



Assembly of First Nations

**Submission to the Standing
Committee on Indigenous and Northern Affairs**

Study on Specific Claims and Comprehensive Land Claims Agreements

October 27, 2017

Introduction

In 2015, Canada elected a new federal government. Following the election, the Right Hon. Prime Minister Justice Trudeau stated that “no relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership”.¹ The Prime Minister also unconditionally accepted the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) and committed to undertake a full review of Canada’s laws, policies and practices to “ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights”.

In 2017, the Prime Minister announced the creation of a Ministerial working group, chaired by the Minister of Justice and the Minister of Indigenous and Northern Affairs (INAC) that would carry out the review of federal laws and policies. Shortly thereafter Canada announced ten principles that would guide the review. According to Canada, the ten Principles are “rooted in section 35, guided by the UN Declaration, and informed by the Report of the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC)’s Calls to Action. They are a “starting point to support efforts to end the denial of Indigenous rights.”

We are at an important point in Canada’s history. For the first time, a Canadian government appears willing to take concrete steps to achieve reconciliation with Canada’s Indigenous peoples. This is critical because the only basis for reconciliation is through the full recognition of Aboriginal rights and title. For too long Canadian policies such as the Specific Claims Policy, and the Comprehensive Claims Policy, have been based on the denial of Aboriginal rights and title.

This submission will demonstrate the need to move forward in partnership with First Nations based on the recognition of rights, and in a manner consistent with the UN Declaration, including :

- 1) 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.
- 2) Article 26, (1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- 3) Article 26, (2): Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

¹ 2016 Federal Minister Mandate Letters

- 4) Article 26, (3): States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
- 5) 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 traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Specific Claims

Since its creation, the AFN and its predecessor, the National Indian Brotherhood, has responded to requests from First Nation governments to reform the federal government's specific claims policies and processes relating to the historical dispossession of First Nations from their lands.

Nevertheless, resolution of specific claims remains elusive, despite AFN and First Nations throughout the last four decades to build a fair, transparent, collaborative and effective process to address historical wrongs.

Commencing with the establishment of the Office of Native Claims in 1974, Canada, through the Department of Indian and Northern Development (DIAND), unilaterally took on a dual role of reviewing claims arising from its failure to discharge its lawful obligations and representing Canada in negotiations.

First Nations were critical of Canada's specific claims process noting it lacked impartiality and objecting to the fact that Canada controlled the claims process. There was a serious conflict of interest in Canada's dual role as both arbiter and defendant, and First Nations consistently called for the creation of an independent body to oversee the entire process.

In response to First Nation concerns, the federal government issued *Outstanding Business: A Native Claims Policy-Specific Claims* in 1982. Canada agreed to negotiate those specific claims which supported a breach in the Crown's lawful obligation owed to First Nations. Canada further clarified that claims would not be dismissed on technical grounds such as limitation periods or laches, which historically acted as barriers to resolution. However, Canada maintained its conflict of interest and continued to reserve for itself authority to unilaterally evaluate specific claims involving wrongs committed by the Crown.

First Nation concerns regarding Canada's conflict of interest in the specific claims process were validated by the 1983 Penner Report on Indian Self-Government. The Report recommended that the 1982 claims resolution process be replaced with an independent body, in relation to which the AFN and Canada should formulate a joint legislative policy framework. In addition, the Penner Report called for a quasi-judicial process to govern claims.

The recommendations of the Penner Report were never implemented and the AFN continued to register its concerns with the specific claims policy.

Following the 1990 Oka crisis – which involved an armed standoff over the development of lands subject to a specific claim involving Mohawk territory – Canada established the Indian Specific Claims Commission (ISCC or ICC) as an interim measure under the *Federal Inquiries Act* to inquire into the basis upon which the Minister of Indian Affairs rejected a claim for negotiation. The ICC also provided mediation when a First Nation entered into negotiation of its specific claim with the Minister of Indian Affairs and Northern Development. In performing this role, the ICC produced reports setting out a historical summary of the claim, its factual and legal conclusions, and its independent recommendations to the federal government as to whether the claim should be accepted for negotiation or rejected. While the Indian Claims Commission had a number of positive aspects, it did not have the authority to make binding decisions and many of its recommendations were rejected or ignored by the Minister. Canada unilaterally and unexpectedly ended the mediation mandate of the Indian Claims Commission in 2007-08.

As the ICC was an interim measure in 1990, the AFN continued its advocacy efforts, and in 1992, Canada and the AFN established a joint First Nations/Canada Working Group on Specific Claims mandated with making recommendations for reforms to the policy over the period of one year.

The Joint Working Group tabled its final report in 1993. The recommendations included the need for legislation to establish an independent process and Independent claims body to settle outstanding claims. These recommendations were largely ignored.

Following the release of the Royal Commission on Aboriginal Peoples Report in 1996, which also called for an independent process, a Joint AFN-Canada Task Force was established and mandated to study the structure and authority of a potential independent claims body. The Joint Task Force issued its report in 1998 and recommended the creation of an independent commission to facilitate negotiations and a tribunal to adjudicate disputes where negotiations failed. The Report also recommended an end to Canada's conflict of interest in settling specific claims.

Canada attempted to pass several pieces of legislation in the years immediately following the Joint Task Force Report. Bill C-60, the *Specific Claims Resolution Act* (2002) proposed to establish a new commission to facilitate claims negotiation and

dispute resolution, and a tribunal to make binding decisions and compensation awards to a maximum of \$7 million per claim.

The AFN and First Nations widely rejected Bill C-60, finding that it would not make the specific claims process fairer, more efficient or transparent, and that it differed dramatically from the Joint Task Force recommendations. The Bill did not make it past 3rd Reading, and was amended in late 2002 and reintroduced as Bill C-6, *Specific Claims Resolution Act*. The only substantive change was that Bill C-6 increased the tribunal's financial awards from \$7 million per claim to \$10 million. First Nations again rejected the legislation as imposing an arbitrary financial limitation on the tribunal, and while Bill C-6 received Royal Assent in November 2003, it was never proclaimed into force.

It is important to note that these failed legislative efforts dismissed the creation of an independent assessment body.

In 2006, the AFN appeared before the Senate Standing Committee on Aboriginal Peoples which was studying the federal governments' Specific Claims Policy and again expressed the need for a truly independent claims process.

The Senate Standing Committee released its special study on the specific claims process entitled *Negotiation or Confrontation: It's Canada's Choice* in December of 2006. The study echoed the AFN's recommendations to expedite the settlement of specific claims by establishing an independent claims body to be developed and implemented in partnership with First Nations within two years, and affirmed the need for increased funding for the preparation, negotiation and settlement of outstanding specific land claims. The Senate Committee's study acknowledges that improving the claims resolution process to enable quick, efficient and fair settlement of specific claims is a moral, economic, political and legal imperative for Canada.

On June 12, 2007, the Prime Minister announced *Justice at Last: Specific Claims Action Plan*, a strategy to reform the specific claims process and address the increasing number of outstanding "backlogged"² claims. A key component of the strategy was the creation of a tribunal that is staffed with Superior Court Justices who would make final decisions on claims when negotiations failed. Canada committed \$250 million per year for ten years to settle specific claims. Canada also promised additional improvements in the processing of claims and enhancements to the Indian Claims Commission's mediation/dispute resolution functions.

Justice at Last was structured around four "pillars" that addressed both the backlog of approximately 800 claims and acknowledged Canada's inherent conflict of interest. The pillars included: (i) impartiality and fairness through the creation of an independent, binding tribunal; (ii) greater transparency through dedicated funding for settlements; (iii) faster processing of claims via a streamlined approach; and (iv) better access to mediation.

² Claims that were dormant within the system, often for years, are often referred to as the 'backlog'.

An integral component of Justice at Last was the creation of a legislative framework to implement the four pillars. The AFN and Canada established a Legislative Working Group to jointly develop new specific claims legislation.

Between July 5 and October 15, 2007, the AFN/Canada Legislative Working Group jointly developed Bill C-30, *the Specific Claims Tribunal Act* (SCTA). The legislation was introduced in the House of Commons on November 27, 2007.

The introduction of Bill C-30 was accompanied by the release of an Canada-AFN Political Agreement aimed at providing for additional discussion on matters not addressed in the legislation. These additional matters included: appointments to the Tribunal; additions to reserves; treaty processes and AFN involvement in the five year review process.

While the creation of the Specific Claims Tribunal was considered a positive step forward, under Justice At Last Canada continued to maintain its role of assessing and accepting claims against itself, as well as being directly responsible for administration and funding.

Ten years after the announcement of Justice at Last, it is clear that Canada has failed to adequately address the backlog, implementing policy and procedural decisions unilaterally and in a manner that has resulted in the vast majority of claims remaining unresolved. Nor has Canada demonstrated a willingness to enter into good faith negotiations; Rather, the Department used the three year legislated assessment timeframes as operational models to unilaterally and arbitrarily shut down negotiations and close specific claim files – and then publicly declare they had ‘addressed’ the backlog.

Canada has also further entrenched its conflict of interest. Instead of transferring the roll of the ICC to a full time mediation service as promised, Canada unilaterally closed the ICC in 2009 and announced that the Department itself would administer mediation services. As a result mediation is rarely utilized in claims negotiations.

Canada also failed to provide adequate resources for First Nations to participate in the process essentially using funding to frustrate access to justice. The resolution of specific claims through negotiations necessarily includes a duty to adequately fund all stages of the claims process, from research and development to transparent and good faith negotiations, and fair settlements. This has not been the case; in fact, funding was dramatically cut, denying First Nations access to the claims process at all stages, including the Tribunal.

Canada also committed to engage with the AFN in a 5-Year policy review of Justice at Last. The AFN insisted that a 5-year legislative review of the *Specific Claims Tribunal Act* must include the AFN as a condition of AFN’s participation in the legislative drafting process. It was understood that the review would be a collaborative effort that would examine the specific claims policy and process, and the SCTA. Canada proved

unwilling to include the AFN and instead appointed Mr. Bernard Peltier as Ministerial Special Representative (MSR) to undertake the 5-Year review – which was limited to the SCTA only.

First Nations and the AFN expressed their concern with this approach, pointing out that many of their concerns were with the policy and process, not the SCTA. In an attempt to ensure a comprehensive review, the AFN and the Chiefs Committee on Claims³ developed an AFN independent Expert Panel process – Canada did not accept an invitation to participate jointly in this process – to provide a parallel review. The panel accepted submissions which resulted in a 2015 report entitled *Specific Claims Review: Expert Based – People Driven* and included a number of recommendations, including the need for a truly independent process.

The MSR completed his report in 2015 which Canada was initially unwilling to release. In 2016, following the election of a new federal government, Canada agreed to release the MSR final report, which ultimately acknowledged some of the concerns expressed by First Nations regarding the policy and process. Then in the fall of 2016, the Minister tabled her report on the 5-year review to Parliament. This report recognized the Departments failure to implement Justice At Last and committed to working with First Nations and the AFN to address their concerns.

Perhaps more significantly, the Office of the Auditor General (OAG) carried out its own independent audit of Canada's handling of specific claims and released its report in November, 2016. The OAG report⁴ clearly stated that Canada had failed to fulfill the commitments made in Justice At Last, and identified ten recommendations for change. In response, Canada accepted all ten recommendations and committed to working with the AFN and First Nations to develop solutions to their concerns.

Immediately following the Minister's report on the 5-year review, the AFN and Canada struck a Joint Technical Working Group on Specific Claims (JTWG) with a mandate to review the Specific Claims policy and process and to make recommendations for change. This work is ongoing and has resulted in significant movement at the technical level. However, as this submission demonstrates, First Nations have been involved in countless working groups and processes on the reform needed to resolve specific claims and the outcomes have always fallen short of what is required.

First Nations have been concerned with Canada's Specific Claims Policy and process since its inception in 1973.⁵ In contrast, the Department of Indian and Northern Affairs Canada has consistently treated Canada's outstanding lawful obligations to First Nations as something that can be addressed through programs and services. This is not

³ For more than twenty years, the AFN's Chief's Committee on Claims (CCoC) has provided advice and expertise in supporting AFN advocacy efforts regarding First Nation claims.

⁴ It should be noted that the OAG accepted submission from First Nations, including the AFN, while undertaking their audit.

⁵ In actually, First Nations have been asking for an independent process to resolve their outstanding claims for almost a century.

the case. Specific claims are an issue of justice, and a burden on the Honour of the Crown. A program approach to claims resolution perpetuates Canada's conflict of interest and, as history shows, has resulted in yet another round of claims reform initiatives. The time for transformation is now

The UN Declaration, in Article 27, clearly states that States must provide an independent process to adjudicate Indigenous land rights. First Nations have been asking for nothing more, and require nothing less, than access to a truly independent process which is capable of managing, assessing, and facilitating the negotiation of specific claims against the Crown.

Canada's approach to claims has been woefully insufficient, out of step with justice, inconsistent with international legal norms, and falls short of what is required to achieve reconciliation and justice.

In order to move forward the AFN recommends the following:

1. Support the continued call by First Nations for a truly independent specific claims policy and process.
2. Support the work of the AFN-Canada Joint Technical Working Group.
3. Provide federal funding to support interim changes to the Specific Claims Policy and Process, and ensure the recommendations provided by the Office of the Auditor General are implemented.
4. Provide federal funding to support the joint development of an independent Specific Claims body capable of managing and funding all aspects of the process, including research, submissions, negotiations, and mediation.
5. Continue supporting the work of the Specific Claims Tribunal, and ensure it has the judicial and financial resources to continue operating effectively.
6. Provide ongoing, adequate, stable funding to First Nations so that claimants can continue to access claims resolution processes while reforms are underway.

Comprehensive Claims

While there seems to be a move towards real reform of the Specific Claims Policy, the current government has done little to change the antiquated Comprehensive Claims Policy (CCP).

The federal land claims policy was borne out of Canada's desire to respond to the question of Aboriginal title following *Calder v. the Attorney-General of British Columbia (1973)*. *Calder*, for the first time, opened the door for the federal recognition of Aboriginal title and created significant uncertainty around the ownership of land.

In an effort to provide some certainty regarding Aboriginal title and rights, the federal government announced that it would be willing to negotiate comprehensive land claims with Aboriginal groups, resulting in the first official comprehensive claims policy, *In All Fairness: A Native Claims Policy*, in 1981. The policy offered to 'exchange' undefined Aboriginal rights and title for defined rights, and required Aboriginal signatories to cede, release, and surrender their pre-existing Aboriginal rights. The AFN and First Nations have consistently stated their opposition to this approach, while calling for a process based on the recognition of Aboriginal rights and title.

In 1982, Aboriginal and Treaty Rights were recognized and affirmed through Section 35 of the *Constitution Act*. Section 35 led to a number of important questions because it was unclear what rights were recognized and affirmed. In addition, it was unclear what Section 35 meant for extinguishment of Aboriginal title. Prior to 1982 Canada believed it could unilaterally extinguish rights, although it was not decided who had the jurisdiction to do so (Federal Crown or Provinces), nor was it clear what language was required.

Several court cases, including the Supreme Court of Canada decision in *R v. Guerin*, which spoke to Canada's fiduciary obligation to act in the best interest of First Nations, began to help clarify the relationship between the Crown and First Nations. Following the release of the 1986 Coolican Report on Comprehensive Claims Policy, Canada agreed to revise *In All Fairness*, replacing it with the Comprehensive Land Claims Policy (CCP) in 1986. The CCP was largely a reflection of the 1981 policy with its emphasis on extinguishment.

Like its predecessor, the 1986 CCP was considered woefully inadequate by First Nations. Not only did it continue the focus on extinguishing Aboriginal rights, but it failed to evolve along with Canadian legal jurisprudence. Numerous landmark decisions were rendered by the Supreme Court of Canada (i.e., *Guerin*, *Delgamuukw*, *Sparrow*) stating Aboriginal rights existed, that they could not be unilaterally extinguished or limited, and that the Crown had a fiduciary duty to act in the best interest of First Nations. Consequently, the CCP continued to fall further and further behind.

In 2000, following the *Delgamuukw* decision, AFN formed the *Delgamuukw* Implementation Strategic Committee (DISC) mandated with advocating for change to the CCP. The DISC undertook a comprehensive legal review of the CCP in light of *Delgamuukw* and provided it to Hon. Stephen Owen, then Secretary of State for Indian and Northern Affairs, in 2002. The report identified a number of the issues and inconsistencies in the CCP, many of which continue to exist today. These include:

- **Compensation:** The CCP indicates the compensation is available as part of negotiations. However, compensation is not a part of the actual negotiations because the Crown takes the position that negotiations should be future looking and not focus on compensation for past infringement. *Delgamuukw* demonstrates that compensation is not a political decision, but a legal one which must be

assumed. Ironically, compensation is payable to third parties, while First Nations are asked to release the Crown from any future claims to compensation.

- The Crown continues to require the extinguishment of Section 35 rights. This is contrary to the law articulated in *Sparrow* which requires “as little infringement as possible”. The CCP provides options for extinguishment, but they are inconsistently applied and illegal. One of the options is to not require “cession or surrender” on reserves or settlement lands. However, in British Columbia, this option is not available. Also, the CCP speaks to certainty and finality to land based rights, and does not seek the extinguishment of the inherent right or other non-land based rights. In the Nisga’a Final Agreement, all Section 35 rights, including the inherent right to self-government were “modified and released”. In other documents there are discussions of the non-assertion of rights as opposed to extinguishment.
- In British Columbia, the treaty model requires that settlement lands become fee simple lands and no longer under the jurisdiction of the federal government pursuant to section 91(24) by providing that upon the coming into force of the treaty, “there will be no more lands reserved for the Indians within the meaning of the Constitution Act, 1867”. Yet according to the CCP – Canada will continue to assume its jurisdiction over Indians and Indian lands pursuant to section 91(24).
- Aboriginal title encompasses “the right to exclusive use and occupation”, the right to “choose to what uses the land can be put” and an “inescapable economic component”. The claims negotiations and the CCP diminish the nature of Aboriginal title in favor of the interests of recreational hunters, or the interests of the public over access. The negotiations and the CCP do not address the commercial nature of Aboriginal rights and title and the policy breaches the right of First Nations to choose how their land is to be used. This is inconsistent with the nature of Aboriginal title and the law.

Despite the evolution in Canadian law, and First Nation advocacy efforts, the CCP remained unchanged.

In 2009, after decades of advocacy, Canada agreed to again examine the CCP, forming a Working Group with AFN and others in 2010. At that time, and in relation to the formation of the Working Group, the AFN again noted that the CCP is inconsistent with Section 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and Treaty rights and the nation-to-nation relationship. Further, the CCP is incompatible with numerous Supreme Court decisions such as *Sparrow*, *Sioui*, *Delgamuukw*, and *Haida*. The Working Group met on several occasions but no major changes resulted.

Following the 2012 Crown-First Nations Gathering, Canada announced a new ‘results based’ approach to treaty and self-government negotiations. This announcement was widely criticized by AFN and First Nations because it effectively prioritized those groups

willing to negotiate under a flawed and unlawful policy and pitted First Nations against one another – a long standing criticism of the CCP is how it deals (or does not deal) with the overlap of Aboriginal title claims. In early 2013, the Prime Minister agreed to establish a joint high level mechanism for reviewing the CCP, which resulting in the 2013 Senior Oversight Committee (SOC) process.

The SOC met 8 times over 2013 and developed a report which included ten draft federal principles on recognition and reconciliation to guide Canada's engagement with First Nations based on the existence of Section 35 Aboriginal Rights and Title.

Despite some positive movement, Canada chose not to renew the SOC process in 2014, and instead announced an 'interim policy' and the unilateral appointment of Mr. Douglas Eyford as a Special Representative to lead engagement with Aboriginal groups and key stakeholders to renew and reform the CCP. Mr. Eyford's engagement resulted in a comprehensive report and 43 recommendations which he submitted to Minister Valcourt in 2015, but no substantive changes to the CCP or how Canada approached negotiations. At the same time, the Supreme Court of Canada released its *Tsilhqot'in Nation* decision, which served to further clarify the nature of Aboriginal title.

As noted, with the election of a new federal government, Canada has committed to undertake a full law and policy review to ensure consistency with Canadian and international legal norms. Further, the Prime Minister has clearly stated that all Canadian laws and policies must be consistent with recognition of Aboriginal rights. The review of the CCP has not yet been done.

In the interim, Canada has shifted its approach away from the official policy and towards what it calls an 'exploratory process' or 'rights and recognition tables'. According to INAC, the exploratory process is designed to get people out of the Comprehensive Claims Policy, and to allow First Nations to define their priorities. There are currently 50 tables involving over 400 Indigenous groups.

In 2017, in a Mandate Letter addressed to the Minister of Crown-Indigenous Relations, the Prime Minister prioritized "increasing the number of modern treaties and new self-government agreements in a manner that reflects a recognition of rights approach and reconciliation. Accelerate progress on existing rights and recognition tables to identify priorities for individual Indigenous communities." The Mandate Letter made no mention of replacing or updating the CCP or creating a policy backing for the rights and recognition tables without requiring extinguishment as a precondition to final agreement.

Canada's comprehensive claims policy is inconsistent with the UN Declaration, Canadian law, and the current Prime Ministers commitments to First Nations. It has been rejected by the AFN time and again, and must be replaced with a policy rooted not in extinguishment but in the fulsome recognition of Aboriginal rights and title.

Recommendation

7. Immediately reject Canada's Comprehensive Claims Policy as inconsistent with rights recognition, respect and partnership.
8. Fund substantive joint work with First Nations and the AFN to develop a new approach to modern Treaty making, rooted in the recognition of Aboriginal rights and title, and consistent with the UN Declaration and Canadian law.

Conclusion

As this committee continues with its study of the claims policies that have a tremendous effect on First Nations communities, we ask that your message to the current government be that fundamental reform is required. We also ask that you help to ensure the government fully honours its commitments, including the need to seek reconciliation through a renewed, nation-to-nation relationship based on the recognition of Indigenous rights.