

SURVEY OF ABORIGINAL LAND CLAIMS

William B. Henderson*

Derek T. Ground**

At a time when Canadians are more aware of Aboriginal claims and claims settlements than ever before, and when the Chrétien government has committed itself to an overhaul of claims processes, it is timely to provide a summary of judicial influence on claims up to now.

Claims processes are administrative mechanisms established by the federal government — although provinces do deal with claims as well — for the purpose of negotiating the issues to resolution rather than having them dealt with by the courts. These processes, however, are little affected by doctrine or remedies of administrative law, and that fact is central to the criticism levelled by most observers, including the Canadian Bar Association, over the years. Other legal principles, such as the doctrine of fiduciary obligation (first applied to an Aboriginal claim by the Supreme Court of Canada in 1984), have not been expressly incorporated into claims processes. That is another ground of criticism.

There are many claims processes. Government regards claims based on unextinguished Aboriginal title as “comprehensive claims” and has a policy to deal with them. Claims based on unfulfilled Treaty obligations, administrative error, unconscionable transactions, and government malfeasance are “specific claims” and the process to deal with those is somewhat selective as to which of the actions listed here can be negotiated. Aboriginal peoples regard the distinctions between the two processes as contrived. Some claims which do not fit into either category can be dealt with by a largely undefined process called “administrative referral”. Others could be dealt with by existing policies, but are seen to require special effort amounting to a special process. The British Columbia Treaty Commission is a notable example of a special process.

Not all Aboriginal peoples have access to every process. Indian First Nations have the best opportunity to have a claim dealt with. Inuit claims have been dealt with as “comprehensive claims”, leading to settlements such as the Inuvialuit and Nuvavut settlements. These, together with Indian settlements such as the James Bay Cree/Naskapi Agreement, are “treaties” within section 35 of the Constitution Act, 1982 which affirms existing Aboriginal and Treaty rights. There are no claims processes at the present time available to Metis

Alors que la population canadienne est plus consciente que jamais des revendications des peuples autochtones et des règlements des revendications, et que le gouvernement de Jean Chrétien s'est engagé à réviser les processus de règlement, il est opportun de faire le bilan de l'influence que les tribunaux ont eue sur les revendications jusqu'à maintenant.

Quoique les provinces s'occupent elles aussi du règlement des revendications, le gouvernement fédéral a mis en oeuvre des mécanismes administratifs pour régler les questions en litige par la voie de négociations au lieu de les soumettre à l'appréciation des tribunaux. Ces processus tiennent cependant peu compte des doctrines et des recours du droit administratif, et ce fait a été l'objet de la critique exprimée au fil des années par la plupart des observateurs et observatrices, y compris par l'Association du Barreau canadien. D'autres principes juridiques, tels que la doctrine de l'obligation fiduciaire qui a été appliquée pour la première fois à une revendication autochtone par la Cour suprême du Canada en 1984, n'ont pas été spécifiquement intégrés aux processus de règlement des revendications. Ce qui donne encore prise à la critique.

Il existe de nombreux processus de règlement. Le gouvernement considère les revendications fondées sur des droits ancestraux non éteints comme des «revendications globales» et il a adopté une politique pour les régler. Les revendications fondées sur le non-respect d'obligations légales, une erreur administrative, des opérations exorbitantes et un acte illégal du gouvernement sont des «revendications particulières» et le processus de règlement de ces revendications est quelque peu sélectif quant aux questions qui peuvent être négociées. Les peuples autochtones estiment que les distinctions entre ces deux processus sont artificielles. Les revendications qui ne peuvent être classées dans l'une ou l'autre catégorie peuvent être réglées au moyen d'un processus qui n'est pas défini en général et qu'on appelle «renvoi administratif». D'autres revendications pourraient être réglées grâce aux politiques existantes, mais on considère qu'elles exigent un effort spécial, c'est-à-dire la mise en oeuvre d'un processus spécial. La British Columbia Treaty Commission est un exemple notable de processus spécial.

* Lang Michener, Toronto; LL.B. (Ottawa), 1980.

** Student-at-Law, Toronto; LL.B. (Ottawa), 1993.

This survey article was initiated during 1993 when the authors were working with the Indian Claims Commission (Canada). It is based on a paper Derek Ground did under the supervision of Professor Errol Mendes of the Faculty of Law, University of Ottawa. They are indebted to him for his suggestions in relation to that much shorter, and in many other ways different, paper.

although they are included, by that Act, among the Aboriginal peoples of Canada.

This survey deals with the history and workings of claims processes, with an emphasis on the specific claims process. The policy is compared with the reality of negotiating these claims and the role of the Indian Specific Claims Commission, established in 1991, is reviewed. Based on this discussion, the authors posit eleven principles which, they say, must be features of any new policy.

The authors argue for a better, fairer, and more open Aboriginal claims policy which will permit all Aboriginal peoples to advance all of their claims and have them dealt with in an expeditious and equitable manner.

Ce ne sont pas tous les peuples autochtones qui ont accès à tous ces processus. Les Premières nations indiennes sont celles qui ont la meilleure chance d'obtenir le règlement d'une revendication. Les revendications des Inuit ont été traitées comme des «revendications globales», ce qui mené à des ententes telles que les ententes sur le règlement des revendications des Inuvialuit et des Nuvavut. Ces ententes, ainsi que les ententes conclues avec des nations indiennes telles que les Cris et les Naskapis de la Baie de James, sont des «traités» au sens de l'article 35 de la Loi constitutionnelle de 1982, qui confirme les droits existants — ancestraux ou issus de traités — des peuples autochtones. Aucun processus de règlement des revendications n'est mis à la disposition des Métis actuellement, bien que cette loi prévoient qu'ils font partie des peuples autochtones du Canada.

Dans cette étude, les auteurs se penchent sur l'histoire et le fonctionnement des processus de règlement et mettent l'accent sur le processus de règlement des revendications particulières. Ils comparent la politique avec la réalité des négociations portant sur ces revendications. De plus, ils examinent le rôle de la Commission sur les revendications particulières des Indiens, qui a été mise sur pied en 1991. En se fondant sur cette discussion, les auteurs formulent onze principes sur lesquels devrait s'appuyer une nouvelle politique.

Les auteurs soutiennent qu'il faut adopter une meilleure politique des revendications autochtones qui serait plus équitable et plus ouverte et qui permettrait aux peuples autochtones de faire avancer toutes leurs revendications et d'obtenir un règlement expéditif et équitable.

TABLE OF CONTENTS

I. INTRODUCTION	191
II. CLAIMS CATEGORIES AND CLAIMS PROCESSES	194
A. <i>Collective Rights</i>	194
B. <i>Collective Experience</i>	195
C. <i>Comprehensive Claims</i>	196
D. <i>Specific Claims</i>	197
E. <i>Hybrid Claims and Others</i>	199
F. <i>Inuit Claims</i>	202
G. <i>Metis Claims</i>	203
H. <i>Provincial Processes</i>	205
III. THE HISTORICAL DEVELOPMENT OF CLAIMS POLICY	206
A. <i>Notes on the Law of Aboriginal Title</i>	206
B. <i>Federal Claims Policy, 1867-1947</i>	208
C. <i>Claims Processes: 1947-1968</i>	211
D. <i>Claims Policy, 1969-1990</i>	212
1. <i>The 1969 White Paper</i>	212
2. <i>A Year of Change: 1973</i>	213
3. <i>Written Policies: 1974-1989</i>	214
4. <i>The Summer of 1990</i>	217
IV. THE JOINT GOVERNMENT /AFN WORKING GROUP	219
V. THE INDIAN SPECIFIC CLAIMS COMMISSION.....	220
VI. THE IMPORTANCE OF THE FIDUCIARY RELATIONSHIP	225
A. <i>The Honour of the Crown</i>	226
B. <i>One Problem Solved</i>	226
C. <i>One Problem Not Solved</i>	228
D. <i>Final Considerations on the Fiduciary Relationship</i>	231
VII. TOWARDS A NEW CLAIMS POLICY	232
A. <i>First Principles</i>	232
B. <i>The Principles at Work</i>	234

I. INTRODUCTION

There can be few Aboriginal communities in Canada who do not have grievances against the Crown in respect of the colonization of their lands and cultures over the past five centuries, the implementation of their Treaty rights, the regulation of their citizenship, or the administration of their assets. Some, but certainly not all, of these grievances can be expressed in terms of legal claims which are, in turn, dealt within the courts or by means of less formal processes which governments have established to address these claims.

There is nothing new about Aboriginal claims. Disputes over land and resources, military alliances for various purposes, military conflict on occasion, and Treaty and other processes to address issues of Aboriginal rights recur throughout our history. The Aboriginal peoples of Canada have never lost sight of their rights, although there was a period from the 1920s to the 1960s when the government was largely successful in keeping claims issues out of sight of the general public. The years after World War I marked a turning point. Delegates from the traditional "Longhouse" Chiefs of the Six Nations were receiving a sympathetic hearing about their rights at the League of Nations. British Columbia First Nations were pressing their claims to Aboriginal title in reaction to the McKenna-McBride Commission which had undercut even their reserve land base¹ and subjected what was left to a provincial right of resumption. There remained outstanding obligations to set apart reserve lands in the prairie provinces at the same time those provinces were pressing for control of their lands and resources.² In Ontario, a series of constitutional decisions created uncertainty about Canada's powers to administer reserve lands as contemplated by the *Indian Act* of the day, and several specific disputes and claims were unresolved.³ The government took swift action to silence the most vociferous claimants.

At Six Nations, the authority of the Longhouse Chiefs was undercut by an order-in-council imposing an elective system of reserve government in 1924. The R.C.M.P. was sent to the reserve near Brantford to seize the Council House and many items of cultural, legal and historical importance. To quiet dissent in British Columbia, and elsewhere, an amendment was made to the *Indian Act* which made it illegal to raise funds or retain counsel to advance an Aboriginal claim without the

¹ See *infra* note 26.

² These were controlled by Canada until the Transfer of Natural Resources Agreements were given effect by the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. 5, c. 26 (formerly *British North American Act, 1930*). While these Agreements made provision for the continuation of reserve selection, this was not done at the time.

³ Continuing problems of reserve selection and other rights in the Treaty 3 area were the subject of a federal-provincial agreement in 1917. The 1923 Williams Treaties attempted to resolve Mississauga and Chippewa claims between Lake Ontario and Lake Nipissing. A further federal-provincial agreement the following year addressed other issues of reserve land administration, but at the price of concessions in respect of which First Nations were not consulted.

permission of the Superintendent-General of Indian Affairs.⁴ With only intermittent breaks, an official silence descended upon Aboriginal claims for over 30 years.

Today, Aboriginal claims, rooted firmly in history but tenuously in law, and requiring redress at a time when funds and other resources are in short supply, present complex problems of recognition, reconciliation, and resolution. The underlying paradox is that communities must look to the past in order to secure a foothold today to secure future interests.⁵ Claims resolution ultimately involves more than just money and land. Inextricably bound up in the process of the validation of claims (whether by negotiation or litigation)⁶ and the settlement of claims is a lengthy agenda of issues seen by the parties from very different cultural perspectives in the context of very different notions of what will constitute a just and appropriate result in modern society. A short list of these agenda items would include frequently competing assessments of historical fact, legal issues (be they substantive issues, such as standing, jurisdiction, governance, access to resources, legislative change and, of course, limitations, or adjectival issues, such as rules of evidence),⁷ economic issues of funding claims processes and settlements in a manner which is appropriate to the actual resources and needs of the claimant community, and social issues such as healing, respect, and self-determination.

Obviously, not all of those issues can be adequately addressed in a survey article. In fact, a full understanding of most of these issues would require a lifetime of experience and study, and even then, the resulting wisdom might still be confounded by the political and economic exigencies of the day. Claims processes are, in part, frustrated by regular changes of personnel on all sides which lead to the attrition of even the limited wisdom that has been gained in specific contexts.

Claims have a rich and long history, but claims settlements, for the most part, do not. The modern era of claims processes can be said to have begun with the 1973

⁴ See S.C. 1927, c. 32, s. 6. To our knowledge, permission was only given once: to R.V. Sinclair to represent the St. Regis Band in a claim against the U.S. government. Mr. Sinclair could hardly have been considered hostile to the Crown as he had been one of the commissioners for the 1923 Williams Treaties. This exception is noted in W.R. Morrison, *A Survey of the History and Claims of the Native Peoples of Northern Canada* (Ottawa: Indian & Northern Affairs, 1983). The offensive section was dropped when the *Indian Act* was extensively amended: see S.C. 1951, c. 149.

⁵ Many communities address the decisions they make in terms of their impact upon the Seventh Generation.

⁶ As will be seen, the decision to litigate or negotiate involves different considerations in terms of validation and settlement, the two basic elements of any claims process. Given that each element may consume a decade or more of time and hundreds of thousands of dollars in cost, it is unfortunate that decisions about validation may, much later, prove inappropriate for settlement; for example, litigation may be the only option for validation, but the limited range of judicial remedies may not provide for the kind of settlement the claimant community needs or wants. A common complaint is that settlements provide money when the basis of the claim, and the desired result, would be the restitution of land. The authors feel that a proper claims process must deal with this problem.

⁷ See e.g. W.B. Henderson, "Evidentiary Problems in Aboriginal Title Cases" (1991) L.S.U.C. Special Lectures 165 [hereinafter "Evidentiary Problems"] and W.B. Henderson, "Litigating Native Claims" (1985) L.S.U.C. Gazette 174.

decision of the Supreme Court of Canada in *Calder*,⁸ in which a claim of Aboriginal title was made to the Nass River valley of British Columbia. The legal grounds for claims were expanded in 1984 when the Court handed down its decision in *Guerin*,⁹ which provided a justiciable remedy to Aboriginal peoples for breach of the emerging concept of fiduciary obligations owed to them by the Crown. In 1990, fiduciary obligations were raised to the constitutional level when the Court, in *Sparrow*,¹⁰ gave its first ruling on section 35(1) of the *Constitution Act, 1982*: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

Claims have now been very much a part of the Canadian political agenda for the past 25 years. Even so, they remain among our most misunderstood issues, marked by general public support for resolution on the one hand, and by specific public fears about the disruption of individual property rights and traditional allocations of renewable and non-renewable resources on the other. It comes as no surprise that claims processes are complex and frustrating, unfolding slowly to the point of distraction. For claimant communities they are, occasionally, rewarding. For lawyers, however, claims are fascinating in the challenges they pose for our theories of legal redress and of social and remedial justice.

In this survey, we will review a discrete list of issues from the lawyer’s perspective. If this analysis is of some benefit to the actual parties to claims processes as they come to grips with those issues, then our effort will be amply rewarded.

We also trust that a survey of this type will be timely in light of the Chrétien government’s Red Book commitments to “undertake a major overhaul of the federal claims policy on a national basis...encompassing all claims” and to “create, in cooperation with Aboriginal peoples, an independent Claims Commission” with a much broader mandate than the current Indian Claims Commission.¹¹ To the extent that past experience can inform these initiatives, we have attempted to encapsulate important elements of the Canadian experience with Aboriginal claims in this

⁸ *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, 4 W.W.R. 1 [hereinafter *Calder* cited to S.C.R.]. In some respects, this was a non-decision, since the Court divided 3-3 on the principal issue, while the seventh justice wrote reasons dismissing the claim on procedural grounds. Nonetheless, the complacency of the Trudeau government was shaken and a new political approach to claims resulted. Trudeau himself eventually conceded that his government’s approach had been “very naive ... not pragmatic enough or understanding enough” (see O. Dickason, *Canada’s First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992) at 387).

⁹ *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

¹⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108, 70 D.L.R. (4th) 385 at 409 [hereinafter *Sparrow* cited to S.C.R.] sets out 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 aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in terms of this historical relationship.”

¹¹ The distinctions between comprehensive and specific claims and the mandate of the Indian Claims Commission are discussed at length below.

article. At best, it is only a selective sampling of the wealth of information and commentary that is available.

II. CLAIMS CATEGORIES AND CLAIMS PROCESSES

A. *Collective Rights*

Aboriginal claims are assertions of collective rights. They can be asserted in the courts by way of representative action against the Crown, as was done in *Guerin*, in which case the collectivity making the claim is identified. Or, as in *Sparrow*, they can be asserted by way of defence to a quasi-criminal prosecution. This is less satisfactory procedurally for several reasons. The issue is not joined at a time when the group, whose rights are at stake, has resolved that it is prepared to go forward on the basis of completed research and ability to sustain the cost of litigation.¹² In fact, there is rarely a consensus among the collectivity on the crucial points of if, how, and when to defend. Furthermore, it is not always clear in a "defence claim" whose interests are at stake.¹³ The Supreme Court of Canada has observed that "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right".¹⁴ In our view, such proceedings are not only inappropriate; they are unfair, and fly in the face of the Court's pronouncements about the "trust-like and non-adversarial" relationship between the Crown and Aboriginal peoples with respect to Aboriginal rights.¹⁵

¹² The Department of Indian Affairs and Northern Development does have a test case funding program which assists with First Nations' legal costs if the Department considers the issue to be of sufficient importance and on the basis of an approved budget which generally allows far less than the normal tariff of legal fees. There are many problems with this program, but chief among them for present purposes is the fact that funding is not available at the trial level.

¹³ *R. v. Howard*, [1994] 2 S.C.R. 299, 115 D.L.R. (4th) 312 [hereinafter *Howard* cited to S.C.R.] is an example of this problem. A former Chief of the Hiawatha First Nation gave evidence for the Crown to the effect that the community understanding for several decades had been that they had no special Treaty rights to hunt and fish. Relying in large part on this testimony, the courts ruled that the 1923 Williams Treaty extinguished the Treaty harvesting rights previously affirmed, under an 1818 Treaty, in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.). In that earlier and authoritative case, evidence of community understanding at the Curve Lake First Nation had been precisely to the contrary. Nonetheless, the government regards *Howard* as binding on Hiawatha and Curve Lake, two other Mississauga First Nations who signed the 1923 Treaty, and three Chippewa communities who signed a different Treaty in 1923 with the same operative wording. None of these other communities had the opportunity to give evidence of their understanding or other relevant historical information at the trial.

¹⁴ *Sparrow*, *supra* note 10 at 1095.

¹⁵ See *R. v. Jack*, [1991] 1 C.N.L.R. 146 (B.C. Prov. Div.) and *R. v. Jones and Nadgiwon* (1993), 14 O.R. (3d) 421, [1993] 3 C.N.L.R. 182 (Ont. Prov. Div.). Neither of these decisions was appealed by the Crown. It should be noted that these were provincial prosecutions based on federal fishery regulations, yet the Crown in right of Canada was not represented despite being served with requisite Notices of Constitutional Question and despite its responsibilities with respect to Treaty rights. In *Howard*, *supra* note 13, Canada was represented at the Supreme Court level, but did not see fit to assist the Court with its understanding of the 1923 Treaty or of the process conducted by the commissioners it had appointed to negotiate in respect of a much narrower claim.

The general approach of the federal government is to deal with claims through political processes rather than litigation. Policies have been developed to implement this approach and it would be satisfying to report at this point that every Aboriginal group in Canada which has a claim against the Crown in right of Canada has access to a claims process under such a policy. That, of course, is not the case. Canada's policies exclude some Aboriginal groups from access altogether and exclude others, expressly or implicitly, on the basis of the type of claim they wish to advance.

B. *Collective Experience*

Current working definitions of various types of claims, and government's concomitant willingness to provide a process to deal with them, have evolved slowly. The Supreme Court of Canada recently offered this synopsis:

For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution*, (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969),¹⁶ although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see the *Quebec Boundary Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973, issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country" [emphasis added]. See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically

¹⁶ *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969) [hereinafter "1969 White Paper"]. While it is common for governments to issue policy statements in the form of "white papers", this particular one, the 1969 White Paper, is so notorious in the field of Aboriginal policy that it is readily identified by the name above.

in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position....As recently as *Guerin v. The Queen* (1984)...the federal government argued in this court that any federal obligation was of a political character. [footnotes omitted]¹⁷

Even this synopsis includes reference to two different types of claims — different, at least, in terms of the processes government has developed for their resolution. The *Calder* case was a claim to an Aboriginal title to land and resources in an area where no Treaty had ever been entered into with the Aboriginal inhabitants. The government calls this type of claim a **comprehensive claim**. The *Guerin* case dealt with the terms of a lease of a specific parcel of reserve land. The government calls this type of claim a **specific claim**. Aboriginal groups claim that this distinction and the differences in the processes developed to deal with the different types of claims are artificial and unfair. The Chrétien government's Red Book repeats the first criticism and promises to end the distinction by creating one national policy for all claims and creating a new Claims Commission to deal with all claims under that policy. In the year since that government took office, consultations have continued, but there has been no announcement made in relation to a new policy. In any event, it is important to understand the current distinctions, since that understanding is essential to any study of current policy and our experience with Aboriginal claims.

C. *Comprehensive Claims*

Comprehensive claim settlements like the 1993 Nunavut Agreement capture the imagination of Canadians: Canadians see an area comprising roughly one-third of the land mass of the country successfully claimed against, with the Inuit claimants establishing, as a result, a land base, a compensation fund, and a negotiated form of self-government.¹⁸ It is important to bear in mind that the basis of the claim was an unextinguished Aboriginal title to this traditional territory: a claim to ownership and a claim to rights of governance over its people, its lands and its resources. There is, however, a fundamental difference between the basis and the result.

In its simplest terms, an Aboriginal title is based upon historic use of lands and resources. A claim asserting this title invariably recites that it has never been ceded

¹⁷ *Sparrow*, *supra* note 10 at 1103-05.

¹⁸ Similar settlements have been reached with the James Bay Cree and Naskapi of the James Bay region of Quebec, the Northern Quebec Inuit of Ungava, the Inuvialuit of the Mackenzie River delta and the Council for Yukon Indians, among others.

to the Crown; in other words, there is no Treaty.¹⁹ Under government's policy for the resolution of such claims, as set out in the 1981 booklet entitled *In All Fairness: A Native Claims Policy, Comprehensive Claims*,²⁰ the basic elements of the claim are not vindicated. They are, in fact, extinguished²¹ in exchange for a different form of title to a much more restricted area of land, for other rights, and for monetary compensation. Accordingly, while the claim seeks recognition of continuing rights unimpaired by Treaty or other form of extinguishment, compensation for prior intrusions upon those rights, and other consequential relief, this is the theory of validation. The theory of settlement, on the other hand, is that the absence of a Treaty is an historical circumstance or aberration which can be resolved by entering into a form of land cession Treaty today. The Constitution supports this theory of settlement.²²

Thus, while the circumstances giving rise to comprehensive claims are varied, and while the law of recognition is difficult,²³ an Aboriginal title claim which alleges the absence of any Treaty — a fact incidental to the substance of the claim — becomes in practice a claim for negotiation of a Treaty. These are the claims which government addresses as comprehensive claims. In the 1969 White Paper, they were described as being so general and undefined as to be incapable of any specific remedy.²⁴ As described above, the *Calder* decision caused the federal government to change that position and seven modern land claim settlements of the "comprehensive" variety have now been concluded, or are close to settlement.

D. Specific Claims

By contrast, specific claims are those which, in 1969, the government notionally considered as being capable of specific remedy. In fact, the White Paper expressly

¹⁹ What this formulation really suggests is that there has been no *consensual* cession of the Aboriginal title to the Crown, as took place, for example, in the case of the so-called "numbered" Treaties. In defending such claims, government takes the position that extinguishment of the Aboriginal title need not be consensual: an argument that is formulated as "extinguishment by operation of law".

²⁰ Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy, Comprehensive Claims* (Ottawa: Minister of Supply & Services, 1981) [hereinafter *In All Fairness*]

²¹ The Liberal Party, prior to its election victory in 1993, stated in the "Red Book" that, as the government of Canada, it would not require blanket extinguishment for claims based on Aboriginal title.

²² S. 35(3) states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired" (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1984, c. 11).

²³ This explains why the courts have advanced more than one theory for the recognition of Aboriginal title as a common law doctrine, but have never, as of this writing, granted any remedy to Aboriginal claimants in respect of a claim based on Aboriginal title.

²⁴ *Supra* note 16.

contemplated the appointment of a claims commission to deal with them.²⁵ What arose out of the White Paper's statement that "lawful obligations must be recognized" was an informal policy to compensate Indians²⁶ for the government's failure to fulfil Treaty obligations, the improper taking or disposition of reserve lands (especially where no compensation had been paid), and mismanagement of Indian moneys and other assets by the Crown.²⁷ In 1982, the original concept of lawful obligation was reduced to enumerated heads of specific claims in another policy booklet entitled *Outstanding Business: A Native Claims Policy, Specific Claims*,²⁸ a government publication which stands today as the official declaration of specific claims policy.

Special provision was made for so-called "cut-off" lands in British Columbia. These were areas of reserve land which had been taken, without compensation, as a result of the McKenna-McBride Commission prior to World War I and subsequent legislation.²⁹ While the government recognized the unfairness of these transactions, it could scarcely recognize a lawful obligation in the face of its own statutes confirming them. The new policy included a new category of specific claim, described as "Beyond Lawful Obligation", which did not refer to the cut-off lands issue specifically. Instead, it spoke generally of "lands taken or damaged by the federal government or any of its agencies under authority." [emphasis added]³⁰ Another category, beyond lawful obligation, recognized "fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government".³¹

The intent of the policy was, principally, to divert specific claims from the courts. In place of the litigation process, there would be an administrative one to provide a means of validating and negotiating these claims without formal

²⁵ Dr. Lloyd Barber of Saskatchewan was appointed as Commissioner for the term of the first Indian Claims Commission throughout most of the 1970s. His effectiveness was limited, however, by the perceived association of his mandate with the White Paper, a policy which was immediate anathema to Indians and effectively renounced by government in 1973. That Commission will hereinafter be referred to as the "Barber Commission", not to be confused with the current Indian Claims Commission, established by the Mulroney government in 1991 as the "Indian Specific Claims Commission".

²⁶ Inuit and Metis did not have access to the specific claims process under the 1969 White Paper approach, and do not today.

²⁷ See generally S. Weaver, "After Oka: 'The Native Agenda' and Specific Land Claims Policy in Canada" (1992) 11 *Proactive* 3 [hereinafter "Weaver"]. We note with sadness the death of Sally Weaver a year after this paper was published. This paper is one of many informative and insightful pieces she produced on issues of Aboriginal policy during the previous 15 years. She will be missed.

²⁸ Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: Minister of Supply & Services, 1982) [hereinafter *Outstanding Business*].

²⁹ For the history of this Commission, see *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156, [1991] 4 W.W.R. 507. See also *The British Columbia Indian Land Settlement Act*, S.C. 1920, c. 51.

³⁰ *Supra* note 28 at 20.

³¹ *Ibid.* It is not clear to us why such conduct is not seen as a breach of lawful obligation.

considerations like limitation periods or rules of evidence (which were specifically excluded) affecting the result. Research and negotiation funding for claimants, which had been provided prior to 1981, were continued as necessary adjuncts to this policy. But there was a price to be paid from the Indian perspective. Foremost was the fact that there were no administrative remedies: the government's decisions about validation could not be appealed and negotiation of compensation was an uncontrolled process. Realistically, the government could settle whatever claims it wished to settle, according to its own schedule, and stall the process in respect of other claims. That is just what happened for the balance of the 1980s and, to a lesser extent perhaps, it continues to happen today.

The effect of the 1982 policy was to limit the number of claims which could be advanced and to subject those which could be advanced to "guidelines" for validation and compensation. These have been widely criticized as too vague, too restrictive, and too favourable to the government.³² Claims settlements became infrequent occurrences and, even where settlements were made, it has emerged that claimant communities are dissatisfied with the result.³³

It is estimated that there are 600 specific claims on behalf of Indian First Nations alone, a number that is undoubtedly low. Some 300 of these are (or have been) in the specific claims process, and about 75 have been settled. While many factors have led to settlements over the years, it is fair to say that increased funding for the process — and especially for settlements — after the 1990 Oka crisis has greatly increased the annual rate of settlement which, prior to that time, had been discouragingly low.

E. *Hybrid Claims and Others*

The 1981-1982 policies created a series of pigeon-holes for different types of claims. Where no land cession Treaty had been entered into, a claim based upon Aboriginal title was a comprehensive claim. Failure to deliver on a Treaty promise³⁴ gave rise to one type of specific claim, recognized as a lawful obligation. Failure to

³² See generally Weaver, *supra* note 27; and Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: Indian Commission of Ontario, 1990) [hereinafter *Discussion Paper*]. The latter document was one of several initiatives which resulted in the creation of the current Indian Claims Commission the following year.

³³ See e.g. Department of Indian Affairs and Northern Development, *Report on the Evaluation of the Specific Claims Negotiation and Settlement Process* (1994) [unpublished] [hereinafter *Report on the Evaluation*]. That report suggests, as one reason for the dissatisfaction, that the process does not take into account ameliorating or mediating the grievance held by the band. In other words (our own), the process of settlement takes on a life of its own, independent of the original source of grievance, resulting in a resolution which does not redress that grievance in a manner which is generally satisfactory to the claimant community. It should be noted that these observations are limited to claims which have been settled. Communities rejected by the process, or languishing in its leisurely pace, or frustrated by seemingly arbitrary or unfair interpretations of the guidelines, frequently feel that the government is abusing them a second time.

³⁴ One example of this was the Treaty 7 Ammunition Claim which alleged failure to provide annual supplies of ammunition as expressly provided for in that Treaty. This claim was settled on the recommendation of the Barber Commission in 1974. More recently, Treaty land entitlement

compensate for reserve lands taken under authority³⁵ gave rise to another type of specific claim, although not recognized as a lawful obligation — and so on. There were, inevitably and not accidentally, claims which did not fit into these categories.³⁶

One example of a hybrid claim was before the courts in the *Bear Island* case.³⁷ In that case there was a claim to an unextinguished Aboriginal title to 2,000 square miles of land around Lake Temagami, an area that was largely described as ceded in the 1850 Robinson Huron Treaty. The claimants, however, argued that they had never participated in that Treaty and that it could not have had the effect of extinguishing their title without their consent. Government did not recognize this as a comprehensive claim because the lands were in a Treaty area. Nor was it a specific claim since it did not allege a breach of Treaty obligations.³⁸ It was a hybrid claim because it alleged an unextinguished Aboriginal title to lands in an area where the government would only acknowledge Treaty rights. The Temagami claim did not fit into either the comprehensive or specific claims categories and, as a result, litigation was the only way to address the issue.³⁹

The Lubicon claim in northern Alberta is a hybrid of the same type. When the Treaty 8 commissioners travelled along the river systems to conclude the Treaty, they missed several inland communities, like Lubicon Lake. The claim, therefore, is based on unceded Aboriginal title in the heart of the Treaty area. Extraordinary measures and a well-publicized level of acrimony have attended the litigation and the stop-and-start negotiation of this claim.⁴⁰

A broader categorization of claims which do not fit the two official policies — and this may include hybrid claims as well — are those which even the government

claims are being settled on the footing that the Treaty formula for calculating the area of lands to become reserves had not been correctly, or fully, applied.

³⁵ See *supra* note 29 and accompanying text in relation to B.C. “cut-off” land claims.

³⁶ The experience of Kanasetake (Oka) (see Weaver, *supra* note 27), is classic. When they submitted a comprehensive claim to their lands in the old seigneurie of Lake of Two Mountains, it was rejected as not being a comprehensive claim. When they subsequently re-submitted it as a specific claim, it was rejected as not being a specific claim either. The rest is history.

³⁷ *Bear Island Foundation v. A.G. (Ont.)* (1984), 49 O.R. (2d) 353, 15 D.L.R. (4th) 321 (H.C.), *aff'd* (1989), 68 O.R. (2d) 394, 58 D.L.R. (4th) 117 (C.A.), *aff'd* [1991] 2 S.C.R. 570, 46 O.A.C. 396 [hereinafter *Bear Island* cited to S.C.R.].

³⁸ With the Supreme Court’s finding that the claimants did ultimately adhere to the Robinson Huron Treaty, the Temagami claim is now being addressed as a specific claim in terms of the implied right to reserve lands and other rights under Treaty. As of this writing, the claim has not been settled.

³⁹ A similar, but not identical, hybrid has been advanced in Nova Scotia where the MicMacs claim on the basis of unextinguished Aboriginal title even though there are Treaties in effect. In this instance, however, it is acknowledged that the Treaties did not cede Aboriginal title: see *Simon v. R.*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 [hereinafter *Simon* cited to S.C.R.].

⁴⁰ There is strong suspicion that a settlement was manipulated. Then federal Minister Pierre Cadieux authorized the establishment of a second Band, the Woodland Cree, and negotiated with that Band rather than the Lubicon. At a referendum conducted in 1989, voters were paid \$50 on

now describes as “claims of a third kind”.⁴¹ This catch-all category developed in large part because of a slow realization on the part of the government that the narrow definitions of the two formal policies could result in the denial of any process, even though such claims may raise issues of lawful obligation in the real sense of the term: an obligation which can be enforced in a court of competent jurisdiction.⁴² While the government has indicated that it will consider, and may deal with claims of a third kind, there remains an air of uncertainty about what types of claims will be deemed appropriate for such treatment and what that treatment will be.

It is also possible to characterize claims of a fourth kind, although we may be the first to do so. This would include claims which do come within one of the two official policies, but which require special processes for negotiation and settlement. Such claims are usually those which cannot be settled without significant provincial participation. Special processes were devised, for example, to deal with outstanding Treaty land entitlement claims (specific claims) in Saskatchewan, and to deal with the 30 or so claims of unextinguished Aboriginal title (comprehensive claims), which have now been referred to the British Columbia Treaty Commission.⁴³

In addition to the categories of claims discussed above, there is a further variety of claims which involve, as threshold issues, questions of status and standing. The specific claims policy, for example, contemplates claims advanced by Chief and Council on behalf of a First Nation.⁴⁴ Thus, while the process is open only to status Indians, not all status Indians have access to it.⁴⁵ One can go further and look at the

the spot for voting, with the promise of \$1,000 if the settlement passed. It did. An observer said: “People signing their names to the new band lists were following a course logical to anybody living in the world where the law is arbitrary, and where rewards and punishments are distributed at random” (J. Goddard, *The Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991) at 213).

⁴¹ See e.g. Department of Indian Affairs and Northern Development, *Federal Policy for the Settlement of Native Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1993).

⁴² *Guerin*, *supra* note 9, represents a classic clash between theories of true (*i.e.* enforceable) obligations and those which are merely political (*i.e.* unenforceable). In that case, the dispute concerned fiduciary obligations. By analogy, there is a similar issue in specific claims: whether the government will, under the policy, address any obligation enforceable at law, or whether the concept of “lawful obligation” is a term of art, referring only to the enumerated types of obligation which are specified in the policy itself. The government’s position seems to be the latter.

⁴³ This process is described in British Columbia Treaty Association, *The First Annual Report of the British Columbia Treaty Commission for the Year 1993-1994* (Vancouver: British Columbia Treaty Association, 1994). The report indicates that the Commission has accepted 41 Statements of Intent to negotiate Treaties.

⁴⁴ In this paper, we use the term First Nation as interchangeable with the “band” defined in the *Indian Act*, R.S.C. 1985, c. I-5, s. 2. That usage is preferred by most First Nations in Canada, but not by all. Some consider their tribe or nation, as distinct from the several bands which constitute it, as the true “First Nation”.

⁴⁵ There is, for example, nothing in the administrative processes comparable to the derivative action in corporate law: a procedure which would permit members to advance the collective claim on behalf of the First Nation where Chief and Council have delayed or declined to do so. Where limitation periods are an issue, any group of members should be able to stop the

situation of individuals who were members, but are not now.⁴⁶ A notable example of this class of potential claimants are former members (or descendants of former members) of Bands which were enfranchised in the past.⁴⁷ There are, therefore, several categories of status Indians who do not have access to claims processes to advance the claims of their First Nations.

F. *Inuit Claims*

The position of Inuit, in terms of access to claims processes, differs from that of Indians. Inuit have, in fact, been deemed to be “Indians” for purposes of section 91(24) of the *Constitution Act, 1867*, which confers on Parliament legislative powers in respect of “Indians, and Lands reserved for the Indians”.⁴⁸ It was not this constitutional wrinkle, however, but the Inuit’s unquestioned traditional use and occupancy of most of Canada’s arctic regions, which has given them access to the comprehensive claims process. As noted above, major settlements have been reached.

Inuit do not have access to the specific claims process. Administratively, they are not “Indians”.⁴⁹ While it is difficult to believe that government’s administration of their lands, resources, and communities has been unblemished, there is no process

clock by commencing a representative or class action in the appropriate court or, as is sometimes necessary, courts.

⁴⁶ In *Sabattis, Polchies and Atwin et al. v. Oromocto Indian Band, Sacobie and Saulia et al.* (1988), 86 N.B.R. (2d) 351, 219 A.P.R. 351, former members of the Oromocto Band sought to share in a specific claim settlement on the basis that they had been members at the time of the transaction which gave rise to the original claim. The court sequestered part of the fund while the issue was being determined, but eventually dismissed their action. *Quaere* whether a group of these former members could have advanced the claim in the courts, on behalf of their former Band, if the Band had been taking no action in its own right? It is clear that they could not have submitted the claim under the process.

⁴⁷ Until 1985, the various *Indian Acts* have made provision for an entire Band to voluntarily give up their Indian status, divide their collective assets and take ordinary fee simple title to their former reserve lands. The process was called “enfranchisement” in reference to the fact that, until 1960, Indians could only gain the vote by giving up their status. Only two Bands ever took this drastic step: the Wyandottes (Wendat or Hurons) of Anderton Township in southwestern Ontario a century ago, and the Michel Band of Alberta in the 1950s. Bill C-31, enacted in 1985, enabled some individuals and some descendants to regain Indian status but not Band membership since the Bands were not reconstituted. If there are claims which can be advanced on behalf of those Bands, there is, under the current specific claims policy, no one with standing to advance them.

⁴⁸ See *Reference Whether “Indians” Includes “Eskimos”*, [1939] S.C.R. 104. It was not until the 1980s that the government officially adopted “Inuit” instead of “Eskimos”. Most important among the legislative changes was s. 35(2) of the *Constitution Act, 1982*: “In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Metis peoples of Canada” (*supra* note 22).

⁴⁹ S. 4(1) of the *Indian Act*, *supra* note 44, states: “A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit”. There is no *Inuit Act* and, prior to the modern land claims settlements, there were no Treaties with the Inuit.

to address any Inuit specific claims. Nor, it appears, is there any process to deal with their claims of a third kind.⁵⁰

G. *Metis Claims*

Metis have no access to the official claims processes at the present time. There is even some uncertainty, in law at least, about which groups of Aboriginal peoples are "Metis" for purposes of s. 35. One possible argument would be that Metis are the descendants of the distinct mixed blood society of northwestern Ontario, Manitoba and the North-West Territory⁵¹ which we associate with historic figures such as Louis Riel and Gabriel Dumont. The more popular usage, however, is to describe any person of mixed Indian and non-Indian blood who does not have status under the *Indian Act* as Metis. It is impossible, however, to discuss Metis claims without using the former usage and we do so with the *caveat* that, for purposes of s. 35(2), "Metis" may well refer to a much broader class of persons.

The 1870 *Manitoba Act* provided for the appropriation of 1.4 million acres of ungranted lands to be apportioned among the "children of the half-breed heads of families residing in the Province" at the time. The expressed purpose of this land settlement was that it would be "expedient, towards the extinguishment of the Indian Title to the lands in the Province".⁵² The claims of Metis heads of families were dealt with subsequently when an 1874 amendment provided for their entitlement to 160 acres of land, or scrip valued at \$160.⁵³ The ready market for scrip led to comparatively few allotments under this amendment. Metis allotments were extended to the North-West Territories, again to extinguish the Indian title, in 1879 by an amendment to the *Dominion Lands Act*.⁵⁴ Again, Metis claims were largely dealt with by provision of negotiable scrip.

During the same period, Indian treaties were being made over the same ground. The practice, which appears to have been consistent from Treaty 1 through Treaty

⁵⁰ Grievances arising from the 1950s relocation of Belcher Island Inuit to new lands farther north would not fit comfortably within either formal process. Arguably, this would be a claim of the third kind, but the Royal Commission on Aboriginal Peoples had to step in to provide a forum for their evidence to be heard. That Commission's 1992 report supported their claim, but the government is currently seeking further reports which will make any determination about validity: see Royal Commission on Aboriginal Peoples, *Overview of the First Round* by M. Cassidy (Ottawa: Royal Commission on Aboriginal Peoples, 1992).

⁵¹ Saskatchewan, Alberta and the present-day North-West Territories were created out of the old North-West Territory in 1905.

⁵² S.C. 1870, c. 3, s. 31. Throughout the statutes and law reports, the term "Indian title" is used as often as not. In legal theory, this terminology is synonymous with the more modern usage, "aboriginal title". Note the linkage in this statute between the group we have come to know as Metis and the concept and terminology of Indian title. This would argue for inclusion of Metis in s. 91(24) of the *Constitution Act, 1867* in the same way that Inuit were included in *Re Eskimos*, *supra* note 48.

⁵³ *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874, c. 20.

⁵⁴ S.C. 1879, c. 31, s. 125(e).

10, was to permit Metis who lived as Indians to opt for Treaty instead of land or scrip. Those who took Treaty were thereafter considered to be Indians for all purposes.⁵⁵ Those who took land or scrip were thereafter disqualified from Indian status.⁵⁶

The authors of *Native Rights in Canada* concluded that, at least with respect to comprehensive claims, those “Metis who have received neither scrip nor land, nor treaty benefits, still arguably retain aboriginal claims which have either not been extinguished, or, have been extinguished, and for which a claim for compensation is outstanding”.⁵⁷ Under current policies, it is unlikely that a collective of qualified claimants, as described, could be found or formed to advance an Aboriginal title claim. It is more likely that, if significant numbers did come forward, some provision might be made for compensation. No such provision now exists.

Where Metis, and others of mixed blood, have benefitted under comprehensive claims policy is through inclusion as beneficiaries of the claims settlements with Indians and Inuit.⁵⁸ Such provisions have been made and, in areas like the Mackenzie River basin, would have to be made in order to discharge all possible claims. It is also in that region that government may, for the first time in 100 years, conclude separate claims settlements with the Dene and Metis claimants.

In terms of specific claims, Metis are not given access to the claims process. Even if they were, it would be difficult to make out an enumerated head of claim under the policy, there being no Treaties with Metis *per se* and no history of federal administration of Metis lands and assets. While Parliament could justifiably enact Metis legislation under s. 91(24) of the *Constitution Act, 1867*, it has never done so. The extent to which Canada is responsible for Metis peoples, their rights, and their claims, is a current and contentious issue.⁵⁹

The Red Book promises that a “Liberal government will take the lead in trilateral negotiations with the Metis and provincial governments to define the nature and scope of federal and provincial responsibility for Metis people” and “provide assistance to enumerate the Metis”. It is silent on the particulars of Metis claims, but promises “consultations with Aboriginal peoples” on a new claims policy, which would certainly include Metis representations with respect to their claims.

⁵⁵ An aberration occurred in 1944 when the Registrar struck 700 names off the Treaty 8 list, even though they were descended from persons who had opted for Treaty, on the ground that they had white blood. After a judicial inquiry and subsequent contention, most were eventually reinstated: see P. Cumming and N. Mickenberg, *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972) at 202-03.

⁵⁶ The express disqualification was still in the *Indian Act* until 1985: see e.g. R.S.C. 1970, c. I-6, s. 12(1)(a)(i). Notionally, the disqualification is still there since there is no provision in the current *Act* that would entitle persons to be registered if they were previously disqualified on account of receipt, or descendancy from a recipient, of Metis land or scrip.

⁵⁷ *Supra* note 55 at 204.

⁵⁸ The exigencies of claims settlement have also led to Inuit being deemed to be Indians: see *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18, s. 19.

⁵⁹ It has become more controversial since the Supreme Court, in *Sparrow*, *supra* note 10 at 1105, emphasized that s. 35(1) applies to Metis and Inuit as well as Indians, and provides

H. Provincial Processes

Few provinces have adopted a general claims policy. Ontario, for example, has promised one for several years, but it has not been forthcoming.⁶⁰ Even so, Ontario does participate in claims negotiations, frequently under the auspices of the Indian Commission of Ontario,⁶¹ and that participation is essential where the settlement is to include the setting apart of Crown lands or resource-sharing agreements, as was the case in the Mississauga No. 8 First Nation claim settled this year. That claim was based on an incorrect survey of the original reserve set apart under the Robinson Huron Treaty after 1850. The settlement involved the transfer of lands to increase the existing reserve and compensation.

Ontario has even settled claims without federal participation. The principal example of such a settlement was the 1991 Manitoulin Island settlement which provided a compensation fund for interests which had not been addressed, or compensated, under an 1862 Treaty. These interests included road allowances and waterbeds. The Manitoulin First Nations' claims against the federal government in respect of the same Treaty have not been dealt with.

Regarding claims of the fourth kind, which require special processes for negotiation and resolution, mention has already been made of initiatives in Saskatchewan (Treaty land entitlement) and B.C. (Treaty Commission). The respective provinces are active participants in those processes. There do not seem to be any parallel initiatives in other provinces at this time, which does not mean that claims are not being resolved elsewhere in Canada. This simply points to the absence of special processes and, more generally, the absence of provincial claims policies.

As a general statement, provinces deal with Aboriginal claims — especially specific claims — in the same way that Canada did for more than a century: on an *ad hoc* basis.

“constitutional protection against provincial legislative power”. Also, the government has the responsibility to act in a fiduciary capacity with respect to Metis: *ibid.* at 1108.

⁶⁰ In the absence of a policy, however, there is a process. The *Indian Lands Agreement (1986) Act*, S.C. 1988, c. 39, sets out a procedure for specific tripartite agreements to deal with lands issues. This grew out of attempts to deal with perceived windfalls received by Ontario in the earlier 1924 agreement (see *Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48), which gave half of the revenue from mineral development on most Ontario reserves to the province and, arguably, gave the province the full benefit of reserve lands which had been surrendered prior to the Agreement but remained unsold in 1924: see *Smith v. The Queen*, [1983] 1 S.C.R. 554. Ontario had, for more than ten years, promised to reconvey those interests, but reneged on those promises and ultimately settled on a process of individual negotiations with First Nations.

⁶¹ The Commission was established by Canada and Ontario in 1978 to assist with matters of tripartite concern. Much of its work to date has involved the mediation of claims in Ontario, although with little success before the 1990s.

III. THE HISTORICAL DEVELOPMENT OF CLAIMS POLICY

A. *Notes on the Law of Aboriginal Title*

The starting point for any discussion of Aboriginal claims in Canada is invariably the *Royal Proclamation* of 1763. Issued at a time when Britain was consolidating its recently-won gains of French territory in North America, and at a time when Pontiac's War had just broken out along the Great Lakes, it was intended to make adequate provision for continuing peace with the Indian Nations by securing their land base and preventing uncontrolled settlement. Its recital is eloquent on this point — referring to previous “Great Frauds and Abuses” — and its terms have come to be known as the “Indian Magna Carta”.⁶²

And whereas it is just and reasonable, and essential to our interest and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds....

We do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to said Indians, within those parts of the colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians. [emphasis added]

First Nations relying on the *Proclamation* to advance their claims must recognize that there is an implied concession that their Aboriginal rights and title are subject to the Crown's assertion of sovereignty over their Lands and Territories.⁶³ At the time, however, the Crown only reserved to itself the exclusive power to purchase Indian title and to capture fugitives. There was no actual assertion of jurisdiction within the Hunting Grounds or over Indians, who continued to be governed civilly and criminally by Aboriginal customary law. More intrusive assertions of British sovereignty would come later.

Much of the legal complexity of Aboriginal claims stems from the absence of a rigorous legal doctrine which describes and governs the transition from Aboriginal

⁶² This terminology was used by the courts in *St. Catharines Milling & Lumber Co. v. R.* (1887), [1888] 58 L.J.P.C. 54, 60 L.T. 197 [hereinafter *St. Catharines Milling* cited to L.J.P.C.] and in *R. v. McMaster*, [1926] Ex.C.R. 68. It is, of course, an attempt from another era to signal the importance of the document to people who are quick to report that they are not “Indians” and to whom Magna Carta is an obscure and foreign document.

⁶³ In the same way, Aboriginal groups who rely on s. 35 for constitutional ascendancy of their rights and titles acknowledge that they are subject to the Constitution.

custom to common law, or the rules by which common law recognizes subsisting Aboriginal custom.⁶⁴ The courts are demonstrably reluctant to provide such a theory themselves, obviously regarding the issue of reconciling Aboriginal title, and Aboriginal and Treaty rights, within Canadian law as a political exercise to be carried out by politicians and legislatures, not by courts. In *Sparrow*, for example, the Court is obviously proud of the policy impact of its earlier decision in *Calder*. That, and the references to section 35 as a “solid constitutional base upon which subsequent negotiations can take place,”⁶⁵ underline the Court’s preference that reconciliation be effected in that way.

In difficult cases, however, there can be little doubt that the courts will subordinate Aboriginal rights to Crown interests. For all the gains that have been made in the courts during the past 20 years on behalf of Aboriginal claimants, none of the leading cases has suggested for a moment any departure from a Diceyan view of the paramountcy of Parliament. If anything, that view has merely been qualified by placing strictures upon how legislative powers can be exercised, not on whether they can be exercised. Nor has the underlying title of the Crown to lands and resources been touched. No claimant to an Aboriginal title has yet gained control over a square foot of territory through litigation.

For these reasons, we will not attempt here to describe the various theories of Aboriginal rights and title that might be advanced in support of comprehensive claims. The next leading case, *Delgamuukw v. British Columbia*,⁶⁶ is now before the Supreme Court of Canada and there is a substantial body of literature on the subject available.⁶⁷ There is neither space nor reason to summarize it here.

All Aboriginal claimants generally do well to avoid the courts. Despite the watershed decision in *Guerin*, no specific claim has succeeded in court in the 10 years since it was handed down. There are many reasons for this, including issue of

⁶⁴ Note that there is a federal common law of Aboriginal rights and title: *Wewayakum Indian Band v. Canada* (1989), 92 N.R. 241, (*sub nom. Roberts v. Canada*), [1989] 1 S.C.R. 322. These issues assume a constitutional dimension, not only because of s. 35, but also by virtue of s. 25 of the *Canadian Charter of Rights and Freedoms*, which provides that the *Charter* shall not derogate from “any aboriginal, treaty or other rights or freedoms” of Aboriginal peoples, including:

(a) any rights or freedoms that have been recognized by the *Royal Proclamation of October 7, 1763*; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

⁶⁵ *Sparrow*, *supra* note 10 at 1105.

⁶⁶ (1991), 79 D.L.R. (4th) 185, 3 W.W.R. 97 (B.C.S.C.), *aff’d* [1993] 104 D.L.R. (4th) 470, 5 W.W.R. 97 (B.C.C.A.). The Court has granted an adjournment of the appeal until June of 1995 in order to give the B.C. Treaty Commission an opportunity to deal with the claims of the Gitksan and Wet’suwet’en Nations.

⁶⁷ Some articles referred to by the Court in *Sparrow* are D. Sanders, “Pre-existing Rights: The Aboriginal Peoples of Canada” in *The Canadian Charter of Rights and Freedoms*, 2d ed. by G. Beaudoin and E. Ratushny (Carswell: Toronto, 1989) 770; B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727; B. Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32 Am. J. Comp. Law. 361; and K. McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982) 4 Sup. Ct. L. Rev. 255.

proof, adversarial process, finality, cost, and the limited range of judicial remedies. But the greatest danger in litigation is the emerging tendency to impose limitation periods and bar claims altogether.⁶⁸

It may well be that the courts are most useful as tools to effect political change. Certainly there has been more change of that nature over the years than substantive justice for Aboriginal litigants. One analysis puts the issue this way:

[D]espite what could be termed a “structural bias” in the law against aboriginal aspirations, judicial decisions in the last twenty years show that there is a potential for transformation, and they hint at ways in which the law might be used to advance the cause of aboriginal peoples. The courts have often been more sympathetic to aboriginal hopes than the political forum. In turn, court decisions have prompted a number of policy breakthroughs in the political arena in the past twenty years.⁶⁹

Thus, while there has been much important law decided in recent years, the focus of this survey will be on claims policy, since that is the route which the majority of claims have followed and it is the route that is most likely to have a settlement at the other end.

B. *Federal Claims Policy, 1867-1947*

Unlike the U.S., where cases such as *Johnson and Graham's Lessee v. M'Intosh*⁷⁰ from the Marshall court set out basic principles of Indian law at an early date, Canada did not have a history of dealing with Indian rights or Indian claims judicially. Following on the principles, if not the strict rule, of the *Royal Proclamation*, settlement advanced into Ontario and the West in lockstep with Treaties that opened the way. In the comparatively few incidents where settlement or resource exploitation got ahead of the Treaty process and disputes occurred, a Treaty was soon negotiated. This was very much the case on the upper Great Lakes when local Ojibway began to disrupt mining locations. Government quickly moved to conduct a rough census of Indians and their land use, then sent William B. Robinson to conclude Treaties.⁷¹ The 1850 Robinson Huron and Robinson Superior Treaties were models for the “numbered” treaties of the post-Confederation era.

Treaties, however, created their own problems. The first major dispute arose over Treaty No. 3 in the Northwest Angle. Canada originally assumed, when it concluded the treaty in 1873, that the area, as part of the Hudson Bay watershed, had been acquired from the Hudson's Bay Company and included in Manitoba. Ontario

⁶⁸ See *Apsassin*, *infra* note 115.

⁶⁹ P. Macklem and R. Townshend, “Resorting To Court: Can The Judiciary Deliver Justice For First Nations?” in D. Engelstad and J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: Anansi Press, 1992) at 79.

⁷⁰ 5 L. Ed. 541 (1823).

⁷¹ The judicial version of this history is set out in *Bear Island*, *supra* note 37. The hazards of litigating history are described in “Evidentiary Problems”, *supra* note 7.

disputed that position and won on arbitration. Canada then fell back on the position that, under the terms of the Treaty, it had control and management of the lands and resources anyway. The second dispute gave rise to the *St. Catharines Milling* case.⁷²

The *St. Catharines Milling* case concerned a federal-provincial dispute over timber rights. The Province of Ontario challenged the federal government's grant of a timber licence to the Milling Company, arguing that the timber was under provincial jurisdiction. As with most early cases which had an impact on Aboriginal rights, the Aboriginal peoples who would be affected by this decision (in this case, the Anishanabek of Treaty 3) were unrepresented in the proceedings. In fact, the claims of Aboriginal title and Treaty administration were largely an excuse for the federal government to assert authority. There had certainly been an "Indian interest" in the lands in question, but the legal issue was the constitutional one of jurisdiction over the lands and resources once the Indian title had been ceded, by Treaty, to the Crown.

The Judicial Committee of the Privy Council held that Canada had only legislative powers under s. 91(24). While the Indian interest had been less than the fee simple interest,⁷³ it was also an "interest other than that of the province" pursuant to section 109 of the *Constitution Act, 1867*. When that interest was ceded to the Crown as the result of Treaty, section 109 applied and the Crown title to lands and resources inured to the province.

Lord Watson, who wrote the decision for the Judicial Committee of the Privy Council, said the following, in a prescient passage:

There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory over which the Indians still exercise their avocations of hunting and fishing is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.⁷⁴

These "questions behind" have never been satisfactorily answered. Many claims, most of which have yet to be submitted, would be based on unexpected and devastating incursions on Treaty lands which severely impaired the exercise of Treaty rights and, indeed, the complete way of life which the Indian parties to those Treaties had been led to believe would not be forcefully changed.⁷⁵

Several other issues derive from *St. Catharines Milling*. Foremost of these in terms of claims issues is the question of the province's responsibility, after becoming the principal beneficiary of the Treaty, to ensure that the terms of the Treaty can be met. The subsequent case of *Ontario Mining Co. v. Seybold*⁷⁶ held that

⁷² *Supra* note 62.

⁷³ The Privy Council described this interest as "a personal and usufructuary right, dependent upon the good will of the Sovereign" (*ibid.* at 57).

⁷⁴ *Ibid.* at 60.

⁷⁵ *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79, (*sub nom. Saanichton Marina Ltd. v. Tsawout Indian Band*) 57 D.L.R. (4th) 161 (B.C.C.A.) is one of the few cases where development was halted on the basis of interference with the exercise of Treaty fishing rights.

⁷⁶ (1902), [1903] A.C. 73 (P.C.).

Canada did not have the authority, again under Treaty 3, to set aside the reserves promised in the Treaty without provincial consent. This has hampered subsequent dealings in respect of claims, and created a constitutional problem in respect of the surrender of confirmed reserve lands which Canada intended to sell for the benefit of the First Nations but were arguably under provincial jurisdiction as a result of the surrender.⁷⁷

At the time *Seybold* was argued, the Privy Council was informed that an agreement had been made between counsel — the Blake/Newcombe Agreement — to deal with the Treaty 3 problem, but that agreement has never been fully implemented and claims remain outstanding in respect of issues such as garden islands and waters between headlands. Reciprocal legislation had already been passed in 1894 to ensure that future Treaties would not give rise to the same problems.

Ontario's unfortunate history, however, is that successive provincial governments have done everything they could to minimize Aboriginal and Treaty rights in the first instance and to erode them thereafter. Canada's complicity in allowing the province to move into regulation of Treaty harvesting rights, for example, cannot pass without mention.⁷⁸ There are, of course, claims which have come forward based upon this conduct and many more can be expected if a precedent is set to compensate for loss of access to renewable resources, such as fisheries.⁷⁹

During the period from Confederation to World War II and the years immediately following the war, Canada was principally concerned with opening lands for settlement, including Indian lands. The numbered Treaties and surrenders of reserve lands served this purpose. Canada was also concerned to secure its powers to administer the *Indian Act* regime without provincial interference. To that end, it entered into agreements with British Columbia and Ontario. It reserved its rights when control of natural resources passed to Alberta, Saskatchewan, and Manitoba in 1930 although, as noted above, the provision for Treaty land entitlements proved ineffective. Where Aboriginal claims were pressed too strongly, steps were taken to quash them.

But, as Thomas Berger has noted in respect of B.C. Indians, "the Native people had never abandoned their land claims or their claim to Aboriginal title, but for a long time such claims were mistaken for the rhetoric of powerlessness."⁸⁰ Governments

⁷⁷ The *sequellae* of these decisions are discussed in W.B. Henderson, "Canada's Indian Reserves: The Usufruct in Our Constitution" (1980) 12 *Ottawa L. Rev.* 167. See also *Smith v. The Queen*, *supra* note 60.

⁷⁸ See e.g. F. Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930" (unpublished paper prepared for the Ontario Native Affairs Secretariat, 1990).

⁷⁹ In *Sparrow*, *supra* note 10 at 1119, the Court described, as part of the analysis of regulating Aboriginal and Treaty rights, the following factors: "whether there has been as little infringement as possible" and "whether, in a situation of expropriation, fair compensation is available".

⁸⁰ T.R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992* (Vancouver: Douglas & McIntyre, 1992) at 140.

were misled into complacency by what was taken to be idle rhetoric. Claims activity in Canadian courts was non-existent, exactly as planned, and the federal government saw little need to have a defined claims policy.

C. *Claims Processes: 1947-1968*

In 1946, the United States created an Indian Claims Commission which had a limited term to do its work and a broad mandate which included Treaty claims, Treaty revision, land claims and “claims based upon fair and honourable dealings that are not recognized by any existing rule of law or equity”.⁸¹ This initiative prompted the Joint Committee of the Senate and the House of Commons to propose a similar Commission for Canada the following year, but nothing came of that proposal.

The Diefenbaker government went further in the early 1960s. Bill C-130, “An Act to Provide for the Disposition of Indian Claims” was tabled in December of 1963. It died on the order paper. Bill C-123, a slightly amended version of the earlier bill was tabled under the Pearson government in 1965 and met the same fate.

These Bills contemplated a five-person Commission with jurisdiction to deal with claims against the governments of Canada or Great Britain in respect of the taking of lands from Indians without agreement or compensation (which may have included Aboriginal title claims), unfulfilled Treaty obligations, misappropriation of Indian moneys, and failure on the part of the Crown or its servants, in any transaction with Indians except a land transaction, “to act fairly or honourably with those Indians...thereby caus[ing] injury to them”. Claims would have to be brought before the Commission within 3 years and provision was made for financial assistance to claimants. The Commission would not be bound by formal rules of evidence, but it could not make awards unless a claim was supported by contemporaneous written evidence or by oral evidence corroborated by other types of evidence. Given the state of Indian Affairs records and their limited availability to researchers in 1965, it would have been interesting to see how that Commission could have received all potential claims within 3 years or enforced those rules of proof.

This was a novel approach to claims, but even as proposed it could not have been as effective as the U.S. Commission, and that turned out to be a low standard to meet. There were, most notably, no comparable provisions in Bill C-123 which would have permitted the Canadian Commission to re-open Treaties and deal with them as if revised on grounds of fraud or duress, no jurisdiction to consider claims based on unconscionable consideration in respect of land and other transactions, and no mandate to consider dishonourable conduct in relation to land transactions. We will,

⁸¹ The mandate was extended several times until the Commission was wound up after 40 years. There is no space here to discuss the work of that Commission, which focused almost exclusively on land claims and was criticized for an overly legalistic approach to its work.

of course, never know how that Commission might have performed and evolved.

Bill C-123 was the last legislative initiative to create a juridical Commission with authority to make awards. The next proposal for a Claims Commission was quite different in nature and in context.

D. *Claims Policy, 1969-1990*

1. *The 1969 White Paper*

The central tenet of the 1969 White Paper, which was couched in terms of “equality”, was the removal of “special” status for Indians,⁸² which meant, among other things, the abolition of the *Indian Act* and the Department of Indian Affairs, the termination of Treaties (“an anomaly ... which should be reviewed to see how they could be equitably ended”), the transfer of jurisdiction over Indians to the provinces and the granting of reserve lands to Band members in fee simple. It was a termination policy, plain and simple.

The Policy refuted claims based on Aboriginal title on the basis that such claims were too general and too vague to be capable of specific remedy. The White Paper was the beginning of the so-called “specific claims” — those which are, unlike Aboriginal title claims, capable of specific remedy — based on “lawful obligations”. The White Paper also proposed the creation of an Indian Claims Commission.

Indian reaction to the White Paper was swift and vitriolic. The National Indian Brotherhood (NIB, the forerunner of the Assembly of First Nations (AFN)) said that the White Paper policies were a form of “cultural genocide”, and the Indian Chiefs of Alberta prepared a response, *Citizens Plus*, which — perhaps inevitably — became known as the “Red Paper”.⁸³ It insisted that

The Government of Canada must declare that it accepts the treaties as binding and must pledge that it will incorporate the treaties in updated terms in an amendment to the Canadian Constitution.⁸⁴

Ironically, Aboriginal opposition to the White Paper resulted in increased national political activity by the NIB and other Aboriginal organizations such as the Native Council of Canada (NCC), formed in 1971. In fact, in the minds of many observers and participants, Aboriginal reaction to the White Paper marks the

⁸² This reflected the particularly “Trudeauesque” version of equality, consistent with the former Prime Minister’s strong belief in individual, and not collective, rights. Many surprised by the vehemence of Trudeau’s broadsides on the Charlottetown Accord based — in large part — on its recognition of certain “collective rights” should have revisited the 1969 White Paper. Then, and perhaps now, Aboriginal and Treaty rights were held politically hostage to one federalist view of special rights for Quebec.

⁸³ B. W. Morse, “The Resolution of Land Claims” in B. W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1989) 617 at 621.

⁸⁴ Weaver, *supra* note 27 at 7.

beginning of the so-called "modern" era of national Aboriginal politics.

The White Paper was subsequently withdrawn, but the thinking behind it in terms of claims policy endured and would be seen again. Dr. Lloyd Barber was appointed to the promised Indian Claims Commission, but in an advisory rather than an adjudicative role. He was able to consolidate a great deal of information about claims generally and to offer valuable advice about the nature of Aboriginal claims and the types of settlements that could be appropriate. On the whole, however, his effectiveness was impaired by the association of his position with the White Paper.⁸⁵

There was little progress made on claims matters until the Nishga Nation of British Columbia took its claim to the Supreme Court of Canada in the *Calder* case.

2. *A Year of Change: 1973*

In 1973 the Supreme Court of Canada rendered judgment in the *Calder* case,⁸⁶ in which the Nishga Nation of Northwestern British Columbia sought to establish that their Aboriginal title to the Nass River valley had never been extinguished prior to British Columbia entering Confederation in 1871. All parties to the litigation assumed that title could not have been extinguished after that date, since there had been no Treaty process in that part of British Columbia, and no federal legislation which would have had that effect. In other words, it was assumed that the province, acting alone, could not have effected an extinguishment of Aboriginal title.

The Supreme Court of Canada issued a split decision: three judges held that the Nishga retained unextinguished Aboriginal title; another three held that whatever title the Nishga had was since extinguished; and a seventh dismissed the claim on a procedural technicality: the Indians had neglected to get a *fiat* from the Lieutenant Governor, a necessary step in order to bring a suit against the Crown in right of British Columbia. The case, while inconclusive in the result, is nevertheless considered a victory for Aboriginal peoples in general. *Calder* made it clear that Aboriginal title was alive and well as a legal concept, despite the federal government's prior denials.

Other significant developments in 1973 included the *Re Paulette* case, in which sixteen Chiefs were successful in registering a caveat on title to approximately 400,000 square miles of the North-West Territories,⁸⁷ and the James Bay Cree obtaining an injunction in the Quebec Superior Court to halt construction of a hydro-electric dam at James Bay. The James Bay injunction was quickly vacated by the Court of Appeal,⁸⁸ but it was the first milestone on the road to the first modern claims

⁸⁵ The Barber Commission was wound up in 1979.

⁸⁶ *Calder*, *supra* note 8.

⁸⁷ *Re Paulette*, [1973] 6 W.W.R. 97, 39 D.L.R. (3d) 45. The caveat was based on the assertion that Aboriginal rights had never been extinguished in that part of the territory.

⁸⁸ *La société de développement de la Baie James*, [1975] R.J.Q. 166, [1974] R.P. 38 (C.S.). The reasons of Justice Malouf granting the injunction are not reported in English, but an English text is available from the Native Law Centre at the University of Saskatchewan.

settlement: the *James Bay and Northern Quebec Agreement* of 1975.

Finally, 1973 was the year of an uprising of the Oglala Sioux at Wounded Knee, South Dakota⁸⁹ under the leadership of the American Indian Movement. The spectacle of Indians in an armed standoff with federal agents received international coverage, and alerted the world to the problems faced by North American Aboriginal peoples in much the same way that Oka would 17 years later. A comparatively tame warning for Canadians was served up in August when a group of Indians occupied Indian Affairs headquarters in Ottawa for a day and made off with some of the James Bay negotiating documents.⁹⁰

1973 was the year of major change in law, in policy, and in attitude. The *Calder* decision had given credence to legal arguments originally advanced in opposition to the White Paper. This forced the federal government to review its Aboriginal policies generally, and its claims policies in particular. The *Calder* decision was handed down in January, 1973. In August of the same year, then Indian Affairs Minister Jean Chrétien made a new policy statement on claims, but that policy dealt only with comprehensive claims.

3. *Written Policies: 1974-1989*

It was not until 1981 that government codified its comprehensive claims policy in a document entitled *In All Fairness*. It was subsequently modified as a result of the 1985 Coolican Report. In 1974 the Office of Native Claims (now the Specific Claims Directorate) was set up within the Department of Indian Affairs and Northern Development. The new policy pronouncements, however, dealt only with comprehensive claims, and it was those claims that attracted most of government's interest during the latter part of the 1970s. Implementation of the Cree-Naskapi and Northern Quebec Inuit settlements were focal points, and the Berger Inquiry into the proposed Mackenzie River Pipeline kept most eyes in Ottawa turned north. Throughout this period, negotiations continued with the Council for Yukon Indians, the Dene and Metis of the N.W.T., and with the Nishga of B.C., but only the Inuvialuit at the mouth of the Mackenzie River achieved a comprehensive claim settlement.

Specific claims continued to be dealt with, but not settled, on the basis of unstated principles effectively identical to the concepts spelled out in the White Paper. In 1979 Gerald La Forest (now Justice La Forest of the Supreme Court of Canada) was commissioned to review the specific claims "process", such as it was. While his conclusion was, in Sally Weaver's words, "highly critical" of the lack of

⁸⁹ Wounded Knee was a significant site for the Sioux Nation. It was there on December 29, 1890 that the Seventh Cavalry (Custer's old regiment) slaughtered approximately 200 Sioux, mostly women and children — an act for which the regiment received 20 Congressional Medals of Honor (see P. Matthiessen, *In The Spirit Of Crazy Horse* (Markham: Viking Penguin, 1991) at 20).

⁹⁰ Weaver, *supra* note 27 at 9, describes the "rising ... militancy" and "native hostility" in Canada which culminated with the Native Peoples Caravan in September, 1974.

independence of the claims process, and although he recommended the establishment of an independent claims body as a result of these concerns,⁹¹ nothing was done until a further review of land claims policy was undertaken by the Trudeau government in 1980.

The following year, *In All Fairness* was published as the government's policy on comprehensive claims. It has been reviewed and refined since its original publication, but the booklet contains the essentials of current policy.

In 1982, the Specific Claims policy was codified in *Outstanding Business*. In that document, specific claims were described as those

[dealing] with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.⁹²

Outstanding Business includes the following examples of lawful obligations which government will regard as specific claims and admit to the process:

- * The non-fulfilment of a treaty or agreement between Indians and the Crown.
- * A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and regulations thereunder.
- * A breach of an obligation arising out of government administration of Indian funds or other assets.
- * An illegal disposition of Indian land.⁹³

These guidelines, to the government's way of thinking, define lawful obligation. In commenting on the guidelines some eight years later the Indian Commission of Ontario noted that

Indian views ... did not find their way into the concept of lawful obligations 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.⁹⁴

It is likely that the ICO was referring to practice rather than theory. In practice, it appears that the ICO was right. In the specific claims process, government tends to interpret Treaty obligations as being quantifiable obligations (e.g. the promise to provide ammunition and twine, or a calculable area of reserve land) as opposed to more general rights such as hunting, trapping and fishing rights. Thus far, government has yet to concede that Treaty harvesting rights, for example, are amenable to resolution under the specific claims process.

Outstanding Business also sets out a category of specific claims under the heading, "Beyond Lawful Obligation", which includes:

⁹¹ *Ibid.* at 11.

⁹² *Supra* note 28 at 3.

⁹³ *Ibid.*

⁹⁴ *Discussion Paper*, *supra* note 32 at 22.

- * Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority;⁹⁵ and
- * 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.⁹⁶

The use of the word “beyond” would appear to imply that the conduct described would not, in the ordinary course, be considered unlawful, which is, of course, nonsense. Fraud, for example, is not condoned in any Canadian jurisdiction. And in *Guerin*, a decision which the specific claims policy has studiously ignored for 10 years now, government employees were found to have committed “equitable fraud” and liability was imposed. Are we to believe that the result would have been different if the court had found actual fraud?

There are problems of terminology, like “Beyond Lawful Obligation”, which are lightning rods for criticism and can divert one from issues of greater substance. This particular example is offensive because it suggests that any settlement of claims of this type will be based on charity, not law. Another observer, who is assuredly not diverted from matters of substance, has complained about the term “claim”, with its connotation of seeking something one does not already have. Joe Mathias, Chief and land claims co-ordinator for the Squamish Nation, points out that, “we’re not talking about being granted our rights — they are our rights!”⁹⁷

In our view, there are seven major failings of the specific claims policy, as it is now written:

1. Access to the process is too limited. An Aboriginal claims process should be open to all Aboriginal peoples and provide a forum for all claims.
2. The policy does not include, or is not interpreted by the government as including, the full range of claims which ought to be addressed. It is assumed that these lines have been drawn with a view to the resources required to deal with a greater number of claims. That, however, gives the appearance of arbitrary categorization.
3. The policy does not acknowledge, or even contemplate, the concept of fiduciary obligation which, since *Guerin*, goes to the heart of every stated basis for a claim.
4. The policy does not provide sufficient procedural fairness. In the final analysis, government is the judge in its own cause. It has drafted rules which expressly exclude Indian views on what those rules should be. It interprets those rules in a manner favourable to its own cause and, when it does so, claimants have little effective recourse.
5. The guidelines for compensation are unduly restrictive and misleading.

⁹⁵ See the discussion of this provision and its linkage to the B.C. cut-off land claims, *supra* note 29.

⁹⁶ *Outstanding Business*, *supra* note 28 at 20.

⁹⁷ J. Thompson, “Dancing Between Two Worlds” (March 1993) *The Canadian Bar Association National* 26.

When the government wishes to settle a specific claim, the guidelines go out the window and a global offer is made. When the government wishes to stall or frustrate negotiations, debate about the guidelines is endless.

6. There is no provision in the policy to re-open Treaties or other agreements on the basis of error, duress, fraud, etc. This was a jurisdiction which the U.S. Claims Commission had, and it could be most effective in dealing with specific claims in Canada.

7. There is no schedule and no finality to the process. There must be some provision for an independent decision-maker to move claims along by means of interim rulings and the parties should have access to a final and binding decision, outside of conventional litigation, if they wish it.

The most telling observation about the process was made in a recent report by an independent consultant retained by the Department of Indian Affairs and Northern Development. It found that in the claims studied, the government settled on the terms — especially the financial terms — that it wished to settle on. The First Nations, on the other hand, settled on average for about 25 percent of their valuation of the claim.⁹⁸ This, however, is only one factor that has led to dissatisfaction with settlements. The assumption that, in most cases, a compromise sum of money will settle the claim and the grievance limits possibilities for creative solutions that would deliver substantive justice to claimant communities.

Since 1982, when the policy was written, some changes have been made and, if we can believe the Red Book, more is on the way. That will be welcome. Most of the change to date took place as a result of the summer of 1990.

4. *The Summer of 1990*

Despite known and well-publicized problems with the claims policy, the government changed nothing to address criticism of its specific claims policy between 1982 and 1990. It did not respond to the *Constitution Act, 1982*. It did not respond to *Guerin*. It did not respond to *Sparrow*. Nor, obviously, did the government respond to a flood of reports and suggestions from Aboriginal organizations, academics, numerous consultants, or the Canadian Bar Association.⁹⁹ Until the conflicts and crises of the summer of 1990.

The failure of the Meech Lake Accord, an exclusionist document which relied on the tired and discredited notion of *two* founding peoples,¹⁰⁰ and the events at Oka, which were in part attributable to the failure to resolve a land claim first litigated in 1912,¹⁰¹ forced

⁹⁸ *Report on the Evaluation*, *supra* note 33 at 18.

⁹⁹ Canadian Bar Association Committee on Aboriginal Rights in Canada, *Report: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988).

¹⁰⁰ The notion of “founding” peoples is seen as an intentional affront to Aboriginal peoples. Mohawk blues singer Murray Porter has one rejoinder to this conceit: “1492 ... Who Found Who?”

¹⁰¹ From the late 18th century, the Indians at Oka and the Seminary of St. Sulpice, which had been granted the seigneurie of Lake of Two Mountains in 1717 and 1735, disputed the nature of the grant. The Indians argued that the land was held in a form of trust for them, and the seminary

Aboriginal issues to the forefront of Canadian consciousness. With the failure of the great Canadian constitutional solution,¹⁰² and a so-called “armed insurrection” two hours from the Parliament buildings, the federal government could no longer afford to ignore Aboriginal issues.

On September 25, 1990, the final day of the “Mohawk Summer” at Kanesatake and Kahnawake, Prime Minister Mulroney announced his government’s “Native Agenda”. The “three parallel initiatives” which made up the agenda were the acceleration of “specific land claims”, the settling of Treaty Land Entitlements, and the acceleration of “negotiations on modern treaties”.¹⁰³

In a speech to the First Nations Congress on April 23, 1991, Mulroney spoke of “four components” of his government’s Native agenda: the acceleration of land claims, the improvement of economic and social conditions on reserves, the pursuit of a “new relationship between aboriginal peoples and governments”, and the addressing of “the concerns of aboriginal peoples in contemporary Canadian life”.¹⁰⁴

Mulroney stated that “no outstanding issue is more important than the settlement of land claims”. To this end, he announced six changes to Specific Claims policy:

1. A fast-track process for dealing with land claims of \$500,000 or less.¹⁰⁵
2. Increase in the authority of the Minister of Indian Affairs to approve settlements of up to \$7 million without reference to Treasury Board.
3. Assigning “substantially more resources — human and financial” to the task of settling specific claims.
4. Establishment of a “Joint Indian-Government Working Group ... to address unresolved specific land claims process and policy issues”.
5. Acceptance of pre-Confederation claims for resolution.
6. Establishment of a “specific land claim commission” which would “provide an independent dispute resolution mechanism ... at arm’s length from [DIAND]”.

felt that it was free to deal with the land as it saw fit. The Indians were denied protection of their individual title in *Corinthe v. Seminary of St. Sulpice*, [1912] A.C. 872 at 878-879, 5 D.L.R. 263 at 267 (P.C.), but the Court was qualified in its judgment:

[Their Lordships] desire ... to guard themselves against being supposed to express an opinion that there are no means of securing for the Indians in the seigniority benefits which section 2 of the [1841] Act shews they were intended to have. If this were a case which the practice of the English Courts governed, their Lordships might not improbably think that there was a charitable trust which the Attorney-General ... could enforce.

The experience of Kanesatake with the claims processes is described *supra*, note 36. See also Weaver, *supra* note 27, and G. York and L. Pindera, *People of the Pines* (Toronto: Little, Brown, 1991). Grand Chief Peltier would no doubt expect an apology for the Privy Council’s (and our) use of the word “Indian”.

¹⁰² The sole Aboriginal member of the Manitoba Legislature, Elijah Harper, received much of the credit for that failure. He now sits as the Liberal member for Churchill in the House of Commons.

¹⁰³ Canada, House of Commons, *Debates* at 13320 (25 September 1990).

¹⁰⁴ Brian Mulroney, Address (First Nations Congress, Victoria, 23 April 1991).

¹⁰⁵ The fast-track approach was criticized in the *Report of the Aboriginal Justice Inquiry of Manitoba*, *infra* note 146 at 179.

Mulroney's changes did not immediately dispel the gloom of most observers of the claims policy. From our present vantage point — three and a half years later — we can see that few policy changes have been made at all. Settlements have been “accelerated” to some degree, due in large part to the increasing fund for settlements. The one change in the interim that may lead to more substantive change in claims policy was the 1993 change of government.

Two of the Mulroney initiatives did, at least, hold out a promise for real change: the Joint Government/AFN Working Group on Claims Policy and the Indian Specific Claims Commission. We will focus on those.

IV. THE JOINT GOVERNMENT/AFN WORKING GROUP

As a follow-up to the Mulroney announcement, a group of Chiefs from across Canada was brought into Ottawa in October of 1990 to consult about the six-point initiative. Using the freshly-completed ICO Discussion Paper, this Group and others who joined later became the Chiefs' Committee on Claims. In December, the Chiefs' Committee and the AFN forwarded to the Minister, Tom Siddon, the *First Nations Submission on Claims*.¹⁰⁶ Exchanges between the Minister and the Chiefs' Committee/AFN continued into the new year. After the AFN general assembly in Winnipeg, Siddon thought he had a consensus to proceed as announced by the Prime Minister. The Joint Working Group would be struck and the Indian Claims Commission would be established, headed by the Indian commissioner for Ontario, Harry LaForme.

The order-in-council for the Commission was passed July 15, 1991. The Commission would be an advisory one with three principal functions. Where the Minister rejected a claim submission, the Commission could inquire into and make recommendations on whether the Band had established a specific claim. Where there was a dispute in the course of compensation negotiations about the Minister's application of compensation criteria, the Commission could again inquire and make recommendations. And, where the parties requested it, the Commission could provide mediation services. The Commission would have the usual powers under the *Inquiries Act*.

Unfortunately, the mandate included, verbatim, the much-criticized “lawful obligation” wording and the compensation criteria from *Outstanding Business*. This drew immediate criticism from the AFN, which had not been shown a draft of the order-in-council. The newly-elected National Chief, Ovide Mercredi, advised Siddon that this type of mandate locked the Commission into the policy too tightly. A further objection was based on the fact that the much-despised policy had been included in an order-in-council, creating the perception that it was more entrenched

¹⁰⁶ Chiefs Committee on Claims, *First Nations Submission on Claims* (Ottawa: December 14, 1990), rep. [1994] 1 I.C.C.P. 187.

than ever. Months passed as the players attempted to dispel the tension created by this dispute and find a way to proceed with the Commission and with the proposed Joint Working Group.

The impasse was broken at a meeting of the nascent Joint Working Group (JWG) in Victoria in February of 1992. New terms of reference for the Commission were agreed upon which removed the actual wording of the policy and directed the Commission to it by reference only. At the same time, the Joint Working Group would proceed with development of its terms of reference to draft a new claims policy.

The JWG terms of reference and budget were agreed upon in June. A few days later, an amending order-in-council was passed to implement the amended mandate of the Commission and appointing six commissioners, three of whom had been recommended by the AFN.

The JWG set to work with three appointees from Government and six from the AFN. Its terms of reference, however, were also flawed. Every major recommendation about claims policy had to be unanimous. The Group started work on the concept of an independent claims body — the same entity proposed by Justice LaForest 13 years earlier — and brought in a mediation specialist to assist them in achieving the unanimity they needed. It would appear that it has yet to be achieved. Some working papers setting out various principles have been distributed, but the JWG has yet to deliver a unanimous report on a new claims policy.

It remains to be seen whether the Joint Government/AFN Working Group on Claims will deliver a policy proposal for consideration by the new Liberal government which, in its Red Book, actively solicits recommendations. These have not come forward quickly to date. The Royal Commission on Aboriginal Peoples, for example, is expected to comment extensively on claims policy, but its report is not expected until the latter part of 1995. It is doubtful that the government is waiting for recommendations of principle, many of which are well-known and some of which are included in the Red Book. It is more likely that the government is waiting for specifics of how an independent claims body should be established, what mandate it should have, what procedures it should follow, and what controls it should exercise over the process. The example of Siddon's problems with the Specific Claims Commission serves as a caution against unilateral action; yet awaiting a consensus may lead, in the short term, to no action at all.

It will be interesting to see how the Chrétien government comes to grips with this dilemma.

V. THE INDIAN SPECIFIC CLAIMS COMMISSION

The mandate of the Indian Specific Claims Commission, which quickly adopted the name Indian Claims Commission, is set out in Order-in-Council P.C. 1992-1730, which must be read together with P.C. 1991-1329. The principal functions are as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and

b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.

AND WE DO HEREBY

a) authorize our Commissioners

(ii) that they may provide such advice and information as may be requested from time to time by the Joint First Nations/Government Working Group,

(iii) to provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim.

One observer felt that even this amended mandate would tie the Commission too tightly to the existing policy and obviously felt that to be a bad thing:

The alterations [to land claims policy] do not represent a new process; they are merely a supplement to the old process. The commission has power only to recommend, so the most fundamental difficulty remains: the federal government is still judging claims against itself. It is a fundamental conflict of interest to be both defendant and judge, and no process with this feature will be fair.

Furthermore, although the commission would presumably be helpful in forcing the government to detail its legal position, the opinion of the Department of Justice regarding the legal merits of the claim will likely remain confidential and will therefore be hard to respond to. Nor is the commission mandated to manage and speed up the process as a whole; that power remains with the federal government.

Except for the removal of the pre-Confederation bar,¹⁰⁷ all substantive parts of the policy remain unchanged, and the commission will be bound by them.¹⁰⁸

Now that the Commission has been operating for over two years, it is possible to assess its performance in terms of the concerns expressed in the above commentary:

1. Is the Commission bound by the specific claims policy?

Surprisingly, given the debate about its mandate, the Commission appears to consider itself so bound. In its first report, on the Primrose Lake Air Weapons Range claims of the Cold Lake First Nation and the Canoe Lake Cree Nation, the discussion of its mandate was to the effect that the Commission is, in its deliberations, guided by the Specific Claims Policy.¹⁰⁹ But in its second report, on the Treaty harvesting rights of the Athabasca Denesuline north of the 60th parallel, the Commission stated that one of the guidelines in the policy “instructs ... this Commission to consider all relevant historical evidence”¹¹⁰ and, later, “the Commission is directed by the Policy”.¹¹¹ One can only conclude from the last two statements that the Commission sees itself as bound by the policy.¹¹²

¹⁰⁷ Under the policy as set out in *Outstanding Business*, *supra* note 28, claims which arose prior to Confederation (1867) would not be accepted for negotiation by Canada. This was a matter of policy, not law: see *Miller v. The King*, [1950] S.C.R. 168, which held that Canada could be liable for Indian claims in Ontario dating back to 1840. In 1992, Minister Siddon lifted the pre-Confederation bar to claims, but this does not necessarily mean that claims dating back to 1763 or earlier are now negotiable. Experience will tell if that is the case, or if the government has a new date (perhaps 1840), or a series of dates in different regions of Canada, which will now apply. Note that the courts have given effect to Treaty rights dating from the 1700s: *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Simon*, *supra* note 39.

¹⁰⁸ R. Townshend, “Specific Claims Policy: Too Little Too Late” in D. Engelstad & J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: Anansi Press, 1992) 60 at 65.

¹⁰⁹ [1994] 1 I.C.C.P at 130.

¹¹⁰ Indian Claims Commission, *Athabasca Denesuline Inquiry into the Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations* (Ottawa: Indian Claims Commission, 1993) at 50.

¹¹¹ *Ibid.* at 80. In both instances, the Commission was dealing with the issue of whether or not it should consider extrinsic evidence as to the interpretation of Treaties. Counsel for Canada, relying on *R. v. Horse*, [1988] 1 S.C.R. 187 [hereinafter *Horse*], said that it should not. The Commission’s strategy appears to have been to lock itself into the policy guideline on historical evidence and force the Department of Indian Affairs and Northern Development and the Department of Justice into the same position. The difficulty with that approach is that these departments would then be considering a set of evidence leading to one interpretation of a given Treaty under the specific claims policy, while advising the government as a matter of law that some of that evidence is not admissible. The Commission’s invitation to have two interpretations of the same Treaty, albeit for different purposes, is one that the government is likely to decline. A different analysis of the problem of Treaty interpretation is set out below.

¹¹² It is not known to what extent the Commission will continue with that position. Of the original complement of seven commissioners, the Chief Commissioner was appointed to the

2. Are Department of Justice opinions more accessible because of the Commission?

They are. The inquiry process the Commission has adopted has led Department of Justice lawyers to appear before the Commission and argue their legal position on the claim. The legal considerations do receive a full airing. What is not known as a result, however, is what weight Justice itself attaches to each of the arguments it advances, or whether those are the same arguments it relied upon in advising the Minister. The Commission has been, in our view, a success on this point.

3. Has the Commission assisted in speeding up the claims process?

The process has speeded up since 1991. There are, however, other factors that have contributed, principally the government's recruitment of more staff to deal with claims and the availability of greatly increased funding for settlements. As one of the factors, and absent any study of which factors have contributed to what extent, some credit must go to the Commission on this score as well.

4. Is a recommendation from the Commission enough to effect change?

It appears not. The government rejected the first report which recommended that the Primrose Lake Air Weapons Range claims be accepted for negotiation. The government also rejected the second report, recommending that the Treaty harvesting rights of the Athabasca Denesuline north of the 60th parallel, be recognized. As of this writing, there has been no government response to the third and most recent report dealing with the nature of the settlement agreement to be concluded with the Lax Kw'alaams First Nation.¹¹³ There may be two answers to the question of whether Commission recommendations are enough: one is that any similar Commission must have more than advisory powers if it is to impose new standards and effect real change; the other is that a recommendation from the present Commission would be enough if it addresses the government's original concerns in a persuasive manner.

It is not difficult to identify the government's problems with the first two reports. Both reports stress that the policy mandates an open and non-technical process of reviewing claims. If claims are found to be valid, they are to be negotiated to settlement as an express and preferred alternative to court proceedings. Both reports dealt with Treaty issues, but rejected the government's legal arguments

General Division of the Ontario Court, one commissioner succumbed to a heart attack, and another has resigned. More to the point, of the three commissioners who signed the Athabasca Denesuline report, only one remains. The Commission may well fall back to its original position that it is "guided" by the policy and, inferentially, not bound by it.

¹¹³ In seeking a confirmatory surrender of reserve lands alienated early in this century, Canada also wished to ensure that any Aboriginal title underlying that tract be ceded as well. The claimants pointed out that claims based on Aboriginal title are excluded from the specific claims

directed to the interpretation of Treaties without substituting another legal analysis.

The Athabasca Denesuline report, for example, refers to only two court decisions in the three pages devoted to the issue of lawful obligation, and none elsewhere. In lieu of law, the report cautions the parties against “technical arguments” and suggests that “[j]ustice and fairness will be better served if all parties to the process adhere to the spirit and intent of the Policy captured in *Outstanding Business*”.¹¹⁴

Given that the impetus for creating the Commission in the first place arose from a decade of criticism of the policy — especially, as noted above, widespread concern that the policy is unfair — the Commission’s latter-day revelation of its intrinsic merit is, to say the least, striking. And the decision to avoid, rather than examine, what law there is and what use the Department of Justice and the government should make of it is, some might say, negligent. In any event, these strategic decisions have not proven to be persuasive to the government or effective in validating the claim in question.

Neither of the Commission’s reports to date adds to our understanding of how the government becomes liable for a breach of fiduciary obligation, or why some facts will give rise to valid claims while others will not. The answer lies in the nature of the duty in each case and the proper scope for the exercise of government discretion when Indian interests are at stake. There are three leading cases on point,¹¹⁵ but the Commission has chosen not to analyze them. Instead, it retreated from the skeletal, but comparatively more fulsome treatment of fiduciary obligations in the Primrose Lake report to observations such as the following, taken from the Athabasca Denesuline report:

Treaty rights of Indians entail a fiduciary obligation which, if breached, will give rise to government responsibility and obligation.¹¹⁶

The Commission’s “argument from fairness”, particularly as described in the Athabasca Denesuline report, does not address the basis for compensation: lawful obligation. That is the criterion the government has chosen as the determinant of whether or not it will expend public funds in an attempt to settle specific claims. It is true that Minister Siddon invited the Commission to make recommendations if it determines that the policy was implemented correctly but the outcome is nonetheless unfair.¹¹⁷ But that is recognized as a supplementary mandate. The first mandate is to decide and recommend on the basis of the policy and the law. If the Commission then

policy and objected to being required to cede, as part of the process, what they could not assert in it. The Commission agreed with the complainants’ position that wording be included which would keep the settlement within the policy. We believe that the government is likely to accept that recommendation.

¹¹⁴ *Supra* note 110 at 77.

¹¹⁵ *Guerin*, *supra* note 9; *Kruger v. The Queen* (1985), [1986] 1 F.C. 3, 17 D.L.R. (4th) 591, full reasons reported in [1985] 3 C.N.L.R. 15; *Apassin v. Canada*, [1993] 2 C.N.L.R. 20 (F.C.A.).

¹¹⁶ *Supra* note 110 at 71.

¹¹⁷ *Supra* note 107 at 122.

perceives an unfair result, it should go further than commenting to that effect: it should consult with the parties and make concrete recommendations as to what remedial action might be taken.¹¹⁸

Setting aside for the moment the Commission's mandate to mediate issues at the request of the parties, its role is to inquire into and report upon decisions that the Minister has made, whether in terms of the validity of a claim or in terms of the compensation criteria to be applied in negotiation of a claim settlement. Those decisions are, in fact, made with significant, and often determinative, input from the Department of Justice. It is plain, then, that if the Commission, after its review, disagrees with those decisions, it has an obligation to inform and persuade the Minister, and certainly the legal advisors to the Minister, why they are wrong. That can only be done if the correct analysis is cogently advanced by the Commission itself.

As this survey article is being written, all government commissions are under review. The Specific Claims Commission is undergoing change as the result of attrition of its commissioners, and this will afford an opportunity for review of its analytical approach to the claims it reviews. If it has a future, it will be necessary for the Commission to make its voice heard amongst the many who seek to improve specific claims process. It must demonstrate that it can add to this dialogue in a constructive, persuasive and relevant manner. Otherwise, it will be just another commission of inquiry whose reports gather dust and are quickly forgotten.

The Commission may, however, form the basis for the much-discussed "independent claims body" which would supervise the claims process and make binding decisions. If the present Commission grows into that role, that will happen because it has proven effective in its present role. It has not yet done so. Time will tell whether a different approach to its current mandate or a different mandate will generate a different report card. As argued elsewhere in this survey, it is really a different claims process that is needed.

VI. THE IMPORTANCE OF THE FIDUCIARY RELATIONSHIP

As suggested above, the concept of the fiduciary relationship between the Crown and Aboriginal peoples must be at the heart of any claims process. Once that is recognized, the impossibility of a fiduciary being the arbiter of his or her own conduct is readily apparent. Fiduciary doctrine is at once sufficiently flexible to ensure fairness in accordance with law, and sufficiently rigorous to hold the

¹¹⁸ In the Athabasca Denesuline report, there was a finding of lawful obligation under Treaty, but in the absence of any actual interference with the existence of the rights — although its existence was denied by the government — there was no requirement to negotiate a settlement under the policy. The report makes no reference to unfairness, but does recommend an "Administrative Referral", as described in *Federal Policy for the Settlement of Native Claims*, *supra* note 41 at 25 and 29.

fiduciary to a high standard of conduct. The courts have more than once referred to the “honour of the Crown”¹¹⁹ in relation to the appropriate standard of conduct, but without much in the way of analysis of that concept.

A. *The Honour of the Crown*

The concept that the honour of the Crown must be maintained in dealings with Aboriginal peoples has been endorsed by the highest Court as one ground for “a general guiding principle” that:

Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹²⁰

It is not clear, however, whether the concept of honour of the Crown imports something more than the usual high standard of fiduciary conduct to Aboriginal law. Specifically, it is not clear whether the historic relationship between the Crown and Aboriginal peoples — described by many Aboriginal groups as a nation-to-nation relationship — is an independent source of fiduciary obligations, giving content to a duty on the part of the Crown without a prior finding of Aboriginal, Treaty or other rights. That may well be the case, but no court has yet extended the concept that far.

Similarly, it could be argued that the honour of the Crown requires that claims based on dishonourable, unfair or sharp conduct in its dealings with Aboriginal peoples be acknowledged in situations where the courts have not traditionally extended remedies. These situations are frequently described as giving rise to moral (as distinct from legal) obligations and would be similar to the equitable mandate of the U.S. Indian Claims Commission. Again, however, no court has yet extended the concept that far.

Or, it may be that the honour of the Crown is, as has been said of the fiduciary relationship itself, “a concept in search of a principle”.¹²¹ For present purposes, it is assumed that the honour of the Crown does not operate as an independent source of fiduciary obligation, but that it does require scrupulous compliance on the part of the Crown with the highest fiduciary standards in dealings with Aboriginal peoples.

¹¹⁹ *Sparrow*, *supra* note 10, is emphatic on this point: see *e.g.* at 1107 and 1109. Ironically, the same decision points out at 1103 that “over the years the rights of Indians were often honoured in the breach”.

¹²⁰ *Ibid.* at 1108. While this was said in the context of s. 35 of the *Constitution Act, 1982*, the statements about the honour of the Crown which were endorsed by the court were those set out with respect to Treaties in *Taylor and Williams*, *supra* note 13.

¹²¹ *Frame v. Smith*, [1987] 2 S.C.R. 99 at 135, (1988) 42 D.L.R. (4th) 81 at 98 (Wilson J.) [hereinafter *Frame* cited to S.C.R.].

B. *One Problem Solved*

The Indian Claims Commission has, as noted above, grappled twice with the issue of extraneous evidence and Treaty interpretation.¹²² The cases relied upon by Canada to exclude such evidence adopt the rule that it is not admissible if its effect would be to vary the written terms of a Treaty. None of those cases, however, addresses the fact that, with respect to Treaty rights and obligations, the government stands in a fiduciary relationship with the Aboriginal parties.¹²³

Once it is recognized that the Crown is a fiduciary, the issue changes. It is not whether oral assurances or other extraneous evidence would have the effect of varying the written terms of the Treaty, it is whether or not the Crown's conduct meets the high fiduciary standard required. When the situation arose in *Guerin*, the unwritten assurances were not added as an implied term of the surrender document, nor of the ensuing lease.¹²⁴ In his reasons, Mr. Justice Dickson (as he then was) stated that the correct approach, based on a fiduciary analysis, was this:

[T]he Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. **The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured.**¹²⁵ They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. [emphasis added]¹²⁶

Simply stated, the Crown is to conduct itself in a manner consistent with its promises, regardless of the formal wording of any document it prepares and relies upon. Or, in the elegant phrasing of Madame Justice Wilson, "Equity will not permit the Crown in such circumstances to hide behind the language of its own document".¹²⁷ Certainly since *Sparrow*, which merges the correct approach in *Guerin* with the

¹²² See *supra* note 111.

¹²³ *Bear Island*, *supra* note 37 at 574: where the Crown had failed to honour Treaty obligations to the appellants, it had "thereby breached its fiduciary obligations to the Indians". See also *Sparrow*, *supra* note 10. There is no reason to believe that the court's imposition of a fiduciary relationship there with respect to Aboriginal rights would not apply equally to Treaty rights within the context of s. 35(1).

¹²⁴ In *Taylor and Williams*, *supra* note 13, a term protecting hunting rights was added by the court to the 1818 Treaty. That, however, was not inconsistent with the document, since it was otherwise completely silent on the issue of hunting.

¹²⁵ This approach is consistent with the words approved by the Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36: Indian Treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by Indians."

¹²⁶ *Guerin*, *supra* note 9 (Dickson J.). The operation of this rule is stated to be analogous to the doctrine of promissory estoppel.

¹²⁷ *Ibid.* at 354.

fiduciary relationship arising out of the Treaty compact and affirmed by section 35(1), when it comes to Treaty interpretation the Crown has been riding a dead *Horse*.¹²⁸

C. *One Problem Not Solved*

Even a fiduciary conforming to the highest conceivable standard of conduct has some scope for action and some parameters within which discretion can be exercised. Describing a relationship as fiduciary, therefore, does not solve the problem of what action can be taken and what those parameters are: it merely defines that problem.¹²⁹

Two decisions from the Federal Court of Appeal have attempted to come to grips with the issue of proper exercise of discretion. In both cases, the federal government sought to obtain Indian reserve land for its own purposes, thus introducing the further element of a perceived conflict of interest. In both cases, the panel agreed that the Crown was a fiduciary. In each case, the dissenting judge set a very high standard on the issue of conflict of interest.

In *Apsassin*, Chief Justice Isaac said that negotiations between the Indian Affairs Branch and the Director under the *Veterans' Land Act* were "a case of self-dealing in its most elementary form".¹³⁰ In *Kruger v. The Queen*, Mr. Justice Heald said the following:

The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interests of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This situation resulted in competing considerations. Accordingly, the federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians.¹³¹

...

¹²⁸ Fiduciary analysis dispenses with any need to consider the parol evidence rule as prescribed by the court in *Horse*, *supra* note 111. However that rule may apply to commercial documents or international treaties, it is not adequate to the task of interpreting Treaties and land claims settlement agreements with Aboriginal peoples. As that case notes, these are compacts *sui generis* which must be construed in their historical context, to which we now add one further factor: construed in the context of the Crown's conduct as a fiduciary.

¹²⁹ This flows from many of the tests for fiduciary relationships, notably the following: Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Frame, *supra* note 121 at 136 (Wilson J.), app'd *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 599 and 646, 61 D.L.R. (4th) 14 at 27 and 63.

¹³⁰ *Supra* note 115 at 88.

¹³¹ *Supra* note 115 at 17.

An indication of [the Departments of National Defence and Transport's] seeming indifference to the plight of the Indians is shown by the initial valuation—only \$50 per acre; by the fact that they had possession for some 18 months without paying the Indians anything on account of compensation; by their rather leisurely approach to negotiations for compensation as compared to their great haste in taking possession and depriving the Indians of their livelihood.¹³²

...

[T]he Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations.¹³³

The majority in *Kruger* found that the compensation paid for the two parcels was within reasonable limits and that the Crown did not breach its fiduciary obligations to the Indians.

I do not understand how it could be said that there was a conflict of duty precluding the Indian Affairs Branch from settling the compensation at a figure which was not wholly satisfactory to the Indian band when all of the circumstances relating to the transactions were taken into account.¹³⁴

The adequacy of compensation was also a determining factor in *Apsassin*, where all members of the court found the Crown had breached its fiduciary obligation by “agreeing to a purchase price of \$70,000 upon the sale of [Indian Reserve] 172 ... without investigating the possibility of obtaining a better price”.¹³⁵ Mr. Justice Marceau commented on the special situation of the Crown when it acquires land for public purposes:

The appellants’ suggestion was obviously that the Crown had its own interest in mind, thereby breaching the most fundamental obligation of a fiduciary, that of avoiding any self-interested dealings while acting in a fiduciary capacity. The suggestion is, in my view, unwarranted. It would be wrong, I think, to treat the Crown like a private individual in this respect. The fact that the surrendered land could help satisfy the needs of veterans does not imply that the Crown was dealing in its own interest. Very exceptional circumstances would be required to place the Crown in a real conflict of interest, since the essence of the Crown is to serve the public and satisfy various public interests, not to acquire for itself. There is nothing in the evidence to suggest that the surrender could not be advantageous to the Band and to some veterans simultaneously, or that the interest of the latter prevailed, in the minds of the officers of the Crown, over that of the Band at the time of surrender.¹³⁶

Not every dispute among government departments will give rise to a conflict of interest or to legal or equitable remedies. In our view, the purpose of fiduciary duties

¹³² *Ibid.* at 24.

¹³³ *Ibid.* at 25.

¹³⁴ *Ibid.* at 50 (Urie J.).

¹³⁵ *Ibid.* at 58 (Stone J.). The majority, however, held that the action was barred by the relevant *Limitation Act* as of March, 1978 (at 64). The action had been commenced in September of 1978 (at 78).

¹³⁶ *Ibid.* at 68.

is to ensure that the fiduciary does not take advantage of position or discretion to injure the interests of the beneficiary. In circumstances where the Crown exercises its public powers and responsibilities, it would not be reasonable to turn the tables so that the Crown is at the mercy of the beneficiary's expectations in every situation where its public and fiduciary duties must be reconciled.

There is scope for the Crown, even as a fiduciary, to resolve these competing claims. It is essential, however, that the Crown be able to demonstrate that its decision-making is not overwhelmed by its own self-interest. In some cases, the Crown will be guided by independent appraisals or by the recommendations of independent advisors. In some cases, the issue can be referred for arbitration. In other cases, the informed consent of the beneficiary, especially if independent advice has been available to the beneficiary, will suffice. Generally, what must be shown is that the Crown is alert to its fiduciary responsibilities in the decision-making process, and that the result is objectively reasonable.

In *Apsassin*, for example, the Crown's failure to show that the compensation paid for the reserve was objectively reasonable led to a finding at trial and on appeal that the Crown had breached its fiduciary obligations, even though the action was statute-barred.

In *Kruger*, the price that was paid for the second parcel of land was approximately \$2,000 less than the highest appraisal of that land, but \$8,000 more than two lower appraisals. The majority considered that the alternative to accepting the compromise figure was a reference, with dubious prospects of success, to what was then the Exchequer Court. While the Crown "did not enjoy the same freedom of action in settling the compensation payable as one who does not occupy a fiduciary position", the decision was made "upon a proper appreciation of the circumstances".¹³⁷ We take this to mean that the result was objectively reasonable.

In *Guerin*, Indian Affairs was negotiating the terms of surrender with the band on the one hand and negotiating the terms of the lease with an outside third party on the other. When the results of these separate negotiations did not match, the Crown was held to the terms of its negotiations with the Indians and liable for \$10 million in damages. In *Kruger* and *Apsassin*, Indian Affairs was negotiating with other branches of the government and not with third parties. It cannot be said that this is a breach of fiduciary obligation, but the existence of that dual role does impose on the Crown a very high duty to demonstrate that any settlement it concludes with or on behalf of Aboriginal peoples is, in all respects, "full and fair" to them.¹³⁸

It is likely that this objective standard would apply to claims settlements as well as to the original claims. That is the risk run by the Crown when it negotiates from

¹³⁷ *Supra* note 115, 17 D.L.R. (4th) 591 at 659 (Stone J.) (Stone J.'s reasons not reported in F.C.).

¹³⁸ The U.S. Indian Claims Commission frequently grappled with issues of inadequate compensation and developed a guideline for awarding damages only when the price was more than 35 percent below fair market value: see *Native Rights in Canada*, *supra* note 55 at 250-51.

its own secret agenda and does not disclose its own appraisals to claimants.¹³⁹ And that would be the advantage, to both sides, of a competent, respected and independent tribunal empowered to guide the negotiation process and make awards.

As we learn more about the law of fiduciaries, we will be able to apply it with greater certainty to these difficult, but all too common, problems that arise in the context of Aboriginal claims. It is to be hoped that the Supreme Court of Canada will, before too much time passes, give content to the fiduciary obligations it describes in *Sparrow*. The Court has granted leave to appeal in *Apsassin*, but is more likely to focus on the issue of limitation periods in that case than on fiduciary duties. And, if the Court should uphold the statutory bar in that case, it will make it all the more important to have an appropriate, non-judicial process for Aboriginal claims.

D. *Final Considerations on the Fiduciary Relationship*

Until 1984, there was a great deal of uncertainty about the legal nature of the relationship between government and the Aboriginal peoples of Canada. It was variously described as a trust relationship, a trust-like relationship, a political trust or a wardship relationship.¹⁴⁰ More importantly, there was doubt as to whether the relationship was such that a breach could be referred to the courts for relief. That uncertainty was removed by the Supreme Court of Canada in *Guerin*,¹⁴¹ where a surrender of reserve lands for leasing was held to impose fiduciary duties on the Crown. Those duties were found to have been breached in circumstances described by the Court as equitable fraud.

In *Sparrow*, the doctrine was extended to encompass section 35 of the *Constitution Act, 1982*, which recognizes and affirms the existing Aboriginal¹⁴² and Treaty¹⁴³

¹³⁹ The difficulty with government secrets is that they eventually become known, as with the consultant's report, *supra* note 33, which reveals that government has a pattern of settling within its own expectations and at a level of about 25 percent of the claimants' valuations. We are aware of one instance where government was able to settle a claim below the range its own appraisers had given.

¹⁴⁰ See e.g. *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, [1950] 2 D.L.R. 225 (Rand J.).

¹⁴¹ *Supra* note 9.

¹⁴² The fiduciary aspects of section 35 were discussed by the Supreme Court of Canada in *Sparrow*, *supra* note 10, a case dealing with Aboriginal rights to fish. The Court, after a brief discussion of *Guerin*, held at 1108:

[T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content.

¹⁴³ The fiduciary nature of the Crown's Treaty obligations was ruled upon, without reference

rights of the Aboriginal peoples of Canada. There are still too few cases dealing with fiduciary obligations to Aboriginal peoples to discern the limits within which the government, and potential claimants, can operate today, much less standards for conduct dating back over centuries. And it is very likely that negotiation of these principles will lead to more and more appropriate settlements.

Bringing fiduciary doctrine into play is essential. As the Indian Commission of Ontario has said:

It is not possible at this point [1990] to say with precision what the exact nature of the Crown's fiduciary obligations will be ... 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.¹⁴⁴

We venture to say that every claim in the process today has an element of fiduciary obligation at its base. Yet the claims policy is silent on fiduciary obligation. That must change. The concept of the honour of the Crown will inform decisions about when the Crown is a fiduciary and what conduct is, or was, conscionable in the circumstances of each claim. And once those determinations are made, it will be well to remember *Guerin*: "Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal".¹⁴⁵

VII. TOWARDS A NEW CLAIMS POLICY

A. *First Principles*

Nemo iudex in sua causa. No one can be the judge of his or her own cause. Whether the new policy applies to all Aboriginal claims or not, and it is promised that it shall, this fundamental principle must apply. With respect to the present specific claims policy, no complaint has been more frequently voiced than the accusation that the government unfairly tilts the scales in its own favour. The Department of Indian Affairs and Northern Development and the Department of Justice currently act, as the Aboriginal Justice Inquiry of Manitoba bluntly noted, "as both judge and jury as well as defendant and author[s] of the laws that apply".¹⁴⁶ No policy that ignores this criticism will have any credibility amongst claimants.

Second, the basis for claims must be, or at least include in forceful terms, breach of fiduciary obligation by the Crown.

to s. 35, by the Supreme Court of Canada in *Bear Island*, *supra* note 37 at 572. Even in the absence of explicit guidance from the courts on this point, one need only look to the language of s. 35(1), "aboriginal and treaty rights", and the quotation in note 142, *supra* from *Sparrow* to extrapolate that Treaty obligations are, perforce, fiduciary obligations. No court, however, has been explicit on this point, and so far all that is available is *Bear Island*.

¹⁴⁴ *Discussion Paper*, *supra* note 32 at 32.

¹⁴⁵ *Supra* note 9 at 388-98.

¹⁴⁶ Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) at 178.

Third, a new policy should, again as promised, extend to all types of claims that may be advanced against the Crown in right of Canada by Aboriginal peoples. Such a policy should not inhibit claims of the fourth kind — those for which special processes like the B.C. Treaty Commission are designed — but rather stand in the wings while those special processes attempt settlements, always ready as an alternative if those processes do not work. Needless to say, there should be no special processes unless the claimants expected to participate support them.

Fourth, a new policy should make provision for provincial involvement. Claims from First Nations located in the provinces, in which restitution or an award of land and resources, or resource-sharing, are in issue, cannot be effectively settled without provincial involvement.

Fifth, there must be an independent body to guide the process for each claim and there should be sanctions where parties are demonstrably participating in bad faith or proceeding in a dilatory manner without good reason. Interim awards of costs might be an effective sanction where the government is the culprit. Loss of priority, suspension of the process for a set time, or termination (without decision) may be effective against claimants. The intent is not to move the process along faster than the parties wish, but to ensure that progress is being made at a reasonable rate. The observation of the Manitoba Aboriginal Justice Inquiry should serve as a caution in establishing this body: “the negotiation process ... is the only vehicle through which the claimants possess any significant degree of direct involvement and control”.¹⁴⁷ This element should be preserved and enhanced, not lost.

Sixth, there must be an independent body capable of making binding decisions or awards if the administrative process does not serve the needs of the parties. Provision for this type of decision-making may confer upon the arbiter the initial decision about the validity of claims, or it may function as an appellate forum in respect of decisions made by the government.¹⁴⁸ This independent body need not be the same body as described in the preceding paragraph.

Seventh, with the sole exception of legal opinions,¹⁴⁹ there should be full disclosure of government documents. This should not pose a problem as it is more the trend today than it has been in the past. Failure to disclose the offending lease to the First Nation, it should be remembered, was the basis for the finding of

¹⁴⁷ *Ibid.* at 180.

¹⁴⁸ This would be similar to the relationship between the Minister and the current Indian Claims Commission, except that the arbiter need not be a Commission, and the decision would not be binding.

¹⁴⁹ A limit on confidentiality of the government’s legal opinions is offered by Canada’s Privacy Commissioner, John Grace, in the *Annual Report of the Privacy Commissioner: 1993-1994* (Ottawa: Department of Supply and Services, 1994) at 30-31. In his view, s. 23 of the *Access to Information Act* has allowed the Department of Justice to create a unique “hegemony” of solicitor-client privilege for each legal opinion: the privilege is never waived, cannot be waived by the “client” Departments, and is never (under s. 25) considered to be severable in respect of supporting documents. His recommendations for a “potential harm” test and for waiver procedures are currently under consideration by the Attorney General.

equitable fraud in *Guerin*.¹⁵⁰ If that is the rule for actual transactions, it is essential for any process designed to review them.

Eighth, the process must provide for fair compensation. It is likely that the second most frequent criticism of the current specific claims policy is directed at the compensation criteria, which are little more than loaded dice.¹⁵¹ The principal guideline for compensation should be as set out in *Guerin*: "If ... the Crown breaches [its] fiduciary duty it will be liable to the Indians in the same way and to the same extent as if ... a trust were in effect".¹⁵²

Ninth, compensation should not be limited to monetary compensation. Where the loss relates to trust funds, for example, monetary compensation is appropriate. Where, on the other hand, the claim is for loss of land, provision should be made for land to be at least a significant component of the settlement.¹⁵³ In addition, there should be creative options such as different types of interests that can be acquired in settlement of a land claim, different lands in different places for different uses, co-management and resource-sharing. These options are necessary for communities which are making decisions for the Seventh Generation.

Tenth, both validation and remedies must address Treaties, and even modern land claims settlements, in accordance with their original spirit and intent. In some instances, that may mean consideration of a Treaty which, in context, is different than the written document.¹⁵⁴ In its remedial aspect, the policy should include provision for the renovation of Treaties — obviously with the full consent of the Aboriginal parties — to give them full force and effect in the modern world and for a future which we cannot know. This is a hazardous but necessary exercise, and must include provisions for future renovation and remedies for breach.¹⁵⁵

¹⁵⁰ *Supra* note 9 at 390.

¹⁵¹ Many of these are borrowed from the U.S. Indian Claims Commission legislation, but are no less offensive for that. Most U.S. observers would agree. They lower the standard of what is to be considered unconscionable consideration for any transaction, they include vague and arbitrary wording which has been interpreted by the government many times in a manner guaranteed to delay or halt negotiations, and they permit "gratuitous offsets" against any final settlement. The criteria are set out in *Outstanding Business*, *supra* note 28 at 30-31, and are reviewed in *Discussion Paper*, *supra* note 32.

¹⁵² *Supra* note 9 at 376.

¹⁵³ Many settlements today include provision for compensation funds to be used for the purchase of land, but subject to a complex policy for "Additions to Reserves". While that policy includes several essential considerations — such as environmental audits — it is too often used to limit program infrastructure funding by keeping reserves smaller and close together.

¹⁵⁴ Note that the U.S. Indian Claims Commission had jurisdiction to evaluate claims on this basis: see above.

¹⁵⁵ One of the many inequities of our Treaty history is the following provision common to the numbered Treaties: "[The Indian parties] promise and engage that they will ... assist the officer of [Her/His] Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty". Our history would have been different (and our future will be different) if officials of the Crown were also answerable for breaches of Treaty.

Eleventh, and last, the process must be adequately staffed and funded for purposes of addressing claims, settling claims and implementing settlements in a timely manner.

B. *The Principles at Work*

These eleven principles can be put into effect in many ways. One example would be to establish an Aboriginal Claims Commission which would receive claims, process them, rule on their validity, direct negotiations between claimants and the Crown, and have the power to make awards.

Another example would be an Aboriginal Claims Commission which is a “process” commission. It would receive claims, process them, build the claim record and then stop while validity is determined. Validation could be effected by agreement, by reference to an arbitrator, or by referring the record as a stated case to an existing court which would adjudicate the claims subject to special statutory rules; for example, no statutes of limitations, no laches, etc. (which are provisions in the current specific claims policy). Claimants could have the option of arbitration or stated case if there is no agreement on validity. If the claim is validated, the Commission could then begin building the record of negotiation and exercise defined powers to control the process. Again, if an *impasse* is reached, the issue could be referred to arbitration or to a court, as above.

A third option, equally consistent with the eleven principles, would be an Aboriginal Claims Commission that is purely supervisory in the sense of monitoring, evaluating and reporting upon a consolidated claims process. If this option were implemented, separate provisions would have to be made for appeals and reviews.

We are not recommending any of these options, nor do we suggest that they are the only ones to be considered. They are included here simply to demonstrate that building a policy upon proper principles does not necessarily lead to the establishment of any particular kind of independent institution, nor necessarily to only one. The policy that is implemented should be one upon which all parties have been consulted and for which there is substantial support. It is our strong submission that no policy proposal can attract such support unless each of the eleven principles is included. We commend them to all concerned.

In the 25 years that have passed since the *1969 White Paper* termination policy was proposed, in the 21 years since *Calder* was decided, in the 10 years since *Guerin* was decided, and in the 4 years that have passed since *Sparrow* and *Oka* — the best of times and the worst of times — so much has happened to fill the void that was claims policy that a survey article of this length cannot hope to annotate it all. Accordingly, we have had to choose certain points of emphasis, and that has forced the omission of equally important issues such as the current law on Aboriginal title and an analysis of the major claims settlements and initiatives. In the end, we wrote about what we have been involved with, and we hope to have done some justice to those issues. For the rest, we trust that this type of survey will be continued: there is much more that needs to be said.

