

Indian
Claims
Commission



INFORMATION GUIDE

FAIRNESS IN CLAIMS NEGOTIATIONS



Message from the Chief Commissioner

Since its inception in 1991, the Indian Claims Commission (ICC) has gained credibility as an independent, neutral body conducting public inquiries into specific claim disputes between First Nations and the Government of Canada. Created temporarily to expedite the claims process – while discussions proceeded on Specific Claims Policy reform and the creation of an independent claims body – the Commission has advanced negotiations where other efforts to resolve disputes have failed.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods and other technical defences which might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct objective, neutral and expeditious inquiries. In turn, these inquiries offer innovative solutions to the parties in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity and justice to promote reconciliation and healing between aboriginal and non-aboriginal Canadians.

At every stage of the process, Commissioners and staff draw upon their cross-cultural knowledge and experience to seek a broader understanding of the issues and to determine whether the dispute can be resolved through some form of alternative dispute resolution. Where an inquiry is deemed necessary, the process is completely open. Both parties are encouraged to participate fully to ensure that the Commission's findings and recommendations are well-informed. To avoid an adversarial setting, elders are not cross-

examined. Oral traditions and the oral history of a First Nation provide important sources of information to supplement the written record of the claim.

The Commission can also provide or arrange for mediation assistance at the request of the parties. Depending on the nature of the claim, the Commission offers a broad range of alternative dispute resolution services tailored to suit the particular needs of the parties. For instance, the Commission might mediate a dispute over a particular issue or provide a neutral facilitator to guide discussions and help overcome minor barriers before they become insurmountable.

The Commission continues to seek ways of improving and streamlining the process to ensure that it is both effective and efficient in resolving disputes. Drawing upon the collective experience of a multi-disciplinary team, the Commission's reports contribute to an evolving area of law on aboriginal and treaty rights and the nature of the Crown's fiduciary relationship with First Nations.

This guide outlines the purpose, history and mandate of the Indian Claims Commission and offers guidance on how to request an inquiry or mediation.



Renée Dupuis
Chief Commissioner
April 2005



Creation of the Indian Claims Commission

In the fall of 1990, the federal government asked First Nation Chiefs to recommend ways to improve the claims process. Following consultations with their communities, the Chiefs Committee on Claims produced the First Nations' Submission on Claims. It received the support of a special assembly of the Assembly of First Nations in December of that year.

Among their 27 recommendations, the Chiefs proposed that an "independent and impartial claims body with authority to ensure expeditious resolution of claims" be established. This body would assist the negotiation process by bringing the parties together and recommending solutions to contentious issues.

In July 1991, the federal government responded to the Chiefs' submission by creating the Indian Specific Claims Commission as a Royal Commission of Inquiry. Justice Harry S. LaForme served as the first Chief Commissioner until February 1994, when he was appointed a Justice of the Ontario Court (General Division). He was replaced in April 1994 by Commissioners Daniel J. Bellegarde and P.E. James Prentice who acted as Co-Chairs until Phil Fontaine's appointment as Chief Commissioner in August 2001. In June 2003, Renée Dupuis was appointed Chief Commissioner following Mr Fontaine's resignation.

Background: The Claims Process

From colonial times up to the 1920s, the federal government and First Nations entered into treaties which created mutual obligations. Many claims derive from the assertion by First Nations that certain treaty provisions have not been honoured by the government.

Government policy divides claims into two categories: specific and comprehensive. **Specific** claims arise from the breach or non-fulfilment of government obligations found in treaties, agreements or statutes. **Comprehensive** claims are based on unextinguished aboriginal title.

The mandate of the Indian Claims Commission is to address disputes arising out of the specific claims process. This process is based on Canada's Specific Claims Policy called *Outstanding Business*, which was published in 1982.

Under the government's current policy, First Nations must research and submit specific claims to the government. The government then decides whether to accept a claim for compensation negotiations.

Negotiation of validated claims may result in an offer of compensation to First Nations. However, concerns have been raised that restitution is currently restricted by government criteria, which First Nations often believe to be unfair or applied in ways that are unfair.

For many years, First Nation and government negotiators have attempted to put an end to deadlocked land claims but there has been little progress. Negotiations have been slow and difficult and only a few settlements have been reached. This backlog of unresolved claims is not acceptable.

Before the creation of the Indian Claims Commission, First Nations were unable to challenge government decisions without going to court. As an alternative to court action, the Indian Claims Commission has offered a fresh and positive approach for First Nations who desire an independent review of government decisions.

For many years, the Commission urged the federal government to create a permanent, independent claims body. On November 4, 2003, Parliament passed the *Specific Claims Resolution Act*, legislation to establish the new Canadian Centre for the Independent Resolution of First Nations Specific Claims. The Centre will replace the Indian Claims Commission, once the legislation is proclaimed. In the meantime, the Commission continues to exercise its mandate.



What the Commission does

The Indian Claims Commission provides to First Nations and Canada a viable alternative to the courts for the resolution of disputes over specific claims. The Commission has two basic functions — **inquiries** and **mediation**.

Inquiries may take place at the request of a First Nation when:

- 1) the Minister of Indian and Northern Affairs Canada (INAC) has rejected the First Nation's claim; or
- 2) the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

Inquiries are more structured and can be initiated at the sole request of the First Nation, provided the request relates to a rejected claim or dispute over compensation criteria. After receiving a First Nation's request for an inquiry, an initial planning conference is held between the parties to plan the process. This first conference is followed by a series of stages concluding with a formal report of the Commissioners' findings and recommendations on the issues. These recommendations are intended to assist the parties in resolving the dispute, but they are not binding on either Canada or the First Nation. Unless the First Nation prefers an alternative arrangement, one important stage of the process is a visit by Commissioners to the First Nation community to hear directly from elders and community members in regard to the claim.

Mediation can be provided or arranged by the Commission, with the consent of both parties, to advance negotiations at any point during the specific claims process. The First Nation and Canada can request that the Commission assist in mediating any issue relating to a specific claim.

Mediation refers to any form of dispute resolution service the Commission provides to assist in settling a dispute by mutual agreement of the parties. It is a flexible and informal process, requiring only that both parties be willing to have a neutral third party assist them in exploring available options. From that point onward, the parties work with the neutral mediator or facilitator to develop a process that best meets the needs of their particular dispute. Mediation can be used at any stage of the specific claims process.

How to Request an Inquiry or Mediation Assistance

Anyone who feels the Commission may be of some assistance can simply call or write to the Commission (see address at the end of this guide). All that is required to start the inquiry process is a letter to Commission Counsel from the First Nation asking that the Commission conduct an inquiry. To formalize the request, the Commission requires a Band Council Resolution requesting the inquiry and authorizing the release of relevant documents, a copy of the original claim submission, and a copy of the Minister's letter of rejection, or, in the case of an accepted claim in which compensation criteria are at issue, a copy of the Minister's letter of acceptance. To request mediation, write to the Director of Mediation.

The process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in processing requests for inquiries or mediation services. There are five stages to the inquiry process, which begins when a request is received from a First Nation. Each of these stages is summarized below.

Inquiry Process

Stage 1: Initial Request for Inquiry

Upon receiving a request for inquiry and accompanying documents, the Commission will consider the request and, upon acceptance, strike a panel of Commissioners to hear the inquiry, and notify the government of Canada and the First Nation of the inquiry. Both parties will be asked to provide copies of the documents relevant to the claim. All relevant documents are organized in chronological order, compiled digitally in CD-ROM format and distributed to the parties. Commission research staff assist in identifying any gaps in the historical documents which may require supplementary research.

Stage 2: Preparation for Inquiry

The inquiry process is planned jointly. Briefing material prepared by the Commission is sent to the parties in advance to facilitate discussion. Counsel for the parties are asked to state issues to be addressed by the inquiry, from which Commission staff will attempt, in consultation with counsel for the parties, to generate a single list of issues. A planning conference, at which the parties will meet, will be arranged and chaired by Commission Counsel. Some objectives of the conference are to identify the relevant historical and legal issues; openly discuss the positions of the parties on the issues; and attempt to obtain a single set of issues to be addressed in the inquiry, failing which issues will be referred to the panel for resolution. This may be done in writing, or the panel may ask for oral submissions to be made at the outset of a further planning conference. Except for this, the panel will not attend a planning conference. Other objectives of the planning conference are to discuss historical documents the parties intend to rely on, determine whether parties intend to call elders, community members or experts as witnesses, and set time frames for outstanding commitments and the remaining stages of the inquiry. In cases where further research is required, the Commission encourages jointly-mandated research. Unless there is a reasonable prospect of resolving the dispute at this stage of the process, the Commission's Liaison staff sets dates for a staff visit to the community to inform the First Nation's membership of the process, meet with elders to obtain summaries of their evidence and make arrangements for the community session (see stage 3).

Stage 3: Community Session

This is a unique and important aspect of the Commission's inquiry process. At this stage, Commissioners and staff attend a session in the First Nation's community to hear directly from elders and other members of the First Nation. The community session encourages a much greater level of participation on the part of the First Nation, and is carried out in a manner that is respectful of the First Nation's language, culture and traditions. The testimony and oral tradition of the elders is recorded and transcribed. These transcripts are an important source of information used to supplement the historical documents and promote a broader understanding of the claim from the First Nation's perspective. Questions are posed only by the Commissioners or their legal counsel and no cross-examination of elders is permitted. However, counsel for the Commission consults with both parties before and during the session to identify relevant questions and lines of inquiry. In some cases, expert witnesses may present evidence in a separate session, provided they have furnished a written report in advance and the Commissioners have requested their attendance in person. Experts may be subject to cross-examination.

Stage 4: Written and Oral Submissions

With the benefit of a wealth of information from elders, community members and historical documents, legal counsel for the parties are asked to provide written and oral submissions to the Commissioners on the facts and law to assist them in determining whether the Crown owes an outstanding "lawful obligation" to the First Nation. Again, the oral submissions are recorded and transcribed to assist in the Commissioners' decision-making process.

Stage 5: Commissioners' Final Report

Upon careful review of all the evidence – from documentary sources, oral tradition and oral history – and upon consideration of all legal arguments, the Commission panel deliberates and reports on its findings and conclusions. Ultimately, these findings and conclusions will inform the Commission's recommendation regarding the Crown's outstanding lawful obligation. The Commissioners' final report is released to the parties involved in the claim and to the public. The Commissioners' recommendations are not binding on either the First Nation or Canada, but the report is intended to assist in resolving the dispute. After releasing the final report, the Commission's inquiry comes to an end.

The Commission's Mediation Process

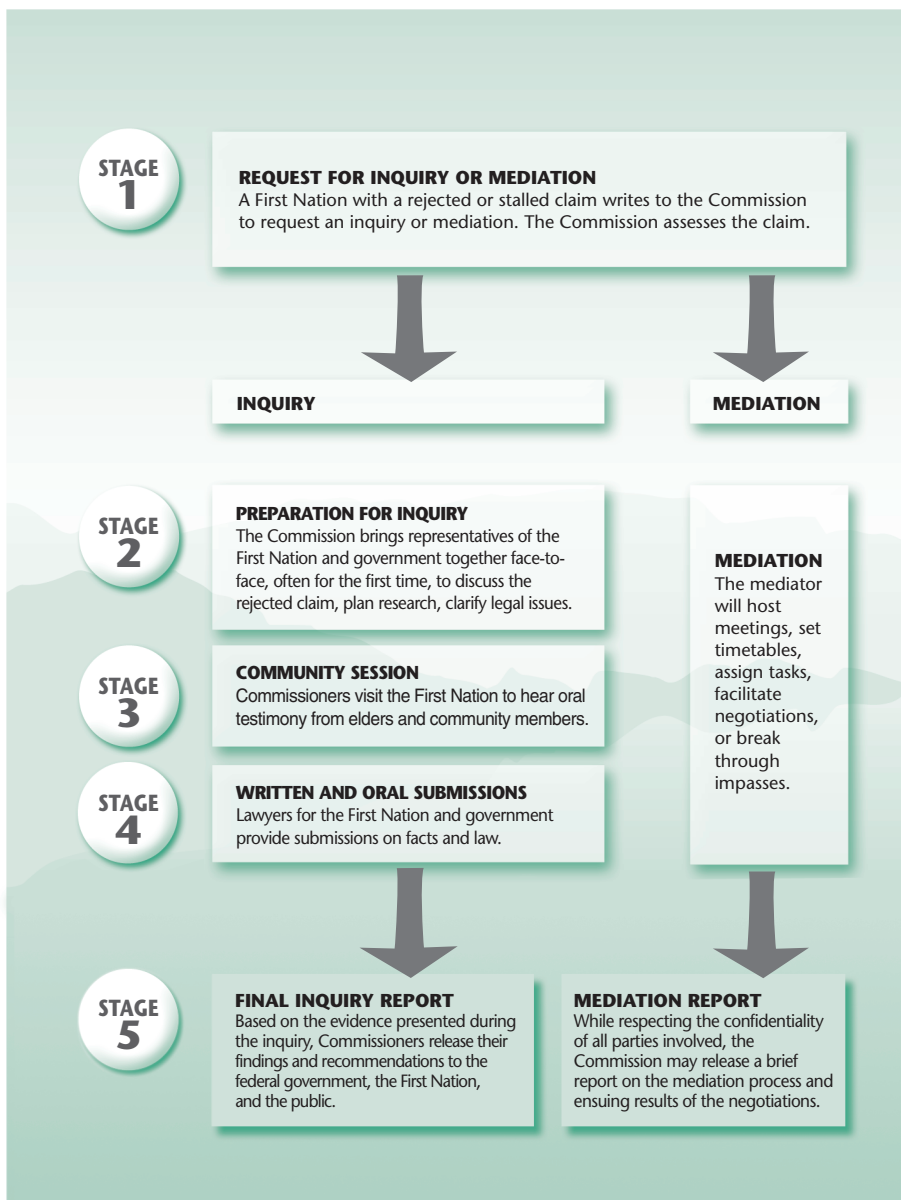
In the interests of reaching claim settlements quickly and efficiently, the Commission offers mediation assistance and alternative dispute resolution to the parties at every stage of the inquiry process. Mediation can take any form, depending on the particular goals and objectives of the parties and the nature of the issues involved. The Commission has experienced staff who can provide mediation to resolve a dispute where the parties have already reached an impasse.

Mediation is a process of dispute resolution whereby the parties elect to meet with an impartial third party for the purpose of assisting them to resolve the issues between them. Mediation can be an informal process or it can proceed in a structured manner with clearly defined parameters. Either form is dictated by the parties to the dispute with a view toward resolution. The Commission's experience demonstrates that when First Nations and Canada agree to mediation or assisted negotiations, the mediation team can assist the parties in the resolution of claims. With the assistance of skilled and experienced mediators, issues can be discussed openly, impasses broken and claims settled. Open discussion among equal participants in a consensual process can promote a better understanding and relationship between the parties.

Facilitation is a form of mediation that can be used to assist the parties from the outset of claim negotiations even though no dispute has arisen. The facilitator serves as a neutral chair to monitor negotiations and encourage open and effective communication between parties. This process can help resolve issues before they become insurmountable obstacles to settlement. In this type of facilitation or assisted negotiation, neutral facilitators chair meetings, help set agendas, maintain an accurate record of negotiations, follow up on undertakings, establish rules and principles for negotiation and assist the parties in generating creative options to reconcile competing interests. As a confidential listener, the Commission can help the parties find common ground and resolve minor disputes before the parties become entrenched in their positions. The Commission may also assist the parties by helping to find technical expertise and coordinating compensation studies, appraisals and studies on complex legal issues, or any other matter of mutual concern.

Experience has proven that the presence of a skilled and impartial member of the Commission's mediation team can provide tangible benefits to the parties in interest-based negotiations by reducing the likelihood of conflict and increasing the efficiency of the process.

The following diagram demonstrates how the Commission's inquiry and mediation processes work.





Frequently asked questions

Does a request for an inquiry or mediation affect negotiations?

From the Commission's perspective, a request for an inquiry or mediation does not prevent a First Nation from opening or continuing negotiations with Canada, a provincial government or any other organization. However, it should be noted that if a First Nation requests an inquiry into a claim currently in settlement negotiations under the Specific Claims Policy, Canada may suspend those negotiations. A party may find it worthwhile to discuss matters with other parties to the negotiations before making a request for inquiry or mediation.

Will it affect present or future court action?

Making a request to the Commission does not prevent a party from taking the claim to court. A party who has already gone to court can still request an inquiry or mediation. However, the Commission must consider what impact, if any, the court action will have on the integrity of the inquiry process and take the most appropriate action in light of the circumstances. For example, it may not be appropriate for the Commission to schedule a community session at the same time a trial is in progress. Furthermore, the Commission may not release a report while a court decision is pending on that same issue. Finally, it should be noted that Canada may request that the First Nation place its court action in abeyance before proceeding with an inquiry to avoid participating in multiple proceedings on the same issue.

Can both an inquiry and mediation be requested?

Yes, although they are two different and separate processes. An inquiry is initiated at the request of a First Nation while mediation is voluntary and requires the consent of both parties to proceed. For example, it is possible for an inquiry to be started and then suspended in favour of pursuing the less formal option of mediation. In other instances, where mediation has been tried and found to be inappropriate, the proceedings can revert to a more formal determination of the issues in dispute. Regardless of whether an inquiry

or mediation or both are selected, the Commission endorses any efforts by the parties to resolve their disputes independently, at all stages of the claims process.

Is funding available?

Indian and Northern Affairs Canada has funds available for First Nations to bring issues to the Indian Claims Commission.

For information about funding contact:

Martine Larocque
Manager
Finance, Administration and Funding Service
Research and Negotiations Funding Unit
Indian and Northern Affairs Canada
10 Wellington Street, Room 1319
Terrasses de la Chaudière
Gatineau, Quebec
K1A 0H4
Phone: (819) 997-0115

What effect will the *Specific Claims Resolution Act* have on claims currently before the Commission as well as potential claims?

The Indian Claims Commission will continue to exercise its mandate to inquire – at the request of a First Nation – into specific claims that have been rejected by the federal government. It will be business as usual for the Commission until the *Act* is proclaimed, establishing the Canadian Centre for the Independent Resolution of First Nations Specific Claims.

The Commission will address claims currently in its system in a way that will minimize any inconvenience or disruption to First Nations claimants.



For more information

Annual Report and Other Publications

The Commission prepares an annual report on the activities of the federal government and First Nations with respect to specific claims and the progress of claims negotiations. The reports identify problems based on the Commissioners' experience and make general recommendations for government response.

The Commission also publishes the *Indian Claims Commission Proceedings*, a compendium of the Commission's official reports and background documents, and *Landmark*, a newsletter about the Commission's activities and land claims issues in general.

For copies of Commission publications, call Manon Garrett, Communications Coordinator at (613) 943-2737. Documents may also be requested through, or downloaded from, the Indian Claims Commission website.

For more information, please write to:

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

Website: www.indianclaims.ca

Collect calls will be accepted for all information or publication requests:

Tel.: (613) 943-2737

Fax: (613) 943-0157



The Commissioners



Renée Dupuis has had a private law practice since 1973 in Quebec City where she specializes in the areas of aboriginal peoples, human rights and administrative law. Since 1972 she has served as legal advisor to a number of First Nations and aboriginal groups in her home province, including the Indians of Quebec Association, the Assembly of First Nations for Quebec and Labrador, and the Attikamek and the Innu-Montagnais First Nations, representing them in their land claims negotiations with the federal, Quebec, and Newfoundland governments and in the constitutional negotiations. From 1989 to 1995, Madame Dupuis served two terms as Commissioner of the Canadian Human Rights Commission. She is Chair of the Barreau du Québec's committee on law relating to aboriginal peoples. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles and lectured extensively on administrative law, human rights and aboriginal rights. She is the recipient of the 2001 Award of the Fondation du Barreau du Québec for her book *Le statut juridique des peuples autochtones en droit canadien* (Carswell), the Governor General's 2001 Award for her book *Quel Canada pour les Autochtones?* (published in English by Lorimer Publishers under the title *Justice for Canada's Aboriginal Peoples*) and the YWCA's Women of Excellence Award 2002 for her contribution to the advancement of women's issues. In June 2004, the Barreau du Québec bestowed on her the Christine Tourigny Merit Award for her contribution to the promotion of legal knowledge, particularly in the field of the aboriginal rights. Madame Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001 and Chief Commissioner on June 10, 2003.



Daniel 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. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission, on July 27, 1992 and April 19, 1994, respectively. He held the position of Co-Chair until the appointment of Phil Fontaine as Chief Commissioner.



Born in Alberta and raised in British Columbia, **Jane Dickson-Gilmore** is an associate professor in the Law Department at Carleton University, where she teaches such subjects as aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she has served as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on aboriginal culture, history and politics. In the past, she provided expert advice to the Smithsonian Institution – National Museum of American Indian on Kahnawake Mohawks. Ms Dickson-Gilmore has also been called upon to present before the Standing Committee of Justice and Human Rights and has been an expert witness in proceedings before the Federal Court and Canadian Human Rights Commission. Ms Dickson-Gilmore graduated from the London School of Economics with a Ph.D. in Law and holds a BA and MA in Criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed Commissioner of the Indian Claims Commission on October 31, 2002.



Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the *Charlottetown Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, NS, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.



Sheila Purdy was born and raised in Ottawa. Between 1996 and 1999, she worked as an advisor to the government of the Northwest Territories on the creation of the Nunavut territory. Between 1993 and 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on matters related to the Criminal Code and aboriginal affairs. In the early 1990s, Ms Purdy was also special advisor on aboriginal affairs to the Leader of the Opposition. Previously, she provided legal services on environmental matters, and worked as a legal aid lawyer representing victims of elder abuse. After graduating with a law degree from the University of Ottawa in 1980, Ms. Purdy worked as a litigation lawyer in private practice until 1985. Her undergraduate degree is from Carleton University, Ottawa. Ms Purdy is on the executive of the Canadian Biodiversity Institute, the Advisory Council of Canadian Arctic Resources Committee, and the Women's Legal, Education and Action Fund (LEAF). She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.



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 and stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone.”

Ernest Benedict, Mohawk Elder
Akwasasne, Ontario
June 1992

Traditionally, the pipe is 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 the central symbol of the Indian Claims Commission logo.

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. The water, land and sky, etched in blue and green, reflect a period of growth and healing.

Logo design by Kirk Brant.

© Minister of Public Works and Government Services Canada 2001
Cat. No. RC31-3/2005
ISBN 0-662-68981-X

Revised April 2005