

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: September 16, 2019
TO: OKT Blog
FROM: Jaclyn C. McNamara
RE: Specific Claims: what you need to know

A ‘specific claim’ is a claim made by a First Nation against Canada for a historic wrong. They typically relate to claims where Canada has either breached its obligations under a historical treaty, or breached its obligations managing a First Nation’s assets, including reserve lands, natural resources and band money. The grounds for a specific claim are:

1. a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
2. a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
3. a breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
4. an illegal lease or disposition by the Crown of reserve lands;
5. a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
6. fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.¹

For example, a specific claim may relate to mistakes made in surveying a reserve, the illegal removal of land from a reserve, or the illegal occupation of reserve land. Specific claims can be brought to the federal government for negotiation and settlement.

Prior to 2008, First Nations had no legal recourse if the federal government declined to negotiate the settlement of a specific claim. In June 2007, the Prime Minister of Canada announced “Justice at Last: Specific Claims Action Plan”, which aimed, in part, to accelerate the resolution of specific claims. As a part of this action plan, and in response to long-standing criticisms, the

¹ *Specific Claims Tribunal Act*, SC 2008, c 22, ss 14(1).

government developed the *Specific Claims Tribunal Act* jointly with the Assembly of First Nations. The *Act* came into force on October 16, 2008.²

Under the *Act*, once a First Nation files a specific claim with the Minister of Indian Affairs and Northern Development, the Minister has three years to determine whether to negotiate a settlement. If the Minister

1. notifies the First Nation that they have decided not to negotiate the claim;
2. allows three years to pass without making a decision as to whether or not to negotiate the claim;
3. decides to negotiate the claim but the parties are unable to come to a settlement in three years; or
4. consents in writing to the filing of a claim with the Tribunal,

the First Nation may file a claim with the Specific Claims Tribunal to have their claim determined.³ A useful diagram illustrating the specific claims process can be found in [here](#).

Once a claim is filed with the Tribunal, the Tribunal must determine whether the claim is valid, and if so, how much compensation is owed. The Tribunal has all the powers, rights and privileges that a superior court of record would have, and may receive evidence as it sees fit, including oral history.⁴

The Tribunal can only award a First Nation money. The maximum monetary compensation the Tribunal can award is \$150 million. It cannot award any non-monetary compensation, nor does it have the power to award punitive or exemplary damages, or damages for harm that cannot be measured in monetary terms including loss of a cultural or spiritual nature.⁵ Decisions of the Tribunal are final and conclusive, although they can be judicially reviewed.⁶

One way to expand the scope of specific claims negotiations beyond financial compensation is by having the province involved in the process. Canada has taken part in specific claims negotiations where, with the agreement of the relevant province, land from the province has been part of the negotiation, with Canada making a monetary contribution.

An important benefit of the Specific Claims Tribunal process is that there is no time limit to bringing forward a specific claim: delay in filing the claim will not impact the Tribunal's determination of the validity of the claim.⁷ To the contrary, First Nations are actually barred from bringing claims that are based on events that occurred within 15 years of the date they file

² "The Specific Claims Policy and Process Guide" (2010-09-15), online: *Government of Canada* <<https://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506>>.

³ *Ibid.* Also see *Specific Claims Tribunal Act*, s 16(1).

⁴ *Specific Claims Tribunal Act*, s 13.

⁵ *Ibid.*, ss 20(1)(a), (b) & (d).

⁶ *Ibid.*, s 34(1).

⁷ *Ibid.*, s 19.

the claim.⁸ This means that the Tribunal can often hear specific claims that are out of time to be brought before courts.

The Government of Canada also provides some funding to First Nations for the specific claims process. Details on this funding can be found on the Government of Canada website.⁹

As of 2019, the Tribunal has four members, two of which are part-time members. The understaffing of the tribunal has long been criticized for causing delays and denials of justice for First Nations. In 2016, the Auditor General also criticized the management of specific claims by Indigenous and Northern Affairs Canada, finding a number of issues that created barriers for First Nations' access to the specific claims process and impeded the resolution of these claims, including that certain practices did not encourage negotiations; cuts to funding for claims preparation and negotiation; and limited information sharing between the Department and First Nations.¹⁰

Criticisms have led to promises from Crown-Indigenous Relations and Northern Affairs Canada to reform the specific claims process, but details of this reform, including when it is likely to occur, have not been made publicly available.¹¹

While necessary reforms are hopefully on the horizon, the specific claims process and Specific Claims Tribunal remain an important tools for First Nations seeking to be compensated for historic injustices.

⁸ *Ibid*, s 15(1)(a).

⁹ For general information on funding, see: Government of Canada, "Specific claims" (2019-08-30), available online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100030291/1539617582343#chp8>>;

for funding for the Specific Claims Tribunal, see: Government of Canada, "Funding for First Nations with claims at the Specific Claims Tribunal of Canada" (2019-08-30), available online: <<https://www.rcaanc-cirnac.gc.ca/eng/1529351013700/1551970150264>>;

for funding for specific claim negotiation costs, see: Government of Canada, "Specific Claim Negotiation Cost Guidelines" (August 17, 2014), available online: <<https://www.rcaanc-cirnac.gc.ca/eng/1409247628791/1539692507972>>. Note that these guidelines are currently under review.

¹⁰ Office of the Auditor General of Canada, "Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada" (2016), online: *Office of the Auditor General of Canada*, <http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html>.

¹¹ See, for example, Government of Canada, "Joint Statement from Ministers Wilson-Raybould and Bennett regarding Huu-ay-aht First Nation Litigation" (September 5, 2017), available online: <https://www.canada.ca/en/indigenous-northern-affairs/news/2017/09/joint_statement_fromministerswilson-raybouldandbennettregardingh.html>. Also see Government of Canada, "Specific claims" (2019-08-30), available online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100030291/1539617582343#chp8>>, which indicates that "Canada looks forward to continuing the joint work on specific claims reform with its partners. These webpages (which reflect the current specific claims process) will be updated as this joint work evolves."