

INDIAN CLAIMS COMMISSION

INFORMATION GUIDE

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Message from the Commissioners

Since its inception in 1991, the Indian Claims Commission has established its credibility as an independent and neutral body conducting public inquiries into land claim disputes between First Nations and the Government of Canada. Established as an interim process to expedite the claims process while discussions proceeded on Specific Claims Policy reform and the creation of an independent claims body, the Commission has successfully advanced negotiations when other efforts have proved unsuccessful in resolving the issues in dispute.

As part of its mandate to find more effective methods of resolving 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, we are not bound by strict rules of evidence, limitation periods, and other technical defenses which present an obstacle to the fair resolution of First Nations' historical grievances against the Crown. This flexibility gives us the freedom to conduct objective, neutral and expeditious inquiries which offer innovative solutions to the parties to resolve a myriad 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 training to seek a broader understanding of issues between the parties and to explore whether the dispute can be resolved through the use of some form of alternative dispute resolution. Where an inquiry is necessary, the process is open and both parties are encouraged to participate fully to ensure that the Commissioners' findings and recommendations are insightful and well-informed. To avoid an adversarial setting, elders are not cross-examined and the oral traditions and history of a First Nation provides an important source 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 can offer a broad range of alternative dispute resolution services tailored to suit the particular needs of the parties. For instance, the Commission could 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 our 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 provide an important contribution to an evolving area of law on aboriginal and treaty rights and the nature of the Crown's fiduciary relationship with First Nations. We have also identified problem areas in the current Specific Claims Policy and offered our insights into how a reformed policy and new independent claims body with enhanced powers could assist both First Nations and Canada in

achieving a fair, equitable, and expeditious resolution of claims.

This booklet provides important information about the purpose, history and mandate of the Indian Claims Commission and offers guidance on how to make a request for an inquiry or mediation.

CREATION OF THE INDIAN CLAIMS COMMISSION

In the fall of 1990, the 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 government responded to the Chiefs' submission by creating the Indian Claims Commission as a Royal Commission of Inquiry. Mr. Justice Harry S. LaForme served as the first Chief Commissioner before he was appointed as a Justice of the Ontario Court (General Division) in February 1994. Commissioners Bellegarde and Prentice were appointed Co-Chairs on April 19, 1994.

Background: The Claims Process

From colonial times through the first half century of Confederation, the 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 to land where no treaty has been signed.

The mandate of the Indian Claims Commission is to address disputes arising out of the specific claims process.

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. Not enough 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 offers a fresh and positive approach for First Nations that desire an independent review of government decisions.

WHAT THE COMMISSION DOES

The Indian Claims Commission provides First Nations and Canada with a viable alternative to the courts to resolve disputes over specific claims. The Commission has two basic functions — **Inquiries** and **Mediation**.

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

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

Mediation can be provided or arranged for 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.

What is the difference between an inquiry and mediation?

Inquiries are more structured and can be commenced at the sole request of the First Nation providing that 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 is followed by a series of stages resulting in 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. One important stage of the process involves the Commissioners convening a session in the First Nation's community to hear directly from elders and community members in regard to the claim, unless the First Nation prefers an alternative arrangement.

Mediation is any form of dispute resolution service the Commission can provide to assist in settling a dispute by mutual agreement of the parties. Mediation is a flexible and informal process which requires only that both parties are willing to have a neutral third party assist them in exploring available options to resolve the dispute. From that point onward, the parties

can 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.

Can both an inquiry and mediation be requested?

Yes. Although they are two different and separate processes, an inquiry and mediation can operate together to advance negotiations. For instance, 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 is tried and found to be inappropriate, the proceedings can revert to a more formal determination of the issues in dispute. Whether an inquiry or mediation is undertaken, at all stages of the claims process the Commission endorses any efforts by the parties to resolve their disputes independently.

HOW TO REQUEST AN INQUIRY OR MEDIATION ASSISTANCE

If you feel the Commission may be of some assistance just call or write to the Commission Counsel (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. There are no formal requirements, or standard forms to fill out.

The process used by the Commission for handling claims submitted for inquiry and/or mediation has been streamlined to increase efficiency and effectiveness in processing these requests. There are four stages to the process, which begins when a request is received from a First Nation. Each of these stages is summarized below.

Streamlined Inquiry Process

Stage 1: Initial Request for Inquiry

Upon receiving a request for inquiry, the Commission will notify Canada and the First Nation of the inquiry in writing. The First Nation will be asked to provide copies of the relevant documents submitted in support of your claim and a Band Council Resolution authorizing the release of any documents held by Canada. The main documents, such as the First Nation's statement of claim and other important correspondence with Canada, will be used to prepare an assessment of the claim to identify the issues and positions of the parties. Both parties are then invited to attend a Planning Conference arranged by the Commission (see Stage 2). All relevant documents are organized in chronological order, compiled in bound volumes, and distributed to the parties along with an annotated index of documents. Our research staff assist in identifying any gaps in the historical documents which may require supplementary research.

Stage 2: Planning Conference

The Planning Conference is chaired by Commission Counsel and is usually held in Ottawa. The purpose of the Planning Conference is to jointly plan the inquiry process. Briefing material prepared by the Commission is sent to the parties in advance to facilitate discussion. The main

objectives of the Planning Conference are to identify the relevant historical and legal issues, openly discuss the positions of the parties on the issues, discuss historical documents the parties intend to rely on, identify whether parties intend to call elders, community members, or experts as witnesses, and set timeframes for outstanding commitments and the remaining stages of the inquiry. If there is no reasonable prospect of resolving the dispute at this stage of the process, the Commission's Liaison staff sets dates to visit 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 one of the most unique and important aspects of the Commission's inquiry process. At this stage, Commissioners and their staff attend a session in the First Nation's community to hear directly from elders and other members of the First Nation. Not only does this encourage a much greater level of participation on the part of the First Nation, but the Commission strives to conduct its sessions in a manner which is respectful of the First Nation's cultures and traditions. The testimony and oral tradition of the elders is recorded and transcribed. This is an important source of information which is used to supplement the historical documents and promote a broader understanding of the claim from the First Nation's perspective. Questions are presented by the Commissioners or their legal counsel only and no cross-examination of elders is permitted. However, legal counsel for the Commission consults with both parties before and at the session to identify relevant questions and lines of inquiry. In some cases, expert witnesses may present evidence during a Community Session providing 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

Based on instructions from the panel of Commissioners, the Commission's research and legal staff prepare a draft report on the merits of the claim and submit it to the Commissioners for their approval. A final report of the Commissioners' findings and recommendations is then released to the parties and 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. There is no provision in the Commission's terms of reference for a rehearing of the same matter or appeal of the decision but it is emphasized that the Commissioners' recommendations are non-binding.

The Commission typically completes the entire inquiry within a period of 1 to 2 years from the

initial request to the release of a final report.

The Commission's Mediation Process

The Commission offers mediation assistance and alternative dispute resolution to the parties at every stage of the inquiry process in the interests of reaching claim settlements quickly and efficiently. Mediation can take any number of forms 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, neutral, third party for the purpose of assisting them to formulate their own consensual resolution of the matters at issue between them. Mediation may take the form of an informal process that is open-textured and flexible or, alternatively, it can proceed in a structured process with clearly defined parameters. Either form is dictated by the parties to the dispute with a view toward resolution. Our experience demonstrates that when First Nations and Canada agree to mediation or assisted negotiations, our 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 help promote a healthy dialogue and a better understanding and relationship among the parties.

Facilitation is a form of mediation that can be used 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 to help resolve issues before they become insurmountable obstacles to settlement. In this type of *process facilitation* or *assisted negotiations*, 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 assist the parties in finding common ground and resolving minor disputes before the parties become entrenched in their positions. The Commission may also assist the parties by retaining technical assistance and coordinating the completion of 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 real and tangible benefits to the parties in interest-based negotiations by reducing the likelihood of conflict and increasing the efficiency of the process.

GENERAL 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 that is currently in settlement negotiations under the Specific Claims Policy, Canada may suspend negotiations following a request for inquiry. Therefore, it may be worth discussing the matter with other parties to the negotiations before making a request for inquiry or mediation.

Will it affect present or future court action?

Sending a request to the Commission does not prevent you from taking the claim to court. If you have already gone to court you 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 and 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.

Is funding available?

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

Enquiries can be made by writing or calling:

Chief, Research Funding Program
INDIAN AND NORTHERN AFFAIRS CANADA
10 Wellington St, Room 1655
Terrasses de la Chaudière
Hull, Quebec
K1A 0H4

Phone (819) 997-0115

ANNUAL REPORT AND OTHER PUBLICATIONS

The Commission writes an annual report each year on the activities of the government and First Nations with respect to specific claims and the progress of claims negotiations. The reports identify problems based on our experience, and make general recommendations for government response.

The Commission also publishes the *Indian Claims Commission Proceedings*, a compendium of information on the specific claims process; and *Landmark* (formerly *The Indian Claims Review*), a newsletter for First Nations and others regarding the Commission's activities and land claims issues in general.

For copies of Commission publications, write or call collect to our Communications unit at (613) 947-0755. Documents can also be requested - and in some cases downloaded - through the Indian Claims Commission website. The address is www.indianclaims.ca.

**For more information about inquiries or mediation, please contact Commission Counsel at:
(613) 947-0740**

**General enquiries should be directed to our Liaison Department at:
(613) 943-8082**

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P. O. Box 1750, Station B
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Collect calls will be accepted for all information or publication requests:

Tel. (613) 943-2737

Fax: (613) 943-0157

The Commissioners

Co-Chair Dan Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in Southern Saskatchewan. From 1981 to 1984, he worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, Mr. Bellegarde 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. He was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992 and April 19, 1994, respectively.

Co-Chair P.E. Jim Prentice, QC is a lawyer with the Calgary law 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. Mr. Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992 and April 19, 1994, respectively.

Roger J. Augustine is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected President of the Union of NB-PEI First Nations in 1988, and completed his term in January 1994. He is currently President of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products and Chairman of the EFP Environment and Communications Advisory Committee. He has received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr. Augustine was appointed a Director to the National Aboriginal Economic Development Board by the Federal Department of Industry. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs. Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional and provincial levels. She has served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs. Corcoran was appointed as a Commissioner to the Indian Claims Commission in July 1992.

Aurélien Gill is a Montagnais from Mashteuiatsh (Pointe-Bleue) Quebec, where he served as

Chief for nine years. He has helped found many important Aboriginal organizations, including the Conseil Atikamekw et Montagnais; the Conseil de la Police amérindienne; the Corporation de Développement Économique Montagnaise; and the National Indian Brotherhood (now the Assembly of First Nations). Mr. Gill served as Quebec Regional Director in the Department of Indian Affairs and Northern Development, and is a member of the National Aboriginal Economic Development Board. M. Gill serves as a member of several boards, including the Board of the University of Quebec in Chicoutimi and on the Board for the Northern Engineering Centre at the University of Montreal. He is a member of the Environmental Management Boards for the Federal Government and for the Province of Quebec. In 1991 he was named to the Ordre national du Québec. Mr. Gill was appointed Commissioner of the Indian Claims Commission on December 8, 1994.

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.”

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 for this reason.

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 an