NLAKA'PAMUX NATION TRIBAL COUNCIL

Fraser Thompson Indian Services Society Nlaka'pamux Services Society
P.O. Box 430, Lytton B.C, V0K 1Z0
Phone: (250) 455-2711 Fax: (250) 455-2565
Email: nlakapamux@nntc.ca

Nlaka'pamux Nation Tribal Council
Specific Claims Program

Submission to the House of Commons Standing Committee
on Indigenous and Northern Affairs

Re: Standing Committee 2017 Study on Comprehensive and Specific Claims

October 2017

Representatives of the Nlaka'pamux Nation Tribal Council (the "NNTC"), Grand Chief Robert Pasco, Chair and Debbie Abbott, Executive Director, appeared before the House of Commons Standing Committee on Indigenous and Northern Affairs (the "Committee") to present on the subject of Specific Claims to inform the Committee's study on "comprehensive claim settlements and specific claims." This submission is intended to supplement the presentation made by the NNTC and to provide context and insight into issues raised before the Committee at the hearing held on September 25th in Delta, B.C.

INAN Committee Hearing September 2017

While the NNTC was pleased to be granted standing to make a presentation to the Committee, we are also very concerned with the nature of this most recent study into comprehensive and specific claims. Let us first say, we are not "claiming" anything. Our title and rights exist and are ours. Wrongs have been perpetuated against us. To "claim" is to suggest otherwise.

There is a historical pattern of resources being directed at studying issues related to Indigenous Peoples and fewer to no resources being directed at implementation of proposed changes. When there has just recently been a substantial review by the Auditor General into the Specific Claims program and myriad legal cases and considerations of the Comprehensive Claims approach, we wonder what further analysis and more importantly, implementation, the Committee will be able to achieve especially when presentations to the Committee did not reflect the diversity and complexity of Indigenous perspectives and experiences.

We are uncertain why the Standing Committee hearings were not publicized to all Indigenous communities and why what limited notification there was, came so late. This does not provide for fulsome input. During the hearing, we were left with the impression that Treaty success stories were what the Committee was most interested in. This may leave a skewed impression. There is widespread dissatisfaction with the BC Treaty process.

While each Nation is unique and speaks for itself, we also know how divide and conquer strategies are used against us, how "overlap" is used to misconstrue the issues and what strength there is in unity so we confirm that we presented at the hearing and are making this submission to share both the Nlaka'pamux perspective and to join in the BC Specific Claims Working Group recommendations and to acknowledge our participation with the AFN Joint Technical Working Group, a group tasked with addressing the recommendations of the Auditor General's Report on Specific Claims released last November. We made significant contributions to the body of evidence that informed that Auditor General report. And these reflect only our most recent efforts. The Nlaka'pamux Nation Tribal Council, under Grand Chief Pasco's leadership, has been a leading participant in the specific claims process as a research unit and as a critic and developer of viable options and alternatives.

For the NNTC, the BC Treaty process is untenable as it is inconsistent with our title and rights. We will not participate in that process and believe there must be respectful, viable alternatives. Our focus, however, in our presentation and submission to the Committee is on the Specific Claims program, recognizing though, that there is an artificial distinction between comprehensive and specific claims.

The Committee should be aware that there are many Nations across the country and especially in British Columbia who are not involved in comprehensive claims or treaty negotiations and oppose that approach. The Nlaka'pamux Nation Tribal Council is an example, choosing to exercise, preserve and protect our Indigenous title and rights directly, in light of the current policies of the Federal and Provincial governments. Any examination of comprehensive claims should include extensive consultation with those who consciously choose not to engage in that process and examine why. Likewise, in communities that have entered into treaty negotiations and settlement, consideration should be given to the concerns of those who are opposed to the treaty settlement.

There will never be one process that will work for all Nations. Each Nation is unique. Therefore, while the Nlaka'pamux Nation Tribal Council supports and is involved with the initiatives of the Union of B.C. Indian Chiefs

and working groups to develop alternatives, we do not want our position to be confused: The Nlaka'pamux Nation is unique and any process of resolution must take that uniqueness as a starting point.

We understand the Committee will make recommendations but perhaps this current engagement is to increase the Committee's awareness of issues, rather than being a vehicle of change. Being well-informed is critical. Recommendations based on partial knowledge can be dangerous and have unintended consequences.

We understand that there are time constraints in formal house committee meetings and hearings. Ten minutes, however, to share generations of wrong doings, suggest ways of mitigating those wrongs and consider ways to move forward, is not adequate even if there is the opportunity for written submissions. This is an example of how the non-Indigenous way of "doing business" is presumed to be "the" way of doing business. Indigenous ways were not factored in - remembering there is not one generic Indigenous way. The premise of the Indian Act that "an Indian is an Indian is an Indian" is part of the current problem. These unquestioned systemic biases need to be considered in addition to the concerns that are more specific to the claims processes.

While most people are aware, at least somewhat, that Indigenous and non-Indigenous ways of doing business are different, there are other less obvious systemic factors of which the Committee should be aware. One such critical factor is identification. Specific claims must be brought on a band-basis but the treaty process is open to different First Nation groupings, despite legal recognition of there being proper title holders. The very use of the term First Nation is problematic. Calling a band a first nation does not change anything. In protecting Nlaka'pamux title and rights and pursuing specific claims for justice, as individuals, we have been forced to identify ourselves as band members. This is a hurt that will never be erased. How insulting to be forced to identify yourself in accordance with the method developed by and through the people who stole your land and resources and tried to take away your way of life and your dignity. For Grand Chief Robert Pasco, who he is, is not defined as being chief of Oregon Jack Creek Band. He is defined by his relationship to the land and his relations.

NNTC Specific Claims Program

The NNTC initiated the specific claims program for the Nlaka'pamux based on grievances arising from the CN Railway. Since the Nlaka'pamux specific claims program began in 1985, the NNTC Research Unit has researched claims, submitted claims but unfortunately has seen very few claims resolved.

Prior to 1985, resources did not exist to do the required research on specific claims. The 60% funding cut which occurred for NNTC for the 2014/2015 year meant once again there was not resourcing to deal with claims. The recent announcement that additional funds would be made available this year does not address the substantial disruption the funding cuts created. We lose members of our research team when we cannot pay them. That is expertise that is difficult and expensive to replace when and if funding is reinstituted. You must not forget, this work is necessary because of the wrongs perpetrated by the government. We did nothing wrong! We are having to direct our energies and resources to a hostile process when we would far rather the wrongs had never been perpetrated in the first place. We are treated like the government is giving us a gift when funding is provided rather than that the government is merely paying a small part of the cost of mitigating its wrongs.
The national specific claims program and policy has changed over time with the most recent policy change being the implementation of the Specific Claims Tribunal Act and the shift to a very legalistic, court-like approach to claims which significantly increases the cost of resolution. While there was no official notice that the policy of "Justice at Last" was to be cast aside, there is no doubt that the federal government adopted a very narrow legalistic and adversarial approach with regard to Specific Claims, which is the opposite of the spirit of fairness and reconciliation proposed in "Justice at Last". This has been cast as a problem of policy implementation, the unilateral implementation of new processes that ultimately worked against the stated public policy of the government.

Over the last 9 years, the government has relied, in part, on the *Weywakum* decision to reject claims. Based on that Court decision, the federal government claims that Indian Reserves remained "provisional" until confirmed by

Order in Council – in 1913 for most Nlaka'pamux reserves in the Railway Belt, and 1938 for those reserves in the rest of the province. The federal government claimed it had no obligations to protect "provisional reserves" from excessive takings and damages etc. and that the Indian Act did not apply to these lands. While the Tribunal cannot overturn the *Weywaykum* decision, the Judges at the Tribunal have applied it to the facts of each claim that it considers. The Tribunal has decided in more than one case that fiduciary duties were triggered prior to the "finalization" of the reserve creation process in Canada's eyes. Canada has requested Judicial Review of these decisions with varying degrees of success. If specific claims are to create justice, legal "hair splitting" to deny responsibility, cannot be permitted.

In an attempt to be able to say that the backlog of claims has been reduced, the federal government began its "take it or leave it approach" which, while reducing the number of claims on the books, did nothing to increase resolution and has in fact resulted in the NNTC having to on the one hand split single claims into multiple claims at significant cost or in the alternative allow claims to languish unresolved. This unilateral policy approach, destroyed any remaining credibility in the specific claims process. During the Harper regime, the Specific Claims Tribunal criticized the government for its take-it-or-leave-it tactic to reduce the specific claims backlog calling it "paternalistic, self-serving, arbitrary and disrespectful". While the current government may be moving away from the take-it-or -leave -it approach, the damage has been done.

The specific claims workload was increased with the unilaterally imposed policy of the Department of Indian Affairs that all hand-written or even slightly blurry copies of typed documents have to be transcribed. The highly adversarial approach, the take-it or-leave-it policy and the increased work load paired with funding cuts was untenable. There has been no option but to challenge the policy changes the federal government has attempted to unilaterally impose.

Challenging the specific claims process has and continues to be done on a community, Nation, regional and national level. The NNTC is involved in specific claims reform initiatives on both regional (BC Specific Claims Working Group) and national (AFN-INAC Joint Technical Working Group) levels. While we are involved in developing recommendations at these tables, we take the opportunity of the INAN Committee Hearings to make known the Nlaka'pamux experience and contextualize high-level, principled recommendations, with the experiences of rights-holders engaged in the process for over 30 years.

Background

As a Nation carved up by the competing interests of two railways, a highway, power transmission lines, and the rushing Fraser and Thompson Rivers - home to the fish that are the life blood of the Nation - the Nlaka'pamux are deeply impacted by third party uses of our land and resources and the government's failure to fulfill its obligations.

The NNTC has been involved in specific claims since 1985. At that time, the Nlaka'pamux stopped CN Railway from constructing a second track in a manner that would negatively impact, indeed destroy, our fishery, our title and rights. The story of that struggle is a long and on-going one. In order to stop the devastation of our river by CN filling the river with rip rap, we made the choice to risk our lives and stop the train to stop the destruction. All else had failed. No one should be forced to risk their life to protect what is rightfully theirs.

We came together with the Sto:lo and the Secwepemec to further fight twin tracking in court. As a result, we continue to have the longest standing injunction in the Commonwealth which protects our rights to the fishery. As well, then Minister, David Crombie, directed that an expedited process be established with the Nlaka'pamux to address the grievances related to the original railway right of way takings – grievances brought to the fore through the twin tracking case.

Twin tracking is a prime example of how "specific claims" and the notion of "comprehensive claims" are interconnected: we came to engage in specific claims as a direct result of exercising, asserting and protecting our

title rights. Nlkouch, known to most as Hell's Gate, is another specific claim which is part of a much larger protection of our title and rights. Our right to fish at Nlkouch has been denied while the reserve is trespassed so others may assert control of our resource.

Nlkouch and the railway example also show clearly how cash as the only settlement option, is not a viable means to a just settlement. The destruction of land, resources, livelihood and well-being can never be equated to a dollar amount. There must be compensation options which correspond to the losses suffered. The government is not even clear in negotiations what are compensable losses. We have been in negotiations in which the federal representatives disagreed on whether or not loss of livelihood is a compensable damage. This loss of livelihood in fact is so much more – entire families – communities- had their way of life destroyed with all the social, emotional and economic damage that entails. No amount of compensation per acre can undo or justify that wrong.

Compensation largely being limited to financial compensations is compounded by the Government's insistence on the 80/20 formula in relation to simple/compound interest. The 80/20 formula has been rejected by the Tribunal but not before many communities were negatively impacted.

This raises a further issue. The practice had been that a claim was submitted and once the "validity" of the claim was determined (which raises the well documented and oft repeated criticism that the federal government cannot be the wrong doer and the judge and jury) then research and determination of compensation was undertaken – work which would not be needed if the claim was not accepted. This practice changed with no input from the Indigenous Nations to require compensation to be included in the initial submission. This is wrong on many levels. When studies were undertaken on a cooperative basis between the band and the government, there was an efficiency. Reaching justice should be a cooperative not adversarial process.

The historic grievances at the heart of specific claims are not issues that the government can "buy its way out of". Money is not adequate compensation. Justice requires remediation to be factored in. Prime Minister Trudeau has said the relationship with Indigenous Peoples is the most important one. The Specific Claims program needs to reflect that sentiment.

Expedited Grievance Procedure

The Nlaka'pamux Nation Tribal Council established its own specific claims research program to forward the claims of Nlaka'pamux communities along the Fraser-Thompson transportation corridor. At that time, we suggested ways to cooperate and advance grievances quickly but we were assured that working with the Regional Office of INAC, our claims could be taken care of quickly within the existing authorities of the specific claims program.

The unique cultural, historic and geographic circumstances of our Nation have meant that we have a disproportionate number of grievances which have had and continue to have a profound impact on our communities. We currently have over 180 specific claims on our books for the ten communities we serve, all related to the transportation corridor. Eighty-four of these claims have been submitted to Canada since our program's inception only 8 of which have been settled. Forty-five Claims have been either rejected or "closed" via partial acceptance – in other words, 45 claims haven't even made it to the negotiation table.

TABLE 1: NLAKA'PAMUX "SPECIFIC CLAIMS" ON RECORD AT NNTC

Total Claims	Submitted (since the 1980s)	Settled	Rejected	PA "Closed"	Under Assessment	In Negotiations	Withdrawnn (2008)
187	84	8	22	24	7	2	21

Railway Rights of Way

Taking a closer look at those numbers as related to railway rights of way claims, since those grievances were at the heart of Minister Crombie's commitment to an expedited process, the picture is bleak.

The CN and CP Railways run through 79 reserves belonging to Nlaka'pamux communities that we serve. This represents 47 claims in our inventory at various stages in the specific claims process (anywhere from research and development to settled).

TABLE 2: NLAKA'PAMUX RAILWAY RIGHT OF WAY CLAIMS ON RECORD AT NNTC

Total Rlwy Claims	Submitted (prior to 2008)	Settled (prior to 2008)	Settled (since 2008)	Rejected	PA "closed"	Withdrawn Split Claims (after 2009)	Under Assessment at DIA
47	33	2	0	6	24	3	3

- 33 submitted prior to 2008. (13 CN 20 CPR)
- Only 2 out of those 33 have been negotiated and settled to date. One in 1997 and one in 2007.
- Of the remaining 30 claims: Not a single one has been settled since Justice at Last.
- 6 have been rejected outright
- 24 were partially accepted, given take-it or leave-it offers and "closed"

One partially accepted claim went to the Tribunal, where even before the hearing was complete, experts from both sides agreed that the right of way takings were improperly valued and compensated at the time of the original taking. Canada realized it should negotiate, and has started that process.

Two communities have requested claim-splitting – one original claim is being broken down into seven separate claims (one for each reserve through which the railway passes), two of which have already been submitted. And another has been broken into two separate claims – a railway and reserve creation claim, both of which have been submitted.

The claims process has been structured in a manner which ensures there is not justice. Rather than resolving outstanding wrongs, we have been forced to rewrite claims and submit each issue separately to avoid over-arching settlement agreements which the government insists upon and which would have us giving up our rights to elements of claims which were denied without proper justification. Ending the practice of overarching, extinguishing settlement agreements is required. Appropriate, respectful settlement agreements must be the norm.

One community has a claim in something like negotiations since 2012 – although years of INAC's refusal of negotiation loan funding for claims it unilaterally valued at being worth less than $3 million in compensation has impeded progress. This highlights the need for systemic change in relation to access to negotiation funding. Loan funding sitting on a community's books as a liability until claim settlement can have far reaching implications – even forcing a community into third party management and acting as handcuffs to force settlement on less than acceptable terms. There are alternatives – contribution funding for example. We can speak of fairness but if financial barriers keep a community from meaningfully participating, there is no fairness and no chance of "justice at last".

The numbers set out above, speak volumes about Canada's commitment to resolving their outstanding legal obligations. And these numbers hint at what Canada's relationship with the Nlaka'pamux has amounted to over the last 30 years. Our Chiefs have requested negotiations and meetings; we have invited Government officials to visit the territory and see for themselves where we live and how the takings in the transportation corridor continue to impact our communities. And Chiefs have been met with silence on the one hand, and refusal on the

other. Minister Crombie's commitment to resolving Nlaka'pamux claims in an expedited manner has amounted to the resolution of 2 claims over 33 years.

Chronology	
1880s, 1911-1915	Railway Takings
1985	Twin Tracking Case – Promise of expedited grievance procedure to address Nlaka'pamux Claims
1997	One CN Railway-related claim settled
2002	NNTC requests Railway Claims negotiated on Nation-basis with compensation determined community by community – BC Regional Office of INAC interested
2005	INAC head office rejects NNTC request – must consider each claim individually
2007	One CP railway-related claim settled
2009	Justice at Last and Claims "Refresh"
2012	Mass Rejection and Partial Acceptance/Closure of Claims
2013	An Nlaka'pamux CPR-related claim filed at the Tribunal (SCT)
2016	Canada and Nlaka'pamux community step out of SCT process to begin negotiations
2017	Intervener Nlaka'pamux Communities await meeting with Senior INAC officials to discuss negotiating as a group with compensation determined community-by-community.

The Path Ahead

We are willing to do all that we can to bring about positive change. With so many studies having been done and then all but ignored, we are concerned with how the Committee will use the information it collects. Since 1948 studies have consistently concluded the federal government cannot be the judge and jury. There must be a separate body for resolution. There must be adequate funding. There must not be an adversarial approach. There must not be unilateral decision making. There must be a process consistent with Indigenous rights as reflected in the United Nations Declaration on the Rights of Indigenous Peoples. There must be justice. Justice demands both the specific and comprehensive claims processes be fundamentally changed.

Our people are getting tired – tired not that we will give up but that we will not remain patient. The disrespect and unjustness of the recent unilateral policy to process claims on a "take it or leave it" basis left us no choice but to know the Crown was not acting honourably and was not acting in any way to create justice. That policy destroyed credibility. As leaders, we must know the Crown is going to do better before we can tell our people to believe in the specific claims process.

Our Nation has one fundamental law:
Ash QUA-nshta a demEEwuh
aksh ash QUA-nshch a-wEE
(Take care of the land and the land will take care of you.)

We take this law and the responsibilities inherent in the law very seriously. This includes exercising our jurisdiction to reach just resolutions and reconciliation. The principles of justice are known, are written down, are agreed upon but very sadly, not acted upon.

The claims which began Nlaka'pamux involvement in the specific claims program remain outstanding more than

30 years later along with the promise of expedited resolution. We end our submission where we began the specific claims process: with twin tracking, the railway grievances and litigation. In Pasco v. CNR, Justice MacDonald found: "We cannot recount with much pride the treatment accorded to the native people of this country". Our recommendation to you is to do what is needed so that no Judge and no Nation has cause to make that finding again.

In sum:

1. Lands were stolen from us.
2. We are in the transportation corridor. People have taken what they want and disregarded the impacts on our people.
3. With all the development of the transportation corridor, emphasis has been on the national economy. There has been no consideration of the Indigenous economy and title whatsoever.
4. Canada's solutions for addressing this have not worked.

We remind you of the issues Grand Chief Pasco raised at the hearing:

- There has to be a real commitment to resolving claims. Not just words. And there needs to be action now.
- It is too easy for bureaucrats to push these matters to the side of their desks. They eventually retire or move on. We are still here.
- What will be the consequences if the recommendations from the Auditor General are not addressed?

General Recommendations:

1. Adopt the recommendations of the BC Specific Claims Working Group.
2. Continue to engage with First Nations in BC directly.
3. Fully engage in the implementation of the UNDRIP.

Recommendations Specific to Dealing with Nlaka'pamux Claims:

1. Create fundamental systemic change which provides for the jurisdiction of the Nlaka'pamux and other Indigenous Nations.

2. Visit the ground. Ensure any government official involved in claim negotiations and/or assessment visit the lands at issue in a claim with the leadership and community members advancing the claim. Many claims from our region arose out of circumstances were the government failed to show up to protect our interests. Resolving these grievances require engagement on the ground.

3. Consistently fund the work of resolving these grievances.
    a. Multi-year funding for the research unit would ensure efficiencies in work planning and execution.
    b. Fund our communities to participate fully in negotiations.
    c. Fund whatever government department or independent body will be party to the process at adequate levels.

4. Communicate with our Nation directly. There are opportunities for efficiencies and cost saving for these transportation corridor claims. We have ideas on how to move these forward. Appropriate government representatives with decision-making authority need to engage with us directly.

5. Joint Oversight: Ensure government officials and emissaries act in a principled and disciplined manner in keeping with the honour of the Crown and UNDRIP. Joint oversight is the only way to keep the government accountable for its actions – or inaction.