

The Expectation of Justice

DENIELLE BOISSONEAU-THUNDERCHILD*

I	INTRODUCTION	3
II	GENESIS AND EVOLUTION OF THE SPECIFIC CLAIMS POLICY	6
	The Institutional Structure: Specific Claims Branch	12
	Criteria for Acceptance of a Claim for Negotiation Under the Policy	13
	Compensation Criteria under the Policy	14
	Stages of the Policy	16
	Unwritten Compensation Implementation Practices	19
	The Unwritten Requirement of a Modern Surrender	20
III	FIDUCIARY DUTY, THE HONOUR OF THE CROWN AND RECONCILIATION	22
IV	CASE SAMPLES	26
	Garden River First Nation's 1987 Settlement	27
	<i>The Lands</i>	27
	<i>The Unlawful Alienation</i>	28

* B.H.J. (University of Regina), LL.B. (University of Toronto), LL.M (University of Ottawa). Denielle is Anishnabe-Nehiyew. A member of the Garden River (Anishnabe) First Nation in Ontario, Denielle also spent half her life in Saskatchewan, where her father's family originates from Thunderchild (Nehiyew) First Nation.

Denielle completed her year of articles with the Indian Claims Commission and continued on as associate legal counsel after her call to the Law Society of Upper Canada in 2002. While there, she had the opportunity to work on a number of diverse specific claim issues from across Canada. In 2004, Denielle began work as a sole practitioner and her law practice has since focused mainly on specific claims and other First Nation land protection issues.

Denielle is a member of the Law Society of Upper Canada in Ontario and the British Columbia Law Society. She continues to work for First Nations as a sole practitioner out of her office located in the Greater Victoria area in British Columbia. She dedicates this article to her late Uncle Ron and her Auntie Gloria, with love and admiration.

	<i>Garden River's Complaints Regarding the Unlawful Alienation</i>	29
	<i>1971: Departmental Review of its Liabilities</i>	30
	<i>Submission and Acceptance of Garden River's Claim</i>	30
	<i>First Rejection of Federal Offer</i>	30
	<i>Second Rejection of the Federal Offer</i>	31
	<i>Third Rejection of Federal Offer</i>	33
	<i>Fourth and Final Consideration of the Federal Offer</i>	
	<i>Finally Passes Utilizing Minority Vote Provisions of the Indian Act</i>	33
	<i>The Settlement Agreement and the Conditional Surrender</i>	34
	Thunderchild First Nation's 1908 Surrender	35
	<i>The Lands</i>	35
	<i>The Unlawful Alienation</i>	36
	<i>First Rejection of Federal Offer</i>	36
	<i>Second, Third and Fourth Rejection of Federal Offer</i>	37
	<i>Thunderchild's Specific Claim</i>	38
V	THE CROWN'S FIDUCIARY OBLIGATION	39
VI	CONCLUSION	44

The aim of this paper is to explore the Crown's obligations to a First Nation claimant leading up to and following the settlement of a specific claim, wherein the specific claim is for the unlawful surrender of Indian reserve lands set aside under treaty. According to the Department of Indian Affairs' published material, specific claims

deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.¹

As part of this exploration, this paper will review the unwritten requirement of the federal Specific Claims Policy to obtain modern surrenders in order to settle the Crown's historical breach, the unwritten implementation

1. Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: Ministry of Supply and Services Canada, 1982) at 3 [*Outstanding Business*]. See also the information sheet found at <http://www.aicn-inac.gc.ca/ps/clm/index_e.html>.

guidelines for Canada's compensation criteria, and the length of time it takes for lands to be added to reserve where that is a component of the settlement agreement. The paper will begin with a brief historical overview of the development of the federal Specific Claims Policy, and review the larger political and legal context within which it has evolved. The paper will then move on to review the current policy and two case samples of settled unlawful surrender claims related to reserve lands set aside under treaty for Garden River First Nation and Thunderchild First Nation.

I INTRODUCTION

In Canada, as in other countries that have grown out of settler colonies, the relationship between the original Indigenous peoples and the settler country is complex. From the time of first contact between European explorers and Indigenous peoples, agreements of coexistence have been developed for their mutual benefit. These negotiated agreements of coexistence, protected by Canada's *Constitution*² since 1982, have been characterized by the Supreme Court of Canada as an exercise of reconciliation. The Supreme Court most recently reiterated in *Haida* that "Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties."³ Breaches of these constitutionally protected agreements of coexistence by the Crown found breeding ground in what the courts have labeled a "dysfunctional bureaucracy"⁴ that had "eccentric record keeping"⁵ practices.

The earliest organization of the modern Department of Indian and Northern Affairs ("DIAND") included Indian agents and sometimes farming instructors residing within Indian agencies responsible for the lawful administration of band assets placed under their care. These Crown officials were located far from the eyes of their colonial masters in Ottawa. They were given heavy responsibility for the protection, preservation and administration of massive First Nations assets, including prime agricultural lands, mineral deposits, timber and water resources: the basic ingredients to build any nation. Research completed over the last 20 years has keenly

2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

3. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73 at para. 25 [*Haida* cited to SCC].

4. *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641, [2000] O.J. No. 4804 at para. 272, leave to appeal denied, [2001] 4 C.N.L.R. iv (S.C.C.) [*Chippewas of Sarnia* cited to O.J.]; and same passage quoted in *Papaschase Indian Band No. 136 v. Canada (A.G.)*, [2004] 4 C.N.L.R. 110 at para. 160 (Alta. Q.B.).

5. *Wewaykum Indian Band v. Canada*, [2002] S.C.J. No. 79 at para.70 [*Wewaykum*].

illustrated that certain Indian agents and senior officials of the department were, at best, inept and, at worst, corrupt.⁶ The reign of these individuals over the lives, lands and assets of the bands under their control often spanned a decade or more, and within that time, the action or inaction of these individuals, combined with certain government policies designed to eliminate “the Indian problem,”⁷ led to what is now over 1000 “specific claims” filed with the department under its Specific Claims Policy.

6. See for example Peggy Martin-McGuire, *First Nation Land Surrenders on the Prairies, 1896-1911* (Ottawa: Indian Claims Commission, 1998).

7. The phraseology of “the Indian problem” was most famously used by Deputy Superintendent General Duncan Campbell Scott in his 1920 address to a parliamentary committee addressing proposed amendments on enfranchisement. The final report of the Royal Commission on Aboriginal Peoples cited Scott’s statement in 1920:

I want to get rid of the Indian problem. I do not think as a matter of fact, that the country ought to continuously protect a class of people who are able to stand alone Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.

The Royal Commission commented on Scott’s statement as follows:

Rarely have the prevailing assumptions underlying Canadian policy with regard to Aboriginal peoples been stated so graphically and so brutally. These words were spoken in 1920 by Duncan Campbell Scott, deputy superintendent general of Indian affairs, before a special parliamentary committee established to examine his proposals for amending the enfranchisement provisions of the Indian Act. This statement, redolent of ethnocentric triumphalism, was rooted in 19th century Canadian assumptions about the lesser place of Aboriginal peoples in Canada. Far from provoking fervent and principled opposition to the assimilationist foundation of his testimony, Scott’s statements were generally accepted as the conventional wisdom in Aboriginal matters. Any dispute was over the details of his compulsory enfranchisement proposals, not over the moral legitimacy of assimilation as the principle guiding relations between the federal government and Aboriginal peoples.

That a Canadian official could speak such words before the representatives of the Canadian people in the 20th century without arousing profound and vehement objections is equally noteworthy. It was taken for granted that Aboriginal peoples were simply a minority group of “inferior” peoples, internal “immigrants,” in effect, in a country ready to accept them on equal terms only if they renounced their Aboriginal identity and demonstrated in terms acceptable to non-Aboriginal society that they were fit for the “privileges” of enfranchisement and fuller participation in the more evolved, more “civilized” society that had overtaken and grown up around them. In other words, the false premises that underlay so much of government policy toward Aboriginal peoples were alive and well in the third decade of this century.

Impassioned opposition to Scott’s proposal, from Indian interveners appearing before the special committee, was ignored, and the amendment allowing enfranchisement of Indians without their consent was passed with minor procedural modifications. Despite continuing Indian hostility to its destructive intent, it was given royal assent and became law on 1 July 1920.

This paper will attempt to address what it means to “settle” a historical grievance brought by a First Nation against the Crown, in this case, where it involves unlawfully surrendered treaty reserve lands. In an era of increased judicial clarification of the concept of reconciliation, the question is particularly compelling where a claimant First Nation wants to maintain their interest in the unlawfully taken lands. To label this grievance and settlement process as encompassing merely an outstanding lawful obligation only captures the historical breach. The policy fails to fully capture the aspect of relationship building set out in *Gathering Strength* and the requirement of reconciliation, as that term has been defined by the Supreme Court.

In a surrender of reserve lands, the Crown has a fiduciary duty to the surrendering band to ensure that the surrender is not an exploitative bargain (even where the First Nation has provided its consent) and that the surrender, including the terms of compensation, are in the best interests of the First Nation. In the two case samples reviewed in this paper, the Crown had, at the time of the modern surrender, a fiduciary duty to protect the First Nation from exploitation by third parties and even from the Crown itself. This paper asks whether this duty has been fulfilled by the Crown and argues that this duty has not been met. Although the author believes this position to be applicable to both First Nations studied in this paper, the situation of Garden River First Nation provides the best example of how the Specific Claims Policy is failing First Nations, given the passage of time. That First Nation’s claim is reported as a “settled” claim, and therefore, a success story of the policy. However, as the First Nation approaches the 20 year anniversary of this settlement agreement, the agreement has yet to be fully implemented.

Thus, on the day commemorating Canada’s own emergence as a distinct political entity in the broader world community, Canada adopted a law whose avowed goal was the piecemeal but complete destruction of distinct social and political entities within the broader Canadian community. This relatively minor episode perhaps best encapsulates the core injustice that had been building for close to 100 years. That was the continuous and deliberate subversion of Aboriginal nations—groups whose only offence was their wish to continue living in their own communities and evolving in accordance with their own traditions, laws and aspirations.

Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at Part Two: False Assumptions and a Failed Relationship, Chapter 13: Conclusions. For more discussion of national policies, see Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-existence* (Ottawa: Supply and Services Canada, 1995) at 29-32; and Martin-McGuire, *supra* note 6 at 11.

II GENESIS AND EVOLUTION OF THE SPECIFIC CLAIMS POLICY

Although a thorough review of the history of the claims process in Canada has been prepared by the Indian Claims Commission and Indian Commission of Ontario,⁸ it is important, in order to situate the two settlement agreements reviewed in this paper in their proper context, to understand the history behind the Specific Claims Policy. Therefore, the intent of this section is to provide a brief historical snapshot of the policy's development.

The existing Specific Claims Policy is rooted in centuries of First Nations' and non-First Nations' attempts to coexist within the traditional territories of diverse Indigenous peoples in a manner that is both peaceful and mutually beneficial. In the simplest of terms, coexistence, its consequent agreements of sharing and cooperation required for human beings to coexist peacefully, and the fulfilment of these agreements is the crux of the matter with regard to the resolution of historical grievances of First Nations against the Crown. In 1947, a special joint committee of the House and Senate was created to investigate "Indian Affairs." In modern times, grievances relating to these agreements are meant to find settlement through a federal grievance process that arguably finds its earliest roots in the mandate of this committee.⁹

As the world emerged from the Second World War and its atrocities, and as the global community intensified efforts to protect and advance human rights, Canada began to formulate its place within the global community as a haven for, and protector of, the abused and dispossessed.¹⁰ In contrast to this role in the global community, Aboriginal soldiers returned home from the war¹¹ to find their fellow First Nations citizens still governed by an oppressive *Indian Act*, including the continuation of a 1927

8. P.E. James Prentice & Daniel J. Bellegarde, "Indian Claims Commission of Canada: Human Rights, Justice, and the Need for an Independent Claims Body in Canada" (Brief presentation to the House of Commons Standing Committee on Aboriginal Affairs, 29 May 2001); Phil Fontaine, "Opening Address" (Presented to the Pacific Business and Law Institute Conference on the New *Specific Claims Resolution Act*, Ottawa, 19 September 2002), available from the Pacific Business and Law Institute, Vancouver, B.C., <Materials@PacificConferences.com>; Indian Commission of Ontario, "Discussion Paper Regarding First Nation Land Claims" (1995) 2 ICCP.

9. Prentice & Bellegarde, *ibid.* at 6.

10. For a discussion of the interplay between Canada's war and post-war environment and First Nations' issues in Canada, see John F. Leslie, "A Historical Survey of Indian-Government Relations, 1940-1970" (Paper prepared for Royal Commission Liaison Office, DIAND, 1993) [unpublished].

11. Standing Senate Committee on Aboriginal Peoples, *The Aboriginal Soldier After the Wars* (Ottawa: Senate of Canada, March 1995) at 4. For more discussion about Aboriginal veterans, see *Warriors: A Resource Guide* (Brantford: Woodland Indian Cultural Educational Centre, 1986).

prohibition on political organization and independent retention of legal representation. In their struggle against these confines, First Nations sought to organize themselves on a national level (for the second time¹²) in the late 1940s under the North American Indian Brotherhood. In this wider context, the 1947 special joint committee heard from First Nations across Canada and one of its recommendations was the creation of an independent administrative tribunal to deal with Indian claims.¹³ A second joint Senate and House committee was struck in 1959 and, again, among its many recommendations was the creation of a claims commission.¹⁴ Although legislation for an independent adjudicative tribunal was drafted by both the Diefenbaker and Pearson governments in response to the committee's recommendations, neither was successful.¹⁵

Most recently, legislation was developed to establish a Centre for the Independent Resolution of First Nations' Specific Claims and it received royal assent in November 2003. It has been subject to intense criticism by First Nations and their representative bodies.¹⁶ Although the legislation has yet to be proclaimed into force, and it is not known when, if ever, this may happen, a separate directorate for the centre has been created within the Specific Claims Branch of the Department of Indian and Northern Affairs.

As Canada approaches the year 2007, sixty years following the 1947 special committee, the government of Canada and Aboriginal peoples continue to be engaged in the same conversation. The evolving political and legal foundation has only strengthened the argument for the need for an independent body to deal with historical grievances of Aboriginal peoples. However, perhaps what has been missing from the discussion is an understanding on the Crown's part that First Nations' historical grievances cannot be looked at in isolation from the current and ongoing process of

12. The first effort followed on the heels of the First World War and the creation of the League of Nations. First Nations in Canada formed the League of Indians; however, it did not last. For a history, see online: Assembly of First Nations: The Story <<http://www.afn.ca/article.asp?id=59>>.

13. Prentice & Bellegarde, *supra* note 8 at 6.

14. See Canada, *Minutes of Proceedings of the Joint Committee of the Senate and the House of Commons on Indian Affairs*, No. 16 (30 May 1961 - 7 July 1961), including "Second and Final Report to Parliament" by Roger Duhamel, F.R.S.C (Ottawa: Queen's Printer, 1961) at 614; for discussion, see also Prentice & Bellegarde, *ibid.* at 6-7.

15. For a review of this period, see Prentice & Bellegarde, *ibid.* at 6-9.

16. For an in-depth review of this legislation, its drafting history, and First Nations' responses, see Legislative Summary LS-431E, "Bill C-6: The *Specific Claims Resolution Act*" by Mary C. Hurley (Ottawa: Library of Parliament, 2003), online: Parliament of Canada, Legislative Summaries <http://www.parl.gc.ca/common/bills_ls.asp?Parl=37&Ses=2&ls=c6>; See also papers prepared for the conference entitled "The New *Specific Claims Resolution Act*" hosted by the Pacific Business & Law Institute (Ottawa, 19-20 September 2002), Email: Materials@PacificConferences.com.

reconciliation. In particular, the resolution of specific claims related to the wrongful surrender of reserve lands must be seen to have a modern, forward-looking component based on a relationship of reconciliation, rather than simply the elimination by compensation of the Aboriginal interest.

The federal Specific Claims Policy, as it was first articulated in the 1969 White Paper, reflected Trudeau's concept of an egalitarian Canada. However it failed to fully comprehend and incorporate the full set of legal rights and responsibilities captured by the concept of reconciliation. The federal policy was revisited in 1973, as a result of the *Calder* decision,¹⁷ and historical claims were then divided into two parts: specific claims and comprehensive claims.¹⁸ The 1974 establishment of the Office of Claims Negotiation started with one federal negotiator and a small support staff.¹⁹ The policy was subsequently set out in a published booklet called *Outstanding Business* in 1982, following a 1981 policy review. The policy was amended again in 1991 as a result of the Oka crisis and continues to be the framework for submission and assessment of specific claims. It is a policy that is in desperate need of an extensive review to ensure that it is consistent with the current legal framework.

Under the policy, Canada defines these claims as “outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay.”²⁰ The public expected a process which would foster justice, but the policy left ill-defined what kind of justice could be achieved. The policy is supposed to be in keeping with *Gathering Strength*, which focuses on distributive justice—that owed by a community to its members, including “the fair disbursement of common advantages and sharing of common burdens.”²¹ Accordingly, the policy should foster the three “mutuals” set out in *Gathering Strength*: mutual respect, mutual recognition and mutual responsibility. Instead, the Specific Claims Policy focuses on some hybrid of personal justice, owed between parties to a dispute “regardless of any larger principles that might be

17. *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 [*Calder*]. This fact (although specifically dealing with the comprehensive claims policy) was acknowledged by the Supreme Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103 [*Sparrow*].

18. Comprehensive claims are based on unextinguished Aboriginal title where there has been no treaty agreement to extinguish title between the First Nation(s) and Canada. A “specific claim” relates to Canada’s breach or non-fulfilment of lawful obligations, such as those found in treaties, statutes or other agreements between First Nations and Canada, including the management of First Nations’ monetary and other assets. There is also a lesser known category of claims known as claims of a third kind, which, although they may fall within the spirit of the comprehensive or specific claims policies as a legitimate grievance, fail to strictly meet the acceptance criteria of these two policies.

19. *Outstanding Business*, *supra* note 1 at 13.

20. *Outstanding Business*, *ibid.* at 3.

21. *Black’s Law Dictionary*, 7th ed., s.v. “justice, distributive justice”.

involved,”²² and the unwieldy and treacherous practice of popular justice that may at times allow space for recognition of First Nations’ rights in this country but only so long as it does not alter established principles of property law.

Everyone has his or her own personal notion of what justice entails. In a democracy such as Canada, the country’s citizens and policy makers take guidance in formulating these notions from carefully crafted decisions of the judiciary—those members of the country laden with the heavy responsibility of interpreting and applying the law. When adjudicating the legal issues of First Nations, the Supreme Court of Canada—those precious few Justices who are laden with the even heavier responsibility of having the final say on legal rights and responsibilities—has pronounced that there is a fiduciary relationship between “Indian Bands” and the Crown. In certain circumstances, this relationship will give rise to a fiduciary duty owed by the Crown. The first articulation of this fiduciary relationship is found in the 1984 Supreme Court decision in *Guerin v. The Queen*.²³ In *Guerin* the Supreme Court underscored the importance of discretionary control as a basic ingredient of this fiduciary relationship. Since 1984, the Crown has been found to hold a fiduciary duty to First Nations in a range of circumstances. The content of this duty will be reviewed in greater detail below.

In the two settlement agreements examined in this paper, there was an unlawful surrender of Indian reserve lands in which the Crown failed to fulfil its fiduciary obligation to preserve and protect what the Supreme Court has called the band’s quasi-property interest.²⁴ As part of the settlement agreement, intended to settle the historical claim, each First Nation was required to provide a modern surrender of their unlawfully taken reserve lands, for which they received unimproved fair market value.

The requirement of a modern surrender as a prerequisite to settling a wrongful surrender claim illustrates how the policy is flawed in that it does not effectively capture the distinction between settling the Crown’s historical breach and settling the current unknown interest. A claimant First Nation with an accepted wrongful surrender specific claim has two very distinct grievances to resolve. First, there is the historical breach, for which the claimant receives compensation for things such as loss of use. The second distinct issue is the First Nation’s present and future claim over the lands. It is this aspect of “uncertainty” that the Crown attempts to resolve by

22. *Ibid.*

23. [1984] 2 S.C.R. 335 [*Guerin*].

24. *Wewaykum*, *supra* note 5 at paras. 93-100.

negotiating a “modern surrender” and purchase of the unknown First Nation interest in the claimed lands.

At the end of the settlement process, the significant change is that the Crown is now in a safer legal position than it was previously. The First Nation walks away from the negotiation table with a compensation package encompassing *both* the Crown’s historical breach, for an amount reached by unprincipled compensation practices (as will be argued later), and with compensation monies that reflect unimproved fair market value for the First Nation’s current interests in the lands at issue. This is despite the fact that the claimed lands have often been improved by third parties. The Crown walks away from the negotiation table with a full and final release to the events giving rise to the claim, an indemnity against any future claims arising from the same events, and protection from litigation that the third party purchasers could have brought against the Crown since the Crown has by the modern surrender purportedly obtained certainty of title by elimination of the unknown First Nation interest.

The federal basis for the requirement of a modern day surrender as a prerequisite to settling a wrongful surrender claim is to obtain “certainty of title” and “finality.” Any attempt by a First Nation to negotiate flexible arrangements that would seek to accommodate *both* recognition of their continuing ownership of wrongfully taken reserve land *and* the interests of innocent third party purchasers (who are often their neighbors and with whom the First Nation wants good relations) is quickly curtailed by Canada’s position that it will not interfere with the rights of *bona fide* third party interests. Accordingly, the settlement of these claims is problematic because the existing policy framework fosters the notion that the recognition of Aboriginal ownership cannot result in certainty of title or finality to a claim. In fact, the very concept of Aboriginal ownership is seen to be contrary to “certainty of title” and “finality.” Yet, such notions are in direct opposition to the principles of mutual respect, mutual responsibility and mutual recognition set out in *Gathering Strength*, which the policy is supposed to foster. In practice, the application of Canada’s position only serves to fear-monger and create acrimony between the local Aboriginal and non-Aboriginal communities who must deal with the real issue of land holdings. It is also an unfair and grossly inadequate balancing of competing interests by the Crown. It paints First Nations’ interests as the dark shadow looming over and scaring away development—a dark shadow that creates uncertainty. The perception remains that the only way to resolve it is to remove that shadow from the picture entirely—to “compensate” it away.

The federal position regarding the settlement of specific claims is particularly problematic given the Supreme Court’s interpretation of the *sui*

generis nature of the Aboriginal interest in reserve land. In the decision *Osoyoos Indian Band v. Oliver*,²⁵ it was held that a First Nation cannot unilaterally add to or replace reserve lands, and that reserve land does not fit neatly within the traditional property law concepts of exchange of land for compensation in the amount of market value plus expenses. The Supreme Court explained in *Osoyoos* that reserve land is more than just a fungible commodity and that it has important cultural and other unique components. Despite this fact, under the current Specific Claims Policy, it is the First Nations who are forced to give up their interests in their reserve land.

To state it more clearly, a parcel of land that is claimed as wrongfully surrendered reserve lands exists in a state of legal uncertainty. In the absence of judicial determination of the status of the lands and a determination as to whether the defence of innocent third party purchasers defeats the First Nation's attempts to take possession, each affected party holds an unknown interest. The First Nation holds a "potential" interest that does *not* fit neatly within the standard compensatory scheme of property. On the other hand, the "potential" interests of the affected third parties *are* interests that fit squarely within the standard scheme of compensation. The harsh reality is that, under the current specific claim compensation practices of Canada, buying out the interests of a vulnerable First Nation is cheaper than buying out the interests of third parties. In this way, Canada places its own financial interests ahead of First Nations.

Canada's rigidity on the issue of third party interests also flies in the face of the direction from the Ontario Court of Appeal in *Chippewas of Sarnia*²⁶—for which the Supreme Court denied leave to appeal—that although there is a need to *reconcile* Aboriginal claims with the rights of innocent third party purchasers, this is a factor which must be considered on a case-by-case basis. The Court explained that where the denial of the Aboriginal interest would be "substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right."²⁷

25. *Osoyoos Indian Band v. Oliver (Town)*, [2001] S.C.J. No. 82; [2001] 3 S.C.R. 746 [*Osoyoos* cited to S.C.J.].

26. *Supra* note 4.

27. *Chippewas of Sarnia*, *ibid.* at para. 309. For an in-depth review of the misapplication of the good faith purchaser rule in the *Chippewas of Sarnia* decision, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2002), online: The Delgamuukw / Gisday'wa National Process <<http://www.delgamuukw.org>>.

The Institutional Structure: Specific Claims Branch

The federal position on the Specific Claims Policy states that the policy is in keeping with *Gathering Strength: Canada's Aboriginal Action Plan*, which was released in 1998. According to a DIAND publication, "*Gathering Strength* is a comprehensive approach to renewing partnerships, strengthening Aboriginal governance, developing a new fiscal relationship, and supporting strong communities, people and economies."²⁸ Currently, the Specific Claims Branch operates out of the Claims and Indian Government sector of DIAND. This sector, headed by its own assistant deputy minister, is responsible for three policies: Specific Claims Policy Branch, Comprehensive Claims Policy Branch, and the Inherent Right to Self-Government Policy Branch. Each policy operates under its own branch.

The Specific Claims Branch operates with its own director general, with a total of approximately²⁹ 65 staff located in offices in Hull, Quebec and Vancouver, B.C. The staff are broken down into four directorates, each with its own director: Negotiations/Operations, Research/Policy, Special Claims, and Claims Research Centre Implementation. The Negotiations/Operations and Research/Policy directorates consist of portfolio managers, claims analysts, policy analysts, research analysts, negotiators and support staff. There are a total of *six* negotiators (or portfolio managers) for specific claims across Canada. It is unknown how many federal negotiators are currently retained on contract. The branch also has 22.8³⁰ Department of Justice lawyers who work in conjunction with *all four* of the directorates. There is a need for greater resources for the research, assessment and negotiation of the filed specific claims across Canada. The Claims Funding Division operates separately with its own staff.

The 2004 summary of claims³¹ prepared by the Specific Claims Branch lists a national total of 1,285 specific claims from 1970 to 2004. Sixty-six of these claims are in active litigation, and would therefore be handled by a separate branch of DIAND and the Department of Justice. Another 264 of

28. Indian and Northern Affairs Canada, "Specific Claims Branch: Overview", online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ps/clm/scb_e.html>.

29. This number is based on a general count provided by the main reception in the director general's office, and is an approximate count *only*. The information in this paper regarding the breakdown of staff in the Specific Claims Branch was also obtained from the main reception of the director general's office.

30. Information on the number of lawyers (22.8) received by email from Perry Robinson, Senior Counsel, DIAND Legal Services (16 February 2005). Of these lawyers, 18.8 work out of DIAND Headquarters in Hull, Quebec, and 4 work out of the British Columbia office. The .8 figure represents a lawyer who works part-time.

31. Indian and Northern Affairs Canada, Specific Claims Branch, *Public Information Status Report* (1 April 1970 - 30 September 2004), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/index_e.html#SpecificClaims>.

these claims have been settled strictly under the policy. Thirty-four have been resolved through an administrative remedy; 80 of the claim files are closed, and 66 claims rejected as showing no outstanding lawful obligation owed by the Crown. This leaves at least 775 claims that are being handled by the Specific Claims Branch, in addition to any of the 66 rejected that are now active in the Indian Claims Commission's process. If the 775 files were split evenly between all 22.8 legal counsel working for the branch, on average each lawyer would have carriage of 35 specific claims. Of these submitted claims, 622 are still under review, with the bulk of this amount caught in the research (228 claims) and preparation of legal opinion (281 claims) phase of review. There are 115 claims in negotiation, with 31 of those claims listed as "inactive." This leaves 84 specific claims in active negotiations. There is no research providing an estimation of how many specific claims are being researched in preparation for submission by bands across Canada.³²

Criteria for Acceptance of a Claim for Negotiation Under the Policy

The policy's criteria for acceptance of a claim for negotiation are categorized under the headings "Lawful Obligation" and "Beyond Lawful Obligation." Under "Lawful Obligation," the policy states:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

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

Under "Beyond Lawful Obligation," the policy states:

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

32. Although the Claims Funding Division of DIAND may have some idea of this number in terms of their spending, this would not account for other claims being researched by First Nations' own funds. In any event, the author's efforts to contact someone from Claims Funding were unsuccessful as of the completion of this paper.

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.³³

Compensation Criteria under the Policy

The policy sets out 10 compensation criteria:

- 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
- 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.
- 3) i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated *either by the return of these lands or by payment of the current, unimproved value of the lands.*
ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.
- 4) Compensation shall not include any additional amount based on “special value to owner,” unless it can be established that the land in question had a special *economic* value to the claimant band, over and above its market value.
- 5) Compensation shall not include any additional amount for the forcible taking of land.
- 6) Where compensation received is to be used for the purchase of other lands, such compensation *may include reasonable acquisition costs, but these must not exceed 10% of the appraised value* of the lands to be acquired.
- 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.³⁴
- 8) In any settlement of specific [N]ative claims the government will take third party interests into account. As a general rule, the government will

33. *Outstanding Business*, *supra* note 1 at 20.

34. This second aspect, the requirement for legal fees to be approved by the Department of Justice, was eliminated in the 1991 amendments.

not accept any settlement which will lead to third parties being dispossessed.

- 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.
- 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered [all emphasis added].

Criterion 10 is often referred to as the discount factor. Although the language of “general in nature” would suggest that the criteria are open to expansion, criterion 10 is actually used to restrict the amount of compensation. The level of doubt as to the validity of the claim (for example, were it to proceed to litigation) is reflected in the level of compensation offered. The more solid a First Nation’s claim, the more compensation it will be offered, and vice versa.

Under Criterion 4, the policy restricts compensation only to economic market value, a restriction that is contrary to the Supreme Court’s direction in *Osoyos* that the Aboriginal interest in land is more than just a fungible commodity, with important cultural components and the inherent and unique value of the land itself.

An aspect of the implementation of these compensation criteria is Canada’s Additions to Reserves (“ATR”) Policy. It is beyond the scope of this paper to delve into a complete review of the ATR Policy or the criticisms brought against it; however, a few brief remarks are necessary.³⁵ The ATR Policy is a three-phase process to either add lands to existing reserves or to create new reserves. The ATR Policy has three justifications within which a First Nation’s proposed lands must fit: (1) legal obligation, (2) community additions, and (3) new reserves/other. Lands to be added to reserves as part of a specific claim settlement agreement fit under the first ATR policy justification, “legal obligation.” There are a number of steps to be undertaken within the ATR process; one of the most important, costly and lengthy is the environmental assessment and clean up of proposed reserve land additions.

35. Information on ATR Policy taken from Department of Indian Affairs and Northern Development, *Expanding the Reserve Land Base: An Overview of the Three Phase Process to Add Land to Existing Reserves or Create New Reserves* (Ottawa).

Stages of the Policy

There are five broad stages of the policy's processing of specific claims:³⁶ first, the First Nation's research and submission of a claim; second, Canada's review and confirming research; third, the minister's acceptance or rejection; fourth, negotiation where accepted; and fifth, the implementation of a settlement agreement. Any First Nation who believes it has a claim captured by the policy bears the financial burden of researching, preparing and submitting its claim to the minister of Indian Affairs. There is some funding available under Canada's Claims Research Funding and Negotiation Program ("CRFNP"), which operates under the Research Funding Division ("RFD") of the Claims and Indian Government sector of DIAND.³⁷

There are a number of criticisms offered by First Nations organizations³⁸ and the Indian Claims Commission with regard to funding, including the lack of clear and precise funding criteria, and the fact that "more often than not, research funds run out well before the end of a given fiscal year."³⁹ There is no intent to delve into a discussion of these criticisms in this paper; they are simply highlighted in the context of setting out the larger specific claims process.

Once a First Nation has submitted its claim to DIAND, the claim will undergo a process of assessment that involves completion of confirming research and a legal opinion for DIAND prepared by a Department of Justice lawyer. The confirming research conducted by DIAND may be

36. This overview is compiled from various resources. The Specific Claims Branch has general overviews of its process on the DIAND website, <<http://www.ainc-inac.gc.ca/ps/clm>>; I have also conducted interviews for the purposes of this paper with Ron French, former Portfolio Manager with DIAND/SCB for Ontario North (5 January 2005), Bev Lajoie, Portfolio Manager, DIAND/SCB for Ontario South (5 November 2004), and with Ralph Brant, Director of Mediation, Indian Claims Commission (15 October 2004); finally, Specific Claims Branch, *Process Manual* (26 July 2001) also describes the process in greater detail.

37. Information on RFD history and process obtained from Department of Indian and Northern Affairs Audit and Evaluation Branch, *Audit of Claims Research Funding and Negotiation Program* (May 2000), online: <http://www.ainc-inac.gc.ca/pr/pub/ae/au/98-10/98-10_e.html> [*Audit of Claims Research*]. Originally, when Canada's claims settlement policies were developed in the early 1970s, claims funding was administered by the Privy Council Office. In 1972, this responsibility was taken over by DIAND to be administered by the Research Funding Division. RFD administers federal contributions to First Nations organizations to assist them in researching potential specific claims on behalf of individual member First Nations. RFD also has the responsibility to provide loan funding to First Nations whose specific claim has been accepted for negotiation by the federal government. A First Nation is then required to pay back this loan out of their settlement monies. RFD also administers contributions and loan funding for comprehensive claims.

38. See for example, *Audit of Claims Research*, *ibid.* at s. 2.

39. Indian Claims Commission, *2001-2002 Annual Report* (Ottawa: Minister of Public Works and Government Services Canada, March 2003) at 3, online: Indian Claims Commission <<http://www.indianclaims.ca>>.

completed separately by each party, or the First Nation and DIAND may agree to conduct joint research, where particular circumstances warrant.

The decision of the minister to accept or reject a claim, either in whole or in part, is communicated in writing to the First Nation.⁴⁰ Where a claim is wholly or partially rejected, the letter will normally provide a statement to the effect that the minister may consider the claim again where the First Nation is able to bring forward additional facts or law.

Where a claim is wholly or partially accepted for negotiation, the current practice⁴¹ is to send two letters to the First Nation. The first letter comes from the minister and outlines very briefly the acceptance of the claim. The second letter comes from the assistant deputy minister, and outlines in a detailed fashion what portion of the claim has been accepted for negotiation, the legal and policy basis for acceptance, and the applicable compensation criteria under the policy.

The second letter will advise the First Nation that all negotiations are on a “without prejudice” basis and that the Crown reserves all technical defences, should the claim go to court. The policy itself makes this statement and states further that the acceptance of a claim for negotiation is not to be interpreted as an admission of the Crown’s liability,⁴² although *Haida* and *Taku* suggest that it may show *prima facie* proof of a section 35 right. The second letter is also supposed to indicate that, where a First Nation does engage in negotiation, the end result will be the provision of a full and final release to the Crown for any past, present or future claim arising out of the same events that gave rise to the negotiated claim.

Where a First Nation agrees to proceed with negotiation of its claim, the negotiations must proceed in accordance with the basis of acceptance and compensation criteria outlined in the acceptance letter(s). The First Nation and Canada may choose to engage the mediation mandate of the Indian Claims Commission, either at the outset of negotiations or later, if ongoing negotiations have reached an impasse. DIAND’s practice is that it will not engage in negotiation of a specific claim where a First Nation has active

40. Where the minister rejects a claim, it is at this stage that the inquiry mandate of the Indian Claims Commission may be engaged, where a First Nation desires to have an inquiry into the minister’s decision, although claims have also come before the Commission in Canada’s review phase, for example, where the review phase has taken an exceptionally long time. For example, see Indian Claims Commission, *Peepeekisis First Nation Report on File Hills Colony* (March 2004), online: Indian Claims Commission, Completed Inquiry and Mediation Reports <http://www.indianclaims.ca/pdf/Peepeekisis_English.pdf> where the First Nation’s request for inquiry was accepted after the First Nation waited for a minister’s response for 15 years.

41. The practice of sending two letters has evolved over approximately the last 10 years. Information obtained in interview with Bev Lajoie, Portfolio Manager, Ontario South (5 November 2004).

42. *Outstanding Business*, *supra* note 1 at 30.

litigation raising the same issues as are in the claim. The rationale for this practice is that DIAND and the Department of Justice have limited resources available and do not wish to duplicate work in two separate spheres on the same issues. The Crown has taken this position one step further, however, and refused to participate in an inquiry before the Indian Claims Commission where the minister has rejected a specific claim on the basis that it fits more properly within the comprehensive claims policy. The Crown's position in that inquiry suggests that in some circumstances the decision of the minister to reject a specific claim cannot be challenged.⁴³

Although negotiation training was provided in the initial years following release of the policy, there is no longer any required training of federal negotiators specifically related to negotiation, mediation, the concept of "policy," purposes and goals of federal policy making, the Specific Claims Policy itself, First Nations issues, or the history and evolution of the Specific Claims Policy.⁴⁴

There are a number of steps in the negotiation process⁴⁵ that are not outlined in the booklet *Outstanding Business*, which otherwise outlines the whole procedure of Specific Claims Policy. These unwritten steps include the appointment of a chief federal negotiator and reaching agreement on a joint negotiating protocol. The joint negotiation protocol sets out the rules for the negotiation and usually references the acceptance letter. There will also be agreement on a communications plan. The parties will work together to develop a joint work plan, which is generally completed twice per year, and is tied to the requirements of DIAND's Research Funding Division. Essentially, this document helps the parties identify what information is lacking with respect to valuing the compensation, how the research will be conducted to obtain this information, who will conduct the research and its timeframe for completion. The parties then engage the services of required technical experts.⁴⁶

The final phases of the negotiation process involve the development of a settlement agreement, which includes a clause by which the First Nation

43. Indian Claims Commission, Proceedings, *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (1 June 2006), online: Indian Claims Commission <<http://www.indianclaims.ca>>. The department not only refused to participate in an inquiry before the Commission where the First Nation challenged the minister's decision, it refused to provide the usual funding to the claimant First Nation.

44. Interview with Ron French, Portfolio Manager, Ontario Region North (5 January 2005).

45. Information obtained from interview with Ralph Brant, Director of Mediation, Indian Claims Commission (15 October 2004), Bev Lajoie, Portfolio Manager, Ontario Region South (5 November 2004) and Ron French, former Portfolio Manager, Ontario Region North (5 January 2005).

46. For example: expert historical land appraiser; expert in Canadian historical agriculture; expert in the historical Canadian timber market in the area at issue, *etc.*

provides a final and formal release on every aspect of the claim to ensure it can never be reopened, and finally, the ratification of the agreement by the First Nation membership by vote.

Planning for implementation of the settlement agreement begins essentially with the beginning of the claim negotiations, and runs concurrently while the negotiations are ongoing. It involves careful planning of ongoing community consultation and advisory sessions with potentially affected non-Aboriginal groups.

Unwritten Compensation Implementation Practices

It will not be until the parties reach a negotiation table that the First Nation will learn of Canada's unwritten practices for implementing the compensation criteria under the policy. Two portfolio managers for the Negotiations Directorate advised in interviews⁴⁷ that the implementation of the policy's compensation criteria follow a set of practices that have evolved over time as Canada has gained more experience in settling these types of claims. These implementation practices are not produced in written form, and when asked, neither portfolio manager had knowledge of any economic studies upon which the implementation practices are based. However, this has not stopped Canada from developing standard internal guidelines for their negotiators that have a significant impact on the negotiations. In particular, one of the most controversial aspects of compensation criteria implementation is what is often referred to as the "80/20" practice. This practice is a formula utilized in implementing the compensation criteria under the policy in order to bring forward historical compensation monies by 80 per cent regular interest and 20 per cent compound interest.⁴⁸

The reason given for conducting claims settlement negotiations in this manner is that each claim is unique and, so, flexibility in implementation of compensation criteria is necessary. On its face, this would appear to be a creative way of approaching these kinds of negotiations.

Although the time within which this paper was completed did not allow for a full canvassing of every First Nation's settlement agreement across Canada, the author did speak with a number of lawyers who have represented First Nations in claims negotiations to compare their experiences

47. Interviews with Bev Lajoie, Portfolio Manager, Ontario Region South (5 November 2004) and Ron French, former Portfolio Manager, Ontario Region North (5 January 2005).

48. Information obtained from interviews with Ralph Brant, Director of Mediation, Indian Claims Commission (15 October 2004), Bev Lajoie, Portfolio Manager, Ontario Region South (5 November 2004) and Ron French, former Portfolio Manager, Ontario Region North (5 January 2005).

in the claims process.⁴⁹ In practice, it seems consistent that there exists an unwritten set of compensation implementation practices—which may or may not be based on any objective criteria—that places the First Nation at a considerable disadvantage in its individual negotiations. First Nations political groups experience an aggregate disadvantage. Each claimant must endure, alone, the agonizing and costly process of exchange of legal positions based on Canada’s unwritten implementation practices. The implementation of compensation will be analyzed further later in this paper within the discussion of the Garden River First Nation settlement.

The Unwritten Requirement of a Modern Surrender

In addition to unwritten compensation implementation practices, the requirement of a modern surrender is also an unwritten aspect of the policy. The language of “modern surrender” is used to capture the transaction whereby the First Nation, with its technically unknown legal interests in the claimed lands, provides a surrender in accordance with the surrender provisions of the *Indian Act* of the claimed lands. This is supposed to release the Crown and clear up the “uncertainty” thereby providing certainty of title to the affected third parties. It is difficult to state with certainty, as a generally applicable practice of DIAND officials, when the claimant First Nation is advised of the requirement of a “modern” surrender of the claimed lands. Nor is it clear when a First Nation is advised that this modern surrender will be a required component of settling the historical grievance, such as loss of use. In recent years, this is generally communicated in some fashion in the very first preliminary meetings; however, what language is used to communicate this information and how it is explained to a First Nation is not necessarily uniform.

In the case of Garden River First Nation, one of the case samples reviewed later in this paper, the message communicated was that the surrender requirement was simply an administrative hoop to jump through, but that at the end of the process, the First Nation would still be able to have their reserve lands restored. The First Nation essentially provided Canada with a conditional surrender that had a three year time period within which to use its compensation monies to buy back as much of the unlawfully alienated lands that it could. At the end of the three years, the lands the First

49. Personal communications (email & telephone) with 3 western lawyers whose practices are heavily involved with specific claims and who, collectively, have been involved in approximately 40 to 50 specific claims negotiations. Each had differing comfort levels with being identified in this work and, so, I have decided not to include any specific details from any of these communications.

Nation had been able to purchase were to be considered as having been excluded from the surrender. This was the condition on the surrender.⁵⁰

The policy itself has a number of vague and potentially misleading statements about the desires of First Nations, however, when the policy directly deals with the issue of wrongfully taken lands. The policy states:

The process of settling specific claims is often a complex one, depending on the nature of the claim and the type of compensation being sought. Specific claim settlements can vary, *but most often consist of such elements as cash, land or other benefits.*

Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, *the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.*

In any settlement of specific [N]ative claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.⁵¹

In no instance in the policy is there any mention of the requirement for a modern surrender of the current interests. Where unlawfully taken reserve land is discussed, it is done so in a manner which clearly leads the reader to believe that land return is an option; in fact, claimants are advised that a settlement will *most often* consist of a land element. The language that a band *shall* be compensated *either* by return of lands *or* unimproved value indicates to the reader that there is a choice, but not that this choice is to be made unilaterally by the Crown. The “general rule” is that the Crown will not allow third parties to be dispossessed, and for many First Nations who wish to retain their current interests in such lands, their view may be that they would seek to enter into some type of creative property arrangement whereby the third parties are not dispossessed.

It certainly is not made explicitly clear in the policy that a modern surrender is an absolute requirement for the settlement of a claim for unlawfully taken reserve lands, where the lands at issue are not vacant Crown held lands. The written policy statement of the federal Crown is meant to outline the parameters of the submission, assessment and negotiation of specific claims, based upon years, or even decades, of consultation with First Nations and experience in the field. It is not a document to be taken lightly and in formulating its position and its strategy,

50. *Garden River Land Claim Settlement Agreement between Her Majesty the Queen in Right of Canada and the Garden River Indian Band* (29 April 1987).

51. *Outstanding Business*, *supra* note 1 at 24, 31 [emphasis added].

a First Nation must take guidance from the written policy statement of the federal Crown as the representative position of Canada.

III FIDUCIARY DUTY, THE HONOUR OF THE CROWN AND RECONCILIATION

The intent of this section is to introduce the reader to certain key principles developed by the Supreme Court that are most relevant to the issues raised in this paper. The fiduciary duty, the Crown's duty of honour and reconciliation are like three strands in a single braid that work together to protect a sacred and solemn relationship between Aboriginal peoples and the Crown in Canada.

In 1984, the Supreme Court established in *Guerin*⁵² that the Crown's fiduciary obligations owed to First Nations, though trust-like, are unique or "*sui generis*." *Guerin* holds that the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land place upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of First Nations. The decision confirmed that there is a unique fiduciary relationship between the Crown and Aboriginal peoples, and it, along with subsequent cases, have clarified the scope and nature of this relationship and some of the instances in which the Crown will owe a consequent fiduciary duty. Judicial interpretation of the Crown – Aboriginal relationship has established that the Crown's fiduciary duty includes the protection of Aboriginal and treaty rights existing under section 35 of the *Constitution Act*, 1982,⁵³ the process of reserve creation⁵⁴ and expropriation of reserve lands.⁵⁵

The Supreme Court took the opportunity in 2002 in *Wewaykum*⁵⁶ to clarify the principles first laid out in *Guerin* and explained that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature; rather, the fiduciary duty imposed on the Crown is in relation to specific Indian interests, and the content of the Crown's fiduciary duty will vary with the nature and importance of the interest sought to be protected.

The Supreme Court has explained that the fiduciary duty of the Crown, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the

52. *Supra* note 23

53. *Sparrow*, *supra* note 17.

54. *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816.

55. *Osoyoos*, *supra* note 25.

56. *Supra* note 5.

lives of Aboriginal peoples.⁵⁷ In the Court's view, the Crown's fiduciary duty is not borne from a paternalistic concern to protect a weaker or primitive people, but arose because of the necessity of persuading Aboriginal peoples, when they had considerable military capabilities, that their rights would receive greater protection by reliance on the Crown than if they proceeded on their own.⁵⁸ This interaction has been held by the Courts to be inextricably imbued with the honour of the Crown and gave birth to the notion of *reconciliation*.⁵⁹ The Supreme Court has subsequently explained in *Haida* and *Taku River* that reconciliation is not merely a final legal remedy to any given legal problem, rather, it is a process which "flows from the Crown's duty of honourable dealing towards Aboriginal peoples, which arises, in turn, from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."⁶⁰ In the Court's view, the assertion of sovereignty began a *process* of fair dealing and reconciliation that requires balance and compromise and which continues *beyond* formal claims resolution.

In addition to ongoing fair and honourable treatment, the Supreme Court has held that the assertion of sovereignty resulted in an obligation on the Crown to protect Aboriginal peoples from exploitation. The Supreme Court has explained that the *sui generis* relationship between the Crown and unconquered Aboriginal peoples had positive aspects by offering protections of Aboriginal peoples historically; however, the degree of economic, social and proprietary control and discretion asserted by the Crown also left Aboriginal peoples vulnerable to the risks of government misconduct or ineptitude. Therefore, where the Crown has assumed discretionary control sufficient to ground a fiduciary duty, the duty will take hold to supervise the Crown's conduct.⁶¹

In *Wewaykum*, the Supreme Court further stated that the Crown's fiduciary duty to Aboriginal peoples does not provide a general indemnity; rather, there must be a specific Indian interest at issue. In this regard, the Court enunciated very clearly the Crown's lawful obligations with respect to reserve lands as follows:

[P]rior to any disposition the Crown has a "fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction." The interests to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence ... is the exploitative bargain ...

57. *Wewaykum*, *ibid.* at para. 79.

58. *Wewaykum*, *ibid.*

59. *Haida*, *supra* note 3 at paras. 18, 19, 20, 25.

60. *Haida*, *ibid.* at para. 32.

61. *Wewaykum*, *supra* note 5 at paras. 80, 81.

ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.⁶²

Once a reserve is created, the band acquires a legal, quasi-proprietary interest in those lands, which the Crown has a fiduciary duty to preserve and protect from exploitation, invasion or erosion. At the time of reserve disposition, the content of the fiduciary duty may change, for example, to respect and implement the wishes of the band. However, the Crown continues to have an obligation to prevent exploitative bargains and, so, has an obligation to refuse to provide its consent where a band's decision to surrender is foolish or improvident.⁶³ Where the Crown breaches its fiduciary duty, the quantum of damages is to be determined by analogy with principles of trust law, and the Crown will be liable to the band in the same way and to the same extent as if a trust in the private law sense were in effect.⁶⁴

In 1995, the Supreme Court rendered its ruling in what remains a leading case on the issue of the Crown's duties in a surrender of reserve lands in *Blueberry River Indian Band v. Canada*.⁶⁵ The decision established the use of an intention-based approach in order to give effect to the true purpose of dealings between the Crown and Aboriginal peoples in relation to reserve lands.

*Osoyoos*⁶⁶ confirmed in 2001 that the intention-based approach developed in *Blueberry River* arose as a result of the *sui generis* nature of Aboriginal interests in land and not because of the capacity of the parties to the transaction. The Supreme Court explained in *Osoyoos* that there are three common features of the Aboriginal interest in both reserve lands and Aboriginal title lands: "both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally."⁶⁷ The Court stated that there are three implications which flow from the nature of this Aboriginal interest. First, since traditional principles of the common law relating to property may not be helpful in the context of Aboriginal interests in land, one must look beyond the usual restrictions in order to give effect to the true purpose of dealings regarding reserve land. This principle was developed as a result of the *sui generis* nature of Aboriginal interests in land and not because of the capacity of the parties to the transaction.

62. *Wewaykum, ibid.* at para. 100.

63. *Wewaykum, ibid.* at paras. 98-104.

64. *Guerin, supra* note 23.

65. [1995] 4 S.C.R. 344 [*Blueberry River*].

66. *Osoyoos, supra* note 25.

67. *Osoyoos, ibid.* at para. 42.

Second, as a result of the *sui generis* nature of the interest and the definition of “reserve” under the *Indian Act*, an Indian band cannot unilaterally add to or replace reserve lands; rather, Crown intervention is required. Particularly relevant to this paper is the Court’s comment that

reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.⁶⁸

The third point made by the Court is that an Aboriginal interest in land is more than just a fungible commodity, as the interest will generally have an important cultural component reflective of the band’s relationship with the land and the inherent and unique value of the land itself to the band.

McLachlin C.J. explained in *Haida* that the notion of the honour of the Crown, which is always at stake in the Crown’s dealings with Aboriginal peoples, “is not a mere incantation, but rather a core precept that finds its application in concrete practices.”⁶⁹ This core precept will give rise to different duties depending upon the circumstance. In the case where the Crown has assumed discretionary control over a specific Aboriginal interest, it will give rise to a fiduciary duty. Although the content of that duty may vary to take into account all of the Crown’s obligations, the Crown *must* act in the best interests of the Aboriginal group concerned. Further, the honour of the Crown infuses the process of treaty making *and* treaty interpretation. Thus, in making *and applying* treaties, the Crown must act with honour and integrity, and must avoid “even the appearance”⁷⁰ of sharp dealing.

The Supreme Court explained that treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and, in the Court’s view,

[t]he historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.”⁷¹

68. *Osoyoos, ibid.* at para. 45.

69. *Haida, supra* note 3 at para. 16.

70. *Haida, ibid.* at para. 19.

71. *Haida, ibid.* at para. 17.

Unfortunately, the Supreme Court denied leave to appeal in *Chippewas of Sarnia*⁷² where the First Nation challenged the validity of a 140-year-old surrender and subsequent patent of reserve land to a third party. In that case, the Ontario Court of Appeal applied the rule of good faith purchaser for value without notice and found against the First Nation. Academic commentary⁷³ on this decision explains that there are a number of faults in the lower and appeal courts' legal reasoning; however, for the purposes of this paper, the *Chippewas of Sarnia* decision stands for the proposition that the innocent third party purchaser of unlawfully surrendered reserve lands holds an unknown interest, and each situation must be examined on a case-by-case basis.

These decisions together provide the main guiding principles of the analytical framework against which the federal process for resolving a grievance related to the wrongful taking of treaty reserve lands is measured. With this statement of the law as the backdrop, this paper will now turn to a review of the two case samples.

IV CASE SAMPLES

To review some of the important principles set out thus far in this paper, the goal of the parties to treaties was to create agreements of coexistence, which were essentially agreements to regulate relationships while they shared resources. Although arguably the Crown's motives were not at all times this pure, the courts have in any event interpreted this process to be imbued with the honour of the Crown. Resolving a breach of these ongoing agreements of coexistence—in this case the wrongful taking of treaty reserve lands—is not about simply paying compensation for the historical breach, it is also about fixing the relationship and the current, ongoing interest in the lands at issue in a way that is not exploitative of the First Nation. It is about an ongoing reconciliation and evolution of legal concepts that foster community cohesiveness and interdependence for mutual benefit.

Having the larger historical, policy and legal picture in place, the intent of this section is to review two specific claim settlement agreements for wrongfully surrendered treaty reserve lands. In 1987, Garden River First Nation in Ontario settled its specific claim for a parcel of land known as Squirrel Island. An 1859 document of surrender⁷⁴ had been misread by Indian Affairs and was wrongfully interpreted to have included the island,

72. *Supra* note 4.

73. See for example, McNeil, *supra* note 27.

74. The Garden River First Nation also challenges the validity of the entire 1859 alleged surrender. There is no need to detail their challenge; it is simply noted here for clarity.

which was then sold and patented to a third party. In 2003, the Thunderchild First Nation in Saskatchewan settled its specific claim for the wrongful surrender of three of its reserves in 1908, the surrender having been obtained under severe duress. In both of these cases, the First Nation was required to provide a modern surrender of their current interests in the lands at issue as a component of their settlement agreement for the historical breach. In both cases, part of the compensation monies were designated to be used for the purchase of additional reserve lands. These claim settlements are of interest to this author since they are the home communities of her mother and father. One is a newer settlement and one is an older settlement and, as such, these settlement agreements stand in interesting contrast to one another.

Garden River First Nation's 1987 Settlement

The Lands

Under the 1850 *Robinson-Huron Treaty*,⁷⁵ the Garden River First Nation received a reserve of 130,000 acres (Indian Reserve #14). Included in this reserved tract of land was a parcel known as Squirrel Island, consisting of 126 acres located in the midst of St. Mary's River⁷⁶ and approximately 500 feet from the reserve mainland. The treaty document states, in part:

For Shinguaconse and his band, a tract of land extending from Maskinonge Bay, inclusive, to Partridge Point, above Garden River, on the front, and inland ten miles throughout the whole distance, and also Squirrel Island.⁷⁷

A document of surrender dated 10 June 1859 purported to provide a surrender of three-fourths of the Garden River reserve lands under Surrender 91B.⁷⁸ The land was to be sold for the benefit of the band. Notably, the surrender document provided band members with the option of purchasing, at the upset price, 80-acre lots in the surrendered tract. The description of the land surrendered in the purported 1859 document of surrender mentions Squirrel Island in two places. This fact led to an incorrect interpretation that the island had been included in the surrender. The surrender document provided, in part:

75. *Robinson-Huron Treaty*, 9 September 1850, *Indian Treaties and Surrenders*, vol.1, No. 61, 149. The reserve was confirmed by a 1 February 1854 Proclamation.

76. Plan of Squirrel Island, St Mary River, Plan T2593 by T.W. Herrick (24 June 1870), as cited in Indian Commission of Ontario, *Claim to Squirrel Island Document Index* (October 1980) [*Claim to Squirrel Island*].

77. *Robinson-Huron Treaty*, *supra* note 75.

78. Surrender 91B, *Indian Treaties and Surrenders*, vol. 1 at 229.

We surrender the land reserved for us by the treaty of 1850, namely the tract of land extending “from Maskinonge Bay, inclusive, to Partridge Point, above Garden River, on the front, and ten miles inland throughout the whole distance, also Squirrel Island, *but retaining for ourselves that part of it which* is bounded by a line starting from the centre point of the western boundary of such tract and running east to Garden River; thence to Onegahmeeny, on Echo Lake; thence following the bank of Echo Lake down the right bank of the river to the front and along the front to the aforesaid western boundary, and following it to the place of beginning, *also Squirrel Island.*⁷⁹

Garden River First Nation’s position⁸⁰ was that the island was clearly retained as part of its reserve and had therefore been unlawfully alienated.

The Unlawful Alienation

In August 1859, Duncan G. McDonald requested purchase of Squirrel Island for one dollar per acre for the purpose of erecting a steam sawmill. McDonald already held the timber licences for the alleged surrendered lands. Subsequent correspondence between Crown officials assumed that the island was included in the 1859 surrender, and the Crown’s focus was a consideration of the advantages and disadvantages of the proposed sawmill. The Crown approved the sale to McDonald, and the island was sold in its entirety to him in 1871⁸¹ for \$254.00⁸² and patented to him in 1888.⁸³ McDonald subsequently built his sawmill on the mainland instead of the island, and chose to use the island for grazing purposes in connection with the sawmill.

Twenty-two years after the sale to McDonald, an 1893 internal memorandum to the deputy superintendent general of Indian Affairs acknowledged the Crown’s breach. The memorandum noted that Squirrel Island had been sold in 1871, although it had been reserved in the surrender, but that no question had been raised by the First Nation in regard to the island.⁸⁴

79. Surrender 91B, *ibid.* [emphasis added].

80. The First Nation’s view is also that there was no valid surrender in 1859. This is usual, as surrender claims will generally have many layers.

81. Sold to Duncan Gillis McDonald (27 July 1871), Sale No. 19, Garden River, 1871, Land Sales Register; also Public Archives RG-10, vol. 378 - P445, vol. 369 - Mc719, vol. 367 - Mc 530, vol. 467 - P 413, as cited in *Claim to Squirrel Island*, *supra* note 76.

82. Correspondence from H.J. Ryan, Acting Head, Land Titles Section to H. Veldstra, District Supervisor, Sudbury District (11 September 1973) 493/30-2-14.

83. Letters Patent 1888, No. 8984, as cited in *Claim to Squirrel Island*, *supra* note 76.

84. 10 August 1893, as cited in *Claim to Squirrel Island*, *ibid.*

The island was subdivided in 1914⁸⁵ into 95 lots. In the late 1930s and early 1940s, many of the subdivided lots were forfeited to the province for non-payment of provincial land tax, and many of these were then sold by the province.⁸⁶ As of 1985, the province held 35 of the 95 lots.

Garden River's Complaints Regarding the Unlawful Alienation

There are remarks in subsequent departmental correspondence of general complaints by the First Nation in regards to their lands and the benefits that were to come to them as a result of surrenders. In June 1917, a former chief of the Sarnia First Nation wrote to DIAND on behalf of Garden River. He explained that he had been asked to write the letter in reference to some islands in front of Garden River's reserve that the band claimed as theirs and upon which they said certain individuals were living and trespassing.⁸⁷ The department responded that Squirrel Island had been acquired in the usual legal manner and that "the Indians do not own any of the other Canadian Islands in those waters."⁸⁸ Later, in 1963, the Sault Ste. Marie Indian Agency Superintendent, A.R. Aquin, informed the Indian Affairs Branch in Ottawa of statements made by the chief of Garden River First Nation regarding his band's ownership of Squirrel Island, that it had been taken without permission, and that the band wanted it to revert back to the band.⁸⁹

A series of correspondence throughout the 1960s and into the early 1970s indicates the department's position that since the surrender was listed in the volume on *Indian Treaties and Surrenders, 1680-1890*, this was sufficient to settle the issue. Some emphasis is placed on the presence of the word surrender. In any event, the department's position was that too much

85. Plan 920, as cited in *Claim to Squirrel Island, ibid.*

86. Correspondence from J.A. Wells, Regional Land Research Officer, Ontario Region, to Mrs. G. Wyman, Senior Claims Analyst, Office of Native Claims, Department of Indian Affairs and Northern Development (10 May 1977). The letter reads, in part:

During the late 1930's and early 1940's, a large number of the subdivision lots were forfeited to the Provincial Crown for non-payment of the Provincial Land Tax. Many of these lots were subsequently sold by the Province. Finally in 1965, at the request of the District Forester, Sault Ste. Marie, Lots 12 to 24 inclusive and Lots 62 to 82 inclusive were set aside as a Crown reserve for public use. This was in line with the Provincial policy that no further sales on any body of water should be made once the public land is reduced to twenty-five percent of the total frontage. The lots retained are slightly in excess of this amount.

87. Correspondence from Ex-Chief F.W. Jacobs to Department of Indian and Northern Affairs (4 June 1917), as cited in *Claim to Squirrel Island, supra* note 76.

88. J.D. McLean, Assistant Deputy and Secretary, to C. McGibbon, Indian Superintendent and Inspector at Penetanguishene (12 June 1917), as cited in *Claim to Squirrel Island, ibid.*

89. A.R. Aquin, Superintendent, Sault Ste. Marie Indian Agency (24 May 1963), as cited in *Claim to Squirrel Island, ibid.*

time had elapsed to revisit the issue, and that the band had never complained before. This despite the fact that the department had been aware at least since 1893 of its breach regarding the sale of the island and that the historical record clearly demonstrates that Garden River had continually raised the issue of Squirrel Island's unlawful alienation.

1971: Departmental Review of its Liabilities

In 1971, the department's "Report on Errors, Omissions and Conflicts in the Indian Title" noted that Squirrel Island had been excluded from the 1859 surrender and that there was no evidence of any other surrender or any order-in-council dealing with Squirrel Island. In 1973, correspondence from K. Allen, Assistant Deputy Registrar, Land Titles Section, to H.J. Ryan, Acting Head, Land Titles Section, acknowledged that the correspondence on file indicated a difference of opinion from various officers within the department as to whether or not the island was included in the 1859 surrender. Allen stated his interpretation that Squirrel Island should have been retained by the Garden River band.

Submission and Acceptance of Garden River's Claim

The band submitted a claim in 1976, by Band Council Resolution, that the department "take the necessary steps to present Garden River Band's claim to ownership of Squirrel Island ... the Garden River band did not sell, lease or otherwise dispose of Squirrel Island."⁹⁰ In 1979, the Union of Ontario Indians prepared a research paper on behalf of Garden River First Nation for its claim. This research was supplemented in 1980 by a consolidated statement of facts prepared by the Indian Commission of Ontario.

The claim was accepted for negotiation in 1981 and negotiations began that year.

First Rejection of Federal Offer

In 1983, the First Nation was offered \$2.5 million. Of this amount, \$134,600.00 was to be paid to the Receiver-General as payment in full for all advances and loans provided to the band by the minister for the purpose of researching, preparing and negotiating the agreement. The notice posted in Garden River First Nation explained what was being sought from the band as follows:

90. Band Council Resolution of Garden River First Nation (21 June 1976).

The absolute surrender of the whole of Squirrel Island ... said Island containing about 126 acres in exchange for a land claim settlement of TWO MILLION, FIVE HUNDRED THOUSAND (\$2,500,000.00) DOLLARS;

and

The authorization of the Chief and Band Councillors to sign on your behalf the Settlement Agreement substantially in the form attached hereto.

The surrender will be for the purpose of obtaining a land claim settlement as specified.

The Garden River Band has fought for this settlement since 1976 when it filed a claim with the Minister of Indian Affairs in Ottawa. The basis of the claim was that Canada sold Squirrel Island in 1871 without authority. These interests have now been acquired in good faith by over 35 parties and the Province of Ontario. An Agreement has been reached between the Band Council and the Government of Canada. This settlement must be approved by the electors of the Garden River Band before it becomes operative.⁹¹

The band membership rejected the federal offer of settlement on 21 September 1983. There were 333 eligible voters, with an impressive voter turnout of 219 voting members. The settlement offer was rejected by a sweeping vote of 144 to 75.⁹² The vote took place amidst community elders' concerns about alleged procedural irregularities concerning the referendum. The elders had sought their own legal counsel and requested that the referendum vote be halted. The vote, however, went ahead as planned. The members rejecting the settlement felt that the compensation offered was inadequate, and did not wish to surrender Squirrel Island. Oral history of the community's elders is that the island has special significance as a sacred site and place to gather medicines.

Second Rejection of the Federal Offer

Negotiations stopped following the September 1983 referendum. In October 1984, a new chief and council were elected, and they sought to re-open negotiations. Initial meetings with federal representatives indicated that Canada had not changed its position on the original offer. A Band Council Resolution dated 11 December 1984 rejected the federal offer for the second time. The band did not want to surrender the island and sought \$10 million in compensation for the historical breach. The band also did not want

91. Document of Information posted in Garden River First Nation in preparation for the referendum vote to be held on 21 September 1983.

92. Correspondence from H. Fanjoy, District Superintendent, Reserves and Trusts, Sudbury District, to Chief Arnold Solomon (23 September 1983).

research and negotiation costs to be deducted from the final settlement amount.⁹³ The band wished to enter into leasing arrangements with the cottage owners and had undertaken a number of meetings with individual cottagers to discuss this option.

Throughout the settlement process, Garden River sought at all times to reassure the cottage owners that Garden River understood they were innocent bystanders, unaware of the historical injustice surrounding the First Nation's claim. They sought to assure the cottagers that it was not Garden River's intention to harass them or remove them from their homes on the island. Instead, they wanted to ensure that the cottagers were kept informed of the progress of the negotiations and sought to meet with them regularly. In this regard, the previous chief and council had issued a press release in 1982 to advise that negotiations had begun, and that

[t]he Band is aware that a number of individuals have registered title to portions of the Island in question. Garden River Band has stressed that [sic] its dispute is not with these residents, but is with the Government of Canada respecting the matter of compensating the Band for its unsettled interest in the Island.

During the resolution process the Band states that it will make every effort not to create unnecessary inconvenience to the current cottagers on the Island.

The Band is contacting the appropriate people to fully explain the situation.⁹⁴

In November 1985, the band stated its position that the island lots should be purchased back from the cottage owners (with prices to be negotiated between the band and the individual cottagers), that the Province of Ontario should release its interest back to the band, that the whole of the island should be recognized as a part of the Garden River reserve and, finally, that the federal government should provide the band with funding to enable the band to establish the island as a cottage and marina industry for the benefit of the band.⁹⁵

93. *Summary Report for the Final Settlement of Squirrel Island Land Claim*, prepared for membership by Garden River Band of Ojibways (July 1985).

94. Garden River Band of Ojibways, Press Release, File # 37-1-19 (14 January 1982).

95. Squirrel Island Land Claim, Position of the Garden River Band (5 November 1985). The proposal put forward on behalf of the band was formed following local level discussions among the membership, and it also reconfirmed the band's position set out in its correspondence to Minister of Indian Affairs David Crombie (10 December 1984).

Third Rejection of Federal Offer

On 26 February 1987, a second community referendum vote was held regarding the federal offer of settlement. Although it was the second time the offer was going to the community members for a vote, it was in fact the third time the offer had been considered by the First Nation—the second time being the 1984 Band Council Resolution that rejected the offer. There were 391 eligible voters. Of them, 188 (or less than half) cast a ballot. A total of 95 members voted in favour of the federal offer and 93 voted against. The 26 February vote was appealed by a council member based on non-compliance with the *Indian Act*. The appeal was dismissed based on a lack of concrete evidence.⁹⁶

Fourth and Final Consideration of the Federal Offer Finally Passes Utilizing Minority Vote Provisions of the Indian Act

Although the appeal was unsuccessful, the 26 February 1987 vote was insufficient to accept the federal offer. The *Indian Act* requires that, in order for a surrender to be valid, it must be accepted by the majority of the majority rule. In other words, a majority of the voting members of the band must cast a ballot and, of those, a majority must vote in favour of the surrender. However, the *Act* makes provision that allows an immediate second vote to be called within 30 days, which can then pass with only a minority vote.

Section 39 of the *Act*⁹⁷ allows for a surrender to be pushed through by a minority of voters casting a ballot.⁹⁸ Where the majority of the electors of a band did *not* vote at the surrender meeting called for that purpose, but, of those who did cast a ballot, the majority voted in favour, then the minister can call another meeting within 30 days for another vote. At that vote, there only has to be a majority of the voters present cast in favour of the surrender for it to then be deemed by the minister as having been assented to by the majority of the actual electors. Utilizing this section of the *Indian Act*, on 27 February 1987, the day after the unsuccessful vote, another referendum was called by the minister to be held on 30 March 1987. This would be the fourth time that the federal offer was brought before Garden River First Nation for its consideration, and it was accepted in accordance with the

96. Correspondence from Assistant Deputy Minister, INAC, to Garden River (26 March 1987).

97. *Indian Act*, R.S.C. 1985, c. I-5, s. 39.

98. The federal court dealt with this issue in *Hill v. Canada*, [1998] F.C.J. No. 1150 (Fed. T.D.), where Six Nations had a similar experience in that a specific claim settlement agreement for unlawfully surrendered reserve lands was accepted by 280 voters, of a total voting population of 4,000.

technical requirements of the *Indian Act* by a minority of Garden River's voting members.

The Settlement Agreement and the Conditional Surrender

As required by the federal policy, Garden River First Nation provided a modern day surrender of its island for the current unimproved market value, although the island was improved by cottagers. The settlement agreement provided that a dedicated portion of the settlement money would be used, "exclusively for the purchase of Squirrel Island."⁹⁹ The surrender was conditional, subject to the following:

EXCEPTING only any lands on Squirrel Island, the title to which is held by the Band, its Trustees or Her Majesty the Queen in Right of Canada on behalf of the Band, on a date being three calendar years after the said surrender is accepted by the Governor in Council.¹⁰⁰

Although the agreement made provision for costs to cover purchase of cottage lots on the island, this was based on an amount that reflected unimproved market value *and* the First Nation had to bear the costs incurred in effecting a transfer (for example, hiring a lawyer to clear cautions on title) of the purchased lots for the purpose of returning the lands to reserve status.

Garden River met with the third party interest holders, namely the cottagers residing on Squirrel Island, and was able to purchase many of the privately held lots on Squirrel Island.¹⁰¹ Some of Squirrel Island remained provincial lands and this, combined with the cottagers who were willing to sell, enabled Garden River to reacquire by negotiation 77 of the 95 lots on the island within the three-year timeframe provided as part of the conditional surrender. For the last 16 years, these lands have sat in limbo as a result of environmental and title issues.¹⁰² Many of the reacquired lots have environmental issues, such as garbage dumps, requiring clean up identified in environmental studies conducted under the Additions to Reserve process. The rule of the ATR process is that "the polluter pays." As a result, Canada has been waiting for the province to pay for the clean up of these lots. The

99. *Garden River Land Claim Settlement*, *supra* note 50.

100. Affidavit of the Chief or Councillor, pursuant to section 40 of the *Indian Act*, sworn at Garden River Reserve in the Province of Ontario on 30 March 1987.

101. Information taken from the 2000 report, Anthony Perreault, "Ketegaunseebee (Garden River) First Nation Fednor Youth Internship Initiative, Working Report" (31 August 1999 - 3 January 2000).

102. Email communication from Shannon Doyle, Senior Land Negotiator, Land Negotiations Unit, Lands and Trusts Services, Indian and Northern Affairs, Ontario Regional Office South (7 February 2005).

province also had a number of title reservations, such as mineral rights, reserved in the original patents. These title issues were left unresolved while DIAND has maintained its position that the province is responsible for paying for the clean up of environmental issues. In the meantime, Garden River has been financially responsible for the care, maintenance and property taxes on these lands.

The precise legal nature of the repurchased lands, since purchase, is unclear. The written text of the settlement agreement is confusing on this point. It states that after three years the First Nation shall have the right to have the lands acquired on Squirrel Island set aside as an Indian reserve, so long as title to the land is satisfactory to the Crown and that any additions are in accordance with the current ATR policy. Other provisions of the agreement use the language of purchase “for the use and benefit of the Band.” The agreement and the affidavit signed by the chief, and all public postings to the members prior to the vote, state that the surrender was conditional in that any lands purchased within three years, at the expiry of that time, would not be considered a part of the surrender. A plain reading of this conditional surrender is that the 77 lots that the First Nation acquired within the three-year timeframe are unsurrendered reserve lands. Although the First Nation interest was technically unknown during settlement negotiations, where the department has allowed a conditional surrender such as in this case, it is arguable that the Crown has conceded that there was a reserve interest that could be excluded from the modern surrender in 1987. However, the department has treated these lands as though they are non-reserve lands and left Garden River solely responsible for all associated maintenance costs and property taxes since the lands were purchased.

It is not surprising that Garden River continues to see the settlement of their claim, both in relation to the remaining 18 lots and the reacquired 77 lots, as an outstanding grievance.

Thunderchild First Nation’s 1908 Surrender

The Lands

The Thunderchild First Nation adhered to the 1876 *Treaty 6*, which made provision for the setting aside of reserve lands as follows:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty’s Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one

square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.¹⁰³

In 1899, pursuant to this *Treaty 6* provision, 20,572 acres located northwest of North Battleford were reserved for the band and designated Indian Reserves 115, 115A and half of 112A. The reserves were located on both sides of the Saskatchewan River. Indian Reserve 112A was set aside jointly as hay lands for the Thunderchild and Moosomin First Nations, while Indian Reserves 115 and 115A, both prime agricultural lands, were set aside exclusively for Thunderchild. By 1908, the vast majority of Thunderchild First Nation's adult members were engaged in farming as their main livelihood.¹⁰⁴

The Unlawful Alienation

In the early 1900s, the Canadian Northern Railway's main line was constructed through Indian Reserve 115. This rail construction increased the value of the already valuable agricultural reserve lands since it was now connected by rail to nearby settlements. As a result, local settlers, business owners, politicians and clergy began to place pressure upon Thunderchild and Moosomin First Nations to surrender their reserves, and by 1907, senior officials from Indian Affairs approached the First Nations in an attempt to obtain a surrender.

First Rejection of Federal Offer

Both Thunderchild First Nation and Moosomin First Nation rejected the suggestion of surrender the first time the Indian agent approached them in August of 1907.¹⁰⁵ At that time, the offer was that both First Nations would receive money to purchase new reserve lands and to relocate to the new

103. *Treaty No. 6 Between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River*, Cat. No. R33-0664, DIAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964).

104. The sources utilized for these points and the remainder of Thunderchild's history are taken from the documents distributed to the community members in anticipation of the community ratification vote of the settlement agreement, ultimately signed on 2 October 2003. "Community Information package to Members of the Thunderchild First Nation Re: Specific Land Claim, 1908 Surrender of IR 115, 115A and 112A", prepared by Griffin, Toews, Maddigan, Brabant (17 January 2003).

105. Martin-McGuire, *supra* note 6 at 308.

lands, and would receive compensation for their improvements on their current reserves. Despite the First Nations' repeated rejections of the Crown's proposal to surrender, one year later in August of 1908, the Crown was successful in obtaining its desired surrenders.

Second, Third and Fourth Rejection of Federal Offer

Over the course of two or three days in late August of 1908 and following a year of intense pressure from a number of groups and Crown officials, the First Nation's adult males were enclosed in a tiny schoolhouse and pressured to vote three or four times on the question of surrendering Indian Reserves 115, 115A and 112A. The women and children were forced to wait outside, as there was barely enough room for the eligible voting adult men and Crown officials.

On the final vote, each man was asked to step on one or the other side of the room to show his vote for or against the surrender. This process took hours as each man painfully considered the options within a situation in which it was clear that the Crown would do anything to obtain Thunderchild's reserve lands. Throughout the time it took for this last vote, the Crown officials present continuously removed money in small bills from a satchel and placed it in full view on a table in the schoolhouse.¹⁰⁶ The Crown's officials had brought with them \$15,000 for this purpose.¹⁰⁷ Finally, with the exception of Chief Thunderchild, each man had made his choice and stood on opposing sides of the schoolhouse, resulting in a tied vote. The chief's vote was required to break the tie.

On this day in late August of 1908, the oral history and historical documents indicate that the First Nation's members were mentally and emotionally exhausted from months of extreme pressure to surrender. While the chief stepped outside and apart from his people to consider his choice, there was yelling and arguing amongst the men inside the schoolhouse, and the women and children sat outside crying as a result of the trauma and duress that their community had been under for so long. Chief Thunderchild had already lived through the horror of the 1885 Riel Rebellion 23 years earlier as one of Chief Big Bear's headmen. He had witnessed the depletion of the buffalo, the main food staple, and economy of his people, and subsequently settled his community on its reserves in the hope of creating a

106. The First Nation's oral history of this surrender is found in Jack Funk, *Outside the Women Cried: The Story of the Surrender by Chief Thunderchild's Band of their Reserve near Delmas, Saskatchewan, 1908* (Battleford: Thunderchild Publications, 1989).

107. Indian Claims Commission, Proceedings, *Mediation Report on Thunderchild First Nation 1908 Reserve Land Surrender* (19 July 2004) at 6 [*Mediation Report*]. This report can also be obtained online at <<http://www.indianclaims.ca>>.

better future for their children in a new farming economy, only to find themselves subjected to the greed of settlers and Crown officials. It was in this environment of unfathomable coercion and duress that he finally walked back into the schoolhouse and stepped across the room on the side of those voting in favour of the surrender.¹⁰⁸

Pursuant to the surrender agreement, the First Nation would receive two years of rations and payment of \$12,840. The surrender vote had been obtained prior to an identification of the replacement reserve lands. The First Nation, which had been flourishing in its new farming economy on three small parcels of its traditional lands, was subsequently relocated to Indian Reserves 115B, C and D. These new reserves were hilly, covered in rocks and stones and subject to early frosts, with very little agricultural value. Thunderchild First Nation could no longer make a living by farming on these new reserves. The buffalo and other game were all but gone, and the First Nation's experience with prosperity as farmers had been cut brutally short by the greed of Crown officials and surrounding settlers and clergy. The meager two years of rations to be received would barely blunt the suffering that was to come for this community in ensuing years.

Thunderchild's Specific Claim

In contrast to Garden River's claim, which was settled in 1987, at that time Thunderchild First Nation had only filed its claim in Canada's specific claims process in 1986. The First Nation alleged that the 1908 surrender was null and void. Canada accepted Thunderchild's claim for negotiation in July 1993 as having "sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy with regard to the 1908 surrender."¹⁰⁹ The First Nation recently reached a settlement agreement on 2 October 2003. Pursuant to the federal policy, the First Nation was required to provide a "modern" surrender of Indian Reserves 115, 115A and 112A. The First Nation will receive, by installments, \$53 million in compensation, with provision that the First Nation has 15 years within which to purchase up to 5,000 acres, after which Canada will turn it into reserve status, *subject to its Additions to Reserves Policy*. In the case of Garden River, the Additions to Reserve process has taken at least 16 years and counting.

Until such time as the land Thunderchild purchases is converted to reserve status in accordance with Additions to Reserves, the First Nation is wholly responsible for all expenses, maintenance and taxes associated with

108. Funk, *supra* note 106.

109. Letter of acceptance from Ian Potter, Assistant Deputy Minister, Claims, to Chief Winston Weekusk (9 July 1993), as reported in *Mediation Report*, *supra* note 107 at 1.

the lands. Thunderchild First Nation may in fact find itself in a similar position as Garden River in the future, where it is responsible for the maintenance and property taxes for these lands for many years before the lands finally make their way through Canada's Additions to Reserve process.

With the settlement monies that it will receive, Thunderchild First Nation is making its long-term plans, including the purchase of several parcels of land. It is also considering certain opportunities in the oil and gas sector.¹¹⁰ In addition, certain of the settlement monies have been designated for an education trust for its members.

The Thunderchild First Nation and Garden River First Nation settlement agreements are an interesting contrast. The Thunderchild agreement is a much lengthier document and very clearly benefits from nearly 20 years of experience on Canada's behalf in its drafting. Where Garden River obtained a conditional surrender and now has lands with uncertain legal status and responsibility, the Thunderchild agreement has an absolute surrender, and clearly states that the First Nation bears all financial responsibility for the lands it purchases in the hopes of having it become part of its reserve holdings.

Given that Thunderchild's settlement is more recent, the remainder of this paper will be focused on assessing the Crown's conduct in relation to Garden River's settlement agreement and its experiences since 1987. In the author's view, there is a striking and disconcerting resemblance between the duress and exploitation in both Thunderchild's 1908 surrender and Garden River's 1987 "modern" surrender. In both instances, the Crown arrived in the First Nation with a set amount of money to be provided in exchange for the surrender the Crown sought. In both instances, the surrender sought by the Crown was for the benefit of the Crown and non-Aboriginal third party interest holders. The Garden River experience since 1987 provides the best example of how the Specific Claims Policy has failed. The First Nation is approaching the 20-year anniversary of its settlement agreement, but continues to await the clean up and return of the wrongfully taken lands it reacquired with its "compensation" monies.

V THE CROWN'S FIDUCIARY OBLIGATION

The settlement of specific claims for unlawful alienation of reserve lands can leave the Crown in a very tenuous position, particularly where the lands at

110. Pamela Sexsmith, "Long-standing Land Claims Settled for First Nations" *Saskatchewan Sage* (13 October 2003), online: <<http://www.ammsa.com/sage/>>.

issue are now held by innocent third party purchasers *and* where the claimant First Nation still desires to retain their interests in those lands. It was and is the Crown's duty to protect those reserve lands from invasion, erosion or destruction. Although politicians have to be sensitive to third parties, this does not mean they should capitulate to unfounded fears.

In the instance of Garden River's Squirrel Island claim, but for the Crown's breach of lawful obligation by the unlawful sale of Squirrel Island, Garden River First Nation would have had an Indian asset that ought to have been prudently managed by the Crown. *Wewaykum* clearly states that the Crown has a fiduciary duty to protect and preserve a band's interests from invasion or destruction by third parties, or even by the Crown itself.

A number of issues arise in the context of considering the Crown's lawful obligations owed to Garden River both in the settlement of the First Nation's historical grievance and settlement of what were the current unknown interests in the lands. Whether the Crown engaged in or allowed an exploitative bargain, either during the negotiations that led to the 1987 agreement or by the terms of the agreement itself, rests on a number of issues, including adequacy of compensation, validity of consent, the best interests of the First Nation, the true nature of the transaction and the precise legal nature of the lots acquired as of the expiry of the three years.

On the issue of adequacy of compensation, one question to be answered is whether the compensation provided was measured by some objective criteria defensible under the law. It would appear not. Garden River First Nation had the unfortunate experience of negotiating their specific claim at a time in the evolution of Canada's claims process when federal negotiators were generally negotiating settlements within a range of \$3 million to \$5 million. In the mid to late 1980s, DIAND undertook a review of claim settlements and previous loss of use studies. One of the outcomes of this review was that DIAND developed what they believed to be an accurate range of settlements of between \$3 million and \$5 million, where \$5 million was considered a high settlement. Subsequent negotiators would then rely upon this review when they made their internal recommendation for their financial settlement mandate, which generally would have a low and high range, though not in every case.¹¹¹ More specifically, in Garden River First Nation's case, the First Nation was advised by the federal negotiator at the time that they were not permitted to exceed \$2.5 million in compensation for the complete settlement.¹¹²

111. Interview with Ron French, former Portfolio Manager for Ontario North, Department of Indian and Northern Affairs Canada (5 January 2005).

112. Personal communication with Councilor Darrell Boissoneau, Garden River First Nation, who was at the time part of the negotiation team on behalf of Garden River First Nation.

Canada's compensation implementation practices are unwritten and today are said to reflect a refined approach based on an evolution of experience gained in the negotiation of specific claim settlements. On its face, this concept of flexibility to adapt to the individual circumstances of each claim may appear to make sense. However, what this in fact illustrates is a lack of planning on Canada's part. Following the release of Canada's claims policy, federal negotiators were sent out in the 1980s to negotiate specific claim settlements without a developed set of implementation criteria to guide them. Negotiators were operating in the field without guidance as to how to implement compensation criteria. This left individual First Nations subject to the individual practices of each federal negotiator.

It is arguable that the loss of use studies and historical land appraisals could offer some set of objective criteria upon which federal implementation practices may be based. For example, if the parties had two studies, such as a timber study and an agricultural lands study, to value what the First Nation has lost, these should represent a set of objective and quantifiable data upon which the parties could base a final settlement amount. However, once the amounts are tallied on the historical research, Canada's practice, when it comes time to present an offer, is that it will not break down its final offer to the claimant utilizing this quantifiable data. The practice of bringing forward the historical dollar amounts by 80 per cent regular interest and 20 per cent compound interest, or by any other formulation of calculating interest, is not based upon any financial study. To have successive federal negotiators rely on an amalgam of what past individual negotiators, negotiating without objective criteria, were able to achieve as a settlement in various claims does not today create objective criteria.

Even if one were to accept Canada's position that they have engaged in an approach of consistent refinement of its compensation implementation practices since 1973, one would expect that by now Canada would have a set of practices that could be substantiated by objective and quantifiable data, defensible not just under the law, but also under the policy's lawful *and* beyond lawful obligations. It is particularly troubling that these implementation practices are unwritten and that Canada's breakdown of compensation is not available when the Crown has known since the Supreme Court's decision in *Guerin* the minimum compensation standards it must meet as a fiduciary.

More recently, in the debates surrounding the establishment of a financial cap for the claims to be handled by the Tribunal component of the new *Specific Claims Resolution Act*, the department's position on the cap has been that its research shows that most claims are settled for under \$7

million.¹¹³ However, such research is questionable given the lack of any written guidelines based on objective data for the implementation of the policy's compensation criteria. Based upon the research conducted for this paper, it does not appear that Canada has any standard of objective criteria based upon sound legal principles. Instead, the concept of flexibility of process to fit the individual needs of each First Nation is held out as the reason for the lack of such a set of criteria.

On the issue of validity of consent to the surrender, we must examine whether the Crown's conduct tainted the transaction such that it would be unwise to rely upon the First Nation's consent. In the case of Garden River, the federal offer of \$2.5 million, which stayed almost identical with the exception in the final offer of an additional amount to cover legal costs, was brought for this First Nation's consideration four times. It was rejected by a massive vote of community members the first time and, based upon community sentiment, it was rejected a second time by the chief and council. The third time it had a narrow margin of acceptance with only a small minority voter turnout, which in turn required use of the minority vote provisions of the *Indian Act* for the fourth and final consideration. By this final vote, the community was exhausted with the issue, as evidenced by poor voter turnout, the retention of independent legal counsel by community elders and an appeal lodged by one of the council members. One cannot blame any individual band members if they believed that there was no real choice but to provide the conditional surrender of Squirrel Island *and* settle its historical claim for a mere \$2.5 million.

In the typical historical surrender for sale, where it is validly provided, the Crown then has an obligation, by statute, by its fiduciary duty, its duty of honour and integrity, and sometimes—as in the instance of Garden River—under treaty, to ensure that the lands are sold for the best prices that the Crown can obtain, in the best interests of the First Nation. The question then arises, in considering the Crown's obligations in these “modern” surrenders, whether unimproved fair market value as of the date of settlement is in the First Nation's best interests. Again, there is a crucial distinction between the compensation monies provided for the historical breach and consequent losses, versus the compensation provided for the current interests of the First Nation.

The historical compensation, which reflects such matters as loss of use and depleted resources, is money that the First Nation can use for any purposes it chooses, such as the establishment of an education trust fund or investments in the market. However, a First Nation ought not be placed in the position of having to use this historical compensation to replace the

113. Fontaine, *supra* note 8 at 16.

wrongfully taken lands. In addition, the compensation for surrendering its reserve lands, whether modern or historical, has to be in the First Nation's best interests. Unimproved fair market value for 126 acres of its reserve lands in 1987 was not in Garden River First Nation's best interests. This is particularly clear, given that the First Nation's intention and expectation was that it had three years to acquire as much of the 126 acres as it could pursuant to the conditional surrender. On its face, the plain text of the settlement agreement is unclear as to the exact legal nature of the lands purchased within the three-year period. The First Nation was essentially put in the position by the Crown of having to clear title to as much of the 126 acres unlawfully alienated by the Crown that it could within three years before the full extent of the lands excluded from surrender could be determined.

On the issue of considering the true nature of the transaction, the Supreme Court's intention-based approach, set out in *Blueberry River* and *Osoyoos*, considers what the band understood at the time of the alienation of reserve lands, and what they expected as a result. The Court has stated clearly that this intention-based approach has nothing to do with the capacity of the First Nation, but rather, arises as a result of the *sui generis* aspect of its reserve land interests.

At all times throughout the Squirrel Island settlement negotiations with Garden River, the Crown was aware that the First Nation's expectation and intention was to retain Squirrel Island. The minutes of meetings¹¹⁴ clearly illustrate this intention. The requirement of the "modern" *conditional* surrender was seen as a mere technical requirement—a hoop to jump through within the federal process. This First Nation certainly in no way expected that nearly 20 years after their settlement agreement their lands excluded from surrender would be caught in an argument between Canada and Ontario over who would pay to clean up the lots, nor that they would have to wait for Canada to negotiate title reservations from Ontario.

On the basis of the text of the settlement agreement alone, it is unclear, after the expiry of the three years, what the precise legal nature of the lots re-acquired by the First Nation is, and what the Crown's lawful obligations in regard to this land are. The lands to be purchased within the three-year timeframe were clearly excluded from the surrender. In fact, it is this provision of the agreement which makes the surrender conditional. Garden River has been left to bear the legal and financial burden of maintaining these lands as though they are non-reserve and taxable property while the

114. These minutes are available to band members, located within the Garden River First Nation Band Office. Details of the minutes and statements made by Crown officials and First Nation representatives will not be excerpted in this paper.

lands have been caught within Canada's Additions to Reserves process. During that time, any business-related benefits that could have accrued to the First Nation had it been able to develop this property as reserve lands have been lost. At the very least, it would appear that Canada owes the First Nation payment for the taxes it has paid for the last 16 years on its reserve lands that were excluded from the surrender, and any additional costs it has incurred that it otherwise would not have if they had been properly treated as reserve lands by the department. This was not a case of reversion of lands, such as in the case of expropriation or leasing arrangements. This was a conditional surrender.

Finally, some may argue that a First Nation cannot revisit a specific claim settlement agreement where the First Nation had independent legal counsel advising them. However, the courts have been clear that the Crown's fiduciary duty requires the Crown to withhold its consent to a surrender, even after the First Nation has provided its consent, if the transaction is an exploitative bargain. The Crown, at that stage, is still required to protect the First Nation from exploitation by third parties and even by the Crown itself. The presence of legal counsel for the First Nation during the negotiations is therefore irrelevant in this respect, since the Crown is not absolved from its fiduciary duty to protect the First Nation's reserve lands from exploitation.

VI CONCLUSION

It is arguable, and certainly many would make the argument, that a First Nation could not have an expectation of retaining its lands under the Specific Claims Policy once the federal negotiator advises the First Nation in their preliminary meetings that, ultimately, a modern surrender will be an absolute requirement of the final settlement agreement. It could be argued that, at that time, a First Nation has the option to walk away from the negotiation table entirely, or, if for some reason there are community members who strongly oppose the option of a modern surrender, to voice such opposition with a negative vote in the framework of the surrender vote/settlement ratification vote. Certainly, this is an arguable position. However, such arguments need to be placed into their proper context.

First, what is being dealt with is not a "normal" property interest—it is a First Nation's *sui generis* interest in reserve lands, an interest that, once lost to the band membership by a surrender, may never be replaced. In addition, the lands at issue may have special value, including sacred sites, which are irreplaceable by any other parcel of land.

Second, the direction of the courts has been that every effort must be made to prevent the erosion of the First Nations' land base. An absolute requirement for a modern surrender in every instance, or even in the majority of instances, does not fulfil this obligation. Although this direction of the courts may not fully address the situation where the defence of innocent third party purchasers could be successfully argued in court, it cannot be forgotten that the policy is aimed at creative resolutions—beyond technical legal arguments—of First Nations' grievances that seek to promote the kind of distributive justice set out in *Gathering Strength*.

Third, when we talk about First Nations claims resolution in Canada, and the historical evolution of Canada's claims processes, it cannot be lost that there must be reconciliation between the Crown and unconquered First Nation peoples, and that First Nations' land is the most fundamental aspect of that reconciliation. How are we to expect claims resolution where one party—the First Nation—is painted as the one with the grievance, the one whose grievance is creating uncertainty, the one required to give up the most in order to rectify the breach of the Crown, with whom it is in a fiduciary relationship?

Finally, simply going through the technical steps for a surrender vote for reserve lands under the *Indian Act* is not sufficient for the Crown to meet its obligations. The courts look beyond these formalities to assess the Crown's conduct to ensure that there is no unconscionable conduct, no duress, not even the appearance of sharp dealing, and that the Crown first and foremost protected the First Nation from an exploitative bargain. Even where it can be assumed that a First Nation in negotiations under the policy has been advised early in the negotiations that they will be required to provide a modern surrender, a First Nation who has reached the point of engaging the Crown at a negotiation table has already invested significant resources in getting to that point in the claims resolution process. It is arguable that First Nations are induced into participation within the Specific Claims Process, with certain expectations based upon the written text of the policy. The First Nation claimant expends financial resources as a result, only to find after this that the policy contains many prejudicial unwritten aspects.

All of these issues must be considered against the reality of options for a First Nation. Most First Nations simply do not have the financial capacity to bring their claims to court. The specific claims process is not simply an alternative to litigation; it is *the* claims resolution process to which the majority of First Nations in this country must turn in order to resolve their historical grievances. There is an important reason why Canada's specific claims resolution process is funded and a reason why Canadian parliamentary committees have insisted that it must be a funded process

from at least 1947, and that the Canadian Bar Association has supported this position since at least 1988.¹¹⁵ Treaty agreements that set aside reserve lands for First Nations are solemn agreements, protected by Canada's *Constitution* and which can only be infringed by a strict test set out by the Supreme Court of Canada. These agreements of coexistence allowed for the creation of Canada—the lands and resources required to build a nation. Without these treaties, the history of Canada's growth as a nation would be quite different. It is the very actions of the Crown in its breaches of these agreements, in combination with past national policies aimed at eradicating Aboriginal culture and land holdings, that has resulted in the impoverished condition of First Nations communities across Canada. To know this history, and to know this impoverished condition, and then to say that the majority of First Nations have any real choice but to engage Canada's specific claims process is irresponsible.

The Honourable A.C. Hamilton, in his 1995 report, commented upon the Crown's fiduciary duty to Aboriginal peoples and the requirement of a surrender in a comprehensive claim settlement. Although his report was prepared in the context of his review of the Comprehensive Claims Policy, certain of his remarks are equally applicable to the Specific Claims Policy. He explained:

While the Government recognizes that it has a fiduciary duty to Aboriginal peoples, there does not appear to be any agreement on the extent of the duty. Some have questioned whether the fiduciary obligation applies to a situation where Aboriginal people are negotiating a treaty with the Crown. *It is argued that the Aboriginal party has the ability to say no if it does not feel that the terms that have been negotiated are in its best interests. I believe that the fiduciary duty of the Crown to which I have alluded would not countenance that approach.*

The Crown is thus in a much stronger position than the Aboriginal party to establish the rules that apply during the negotiation of a treaty. It sets the policy which dictates some of the contents of a treaty and the actions of federal negotiators. It insists on the inclusion of surrender provisions and other clauses which serve its own interests but are not in the best interest of Aboriginal peoples.

115. Reference to the 1947 Special Joint Committee Report has already been made earlier in this paper (and cited in Prentice & Bellegarde, *supra* note 8). For a discussion of the Canadian Bar Association's support of a funded claims process, see Canadian Bar Association (CBA), Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988). This CBA report is also mentioned in a 1990 paper prepared by the Indian Commission of Ontario, found in Indian Claims Commission, Proceedings (1995) 2 ICCP at 213, where the ICO discusses the problems associated with the lack of adequate claims funding.

I am convinced that the Government would not want a treaty to be challenged on the basis of a breach of its fiduciary duty. It must therefore give careful attention to its fiduciary obligation in the treaty-making process. At the moment, it appears to me that *the demand that one party sign a surrender of rights recognized and affirmed by the Constitution is in flagrant breach of the Crown's fiduciary responsibility.*¹¹⁶

These remarks, when placed within the context of settling a specific claim for unlawful surrender of reserve land, are even more compelling. Reserve lands are protected from invasion, erosion and destruction by treaty, by the *Indian Act*, by the Crown's fiduciary duty, and the Crown's duty of honour and integrity when dealing with the interests of First Nations. As a right protected by treaty, reserve lands are also protected by the *Canadian Constitution*.

The Crown in its discretion categorized First Nations claims as specific or comprehensive and developed the Specific Claims Policy to resolve specific breaches of specific obligations (lawful and beyond lawful). The Crown interprets the policy and applies the policy, and such is often done in accordance with unwritten and unprincipled guidelines. As a result, the policy has a built-in power imbalance. First Nations continue to be vulnerable to the exercise of this discretion.

The Supreme Court has stated again in *Haida* and *Taku* that claims settlement is an exercise of reconciliation, and reconciliation is the purpose of section 35 of the *Constitution*, which in turn is based on the honour of the Crown. The honour of the Crown is rooted in the assertion of Crown sovereignty over peoples who were never conquered. This exercise of reconciliation between the Crown and unconquered peoples is not a final legal remedy but is something ongoing.

For a number of reasons, Canada's Specific Claims Policy is like a house of mirrors, where claimants can never be sure that what they are looking at is the way forward or only an illusion. First, the specific claims process is heralded as the alternative to litigation that allows First Nations to bring forward their grievances in a funded process in which Canada will consider the merits of each claim, without regard to technical defences under the law. However, as the Indian Claims Commission has pointed out, in most years the funding for specific claims research runs out very early in each year. In addition, Canada does engage in a very technical review of each claim with the primary objective being not to understand the claim in order to find a way to resolve it but, rather, to find a way to defeat it. This

116. The report of the Hon. A.C. Hamilton, fact finder for the Minister of Indian Affairs and Northern Development, *A New Partnership* (Ottawa: Minister of Public Works and Government Services, 1995) at 98-99 [emphasis added].

practice becomes very clear upon review of the reports of the Indian Claims Commission and the manner in which Canada will make every technical argument, short of limitations and laches, to defeat a claim where the minister has already rejected it as showing no outstanding obligation. Examples of this can be found in the recent release of the Commission's special issue report on interim rulings, which reports on its rulings for Government of Canada and First Nation objections.¹¹⁷

Second, the requirement for a modern surrender to settle the historical breach does not form a part of Canada's written policy. What is written in the policy with regard to land would lead any reader to assume that land can, and in the majority of instances does, form a component of the final settlement. In addition, Canada's policy does not explain why it will not seek purchase of third party interests on behalf of First Nations.

Third, a full explanation of the compensation criteria and how these criteria are implemented on the basis of a set of clear and objective criteria is wholly absent. Instead, a First Nation finds itself well into the process of negotiation before it is verbally advised as to how compensation criteria are to be implemented, following which each individual claimant First Nation endures the agonizing battle to have Canada explain the legal basis for these implementation practices, only to learn there is no concrete explanation, no objective criteria, and that Canada will rarely deviate from its own current internally accepted formulation of calculating interest. It is, in the end, a heartbreaking experience for First Nation claimants, who walk away from the process emotionally, mentally and financially exhausted. Every individual for either party (First Nation or federal) who has participated in formulating a final settlement agreement in this process where it is ultimately brought to a community vote, regardless of whether the agreement is ultimately ratified, is to be commended for doing so under such restrictive and unfair conditions.

Canada must engage itself more concretely in measuring the success of its specific claims policy against the lofty ideals which it purports to uphold, particularly if it hopes to ever reach a point where it can say with certainty that a grievance has been resolved. In particular, Canada must remove the requirement of modern surrenders in order to settle historical breaches. At this point in our history, the Crown should be able to move beyond its fear of First Nations' title and interests as the bogeyman in the closet. There is no reason to believe that certainty can only be obtained by elimination of the

117. Indian Claims Commission, (2003) 16 ICCP, Special Issue on Interim Rulings. See also *Peepeekisis First Nation Report*, *supra* note 40, and the recent response of the minister rejecting the First Nation's claim again on the basis of *res judicata*. The minister's letter can be accessed online at <<http://www.indianclaims.ca>>.

“Indian problem”—the purported problem for the Crown being the existing Indian interest in the lands at issue. There is, instead, every reason to accept that there can be meaningful coexistence and creative solutions that seek to recognize both the existing First Nation interest and the interests of any affected third parties. There is a comfort level already apparent on reserve lands across Canada that have been the subject of leasing arrangements at smaller levels such as gas stations, cottages, small businesses, right up to massive economic development projects such as condominium developments¹¹⁸ and multi-million dollar shopping centres.¹¹⁹

The Supreme Court has stated that there is no difference between a First Nation’s interests in its reserve lands and its Aboriginal title lands. The Supreme Court has also stated that Aboriginal title is a burden on Crown title, that claims settlement is not a final legal remedy but an exercise in reconciliation. All arrows point to the need for creative coexistence and for the need to arrive at settlement agreements that seek to implement the

118. For example, the condominium development located on Tsleil-Waututh First Nation in Vancouver. One commentator explained:

One key to success for Tsleil-Waututh was to see an economic development opportunity and to use the projects to fund new projects. In the early 1990s, the First Nation looked for partners to build a high-density on reserve housing complex.

They chose an Asian business partner that shared the interest in long-term relationship building and respect for [I]ndigenous business development values. This partnership resulted in the construction of 6, three-storey buildings with nearly 700 condominium units; each of which is leased for a period of 99 years. About 4 of the 110 hectares of the Tsleil-Waututh’s largest urban reserve has been set aside for this form of development.

Community consultation for this plan included a vote on the designation of land and the structure of the partnership agreement. An Operations Committee, which has two representatives from the Tsleil-Waututh Economic Development Department and two from the developer partner, oversees the operation. The committee’s goals include high standards for environmental protection, quality of materials, and putting profits towards social and other community programming. Ongoing accountability comes from quarterly community meetings, a community newsletter, and cooperation with other departments of the Tsleil-Waututh First Nation government.

Income from the development has helped fund many useful community activities, including a golf driving range, eco-tourism and forestry companies, and construction of a new community centre and early childhood development facilities. Most recently, income from the housing development let the Tsleil-Waututh almost quadruple their land base by buying 317 hectares of fee-simple private land located in the scenic Indian River Valley.

Article can be found online at Public Works and Government Services Canada <http://www.pwgsc.gc.ca/rps/inac/content/docs_governance_comm_part5b-e.html>.

119. For example, the Park Royal Shopping Mall located on Squamish First Nation in West Vancouver.

exercise of reconciliation of two burdens on title—Crown and First Nations—underlying third party interests.

If we think that these ideas are too far off or unrealistic, we must revisit the legal landscape pre-*Calder*. Pierre Elliot Trudeau, one of Canada's greatest prime ministers and arguably the most popular—a person who took great pride in his ideas of equality, fair mindedness and justice—stated before *Calder* that First Nations did not have specific claims capable of legal remedy. He was wrong and admitted so after the *Calder* decision was released. If someone like Trudeau can be wrong about an aspect of Canadian history that is so critical to her functioning and ideals, then what seems impossible or implausible must be looked at in a different light.

There is room in the Canadian legal picture for First Nations to retain their wrongfully surrendered reserve lands and for third parties to retain their properties. There is room for meaningful coexistence and implementation of the two burdens on title in Canada. Meaningful coexistence in this respect could include such matters as access agreements for hunting, fishing or collection of medicines, agreements to protect sacred sites and tax revenue sharing. The author's vision of this coexistence would have parties to these negotiations deal with the actual ingredients of the "uncertainty." What creates uncertainty is fear of the unknown in a relationship where trust between the affected parties has been damaged. What the author suggests is that all affected parties begin by identifying the ingredients of the unknown. Third parties want to ensure that their property investment will be secure and that they will not find themselves subjected to arbitrary or unfair rules imposed by First Nations. First Nations want to ensure that their reserve land interest, that *sui generis* interest accorded protection under the *Constitution*, is protected from erosion, and that First Nations can gain the financial and cultural benefit of their lands. All parties, whether First Nations, third party owners, or municipalities, want some level of certainty and comfort level with a resolution that fosters economic development and stable future planning.

What the policy now does is purchase the unknown interest at the expense and exploitation of the First Nation with whom the Crown is in a fiduciary relationship. This is not the way to bring finality to historical grievances because what underlies these grievances is a breakdown in the relationship, and the current Specific Claims Policy only serves to compound that breakdown. Recognition of a First Nation's continuing legal interest in its wrongfully surrendered reserve lands and the creation of space to allow that interest to continue can bring finality and certainty—and justice—to an otherwise aching and neglected relationship.