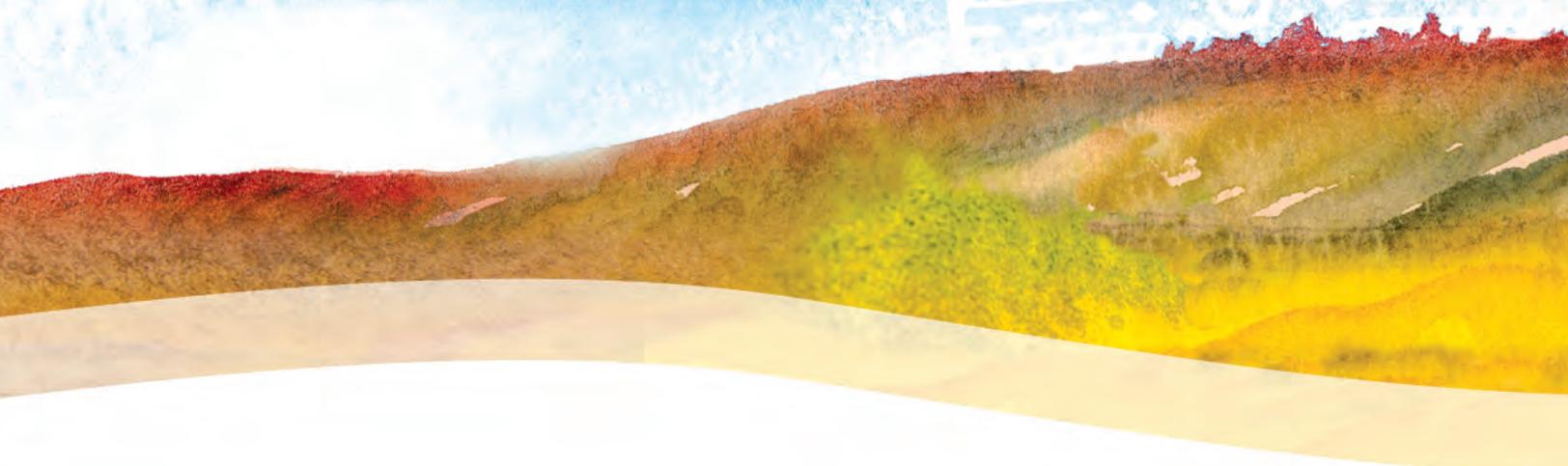


2019 Specific Claims Reform

*Historical Review of Past Calls for an Independent
Specific Claims Process*



BACKGROUNDERS: The Evolution of the Specific Claims Process
Prepared for the AFN Joint Technical Working Group



2019 Specific Claims Reform

Historical Review of Past Calls for an Independent Specific Claims Process

Robert Winogron
Jeremy Bouchard
John J. Wilson
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0176
Fax: 613-788-3559
robert.winogron@gowlingwlg.com
jeremy.bouchard@gowlingwlg.com
john.j.wilson@gowlingwlg.com



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Introduction

The Joint Technical Working Group

In 2017, the Assembly of First Nations (“AFN”) and Canada formed a Joint Technical Working Group on the Specific Claims Policy (“JTWG”). The JTWG was tasked with reviewing and recommending changes to the current policy to better reflect, inter alia, the Calls to Action set out in the Final Report of the Truth and Reconciliation Commission of Canada, Canada’s endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, and the government’s stated commitment to Nation-to-Nation relationships with Canada’s Indigenous peoples.

In the summer of 2018, the JTWG will engage in a series of discussions in First Nation communities across Canada, with the goal of gathering important community feedback about how the Specific Claims process can best be reformed.

Scope and Purpose of this Document

This document provides an historical overview of previous claims models and processes, from the 1983 Penner Report to the present. It is an intentionally abbreviated summary, intended to be a reference tool for those engaging in discussions with the JTWG. Its purpose is to provide participants with the background knowledge necessary to facilitate, but not pre-empt conversations about what a modern and reformed Specific Claims process may look like.

The document contains a set of chronological entries for each previous claim proposal or process, concluding with a Master Table juxtaposing all entries for quick comparison.

The authors, together with the JTWG, acknowledge that the vast regional differences across First Nations communities will, of necessity, lead to different views on what would constitute a just, fair, and modern Specific Claims process and policy. The JTWG is committed to hearing and considering those different views when it ultimately tables its recommendations.



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1. Indian Self-Government in Canada (the Penner Report), 1983¹

Report of the Special Committee | October 20, 1983

Mandate of the Special Committee

In 1983, The Standing Committee on Indian Affairs and Northern Development was given a broad mandate to develop legislative and administrative proposals that address the social, economic, demographic, administrative, legal and political circumstances of First Nations. As part of its inquiry on Lands and Resources, the Special Committee heard from witnesses on the need for a reformed policy to resolve outstanding land claims.

Proposal: Negotiations for an Independent Administrative Body

Structure: *The Penner Report proposed a jointly-developed model of claims resolution through bilateral negotiations between Canada and First Nations. The new process would run independently of political intervention and a neutral third party would facilitate negotiations between the Crown and First Nation.² A quasi-judicial process could be accessed where settlements are not reached.³*

Jurisdiction: *The Body would recognize all pre- and post-Confederation treaties and rights.⁴ Settlement agreements would be limited to matters negotiated and, importantly, would not seek to extinguish rights⁵*

Implementation: *the Body would be entrenched in law. Adequate funding should be made available to First Nations to pursue the resolution of claims.⁶*

“ KEY PASSAGES ”

Many witness objected to the fact that land claims policy and procedures are defined by government decision rather than by legislation. They pointed to the conflict of interest inherent in departmental control of a process set up to decide upon the rights and entitlement of bands whose claims arise from the actions or inaction of the same Department...When a claim is rejected, no substantiation is given.⁷

”

¹ In its Final Report 1991-2009, the Indian Specific Claims Commission summarizes the history of the specific claims in Canada starting in 1946 through the creation of the federal Office of Native Claims in 1974 and policy Outstanding Business in 1982. It is this policy and process that is the subject of criticism by the Penner Report :A Unique Contribution to the Resolution of First Nations Specific Claims in Canada, Indian Specific Claims Commission, Final Report 1991-2009, Ottawa, Minister of Public Works and Government Services Canada, 2009,(ISCC Final Report) pp. 5-9

² Report of the Special Committee, Indian Self-Government in Canada, 116.

³ Ibid, 115.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid, 114.oncepts. All are available here: <https://www.afn.ca/resolutions/>



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2. The Specific Claims Joint Working Group Report, 1993⁸

Assembly of First Nations | July 26, 1993

Specific Claims Joint Working Group Mandate

In 1991, the Joint Working Group on Claims (“JWG”) was established to review the existing specific claim policy and develop recommended changes. The JWG was comprised of both political representatives and technical advisors from the eight AFN Regions, and officials from the Department of Indian Affairs and Northern Development and Justice Canada. The recommendations were developed by the JWG with the assistance of an independent facilitator and presented to the Chief’s Assembly in July 1993.⁹

Proposal: The Independent Claims Body & Independent Assessment Panel

Structure: The JWG proposed that an Independent Claims Process be established with dedicated members, staff and funding. The members would be appointed by the Federal Government and the AFN for a term of five years. The Claims Process would involve both an Independent Claims Body responsible for overseeing and encouraging negotiations (“the ICB”) and an Independent Assessment Panel responsible for determining whether negotiation of a claim should commence (“the IAP”).¹⁰

Jurisdiction: The First Nation claimant would have the option of submitting the claim to the ICB. The ICB would establish the IAP to assess whether the claim should proceed to negotiations.¹¹ If a claim submitted directly to the Federal Government is rejected, the First Nation could appeal the decision with the ICB.¹² Once a claim is under negotiation, the ICB would

monitor and assist negotiations, or facilitate mediation or binding arbitration.¹³ The Federal Government and First Nation claimant would have obligations to share all relevant historical and factual documents during this process.¹⁴ Where negotiations fail, the IAP could make a non-binding recommendation.¹⁵ Where negotiations are successful, the ICB would monitor and report on the implementation of the settlement agreements.¹⁶

“

KEY PASSAGES

The objective of the Independent Claims Process...is to settle claims brought by First Nation claimants, against the Federal Government and, in some cases, provincial and territorial governments...The process must include ongoing impartial and independent assistance and review. The settlements reached should be clearly understood, final with respect to the issues resolved, fair and just, satisfactory to the parties, and capable of being implemented effectively.¹⁷

The independent claims process...should be implemented through the signing of an agreement by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.¹⁸

”

⁸ Following the Penner Report, in the summer of 1990, the confrontation at Oka/Kahnstake Quebec prompted a renewed examination of reform. In August of 1990 the Assembly of First Nations delivered its Critique of Federal Government Land Claims Policies, describing the policy as “useless for resolving a large number of claims”, Ottawa, AFN, August 21, 1990 [unpublished]. The Final Report of the Indian Specific Claims Commission further details events giving rise to its creation under the Inquiries Act as an interim measure: ISCC Final Report, pp. 10-12

⁹ Assembly of First Nations, The Specific Claims Joint Working Group, Executive Summary, July 26, 1993, 2.

¹⁰ Ibid, 5.

¹¹ Ibid, 8.

¹² Ibid, 9.

¹³ Ibid, 10.

¹⁴ Ibid, 17 & 18.

¹⁵ Ibid, 11.

¹⁶ Ibid, 12.

¹⁷ Ibid, 3.

¹⁸ Ibid, 25.



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3. Report of the Royal Commission on Aboriginal Peoples, 1996

Royal Commission on Aboriginal Peoples | October 1996

RCAP Mandate

The Royal Commission on Aboriginal Peoples (“RCAP”) was broadly tasked with investigating Canada’s relationship with Indigenous peoples and proposing new approaches to support reconciliation. Volume 2 of the Report, “Restructuring the Relationship” addressed “less sweeping” issues and disputes that could be entrusted to an open and independent administrative body.¹⁹

Proposal: The Aboriginal Lands and Treaties Tribunal

Structure: RCAP proposed a single, nation-wide tribunal with internal devolution that provides for specific matters through specialized panels.²⁰ The tribunal would also include a registry office to file documents and a library containing the research of panels and their respective decisions.²¹ The Tribunal Executive would be comprised of regional representatives supported by research and legal staff.²² RCAP further specified that the Tribunal Members should include Aboriginal nominees, be representative of all regions in Canada, and appointed through a transparent process.²³

Jurisdiction: RCAP proposed that the Tribunal’s jurisdiction would run concurrently with that of the superior courts of the provinces.²⁴ The Tribunal would possess powers to monitor the bargaining process between Canada and First Nations, as well as powers to issue binding decisions on substantive issues where no settlement is reached.²⁵ The Tribunal’s jurisdiction would not extend to either the reallocation of lands or resources or the implementation of self-government agreements.²⁶

Implementation: The Federal Government would enact “companion legislation” to the Royal Proclamation that provides for an independent tribunal to assist in the resolution of specific claims.²⁷ Provincial participation would be encouraged via a “sign on” mechanism, but not vital to the Tribunals existence.²⁸

“ KEY PASSAGES ”

Experience clearly indicates that without an enforcement mechanism, it is all too likely that disputes will continue to be protracted as a result of the reluctance of the federal or provincial governments to come to the bargaining table or, when there, to attempt in good faith to reach a speedy and just resolution of the issues. It seems equally clear that a body with the power only to make recommendations is of limited value in effecting settlements.²⁹

”

¹⁹ Report of the Royal Commission on Aboriginal Peoples, October 1996, 566

²⁰ Ibid, 583.

²¹ Ibid, 583.

²² Ibid, 583.

²³ Ibid, 584 & 585.

²⁴ Ibid, 583.

²⁵ Ibid, 572.

²⁶ Ibid, 574 & 575.

²⁷ Ibid, at 567.

²⁸ Ibid, 579.

²⁹ Ibid, 567.



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4. Report of the Joint First Nations – Canada Task Force on Specific Claims Policy Reform, 1998

Assembly of First Nations & Specific Claims Branch, DIAND | November 25, 1998

Joint Task Force Mandate

As part of the Federal Government's "new partnership" promised with First Nations, the Joint Task Force ("JTF") was mandated to develop agreed upon recommendations concerning the major elements of a new specific claims process.³⁰ The JTF was a technical table, composed of regional First Nation representatives and officials from Indian and Northern Affairs Canada and the Department of Justice.³¹

Proposal: First Nations Specific Claims Commission & First Nations Specific Claims Tribunal

Structure: The JTF proposed the creation of two bodies. First, a Commission composed of a Chief Commissioner, a Vice Chief Commissioner and three to five other commissioners appointed for five years.³² First Nations would submit claims to the Commission.³³ Second, a Tribunal consisting of a Chief Adjudicator and Associate Chief Adjudicator along with other members with a view to regional representation.³⁴ Once the Tribunal received a claim, the Chief Commissioner would strike a panel to examine the issue.³⁵

Jurisdiction: The JTF proposed that the Commission would be responsible for ensuring good-faith negotiations through a variety of alternative dispute settlement ("ADR") mechanisms, including mediation and arbitration on narrow issues.³⁶

The Tribunal, in contrast, would be a quasi-judicial body of last resort that makes binding decisions on the claim validity, discreet legal issues, and damages.³⁷ Issues related to aboriginal title and rights were excluded from the proposal.³⁸

Implementation: The Federal Government would enact the proposed First Nations Specific Claims Resolutions Act. The process would be supported by a fiscal framework of budgeted settlement funds over the initial five year period.³⁹

“

KEY PASSAGES

The Commission will ensure a more level playing field for negotiations by providing for independent facilitation. It can draw upon an entire range of alternative dispute resolution techniques and mechanisms to assist the parties in reaching final settlements that will be satisfactory to both sides.

The Tribunal is an essential element in the proposed process. It is where independence ultimately resides, thereby eliminating any conflict of interest on the part of the Crown. Its presence is intended to provide incentive for the parties to conduct negotiations in good faith and reach timely settlement.⁴⁰

”

Endnote

Unlike the 1991 Joint Working Group on Claims, the Joint Task Force submission – at the insistence of the federal government – excludes outstanding lawful obligations and grievances related to aboriginal title and rights, thus maintaining the distinction between specific and comprehensive claims.

The Final Report of the Indian Specific Claims Commission traces the history of failed legislative attempts at reform starting with Bill C-60, An Act to establish the Canadian Centre for the Independent Resolution of Specific Claims. This Bill died on the Order Paper when Parliament was prorogued in September 2002. The model of Bill C-60 (introducing a financial cap) was amended slightly and introduced in Bill C-6, The Specific Claims Resolution Act in the fall of 2002. This Bill received Royal Assent in 2003 but was flatly rejected by First Nations and never proclaimed into force by the government.⁴¹

³⁰ The Assembly of First Nations & Specific Claims Branch, DIAND, Report of the Joint First Nations – Canada Task Force on Specific Claims Policy Reform, November 25, 1998, 7 & 9.

³¹ Ibid, 7.

³² Ibid, 7.

³³ Ibid, 10.

³⁴ Ibid, 20.

³⁵ Ibid, 24.

³⁶ Ibid, 8.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid, 11.

⁴⁰ Ibid, 8.

⁴¹ ISCC Final Report, pp. 13-14



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5. Negotiation or Confrontation: It's Canada's Choice, 2006

Standing Senate Committee on Aboriginal Peoples – Special Study on the Federal Specific Claims Process | December 2006

Mandate of the Special Study on the Federal Specific Claims Process

In May 2006, the Senate Committee was directed to examine and report on the Federal government's specific claims process. The Senate Committee conducted its review in light of the "recent" events at Caledonia, Ontario and previous incidents arising out of outstanding claims.⁴²

Proposal: Establishing an Independent Body within Two Years

Structure: *The Senate Committee Report establishes only a general outline of an Independent Body. The Body would be developed in partnership with First Nations in a sufficiently resourced joint process. The Senate Report further proposed that the Body should be capable of reaching settlement agreements within five years of a claim's submission.*⁴³

Implementation: *The Senate Report proposed that the Federal Government first repeal the Specific Claims Resolution Act. In conjunction with the new Independent Body, the Senate Report further called on the Federal government to increase settlement funds, provide additional resources to the existing process, and adopt new guiding principles, including fairness, inclusion, dialogue and recognition of regional differences.*⁴⁴

KEY PASSAGES

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*The claimants' primary concern with the Specific Claims policy is the apparent conflict of interest wherein the Government of Canada is both the causer and the 'resolver'. Witnesses speaking on behalf of the claimant First Nations felt the process is not fair, independent, or impartial. They cited this as one of the main reasons it is so slow and ineffective. The legal practitioners and academics who appeared pointed to conflict of interest as the primary reason for reform...*⁴⁵

*The independent claims process...should be implemented through the signing of an agreement by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.*⁴⁶

”

⁴² Final Report of the Standing Senate Committee on Aboriginal Peoples, Special Study on the Federal Specific Claims Process, Negotiation or Confrontation: It's Canada's Choice, December 2006, 6.

⁴³ Ibid, 38.

⁴⁴ Ibid, 37, 38 & 39.

⁴⁵ Ibid, 11 & 12.

⁴⁶ Ibid, 19.



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6. Justice at Last: A Specific Claims Action Plan, 2007

Indian and Northern Affairs Canada | June 2007

Justice at Last Mandate

In June 2007, the Federal Government introduced an action plan to revise the specific claims process by creating the current Specific Claims Tribunal.

Proposal: The Specific Claims Tribunal

Structure: *Justice At Last* proposed the creation of an independent claims Tribunal capable of making binding decisions if negotiations fail.⁴⁷ The Tribunal was to be made up of retired or sitting judges who have the experience and credibility to examine historical facts and evidence.⁴⁸

Jurisdiction: *The Tribunal* would examine claims that (a) are not accepted for negotiations, (b) all parties agree to refer the claim to the Tribunal, and (c) after three years of unsuccessful negotiations.⁴⁹ The Tribunal can award up to \$150,000,000 in compensation,⁵⁰ and make decisions on validity and compensation. The Tribunal does not address claims concerning land or resources, punitive damages, cultural and spiritual losses, and other non-financial compensation.⁵¹

Implementation: *The Specific Claims Tribunal* was to be created by an Act of Parliament (*The Specific Claims Tribunal Act*). As part of the wider *Specific Claims Action Plan*, the Tribunal would be supported by “substantial and visible funding” arrangements, with specific triggers for authorized payments.⁵²

“

KEY PASSAGES

Recognizing that tinkering around the edges of the process is not enough, we are proposing major reforms that will fundamentally alter the way specific claims are handled. Our approach builds on the lessons learned from years of study and past consultations and responds to major concerns expressed by First Nations. The Specific Claims Action Plan will ensure impartiality and fairness, greater transparency, faster processing and better access to mediation. It is a critical first step in bringing the specific claims program into the 21st century to deal with the existing backlog once and for all.

”

⁴⁷ Indian and Northern Affairs Canada, *Specific Claims: Justice at Last*, 2006, 8.

⁴⁸ *Ibid.*, 9

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 9 & 10.

⁵¹ *Ibid.*, 9

⁵² *Ibid.*



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7. Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act, 2015

Dr. Benoit Pelletier, Minister's Special Representative Respecting the Tribunal's Five Year Review | September 29, 2015

Five-Year Review Mandate

The five-year review of the Tribunal's efficiency and effectiveness was conducted pursuant to section 41 of the Specific Claims Tribunal Act.⁵³ Dr. Pelletier attended meetings across the country and received representations from First Nations, First Nation organizations, and stakeholders.⁵⁴ The report identifies issues raised during the engagement process and outlines recommendations to fulfill the requirements of the Specific Claims Tribunal Act five year review.⁵⁵

Proposal: Status Quo

Structure: *There is no requirement for the Tribunal to have its own Registry to maintain its independence.⁵⁶ The Federal government should appoint the full complement of Members provided for in the Act, or increase the part-time Members.⁵⁷ A satellite Tribunal in Vancouver would serve the large proportion of claims originating in BC.⁵⁸ Using independent bodies to assess claims, oversee funding, and investigate rejected claims are unnecessary.⁵⁹*

Jurisdiction: *It is not recommended that Canada expand the Tribunal's mandate to include: (1) oversight over funding of specific claims;⁶⁰ (2) the pre-assessment of claims, but one for future consideration;⁶¹ (3) overseeing negotiation and mediation given the understaffed status of the Tribunal,⁶² or (4) compensation awards of more than \$150 million or the ability to acquire lands.⁶³*

Implementation: *Increase Tribunal Members and provide staffing support. First Nations and Canada should hold joint exploratory processes on items that may result in changes to the Act,⁶⁴ such as including the oversight of mediation or negotiations in the Tribunal's mandate.⁶⁵*

“

KEY PASSAGES

On the one hand, in light of everything I have heard and read throughout the consultation process, I do not believe that the Government of Canada has acted in bad faith from the adoption of the Justice At Last initiative to the present day. On the other hand, First Nations, First Nations organizations and different stakeholders unequivocally raised many serious concerns during the Five-Year Review that cannot be ignored. It is now the responsibility of the federal government and of First Nations and their representatives to address these concerns and issues in an effective manner, and within a spirit of reconciliation.⁶⁶

”

⁵³ Dr. Benoit Pelletier, Minister's Special Representative Respecting the Tribunal's Five Year Review, Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act, September 29, 2015, 3.

⁵⁴ Ibid, 3.

⁵⁵ Ibid.

⁵⁶ Ibid, 46 & 47

⁵⁷ Ibid, 49.

⁵⁸ Ibid, 51.

⁵⁹ Ibid, 79 - 81.

⁶⁰ Ibid, 27.

⁶¹ Ibid, 28.

⁶² Ibid, 29 & 32.

⁶³ Ibid, 34 & 35.

⁶⁴ Ibid, 5.

⁶⁵ Ibid, 90.

⁶⁶ Ibid, 88.



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8. Specific Claims Tribunal of Canada Submission, 2015

Hon. Harry Slade, Q.C., Chairperson, Specific Claims Tribunal Canada & Alisa Lombard, Legal Counsel, Specific Claims Tribunal Canada | 2015

Specific Claims Tribunal Submission Mandate

As part of Canada's five-year review of the Specific Claims Tribunal Act, Justice Harry Slade of the Specific Claims Tribunal made a submission outlining an expanded role for the Tribunal. The proposal included several options for consideration.

Proposal: Specific Claims Commission (Canadians Human Rights Commission Model) & Expanded Role for the Tribunal

Structure: Justice Slade proposed the creation of a Commission independent of the Minister of INAC and capable of managing the claim throughout its life.⁶⁷ The Specific Claims Branch would be given a new researching and analysis function and the Commission would facilitate information exchange and early settlement.⁶⁸ The existing Tribunal could also be expanded to fulfill additional needs that have arisen with time.

Jurisdiction: The existing Tribunal could have summary proceeding powers⁶⁹, or an early and non-binding judicial opinion based on the material presented in a summary trial.⁷⁰ The Tribunal could also provide disclosure orders to a Mediator to prevent settle privilege,⁷¹ and greater power to encourage or order mediation.⁷²

Implementation: Various amendments to the Specific Claims Tribunal Act and regulations. The Tribunal, much like the Superior Courts, should be supported by funding decisions that operate independent of the Minister.⁷³

“

KEY PASSAGES

As an extension of the executive branch of government with an adjudicative mandate, emphasizing independence and reconciliation, the Tribunal must adopt processes that adhere to principles of natural justice. The need is particularly acute as the mandate of the Tribunal is the adjudication of First Nations' claims which assert the failure of the Crown to meet its lawful obligations. The Tribunal's submissions are underpinned by these principles.⁷⁴

”

⁶⁷ Hon Harry Slade & Alisa Lombard, Specific Claims Tribunal Submission to Dr. Benoit Pelletier, Minister's Special Representative Respecting the Tribunal's Five Year Review, at para 15.

⁶⁸ Ibid, at para 15.

⁶⁹ Ibid, at para 19.

⁷⁰ Ibid, at para 29.

⁷¹ Ibid, at para 36.

⁷² Ibid, at paras 52 to 55.

⁷³ Ibid, at para 49.

⁷⁴ Ibid, at para 6.



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9. Specific Claims Review: Expert Based – Peoples Driven, 2015

Assembly of First Nations Independent Expert Panel Report | May 15, 2015

Specific Claims Review Mandate

The Assembly of First Nations established its own Expert Panel which ran concurrently with the Ministerial Special Representative's Five Year Review study of the Justice at Last initiative and the Specific Claims Tribunal.⁷⁵ The Expert Panel held hearings and received submissions from First Nations for the development of recommendations to improve the Specific Claims policy.⁷⁶

Proposal: Revitalizing and Expanding the Tribunal

Structure: *The Expert Panel proposed that the number of Tribunal Members should be increase to six full time judges⁷⁷ with adequate support staff.⁷⁸ The Tribunal should also have an independent Registry to serve the claims process.⁷⁹*

Jurisdiction: *The Tribunal should provide "Stage One" functions that include supervisory role over funding for claims research, negotiation and offer assessment.⁸⁰ The Tribunal would then also provide mediation services under Stage One (claim assessment) and Stage Two (adjudication) of the claims process.⁸¹ In place of the three-year lapse whereby a claim under negotiation is sent to the Tribunal, a claimant can take the claim to the Tribunal whenever there is an impasse during negotiations.⁸² The bifurcation of claims would be an option at the case management stage and not imposed by legislation.⁸³*

Implementation: *Amendments to the Specific Claims Tribunal Act, adequate funding, and the establishment of an ongoing joint discussion table composed of First Nations and Canada to assess and improve the claims process.⁸⁴*

“

KEY PASSAGES

First Nations have a favourable view of the independence and caliber of the judges who are serving on the Tribunal, and with its flexible and culturally sensitive rule system. First Nations, however, are concerned that Canada has taken steps that have impaired the administrative autonomy of the Tribunal leaving it understaffed in light of its existing and forthcoming case load.⁸⁵

As previous exercises have shown...a partnership relationship on the monitoring and oversight of the system is the proven, legitimate and effective path to ensuring a system is devised that justly and efficiently takes into account the interests of all parties, including their shared interests in the just an timely resolution of claims.⁸⁶

”

⁷⁵ Assembly of First Nations Independent Expert Panel Report, Specific Claims Review: Expert Based – People Driven, May 15, 2015, 5

⁷⁶ Ibid, 5.

⁷⁷ Ibid, 19

⁷⁸ Ibid, 24

⁷⁹ Ibid, 20

⁸⁰ Ibid, 11 & 12

⁸¹ Ibid, 13

⁸² Ibid, 15

⁸³ Ibid, 23

⁸⁴ Ibid, 6.

⁸⁵ Ibid, 10.

⁸⁶ Ibid, 25.



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10. Recommendations for AFN-Canada Joint Process on Specific Claims Policy and Reform, 2017⁸⁷

United Chiefs Council of Mniidoo Mnising (UCCMM) | May 15, 2017

Submission Mandate

Representatives of the United Chiefs Council of Mniidoo Mnising (“the UCCMM”) participated in a Dialogue Session as part of the AFN-Canada Joint Process on Specific Claims Policy and Reform on March 29, 2017. The UCCMM prepared a written submission following the Dialogue Session, which recommends a “complete overhaul” of Canada’s approach to the assessment and negotiation of specific claims.

Proposal: Extending the Specific Claims Tribunal Mandate

Structure: *At Stage One, the Claimant First Nation researchers work alongside INAC to determine the nature of the claim and relevant facts.⁸⁸ At Stage Two, the claimant First Nation has one calendar year to draft the specific claim. At Stage Three, the parties make written submission to an independent, arms-length body with expertise in specific claims. This body would assess claims⁸⁹ and recommend whether the parties should proceed to negotiation.⁹⁰ At Stage Four, the body would oversee the negotiation process with a particular emphasis on mediation and ADR assistance.⁹¹*

Jurisdiction: *The Specific Claims Tribunal mandate is expanded to oversee the above process.⁹² The Tribunal Members would guide the parties through an ADR process with the intention of improving the chances of successful negotiations.⁹³*

Implementation: *Various amendments to the Specific Claims Tribunal Act. INAC must develop a funding formula to provide consistent support for the research and development of specific claims.⁹⁴*

“

KEY PASSAGES

Although the objectives behind the [Justice at Last Policy] were noble and made in the spirit of collaboration with First Nations, it has become apparent that INAC’s role as gatekeeper and negotiator for specific claims results in a conflict of interest. It would be more appropriate for a third party such as the Tribunal to determine whether the Crown has an outstanding lawful obligation that should be negotiated.⁹⁵

”

⁸⁷ In the fall of 2016 the Office of the Auditor General (OAG) of Canada tabled its independent audit examining whether Indigenous and Northern Affairs Canada (INAC) adequately managed the resolution of First Nations specific claims. The OAG found that INAC did not adequately manage the resolution of First Nations specific claims and made a number of recommendations for improvement. In response, INAC agreed to work with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process: 2016 Fall Reports of the Auditor General of Canada, paragraphs 6.21-6.32. The AFN convened two regional dialogue sessions in 2017 (one east, one west) to engage directly with First Nations. The UCCMM delivered this submission to the eastern session in Ottawa.

⁸⁸ United Chiefs Council of Mniidoo Mnising, Recommendations for AFN-Canada Joint Process on Specific Claims Policy and Reform, May 15, 2017, 6.

⁸⁹ Ibid, 6.

⁹⁰ Ibid, 8.

⁹¹ Ibid, 6.

⁹² Ibid, 7.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid, 9.



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11. “On a Human Rights Foundation”: Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations’ Historical Losses, 2017⁹⁶

BC Specific Claims Working Group Submission to the AFN-INAC Joint Technical Working Group on Specific Claims | July 24, 2017

Working Group Mandate

The BC Specific Claims Working Group (“the Working Group”) is comprised of Indigenous leaders and technicians tasked with advocating and advancing specific claims policy on a national level. The Working Group developed its submission from (1) an online survey, (2) the AFN’s Western Dialing Session held in Vancouver 2017, and (3) previous reports, submissions, letters, and directions endorsed by the BC Nations.⁹⁷

Proposal: Independent Specific Claims Process & Strengthening the Specific Claims Tribunal

Structure: *The Specific Claims process should be removed from INAC’s mandate and placed with a new jointly-developed institutional structure based on a Nation-to-Nation framework. The independent process could be achieved by extending the Specific Claims Tribunal’s mandate or by creating a standalone body.⁹⁸ The Specific Claims Tribunal should establish regional Tribunals with specialized knowledge of the historical facts of the area.⁹⁹*

Jurisdiction: *All claims could be filed with the new body, providing independent claims assessment, mediation services, and binding decisions where appropriate.¹⁰⁰ The new process should embrace Indigenous laws¹⁰¹, address claims larger than \$150 million¹⁰², and provide non-monetary compensation if requested.¹⁰³*

Implementation: *Canada must provide stable funding for the development of community capacity to pursue specific claims.¹⁰⁴ Canada must also ensure that Indigenous Nations have timely access to necessary information to develop the claims,¹⁰⁵ and must provide adequate funding and staffing for the Specific Claims Tribunal.¹⁰⁶*

“

KEY PASSAGES

Overall, a fair and independent process is necessary—one in which Indigenous Nations and Canada meet as equal partners to determine meaningful redress of historic wrongs. Indigenous Nations must have the full resources, capacity, and information to act as equal partners in all aspects of this process. As the basic objective of specific claims is reconciliation, any approach to redressing historical wrongs must be guided by the overarching need to repair a broken relationship. This entails that Canada act honourably and in a spirit of equal partnership, rather than as an adversary.¹⁰⁷

”

⁹⁶ The BC Specific Claims Working Group delivered this submission following the AFN regional session in Vancouver 2017 as a composite of the views expressed by the participating First Nations

⁹⁷ The BC Specific Claims Working Group Submission to the AFN-INAC Joint Technical Working Group on Specific Claims, “On a Human Rights Foundation”: Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations’ Historical Losses, July 24, 2017, 3.

⁹⁸ Ibid, 6 & 7.

⁹⁹ Ibid, 14.

¹⁰⁰ Ibid 6 & 7.

¹⁰¹ Ibid, 10 & 11.

¹⁰² Ibid, 11.

¹⁰³ Ibid, 15.

¹⁰⁴ Ibid, 8 & 9.

¹⁰⁵ Ibid, 9.

¹⁰⁶ Ibid, 13.

¹⁰⁷ Ibid, 16.



2019 Specific Claims Reform

Historical Review of Past Calls for an Independent Specific Claims Process

12. Indigenous Land Rights: Towards Respect and Implementation, 2018¹⁰⁸

Report of the Standing Committee on Indigenous and Northern Affairs | February 2018

Committee Mandate

The Committee undertook a broad study of INAC's comprehensive land claims and self-government agreement policies, as well as the specific claims policy. The study includes an assessment of how the current specific claims policy is implemented and identifies outcomes and impacts. The Committee held ten public meetings and heard from 89 witnesses.¹⁰⁹

Proposal: Independent body to assess and evaluate specific claims

Structure: An independent body is established to assess and evaluate specific claims as they are filed.¹¹⁰ First Nations should also be involved in the valuation of specific claims.¹¹¹

Jurisdiction: All claims related to the non-fulfillment of Treaty rights should be eligible for consideration under the specific claims policy.¹¹² Compensation for claims should be broadened beyond existing formulas to encapsulate the nature of losses experienced by First Nations, including the option of land transfers.¹¹³ The \$150 million cap imposed on the Specific Claims Tribunal should be reviewed to ensure it provides a just alternative to litigation.¹¹⁴

Implementation: First Nations and INAC should jointly reform the specific claims policy and amend the Specific Claims Tribunal Act,¹¹⁵ as well as develop a funding framework to support stable and long-term funding.¹¹⁶

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KEY PASSAGES

Although not all Indigenous groups participate in the claims process for the same reasons, there seemed to be some consensus among witnesses that the current process does not always aim to rebuild the relationship. As Grand Chief Constant Awashish explained, “reconciliation implies recognizing mistakes.” If Canada is serious about correcting the wrongs it has done, it will have to acknowledge its past mistakes and the shortcomings of its current policies.¹¹⁷

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¹⁰⁸ This Standing Committee Report tabled in February 2018 is the most recent examination and recommendation for reform of the specific claims policy and process.

¹⁰⁹ Report of the Standing Committee on Indigenous and Northern Affairs, Indigenous Land Rights: Towards Respect and Implementation, February 2018, 12.

¹¹⁰ Ibid, 62.

¹¹¹ Ibid.

¹¹² Ibid, 61.

¹¹³ Ibid, 62 & 63.

¹¹⁴ Ibid, 63.

¹¹⁵ Ibid, 64.

¹¹⁶ Ibid, 65.

¹¹⁷ Ibid, 13.



2019 Specific Claims Reform

Historical Review of Past Calls for an Independent Specific Claims Process

Master Table of Proposed Specific Claims Policy Reforms

Proposal	Independent Assessment	Funding Assistance to First Nation	Independent Mediator	Negotiation Assistance	Claim Adjudication	Remedies
1. Indian Self-Government in Canada, 1983	N/A	Yes	N/A	Neutral Third Party	Quasi-judicial process	Compensation
2. The Specific Claims Joint Working Group Report, 1993	Independent Assessment Panel ("IAP")	No	Independent Claims Body	Independent Claims Body	IAP makes non-binding recommendations	Compensation
3. Report of the Royal Commission on Aboriginal People, 1996	N/A	Yes	Aboriginal Lands and Treaties Tribunal	Aboriginal Lands and Treaties Tribunal	Aboriginal Lands and Treaties Tribunal	Compensation – no land or resource reallocation
4. Report of the Joint First Nations-Canada Task Force on Specific Claims Policy Report, 1998	First Nations Specific Claims Commission	N/A	First Nations Specific Claims Commission	First Nations Specific Claims Commission	First Nations Specific Claims Tribunal	Compensation
5. Negotiation or Confrontation: It's Canada's Choice, 2006	Independent Body	Yes	Independent Body	Independent Body	Independent Body	N/A
6. Justice at Last" A Specific Claims Action Plan, 2007	No	No	No	No	Specific Claims Tribunal	\$150 million cap
7. Re-Engaging: Five-Year Review of the Specific Claims Tribunal Act, 2015	No	No	No	No	Specific Claims Tribunal	\$150 million cap



2019 Specific Claims Reform

Historical Review of Past Calls for an Independent Specific Claims Process

Master Table of Proposed Specific Claims Policy Reforms

Proposal	Independent Assessment	Funding Assistance to First Nation	Independent Mediator	Negotiation Assistance	Claim Adjudication	Remedies
8. Specific Claims Tribunal of Canada Submission, 2015	Specific Claims Commission	Yes	By order of the Tribunal	Specific Claims Commission	Specific Claims Tribunal	N/A
9. Specific Claims Review: Expert Based – People Driven, 2015	Specific Claims Tribunal	Yes	Specific Claims Tribunal	Specific Claims Tribunal	Specific Claims Tribunal	N/A
10. Recommendations for AFN-Canada Joint Process on Specific Claims Policy and Reform, 2017	Specific Claims Tribunal	Yes	Specific Claims Tribunal	Specific Claims Tribunal	Specific Claims Tribunal	N/A
11. "On a Human Rights Foundation": Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations' Historical Losses, 2017	Independent Body or Specific Claims Tribunal	Yes	Independent Body or Specific Claims Tribunal	Independent Body or Specific Claims Tribunal	Specific Claims Tribunal	Eliminating the \$150million cap; include non-monetary compensation
12. Indigenous Land Rights: Towards Respect and Implementation, 2018	Independent Body	Yes	N/A	N/A	Specific Claims Tribunal	Review \$150million cap; include land transfers



55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
www.afn.ca

Toll Free: 1.866.869.6789
Telephone: 613.241.6789
Fax: 613.241.5808