

LEGAL REQUIREMENTS IN CLAIM SUBMISSIONS

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**by: Paul B. Forsyth
of Taylor McCaffrey, Barristers and Solicitors
Winnipeg, Manitoba**

LEGAL REQUIREMENTS IN CLAIM SUBMISSIONS

A. FORMAL REQUIREMENTS

There are no specifically prescribed forms that are required to be used in respect of a Claim Submission within the Specific Claims policy. However, "OUTSTANDING BUSINESS: A NATIVE CLAIMS POLICY" (1982) directs as follows in respect of the presentation of a Claim:

"Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based. In order to speed up the review of the claim, presentations should include copies or lists of the documentation upon which the claim is based. This documentation may come from primary sources such as archival documents, government files, testimony of knowledgeable participants and land records, or from secondary sources such as books and articles."

The "draft" PROCESS MANUAL FOR SPECIFIC CLAIMS (1992) elaborated upon this direction somewhat as follows:

"Allegations

The claimant band must provide specific allegations of actions or omissions on the part of the Canadian government and its agents as well as explain the way in which these actions or omissions give rise to lawful obligations or to a claim beyond lawful obligation as defined in the policy. These allegations should be clearly outlined and tied to the historical documents. These documents may include:

- federal and provincial legislation;
- enabling Orders-in-Council;
- Minutes of Decision;
- surveys, plans and field notes;
- departmental regulations;
- judicial decisions;
- treaty provisions;
- past agreements with the Crown;
- correspondence; and
- reports.

The legal arguments should also cite case law and precedent, when applicable.

Documentation

The claim must include copies of all **historical documentation** supporting the allegations including maps and plans. Furthermore, where the claim is related to reserve land, the initial survey, field-notes and Order-in-Council that set aside the land should be included. The material must be indexed, identified as to source and transcribed if oral testimonies were taken. There are also specific Department of Justice guidelines for the taking of elders' statements.

Claimant bands should include an **index** to these documents and a list with locations of all **sources** consulted (whether productive or not).

Statement of Expected Claim Settlement

The band may provide their proposed principles of compensation including all assumptions and calculations made."

Early Claim Submissions may have consisted of nothing more than a letter from an incoming Chief and Council complaining that a piece of land which had been regarded as Reserve land had recently been found to be the subject of a Certificate of Title in favour of Mr. Jones. Both the form and substance of Claim Submissions have evolved in respect of their formality, complexity and sophistication. There are at least two reasons which come to mind for this evolution. Firstly, the researchers continue to attain higher levels of expertise in respect of developing the historical basis for a Claim Submission. Secondly, the law has evolved and expanded in respect of the "lawful obligations" of the Crown and the remedies which might be available in respect of a breach of same. The combination of researchers working hand-in-glove with lawyers has developed a much more sophisticated style in respect of Claim Submissions.

While there may be differences in the nature of the documentation which comprises a Claim Submission, depending upon the practices adopted in various regions of Canada and on the expertise of the organization submitting the Claim, an informal protocol would appear to have developed such that, in general, the Claim Submission will contain the following components:

- (1) Statement of Claim;
- (2) Statement of Facts and Documents;
- (3) Legal Argument;
- (4) Claim for relief/compensation;
- (5) Historical documents and references.

B. STATEMENT OF CLAIM

This portion of the Claim Submission should disclose concisely the nature and extent of the alleged failure by Canada to fulfill a lawful obligation. While reference may be made to the facts in general terms, the Statement of Claim should be an overview of the Claim as distilled from the facts and documents which will be found elsewhere in the Submission.

The existence of an outstanding "lawful obligation" is the fundamental premise upon which the Specific Claims Process is based. At page 20 of "OUTSTANDING BUSINESS" the original criteria are defined as follows:

"1) LAWFUL OBLIGATION

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation" i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

2) **BEYOND LAWFUL OBLIGATION**

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated."

In or about 1992, consideration was given to recognizing other "Claims of a Third Kind" but I have yet to encounter a creature of this type in my practice to date.

Whether the Statement of Claim is a separate document or is part of a combined Submission package, my preference is that it should precede the Statement of Facts and Documents so as to serve as an overview or summary of the Claim in precis form and establish context within which the historical and factual portion of the Submission will be reviewed.

From my own personal perspective, I find the Statement of Claim to be a valuable summary which helps me to identify the Claim and to distinguish it from others which may be similar within my own case load.

This does not mean that it is not helpful to repeat the content of the Statement of Claim elsewhere in the Claim Submission, either by way of a summary or a conclusion, either at the end of the Statement of Facts, or as part of the Legal Argument, or both.

It should be remembered that there may be more than one "lawful obligation" arising from the same factual circumstances. A Statement of Claim should concisely refer to each and every basis for the Claim being made against Canada even though they may overlap somewhat. For example, a failure to follow the provisions of the *Indian Act* in respect of a surrender may of itself be a failure to fulfill a lawful obligation. But, at the same time, the facts may support a breach of fiduciary obligation argument. Each "claim" should be clearly set forth.

I might add that in Manitoba, we eventually prepare as an adjunct to the Statement of Claim, a list of "**Legal and Factual Questions**". These are submitted with the Claim Submission and are intended to trace or parallel the issues raised in the Statement of Claim in the form of questions which, as they are answered, hopefully in the affirmative, will eventually result in a favourable resolution to the Claim Submission.

C. STATEMENT OF FACTS AND DOCUMENTS

This, in my view, is the heart of the Claim Submission: the research component presenting the historical facts and documentation through which the Claim is identified, traced and eventually established within the parameters of the Specific Claim Policy. If researchers cannot discover and compile the facts necessary to establish a wrong-doing, then in most cases, no

amount of legal argument will be able to achieve a remedy for the aggrieved First Nation.

Since I became involved in this area of practice several years ago, I continue to marvel at the abundance of information that researchers are able to uncover and document from both primary and secondary sources. In most instances, the Claim will rise or fall on the thoroughness, accuracy and presentation of these documented facts.

Needless to say, this portion of the Submission should evidence, and be a product of, the fundamentals of good research practices. While I am certain there are a multitude of guidelines which researchers follow, I would not presume to profess any expertise in that area. Suffice to say, that from my perspective as legal counsel reviewing the preparation of a Claim Submission, the primary fundamentals are:

- (1) thoroughness;
- (2) accuracy;
- (3) relevance.

Before research begins in earnest in respect of the preparation of a Claim Submission, sufficient preliminary research will already have identified the nature of a potential Claim. The researcher should be aware of the issues, both factual and legal, that must be considered in respect of the particular Claim. By and large, this familiarity will come with experience, as there are really only a limited number of Claim situations which have a tendency to repeat themselves. I believe that there is at least one form of manual, either available, or in the process of being available, by which the Specific Claims Branch provides a brief outline of the most common types of Specific Claims and explains the kind of

information and supporting documentation that should be reviewed and supplied with a Submission. The draft manual which I had occasion to review had at least sixteen separate sections, each devoted to a particular type of Claim, along with basic questions to consider, and checklists in respect of potential documents required to support the Claim. Other research organizations may have developed their precedent systems or manuals with respect to various Claims. Where available, these should be utilized by those unfamiliar with a Claim type. It is essential to know the issues surrounding a Claim since they will form the underlying premise to the thoroughness, accuracy and, in particular, relevancy of the Submission from a research standpoint.

I would like to identify and comment upon some of the items which I personally have found helpful in the Statement of Facts portion of the Claim Submission (in no particular order of priority):

- (a) **Keep the narrative chronological.**
- (b) **Use numbered paragraphs and keep the paragraphs concise and on-topic. Try to avoid putting too much into one paragraph.**
- (c) **Start from the beginning and lay all of the building blocks which are necessary to the foundation upon which the Claim will rely.**

I find it preferable to establish and document all of the facts which are important to the Claim. Even if certain preliminary facts are obvious and might easily be assumed, the Submission should cover them in a formal fashion. For

example, a Specific Claim may relate to the mis-administration of funds arising from a surrender for sale in the 1950's. While it may seem trite, the researcher should carefully document the First Nation's origins, the signing or adherence to Treaty, the setting aside of reserve lands, etc. even if these occurred decades before and may not appear to be disputed by Canada. These historical facts will be the cornerstones of the relationships which will give rise to the "lawful obligation" complained of. Each element of the Submission should be proven so as to form a continuous chain of links throughout the Statement of Fact.

- (d) **Carefully and accurately footnote your references and, where possible, have the footnotes appear at the bottom of the page throughout the narrative of the Statement of Facts.**

This permits a much more fluid reading and understanding of the Submission than the style whereby the footnotes are contained on several pages at the end of the Submission.

- (e) **Don't discount any available source of information.**

It should be noted that in respect of the Specific Claims Policy, *"All relevant historical evidence, including oral testimony, will be considered as well as evidence that, under strict legal rules, would not normally be admissible in a court of law."*

If you have a recent letter from a Councillor saying that as a child, he/she heard their grandmother speaking of a friend whose father had heard that the Indian Agent had handed out money from a satchel during a Surrender Vote in 1888, that is admissible!! If it sheds light on the Claim Submission, feel free to use it.

(f) **Be objective and impartial.**

The Statement of Facts should be just that, a Statement of Facts. Leave the editorializing or innuendo for legal argument. Letting bias show through the Statement of Facts can only hurt the credibility of the overall work. This may be very difficult in some instances, particularly where the researchers may not be independent but may actually be members of the First Nation, feeling aggrieved by Canada's conduct. Nevertheless, the credibility of the Submission can be harmed if a sense of objectivity is not maintained. This is often a primary focus in respect of editing drafts of Submissions in the course of preparation.

(g) **Be unscrupulously fair in respect of the disclosure of facts and documentation.**

The Statement of Facts should put in both the "good" and the "bad" in respect of the Claim Submission. It is generally better to face the music on what might appear to be a negative fact or document, rather than to ignore or hide the circumstance, and have its absence later noted and raised

to undercut the credibility of your entire presentation. If a wrong has been done by Canada, records of what may appear to be negatives can very often be explained or countered in other ways through the course of the documented Submission.

This is one area where it is helpful to have a draft and edit process with the legal counsel involved. My own preference is to have these problem areas highlighted and brought to my attention as areas where the evidence does not appear to support our Submission. This will usually generate further discussions as between legal counsel and the researcher and will at least keep both cognizant to keep an eye open for methods to overcome any negative inferences.

- (h) **Where in doubt in respect of relevancy, include the circumstances and they can be the subject of subsequent editing.**
- (i) **A chronological document list can often be helpful, either as a part of the Statement of Facts or as part of an index for the documents which will be attached to the Submission.**
- (j) **An annotated list of "Key Dates" can be a helpful summary in terms of establishing time frames relevant to the Submission.**
- (k) **A "Cast of Characters" can also prove helpful.**

This would identify the names and positions of the various persons who are referred to in the Statement of Facts and in the Documents. I personally find that when I am first reviewing a draft Claim Submission, I usually find myself making a list of the key players. More often than not in the narrative, at least once (usually on the first occasion of reference), the person and his office will be referred to. Thereafter, references will often be made to a letter from Mr. Smith to Mr. Jones. While it does not hurt to refer again to the position of the parties to that document, if it is not done, it is quite helpful to have a cast of characters to refer to.

I have also found this to be a very helpful tool when preparing for oral submissions or meetings in respect of the facts and circumstances of the Claim.

- (l) **Use the best photocopies of documents available.**
- (m) **Make good and proper use of quotations excerpted from documents.**

Wherever possible, **avoid paraphrasing** what players may be saying in letters or other documents. Utilize the actual quotations and see that they are completely accurate.

Give careful consideration when using excerpts from quotations. Very often, I have found that, where a simple two or three lines have been excerpted from a quotation and placed in the narrative of the Statement of Facts, on a closer

review of the document, it might have been quite a bit more effective if a much more significant portion of the document had been included in the narrative.

Once again, when in doubt, put in more and it can always be edited out before finalization of the Submission.

- (n) **Put quotes, sections of statutes, etc. into the text of the Statement of Facts so that it can be more fluidly read and understood in support of the Claim Submission.**

This does not preclude you from also having the sections attached as Appendices to the Submission.

D. LEGAL ARGUMENT

The extent and nature of the Legal Argument that might be included in a Claim Submission is a matter of practice and preference. From my own review of various Submissions, it would appear that there are two schools of thought on this point. This may depend upon the nature and intent of the argument that is put forward or it may depend upon the practice of a particular region from whence the Submission originates.

One approach utilizes the inclusion of a full blown Legal Argument as part of the Claim Submission, justifying the duty, breach and damage sustained by the First Nation, while anticipating and attempting to circumvent any defence arguments which may be raised by Canada.

An alternative approach understates the legal arguments in the Claim Submission by simply putting forward sufficient legal justification to

establish the breach of a statutory requirement or fiduciary duty, almost as though it were assumed to be as alleged. In this circumstance, the claimant would then wait to see what response was received from Canada in terms of denying the lawful obligation before embarking upon a legal analysis and argument in respect of the merits of the denial.

Both approaches seem to be utilized successfully. The more simple and straight-forward the Specific Claim, the more likely the latter style might be utilized. Where the Claim is more complex and it is likely to be more steadfastly resisted, such as in respect of a Claim for outstanding Treaty Land Entitlement, the more complex and thorough the initial Legal Argument would likely be.

E. RELIEF/COMPENSATION

While the Process Manual contemplates that the Band "*may provide their proposed principles of compensation including all assumptions and calculations made*", in practice, it has been my experience that the Specific Claims Branch would prefer to defer the issue of compensation to the negotiation phase in the event that a Claim is accepted for negotiation purposes. This is not surprising, given that the issues relating to compensation have become extremely complex in recent years. Accordingly, you will find Claim Submissions which only briefly refer to the nature of the relief/compensation being claimed as a result of the breach of lawful obligation. Where lands have been unlawfully surrendered, there technically would appear to be the potential to have the return of these lands. In practical terms, this can rarely be accomplished through the Specific Claims process. The process prefers to focus on compensation in lieu

of land combined with an offer by Canada to co-operate in assisting the First Nation to re-acquire those or other lands in lieu thereof.

Compensation should be claimed in any event with respect to every wrongdoing. The nature of the compensation parameters is initially set forth in the Guidelines however, the topic of compensation could provide food for a week-long seminar in itself. Suffice to say that the compensation contemplated by the Specific Claims Policy is proposed to be "based on legal principles". There then follow several guidelines which purport to restrict the compensation which one might otherwise be entitled to claim in the event that the matter were to proceed through a court of law. In great measure, the involvement of legal counsel in the Specific Claims process has been necessitated by the restriction in compensation. Continued efforts are being made to broaden the range of compensation that might be available through the Specific Claims Process and bring it closer to remedies that would be available through civil litigation. Some of the more contentious issues relate to loss of use, compounding of interest, principles of restitution, etc. I believe that this will be a topic reviewed during these meetings and that it will certainly be of interest to researchers.

While legal counsel may be instrumental in shaping a Claim for compensation, the researchers, during preparation of the basic Claim Submission, should be cognizant of the issues that will be faced in respect of compensation at a later date. Whether these issues are raised in the original Claim Submission or left for later negotiation, there will undoubtedly be facts and documentation which the researchers will come upon in preparation of the Claim that will be relevant on the issue of compensation. Generally, once a Claim is accepted for negotiation, further research funding can be available to look at the compensation issues. Nevertheless it does not hurt to keep an eye out and to

include relative facts and documents in the original Claim Submission which might prove supportive of the subsequent compensation issue.

For example, the motivation behind a breach of obligation can often be closely related to a loss of use claim. On several occasions I have seen Claims where local settlers have encouraged the obtaining through Canada of a surrender of land for sale and, where Canada has held on to prime pieces for its own use, evidence of the local demands and market conditions which existed would clearly be relevant to the damage claim as well.

In my experience, the ability to dig deeply and disclose facts and documents which can support a loss of use claim is a major challenge to researchers. Very often the documentation available to support the liability side of the claim is available and quite accessible. More resourcefulness in a search for primary or secondary sources is usually needed in order to get at the local market conditions that would frame a loss of use claim.

In any event, even if the brief approach is taken to the inclusion of a compensation claim in the Claim Submission, it should clearly make reference to the potential heads of damage and make clear to the Specific Claims Branch that those heads which are being sought are not limited but will involve the consideration of equitable, as distinct from legal, remedies and concepts of restitution. These concepts will be discussed elsewhere during this program.

F. HISTORICAL DOCUMENTS AND REFERENCES

Obviously these should be attached and indexed. As stated above, it may be helpful to have a chronological document list. Case law references should be accurate and set out alphabetically. An index should

usually be provided in respect of primary and secondary sources of reference material.

Once again, the documents and reference materials attached should be photocopied carefully, not just with respect to the original Claim Submission, but with respect to copies of same that might be provided to counsel, consultants and others involved in the process.

Hopefully, my comments and observations will be of some assistance to those embarking upon the preparation of a Claim Submission.

Paul B. Forsyth
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