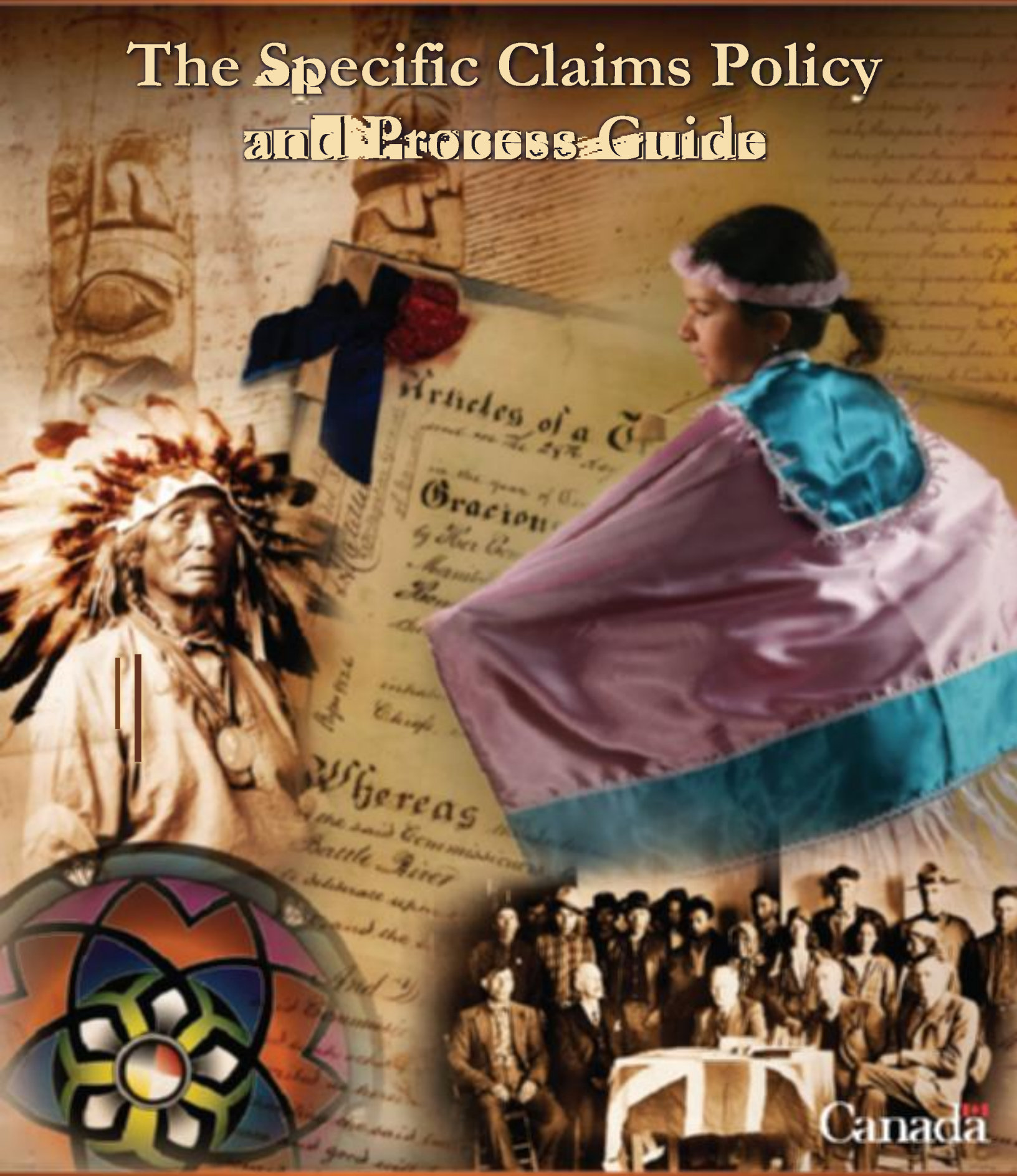
Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

# The Specific Claims Policy and Process Guide



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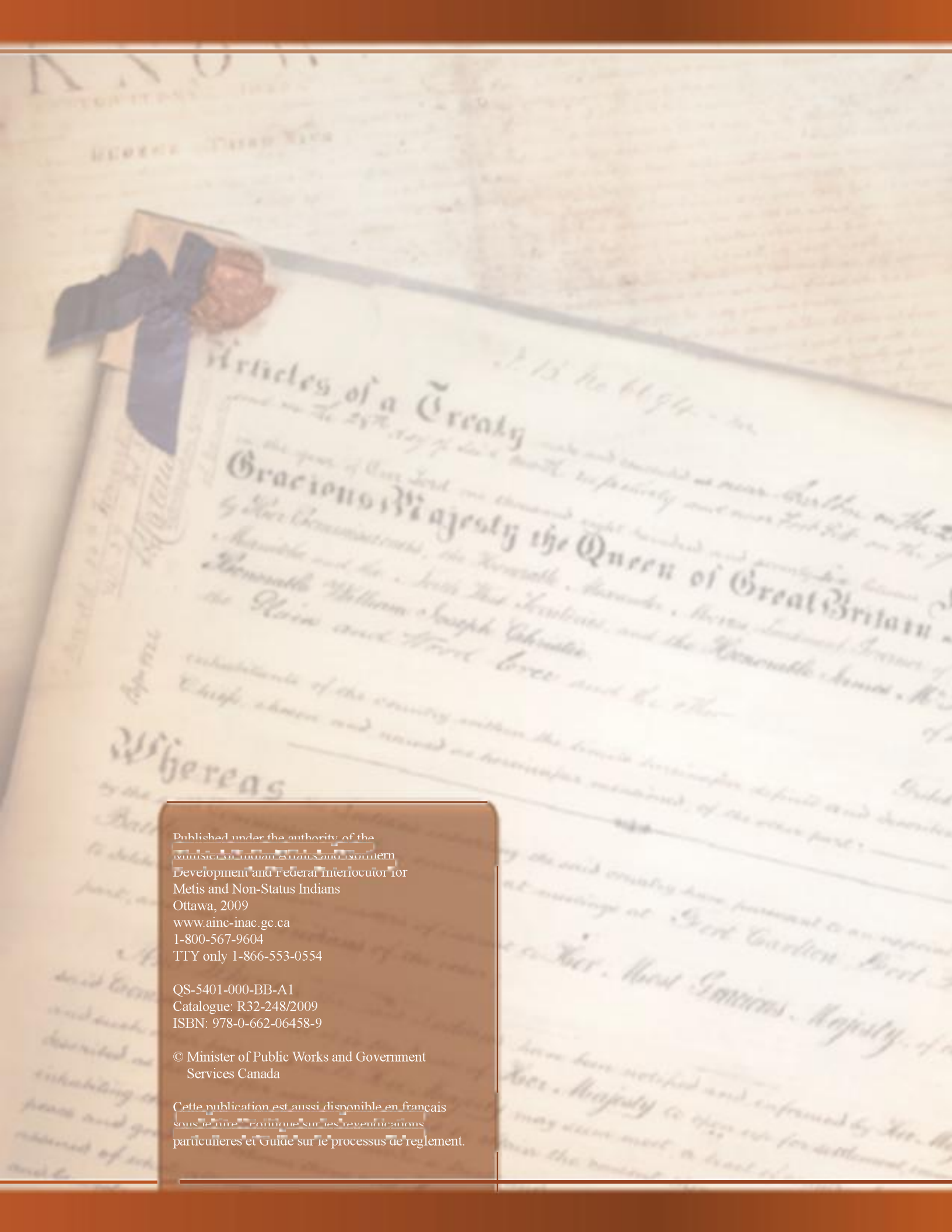


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# INTRODUCTION

In 1982, the federal government released *Outstanding Business: A Native Claims Policy*, which set out the policy on specific claims and guidelines for the assessment of claims and negotiations. Important amendments were made to the Specific Claims Policy in the early 1990s.

On June 12, 2007, the Prime Minister announced *Justice at Last: Specific Claims Action Plan*, which outlined plans to accelerate the resolution of specific claims in order to provide justice for First Nation claimants and certainty for government, industry and all Canadians. The *Action Plan* is intended to ensure impartiality and fairness, greater transparency, faster processing and better access to mediation.

A key feature of the *Action Plan* is the *Specific Claims Tribunal Act*, which came into force on October 16, 2008. Pursuant to the *Act*, First Nations may choose to file claims with the independent Tribunal that are not accepted for negotiation or that are not resolved through a negotiated settlement agreement within a specified time frame.

The fundamental principles of the Specific Claims Policy as articulated in *Outstanding Business: A Native Claims Policy* have not changed. These principles are:  an outstanding lawful obligation must be confirmed, valid claims will be compensated in accordance with legal principles and any settlement reached must represent the final resolution of the grievance. The purpose of this document is to set out an updated policy statement and process guide that reflects the foregoing developments and ensures consistency of language between the Specific Claims Policy and the *Act*.

## *Justice at Last: Specific Claims Action Plan*

*Justice at Last: Specific Claims Action Plan* is designed to dramatically improve the specific claims process and address the backlog of specific claims through the implementation of practical measures to enhance the efficiency of processing. The *Action Plan* built on the lessons learned from previous attempts to reform the specific claims process, the recommendations in the Standing Senate Committee on Aboriginal Peoples' final report on specific claims entitled *Negotiation or Confrontation: It's Canada's Choice*, which was tabled in the Senate on February 7, 2007, and the advice of First Nations.

The *Action Plan* has four interdependent pillars:

- creation of a legislated independent Tribunal with the authority to issue binding decisions;
- dedicated funding for settlements in the amount of $250 million per year for ten years;
- faster processing of specific claims and improvements to internal government procedures; and
- better access to mediation services to help the parties reach negotiated settlements.

## The *Specific Claims Tribunal Act*

The *Specific Claims Tribunal Act* (the *Act*), developed jointly with the Assembly of First Nations, was introduced in the House of Commons on November 27, 2007, received Royal Assent on June 18, 2008 and came into force on October 16, 2008. The *Act* creates an independent adjudicative body known as the Specific Claims Tribunal (the Tribunal) and introduces timelines for the assessment and negotiation of specific claims. The Tribunal provides First Nations with a further alternative to the courts to settle specific claims.

As set out in the *Specific Claims Tribunal Act*, there are four scenarios in which a First Nation may file a claim with the Tribunal:

- the Minister has notified the First Nation of his or her decision not to negotiate the claim, in whole or in part;
- three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
- in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or,
- three years have elapsed after the day on which the Minister has notified the First Nation in writing of his or her decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

# THE POLICY

The term “specific claims,” generally, refers to claims made by a First Nation against the federal government which relate to the administration of land and other First Nation assets and to the fulfilment of Indian treaties, although the treaties themselves are not open to renegotiation.

The primary objective of the federal government with respect to the Specific Claims Policy is to discharge its lawful obligation, as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the federal government. The Specific Claims Policy establishes the principles and process for resolving specific claims through negotiation.

## Assessment of Claims

In order to be assessed within the Specific Claims Policy, a specific claim:

- must be submitted by a First Nation* and the First Nation submitting the claim must be the First Nation suffering the alleged grievance, or a group of First Nations if all are submitting the same claim;
- must concern events that occurred at least 15 years prior to the filing of the claim;
- cannot be based on a land claims agreement* or self-government agreement entered into after December 31, 1973 or any related agreement or Act of Parliament;
- cannot concern the delivery or funding of programs or services related to policing, regulatory enforcement, corrections, education, health, child protection or social assistance, or of any similar programs or services;
- cannot be based on an agreement between the First Nation and the Crown that provides for another mechanism for the resolution of disputes arising from the agreement;
- cannot be based on, or allege, Aboriginal rights or title;
- cannot be based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights; and
- must be compensable in accordance with the compensation criteria.

* These terms are defined in the Glossary.

## Grounds for a Claim

A First Nation may submit a claim seeking compensation for its losses based on any of the following grounds:

a) a failure to fulfil a legal obligation of the Crown* to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown*;

b) a breach of a legal obligation of the Crown* under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

c) a breach of a legal obligation arising from the Crown's* provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

d) an illegal lease or disposition by the Crown* of reserve lands;

e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown* or any of its agencies under legal authority; or

f) fraud by employees or agents of the Crown* in connection with the acquisition, leasing or disposition of reserve lands.

*This term is defined in the Glossary.

## Compensation

The compensation criteria as previously set out in *Outstanding Business: A Native Claims Policy* shall continue to be the basis upon which compensation is determined.

1. As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.

2. Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.

3. (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of the lands or by the current unimproved value of the lands.

   (ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.

4. Compensation shall not include any additional amount based on “special value to the owner” unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.

5. Compensation shall not include any additional amount for the forcible taking of land.

6. Where compensation received is to be used by the First Nation for the purchase of other lands, such compensation may include reasonable acquisition costs, but these costs must not exceed 10% of the appraised value of the lands to be acquired.

7. Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid.

8. In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.

9. Any compensation paid in respect to a claim shall take into account any previous expenditures already paid to the claimant in respect to the same claim.

10. The criteria above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands were ever reserve land, the degree of doubt will be reflected in the compensation offered.

In respect to criterion 2, established practice will continue. Compensation will be equal to the market value of the reserve land at the time that it was taken brought forward to the present value. Similarly, in respect to damage, compensation will be equal to the historical value of the damage done brought forward to the present value.

## Certainty and Finality

The federal government requires certainty and finality when it settles a claim. A claim settlement must achieve complete and final redress of the claim. First Nations must, therefore, provide the federal government with a release and an indemnity with respect to the claim, and may be required to provide a surrender, end litigation or take other steps so that the claim cannot be re-opened at some time in the future.

In any settlement of specific claims the federal government will take third party interests into account. The federal government will not accept any settlement which will lead to third parties being dispossessed. A claimant may use settlement money to purchase lands. Any land purchased by a claimant would be on a willing-seller/willing-buyer basis.

First Nations achieving a settlement of their claims are expected to manage the proceeds of the settlement themselves. In the case of substantial settlements, the final agreement may specify the structure of mechanisms established by the First Nation to administer settlement benefits.

## Statutes of Limitation, the Doctrine of Laches and Other Defences

Statutes of limitation are federal or provincial statutes which limit the time within which legal action may be taken in the courts to resolve a grievance. The right to take action will, therefore, expire after a certain length of time unless legal proceedings have been started.

With respect to specific claims, however, the federal government decides whether to negotiate each claim on the basis of the issues involved. First Nations with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the federal government is not going to refrain from negotiating claims on the basis that they are submitted too late (statutes of limitation) or because the First Nation has waited too long to present its claim (doctrine of laches).

Each claim submission will be assessed on its own facts and merits. All relevant historical evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law. Therefore, the acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event no settlement agreement is reached and litigation ensues, the federal government reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

# THE PROCESS

## 1. Submission

First Nations are responsible for researching their own claims and submitting those claims in accordance with the Minimum Standard (see Annex A). The Minister of Indian Affairs and Northern Development will notify First Nations in writing when their claim submission has been received.

## 2. Early Review: Minimum Standard

Within six months of receipt by the Minister, all claim submissions will be assessed against the Minimum Standard. All claim submissions that meet the Minimum Standard will be filed with the Minister. The First Nation will be notified in writing whether the claim has been "filed with the Minister." It is the date of filing that marks the beginning of the three-year assessment period.

If a claim submission does not meet the Minimum Standard, it will be returned to the First Nation with an explanation as to why it has not been filed with the Minister.

The claim filed with the Minister is the same claim that may ultimately be filed with the Tribunal by the First Nation, consequently, no new allegation, grounds or evidence can be added to the claim once the First Nation has been notified that its claim has been filed with the Minister.

## 3. Research and Assessment

Once the claim is filed with the Minister, the Minister then has three years to assess it in accordance with the assessment criteria and the six grounds for establishing a specific claim set out in the Policy section of this publication. As part of its assessment, the Specific Claims Branch may perform additional research and obtain legal advice.

In the event the First Nation does not receive a response as to whether its claim has been accepted for negotiation within the three-year time period, the First Nation has the option of either waiting for the results of the federal government's assessment or filing the claim with the Tribunal for a determination on its validity and compensation.

## 4. Negotiation and Settlement

In cases where the Minister has notified the First Nation that its claim has been accepted for negotiation, in whole or in part, negotiations with the First Nation will follow. Although the three-year time frame for negotiations begins on the date the Minister notifies the First Nation in writing that the claim has been accepted for negotiation, the negotiation process itself will not begin until the Minister has received evidence, such as a Band Council Resolution, stating that the First Nation is prepared to enter into negotiations on the basis set out in the notification of acceptance.

A First Nation may choose to refer the claim to the Tribunal for a determination on validity and compensation if after three years a settlement agreement has not been reached or within the three-year negotiation period if both the First Nation and the Minister agree.

Once an agreement has been reached between the First Nation and the federal government, the final settlement agreement is ratified and signed, final releases and compensation are provided and the claim is settled.

## Mediation

The vast majority of specific claims that enter into a negotiation process will likely be resolved by a final settlement agreement. The federal government remains committed to the principle that specific claims are best settled through negotiation. Mediation can be a valuable tool to help in settling disputes and the federal government will ensure these services will be available.

## Claims over $150 million

Claims valued over $150 million require the Minister to obtain a discrete mandate prior to being accepted for negotiation. “Claims over $150 million” is not a new class or category of claim. These claims are still specific claims as defined in the Specific Claims Policy.

## CONCLUSION

All Canadians benefit from the resolution of specific claims and the resolution of claims outside of the court process is in the best interests of all Canadians. Negotiated settlements are about justice, respect and reconciliation. They are not only about coming to terms with the past and respect for treaties but also about moving forward together to realize a better, shared future.

### *Find out more*

For additional information about specific claims, please consult the Web site:

http://www.ainc-inac.gc.ca

Or call (toll free):
1-800-567-9604
(TTY) 1-866-553-0554

## GLOSSARY

- "First Nation" means a Band as defined in section 2(1) of the *Indian Act*; or a group of persons that was, but is no longer, an *Indian Act* Band that has retained the right to bring a specific claim under a land claim or self-government agreement.

- "land claims agreement" has the same meaning as in subsection 35(3) of the *Constitution Act, 1982*.

- "Crown" means her Majesty in Right of Canada.

- For the purposes of the section "Grounds for a Claim," "Crown" means as follows:

    - For the purpose of applying paragraphs (a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

    - For the purpose of applying paragraph (d) in respect of an illegal lease or disposition of reserve land located in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that liability for the illegal lease or disposition became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

    - For the purpose of applying paragraphs (e) and (f) in respect of reserve lands located in an area within Canada's present boundaries, a reference to the Crown includes the Sovereign of Great Britain and its colonies for the period before that area became part of Canada.

# ANNEX A

## Minimum Standard

The *Specific Claims Tribunal Act* requires the Minister to post the Minimum Standard on the Internet. The Minimum Standard is replicated here in its entirety. The "Specific Claims Policy" referred to below is this publication, *The Specific Claims Policy and Process Guide*.

**Minimum Standard for Kind of Information**

1. Claim Document

The claim document must include:

- a list of allegations based on one or more of the grounds related to the validity of the claim, as set out in the Specific Claims Policy;
- legal arguments supporting each allegation;
- a statement of the facts supporting the allegations;
- a statement that compensation is being claimed; and,
- a list of authorities with citations, including treaties, statutes, case law and law journal articles, that support the allegations (copies not required).

2. Historical Report

An historical report, including references to supporting documents, outlining the factual circumstances surrounding the allegations, must be provided.

3. Supporting Documents

Complete copies of primary documents and relevant excerpts of secondary documents relied upon to support the allegations included in the claim document and referred to in the historical report are also necessary. Further details related to supporting documents are included in the "Form and Manner" Minimum Standard.

**Minimum Standard for Form and Manner**

1. The documents provided in support of the claim submission must be clearly labelled with the document source and number. Supporting documents must be identified as referenced in the claim document and/or the historical report and/or the list of all allegations. A separate document index setting out, at a minimum, the document number, date and archival reference where applicable, must be provided with the claim submission.

2. Documents can be submitted as hard copies and/or on CD-Rom, DVD-ROM, or any other standard mass storage device.

3. The supporting documents must be legible and complete. This may require preparing transcripts of documents that are of poor quality or are difficult to read. Avoid writing on copies of documents included in the submission and ensure that document pages are not cut off, stapled through or added to binders in a manner that obscures the text. Minor technical errors, such as a missing page or illegible photocopy, will be brought to the attention of the claimant so that the error may be addressed by the claimant. This should not, however, affect compliance with the Minimum Standard.

4. Specific claims submissions must be sent by mail or courier to the Director General for the Specific Claims Branch at Indian and Northern Affairs Canada at the following address:

   Director General
   Specific Claims Branch
   Indian and Northern Affairs Canada
   Les Terrasses de la Chaudiere
   10 Wellington Street, Room 1660
   OTTAWA ON K1A 0H4

   A claim submission cannot be submitted electronically by fax or e-mail.

5. The specific claim submission must include a clear statement indicating that the claim is being submitted on behalf of a “First Nation” as defined in the Specific Claims Policy.

6. Where a specific claim is submitted on behalf of a First Nation as defined in the Specific Claims Policy, the claim submission must include evidence, such as a Band Council Resolution, that the claim is being submitted with the express authority of that First Nation.

## Publication Images from Library and Archives Canada

- Wanduta (Red Arrow) from the Oak Lake area of Manitoba, ca 1913: PA-030027
- Dog Child, a North West Mounted Police scout, and his wife, members of the Blackfoot Nation, Gleichen, Alberta, ca. 1890: PA-195224
- Western Treaty 6, signed at Fort Carlton, August 1876 and Fort Pitt, September 1876 [IT 296], Department of Indian and Northern Affairs, RG10, vol. 1847, e004156541
- Additional Treaty Images from Library and Archives Canada (e0041566553, e004156554, e004156531) can be found at: http[illegible]gc.ca

## Publication Images from the Glenbow Museum

- Treaty party with Cree and Ojibwa, Rocky Mountain House, Alberta, May 1947: NA-1954-1
- Four Haida totem poles at Massett, British Columbia, ca. 1890s: NA-1141-12