JUSTICE AT LAST:
PART OF CANADA'S NATIONAL DEBT

National Claims Research Directors

Pre-Budget Submission to the
Standing Committee on Finance

August 6, 2014

NCRD's 2015 Pre-Budget Submission to the House of Commons Standing Committee on Finance

The **National Claims Research Directors (NCRD)** are pleased to submit the following brief regarding specific claims to the Standing Committee on Finance for the 2015 pre-budget consultation. We welcome an opportunity to present our recommendations to the committee in Ottawa.

The National Claims Research Directors (NCRD) are a national body of technicians who manage over 30 centralized Claims Research Units (CRUs) mandated to research and develop specific claims on behalf of First Nations. Research Directors liaise with communities, legal counsel, funding administrators, the Specific Claims Branch, claims negotiators and Specific Claims Tribunal members. Combined, Research Directors have overseen the research, development and submission of over 1200 specific claims in Canada.

Executive Summary

Specific claims comprise historical breaches of the Crown's lawful obligations with respect to First Nations' lands, monies and assets. They are an outstanding debt owed to First Nations by the Crown. Specific claims are rarely discussed in the context of Canada's national debt but the obligation to pay this debt is real. The Government of Canada recognized its obligation and the extent of this debt when it announced its *Specific Claims Action Plan: Justice At Last* in June 2007. In the interests of justice and making it possible for First Nations to explore and develop lasting economic opportunities in their communities, Canada committed to resolving specific claims fairly and promptly through good faith negotiations with dedicated funding to achieve this end.

However, in practice, the principles of fairness, negotiation and proper funding articulated in *Justice At Last* have been effectively abandoned, resulting in increased administrative costs, needless and exorbitant legal costs and rapidly escalating numbers of new and unresolved claims. Canada's approach is placing a substantial financial burden on all Canadians and quashing potential economic benefits to First Nations as resolution of specific claims is once again deferred to future generations.

Evidence clearly demonstrates that appropriately funding all stages of claims research and development, negotiations and settlement is considerably more cost effective than administering funding cuts, eschewing negotiations, and directing the vast majority of claims to a Tribunal and to court. A balanced budget can and must be reconciled with the honour of the Crown, the rule of law and international human rights declarations. A cost effective and fiscally responsible approach to specific claims resolution is achievable if Canada engages in direct, meaningful negotiations with First Nations.

Recommendations

NCRD makes the following recommendations to the Standing Committee on Finance:

Recommendation #1:

Since appropriately funding all stages of claims research and development, negotiations and settlement is considerably more cost effective at lowering Canada's outstanding debt to First Nations than administering funding cuts to these programs:

- **Restore funding to claims research units to ensure all historical grievances can be brought forward and finally resolved.**

- **Reallocate funds from divisions of the Specific Claims Branch and Department of Justice dedicated that litigating First Nations specific claims to research and development and negotiations of claims.**

- **Apply the Minimum Standard properly to avoid cost overruns; incorporate upgrade costs into research budgets.**

- **Dedicate separate funding to the Specific Claims Tribunal to maximize resources for research and negotiations.**

Recommendation #2:

Since negotiating claims in good faith costs substantially less than offering partial acceptances to First Nations and results in direct economic benefits to First Nations communities:

- **Abandon the practice of offering partial acceptances; if a lawful obligation is found, curb exponentially rising costs associated with needlessly creating new claims by accepting for negotiation the entirety of the allegations brought forward.**

Recommendation #3:

Since negotiating claims in good faith costs substantially less than Tribunal and court proceedings:

- **Negotiate all claims in good faith, regardless of compensatory value, to bring about the resolution of specific claims.**

- **If claims proceed to the Specific Claims Tribunal, accept as valid, binding and final the Tribunal's decisions and abandon the costly practice of applying for judicial review.**

A Balanced Budget, Fiscal Sustainability and Economic Growth through Adherence to Justice At Last

Specific claims comprise historical breaches of the Crown's lawful obligations with respect to First Nations' lands, monies and assets. They are an outstanding debt owed to First Nations by the Crown and as such form a portion of Canada's national debt. Reducing this debt and balancing the budget will increase First Nations' economic potential and the economic potential of all Canadians. The Standing Senate Committee on Aboriginal Peoples recognized this in December 2006, concluding that:

> …failure to compensate for lands and monies legitimately owed to First Nations bands prolongs the impoverishment of First Nations people. The Committee recognizes that it also prevents First Nations from acting on present and fleeting opportunities for economic development. Systematic delay in resolving Specific Claims increases the cost of settling them. In the view of the Committee, delaying the resolution of Specific Claims is fundamentally irresponsible and detrimental to the Canadian economy in general.[1]

In June 2007 Canada announced its Specific Claims Action Plan called *Justice At Last* to "restore confidence in the integrity and effectiveness of the process to resolve specific claims."[2] Minister of Indian Affairs Jim Prentice committed to honourably negotiating compensation with First Nations, stating, "Canadians' commitment to justice demands that these legal obligations are discharged and our outstanding debts to First Nations paid in full." *Justice At Last* cites negotiations as the preferred route for arriving at compensation amounts since "Negotiations are less adversarial, more cost-effective and avoid the risks of court-imposed settlements where outcomes can be uncertain. Just as important, they help build relationships and generate multiple benefits for all Canadians."[3]

The commitment to resolve specific claims through negotiations necessarily includes a duty to adequately fund claims research and development since First Nations are required under the specific claims policy to provide detailed, accurate historical research and legal arguments for claims to be considered by Canada. It also includes a patent duty to engage meaningfully in and properly fund good faith negotiations. This duty is clearly articulated in *Justice at Last* which includes as one of its four pillars "dedicated funding for claims settlements [which] will underscore Canada's commitment to honour its outstanding debts to First Nations."[4]

Despite the 2013-14 federal budget announcement dedicating $54 million over two years to ensure the prompt review of specific claims, it is important to highlight that this money did not represent an increase in program dollars but was part of the original commitment made after the *Justice At Last* announcement. In actual fact, in February 2014 Claims Research Units nationwide received notification of significant budget cuts (between 30 and 60 percent).

Canada's current approach to assessing the validity of specific claims and its approach to negotiations violates the principles of fiscal sustainability in the following ways:

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[1] *Negotiation or Confrontation: It's Canada's Choice, Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process*. December 2006, p. 4. Government of Canada website at www.parl.gc.ca.
[2] INAC, *Specific Claims: Justice At Last*, Indian Affairs and Northern Development, June 2007. AANDC website at www.aandc-aandc.gc.ca
[3] *Ibid.*
[4] *Ibid.*

1. **Substantial cuts to claims research funding result in layoffs and diminished capacity, as well as significant losses of economies of scale that allow centralized claims research units to maximize resources and cost efficiencies for First Nations clients.** While reduced research budgets have the appearance of sound fiscal practice by limiting program dollars, cuts to research impede economic efficiency and result in needless delay and increased costs.

2. **The unreasonable application of a Minimum Standard for claim submission is creating costly burdens for First Nations and Canada and delays filing and resolution of claims.** To reach the negotiation stage, a First Nation must research and develop a specific claim submission. The submission must meet a "Minimum Standard" reviewed by the Minister as outlined in *Justice At Last*. Canada imposes technical requirements that are unrelated to the substance or coherence of the claim submission and are outside the parameters of policy or legislation. These unnecessary and onerous requirements impose significant economic burdens on First Nations and CRUs and delay filing claims.

3. **Eschewing good faith negotiations for the practice of making inadequate one-time offers and arbitrarily closing files defers payment of Canada's outstanding debts to First Nations, thereby increasing costs as interest compounds and settlement costs rise.**

4. **Canada's practice of partial acceptances - offers to negotiate the least substantive portions of a claim while demanding releases on the remainder of a submission - exponentially increases the number of specific claims resulting in unnecessary research, administrative and legal costs.** First Nations are forced to split claims into artificial, distinct submissions with single allegations to achieve justice, resulting in hundreds of new, arguably unnecessary claims.

5. **The practice of refusing to negotiate "small value" claims is ineffective at resolving them, leading to unnecessary protracted disputes that waste taxpayer dollars.**

6. **Relying on the narrow provisions for judicial review in the *Specific Claims Tribunal Act* as a tacit secondary appeal process to review claims decided in favour of First Nations amounts to a needless waste of taxpayer dollars and resources.** Canada now routinely challenges Tribunal decisions favourable to First Nations in federal court. This places enormous financial burdens on First Nations and the general public.

The principles articulated in *Justice At Last*: the fair and timely resolution of specific claims through good faith negotiations are also the most expedient and fiscally sound way of reducing Canada's debt.

Supporting Families, Assisting Vulnerable Canadians and Ensuring Prosperous and Secure Communities through Adherence to Justice At Last

According to James Anaya, former United Nations Special Rapporteur on the rights of Indigenous peoples:

> Canada faces a crisis when it comes to the situation of indigenous peoples of the country. The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginals claims remain persistently unresolved, and overall there appear to be high levels of distrust among aboriginal peoples toward government at both the federal and provincial levels.
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> Canada consistently ranks near the top among countries with respect to human development standards, and yet amidst this wealth and prosperity, aboriginal people live in conditions akin to those in countries that rank much lower and in which poverty abounds. … The Canadian Human Rights Commission has consistently said that the conditions of aboriginal peoples make for the most serious human rights problem in Canada.[5]

It is widely acknowledged that settling specific claims quickly and fairly through negotiations will create real potential for economic and community growth, infrastructure, social service delivery and education:

> The money to pay out claims is money that, if it were in First Nations' possession, would contribute to their human growth, their investment in human capital, their education and welfare, and thus build stronger communities of talented people to contribute to local economies and to participate in professions and occupations.[6]

Aboriginal Affairs and Northern Development Canada (AANDC) provides several recent and positive examples of communities benefiting in this way from claim settlements[7]. However, over 70% of claims resolved through negotiations were settled prior to the introduction of *Justice at Last*. Though a small number of large value claims have been settled since 2007, the vast majority of specific claims (85%) have been rejected or deemed closed files. These First Nations must apply to a costly Tribunal process to enjoy the economic and social benefit resulting from the resolution of their grievances.

AANDC has spent excessive amounts of money on legal costs. However, investment must be made in claims resolution through negotiations in order for First Nations to realize any tangible economic benefits. Resolution of claims injects much needed compensatory money into communities that can be used towards education, health and infrastructure.

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[5] Anaya, James, *Statement upon conclusion of the visit to Canada*, October 15, 2013. Available at http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada

[6] *Negotiation or Confrontation*, p. 32

[7] AANDC website at https://www.aadnc-aandc.gc.ca/eng/1306932724555/1306932845296