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Landmark

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

Ernest Benedict, Mohawk Elder
Akwesasne, Ontario
June 1992

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Landmark is published by the Indian Claims Commission to inform readers of Commission activities and developments in specific claims. Landmark and other ICC publications are also available on our Web site at: www.indianclaims.ca

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Lucian Blair,
Director of Communications
Tel: (613) 943-1607
Fax: (613) 943-0157
E-mail: lblair@indianclaims.ca

Please address all correspondence to:
Indian Claims Commission
P.O. Box 1750, Station B
Ottawa, ON K1P 1A2

ICC Urges MPs To Follow Basic Principles In Creating New Claims Body

Chief Commissioner Phil Fontaine with Commissioner Renée Dupuis and Commission Counsel Kathleen Lickers present ICC's brief to the House of Commons Standing Committee.

On November 26, 2002, Chief Commissioner Phil Fontaine presented the Indian Claims Commission's (ICC) brief to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources. The Committee was hearing submissions on C-6, proposed legislation to create a new, independent claims body that would replace the ICC. The Chief Commissioner was accompanied by Commissioner Renée Dupuis and Commission Counsel Kathleen Lickers.

Mr Fontaine outlined some basic principles that should be followed in creating a new specific claims body and urged Members of Parliament reviewing Bill C-6 to measure the provisions of the bill against these principles.

"We believe that the bill has both strengths and weaknesses," said Phil Fontaine, "We ask you to consider the principles we have outlined, to look at what it is the legislation is trying to achieve, and to try to find a balance between the two."

The principles listed by Mr Fontaine call for the new claims body to be independent; to have the authority to make binding decisions; to be a viable alternative to litigation; to allow First Nations to provide oral testimony of their history; to emphasize alternative dispute resolution; to ensure access to justice; to ensure access to information; and to ensure the primacy of the fiduciary relationship between First Nations and the federal Crown.

"Based on our eleven years of experience, the Commission believes that in dealing with First Nations' specific claims these eight principles are the minimum standard that needs to be met," concluded the Chief Commissioner.

A copy of ICC's brief is available on ICC's website at www.indianclaims.ca or upon request by contacting mgarrett@indianclaims.ca.

A more detailed report on Bill C-6 will appear in the next *Landmark*, to be published in March 2003.

CLAIMS IN INQUIRY

Alexis First Nation (Alberta) - TransAlta Utilities Rights of Way

Canupawakpa Dakota First Nation (Manitoba) - Turtle Mountain Surrender

Conseil de bande de Betsiamites (Quebec) - Highway 138 and Betsiamites Reserve

Conseil de bande de Betsiamites (Quebec) - Betsiamites River bridge

Cowessess First Nation (Saskatchewan) - 1907 Surrender

Cumberland House Cree Nation (Saskatchewan) - IR 100A

James Smith Cree Nation (Saskatchewan) - Chakastaypasin IR 98

James Smith Cree Nation (Saskatchewan) - Peter Chapman IR 100A

James Smith Cree Nation (Saskatchewan) - Treaty Land Entitlement

Mississaugas of the New Credit First Nation (Ontario) - Toronto Purchase

Opaskwayak Cree Nation (Manitoba) - The Pas

Opaskwayak Cree Nation (Manitoba) - Lanes

Paul Indian Band (Alberta) - Kapasawin Townsite

Peepeekisis First Nation (Saskatchewan) - File Hills Colony

Roseau River Anishinabe First Nation (Manitoba) - 1903 Surrender

Sandy Bay Ojibway First Nation (Manitoba) - Treaty Land Entitlement

Siksika First Nation (Alberta) - 1910 Surrender

*Stanjikoming First Nation (Ontario) - Treaty Land Entitlement

Stó:lo Nation (British Columbia) - Douglas Reserve

Taku River Tlingit First Nation (British Columbia) - Wenah Specific claim

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Williams Lake Indian Band (British Columbia) - Village site

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CLAIMS IN FACILITATION OR MEDIATION

Blood Tribe/Kainaiwa (Alberta) - Akers Surrender

Chippewa Tri-Council (Ontario) - Coldwater-Narrows Reservation

Chippewas of the Thames First Nation (Ontario) - Clench Defalcation

Cote First Nation No.366 (Saskatchewan) - Pilot Project

Cote, Keeseekoose and Key First Nations (Saskatchewan) - Pelly Haylands

Fort William First Nation (Ontario) - Pilot Project

Keeseekoowenin First Nation (Manitoba) - 1906 Lands Claim

Michipicoten First Nation (Ontario) - Pilot Project

Moosomin First Nation (Saskatchewan) -1909 Surrender

*Nekaneet First Nation (Saskatchewan) - Treaty Benefits

Qu'Appelle Valley Indian Development Authority - Q.V.I.D.A. (Saskatchewan) - Flooding

Standing Buffalo First Nation (Saskatchewan) - Flooding

Thunderchild First Nation (Saskatchewan) - 1908 Surrender

Touchwood Agency (Saskatchewan) - Mismanagement

CLAIMS WITH REPORTS PENDING

Alexis First Nation (Alberta) - TransAlta Utilities Rights of Way

** placed in abeyance at the request of the First Nation*

The Prime Minister appointed Jane Dickson-Gilmore to the ICC on October 31, 2002.

Jane Dickson-Gilmore Appointed To The Indian Claims Commission

On October 31, 2002, Prime Minister Jean Chrétien appointed Jane Dickson-Gilmore to the Indian Claims Commission.

ICC Chief Commissioner Phil Fontaine welcomed Ms Dickson-Gilmore's appointment. She joins Mr Fontaine and Commissioners Roger J. Augustine, Daniel J. Bellegarde, Renée Dupuis, Alan C. Holman and Sheila G. Purdy on the Commission.

"With her knowledge of human rights and aboriginal issues, Ms Dickson-Gilmore is a welcome addition to our team," said Chief Commissioner Fontaine. "My fellow Commissioners and I look forward to working with her."

Ms Dickson-Gilmore is an associate professor in the law department at Carleton University, where she teaches such subjects as aboriginal community and restorative justice, as well as conflict resolution.

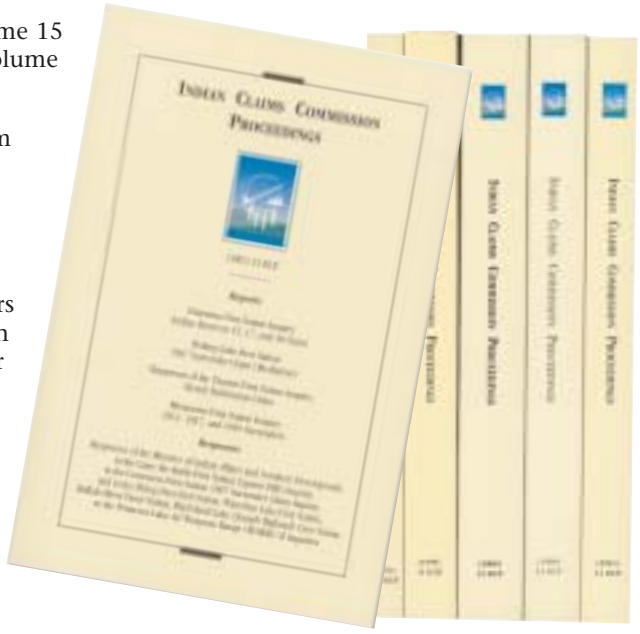
Active in First Nations communities, she serves as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on aboriginal culture, history and politics. Ms Dickson-Gilmore graduated from the London School of Economics with a Ph.D. in law and holds a B.A. and M.A. in criminology from Simon Fraser University.

Publications

The Indian Claims Commission (ICC) has recently published volume 15 of the *Indian Claims Commission Proceedings (ICCP 15)*. This volume contains the following ICC Inquiry Reports:

Esketemc First Nation Inquiry, Indian Reserves 15, 17, and 18 Claim
Fishing Lake First Nation, 1907 Surrender Claim (Mediation)
Chippewas of the Thames First Nation Inquiry,
Clench Defalcation Claim
Mistawasis First Nation Inquiry, 1911, 1917, and 1919 Surrenders

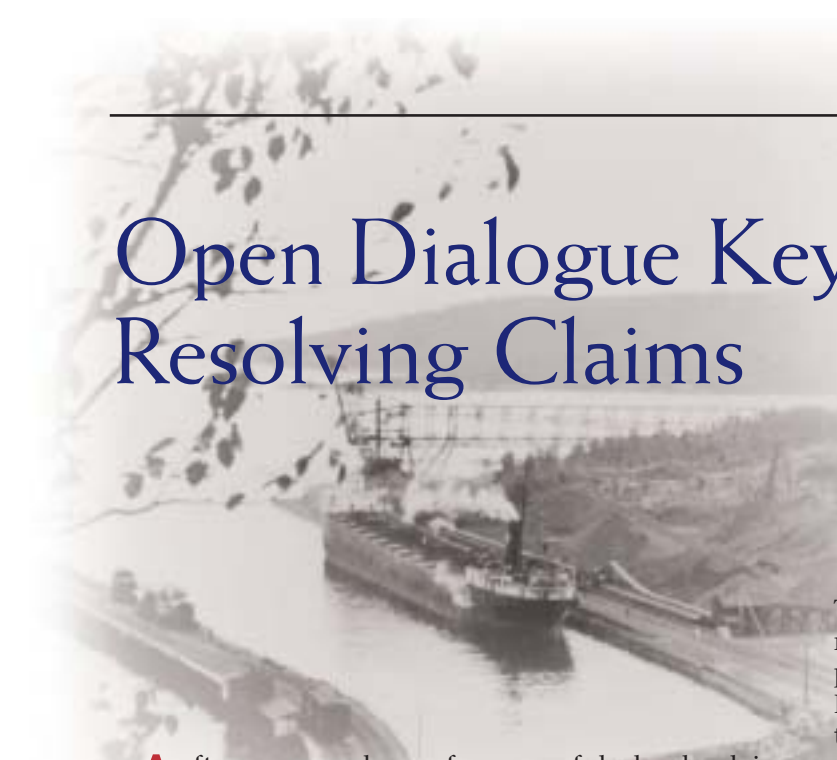
ICCP 15 also contains the responses of the Minister of Indian Affairs and Northern Development to the Carry the Kettle First Nation Cypress Hills Inquiry; the Cowessess First Nation 1907 Surrender Claim Inquiry; and the Flying Dust First Nation, Waterhen Lake First Nation, Buffalo River Dene Nation, and Big Island Lake (Joseph Bighead) Cree Nation regarding the Primrose Lake Air Weapons Range (PLAWR) II Inquires.



This volume is not available on-line, but is available upon request.

Call (613) 947-3939 or fax (613) 943-0157
or e-mail: mgarrett@indianclaims.ca to request a copy.

Open Dialogue Key To Success In Resolving Claims



An ore boat tied to the dock in the Michipicoten harbour in the early 1900s. In 1997, the ICC facilitated meetings between the Michipicoten First Nation and Canada which led to the innovative Michipicoten Pilot Project.

After a number of successful land claims resolutions, the ICC's unique way of conducting its inquiries has earned considerable recognition. The Commission's process respects the dignity of all parties involved while employing non-confrontational methods for resolving disputes.

Since its beginning in 1991, the ICC has seen 26 of its inquiries result in claims being settled or accepted for negotiation. In some cases, these claims are accepted early in the ICC process. An early acceptance saves all parties a great deal of time and money since it means there is no need to go through a full inquiry.

Currently, the ICC is involved in various projects that involve a cooperative approach to claims resolution from the outset. One example of these is the Michipicoten Pilot Project. In January 1997, the Commission sponsored a meeting with the Michipicoten First Nation (located near Wawa, Ontario), Canada, and their respective lawyers. The pilot project that was a result of the meetings was an innovative attempt to create a fair and efficient process within which the Michipicoten First Nation's historical grievances could be resolved.

Under the project, Canada and the First Nation have agreed to conduct joint research on a number of historical claims of the Michipicoten First Nation. The First Nation and the Department of Indian Affairs and Northern Development work together to research, identify, and resolve the specific land claims. The project also involved a community session at the First Nation to hear oral testimony on the history of the First Nation directly from elders and other informed people.

The ICC has acted as the facilitator for this project at the request of the parties. Commission personnel have prepared newsletters, convened and chaired meetings, and ICC Commissioner Roger Augustine acted as convenor for the community session. The project incorporates a number of innovative features, and could prove to be a good model for resolving claims in a collaborative manner. In this sense, it represents some of the fundamental principles advanced by the ICC and demonstrates how willingness, flexibility and commitment can facilitate effective discussion. So far, the project has been quite successful and the parties are pleased with its progress.

The ICC has worked on similar projects across Canada, including the Cote First Nation, Saskatchewan and the Fort William First Nation, Ontario.

Planning conferences have proven to be an effective first step in resolving claims disputes. They are chaired by the Commission's Director of Mediation, and the parties are encouraged to be as involved as is practical in the planning and conduct of the inquiry. The ICC places great emphasis on the need for flexibility. Commissioners have learned through experience that early and open discussions can address concerns and head off impasses. To date, 13 claims have been accepted for negotiation as a result of the ICC's planning conferences.

"Certainly, the planning conference stage has proved to be innovative and it is a very important component of the ICC's process. It actually takes its genesis from the Commission's first legal mediation advisor, Justice Robert Reid, who was and remains one of Canada's foremost administrative law experts ," says ICC Counsel Kathleen Lickers. "All planning conference discussions are without prejudice. Knowing that these discussions will not prejudice any other discussions that the parties may be involved in elsewhere is important to their being

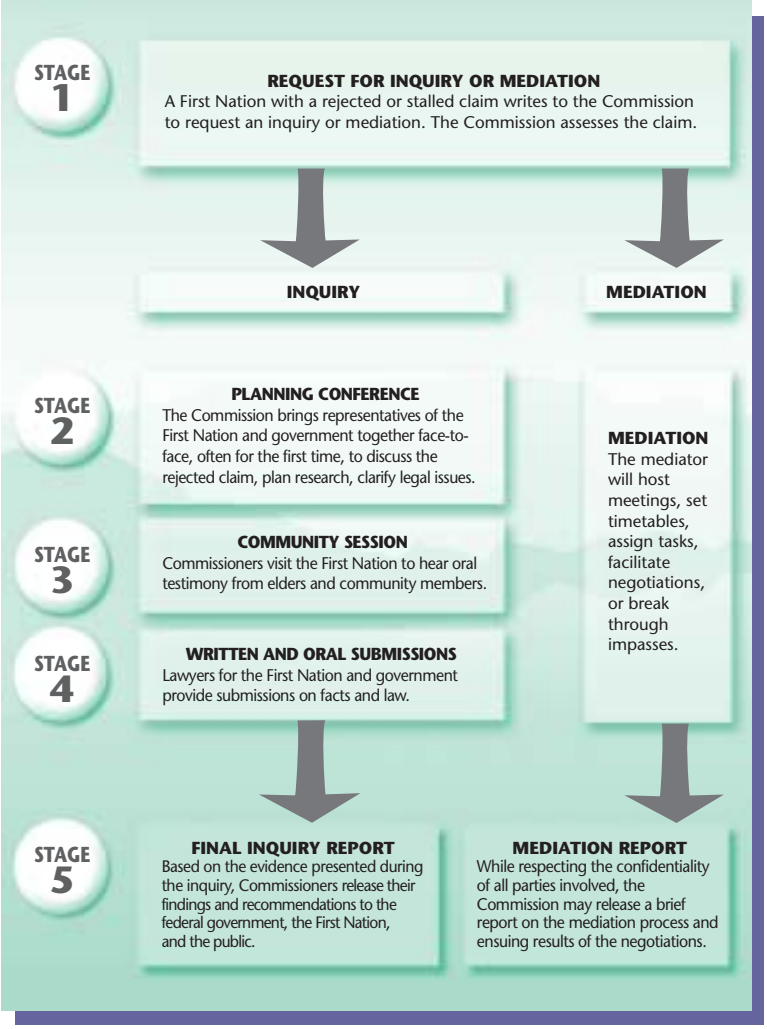
comfortable. It is critical in areas where either party may be willing to concede on an issue, or a fact, for the purposes of moving forward, but where if they were pressed in a court of law, they would defend themselves. A fundamental distinction between the ICC and the courts is the flexibility of the process compared to the rigidity of the courts."

Also significant is the fact that the planning conference is usually the first opportunity for Canada and the First Nation to discuss the claim face-to-face.

The main objectives of the planning conferences are to enable the parties to discuss the claim openly in a non-adversarial, co-operative setting, as well as to review their positions in light of the latest developments in the constantly evolving area of aboriginal and treaty rights law. The parties identify and explore the relevant historical and legal issues and determine which historical documents they intend to rely on. They also disclose which elders, community members, or other experts are to be called as witnesses, and they set time frames for the remaining stages of the inquiry. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference to facilitate an informed discussion of the issues.

The first planning conference also gives the First Nation and Canada an opportunity to discuss any preliminary issues that need to be resolved before an inquiry. The number of planning conferences held depends on the nature and complexity of the issues of the claim. Even if the planning conferences do not lead to a resolution and a formal inquiry process is necessary, the conferences assist in clarifying issues and making the inquiry more effective. The Commission's experience to date is that these meetings are very fruitful. Sometimes, there has been a basic misunderstanding of the issues involved. Open discussion means these communication issues can be rectified.

Ms Lickers, who has been involved in a number of these conferences, says: "The Commission's process has been designed to respond to each and every case that comes before it. We are not governed by strict rules of evidence, although the fundamental principles of natural justice and fairness underlie everything we do. While we can design our process to respond to a particular case, we never deviate from those two fundamental principles, regardless of how we structure it."



This flow chart depicts the ICC process, which emphasizes fairness, flexibility and cooperation between all parties.The process respects the dignity of all parties involved while employing non-confrontational methods for resolving disputes.

Planning conferences sometimes evolve into mediation rather than a full inquiry. The ICC's mandate allows it to act as a mediator in land claims talks between the parties. Mediation can occur at any stage in the process, not just at the outset of the inquiry. Because of the Commission's experience with the savings in time and money mediation can bring, Commissioners continue to recommend in the ICC's Annual Reports that "Canada... make greater use of the Commission's mediation services, where feasible, in order to reach claim settlements more quickly and efficiently."

Participants at the Michipicoten Pilot Project community session, including Commissioner Roger Augustine (bottom row, centre) and Chief Sam Stone (middle row, left), Sept. 1997.

Under its mandate, the ICC has undertaken a number of initiatives to apply the concept of "open, face-to-face" dialogue in a number of claims situations. As part of its commitment to fairness in claims review, the ICC will also continue to recommend and practice a flexible, co-operative process based on open discussions.

"Certainly, from the Commission's perspective, having a third party at the table does move the agenda; it moves the process forward," said Ms Lickers. "With us you have a neutral chair, keeping the parties engaged, keeping everyone on a set timetable, ensuring that assigned undertakings are followed up on. The Indian Claims Commission helps facilitate and mediate throughout the claims process: these are critical roles."

The Loss-Of-Use Study:

A COMPLEX TOOL

Land and its resources provide a community with a healthy environment, within which it can grow. In claims where land is involved, complex loss-of-use studies are done to help the parties understand what impact the loss of use of the land has had on the economy of the community.

Ralph Brant, Director of Mediation for the Indian Claims Commission, says that without land a community's ability to exist is severely challenged.

"Land is an economic base; if you do not have land, then you do not have an economy. A lack of land destroys a First Nation's economic way of life. First Nations have a special relationship with the land. You take that away and what are they left with?" Mr Brant says.

The loss-of-use study is one tool Canada and a First Nation use in valuating how the First Nation's economy was affected by being unable to benefit from the land and resources in question. The complexity of the loss-of-use studies and the fact they can span over a hundred years means the studies can take from 12 to 18 months to complete.

"For instance, suppose the illegal surrender took place in 1907, what might the land surrendered have looked like at that time? How much was covered by forest? How much was broken and being used for agriculture? How much was unused? The study has to determine how quickly the First Nation might have broken the land and begun to use it for agriculture, or how quickly they might have been able to harvest the forests, or take out sand and gravel," Mr Brant says.

The studies are done by independent consultants who are specialists in their various fields. Studies on land appraisals, agriculture, forestry and mining potential are

National Archives of Canada C7819, Photo by J. Woodruff

National Archives of Canada PA945

"The study has to determine how quickly the First Nation might have broken the land and begun to use it for agriculture, or how quickly they might have been able to harvest the forests, or take out sand and gravel," Mr Brant says.

usually carried out by a specialist or a team of specialists hired by the First Nation and paid for by the federal government.

"They are putting their professional opinion into these reports," Mr Brant says. "They can not be seen as being other than independent and professional in what they say, they can only tell it as it is. Their professional reputation is at stake."

A year-by-year assessment is done, up to the present day, involving an inventory of the quantity and quality of the land and its resources. Estimates of what resources may have been harvested in an individual year are done, including such factors as the land's possible rate of development, market values in the individual years, and even variables such as what impact a forest fire or drought may have had on a given year's industry.

All the parties involved agree upon the terms of reference for the loss-of-use study; these define what land area will be studied, the time frames and resources. The rate of development is a significant factor in the loss-of-use study. It defines how soon and at what rate a First Nation would have profited from its resources. The rate of development is assessed by looking at surrounding municipalities and other reserves within the area and how quickly they developed their lands.

"We spend a lot of time developing the terms of reference for these studies, telling the consultants involved exactly what it is they are supposed to do," Brant says. "They have to do an awful lot of research on what might have happened. For instance, for something like gravel they would actually have to go back and determine what roads were built in the area and if gravel was taken from that particular piece of land for use in that road, what price was paid for the gravel, and how much gravel was taken."

This valuation of the quality and quantity of land allows the parties involved to create a foundation of understanding from which they can discuss the realities of the claim.

"When land was taken through an illegal surrender, and Canada determines that the taking of the land was not right, it falls under the Specific Claims Policy. This Policy makes it possible to compensate the First Nation for the current market value of the land that was taken and usually allows the First Nation to buy that same amount of land and have it returned to reserve status through the Additions to Reserves Policy. Canada will also compensate the First Nation for any economic benefits they might have gained had they been able to keep the land," Mr Brant says.

The numbers within a loss-of-use study often form the basis of a negotiated settlement. The Government of Canada says it is committed to honouring its outstanding obligations to First Nations by negotiating agreements that bring full and final closure to longstanding claims, to the benefit of all Canadians.

At the request of the parties, the ICC will act as a study coordinator, working on behalf of the negotiating parties to facilitate the loss-of-use study. The ICC will work directly with the consultants, making sure the same job is not being done twice and that all the relevant information is shared. The ICC will also arrange any interviews or meetings to help complete the loss-of-use study.

Mr Brant says facilitation of the loss-of-use study by the ICC can save both time and money for Canada and the First Nation.

"We take the problem of facilitation off the backs of Canada and the First Nation. They do not have to worry about coordinating the study, we arrange things like interviewing elders and all the rest of it. We do all that for them, otherwise, they would have to hire someone to do it or one side or the other would have to do it. We provide independence to the study, since we do not have a stake in either side."

What's New

Chief Commissioner Phil Fontaine

PHIL FONTAINE CHAIRS CONFERENCE ON NEW LEGISLATION

The ICC's Chief Commissioner, Phil Fontaine, chaired and gave the opening address to the Pacific Business and Law Institute's conference on the *Specific Claims Resolution Act*. At the conference, held on September 19th and 20th, 2002, a number of aboriginal and non-aboriginal experts in the fields of aboriginal law and politics discussed the ramifications of the proposed legislation. Formerly known as Bill C-60, the act was re-introduced into the House of Commons on October 9th, 2002, as Bill C-6.

If passed, the legislation would establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation, and resolution of specific land claims.

It would also have a significant impact on how specific claims are resolved. The two-day conference contrasted the new process with the old and looked at similar legislation in other countries.

In its 1994-95 *Annual Report*, the ICC recommended that Canada and First Nations implement a new claims policy and process that does away with the unfair situation wherein Canada judges claims against itself. This recommendation was reiterated in the 1995-96 *Annual Report* when the ICC recommended that Canada and First Nations establish an Independent Claims Body empowered to settle the legitimate historical grievances of First Nations with regard to land and other issues.

APPOINTMENTS TO STANDING COMMITTEE

The Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources has been hearing presentations and recommendations concerning future land claims and the *Specific Claims Resolution Act*. The chairs for the Standing Committee were chosen by secret ballot on November 4th, 2002. Raymond Bonin was elected chair of the Standing Committee, Nancy Karetak-Lindell and Maurice Vellacourt were elected as the vice-chairs.

On November 26, 2002, the ICC presented its recommendations regarding the *Specific Claims Resolution Act* to the Standing Committee.

CAROLE T. CORCORAN MEMORIAL AWARD PRESENTED

Lee Robin Caffrey, the recipient of the Carole T. Corcoran Memorial Award.

Lee Robin Caffrey is this year's recipient of the Carole T. Corcoran Memorial Award in Law. The $1,200 award is given in memory of the late ICC Commissioner, Carole Corcoran, who passed away on February 15, 2001.

Ms Caffrey graduated from the University of British Columbia in May 2002 and is currently articling at the law firm Hutchins, Soroka and Grant in Vancouver. Ms Caffrey's mother is from Holland and her father is from Sandy Bay, Saskatchewan, a community with many people of Cree and Métis descent. "I would like to say what an honour it was to receive the Carole Corcoran Award and what a pleasure it was to meet Carole's family and friends," Ms Caffrey said.

Ms Corcoran, a Dene from Fort Nelson, BC, was one of Canada's foremost aboriginal lawyers and was appointed to the ICC in July 1992. Her dedication to the work of the ICC, her undaunting efforts to clarify the spirit of the law, and her gentle disposition will remain an inspiration to all who knew her.

PHIL FONTAINE HONOURED WITH GOLDEN JUBILEE MEDAL

The Golden Jubilee Medal of Queen Elizabeth II is awarded to Canadians who have made a significant contribution to their fellow citizens, their community or to Canada.

On September 24th, 2002, ICC Chief Commissioner Phil Fontaine was presented with a Golden Jubilee Medal at Government House in Winnipeg. Mr Fontaine was presented the award by the Lieutenant Governor of Manitoba, Hon. Peter M. Liba.

The Golden Jubilee Medal of Queen Elizabeth II commemorates the 50th anniversary of Her Majesty's reign as Queen of Canada. The medal is awarded to Canadians who have made a significant contribution to their fellow citizens, their community or to Canada.

Correction

The summer issue of *Landmark* carried an article entitled "Is It A Valid Treaty Land Entitlement Claim?" (Vol. 8, no. 2, p. 6). The article stated that "In 2000, the TLE claim [of the Kawacatoose First Nation] was settled for $23 million in federal compensation and $15 million in improvements to the reserve."

The $15 million in improvements to the Kawacatoose reserve was an investment by Indian and Northern Affairs Canada (INAC) that in no way is connected to the TLE settlement.

The source of this erroneous statement is INAC news release no. 2-01125, dated March 24, 2001.

We sincerely regret any inconvenience our publication of this information from INAC's news release may have caused.

Landmark volume 8, number 2, Summer 2002

Looking Back

Landmark is introducing a new section called Looking Back. The new section will highlight documents, issues, people and places that have had an impact on the treaty making process or land claims.

The *Royal Proclamation of 1763*: One Of The Seeds In The Forest That Is Canada

The *Royal Proclamation of 1763* entrenched and formalized a process whereby only the Crown could obtain Indian lands through agreement or purchase from First Nations.

After Britain defeated France in the Seven Years War, it controlled all of North America east of the Mississippi. The *Proclamation* was a part of British attempts after its victory to restore peace and economic growth to its colonies, both old and new. By this time, Britain had come to recognize many of the mistakes it had made with aboriginal people. The *Royal Proclamation of 1763* constituted an effort to begin a new relationship with the First Nations of North America. Land could only be exchanged after Britain and the First Nation had negotiated a treaty or a sale, at which point the land would be exchanged from government to government.

> *And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie...*
>
> - *Royal Proclamation of 1763*, reprinted in the *Report of the Royal Commission on Aboriginal Peoples*, 1996, Vol. I, Appendix D

All land surrender treaties entered into with the Indians after 1763 were therefore required to meet these procedures to safeguard the Indians from fraud in the sale and disposition of their traditional territories.

It is through its role as intermediary between the Indians and purchasers that the Crown assumes a protective and fiduciary role.