



UBCIC BC Specific Claims Working Group

Annual Report to the UBCIC Chiefs in Assembly
September 27-29, 2021

VIRTUAL MEETING

THE BC SPECIFIC CLAIMS WORKING GROUP

Created by UBCIC resolution in 2013, the BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and technicians advocating for policy reforms that advance justice for BC Nations and raise the profile of specific claims on the national political agenda.

The BCSCWG joins its voices with Indigenous leaders and communities across the country who for decades have called for a truly independent specific claims process that eliminates Canada's conflict of interest. As well, the BCSCWG supports reforms that would lead to full and equal integration of Indigenous laws into specific claims processes.

Current co-chairs are Chief Dalton Silver (Sumas First Nation) and Kukpi7 Judy Wilson (Neskonlith Indian Band). For more information or to access BCSCWG reports and publications, please visit [www.ubcic.bc.ca/about the bc specific claims working group](http://www.ubcic.bc.ca/about_the_bc_specific_claims_working_group).

UBCIC is a leading advocate for specific claims policy reform, coordinating efforts and communications among Nations and organizations across Canada. We track data on claims processes, closely follow policy and process changes, continuously call for greater transparency and open communication, and advocate for ongoing accountability and fundamental reforms. We participate in a wide array of initiatives to advance a fair, just, and timely specific claims process that reflects that unique needs of BC claimant Nations.

Working Groups and Committees

Political and technical members and guests of the BCSCWG sit on various committees and working groups, including:

1. AFN Chiefs Committee on Lands, Territories and Resources
 - a. BC Political Representatives: Chief Mark Point and Kukpi7 Judy Wilson
 - b. BC Technical Representative: Jody Woods
2. AFN-Canada Joint Technical Working Group: Jody Woods
3. Claims Research Unit (CRU) – Negotiation Support Directorate (NSD) Working Group: Jody Woods, Robyn Laba, Allison Eccleston, Morgan Chapman, Shannon Williams
4. CRU-ATI Working Group (with SCB, Library and Archives Canada and Treasury Board Secretariat): Jody Woods, Robyn Laba, Allison Eccleston, Morgan Chapman, Shannon Williams
5. National Claims Research Directors: Jody Woods (Coordinator)

Current Work of the BCSCWG

1. Draft Proposal for a Fully Independent Specific Claims Process

The UBCIC continues to advocate for a fully independent specific claims process. The current process is hampered by systemic barriers due to Canada's conflict of interest wherein:

- Canada functions as the decision-maker in claims against itself;
- all rules are based on Canadian law and legal traditions; laws and legal traditions of First Nations are excluded;
- Canada acts unilaterally in setting all policies and administrative procedures, excluding First Nations from substantive and equal roles in decision-making regarding processes that affect First Nations' rights and interests.

Background

Following the 2016 Auditor General's report which found Canada had grossly mismanaged the specific claims process, (Justice At Last), the AFN and Canada formed a Joint Technical Working Group to address problems with the process. UBCIC Research Director Jody Woods has sat on this working group since 2017.

After two rounds of engagement with First Nations that included 11 regional sessions and numerous written submissions¹, the JTWG refocused its work to develop a proposal for a fully independent specific claims process that finally removes Canada's conflict of interest and integrates Indigenous laws. The UBCIC, AFN, and FSIN have passed resolutions in support of a proposal for an independent process that advances four principles:

- It must be consistent with the honour of the Crown.
- It must ensure independence of all aspects of claims resolution:
- It must create space and support for the full recognition and integration of Indigenous laws:
- And there must be no arbitrary limits on compensation.

The AFN has developed a draft proposal for a fully independent specific claims process based on a shared approach to justice, founded equally on the laws of claimant Nations and Canada. The proposal has undergone peer review, including by several experts in Indigenous laws. **The AFN has made the proposal public and is asking all First Nations to review it and provide comments no later than October 30, 2021.**

The proposal and associated review materials can be found here: <https://www.afn.ca/specific-claims-policy-reform/>. On this site, you will also find a link to a comment form which is how the AFN would like you to submit any feedback you have on the proposal. We strongly encourage all First Nations to review the proposal and send any comments to the AFN as soon as possible. In addition, we have prepared some at-a-glance materials to assist you in your review which are included in your kit.

If you are interested in having representatives from the AFN present the proposal to your community, please contact Jody Woods at jwoods@ubcic.bc.ca.

¹ The BC Specific Claims Working Group made two submissions based on feedback received at BC regional engagement sessions. These can be found on UBCIC's publications page or by clicking the links below:

- [On a Human Rights Foundation: Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations' Historical Losses](#), BC Specific Claims Working Group Submission to the AFN, July 24, 2017.
- [The Work Ahead: Eliminating Canada's Conflict of Interest to Create a Fair, Legitimate Process for Resolving Specific Claims](#), BC Specific Claims Working Group Submission to the AFN Engagement Session on an Independent Process December 18, 2019.

2. Challenging Unilateralism: Holding Canada Accountable Regarding Changes to Research and Negotiation Funding Guidelines

While the AFN proposal is under review, Canada and its representatives within CIRNAC, particularly at the Specific Claims Branch and the funders at Negotiation Support Directorate, are unilaterally developing policies, regulations, and funding guidelines without the full and equal participation of First Nations who are directly affected by the specific claims process. Canada characterizes these unilateral actions as “interim measures” put in place while substantive policy work towards an independent process is occurring. However, Canada’s failure to work in full partnership with First Nations and the “interim” policies themselves are backward steps that entrench Canada’s conflict of interest and call into question Canada’s commitment to an independent process.

2.1. New Draft Research and Negotiation Funding Guidelines

Canada provides funding to First Nations to support the research and development of specific claims as well as the negotiation of specific claims. The Negotiation Support Directorate (NSD) administers funding for these purposes. The Negotiation Guidelines, which set out the process for First Nations to receive loan funding to support the negotiation of their claims, were substantively and unilaterally revised in 2020. The Research Guidelines were imposed on First Nations in the same year. Both Guidelines have undergone revision. Currently, the NSD is engaged in another review of both Guidelines and intends to publish them in fall 2021. Together, the Guidelines fail to respond to the needs and priorities of First Nations and impose barriers to fair claims resolution. Moreover, the Guidelines entrench the SCB’s control over key aspects of the specific claims process. As Canada seeks to meet its commitments and obligations under international law by establishing a fully independent process, the Guidelines represent a step backwards.

2.1.1 Draft Research Funding Guidelines

We identified a number of serious concerns with new guidelines for claims research funding:

- Lack of consultation with First Nations as equal partners throughout the development of the guidelines
- Guideline objectives do not align with First Nations’ priorities or Canada’s commitments to ensure full support for all Nations to research and develop their claims in accordance with the UN Declaration, so that First Nations and Claims Research Units have resources equal to Canada, as well as the autonomy and flexibility they need to their research.
- Guidelines were set to impose new funding limits that impede access to claims resolution, including an arbitrary and unreasonable 5-year limit on funding to research claims. This time limit does not accurately account for the time it often takes to research claims, evolving First Nation priorities, differences in the complexity of claims, or delays caused by Canada’s own conduct – including years-long delays in accessing government records necessary to develop claim submissions. After significant opposition to this limit was made by the BCSCWG and Research Directors, the NSD agreed to remove this provision. However, they insist that there be some mechanism included in the Guidelines to quantify and limit funding available to First Nations to research their claims.
- The guidelines give SCB decision-making authority over funding in some circumstances. SCB is essentially one party in the claim and controls access and works closely with DOJ to assess claims and must remain arms length from funding processes.

- Several new sections in the guidelines retroactively allow for research and development funding to be used to support negotiation activities that should be funded through other mechanisms. The outcome is that First Nations wanting to research and develop their claims will have to compete for resources with First Nations in negotiations.

The National Claims Research Directors Communicated these concerns on an ongoing basis and finally in August 2021 when we called for Canada to abandon the flawed guidelines and work directly with First Nations to develop guidelines that meet their needs. Aside from acknowledging receipt of our communique and thanking us for our “input”, we have not received a response. We anticipate the guidelines will be released by November.

2.1.2 Issues with the Draft Negotiation Guidelines

We commissioned a legal opinion on the draft negotiation funding guidelines which raise a number of concerns:

- The Guidelines, which apply to specific claims that Canada has accepted for negotiation, set out the process for First Nations to receive loan funding from Canada to participate in specific claims negotiations. Previously, loan funding was not available for claims that the SCB deemed to be of small value. In response to First Nations’ concerns, the Negotiation Guidelines were amended to allow First Nations to receive loan funding for small value claims. While this was a positive development, significant financial risk remains for First Nations whose claims are deemed to be of small value. These First Nations may inadvertently take on negotiation loan funding that exceeds the value of the settlement agreement. This risk is amplified by the continued lack of transparency in relation to the valuation of specific claims by Canada.
- First Nations are reporting a lack of clarity, transparency, and communication regarding preliminary funding to support activities upon receipt of a letter from Canada agreeing to negotiate or discuss the claim.
- Some First Nations are being denied (without justification) the full \$15K in preliminary negotiations as set out in the new guidelines.
- Restrictions on experts resulting in protracted delays and questions of fairness: The new guidelines restrict experts to those working ‘jointly’ and will fund First Nations to hire their own expert only in rare circumstances (which are not set out).
- Despite NSD assurances that First Nations have flexibility with their budgets and can move items around as they need, Nations are being subjected to an increased level of scrutiny and micro-justification when submitting loan funding applications, such as being asked to justify honoraria to Chiefs, having to justify a small budget line for an Elders Committee.
- New percentage caps on budgetary costs are making it difficult for Nations to engage and could cause problems in audits (for example, setting strict limits on ‘First Nations costs’ versus ‘Legal and Professional costs’).

3. Allocation of Research Funding for Other Activities

We are learning new information about the how research funding, intended for First Nations or their designated research associations to research and develop their claims, is being allocated for other activities, not related to claims research.

- In 2019, Canada announced “additional support of \$40.0 million over five years, to First Nations to help research and develop their claims.” This amounts to a total of 12 million per year for claims research.

- We have learned through access to information requests that significant expenditures are being made out of the research budget that are unrelated to the research and development of specific claims.

Summary of Expenditures 2019-2020

\$12,109,000 Total Budget (including \$4.1M A-base; \$8M budget 2018 increase for 5 years)

- **\$7,291,471 Total Spent on Specific Claims Research for 47 groups (see detail Summary attached)**
- **\$1,500,000 used to support AFN** Joint Working Group for Specific Claims Policy Engagement
- **\$300,000 used to support AFN** Specific Claims Policy Work
- **\$348,000 used to cover for negotiation** support funding requests pressures
- **\$1,068,620 used to support Specific Claims Tribunal** funding requests pressures
- **\$10,508,091 Total Specific Claims Research Budget Spent**

\$1,600,909 Surplus* returned to the Department to fund pressures (unable to provide details on what specifically it was used for) * Surplus funds were returned after doing a second call for proposals, supporting policy work, and funding TAG Sector pressures as noted above.

NOTE: This was the first year receiving the \$8M and therefore the take-up was lower than forecasted since groups (particularly individual First Nations) were not aware that additional funding was available and that they could submit individual requests. The practice in past years was to mostly to fund Specific Claims Research through CRUs given budget deficit. You will note an increase of take up in the number of proposals and funding offered in 20-21 (despite COVID-19 measures).

Summary of expenditures 2020-2021

\$12,109,000 Total Budget (including \$4.1M A-base; \$8M budget 2018 increase for 5 years)

- **\$9,766,295 Spent on Specific Claims Research to 88 groups (see detail Summary attached)**
- **\$443,000 used to support joint activities with First Nations:** agricultural benefits mediation with First Nations (\$250K); Section 35 consultations for Alberta (\$93K) and BC First Nations (\$100K)
- **\$67,500 used to support AFN** Specific Claims Policy work
- **\$15,000 used to support consultations** for a Quebec First Nation
- **\$464,434 used to support Specific Claims Tribunal** funding requests pressures
- **\$10,756,229 Total Specific Claims Research Budget Spent**

\$1,352,771 Surplus returned to the Department to fund COVID-19 pressures *Surplus funds were returned after doing a second call for proposals, supporting policy work and joint activities as noted above. Several research groups have indicated to NSD that they did not submit an additional funding request during the second call for proposals given that they experienced delays in their work due to limitations with COVID-19 measures, e.g. in accessing information.

*information provided, after significant pressure by NSD

- In some instances, we have learned that First Nations' research proposals or activities/projects that could support research directly have been denied (in the same years surpluses were reabsorbed)
4. Project on the Impacts of the Reserve Creation Processes on Indigenous Women and Implications for Specific Claims

The BC Specific Claims Working Group received federal funding to prepare a discussion paper and conduct video-recorded interviews on the relationship between the historic Indian reserve creation in British Columbia and the political, economic, and social marginalization of Indigenous women. The paper

will increase our understanding of this complex history and explore possible implications for the resolution of specific claims. The videos will capture interviews with community experts on their home territories talking about the ways in which colonial gender bias has resulted in historical losses of land, resources, as well as vital knowledge of Indigenous laws and matriarchal economic systems and governance structures.

We are working with lawyer Halie (Kwanxwa'logwa) Bruce (Namgis/Kwa'kwa'kawakw Nation), and Dr. Sarah Hunt/Tłaliłila'ogwa (Kwakwaka'wakw Nation), Assistant Professor and Canada Research Chair in Indigenous Political Ecology at the University of Victoria, on this fascinating project. Dr. Hunt is currently working on the draft discussion paper and will present her draft findings to you today.

5. *Our Laws Arise from the Land: Indigenous Laws and Specific Claims*

The BC Specific Claims Working Group continues to advocate for a specific claims process that reflects Indigenous laws on equal footing with Canadian common law. Article 27 of UNDRIP emphasizes the need for independence and recognition of Indigenous laws in the adjudication of land rights:

*States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, **giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied and used. (UNDRIP Article 27, emphasis added)***

To advocate for this change and to support Indigenous community researchers seeking to enact their own laws in relation to historical losses, the BC Specific Claims Working Group and UBCIC Research (in partnership with Ardith Walkem) created an online resource: *Our Laws Arise from the Land* (www.ourlawsarisefromtheland.org). This site contains a discussion paper on principles for the integration of Indigenous laws, video interviews with community, academic, and legal experts in the application of Indigenous laws, and further resources.

6. *Reviews of the federal Privacy Act and Access to Information Act*

In November 2019 UBCIC led the National Claims Research Directors in making a formal submission to the Department of Justice's Stakeholder Engagement Process. The submission was titled *Canada's Proposed Modernization of the Privacy Act: Issues and Concerns for Indigenous Peoples*. Its key recommendation stressed the need for continued, direct engagement with Indigenous peoples and their representative organizations regarding legislative reform, obtaining their free, prior, and informed consent to ensure they are equal decision-making partners in matters that concern them.

The federal Treasury Board Secretariat (TBS) is initiating its one-year review of the recently revised Access to Information Act. UBCIC Research has been in preliminary discussions with TBS to obtain necessary resources for meaningful and substantive participation in developing the review process and engaging in a full review of the Act.

7. *Accountability of Canada During COVID-19*

In March 2020, in the context of COVID-19, UBCIC Research heard from multiple sources that representatives of Canada's specific claims process were calling specific claims a "non-essential service." Delays and operation shutdowns were widespread. A total lack of communication and consistency

meant that the claimant community was extremely concerned about whether Canada would continue to try to meet its lawful obligations. The BCSCWG conducted a national survey and wrote a letter to the Director General of the Specific Claims Branch and the Minister of Crown-Indigenous Affairs regarding the need for Canada to communicate with claimant Nations and involved organizations and continue to uphold the honour of the Crown, even in the uncertainty surrounding the effects of COVID-19.

THE WORK AHEAD

The BCSCWG would like to thank the UBCIC Chiefs in Assembly for continued support of all our efforts. In the coming year, we will continue to work to advance claims for individual First Nations and to advocate for broader changes that will result in a more fair, just, and timely process for all Nations. We welcome all feedback, questions, and ideas regarding our work – please do not hesitate to get in touch.

CONTACT

BC Specific Claims Working Group
Chief Dalton Silver and Kukpi7 Judy Wilson, co-chairs
Email: bcscwg@ubcic.bc.ca

Jody Woods, Research Director
Email: jwoods@ubcic.bc.ca
Tel: 604-684-0231