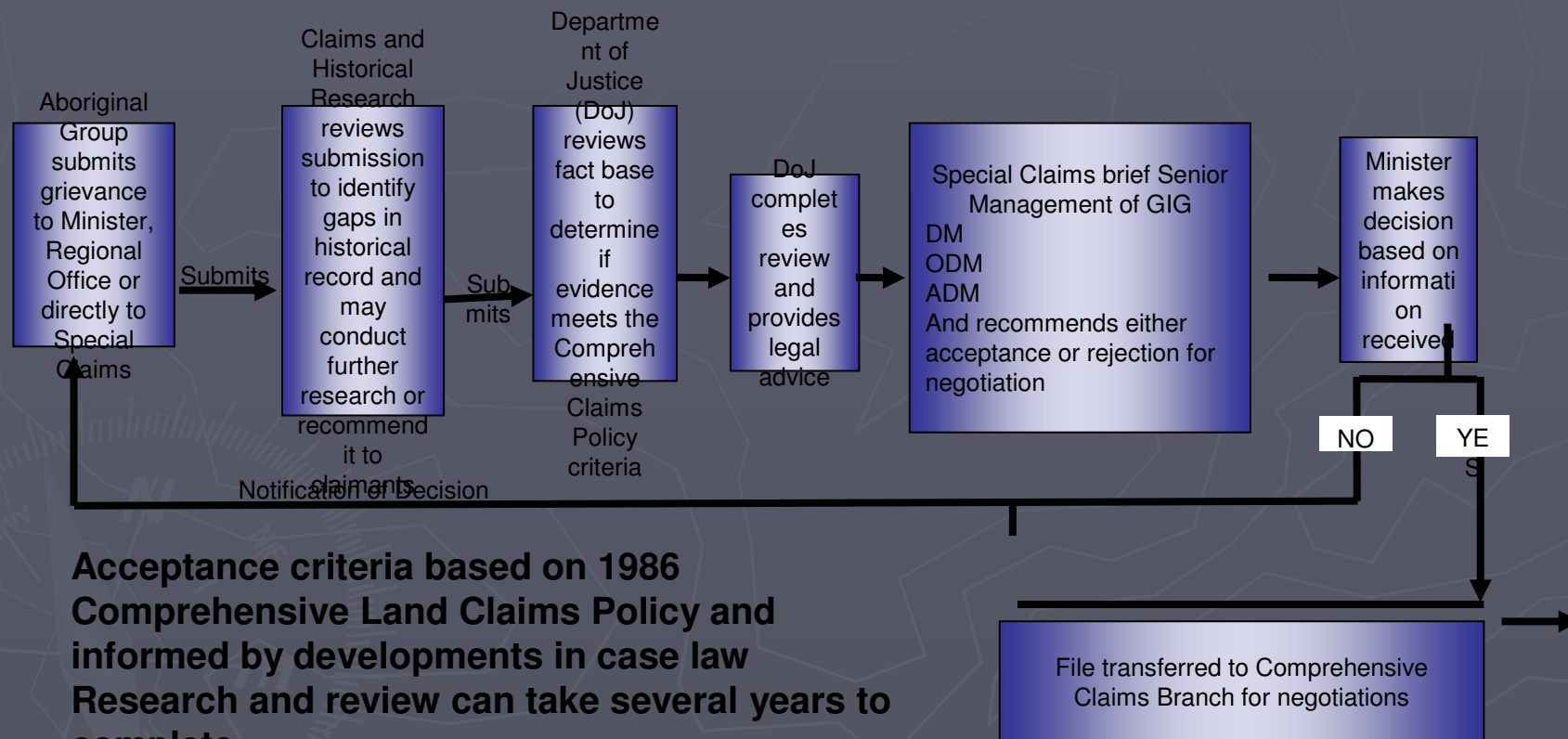


# Special Claims, Claims and Historical Research Centre

PREPARED BY Sean Darcy  
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# Comprehensive Claims Process



# Special Claims

- ▶ **1992 INAC established Research and Assessment Directorate (now Special Claims Directorate) to provide flexibility for the government in dealing with grievances submitted by recognized First Nations that do not fit within the parameters of the existing comprehensive or specific claims policies and is not being considered under any other mechanism i.e. Courts**
- ▶ **Senior Management guidelines on processing special claims:**
  - **grievance submitted cannot be dealt with under the existing claims policies (Specific or Comprehensive) and is not being considered under any other mechanism i.e. Courts**
  - **authority to reject the claims rests with Assistant Deputy Minister of Claims and Indian Government**
  - **Cabinet authority usually required for acceptance**

# Special Claims

## ► Types of Issues:

- No lawful obligation but a remedy required e.g. Cold Lake
- Area covered by treaty, but indigenous First Nation not signatory (e.g. Golden Lake or Algonquins of West Quebec)

# Research

- ▶ **Elements of a Good Claim Submission**
  - clear allegations
  - evidence that supports the allegations
  - good document index
  - index to records researched
- ▶ **The story should be in a clear form and structure; built step by step on evidence; and on the principle of objectivity**

# Research

## ***Two rules of Documentation***

- 1) if the document is mentioned anywhere within the claim it must be included in the document collection**
- 2) facts and/or statements asserted within the claim must be confirmed with a document**
  - Photocopy every document. Ensure it is sourced and added to the document collection and indexed in the “Index to Records Researched”**

# Non-Federal Government Sources

- ▶ Band Council Office
- ▶ Church Records
- ▶ Cemeteries
- ▶ Birth, baptism, marriage and death records
- ▶ Mission diaries or journals
- ▶ Printed reports
- ▶ Church histories
- ▶ Indian organizations
- ▶ Land Title office (or registry office)
- ▶ Provincial Government Records
- ▶ Provincial Archives
- ▶ Other collections – museums, libraries, archives, private collections

# Library and Archives Canada

- ▶ RG 2 Privy Council
- ▶ RG 6 Secretary of State
- ▶ RG 10 Indian Affairs
- ▶ RG 15 Department of Interior
- ▶ RG 22 and 85, Records of the Northern Affairs Branch
- ▶ MG 1 to 8 – Records of New France
- ▶ RG 1 Early land Records
- ▶ MG 18 and 19 Fur trade records
- ▶ MG 17 Church Records
- ▶ MG 26 Prime Minister's Papers
- ▶ MG 27 papers of politicians e.g. Clifford Sifton
- ▶ MG 29 and 30 – papers of Missionaries and explorers



# INAC

- ▶ Central Registry files
- ▶ Indian Land Registry
- ▶ Legal Surveys Map Collection
- ▶ Program Reference Centre
- ▶ Indian Membership Division Records
- ▶ Elections Bylaws Unit of the Statutory Requirements Division
- ▶ Departmental Library

# Informal Access to Records - Guidelines

- ▶ Provide identification, a Band Council Resolution (BCR) or a letter authorizing that person to conduct research and to have access to files pertaining to the First Nation's or Inuit Association's claims research
- ▶ Most departmental files are not housed within and must be retrieved in advance. When requesting files, 4 to 6 weeks notice should be given to ensure departmental staff has the opportunity to retrieve and review material prior to release to the researchers. The principles of access to government records will be used to review information. The researcher will be notified of this action, if applicable, upon receipt of the file.

# **Responsibilities of Directorate once claim submitted**

- **Ensure all facts regarding the issue are thoroughly researched and assembled**
- **This fact base is submitted to DoJ for review to determine if the grievance fits one of the existing claims policies and, if not, what position the courts could be expected to take given current case law**
- **Once reviewed by DoJ Special Claims briefs Senior Management (Deputy Minister), Associate Deputy Minister and Assistant Deputy Ministers) on the facts of the case, the legal advice and provides them with any other info that should be considered in the particular case, e.g. social or political factors**
- **Directorate also suggests either acceptance or rejection of the grievance or negotiations**
- **If acceptance is proposed, negotiation mandate is submitted for approval by Cabinet**
- **Claims and Historical Research Centre review all comprehensive claims. It may participate in the review of Special Claims if required.**

# Comprehensive Claim Process

- ▶ **Claims process begins with the claimant preparing a statement of claim and appropriate supporting materials by the claimant group. That should contain the following information:**
  - **statement that the claimant group has not previously adhered to treaty;**
  - **a documented statement from the claimant group that it has traditionally used and occupied the territory in question and that this use and occupation continues;**
  - **a description of the extent and location of such land use and occupancy together with a map outlining the approximate boundaries; and**
  - **identification of the claimant group including the names of the bands, tribes or communities on whose behalf the claim is being made; linguistic and cultural affiliation and approximate population figures of the claimant group**
- ▶ **Upon receipt of the claim Minister of INAC will review the submission and accompanying documentation and seek advice of the Minister of Justice as to its acceptability according to legal criteria**

# Comprehensive Claim Process

- ▶ The elements comprising the statement of claim and the supporting documentation provide the evidentiary basis for the assessment of the existence of aboriginal rights over land and derive from the *Baker Lake Test* (1979)
- ▶ The legal tests for aboriginal rights and title have been altered and refined since *Baker Lake*
- ▶ The factual and evidentiary components assessed for the purpose of applying those tests have changed little
- ▶ Claimant group required to document or produce evidence showing:
  - It is the proper party to the claim, or is the holder of the aboriginal rights at issue;
  - It has traditionally used and occupied the territory in question and that this use and occupation continues
  - Its aboriginal rights over the lands have not been extinguished

# Comprehensive Claims Process

- ▶ INAC provides assistance to claimant groups in researching and compiling the relevant materials and provides a checklist more detailed than set out in the 1986 Policy
- ▶ INAC does *not provide legal advice or advise the claimant groups of the legal requirements for establishing aboriginal rights. Claimants are expected to get independent counsel*
- ▶ Upon submission to INAC official review the claim documentation for completeness in respect to the various evidentiary elements or components of the claim



# Comprehensive Claims Criteria

- ▶ **Claim then reviewed by DoJ for acceptability according to the current legal criteria which is:**
  - **Aboriginal group is and was part of an organized society**
  - **The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations**
  - **The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies**
  - **The aboriginal group can demonstrate some continuing use and occupancy of the land for traditional purposes**
  - **The group's Aboriginal title and rights to resource use have not been dealt with by treaty**
  - **Aboriginal title has not been eliminated by other lawful means**
- ▶ **Based on case law that has evolved over time**

# Baker Lake (1979)

- ▶ **existence of an organized society a prerequisite for proof of aboriginal title – assumption that an organized society was apparently necessary for there to be pre-existing rights which could be recognized by the common law after the Crown acquired sovereignty .”**
- ▶ **Baker Lake Test**
- ▶ **That they (the plaintiffs) and their ancestors were members of an organized society**
- ▶ **That the organized society occupies the specific territory over which they assert aboriginal title**
- ▶ **That the occupation was to the exclusion of other organized societies**
- ▶ **That the occupation was an established fact at the time of assertion of sovereignty.**



# Van der Peet (1996)

- Courts must take into account the perspective of aboriginal peoples themselves
- Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right
- To be an integral practice, custom or tradition must be of central significance to the aboriginal society in question
- The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed *prior to contact*
- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims
- Claims to aboriginal rights must be adjudicated on a specific rather than general basis
- For practice, tradition or custom to constitute an aboriginal right it must be of independent significance to the aboriginal culture to which it exists

# Van der Peet cont.

- The integral to a “distinctive culture test” requires that a practice or custom or tradition be distinctive, it does not require that that practice, custom or tradition be distinct
- The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence
- Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.

► Van der Peet important as it states relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights) must not confuse the analysis of what constitute an aboriginal right. *Aboriginal rights arise from prior occupation of the land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on the land*

# Adams and Cote (1996)

- ▶ - Supreme Court ruled accused had unextinguished Aboriginal fishing rights in the subject territory based on the evidence that the activity was *prior to European contact and continuing to present day, integral to the Algonquin's distinctive culture.*
- ▶ - To establish an Aboriginal right the accused did not have to establish Aboriginal title (continuous occupation) of the territory. Adams (1996) based on same rationale as Cote decision – accused had established an Aboriginal fishing right despite the fact that his forefathers had not continuously occupied the territory prior to European contact
- ▶ Court held that the subject regulations unjustifiably infringed the accused existing Aboriginal fishing rights contrary to section 35 of the *Constitution Act, 1982*

# Delgamuukw (1997)

- ▶ **Delegamuukw established or first time that aboriginal title is a right to land akin to ownership. This may be contrasted to aboriginal rights more generally which are related to activities such as hunting and fishing which require access to and use of the land.**
- ▶ **To prove aboriginal title a group must:**
- ▶ **establish that it exclusively occupies the claimed territory at the time of sovereignty and has maintained a connection to the territory to the present**
- ▶ **has maintained a connection to the territory to the present**

# Conclusion

## ► Greatest success of Claims and Historical Research Centre:

- Work cooperatively with First Nations to establish unbiased fact base upon which both parties can assess a grievance
- Assist both parties in reaching better understanding of the facts of the grievance under review, as well as each other's position regarding the interpretation of these facts.
- Claim reviewed in an open forum in order to confirm the research