrower.

Even before the specific claims policy was formalized in 1982, it was obvious to all concerned that the threshold standard of obligation would govern the utility of the entire process.

In light of the need for a satisfactory resolution for all parties, the case is argued for a broad definition of the obligations upon the federal government which are "lawful" in the truest sense of the word. This issue is by far the most complex to be dealt with in developing a new model, yet it is obviously fundamental.⁴⁵

⁴³ DIAND, "Office of Native Claims Reference Book" [unpublished] [hereinafter "ONC Reference Book"], 18.

⁴⁴ E. Denhoff, "Specific Land Claims: How Does a Tribunal Deal with Them?" in "Native Land Issues (See You in Court)" (Canadian Bar Association Symposium, Winnipeg, April 1979) [hereinafter "Native Land Issues"], 9.

⁴⁵ Morse, ed., note 34 above, 9.

All the current problems of denied access, grudging validation procedures, arbitrary principles of compensation, frustration, and repeated delays can be traced to problems with the concept of lawful obligation as set out in the specific claims policy. Fortunately, there is another standard available.

THE CROWN'S FIDUCIARY OBLIGATIONS TO INDIANS

Much learned debate has centred on the appropriate standard of fairness that the Crown should have observed in its dealings with Indian rights, lands, and resources. To many, the legal standards imposed on a formal trustee seemed appropriate, but government resisted.

Many Indian claims will probably remain outstanding until the legal nature of the historical Indian-government relationship is clarified. The underlying contention in such claims is that the federal government is the Indians' legal trustee and that particular actions taken by the government over the years have breached this trust responsibility by not being in the best interest of Indians. In litigation where this issue has been raised, the government has taken the position that it does not have a responsibility for Indians or Indian lands. The term "trust" is perhaps better defined as a "political" or "administrative" trust which, in effect, is merely another way of expressing federal constitutional responsibilities for Indians.⁴⁶

Government's aversion to trust responsibility, enforceable by the courts, can be attributed to several considerations: the desire to limit liability, to exclude court direction on appropriate conduct, continued reliance on limitation periods, and, above all, a fear that past conduct might be measured by current morality.

Others felt that the duties of a trustee had not changed so much that past transactions should avoid scrutiny by modern principles of equity. Ken Tyler recommended that the standard be legislated retrospectively.

Contemporary morality would not be anachronistically applied to past events if it were now enacted that all Indian reserve lands, monies, and other assets which were, at any time, held by the Crown for the use and benefit of any Indian or Indians, be deemed to have been held on an express trust.⁴⁷

At the same time, many First Nations had to put the issue before the courts since, without an appropriate legal standard of conduct, they would have no cause of action against the Crown. The *Guerin* case,⁴⁸ arising out of an improvident leasing transaction on the Musqueam Reserve in Vancouver, was the first to reach the Supreme Court of Canada.

⁴⁶ "ONC Reference Book," note 43 above, 21.

⁴⁷ Tyler, note 30 above, 25.

⁴⁸ Note 37 above.

For policy purposes, still others examined a standard of fairness not overburdened by strict principles of law. Gerard La Forest, then a law professor and now justice of the Supreme Court of Canada, made such a proposal to the Office of Native Claims in 1979:

... we are not so much concerned with a *legal obligation* in the sense of enforceable in the courts as with a *government obligation of fair treatment* if a lawful obligation is established to its satisfaction. Consequently, technical rules of evidence that have a place in ordinary actions should not be relevant. Similarly, lapse of time should afford no defence to liability by the Crown.⁴⁹

This proposal may have been drawn from the U.S. experience with the Indian Claims Commission. The 1946 act establishing the commission directed it to hear, in addition to legal and equitable claims, claims of a moral nature based upon the principle of "fair and honourable dealings."⁵⁰

In practice, claims based only on their moral nature rarely succeeded before the U.S. commission. But the U.S. Court of Claims, sitting in review of the commission, did give substance to the clause:

In any event, the United States is held liable under the "fair and honourable dealings" clause, not because it has title to the property [i.e. as trustee] but because, by its own acts, it has undertaken special duties which it has failed to fulfil.⁵¹

None of these principles found their way into the specific claims policy, but they were soon reconciled as part of Canadian law: by the Supreme Court of Canada in its 1984 watershed decision in *Guerin*.⁵²

The *Guerin* decision did not answer all possible questions about Crown obligations to Indians. But it did examine standards of conduct and, in connection with the land surrender at issue, came down in favour of the fiduciary standard in preference to the express trust. The reasoning of the majority in our Court sounds very much like the U.S. Court of Claims:

Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself

⁴⁹ G. La Forest, "Report on Administrative Processes for the Resolution of Specific Indian Claims" (Ottawa: DIAND, 1979) [unpublished], 14.

⁵⁰ See S. Henderson and R. Barsh, "Indian Land Claims Policy in the United States," in Morse, ed., note 34 above, 183.

⁵¹ *Lipan Apache Tribe v. U.S.*, 180 Ct.Cl. 487, at 502 (1967).

⁵² Note 37 above.

where the Indians best interests really lie . . . This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.⁵³

Some writers suggest that even this formulation would not exclude an express trust in another case where specific personality is in issue. For example:

Another issue concerns Indian assets other than reserve lands. Is the Crown still a trustee with established trusteeship powers over Indian moneys held by the Crown for Indians or . . . is the Crown now but a significant fiduciary with powers not yet delineated?⁵⁴

Clearly the Court preferred the more flexible and unique (*sui generis*) fiduciary relationship to the formalized structure of the express trust. While the analysis was weak in the case, and some would say wrong with respect to the American precedents, the result was unmistakable: where the Crown assumes, or Parliament imposes, duties with respect to Indians and lands reserved for the Indians, and the performance of those duties involves an exercise of discretion, the courts will impose and enforce the standards of a fiduciary upon and against the Crown.

In terms of developing claims policy, the only real question was how far the "blunt tool" of fiduciary obligation would be extended beyond the facts of *Guerin*. We now know the answer to that question.

Initially, Justice Canada took the position that *Guerin* only applied in reserve land surrender situations. The Federal Court of Appeal quickly moved to correct that error by extending the fiduciary obligation to expropriations of reserve land: *Kruger v. The Queen*.⁵⁵

One writer has noted that the Supreme Court itself went beyond its narrower ruling in *Guerin* when it later had occasion to comment on the case:

"[I]n *Guerin* this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them." The Court would seem to have moved to discount a distinction between surrendered and unsurrendered reserve lands.⁵⁶

⁵³ *Guerin v. R.*, [1984] 2 SCR at 383, [1984] 6 WWR at 500, [1985] 1 CNLR at 137 (Dickson, J).

⁵⁴ D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989), 421-22.

⁵⁵ [1986] 1 FC 3 (CA), 17 DLR (4th) 591, [1985] 3 CNLR 15 (Fed. CA).

⁵⁶ R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301 at 325, quoting and commenting on *Canadian Pacific Ltd. v. Paul* [1988] 2 SCR 654 at 676, 53 DLR (4th) 487 at 503, [1989] 1 CNLR 47 at 59.

By this point, the only large issue was what the courts might do about treaty obligations which are not proprietary or compensatory in nature. In general terms, the United States again provides a lead:

In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of Court, it has charged itself with moral obligations of the highest responsibility, as disclosed in the acts of those who represent it in dealings with the Indians, and should therefore be judged by the most exacting fiduciary standards.⁵⁷

Would these principles extend to treaty promises of hunting, fishing, wild rice harvesting, education, etc.? One writer thought that the fiduciary's duty of loyalty made such extensions necessary.⁵⁸

It has, however, been section 35 of the *Constitution Act, 1982*, which has turned the key and opened wide the door. In *Sparrow v. The Queen*, the Supreme Court of Canada has ruled that the Crown's fiduciary obligations extend to the aboriginal and treaty rights of the aboriginal peoples of Canada.

In our opinion, *Guerin* together with *R. v. Taylor and Williams* . . . ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginal is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historical relationship.⁵⁹

The Court also notes that "the honour of the Crown is at stake in dealings with aboriginal peoples."⁶⁰ Clearly the Court anticipates the legal consequences of a fiduciary relationship over a broad range of aboriginal and treaty rights issues. Yet it also recognized a role for political resolution of these issues.

Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.⁶¹

It is not possible at this point to say with precision what the exact nature of the Crown's fiduciary obligations will be in each individual fact situation of the 600 to 800 known claims, much less those which can be anticipated on the basis of recent court rulings.

⁵⁷ *Seminole Nation v. U.S.*, 316 U.S. 286 at 196-7 (1942).

⁵⁸ D. Johnston, "A Theory of Crown Trust towards Aboriginal People" (1986) 18 Ottawa L.R. 331.

⁵⁹ Note 3 above, [1990] 1 SCR at 1108, 70 D.L.R. (4th) at 408, [1990] 3 CNLR at 180.

⁶⁰ [1990] 1 SCR at 1114, 70 D.L.R. (4th) at 413, [1990] 3 CNLR at 183.

⁶¹ Note 59 above.

It is, however, necessary to say that any claims policy which does not now incorporate fiduciary obligations over a broad range of transactions, including treaty promises, will be so far distanced from the law of the land that no one could repose any faith in its capacity to resolve claims in a fair and equitable manner.

And once that fundamental principle is built in to claims policy, it will be much easier to address the second most common complaint: government's role as judge of its own conduct.

THE CONFLICT OF INTEREST ISSUE

One of the most obvious criticisms of the process is the conflict of interest the federal government has in attempting to deal with these matters. On the one hand the federal government has a fiduciary or trust-like responsibility towards aboriginal peoples to act in their best interest, while at the same it seeks to act in its own best interests. Clearly the interests of the two parties are not the same and often directly conflict. Therefore, how can one party to resulting disputes control the resolution process and expect the others to perceive that the process results in fair and just settlements?

Through these policies the federal government sets itself up as the judge and jury in dealing with claims against itself. It sets the criteria, decides which claims are acceptable, and controls the entire negotiation process, including funding support.

Clearly, in the democratic world there are few examples of such a grievance procedure being so totally controlled by one party to a dispute. Seventeen years of experience have shown this to be an inadequate dispute resolution mechanism.⁶²

The current process whereby the Office of Native Claims and the Department of Justice ascertain the historical and legal merits respectively of a claim has been criticized as inequitable and requiring modification by the presence of an impartial third party.⁶³

The issue of conflict of interest arises at several levels in the claims process.

1. Historical

Except in rare cases of honest error or oversight, most claims are based on fact situations where the Crown has advanced its own, or some other party's, interest at the expense and to the detriment of Indians. The concept of fiduciary obligation provides an equitable standard to determine which of these claims should have access to a resolution process.

⁶² *AFN's Critique*, note 12 above, 3.

⁶³ "ONC Reference Book," note 43 above, 17.

2. Submission of a Claim

The claims policy puts the burden on the claimant to establish a valid claim. This is inconsistent with the legal duty of a fiduciary, or a trustee, to account for the management of assets. Thus, for most claims admissible under the current policy, government has imposed an obligation on claimants which conflicts with its own duty to demonstrate the legality, propriety, and fairness of impugned transactions.

3. Validation of a Claim

This has proven most problematic. Without acknowledging any fiduciary obligation at any level, the fiduciary of today assesses the conduct of the fiduciaries of the past and determines, in secrecy, the validity of every claim submitted according to criteria which are an undisclosed mix of legal, political, and budgetary considerations. There is little doubt, however, that the greatest single factor in determining validation is the Justice opinion.

The Specific Claims Branch of DIAND has responsibility to research claims and present them to the Department of Justice for an opinion as to whether there are outstanding "lawful obligations." If a claim is judged "valid" by the Department of Justice and accepted by DIAND for negotiation, the Specific Claims Branch has the additional mandate of negotiating the claim to determine compensation. DIAND also has the responsibility to determine what monies should be provided to the Indian bands for research to develop and negotiate claims.

Aboriginal leaders have expressed many times their perceptions of numerous situations of conflict of interest that the Specific Claims Branch may be in.⁶⁴

The Union of Ontario Indians has described the role of the Department of Justice in providing legal opinions:

The legal analysis takes two to four years to complete. This usually means that there are between two and five lawyers who bear primary responsibility for an opinion, since the average time a lawyer remains in that part of the Department of Justice is less than two years. When an opinion is given, it must still pass through the "Native Law" section of the Department of Justice – a process that takes between six months and two years, and which result(s) in the initial opinion being sent back for more work. It has never been made clear whether the role of the Department of Justice is that of an objective "judge" or that of lawyers defending a client. In trying to fulfil both functions, Justice lawyers have a clear conflict – usually resolved in favour of the government.⁶⁵

Part of the validation process is an invitation to the claimants to submit the legal basis of their claim; in effect, to disclose their legal advice. There is, of course, no reciprocity since Justice Canada's advice is treated as confidential between solicitor and client. The

⁶⁴ *Aboriginal Rights*, note 10 above, 54-55.

⁶⁵ Union of Ontario Indians, "Land Claims Policy Development," submitted to the Indian Commission of Ontario by the UOI, 19 September 1990 [hereinafter UOI, "Land Claims Policy"], 3.

client, DIAND, has given no indication of waiving confidentiality, probably because Justice lawyers have said that it can't. One reason for this reticence can be inferred from documented instances where Justice opinions are inconsistent on the same point of law.

David Knoll provides an example of inconsistent legal opinions leading to different results in the validation of two similar claims.

[T]he autonomy of Justice lawyers has led to us getting opinions on different claims which are blatantly contradictory. For example, the question of when precisely is a reserve created is a factor in many claims. In the case of Brokenhead Band, the reserve was surveyed in 1874 and 1876, but the Reserve was not confirmed (with boundaries as amended by the surrender) by Order-in-Council until 1916. The opinion of one Justice lawyer was that the reserve did not exist until the Order-in-Council was passed . . . In the case of the Gamblers Band and Waywayseecappo Band, a reserve had first been surveyed for the combined Band in 1877, but the location of it was not acceptable to the majority of the Band, and caused the Band to split into parts. The Orders-in-Council confirming [the new] reserves in 1880 referred to the boundaries as amended by the 1877 agreement. The opinion of the assigned Justice lawyer in this case was that an Order-in-Council was not required to create a reserve, and that it was the boundary surveyed in 1877 which should count for claims purposes. Thus, one Justice lawyer is saying that an Order-in-Council is necessary before a reserve "exists" . . . while another says that such an Order-in-Council is not necessary . . .⁶⁶

Inconsistencies and other technical problems that exist include: the validation process is based on legal principles, but the involvement of the Minister of Indian and Northern Affairs in the final determination of the claim as to validity and compensation points to the political nature of the process; the concept of "lawful obligation" is not specifically defined; the available jurisprudence gives limited guidance, thereby allowing great latitude for individual lawyers' opinions to govern the decision on validity; and Department of Justice opinions are kept secret by the Government so that an Indian claimant never knows why a particular claim has been accepted or rejected.⁶⁷

[T]he most fundamental criticism of the 1982 claims policy is that Canada still remains the ultimate adjudicator of claims made against it. This has been a constant criticism of the Federal Government's native claims policy which they have repeatedly ignored. The Federal Government remains the ultimate determiner of what claims will be funded, validated and accepted for negotiation. No appeal is available except to commence an action through the Courts. There is not even the least effort to the image of any sense of neutrality. This situation, more than any other, is what condemns this policy and process to be viewed as biased, arbitrary and unfair.⁶⁸

⁶⁶ Treaty and Aboriginal Rights Research Centre (TARR), *Discussion Paper: Specific Claims Policy and Process* (Winnipeg: TARR, 1986), 2-3.

⁶⁷ *Aboriginal Rights*, note 10 above, 55.

⁶⁸ Knoll, note 40 above, 15.

The Penner Committee, travelling across Canada to investigate Indian self-government, encountered much comment on Indian claims policy, including the well-known allegation of conflict of interest in the claims process:

The process was condemned by Indian witnesses for its lack of independence from the Federal Government and for its unilateral imposition of conditions. Although many claims have been filed since the Office of Native Claims was established, few have been settled:

"The federal government right now is judge, jury, executor. They are everything rolled one, and that is specifically the problem now. When negotiations break down there is no way we can arbitrate that situation. It is totally in the hands of the government to determine what they want to do with that process if we do not want to negotiate any further or if we fail to come to an agreement on negotiation. So anything where we could take some of the authority away from the federal government in that delaying would be of benefit. It would be a positive step." (Association of Iroquois and Allied Indians, Special 16:25)

"It is a strange rationale to allow a bureaucrat to have the power to decide on what is and what is not a legitimate land claim. In the policy established for the settlement of specific land claims, it is the lawyers of the Department of Indian Affairs and Northern Development and Justice who determine the merit of the claim. In this way, they are both defendant and judge. To further complicate matters, the opinions they write regarding the claims are confidential. Therefore it is safe to state that they have taken on the role of protecting the federal government and the provinces from claims that may be filed by the First Nations. Claims that they feel have merit they will negotiate out of court, although the compensation they would award would be in proportion to the strength of the claim. So in this case it would be best to go to court in order to ensure fair treatment." (Restigouche Band, Special 22:10).⁶⁹

Not much more need be said about the nature of this problem. Everyone who has attempted to validate a claim has his or her anecdotes about the process. Some are amusing; many are frightening. The fears of the academic writers are, if anything, magnified in practice.

The experience of the Mississaugas of New Credit bears mention here. That First Nation found that validation of their claim was revoked, three years after the fact, at a time when they were led to believe they were close to a negotiated settlement. It is difficult to give credence, good faith, time, and effort to a process so patently arbitrary.

4. Compensation Negotiations

For many claimants, validation is the easy part of the process. It is when the claim is accepted for negotiation that the real problems begin.

⁶⁹ Penner Report, note 13 above, 14.

The process of settling claims is often a complex one, depending on the nature of the claim and the type of compensation being sought. Specific claim settlements can vary, but most often consist of such elements as cash, land or other benefits. The criteria for calculating compensation may also vary from claim to claim according to the particular issues and obligations established in the claim and to the strength of the claim.⁷⁰

The specific claims process is nasty, brutish, and long, very, very long. Correspondence and documents sit on bureaucrats' desks for extended periods of time without reply to letters and concerns of the claimants.⁷¹

The Departmental policy as opposed to the Government policy appears to be one of avoiding negotiations and therefore settlement, at all cost.⁷²

To begin with, there is little doubt that claims are validated, in part, on the basis that they can be settled within foreseeable time and within the claims budget. Assuming that there is some rational appreciation of the nature of the claim, there should be no reason for failing to reach such agreement. But there are many reasons for the many failures which occur.

First, the Justice lawyer who may have to get the claim rejected at the first level is now the "expert" on that claim and comes to the fore as adversary/defendant/negotiator defending the public purse. And Justice lawyers do control the negotiation process.

In the negotiations, the Department of Justice lawyers tend to take control, rather than the Indian Affairs negotiators. This is because the crucial questions of validity and compensation are seen by Canada as legal questions. Though Canada tends to say that negotiations allow maximum control and participation by Band Councils, in fact the legalism of the standards and processes used by Canada makes the Councils into spectators while lawyers argue over fine legal points. Instead of participation, the process's legalism offers Chiefs and Councils frustration and bitterness over its unfairness.

Once the federal government adopts a legalistic stance, all the other parties are compelled to counter that by bringing in their lawyers and legal arguments. We might as well be in court, where at least there is a judge to keep order, and a set of rules everyone lives by.⁷³

Second, all the elements which are supposed to be "history" by the time a claim reaches negotiation are still on the table. Was the land reserve land? Could the claim succeed in court? Would limitation periods apply? Does the First Nation have credible witnesses? Et cetera. Et cetera. In the extreme case, new information (or a new lawyer looking at old information) appears and the First Nation is back to square one, or shoved off the board altogether.

⁷⁰ *Outstanding Business*, note 29 above, 24.

⁷¹ V. Savino, "The Blackhole' of Specific Claims in Canada: Need It Take Another 500 Years?" in "Native Land Issues," note 44 above, 14.

⁷² Allen Ruben, quoted by Savino, note 71 above, 14.

⁷³ UOI, "Land Claims Policy," note 65 above, 8.

Third, claimants are invited to accept the unacceptable. In some cases, this will imply *taking money instead of land* the First Nation clearly wanted returned. On other occasions, claimants are asked for a release of obligations that are not part of the claim at hand. Such positions can delay negotiations for so long that claimants seriously wonder why the claim was accepted for negotiation in the first place.

Fourth, monetary compensation is often offered in unrealistically low amounts. This is understandable in terms of "opening positions," but those positions do not generally change as negotiations progress: they become entrenched. There are many examples of claims that languished at the \$100,000-\$300,000 level for years, only to be settled in a final rush for \$2 million plus. Frequently, the government position on compensation ranges from the intransigent to the irrational. Two examples come from the files of the ICO and are summarized here.

Mohawks of Gibson

After this claim was rejected and litigation was commenced, the federal government agreed to negotiate settlement. The First Nation obtained a professional appraisal which, they felt, put potential settlement within their expectations.

At a negotiation session, the appraised value was decimated by the ONC representative. When asked for the basis of his appraisal, he indicated that he had made a few phone calls to realtors in the area and decided to substitute his valuation for the professional appraiser's. Negotiations immediately broke down as the First Nation did not expect that the process could meet their expectations.

Batchewana Band

When the federal government finally agreed to return Whitefish Island to reserve status – an issue that had stalled the claim for several years – the opening offer was zero compensation.

Counsel for Batchewana pointed out that the accepted basis for the claim was that the island had been undervalued at the time it was taken, allegedly for railway purposes. Accordingly, *compensation should, in part, be based on placing the difference in value into the trust account at the relevant time and letting it earn interest as prescribed by regulation to the date of settlement.*

The federal government's response, backed by a Justice opinion, was that 20 per cent of the interest should be taken out of the calculation each year in order to generate a "proper" settlement figure. *The First Nation remains unconvinced that government should be able to deprive them of fair value in the first instance and then reward itself with 20 per cent of the interest that the trust moneys would have earned every year since.*

In addition to these specific examples, there are dozens of others in Ontario – perhaps hundreds nationally – of deadlines missed, meetings cancelled, undertakings not performed, and the eternal search for a "mandate to settle." *All of this occurs despite the fact that a mandate to settle had apparently been given when the claim was accepted for negotiation.*

In cases where the Minister accepts a claim as negotiable in whole or in part, the Office of Native Claims is authorized to negotiate a settlement with the claimant on behalf of the Minister and the federal government.⁷⁴

While all this unfolds, First Nations are obliged to sustain their efforts towards settlement by taking out loans from the federal government which will eventually be a first charge against settlement funds. Thus delays are not only frustrating, they are expensive, and it is frequently the claimants who pay.

No one expects that validation of a claim will give a First Nation open access to the federal treasury. Everyone, however, expects that even in the clearly adversarial atmosphere of claims negotiations, First Nations will have the opportunity to negotiate a reasonable settlement in good faith and in the foreseeable future. That this is not happening in Ontario points to an immediate need to reconcile policy and practice.

The more profound issues of conflict of interest must also be addressed to assure First Nations that their claims are being fairly assessed. There is grave suspicion that this is not happening now.

VAGUE WORDING: ARBITRARY INTERPRETATION

Some observers think that the "Guidelines" in the specific claims policy have more legislative force in this country than section 35 of the Constitution. Until recently they certainly had more impact.

Yet the policy contains many terms which are arbitrarily defined and redefined without obviously improving the claims resolution process. Some of the guidelines are simply offensive and contrary to commonly accepted principles of law and equity.

Degree of Doubt

An example of arbitrary definition is the term "degree of doubt."

The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the *degree of doubt* will be reflected in the compensation offered.⁷⁵

"Degree of doubt" was originally incorporated into the validation process where an individual claim was considered to be weak, or where there was an issue over the reserve status of land. Normally, this doubt would be expressed in the validation letter and negotiations would proceed, with the consent of the claimant, on the basis that compensation would be discounted.

⁷⁴ *Outstanding Business*, note 29 above, 24.

⁷⁵ *Ibid.*, 31 [emphasis added].

After 1985, as part of an internal "toughening" of the process, degree of doubt became a lurking spectre that might crop up at any stage of the process.

One of the more disconcerting changes brought in at that time was the concept of "discounting" with regard to calculating compensation. Discounting is done by the Indian Affairs in conjunction with the Department of Justice and involves reducing the amount of compensation to be offered on a claim by a percentage equal to the federal government's assessment of the chances for success a claim would have if submitted to the courts. Therefore, if a claim was assessed as having a fifty percent chance of being successfully litigated, the government would cut the compensation by fifty percent.

This ludicrous concept is just an example of the confounding impediments First Nations run into when attempting to resolve claims under this policy. This new more "rigorous" interpretation of the policy has failed to significantly improve the paltry annual average of claims settled.⁷⁶

The Mississaugas of New Credit suffered from this, when at the last formal negotiation meeting the Office of Native Claims for the first time indicated that they had a 50 per cent degree of doubt that would affect settlement. But this was merely a prelude to government's withdrawal from negotiations shortly afterward.

As the Assembly of First Nations indicates, the perception is that degree of doubt is a budgetary measure perpetrated by Justice lawyers who "guesstimate" a claim's chances of success in court. It is seen as having little to do with factual weakness of the claim or with legal precedent – many of the issues are untested in court – or with any realistic assessment of prospects in court, unless these are based on technical defences supposedly irrelevant to the claims process.

All of this is betrayed by the actual calculation Justice makes: usually a 50 per cent degree of doubt. The reasons for the actual calculation are never conveyed to the claimant, leaving the impression that the calculation was in fact arbitrary.

Compensation: Special Value to Owner

If the concept of "degree of doubt" is arbitrary, other guidelines for compensation are offensive. An example of the latter is the concept of "special value to owner."

Compensation shall not include any additional amount based on "special value to owner," unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.⁷⁷

This principle is completely out of step with Indian views about land. First, it might reasonably be said that all reserve lands have special value when it is virtually impossible

⁷⁶ *AFN's Critique*, note 12 above, 12.

⁷⁷ *Outstanding Business*, note 29 above, 31.

to replace them under existing land acquisition policies. Second, special value is limited to economic value, which gives little or no regard to truly unique sites such as Whitefish Island or to sites of spiritual significance such as the burial ground at Oka or the Toronto Islands. Such considerations may be difficult to quantify, but certainly not impossible. In the Whitefish Island claim, for example, the proposal (presumably rejected) was for establishment of a trust fund to promote traditional use of the site.

Compensation: Loss of Use

Similar problems arise with respect to loss of use which, in fact, rarely forms part of compensation packages.

Compensation may include an amount based on the loss of use of the lands in question, where it can be established the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.⁷⁸

One would think that in situations where a First Nation has been wrongfully excluded from possession or use of its land, the nature of the loss is obvious even if its dollar value is not. Yet, time and again, the federal government approaches compensation as though loss of use only applies in special cases. That approach is fundamentally wrong.

The Government of Canada accepts the principle that being deprived of the use of land can and should lead to compensation to the Band. But the Government of Canada fails to follow the law as set out in the *Guerin* case: it tends to seek what the band use of the land would have been, rather than what reasonable use of the land would have been.⁷⁹

There is an apparent gulf between Indian and government views of what legal principles of compensation do, or should, apply to native claims. With an understanding of Indian views of their relationship to the land and the realities of securing additional reserve land today, it should be possible to develop acceptable principles and resolve claims based upon those principles.

Costs of Negotiation

A further perceived injustice results from the approach taken to costs of negotiation.

Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.⁸⁰

⁷⁸ *Ibid.*, 31.

⁷⁹ UOI, "Land Claims Policy," note 65 above, 9.

⁸⁰ *Outstanding Business*, note 29 above, 32.

In all cases of validated claims, a reasonable portion of the costs of negotiation would be 100 per cent, especially in view of the fact the First Nations have to borrow from government to cover those costs in the first place. That is a concern for First Nations.

Their legal advisers are troubled by the review of their fees by the Department of Justice, whose staff are not always familiar with the realities of private practice. In some cases, the impression may be received that if the lawyers are "good guys" and make the government look good, their fees will be covered on a generous scale. This, of course, has serious implications for the clients.

Again, as with comprehensive claims, financial support is provided through loans which the claimant is expected to repay from eventual compensation. Claimants are at a disadvantage because they do not have the financial, administrative or legal resources to draw upon, except through this loan funding, which is very closely monitored and controlled by the department. Meanwhile the federal government has the resources of the entire federal bureaucracy to draw upon. Often, another round of wrangling takes place over how much of the claimants negotiation loans will be reimbursed if a settlement agreement is reached.⁸¹

One suggestion for change would be that a separate group, inside or outside of government, should deal with approval of negotiation costs and legal fees. Standard retainer agreements for legal services could be worked out in advance so that lawyers and clients both know what the payment will be and both will know that such payment will *not* come from negotiated settlement funds.

As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.⁸²

As a general rule, a fiduciary who breaches fiduciary obligations will be required to fully indemnify the beneficiary. Both legal and equitable principles apply, but they are *not applied now in claims negotiations*.

Additional Defences

In addition to the uncertainty of the guidelines for compensation, other concepts have crept into the process since these guidelines were published in 1982. The most notorious of these is the so-called "technical breach," which is used by government to avoid the guidelines that a First Nation has relied upon in advancing and negotiating a claim in the first place.

In Ontario, this concept was invoked to invalidate – years after validation – the claim of the Mississaugas of New Credit to 200 acres of valuable land on the Credit River reserved to them by treaty and never surrendered.

⁸¹ *AFN'S Critique*, note 12 above, 12.

⁸² *Outstanding Business*, note 29 above, 30.

The guidelines, in such a case, are quite clear:

Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.⁸³

Long after this claim had been validated, and hundreds of thousands of dollars were expended on negotiation costs, the federal government decided that the guidelines did not apply since the breach was only "technical." This apparently meant that, although the taking was wrongful, the First Nation did receive some compensation, so no real damage was done. No consideration is apparently given in such cases to the question of whether or not payment for the land was adequate, or collected in a timely manner.

It should not be necessary to point out that dozens of claims involve the taking of lands where some compensation was paid. Many of these have been validated and some settled. Why the New Credit claim is different from the others may never be known. One suspects that the cost of settlement was the determining factor.

The common thread running through most, if not all, of the post-1982 glosses on the claims policy is that they do not pretend to promote claims settlement. Instead they frustrate or forestall claims settlements. Both policy and practice need immediate review.

LACK OF AUTHORITY TO SETTLE

The most disconcerting element of claims negotiation for claimant First Nations is the lack of apparent authority of the civil servants sent to the bargaining table. The history of negotiation is full of examples of commitments and undertakings dishonoured by anonymous bureaucrats back in Ottawa, and "done deals" set aside by higher authority.

In many cases, effective presentations at the bargaining table are wasted because the right people do not hear them. The bargaining table becomes a show that decision-makers do not see.

The unfairness of this to Indian claimants is obvious. Not so apparent is the toll it takes on government employees of a department whose greatest single self-identified problem is morale.

In 1987, the Director and most of the staff of the Specific Claims Branch either quit their jobs or asked for transfers. There was hope expressed in some quarters that the "new boys on the block" or "class of 88" could begin to cut through the pitfalls.⁸⁴

Since 1987, more transfers have been sought and at least two negotiators have received medical treatment for job-related stress.

⁸³ Ibid., 31.

⁸⁴ Savino, "The Blackhole," note 71 above, 15.

It is simple justice to all concerned that the negotiators have authority to do their job and that everyone knows the rules of the game. The "absence of mandate factor" must be eliminated or the sense of futility will continue indefinitely.

THE EXTINGUISHMENT FACTOR

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that negotiation on the same claim cannot be reopened at some time in the future.⁸⁵

This provision of the policy goes beyond the need for certainty and finality in claims negotiations. It implies, and experience has shown, that claims settlements are structured to ensure that no continuing obligations of government remain.

The Indian perception is that extinguishment is an echo of the 1969 White Paper which would have settled claims as part and parcel of a termination policy. Continuing obligations as part of claims settlements at that time would have clearly been inconsistent with the main objectives of the policy. It is not apparent, however, why continuing obligations should not be recognized now.

One reason why they are not in practice is that claims based on interference with the exercise of treaty rights, or the failure to extend services pursuant to treaty promises, are not admitted to the process at all. This has been much criticized as out of step with constitutional realities.

First Nations in Canada have had their aboriginal and treaty rights recognized and affirmed within Canada's Constitution since 1982. The accumulation of case law by the Supreme Court of Canada has assisted in defining the federal government's responsibilities toward the aboriginal peoples. Section 35 of the *Constitution Act, 1982*, requires that all laws and policy in Canada must be consistent with the recognition and affirmation of aboriginal and treaty rights. Despite this legal foundation, the federal government's approach to aboriginal matters has remained fundamentally unchanged and continues to be a source of frustration for the aboriginal peoples of this country.

The underlying source of this contradiction is to be found in the opposing objectives of aboriginal peoples and the government of Canada. Whereas the First Nations have sought to have their rights recognized and implemented, the federal government's primary goal has always been to extinguish the "burden" of aboriginal rights and minimize its legal obligations.⁸⁶

The Specific Claims Branch would never consider a claim, for example, based on one of the "outside" promises of the treaty, or even an elaboration of an inside promise in the negotiations leading up to the treaty.

⁸⁵ *Outstanding Business*, note 29 above, 24.

⁸⁶ *AFN's Critique*, note 12 above, 2.

For example, Treaty 3's wild rice as a treaty right claim could not be considered in the Specific Claims process as it now exists. Nor could the claim that education is a treaty right.⁸⁷

Apart from the threshold issue of admission to the process – obviously designed to limit continuing obligations – the extinguishment factor separates negotiated settlements from future use of the land, especially where third parties are involved. First Nations can, presumably, acquire money by many means, but how can they replace unique parcels of land or the loss of rights to use land?

The Penner Committee commented on this problem:

Over the years Canadian governments have responded negatively to land claims made by Indians, often maintaining that there is no unsettled land available or going to great lengths to rebut the rationale for the claims. Unfortunately this negative attitude to Indian land rights has been shared by too many Canadians.

It is essential to point out the false premise and injustice of this response. While Canadian governments have been slow to find land to settle the Nishga claim, the B.C. cut-off claims, the Prairie entitlements, and many others, they have had no trouble finding land for much larger national parks, defence bases, hydro developments, airports and resource projects. Canada has set aside 130,168 square kilometres for national parks, yet only 26,335 square kilometres for Indian reserves. The Committee does not dispute the need for parks, defence bases and airports; but surely the land rights of the original inhabitants of this continent deserve as much or more attention. Canadians who consider themselves just and fair must reconsider their views on this matter.

The government should commit itself to this endeavour with at least the same effort it devotes to finding land for government.⁸⁸

At some point, policy and practice will have to incorporate recognition of Indian rights as a source of continuing obligation and provide a forum for negotiation. For Indian harvesters, for example, no such forum exists today. The claims process could and should be adapted to address issues of economic harm in the past and future exercise of rights. In some cases, that may imply a drastic change from current policy.

Other elements of the resolution process need to be addressed, and not in the context of extinguishment.

Settlement of their claims ought to offer the Native people a whole range of opportunities: the strengthening of the hunting, fishing, and trapping economy where that is appropriate; the development of the local logging and lumbering industry; the development of the fishing industry, and of recreation and conservation.⁸⁹

⁸⁷ Savino, "The Blackhole," note 71 above, 13.

⁸⁸ Penner Report, note 13 above, 112.

⁸⁹ Berger, "Native Rights," note 11 above, 9.

In the past the federal government has been slow in settling claims. The time has come to change this attitude by adopting an explicit policy of settling claims in a fair, just and prompt manner. Behind the policy should be the principle that Canada is obligated to restore a strong economic base to those who have shared their land and resources. Such an acknowledgement would recognize the original contribution of Indian people to the growth and development of Canada.⁹⁰

And all of this implies, in appropriate claims, self-government issues currently excluded from the claims process. Certainly the land and economic elements of claims are closely related, from the First Nations' perspective, to the self-determination issue. But to pursue that at present, claimant First Nations can only apply to negotiate self-government under another, untested process and policy which may very well duplicate the claims experience over the course of the next few years.

Clearly, the rationale for extinguishment – and for all the limiting factors that flow from extinguishment – needs to be rethought in light of existing law and the realities of Indian communities. What should emerge is a vital and dynamic process that recognizes the continuing existence of those communities, distinct in their own right, and occupying a valued place in Confederation.

LACK OF APPEAL MECHANISMS

Assuming that a claimant First Nation has invested considerable time, effort, and expense towards the claims process, it will probably not be quick to abandon the process in favour of litigation. But when the process rejects their claims, there is no independent review of that decision.

The adversarial nature of native claims puts the government in a poor position when it attempts to control the exclusive arena for negotiated settlements of First Nation grievances and outstanding matters. The federal government has not attempted to provide for appeal mechanisms when claims are reflected or negotiations fail. Over the years First Nations have unsuccessfully proposed that arbitration or mediation mechanisms be put in place as part of the process. Clearly this is one policy area requiring fundamental review with a view to making it consistent with the current aspirations of First Nations and the constitutional rhetoric of the federal government.⁹¹

The policy does make provision for "Further Review" of a claim, but the essential element of independence from the original decision makers is conspicuous in its absence.

⁹⁰ Penner Report, note 13 above, 116.

⁹¹ *AFN's Critique*, note 12 above, 13.

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.⁹²

This fundamental issue goes to the very credibility of the claims process. Methods of addressing the problem are discussed later in this paper.

THE ROLE OF THE PROVINCE

A federal decision to pursue a speedy settlement of claims would require the federal government to deal with the provinces. There should be every effort to involve the provinces where appropriate in co-operative efforts to settle claims. The claims process should also include periodic joint reviews so that new situations can be accommodated as they arise.⁹³

Provincial participation would be limited to those topics involving provincial lands or jurisdiction. However, refusal of a province to participate should not preclude reaching settlements with aboriginal groups or implementing the terms of such agreements to the fullest extent of federal constitutional authority. While negotiations continue, groups asserting aboriginal title should be fully consulted by federal and provincial governments well in advance of any proposed actions respecting the claimed lands or rights that might prejudice or otherwise affect the course of the negotiations.⁹⁴

In Ontario, provincial involvement in claims operates at several levels. Primarily, the province was the beneficiary of the treaty process without, after Confederation, any obligation to honour or pay for treaty promises.

After 1900, this situation changed and Ontario was obliged to carry the expense of subsequent treaties concluded between Indians and Canada. Its responsibility to protect the exercise of treaty rights remained uncertain.

In 1924, Ontario became, by statute, the intended beneficiary of one-half of mineral royalties derived from most Indian reserves in the province. It may also have become (on its reading of the law) the unfettered owner of all unsold surrendered lands as of that date. Indians hotly contest the latter position and resent the former.

Under fundamental principles of constitutional law, Ontario owns and, for the most part, manages all Crown lands and resources in the province. It also regulates, *de facto*, fishing even though fishing is a federal responsibility.

This brief description illustrates many key areas where provincial involvement may be desirable or necessary in the claims process if a broad range of settlement options is to be negotiated. Provincial involvement is not needed where payment of compensation is the only issue, nor would it be needed if Canada were willing to expropriate lands to settle claims (which it is not willing to do).

⁹² *Outstanding Business*, note 29 above, 25.

⁹³ Penner Report, note 13 above, 116.

⁹⁴ *Aboriginal Rights*, note 10 above, 28.

In some claims, federal validation is contingent upon provincial participation. In others, the province sits in on negotiations and may "top up" settlement funds where the province has acquired road or shore allowances from Indians without compensation. In one recent case, Ontario negotiated compensation for land rights on Manitoulin and adjacent islands without any federal involvement.

The province of Ontario has no formal claims policy, preferring to adopt instead an ad hoc approach which the government states is based on a combination of fairness and legal considerations.

There is, however, a role for the province in claims negotiated under the auspices of the Indian Commission of Ontario. That is a tripartite process and, in a sense, "belongs" to Ontario as much as it does to Canada and the Indians. Provincial involvement and commitment is both desirable and necessary if the ICO claims process is going to work effectively.

SUMMARY

To reiterate the theme of this chapter, none of the points addressed here is new. Most were anticipated and commented upon prior to publication of the specific claims policy in 1982.

Indian representatives all stated, in the strongest of terms, that Indian views must be considered in the development of any new or modified claims policy. It was also pointed out, in nearly every case, that any national policy for claims resolution should take account of regional variations in the nature of claims and in the circumstances.⁹⁵

It is apparent that regional realities in Ontario have not been accommodated in the policy. To the extent that the existence of aboriginal rights and aboriginal title is denied, and pre-Confederation claims are excluded from the process, large numbers of claims are not being dealt with at all.

⁹⁵ *Outstanding Business*, note 29 above, 16.

THE COURT ALTERNATIVE

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.⁹⁶

INTRODUCTION

From the above quotation, it might appear that the resources of the courts are intended to supplement negotiation by deciding contentious issues of liability. Such use of the courts might be desirable in some instances, answering as it would the need for independent review and impartial judgment.

That scenario, however, forms no part of the claims process. There is no mechanism and no funding to facilitate court references as part of claim negotiations. Officially, government's position is that when litigation begins, negotiations end. Unofficially, several claims were put into the process by threatened or actual litigation: the cut-off lands issues in British Columbia, the Mohawks of Gibson claim, and the Sturgeon Lake settlement in Alberta are examples of negotiations prompted by litigation.

For most claimants, however, litigation is neither a supplement to negotiations nor a particularly effective threat that will bring government to the table. It is a distinctly alternative process to be resorted to only when all else has failed.

This chapter will review the difficulties attendant upon litigation as a means of settling claims. And the question of using the courts as a supplement to negotiations will be addressed.

ARE THE COURTS A REAL ALTERNATIVE?

It should be noted that Indian claimants generally do not regard the courts as a vehicle for providing a satisfactory alternative. Rules of evidence, limitation periods, and the non-native foundations of the European and Canadian legal traditions are all factors which, from the Indian perspective, make the courts unappreciative of the Indian viewpoint which is provided in an oral culture with different conceptions of time and property.⁹⁷

⁹⁶ *Ibid.*, 19.

⁹⁷ "ONC Reference Book," note 43 above, 17.

Our general conclusion is that the Canadian legal system has not responded well in the past to aboriginal issues and that this problem is ongoing.

The difficulties with the legal system are particularly acute because in many ways the political process is also failing. Until *Calder*⁹⁸ aboriginal people were only involved in litigation in cases which were not of their own choosing. Aboriginal people were either bystanders, victims, criminal defendants, or not present at all. It is useful here to recall that the leading Canadian case on aboriginal title is still *St. Catherine's Milling*⁹⁹ where aboriginal people were not represented at all. It is only in very recent times that aboriginal peoples have begun to assert their rights as plaintiffs. They are seriously disadvantaged in this, in that they are effectively asking the courts to overturn 100 years of legal precedent that involved an entirely different view of Canadian history.¹⁰⁰

Those quotations, from non-Indian sources, illustrate the fundamental problems of litigating native claims: the demonstrable fact that courts are inherently conservative institutions, drawing their analytical framework from precedents of the past, rather than as instruments of change. Furthermore, few judges have any training in the specialized body of law relating to native peoples and claims. These observations may seem strange in light of the Supreme Court's recent pronouncements, and unfair to judges of the lower courts who have brought considerable legal skills to bear to ensure that aboriginal peoples can exercise their aboriginal and treaty rights. Therefore, it must be put in context.

Prior to 1982, the courts upheld, sometimes reluctantly, Parliament's power to abrogate aboriginal and treaty rights, without any suggestion that compensation or other remedies ought to follow.

For example, it was way back in the early 1960's when the Supreme Court ruled that the government had *breached* the treaties in the enactment of the *Migratory Birds Convention Act*.¹⁰¹

[F]rom time to time Canadian courts have acknowledged that the federal government's curtailment of Indian treaty rights amounts to a breach of faith by Canada. The courts, in failing to accord the treaties superior status over federal legislation, have simply characterized the inconsistency as a situation in which the treaties were overlooked, or a case of the left hand having forgotten what the right hand had done.¹⁰²

By this reasoning, treaty breaches were merely unfortunate accidents. But the courts ratified the breaches, not the treaties. One action for breach of contract based on promises

⁹⁸ Note 7 above.

⁹⁹ Note 4 above.

¹⁰⁰ *Aboriginal Rights*, note 10 above, 25.

¹⁰¹ Savino, "The Blackhole," note 71 above, 4.

¹⁰² *Aboriginal Rights*, note 10 above, 53.

of fishing rights in an 1850 treaty was barred, in part, on the ground that the six-year limitation period had expired.¹⁰³

[T]here can be no doubt that over the years the rights of Indians were often honoured in the breach . . . As McDonald J. stated in *Pasco v. Canadian National Railway Co.* [1986] 1 C.N.L.R. 35, ATP 37 (B.C.S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."¹⁰⁴

After 1982, the situation changed dramatically with respect to aboriginal and treaty rights. It should be noted, however, that all the cases – *Simon*, *Sioui*, *Sparrow* – which have emerged from the Supreme Court were based on prosecutions of Indians. In dealing with these cases, the Court has fashioned an effective defence based on section 35(1) of the *Constitution Act, 1982*, and has returned harvesting issues to the political arena as "a solid constitutional basis upon which subsequent negotiations can take place."¹⁰⁵

Land claims cases have not fared nearly so well. With the exception of *Guerin*, which shaped the cause of action and remedies flowing from fiduciary obligations, the law reports are virtually devoid of Indian successes in lawsuits based on land claims issues.

There are many reasons for this. One of the more obvious is that many First Nations prefer to work within a fully funded negotiation process, no matter how unwieldy or unsatisfactory, rather than face the fears, time, expense, legal uncertainties, inequities, technicalities, and finality of the court process.

All these factors merit brief review and comment. Unless they are addressed, and some changes implemented, the courts are **not** and cannot become a real alternative when negotiations break down. This furthers the very real perception that native claimants do not have meaningful access to justice in Canada.

CONSTITUTIONAL TIMES ARE CHANGING

There can now be no doubt that the Supreme Court has in recent years been developing its native law with a direct or sidelong glance at section 35. It said as much in *Sparrow*:

[I]t is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*.¹⁰⁶

¹⁰³ *Pawis v. The Queen* (1980), 102 DLR (3d) 602 (FCTD).

¹⁰⁴ *R. v. Sparrow*, note 3 above, [1990] 1 SCR at 1103, 70 DLR (4th) at 404, [1990] 3 CNLR at 177.

¹⁰⁵ Note 3 above, [1990] 1 SCR at 1105, 70 DLR (4th) at 406, [1990] 3 CNLR at 178.

¹⁰⁶ *Ibid.*

It can also be said that the Indian successes in the Supreme Court can, in part, be attributed to governments' failure to posit reasonable alternatives to "all or nothing" interpretations of Indian rights:

As recently as *Guerin v. The Queen*, [1984] . . . the federal government argued that any federal obligation [with respect to Indian land rights] was of a political [and legally unenforceable] character.¹⁰⁷

What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.¹⁰⁸

Had the Court accepted either of these arguments, section 35 would be virtually meaningless and land claims litigation virtually hopeless. On the other hand, had the government position been somewhat more reasonable, then *Guerin* and *Sparrow* might have resulted in defeat for the native parties, and an encouraging body of law might have been stillborn. The irony is inescapable. The point is that the Crown's intransigence in litigation has contributed substantially to the current state of the law. This does not mean that more subtle and sophisticated arguments in future will not erode some of the present gains. And even that "uncertainty" overlooks the fact that the court has *not* yet dealt with two important issues in land claims litigation.

INDIAN PROPERTY RIGHTS

The Supreme Court in *Sparrow* did not deal with any issue of aboriginal title. In fact, the Court has not heard a case on aboriginal title since *Calder* in 1973, where the real issue was the test of extinguishment. As a result, the nature of those rights and the protection that will extend to them today remain uncertain:

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgement in *Guerin* . . . referred to as the "*sui generis*" nature of aboriginal rights.¹⁰⁹

It is noteworthy that section 35 does not expressly protect "aboriginal title," it protects "existing aboriginal and treaty rights." But in the above passage the Court uses the term "aboriginal rights" to refer to an earlier discussion, in *Guerin*, which dealt only with title.

¹⁰⁷ *Ibid.*

¹⁰⁸ Note 3 above, [1990] 1 SCR at 1095, 70 DLR (4th) at 399, [1990] 3 CNLR at 172.

¹⁰⁹ Note 3 above, [1990] 1 SCR at 1112, 70 DLR (4th) at 411, [1990] 3 CNLR at 172.

In Ontario, some of this uncertainty may be removed when the Supreme Court of Canada decides the *Bear Island* appeal which may be decided, as it was in the Court of Appeal, on treaty issues.¹¹⁰ In the meantime, uncertainty remains.

INDIAN SELF-GOVERNMENT RIGHTS

In *Sparrow*, the Court also sidestepped the issue of Indian jurisdiction over the exercise of their aboriginal rights.¹¹¹ Traditionally, the courts have not respected Indian rights of self-government.¹¹² Yet First Nations regard self-determination as an essential component of land claims settlements.

At the present time, neither the land claims process nor the courts seem prepared to deal with this fundamental issue. Indeed, it is difficult to conceive of a satisfactory set of facts which might give rise to a judicial determination of this issue. As mentioned previously, most aboriginal and treaty rights decisions result from prosecutions, and even land claims litigation seldom results in helpful decisions.

TWO COURTS: TWO ACTIONS

Any First Nation in a province which wishes to assert a claim involving Crown land or natural resources faces the inherent difficulty that there is no choice of forum: there are two forums in which full relief must be sought.

Actions involving natural resources in a province must be pursued in the superior courts of the province. In Ontario, that would involve an action in the General Division of the Ontario Court of Justice. Such action may declare or secure a First Nation's rights in provincial Crown lands or resources.

Relief against the federal government, including declarations and payment of damages, must be sought in the Federal Court of Canada, an entirely different court with different jurisdiction and different rules and procedures.

This anomaly, which may involve double the time and expense, is well known.¹¹³ And fortunately, there is some legislative effort being made to resolve it.

Bill C-38, introduced in Parliament in September 1989, would enable Indian claimants to pursue all their remedies, including remedies against the federal government, in the provincial court system. It will not, however, resolve all problems of choosing a forum. There may be valid reasons for initiating action in the Federal Court, but those proceedings could be frustrated if Canada elects to claim over against a province or other third party.¹¹⁴

¹¹⁰ See note 31 above.

¹¹¹ Note 3 above, [1990] 1 SCR at 1103, 70 DLR (4th) at 404, [1990] 3 CNLR at 177.

¹¹² See, for example, *Attorney General of Ontario v. Bear Island Foundation* (1984), 49 OR (2d) 353, 15 DLR (4th) 321, [1985] 1 CNLR 1 (HC).

¹¹³ See *Gardner v. Ontario*, 45 OR (2d) 760, 7 DLR (4th) 464, [1984] 3 CNLR 72 (Ont. HC).

¹¹⁴ See J. Evans and B. Slattery, "Case Comment: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 840ff.

CAUSES OF ACTION

The cause of action is the legal basis of a lawsuit. As noted above, without *Guerin*, there would be no cause of action for many claims. And government is always ready to attempt to defeat court actions on the basis of "no cause of action." A recent, and unsuccessful, attempt was made to defeat the Métis' action in Manitoba based on their land rights.

The usual tactic of the Federal Government in the ten provinces ... is to claim that it has no responsibility in regard to land rights asserted by the Native Peoples. Essentially, the Federal Government attempts to abdicate its fiduciary responsibilities whenever and wherever it can, callously ignoring its constitutional responsibility under section 91(24) of the *Constitution Act, 1867* and the *Guerin* decision.

It has attempted to do this in the *Gitk'san Wet'suwet'en* case, in the *Lubicon* legal proceedings and in the Temagami legal proceedings, to name a few.¹¹⁵

More surprisingly, two land claim actions have failed to date, while the higher courts suggested that they might have succeeded on different causes of action.¹¹⁶ This creates the kind of uncertainty that is, perhaps, the hallmark of an emerging area of law. At the same time, it strongly inclines claimants away from the courts until such time as the law is more settled.

TESTIMONIAL FACTORS

The trial of a native claim can be an unfamiliar and unnerving one for the native participants. Judges unfamiliar with cultural characteristics may find witnesses to be evasive and unconvincing, especially when translation is involved.¹¹⁷

In extreme cases, judicial suspicion extends to expert witnesses and others appearing in support of the native cause.

[They] were typical of persons who have worked closely with Indians for so many years that they have lost their objectivity when giving evidence.¹¹⁸

Furthermore, the written record of events is almost always comprised of government documents, and the oral native record, despite certain favourable rules of evidence, can often only be considered if the Crown's written version contains an ambiguity.¹¹⁹ In sum,

¹¹⁵ J. O'Reilly, "Comprehensive Native Land Claims Litigation," in "Native Land Issues" (CBA symposium), note 44 above, 39.

¹¹⁶ See *Canadian Pacific Ltd. v. Paul*, note 56 above; *Attorney General of Ontario v. Bear Island Foundation*, 49 OR (2d) 353, 15 DLR (4th) 321, [1985] 1 CNLR 1, affirmed [1989] 2 CNLR 73 (CA).

¹¹⁷ See, for example *Apsassin v. The Queen* (1987), 14 FC 161, [1988] 1 CNLR 73 (FCTD); generally see R. Ross, "Ontario's Northern Indians: A Lawyer Glimpses the Gulf," in "Practicing Law for a Native Clientele," *C.B.A.O. Annual Institute* (Toronto, 1986).

¹¹⁸ *Bear Island*, note 116 above, 49 OR (2d) at 390, 15 DLR (4th) at 358, [1985] 1 CLNR at 37 (Ont. HC).

¹¹⁹ See, for example, *R. v. Horse*, [1988] 1 SCR 187, [1988] 2 WWR 289, [1988] 2 CNLR 112 (SCC).

the court alternative is not attractive for the reasons set out, although this may change with increased judicial training and response to the lead given by the Supreme Court of Canada.¹²⁰

TECHNICAL DEFENCES

The acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, *laches* and lack of admissible evidence.¹²¹

Lack of admissible evidence has not proven to be a problem in claims litigation, although the weight given to evidence and the inferences drawn from it are recurring nightmares for Indian litigants. That, however, is not the focus of this section on technical defences.

Defences are technical when they do not deal with the merits of a claim, but can nonetheless defeat it. In this category, government frequently relies on various statutes imposing limitation periods and on the legal doctrines of estoppel, acquiescence, and *laches* (delay).

These are offensive to claimants for several reasons:

- If the merits of the claim are not heard and judged, there is no sense of justice being done.
- Delay in getting to court is not the fault of the claimants. Twenty years ago there was little access to documents, no funding and no body of law to sustain such actions, and until 1951 any action to further native claims was prohibited.
- Where there was no recognized "cause of action" until recently, there are no limitation statutes dealing with that cause of action.
- Where Indians had no legal authority or discretion to authorize certain transactions, they cannot be estopped from challenging them or be said to have acquiesced in them.
- Where a claim is based on breach of statutory duty, no estoppel can be set up as a defence.¹²²
- *Laches*, or delay in bringing action, should not apply in favour of the government – which has always had the power to deal with claims – although *laches* may have some application where the rights of innocent third parties are involved.

¹²⁰ For a general discussion of these problems, see Ross, note 117 above; O'Reilly, note 115 above; and W. Henderson, "Litigating Native Claims" (1985) 19 L. Soc. Gaz. 174, and "Problems of Proof in Native Litigation," in "Practicing Law for a Native Clientele," *C.B.A.O. Annual Institute* (Toronto, 1986).

¹²¹ *Outstanding Business*, note 29 above, 30.

¹²² *St. Ann's Island Shooting & Fishing Club Ltd. v. The King* [1950] SCR 211, [1950] 2 DLR 225, 5 CNLC 608.

The Supreme Court in *Sparrow* made it clear that for a lengthy period in our history native rights were simply not recognized, and clearly the bringing of a native claim would have been futile.

Several writers have commented on the inappropriateness of technical defences to claims litigation.

There are also other factors to be considered, not the least of which is that for much of this century, and all of the last, native peoples have been dependent upon government to maintain records, inform them of their rights and act on their behalf. As *Guerin* shows, that situation was no accident; until recently it was firm policy. Furthermore, during the period 1927-1952 it was an offence under the *Indian Act* to attempt to raise money for the prosecution of an Indian claim. As these factors are taken in context by the courts, it is hoped that just claims will not be unjustly foreclosed by statutory bars.¹²³

Parties to land claims litigation should confront fundamental issues respecting claims and title rather than relying only on technical defences.¹²⁴

Others have proposed legislative reform.

Many of these problems could be avoided if, instead of abandoning its commitment to abide by its lawful obligations, the government enacted a few reforms which would extend its liability in native claims cases. In the first place, section 24 of the *Crown Liability Act* could be repealed, and the liability of the Crown in right of Canada in tort could be made retroactive. Insofar as the Indians of Manitoba are concerned it would likely be sufficient if this liability were extended back to 1870, but the historical circumstances in other parts of Canada would lead one to the conclusion that this retroactive liability should extend to the date of the assertion of British sovereignty in each region of the country. In this way, valid Indian claims in Ontario, Quebec, the Maritime Provinces, and British Columbia could also be accommodated.

Secondly, claims on behalf of any Indian band or tribe against the Crown in right of Canada could be exempt from the operations of any statute of limitations. When one considers the past history of the immunity of the Crown from suit, and the legal and economic disabilities under which Indian people formerly laboured, the justice of such a reform seems clear.¹²⁵

Legislation could remove many of the limitations of the courts as a mechanism for resolving claims. The laws of evidence could be modified in their application to claims, norms of honourable conduct associated with the Crown's relation to Indians could be articulated in legislation, and defences respecting limitation periods (insofar as these may be relevant) could be abolished.¹²⁶

¹²³ Henderson, "Litigating Native Claims," note 120 above, 191.

¹²⁴ *Aboriginal Rights*, note 10 above, 28.

¹²⁵ Tyler, note 30 above, 24.

¹²⁶ La Forest, note 49 above, 20.

This would have the obvious result of having the courts deal with historical grievances on the merits of each case rather than dealing with the obscurities of limitation statutes which differ from province to province. In fact, the higher courts have been reluctant to deal with the limitations issue.

In *Guerin*, for example, the Supreme Court ruled that no limitation applied, but did so on the basis of "equitable fraud," leaving the question open as to whether any limitation period *could* apply. In *Bear Island*, the First Nation's claim to the land was defeated, in part, by application of a limitation period at trial, but the Court of Appeal did not rule on the point. In *C.P.R. v. Paul*, the trial judge similarly applied a limitation period against the Woodstock First Nation. The Supreme Court, however, in suggesting that other causes of action might have been more appropriate, did not suggest that these might be statute-barred.

Following *Sparrow*, it is almost certain that limitation statutes cannot bar a claim based on an "existing aboriginal or treaty right." While this offers some relief, it creates new uncertainties and anomalies. For example, provincial limitation statutes vary widely in their approach to extinguishing rights which are statute-barred. Thus, if those statutes applied prior to 1982, many claims may now be barred in some provinces but not others. In addition, the scope of section 35 rights remains undetermined. If an aboriginal or treaty right was extinguished without consent prior to 1982, is the right to claim damages protected by the *Constitution Act, 1982*?

In Ontario, and elsewhere in Canada, the uncertainty remains and, for most claims dating back before 1927 – to choose an almost random date – remains a major obstacle to claims litigation as an alternative to negotiation.

It appears clear that the intent of the claims policy is that this should be so. The question, for purposes of this discussion paper, is whether that policy is now either desirable or tenable.

JUDICIAL REMEDIES

Assuming that all of the above obstacles are overcome, or may not apply in particular native claims cases, the successful litigant must anticipate what the court will provide by way of remedies. The answer is, very little.

The most that an average claimant can hope for is:

- A declaration of rights, which may lead to negotiated and lengthy transfers of land rights between federal and provincial governments.
- Monetary damages payable to the First Nation based on the Court's assessment, which may include, in very rare cases, punitive damages (*Guerin* didn't).
- An order of the Court directing the Minister or some official to perform his or her duty, or directing or preventing some course of conduct.
- Legal costs, which may only be a fraction of the actual costs of preparation and trial.

This is a fairly limited range of remedies given the scope of land claims and the legitimate expectations of claimants, especially if a larger land base or resource rights are claimed in the first instance.

Tyler notes

the desire of many bands to obtain a greater area of reserve lands as compensation. The Courts would only be in a position to award monetary damages. Even if land were purchased with the money, reserve status could be imparted to it only by the actions of the federal government. Thus, bands that wish to expand their reserve holdings will find negotiation much more attractive than litigation.¹²⁷

Here again, reform has been suggested:

It is recommended that serious study be given to making judicial remedies more effective in ensuring that both government policies and judicial decisions are fully implemented in relation to aboriginal rights and claims. This would require making injunctive relief available against the Crown, enabling remedies *in rem* to be given against the Crown, empowering the courts to require the Government to enter into good faith negotiations, and employing positive injunctive relief – the so-called structural injunction – in appropriate cases.¹²⁸

The message is that Canadian courts operate on a principle of judicial restraint which, however desirable it may be in other areas of law, leaves little scope for satisfactory resolution of claims issues. That factor alone, even with modest reform, will always make negotiation of the settlement package more attractive than existing judicial remedies.

The one great disadvantage of these proposals is that they do seem to contemplate more legal action, which is often very expensive and far removed from the concerns and understanding of the Indian people who put forward the claims. To some extent this is inevitable so long as the federal government maintains its policy of viewing claims from the perspective of its lawful obligations. But if those obligations are altered in the manner suggested here, it may well be that many more claims could be settled at the negotiating table than is now possible, and recourse to the legal system would be far less frequent than might be imagined. Indeed, there are strong reasons which would still operate to keep bands out of the courts.¹²⁹

Among those reasons, he lists the limited scope of remedies quoted above. Another reason remains, for most First Nations, the most common: lack of funding.

¹²⁷ Tyler, note 30 above, 27.

¹²⁸ *Aboriginal Rights*, note 10 above, 28.

¹²⁹ Tyler, note 30 above, 26-27.

LACK OF FUNDING

The federal Government should financially support the establishment of an independently administered aboriginal rights and title litigation fund.¹³⁰

The time and expense of litigation need no elaboration. A single claim of aboriginal title to traditional lands can cost millions of dollars on the Indian side alone.

In the specific claims area, costs are more modest but can run to hundreds of thousands of dollars if a great volume of historical evidence or a number of experts are involved. Of course, claims negotiations can cost hundreds of thousands of dollars as well. The difference is that funding is available for negotiations (on a loan basis), but not for litigation, except in limited cases.

If governments regard the courts as a serious alternative to negotiations, as the policy quoted at the beginning of this chapter seems to affirm, then several measures are possible.

- funding should be available on the same basis to claimants as for negotiations
- issues should be limited to keep costs down and get negotiations back on track
- facts and evidence should be agreed upon as far as possible; ideally issues could be referred as stated cases
- pre-trial proceedings should be kept to a minimum
- technical defences should be set aside for the limited purposes of issues referred to the courts; ideally they would not be relied upon at all
- funding should be extended to cover cases dealing with the exercise of aboriginal and treaty rights.

A particular problem in Ontario is the illegality of contingency fees, which might encourage meritorious claims by typically cash-poor claimants. The availability of such arrangements in other provinces has shown, however, that this is far from a complete answer.

It seems important, however, that the issues of funding not be addressed in isolation. Financial access to the courts will be of little value unless the legal process is better used to accomplish perhaps more limited objectives. Otherwise, this observation will remain accurate:

It is discomfoting to think that we may not be any better prepared then than now to deal with these claims. It is equally discomfoting to think that the enormous energies invested in taking the cases through the courts would be dissipated rather than harnessed by the court to oversee, guide and, where necessary, prod the parties to settlement of their disputes.¹³¹

¹³⁰ *Aboriginal Rights*, note 10 above, 28.

¹³¹ *Ibid.*, 86.

SPECIAL CASES

Special cases are cases for which the court cannot be an alternative to negotiations, and *vice versa*.

First among those are the moral and political claims where there may be many reasons for negotiating a settlement other than strict legal liability. For those, the courts are no option at all.

Many other native claims, which have been the source of a genuine and acute sense of grievance may lack legal merit even if the claimants were allowed to present their entire case under very liberal rules of evidence. Clearly, the courts would be of little utility in resolving such claims.¹³²

The second category involves resource and land developments in claim areas or threatening land entitlements or the exercise of aboriginal and treaty rights. In such case, First Nations may not have negotiations as a real alternative. They may be forced to go to court to seek interim injunctions to prevent irreparable harm. A good example of this type of case is *Saanichton Marina*.¹³³

The third category involves the hundreds, if not thousands, of prosecutions brought against individuals claiming aboriginal and treaty rights. These people did not choose to go to court and there is no negotiation process in place for them. Their communities often lack the financial resources to defend them and many plead guilty out of an uninformed sense of futility. Their needs must be addressed by both levels of government.

The absence of inexpensive, speedy, fair and effective mechanisms by which Canada's aboriginal peoples may pursue their rights and titles is contrary to the standards expected of a democratic society which respects the rule of law.¹³⁴

If the courts and negotiations are to be mutual alternatives as part of a coherent land claims policy, these special cases must be taken into account.

SUMMARY

Despite recent successes in the courts, there is a strong reluctance to litigate native claims out of a lingering fear that the justice system will legitimize past actions rather than correct them. The very culture of the law and its judicial institutions are too often blind to the basic fact that many legal rules, presumptions, and procedures apply only **by analogy**

¹³² R.C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979*, prepared for the Department of Indian Affairs and Northern Development (Ottawa: DIAND, 1983), 239.

¹³³ *Saanichton Marina Ltd. v. Claxton* (1989) 36 BCLR (2d) 79, 57 DLR (4th) 161, [1989] 3 CNLR 46 (BC CA).

¹³⁴ *AFN Critique*, note 12 above, 15.

to native claims. When one examines the Ontario Court of Appeal decision in *Bear Island*,¹³⁵ which undercut the very foundations of Indian title and treaty law, it is difficult to say that the apologist tendency of the courts is a phenomenon of the past.

Part of the problem is that judges have not been trained or used to best advantage.

Moreover, most judges are not particularly familiar with the terrain. It takes some time and experience to get the "feel" of the law relating to Indians.¹³⁶

Part of the problem is institutional in terms of rules and procedures. Part of the problem is excessive reliance on technical defences. Part of the problem is that we can all do better, and haven't.

Certainly part of the problem is funding, although one must assume that even the notable losses in court were adequately funded somehow. Besides, there is little point – apart from the special cases – of funding a process that will not work.

In sum, the court is really only an alternative for non-Indian governments and a highly desirable one for them. It enables Department of Justice lawyers to "bring out all the guns"; government funding for its own participation comes from a different and almost unlimited budget; and the courts have traditionally favoured government in claims cases. The courts are not a real alternative for First Nations now.

Ideally, the courts would not function as a complete alternative to negotiations but as a supplement when negotiations are blocked at key decision points. This is Jim O'Reilly's view:

It seems preferable to consider the Courts as one of a number of potential remedies to redress grievances. In many cases, the Courts can be used as part of a series of actions having as an objective the recognition of land rights. Nonetheless, recourse should not be had to the Courts if there is no intention of proceeding. The Federal Government in particular seems to be quite content to have aboriginal groups sue as much as they want, because this puts off the day of reckoning and is fundamentally a more propitious and friendly arena for governments.¹³⁷

The objective should be, as the Canadian Bar Association committee has recommended, to use the courts effectively, in the manner cited above – "to oversee, guide and, where necessary, prod the parties to settlement of their disputes" – as an integral part of an overall claims policy, not as an alternative to it.

¹³⁵ Note 116 above.

¹³⁶ La Forest, note 49 above, 20.

¹³⁷ O'Reilly, note 115 above, 39.

EXPLORING ALTERNATIVES

INTRODUCTION

At this point we must take it as a given that all parties (First Nations and non-Indian governments alike) recognize that the current practice of attempting to settle claims has been demonstrated to be a failure. It is axiomatic to note that it is much less difficult to criticize than to posit realistic alternatives. Over the last 17 years much has been written detailing the shortcomings of the current practice. Most observers have offered suggestions as to how to improve upon existing process and/or policy.

The general thrust of the commentary to date has been towards several critical ends:

- 1 the process must be expedited, as justice delayed is justice denied (it may already be too late to satisfy this maxim, but that is not a reason not to try);
- 2 the process must be made to be fair and to be perceived to be fair by all of the participants; and
- 3 the policy must be expanded to include a fiduciary obligation on the part of the federal government to First Nations and their obligation to act in such a way as to preserve the honour of the Crown.

The process of exploring alternatives is complicated by the fact that current practice is a blend of process, policy, law, and politics, and further complicated by the fact that many observers make recommendations regarding one, some, or all the aspects that go into current practice. The simplest alternative to examine, although it is in and of itself very complex, is one that presently exists and is utilized as an alternative to the current claims resolution process: the courts.

THE COURT ALTERNATIVE

As set out in the earlier section, The Court Alternative, the courts, as presently structured, have serious drawbacks as a mechanism for dispute resolution regarding First Nation rights and claims. The Conclusions section of this discussion paper will set out specific recommendations as to how the courts could be made a better alternative for this type of dispute resolution. We would strongly recommend that those suggestions be given serious

consideration, as the courts will likely always have an important, and often precedent-setting, role to play in the resolution of these issues: witness the *Guerin* and *Sparrow* decisions from the Supreme Court of Canada. But we do not believe that anyone has put forward the proposition that the proper way to resolve all the outstanding issues is to litigate each and every one of them, for the simple reasons that it would be far too costly and by far too time consuming. The courts have an important role to play in these matters, but as indicated earlier they are probably not the forum of first choice.

STRUCTURAL CHANGES

(a) Adjudicative Tribunals

To the extent that it is possible, this section will attempt to distinguish between **process** and **policy** (and will attempt to ignore the fact that the current process is itself a policy). This section is further complicated by the fact that the current practice incorporates process and policy regarding two logically distinct phases of the process, which are not in fact always clearly demarcated:

- 1 validation, and
- 2 compensation negotiations.

(By way of illustration, the federal practice of discounting claims is clearly a way of bringing validation into compensation negotiations.) As will become apparent in the Conclusions section, it would appear that there is merit in approaching validation and compensation differently, but it should be noted that most commentators do not do so.

In terms of process alternatives, there are two main broad categories that have been advanced over the years:

- 1 some sort of tribunal or commission that is structured along the lines of either an administrative tribunal or a simplified court; and
- 2 a reworked negotiation process with some form of mediation and/or arbitration to assist the parties through impasses.

The recommendation to move to some form of adjudication is really a suggestion that there needs to be a fundamental change in the structure of the process. The structural change to adjudication (from the present practice of negotiation) is generally advanced as a solution to the previously discussed concern regarding fairness, in that if an independent body is hearing and determining claims, then the governments are no longer the accused, as well as the judge and the jury.

This was the process established by the United States in 1946 when it established the Indian Claims Commission with the following broad jurisdiction:

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribes, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

1. claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
2. all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
3. claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
4. claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of such lands of compensation agreed to by the claimant; and
5. claims based upon "fair and honourable dealings that are not recognized by any existing rule of law or equity."¹³⁸

Note that the Commission's mandate was to "hear and determine" claims, in other words: adjudicate.

Draft legislation similar to this was reintroduced in the Canadian Parliament in 1965 (it had first been introduced in December 1963) for a similar sort of tribunal and with a similarly broad mandate:

Subject to this Act, the Commission shall hear and consider every claim that is brought before it as provided in this Act and that comes within any of the following classes of claims, namely:

- a) that lands in any area that now forms part of Canada were taken from Indians by the Crown or by an officer, servant or agent of the Crown on behalf thereof without any agreement or undertaking to give compensation therefor;
- b) that lands set apart for the use and benefit of Indians in any area that now forms part of Canada were granted, sold or otherwise disposed of by the Crown or by any officer, servant or agent to the Crown and no compensation was given in respect thereof to such Indians or the compensation given was so inadequate as to be unconscionable;

¹³⁸ La Forest, note 49 above, quoting Public Law No. 726, 79th Congress, 2nd session, s.2.

- c) that moneys held by the Crown for Indians living in any area that now forms part of Canada were improperly used by the Crown or by any officer, servant or agent of the Crown on behalf thereof;
- d) that the Crown failed to discharge any obligation to Indians living in any area that now forms part of Canada, arising under any treaty, agreement or undertaking, or
- e) that the Crown or any officer, servant or agent of the Crown on behalf thereof, in any transaction or dealing with Indians in any area that now forms part of Canada, other than a transaction or dealing relating to lands, failed to act fairly or honourably with those Indians and thereby caused injury to them.¹³⁹

Again note that the proposed Indian Claims Commission was designed to adjudicate – “hear and consider every claim that is brought before it.” The Canadian tribunal was derailed by the 1969 White Paper and has never been implemented.

The concept of an administrative tribunal was thoroughly explored by Gerard V. La Forest, Q.C. (as he then was, he is now a justice of the Supreme Court of Canada) in “Report on Administrative Processes for the Resolution of Specific Land Claims” in 1979, a report commissioned by and for the federal Office of Native Claims. In his conclusions he recommended that an independent administrative tribunal be established through legislation:

This independent body should for all practical purposes be a specialized court but with power to adopt procedures and practices suitable to its particular functions. Its jurisdiction should extend beyond claims now enforceable in a court of law to encompass those arising out of the honourable treatment that should be accorded the Indians by the government. In addition, a number of technical rules, such as limitation periods and certain rules regarding the admissibility of evidence should be removed or relaxed to permit substantial justice in the settlement of Indian claims.¹⁴⁰

La Forest's recommendations were not followed by the federal government when the specific claims policy was reworked in 1982, as set out in *Outstanding Business: A Native Claims Policy*.

The Canadian Bar Association Special Committee on Native Justice, in its 1988 report entitled *Aboriginal Rights in Canada: An Agenda for Action*, has also recommended that a tribunal should be created through legislation to adjudicate specific claims:

Recommendation 24: Specific Claims Tribunal

After thorough consultation with aboriginal people, perhaps with the utilization of a Task Force such as was used to develop the new policy on comprehensive claims, the federal Government should proceed with the creation of a legislatively based Specific Claims Tribunal with a clearly defined mandate to adjudicate the resolution of specific claims.¹⁴¹

¹³⁹ Bill C-123, *An Act to Provide for the Disposition of Indian Claims*, 3rd Sess., 26th Parl, 1965.

¹⁴⁰ La Forest, note 49 above, 64-65.

¹⁴¹ *Aboriginal Rights*, note 10 above, 83.

In the commentary that follows, the CBA Committee Report notes that the sheer number of specific claims makes the courts an impractical alternative and adds that a tribunal could be useful:

The fact that the issues are relatively more specific than in claims involving aboriginal title suggests that an administrative tribunal with a clearly defined mandate, expert adjudicators, and simplified procedures could be used to expedite a clearing of part of the backlog of these important claims.¹⁴²

Many other commentators have recommended that an independent tribunal be established, with the authority to adjudicate claims. One interesting mode, which has not been advanced to our knowledge to date, is the Private Court. It is a form of alternate dispute resolution that was developed in the United States which is now operating in Ontario, established initially by corporations with a desire to reduce the costs and time of protracted commercial litigation. In Ontario it has been expanded to include family litigation, personal injury and insurance litigation, and some special fields such as sports and entertainment. Panels of adjudicators have been assembled who are recognized experts in their field (and are generally lawyers). The parties are assigned an adjudicator, but are free to agree upon another. The process is essentially a simplified and expedited court:

The Private Court operates on a two-step system. The first step is a moderated settlement conference at which an adjudicator attempts to resolve the dispute. If that is unsuccessful, the second step is a private trial.

To remedy the problems faced in the public court system, the Court provides:

- a) early and repeated settlement conference;
- b) full disclosure;
- c) early hearings;
- d) decisions within 30 days;
- e) flexibility;
- f) confidentiality;
- g) informality;
- h) choice of adjudicator;
- i) fixed dates.

Through these means, the Private Court will reduce the overall cost of litigation. *In the United States, private courts have cut the cost of litigation by 50%.*¹⁴³

¹⁴² Note 10 above, 84.

¹⁴³ *The Private Court: How It Works*, pamphlet (Toronto, 1990), 1.

The parties agree in writing to be bound by the rules of the Private Court and that any order is an “award” enforceable under the *Arbitration Act*. Settlement conferences, similar to pre-trial conferences in the public court system, are mandatory, with the adjudicator attempting to mediate the dispute. If the parties fail to reach a settlement, a second adjudicator will be appointed to hear the trial, unless the parties and the first adjudicator agree to have the first adjudicator hear the trial.

This is an intriguing alternative that bears closer examination as a model for settling First Nations claims. It also in some ways incorporates some aspects of the next alternative to be discussed, in that assisted negotiation is an integral part of the Private Court system, accomplished through settlement conferences with the adjudicator.

There are a myriad of questions to be answered regarding any tribunal that would be established to adjudicate First Nations claims: jurisdiction, mandate, procedure, rules, appeals, forms of evidence, style of tribunal (passive or inquisitorial), parties, modes of representation, enforceability of awards, etc. These important details lie outside of the scope of this discussion paper, but it should be noted that many detailed recommendations are extant, which would greatly assist the parties in designing an adjudicative tribunal should this alternative be selected.

(b) The “Soft Adjudicative” Tribunal

This fascinating descriptive terminology comes from a study done for the Canadian Bar Association Special Committee on Native Justice, entitled “New Zealand’s Waitangi Tribunal: An Alternate Dispute Resolution Mechanism,” written by Joseph Williams in 1988. The Waitangi Tribunal was established by legislation in 1975 to adjudicate claims arising from the Treaty of Waitangi signed in 1840 between the British Crown and Maori Chiefs in New Zealand.

It is a “soft adjudicative” tribunal because its decisions are not binding in nature, but are rather recommendations made to the Minister of Maori Affairs and the Cabinet. The government is free to accept or reject the recommendations and the claimants must rely on political or societal pressure to ensure that the recommendations are acted upon by the government. The Waitangi Tribunal has achieved a great measure of success for a number of reasons, but certainly an important factor has been its ability to adopt the protocols and procedures of the Maoris in the hearing of claims. This, plus the fact that the chairman is a Maori and the chief judge of the Maori Land Court, has given the tribunal a high level of credibility in the Maori world.

The following is a brief overview of the New Zealand legislation creating the Waitangi Tribunal:

Salient Features of the Treaty of Waitangi Act 1975 (and subsequent amendments)

- Claimants must be Maori or of Maori descent. Claims must be brought by an individual who may in turn claim on behalf of a group.
- The Waitangi Tribunal can only hear against the Crown.

- The claim must explain how the Maori or a group of Maori people have been or are likely to be prejudicially affected:
 - by any ordinance or Act passed on or after 6 February 1840; or
 - by any regulations or other statutory instrument made on or after 6 February 1840; or
 - policy or practice adopted or proposed to be done or omitted, by or on behalf of the Crown on or after 6 February 1840.
- The Act says that the Tribunal is a Commission of Inquiry. This means it can:
 - order witnesses to come before it;
 - order material or documents to be produced before it;
 - actively search out material and facts to help it decide on a claim. (Courts are much more limited in doing this.)
- The Tribunal must send copies of its recommendations (if any) to the claimant, the Minister of Maori Affairs, other Ministers of the Crown that the Tribunal sees as having an interest in the claim and other persons as the Tribunal sees fit.
- The Tribunal has the right to refuse to inquire into a claim if it considers it too trivial, or if there is a more appropriate means by which the grievance can be solved.
- The Tribunal may receive as evidence any statement, document, or information which it feels may assist it to deal effectively with the matter before it.¹⁴⁴

A similar body would solve some, but certainly not all, of the problems plaguing the present process in Ontario.

PROCEDURAL CHANGES

The present specific claims process in Ontario is essentially a form of unassisted negotiation. The parties to the process enter into negotiations by themselves in an attempt to reach a settlement of a First Nation claim. For a number of reasons discussed earlier in this paper, this process is not working. This part of this section will deal with the types of procedural changes that could be made to the current practice in order to make it meet its stated goals.

The Assembly of First Nations has noted that negotiations are the First Nations preferred mode of dispute resolution.

There can be no doubt that current policy frameworks are inconsistent with existing case law, and with the reality of the situation. Negotiations have always been the First Nation's preferred method of resolving outstanding matters, but what is needed are realistic and equitable rules of the game for such negotiations.¹⁴⁵

¹⁴⁴ *The Treaty of Waitangi and the Waitangi Tribunal*, pamphlet (Wellington, N.Z.: Waitangi Tribunal, 1992), 10-11.

¹⁴⁵ AFN, "Draft: Alternative Approaches to First Nations Interest, Aboriginal and Treaty Rights in Canada" (Ottawa, 1990) [unpublished], 5.

But it is also clear from this quotation that the present unstructured and unassisted negotiations are not the preferred method. What then can be added to the present negotiation process to make it work?

a) Facilitated Negotiations

One present attempt to facilitate the negotiations process is the Indian Commission of Ontario (ICO). It is an independent body created by joint orders in council from Canada and Ontario, ratified by the First Nations of Ontario in assembly. Its functions, as set out in the orders in council, are as follows:

2. Functions

- 2.1 To provide a forum for the negotiation of self-government issues;
- 2.2 To facilitate the examination and bring about resolution of any issue of mutual concern to the federal government and provincial government, or either of them, and to all or some of the First Nations in Ontario, which the Tripartite Council refers to the Commission by formal direction or as otherwise requested by the parties as herein after described; and
- 2.3 Under the general direction of the Tripartite Council, to acquaint the residents of Ontario with the activities of the Commission and with the nature and progress of the matters before it.

Essentially the ICO acts as a facilitator in the sense of convening and chairing meetings, preparing reports and generally assisting the parties in meeting and negotiating, and as an informal mediator in attempting to assist the parties in reaching settlements. But the ICO lacks the ability to compel the parties to do much of anything, without their express consent. Regarding the 10 or so specific land claims that have been brought into the ICO process in the last 12 years, only two have reached final settlement. With respect to the types of problems with the process that are identified in the section Problems with the Claims Process in this discussion paper, it is the present opinion of the Indian Commission of Ontario that we are incapable of properly rectifying them at the present time. The simple addition of facilitating non-binding mediation (although perhaps preferable to nothing at all) does not appear to break the logjam in the specific claims process. Perhaps the most telling comment on the ICO process and its success, or lack thereof, comes from the previous commissioner, Roberta Jamieson, as set out in the 1988 Canadian Bar Association Committee Report:

In comments provided by Roberta Jamieson, the current Commissioner, the presence of sustained political commitment to actually resolve issues is cited as the determining factor for the success of negotiations.¹⁴⁶

¹⁴⁶ *Aboriginal Rights*, note 10 above, 75.

Certainly if the sustained commitment referred to above was present, **and** demonstrated by adequate levels of staff and adequate levels of resources to actually settle large numbers of claims, then the ICO-type process of facilitated negotiations could be more successful.

b) Negotiations with Binding or Non-Binding Arbitration

In 1981, the Association of Iroquois and Allied Indians, Grand Council Treaty #3, and the Union of Ontario Indians made a joint presentation to the then Minister of Indian Affairs, the Honourable John Munro. In it, they explained that the Indian Commission of Ontario process as then (and presently) structured was not satisfactory, but that it could be remedied with the addition of certain powers:

Summary:

There is a process for the resolution of Indian claims in Ontario that contains many of the characteristics of the process we are proposing. We suggest that, at least in the interim, the process involving the Indian Commission of Ontario be modified to accept some of these changes.

The ICO process today includes:

- clearly established independence;
- reference to negotiation, conciliation, mediation and arbitration with the consent of the parties involved;
- a secretariat function for the parties in co-ordinating meetings and documentation on the claims;
- a separation in process between determination or validity and agreement on compensation;
- a possibility of designing specific bodies, or assigning specific individuals, to mediation or arbitration of any claim.

What is required to accommodate the changes we seek:

1. By adding to the Order in Council;

- the power to investigate complaints of a breach of the duty to bargain in good faith;
- the power to hold hearings on these allegations;
- the power to investigate these allegations;
- the power to make declarations, or order to furnish information, convene or attend meetings, or perform specific duties;
- the power to examine documents and to determine whether they are privileged;
- the provision for reference to binding arbitration by the claimant.

2. *By agreement between the parties:*

- the recruitment and training of mediators and arbitrators and other "outside assistance" personnel;
- the acceptance of claims into the process at the initiative of the claimant without the necessity of approval by the parties being claimed against.¹⁴⁷

The proposal was based loosely on the labour relations model of negotiation – conciliation – mediation – arbitration – decision, with agreement being the preferred outcome of each stage and advancing to the next stage only when agreement could not be reached in the previous stage. The advantage of this type of model is that it allows the facilitator and the parties to break impasses which can frustrate either simple negotiations or facilitated negotiations.

Arbitration can be used as an impasse-breaking tool in many different ways and at different stages of the process. For example, in compensation negotiations impasses can be reached on valuations of loss of use, the value to be placed on the property at the time of loss, how to translate the value of the loss into current figures, among a host of others. Specific issues that have reached an impasse can be referred out for arbitration without necessarily having to arbitrate the whole compensation claim, although that is also an alternative.

Arbitration can be binding or non-binding, and the arbitrator can be allowed to determine amounts, or final offer arbitration can be used whereby the arbitrator is forced to select one as between the final positions of the parties. Final offer arbitration has the benefit of compelling the parties to be realistic in putting forward final offers, rather than assuming "bargaining positions" with the knowledge that they will be cut down by the arbitrator.

The selection of arbitrators can be an issue, obviously with agreement among the parties being the preferred mode, but failing that the choice can be left to the facilitator of the negotiators. The number of arbitrators can also be an issue with the basic options being a single arbitrator agreed to or selected, or a panel of three (or more depending on the number of parties) with one appointee from each party and an agreed-upon chair.

All of these issues must be addressed and answered if negotiation assisted by arbitration is to be adopted by the parties to the specific claims process.

ADMINISTRATIVE CHANGES

Put in very simple terms, regardless of what process is selected, there is a need for more people and more money in order to make any model work. This is true for all of the parties to the process: Canada, Ontario, and the First Nations. Any system can be effectively choked off if insufficient staff are available or insufficient resources are present to reach settlements.

¹⁴⁷ Association of Iroquois and Allied Indians, Grand Council Treaty # 3, and Union of Ontario Indians, *A New Proposal for Claims Resolution in Ontario*, Submission to the Minister of Indian Affairs, 11 April 1981 [hereinafter *New Proposal*], 3-4.

If we are to look at an Ontario-specific solution, we suggest that it would be appropriate for Canada to establish an Ontario-specific office to deal with First Nations rights and claims, with an Ontario-specific budget. As well, Ontario should look to creating an office and full-time staff to deal specifically with these issues, again with their own budget. Again, all of this will come to naught if the First Nations are not provided with adequate resources to research and pursue settlements of their claims. Generally, the acid test of "sustained political commitment" is the provision of sustained resources for the process. To be blunt, political will equals people and dollars.

COMMENTARY

The basic choice among the alternatives available is adjudication versus negotiation. It should again be noted that different aspects of claims may be more appropriate for one dispute resolution mechanism than another, for example "validation" as opposed to "compensation." As well, many commentators have pointed out that a full range of options should be available to the parties:

Our proposal includes the creation of a new method of settling out-standing claims. This method is strictly intended to lead to the establishment of a new approach to resolving Indian grievances. It must *not* be viewed as being the only avenue available to Indian governments who wish to settle their claims, but instead be seen as a new alternative. Existing options within Canada, such as the courts, and outside Canada, such as the United Nations or international tribunals, must and will continue to be open to Indian governments.¹⁴⁸

The Canadian Bar Association special committee report closely examines the relative merits of both options. Regarding negotiations they wrote:

In comments provided to this committee, Roberta Jamieson and Murray Coolican have convincingly argued their preference for negotiated settlements rather than adjudicated outcomes in the case of aboriginal claims.

The advantages of negotiation in most contexts are stated to be:

- aboriginal people are accorded an equal position at the bargaining table, which they perceive to be consistent with their understanding of their original relationship with the Government;
- the agenda can include political and other public interest concerns as well as legal ones;
- they are more adaptable to third party involvement;
- adversary positions can be tempered;
- the parties design their own solutions rather than face an "all or nothing" outcome;

¹⁴⁸ *Ibid.*, 19.

- outcomes can be partial and incremental;
- the parties can agree on their own framework and timetable for negotiations;
- the parties can be assisted by facilitators or mediators;
- the parties are more likely to be on an equal footing so far as resources are concerned, because the policy in Canada in recent years is for government to fund the negotiation of claims, whereas litigation funding is infrequently provided;
- there is a stronger commitment to implementation of the resulting agreement.

Nevertheless, it should be noted that the negotiation process in Canada is encountering serious obstacles. The specific claims process is failing to make significant inroads into the backlog of "lawful obligation" claims against the federal Government. In the non-treaty regions of Canada the comprehensive claims policy seems to have stalled.¹⁴⁹

The CBA goes on to conclude that, although negotiations are preferable regarding the specific claims process, adjudication seems necessary and, as previously noted, it recommends the creation of a Specific Claims Tribunal, utilizing a task force with members from all the parties. It recommends that negotiation continue to be the preferred mode of resolution for comprehensive claims, but also recommends the creation of an Aboriginal Rights Commission to assist the parties in those negotiations.

Dr. Lloyd Barber, then head of the Canadian Indian Claims Commission, in a paper published in 1974 examined the full range of options including:

- 1 the judicial process;
- 2 the legislative process;
- 3 the special tribunal or quasi-judicial approach; and
- 4 the straight administrative negotiation process.

He then concluded:

It seems to me that all of these mechanisms have their place and that in one form or another all will be used in Canada before the backlog of grievances has been dealt with. I believe that it is important that the mechanisms available for settlement be as efficient and effective as possible because I believe that the process used and the experience with the process can have an important bearing on the satisfaction which is derived from the settlement. Settlements which leave a lingering bad taste are not settlements at all and simply set the stage for future strife.¹⁵⁰

¹⁴⁹ *Aboriginal Rights*, note 10 above, 80-81.

¹⁵⁰ Barber, note 27 above, 15.

Vic Savino, in a paper presented to the Canadian Bar Association Continuing Legal Education Seminar in Winnipeg in 1989 entitled "The Blackhole' of Specific Claims in Canada: Need It Take Another 500 Years?" concludes:

It must be noted that the matter of specific claims is "a fundamental point of honour to which we have been indifferent." This indifference can only lead to a compounding of injustice upon injustice. It is time that the grievances of Canada's aboriginal peoples are addressed by this nation. The establishment of an independent claims tribunal is an absolute necessity in addressing those grievances. Surely, after 40 years of its own advisors telling it that a tribunal is necessary the Federal government does not need another study.¹⁵¹

There is a real and present concern by the First Nations that any tribunal that may be established not model itself too closely on the practices and procedures of a court of law. This would appear to be the most common complaint regarding the United States Indian Claims Commission in that it followed the adversary system and played a wholly passive role of weighing evidence. First Nations do not have the same degree of faith in, and respect for the judicial process as does the average Canadian, for good reasons as pointed out in the section entitled The Court Alternative. Grand Council Treaty #3 in its submission for this discussion paper gives a succinct statement of this lack of faith:

First Nations in Grand Council Treaty #3 were direct victims of the notorious *St. Catherine's Milling* case, by which the Victorian judiciary stripped Indians of land rights to placate Ontario government demands. The land involved in that case was on Wabigoon Lake at the centre of our traditional territory. It has taken more than 100 years to begin to undo that in the courts through recent judgements at the Supreme Court level. However, substantial settlements based on either the federal or provincial claims processes have not occurred.¹⁵²

There is some cautious optimism on the part of some First Nations regarding the concept of a claims tribunal, but it is guarded as evidenced by the submission from the Union of Ontario Indians to this discussion paper:

There has been much discussion of the idea of a tribunal of some kind to deal with the claims. The idea of some formal body to address the problems is a good one – for some things.

... A tribunal that would simply extend the present legalistic approach would be a mistake.

A tribunal that would enforce a code of procedural fairness, and ensure that parties negotiated in good faith, would be helpful.

¹⁵¹ Savino, "The Blackhole," note 71 above, 34-35.

¹⁵² Grand Council Treaty #3, "Comments for Discussion Paper on Proposed Changes to the Specific Claims Policy and Process" (1990) [unpublished] at 4.

A tribunal that would address specific questions and then return the matters to the bargaining table would be helpful, while a tribunal that would take the entire claims and resolve all issues would remove control from the community. Such a tribunal would be attractive to the governments, since it would be quicker and simpler, but (especially if the tribunal became legalistic and stiff on its own procedure) would quickly be avoided by the Indian parties. If any party to a claim had the power to take the issues to such a tribunal, the governments would do so all the time. That is why only the claimant should be allowed to take matters of substance to a tribunal – while issues of procedure should be open to any party to take to the tribunal for enforcement.¹⁵³

Six Nations of the Grand River, in its submission to this discussion paper, recommends that the claims process in Ontario at the Indian Commission of Ontario be explored with a view to supplementing the power of the ICO to improve the process:

Based on the foregoing, we submit the following to the I.C.O.:

1. Individual Bands within Ontario should be allowed better access to the Tripartite Process as opposed to the restriction of Indian Associations;
2. Indian Associations who are representing Indian Bands in support and with authority from the Bands they represent should be able to make binding commitments on behalf of the said Bands;
3. Both the federal and provincial government representatives should likewise have authority to make binding commitments on behalf of their Governments;
4. Time frames for the development stage of issues should be established on the introduction of each issue with an overall date stated for its finalization. This time factor should be by mutual consent of all concerned parties and enforced by the Commissioner throughout the negotiations;
5. The claim requiring resolution should be presented by all concerned parties in a form similar to a "Stated Case" before the Commissioner/Arbitrator;
6. As to the credentials of the Commissioner and with no disrespect to the present I.C.O. Commissioner, experience on the legal bench such as past I.C.O. Commissioner Justice Patrick Hartt would add credence to decisions;
7. In the event of the Tripartite Forum failing to resolve an issue, the Commissioner/Arbitrator should be given the proper authority to make final decisions, awards, or whatever is deemed necessary for a major step toward finality; and
8. Assurances must be given by the Governments and Indians concerned for the acceptance of the Commissioner/Arbitrator's decisions as being the settlement of the issue.¹⁵⁴

This would appear to support a facilitated negotiation approach with time frames and the addition of some form of binding arbitration.

¹⁵³ UOI, "Land Claims Policy," note 65 above, 12.

¹⁵⁴ Six Nations of the Grand River Council, "Draft Position Paper No. 1 on 'Specific Land Claims' in Ontario," submitted to the Indian Commission of Ontario, 20 September 1990, 9-10.

Grand Council Treaty #3, in its submission to this discussion paper, comments on its perception as to the problems it has experienced with the ICO process:

Since 1980, two Grand Council Treaty #3 First Nations, Rat Portage and Lac La Croix, have participated in a claims facilitation process, with Canada and Ontario jointly, undertaken by the Indian Commission of Ontario. This process, while it has rendered considerable technical and administrative assistance, has also been unproductive of results. The mandate of the Commission has also been limited to facilitation; breach of promises by Ontario since 1984, for example, to deliver a written position within a time limit, have proven that the ICO is limited by the good faith of the parties. In the case of the Ontario government party, however, good faith has been noticeably deficient. Due to the constraints of a facilitation process, the ICO has been unable to enforce procedural standards, leading, for example, to continued suspension of the Rat Portage claim. This failure is the direct result of a lack of provincial claims policy which binds Ontario, in a procedurally fair manner, to resolve outstanding claims. The result has been 10 years of interminable discussion and delay, without a settlement with Ontario.¹⁵⁵

Earlier in their submission Grand Council Treaty #3 stand by the joint submission, made by them and AIAI and the Union of Ontario Indians in 1981 (quoted earlier). The above quote also underlines the necessity of Ontario being formally brought into whatever process is established and the need for a provincial claims policy.

The Ontario Native Affairs Directorate, in its submission to this discussion paper, makes the following suggestion regarding the Indian Commission of Ontario process:

The Directorate would like to see the ICO take a more pro-active role in the resolution of land claims than has been the case in the past. It is our view that all these functions – prioritization, joint research, establishment of time frames, fact finders, mediators/facilitators, non-binding arbitration – could best be accomplished under the authority extended to the ICO by orders-in-council. In addition, it might be beneficial to the process for the federal government to open an office for Land Claims in Ontario.¹⁵⁶

To conclude on an agreeable note, we suggest that all parties would subscribe to the following quotation from R.C. Daniel in his comprehensive review of the native claims process in Canada from 1867 to 1979, prepared for the Research Branch of the Department of Indian and Northern Affairs in 1980:

Whatever might be said about the relative merits of various mechanisms for dealing with native claims prior to World War II, one must conclude that, on the whole, they were not effective. In fact, the particular nature of the relationship between Indian people and the government seems to have provided a fertile ground for creating claims and no mutually

¹⁵⁵ Grand Council Treaty #3, "Comments," note 152 above, 4.

¹⁵⁶ Letter to Commissioner H. LaForme from Mark Krasnick, 13 September 1990, 6-7.

acceptable mechanisms for resolving them, with the possible exception of the treaties. Since the war, there has been a growing awareness of a backlog of claims and of the need for a more definite native claims process.¹⁵⁷

The situation is now at a crossroads, with one path leading to more Okas and continued unrest, the other path leading to the just settlement of First Nations rights and claims. This discussion paper is an attempt to clear the path – to sweep it clean of rocks and twigs – so that the second alternative can become a reality and the first alternative a memory.

¹⁵⁷ Daniel, note 132 above, 215-16.

CONCLUSIONS AND RECOMMENDATIONS

They will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and river flows.' That promise must never be broken.¹⁵⁸

In issuing its revised specific claims policy in 1982, the federal government stated that the objective of the policy was to discharge the government's historical "lawful obligation" to Indian First Nations "in a fair and equitable manner." Further, the government stated, the revised policy was intended to accelerate the claims settlement process which, it recognized, had not been producing settlements at an acceptable rate. Measuring the policy by either of those goals, it must be considered an utter failure.

The current Minister of Indian Affairs, like several of his predecessors, has publicly conceded that the specific claims process is not satisfactory. This discussion paper, we hope, has made it clear that the failure of the current process is not an unfortunate accident; on the contrary, the seeds of failure have been built into the process itself. The intense frustration expressed in recent months by Indians across Canada was not only known to Indians and non-Indians alike involved in the claims process, but could have been predicted **and in fact was predicted** by every independent review of the process over the past decade of which the Commission is aware.

Nor, in the view of the Commission, is the problem that the stated goal of the process – fair and equitable honouring of the Crown's obligations within a reasonable timeframe – is too ambitious. Canadian governments, as well as the Supreme Court of Canada, have correctly acknowledged that governments have significant legal obligations towards Indian First Nations, grounded in history, common law, the treaty-making process, and the Canadian Constitution, to say nothing of moral grounds. Unless Canadians are prepared to ignore history, refuse to respect fundamental principles of common law simply because they would benefit Indians, and amend the Constitution, those obligations of the Crown must surely be honoured.

Independent and respected commentators, from Dr. Lloyd Barber, former federal Indian Claims Commissioner, to the Supreme Court of Canada and the Canadian Bar

¹⁵⁸ Lord Denning, *R. v. Secretary of State for Foreign and Commonwealth Affairs* [1982] 2 All E.R. 118, [1981] 4 CNLR 86 (CA).

Association, have concluded that Canada has for too long been indifferent to the legal rights of Indians. Surely it is axiomatic that Canadian governments should not only face up to their obligations to Indian First Nations, but should also actively ensure that those obligations are fulfilled. In the view of the Commission, to do so would be in the interest of all Canadians, not only because it would help avoid future angry confrontations but, more importantly, because Canadian society is based on the premise of respect for legal principles and justice for all. Further, in the view of the Commission, the Canadian public, if it were fully aware of the tragic history of Canadian justice as it has applied to Indian land and treaty rights, would support a decision by governments in Canada to ensure that their solemn legal and historical obligations are fulfilled.

In the view of the Commission, in order to determine and give effect to Indian rights in Ontario, the governments of Canada and Ontario should provide a claims resolution process that is at once **fair, expeditious, and comprehensive**, as well as having some measure of **finality** – in the sense that all parties and, in particular, Indian First Nations, should be left with the knowledge that the substance of their grievances has been addressed. The Commission's conclusions regarding the existing specific claims process and its recommendations for change will be set out with those objectives in mind.

The Commission's conclusions and recommendations, set forth first in relation to the claims policy and second in relation to the claims process, are as follows:

THE SPECIFIC CLAIMS POLICY

A. The Validation Decision

Conclusion While the Supreme Court of Canada has affirmed that fair dealing and honour of the Crown in its relations with Indian First Nations, together with the fiduciary obligation of the federal government towards Indians, should be touchstones of the governments' legal obligations with respect to Indian land rights, the federal specific claims policy does not acknowledge the relevance of any of these factors. One must question why neither fairness nor equity are included in the criteria for determining whether a claim is valid or in determining compensation for a valid claim if indeed the object of the specific claims policy is to achieve a fair and equitable result.

Further, in this regard, the policy should be contrasted with criteria used by the U.S. Indian Claims Commission and the criteria originally set out in 1965 for the proposed Canadian Indian Claims Commission.

The intent should be that all existing land, treaty, and aboriginal rights issues should have access to a claims process that is objectively fair and equitable, operating under principles which are generally acceptable and evenly applied. While this will lead to a broader range of claims that might be submitted, it does not mean that validation criteria need become hopelessly complex.

RECOMMENDATION NO. 1

The criteria for validation of claims should be simplified. The policy should be expressed in general terms to ensure that principles of fairness and equity underlie the validation decision and that the application of the validation criteria will take into account evolving legal standards as set out by the courts (for example, "honour of the Crown").

Conclusion Respected commentators, including the Canadian Bar Association committee and Gerard La Forest, have noted that government reliance on technical defences to refuse to negotiate compensation even where the government has clearly acted in violation of established legal principles is both unfair and counterproductive, in that it fails to deal with the underlying causes of an Indian land claim. Reliance on statutes of limitation, the immunity of the Crown against civil actions, the supposed defence (unknown in law) of "mere technical breach," and the refusal to consider the full range of solemn undertakings which accompanied treaties are all examples of technicalities which prevent the achievement of a fair resolution of land claims.

RECOMMENDATION NO. 2

The validation criteria should state explicitly that technical defences, such as laches, limitation periods, and Crown immunity prior to 1951, shall not be taken into account in the validation or in the compensation process.

Conclusion The arbitrary rule in the federal specific claims policy that claims based on Crown commitments made prior to Confederation will not be reviewed, even where governments continue to benefit from the breach of those commitments, is unfair. This is particularly true in Ontario where the majority of Indian treaties were signed prior to 1867. Refusal to fulfil the terms of such treaties is especially odious in light of the fact that British courts have concluded that those treaties are the responsibility of Canadian governments. The Commission is aware of no justification for this distinction.

RECOMMENDATION NO. 3

The validation criteria should not exclude pre-Confederation claims.

Conclusion Currently, decisions with respect to the validity of a claim are made in relative secrecy. Federally, Justice lawyers provide the government with a legal opinion as to whether, on the evidence presented, the government has breached a lawful obligation to the claimant. That legal opinion is then reviewed by the Minister of Indian Affairs, who has the final decision (presumably based on political considerations as well) whether or not to accept the claim. At the end of this process, which may take up to eight years, the claimant is not given access to the legal opinion on which the validation decision was presumably based. Thus, the claimant may be unable to understand the reasons for the validation decision or to identify inconsistencies with other opinions on similar issues, much less to question the basis of that decision. To the frustration of a Band whose claim is rejected in this summary way must be added the frustration of other claimants who find their claims accepted only in part, or accepted subject to a 50 per cent "discount" on the basis that a secret Justice opinion had questioned the chances of the claim's success in court. Thus, the negotiation process ignores a generally accepted principle of natural justice, namely that an applicant is entitled to examine the reasons for an administrative decision. That this policy of secrecy has been vehemently criticized and has given rise to a lingering sense of injustice among claimants is both predictable and justified.

Analysis Any system of secret judgments over the validity of land claims will be open to suspicion of arbitrariness and disregard for law. It is difficult to understand why a government which wishes to deal with land claims fairly would be unwilling to permit the reasons for its decisions to be disclosed. Further, in cases where a land claim is validated in whole or in part, the failure to disclose the basis of that validation makes it extremely difficult to provide rational criteria for the compensation negotiations which will follow.

RECOMMENDATION NO. 4

Detailed reasons, including legal reasons, supporting the decision to accept or reject a land claim should be provided to the claimant and to all other parties.

Conclusion The current separation of the claims processes offered by Canada and Ontario, combined with the fact that many claims involve both Canada and Ontario as "defendants," unfairly renders Indian claimants subject to disputes between Canada and Ontario regarding their respective responsibilities for a particular claim.

Analysis There seems to be no reason why Canada and Ontario should not deal with Indian claims in this province on the same basis and in the same process.

RECOMMENDATION NO. 5

Ontario should be bound by the same validation criteria as Canada.

Conclusion A strong criticism of the existing claims policies of Canada and Ontario is that they were developed without serious regard to First Nations recommendations.

RECOMMENDATION NO. 6

The general validation criteria, which would thereafter be applied on a case-by-case basis, should be formulated through consultation between representatives of First Nations, Ontario, and Canada.

Conclusion In focusing solely on claims relating to lands, the current federal interpretation of its specific claims policy excludes consideration of other aboriginal and treaty issues, such as self-government and claims for compensation for abrogated hunting, trapping, or fishing rights and the continuing exercise of those and other treaty rights. The fact that claims of aboriginal title are dealt with through an entirely separate process has also been criticized on the basis that many aboriginal claims do not fit neatly into the criteria established by existing federal policies. In Ontario, there is no reasonable expectation that claims based on unextinguished Indian title will be dealt with in the foreseeable future.

Analysis Inclusion of self-government negotiations would be difficult within the contemplated land claims process. However, claims for compensation for abrogation of hunting, trapping, or fishing rights, while difficult to quantify, should nonetheless be recognized as compensable claims. Similarly, the process should deal with treaty promises of services, immunities, etc. Such claims could be conveniently dealt with in the process contemplated by these recommendations.

RECOMMENDATION NO. 7

In Ontario, the validation criteria should be sufficiently broad to permit resolution of all Indian land claims, including claims of aboriginal title to lands and Crown management of Indian assets and Indian rights. While self-government issues may be too broad to be dealt with in the context of specific claims, Indian management of continuing rights arising out of such claims should be negotiated.

B. Compensation

Conclusion With respect to the stated federal criteria for compensation, arbitrary principles which restrict compensation, such as non-recognition of "special value to the owner" and non-compensation for unlawful breach of individual hunting, trapping, or fishing rights (unless the claimant Band historically exercised those rights through some form of collective), contradict generally accepted principles of law.

RECOMMENDATION NO. 8

The compensation criteria should be simplified to provide that claimants will be compensated for all losses reasonably established to have been caused by the acts which gave rise to validation. Arbitrary criteria which limit compensation in a manner inconsistent with legal and equitable principles should be discarded.

RECOMMENDATION NO. 9

Pre-judgment interest should be a recognized element of compensation. In appropriate cases, the interest rate would be as historically prescribed for Indian trust moneys.

Conclusion The federal policy of "discounting" validated claims creates lingering resentment among claimants even after settlement. In addition, the discount calculation is invariably arbitrary and incapable of reasoned justification in any given case. The Commission notes the frustration that would arise in the court system if plaintiffs, whose claims have been upheld in court, were to see their compensation arbitrarily reduced on the basis that their claim had been "weak." Finally, the process of discounting claims which have been validated creates an impression that the government is seeking only to minimize its financial liability through the claims negotiation process rather than to deal with claims in a fair and equitable manner.

RECOMMENDATION NO. 10

The current federal guideline which indicates that compensation shall be reduced to reflect "degree of doubt" should be abolished.

THE PROCESS

A. Independence

Conclusion An essential principle underlying the Canadian justice system is that justice should not only be done, but should be seen to be done. Not only are the current claims negotiation processes seen by First Nations as unfair, but they are unfair. These processes ensure that governments act not only as defendants with respect to alleged wrongdoing, but also act as judge and jury, as banker to the claimant, and, at least in the case of the federal government, as a fiduciary legally charged with protecting the rights of the claimant. This fundamental conflict of interest is inherent in the existing process and ensures that even where settlements are agreed to by Indian First Nations (perhaps because they have no reasonable financial alternative) a perception of unfairness is likely to linger.

In the majority of cases where an agreed settlement is not easy to reach, if the government simply refuses to address an issue or even to negotiate at all, the claimant has no recourse apart from the courts. The claimant simply has no way to resolve an impasse where the parties disagree on an issue. However, resort to the courts is not a realistic option for most claimants for financial and other reasons.

Analysis All parties to the negotiations should be subject to an independent authority mandated to assist them in resolving differences and breaking impasses and generally to ensure that the negotiation process is fair. The authority should have greater powers than the Indian Commission of Ontario whose consensual powers are ineffective where one party is intransigent.

RECOMMENDATION NO. 11

An independent body should supervise the validation and negotiations. In this context "independent" means that the supervisory body must have real and perceived independence.

RECOMMENDATION NO. 12

The role of the supervisory body should be to monitor, facilitate, and keep a record of negotiations. It should also include the right to set timeframes and deadlines. While a possible model for the powers of such an independent authority is set out in recommendation no. 25, the powers of this body should be greater than those currently vested in the Indian Commission of Ontario.

B. Resources

Conclusion A fundamental precept of common law is that justice delayed is justice denied. With more than 500 specific claims filed and with settlement agreements reached at a rate of three per year, it is apparent that the outstanding claims will not be settled within any reasonable timeframe. Canada has a national settlement budget for specific claims of only \$15 million per year, while its own officials have estimated that settlement of the remaining claims will cost some \$700 million. In addition, the dearth of government personnel at all levels ensures that negotiations are subject to unacceptable delays. At present, the Ontario government has no full-time land claims negotiator or research staff. The federal government has only one negotiator who attempts to deal with the more than 60 specific claims submitted in Ontario. The obvious consequence is that all too frequently the entire claims process grinds to a halt.

As the Ontario government's submission to this Commission points out, the existing negotiation processes in fact provide incentives to governments to delay settling valid claims. By doing so, governments are able to defer payments and to save interest costs.

Analysis Perhaps more than any other factor, the refusal of governments to assign resources to the negotiated settlement of land claims has caused intense frustration among claimants. Any changes to the specific claims policy or process will be futile if not accompanied by a massive injection of resources at all levels.

RECOMMENDATION NO. 13

Governments and claimants should have access to a dramatic increase in the resources needed to deal with existing and anticipated claims.

RECOMMENDATION NO. 14

There should be no pre-determined annual budget for the provision of compensation to claimants. Governments should be prepared to provide the aggregate funds necessary in any given year.

RECOMMENDATION NO. 15

The independent authority which supervises the negotiation process should be adequately funded.

Conclusion The funding for First Nations' research and negotiation costs is provided by Canada. This process suffers from the same conflict of interest as described above and encourages a similar perception of unfairness. Further, the existing system of providing for claimants' negotiation costs through loans unfairly renders claimants financially dependent on the result of the negotiations and the good faith of employees of the Department of Indian Affairs.

The Commission notes that the repayment of claimants' negotiation costs does not in fact appear to have been carried out generally in an unreasonable fashion. However, the system of having one party fund the other's negotiation costs remains unfair for the reasons described above and, predictably, it has given rise to much criticism from claimants.

Analysis Fairness in negotiation funding is essential to the achieving of a fair result in negotiations. As long as the negotiation costs of Indian claimants are funded primarily through government loans, a reasonable apprehension that the claimants are subject to undue influence in the course of negotiations will continue to exist.

RECOMMENDATION NO. 16

Funding to claimants should be provided through grants. Where there is a dispute, the amounts of such grants should be reviewed by an independent funding authority. The claimant would be accountable for proper expenditure of the grants.

RECOMMENDATION NO. 17

Provision should be made for an independent panel to approve awards of negotiation, legal, and other costs associated with the research, submission, validation, and negotiation of a claim. Offsets for granted funds may form part of the panel's net award to the claimant.

C. Consenting to the Process

Conclusion The current claims negotiation process is often ineffective simply because either the government of Ontario or of Canada unilaterally refuses to agree to negotiate or decides to terminate negotiations prior to settlement.

RECOMMENDATION NO. 18

From the time of initial submission of a claim until completion of the negotiations for compensation, all parties should submit to the negotiation process, including:

- complying with reasonable deadlines,
- being bound by admissions, and
- negotiating in good faith.

RECOMMENDATION NO. 19

Parties to the process should include the claimant, and either Canada or Ontario, or both if they are necessary to resolution of the claim.

Conclusion The fact that many land claims involve both governments as respondents has the result that each government may assign responsibility for settlement to the other government. Thus, even in cases where both governments agree that a land claim is valid, the claimant may be unable to obtain settlement and compensation.

RECOMMENDATION NO. 20

Where the claims process determines that Ontario may be liable in respect of the claim, the federal government should be jointly liable. To the extent that Ontario refuses to accept its compensation obligations as determined in the claims process, Canada should be required to deliver such compensation, with a claim over against Ontario. The resolution of internal questions of governmental responsibility should not be permitted to prejudice a native claimant. The appropriate arbitration process for determining such responsibility should be agreed to by Canada and Ontario.

RECOMMENDATION NO. 21

To facilitate the development and implementation of a process which involves Ontario, Canada should establish a separate claims division for Ontario, reporting to a deputy minister.

Conclusion It is the current general policy of Canada to terminate specific claims negotiations upon the commencement of court proceedings by the claimant. This is contrary to general litigation practice and is unfair to claimants who are forced to place their legal rights in abeyance in favour of negotiations which may prove illusory.

RECOMMENDATION NO. 22

The initiation of court proceedings by the claimant should not affect the negotiation process unless a court judgment is obtained.

D. Management of the Process (Details)

RECOMMENDATION NO. 23

The precise mechanics by which the independent body would supervise the negotiation process *should be determined through consultation between the representatives of First Nations, Ontario, and Canada.*

RECOMMENDATION NO. 24

The method by which the negotiation of compensation is supervised should ensure that flexible remedies can be fashioned in order to meet the claimant's needs and aspirations.

RECOMMENDATION NO. 25

The following two-stage model is submitted for consideration by the parties:

(i) *Validation*

- Upon submission of a claim, the validation process should be subject to supervision of an independent authority charged with ensuring that validation is a timely and fair process.
- Timeframes should then be established which would provide for governments' detailed response to the statement of claim (e.g. six months from submission), followed by an informal pre-adjudication to examine and encourage agreement.
- If the parties are unable to agree on the terms of validation, including the reasons therefore, final adjudication would be determined by an independent adjudicator or panel of adjudicators.

- Rules of procedure and evidence should be flexible and research and statements of fact should be encouraged wherever possible. Decisions will be based upon materials and evidence submitted.

(ii) Compensation

- Where a claim is validated, the process for determining appropriate remedies should encourage the parties to develop remedies consistent with the claimant's needs and with the rights of third parties and other governmental constraints.
- An independent authority should facilitate and monitor these negotiations and should have the power to order fact-finding or arbitration where impasses develop and to set deadlines for responses to positions.
- If one party fails to provide documents or responses in accordance with the deadlines established and is unable to satisfy the independent authority that such failure is justified (for reasons, in the case of government parties, other than lack of resources), such fact-finding or arbitration would be decided on the basis of the submissions received.

E. Scope of the Process

Conclusion If it is agreed that the claims policy and process are to be amended in accordance with the recommendations herein, it would be unfair not to permit the resubmission of claims which were previously filed and rejected by governments under the existing policy (which, as demonstrated throughout this paper, fails to give effect to fundamental principles of law and equity).

RECOMMENDATION NO. 26

All claims which have not previously been settled and ratified by the claimant should be eligible for reconsideration under the new claims policy and process.

F. Finality

Conclusion While a claims policy and process which achieves results that satisfy all parties in every case is clearly impossible, a policy and process which is fair and is perceived to be fair by the parties is essential to the establishment of a lasting, harmonious relationship between Indian and non-Indian governments. A policy and process arrived at through consultation among all the parties is most likely to achieve this result.

However, given the past experience of Indian claimants with the ineffectiveness of claims negotiations processes, they could not reasonably be expected to forego their existing right to litigate claims. Given the nature of the relationship between Indian claimants and non-Indian governments, the rules governing the binding nature of the settlement process could and should be unequal. It should be more difficult for governments to withdraw from the process and governments should be bound by the results of the process to a greater degree than Indian claimants.

It should be noted that finality is not used here in the sense of extinguishment or termination, but as noted above in the sense that all parties be left with the knowledge that the substance of the claim has been addressed in a fair and equitable manner consistent with existing law.

RECOMMENDATION NO. 27

Indian claimants should not be required to surrender their right to litigate in the event that they are not satisfied with the results of the negotiation process, unless they so agree.

RECOMMENDATION NO. 28

The results of the negotiation process should be binding on Ontario and Canada. In all cases of settlement the Indian claimant should have to advise within six months of completion of the process as to whether it accepts the settlement.

RECOMMENDATION NO. 29

Implementation of the terms of settlement should be reported to the independent authority supervising the negotiations.

RECOMMENDATION NO. 30

The independent authority which supervises the claims process should report to the provincial legislature and federal Parliament regularly on progress in the negotiations and failures or refusals by governments to comply with decisions reached within the process.

RECOMMENDATION NO. 31

Non-parties should not be directly bound by decisions made within the claims and should not participate.

RECOMMENDATION NO. 32

Permanence should be provided to the claims process by having the First Nations, Canada, and Ontario confirm the essential elements of the process in a manner binding upon them.

G. Alternatives to the Claims Process

Conclusion The history of the legal and financial disabilities of First Nations with respect to the advancement of land and treaty claims renders unfair the application of the technical defences of limitation periods and former Crown immunity. While the courts are not now an adequate substitute for a properly functioning negotiation process, in the interest of promoting fair and honest negotiation they should be made a real alternative for the just resolution of claims.

RECOMMENDATION NO. 33

Applicable legislation should be amended to ensure that the Crown may not rely on laches, statutes of limitation, or Crown immunity as a defence to an Indian land or treaty claim.

RECOMMENDATION NO. 34

A litigation fund should be established, similar to the current fund established for applications under the Charter of Rights, to enable Indians to pursue their claims in the courts.

RECOMMENDATION NO. 35

Judges should be given specialized training, perhaps sponsored by the Judicial Council of Canada in conjunction with Indian organizations, before being assigned to an Indian case.

RECOMMENDATION NO. 36

A panel should be commissioned to review the recommendation of the Canadian Bar Association which anticipates a more active role for the courts in awarding and implementing a broader range of remedies for claimants.

Conclusion There is currently no alternative, apart from the courts, to adjudicate and resolve claims independent of government. While it is hoped that the recommendations proposed here will, in the first instance, obviate the need for further alternative processes and, second, make the courts better able to deal with claims issues, it is far too early to predict the ultimate achievement of either goal. Accordingly, it would be prudent to plan now for a "third alternative" should that become necessary. Many models, including those used in other jurisdictions, are described in this discussion paper, and it may well be that only a Canadian analogue can achieve in policy and practice the reasonable goal of resolving all claims within the lifetimes of those who saw the beginning of the modern era in 1973.

RECOMMENDATION NO. 37

A tripartite task force should be commissioned to develop a model for an Ontario Indian Claims Tribunal as a "third alternative" for resolution of claims in this province. The work of this task force should not delay or defer implementation of any of the other recommendations set out here, nor should it proceed on the assumption that such a tribunal will ultimately be created. The model should be in place if and when the need becomes apparent.

H. Implementation and Workplan

Conclusion It is the view of the Commission that this discussion paper represents a broad enough range of input that the parties to the Ontario Tripartite Process should be able to react and provide positive input to an implementation process within a fairly limited period of time. For discussion purposes, we posit a deadline of October 31, 1990, to take the next logical step.

RECOMMENDATION NO. 38

The Indian Commission of Ontario should convene a meeting of the parties on or before October 31, 1990, to discuss reaction to the recommendations made in this paper and to develop and implement a workplan to deal with the issues substantively. Interim comment and suggestions will be distributed by the ICO in advance of the meeting.