Indian Claims Commission

Annual Report

1991-1992 to 1993-1994

Fairness in Claims Negotiations

Commission Logo

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

The wisps of smoke rising upward to the Creator lead to a tree covered island representing Canada, where claims are being negotiated.

The four eagle feathers, symbolizing the races of the earth, represent all parties involved in the claims process. Elements of water, land and sky etched in blue and green indicate a period of growth and healing.

Ernest Benedict
Mohawk Elder
Akwasasne, Ontario
June 1992

Traditionally, the pipe was smoked to bring a spiritual dimension to human affairs, to seal an agreement, to bind the smokers to a common task or to signal a willingness to discuss an issue. It is still being used today for the same reasons. For this reason, the pipe was chosen as the centre of the Indian Claims Commission logo.

Centre Figure Design by **Kirk Brant**

Kirk Brant, a member of the Mohawks of the Bay of Quinte, has completed two years of graphic design at Algonquin College in Ottawa, Ontario.

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Indian Claims Commission

CANADA

Commission des revendications des Indiens

Commission Co-Chairs
Jim Prentice, QC
Dan Bellegarde

TO HIS EXCELLENCY
THE GOVERNOR GENERAL IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY

On July 15, 1991, the Cabinet through Order in Council (P.C. 1991-1329) created the Indian Specific Claims Commission, and appointed Harry S. LaForme chief commissioner. After discussions lasting the better part of a year, on July 27, 1992, the Cabinet amended that Order by P.C. 1992-1730. Subsequently, six additional Commissioners were appointed, and the work of the Commission moved from initial administrative arrangements to consideration of specific claims.

On March 17, 1994 we were appointed Co-Chairs of the Commission. Harry S. LaForme left the Commission in February 1994 when he was appointed a judge to the Ontario Court, General Division. Of the six Commissioners appointed in July 1992, Carol Dutcheshen has accepted a full-time position with Ontario Hydro in Toronto. Regrettably, Charles-André Hamelin passed away in July 1993.

The Commission has swiftly acquired the research, mediation and liaison skills necessary for the review of claims. At the close of 1993/94, the Commission had received 78 claim submissions from First Nations, completed five inquiries, and facilitated 14 claims which are now in direct negotiations with the Department of Indian Affairs and Northern Development. As well, 11 claims were being assessed by the Commission for acceptance as inquiries, 10 claims involved the Commission in mediation activity, and 12 inquiries were in process.

The Commission herewith makes six important recommendations for consideration by Cabinet that deal with the response protocol, government representation at planning conferences, mediation challenges, mandate challenges, historical documents and the need for the appointment of a Commissioner from Quebec to replace the late Charles-André Hamelin.

It is with pleasure that we submit this Annual Report, which in effect covers the activities of the Commission from August 1991 to March 1994.

Respectfully submitted,

Jim Prentice, QC
Co-Chair

Dan Bellegarde
Co-Chair

March 1994

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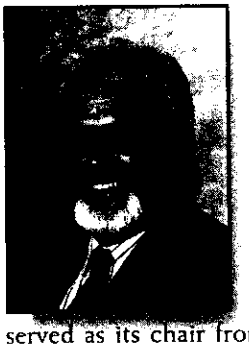
Members of the Commission

Co-Chair

P.E. James Prentice, QC is a lawyer with the Calgary firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989.

Roger J. Augustine is a MicMac who has been Chief of the Eel Ground First Nation of New Brunswick since 1980. In 1982, Chief Augustine became a member of the National Native Advisory Council on Drug Abuse, and served as its chair from 1984 to 1986. He served as the president of the Union of New Brunswick Indians from October 1990 to January 1994.



Co-Chair

Dan J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988, he has held the position of first vice-chief of the Federation of Saskatchewan Indian Nations.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs. Corcoran has extensive experience in Aboriginal government and politics at the local, regional and provincial levels. She served as a commissioner on the Spicer Commission in 1990. In April 1993, she was appointed to a two-year term as Commissioner on the British Columbia Treaty Commission. Mrs. Corcoran was called to the British Columbia Bar in 1992.

Former Commissioners

Former chief commissioner

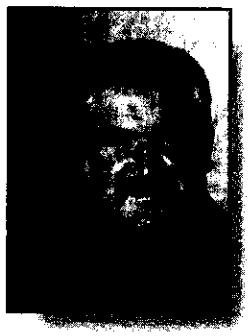
Many congratulations were extended to

Mr. Justice Harry S. LaForme on his appointment to the Ontario Court. He served as chief commissioner since 1991. Justice LaForme is an Anishinabe from the Mississaugas of New Credit First Nation in southern Ontario. As a lawyer, he specialized in First Nation land claims. While Indian Commissioner of Ontario from 1989 to 1991, he submitted a discussion paper on native land claims to the governments of Canada, Ontario and First Nations. As well, he served as co-chair to the national Chiefs' Committee on Claims.

Former commissioner

Carol A. Dutcheshen in May 1994 accept-

ed a position with the Law Division of Ontario Hydro. She served as a commissioner for approximately two years and will be remembered for her contributions. Ms Dutcheshen is a lawyer with experience in the legal aspects of commercial development on Indian reserve land, and in real property law.



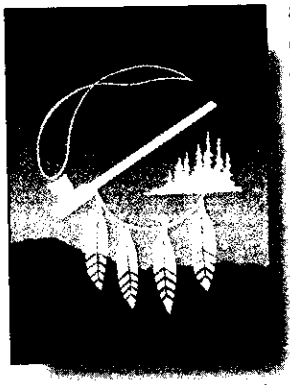
Special Tribute

Charles-André Hamelin of Baie-Saint-Paul was a member of Parliament for Charlevois from 1984 to 1988, a member of the National Parole Board, a commissioner with the Indian Claims Commission and a consultant on international business development. Mr. Hamelin died suddenly in Montreal on July 29, 1993.

Message from the Commissioners

On behalf of the Indian Claims Commission it gives us great pleasure to present this Annual Report, which covers the time from the creation of the Commission to the end of 1993/94.

The first year and a half was devoted to start-up and mandate issues. Consequently, 1993/94, was essentially the first full year of the Commission's operation. During this time the Commission conducted five inquiries in First Nation communities. Two Reports on Findings and Recommendations to deal with the Athabasca Denesuline, Cold and Canoe Lake First Nations' claims were produced. Reports on the Lax Kw'alaams and Young Chipeewayan inquiries will be released this summer.



The Commission is not a court of law. It is a Commission of Inquiry which has a mandate that specifically requires us to listen to material that might not be acceptable in a court of law. Accordingly, elders, chiefs and members of the communities have all been given the opportunity to tell the Commission their personal thoughts on the claims. As a result, the communities have become involved in and supportive of the process.

The first report on the Cold Lake and Canoe Lake Inquiries was released in August 1993 and recommended that government accept the First Nations' claims for negotiation under Canada's Specific Claims Policy. These claims arise from the creation of the Primrose Lake Air Weapons Range in 1954, and the devastating effects it had on the members of those two First Nations. The second report on the Athabasca Denesuline claim was presented to the parties in December 1993. We are particularly pleased with the way these inquiries brought all parties to the table as equals. Effectively, the parties all shared the same objective: to do what is fair for the community.

The Commission has also concentrated on alternative dispute resolution techniques, starting with increased cross-cultural awareness by all its staff and Commissioners. Together, we have shown respect to the First Nations involved, and as a result we are increasingly enjoying the confidence of all parties who have brought claims to us. By stressing understanding and fairness, we believe it is possible for people to walk away from the process feeling that justice has been served.

The Commission's interpretation of Treaties is overdue and unique. We are encouraged by the response to our approach from lawyers and others involved in land claims. We hope that this represents the beginning of interpreting treaties as they were intended to be and should be interpreted.

Good as it is, this Commission can be made better. It could decide the validity of claims, instead of waiting for them to be rejected first. Its researchers, mediators and negotiators could improve the chances for an appropriate, speedy – and above all, fair – resolution to claims.

The Commission's approach works. It is perhaps at the preliminary planning conferences that the Commission has been most successful. The parties come together before Commission staff they trust to

review and decide the central issues of the claim. Stalled talks at this stage of the inquiry process have the potential to get re-started without going through a full inquiry.

We are encouraged by the shift in attitude we have seen in government over the past two years, and we believe the Commission can take credit for a more positive attitude towards claims and a willingness amongst government departments to look at other ways of dealing with grievances.

This Commission has a special importance to all Canadians. It is respected, it has credibility, it has researched diligently, and listened attentively. This Commission has the capacity to speed up the claims process which has dragged on for generations. Moreover, this Commission is crucial to the elimination of the backlog of claims which is of such great concern to aboriginal people and other Canadians.

Historical Overview of the Commission

The Indian Claims Commission conducts impartial inquiries either when a First Nation disputes the government's rejection of its specific claim, or when a First Nation disagrees with the compensation criteria used by the government in negotiating the settlement of a claim. In either of these situations, the Commission may conduct hearings to complete its report and recommendations, which may include sessions in the relevant First Nation community. It also provides mediation services to help reach agreements about any matter relating to a land claim. The Commission operates under the provisions of the *Inquiries Act*.

"...a fair process where First Nations can go for a fair hearing..."
Former chief commissioner
Harry S. LaForme

Background to the Creation of the Commission

The idea of an Indian Claims Commission is not new. Two Parliamentary Committees on Indian Affairs, one in 1947 and the other in 1961, recommended the creation of such a commission, and two bills were prepared for the House of Commons in 1963 and 1965, but neither progressed to a vote.

In 1969, the Government of Canada issued a discussion paper on Indian policy, generally known as the "White Paper." This document introduced the concepts of "lawful obligation" and "specific" claims. However, the White Paper asserted, among other things, that claims of Aboriginal title were too vague to be capable of specific remedy. An angry response from the Aboriginal community caused the government to backtrack, and helped propel the development of the claims agenda.

Four years later in 1973, the Supreme Court of Canada ruled that Aboriginal Title does exist, but may be extinguished in certain circumstances. The case, *Calder v. Attorney General of British Columbia* (1973) and the Aboriginal opposition to the White Paper were major factors in the review of the White Paper's policies.

One of the White Paper's recommendations was the creation of an Indian Claims Commission. Dr. Lloyd Barber was appointed Indian Claims Commissioner in 1969. His 1977 report did not contain any detailed recommendations.

The Specific Claims Policy

The Government of Canada initiated its current claims policy in 1973, after *Calder*. In 1982, the government summarized and published its specific claims policy in the booklet *Outstanding Business*. This publication spelled out what a claim is, how claims must be examined, plus the criteria by which to validate the claim or to compensate claimants.

The two categories of claims, "comprehensive" and "specific" were created by the Department of Indian Affairs and Northern Development (DIAND) without sufficiently consulting the Aboriginal Peoples of Canada, many of whom perceived these categories as artificial and even convenient for the federal government. The distinction did

nothing to diminish the backlog of claims to DIAND. Moreover, the Department's slow process of handling claims was criticized by virtually all observers, including the Auditor General.

The claims policy was also criticized by the Canadian Bar Association's Special Committee report, *Aboriginal Rights in Canada: An Agenda for Action* (1988), which also recommended the establishment of a specific claims tribunal and a Royal Commission to examine treaty issues.

The Momentous Year Prior to the Commission's Creation

Throughout 1990 there were major developments in law, politics and the media that led to the creation of the Commission. In May, the Supreme Court of Canada handed down its precedent-setting decision on the *Sparrow* case, which represented the culmination of years of litigation about Aboriginal rights that began with the *Guerin* decision in 1983. Each case confirmed and strengthened the bond between Aboriginal rights and land claims. Together, the cases pronounced and subsequently clarified the concept of the "fiduciary duty" owed by the Crown to Aboriginal Peoples.

In June 1990, Elijah Harper, an Aboriginal member of the Manitoba legislature, protested the federal government's policies of exclusion by opposing the Meech Lake Accord. Soon after in July, the "Mohawk summer" erupted at Oka.

Photo: Fred Cattroll

Micmac Elder Margaret Labillios greets Commissioner Augustine at Commission's grand opening reception in Ottawa August 19, 1992.

"This Commission was struck in the days after Oka. I feel that it embodies the consensus which exists amongst Canadians that there is a better way to address historical Aboriginal grievances."
Commission Co-Chair
Jim Prentice

Aboriginal issues came to the forefront of the Canadian public conscience. The government's response on September 25, 1990, was to announce the "four pillars" of the "Native Agenda," the first of which was the acceleration of the settlement of specific claims. At the same time, the Indian Commission of Ontario (ICO) released a "Discussion Paper on First Nations Claims." The paper contained influential recommendations, including the establishment of an independent body similar to the Indian Claims Commission.

In December 1990, an independent Chiefs' Committee on Claims released a report which (like the ICO) was critical of the narrow scope of government policy, its failure to address many treaty issues, and its slow implementation process.

An Independent Body for the Review of Specific Land Claim Disputes

The Indian Claims Commission was established in July 1991 as an independent body to inquire into and report on disputes between First Nations and the Government of Canada relating to claims based on treaties, agreements or administrative actions. Harry S. LaForme was appointed chief commissioner.

The Mandate of the Commission Challenged and Revised

In its first year, the Commission was deeply involved with discussions between the Government of Canada and the Assembly of First Nations (AFN). The Order in Council creating the Commission used much of the wording from the 1982 booklet *Outstanding Business*, which had been criticized from many sides as a flawed document. The AFN was particularly concerned that by enshrining the words of that booklet in an Order in Council, the government was essentially giving a contentious policy the force of law. The Commission was equally concerned because the wording of the mandate severely limited the Commission's independence, by prescribing the criteria — and in effect the outcome — of an inquiry.

"It was like starting a Commission with one hand tied behind its back."
Former chief commissioner
Harry S. LaForme

AFN National Chief Ovide Mercredi criticized the terms of reference of the Order in Council as unconstitutional. He also noted that the AFN had not been consulted.

The Chiefs' Committee met in Quebec in August 1991. They indicated that the Commission should continue with its work while the AFN investigated the legality of the mandate. Two legal opinions were obtained, one of which suggested that a constitutional argument might succeed. At a second meeting in Winnipeg in November, a sub-Committee of Chiefs drafted an amended Order in Council that deleted the contentious material from *Outstanding Business*, giving the Commission more independence.

The chief commissioner advised the Minister that the wording of the existing mandate was not acceptable, and that an amendment was necessary before a meeting between the Minister and the National Chief. That meeting did not take place, but thanks to one of 27 recommendations made by the Chiefs' Committee on Claims in their December 1990 submission, the AFN/ Government Joint Working Group (JWG) was created.

The mandate impasse was partially resolved at a meeting in Vancouver in December 1991. The Chiefs' Committee referred the issue of the Commission's mandate and the appointment of more Commissioners to the JWG. During that week, officials from DIAND, the chief commissioner of the Indian Claims Commission and the National Chief appeared before the House Standing Committee on Aboriginal Affairs.

The JWG met in Victoria in February 1992. They agreed on a revised mandate that was endorsed by the AFN later that month. The AFN also agreed to submit a list of prospective commissioners on the understanding that three would be named from that list. The revised Order in Council for the Indian Claims Commission was passed on July 27, 1992; and six additional Commissioners were appointed.

Establishing Agreement on How the Commission Should Operate

While the Commission's mandate was being debated, the then chief commissioner and senior staff took the opportunity to consult widely with First Nation leaders and experts in the field of alternative dispute resolution.

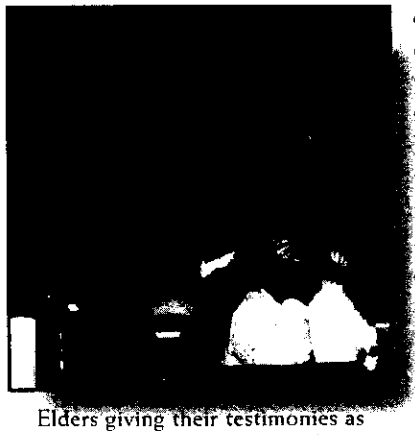
The chief commissioner and the Commission's liaison director consulted with the Chiefs' Committee on Claims, members of the JWG and at First Nations meetings. The Commission made presentations at the annual meetings of organizations including the Indigenous Bar Association, the

Canadian Bar Association's Native Law Panel on Self-Government and the Union of Ontario Indians. The chief commissioner visited groups in most of the provinces to discuss community expectations and to hold exploratory talks with claimants who wondered whether the Commission could help them.

In August 1991, the Commission explored its mandate with experts and developed an organizational plan by which staff members were recruited. An in-house planning session decided the Commission's procedures for handling the caseload of claims that would follow the resolution of the mandate question and the appointment of more commissioners.

The Commission adopted a communication plan that led to increased awareness of both its services and the names of the newly appointed Commissioners. It published and distributed an *Information Booklet* and a *Submission Guide* to which claimants can refer when submitting a claim. A reception formally launched the Commission and introduced the Commissioners.

Photo: Bert Crowfoot



Elders giving their testimonies as members of the Cold Lake First Nations' community listen attentively.

"The ICC was formed by cooperative action of the Assembly of First Nations and the Government of Canada. There was an understanding that things could not carry on in the ways of the past."
Commission Co-Chair
Dan Bellegarde

The Commission consulted with other organizations operating under the *Inquiries Act* to learn from their organizational and procedural experience, and to find and recruit experienced staff. Other Commission contacts included The Royal Commission on Aboriginal Peoples, Treaty and Aboriginal Rights Research Centres, the Saskatchewan Treaty Commission, the Indian Commission of Ontario, the Waitangi Tribunal in New Zealand and the National Archives and Library in Ottawa.

Initial Reaction to the Work of the Commission

From its inception, the Commission focused on research, mediation and liaison. It has constantly been concerned to discover relevant historical facts, using expert assistance to assess verbal and written statements pertaining to claims. The Commission laid emphasis on sensitivity to cultural issues. To this end, it developed an alternative dispute resolution process. Its successful use of mediation has respected claimants' traditions and culture by avoiding the bruising exchanges characteristic of an adversarial courtroom process. In all its endeavours, the Commission has constantly maintained liaison with both First Nations and government.

The Commission has operated on a basis of equality with everyone. By stressing its independence and commitment to fairness, and by treating claimants with respect, the Commission received a favourable and lasting response. Seventy-eight First Nations have contacted the Commission with a variety of problematic claims.

The Commission was able to assist 14 First Nations resume direct negotiations with DIAND almost immediately. The Commission's initial review of these claims typically

discovered a relatively minor stumbling block, and suggested a solution that re-started stalled talks. Of these, the Henry Laubicon Claim was settled, and both the Alexis and Gesgapegiag First Nations returned to the negotiating table. These relatively brief consultations between the Commission and the First Nations expedited the existing process with unexpected ease, due to the Commission's neutrality, perceived fairness and expertise in the claims process.

"I believe that Canadians can take confidence that certainly in the area of specific claims that there is a fair and an impartial Commission in place which has been empowered to review these types of situations and to make recommendations."
Commission Co-Chair
Jim Prentice

The Commission's first two reports on the *Cold Lake and Canoe Lake Inquiries* (the Primrose Lake Air Weapons Range) and the *Athabasca Denesuline Inquiry* significantly affected the First Nations concerned. Even though government has not yet responded formally to these reports, the people involved declared themselves satisfied by the way in which the inquiries had been conducted.

Improvements and Opportunities

Internally, the Commission's inquiries can be improved by streamlining paperwork, thereby shortening the time necessary for process. This will make it possible to supply mini-reports for claims that can be re-routed into negotiation after a Planning Conference. Similarly, the Commission's experience will speed the process by helping both parties to a better understanding of what documentation is needed. An enhanced information program can address both these opportunities.

In terms of the Commission's larger role and relationship to government, there is an opportunity to improve the entire claims process. The present system demands that a claim be either completed or rejected by both DIAND and the Department of Justice before it can be brought to the Commission. Were the Commission to receive claims before either department, its credibility for independence and fairness could lead to a mediation process in which all parties could strive for an equitable solution. This would replace the adversarial relationship between First Nations and the federal government and substitute a culturally relevant and effective process of alternate dispute resolution.

"Why go through a rejection process that alienates everyone?"
Former chief commissioner
Harry S. LaForme

The major opportunity for government lies in its prompt attention to completed reports that are the mandated outputs of the Commission, in which the claimants have placed faith. Contingencies, such as changes in governments and ministers responsible, are contributing factors, but the fact remains that the government's slow response undermines the credibility of the entire process and reduces the good faith necessary for the conclusion of the many cases that are still outstanding.

Commission Recommendations to Government

The Commission has faced delays that spring from misunderstanding by departments and agencies of government. Many of these issues are well on the way to resolution through liaison; however, six important matters are beyond the scope of either the Commission or those departments with which it interacts. These matters require the attention of government.

The Commission offers six recommendations concerning:

1. Response Protocol
2. Mediation Challenges
3. Government Representation at Planning Conferences
4. Mandate Challenges
5. Historical Documents
6. Quebec Commissioner Appointment

Resolving these issues will have favourable consequences both for the work of the Commission and the overall relationships between government and First Nations. The first three are more general, and deal with government's need to recognize the full implications of the Commission's role and mandate. The next two are specific matters that are *en route* to resolution, but which need to be expedited by positive action. The last is a matter which should be addressed as soon as possible.

1. Response Protocol

Recommendation 1.

That the parties to an inquiry by the Indian Claims Commission shall respond formally in writing to the Findings and Recommendations Report issued by the Commission within sixty days of the date of transmittal.

Rationale

The Commission was mandated to provide independent review of First Nations' grievances about decisions rendered by government regarding compensation or the rejection of specific claims. As one of the programs associated with the "Native Agenda" on outstanding issues, the Commission's stated intent was to expedite the process of reconciliation of disputes. The Prime Minister's communications indicated that the government would respond to recommendations made by the Commission following its inquiries.

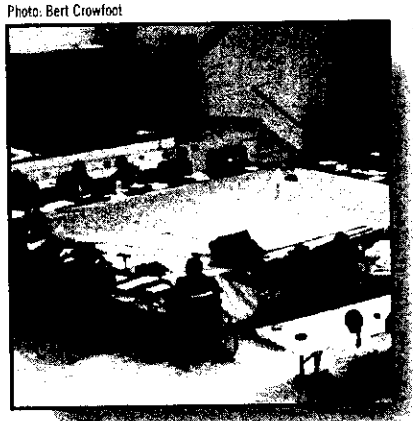
In accordance with its mandate, the Commission received its first claims for inquiry from the Cold Lake and Canoe Lake First Nations. These claims concerned rejections of their specific claims arising from the creation of the Primrose Lake Air Weapons Range. After examining the historical documents associated with these disputes, the Commission convened community hearings in the winter of 1993, and issued its Report on Findings and Recommendations to the government and the claimants on August 16, 1993. The First Nations responded to the recommendations formally and immediately. At the time of writing this Annual Report (March 1994), government has yet to make a formal response.

The second claim accepted for inquiry was from the Athabasca Denesuline.

The Commission's Report on Findings and Recommendations was issued to the government and the claimants on December 21, 1993. At the time of writing this Annual Report, the First Nations have responded formally, but not the government.

Formal responses to the Reports would contribute to the perception of fairness and justice respecting specific claims negotiation. As indicated elsewhere within this Annual Report, the Commission has fulfilled its mandate by successfully gaining and maintaining the confidence of the parties to its inquiries, mediations and planning conferences. It would be unfortunate if this goodwill were undermined by lack of response from government.

Photo: Bert Crowfoot



The Cold Lake First Nations' community information session in progress at the community's multi-purpose building December 14 to 17, 1992.

Furthermore, the Commission is streamlining the inquiry process to reduce unnecessary delay as it addresses the next 10 claims accepted for inquiry. Reports on the Findings and Recommendations will be completed on many of these claims within the next year. The Commission anticipates that a further 10 claims will soon pass from their present status as requests to the inquiry level; and that many more requests will be received in the coming months. Therefore, the Commission recommends that both parties (government and First Nations) adopt the foregoing response protocol, agreeing to respond within sixty days of receipt of the Commission's Report. Since the Commission's Reports are advisory, and the parties are not bound by the findings or recommendations, a swift, formal response should not be an onerous burden for either party.

2. Mediation Challenges

Recommendation 2.

That government departments recognize that refusal to mediate early in the inquiry process necessitates a costly and time-consuming full inquiry, often resulting in mediation in any event.

This recommendation also emerges directly from the Commission's mandate. During preliminary investigations of requests from First Nations, the Commission has seen the possibility for immediate return to the bargaining table, and has offered its mandated services as mediator. In six such cases, the response from DIAND has been a statement that mediation in their view is not appropriate. The consequences are circular: delay as the Commission moves to a full inquiry, frequently followed by the Commission's formal recommendation of mediation.

As a result of recent successful resolutions at the Planning Conference stage, the Commission is optimistic that this matter is on its way to being resolved. Adoption of the foregoing recommendation will hasten and confirm an improving situation.

3. Government Representation at Planning Conferences

Recommendation 3.

That government ensure full representation at Commission Planning Conferences, and that it more fully address the potential for mediation.

Rationale

The Commission has noticed that Canada lacks the presence of the Specific Claims Office at Planning Conferences of the ICC. The spokespersons for the claimant and their clients are present at these conferences; however, because of the transfer of responsibility from the Department of Indian Affairs and Northern Development to the Department of Justice at the outset of an inquiry, only Justice attends. The Justice spokespersons are therefore unable to obtain instructions from their client, DIAND, during the meeting. Consequently, counsel for the Department of Justice has no power to speak for Canada.

The Commission has asked that the Specific Claims Office of DIAND send a representative to future Planning Conferences, and believes that the Department will do so.

However, the underlying problem remains. There appear to be two "tracks" from the point of view of government:

1. negotiation of a specific claim, which is DIAND's responsibility; and

2. inquiry, which is the responsibility of Justice.

The "third track" of mediation, before, after or during an inquiry, does not yet appear to have a home.

As a result, issues that might be resolved, go unresolved, and the Commission's mediation mandate languishes. However, as a result of recent successful resolutions at the Planning Conference stage, the Commission is optimistic that this matter is on its way to being resolved. Adoption of the foregoing recommendation will hasten and confirm an improving situation.

4. Mandate Challenges

Recommendation 4.

That government departments more fully recognize the mandate of the Commission.

Rationale

Though government response to the Commission's existence and mandate is generally becoming more favourable, there have been occasions when the Commission's mandate has been directly challenged.

The Commission believes that these challenges stem from Canada's unfamiliarity with its role, and also from an unnecessarily technical interpretation of the Commission's mandate. From its inception, the Commission was designed not to be a court of law. Its role is to take a non-adversarial approach, and it is empowered to examine information and testimony not necessarily acceptable in a court of law. Its recommendations are not binding on either party. Nonetheless, it may be perceived in some areas as a court of appeal, whose decisions might reflect badly on those who made the initial determination against which claimants have protested.

The Commission's role and conduct have been to seek resolution initially through mediated negotiation, and failing that, to conduct a full and open inquiry. Canada's

interpretation has led to technical challenges that are not supportable by the Commission's mandate, intent or actions.

Again, the Commission is optimistic that this matter is on its way to being resolved. Adoption of the foregoing recommendation will hasten and confirm an improving situation.

5. Historical Documents

Recommendation 5.

That the relevant departments of government expedite the delivery of documents requested by the Commission.

Rationale

The Commission has the power to subpoena documents and witnesses, but it usually proceeds by the claimants giving the Commission permission to obtain documents from government relating to their claim. Claimants can offer research, documents, videos or other information that help explain the claim, and can indicate where such sources of information might be, so that the Commission can access them. The review process is internal to the Commission. It respects the confidentiality of any information so designated by the claimants.

In the past, it has taken up to four months for the relevant government departments to supply documents requested by the Commission.

Yet again, the Commission is optimistic that this matter is on its way to being resolved. Adoption of the foregoing recommendation will hasten and confirm an improving situation.

6. Quebec Commissioner Appointment

Recommendation 6.

That Government move with all due speed to appoint a Commissioner from Quebec.

Rationale

The untimely death of Commissioner Hamelin in July 1993 has added to the work-load and schedules of the other Commissioners. What is more important, the lack of a Commissioner for Quebec seriously affects the regional balance and cultural expertise necessary to a fully representative national Commission. The contributions of a Quebec Commissioner are essential for the Commission to reflect accurately the linguistic, cultural and historic uniqueness of Quebec and the First Nations of that province.

Claims Brought forward to the Commission

Summary of Claims March 31, 1994

78	claims submitted to the Commission
5	completed inquiries
11	claims being assessed for acceptance as inquiries
10	claims involving mediation
14	cases brought to the Commission, now in direct negotiations with DIAND
25	other claims
1	settlement
12	inquiries in progress

Completed Inquiries

Cold Lake (Primrose Lake Air Weapons Range
Canoe Lake (Primrose Lake Air Weapons Range
Athabasca Denesuline
Lax Kw'alaams (report June 94)
Young Chipeewayan (report July 94)

Cold and Canoe Lake Inquiry (Primrose Lake Air Weapons Range) August 1993

The overall issue facing the Commission was:

Did the Government of Canada properly reject the land claims of the Cold Lake and Canoe Lake First Nations in 1975 and 1986?

This issue broke down into two questions:

1) Did the Government of Canada breach its treaties with the peoples of Cold Lake First Nations (Treaty 6, 1876) and Canoe Lake Cree Nation (Treaty 10, 1906) by excluding them from their traditional hunting, trapping and fishing territories in 1954 so that those lands could be converted for use as the Primrose Lake Air Weapons Range? and

2) Did the Government of Canada breach any fiduciary obligation owed to the First Nations, following the exclusion of their people from their traditional territories?

The Commission traveled to the communities, pursuing its mandate to listen to historical evidence, including that which might not be admissible in a court of law. The evidence was sincere, compelling and uncontradicted. The Commission was struck by the totality of the destruction of these communities. A centuries-old traditional lifestyle characterized by communal self-sufficiency was abruptly terminated "for the good of Canada." For 30 years, claims for fair compensation and reasonable rehabilitation were repeatedly advanced by the First Nations, and repeatedly rejected by successive governments.

"The Cold Lake and Canoe Lake claims were claims with huge consequences. No one could sit through this without saying, 'We have to do something.'"
Commission Co-Chair
Dan Bellegarde

The Commission's conclusions after the hearings and intensive archival research were:

1) That as a consequence of the abrupt exclusion of the peoples of the Cold Lake and Canoe Lake First Nations from virtually all of their traditional territories and the consequent destruction of their independent lifestyle despite all assurances and guarantees to the contrary, the

Government of Canada is in breach of Treaties 6 and 10.

2) That the Government of Canada was a fiduciary on behalf of those First Nations and breached its fiduciary duty in consciously failing to provide adequate compensation or any means of rehabilitation for the claimant First Nations.

The Commission's determination (in part) was:

In our view, no reasonable interpretation of these treaties would allow government to destroy the Indian economies upon which the treaties were premised. That, however, is precisely what was done here through the expulsion of claimant First Nations from their traditional lands....In our view, the language of the treaties alone is sufficient to reach this conclusion....The full historical background serves to confirm the significance of the undertakings given to the Treaty Indians and the extent of the breach....Not every taking up of treaty land for settlement or other purposes would constitute a breach of treaty. That, however, does not persuade us that compensation and other remedies are not available when a breach on the scale that we have found here occurs.

Photo: Bert Crowfoot

Elder Isabelle Martial giving testimony at the Cold Lake First Nations' community information session.

The Commission recommended:

That the Primrose Lake Air Weapons Range claims of the Cold Lake First Nations and the Canoe Lake Cree Nation be accepted for negotiation pursuant to the 1982 specific claims policy of Canada.

Response to Report

On August 16, 1993, the Indian Claims Commission presented its report to the parties involved in the Primrose Lake Air Weapons Range Inquiries (PLAWR). Other First Nations have submitted PLAWR related claims to the Commission, but have agreed to put their inquiries on hold pending the government's formal public response to the first report. A preliminary response from the former government to the Primrose Lake Report was received October 13, 1993. The Minister of DIAND at the time stated that she expected to accept the Commission's recommendations "where they fall within the Specific Claims Policy" and that the Commission could expect a formal response in the next two to three months.

"It is only recently that the words of the elders were able to be considered in the review of claims."
Commission Co-Chair
Dan Bellegarde

The Cold and Canoe Lake First Nations anxiously await a formal response from the government. The Canoe Lake and Cold Lake First Nations are pleased with the Commission's recommendations. They are aware of the changes in Ministers responsible and the recent election; however, they are understandably disappointed that no formal response has been made to date. By report, residents of the reserves are now being asked to compete for some of the contract jobs on the Armed Forces Base, which they perceive as a positive outcome of the process.

Athabasca Denesuline Inquiry, December 1993

The Commission acted on its mandate to inquire into specific claims that have been rejected by Canada on the basis that they are not valid according to the Specific Claims Policy (published by the Department of Indian Affairs in 1982 in a booklet entitled *Outstanding Business*). This booklet directs that all relevant historical evidence, including evidence that might not be admissible in a court of law, must be taken into account in the assessment of claims.

The claim of the Denesuline arises out of the Government of Canada's denial that the Denesuline have treaty rights north of the 60th parallel....The central question facing the Commission was whether the Government of Canada owes an outstanding lawful obligation to the Denesuline.

The specific issues before the Commission were:

1) Does the geographical scope of Treaties 8 and 10 extend north of the 60th parallel or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

2) In the alternative, do the claimants have a treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

3) Has Canada breached its lawful obligations to the claimants under the Specific Claims Policy by failing to recognize that:

a) the geographical scope of the treaties extends north of the 60th parallel; or that

b) the claimants have treaty harvesting rights north of the 60th parallel?

The parties agreed that the Denesuline had used and occupied lands north of the 60th parallel since time immemorial and that they continue to do so today. The Denesuline agreed to sign Treaty 8 only when the Treaty Commissioners assured them that they "would be as free to hunt and fish after the treaty as they would be if they never entered into it." Similarly, they agreed to sign Treaty 10 only when the Treaty Commissioners promised "they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and ... that they had the privilege of hunting and fishing as before." There was no evidence before the Commission that the treaty harvesting rights of the Denesuline were ever expressly limited to the geographic areas defined by the metes and bounds descriptions in the treaties. The Denesuline continued to operate under the assumption that they had treaty rights to hunt, fish and trap north of the 60th parallel until 1989. At that time the Government of Canada advised them, for the first time, that their rights to that portion of their lands were extinguished.

The Commission concluded:

Issue 1: The Geographical Scope of Treaties 8 and 10

The evidence does not support the claimants' submission that the boundaries of Treaties 8 and 10 extend beyond the metes and bounds descriptions to include the traditional lands of the Denesuline. The traditional territory of the Denesuline was not delineated at the time of the signing of the treaties and, for the most part, remains undelineated to this day.

The Denesuline's traditional lands outside the boundaries described in Treaties 8 and 10

were not intended to be "opened for" non-Indian settlement, mining, lumbering, and such uses at that time. The parties did not intend the boundaries of the treaties to encompass the Denesuline traditional lands north of 60° latitude.

Issue 2: Harvesting Rights beyond the Boundaries of the Treaties

The Text of the Treaties

The language employed in Treaties 8 and 10 is essentially the same. The correct interpretation of the text of the treaties is that the parties intended the right to hunt, fish and trap to apply to *all* the traditional lands surrendered by the Denesuline.

The Relevant Historical Evidence

- Canada's objective was to secure a specific tract of land for settlement and other purposes; the objective of the Dene was to protect their traditional lifestyle.

- The Denesuline were extremely apprehensive about entering into Treaties for fear that their traditional way of life, including hunting, fishing and trapping, would be jeopardized.

- To assuage the concerns of the Denesuline, oral assurances were given by the Treaty Commissioners that the Denesuline would be "as free to hunt and fish after the Treaty as if they had never entered into it."

- There is no cogent evidence that the Treaty Commissioners at any time told the Denesuline that their right to hunt, fish and trap would be restricted to a specific geographic area.

- It is not a reasonable interpretation of the evidence to say that the Denesuline knowingly and deliberately gave up all their traditional territory in return for certainty of harvesting rights over a smaller area described by the metes and bounds. Further, this was not where they hunted caribou. It is unreasonable to think that a people known as the "caribou eaters" would have agreed to such an agreement.

- While the subsequent conduct of the parties is not conclusive, nonetheless it is consistent with our interpretation of the treaties.

Issue 3: Does Canada Have a Lawful Obligation?

- It is not necessary in the case of "non-fulfillment of a treaty or agreement" to show a "breach" of a lawful obligation before a claim may be considered for negotiation under the Claims Policy. Rather, the claim must disclose an "outstanding lawful obligation."

- We find that Canada has treaty obligations in the matter before us. Canada's lawful obligation must include, at a minimum, the requirement to recognize formally the treaty rights in issue, and to ensure that the rights of the Denesuline are fulfilled.

- In addition to disclosing an outstanding lawful obligation, to be eligible for negotiation a claim must show some loss or damage capable of being negotiated under the Policy.

- Currently, the Specific Claims Policy and process are ill-equipped to deal with the Denesuline's claim as there appears to be no loss or damage capable of being negotiated under the Policy.

- We agree with Canada's submission that this Commission is not entitled to grant

declaratory relief. Our mandate, as prescribed by Orders in Council, directs us to inquire into and report on rejected claims and to submit our findings and recommendations to the parties. Declaratory relief is a judicial remedy that is binding on the parties, a relief which we cannot grant.

Recommendation I

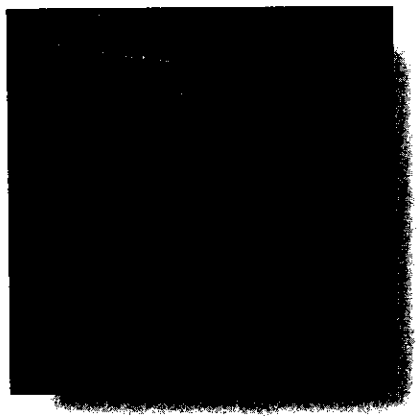
The parties should remain mindful of the spirit and intent of the Policy and process, which is to encourage and support the fair negotiation of outstanding claims. This is best done without the application of technical court rules and procedures.

Recommendation II

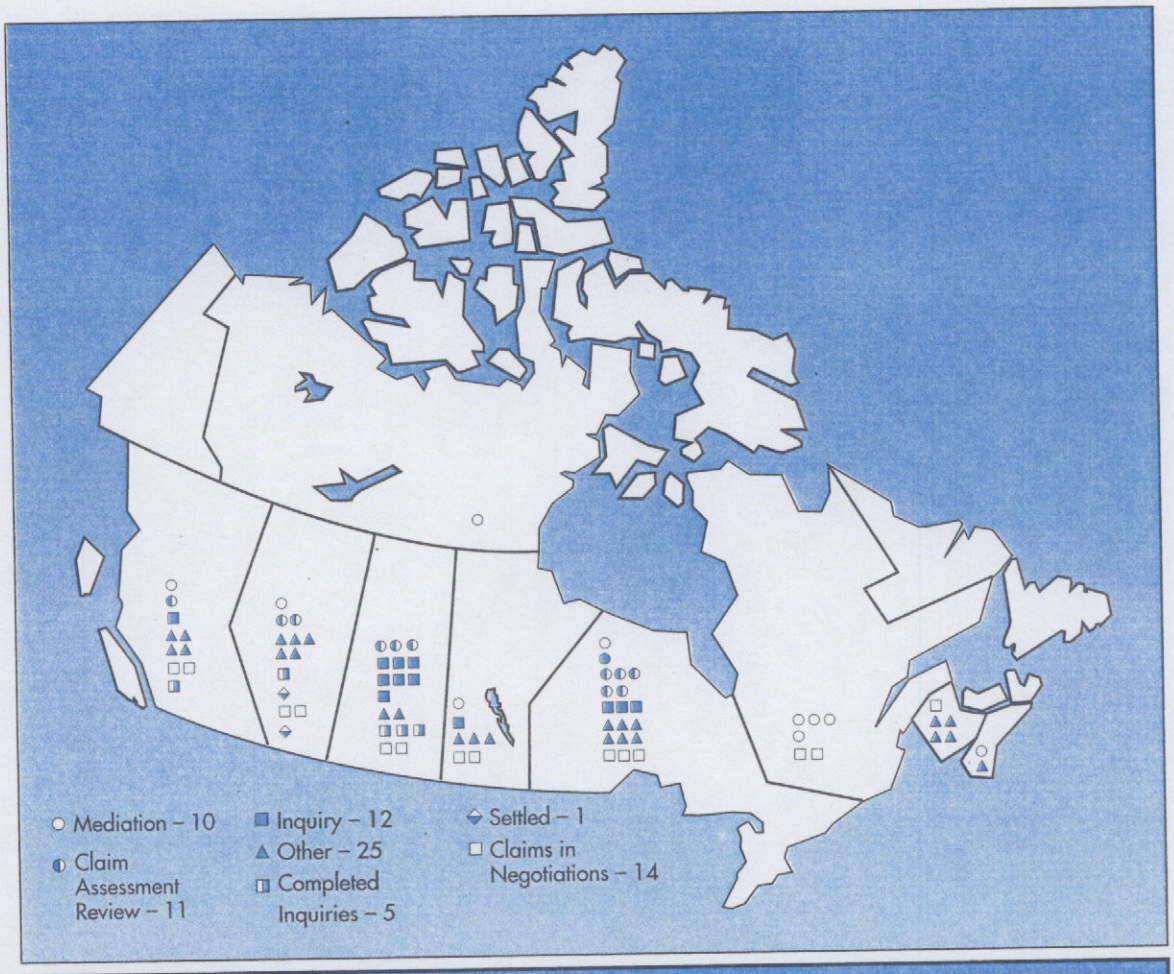
Outstanding Business does not strictly allow for the negotiation of this claim. However, other processes for negotiation of similar issues have been established by Canada, one of which is described as "Administrative Referral." As soon as possible, the parties should start negotiation of the claimants' grievance pursuant to that process.

Response to Report

The report was submitted to the Minister, and the Commission awaits a formal response from DIAND. The Denesuline have accepted the report, and look forward to the negotiation process recommended by the Commission.



Status of Claims and Inquiries March 31, 1994



Claims Accepted for Inquiry

Alexis First Nation (Alberta)
Buffalo River Band (Saskatchewan)
Chippewas of the Thames [Muncey] (Ontario)
Lac La Ronge [Candle Lake] (Saskatchewan)
Lac La Ronge [School Lands] (Saskatchewan)
Lac La Ronge [T.L.E.] (Saskatchewan)
Micmacs of Gesgapegiag [Maria] (Quebec)
Roseau River Anishinabe FN
[1903 Surrender] (Manitoba)
Sumas Indian Band (BC)
Joseph Bighead Band (Saskatchewan)
Chippewas of Beausoleil, Rama & Georgina Island (Ontario)
Chippewas of Kettle & Stony Point [Beachfront] (Ontario)
Flying Dust # 115 (Saskatchewan)
Walpole Island First Nation (Ontario)
Washagamis Bay First Nation (Ontario)
Waterhen Lake (Saskatchewan)

COMPLETED INQUIRIES

Athabasca Denesuline (Saskatchewan)
Canoe Lake Cree Nation (Saskatchewan)
Cold Lake Fist Nations (Alberta)
Lax Kw'alaams Indian Band (BC)
Young Chipeewayan (Saskatchewan)

Claims accepted for inquiry do not always go to the hearing stage. Some claims may revert back to negotiations with the government or could move into the Commission's mediation process.

Inquiries in Process

This section capsules in list form the information set out geographically on the preceding map.

12 inquiries in process

British Columbia	1
Saskatchewan	7
Ontario	3
Manitoba	1

11 claims being assessed for acceptance as inquiries

British Columbia	1
Alberta	2
Saskatchewan	3
Ontario	5

Claims involving Mediation

10 claims with mediation activity

British Columbia	1
Alberta	1
North West Territories	1
Manitoba	1
Ontario	1
Quebec	4
Nova Scotia	1

Claims brought to the Commission that progressed to the Negotiating Table

14 claims brought to the Commission, now in negotiations with DIAND

Alberta	2
Ontario	3
Quebec	2
Saskatchewan	2
Manitoba	2
New Brunswick	1
British Columbia	2

Other Claims

25 claims

British Columbia	4
Alberta	5
Saskatchewan	2
Manitoba	3
Ontario	6
New Brunswick	4
Nova Scotia	1

Settled

Alberta	1

The Commission's Information Programs

As indicated earlier in this report, the former chief commissioner and senior Commission staff raised awareness of the Commission at meetings of First Nations in Quebec, New Brunswick, British Columbia and at organizations such as the Indigenous Bar Association and the Union of Ontario Indians.

When the Commissioners were appointed, further meetings were necessary to make them known to First Nation leaders. The newly-appointed Commissioners and the Commission's terms of reference were featured in the *Indian Claims Commission Information Booklet*, and the way to approach the Commission was described in the pamphlet *The Indian Claims Commission Submission Guide*.

The Commission sent its *Information Booklet*, *Submission Guide*, and poster to all First Nations. The booklet and guide were also sent to relevant provincial and federal government departments and agencies. The media received releases on each of the completed inquiries, and the Commission has initiated a newsletter. The ICC is listed in Aerofax and other general information sources used by researchers and the media.

The Commission anticipates greater activity at the regional level, with the regional Commissioners taking part in appropriate annual meetings, gatherings etc., to heighten awareness of the Commission. Their knowledge of specific regional needs and interests enables them to indicate where and how the Commission can resolve claims.

Specific Claims Research

It is important to distinguish between specific and general claims research. General research addresses issues such as water rights that are in common to many situations and claims. Commission staff does such research when necessary, building up a corporate resource of completed information.

Specific claims research addresses specific issues, for example, the capability of the lands in question to support the First Nations of Cold Lake and Canoe Lake inquiries. Similarly, expert research was necessary to the Commission's interpretation of the intent of the treaties involved in the Cold and Canoe Lake claims. This kind of research relies on expert advice that is customarily contracted by the Commission as needed for the consideration of individual claims.

Mediation — Alternative Dispute Resolution

Briefly, mediation is any service the Commission can provide to help the parties resolve their disputes by agreement, rather than by a one-wins-the-other-loses court fight, or by way of a full inquiry by the Commission. In a successful mediation, both sides win. Mediation settlements are by agreement rather than being forced on the parties by a judge's order.

Mediation as an alternative to a courtroom battle is increasing in popularity among lawyers and their clients. Law societies require lawyers to advise their clients to

consider mediation as an alternative to the expense, delay and agony of the typical lawsuit. Typically, the parties chose a mutually acceptable person to act as mediator, and sit down with him or her to discuss and define the mediator's role. Usually, the mediator's task is to help the parties recognize the real issues in the dispute between them and to understand what stands in the way of a settlement. Mediation proceeds by mutual agreement through discussions with the parties either separately (shuttle-mediation) or together (round-table mediation).

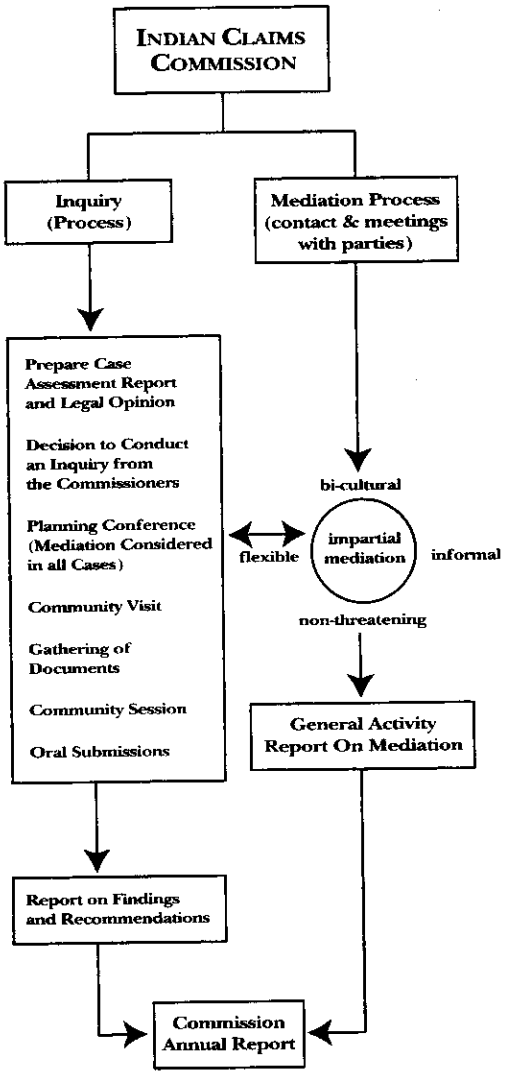
Mediation is essentially an impartial process that is informal, non-threatening, flexible and bi-cultural. The concept of mutual respect is at the heart of the mediation process. This implies a non-adversarial approach in which neither side is superior to the other, and nobody has "the only" or "the best" approach.

The role of the Commission in mediation is a specific example of its continuing concern for improved cross-cultural understanding. The Commission has drawn together some of the most distinguished and creative experts in Canada on Alternate Dispute Resolution (ADR). The Commission is priviledged to have the assistance of the Honourable Robert F. Reid, QC, formerly of the Ontario Supreme Court, a respected expert in ADR and administrative law. We also have the assistance of Mr. Mark Dockstator who has recently published a thesis *Towards an Understanding of Aboriginal Self-Government* which captures the consequences of basic differences between Aboriginal and Western understanding. Dockstator's thesis can be used to provide an introduction to the philosophical approach of the Commission in reconciling differences through mediation. His explanations of how Aboriginal and Western assumptions differ gives neither system preeminence over the other, but rather shows how the two can and must be reconciled.

As a result of the efforts of Mr. Reid and Mr. Dockstator a concensus is developing for an expanded role for mediation as a method for resolving specific claims.

Mediation and the Inquiry Process

The following diagram indicates the relationship between mediation and the inquiry process. As can be seen, it is possible for the Commission to see the potential for mediation when the claimants make their first approach. Mediation is always an option. Often, mediation flows from the Planning Conference, where the parties meet to identify and narrow the issues of the claim. Both parties at this stage may be willing to use mediation as an alternate route towards resolving the claim, rather than going through the process of a full inquiry. It is at this stage that claims initially accepted for inquiry can be resolved informally. If the impasse cannot be broken at the Planning Conference, the parties continue with the more formal steps of the inquiry process.



Evolving a New Claims Policy Direction

As indicated earlier, the policy document *Outstanding Business* has been seen by many as flawed in important respects. In this regard, the Commission contributed to the Joint First Nation/Government Working Group (JWG), which was charged to review the Specific Claims Policy and its process. The JWG was created to consider criticism that the existing Specific Claims Policy and process were unnecessarily restrictive. The first meeting of the JWG was held in February 1992, but by the close of this Annual Report's period, the JWG's mandate had expired without its having made a formal report and recommendations. Nonetheless, the need for a new claims policy direction is, if anything, even more necessary.

The Commission has appropriate experience, expertise and corporate memory that can make important contributions to the evolution of a new policy direction. The Commission could help in the evolution of an independent claims body characterized by a high degree of cross-cultural awareness that could improve the process by which claims are considered and resolved.

The Commission could make the first assessment of claims brought by First Nations, using its experience to distinguish those claims that require a full inquiry process from those less complicated claims that might move speedily to a resolution through a process of mediation. The Commission could offer training and consultation in the use of the alternate dispute resolution model that it has developed as a credible alternative to the adversarial approach.

Organization

Staffing and Staff Training

The Commission has 10 staff members working in Toronto, and 27 in its Ottawa office. Approximately 50 per cent of staff are Aboriginal, and 50 per cent of the professional team are Aboriginal women.

The policy of the Commission is to provide staff with cross-cultural and professional training courses, and to offer opportunities for individuals to further their personal development.

Administration

The Commission has developed internal guidelines with respect to finances, contract management, security, confidentiality, terms and conditions of employment, inventory management and other general administrative issues. Automated systems in the two offices provide communication of messages, documents and data through a computer network. A database of information on First Nations, Associations, government contacts, media and researchers can be used both for information and the preparation of mailing lists and labels.

General Enquiries

The Commission's mailing address is:

The Indian Claims Commission
P.O. Box 1750, Station B
Ottawa, Ontario
K1P 1A2

The Commission accepts collect calls. Its Ottawa office is located at:

The Enterprise Building
Suite 400-427 Laurier Avenue West
Phone: (613) 943-2737
Fax: (613) 943-0157

The Toronto Office is located at:

The Canada Trust Building
Suite 1502-110 Yonge Street
M5C 1T4
Phone: (416) 954-2760
Fax: (416) 954-2765

Financial Statement

Financial Highlights — The Commission's Operating Budget

- 1991/92 $1.2 M.
- 1992/93 $3.8 M.
- 1993/94 $5 M.

The increases in the second year were to cover the cost of new Commissioners and conducting three inquiries. The increase in the third year will cover the cost of claims accepted for inquiry and mediation.

To find out more about the ICC

For mediation or an inquiry
call or write:

Director of Liaison
Indian Claims Commission
P.O. Box 1750, Station B
Ottawa, Ontario
K1P 1A2

Phone: (613) 943-1959
Fax: (613) 943-0157

Publications available:

Newsletter; Information Booklet;
Submission Guide; Poster;
Reports: Athabasca Denesuline;
Primrose Lake

For more information
call collect to the Director
of Communications
(613) 943-1607