Canada: Implementation of an Independent Process for the Resolution of Specific Claims

Submission to the UN Committee on the Elimination of Racial Discrimination

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On behalf of the Union of British Columbia Indian Chiefs

BACKGROUND: A CONFLICT OF INTEREST

Indigenous Nations in Canada have long sought a fair, impartial process for redress of the past loss and damage of their lands and the forced curtailment of their way of life as a result of racially discriminatory legislation and policies. This redress constitutes a human right of Indigenous peoples and an obligation of Canada as a signatory to the ICERD and the UNDRIP.

The "specific claims" process is the Government of Canada's approach to dealing with historical wrongs related to illegal alienations of Indigenous lands, mismanagement of Indigenous assets held "in trust" by the government, and the non-fulfillment of treaties. However, since it was first established in 1973, the specific claims process has been plagued by institutionalized conflict of interest: the Government of Canada ("Canada") adjudicates all claims against itself. This situation perpetuates the very inequalities the process is meant to address. Additionally, the Specific Claims Branch, which manages the process, is housed within Indigenous and Northern Affairs Canada ("INAC"), a government department with a long history of paternalism, discrimination, and unilateralism in its dealings with Indigenous Nations.[1]

For decades, Indigenous Nations have fought for meaningful reform; they seek a truly independent process through which their claims can reach resolution. In 2008, Canada introduced changes designed to acknowledge and accept responsibility for past wrongs and promote reconciliation among Indigenous peoples, the Canadian government, and citizens of Canada. One of the principal reforms fulfilled a commitment to Indigenous Nations by creating the Specific Claims Tribunal ("Tribunal"), the only independent, impartial body authorized to adjudicate specific claims, outside of formal, costly and often infeasible court proceedings.[2]

While a positive step, the Tribunal is a *secondary* process for the adjudication of specific claims. It functions as a forum for appeal: if Canada rejects a claim, Indigenous Nations can take the case to the Tribunal. The primary assessment of the validity of Indigenous claims against the Canadian government still lies with Canada, as do all administrative and funding decisions. Canada's conflict of interest remains. Large value claims (over $150 million) are also ineligible for the Tribunal and subject to secret government deliberations (from which Indigenous Nations are excluded).

Importantly, claims at the Tribunal constitute only a small portion of claims overall: currently, there are just 76 claims active at the Tribunal, while there are 386 active in other processes of negotiation and assessment.[3] Indigenous Nations seek a fair and independent process for all their claims—not just those that go before the Tribunal. In its 2012 report, the CERD raised the issue of the Tribunal's limited scope: "the Committee is concerned at reports that this tribunal does not resolve disputes on treaty rights for all First Nations and does not provide for all guarantees for a fair and equitable settlement (art. 5)."

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[1] Lawyers at the Department of Justice review claims and provide recommendations, but INAC oversees the process.

[2] Taking historical claims to court is often infeasible due to Canada's reliance on technical defenses, such as statutes of limitations.

[3] In other words, there are five times more claims in processes other than at the Tribunal. See Indigenous and Northern Affairs Canada, "National Summary on Specific Claims," July 7, 2017. Available at: http://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/PreviewReport.aspx?output=PDF

RECENT EVENTS HIGHLIGHTING SYSTEMIC CONFLICT OF INTEREST

1. A 2016 report by the Office of the Auditor General (OAG) found that Canada had systemically mismanaged the claims process, creating many new barriers for Indigenous Nations seeking just resolution of their claims.[4] The audit found that Canada had publicized misleading information about having "resolved" claims that it had in fact unilaterally deemed closed; during the period under review, 85 percent of claims were rejected by Canada. Furthermore, the OAG noted that Canada had failed to act on Indigenous peoples' concerns and refused to engage in mediation or honest, good faith negotiations. The OAG also pointed out that, between 2013 and 2016, Canada cut funding to Indigenous Nations by 40 percent while maintaining its own funds at constant levels.

2. Canada has systematically undermined the viability of the Tribunal via significant underfunding and understaffing, and by challenging its decisions in court, thereby creating further barriers to justice. As of January 25, 2017, Canada has sent 10 Tribunal decisions for judicial review.[5] Under the Specific Claims Tribunal Act, Tribunal decisions are to be final and binding, and judicial reviews are meant to be used only in cases where the Tribunal's jurisdictional reach, procedures, and correct application of the law are at issue. However, Canada is repeatedly misusing judicial reviews to retry the facts of each claim—undermining the authority of the Tribunal and choosing to engage in expensive legal battles with Indigenous Nations. Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs, noted, with these judicial reviews, Canada is "choosing denial, conflict, and litigation over fair process, resolution, and upholding the honour of the Crown."[6] The cases impose huge costs burdens on Indigenous Nations, who must participate in order to resolve their claims but receive no funding to do so.

THE CURRENT STATE REVIEW PROCESS

Under the current Liberal government, Canada has created a Joint Technical Working Group (JTWG) tasked with reforming the specific claims process based on the Auditor General's report. The recommendations of the JTWG are due to Canada in November 2017. Indigenous Nations are concerned that this JTWG will result in minor changes in a system deeply in need of real reform. Past review processes have failed to address the structural conditions that give rise to the conflict of interest and inequality we describe here. As such, Indigenous Nations are aware of the need to hold Canada accountable for creating a specific claims process that is truly independent.

THE NEED FOR JOINT OVERSIGHT

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[4] Office of the Auditor General of Canada, *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*, November 2016.

[5] Specific Claims Tribunal Canada, "Judicial Review to the Federal Court of Appeal ("FCA") as of January 25, 2017," http://www.sct-trp.ca/DecisionCourt/index_e.htm.

[6] Union of BC Indian Chiefs, "Canada's Application for Judicial Review 'Shameful'; UBCIC Demands Its Withdrawal," January 27, 2017, http://www.ubcic.bc.ca/support_huuayaht.

Indigenous Nations in Canada have been waiting for decades—in some cases, over a century—to obtain justice. There are almost 1,000 unresolved claims in Canada; these perpetuate social and economic inequality and create uncertainties for Indigenous Nations trying to plan for their futures. Meanwhile, Indigenous Nations, having fought tirelessly for reform, are well aware of the kinds of processes that would advance claims resolution; their knowledge will be essential to reforming and advancing specific claims. For this reason, any specific claims process that seeks historical redress and aims to advance reconciliation must include Indigenous Nations as equal partners. Thirty-six years of a process mired in government unilateralism and conflict of interest has only exacerbated inequality and social marginalization. Real change is needed.

QUESTIONS FOR CANADA

1. What steps will Canada take to eliminate the conflict of interest that still characterizes the specific claims resolution process and what is the timeline for implementing them?
2. What measures will Canada take to ensure joint oversight with Indigenous Nations of the implementation of reforms designed to remove the conflict of interest, discrimination and barriers of the current process?
3. What measures will Canada take to guarantee fairness and equity in procedures before the Specific Claims Tribunal?
4. What steps will Canada take to ensure adequate and equitable resourcing at all stages of the process, including the Tribunal?

RECOMMENDATIONS

1. Create a truly independent agency, outside of Canada's Ministry of Indigenous and Northern Affairs, able to facilitate real negotiation between Indigenous Nations and Canada, on equal footing, for the just resolution of specific claims.
2. Create a body of representatives comprising Indigenous Nations and Canada to oversee this independent agency.
3. Respect the reconciliatory objectives of the Tribunal and the intent of the Specific Claims Tribunal Act by accepting its decisions as final and binding.
4. Working with Indigenous Nations, create a sustainable, long-term funding regime within which all parts of the process—from claims research and preparation, through negotiation and Tribunal processes, to resolution—are fairly and adequately funded.