

OUTSTANDING BUSINESS

A NATIVE CLAIMS POLICY



Canada

THE POLICY: A RENEWED APPROACH TO SETTLING SPECIFIC CLAIMS

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.

As noted earlier the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.

1) Lawful Obligation

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.

2) Beyond Lawful Obligation

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

3) Statutes of Limitation and the Doctrine of Laches

Statutes of Limitation are federal or provincial statutes which state that if one has a legitimate grievance, yet fails to take action in the courts within a prescribed length of time, the right to take legal action is lost. The right to take action on a valid civil claim, therefore, will expire after a certain length of time unless legal proceedings have been started.

The doctrine of laches is a practice which has come into observance over the years. It is, therefore, a common law rule as opposed to a specific piece of legislation passes in Parliament. The doctrine is based on actual cases whereby over an unreasonable period of time.

With respect to Canadian Indians, however, the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.

THE PROCESS: HOW SPECIFIC CLAIMS ARE DEALT WITH

1) Presentation of the Claim

Specific claims are presented by Indian bands to the Minister of Indian Affairs and Northern Development, acting on behalf of the Government of Canada. Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based. In order to speed up the review of the claim, presentations should include copies or lists of the documentation upon which the claim is based. This documentation may come from primary sources such as archival documents, government files, testimony of knowledge participants and land records, or from secondary sources such as books and articles. In return, the Office of Native Claims makes claim-related research findings in its possession available to the claimants and consults with them at each stage of the review.

2) Review of Claims by the Office of Native Claims (ONC)

The Office of Native Claims undertakes a review of the claim at the direction of the Minister of Indian Affairs and Northern Development. In conducting its review, ONC analyses the historical facts presented in the claim and arranges for additional research if required. It also investigates the sequence of historical events surrounding the issues raised in the claim. Meetings between the claimant group and the departmental officers may be arranged in order to clarify aspects of the claim and thereby reach a better

understanding of the issues involved. In the process, departmental officers and claimants exchange copies of historical documentation pertaining to the claim. In addition, consultation and co-ordination may be required with other federal departments and provincial governments who may be involved in, have been a party to, or may be affected by, the claim and its resolution.

All pertinent facts and documents are then referred by ONC to the Department of Justice for advice on the federal government's lawful obligation.

Once obtained, the elements of the legal advice is reviewed with the claimant groups to obtain any additional views or comments before the claim is referred to the Minister of Indian Affairs and Northern Development.

3) Determination of the Acceptability of the Claim

On the basis of the legal advice received from the Department of Justice, the Minister of Indian Affairs and Northern Development accepts on behalf of the Government of Canada, such claims as are eligible for negotiation and advises the claimant group of the decision.

4) Resolution

In cases where the Minister accepts a claim as negotiable in whole or in part, the Office of Native Claims is authorized to negotiate a settlement with the claimant on behalf of the Minister and the federal government.

The process of settling specific claims is often a complex one, depending on the nature of the claim and the type of compensation being sought. Specific claim settlements can vary, but most often consist of such elements as cash, land or other benefits. The criteria for calculating compensation may also vary from claim to claim according to the particular issues and obligations established in the claim and to the strength of the claim.

Once an agreement has been reached between the claimant group and the Office of Native Claims acting on behalf of the Government of Canada on the terms of settlement, a final agreement is signed, compensation is provided and the claim is settled. Bands achieving a settlement of their claim are expected to manage the proceeds of settlement themselves as far as possible. In the case of substantial settlements, the final agreement may specify the structure of mechanisms established by the claimant group to administer settlement benefits.

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that negotiations on the same claim cannot be reopened at some time in the future.

If the review of the findings reveals insufficient grounds for negotiation of the claim, it may still be capable of resolution through existing departmental or governmental programs and, in this case, it is referred to an appropriate program group or agency.

5) Further Review of the Claim

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.

GUIDELINES

In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While the guidelines form an integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.

Submission and Assessment of Specific Claims

Guidelines for the submission and assessment of specific claims may be summarized as follows:

- 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.
- 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, of all are bringing the same claim.
- 3) There shall be a statement of claim which sets out the particulars of the claim, including the facts upon which the claim is based.
- 4) Each claim shall be judged on its own facts and merits.
- 5) The government will not refuse to negotiate claims on the grounds that they are submitted too late (statutes of limitation) or because the claimants have waited too long to present their claims (doctrine of laches).
- 6) All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law.
- 7) Claims based on unextinguished native title shall not be dealt with under the specific claims policy.
- 8) No claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.
- 9) Treaties are not open to renegotiation.
- 10) The acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

Compensation

The following criteria shall be given the determination of specific claims compensation:

- 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
- 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the cause.
- 3) (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
(ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.
- 4) Compensation shall not include any additional amount based on "special value to owner", unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.
- 5) Compensation shall not include any additional amount for the forcible taking of land.
- 6) Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired.
- 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.
- 8) In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.
- 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.
- 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.

CONCLUSION

The government of Canada is committed to resolving specific claims in a fair and equitable manner. At the same time it recognizes that over the years the existing process has not been effective in resolving them in any significant degree. The new policy initiatives outlined in this publication are meant to correct this situation. The injection of new resources for research, development and the processing of claims is a measure of the depth of this government's commitment.