

Addressing Aboriginal Disputes in Canada: A New Initiative

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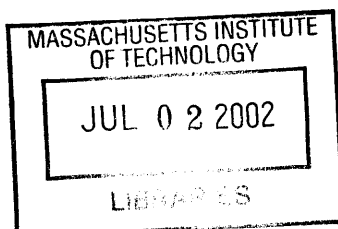
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ADDRESSING ABORIGINAL DISPUTES IN CANADA:

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Submitted to the Department of Urban Studies and Planning
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ABSTRACT

Tension or outright conflict is a recurring theme in relations between Aboriginal communities and non-Aboriginal institutions and bodies in Canada. Additionally, many Aboriginal communities are fraught with internal divisions that prevent their leaders from taking consistent policy stands and negotiating effectively with other parties. These tensions and divisions can hinder the possibility of cooperation and disrupt the processes of problem-solving that are necessary to address many of the concerns of Aboriginal and non-Aboriginal Canadians. The current policy in Canada to move towards Aboriginal self-governance is likely to increase the frequency and complexity of such disputes.

Despite these well-recognized dynamics, there are insufficient mechanisms and resources to address Aboriginal disputes, whether between Aboriginal groups and government, Aboriginal groups and non-governmental, non-Aboriginal parties, or amongst and between Aboriginal groups. A new initiative is proposed in the form of an independent, non-partisan, nonprofit organization devoted to the resolution of Aboriginal public disputes. The organization would work independently and with other organizations to fill the gaps in the field by providing access to professional dispute resolution services and by building capacity amongst Aboriginal and non-Aboriginal stakeholders to resolve such disputes. It would integrate and build on dispute resolution approaches from Western and Aboriginal models. In its startup phase, the organization would maintain a limited focus and engage in a relatively small range of activities. Ultimately, it is envisioned as a national organization, offering a broad range of services, which fundamentally transform the way Aboriginal disputes are addressed in Canada.

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Introduction

In Canada, tension or outright conflict is a recurring and well-recognized theme in relations between Aboriginal communities and non-Aboriginal actors like resource development industries, neighboring non-Aboriginal communities, and the federal and provincial governments. Periodically, conflicts either become violent, or threaten to become so. The sources of strain on these relations are numerous. They include, but are not limited to: lingering historical grievances; ambiguous treaty, constitutional, and provincial rights and obligations; widely differing world-views and cultures; competition over resources; and festering frustration over the slow pace of progress in reducing the disproportionately high rates of poverty and other social ills amongst the Aboriginal population of Canada. Strained relations, which tend to breed distrust, can hinder the possibility of cooperation that is necessary to address many concerns of Aboriginal and non-Aboriginal Canadians. Additionally, many Aboriginal communities are fraught with internal divisions, whether ideological, political, sociological, or personal. Internal disputes often prevent bands from taking consistent policy stands, and can severely inhibit a community's ability to address pressing internal issues and to negotiate effectively with other parties.

These tensions and conflicts currently obstruct the course of many activities and undertakings of Aboriginal and non-Aboriginal Canadians alike. They can be inconvenient at best, and extremely bitter and costly at worst. Since 1995, the Canadian government has adopted a policy to negotiate self-government arrangements with Aboriginal groups across Canada. This process of devolution is presenting new and complicated issues that commonly cause friction both within Aboriginal communities and between them and non-Aboriginal interests. As Aboriginal communities across Canada continue to assume greater responsibility for the administration and management of services and resources, these disputes are likely to increase in frequency and complexity. Yet, Canada is inadequately equipped to address even current Aboriginal disputes.

Although many disputes between Aboriginal and non-Aboriginal interests are resolved in court, litigation can be overly adversarial, and it is usually expensive and time-consuming. Moreover, as in the *Marshall* case described below, it may not even produce a clear resolution to the dispute. For these reasons, amongst others, over the last decade there has been growing interest in applying alternative dispute resolution (ADR) or consensus building techniques to disputes in the Aboriginal context. This interest has stimulated academic writings¹, national conferences², and even the creation of organizations, like the Indian Claims Commission, to apply ADR techniques to certain types of Aboriginal/non-Aboriginal conflicts. It has also inspired some institutions that

¹ For example: McCallum, A. "Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments"; Price, R. and Dunnigan, C. *Toward an Understanding of Aboriginal Peacemaking*; Rudin, J. and Russell, D. *Native Alternative Dispute Resolution Systems: the Canadian Future in Light of the American Past*.

² For example: UVic Institute for Dispute Resolution. Proceedings: Making Peace and Sharing Power; A National Gathering on Aboriginal Peoples and Dispute Resolution. 1997

deal with interactions between First Nations³ and other Canadians, like the Indian Taxation Advisory Board (ITAB), to introduce and integrate these techniques into their work. These various activities have functioned as a testing ground for the use of ADR techniques in the Aboriginal context. In many instances, they have shown that there is great potential for the use of ADR in this context.

While ADR techniques are being introduced and used in a variety of Aboriginal/non-Aboriginal disputes, the high frequency, widespread scale, and common vociferousness of such conflicts indicate that current efforts are insufficient. This thesis suggests that there are inadequate mechanisms and resources in place to allow the use of tried and tested dispute resolution techniques in a consistent and effective manner. Too often, disputants in all kinds of conflicts – whether within or between First Nations, or between Aboriginal groups and non-Aboriginal bodies – simply stumble through various attempts at resolution, without a clear understanding of their objectives, interests or a plausible and sustainable outcome, and without the benefit of the expertise and guidance of a professional neutral. In other cases, disputants might attempt to import dispute resolution techniques from other contexts that ignore the unique historical and cultural dimensions of the specific Aboriginal dispute.

In this thesis, I propose the creation of a new initiative to begin to address the gaps that currently exist, and to strengthen the resources available to deal with complex Aboriginal disputes. I propose that this initiative involve the establishment of an independent, nonprofit organization, dedicated to providing disputants with access to high quality dispute resolution services, and to building capacity amongst Aboriginal and non-Aboriginal populations to address Aboriginal disputes effectively. In order to reflect a concern not only with resolving disputes once they have arisen, but also with building agreement in potentially divisive situations, I refer to this initiative as the “Agreement Building Initiative” (ABI).

The focus of this thesis is on public disputes, rather than interpersonal or neighbourhood disputes, that arise in the Aboriginal context. Public disputes refer to conflicts involving at least one public agency. In the context of Canadian Aboriginal disputes, this includes not only agencies of the federal and provincial governments but, as Aboriginal groups develop self-government arrangements with Canada, it would include certain Aboriginal agencies too. Public disputes also frequently involve other stakeholders too, such as resource extraction industries, citizen activist groups, and trade associations.

Overview

The first chapter of this thesis sets the context for Aboriginal disputes in Canada. It first describes the social, historical, and political context in which Aboriginal disputes arise. It then presents two examples of Aboriginal disputes that demonstrate some of the

³ In this thesis the term “First Nations” refers to Aboriginal nations other than the Inuit and Metis. The term “Aboriginal” is used more broadly to refer to the indigenous people of Canada, and those with considerable indigenous ancestry.

issues arising in such conflicts, and the unproductive path such disputes often follow. Chapter 2 provides an overview of Aboriginal disputes and the current mechanisms that exist to address them. It then exposes the gaps in these mechanisms, thereby setting the stage of the creation of a new initiative, ABI. Chapter 3 compares two options for the form that a new initiative might take, and presents an argument favouring the option of creating a new organization to address the gaps identified in Chapter 2. It then presents four criteria, derived from my research, to guide the design of the new organization. Chapter 4 first discusses some of the general legal, political and financial features of ABI's design, and then outlines the potential scope of ABI's activities. Chapter 5 presents recommendations for ABI's governance, management, and staffing structures, as well as an estimate of ABI's initial financial requirements. The discussion of ABI's design focuses both on the initial steps to get ABI operational, and on a vision for its ultimate structure and scope.

Methodology

The sources I used for my research for this thesis fell into three categories: published materials, telephone interviews, and document research.

Amongst the published materials I used were books, journal articles, conference proceedings, another student thesis, and certain Internet pages. I used information from these materials to provide historical and political context for the arguments in this thesis, to outline the types of Aboriginal disputes that exist in Canada and the existing mechanisms in place to address them, and to inform some of the ideas I present concerning organizational design and management.

I conducted a total of twenty telephone interviews for this thesis. (See Appendix I for a complete list of interviewees.) Each of the interviewees fell into one of two possible categories: representative of a typical stakeholder group, or experienced dispute resolution practitioner in the field. The first category included representatives from the federal and provincial governments (some of whom were Aboriginal), from First Nations, and from industry. The practitioners I interviewed included Aboriginals and non-Aboriginals, and those who work, or have worked, for specific bodies to address Aboriginal disputes, and also those who work independently. I used the interviews to gather information from all these individuals about what they see as the major needs in the area of Aboriginal dispute resolution, and about the types and nature of services they would most value from a new initiative to address Aboriginal disputes. I also presented some of my ideas to certain interviewees so that they could respond with suggestions, comments, and criticism about the various institutional design elements presented in this thesis. (See Appendix II for the interview protocol used for all interviews, and the "working sketch" presented to certain interviewees.)

The documents I consulted included the annual reports of certain organizations described in this thesis, statistical reports (for example, concerning Aboriginal demographics and concerning specific claims), and the organizational charts and bylaws of sample non-governmental organizations. Thus, the document research functioned

either to provide concrete evidence of the issues described in this thesis, or to inform my understanding of institutional governance.

Chapter 1: Historical and Political Context

There are many disputes, and many types of disputes between Aboriginal and non-Aboriginal interests in Canada. In order to begin to understand why these disputes have become such a common feature of the landscape, it is necessary to have a sense of the context of these relations. This chapter sets the social, historical, and political context for Aboriginal disputes, and then provides two examples that illustrate the nature of such disputes, and the way they tend to play out.

Canadian Aboriginal Demographic Data

According to the 1996 Canadian Census, the Aboriginal population of Canada comprises 799,010 people, approximately 3% of the Canadian population as a whole⁴. The majority of the Aboriginal population is North American Indian, but approximately a quarter is Metis, and about 5% are Inuit⁵. According to a 2001 report by the Department of Indian Affairs and Northern Development, at the end of 2001 there were 690,101 registered Indians in Canada⁶. This includes those living on- and off-reserve. Ontario and British Columbia have the largest populations of registered Indians, with 157,082 and 112,305 respectively, and the largest number of bands, with 126 and 198, respectively⁷. However, registered Indians comprise relatively higher proportions of the population as a whole in the northern territories (in 1996, 61.9% and 20.1% in the Northwest and Yukon Territories respectively) and Manitoba and Saskatchewan (11.7% and 11.4% respectively)⁸.

The socio-economic conditions of Aboriginals in Canada are considerably worse, on average, than for the rest of the population. In 1995, the median household income for registered Indians was \$25,602, while for Canada as a whole it was \$41,898⁹. Almost one third of all Aboriginal children under the age of 15 live in a single-parent family, twice the rate within the general population¹⁰. Although the Aboriginal birthrate has declined over the last century, it is still considerably higher than the national average. In 1991 it was 22.2 per 1000, nearly double the national average¹¹. Birth rates on-reserve and amongst the Inuit are particularly high. In 2001, 60% of on-reserve Indians and Inuit

⁴ Statistics Canada. "1996 Census: Aboriginal Data". *The Daily*. January 13, 1998.

⁵ *Ibid.*

⁶ Department of Indian Affairs and Northern Development, First Nations and Northern Statistics Section. *Registered Indian Population by Sex and Residence*. Ottawa: Minister of Public Works and Government Services Canada. 2001

⁷ *Ibid.*

⁸ Statistics Canada. "1996 Census: Aboriginal Data". *The Daily*. January 13, 1998.

⁹ Indian and Northern Affairs Canada. *Comparison of Social Conditions, 1991 and 1996: Registered Indians, Registered Indians living on Reserve and the Total Population of Canada*. Ottawa: Minister of Public Works and Government Services Canada. 2000

¹⁰ Statistics Canada. "1996 Census: Aboriginal Data". *The Daily*. January 13, 1998.

¹¹ Frideres, J. *Aboriginal Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice Hall Allyn and Bacon Canada. 1998. Fifth Edition. p. 115

were under the age of 30¹². Although life expectancy for Aboriginals has increased over the last century, it still lags behind the national average. In 1991 the life expectancy of an Aboriginal man was 68 versus the national average of 74, and the life expectancy of an Aboriginal woman was 73 versus the national average of 80¹³.

The History of Treaty-Making Throughout Canada

Before the Europeans and First Nations in Canada signed any treaties involving arrangements concerning land ownership, the Royal Proclamation of 1763 delineated lands to remain Indian hunting grounds, and referred for the first time to Indian rights. Subsequently, the relationships between the British Crown, and later the Canadian government, and First Nations have often been defined formally by the treaties signed between them¹⁴. The treaties generally followed the pattern of European settlement, and the period of treaty-making lasted from the early 18th century until the end of the 19th century. The first treaties, signed in the Maritime region before confederation, dealt mostly with political relations between the parties and governance of the region. Later, when the Crown signed treaties with First Nations in Quebec and Ontario during the early 19th century, the treaties became a mechanism (at least as understood by Crown representatives) to acquire land for settlement of immigrants of European descent, and to compensate First Nations for the land transfer.

By the 1870s, the Crown undertook a process to allow large-scale settlement of immigrants in central Canada and the Prairies. The “numbered treaties” covered most of this region. These treaties were fairly uniform, and they were more comprehensive than earlier treaties that had been signed to the east. Treaties 1 through 7 were all signed during the 1870s. They generally entailed a surrender of land in exchange for various benefits, including the establishment of reserves¹⁵, monetary compensation in the form of annuities and gratuities per person, and the establishment of a school on reserve. Sometimes the treaties included provisions entitling Aboriginals to agricultural aid and particular hunting or fishing rights. By 1899, the Canadian government began a new round of negotiation of numbered treaties, and signed Treaties 8 through 11. These allowed further settlement as well as mineral development. Since government officials generally used earlier treaties as models for later ones, and because Aboriginal negotiators often insisted on similar treatment to that received by other Aboriginal groups, the terms of all the treaties are fairly comparable¹⁶.

British Columbia remains a special case because most of the land in the province was never acquired by treaty. Treaties that were signed covered only parts of Vancouver

¹² Department of Indian Affairs and Northern Development, First Nations and Northern Statistics Section. *Registered Indian Population by Sex and Residence*. Ottawa: Minister of Public Works and Government Services Canada. 2001

¹³ Frideres, J. *Aboriginal Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice Hall Allyn and Bacon Canada. 1998. Fifth Edition. p. 117

¹⁴ Since Confederation, the terms of all pre-existing treaties were turned over to the Canadian government.

¹⁵ Reserve size was based on a formula of a stipulated number of acres of land per family of five.

¹⁶ Frideres, J. *Aboriginal Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice Hall Allyn and Bacon Canada. 1998. Fifth Edition. p. 47-53, 58

Island and the northeast of the province. As a result, Aboriginal claims to their traditional land have been a matter of considerable dispute since Confederation¹⁷.

Since the signature of the historic treaties, their interpretation has repeatedly come into dispute. It is evident that government representatives understood them as final deals in which land was exchanged for goods, monetary compensation and, in later years, reserve lands and guaranteed hunting and fishing rights. However, many First Nations have argued that their ancestors did not understand their treaties as land surrenders, but as peace treaties in which the land would be shared in exchange for benefits such as education, medical assistance, and annuity payments¹⁸. Further difficulty is caused by the common assertion by First Nations that government representatives made additional oral promises when they signed the treaties. These promises have been the source of considerable controversy during land claims litigation and negotiation, and the use of oral evidence for these claims has proved a challenge for the legal system.

The Policy Context of Recent Aboriginal Disputes

Traditionally, Canadian Aboriginal policy has been shaped by the 1876 *Indian Act*. The *Indian Act* is administered by the federal department that is now called Indian and Northern Affairs Canada (INAC)¹⁹. The Act defines Canadian policy on, and the extent of governmental control over, broad areas of Aboriginal affairs, including Aboriginal lands and resources, Indian status, management of Indian monies, taxation, and education. The Act allows First Nations limited power under federal supervision through its provisions for a Chief and Council system with regulations for elections and political administration. Over time, various amendments have been made to the *Indian Act* to reverse or modify original aspects that were later deemed discriminatory or otherwise unacceptable. For example, the Act underwent a major revision in 1951, representing a shift in governmental policy away from undermining Aboriginal culture. Aboriginals throughout Canada were granted the right to vote only in 1960.

In 1969, former Minister of Indian Affairs and Northern Development, Jean Chretien, introduced a White Paper that proposed the elimination of special status for Aboriginals, and the integration of all Aboriginal services into those of the rest of Canadian society. This proposal was strongly rejected by Aboriginal leaders throughout Canada, who argued that Aboriginals' status as the original inhabitants of the land that is now Canada gave them special rights. The 1973 *Calder Decision*, requiring Canada to recognize that the existence of Aboriginal societies predating colonization, indicated that

¹⁷ Since 1993, following political pressure from B.C. First Nations and several court rulings addressing aboriginal rights and title, the Federal and Provincial governments have been negotiating with those First Nations who never signed treaties but who seek a treaty relationship with British Columbia and Canada. This was a significant step because it marked the reopening of the treaty process after almost a century.

¹⁸ Treaty 7 Elders and Tribal Council with Hildebrandt, W., Carter, S., and First Rider, D. *The True Spirit and Original Intent of Treaty 7*. Montreal & Kingston: McGill-Queens University Press. 1996

¹⁹ This department recently underwent a name change from the Department of Indian Affairs and Northern Development (DIAND) to Indian and Northern Affairs Canada (INAC). Throughout this thesis, the two names are used interchangeably.

Aboriginal institutions, tenures, and rights remained in place despite the establishment of the Canadian state²⁰. This decision set the stage for an about-face in Canadian Aboriginal policy, and the formal recognition of Aboriginal rights.

In 1982, Canada adopted its national Constitution. Aboriginal leaders were included in the preparation of the Constitution, and Section 35 of the Constitution recognized and affirmed existing Aboriginal and treaty rights. However, although all parties agreed to include “Aboriginal rights” in the Constitution, they could not agree on the definition of those rights. A conference was held in 1983 in an attempt to define these rights, and it was attended by Pierre Trudeau, then Prime Minister, the ten provincial premiers, and Aboriginal representatives. The participants were unable to agree on a definition of Aboriginal rights, and could only agree to continue discussing the matter at conferences set for the next few years. A matter of particular concern in these discussions was whether Aboriginal rights would include special rights, like self-government, for Aboriginals²¹.

The definition and enforcement of Aboriginal rights has remained a highly contentious issue in the years since Canada adopted its Constitution. When Canada attempted to amend its Constitution at Meech Lake in 1990, the question of Aboriginal rights was one of the issues that led to the failure of this effort. In the Aboriginal view, these rights include rights to self-determination and government, rights to ownership of traditionally held lands and resources, rights to hunt, trap, and fish, and rights to the full practice, preservation, and development of culture. Aboriginals tend to see these rights as fundamental to their survival as a people. Sometimes Aboriginals have argued that their rights include being exempt from all taxation by governments other than their own²². The Canadian government traditionally argued that Aboriginals had none of these types of rights, but this position has changed gradually over time, particularly after *Calder*. Government was more willing at first to recognize Aboriginal property rights, but in recent years it has recognized self-government as an Aboriginal right. In 1988, the Canadian government strengthened Aboriginal bands’ authority over development of their lands, and amended the *Indian Act* to permit bands to pass property tax by-laws and to tax interests in reserve lands. In 1995, the federal government initiated a process to negotiate individually adapted self-government agreements with those First Nations who sought self-government.

The “Indian Summer” of 1990, marked especially by the widely publicized “Oka Crisis”, brought national attention to Aboriginal issues. The crisis developed when a group of Mohawks held a standoff to prevent commercial development on a traditional burial ground. The Canadian army was dispatched to try to end the standoff. The crisis, which lasted much of the summer, marked a turning point in the relationship between

²⁰ Asch, M. (Ed.) *Aboriginal and Treaty Rights in Canada: Essays and Law, Equity, and Respect for Difference*. Vancouver: UBC Press. 1997. p. ix

²¹ Asch, M. *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Toronto, New York: Methuen. 1984. p.1

²² Asch, M. *Home and Native Land: Aboriginal Rights and the Canadian Constitution*. Toronto, New York: Methuen. 1984. p. 27

Aboriginal and non-Aboriginal Canadians. In 1991 the federal government established the Royal Commission on Aboriginal Peoples (RCAP) to “investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Metis), the Canadian government, and Canadian society as a whole”, and “to propose specific solutions ... to the problems which have plagued those relationships and which confront aboriginal peoples today”²³. RCAP was permitted to investigate all issues it deemed relevant to Aboriginal people. In 1996, after conducting 178 days of public hearings around Canada and authorizing more than 300 research reports, RCAP released its final five-volume report. In it, RCAP proposed a fundamental restructuring of the relationship between Aboriginal and non-Aboriginal people in Canada, and it presented 440 recommendations and a 20-year agenda for future policy-making. Despite this enormous effort, many of RCAP’s recommendations are yet to be implemented²⁴.

Delgamuukw v. B.C. (1991) marked another milestone in the definition of Aboriginal rights. Initially, the B.C. Supreme Court ruled that the Gitksan and Wet’suwet’en First Nations of British Columbia do *not* hold Aboriginal rights over the land they claimed. Justice A. McEachern stated that the *Royal Proclamation* of 1773 never applied to British Columbia and that Aboriginal interest in the land excluded possession of or jurisdiction over it. He ruled that although Aboriginal rights were never explicitly extinguished, colonial laws predating Confederation show a clear intention to extinguish Aboriginal interests, and so Aboriginal rights no longer exist. However, this decision was partially overturned by the B.C. Court of Appeal in 1993. Finally, the Supreme Court of Canada ruled in 1997 that Aboriginal title does exist in B.C., and this title extends to the land itself, rather than just the right to hunt and fish. The *Delgamuukw Decision* required the federal and B.C. governments, and B.C. First Nations, who were engaged in a renewed treaty negotiation process, to review the process to allow reconciliation of Aboriginal title and Crown title.

The *Marshall Decision* of 1999, described in the second case below, has been one of the most recent major Supreme Court decisions on Aboriginal rights. The implications of *Marshall* are still unfolding.

Aboriginal public disputes: some examples

The following two cases provide examples of public disputes in the Canadian Aboriginal context. They are presented to illustrate the complex nature of some of these disputes, as well as to introduce the reader to certain common themes in these types of disputes. In particular, the first case reveals how a history of bad faith in Aboriginal-government relations impacts a community’s social conditions, and consequently, its approach to further dealings with government. Both cases demonstrate the inadequacy of the resources and mechanisms available to address the disputes. When mediation is

²³ <http://www.ubcic.bc.ca/RCAP.htm>

²⁴ Sarfaty, G. *Globalizing the Local and Localizing the Global: The Cross Lake Cree’s Campaign for Self-Government*. Honors thesis presented to Harvard University’s Department of Anthropology. 2000

attempted in the second case, it fails at least in part because it is conducted more as a form of “drop-in diplomacy” than a professional, systematic service.

*Cross Lake Cree*²⁵

The Cross Lake Cree reservation is located 520 km north of Winnipeg, Manitoba, where the Nelson River enters Cross Lake. The Cross Lake Cree are part of the larger Cree Nation, whose range stretches from parts of British Columbia and the Northwest Territories, through much of the prairies and into Ontario and Quebec. Like many Aboriginal Canadians, the Cross Lake Cree were originally nomadic, and subsisted by hunting, fishing, trapping, and gathering. In 1875, the Cree of Cross Lake, along with other First Nations in the region, signed Treaty Five with the Crown. In addition to some other benefits, the Treaty provided the First Nations with reserve lands, annual monetary payments, and protection of certain fishing, hunting, and trapping rights in exchange for large tracts of land in northern Manitoba. Today, the Cross Lake reservation covers 20,229 acres, and its registered population in 1999 was 5,508 (3,900 on-reserve and 1,608 off-reserve). The socio-economic conditions on the reserve are poor, even by the standards of other Aboriginal reserves: the unemployment rate is 85%; alcoholism and substance abuse are rampant; the crime rate is amongst the highest in Manitoba; and the suicide rate is 10 times higher than the general rate for Aboriginals, and 23 times the national average.

For over two decades, the Cross Lake Cree have been engaged in a dispute with the Canadian and Manitoba governments, as well as Manitoba Hydro, a province-wide Crown electric utility company. This dispute concerns ecological damage and social disruption caused by construction and operation of the Churchill-Nelson River Diversion Project and the Jenpeg Dam. As later acknowledged by the Canadian government, construction on this project began in the 1970s before an environmental impact study was completed, and without prior consultation with the five Aboriginal communities who would be affected by it.

The Cross Lake Cree view the project as destructive not only of their environment, but also of their culture and their ability to be self-sufficient. The project flooded 20% of the reserve land base of the five Aboriginal communities in the area. This flooding caused various forms of ecological damage, such as mercury contamination of fish and disruption of wildlife migration routes, and thereby significantly reduced the capacity of the Cross Lake Cree to pursue their traditional subsistence livelihood. Many Cree believe that their traditional hunter-gatherer lifestyle has been the foundation for building a deep understanding and appreciation of the land. Moreover, this lifestyle has functioned as an incubator for Cree culture, in which new generations learn the skills and wisdom of older generations. The damage from the project also destroyed the local commercial fishing industry, and the Cross Lake community has increasingly

²⁵ This case is based entirely on the work of Sarfaty, G. *Globalizing the Local and Localizing the Global: The Cross Lake Cree's Campaign for Self-Government*. Honors thesis presented to Harvard University's Department of Anthropology. 2000

supplemented their diet with processed foods from grocery stores since the project's construction.

In 1974, following the construction of the hydroelectric project, the five affected Aboriginal communities, including the Cross Lake Cree, formed the Northern Flood Committee and negotiated a compensation deal with the Canadian and Manitoba governments and Manitoba Hydro. In 1977, the three parties signed the Northern Flood Agreement (NFA). This Agreement stipulated provision of several forms of compensation, including four acres of replacement land for each acre flooded, expansion and protection of the communities' wildlife and harvesting rights, funding for economic development, and remediation and restoration of shorelines and burial grounds. The NFA was envisioned, at least by some parties, as the formalization of a long-term socio-economic relationship between the Aboriginal communities and the Crown parties.

Since the NFA's ratification, few of its provisions have been implemented. A 128-page report on the NFA by Canada's Royal Commission on Aboriginal Peoples concluded in 1993 that the history of the NFA is a "manifestation of bad faith by both levels of government". The affected Aboriginal communities received almost none of the compensation outlined in the NFA, having been granted only 60 of the stipulated 14,000 hectares of replacement land, and 12 of the 1,000 anticipated new jobs. Implementation has been complicated by disagreement amongst the Crown parties over attribution of responsibilities, as well as over the spirit and intent of the Agreement.

Since 1992, the Crown parties have sought to renegotiate compensation for the hydroelectric project, and have offered one-time cash settlements called Comprehensive Implementation Agreements (CIAs) in lieu of the provisions of the NFA. Amid considerable debate amongst the communities, four of the five communities accepted these CIAs. In exchange for the cash settlement, the CIAs terminated the Crown parties' treaty and fiduciary responsibilities as outlined in the NFA, and prevented any further legal action concerning the NFA. The Cross Lake Cree, however, refused to accept a CIA, and chose instead to pursue implementation of the terms of the NFA.

The Cross Lake Cree tend to blame the particularly severe social problems they face on the disruption caused by the hydroelectric project, and the lack of compensation for its damage. Beyond the direct ecological, economic and social impacts of the project, the Cross Lake Cree have also suffered indirect effects. Most notably, in anticipation of compensation from the NFA, the Department of Indian Affairs and Northern Development has not provided levels of essential social services comparable to other reserves. For example, non-NFA Aboriginal bands in Manitoba received \$26,100 per capita in federal benefits, while NFA bands received \$10,700 per capita. Yet the anticipated NFA funds never materialized and the NFA bands were left with considerably higher unemployment and poverty rates than average. In response to this situation, the Cross Lake Cree have launched a human rights campaign that they have taken to various fora in Canada and the US, as well as to the United Nations, in order to put pressure on the Crown parties. They publicized their case to Manitoba Hydro customers, especially in

the Northern States Power Company in Minnesota, and asked them to consider boycotting Manitoba Hydro until it had fulfilled its NFA obligations.

At the time of writing (spring 2002), this dispute remains unresolved.

The Marshall Decision and Burnt Church

On September 17, 1999, the Supreme Court of Canada issued its now famous *Marshall Decision*. Donald Marshall, an East Coast Aboriginal fisherman, had been charged in 1993 for fishing without a license, selling his catch of eels without a license, and fishing during the closed season. Marshall disputed this charge, arguing that he had an Aboriginal right to fish, and a treaty right to sell his catch. The case made its way through Canada's legal system until it reached the Supreme Court. The Supreme Court decision upheld East Coast Aboriginal treaty rights to earn a "moderate livelihood" from year-round hunting, gathering and fishing, without a permit, for commercial purposes²⁶. Most Aboriginals greeted the decision as a significant victory.

In response to this ruling, the Mi'kmaq community of Burnt Church, Nova Scotia, expanded its traditional lobster fishery. They saw the *Marshall Decision* as an opportunity to address poverty and unemployment in their community. Unemployment amongst Burnt Church Aboriginals at the time was about 85%, a high proportion even by Aboriginal standards²⁷. As a community, the Mi'kmaq believed that they had not benefited under past fishery management regimes, and had been left out of the generally lucrative commercial lobster fishery. They decided, therefore, to hold an autumn fishing season in which they used some of their traditional techniques to take advantage of the lobsters' presence in shallower waters at that time of year.

Non-Aboriginal fishermen share the Miramichi Bay area where the Burnt Church community lives. Since their lobster harvesting season is limited from November to June, they were angered by the Mi'kmaq's actions. Moreover, they were concerned that these actions would damage the lobster stocks, and irreversibly damage the multi-million dollar lobster industry. The recent devastating collapse of Canada's cod fishery, one of the Maritime provinces' most important industries, fueled their fears about the potential for damage to their own fishery. They appealed to the Department of Fisheries and Oceans (DFO) to intervene. In the autumn of 1999, there were several clashes between Mi'kmaq fisherman and DFO agents when the DFO ordered the confiscation of untagged (i.e., unlicensed) lobster traps that they considered illegal²⁸.

The *Marshall Decision* caused such panic amongst non-Aboriginal fishermen and such confusion amongst the federal and Maritime governments, that the Supreme Court took the unusual step of issuing a clarification of the ruling in November 1999. This stated that treaty rights did not imply completely unlimited fishing and hunting rights, and that the Canadian government maintained the right to regulate these activities.

²⁶ DeMont, J. "Trouble at Sea". *Macleans Magazine*. May 22, 2000

²⁷ DeMont, J. "Trouble at Sea". *Macleans Magazine*. May 22, 2000

²⁸ DeMont, J. and Geddes, J. "Beyond Burnt Church". *Macleans Magazine*. October 18, 1999

Following the clarification, the Canadian government appointed a representative to strike one-year deals with Aboriginal communities, in order to bring the communities under federal regulation. Thirty out of thirty-four East Coast Native bands signed one-year agreements to abide by the government's regulations in exchange for commercial fishing licenses, fishing boats and gear, training, and money for infrastructure.

However, the Mi'kmaq of Burnt Church refused the government's \$3.3 million offer that included 17 commercial licenses with 5,100 traps, 5 fully equipped boats, and money for training, amongst other benefits²⁹. Instead, they decided to adopt their own fisheries management plan. Over the summer and fall of 2000, the Burnt Church Mi'kmaq issued their own tags for lobster traps, and the Mi'kmaq fishermen followed their own management rules. This resulted in renewed clashes between DFO agents and Mi'kmaq fisherman, some of which turned violent. On a few occasions, shots were fired. There were also numerous incidents of violence between Aboriginal and non-Aboriginal fishermen, including vandalism of fishing gear and other property, and even a few physical assaults³⁰.

In September 2000, the government and the Mi'kmaq tried to resolve their dispute in a mediated negotiation session. Former Ontario premier, Bob Rae, was selected to mediate the dispute. Although the parties reached an agreement, it collapsed within a couple of days amid contradictory accusations and general confusion. The conflict and violence continued until the Mi'kmaq closed their fall fishery – as per their own plan – in early October. The DFO and the Burnt Church Mi'kmaq held formal and informal discussions after the end of the lobster season in 2000, but were unable to reach an agreement by the opening of the 2001 season. Despite the absence of an agreement, the 2001 season proceeded relatively uneventfully³¹.

In February 2001, the Federal Minister of Indian Affairs and Northern Development, and the Minister of Fisheries and Oceans launched Canada's long-term strategy to address the *Marshall Decision* and to try to build a sustainable treaty relationship with the affected Aboriginal communities. The long-term strategy has two objectives, and two corresponding tracks. The Department of Indian Affairs and Northern Development (DIAND) would take responsibility for a process to reach long-term agreement on issues of Aboriginal and treaty rights. DFO would be responsible for the second initiative, with the goal of negotiating fishing agreements that would immediately increase Aboriginal access to the fishery. Broader issues relating to Aboriginal fishing would fall into the realm of the more comprehensive process led by DIAND³².

²⁹ Nobes, D. "Troubled Waters". *Macleans Magazine*. August 28, 2000

³⁰ Nobes, D. "Troubled Waters". *Macleans Magazine*. August 28, 2000

³¹ A notable exception was one day in September when some commercial herring fishers from a neighboring area staged demonstrations at Burnt Church on the closing date of the herring fishery. These demonstrations turned violent; some demonstrators destroyed some Mi'kmaq lobster traps and burned a fishing boat, and some shots were fired, though nobody was injured.

³² Government of Canada. Press Release. *Ministers Announce Negotiators, Process for Long-Term Response to Marshall*. February 9, 2001

Upon request from several groups in Miramichi Bay, in January 2002, the DFO established a Community Relations Panel to address the tensions that continue between communities in the area. Two prominent practitioners in dispute resolution conducted an assessment report in preparation for this new initiative. At the time of writing, the content of this report is not known, and the outcome of the initiative remains to be seen.

* * *

Historically, the approach of non-Aboriginal Canada to Aboriginal Canadians has often been one of presumed superiority. Sometimes this would manifest itself in paternalistic arrangements to manage Aboriginal affairs. On other occasions, it would have more sinister manifestations, in the ignoring of Aboriginal rights and interests, and even in outright abuse. Although the attitudes of Canadians are diverse and evolving, there remains amongst many Aboriginals a sense of grievance, and a lack of trust for much of non-Aboriginal Canada. Non-Aboriginal Canadians, by contrast, sometimes grow weary of Aboriginal complaints and demands, and many remain suspicious of Aboriginal calls for special rights. Thus, the landscape of relations between Aboriginal and non-Aboriginal Canadians is fertile ground for tension and conflict. The following chapter provides an overview of Aboriginal conflicts, and highlights shortfalls in the mechanisms available to address them.

Chapter 2: Shortfalls in Current Mechanisms to Address Aboriginal Disputes

Although conflict has been an ongoing feature of Aboriginal/non-Aboriginal relations since contact, in the years since Canada's adoption of its Constitution, there have been an increasing number of highly publicized disputes between Aboriginal and non-Aboriginal interests. Nevertheless, current mechanisms in place to address these disputes are inadequate. The federal government has established bodies or outlined policies to address specific types of disputes, like land claims, residential school claims, and certain disputes over taxation. However, the options for resolution of many Aboriginal disputes are only litigation and *ad hoc* negotiations, and these mechanisms are either not always appropriate or, in the case of *ad hoc* negotiations, not adequately supported. This chapter will provide an overview of current Aboriginal disputes and mechanisms to address them, and then describe how litigation and existing bodies fail to address all disputes adequately. It will expose the gaps not covered by the governmental institutions and ADR organizations that presently exist to support *ad hoc* negotiations.

Overview of Aboriginal disputes³³ and mechanisms established to address them

Aboriginal disputes cover a broad range of issues, and almost defy comprehensive categorization. Nevertheless, the set of parties involved in a given Aboriginal dispute will often strongly influence the way it is handled. Therefore, this overview of Aboriginal disputes and the mechanisms available to address them is structured according to three categories: disputes between Aboriginals and government; disputes between Aboriginals and non-Aboriginal, non-governmental parties (in which the federal and provincial governments may or may not be involved); and disputes amongst Aboriginals. As I outline the different types of disputes in the following sections, I shall describe any institutions or policies established to address them.

Disputes between Aboriginal groups and government

First Nations frequently find themselves in conflict with the federal government over issues relating to treaties, the provisions of the *Indian Act*, and the impacts of earlier government policies. These include disputes over land claims, questions of self-government, provision of social services to a reserve, and claims of widespread abuse at residential schools that Aboriginal children were once forced to attend. Provincial governments are also frequently party to disputes with Aboriginal groups, particularly those concerning management of resources like forests and rivers, since most natural resources fall under provincial jurisdiction in Canada. When disputes concern a number of issues over which jurisdiction is split between the different levels of government, all three types of party may be involved.

³³ The categories within this overview provide a comprehensive description of all Aboriginal disputes, other than interpersonal disputes. However, the examples given cannot cover every type of Aboriginal dispute that arises in Canada, and they include only some of the major types of disputes that occur within each category.

The following description of Canada's land claims policy provides an example of some of the most common disputes between First Nations and the Canadian government. The current Canadian claims policy was developed shortly after the 1973 *Calder Decision* and it categorizes claims into comprehensive claims and specific claims. Each type of claim is handled through different mechanisms.

Comprehensive Claims

Comprehensive claims are, in general, most concerned with land, and they arise in parts of Canada where First Nations never signed a treaty with the Crown³⁴. The parties negotiate comprehensive claims "to exchange undefined Aboriginal land rights for concrete rights and benefits"³⁵. Thus, these claims can take two different forms. The first kind, usually occurring amongst northern Aboriginals, seeks legal recognition of Aboriginal land title and all rights associated with it. The second kind, more commonly found in Southern Canada, seeks cooperative extinguishment of Aboriginal title in return for the recognition of specific rights and/or compensation in the form of money, land, or other valued items or services. The settlement resulting from a comprehensive claim grants the claimant First Nation ownership of designated areas of land, and permits them to exercise certain land-related rights, like hunting and fishing rights, in other designated areas. Settlements are usually designed also to address First Nations' concerns that they be able to maintain a fairly traditional lifestyle, that they will have a meaningful role in land and resource use decisions, and that they will share in the economic opportunities and benefits of development of the claim area. Thus, they often include provisions concerning resource revenue sharing, participation in natural resource management, and environmental protection matters³⁶.

The comprehensive claims policy specifies that all comprehensive claims must be negotiated directly between INAC and the Aboriginal claimants. Settling a comprehensive claim is usually a long and complex negotiation process that involves negotiations at a main table, as well as various sets of sidebar negotiations to address specific issues like resource management. Once an agreement is reached, it must be ratified by the First Nations involved and by the federal government. It is then enacted into law by Parliament³⁷.

In British Columbia, after the launch of a renewed province-wide process of treaty negotiations, Canada, British Columbia, and First Nations of British Columbia signed an agreement in 1992 to establish the B.C. Treaty Commission to assist that process. The Treaty Commission is an independent body that is responsible for facilitating treaty negotiations, allocating funding to support First Nations in their negotiations, and

³⁴ The federal government tends to favour comprehensive claim negotiations with First Nations from British Columbia, northern Quebec, and the northern territories over most other parts of Canada. This is because it is known that no treaty negotiations ever took place in these parts of Canada, whereas at least some type of negotiation usually took place in other parts.

³⁵ Frideres, J. *Aboriginal Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice Hall Allyn and Bacon Canada. 1998. Fifth Edition. p. 80

³⁶ *Ibid.* pp. 68-71

³⁷ *Ibid.* pp. 68-69

providing public information on the treaty process. In its facilitation of the process, the Commission assesses when parties are ready to negotiate, develops policies and procedures for the negotiations, monitors the talks, and assists in problem-solving and resolving disputes, when necessary³⁸. The B.C. Treaty process has been very slow, and it has caused considerable frustration to First Nations, the non-Aboriginal public, and resource industries, who all seek certainty on the complex issues involved. Moreover, the process has been marred with disagreement over questions of representation and standing; some segments of the non-Aboriginal public are demanding more direct participation in the process.

Specific Claims

Specific claims arise in situations in which a First Nation did sign a treaty with government. These claims are generally assertions that the government has not fulfilled specific treaty terms or lived up to the general spirit of the treaty³⁹. The most common types of specific claims result from losses of reserve land through governmental expropriation, formal surrender, squatting, or re-surveying of land. Other examples include claims about governmental mismanagement of band funds, reserve resources or general band affairs, and claims resulting from First Nations' dissatisfaction with the fairness⁴⁰ of the original terms of a treaty⁴¹.

The procedure for dealing with specific claims requires First Nations to submit their claims to INAC. The Office of Native Claims (ONC) at INAC reviews the materials presented with the claim. The ONC might require the First Nation to clarify their claim, and this can take a substantial amount of time and effort⁴². Once the ONC is satisfied, it refers the claim to the Department of Justice. Based on the advice of the Department of Justice, the ONC issues a decision, either to accept the claim for negotiation of a settlement, reject the claim, or require additional documentation⁴³. Accepted claims are then negotiated between the ONC and the Aboriginal claimant. Rejected claims may not be appealed, but they may be turned over to the Indian Claims Commission (ICC) for investigation or mediation. As of May 2001, Canada had received 1071 specific claims since it established its claims policy⁴⁴. Between 1991 and 2001, the government received

³⁸ <http://www.bctreaty.net/files/bctreaty.html>

³⁹ Such claims are commonly based on the argument that oral agreements originally accompanied the written treaty, and that these agreements have not been fulfilled.

⁴⁰ First Nations making this type of claim often argue that the Aboriginal signatories did not properly understand the terms of the treaties, or the nature of a written treaty, because this type of formal interaction was alien to Aboriginal culture at the time of signing.

⁴¹ Frideres, J. *Aboriginal Peoples in Canada: Contemporary Conflicts*. Scarborough: Prentice Hall Allyn and Bacon Canada. 1998. Fifth Edition. p. 63

⁴² The federal government tends to provide grants or loans to allow First Nations to undertake the research necessary to file a claim.

⁴³ The federal claims policy has been criticized repeatedly by Aboriginals, the ICC, and other commentators because of its creation of a system in which the government adjudicates claims made against itself. The ICC itself has repeatedly called for the establishment of a permanent, independent institution with the authority to issue binding recommendations on claim settlements. This issue has been the subject of ongoing discussion and debate, but has not yet been resolved.

⁴⁴ Indian Claims Commission. *Specific Land Claims Statistics*. 2001. (Internal Document; unpublished)

an average of 61 new specific claims per year, but resolved an average of 18 specific claims per year⁴⁵. Table 2.1 illustrates the track taken by each of the claims ever received by Canada.

Table 2.1 Status of All Claims received by Canada. May 2001⁴⁶

Claims in the system	Claims under review	408
	Claims under negotiation	115
	Claims in active litigation	47
	Claims under review by ICC	61
	Subtotal	631
Claims no longer in the system	Claims settled	223
	Claims rejected	109
	Other resolution	108
	Subtotal	440

The federal government created the ICC in 1990, in the wake of the Oka crisis that was sparked as a result of a rejected land claim. It is an independent, advisory organization that was based on a model proposed during consultations with Aboriginal organizations, and it has a triple mandate: (i) to conduct public inquiries into specific claims that are rejected by the federal government; (ii) to mediate negotiations between First Nations and the federal government to reach settlements on claims that have either been rejected or accepted by the federal government; and (iii) to report and provide recommendations to the federal government on any issues relating to specific claims that the commissioners consider to be important. Though not central to its mandate, ICC Commissioners have also mediated disputes between First Nations. The ICC does not deal with comprehensive claims, and its recommendations are never binding⁴⁷.

Either Canada or a First Nation can request mediation of the ICC, and if both parties agree, the ICC can provide a host of ADR services, including arbitration, mediation, and facilitation. The ICC also coordinates studies relating to claims (such as studies of the economic loss suffered as a result of the loss of land). As of the time of writing, the ICC has helped First Nations and government negotiate or settle 23 previously rejected claims⁴⁸, and 14 files for mediation were in process⁴⁹. As of May 2001, only 4 claims had been settled through mediation⁵⁰.

Ralph Brant, the ICC's Director of Mediation contends that mediation tends to allow parties to reach a settlement more quickly than if they negotiated by themselves, because it keeps them focused on important issues and prevents minor details from

⁴⁵ *Ibid.*

⁴⁶ Indian Claims Commission. *Specific Land Claims Statistics*. 2001. (Internal Document; unpublished). Since these figures include some claims even from before the establishment of Canada's current claims policy, no starting date was provided.

⁴⁷ <http://www.indianclaims.ca>

⁴⁸ <http://www.indianclaims.ca>

⁴⁹ Ralph Brant. Personal Communication. January 17, 2002.

⁵⁰ Indian Claims Commission. *Specific Land Claims Statistics*. 2001. (Internal Document; unpublished)

complicating matters. He also stated that most cases mediated through the ICC tend to get settled, and that, as yet, none of the cases the ICC has mediated has ever resurfaced after settlement⁵¹.

The ICC's Annual Reports detail the status of each claim in which it is involved. One of the examples cited as a successful case of mediation is the claim of the Fishing Lake First Nation in Saskatchewan. According to the ICC, the First Nation's efforts to have its claim settled had failed for seven years. The First Nation asked the ICC to assist with their negotiations after the ICC had worked with the First Nation during the preceding inquiry process. The ICC was able to assist the parties to break impasses over the interpretation of certain legal principles, and the parties reached a settlement that was ratified by the First Nation community in March 2001⁵².

Disputes between Aboriginal groups and non-Aboriginal, non-governmental parties

Sometimes disputes arise between Aboriginal groups and non-Aboriginal parties like commercial organizations or non-Aboriginal communities. The federal or provincial governments are often also involved in these disputes, either as an intermediary or as an interested party. This category covers a wide variety of disputes, including some of those arising over First Nations' new authority to levy certain taxes, competition over resources like fisheries, and development impacting Aboriginal land, such as construction of gas pipelines⁵³.

Taxation

The 1988 amendment to the *Indian Act*, that permitted bands to pass property tax by-laws and to tax interests in reserve lands, has assisted those bands who have been able to take advantage of their new authority by increasing their revenue flow to meet some of their often severe economic needs. However, the practical implementation of these extended powers is a common source of conflict both within First Nations and between First Nations and non-Aboriginal stakeholders.

Some of the most common disputes arise between Aboriginal bands and their new ratepayers, who might include individuals, energy companies, and utilities. For example, as bands exercise their new rights and set tax rates, the ratepayers, suddenly facing new and typically higher tax rates, commonly disagree with the bands over what constitute fair and reasonable rates. Sometimes there is disagreement as to whether a utility or company is required to pay tax at all⁵⁴. Other conflicts tend to arise when new non-

⁵¹ Ralph Brant. Personal Communication. January 17, 2002.

⁵² Indian Claims Commission. *Annual Report 2000-2001*. Minister of Public Works and Government Services Canada. 2001

⁵³ Some of these disputes might arise out of unsettled land claims, as described above, but they are classified differently here because the issue involves stakeholders other than First Nations and the federal or provincial governments.

⁵⁴ The Indian Taxation Advisory Board (described below) has facilitated agreements between First Nations and B.C. Hydro, and between First Nations and Canadian Pacific Rail, after disputes arose over whether B.C. Hydro and CP Rail were subject to the First Nations' new tax by-laws. In the B.C. Hydro case, the

Aboriginal ratepayers raise concerns about taxation without representation, or when they express dissatisfaction with the quality or quantity of municipal services provided. First Nations' new taxing authority has also caused disputes between bands and neighbouring municipalities, who face a reduction in their tax base when First Nation bands assume taxing authority⁵⁵.

The Indian Taxation Advisory Board (ITAB), based in Kamloops, British Columbia, was established to assist bands with the various issues relating to implementation of First Nations' new taxation powers. The ITAB has a three-pronged mandate: to provide advice to Aboriginal bands and to the federal Minister of Indian and Northern Affairs on the approval of real property taxation bylaws; to promote the development of First Nations' taxation powers; and to improve administration of the Minister's statutory responsibilities related to those powers. It has worked with energy companies in the region to develop policy on tax rate increases for utilities on Aboriginal lands that all sides consider fair. However, amongst its various other responsibilities, the ITAB is also charged with fostering the use of dispute resolution techniques. To this end, the ITAB has facilitated dialogue between the parties to some taxation disputes and, together with its industry partner, the Canadian Energy Pipeline Association, offered training in interest-based negotiation to stakeholders in disputes⁵⁶.

Disputes among and between First Nations

Although disputes amongst and between First Nations receive considerably less public attention, they occur fairly frequently⁵⁷. The preceding section mentioned that disputes sometimes arise between bands with regard to their new taxation powers. Other disputes occur within bands, such as when band members are dissatisfied with the performance of their Council. Internal disputes can be particularly harmful to a band when they prevent leaders from being able to negotiate effectively with other parties. For example, in a recent set of negotiations, negotiators for the Peigan Nation reached an agreement with the Alberta and Canadian governments to address issues arising from the construction of a dam upstream from the Peigan reserve⁵⁸. Although the negotiators believed they had reached a highly beneficial deal, the agreement was rejected by a very small margin when it was put to a ratification vote. The results of the vote revealed a deep division in the community: 533 band members voted against the deal, and 518 voted for it⁵⁹.

question was whether a public body was subject to the by-law. In the CP Rail case, the question was whether the land expropriated for the railway was still considered reserve land.

⁵⁵ The Consensus Building Institute. *Conflict Prevention, Facilitation and Mediation: ITAB's Role in Alternative Dispute Resolution in First Nation Property Taxation*. A Policy Paper. 8 February, 2001.

⁵⁶ *Ibid.*

⁵⁷ Several of the people I interviewed referred to the crippling effect of internal disputes within First Nations. One Aboriginal interviewee went so far as to state that traditional leadership styles that require consensus do not work because it is too difficult to achieve a consensus quickly enough to keep pace with the modern world.

⁵⁸ Some of these issues included: water allocation and rights; compensation for damage caused by the dam and by a flood in 1995; and assessment of the environmental, economic and cultural impacts of the dam.

⁵⁹ Brian Jackson, Peigan negotiator. Personal Communication. December 2001

Other than ITAB, whose focus is solely on taxation related matters, there are no formal or national mechanisms in place to address disputes amongst and between First Nations.

Mechanisms to address all categories of Aboriginal disputes

Where no specific institutions or policies are in place to address a certain type of conflict, disputants generally have the choice of pursuing litigation or *ad hoc* negotiations to reach a settlement. Lawyers obviously provide assistance in litigation, and various ADR organizations exist to provide certain types of support for *ad hoc* negotiations.

Litigation

Frequently, First Nations choose to pursue resolution of their disputes with non-Aboriginal parties through the judicial system. At present, an enormous number of disputes between Aboriginal and non-Aboriginal interests are taken to the courts. Aboriginal groups have often been encouraged by the issuance of some of the recent prominent Supreme Court decisions, including *Calder*, *Delgamuukw*, and *Marshall*, which appeared to support their causes. They are particularly likely to pursue litigation when they believe that legal action is necessary to allow their rights to be defined, clarified and formalized. They will also tend to turn to this approach when they believe that the other disputant is behaving unreasonably or in bad faith⁶⁰. In some of these circumstances, it is indeed appropriate for disputes to be settled in court. For example, legal action is usually appropriate when there is a need to set a precedent or to clarify existing laws.

There are, however, considerable disadvantages associated with litigation, and certain disputes might well be resolved more to the satisfaction of the disputants through alternative means. The fact that litigation tends to create a harsh adversarial climate, and almost inevitably erodes the possibility of future cooperation between the parties, can be especially disadvantageous when the parties need to maintain an ongoing relationship⁶¹. Moreover, the legal avenue is usually inordinately expensive and is often a strain on the resources of all parties. The average legal and associated costs of resolving a single specific claim is \$2 million CDN⁶². When the First Nation involved is short of funds in the first place, embarking on litigation can be especially straining, and can be devastating in the event of a loss in the courts. Another problem is that because of a backlog in the courts, most cases take many years to complete. From beginning to end, the average time

⁶⁰ Several Aboriginal interviewees referred to decisions their bands had made to resort to litigation when it appeared that less confrontational approaches were being ignored or exploited.

⁶¹ Aboriginal critics frequently charge that the Euro-Canadian legal system is more concerned with punishment than with healing. For this reason, at the level of disputes between individuals, there have been several initiatives, like community sentencing panels, to allow Aboriginal communities to deal with interpersonal disputes in a manner that is seen to be more consistent with traditional Aboriginal values.

⁶² Fiscal Realities. *Addressing the Fiscal Impacts of Settling Specific Claims*. Kamloops, B.C. 1998

to resolve a disputed specific claim is ten to fifteen years⁶³. Most critically, even once a case is over, the final ruling does not necessarily ensure that the conflict will end, and may even spark new conflicts. As the events following the *Marshall Decision* illustrated, while the Court can establish or clarify a principle, it cannot determine how the practical implications of its decision should be implemented. Thus, there are considerable risks entailed in litigation, and in many cases it will not provide the best resolution to a dispute.

Ad Hoc Negotiations

When no particular institutions exist to handle Aboriginal disputes, and the parties want to resolve the issues without resorting to litigation, they may enter into *ad hoc* negotiations. Parties may undertake *ad hoc* negotiations without any assistance, but more complicated disputes commonly need support. Several organizations in Canada – most of them private – offer support for *ad hoc* negotiations, either by providing alternative dispute resolution services, or by helping the parties to build their capacity to resolve conflicts. While some of these organizations do have special programs relating to Aboriginal disputes, none is devoted entirely to dispute resolution in the Aboriginal context. The following paragraphs provide a brief overview of these organizations. The first two organizations provide access to dispute resolution practitioners and resources for capacity building; the rest focus solely on capacity building (except for the last organization, which no longer exists, that provided a broad range of services to support Aboriginal disputes).

ADR Institute of Canada (ADR Canada)

ADR Canada is a national, non-profit organization with seven regional affiliates across Canada. This organization includes arbitration, mediation, and facilitation amongst the techniques it considers alternative dispute resolution. ADR Canada does not employ dispute resolution practitioners to provide services to clients, but rather serves as a clearinghouse for information relating to ADR and for skill-building. To this end, ADR Canada provides referral to practitioners, as well as an Internet database of dispute resolution professionals for the use of those interested in pursuing ADR. It also provides training and professional certification for mediators and arbitrators, and it has developed national standards and a code of ethics for ADR trainers. ADR Canada seeks to represent and support both ADR professionals and the individuals and organizations using ADR services.

ADR Canada does not specialize in any particular area of dispute resolution. It assists individuals and organizations seeking dispute resolution for any of a broad range of disputes, including interpersonal, intra-organizational, community, and business disputes, amongst others. Its Internet database allows a user to specify the type of professional being sought (such as mediator, arbitrator, process advisor, or systems designer), the professional's qualification and minimum experience, the language of conduct, the location of the dispute, and the dispute's subject matter (according to broad categories). Thus, a user could conduct a search for a professional with knowledge about,

⁶³ Indian Claims Commission. *Specific Land Claims Statistics*. 2001. (Internal Document; unpublished)

or experience with “First Nations”. I ran a sample trial of this database, in which I specified a search for an English-speaking chartered mediator in Ontario, with minimum experience of twenty cases and twenty hours, for a dispute relating to First Nations. The database returned four “hits” – four professionals who fit the criteria I specified – along with their personal details, descriptions of their experience, and resumes.

ADR Canada does not guarantee the quality of services received through its database, although all member professionals of ADR Canada are bound by its Code of Ethics. The dispute resolution professionals provide the information about themselves on the web site, and ADR Canada does not endorse any of the individuals listed thereon. The website’s terms of use stress that it is the user’s responsibility to evaluate the accuracy, completeness, or usefulness of any information provided through the site. Further, since ADR Canada is not involved in the actual provision of dispute resolution services between users and the selected dispute resolution professional, it disclaims any liability from use of the website, and requires users to release it from any claims, demands or damages stemming from dissatisfaction with a professional’s services⁶⁴.

Conflict Resolution Network Canada (The Network)

The Network provides information about all types of alternative dispute resolution in Canada, and has seven distinct program areas including one on “environment and public policy”, but none specifically on Aboriginal issues. As its name suggests, it is a network of conflict resolution organizations and, as such, it does not provide any services itself, but rather directs those interested to the services or information they require. It holds annual conferences and publishes a quarterly newsletter with articles and commentary on current events and issues in conflict resolution. The Network also makes available documents from dispute resolution organizations in Canada and the United States on standards and credentials in dispute resolution.

The Network’s website⁶⁵ provides several useful resources, including an extensive calendar of conflict resolution training courses and conferences throughout Canada and internationally, and a directory of conflict resolution practitioners, with profiles of professional mediators, arbitrators, facilitators, trainers and conflict resolution system designers in Canada. The professionals listed in the directory are members of the Network who provide dispute resolution services and/or training in dispute resolution. The practitioners themselves provide the information in the directory about the services they offer. The directory is not an accreditation-based listing and the Network recommends that users inquire directly with potential practitioners about their experience, training, academic background, fee structures, and references.

Governmental Departments of Dispute Resolution

The federal government, as well as some provincial governments, have departments of dispute resolution services within their Departments of Justice. According to the

⁶⁴ <http://www.adrcanada.ca/terms.html>

⁶⁵ <https://www.cnetwork.ca/>

federal Department of Justice website⁶⁶, Dispute Resolution Services was established in response to growing interest in and demand for alternative forms of dispute resolution. This office seeks to provide parties with information and advice as to the options available for resolving disputes in which they are involved. Dispute Resolution Services specializes in non-litigious forms of dispute resolution (amongst which it includes mediation, arbitration and mini-trial), and is involved in policy development for increasing the federal government's use of non-litigious dispute resolution mechanisms, as well as training for Department of Justice counsel in dispute resolution skills. It also provides services to disputants, including design of dispute resolution systems, and drafting of dispute resolution clauses. According to a former employee, the office does not provide mediation because it is not a neutral party⁶⁷.

Justice Institute of British Columbia (JIBC): Centre for Conflict Resolution

JIBC's Centre for Conflict Resolution provides training in interest-based dispute resolution through open registration courses. The Centre offers its courses either on its campus or at other specific locations across B.C. and in the Yukon, and can design training on a contract basis to cater to particular needs. The training focuses on interest-based negotiation theory and skills. JIBC specializes in several areas of conflict resolution, including interpersonal and workplace conflict, mediation of workplace, family, and multi-party disputes, and intercultural conflict resolution.

The Centre offers courses relating to Aboriginal disputes that are of particular interest for the purposes of this thesis. In particular, the Centre offers a First Nations Negotiation Skills Certificate Program on a contractual basis to First Nations Tribal Councils or Bands. The program trains up to twenty-five members in negotiation skills for treaty negotiations, contract negotiations, or daily negotiation in the workplace or community. The program is offered on a course-by-course basis over a time period desired by the community, but the total time period of the program is 25 days, or 175 hours of classroom training. The training includes required and elective courses. The Centre states that cultural relevance is ensured by the fact that its trainers have extensive experience in working with First Nations communities and organizations, and that the training team includes Aboriginal trainers and coaches⁶⁸.

JIBC's website⁶⁹ outlines its philosophy of dispute resolution and training. It states that the Centre encourages innovative techniques in dispute resolution, and values the experiential, practical, theoretical and philosophical components of learning. The Centre states that its programs are designed to be consistent with existing professional standards, and that it seeks to use evaluation methods that are measurable, fair, consistent and based on objective criteria.

⁶⁶ <http://canada.justice.gc.ca/en/ps/drs/objet.html>

⁶⁷ Joe Friday. Personal communication. January 15, 2002.

⁶⁸ <http://www.jibc.bc.ca/ccr/f-ccr.html>

⁶⁹ *Ibid.*

While the Centre does not provide services in dispute resolution, it does offer to connect those seeking assistance with practitioners.

Banff Centre for Aboriginal Leadership

The Banff Centre provides diverse programs relating to Aboriginal leadership and management. Amongst these programs is one that provides training in negotiation skills. The training is intended for four types of individuals: Aboriginal representatives mandated to negotiate on behalf of their communities or organizations; federal, provincial, and municipal government negotiators seeking a better understanding of the Aboriginal negotiating context; private sector parties in negotiation with First Nations and the Crown; and consultants or advisors to Aboriginal groups or government.

The Banff Centre stresses the program's goal of enhancing negotiators' capacities to influence the outcomes of negotiations. The training techniques include roleplay and simulation. The Centre's program is designed to teach participants how to clarify interests and the goals of negotiation, choose a negotiating team, prepare for negotiation, and stimulate community participation in and support of negotiation. The training takes place over a period of four days⁷⁰.

University of Victoria: Institute for Dispute Resolution

The University of Victoria has an Institute for Dispute Resolution (IDR) whose mandate is to "work toward fair, effective and peaceful dispute resolution locally, nationally and internationally"⁷¹. Amongst its various objectives, the IDR seeks to: conduct theoretical and empirical research in the area of dispute resolution; develop university and professional education and training in dispute resolution; and enhance awareness of, and promote the use and acceptance of, alternative dispute resolution procedures⁷². One of the issues on IDR's fairly extensive research agenda is "Conflict involving Aboriginal Peoples". Within this area, IDR runs a project on Aboriginal Peoples in B.C., offers courses that can be taken for academic credit or professional development, and provides professional development workshops on Aboriginal Peoples and dispute resolution. It has also hosted a conference on Aboriginal Peoples and Dispute Resolution in Canada, called "Making Peace and Sharing Power", and produced two publications (one of which presented the proceedings of the conference). IDR's graduate course on dispute resolution and indigenous people takes what its outline describes as a "critical approach ... to the application of dominant society models of negotiation and mediation to conflict situations involving indigenous people"⁷³.

⁷⁰ http://www.banffcentre.ca/programs/leadership_aboriginal_skills/detail.asp

⁷¹ <http://dispute.resolution.uvic.ca/>

⁷² *Ibid.*

⁷³ *Ibid.*

The former Indian Commission of Ontario (ICO)

Up until 2000, there was an institution in Ontario with a mandate to provide a forum for identifying and addressing issues of mutual concern between Aboriginal communities and the federal and provincial governments. The ICO was established in 1978 as an independent body though a joint Order-in-Council, in which it was approved by the federal and provincial cabinets and through ratification by the Ontario Chiefs and Assembly⁷⁴. It reported annually to a Tripartite Council of representatives from the Canadian and Ontario governments, and from the Indian Chiefs of Ontario.

The ICO handled a broad range of issues, including fairly standard land claims⁷⁵ and questions of self-government, as well as questions of Aboriginal policing, traditional food harvesting (of resources like wild rice, fish, and game), and the establishment of casinos. Generally, the cases brought to the ICO were those in which the involved parties believed that the issues were too complex to be addressed outside a tripartite forum.

The Commission chaired negotiations that took place either at the ICO in Toronto or on-reserve. Depending on the case at hand, the ICO often also provided facilitation, mediation, and arbitration services. It maintained records of all understandings reached during negotiations, and reported on outstanding issues and concerns.

ICO had some considerable successes. One former mediator for the ICO estimated that approximately 75% of the specific claims mediated by the ICO were resolved successfully, in that the stakeholders were satisfied with the settlement, and the issue did not arise again after settlement⁷⁶. Another former mediator with the ICO stated that this forum showed that interest-based negotiations can often be used successfully in the Aboriginal context.

The ICO closed in March 2000, as a result of a disagreement between the federal Minister of Indian Affairs, Robert Nault, and the Ontario Minister Responsible for Native Affairs, James Flaherty. Every five years, the federal and provincial governments and the Chiefs of Ontario reviewed the role and function of the ICO in order to renew its Order-in-Council. The circumstances surrounding its closure remain unclear. It seems that the closure occurred because the federal and Ontario ministers disagreed over whether to expand the ICO's mandate. However, some interviewees that were involved with the ICO suspect that the reasons went deeper than this, but did not know what they were. What is clear is that in 1999, Flaherty signed the Order-in-Council, assuming that Canada would follow suit. However, Canada refused to sign it. Nault and Flaherty were unable to resolve their differences or even to reach an interim arrangement to allow the ICO to continue its work while they came to a mutually satisfactory arrangement. A former mediator with the ICO stated that he believes the ICO's closure leaves a vacuum, because a number of First Nations in Ontario have no forum for addressing matters of pressing concern to them.

⁷⁴ Chiefs from 134 Aboriginal communities in Ontario unanimously approved the establishment of the ICO.

⁷⁵ Some cases were directed to the ICO from the ICC in Ottawa.

⁷⁶ Ward LaForme. Personal communication. January 10, 2002.

Gaps left unfilled by present resources

Litigation and the institutions and resources described above are useful in resolving many Aboriginal disputes, and do meet some of the needs of disputants looking to resolve conflicts. However, litigation is not always appropriate and, partly due to the high frequency and widespread nature of Aboriginal disputes, the resources currently available to support ADR in the Aboriginal context are either insufficient, or leave certain needs unfulfilled.

Disputes between Aboriginal groups and Government

The previous section of this chapter described several organizations established to address disputes between Aboriginal groups and government. The B.C. Treaty Commission exists to support comprehensive claim negotiations in British Columbia, and the ICC mediates specific claims in general. However, these organizations are limited both in mandate and in resources. The B.C. Treaty Commission is obviously limited to negotiations in B.C., and its role in the Treaty process is fairly limited to facilitation. The ICC focuses almost exclusively on specific claims involving the federal government, but not on other disputes involving the federal government, like those over provision of social services. Also, the provinces tend not to use the ICC, since multiparty disputes are beyond its mandate⁷⁷. The closure of the ICO has left Ontario without a forum to address trilateral disputes, and with fewer resources to do so. Other provinces are similarly short of options to address these disputes.

Disputes between Aboriginal groups and non-Aboriginal, non-governmental parties

Although ITAB was established to address issues relating to First Nations' new taxing authority, it is not in a position to provide dispute resolution services beyond those it currently offers. Since the ITAB mandate includes promoting development of First Nations' taxation powers, it is not always viewed as impartial in the disputes arising from those powers. Therefore, ITAB staff members are not in a position to mediate these disputes⁷⁸.

For issues other than taxation, there are no established mechanisms in place to address disputes between Aboriginal groups and non-Aboriginal, non-governmental groups.

Disputes among and between First Nations

There are practically no formally established mechanisms to address disputes among and between First Nations. ITAB might be able to intervene in tax related disputes, but other disputes are beyond its mandate. Sometimes band members will ask INAC to intervene in an internal dispute between band members and Council, but INAC

⁷⁷ Gordon Hannon. Personal communication. February 7, 2002.

⁷⁸ *Ibid.*

does not usually have the authority to do so⁷⁹. Therefore, Aboriginal groups are generally left to their own devices to resolve their disputes informally or in an *ad hoc* manner.

Ad Hoc negotiations

Few organizations exist in Canada to provide dispute resolution services specifically for *ad hoc* Aboriginal negotiations. As described above, existing support for alternative options for resolving disputes tends to specialize in providing dispute resolution services and/or building the capacity of disputants to resolve conflicts. Both of these functions are important, and yet there are gaps in the options currently available for both areas.

Provision of dispute resolution services

Mediation and facilitation services are most commonly offered by private individuals. If disputants wish to employ a dispute resolution practitioner, they may find one either through their professional or personal contacts, or through the databases provided by national ADR organizations. These databases are not vetted, and the services provided by the practitioners thereon are not verified nor guaranteed. The user is responsible for finding a practitioner with the appropriate knowledge and expertise, and for checking practitioners' qualifications. Thus, there is no national mechanism to provide disputants with access to practitioners with well-recognized expertise and experience in the field of Aboriginal disputes.

Capacity building

Building capacity to resolve Aboriginal disputes requires training of dispute resolution practitioners as well as disputants themselves. It also requires research and development of techniques that are appropriate to, and effective in, the Aboriginal context.

At present, despite an apparent shortage of practitioners qualified and experienced in handling Aboriginal disputes⁸⁰, there are few programs to train mediators. In particular, initiatives aimed at building Aboriginal capacity to resolve disputes tend to focus more on training negotiators, rather than Aboriginal practitioners. The ADR Institute of Canada certifies mediators, but offers no special training for the context of Aboriginal disputes.

Various organizations offer interest-based negotiation training focused on Aboriginal disputes, including JIBC, the Banff Centre for Aboriginal leadership, the University of Victoria's Institute for Dispute Resolution, as well as certain governmental bodies, like the Department of Justice's Dispute Resolution Services⁸¹. However, most of these organizations are based in Western Canada. In the rest of the country, it seems that

⁷⁹ Tom Saunders. Personal communication. February 6, 2002.

⁸⁰ Tom Saunders. Personal communication. February 6, 2002.

⁸¹ Governmental bodies, however, often offer training only for governmental employees.

most training is conducted by numerous independent trainers. One of the interviewees described the need for negotiation training for Aboriginal disputes to be “insatiable”⁸², and a total of nine interviewees stated that they believe more training would be valuable. However, the extent of the need for more training is not clear.

There are relatively few initiatives to research and develop the theory and practice of dispute resolution in the Aboriginal context. Other than the research being conducted at the University of Victoria, most experimentation with adapting mediation and facilitation procedures to the Aboriginal cultural context seems to be occurring at the level of individual practitioners. For example, some individuals are integrating principles from the restorative justice movement⁸³ into their work, and others introduce their work using symbols from Aboriginal culture, like the medicine wheel⁸⁴. If the field of dispute resolution is to evolve to become more effective and appropriate to the Aboriginal context, more institutional resources will need to be directed towards documenting and analyzing its use in this context, and to integrating the findings from research into practice and training.

* * *

These gaps suggest a need for a national initiative devoted both to addressing disputes between Aboriginal communities and the various types of non-Aboriginal actors, and to assisting Aboriginal communities to manage their own internal disputes. The next chapter addresses the form of such an initiative.

⁸² Gordon Sloan. Personal communication. January 29, 2002

⁸³ Briefly, this movement is interested in bringing about justice through collective healing, rather than through punitive measures.

⁸⁴ For example, Chris Knight . Personal communication. February 21, 2002

Chapter 3: Shaping a New Initiative

The last chapter demonstrated that the frequency and widespread nature of Aboriginal disputes across Canada suggests a need for a national initiative to address these disputes. While such an initiative could be carried out through existing channels and institutions, the creation of a new organization specifically to address the gaps identified in Chapter 2 is likely to be a more viable option. The results of my research suggest how certain considerations should guide the development of this organization. Based largely on some of the more prominent comments expressed by the interviewees, I propose four criteria in the second part of this chapter to guide the organization's design.

Options for the form of a new initiative

An initiative to address Aboriginal disputes in Canada could take one of a number of different forms. This section considers the choice between two notable options: addressing unfulfilled needs through existing institutions, or by establishing an entirely new organization. Although important, the mechanisms available to explore other options and choose amongst them are beyond the scope of this thesis⁸⁵. To the extent that any further investigation or decision-making process concerning the launch of a new initiative might be necessary, the ideas presented here would provide an argument for a particular course of action.

The first option would work to strengthen the capacity of existing institutions to fill the gaps in the area of Aboriginal dispute resolution. Namely, the initiative would assist existing bodies to expand and improve delivery of dispute resolution services and training, and to research and develop the theory and practice of dispute resolution in the Aboriginal context. The initiative might take the form of an umbrella organization that would seek to support and coordinate the work of existing institutions. It would need to work with all major organizations in Canada involved in dispute resolution in the Aboriginal context, as well as with other organizations that are involved with either just dispute resolution or Aboriginal development. It would create opportunities for those organizations to work together to address needs in the field, as they are identified. In its role as coordinator, it would also facilitate knowledge exchange between different areas of specialization. As an umbrella organization, it might also promote the use of alternative methods of dispute resolution for Aboriginal disputes.

⁸⁵ One mechanism is worthy of note, however. In order to derive the benefit of the experience and knowledge of those currently involved in addressing Aboriginal disputes, and to build support for a new initiative, a decision as to how to proceed might best be made through a policy dialogue, a collaborative process to identify the problem and design the solution. The participants would include representatives of typical disputant groups, such as the federal and provincial governments, and national and regional Aboriginal groups. Invitations would also be extended to other stakeholders, such as major industry associations, as well as to bodies that currently exist to address these disputes. This process would allow a thorough examination of all aspects of Aboriginal disputes, and might stimulate not only a specific initiative, but a move toward overcoming existing obstacles by restructuring existing institutions. However, this process might be relatively costly and time-consuming.

The option of creating a new organization would entail a different approach. The organization would seek to fill the gaps itself, rather than strengthen the capacity of existing institutions to do so. Thus the organization itself would take responsibility for delivering dispute resolution services and training, and for undertaking research and development of dispute resolution theory and practice. In this way, it might sometimes compete with existing organizations in providing certain services. However, since the organization would be established to meet needs that are currently unfulfilled, competition would not be its goal. In fact, its establishment as a distinct organization would not preclude it from working with other institutions when necessary, or from assuming a coordinating role for certain purposes. However, unlike an umbrella organization, coordination would not be its central purpose, and the organization would probably undertake a coordinating role only as and when requested.

Each of these options has its strengths and weaknesses. An umbrella organization would be able to draw on the knowledge, experience, and resources of those currently in the field to address the gaps that exist. Unlike a new organization that would provide certain dispute resolution services, a coordinating body would be seen to have little self-interest, and is unlikely to be perceived as a threat by existing organizations. However, an umbrella organization would face at least two challenges. Firstly, an organization cannot decide unilaterally to coordinate other organizations. It would need to demonstrate that other organizations stand to benefit by working together to address the current gaps in the area of Aboriginal disputes. If those organizations prefer to work independently, or are simply more concerned with their preexisting priorities than with addressing the gaps that remain to be filled, an umbrella organization could do little to gain their participation.

Secondly, an umbrella organization might well have difficulty sustaining itself financially. An organization created specifically to fill the needs outlined above would be able to charge for many of the services it might undertake, such as mediation, training, and even research. However, an umbrella organization would be almost wholly dependent on membership fees and grants. Since there is not a particularly large pool of dispute resolution practitioners who focus on Aboriginal disputes, it is unlikely that membership fees would cover a substantial portion of the organization's costs, and so an umbrella organization would probably have to apply continually for new grants. While it might succeed in obtaining startup grants, an umbrella organization might face difficulty maintaining funding, especially since in difficult economic times it can be harder to justify the role of a coordinator than of a service provider.

Some examples demonstrate the difficulty of sustaining an organization that does not itself provide dispute resolution services, but functions mainly to support other ADR efforts. The Administrative Conference of the United States (ACUS) was unable to sustain itself by offering only research, recommendations and training. ACUS was a federally-funded but independent body, that was established to recommend administrative improvements to Congress and other public agencies. One of its most important roles was to introduce and support the use of alternative dispute resolution techniques in public agencies⁸⁶. Although ACUS was able to charge for some of its

⁸⁶ Funk, W. "Rest in Peace A.C.U.S." *Administrative and Regulatory Law News*. Vol. 21, No. 2. 1990

training and research, federal funding was by far its primary source of income, and even paid for certain trainings and research projects. Therefore, when a House-Senate conference sought to cut spending and withdrew funding for ACUS in 1995, the Conference was terminated.

Family Mediation Canada is an umbrella organization for family mediators that has been in existence since 1985. While this organization has managed to sustain itself on membership fees and federal and other grants, it has very limited objectives and operations. It seeks to promote the use of alternative methods of dispute resolution amongst families, to promote professionalism amongst family mediators, and to function as a forum for practitioners to exchange ideas about the field. To these ends, it produces a newsletter three times annually and holds an annual conference to promote skill-building and networking opportunities for family mediators. It also administers certification for family mediators, but does not provide preparatory training⁸⁷. It is unlikely that an initiative to address the gaps identified in Chapter 2 could accomplish its goals through such limited activities.

By comparison, other organizations offer their own services for fees in addition to taking a supporting role of other service providers. The United States Institute for Environmental Conflict Resolution (IECR) oversees environmental dispute resolution concerning federal agencies in the United States, and directs many disputes to other organizations that provide dispute resolution services. However, for certain types of environmental disputes, it also provides dispute resolution services itself, including in-house facilitation and mediation, dispute systems design, and training of dispute resolution practitioners⁸⁸. This type of a balance can serve as a model for an organization established to address Aboriginal disputes.

A new, national initiative to address the gaps in resolution of Aboriginal disputes might be effective by strengthening existing resources and institutions. However, the option of creating a new organization appears to be more viable, and therefore preferable⁸⁹. Therefore, all further discussion of a new initiative concerns the establishment of a new organization⁹⁰. Nevertheless, since the concept of working through existing channels embodies valuable elements, certain aspects of this concept

⁸⁷ Jane Faulkner, Executive Director of Family Mediation Canada. Personal communication. May 13, 2002

⁸⁸ <http://www.ecr.gov>

⁸⁹ This thesis does not suggest that the establishment of this body alone will provide the means to resolve all conflicts involving Aboriginals. For example, where conflict arises out of a lack of will amongst any given party to address problems, or fundamental flaws in institutions that shape the interactions between parties, the establishment of this organization would have little, if any, impact. However, to the extent that resolution of certain conflicts is currently hindered by parties' distrust for each other, or their inability to communicate their concerns and interests effectively, or their inability to frame the problems they face in a way that stimulates creative problem-solving, the organization's provision and development of dispute resolution services and training would facilitate resolution of more conflicts.

⁹⁰ It is important to note that the initiative proposed here would need to entail more than simply the organization. It would also include a campaign to publicize and build support for the organization and its work in its initial phase and over the long-term. This thesis, however is concerned primarily with the nature of the organization itself.

feature in later discussion about the design of a new organization in this and the next two chapters.

Criteria to guide the design of a new organization

Several comments and concerns about the nature of a new organization were emphasized or mentioned repeatedly in the interviews I conducted. Primarily in response to those that featured most prominently, I propose the following four criteria to guide the design of a new organization:

Criterion #1. Impartiality: Its structure, operation, and policies are designed to ensure that the organization is apolitical and impartial, and that it can logically only be viewed that way;

Criterion #2. Aboriginal Orientation: It is uniquely focused on Aboriginal disputes and methods to improve the ways in which they are handled;

Criterion #3. Cooperative Capacity: It has the capacity to cooperate and coordinate with other efforts to address Aboriginal disputes;

Criterion #4. Institutional Sustainability: It is economically sustainable and politically viable.

Each of these criteria is discussed in more detail below.

Criterion #1. Impartiality: Its structure, operation, and policies are designed to ensure that the organization is apolitical and impartial, and that it can logically only be viewed that way

One of the most common sentiments expressed in the interviews I conducted was that an organization dedicated to dispute resolution in the Aboriginal context can be effective only if it has broad credibility, and earns the trust of diverse segments of Canadian society. In particular, it must develop the trust of Aboriginal populations, governmental bodies, business interests, and other groups that might be amongst the parties to a given dispute. Although almost every interviewee mentioned the need for credibility explicitly, and those that did not mention it implied it with their answers, they differed slightly on what this would entail, and how it would be achieved. When pressed, many interviewees tended to talk about the need for the organization and its representatives to be impartial. For example, Ward LaForme, an Aboriginal mediator, stressed that the organization would need to be able to do its work “without reprisal from government or from First Nations”⁹¹. Gordon Hannon, a lawyer with the Manitoba Department of Justice, suggested that the Board of the organization should function to ensure the neutrality of the services provided⁹². Tom Saunders, who is Senior Council in

⁹¹ Ward LaForme. Personal communication. January 10, 2002

⁹² Gordon Hannon. Personal communication. February 7, 2002

Aboriginal Law with the Federal Department of Justice, stated that if the mediators were not perceived as fair and impartial, or if they tried to impose a settlement on the parties, the government would simply refuse to use their services⁹³. One interviewee questioned how a neutral could be effective if he or she did not lean on recalcitrant parties. Generally, however, the interviewees emphasized that a dispute resolution body could be effective only if it were known not to take sides, and if the outcome of a dispute resolution effort would not be a foregone conclusion. Many interviewees also stressed that the credibility of the organization would be built only with time, and if it employed practitioners with a strong reputation for fairness and impartiality. Several interviewees mentioned that, compared to other kinds of disputes, resolution of Aboriginal disputes tends to require more attention to building trust and relationships in order for negotiations to succeed⁹⁴.

Given the importance of this organization maintaining a reputation for impartiality, it would never be able to act as an advocate with regard to any substantive political issue⁹⁵. The only advocacy role it could and probably should adopt would be with regard to questions of process. That is to say, the organization might take a public position on the process by which a particular matter should be handled, but it could never express an opinion on substantive issues to be decided in government, through the courts, or through negotiation. Since the distinction between questions of substance and process is not always clear, the organization would require carefully formulated policy on how the organization or its staff could express opinions on public matters.

Criterion #2. Aboriginal Orientation: It is uniquely focused on Aboriginal disputes and methods to improve the ways in which they are handled

Aboriginal disputes take place within a unique cultural and political context. A new organization would need to ensure that its work is appropriate for and relevant to this context. An important question to consider is whether, or the extent to which, this organization should be an Aboriginal organization. At present, none of the organizations providing dispute resolution services in Canada is governed and managed by Aboriginals. Given this fact, it is possible to see the practice of dispute resolution or consensus building as yet another foreign or “white” methodology to be imposed on Aboriginals. Indeed, interest-based negotiation has been criticized for being an outgrowth of (white) corporate culture, in which rights are converted to interests, assigned a monetary value, and readily traded between the parties⁹⁶. In being a foreign system that is imposed on Aboriginals, dispute resolution techniques like interest-based negotiation could be seen as comparable to the Canadian legal system that has been criticized so frequently for being

⁹³ Tom Saunders. Personal communication. February 6, 2002

⁹⁴ For example: Michael Blackstock. Personal communication. February 13, 2002; and David Mackey. Personal communication. February 1, 2002.

⁹⁵ Several interviewees also stressed that no politicians should be formally or publicly associated with the effort, because that would undermine its perceived neutrality.

⁹⁶ For example, Woodward, J. “Why the ‘Interest-based’ Model is not Suitable for Negotiations about Aboriginal Rights” in *Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples and Dispute Resolution*. Victoria, B.C.: UVic Institute for Dispute Resolution. 1997. p. 171 - 175

incompatible with Aboriginal culture. Two interviewees discussed how mediation in the Aboriginal context is sometimes seen as “too white”⁹⁷. From this perspective, the creation of an Aboriginal organization would allow the dispute resolution services it offered to grow out of an Aboriginal context, and presumably thereby ensure that the techniques used would be compatible with Aboriginal values and culture.

Another reason that it might appear attractive to create an Aboriginal organization is that it would support the goal of Aboriginal empowerment. For centuries, Aboriginal Canadians have been subject to paternalistic treatment by Canada’s government, Church organizations, and other non-Aboriginal institutions. Canada’s official Indian policy is seen to have created a pattern of Aboriginal dependency on government that is exacerbated by the disproportionate number of Aboriginal Canadians on social assistance. In an effort to break these patterns of dependency, there has been an increasing drive amongst Aboriginal Canadians over the last few decades toward self-determination and empowerment. An Aboriginal organization – governed, managed, and staffed by Aboriginal Canadians – might represent a success in Aboriginal empowerment. It would also serve to create employment for Aboriginals, thereby helping to meet an urgent need common to many Aboriginal communities.

There are, however, several important reasons why I believe it is *not* ultimately desirable for an organization created to address disputes between Aboriginal and non-Aboriginal Canadians to be entirely Aboriginal. The most fundamental reason is that, based on my interviews and other research, I do not believe that it is possible for an entirely Aboriginal organization to be perceived as impartial in disputes between Aboriginal and non-Aboriginal parties. Although, in theory, there is no reason that an Aboriginal organization should not be capable of being impartial, if the organization were not broadly *perceived* as impartial, it would not succeed as a dispute resolution body. Most interviewees stressed that this body should include representatives from broad segments of Canadian society⁹⁸. As Tom Saunders’ comment above demonstrates, unless potential clients believed that the body were not biased against them, they would have no reason to make use of its services. An exclusively Aboriginal organization could be at least as alienating to non-Aboriginals as exclusively non-Aboriginal institutions are said to be for Aboriginal Canadians. Moreover, Aboriginal Canadians might expect more sympathy from an Aboriginal organization and try to employ its services specifically attempting to influence the outcome of a dispute.

There are at least two other reasons that the organization should not be exclusively Aboriginal. Firstly, one of the organization’s central objectives would be to foster cooperation between people of diverse backgrounds and cultures. Therefore, this organization would have to include a diverse set of representatives amongst those who govern, manage, and staff it, so that it would serve as an example that this is possible.

⁹⁷ Gordon Sloan. Personal communication. January 29, 2002; Chris Knight. Personal communication. February 21, 2002.

⁹⁸ These included: Michael Blackstock, Ralph Brant, Randy Chan, Michael Coyle, Joe Friday, Gordon Hannon, David Mackey, Rod McLeod, Bill Pentney, Tom Saunders, Gordon Sloan, and Gary Youngman.

Finally, the exclusion of non-Aboriginals from the organization might limit the sources from which funds could be raised.

The creation of an organization that is governed, managed and staffed by representatives of diverse segments of the population would not necessarily deny Aboriginals all of the benefits associated with the creation of an exclusively Aboriginal organization. So long as there is substantial Aboriginal representation at all levels of the organization's governance structure and operations, there should still be considerable opportunities for the development of consensus building approaches that integrate well with generally held Aboriginal principles or values. Indeed, the development of such models should be a central goal of the organization. With regards to empowerment, this objective would still be fulfilled if the organization provided a context in which Aboriginal Canadians work together with non-Aboriginal Canadians as equal partners in the provision and development of consensus building services.

Criterion #3. Cooperative Capacity: It has the capacity to cooperate and coordinate with other efforts to address Aboriginal disputes

The first section of this chapter argued that the organization itself should assume responsibility for providing services that are needed in the area of Aboriginal disputes, rather than working through existing channels to do so. However, Chapter 2 showed that at present, various organizations and individuals are engaged in a broad range of activities and offer a fairly diverse range of services. Yet, most of these efforts are taking place independently of each other. With little coordination between these efforts, apart from occasional conferences, there are relatively few opportunities for people involved in them to learn from each other's expertise and to shape their activities accordingly. While coordination of other efforts should not be the organization's central approach, if the organization's objective is to meet a public need, it would be irresponsible to dismiss the possibility of building on or cooperating with other efforts, or even assuming a coordinating role when deemed appropriate⁹⁹.

Thus, the organization should have the capacity to cooperate and coordinate with other efforts. For example, if the organization were involved in a particular issue that impacted other institutions, or in which other organizations were involved or held special expertise, it might invite those bodies to participate in a joint process to examine and address that issue. Additionally, if requested, or as deemed appropriate, the organization might even host retreats or workshops with the specific purpose of bringing together those involved in particular aspects of dispute resolution, such as training, to compare their work and to assess the needs not fulfilled by their work. Moreover, the organization might consult with existing organizations that are regionally based, in order to model their approach elsewhere in the country.

⁹⁹ Chris Knight, former chair of The Network, argued that coordination of existing efforts might be more useful than creating a new body. This issue was addressed in the first section of this chapter. However, his arguments influenced the development of this criterion.

Developing a capacity to work with other organizations is being presented here as a concept. Since the organization would have limited resources, a decision would be necessary as to the extent to which resources should be directed away from the organization's own work, towards coordinated efforts to address certain problems. Such decisions would be the responsibility of those managing the organization.

Criterion #4. Institutional Sustainability: It is economically sustainable and politically viable

Finally, it is clear that various practical considerations would need to guide the design of the new organization. Once a legal status has been chosen, there would be certain legal requirements for the establishment and operation of the organization. Moreover, availability of funding would place constraints on many aspects of the structure and operation of the organization including, for example, the number of branches, the viability of operations in different geographic regions, the number of employees, and the number of programs and types of research. Since the organization would most likely be supported in part by funding grants, it might also face constraints stipulated by the grants. An appropriate plan for the organization's establishment and operation would need to function within all such economic constraints.

To become effective within the field of dispute resolution, the organization would need to develop standing and recognition for its work. While the organization's reputation would be built primarily on its track record, the setup of the organization would need to support the objective of being politically viable. It would be essential to design the organization with the capacity to interact effectively with the structures of major institutions that are likely to be parties to disputes. These probably include, but are not limited to, federal, provincial, and municipal governments, band councils, the Assembly of First Nations, and corporate, professional, and labour associations. There are several ways to develop the organization's capacity to interact effectively with these institutions. These include ensuring that board and staff members are familiar and experienced with these institutions, and locating offices within the same geographic area as some of these institutions. These details are the concern of later chapters.

* * *

The criteria proposed in this chapter shall serve to guide the recommendations I outline concerning the organization's design in the next two chapters.

Chapter 4: Introducing the Agreement Building Initiative (ABI)

In preparing for a new organization that works to fill the gaps identified in Chapter 2, a clear vision of its design and operations is necessary. The criteria outlined in Chapter 3 suggest that, in order to assist its objective of specializing in resolution of Aboriginal disputes, this organization should not be run for profit, and would need to be independent. Further, it should provide access to a range of dispute resolution services and work to build capacity, both amongst practitioners and stakeholders, to address disputes more effectively and appropriately. As explained in the Introduction, I refer to this organization as the Agreement Building Initiative (ABI). This chapter begins to define the setup and design of ABI, and then outlines the potential scope of its activities. Chapter 5 provides a more detailed discussion of the major aspects of ABI's institutional design.

General design considerations

The process of establishing the organization involves defining the contents of the following components of the transition from intent to the state of being ready to function.

Legal mandate

As an official organization, ABI would require a legal mandate that defines its purpose and objectives, as well as its legal status, rights and responsibilities. In consideration of the gaps and criteria discussed in earlier chapters, I propose that ABI's mandate delineates its objectives to provide and coordinate dispute resolution services for public disputes involving Aboriginal groups in Canada, and to build capacity amongst practitioners and stakeholders to resolve such disputes more effectively and appropriately. In so doing, ABI would provide mediation and facilitation services, train mediators and negotiators, and research and document the use of dispute resolution in the Aboriginal context. (See Appendix III for a recommended Mission Statement). ABI's mandate should allow it to become involved in all three categories of Aboriginal disputes identified in Chapter 2, since there is a demonstrated need for further support in each of these categories across Canada¹⁰⁰.

As a public service-oriented initiative, ABI would fall naturally within the category of nonprofit organizations, and indeed the nonprofit status would be most appropriate for ABI. Although there would be some benefits to operating for profit, they are outweighed by the drawbacks. If ABI operated for profit, it would not have to rely on fundraising, and would thus stand to benefit in two ways. Firstly, ABI would not face the uncertainty and difficulty in long-term planning resulting from fluctuations in the availability of grants with changes in societal economic and political trends. Secondly, ABI would avoid the problem that dependence on grants can colour the public's perceptions of an organization if the grants either come with conditions, or originate from

¹⁰⁰ ABI should adopt a relatively inclusive definition of aboriginality in its mandate, such as one that relies on self-identification. Since ABI will be concerned with public disputes in which groups of stakeholders are involved, a group's aboriginality is seldom likely to be called into question.

sources that are not seen to be neutral, especially in the types of disputes ABI would handle.

Despite the considerable advantages of independence from fundraising, ABI is unlikely to be successful as a for-profit venture. Nor is a goal of turning a profit likely to further ABI's fundamental objective of improving the way Aboriginal disputes are handled. A for-profit organization would have to charge market-rate fees for all services it provided. However, ABI might believe various services, like research, are useful in meeting this objective, but clients are unlikely to be willing, or even able, to pay for more than just the cost of such services. Also, if ABI were established to serve the public good, it is questionable whether it would do so if its primary goal were to make a profit. Certainly, the accessibility of its services to less financially secure clients would be diminished if profit were a major concern, and a nonprofit might be able to be more flexible with its fee structures than a for-profit organization. Moreover, the public might be equally wary of a for-profit organization in dispute resolution as of one dependent on grants. An organization's interest in turning a profit might be seen to diminish the impartiality of the neutrals it employs.

As a nonprofit organization, ABI should become incorporated to allow it to become more permanent and established than an unincorporated association of individuals. A nonprofit corporation requires a governing board whose members are the members of the corporation. In Canada, a corporation may own property, carry on business, possess rights, and incur liabilities. A corporation has its own legal identity, separate from that of its members, that exists in perpetuity independent of its members. Incorporation enables the organization to sue, be sued, and to contract as an entity. If ABI is incorporated, its members would be freed from liability for the debts and obligations of the organization. Organizations are incorporated by letters patent which, for nonprofit organizations, must exclude any references to pursuing business for profit except as auxiliary to the nature of the organization¹⁰¹.

In Canada, organizations have the choice to incorporate under provincial or federal legislation. While ABI might need to function relatively locally in its initial phases, ultimately it would seek to work at the national level. Since its services would be carried out in more than one province, ABI would have to incorporate under federal legislation. Federal legislation prohibits non-commercially oriented organizations from incorporating with share capital¹⁰². This would not present a problem for ABI since it would not be operated for the pecuniary gain of its members.

According to the stipulations of the Canada Customs and Revenue Agency, it is possible that ABI might qualify to register as a charity: it would not operate for profit; it would not undertake political activities; it would provide services that might be considered to be of "benefit to the community"; and, in providing training, it might be

¹⁰¹ Law Society of Upper Canada. 44th Bar Admission Course Materials. *Business Law: Reference Materials*. Law Society of Upper Canada. 2001. Chapter 1. pp. 1-19 and 1-20.

¹⁰² *Ibid.*

considered to be “advancing education”¹⁰³. As a registered charity, ABI would be allowed to issue official receipts for gifts received, thereby reducing the income tax payable of individual donors, and the taxable income of possible corporate donors. However, as a neutral organization, ABI would not promote a “cause” around which the public could rally, and so it is unlikely to be successful at public fundraising. While it might be helpful to solicit donations from certain prominent individuals with an interest in the type of work ABI performs, ABI would not rely on public donations, and so failure to qualify for charitable status should not significantly impair ABI’s ability to operate.

Auspices

If ABI is to be impartial, it cannot be under the auspices of any one organization that might represent a stakeholder group in a dispute. Thus, ABI should not be under the auspices of any government or existing Aboriginal organization. To be impartial, ABI would either have to be under the auspices of a collective of stakeholders, or it would need to be independent. The Indian Commission of Ontario functioned under a Tripartite Council, comprised of representatives from each of the three stakeholder groups involved in any given dispute. While this appears to have allowed the ICO to operate effectively, it also ultimately led to the ICO’s closure. Given the competing agendas and interests of the federal and provincial governments and Aboriginal organizations, it appears that ABI would be able to operate more flexibly as an independent organization. Thus, ABI would work for its own members who would be chosen to represent those interested in the resolution of Aboriginal disputes. This would allow its staff to develop ABI as they believe would most appropriately meet the needs it faces, without having to consider the political climate in government and amongst Aboriginal bodies.

Financing

As a non-profit organization, there would be several potential funding sources available to ABI. However, each source individually is unlikely to be sufficient, and so a mix of funding would be necessary. In securing funding, ABI would need to balance the competing criteria of impartiality and institutional sustainability. Clearly, ABI would need to secure adequate funds at least to cover its costs of operations. However, decisions concerning ABI’s sources of funding must also ensure that they do not create even a perception that ABI is not neutral.

ABI should certainly charge for its services, and so its fees would cover at least some of its costs. However, some of ABI’s activities are unlikely to find adequate financial support through fees. Moreover, since some of ABI’s clients, particularly amongst the Aboriginal population, would have limited financial resources, and since denying services due to a potential client’s financial conditions seems contradictory to ABI’s objective to fulfill a public need, ABI would probably have to provide some services below cost. Therefore, ABI would need to secure other sources of funds beyond fees.

¹⁰³ Canada Customs and Revenue Agency. “Registering a Charity for Income Tax Purposes”. http://www.ccr-a-drc.gc.ca/E/pub/tg/t4063eq/t4063eq.html#P184_9792

Additional funding would likely need to take the form of grants. ABI should seek funding in the form of two different types of grants. First, ABI should seek general grants for its operation. This would be especially important in its startup phase, before it can charge fees for its services, since loans are generally inappropriate for establishing a nonprofit organization. Second, ABI should seek project related grants from institutions with an interest in ABI's projects. However, the criterion of impartiality would necessitate that ABI accepts grants only if there are no conditions attached that could threaten its neutrality or even create a perception that ABI's neutrality would be threatened. Thus, charitable foundations would normally be desirable sources of both types of grants. ABI might be able to accept grants from government for certain projects, but should avoid government grants for its operations so as to avoid being too closely tied to government.

As mentioned above, other fundraising might be desirable for supporting ABI's operations, but ABI should not rely on or try to solicit public donations.

Leadership

Over time, ABI's leadership structure would likely become more developed and sophisticated. However, even initially, it would legally require a Board of Directors to oversee its general policies and financial well-being. Initially the Board would be comprised of founding members who would be intimately involved in the launch of ABI, and who would work to attract new members to the Board. ABI would also need an Executive Director to oversee implementation of its programs. As ABI's programs and operations expanded, more senior staff would be required to manage each of them. Options for ABI's governance and management structures are discussed further in Chapter 5.

ABI might also seek to incorporate more traditional Aboriginal forms of leadership, such as a panel of elders, to provide guidance in assuring that ABI's policies and activities are consistent with Aboriginal values and culture. In order to prevent the existence of such a body from biasing ABI's approach and activities, the body would need to take the form of an advisory committee, without any decision-making authority, that could provide recommendations on specified issues falling within its area of expertise. The members of this committee would need to be selected by the governing board to ensure that they are appropriate, knowledgeable, and reputable. Those selected for this committee would need to be familiar with not only traditional Aboriginal approaches to dispute resolution, but also more "Western" approaches.

Staffing

ABI would require a professional staff to implement its programs and to oversee its administration. In its startup phase, when ABI has a very small staff, some staff members might function both as program staff and as administrators. However, as soon as funding allowed, ABI would need to hire separate staff for each of these functions,

since it would clearly operate more effectively if the people filling its staff positions were uniquely qualified for their tasks. Details of the nature of the work that could be performed by different staff positions are elaborated later in this chapter and in Chapter 5.

Operations

In the period following its inception, ABI would likely have the funds and resources to function out of only one office. Since this office might ultimately become ABI's head office, its geographic location should be carefully selected. Various factors should be taken into consideration, including: accessibility to groups and institutions with which ABI would need to interact; accessibility to the people whose expertise would be needed to guide ABI's start up and operations; and the relative need for ABI in the region¹⁰⁴. As ABI develops, it could open offices in other regions, as described in Chapter 5.

Startup plan

Clearly, the ultimate vision for ABI will be different to the form the organization would take when it is initially established. I have already mentioned some ways in which ABI's financing, governance and management structures, staffing, and operations would need to evolve as the organization develops. There also needs to be a vision in place for how to begin to establish ABI.

A common starting point for this task is to establish a convening committee. This group, which might not comprise more than four or five people, would actively seek, select, and invite suitable individuals to become the initial Board members. Chapter 5 details some procedures for this process. Ideally, the convening agents should come from several different organizations, so as to prevent ABI from becoming a branch of an existing body. Either the convening agents or the founding Board members would need to secure startup funding for ABI and make a decision about the regional location of ABI's first office. Thereafter, the founding Board members would need to hire the Executive Director who, in turn, would be responsible for hiring other staff members.

In order for ABI to begin to build its reputation before becoming involved in specific disputes, it could initially focus on training and research, and possibly some activities to reach out to other organizations, as described in Chapter 3. ABI could also begin to develop a database of dispute resolution practitioners that would later inform the development of a roster, as described in Chapter 5. Substantial energy would also need to be focused on publicizing ABI's activities and work.

Once ABI did become involved in providing dispute resolution services like mediation, it should start by focusing on a limited range of disputes, with the ultimate

¹⁰⁴ Some careful judgment would be necessary for this question. For instance, if other organizations that provide services similar to those provided by ABI exist in a region being considered, ABI's work might not be as welcomed as in places where no such organizations function. However, if ABI sought to work with other organizations, it might need to have more ready access to them.

goal of expanding its scope to include all types of Aboriginal public disputes. In its initial stages, ABI should focus on those types of disputes about which a considerable body of knowledge already exists, such as disputes concerning taxation, land-use, and natural resource management. As ABI develops its own expertise and reputation, it could branch out into different directions, such as into addressing disputes over the provision of social services.

Potential scope of activity

Given the gaps in resources identified in Chapter 2, ABI should be involved in the following three types of activities: general consensus building services; training in interest-based negotiation and dispute resolution practice; and research and documentation of the use of dispute resolution in Aboriginal disputes.

Consensus building services

ABI would need to assist disputants to obtain consensus building services provided by professional neutrals. As discussed in the following chapter, ABI might provide these services itself, or it might direct disputants to dispute resolution practitioners, or employ a combination of both approaches. The neutrals that ABI provides or endorses should offer a variety of consensus building services, including conflict assessments, mediation or facilitation of consensus building efforts, coordination of joint fact-finding efforts, and coordination of informal interaction between diverse parties.

Conflict assessment: A conflict assessment is a preliminary report, usually conducted by a professional neutral (or a team), to evaluate whether a consensus building effort is likely to be productive and, if so, to propose a process acceptable to all parties for conducting it¹⁰⁵. Conflict assessments lay the groundwork for consensus building by identifying all stakeholder groups, exploring their interests and concerns, clarifying the issues involved, and considering the extent of the differences between the parties. The assessor also explores parties' willingness and capacity to participate in such a process. The conflict assessment process involves five stages: (i) identifying all key stakeholders to be interviewed; (ii) conducting personal, confidential interviews with the stakeholders; (iii) summarizing the concerns of each stakeholder group, without attribution of name or organization; (iv) assessing possibilities and obstacles to reaching an agreement; and (v) recommending, if appropriate, the key elements of a facilitated process. Typically, the assessor will send a draft of the report to all interviewees for comment, to ensure that their concerns and interests are presented accurately. If consensus building is unlikely to be helpful, a conflict assessment can prevent parties from undertaking an effort that is likely to fail.

¹⁰⁵ A detailed explanation of conflict assessments can be found in Chapter 2 of Susskind, L. *et al.* (Ed.s) *The Consensus Building Handbook*. Thousand Oaks: Sage Publications. 1999

Mediation and facilitation: Mediation and facilitation are tools that support complex consensus building processes. Since facilitators and mediators are both neutral parties who work to promote improved communication and problem-solving amongst the group, their roles may overlap considerably. In general, however, a facilitator's role is directed primarily towards managing a consensus building process, for example, by assisting the participants to develop the agenda and by enforcing ground rules. While mediators might perform these tasks, they also typically work more intensively with the parties, for example, by helping them to identify and communicate their interests, generate potential solutions, and strengthen the relationships within the group¹⁰⁶. The strategies of facilitators and mediators can vary considerably, especially in the Aboriginal context, in which they are sometimes informed by approaches from Aboriginal culture and other disciplines.

The practitioners provided or endorsed by ABI should assist parties in various types of situations. They should be available to assist in the resolution of public disputes, such as the one concerning the Cross Lake Cree. However, they should also promote and facilitate policy dialogues concerning important Aboriginal issues. As certain public agencies in the United States have used facilitated negotiation to develop regulations, so agencies in Canada might be able to use facilitated consensus building to develop policy initiatives, such as white papers, on a number of different Aboriginal issues¹⁰⁷.

Coordination of joint fact-finding efforts: In any given conflict, the parties frequently disagree vigorously over facts concerning historical, scientific, technical, economic, or other matters that are central to the dispute. Joint fact-finding is a collaborative method of collecting and producing data that can allow parties to find common ground as they seek to resolve a dispute or to set policy. Usually, parties with different viewpoints and different levels of technical background participate in designing, and sometimes even conducting, the necessary investigations. The parties jointly determine the particular issues requiring further analysis, the experts who ought to be consulted, and the most appropriate methods of gathering information. Subsequently, both those with technical backgrounds and those without analyze the products of such investigations¹⁰⁸. While a professional neutral is not always essential in joint fact-finding, in complex situations a neutral might be necessary to facilitate any technical working groups that are established, and to ensure that those without the technical expertise are participating meaningfully in the work.

Coordination of informal interaction and dialogue: In their interviews with me, some experienced mediators suggested that certain disputes require more than facilitation of formal negotiations. When different communities are involved in a dispute, cultural

¹⁰⁶ For more detailed information about the tasks and strategies of facilitators and mediators, see Poirier Elliot, Michael L. "The Role of Facilitators, Mediators, and Other Consensus Building Practitioners" in Susskind, L. *et al.* (Ed.s) *The Consensus Building Handbook*. (Thousand Oaks: Sage Publications). 1999.

¹⁰⁷ However, one interviewee, Tom Saunders, stressed that policy decisions were not suited to facilitated dispute resolution mechanisms. He stressed that the ability to formulate its own policy is a fundamental right of government.

¹⁰⁸ Ehrmann, J. and Stinson, B. "Joint Fact-Finding and the Use of Technical Experts". Susskind, L. *et al* (Ed.s) *The Consensus Building Handbook*. (Thousand Oaks: Sage Publications) 1999

barriers and stereotypes sometimes form the backdrop to interaction between the communities. One mediator believed that more public education addressing myths about Aboriginals is necessary to address this problem¹⁰⁹. Another suggested that there is a need to bring Aboriginal and non-Aboriginal communities together to discuss their concerns¹¹⁰. While practitioners associated with ABI would not run public education programs, and would not be necessary for many types of informal activities, in circumstances in which they thought it could be helpful, they could coordinate informal opportunities for Aboriginal and non-Aboriginal community members to meet, socialize, and discuss matters of shared concern.

Training

Training in the many techniques of dispute resolution and consensus building is known to be very important to the successful use of these methods. Training in mutual gains or interest-based negotiation redirects negotiators from an entirely adversarial approach to one that is geared towards problem-solving. When negotiators in public disputes adopt this approach, they are better geared to produce solutions that meet a higher degree of satisfaction amongst more parties¹¹¹. Depending on the supply of such training within the areas in which ABI functions, ABI might provide training workshops, or it might work to coordinate with other organizations that offer interest-based negotiation training¹¹².

Training in mediation and facilitation is necessary to ensure that there are sufficient practitioners available to assist disputants. Since no organization currently offers mediation training specializing in Aboriginal disputes, ABI should develop and provide certification courses for mediators with an emphasis on Aboriginal disputes. In order to build capacity amongst Aboriginals to resolve their own disputes, this training should be particularly geared to Aboriginal participants. This training should include “Western” dispute resolution models and Aboriginal approaches, and encourage participants to integrate insights and skills from both. Its goal should be to produce mediators who are skilled and qualified to work on Aboriginal disputes for the courts, governmental or social service agencies, and even for ABI itself.

Research and documentation

Ultimately, ABI should adopt several objectives and approaches in developing its research program. Initially, however, ABI should choose just one or two research objectives, and then expand the research program as the organization grows. The initial objectives should require relatively modest resources. For example, ABI could become a clearinghouse to which parties could turn to find the most current literature on issues

¹⁰⁹ Michael Coyle. Personal communication. January 22, 2002

¹¹⁰ Ralph Brant. Personal communication. January 17, 2002

¹¹¹ See, for example, Susskind, L. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. New York: Basic Books. 1987

¹¹² While several interviewees stated there is still a high demand for interest-based training, despite the existence of other training programs, the decision-makers at ABI should conduct some market research as to the level of demand.

concerning Aboriginal disputes, including legal and policy materials, updates on ongoing cases, and theoretical analysis¹¹³. As ABI's work expanded, it could develop a collection of case studies, including evaluation of the appropriateness of the methods used in each case, to be used for teaching purposes¹¹⁴. ABI's researchers could also conduct experimentation with, and in-depth research into new forms of mediation¹¹⁵. Finally, ABI's researchers should explore some of the critical questions concerning the use of dispute resolution in the Aboriginal context, and develop recommendations on best practice.

There are at least two critical issues that stand out in need of research. The first involves the adaptation of consensus building techniques to Aboriginal cultural contexts. ABI researchers should investigate, compare, and evaluate experimental methods employed in various dispute resolution efforts. For example, several negotiation efforts have been designed to give a special role to community elders. Given the importance of elders to traditional Aboriginal culture, these innovative methods should be explored in depth in order to understand the way that they might facilitate or complicate resolution. Another example that might be worth investigation is the integration of ideas from the restorative justice movement into dispute resolution training and processes.

Another important area of research concerns the application of interest-based models to value-based and rights-based disputes. A large proportion of Aboriginal disputes concern questions of rights (at least from the Aboriginal perspective), and rights are often considered to be non-negotiable. Others see "rights talk" as unproductive, and argue that rights are a means to satisfy or protect interests. However, efforts to reframe a dispute from one over rights to one over interests are often greeted with suspicion¹¹⁶. Fundamental questions remain as to which conflicts are better suited to litigation, and which to negotiation. ABI's researchers should investigate and analyze these questions to promote better decisions about the way particular disputes are handled.

* * *

ABI's general design must allow it to function effectively in the realm of Aboriginal disputes. This chapter has set out some of the legal and practical requirements ABI should follow, and suggested the nature of the activities it should undertake, to achieve this goal. The next chapter provides further detail for ABI's institutional design.

¹¹³ This option was suggested by interviewee David Mackey.

¹¹⁴ This option was suggested by interviewees Richard Price and Chris Knight.

¹¹⁵ Interviewee Gordon Sloan said he believed there was a great need for this type of research.

¹¹⁶ For example, negotiators of the governments of Canada and Alberta, and of the Peigan Nation were able to reach an agreement over damage caused by a dam and various other related issues, by reframing the negotiations away from a distribution of rights. However, the agreement was rejected in a ratification vote amongst the Peigan, apparently because of a fear that the deal would sell out Peigan rights.

Chapter 5: Detailed Institutional Design

As an independent, nonprofit organization, ABI would require governance and management structures that would support its objectives, as suggested in the last chapter. Its Board of Directors must be selected carefully to build and safeguard its credibility. Its management and operations should allow it to cater to a broad clientele while ensuring that it maintains a high quality of service, and remains economically sustainable. This chapter will present details of three features of ABI's institutional design: its Board of Directors, its management and staff, and its initial financial requirements.

Board of Directors

In *Managing a Nonprofit Organization*, Thomas Wolf describes the typical responsibilities of a governing board. He emphasizes that these responsibilities, along with the skills and integrity of the board members themselves, help to ensure that a nonprofit is governed in a manner that is professional and accountable¹¹⁷. However, while the board functions to guide and assist the organization, its members are not involved in the organization's day-to-day operations.

Responsibilities

In order that ABI will be recognized as a legitimate nonprofit organization and charity, its board should be assigned the standard responsibilities of a Board of Directors. Applying Wolf's description¹¹⁸ to ABI, once ABI has been established, its board would have the following responsibilities:

1. Confirm ABI's mission, and review it periodically.
2. Set and review policies for ABI's operation, including articles of incorporation and bylaws¹¹⁹. Also, create and review documents that spell out the respective roles and responsibilities of the staff and the Board, and general policies relating to operation¹²⁰. The Board must ensure that there is consistency between ABI's articles of incorporation, its mission, and the law.
3. Review ABI's overall annual program, and engage in longer-term planning to help ensure an effective and sustainable course for the next several years. To this end, Board members would review general goals and more specific objectives,

¹¹⁷ Wolf, T. *Managing a Nonprofit Organization*. New York: Prentice Hall Press. 1990. p. 29

¹¹⁸ *Ibid.*

¹¹⁹ These policies relate generally to the functioning of the Board itself, and would include the following matters: the number of Board members and their tenure; how and when meetings are set; how members of the Board are elected or appointed; how decisions are made; and how vacancies are filled. I would recommend that Board members have limited terms of office (such as three years), with the terms staggered amongst members so that there is continuity of governance.

¹²⁰ Amongst others, these policies would likely address: questions of conflict of interest; impartiality; confidentiality of client information; interaction of ABI staff with the media; use of organizational funds by staff and Board members; fee schedules; community outreach; and interaction with other dispute resolution professionals.

- review implementation plans developed by the staff, and evaluate the implementation of recent projects.
4. Establish fiscal policies and boundaries: assist in reviewing the budget, approving it, monitoring its implementation, and amending it, if necessary. Establish financial controls, possibly through a financial subcommittee¹²¹.
 5. Assure ABI's financial security by contributing financially to the organization, assisting in fundraising, and maintaining proper controls over spending.
 6. Hire and work with the Executive Director.
 7. Promote ABI's work both formally and informally¹²².

Structure

To a large degree, Board members themselves would need to determine the Board's structure when they are involved in writing up ABI's articles of incorporation and other policies. The main questions regarding structure will be the size of the Board, the number and types of Board committees, and the officers of the Board.

Subcommittees are established to enable the appropriate Board members to deal with issues that are more specific to their expertise. Often, each subcommittee works with its respective professional staff person on issues of specialized interest. Individual Board members usually sit on more than one subcommittee. Large nonprofit organizations tend to have many subcommittees, whereas smaller ones need fewer. Typically, a large organization's board includes many of the following subcommittees: executive, finance, fundraising, nominating (of board members), planning and program, personnel, investment, and audit.

Certainly at the outset, and possibly even later, ABI's Board would not need all of these subcommittees, and many of their functions could be combined. They are presented only to show how the Board might choose to develop over time. At the very least, however, once ABI has been established, its Board should start with an Executive Committee to oversee general management and finances, a Personnel Committee to set salaries for the major staff positions, and a Fundraising Committee. I would also recommend the establishment of a Nominating Committee early on, to help select new Board members.

The Board would also need to elect its officers. These positions should include a chairperson, treasurer, and secretary. The treasurer and secretary might be the same person, or an ABI staff person could also function as secretary. As ABI develops, it might find it useful to add new officers to its board, like vice-chairs, and chairs of subcommittees. That, however, would be a decision for the Board to evaluate over time.

¹²¹ The Board might also need to engage in other related tasks, such as appointing auditors, and approving signing authority on ABI's banking documentation.

¹²² This might include formal publicity events and general networking.

Desirable types of Board members

The board of a nonprofit organization is critical to ensuring the organization functions effectively and credibly. Given the great importance of the Board's responsibilities and work, and given the degree to which an organization's credibility rests on its Board, it is crucial that Board members have the necessary skills, experience, and public standing to ensure that the organization achieves its mission. Not all Board members would have all the kinds of skills and experience listed below. Rather, the main objective in selecting Board members should be to ensure that each member makes a unique contribution to the Board's resources, such that the Board ultimately represents a broad range of skills and experience.

Amongst its Board members, ABI would require those with the skills necessary for any nonprofit organization, as well as those with additional skills and experiences to assist ABI with its unique work in what can often be a charged political context. As for any nonprofit, ABI's Board should include members with skills and experience in organizational planning, finance or accounting, fundraising, personnel management, legal matters, public relations, and nonprofit trusteeship¹²³. However, ABI's Board should also include individuals who know how to navigate the complexities of Canadian Aboriginal politics, and who have a familiarity with the important players on this landscape. This would likely require individuals with experience working with or in First Nations or Aboriginal groups, government, and industry. Additionally, the Board should include members with a clear understanding of the theory and practice of a range of dispute resolution methods, and with experience in the field. Further, it would be helpful if some Board members had skills in, and experience with, some of the issues that are often the subject of dispute, including land use, tax, land claims, treaty negotiations, natural resource management, and economic development. Finally, since the objective would be for ABI to ultimately become national in scope, it would be appropriate for Board members to be representative of, or at least have experience working in, Canada's major geographic regions, such as the Maritimes, Central Canada, the Prairies, the West, and the North.

Beyond skills and experience, other factors should guide the Board's composition to give it credibility. Most critically, individual Board members must have reputations of broad and strong credibility amongst Aboriginal and non-Aboriginals alike, and amongst the various subgroups that tend to be stakeholders in the types of conflicts discussed above. It is essential that no members have a reputation for bias toward any potential stakeholder group¹²⁴. To the extent that any member might arouse suspicion of bias, other Board members should be selected to offset that suspicion. This is one reason that the Board would need to be composed of members of Aboriginal and non-Aboriginal backgrounds. By no means should individuals be selected or rejected simply because of their ethnic background; the individual's skills, experiences, and reputation must be the critical variables. However, as discussed in Chapter 3, ABI might not enjoy broad

¹²³ Wolf, T. *Managing a Nonprofit Organization*. New York: Prentice Hall Press. 1990. p. 43

¹²⁴ Several interviewees advised against allowing politicians onto the Board, because they tend to establish partisan reputations during their political careers.

credibility if it is perceived to be exclusively, or even predominately, Aboriginal or non-Aboriginal.

Procedures for selecting Board members

The procedures for selecting Board members would differ for the initial startup phase and for after ABI had already been established. Initially, a convening committee would be necessary to find and nominate the initial set of Board members. After they have fulfilled their convening role, these individuals might terminate their participation in ABI or, if deemed appropriate by other Board members, they might join the Board. In the first stage of the selection process, the conveners should distribute a letter inviting suggestions both for actual candidates for the Board, and for ideas about the important people or organizations to be consulted about suggestions for appropriate candidates. The Committee should send the letter to selected interviewees from this thesis research, and selected organizations representing major stakeholder groups.

In the second stage, when the Committee had received responses to its letters, it would have to compile a list of candidates according to the suggestions it received, and review them according to their expertise, knowledge, background, and reputation for credibility. This might involve some additional investigation into each individual. In formulating a shortlist of candidates, the Committee should use an “expertise matrix” to ensure that all critical skills are covered. (See Appendix IV). I further suggest that the committee show the matrix to representatives of key stakeholder groups to ensure that it covers a comprehensive range. Candidates could then be categorized as first, second, or third choice according to the expertise, knowledge and experience they would bring to the Board. Finally, the Committee would need to contact the candidates to inform them about ABI and its work, gauge their interest, and invite them to participate. The Committee may choose to invite all potentially interested candidates to an information and planning retreat to launch the Board and select its members.

After the initial establishment of the Board, the Board would need to determine its own procedures for further nomination of its members. The Board might establish a nominating committee for this purpose.

Management and staff

In this section I present two models for ABI’s management and staff. The first model is the more practical option for ABI’s startup phase, while the second model more clearly supports the long-term objectives in establishing ABI. However, these two models are not necessarily mutually exclusive, and ultimately, ABI should probably transform from the first to the second model.

CENTRALIZED MODEL

This model describes a relatively centralized, cohesive option for a management structure. As described above, ABI would have a Board of Directors with various committees to oversee general organizational policy and planning. The staff of ABI would be involved in the day-to-day operation of ABI. They would fall into three categories: management, project staff, and administration. Since ABI is likely to be fairly small, especially at first, some staff members may well be involved in both management and project implementation.

Since ABI's focus would be on Aboriginal disputes, people of Aboriginal background should comprise a substantial, and perhaps dominant, proportion of the staff. As with ABI's Board, however, staff members' qualifications for the work would have to remain the primary criterion for their employment. In particular, it is essential that any practitioners ABI hires or endorses have a strong reputation amongst all key stakeholder groups for impartiality, fairness, and effectiveness. Those hired for ABI's management staff also need to enjoy broad credibility amongst diverse population groups.

Management

ABI would require an Executive Director and some senior staff to manage the organization. Depending on funds, initially ABI might require and be able to afford only an Executive Director and perhaps a single senior partner. As the organization grows, however, it might well require more senior partners. The Executive Director would be the top manager, who would be responsible for hiring all other senior staff, and overseeing all management staff decisions. He or she would also need to liaise with the Board, and ensure compatibility between the organization's activities and its policies. ABI's senior partners would ultimately oversee its major areas of operation, such as: dispute resolution services, research and documentation, coordination with other bodies, and administration. They might consult with Board members if they require particular expertise or guidance. All management staff would require management skills, but would also require in-depth understanding of dispute resolution, and should have considerable experience in the field.

Project Staff

The project staff would be engaged in the activities described in Chapter 4: dispute resolution services, training, and research and documentation, as well as coordination with other bodies, when appropriate. While it is likely that most project staff would be involved in several types of activities, they would probably fall into two general categories: dispute resolution practitioners, and researchers. There are various possibilities as to the way ABI might provide consensus building services, including through in-house practitioners or through a roster system, as described below. However, in the centralized model, all other activities, including research, information dissemination, and training, would be conducted by in-house staff.

Researchers

As described in Chapter 4, researchers would be responsible for products like case studies, policy papers, and recommendations on best practice. If dispute resolution services were offered in-house, researchers would also be able to assist the practitioners with conflict assessments, as necessary. It would likely be to ABI's economic benefit to have senior and junior researchers, and possibly to provide annual internships to university students, as this would allow different levels of work to be performed at different pay scales. If and when ABI considered it appropriate to cooperate with other dispute resolution efforts, the researchers could work with those from other organizations to develop a substantive body of literature on issues relating to the use of dispute resolution in the Aboriginal context.

Practitioners Option 1: In-house

The first option is for ABI to employ dispute resolution practitioners to work from its offices. These practitioners would provide the services described in Chapter 4, as well as training in mediation and mutual gains negotiation. Disputants seeking assistance would contact ABI, and ABI would assign one or more practitioners who would travel to the location of the dispute, and remain there while conducting the services requested. The process for hiring practitioners would have to be thorough, to ensure that those selected would be highly effective in their work. The evaluation process should include not only an interview and a review of the applicant's credentials, but also activities that require the applicant to demonstrate his or her abilities¹²⁵.

ABI would benefit from having senior, midlevel, and junior practitioners to assign to conflicts of varying complexity and difficulty. More junior staff members might also assist senior staff in certain conflicts. This would also enable junior project staff to build practical experience without putting important and delicate situations at unacceptable risk.

While this option has the distinct advantage of allowing management to exercise careful control over the provision of dispute resolution services, it is also likely to be the most expensive option. Even if clients pay for practitioners' travel expenses, the additional staff will require regular salaries and office space. Moreover, it is probably unrealistic to expect that ABI's practitioners would travel regularly outside the office's region, since this would be expensive and impractical for disputes that require lengthy intervention processes. Also, for this option, the process of finding appropriate practitioners is likely to be fairly lengthy. Finally, a risk entailed in this option is that an early failure or blunder by an ABI practitioner working on a highly publicized dispute could have a devastating impact on the organization's reputation.

¹²⁵ This might include, for example, a requirement that the applicant function as a mediator in role-plays, or that he or she presents detailed descriptions of his or her experience resolving real disputes.

Practitioners Option 2: Roster

As an alternative to providing in-house practitioners, ABI could develop a roster from which disputants could select a practitioner. Rather than working directly out of ABI, these practitioners might live in different parts of the country and also work in other jobs. Disputants looking for the services of a neutral would contact ABI, and ABI would put the client in touch with a small selection of practitioners best suited for the job.

ABI's Board and management staff would need to decide whether these practitioners would work for ABI on a contractual basis, or whether the roster would simply be a referral system. They would also need to decide whether ABI would endorse the use of the practitioners on its roster. If ABI endorsed roster practitioners, each practitioner would have to be interviewed by ABI's management staff and subjected to other evaluation of his/her abilities.

This option also has its benefits and drawbacks. The roster system would lower the risk ABI would face in the event of a widely known failure by one of its practitioners, because the practitioner could probably be removed from the roster more readily. Also, the roster system would allow ABI to endorse practitioners from many parts of the country, and this might mean that practitioners are more familiar with the local nuances of disputes to which they would be assigned than in-house mediators. Finally, ABI would likely be able to afford endorsing many more practitioners than it could employ, and this might promote a more widespread use of ABI's services. However, ABI would have less control over the quality of the services the practitioners offered, as the management staff could not know the practitioners on the roster as well as they would know and trust in-house staff. Moreover, if ABI were to conduct its own trainings in mediation and negotiation, it would have to either hire staff specifically for that purpose, or contract the work out to practitioners on the roster.

Practitioners Option 3: Transition from roster to in-house

ABI need not necessarily have only in-house mediators or a roster. A final option is for ABI to begin with a roster system and then, after it has begun to establish its reputation, to build an in-house staff of practitioners. This might allow ABI to start up relatively quickly, build its credibility, and then become more intensively involved in offering dispute resolution services. Even once ABI hired in-house practitioners, it could still retain a roster for cases in which the use of an in-house practitioner were either not practical or appropriate.

This option appears to be the most favourable, as it ultimately allows the benefits of both of the first options, and reduces the risk of the in-house option.

Finance and Administration

ABI would require at least one staff person to oversee the organization's finances and administration. This person may be a senior partner, or an assigned administrator. Either way, he or she would prepare and review the annual budget, and oversee project budgets. He or she would also need to ensure that proper financial records are kept in accordance with statutory requirements, and that all required government filings are lodged. He or she should also prepare financial statements in accordance with generally accepted accounting principles, and oversee compliance with internal controls over ABI's assets. On occasion, this individual would need to liaise with the Board, or sometimes with its treasurer.

ABI would also require other administrative positions, and as the organization grows, ABI might require more administrative staff. Even in its initial stages, ABI would likely need a bookkeeper and/or a clerk, a receptionist, and an information technology manager¹²⁶. Ideally, a staff member should also be responsible for publicity and marketing.

REGIONAL MODEL

The primary objective behind this model is to allow ABI to be more in touch with the regional nuances of public disputes involving Aboriginal groups. Although there are several overriding similarities, issues concerning Aboriginals also differ markedly across Canada, due to differences in histories, treaty arrangements, economic realities, natural resources, and provincial or territorial governments. Therefore, Aboriginal disputes often share regional rather than national characteristics.

Instead of being based in one office, ABI could ultimately have up to five offices – one in each of Canada's major regions: the Maritimes, Central Canada, the Prairies, Western Canada, and Northern Canada. As in the centralized model, a single Board of Directors would oversee ABI in the regional model, but each office would probably require its own advisory council to assist it in working with local issues. Also, in the regional model, the national Board of Directors would need to include representatives of each regional advisory council. The national governing board would have the same responsibilities as described above, but it would also be responsible for allocating funds between ABI's regional offices.

Each office would require its own management, administrative, and project staff, and the responsibilities of each of these positions would mirror those described in the centralized model. In addition, at least one staff member in each office would be a liaison with other ABI offices. Although there would be fewer staff in each regional office than

¹²⁶ With later growth, information technology might become a separate department.

there would be in a centralized office, clearly the total number of staff would be greater, and the regional model would have higher operating costs than the centralized model.

The regional model would assist the work of ABI's dispute resolution practitioners and its researchers. If ABI had in-house practitioners¹²⁷, then the regional model would allow those practitioners to be more accessible to local disputants than the centralized model, and practitioners would be able to travel to all parts of Canada at lower costs. Thus, practitioners would probably have more opportunities to develop a rapport with the disputants. This might be particularly important in cases in which the practitioner needs to earn the disputants' trust to be effective. Additionally, practitioners based in the region would probably be more attuned to local culture, and be able to adapt dispute resolution techniques more readily than practitioners from outside the region. The regional model would allow ABI researchers to tailor their research and documentation programs to regional needs and resources. For example, a B.C. office might specialize in research on the use of dispute resolution in the areas of Aboriginal taxation, comprehensive claims, and forestry. The regional model would also enhance the capacity of ABI practitioners and researchers to specialize in applying dispute resolution techniques to local political institutions and structures.

The regional model would have to make arrangements to ensure that ABI remained a cohesive organization, and that each office's staff would have opportunities to share its research, experiences and insights with the others. The existence of a shared national board alone would not provide enough opportunities for integration and institutional learning that this model should ideally offer. While an inter-regional liaison in each office would facilitate some information exchange, the regional model would probably require an annual national conference or retreat in a different region each year. This would provide an opportunity not only for staff from different offices to present their major projects to each other, but it would also allow them to build relationships with each other so that ongoing contact throughout the rest of the year would be more natural.

Depending on the funding available, the regional model might either hinder or assist any coordination with other organizations that ABI might undertake. If funding were too limited, ABI staff might find it too difficult to coordinate with each other and with other organizations. However, if funding were readily available for adequate staff and resources, the establishment of ABI offices in various regions could enhance ABI's coordinating capacity; ABI could use its own internal network to strengthen coordination between other organizations across Canada that would otherwise have few means or opportunities to interact with each other.

Initial financial requirements

The plan for any new initiative is incomplete without an analysis of its financial requirements. ABI would probably be able to charge for some of its services in its first

¹²⁷ The regional model also allows for the roster system. Though it might be less necessary in the regional model, the roster system would still have some advantages, such as lower cost.

year, such as training, but most of its initial expenses would need to be covered by grants. Since fundraising would have to be one of the first steps in establishing ABI, the fundraisers would require an idea as to the amount they need to raise. At this level of analysis, with variables such as office location as yet undecided, it is impossible to provide a precise prediction of ABI's costs of startup and operation. Such an analysis would have to be conducted at a later stage in the startup process. Nevertheless it is possible to provide a rough estimate of these costs, based on certain assumptions.

The following estimate is based on the assumption that, in its startup phase, ABI would employ an Executive Director, two program staff people, one administrative staff person, and a part-time controller. The figures, which are in Canadian dollars, are necessarily approximate, but they are based on the costs of comparable organizations in the United States and Canada¹²⁸.

Table 5.1 Estimated costs for ABI's first year of operation (Canadian dollars)

Startup Costs	Office Furniture	\$10,000
	Computers (4)	\$8,000
	Ethernet connection	\$10,000
	Telephone connection	\$2,000
	Startup Legal Fees	\$10,000
	Subtotal	\$40,000
Salaries and Benefits (per annum)	Executive Director (1)	\$110,000
	Program Staff (2)	\$140,000
	Controller/Bookkeeper (part-time)	\$35,000
	Administrative Support Staff (1)	\$35,000
	Subtotal	\$320,000
General Operating Costs (per annum)	Insurance	\$10,000
	Rent (including heat, AC, maintenance)	\$15,500
	Rent for training space (periodic)	\$2,500
	Telephone and email charges	\$24,000
	Office supplies and expenses	\$36,000
	Brochures and advertising	\$20,000
	External consultant fees	\$20,000
	Legal and Audit fees	\$8,000
	Travel	\$24,000
	Miscellaneous	\$5,000
	Subtotal	\$165,000
Total	\$525,000	

Most of the figures presented are self-explanatory. The figure for rent is based on an estimated cost of \$15 per square foot, for 1,000 square feet, plus tax. Rental rates may range between approximately \$13 and \$22 per square foot. The figure for rental of

¹²⁸ Estimates for these figures were based on discussions with staff members at the Indian Taxation Advisory Board in Kamloops, B.C.; the Jewish Federation of Greater Toronto in Toronto, Ontario; and the Consensus Building Institute in Cambridge, Massachusetts.

training space presumes five trainings (or other functions) per year, at \$500 per event. In its first year, ABI might hold fewer than five trainings, but it might start instead with a retreat or conference, as described above. The figure for travel expenses is based on an estimated allocation of \$2,000 per month. In its first year of operation, the staff might have to undertake a considerable amount of travel, in order to publicize ABI's activities and approach.

Therefore, the costs of setup and the first year of operation are estimated conservatively to be approximately \$525,000. Clearly, if ABI expanded in later years, employed additional staff, moved to a different office, and opened regional offices, these costs would increase. However, later costs would be offset, at least in part, by fees ABI would charge for service.

* * *

A successful and effective nonprofit organization requires governance and management structures that are tailored to allow the organization to meet its objectives. This chapter has presented a vision of a Board of Directors that serves as a rich source of expertise to guide ABI's operations, and that functions to ensure its accountability and credibility. It has also provided two possible models for ABI's management and staffing structures: a centralized model that is likely to be more practical in ABI's earlier phases of operation, and a regional model that would allow ABI to reach a broader clientele and address the regional nuances of Aboriginal disputes more effectively, once it has established its reputation and become more financially secure. Finally, in order to begin to outline the scope of the task facing ABI's founders, it presented a preliminary estimate of ABI's initial financial requirements.

Conclusion: Meeting the Challenges

A glance at the often turbulent history of the relations between Aboriginal and non-Aboriginal Canadians could lead to the conclusion that ongoing tension and conflict is inevitable. Repeated failures to resolve pressing problems, like the consequences of not implementing the Northern Flood Agreement, might seem to indicate that further efforts to resolve such conflicts are futile. However, most of the people I interviewed thought otherwise. Many had witnessed or been party to situations that were ultimately, sometimes painstakingly, resolved. There is no magic formula for resolving Aboriginal disputes. It requires resolve and commitment, as well as the patience to overcome cultural barriers and to develop trust, and the willingness to try new approaches where previous attempts have failed.

However, the success of such efforts relies not only on the personal traits of the individual parties to the disputes. The parties also require adequate resources and support to allow them to negotiate more effectively. This thesis has presented a design for an organization to provide that support where it is too often missing. In implementing this design, ABI's founders and staff are likely to encounter challenges. ABI would be a new player in a complex political landscape replete with diverse interests and perspectives relating to Aboriginal disputes and their resolution. While its work is likely to be welcomed by some, it would likely be greeted with skepticism by others, and it would possibly even be opposed by yet others. In particular, those involved in establishing and managing ABI should expect at least four types of challenges: potential opposition from other dispute resolution service providers who fear that their turf is being threatened; lack of support, or even opposition, by those whose ideology or general conception of the structure of the relations between the parties is challenged; lack of support from those who are highly skeptical of the benefits of a conciliatory approach; and general wariness as a result of the difficulties of the B.C. Treaty process. Such challenges are surmountable.

Other dispute resolution service providers might see ABI as a competitor, and thus oppose its creation. While opposition by a few individual practitioners is unlikely to present much of a challenge to ABI, public opposition or criticism by major organizations like the ICC, the B.C. Treaty Commission, or the Network could harm ABI's reputation and its ability to perform its work. It is therefore important that ABI's founders are careful to avoid such challenges. Thus, during ABI's startup phase, its founding Board and Executive Director should reach out to those other organizations. It should be made clear that, in terms of the types of services to be provided, the types of disputes to be addressed, and/or the region of operation, ABI is being established to fill gaps that are currently unfulfilled by other bodies. Thus, ABI's founders should seek and encourage input from members of other organizations to reassure them that ABI is not being established to compete with their work.

A body like ABI, that promotes the use of consensus building amongst diverse stakeholder groups, sometimes in unconventional contexts, might challenge some people's ideologies or conceptions of the structure of relations between certain actors.

For instance, within government there are often certain understandings of the limits to participation by external actors, and of the rights of government to exercise authority over certain areas, such as policy decisions¹²⁹. Similarly, many First Nations are wary even of the term “stakeholder” in the context of certain decision-making processes, because they see themselves as engaged in government-to-government negotiations, and thus more than just stakeholders¹³⁰. In either of these cases, if ABI is seen to be trying to open up decision-making to parties that are not considered by others to have legitimate standing, it is likely to encounter resistance. This is something about which ABI’s staff should simply be aware as they make recommendations or statements about particular cases. In each set of circumstances they would need to decide whether to challenge existing ideas about standing, and if so, how to justify their recommendations and build support for them amongst the various parties involved.

There are individuals and groups in Canada who believe that the only way to achieve their aims is through confrontation. This sentiment is particularly prevalent amongst Aboriginals who believe that otherwise government and other non-Aboriginal institutions will ignore their concerns. Indeed, one Aboriginal interviewee stated that “the only thing that gets any action is confrontation”¹³¹. Such individuals and groups are not likely to oppose the establishment of ABI, but would be skeptical of its benefit. Moreover, they might suspect that any effort to promote more conciliatory approaches would immediately benefit government and other non-Aboriginal institutions, which they perceive to be comfortable with the *status quo*. Thus, if ABI is to be successful, its members and staff would need to address the concerns inherent in this sentiment. In particular, they would need to demonstrate firstly a recognition of the conditions under which conciliatory approaches are suitable, and those under which other approaches are likely to be more appropriate. Secondly, they would need to demonstrate how, under certain circumstances, consensus building can benefit even those who are in a relatively weak position¹³².

Finally, the experience of the B.C. Treaty process has caused wariness amongst some people as to the benefits of negotiation in the Aboriginal context in Canada. This process is seen by many to have been overly time-consuming and costly, with as yet few tangible results. ABI’s founders and staff would need to be able to demonstrate how ABI’s work would differ from, or improve upon, the ways that process has been handled. ABI might well benefit from directing some of its research to the B.C. Treaty process, the ways in which it could be handled better, and the lessons that emerge from it.

Despite these challenges, ABI and its work are likely to find considerable support amongst those who stand to benefit from improved mechanisms to handle Aboriginal disputes, as well as amongst those who advocate and work for Aboriginal development. It

¹²⁹ Tom Saunders. Personal communication. February 6, 2002.

¹³⁰ Gordon Hannon. Personal communication. February 7, 2002.

¹³¹ Phil Monture. Personal communication. January 31, 2002.

¹³² This issue has been explored in other works and subject areas. See, for example, Susskind, L. and Cruikshank, J. *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*. New York: Basic Books. 1987.

would be the responsibility of ABI's founders to campaign actively and build support amongst these groups. They should reach out to the federal and provincial governments, which currently invest considerable resources in Aboriginal disputes and their resolution, and whose interactions with First Nations are poised to become more complex throughout and after the process to establish Aboriginal self-government. Similarly, they should reach out to Aboriginal political organizations whose membership might include groups whose economic or social development is hindered by unresolved conflicts. They should reach out to groups representing industries whose operations are affected periodically by unresolved Aboriginal disputes. They should reach out to Aboriginal business associations and other organizations that promote Aboriginal commercial interests, or support development of Aboriginal capacity within the business sector. In certain circumstances, they should explore possibilities of partnering with these various groups for particular projects. Primarily, however, they should work simply to win these various groups' endorsement of ABI and its work.

This thesis has outlined an institutional design that aims high, with an ultimate vision of a national organization with regional offices that functions as a center of excellence in the provision of diverse dispute resolution services, and a model of cultural integration. However, it also allows for a modest, realistic start by outlining the initial steps for selecting Board and staff members, and by suggesting the types of activities and approaches that are more practical and advantageous for a startup organization. Like the resolution of disputes, the creation and development of ABI would require energy, commitment, patience, and inventiveness. The challenge has been presented. Now it must be grasped.

APPENDIX I

List of Interviewees

1. Richard Price: UVic Institute for Dispute Resolution, B.C.;
Facilitator and trainer
Interview date: January 2, 2002
2. Israel Ludwig: Lawyer representing Aboriginals in residential school
claims, Manitoba
Interview date: January 3, 2002
3. Gary Youngman: UVic Institute for Dispute Resolution, B.C.;
Mediator and trainer. [Aboriginal]
Interview date: January 7, 2002
4. Ward LaForme: Formerly with the Indian Commission of Ontario (ICO);
Mediator. [Aboriginal]
Interview date: January 10, 2002
5. Peter Colenbrander: B.C. Treaty Commission, B.C.;
Treaty process manager
Interview date: January 11, 2002
6. Joe Friday: Formerly with Dispute Resolution Services, Federal
Ministry of Justice; Ontario;
Lawyer
Interview date: January 15, 2002
7. Rod McLeod: Lawyer and negotiator, Manitoba. [Aboriginal]
Interview date: January 15, 2002
8. Ralph Brandt: Indian Claims Commission, Ontario;
Director of Mediation; Mediator. [Aboriginal]
Interview date: January 17, 2002
9. Michael Coyle: Former director of the ICO, Ontario;
Mediator.
Interview date: January 23, 2002
10. Gordon Sloane: Mediator and trainer, B.C.;
Interview date: January 29, 2002
11. Phil Monture: Six Nation Reserve, Ontario;
Specialist in land claims. [Aboriginal]
Interview date: January 31, 2002

12. David Mackey: Formerly with the ICO, Ontario;
Mediator
Interview date: February 1 2002
13. Tom Saunders Federal Department of Justice, Ontario;
Senior Council in Aboriginal Law.
Interview date: February 6, 2002
14. Gordon Hannon: Manitoba Department of Justice, Manitoba;
Lawyer
Interview date: February 7, 2002
15. Michael Blackstock: B.C. Ministry of Forests, B.C.;
Registered professional forester.
Interview date: February 13, 2002
16. Anne-Marie Robinson: Federal Department of Litigation, Indian Claims
Director of Policy and Research. [Aboriginal]
Interview date: February 15, 2002
17. Randy Chan: Tolko Industries, Ltd., B.C.;
Registered professional forester.
Interview date: February 20, 2002
18. Chris Knight: Formerly with The Network, B.C.;
Mediator
Interview date: February 21, 2002
19. Alan Pratt: Lawyer on Aboriginal land claims, Ontario.
Interview date: February 27, 2002
20. Bill Pentney: Federal Ministry of Justice, Ontario;
Deputy Head, Aboriginal Affairs.
Interview date: March 1, 2002

APPENDIX II

This protocol formed the basis of all interviews. Depending on the way that interviewees responded, sometimes additional questions were added spontaneously, or, if they appeared redundant or irrelevant, certain questions were left out. The protocol evolved slightly over time, as I realized that certain questions would be answered more comprehensively if phrased differently. However this protocol represents the substance of almost all interviews.

Interview Protocol

1. Please *briefly* describe your background in mediation and negotiation within the context of Aboriginal/non-Aboriginal relations. (i.e. What sort of cases have you worked on? What was your role?)
2. What do you see as the major areas of need in terms of methods to resolve Aboriginal/non-Aboriginal or Aboriginal/Aboriginal conflicts? (could relate to types of negotiation, geographic area, types of services needed [forum, training, more mediators, more fact-finders, etc.])
3. From your experience, in what ways does mediation, as it is currently applied to the context of Aboriginal/non-Aboriginal relations or Aboriginal affairs, fall short of its goals and of the needs and hopes of the parties involved?
4. If a private, non-profit organization existed to deal specifically with Aboriginal/non-Aboriginal or internal aboriginal disputes, what kind of support could it provide that would be most useful to your work **and/or** to other efforts to improve the way disputes are handled in the Aboriginal context?
5. [*In later interviews, the following question was added*] Comments on “working sketch” (attached pages).
6. What types of people do you think should sit on the Board of this organization in order to provide it with a high level and balanced variety of expertise, and to provide it with the credibility it will need to succeed in its work?
7. What other advice would you give about how this organization could build credibility amongst all relevant stakeholders? (Different Aboriginal groups, government, industry, non-Aboriginal citizens)
8. What do you think would be the biggest challenges in setting up this organization, and how should they be dealt with?
9. If this organization wanted to affiliate itself with other bodies, which do you think might be important ones to consider?
10. Can you recommend anybody else that you think I should contact about this?

APPENDIX II (Cont.)

Preliminary working sketch of organization

Types of Disputes:

The organization would deal with most types of disputes that arise either between Aboriginal and non-Aboriginal interests, or within Aboriginal communities. For example, it could deal with disputes over taxation, use and/or management of natural resources, provision of social services, infrastructure development, and possibly comprehensive claim negotiations (or, at least, some of the sidebar negotiations). One of the likely exceptions would be specific claim negotiations, as there are some other mechanisms in place to deal with these, and the current claims process is considered to be particularly ineffective at producing satisfactory outcomes.

The organization would likely specialize in multi-party negotiations, particularly at the local or regional level. Any given dispute might include various Aboriginal stakeholders, government representatives from the federal, provincial and/or municipal level, industry representatives, and stakeholders from non-Aboriginal communities that are affected by the dispute.

Services offered:

- Conflict Assessment (Preliminary research and report to identify options for handling the conflict and to recommend the most appropriate one, including whether the use of a third party neutral is likely to be helpful).
- Third Party Neutrals:

Ideally, would include practitioners of Aboriginal and non-Aboriginal background. However, the practitioner's reputation (amongst all key stakeholders) for impartiality, fairness, and effectiveness would be most important.

Scenario A: full-time in-house mediators/facilitators that are sent to particular dispute around the country

Scenario B: the organization would have a roster of mediators/facilitators that work on a contractual basis. These practitioners might live in different parts of the country and also work in other jobs. To be placed on the roster, the practitioner would be interviewed by the organization and subjected to other evaluation of his/her abilities. Clients would contact the organization for its services, and the organization would assign the practitioner considered most appropriate for the job.

Beyond mediation or facilitation, the role of the third party might also include (but not be limited to):

- Coordination of joint fact-finding efforts (regarding clarification of historical, scientific, technical or other disputed matters)
- Where considered appropriate and likely to be helpful, coordination of opportunities for Aboriginal and non-Aboriginal community members to meet/socialize/discuss matters of shared concern.
- Negotiation and mediation skills training
- Research:
 - Experimentation with adapting/transforming consensus-building models to specific Aboriginal cultural context (i.e. dealing with consultation of elders etc.)
 - Development of archive of cases of interest-based negotiations, documenting and analyzing possible factors in their success/failure
 - Writing of policy papers documenting best practices in interest-based negotiations

APPENDIX III

Recommended Mission Statement

The mission of the Agreement Building Initiative is to be a Canadian centre of excellence in the provision and promotion of consensus building services, to prevent and resolve public disputes amongst Aboriginal groups, and between First Nations and federal, provincial, and/or municipal governmental bodies, private stakeholders, and/or commercial interests. It will maintain its role as an impartial guardian of good process to assist parties to reach agreements that are fair, efficient, stable and wise. To this end, ABI will:

- Provide (access to) professional, impartial consensus building services including, but not limited to: conflict assessment, facilitation, and mediation;
- Work to build capacity to resolve and prevent conflicts amongst Aboriginal groups, federal, provincial and municipal government, and private stakeholders, through training in mediation, mutual-gains negotiation, and other methods of conflict resolution;
- Ensure that consensus building techniques are culturally relevant and appropriate to the Aboriginal context through use of Aboriginal consensus models, and through additional research and innovation;
- Publish and distribute research and analysis of dispute resolution efforts in, and policies and options for, the Aboriginal context in Canada;
- Work to develop Best Practice Guidelines for the use of consensus building in the Aboriginal context in Canada;
- Work with other dispute resolution professionals to make consensus building services for the Aboriginal context more accessible throughout Canada;
- Demonstrate the social, political, and economic benefits of consensus building in the Aboriginal context in Canada.

APPENDIX IV

Sample “Expertise Matrix”

	Board member 1	Board member 2	Board member 3	Board member 4	Board member 5
Legal Expertise		X			
Finance Expertise	X				
Public Relations			X		
First Nations Experience		X	X	X	
Government Experience		X		X	X
Industry Experience	X				X
ADR Expertise				X	X

(Based on Wolf, T. *Managing a Nonprofit Organization*. New York: Prentice Hall Press. 1990. p. 44)

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Personal Communications

Michael Blackstock, *February 13, 2002*

Ralph Brandt, *January 17, 2002*

Randy Chan, *February 20, 2002*

Peter Colenbrander, *January 11, 2002*

Michael Coyle, *January 23, 2002*

Jane Faulkner (Family Mediation Canada). *May 13, 2002*

Joe Friday, *January 15, 2002*

Gordon Hannon, *February 7, 2002*

Brian Jackson, *December, 2001*

Chris Knight, *February 21, 2002*

Ward LaForme, *January 10, 2002*

Israel Ludwig, *January 3, 2002*

David Mackey, *February 1 2002*

Rod McLeod, *January 15, 2002*

Phil Monture, *January 31, 2002*

Bill Pentney, *March 1, 2002*

Alan Pratt, *February 27, 2002*

Richard Price, *January 2, 2002*

Anne-Marie Robinson, *February 15, 2002*

Tom Saunders, *February 6, 2002*

Ken Skopic (ITAB). *Ongoing.*

Gordon Sloane, *January 29, 2002*

Gary Youngman, *January 7, 2002*

David Zion (Jewish Federation of Greater Toronto). *Ongoing.*