

A NEW CLAIMS BACKLOG: Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims

Prepared by the BC Specific Claims Working Group
November 26, 2018

INTRODUCTION

Since the spring of 2017, members of the BC Specific Claims Working Group (BCSCWG)¹ have been made aware that Canada is missing its three-year deadline to respond to specific claims submitted by Indigenous Nations. Under the federal *Specific Claims Tribunal Act*, Canada's Minister of Indigenous Affairs must respond to a First Nation's² specific claim within three years of the claim being filed. The BCSCWG is also hearing that Canada is failing to communicate with Indigenous Nations to inform them of the delay or provide explanations for the missed deadlines.

Open-ended delays and lack of communication are recognized as systemic problems within the specific claims process, as noted by the Office of the Auditor General (OAG) in its 2016 assessment of the program.³ The OAG reported that these problems pose significant barriers for Indigenous Nations seeking just and timely resolution of their specific claims.

Amid widespread accounts of missed deadlines and failing to adequately communicate about them, the BCSCWG undertook research to address two questions:

1. How consistently is Canada missing its legislated three-year deadline to assess Nations' claims?
2. How does Canada communicate with Indigenous Nations when it misses its three-year deadline? (With this question, we were interested in both the method by which Canada communicates and the content of the communication – i.e. whether Canada offered explanations for the delay or an updated timeline.)

To address these questions, we conducted a detailed analysis of Canada's Status Report on Specific Claims, an online, regularly updated database that tracks the status of all filed specific claims in Canada.⁴ We also sent out a series of questions to Indigenous Nations, legal counsel, and claims research units.

Our findings have been startling:

- Of the claims filed between January 1, 2014 and November 10, 2015, Canada failed to respond to a total of 69 claims within the three-year legislated time frame. This number is equal to 65 percent of all claims filed. In 97 percent of these cases, legal opinions were signed by the Department of Justice (DOJ) well in advance of the three-year deadline – nine months, on average – suggesting the delays are occurring at the Specific Claims Branch (SCB) during the last part of the assessment phase.⁵

¹ The BCSCWG is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs (UBCIC) in 2013 and tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims resolution as a key component of reconciliation between Indigenous peoples and Canada.

² In our report we use both "Indigenous Nation" and "First Nation" when referring to claimants, the latter in direct connection with legislation and policy since this is the term used in these contexts.

³ Office of the Auditor General, 2016. *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. November 2016. Available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html

⁴ Accessible at http://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx

⁵ The "last part" of the assessment phase includes a review of the claim by a Claims Advisory Committee (CAC), whose function it is to review the legal advice provided by DOJ and make a recommendation to the Minister about whether to accept the claim for negotiation. The

- In the vast majority of cases, respondents indicated that SCB did not communicate directly with Indigenous Nations about these delays.

BACKGROUND

Once a specific claim is filed with the Minister, the Specific Claims Branch of Crown-Indigenous Relations and Northern Affairs (CIRNA)⁶ conducts its own research and receives a legal opinion from the Department of Justice on whether Canada breached its lawful obligations to the First Nation. Under the *Specific Claims Tribunal Act*, the Minister has three years to notify a First Nation if Canada will negotiate a settlement of the claim. Failure to meet the three-year deadline results in a First Nation having the option of filing the claim with the Specific Claims Tribunal for final, binding adjudication.

The legislated three-year timeline was established in the context of an approximately 850-claim backlog at the Specific Claims Branch, where claims languished for years awaiting legal opinions and decisions on validity. In 2008, when Canada implemented its new specific claims policy, Justice At Last, 70 percent of all unresolved specific claims in the system were backlogged at the assessment stage. First Nations largely identified the source of the backlog as the Department of Justice. In the 2006 final report of its special study on the federal specific claims process, the Senate Standing Committee on Aboriginal Peoples noted, “First Nations told the Committee that they have unresolved claims languishing at DIAND or lurking in the “black hole” that is the Department of Justice for too many years.”⁷

The introduction of legislated timelines in the *Specific Claims Tribunal Act* and Justice At Last was intended to ensure timely claims processing and give Indigenous Nations a pathway to justice when Canada does not fulfill its legal obligations since a First Nation may file its claim with the Specific Claims Tribunal if Canada fails to respond in three years time⁸. In numerous public policy statements and testimony delivered at parliamentary hearings, Canada described the three-year time frame as an essential part of the anticipated effectiveness of Justice At Last: it was to function as a mechanism to ensure Canada’s accountability to First Nations in resolving their claims in a timely way through negotiated settlement. Timeliness is one of the policy’s “four pillars”; Canada committed to “faster processing” as part of a broader plan to address the systemic delays in the assessment phase of claims resolution.⁹ Canada continues to emphasize the relationship between timelines and Canada’s accountability to Indigenous Nations on its website.¹⁰

Though still staunchly critical of the Justice At Last policy¹¹, Indigenous Nations welcomed the creation of the three-year assessment timeline to address the interminable delays in the process. However, the implementation of the timeline has also been subject to strong criticism: first, because the Specific Claims Branch unilaterally imposed an extra-legislative six-month pre-assessment period to determine if a claim meets a “minimum standard” for proper form and content; and second, during the federal review of the

CAC is comprised of the Director General of the Specific Claims Branch, Directors of Negotiations, and Research and Policy, as well as various managers, and general counsel for SCB. Individual file experts from SCB and DOJ attend to make presentations as required. Depending on the nature of the claim, representatives from other government departments may be invited to participate. See https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/au_scp_1375188449984_eng.pdf

⁶ Known formerly as Indigenous and Northern Affairs Canada.

⁷ Senate Standing Committee on Aboriginal Peoples, *Negotiation or Confrontation: It’s Canada’s Choice*, December 2006, p. 16.

⁸ First Nations are also eligible to take their claims to the Tribunal if negotiations exceed three years or prove intractable. See Indian and Northern Affairs Canada, *Specific Claims: Justice At Last*, 2007.

⁹ Indigenous and Northern Affairs Canada, 2010. *Specific Claims Policy and Process Guide*. Available at <https://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506>

¹⁰ Indigenous and Northern Affairs Canada, 2016 *Fact Sheet - At a Glance: The Specific Claims Tribunal Act* <https://www.aadnc-aandc.gc.ca/eng/1100100030306/1100100030307>

¹¹ While Justice At Last and the SCTA introduced the Specific Claims Tribunal, an independent quasi-judicial body authorized to make final, binding decisions on claims, the primary assessment of a claim’s validity still rests with Canada, leaving the much criticized conflict of interest firmly in place.

policy in 2015, Indigenous Nations across the country reported the three-year timeline was being used as an operational tool to reject or close claims *en masse*, effectively barring them from access to negotiations and the settlement of their claims.¹² In principle, the existence of the timeline should have worked to the benefit of Indigenous claimants; yet in practice, the internal manipulation of the timeline by SCB undercut the central commitment of the Justice At Last policy to resolve claims fairly, through timely access to negotiations.

While this practice was characteristic of the Specific Claims Branch’s approach under the Harper government, the Liberal government under Justin Trudeau acknowledged it was a misapplication of the timeline and would end under their tenure.¹³ With this assurance, Indigenous Nations continued to rely on Canada adhering to the legislated timeline to assess their claims. Based on information from Indigenous Nations and their representatives - that Canada was failing to meet the legislated assessment timeline - and an awareness of past issues with SCB’s implementation of timeline to the detriment of Indigenous Nations, the BCSCWG conducted a review of the Specific Claims Branch’s public data and undertook the analysis in this report.

FINDINGS

Missed deadlines

By reviewing the Status Report on Specific Claims¹⁴, we ascertained that Canada missed the legislated three-year timeline for 69 out of the 106 claims filed between January 1, 2014 and November 10, 2015. In other words, in 65 percent of claims filed, Canada failed to meet the three-year timeline.

These delays are considerable and growing. Table 1 compiles data on all claims filed in 2014 and 2015 for which Canada failed to meet the three-year assessment deadline.¹⁵ On average, claims are over five months past the deadline.

Province	Impacted Claims ¹⁶	Average Time Elapsed Since Claim Filed	Average Time Between Legal Opinion and 3 Year Deadline	Average Time Since Legal Opinion Completed
AB	5	3 yrs, 2 months, 23 days	4 months, 20 days	7 months, 12 days
BC	46	3 yrs, 5 months, 8 days	10 months, 1 day	1 yr, 2 months, 9 days
MB	2	3 yrs, 8 months, 1 day	8 months, 30 days	1 yr, 5 months, 2 days
NWT	1	3 yrs, 5 months, 15 days	8 months, 10 days	1 yr, 1 month, 27 days
NS	2	3 yrs, 1 month, 30 days	6 months, 31 days	9 months, 1 day
ON	5	3 yrs, 8 months, 19 days	9 months, 27 days	1 yr, 7 months
QC	6	3 yrs, 9 months, 3 days	6 months, 18 days	1 yr, 4 months, 4 days
SK	3	3 yrs, 3 months, 24 days	5 months, 16 days	9 months, 26 days
Total	70 ¹⁷			
National Average		3 yrs, 5 months, 17 days	9 months, 1 day	1 yr, 2 months

Table 1. Time elapsed since claim submission, legal opinion and three-year deadline, and legal opinion to present.

¹² INAC, *Formative Evaluation*, 2011. See also National Claims Research Directors, *In Bad Faith*, March 2015.

¹³ This commitment was made in several meetings between then Director General of SCB, Stephen Gagnon, and the UBCIC.

¹⁴ While Indigenous Nations, the Office of the Auditor General - and Canada in response - have identified problems with the Status Report, including misrepresenting the status of claims (excluding claims in research and development, wrongfully identifying partially accepted claims as “in negotiations”, and unilaterally “closed claims” as resolved), the categories used in this report appear to accurately reflect this portion of claims assessment.

¹⁵ Data compiled from SCB online status report on November 10, 2018.

¹⁶ Claims for which Canada did not meet the three-year assessment deadline.

¹⁷ Figures in Table 1 include one impacted claim from Quebec filed in 2013, not included in our review.

Table 1 also shows that on average, there is a nine-month period between the Department of Justice issuing a legal opinion and the expiration of the three-year deadline; additionally, over a year has passed since the Department of Justice issued a legal opinion and the current date, with no response to the claim issued to Indigenous Nations from SCB. Assessment of the claims represented in Table 1 and described above is not yet complete and the Status Report on Specific Claims suggests Indigenous Nations have still not been notified by SCB about the status of their claims.¹⁸ As these claims have still not been addressed, the length of the delay is still increasing.

Further, our research suggests that the problem is getting worse. Out of the 35 claims filed in 2014, Canada failed to meet the deadline in 10 cases [29%]. Out of the 71 claims filed in 2015, Canada failed to meet the deadline in 59 cases [83%]. This is a rate of increase of 186% over the two-year period.¹⁹ The number of delayed responses is worrying, indicating at the very least that the problem of delays has not been addressed or resolved. The Status Report also shows that there are an additional 20 claims that were filed in 2014 and 2015 for which Canada missed the three-year assessment deadline but has since informed the Nation about whether it will accept the claim for negotiation, making the total number of claims with late assessments 89 [84% of claims filed].

In 2008, a significant portion of the “backlog” targeted by Justice At Last was at the Department of Justice. Current data shows that now the DOJ is largely completing its legal opinions well in advance of the three-year legislated deadline (9 months prior, on average). This suggests that the new backlog originates at a later part of the assessment stage.

Responses from members of the claimant community to the questionnaire we sent support this finding. One representative of an Indigenous organization wrote: “for all [our] claims... Canada’s status report indicates that legal opinions have been signed. In some cases, the legal opinions have been signed for years with still no response on claim acceptance. This would indicate that the delay is not attributable to the production of Justice’s legal opinions.”

Communications

In assessing the type, consistency, and quality of communications by Canada, we relied on information from the claimant community.

We asked representatives of Indigenous organizations and Nations if and how Canada communicated with them about missing the three-year deadline. The feedback shows a consistent pattern of minimal and poor communication. Respondents identified only four cases where the Specific Claims Branch appeared to take the initiative to inform an Indigenous Nation that it missed the three-year timeline. Further, many respondents said that they had received no responses from Canada, even after they made their own queries (“no response has yet been received on any of the delayed files”). From those that reported receiving responses from Canada, they stated the response was delivered via telephone when a First Nation/representative called or wrote repeatedly to make an inquiry. The most common responses include the following:

- “Yes, they said, ‘Sorry, this is a problem the system is having.’”
- “This is a problem our system is having.”
- “Canada did not provide a reason for not meeting the 3-year deadline.”
- “It was explained to us that could either wait for a response or take our claim to the Tribunal.”

¹⁸ The Status Report indicates the date a Letter of Offer to negotiate a claim has been issued to a First Nation, as well as a rejection date.

¹⁹ Canada, Status Report on Specific Claims: Accessible at http://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx

At the 2018 National Claims Research Workshop, one claims practitioner asked SCB Director General Stefan Matiation why Canada was missing its three-year legislated deadlines. He responded that the SCB was understaffed. This is the only explanation of which we are aware for Canada's failure to respond to claims within the legislated time frame.

It is important to note that the OAG cited poor and misleading communications as one of Canada's key failures in managing the specific claims program:

We found that the Department's reforms to the process introduced barriers that hindered First Nations' access to the specific claims process and impeded resolution of claims. These barriers included ... limited information sharing between the Department and First Nations. We also found that the Department was aware of First Nations concerns about these barriers, but was unable to demonstrate that it had a formal process to gather, monitor and respond to information and feedback about these concerns and make required improvements.²⁰

The failure to adequately inform Indigenous Nations about missed deadlines continues the pattern of poor communication the Department of Indigenous Affairs promised to address in response to the OAG's report.

Conclusion

This study demonstrates that, with increasing and alarming frequency, Canada is failing to adhere to the three-year legislated timeline to assess claims. Further, Canada is not communicating effectively or in a transparent manner with Indigenous Nations about the delays, what is causing them, and what measures, if any, are being taken to address this problem.

The consequences of Canada repeatedly missing its legislated timelines are significant for Indigenous Nations. These claims are active, yet do not have timely access to negotiations. Under the *Specific Claims Tribunal Act* these claims are eligible for the Specific Claims Tribunal - an option that SCB is pointing out to some claimants. However, access to this adjudicative process is hindered by the fact that funding is not provided to Indigenous Nations to prepare a Declaration of Claim, a necessary step to file a claim with the Tribunal. Further, the Tribunal is a quasi-judicial, adversarial process that is costly, and supposed to be a backstop when negotiations fail, not a way of circumventing the obvious advantages of reaching a negotiated resolution of the claim.

It is difficult to ascertain what consequences Canada faces for failing to adhere to legislated timelines or to communicate with Indigenous Nations. They include the possibility of increased debt and contingent liability as resolution of these claims is repeatedly deferred. There may also be direct consequences to Crown-Indigenous relations as Canada fails to meet commitments made to the OAG and the Public Accounts Committee to improve communications with Indigenous Nations.

Recommendations

The BCSCWG recommends that Canada immediately take the following actions:

1. Communicate with Indigenous Nations waiting for late claim assessments and provide a full and clear explanation as to why SCB has missed its legislated timeline to respond.

²⁰ http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html#

2. Work with each affected Indigenous Nation to establish a jointly agreed upon path forward, including, where applicable, new timelines.
3. Include a list of all viable options to ensure a specific claim has access to justice.
4. If the Specific Claims Tribunal is included among these options, provide up-front funding for Indigenous Nations to prepare a Declaration of Claim.
5. Work with Indigenous Nations and their representative organizations to develop and communicate a remedial plan to deal with this growing backlog.