

the Interior's Office of the Solicitor made public its legal opinions on a range of issues affecting Native Americans, but also these are now widely available online.<sup>63</sup>

## Call to Action

- 51) We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.

One of the aspects of the Doctrine of Discovery that continues to assert itself to this day is the fact that court cases involving Aboriginal territorial claims have placed a heavy onus on Aboriginal claimants to prove that they were in occupation of land since first contact and that the rights claimed over the territory continued from then to the present. The Commission believes that there is good reason to question this requirement, particularly in view of the fact that much of the record upon which courts rely is documentary proof or oral testimony from acknowledged Elder experts. History shows that for many years after Confederation, Aboriginal claimants were precluded from accessing legal advice or the courts in order to assert their claims, and that many of their best Elder experts have passed on without having had an opportunity to record their evidence.

The Commission believes that it is manifestly unfair for Aboriginal claimants to be held to the requisite standard of proof throughout legal proceedings. However, it is reasonable to require that an Aboriginal claimant establish occupation of specified territory at the requisite period of time. That could be at the time of contact or at the time of Crown assertion of sovereignty. It is our view that once occupation has been proven, then the onus should shift to the other party to show that the claim no longer exists, either through extinguishment, surrender, or some other valid legal means.<sup>64</sup> Therefore, we conclude that Aboriginal claims of title and rights should be accepted on assertion, with the burden of proof placed on those who object to such claims.

## Call to Action

- 52) We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:
- i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.
  - ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.