SPECIFIC CLAIMS:
NEGOTIATING AWAY CANADA'S NATIONAL DEBT

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Pre-Budget Submission to the
Standing Committee on Finance

August 6, 2014

CCOC's 2015 Pre-Budget Submission to the House of Commons Standing Committee on Finance

The **Chief Committee on Claims (CCOC)** is pleased to make the following submission to the Standing Committee on Finance for the 2015 pre-budget consultations. Co-Chair Chief Maureen Chapman would welcome the opportunity to present our recommendations before the Committee.

The Chiefs Committee on Claims (CCOC) has been active for more than twenty years and is responsible for providing the Assembly of First Nations (AFN) with technical and political guidance in its engagement with Canada on land rights and claims. The CCOC consists of a core committee of ten Chiefs, one representing each of the ten AFN regions.

Executive Summary

Specific claims arise where Canada has failed to fulfill its lawful obligations under Treaties or the management of First Nation reserve lands and assets. Specific claims are an outstanding debt owed to First Nations by the Crown and while rarely discussed in the context of the Canadian national debt, the obligation to pay this debt is real.

A 2006 report by the Senate Committee on Aboriginal Peoples acknowledged the characterization of outstanding claims as debt, stating "the solution for both Specific Claims and economic development is ... recognizing [that resolving specific claims] is part of paying down the national debt."[1]

Canada has long stated its desire to resolve specific claims through a fair and just process, recognizing that delaying or deferring claims represents a significant future liability. According to the 2007 Specific Claims Action Plan, *Justice at Last*, negotiation is Canada's preferred method to achieving settlement. However, Canada's current approach consists of significant funding cuts to programs and services essential to the specific claims process, directing the majority of claims to the courts and tribunals, and spending millions of dollars on costly and time consuming litigation.

Conversely, the fair negotiation of claims is the most cost effective approach to claims settlement and also has the greatest potential to achieve reconciliation between First Nations and Canadians. A commitment to negotiation necessarily includes a duty to adequately fund all stages of the claims process, from research and development to transparent and good faith negotiations and ultimately fair settlements.

To date, Canada is not fulfilling its commitments under *Justice at Last*. Nor is Canada dealing with specific claims in a manner consistent with financial prudence or the honour of the Crown.

It is possible for Canada to fulfil promises to balance the budget and adequately fund a specific claims process equipped to achieve settlement through negotiation. Further, the Federal budget must also be reconciled with Section 35 of Canada's *Constitution Act,* the rule of law, and international mechanisms

[1] *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*. December 2006, p. 33. Government of Canada website at www.parl.gc.ca.

including the *United Nations Declaration on the Rights of Indigenous Peoples*. Achieving this balance in a transparent and fiscally responsible manner will occur if Canada engages in fair and meaningful negotiation with First Nations, eschewing litigation as a last resort.

The CCOC will address and make recommendations related to the mandated theme: *Balancing the federal budget to ensure fiscal sustainability and economic growth*. The spirit of this submission is one of reconciliation. We believe we can achieve a better relationship while being fiscally responsible. As such, our recommendations are largely cost neutral. Rather than demanding new moneys, they ask for a shifting of Federal priorities; from an adversarial approach defined by litigation and exorbitant costs, both material and spiritual, to an approach of mutual respect and recognition, defined by fair and just negotiations.

Balancing the Canadian Budget and Ensuring Fiscal Sustainability and Economic Growth By Adhering to Justice At Last

In 2007, the Government of Canada took significant steps towards reconciling with First Nations when it announced its specific claims policy: *Justice at Last*. Speaking to Canada's commitment to honourably negotiate claims settlements, Minister of Indian Affairs Jim Prentice stated, "Canadians' commitment to justice demands that these legal obligations are discharged and our outstanding debts to First Nations paid in full."[2] *Justice At Last* cites negotiations as the preferred route for achieving justice because "Negotiations are less adversarial, more cost-effective and avoid the risks of court-imposed settlements where outcomes can be uncertain. Just as important, they help build relationships and generate multiple benefits for all Canadians."[3]

The fair resolution of claims is the central message in *Justice at Last* and negotiation is the primary vehicle through which reconciliation can be achieved. In addition, the economic benefits of a fair, effective and just specific claims process are articulated in *Justice at Last*:

> This certainty (settled claims) brings benefits to First Nations, governments, industry and area communities. A key obstacle to the growth of First Nation businesses is acquiring the investment and loan capital that companies need to prosper. With confusion over land or resource ownership removed, the door is open to expanded opportunities, including joint ventures with non-Aboriginal businesses. Land-related settlements also bring closure for non-Aboriginal people who live or work on lands subject to a claim. Settled claims enable First Nations and all investors to proceed with confidence.[4]

It is widely acknowledged that settling specific claims quickly and fairly through negotiations will create meaningful potential for economic and community growth, infrastructure, social service delivery and education. James Anaya, UN Special Rapporteur on the Right of Indigenous Peoples clearly articulates this point:

> The money to pay out claims is money that, if it were in First Nations' possession, would contribute to their human growth, their investment in human capital, their education and

[2] INAC, *Specific Claims: Justice At Last*, Indian Affairs and Northern Development, June 2007. AANDC website at www.aandc-aandc.gc.ca
[3] *Ibid.*
[4] *Ibid.*

welfare, and thus build stronger communities of talented people to contribute to local economies and to participate in professions and occupations.[5]

Clearly the economic prosperity of both First Nations and Canadians is envisioned by *Justice at Last*.

Close to 6 years have passed since *Justice at Last* came into effect, and unfortunately, Canada has failed to fully adhere to the principles outlined in this policy. Rather than contributing to a process of mutual reconciliation and shared economic benefit by encouraging just and principled negotiated settlements; Canada has closed or rejected the vast majority of claims (85%) forcing First Nations to pursue costly litigation. A portion of closed claims are a result of poor negotiation processes, in which 'take it or leave it' offers are proposed to First Nations. This approach is inefficient and fails to adhere to the principles of fiscal sustainability, economic growth, justice and reconciliation.

The following examples illustrate how Canada's approach to the assessment, negotiation and settlement of specific claims fails to adhere to *Justice at Last* or fulfill the principles of fiscal sustainability and economic growth:

1. **By choosing to reject or close the majority of claims, Canada is taking a stance that it would prefer costly and unsustainable litigation over good faith negotiations. According to Canada, AANDC spent $106 Million in 2012-13 on legal fees.[6]** Litigation is a long and costly process that should only be used as a last resort; First Nations have long stated their willingness to engage in good faith and transparent negotiations.

2. **Substantial cuts to claims research funding results in layoffs, diminished capacity, and significantly diminishes economies of scale that allow claims research units to maximize resources and cost efficiencies for First Nations clients.** While reduced research budgets have the appearance of sound fiscal practice, these cuts impede economic efficiency and result in needless delay and increased costs.

3. **Canada's common practice of making inadequate take it or leave it offers and arbitrarily closing files defers payment of Canada's outstanding debts to future generations, increases costs as interest compounds and settlement costs rise.**

4. **Canada's partial acceptances of claims - offers to negotiate the least substantive portions of a claim while demanding releases on the remainder of a submission - exponentially increases the number of specific claims resulting in unnecessary, higher research, administrative and legal costs.** First Nations are forced to split claims into artificial, distinct submissions with single allegations in an effort to settle *all* grievances and debts; resulting in hundreds of new, arguably unnecessary claims.

5. **Canada's use of the judicial review clause in the *Specific Claims Tribunal Act* to challenge the Tribunal mandate amounts to a tremendous waste of taxpayer dollars and resources.** In an effort to restrict the Tribunals mandate, Canada has instigated judicial review of two recent Tribunal decisions, both favorable to First Nations. Both cases were challenged on similar

[5] Anaya, James, *Statement upon conclusion of the visit to Canada*, October 15, 2013. Available at http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada

[6] AANDC, *Backgrounder – AANDC Legal Fees*, November 15, 2013. AANDC website at https://www.aadnc-aandc.gc.ca/eng/1359569904612/1359569939970

ground. Yet despite the Federal Court of Appeal ruling in favor of the Tribunal's initial decision, Canada continues to challenge the Courts mandate. This represents Canada's litigious approach to specific claims, which clearly places an unwarranted financial burden on Canadian taxpayers, as well as having a devastating effect on the responding First Nation, as they receive no funds to engage in this mandatory process.

6. **The principles of economic growth and reconciliation are further eroded by Canada's continued failure to adhere by its public federal budget announcements. Canada's *Budget Plan: Jobs, Growth and Long-term Prosperity - Economic Action Plan 2013* promised: "$54 million over two years to ensure that specific claims continued to be addressed promptly, providing resolution to First Nations claimants"**. It is important to note that the $54 million does not represent new programing dollars, but is instead part of the original commitment made under *Justice at Last* in 2007. Further, the announcement conflicts with funding cuts that have been implemented since 2013, at all stages of the specific claims process.

Recommendations

1. Restore specific claims research and development funding so that historical grievances may be brought forward and finally resolved. We propose that funds allocated to the Specific Claims Branch, Department of Justice and external legal counsel to litigate against First Nations land claims be re-allocated to research, development, negotiations and the Specific Claims Tribunal.

2. Immediately fulfill the commitment made under *the Economic Action Plan 2013* to allocate $54 million over two years to ensure that specific claims are addressed promptly.

3. Engage in good faith negotiations as promised in *Justice At Last* to bring about the fair and timely resolution of specific claims. **Estimated costs to develop, negotiate, and settle claims, are significantly lower than the costs of prolonging the process and pushing claims to the Specific Claims Tribunal and Judicial Review.**

4. Negotiate all claims, regardless of compensatory value and abandon the practice of offering partial acceptances; if a lawful obligation is found, curb exponentially rising costs by engaging in the negotiation of *all* allegations brought forward. All lawful obligations must be completely fulfilled to provide real certainty and closure to past grievances. This will lead to greater economic investment and growth for both First Nations and Canadians.

5. Accept as valid, final and binding the decisions of the Specific Claims Tribunal and abandon the costly practice of applying for judicial review on decisions favourable to First Nations.

6. Support the most economically marginalized communities in Canada by negotiating specific claims fairly and awarding compensation to promote economic development in First Nation communities. Land ownership certainty brings economic prosperity including private investment and jobs for First Nations and Canadians.

7. Encourage employment by restoring funding to claims research units, government record repositories, and First Nations program delivery associations.