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Presentation to the House of Commons Committee on Indigenous and Northern Affairs (INAN)

Study on Specific and Comprehensive Land Claims

by

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Who we are

The Algonquin Nation Secretariat represents three Algonquin First Nations: Timiskaming, Wolf Lake and Barriere Lake. Our territories lie in both Ontario and Quebec. Timiskaming and Wolf Lake's territory stretches from the Dumoine River basin up to Lake Timiskaming. Barriere Lake's territory lies around Cabonga, the headwaters of the Ottawa River. You can refer to the map to see the Ottawa River basin and the location of our communities.

We assert unceded Aboriginal title and rights throughout our traditional territories. Our lands are within the "Indian territory" set out by the Royal Proclamation of 1763. We are parties to Treaties with the British Crown, made at Swegatchie and Kahnawake in 1760, and at Niagara in 1764, which recognized our title. Our rights have never been extinguished by treaty or any other lawful means. It is important to add that we have never mandated any other group to negotiate these matters on our behalf.

There is much unfinished business between our people and the Crown. Timiskaming received a Reserve in 1854, but later lost more than 90% of its reserve lands through boundary changes and questionable surrenders. Barriere Lake did not receive a reserve until 1962, and then only 59 acres - barely enough for housing. Wolf Lake, even though it has been recognized as a Band by Canada since the 1800's, still has no reserve lands for community purposes.

So our communities have both Specific and Comprehensive Claims according to the federal government's policies. Despite years of trying we have still not resolving our outstanding land issues with Canada.

Federal Claims Policies are a Barrier to Reconciliation

The main reason why we have not been able to move towards reconciliation are the federal claims policies.

The biggest problem is the conflict of interest: these claims are against the Crown, but the Crown is also the judge, jury and banker. There have been efforts to make the Specific Claims policy more independent with the creation of the Specific Claims Tribunal, but in that process the federal government still assesses claims against itself and controls funding. In the Comprehensive Claims process there is no independence at all: the only hope of escaping the government's conflict of interest is to go to court, with all of the expense and risk.

The Royal Commission on Aboriginal Peoples acknowledged this conflict of interest, and called for some form of oversight over the federal government's policies and actions, but nothing was done to implement this recommendation.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) addresses this conflict of interest as well. Article 27 says that states shall:

establish a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.¹

Article 28 says that indigenous people should have fair and just compensation for the lands and resources taken from them.²

This government has said very publicly that it intends to implement the UNDRIP, but we haven't seen any evidence yet. In fact, the United Nations Committee on the Elimination of Racial Discrimination (CERD) report for 2017 concluded that Canada has not yet taken steps to fully implement UNDRIP, and that "violations of the land rights of Indigenous peoples continue" without consent. CERD concluded that this continues to result in breaches of treaty obligations and international human rights law.³

Recent Interventions

We have raised these issues, identified the problems we face, and recommended solutions many times. Just in the past three years, here are some of the efforts we have made:

- October 30, 2014: ANS Brief to Douglas Eyford, Special Ministerial Representative on Comprehensive Claims Policy (CCP)⁴: We met in person with Mr. Eyford and presented our concerns with the Comprehensive Claims policy. Our recommendations were ignored in his final report.
- March 9, 2015: The ANS contributed to "Justice at Last and Canada's Failure to Resolve Specific Claims", prepared by the National Research Directors.⁵
- March 10, 2015: ANS submission to the Assembly of First Nations Expert panel on

¹ United Nations Declaration on the Rights of Indigenous Peoples, Article 27.

² United Nations Declaration on the Rights of Indigenous Peoples, Article 28.

³ CERD/C/CAN/CO/21-23

⁴ The Algonquins of Wolf Lake, Timiskaming, Eagle Village & Barriere Lake: Presentation to Mr. Douglas Eyford, Special Federal Representative, Regarding Canada's interim Comprehensive Claims Policy (Montreal, 30 October 2014).

⁵ "Justice at Last and Canada's Failure to Resolve Specific Claims", Joint report presented to Prime Minister Stephen Harper, prepared by the National Research Directors, 9 March 2015.

- Specific Claims Tribunal Act.⁶ Our concerns were reflected in the Expert Panel report, which was released on 15 May, 2015⁷, but this report was not acted on by Canada.
- April 7, 2015: ANS brief to Benoit Pelletier, Special Ministerial Representative on Specific Claims.⁸ We met in person with Mr. Pelletier. Most of our concerns were not reflected in his final report.
 - July, 2015: Letter to Canada with results of our initial consultations on the Algonquins of Ontario (AOO) land claim Draft Agreement in principle, which directly affects the rights of some of our members. We received no meaningful reply, and our key concerns have been ignored.
 - November 9, 2015: We sent a letter to Prime Minister Trudeau with recommendations regarding the Comprehensive claims policy, and cc'd this letter to the Ministers of INAC and DOJ. No reply received.
 - May, 2016: The ANS sent a brief and evidence to the Office of the Auditor General regarding Specific Claims. The Office of the Auditor General did listen to our concerns and his 2016 fall report reflected many of the concerns that First Nations have raised. The government of Canada appears to be working to follow up on the OAG report.
 - May, 2016: The Algonquins of Barriere Lake wrote to Canada regarding Comprehensive Claims and the Algonquin claim - no meaningful reply
 - June, 2016: Timiskaming and Wolf Lake wrote to Canada regarding Comprehensive claims and the Algonquin claim - no reply.
 - June, 2016: ANS legal counsel wrote to Debra Alivisatos, Director of Claims Assessment Directorate at INAC, asking for without prejudice discussions on changes to CCP - No reply.

We would have liked to provide you with all of those presentations, but we are limited in what we are allowed to provide to this committee. These interventions were received by the previous government and the current government. Here we are again, with yet another study. We have to wonder where it will end, but we have prepared this submission because resolution of these claims are essential to the legal, economic and cultural survival of our communities.

⁶ Specific Claims and the Specific Claims Tribunal Act: Five Years Later. A Presentation to the Assembly of First Nations Independent Expert Panel, from the Algonquin Nation Secretariat on behalf of the First Nations of Timiskaming, Wolf Lake, Barriere Lake & Eagle Village, 10 March 2015.

⁷ Specific Claims Review: Expert Based - Peoples Driven. Assembly of First Nations Independent Expert Panel Report, 15 May 2015.

⁸ Presentation to Mr. Benoît Pelletier, Minister's Special Representative, Aboriginal Affairs and Northern Development Canada, Specific Claims Tribunal Review, from the Algonquin Nation Secretariat on behalf of the First Nations of Timiskaming, Wolf Lake, Barriere Lake and Eagle Village. 7 April 2015.

On Specific Claims, there appears to be some positive movement on the part of the current government. But on Comprehensive claims, we don't see any difference in the approach between the previous government and the current one. We will explain in more detail below.

Specific Claims

With regard to Specific Claims, we can confirm that for Wolf Lake and Timiskaming, we are further away from resolving our claims today than we were ten years ago, before the *Specific Claims Tribunal Act* was introduced. In 2007, the Specific Claims Branch ripped up an agreement that had been reached with Timiskaming to address its very complicated claims.⁹ And at the same time, Wolf Lake's claim for reserve lands was taken out of the Specific Claims Commission unilaterally by Canada.¹⁰ Each community has seen multiple claims rejected by Canada, but there is no funding in place to get these claims in front of the Specific Claims Tribunal, because Canada has adopted restrictive funding policies which seem intended to discourage communities from appealing to the Tribunal.¹¹ So our communities have been effectively denied the chance to appeal the government's rejection of their claims.

We also note that, even for those communities that manage to get in front of the Tribunal, if they get a decision in their favour, in most cases it appears that the federal government will seek a judicial review of the decision, forcing the communities to defend themselves again, but without any funding. It is significant that when the federal government appeals a Tribunal decision, it funds itself, but refuses to fund the First Nation. This practise, taken up by the previous government, has been continued by the current government. This is not the "Justice at Last" that was promised in 2007.

On September 5, 2017 The Minister of Justice, Jody Wilson-Raybould, and the Minister of INAC, Carolyn Bennett, jointly announced the federal government's commitment to "completely overhaul the [Specific Claims] policy, in co-operation and collaboration with Indigenous

⁹ An agreement was signed with the Specific Claims Branch on April 13, 2005, which provided for cooperative measures to assess and address Timiskaming's Specific Claims. SCB renounced this agreement unilaterally in 2007.

¹⁰ Wolf Lake's claim for Reserve lands (post 1951) was at the Specific Claims Commission in a funded process. This claim was unilaterally removed from the roster of cases before the Commission by the federal government in 2007. Changes to funding guidelines prevented any support for Wolf Lake to take its claim to the new Specific Claims Tribunal.

¹¹ Rejected claims since 2007: Wolf Lake Non-provision of reserve lands post 1951; Timiskaming Piche Mill Trust fund claim; Wolf Lake and Timiskaming 1849 Order in Council and Reserve on the East Side of Lake Timiskaming claim.

Peoples, including working with the Assembly of First Nations”.¹² We welcome this commitment, and from what we know INAC is working through the Assembly of First Nations to take up reform of Specific Claims policy and practise. We do not know where this will lead, but we hope that it is an honest effort to make the necessary changes to ensure that the Specific Claims process does indeed bring Justice at Last.

For the committee’s benefit, we would strongly recommend the following:

- We need a truly independent claims process. The government of Canada must be removed from the assessment of claims against itself. This allows for continued conflict of interest to the prejudice of First Nations and works against the resolution and reconciliation of their claims against Canada. It allows officials to take arbitrary measures.
- Alternative arrangements for the funding of claims research and negotiation must also be devised. As it is today, Canada has crafted policies related to funding which effectively discourage First Nations from accessing the Specific Claims Tribunal. This denies claimants access to justice.
- In the interim, while discussions are taking place to reform the policy:
 - Canada should provide adequate resources, for INAC and for First Nations, to research, develop and negotiate Specific Claims
 - Canada should provide funding to First Nations who’s claims have been rejected, to enable them to prepare Declarations to go before the Specific Claims Tribunal
 - Funding for First Nation participation at the Specific Claims Tribunal should cover First Nations’ actual costs
 - If Canada chooses to seek judicial review of a Tribunal decision, it should provide funding to the affected First Nation to ensure that they have a proper hearing.

We would direct the Committee’s attention to the Joint Task Force report, which was prepared by the Assembly of First Nations and the government of Canada in 1998.¹³ This report, although almost twenty years old, is a significant milestone. It still contains approaches that are relevant today and which could frame some of the current effort to reform Specific Claims policy and practise.

¹² 6 September 2017: Joint Statement from Ministers Wilson-Raybould and Bennett re: Huu-ay-aht First Nation Litigation. http://canada.justice.gc.ca/eng/news-nouv/stat_huuyaht-decl_huuyaht.html

¹³ Report of the Joint First Nations - Canada Task Force on Specific Claims Reform (Assembly of First Nations and Specific Claims Branch, 25 November, 1998)

Comprehensive Claims

In contrast to the apparent progress being made to reform the Specific Claims policy, the current government has done nothing to change the Comprehensive Claims Policy (CCP), which is perhaps even more out of step with the state of the law, and full of conflict of interest. Chief Harry St. Denis of Wolf Lake has been personally involved in efforts to change the CCP for at least twenty years, and yet we are still faced with the same problems.

The most important point to be made here is that the CCP has not kept pace with the state of the law or with international standards - including the UNDRIP, which this government has publicly endorsed. We would direct the Committee's attention to a legal review of the CCP which was carried out by lawyers Mark Stevenson and Albert Peeling in 2002.¹⁴ This review assessed the CCP in light of the case law at the time - in particular, *Delgamuukw*. It found that, "apart from not keeping pace with the law, the policy is disjointed and applied inconsistently".¹⁵

Their report identified a number of areas where the CCP fell far short of the requirements of the law:

- The requirement for extinguishment of Aboriginal title or non-assertion of rights, instead of recognition
- The refusal to pay compensation for past infringements - compensation may be payable to third parties, but not to First Nations!
- The insistence on elimination of 91(24) reserve land status and replacement with fee simple lands
- Inadequate interim measures to protect Aboriginal interests until an agreement is reached

The huge gap between the CCP and the law has only increased since then, especially since the Supreme Court's decision in *Tsilhqot'in*, which issued a declaration of title.

To add to these issues, there are other problems with the policy, in particular:

- Loan funding which puts vulnerable First Nations in an even more vulnerable situation once they are tens of millions of dollars in debt
- The insistence that First Nation citizens and businesses give up their tax exemptions as

¹⁴ Review of Canada's Comprehensive Land Claims Policy, prepared by Mark Stevenson and Albert Peeling (AFN Delgamuukw Implementation Committee, 15 February 2002)

¹⁵ Review of Canada's Comprehensive Land Claims Policy, prepared by Mark Stevenson and Albert Peeling (AFN Delgamuukw Implementation Committee, 15 February 2002): p 9.

- a price of reaching a final agreement
- Very loose rules for eligibility which, in the case of the “Algonquins of Ontario” claim, has allowed non-Algonquins to negotiate for Algonquin title

Our Algonquin communities have been waiting since the Royal Proclamation of 1763 and the treaties we made between 1760 and 1764, for the Crown to deal with us honourably. Instead, our lands were taken without consent and without compensation. Today we are faced with third parties everywhere, who are treated as if they have more rights than we do, and our lands are divided between two provinces, Ontario and Quebec.

We are not prepared to negotiate under the existing CCP, even though Canada has tried to get us to the table for decades. In that time we have seen the law evolve, but the CCP has not. We have worked hard to complete our evidence to prove the nature and scope of our rights to the land, and we have shared much of this information with the governments of Canada, Ontario, and Quebec. But we are still treated as if we have no rights.

This is an important message that this Committee must take back to government: We have rights. The law says so. But existing policy does not acknowledge the law, or our rights. Instead it allows for our rights to be further trampled and ignored, and prolongs the suffering of our members. This must change. In the meantime, until we resolve the land question, Canada must engage us in a real and meaningful way to address our rights, and implement necessary interim measures.

The government cannot treat us as if we have no rights just because we refuse to enter into a policy that is inconsistent with the law. If this government is serious about reconciliation and about implementing the UNDRIP, then it must reform the CCP to bring it into line with domestic law and international standards.

So far, the current Liberal government is no different than the previous Conservative government when it comes to ignoring our rights and interests. Let us provide you with some examples:

In January 2013 Timiskaming and Wolf Lake presented Canada, Ontario and Quebec with a Statement of Asserted Rights.¹⁶ This was intended to provide these governments with substantial evidence to demonstrate our strength of claim, so that they would consult more seriously with us on issues affecting our lands. One of our concerns at that time, and today, is the impact of the negotiations that Canada and Ontario are conducting with the “Algonquins of Ontario” (AOO) - which directly affect our interests.

¹⁶ Statement of Asserted Aboriginal Rights and Title: Executive Summary of Evidence. Prepared by David C Nahwegahbow, Nahwegahgow, Corbiere, based on research reports by Peter Di Gangi and James Morrison, 11 January 2013. (This document was prepared on behalf of Timiskaming, Wolf Lake and Eagle Village (Kebaowek)).

And yet Canada and Ontario have refused to respond seriously to our concerns or our asserted rights, and instead they have proceeded to negotiate with a group that does not meet the legal criteria as title holders. The AOO is negotiating for a portion of Algonquin territory covering the Ontario side between Port Hawkesbury, south east of Ottawa, and Long Sault Island, north of Mattawa. We have overlapping land interests which will be affected by this claim.

In the spring and summer of 2015, we carried out a preliminary consultation on the AOO claim and presented Canada with our concerns on the AOO Draft Agreement in Principle (AIP) which had been released that winter. We expressed grave concerns and indicated that the government needed to engage further to address our asserted rights. We received no meaningful reply, and our key concerns have continued to be ignored.

The AOO draft AIP went to a vote in the spring of 2016. The voters' list was posted publicly and we carried out a review of those voters and the criteria used to determine their eligibility. According to our review, out of the 7,714 individuals on that voters' list, only about 10% were actually registered members of the Algonquins of Pikwakanagan. The remaining people were not registered members of Pikwakanagan, but were people who claimed their eligibility by way of one or more "root ancestors" contained on a master list prepared by the AOO.¹⁷

In the process of review, we identified a very large number of individuals who have relied on root ancestors whose only connection to the Algonquins or Nipissings appears to date back to the 1600's or early 1700's. It also appears that the "Algonquins" who are relying on these root ancestors have had no intermarriage with anyone of Algonquin or Nipissing ancestry for at least 200, and in some cases, more than 300 years. By our count, this category of individuals makes up 39% of the entire AOO voters' list. When the draft AIP went to a vote in March 2016, the majority of the registered Pikwakanagan members voted against it, but they were outnumbered by these instant Algonquins.

This affects us in more than one way. First, the AOO is negotiating for some lands over which we have asserted a legal interest. They are in a position to extinguish title to those lands without our consent. Secondly, the eligibility criteria directly affect who is an Algonquin, but they were developed without any consideration of the rest of the Algonquin nation or our Algonquin practises and customs. It seems to us that Canada and Ontario engineered loose membership criteria so that they could secure approval of an extinguishment agreement. Other First Nations are free to negotiate their interests, but should not be able to extinguish our rights, or rely on voters whose only connection to the Algonquin nation is sketchy at best.

¹⁷ Memo by Peter Di Gangi & Alison McBride, Algonquin Nation Secretariat: Review of AOO Voter's List of December 2, 2015 (25 February 2015).

Before and after the AIP vote, we repeatedly raised concerns with Canada and Ontario about these issues, but have gotten nowhere. These governments have simply ignored us. In this regard, the federal Liberal government is no different than the preceding Conservative government. Its officials have refused to engage us or consider our rights with respect to the AOO negotiation process.

Before closing, we would like to review the conduct of the current government in our efforts to engage in reconciliation, and to have positive changes made to the CCP. After the election, on November 9, 2015, we sent a letter to Prime Minister Trudeau with recommendations regarding changes to the CCP, and expressed our wish to engage the new government, and take it up on its offer of a “new nation to nation relationship”. We sent copies of this letter to the Ministers of INAC and DOJ, and hand delivered a copy to Minister Bennett’s Chief of Staff. We are still waiting for a reply to that letter.

In May and June 2016, our communities received letters from Ms. Debra Alivisatos, Director of the Claims Assessment and Treaty Mechanisms Directorate at INAC. She referred to previous support which had been provided to carry out research on Aboriginal title, and asked if we would like to discuss the submission of an Aboriginal title claim for negotiations. She invited us to follow up with her staff.

Timiskaming and Wolf Lake replied directly to Ministers Bennett and Wilson-Raybould. We relayed to them our many efforts since 2013 to engage Canada with respect to our assertions of rights, and our optimism about the federal Liberal government’s wish to engage in a nation to nation relationship, and to implement the UNDRIP, and reform policy and law so it would respect indigenous rights. We asked both Ministers to consider their government’s public commitments, and indicated that we were ready to engage immediately to begin the process of reconciliation and to find ways and means of working together to address outstanding issues relating to the land question.

On the same day, we instructed our legal counsel to reply to Ms. Alivisatos at INAC. That letter cited the current government’s commitment to UNDRIP, renewal of the nation to nation relationship, and implementation of the Truth and Reconciliation Commission Calls to Action. This letter indicated that we would be prepared to enter into negotiations on the land question once the CCP was revised to our satisfaction, and it invited officials to contact our tribal council to begin to engage, so that we could move in a real way towards reconciliation.

It is now almost a year and a half later. We are still waiting for a reply to these letters. All the while we continue to hear about this government’s commitment to reconciliation with Aboriginal peoples, and the great things it will do. Government members even acknowledge that this is Algonquin land when they open meetings here in Ottawa. But this government cannot find the will to engage us in a meaningful way regarding our Aboriginal title and rights.

As your Committee continues with its study of the federal claims policies, we would request that you take seriously the need for fundamental reform of the CCP. We would also ask that you hold this government to account on its commitments regarding respect and reconciliation as they apply to our communities.

We will repeat this important message that your Committee must take back to government: We have rights. The law says so. But existing policy does not acknowledge the law, or our rights. Instead it allows for our rights to be further trampled and ignored, and prolongs the suffering of our members.

The government cannot treat us as if we have no rights just because we refuse to enter into a policy that is inconsistent with the law. If this government is serious about reconciliation and about implementing the UNDRIP, then it must reform the CCP to bring it into line with domestic law and international standards. In the meantime, it must engage us in a real and meaningful way to address our rights with necessary interim measures.

We have referenced many background documents in this submission. We would be pleased to provide copies to the Committee if they feel it would be of benefit. In this regard, we would particularly recommend:

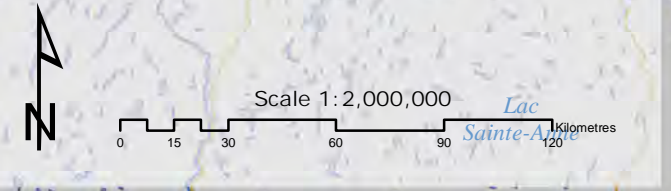
- Re: Specific Claims: Report of the Joint First Nations - Canada Task Force on Specific Claims Reform (Assembly of First Nations and Specific Claims Branch, 25 November, 1998)
- Re: Comprehensive Claims: Review of Canada's Comprehensive Land Claims Policy, prepared by Mark Stevenson and Albert Peeling (AFN Delgammukw Implementation Committee, 15 February 2002)

We sincerely hope that your efforts result in real and meaningful changes to the federal government's land claims policies. It is time.

Megwetch

The Ottawa River Watershed and Aboriginal communities, showing the height of land

— Height of Land: Southern boundary of Rupert's Land (HBCo Charter, 1670, Treaty of Utrecht, 1713) and Northern boundary of Quebec (Quebec Act, 1774 and Governor Guy Carleton's Commission, 27 December 1774). Line demarcated using NRCAN's Atlas of Canada 1:1,000,000 watershed boundaries.



Without prejudice and for discussion only. This map is provisional. Boundaries are based on the results of research to date and may change as additional materials are discovered. This map is not to be displayed, used, or reproduced without prior approval of the Algonquin Nation Secretariat.

Map prepared by PlanLab Ltd., for the Algonquin Nation Secretariat, September 27, 2007. RN 51367

