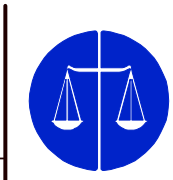

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Examination of Canada's Specific Claims Policy

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

Examination of
Canada's Specific Claims Policy

I. INTRODUCTION

The National Aboriginal Law Section of the Canadian Bar Association (CBA Section) appreciates the invitation to appear before the Senate Standing Committee on Aboriginal Peoples (Senate Committee). The Senate Committee has been asked to examine and report on the nature and status of the Government of Canada's Specific Claims Policy, pursuant to an Order of Reference dated May 30, 2006. The Terms of Reference for this study focus on the problem of delay in the Specific Claims process.

The CBA Section agrees that this is the correct focus for examination. While there are several other aspects of the Specific Claims process that require reform, the enormous delays in addressing Specific Claims threaten the very integrity and credibility of the system.

In our submission, we first look at the magnitude of the problem of backlog in the Specific Claims process. We consider the causes for delay, and offer suggestions to address the problems. Finally, the CBA Section discusses other aspects of the Specific Claims process that require reform.

II. THE BACKLOG

By far the most critical issue of the Specific Claims process for reform is that of the enormous backlog of claims. The Senate Committee's Terms of Reference note that "the problem of delays in the Specific Claims process is decades old"[1]. It is at least partly true that there have always been issues of delay. However, within the last 10 years, the problem of delay has increased dramatically. What was once a slow process is now essentially paralyzed, creating a kind of institutional gridlock.

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1 Source: http://www.parl.gc.ca/39/1/parlbus/commbux/senate/Com-e/abor-e/press-e, at 1.

Our analysis of the national Specific Claims backlog suggests that at the current rate, it will take 53.6 years for all claims presently in the system to be resolved (see Appendix I). We believe that this is actually a conservative estimate, as it includes claims that are rejected with the concluded claims. In fact, Specific Claims often do not end when they are rejected, but are moved to the Indian Claims Commission, a Commission of Inquiry created by the federal government in 1991 (the ICC). Further, the 53.6 year projection excludes claims that still need to be researched and submitted to the Specific Claims Branch.

The backlog in British Columbia appears to be the most severe in Canada. According to our estimates, if the resolution of British Columbia's Specific Claims continues at its current rate, it will take 80.2 years for the backlog to be cleared (see Appendix II). For the same reasons previously described, we believe this estimate to be quite conservative.

In our view, as a form of alternative dispute resolution, the Specific Claims process should offer a relatively swift and low cost alternative to litigation. Instead, the current situation is anything but swift and inexpensive. Without significant reform to this process, Canada's efforts to rectify past mistreatment of Aboriginal Nations will be unnecessarily dragged out for generations to come. A Specific Claims process that actually generates new and legitimate grievances by failing to address claims within a reasonable amount of time does not reflect well upon Canada.

III. SOURCE OF THE PROBLEM

Under the current process, Specific Claims are researched and submitted by a First Nation, typically with a legal opinion, a historical chronology and copies of all relevant archival documents. The First Nation's claim is then reviewed by a researcher retained by the Specific Claims Branch. Generally this research is done competently and relatively quickly. The resulting report is sent back to the First Nation for a response.

Once the First Nation responds, the response is attached to the other documentation, and the entire package is sent to Justice Canada for a preliminary legal review. This review is the primary source of the problem, and the source of the institutional gridlock.

Specific Claims languish for an inordinate amount of time at the stage of Justice Canada's legal review. As a result, the backlog at that stage of the process gets larger with each passing year. This growth is inevitable, as the number of Specific Claims submitted each year substantially exceeds the number of legal opinions produced by Justice Canada.

After a legal opinion is signed by Justice Canada and provided to the Specific Claims Branch, the claim should theoretically be either accepted for negotiation or rejected if no breach of lawful obligation was found. Unfortunately, some claims have fallen into another stage of limbo after Justice Canada's legal opinion has been signed, when years pass without the First Nation being notified as to the conclusion reached.

If a claim is accepted for negotiation, Canada and the First Nation will appoint a negotiation team and attempt to reach a Settlement Agreement. While many claims that reach this stage are ultimately settled, others become bogged down by seemingly endless negotiations.

If a claim is rejected, a First Nation is entitled to seek an inquiry before the ICC, which has a mandate to review rejected claims. The ICC process is relatively swift and in our experience, well respected by those who have followed it. Unfortunately, Canada itself is not obliged to participate in this process, and has on occasion avoided its own Commission. Further, Canada is not obliged to comply with a report of the ICC. There are cases where the ICC has validated a Specific Claim, only to have Canada continue to refuse to negotiate.[2]

Without reforms to the current system, a Specific Claim that was filed today would have no reasonable chance of resolution until 2060, or 2087 in British Columbia. Surely, any process that involves decades of delay cannot purport to provide a reasonable option for resolving First Nations' Claims.

2 See, for example, Indian Claims Commission Proceedings (2004), 17 ICCP at 357-359.

IV. BREAKING THE LOGJAM

In our view, the problem is simply that too few lawyers are assigned to review Specific Claims. Further, this work is too often set aside when other files are seen to represent more pressing concerns, such as those involving litigation, treaty negotiations or ICC inquiries.

The CBA Section believes that Canada has clearly not considered the timely review and processing of Specific Claims to be a priority. The Justice Department has the legal capacity to review Specific Claims and move them efficiently forward through the system, but does not assign sufficient legal and other resources to properly address these claims.

The primary and most obvious solution would be for Canada to assign appropriate resources to move the legal review process ahead expeditiously. An immediate increase in resources, coupled with a mandatory deadline for completing this stage for all claims, would produce real and measurable progress to eliminate the backlog. It is worth noting that the proposed national resolution of residential schools claims would require at least 2,500 claims to be addressed each year through the new process and imposes a strict deadline for addressing each individual claim[3]. Surely, the resolution of Specific Claims should have the same checks and balances.

We recommend that Canada set an internal deadline of one year between the submission of the Specific Claims package to Justice Canada and the issuance of Canada's preliminary legal opinion.

Each Specific Claim is based on unique facts, but it would be reasonable for the federal government to conduct a preliminary analysis sufficient to sort claims according to the nature of the Specific Claim and assign legal teams to review and address each group. This would provide a more efficient and effective use of Canada's legal resources, but the current glacial pace of review militates against this sort of efficiency.

3 Source: http://www.residentialschoolssettlement.ca/Schedule_D-IAP.PDF, Section 111, para 5.

If the federal government was to expedite the Specific Claims process by eliminating the Justice Canada bottleneck, it would settle many more claims each year. This would, of course, require Canada to significantly increase the number of negotiators that it employs, as well as its annual settlement budget. Without also addressing these downstream adjustments, it would simply relocate the bottleneck to the negotiation/settlement stage of the process.

Finally, there is no legitimate justification for a significant delay between the signed legal opinion and the decision by Canada as to whether to accept the Specific Claim for negotiation. If a legal review indicates a breach of lawful obligation, then the negotiation process should follow expeditiously.

V. BEYOND THE BACKLOG

The CBA Section strongly believes that the Specific Claims backlog is the central problem to resolve. However, we offer some additional suggestions for improving the Specific Claims process, and enhancing fairness and transparency. This could actually generate time savings in the processing of Specific Claims.

A frequent criticism of the Specific Claims process is that the federal government acts as both judge and jury. Clearly an independent body reviewing and addressing Specific Claims would address the problems inherent when the federal government can decide when it will negotiate and when it will not. An independent body such as the ICC, with power to make binding decisions, would also provide an incentive to move the Specific Claims through the system more efficiently and with greater effect. In 2003, Parliament passed the *Specific Claims Resolution Act*, which established the Canadian Centre for the Independent Resolution of First Nations Specific Claims, but that legislation has yet to be proclaimed.[4]

Under the current process, Canada should at a minimum immediately share with First Nations any legal opinions from Justice Canada. At present, the First Nation provides a detailed legal opinion to the Crown but then receives little more than a brief letter indicating

4 Source: http://www.indianclaims.ca/about/history-en.asp

that the Specific Claim has either been accepted for negotiation or rejected. The First Nation is often left guessing as to the factual or legal basis upon which the claim was assessed.

The current process could also be improved if parties were able to refer difficult issues for non-binding, or binding, advice before an independent lawyer or former judge. This would provide both sides with an arms-length, third party review of the merits of their respective legal or factual positions.

We urge Canada to consistently implement the recommendations of the ICC. At present, the federal government will always follow those recommendations if the ICC rules in its favour, will sometimes follow those recommendations if the First Nation succeeds, and will on occasion boycott the ICC process altogether.

VI. CONCLUSION

Our predominant message to the Senate Committee is that the Justice Canada backlog of Specific Claims must be remedied. Unless the issue of institutional gridlock is addressed, any other changes will only tinker with an essentially broken system. In our view, both the just resolution of the legal claims of Aboriginal Nations and the honour of the Crown are at stake.

APPENDIX I
Time needed to address the backlog using the current process

It is impossible to project precisely how long it would take for the current Specific Claims backlog to be addressed using the existing process. However, the following provides a reasonable estimate, with numbers current to June 30, 2006.

By taking the total number of Specific Claims concluded and dividing it by the number of years that the Specific Claims process has existed[5], we can calculate the average number of claims concluded per year. When the current backlog is divided by that average annual rate for concluding claims, we can roughly estimate the time required to address the existing backlog.

This estimate is conservative as it does not factor in Specific Claims that have not yet been identified and submitted to the Specific Claims Branch. Further, the estimate includes rejected claims with "Claims concluded", while many of these claims will actually proceed to the Indian Claims Commission (ICC) or to litigation.

National Partial Summary
Specific Claims Branch
Reporting Period: 1970/04/01-2006/06/30

Claims under Review:

SUB/REV	Claim received and under review by SCB	28
RES	Research	70
BA	SBC Research Report sent to Claimant	163
DOJ	DOJ preparing Preliminary Legal Opinion	312
LOS	Legal Opinion Signed	56
	Claims Under Review Total:	**629**

5 The current process has been in place for 33 years.

Claims under Negotiation:

ACT	Claims in Active Negotiations	89
INACT	Claims in Inactive Negotiation	32
	Claims Under Negotiation Total:	**121**

Claims Concluded:

SET	Claims settled	275
NLO	No Lawful Obligation found	80
AR	Date referred for Administrative Remedy	35
FCL	File closed	80
	Claims Concluded Total:	**470**

Other Claims:

LIT	Claims in Active Litigation	74
ISCC	Claims in the ISCC [ICC] Process	31
	Other Claims Total:	**105**
	NATIONAL TOTAL OF CLAIMS[6]:	**1,325**

ANALYSIS

Annual Rate of Claims Concluded

(Claims concluded ÷ years that the Specific Claims process has existed)
470 Claims concluded ÷33 years of Specific Claims Branch = 14/yr

Canada Backlog

(Claims under review ÷ annual rate of Claims concluded)
750 ÷ 14/yr = **53.6 year backlog**

6 Source: http://www.ainc-inac.gc.ca/ps/clm/msp_e.pdf

APPENDIX II
Time needed to address the British Columbia backlog using the current process

The British Columbia Specific Claims backlog is particularly acute. Well over half of the national total at the "Department of Justice preparing Preliminary Legal Opinion" stage are from British Columbia. While it is impossible to project precisely just how long it would take for the current British Columbia Specific Claims backlog to be addressed without reform, the following provides a reasonable estimate.

By taking the total number of British Columbia Specific Claims concluded and dividing it by the number of years that the Specific Claims process has existed[7], we arrive at an average number of British Columbia Claims concluded each year. When the current backlog is divided by the British Columbia Claims conclusion rate, we have a rough estimate of the time required under the present process to address that province's backlog.

For the reasons noted in Appendix I, this estimate is likely quite conservative.

British Columbia Summary
Specific Claims Branch
Reporting Period: 1970/04/01-2006/06/30

Claims under Review:

SUB/REV	Claim received and under review by SCB	1
RES	Research	23
BA	SBC Research Report sent to Claimant	64
DOJ	DOJ preparing Preliminary Legal Opinion	188
LOS	Legal Opinion Signed	20
	Claims Under Review Total:	**296**

7 *Supra*, note 5.

Claims under Negotiation:

ACT	Claims in Active Negotiations	29
INACT	Claims in Inactive Negotiation	12
	Claims Under Negotiation Total:	**41**

Claims Concluded:

SET	Claims settled	82
NLO	No Lawful Obligation found	26
AR	Date referred for Administrative Remedy	9
FCL	File closed	23
	Claims Concluded Total:	**140**

Other Claims:

LIT	Claims in Active Litigation	8
ISCC	Claims in the ISCC [ICC] Process	9
	Other Claims Total:	**17**
	TOTAL CLAIMS FOR BRITISH COLUMBIA[8]:	**494**

ANALYSIS

British Columbia Annual Rate of Claim Concluded

(British Columbia Claims concluded ÷ Years that Specific Claims process has existed)
140 Claims concluded ÷ 33 years = 4.2/yr

British Columbia Backlog

(Claims under review ÷ Rate of Claims concluded)
337 ÷ 4.2 years = **80.2 year British Columbia backlog**

8 Source: http://www.ainc-inac.gc.ca/ps/clm/msp_e.pdf