
Assembly of First Nations

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Assemblée des Premières Nations

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**Special Chiefs Assembly
December 7, 8, 9, 2021, Ottawa (Ontario)**

Resolution no. 38/2021

TITLE: Protecting the Institutional and Judicial Independence of the Specific Claims Tribunal

SUBJECT: Specific Claims Adjudication

MOVED BY: Chief Dennis Meeches, Long Plain First Nation, MB

SECONDED BY: Chief Calvin Bruneau, Papaschase First Nation, AB

DECISION Carried; 3 abstentions

WHEREAS:

A. The *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration) states:

- i. Article 8(2): States shall provide effective mechanisms for prevention of, and redress for:
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights
- ii. Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- iii. Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were

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traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process;

- iv. Article 28(1): Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
- v. Article 28(2): Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

- B. The Government of Canada introduced the Specific Claims Action Plan: Justice At Last on June 12, 2007 to “ensure impartiality and fairness, greater transparency, faster processing and better access to mediation” for specific claims, resulting in new legislation, the *Specific Claims Tribunal Act (SCTA)*, which came into force on October 16, 2008. The 2008 *SCTA* provided that the Specific Claims Tribunal’s (Tribunal) adjudicative membership would consist of independent superior court judges, and that the Tribunal would have its own dedicated Registry (section 10), with an office in the National Capital Region. Additionally, the *SCTA* provided that the Tribunal’s Judges would have the power to make rules regarding Tribunal and Registry staff (section 12), and that the Registrar (a “Deputy Head” under the *Financial Administration Act*) would be responsible for managing the Tribunal’s work, including the duties and staff of the Tribunal, and be accountable to the Tribunal as an institution.
- C. The Tribunal was established in October 2008 as an independent adjudicative body with the authority to make final, binding decisions on specific claims. First Nations agreed to the establishment of the Tribunal on the basis of its independence, as guaranteed in the 2008 *SCTA*, and its ability to make final and binding decisions. For First Nations, these factors are fundamental aspects of the Tribunal’s legitimacy as an adjudicator of First Nations’ historical claims against the Crown.
- D. On March 1, 2010, the Assistant Deputy Attorney acknowledged that the Department of Justice, as a legal advisor to Canada, is in a conflict of interest in relation to the provision of legal counsel to the Tribunal.
- E. In 2014, the Harper government passed the *Administrative Tribunal Support Services of Canada Act (ATSSCA)* to “provide registry, administrative and other support services to 11 administrative tribunals”, which resulted in amendments being made to the *SCTA* resulting in the Tribunal’s loss of its dedicated Registry

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(repealing of section 10) and loss of control over its administrative operations, such as staffing and budgets (repealing of section 12). It further resulted in the relocation of the Tribunal's administrative offices within a federal government department, accountable to the Minister of Justice.

- F. The passing of the *ATSSCA* and amendments to the *SCTA* were done unilaterally by Canada without any consultation with First Nations, and in advance of the legislative five-year review of the *SCTA*, contrary to what was explicitly promised to First Nations by Canada when it announced Justice At Last and established the Tribunal. The *ATSSCA* and amendments made to the *SCTA* have removed the statutory mechanism that guaranteed and protected the full judicial and institutional independence of the Tribunal and pose significant threats to First Nations' confidence in the Tribunal's independence.

THEREFORE BE IT RESOLVED that the Chiefs-in-Assembly:

1. Direct the Assembly of First Nations (AFN) to write to the Minister of Justice and the Minister of Crown Indigenous Relations to advocate for: the removal of the Specific Claims Tribunal (Tribunal) from the *Administrative Tribunal Support Services of Canada Act (ATSSCA)*; the return of the Tribunal's dedicated registry; the resumption of Tribunal control over its administrative operations, such as staffing and budgets; the removal of the Tribunal's administrative offices from a federal government department, which is accountable to the Minister of Justice; the reinstatement of sections 10 and 12 of the *Specific Claims Tribunal Act (SCTA)*; and, a full review of the impacts of the *ATSSCA* on the Tribunal's independence.
2. Direct the AFN to write to the Minister of Justice and the Minister of Crown Indigenous Relations to urge that the current *SCTA* be amended, in full partnership with First Nations, to return legislative protections to the Tribunal's judicial and institutional independence, as well as align with Canada's legal obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

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