

The Right to Redress and the Need for an Independent Specific Claims Process

BC Specific Claims Working Group Submission to the House of Commons Standing Committee on Indigenous Affairs Study on Specific Claims and Comprehensive Land Claims Agreements

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INTRODUCTION

The specific claims process is Canada's approach to redress of historical wrongs related to the illegal alienation of Indigenous lands, mismanagement of Indigenous assets, and the non-fulfillment of treaties. The on-the-ground realities of these historical losses are stark: claims tell stories of lands and resources mismanaged, sold, degraded, often while communities faced poverty and struggled to secure even the most basic necessities of life (see boxes 1 and 3).

Box 1. The Williams Lake Indian Band Village Site Claim

During the 1850s and 60s, as the colony set out its pre-emption laws, it prohibited settlers from pre-empting Indian villages or settlements. Despite those laws and the promises to Indigenous peoples that their villages would be protected, in the early 1860s, the Williams Lake Indian Band was pushed off their village lands by settlers.

The band protested widely, and a letter that Chief William wrote in 1879 appeared in the British Colonist newspaper. In it, Chief William wrote, "The land on which my people lived for five hundred years was taken by a white man. He has crops of wheat and herds of cattle. We have nothing, not an acre." Canada was aware of the dispossession, but did nothing to restore the village lands to the band. The Williams Lake Band members lived without reserve lands for twenty years and faced extreme poverty and starvation.

This claim has been heard by various iterations of specific claims processes since the 1980s. Finally, in February 2014, the Specific Claims Tribunal validated the claim on the basis that the Colony and Canada had a duty to protect the band's village lands, including the duty to "clear away the impediment" of non-Indian pre-emption. However, Canada then sent this claims for judicial review, and it has gone all the way to a hearing at the Supreme Court of Canada, whose decision is now pending.

Such redress is a key element of reconciliation, and unresolved claims perpetuate social and economic inequality. As the Standing Senate Committee on Aboriginal Peoples stated in its 2006 study of specific claims: "In every case where [claims] have been settled, it has meant an immediate improvement in the lives of First Nations people. It has also strengthened relations between Canada and those First Nations

and between those First Nations and the communities that surround them. Settling outstanding claims is not only the just thing to do, it is the smart thing.”¹

But the specific claims process has been so systematically ineffective that many BC Indigenous Nations believe its true purpose is to thwart rather than advance claims resolution. At the heart of the barriers faced by Indigenous Nations is the conflict of interest in the process: Canada is judge, jury, and banker on claims against itself. In no other scenario would it be acceptable for a defendant to determine whether negotiations can occur. This conflict of interest is the reason why an independent process is so urgently needed (see recommendation 1).

Indigenous Nations and government initiatives have been calling for the creation of an independent process for claims resolution for almost seventy years. An independent process is the only way to remove the institutionalized conflict of interest and resolve claims in a fair and impartial way.

Creation of an independent process will take time and must be done in full partnership with Indigenous Nations. In the interim, Canada can undertake steps to support claims resolution that are supportive of the broader transformational shift toward independence and the equity of a true Nation-to-Nation partnership. Sustainable research funding, support for the Tribunal’s processes and authority, research and planning for the integration of Indigenous laws and legal processes, and fair access to information are key steps that can be taken. We will describe these recommendations after some brief background.

Box 2. RECOMMENDATIONS

1. Create an independent process for specific claims resolution
2. Establish sustainable research funding
3. Support the function and authority of the Specific Claims Tribunal
4. Work with Indigenous Nations to research, plan, and develop frameworks for the integration of Indigenous laws and legal traditions into specific claims processes
5. Work with Indigenous Nations to create a process for resolving large claims
6. Move toward full and fair access to information by supporting the working group on records access
7. Support full and fair access to information by withdrawing Bill C-58 and undertaking full and meaningful consultation with Indigenous Nations on ATIP reform

About the BC Specific Claims Working Group

The BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs (UBCIC) in 2013 and tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims as a national political agenda item. Throughout our work, we emphasize the historical uniqueness of colonization in BC and the need for a process that addresses the distinctive challenges of claims resolution in this province.

¹ Senate Standing Committee on Aboriginal Peoples, 2006, “Introduction.” *Negotiation or Confrontation: It’s Canada’s Choice—Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process*, page iv. Available at [https://www.afn.ca/uploads/files/sc/spec_-_2006_negotiation_or_confrontation_\(senate_report\).pdf](https://www.afn.ca/uploads/files/sc/spec_-_2006_negotiation_or_confrontation_(senate_report).pdf).

In July 2017, the BCSCWG made a submission to the current AFN-INAC Joint Technical Working Group (JTWG) process, outlining eighteen recommendations (see appendix 1). These recommendations arose directly from statements made by representatives of BC Indigenous Nations and organizations during a two-day “dialogue session” that the AFN ran in June 2017 (as well as a short survey that the BCSCWG created prior to this event). We continue to support and advance these recommendations, but highlight here seven recommendations that we have identified as priorities, based on their overarching importance and/or immediate applicability.

BACKGROUND 1: BC UNIQUENESS

Processes of colonization in BC are unique: most BC Nations never signed historical treaties, in large part because the Crown was unwilling to fund treaty-making processes or the purchase of land. Instead, in colonial times and after BC joined Confederation in 1871, governments established many orders, laws, processes, and commissions for the creation of reserves. This history of reserve creation (in combination with other complex factors, including the larger number of communities and reserves, smaller reserve sizes, frequent overlap of transportation corridors with reserves, and frequent illegal land takings for development) created many grievous historical losses that must now be addressed. The land in Indian reserves in BC constitutes less than 0.4 percent of the provincial land area.² Specific claims from BC Nations now constitute half of the national total.

Thus, barriers to full participation faced by Nations across Canada (and identified in the November 2016 report by the Office of the Auditor General³) have a disproportionate effect on BC claimants. BC Indigenous Nations face significant challenges when seeking resolution of their specific claims, particularly via negotiation. The following statistics demonstrate these challenges:

- **A large number of rejected and closed claims.** BC claims constitute 53 percent of all claims where Canada has found “no lawful obligation” and 40 percent of all claims where the files have been closed.
- **A large number of claims channeled into the “small-value claim” process.** Indigenous Nations in BC have long asserted that closed claims include those where only one or a few allegations have been accepted by Canada while the rest are rejected (with a release provision). These “partial acceptances” have the outcome of lowering the imposed value of the claims to the extent that many are shoehorned into the “small value claims” process, which has been plagued by deep inequality and unilateralism. If a claim is deemed “small value” Canada will not negotiate nor provide negotiations funding. The OAG final report quotes a Tribunal judge who called INAC’s approach to small-value claims “paternalistic, self-serving, arbitrary, and disrespectful of First Nations.”
- **A large number of the claims at the Tribunal (and sent for judicial review).** BC claims constitute 34 percent of all claims that the Tribunal has heard. Further, six out of the ten Tribunal decisions that Canada has sent for judicial review have come from BC.

² The total land base in BC is 96,646,000 hectares; the total area of reserves is 360,000 hectares as of 2010. See Province of British Columbia, 2011, *Crown Land: Indicators and Statistics Report 2010*. Available at https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown_land_indicators_statistics_report.pdf.

³ Office of the Auditor General of Canada, 2016, *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. Available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html

BACKGROUND 2: UNDRIP & PRINCIPLES OF REFORM

Specific claims are a human rights issue. In all discussions of specific claims process, BC Indigenous Nations consistently refer to international instruments that affirm their Indigenous human rights, particularly the United Nations Declaration on the Rights of Indigenous Peoples and the Organization of the Americas Declaration on the Rights of Indigenous Peoples, as well to as recommendations from domestic commissions, such as the Truth and Reconciliation “Calls to Action” (which also recommend that Canada “adopt and implement the UN Declaration on the Rights of Indigenous Peoples as a framework for reconciliation”).

Article 28 of the UNDRIP states that Indigenous peoples have the right to redress in cases where their lands have been taken, used, or damaged without their “free, prior and informed consent” (FPIC); specific claims should be a critical mechanism for this kind of redress. The UNDRIP recognizes the right of Indigenous peoples as self-determining Nations and affirms that they must have the authority to act in full and equal partnership with States. As such, Indigenous Nations must be full and equal partners in processes of legislative reform and ongoing oversight.

RECOMMENDATIONS

RECOMMENDATION 1: Create an independent process for specific claims resolution

Canada must create an independent and impartial process for the resolution of historical claims. For decades Indigenous Nations have sought this process. Governments, too, have repeatedly called for it: since 1948, there have been fully *eighteen* initiatives undertaken or requested by government that have made this recommendation.⁴

One of these initiatives was a 1998 joint task force involving the Assembly of First Nations (AFN) and INAC; it “provided a highly detailed and focussed blueprint for fulfilling the longstanding need for an independent claims body,” attempting to “design a process whereby the perception of conflict of interest would be eliminated.”⁵ This 1998 task force recommended a two-prong strategy: “a commission to facilitate negotiations and a tribunal to resolve disputes.”⁶ The Tribunal has been created (and must be supported; see recommendation 3). But the need for an independent commission is still outstanding and urgent.⁷

While a positive step, the Tribunal is a *secondary* process for the adjudication of specific claims. It functions as a forum for appeal: if Canada rejects a claim, Indigenous Nations can take the case to the Tribunal. The primary assessment of the validity of Indigenous claims against the Canadian government still lies with Canada, as do all administrative and funding decisions. Canada’s conflict of interest remains.

⁴ Senate Standing Committee on Aboriginal Peoples, 2006, “Appendix C: Past Efforts to Establish an Independent Indian Claims Commission.” The report also states: “The establishment of an independent body for resolving Specific Claims through a cooperative effort by First Nations and Canada was the long term solution recommended by most witnesses” (page v).

⁵ Rolland Pangowish, co-chair of the Joint Task Force, letter to Chiefs Phil Fontaine and Bill Erasmus, 25 November 1998. *Report of the Joint First Nations-Canada Task Force on Specific Claims Policy Reform*.

⁶ *Report of the Joint First Nations-Canada Task Force*, 1998, page 8.

⁷ An “Indian Claims Commission” operated between 1991 and 2009. While this body did have the independence that Indigenous Nations had long recommended, its recommendations to government were non-binding. It was dissolved in 2009 and has not been replaced.

The exact form for an independent commission must be determined through a joint process with Indigenous Nations, but there are similar bodies internationally, such as New Zealand’s Waitangi Tribunal,⁸ that—in conjunction with the decades’ of expertise built by Indigenous Nations and organizations on what is needed—could help form the basis of a new model here in Canada.

Almost twenty years after the 1998 AFN-INAC task force, we see the same partners undertaking another joint review of the specific claims process. It seems logical that the current AFN-INAC JTWG will reach the same conclusion as the many initiatives that have preceded it: the only way to resolve claims in a fair and equal manner is to remove Canada’s conflict of interest by creating a fully independent process for claims assessment, negotiation, and settlement. Indigenous Nations agree this is the only path forward.⁹

Canada can support this transition to an independent process in three key ways:

1. Supporting and engaging in the current JTWG process in good faith to eliminate the conflict of interest in all parts of the process, including assessment and negotiation;
2. Planning for long-term joint review and reform processes to ensure equality, fairness, and transparency;
3. Directly supporting Indigenous Nations and regional organizations so they may directly participate in developing an equal, fair, and transparent process for claims assessment and negotiation.

RECOMMENDATION 2: Establish sustainable research funding

Canada must provide funding that is reliable and stable from year to year, to enable continuity in claims preparation. Indigenous Nations’ access to the specific claims process is dependent on their ability to fully research, prepare, and advance claims. Research funding is thus essential in providing access to justice. Further, funding approaches need to align with UNDRIP and FPIC; in other words, states are obligated to provide Indigenous Nations with access to resources to support their full and equal participation in claims processes.

The JTWG is currently developing its recommendations on funding for Indigenous Nations and organizations participating in the claims process; Canada must guarantee current funding levels until the JTWG recommendations can be implemented.¹⁰ Further, Canada must commit to providing sustainable and sufficient support of the research and preparation of claims by Indigenous Nations and Claims Research Units over the long term.

RECOMMENDATION 3: Support the function and authority of the Specific Claims Tribunal

BC Indigenous Nations value the Specific Claims Tribunal as a body with the independence and reconciliatory aims to be able to resolve claims. The Tribunal has validated several claims that Canada rejected. The Tribunal could be a key part of a Nation-to-Nation strategy for specific claims resolution, but it needs the authority, resources, staff, assurance of independence, and expanded mediation and assessment

⁸ For information on the history and mandate of the Waitangi Tribunal, see <https://waitangitribunal.govt.nz/about-waitangi-tribunal>.

⁹ See the BC Specific Claims Working Group submission to the AFN-INAC JTWG, entitled, *Negotiation or Confrontation: It’s Canada’s Choice* (attached to this submission). In this report, the BCSCWG draws together feedback from Indigenous Nations who participated in a June 2017 dialogue session that the AFN ran as part of engagement for the JTWG process. The call for an independent process was the change advocated most repeatedly by participants in this dialogue session.

¹⁰ Between 2013 and 2016, the Conservative government cut funding to Indigenous Nations and research organizations by 40 percent. These cuts incapacitated research organizations across the country—hundreds of claims had to be put on hold, with no clear path forward. Some organizations were so debilitated that they were unable to submit any claims at all. Funding was restored to 2009 levels for the 2017–2018 fiscal year; however, this decision was made on a one-time basis.

mandate to be able to fulfill this role. Canada must support—rather than undermine—the Tribunal. Key actions include:

1. Properly funding the Tribunal to address the lack of staff and resources;
2. Providing adequate resources for Indigenous Nations to prepare their claims for submission to the Tribunal;
3. Participating in the Tribunal hearings in good faith, rather than approaching these claims in an obstructionist and adversarial manner;
4. Respecting the specialized authority of the Tribunal by ceasing to send Tribunal decisions for judicial review (see box 3);
5. Funding Indigenous Nations' participation in any judicial review that does occur.

We also recommend the creation of regional tribunals that will be more accessible and responsive to communities. The Tribunal relies on specialized knowledge to evaluate the complex historical fact patterns that comprise specific claims. Many BC Indigenous Nations and representatives have suggested that the creation of regional tribunals would support the development of this specialized knowledge and also that these bodies would be more accessible to communities in ways that could create trust (although other representatives expressed concern, based their experience with Canada's underfunding of BC programs, that a regional tribunal could be marginalized and under-resourced).

Box 3. The Huu-ay-aht First Nation Logging Claim

In 2014, the Specific Claims Tribunal ruled that Canada had “failed completely” in its duty to consult the Huu-ay-aht First Nation regarding the terms of a logging license issued in 1942. This license contained a clause granting the logging company a 21-year, renewable term.

When the Huu-ay-aht Nation learned of the license in 1948, it appealed to Canada to cancel the agreement, saying it would not fully benefit from the timber sales; however, Canada permitted logging to continue for another 21 years, until 1969.

During the Tribunal hearings, Canada argued that the Huu-ay-aht should be entitled to less compensation because the community was very poor at the time Canada was illegally selling timber off its land, and would therefore have spent the money on “non-durables” such as food and medicine, rather than investing it. In his decision on compensation, Tribunal Justice W.L. Whalen rejected this argument and emphasized fairness: “the goal of equitable compensation is to achieve fairness and a more complete justice based on conscience and bearing an ethical quality.”

In January 2017, Canada sent the Tribunal for judicial review, refusing to acknowledge the Tribunal decision as binding. Finally, in September 2017, Ministers Bennett and Wilson-Raybould withdrew this application for review, stating that the “Huu-ay-aht Nation has waited far too long for the Government of Canada to make amends for past wrongs.” Only then, almost seventy years after the Nation first challenged the logging agreement, did the claim reach resolution.

RECOMMENDATION 4: Work with Indigenous Nations to research, plan, and develop frameworks for the integration of Indigenous laws and legal traditions into specific claims processes

The specific claims process needs to reflect the Indigenous laws of the Nation bringing forward a claim. This is a point BC Indigenous Nations made strongly at the AFN dialogue session in June 2017, where participants said unequivocally that the assessment and negotiation processes were biased and unfair because they failed to consider and incorporate Indigenous legal principles and protocols. Similarly, the Truth and Reconciliation Commission calls for “recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.”

Representatives of BC Nations at the dialogue session also emphasized the need to transform negotiation models away from standard templates developed by INAC, which have their roots in colonial premises whose endpoint is the disintegration of Indigenous sovereignty, and toward protocols developed with Indigenous Nations as equal partners, such that they meaningfully incorporate Indigenous priorities, teachings, and legal principles.

Redress for historical wrongs should not replicate the imbalances in authority that created the wrongs in the first place. The systematic integration of Indigenous legal traditions will make the claims process stronger, fairer, and more resilient over time. Yet legal research on how to integrate Indigenous laws into specific claims does not currently exist. Canada should support regional pilot projects on Indigenous legal systems for redress and conflict resolution, within an overall plan of how to scale up findings to build a flexible but meaningful framework for integrating Indigenous laws and legal traditions overall.

RECOMMENDATION 5: Work with Indigenous Nations to create a process for large claims

Canada must work with Indigenous Nations to create a fair, effective, and transparent process for resolving large claims. In the past, Canada has required that Indigenous Nations who submit a claim to the Specific Claims Branch must include a band council resolution stating that the claim will not exceed \$150 million, in advance of any negotiated process or joint assessment. This \$150 million cap was set unilaterally by Canada. Currently, any claims over \$150 million are ineligible for the Tribunal and subject to secret government Cabinet deliberations from which Indigenous Nations are excluded and which typically result in very low offers.

In 2007, Canada and the AFN signed a political agreement which in part committed both to jointly developing a process to deal with large claims. However, Canada walked away from the process, leaving the issue of large claims unresolved. Many Indigenous Nations lack the capacity to take these large claims to court; as such these injustices go unaddressed.

Although a large proportion of BC claims are small, the issue is nevertheless highly relevant to BC Indigenous Nations. For instance, Canada walked away from negotiations with the Okanagan Indian Band regarding a large commonage claim. Several BC Nations have highlighted how their large value claims remain dormant until an acceptable, fair process is developed, while in the interim their territorial lands are destroyed through illegal resource extraction and development, the impacts of which will never factor into any assessment of the claim.

RECOMMENDATION 6: Move toward full and fair access to information by supporting the working group on records access

Canada is in a conflict of interest: it has the authority to allow or deny access to the information that Indigenous Nations need to document their claims. Evidence shows that Canada is tightening control over records that form the bases of Indigenous Nations claims, grievances, and disputes.¹¹

Indigenous Nations must have full and timely access to all records necessary to their claims. Parity in information access is a prerequisite of a fair, Nation-to-Nation process. In summer 2017, National Claims Research Directors established a working group that includes INAC staff (from regional offices and headquarters) to address barriers Indigenous Nations face in seeking access to records. We recommend that Canada support its ongoing work.

RECOMMENDATION 7: Support full and fair access to information by withdrawing Bill C-58 and undertaking full and meaningful consultation with Indigenous Nations on ATIP reform

An October 16, 2017 submission by National Claims Research Directors to the Standing Committee studying Bill C-58 outlines serious concerns regarding Canada's failure to consult Indigenous Nations prior to drafting the bill and concludes that C-58 will "greatly impair the ability of First Nations to document their claims ... and will significantly impede First Nations' access to justice in resolving their claims."¹² We fully endorse and echo the Research Directors' principal recommendation that Canada uphold its commitments to reconciliation and implementation of the UNDRIP and withdraw Bill C-58 and engage in full and meaningful consultation with Indigenous Nations regarding legislative reform to access to information.

SUMMARY: ELIMINATING CONFLICT OF INTEREST VIA NATION-TO-NATION PARTNERSHIP

The unique history of colonization in BC has generated a high number of historical grievances that require redress. The specific claims process should be the mechanism for this redress; however, as the OAG 2016 audit report extensively describes, this process has been mismanaged in ways that have generated barriers for Indigenous Nations seeking to advance their claims. This mismanagement has a pattern: at the root of all these barriers is a systemic conflict of interest, wherein Canada is set up to assess and adjudicate claims against itself. As a result, most BC claims are failing to achieve resolution, particularly through negotiation. Clearly, reform is needed.

The BCSCWG stands in support of Indigenous Nations and the many past initiatives that have recommended the creation of an independent specific claims process. Until this independent process is realized, the specific claims will continued to be plagued by inequality and distrust—and will fail to lead to claims resolution in BC and throughout Canada. Only by addressing Canada's institutionalized conflict

¹¹ National Claims Research Directors, 2016. *Joint Submission to the Standing Committee on Access to Information, Privacy and Ethics and First Nations Experience with Access to Information*. Document available upon request to UBCIC.

¹² National Claims Research Directors, 2017. *Impaired Access: Submission to the Standing Committee on Access to Information, Privacy and Ethics Regarding Bill C58 "An Act to Amend the Access to Information Act and the Privacy Act and to Make Consequential Amendments to Other Acts."* The submission reflects the shared view of 21 Claims Research Units across Canada and has been endorsed by over 20 Indigenous Nations and Tribal Councils, as well as by several Indigenous and like-minded organizations.

of interest will reforms of the specific claims process meaningfully address the systemic inequities that so many people (most recently the OAG) have documented.

We also recommend that Canada support the full and equal participation of Indigenous Nations in claims processes by establishing sustainable research funding, supporting the work of the Tribunal, taking action on practical routes to begin to integrate Indigenous laws and legal traditions, and ensuring full, equal access to information necessary to document claims.

Indigenous Nations, as proper rights holders, must be full and equal partners in all aspects of any reform process. This kind of equality is at the heart of the UNDRIP and forms the basis of a true Nation-to-Nation relationship. Only through creation of an independent process and equal Nation-to-Nation partnerships will historic inequities finally be remedied.

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APPENDIX 1: BCSCWG RECOMMENDATIONS MADE TO THE AFN IN JUNE 2017

ACTION	KEY ELEMENTS
1. Jointly develop an independent process based on a Nation-to-Nation framework	<p>Joint development based on a Nation-to-Nation framework that removes institutionalized conflict of interest</p> <p>Joint oversight and regular joint reviews</p>
2. Support Indigenous Nations' full and equal participation in all aspects of the specific claims process	<p>Full, fair, and independently administered funding</p> <p>Reliable, stable funding for development and support of claims</p> <p>Community capacity for claims preparation and oversight</p> <p>Transparency</p> <p>Fair and equal access to information</p>
3. Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws	<p>Recognition and inclusion of Indigenous Nations' laws and the creation of protocols</p> <p>A process for large claims</p> <p>A process for claims Canada rejected when INAC was dealing with the "backlog"</p> <p>A process to fairly resolve closed claims</p> <p>Community visits and relationship building</p>
4. Support the full range of functions of the Specific Claims Tribunal	<p>Providing the necessary resources for Tribunal processes</p> <p>"Good faith" participation in Tribunal hearings</p> <p>Respect for the authority of the Tribunal</p> <p>Establishment of regional tribunals/commissions that will be more accessible and responsive to communities.</p>
5. Enact real redress and restitution rather than trying to minimize liability, with Indigenous Nations as equal partners in determining remedies.	<p>A focus on reconciliation</p> <p>Indigenous Nations as equal partners in determining remedies</p> <p>Opportunities for inclusion of non-monetary items in negotiation</p> <p>Fair and reasonable settlements</p>