By Law or In Justice

The Indian Specific Claims Commission and the Struggle for Indigenous Justice

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Acronyms

AFN	Assembly of First Nations
AIM	American Indian Movement
AOKFN	Aundeck Omni Kaning First Nation
DAAND	Department of Aboriginal Affairs and Northern Development
DIAND	Department of Indian Affairs and Northern Development
FNSCC	First Nations Specific Claims Commission
ICC	Indian Specific Claims Commission
ICCP	Indian Claims Commission Proceedings
INAC	Indian and Northern Affairs Canada
JTF	Joint First Nations–Canada Task Force
OIC	Order in Council
ONC	Office of Native Claims
SCB	Specific Claims Branch
SCRA	Specific Claims Resolution Act
SCTA	Specific Claims Tribunal Act

Introduction

Imagine your new neighbour comes into your backyard and fences off half of it. Then he sells it to someone down the street. This new neighbour tells you he got a good deal but he won't say how much he got. Then, he says he'll take care of the cash – on your behalf, of course.

Maybe he even spends a little on himself.

You complain. He denies he did anything wrong.

What would you do?

Go to the proper authorities? Turns out all the authorities and their agencies work for him.

Sue him? He tells you that none of the lawyers can work for you – he's got everyone in town working for him. When he finally lets a lawyer work for you – it turns out that he can afford five of them for every one you can afford.

Finally he says: Okay, I'm willing to discuss it. But first you have to prove I did something wrong. Oh, and I get to be the judge of whether you've proved it. And, if you do prove it, I get to set the rules about how we'll negotiate. I'll decide when we've reached a deal and I'll even get to determine how I'll pay the settlement out to you. Oh, and I hope you're in no rush because this is going to take about twenty or thirty years to settle.

Sound crazy?

Welcome to the world of Indian Specific Claims.

– CANADA, "NEGOTIATION OR CONFRONTATION: IT'S CANADA'S CHOICE"

On September 30, 2013, a journalist at the Aboriginal Peoples Television Network received a leaked letter written by a group of federal government employees to Bernard Valcourt, the minister of Aboriginal Affairs. It was unsigned, but its authors were staff in the minister's own department – in the Treaties and Aboriginal Government division of its Specific Claims Branch.[1] The letter – or rather, the first page of what was clearly a much longer communication – informed Valcourt of serious concerns about his department's commitment to the timely and just resolution of specific claims.[2] The staffers were greatly distressed about the unreasonable delay in claims resolution at the Specific Claims Branch, a problem that they traced to senior management.[3] As the letter explained,

> delays of several months [are] not unusual for even the simplest and most straightforward matter. Settlement agreements are needlessly delayed over minor and insignificant issues that have already been addressed. Constant and endless reviews come with continual requests for changes. These are not substantive changes ... [They] are needless changes which do not change the substance of agreements but add considerable delays to the process ... Such delays are needless and constant changing also impacts our relationship with the First Nations.[4]

The alleged "micromanaging" and changeability in the approach of senior staff were made worse by an overall intransigence regarding claims.[5] Senior management was charged with refusing to consider the larger context of claims, or being open to broader information about a claim submission that could lead to what staffers saw as a more complete and just outcome. "Bullying" was common and accountability limited,[6] all to the detriment of the claims process itself. Asked to respond to these allegations, the minister dismissed them as nothing more than an "internal human resource management issue"[7] – and both the letter and its contents simply slipped out of the public eye.

For those of us who have a history with the recently renamed Indigenous and Northern Affairs Canada in general and the Specific Claims Branch in particular, there was little in the leaked letter – or the minister's response to it – that was new or terribly surprising. Since the first formal policy statement on specific claims, aptly titled *Outstanding Business,* was released

by the department in 1982, the approach to specific claims has been profoundly undermined by deep problems in both the policy and the process it informs. Although these problems are numerous and varied, almost all of them stem from a fundamental flaw: the Crown, which is the party against whom a First Nation must make its claim, also determines the claim's validity and controls the process through which it is negotiated and resolved. This conflict of interest permeates every pore of the policy and feeds a climate of control in the Department of Indigenous and Northern Affairs (DIAND) that is probably the driving force behind the micromanagement that allegedly plagues the claims process. It also nurtures a certain reticence on the part of the Crown, which has little to gain by a generous interpretation of its lawful obligations to Indigenous people or of its own honour in dealing with them. The result is a specific claims process characterized by woefully inadequate resources, levels of delay bordering on paralysis, and what appears to be profound government ambivalence around claims and their resolution. It is interesting that despite an overhaul of the claims policy in 2007, in a policy document titled "Specific Claims: Justice at Last," the conflict of interest persists, and there is little evidence that the new policy is any better than the old one.[8]

"Justice at Last" is merely the most recent of many attempts to improve the resolution of specific claims. The Indian Specific Claims Commission (ICC), created in 1991 in response to the conflict and violence of the Oka Crisis, was one of the more enduring efforts, lasting until 2009. It earned considerable respect for its oversight of the claims process and its contributions to advancing Aboriginal law in Canada. That the commission should rise from the ashes of Oka is not surprising – the crisis itself was a direct consequence of a failed specific claim: the Mohawks of Kahnesatake had submitted a claim to the land known as the Pines on three separate occasions over many years, and all three submissions were rejected by the Department of Indian Affairs, leaving the sacred lands open to development and sowing the seeds for the conflict that erupted in 1990. Few Canadians are likely to remember this fact, and they will be greatly outnumbered by those who recall the more spectacular moments of that nearly seven-month clash: the occupation by the Mohawk protesters of the Pines in March of 1990; the subsequent storming of their encampment by Sureté du Quebec, leading to much gunfire and the death of a police officer; and the later

replacement of the Sureté, first by the RCMP and then by the Canadian Forces, at barricades set up at Kahnesatake, Kahnawake, and Akwesasne. The crisis persisted from July 11 to September 26, 1990. By the time the barricades came down and the last remaining protesters were arrested, the fiasco had ignited protests throughout Canada in support of the Mohawks, drawing critical attention to, and international condemnation of, Canada's approach to Indigenous land rights.

Shocked that a rejected claim involving such a small parcel of land could spark a national crisis, Prime Minister Brian Mulroney announced before the House of Commons a set of parallel initiatives to expedite the claims resolution process and, on the advice of the Assembly of First Nations (AFN), to improve public scrutiny of that process.[9] At the core of the latter initiative was an independent review body that would operate at arm's length from the government; it would have the power to inquire into the basis for rejection of claims, facilitate negotiation, and break any impasses that might arise in their negotiation and settlement. Following a rather painful period of consultation, the Indian Specific Claims Commission came into being on July 1, 1991. Its purpose was to conduct public inquiries into claims rejected by the federal government and provide mediation services to the Crown and Aboriginal communities whose claims had been accepted for negotiation. Between 1991 and 2009, when it was decommissioned by the Harper government, it conducted mediations and inquiries in ninety-six claims, produced sixteen annual reports, and completed twenty-six joint studies for First Nations and Canada. This is an impressive record, but one whose efficacy in achieving greater social justice for First Nations and greater accountability in the claims process remains unclear.

As an interim measure, the ICC was certainly never intended to last as long as it did; indeed, commissions of inquiry rarely have a lifespan of more than three or four years. Over its almost eighteen year history, there were numerous calls to replace it with a permanent, independent body that would oversee and adjudicate specific claims. The 1996 Royal Commission on Aboriginal Peoples recommended this measure, and through participation in joint working groups with Indian Affairs, the AFN made similar calls in 1992 and 1997. By 2002, these efforts had acquired a sufficient critical mass to produce Bill C-6, the Specific Claims Resolution Act.

This bill, which was not favourably received by many First Nations, including the Federation of Saskatchewan Indian Nations, the Treaty and Aboriginal Rights Centre of Manitoba, the Union of BC Indian Chiefs,[10] or the AFN, was passed by the House and Senate, and received Royal Assent in 2003. Substantial and ongoing opposition to the bill, much of which was captured by the Standing Senate Committee on Aboriginal Peoples in its "Special Study on the Federal Specific Claims Process,"[11] killed the legislation. The Specific Claims Resolution Act was never proclaimed into force, and rather like the letter that opened this chapter, it simply slipped away. Recognizing failure when directly confronted by it, Indian Affairs withdrew and regrouped.

These events have brought us to the present moment and "Justice at Last." This latest permutation of specific claims policy made bold promises – but not necessarily new ones. These included greater transparency in claims assessment and funding, faster processing of claims pressed by a three-year rule that sets time limits for assessment and negotiation, and a climate wherein "every reasonable effort will be made to achieve negotiated settlements."[12] When Indigenous Affairs and Northern Development fails to meet its three-year rule, or a First Nation's claim is rejected, the claimants may take it to a Specific Claims Tribunal, which provides a final determination.[13] The "permanent body" that answers the historic calls for such by First Nations, their advocates, and the ICC, the tribunal is a central pillar of the Crown's "new approach" to the resolution of specific claims.

And yet, here we are, a decade into the new approach, and it seems that not much has improved.[14] According to the AFN, the department has assumed an adversarial and Machiavellian approach to claims assessment and resolution since 2007, focusing on either hasty rejection of claims or acceptance with an offer of resolution that is partial and grossly out of step with even the most parsimonious interpretation of fairness.[15] Rejection appears to be the preferred mode of "resolution," a practice facilitated by "formalistic quibbling" and rigid and unreasonable adherence to a "minimum standard" for claims submissions.[16] The result is that, whereas history and expert opinion suggest that roughly 70 percent of submitted claims are valid, the "actual rate of validation under Justice at Last, after an initial flurry of offers, is 20 percent or less."[17]

Given this approach, it is hardly surprising that the department can boast remarkable progress in reducing the staggering backlog of claims, as well as high rates of resolution. In its "Progress Report – Specific Claims" for 2012–13, the department stated that it had reduced the backlog by 51 claims out of the 800–900 claims estimated to constitute the backlog in 2007 and 2009, respectively, and settled 95 claims through agreements totalling $1.8 billion.[18] These results are impressive, but as is so often the case, it seems there are many devils dancing among the details. If one looks closely at the numbers for even a slim section of the recent history of the "new approach," it becomes clear that addressing the backlog was primarily achieved on the backs of the Aboriginal claimants. For example, a breakdown of "resolved claims" for October 2008 to October 2011 reveals that the vast number were resolved by rejection or through "file closure," which occurs when a First Nation declines the Crown's offer to settle. Such "resolutions" constituted just over *90 percent of the total claims removed from the backlog* during that timeframe. Of the remaining 10 percent, the majority were resolved by "administrative remedy" or through actual settlement.[19] As the AFN, the Union of BC Indian Chiefs, and many other Aboriginal advocacy bodies note, the combined impact of the three-year rule and the increasing focus on closing files and rejecting claims creates the illusion that the Department of Aboriginal Affairs and Northern Development is making "substantive progress in resolving claims and clearing up its claims backlog," when in fact, it is merely shifting responsibility for the logjam onto the tribunal.[20] As the AFN observes, "the Tribunal was not created to be the new home of the massive backlog of claims that are considered 'unresolved' by First Nations,"[21] yet this is precisely what has happened.

If this scenario persists, it is unlikely that there will be much justice at last. And though the tribunal has the power to rule decisively on claims and bind both Crown and claimant, the wheels of justice grind slowly – perhaps not as slowly as the Specific Claims Branch, but certainly slowly enough that the backlog has little chance of being reduced any more quickly by simply being passed over to the tribunal. Early indications are that this is indeed the case: the start-up of the tribunal was significantly delayed, in part due to issues regarding the appointment of its judges, so it undertook no real work until nearly three years after its creation by

legislation. Once under way, much of its initial work consisted of applications, but this was soon overtaken by the forty-nine decisions it has handed down since 2012, some of which contain strong judicial criticism of the state of affairs at the Specific Claims Branch (SCB).

Between the apparently pugnacious approach of Indigenous Affairs and the SCB, and the independent but necessarily legalistic focus of the Specific Claims Tribunal, there is precious little middle ground for a non-adversarial approach in which law, rights, history, and co-existence can achieve a balance. In its 2012 review of the Justice at Last policy, the AFN cited the elimination of the Indian Claims Commission as a significant loss to that middle ground, as it "was to assume a major role in alternative dispute resolution" in the new claims policy. When the commission closed, its significant experience and history with claims was lost, and "currently, independent mediation through a neutral third party is unavailable."[22]

There is no formal port of entry into the "new approach" of the Justice at Last policy for the knowledge and expertise that the ICC acquired during its eighteen-year journey to assist First Nations and Canada in the resolution of claims. This is regrettable. As an ICC commissioner for seven years, I was fortunate to benefit from the considerable wisdom and expertise of my colleagues and predecessors in juggling the competing interests complicating just claims resolution within the claims policy. I have also seen the difficulties encountered by First Nations, who experience many challenges in mounting a claim. As commissioners, we observed first-hand the egregious levels of delay, the idiosyncrasies of the specific claims process, and the myriad problems arising from the inherent conflict of interest in the Crown's approach to claims. We met with claimant communities, took testimony, perused volumes of historical research, and engaged the thrust and parry of the fields of law that intersected with our duties as commissioners – Aboriginal law, administrative law, constitutional law. We confronted the limitations of both claims policy and our oversight of it as a body empowered solely to recommend, not order, necessary change. It was an interesting, frustrating, inspiring, and highly educational journey, and given the increasingly apparent problems with the Justice at Last policy, both within Indigenous Affairs and outside it, I feel it is time to bring our experience and expertise into the current conversation about claims.

The pages that follow will trace the origins of claims policy and the ICC. Readers will be invited into the inquiry process and behind the scenes of a select sample of our inquiries and into some of our most bedevilling struggles. Opening with a brief outline of the history and development of specific claims policy, the initial chapter chronicles the early approach to Indigenous nations and lands, and briefly touches upon the resulting treaties, surrenders, and jurisprudence. From this limited discussion, the chapter explores the development of Canadian claims policies and specifically the repeated calls for a claims commission like that which emerged in the United States. It concludes with an examination of the US Court of Claims and the history of American treaties, claims, and claims processes, revealing the influence and impact of US approaches on the evolution of a Canadian claims process.

Chapter 2 shifts the focus directly to the Canadian experience, describing the development of specific claims policy and the conflict of interest that lies at its heart. The flaws of the policy laid bare, the chapter shows how the 1990 Oka Crisis was the inevitable result. Oka's implications for state policies in relation to Indigenous people provide the opening discussion of Chapter 3, which examines the events and interests that sparked the creation of the Indian Specific Claims Commission. The early commission is described, as is the process that the first commissioners created, which persisted largely unchanged throughout the ICC's eighteen-year tenure.

From here, the book concentrates on the last seven years of the ICC, during which I sat as a commissioner (from 2002 to 2009). Chapter 4 discusses the specific claims process, as well as its associated difficulties and their impacts on claims resolution. Chief among these difficulties is shocking delay: claims languishing for an average of thirteen years, awaiting a determination of acceptance or rejection. In some cases, the process can take even longer: consider the example of the Peepeekisis people, who waited fifteen years for the SCB to complete its review of their claim, or the seventeen-year wait of the Siksika First Nation to hear the outcome of its submission.[23]

Though remarkable in its magnitude and ubiquity, delay was not the only problem with the claims process, but it was a central factor in the development of the ICC's "constructive rejection policy." This evolved over

time in response to the entreaties of First Nations whose claims were stuck in limbo at the SCB, thus undermining the integrity of the process and any assertions regarding its fairness or efficiency. In Chapter 4, I explain the origins and details of our constructive rejection policy and discuss our efforts to implement it in the Alexis First Nation and Red Earth and Shoal Lake Cree First Nations inquiries.[24] Although such inquiries were technically outside our mandate because they involved claims that had not yet been formally rejected by the minister, constructive rejection claims reflected important truths about the claims process and the honour of the Crown in its dealings with First Nations.

The fifth chapter begins the discussion of our process and my experiences with it, which continues through Chapter 6. These chapters detail the strengths and weaknesses of our process, including the unique challenges of planning conferences and community sessions, as well as some of our more controversial rules of procedure, such as the rule against cross-examination of elders. These chapters focus on the "orals," the session in which the parties' legal counsel presented their arguments, the forum of panel deliberations, and the never dull, and often surprising, relationship between commissioners and ICC lawyers. As the story draws to a close, the penultimate chapter dedicates attention to the rise of "Justice at Last" – the "new approach" to claims – and the Specific Claims Tribunal's role in that new approach. The book concludes with a brief statement about the legacy of the ICC and what lessons this may hold for the future.

Readers who are familiar with the ICC will notice that its mediation function receives a limited treatment here. Throughout its lifetime, the commission provided mediation services free of charge to claimants and Canada, and in that context also funded and oversaw a number of studies, pilot projects, and negotiation support services.[25] Mediations that reached a successful conclusion are detailed in fourteen reports, published in our *Indian Claims Commission Proceedings*. I discuss these services only briefly because, quite frankly, I know very little about them. Although as commissioners we received extensive mediation training, and some of us were quite proficient in that skillset, we had virtually no involvement with the mediation aspect of the commission. As a result, though the Mediation Unit appears to have performed a fair amount of work, I have little to say on the subject.

A final word about this book before we begin. It is important to understand that my goal in sharing my experiences of the ICC is not to speak for or critique the commission, the Crown, or First Nations, but rather to help foster understanding of the strengths and weaknesses of the key players and policies in specific claims, and in so doing, to assist in achieving better outcomes in the future. Like any organization, the ICC manifested significant strengths and weaknesses. I will refer to many of both in this book but must admit that much cannot and should not be shared. Our work often required us to balance many difficult and delicate issues and situations; much of that work was confidential and, in respect for the parties, must remain so. That said, the members of the ICC have remained largely silent on our experiences since the commission closed in 2009. After careful consideration, it seems the right time to break the silence and share the rich experience and education implicit in the story of the Indian Specific Claims Commission.

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