THE SEARCH FOR APPROPRIATE DISPUTE RESOLUTION MECHANISMS TO RESOLVE ABORIGINAL LAND CLAIMS: EMPOWERMENT AND RECOGNITION

by

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Abstract

Different dispute resolution mechanisms, including treaties, litigation, negotiation and, to a lesser extent, mediation and arbitration, have been employed to resolve land disputes in Canada over the centuries. Since 1973, the federal government has unilaterally developed and reviewed land claims policies which favour negotiation to resolve land claims between governments and First Nations. Further, two regional institutions were created in Ontario and British Columbia to facilitate the resolution of these complex claims. Various processes have also been used to resolve similar claims in New Zealand and Australia.

The problems associated with the present land claims processes in Canada have been discussed for more than twenty years. The purpose of this thesis is to analyze the appropriateness of the various dispute resolution processes which are, or could be, employed to resolve the land question in Canada. The search for dispute resolution mechanisms suitable to resolve land claims is undertaken in light of the two basic characteristics of the relationship of the parties to these disputes: the cultural differences, and the imbalance of power between the parties. The first chapter of my thesis examines the history of land claims policies and processes in Canada, discusses the historical relationship between Aboriginal peoples and governments, and explores the main assumptions, premises, values and beliefs held by the parties involved in Aboriginal disputes, and the dynamics of their relationship. The following three chapters discuss specific dispute resolution processes which have been employed to resolve the land question in Canada. At the end of each of these chapters, suggestions are made to improve these various processes. Chapter Two analyzes the advantages and disadvantages of litigation in the context of Aboriginal land cases. Chapter Three examines the process of negotiation, with a focus on the federal government's policies on land claims. Chapter Four discusses the processes of mediation and arbitration, and considers the appropriateness of these mechanisms to resolve land claims in Canada. Chapter Five provides a comparative look at three institutions which have been created to resolve Aboriginal claims in New Zealand, Australia and Canada: the Waitangi Tribunal of New Zealand; the National Native Title Tribunal of Australia; and the British Columbia Treaty Commission. Finally, Chapter Six identifies the essential elements which must be present for dispute resolution mechanisms to be successful in the Aboriginal land claims context and integrates
In the course of my research, I have examined literature dealing with alternative dispute resolution (ADR), the resolution of Aboriginal claims, and on Aboriginal law generally. Throughout this thesis, I have used different methods of research and analysis. The critical approach is used to question the self-professed legitimacy and fairness of some dispute resolution processes, as well as to examine the theoretical underpinnings of various processes for cultural biases. The comparative method is helpful in analyzing different institutions that have been created in Australia, New Zealand and British Columbia to resolve Aboriginal claims. Finally, considering that the field of dispute resolution is informed by a wide variety of disciplines, the interdisciplinary approach is used to present different propositions concerning which dispute resolution mechanisms are the most appropriate to resolve Aboriginal land claims based on anthropological, historical, sociological and political variables. One of the difficulties in trying to find appropriate dispute resolution mechanisms to deal with Aboriginal land claims is to accommodate the diversity of the approximately 633 First Nations in Canada. Another difficulty relates to the fact that most of the ADR literature rarely addresses the issue of cultural differences.

This thesis concludes that the various dispute resolution mechanisms studied have both advantages and disadvantages for resolving the land question in Canada. I suggest that each mechanism has a role to play in the overall process of resolving Aboriginal land claims as long as it accommodates the cultural diversity and ensures that all concerned have a voice in designing the process(es) employed to resolve land disputes. This thesis also recommends the creation of an independent land claims body which would provide the benefits of third-party intervention while avoiding the deficiencies of the present judicial system. Objectives would be to reduce costs, expedite procedures, permit flexibility in the handling of polycentric problems, maximize the involvement of the parties in the process and outcome, and facilitate the production of a settlement which contributes to future harmonious relationships between Aboriginal and non-Aboriginal society. The most important element remains that discussions about possible changes to the existing processes should occur between governments in partnership with the First Nations of Canada, and in consultation with non-Aboriginal interests.
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In the final analysis it must be realized that the process of Indian Claims settlement involves not just the resolution of a simple contracted dispute, but rather the very lives and being of the people involved. Desire for settlement does not only concern the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people...

(Barber, 1973)

INTRODUCTION

Different dispute resolution mechanisms are available to settle disputes. Litigation is increasingly being seen by commentators, lawyers, judges, governments and the general public as only one way to do this. Alternatives to the court system have developed in response to a number of factors, including overcrowded courts and questions of the appropriateness of the judicial forum for some disputes. The three basic alternative dispute resolution (ADR) mechanisms are negotiation, mediation, and arbitration. The ADR movement has also seen the development of hybrid dispute resolution processes which are combinations of the three central ADR approaches. These include med-arb, mini-trial, recourse to rent-a-judge or private courts, use of an ombudsperson, and use of a fact-finding expert.

In the context of Aboriginal claims, various dispute resolution mechanisms have been employed in Canada over the centuries. The earliest attempt to deal with Aboriginal claims was through the signing of treaties. After the making of treaties, several other mechanisms were used to resolve outstanding grievances and claims between First Nations and the Crown. These included litigation, negotiation, and to a lesser extent, mediation and arbitration. Experience with these various approaches has shown mixed results in resolving the land disputes in Canada. Different processes have been used to resolve similar claims in other countries. For instance, New Zealand created in 1975 a fact-finding tribunal to deal with Maori claims and Australia established in 1993 the National Native Title Tribunal which uses, among other things, the mediation process to resolve the several land claims arising out of the Mabo decision.

The purpose of this thesis is to analyze the appropriateness of various dispute resolution processes which are, or could be, employed to resolve the land question in Canada. Aboriginal land grievances are particularly interesting in that they reflect the complex nature of the relationship between First Nations
and Canadian governments. Thus, the search for dispute resolution mechanisms suitable to resolve the land question should be undertaken in light of the two basic characteristics of the relationship of the parties to these disputes: the cultural differences and the imbalance of power between the parties. These two elements are fundamental in the search for appropriate mechanisms to resolve land claims since it is well-recognized in the dispute resolution literature that cross-cultural disputes are difficult to resolve, especially when one cultural group is more powerful than the other.

In this thesis, the inequality of power between First Nations and Euro-Canadian governments will be considered to determine how this factor affects the various dispute resolution processes employed to resolve Aboriginal land claims. I will briefly explore the sources of the imbalance of power between First Nations and Euro-Canadian governments and examine whether the various dispute resolution mechanisms are structured to compensate for the power imbalance between the parties.

The other major theme of this thesis relates to the cultural differences between Aboriginal and non-Aboriginal society. Culture has fundamental implications in the search for appropriate dispute resolution mechanisms to resolve the land question since "culture shapes the way people (...) perceive, approach, process, and resolve conflict." It is clear that the diverse cultural frameworks and differences between First Nations and Euro-Canadian governments manifest themselves in every dispute resolution forum. However, to date, it has been suggested that "[n]egotiation, mediation, arbitration, and even litigation models have not been fully developed to reflect the cross-cultural nature of their function when disputes are being addressed between First Nations and governments." The impact of cultural differences on the various dispute resolution processes will therefore be examined throughout this thesis.

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This thesis does not argue the case for or against Aboriginal land rights. It recognizes that such rights already exist in Canada. Already in place are processes of land claims resolution such as the federal land claims processes, the Indian Claims Commission, the British Columbia Treaty Commission and the Indian Commission of Ontario. This thesis proceeds rather on the widely accepted view that the existing land claims mechanisms are not working well and that the pace and conditions for the resolution of land claims disputes are inadequate. Canada and First Nations have acknowledged that there exists a need for a new approach for resolving the numerous outstanding land claims. Therefore, what this thesis seeks to do is to examine various dispute resolution mechanisms in the context of Aboriginal land claims and comment on the appropriateness of each of these processes. My interest centres on finding processes to achieve both the resolution of disputes and broad cross-cultural acceptance in society.

General Structure

In order to understand the nature of the land question from the perspective of both First Nations and Canadian governments, the first chapter will briefly examine the history of land claims policies and processes in Canada, discuss the historical relationship between Aboriginal peoples and governments, and explore the main assumptions, premises, values and beliefs held by the parties involved in Aboriginal disputes, and the dynamics of their relationships. The following three chapters will examine specific dispute resolution processes which have been, or could be employed to resolve the land question in Canada. In Chapter Two, I will analyze the advantages and disadvantages of litigation in the context of land claims cases. In Chapter Three, I will examine the process of negotiation with a focus on the federal government’s policies on land claims. In Chapter Four, I will discuss both the processes of mediation and arbitration and consider the appropriateness of these mechanisms to resolve land claims in Canada. I will then proceed with a comparative look at three institutions which have been created to resolve Aboriginal claims in New Zealand, Australia and Canada. In Chapter Five, I will therefore compare the Waitangi Tribunal of New Zealand, the National Native Title Tribunal of Australia and the British Columbia Treaty Commission. Finally, in Chapter Six, I will identify the essential elements which must be present for dispute resolution mechanisms to be successful in the Aboriginal land claims context and recommend
strategies to improve the existing processes in Canada. Essentially, these conditions will involve increasing the bargaining power of Aboriginal groups vis-à-vis Canadian governments and validating First Nations cultural frameworks, values, and priorities in the eyes of the Euro-Canadian society.

This thesis will not recommend only one specific model of dispute resolution nor will it provide definitive answers to all the questions raised. My analysis will offer some general findings which might be useful to governments and Aboriginal organizations who are working to design appropriate processes for resolving land claims. At the end of each chapter, suggestions will be made to improve the various dispute resolution processes used to resolve land claims in order to address the particular characteristics of disputes between Aboriginal groups and governments. In Chapter Six, I will recommend the integration of some fundamental principles into a general model to resolve the land disputes. These recommendations are only a foundation for further discussions since I believe that the search for a fair approach to resolve land claims must be the product of a joint effort between Aboriginal peoples and governments in consultation with non-Aboriginal interests.

Scope of the Analysis

The federal government divides land claims into three categories: specific claims, comprehensive claims, and “claims of another kind.” “Specific claims” involve grievances that Indian people might have that relate to the fulfillment of Indian treaties or to the administration of lands and other assets under the Indian Act\(^3\). “Comprehensive claims” are claims that are based on traditional native use and occupancy of the land. Such claims arise in those parts of Canada where native title has not been previously dealt with by treaty or other means - including the Yukon and Labrador, most of British Columbia, and parts of Quebec and the Northwest Territories. They are comprehensive in their scope, including such elements as land title, specified hunting, fishing and trapping rights, financial compensation and other economic and social benefits. They have been equated to modern day treaties. Finally, “claims of another kind” are

claims based on traditional use and occupancy by First Nations that have entered into treaties before Confederation where the terms of the treaties do not deal explicitly with land.\(^4\)

For years, the definitions and the distinction between different types of claim have been severely criticized as being "artificial", "arbitrary" and "inadequate".\(^5\) In the last federal election, the platform of the Liberal Party of Canada, Creating Opportunity,\(^6\) committed the party to eliminating the distinction between specific and comprehensive land claims. It stated that "[i]nstead of separate specific and comprehensive claims, we propose a general policy encompassing all claims."\(^7\)

Although the focus of my thesis will be mainly on the resolution of comprehensive claims, my analysis is not without significance for specific claims. In fact, most of the issues involved in the resolution of comprehensive claims are applicable to other types of disputes involving Aboriginal peoples and governments and extensive references will be made throughout this thesis to mechanisms used to resolve specific claims both in Canada and in other countries.

**Research Methodology**

In the course of my research, I have examined the literature dealing with alternative dispute resolution (ADR), the resolution of Aboriginal claims, and on Aboriginal law generally. Throughout this thesis, I used different methods of research and analysis. The critical approach is used to question the self-professed legitimacy and fairness of some dispute resolution processes as well as to examine the theoretical underpinnings of various processes for cultural biases. The comparative method is helpful in analyzing different institutions that have been created in Australia, New Zealand and British Columbia to

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\(^4\) Turpel, *supra* note 2, at 67.


\(^7\) *Aboriginal Peoples, supra* note 6, at 12.
resolve Aboriginal claims. Finally, considering that the field of dispute resolution is informed by a wide
diversity of disciplines, the interdisciplinary approach is used in my thesis to present different propositions
regarding which dispute resolution mechanisms are the most appropriate to resolve Aboriginal land
claims based on anthropological, historical, sociological and political variables.

Problems with Topic and Methods

1. **Diversity of First Nations in Canada**

One of the difficulties in trying to find appropriate dispute resolution mechanisms to deal with Aboriginal
land claims is to accommodate the diversity of Aboriginal peoples in Canada. There are approximately
633 First Nations in Canada. These First Nations are from different regions, have different interests,
engage in different activities, have different beliefs and values, and live in different political contexts. Not
only is there regional diversity, but there are also significant differences between the Aboriginal groups
within a region. These various groups have advanced land claims which focus on different priorities,
thus reflecting a diversity of cultures, histories, and geographies. Moreover, some land claims overlap and
raise sensitive inter-Aboriginal issues of territorial boundaries and rights. This diversity of First Nations
in Canada makes it more difficult to deal with Aboriginal issues in general and renders the search for
appropriate dispute resolution mechanisms to resolve Aboriginal claims much more problematic than in
countries such as New Zealand where there is only one indigenous group. Thus, in proposing changes to
the actual land process, one must be careful to avoid recommending a rigid policy that precludes a
diversity in settlement agreements depending on the Aboriginal group and its geographical location. It is
important to address this diversity to ensure that the process is both fair and responsive to the
circumstances of all First Nations in Canada.

2. **Regional Initiatives**

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Agreements* (Ottawa: Queen’s Printer, December 1985) at 47. [hereinafter *Living Treaties: Lasting
Agreements*]

9 Turpel, *supra* note 2, at 64.
Another difficulty with the study of land claims in Canada is the growing regionalization of the process. The creation of different land claims mechanisms in the provinces of Ontario and British Columbia is a significant innovation and may, to some extent, be a sign of the failure of the federal land claims processes. The search for a land claims model at the national level must therefore not only acknowledge the existence of these regional initiatives, but the national approach should be informed by their experience and respect their mandate. The institutions in Ontario and British Columbia will be discussed as part of this thesis.

3. Combining Literature from Different Fields of Study

One of the major difficulties encountered in my research for appropriate dispute resolution mechanisms to resolve Aboriginal land claims relates to the fact that the literature dealing with the resolution of Aboriginal claims has not fully integrated ADR theories, nor does the literature on ADR apply its theories or use examples to fit the Aboriginal claims context. These two fields of study have been generally researched separately. However, recent initiatives tend to demonstrate that academics, First Nation leaders, lawyers and governments have finally come to realize that appropriate dispute resolution processes can aid substantive changes in the resolution of the land question by providing a fair context to assess these difficult questions.

One example of the difficulty in applying ADR literature to the Aboriginal claims arena relates to the fact that most of the ADR literature does not address the issue of cultural differences. It appears that most commentators discuss ADR theories by assuming that disputing parties are all members of the same

10 Ibid, at 64-65.
11 NOTE: The Aboriginal literature has primarily focused on discussions regarding the scope of Aboriginal rights with no real analysis of the various processes to achieve a resolution of these critical questions.
culture, usually “western” culture. They rarely mention the fact that ADR strategies and techniques are culturally relative and that what is considered appropriate behaviour by one culture may not be considered appropriate by another. A study done in Victoria between 1990 and 1994 by the UVic Institute for Dispute Resolution, through its Multiculturalism and Dispute Resolution Project, noted that before the 1980s, most work in the conflict resolution field did not address cultural issues. According to Michelle LeBaron Duryea, this is probably the result of a combination of factors:

First, there are methodological problems with researching interpersonal conflict and culture. Both terms are subject to ambiguity and a variety of interpretations. Both are multidimensional phenomena and difficult to examine. As such, there are the usual difficulties inherent in social science research including the isolation of variables, the observer effect, among others. Second, dispute management has only recently been acknowledged as having cultural components. Thus, the ADR literature is not always applicable to the Aboriginal claims context, since it does not adequately deal with cultural differences. However, it must be noted that this is slowly changing.

Recently, the ADR field has seen developing an increasing body of literature...

...which underscores the integral role of culture in conflict resolution, the intertwined and interactive relationship between conflict and culture, and the fact that all conflict involves culture, not just intercultural conflict. This interdisciplinary literature comes from the fields of education, anthropology, psychology, sociology, communication, management and law. The literature indicates only a beginning understanding of the relationship between conflict and culture. There is little theory specifically relating to conflict and culture. Even less literature has clear cross-cultural applications.

Terminology

Some preliminary definitions of the various terms used throughout this thesis to identify indigenous people of Canada are necessary. I have chosen to use principally the term “Aboriginal” which in Canada

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14 M. LeBaron Duryea, Conflict and Culture - A Literature Review and Bibliography (Victoria: UVic Institute for Dispute Resolution, 1992) at 20.
16 NOTE: However, Michelle LeBaron Duryea has done extensive research in the field of conflict and culture, focusing on implicit cultural assumptions in dispute resolution practice in North America.
17 Lund & al., supra note 1, at 4. NOTE: This new literature has pointed out that the main over-arching principles that apply in conflict resolution across cultures are the universal need for respect, caring, and procedural fairness.
applies to status and non-status Indians, Inuit and Metis. "Aboriginal" is also the term used in the Constitution Act, 1982. I also use the term "First Nations" which refers to the indigenous peoples of Canada, who have historically been described by Europeans as Indians. "First Nations" is the term preferred by many Indian nations. The term "Indian" is used to refer to Indians only in the context of the Indian Act, which distinguish between Indians who have status and excludes non-status Indians, Metis and Inuit. I use the term "indigenous peoples" when referring to the international level, given that it is now the accepted usage at the United Nations. The term "native" is also occasionally used to describe Aboriginal people of Canada.
CHAPTER ONE RELATIONSHIP BETWEEN ABORIGINAL AND EURO-CANADIAN SOCIETY

Part I Historical Background

Before examining the various dispute resolution processes which are employed or could be employed to resolve Aboriginal land claims in Canada, it is first necessary to briefly examine the historical relationship between Aboriginal and non-Aboriginal societies to understand how this history has contributed to creating the present political and legal reality with respect to Aboriginal claims.

A. The Early Period

1. The Royal Proclamation of 1763

Early in the settlement of Canada, the British Crown forecast the tensions that would arise between First Nations, who had long lived on the land then being settled, and the newcomers from Europe. In order to protect Aboriginal people from settlers eager to obtain vast amounts of land in what would become Canada, and to establish peace among all peoples, England passed the Royal Proclamation of 1763.\(^{18}\)

The Proclamation declared, among other things:

\[
\text{that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominion and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.}
\]

The Proclamation affirmed that territories beyond the boundaries of the colonies were "Indian lands" and could not be settled on, and it dictated that only the Crown could acquire land from Aboriginal people within Canadian territories:

\[
\text{it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.}^{19}\]

\(^{18}\) The Royal Proclamation of 1763, R.S.C., 1985, Appendix II, No.1.

\(^{19}\) Quoted in D.W. Elliot, eds., Law and Aboriginal Peoples of Canada, 2d ed., Canadian Legal Studies Series (Ottawa, Ont.: Captus Press, 1992) at 29-30. NOTE: The vagueness of this description of
The spirit of the Proclamation was followed, to some degree, in some of the early treaties that were signed between the Crown and the First Nations of Canada. Further, the Royal Proclamation of 1763, as part of the Constitution of Canada, is included in a schedule to the Constitution Act, 1982. The Proclamation was referred to by Mr. Justice Dickson of the Supreme Court of Canada in Guerin v. The Queen as the source of a fiduciary obligation owed by the Crown to Indians. Some aspects of the Royal Proclamation can also be found in the surrender provisions of the Indian Act.

2. Treaties

In the early 1700s, the Crown started to secure title to the land by signing a number of treaties with Aboriginal groups who ceded title in exchange for land reserves and other rights. Most of the treaties signed in that early period in the Maritime provinces and in Quebec were “peace and friendship” treaties, more concerned with military alliance than land. These treaties, nonetheless, confirmed the right of the First Nations to hunt and fish at liberty as they had been accustomed to doing. More than 30 different treaties covering the Great Lakes basin were entered into between 1763 and 1850. The prairies were settled through the “numbered” treaties, signed between 1870 and 1921. The adhesion to Treaty 9, covering most of northern Ontario, was entered into in 1929.

territorial limits is the basis for the British Columbia government claim that the Royal Proclamation does not apply to this province, west of the Rocky Mountains.


21 [1985] 1 C.N.L.R. 120 (S.C.C.). NOTE: According to Mr. Justice Dickson, this obligation was assumed by the Crown in 1763 when it began to interpose itself between aboriginals and prospective purchasers of their land by accepting a surrender of title from the Indians and then by acting on their behalf. See Living Treaties: Lasting Agreements, supra note 8, at 7.


23 An Agenda for Action, supra note 3, at 1; Living Treaties: Lasting Agreements, supra note 8, at 2.

24 ICC, supra note 20, at 7; Living Treaties: Lasting Agreements, supra note 8, at 2-3.
In B.C., however, relatively few treaties were signed. On Vancouver Island, the British Crown gave trading rights to the Hudson’s Bay Company, and placed it in charge of immigration and settlement.25 James Douglas, who became governor of the Vancouver Island colony in 1851, was instructed to purchase First Nation lands. Between 1850 and 1854 Douglas made fourteen purchases on the Island covering an area of about 358 square miles - about 3 percent of Vancouver Island.26 Douglas recognized pre-existing Aboriginal land ownership as well as Aboriginal rights to fish and to hunt on unoccupied treaty lands.27

When the mainland was made a colony in 1858, Douglas was encouraged by the Colonial Office to continue purchasing land, but the Colonial Office refused to offer funds, stating that the money should be raised locally.28 In a letter to Douglas dated October 19, 1861, the Secretary of State for the Colonies wrote: “I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island; but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds ...”29

However, unable to raise sufficient funds locally, Douglas made no further purchases.30 Douglas then sought to create a future for First Nations “in which they would be secure, prosperous, equal, and assimilated.”31 Small reserves started to be created as protection from aggressive land acquisition by settlers32 and a policy of assimilation guided the new colony.33 Unfortunately, not everyone in the new

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29 British Columbia, Papers Connected With the Indian Land Question, 1850-1875 (Victoria: Government Printer, 1875) at 20.
30 NOTE: Apart from a portion of the Peace River which is included in Treaty 8 negotiated by the federal government in 1899, these 14 treaties signed by governor Douglas are the only treaties that exist in B.C.
32 NOTE: By the time the colony of B.C. entered Confederation in 1871, 120 Indian reserves had been established throughout the colony. These reserves were considerably smaller that those elsewhere in the
colonies on the mainland agreed with Governor Douglas' recognition of Aboriginal title. As a result, in the
years following Douglas's retirement in 1864, many of his policies were reversed. Joseph Trutch assumed
control of Aboriginal policy and in contrast to Douglas, regarded First Nation people as "inferior
savages".34 The legislature of the united colony removed Aboriginal people's right to acquire Crown land
and affirmed that Aboriginal title had never been acknowledged. No compensation was offered to
Aboriginal people for the loss of traditional lands and resources.35

3. Confederation

Section 91(24) of the British North America Act gave the federal government jurisdiction over "Indians
and Lands reserved for Indians". The basis upon which Canada would fulfill this role soon became the
subject of many federal-provincial jurisdictional disagreements. These disputes are still at the heart of
many difficulties currently experienced in resolving Aboriginal claims. One of these disputes was
brought to the Judicial Committee of the Privy Council in Britain, and as a result of this case, the
provinces of Canada obtained control of all the lands within the boundaries that the Indians had ceded by
way of treaty to the federal Crown, or to the British Crown before 1867.36

Under federal control, First Nations became subjected to the constraints of the Indian Act, enacted in
1868. It has been suggested that the Indian Act "...was a mandate for government administrators to

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33 B.C. Task Force, supra note 25, at 7.
34 Tennant (1993), supra note 27, at 1.1.01.
36 St. Catherine's Milling and Lumber Company v. R. (1889) 14 AC 46 (J.C.P.C.). NOTE: This case
was the most important Indian land rights decision in Canada for many decades, even though no Indians
were represented before the Court. ICC (1995), supra note 20, at 8.
control the lives of Indians on reserves." The impact for First Nations of being subjected to the Indian
Act was explained as follow:

The "band" system of administration was imposed on First Nations and bands were made subject
to detailed supervision by federal officials. The governments outlawed the great, traditional
potlatches which were the heart of the First Nations' social and political system. Throughout the
province, the authorities removed children from their families and communities, and placed them
in residential schools. Separated from their families and their own society, forbidden to speak
their own language, the children were to be educated as non-aboriginals. Inevitably, the
persistent and growing exclusion from traditional lands, seas, and resources led to an increasing
reliance upon federal support programs. These actions began a long decline into a state of
dependency.38

During the 1880s and 1890s, some inter-governmental disputes relating to Aboriginal issues were directed
to an Arbitration Board created to adjust financial accounts between Canada and Ontario, but without
much success.39 During the same period, Aboriginal groups in the west part of the territory were
enjoining governments to continue negotiating treaties. These demands were reiterated over the following
decades but remained unanswered.40 In B.C. where almost no treaty had been signed, the First Nations

...remained adamant in their demands for recognition of aboriginal title and the making of
treaties. Just as persistently, the federal and provincial governments declined to respond to the
aboriginal demands. While some non-aboriginal people supported aboriginal concerns, most of
them, particularly at the political level, held the view that aboriginal title had never existed in
B.C., or that it had been displaced by the activities of the new society and its legal system.41

In B.C., settlement pressure on agricultural land increased after the turn of the century. The federal and
B.C. governments agreed in 1912 that a Royal Commission should re-examine the size of every reserve in
the province of B.C.42 The Commission sat continuously from 1913 to 1916 and visited all the tribes in
the province. Its report was published in four volumes in 1916.43 The Report of the Commission

37 J. Ryan and B. Ominayak, "The Cultural Effects of Judicial Bias" in Sheilah L. Martin & Kathleen E.
39 Indian Commission of Ontario, Discussion Paper Regarding First Nation Land Claims (Toronto: ICO,
September 24, 1990) at 7.
40 Cassidy and Dale, supra note 32, at 6; See also B.C. Task Force, supra note 25, at 10.
41 B.C. Task Force, supra note 25, at 11.
42 Tennant (1993), supra note 27, at 1.1.03; R.C. Daniel, A History of Native Claims Processes in Canada
1867-1979 (Report prepared for the Department of Indian Affairs and Northern Development, February,
1980) at 43.
43 Canada, Report of the Royal Commission on Indian Affairs for the Province of British Columbia
recommended the enlargement of some reserves, but also advised that much valuable land be cut off from others. Disregarding both the Indian Act and the constant reassurances from the commissioners that the size of reserves would not be changed without First Nations' consent, the governments imposed land reductions unilaterally.

4. First Nations Organization

Courageous in their struggle to attain recognition of their right to the land, First Nations started to organize themselves. In 1908, the Nisga’a Land Committee was formed in B.C. and in 1916, the first inter-tribal First Nations organization, the Allied Indian Tribes of British Columbia, was founded. In June 1926, the Allied Tribes had raised enough money to present a land claim and a petition to Parliament. As a direct consequence of that petition, a Special Joint Committee of the Senate and House of Commons was convened on March 22, 1927, to hear evidence and to report. In its report, the Committee dismissed the demands and declared that “the natives had not established any claim to the lands of British Columbia based on aboriginal or other title.” The same year, Parliament amended the Indian Act to make it illegal to raise or spend money to advance claims. The amendment stated that:

141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offense and liable upon summary conviction for each offense to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

44 Stokes, supra note 26, at 183; Tennant (1993), supra note 27, at 1.1.03.
45 B.C. Task Force, supra note 25, at 11; See also Daniel, supra note 42, at 46-47; Tennant, supra note 27, at 1.1.03.
46 Cassidy and Dale, supra note 32, at 6; Tennant (1993), supra note 27, at 1.1.03.
47 Daniel, supra note 42, at 49; Tennant (1993), supra note 27, at 1.1.04.
48 Daniel, supra note 42, at 50.
49 Cassidy and Dale, supra note 32, at 6-7.
50 R.S.C. 1927. c.98, section 141, in Department of Indian and Northern Affairs, Consolidation of Indian Legislation, Vol. 2, at 301.
This amendment blocked Indian bands from effective political and court action in pursuit of their rights until 1951 when Parliament repealed this provision of the *Indian Act*.  

In the period before World War II, the federal government did not adopt any clear policy for dealing with Aboriginal claims. Aboriginal issues were simply not on the agenda of the government during that period. As a result, depending on the people involved and on the nature and history of a claim, settlements were sought by negotiation, mediation, arbitration, litigation, and executive or legislative fiat. An historical review of that period has concluded that

> whatever might be said about the relative merits of various mechanisms for dealing with native claims prior the World War II, one must conclude that, on the whole, they were not effective. In fact the peculiar nature of the relationship between Indian people and the federal government seems to have provided a fertile ground for creating claims and no mutually acceptable mechanisms for resolving them, with the possible exception of the treaties.  

**B. Post World War II**

After the Second World War, tribal councils and political Aboriginal organizations became very vocal and the political activity in pursuit of the land claims re-emerged. Canada finally decided to address the “Indian problem” after over 100 years during which “...law and policy directed towards Indians had been built upon the premise that Indians were a disappearing race, doomed to extinction as a result of disease and assimilation.” In 1946-48 and 1958-61, joint committees of the Senate and the House of Commons recommended the creation of an Indian Claims Commission, similar to the American Indian Claims Commission, with court-like powers and a mandate to hear and consider various classes of claims. Enabling legislation was introduced in the House of Common in December, 1963, then re-introduced in June, 1965 after consultation with Aboriginal groups but both times the draft bills died on the order paper.

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Starting in the 1960s, commissions of inquiry were used in identifying Aboriginal interests and legal issues when conflicts developed in areas subject to Aboriginal claims. These commissions of inquiry include the Northern Natural Gas Pipelines, West Coast Oil Ports, Northern Development in Ontario, Metis Land Entitlements in Manitoba and Alberta.\textsuperscript{55}

During the same period in B.C., one attempt at negotiating a settlement was made by Arthur Laing, then Minister of Indian Affairs. Minister Laing was showing some interest in discussing the land question because of the threat of litigation. Before starting negotiations, he insisted on the condition that the various bands in B.C. united in one negotiating team. Given the Aboriginal diversity in B.C., this was an unrealistic demand and this attempt to negotiate Aboriginal title failed.\textsuperscript{56} In the late 1960s, the Nisga’a went to court, seeking a declaration that they had held Aboriginal title to their land prior to colonization, and that their title had never been extinguished.\textsuperscript{57}

1. White Paper of 1969

In 1969, the federal government proposed a fundamental change in the relationship between First Nations and the Euro-Canadian society by submitting the \textit{Statement of the Government of Canada on Indian Policy}.\textsuperscript{58} The government’s White Paper essentially reiterated the government’s position that Aboriginal title claims were “too vague and undefined” to be dealt with and called for the abolition of treaty rights and the termination of the “special status” of Canada’s Indians, suggesting that they should have “the

\textsuperscript{55} \textit{An Agenda for Action}, \textit{supra} note 3, at 74.
\textsuperscript{57} \textit{B.C. Task Force}, \textit{supra} note 25, at 12. Tennant (1993), \textit{supra} note 27, at 1.1.05.
same rights and opportunities as other Canadians." Many contend that this policy was in fact the final steps toward assimilation. According to Menno Boldt and J. Anthony Long, the White Paper blamed the economic and social stagnation of Indians and their condition of dependency on the existing policy of internal colonialism. The White Paper proposed that the only acceptable solution to the "Indian problem" was to integrate Indians fully and equally into Canadian society. To achieve this objective, the White Paper recommended the repeal of the Indian Act, [and] the removal of special status for Indians.

The White Paper had a major effect in raising the political consciousness of First Nations and contributed in uniting Aboriginal groups across the country as never before. Aboriginal groups from everywhere in Canada, who were obviously not consulted in the development of this policy, condemned the White Paper which they perceived as being racist in its intent and potentially genocidal in its consequences. Terry Lusty, a Metis from Calgary, circulated a small pamphlet in many Aboriginal communities in Canada entitled Red Paper vs. White Paper in which he stated:

The Indian did not ask for an Indian Affairs Branch; they did not ask to be Federally controlled; they did not ask for racial segregation; nor did they ask for a pathetic and paternalistic administration to govern them - so how can the Indian be the one to blame for his current situation?

The Trudeau government was embarrassed by the unexpected opposition from Aboriginal groups and, as a result, started funding Aboriginal political organizations. The government finally retracted the White Paper in 1970, although it is suggested that "...the legacy of suspicion and mistrust which they left in their wake remains strong to this day."

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59 Cassidy and Dale, supra note 32, at 9; See also Daniel, supra note 42, at 153; Tennant (1993), supra note 27, at 1.1.05; ICC (1995), supra note 20, at 9.
60 Mandell, supra note 51, at 2.4.07.
66 J.R. Ponting and R. Gibbins, Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada (Toronto: Butterworths, 1980) at 29; See also Boldt and Long, supra note 61, at 5; See also J.L.
As part of the White Paper, the federal government had accepted to recognize the validity of certain specific claims where a “lawful obligation” existed. These claims were to be resolved with the assistance of the new Office of Indian Claims Commissioner. Lloyd Barber was first appointed to the position on December 19, 1969. The Office of the Indian Claims Commissioner was established under the Public Inquiries Act to consult with Indian groups and to inquire into specific claims. The Commissioner’s role was not to deal with the merits of any claims but rather to consider appropriate methods of resolving these disputes. The concrete role played by Lloyd Barber appears to have been along the lines of unstructured mediation as an aid to the negotiation process:

The role of the Indians Claims Commission thus evolved into one characterized by a variety of functions: chairman of negotiations, facilitator, mediator, middleman, ombudsman, prodder, sounding board. Sometimes specific questions required immediate resolution, but more often it was a matter of the general framework within which on-going issues between the Indians of Canada and the Government could be identified and resolved.

Thus, the Commissioner acted as a mediator, helped to clarify issues, established structures and processes for negotiation. However, many First Nation leaders criticized the role of the Commissioner partly because it was associated with the White Paper, but particularly because his mandate excluded substantive consideration of Aboriginal issues and his powers were too limited to put pressure on the parties. The office of the Indian Claims Commissioner was discontinued in 1977.

2. Calder Decision in 1973


Appointed by Order in Council 1965-2404. Canada, Commissioner on Indian Claims, A Report Statements and Submissions (Ottawa, Queen’s Printer, 1977) at 1. [hereinafter Commissioner]; Durocher, supra note 20, at 32.


Commissioner, supra note 67, at 2.

Barber, supra note 54, at 12; Colvin, supra note 54, at 25-26.

Daniel, supra note 42, at 154; Colvin, supra note 54, at 26.
In 1973, the Supreme Court of Canada ruled in Calder v. Attorney General of British Columbia\(^73\) that the Nisga’a had held Aboriginal title in pre-colonial times, but the judges were evenly divided on the question of the continuing existence of that title.\(^74\) The then Prime Minister, P.E. Trudeau admitted that the Nisga’a judgment had led him to modify his views on the question of Aboriginal rights. He remarked, “[p]erhaps you have more legal rights than we thought you had when we did the White Paper”.\(^75\)

According to Trudeau, the Calder case allowed him to reconsider the colonialist assumptions underlying government Aboriginal policy and to acknowledge the possibility of self-determination, Aboriginal and treaty rights, and self-government as key organizing principles.\(^76\) Thus, the Calder decision altered the framework for arguing Aboriginal rights and provided significant bargaining leverage to Aboriginal groups.

The strong reaction of the Aboriginal groups to the 1969 White Paper, combined with the important decision of the Supreme Court of Canada in Calder in the early 1970s, forced the federal government to rethink its approach with respect to Aboriginal land claims. In fact, the Calder decision had a decisive effect on the federal government for it showed that land claims could no longer be casually dismissed and thus influenced the government to agree to negotiate Aboriginal land claims. What followed over the next 23 years was a complete reversal in the government’s attitude in relation to Aboriginal issues. In 1973, the government started to issue various policy statements recognizing some categories of claims to be resolved through negotiations. This shift was reluctant, for the liberal government of Trudeau had opposed a nationalism on the part of Indians. In fact, the policies under the Trudeau government persistently reflected the attitude that special treatment was discriminatory treatment. Other factors also contributed to force the government to reconsider its approach in the early 1970s. These include the strong influence of the public opinion which supported the resolution of Aboriginal claims, the precarious situation of a minority government facing the opposition parties which were in favour of First Nations

\(^73\) (1973) 34 D.L.R. (3d) 145 (S.C.C.)
\(^74\) Elliot, supra note 19, at 48; Tennant (1993), supra note 27, at 1.1.05.
\(^75\) Cassidy and Dale, supra note 32, at 9; See also Commissioner, supra note 67, at 12.
claims, and a consciousness that the social and economic condition of the First Nation communities conflicted with Canadian ideas of human rights and national prestige.

3. Land Claims Policies

On August 8, 1973, the federal government issued a policy statement recognizing claims based on traditional use and occupation of the land, referred to as "comprehensive claims". This policy called for the "exchange of undefined aboriginal rights for concrete rights and benefits that would be guaranteed by settlement legislation."

This "exchange" did not, however, imply an admission by the government that these "undefined" rights actually existed. The policy stressed that in exchange for these rights and benefits, all Aboriginal rights and title were to be extinguished once and for all. With respect to the process of negotiation, it has been suggested that while this new policy "...confirmed the government's newfound willingness to talk, it also demonstrated Ottawa's determination to control the outcome of any negotiations." The federal government was indeed induced to adopt a preference for negotiated settlements as it probably realized that it would have more control of the process and outcome of negotiation than litigation.

In July 1974, the federal government created the Office of Native Claims (ONC) as part of the Department of Indian and Northern Affairs to deal with the growing number of claims that were being received. The process established to deal with these claims was as follows: (1) a claim, backed by historical research, would be submitted to ONC for consideration; (2) the claim along with its supporting documentation would be reviewed by ONC officials and an agreement on the facts would be reached between the two parties; (3) the claim would be handed over to the Department of Justice, which would decide if a "lawful obligation" existed. If a claim was deemed "valid", the government would agree to enter into negotiations.

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77 *Living Treaties: Lasting Agreements*, supra note 8, at 13.
78 *An Agenda for Action*, supra note 3, at 24.
79 Ibid.
81 Durocher, *supra* note 20, at 32. **NOTE:** More than 600 specific claims have been submitted to the federal government since 1973.
to fulfill its obligations. If not, the claim would be rejected, and the matter would end.\textsuperscript{82} The James Bay and the Mackenzie Valley disputes were handled by the ONC. The \textit{James Bay and Northern Quebec Agreement}, the first Canadian land claims agreement, was signed in 1975 with almost 11,000 James Bay Cree and Inuit of Northern Quebec.

In 1975, a Joint National Indian Brotherhood/Cabinet Committee was formed to study, among other things, whether there should be a national approach to the resolution of land claims. The committee was in operation until January 1979.\textsuperscript{83} From this committee, an agreement was reached to create a subcommittee called the Canadian Indian Rights Commission with a mandate to discuss the principles and parameters of mechanisms to make settlements. However, the only process which was set up was the Indian Commission of Ontario (ICO) in March 1978. The ICO is a neutral and independent Tripartite Council with a mandate to provide a forum for the negotiation of specific claims and to deal with questions relating to Aboriginal self-government in Ontario.

During the same period, one notable event which occurred was the beginning of negotiations in 1976 with the Nisga'a Tribal Council and the federal government.\textsuperscript{84} Moreover, in 1979, the federal government asked Gerard V. LaForest to review the land claims process and to prepare a report for the ONC. Mr. LaForest concluded that the most serious problem with the ONC process was its lack of independence and objectivity in considering the claims presented to it. He recommended the establishment of an

\textsuperscript{82} A. Murray, \textit{supra} note 80, at 39 and 41. \textbf{NOTE:} "In cases where the Department of Justice confirms that a "lawful obligation" exists, the Office of Native Claims may still refuse to enter into negotiations if the cost of a settlement has the potential to overwhelm ONC's limited budget. Bands with such legally valid but expensive claims are not offered redress by the government through negotiations, as the policy would imply. They are left to go to court because the government is not willing to allocate the funds necessary to redress the grievance - unless forced by the courts."

\textsuperscript{83} Durocher, \textit{supra} note 20, at 32-33.

\textsuperscript{84} \textbf{NOTE:} B.C. maintained its long standing position of denying the validity of Aboriginal title and did not join the Nisga'a negotiations until 1990 when it finally reversed its policy. Elliot, \textit{supra} note 18, at 49; Tennant (1993), \textit{supra} note 27, at 1.1.05; J. Aldridge, "An Overview of the Land Claims Settlement Process in B.C." in \textit{The Economic Bridge to Self Reliance Aboriginal Land Claims} (Native Investment & Trade Association, Conference held on May 12-14, 1990) at 1; \textit{B.C. Task Force, supra} note 25, at 12-13.
independent tribunal to adjudicate and otherwise assist the resolution of the claims.\textsuperscript{85} The government did not follow Mr. LaForest's recommendation.

4. \textit{Constitution Act, 1982}

The year of 1982 was a turning point in the law relating to Canadian Aboriginal peoples. "Rights that had an uncertain existence in the common law were suddenly enshrined in the written part of the Canadian constitution. Aboriginal-government relations and aboriginal non-aboriginal relations were put into a more legal framework, and much more under the control of lawyers and courts."\textsuperscript{86} The \textit{Constitution Act, 1982}, included provisions which recognized and affirmed Aboriginal and treaty rights. Section 35(1) states that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."\textsuperscript{87} These references to Aboriginal rights remain vague, but the courts have held they include the right to hunt and fish. Section 35 may also include the inherent right of self-government according to the federal government's recently released policy on Aboriginal self-government. This premise was in fact part of the Liberal promises in the Red Book of 1993. Minister Ron Irwin confirmed this position by stating: "[T]he federal government operates on the premise that the inherent right to self-government exists and is recognized as an Aboriginal right under section 35 of the \textit{Constitution Act, 1982}."\textsuperscript{88}

5. \textit{Revision of Land Claims Policies}

In 1981, the federal government issued its revised comprehensive claims policy in a document entitled \textit{In All Fairness}.\textsuperscript{89} This document clarified some broad positions of the government, such as the desire to

\textsuperscript{85} G.V. LaForest, \textit{Report on Administrative Processes for the Resolution of Specific Indian Claims}, (Ottawa, DIAND, 1979); \textit{See also} V. Savino, "The "Blackhole" of Specific Claims in Canada - Need it Take Another 500 Years?" \textit{in Native Land Issues (See You in Court...)} (Winnipeg: CBA, April 1989) at 22.

\textsuperscript{86} Elliot, \textit{supra} note 19, at 119.

\textsuperscript{87} \textit{Constitution Act, 1982} s. 35, being Schedule B to the \textit{Canada Act, 1982} (U.K., 1982 c.11).

\textsuperscript{88} Federal Treaty Negotiation Office, "Federal Perspective on Self-Government" \textit{in Treaty News} (July 1995) at 3; \textit{An Agenda for Action, supra} note 3, at 4-5.

\textsuperscript{89} Canada, \textit{In all Fairness: A Native Claims Policy} (Ottawa: Queen's Printer, 1981) (hereinafter \textit{In All Fairness}).
protect cultural identity of Aboriginal people while allowing their full participation in the development of the economy, the unwillingness of government to consider the issue of Aboriginal self-government and constitutional reform within the land claims process, and insistence that all settlements be final and result in the extinguishment of Aboriginal rights in exchange for specific benefits. Despite its title and apparent revision, the 1981 policy received severe criticisms. For instance, the Nisga’a Tribal Council stated that “... (In All Fairness) is a very slick process to create in the public mind a definition of what is fair; then, clearly, anything that falls outside of that definition is unfair, unrealistic, not pragmatic, radical, etc. It is a very, very insidious document in that respect.”

The policy relating to specific claims was reviewed in 1982 and released under the title Outstanding Business. It appears that this revised policy was also a disappointment. Instead of initiating major changes to the previous policy, the government elaborated on the existing premises and only clarified the limits of what the government was willing to negotiate. The federal government reiterated that its main objective was to discharge lawful obligations, and stated its preference for negotiated settlement for which it described a five-stage negotiation process to be followed, a procedure developed unilaterally by the federal government. The development of land claims policies without the participation of Aboriginal groups has always been a major grievance with First Nations, especially with respect to specific claims policies as it clearly departs from the bilateral nature of the treaties.

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92 Canada, Outstanding Business: A Native Claims Policy; Specific Claims (Ottawa: Queen’s Printer, 1982).
93 Ibid, at 19.
94 Ibid, at 23-25.
95 An Agenda for Action, supra note 3, at 54; E. Denhoff, “Specific Land Claims - How Does A Tribunal Deal With Them?” in Native Land Issues (See You in Court...) (Winnipeg, CBA, April 1989) at 10.
The comprehensive claims policy was revised again in 1987 in response to the report of the task force to Review Comprehensive Claims Policy (the Coolican Task Force) - *Living Treaties: Lasting Agreements*. The Task Force had called not just for a new policy on comprehensive claims, but an entirely “new relationship” between the government and the First Nations of Canada. Moreover, according to the task force, a serious impediment to reaching land claims settlements was the federal government’s insistence that all Aboriginal rights be extinguished in any comprehensive claim settlement. Consequently, the task force recommended an alternative which would allow for flexible agreements that would recognize and affirm Aboriginal rights. In its response to the Coolican Report, the Mulroney government not only ignored the task force’s recommendations of not insisting on extinguishment of Aboriginal rights but rather emphasized the fact that settlements had to be final. In this latter policy revision, the government confirmed its commitment to negotiation, clarified what would be negotiable at the comprehensive claims table, expanded the scope of comprehensive claims in certain areas and ignored most of the other recommendations of the task force. It has been suggested that this negative response to the Coolican Report has contributed to a deterioration in the relationship between the federal government and First Nations.

6. **Oka Crisis in 1990**

During the summer of 1990, members of the Kanasatake reserve near Oka, Quebec, decided to blockade a major highway in protest against a proposed golf course expansion onto land which they had laid claim to. On July 11, the protest erupted into a gun battle with Quebec police. The army was called in to deal with this and another Mohawk blockade of the Mercier bridge in Montreal. The blockades continued until September when provincial and federal governments agreed to negotiate. A number of First Nation groups across Canada also used rail and road blockades as an expression of their solidarity with the
activities of the Mohawk in Quebec and to emphasize their demands to both levels of government to recognize their inherent Aboriginal title and rights as well as to begin land claims negotiations. For all governments in Canada, the massive publicity over Oka drew attention to the dangers of not moving on Aboriginal claims. As a result of Oka, initiatives were made by New Brunswick and Quebec to establish Aboriginal seats in their legislatures. Further, it has been suggested that British Columbia, Saskatchewan and Ontario have taken the land question more seriously, and each of these provinces has endorsed the principle of the inherent Aboriginal right to self-government.

7. Revision of Land Claims Policy and Establishment of Land Claims Commissions

The federal government announced a new initiative on specific claims on April 23, 1991 which includes, among other things, the increase in the funds available for settlements from $15 million to $60 million annually, the inclusion of pre-confederation claims, a “fast track” process to settle claims under $500,000, the power for the Minister of Indian and Northern Affairs to settle claims under $7 million without Treasury Board authority, the creation of a joint First Nation/government working group to review and make recommendations regarding land claims policy and process, and the creation of the Indian Claims Commission on an interim basis. This Commission was created to deal with specific claims disputes only. The Commission’s mandate is to conduct impartial inquiries where a First Nation challenges the federal government’s rejection of its specific claim and where a First Nation disagrees with the compensation criteria used by the government in negotiating settlement of a claim. In these situations, the Commission can conduct hearings in order to complete its report and then it must make recommendations.

101 B.C. Task Force, supra note 25, at 14; See also Elliot, supra note 19, at 7; Tennant (1993), supra note 27, at 1.1.06.
102 Fleras and Elliot, supra note 63, at 96.
103 ICC (1995), supra note 20, at 14. NOTE: The mandate of the Joint Working Group (JWG) expired in July 1993. The parties were unable to reach agreement on an extension of the JWG’s mandate and the process ended.
to the federal government. The Commission also has the mandate of mediating disputes, when such a process is agreeable to both parties.\textsuperscript{105}

During the same period, an important regional initiative originated in British Columbia. The British Columbia Treaty Commission is a First Nations, provincial, and federal government initiative undertaken after the province of B.C. recognized continuing Aboriginal land rights in 1990. This Commission is comprised of both Aboriginal and non-Aboriginal commissioners and supervise the negotiations of modern treaties between governments and First Nations in British Columbia.

Some very important agreements were signed in the early 1990's. For instance, in November 1991, the Council for Yukon Indian Comprehensive Land Claim Umbrella Final Agreement was signed with 7,000 registered and non-registered Yukon Indians, providing a general framework for individual agreements with 14 Yukon First Nations. To date, four Yukon First Nation final agreements have been ratified by all parties and this process is continuing. Moreover, in December 1991, the Tungavik Federation of Nunavut land claims agreement was signed with 17,000 N.W.T. Inuit, after 15 years of negotiation. Under this agreement, Nunavut - the third northern territory - was agreed to and will be in place in 1999. The Nunavut Land Claim Agreement Act received royal assent on June 10, 1993 and came into force on July 9, 1993.\textsuperscript{106} Another agreement was signed in September 1993 in southwestern N.W.T. with 2,000 Sahtu Dene Indians and Metis. Finally, in February 1996, the B.C. government, Canada and the Nisga’a Tribal Council signed an agreement-in-principle after over 20 years of negotiations.

\section*{Part II \hspace{0.5cm} Aboriginal and Euro-Canadian Ideologies}

The disputes over the land question in Canada is a reflection of the difficulties in reconciling fundamentally different philosophical and cultural systems. I will therefore briefly describe the major ideological differences between Aboriginal and non-Aboriginal society.

\begin{itemize}
\item[\textsuperscript{105}] Indian Claims Commission, "The Indian Claims Commission" (1994) 1 ICCP, at vii; Turpel (1995), \textit{supra} note 2, at 79.
\item[\textsuperscript{106}] Elliot, \textit{supra} note 19, at 8.
\end{itemize}
A. Western-Liberal Ideology

Before contact, Aboriginal societies were self-sufficient and self-governing nations. However, the arrival of Europeans changed the situation dramatically. A policy of assimilation guided the new colony.

"Through assimilation, the dominant sector sought to undermine the cultural distinctiveness of aboriginal tribal society; to subject the indigenous to the rules, values, and sanctions of Euro-Canadian society; and to absorb the de-culturated minority into the mainstream through a process of 'anglo-conformity'."\(^{107}\)

The values of the colonial society were and are still very different from those of Aboriginal peoples. The European-western idea of society "distrusted communal values, exalted the enterprising individual, favoured progress over tradition, and believed that the betterment of humankind lay not in harmony with nature but in its conquest and transformation."\(^{108}\) In the western-liberal tradition, the dominant conception of society is one where the individual is considered to be morally prior to any group.\(^{109}\) North American Aboriginal peoples have a very different conception of individual and society. Traditional Aboriginal philosophies define a person in terms of spiritual unity, consensus, cooperation, and self-denial.\(^{110}\) The society is unified and "... conceived of as cosmocentric rather than homocentric."\(^{111}\)

Thomas Berger contends that "the Europeans' assumption of power over the Indians was founded on a supposed moral and economic superiority of European culture and civilization over that of the native people."\(^{112}\) Louise Mandell describes the western ideology as one which,

...assumes hierarchies of races; it is a commitment (over and above profit) that distant territories and their inferior peoples should be subjugated, and given the benefit of the superior dominion; it is a duty of the superior race to bring their opportunities, knowledge, democratic government to less evolved races and to promote their evolution. In summary, the vision is of western powers

\(^{107}\) Fleras and Elliot, *supra* note 63, at 41.
\(^{108}\) B.C. *Task Force*, *supra* note 25, at 8.
\(^{110}\) *Ibid*, at 167.
\(^{111}\) *Ibid*, at 166.
who have a right to rule, indeed an obligation to do so because of the superiority of their race; in ruling inferior peoples they bring opportunity, benefits and enlightenment.113

The means used by the Euro-Canadian governments to achieve their goal of assimilation were, among other things, the location of the Aboriginal people on reserves where they could be “civilized” and where education and Christianity could be brought to them.114 Children were removed from their families and communities and placed in residential schools where they were to be educated as non-Aboriginals.115 The reserve system also forced the replacement of the Aboriginal systems of governments with the introduction of western systems of governments, known as band councils.116 The governments outlawed the traditional potlatches which were the heart of the social and political system of Aboriginal peoples on the west coast.117 This paternalistic attitude went as far as prohibiting Indian people from raising money for the advancement of a land claim, prosecuting claims to land, or retaining a lawyer.118 In spite of the colonization movement, Aboriginal peoples survived. However, the effects of colonization and assimilation were dramatic:

(the First Nations) say that their lands and resources have been stolen; that they, their institutions and their way of life have been ignored, disrespected, degraded. They say that they were abused by the education system, which tore apart families, and caused much grief. Residential schools also left them without the benefit of their peoples’ knowledge which ordinarily would have been passed to them. They say that their languages, spirituality and culture was attacked.119

B. Modern Relationship

Ryan and Ominayak point out that the relationships between Aboriginal and non-Aboriginal people have changed over time but have always been characterized by a serious imbalance of power between the two

117 See F.E. LaViolette, The Struggle For Survival: Indian Cultures and the Protestant Ethic in British Columbia (Toronto: University of Toronto Press, 1973) at 43.
groups. They explain that "[t]hese relationships have reflected varying historical conditions as the two groups progressed. However, it is clear that at all times, the relationships reflect an attempt by the dominant group to control Indians and that the dominant group has, at all times, retained power (and thus control) over native people."\(^{120}\)

The attitudes of assumed Aboriginal inferiority and the government policies over the last century have had a cumulative impact which is reflected in contemporary relationships between Aboriginal and non-Aboriginal societies. According to Judge Sarich,

\[\text{[t]he Indian Act of Canada is premised upon the postulate that Native people are incapable of managing their own lives, that they cannot make their way in non-Native society and that they are inferior to non-Natives. These concepts have been advanced for so long by the Government of Canada through the Department of Indian Affairs, and so uncritically accepted for so many decades by the non-Native population, that there has come to an unconscious acceptance of these so-called truths. The dependency, the poverty, the self-destruction to which the Natives were reduced by a conscious policy of government were unspoken confirmation of this 'truths'.}^{121}\]

The relationship between First Nations and Euro-Canadian governments has deteriorated slowly throughout the last 150 years to the point where their relationship can now be characterized by distrust, dependency, tension and frustration. It is these same groups - First Nations and governments - who are now involved in trying to find an acceptable way to resolve some of the many injustices that have occurred during more than a century. All parties are claiming to represent legitimate interests and one must recognize that they all feel enormous pressure in the present social, economic and political context with respect to how to resolve these complex issues.

**Part III Dynamic Between Parties to the Land Claims Disputes**

The land disputes have many characteristics which must be mentioned at the outset. One of the most important elements is the fact that these disputes involve many parties and none of these parties are monolithic - they all represent a broad diversity of views among their respective groups. There are also

\(^{120}\) Ryan and Ominayak, *supra* note 37, at 346.
some parties that will be directly involved in the resolution of these disputes while some others will only
be consulted. Moreover, it is critical to recognize that these disputes involved not only divergent interests,
but they also challenge fundamental differences in values, culture and sense of identity.

A. Governments’ Dilemma

1. The Role of Ideology

Sally Weaver contends that ideology plays a major role when governments develop Aboriginal policies.

“Indian policy in Canada is made by individuals who hold strong feelings about whether or not native
groups should be treated differently from other Canadians.” It has been suggested that one of the most
pervasive forces underlying the federal government’s resistance to Aboriginal rights demands is its
resolute commitment to liberal-democratic ideology. Weaver explains that:

Liberal-democratic ideology stresses equality, individualism, and freedom from discrimination on
the basis of race, religion, nationality, and so on. For most policy-makers in government,
demands for aboriginal rights are problematic because they call for the administration of services,
programs, and laws on the basis of special status, collective rights, and cultural uniqueness. All
of these concepts are viewed by the government as contradicting liberal-democratic ideology.

Therefore, it is suggested that the attitudes of governments in relation to Aboriginal demands “are shaped
by a fundamental dualism regarding the nature of the ‘Indian problem’, with predictable consequences for
policy resolutions.” In fact, it appears that

... policy-makers are confused by competing definitions of equality; one entailing equal treatment
and no special privileges, and the other acknowledging the necessity of special treatment for
certain sectors if true equality is to be attained. When applied to aboriginal policy and
administration, this duality of meanings breeds ambiguity and confusion, since some federal
spending cuts, abolition of the Department of Indian Affairs, and curtailment of federal services,
while others endorse self-government and aboriginal rights as basic human rights.

122 S.M. Weaver, “Federal Difficulties with Aboriginal Rights” in Boldt & Long, eds., The Quest for
Justice: Aboriginal People and Aboriginal Rights (Toronto: University of Toronto Press, 1985) 139 at
141-142.
123 NOTE: When provisions for special treatment of Indians have been incorporated into government
policies, they have always been characterized as transitory or temporary measures and rationalized on the
basis of economic need (socio-economic class), not on the basis of cultural recognition (ethnicity). Ibid, at
142.
124 Fleras and Elliot, supra note 63, at 51.
125 Ibid.
2. **Sensitive Political Issues**

Governments generally seek to find a balance when dealing with Aboriginal issues by trying to represent what is generally accepted by society as being just and equitable. This is a difficult task. The dilemma facing governments was explained by John Ciaccia in these terms:

> On the one hand, because our sense of justice and concern for the disadvantaged is generally accepted by society, governments must be more flexible in their approach to native claims. On the other hand, claims cannot contain concepts and be viewed as being so exorbitant as to be rejected by society. We are caught in a balancing act between the views and needs of society on the one hand, and the needs and aspirations of the native community on the other.\(^{126}\)

Commentators, judges and First Nations have all recognized that the Aboriginal land question is fundamentally a political issue. It was suggested that all Aboriginal issues are “public issues where everyone feels he has, if not a direct interest, at least a sufficient interest to entitle him to have views on the subject and, more often than not, views which he considers just and which should prevail.”\(^{127}\)

Consequently, governments know that what is negotiated and the terms of settlement of any Aboriginal land claims will be ultimately decided by the political acceptance of their contents. “What the government offers and finally negotiates must be acceptable to the public.”\(^{128}\)

The determination of what the federal government will accept to negotiate is contained, since 1973, in the land claims policies. In setting the objectives and limits of what is on the negotiation table, the federal government is trying to find a balance between the interests of Aboriginal and non-Aboriginal society. Whether the federal government has been successful in finding this balance will be discussed in Chapter Three.

3. **Public Opinion**

The public opinion concerning Aboriginal issues is precarious. Public-opinion polls done shortly after the Oka crisis in September 1990 and recently in B.C. indicate considerable public sympathy for the demands

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127 Ibid, at 561.
128 Ibid.
of Aboriginal peoples in Canada.129 However, while there seems to be a general support for a fair resolution of Aboriginal land claims in Canada, this support is often disturbed or weakened by various factors including the amount of money to be granted to First Nations in compensation and the non-Aboriginal interests being adversely affected by proposed settlements. The federal government must find the right balance between the various competing interests involved in land claims. Canada has a general obligation to represent all Canadian citizens, including all Aboriginal people. However, it is sometimes argued that in land claims negotiations the federal government tends to only represent non-Aboriginal interests at the negotiation table since Aboriginal people are on the other side of the table representing their own interests. Moreover, considering the fact that Aboriginal people represent about four percent of the total population in Canada, it becomes a difficult task for the government to find a balance between the interests of Aboriginal and non-Aboriginal people. There is therefore a risk that the views and desires of the ninety-six percent of non-Aboriginal Canadians will be a major influence in dictating to the government the way to resolve the land question in Canada.

4. Personalities of Policy-Makers

It is also argued that personalities are a key factor in the development of policies both at the level of politicians and non-elected officials. Weaver contends that most of the policy initiatives in the 1960s and 1970s were strongly influenced by officials in various federal departments and agencies that were sympathetic to the Aboriginal cause. However, it seems that today these sympathetic public officials are few and have little influence in their departments. With respect to politicians, Weaver suggests that “although individual ministers can be and have been sympathetic to native demands, they have neither the

129 NOTE: The survey done in September 1990 indicated that more than 67% believed the government had broken its obligations to Aboriginal peoples. Another 70% believed the government had failed to honour its treaty obligations, and 62% supported land claims settlements. Moreover, the Spicer Commission Report on the Citizens Forum for Canada’s Future in late June 1991 confirmed overwhelming public support for equitable resolution of Aboriginal land claims and establishment of appropriate self-governing structures where warranted. Quoted in Fleras and Elliot, supra note 63, at 97-98.
time nor, often, the skill or influence to translate native demands into policy forms acceptable to cabinet.”

5. Political Priorities

Other central factors that influence the development of Aboriginal policies are the political priorities of governments. Governments are now focusing on economy and unemployment and there has been an strong emphasis on more rigorous financial control and management and spending restraint. According to Angus Murray, “Native people will inevitably be among the victims of any cuts in government spending because they are already a marginalized group in Canadian society - demographically, regionally, economically, politically and racially. As competition increases for the remaining seats in the lifeboats, these factors will ensure that Native people will be among the first to be thrown out.” Fleras and Elliot agree that “Aboriginal policy at present is shaped in a context dominated by fiscal restraint and reduction of federal expenditures.” Until now, Aboriginal programs have not been subject to the general cuts made by the federal government. DIAND is nonetheless affected by the general spending restraint of the government. This can be illustrated by Minister Irwin’s comment in June 1996, during a national conference on land claims held in Toronto, when he raised the current fiscal problems as an obstacle to the creation of an independent claims body.

6. Incentive

Some forces are driving provincial and federal governments to engage in the process to resolve the land question. In recent years, the Canadian courts have become more inclined to recognize Aboriginal rights. Aboriginal peoples have been using direct political action and the court system to obtain injunctions to halt development while the question of Aboriginal title and rights is being decided by the courts or being

130 Weaver (1985), *supra* note 122, at 142-143.
131 A. Murray, *supra* note 80, at 23.
132 Fleras and Elliot, *supra* note 63, at 49.
More importantly, there is a clear sense that the absence of settlements is causing uncertainty which is negatively affecting the economy. Frank Cassidy has described how this uncertainty is affecting the province of British Columbia:

Developers wonder who their real landlords are or will be. Investors are concerned about the conditions that surround and will be surrounding development. Working people worry about their jobs. Small businesses, such as those in the fishing industry, are concerned about who will pay for settlements when they do come. Large businesses are thinking about going or just staying elsewhere.

The uncertainty created by land claims in Canada has resulted in economic losses. All levels of government have therefore expressed the fact that their primary goal in settling land claims is to end this uncertainty to encourage economic developments in regions affected by land claims.

7. Complexity of Governments

Another difficulty for governments in dealing with Aboriginal issues is the fact that a government is not a "monolithic corporate entity whose component parts think and act in concert." Rather, governments' organizational complexity and scale inevitably lead to internal conflict among their various departments and agencies and to contradictory philosophies and policies. In the context of Aboriginal land claims, this can be evidenced by the lack of co-ordination between government actions and policies.

7.1 Federal Department of Indian Affairs and Northern Development

When the federal government assumed jurisdiction over Aboriginal affairs in 1867, it created the Indian Affairs branch within the Department of the Secretary of State. The responsibility for Aboriginal affairs

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133 NOTE: Political responses to direct political action by First Nations is difficult. Governments "cannot be seen as moving too quickly, for that might risk electoral rebuke and grave social consequences. By contrast, moving too slowly incurs the risk of stoking the fires of another Oka in one of numerous hot spots across Canada. By the same token they cannot afford to be seen as weak and vacillating, passively accepting all aboriginal demands. Finding the proper political response, in other words, is critical if diverse publics are to be placated." Fleras and Elliot, supra note 63, at 86.


135 Weaver (1985), supra note 122, at 141

136 Ibid.
was shortly after transferred to the Department of Interior, then to the Department of Mines and Resources in 1936, to the Department of Health and Welfare in 1945 and to the Department of Citizenship and Immigration in 1949. It was only in 1966 that the Department of Indian Affairs and Northern Development (DIAND) was created.137

The Department of Indian Affairs and Northern Development has been severely criticized as being "an instrument of colonial domination, control and assimilation."138 However, the difficult situation in which DIAND finds itself must be acknowledged. DIAND faces a conflicting mandate in that it must administer the provisions of the Indian Act which is based on colonialist and paternalistic assumptions and, at the same time, it is asked to advance the cause of Aboriginal self-sufficiency and community self-government within the parameters of the Indian Act.139

To add to this complexity, since the decision of the Supreme Court of Canada in Guerin v. The Queen,140 DIAND has to take into account the Crown's fiduciary obligations to Indians. In Guerin, the Supreme Court of Canada stated that:

Through the confirmation in the Indian Act of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians best interests really lie... This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.141

This fiduciary obligation has serious implications for the federal government's approach toward the resolution of land claims. In fact, the Supreme Court of Canada ruled in Sparrow v. The Queen142 that the Crown's fiduciary obligations extend to the Aboriginal and treaty rights of the Aboriginal people of Canada. As a result,

137 Ponting and Gibbins, supra note 66, at 14-15.
138 Fleras and Elliot, supra note 63, at 81.
139 Ibid.
141 Ibid, at 384.
...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginal is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historical relationship.\(^{143}\)

DIAND must also try to balance the competing demands of some 600 Indian bands, as well as those of the several government departments and agencies. Thus, it appears that “...many of the Department’s failures reflect its status as a bureaucracy, and the high degree of rigidity and inefficiency intrinsic to any large organization.”\(^{144}\) Further, it was suggested that “the Department’s relatively low status within the government has cramped its effectiveness as a forum for aboriginal grievances.”\(^{145}\) In fact, it is argued that “the primary (if latent) function of the Department is to contain and control aboriginal peoples, in large part by channeling aboriginal aspirations into avenues that are acceptable to outside interests.”\(^{146}\)

Fleras and Elliot conclude that DIAND

...finds itself in the unusual position of intermediary between the state and the aboriginal nations. This middle ground means that it must fulfill its obligation to the government and state, yet at the same time be responsive and answerable to its aboriginal clients - without much support from either sector. Confusion arising from this dual mandate has made DIAND a convenient target, and a lightning rod for aboriginal anger and frustration.\(^{147}\)

As a result, it has been suggested that “Natives have long been dissatisfied by their relationships with the bureaucracies of the federal government”.\(^{148}\) It seems that the current relationship between First Nations and the federal government, especially with DIAND, is primarily adversarial. Turpel contends that this environment of adversarial attitude and distrust makes it very difficult to introduce alternative philosophies of dispute resolution.\(^{149}\) She explains that this climate of hostility and adversarialism is a result of the fact that “claims resolution policies have never been sensitive to the cross-cultural nature of the endeavour.”\(^{150}\)

\(^{143}\) *Ibid*, at 24.
\(^{144}\) Fleras and Elliot, *supra* note 63, at 82.
\(^{145}\) *Ibid*.
\(^{146}\) *Ibid*, at 82-83.
\(^{147}\) *Ibid*, at 83.
\(^{149}\) Turpel (1995), *supra* note 2 at 81.
\(^{150}\) *Ibid*, at 82.
7.2 Provincial and Territorial Governments

Federal-provincial/territorial relations with respect to Aboriginal issues remain mostly undefined. It appears that there has never been a systematic effort by the federal government to develop a clear policy direction engaging the provinces in Aboriginal affairs. A good example of this is the lack of consultation with the provinces and territories when the federal government released its first comprehensive claims policy in 1973. However, because of the constitutional division of powers, provincial governments are significantly affected by the resolution of land claims since most of the lands and resources involved in the settlement of these claims fall under provincial jurisdiction. In the Yukon and the N.W.T., although lands and resources fall under federal jurisdiction, the territorial governments generally participate in the negotiations and in the application of land claims policy.

First Nations have historically avoided formal relationships with the provinces, in an effort not to jeopardize their special relationship with Canada set out in the Royal Proclamation of 1763, the Constitution Act of 1867, and the Indian Acts of 1876 and 1951. Further, in current land negotiations, it seems that federal and provincial governments still disagree on how to share the responsibility with respect to land rights. This exercise is often referred as the "jurisdictional ping-pong" and partly explains why First Nations often seek to negotiate only with the federal government.

It is however clear that the involvement of provinces is critical to the resolution of land claims in Canada. This can be illustrated by the rapid changes that occurred in British Columbia as a result of a shift in the province's position with respect to its involvement in the resolution of land claims. After Confederation, the government of B.C. took the position of denying the existence of Aboriginal title or special rights and

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151 Weaver (1985), supra note 122, at 146; See generally D.C. Hawkes, ed., Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles, (Ottawa: Carleton University Press, 1989). NOTE: However, constitutional recognition of existing Aboriginal rights has the effect of bringing the provinces into the negotiations on Aboriginal issues, given that the provinces' part in the constitutional amending process gives them a key role in future efforts to define Aboriginal rights. Boldt and Long, supra note ... , at 11.

refused any involvement claiming that comprehensive claims were a federal responsibility.\textsuperscript{153} It was only in August 1990 that the provincial government agreed to join the First Nations and the government of Canada in land claims negotiations following a recommendation of the Premier’s Council on Native Affairs. Since 1990, the province of B.C. has entered into an agreement with the First Nations and the federal government to create the British Columbia Treaty Commission to supervise the negotiation of modern treaties in this province. Moreover, in February 1996, the first agreement-in-principle was signed by the Nisga’a people and both levels of government after more than 20 years of negotiations.\textsuperscript{154}

**B. First Nations of Canada**

Many First Nations believe that the only way policies affecting Aboriginal people will change is by raising their issues on the public agenda. They have to convince the public of the legitimacy of Aboriginal issues in both the legal and the political sense. Miles Richardson, President of the Haida Tribal Society, stated that: “I believe that a solution is possible. It’s going to take a huge effort to raise it on the public agenda. The lack of seriousness with which politicians take this issue has to change and only we can bring it about - the First Nations, and people who want to make an effort to understand these issues.”\textsuperscript{155} Unfortunately, First Nations have a relatively limited political power at their disposal for initiating fundamental social change.\textsuperscript{156}

Therefore, when conventional means of redress have been ineffective or unavailable, Aboriginal groups have used various tactics including demonstrations of civil disobedience, policy protests, appeals to international agencies and occasionally violent confrontations to bring public and political attention to

\textsuperscript{153} Cassidy and Dale, *supra* note 32, at 12.

\textsuperscript{154} NOTE: Under the agreement-in-principle, the Nisga’a will receive $190 million, ownership of about 1,930 square kilometers of land in the Lower Nass Valley and broad self-government powers.


\textsuperscript{156} Fleras and Elliot, *supra* note 63, at 85.
their grievances. Don Ryan, speaking of behalf of the Office of the Gitksan Wet’suwet’en Hereditary Chiefs, described their efforts to influence governments in dealing with comprehensive claims:

We have been putting pressure on the federal government and the province to deal with this issue, and we have used the litigation route as one way to put pressure on them; the other is the direct political action that we have been involved with. (...) There has to be some movement in that area, and it takes a lot of effort to change policies. The strategies that we carry out to try to initiate that action require a lot of support from people.\(^{157}\)

Professor Douglas Sanders describes the entire strategy of the Gitskan and Wet’suwet’en to force a political response to their claim: “[t]hey used every strategy available - roadblocks, fish-ins, marshmallow fights, participation in the First Ministers’ Conferences, a play (that toured the province, the country, and the world), a film, links to academics, [a] conference (...), [a] book, the book of the opening presentation, buttons, shirts, posters, T-shirts.”\(^{158}\)

Therefore, even if tactics to attract media exposure incur the risk of backlash, it appears that in Canada, these means have been generally relatively effective in moving Aboriginal issues to the centre of the national agenda.\(^{159}\)

Conclusion

The relationship between First Nations and Euro-Canadian society has been a difficult one which has resulted in many serious grievances. Different means have been used to resolve complex disputes between Aboriginal people and Canadian governments, including treaties, litigation, negotiation and sometimes mediation and arbitration. However, as explained by Daniel,

...the particular nature of the relationship between Indian people and the federal government seems to have provided a fertile ground for creating claims and no mutually acceptable mechanisms for resolving them, with the possible exception of the treaties. Since the war, there


\(^{159}\) Fleras and Elliot, *supra* note 63, at 86.
has been a growing awareness of a backlog of claims and of the need for a more definite native claims process.¹⁶⁰

In fact, prior to World War II, Aboriginal issues were not a priority for the federal government and there was no process in place to deal with Aboriginal land claims since the government did not recognize Aboriginal rights. However, in the early 1970s, the policy discourse of the federal government on Aboriginal issues shifted in response to various events. First, the Supreme Court of Canada ruled in Calder that the Nisga’a had held Aboriginal title in pre-colonial times and then split evenly on the question of the continuing existence of that title. Second, the 1969 White Paper raised the political consciousness of Aboriginal groups and contributed in uniting First Nations across Canada. Third, as a result of these events, the general public was supporting the fair resolution of land claims. Fourth, the Trudeau government in 1973 was in a precarious situation of a minority government, with the opposition parties supporting the resolution of Aboriginal claims. Finally, there was an increased consciousness that the social and economic condition of the Indian communities conflicted with Canadian ideas of human rights and national prestige. Thus, the combined impact of these events forced the federal government to propose a new paradigm in the making of the Aboriginal agenda. However, this shift in the government’s policy discourse with respect to Aboriginal issues was reluctant and this would explain part of the difficulties which have arisen in the resolution of land claims. Many commentators have suggested that the changes in the Aboriginal agenda have been largely symbolic, illusory and rhetorical rather than substantive and real. In fact, what followed the initial reversal of the policy was 23 years of ad hoc and inconsistent governmental promises, proposals, and sometimes decisions aiming at developing processes and policies to resolve land claims. The commitment of the federal government in dealing with Aboriginal issues was and still is unreliable, for it tends to respond to pressing issues and current controversy rather than developing long-term policy. Aboriginal issues are particularly difficult to resolve since various parties with competing interests and ideologies are involved in the debate and push for their views to be represented in the national Aboriginal agenda. Moreover, other factors have caused problems in the development of adequate processes to resolve land claims. These include the fact that the federal

¹⁶⁰ Daniel, supra note 42, at 215-216.
government has had difficulties in trying to coordinate federal and provincial/territorial interests in relation to Aboriginal issues. There is also the fact that government has found land claims negotiations difficult, both in terms of finding skilled negotiators able to handle polycentric problems and giving them an adequate mandate. The federal government is also concerned about the time and resources needed to settle land claims and the risk of major shifts in public attitudes. The commitment of the government has also been unreliable due to the fact that First Nations have been unable to play by federal rules in terms of cohesiveness, ability to lobby, ability to negotiate and willingness to move with appropriate speed. In fact, First Nations have been unable to keep a reasonably steady pressure on government.

Thus, it can be concluded that to date, the attitude of the federal government in relation to Aboriginal issues has been mostly reactive rather than proactive. Land claims policies which recognize the need to negotiate land and resources issues with First Nations have been reluctantly put in place by the federal government in the early 1970s and by themselves, these policies cannot undo decades of inertia and assimilationist policies. Fundamental changes in the attitude towards Aboriginal issues will take time and will require a serious commitment of all the parties to generate a new relationship based on equality. In order to develop such a relationship, there will be a need for greater tolerance of cultural differences and a willingness to share the power with the First Nations of Canada. It is these same principles of recognition and empowerment which should guide the reform of the land claims process in Canada.
CHAPTER TWO  LITIGATION

Canadian literature regarding litigation in the context of Aboriginal land claims recognizes that Aboriginal people are generally in a disadvantaged position when going before the courts. There are many reasons for this: the lack of resources available to Aboriginal groups and the contrasting power and resources of governments, the delays of litigation which almost always work in favour of governments, the unfamiliarity of many judges with the area of Aboriginal law, the background and philosophy of many members of the judiciary and the serious consequences of a judicial decision in favour of the Aboriginal people. Furthermore, the judicial system is unlikely to be an appropriate forum to define all aspects of a new relationship between Aboriginal societies and Euro-Canadian governments. Referring to Aboriginal claims that were brought before the courts, one First Nation stated that these were “attempts to find aboriginal rights in the jurisprudence of the oppressor.”

Because of the several difficulties with the judicial system, the tendency has been in recent years to favor the process of negotiation to address the difficult issues involved in land claims. Despite this, the courts continue to have a role to play in the resolution of the land question in Canada. The purpose of this chapter is therefore to outline the benefits and impediments of litigation with respect to Aboriginal land claims in order to improve the role of the courts in relation to these complex questions. In the first part of the chapter, I will examine the theories of adjudication. Part II will discuss the advantages and disadvantages of litigation as a mean to resolve Aboriginal claims. Finally, Part III will explore some possibilities to improve the role of Canadian courts when dealing with Aboriginal land disputes.

161 See for example, H. Feit, “Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement” (1980) 1 Canadian Journal of Anthropology 159 at 163; Living Treaties: Lasting Agreements, supra note 8, at 75; Colvin, supra note 54, at 5; Daniel, supra note 42, at 239; R. Jamieson, Resolution of Issues Involving First Nations and Governments: An Ontario Experience (Draft prepared for the Special Committee on Native Justice of the Canadian Bar Association, 1988); Ciacca, supra note 126, at 557; K. Lysyk, “Approaches to Settlement of Indian Title Claims: The Alaskan Model” (1973) 8 U.B.C.L. Rev. 321.
163 An Agenda for Action, supra note 3, at 77-78.
Part I Theories of Adjudication

A. Definition

Adjudication involves a highly structured process by which one party forces another party to submit a dispute to compulsory determination by a neutral judge. Theories on the role of adjudication have been heavily influenced by the ideas of late law Professor Lon Fuller. Fuller described the adjudicatory framework in the following way:

(1) Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments. (2) The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant. (3) A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon the same principle. Hence, (4) issues tried before an adjudicator tend to become claims of right or accusations of fault.

B. Limitations of Adjudication

1. Polycentric Problems

Fuller's work has focused on the limits of adjudication, trying to identify disputes which are inherently unsuited to the adjudicative process. He suggested that "polycentric" problems, which have complex interconnected issues which exceed the ability of a rational, principle-based approach, should not be resolved through the "all or nothing" approach of adjudication.

2. Relationship between the Parties

Another limit of adjudication concerns the relationship between disputants. Fuller was of the opinion that the institutional framework of adjudication, with its orientation towards proofs and reasoned arguments, tends to convert all submissions into claims of right and wrong. He stated that "certain kinds

165 L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353; See also Colvin, supra note 54, at 9.
166 Fuller, supra note 165, at 369.
168 Colvin, supra note 54, at 10; Fuller, supra note 165, at 368-370.
of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument. Accordingly, he submitted that adjudication is not just inappropriate but is in fact counter-productive when disputants are engaged in an on-going relationship. He stated that

[i]f we regard a formal definition of rights and wrongs as a nearly inevitable product of the adjudicative process, we can arrive at what is perhaps the most significant of all limitations on the proper province of adjudication. Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined “rights” and “wrongs”.

Thus, he suggested that the adversary proceedings in adjudication are antithetical to the goal of reconciliation. Experience has also demonstrated that the focus on confrontation in adjudication encourages the parties to see disputes as a win or lose proposition, in which they are “adversaries” and communicate only through their lawyers. It has been further suggested that the courtroom itself “establishes and fosters both adversarial attitudes and binary thinking that stifle creative problem-solving.” Moreover, in the context of Aboriginal land claims, it has been noted by a committee of the Canadian Bar Association that “...in dealing with matters so fundamental as cultural survival and nationhood, imposed solutions are not viable and cannot last.”

Sociological theorists of dispute resolution have also focused upon the extent to which disputants engaged in on-going cooperative relationships should be protected from the potentially disruptive consequence of adjudication:

Common human experience teaches us that the consequence, on the future relationship of the parties to conflict depend, to a degree, on their sense of equitable treatment in the conflict. Where the parties want or must have continuing interactions of a nonantagonistic nature after the dispute, both must leave the dispute-settlement procedures without too much of a sense of grievance. If, however, the parties need not live together thereafter, then it is irrelevant whether either of the parties continues to be antagonistic to the other after the proceedings.

169 Fuller, supra note 165, at 371.
171 See also Colvin, supra note 54, at 10.
173 An Agenda for Action, supra note 3, at 71.
Therefore, it appears that adjudication might not be the most appropriate mechanism to deal with
“polycentric” problems and might even be counter-productive when the disputants are involved in a
continuing relationship. I will now examine how these theories apply in the context of Aboriginal land
claims.

Part II Adjudication in the Context of Aboriginal Land Claims

Prior to 1973, the courts were the only forum to hear and determine claims relating to Aboriginal rights.

As stated by James Frideres,

...coercion and adjudication were the most prevalent ways of processing disputes. The
government of Canada, either through its administrative arm, DIAND, or through the courts,
processed all native claims. The stronger of the disputants, i.e., the government, inevitably
imposed its decision on the weaker of the parties.175

After the federal government’s policy announcement in 1973 that it would enter into negotiations with
Aboriginal groups to settle comprehensive claims where rights of traditional use and occupancy had
neither been extinguished by treaty nor superseded by law, Aboriginal land claims started to be mainly
negotiated. However, land claims continue to be brought to the courts by claimants for a variety of
reasons. For instance, the courts are the only option for Aboriginal claimants when governments are
unwilling to negotiate176 or when Aboriginal claimants are dissatisfied with the progress of the
negotiations. Professor Douglas Sanders reports that the following goals have been pursued in Aboriginal
litigation:

Litigation over specific rights was aimed at winning recognition of those rights. Sometimes
litigation attempted to hold the status quo by blocking some development project. This was the
initial goal of the James Bay litigation in the early 1970s. But cases like Calder, Coe, Taxed
Mountains, and Delgamuukw were aimed at changing government policy, opening up
negotiations, getting a new deal.177

175 J.S. Frideres, “Native Claims and Settlement in Yukon” in Ponting ed., Arduous Journey: Canadian
Indians and Decolonization (Toronto: McClelland and Stewart, 1986) 284 at 290-291.
176 M. Coolican, in F. Cassidy ed., Reaching Just Settlements: Land Claims in British Columbia
(Proceedings of a Conference held February 21-22, 1990) (Vancouver: Oolichan Books and The Institute
177 Sanders (1992), supra note 158, at 281.
In August 1988, a special committee of the Canadian Bar Association filed a report noting that Aboriginal people had not fared well within the structure of the judicial system since Confederation. The report concluded that the Canadian legal system had not responded well in the past to Aboriginal issues and that the problem was ongoing. The CBA wrote that First Nations are seriously disadvantaged “in that they are effectively asking the courts to overturn 100 years of legal precedent that involved an entirely different view of Canadian history.” I therefore suggest to begin by exploring the disadvantages of litigation in the resolution of Aboriginal land claims.

A. Limitations of Litigation

1. Cultural Framework of the Canadian Courts

1.1 Colonial Sovereignty

Our relationships with Aboriginal people have been characterized by a failure to understand, or an unwillingness to accommodate Aboriginal traditional cultures. Thus, it has been suggested that “…in approaching the courts to determine claims, Aboriginal people essentially submit themselves to a foreign cultural framework, one which enjoys self-professed legitimacy and supremacy.” As stated by Peter Kulchyski, Aboriginal people have painstakingly had to learn the process of addressing the courts in order to begin to be heard. … The languages of Aboriginal peoples, not just the verbal patterns and “translatability” but the very grammar implied in the cultural forms, have not been addressed by the courts. … Instead, the dominant cultural form presents itself as Truth: bibles are produced, spectacles are arranged.”

This was clearly the feeling of the Gitksan and Wet’suwet’en People in bringing their case before the courts. According to Satsan, he and his people “were entering a game in which we had no involvement

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178 An Agenda for Action, supra note 3 at 11.
179 Ibid, at 25.
180 Ibid.
182 McCallum, supra note 13, at 10.
183 Kulchyski, supra note 20, at 2.
whatsoever with the putting together of that game, the making up of the rules, in the appointment of referees and umpires.”

The courts in Canada, as in other colonized societies, rests upon a presumption of colonial sovereignty. Canadian law presumes that the Crown has, at some point in history, effectively asserted sovereignty over Aboriginal peoples and the legitimacy of this assumption is rarely challenged by the courts. According to Brian Slattery, it is clear that Anglo-Canadian law “treats the question of when and how the Crown gained sovereignty over Canadian territories in a somewhat artificial and self-serving manner.” Menno Boldt and J. Anthony Long contend that courts in colonial societies have generally decided cases of Aboriginal rights in the interest of the dominant society rather than based on fundamental principles of justice. They are of the opinion that colonial governments were “[m]otivated by racism, greed, and lust for land” and deliberately disregarded the British and international laws which protected Aboriginal rights. They then add that:

The Canadian courts, like those of New Zealand, Australia, and the United States, act as handmaidens of the government, consistently giving precedence to the legitimacy and validity of government power, policies, and actions...

The courts made aboriginal rights subject to the self-interest of the dominant group; they subordinated fundamental principles of justice and human rights to the collective self-interest; and they legitimized the dominant group’s use of political and legislative power to deprive the aboriginal peoples of their rights and self-government.

The consequences of this influence of the state over the judicial system is described by John Borrows:

[s]ince the judicial power often cascaded from the dominant group’s ideological headwaters, bias spills onto the pages of legal decisions from a contextualized, politically hued stream. The

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188 Boldt and Long, supra note 109, at 183.
189 Ibid.
ideological undertones of judicial decisions are revealed when viewed through the eyes of communities that are disadvantaged by the exercise of legal power.\textsuperscript{190} John Ciacca also believes that "...in interpreting the laws the courts generally reflect the mores of society."\textsuperscript{191} Finally, James Youngblood Henderson describes the way in which western courts have circumscribed Aboriginal rights:

The courts became the caretakers of the racism of the late nineteenth and twentieth centuries. Such cowardice incurs an enormous cost. When governments act in a disorderly and lawless way, their courts save face by classifying oppression as justice or confiscation as a political question. Either way, they remove the cause of action from their jurisdiction. ... In its approach to the rights of native peoples the law becomes tyranny at worst and an ineffective apologist at best.\textsuperscript{192}

1.2 Judicial Ethnocentrism and Bias

The term "ethnocentrism" refers to the belief that "one's culture represents the natural and best way to do things and that it is, therefore, appropriate to evaluate other cultures on the basis of the precepts of one's own."\textsuperscript{193} Judicial ethnocentrism is therefore an example of non-neutral or biased judicial behaviour because it involves the use of stereotypes which classify on the basis of presumptions and generalizations defined by the dominant group.\textsuperscript{194} In the context of Aboriginal claims, judicial ethnocentrism can be evidenced by the burden put on Aboriginal claimants to demonstrate that their law at the time of contact was recognizable in British eyes and therefore reconcilable with British legal tradition.\textsuperscript{195} According to Asch and Bell:

...it has always been easier for British Courts to recognize ongoing legal rights in newly acquired territories where the local inhabitants had traditions and values similar to their own. With colonial expansion, the British acquired territories whose inhabitants had traditions, values and a lifestyle quite different from their own. In these situations, the British courts typically failed to

\textsuperscript{191} Ciacca, \textit{supra} note 126, at 557.
\textsuperscript{192} J.Y Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in Boldt and Long eds., \textit{The Quest for Justice: Aboriginal People and Aboriginal Rights} (Toronto: University of Toronto Press, 1985) 185 at 220.
\textsuperscript{193} Asch and Bell, \textit{supra} note 185, at 510.
\textsuperscript{194} S.L. Martin and K.E. Mahoney, eds., \textit{Equality and Judicial Neutrality} (Toronto: Carswell, 1987) at iv; McCallum, \textit{supra} note 13, at 20-21.
\textsuperscript{195} M. Asch, \textit{Home and Native Land: Aboriginal Rights and the Canadian Constitution} (Toronto: Methuen, 1984) at 42; McCallum, \textit{supra} note 13, at 20.
address these differences in a relativistic sense, but rather, following the dictum of ethnocentrism, perceived them as indications of inferiority.196

One example of judicial ethnocentrism is illustrated by a comment of Chief Justice Davey in the British Columbia Court of Appeal decision, in Calder, in which he calls the Nisga’a nation “a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property”.197 A similar comment was made by Chief Justice McEachern in Delgamuukw: “The plaintiff’s ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs (sic), that aboriginal life in the territory was, at best, ‘nasty, brutish and short’.”198 Chief Justice McEachern stated that the plaintiffs should understand that “...although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call the ‘white man’s law’.”199 According to Professor Brian Slattery, this last statement implies that the laws of one racial group occupy a privileged position in Canada and apply to Aboriginal people to their disadvantage and to the exclusion of their own laws.200 Many authors have suggested that McEachern C.J. relied upon an outdated anthropological premise known as the “acculturation theory” in reaching his conclusions.201 This theory posited that Aboriginal peoples were in a position of inferiority as compared to European settlers, and that there would be an inevitable move away from traditional practices towards acculturation and assimilation into the dominant Western society.202 Professor Paul Tennant, in examining the decision in Delgamuukw was of the opinion that in that case, the particular perceptions, assumptions, and values of

196 Ibid.
199 Ibid, at 201.
202 Kew, supra note 201, at 97.
the judge were arguably more important and influential than the facts and even the established points of law. He explains that:

When minorities are small or marginal the majority often seeks to deny them express standing, and in so doing equates the interest of the whole society and political system with the interest of itself, the majority. In these circumstances the members of the dominant group will often be unaware of the possibility that their deeply held beliefs about their own group and about the minorities are founded less on any objective reality than upon their own group’s desire to protect its own dominance. In these circumstances the judiciary will be the majority’s judiciary and may even provide the front line defense for majority interests.

The decision in Delgamuukw was also criticized as being ethnocentric for its judicial treatment of the anthropological evidence and the testimony of Aboriginal witnesses. Based on the decision in R. v. Simon where the Supreme Court of Canada held that oral history based on successive declarations by persons now deceased was admissible since it could not otherwise be proved, McEachern J. admitted oral evidence in Delgamuukw which related to origin and territory. However, McEachern J. placed very little weight upon that evidence, concluding that it represented “belief” rather that “fact” and that it was anecdotal, instead of historically entrenched in written form. Anthropologists have argued that this treatment of evidence is subjective and ethnocentric, since it fails to recognize that Aboriginal culture was traditionally orally based. Patricia Monture points out that “[t]he courts have tended to simplify the process of oral history and treat it as something less advanced than recording history on paper.” After reviewing the difficulties arising over the reception of oral history in cases involving treaties and land claims, Delia Opekokew concluded that the Canadian judicial system, in its application of technical rules of evidence, construction and procedure, has created an ethnocentric bias against Aboriginal witnesses.

Thus, the rules of evidence and particularly the application of these rules by the courts have not always

204 Ibid, at 75.
recognized Aboriginal values and traditions, making it more difficult for Aboriginal claimants to adduce evidence of their rights.

Many commentators have noted that the views which are reflected in the Delgamuukw decision do not stand outside the dominant historical and cultural Canadians traditions. For instance, professor Douglas Sanders writes that “[i]t would be wrong to ... dismiss the trial decision in Delgamuukw as an isolated replay of 19th century racism.”\(^\text{210}\) Michael Asch also notes that “...the Delgamuukw judgment is not a rogue decision. It does not stand outside of Canadian legal precedent and tradition. Rather, this judgment ... is in fact consonant with, if not fostered by, the tradition.”\(^\text{211}\) Finally, professor Robin Ridington contends that “[i]n Delgamuukw, Mr. Justice McEachern revealed a world view and an ideology appropriate to a culture of colonial expansion and domination.”\(^\text{212}\) Thus, the views expressed by McEachern J. appear to be a resurgence of an old tradition which has been suppressed from the political and legal discourse on Aboriginal issues for some time now. What is uncommon about Justice McEachern’s comments in Delgamuukw is therefore not so much the fact that these kind of ideas still exist but rather that these views are being expressed in a court’s decision in the early 1990s.

Thus, it appears that the different value systems and the background philosophy and predilections of most of the judges, to whom Aboriginal people’s values and rights are foreign, can sometimes constitute an obstacle for Aboriginal parties in litigation.\(^\text{213}\) In fact, the judges hearing Aboriginal cases have generally been drawn from the white Euro-Canadian society and their status as impartial third-parties is often questioned.\(^\text{214}\) As stated by Rosalie Sibelman Abella,

> [e]very decision maker who walks into a courtroom to hear a case is armed not only with relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded.

\(^{210}\) Sanders (Aug. 30, 1995), supra note 198, at 33.
\(^{211}\) Asch (1992), supra note 201, at 238.
\(^{213}\) See for example, J. O'Reilly, “Comprehensive Native Land Claims Litigation” in Native Land Issues (See You in Court...) (Winnipeg: Canadian Bar Association, April 28 & 29, 1989) at 2.
\(^{214}\) Colvin, supra note 54, at 15; J.Y. Henderson, supra note 192, at 220.
The decision-making process takes place in cultural context, and that context may require a degree of ‘imperturbable disinterestedness’ of which not all are consistently capable.\textsuperscript{215}

Therefore, as suggested by MacGuigan in the text \textit{Equality and Judicial Neutrality}, the role of judges cannot be merely neutral since it is an activity with a view to achieving the goals of the society in which the judge lives.\textsuperscript{216}

These examples serve to illustrate that the judicial system operates within the dominant cultural framework. It must however be noted that since 1973, there has been an increasing recognition by the courts of Aboriginal rights but this movement is slow and remains limited in scope and uneven in application as the trial decision in \textit{Delgamuukw} has demonstrated. Aboriginal issues continue to be decided within the legal principles and precedents developed by and applicable to the Canadian legal system. The courts apply principles of western law and justice to Aboriginal questions and the judicial decisions are a reflection of the Canadian justice system.\textsuperscript{217} For instance, most judges come from the dominant culture, the language of the court proceedings is the language of the dominant culture, the substantive rules of the court are the dominant culture’s rules, and the procedural rules of the court, including rules of evidence, are those of the dominant culture. Therefore, the Canadian courts generally do not recognize the Aboriginal cultural framework, values, laws and interpretation of history. This constitutes a considerable disadvantage for First Nations when their only option in terms of dispute resolution is to bring their claims before the very entity that denies the validity of their own reality.

2. Procedural and Substantive Issues


\textsuperscript{217} Mandell (1995), \textit{supra} note 113, at 4-5; \textbf{NOTE}. “The English did not understand the native attitude toward land, and rather than attempt an understanding, they simply imposed the common law system on everyone, with no regard to possible incompatibility with the traditions of the native peoples. Since then, native rights in land have only been recognized when it has suited the Courts to recognize them, because of other overriding factors.” W.T. Badcock, \textit{Who Owns Canada? Aboriginal Title and Canadian Courts} (Ottawa: Canadian Ass. in Support of the Native Peoples, 1976) at 35.
2.1 Nature of the Claims

The field of comprehensive claims presents serious problems for the traditional court system. The likely complexity of any terms of settlement make such claims highly polycentric.218 These claims are polycentric because they are multifaceted and each aspect of the claim is interrelated with every other aspect. As mentioned in part I of this chapter, Fuller is of the opinion that polycentric problems, with many interacting points of influence, are unsuited to resolution by adjudication. Adjudication is more effective when a single issue can be isolated and reasoned argument can be directed exclusively to it. As stated by Colvin, "[w]hen any decision on one matter has complex repercussions with respect to other matters, proceeding by proof and reasoned argument, with full participation of all affected parties, can become unmanageable."219

However, this is not to say that adjudication is never capable of handling polycentric problems. Polycentric elements are present in most disputes and to some extent can be accommodated. As stated by Fuller, "[i]t is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached."220 Therefore, some comprehensive claims could still be successfully handled by the courts under certain circumstances. This assessment should be made in light of all the other factors which affect the handling of such cases by the courts.

2.2 Jurisdiction, Procedure and Remedies

The courts do not have the jurisdiction and the procedural ability to deal effectively with comprehensive claims, which usually involve complex ideological, historical, social and political issues. This has been widely recognized by the courts, Aboriginal groups, governments and commentators.

218 Colvin, supra note 54, at 15.
219 Ibid, at 10; Fuller, supra note 165, at 401-403.
220 Fuller, supra note 165, at 398.
The Supreme Court of Canada said, on some occasions, that it considers the issue of Aboriginal land rights to be a mix of law and politics.\textsuperscript{221} Chief Justice McEachern, in his trial judgment in \textit{Delgamuukw} recognizes the limitations of the judicial approach in relation to Aboriginal claims:

The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and “rights”, which are fascinating legal concepts. Important as these questions are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.\textsuperscript{222}

Aboriginal objections to litigation have also stressed matters of jurisdiction. For instance, the Association of Iroquois and Allied Indians have stated that “...the courts decide only legal issues meaning moral and political issues are disregarded.”\textsuperscript{223} Governments have also expressed the fear of a judicial outcome which does not take account of the broader political and social issues raised by a claim.\textsuperscript{224}

One commentator, John Ciaccia, contends that Aboriginal claims cannot be settled by the courts because “[t]hey do not deal with purely legal matters.”\textsuperscript{225} Ciaccia describes the political and social factors involved in Aboriginal rights cases:

When you are discussing native claims, you are dealing with a wide spectrum of issues encompassing: the cultural rights of a minority and the economic benefits which should be provided to a disadvantaged minority. You cannot avoid becoming involved in a discussion of the impact of our society on the natives and the effects on them, for example, of our administration of justice. You must seek out methods to ensure the participation of a people in the government process. You are called upon to find ways and means of assuring that a group with a different culture background can thrive and flourish in our society. Of course, one must also be constantly aware of the attitudes and demands of the non-natives in the territories which are the subject of the settlement.\textsuperscript{226}

\textsuperscript{222} (1991), 79 D.L.R. (4th) 185 at 537.
\textsuperscript{223} Association of Iroquois and Allied Indians, \textit{The Indian Land Claims Resolution Process (An Information Paper)} (Walpole Island, Ont.: March 1980) at 7.
\textsuperscript{224} Colvin, \textit{supra} note 54, at 15.
\textsuperscript{225} Ciaccia, \textit{supra} note 126, at 557.
\textsuperscript{226} \textit{Ibid}, at 561.
There seems to be a clear consensus among all these groups that the judicial forum is not the most appropriate means to resolve comprehensive claims since the courts do not have the jurisdiction to deal with the broader social, economic and cultural issues involved in this type of cases.

The complex procedures of the court system also means that many technical impediments may interfere with the substantive issues or merits of the case. There are instances in Canadian history where it could be argued that Aboriginal claimants have lost their claims on procedural points. One well known example is the Calder decision where one judge refused to rule on the substance of the case because the plaintiffs did not have a petition of right or fiat to sue the Crown.227

The federal government also reserves the right to use any technical defences available to it which include reliance on statutes of limitation, the immunity of the Crown against civil actions with respect to injunctions only, the supposed defence of “mere technical breach” and the legal doctrine of estoppel, acquiescence and laches.228 This approach is unfair since “[d]elay in getting to court is not the fault of the claimants. Twenty years ago there was little access to documents, no funding and no body of law to sustain such actions, and until 1951 any action to further native claims were prohibited.”229 Moreover, many commentators have noted that the reliance on technical defences to reject a valid claim is both unfair and counterproductive in that it fails to deal with the underlying causes of the First Nation grievances.230

Finally, the judicial system does not provide the full range of remedial powers which would be necessary to compensate valid comprehensive claims and to address the ongoing relationship between Aboriginal and non-Aboriginal societies. As stated by Lloyd Barber, “while some claims may be recognized by the

228 ICO (1990), supra note 39, at 60; See also W. Henderson, “Litigating Native Claims”, (1985) 19 Law Society of Upper Canada Gazette 174 at 191.
229 ICO (1990), supra note 39, at 61.
230 Ibid. See also An Agenda for Action, supra note 3, at 28.
courts, legal remedies may not exist.” In fact, the power of the courts to redress grievances is limited and thus, “a court’s judgment cannot normally require parties to work together to co-manage resources or to share responsibilities, nor can it dictate, for example, that a First Nation receive as an alternative, less populated lands as part of a land claim settlement.” In practice, the remedial powers of the courts in dealing with Aboriginal land disputes include to render a decision on rights which may lead to negotiation, to award monetary damages payable to the First Nation based on the court’s assessment, or to give an order directing the government to perform its duty, or directing or preventing some course of action.

2.3 Aboriginal Participation

In the litigation process, the role of First Nations might sometimes be limited. In fact, the litigation process relies on representation through lawyers and on the testimony of expert witnesses, thus limiting considerably the direct participation of Aboriginal people in the resolution of their claims. First Nations generally participate in litigation as witnesses, but without any control over the final decision. It is also important to mention that even legal representation has not always been easily available for Aboriginal groups. For almost a century, Aboriginal people were often not represented in important cases which affected their rights. For instance, in *St. Catherine’s Milling Co. Ltd. v. The Queen*, the Privy Council was asked to decide whether the Indians surrendered timber rights to the federal or provincial government under a treaty concluded between the Crown and a First Nation in Ontario. The Aboriginal nation involved in this case was not even represented by legal counsel and the Privy Council rendered a decision which would have implications for Aboriginal rights for over a century and became a precedent upon which subsequent judgments have been based.

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233 (1889) 14 App. Cas. 46 (J.C.P.C.).
Moreover, as mentioned in Chapter One, from 1927 until 1951, there was a statutory provision in the Indian Act which had the effect of prohibiting Indians from retaining legal assistance on their own when they asserted claims. Finally, until 1974, some provinces still had the requirement that Aboriginal claimants needed to obtain a petition of rights from the Crown to institute proceedings against the Crown.

2.4 Burden of Proof and Evidence

In Canada, the system of Aboriginal title litigation places the onus on Aboriginal groups to prove the existence of a valid Aboriginal title. According to Louise Mandell, this decision is based on the assumption that the Crown's 'discovery' of this continent gave it rights to the soil. Alternatively, the assertion is that the Crown conquered the Aboriginal nations by exercising jurisdiction over the territory. The Crown then has the burden of proving that these rights were legally terminated before the recognition and affirmation of Aboriginal rights in the Canadian Constitution. The burden of proof on Aboriginal plaintiffs is problematic in two ways: the content of what must be proven and the method by which it is to be proved.

In order to win a land claim, Aboriginal groups must be able to bear an enormous burden of proof. In the Canadian history, there has evolved a set of tests that claimants of Aboriginal rights must meet in order to

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235 Section 141, Indian Act, R.S.C. 1927 c. 98 (originally enacted in S.C. 1927 c.32 s.6.); See also An Agenda for Action, supra note 3, at 10.
236 NOTE: Legislation governing this issue in Canada was enacted at federal level and in each of the provinces at different times over a period of years until 1974. For a full discussion of this issue, see P.W. Hogg, Liability of the Crown, 2nd ed. (Toronto: Carswell, 1989) at 7-9; McCallum, supra note 13, at 35.
237 NOTE: According to Mandell, "[t]he result of this manifestly arrogant assertion of power is that the courts have said that the extent of Indian title depends upon the degree to which the Nation traditionally possessed their lands." Mandell (1987), supra note 234, at 359.
238 R. v. Sparrow (1990), 70 D.L.R. (4th) 385 (S.C.C.) at 401 and 410. NOTE: Actions taken by the federal government to terminate or limit Aboriginal rights by legislation or regulation after 1982 must meet a justification test. Once Aboriginal claimants prove the existence of a right and interference with it by legislation, the onus then shifts to the government to justify its actions. The Crown must prove a valid legislative objective and must further prove that the objective was attained in such a way as to uphold the honour and fiduciary obligation of the Crown.
239 Asch and Bell, supra note 186, at 521.
make their case. These tests have been stated by judges in a number of ways, but the most succinct expression of them was provided by Mr. Justice Mahoney of the Federal Court in *Baker Lake*.240 The elements which the plaintiffs must prove to establish an Aboriginal title cognizable at common law are (1) that the claimants and their ancestors were members of an organized society; (2) that the organized society occupied the specific territory over which they assert the Aboriginal title; (3) that the occupation was to the exclusion of other organized societies; and (4) finally, that the occupation was an established fact at the time sovereignty was asserted by England.241 Since 1980, the *Baker Lake* test has been applied, modified and interpreted differently depending upon the particular matter being heard.242 There are however serious problems with the enormous amount of data that must be collected to support land claims.243 As stated by Elias:

...the tests are becoming increasingly particular, to the point that if they are elaborated much further, it would not be possible to meet them with any amount of research and data-gathering. The tests set out by Mr. Justice Steele in *Bear Island*, may have crossed the line of social science comprehension. It is difficult to imagine what resources are available that could be used to reconstruct native practices at the time of the *Royal Proclamation of 1763*, and then to show that those practices were unique to the Temagami people, especially at the level of definition and detail demanded by the court.244

Further, anthropologists have argued that the test set out in *Baker Lake* is inherently ethnocentric because it implies, among other things, that there are some cultures which are so innately primitive that they cannot even be described as “organized.”245 Anthropologists therefore accuse courts of being steeped in an ethnocentric legal tradition, and criticize the courts for being apparently unable to develop new legal tests and attitudes which would embrace the notion of cultural relativism.246

240 *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17 (Federal Court, Trial Division).
243 NOTE: In the *Delgamuukw* trial, testimony was given by 61 witnesses at trial, and by about 70 more on commission or by affidavit. Transcripts of evidence totaled about 35,000.
244 *Ibid*, *supra* note 241, at 27.
246 See generally B. Smith, “Obstacles to the Application of Anthropological Testimony in Aboriginal Claims Litigation” (Victoria: December 4, 1995) [unpublished].
The second difficulty relates to the fact that Aboriginal plaintiffs must deal with a judicial system which is not designed to handle crucial evidence which is generally of an historical and anthropological kind. 247 Given the volume and nature of the evidence required to prove historical fact and to meet the tests for title discussed above, special rules of evidence have been developed to assist the courts in the fact-finding process. Exceptions have been created to the hearsay rule to allow the admission of oral history passed from generation to generation and rules on opinion evidence have been relaxed to allow the opinions of social scientists to be heard. Thus, the difficulty faced by Aboriginal claimants does not concern the admissibility of evidence, but rather the weight or probative value to be given to such evidence.

With respect to oral history, McEachern concluded in the trial judgment in Delgarnuukw that oral history was faulty in that it was influenced by recent political trends and thus it was to be given little or no probative value. Concerns relating to the frailty of human memory, the accuracy of the oral record, and the role of culture (as distinct from historical fact) in the formulation of oral histories create a presumption that oral histories reflect subjective belief or “a romantic view of their history” which is not “literally true”. Quoting conflicting academic opinion on the accuracy of oral traditions and the influence of non-Indian narratives, McEachern C.J. concluded that oral history may only be useful “to fill in the gaps” left at the end of a purely scientific investigation.248

Moreover, there has also been extensive discussion concerning the acceptance of social scientists, such as anthropologists, as expert witnesses. Although the Supreme Court of Canada in Calder and Sparrow appeared to accept the testimony of anthropologists, other decisions, including the trial decision in Delgamuukw, have called into question their ethics and credibility. In Bear Island, for example, Steele J. said that anthropologists “...were typical of persons who have worked closely with Indians for so many years that they have lost their objectivity...”249 Similarly, McEachern C.J. in Delgarnuukw said that

247 Colvin, supra note 54, at 15.
248 Asch and Bell, supra note 186, at 540.
anthropologist Dr. Mills was “...very much on the side of the Plaintiffs”250; he discounted Mr. Brody’s
testimony on the ground that he did not qualify as being sufficiently objective251 and Dr. Daly was
dischegrated due to his adherence to the code of ethics of the American Anthropological Association which
states that “in research, an anthropologist’s paramount responsibility is to those he studies.”252 Therefore,
it appears that “[d]espite the creation of exceptions to rules of admissibility, judges continue to be
influenced by familiar rules of evidence and the rationale for those rules, which render new forms of
evidence suspect.”253

Thus, this short analysis of the courts’ rules of evidence reveals that there are, in some instances,
problems with the resolution of Aboriginal land claims by the courts. It is possible that some Aboriginal
land claims which might otherwise be successful in court will fail on the basis of difficulties in dealing
with evidence. The tests developed by the courts are obviously based on non-Aboriginal, colonial values
and standards. The vast amount of evidence, the nature of the evidence and the rules of evidence create
practical difficulties. Further, the courts have, on some occasions, suggested that anthropologists lack
objectivity by the very nature of their profession, and that they will be unavoidably biased in favour of the
subjects of their research. This distrust of anthropological witnesses represents a significant obstacle to the
application of anthropological findings in Aboriginal claims litigation.254

2.5 Costs and Delays

Generally, the courts have been a slow and expensive means of dealing with Aboriginal land claims. For
instance, the Tlingit-Haida litigation in Alaska took over 33 years to resolve,255 the Calder case took four
years, Sparrow took six and the trial in Delgamuukw lasted 374 days.256

at 74.
252 Cited in Storrow and Bryant, supra note 206, at 186.
253 Asch and Bell, supra note 186, at 533.
254 B. Smith, supra note 246, at 11.
255 Tlingit and Haida Indians of Alaska v. United States, 389 F. 2d 778 (Ct. Cl. 1968).
256 Elliot, supra note 19, at 163; Sanders (Aug. 15,1995), supra note 241, at 17.
The costs of those lengthy actions can be prohibitive, and few bands or Aboriginal organizations are in a position to provide the necessary financial support.\textsuperscript{257} Research funds provided to bands and Aboriginal organizations by the Department of Indian and Northern Affairs cannot be used for litigation without the consent of the Minister. However, since the government’s land claims policy is to encourage negotiation rather than litigation, it might be difficult to receive such approval.\textsuperscript{258} Furthermore, when the federal government simply refuses to fund Aboriginal litigants, it increases traumatically the pressure on the Aboriginal groups to accept the federal position in negotiation.\textsuperscript{259}

It must however be noted that the experience over the last 15 years suggests that the relative costs and delays of litigation are comparable to those of negotiation. Both processes are costly and time-consuming and these factors might become irrelevant in choosing between them.\textsuperscript{260}

\subsection*{2.6 Lack of Control and Compliance}

In general, using the courts to achieve the resolution of a dispute is a highly risky adventure. “Unlike a negotiation process, in which both sides are assured of an outcome that will meet some of their needs, the court process has the potential to create clear winners and losers.”\textsuperscript{261} Therefore, there is a serious risk that the parties will be bound by an imposed decision which does not address the underlying needs of the parties and which will not be a mutually beneficial settlement for the parties.

Moreover, even when Canadian courts rule in favour of an Aboriginal disputant on a specific issue, Canadian governments may resist the application of the new decision. According to Angus Murray, “[f]aced with unfavourable rulings, governments have responded by ignoring or minimizing their policy

\textsuperscript{257} \texttt{NOTE}: The \textit{Delgamuukw} case is estimated to have cost $25 million to bring to trial only. Asch and Bell, \textit{supra} note 186, at 533.
\textsuperscript{258} Daniel, \textit{supra} note 42, at 238.
\textsuperscript{259} O’Reilly, \textit{supra} note 213, at 41.
\textsuperscript{260} \textit{An Agenda for Action}, \textit{supra} note 3, at 80.
\textsuperscript{261} A. Murray, \textit{supra} note 80, at 58.
implications.” An example of this attitude on the part of a provincial government is the case of the Micmac Indians of Nova Scotia. The Micmac Indians had signed treaties with colonial powers in the 1700s which ensured that both parties could pursue their respective economic activities without interference from governments. However, after many decades of non-respect of their treaties and in light of the aggressive enforcement of provincial fishing and gaming laws, the Micmacs finally decided to go to court to reassert the validity of their treaties:

In 1985, the Supreme Court of Canada issued a landmark ruling stating that the Micmacs’ treaty rights to hunt and fish were still valid. Despite this ruling from the country’s highest court, the actions of the provincial government have barely changed - Indians continue to be harassed, arrested and jailed for their hunting practices. After going through the court system to establish the law, the Micmacs are now repeating the process to get the government to obey it. After the Nova Scotia Supreme Court Appeals Division threw out subsequent charges for illegal salmon fishing in 1990, the provincial government finally threw in the towel and agreed to stop its prosecutions; but not before the Native organizations were left “financially crippled.”

2.7 Injunction

The courts’ attitude towards granting injunctive relief in Aboriginal land claims has been mixed. In determining which party would likely suffer the greater inconvenience if the applicant succeeded in its application for an interim injunction, the courts have not always understood and thus given much weight to the arguments presented by Aboriginal groups. For example, in the Lubicon Lake case, the Lubicon Lake Aboriginal people made an application for an interim injunction to stop oil and gas development from occurring on their traditional lands, as it would destroy their homelands and livelihoods. Justice Forsyth wrote in his judgment:

...I am more than satisfied that the respondents would suffer large and significant damages if injunctive relief in any of the forms sought by the applicants were granted. Furthermore, the respondents would suffer a loss of competitive position in the industry vis-à-vis the position of other companies not parties to this action. That loss coupled with the admitted inability of the applicants to give a meaningful undertaking to the court as to damages ... reinforces my decision that injunctive relief in this case is not appropriate.

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262 Ibid, at 62.
263 Ryan and Ominayak, supra note 37, at 352.
According to Ryan and Ominayak, the comment on the inability to pay of the Lubicon people reflects the judicial bias against Aboriginal people. The authors contend that the poor cannot look to the courts for injunctive relief against the rich and as a result there exists not only a racial bias but a class one as well.265

Another example of an Aboriginal group seeking an injunctive relief is the case of the James Bay hydroelectric project where the Quebec Superior Court ordered the halt of the project. However, Quebec officials argued that the injunction costs them one million dollars a day and the Court of Appeal decided to lift the injunction pending a full hearing.266 The Quebec Court of Appeal did not believe the evidence of the Aboriginal plaintiffs and the environmental consequences predicted for the project by the scientific witnesses of the plaintiffs, even though the Court of Appeal did not hear any of the witnesses. According to James O’Reilly, “[t]his is a tough obstacle for aboriginal litigants to overcome because it is based fundamentally on judicial predisposition.”267

In MacMillan Bloedel v. Mullin,268 both the First Nation and the logging company sought injunctions, one side to stop Aboriginal protests, the other to halt logging, pending the resolution of the dispute over Aboriginal title. Mr. Justice Gibbs of the British Columbia Supreme Court rejected the First Nation arguments, “noting the potential impact of similar injunctions on other land in the province.”269 However, this decision went to the Court of Appeal where injunctions were granted against both the First Nation and MacMillan Bloedel pending a resolution of the Aboriginal title issue.270 In this decision, Justice Seaton said:

> It has also been suggested that a decision favourable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging.

265 Ryan and Ominayak, supra note 37, at 356.
266 Sanders (1989), supra note 56, at 716-717.
267 O'Reilly, supra note 213, at 23-24.
There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.\textsuperscript{271}

In the years following the \textit{MacMillan Bloedel} decision, other interim injunctions were granted to prevent logging and other activities pending resolution of Aboriginal land claims.\textsuperscript{272} The problem with judicial findings based upon the "balance of inconvenience" is that they are generally based upon subjective evaluations of what is important and of value. The courts sometimes equate inconvenience with financial loss. However, for Aboriginal people the loss of their land involves not only a loss of income but a loss of a way of life.\textsuperscript{273} The focus of the courts on financial loss reflects the values and priorities of non-Aboriginal cultural priorities at the expense of those of Aboriginal claimants.

\textbf{B. Benefits of Litigation}

Despite the serious difficulties with the litigation process, there are clearly situations where the judicial system is the chosen solution to resolve comprehensive claims, for instance when the parties are unable to reach agreement through negotiation, or simply when the disagreement on some issues is so fundamental and so divisive that compromise is impossible and less authoritative decisions unacceptable.\textsuperscript{274} I therefore propose to explore some of the advantages of litigation in order to assess the role which the courts currently play and could play in the future in dealing with Aboriginal land claims.

\textbf{1. Strategic Advantages}

\textbf{1.1 Binding Precedents}

There is a clear advantage in bringing a land claim through the court system if it has the potential of being a favorable precedent-setting case. The principal benefit is that a favourable decision of the court

\textsuperscript{271} \textit{Ibid.}, at 73.
\textsuperscript{273} Ryan and Ominayak, \textit{supra} note 37, at 354.
\textsuperscript{274} Daniel, \textit{supra} note 42, at 238.
will become binding precedent upon other courts in the jurisdiction.\textsuperscript{275} Even if the decision is not favourable to the claimants, the judgment may nevertheless contain valuable \textit{obiter dicta} which can be argued in subsequent cases, and which could be influential outside the courts.\textsuperscript{276}

1.2 Changes in Government's Claims Policies

Judicial decisions have also the potential of influencing the government's land claims policies. According to Peter Douglas Elias, "as questions of law are settled by the courts, their determination are reluctantly incorporated into government policy."\textsuperscript{277} In fact, prior to the \textit{Calder} decision, the federal government policy on Aboriginal title was to deny its existence. The decision in \textit{Calder} forced the government to reassess its position and on August 8, 1973, it issued the first 'statement of policy' regarding Aboriginal lands in which it agreed to negotiate land claims with certain Aboriginal groups in Canada.

1.3 Impetus for Negotiation

Building favourable precedents can also have a significant impact on the negotiation process. The courts can play a significant role in defining Aboriginal rights in a manner as to discredit the most extreme negotiating positions of both sides and laying the necessary foundation for the initiation of effective and realistic discussion.\textsuperscript{278} As stated by Louise Mandell, "courts could have a role in building the foundation for meaningful political negotiations between the Indian Nations and the Crown."\textsuperscript{279} Thus, litigation can provide Aboriginal claimants with a substantial degree of bargaining power in negotiations.

\textsuperscript{275} NOTE: In the Australian decision of \textit{Mabo v. Queensland (No.2)} (1992), 107 A.L.R. 1 the High Court overturned 150 years of precedent which had consistently denied the application of Aboriginal title in Australia. The High Court's decision is now a binding precedent upon all inferior courts in that jurisdiction.

\textsuperscript{276} McCallum, \textit{supra} note 13, at 44.

\textsuperscript{277} Elias (1989), \textit{supra} note 241, at 3.

\textsuperscript{278} \textit{An Agenda for Action, supra} note 3, at 25 and 84-85; Daniel, \textit{supra} note 42, at 238.

\textsuperscript{279} Mandell (1987), \textit{supra} note 234, 358 at 365; See also R. Cavanagh and A. Sarat, "Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence" (1980) 14 Law and Soc. Rev. 371, at 373.
Sometimes, only the threat of an imposed decision can spur negotiation and compromise.\textsuperscript{280} For instance, in the James Bay case, the Quebec government was initially unwilling to negotiate with the Crees and Inuit since it "...saw no threat from the indigenous people, no realistic means by which they could alter the course of action which the Quebec government was pursuing, and it therefore felt no need to give up anything it valued, no need to compromise. In short, it really was not ready to negotiate."\textsuperscript{281} However, a few days only after the claimants were successful in their injunction before the Quebec Superior Court against the Quebec government, the province agreed to negotiate and proposed a settlement to the Cree and Inuit within two weeks.\textsuperscript{282} Thus, the court action pushed the provincial government to negotiate and also provided significant leverage to the Aboriginal claimants in the negotiation process. Billy Diamond contends that if they had lost their case before the Superior Court of Quebec, "it is highly improbable that the Crees would have obtained anything near what we did through that agreement."\textsuperscript{283}

As with the James Bay case, it has been suggested that in both the Calder case and the Delgamuukw case, the real intention of the Aboriginal groups were to use the courts to force governments in taking Aboriginal issues seriously. According to Professor Douglas Sanders,

> The Gitksan and Wet’suwet’en were trying to get land claims negotiations going. Land claims had been stalled in British Columbia since 1973. The plaintiffs in both cases were seeking negotiations with governments. But Indians needed some recognition of rights - some cards - some status - if negotiations had any chance.\textsuperscript{284}

This incentive to negotiate was also discussed by the Supreme Court of Canada in Sparrow, in which the judges referred to the Calder decision as a case in which the court system had played a positive role in bringing pressure on the federal government to move on the land question.\textsuperscript{285} Courts therefore can be

\textsuperscript{280}Ibid, at 394-411; See also Colvin, supra note 54, at 12; McCallum, supra note 13, at 45.
\textsuperscript{281}Feit, supra note 161, at 161.
\textsuperscript{282}NOTE: The Quebec Superior Court order for an injunction was overturned on appeal. Feit, supra note 161, at 162; Sanders, (Aug. 15, 1995) supra note 241, at 8; B. Diamond, "Aboriginal Rights - The James Bay Experience" in Boldt & Long eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) at 265; Feit, supra note 161, at 162.
\textsuperscript{283}Diamond, supra note 282, at 272.
\textsuperscript{284}Sanders (1992), supra note 158, at 281-282.
\textsuperscript{285}Ibid, at 280 and 282.
used, under the right circumstances, to provide bargaining leverage rather than acting as decision
makers.286

2. Public Sphere

2.1 Public Opinion

Another advantage for Aboriginal claimants in using the judicial system to resolve their claims is that the
courts are public and attract the scrutiny and interest of the media and the general public. Favourable
media coverage can be a more valuable means of provoking a political will to settle rather than pursuing
before the courts. As stated by Fleras and Elliot, "the Canadian public has likewise been instrumental in
exerting pressure for changes in the aboriginal agenda."287 An example of a successful attempt in gaining
public support is with the Cree of James Bay which attracted substantial national and international media
and public support for their claim in 1973.288 Another example of the influence of the media is the
inquiry on the Mackenzie Valley Pipeline where Tom Berger organized national media coverage of the
community hearings held in First Nations villages. Berger supported Aboriginal claims, his report
became a best seller and killed the pipeline project.289

2.2 International Discourse

There is great opportunity for the courts in common law jurisdictions to influence each other in respect of
Aboriginal title by drawing on each other's precedents. For instance, such an exchange has been
happening between Australia and Canada for some time now. Canadian case law is frequently referred to
in Australian decisions and vice versa. As stated by Richard Bartlett "...Canadian and Australian courts
can now engage in a valuable discourse in the area of law affecting Aboriginal peoples."290 This could
have significant advantages for Aboriginal groups in Canada. For instance, if one decision is made in

No.3, 493 at 497.
287 Fleras and Elliot, supra note 63, at 119.
288 MacGregor, supra note 227, at 172 and 178; McCallum, supra note 13, at 47.
289 Sanders (1989), supra note 56, at 717.
290 R.H. Bartlett, "The Landmark Case on Aboriginal Title in Australia: Mabo v. State of Queensland"
another common law jurisdiction which expands the concept of Aboriginal title and rights, this may encourage Canada to follow suit.291

Part III Appropriateness of Litigation

It is clear that there are circumstances where adjudication is an appropriate process to resolve Aboriginal land claims. Thus, the questions become: How to deal with problems such as judicial ethnocentrism and bias? When and in what circumstances should issues be left to the courts to decide? How can the courts play a more productive role?

A. Cultural Relativism

There are no easy solutions to the problems of ethnocentric biases. May be the only way to combat the judicial ethnocentrism is to “make the different world view of the Indian Nations visible”292 and to call for reasoning by the courts based on cultural relativism. Perhaps in this manner it would be possible to convince judges that “...all cultures are equally worthy of respect and must be understood on the basis of their own value systems.”293 Judges hearing Aboriginal cases must “...hear evidence before them with an open mind so that they can understand another world view as it is understood by the Indians.”294 The use of an analytical framework based on cultural relativism could increase “objectivity, empathy, and informed judgment”295 which are essential qualities for anyone who wants to understand the lifestyle of another society. “The law should cease to interpret historical fact in a way which favours the perceptions of one culture over those of another.”296 However, this would not totally eliminate the possibility of ethnocentric reasoning, since legal precedents, based upon the Baker Lake test, would probably still influence the reasoning of the judges. For this reason, some anthropologists have argued that the only

291 McCallum, supra note 13, at 49.
293 Asch (1992), supra note 201, at 229. Asch and Bell, supra note 185, at 516.
296 Asch and Bell, supra note 185, at 549.
way to eradicate ethnocentrism in Aboriginal claims cases would be to completely abandon the *Baker Lake* line of case law.\(^{297}\)

There is also no easy solution to the problems raised by legal treatments of oral history. One can only hope that the courts will adopt a consistent approach in accepting and relying upon oral history in Aboriginal cases. In fact, both the decisions in *Simon* and *Sparrow* suggest that “...where evidence regarding aboriginal rights is equivocal, but not unconvincing, the confines of the law should be extended to resolve evidentiary issues on the side of the aboriginals.”\(^{298}\) At the same time, it is conceded by Aboriginal advocates that a strategic attempt should be made to separate “unorthodox” oral histories from those which are more likely to be accepted by the court as factual in nature.\(^{299}\) Such an approach would lessen the likelihood of a judge dismissing the totality of oral evidence as being romanticized, or unreliable.

Finally, the courts should not dismiss the entire field of anthropology solely on the mistaken assumption that direct and close contact with Aboriginal peoples necessarily perverts anthropological findings. Anthropologists assert that the focus should instead be on the rigour and quality of the research being presented, as assessed within the discipline itself. Although this would not guarantee absolute objectivity, bringing evidence under the scrutiny of other anthropologists would at least guarantee comparability in the evaluation of ideas and testimony.\(^{300}\)


\(^{298}\) Storrow and Bryant, *supra* note 206, at endnotes 33 at 191; see also Elias (1989), *supra* note 241, at 22.

\(^{299}\) Storrow and Bryant, *supra* note 206, at 185.

\(^{300}\) Kew, *supra* note 201, at 100; Asch (1992), *supra* note 201, at 237. **NOTE:** Some institutional and procedural reforms have been suggested to enhance the perceived objectivity of anthropologists, such as pre-hearing anthropological discussions and intermediary anthropological boards. See B. Smith, *supra* note 246, at 16-17.
The seriousness of these issues has led many to conclude that there exists no solution to these problems and thus, the courts are not an appropriate forum for the resolution of Aboriginal land claims. Lambert J.A. stated in his dissent in *Delgamuukw*: "I can think of no way around the problems in relation to historical and anthropological evidence except to try to avoid those problems by settling the existence and scope of rights by a process of negotiation, including the use of resources of mediation and commissions of inquiry." 301

However, since it is most likely that Aboriginal cases will continue to be referred to Canadian courts - unless the federal government creates an independent land claims body with power of adjudication - there must be concrete actions taken to resolve these critical issues. As suggested by the Indian Commission of Ontario, a first step could be that judges “...be given specialized training, perhaps sponsored by the Judicial Council of Canada in conjunction with Indian organizations, before being assigned to an Indian case.” 302 Gerard V. LaForest also suggested that:

Legislation could remove many of the limitations of the courts as a mechanism for resolving claims. The laws of evidence could be modified in their application to claims, norms of honourable conduct associated with the Crown’s relation to Indians could be articulated in legislation, and defences respecting limitation periods (insofar as these may be relevant) could be abolished. 303

The following discussion will explore other ways to circumvent some of the problems with the litigation approach.

B. Combining Litigation and ADR Mechanisms

Ideally, litigation should be employed in conjunction with other alternative dispute resolution mechanisms, as litigation and other dispute resolution processes are interrelated parts of a total process. 304

302 ICO (1990), *supra* note 39, at 105.
303 LaForest, *supra* note 85, at 20.
304 NOTE: This total process is one that “...starts with a perception of rights, a realization that these rights are being thwarted or denied, the formulation of a claim, the initiation of discussions, recognition of the claim to the point where negotiations begin, or threat of court action or other consequences to provoke a negotiating response.” *An Agenda for Action, supra* note 3, at 78.
The court system can be used as part of a series of actions having for objective the resolution of the land question. "[R]esort to the Courts should be part of an overall strategy with alternative scenarios planned in advance." According to professor Douglas Sanders, litigation is a bad strategy only if it is seen in isolation from other actions and strategies. This has also been recognized by Mr. Justice MacFarlane in *MacMillan Bloedel v. Mullin*: "I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations."

It is also possible to combine other dispute resolution mechanisms within the process of litigation itself. For instance, in the United States, courts have occasionally used special masters to help manage complex cases in an effort to circumvent the several obstacles of litigation. The traditional role of masters has involved render accountings, presiding over hearings and making findings of fact and recommendations. More recently, masters have also been acting as facilitators and mediators. Some American courts have created programs, known as Early Neutral Evaluation Programs (ENE), which are based on the use of special masters. These programs work in the following way:

ENE session is a confidential, non-binding evaluation conference, attended by counsel, their clients, and a neutral member of the private bar who has substantial litigation experience, and who is an expert in the subject matter of the lawsuit. The ENE session takes place early in the pretrial period so that the parties can use what they learn during the session to make the case less expensive and time-consuming.

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306 Sanders (1992), supra note 158, at 283.
308 Nolan-Haley, supra note 167, at 186.
309 NOTE: Many courts in the United States are now using special masters to help facilitate settlement. These programs, known as Early Neutral Evaluation Programs (ENE) have been instituted, among other places, in the Northern District of California, the Eastern District of California, the Southern District of California, the Northern District of Indiana, the Eastern District of New York, the Northern District of Ohio, the Western District of Tennessee, and the Western District of Wisconsin. B.J. Roth, R.W. Wulff, and C.A. Cooper, *The Alternative Dispute Resolution Practice Guide* (New York: Lawyers Cooperative Publishing, 1993) at 1:11; W.D. Brazil, "Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?" (1986) 53 Univ. of Chicago Law Review, No. 2, 394; W.D. Brazil, "A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values" (1990) Chicago Legal Forum 303.
One of the most well-known cases where a special master was appointed as settlement facilitator involved a dispute over the Great Lakes fishing rights.\footnote{For a discussion of the Great Lakes dispute, see F.E. McGovern, “Toward a Functional Approach for Managing Complex Litigation” (1986) 53 Univ. of Chicago Law Review, No.2, 440 at 456-468.} This complex dispute over the fishery allocation plan in the Great Lakes had a twelve year litigation history and involved many parties including several tribes of Indians asserting rights based on nineteenth century treaties, the Secretary of the Interior, the Michigan Department of Natural Resources and the non-Indians fishing interests. The judge decided to appoint, in consultation with all parties, a special master after recognizing the following problems with the fishing rights case: (1) the litigation would require processing and analysis of enormous amount of economic, scientific, and environmental data; (2) the parties were intensely hostile toward one another, and; (3) the issues were polycentric and the case had great political sensitivity.\footnote{NOTE: The special master was of the opinion that the case presented a classic example of a polycentric problem which could not be easily resolved in an adjudication process. He wrote that: “The solution to any given question concerning resource division was dependent upon the solutions reached on the other questions; no issues were independent. This complex interrelationship of issues created difficulties which were compounded by the lack of any - much less clear- legal standards. The court was being asked to make extremely complex management decisions by using policy differences unreflected in the substantive law.” McGovern, supra note 310, at 459-460; See also Brazil (1986), supra note 309, at 410.} Moreover, because of the continuing relationship between the parties, it was estimated that any court-imposed solution would likely generate future conflict. Thus, the judge decided that these characteristics urged for an agreed settlement through a process of integrative negotiation.\footnote{McGovern, supra note 310, at 459.} The chosen special master was given the mandate to manage the pretrial case development within eight months and to facilitate settlement efforts. The master duties did not include ruling on substantive issues, and all his decisions were subject to review by the federal judge.\footnote{Ibid, at 458.} It is argued that delegating responsibility for the discovery phase to a master has the following advantages:

First, decisions of higher quality, based on familiarity with all circumstances, may be reached, and often can be delivered more promptly. Second, the master’s thorough understanding may also contribute to more consistent rulings. (...) Finally, a knowledgeable master who enjoys the parties’ confidence is well positioned to suggest cost-effective, cooperative methods for sharing or acquiring information.\footnote{Brazil (1986), supra note 309, at 411.}
Moreover, the familiarity with the issues that the special master developed in dealing with the case also helped the facilitation of a settlement. It is suggested that "by assigning a special master as settlement facilitator, the court can foster a negotiated disposition yet avoid either appearing prejudiced by counsel's behavior in negotiations or by matters learned off the record, or appearing to abuse the power it would have at trial to pressure parties into accepting settlements." Thus, contrary to a judge, a special master usually tries to get the parties to "look for steps they might take, perhaps in concert, that would create net gains for both sides. He also tries to shake up assumptions and compel dialogue along holistic rather that fragmented lines." In the fishing rights case, the special master helped all parties to appreciate the limits on what they could expect to achieve even if they won at the trial level and demonstrated that by using a negotiated settlement to resolve their dispute, they could all "secure valued ends that could not be part of a court-imposed judgment." Using a computer-assisted negotiation model, the parties reached an agreement after only three days of negotiations. The court approved the settlement, but one of the Indian tribes overruled its negotiators and decided to proceed with the litigation while all the other parties ratified the negotiated agreement. The judge ruled on the merits in favor of the negotiated plan.

Another example where a special master was appointed in a dispute involving Aboriginal rights was in United States v. Suquamish Indian Tribe (1990) where the Ninth Circuit Court of Appeals assigned a special master to determine whether the Suquamish Indian tribe could assert the fishing rights of another tribe as a successor in interest.

I submit that lessons should be learned from these positive experiences in appointing special masters. In fact, most Aboriginal claims cases involve the processing of vast amount of complex evidence, the issues are generally highly political and the parties are involved in a continuing relationship. Thus, the

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315 Ibid
316 Ibid, at 412.
317 Ibid.
318 McGovern, supra note 310, at 465-466; Nolan-Haley, supra note 167, at 188.
319 Nolan-Haley, supra note 167, at 185-186.
combination of a form of mediation as part of the litigation process would allow a person with a sophisticated understanding of a complex case to help the parties in narrowing the issues by finding solution benefiting all parties and building trust and effective communication between First Nations, governments and third-party interests. This approach could also accelerate the process and reduce the costs of litigation.

C. Improving the Role of the Courts in the Context of Aboriginal Land Claims

1. Fundamental Legal Issues

Litigation becomes an inevitable step to answer fundamental legal questions underlying Aboriginal land claims when the parties cannot agree among themselves. Thus, the courts should be used to solve central legal questions such as whether Aboriginal rights exist or have been extinguished and the meaning of these rights in contemporary Canada. However, for this to be a realistic option, funding for First Nations should be available on the same basis as it is under the negotiation process.

2. Implementation

Once these questions have been answered, there remains the arduous task of completing the detailed arrangements necessary to implement the decision. The courts should play the crucial role in ensuring that decisions are to be implemented fairly and efficiently. A special committee of the Canadian Bar Association has suggested that the courts, in appropriate cases, go beyond the determination of fundamental legal rights to oversee their implementation as well. “The shadow of the court may lead the parties to the light of day”. The CBA committee made the following recommendations with respect to judicial remedies:

It is recommended that serious study be given to making judicial remedies more effective in ensuring that both government policies and judicial decisions are fully implemented in relation to aboriginal rights and claims. This would require making injunctive relief available against the Crown, enabling remedies in rem to be given against the Crown, empowering the courts to require the Government to enter into good faith negotiations, and employing positive injunctive relief - the so-called structural injunction - in appropriate cases.

320 An Agenda for Action, supra note 3, at 85.
321 Ibid.
322 Ibid.
Conclusion

It is important to recognize and appreciate both the benefits and shortcomings of the court system in dealing with Aboriginal land claims. The courts can play a role in the resolution of the land question. Since the Calder decision in 1973, there has been an increasing recognition by the courts of the issues involved in the land question. The courts now can play a critical role in forcing governments to take the land question seriously and in increasing the public awareness on these important issues. The court system can also be an effective option for Aboriginal groups when governments are unwilling to negotiate, to clarify certain legal positions, or when disagreement on some issues is so divisive that compromise is impossible. Furthermore, the threat of litigation can spur negotiations and provide significant bargaining leverage to Aboriginal claimants during negotiations.

However, the judicial system also brings serious problems in the resolution of Aboriginal disputes. In submitting land claims to the courts, Aboriginal people submit themselves to a foreign cultural framework, and a formal technical system, in which they have the onus of proving traditional title under rules that are unclear and changing. Further, due to the fact that land claims are polycentric problems and usually involve complex ideological, historical, political and social issues, the court system lacks the jurisdiction to effectively deal with these matters and the courts’ rules of evidence are generally not designed to handle the complex historical evidence raised by these claims.

Litigation remains an alternative for some types of Aboriginal claims, but its weaknesses have been recognized for some time. The issues involved in the land question are very basic and fundamental to the lives of both Aboriginal and non-Aboriginal peoples in Canada and it is hoped that they will be resolved through direct non-adversarial communication between all affected by these disputes. New efforts to develop appropriate mechanisms of dispute resolution should be made. In this chapter, I have discussed the option of appointing a special master in an effort to circumvent some of the obstacles of litigation. There also exist other options, including the creation of an independent Aboriginal land claims body.
which would combine the process of mediation, negotiation with some powers of adjudication. This option will be further explored in Chapter Six of this thesis.
CHAPTER THREE

NEGOTIATION

Aboriginal groups, academic commentators, judges and governments, though for different reasons, generally regard negotiation as the most appropriate mechanism for the resolution of Aboriginal land claims and other dispute involving governments and Aboriginal peoples. In fact, at present, both the federal comprehensive and specific land claims policies provide for a structure of negotiation to resolve outstanding land claims. Negotiation is perceived as a fair process for the resolution of comprehensive claims since it requires both parties coming to the negotiating table on a voluntary basis and maximizes direct participation by Aboriginal claimants. As stated by a special committee of the Canadian Bar Association, "...aboriginal people are accorded an equal position at the bargaining table, which they perceive to be consistent with their understanding of their original relationship with the Government." Further, direct negotiation is considered the most appropriate process due to, among other things, the polycentric nature of comprehensive claims, and the nature of the relationship between the parties.

However, despite this preference for the negotiation process, it is arguable whether the process has been successful. The numerous problems with the federal land claims processes have been widely recognized and discussed over the past 20 years. In a 1990 discussion paper in relation to land claims, the Indian Commission of Ontario stated that "Canadian law and Canadian government policy does not begin to meet Indian aspirations (...) Without a policy and a process which is able to provide fair and expeditious resolution of Indian land claims, we can expect to see recurrences of the desperate alternative we have witnesses occurring at Oka and elsewhere."

323 Agenda for Action, supra note 3, at 78
324 NOTE: There has been several studies, reports, and proposals for Aboriginal land claims reform. These include Living Treaties: Lasting Agreements, supra note 8; Agenda for Action, supra note 3; ICO (1990), supra note 39; Jamieson, supra note 161; Leghorn, supra note 90; McCallum, supra note 13; ICC, supra note 12; Morris, Rose and Ledgett, "Analysis of Canada’s Comprehensive and Specific Claims Policies and Suggested Alternatives" (Draft paper prepared for the Royal Commission on Aboriginal Peoples, April 1994).
325 ICO (1990), supra note 39, at 3 and 5.
The purpose of this chapter is to explain the various reasons for these difficulties. I should only mention at the outset that the literature regarding negotiation theories suggests that two fundamental conditions must be met for negotiation to be successful in terms of objective fairness. Firstly, both parties must have a strong common interest in achieving a mutually acceptable settlement, and secondly, there must be relative equality between the parties. In Aboriginal claims negotiations, however, there is neither equality between the parties, nor is there always the presence of a strong common interest. Thus, although negotiation appears to be an attractive option, the nature and the extent of the power imbalance between the parties will have to be addressed for equitable negotiations to take place, both in terms of process and outcomes.

This chapter is divided into three parts. In Part I, I will briefly describe the two main models of negotiation and apply these theories to the Aboriginal land claims context. Part II will examine the current reality of the negotiation process and identify the major problems with the existing land claims policies. Finally, in Part III, I will suggest some strategies to improve negotiations between First Nations and governments and look at a conceptual approach to empower Aboriginal people in the negotiation process.

Part I Characteristics and Theories of Negotiation

A. Theories of Negotiation

1. Definition

Negotiation may be generally defined as a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter. The purpose of negotiating is for parties to achieve an advantage which is not possible by unilateral action.327

2. Models of Negotiation

326 Colvin, supra note 54, at 5; D. Druckman, Negotiations: Social - Psychological Perspectives (London: Sage, 1977) at 215; McCallum, supra note 13, at 93.
The literature regarding negotiation in the context of Aboriginal claims generally uses the word "negotiation" as a generic term. However, the literature on negotiation identifies two types of negotiation: dispute negotiation or transactional negotiation. Transactional negotiation involves parties planning for a future event and dispute negotiation involves parties who are in conflict over an event which has occurred.\textsuperscript{328} It is further suggested that the issues in dispute negotiation are generally susceptible to resolution by adjudication, such as by a judge or an arbitrator, while the issues in transactional negotiation should be resolved by the parties themselves.\textsuperscript{329}

Further, the negotiation literature identifies two approaches to negotiation. Negotiation theorists are comparing and contrasting two distinct negotiation strategies: the competitive strategy (or adversarial, distributive)\textsuperscript{330} and the non-competitive strategy. The non-competitive strategy can be subdivided into two different approaches: the cooperative strategy and the integrative strategy (or principled, interests-based, problem-solving).\textsuperscript{331}

2.1 Competitive Strategy

The primary assumption of competitive theory is that the community is governed by egocentric self-interest. Thus, the basic premise underlying the competitive strategy is that all gains for one side are obtained at the expense of the opposing party.\textsuperscript{332} The competitive negotiator tries to maximize the

\textsuperscript{328} \textit{Ibid}, at 13-14.
\textsuperscript{329} \textit{Ibid}, at 14.
\textsuperscript{330} \textbf{NOTE}: The term "adversarial" best describes the fact that this model is strongly influenced by the court conception of dispute resolution. See C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 U.C.L.A. Law Rev. 754 at 756 and 791.
benefits for his client by manipulating the process to serve his own end. Such negotiations become a "zero-sum" game and the bargaining engaged in is generally qualified as "distributive" bargaining.\(^{333}\)

Negotiation theories suggest a number of competitive tactics designed to force the other side to capitulate. As stated by Carrie Menkel-Meadow "[t]he literature is replete with advice to overpower and take advantage of the other side."\(^{334}\) For instance, competitive negotiators will often use the following tactics: (1) a high initial demand; (2) limited disclosure of information regarding facts and one's own preferences; (3) few and small concessions; (4) threats and arguments; and (5) apparent commitment to positions during the negotiating process.\(^{335}\)

Competitive negotiators tend to avoid normative arguments of "fairness, wisdom, durability and efficiency" of negotiations. They rather position themselves psychologically against the other party.\(^{336}\) Competitive tactics of negotiations engender tension, mistrust, frustration, distort communication, and consequently create many opportunities for an impasse between the parties.\(^{337}\) These negative attitudes may make the continuing relationships between the disputants extremely difficult.\(^{338}\)

2.2 Cooperative Strategy

The cooperative negotiator values concessions as a positive technique designed to "capitalize on the opponent’s desire to reach a fair and just agreement and to maintain an accomodative working relationship."\(^{339}\) The cooperative negotiator shares information and usually begins negotiations with a moderate opening bid that is both favorable to her and almost acceptable to the other side.\(^{340}\) The

\(^{333}\) Menkel-Meadow, supra note 330 at 765; Nolan-Haley, supra note 167, at 15.

\(^{334}\) Menkel-Meadow, supra note 330, at 779.

\(^{335}\) Gifford, supra note 331, at 48-49.

\(^{336}\) Murray (1986), supra note 332, at 182; See also E.F. Lynch & al., Negotiation and Settlement (New York: Lawyers Cooperative Publishing) at 172-173.

\(^{337}\) Murray (1986), supra note 332, at 183; See also Gifford, supra note 331, at 52.

\(^{338}\) Gifford, supra note 331, at 52.

\(^{339}\) Ibid.

cooperative negotiator generally initiates granting concessions in order to create both a moral obligation to reciprocate and to build a relationship on trust that is conducive to achieve a fair agreement. According to Gifford, "the major weakness of the cooperative approach is its vulnerability to exploitation by the competitive negotiator."  

2.3 Integrative Strategy

The main distinction between the integrative strategy and the two previous ones is that while both the competitive and cooperative strategies focus on the opposing positions of the negotiators and the making of concessions to move closer to an outcome favorable to the negotiator, the integrative strategy attempts to reconcile the parties' interests in order to provide high benefits for all the parties involved in the dispute. Under the integrative theory, a dispute is a mutual problem to be studied and resolved jointly by the parties. The goal is to reach an outcome which benefits both parties, or maximizes joint and individual gains in terms of "win-win" solutions. The process advocated by problem-solving negotiation theorists involves focusing on the interdependence between the parties. All the parties must share information so that each party's motives, goals, and values are understood and appreciated in order to reach a solution which meet the parties' needs and priorities. The integrative negotiator considers the needs of both parties as being relevant and legitimate, and focuses on identifying their common interests. Moreover, under the integrative strategy of negotiation, the aspect of fairness of both the process and outcomes is very important. According to Carrie Menkel-Meadow,

[The principle underlying such an approach is that unearthing a greater number of the actual needs of the parties will create more possible solutions because not all needs will be mutually exclusive. As a corollary, because not all individuals value the same things in the same way, the exploitation of differential or complementary needs will produce a wider variety of solutions which more closely meet the parties' needs.]

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341 Gifford, supra note 331, at 52.
342 Ibid, at 53.
343 Ibid, at 54.
344 Fisher, Ury & Patton, supra note 332.
347 Menkel-Meadow, supra note 330, at 795.
3. The Choice of a Negotiation Strategy

The choice of which negotiation strategy(ies) to adopt in a negotiation depends on a number of factors. In deciding whether the competitive strategy or one of the noncompetitive strategies, either the cooperative or the integrative strategy, is more likely to be advantageous, the negotiator must assess the following elements. First, the most important factor to consider is the opponent’s likely negotiating strategy. In fact, to be successful the cooperative and integrative approaches require that negotiators from all parties adopt the same strategy. If the opponent adopts a competitive strategy, a negotiator should not opt for a non-competitive approach since he would be vulnerable to exploitation by the competitive negotiator. If the opponent pursues a non-competitive strategy, the negotiator can then choose between a competitive strategy or one of the two non-competitive approaches. The only circumstance where a negotiator will choose a competitive approach even if her opponent has chosen an non-competitive strategy is when the negotiator is not concerned about the parties’ continuing relationship and when there exists a feasible alternative if negotiations break down.\(^{348}\)

The second factor the negotiator should consider in choosing a negotiation strategy is the relative power of the negotiator and the opponent. In fact, “the critical factor in negotiations is not power itself, but rather the opponent’s perception of power.”\(^{349}\) When a negotiator has, or is perceived to have, more power than the other party, he may choose either a competitive or a noncompetitive strategy. “A negotiator with a viable alternative to a negotiated agreement is exposed to minimal risk if she chooses the competitive strategy, despite the increased risk of settlement impasse.”\(^{350}\) On the other hand, when a negotiator’s power is less than that of her opponent, noncompetitive strategies should be chosen because “the competitive strategy fails for the low-power negotiator because his threats are not credible and his positions are not viewed by the opponent as firm and unyielding.”\(^{351}\)

\(^{348}\) Gifford, supra note 331, at 59-61.
\(^{349}\) Ibid, at 62.
\(^{350}\) Ibid, at 64.
\(^{351}\) Ibid.
The third factor to consider in choosing a negotiating strategy is the likelihood of future interaction with the other party(ies). Generally, where there exists a continuing relationship between the parties, a non-competitive approach is suggested, since “the competitive strategy often generates distrust and ill will.”

If a negotiator decides that a non-competitive approach is more appropriate, she must then choose between the cooperative or the integrative strategy. This decision should be made based on three factors. First, a negotiator must consider whether the negotiation is a zero-sum negotiation or not. In the context of a zero-sum situation - or distributive bargaining - the cooperative strategy is recommended. On the other hand, integrative bargaining is possible only with non-zero sum negotiation - or problem-solving situation - so that the parties can invent solutions that will satisfy the underlying interests of all parties. Second, the number of disputed issues is a relevant factor when choosing between the cooperative and integrative negotiation approaches. “The more issues that the parties must negotiate, the greater the opportunity for integrative bargaining.” Finally, the negotiator must assess the desire of all the parties to maximize both their own and the opponent’s gain.

B. Application to Aboriginal Land Claims

352 Ibid, at 65.
353 NOTE: A zero-sum negotiation occurs when “the parties seek to divide a fixed pie, a finite amount of resources or widgets; the gain of one party necessarily comes at the expense of the other party.” Ibid, at 69.
354 Ibid, at 69.
355 Ibid, at 70.
356 NOTE: This motivation depends on the following elements: “First, when the negotiators have high aspirations and high limits in negotiations, an integrative approach is recommended. High limits and aspirations complicate making concessions, and, therefore, discourage the use of a cooperative strategy. Second, both parties’ possession of high power or high threat capacity (...) also contributes to the motivation for integrative bargaining. (...) Finally, deadlocked negotiations on one hand, and pressure to reach agreement quickly on the other hand, affect the utility of integrative negotiations in very different ways. Deadlock often suggests that the parties regard themselves as unable to bargain cooperatively by making further unilateral concessions: integrative bargaining may emerge at this point. Conversely, pressure to reach agreement quickly will most likely lead to a pattern of concession-granting and a cooperative strategy, instead of the integrative strategy which requires more time to explore the possibilities of brainstorming and logrolling.” Ibid, at 70-71.
Given the complex and multi-dimensional nature of comprehensive claims, the integrative model of negotiation seems to be the most appropriate approach to successfully resolve these disputes, for at least three major reasons. First, negotiation theorists have affirmed that the competitive strategy is not suitable when the issues in a negotiation are multiple and varied. Menkel-Meadow explains that "the stylized ritual of offer/response, counteroffer/counterresponse and concessions may not be of assistance when the issues are multi-dimensional and the parties seek to discuss a variety of solutions at the same time." The B.C. Treaty Commission encourages the use of the problem-solving in the negotiation of modern treaties in British Columbia since this approach "...allows negotiators to consider and discuss the interests underlying each party's position. More options for resolution may then emerge." Secondly, it is generally accepted that the integrative model is more appropriate when then parties are engaged in an ongoing relationship. Therefore, any process which facilitates better communication and understanding between Aboriginal groups and governments, and which attempts to strengthen the parties' relationships should be adopted. Finally, the integrative model of negotiation is more culturally appropriate for First Nations, "...since the principles which it espouses are, broadly speaking, more akin to the cultural values and priorities of Aboriginal peoples."

However, it may not be realistic to expect that governments will adopt the integrative model in comprehensive claims negotiations. In fact, some commentators have explicitly characterized land claims negotiations between Aboriginal groups and governments as being "adversarial" or "competitive." It was reported that "...pressure tactics are used in the negotiation process, and the power imbalance between the parties is used to force agreements or to put claims on the backburner." The major problem for

357 Menkel-Meadow, supra note 330, at 771.
358 Ibid, at 777.
360 See generally, Fisher, Ury & Patton, supra note 332; Menkel-Meadow, supra note 330, at 760; Gifford, supra note 331, at 65.
361 McCallum, supra note 13, at 85.
362 See for example Coolican, supra note 176, at 6-7; McCallum, supra note 13, at 91; Interview with William Dunlop, Director Resource Policy and Transfers Directorate, Indian Affairs and Northern Development, Ottawa, June 20th, 1996.
363 Turpel (1995), supra note 2, at 78.
Aboriginal claimants is that they have no leverage to force governments to agree to problem-solving negotiation, but neither do they usually have the power to respond to government “competitively” in negotiations. As noted by Menkel-Meadow, “problem solving cannot work where one party is so powerful that it will not accede to demands or requests to bargain for joint or mutual gain.”\textsuperscript{364} The adversarial negotiation tactic might also damage the long-term relationship and the ability of First Nations and governments to work together productively to implement their future agreements. This is also the opinion of the B.C. Treaty Commission:

When parties cannot negotiate beyond their positions, the process becomes a battle of wills. One side may see itself as bending to the rigid will of the other, while its legitimate concerns are not addressed. Particularly where there is an imbalance of power, such a battle is harmful to the relationship among the parties.\textsuperscript{365}

It appears that the federal government is now committed to adopting the interest-based approach in its negotiation with First Nations.\textsuperscript{366} However, I submit that the structure of the process, the lack of mandate of government’s negotiators and the inequality of power between the parties are factors which prevent the federal government’s negotiators from reaching the true benefits of interest-based negotiation. The various problems with the structure of the existing negotiation process will now be examined.

\textbf{Part II} \hspace{1cm} \textbf{Negotiation of Aboriginal Land Claims}

The purpose of this section is to examine the current reality of the negotiation process between the Canadian governments and Aboriginal claimants. As mentioned above, there are two land claims policies in place at present in Canada: a comprehensive claims policy and a specific claims policy. Both policies look at negotiations as the most appropriate mechanisms to resolve land claims. It appears that the underlying assumptions which have motivated the federal government to choose this approach are that negotiations will: (1) lead to better decisions; (2) be more adaptable to changing conditions; (3) be fairer to all parties involved in the dispute; and (4) be better implemented than other types of decisions.\textsuperscript{367}

\textsuperscript{364} Menkel-Meadow, supra note 330, at 833.
\textsuperscript{365} Third Annual Report, supra note 359, at 21.
\textsuperscript{366} Interview with William Dunlop, Director Resource Policy and Transfers Directorate, Indian Affairs and Northern Development, Ottawa, June 20th, 1996.
\textsuperscript{367} Frideres, supra note 175, at 291.
However, the shortcomings of the existing land processes have been widely recognized over the past 20 years. Some of the problems are due to the fact that under the existing land claims policies, "[t]he government decides which claim is accepted, how much money will be made available to the claimant group for research and negotiation, when negotiations will begin, and the process for negotiations."368 The following will discuss some of these problems and will recommend measures to improve the negotiation process.

A. Structural Problems with Land Claims Negotiations

1. Symmetry of Power Between the Parties

Power is not a characteristic of an organization or person but is an attribute of a relationship. A party's power is directly related to the power of an opponent. Power is therefore multidimensional and dynamic. Power relations generally occur in two forms: symmetric, or equal, and asymmetric, or unequal, levels of influence.369 When there is unequal power between parties involved in a dispute, it must become a factor actively considered. In fact, several studies have shown that an unequal distribution of power generally results in less effective bargaining overall, than does an equal distribution.370 Unequal power, moreover, appears to differentially affect the behavior of the more powerful and less powerful parties. As discussed earlier, negotiators with high power relative to that of their adversary tend to behave manipulatively and exploitatively, while those with low relative power tend to behave more submissively.371 As stated by Druckman "...the more powerful party is likely to avoid bargaining because of a belief that he [sic] can or should be able to dominate the other, and the less powerful is likely to follow suit out of fear of reprisal or because of a sense of hopelessness about achieving an equitable agreement."372

368 Living Treaties: Lasting Agreements, supra note 8, at 78.
371 Rubin and Brown, supra note 370, at 221-223; Moore, supra note 369, at 278.
372 Druckman, supra note 326, at 185.
In the context of Aboriginal land claims, it is suggested that "the process of negotiating has been affected by the extent to which the parties differ in power and resources." Aboriginal people "... are usually in the position of supplicants seeking redress from parties whose interests in achieving an agreed settlement are not as great as their own. The opposing parties are usually governments backed by greater resources for the conduct of negotiations and able to rely on the coercive machinery of the government to enforce the status quo in the event of break-down." As mentioned above, governments tend to adopt a style of competitive negotiation with Aboriginal claimants. As a result, Aboriginal groups are often forced to relate to governments on terms unilaterally defined by those governments. It is suggested that in practice, during negotiations the government acts as "defendant" and "judge" as well as banker, and hence is able to force a narrow range of settlement alternatives for consideration. Despite repeated and frequent criticism from Natives, academics, the international community, and from sources within government itself, the current process remains largely unchanged.

Where there is a serious imbalance of power between the parties, as it is the case between Aboriginal peoples and governments, negotiation theories suggest that the likelihood increases that negotiations will break down or that the outcome will be perceived by one side as an exercise of coercion. The breakdown of negotiations may itself create a coerced settlement in a case where, for instance, the status quo leaves one party in possession of the disputed resource and where no alternatives for dispute-resolution are available. Thus, past experience shows that "[i]f governments are going to ensure fair and just negotiating processes, they have to be structured to compensate for those power imbalances and seek methods less adversarial than those currently employed."

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373 Frideres, supra note 175, at 291.
374 Daniel, supra note 42, at 222-225; Colvin, supra note 54, at 16-17. NOTE: "As a negotiator, it is important to see each party having some leverage in any negotiations, otherwise the tendency on the part of the party with all the marbles is not to play. The Department of Indian Affairs and Northern Development has all the marbles and tends not to play." Denhoff, supra note 95, at 11.
376 Leghorn, supra note 90, at 19.
377 Colvin, supra note 54, at 5.
2. Terminology

Many commentators have noted the inappropriateness of the terms Aboriginal "land claims" arguing that this expression is misleading in that it connotes that Aboriginal's grievances are merely a contention rather than a valid fact. Aboriginal people have said many times that they find this expression very offensive because it seriously misrepresents Aboriginal concepts of land and contribute to reinforcing the power imbalance between the parties.379

Professor Michael Asch argues that by using the term "land claims", Aboriginal people "...have had to accept working within a paradigm that is external to their ideology and yet to find ways within it to obtain some of the rights and guarantees they see as properly theirs."380 Thus, the use of the expression "land claims" has a serious impact on First Nations, for they are forced to operate within parameters which do not recognize the principle which derives from their own conceptual framework and ignore the right that would flow from an acceptance of their framework in Canadian law.381

The existing situation would be more appropriately represented by the expression "land question". As Frank Cassidy points out, there are claims on both sides and the situation is in fact "a dispute or a difference about who has the rights to the land, who has the rights to the resources, who has the right to govern."382

3. Land Claims Policies

379 Living Treaties: Lasting Agreements, supra note 8, at viii; Puxley, supra note 375, at 116; See also J.R. Ponting, Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart, 1986) at 236-240; McCallum, supra note 13, at 97.
381 Ibid, at 212.
"Policy-making is not a pragmatic exercise devoid of principles and beliefs, but a process in which values that will guide government actions are selected and rationalized."383 One of the most serious problems with the land claims policies is the fact that the federal government has unilaterally developed and revised them without substantial input by First Nations, and therefore these policies generally reflect the principles and beliefs of the non-Aboriginal society. As noted by Leghorn,

[In general, the government has not consulted with Native organizations before deciding on its policy for dealing with their land claims, and has remained intractable on most of its positions. Indeed, rather than a process of negotiation, it appears that Natives are being encumbered in a time-consuming process of learning the government’s position on a range of claims-related issues. The government’s reactions to Native displeasure concerning land claims negotiations has [sic] been limited to verbal assurances; little substantive change has occurred.384

The problem is not so much with the process of negotiation since it seems to have been the preference of most First Nations in the period leading up to the 1973 statement of policy on land claims, as assessed through informal consultations by Lloyd Barber. The difficulty arises from the fact that through its land claims policies, the government largely dictates the terms for negotiation and states its non-negotiable positions. In practice, this mean that the government decides “...not only the specific rights claims that can be negotiated, but also the various premises which must be accepted by Aboriginal claimants if the government is to agree to negotiate at all.”385 Thus, through the development of land claims policies, the federal government is able to control the negotiation process from the outset by defining the scope, premises and principal terms of negotiations.

The problems with the existing land claims policies and processes have been widely recognized for a long time now and progress on new approaches and innovative dispute-resolution strategies have been slow.386 Given the serious impact of the application of governmental policies in the negotiation forum, there

383 Weaver (1985), supra note 122, at 141.
384 Leghorn, supra note 90, at 18. NOTE: However, the system has changed in British Columbia since the establishment of the B.C. Treaty Commission.
385 McCallum, supra note 13, at 89.
clearly needs to be increased participation by Aboriginal peoples in the policy-making process so as to influence the setting of agenda and scope of the negotiations.387

4. Conflict of Interest

Since the establishment of the first federal land claims policy in 1973, it has been suggested on many occasions that the process for dealing with both the specific and comprehensive claims is not based on standards of fairness and equity. In fact, the Minister of Indian Affairs and Northern Development (DIAND) is responsible for all decisions in relation to which claims will be accepted for negotiations and all the funding decisions. At the same time, the same Minister is responsible for the government’s position in negotiations and also has a fiduciary duty to the Aboriginal groups all of which create an inherent conflict of interest in the process.

4.1 Acceptance of Claims

The responsibility to decide which comprehensive claims will be negotiated is given to officials of DIAND. They have the mandate to make such decisions relatively to comprehensive claims by determining a claim’s “acceptability according to legal criteria.”388 The criteria to be met to have a comprehensive claim accepted are the following: (1) claimants must prepare a statement of their claim, with supporting material demonstrating that they can satisfy a test for the existence of Aboriginal title to lands; (2) they must show that they are an organized society; (3) that they have occupied a certain territory since time immemorial; (4) that their occupation and use was continuous; and (5) that they have excluded

387 NOTE: Another example of the limited participation of Aboriginal peoples is expressed by Chief John Snow when he refers to the Constitutional conferences on Aboriginal issues - section 37 of the Constitution Act, 1982, states that the constitutional conferences on aboriginal issues will be ‘composed of the Prime Minister of Canada and the First Ministers of the Provinces,’ while members of the Indian nations will attend only as invited ‘representatives.’ “Our status at the conferences is that of a powerless minority group, which may deserve some kind of special recognition but which is not entitled to share any real power,” Chief J. Snow, “Identification and Definition of Treaty and Aboriginal Rights” in Boldt & Long, eds., The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) at 43.

388 Denhoff, supra note 95, at 10. NOTE: Under the specific claims policy, the acceptance of a claim is based on the controversial concept of “lawful obligation”.
other Aboriginal peoples in the pursuit of traditional customs within the territory. The procedure was described in the most recent comprehensive claims policy in the following way:

Upon receipt of a statement of claim, the Minister of Indian Affairs and Northern Development will review the submission and accompanying documentation and seek the advice of the Minister of Justice as to its acceptability according to legal criteria. The claimant group will be advised by the Minister of Indian Affairs and Northern Development, within twelve months, as to whether the claim is accepted or rejected. In the event that a claim is rejected, reasons will be provided in writing to the claimant group.

There has been abundant criticism of this validation process since it appears that “...the government has set out broad criteria and often interprets them in narrow and unpredictable ways, often withholding legal reasons from First Nations claimants on the basis of Crown privilege.” I would submit that in cases where the federal government does not provide reasons for rejecting a claim, the negotiation process disregards a generally accepted principle of natural justice, namely that an applicant is entitled to examine the reasons for an administrative decision. As noted by the Indian Commission of Ontario: “Any system of secret judgments over the validity of land claims will be open to suspicion and arbitrariness and disregard for law.”

Moreover, it has been suggested that in applying the criteria for accepting a claim, the federal government wants to have what is considered true “evidence” from a Euro-Canadian perspective. “They want studies by experts, experts they trust and define as credible. The stories of elders or neighbourhood mothers are in their world, just stories. What they want is “science”, truth claims produced by people who have credentials; law degrees, Ph.D’s and certified appraisers.” As a result, “...First Nations frequently will not accept treatment of all claims as having been just when the federal government - which is the party

389 Turpel (1995), supra note 2, at 76.
390 Claims Policy 1987, supra note 96, at 23.
391 Turpel (1995), supra note 2, at 76.
392 ICO (1990), supra note 39, at 96.
against which the claim has been lodged - rejects it by a unilateral decision made according to a
unilaterally-imposed claims policy.”

4.2 Funding Decisions

When the federal government accepts a claim for negotiation, the Aboriginal claimants are almost entirely
dependent upon grants and loans from the federal government to develop their negotiating positions and
to pursue claims negotiations. Many commentators have argued that “[f]unding for submission and
negotiation is inadequate, owing to the fact that loans and funding decisions rest with the department.”
The federal government has the power to refuse to provide adequate financial assistance by way of loan or
grant. When it does make funds available to Aboriginal claimants, the government decides on the level of
financial support which in certain cases can be insufficient which can affect the quality of the claim put
forward. It is also argued that funding is being used as a lever in negotiations since Canada can suspend
or withhold funding in its absolute discretion. No direct accountability is required which in turn
directly constraints the negotiating power of the Aboriginal claimants. Steve Kakfwi, Dene Nation
president stated that “[w]e are told this is what you can talk about and this is what you can’t talk about. If
you don’t talk the way we want you to talk, then there is no financial assistance. We get a loan to do
research, to develop our positions; but if we don’t do the kind of work they want us to do, then they
withdraw the loan. This has happened over and over again...”

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394 Jamieson, supra note 161, at 11; An Agenda for Action, supra note 3, at 55.
395 Turpel (1995), supra note 2, at 78.
396 Leghorn, supra note 90, at 11.
397 Living Treaties, Lasting Agreements, supra note 8, at 89. NOTE: In 1978 the federal government
suspended funding for the Dene for a period of two years, during which time the Dene and Metis had to
agree upon a joint negotiating mechanism. In 1983, funding was again suspended due to an alleged lack
of cooperation between the parties. Further, it is reported that in 1973, Jean Chrétien, then Minister of
Indian Affairs, threatened to cut off federal funding to the Cree and Inuit when they initially refused to
accept Quebec’s offer to settle. McCallum, supra note 13, at 138; In all Fairness, supra note 89, at 30; K.
Crowe, “A Summary of Northern Native Claims in Canada: The Process and Progress of Negotiations”
(1979) 3 Inuit Studies 31 at 36; K.S. Coates and W.R. Morrison eds., For The Purposes of Dominion:
Essays in Honour of Morris Zaslow (North York, Ontario: Captus University Press, 1989) at 267;
Leghorn, supra note 90, at 11-12; MacGregor, supra note 227, at 115.
398 CARC, 1983, quoted in Leghorn, supra note 90, at 12.
Moreover, funds used by Aboriginal groups to regain land title and rights must be repaid from compensation moneys granted to them which, as a result, places unfair pressure on Aboriginal people to settle. The federal government is therefore placed in a serious position of conflict of interest by its ability as a negotiating party to control the financial resources of the other party. With this financial control, one could argue that the federal government not only has the power to manipulate the process but also to control the behavior of the other party.

Thus, the conflict of interest in which the government finds itself is obvious since it "...remains the ultimate adjudicator of claims made against it." David Knoll summarizes this conflict of interest in these words:

The Federal Government remains the ultimate determiner of what claims will be funded, validated and accepted for negotiation. No appeal is available except to commence an action through the Courts. There is not even the least effort to preserve the image of neutrality. This situation, more than any other, is what condemns this policy and process to be viewed as biased, arbitrary and unfair.

4.3 Lack of Appeal Mechanisms

If a comprehensive claim is rejected, there is no appeal process, and there is no right to a hearing, to make submissions, or to have an independent party reviewing the decision. The only alternative to the comprehensive claims policy is to go to court. As mentioned in Chapter One, the federal government has established the Indian Claims Commission to review claims that have been rejected but the mandate of the Commission is limited to specific claims only.

399 Leghorn, supra note 90, at 19; Dacks, supra note 90, at 256.
401 Ibid.
402 Ibid, at 78.
403 NOTE: As stated by the CBA, “[i]n reality the aboriginal claimant is denied this option because access is largely dependent on the availability of funds, which most aboriginal communities do not have. Secondly, presuming funds can be found for this costly procedure, the process is lengthy and complex, involving lawyers almost to the exclusion of the aboriginal claimants. Third, the legal system is renowned for its formality. As well, the judiciary is trained in the English common-law system and has little or no training in Aboriginal laws and concepts. See An Agenda for Action, supra note 3, at 56.
5. **Interim Measures Agreements**

The negotiation process is slow and it takes generally many years before a final agreement is reached between First Nations and governments. In 1985, the Coolican report pointed out that "...unless negotiations deal more expeditiously with aboriginal claims and the interests of aboriginal groups are protected pending the outcome of negotiations, groups may turn to litigation as the only effective means of securing their rights."\(^{404}\) Despite this recommendation, the most recent federal comprehensive claims policy states only that "[a]ppropriate interim measures may be established to protect aboriginal interests while the claim is being negotiated. These measures will be identified in initial negotiating mandates in specific cases."\(^{405}\) Turpel reports that the actual process is not working in that it does not provide for any real form of protection for the interests of claimants. According to William Dunlop of the Department of Indians Affairs and Northern Development, the federal government is willing to negotiate interim measures agreements but difficulties arise due to the fact that First Nations' demands are often too extreme.\(^{406}\) Moreover, in the third annual report of the B.C. Treaty Commission, the B.C. government was severely criticized for refusing to negotiate interim measures agreements at an early stage of the negotiation. In fact, the B.C. government said that it would negotiate such agreements only when the claims are at an advanced stage for negotiation. According to Alec Robertson, Chief Commissioner of the B.C. Treaty Commission, interim measures agreements are necessary to keep Aboriginal groups at the negotiation table and prevent them from resorting to the courts.\(^{407}\) Thus, when governments refuse to negotiate interim measures agreements, the only forum available to claimants to secure their rights before and during the negotiation process is to seek redress before the courts through injunctive relief or other means in order to prevent the destruction of the lands and resources they claim.\(^{408}\)

6. **Timelines**

\(^{404}\) *Living Treaties: Lasting Agreements*, supra note 8, at 76.

\(^{405}\) *Claims Policy - 1987*, supra note 96.

\(^{406}\) Interview with William Dunlop, Director Resource Policy and Transfers Directorate, Indian Affairs and Northern Development, Ottawa, June 20th, 1996.


\(^{408}\) *Turpel (1995)*, supra note 2, at 78.
Deadlines are one of the most important factors in negotiation. A deadline has been defined as

...a point in time after which the potential costs and benefits to the parties will change markedly. It provides the opportunity and the pressure for the parties either to conclude an agreement or risk foregoing benefits and increasing costs. Without a deadline that is regarded as valid by all parties (that is, one that cannot be changed without imposing significant costs on the parties), negotiations can be prolonged indefinitely and ultimately may yield no conclusion.409

However, there are no fixed timelines for negotiations in the existing claims policies and it is arguable whether governments always have strong incentives for settlement. Consequently, there is a danger that negotiations, as it has been the case in the past, will linger on with no foreseeable prospects of settlement.410 These interminable delays have serious consequences for First Nations as the funds loaned to them to finance their participation in land claims negotiations must be repaid.

7. Impasse

When negotiation fails, there is no alternative but to bring the claim before the courts since the government has generally refuses to participate in mediation and arbitration. The problem with respect to impasses occurring during the negotiation process has been expressed by the Indian Commission of Ontario in the following way:

In the majority of cases where an agreed settlement is not easy to reach, if the government simply refuses to address an issue or even to negotiate at all, the claimant has no recourse apart from the courts. The claimant simply has no way to resolve an impasse where the parties disagree on an issue. However, resort to the courts is not a realistic option for most claimants for financial and other reasons.411

In fact, under the existing land claims policies, the claimants cannot refer an unresolved issue to the court and go back to the negotiation table to continue the rest of the discussion on other issues. The federal government’s position is that when litigation begins, negotiation ends. Consequently, there is no funding available to facilitate court references as part of claim negotiations.412

409 J.A. Folk-Williams, “The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights” (1988) 28 Natural Resources Journal, 63 at 94.
410 Turpel (1995), supra note 2, at 78.
411 ICO (1990), supra note 39, at 99.
412 Ibid, at 53.
One example of this is with the Gitxsan negotiations. On February 1, 1996, the province of B.C. announced the suspension of the treaty negotiations with the Gitxsan Treaty Office at the expiry of the Accord of Recognition and Respect which was signed in June 1994. Under the terms of the Accord, the parties sought and were granted an adjournment of the Delgamuukw appeal on issues of Aboriginal rights to the Supreme Court of Canada. Citing fundamental differences between the province and Gitxsan, Minister Cashore said that there was little chance of progress in negotiating Aboriginal rights and jurisdictions with the Gitxsan without further direction from the Supreme Court of Canada. Thus, the entire negotiation broke down and all the issues will be resolved by the Supreme Court of Canada.

B. Problems in Substantive Negotiations

Other than these procedural difficulties, attempts to negotiate disputes over Aboriginal land claims also raise a number of substantive problems that have made the use of negotiation to resolve the land question very difficult.

1. Compromise

Whether the competitive, cooperative, or the integrative strategy is employed in negotiations, there is always a need for some measure of compromise. In the context of land claims negotiations, this element has proven to be problematic. On one hand, compromise on fundamental issues such as resources which are vested with great symbolic, cultural, and economic importance is extremely difficult for First Nations. In fact, it is often impossible for community leaders to appear to be bargaining about what are seen as spirituality, fundamental values, rights, lifestyle, and cultures. On the other hand, it is unlikely that the federal government will adopt a much broader interpretation of Aboriginal rights than what it is prepared to acknowledge through its land claims policies. In fact, the governments' negotiators are bound by departmental policies and they have to handle negotiations in a way to comply with and reinforce existing

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Therefore, given the disparity of power between the parties, one could presume that the weaker party - First Nations - will face the heaviest burden in any compromise.

2. Premises of Negotiations

Negotiations have better chance of success when the parties share common or compatible objectives and similar expectations of the process. However, the objectives of First Nations and governments in entering land claims negotiations are generally in direct opposition. On one hand, the primary goal of the federal government in comprehensive claims negotiation rests on extinguishing Aboriginal title to land in exchange for some specific benefits which could contribute in lessening Aboriginal dependency. On the other hand, First Nations aspire to "striking a "social contract" with governments, obtaining official recognition of the full range of inherent rights, and finding equitable arrangements for sharing resources with governments."

2.1 Certainty

Canadian land claims policies have always contemplated certainty by insisting upon the extinguishment of all Aboriginal rights as a condition to enter into negotiations. However, First Nations view extinguishment as culturally unacceptable and as a renunciation of their unique relationship with their traditional territories. Lloyd Barber explains that the terms "extinguishment" and "compensation" for Aboriginal people "... mean that the Government’s policy is to buy them out and terminate traditional rights which they believe are still very relevant." However, "Indians do not see their rights as being for

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414 McCallum, supra note 13, at 118.
415 Coolican, supra note 176, at 7; McCallum, supra note 13, at 112.
416 Leghorn, supra note 90, at 10.
417 McCallum, supra note 13, at 113; See also G. Erasmus, "Introduction: Twenty Years of Disappointed Hopes" in B. Richardson ed., Drumbeat: Anger and Renewal in Indian Country (Toronto: Summerhill, 1989) 1 at 13. See also Dacks, supra note 90, at 252; Berger, supra note 112, at 213.
418 NOTE: In the 1987 revised comprehensive claims policy, the federal government states that settlements must be final and that the purpose of this is to provide certainty and clarity of rights to ownership and use of land and resources. See Claims Policy (1987), supra note 96, at 9; See also Berger, supra note 112, at 228.
419 Turpel (1995), supra note 2, at 73.
420 Commissioner, supra note 67, at 46.
sale. They expect recognition of their rights to lead to the continuing exercise of those rights with implications for self-sufficiency and self-determination. \(^{421}\) Aboriginal groups have therefore condemned this policy arguing that it meant assimilation and cultural destruction\(^{422}\) and that it violated constitutional recognition of existing Aboriginal and treaty rights, including an intrinsic right to self-government as promulgated in the Roya}
Aboriginal or treaty rights and that other approaches would be explored which would not require Aboriginal peoples to sever their historic relationship to lands. The policy document stated that “[i]n order to be consistent with the Canadian Constitution which now “recognizes and affirms” Aboriginal and treaty rights, a Liberal government will not require blanket extinguishment for claims based on Aboriginal title.” However, to date, no formal change have been made to the comprehensive claims policy with respect to the extinguishment condition. Governments have nonetheless accepted to sign an agreement-in-principle with the Nisga’a people in British Columbia which is not premised on the extinguishment of the First Nation’s rights. This could be an important precedent which could lead to a formal change in the comprehensive claims policy.

2.2 Flexibility

According to Lloyd Barber, “there can be no finality in Indian-Government relations.” When negotiating treaties, the parties must consider the possibility for renegotiation in the event of new, previously unforeseen circumstances occurring. Dynamic, ongoing relationships involve change and thus require flexibility in the process. Murray Coolican also encourages a flexible approach, “[t]o believe that yesterday, today, or tomorrow we can fix with finality our association with aboriginal societies is to deny the potential for growth and for change which is so important to any society.”

Thus, the parties usually come to the negotiation table with different expectations and opposing goals. The reconciliation of these divergent goals is extremely difficult given the enormous inequality of power between Aboriginal groups and governments. Unfortunately, it has been suggested than “Aboriginal claimants are often powerless to enforce their perceptions, or change the rules of the game defined by governments, and have few options but to reluctantly accept the game (...)”

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427 Creating Opportunity, supra note 6, at 11.
428 Commissioner, supra note 67, at 50.
429 Dacks, supra note 90, at 254; McCallum, supra note 13, at 116.
430 Coolican, supra note 176, at 8.
have resisted the government demand for extinguishment, negotiations have dragged on interminably, often dissolving in acrimony and frustration.\footnote{McCallum, supra note 13, at 113 and 114.}

3. **Lack of Authority**

Many commentators have suggested that one of the most serious difficulties in land claims negotiations is the lack of authority of the governments’ negotiators. It appears that often negotiators do not have a real mandate to make substantive commitments on the part of their government. The B.C. Treaty Commission has observed that “Canada’s and B.C.’s negotiators have demonstrated limited authority and worked with mandates that are rigid and often unchangeable.”\footnote{Third Annual Report, supra note 359, at 22.} The Indian Commission of Ontario reports that “[t]he history of negotiation is full of examples of commitments and undertakings dishonoured by anonymous bureaucrats back in Ottawa, and “done deals” set aside by higher authority.”\footnote{ICO (1990), supra note 39, at 46.}

Mandates are generally difficult to obtain from large organizations such as governments. The negotiators’ lack of authority affects the credibility and perceived commitment of the governments involved in the resolution of land claims and contributes to increasing the distrust of the First Nations. Moreover, the limited mandate of government’s negotiators affect their ability to use the interest-based strategy of negotiation. They rather come to the table with a firm position and do not have the flexibility to explore creative options.\footnote{Statement made by Barbara Fisher, Commissioner, B.C. Treaty Commission at the Conference Making Peace and Sharing Power - A National Gathering on Aboriginal Peoples & Dispute Resolution, Victoria: April 30-May 3, 1996.}

4. **Lack of Trust**

One of the principal characteristics of the relationship between Aboriginal groups and governments is the lack of trust between the parties. It has been suggested that the relationship is such that “[e]ven positive moves are suspected of concealing ‘hidden agendas’.”\footnote{Fleras and Elliot, supra note 63, at 125.} This negative relationship has a serious impact...
on the dynamic of the negotiations and can be evidenced by the fear on the part of all parties to adopt an open and cooperative attitude throughout the negotiations.

5. Incentive to Negotiate

As noted by the Indian Commission of Ontario, “[i]t would be naive (...) not to consider the possibility that some parties (particularly the federal and provincial governments), may believe that it is in their interest to simply “manage the issues” rather than resolve them.”\textsuperscript{436} In fact, by delaying the settlement of valid claims, governments are able to defer payments and to save interest costs. However, there is also a considerable cost of not settling the outstanding land claims in various provinces.\textsuperscript{437} First, there is the ongoing cost of the negotiation process which involves many public officials, consultants, negotiators, experts, lawyers. Second, there is the uncertainty created around the lands subject to claims which might impede economic development in these regions. Third, there is the price of violent confrontation which is always very significant.

The incentive to settle is stronger on the part of a First Nation since the status quo will generally leave the government in possession of the disputed land and resources, with no other option than the court system for the First Nation to resolve its claim. As noted by the Indian Commission of Ontario:

There is less incentive for a First Nations to attempt to set preconditions for land claims negotiations or to refuse to discuss positions at the table, since an impasse at the negotiation table will leave the First Nation without the land or compensation they ultimately seek. Failure to change the status quo seems to be more easily accepted by Canada and Ontario, which can simply close a file to “resolve” an issue.\textsuperscript{438}

It has been suggested that “[t]he government’s receptivity to aboriginal demands is not necessarily based on compassion or outrage but on politics and power.”\textsuperscript{439} In the past, economic development has been the

\textsuperscript{436} ICO (1994), \textit{supra} note 152, at 53.

\textsuperscript{437} NOTE: A Price Waterhouse Report for the province of B.C. stated that “Cost of uncertainty over land claims is more than $1 billion in foregone investment” (Price Waterhouse Report: Economic Value of Uncertainty Associated with Native Claims in B.C. 1990)

\textsuperscript{438} ICO (1994), \textit{supra} note 152, at 46.

\textsuperscript{439} Fleras and Elliot, \textit{supra} note 63, at 125.
main incentive for inducing governments to negotiate Aboriginal claims. In fact, most modern settlements have been achieved only when governments were eager to facilitate an economic development project, otherwise, "...the government's patience for negotiation appears unlimited." A clear example of the motivation of the government to settle is the James Bay hydro-electricity project. According to John Ciacca,

[without the James Bay project there would be no agreement. Unfortunately, governments rarely act with that degree of foresight, generosity and magnanimity which many of us would expect. Governments usually respond to situations and, in this case, the response of government was made necessary by the hydro-electric project. (...) In that manner, development can be an opportunity to effect important reforms while providing adequate protection to the native communities.]

Another example of the true motivation of the government to settle land claims is the agreement-in-principle with the Inuvialuit in Canada's Western Arctic in 1978. In that case, the motivation of the federal government was to enter into an agreement to clear title and to allow for large-scale petroleum and natural gas developments. However, when the project became unfeasible, the government's enthusiasm to settle declined, though a settlement was finally reached. A similar attitude was noted in the case of the Dene comprehensive claim in the MacKenzie River region of the Northwest Territories. In that case, the fluctuations in the negotiations correspond with the level of government enthusiasm for resource development. Thus, as Leghorn stated in concluding her analysis of the Canadian Aboriginal claims process, "[t]he evidence indicates that industrial development, not fairness, is the actual motivation".


441 Living Treaties: Lasting Agreements, supra note 8, at 78.

442 Ciacca, supra note 126, at 562.

443 An Agenda for Action, supra note 3, at 24; McCallum, supra note 13, at 136.

444 McCallum, supra note 13, at 136; See also S. Smith, supra note 440; Commissioner, supra note 67, at 21.

445 Leghorn, supra note 90, at 20. See also Coolican, supra note 176, at 6.
C. Cultural Differences

The resolution of Aboriginal claims cannot be meaningfully discussed without reference to Aboriginal cultures and their fundamental differences from Euro-Canadian culture. The differences in the cultural frameworks of Aboriginal and non-Aboriginal society manifest themselves in the negotiation forum. The dominant Euro-Canadian culture uses its power to define the cultural framework of negotiations as Aboriginal people lack the political power and perceived legitimacy to impose their own values.446

In the following discussion, I will briefly comment on the different worldviews of Aboriginal and non-Aboriginal societies and I will examine two of the major cultural differences between the two groups to illustrate the constant challenge faced by Aboriginal peoples when participating in a system that does not reflect the basic value structure of their culture.

As mentioned in the Introduction, it is critical to recognize the diversity within Aboriginal cultures in Canada. It is therefore essential to be careful not to over-generalize or over-simplify. However, despite the diversity among First Nations in Canada, it is still possible to broadly examine the underlying unity of Aboriginal cultures versus non-Aboriginal culture as the differences are quite pronounced.

1. Different Worldviews

According to Kulchyski, “Aboriginal cultures are the waters through which Aboriginal rights swim.”447 Williamson defines culture as being “...the most profound force that conditions human behaviour. Vital components of culture include mythic tradition and symbolism, supernatural beliefs and values.”448 Moreover, it should always be kept in mind that culture is an evolving dynamic, not a static concept.

446 McCallum, supra note 13, at 119.
447 Kulchyski, supra note 20, at 13.
One of the most interesting discussions about the cultural differences between Aboriginal and non-Aboriginal societies is found in Rupert Ross' *Dancing with a Ghost.* The central theme of Ross' work is that Aboriginal and non-Aboriginal culture are "...separated by an immense gulf, one which the Euro-Canadian culture has never recognized, much less tried to explore and accommodate." According to Ross, the dominant culture's traditional lack of recognition of cultural differences has its roots in colonialist ideology. Thomas Berger was also of this opinion when he wrote that "[a] lack of understanding and of sensitivity to native peoples and native values is endemic to European-derived political systems." He then adds that:

> Euro-Canadian society has refused to take native culture seriously. European institutions, values and use of land were seen as the basis for culture. Native Institutions, values and language were rejected, ignored or misunderstood and - given the native people's use of land - the Europeans had no difficulty in supposing that native people possessed no real culture at all.

A good example of the cultural misunderstandings between Euro-Canadian and Aboriginal societies can be found in the Gitksan and Wet'suwet'en case, where Chief Justice McEachern offers the following explanation for the problems Aboriginal peoples face with the present society: "In my view the Indian's lack of cultural preparation for the new regime was indeed the probable cause of the debilitating dependence from which few Indians in North America have not yet escaped." This comment clearly reflects an underlying assumption of inferiority by implying that the problem lies within the limitations of Aboriginal culture to adapt to the dominant legal culture.

I submit that the resolution of cross-cultural conflicts will depend upon the recognition and understanding of the cultural differences between the parties. As Rupert Ross pointed out:

> We interpret what we see and hear through our own cultural eyes and ears. When we deal with people from another culture, our interpretations of their acts and words will very frequently be wrong. It follows that when we respond to their acts and words, relying upon our interpretations of them, we will respond by doing and saying things which we would never consider appropriate.

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450 *Ibid*, at xxii.
451 *Ibid*.
had we known the truth. (...) We have not understood the degree to which the rules of their culture... differ from ours. We must learn to expect such difference, to be ever wary of using our own cultural assumptions in interpreting their acts and words, and to do our best to discover their realities and their truths.455

One of the most important cultural differences which contribute to creating misunderstanding during negotiations is the native language of the various groups involved in land disputes.

1.1 Language

Language is the common thread within a culture - its way of expressing feelings, concepts, understanding and aspirations. Language is a reflection of a way of thinking - it expresses the thoughts emanating from the mind.456 As noted by Edward Hall, “people from different cultures not only speak different languages, but inhabit different worlds... so that experience as is perceived through one set of culturally patterned sensory screens is quite different from experience perceived through another.”457

In Canada, the different Aboriginal groups developed distinct languages over thousands of years, each of which reflected a unique lifestyle. After the arrival of Europeans, many First Nations learned one or both of Canada’s official languages (through residential schools for instance) and English and French are now the official languages for the negotiation of land claims with governments. However, it is important to note that First Nations people do not use English words in the same way as people who do not share their culture with them. For instance, Aboriginal and non-Aboriginal peoples all use the words “respect” or “responsibility” but they mean different things.458 Chief John Snow explains the difficulty of expressing Aboriginal concepts in a different language:

Today we are being asked to spell out our Indian rights in a foreign language - the English language - in constitutional form. We are accustomed to talking about our rights in our own languages with our elders. Because of problems of interpretation we have always been in a weak position in our dealings with government. We have experienced an additional disadvantage because we have had to pursue our rights through the English legal and legislative systems.

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458 Monture-Okanee (1991), supra note 208, at 356.
Explaining our rights in a foreign language is almost impossible, because sometimes we cannot find English words equivalent to our Indian words.\(^{459}\)

Further, another important difference in the way First Nations communicate is the body language. J.T.L. James stated that the usual non-Aboriginal’s tone of voice, or volume, may prove unduly intimidating, being so different to that used by Aboriginal people who lower their voice in serious matters. He explains that:

Non-verbal communication is important in any culture but perhaps more so amongst people who, in their close relationship with nature, read signs invisible to us. Our body language displays our impatience, frustration and rejection of their shrugs, downcast eyes and shuffling. The non-verbal impasse can be as damaging as the verbal one in achieving the ends of justice.\(^{460}\)

Communicating with another culture requires an understanding of its values, perceptions, and philosophies. However, governments have not always tried to understand the unspoken assumptions underlying Aboriginal words. Thus, it could be argued that Aboriginal people are put at a disadvantage in the negotiation process because of the differences in the language and the meaning of crucial concepts which are negotiated.

1.2 Decision-Making

As Leghorn suggests, “...both Natives and government participants should be familiar with each other’s culture, values, and decision-making processes, so that this type of ignorance doesn’t bias the entire proceedings.”\(^{461}\)

Marg Huber reports that Canadian native community leaders have listed the following as Aboriginal values concerning conflict: “cooperation, equality among people, harmony, non-interference in individual matters, consensus decision making, privacy, a holistic approach to life, respect for elders, the relativity of time, and spirituality.”\(^{462}\) The literature reports that Aboriginal cultures value open and continuous

\(^{459}\) Snow, supra note 387, at 41.


\(^{461}\) Leghorn, supra note 90, at 7.

\(^{462}\) Quoted in LeBaron Duryea, supra note 14, at 35-36.
dialogue and consensus.\textsuperscript{463} The decision-making process is horizontal and issues are discussed and dealt within their own context.\textsuperscript{464} All members participate in decision-making as a collectivity.\textsuperscript{465} The power of decision is traditionally vested in the total membership of the group or band, and unanimous consent is required before action is taken. Chiefs are spokespersons for the group and elders are generally always consulted before final decisions affecting the community are made.\textsuperscript{466} The problems and disputes are discussed openly and are not limited to formal forums governed by set timeframes. Process with integrity is more important than quick and binding solutions, since joint decision-making is thought to facilitate people abiding by the decisions which are arrived at.\textsuperscript{467} All these factors serve to empower individual community members and unify the collective community. As reported by the Osnaburgh/Windigo Tribal Council Justice Review Committee: "Disputes would be solved by a person known to both disputants, in contrast to the impersonalized machinery adopted by the Euro-Canadian justice system. When a dispute arose, it tended to involve other members within the same community and a well-understood system existed to resolve itself."

In the negotiation context, it may become increasingly clear that the two sides are operating under two distinct value systems, which in turn can lead to very different tactics and strategies.\textsuperscript{469} It is submitted that the usual negotiation style of the government - the competitive model - reflects the non-Aboriginal cultural values. As stated earlier, the competitive approach is generally characterized by confrontation, adversarial tactics, and claiming strategies.\textsuperscript{470} This discourse then usually dominates the atmosphere of negotiations, since Aboriginal claimants have no leverage to force governments to use the integrative

\textsuperscript{463} See, for example, Ross (1992), \textit{supra} note 449, at 21-23; McCallum, \textit{supra} note 13, at 125.
\textsuperscript{465} Boldt and Long, \textit{supra} note 109, at 169.
\textsuperscript{466} R. Fumoleau, \textit{As Long as this Land Shall Last: A History of Treaty 8 & Treaty 11 1870-1973} (Toronto: McClelland & Stewart, 1974) at 151; Boldt and Long, \textit{supra} note 109, at 169; Richardson (1975), \textit{supra} note 227, at 304-305.
\textsuperscript{467} Ross (1992), \textit{supra} note 449, at 23.
\textsuperscript{468} Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee (1990) at 4-6.
\textsuperscript{469} Brienza, \textit{supra} note 172, at 182-183.
\textsuperscript{470} See, for example, I. La Rusic, \textit{Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement} (Montreal: ssDss, 1979) at 2 and 32; See generally, Feit, \textit{supra} note 161.
approach of negotiation. In traditional Aboriginal society, confrontation is usually avoided at all costs.  

However, if First Nation withdraw from confrontation at the negotiation table, they risk being exploited or ignored.

In the negotiation process controlled by Euro-Canadian governments, Aboriginal claimants must adapt to the dominant cultural framework by translating their values and priorities into the language of the dominant discourse with the associated risk of misrepresenting the true aspirations of the Aboriginal community.  

As Leghorn observed: "... Natives need complete understanding of the liberal capitalist economic system and representative democratic political structure within which they are pursuing their claims."  

In order to protect their rights and adjust to the government's negotiation strategy, First Nations must be as technical, adversarial and legalistic as governments. As a result, First Nations become more dependent upon legal consultants and technical experts which may, in the long-term, affect the way of life of some Aboriginal communities. As reported by Ignatius E. La Rusic in relation to the negotiation of the James Bay Agreement, "...the legalistic tone established during the negotiations continues to influence a major part of the Cree administrative operations, which have since developed."

Part III Strategies to Improve the Negotiation Process

A. Lessons Learned from the Yukon Agreement

Before examining various strategies to improve the existing negotiation process, it is useful to look at one successful experience that occurred in the Yukon. I will briefly summarize the history of the dispute and then examine the process which was followed during the negotiations.

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471 Ross, supra note 449, at 8.
472 McCallum, supra note 13, at 130.
473 Leghorn, supra note 90, at 13. NOTE: See for example the James Bay and Northern Quebec Agreement negotiations in which the Cree and Inuit adopted very confrontational strategies and tactics. For a more detailed discussion of these negotiations, see LaRusic, supra note 470, at 21.
474 NOTE: For example, in an article about the James Bay and Northern Quebec Agreement, the then Chief of the Crees, Billy Diamond said that "[a]t our insistence technical and legalistic language was used to ensure precision in defining our rights... We were determined that our rights would be written down with as much precision as possible. Diamond, supra note 282, at 281.
475 For a very thorough discussion of these issues, see La Rusic, supra note 470 at 45.
1. **Background**

In early 1973, the Council for Yukon Indians submitted its claim, entitled *Together Today for our Children Tomorrow*, and negotiations commenced by late 1973. In 1984, an agreement-in-principle was reached and was ratified by both the federal and territorial governments, but failed to get the necessary ratification of the 14 Yukon First Nations as they were concerned with provisions that required Aboriginal title to land and resources to be extinguished. In 1987, negotiations continued under the new comprehensive claims policy and with a specific Cabinet mandate. Between October 1987 and November 1988 the parties negotiated an agreement-in-principle which was finally ratified in 1989. The agreement includes provisions to the effect that Aboriginal title will not be extinguished on most settlements lands, for a framework to negotiate self-government agreements, and for rights to subsistence wildlife harvesting. Due to the complexity of the issues to be resolved, the parties agreed to proceed with a series of agreements which include:

- an umbrella final agreement, which will be general in nature and will apply throughout the settlement area;
- individual Yukon First Nation final agreements, which will incorporate all of the provisions of the umbrella final agreement and will address the specific circumstances of each Yukon First Nations.
- transboundary agreements, which will resolve overlapping claims of Aboriginal groups in the Yukon, the Northwest Territories and British Columbia;
- self-government agreements, to be negotiated concurrently with claims agreements in accordance with specific guidelines for self-government negotiations;
- implementation plans for the umbrella final agreement, Yukon First Nation final agreements, self-government agreements and transboundary agreements;
- financial transfer agreements; and
- settlement and self-government legislation.

In May 1992, the Yukon Indian Umbrella Final Agreement was initialed by negotiators for the federal and territorial governments and was later ratified by all the parties. To date, four Yukon First Nation final agreements have been ratified which include Champagne and Aishihik, Nacho Nyak Dun, Teslin Tlingit Council, and Vuntut Gwitchin. Each of these four First Nations has ratified self-government agreements

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476 Knight, *supra* note 378, at 66.
477 Elliot, *supra* note 19, at 180.
and the respective implementation plans for each of the claim and self-government agreements.\textsuperscript{478}

Negotiations are currently continuing with additional Yukon First Nations.

2. Principles of the Process

Chris Knight, chief negotiator for the Land Claims Secretariat, Yukon Territorial Government reports that the negotiation process was based on four basic principles: (1) the negotiations would be “principled”; (2) the process would be “community-based”; (3) the process would be “open”; and (4) timelines were necessary to impose discipline.\textsuperscript{479} As described at the beginning of this chapter, principled negotiations “focus on interests, not positions, and place a high value in the integrity of the relationship among the parties both during and after the negotiations.”\textsuperscript{480} Knight explains that this approach “requires more work, more preparation, more focus on process design, but the main thing it requires training.”\textsuperscript{481} The process in the Yukon was “community-based” with negotiation table rotating to the various Yukon communities. Knight describes the benefits of a community-based process. He explains that this approach makes the process more real to the people it most directly affects, the Aboriginal people and their neighbors at the community level. Aboriginal people have the opportunity to better understand the issues and accept the need to compromise during the negotiating process. It also provides direct community access to the negotiators of both parties. Government negotiators have an opportunity to understand in context the practical application of the issues and concepts being negotiated. Finally, community-based negotiation allows negotiators to “ratify as they negotiate” by ensuring that the decisions reached at the negotiating table have support at the community level.\textsuperscript{482} This concept of “ratify as you negotiate” directly depends on the degree to which the process is open to all interested parties. In the Yukon, Knight reports that from the beginning of the process, negotiators from all parties discussed

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\textsuperscript{478} Ibid.
\textsuperscript{479} Knight, supra note 378, at 66.
\textsuperscript{480} Ibid at 67.
\textsuperscript{481} Ibid.
\textsuperscript{482} Ibid, at 67-68
with fifty to sixty different interest groups on the process of negotiation and on any specific issues of interest to them.\textsuperscript{483}

Finally, a deadline of nine months was imposed on the Agreement-in-Principle negotiations. It is argued that this deadline kept the parties focused on the process and provided some leverage for resources to support the negotiations.\textsuperscript{484}

3. Lessons Learned

This successful experience can teach us many lessons about the negotiation process. First, Knight learned that “a broad base of support for the agreement is a very tenuous thing; and once you open lines of communication with a large number of interest groups, you had better keep them open or they will be snapping at your heels.”\textsuperscript{485} Secondly, Knight contends that political leaders of all parties must also be involved at strategic points throughout the process to make it successful. Thirdly, it seems that there is a need to implement parts of the agreement as they are negotiated in order to “test drive” some of the structures and processes and see how they work. Finally, an important lesson to be learned is that “the people at the table must strive to reach a high level of cross-cultural awareness and understanding, and without it, all the training in interest-based negotiations in the world won’t yield successful results.”\textsuperscript{486}

Even though northern Aboriginal claims settlements are, in many ways, different from the southern modern treaties, the principles on which the Yukon negotiations were based are relevant and should be followed in other negotiations involving First Nations and Canadian governments.

B. Strategies to Improve the Existing Process

\textsuperscript{483} \textit{Ibid}, at 68.
\textsuperscript{484} \textit{Ibid}, at 68-69.
\textsuperscript{485} \textit{Ibid}, at 69.
\textsuperscript{486} \textit{Ibid}.
This Chapter has examined some of the problems with the federal government land claims policies and processes, and discussed the difficulties arising from the cultural differences and the disparity in the relative power of the parties. I will now explore some strategies to improve the process in order to achieve fair and expeditious settlements of land claims.

1. **Pre-Negotiation Strategies**

1.1 **Redressing the Power Imbalance**

In the past, Aboriginal groups have used different strategies to redress bargaining power inequalities. For instance, Aboriginal groups have resorted to tactics of confrontation. They have organized demonstrations and engaged in other “nuisance” activities in order to maximize the interests of governments in settling claims.487 These actions have generally been successful in moving Aboriginal issues to the centre of the national agenda.488 John Borrows is of the opinion that “...political action will be the most successful strategy First Nations can employ to contest the oppression of their governments and reinvigorate the obligations of the power they possess.”489

The courtroom has also been used to correct a disparity in the balance of power. Some Aboriginal leaders feel that they should litigate first to have their rights affirmed and quantified, in order that they might sit with greater political power at the negotiation table.490 The setting of precedents can induce governments to engage in negotiations and give leverage to Aboriginal claimants on some substantive issues.

First Nations should also explore other sources of power. For instance, they should consider the power of coalition by trying to build alliances with other interested parties to the negotiations - such as building understanding and friendship with municipalities, corporations and industries. The power of principles should also be used in promoting fairness in an attempt to influence the public opinion. There is always

487 Colvin, supra note 54, at 17.
488 Fleras & Elliot, supra note 63, at 86.
489 Borrows, supra note 190, at 7.
490 Brienza, supra note 172, at 172.
the power of information which can be utilize by First Nations with their knowledge of their history and a good preparation to the negotiation.491

1.2 Land Claims Policies

The policy-making process must change for allowing meaningful participation of Aboriginal people in the formulation of land claims policies. As mentioned earlier, the power of the federal government to unilaterally develop land claims policies is unfair, since it can and does formulate policies which operate in its favor. Thus, the goals and purposes of negotiations, as well as the agenda for negotiations, should be decided by both parties. Further, in formulating land claims policies, the government must be willing to consider alternatives to extinguishment. As discussed earlier in this chapter, the requirement of extinguishment has been and remains a major impediment to resolving comprehensive claims. The Report of the Task Force to Review Comprehensive Claims Policy suggests that

[(t)o be workable, an alternative to extinguishment must have at least four characteristics. First, it must be acceptable to the aboriginal people concerned, for their rights cannot be altered without their consent. Secondly, to encourage investment in, and development of, property rights, it must enable the granting of secure rights to lands and resources. Thirdly, it must be simple, because complex approaches promote legal uncertainty. Fourthly, it must be familiar, so that rights can be defined to fit comfortably into the dominant property law system.492

Finality may not be realistic but certainty could be achieved through the establishment of a better relationship between the parties and a long-term “social contract.”493 This was also the view of Lloyd Barber in 1977 when he stated “I would urge the Government and native people to strive for an agreement which is flexible enough to permit the necessary positive evolution. I don’t think anyone can draw out a detailed master plan for the future, and the settlement terms should provide the greatest possible latitude for change. Rigidities may only lead to a new set of problems.”494

491 NOTE: These advice were given by Professor Susskind, Director, MIT - Harvard Public Disputes Program at Harvard Law School at the Conference Land Claims in Canada: Beyond the Rhetoric - A Debate About the Critical Issues, June 27th, 1996.

492 Living Treaties: Lasting Agreements, supra note 8, at 41.

493 NOTE: Murray Coolican stated that “[t]he approach we recommended must also allow for flexibility. Settlements must recognize the regional differences in the country as well as the different aspirations and histories of the aboriginal and non-aboriginal communities within a settlement area.” Supra note 22, at 8.

494 Commissioner, supra note 67, at 45 and 50.
1.3 Conflict of Interest

The federal government should not be able to unilaterally decide which claims to negotiate, as this gives it an unfair advantage over the claimants. The conflict of interest must be resolved. In any dispute, it is illogical to have the opposing party decide whether or not the claim against it is valid. Decisions as to which claims to negotiate should be made by an independent body which oversees the land claims process. The same approach should be adopted for funding. Funding for Aboriginal claimants to research and pursue negotiations should cease to be administered by the federal government. The funding process must allow First Nations to have adequate and secure funding as well as the integrity of making their own decisions about their research priorities.

1.4 Building Trust

Considering that the First Nations and governments are unlikely to trust each other at the beginning of any negotiation, the development of safeguards is needed to compensate and to help building a more trusting relationship between the parties. Different means can be used to accomplish this, such as replacing trust by a firm commitment to the process, creating several procedural rules, defining in a joint protocol important terms (such as consultation), implementing parts of the agreement as they are negotiated in order to test the good will of the other parties to comply with the agreement.495 The Indian Commission of Ontario has also suggested that “[f]rom the time of initial submission of a claim until completion of the negotiation for compensation, all parties should submit to the negotiation, including complying with reasonable deadlines, being bound by admissions, and negotiating in good faith.”496

2. Procedural Issues

2.1 Flexibility

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495 NOTE: For instance, the term “consultation” was defined in the Yukon Umbrella Agreement.
496 ICO (1990), supra note 39, at 101.
In order to redress inequality of power, it is essential that no party be in a position to dictate to the other what the fundamental issues are to be discussed during the negotiations. The land claims process must be flexible to accommodate any revisions during the negotiations, due to changing circumstances. Moreover, as a general rule, due to the complex nature of comprehensive claims and the difficulty of compromising on fundamental cultural and spiritual issues, single-issue settlements should be possible, which may either stand alone, or be incorporated into any subsequent comprehensive settlement.\footnote{1b1d, at 31.}

2.2 Interest Based Negotiation

The process should be designed to encourage the parties to engage in integrative bargaining rather than competitive negotiations. To move the parties from positional bargaining to problem-solving negotiation, the Indian Commission of Ontario suggests that all parties be requested to bring forward concrete options which they sincerely believe all parties could live with, to do collective research, and to use "one neutral draft" to formulate an agreement.\footnote{ICO (1994), supra note 152, at 52.} Further, considering that the parties are unlikely to be prepared to make any compromise in relation to their values or their legal rights, the focus should then be on negotiating in respect of their respective behaviour and performance. This approach requires an early acknowledgment and acceptance of each party's view of their values and legal rights. It also requires the recognition of the legitimate aspirations and limitations of the other parties. "All parties must adopt a fresh solution-oriented approach, unencumbered by the past."\footnote{ICO (1994), supra note 152, at 52.}

2.3 Third-Party Interests

It has been recognized that if a settlement is to be successful and respected, it must be accepted in some measure by third-parties in addition to the parties at the negotiating table. Therefore, without making land settlements based on valid rights subject to the public opinion, there needs to be some involvement of the parties affected by a proposed agreement. However, it must be noted that even when specific interest

\footnote{Ibid, at 31.}
\footnote{ICO (1994), supra note 152, at 52.}
\footnote{NOTE: The ICO reports that progress in claims negotiation is often slowed down by personality conflicts. ICO (1994), supra note 152, at 31.}
groups are being consulted regarding the details of a proposed agreement, they often lack the basic historical background to assess the fairness of such agreement. Therefore, there should firstly be some public education to inform all Canadians about the general legal, constitutional and historical aspects of land claims issues. There should then be consultations with third-party interests on proposed agreements to ensure a fair representation of their concerns at the negotiation table and to allow for the building of a new relationship between Aboriginal and non-Aboriginal society.

2.4 Dispute Resolution Mechanisms to Break Impasses

Prior to substantive negotiations, the parties should agree upon mechanisms to resolve disputes which may arise during negotiations and which the parties are unable to resolve themselves. Provision could be made, for example, for unresolved conflict to be dealt with by mediation or arbitration. Many commentators have suggested the creation of an independent body which would supervise the negotiations by setting timeframes and deadlines and would have adjudicating powers when the parties are unable to reach an agreement on one or many issues. This option will be discussed in more details in Chapter Six.

Further, the possibility to refer some difficult issues to a neutral fact-finding body, designed to perform an investigatory role, could also be used in conjunction with negotiation. Findings and/or recommendations would be reported to the parties and contained in public reports, but remain unbinding on the parties. One illustrative example of such a body is the Waitangi Tribunal in New Zealand which will be discussed in Chapter Five of this thesis.

2.5 Interim Measures Agreements

It is also recommended that interim measures agreements be agreed upon, either before or during substantive negotiations, to protect an interest being currently affected as it could undermine the process.\(^{500}\)

\(^{500}\) *Ibid*, at 63.
2.6 Implementation

The implementation of settlement agreements should also be agreed upon during the substantive negotiations.\textsuperscript{501} This would diminish the risk of future conflict by making all parties accountable for their commitments. This would also contribute, in the long run, to building trust between the parties.

3. Cultural Understanding – Developing a Language of Perspicuous Contrast

In developing strategies to improve negotiations between Aboriginal and Euro-Canadian governments, cultural differences must receive particular attention. According to Monture, there are two things that must be understood when exploring cultural differences. First, "[t]he ways of First Nations cannot be understood or explained at a glance. And second, that these ways are not the same as the ways known to the ‘dominant society’.\textsuperscript{502} She also stated that “…the source of misunderstanding between Canadians and Aboriginal people is often the result of an inability to communicate across the different world views.\textsuperscript{503}"

In order to bridge the gulf that divides Aboriginal and Euro-Canadian society,\textsuperscript{504} Euro-Canadians must consider the preliminary assumptions underlying their beliefs and ideas. These assumptions shape the content of the Euro-Canadian way of thinking.\textsuperscript{505} This reevaluation is necessary before any other step is taken to change the relationship between Aboriginal and non-Aboriginal peoples. Borrows explained the two steps of developing a language of perspicuous contrast:

In generating a language of perspicuous contrast, one neither speaks wholly in the language of the dominant society nor does one speak fully in the language of the suppressed. The language of perspicuous contrast incorporates perspectives from both cultures and requires that I question my own perspective while simultaneously challenging the other. The distinctions revealed in this process underscore and accentuate where confusion, misinformation or self-contradictions exist in our shared universe. A blending and mingling of perceptions will produce a language which will neither be fully Native, nor will it be entirely “western”. The testing of each perspective against the other creates a new language because it allows for the critique and incorporation of conceptions from diverse cultural understandings.\textsuperscript{506}

\begin{itemize}
\item \textsuperscript{501} Ibid, at 30.
\item \textsuperscript{502} Monture (1991), supra note 208, at 355
\item \textsuperscript{503} P. A. Monture-Okanee, “Alternative Dispute Resolution: A Bridge to Aboriginal Experience?” in C. Morris and A. Pirie eds., Qualifications For Dispute Resolution: Perspectives on the Debate, (Victoria: UVic Institute for Dispute Resolution, 1994) 131 at 135.
\item \textsuperscript{504} Ross (1992), supra note 449, at xxiv.
\item \textsuperscript{505} Monture (1991), supra note 208, at 351.
\item \textsuperscript{506} Borrows, supra note 190, at 7-9.
\end{itemize}
In the negotiation context, Aboriginal cultures could be legitimized and empowered by giving recognition to cultural differences and by developing a language of perspicuous contrast. By focusing on cultural differences, the emphasis moves away from ethnocentrism to cultural wealth and diversity. This could be translated in practice by conducting negotiations on the community lands as often as possible as it promotes cultural understanding and facilitates consensual decision-making. Further, negotiations should be less formal and should be complemented by some social interaction in order to cultivate a positive relationship and increase the trust between the parties. In fact, it has been suggested that familiarity and liking are significant factors in ensuring flexible and successful negotiations.507

Conclusion

In this chapter, I have attempted to examine the principal difficulties with the land claims negotiation process as set up unilaterally by the federal government. The application of adversarial negotiation strategies contributes to disempowering Aboriginal groups. The control of the government over the development of land claims policies, the acceptance of claims to be negotiated and the funding for First Nations create a situation of conflict of interest which is intolerable.

Thus, there is an urgent need to redesign the negotiation process in a way which strengthen the bargaining power of Aboriginal groups and avoid any form of conflict of interest. In this chapter, several suggestions were made to answer some of the procedural and substantive problems with the present negotiation process and improve the relationship between Aboriginal and non-Aboriginal societies. The development of a language of perspicuous contrast could be an ideal approach to encourage Euro-Canadians to question the preliminary assumptions underlying their beliefs and ideas and legitimate Aboriginal values in the eyes of the dominant culture. In order to achieve fair and reasonable settlements, there must be a real cross-cultural dialogue between the parties during negotiation which recognizes the differences in culture.

CHAPTER FOUR MEDIATION AND ARBITRATION

It has been suggested that the limitations of negotiation and the inherent problems of litigation provide a structural explanation for the existence in most societies of some institutions of more informal third-party intervention in dispute-resolution. This Chapter will examine the theories of mediation and arbitration and apply these theories in the context of Aboriginal land claims. This Chapter is divided into three parts. Part I will explore the mediation process with a particular focus on the transformative potential of this dispute resolution mechanism. Part II will discuss the use of arbitration and the combination of mediation and arbitration to resolve Aboriginal land claims. Finally, Part III will assess the appropriateness of these processes to resolve the land question in Canada.

Part I Mediation

A. Theories of Mediation

1. Definition

Mediation is generally understood as an informal process in which a neutral third party with no power to impose a decision helps the disputing parties in reaching a mutually acceptable settlement. The main role of the mediator is one of exchanging information and bargaining. The mediator may assist disputants towards agreement by, for example, identifying their areas of common interest and suggesting terms or directions for a mutually acceptable compromise. The mediator may also assist in defining and drafting the final agreement. Mediation consists of joint meetings, private session, or a combination of both.

There must be a degree of trust and rapport between the mediator and the parties for the process to work effectively. Unlike litigation where legal discourse dominates, mediation may involve other values and concepts such as fairness, morals, and ethical concerns. This common description captures some of the

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509 Moore, supra note 369, at 14; Roth, Wulff and Cooper, supra note 309, at 23:3; Nolan-Haley, supra note 167, at 56.
510 Colvin, supra note 54, at 6.
major characteristics of the process, especially its informality and consensuality. It also reflects the view that the most significant effect of the process is the production of a voluntary settlement of the dispute.511

However, it must be noted that the mediation model is not a monolithic structure and there are still debates among practitioners and academics about its exact parameters and appropriateness in various settings.512 Moreover, mediation has been used in Canadian Aboriginal societies for hundred of years and mediation as practised among Aboriginal people is different than the Euro-Canadian model. In fact, while there is an emphasis on solving the immediate dispute in Aboriginal mediation, there is also a much stronger focus on healing and rebuilding the relationship that existed before the dispute than in the general North American model of mediation.513

2. Types of Mediation

The literature on mediation has identified two types of mediation: rights-based and interests-based mediation.514 In the rights-based model, the process is influenced by what the parties believe would be available to them in a court of law. In this type of process, there is more focus on the immediate dispute rather than the underlying conflict. Nolan-Haley points out that “[a]n exclusive emphasis on rights, however, encourages positional bargaining and undercuts the value of the mediation process.”515 On the other hand, interest-based mediation attempts to help disputing parties understand the underlying needs and interests of the other party. This approach is more focused on the underlying conflict which gave rise to the dispute between the parties.

3. Transformative Potential

512 LeBaron Duryea, supra note 14, at 11.
513 Ibid, at 12.
514 Nolan-Haley, supra note 167, at 57.
515 Ibid.
Practitioners and scholars have started to explore some other effects of mediation apart from settlement *per se*. It is suggested that the mediation process contains within it “a unique potential for transforming people - engendering moral growth - by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict.”\(^{516}\) This transformative potential comes from the capacity of mediation to generate two important effects: empowerment and recognition.

### 3.1 Empowerment

“Empowerment means the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems.”\(^{517}\) Empowerment does not mean redressing the imbalance of power within the mediation process itself in order to protect weaker parties.\(^{518}\) Similarly, empowerment does not mean controlling or influencing the mediation process so as to produce outcomes that redistribute resources or power outside the process from stronger to weaker parties.\(^{519}\) Finally, empowerment does not mean increasing the power of either party by becoming an advocate, adviser, or counselor. Bush and Folger suggest rather that “the objective of empowerment does not require or support the mediator’s taking sides, expressing judgments, or being directive. In fact, empowerment in a transformative approach to practice requires avoiding all these behaviors.”\(^{520}\) Thus, this potential effect of mediation means empowering each of the parties so that they can each optimize their strength and feel confident in their value.

### 3.2 Recognition

According to Bush and Folger, recognition means “the evocation in individuals of acknowledgment and empathy for the situation and problems of others. Recognition means giving recognition to another, not getting it from another.”\(^{521}\) Recognition does not necessarily mean reconciliation nor does it mean the

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\(^{516}\) Bush and Folger, *supra* note 511, at 284.

\(^{517}\) *Ibid*, at 95.

\(^{518}\) *Ibid*, at 95-96.

\(^{519}\) *Ibid*, at 96.

\(^{520}\) *Ibid*.

\(^{521}\) *Ibid*. 
mere realization of one’s enlightened self-interest. The purpose of recognition is abandoning “...one’s focus on self and becoming interested in the perspective of the other party as such, concerned about the situation of the other as a fellow human being, not as an instrument for fulfilling one’s own needs.”

4. Attitude of the Mediation Movement

It is suggested that when both empowerment and recognition are central in the practice of mediation, parties are helped to use conflicts as opportunities for moral growth, and the transformative potential of mediation is realized. Slowly, the mediation movement is starting to realize how important the effects of empowerment and recognition really are. According to Bush and Folger,

The broader significance of these phenomena is becoming clearer as dispute resolution scholars see that mediation’s transformative dimensions are connected to an emerging, higher vision of self and society, one based on moral development and interpersonal relations rather than on satisfaction and individual autonomy. Scholars and thinkers in many fields have begun to articulate and advocate a major shift in moral and political vision - a paradigm shift - from an individualistic to a relational conception. They argue that, although the individualist ethic of modern Western culture was a great advance over the preceding caste-oriented feudal order, it is now possible and necessary to go still further and to achieve a full integration of individual freedom and social conscience, in a relational social order enacted through new forms of social processes and institutions.

It is also argued that the goal of transformation is even more important because it is one that only the mediation process is capable of achieving. Other dispute resolution processes, such as litigation or arbitration, “...are far less capable than mediation (if at all) of fostering in disputing parties greater strength and compassion, and thus of achieving moral growth and transformation.” As a result, some see transformation as the most important goal of mediation, since this valued goal is one that mediation alone can achieve.

522 Ibid, at 96-97.
523 Ibid, at 2-3. NOTE: “Some have even come to realize that working for empowerment and recognition usually results in reaching settlement as well, while focusing on settlement usually results in ignoring empowerment and recognition. So, while these different dimensions of mediation are not necessarily mutually exclusive or inconsistent, the relative emphasis given to them makes a crucial difference.”
524 Ibid, at 3.
Although mediation provides a unique opportunity for achieving empowerment and recognition, it appears that the mediation practice has not yet realized that potential. Substantive evidence suggests that mediation practice still focuses primarily on settlement. Thus, Bush and Folger observe that mediation “rarely generates empowerment and recognition, and even then it generally does so serendipitously rather than as a result of mediators’ conscious efforts.”

B. Mediation in the Context of Aboriginal Land Claims

1. Advantages and Disadvantages

The mediation process could be beneficial to the parties involved in Aboriginal land disputes. Mediation process is generally viewed as more expeditious, inexpensive, and procedurally simple than adversarial dispute resolution mechanisms. Moreover, as suggested by Durocher, “[i]n addition to being a liaison between the parties in narrowing down their differences, the third party can act as a sounding board for the frustrations of either side and can eliminate the need for the parties to vent their frustrations face to face.” As Professor Lon Fuller stated, mediation has the “capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attention toward each other.” Mediation has also a great potential as an empowering process, the parties having autonomy and control over the outcome of the process. Finally, a mediator can contribute to ensuring productive use of time by drafting agendas, framing the terms of discussion and developing ideas about the sequencing of negotiation tasks.

However, mediation suffers from some shortcomings. In the present mediation setting, only the parties to the dispute are present. Third parties might not be present or represented at the mediation sessions where issues affecting them are being discussed and resolved. Moreover, many authors suggest that mediation

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527 Nolan-Haley, supra note 167, at 57.
528 Durocher, supra note 20, at 53.
529 Quoted in Nolan-Haley, supra note 167, at 58.
530 Brienza, supra note 172, at 177-178.
works best where there is equal bargaining power on both sides.\textsuperscript{531} It is suggested that "[b]y far the most difficult problem mediators face regarding relationships is the instance in which the discrepancy between the strength of means of influence is extremely great."\textsuperscript{532} Thus, given the imbalance of power between the First Nations and the governments, there could be some difficulties in using mediation in the land claims context. One solution could be to use procedural rules - including caucusing, providing information, bringing out the weaker party's view through direct intervention, and openly addressing the issue of power - to try to redress the imbalance of power between First Nations and governments in the mediation forum. However, there exists a debate among mediators concerning the risk of assistance or possible empowerment of the weaker party by the mediator. One school states that a mediator has an obligation to create just settlements and must therefore help empower the weaker party to reach equitable and fair agreements while another school argues that mediators should not do anything to influence the power relations of disputing parties because it taints the intervenor's impartiality. As stated by Moore, "[t]here is no easy answer to this strategic and ethical problem, but it does have an important impact on the types of moves a mediator initiates."\textsuperscript{533}

Finally, it has been suggested that the mediation model can not be exported wholesale to another cultural setting. In fact, a study done by the UVic Institute for Dispute Resolution concluded that "the staged, linear model of mediation prevalent throughout North America has limitations when applied in multicultural settings. There are limitations to the usefulness of third-party neutrality; certain widely taught active listening skills; and the bias toward direct, face-to-face negotiation."\textsuperscript{534} Therefore, some academics contend that the promise of mediation as the appropriate model for resolving disputes in multicultural contexts will only be realized if fundamental questions about the cultural dimensions of mediation are addressed.\textsuperscript{535}

\textsuperscript{532} Moore, supra note 369, at 281.
\textsuperscript{533} Ibid, at 34-35; See also LeBaron Duryea, supra note 14, at 20.
\textsuperscript{534} Lund, supra note 1, at 5. See also LeBaron Duryea, supra note 14, at 21.
\textsuperscript{535} LeBaron Duryea, supra note 14, at 12-13.
2. Experiences with Mediation in Canada

Mediation is not the most common process employed to resolve comprehensive land claims in Canada. However, according to Gordon Sloan, mediation and mediation-like methodologies have been used in Canada by various non-Aboriginal governments and Aboriginal groups to address multi-party issues.\textsuperscript{536}

In one particular dispute, the mediator concluded that

\begin{quote}
[t]here is a vast cultural chasm between Indian people and the dominant majority in this society. That chasm cannot be bridged without effective communication and a willingness on the part of both parties to understand the cultural interests affected by the dispute. Mediation represents an effective instrument for such communication. (...)This successful experience with mediation leads me to conclude that in a dispute between Indian people and governments which requires effective communication and which has it premise that the resolution must be mutually acceptable to all of the parties, mediation is preferable to such other alternatives as reference to a third-party tribunal. An arbitrator or a court would impose a solution to the problem and would have less discretion in the matters that could be included in a solution.\textsuperscript{537}
\end{quote}

Moreover, mediation has been adopted as a dispute resolution mechanism in the Yukon Umbrella Final Agreement. Under that agreement, the parties must agree on the choice of a mediator. In addition to assisting the parties come to their own agreement, the mediator may, upon his/her own discretion, or must, at the request of the parties, provide a brief non-binding written recommendation to the parties.\textsuperscript{538}

The Indian Commission of Ontario (ICO) also uses the mediation process as part of its functions. As mentioned in Chapter One, the ICO was created in 1978 to operate as a neutral and independent Tripartite Council comprised of the First Nations Chiefs of Ontario and representatives from the federal and provincial governments. The mandate of the Commission is to provide a forum for the negotiation of land claims (specific claims only) and to deal with questions relating to Aboriginal self-government. To


\textsuperscript{537} L. Mitchell, “Using Mediation to Resolve Disputes over Aboriginal Rights: A Case Study” in \textit{The Quest for Justice: Aboriginal People and Aboriginal Rights} (Toronto: University of Toronto Press, 1985) 286 at 289.

fulfill its mandate, the Commission chairs negotiating meetings, both in Toronto and on reserves, and
monitors progress in negotiations. The functions of the Commission also include providing resources
to the parties, assisting in resolving procedural matters, and arranging for professional dispute resolution
services such as facilitation, conciliation, mediation, and arbitration, to be made available to the parties.
The powers of the Commission include the power to order the production of documents, impose deadlines
for the completion of any process, ask questions and request responses from the parties, and adjourn
negotiations. The Commission also has the power to recommend a formal inquiry into a matter as a way
of clarifying an issue. The ICO reports that it has used its formal powers very rarely in the last five years.
The reason being that:

Commission staff believe that encouraging the parties to find their own solutions is more likely to
yield results than exercising authority to suspend negotiations or ordering parties to attend a
meeting at which they are not prepared to make progress. Further, in some cases where the ICO
has considered it appropriate to use its powers to assist negotiations (for example, to arrange non-
binding arbitration to advance an issue), the Ontario and federal governments have refused to
provide their consent.

The ICO’s preferred mechanism for assisting the parties in negotiations is through mediation. The ICO
suggests that a mediator can help the parties find common and creative solutions in the following way:

1. by monitoring each party’s undertakings in negotiations;
2. by discouraging the parties from taking an adversarial or positional approach, and encouraging
   them instead to propose solutions which take into account all parties’ underlying interests;
3. through private discussions with each party, by encouraging them to reflect upon the wisdom and
   realism of positions they bring to the negotiation table;
4. by suggesting options the parties may wish to consider that the negotiators themselves may not be
   authorized to volunteer;
5. by co-ordinating neutral and independent research on behalf of all parties, rather than witnessing
   negotiations degenerate into a wasteful and costly battle of each party’s experts;
6. by providing independent drafts of proposed agreements intended to meet all parties’ concerns,
   avoiding the pre-judgments possible from other parties where one party drafts its own proposed
   agreements;
7. by retaining independent, respected experts to offer their recommendations on issues over which
   the parties disagree, forcing each party to reconsider preliminary and self-serving positions they
   may have tabled;
8. by calling the attention of the parties and the public to long-standing issues which the parties
   have failed to resolve;
9. by maintaining, through its chairmanship of negotiations, an atmosphere of respect and creativity
   among the parties; and

539 An Agenda for Action, supra note 3, at 72.
by offering an independent analysis of the parties’ policies or approaches to an issue where requested by the parties and where this may eliminate procedural barriers to successful negotiations.

Despite its role in helping in the resolution of Aboriginal disputes, the ICO has no power to compel performance or attendance by governments, neither can it impose decisions on the parties. This means that negotiations will proceed only when governments will accept to cooperate. According to Colvin, the Commission

...lacks the established institutional framework which could facilitate the speedy and effective processing of large numbers of claims, the authority to bring pressure to bear on recalcitrant parties, and the coercive powers in reserve to provide an incentive for compromise. It is mediation as a variation on direct negotiation rather than mediation as a genuine alternative in dispute-resolution.542

In 1990, after identifying the limitations of its mandate, the Commission made several recommendations to review its mandate and powers. For instance, the ICO requested that:

In an exceptional case of failure to make progress in negotiations chaired by the ICO, if one party wishes to review the bona fides of the other party’s commitment to resolve the issues fairly and expeditiously, the Commissioner should be given the discretion, where formally requested and where the Commissioner considers it necessary and appropriate, to review the conduct in question and make a finding on this issue for the benefit of the parties involved.543

Moreover, in light of the refusal of the federal and Ontario governments to participate in non-binding arbitration and neutral studies to break impasse in negotiations since 1986, the Commission concluded that this attitude was promoting a lack of accountability and responsibility and recommended that it

...be given the power and financial resources to obtain the views of respected and (where possible) mutually-agreed upon arbitrators or fact-finders in land claim negotiations. The views of such experts would not be binding on the parties and would be sought wherever an impasse over a legal or factual issue has, in the opinion of the Commissioner, caused an undue delay in the negotiations.544

Unfortunately, the recommendations made by the ICO in 1990 have not created the changes in the ICO’s mandate and powers needed to achieve “mediation as a genuine alternative in dispute-resolution.”

542 Colvin, supra note 54, at 27.
543 ICO (1994), supra note 152, at 32
Another independent Commission is also mandated to use mediation to resolve issues arising from land claims. As mentioned in Chapter One, the federal government established in 1991 the Indian Claims Commission (ICC) as an interim measure to deal with specific claims disputes. The Commission’s mediating role is defined in broad terms. The Commission has authority to “provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian Band to reach an agreement in respect of any matter relating to an Indian specific claim.” The Commission reports that

...mediation is intended to facilitate negotiations in the manner the parties deem appropriate. It is therefore not possible to define and thus predetermine the specific nature of mediation activities. Rather, the Commission views mediation as a process that responds to the local conditions of a specific negotiation. Appropriate forms of mediation are regarded as those that are (1) bicultural, (2) informal, (3) non-threatening, and (4) flexible. Any mediation service offered by the Commission is based on these four criteria.

According to Turpel, the ICC has, with only a few years’ experience, established credibility and developed expertise on cross-cultural mediation and negotiation. However, concerns have been expressed that the mediation capacity of the Commission is being overlooked because it has no “teeth” to supervise negotiations except by the consent of the parties and its decisions are not binding. The ICC has no power to ensure that negotiations proceed in a timely or fair manner, nor does it have the power to assist the parties to break impasses. The ICC reports that it has received numerous requests from First Nations for mediation but very few from Canada and it seems that Canada is generally reluctant to agree to mediation when requested by a First Nation. According to the Commission, one of the primary reasons for this is due to:

...an inherent bias in Canada’s claims policy which presumes that mediation is appropriate only in exceptional circumstances. Despite statements from Canada’s representatives to the effect that they are prepared to use the Commission’s mediation services, DIAND has traditionally been very inflexible in its assessment of when mediation is appropriate.

546 ICO (1994), supra note 152, at ix.
The Commission also noted another reason why Canada has often rejected ICC's mediation requests. It appears that "...Canada has suggested (at least informally) that they perceive the Commission as being biased in favour of First Nations."549 Finally, the ICC also noted that one of the difficulties in obtaining Canada’s consent to mediation might be that there is no formal mechanism in place to properly assess the request to determine whether it is appropriate for mediation.550

On June 27th, 1996, the five Commissioners presented a letter of resignation to Prime Minister Jean Chrétien and national Chief Ovide Mercredi. In their letter of resignation, the Commissioners explained that their work was "severely undermined" by the government’s lack of response to the ICC’s reports. They have therefore decided to stop accepting new claims inquiries as of September 1, 1996 and the activities of the Commission will end March 31, 1997. The Commissioners have also mentioned that they will table "if necessary" a special report in October with recommendations for an independent claims body.551 It is therefore up to the government to fulfill its election promise of 1993 and create an independent claims Commission with a meaningful mandate. The future of the ICC remains highly uncertain to this date.

Part II

Arbitration

A. Theories of Arbitration

1. Definition

In arbitration, the parties present their cases to a neutral third-party person or panel who has the power to render a decision which could be either binding or non-binding on the parties. Contrary to court proceedings, arbitration can involve other considerations than law if all parties agree. Procedures are also controlled by the parties, and can be more flexible than in a court of law. The parties themselves can select the arbitrator(s). As noted by Nolan-Haley, “[a]rbitrators typically have more expertise in the

549 Maurice, supra note 545, at 2.
specific subject matter of the dispute than do judges. They also have greater flexibility in decision-making since they are not bound by the principle of *stare decisis* in rendering a decision. In fact, arbitrators are not even required to give reasons to support their awards.\footnote{Nolan-Haley, *supra* note 167, at 125.}

2. **Types of Arbitration**

Arbitration can be classified as either interest arbitration or rights arbitration.\footnote{Ibid, at 130.} Interest arbitration involves disputes about the terms and conditions of a contract or another relationship between the parties. Rights arbitration is concerned with the violation or interpretation of an existing contract or relationship.

3. **Mediation-Arbitration**

The process of "med-arb" is a two-step process. Typically, the first step involves mediation of the issues and if the parties fail to reach a settlement on all the issues, the second step uses formal arbitration, usually by the same neutral, to render a decision on the remaining issues. The final result is a binding decision which includes the agreements arrived at during the first step - mediation - together with the decisions resulting from the second step - arbitration. This process is seen as giving the parties the extra incentive to settle because they know that the mediator will become the arbitrator if settlement is not reached.\footnote{Roth, Wulff and Cooper, *supra* note 309, at 37:1.}

There are a number of variations on the med-arb process. For instance, parties can opt to start arbitration proceedings and allow for mediation at some point during the arbitration. It is also possible to mediate some issue and arbitrate others. Parties can choose to mediate, then arbitrate some unresolved issues, then return to mediation. Further, some may decide to mediate, if unsuccessful ask for an "advisory opinion" by the mediator which is binding as an award unless either party vetoes the opinion within a limited period of time. Finally, another variation is mediation, if unsuccessful, followed by a final offer by each side,
coupled with limited argument, following which the mediator turned arbitrator who must choose one or other of the offers.\footnote{555}

\section{B. Arbitration in the Context of Aboriginal Land Claims}

\subsection{1. Advantages and Disadvantages}

The arbitration process could give settlements on land claims some degree of finality. Arbitration also offers some flexibility of process and procedure and allows for the parties to decide on the degree of formality which will govern the arbitration. However, the major shortcoming of arbitration is that it is an adversarial process which creates a win-or-lose situation where the winner takes all. The arbitration process can also disempower disputants by taking control of outcome out of the parties' hands and by necessitating reliance on professional representatives. Many also contend that arbitration suffers many of the disadvantages of litigation, such as costs, delays, and lack of suitable remedies.

\subsection{2. Experiences with Arbitration in Canada}

Arbitration has not been used to resolve many land claims in Canada to date. In fact, as noted by the Indian Commission of Ontario, governments tend to refuse to participate in binding and even non-binding arbitration to resolve difficult questions in relation to a land claim.\footnote{556}

However, recourse to the process of arbitration has been included in settlement agreements. For instance, in the Umbrella Final Agreement between the federal government, the Yukon government and the Council for Yukon Indians, a provision is made for disputes arising from the Agreement to be submitted to mediation. In the event that mediation fails to resolve the dispute, the matter is referred to arbitration.

\footnote{555 D.C. Elliot, "Med/Arb: Fraught with Danger or Ripe with Opportunity!" (1995) 34 Alberta Law Review, No.1, 163 at 164.}
\footnote{556 ICO (1994), \textit{supra} note 152, at 42. \textbf{NOTE:} The ICO reports that in the early 1900's, a procedure of international arbitration was used by the Cayuga Indians living at Six Nations to recover treaty annuities from the U.S. government which had remained unpaid after the war in 1812. The claim was lodged in 1882 and an arbitration panel was set up in 1910. It was settled in 1926 when Canada took control of a $100, 000 trust fund on behalf of the First Nation, intended to provide the $5, 000 annuity they had been awarded. ICO (1990), \textit{supra} note 39, at 7.}
The decision of the arbitrator is final and binding on the parties and is not subject to appeal or to judicial review unless it is alleged that the arbitrator failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise jurisdiction.\footnote{Yukon Umbrella Final Agreement between the Government of Canada, The Council for Yukon Indians and the Government of Yukon, May 30, 1992, at 275-277.}

Despite the limited use of arbitration in Canada to resolve Aboriginal land claims, some commentators have discussed the benefits of using the arbitration process to determine various aspects of land claims. For instance, Professor Bradford Morse has analyzed the alternative dispute resolution processes of labour management and has applied his findings to the Aboriginal claims context.\footnote{B.W. Morse, "Labour Relations Dispute Resolution Mechanisms and Indian Land Claims" in B.W. Morse ed., Indian Land Claims in Canada (Wallaceburg: Association of Iroquois and Allied Indians, Grand Council Treaty #3, and Union of Ontario Indians, Walpole Island Research Centre, 1981) at 293.} He concludes that arbitration would be an appropriate process to resolve Aboriginal claims in the following circumstances: (1) incorporating systems of grievance arbitration to determine the validity of a claim, or to interpret, administer, or implement terms of settlement that are incapable of negotiation due to conflict; (2) interest arbitration for compensation decisions; and (3) combined mediation-arbitration where an independent person is engaged first as a mediator to assist the parties to come to their own agreement, failing which the mediator becomes an arbitrator and makes a determinative finding binding upon the parties. Moreover, Professor Morse suggests that arbitration should be used only to determine specific issues in the overall claim.\footnote{Ibid, at 363-364; McCallum, supra note 13, at 62-63.} In fact, the arbitration literature indicates that this process works best when a single issue can be isolated and reasoned argument directed exclusively to it.\footnote{S.B. Goldberg, F.E.A. Sander & N.H. Roger, Dispute Resolution, Negotiation, Mediation, and Other Processes, 2d ed. (Toronto: Little, Brown & Co., 1992) at 200.}

There are however important differences between arbitration in the context of labour disputes and in the context of Aboriginal land claims. It could be argued that labour organizations generally have more bargaining and political power that Aboriginal groups since they have the force of threatening strikes and lock-outs. However, this distinction might not be so significant since First Nations can gain bargaining
power by threatening to resort to political action or by referring a claim to the courts. I would therefore submit that the most significant difference between labour disputes and land claims is that labour dispute negotiations are not final in the same sense as treaty negotiations because renegotiation of certain matters subsequent to labour agreement is possible where renegotiation might be almost impossible after a treaty has been signed considering the government’s goal to achieve finality and certainty.561

Part III Appropriateness of Mediation and Arbitration

A. The Med-Arb Approach

There is a role for arbitration and mediation to play in the overall process of resolving Aboriginal land claims. I would submit that the process of med-arb would be appropriate to deal with Aboriginal land claims. A combination of approaches, in which neutral third-parties would be oriented primarily towards mediation, but would have powers of adjudication in reserve through arbitration to put pressure on the parties to settle, could be used to resolve these disputes. The med-arb process would bring the following benefits in the resolution of land claims: (1) the mediation component would offer a chance to the parties to resolve the land dispute while retaining control of the decision; (2) if the parties fail to resolve the dispute through mediation, the arbitration component would provide a clear end point, usually within a reasonably acceptable time frame, within a process than can be designed by the parties in dispute, and with a decision maker of the disputants’ choice; (3) the time spent in mediation serves as a means of giving the mediator enough information for a decision to be made, so time is not “wasted” in a subsequent arbitration hearing; (4) the process is relatively informal and can be designed to suit the specific needs of the parties, the result comparatively speedy, and the costs controllable.562 The quality of med-arb settlements is seen as the primary advantage of this approach “either because it is entirely or partially resolved through the mediation part of the process, or because the award is more likely to be in line with the needs of the parties as a result of the enhanced knowledge that the mediator/arbitrator has by participating in the mediation process.”563

561 Morse, supra note 558, at 348-349; McCallum, supra note 13, at 63.
562 D.C. Elliot, supra note 555, at 164-165.
563 Ibid, at 171.
B. Approach and Procedures

The mediator should be encouraged to focus on the transformative dimension of mediation by providing greater empowerment of parties in restoring their sense of their own value and strength and their own capacity to handle life’s problems. This effect would be greatly beneficial for First Nations. The focus on the goal of recognition would also contribute in helping the parties to understand each other’s perspective. Gordon Sloan has identified four elements which must be liberally recognized between First Nations and governments: (1) the parties must recognize each other’s histories which also include a validation of each other’s traditions; (2) each party must recognize fault; (3) strengths should be lavishly recognized by noting and encouraging each other’s cultural gifts and accomplishments in order to craft joint solutions by sharing the power of their strengths; (4) the parties should recognize the depth of the challenges of intercultural negotiation based in value differences and the transitions which each party has to make to reframe its concept of the other.\footnote{G.B. Sloan, Reconciliatory Negotiation (Materials prepared for Making Peace and Sharing Power, Pre-Conference Workshop - Using Third Party Neutrals) (Victoria, B.C.: University of Victoria, April 30, 1996) at 8.} Some of these elements might be difficult to recognize since politicians and government generally reject their own traditions of treatment of First Nations and refuse to admit any fault since injustices occurred during colonization.

The parties should however try to negotiate with each other as people and cultures, not as stereotypes. To do so, Sloan suggests to “check out preconceptions about each other and allow themselves to experience the difference between the other they imagined and the other they are negotiating with.”\footnote{Ibid, at 9.} Michelle LeBaron Duryea suggests that one way to address deep cultural differences is through the incorporation of visual and experiential rituals into conflict resolution process. In the context of native culture, she recommends the incorporation into a process of the sweetgrass ceremony or drumming, or the incorporation of the symbolism of the medicine wheel into the mediation process.\footnote{LeBaron Duryea, supra note 14, at 43.} However, I would submit that any attempt to incorporate cultural elements into the dispute resolution process should be
carefully weighted to avoid stereotyping Aboriginal culture as purely “traditional” culture. Thus, I would suggest that the bicultural elements of the process should be chosen by each First Nation involved in a dispute and the process should be flexible enough to accommodate for any “cultural” addition to the dispute resolution mechanism at any time.

Thus, the med-arb process represents a balance between two approaches which both bring important benefits in the Aboriginal land claims dispute. As stated by Colvin, “[a]rbitration could secure the parties’ confidence in the intervenant and ensure that the adjudicative process is adapted to the distinctive features of Indian claims. Mediation, on the other hand, would give more scope to opportunities for a negotiated settlement.” However, Colvin conceded that neither of these processes could be expected to have a widespread success if jurisdiction depends wholly on the consent of the parties. He therefore suggests that while it would be preferable for the parties to agree to the choice of a particular intervenant, it would be better if this process could be initiated at the behest of the Aboriginal claimants alone.

To accommodate the bicultural approach which would be more acceptable to First Nations, it would be possible to use a team of mediator-arbitrator, comprised of Aboriginal and non-Aboriginal neutrals. In fact, as noted by Michelle LeBaron Duryea, “a single intervenor may not meet parties’ needs where conflicts are complex and cultural factors play prominently, or when a conflict involves parties from different cultural backgrounds.” Co-mediators have been used in the past in cases of unusual complexity, in cases where a specific expertise is needed for resolving the dispute, and in cases involving a multiplicity of parties. In the context of Aboriginal land claims, the cases are generally very complex, they involve at least three parties (which could be more if third-party groups were represented at the table), and all claims require a deep understanding of the issues from both an Aboriginal and non-Aboriginal perspective, to work efficiently with the parties. Moreover, the team of mediators-arbitrators

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567 Colvin, supra note 54, at 27.
568 Lund & al., supra note 1, at 6.
should be appointed by agreement of the parties to give them direct involvement in choosing the intervenants and determining the procedures by which they would operate. These neutrals should be chosen for (1) their knowledge about Aboriginal and non-Aboriginal society (including history, folklore, traditions, customs, values); (2) their communication skills, both verbal and non-verbal; (3) their technical skills; and finally (4) their knowledge and awareness of their own biases and values and the importance of respecting differences.570

Conclusion
This chapter has examined two dispute resolution processes which have not been used in the context of Aboriginal land claims as often as other mechanisms such as litigation and negotiation. The mediation process is generally viewed as more expeditious, inexpensive, and procedurally simple than adversarial dispute resolution mechanisms. More importantly, it has been suggested in recent literature regarding the potential of mediation that this process provides a unique opportunity for achieving empowerment and recognition. In the context of Aboriginal land claims, the transformative potential of mediation through empowerment could be beneficial to First Nations to restore their own value and strength. The recognition and understanding of the other party’s perspective would allow for the development of a bicultural approach in the resolution of Aboriginal land claims.

The arbitration process could also provide some benefits in resolving Aboriginal land claims as it would give settlements some degree of finality and allow for more flexibility in the procedures that the courts. Therefore, considering the advantages of both the process of mediation and arbitration, a combination of these two approaches, in which a team of Aboriginal and non-Aboriginal neutral third-parties mediate the dispute (with powers of adjudication in reserve to put pressure on the parties to settle), could be successful in resolving Aboriginal land claims in Canada.

570 LeBaron Duryea, *supra* note 14, at 17.
CHAPTER FIVE EXPERIENCE WITH THREE INSTITUTIONS: A COMPARISON

Aboriginal people in Canada are not alone in their struggle to define and shape the society they live in. Over the past twenty-five years, modern treaties and a variety of other land claims settlements have taken place in several countries and have taken several forms. Australia and New Zealand offer both historical and contemporary experiences which can inform Canadian endeavours to frame settlement mechanisms and agreements. Although there are fundamental differences in the history and society of Australia and New Zealand, Canada can still take advantage of lessons learned from past experience with different types of land claim mechanisms used in these two countries to improve its existing institutions dealing with Aboriginal claims. Canada has also seen the development of specialized institutions to deal with land claims. One of them is the British Columbia Treaty Commission established in 1992 to monitor the negotiations of comprehensive claims in British Columbia. This Commission will be analyzed with the models in Australia and New Zealand.

The purpose of this Chapter is to describe the make-up, mandates and processes used by each of these three bodies to find agreement between First Nations and governments. This Chapter is divided into three parts. In Part I, I will examine the Australian National Native Title Tribunal created to resolve Aboriginal land claims. This Tribunal was created under the Native Title Act, 1993 to give effect to the principles of the Mabo decision. Part II will explore the Waitangi Tribunal and its innovative procedures in hearing Maori claims. The Waitangi Tribunal was established in 1975 to hear, investigate and make recommendations concerning grievances from the Maori people about the many ways in which they felt the Treaty of Waitangi was not being honoured by the New Zealand government. This most original Tribunal is made up half from representatives of Maori tribes and the other half from representatives of the dominant Anglo-Saxon culture. As part of this discussion, I will also examine whether the Waitangi Tribunal can be seen as a vehicle of legal pluralism in a primarily monocultural legal system. Finally, Part III will examine the approach of the B.C. Treaty Commission. The B.C. Treaty Commission is a First Nations, provincial, and federal government initiative undertaken after the province of B.C. recognized continuing Aboriginal land rights in 1990. This Commission is comprised of both Aboriginal
and non-Aboriginal commissioners and supervises the negotiations between governments and First Nations.

Part I The Australian Experience

A. Background

1. The Concept of Native Title

Australia did not sign any treaties with its original indigenous inhabitants. For two hundred years, courts in Australia have denied the recognition of legal title to the land to the indigenous people of Australia. However, this changed in 1992 when six of the seven members of the High Court of Australia decided in Mabo v. The State of Queensland that “...the common law of this country recognises a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.” In that decision, the High Court rejected the view that Australia was terra nullius at the time of European colonization and recognized a form of native title to which the Crown was subject. Justice Brennan, with whom Mason CJ and McHugh J agreed, described the doctrine of terra nullius as having “a false basis in fact and as now being unacceptable in our society.” Justice Brennan also said that the Court should not allow the common law to be or be seen to be “frozen in an age of racial discrimination” since this would perpetuate injustice. The High Court ruled that native title may be extinguished by legislation, by the alienation of land by the Crown or by the appropriation of the land by the Crown in a manner inconsistent with the continuation of native title. Three judges in Mabo also mentioned specifically the requirement to pay compensation for extinguishment of native title. Following this decision, Australia had to re-think its entire understanding of the rights of Aboriginal peoples, and new

571 Durocher, supra note 20, at 46.
572 (1992), 107 A.L.R. 1; (1992), 175 C.L.R. 1 at 15 (Mason CJ and McHugh J).
574 Quoted in Wilson, ibid, at 240.
576 Wilson, supra note 573, at 240.
policies of acceptance and engagement became necessary. As stated by Peter Jull, “Mabo was a reminder that easy assumptions of hegemony and cultural ascendancy are misplaced.”

2. Recognition of Aboriginal Title before Mabo

In Australia, much of the constitutional jurisdiction over land remains with the state governments and, as a result, there has never been a uniform national process for the recognition of Aboriginal title. In fact, until the Mabo decision in 1992, the recognition of Aboriginal title and the resolution of land claims has been mostly determined by statutes at the state level. Australian Federal and State governments started in 1976 to pass legislation acknowledging the legitimacy of Aboriginal land claims and providing processes for recognizing Aboriginal entitlement.

The first legislation was the Aboriginal Land Rights (NT) Act, 1976 passed by the Commonwealth Parliament in relation to Australia’s Northern Territory in response to the proposals of the Woodward Report for the legislative recognition of Aboriginal title. The Act automatically gave to the Aboriginal people of the Northern Territory lands that had already been reserved for them. The Act also allowed natives to claim and hold vacant Crown land to which they could demonstrate a connection of traditional ownership. A land claims process was established with an Aboriginal Land Commissioner - the Judge of the Supreme Court of the Northern Territory - having the power to hear traditional land claims and to recommend the granting of title with respect to unalienated Crown land.

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579 M. Jackson, A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements (A Report prepared for the Royal Commission on Aboriginal Peoples) (September 1994) at 130; Durocher, supra note 20, at 46.
581 Durocher, supra note 20, at 46; Sanders (1992), supra note 158, at 270.
582 Colvin, supra note 54, at 24; Durocher, supra note 20, at 46-47; Sanders (1992), supra note 158, at 270.
(NT) Act did not specify any detail as to the procedure to be followed in conducting hearings, however some directions were given to the effect that hearings should follow the model of adversary adjudication although with less formality and a liberal policy respecting the admission of evidence. The Commissioner therefore had the task of trying to balance common law principles of natural justice and complete disclosure of evidence against sensitivity to Aboriginal customs. The Act stated that the reports of the Aboriginal Land Commissioner would not be binding, but rather simply recommendations to the Federal Minister of Aboriginal Affairs who would make the final decision as to whether there will be a grant of the land. In January 1996, a Report on the Social and Economic Impacts of Aboriginal Land Claim Settlements prepared in Canada revealed that Australia’s past performance of land claims with the Aboriginal Land Rights (NT) Act, 1976, has not, from a resource development perspective, provided a positive example of settlement.

The land rights legislation for the Northern Territory became a precedent and other land rights legislations were passed by individual State governments. For instance the Pitjantjatjara Land Rights Act, 1981 of South Australia was the result of negotiations between tribe and state government over a period of years. Another example is the Torres Straight Island Land Act, 1991, which enables claims to be made to a Land Tribunal on the ground of “customary affiliation”. This Act empowers a

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583 Colvin, supra note 54, at 24. See Aboriginal Land Rights (Northern Territory) Act, 1976. Practice Directions (1977). NOTE: Direction 18 states in part: “The hearing of an application will be conducted along the lines of conventional court proceedings although with less formality.” Direction 22 states in part: “There will be no strict adherence to the ordinary rules of evidence.” For instance, Aboriginal women generally do not want any male other that the Commissioner to be present when they are giving evidence of a secret nature. As a result, males are usually excluded under these circumstances.


585 Ibid. See also Durocher, supra note 20, at 46-47.


588 Pitjantjatjara Land Rights Act, 1981 No.20 (S.A.); McHugh, supra note 584, at 308.

589 Torres Straight Island Land Act, 1991; Jackson, supra note 579, at 132.
Commission to negotiate and conclude agreements with the government and to grant property interests to
Aboriginal and Torres Strait Islander corporations.\footnote{McHugh, supra note 584, at 309.}

B. The Native Title Act, 1993

As mentioned earlier, the Mabo decision provided fresh impetus for a coordinated national approach to the settlement of Aboriginal land claims.\footnote{Wickliffe, supra note 578, at 207.} In June 1993, to address the implications of Mabo, the Commonwealth government issued a discussion paper and then made public a detailed outline of a proposed legislation which was designed to “resolve the uncertainties created by Mabo while ensuring that Native title is treated with fairness and justice.”\footnote{Statement by the Prime Minister Keating, quoted in Jackson, supra note 579, at 137. NOTE: Other initiatives of the government in response to the Mabo decision were (1) to establish a fund for open-market purchase of land for indigenous Australians who are not able to claim native title (the Land Fund and Indigenous Land Corporation) and (2) to seek proposals for a “social justice” package from ATSIC, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner.}

This discussion paper was shortly followed by the adoption of the Native Title Act, 1993 which provided for the recognition and protection of native title as recognized by the common law of Australia.\footnote{Received Royal Assent on December 24, 1993 and its operative provisions commenced on January 1, 1994.} The Act also established a system to “validate” past Crown acts that may have rendered existing titles to land invalid. This validation has the consequence that native title is completely or partially extinguished depending on the effect of the past act and the extent of any inconsistency with the continued existence of native title.\footnote{Wickliffe, supra note 578, at 207-208.} It has been suggested that in practice, this means that the only real land and natural resources available to settle claims are unoccupied and unused Crown land.\footnote{Ibid.} Once these acts have been validated, claimants are entitled to a form of compensation similar to that of an ordinary title holder.\footnote{Ibid.}

The Act further established a regime for the protection of native title rights in future dealings affecting
native title land and waters. For certain future acts, relating among other things to mining proposals, the Act recognized a right to negotiate for native title holders and claimants.\textsuperscript{597} The regime under the \textit{Native Title Act, 1993} also recommended, but did not require, the enactment of complementary State and Territory legislation.\textsuperscript{598}

More importantly for the purpose of this thesis, the \textit{Native Title Act, 1993} established the National Native Title Tribunal. The Tribunal's role is to screen and mediate applications for determination of native title or for compensation and to inquire whether an agreed determination is both within its powers and appropriate. The Tribunal is also involved as an arbitral body in the right to negotiate process relating to the grant of mining tenements (future acts) and compulsory acquisition of native title land.\textsuperscript{599}

C. The National Native Title Tribunal

1. Functions

The principal functions of the Tribunal relate to applications, inquiries and determinations. There is also an ancillary research function.\textsuperscript{600} More than 230 claims have been filed with the Tribunal as of May 1996.\textsuperscript{601}

1.1 Applications

There are different types of applications that can be made to the Tribunal. All applications are initially made to the Native Title Registrar. An application can be made by the person(s) who claim the native title, the Commonwealth Minister, or by the Minister of a State or Territory, where the whole area is

\textsuperscript{597} Butt, \textit{supra} note 575, at 291.

\textsuperscript{598} \textit{Ibid} at 285. \textit{NOTE}: The \textit{Native Title Act} does not affect existing Commonwealth land rights legislation. For example, the rights and interests of persons under the \textit{Aboriginal Land Rights (Northern Territory) Act 1976} are left untouched.

\textsuperscript{599} Justice R.S. French, "The National Native Title Tribunal - Early Directions" (1994) Australian Dispute Resolution Journal, 164 at 164 (Summary). Durocher, \textit{supra} note 20, at 47.

\textsuperscript{600} Section 108 of the Act. See French, \textit{supra} note 599, at 168.

within the State or Territory's jurisdiction. An application can also be made by any person holding an "interest" in the whole of the area over which the determination is sought. The term "interest" is widely defined, including any "right ... power or privilege" over land.602 The Registrar has the power to reject applications on certain grounds, including that the application is frivolous or vexatious.603 However, the Registrar’s rejection can be overridden by a presidential member of the Tribunal. If the presidential member confirms the Registrar’s rejection, a right of appeal lies to the Federal Court on a question of fact or law.604 The Registrar must give notice of accepted applications to all persons whose “interests” may be affected by a determination who can then oppose the application.605

Where the application is not opposed or where it is opposed but the parties have reached an agreement, the Tribunal has the role to determine whether a native title exists and what rights comprise it.606 Where the application is opposed and the parties have not reached an agreement, a mediation conference must be held to try to resolve the matter.607 If at this conference the parties come to an agreement, then the Tribunal can make a determination about the existence or otherwise of native title consistent with the terms of the agreement.608 In any cases where the Tribunal could have made a determination but fails to do so, the Registrar must refer the matter to the Federal Court for decision.609

Determinations by the Tribunal are lodged for registration with the Federal Court and have the effect of a Federal Court order.610 However, the Tribunal’s determinations of native title are not binding and

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602 French, supra note 599, at 168-169. NOTE: For instance, a mining company with a licence to prospect over an area of land could apply for a determination whether native title exists over the land. See Butt, supra note 575, at 286.

603 Section 63 of the Act.

604 Section 169(2) of the Act.

605 NOTE: This includes a person with a proprietary interest in land, registered in a Torrens or other register. It is unclear whether the definition of interest in s. 253 applies here to limit “interests” to interests over land, or whether “interests” in a wider sense are included, such as rights to royalties, or other forms of financial interest. Butt, supra note 575, at 286.

606 Sections 70 and 71 of the Act.

607 Section 72 of the Act.

608 Section 73 of the Act.

609 Section 74 of the Act. See Butt, supra note 575, at 287.

610 Section 167 of the Act.
conclusive and parties to the Tribunal proceedings, or any person whose interests are affected by the determination, can ask the Federal Court to review the determination.611

1.2 Inquiries

In addition to receiving and dealing with applications, the Tribunal has functions in relation to the carrying out of inquiries and the making of determinations. There is a requirement to hold an inquiry into an application for native title determinations and compensation where such application is unopposed or an agreement is reached either at the end of the notice period or after a mediation conference.612 The purpose of the inquiry is to ensure that "conditions laid down by the Act for the making of the proposed determination are satisfied, that there is a basis for it and that it is fair and reasonable in the circumstances. It is not intended that such inquiries should be by way of an exhaustive investigation of the existence of native title or other issues arising in the application."613

Applications based on the right to negotiate must also be the subject of an inquiry.614 Further, the Commonwealth Minister can direct the Tribunal to hold an inquiry into a particular matter or issue relating to native title.615 A conference may be directed by the president to help resolve any matter relating to an inquiry.616 After holding an inquiry into an unopposed or agreed application, the Tribunal must make a determination about the matters covered by the inquiry.617 After holding an inquiry into a special matter, the Tribunal must make a report about the matters covered by the inquiry.618 The scope of determinations possible after an inquiry is not limited to determinations of native title or compensation for which specific determinations are expressly provided in the Act.619 In conducting its inquiries, the

611 Sections 164 and 167 (4) of the Act. See Butt, supra note 575, at 287.
612 Section 139(a) of the Act. French, supra note 599, at 170 and 176.
613 French, supra note 599, at 176.
614 Section 139(b) of the Act. French, supra note 599, at 170.
615 Section 137, 139(c) of the Act.
616 Section 150 of the Act.
617 Section 160 of the Act.
618 Section 163 of the Act.
619 French, supra note 599, at 170.
Tribunal is not bound by technicalities, legal forms or rules of evidence and it must take into account the cultural and customary concerns of Aboriginal people and Torres Strait Islanders.\textsuperscript{620}

1.3 Negotiation

The Act gives registered native title holders and registered native title claimants, as well as some others, the right to negotiate before the government performs certain acts over native title land.\textsuperscript{621} Essentially, the right to negotiate arises with respect to proposals for mining activity and proposals to acquire native title rights and interests in order to confer rights or interests on others.\textsuperscript{622}

The government must give notice of its intention to do the act to the public and to any registered native title holders or claimants.\textsuperscript{623} If no one objects within two months of the notice, the government can proceed and the act will be valid. However, if one or more native title party(ies) appears within the two month period, the government must then give them the right to make submissions, and must negotiate in good faith with them with a view to obtain the native title parties' agreement to the proposed act.\textsuperscript{624}

Conditions agreed upon by the parties will have the force of a contract.\textsuperscript{625}

The National Native Title Tribunal must make its mediation services available to the parties to the negotiation if so requested.\textsuperscript{626} If the parties fail to achieve agreement within the specified period,\textsuperscript{627} any party involved in the negotiation may apply to the Tribunal for a determination of whether the proposal

\textsuperscript{620} Section 109 (2) (3) of the Act.

\textsuperscript{621} Sections 26, 28, 31 of the Act. See Butt, supra note 575, at 292-293. NOTE: Section 26(3) of the Act creates some exceptions to the right to negotiate. On June 7, 1995, the President of the National Native Title Tribunal, the Honourable Justice French, issued the National Native Title Right to Negotiate Procedures under section 123 of the Native Title Act. Revised procedures were issued on September 8, 1995.

\textsuperscript{622} Section 26 of the Act. See Butt, supra note 575, at 292; French, supra note 599, at 170.

\textsuperscript{623} Section 29 of the Act.

\textsuperscript{624} Section 31 of the Act. Butt, supra note 575, at 292; French, supra note 599, at 170. NOTE: The negotiation must include the possibility of including a condition entitling native title parties to payments based on future profits or income derived from the land - Section 33 of the Act.

\textsuperscript{625} Section 41 of the Act. Butt, supra note 575, at 292.

\textsuperscript{626} Section 31(2) of the Act. Butt, supra note 575, at 292. French, supra note 599, at 170.

\textsuperscript{627} Section 35 of the Act.
should proceed and, if so, under what conditions.\textsuperscript{628} Conditions imposed by the Tribunal have the force of a contract between the parties and there is no right of appeal against the imposition of conditions by the Tribunal. However, a right of appeal lies to the Federal Court against the Tribunal's determination on a question of law.\textsuperscript{629} In making its decision, the Tribunal must consider a number of factors, including the impact of the proposed act on native title, the way of life, culture and traditions of the native title parties, freedom of access to the land for ceremonial purposes, and the natural environment of the land or waters concerned.\textsuperscript{630} It must also take into account the wishes of the native title parties regarding the management and use of the land or waters.\textsuperscript{631} The relevant Commonwealth Minister can overrule the Tribunal's decision within two months if he or she considers the overruling to be in the national interest, or in the interest of the State or Territory.\textsuperscript{632} Also, if there are State/Territory bodies equivalent to the National Native Title Tribunal, the relevant State/Territory Minister can overrule a decision of that local body if that Minister considers the overruling to be in the interest of the State/Territory. The Act does not define the national or State/Territory “interest” and there is no appeal against the Minister's decision.\textsuperscript{633}

\subsection*{1.4 Federal Court}

All land claims must be first directed to the National Native Title Tribunal. If no agreement is reached through the procedures of the Tribunal, the claim can then be referred to the Federal Court. Once a matter is referred to the Federal Court, it “...must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt”.\textsuperscript{634} Accordingly, under the \textit{Native Title Act, 1993} the Federal Court is not bound by technicalities, legal forms, or rules of evidence and it can decide to request the service of assessors or direct the holding of public conferences to help resolve matters that it considers relevant.\textsuperscript{635}

\textsuperscript{628} French, \textit{supra} note 599, at 170.
\textsuperscript{629} Section 169 (1). See Butt, \textit{supra} note 575, at 292.
\textsuperscript{630} Section 39 of the Act.
\textsuperscript{631} Butt, \textit{supra} note 575, at 292.
\textsuperscript{632} Section 42(2) of the Act.
\textsuperscript{633} Butt, \textit{supra} note 575, at 292.
\textsuperscript{634} Section 82 of the Act.
\textsuperscript{635} Sections 83 and 88 of the Act. See Butt, \textit{supra} note 575, at 287.
2. Jurisdiction

The Native Title Act, 1993 encourages States and Territories to enact complementary legislation by making provisions for a "recognised State/Territory body". When recognised this body can play parallel roles to those of the National Native Title Tribunal and the Federal Court. The purpose is to allow States and Territories to deal with native title matters themselves, but only where procedures and functions of the State/Territory bodies harmonize with those of the Federal bodies in order to ensure "a nationally consistent approach to the recognition and protection of native title".636 The main incentive for States and Territories to designate bodies of their own is that such State/Territory bodies would have the sole right - as against the National Native Title Tribunal - to make 'arbitral' determination relating to future acts concerning land wholly within the boundaries of the State or Territory. By contrast, natives seeking a determination of native title and/or compensation could choose between the relevant State/Territory body and the National Native Title Tribunal.637 Another possible advantage for a State or Territory to create its own body in relation to future acts is that the ultimate ministerial "override" power for its determinations will belong to the State or Territory Minister rather that to the Commonwealth Minister.638

The Commonwealth government has made a financial offer to the States and Territories which decide to enact complementary legislation. The government has offered to contribute 75% of the cost of compensating for the effect on native title of validations of past acts and 50% of the costs of establishing and maintaining State/Territory native title bodies until the end of the decade. By May 1995, all the States and Territories except the Northern Territory had accepted the financial assistance offer.639

3. Composition

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636 Section 251(2) of the Act. Butt, supra note 575, at 293.
637 "Native Title: State and Territory Legislation Summary" (1996) 1 AILR 53, at 53.
638 Ibid, at 54.
639 Ibid.
The membership of the National Native Title Tribunal comprises presidential and non-presidential members. Presidential members are the president and the deputy presidents of the Tribunal. They are chosen among serving judges of the Federal Court or among any former judges of the High Court, Federal Courts or Supreme Courts of a State or Territory. The non-presidential members are persons other than a judge or former judge who have special knowledge in relation to either Aboriginal and Torres Strait Islander societies, land management, dispute resolution, or any other matters which have substantial relevance to the duties of such a member. The government unilaterally appoints presidential and non-presidential members of the National Native Title Tribunal. As to the participation and representation of Aboriginal peoples, the legislation does not reserve any position to them. The commentary to the legislation only states that "to the extent possible, Aboriginal and Torres Strait Islander persons will be appointed as mediators/assessors..." As of May 1996, there were two Aboriginal members who had been appointed to the Tribunal.

4. Approach

The most critical function of the Tribunal is its responsibility to assist parties in resolving disputed applications. The President of the Tribunal, Justice French, noted that to be effective in this work, the Tribunal needs the trust and respect of those involved in applications. The Tribunal must be seen as professional, independent and impartial in order to advance its functions in relation to mediation and conciliation of disputed applications. It is a fundamental principle of the Tribunal that each party be treated fairly with respect to its legal rights, interests and concerns. Successful mediation and conciliation necessitate sensitivity to the interests and concerns of all participants. Justice French explains that

[the cultural awareness necessary for the task of the tribunal’s members and officers extends to awareness of the concerns and interests of Aboriginal and Torres Strait Islander people, farmers, pastoralists, miners, governments, local authorities and other relevant interest groups. The techniques of mediation and negotiation impose a need for that awareness as a professional responsibility.]

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640 French, supra note 599, at 172.
641 Mabo: Outline of Proposed Legislation on Native Title, at 25 quoted in Jackson, supra note 579, at 141.
642 Interview with the Honourable Frederick Chaney, National Native Title Tribunal, May 2, 1996.
643 French, supra note 599, at 173.
644 Ibid.
The Tribunal has indicated that its preferred approach in relation to mediation conference is the “interest-based negotiation”. In that context, interest-based negotiation involves the three following elements: (1) parties identifying their own and the other parties’ interests relevant to the application; (2) parties thinking about a variety of options for the resolution of the application before deciding what to do; and (3) parties considering the options against some acceptable standard of fairness or reasonableness.645 The purpose of interest-based negotiation is to “...induce each party to focus on the dispute as a common problem to be solved rather than to focus on the other parties and their respective positions.”646 All parties should be open to the possibility that a partial agreement may be achievable or an agreement which goes beyond the strict terms of a statutory determination. The mediation conference will therefore include a session in which parties explain their respective interests to each other, that is, what they each hope to achieve by an agreed resolution of the application. With the help of advisers, if required, they may put forward their various options as suggestions to be explored rather than as positions to be adopted. They may also indicate ways of judging the fairness or legitimacy of the various options.647 During the mediation session each party can have confidential discussions with the presiding member in the absence of the other parties so that interests or concerns which they wish to have identified but do not wish disclosed at that point can be discussed. In the case of Aboriginal claimants, this may involve a meeting between the presiding member and the Aboriginal claimants at the site(s) which are the subject of the claim.648 The presiding member, as mediator, may if it seems helpful, prepare a draft proposal for criticism and decision but whether this is done will depend upon the progress of the conference.649

However, Justice French pointed out that interest-based negotiation “...is simply a point of departure and may require modification or abandonment depending upon the extent to which it can be applied to the

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645 Section 30 of the National Native Title Tribunal - Procedures for Application for Native Title and Compensation (August 1994).
646 Section 30 of the Procedures.
647 Section 34 of the Procedures.
648 Section 33 of the Procedures.
649 Section 37 of the Procedures.
parties to the particular application." Moreover, while suggesting that the people involved in the mediation process should have the authority to make decisions about any proposed agreement, the Tribunal also recognizes and accepts that the process may have to allow time for traditional methods of decision-making by Aboriginal people which may require more meetings for that purpose.

The Tribunal is committed, when acting as mediator and conciliator, to find creative solutions. The President of the Tribunal said that he is open to discussions between the parties concerning processes of resolving applications, other than ways which necessarily involve determinations of the existence or non-existence of native title or determination for the purposes of compensation. For example, Justice French suggested that it may be possible in some cases,

...to reach agreements about the use and management of land between various parties which may or may not be associated with a determination of native title. One form of agreement might involve a concession of the existence of native title with an agreement involving the Commonwealth, State or Territory government, under which it is exchanged for other forms of statutory title or benefit.

Thus, a clear advantage of using the mediation process rather than litigating applications in a court of law, is the fact that mediation allows for flexibility and creative thinking for all the parties involved. As stated by Justice French, "[i]t does not have to be confined to a railway line which has only two stops, native title or no native title."

5. Procedural Concerns

Until recently, it was the practice of the Tribunal not to make available to the public details of applications received by the Registrar until after formal acceptance. However, due to the growing public interest in the

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650 French, supra note 599, at 176-177. NOTE: Section 30 of the Procedures states that: "The Tribunal accepts that the concepts associated with interest-based negotiation may not necessarily transplant into the cultural context of some parties. It will be open to apply different or modified approaches to take account of such circumstances."

651 Section 31 of the Procedures.
652 French, supra note 599, at 177.
653 Ibid.
654 Ibid, at 176-177.
nature and number of applications lodged with the Tribunal, Justice French recently decided that from now on, following lodgment of an application, the registrar will make available for public inspection a summary of the information contained in it. Supporting material will not be available for public inspection until after formal acceptance.\textsuperscript{655} In order to respond adequately to other procedural concerns which could arise, the Tribunal has set up a process of early consultations in connection with the procedures and operations of the Tribunal. The Tribunal intends to invite representative groups affected by its work to participate in liaison committees, to operate in the various States and Territories.\textsuperscript{656}

\textbf{Part II \hspace{1em} The Waitangi Tribunal of New Zealand}

New Zealand offers a great experience in terms of Aboriginal claims settlement. It is however impossible to appreciate the role and function of the Waitangi Tribunal without an understanding of the \textit{Treaty of Waitangi} and its implications for New Zealand society. A brief review of the history of the relationship between the Maori and the white New Zealanders (\textit{Pakeha}) is essential to learn and apply important comparative lessons.

\textbf{A. Historical Background}

Contrary to Canada where a multitude of Aboriginal groups signed treaties with the Crown, only one treaty covering most of the territory was ever signed in New Zealand. The \textit{Treaty of Waitangi} is an agreement between the Crown and Maori which was signed on February 6, 1840, by William Hobson, representing the British Crown and 539 of the leading Maori chiefs of the time.\textsuperscript{657} Hobson signed both the English and the Maori texts of the Treaty where the Maori chiefs signed the Maori text only.\textsuperscript{658} The

\textsuperscript{655} \textit{Ibid}, at 175.
\textsuperscript{656} \textit{Ibid}, at 173-174. NOTE: These liaison committees will comprise representatives of Aboriginal interests, mining, agricultural and pastoral industries, appropriate State and Territory government representatives, the legal profession and such other interest groups as may be identified from time to time. \textsuperscript{657} M. Wharepouri, “The Phenomenon of Agreement: A Maori View” (1994) 7 Auckland University Law Rev., No.3, 603 at 611.
\textsuperscript{658} NOTE: It is important to mention that the Maori text of the Treaty is not a word-for-word translation from the English text, so that subsequent problems of interpretation have focused not only upon the meaning of particular words but upon which text should be resorted to. Wilson, \textit{supra} note 573, at 242.
Treaty of Waitangi establishes a relationship between Aboriginal peoples and colonial governments based upon the recognition of existing Aboriginal rights. It confirms Maori ownership to the land but gives the Crown the exclusive right of pre-emption of such land that Maori wished to sell. The Treaty also transfers some political rights from the Maori people to the Crown. By Article 2 of the Treaty, Maori were promised: "[F]ull exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."

Under the Treaty of Waitangi, Maori-Pakeha relations were to be guided by the slogan "he iwi kotahi tatou", which means "we are all one people". However, it has been suggested that the Europeans were always strongly opposed to any social order that did not recognize their own racial and cultural superiority. As a result, "the spirit of accommodation that had characterized early Maori-Pakeha relations disappeared in the face of settler greed for land and control." During those years, the Maori Land Court was established to determine ownership rights to lands under Maori law for the purpose of enabling the transfer of those rights to settlers. According to Professor Douglas Sanders, "historically, the Land Court had been a vehicle to grab Maori land." As a result, Maori peoples started to protest and claimed that the Europeans had taken their land wrongfully. To right this wrong, the Maori have continuously sought to enforce the Treaty of Waitangi, and expected to regain some of their rights under it. Durie and Orr explain that "Maori protest, about land and fishing losses, the destruction of their

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659 Fleras and Elliot, supra note 63, at 180.
660 NOTE: The Treaty of Waitangi can be compared with the Canadian Royal Proclamation of 1763 as it provides a comprehensive guarantee of pre-existing rights to land rather than being primarily a transfer of land treaty.
662 Ibid. See also Wilson, supra note 573, at 244-245.
663 Sanders (1992), supra note 158, at 266.
664 Ibid, at 267.
665 J.S. McGinty, "New Zealand’s Forgotten Promises: The Treaty of Waitangi" (1992) 25 Vanderbilt Journal of Transnational Law, No.4, 681 at 688; See also Wharepouri, supra note 657, at 615.
tribal ways and the failure to provide for their culture, was continued with barely a pause and before every forum until, in the heady days of the 1960s, it was taken to the streets." 666

B. Establishment of the Waitangi Tribunal

1. Response to Pressure

The Waitangi Tribunal was created as a political response to Maori pressure in the 1970s for the recognition of the Treaty of Waitangi and a settlement of many Maori grievances. 667 The response, in 1975, was to establish a Tribunal with particular functions of considering contemporary Maori grievances where a Crown policy was involved, measuring the policy against the principles of the Treaty of Waitangi, and if prejudice was apparent, making recommendations to the Minister of Maori Affairs so that adherence to the principles of the Treaty could be achieved and the prejudice removed or compensated. 668

The Tribunal was given powers of recommendation only and could not issue judgments or decisions, but only prepare reports addressed to the Minister of Maori Affairs.

2. General Reaction

The establishment of the Waitangi Tribunal in 1975 passed unnoticed. Claudia Orange explains that "...the Tribunal was immediately suspect as a piece of government 'window-dressing', a suspicion that gained substance when the incoming National government in 1975 delayed setting it up." 669 In fact, the

667 NOTE: Section 5(2) of the Treaty of Waitangi Act 1975, gives the Waitangi Tribunal exclusive authority, in exercising any of its functions under the section, to determine the meaning and effect of the Treaty. Andrew Sharp is of the opinion that the Waitangi Tribunal was instituted as a way of avoiding rather than confronting the continued Maori demand that the Treaty should be 'ratified' and as a means of negotiating, perhaps even evading, Maori claims that many statutes were in breach of the Treaty. A. Sharp, Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980's (Auckland, NZ.: Oxford University Press, 1990) at 74.
new government did not convene the Tribunal until 1977 and on the few occasions it was convened in the first seven years of its existence, it seems to have received little interest, was mostly ignored by the government of the day, and made no mark of any kind on national life. For many there was nothing especially innovative about the Tribunal's formal structure. It was simply a commission of inquiry with its own empowering statute.\(^{670}\)

This all changed around 1983 when the Waitangi Tribunal became a major focus of public attention with the release of its first major report, *Motunui*, under the Chairmanship of the first Maori Chief Judge, Eddie Durie. The report upheld Maori fishing rights that were being threatened by a large government-promoted industrial plant. The combination of the Tribunal's recommendation and other external factors resulted in the project being canceled.\(^{671}\) The hearing of this claim was innovative in a number of ways, particularly because it was heard on a *marae* (traditional meeting ground of the tribe). The Tribunal's report was comprehensive, lucid, innovative and brought the contents of the Maori text of the Treaty into national prominence. As stated by McHugh, "[i]n little over seven years the Tribunal has gone from neglect to utmost centrality."\(^{672}\)

3. **Amendments in 1985 and 1988**

In 1985 the *Treaty of Waitangi Act, 1975* was substantially amended, backdating the Tribunal's powers of inquiry to acts and omissions of the Crown arising since 1840.\(^{673}\) This amendment to the Tribunal's jurisdiction was accompanied by decisions to extend the Tribunal's membership and to provide a research team that could report on claims ahead of any hearing.\(^{674}\) Chief Judge Durie stated that the purpose of these changes was "...to reaffirm the Tribunal's inquisitorial and advisory role, for by these amendments..."
the Tribunal assumes less of a “Court-like” appearance.”\textsuperscript{675} Moreover, Sharp contends that by extending the jurisdiction of the Tribunal, the government “...went some way towards providing for what the Tribunal and its clients wanted - reparatory justice.”\textsuperscript{676}

Further powers were proposed for the Tribunal in the Treaty of Waitangi (State Enterprises) Bill which became law in August 1988. These amendments were to the effect that some restitutory decisions of the Tribunal would now be binding on the Crown.\textsuperscript{677} As a result of these changes, the administrative and research capacities of the Tribunal were further improved.\textsuperscript{678}

The Tribunal is now comprises of the Chief Judge of the Maori Land Court as chairperson and up to 16 additional members appointed by the Crown for terms not exceeding three years with seven Maori Land Court judges able to assist as presiding officers. The Tribunal sits in division.\textsuperscript{679} There are an equal numbers of Maori and Pakeha members chosen for their experience and knowledge in tikanga Maori, law, historical geography, anthropology, history, agriculture, business or industry.\textsuperscript{680}

In 1987, the Tribunal released two important reports in the Orakei and Waiheke Island claims, which were then followed by the very important and undoubtedly controversial Muriwhenua Fishing Report.\textsuperscript{681} In June 1996, the Tribunal released another important report in which it recommends the compensation and the redress of “horrendous injustices” done 133 years ago to the Taranaki Maori tribes of the west coast of the North Island. According to the Judge Durie, some 768,000 hectares were illegally seized by the government in 1863. The Tribunal stated that based on legal principles, the Taranaki claims could be assessed in billions of dollars. The Prime Minister, Jim Bolger, said that he would press toward a final

\textsuperscript{675} Durie (1986), supra note 668, at 237.
\textsuperscript{676} Sharp, supra note 667, at 79.
\textsuperscript{677} Ibid, at 80.
\textsuperscript{678} Ibid, at 80-81.
\textsuperscript{680} Durie (1995), supra note 679, at 100. See also Stokes, supra note 26, at 188.
\textsuperscript{681} Boast, supra note 670, at 227.
settlement and the minister in charge of Treaty of Waitangi negotiations, Doug Graham, expressed hope of an early settlement of any claim.682

C. Overview of the Structure and Approach of the Waitangi Tribunal

1. Powers

The Tribunal is a body that investigates, researches, makes findings on past practices and current policy in light of the Treaty of Waitangi, and then recommends in the context of modern practicalities.683 The Waitangi Tribunal does not make final judgments, does not award costs and it has no facility to enforce its determinations. The Ministers of the Crown who receive the Tribunal’s recommendations are free to accept, qualify, or reject the advice given to them on the principles of the Treaty of Waitangi. The practice of the Tribunal has been to deliver comprehensive and detailed reports in relation to claims.684 Through its reports, the Tribunal does not only address the relevant Ministers of the Crown, but also the general public, “...for the place of the Treaty of Waitangi in the New Zealand’s life is of public relevance.”685 The Tribunal does not participate in subsequent negotiations between claimant and government, although its recommendations may become the framework for subsequent negotiations.686 The Tribunal may also refer matters to mediation but, according to Chief Judge Durie, this is done only when the facts are largely settled and the issues delineated.687

The Tribunal’s non-binding status has many advantages. According to Chief Judge Durie, the fact that the Tribunal does not perform an adjudicative role has prevented it from falling into an adversarial style of procedure and the Tribunal has rather been able to adapt its procedures to accommodate Maori claimants.688 Moreover, Wilson suggests that the non-binding character of the Tribunal reinforces its role

683 Durie (1986), supra note 668, at 235.
684 Wilson, supra note 573, at 248.
685 Durie (1986), supra note 668, at 235.
686 Stokes, supra note 26, at 188.
687 Durie (1995), supra note 679, at 100. NOTE: As of July 1995, six claims had been referred to mediation and there had been settlement in two cases.
688 Durie (1986), supra note 668, at 237.
as an alternative dispute resolution venue outside the judicial system. He stated that "[i]t is a venue which the parties in conflict come with a view to being heard. But it is also a venue which facilitates discussion, and the process of reaching an agreement." Because of its non-binding powers, the Tribunal is able to ascertain the facts and to find the solution which is the fairest to all parties without regard to precedent or rules of law other than those embodied in the Treaty. The Tribunal is not constrained by a need to fit the parameters of strict legal rights. Consequently, the Tribunal "...brings the parties together in an environment which permits them to not only state their case but to search for an accommodation. Reflected in many of the Tribunal’s reports is an agreement which the parties have reached rather than an imposition by the Tribunal of a ruling created entirely of its own motion."

2. Procedures

The Tribunal is not bound by the laws of evidence or rules of civil procedure. This flexibility to choose its own procedure has enabled it to select the appropriate style and to make several procedural adjustments over the years.

2.1 Initial Style

The Tribunal’s initial style of procedure was fairly traditional. Under the Chairmanship of former Chief Judge Gillanders-Scott, it chose to adopt a court-like approach. As Professor McHugh observes, "...convening hearings in the Inter-Continental Hotel, Auckland, did not encourage Maori receptivity." Consequently, during these years where it used conventional procedures, the Tribunal was regarded as "irrelevant and powerless." Jane Kelsey of the Auckland University Law School pointed out that "[w]hen the Waitangi Tribunal worked along [established legal] lines - using lawyers, common law rules of evidence and procedure, alien physical surroundings, judges lacking taha Maori, it could not deliver decisions which reflected the spirit of the Treaty."

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689 Wilson, supra note 573, at 249.
690 Ibid, at 249.
691 McHugh, supra note 584, at 311.
692 Ibid.
693 Kelsey, "Te Tirity o Waitangi and the Bill of Rights" at 27 - quoted in Sharp, supra note 667, at 76.
2.2 Recent Approach

Since 1982, the Tribunal has won popularity for its innovative procedure. The Tribunal is now regarded as being "bicultural and inter-disciplinary." The Tribunal has adopted "the legal mores and procedural protocols of both Maori and Pakeha cultures." In fact, for the last fourteen years, it has been the practice of the Tribunal to adopt te kawa o te marae (the customs of the individual marae at which the hearing takes place). The Tribunal and guests are welcomed by the tangata whenua and invited onto the marae in the wharenui (meeting house). This approach brings increased statute and produces the result that [the Maoris] are no longer the supplicants making yet another excursion to Wellington and its Pakeha institutions in an attempt to obtain justice: the Tribunal has come to them in order to deliver justice. The distinction may be a subtle one to the mind of a pakeha New Zealander but certainly not to a Maori one.

The marae is a place which is sacred. Accordingly, "...when the Tribunal first arrives at the marae the whole of that day will be concerned with the formalities of welcome." Once the customary formalities are completed, the Tribunal lets the claimants 'vent steams'. Several sessions are given to the oral evidence of the kaumatua (elders) and other members of the tribe. Hearings are conducted largely in the Maori language, using Maori procedural conventions and etiquette, and in which elders feel encouraged to speak freely. The day's sessions are opened and closed by prayers in the Maori language, and the opening of a hearing is always commenced by a formal calling-on to the marae and classical Maori oratory, in which the Tribunal's own elders participate fully. The Tribunal said in one of its report:

[T]he Tribunal was of the firm opinion that on their home territory the Maori people would be better able to express their feelings and make their concerns known. The Tribunal is completely satisfied that by adopting this procedure it was able to reach the real heart of the matter. This would not have been possible had the proceedings been held in a building such as a Courthouse or in proceedings conducted in the same manner as a court hearing.
The usual procedure is for the Maori claimants to speak first, followed by all others who wish to speak in support of the claim. Contrary to the rules of a court, all persons wishing to speak at the hearing are permitted to do so, and to speak for as long as they wish with no constraints as to relevance.703 From these preliminary hearings, certain issues will begin to emerge and their priority will usually become clear. Counsel for the Crown and claimants will identify the list of issues for the Tribunal.704 Evidence and testimony will then be directed towards these particular issues. Sometimes hearings will become very technical, as when scientific evidence is being given, and they will usually be conducted off the marae.705

In the more recent Muriwhenua Fishing Report, the Tribunal noted that:

It is not an easy task to capture elders’ recollections of the past and the descriptions passed on to them... We adapted our procedures as far as we could to accommodate the many Maori witnesses who spoke, and to remove some constraints, we restricted the cross-examination of elders’ evidence, requesting counsel to state their concerns so that we ourselves might invite a reply. We accepted group evidence and allowed some discussion as tribal members assisted elders in their recall of events and matters of oral tradition. We dispensed with sworn testimony having regard to the nature of the evidence, the inevitable mixture of fact and opinion, and the presence of kinfolk on a marae to provide the necessary sanction against errors or slanted accounting. We also listened to elders during site visits, in the company of counsel, for it was easier for them to talk of former villages, past events, fishing grounds and practices when standing on the land that recalled those matters to mind.706

The Tribunal also uses interpreters but does not employ sentence-for-sentence translations. This is because according to the marae etiquette, speakers are entitled to be heard without interruption. Thus, the interpreter must maintain a written note of what is being said and give the translation later during the hearing.707 There also exists a major difficulty in translating between Maori and English because the underlying concepts are not the same. To alleviate this difficulty, the Tribunal may, contrary to the norm, retain as interpreters “...persons of the claimant tribe familiar with the nature of the claim and with the people giving evidence. They may hold discussions with witnesses in order both to clarify and expound

703 Wilson, supra note 573, at 251.
704 Ibid. NOTE: The Tribunal will step in to state the issues only where no agreement has been reached between the parties.
705 McHugh, supra note 584, at 311-312
707 Wilson, supra note 573, at 250.
what is meant and to ensure that the literal translation is expanded to convey any fuller intent.” 708 In these cases, it is also seen as helpful that the interpreters have rapport with local elders.

In summary, the general approach which the Tribunal has adopted is structured appropriately so as to meet Maori cultural values and priorities. Concrete recognition of Maori protocol is considered to be appropriate not only because it is legitimate, but also because a full understanding of the issues in dispute requires that their historical and cultural context be addressed in the dispute resolution process.

3. Formality

Despite its commitment to culturally appropriate proceedings, it appears that the Tribunal’s mode of inquiry into cases is becoming more formal and judicialised. Some commentators have noted that Crown and Maori counsels make opening and closing submissions “...reading from elaborate written texts which bulge with legal citations and arguments.” They also contend that much of the evidence is now given by Pakeha experts who read from elaborate reports. Moreover, despite indications to the contrary in the Tribunal’s Practice Notes, it seems that cross-examination of witnesses by counsel is now standard practice. 709 These critics thus contend that Pakeha procedures, lawyers and experts have taken over the Tribunal procedure to such an extent that Maori are now reduced to “paying spectators in their own cause”. 710 According to Williams,

[t]he increased role of professionals, lawyers and historians in particular, at the expense of tangata whenua input to the order of proceedings has been most profound. Whilst the Tribunal continues to be an inquisitorial commission of inquiry which initiates much of the necessary historical research on its own motion, the public hearings have taken on a distinctly adversarial air as between claimants and the Crown. 711

708 Durie and Orr, supra note 666, at 71.
709 Boast, supra note 670, at 234-235.
710 NOTE: For instance, Kelsey argues that Maori claimants have become excluded from the process “as Pakeha lawyers, legal procedures, and legal concepts captured the proceedings”.
However, this adversarial element in the Tribunal’s procedure does not necessarily work against the interests of Maori people. In fact, it can be argued that Maori participation in the process can hardly be characterized as ‘passive’ considering that if claimant lawyers are Pakeha, they are only there because the claimants have chosen to instruct them. Moreover, lengthy cross-examination of a Crown or Tribunal witness by Maori counsel will occur because claimants see this as important. The issues facing the Tribunal are often very complex and require extensive research, thus it is only normal that expert witnesses will play an important role in the hearings.712 Moreover, according to Durie and Orr,

[if] it suits the convenience of counsel to present legal argument and submissions in accordance with the rules that lawyers know, and in a courtroom, the Tribunal will endeavour to oblige. It is not a case of opting for more of one system than the other, but of maintaining a balance, and of considering what seems best for the occasion. In all, the Tribunal’s procedures are various, and endeavour to meet the needs of the Maori, Pakeha and legal representatives who appear.713

4. Judicial Review

Although there is no right of appeal from the Tribunal’s recommendations, the Tribunal is subject to judicial review on the ordinary principles of administrative law. This possibility obliges the Tribunal to prepare a fully documented record of the proceedings, give full opportunity for witnesses to be questioned, and to generally preserve a rigorous impartiality between Crown and claimants.714 According to McHugh, an application for judicial review to the High Court could occur “...because the Tribunal has breached one of the Wednesbury tests of ‘reasonableness’.”715 An example would be if the Tribunal was to make a finding after failing to take into account relevant facts or material, or on the contrary, taking account of an irrelevancy. Further, a breach of the rules of natural justice could cause an application for judicial review, as where the Tribunal hears evidence without giving some other interested party the chance to assess and reply to material that may be hostile to its position.716

5. Social Role - Reconciliation and Healing

712 Boast, supra note 670, at 235.
713 Durie and Orr, supra note 666, at 71-72.
714 Boast, supra note 670, at 233-234.
715 McHugh, supra note 584, at 310.
716 Ibid.
The Waitangi Tribunal "...has been viewed as a major catalyst for Maori politicization, a spiritual and ideological focus for Maori politics, and a stimulant to discussion of New Zealand nation-building and Maori sovereignty."\footnote{Fleras and Elliot, supra note 63, at 190.} This impact made by the Tribunal can be attributed to its interpretation of the Treaty of Waitangi as a social contract instead of relying on legal rights, such as a doctrine of common law Aboriginal title. The Tribunal has always tried to adopt a liberal approach in treaty interpretation in order to recapture the real spirit of the Treaty.\footnote{McHugh, supra note 584, at 314.} The Tribunal has constantly referred to the Treaty of Waitangi as something more that a "sum total of its component written words". The Treaty is rather "the foundation for a developing social contract" with a wairua (spirit of its own).\footnote{Ibid.} The Tribunal "...does not presume that a settlement can be a once and for all affair, for a political and social contract between two peoples is by its very nature something to be developed over time. It is not capable of a finite settlement at any particular stage in history."\footnote{NOTE: "Perhaps more significantly, we have not adopted the Canadian opinion that tribal claims can be bought off with a price paid for the cession of rights. Aboriginal rights are endemic. They belong as much to future generations as the present and cannot be for sale. (...) Nor have we followed the Australian example of seeking a framework of particular laws in advance. We have opted instead for the longer term development of a political, social and legal framework from the experience of a case by case analysis and the continuance of political negotiations outside of the Tribunal." Durie (1986), supra note 668, at 236-237. Canadian Bar Association, New Zealand's Waitangi Tribunal: An Alternative Dispute Resolution Mechanism (undated) at 2.} 

Moreover, Chief Judge Durie sees the Tribunal as serving an important function in explaining a Maori world to a predominantly Western society.\footnote{Durie (1986), supra note 668, at 237.} In fact, a recent Report on the Social and Economic Impacts of Aboriginal Land Claim Settlements reveals that "New Zealand society has become progressively more aware of Maori culture and language. This has been achieved largely through Maori self-awareness, which was increased by the land claims movement."\footnote{ARA Consulting, supra note 586, at 33.}
The Waitangi Tribunal also plays a role in reconciling and healing and, as such, it appears to be interested in social justice in the widest sense. The members of the Waitangi Tribunal have assumed this complex role of change agents. For them the vision is one of the Tribunal as a "...bicultural partnership fashioning a new approach to law making, the formation and delivery of public policy and services within a single jural order with bicultural capabilities." Further, according to Durie, "[i]t is also helpful, in Maori terms, that those chosen for the Tribunal should be able to assist their people to work through the past in order to grapple with a perspective for the future."

D. Credibility and Legitimacy: Different Views

On the whole the Tribunal has managed to achieve and retain a remarkable level of legitimacy and respect. Many commentators agree that, since 1983, the Waitangi Tribunal has achieved considerable stature and profile in New Zealand society, not to mention mana in the Maori community. In large part this appears to be the result of its bicultural approach and its concern to ensure a practical and reasonable application of the principles of the Treaty of Waitangi.

There are, of course, those who disagree with this happy picture. One notable dissenter is Jane Kelsey of the Faculty of Law at the University of Auckland, who, from the perspective of a critical legal studies scholar, has conducted a severe critique of some reports of the Tribunal, arguing that the Tribunal "...has backtracked on the question of whether the Treaty of Waitangi guaranteed Maori sovereignty and accusing it of capitulating to a 'redefinition' of the principles of the Treaty of Waitangi by the ordinary courts." She is of the opinion that

[t]he Tribunal’s organization grew increasingly bureaucratic while its personnel became Pakeha-dominated and marginalized by the government. Hearings proved to be a drain on the claimants' resources, with few prospects for tangible returns even in successful cases. In short, not only had

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723 Durie (1986), supra note 668, at 238.
725 Durie (1986), supra note 668, at 237.
726 McHugh, supra note 584, at 330-331.
727 Boast, supra note 670, at 224.
the Tribunal ceded the symbols of Maori sovereignty to the Crown, but it had momentarily co-opted Maori interests in an act of 'legal imperialism'.

From the Maori perspective, the Tribunal's lack of adjudicative powers is also a major problem. One Maori author has said that

[as] the Tribunal’s powers are strictly limited and its role primarily recommendatory, the Maori struggle for justice continues to largely fall in the barren and stony ground of democratic fairness and bona fide. (...) In terms of access to real justice, when stripped of cosmetic rhetoric, many Maori see the Tribunal as little more that a stream vent, tied to a facility for tribal research and a publicity platform of sorts.

E. Current Difficulties

Although the Waitangi Tribunal is attempting to assume a significant role in shaping the future of New Zealand and in resolving Maori claims, it faces serious practical difficulties which deserve to be mentioned. First, there are over 450 claims now waiting determination. The Tribunal has sufficient staff and resources to dispose of only two or three a year. The government recently committed itself to resolve all the claims by the year 2000. Obviously, something will need to be done. Secondly, there is serious concern about the substantial amount of compensation that may be due to the Maori. The New Zealand government recently proposed, without Maori consultation, a $1 billion fiscal cap on the resources devoted to settling all the claims. This amount includes the assessed value of land and other resources used to settle claims, including the value of certain claims which have already been settled.

This proposal, which is neither a policy nor legislation yet, has been severely criticized by Maori people for many reasons including the process adopted in the development of the proposal, the principles upon

728 Kelsey (1991) at 128, quoted in Fleras and Elliot, supra note 63, at 191.
730 NOTE: However, it seems that there would be only about 12 major claims. The other claims would be mostly duplication, i.e. more than one person submitting the same claim. Statement made by S.P. Bryers, Senior Counsel before the Waitangi Tribunal on behalf of the Ngati Awa Tribe, New Zealand at Conference Making Peace and Sharing Power - A National Gathering on Aboriginal Peoples & Dispute Resolution, Victoria: April 30-May 3, 1996).
731 Wilson, supra note 573, at 253. See also Durie (1995), supra note 679, at 103. NOTE: Durie stated that the Tribunal’s budget for 1994-1995 was $3,408,000 and this is not sufficient.
which the proposal is based, the assumptions made in justification, and the framework within which the proposal has been drafted. One author has stated that "...justice will not be served and full and final settlements will never be achieved if claimants do not feel that their claims have been adequately dealt with." Finally, controls are also imposed in claimant research expenditure. Chief Justice Durie reports that the budgetary allocation of $400,000 for claimant research has proved to be too limited for the tasks the claimants must perform. The Tribunal therefore decided to reduce the number of hearings to target funds to research but this led to claimant dissatisfaction and to a process that was perceived as less "people-empowering". Consequently, the Tribunal recently decided to require that all research be compiled before hearing, that procedural and research issues be settled at preceding conferences and the hearing of the people’s evidence be severed, in hearing, from academic submissions and legal argument.

F. Other Processes and Institutions

The Tribunal is not the sole institutional means for resolving Maori grievances in New Zealand. Some have warned that New Zealand should not be "...characterised as a jurisdiction which typifies or exemplifies a Tribunal-type method of resolving land claims and other issues and grievances of the indigenous population of the state. The Tribunal is flanked by a plethora of other institutions and processes." 

1. Direct Negotiation

The Waitangi Tribunal is not the only dispute resolution mechanism available to Maori who seek redress for violation of the Treaty of Waitangi. Direct negotiation and mediation are other alternatives which are encouraged by the Crown as being lower cost options to a full Tribunal hearing.

733 M.H. Durie, supra note 732, at 110.
734 Wickliffe, supra note 578, at 217.
736 Boast, supra note 670, at 235.
737 Wilson, supra note 573, at 251.
In December 1989, the New Zealand government established the Crown Task Force on Treaty of Waitangi Issues. The Task Force comprises a special standing committee of Cabinet chaired by the Minister of Justice and a core group of officials from Government departments and agencies involved with Treaty matters. One of the Task Force’s responsibilities is to oversee direct negotiations between Maori claimants and the Crown when all the parties are willing to see if progress can be made through this process. Then, the Treaty of Waitangi Policy Unit, located in the Department of Justice, is responsible for direct handling of the negotiation.738 The practice of the Crown is to agree to direct negotiation of claims provided that four criteria are met: (1) the person(s) acting on behalf of the claimants properly represent(s) all those involved in the claim; (2) both sides have at least a measure of agreement about the underlying facts of the claim (but not necessarily how they ought to be interpreted); (3) both sides are prepared to abide by any agreement; and (4) the claim does not present new policy issues not yet fully considered by the Crown.739

Claimants can request to negotiate before the matter has been referred to the Waitangi Tribunal. The Tribunal can also recommend on its own initiative that negotiation takes place. If claimants or the Crown decide at any point that progress is not being made in the negotiation, they retain the right to end the negotiation and have their case referred to the Tribunal. Normally, a negotiation of Treaty grievances proceeds in three stages: (1) negotiation of a framework agreement; (2) agreement-in-principle; and (3) detailed agreement.740

2. Mediation

It is open to the claimants and the Crown to agree at any point, either before, during or after direct negotiations or a Tribunal hearing, that a mediator be appointed to facilitate consideration of a claim.

738 Ibid, at 251-252. See also Boast, supra note 670, at 237-238. NOTE: The Treaty of Waitangi Policy Unit also prepares general policy advice and deals with the formulation of responses to Waitangi Tribunal recommendations.
739 Wilson, supra note 573, at 251-252.
740 Ibid, at 252.
The Tribunal itself may also take the initiative and suggest that a mediator be appointed. The mediator will be chosen by agreement between the parties and will attempt to assist them in resolving a claim or specific matters within a claim. As with negotiation, both the claimants and the Crown retain the right to refer the matter to the Waitangi Tribunal if they are of the view that progress is not being made or that the mediation has failed.  

3. Court System

Claimants can always have resort to the traditional court system, even after either negotiations, mediation, or a hearing at the Waitangi Tribunal. This option remains available at all times whether other processes are not selected or if they failed to produce a satisfactory resolution.

4. Interplay

The interaction between the work of the Tribunal with governments and the courts seem to have given more power to the Tribunal than what was originally intended. Sharp explains that "...as law is the language in which the Government commanded its people, so it found itself commanded by law to rely on the Tribunal in ways it never seems to have contemplated." He then adds that this dynamic

...was not well explained to the public, and the lack of explanation in turn led to the Tribunal’s power over the imaginations of the peoples in 1987, 1988 and into 1989 being very great: greater by far than its legal power (narrowly defined) would have suggested, but perhaps no greater than its strategic position in the politics of the times warranted.

The interplay between the Tribunal and the courts, and the legislature has been further explained by Keith:

On the claimants’ proposal the Tribunal recommends action to the executive which proposes amendments to the legislature which enacts the proposal in terms which the Court of Appeal interprets as placing important obligations in the executive which negotiates with Maori and proposes further agreed legislation, noted by the Court, which Parliament enacts conferring further powers on the Tribunal and safeguarding the disputed assets against transfer in breach of the principles of the Treaty.

Ibid.

Ibid.

Sharp, supra note 667, at 78.

Ibid.

Therefore, it has been suggested that it is through the interplay of the Waitangi Tribunal, the courts and the legislature that "...a bicultural methodology in the management of law can be seen to be emerging."\textsuperscript{746}

G. Legal Pluralism or Bicultural Approach

The question I wish to address now is whether it is theoretically possible to speak of legal pluralism when discussing the Waitangi Tribunal. Considering that the Waitangi Tribunal was created by the New Zealand legal system and that this state legal system is firmly sourced in English law which strictly operates in a monocultural manner, in that sense, can a tribunal of this state legal system be a vehicle of legal pluralism?\textsuperscript{747}

1. Legal Pluralism

1.1 Definition

Legal pluralists are interested with the coexistence of different forms of law and basic legal alternatives within one state. According to John Griffiths,

\begin{quote}
a situation of legal pluralism is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.\textsuperscript{748}
\end{quote}

Further Sack explains that,

\begin{quote}
[\textit{I}legal pluralism is more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised - and controlled - rather than eliminated. Legal pluralism thus involves an ideological commitment. However, this commitment takes the form of an opposition to monism, dualism and any other form of dogmatism instead of prescribing a certain, positive
\end{quote}

\textsuperscript{746} Durie and Orr, \textit{supra} note 666, at 81.

\textsuperscript{747} NOTE: For instance, by the non-recognition of Maori laws and customs as valid sources of law. Williams (1994), \textit{supra} note 711, at 198-199.

\textsuperscript{748} J. Griffiths, "What is Legal Pluralism?" (1986) 24 Journal of Legal Pluralism and Unofficial Law 1 at 39.
course of action (...) [The] counterpart of legal pluralism is an ideology which aims at a global unification of law and which deserves the ugly label “legal unification.”

Laura Nader points out that pluralism “...is not something that is explicitly recognized in the area of legal justice, for to recognize the legitimacy of other ideas of justice is to cast doubt on one’s own ideas. In particular, one might hesitate to give standing to other ideas of justice because this might in turn affect the application of justice in one’s own realm.” Nader suggests that...

...whenever two or more legal cultures apply to the same group, there is what Bohannan (1957) refers to as a “working misunderstanding”. In all these pluralistic situations it appears that fairness, or something called “justice”, is difficult for the national legal system to achieve. (...) It is all the worse when the dispute involves litigants of unequal status or different group membership, for in such situations the grievance is usually heard within the legal sphere of the dominant culture, a culture whose values are usually quite alien to one of the parties.

1.2 Application to the Waitangi Tribunal

The literature reveals different views as to whether the Waitangi Tribunal brings about legal pluralism. David Williams has studied this question and it is interesting to look at the evolution of his opinion concerning this issue. In 1984, Williams stated that there was no doubt that he perceived the Waitangi Tribunal as being committed to legal pluralism. In support of this opinion, he referred to the reports of the Tribunal which he thought “...indicated a strong opposition to dogmatic monism and “legal unificationism”. He was of the view that the Tribunal was “...impelled by an ideological commitment to recognise Maori law, values and spirituality as a positive force.” Moreover, he felt that the composition of the Tribunal and the Maori procedures permitted in hearings held from 1982 onwards “...showed promise of basic legal alternative developing and coexisting with the dominant Pakeha norms and processes.” However, he also pointed out the danger of legal pluralism:

A facade of legal pluralism may conceal a reality of monocultural legal domination. This may well be a warning for scholars to be cautious in their analysis of attempts by a modern state legal system to operate in a pluralistic manner. There is always a danger that “people’s law” becomes

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751 Ibid. at 157.
752 Williams (1994), supra note 711, at 200.
753 Ibid.
754 Ibid.
And then, referring to the Waitangi Tribunal, he added that

[...]he hope of those promoting legal pluralism, as for example in recent initiatives in New Zealand by the Waitangi Tribunal (...), is that pluralism is a necessary ingredient in the legal system of a culturally diverse social formation, especially, as in the New Zealand situation, where there is a significant but generally disadvantaged population of the indigenous people of the land.\(^{756}\)

In 1990, Williams started to see the problems with integrating Maori concepts into the mainstream of the traditional legal system. He wrote that “[w]hen a legal system, which has historically operated in a monocultural manner, takes steps towards legal pluralism, there is a distinct danger that the meanings and values attached to Maori concepts, when used in an iwi or hapu context, will be distorted and amenable to manipulation by others when they are used in the official discourse of the state legal system.”\(^{757}\) He concluded that the future would show whether New Zealand common law was going through a genuine paradigm shift or “...merely an adjustment of old legal orthodoxies to the modern context.”\(^{758}\)

Finally, in an article published in 1992, Williams reassessed his previous views and stated that “...there can now be no doubt whatsoever that the Tribunal directly serves the interests of the SLS [state legal system] by incorporating Maori iwi within the hegemony of the state’s dispute resolution strategies.”\(^{759}\)

Williams admitted that he had been influenced by the arguments of Kelsey who summarized the concept of “incorporated justice” as follows:

Those who harbour grievances are persuaded to abandon radical measures, such as boycotts or militant action, in favour or orderly and peaceful resolution under the protection of informal state institutions. The conflict is redefined, its manifestation controlled within state-prescribed limits, and the demands of the grievants moderated. Voluntary submission to the process increases the likelihood of consent to the outcome. The lack of any real alternative further helps to encourage grievants to accept, and even to propose, compromises which fall short of their actual entitlement, in return for the willingness of the state to meet them halfway. Continued resort to

\(^{755}\) D. Williams, “The Recognition of ‘Native Custom’ in Tanganyika and New Zealand - Legal Pluralism or Monocultural Imposition?” in Legal Pluralism, Sack and Minchin eds. (ANU, Canberra, 1986) at 152.

\(^{756}\) Ibid.


\(^{758}\) Ibid.

\(^{759}\) Williams (1994), supra note 711, at 206.
extra-legal tactics by other grievants can be discredited by reference to those who have accepted the opportunity, which the state has provided, to address their concerns responsibly.760

In comparing the Maori militancy from the early 1970s to early 1980s and the frequent resort to extra-legal tactics at that time with the “juridification of conflict” in the most recent decade, Williams argues that “...there can be no doubt in my view that the concept of incorporated justice is entirely apt to describe the changing nature of interactions between Maori iwi and state dispute resolution bodies over the last twenty years in this country.”761 He then concluded that the “Tribunal has acted as an instrument of incorporated justice and that this conclusion is consistent with viewing that body as mediating a hegemonial relationship between the state legal system (SLS) and the Maori non-state legal system (NSLS).”762 Williams finally rejected the idea that the Waitangi Tribunal can be a vehicle of legal pluralism.

2. Bicultural Approach

It is questionable whether there was ever a real intention on the part of the New Zealand government or the members of the Waitangi Tribunal to achieve legal pluralism. In fact, Chief Judge Durie and Professor Orr stated that in considering the accommodation of Maori in the law, the Tribunal was faced with various options, including legal pluralism, and the division of legal services to provide separate units for Maori. However, it rather chose an approach which “…might be described as a single jural order with bilingual capabilities as the option most expressive of the Treaty and best suited to the New Zealand milieu.”763 In fact, because of its limited powers, the Tribunal cannot itself initiate a new legal methodology, but as suggested by Durie and Orr, the Tribunal “...is at best a harbinger of one to come.”764

In order to adopt a bicultural approach, it is essential to accept the idea that a form of legal order is present in all societies. As noted by Durie and Orr, it is “…necessary to maintain a respect for the laws of

761 Williams (1994), supra note 711, at 207.
763 Durie and Orr, supra note 666, at 63.
764 Ibid.
both cultures and not to assume that the British alone have laws and legal procedures. That in itself is an exemplification of the spirit of the Treaty of Waitangi.”765 They explain that “Western law is not universal, despite its adoption by many non-Western countries as a basis for their own state legal systems. Nor is indigenous law and practice invalidated because the peoples concerned have willingly received Western law, or have had it imposed upon them.”766

It was suggested that the term “bicultural” should be understood in terms of the “accommodation” of Maori rights by the infusion of a Treaty jurisprudence into the existing law through five methods: (1) the interpretation of legislation relating to Maori; (2) the application of general laws to Maori circumstances; (3) the development of special statutory provisions for Maori; (4) the re-examination of the relevant common law, and (5) the review of legislation against the backdrop of the Principles of the Treaty.767

Therefore, it appears that the goal and spirit of the Waitangi Tribunal is to allow Maori values to be set out as valid in their own right and on their own terms. However, it seems that there is still a “…long legislative reform road to be traveled before Maori spirituality can receive the recognition which the Tribunal has called for, and many vested interests may intervene to frustrate Maori aspirations.”768 Meanwhile, however, one must recognize that the Tribunal has given some practical reality to the rhetoric of the Governor General who said during his speech on Waitangi Day 1981: “I am of the view that we are not one people, despite Hobson’s often-quoted words, nor should we try to be. We do not need to be.”769

765 Durie and Orr, supra note 666, at 69. NOTE: Durie explains that the Maori legal order was values oriented - not rules based. He adds that “So strongly was adherence to ancestral precedent ingrained, that disputes could be settled without the mediation of an external agency. The adherence to principles, not rules, also enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments.” E.T. Durie “Custom Law: Address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 VUWL 335, at 331. NOTE: Moreover, Maori people are not entirely enamoured of western legal processes or western legal norms. Durie notes that “[t]hey refer not so much to the Rule of Law as to Te Riri Ture - the anger of the law.” Durie, “Protection of Minorities” (1987) NZLJ at 260.
766 Durie and Orr, supra note 666, at 69.
769 Ibid.
Part III The British Columbia Treaty Commission

A. Background

The land question in British Columbia is a major problem that has remained unresolved for more than 125 years. The treaties signed in that province - the Douglas Treaties and Treaty 8 - cover only small areas of the province. Today, comprehensive claims negotiations are a continuation of the treaty-making process the Crown has pursued since colonial times and it is now considered by many as being the single biggest public-policy issue facing British Columbia. A climate of uncertainty exists for everyone in the Aboriginal claims question: governments, First Nations, and industry as well as other third party interests including environmentalists, residents of claimed areas and the general public. The current situation in B.C. is both the product and the expression of more than twelve decades of misunderstanding between First Nations and the Euro-Canadian society.

After Confederation, the government of B.C. took the position of denying the existence of Aboriginal title or special rights and refused any involvement claiming that comprehensive claims were a federal responsibility. However, during the 1980s, due to the activities of the local and provincial First Nation organizations, the growing public support for Aboriginal issues, and a series of court decisions in favour of Aboriginal people, the provincial government became more responsive to Aboriginal concerns. In 1988, the province formed the Ministry of Native Affairs (now Aboriginal Affairs). In 1989, the Premier’s Council on Native Affairs was created to meet with First Nations and prepare recommendations to the government on a range of Aboriginal issues. The Premier’s Council on Native Affairs recommended that the B.C. government “...should move quickly to establish a specific process by which...”

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770 NOTE: Comprehensive claims are based on the concept of continuing Aboriginal rights and title which have not been dealt with by treaty or other lawful means. Elliot (1992), supra note 19, at 172.
771 Cassidy and Dale, supra note 32, at viii.
772 Aldridge, supra note 84, at 1.
773 Cassidy and Dale, supra note 32, at 12.
774 Stokes, supra note 26, at 182.
775 Ibid, at 182-183.
aboriginal land claims may be received and placed on the negotiation table". In August 1990, the provincial government agreed to join the First Nations and the government of Canada in negotiations, and proceeded immediately to enter the negotiations underway between the Nisga’a and the federal government.776 Premier Vander Zalm justified the policy shift by asserting that the province had a "strong moral obligation to set the historical record right in our dealings with Indian people" and an obligation to represent the interests of British Columbians at negotiations affecting B.C.’s land, resources, and economy.777

B. Establishment of the British Columbia Claims Task Force

In October 1990, B.C. First Nation leaders met with the Prime Minister of Canada and then with the Premier and Cabinet of B.C. urging the appointment of a tripartite task force to develop a process for negotiations. The federal and provincial governments agreed. On December 3, 1990, the Task Force was established by agreement between the government of Canada, the government of B.C., and representatives of the First Nations.778 Leaders from First Nations across B.C. appointed three members to the Task Force. Two members were appointed by the federal government, and two by the provincial government.779 In the course of its deliberations over five and a half months, the Task Force met with a number of people who had experience in similar negotiations and considered 17 written submissions received from interested persons and organizations who responded to a province-wide request.

C. The Report of the British Columbia Claims Task Force


776 B.C. Task Force, supra note 25, at 15; Tennant (1993), supra note 27, at 1.1.06.
779 B.C. Task Force, supra note 25, at 15.
1. **New Relationship**

The First Nations in B.C. have made it clear that they want a peaceful political resolution of the land question. It has therefore been suggested that voluntary negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants should be used to resolve land claims in B.C.\(^780\) This approach will also be conducive to the development of a new relationship between Aboriginal and non-Aboriginal society. In fact, everyone recognizes that “[t]he status quo has been costly. Energies and resources have been spent in legal battles and other strategies. It is time to put these resources and energies into the negotiation of a constructive relationship.”\(^781\)

2. **Scope of Negotiations**

The Task Force recommended that treaty negotiations between Aboriginal groups and governments deal with all issues of fundamental importance to their relationship and that no party be able to dictate to the other what these fundamental issues are. Consequently, it was suggested that the parties remain free to raise any issue which they view as significant to their relationship and that there should be no unilateral restriction by any party on the scope of negotiations.\(^782\) The Task Force recommended a list of issues which they perceive as being significant in the negotiation of the new relationship. This list included the issue of self-government, the central problem of the land, sea, and resources, the question of the financial component, the issue of the jurisdiction for government services, the objective of certainty, the formula of amendment of treaties, and finally the question of how the treaty should be implemented.\(^783\)

3. **Characteristics of the Process**

According to the Task Force, in order to achieve successful and lasting agreements, the process of negotiations should embody the following characteristics: (1) it must be a voluntary process where groups who prefer to resolve their disputes in other ways have that right; (2) agreements must be carefully drafted

\(^782\) B.C. *Task Force*, *supra* note 25, at 21.
so that they work, they are supported by Aboriginal and non-Aboriginal people, and they stand the test of time; (3) there must be a serious commitment of all the parties to reach agreements and parties must match their commitment with sufficient resources to support the process; (4) the process must be located and managed in B.C.; (5) the process must provide a level playing field for the participants; (6) no one party should have control over the process, all three must be equal partners in its management; (7) the process must encourage effective negotiations which are efficient and avoid creating barriers to progress; and (8) each party should clearly understand its duties and responsibilities in the negotiation process.\(^7\)

4. Establishment of the B.C. Treaty Commission

The Task Force recommended the establishment of the British Columbia Treaty Commission. The proposed Commission would be a tripartite organization appointed by the First Nations, the federal and provincial governments. The mandate of that Commission would be first to co-ordinate the start of negotiations. After the negotiations had begun, the parties would assume responsibility for co-ordination of their activities and set their own schedule. The role of the Commission would then change to one of monitoring the progress that the parties make toward the targets they have set. The Commission would also ensure that the process is fair and impartial, that all parties have sufficient resources to research and negotiate, and that the parties work effectively to reach agreements.\(^8\)

D. The British Columbia Treaty Commission

The federal government, B.C. and the First Nation Summit accepted all 19 recommendations of the B.C. Claims Task Force. In September 1992, the B.C. Treaty Commission was established. The newly-elected Premier of B.C., Mike Harcourt, declared: “Together, we are committed to reaching just and honorable treaty settlements that acknowledge First Nations rights to participate in the economic and social fabric of this province as equal partners”.\(^9\) According to B.C. Aboriginal Affairs Minister Andrew Peter, the

\(^7\) Ibid, at 33-35.
\(^8\) Ibid, at 38.
intention of the province is "...to end 125 years of injustice in British Columbia through the negotiation of just and honorable treaty settlements with First Nations." The objective of treaty negotiations is therefore to "...translate historic Aboriginal rights into contemporary terms that balance current interests and work with the modern economy in British Columbia." In April 15, 1993, a Chief Commissioner and four Commissioner were appointed. The Chief Commissioner was appointed by the three parties, two Commissioners were appointed by the First Nations Summit and one was appointed by each of the federal and provincial governments.

The British Columbia Treaty Commission Agreement states that the primary role of the Commission is "to facilitate the negotiation of treaties and, where the parties agree, other related agreements in British Columbia". The Commission does not directly mediate disputes but it can provide trained mediators where the parties request this kind of assistance. Moreover, if one party is slowing down progress, the Commission may be able to encourage that party to find different solutions. To date 48 First Nations representing 70 per cent of the Aboriginal community in B.C. have filed intentions to negotiate treaties. The total land area under claim exceeds 111% of the province because of overlapping claims.

1. Pre-Negotiation Issues

1.1 Question of Accessibility

The negotiating process is open to all First Nations in B.C. even when treaties were signed prior to the entry of B.C. into Confederation. It was decided that the existence of these treaties should not exclude First Nations from the negotiation process because not only are there questions concerning the making of

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790 British Columbia Treaty Commission Agreement, section 3.1.
791 Fisher, supra note 789, at 3.1.09.
these treaties, their interpretation and their implementation, but more importantly, the new relationship will encompass a wider range of issues than do these treaties.\footnote{792}{BC Task Force, supra note 25, at 48.}

1.2 Organization of First Nations

The question of how First Nations should organize themselves for negotiation purposes is a delicate one. In the late 1960s and early 1970s the federal government urged bands in B.C. to group together to pursue a collective approach to land claims negotiations. Province-wide organizations were formed. Negotiations never materialized and the insistence on establishing a province-wide Aboriginal organization was discontinued. Resurrecting this approach for the purpose of negotiating treaties is impractical and doomed to failure.\footnote{793}{Ibid, at 51.} The essential factor in organizing First Nations is that the organization which is negotiating on behalf of a group of native people has the support of these people who will ultimately be the ones to ratify the treaty. Accordingly, it was decided that “[t]he manner in which First Nations organize and structure themselves for treaty negotiations must be left to them to decide.”\footnote{794}{Ibid, at 50.}

1.3 Funding for Negotiations

Critical to the success of the Treaty process is the provision of adequate funding for all parties involved in negotiations. This is critical in order to redress the imbalance of power between First Nations and governments so that First Nations can prepare for and carry out negotiations on an equal footing with the federal and provincial governments. This can only be achieved if First Nations have adequate resources available to them and if they are free to plan and manage their own negotiations without having their expenditures reviewed by governments.\footnote{795}{Ibid, at 55-56.} The needs of First Nations vary considerably depending on such factors as their current degree of readiness, availability of resources and expertise, diversity of membership, travel requirements, and experience in negotiations.\footnote{796}{Ibid, at 56.} Under the Treaty Commission process, it is the Commission itself which is responsible for allocating funds to First Nations through
loans and contributions. More importantly, First Nations are accountable to their own people, and not to the Commission or to governments for the specific expenditures.\textsuperscript{797} The funds are provided by the federal and provincial governments. Eighty per cent of the funding is in the form of a loan from Canada, and twenty per cent is a contribution, which comes sixty per cent from Canada and forty per cent from B.C.\textsuperscript{798}

1.4 Overlapping Territories

In many instances, traditional territories of First Nations overlap one another. This will not, however, prevent First Nations from entering the Treaty process. It was decided that Aboriginal groups would have the sole responsibility to resolve their overlapping claims outside of the Treaty process. However, while it is not necessary to settle this issue prior to the beginning of the negotiations, the Treaty Commission requires that First Nations have a process for resolution in place before the conclusion of a treaty. The Commission can also play a role in providing advice to the First Nations on the various dispute resolution services available to them to resolve overlapping issues. It is also possible for First Nations to require funding from the Commission to carry out the necessary studies to assist in resolving overlaps.\textsuperscript{799}

In May 1995, B.C. restated its position that it would not agree to a treaty settlement that includes land subject to an overlap dispute, unless an accord has been reached among the First Nations concerned. The province explained that it could however agree to non-exclusive arrangements such as provisions for hunting or fishing in the area of an overlap dispute. These arrangements would not, in any case, interfere with the rights of the other First Nations concerned, or with the rights of non-Aboriginal British Columbians.\textsuperscript{800}

2. Stages of Negotiation

\textsuperscript{797} Ibid, at 37.
\textsuperscript{799} B.C. Task Force, supra note 25, at 52.
\textsuperscript{800} “B.C.’s Approach”, supra note 788, at 12.
The Treaty Commission’s negotiation process can be divided into two main parts: readiness and monitoring. The Commission facilitates and encourages all negotiations to follow a six-stage process. Stages 1 and 2 fall under the ‘readiness’ category and stages 3 to 6 fall under the ‘monitoring’ category.

### 2.1 Readiness

One of the major duties of the Commission is to co-ordinate the start of negotiations. This requires substantial communication with all three parties to ensure they are properly prepared to begin negotiations.

**Stage 1 - Statement of Intent:** The process begins when the Commission receives a statement of intent from a First Nation. The statement of intent is a short document which identifies the First Nation, the general geographic area of the First Nation’s traditional territory and a formal contact for communications.

**Stage 2 - Preparation for Negotiations:** Within 45 days of receiving a Statement of Intent, the Commission must convene an initial meeting of the three parties. This meeting gives the parties an opportunity to exchange information and to discuss a number of matters related to preparing for negotiations. “These meetings usually take place in the traditional territory of the First Nation to give the community the chance to be directly involved at this ‘ground breaking’ stage.”

The Commissioner’s role as “keeper of the process” is found at this stage. The Commission assesses whether all parties are ready to begin negotiations based on the following criteria: A First Nation is “ready” when it has identified subject matters it wishes to negotiate, consulted its communities, established an organization sufficient to support the negotiations, and adopted a ratification procedure. When needed, a First Nation should also have begun to address any overlapping territorial issues with

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neighbouring First Nations. Governments are “ready” when each has identified the subject matters it wants to include in negotiations, established a mechanism for consultation with non-Aboriginal interests, researched the background of the communities and interests likely to be affected by the negotiations, and adopted a ratification procedure. They must also confirm that they have appointed negotiators, given them a comprehensive and clear mandate, and have sufficient resources to carry out the negotiations. The Commission then decides that all three parties have met the criteria for readiness and confirms that the table is ready to begin negotiation of a Framework Agreement.\textsuperscript{802}

2.2 Monitoring

Once the parties have commenced negotiations, the Commission’s duties relate to its monitoring role to ensure that the process is moving forward.

Stage 3 - Negotiation of Framework Agreement: A Framework Agreement is a negotiated agenda which identifies the subjects and objectives of the negotiations and establishes a timetable and any special procedural arrangements for the negotiations.

Stage 4 - Negotiation of an Agreement-in-Principle: The parties begin substantive negotiations to reach the general terms of what will form the basis of the treaty. The ratification process of the agreement-in-principle provides the parties with the opportunity to review the emerging agreement and approve, reject or seek amendment of its provisions and provide their negotiators with a mandate to conclude a treaty.

Stage 5 - Negotiation to Finalize a Treaty: The treaty will formally embody the agreements reached in the agreement-in-principle. Technical and legal issues will be resolved at this stage. It will also provide for an implementation plan by which the parties will give effect to the agreements.

\textsuperscript{802} B.C. Task Force, supra note 25, at 44-45.
Stage 6 - Implementation of the Treaty: The parties will implement the treaty in accordance with the procedures agreed upon during the negotiations. At this stage, issues about implementation can be the subject of discussions over which the Commission has an overseeing function.803

3. Related Issues

3.1 Cost of Settlements

In June 1993, despite the uncertainty over the eventual cost of settlements, the federal government and the province of B.C. agreed to a complex cost-sharing formula. Under this cost-sharing memorandum of understanding, the provincial government’s share of treaty settlements will primarily be in the form of Crown land and the federal government’s share will primarily be in the form of money.804 Over the course of all treaties, the estimated provincial share of money and resource will be approximately 17% of treaty settlement costs.805

The final cost of treaty settlements is not known. In October 1995, the Minister of Aboriginal Affairs, John Cashore, released some preliminary numbers suggesting that treaty settlements in B.C. could cost taxpayers approximately $10 billion which represents about $5 billion in cash and $5 billion worth of land over 20 years.806 Later that year, the B.C. government commissioned a study on the projected financial and economic impacts of treaty settlements. The Vancouver consulting firm KPMG estimated the total settlement financial costs in B.C. to range between $5.7 and 6.2 billion. With all the direct and indirect costs, it is estimated that the dollar cost to the B.C. government would range between $1.4 and $2.1 billion over the next 40 years.807

803 B. Fisher, supra note 789, at 3.1.08.
804 M. Smith, supra note 32, at 98.
805 "B.C.'s Approach", supra note 788, at 14.
806 S. Bell, “Indians land claims could cost taxpayers $10 billion” Vancouver Sun (October 18, 1995) A1.
Despite assurances to the contrary, private property may indeed be at stake. Minister John Cashore concedes that the potential scope of claims may include expropriations of private interest:

> It may be necessary to purchase interests held by persons other than Canada, British Columbia or the First Nations. The types of interests which might have to be purchased would include fishing vessels and licenses, forest tenure, traplines, mining interests and other tenures ... I can say that anyone whose legal interest is expropriated will be fairly compensated. 808

The federal government said that it would pay the province for lost resource revenues. These lost revenues could be very important. A Price Waterhouse study concluded that the lands claimed, even as early as 1992, encompassed resource industries generating 200,000 jobs and $17.5 billion in yearly revenues. 809 The province has agreed to pay 50% of the cost of compensating dispossessed Crown land lease-holders in claim areas. The federal government will pay the other half. 810

As Aboriginal Affairs Minister John Cashore pointed out, the costs and benefits of resolving land claims must also be considered in the context of the cost of failing to conclude treaties. The cost of not resolving the land question includes increased civil unrest in terms of blockades and other actions which tie up resources, the cost of fighting continual court actions brought by Aboriginal people seeking their rights and the cost of continued investment uncertainty. 811

### 3.2 Non-Aboriginal Interests

Modern treaties will significantly affect all British Columbians as they will cover a variety of political, economic and social issues, as well as the ownership of and jurisdiction over land, sea, and resources. 812 Accordingly, a wide-range of groups have asked to participate in the development of treaties with First Nations. The federal and provincial governments have been given the responsibility of establishing ways of consulting with non-Aboriginal interest groups. 813 However, mere consultations do not seem to be

808 "Responses to Questions from Mike Scott MP, submitted by Jack Weisgerber, MLA, to Minister John Cashore for reply" (1994) at 4, quoted in M. Smith, supra note 32, at 98.
809 Ibid, at 98.
810 Ibid, at 99.
811 KPMG Report, supra note 807, at 4.
812 B.C. Task Force, supra note 25, at 54.
813 Ibid.
sufficient for third-parties who have criticized both levels of government for not keeping them adequately informed during past negotiations. This has led to demands for a place at the negotiating table and for the opportunity to observe negotiations. These arrangements have however been considered impractical as they could impede progress in negotiations.  

Nevertheless, both levels of governments have tried to establish a structure for effective consultation with non-Aboriginal interests. In July 1993, Canada and B.C. created the Treaty Negotiation Advisory Committee (TNAC). This body is constituted of 31 members and the structure consists of one cross-cultural committee with an impartial chair, and a number of sectoral advisory committees (fisheries, energy, petroleum and mineral resources, lands and forests, wildlife and governance). These committees are to provide advice to ministers or their designates on matters related to treaties which may affect third-party interests. Members of all committees are jointly appointed by federal and provincial ministers through a nomination process of the organizations represented.

Moreover, in the Spring of 1993, the B.C. government reached agreement with the Union of B.C. Municipalities to provide a consultative mechanism with local governments when municipal interests are potentially affected in treaty negotiations. The Memorandum of Understanding recognizes that the land claim negotiation and settlement process “must be fair, open, principled and community based, and the process must be democratic, efficient, inclusive and acceptable to all parties.” To meet these objectives, the agreement provides that affected municipalities are to be “represented in the process of negotiating treaties as respected advisers” and may, in certain cases, have a seat at the negotiating table. Moreover, as a result of the Protocol Agreement between the Province and the Union of B.C. Municipalities, signed in September 1994, municipal representatives will form an integral part of regional negotiation teams.

814 Ibid, at 54-55.
815 First Annual Report, supra note 801, at 22.
816 B. Fisher, supra note 789, at 3.1.09; Third Annual Report, supra note 359, at 29.
817 First Annual Report, supra note 801, at 23.
818 M. Smith, supra note 32, at 90-91.
The preferred approach of the B.C. Treaty Commission is a “balance of openness and confidentiality, combined with broad public information programming.” The rationale behind this strategy has been explained in the following way:

Because of the nature of these negotiations, some discussions need to be conducted in confidence. Parties need time to explore interests and develop options in a safe and confidential environment. They need to develop trust among themselves. When they have narrowed the issues for continued discussion, the time should be appropriate for the talks to be open to the public. Main tables generally provide this opportunity. The public has everything to gain by supporting a process that allows for confidential exploratory discussions combined with open sessions.

3.3 Interim Measures Agreements

The negotiations of permanent treaties in B.C. is a laborious process which will take many years. While these treaties are being negotiated, the parties must balance their conflicting interests. It was decided that the most appropriate method would be the use of interim measures agreements. “Interim measures agreements are designed to provide First Nations with some assurance that resources or interests in land which ultimately might be negotiated in their favour would not, in the interim, be extracted without their interests being protected.”

Interim measures can also be an important indicator of the sincerity and commitment of the parties to the negotiation of treaties. In fact, under the rules of the Treaty Commission, the federal and provincial governments are required to provide notice to First Nations of any proposed developments in their traditional territories in order to protect interests prior to the beginning of negotiations and, when necessary, the parties can initiate negotiations for an interim measures agreement. The range of options for interim measures agreements includes: 1) notification to affected parties before an action is

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819 Third Annual Report, supra note 359, at 29.
820 Ibid.
821 B.C. Task Force, supra note 25, at 63.
822 M. Smith, supra note 32, at 99.
823 B.C. Task Force, supra note 25, at 63. NOTE: It is important to note that the settlement of an interim measures agreement will not limit the scope of negotiations, nor preclude any party from advancing propositions in the negotiations which are different from the agreement.
taken concerning matters which are or may be the subject of negotiations; 2) consultation with parties affected by any proposed action; 3) consent of one of the parties before action is taken; 4) joint management processes requiring consensus of all the parties; 5) restriction or moratorium on the alienation of land or resources.\textsuperscript{824}

On August 20, 1993, the government of B.C. entered into a Protocol with the First Nations Summit to govern the procedure for entering into interim measures agreements. Moreover, the federal government stated that it “...will seek to ensure that existing third party interests are identified and taken into account in the consideration of interim measures proposals and will not consider vetoes or freezes over development as forms of interim measures.”\textsuperscript{825}

3.4 Public Education and Information

All the parties involved in the negotiation of treaties must jointly undertake public education and information programs. On a province-wide basis, the Tripartite Public Education Committee (TPEC) chaired by the B.C. Treaty Commission, is implementing a public information program. The program involves a series of open houses and public forums in communities around B.C. in partnership with community colleges.\textsuperscript{826}

At the local level, federal negotiators undertake specific public information activities to enhance understanding and acceptance of both the treaty-making process and the resulting treaties. Generally, these activities are undertaken in concert with other parties to the negotiations, but negotiators can also pursue bilateral or independent efforts at keeping the public informed. Public information activities may include workshops, media interviews, open houses or other venues. One important initiative has been

\textsuperscript{824} Ibid, at 64.


\textsuperscript{826} Ibid, at 30.
initiated by the Ministry of Education in November 1995 with the introduction of the First Nations Studies curriculum for Grade 12.\textsuperscript{827}

\section*{E. Assessment}

According to the Commission, there is solid evidence that the Treaty process is working. However, it also admits that significant challenges have been faced by the Commission and the parties.\textsuperscript{828} I therefore propose to examine some of the difficulties with the process of the B.C. Treaty Commission.

\subsection*{1. Procedural Problems}

\subsubsection*{1.1 Openness}

\textit{i) Third-Party Representation}

Canada and B.C. have stated on many occasions that there will not be treaties without first involving the public and interested stakeholders in the process. However, as discussed earlier, the actual process does not provide for third-parties to be present at the negotiating table. The stakeholders are expected to rely on governments' officials to represent their interests. The Commission has noted the difficulty with this approach:

There has been public criticism of the consultation process, based mainly on a lack of trust that non-aboriginal interests will be properly represented at the table. Some interests have expressed their wish to be not only consulted but to have 'third parties' present at the table as part of the negotiating team. However, there are many 'third parties' and their interests do not always coincide.\textsuperscript{829}

It is true that there is some measure of consultation through the Treaty Negotiation Advisory Committee (TNAC) but this consultation contemplates its members offering advice to government negotiators rather than being directly involved in the negotiations. In addition, it appears that the members of this

\textsuperscript{827} Third Annual Report, supra note 359, at 30.

\textsuperscript{828} Second Annual Report, supra note 198, at 11. NOTE: For instance, public faith in the process was shaken in 1995 by media reports suggesting that Aboriginal groups were claiming virtually the entire province. Confidence was further eroded during the summer of 1995 when First Nations not involved in the treaty talks set up roadblocks to press their own agendas. See R. Ajello, "Bittersweet victory - The Nisga’a land claim deal faces stiff opposition” (Maclean’s, February 26, 1996) at 24.

\textsuperscript{829} Second Annual Report, supra note 198, at 14.
Committee must swear oaths of confidentiality which prevent them from communicating to the members they represent any meaningful information about the negotiations.830

Another problem concerns the involvement of municipalities which are particularly affected by the settlement of land claims.831 It was stated on many occasions that treaties will serve to clarify relationships between First Nations and local governments,832 and issues directly affecting municipalities, such as the municipalities' tax revenue base, will be discussed at the negotiating table.833 Given the importance and complexity of these issues, comprehensive discussions must occur among all the parties and municipalities must have a direct input on the final settlement.834 Municipalities have also complained about the lack of funding to prepare their positions in treaty negotiations. On October 3, 1995, B.C. municipalities filed a motion before the Union of B.C. Municipalities Annual Convention asking for more money from the provincial government to help them prepare for treaty negotiation with Aboriginal groups.835 Provincial funding to treaty advisory committees - the 10 regional groups that represent municipal interests in treaty talks - was capped at $250,000. The motion stated that “[i]t is estimated that each TAC will require a minimum of $55-60,000 per annum to operate.”836 Individual municipalities get no funding for treaties, although they will ultimately be forced to deal with many of the

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830 M. Smith, supra note 32, at 90-91.
831 NOTE: For instance, the province of B.C. noted that in certain circumstances, Crown lands located within municipal boundaries may be the subject of negotiations. It also stated that in the case where treaty settlement lands will be adjacent to municipal land arrangements will be made between municipalities and First Nations to ensure compatibility of land use planning and zoning processes in the adjoining areas.
832 “B.C.’s Approach”, supra note 788, at 6-7.
833 G. Hanson, “Where the Provincial Opposition Stands” in The Economic Bridge to Self Reliance Aboriginal Land Claims (Native Investment & Trade Association, Conference held on May 12-14, 1990) at 2.
834 NOTE: At least one political party in B.C. said it would give a more meaningful role to municipalities in the Treaty process. In October 1995, B.C. Reform leader Jack Weisgerber said that he would give local communities a veto on proposed treaty deals. “Any treaty that can’t pass the acid test of local approval is a treaty that should not be passed into law, let alone set in stone under the Constitution” J. Hunter and S. Bell, “Veto on treaty deals promised” Vancouver Sun (October 5, 1995) at A1. The settlement would go to a referendum in the local community at the same time the Indian band holds its referendum. If a majority in both communities approve, the agreement would go to the legislature for approval. D. Bramham, “Weisgerber: Crown Corporations on Hit List” Vancouver Sun (November 18, 1995) at C-10.
835 S. Bell, “Councils seek cash for Indian treaty talks” Vancouver Sun (October 3, 1995) at B1.
836 Ibid.
issues arising from treaty settlements. The shortage of money seems especially acute in the province's major urban area, such as the Lower Mainland municipalities, which have to work with several Aboriginal groups that are competing for the same lands.\textsuperscript{837}

It is essential that all parties involved in the negotiations of modern treaties be given a fair opportunity to participate fully, at the same playing level as other participants. Whether it is an interest group or a municipality, these parties have to be empowered so that their views are well-represented in the final treaties which will affect all British Columbians.

\textit{ii) Public Education and Information}

According to Chuck Connaghan, former Chief Commissioner of the B.C. Treaty Commission, when the process first started, the public had not been sufficiently informed about the role and mandate of the Commission. The information vacuum then was filled, at least in part, with incorrect information based more on fear than fact. As a result, this lack of information has left some people questioning the need to change the status quo.\textsuperscript{838} Connaghan noted:

\begin{quote}
The Commission also has concern about the response of the Principals to their obligation to inform the public about the historic need for treaty making in British Columbia and about the ways in which this need is being addressed. In the view of the Commission, the three Principals have been slow to proceed in this regard. It is clear that the absence of accurate information from the Principals has led, and will continue to lead, to apprehension and resistance from interest groups and the public.\textsuperscript{839}
\end{quote}

On September 20, 1994, the Premier of B.C. announced his commitment to an “open land claim process” for all British Columbians. He set out five principles: (1) open negotiations must be the rule, not the exception; (2) all British Columbians must have the opportunity to provide meaningful input; (3) B.C.’s negotiating mandate will be made public; (4) B.C. will pursue the most effective means of sharing information about the negotiating sessions; (5) the legislature will “sign off” treaty settlements.\textsuperscript{840}

\textsuperscript{837} Ibid.
\textsuperscript{838} C.J. Connaghan, “Where native land claims stand in B.C.” (Speech delivered to the Simon Fraser University President’s Club dinner on February 16, 1995).
\textsuperscript{839} First Annual Report, supra note 801, at 24-25.
\textsuperscript{840} M. Smith, supra note 32, at 93.
It is essential to the success of the treaty process that negotiations be conducted in an atmosphere that will contribute to the development of a new relationship between Aboriginal and non-Aboriginal people in B.C., without fear, misunderstanding and bitterness. In large measure, the atmosphere will depend on the public awareness and understanding of the nature of the conflicts between First Nations and governments, the removal of many of the misconceptions surrounding the land question and the constant dissemination of accurate information about the negotiations.

1.2 Funding

In its first annual report, the Commission noted that there was a strong sentiment among First Nations that insufficient funding had been provided to them to negotiate on an equal footing with governments. This was reiterated in the Commission's second and third annual reports. For the fiscal year which ended March 31, 1995, the funding allowed totaled $18,896,644. For the next three years, the two governments have agreed to provide $23.8 million for 1995-96, $16.8 million for 1996-97 and $17 million for 1997-98. In 1994-95, funds requested by the First Nations substantially exceeded the available funds and the Commissioners stated that "[i]n no case could the Commission provide the level of funding requested by any First Nation." The gap between First Nations needs and available funds can be explained by two reasons: the number of First Nations in the process is higher that expected and many negotiations have progressed faster that anticipated with First Nations' needs increasing as they move through the process. Treasury Board is currently examining a demand for increased funding to support First Nations involved in negotiations through the B.C. Treaty Commission process.

NOTE: First Nations were concerned with the amount of funding available over the long term, the timing of the allocations and distribution, a lack of resolution on issues arising where negotiations break down and a number of administrative issues which created inefficiencies and delay. First Annual Report, supra note 801, at 14 and 23.

Second Annual Report, supra note 198, at 14; Third Annual Report, supra note 359, at 25.

Ibid.

Third Annual Report, supra note 359, at 25.
First Nations have also expressed widespread concern about the possibility that some negotiations may terminate before the conclusion of treaties. These terminations could have a serious impact on First Nations which have loan obligations. Under the loan agreements, loans are repayable to the federal government 12 years from the date of the first loan advance, if negotiations terminate before an agreement-in-principle is reached. The governments and the First Nation Summit have examined this question with a goal to develop option for resolution but no solution has been found to date.

Finally, there is also the view that the Commission has been placed in an unenviable position: on the one hand, as “keeper of the process”, it must oversee and facilitate the negotiating process, and at the same time, it must act as pay master when it allocates funds to First Nations. To some, this places the Commission in a contradictory situation. I would however submit that this situation is preferable than having the federal government controlling the funding for the other party with who it is negotiating.

It is the responsibility of the Treaty Commission to ensure that First Nations negotiate on an equal footing with governments. Currently the playing field is not level. Due to the financial constraints, some of the research spending could be avoided by requiring that the parties share their factual research with each other so as to avoid duplication in the research costs. Two commentators have also suggested that the Commission could “assist” the process by “developing an information base on negotiations to facilitate the parties’ preparation.”

1.3 Management

In 1991, the B.C. Task Force on Land Claims had evaluated that as many as thirty separate negotiations could take place, with many occurring at the same time. In 1996, 47 First Nations were currently involved in the B.C. Treaty Commission process. From the outset, the B.C. Treaty Commission has sought as a basic principle to accommodate every First Nations wishing to negotiate, and to start

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845 First Annual Report, supra note 801, at 23.
negotiation as soon as the parties would be ready. However, both levels of governments have expressed serious concerns with respect to the management and overall cost of trying to accommodate negotiations with all the First Nations involved in the process. In its second annual report, the Commission stated that the parties should "...engage in constructive dialogue with each other and with the Commission to find creative ways to manage these complex negotiations, while respecting the principles of the Task Force recommendations."\(^{847}\) In its third annual report, the Commission noted that the federal government had recently began to hire additional staff to be involved in the negotiations but the B.C. government has not followed suit.\(^{848}\) As a potential solution, the Commission recommended that in some cases, "First Nations within a common area, with common issues, may agree to have certain discussions at a multi-party table."\(^{849}\) More options need to be developed to resolve this administrative problem.

1.4 Overlapping Territories

Many overlapping claims will need to be resolved as part of the treaty making process.\(^{850}\) Before meeting with government negotiators, Aboriginal representatives are expected to discuss between themselves how to resolve the question of overlapping territories. However, the New Zealand experience suggests that the resolution of these claims by the First Nations themselves "...is no simple matter where tribal mana is at stake."\(^{851}\) The Commission has a duty to monitor the progress of overlap negotiations and can provide advice on dispute resolution. However, it is still not clear what kind of dispute resolution services will be available and if these processes will be culturally appropriate. As discussed in Chapter Four, the traditional North American model of mediation and arbitration might need to be considerably modified to accommodate the cultural differences of the First Nations involved in resolving their overlapping claims.

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\(^{847}\) Second Annual Report, supra note 198, at 16.

\(^{848}\) Third Annual Report, supra note 359, at 23.

\(^{849}\) Ibid, at 24.

\(^{850}\) NOTE: For instance, the Sto:lo Nation - which comprises 21 Indian bands, 18 of whom have signed the claim - has laid claim to the entire Greater Vancouver region and the Fraser Valley. This area is also claimed by at least seven other Aboriginal groups including the Musqueam, Tsawwassen, Squamish, Semiahmoo and New Westminster bands. P. Fong, "18 bands claim entire Lower Mainland" Vancouver Sun (October 17,1995) at B1.

\(^{851}\) Stokes, supra note 26, at 189.
The Commission has made a commitment in its third annual report to develop new policies about its role in addressing overlapping claims.852

1.5 Interim Measures Agreements

Serious problems have occurred in the negotiation of interim measures agreements which jeopardize the treaty process. The Commission reports that:

...conflicts over interim measures are beginning to have a negative effect on the treaty process and the Commission has a duty to safeguard that process. So far, British Columbia and Canada have delegated authority to individual government ministries and departments for many interim measures issues, primarily those which have arisen early in the process. The implementation of these policies, mainly by British Columbia, has been inconsistent. A large number of interim-measures agreements have been negotiated between British Columbia and various First Nations on a wide range of issues. Most of these agreements relate to the provincial government’s obligation to consult First Nations and fall outside the treaty process. For those First Nations which have entered treaty negotiations, many have not been able to engage the relevant ministry officials in constructive discussions.853

As a result of these unclear procedures, there has been confusion and fear concerning interim measures agreements both among the First Nations and the non-Aboriginal communities which all have interests being affected by these agreements.854 In its third annual report, the Commission criticized the B.C. government for refusing to negotiate interim measures agreements at an early stage of the negotiation in order to demonstrate the government’s commitment to resolve these issues in a fair manner and keep the First Nations at the negotiation table. Instead, the B.C. government has decided that it would consider negotiating interim measures agreements only when the claims are in Stage 4 of the process.855

According to the Commission, “B.C.’s policy allows for full protection, such as restriction on alienation, when the parties have substantially agreed on the lands and resources that are likely to form part of the

852 Third Annual Report, supra note 359, at 28.
853 Second Annual Report, supra note 198, at 11-12.
854 Ibid, at 12. NOTE: One interested group, the Council of Forest Industries of B.C., recently reported that after examining 54 interim measures agreements negotiated up to February 1995, it came to the conclusion that at least 20 of them which pertain to land and resources “promote false perceptions of aboriginal jurisdiction over asserted traditional territory [and] generate non-achievable expectations of industry and government.” As a result, the Council has asked that all negotiations on future interim measures agreements be put on hold “until consistent, workable and public-supported government policy is in place.”
final settlement. But the policy provides little, if any protection at earlier stages of the process.⁸⁵⁶ Thus, the problem in relation to the negotiation of interim measures agreements is still present and creates confusion, fear and false perceptions.

The Commission has recommended that the province reconsider its refusal to negotiate the full range of options for interim measures during the earlier stages of treaty negotiations.⁸⁵⁷ Another approach could be to expand the mandate of the Commission to supervise the negotiation of these interim agreements at an early stage in order to ensure fair access to the First Nations who want to negotiate interim measures agreements early in the process as well as helping all the parties to communicate effectively. The Commission could act as a mediator between the parties to help them reach a solution which protects their interests without compromising their positions for future negotiations. The terms and reasons for interim measures agreements should also be explained to the public to restore confidence and avoid fear and confusion.

2. Commitment of the Parties

Since the establishment of the B.C. Treaty Commission, doubts have been raised as to whether the parties are truly committed to settling outstanding claims. The Commission reported that: “[t]he process provides a solid structure for negotiations, but the relationships upon which this process is based are fragile. This makes the process itself fragile, and all the parties must be careful about how they proceed down this difficult path.”⁸⁵⁸ It then added that: “[t]hroughout the past year, the Commissioners have found that the public continues to question the federal and provincial governments, as well as the First Nations, about their respective commitments to negotiate treaties and the underlying reasons for their actions.⁸⁵⁹

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⁸⁵⁶ Ibid, at 27.
⁸⁵⁷ Ibid, at 28.
⁸⁵⁸ Second Annual Report, supra note 198, at 1.
No doubt that without this elementary ingredient - a willingness to negotiate just settlements - the B.C. Treaty Commission is bound to fail. Whether the three parties have the requisite commitment to resolve the land question may be determined by examining the attitudes of the three parties in their historical and current dealings. First Nations are presumably the most committed to settling land claims. As stated by Paul Tennant:

Underlying the land claims, but usually unspoken by Indians and unnoticed by non-Indians, is the passionate Indian desire that non-Indians, both ordinary people and government leaders, will acknowledge and appreciate the simple historical fact that Indians were present in established societies of high attainment before Europeans arrived. For this reason, Indian demands for negotiation are almost always expressed with vigour and emotion, and they are usually phrased in terms of the claimant group’s historic identity. For Indians, land claims are important not only because of the land, but also because they will signify that governments, and the non-Indian public, are acknowledging something of the historic and the present importance of Indian peoples.\(^{860}\)

Thus, Aboriginal groups are committed to the process of negotiation modern treaties, for this can help in fulfilling their need for recognition by non-Aboriginal people of their identity. However, despite their commitment to resolve the land question, some First Nations remain very skeptical of the process under the B.C. Treaty Commission. This skepticism has led to deep divisions within Aboriginal communities regarding the appropriate means to employ to achieve a fair and equitable resolution of the land question. Thus, even if a majority of First Nations have agreed to join the B.C. Treaty process, many others have refused to enter the process.\(^{861}\)

The federal government appears relatively committed to the treaty process but its past record of dealing with First Nations is far from admirable. Canada’s goal in resolving land claims in B.C. is questionable. Canada is negotiating treaties to provide certainty and investment stimulation and it is not necessarily driven by a need for justice and fairness. In fact, in a document entitled “British Columbia Treaty

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\(^{860}\) Tennant (May, 1990), *supra* note 31, at 2.

\(^{861}\) **NOTE:** In 1992, just after the passage of the legislation which created the B.C. Treaty Commission, about 200 First Nation people protested on Highway 97 outside Penticton, rejecting the province’s authority to enter into land claim negotiations, saying the discussions should involve only First Nations and the federal government. Canadian Press, “Slowing Traffic O.K., but full blockades a no-no” Vancouver Sun (May 31, 1993) at A6.
Negotiations: The Federal Perspective**, Canada declared that it “...does not provide financial benefits as compensation for alleged past wrongs, but rather, as part of benefits in exchange for certainty about rights of ownership and use of lands and resources.” This goal of achieving certainty and investment stimulation should not be the only incentive to resolve the land question since this approach could put at disadvantage First Nations claiming lands that do not have such a high potential for major economic development for non-Aboriginal people. Another element that renders the commitment of the federal government questionable is the fact that Canada may see a financial incentive in postponing the finalization of negotiations since it will have to pay important financial “benefits” to First Nations.

The commitment of the B.C. government to resolve land claims has varied since its involvement in the land debate five years ago. As with Canada, the real motivation of the provincial government in resolving the land question is to ensure long-standing treaties, so that the current level of uncertainty does not continue to haunt political, economic and social relations in B.C. Thus, it is again this issue of uncertainty that has brought B.C. to the negotiating table, not fairness. The B.C. Ministry of Aboriginal Affairs stated that “[t]he growth and development of direct and indirect economic opportunities throughout the province is a major goal of the province to ensure treaty settlements are fair to all British Columbians.” However, as noted by Frank Cassidy, “[m]any compelling reasons - economic, legal community, national and historical - are pushing British Columbians toward settlements, but perhaps the most compelling is - or should be - the matter of justice itself.” The attitude of the B.C. government with respect of the negotiation of interim measures agreements can also be interpreted as a sign of non-commitment to the process. In addition, the commitment of the provincial government is precarious not only because it is very recent but also because of the divergent views among the various political parties in B.C. The three major political parties in B.C. have different views on how the process of settling

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862 Federal Perspective, supra note 825, at 21.
863 “B.C.’s Approach”, supra note 788, at 1.
Aboriginal land claims should work. This has caused some uncertainty in the last provincial election as to whether future governments will be bound by the process and by future treaty settlements.  

3. **Imbalance of Power**

As discussed in Chapter Three, the “fairness” of negotiations in the treaty process should be assessed from the perspective of the symmetry of power between the parties. Land claims negotiations between Aboriginal groups and governments have been characterized as being adversarial even though it is generally recognized that because of the nature of the issues and the relationship between the parties, the problem-solving approach to negotiations would be more appropriate. The major problem for Aboriginal claimants is that they have no leverage to force governments to agree to problem-solving negotiation, but neither do they have the power to respond to government “competitively” in negotiations. According to Alec Robertson, Chief Commissioner of the B.C. Treaty Commission, even if the Commission is trying to level the playing field, there will always remain an inherent imbalance of power between the parties at the negotiating table.

The recent break down in the Gitksan negotiations can serve to illustrate the difficulties in managing the process when there exists a serious imbalance of power between the parties. In the Gitksan case, the province of B.C. unilaterally walked away from the negotiating table - announcing its intention to pursue the case before the Supreme Court of Canada - without even informing the B.C. Treaty Commission. In response to this incident, the Commission offered its mediation services to bring the parties back to the negotiation table but this offer was rejected by the province. The Commission finally convinced the

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**NOTE:** For instance, it appears that the B.C. Reform party opposes the cost-sharing formula with the federal government regarding how land-claims settlements are being paid for, and it would prefer a ratification process for treaty settlements by which settlements are put through a province-wide referendum. Further, the B.C. Liberal party seems to adhere to a philosophy by which it would support only settlements which enshrine the principle of equality for all British Columbians. Hunter and Bell, [*supra* note 834, at A2].

866 See for example Coolican, [*supra* note 176, at 6-7].

867 Interview with Alec Robertson, Chief Commissioner of the B.C. Treaty Commission, Toronto, June 26th, 1996.
parties of the need to conduct an impartial inquiry on the events surrounding the breaking down of the negotiations. The report of the Commission concluded that both parties had to share the blame for the impasse in the negotiations and recommended a series of meetings which have still not occurred to this date. 868

Thus, I submit that there are some difficulties with the mandate of the B.C. Treaty Commission since the process does not provide for any procedural rules that can be enforced to help the weaker party during negotiations. For instance, the B.C. Treaty Commission does not have the necessary powers to put pressure on the most powerful parties to remain at the negotiating table for the benefit of the weaker party which is automatically put at a serious disadvantage with no alternative but to pursue its claims before the courts. There is a serious risk that the enormous disparity of power between the First Nations and governments will remain with the consequence that fair and equitable settlements might not be achieved. The Commission contends that it has taken a more active role in dispute resolution in the past year and this should continue to the extent of its existing powers. 869 However, the Commission might eventually need a stronger mandate if it wants to redress the imbalance of power in order to produce fair agreements for all parties.

4. Cultural Differences

First Nations and governments should ensure that the negotiation process responds to the fundamental differences of culture, values and world views. Recognizing and understanding the cultural differences between the parties is a most important aspect of cross-cultural negotiations. It is therefore important to assess whether the cultural framework of the Treaty process is bicultural, multicultural, or whether only one set of cultural values is being imposed at the expense of another.

868 NOTE: Negotiations involving the Gitksan people, the B.C. and federal governments. Interview with Alec Robertson, Chief Commissioner of the B.C. Treaty Commission, Toronto, June 26th, 1996.

869 Third Annual Report, supra note 359, at 21.
The process of the B.C. Treaty Commission does not seem to fully bridge the cultural gap between the First Nations and Euro-Canadian governments. In fact, the only effort made by the B.C. Treaty Commission to accommodate Aboriginal cultures is to allow the meetings at Stage 2 of the process to take place in the traditional territory of the First Nation. The Commission states that “[t]raditional ceremonies, which recognize the significance of beginning long-awaited process, lend an historic dimension to many first meetings.” This limited effort to integrate Aboriginal cultures in the process can hardly be compared with a meaningful bicultural approach such as the one adopted by the Waitangi Tribunal in New Zealand.

F. Potential Impact of Treaties and Land Claims Settlements in British Columbia

In anticipating the potential impact of treaty-making in B.C., the federal and provincial governments recently commissioned a comparative study which considered the nature and impact of modern land claims settlements elsewhere in Canada and in other countries.871

Generally, the study found that in each settlement, the treaties or legislative acts ended a long-standing dispute over land and resources and provided a new framework for social, economic and political relations. However, because each treaty arises out of specific historical, political, cultural and legal circumstances, it is impossible to see any agreement as a direct model for B.C. Nonetheless, the overall impacts derived from other experiences can still inform us on some potential consequences for B.C.872

It was reported that in no case has the resolution of land claims brought political or economic chaos. People adjusted to the new arrangements, political systems adapted, and businesses quickly found new ways of responding to the post-settlement environment.873 Moreover, all of the modern treaties have respected and accepted private land holdings and leases.874 It was also found that the level of non-

870 Second Annual Report, supra note 198, at 7.
871 ARA Consulting Group, supra note 586.
872 Ibid (executive summary) at 7.
873 Ibid.
874 Ibid, (executive summary) at 8.
Aboriginal support for, or acceptance of, treaty negotiations and settlements is closely related to the availability of information. The situations in other areas also demonstrates that it is vital that the approaches regarding resource use and control be fully explained in order to alleviate non-Aboriginal concerns about the future of businesses and communities that rely on resource development. An important finding was the fact that treaties have provided Aboriginal groups with the financial and administrative means to begin planning a new economic future for their people and their regions. It was found that Aboriginal peoples have used the land claims process as a basis for participating more fully in the broader economy and, typically, have become more heavily involved with the non-Aboriginal population as a result of the treaty. An important consequence of the negotiation of the treaties has been the awakening of non-Aboriginal people to the passion and conviction of Aboriginal communities about their traditions and language. It was reported that

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\text{[t]he negotiation process, while focusing heavily on legal, administrative and financial matters, has the potential to begin creating bridges and to altering non-indigenous peoples to the richness and depth of aboriginal culture. This, perhaps more than any technical or legislative initiative, may well be the most important legacy of land claims negotiations, precisely because it helps to build lasting, culturally-based links between peoples.}\]

Finally, the report found that in general, the modern treaties have not caused the "level of disruption, disharmony and dislocation that critics forecast, although, to be fair, neither have they offered instant solutions to difficult problems, as some proponents seemed to expect." It seems that the best approach to understand these modern treaties is to see them

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\text{...as evolutionary in nature, rather than revolutionary, modifying existing patterns of indigenous-government relations rather than over-throwing the political, economic and social status quo. Modern settlements are, in the final analysis, both less of a threat and less of a solution that opponents and advocates have claims. They have been (...) the catalyst for a new relationship between indigenous and non-indigenous peoples.}\]

Part IV Comparison of the Models in Australia, New Zealand and British Columbia

A. Differences Between the Three Institutions

875 Ibid.
877 Ibid.
878 Ibid.
879 Ibid.
The National Native Title Tribunal has a very formal legal framework, having been created in response to the *Mabo* decision and by the *Native Title Act, 1993*. The procedures of the Tribunal are inspired by those of the traditional courts. The Tribunal is however innovative in that it uses the process of mediation to resolve certain types of claims. Nonetheless, its overall legalism leads to its formality and both lead to its uniculturalism. The legal framework of the Tribunal contrasts with the earlier mandate of the Aboriginal Title Commissioner of the Northern Territory in Australia. The former role of the Aboriginal Title Commissioner was to determine traditional territories and as such it had to construct the story of what the traditional territory was, primarily from oral evidence. In doing so, the Commissioner had adopted a flexible and innovative approach in procedure to hear the stories being told by the indigenous side. This is very different than the role of the National Native Title Tribunal since its mandate is strictly to apply the legal principles of the *Mabo* decision which have been translated into the *Native Title Act, 1993*. The focus of the Tribunal is on the question whether Aboriginal title has been extinguished, more than on establishing the title.

The Waitangi Tribunal deals with the fact that New Zealand recognized Maori land rights in the *Treaty of Waitangi* and then followed a long history of dispossession. The way Maori people were dispossessed is a complex story which varies from area to area in New Zealand. The fact-finding role of the Tribunal is to put together the particular stories of dispossession in the particular parts of the country. The Waitangi Tribunal is therefore not directly involved in reaching final settlements but it rather tries to construct the story which will then serve as the basis for negotiation, mediation or litigation of the claim. The fact-finding role of the Tribunal opens it up more than the two other bodies to being bicultural. In fact, the bicultural approach is necessary for in constructing the story, the Tribunal must hear the stories from all sides, but in practice it is the Maori story that needs to be put together, not the government story. It is also simpler to adopt a bicultural approach in New Zealand where there is only one indigenous group than it would be in Australia or in Canada where there is a multitude of First Nations from different cultures, speaking very different languages. Evelyn Stokes has briefly compared the Waitangi Tribunal and the B.C. Treaty Commission and noted some important structural and functional differences. These
distinctions are based on the fact that “[t]here is no equivalent institution to the Maori Land Court in
British Columbia. Nor is there any equivalent of the long convoluted web of Maori land legislation.”
More importantly, there is no equivalent of the Treaty of Waitangi in British Columbia.

The British Columbia Treaty Commission is not concerned with the story of the claims. Everyone accepts
the fact that First Nation people lost their traditional lands and it is irrelevant for the settlement of
comprehensive claims as to when third party rights were granted or the legal effect of those grants. The
role of the Waitangi Tribunal in constructing the story of dispossession in New Zealand would be more
comparable to specific claims in Canada where there is a story to put together about dispossession. With
comprehensive claims, however, the story is known. The framework for taking the land is the same
everywhere in British Columbia. The extent of third party rights becomes relevant as to the type and
scope of settlements. Thus, the role of the B.C. Treaty Commission is much more future oriented than the
work of the National Native Title Tribunal or the Waitangi Tribunal. The Commission is involved in the
process of negotiating modern treaties and in the development of a new relationship between the parties.
By being future oriented, the Commission has a different interest in being bicultural. Despite the fact that
the Commission is not involved in constructing the story of the claims, the recognition of the existing
cultural differences remains necessary but with a different focus. In a process which is future oriented, the
differences in the cultural framework of the parties should be recognized in the dispute resolution process
itself.

B. Lessons Learned from Australia, New Zealand and British Columbia

Because each land claim arises out of specific historical, political, cultural and legal circumstances, it is
impossible to see any foreign process as a direct national model for Canada. However, Canada can still
learn a great deal from past experiences in Australia, New Zealand and British Columbia and improve its
existing process to resolve the land question.

880 Stokes, supra note 26, at 188.
881 Ibid, at 189.
1. National Native Title Tribunal

There are several unique characteristics to this Tribunal, such as the Tribunal’s power to determine if
native title does not exist in a particular area and the right to hear those claims from non-Aboriginal
persons. Another particular characteristic is the power of the Tribunal to revoke or vary a determination
of title that it has previously made. However, it has been suggested that the idea of importing the
Australian model in the Canadian land claims context would not work since “...characteristics such as
those, and the rationale behind them, would never be acceptable to the First Nations in Canada.”882
Moreover, according to Professor Michael Jackson, the Australian approach is flawed because “...the
process by which recognition and accommodation is reached is a unilateral one with no recognition of
government-to-government relationships.”883 Consequently, Jackson stated that “...the legislation seems
to hold little in the way of future directions for Canada...”884

I would submit that it is too early to make a final judgment on the National Native Title Tribunal since it
has not participated in the resolution of any claims yet. Nonetheless, I believe that many aspects of the
Australian approach could be used in a Canadian model for the resolution of land claims. For instance,
the power of the Tribunal to set time limits on applications and on responses to these applications has the
potential of expediting the process and prevent the interminable delays that seem to be common to all land
claims processes.885 Moreover, the Tribunal has adopted the mediation process to resolve applications
which, in my opinion, brings important advantages in the context of Aboriginal claims. I would however
agree with Justice French that if the National Native Title Tribunal is to achieve any measure of success, it
will “...require the co-operation of those who are involved in or affected by its work.”886 Canadian
governments could therefore learn from the Australian experience and from the attempts in Canada to use

882 Durocher, supra note 20, at 52-53.
883 Jackson, supra note 579, at 142.
884 Ibid.
885 Durocher, supra note 20, at 53.
886 French, supra note 599, at 177.
the mediation approach to resolve Aboriginal claims and seriously consider the integration of a mediation component in the existing land claims processes.

2. **Waitangi Tribunal**

The New Zealand Waitangi Tribunal does not have final decision-making powers. It merely recommends settlements to the government after it conducts its hearings. Some commentators have raised some doubts about the suitability of the New Zealand approach as a model for export. “The Tribunal has evolved gradually into its present shape. It forms but a part of an institutional structure of growing complexity, and is a product of the rather unique - and complicated - New Zealand political climate.” However, certain features of the Waitangi Tribunal could be adopted into the claims resolution process in Canada. The Tribunal’s efforts to ensure a bicultural process of dispute resolution are exemplary. Numerous culturally sensitive strategies are employed by the Tribunal to observe and respect Maori protocol and cultural values, and minimize the adversarial nature of negotiation. This strong commitment to a bicultural approach to process and outcomes could also certainly be a progressive addition to the current process of Aboriginal claims resolution in Canada. However, while the bicultural approach is an appealing idea, there are also great differences between the situation in New Zealand and Canada. While there is only one Aboriginal group in New Zealand, there are a multitude of First Nations in Canada, with differing languages, cultures, and procedures. According to Durocher, “[i]t would be a massive undertaking to become completely bicultural in Canada, but it would not be impossible.”

The idea of some form of fact-finding powers should also be explored in a Canadian land claims process. Due to the complexity of most land claims, a process which would provide for an investigative division to research the factual background of claims and where findings and/or recommendations would be reported to the parties and contained in public reports, but remain unbinding on the parties, deserves consideration for implementation in the Canadian context. As with the Waitangi Tribunal, parties to a land dispute

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888 Durocher, *supra* note 20, at 52.
should be able to agree on certain research needed to be done for certain claims and refer it to an independent body to be done under its auspices, in order to obviate duplication of research costs.

In 1988, a committee of the Canadian Bar Association Committee recommended the establishment of an Aboriginal Rights Commission, similar to the New Zealand Waitangi Tribunal model. The CBA suggested that in addition to employing flexible process and procedures, the Commission could fulfill various functions, including fact-finding, recommendations for action, and facilitating the employment of other alternative dispute resolution mechanisms where appropriate. Thus, in terms of the process used to resolve Aboriginal claims, the Waitangi Tribunal has many strengths and would provide a useful model for the resolution of comprehensive claims in Canada, to be employed in conjunction with other dispute resolution mechanisms.

3. British Columbia Treaty Commission

Because the B.C. Treaty Commission is new, it is difficult to assess its success to date. However, it should be noted that one of the positive elements of the B.C. Treaty Commission is that the process has been designed by First Nations and the two levels of government and it is comprises of both Aboriginal and non-Aboriginal commissioners. The process of negotiation has been chosen by all parties to settle the land question. However, the Treaty Commission has already reported some difficulties regarding the amount of resources and the political will of all the parties involved. Moreover, the B.C. Treaty Commission could improve its process and approach to ensure a proper balancing of all the interests affected by the settlement of the land claims. As mentioned above, the B.C. Treaty Commission could also design safety features in its procedural framework to be able to intervene and redress the imbalance of power between the parties and consider some changes in its overall procedures to further accommodate the diverse Aboriginal cultures.

889 An Agenda for Action, supra note 3, at 84.
890 Ibid.
The experience in New Zealand, Australia, and British Columbia could serve as model for a national independent body specially designed to help resolving the claims of Aboriginal peoples in Canada. Direct negotiations have often failed to produce satisfactory results and the judicial system is not seen as a suitable alternative for the distinctive problems raised by such claims.

Conclusion

This chapter described three important institutions involved in the process of finding agreements between First Nations and governments. These three models have many strengths and should inform Canadian endeavours to frame dispute resolution mechanisms to resolve the land question.

The first model discussed, the Australian National Native Title Tribunal, presents some unique characteristics. The most critical function of that Tribunal concerns its role in assisting parties in resolving disputed applications. In order to fulfill its mandate in relation to the mediation conference, this Tribunal chose and described the approach of “interest-based negotiation” where parties are induced to focus on the dispute as a common problem to be solved rather than to focus on the other parties and their respective positions. The Tribunal has expressed a serious commitment to find creative solutions to disputes between claimants and governments. Canada could learn from the mediation experience in Australia and integrate this process as part of an overall strategy to resolve land claims.

In New Zealand, the Waitangi Tribunal has been generally successful in setting the stage for settlement of legitimate grievances held by the Maori over land and other matters related to the Treaty of Waitangi. This Tribunal has gained its credibility by developing a bicultural approach in the way it conducts its hearings. Many see these moves to accommodate Maori circumstances, procedures and values as a predication of the growth of a distinctive bicultural legal regime, one in which the Treaty will increasingly be seen as a source of law. It appears that the Waitangi Tribunal has definitely become a forum upon which discourses are altered. Moreover, from a cultural perspective, New Zealand is a good example of Maori culture being incorporated, to a greater extent, in the collective culture of the country, facilitated in
large part through the land claims movement. Commitment to a bicultural approach to process and outcomes would certainly be a progressive addition to the current process of Aboriginal land claims resolution in Canada.

In British Columbia, the process of negotiating modern treaties has been chosen by governments and First Nations to resolve the land question and address some of the problems between the Aboriginal and non-Aboriginal societies. However, there can be no doubt that treaty-making on a scale as large as that currently under way in B.C. will require considerable amount of resources, political will, persistence and a clear set of goals and objectives. Moreover, for the Treaty Commission process to succeed in building the new relationships between First Nations, British Columbia and Canada, there must be continued patience, understanding and goodwill on the part of all Canadians. Many encouraging developments have come from this trilateral process, such as the appointment of both Aboriginal and non-Aboriginal commissioners. However, if the land question in B.C. is to be equitably and efficiently resolved, the Treaty Commission process should consider some changes to ensure early and satisfactory agreements which recognize the cultural diversity and promote the development of an harmonious relationship between communities which must co-exist in Canada. A proper balancing of these interests is a delicate and crucial matter. In order to properly balance these interests, the B.C. Treaty Commission should do two things. First, it should design safety features in its procedural framework in order to facilitate the reaching of agreements. Such a framework should contain guidelines or techniques to intervene and redress the imbalance of power between the parties. Secondly, the Commission should consider some changes in its overall procedures to accommodate the diverse Aboriginal cultures. Thirdly, the Commission should ensure that third-party interests are well-represented at the negotiation table to prevent misunderstanding and frustration vis-à-vis proposed settlements which would ultimately prevent the development of an harmonious relationship between Aboriginal and non-Aboriginal society.
CHAPTER SIX CONCLUSIONS AND RECOMMENDATIONS: MODEL FOR CANADA

This thesis has examined the various dispute resolution mechanisms which have been or could be employed to resolve land claims in Canada. The advantages and limitations of the courts were discussed in Chapter Two. It was concluded that the courts should be used to resolve pure legal matters, they should resort to alternative dispute resolution mechanism when appropriate, such as appointing a special master and they should try to achieve the goal of cultural relativism. Chapter Three examined some of the problems associated with the negotiations of land claims based on the federal claims policies. The specific and comprehensive claims policies have been criticized principally for having been developed unilaterally by the federal government and because of the inherent conflict of interest in the process. Chapter Four explored both the process of mediation and arbitration. As part of this discussion the mandate and functions of the Indian Commission of Ontario and the Indian Claims Commission were analyzed and it was found that their limited powers does not allow them to put the necessary pressure on the governments to participate fully in any dispute resolution mechanisms and they have generally been unable to intervene in a meaningful way when negotiations break down. Finally, Chapter Five compared three institutions established to help in the resolution of Aboriginal claims. In particular, the role of the B.C. Treaty Commission was described and it was concluded that while it is too early to make a final judgment on the success of this Commission, it remains in a precarious position due to the unreliable commitment of the parties.

This Chapter will explore some options to design an appropriate process to resolve land claims in Canada. Based on the conclusions reached in previous chapters, I will first identify what I perceive as being the essential elements that should be present in any dispute resolution mechanisms employed to resolve disputes between First Nations and Euro-Canadian governments. Second, I will propose to integrate these fundamental elements into the creation of an independent Aboriginal claims body to deal with all types of Aboriginal land claims in Canada.
A. Essential Elements for Dispute Resolution Processes

1. Independence

The first and most important aspect of any dispute resolution process involves a completely independent process so as to avoid conflicts of interest, to ensure principles of fairness, equity and neutrality, and to allow First Nations the security of protection from adverse action by the Crown. An independent process can also contribute in equalizing the playing field between the parties involved in a dispute.

2. Aboriginal Participation in the Development of Land Claims Policies

A critical step in improving the land claims processes is to allow Aboriginal people full participation in the formulation of the land claims policies. "The old model of imposing policies and bureaucratic visions of what is right or workable has been jettisoned in favour of power-sharing and rebuilding better working relationships between First Nations and governments."891 The goals and purposes of negotiations, as well as the agenda for negotiations, must be decided by both parties. A new substantive land claims policy should unify the definition and criteria for claims, emphasize the honour of the Crown and full compliance with fiduciary duties, and recognize Aboriginal and treaty rights. The policy should also allow for variation between and within regions based on historical, political, economic, and cultural differences.892 Moreover, a new claims policy must consider alternatives to extinguishment. As mentioned earlier, this requirement of extinguishment has been and still remains a major impediment to the resolution of comprehensive claims.

3. Jointly Created Institution

Another essential element is a jointly-created First Nations/government institution, operating under a jointly defined protocol, which can employ all dispute resolution strategies to ensure that negotiations are

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891 Turpel (1995), supra note 2, at 72-73.
892 Living Treaties: Lasting Agreements, supra note 8, at 31.
successful. This institution could facilitate negotiations, mediate disputes in the negotiations, offer binding and non-binding arbitration, and adjudicate disputes if necessary.

Numerous studies and reports endorse a non-adversarial process for resolving land claims disputes. The courts use adversarial procedures and are one-sided institutions which do not reflect the idea of power-sharing or a sensitivity to a bicultural approach. As discussed earlier, Aboriginal claims require a flexible approach to evidence and fact-finding because of the First Nations’ oral tradition and the “fragmentary nature of Canadian historical records”.893 One way to avoid the assessment of claims based on old and mistaken perceptions of First Nations people and their histories is to ensure that the institution assessing a dispute is representative of both First Nations and non-Aboriginal peoples.894 As noted by Turpel, “[t]he courts cannot provide this diversity, nor is their history or discourse well suited to such innovation. We need to develop for this unique purpose a dispute-resolution process that can supplant to a large extent the jurisdiction of the courts.”895 Many commentators have suggested the creation of an independent claims body which would remain subject to judicial review by a superior court but would deal with findings of fact and mixed issues of fact and law so that it would increase the chances for greater sensitivity at the appeal level to the bicultural nature of the claims.896

4. Bicultural Approach

It is important to understand the land claims process within a “...bilateral and bicultural framework and the impediments to the development of that framework, having regard to the inherent biases of one-dimensional and Euro-centric analyses which are the inherited legacy of colonialism.”897 Miguel Alfonso Martinez explains that:

...all attempts to explore and understand the motivations, constructions and aspirations of indigenous peoples with respect to juridical manifestations such as treaties, agreements and other consensual arrangements must be done in the light of what has been termed as ‘contemporary

893 Turpel (1995), supra note 2, at 98.
894 Ibid, at 99.
895 Ibid.
896 Ibid.
897 Jackson, supra note 579, at 182.
epistemological awareness\textsuperscript{898}, which favours a decentered view on culture, society, law and history.\textsuperscript{898}

Mr. Martinez insists on the need to approach the analysis of treaties and agreements with Aboriginal peoples within a framework which recognizes the existence of legal and social systems other than those of the modern state.\textsuperscript{899} In order to do so, one must consider some of the essential differences between Aboriginal discourses and those of the modern, western, state-based societies. There is a need to develop dispute resolution mechanisms which recognize and respect the different ways in which Aboriginal peoples conceive of their place in the world. This has not been done to date in Canada. As noted by Turpel,

First Nations legal principles have not been reflected in the mainstream Canadian legal system. A bicultural sensitivity in the analysis and application of norms is absolutely essential for fair claims resolution. New principles, and even new process of resolving conflicts, need to be developed, ideally by an expert body that can reflect in its composition and mandate the history, culture, and sensibilities of both Aboriginal and non-Aboriginal traditions. ...such an expert body would most likely lead, and not simply follow the law. This leadership is essential, since the law in this area is not simply Anglo-American law.\textsuperscript{900}

Therefore, any land claims resolution mechanism must contain a means of accommodating a bicultural approach. It has been suggested that a bicultural process would go a long way in making First Nations feel they are part of the process. If the proper steps were taken, they would encourage elders and First Nation communities in general to be more trusting of the process and, thereby, would make an immense contribution to the entire land claims resolution procedures in Canada.\textsuperscript{901}

In order to develop a bicultural approach to land claim processes, it is essential to understand both the Aboriginal and the non-Aboriginal perspectives. Professor John Borrows suggests the development of a “language of perspicuous contrast” to broader the perspective on Aboriginal issues. The goal is to understand each culture’s practices and motivations according to their own self-understanding. After

\textsuperscript{898} Miguel Alfonso Martinez, First Progress Report, E/CN.4/Sub.2/1192/32, 25 August 1992, paras. 32-40 quoted in Jackson, \emph{ibid}, at 183.
\textsuperscript{899} \emph{Ibid}, paras. 77 and 80.
\textsuperscript{900} Turpel (1995), \emph{supra} note 2, at 98.
\textsuperscript{901} Durocher, \emph{supra} note 20, at 56.
becoming aware of the other society's self-understanding, one must place this newly acquired understanding of that society beside his/her traditional perception of that same event. The resulting contrast in understanding between the two societies will show that there are different approaches which can be taken to the same practice. The recognition of various possibilities can result in the development of a language of perspicuous contrast which will ultimately create a "fusion of horizons" between western and Aboriginal worldviews.

Professor Jackson suggests to begin with the Aboriginal perspective. He wrote that if "...we start with the languages of First Nations it is possible to construct language understandable to non-Aboriginal people in which meaning is given to Aboriginal rights and responsibilities which have contemporary references." Edward Said also explains in his book *Culture and Imperialism* that if Euro-Canadians and Aboriginal people are to achieve a meaningful co-existence, it will depend upon the development of an understanding that all cultures are interdependent, that they will borrow from one another, and that the human community is global. This understanding must be of contemporary Aboriginal culture and contemporary Canadian culture, for we are trying to establish an ongoing positive relationship.

5. **Third-Party Representation**

The openness of the process is essential for resolving the land question. First Nations, the federal and the provincial governments must consult with the general public and particularly with third-party interest groups across the country before designing a land claims process. There needs to be public awareness and acceptance of the process and settlements. In order to accept settlements, the public needs to participate, be educated and be consulted in a meaningful way. As Frank Cassidy pointed out, "labour has to be involved; industry has to be involved; environmentalists have to be involved; municipalities have to be involved;"

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904 Jackson, *supra* note 579, at 161.
involved. There needs to be an open process where people are talking to one another, defining the issues and the roles that they would like to play.”

B. Creation of an Independent Land Claims Body

Many commentators have suggested the creation of a independent institution of dispute-resolution to resolve Aboriginal land claims in Canada. From the Senate Commons Committee of 1946 to 1948, the Canadian Bar Association in 1988, and to the Liberal Party in 1993, people have recognized that there has to be a process independent from the federal government to resolve Canada’s outstanding Aboriginal land claims. There is a pressing need for a process which is fair and which is perceived to be fair by all participants. The common features of all these recommendations is that such an institution should be designed to provide the benefits of third-party intervention while avoiding the deficiencies of the present judicial system. Objectives should be to reduce costs, expedite procedures, permit flexibility in the handling of polycentric problems, maximize the involvement of the parties in the process and outcome, and facilitate the production of a settlement which contributes to future harmonious relationships between Aboriginal and non-Aboriginal society. Surely the time has come for the government of Canada to acknowledge, consider and act upon the advice that it has been getting from its own advisors for over 40 years and to establish an independent claims body.

One of the most critical aspect of this debate is whether there exists a true political will to create an independent body with meaningful powers to help in the resolution of the land question. The Liberal government has stated on many occasions that it recognizes the urgent need to rethink federal claims processes to resolve disputes over lands and resources between First Nations and governments. During its election campaign in the fall of 1993, the Liberal party declared that the "...current process of resolving comprehensive and specific claims is simply not working." It therefore proposed to undertake a reform of the current approach by creating "...in cooperation with Aboriginal peoples, an independent claims

907 Creating Opportunity, supra note 6, at 103.
commission to speed up and facilitate the resolution of all claims. This Commission would not preclude direct negotiations.” Minister Irwin recently announced the creation of a group of officials and First Nations to study possible reforms to the specific and comprehensive claims policies and processes.

1. Structure

The Indian Claims Commission contends that there exists a consensus between the federal government and First Nations on the need for some fundamental reforms such as (1) the creation of an independent claims body; (2) the validation of claims by some other body (such as the independent claims body), so as to remove the conflict of interest that exists for the federal government in the present system; (3) the facilitation of claims negotiations by an independent claims body (or some other body like the Indian Commission of Ontario) to ensure fairness in the process; and (4) the need for the independent claims body to possess the authority to break impasses in negotiations regarding compensation.

Drawing on the various proposals for reform of the land claims process, and considering the present political and legal context and the relationship between First Nations and governments, I suggest the following features as part of an independent Aboriginal Claims Commission:

**Jurisdiction**

1. **ALL CATEGORIES OF CLAIMS**

The Commission would have a general non-exclusive jurisdiction to deal with all categories of claims, whether they are comprehensive, specific, or otherwise. It would also address grievances relative to a breach of fiduciary duty on the part of the Crown.

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908 Ibid.
910 Durocher, supra note 20, at 57-58; Turpel (1995), supra note 2, at 99-101; An Agenda for Action, supra note 3; B.C. Task Force, supra note 25; Colvin, supra note 54, at 28-29; Savino, supra note 85; ICO (1990), supra note 39; AFN proposal, supra note 5; LaForest, supra note 85;
2. ACCEPTANCE OF CLAIMS

The Commission would have an exclusive jurisdiction over the validation stage. The Commission would therefore make decisions as to which claims to negotiate and the objective criteria to apply in making these decisions. The criteria for validation would be developed after consultation with First Nations and governments and would be based on principles of fairness and equity. Detailed written reasons for these decisions would be provided to the claimants and to any other interested parties.

3. FUNDING OF CLAIMS

The Commission would also be exclusively empowered to decide on issues concerning adequate and secure funding for Aboriginal claimants to research and pursue negotiations. Written reasons for these decisions would be provided to the claimants.

The exclusive jurisdiction of the Commission over the acceptance of claims and funding decisions would solve the problem of the conflict of interests presently existing in the comprehensive and specific claims processes. The decisions of the Commission on these issues could be appealed by either party to the Federal Court.

4. IMPLEMENTATION

The Commission would also have exclusive jurisdiction to monitor the implementation of agreements and deal with any grievances based upon a perceived or real failure to implement the terms of an agreement. Therefore, when claims would be negotiated without the help of the Commission, the Commission would be given the authority to approve settlements, in order to give the parties some means of redress if one of the parties fails to deliver on the implementation of a settlement. When receiving a complaint that one of the parties has violated a term of the settlement agreement, the Commission could either conduct an investigation, enter into a mediation process with the parties, or conduct a hearing on the matter and make a final and binding recommendations.
5. ASSISTED NEGOTIATIONS

The Commission would have jurisdiction over the progress of negotiations of claims referred to it at the request of only one party. The involvement of the Commission would be an additional process available to the parties who fail to achieve a solution through direct negotiation or where one party deems the assistance of the Commission to be necessary or appropriate.

6. INTERIM MEASURES AGREEMENTS

The Commission would provide services for the parties to enter into interim measures agreements, either before or during substantive negotiations or mediation, to make provision to protect an interest being currently or potentially affected.

7. OVERLAPPING CLAIMS

If requested, the Commission could help to facilitate the resolution of disputes arising between Aboriginal groups where the traditional use and occupancy of one Aboriginal group overlaps geographically with that of another. The Commission could provide independent fact-finders and mediation services for that purpose.

8. PROVINCIAL AND TERRITORIAL PARTICIPATION

Provincial and territorial cooperation would be required in order to confer upon the Commission the most comprehensive jurisdiction. The participation of provincial and territorial governments in the negotiation of claims would be essential to any negotiation of claims involving lands and resources within their jurisdiction.

Mandate - Dispute Resolution Mechanisms

9. MEDIATION

On request from one of the parties, the Commission would have the mandate to assist parties in reaching mutually acceptable settlements by facilitating negotiations between them, such as setting timetables for
progress and arranging logistics, mediate when disagreements start to harden, and advise the parties on their obligations and suggest particular settlements if necessary.

10. FACT-FINDING

The Commission would also possess an investigative division to research the factual background of claims. Findings and/or recommendations would be reported to the parties and contained in public reports, but would remain unbinding on the parties unless they agree otherwise. The parties would also be able to agree on certain research needed to be done for certain claims and refer it to the Commission to be done under its auspices, in order to obviate duplication of research costs.

11. ADJUDICATION

The only adjudicating powers given to the Commission would be in relation to the acceptance of claims, the funding of claimants and the implementation of settlements.

Unresolved legal issues among the parties during the substantive negotiations or mediation could be referred to the courts, following a fact-finding report by the Commission. The reasons why a broader power of adjudication is not recommended will be explained below.

Other Functions

12. RESEARCH AND INFORMATION CENTRE

The Commission would provide a database of past settlements including information, documents, and research data collected by the negotiating parties which could be made available to other groups.

13. PUBLIC EDUCATION AND CONSULTATION

The Commission would play a role in educating the public about the claims process and the importance of a fair resolution of the land question. The Commission would also organize public education programs early in the process in regions where claims are made to inform local citizens of the claims filed, the
process for the resolution, and the objectives of agreements. Public education programs would then be supplemented with programs of public consultation when the process of resolution is underway.

14. TRAINING

The Commission would identify sources of information and training on negotiation skills and dispute resolution. There would be a strong emphasis put on training on cross-cultural dispute resolution techniques.

Procedures

15. CROSS-CULTURAL APPROACH

The techniques of dispute resolution employed by the Commission would be tailored to the specific cross-cultural context of First Nations - governments relations.

The Commission would sit, as often as possible, on the First Nations lands. This approach would make the process real to the people it most directly affects and would provide for direct community access to all the parties. This would also promote cultural understanding and facilitate consensual decision-making. The work of the Commission would also be complemented by some social interaction in order to cultivate a positive relationship and increase the trust between the parties.

16. RULES OF EVIDENCE

The Commission would not be bound by strict and technical rules of evidence and procedures when it would conduct hearings on matters relating to the implementation of agreements. This would allow the Commission to adopt a cross-cultural approach.

This would respond to some of the concerns regarding the limitations of the courts in handling Aboriginal claims. In fact, First Nations often feel that in submitting their claims to the courts, they submit themselves to a foreign cultural framework. The courts also lack competence to effectively deal with
polycentric problems involving complex ideological, historical, political and social issues and the courts’ rules of evidence can become problematic when dealing with the complex historical evidence raised by Aboriginal land claims.

17. FLEXIBILITY

The procedures of the Commission during negotiation, mediation and hearing would be flexible in order to accommodate any amendments or revisions of the issues needed over the course of time due to changing circumstances.

Structure

18. REPRESENTATION

The Commission would be a national body with strong regional representation, to mirror the different First Nations across the country. It would be constituted of an equal number of Aboriginal and non-Aboriginal Commissioners.

19. COMMISSIONERS

Sufficient Commissioners would be appointed to allow for more than one hearing at a time. Each Commissioner would be designated to a specific region. Commissioners would be knowledgeable in the field of land claims and its related aspects. They would be appointed by both the federal government and the First Nations on an equal basis.

Legal Basis

20. LEGISLATION

The Commission would have a legislative basis rooted in a joint protocol between First Nations and the federal government. Such a protocol would require legislation passed by Parliament and by an appropriate mechanism by First Nations to ensure a degree of permanence and stature.
21. RESOURCES

The Commission would be given sufficient funds and resources to carry out its mandate and to provide financial resources to the claimants.

22. ANNUAL REPORT

The Commission would report annually on its activities and progress to both Parliament and the First Nations and would make suggestions for improvements in the process.

2. Political Reality

Generally, proposals to improve the land claims process recommend to confer some form of adjudicating power to an independent body so that pressure can be put on the parties to negotiate in good faith, to create an incentive for compromise and to deal with cases where negotiation and mediation have failed. This is the ideal approach and I fully endorse it. I would adopt the recommendation of the Assembly of First Nations which provides that when adjudicating a claim, the Commission would have the limited jurisdiction to make a binding determination based on the facts and the law and it would then refer the matter to the parties to decide compensatory amounts through negotiations or mediation within a specified period of time. In cases where the parties would not be able to reach an agreement within the legally prescribed time, the matter would then be returned to the Commission who would order land compensation and/or some combination of land and dollar compensation. According to this proposal, all decisions of the Commission could be appealed by either party to the Federal Court.

There are many advantages to this approach. For instance, Mr. LaForest’s rationale for suggesting the creation of a land claims tribunal rather than using the existing court system was that “[s]uch a tribunal could acquire the necessary expertise to hear Indian claims and could develop appropriate procedures. Furthermore, its constituent statute could make such modifications to the ordinary law, whether substantive or evidentiary as was considered appropriate.”911 Moreover, an institution which would be

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911 LaForest, supra note 85, at 21.
primarily oriented towards mediation, but would retain powers of adjudication in reserve, would bring the promise of overcoming some of the difficulties which have been experienced with litigation in the context of Aboriginal land claims. 912 The result of combining mediation and adjudication would be an amalgam of the legal traditions of Aboriginal people and Euro-Canadian society. 913 As stated by Colvin, "[i]t is fortunate that the Indian legal heritage of mediation is available to suggest new directions. It would be yet one more tragedy in the history of the Indian peoples if this heritage were to be ignored." 914

However, despite the evidence that an independent body with adjudicating powers is critical to the fair and equitable resolution of land claims in Canada, I decided to recommend referring most unresolved legal issues between the parties to the courts. The reason is very simple: even if, ideally, everyone agrees that it would be better to give such powers to an independent Commission comprised of both Aboriginal and non-Aboriginal commissioners, it is most unlikely that the governments, both federal and provincial, will ever agree to grant adjudicating powers to a Commission which could order the federal government to pay large amounts in compensation to Aboriginal claimants and decide on an allocation of resources that could affect the provinces. In fact, despite the electoral promise of the Liberal party that it would create such an independent body to help resolving land claims, nothing has been done to date. The Minister of Indian Affairs and Northern Development, Ron Irwin, recently announced the creation of a policy unit to review the comprehensive and specific claims processes. However, when directly asked if he would support the idea of creating an independent claims body, he raised the problem of the current fiscal reality as an obstacle for the funding of such a body. 915

As it is the case in New Zealand with the Waitangi Tribunal, an independent Aboriginal land claims Commission in Canada could be given investigative powers to research the factual background of claims and produce specific fact-finding reports as requested by any parties to help the negotiations. Even if

912 Colvin, supra note 54, at 27.
913 Ibid, at 18.
914 Ibid, at 29.
findings and/or recommendations would remain unbinding on the parties unless they agree otherwise, it is likely that the opinion of an impartial Commission would put pressure on the parties to accept the findings as a basis for negotiations. In the event where the parties would decide to bring unresolved issues before the courts, the report of the neutral body would most likely influence the findings of the courts on the same issues.

The only questions left to the courts would be purely legal questions. As discussed in Chapter Two litigation could be used only to answer fundamental legal questions underlying Aboriginal land claims when the parties cannot agree among themselves. Therefore, as recommended by a special committee of the Canadian Bar Association, under the proposed model the courts would be used only to solve central legal questions such as whether Aboriginal rights exist or have been extinguished and the meaning of these rights in contemporary Canada. The courts would then refer the matters to the Commission who would supervise the negotiation on compensation and other issues when necessary.

The creation of an independent claims body has been discussed for over 40 years but there has never been a true political will to establish such an independent body with a strong mandate and meaningful powers. The reasons for this are obvious from a government's perspective. Why would the federal government abdicate its powers over the process - and sometimes even the outcomes of the disputes - to give any form of binding authority to an independent claims body comprised of half Aboriginal and half non-Aboriginal commissioners? The three Commissions created in Canada have brought a very valuable experience which should inform the creation of a national body but it must be noted that all of them have been criticized for not having appropriate mandates and powers to fulfill their role and for eliminating the problems of conflict of interest and imbalance of power which exist in the current land claims processes.

In light of this, I have chosen to make recommendations which I believe represent the minimum acceptable in the design of an independent land claims Commission. These recommendations take into account the pressure existing on all the parties involved in the land disputes and the political reality. The
proposed model integrates the basic elements which must be present to achieve a fair and efficient resolution of the land question in Canada.

Conclusion

Throughout this thesis, I have described different dispute resolution mechanisms and offered suggestions as to how these mechanisms could be best utilized to resolve Aboriginal land claims in Canada. I have attempted to demonstrate that all these processes bring some benefits while at the same time suffer from some limitations when used to resolve land claims. I believe that each dispute resolution mechanism has a role to play in the overall process of resolving Aboriginal land claims as long as each of them is structured to accommodate the cultural diversity, provide for means to redress the imbalance of power between the parties and ensure that all concerned have a voice in designing the process(es) employed to resolve the land question.

Chapter One of my thesis examined the historical relationship between Aboriginal and non-Aboriginal societies in order to better understand how this history has contributed to create the present political and legal problems with respect to the land question. The characteristics of land disputes were also identified as well as the nature of the pressure facing each of the parties.

The first process examined was litigation. Chapter Two explored both the benefits and shortcomings of litigation. The weaknesses of the courts in dealing with Aboriginal claims have been recognized for some time. In my analysis, I have argued that in submitting their claims to the courts, Aboriginal people have to work within a foreign cultural framework. This can be evidenced by the fact that the courts' rules of evidence are generally not designed to handle the complex historical evidence raised by Aboriginal land claims. Further, adjudication theories suggest that the court system cannot generally deal adequately with polycentric problems. However, litigation can present some advantages. For instance, the courts can play a critical role in forcing governments to take the land question seriously and in increasing the public awareness on these important issues. The court system can also be an effective option for Aboriginal
groups when governments are unwilling to negotiate, to clarify certain legal positions, or when
disagreement on some issues is so divisive that compromise is impossible. Furthermore, the threat of
litigation can spur negotiations and provide significant bargaining leverage to Aboriginal claimants
during negotiations. In concluding Chapter Two, suggestions were made to achieve the goal of cultural
relativism by the courts, and recommendations were made to appoint a special master in an effort to
circumvent some of the obstacles of litigation.

In Chapter Three, the general theories of negotiation were described and applied to the Aboriginal land
claims context. The principal difficulties with the land claims negotiation process were then identified
and discussed. It was argued that the application of adversarial negotiation strategies contributes to
disempowering Aboriginal groups. Moreover, the control of the government over the development of land
claims policies, the acceptance of claims to be negotiated and the funding for First Nations create a
situation of conflict of interest which is unacceptable. It was therefore concluded that there is an urgent
need to redesign the negotiation process in a way which strengthens the bargaining power of Aboriginal
groups and avoids any form of conflict of interest. Several suggestions were made to address some of the
procedural and substantive problems with the existing negotiation process under federal land claims
policies. The development of a language of perspicuous contrast was presented as an ideological approach
to encourage Euro-Canadians to question their preliminary assumptions underlying their beliefs and ideas
and legitimate Aboriginal values. Strong emphasis was put on the objective of engaging in a real cross-
cultural dialogue between the parties involved in land negotiations.

Chapter Four examined the theories and practice of mediation and arbitration. The mediation process was
found to provide a unique opportunity for achieving empowerment and recognition. These effects are
particularly important in the context of Aboriginal land claims if it can help First Nations restoring their
own value and strength and their own capacity to handle life’s problems. The recognition and
understanding of the other party’s perspective could also encourage the development of a cross-cultural
approach in the resolution of Aboriginal land claims. It was also argued that the arbitration process could
provide some benefits in resolving Aboriginal land claims as it would give settlements some degree of finality and allow for some flexibility in the procedures. It was therefore concluded that in view of the advantages of both of these processes, a potential approach to resolving Aboriginal land claims would be the combination of mediation and arbitration in a process by which a team of Aboriginal and non-Aboriginal neutral third-parties would mediate the dispute keeping the power to adjudicate the matter in reserve to put pressure on the parties to settle.

Chapter Five described the make-up, mandates and processes used by three institutions established to help in the resolution of claims between First Nations and governments. The first model examined was the Australian National Native Title Tribunal created under the Native Title Act, 1993 to give effect to the principles of the Mabo decision. As part of its mandate, the National Native Title Tribunal organizes mediation conferences in which the Tribunal uses the approach of interest-based negotiation. It is too early to make a final judgment on the success of the National Native Title Tribunal, but so far, the Tribunal seems to be seriously committed in finding creative solutions to disputes between the indigenous population and Australian governments. In New Zealand, the Waitangi Tribunal has been generally successful in setting the stage for settlements of legitimate grievances held by the Maori over land and other matters related to the Treaty of Waitangi. This Tribunal has gained its credibility by developing a bicultural approach in the way it conducts its hearings. Studies show that the Waitangi Tribunal has contributed in bringing Maori culture closer to the collective culture of the country. Commitment to a bicultural approach to process and outcomes would certainly be a progressive addition to the current process of Aboriginal land claims resolution in Canada. Finally, the third institution examined was the B.C. Treaty Commission created to help the negotiation of modern treaties in B.C. This trilateral process has many positive features including the appointment of both Aboriginal and non-Aboriginal commissioners. However, the B.C. Treaty Commission needs a stronger and more reliable commitment from the governments involved in resolving comprehensive claims, as well as finding solutions to some procedural problems such as the representation of third-parties at the negotiating table, the funding question and the negotiation of interim measures agreements by the province of B.C. I would also suggest
the use of various mediating techniques to ensure that the imbalance of power between the parties is not so enormous as to prevent fair agreements to be reached and that cultural differences are recognized.

Finally, Chapter Six identified the essential elements that should be present in any dispute resolution mechanisms dealing with claims involving First Nations and Euro-Canadian governments. These fundamental elements were then integrated into a model of an independent land claims commission which would be created to help resolving all types of Aboriginal land claims in Canada. These recommendations were made in light of the present political context.

Discussions about possible changes to the existing processes should occur between governments in partnership with the First Nations of Canada and in consultation with other non-Aboriginal interests. It is not enough for the federal government to say that it recognizes that the courts are not the best forum to resolve land claims and that the existing land claims processes are not working. It must act on these declarations. Grave injustices have been committed over last 150 years and there is now a pressing need to resolve them in a fair and equitable manner so that the victims of these injustices can start the healing process.
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