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Presentation to Mr. Benoît Pelletier, Minister's Special Representative
Aboriginal Affairs and Northern Development Canada
Specific Claims Tribunal Review

by the Algonquin Nation Secretariat on behalf of the First Nations of
Timiskaming, Wolf Lake, Barriere Lake and Eagle Village

7 April 2015

Dear Mr. Pelletier,

This presentation is made in connection with your mandate as a Special Representative of the Minister of Aboriginal Affairs and Northern Development, to carry out a review of the SCTA. We are pleased to be able to meet with you to share our experience and our concerns.

Background

Wolf Lake, Timiskaming, Barriere Lake and Eagle Village are all members of the Algonquin nation, whose territory straddles the Ottawa River and includes lands and waters in what is now Ontario and Quebec. (See attachment #1: map showing First Nations communities in the Ottawa River watershed.) They are parties to a series of treaties made with the British between 1760 and 1764 which recognized their aboriginal title and rights. Their traditional territories were reserved under the terms of the Royal Proclamation of 1763, and the anti-trespass legislation adopted by the Crown in the years following applied to those territories. They have never signed a land surrender treaty.

In many ways our situation is unique. A lot of our claims have their origins in events, treaties and legislation from the pre-Confederation era. They often involve lands in two provinces which have a long history of being hostile to our land rights; and they are often affected by the peculiarities of Quebec (for instance, the 1851 Lower Canada legislation creating reserves, and the *Star Chrome* decision of the Judicial Council of the Privy Council). Timiskaming has claims which relate to the creation of the reserve in 1851, surveys and boundaries; illegal surrenders; and mismanagement of trust fund monies. Eagle Village and Barriere Lake, who did not receive reserves until the 1960's and 1970's, are affected by the non-provision of reserve lands as well as subsequent administration of their assets. Wolf Lake still has no reserve lands and has claims based on the non-provision of reserve lands.

What is not unique is that our claims arise from actions, or inaction, on the part of the Crown, and ongoing breaches of its duties to our communities and our members. Although some of the comments that follow may appear critical of federal policy and conduct, we want to assure you that we want this system of claims resolution to operate effectively and fairly - and we remain ready to work with Canada to see that this is the case. Our communities have suffered significant economic loss due to the past administration of their assets by the federal Crown, and they want the opportunity to have these lawful obligations addressed and resolved.

Summary of Concerns

As you are aware, the Assembly of First Nations has sponsored a parallel process of review. We understand that you were able to attend the session which they sponsored last month in Toronto. The AFN initiative was in part a response to the fact that the scope of your review

appears very limited, to the point where some fundamental events and issues directly related to the operations of the SCT appear to be outside your mandate. We cannot be sure, because your terms of reference have not been made public, but the other materials generated by AANDC around the 5 year review suggest that this is the case.

In any event, we did prepare a submission to the AFN Expert Panel, which we enclose here for your information and review (see attachment #2) We will not repeat it, but it would be worthwhile to highlight some of our concerns, so that you can be aware of them, and refer to our submission to the AFN Expert Panel for further details.

- Crown Conduct & Conflict of Interest: The SCT, and Justice at Last, were intended to address the Crown's pervasive conflict of interest in the Specific Claims process, to ensure a more independent and fairer process for resolving claims. Unfortunately subsequent Crown conduct appears to indicate that the conflict of interest remains, and is still affecting the ability of First Nations to obtain a fair hearing and resolution of their claims. Generally speaking, with respect to Specific Claims, Canada has become far more adversarial, arbitrary and unilateral since the Justice at Last initiative was announced and the SCTA came into force. This is in stark contrast to the stated intention of reconciliation which was supposed to be the hallmark of this effort. Please refer to our submission to the AFN Expert Panel for more detail.

- "There are no more claims": Canada has suggested that there are few claims left to settle, and therefore cut funding for research and development by 50% in 2013/14. There is another cut of 60% scheduled for 2016/17, covering all aspects of claims, from research to negotiations, to compensation funding. According to our own inventory of claims, Canada's assertion that claims are over is false. In 2014/15 we did an assessment of our member's potential specific claims. We identified a total of 6 claims that had been rendered inactive due to funding shortfalls, and another 38 new Specific Claims where preliminary research indicated that there was a strong potential basis for a valid claim. Under the federal government's current plans, these claims may never be heard or addressed. The federal government is wrong to suggest publicly that the number of claims is dwindling because it is simply untrue. Please refer to our submission to the AFN Expert Panel for more detail.

- Federal Approach unfairly impacts on Quebec First Nations: As we have explained, the claims of our communities (and Quebec generally) are extremely complex for a variety of reasons. This has meant that they take longer to develop and assess, and they have taken longer to get into the system. Canada's current bias towards "expedited" processes and claims assessment appears to negatively impact on our members and our region. Other regions, such as the prairies, have had many more claims addressed and resolved over the years, partly because they relate to Treaties which contain specific provisions and formulas (such as TLE), and partly because they are in most cases post-

Confederation. They also started researching their claims in the 1970's, whereas our communities, for the most part, only began researching their claims in the mid-1990's. Claims in Quebec and the Atlantic are very different than numbered-treaty claims, and have seen a much lower rate of resolution. The fact that Canada seems intent on shutting down, or severely curtailing the Specific Claims process, when our communities are still in the process of getting the majority of their claims ready to present, will have the consequence of enabling Canada to avoid its lawful obligations to our communities. This will have significant legal and economic impacts to our members.

- Federal Assessment of Claims: We are concerned at the way in which the Minimum Standard guidelines are being implemented. SCB has been taking a hard line with claimants, but is unable or unwilling to apply the same guidelines to itself. This is unacceptable. The Expedited Review Process also raises some concerns, particularly with respect to complex claims. We also note that valuation has been introduced into the ERP process, when Statements of claims are not intended to deal with valuation and research units have never been funded to provide valuation information during the initial claims development phase. Further, it is by no means clear that the SCB staff who are carrying out ERP have the qualifications necessary to valuate claims. Please refer to our submission to the AFN Expert Panel for more detail. Also, please refer to attachment #4, which is a package of materials provided by Canada with respect to the matter of expedited legal opinions.

- Lack of Access to Federal Records: This is an ongoing and significant concern. Please refer to attachment 4 in our submission to the AFN Expert Panel.

- Barriers to Accessing the Specific Claims Tribunal: There are some actions which Canada has taken that effectively prevent or unduly restrict access to the Tribunal by First Nations. More on this in our presentation to the AFN Expert Panel, and below in our detailed remarks.

- Independence of the Tribunal: We remain concerned at actions by the government of Canada which have the effect of reducing the independence of the Tribunal - for instance, recent legislation which included the set up of Administrative Tribunal Support Services Canada (ATSSC), which was done without even the pretense of consultation. More on this below in our detailed remarks. Please refer to the SCT's 2014 annual report for further detail and additional issues.

Specific Comments on the Questions

We have reviewed the questions associated with the discussion paper that Canada released in conjunction with the five year review. As already stated, we are concerned at the way in which the scope of this review was narrowed - unnecessarily in our view. We have not answered all of

the questions, but we have provided comments on the ones which we were able to respond to.

3 Year time frame

> Question 1: In your view, what are the strengths and weaknesses of the three year time frames set out in s.16(1) of the Specific Claims Tribunal Act.

Ideally, the time frame should assist in expediting the review and negotiation of claims. But the 3 year time frame can be manipulated by SCB.

Re: Claims assessment: now that the backlog is gone, claims should be able to be assessed in a shorter time. But the 3 year time frame appears to be used now to stall completion of assessments and delivery of offers. Example: 1849 Reserve on East Side of Lake Temiskaming Specific Claim for WLFN and TFN has had DOJ legal opinion completed since June 2014, but our communities have received no decision from the Minister on whether their claim has been accepted or rejected.

Re: Negotiations: We hear from groups that the 3 year time frame is sometimes used as a threat by SCB, ie., pressure to take it or leave it with respect to offers. This is not what was intended.

Expansion of the Specific Claims Tribunal's Functions

> [...] the function of the Specific Claims Tribunal could be expanded to include oversight of:
> i) the negotiation process, including mediation (upon mutual consent of the parties); and
> ii) the administration of funding to support the research and development of claims.
>
> Question 4: In what ways would you suggest the function of the Specific Claims Tribunal might be expanded to improve services to the parties?

The original Joint Task Force report of 1998, drafted jointly by Canada and the AFN, called for a completely independent body, which would deal with all aspects of claims, including funding, research and review of incoming claim in the first instance (see attachment #3 on CDROM). This was to address the federal Crown's conflict of interest, and the lack of confidence in SCB's ability to manage claims against itself. The current government rejected this approach in 2007 as it developed the SCTA, and it limited the tribunal's duties. SCB's behaviour since that time suggests that it has used what unilateral powers it has left to maintain, and in some cases increase, the detrimental effects of the conflict of interest, with little apparent accountability to the claimants. This has eroded confidence in SCB's ability to manage Specific Claims in an

even handed manner.

There is no doubt that more oversight of federal behaviour is required if confidence it to be restored to the system. What form this takes is another matter. It certainly could include increased powers for the SCT, as contemplated in the 1998 Joint Task Force report.

But in order to do this, adequate resources would be essential. We have heard that this government intends to substantially reduce its commitment to resolving Specific Claims beginning in 2016/17 - the main estimates call for an overall reduction of 60% in funding for all aspects of Specific Claims, from research & development, through negotiations, to compensation. This reduction has no connection to the actual number of outstanding claims, and seems to indicate that the federal government intends to renounce its commitment to resolving its lawful obligations with respect to Specific Claims.

Without adequate resourcing, what would the Tribunal do with its new responsibilities? What would be the point? If Canada is serious about "improving services" then it needs to provide adequate resourcing. Please see the SCT's 2014 annual report.

Judicial Review

> Question 5: In your opinion, how might Section 34 of the Specific Claims Act be amended to improve the right of either party to the proceedings to challenge a Tribunal decision?

As we understand it, so far Canada has been the only party to seek judicial review of SCT decisions. Further, it appears that claimants are not funded to participate in the judicial review process, even though their claim is directly affected. This refusal to provide funding appears to be another example of how Canada has worked to erect barriers to an First Nation's ability to appeal or participate in the process of resolving their claims. Canada should pay for the First Nation claimant to represent its interests in the case of a judicial review.

Paper Hearings to Determine Validity and Compensation

> ... It has been suggested that bifurcated validity hearings could be conducted as paper exercises to expedite the process, rather than by oral hearings which typically demand more extensive preparation, exchange of documents and, possibly, the use of expert witnesses.
> This suggestion would eliminate the Tribunal's powers regarding discovery, document production and summoning witnesses, which can require significant commitments by both parties of time and resources. The paper hearing would introduce a process where the claim and evidence submitted to the Tribunal is identical to the claim and evidence that was submitted to the Minister of Aboriginal Affairs and Northern Development in

the specific claims process.

Some claims may be too complicated for such an expedited process. Accordingly, this suggestion would also provide that oral arguments could be made at the validity stage under exceptional circumstances.

What is your opinion regarding the suggestion that validity hearings could be conducted as an expedited process, upon mutual consent of the parties, using the claim and evidence which was originally submitted to the Minister of Aboriginal Affairs and Northern Development?

This line of reasoning raises a number of concerns. One is that it appears to undermine the independence of the tribunal to conduct hearings as it sees fit. Another is that it seems to conform to a general trend supported by Canada to "expedite" or "simplify" the management of claims. This is very troubling for our First Nations because in fact their claims are extremely complex and often arose in the absence of any agreed upon benchmarks (unlike TLE, for instance). Even surrender claims in Quebec are complicated by the *Star Chrome* decision, and Timiskaming's Specific Claims are even more complex because of the existence of a *Star Chrome* waiver, the meaning of which is in dispute.

In this regard, we would point you to a package of internal SCB correspondence which was released in response to an Access to information request (see attachment #4, on CD ROM). Although heavily redacted, these materials suggest that SCB staff are also concerned about the impact of "dumbing down" claims assessment and legal review (ie., expedited legal opinions and also the early review process (ERP)). You may want to investigate this further. We expect that your terms of reference may enable you to review un-redacted versions of the materials contained in this package, which could prove illuminating.

There might be some ways in which the SCT's operations could be improved, but we remain concerned at efforts to interfere with the Tribunals's independence.

<u>Equitable Compensation</u>

In your opinion, what are the advantages or disadvantages of amending the Specific Claims Tribunal Act to legislate a standard methodology for determining the current value of historic losses?

We have heard a lot about SCB's "new" approach to compensation since the SCTA came into force. It does not inspire confidence and often seems based on arbitrary and unilateral action, not real negotiation. Given Crown conduct post-SCTA, we are not confident that any changes made to the legislation in this regard would actually create a more level playing field for the claimant. Moreover, given the geographic location of our communities (with territories, and

lands under claim, in both Ontario and Quebec), and their unique fact situation, we are not convinced that a cookie cutter approach to calculating compensation would be serve the interests of fairness, or accurately determining the value of the claims.

Exchange of Documents & Expert Witnesses/Reports

> It has been suggested that the exchange of documents between the parties has been a significant factor in the slow progress of some claims.
>
> With the Tribunal's powers regarding witnesses and evidence, proceedings before the Tribunal can become expansive with increased costs to the parties, both in terms of time and resources.

These lines of reasoning, and the questions associated with them strike to heart of the Tribunal's independence and seem intended to question the way the tribunal is being run. This is an example of how Canada's conflict of interest appears to operate and work against the principle of a truly independent claims process. The claims of the First Nations we work with are complex not only because of their factual situation, but also because successive governments have refused to address these claims, leaving them unresolved for decades and in some cases centuries. Now Canada appears to suggest that it does not have the time to unpack these claims and address its outstanding lawful obligations with the standard of care that is required. This is not acceptable.

Proportionality of Costs

We have seen some concerns raised - both by SCB and by claimants - about Canada's apparent tendency to "lowball" claims values during the Early Review Process, without adequate information or assessment (see the Access to information request, attachment #4, on CD ROM). We believe that if there are issues around the value of a claim, the parties, with the Tribunal, should be able to work these matters out.

Final Adjudication

> In your opinion, what are the advantages or disadvantages of amending the Specific Claims Tribunal Act to create a time limit for submission of eligible claims to the Tribunal for binding adjudication.

This line of reasoning is a very good example of the federal conflict of interest at work. The fact of the matter is that there are financial barriers to First Nations taking their claims to the Tribunal because Canada unilaterally made a policy decision to refuse funding for First Nations to make their initial appeal to the Tribunal. Many First Nations do not have the resources to undertake this work, or may need to save up the money, or wait until they have money to do

so. We know that for a fact. The approach suggested by Canada would do further damage to First Nations since it would, with finality, wholly eliminate their ability to appeal a rejection of their claim by Canada, through no fault of their own.

We have seen the rejection rate for claims skyrocket since the SCTA came into force. Canada's approach does not seem based on reconciliation and resolving claims, but instead on simply rejecting claims and erecting barriers for First Nations to access the appeal process. The suggestion about final adjudication should be seen in this context. Canada seems to want "finality" without procedural fairness. This seems odd behaviour for a fiduciary.

Minimum Standard

In our experience the Minimum Standard guidelines have been applied capriciously and arbitrarily by SCB, to the prejudice of claimants. Complying with SCB requests has created a huge amount of busy work, at a time of significantly reduced budgets. Further, SCB seems unwilling or unable to adhere to its own minimum standard guidelines. SCB has been unprepared to engage claimants on this issue in an meaningful way. Please see our submission to the AFN Expert Panel for additional detail.

Further Review

Yes, another review should take place, but it should be broader than the current review, to take into account the Specific Claims process and policy as a whole. In our view the utility of this 5 year review has been compromised by narrow scope.

Concluding Remarks

Our member communities want the Specific Claims process to work. They have been waiting generations to have their claims receive a fair hearing and move towards reconciliation and resolution. We had high hopes with the Justice at Last initiative and the SCTA, but those hopes have been severely compromised by subsequent Crown conduct. Once again, as in 1990 and in 2000, there is a crisis of confidence in Canada's commitment to honestly resolve it's lawful obligations to First Nations for past misconduct. We trust that your report will identify ways in which confidence can be restored and so that all parties can walk on the path of reconciliation.

Enclosures

1. Map showing First Nations in the Ottawa Valley
2. Submission to the AFN Expert Panel, March 2015
3. Canada-First Nations Joint Task Force Report (1998) (on CD ROM)
4. Access to Information response re: Expedited legal review (on CD ROM)