Canada's Undermining of the Specific Claims Process

This summary and analysis of recent developments affecting First Nations' specific claims has been prepared by the Union of BC Indian Chiefs, the Nlaka'pamux Nation Tribal Council and the Alliance of Tribal Nations. It is intended to inform First Nations in British Columbia about the actions of Canada to deny First Nations a process to settle specific claims through fair, transparent and timely negotiations. It has been prepared, as well, for the attention of the National Chief of the Assembly of First Nations. It is hoped that First Nations in BC, with over half of all specific claims in Canada, will recognize the urgency of the situation and take appropriate action quickly to protect their rights and advance their claims.

Canada's "Justice At Last" action plan – overview.

In August 2007, Canada announced it was going to embark on a new action plan to fairly, honourably and quickly resolve Canada's lawful obligations to First Nations with respect to specific claims. It was called, *"Justice At Last."*

Canada stated that "*Justice at Last"* was to be a reform of the specific claims process to ensure that First Nations' specific claims would be resolved based on the following principles:

- impartiality and fairness;
- greater transparency;
- faster processing of claims; and
- better access to mediation

Most importantly, "*Justice at Last"* renewed and strengthened Canada's commitment to pursue settlement of specific claims through negotiation instead of the courts or other adjudicative bodies.

The Specific Claims Tribunal – overview.

To support First Nations and Canada in achieving the goals of *"Justice At Last,"* a Specific Claims Tribunal was established. The *Specific Claims Tribunal Act* (SCTA) came into effect on October 16, 2008. The SCTA imposed a three-year timeline for Canada to respond to First Nations' specific claims and created an independent tribunal to hold hearings and make final and binding decisions on specific claims that had either been rejected by the Minister or not settled through negotiation.

On November 27, 2009, over a year after the SCTA came into force, Canada appointed three full-time judges as the first members of the Specific Claims Tribunal:

1. Mr. Justice Harry Slade of the Supreme Court of British Columbia (Tribunal Chair)
2. Mr. Justice Patrick Smith of the Superior Court of Justice of Ontario
3. Madam Justice Johanne Mainville of the Superior Court of Quebec

An additional six judges have been placed on a roster of Judges who may be called upon to sit on the Tribunal to make decisions on specific claims.

The delay in appointing judges to the Tribunal greatly concerned First Nations, since start-up of Tribunal operations could not begin in earnest until the Tribunal members were in place.

The judges began developing rules and procedural guidelines. On June 8, 2010, draft rules and procedures for the Specific Claims Tribunal were issued and First Nations were invited to submit comments and suggestions. After considerable input from First Nations and Canada, the Tribunal's rules and procedures were revised. They were finalized at the end of May, 2011 and the Specific Claims Tribunal opened for business on June 1, 2011, nearly 3 years after the SCTA came into effect.

A First Nation may file a claim with the Tribunal if the claim has been previously filed with Aboriginal Affairs and Northern Development (Canada) and:

- if the claim was rejected after October 16, 2008;
- if three years have passed since filing the claim without a decision by Canada to negotiate;
- if Canada consents during negotiation of a claim to the First Nation filing the claim with the Tribunal; or
- if three years have passed after the day on which Canada notified a First Nation of its decision to negotiate a claim and the claim has not been resolved by a final settlement agreement.

If three years have passed and a claim is still in active negotiations, the SCTA does not require that the First Nation take the claim to the Tribunal; talks with Canada to resolve the claim can continue. However, at some negotiation tables, Canada has taken the position that the three-year timeline is a *deadline* for negotiations, and is insisting that negotiations be substantially completed within three years, after which Canada will cease negotiating.

Canada's Subversion of *"Justice At Last"* – the key issues.

Since the SCTA came into force, the UBCIC, NNTC and ATN have grown increasingly concerned that the principles and goals of "*Justice at Last"* are being subverted by Canada and, as a result, will not be achieved. At a recent national meeting, it was clear that our concerns in British Columbia are shared by specific claims researchers across the country. The fundamental issues that have surfaced are:

1. Canada has adopted a highly adversarial, technical and legalistic approach to specific claims rather than a collaborative one. This has resulted in unnecessary delays and arbitrary rejection of specific claims.
2. Canada has abandoned all pretence toward working to achieve negotiated settlements for many specific claims. It is, in short, negotiating in "bad faith."

3. Canada has accelerated its "resolution" of specific claims by simply removing claims from its Specific Claims Inventory by rejecting them, closing files and by other means – creating the illusion that it has made substantive progress in resolving claims and clearing up its claims backlog. (The Specific Claims Inventory is an online listing created by the Specific Claims Branch to both track and publicly report on the progress of specific claims.)
4. Further to the above, Canada's strategy appears to be aimed at transferring the large backlog of unresolved specific claims away from Indian Affairs and the Department of Justice and onto the back of the new Specific Claims Tribunal.

Unilateral imposition by Canada of "minimum standards" and a longer, extra-legal timeline

On February 26, 2009, Canada released *The Specific Claims Policy and Process Guide* to replace the long-standing specific claims policy set out in the booklet, *Outstanding Business* (1982). This new policy document provides detailed guidelines for the submission of specific claims, including "minimum standards" by which Canada will decide whether a claim submission is complete enough to be considered officially "filed".

Under these new guidelines, Canada has given itself an additional six-months to decide if a claim submission meets its new "minimum standards." This extra six months is in addition to the three-year time period for Canada to accept or reject a specific claim legislated by the SCTA.

In effect, Canada unilaterally added an six months onto the three-year timeline established by law – contrary to the spirit, if not the letter, of the SCTA.

Nevertheless, specific claims filed before October 16, 2008 will be eligible to be filed with the Specific Claims Tribunal on October 17, 2011, unless Canada accepts the claim for negotiation or a settlement agreement is reached.

Using "minimum standards" to delay and defer consideration of specific claims

The "minimum standards" are technical guidelines created and imposed by the Specific Claims Branch, dictating what each First Nation's specific claim submission must include in order to be considered by the SCB for review.

If a specific claim submission meets the "minimum standards," the claim will be considered officially "filed" by Canada. If it does not, the SCB will return the claim to the First Nation The First Nation can revise the claim so that it meets the minimum standards and resubmit it to the SCB, at which time Canada can take an additional six months to review the claim again.

In practice the application of the "minimum standards" should be reasonable and in general reflect best practices in research. However, recently the SCB has been applying the "minimum standards" unreasonably, returning specific claims to First Nations that should easily have met the "minimum standards."

For example, claim submissions are now being turned back because transcriptions of historical materials have not been created for commonly-referenced, multi-page documents if even one small portion or edge of the document copy is slightly blurry. The unreasonableness of this demand by the SCB that First Nations create new

transcriptions of such documents is hard to overstate. It imposes considerable extra costs on First Nations and creates lengthy delays in filing claims but produces no improvement whatsoever in the substantive quality of specific claim submissions.

First Nations from across Canada have expressed increasing concern that Canada is now unreasonably applying the "minimum standards" as a way to keep new specific claims off of its inventory ahead of an impending internal SCB review that is intended to show the "success" rate of Canada's new policy.

De facto rejection of specific claims through letters of "partial acceptance"

In the past few months, many First Nations have received letters from Canada saying that their claim has been accepted for negotiation. However, typically, only one (and usually a smaller) aspect of the claim is accepted. In some of these cases, Canada does not offer to negotiate, but sets out a pre-calculated figure or formula which is offered as part of an "expedited settlement." There is no offer to negotiate or even talk.

It is important to note that if the First Nation accepts the expedited settlement offer or agrees to negotiate the settlement, Canada will require that they sign a release on all the other aspects and allegations of the claim that Canada has rejected, meaning that the First Nation must extinguish its right to pursue a settlement of the rejected parts of the claim with the Specific Claims Tribunal or in court.

Shifting the Backlog to the Tribunal

Since the SCTA came into effect, Canada has been rejecting or simply "closing the files" on specific claims at an unprecedented rate. In the period 2008-2010, at least 116 claims were rejected by Canada and many more were "addressed" (rather than resolved) by means of "file closure." These claims qualify for access to the Tribunal. In addition, on October 16, 2011, when the first three-year timeline expires, as many as 87 other claims could be eligible if settlements are not reached.

It is quite possible that these additional claims will be filed with the Tribunal, given that federal negotiators have indicated that they may walk away from any active negotiations that are not finalized by October 16 2011. At many of these active negotiating tables, Canada is not even negotiating but simply tabling final "take-it-or-leave-it" offers and waiting for the clock to run out.

Tribunal resourcing

At this point in time, it is clear that the Specific Claims Tribunal does not itself have the resources necessary to fulfill its responsibilities if even a portion of the First Nations whose claims are rejected or are not settled move their claims to the Tribunal. It is not known whether Canada will provide the resources required to enable the Tribunal to meet its responsibilities. If it does not, it will be extremely difficult, if not impossible, for First Nations to achieve fair and timely settlements of specific claims, as promised by Canada under the *"Justice At Last"* action plan.

Mediation role in specific claims restricted by Canada

Canada's *Justice at Last* action plan stated: *"negotiations will continue to be Canada's first choice for resolving specific claims"*[1] and that mediation would be a key focus of the new specific claims resolution process. The AFN and Canada worked jointly on a framework for a new Alternate Dispute Resolution Centre. However, Canada subsequently closed off discussions with the AFN on this matter and unilaterally announced mediation services will be housed in Department of Indian Affairs offices, administered by INAC staff and will only be available while negotiations on a specific claim are active. Mediators will be chosen by INAC.

In a letter dated November 15, 2010, Canada indicated it will not participate in any mediation it deems inappropriate. In effect, mediation will be available only when Canada wants it and Canada controls it. The practice of independent mediation does not exist in the current specific claims process.

CONCLUSIONS

1. Many of the conflicts-of-interest that existed under the old policy continue to exist under the new policy.
2. Opportunities for mediation that existed under the old policy have been severely limited by Canada under the new policy.
3. Canada continues to negotiate in bad faith.
4. Whether the Specific Claims Tribunal is able to do the job it was set up to do will depend on whether it gets the funding it needs and Canada alone will decide this.
5. By "partially accepting" only small parts of larger specific claims, Canada will claim that it has, in fact, offered to "accept" the claim – and if a First Nation refuses to accept the little that is offered, Canada will say it is the First Nation who is at fault and is standing in the way of reaching a fair and timely settlement.
6. If Canada succeeds in "clearing up" its specific claims backlog by October 16, 2011 – by whatever means – it will claim that it has met its responsibilities under the SCTA and next steps are all up to First Nations.

The October 16, 2011 deadline is quickly approaching and Canada is accelerating its efforts to minimize its commitments, obligations and liabilities under the new specific claims process. First Nations can expect that many more specific claims will be rejected by Canada in the next three months and they will face decisions on how to deal with the tidal wave of bad news.

First Nations in British Columbia have over half of all specific claims in Canada. Rejected claims impact BC disproportionately. While it is important to explore opportunities for working together with First Nations nationally, this should not divert or delay First Nations in BC from doing what has to be done to challenge Canada's actions and propaganda as quickly as possible.

[1] INAC. *A New Beginning for the Resolution of Specific Claims in Canada.*