

OUTSTANDING BUSINESS

A NATIVE CLAIMS POLICY



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A NATIVE CLAIMS POLICY

SPECIFIC CLAIMS

©Published under the authority of the Hon. John C. Munro, P.C., M.P.,
Minister of Indian Affairs and Northern Development,
Ottawa, 1982.
QS-5171-000-BB-A1

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Cat. No. R15-2/1982
ISBN 0-662-51885-3

The artwork on the cover
is a painting by Simon Brascoupe

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FOREWORD

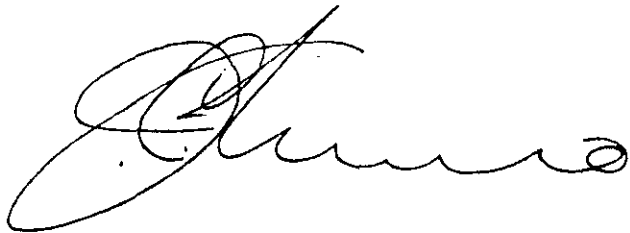
The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets. They have represented, over a long period of our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

To date progress in resolving specific claims has been very limited indeed. Claimants have felt hampered by inadequate research capabilities and insufficient funding; government lacked a clear, articulate policy. The result, too often, was frustration and anger. This could not be allowed to continue. The Government of Canada, therefore, undertook a review of the situation including consultation with Indian groups across the country. This booklet represents the outcome of this review.

Together with this effort at meeting the concerns of the Indian people, the Government has approved a substantial increase in the funding made available to claimants for their research and negotiation activities; it has, also, reinforced the capabilities of the Office of Native Claims. The instruments for greater success are now in place.

The task, however, is enormous, complex and time-consuming. Level-headedness, persistence, mutual respect and cooperation will be required on the parts of government and Indian people alike.

Nevertheless, I think that success is within reach, because success in this endeavour is in the interest of both Indians and government, indeed of all Canadians.

A large, stylized handwritten signature in black ink, appearing to read 'John C. Munro'.

The Hon. John C. Munro, P.C., M.P.
Minister of Indian Affairs
and Northern Development

PART ONE



INTRODUCTION

The federal government's policy on Native claims finds its genesis in a statement given in the House of Commons on August 8, 1973 by the Minister of Indian Affairs and Northern Development. Since that time experience and consultations with Indian bands and other Native groups and associations have prompted the government to review and clarify its policies with respect to the two broad categories of claims: comprehensive claims and specific claims.

The term "comprehensive claims" is used to designate claims which are based on traditional Native use and occupancy of land. Such claims normally involve a group of bands or Native communities within a geographic area and are comprehensive in their scope including, for example, land, hunting, fishing and trapping rights and other economic and social benefits.

The government has already made public its policy on comprehensive claims in a booklet entitled *In All Fairness*, published in December 1981. The term "specific claims" with which this booklet deals refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.

This booklet traces the historical relationship that has developed between the Indians and the Crown through the treaty process as well as examining more recent events leading toward the adoption of the current policy on specific claims. Its major purpose, however, is to outline this policy and to enunciate guidelines regarding the bases for specific claims, operation of the claims process, assessment of claims and compensation.

INDIAN TREATIES

Treaties play a significant part in the heritage of Canada's Indians and are central to many of their existing claims. As far back as the Royal Proclamation of 1763, the British sovereign recognized an Indian interest in the lands occupied by various Indian tribes which could only be ceded to, or purchased by, the Crown. This policy led to the tradition of making agreements, or treaties as they were later called, with the Indians.

As Upper Canada began to feel the effects of settlement after the American War of Independence (1775-1783), many land cession treaties were made with the Indian people for the surrender of their interest in the land. Initially these involved one time cash payments, but in later surrenders, such as the Robinson-Huron and Robinson-Superior Treaties of 1850, the Crown undertook to set aside reserves, and to grant annuities and other considerations for the benefit of the Indian people.

Following Confederation 13 treaties were concluded between the Indians and the Government of Canada. Eleven -- the so-called numbered treaties -- extend from the Québec border, covering all of northern Ontario, and across the prairie provinces into northeastern British Columbia, southeastern Yukon and the Mackenzie Valley in the Northwest Territories. Most post-Confederation treaties in what are now the prairie provinces were made before the provinces came into being or provincial boundaries were finally determined.

Features common to many of the western treaties include the provision of reserve lands; gratuities; annuities; medals and flags; clothing to chiefs and councillors; ammunition and twine; and schooling where requested. Treaty No. 6, covering central Saskatchewan and Alberta also provided for a medicine chest and for assistance during times of pestilence and famine.

THE INDIAN ACT

As well as being concerned with the fulfillment of Indian treaties, specific claims relate to the administration of land and other assets under the Indian Act. Such land and other assets, mainly in the form of money, were derived in large measure from the treaties and earlier Indian agreements with the Crown or found their origin in colonially established Indian reserves and funds. Again, in some cases, they came from what had been church administered holdings. All were brought within the aegis of a series of post-Confederation Acts beginning in May 1868, with legislation giving the Secretary of State control over the management of Indian lands and property and all Indian funds. The first *Indian Act* of 1876 and its several subsequent versions maintained the principle of government responsibility for the management of Indian assets.

The two principal categories of Indian assets which fall under federal government management are Indian reserve lands and Indian band funds and hence are most often at the centre of Indian claims where breach of an obligation arising out of government administration is asserted. In turn, land-related claims have to date been most frequently raised. The latter may find their origin in such areas as the taking of reserve lands without lawful surrender by the band concerned or failure to pay compensation where lands were taken under legal authority.

While not as frequently filed as land-related claims, some claims have arisen with respect to the administration of Indian moneys; for example, that embezzlement has occurred or that money owing to a band was never paid into band funds. Other claims concerning the administration of Indian assets have arisen with respect to removal of timber or gravel from reserves without compensation or in regard to damage to trees or other assets.

RECENT HISTORY

Over the years following the signing of the treaties, Indians concluded that the government had not fulfilled all of its commitments to them. Some Indians maintained that the government had reneged on some of its promises under treaty. Others charged that the government had deliberately disposed of their reserve lands without first securing their permission. Claims of mismanagement of band funds and other assets were presented to government.

Faced with an increase of such claims and a growing discontent among the Indian population, the government determined to give careful consideration to each of these claims in order to determine their validity and its responsibility.

In 1969 the Government of Canada stated as public policy that its lawful obligations to Indians, including the fulfillment of treaty entitlements, must be recognized. This was confirmed in the 1973 *Statement on Claims of Indian and Inuit People*. The 1973 statement recognized two broad classes of native claims—"comprehensive claims": those claims which are based on the notion of aboriginal title; and "specific claims": those claims which are based on lawful obligations.

Following the issuance of the 1973 statement there was a marked increase in claims activities. Research funded by the federal government and in some cases by non-government organizations and band councils, was accelerated.

In July 1974 the Office of Native Claims was created and located within the Department of Indian Affairs and Northern Development to review claims and represent the Minister and the Government of Canada in claims assessment and negotiation with Native groups.

Between 1970 and the end of fiscal year 1981-82, a total of \$16.7 million in accountable contributions had been provided by the federal government for the research and development of specific claims; most of that has been used by provincial Indian organizations on behalf of Indian bands.

Approximately 250 specific claims had been presented to the Department by the end of December 1981. Twelve claims had been settled involving cash payments of some \$2.3 million. Seventeen claims had been rejected and five had been suspended by the claimants. Negotiations were in progress on 73 claims and another 80 were under government review. Twelve claims had been filed in court and 55 others referred for administrative remedy (e.g. return of surrendered but unsold land).

Since the beginning of 1982 the government has concluded an agreement with the Penticton Band in British Columbia on its claim with respect to lands cut-off from its reserve in 1916. In addition to having 4,855.2 hectares of land returned by the provincial government, the band received \$13.2 million in compensation from the federal government for lands that had been alienated for other uses and will receive a further \$1.0 million from the provincial government for lands it is retaining for public purposes. In Nova Scotia, the Wagmatcook Band claim has been resolved. In exchange for lands removed from its reserve almost a century ago, the band has received a payment of \$1.2 million which will enable it to purchase land on the open market and undertake certain business ventures.

It is clear however that the rate at which specific claims have been resolved does not correspond with the expectations of the Government of Canada or the Indian claimants. This fact plus the estimated hundreds of other claims which are being withheld pending clarification and resolution of the existing claims policy underscores the seriousness with which the government views the current situation and has led to the reevaluation of its policy on specific claims.

INDIAN VIEWS

General Indian dissatisfaction with the specific claims policy and procedures has been evident for a number of years. This culminated in a call for a new policy at the First Nations Conference in Ottawa in 1980.

More recently, the Department has sought the views of Indian organizations through direct discussions. Numerous reports and other submissions have also been examined. While Indian groups and associations are by no means unanimous on the subject, some commonality of views is evident.

In the first instance Indian groups have complained that the lawful obligation criterion has been too narrow to permit their claims to be dealt with fairly and hence has been an inhibiting factor in their resolution. They believe that claims should be based on moral and equitable grounds as well as lawful obligation and these should be clearly set out. They also wish to ensure that the lawful obligation criterion is not interpreted as only allowing for claims that originated after Confederation. In all cases it was the view that treaty rights respecting land, hunting, fishing and trapping should be met and should be fairly interpreted. Moreover, it was contended that the federal government has had an historical trust responsibility for Indian bands and their assets, and that particular actions taken by the government over the years have breached such responsibility.

With regard to the assessment of claims, Indian representatives stated that rules of evidence, time limitations and other procedural defences should be relaxed or eliminated. They added that oral tradition should be accepted as evidence. It was further stated that Indians should have access to Department of Justice opinions so that adequate responses could be prepared.

In terms of process it was held that the department should actively assist in the preparation of claims, making internal documents more easily available and generally acting in a supporting role. The Office of Native Claims should either be disbanded or given a more liberal mandate to settle claims. It was also held that the government should not unilaterally assess the validity of a claim but rather that greater efforts should be made at reaching consensus on facts and merits. Independent third parties should be used to facilitate settlements especially in the role of mediator. The use of courts for certain claims may be desirable but, in the Indian view, government should provide funding for court action and be prepared to negotiate while claims are under litigation. Furthermore, funding assistance should be increased in amount and extended as accountable contributions to all phases of the claims process.

In the area of compensation, the general view expressed was that bands should be restored to positions held before loss. Many of the bands view claims not only as a means to restore or improve their land base but to obtain necessary capital for socio-economic development. Where non-Indians are occupying claimed lands, such lands should be returned to the bands concerned and, if necessary, the former occupants compensated by the government.

Indian representatives all stated, in the strongest of terms, that Indian views must be considered in the development of any new or modified claims policy. It was also pointed out, in nearly every case, that any national policy for claims resolution should take account of regional variations in the nature of claims and in the circumstances lying behind them.

All of these views have been taken into consideration by the government in developing new policy initiatives as outlined in the next section. The policy as now adopted by the government, while not meeting in full the wishes of the Indian people in the area of specific claims, will clarify procedures and liberalize past practice. In effect, the government has done its best to meet the aspirations of the Indians, while maintaining the required degree of fiscal responsibility. Moreover, the government will continue to fund the specific claims process through both contributions and loans, assist in the provision of documentation and enter into negotiations in a spirit of good faith.

PART TWO



THE POLICY: A RENEWED APPROACH TO SETTLING SPECIFIC CLAIMS

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.

As noted earlier the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.

1) Lawful Obligation

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

2) Beyond Lawful Obligation

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) 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.

3) Statutes of Limitation and the Doctrine of Laches

Statutes of Limitation are federal or provincial statutes which state that if one has a legitimate grievance, yet fails to take action in the courts within a prescribed length of time, the right to take legal action is lost. The right to take action on a valid civil claim, therefore, will expire after a certain length of time unless legal proceedings have been started.

The doctrine of laches is a practice which has come into observance over the years. It is, therefore, a common law rule as opposed to a specific piece of legislation passed in Parliament. The doctrine is based on actual cases whereby people lose certain rights and privileges if they fail to assert or exercise them over an unreasonable period of time.

With respect to Canadian Indians, however, the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with Native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.

THE PROCESS: HOW SPECIFIC CLAIMS ARE DEALT WITH

1) Presentation of the Claim

Specific claims are presented by Indian bands to the Minister of Indian Affairs and Northern Development, acting on behalf of the Government of Canada. Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based. In order to speed up the review of the claim, presentations should include copies or lists of the documentation upon which the claim is based. This documentation may come from primary sources such as archival documents, government files, testimony of knowledgeable participants and land records, or from secondary sources such as books and articles. In return, the Office of Native Claims makes claim-related research findings in its possession available to the claimants and consults with them at each stage of the review process.

2) Review of Claims by the Office of Native Claims (ONC)

The Office of Native Claims undertakes a review of the claim at the direction of the Minister of Indian Affairs and Northern Development. In conducting its review, ONC analyses the historical facts presented in the claim and arranges for additional research if required. It also investigates the sequence of historical events surrounding the issues raised in the claim. Meetings between the claimant group and departmental officers may be arranged in order to clarify aspects of the claim and thereby reach a better understanding of the issues involved. In the process, departmental officers and claimants exchange copies of historical documentation pertaining to the claim. In addition, consultation and co-ordination may be required with other federal departments and provincial governments who may be involved in, have been a party to, or may be affected by, the claim and its resolution.

All pertinent facts and documents are then referred by ONC to the Department of Justice for advice on the federal government's lawful obligation.

Once obtained, the elements of the legal advice is reviewed with the claimant groups to obtain any additional views or comments before the claim is referred to the Minister of Indian Affairs and Northern Development.

3) Determination of the Acceptability of the Claim

On the basis of the legal advice received from the Department of Justice, the Minister of Indian Affairs and Northern Development accepts on behalf of the Government of Canada, such claims as are eligible for negotiation and advises the claimant group of the decision.

4) Resolution

In cases where the Minister accepts a claim as negotiable in whole or in part, the Office of Native Claims is authorized to negotiate a settlement with the claimant on behalf of the Minister and the federal government.

The process of settling specific claims is often a complex one, depending on the nature of the claim and the type of compensation being sought. Specific claim settlements can vary, but most often consist of such elements as cash, land or other benefits. The criteria for calculating compensation may also vary from claim to claim according to the particular issues and obligations established in the claim and to the strength of the claim.

Once an agreement has been reached between the claimant group and the Office of Native Claims acting on behalf of the Government of Canada on the terms of settlement, a final agreement is signed, compensation is provided and the claim is settled. Bands achieving a settlement of their claim are expected to manage the proceeds of settlement themselves as far as is possible. In the case of substantial settlements, the final agreement may specify the structure of mechanisms established by the claimant group to administer settlement benefits.

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that negotiations on the same claim cannot be reopened at some time in the future.

If the review of the findings reveals insufficient grounds for negotiation of the claim, it may still be capable of resolution through existing departmental or governmental programs and, in this case, it is referred to an appropriate program group or agency.

5) Further Review of the Claim

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.

PART THREE



GUIDELINES

In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While the guidelines form an integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.

Submission and Assessment of Specific Claims

Guidelines for the submission and assessment of specific claims may be summarized as follows:

- 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.
- 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, if all are bringing the same claim.
- 3) There shall be a statement of claim which sets out the particulars of the claim, including the facts upon which the claim is based.
- 4) Each claim shall be judged on its own facts and merits.
- 5) The government will not refuse to negotiate claims on the grounds that they are submitted too late (statutes of limitation) or because the claimants have waited too long to present their claims (doctrine of laches).
- 6) All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law.
- 7) Claims based on unextinguished native title shall not be dealt with under the specific claims policy.
- 8) No claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.
- 9) Treaties are not open to renegotiation.
- 10) The acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

Compensation

The following criteria shall govern the determination of specific claims compensation:

- 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
- 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.

- 3) (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
(ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.
- 4) Compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.
- 5) Compensation shall not include any additional amount for the forcible taking of land.
- 6) Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired.
- 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.
- 8) In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.
- 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.
- 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.

CONCLUSION

The Government of Canada is committed to resolving specific claims in a fair and equitable manner. At the same time it recognizes that over the years the existing process has not been effective in resolving them in any significant degree. The new policy initiatives outlined in this publication are meant to correct this situation. The injection of new resources for research, development and the processing of claims is a measure of the depth of this government's commitment.