Mishkosiiminiziibiing (Big Grassy) First Nation

Submission

House of Commons
Standing Committee on Indigenous and Northern Affairs
Specific Claims and Comprehensive Land Claims Agreements

October 19, 2017

A. INTRODUCTION

Mishkosiiminiziibiing (Big Grassy) First Nation is an Anishinaabe First Nation located in northwestern Ontario, on the southeast shore of Lake of the Woods. Our forefathers were signatories to Treaty 3.

From time immemorial, Mishkosiiminiziibiing has used and occupied the lands, waters, and resources within Treaty 3 territory. Our traditional economy is based on wild rice harvesting, fishing, hunting, and trapping. While our community members still practice our traditional way of life, our ability to earn a living from our traditional lands has been severely and negatively impacted by the effects of colonization, including numerous breaches by Canada of its promises under the Treaty.

We turned to the Specific Claims process to address some of these wrongs. It has been, and continues to be, a long process with a heavy financial and human cost.

Our experience in the Specific Claims process goes back three decades. Over that time, our community has submitted a total of five Specific Claims under Canada's Specific Claims policy. Of these five, we have settled one claim, and a portion of another claim. We currently have three claims before the Specific Claims Tribunal, and one other claim active negotiations under Canada's Policy.

In these submissions, we describe some of the barriers and challenges Mishkosiiminiziibiing has faced in obtaining a just resolution and compensation for the damage caused by Canada's failures to fulfil its obligations to our community. We further outline specific and concrete changes that we respectfully ask the Standing Committee to consider in any recommendations it may make for reform to Canada's Specific Claims policy.

B. ISSUES

1. Delay and its Human Cost

Our experience in the Specific Claims process provides a concrete example of the ongoing problem of delay, which have been well documented by the Auditor General[1] and others. Our highway claim, for example, was filed in February 1988. It was accepted for negotiation in April 1999. Subsequently, by agreement the parties, part of the claim was separated out and settled. The remainder of the claim remains unsettled. After Canada made a "take it or leave it" low-ball offer, Big Grassy filed a Statement of Claim in the Specific Claims Tribunal in October 2011, and a resolution remains outstanding.

Under present policies and practices, claims frequently proceed from the "validation letter" stage into years of frustrating delays, and the elders who have suffered most pass on.

Often, the people who most directly suffered the loss are the elders of the community. Even where the original Crown breach pre-dates everyone still alive, the elders of the First Nation community often have the most direct experience of the loss.

---

[1] Office of the Auditor General of Canada, 2016 Fall Reports, Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada: http://www.oagbvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html (the "Auditor General Report")

We have lost numerous elders in the time that our various claims have been in the system. It is painful to know that these elders were denied the opportunity to see the day that settlement is achieved.

As the negotiator for the First Nation, I have often been called upon to explain to our membership why we still do not have a settlement after many years in negotiations or before the Tribunal. Ironically, a process intended to right past wrongs is itself re-victimizing those who were wronged by Canada's past actions. The delays are pushing us further from reconciliation by fuelling mistrust and despondency amongst our community members.

2. Advance Payments

When Canada accepts a claim for negotiation, then by definition, Canada has accepted (for the purpose of the negotiation) that it breached its lawful obligation, and that compensation is owing.

Advance payments could be a way to provide something to the claimant at a time when it is needed, and would be a way to mitigate the human impacts described above. It would also demonstrate good faith on the part of Canada and may provide momentum to the negotiations.

There is precedent in the insurance industry for advance payments, which are sometimes paid by insurance companies once they are satisfied that they will be obligated to pay compensation. These payments are without prejudice, and recognized and protected by insurance policy terms, by contracts and by court rules.

The advance payment procedure would seem to be well suited to specific claims. At the point in time where a validation letter is sent out by Canada, the First Nation claimant has already fully documented its claim, and Canada has already fully reviewed and assessed the claim and determined that it is partially or wholly liable. Why should not this be the point in time when Canada also advises the First Nation that it will make an advance payment in a certain amount?

3. Loan Funding

Loan funding is shown as a liability on the First Nation's financial statements, and can interfere with the First Nation's ability to obtain financing for critical community needs such as housing and infrastructure. This problem is exacerbated when negotiations drag on for years. The loan funding structure may even incentivize the First Nation to settle for a lowball offer just to get out from under the loan funding debt. The loan funding structure does not enable First Nations to engage in negotiations on an even playing field with the Federal government.

Instead of loan funding the Government of Canada should follow the example of some provinces, and provide grant funding instead.

4. Types of Damage That Will Be Compensated, and Remedies Available

Compensation available through Specific Claims negotiations is dictated by the Specific Claims Policy and Process Guide.[2] We have been told by Canada's negotiators in no uncertain terms that damages such as cultural and spiritual losses and loss of life are not compensable under the specific claims process. If these damages can be proven, and it can be shown that they were caused by Canada's breach, then Canada's policy should not arbitrarily deny compensation for these heads of damage. Just because these types of loss may be difficult to quantify is not a principled basis to deny compensating for them.

As for remedies, reconciliation requires recognition. if Canada and the First Nation reach a settlement, then if requested by the First Nation, Canada should provide an acknowledgement that what happened to the First Nation was wrong, and an apology. This is important to our people and would go a long way to building a foundation for a future relationship of trust and mutual respect.

5. Canada's Representatives in Negotiations and before the Tribunal

Under Canada's 2007 Specific Claims Action Plan - *Justice at Last,* the Department of Justice Canada (DoJ) has multiple roles. DoJ advises Indigenous and Northern Affairs Canada on whether a specific claim discloses an outstanding lawful obligation for Canada, offers advice to Indigenous and Northern Affairs Canada during negotiations, and represents Canada before the Specific Claims Tribunal and the courts.[3]

Mishkosiiminiziibiing's view is that it is problematic that DoJ both assesses the validity of claims and also defends Canada against claims. The validity of First Nations' concerns about the independence of the specific claims process was recognized in the Senate Committee's 2006 study, which reported that the federal government judges and determines compensation for claims made against itself.[4]

In his December 2016 decision in the *Hue-Ay-Aht First Nations v. Her Majesty the Queen in Right of Canada*,[5] Justice Whalen of the Specific Claims Tribunal referred to Canada's general approach as one of "theoretical fervour" in support of its own vision. In *Huu-ay-aht,* Canada had argued that "HFN [should not] receive compensation of any kind for the amount attributed in their model to foregone consumption, i.e. no compensation for the historical dollar value, its equivalent purchasing power today, or any interest." Canada's arguments in *Huu-ay-aht* concerning consumption losses exemplifies an endemic resistance and denial of First Nations' claims and compensation, even where liability has been established.

Just as the Tribunal is substantially independent, so should be the negotiating and litigating agency representing the Crown in specific claims negotiations and in the Tribunal. In keeping with Canada's "10 principles," such an agency could be mandated to negotiate and/or litigate

---

[2] https://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506#chp10

[3] Auditor General Report 2016, at paragraph 6.10.

[4] Standing Senate Committee on Aboriginal Peoples, *Negotiation or Confrontation: It's Canada's Choice* (2006), cited in Auditor General Report 2016, at paragraph 6.5.

[5] 2016 SCTC 14, at para 314

Specific Claims with a view to arriving at "constructive arrangements between Indigenous peoples and the Crown [as] acts of reconciliation based on mutual recognition and respect."[6]

6. Better Communications with INAC Regional Offices to Implement Settlements

In specific claims which involve reserve lands that were never lawfully surrendered, or otherwise taken under legal authority, settlement of the claim may require that an *Indian Act* instrument be put in place to legalize the use of the land in the future. For example, if reserve lands were taken for a highway but a surrender or expropriation was never obtained, then the *Indian Act* requires that instrument be put in place to either remove the lands from reserve (e.g., expropriation or surrender), or an easement be put in place to permit the lands to continue to be used for highway purposes (e.g., a permit, designation, or s. 35 easement).

In Mishkosiiminiziibiing's experience, communication and coordination between Specific Claims Branch ("SCB") (whose mandate involves settling claims) and INAC Regional Offices (whose mandate involves administering reserve lands) is poor at best. Sometimes these two branches of INAC are even working at cross-purposes. The reasons for this require investigating, but may involve lack of co-ordination when setting priorities and budgets, such that Regional Offices simply do not prioritize or direct resources to the work required to give effect to settlements negotiated by SCB. This has been a major source of frustration for Mishkosiiminiziibiing and other Treaty 3 communities, and likely for SCB as well.

It will be even more important to address this lack of co-ordination with the separation of the Department into two Ministries: Indigenous Services and Crown-Indigenous Relations.

7. Inter-Crown Disputes about Which Level of Government is Responsible

Mishkosiiminiziibiing's experience is that circumstances leading to breaches of the Crown's duty may involve more than one level of Crown government. Inter-Crown disagreement about who is responsible for compensating First Nations should not cause delay or denial of a settlement.

Within Canada's constitutional framework, and in the jurisprudence, a fiduciary relationship between the Federal Crown and a First Nation arises when the Federal Crown deals with First Nation land.

Jordan's Principle provides that where a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service.[7] Canada's Specific Claims policy should similarly enshrine the principle that where the parties are negotiating on the basis that Canada has breached its lawful obligation to a First Nation, Canada should pay fair compensation, and seek any indemnification or contribution from other Crown governments (e.g., provinces) separately.

---

[6] Principles respecting the Government of Canada's relationship with Indigenous peoples, http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html, Principle #5.

[7] See: https://www.canada.ca/en/health-canada/services/first-nations-inuit-health/jordans-principle.html

C. CONCLUSION

In this submission we have identified concrete steps Canada could take to make Canada's Specific Claims policy and process more accessible, more effective, and less frustrating and burdensome for First Nation claimants.

We respectfully request that the Committee consider these views in its study of the Specific Claims process, and when reporting its findings to the House of Commons.

Glenn Archie, Head Negotiator
Mishkosiiminiziibiing (Big Grassy) First Nation