Submission to the Standing Committee on Indigenous and Northern Affairs

"Anishinabek Nation Recommendations on Specific Claims Policy and Process"

October 24, 2017

The Anishinabek Nation

The Anishinabek Nation is a political advocate and secretariat for forty First Nations across Ontario. The Anishinabek Nation is the oldest political organization in Ontario which traces its roots back to the Confederacy of Three Fires, which existed long before European contact.

The forty member First Nations of the Anishinabek Nation have a combined population of approximately 60,000 citizens, whom are geographically located in areas extending from Thunder Bay, along the north shore of Lake Superior, Lake Nipigon, the north shore of Lake Huron, Manitoulin Island, east to 150 km west of Ottawa, and through the south central part of Ontario. The Anishinabek Nation membership is divided into four regions, namely the Northern Superior region, Lake Huron region, Southeast region, and Southwest region, which are based on the Treaty territories of the member First Nations.

The Anishinabek Nation is mandated by the Anishinabek Nations Chiefs in Assembly to provide support to its member First Nations. This is accomplished through the Anishinabek Nation involvement in aggregated activities in the areas of health, social services, education, resource management, self-government negotiations, and justice.

Background

Specific claims are historical grievances pertaining to the Government of Canada's failure to uphold treaty agreements or fulfill its legal obligations under the Indian Act to protect reserve lands and assets from alienation, encroachment and mismanagement. The impacts of unresolved specific claims cannot be overstated.

In 2007, then Minister of Indian Affairs Jim Prentice, introduced the Specific Claims Action Plan, characterized as a dramatic reformation of Canada's specific claims policy. The plan, titled "*Justice at Last"*, was structured around four independent pillars that addressed both the backlog of claims that had languished for years while awaiting legal opinions, and the glaring conflict of interest whereby Canada assessed claims against itself. "*Justice at Last"* renewed and strengthened Canada's commitment to settle specific claims through negotiation instead of litigation.

Implementation of "*Justice at Last"* not only failed to establish the fairer, faster, and more transparent process that the plan itself was intended to do; it also created many new obstacles that impeded claim resolution and generated widespread mistrust of the process among First Nations.

Since the implementation of "*Justice at Last"*, Canada has systematically departed from the meaningful resolution of specific claims through negotiation and mediation and moved to a narrow and legalistic approach. It has set up burdensome and unnecessary bureaucratic obstacles and has not provided appropriate funding so that First Nations can surmount these obstacles.

Canada has not engaged in meaningful, good faith negotiations aimed at reconciliation. Rather, Canada is making "take-it-or-leave-it" final settlement offers to First Nations that often fall far short of the real value of the claim.

Many First Nations have received misleading notifications indicating that their claims had been "accepted for negotiations" but in fact, only one or two aspects of a claim had been accepted and the remainder of the claim had been rejected.

Canada has also required that First Nations sign a release on all aspects and allegations of a claim, whether accepted by Canada or not. This meant that First Nations must extinguish their rights to pursue the rejected portions of their claims. First Nations have been forced to respond to this approach by taking out rejected components of complex specific claims and re-filing these as separate claims. In many cases, this resulted in ten or more new claims originating from one original claim. This adding to the backlog that "*Justice at Last*" was to relieve.

Since 2013 First Nation research organizations across the country experienced drastic funding cuts. These cuts incapacitated First Nation research organizations and have resulted in hundreds of specific claims having to be put on hold with no clear path forward. Some organizations were so debilitated that they have been unable to submit any claims at all.

The Anishinabek Nation, Specific Claims Program experienced a 60% funding cut in 2014. These cuts resulted in:

- Layoffs to staff and contracted researchers with years of archival and historical research expertise;
- Insufficient funds to conduct research, obtain documentation and transcribing necessary primary and secondary support materials as required by the Minimum Standard for filing a specific claim submission with the Minister;
- Insufficient funds to conduct necessary legal work required to prepare specific claims for submission; and
- Insufficient funds to cover basic administrative costs to run the program.

Current Status

As of May 10, 2016, Canada announced its full support and implementation of the United Nations on the Declaration and Rights of Indigenous People (UNDRIP). A key principle of the Liberal Party platform is a "renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, cooperation, and partnership." The Liberal government has repeatedly identified reconciliation between Canada and Indigenous Nations as a key priority.

The Office of the Auditor General (OAG) released a report in fall 2016 that identified cuts to funding as a significant barrier to Indigenous Nations' resolution of their specific claims. The government's response to the OAG report was to emphasize the mutual benefits when Canada takes concrete steps to advance reconciliation with Indigenous Nations.

In a joint statement dated September 5, 2017 Minister Wilson-Raybould and Minister Bennett, made it clear that the existing specific claims policy and process are not in keeping with a reconciliation-based approach. In collaboration with the Assembly of First Nations, Canada will be completing an overhaul of the specific claims policy.

Minister Carolyn Bennett has committed to working with the AFN, Indigenous Nations, and other interested parties, to bring the principles of UNDRIP to bear on specific claims policy and to implementing all ten recommendations from OAG report.

Recommendations:

In keeping with the goal of reconciliation as a key priority, and in order for the specific claims process to be successful the Anishinabek Nation recommends that the Federal government make the following changes to the specific claims process:

Resourcing

- Provide adequate resources to all claimants, at all stages of the claims process to support First Nations' full and equal participation in the specific claims process (including the Tribunal); and
- Develop a consistent funding methodology that focuses on equity in the distribution of resources (i.e. funds to First Nations must be on par with those provided to INAC and the department of Justice Staff) for all stages of the process.

Policy and Approach

- Create opportunities for First Nations and Research Units to provide input into policy changes and department practices;
- Cease the practice of imposing the minimum standard unreasonably, and, as a show of good faith, meet with the individual First Nation claimants to review, assess and advise on the development of claims prior to submission;
- Cease the practice of partial acceptance with blanket releases;
- Cease the practice of unilaterally valuing claims during the assessment phase;
- Collaboratively establish a fair process to resolve claims over $150 million; and
- Honour the decisions of the Tribunal.

Negotiations

- Assess claims on their merit and negotiate such claims in an honourable manner based on legal principles, rather than pressing First Nations into an unfair "expedited settlement process";
- Negotiate with First Nations in a fair and transparent way to establish the value of all claims before any offer is generated;
- Negotiate all claims regardless of value;
- Cease the use of non-negotiable, final, take-it-or-leave-it settlement offers;
- Cease the practice of forcing First Nations to surrender land rights before Canada will agree to negotiate a claim;
- Negotiations should include consideration of land as compensation and not be limited to monetary settlements. The acquisition of land should not be based on the Additions to Reserve process as it is not an efficient or timely process for acquiring lands; and
- If lands are a part of the claim settlement, the onus should always be on Canada when dealing with the compensation for third party losses.

Conclusion

The specific claims process is in urgent need of transformation and revitalization. Only with adequate funds to research historical wrongs will First Nations be able to seek redress for the injustices by which they have been so long affected. Restoration of funding would demonstrate that Canada is willing to do what is necessary to meet its international obligations.

Canada must honour its promises and begin to work in partnership with First Nations to resolve outstanding specific claims. This includes adopting meaningful approaches to resolution of specific claims through negotiation and mediation.

The ultimate goal should be, Canada working collaboratively with First Nations to change the fundamental approach of the specific claims policy.