



LANDMARK

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

*Ernest Benedict, Mohawk Elder
Akwasasne, Ontario
June 1992*

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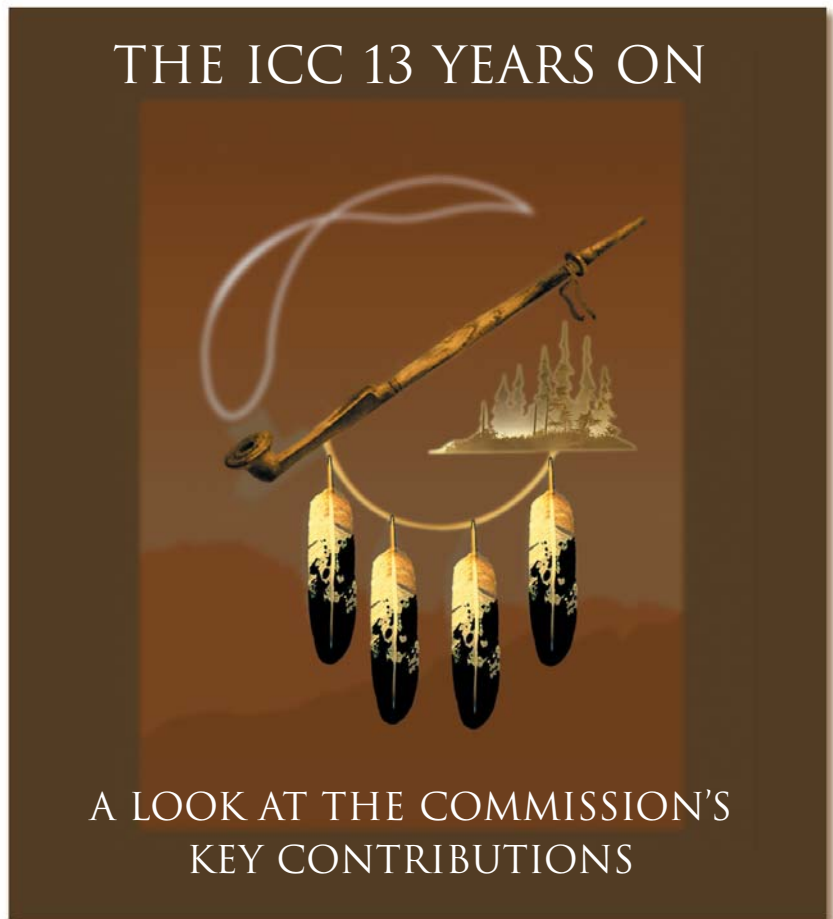
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The ICC's logo reflects the Commission's purpose and values.

On July 15, 2004, the Indian Claims Commission marked its 13th anniversary as the only independent body in Canadian history mandated to investigate and report upon specific land claims. What has this temporary body achieved in that time? This article looks at five contributions that have made a difference to the field of specific land claims.

The Commission's logo encapsulates the ICC's work and provides a good starting point. The pipe brings a spiritual dimension to human affairs, sealing an agreement or signalling a willingness to discuss an issue. The island represents Canada, where claims are being negotiated. The four eagle



CP Photo/Paul Chiasson

Quebec police man a road block on the western side of the Kanesatake reserve near Oka in July 1990. The “Oka crisis” led to the creation of the ICC.

feathers symbolize all the races of the earth, the parties involved in the claims process. Elements of water, land and sky illustrate a period of growth and healing.

Why is there a reference to growth and healing? The ICC grew out of crisis. It was created by the government of the day on an interim basis to make growth and healing possible following the bitter confrontation that took place at Oka, Quebec, in 1990. It represents the only post-Oka institutional improvement in the specific claims area and embodies a consensus reached between aboriginal and non-aboriginal Canadians in the days after Oka—namely, that there was a better way to adjudicate these long-standing historical grievances.

“The ICC has recorded a number of notable achievements over the past 13 years, some of which it pioneered,” says Chief Commissioner Renée Dupuis. “These accomplishments lay the groundwork for the permanent body that is slated to take the ICC’s place.” She points to five outstanding areas of success:

- the Commission’s ability to remain neutral and bring fairness to the land claims process
- its recognition of the importance of oral history to the process
- its contribution to the evolving area of law on aboriginal and treaty rights and the Crown’s fiduciary relationship with First Nations
- its work on Prairie land surrenders
- its mediation services

FAIRNESS IN LAND CLAIMS RESOLUTION

As of March 31, 2004, the ICC had been involved in 124 claims across Canada. This is a substantial number and is somewhere between one-sixth and one-tenth of the known specific claims in Canada, depending on available information. The strength of the Commission lies in its neutrality. It is an impartial review body and makes every effort to walk a middle road, favouring neither party in a dispute.

The ICC is not an advocate for the government nor for First Nations. It can be relied upon to deliver the straight goods in terms of what claims mean for all Canadians. The Commission has successfully advanced negotiations where other efforts failed. Of the 62 inquiries completed by the ICC since it began its work, 16 have been accepted by government half-way through the Commission’s inquiry.

In part, this success is because the ICC’s process brings everyone together to discuss and clarify the issues in dispute. “I believe this is one of the Commission’s most valuable roles,” notes Madame Dupuis. “We help bring First Nations and government representatives together to talk about each claim. Talking face to face makes it easier to understand each other. It’s common sense and it works.”



Oral evidence is heard at a community session held on the Blood Tribe's reserve in Alberta. As an integral part of the Commission's process, Commissioners travel to a First Nation community to hear from community members firsthand.

ORAL HISTORY

In the course of a claim inquiry, Canada's case is usually well-documented and carefully recorded; however, the history of aboriginal peoples is not in written form. It is an oral history, passed down by word of mouth from generation to generation in the form of stories, myths, and songs. It embodies the experiences and traditions of a people. It is a "living" history in every sense of the word.

One of the achievements ICC is proudest of is its acceptance of oral history and tradition as an integral part of the Commission's inquiry process. Until recently, the courts favoured written history and treated most aboriginal oral history and traditions as hearsay – information from someone who was not directly involved and, therefore, information given less importance in court.

Since 1991, the Commission has considered the testimony of elders and others as important sources of evidence in specific land claims. Commissioners hold sessions in the First Nation community. When the Commission travels to a First Nation community to listen to the stories of the past told by the elders, it is often the first and only time that the community will have had direct contact with "Ottawa," and it is the only opportunity that band members will have had to put their case themselves directly to Commissioners. These

sessions give all members of the community who wish to do so an opportunity to address the Commissioners conducting the inquiry.

In this respect, the ICC's initiative was in advance of the Supreme Court of Canada's decision on *Delgamuukw*. The 1997 decision stated that oral history should be "placed on an equal footing" with written history. The Court noted that



Former Commissioner Aurélien Gill and Legal Counsel Kim Fullerton listen to oral evidence from Elder Ethel Alfred and Peggy Svanvik at an ICC community session in 'Namgis First Nation, BC.



Glenbow Archives NA-2974-18

Chipewyan encampment, Fort McKay, Alberta. The ICC's recommendation in the Fort McKay inquiry caused a reversal in the federal government's treaty land entitlement policy.

First Nations kept records through oral history, passing information down from generation to generation. It ruled that to accept only written history as evidence placed an “impossible burden of proof” on aboriginal peoples. The *Delgamuukw* decision means that oral history can no longer be excluded automatically and that it will be examined and weighed as rigorously as written history before being accepted as proof.

CONTRIBUTING TO THE LAW ON ABORIGINAL AND TREATY RIGHTS

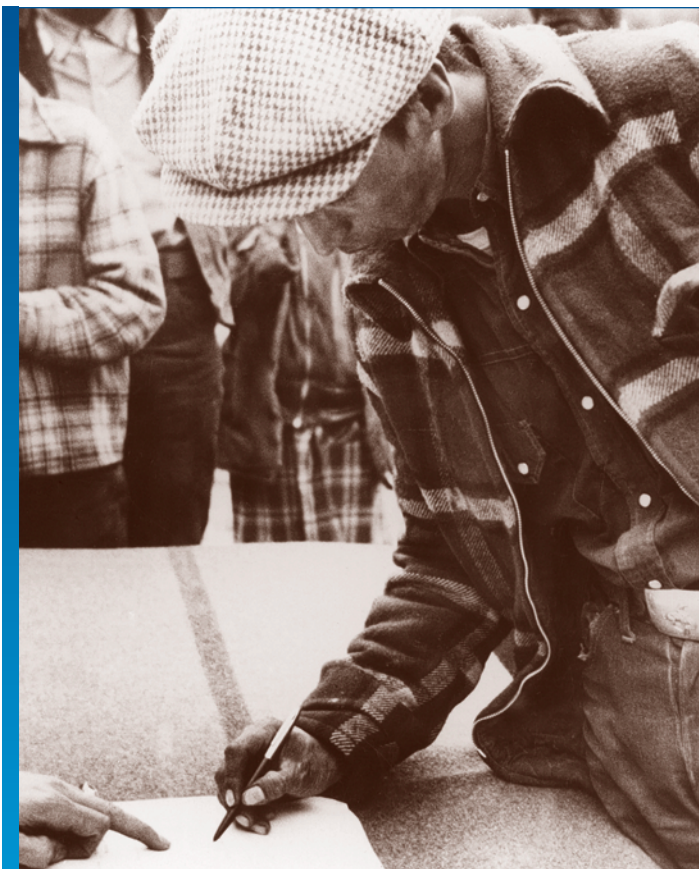
The ICC's reports have had a direct bearing on the resolution of a number of specific claims; equally importantly, they have had a direct impact on the redefinition of Canadian government policy in several important areas.

The ICC's 1995 recommendation in the case of the Fort McKay First Nation in Alberta resulted in the reversal of the government's policy position with respect to treaty land entitlement. The current government policy on this issue is based entirely on the ICC's report.

Before the Fort McKay report, the policy for counting the number of Indians in a given band was to set the population as of the date of survey. The problem with this approach was that it eliminated all those members of the band who – for whatever reason – did not happen to be in the community on that particular date. It did not take into account the migration that marked the nomadic way of life of First Nations people at the time.

In its report on Fort McKay, the Commission included in the count people who transferred from other bands, people who married into the band and people who were absent. The thinking was that this method more closely reflected what was actually happening on the ground. It also upheld the principle that each and every Indian was entitled to be counted under treaty.

This policy was applied by the Commission in a number of subsequent claims inquiries, most notably in the Bigstone Cree Nation treaty land entitlement claim, which the federal government accepted for negotiation in 2000.



Glenbow Archives NA-1954-6

Signing adhesion to Treaty 6, circa 1948. The Numbered Treaties (1-11) helped open the West to settlement.

The Fort McKay report was the Commission's most authoritative statement on this matter to date and was adopted in subsequent reports. We now see the courts taking a similar interpretive approach in this field.

PRAIRIE LAND SURRENDERS

The ICC's work in the field of Prairie land surrenders is well-known. In that regard, the ICC released a very important report several years ago dealing with the Kahkewistahaw First Nation's 1907 surrender.

Between 1871 and 1921, Canada and First Nations signed 11 treaties most of which covered western and northern Canada. The government sought clear title to the land to open the West to settlement in exchange for reserves and other promises. For First Nations, reserves were crucial to protect their way of life. For Canada, reserves provided a way of converting First Nations members from hunters to farmers.

At the turn of the 19th century, many settlers viewed Indians and Indian reserves as obstacles to progress. Farmland in Ontario, Quebec and the Maritimes was hard to come by and people in those regions saw reserve land in the Prairies as a waste. Between 1886 and 1911, more than a fifth of



Glenbow Archives NA-86-13

Between 1886 and 1911, more than a fifth of reserve land was surrendered back to Canada. By the 1930s, Canada had taken more than 100 surrenders of reserve land on the Prairies.

reserve land was surrendered back to Canada. By the 1930s, Canada had taken more than 100 surrenders of reserve land on the Prairies. Most claims now filed with Indian and Northern Affairs Canada originate from these Prairie land deals.

In the case of the Kahkewistahaw First Nation in Saskatchewan, whose members were induced to surrender three-quarters of their reserve in 1907, the Commission found that the Crown's agents had engaged in "tainted dealings" to obtain approval. These officials, as the ICC report relates, took advantage of the community and manipulated the process when in fact the government was responsible for looking after the best interests of the community.

The winter of 1907 was particularly harsh for the Kahkewistahaw First Nation. Disease and starvation had reduced the community from 356 to 84 people. Chief Kahkewistahaw, who had opposed requests to surrender the band's land in the fertile Qu'Appelle Valley for 22 years, had died. Government agents picked that January to seek a surrender to appease local farmers and others who had wanted the excellent farmland for some time.

Twice that winter, the band voted against the surrender. Only at the third meeting, when the government agent arrived offering cash in hand, did the First Nation vote to

surrender three quarters of its best lands –33,281 acres. The Kahkewistahaw were left to survive on the steep escarpment and lower benches of the Qu'Appelle Valley with little arable land.

In December 1997, Canada agreed that it had breached its fiduciary obligation to the First Nation and accepted the claim for negotiation as a result of the Commission's inquiry process. The Commission's mediation department was asked to facilitate the negotiations which resulted in a settlement, in November 2002, for \$94.65 million in federal compensation—the largest specific land claims settlement to date in which the ICC was involved.

MEDIATION SERVICES

The ICC has a double mandate: to inquire, at the request of a First Nation, into specific land claims that have been rejected by the federal government; and to provide mediation services for claims in negotiation when requested to do so by both parties.

The Commission is especially proud of its mediation services. Experience has shown that the presence of a skilled and impartial member of the Commission's mediation team can provide tangible benefits to the parties in a dispute. It

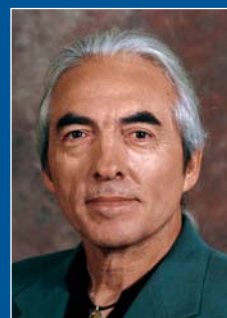
CHIEF COMMISSIONERS AND CO-CHAIRS OF THE ICC SINCE ITS INCEPTION



Chief Commissioner
Harry LaForme
1991-1994



Co-Chairs Daniel J. Bellegarde
and P.E. James Prentice
1994-2001



Chief Commissioner
Phil Fontaine
2001-2003



Chief Commissioner
Renée Dupuis
2003-

does so by reducing the likelihood of conflict and increasing the efficiency of the process.

Depending on the nature of the claim, the Commission offers a broad range of alternative dispute resolution services tailored to suit the particular needs of the parties. The Commission played a pivotal role in three recent claims: Chippewa Tri-Council (Coldwater Narrows), Mississaugas of the New Credit (Toronto Purchase) and Chippewas of the Thames (Clench Defalcation). In each of these claims, the Commission's contribution was to provide an environment that permitted the parties to have informal discussions that would not prejudice any previous positions that they had taken. The Commission created the ideal venue for talks and it helped keep the parties focussed on their objectives. As a result of the process established by the Commission, the First Nations were able to get Canada to change its opinion and accept the claims for negotiation.

ICC FACTS

Biggest claim in terms of compensation – Kahkewistahaw First Nation's 1907 surrender claim for \$94.65 million in federal compensation

Smallest claim in terms of compensation – Sturgeon Lake First Nation's agricultural lease claim for \$190,000 in federal compensation

Oldest claim – Chippewa Tri-Council's Collins Treaty claim which dates back to 1785

GET THE FACTS ON CLAIMS



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Indian Claims Commission
Fairness in claims negotiation

Get the facts on claims
a new fact sheet series from the
Indian Claims Commission

- ▶ What are Indian Land Claims?
- ▶ What is a Treaty Land Entitlement Claim?
- ▶ What is a Surrender Claim?
- ▶ What is the Indian Claims Commission?

(613) 943-2737



What are Indian land claims? What is a TLE claim? What is a surrender claim?

How many times have you found yourself trying to provide quick, accurate answers to these questions? Specific claims are based on history, law, and policy and are often complex. The Indian Claims Commission has a series of fact sheets called "The Facts on Claims" to explain the basics behind specific claims. They are available free of charge as a useful public education tool for any organization or First Nation with an interest in claims. To get "The Facts on Claims", call (613) 947-3939 or email mgarrett@indianclaims.ca

FACTS ON CLAIMS: WHAT ARE INDIAN LAND CLAIMS?

Certain words and phrases are used extensively in discussions of specific land claims. All too often, it is assumed that the average reader understands the meaning of these terms and that they therefore require no further explanation.

With this issue of *Landmark*, we introduce a series that will help readers understand terms that define or circumscribe the work of the Commission. Over the next several issues, we will look at such things as surrender claims, treaties, treaty land entitlement claims and oral history. To begin at the beginning, we answer the question “What are Indian land claims?”

Land claims are unresolved grievances between Indian Bands – also called First Nations – and the Government of Canada relating to land and resources.

TWO TYPES OF CLAIMS

The federal government first announced a formal policy on claims in 1973. That policy divides grievances into two broad categories: comprehensive claims and specific claims. The Indian Claims Commission considers only specific claims.

COMPREHENSIVE CLAIMS

Comprehensive claims may arise when a First Nation asserts aboriginal rights and title to land. Most of these claims are in British Columbia where no land surrender treaties were made. Others are in Newfoundland, parts of Atlantic Canada, Quebec and the Yukon.

Federal policy bases these claims on traditional use and occupancy of the land and requires First Nations to exchange aboriginal rights and title for treaty rights. Some First Nations object to this requirement because they



CP Photo/Fred Chartrand

President of the Nisga'a Tribal Council Joseph Gosnell and INAC Minister Jane Stewart display the Nisga'a Final Agreement in Ottawa on May 4, 1999. The Nisga'a agreement is one of the most well-known comprehensive claims in Canada.

believe it asks them to extinguish their aboriginal title and, by doing so, to extinguish their aboriginal identity.

To date, 15 comprehensive claims have been settled; the settlements form modern treaties protected under the Constitution. Settlements typically define First Nation territory, provide cash and may establish resource management and government structures.

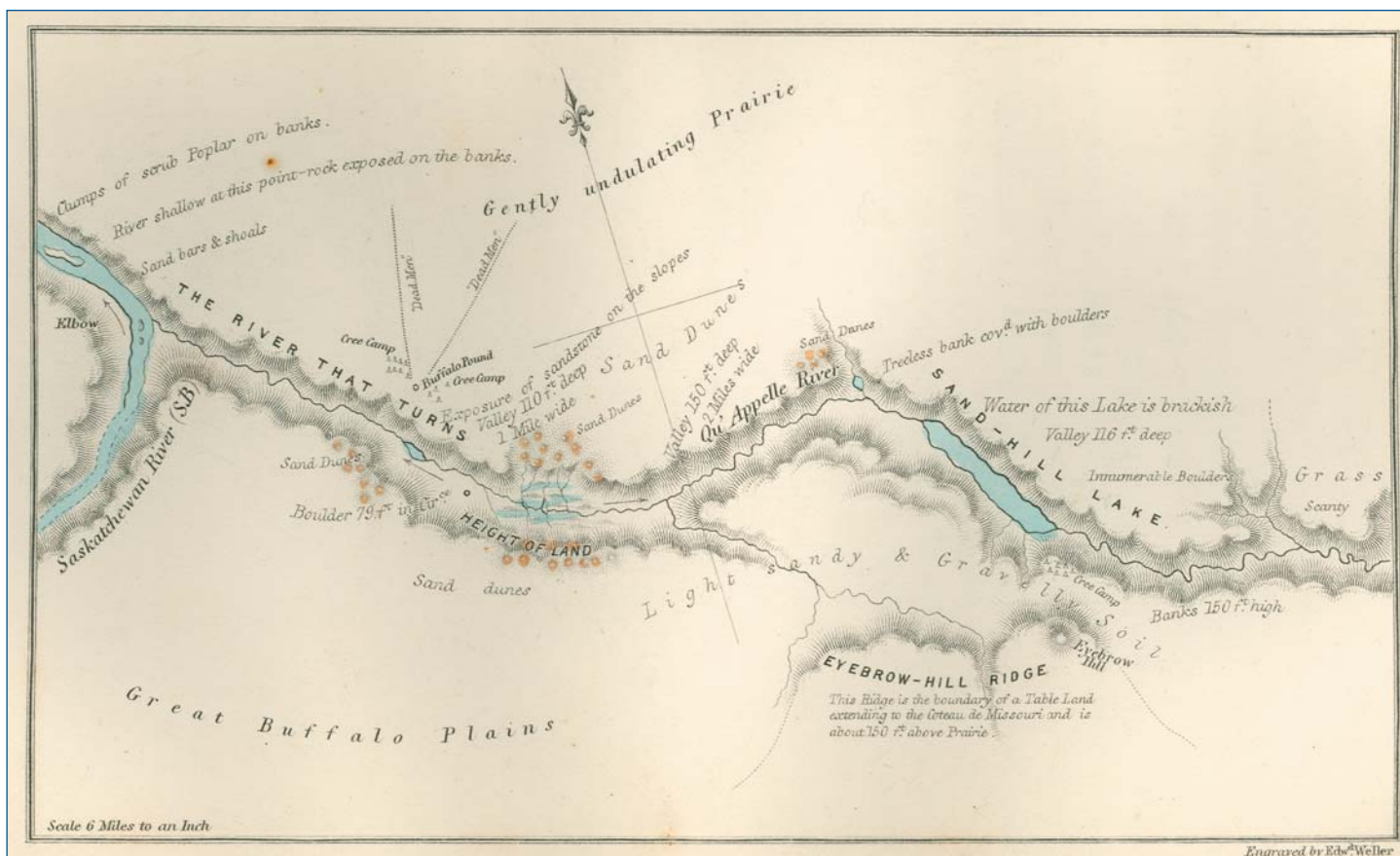
Well-known comprehensive claims: Nisga'a, Nunavut

SPECIFIC CLAIMS

Specific claims arise when a First Nation alleges that the federal government has not honoured its treaties, agreements or legal responsibilities. Most of the outstanding claims across Canada are specific claims. About 1,270 of these claims have been submitted to government since 1973 and about 260 have been settled.

According to federal policy, a valid specific claim exists when a First Nation can prove the government has an “outstanding lawful obligation” by demonstrating:

- the non-fulfillment of a treaty or agreement
example: failing to provide reserve land promised in a treaty, creating a treaty land entitlement



From Henry Youle Hind, *Narrative of the Canadian Red River Expedition of 1857 and the Assiniboine and Saskatchewan Exploring Expedition of 1858*. vol. 1. London: Longman, Green, Longman, and Roberts, 1860. University of Saskatchewan Library, Special Collections

Map of the Qu'Appelle River in Saskatchewan. Water control structures were built in the 1940s which flooded and damaged the reserve lands of the six Qu'Appelle Valley Indian Development Authority (QVIDA) First Nations.

- a breach of an *Indian Act* or other statutory obligation
example: allowing another party to use reserve land without band permission
- the mishandling of Indian funds or assets
example: selling logs or minerals off reserve land at below market value or without band permission
- an illegal sale or disposition of Indian land
example: selling reserve land without prior surrender by vote of the band members

The policy also recognizes claims that the government says go “beyond lawful obligation.” It defines these as including:

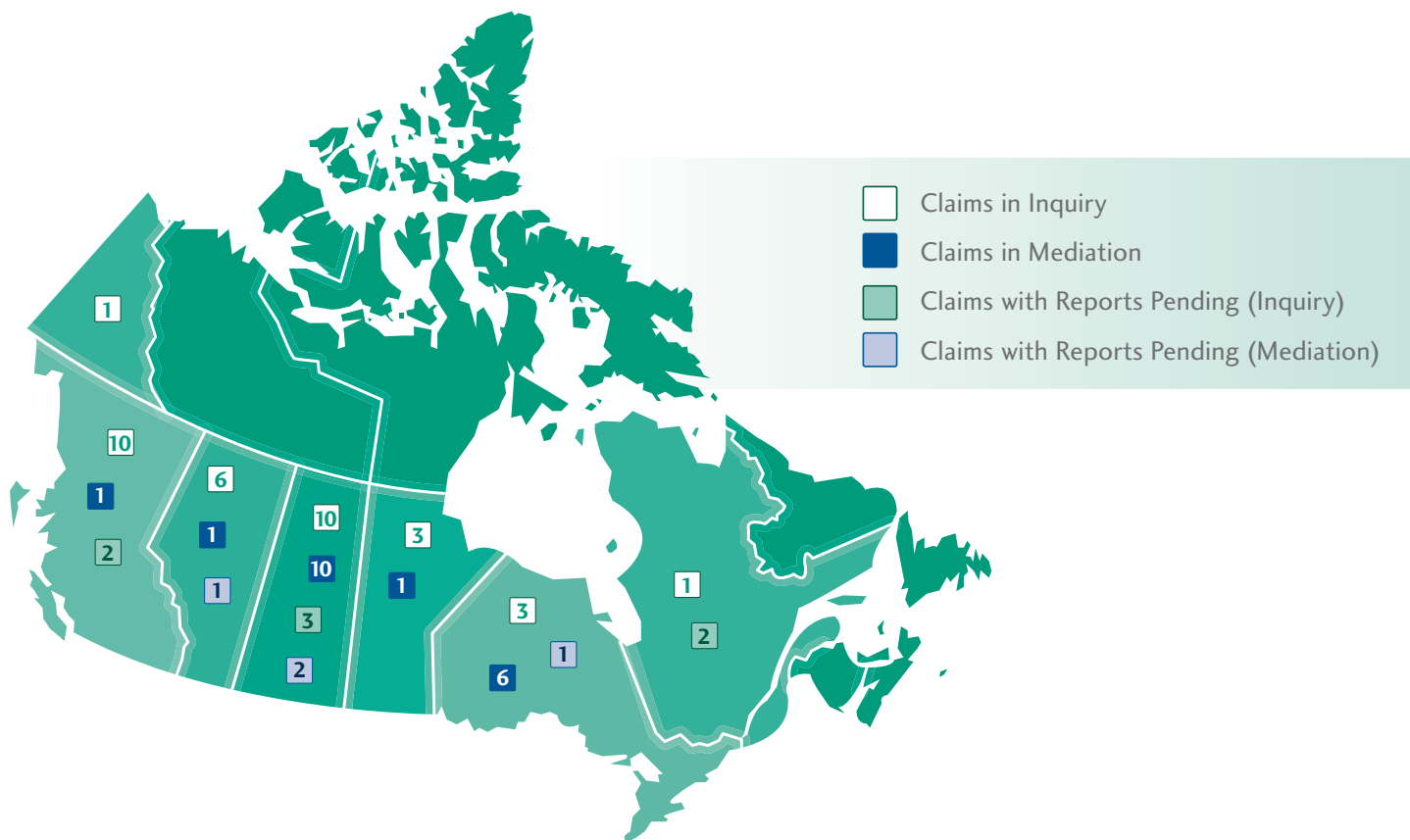
- failure to compensate a band for reserve land taken or damaged under government authority
example: paying less than market value, or nothing, for land taken by government in a legal surrender

- fraud by federal employees in connection with the purchase or sale of Indian land
example: purchase of reserve land at less than market value by the Indian agent involved in taking the land surrender

Specific claim settlements typically include cash to compensate for the value of land or resources taken unlawfully, or to purchase land to create a reserve or add to an existing reserve.

Well-known specific claims: Qu'Appelle Valley flooding, Samson Cree

CLAIMS CURRENTLY BEFORE THE ICC



CLAIMS IN INQUIRY

- Athabasca Chipewyan First Nation (Alberta)
 - Compensation criteria agricultural benefits
- Blood Tribe/Kainaiwa (Alberta) – Big Claim
- Cowessess First Nation (Saskatchewan)
 - 1907 surrender - phase II
- Esketemc First Nation (British Columbia)
 - Wright’s meadow pre-emption claim
- James Smith Cree Nation (Saskatchewan)
 - Treaty land entitlement
- * Kluane First Nation (Yukon)
 - Kluane Park and Kluane Game Sanctuary
- Lheidli T’enneh Band (British Columbia)
 - Surrender Fort George IR 1
- Little Shuswap Indian Band, Neskonlith First Nation and

- Adams Lake First Nation (British Columbia)
 - Neskonlith reserve
- Lower Similkameen Indian Band (British Columbia)
 - Victoria, Vancouver and Eastern Railway right of way
- Lucky Man Cree Nation (Saskatchewan)
 - Treaty land entitlement - phase II
- * Mississaugas of the New Credit First Nation (Ontario)
 - Crawford purchase
- * Mississaugas of the New Credit First Nation (Ontario)
 - Gunshot Treaty
- Muskowekwan First Nation (Saskatchewan)
 - 1910 and 1920 surrender
- Nadleh Whut’en Indian Band (British Columbia)
 - Lejac School
- * *in abeyance*

- * Ocean Man Band (Saskatchewan)
 - Treaty land entitlement
- Opaskwayak Cree Nation (Manitoba) – Streets and lanes
- Pasqua First Nation (Saskatchewan) – 1906 surrender
- Paul First Nation (Alberta) – Kapasawin townsite
- Red Earth and Shoal Lake Cree Nations (Saskatchewan)
 - Quality of reserve lands (agriculture)
- Roseau River Anishinabe First Nation (Manitoba)
 - 1903 surrender
- Sakimay First Nation (Saskatchewan)
 - Treaty land entitlement
- Sandy Bay Ojibway First Nation (Manitoba)
 - Treaty land entitlement
- Siksika First Nation (Alberta) – 1910 surrender
- Stanjikoming First Nation (Ontario)
 - Treaty land entitlement
- * Stó:lō Nation (British Columbia) – Douglas reserve
- Sturgeon Lake First Nation (Saskatchewan)
 - 1913 surrender
- Touchwood Agency (Saskatchewan)
 - Mismanagement (1920-1924)
- Treaty 8 Tribal Association [Blueberry River & Doig River First Nations] (British Columbia)
 - Highway right of way - IR 72
- Treaty 8 Tribal Association [Saulteau First Nation] (British Columbia) – Treaty land entitlement and land in severalty claims
- Treaty 8 Tribal Association [Seven First Nations] (British Columbia) – Consolidated annuity
- U'Mista Cultural Society (British Columbia)
 - The prohibition of the potlatch
- Whitefish Lake First Nation (Alberta)
 - Agricultural benefits Treaty 8
- * Whitefish Lake First Nation (Alberta)
 - Compensation criteria - agricultural benefits Treaty 8
- Wolf Lake First Nation (Quebec) – Reserve lands

CLAIMS IN FACILITATION OR MEDIATION

- Blood Tribe/Kainaiwa (Alberta) – Cattle claim
- Chippewa Tri-Council (Ontario)
 - Coldwater-Narrows reserve
- Cote First Nation (Saskatchewan) - Pilot project
- Cowessess First Nation (Saskatchewan) – Flooding
- Fort Pelly Agency (Saskatchewan) – Pelly Haylands
- Fort William First Nation (Ontario) – Pilot project
- Gordon First Nation (Saskatchewan)
 - Treaty land entitlement
- Keeseekoowenin First Nation (Manitoba)
 - 1906 lands claim
- Michipicoten First Nation (Ontario) – Pilot project
- Missanabie Cree First Nation (Ontario)
 - Treaty land entitlement
- Mississaugas of the New Credit First Nation (Ontario)
 - Toronto purchase
- Mohawks of the Bay of Quinte (Ontario)
 - Culbertson tract
- Muscowpetung First Nation (Saskatchewan)
 - Flooding claim
- Muskoday First Nation (Saskatchewan)
 - Treaty land entitlement
- Nekaneet First Nation (Saskatchewan) – Treaty benefits
- Pasqua First Nation (Saskatchewan) – Flooding claim
- Skway First Nation (British Columbia)
 - Schweyey Road claim
- Sturgeon Lake First Nation (Saskatchewan)
 - Treaty land entitlement
- TLE Common Table (Saskatchewan)
 - Treaty land entitlement
- * *in abeyance*

CLAIMS WITH REPORTS PENDING (INQUIRY)

- Conseil de bande de Betsiamites (Quebec)
 - Bridge over the Betsiamites River
- Conseil de bande de Betsiamites (Quebec)
 - Highway 138 and Betsiamites reserve
- Cumberland House Cree Nation (Saskatchewan)
 - Claim to IR 100A
- James Smith Cree Nation (Saskatchewan)
 - Chakastaypasin IR 98
- James Smith Cree Nation (Saskatchewan)
 - Peter Chapman IR 100A
- Taku River Tlingit First Nation (British Columbia)
 - Wenah specific claim
- Williams Lake Indian Band (British Columbia)
 - Village site

CLAIMS WITH REPORTS PENDING (MEDIATION)

- Blood Tribe/Kainaiwa (Alberta) – Akers surrender
 - Chippewas of the Thames First Nation (Ontario)
 - Clench defalcation
 - Qu'Appelle Valley Indian Development Authority (Saskatchewan) – Flooding claim
 - Touchwood Agency (Saskatchewan)
 - Mismanagement 1920-1924
- * *in abeyance*

ICC MAILING LIST SERVICES

Getting relevant information on specific claims has never been easier. Did you know that you could join the Indian Claim Commission's mailing list and receive its publications for free? Did you know that ICC has an e-mailing list service?

These are two services offered free of charge by the ICC that many people may not be aware of.

ICC's mailing list is used to distribute the *Indian Claims Commission Proceedings (ICCP)*, its newsletter (which you are currently reading) and its annual reports. To add your name to the mailing list, call (613) 947-3939, fax (613) 943-0157 or email mgarrett@indianclaims.ca with the following information:

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