

Progress Report to the Standing Committee on Public Accounts

Context:

Specific claims are claims made by First Nations against the federal government which relate to the administration of land and other First Nation assets, and to the fulfilment of pre-1975 treaties. In 2007, the Government of Canada launched *Justice at Last*, a fundamental reform of the specific claims process. The objectives of the initiative were to: enhance the impartiality and fairness of the process; increase process transparency; increase the rate at which claims are resolved; and enhance access to mediation services to support negotiated settlements. Central to the initiative was the creation of the Specific Claims Tribunal, an independent adjudicative body with the authority to make binding decisions in respect of the validity of claims and to award monetary compensation to a value of \$150 million *per claim*.

In November 2016, the Auditor General released the *Report 6, First Nations Specific Claims, of the fall 2016 Reports of the Auditor General of Canada*. The Audit concluded that:

- Indigenous and Northern Affairs Canada (INAC) did not adequately manage the resolution of First Nations specific claims as defined for the purpose of the audit;
- funding cuts and lack of information sharing between INAC and First Nations posed barriers to First Nations' access to the process for resolving specific claims;
- INAC met its commitment to assess specific claims in three years, although certain systems and practices put in place to accelerate the negotiation of claims hindered the resolution of some First Nations' claims;
- INAC failed to increase the use of mediation services, and did not use available information and feedback to improve program performance; and
- INAC's selective reporting on the specific claims process provided an incomplete picture of results, which made it difficult for parliamentarians and Canadians to accurately assess overall program success.

On November 25, 2016, the Minister of Indigenous and Northern Affairs tabled in Parliament a report in respect of the review of the *Specific Claims Tribunal Act*. In this report, the Minister committed to a joint process with First Nations to identify fair and practical measures to improve the specific claims process.

On February 15, 2017, INAC officials appeared before the House of Commons Standing Committee on Public Accounts in respect of the Auditor General's Report on First Nations Specific Claims. In May 2017, the Standing Committee tabled its report endorsing the Auditor General's findings and requesting that INAC present a progress report to the Committee by April 30, 2018, on the 5 recommendations it made in respect of the Auditor General's Report.

The following is Crown-Indigenous Relations and Northern Affairs Canada's (CIRNAC) report to Standing Committee on Public Accounts.

Introduction:

Since June 2016, the Assembly of First Nations-Canada Joint Technical Working Group on Specific Claims (JTWG), which includes representatives from the Assembly of First Nations, the Union of British Columbia Indian Chiefs, the Federation of Sovereign Indigenous Nations, the Algonquin Nation Secretariat, the Nlaka'pamux Nation Tribal Council, Justice Canada and CIRNA, has been meeting regularly to discuss issues and challenges with the specific claims process and to develop solutions.

The JTWG initially identified the following four priority issues that were highlighted in the findings of the Auditor General: funding to support First Nations' research and development of claims; a process for the resolution of claims valued over \$150M; the use of mediation in negotiation processes to advance negotiated settlements; and public reporting.

Although productive discussions on some of these topics took place, it became apparent that more fundamental issues with the specific claims process need to be addressed. Rights holders continue to perceive an inherent bias in the current specific claims process in that Canada accepts claims for negotiation and determines compensation for claims made against it. Consequently, discussions within the JTWG have focused on short-term process reform to implement practices that will result in a more collaborative approach to the development and resolution of specific claims, and the development of a broader dialogue with First Nations to examine longer-term policy, process, and potential legislative reforms to address the perception of bias.

JTWG discussions have been informed by two engagement sessions with First Nations from across Canada hosted by the Assembly of First Nations, at which First Nations identified as a key priority the joint development of an independent mechanism to assess the validity of claims and oversee negotiation processes.

Recommendations of the House of Commons Standing Committee on Public Accounts:

Recommendation 1: INAC will provide the Committee with a report detailing how it has increased the rate at which claims are resolved through negotiations in line with the aims of Justice at Last.

During fiscal year 2017-2018, a total of 31 specific claims were settled by way of negotiated settlement agreements. In previous years (from 2009-10 to 2016-17), the average of claims settled *per year* was 14.

This success can be attributed, in part, to First Nations and Canada taking more creative approaches to negotiations. For example: multiple similar claims were grouped into larger projects as a means to avoid duplication of efforts and a broader use of studies and expertise amongst tables resulted in leveraging accomplishments in several negotiations.

Canada has also adopted a more collaborative approach in negotiations, one that promotes active listening and improves nation-to-nation relations. The Government of Canada remains committed to continuing to work in the JTWG to implement a more participatory approach to the resolution of specific claims. It is expected that increased participation and dialogue throughout the process will restore confidence in the specific claims process as an alternative to litigation, with a view to achieving more negotiated settlements.

Recommendation 2: INAC will provide the Committee with a report detailing what progress has been made with regard to negotiation practices for small value claims; developing and implementing a strategy to use mediation more frequently; and, updating its website to reflect the full range of negotiation practices for all types of specific claims.

Small value claims:

In response to First Nations' concerns, CIRNAC no longer makes a distinction with respect to how small value claims (claims valued at under \$3M) are treated. Although efforts are still being made to negotiate the settlement of small value claims more expeditiously, First Nations with small value claims are now eligible for negotiation funding and funding to support expert studies, including more extensive research.

Mediation:

First Nations and Canada agree that the use of mediation more frequently throughout the specific claims process can support the resolution of differences. The intent is to make use of mediation at all points in the process, including during discussions of research gaps or when Canada does not accept a claim for negotiation. The Auditor General noted that Canada had participated in a mediation process only one time between the launch of the *Justice at Last* initiative and the Performance Audit. Since the release of the Performance Audit, mediation services have been engaged in four processes.

Online information on specific claims:

Efforts to update the departmental online information on specific claims have commenced and are ongoing. This work is being undertaken in collaboration with the JTWG and in keeping with Treasury Board of Canada Secretariat guidelines, as part of the government-wide web renewal initiative. Initial updates to the existing online content on specific claims will be made in spring 2018.

Canada continues to work with members of the JTWG to improve the specific claims process, including looking at ways to improve public reporting on specific claims. The updated webpages will reflect the current specific claims process but will include additional information on the initial process changes noted in this report and on the ongoing work to improve the process. Updates to the webpages will also include amendments to remove outdated content and bring the existing content in line with Canada.ca guidelines. The related webpages will be further updated as joint work evolves.

Recommendation 3: INAC will provide the Committee with a report detailing what progress has been made with regard to developing a clear and consistent methodology for funding to First Nations to adequately support the research and preparation of claims; developing on evidence-based methodology for loan funding to adequately support First Nations' participation in the negotiation process; and, ensuring First Nations are made aware of the facts on which the Department of Justice Canada will rely to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada.

The availability and adequacy of funding to support First Nations' participation in all phases of the specific claims process was discussed extensively by the JTWG and there is agreement that further work is needed.

CIRNAC is implementing changes in its approach to resolving specific claims that emphasize a more participatory approach to the resolution of claims. In particular, the frequency and scope of communication with First Nation claimants is increasing and is intended to develop a comprehensive and common understanding of the history and legal issues associated with each claim.

CIRNAC is becoming more engaged with individual claimants while also working more broadly with First Nations to address further reforms to the specific claims process. Resources and capacity requirements of both First Nations and Canada, and the viability of the three-year assessment and negotiation timeframes, are being reviewed in light of this new approach.

Recommendation 4: INAC will provide the Committee with a report detailing what progress has been made with regard to developing practices to gather, monitor, and respond to information and feedback about the specific claims process.

The JTWG has discussed how best to gather and respond to First Nations' concerns about the specific claims process. JTWG members agree that further discussion is necessary to identify the process reforms required to support the negotiated resolution of claims in a manner that builds trust, strengthens nation-to-nation relationships, and promotes respect and co-operation.

In 2017, rights holders participated in two dialogue sessions organized by the Assembly of First Nations. These dialogue sessions provided the JTWG with greater clarity regarding the preferred direction of specific claims process reform. This direction includes a longer term goal of creating an independent mechanism to assess the validity of claims and oversee negotiation processes.

There is agreement that developing options for an independent mechanism will take time and will require broad consultation. Therefore, a comprehensive dialogue strategy is being jointly developed between First Nations and Canada and will guide the

implementation of a dialogue process intended to identify and examine models for an independent mechanism.

Recommendation 5: INAC will provide the Committee with a report that provides complete information about the specific claims process to allow the government and Canadians to assess real results, and confirm that the Department is keeping the information about the specific claims process on its website up to date.

The JTWG has provided comment on information on the CIRNAC webpages, including concerns with respect to the status of "closed files". In order to increase Canada's transparency in reporting results on the online specific claims reporting tool, what were previously referred to as "closed" files" are no longer included in the "concluded" category, but rather are reported in the "other" category. In addition, definitions of the terms "concluded", "file closed", and "other" are under review as part of the ongoing joint work on public reporting.