

SENATE



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# **NEGOTIATION OR CONFRONTATION: IT'S CANADA'S CHOICE**

**Final Report of the Standing Senate Committee on Aboriginal Peoples  
Special Study on the Federal Specific Claims Process**

The Honourable Gerry St. Germain, P.C.

*Chair*

The Honourable Nick Sibbeston

*Deputy Chair*

December 2006

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(Committee Business — Senate — 39<sup>th</sup> Parliament, 1<sup>st</sup> Session)

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## MEMBERSHIP

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### THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES 39<sup>th</sup> Parliament, 1<sup>st</sup> Session

The Honourable Gerry St. Germain, P.C.  
*Chair*

The Honourable Nick G. Sibbeston  
*Deputy Chair*

and

The Honourable Senators:

Larry W. Campbell  
Lillian Eva Dyck  
Aurélien Gill  
Leonard Gustafson  
\*Daniel Hays (or Joan Fraser)  
Elizabeth Hubley  
\*Marjory LeBreton (or Gerald Comeau)  
Sandra Lovelace Nicholas  
Robert W. Peterson  
Hugh Segal  
Charlie Watt

\* Ex officio members

*Other Senators who have participated from time to time on this study:*

The Honourable Senators Andreychuk, Banks, Cochrane, Cook, Johnson, Nolin, Smith,  
Trenholme Counsell, Tkachuk and Zimmer.

*Committee Clerk:*  
Gaëtane Lemay

*Analysts from the Parliamentary Information and  
Research Service of the Library of Parliament:*

Lisa L. Patterson  
Tonina Simeone

## ORDER OF REFERENCE

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### **Extract from the *Journals of the Senate*, Tuesday, May 20, 2006:**

The Honourable Senator St. Germain, P.C., moved, seconded by the Honourable Senator Cochrane:

That the Standing Senate Committee on Aboriginal Peoples, in accordance with rule 86 (1)(g) of the Senate, be authorized to examine and report on the general concerns of First Nations in Canada related to the federal Specific Claims process, the nature and status of the Government of Canada's Specific Claims policy, the present administration of the policy, the status of the Indian Specific Claims Commission, and other relevant matters with a view to making recommendations to contribute to the timely and satisfactory resolution of First Nations' grievances arising out both their treaties with the federal Crown and the Government of Canada's administration of their lands, monies, and other affairs under the Indian Act.

That the Committee report to the Senate from time to time, but no later than June 14, 2007 and that the Committee retain until September 1, 2007, all powers necessary to publicize its findings.

After debate,

The question being put on the motion, it was adopted.

Paul C. Bélisle  
*Clerk of the Senate*

Oka, Ipperwash, Caledonia.

Blockades, masked warriors, police snipers.

Why?

Canada's failure to address and resolve the legitimate claims of First Nations.

Imagine your new neighbour comes into your backyard and fences off half of it. Then he sells it to someone down the street. This new neighbour tells you he got a good deal but he won't say how much he got. Then, he says that he'll take care of the cash – on your behalf, of course.

Maybe he even spends a little on himself.

You complain. He denies he did anything wrong.

What would you do?

Go to the proper authorities? Turns out that the authorities and their agencies work for him.

Sue him? He tells you that none of the lawyers can work for you – he's got every one in town working for him. When he finally lets a lawyer work for you – it turns out that he can afford five of them for every one you can afford.

Finally he says: Okay, I'm willing to discuss it. But first you have to prove I did something wrong. Oh, and I get to be the judge of whether you've proved it. And, if you do prove it, I get to set the rules about how we'll negotiate. I'll decide when we've reached a deal and I'll even get to determine how I'll pay the settlement out to you. Oh, and I hope you're in no rush because this is going to take about twenty or thirty years to settle.

Sounds crazy?

Welcome to the world of Indian Specific Claims. Specific Claims arose when Canada and its agents failed to live up to Canada's responsibilities in connection with First Nations' lands, monies and assets. In some cases Canada didn't give them the land they were promised in the treaties. In some cases, they got the land only to have it taken away again – in a way that violated Canada's own rules. In other cases, federal employees actually stole Indian land, money or other assets.

Until the 1950s, First Nations were prohibited by law from hiring lawyers to pursue these claims – many of which date back 70, 100 or 200 years. Since then impoverished Indian communities have had to fight the federal government in court or else persuade it to

acknowledge the claim and negotiate a settlement. Currently, everything is done on Canada's terms and the government is both defendant and judge.

With few resources allocated to find solutions, it can often take twenty or more years from the time a First Nation comes forward with a claim to finally reaching a settlement.

Despite the amazing hurdles, almost 300 claims have been settled. In every case where they have been settled, it has meant an immediate improvement in the lives of First Nations people. It has also strengthened relations between Canada and those First Nations and between those First Nations and the communities that surround them. Settling outstanding claims is not only the just thing to do, it is the smart thing.

Close to 900 claims sit in the backlog. Things are getting worse rather than better. First Nations have been patient – incredibly patient – but their patience is wearing thin.

This report proposes a series of actions the government can take immediately to improve the process and demonstrate to First Nations that Canada is serious about living up to its lawful obligations. It also proposes some longer term measures that will resolve this issue once and for all. No-one expects Specific Claims to be cleared up over night. But we have to start and we have to start now.

The choice is clear.

Justice, respect, honour.

Oka, Ipperwash, Caledonia.

Canada is a great nation in the world but Canada will only achieve true greatness when it has fulfilled its legal obligations to First Nations.

Gerry St. Germain, P.C.

Nick G. Sibbeston

*Chair*

*Deputy Chair*



## EXECUTIVE SUMMARY

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The twenty-five-year-old Specific Claims policy of the Department of Indian Affairs and Northern Development (DIAND) is the basis for the process by which the federal government means to respond to First Nations' historic grievances. This policy requires the federal government to determine whether it breached lawful obligations or committed errors or frauds in managing First Nations' lands, monies, and other assets and, if so, to determine and pay the compensation owed to the affected First Nations.

In its study of Specific Claims, the Committee found the process to be fraught with delay and so ineffective as to be working to the detriment of the government's stated objectives. Almost 900 of the approximately 1,300 claims submitted since 1970 are in the system at one stage or another. If only 70 per cent of those outstanding claims prove valid, one witness estimated it could take ninety years to deal with the backlog at the present rate of ten or less a year.

The Committee heard that First Nations are extremely frustrated with the process. They see conflict of interest in a system wherein the government judges and compensates for claims made against it. Even though the policy is intended as an alternative to the courts, the Committee heard that the process is confusing, complicated, time-consuming, expensive, adversarial, and legalistic. As it stands, First Nations have little practical recourse to either mediation or the courts.

The establishment of an independent body for resolving Specific Claims through a cooperative effort by First Nations and Canada was the long term solution recommended by most witnesses. As a starting point, they favoured the 1998 recommendations of the First Nations-Canada Joint Task Force on Specific Claims Resolution, saying that the 2003 *Specific Claims Resolution Act* should not be implemented.

The Committee also heard that, in the short term, DIAND and the Department of Justice need to improve procedures in the existing process. They need to use more collaborative approaches and they need to have resources sufficient to stabilize or reduce the growing backlog of unresolved claims. For the system to work, First Nations require equal access to government records as well as the human and financial resources to research and prepare claims submissions.

Witnesses urged that Specific Claims be recognized as an economic issue. In light of the immediate need of most claimant First Nations for timely compensation to equip them to pursue economic development activities, several witnesses felt funding to resolve Specific Claims should be made available with First Nations' economic needs in mind and not as discretionary funding.

Hearing and accepting that the current Specific Claims process is not an intelligent way to seek resolution, and that Specific Claims have moral, human rights, financial, economic, political, and legal dimensions, the Committee recommends:

- an increase in funds available for settlements
- the establishment of an independent body within two years
- adequate resources for the existing process
- the adoption of new guiding principles.

The Committee fears that failing to find the political will to act appropriately on Specific Claims could invite confrontations. The choice is Canada's.

## I. INTRODUCTION

The foreword to the 1982 Specific Claims policy booklet, *Outstanding Business*, stated:

The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets. They have represented, over a long period of our history, outstanding business between Indians and government which *for the sake of justice, equity and prosperity* now must be settled without further delay. [emphasis added]<sup>1</sup>

Twenty-five years later, this remains true. Instead of being outstanding in the business of resolving claims, successive governments from 1970 to 2006 have resolved only 275 of the 1,337 Specific Claims submitted to the end of September 2006. With approximately 861 remaining unresolved, there is now more “outstanding business” than ever.<sup>2</sup>

About seventy per cent of the First Nations in Canada have claims in the Specific Claims system. That is, roughly 445 First Nations have a direct interest in future government action on the Specific Claims policy and process.<sup>3</sup>

### A. Nature of Specific Claims

The Specific Claims policy outlined in *Outstanding Business* (and reproduced in the Terms of Reference for this study, Appendix D) may be convoluted at first read but the Auditor General captured the essence of it for the Committee as follows:

In contrast to comprehensive land claims, Specific Claims are claims that arise from alleged non-fulfillment of Indian treaties already in place and other lawful obligations, or the improper administration of lands and other assets under the Indian Act or other formal agreements. Claims for alleged breaches of the government's obligations can include: The non-fulfillment of a treaty or other agreement provision; the breach of an Indian Act or other statutory responsibility; the breach of an obligation arising out of government administration of First Nations funds or other assets; or an illegal sale or other disposition of First Nation land by government.<sup>4</sup>

The strength of First Nations' statements about the nature of Specific Claims captured the attention of the members of this Committee prompting them to focus on the key aspects of the policy described by our witnesses as fraud, theft, and other illegal actions.

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<sup>1</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), p. 3.

<sup>2</sup> DIAND, Specific Claims Branch, National Mini-Summary available on-line at: [http://www.ainc-inac.gc.ca/ps/clm/nms\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf)

<sup>3</sup> At 31 December 2005 there were 615 First Nations in Canada. As of late 2006, roughly 445 First Nations of the approximately 615 First Nations in Canada have Specific Claims in the system, according to Louise Poitras, Claims Coordinator, Negotiations Directorate, DIAND.

<sup>4</sup> *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 8 October 2006, Sheila Fraser, Auditor General of Canada

I believe the public are not aware of what Specific Claims really are: fraud, misappropriation, misuse of our First Nations peoples' lands. This is not strictly a negotiation of trying to establish this, that or the other thing. This is fraudulent action taken on the part of government officials and where governments allowed lands to be used for railways and highways.<sup>5</sup>

Canada has breached its fiduciary duty. There was outright theft of land, improper and illegal surrender of land. In spite of the unfair process that currently exists, over 300 claims have been validated and approximately 280 claims have been resolved in the last number of years. There is clear validity to our position on claims.<sup>6</sup>

According to the policy, Specific Claims are allegations regarding specific legal breaches by Canada in the administration of lands and monies of First Nations (Status Indian Bands) under the *Indian Act* and/or in the fulfilment of treaties. The Specific Claims process involves research to substantiate allegations, submission and validation of the claim, negotiation and implementation of a mutually acceptable settlement.

### **B. The Need to Negotiate**

Rectifying provable breaches and errors by federal officials should not take generations. In its study on Specific Claims, the Committee has been reminded that justice delayed is justice denied. Every Canadian deserves just treatment from the federal government.

Specific Claims are allegations of wrongdoing submitted to the Government of Canada by First Nations, that is, by Status Indian bands not by individual members of First Nations. These claims, which our witnesses explained are about fraud, theft of band monies, illegal taking of reserve lands and the government's failure to deliver reserve land promised under treaties, ARE taking generations to resolve. This is wrong! So wrong, in fact, that it has been called a human rights issue.

In his 2005 report to the United Nations Commission on Human Rights, Special Rapporteur Rodolfo Stavenhagen associated the numerous instances of Canadian federal, provincial and territorial governments failing to fulfil their obligations to Aboriginal peoples with the impoverishment and ill-health of Aboriginal people and with social strife.

Aboriginal people are justifiably concerned about continuing inequalities in the attainment of economic and social rights, as well as the slow pace of effective recognition of their constitutional Aboriginal and treaty rights, and the concomitant redistribution of lands and resources that will be required to bring about sustainable economies and socio-political development.<sup>7</sup>

The social and economic situation of Aboriginal people is among the most pressing human rights issues facing Canada according to the Canadian Human Rights Commission. In 2001, Jim Prentice, former Co-Chair, Indian Claims Commission (ICC) and present Minister of

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<sup>5</sup> *Proceedings*, 18 October 2006, Chief Morris Shannacappo, Treaty and Aboriginal Rights Research Centre of Manitoba

<sup>6</sup> *Proceedings*, 8 November 2006, National Chief Phil Fontaine, Assembly of First Nations

<sup>7</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mission to Canada, Advance edited version, <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.88.Add.3.pdf>

Indian Affairs and Northern Development, observed that: “The settlement of specific land claims is fundamentally a human rights issue.”<sup>8</sup>

Two hundred and seventy-five Specific Claims have been settled over the last thirty years. On examination, the majority of the 861 Specific Claims now waiting to be resolved may prove valid. Canada cannot choose to ignore or reject legitimate grievances. The Committee heard that First Nations do not make allegations against the government without going to considerable trouble. The claimant band (First Nation) first must locate, acquire, and assemble ample supporting documentation, then outline thoroughly the meaning of all evidence with respect to the allegations and, finally, acquire legal analysis prior to submitting a Specific Claim.

Of the 861 Specific Claims waiting to be settled, many have been in the process for a decade or longer. Collectively, these unresolved claims represent a potential multi-billion dollar liability for Canada.<sup>9</sup> The Committee believes that not dealing with this potential liability as quickly as possible may cost Canadians much more over time.

The federal government’s main role with respect to First Nations has been managing lands, monies and other band assets on their behalf.<sup>10</sup> These functions were carried out, band by band, mostly by local federal officials termed “Indian Agents” who operated out of local Indian agencies.

Judging by the volume of allegations made by First Nations in their Specific Claims, it seems most of the alleged wrongdoing by Indian Agents, their successors, and ultimately the federal government itself was overlooked in the past. Those suffering the effects did not forget, however. Even though, from 1927 to 1951, First Nations were prohibited by the *Indian Act* from raising money or hiring lawyers to pursue their claims a few First Nations persevered in their quest for justice. In the 1970s, the highest courts began to find in their favour establishing that Canada does have lawful obligations to First Nations.

More than one thousand Specific Claims have been submitted to Canada since the 1973 decision in the pivotal *Calder* case. The Committee was told that Canada has resolved less than 300 of these. The Specific Claims process is so ineffective that it is working to the detriment of the government’s stated objectives and increasing the frustration levels of the claimants.

One of the expert witnesses heard in this study estimated that, at the current rate, it could take 90 years to settle outstanding Specific Claims if just 70 per cent of the more than 800 waiting claims were validated.<sup>11</sup> Assembly of First Nations National Chief Phil Fontaine guessed it could take 130 years to resolve all the claims in the backlog.

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<sup>8</sup> ICC media release, 3 December 2001, available at [http://www.indianclaims.ca/pdf/prenticeresignation\\_eng.pdf](http://www.indianclaims.ca/pdf/prenticeresignation_eng.pdf)

<sup>9</sup> The contingent liability figure for Specific Claims alone has not been made available to the Committee. The contingent liability for Indian and Northern Affairs Canada in “claims and pending and threatened litigation” is listed as \$15B (\$15,354.8M) in the 2004-05 Departmental Performance Report. Canada, Department of Indian Affairs and Northern Development, 2004-05 Departmental Performance Report, 47.

<sup>10</sup> The federal government acquired legislative jurisdiction over “Indians and lands reserved for the Indians” at Confederation under section 91(24) of the *Constitution Act*, 1867.

<sup>11</sup> *Proceedings*, 4 October 2006, Jerome Slavik

In other words, we will be finished dealing with the existing backlog by the year 2136. Realistically our great-great-grandchildren will be finishing this important work. This is an agonizingly slow pace for our people, and a serious liability for Canada. Modest estimates place the federal government's liability to First Nations for unsettled Specific Claims at over \$1.5 billion. Resolving the current backlog of claims in three years would, therefore, require a financial commitment of approximately \$500 million per year; or \$300 million per year over five years or [\$150 million] per year over 10 years.<sup>12</sup>

Postponing the resolution of Specific Claims bears unwanted consequences for all Canadians and for Canada's reputation internationally.<sup>13</sup>

The Committee strongly feels that failure to compensate for lands and monies legitimately owed to First Nations bands prolongs the impoverishment of First Nations people. The Committee recognizes that it also prevents First Nations bands from acting on present and fleeting opportunities for economic development. Systematic delay in resolving Specific Claims increases the cost of settling them. In the view of the Committee, delaying the resolution of Specific Claims is fundamentally irresponsible and detrimental to the Canadian economy in general.

The question of how to resolve Specific Claims has been studied literally 'to death'. The solution – setting up a body to handle Specific Claims that is independent of the Department of Indian Affairs and Northern Development – has been recommended over and over, most recently by the Royal Commission on Aboriginal Peoples (RCAP) in 1996 and the Joint First Nations-Canada Task Force on Specific Claims Policy Reform (JTF) in 1998.

Members of the Committee are convinced that frustration in this area could lead to confrontation. Several witnesses alluded to this possibility but Chief Terrance Nelson, Roseau River First Nation, was explicit about his intentions.

You will hear from many more First Nation leadership like me, who will tell you in clear terms that our patience has run out. I hope that this time the immigrant people who came to our lands in poverty have more to offer than empty promises.

I recognize clearly that these are strong statements, but I also tell you that in December [2006], at the AFN [Assembly of First Nations] conference, there will be a protest on the first day by all of the [First Nations] people across Canada on Parliament Hill and there will be a resolution before the assembly on the first day asking for a national railway blockade on Tuesday, June 29 [2007]. I will be putting that resolution before the AFN.<sup>14</sup>

Most Canadians are highly aware that the immediate costs of claims confrontations, including loss of human life at Oka and Ipperwash, are enormous and wholly unacceptable. It seems successive governments of Canada and the general public have a poor understanding of the injustices at the root of Specific Claims.

In essence, Specific Claims grow out of the unfair and unjust hurts inflicted on First Nations by the Government of Canada years ago. The Committee asks: Why make things worse

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<sup>12</sup> *Proceedings*, 8 November 2006, National Chief Phil Fontaine, Assembly of First Nations

<sup>13</sup> *Proceedings*, 8 November 2006, National Chief Phil Fontaine, Assembly of First Nations

<sup>14</sup> *Proceedings*, 22 November 2006

today when, with political will, these matters can be resolved? The Committee heard that various workable options for dealing with the issues ARE within Canada's means. The Government of Canada must act now. The debt associated with Specific Claims cannot be run into infinity. From its findings, the Committee sees that Specific Claims present a choice. That choice is: negotiation or continued uncertainty.

Favouring negotiation, this Committee respectfully recommends:

- an increase in funds available for settlements
- the establishment of an independent body within two years
- adequate resources for the existing process
- the adoption of new guiding principles.

The Committee's full recommendations appear, under these four headings, in Section VI.

### **C. Structure of the Report**

Below, in Section II, is an explanation the reasons for this study of the Specific Claims policy and process by the Committee. Section II also indicates the types of witnesses the Committee heard and the kinds of evidence offered in their testimony and in written briefs received for this particular study.

The Committee's findings regarding the policy and process follow in Section III. Section IV outlines reasons in favour of resolving Specific Claims efficiently and effectively. The Committee also heard that a fair and effective process needs to be built on certain fundamental principles; these are outlined in Section V. The full recommendations of the Committee comprise Section VI. Section VII is a brief conclusion summing up the urgency of moving on Specific Claims. Several Appendices attached to the report provide additional information on various points made in the body of the report.

## II. BACKGROUND

### A. Reasons for the Study

On 30 May 2006 the Standing Senate Committee on Aboriginal Peoples obtained the Order of Reference from the Senate to examine and report on the nature and status of the Government of Canada's Specific Claims policy. Given the recent events at Caledonia, Ontario, and previous unrest around other outstanding claims, the Committee feels such a study is timely.

At the Department of Indian Affairs and Northern Development (DIAND) the Claims and Indian Government Sector was and is responsible for the negotiation of Specific Claims and the implementation of Specific Claims Agreements. Under the theme of "Resolution of Grievances," the Claims and Indian Government Sector describes the work of its Specific Claims Branch (SCB) as follows:

The Specific Claims Branch manages the Specific Claims and Treaty Land Entitlement policies to resolve Canada's lawful obligations through alternative disputes resolution mechanisms rather than litigation. The objective of the Specific Claims Program is to address past grievances related to the administration of Indian lands and other assets, as well as the fulfilment of treaties, in a manner that strengthens partnerships, aids community healing, builds capacity and provides First Nations with needed lands and resources.<sup>15</sup>

"Healing" is not happening through Specific Claims settlements nearly fast enough. In most cases, the Committee heard the "program" that is Specific Claims is not able to meet its basic objective of addressing the past grievances let alone building "capacity" and providing "needed lands and resources." 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.

The Committee found the current process to be so flawed that its most conspicuous accomplishment is adding to the mountain of unresolved Specific Claims through bureaucratic and legalistic approaches, staff shortages and turnover, loss of corporate memory, and insufficient expertise all of which contribute to bottlenecks and delay. A pattern of internal delay together with the lack of communication between the Department of Justice and First Nations on their claims, produces suspicions in First Nations communities "that Canada is trying to find a way out," that it is trying to minimize its obligations.<sup>16</sup>

The Committee recognizes that too many legitimate grievances are festering and the treaties are remaining unfulfilled. Many observers of and participants in the process traced this lack of progress to the inherent or apparent conflict of interest wherein a department that is the object of the complaints is also the one that has to resolve it. The Committee is very aware that this is why First Nations, as well as the numerous respected academics, jurists, and public policy commentators who have examined this subject over the last sixty years, have

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<sup>15</sup> DIAND web site at <http://www.ainc-inac.gc.ca/ps/clm/>

<sup>16</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation; *Proceedings*, 18 October 2006, TARR MB



consistently recommended the establishment of a truly independent body to handle these historic grievances. Structural change along these lines was recommended long before such recommendations were repeated by the Royal Commission on Aboriginal Peoples (RCAP) in 1996 and the Joint First Nations-Canada Task Force on Specific Claims Policy Reform (JTF) in 1998. A list of the previous calls for reform and the past efforts to establish an independent claims commission may be found in Appendix D.

The *Specific Claims Resolution Act* (SCRA), which received Royal Assent on 7 November 2003, was the most determined effort to bring about a new process for dealing with claims; however, the SCRA has not been brought into force. The SCRA was so flawed that it was not accepted. That situation left open the questions of how Specific Claims will be handled in the future and, as a corollaries, what the roles of Specific Claims Branch at DIAND and the separate Indian Specific Claims Commission will be in the future.

When the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-status Indians, the Honourable Jim Prentice, appeared before this Committee in this study on 1 November 2006 he engaged in a useful and detailed discussion with Senators about Specific Claims. The next day, appearing on departmental estimates before the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, he described the situation in these concise terms:

There are approximately 800 Specific Claims currently at various stages of processing. This number continues to grow, because each year, the number of claims submitted by First Nations greatly exceeds the number of claims that are resolved.

As the backlog of Specific Claims continues to increase, the amount of time it takes to process a claim also increases, and the value of the Specific Claims program as an alternative to litigation or to other forms of adversarial activity becomes diminished. This situation is unacceptable to First Nations, to other Canadians, and to Canada's new government.<sup>17</sup>

The Standing Senate Committee on Aboriginal Peoples conducted this study on Specific Claims because the time for it had come.

## **B. Nature of the Evidence**

The hearings in this study took place in Ottawa over 11 meetings: on 13 June 2006 and from 3 October to 22 November 2006. The Committee heard from Chiefs and other representatives of First Nations claimants including experienced researchers working in First Nations Specific Claims research units. They made clear recommendations and spoke of their experiences with the Specific Claims process from the perspectives of First Nations in Nova Scotia, Prince Edward Island, New Brunswick, Quebec, Ontario, Manitoba,

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<sup>17</sup> Notes for an address by The Honourable Jim Prentice, PC, QC, MP, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-status Indians, to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development on the Main Estimates of the Department of Indian Affairs and Northern Development, 2 November 2006. Located at [http://www.ainc-inac.gc.ca/nr/spch/2006/medp\\_e.html](http://www.ainc-inac.gc.ca/nr/spch/2006/medp_e.html)

Saskatchewan, Alberta, British Columbia and the Yukon. Legal practitioners and academics who had a wealth of experience with the Specific Claims policy and process were heard as were relevant officials from DIAND, DOJ, the Office of the Auditor General, and the Indian (Specific) Claims Commission. A number of written submissions were received and circulated to the members. The list of witnesses heard and submissions received in this study on Specific Claims is at Appendix A.

The terms of reference adopted by the committee for the study on 3 October 2006 (see Appendix D), outlining seven key questions, were posted on the Committee's web site and were shared with all prospective witnesses. Those whom the Committee was able to schedule and hear focussed on the nature of and reasons for the inordinate amount of time it generally takes to resolve any Specific Claim. They commented on their experience with the process and proposed solutions. Most importantly, they made the recommendations that underpin the recommendations of this Committee.

### III . FINDINGS

#### A. The Flawed Process

##### 1 The Process is Long and Complicated

The basic steps in the Specific Claims process are:

1. Submission of Claim
  - Claimant First Nation formally submits claim
2. Research of Claim by Canada
  - Department of Justice formulates a legal opinion on the claim
  - Canada assesses whether or not to accept the claim for negotiation
3. Acceptance or Rejection of Claim by Canada and Claimants Options
  - Claimant is informed of the federal government's decision
  - If accepted (i.e. a lawful obligation is found) then the claim goes into negotiation
  - If rejected (i.e. no lawful obligation is found) then (a) the claimant can submit more information to DIAND; or (b) the claimant can ask the Indian Specific Claims Commission to intervene; or (c) the claimant can litigate.
4. Negotiations
  - Parties develop a framework for negotiations for Agreement-in-Principle (AIP).
  - Ratified the AIP becomes the Settlement Agreement
  - Signing of the Settlement Agreement
5. Implementation
  - Transfer of land or cash (as agreed)

A more detailed flow chart of the process (Appendix B) was provided to the Committee by departmental officials when they appeared on 13 June 2006.

##### i) System is Failing

Departmental statistics indicate that the federal government has resolved roughly 20% of the 1,337 Specific Claims put forward by First Nations between 1 April 1970 and 30 September 2006. Of the 1,337 claims submitted 275 claims have been settled and 861 remain unresolved. Of the 861 unresolved claims, 632 are under review by the Department of Indian Affairs and Northern Development (DIAND) or with the Department of Justice (DOJ). The balance, 201, were rejected, closed, or referred for administrative remedy.<sup>18</sup>

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<sup>18</sup> DIAND, Specific Claims Branch, National Mini-Summary available on-line at: [http://www.ainc-inac.gc.ca/ps/clm/nms\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf)

ii) First Nations Lack Faith in the Process

While the Committee acknowledges the efforts of the Government of Canada to resolve First Nations claims against it, the Committee is deeply concerned about the ineffectiveness of the process based on the Specific Claims policy set out in *Outstanding Business*. (That policy is outlined in the Terms of Reference for this study – see Appendix D.) Witnesses told us First Nations claims are not being dealt with efficiently; there is a huge and growing number of unresolved Specific Claims remaining in the system.

None of the witnesses who appeared before the Committee attempted to justify the effects of the current policy and process on the claimants. Irrespective of whether they were government officials, academics, legal practitioners, or First Nations representatives and claimants, witnesses were virtually unanimous in their view that the existing process is not meeting and cannot meet the stated objectives of the Specific Claims policy. The Committee heard that neither the policy nor the process functions well.

As to the difficulties with the process itself, a variety of reasons were given by the witnesses for why it is prone to excessive delay. These reasons included shortages of staff, staff turnover, loss of corporate memory and continuity, the absence of expertise at DIAND and a shortage of lawyers at DOJ, including French-speaking lawyers for the claims from bands in Quebec. Lack of transparency and communication was associated with delays due to lack of clarity among claimants about what was required and how decisions were being made.

The duplication of efforts in the ‘counter research’ or ‘confirmation’ stage of research, where DIAND finds it necessary to redo research but with greater access to records than is available to the claimants, was also blamed for being expensive and time consuming.<sup>19</sup> In the present system, the First Nation hires one researcher to do all the research and then Canada hires somebody else to replicate that work. This “adds years and usually \$30,000 to \$50,000 on to the cost of the claim.”<sup>20</sup> All of these factors combine to bog down the work.

Speaking for the Mi’kmaq Confederacy of Prince Edward Island, Tracey Cutcliffe described the process as a mess:

The execution of the process has resulted in what can best be described as a tangled mess of bureaucracy, even, unfortunately, the most experienced of participants can be hard-pressed to understand. Unfortunately there are redundancies, lack of communications and numerous delays, which all serve to highlight the inefficiencies with the existing process.<sup>21</sup>

Law Professor Bryan Schwartz found the process too challenging for the claimants and with no guarantee of success:

There were too many hurdles put in the way of getting a claim through the system. It was like a labyrinth at which the *minister had control* over certain choke points and could delay matters indefinitely.<sup>22</sup> [emphasis added]

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<sup>19</sup> *Proceedings*, 31 October 2006, Denis Brassard, Mamuitun Tribal Council

<sup>20</sup> *Proceedings*, 4 October 2006, Kim Fullerton

<sup>21</sup> *Proceedings*, 7 November 2006

<sup>22</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

Audrey Stewart, Director General of the Specific Claims Branch (SCB) told the Committee that DIAND recognizes that the process for negotiating specific land claims is far too long. She said it has been engaging in efforts to simplify the process such as grouping claims according to type in order to decrease the length of time it might take to obtain a legal opinion from DOJ.<sup>23</sup> The Branch is also looking at how to derive savings in time and money from negotiating all of one First Nation's claims at the same time.

Legal practitioners who have extensive experience with SCB are doubtful about what can be accomplished through greater departmental efforts. One thought DIAND is "organizationally and functionally incapable" of grouping claims to process them more efficiently. "You need a different organization to do it."<sup>24</sup>

Witnesses pointed out the negative socio-economic impacts upon First Nations due to the delay in restoring to First Nations that to which they are entitled. They warned of escalating social tensions if First Nations' legitimate grievances go unaddressed.

Legal counsel for various First Nations, Jerome Slavik, who has extensive first-hand experience with the process, cautioned the Committee about the seriousness of the problems with the policy and the existing process.

Based on my experience and knowledge, the operational, structural and policy problems that currently plague the specific claim process have been with it from the start. These are endemic problems requiring transformational and fundamental change. These problems cannot be fixed by tinkering around the edge. The problems are too large and too ingrained and have huge consequences that must be addressed.<sup>25</sup>

He is among those who feel the whole process is flawed and, as a consequence, the cost to the Government of Canada and, therefore, to the people of Canada to resolve these issues is growing.

The Committee heard widespread agreement on the need to reform the system for assessing claims but, allocating new resources to the current system is, from Ralph Abramson's point of view, not going to change the wait times.<sup>26</sup>

## 2. The Process has Conflict of Interest

The claimants' primary concern with the Specific Claims policy is the apparent conflict of interest wherein the Government of Canada is both the causer and the 'resolver'.<sup>27</sup> Witnesses speaking on behalf of the claimant First Nations felt the process is not fair, independent, or impartial. They cited this as one of the main reasons it is so slow and ineffective.<sup>28</sup> The legal practitioners and academics who appeared pointed to conflict of

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<sup>23</sup> *Proceedings*, 13 June 2006

<sup>24</sup> *Proceedings*, 4 October 2006, Jerome Slavik

<sup>25</sup> *Proceedings*, 4 October 2006, Jerome Slavik

<sup>26</sup> *Proceedings*, 18 October 2006, TARR MB

<sup>27</sup> *Proceedings*, 18 October 2006, TARR MB

<sup>28</sup> *Proceedings*, 21 November 2006, Peter DiGangi, Algonquin Nation Secretariat; *Proceedings*, 21 November 2006, Grand Council Chief John Beaucage, Union of Ontario Indians; *Proceedings*, 8 November 2006, Blood Tribe

interest as the primary reason for reform, as did Wayne Nicholas, a member of the Tobique First Nation in New Brunswick:

My involvement with the Tobique land claims started in 1984. We noticed the conflict of interest of the Crown whereby Canada is the judge, the jury and the prosecutor in the process of resolving specific land claims. Canada, as the prosecutor, reviews the elements of the land grievance and rejects or validates the First Nations' land claims submission. Canada, as the jury, evaluates the aspects of the land grievance and recommends a resolution to the land claim. Canada, as the judge, hands down a decision to reject or award a settlement. This process is neither fair nor equitable and should be changed.<sup>29</sup>

Grand Council Chief John Beaucage of the Union of Ontario Indians said the role of DIAND in the current system "is much akin to being judge, jury and executioner in the Old West."<sup>30</sup>

Witnesses speaking for the claimants made it quite clear that they do not trust the federal government to be acting in their interest in Specific Claims. Some say the government has no interest in quickly settling Specific Claims.<sup>31</sup> Some feel they are being offered settlements on a 'take it or leave it' basis and therefore have the impression that the government has other priorities other than the just settlement of Specific Claims.

At times it appears that Canada is too preoccupied with exercising fairness to the people of Canada generally, to surrounding communities, and in our view this conflicts with the fiduciary responsibility that Canada has with First Nations.<sup>32</sup>

Claims can drag on when the claimants feel that they are being offered "bargain-rate agreements" or an acceptance that, ultimately, represents the practical rejection of the claim. They sense those at DOJ are primarily working to defend the interest of Canada.

If a specific claim deals with various wrongs, the First Nation will come back again and again, even if the claim is rejected the first time. It will table new arguments and new historical facts. We sometimes have the impression that a specific claim is accepted just to get rid of it, but the acceptance deals with a minuscule portion of the wrongs that have been identified in the claim.<sup>33</sup>

Even when agreements are implemented, some conflict is evident. One striking example was given by the witness for the relatively new First Nations organization, the British Columbia Specific Claims Committee:

Even up until recently, when we had an opportunity to negotiate a settlement on one of our Douglas Reserve claims in Chilliwack, one of the pieces of land they offered us was a swamp. One would think that happened a hundred years ago. On the contrary, that was only about four years ago... they offered us a swamp. They

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<sup>29</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation

<sup>30</sup> *Proceedings*, 21 November 2006

<sup>31</sup> *Proceedings*, 31 October 2006, Denis Brassard, Mamuitun Tribal Council

<sup>32</sup> *Proceedings*, 8 November 2006, Blood Tribe

<sup>33</sup> *Proceedings*, 31 October 2006, Denis Brassard, Mamuitun Tribal Council

offered us a swamp that they wanted to turn into a bird sanctuary. It would have remained a bird sanctuary, but we would have owned it. When we talk about the honour of the Crown, they are pretty consistent. We are still under the same situation we were under a hundred years ago. We are still trying to negotiate. One of the other pieces of land they offered us was a rocket range that DND did not need anymore, but it would have cost millions of dollars to clean up because unexploded bombs and munitions remain in those areas. You have probably heard of people in Alberta who have paid millions of dollars to clean up DND land that was returned to them. That is the same thing we are being offered. There is a lot of Crown land in our area, but it is not being offered to us. We are being offered land that nobody else wants.<sup>34</sup>

Frustration levels increase when First Nations feel they are being offered settlements on a 'take it or leave it' basis.

Various witnesses felt the merits of claims were being decided too much on a legalistic or political basis.

Basically, it comes down to if we had to go to court, would we lose? If the risk assessment is such that there is likely a 90 per cent chance that we would lose if we went to court, then they will negotiate. The lower that ratio is, the more discussions there will be about whether they should bother to negotiate at all....

It is my understanding that it is not only the lawyers from Justice Canada that make that final decision because at the end of the day, it is a political call by the minister or deputy minister to accept or reject a claim. There is a committee process at INAC to review the validity of claims and make recommendations on what to do with them. A significant amount of influence is still retained by lawyers who are employed by the Crown to reflect on the risk of a claim succeeding against the Crown.<sup>35</sup>

Even the Auditor General of Canada acknowledged that some First Nations involved with the Specific Claims policy might have trouble trusting DIAND:

The department acknowledges the conflicting roles that it is called upon to play. On the one hand, it provides services to First Nations and funds their programs, while on the other hand, First Nations institute legal proceedings against the department for failing to uphold its obligations. One example of this is the fiduciary role of the department. Many of these roles are inherently conflicting. The government can organize itself as it sees fit, but it cannot lose sight of the fact that under these conditions, it is difficult to maintain a relationship with First Nations based on trust.<sup>36</sup>

In the view of Sylvia Duquette, General Counsel/Manager, Specific Claims, DOJ, there is no conflict of interest because both parties are represented by legal counsel.

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<sup>34</sup> *Proceedings*, 7 November 2006, Grand Chief Ken Malloway, British Columbia Specific Claims Committee (BCSCC)

<sup>35</sup> *Proceedings*, 21 November 2006, Peter DiGangi, Algonquin Nation Secretariat

<sup>36</sup> *Proceedings*, 18 October 2006, Sheila Fraser, Auditor General of Canada

The Crown is always in a fiduciary relationship with Aboriginal people. In the context of negotiations where both parties are represented, we do not carry out fiduciary duties. We do not control lands or assets. We do not carry out a program, we are negotiating. That is why it is important that throughout the process — and I emphasize this — both parties are represented by legal counsel. Counsel for First Nations is there from the time of the submission, throughout the negotiations and the drafting of the settlement agreement. Should it end up in litigation, we still have a fiduciary relationship, but we are not acting in a fiduciary capacity. Again, both parties are represented at that point in time.<sup>37</sup>

There is no conflict of interest according to government departments. The Government surrenders its fiduciary duty to First Nations once they have obtained separate legal counsel.<sup>38</sup>

### 3. The Process has Limited Resources

The Honourable Jim Prentice, Minister of Indian Affairs and Northern Development, pointed out that there has been a doubling of Specific Claims submitted for review since 1993 but this increase in claims coincided with a decrease in personnel. The legal context in which Specific Claims are being reviewed is constantly changing.<sup>39</sup>

Virtually every witness told the Committee that neither First Nations nor the federal government has enough financial or human resources to manage the current backlog of Specific Claims.<sup>40</sup> No doubt hoping that increasing resources would speed up the process, most witnesses called for increased budgets and staff. Having reductions in their budgets for negotiating claims, officials from SCB, DIAND, and DOJ called for more personnel to clear the backlog of claims.<sup>41</sup>

Many First Nations witnesses and others pointed to the frequent turnover of government staff and the steep learning curve on Specific Claims cases as factors that combine to slow down the process.<sup>42</sup> In studies involving DIAND but not looking at Specific Claims in particular, the Auditor General's Office found high staff turnover rates there to be problematic in ensuring the necessary management attention to follow-up on whether implementation targets were being met.<sup>43</sup>

Minister Prentice confirmed that there is a shortage of staff to review claims and begin negotiations with First Nations.<sup>44</sup> Professor Coyle, former counsel for the Indian Commission of Ontario, Renée Dupuis, Chief Commissioner of the Indian Claims Commission, and others underlined this point and went on to say more money earmarked for settlement is required.<sup>45</sup> Professor Coyle maintains the artificial limit of total money available for settling claims each year delays settlement.<sup>46</sup> The Indian Claims Commission

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<sup>37</sup> *Proceedings*, 13 June 2006, Sylvia Duquette, Department of Justice

<sup>38</sup> *Proceedings*, 13 June 2006, Sylvia Duquette, Department of Justice

<sup>39</sup> *Proceedings*, 1 November 2006, Minister Prentice

<sup>40</sup> *Proceedings*, 18 October 2006, FSIN

<sup>41</sup> *Proceedings*, 13 June 2006, Audrey Stewart, Indian Affairs and Northern Development

<sup>42</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation; *Proceedings*, 22 November 2006, Grand Council Chief John Beaucage

<sup>43</sup> *Proceedings*, 18 October 2006, Sheila Fraser, Auditor General of Canada

<sup>44</sup> *Proceedings*, 1 November 2006, Minister Prentice

<sup>45</sup> *Proceedings*, 1 November 2006

<sup>46</sup> *Proceedings*, 3 October 2006



needs more resources to perform its mandate but it also sees that First Nations need greater access to resources to compile research, prepare claims and negotiate their claims with the government.<sup>47</sup>

The Committee heard that First Nations feel handicapped in their ability to pursue Specific Claims because they lack financial human resources to research, submit, negotiate and settle a claim.<sup>48</sup> They observe the disparity between the resources available to First Nations and those available to the Government of Canada in this area:

First Nations do not have the financial resources to hire the personnel to conduct their research to the extent that Specific Claims does. Specific Claims has the whole Department of Justice to assess their claims and develop their legal arguments.<sup>49</sup>

First Nations often do not have the “trained experts in the field of research, legal analysis and negotiations... [requiring them to] ...contract researchers, lawyers and negotiators that are not from their community to assist in the advancement of a specific claim.”<sup>50</sup>

The Committee learned that First Nations researchers have unequal access to records and that this differential access favours the government. “[W]e cannot get access to the same materials and we must wait longer to get them in certain cases.”<sup>51</sup>

The Committee heard that impediments or delays in obtaining research materials encourages First Nations to use research that has been influenced, or even controlled by, the government. Since access to information requests are not an adequate solution, Peter Di Gangi, speaking for the Algonquin Nation Secretariat, suggested researchers working for First Nations should have equal access to pertinent departmental files.

First Nations spokespersons said the money available to First Nations from the government for research has not increased in the last decade. The operations of their claims research units are regularly disrupted because of financing interruptions.<sup>52</sup>

#### 4. The Process has Untrained Researchers

Several witnesses mentioned that specialized training and expertise is required to perform Specific Claims research. One witness suggested that DIAND and First Nations researchers should receive the same training observing that: “This training may foster similar research and claim validity standards.”<sup>53</sup> In the experience of Mr. Slavik and others, the level of knowledge, education and corporate memory is minimal at DIAND. In his testimony, he said: “They, therefore, continually repeat historical errors, fail to have effective management regimes and function inefficiently.”<sup>54</sup>

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<sup>47</sup> *Proceedings*, 1 November 2006, Renée Dupuis

<sup>48</sup> *Proceedings*, 22 November, John Beaucage, Union of Ontario Indians; *Proceedings*, 7 November 2006 Ken Malloway, BCSCC

<sup>49</sup> *Proceedings*, 8 November 2006, Blood Tribe

<sup>50</sup> *Proceedings*, 22 November, John Beaucage, Union of Ontario Indians

<sup>51</sup> *Proceedings*, 21 November, Peter DiGangi, Algonquin Nation Secretariat

<sup>52</sup> *Proceedings*, 21 November, Peter DiGangi, Algonquin Nation Secretariat

<sup>53</sup> *Proceedings*, 21 November, John Beaucage, Union of Ontario Indians

<sup>54</sup> *Proceedings*, 4 October 2006, Jerome Slavik

Representatives of the Blood Tribe, in Alberta, made their unhappiness with the quality of the research carried out by contract researchers working for DIAND known. The Committee was told that one of their Specific Claims was rejected at the confirmation report stage because the researcher incorrectly provided a legal opinion on the claim as opposed to a historical account. The Blood Tribe found that researchers have a tendency to “misidentify, over-generalize, unilaterally expand upon and/or misunderstand the factual issues presented by the Blood Tribe in a particular claim.” Finding the “language and terminology used by Specific Claims researchers in their historical research reports ... often biased against the Blood Tribe,” they felt that some Specific Claims researchers do not show an appreciation or knowledge of the Blood Tribe.<sup>55</sup>

The Blood Tribe also found methodological problems with the work by Specific Claims researchers such as poor citation, poor use of references, improper use of unrelated documents ultimately resulting in “conclusions that are not supported by the facts.” Since they thought the terms of reference and historical and confirmation research were frequently at odds with the evidence provided by the Blood Tribe, their representatives suggested First Nations be consulted during the selection of contracted employees who compile “confirmation historical reports” for DIAND. The Blood Tribe would also like departmental researchers to include oral evidence in reports.<sup>56</sup>

#### 5. The Process has Flawed Communication

The official from DOJ told the Committee, what most other witnesses did later, that the greatest delay in the system for assessing claims is the length of time the file spends at DOJ when DIAND asks it to provide a ‘lawful obligation opinion’. The DOJ needs more lawyers to write legal opinions on Specific Claims proposals, she said. DOJ finds the age of the incidents problematic. The claims are complex “because of the long historical record” and the law “complex and subject to differing interpretations.”<sup>57</sup>

##### i) Need Communication

While DIAND says it has opted for the negotiation process “as our prime resolution tool” for arriving at jointly acceptable solutions,<sup>58</sup> the First Nations say DOJ is mainly to blame for the overly slow process because DOJ is isolated and never at the table with First Nations.<sup>59</sup> Poor communication was repeatedly blamed for inefficiency and delay.

The case for better communications, joint research, and meaningful and effective negotiations was made to the Committee in comments such as the following by First Nations representatives and their counsel:

The fundamental flaw with the existing system is that one labours for years without ever talking about the nature of the claims or finding ways to resolve them.<sup>60</sup>

The parties almost never meet face-to-face during the “validation” stage which takes five to ten years for claim to be researched and submitted by the First Nation to Specific Claims Branch (SCB), SCB to contract out “confirming research” which they send back to the First

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<sup>55</sup> *Proceedings*, 8 November 2006, Blood Tribe

<sup>56</sup> *Proceedings*, 8 November 2006, Blood Tribe

<sup>57</sup> *Proceedings*, 13 June 2006, Sylvia Duquette, Department of Justice

<sup>58</sup> *Proceedings*, 13 June 2006, Audrey Stewart, Indian Affairs and Northern Development

<sup>59</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation

<sup>60</sup> *Proceedings*, 4 October 2006, Kim Fullerton

Nation for review, SCB to send entire package to DOJ, a legal opinion to be rendered, and the First Nation to be informed as to whether the claim has been accepted or rejected by DIAND. There is a conspicuous lack of ‘face time’ at every stage.

The Specific Claims process is a form of dispute resolution, and the way it works now is like trying to do mediation without a mediator. There is the First Nations and Canada, and no one is helping them or moving them along.<sup>61</sup>

The Indian Claims Commission recommends more mediation between claimants and the government throughout the claims process, not only at the end of it.<sup>62</sup>

This Committee is receptive to the suggestion, by Kim Fullerton and others, that it recommend “that the parties [be] obliged to sit down and discuss the issues, look at the problems, and try to find ways to resolve them.”<sup>63</sup>

#### ii) Need a Way to Break Impasses

Finally, in the testimony on the state of the existing process, it was pointed out to the Committee that there is a lack of adequate mechanisms to settle disagreements between Canada and a First Nation and Canada and a province.<sup>64</sup> This also causes delays. Without a dispute resolution mechanism in the negotiation system, parties can be forced to go to court.

### 6. The Process Deals with Complex and Varied Claims

By hearing First Nations witnesses from one territory and all provinces except Newfoundland, the Committee was able to gain an appreciation of the regional differences in Specific Claims. This helped overcome the initial tendency to think of Specific Claims being about treaty entitlement in the prairies. The subjects of Specific Claims also may be topics such as trust funds, reserve land surrenders, leases, right-of-way, flooding, and surveys. The period in time and location of the events makes each claim original and distinct. From the testimony heard, the Committee came to recognize that the historical origins of these grievances, together with the complexities that have become encrusted upon them with the passage of time, complicate even the most determined efforts to address them.

Witnesses from British Columbia were quick to point out that majority of Specific Claims in the system are from BC. They said the uniqueness of British Columbia’s Specific Claims must be considered in any new strategies aimed at reducing the backlog of Specific Claims.<sup>65</sup> Speaking for the Union of BC Indian Chiefs (UBCIC), Chief Debbie Abbott thought not only that the allocation of resources for resolving BC claims should reflect the number of Specific Claims submitted by First Nations in BC but that there should be an independent body established for BC claims only. Her message to the Committee from UBCIC was that there should be one independent body per region because of the uniqueness in claims throughout the country. As to the composition of such bodies she said: “Members of

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<sup>61</sup> *Proceedings*, 4 October 2006, Kim Fullerton

<sup>62</sup> *Proceedings*, 1 November 2006, Renée Dupuis

<sup>63</sup> *Proceedings*, 4 October 2006, Kim Fullerton

<sup>64</sup> *Proceedings*, 3 October 2006, Michael Coyle

<sup>65</sup> *Proceedings*, 17 October 2006, Debbie Abbott, Union of British Columbia Indian Chiefs; *Proceedings*, 7 November 2006, Ken Malloway, BCSCC

independent body could be from the regional community, not First Nations or the Government.

The creation of reserves in British Columbia was the product of a series of early reserve commissions in that province. The federal government was not involved to the extent it was in some other provinces hence the unique reserve history of BC needs to be taken into consideration in the resolution of Specific Claims there.<sup>66</sup>

The Committee also learned the Specific Claims landscape in the Maritimes is unique because of the pre-Confederation aspect there. The situation in the Maritimes is more like that in British Columbia. In the prairies, most reserves were created in a fairly straightforward way under post-Confederation treaties.

Denis Brassard, the witness representing the Mamuitun Tribal Council in Quebec, reminded the Committee that many provinces, like Quebec, do not have a Specific Claims policy or do not recognize Specific Claims. This leaves First Nations in a predicament where they “do not know what the results of such a negotiation with the province would be.”<sup>67</sup>

Since the federal government does not own much land compared to the provinces, the settlement of many claims involves land that is in provincial hands. For this reason, the Committee heard: “Canada cannot act unilaterally on a claims resolution system. The 10 provinces and three territories need to buy into the system. If they do not, it will not work; and it will not work for pre-Confederation claims.”<sup>68</sup>

Expert witness Kim Fullerton advised that “Canada does not have exclusive jurisdiction over these issues, nor exclusive liability for the resolution of these claims. Almost all pre-Confederation claims need a provincial component to make a resolution.”<sup>69</sup> The Committee heard that some provinces work reasonably well on resolving claims, some better than others.

[T]he Province of Ontario will not sit down in the same room with the Indian Claims Commission because they had nothing to do with it, and it makes the facilitating claims rather tricky. Most, if not all, pre-Confederation claims require the province at the table to settle.<sup>70</sup>

Provincial buy-in is essential for resolving many claims.

A federal-provincial blame game serves no one and holds up the final resolution of Specific Claims. Denis Brassard felt the federal government should act on behalf of the provincial governments during negotiations. “It should not blame the provinces for half of compensation and leave First Nations to make their case with the provincial governments.” He also suggested the federal government pay the provinces’ share of compensation and then obtain the money from them later.<sup>71</sup>

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<sup>66</sup> *Proceedings*, 17 October 2006, Debbie Abbott, Union of British Columbia Indian Chiefs

<sup>67</sup> *Proceedings*, 31 October 2006

<sup>68</sup> *Proceedings*, 4 October 2006, Kim Fullerton

<sup>69</sup> *Proceedings*, 4 October 2006

<sup>70</sup> *Proceedings*, 4 October 2006, Kim Fullerton

<sup>71</sup> *Proceedings*, 31 October 2006

## **B. A Proposed New Approach**

### **1. Adopt a Fresh Frame of Mind**

The Committee has serious concerns about successive governments' failure to acknowledge the size of the problem represented by Specific Claims and to allocate the resources required to address it effectively. It recognizes that — for financial, economic, legal, social, political, historical, and moral reasons outlined below in section IV — the Government of Canada needs to act immediately to prove its commitment to the fair and timely resolution of valid Specific Claims.

The majority of the witnesses expressed the view the government needs to adopt a new approach to resolving Specific Claims. Not only does the absence of any effective appeal mechanism for questioning the government's inaction or decisions in Specific Claims inflame the current situation,<sup>72</sup> there is a growing consensus that the government must change its outlook on Specific Claims.

Probably the most striking advice came from the several witnesses who asked the Committee to urge the government to face and respond accordingly to the size of the potential liability for Specific Claims. Academic, legal, and First Nations witnesses urged the Committee to recommend that Specific Claims be looked at with “a fresh frame of mind” – an outlook that recognizes the potential or contingent liability for Specific Claims as part of the national debt.

Those advocating this new approach think the government should see the amount owing for Specific Claims not as discretionary spending but as “a capital investment in the future of First Nation communities”.<sup>73</sup> They advocated moving out of the program spending box.<sup>74</sup>

In order to realize the funds required for a functional process, these witnesses pointed out that this conceptual shift needs to occur so that the government no longer considers Specific Claims a program for First Nations somehow comparable to programs in areas such as health, education and housing. Specific Claims demand higher level of priority. They demand a level of priority befitting resolving historic injustices and the size of the growing mountain of Specific Claims.

Both First Nations and government witnesses said that the human and financial resources presently budgeted for the existing process are grossly inadequate. A large number of witnesses were adamant that the government needs to work with First Nations organizations to establish an independent body dedicated to resolving claims in a fair and timely manner so that claimants do not have to turn to the courts.

Several witnesses spoke to the benefits of introducing mediation and alternative dispute resolution into the existing process. In the independent body proposed by the Joint Task Force, the Commission component was to provide for, among other things, facilitation, mediation, and non-binding arbitration at the request of the parties.

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<sup>72</sup> *Proceedings*, 8 November 2006, Phil Fontaine, Assembly of First Nations

<sup>73</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>74</sup> *Proceedings*, 3 October 2006, Bryan Schwartz; *Proceedings*, 8 November 2006, Blood Tribe

Some witnesses explicitly called for a public education campaign to ease public concerns. Others called for research into the social and economic costs of not settling Specific Claims.

Taking a new approach to Specific Claims was the gist of most of the recommendations made to the Committee. They ran the gamut from improving the existing system in the short term to replacing it with an independent body in the long term.

The Committee heard experts making a direct connection between alleged federal wrongdoing in the past, including Canada's failure to live up to the promise in the Constitution of honouring Aboriginal and treaty rights, and First Nations' poverty, unemployment, and substance abuse today.<sup>75</sup> Only the "abysmal ignorance of the Government of Canada as a whole in regard to the magnitude and nature of the issue of Specific Claims" could account for the Minister of Indian Affairs saying in 1991 that all the Specific Claims would be settled by the year 2000.<sup>76</sup> The Committee heard that now is the time to admit that both DIAND and DOJ lack the credibility, authority, expertise and resources to solve the problem of resolving Specific Claims.

If the true size of the number of claims of contingent liabilities were to show up, the huge inadequacy of the current resources allocated by the government and particularly, Indian and Northern Affairs Canada in this issue, would be profoundly embarrassing.<sup>77</sup>

## 2. See Specific Claims as Economic

Bryan Schwartz, Jerome Slavik, Alan Pratt and others made the case that settling Specific Claims should be seen as a logical part of the economic agenda and not part of the grievance and the lawful obligation agenda. Professor Schwartz spoke of the positive contribution made by claims settlements:

The only real capital accretion that these bands get to invest in their people, to invest in their human capital, to invest in their economies and to become self-sufficient, to no longer be, to some extent, a draw on resources but a contributor to the net fiscal welfare of Canada, is the resolution of Specific Claims. This is the reality that you can see across Canada. When bands get their claims settled and they get the resources, they are put in trust funds and they contribute to community development and to self-sufficiency.<sup>78</sup>

Mr. Slavik also said, "This is about restoring to First Nations their economic capacity to participate in the regional economies."<sup>79</sup>

All witnesses implied and some said directly that "positive, practical human benefits" result from Specific Claim settlements.<sup>80</sup> Seeing the settling of Specific Claims as a means of capitalizing and investing First Nations would make it "a key tool for restoring to First

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<sup>75</sup> *Proceedings*, 4 October 2006, Alan Pratt; *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>76</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>77</sup> *Proceedings*, 4 October 2006, Jerome Slavik

<sup>78</sup> *Proceedings*, 3 October 2006

<sup>79</sup> *Proceedings*, 4 October 2006

<sup>80</sup> *Proceedings*, 4 October 2006, Alan Pratt; *Proceedings*, 8 November 2006, Blood Tribe

Nations the land and economic resources they have been deprived of through failure to meet treaty obligations or breach of lawful obligations.<sup>81</sup>

The Committee heard that the scope of the potential liabilities to Canada and the lost opportunity costs to First Nations need to be assessed fully to give Cabinet and DIAND the necessary information to budget for and design an effective framework to address claims resolution.<sup>82</sup>

Mr. Slavik informed the Committee that “[u]sing Ms. Stewart’s numbers, the outstanding contingent liability in 2005 dollars is estimated to be a minimum of \$6 billion. My estimate — and I believe people knowledgeable in the area would concur — is that it could be at least double that figure.” In his testimony and in a follow-up brief he made the point that: “First Nations claims and related litigation are among the federal government’s largest outstanding acknowledged contingent legal and financial liabilities...[t]hey require a focused, cohesive and systematic response,....”<sup>83</sup>

In appearing before the Committee, the Assembly of First Nations made the request that the Auditor General review the federal government’s comprehensive and Specific Claims policies with an emphasis on the implications of Specific Claims for the national debt.<sup>84</sup> The Auditor General told the Committee that her office would consider any request to review Specific Claims.<sup>85</sup>

One suggested new approach is to take some of the \$13 billion surplus that Canada has and pay this Specific Claim debt down.<sup>86</sup> Settlements could be paid out of the general revenues (Consolidated Revenue Fund), like residential school settlements, and not out of DIAND budgets, the Committee heard.<sup>87</sup> The Assembly of First Nations (AFN) suggested considering a plan similar to the one used to negotiate and compensate residential school victims.<sup>88</sup>

Professor Schwartz acknowledged the need to come up with a practical approach.

We must first get into a steady state so that there is not a constant rise. That can be done in about five to seven years. It would require about a \$30-million investment in Department of Justice people to deal with the claims. I think the current budget is only about \$5 million. It would require an investment of maybe \$800 million to \$1 billion a year to pay out the claims.<sup>89</sup>

These figures are an estimate of what Professor Schwartz thought would need to be invested to stabilize the situation not to meet the ideal resolution of paying the overdue debt now.<sup>90</sup>

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<sup>81</sup> *Proceedings*, 4 October 2006, Jerome Slavik

<sup>82</sup> *Proceedings*, 4 October 2006, Jerome Slavik; *Proceedings*, 4 October 2006, Alan Pratt

<sup>83</sup> Jerome Slavik’s brief; *Proceedings*, 4 October 2006, Alan Pratt

<sup>84</sup> *Proceedings*, 8 November 2006

<sup>85</sup> *Proceedings*, 18 October 2006

<sup>86</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>87</sup> *Proceedings*, 4 October 2006, Jerome Slavik

<sup>88</sup> *Proceedings*, 8 November 2006

<sup>89</sup> *Proceedings*, 3 October 2006

<sup>90</sup> *Proceedings*, 3 October 2006

The Committee consistently heard that the current limit on settlement monies should be increased. The AFN recommends that \$1.5 billion dollars be allocated to jumpstart settlements to clear the backlog of Specific Claims.<sup>91</sup>

Negotiating Specific Claims agreements raises other related issues such as the DIAND requiring First Nations “to borrow money from the federal government to pay for the federal government’s obligation, because the federal government’s budget does not include enough money for them to hold up their end at the table and do appraisals and loss of use studies.”<sup>92</sup>

Some, like the Blood Tribe, want compensation paid differently, in single payments of compensation, not multiple payments over significant periods of time. “They should have the full benefit of compensation up front so that they can plan comprehensively in terms of community development and investments.”<sup>93</sup> The Union of Ontario Indians thinks the federal government and First Nations should work collaboratively to arrive at compensation limits for the new Specific Claims policy.<sup>94</sup>

The AFN called for the government to promise to significantly reduce the number of Specific Claims in three to five years.<sup>95</sup> In the same vein, the Union of Ontario Indians (UOI) suggested a new Specific Claims policy be developed to set 5 years as a deadline for processing Specific Claims. In special circumstances the timeline could be extended to allow a 10 year processing time. The UOI felt the new policy must include enforcement measures and describe the consequences of not adhering to the timelines.<sup>96</sup>

### 3. Establish a Well-Managed Process

In order for everyone to rise above the enormous delays, we require commitment, dedication, experience, knowledge and cooperation from all parties in the claims process.<sup>97</sup>

The Committee heard that Specific Claims policies should be more enlightened.<sup>98</sup> At least one witness thought it is not imperative that a new set of processes be developed. Rather, he felt the current system could be modified to achieve better results.<sup>99</sup> Another witness said Specific Claims should be seen and treated as a non-partisan issue or apolitical issue.<sup>100</sup> Many First Nations witnesses and those pursuing their claims on their behalf said the government assessment of claims should be less legalistic and more transparent.

Though they expressed it in various ways to the Committee, it seems all the witnesses want the process for assessing claims to be streamlined and consolidated.<sup>101</sup> The Minister thinks valid Specific Claims must be identified earlier in the process because non-valid claims are

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<sup>91</sup> *Proceedings*, 8 November 2006

<sup>92</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>93</sup> *Proceedings*, 8 November 2006

<sup>94</sup> *Proceedings*, 22 November 2006

<sup>95</sup> *Proceedings*, 8 November 2006

<sup>96</sup> *Proceedings*, 21 November 2006

<sup>97</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation

<sup>98</sup> *Proceedings*, 22 November 2006, Rick O’Brien, Council of Yukon First Nations

<sup>99</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation

<sup>100</sup> *Proceedings*, 21 November 2006, Peter DiGangi, Algonquin Nation Secretariat

<sup>101</sup> *Proceedings*, 7 November 2006, Mi’kmaq Confederacy of Prince Edward Island



“absorbing resources that should be applied to the claims that do have merit.”<sup>102</sup> All favour clear guidelines and procedures for evaluating Specific Claims in order to reduce duplication and increase communication.<sup>103</sup> First Nations also need information on how the merits of a claim will be determined to avoid blindly looking for whatever they guess might convince the government of validity of their claims.<sup>104</sup>

Improving the involvement of and communication with First Nations was a theme in the testimony that the Committee heard, especially in the creation of regulations to manage institutions, programs and to set standards.<sup>105</sup> Information should be shared with First Nations so they have the same “access to a corpus of decisions, a corpus of legal opinions” as the federal government.<sup>106</sup>

#### 4. Use Less Litigation

“We also need a different attitude on the part of the Crown toward litigation,”<sup>107</sup> the Committee heard. “The court access option is decreasingly available. The courts have been applying limitation periods with a vengeance”<sup>108</sup> therefore the courts are not an accessible or appropriate forum.

Most First Nations lack the fiscal resources to carry on a 5 to 7 year lawsuit against the full weight of the Crown’s unlimited legal resources. Moreover, in court they face numerous ‘technical’ challenges including rigorous evidentiary standard, robust statutes of limitations, defences and different criteria for compensation and damages.<sup>109</sup>

The way the “Government of Canada instructs its lawyers to use every procedural tactic to delay, obfuscate, complicate and to run up costs when in court” is “is not an honourable way of dealing with just debts.”<sup>110</sup>

The AFN told the Committee it wants the federal government to outline limitation periods for claims which, for the courts, are now determined by the provinces, creating multiple standards throughout Canada. According to the AFN, funds should be available to First Nations for litigation costs if they choose not to enter the Specific Claims process.<sup>111</sup>

#### 5. Create an Independent Body

Minister Prentice declared to the Committee that there needs to be a claims resolution body outside of the current system that is independent of the government. He said this body would be “able to measure progress, to police progress, to push things along and to draw the parties together.” For the independent body to speed up the resolution process he felt both Government and First Nations must agree to be bound by its decisions.<sup>112</sup>

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<sup>102</sup> *Proceedings*, 1 November 2006

<sup>103</sup> *Proceedings*, 7 November 2006, Mi’kmaq Confederacy of Prince Edward Island

<sup>104</sup> *Proceedings*, 21 November 2006, John Beaucage, UOI

<sup>105</sup> *Proceedings*, 18 October 2006, Sheila Fraser, Auditor General of Canada

<sup>106</sup> *Proceedings*, 31 October 2006, Denis Brassard, Mamuitun Tribal Council

<sup>107</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>108</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>109</sup> Jerome Slavik’s brief

<sup>110</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>111</sup> *Proceedings*, 8 November 2006

<sup>112</sup> *Proceedings*, 1 November 2006

First Nations told the Committee that an independent body is needed to ensure fairness and the timely resolution of Specific Claims.<sup>113</sup> Professor Coyle imagined “a body ... capable of resolving contentious claims quickly...that all parties respect as much as the courts.”<sup>114</sup> The Assembly of First Nations advocates the creation of an independent claims commission believing is essential to improving the current process.<sup>115</sup> First Nations believe it is necessary to overcome the conflict of interest, as recommended by the JTF report.<sup>116</sup> Accordingly, they feel First Nations and the government should work together to establish the independent body.<sup>117</sup>

Minister Prentice thinks the Government of Canada, as a centre of excellence, needs to be “institutionally connected” to the resolution body.<sup>118</sup> Denis Brassard thinks the independent body would serve an important function by helping to build a body opinions and doctrines on the Specific Claims and “on the wrongs that are acceptable.”

He felt it would be unwise to “legalize” the independent body because of the lack of case law.<sup>119</sup> The Auditor General pointed out that this independent body will need to be “appropriately funded so delays do not reoccur.”<sup>120</sup>

First Nations want an independent body to ensure that claims do not remain in the system for decades without a mechanism to compel the government to make a decision on the claim and to exert pressure on First Nations and the government to reach agreements.<sup>121</sup> According to the Federation of Saskatchewan Indian Nations, the independent body should be able to offer binding decisions.<sup>122</sup> Chief Morris Shannacappo of Manitoba’s Treaty and Aboriginal Rights Research Centre thought having an international representative from the United Nations to observe the process or sit on the independent body might be an option.<sup>123</sup>

The idea of establishing one independent body per province or region was mentioned by both BC and Ontario witnesses for First Nations.<sup>124</sup> Speaking for the Union of Ontario Indians, Grand Council Chief Beaucage thought the body should be composed of retired justices and First Nations people and that there should be around 5-6 people on the body.<sup>125</sup> The Blood Tribe believes appointments and reappointments to the new body should be made in cooperation with First Nations.<sup>126</sup>

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<sup>113</sup> *Proceedings*, 18 October 2006, TARR MB; *Proceedings*, 7 November 2006, Ken Malloway, BCSCC

<sup>114</sup> *Proceedings*, 3 October 2006

<sup>115</sup> *Proceedings*, 8 November 2006, AFN

<sup>116</sup> *Proceedings*, 21 November 2006, Peter DiGangi, Algonquin Nation Secretariat; *Proceedings*, 21 November 2006, John Beaucage, UOI; *Proceedings*, 7 November 2006, Mi’kmaq PEI

<sup>117</sup> *Proceedings*, 21 November 2006, John Beaucage, UOI; *Proceedings*, 18 October 2006, TARR MB

<sup>118</sup> *Proceedings*, 1 November 2006

<sup>119</sup> *Proceedings*, 31 October 2006

<sup>120</sup> *Proceedings*, 18 October 2006

<sup>121</sup> *Proceedings*, 18 October 2006, Federation of Saskatchewan Indian Nations; *Proceedings*, 31 October 2006, Denis Brassard, Mamuitun Tribal Council

<sup>122</sup> *Proceedings*, 18 October 2006

<sup>123</sup> *Proceedings*, 18 October 2006

<sup>124</sup> *Proceedings*, 21 November 2006, John Beaucage, UOI; *Proceedings*, 17 October 2006, Debbie Abbott, UBCIC

<sup>125</sup> *Proceedings*, 21 November 2006

<sup>126</sup> *Proceedings*, 8 November 2006

The question of how to go about setting up the independent body naturally came up in our hearings. The Committee heard that most witnesses felt ‘starting from scratch’ would be too slow and perhaps unnecessary when so much effort had been put into this question several years ago.

Many echoed the recommendations by Professor Schwartz and the Assembly of First Nations, which were, essentially, to pick up where things left off before the passage of the *Specific Claims Resolution Act* (SCRA).<sup>127</sup> They said the federal government should work in partnership with First Nations to establish an independent commission.<sup>128</sup> That is, the AFN and the federal government should negotiate the changes proposed to Bill C-6, which became the SCRA, in a modest package of amendments dealing with key flaws in SCRA. They feel the parties should go to the table to work cooperatively and solve the problem.<sup>129</sup>

Given that the majority of the outstanding Specific Claims are from BC, the Committee considers it significant that the Grand Chief Ken Malloway of the First Nations’ BC Specific Claims Committee is of the view that recommendations made by the Joint Task Force are important to reforming the system and should be seriously considered.<sup>130</sup>

Speaking for the Algonquin Nation Secretariat, Peter Di Gangi was able to offer the Committee some insight into the JTF process. He said:

The development of the independent body should be consistent with the JTF recommendations because of the compromises made by First Nations and the government to reach a consensus and the “balanced approach” that was taken.<sup>131</sup>

The structure of the proposed body was outlined for the Committee by the representative for the Federation of Saskatchewan Indian Nations (FSIN) as follows:

The first part would be a commission that facilitates negotiation.

The second portion would be a tribunal to adjudicate claims if they were not resolved in the first part of the body. If the claimant was, at any time, not satisfied with the commission they could proceed to adjudication.<sup>132</sup>

The AFN told the Committee there should be seven “commissioners or tribunal or adjudicators, and perhaps another seven to deal with the claims that are coming in if you are looking within the structure of the Specific Claims Resolution Act.”<sup>133</sup>

AFN and FSIN think there should be time limits established by the independent body to control the time it takes to review, decide on, and oversee the negotiation of the claim. If exceeded, the First Nation should be able to request a binding ruling.<sup>134</sup> The Committee heard from legal practitioners Alan Pratt and Ron Maurice that a binding body “is a

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<sup>127</sup> *Proceedings*, 17 October 2006, Debbie Abbott, UBCIC

<sup>128</sup> *Proceedings*, 8 November 2006, AFN

<sup>129</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>130</sup> *Proceedings*, 7 November 2006

<sup>131</sup> *Proceedings*, 21 November 2006

<sup>132</sup> *Proceedings*, 18 October 2006, Federation of Saskatchewan Indian Nations

<sup>133</sup> *Proceedings*, 8 November 2006

<sup>134</sup> *Proceedings*, 18 October 2006, Federation of Saskatchewan Indian Nations; *Proceedings*, 8 November 2006, AFN

fearsome monster to create. Rational people will avoid that at all costs if there is a risk of losing, which is an incentive to settling.”<sup>135</sup>

The AFN said it should be an active participant in the legislative review of the independent commission immediately after it is established.<sup>136</sup> FSIN feels the independent body should report to Parliament.<sup>137</sup> Its Research Director, Jayme Benson, indicated that the Joint Task Force’s recommendations “ensured there was no sort of blank chequebook” to allocate unrestricted amounts of money. Rather, “there was a maximum cap on how much the body could spend.”<sup>138</sup> Mr. Pratt told the Committee that while First Nations do not need a blank cheque, they “need a big one.”<sup>139</sup>

Mr. Slavik, endorsing the JTF recommendations along with the other legal practitioners and academics heard, suggested the body be a separate Office of Claims and Rights Resolution that reports directly to a committee of senior Ministers including Justice, Finance, Treasury Board and Indian Affairs.<sup>140</sup> In testimony he said, with a broad and proper mandate and attracting “knowledgeable, committed and capable personnel to address some of Canada’s more challenging political, economic and legal issues,” this body would require time to address the number of outstanding claims which now exceed 800 and are still growing.<sup>141</sup> “[N]o matter how you cut this, we are looking at 20 to 25 years to get rid of this backlog and resolve these claims.”<sup>142</sup> Mr. Pratt considered that a reasonable estimate. He commented: “[In] running the country as a business, we must evaluate [the legitimate debts owed] and pay them down. It will not happen overnight.”<sup>143</sup>

If the transition from the current system to an independent body is done through the cooperation of the AFN and federal government, the FSIN sees it taking one or two years.<sup>144</sup> A benefit, in the view of Professor Schwartz, is that the independent body could study the successes and make recommendations as to how they can be built upon.<sup>145</sup>

If this serious engagement with resolving these claims gets underway and we start to resolve 50 or 100 claims a year, very quickly certain categories of claims will be well understood, justice officials will be able to compare certain claims being familiar with previous approaches and the same thing on the First Nations side. The possibility of grouping claims becomes possible when there is a manageable umbrella. Much improved administration is possible. There have been successful experiments, but we need a comprehensive system in which to locate those experiments and make sure the maximum learning is derived from them.<sup>146</sup>

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<sup>135</sup> *Proceedings*, 4 October 2006

<sup>136</sup> *Proceedings*, 8 November 2006

<sup>137</sup> *Proceedings*, 18 October 2006

<sup>138</sup> *Proceedings*, 18 October 2006, Federation of Saskatchewan Indian Nations

<sup>139</sup> *Proceedings*, 4 October 2006

<sup>140</sup> *Proceedings*, 4 October 2006

<sup>141</sup> *Proceedings*, 4 October 2006 and in Jerome Slavik’s brief

<sup>142</sup> *Proceedings*, 4 October 2006

<sup>143</sup> *Proceedings*, 4 October 2006

<sup>144</sup> *Proceedings*, 18 October 2006, FSIN; *Proceedings*, 8 November 2006, AFN

<sup>145</sup> *Proceedings*, 3 October 2006

<sup>146</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

Professor Schwartz told the Committee that it would be easier to improve procedures if there were a new “framework in which to locate those experiments.”<sup>147</sup> Referring to the present DIAND / DOJ process, he said, it is difficult to learn from experience when resolving Specific Claims at the rate of 10 per year.<sup>148</sup>

#### 6. Engage in a Different Legislative Process from Bill C-6 / SCRA

The Committee feels there is no need, in this report, to go into the substance of the various flaws in Bill C-6 and the *Specific Claims Resolution Act* (SCRA). Testimony is fully available from hearings of parliamentary committees on the subject just a few years ago. Suffice to say, in the words Alan Pratt: the Joint Task Force produced an agreed set of principles and a draft bill but, in the SCRA, “they were distorted and changed. The government was let off the hook and relieved of responsibility on almost every issue.”<sup>149</sup>

In appearing before the Committee, Professor Schwartz adopted the positive view that, in C-6, the parliamentary process “almost worked” and that the time to finish the job is now. He said the bill contains a fiscal framework that must be worked on but which gives the federal government the margin of comfort that it was looking for so that it is not writing a cheque that will have an immediate liability in a single year. “That has been discussed and negotiated.”<sup>150</sup> In its testimony, the Blood Tribe agreed: C-6 can be fixed and made to be fair with First Nations involvement “at all stages, including political, communications, technical and the drafts.”<sup>151</sup>

As outlined by Professor Schwartz and several other witnesses, the one of the essential problems was that the Bill put the full burden of disclosure on the First Nation and did not create a duty on the part of the minister to give reasons for rejecting claims.<sup>152</sup> Another problem was that the SCRA guaranteed the federal government unlimited time to respond to a claim with the effect that a claim could remain suspended for as long as the government wanted.<sup>153</sup> Most witnesses seemed to be in agreement with building an independent body based largely on the Joint Task Force recommendations so as to provide for negotiations and mediation with clear and enforceable timelines and for services for breaking impasses.<sup>154</sup>

Professor Schwartz feels “an extraordinary historical convergence” makes progress possible. Those who supported the Joint Task Force (JTF) position in the 37<sup>th</sup> Parliament are a majority in the 39<sup>th</sup> Parliament now. Paying down the national debt is a concept acceptable to both Liberal and Conservative governments. Persons knowledgeable about claims are the National Chief of AFN and the Minister of Indian Affairs. And, the present government’s Accountability Bill is emphasizing transparency and fairness.<sup>155</sup>

In appearing before this Committee, Minister Prentice pronounced that, due to its unacceptability to First Nations, the SCRA must be reformed, rewritten or discarded altogether.

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<sup>147</sup> *Proceedings*, 3 October 2006

<sup>148</sup> *Proceedings*, 3 October 2006

<sup>149</sup> *Proceedings*, 4 October 2006

<sup>150</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>151</sup> *Proceedings*, 8 November 2006

<sup>152</sup> *Proceedings*, 3 October 2006

<sup>153</sup> *Proceedings*, 4 October 2006

<sup>154</sup> *Proceedings*, 3 October 2006, Michael Coyle; *Proceedings*, 4 October 2006, Alan Pratt

<sup>155</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

[T]his is the inherent problem with Bill C-6: If there is not buy-in from First Nations communities as to the integrity of the process, it will not work. The Specific Claims process is an alternative to litigation. If it is lopsided or one-sided in its construction, First Nations will not have confidence in it and they will not use it. The alternative will be litigation and unhappiness.<sup>156</sup>

The Assembly of First Nations made clear recommendations to the Committee as follows:

- The AFN and federal government should work together to appoint and reappoint officials to the Specific Claims resolution body to ensure that the body remains “independent and impartial and avoids any actual and perceived conflicts of interests.”
- The Department of Indian Affairs should be reformed so that the federal government cannot delay claims “and in fact be financially rewarded for doing so.” Specific time limits for each stage of review, negotiation and settlement of claims should be defined.
- There should be a limit on the monies awarded to First Nations after a successful Specific Claims application, these limits should be “high enough to at least ensure that the preponderance of claims have access and that claims above any initial cap have meaningful access to the commission.
- Claims above the limit prescribed must be treated equitably. Larger claims should not be ignored because of the need to reduce the backlog of Specific Claims.
- Regional differences in law, history and circumstances should be considered by the commission. The system should be sensitive to these differences and any effort to reduce the backlog of claims should be equally applicable throughout the provinces.<sup>157</sup>

The Auditor General reminded the Committee that there can be limitations to legislative solutions. She cautioned that legislation only defining roles and responsibilities may not be enough to ensure implementation of claims settlements within a reasonable amount of time. In examining the process for Treaty Land Entitlement settlements her office found “follow-up and implementation procedures must be improved upon and made more stringent.”<sup>158</sup>

### 7. Expand Mediation and Joint Research

In this study the Committee heard that the “cooperative, team-based approach” used in the Michipicoten Pilot Project to resolve the Michipicoten First Nation’s thirteen potential claims was an unparalleled success due to a joint research and issue identification approach tried as a pilot project starting in 1997. In this project, the Indian Claims Commission acted as an invaluable mediator, chairing meetings and coordinating loss of use studies.<sup>159</sup>

Using joint research and mediation resolved Michipicoten’s claims in less time and at a lower cost than usual. Kim Fullerton, counsel for Michipicoten First Nation and formerly Commission Counsel with the Indian Claims Commission, conceded that this was a rare

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<sup>156</sup> *Proceedings*, 1 November 2006

<sup>157</sup> *Proceedings*, 8 November 2006, AFN

<sup>158</sup> *Proceedings*, 18 October 2006

<sup>159</sup> *Proceedings*, 4 October 2006, Kim Fullerton

example of success but that it was a good one to illustrate what can be accomplished through joint research and having the parties meeting face-to-face with the help of a mediator. In his view, joint research should be considered whenever possible to reduce costs and time required.<sup>160</sup>

In 1991, the Indian Claims Commission was established primarily as a body to which First Nations could take their rejected claims for an inquiry but, as Yukon Regional Chief Rick O'Brien told the Committee: "[T]he Indian Claims Commission is a toothless tiger and cannot enforce or bind its decisions on any of the parties, especially the Crown."<sup>161</sup> Over the years, the Indian Claims Commission has worked to expand its mediation mandate. Nevertheless, the Assembly of First Nations stressed that the absence of dispute resolution mechanisms within the DIAND/DOJ Specific Claims process "inflames the situation" by providing no meaningful opportunity for First Nations to appeal the decision.<sup>162</sup>

The Department of Justice (DOJ) official who appeared before the Committee criticized the work of the Indian Claims Commission, saying:

The Indian Specific Claims Commission is being misused because the claims that are reviewed by the Commission are significantly different than those that were initially reviewed by the DOJ.<sup>163</sup>

She alleged that the Commission's mandate as it is being practiced now is different from what was originally intended.<sup>164</sup>

#### 8. Provide More Public Education

Wayne Nicholas of the Tobique First Nation considers the Aboriginal and treaty rights education initiative by the Atlantic Policy Congress a "godsend." With respect to Specific Claims, he felt "there should be more continuing education — because as these claims come to a head, the more that people know about the Specific Claims process and the treaties, the public would appreciate a resolution to all of them."<sup>165</sup>

Chief Shannacappo of Manitoba is also in favour of more public education:

The public should understand that our First Nations people are only asking for fairness to deal with the injustices that took place in the past with regard to property and, in most cases, land was allocated to them.<sup>166</sup>

National Chief Phil Fontaine and others spoke of the unfounded fears that reside in the public's mind saying: "[W]e have to do a far better job of educating and informing Canadians about claims, the nature of claims and why Specific Claims exist."<sup>167</sup>

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<sup>160</sup> *Proceedings*, 4 October 2006

<sup>161</sup> *Proceedings*, 22 November 2006, Rick O'Brien, Council of Yukon First Nations

<sup>162</sup> *Proceedings*, 8 November 2006

<sup>163</sup> *Proceedings*, 13 June 2006, Sylvia Duquette

<sup>164</sup> *Proceedings*, 13 June 2006, Sylvia Duquette

<sup>165</sup> *Proceedings*, 17 October 2006

<sup>166</sup> *Proceedings*, 18 October 2006

<sup>167</sup> *Proceedings*, 8 November 2006, AFN; *Proceedings*, 22 November 2006, John Beaucage, UOI

[M]any Canadians are afraid of land claims. People have this real fear that if a claim will be settled, they will be dispossessed of their lands and their property and rights that they enjoy will be taken away. There has never been any desire or any interest on the part of First Nations to dispossess or deny someone else rights that we should all enjoy.<sup>168</sup>

The National Chief said the AFN is willing to assist Canada in providing education to Canadians about First Nations claims and their history.<sup>169</sup>

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<sup>168</sup> *Proceedings*, 8 November 2006

<sup>169</sup> *Proceedings*, 8 November 2006



#### **IV. REASONS TO SETTLE SPECIFIC CLAIMS**

Canada has waited too long to correct historic grievances resulting from actions by its Indian Agents and other officials; the degree of delay vastly exceeds the expected or proper length of time.

##### **A. Moral Imperatives**

Observing, in 1991, that: “The settlement of specific land claims is fundamentally a human rights issue,” former Co-Chair of the Indian Claims Commission Jim Prentice added that Canadian society ultimately will be judged by how it handles settlement of such claims.<sup>170</sup> Appearing before this Committee in November 2006, as the Minister, he shared the view: “At the end of the day, in cases where they are legitimate, [Specific Claims] are moral and legal obligations on the part of the people of Canada toward First Nations.”<sup>171</sup>

Members of the Committee made similar comments when hearing witnesses in this study. In 2003, when the Chief Commissioner of the Indian Claims Commission appeared before this Committee, she characterized the matter of Specific Claims for the Committee as a social justice issue.<sup>172</sup>

With Canada’s rating in the United Nations Human Development Index slipping largely because of conditions in First Nations communities, it appears to the Committee that fair and equitable treatment for First Nations should bring about spending roughly on par with that for Canadians generally. Elsewhere, the point has been made that allocations for First Nations are not keeping up with First Nations’ population growth.

Owing to the adversarial approach underlying the current process for resolving Specific Claims, First Nations feel they are “continually at odds” with the DOJ<sup>173</sup> because DOJ is advising DIAND that is the object of the complaints but that is also the department that has to resolve them. They sense that “the object[ive] in judging claims seems to be not to determine whether there is a claim, but to try to minimize government liability as much as possible.”<sup>174</sup>

Why are claims not resolved? Because, in the short term, “frankly, it is cheaper to keep talking than it is to pay them.” Professor Schwartz believes: “It is a moral and practical necessity to have [an independent] body because Specific Claims policy is a disaster.”<sup>175</sup>

##### **B. Financial and Economic Imperatives**

In his testimony, Professor Coyle stated that, five years ago, Canada estimated the contingent liability for Specific Claims as \$2.6B. He said if the yearly limit for Specific Claims is \$100M then it would take 26 years to address that liability and that number is probably low.<sup>176</sup> This Committee was not able to secure any hard numbers on the

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<sup>170</sup> ICC media release, 3 December 2001, available at [http://www.indianclaims.ca/pdf/prenticeresignation\\_eng.pdf](http://www.indianclaims.ca/pdf/prenticeresignation_eng.pdf)

<sup>171</sup> *Proceedings*, 1 November 2006

<sup>172</sup> Renée Dupuis, ICC, 11 June 2003, Evidence, Issue 18

<sup>173</sup> *Proceedings*, 7 November 2006, Mi’kmaq Confederacy of PEI

<sup>174</sup> *Proceedings*, 18 October 2006, TARR MB

<sup>175</sup> *Proceedings*, 3 October 2006

<sup>176</sup> *Proceedings*, 3 October 2006

contingent liability for Specific Claims<sup>177</sup> but there is little doubt that the accumulation of potential liability owed is growing at a rapid rate. “[E]ach year more claims are coming into the system, so the pile of liability gets bigger.”<sup>178</sup>

Professor Coyle made arguments to counter the popular view that this problem is insolvable, that is, that Canadians and the government feel: “We will never work it out. We will never address the grievances. No amount of money could do it.” He said: “If the government and Canadians look at the costs of not settling claims, Caledonia and elsewhere, and they look at the benefits that can be achieved by settling them, then the cost argument should also be persuasive.”

As one quite familiar with the situation at Caledonia, Professor Coyle shared his view that: “Deferring payment of this liability while land development continues and interest compounds can only increase the ultimate financial costs of settlement. Delaying settlements causes continuing economic and legal uncertainty with its attendant costs. Finally, failing to address claims in a timely way leads, as newspaper headlines continually remind us, to frustration and anger at the community level and to a compounding risk of confrontations and the extraordinary costs, both financial and human, of police intervention.”<sup>179</sup>

In the summer of 2006 some felt the health of the economy of Canada was in danger when the main CN railway line was about to be blockaded by Manitoba First Nations protesting the slow resolution of their Treaty Land Entitlement and other Specific Claims. Leading the proposed action was Chief Terrance Nelson of Roseau River First Nation. He implored Canada, “the immigrant government,” to take the proper action on Specific Claims:

While the railway cars are filled with billions of dollars of our resources, our people are living in poverty, with inferior schools, inferior housing, inferior health and inferior lives.<sup>180</sup>

According to the Manitoba Treaty and Aboriginal Rights Centre: “[T]he most economical, the most reasonable course of action would be to put in place an adequately resourced, independent system developed jointly by First Nations and government.”<sup>181</sup>

Increasing resources for settling claims is the best solution in the long run, the Committee was told, because it will save this country a considerable amount of money. Professor Coyle reminded the Committee that litigating Specific Claims is very expensive, well over and above the cost of negotiations. He said the money the federal government uses for litigation should be used to settle claims out of court, as was intended by the Specific Claims policy.<sup>182</sup>

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<sup>177</sup> The overall contingent liability of Indian and Northern Affairs Canada in “claims and pending and threatened litigation” is listed as \$15B (\$15,354.8M) in the 2004-05 Departmental Performance Report. Canada, Department of Indian Affairs and Northern Development, 2004-05 Departmental Performance Report, 47.

<sup>178</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>179</sup> *Proceedings*, 3 October 2006, Michael Coyle

<sup>180</sup> *Proceedings*, 22 November 2006

<sup>181</sup> *Proceedings*, 18 October 2006

<sup>182</sup> *Proceedings*, 3 October 2006

Minister Prentice's message to the Committee that resolving claims creates economic opportunities for First Nations peoples coincided with views expressed by many witnesses.<sup>183</sup> The AFN indicated it is willing to assist Canada in conducting studies into how an expenditure by Canada for Specific Claims settlements would reduce the socio-economic and related maintenance and dependency cost to Canada.

According to Professor Schwartz and other witnesses the solution for both Specific Claims and economic development is "moving out of the program spending box and recognizing [that resolving Specific Claims] is part of paying down the national debt."<sup>184</sup> The money to pay out claims is money that, if it were in First Nations' possession, would contribute to their human growth, their investment in human capital, their education and welfare, and thus build stronger communities of talented people to contribute to local economies and to participate in professions and occupations.<sup>185</sup>

Professor Coyle proposed that the awards of the neutral independent body be treated like court orders so that they would come out of consolidated revenue like other liabilities that are awarded against Canada. In the alternative, he suggested "create a global budget for settlement awards that could be awarded in any given year, say \$300 million, \$400 million; that would have to be negotiated." He said "That would allow the tribunal to make awards based on legal obligation, but it would give the government the comfort of knowing that it will not be surprised at the end of the year that an award for \$3 billion was made by a tribunal that year. The maximum amount of awards that it could make would be known in advance."<sup>186</sup>

### **C. Political and Historical Imperatives**

Spurred by decisions in the courts, the policy processes that emerged in the 1970s and 1980s and which give DIAND the role of resolving Specific Claims were soon criticized for placing Canada in a conflict of interest.

The Committee heard often how the backlog of claims creates frustration and friction with the government and how the historical grievances remain unaddressed.<sup>187</sup> First Nations in British Columbia came before the Committee seeking assurances that future claims will be reviewed in a timely manner and negotiated fairly.<sup>188</sup> "Make no mistake about it," they said, "unless real reform occurs soon, it is only a matter of time before incidents like Oka, Ipperwash and Caledonia occur in communities across British Columbia. Time is running out. Our patience is wearing thin."<sup>189</sup> The Committee was advised that: "There is a strong sense in B.C. that, if the current situation persists, there are only two options left – litigation or confrontation – both of which are costly not only in terms of resources and time but also

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<sup>183</sup> *Proceedings*, 1 November 2006, Minister Prentice; *Proceedings*, 8 November 2006, Blood Tribe; *Proceedings*, 7 November 2006, Ken Malloway, BCSCC; *Proceedings*, 22 November 2006, Chief Terrance Nelson, Roseau River Anishinabe First Nation

<sup>184</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>185</sup> *Proceedings*, 3 October 2006, Bryan Schwartz

<sup>186</sup> *Proceedings*, 3 October 2006, Michael Coyle

<sup>187</sup> *Proceedings*, November 21 2006, Peter DiGangi, Algonquin nation Secretariat; *Proceedings*, 1 November 2006, Minister Prentice

<sup>188</sup> *Proceedings*, 17 October 2006, Debbie Abbott, UBCIC

<sup>189</sup> *Proceedings*, 7 November 2006, Ken Malloway, BCSCC

to the successful building and sustaining of relationships between B.C. First Nations and Canada.”<sup>190</sup>

Delaying settlement increases political uncertainty and perpetuates the negative stereotypes of First Nations.<sup>191</sup> People whose patience has run out may resort to desperate acts. Chief Terrance Nelson, Roseau River First Nation, explained to the Committee:

We are in a bind, and we do not know how to get out of it. The only way for us to do that is to declare a treaty to be fundamentally breached and thereby denying access to Enbridge, to CN to cross our lands, and basically to look like militant Indians again. I really do not know what else to do. We filed as many lawsuits as we can. We have gone through the courts. It is unfortunate, but it ends up at that point people will look at us and say, “Here they are again. Here are the lawless people going again.”<sup>192</sup>

Chief Nelson also told the Committee:

Let me make this perfectly clear: Caledonia is not an isolated incident. To me, it represents the future of indigenous and immigrant relations in these lands if we cannot settle issues in a timely fashion.<sup>193</sup>

Community sessions held by the Indian Claims Commission at least enable the Commissioners to learn the feelings in the claimant communities. “There is a lot of mistrust, a lot of anger, a lot of frustration – and legitimate frustration.” said the Chief Commissioner, Renée Dupuis, to this Committee.

Sometimes it is the first time being in the same room, at the same table, and with the help of an independent and neutral part trying to clarify facts, get at defining issues jointly, hearing arguments and opposing views... It is, in some cases, a very strong shock of reality in the sense that you, as a First Nation, suddenly hear the very people that argue that you do not have rights. On the other side of the table are Canada’s lawyers, hearing for the first time the elders of a community putting evidence before this commission in the form of testimony about the First Nations perspective on their own claim.<sup>194</sup>

Specific Claims, especially to do with land, are emotional issues for First Nations because the memory of historical events lives in the community.

The Committee heard that settling Specific Claims for land is spiritually important to First Nations because it allows them to move on.<sup>195</sup> Some claims activists, in their quest for justice, are proud to be acting on the words of their elders. As a child, Wayne Nicholas heard from his elders about land “that one day ... should come back to us.” He told the

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<sup>190</sup> *Proceedings*, 17 October 2006, Debbie Abbott, UBCIC

<sup>191</sup> *Proceedings*, 18 October 2006, FSIN

<sup>192</sup> *Proceedings*, 22 November 2006, Chief Terrance Nelson, Roseau River Anishinabe First Nation

<sup>193</sup> *Proceedings*, 22 November 2006

<sup>194</sup> *Proceedings*, 1 November 2006, Renée Dupuis

<sup>195</sup> *Proceedings*, 7 November 2006, Mi’kmaq PEI

Committee, “I am an optimist, and I hope there will be a resolution some day. If there is no resolution, we can always take Canada to court regarding the loss of our lands in 1892.”<sup>196</sup>

Mr. Nicholas recounted for the Committee a situation involving disagreement and potential unrest in his area that had a positive outcome.

In 1985, there was a lot of animosity among the local people. The town of Perth-Andover is on the land in question. We conducted some activities on those lands that offended the local people. It affected our children going to school and created a lot of non-support from the local people. However, in other areas we had a lot of support from non-Indian people. We made amends with the local people once they understood that we are not there to displace them and that it is not their fault; it is the fault of the government for failing to fulfill their obligations. We now have a lot of support locally.<sup>197</sup>

The Committee acquired this small but valuable illustration from Mr. Nicholas of what can be accomplished through negotiation and education.

#### **D. Legal Imperatives**

Law Professor Coyle’s presentation dealt with the justice issues of the Specific Claims situation as well as the costs. He reminded the Committee that “The government is not and cannot be seen to be above the law or to consider its application of the law continuously postponable.”<sup>198</sup> The 2004-2005 *Annual Report* of the Indian Claims Commission reiterates that the “duty to respond to claims submissions in a timely fashion flows from the honour of the Crown.”<sup>199</sup>

On the subject of the SCRA, legal practitioner Alan Pratt asked the Committee to consider: “What does it say about the rule of law when the government can pass a piece of legislation that everyone dislikes, yet no one wants to do anything about? You are pretending it is not there. It has received Royal Assent; it is not in force or on the statute books. It has a number; it is in the Statutes of Canada 2003, chapter 23. We have no idea if it will ever see the light of day — it has seen the light of day, but it is sitting there decaying and smelling up the place.”<sup>200</sup>

On Specific Claims, the Assembly of First Nations’ presentation pointed out the legalities as follows: Compensation for past wrongs is a fundamental principle of the Canadian legal system. First Nations are no less entitled to compensation for wrongs committed against them by the government than any other individuals or groups in society. The federal government is bound to resolve claims where there were past wrongs against First Nations peoples. The government has a fiduciary duty to First Nations, and when it breaches this duty, it is obligated to provide restitution for past wrongs. The premise for restitution is that it will “restore First Nations to the position they would have been in had the breach not occurred.”<sup>201</sup>

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<sup>196</sup> *Proceedings*, 17 October 2006, Wayne Nicholas, member of the Tobique First Nation

<sup>197</sup> *Proceedings*, 17 October 2006

<sup>198</sup> *Proceedings*, 3 October 2006, Michael Coyle

<sup>199</sup> Indian Claims Commission, *Annual Report, 2004-2005*, p. 9

<sup>200</sup> *Proceedings*, 4 October 2006

<sup>201</sup> *Proceedings*, 8 November 2006

Overburdened courts are not equipped to deal with the number of Specific Claims or to fashion flexible remedies. The costs and adversarial relationships that will result from extensive use of the courts make litigation an impractical alternative, said Professor Coyle.<sup>202</sup>

Several witnesses thought the Specific Claims policy framework should keep pace with the law.<sup>203</sup> “We have learned a great deal about the law that applies to Aboriginal people since 1982.”<sup>204</sup> The Union of Ontario Indians witness said the use of oral history, for example, should be reflected in the Specific Claims policy and process.<sup>205</sup> ICC Chief Commissioner Dupuis also stated that there needs to be a better application of “precedents and principles that have been generated through 30 years of settling claims.”<sup>206</sup>

### 1. Resolving Specific Claims is a Necessity

The foregoing is not an exhaustive explanation of all the testimony or the factors that favour resolving Specific Claims. Clearly, though, delay generates further mistrust and frustration, the consequences of which are all too well known. Why should Canada resolve Specific Claims? The answer should be “a no brainer.”

Twenty-four years ago, in the *Outstanding Business* policy booklet, the key to this task was identified but not picked up:

The task,..., is enormous, complex, and time-consuming. Level-headedness, persistence, mutual respect and cooperation will be required on the part of government and Indian people alike.<sup>207</sup>

Through this study, the Committee learned the current Specific Claims system is not an intelligent way to resolve grievances.<sup>208</sup>

A majority of the witnesses generally recognized that moving in the right direction means all parties have to adopt a principled stance and that the resulting collective effort needs to be supported by a level of financial and human resources from the federal government that makes progress both real and visible. Acting any other way produces misguided policies and misguided warriors.

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<sup>202</sup> *Proceedings*, 3 October 2006

<sup>203</sup> *Proceedings*, 21 November 2006, Peter DiGangi, Algonquin Nation Secretariat

<sup>204</sup> *Proceedings*, 4 October 2006, Alan Pratt

<sup>205</sup> *Proceedings*, 21 November 2006, John Beaucage

<sup>206</sup> *Proceedings*, 1 November 2006

<sup>207</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), p. 3.

<sup>208</sup> *Proceedings*, 4 October 2006, Kim Fullerton

## V. PRINCIPLES

DIAND officials say its Specific Claims process involves the principles of fairness, First Nations as separate parties, and mutual acceptability.<sup>209</sup> First Nations with claims stuck in the system do not see these principles logically reflected in the structure or administration of the Specific Claims policy process.<sup>210</sup> They complain they have to wait an unfair length of time to learn very little about the department's assessment of their claim. They have to borrow money from the government to participate in the negotiation process and they frequently encounter major stumbling blocks at the agreement and implementation stages. Moreover, they have no practical recourse to litigation if and when the matter proves irreconcilable.

For a just and workable new approach to resolving Specific Claims, the Committee believes the following principles provide a solid basis for the needed discussions among interested parties.

### 1. Fairness

- full disclosure of arguments, legal opinions, and other negotiations
- full access to records and information
- no penalizing effect on compensation levels due to other First Nations' settlements
- new, impartial process independent of DIAND

### 2. Inclusion

- inclusion of First Nations leaders in reforming the Specific Claims process
- cooperation with First Nations leaders in designing the structure and operations of a new independent body
- involvement of other stakeholders such as provincial and territorial governments to arrive at mutually acceptable settlements earlier

### 3. Dialogue

- open and transparent communications to eliminate the "us versus them" atmosphere
- truth and the exercise of good will to resolve claims cooperatively and more quickly

### 4. Recognition of Regional Differences

- processes appropriately adapted to regional differences including those accommodating the fact that the greatest number of outstanding Specific Claims are from BC
- inclusion of oral history relevant to understanding First Nations' experience

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<sup>209</sup> *Proceedings*, 13 June 2006, Audrey Stewart

<sup>210</sup> *Proceedings*, 21 November 2006, John Beaucage, UOI

## **VI. RECOMMENDATIONS**

### **Background to the Recommendations**

In its study of the Specific Claims policy and process, this Committee found that the present system cannot resolve Specific Claims within a reasonable length of time. Lack of resources for, and contradictions within, the present system are producing results contrary to the goal of the federal government's Specific Claims policy which is to resolve Specific Claims.

The number of unresolved Specific Claims now exceeds 800 and is growing. Collectively, these claims represent a significant potential liability for the Government of Canada. Where their Specific Claims are valid, First Nations require the compensation owing for their future economic development; moreover, justice requires that Specific Claims be addressed.

### **Recommendations**

In keeping with the recommendations of witnesses heard in this study and with calls for an independent body by virtually every respected academic, jurist, and public policy commentator who has studied the question over the last sixty years, this Committee respectfully recommends the following:

#### **1) Increasing Funds for Settlements**

That the Government of Canada establishes a dedicated fund for the payment of Specific Claims settlements. That Specific Claims be identified as contingent liabilities.

These funds shall:

- i) not be allocated to other spending priorities.
- ii) not lapse at the end of the fiscal year and any unused funds in a given fiscal year be carried forward to subsequent fiscal years.
- iii) be for an amount no less than \$250 million per year with said amount to be allocated annually to the fund.

#### **2) Establishing an Independent Body within Two Years**

- i) That the Government of Canada start work immediately to establish a new body independent of government with the mandate and power to resolve Specific Claims.
- ii) That the new body be established in full partnership with First Nations.
- iii) That the joint process for establishing the new body be sufficiently resourced to enable the body to be operational within two (2) years of the next budget date.
- iv) That the new body be fully capable of reaching settlement agreements on claims within five (5) years of their submission to the independent body.



- v) That the Government of Canada repeals the *Specific Claims Resolution Act*.

### 3) Improving the Existing Process by Providing Additional Resources

- i) That the Government of Canada increase the financial and human resources for Specific Claims resolution at the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice (DOJ) in order to improve the existing process and thus move a significant portion of the unresolved claims forward to resolution before the new body is in operation.
- ii) That the Government of Canada ensures that human resources assigned to Specific Claims at DIAND and DOJ are working in teams in a common location in order to improve communication, file management, and the timely resolution of valid claims.
- iii) That the Government of Canada provide sufficient funding for the human and financial resources that First Nations require to research and prepare their claims submissions.
- iv) That the Government of Canada ensures that First Nations have equal access to government records necessary for documenting their Specific Claims.

### 4) Adopting New Guiding Principles

- i) That the principles of fairness, inclusion, dialogue and recognition of regional differences be used as guidelines for both the development of a new independent body and for any reforms to the existing process in the interim.

## VII. CONCLUSION

Specific Claims are historic grievances by First Nations arising out of alleged wrongdoing by federal officials. These can be, among other things, instances of mishandling of band monies in trust and revenue accounts, improper conduct of reserve land transactions, and failure to properly establish reserves under treaties and to resolve reserve boundary issues. Where a Specific Claim is proven valid the claimant is legitimately seeking to recover what was lost.

The Committee is concerned that some Canadians may incorrectly regard claims settlements as something akin to a gift from the federal government. Canadians should know that these are justice issues that have to be addressed.

The tendency for some to characterize Specific Claims settlements as discretionary expenditures has made it easier for government to equate claim settlement money with program money that it directs to First Nations for programs such as housing, health, and education. Unlike program money, Specific Claims settlements are not discretionary spending. They are compensation and remedy for a past wrong. The Committee therefore expects a response from Canada befitting the magnitude of the potential debt to Canada that Specific Claims now represent.

First Nations cannot wait any longer to be empowered by the settlement of their Specific Claims. These settlements must provide First Nations with justice, with resources, and with a fair and reasonable opportunity to make important decisions about their own future and welfare.

The Committee feels that eliminating the delay in settling Specific Claims is an outright necessity not only for the claimants but for Canadians in general. Failing to find the political will to act appropriately on Specific Claims could invite more confrontations. The choice is Canada's.

**APPENDIX A**

**Witnesses Heard and Briefs Submitted**

<b>ORGANIZATION</b>	<b>NAME, TITLE</b>	<b>DATE OF APPEARANCE</b>	<b>ISSUE NO.</b>	<b>BRIEF</b>	
Algonquin Nation Secretariat	Peter Di Gangi, Director	21 November 2006	11	X	
As Individuals	Michael Coyle, Assistant Professor, Faculty of Law, University of Western Ontario	3 October 2006	7	X	
	Bryan Schwartz, Professor, Faculty of Law, University of Manitoba				
	Ron Maurice, Senior Partner, Maurice Law Barristers & Solicitors	4 October 2006	7		
	Jerome Slavik, Partner, Ackroyd, Piasta, Roth & Day LLP			X	
	Kim Alexander Fullerton, Barrister & Solicitor			X	
	Alan Pratt, Barrister & Solicitor, Alan Pratt Law Office			X	
	Wayne Nicholas, Member of the Tobique First Nation	17 October 2006	8		
	Kevin Christmas			X	
Assembly of First Nations	Phil Fontaine, National Chief	8 November 2006	10	X	
	Candice Metallic, Legal Counsel				
Blood Tribe / Kainai	Les Healy, Councillor				
	Annabel Crop Eared Wolf, Tribal Government and External Affairs Coordinator				
	Dorothy First Rider, Senior Researcher				

British Columbia Specific Claims Committee (BCSCC)	Grand Chief Ken Malloway, Acting Chair	7 November 2006	10	
	Jody Woods, Research Director, Union of British Columbia Indian Chiefs			X
Canadian Bar Association (National Aboriginal Law Section)	Christopher Devlin, Chair			X
Cape Mudge Band Council	Chief Ralph Dick			X
Confederacy of Mainland Mi'kmaq				X
Council of Yukon First Nations	Rick O'Brien, Regional Chief, AFN Yukon	22 November 2006		
Department of Indian Affairs and Northern Development (DIAND)	Jim Prentice, P.C., M.P., Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians	1 November 2006	9	
	Audrey Stewart, Director General, Specific Claims Branch	13 June 2006 & 1 November 2006	3 & 9	
	Michel Roy, Assistant Deputy Minister (Claims and Indian Government)	1 November 2006	9	
Department of Justice Canada	Sylvia Duquette, General Counsel, Specific Claims	13 June 2006 & 1 November 2006	3 & 9	
Federation of Saskatchewan Indian Nations (FSIN)	Chief Elaine Chicoose, Pasqua First Nation.	18 October 2006	8	X
	Jayne Benson, Director of Specific Claims.			
Indian Claims Commission	Renée Dupuis, Chief Commissioner			
Indigenous Bar Association	Jeffrey Hewitt, President			X

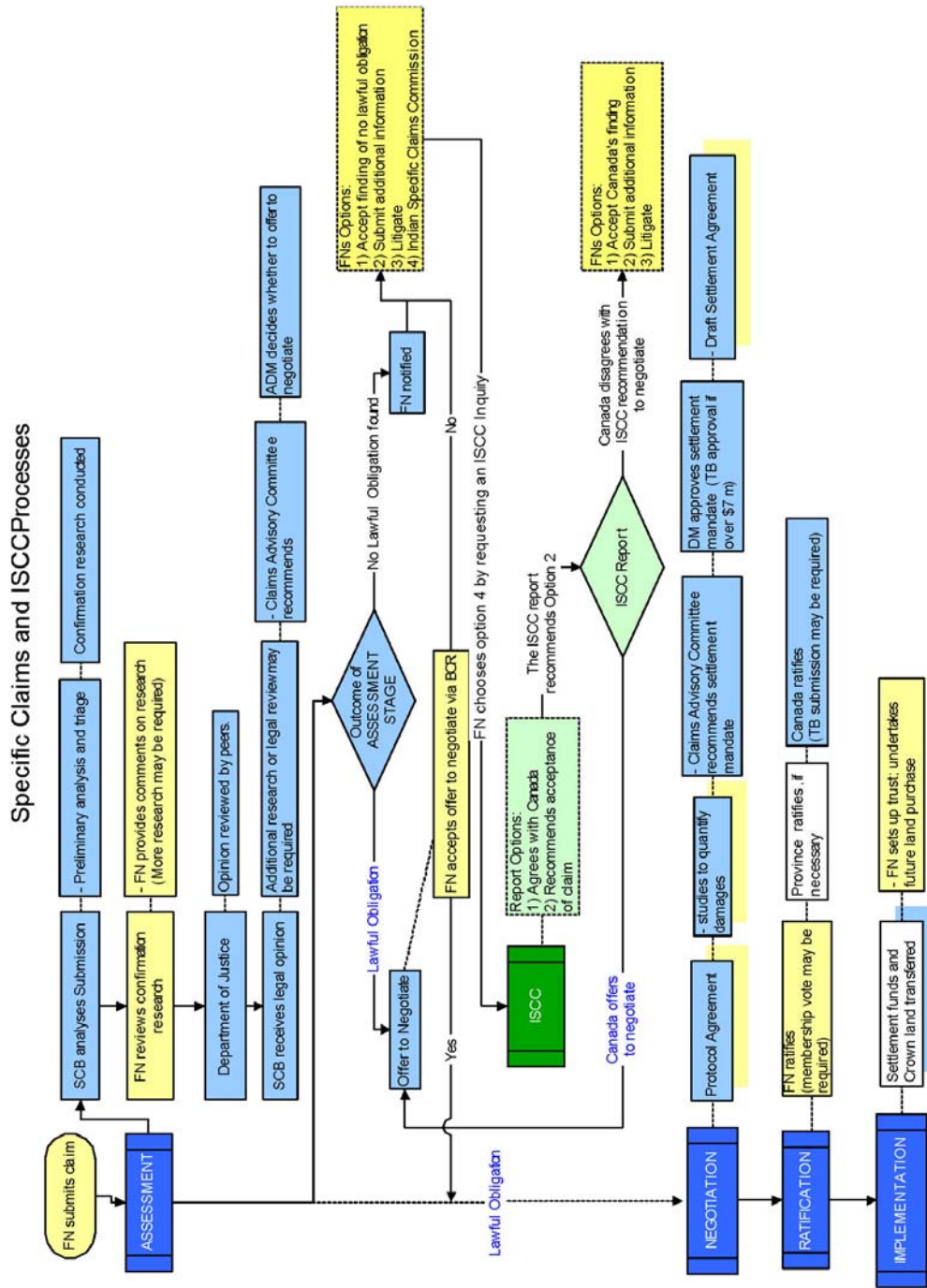
Mamuitun Tribal Council	Denis Brassard, Specific Claims Coordinator	31 October 2006	9	
Mi'kmaq Confederacy of Prince Edward Island	Chief Darlene Bernard, Lennox Island Band, Chair	7 November 2006	10	
	Tracey Cutcliffe, Executive Director			
	Tammy MacDonald, Research Director			
Mohawks of the Bay of Quinte	Lisa Maracle, Researcher			X
Office of the Auditor General of Canada	Sheila Fraser, Auditor General of Canada	18 October 2006	8	
	Jerome Berthelette, Principal			
	Ronnie Campbell, Assistant Auditor General			
Red Earth First Nation and Shoal Lake First Nation	William, A. Selnes, Barrister & Solicitor			X
Roseau River Anishinabe First Nation	Chief Terrance Nelson	22 November 2006	11	
Snuneymuxw First Nation	Chief Viola Wyse			X
Treaty & Aboriginal Rights Research Centre of Manitoba Inc. (TARR MB)	Chief Morris Shannacappo, Chairman	18 October 2006	8	X
	Ralph Abramson, Director			
Union of British Columbia Indian Chiefs	Debbie Abbott, Executive Director, Nlaka'Paumux Nation Tribal Council	17 October 2006	8	X
Union of Nova Scotia Indians	Gillian Allen, Researcher	22 November 2006	11	X
Union of Ontario Indians (Anishinabek Nation)	John Beaucage, Grand Council Chief, Anishinabek Nation	21 November 2006		X

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Specific Claims and ISCC Processes

Source: Specific Claims Branch, DIAND



## APPENDIX C

### Past Efforts to Establish an Independent Claims Commission

1948	Special Joint Committee of the Senate and the House of Commons recommends immediate creation of a "Claims Commission to appraise and settle in a just and equitable manner any claims or grievances."
1950	John Diefenbaker, Member of Parliament for Lake Centre Saskatchewan, argues publicly for an independent claims commission similar to the Indian Claims Commission set up in the United States in 1946.
1961	A Joint Committee of the Senate and House of Commons recommends the establishment of an Indian claims commission in Canada.
1965	Bill reviving previous legislative initiatives to establish an Indian claims commission dies on the Order Paper and is never reinstated.
1969	Federal government establishes an Indian Claims Commission under Commissioner Lloyd Barber who had a mandate to review and study grievances concerning Indian claims. That Commission is dissolved in 1977.
1973	Federal government releases its claims policy, defining Specific and Comprehensive Claims, in response to the <i>Calder et al. v. Attorney General of British Columbia</i> case.
1979	Gérard La Forest writes, in an unpublished report, that the Office of Native Claims in the Department of Indian Affairs has "conflicting duties in relation to Indian claims" and that, in the interest of impartiality, an independent body should be established outside of the department to settle Specific Claims.
1982	Federal government releases <i>Outstanding Business: A Native Claims Policy - Specific Claims</i> .
1983	<i>Penner Report</i> recommends a new Specific Claims policy be created with input from First Nations and the Government of Canada. It recommends legislation to establish a quasi-judicial process for managing failed negotiations and the neutral facilitation of negotiated settlements.
1990	<i>Unfinished Business: An Agenda for All Canadians in the 1990s</i> , a report of the House of Commons Standing Committee on Aboriginal Affairs, notes that there is wide spread dissatisfaction with the claims resolution process, that the current system is too slow in processing claims, and that there are recurring proposals for an independent claims body.
1990	Assembly of First Nations' Chiefs Committee conducts a study on claims, overall, at request of Minister of Indian Affairs. AFN Chiefs Committee recommends that the claims policy be fundamentally reformed and that there be a joint AFN-DIAND working group established to develop an independent claims process.



1991	Auditor General reviews the Specific Claims process, notes the delays, and suggests "the government reassess the fundamental concepts and practices for settling claims." 1991, Report of the Auditor General, Chapter 14, DIAND, Recommendation 14:92.
1991	Indian (Specific) Claims Commission is created through an Order-in-Council as an "interim process" with a mandate to inquire, at the request of First Nations, into First Nations' Specific Claims that have been rejected by DIAND and to provide mediation services for claims in negotiation.
1996	Royal Commission on Aboriginal Peoples (RCAP) recommends that an Independent Lands and Treaties Tribunal be established through legislation to replace the Indian Claims Commission.
1998	Joint First Nations-Canada Task Force on Specific Claims Policy Reform (JTF) recommends the creation of an independent commission to assess claims as well as a tribunal to assist in resolving disputes in a timely fashion.
2003	Bill C-6, An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims, is introduced in the House of Commons in October 2002. The proposed body would manage negotiation and resolution of Specific Claims, deliver binding decisions on the validity of claims, and determine compensation. The <i>Specific Claims Resolution Act</i> (SCRA) which received Royal Assent in November 2003 was rejected by First Nations because it departed too much from the model recommended by the Joint First Nations-Canada Task Force on Specific Claims Policy Reform. The SCRA allows the government to appoint commissioners without input from First Nations, places limits on compensation, and does not contain the resources needed to resolve outstanding Specific Claims.
2004	AFN Confederacy of Nations resolution number 14 adopted. It outlines First Nations' proposed changes to the <i>Specific Claims Resolution Act</i> . Included in these changes are modifications to the process that was used to write the SCRA to ensure First Nations' participation in decisions to amend the <i>Act</i> . Also recommended by First Nations are changes to the appointment process to ensure that it is "balanced and fair"; equal access to the Specific Claims resolution system by various claimants regardless of the size of their claim; the allocation of adequate resources to allow the system to function properly; and the need for the new system to be independent and to decrease the time needed to assess claims.
1994-2005	Indian (Specific) Claims Commission (ICC) recommends in each of its annual reports that an independent claims commission should be established to replace the ICC. From 2003 to 2005, the ICC encourages the creation of the Centre for the Independent Resolution of First Nations Specific Claims as outlined in the <i>Specific Claims Resolution Act</i> . In late 2006, that Centre has not been established and the ICC continues to hold inquiries and offer mediation services.



### TERMS OF REFERENCE

On 3 October, 2006, the Committee adopted the following Terms of Reference for its Special Study on Specific Claims:

#### **BACKGROUND**

On 30 May 2006 the Standing Senate Committee on Aboriginal Peoples received an Order of Reference to examine and report on the nature and status of the Government of Canada's Specific Claims policy.

The main reason for the study is widespread dissatisfaction with the slow progress of the Specific Claims process for resolving First Nations' historical grievances. Estimates vary as to the average length of time it takes the Department of Indian Affairs and Northern Development (DIAND) to resolve a Specific Claim. A significant percentage of the outstanding claims have been pending for well over 10 years.<sup>1</sup> Of these, some were initiated in the 1970s and 1980s.<sup>2</sup>

The problem of delays in the Specific Claims process is decades old. Due to a prevalent feeling that there is a conflict of interest inherent in it, many First Nations have taken their claims to the courts and/or to the Indian Specific Claims Commission, with mixed results. These actions, however, have contributed to the overall frustration of claimants. Frustration has also been felt by those in federal, provincial, and municipal governments and especially by those who consider unresolved Specific Claims to be an impediment to First Nations' economic endeavours.

Structural change has been recommended by various bodies,<sup>3</sup> culminating with the *Specific Claims Resolution Act* (SCRA) which received Royal Assent on 7 November 2003.<sup>4</sup> The

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<sup>1</sup> DIAND, Specific Claims Branch, Public Information Status Report, available on-line at: [http://www.ainc-inac.gc.ca/ps/clm/pis\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/pis_e.pdf).

<sup>2</sup> Between 1 April 1970 and 30 June 2006 First Nations claimants put forward a total of 1,325 Specific Claims. Of the 1,325 Specific Claims registered with DIAND, 275 have been settled, 855 remain unresolved, 80 are closed, no lawful obligation was found in another 80, and 35 were referred for administrative remedy. Of the 855 unresolved claims, a total of 629 are under review by DIAND, the Department of Justice, or the claimants, 89 are in active negotiation, 32 are in inactive negotiation, 74 are in active litigation, and 31 are before the Indian Specific Claims Commission. The 629 under review are in the following stages: Claim received and under review by Specific Claim Branch (28); Research (70); Specific Claim Branch Research Report sent to claimant (163); Department of Justice preparing Preliminary Legal Opinion (312); and, Legal Opinion Signed (56). Source: DIAND, Specific Claims Branch, National Mini-Summary available on-line at: [http://www.ainc-inac.gc.ca/ps/clm/nms\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf).

<sup>3</sup> For example, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 1990; Assembly of First Nations, 1990; Royal Commission on Aboriginal Peoples, 1996; Indian Specific Claims Commission, 2001-2002; Parliament of Canada, Specific Claims Resolution Act (Bill C-6), 2003; and, Assembly of First Nations, 2004.

federal government's decision to not to proclaim the SRCA, however, has left open the question of how Specific Claims and the Indian Specific Claims Commission will be dealt with in the future.<sup>5</sup>

## **OBJECTIVES**

The Standing Senate Committee on Aboriginal Peoples is undertaking the study on Specific Claims with a view to making recommendations to the federal government that will enable it to bring about the timely and satisfactory resolution of First Nations' historical grievances arising from its administration of their lands, monies, and other affairs under the *Indian Act* and their treaties.

The committee will examine and report on:

- General concerns of First Nations in Canada related to the federal Specific Claims process;
- Nature and status of the Government of Canada's Specific Claims policy;
- Present administration of the policy;
- Status of the Indian Specific Claims Commission; and
- Other relevant matters.

## **SCOPE**

The study will focus on the delays in moving legitimate Specific Claims from their submission by the claimant band (that is, from the time when they are registered with DIAND) to settlement agreement. The phase involving the implementation of settlement agreements, including land purchases involving provincial governments, is beyond the scope of this initial study.

The Committee is not seeking to learn about the history or circumstances from which any particular claim arose. It is concerned with the effectiveness of the federal government's process for dealing with Specific Claims, with a view to identifying the nature and cause of the restrictions in the process as well as potential solutions that would best eliminate the "bottlenecks."

Thus, since many of the key challenges inherent in the operation of the Specific Claims process are administrative in nature (i.e., issues concerning delays, transparency, compensation, etc.) and rest, to a great extent, with the federal government's management of

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<sup>4</sup> *An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation and resolution of Specific Claims and to make related amendments to other Acts (Bill C-6).*

<sup>5</sup> In July 2004, a meeting of the AFN Confederacy of Nations called on the government not to proclaim the SCRA in force until First Nations concerns were addressed, or to replace it. The resolution also called for renewed joint efforts to reform the Specific Claims system, specifically in areas such as appointments to and independence of Specific Claims bodies, the definition of Specific Claims, efficiency, access and resources (see: Confederacy of Nations Resolution No.14, May 2004). According to the Assembly of First Nations, the then Minister, in September 2005, advised that the federal government intended not to pursue proclamation of the SCRA, and would concentrate instead on improving the existing Specific Claims process (see: <http://www.afn.ca/article.asp?id=127>).

the process, the Committee will conduct its hearings in Ottawa. To this end, it will be seeking input from a broad range of witnesses from all regions of the country, including:

- Relevant federal departments;
- Indian Specific Claims Commission;
- First Nations representative organizations;
- Specific Claims research units working for First Nations, Tribal Councils, etc.;
- Specific Claims practitioners including legal representatives and research consultants;
- Spokespersons for Royal Commission on Aboriginal Peoples (1996 final report);
- Spokespersons for Joint First Nations-Canada Task Force on Specific Claims Reform (1998 report); and
- Academics whose work has focussed on Specific Claims.

The Committee welcomes brief written submissions in keeping with the subject under study as outlined in these Terms of Reference.

## **AGENDA**

The Committee will pursue an active schedule of hearings in the fall of 2006 with a view to presenting its report to the Senate at the earliest opportunity.

As noted, the hearings will be held in Ottawa. Requests to appear should be submitted no later than 30 September 2006. Should the number of available meeting times prove insufficient to accommodate all requests then interested parties will be invited to submit brief written submissions addressing the key questions.

Those appearing before the Committee will be asked to make their presentations extremely short in order to allow committee members ample time for questioning.

Committee members will pursue freely their own lines of questioning. Witnesses and interested parties, however, should focus on the following key questions in their presentations, replies, and written submissions:

1. At what stage(s) in the Specific Claims process do most of the delays occur?
2. How and why do such delays occur?
3. Is there sufficient in-house expertise to deal effectively with claims?
4. Would the addition of human, financial, or other resources be sufficient to eliminate the main delays? If so, please specify which of these is most needed and where? If not, what else do you feel would be required?
5. Is the Specific Claims policy adequate to the task of addressing the federal government's lawful obligations to First Nations?
6. What are the potential benefits to Canada and to First Nations, if any, of resolving the grievances encompassed by Specific Claims?
7. What should this Committee recommend to the federal government to facilitate the resolution of the documented historical grievances now defined as Specific Claims?

## REPORTING

The Order of Reference for the study requires the Standing Senate Committee on Aboriginal Peoples to submit a final report on its Specific Claims study to the Senate no later than 14 June 2007. Recommendations will comprise the major component of the committee's report. All evidence supplied by witnesses as well as input received in written submissions will be considered in the drafting of the final report.

## SPECIFIC CLAIMS DEFINED

In 1973, two broad classes of claims – Specific Claims and Comprehensive Claims – were created when the Government of Canada issued its *Statement on Claims of Indian and Inuit People*. The Department of Indian Affairs and Northern Development established one policy and process for Specific Claims and another for Comprehensive Claims. Both were and remain alternatives to First Nations and Inuit pursuing their historical grievances in court.

Specific Claims are based on allegations regarding specific legal breaches by Canada in the administration of lands and monies under the *Indian Act* and/or in the fulfilment of treaties. In contrast, Comprehensive Claims relate to aboriginal title questions.<sup>6</sup>

Only an Indian band – a First Nation recognized as a “band” under the *Indian Act* – can bring forward a Specific Claim. Specific Claims therefore should not be termed “Aboriginal claims” because Non-status Indians, Inuit and Métis cannot pursue Specific Claims.<sup>7</sup>

The Specific Claims policy, released in 1982 under the title *Outstanding Business*, indicates that a Specific Claim exists when an Indian band (First Nation) establishes that its grievance gives rise to a lawful obligation in the following circumstances:

- The non-fulfillment of a treaty or agreement between Indians and the Crown.
- A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- A breach of an obligation arising out of government administration of Indian funds or other assets.
- An illegal disposition of Indian land.<sup>8</sup>

Within the Specific Claims policy Canada also considers claims based on:

- Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.<sup>9</sup>

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<sup>6</sup> The policy for Comprehensive Claims was published in 1981 under the title *In All Fairness*.

<sup>7</sup> The expression “Aboriginal land claims,” which is current today, contributes to widespread confusion over the differences between Specific Claims and Comprehensive Claims and who can make them. The term “Aboriginal” is a collective term. As used in the *Constitution Act, 1982*, it encompasses all Status Indians (First Nations), Non-status Indians, Inuit and Métis.

<sup>8</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), p. 20.

Many steps or stages are involved in settling any one Specific Claim. In essence, the Specific Claims process involves research to substantiate allegations, validation of the claim, and timely implementation of a mutually acceptable settlement.

The allegations that give rise to a Specific Claims are those that pertain to the federal government's exercise of its lawful obligations in matters such as the handling of band monies in trust and revenue accounts, the conduct of reserve land transactions, unresolved boundary issues, and, where applicable, the establishment of a reserve under treaty.

While not all Specific Claims are about treaties, the number of Specific Claims turning on whether treaty formulas for setting out reserve land were properly followed proved so numerous that a subcategory of Specific Claims known as Treaty Land Entitlement (TLE) emerged.<sup>10</sup> Just a few examples of the other types of Specific Claims are: trust fund claims, surrender claims, lease claims, right-of-way claims, survey claims, and pre-Confederation claims.

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<sup>9</sup> *Ibid.*

<sup>10</sup> TLE claims raised many questions about the criteria for validation and were subject to an evolution in policy during the 1970s, 1980s, and 1990s.