

# United Nations Committee on the Elimination of Racial Discrimination 80th Session 13 February - 9 March 2012, Geneva

---

## **Alternative Report to the United Nations Committee on the Elimination of Racial Discrimination on how Canada fails First Nations in the Fair, Just and Timely Resolution of Specific Indigenous Land Claims**

**Submission by the Union of British Columbia Indian Chiefs, January 31, 2012**

### **Executive Summary**

This submission addresses how Canada's failure to fulfill its lawful obligations with respect to Indigenous Specific Land Claims threatens Indigenous people's human rights and challenges Canada's obligations under the *United Nations Convention on the Elimination of All Forms of Racial Discrimination*. Both historical and current practices to resolve Specific Claims are fraught with serious challenges that continue to severely impede their fair resolution. As its own 2011 internal review demonstrates, the Crown is failing to uphold important commitments made in its 2007 *Justice At Last* Action Plan with respect to settlement of Specific Claims. In perpetuating the non-resolution of Specific Claims, the honour of the Crown is called into question. Further, Canada is failing to adequately remedy the alienation of Indigenous lands that directly arose from race-based discriminatory legislation and policies targeting Indigenous peoples.

### **Introduction**

Specific Claims are grounded in discriminatory, colonial laws, policies and practices. These, in turn, are perpetuated by a process that does not meaningfully resolve Specific Claims and that undermines Crown-Indigenous relationships. The Government of Canada's failure to settle Specific Indigenous Land Claims (Specific Claims) in a fair, just and timely manner challenges its obligations under the *United Nations Convention on the Elimination of All Forms of Racial Discrimination*, in particular, Article 2 (c) and (d) requiring States:

- (a) "take effective measures to review governmental, national or local policies and to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;"

and to

*(b) “prohibit and bring to an end, by all appropriate means, including legislation, as required by circumstances, racial discrimination by any persons group or organization.”*

And; by contravening key provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* that protect against racial discrimination; specifically:

- Article 8 which provides that, “States shall provide effective mechanisms for prevention of, and redress for... Any action which has the aim or effect of dispossessing them of their lands, territories or resources”;

- Article 27 which provides that:

*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 or used. Indigenous peoples shall have the right to participate in this process;*

- Article 28 which provides that:

1. *Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*
2. *Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*

Canada’s current approach to Specific Claims perpetuates an inequity that is historically based in racially discriminatory legislation, policies and ideas which Canada has publicly committed to resolve, in part via the resolution of Specific Claims. Canada’s current approach is intended to improve previous processes, but in fact, it creates new and insurmountable obstacles to Specific Claims resolution, threatens to exacerbate the already untenable situation in many Indigenous communities and jeopardizes the tenuous relations between Indigenous Nations and the Crown.

Further, by publicly and misleadingly reporting the success of its Specific Claims resolution approach, Canada is undermining the very basis of open reconciliation towards Indigenous Nations by maintaining the system of public obfuscation that has been practiced since colonization began.

## **Background**

### **Specific Claims**

Specific Claims comprise sometimes 200 year old grievances pertaining to the Government of Canada's ("Canada" or "the Crown") lawful obligations owed to Indigenous Nations with respect to Indigenous lands, resources, and entitlements. Specific Claims arise out of racially discriminatory legislation and policies that facilitated the alienation of traditional Indigenous lands, resources and ways of life. Specific Claims involve: the illegal alienation of Indigenous lands; non-fulfillment of treaties and agreements between Indigenous Nations and the Crown; breaches of obligations arising from the Indian Act or other federal laws; and misadministration of assets. Specific Claims can also include a failure by the government to compensate Indigenous Nations for alienated or damaged reserve lands and assets.

The impact of unresolved Specific Claims on Indigenous communities cannot be overstated. According to current policies, an Indigenous community can only be compensated in cash (not land) when Canada breaches its lawful obligations with regard to Specific Claims. Compensation amounts are determined by the impacts of the loss of use over time of alienated lands and resources. For many communities, this can be significant, since lands alienated were and are rich in resources and economic potential.

Alienation from this economic potential contributes to the crisis of poverty experienced by a disproportionately large number of Indigenous peoples in Canada; according to the United Nations Human Development Index that documents quality of life enjoyed by people living in all parts of the world, non-Indigenous Canadians enjoyed the ninth highest quality of life in the world, while Indigenous Canadians rank 63rd<sup>1</sup>. The historic and continuing alienation from our lands and resources and our potential economic benefits perpetuates conditions on many reserves that are similar to those in many developing nations.

Historically, the process for resolving Specific Claims has been agonizingly slow, unfair and fraught with conflict of interest on Canada's part – in that Canada sat in judgment against itself. In spite of a new *Specific Claims Action Plan* (2007) to address these injustices, the majority of Canada's Specific Claims remain unresolved. New legislation and policies designed to resolve Specific Claims have actually undermined successful resolution of these long standing grievances and threaten to keep Indigenous Nations in poverty and to further deteriorate Crown-Indigenous relations.

In August 2007, the Government of Canada announced a *Specific Claims Action Plan*, called *Justice At Last* (the "Action Plan") to finally address Canada's longstanding, unresolved lawful obligations issues based on the following principles:

- impartiality and fairness;
- greater transparency;
- faster processing of claims; and
- better access to mediation.

Most importantly, *Justice at Last* renewed and strengthened Canada's commitment to pursue settlement of Specific Claims through non-adversarial negotiation instead of the courts or other adjudicative bodies. Unfortunately, Canada is not living up to this commitment.

Indigenous Nations have consistently raised serious concerns about the new process and the spirit and practice of Specific Claims resolution.

---

<sup>1</sup> (<http://aboriginalservices.uwaterloo.ca/documents/FirstNations.pdf>).

Further, the Crown itself identified glaring problems in a 2011 internal review conducted by the Department of Indian Affairs into its Specific Claims resolution program. The review, which evaluated the success of *Justice at Last*, highlighted severe internal concerns about how implementation of the Action Plan was negatively impacting Crown – Indigenous relationships. The review examined the “Four Pillars” which are the key outcomes of the Action Plan, including: the creation of a Specific Claims Tribunal and a Specific Claims Settlement Fund; the advancement of mediation services; and the development of effective internal governmental procedures. Below, we outline how Canada is perpetuating racial discrimination against Indigenous Nations involved in Specific Claims through the implementation of its current *Justice At Last* Action Plan.

## **Pillar 1: The Specific Claims Tribunal**

The *Specific Claims Tribunal Act* (SCTA) imposed a three-year timeline for Canada to respond to Specific Claims submissions and created an independent tribunal to hold hearings and make final and binding decisions on Specific Claims that had either been rejected by the Minister or not settled through timely negotiation.

Even before the Specific Claims Tribunal (“the Tribunal”) was operational, Indigenous Nations identified key concerns about it relating to the perpetuation of injustice and discrimination:

1. The Tribunal is prevented from hearing a large component of Specific Claims – those valued at over \$150,000,000. No other avenues for justice are available to resolve these claims.
2. The Tribunal follows very limited rules of court and, at the discretion of the presiding judge, allows for the cross examination of witnesses, including Elders. This reflects Canada’s shift to an adversarial, technical and legalistic approach to Specific Claims rather than the collaborative and restorative approach promised in *Justice at Last* one.
3. Conflict of interest or its appearance remains in the appointment process because Judges to the tribunal are appointed solely by Canada;
4. Unlike other tribunals of a similar nature, only one judge presides over each claim.
5. Tribunal operational costs are inadequate; these are the costs it takes for each Indigenous Nation to bring forward a claim to the Tribunal. Significantly, this includes legal costs. Moreover, many of the resources set aside to cover these costs come from the same fund allocated to research and prepare Specific Claims submissions. In British Columbia in particular, this is worrisome since there is potentially a large number of claims yet to be researched and advanced (see Appendix One: British Columbia and Specific Claims). At this point in time, it is clear that the Specific Claims Tribunal does not itself have the resources necessary to fulfill its responsibilities if even a portion of the First Nations whose claims are rejected or are not settled move their claims to the Tribunal.

Canada is transferring its lawful obligation to resolve Specific Claims, and its moral obligation to do so through good faith negotiations, from the Departments of Aboriginal Affairs (formerly Indian Affairs) and Justice and onto the back of the new, under-resourced Specific Claims Tribunal. Since the SCTA came into effect, Canada has been rejecting or simply “closing the files” on Specific Claims at an unprecedented rate. These claims, which should be resolved through meaningful, good faith negotiations, potentially number in excess of 200 - all of these may bottleneck at an under-resourced and problematic Tribunal. Federal negotiators have also indicated that they may walk away from any active negotiations that are not finalized within three years.

All rejected claims and possibly those whose files are simply closed – could potentially access the tribunal. Administratively and publicly Canada can say it has addressed (though not resolved) Specific Claims. In actuality, they have simply shifted these claims to the Tribunal. Since the Tribunal is not resourced well enough to cope with this influx of claims, Canada’s commitment to claims resolution is called into question. Increasingly, Indigenous Nations believe Canada is simply trying to walk away from lawful obligations that arose from discriminatory policies and practices, by creating a new system that cannot, practically, resolve claims.

## **Pillar 2: Specific Claims Settlement Fund**

The Action Plan earmarked a total of \$250 million per year, for 10 years to cover settlements up to \$150 million per claim and for Specific Claims Tribunal awards. Indigenous Nations, as well as Canada's internal review, caution that money set aside for the settlement of Specific Claims is insufficient and, as a result, not all outstanding obligations will be resolved.

## **Pillar 3: Mediation**

According to the Action Plan, "negotiations will continue to be Canada's First Choice in Resolving Specific Claims ... [they] lead to win-win solutions that balance the interests of all Canadians; they ensure that settlements lead to a just resolution of First Nations claims and are fair to all parties"<sup>2</sup> and that mediation would be a key focus of the new Specific Claims resolution process. The Assembly of First Nations (AFN) and Canada worked jointly on a framework for a new Alternate Dispute Resolution Centre. However, Canada subsequently closed off discussions with the AFN on this matter and unilaterally announced mediation services will be housed in Department of Indian Affairs offices (now Aboriginal Affairs), administered by INAC (now AANDC) staff, and will only be available while negotiations on a Specific Claim are active. Indigenous Nations have made it clear this is unacceptable and laden with, at the very least, the appearance of conflict of interest.

Canada's internal review states:

*Mediation is the one component of the Action Plan where the least progress has been achieved thus far. ... Findings from the evaluation conclude that the Specific Claims Branch has yet to clearly articulate which circumstances INAC negotiators would consider a mediation process. ... Representatives from First Nation organizations noted that, while some discussions were held with INAC in the early stages of the Action Plan implementation in regards to mediation services, they are now largely excluded from the process leading up to the selection of mediators. This, in turn, could negatively affect the willingness of First Nations to agree to a mediation process.<sup>3</sup>*

While these observations are astute, they do not go far enough to describe the wholly unsatisfactory nature of Canada's willingness to participate in truly independent mediation.

Canada has indicated publicly it will not participate in any mediation it deems inappropriate. In effect, mediation will be available only when Canada wants it and Canada controls it. The practice of independent mediation does not exist in the current Specific Claims process.

## **Pillar 4: Internal Governmental Procedures**

Many of Canada's strategies to "address" Specific Claims have been technical and administrative in nature and were implemented outside of the political and legislative arena; these strategies have been contrary to the promises Canada made when it announced *Justice at Last*. They not only perpetuate historically-based practices that are rooted in racial discrimination, but undermine the fair, just and timely resolution of Specific Claims. New government procedures include:

---

<sup>2</sup> A new beginning for the Resolution of Specific Claims in Canada: The Specific Claims Process at a Glance. Indian and Northern Affairs Canada. R#-89/2009)

<sup>3</sup> Formative Evaluation of the Specific Claims Action Plan Project No. 10005

### ***The administrative extension of its legislated three year timeline by the imposition of a minimum standard review period***

Canada's internal review observes:

*A critical goal behind the implementation of the minimum standard has been a desire to streamline the upfront process of review and assessment of claims. When considering the achievement of this goal, great caution should be exercised. Claims are, by their very nature, a remarkably complex endeavour and to gather the required information to support a specific claim is bound to be challenging. Before the Action Plan, a First Nation claimant and the Specific Claims Branch could collaborate for several months to properly document a claim. This, technically, was added to the official timeframe needed to address the claim. Now, the very same work is still needed but falls outside the official timeframe considered and tracked. In other words, only when the file is submitted to the Specific Claims Branch does the official clock get set in motion. ...*

*Having a minimum standard is not unusual for a claim-related process. ... It is rather how this concept is applied to the Specific Claims process that may trigger unexpected negative impacts if it becomes a barrier to the prompt and fair resolution of a claim.<sup>4</sup>*

There are no provisions of the SCTA that allow for the extension of the three year deadline. This extra-legislative review period delays the resolution of Specific Claims. It also undermines the overarching goal of working towards negotiated settlements and calls into questions Canada's commitment to resolving its outstanding lawful obligations by denying opportunities for collaboration.

### ***The creation of an "operational model" based on the legislated three year timeline.***

The SCTA legislated that Indigenous Nations can access the Specific Claims Tribunal if Canada rejects a claim or has not accepted it for negotiations within three years. This was intended to be a tool for Indigenous communities to compel Canada to negotiate and resolve Specific Claims in good faith. Indigenous Nations do not have to file claims with the Tribunal. In fact, if Indigenous Nations are happy with the progress of talks with Canada, they can opt to continue those talks even after three years has elapsed.

However, Canada has been using the legislated three year timeline as an "operational model" whereby Canada has internally determined it must "address" Specific Claims within this time period. To this end, Canada has been rejecting claims outright on an unprecedented scale, providing limited acceptances or "closing files" (see below) that are beyond the three year timeline.

Canada's internal review observes:

*In reviewing the negotiation process in light of the Action Plan, INAC decided the Department would attempt to negotiate and settle all valid claims within a three-year period following the notice from the Minister to the First Nation claimant offering to negotiate a settlement. In practical terms, this decision became an operational model. Nowhere in the Specific Claims*

---

<sup>4</sup> Formative Evaluation of the Specific Claims Action Plan Project No. 10005

*Tribunal Act or in the Specific Claims Policy itself, is there an obligation to negotiate a settlement within three years. ... Evidence gathered as part of this evaluation indicates that there is little incentive for a First Nation to abandon a negotiation table and turn to the Tribunal simply because this option has become available..... evidence gathered as part of this evaluation indicates that this operational model will not be sustainable for larger and more complex claims. ... The unintended impact of this approach is that First Nations are feeling rushed and pressured. Representatives from First Nations interviewed as part of this evaluation indicated that, in their view, negotiations under the Action Plan tend to proceed at an unreasonable pace.<sup>5</sup>*

In practical terms, Indigenous communities cannot rely on Canada to negotiate in good faith, the resolution of its longstanding lawful obligations if Canada continues to employ this model. This concern is supported by Canada's new practice of tendering "final offers" rather than offering to negotiate as Canada's internal review observes:

*Finding from the evaluation suggests that INAC's negotiators may appear more prompt to table so-called final offers, which have little chance of being accepted by First Nations, in order to close a file before the end of the three-year period... What appears concerning, however, is the extent of the increase in the number of files closed. This is six to eight times higher than what was experienced before the Action Plan<sup>6</sup>.*

Canada's mostly untenable final offers are publicly reported as "Canada offered to negotiate," creating the false public impression that Indigenous Nations are stalling the resolution process by refusing to accept Canada's offers to negotiate claims settlements.

### ***Partial Acceptances and Final Offers***

*Final offers* often accompany what Indigenous Nations are calling *partial acceptances* or *de facto rejections*. Increasingly, Indigenous Nations have been receiving misleading notifications that their submitted claims have been "accepted for negotiations." In fact, for many of these claims only one (and usually a smaller) aspect of the claim is accepted. The substantive allegations are rejected.

Canada does not offer to negotiate many of these claims, but sets out a pre-calculated, take-it-or-leave-it figure or formula which is offered as part of an "expedited settlement." These small offers have been described as insulting attempts to take advantage of the poverty in many Indigenous communities by offering much needed money even though that money does not compensate the communities for Canada's breach of its lawful obligation.

It is important to note that if the Indigenous Nation accepts the expedited settlement offer or agrees to negotiate a settlement, Canada will require that Indigenous Nation sign a release on all the other aspects and allegations of the claim that Canada has rejected, meaning that the Indigenous Nation must extinguish its right to pursue a settlement of the rejected parts of the claim with the Specific Claims Tribunal or in court. Further, Canada has been imposing unnecessary, unlegislated deadlines by which time Indigenous Nations must accept Canada's "offer" or it will be rescinded.

Publicly these claims are reported as "Canada offered to negotiate."

---

<sup>5</sup> Formative Evaluation of the Specific Claims Action Plan Project No. 10005

<sup>6</sup> Formative Evaluation of the Specific Claims Action Plan Project No. 10005

### ***Administrative File Closures***

Rather than accepting or rejecting claims outright, Canada is “closing” many files at an alarming rate; that is, removing them from consideration based on technical reasons not on the merits of the claims. It is unclear whether these claims are eligible to be heard by the Tribunal because they have not technically been rejected. These claims and the lawful obligations they may represent, may have no avenues for resolution.

### ***The Specific Claims Inventory and Public Accountability***

The Specific Claims Inventory is an online listing created by the Specific Claims Branch to both track and publicly report on the progress of Specific Claims. Canada has accelerated its addressing of Specific Claims by simply removing claims from its Specific Claims Inventory by rejecting them, closing files and by other means – creating the illusion that it has made substantive progress in resolving claims and clearing up its claims backlog. These claims are not resolved and Canada’s lawful obligation with regard to these claims is not addressed.

## **Conclusions and Recommendations**

All of these measures call into serious question Canada’s commitments under the *United Nations Convention on the Elimination of All Forms of Racial Discrimination* to amend policies that perpetuate inequity based on discrimination- Indigenous Nations enter into the Specific Claims process specifically in response to historical government actions that discriminated against their racial identity as Indigenous peoples. Instead of resolving its longstanding lawful obligations, Canada is accelerating its efforts to minimize its commitments, obligations and liabilities under the new Specific Claims process.

The Union of British Columbia Indian Chiefs makes the following recommendations:

- **Canada take immediate and effective measures to implement the *UN Declaration on the Rights of Indigenous Peoples*, with specific attention paid to the full recognition of Indigenous land rights, including the resolution of Indigenous Specific Claims that arise from and continue to racially discriminatory legislation, policies and ideas which Canada has publicly committed to resolve.**
- **Canada, in full partnership and consultation with Indigenous Peoples, *immediately begin work to* establish a process to reform the *resolution of* Specific Claims that addresses concerns raised by both Indigenous Nations and by Canada’s own internal review of the Specific Claims Process.**
- **Canada in full partnership and consultation with Indigenous Peoples, *immediately begin work to* establish a process to reform the *resolution of* Specific Claims based on the principles articulated in the *Justice at Last Action Plan*; namely, impartiality and fairness; greater transparency; faster processing of claims; and better access to mediation.**
- **Canada take full and effective measures to ensure its actions and policies with respect to the resolution of Specific Claims are fully consistent with CERD, and that the Honour of the Canadian Government compels it to respect its outstanding lawful obligations to Indigenous peoples.**

## Appendix One: British Columbia and Specific Claims

Due to its unique historical circumstances, Indigenous Nations in British Columbia have over half of all Specific Claims in Canada and rejected claims impact BC disproportionately. In British Columbia, there are over 200 individual Indian Bands living on approximately 1,680 small. *Indian reserves*, which were unilaterally allotted by the Crown. These reserves comprise the second smallest reserve land base in Canada, yet BC has the third largest on-reserve population in the country. Indian Band bands in BC comprise approximately 27 Tribal Nations, each with distinct languages and cultures. This represents over one half of all the Tribal groups in Canada. Further, in most of BC, treaty negotiations between the Crown and Indigenous communities have either stalled or failed. These factors have resulted in a disproportionately large number of Specific Claims arising from British Columbia.

BC claims are unique in that most are not related to breach of Treaty promises but to Canada's failure to fulfill its lawful obligation to protect reserve lands and assets from alienation or misuse.

Canada's new strategy to make unilateral, untenable, final offers en masse (up to 600) to First Nations particularly effects BC:

- BC has 166 First Nations who have filed a total of 695 Specific Claims against Canada comprising, 43% of the claims currently under review<sup>i</sup>.
- This does not include claims that have not been filed yet, of which UBCIC alone has at least 80.
- It also does not include claims that have not yet been identified or researched. In BC, that number could be in the 100s.

Further, some provinces will likely be winding up their involvement of Specific Claims as all potential claims have been researched and/or submitted. BC First Nations have the longest term, and possibly the largest stake in a claims resolution process that works.

---

<sup>i</sup> Statistics

Province	# of First Nations with claims	# of claims in system
Alberta	43	141
<b>BC</b>	<b>166</b>	<b>695</b>
Manitoba	52	100
New Brunswick	14	30
NW Territories	6	11
Nova Scotia	14	31
Ontario	91	288
PEI	2	2
Quebec	21	136
Saskatchewan	74	157
Yukon	10	25