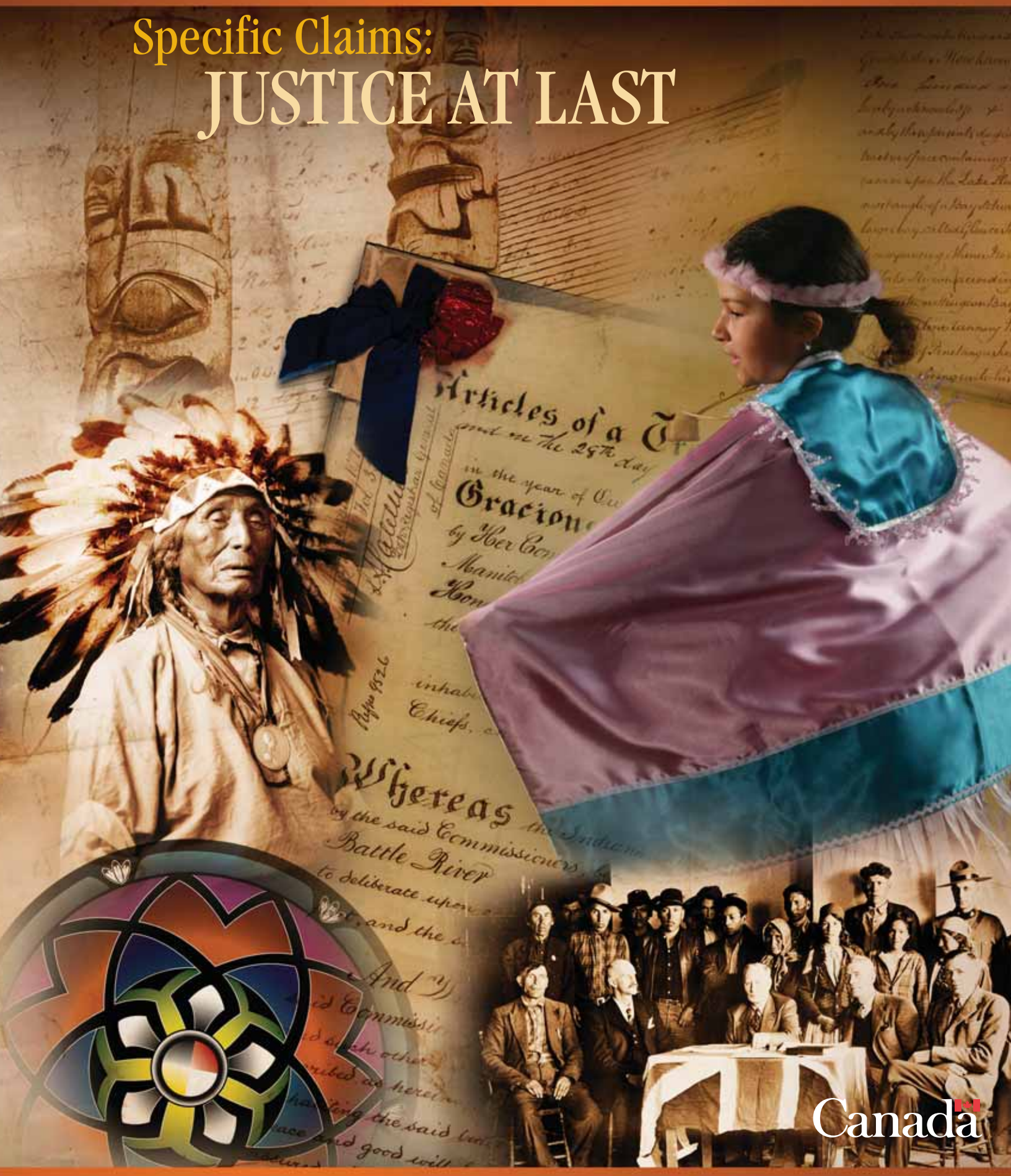
Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Specific Claims:
JUSTICE AT LAST



Canada

Specific Claims JUSTICE

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MINISTER'S MESSAGE

It is my pleasure to outline in this booklet the actions Canada's New Government plans to take to accelerate the resolution of specific claims in order to provide justice for First Nation claimants and certainty for government, industry and all Canadians. After years of debate, we are taking a new, decisive approach to restore confidence in the integrity and effectiveness of the process to resolve specific claims.

The specific claims described in this booklet deal with past grievances of First Nations. These grievances relate to Canada's obligations under historic treaties or the way it managed First Nation lands and finances.

The Government of Canada has a policy in place to resolve these claims through negotiations rather than through the courts. To honour its obligations and right these past wrongs, Canada negotiates settlements that provide justice to First Nation claimants as well as fairness and certainty for all Canadians. Negotiation is always better than confrontation in securing peaceful settlements that respect the interests of all parties.

First Nations' frustration with the slow pace of progress in resolving their outstanding claims is understandable. The number of unsettled claims in the federal system has doubled since 1993 and there is a growing backlog of claims awaiting attention or action. This is an unacceptable situation for First Nation people and for all Canadians – a situation that delays economic and social progress in our country, to the detriment of Canada as a whole.

The unfinished business of specific claims has plagued us for far too long. In fulfillment of our Government's pledge, I am introducing a comprehensive action plan to restore confidence in the integrity and effectiveness of the process.

Recognizing that tinkering around the edges of the process is not enough, we are proposing major reforms that will fundamentally alter the way specific claims are handled. Our approach builds on the lessons learned from years of study and past consultations and responds to major concerns expressed by First Nations. The *Specific Claims Action Plan* will ensure impartiality and fairness, greater transparency, faster processing and better access to mediation. It is a critical first step in bringing the specific claims program into the 21st century to deal with the existing backlog once and for all.

The purpose of this document is to provide the historical context for specific claims and outline the key changes being introduced to improve the process. It describes our plan to create an independent claims tribunal and highlights the key elements of the legislation we intend to introduce in Fall 2007 following discussions with First Nations over the summer.

These very necessary and overdue actions will accelerate claims resolutions so First Nations and all Canadians can put the past behind us and move forward together toward a better future.

The Honourable Jim Prentice, PC, QC, MP
Minister of Indian Affairs and Northern Development and
Federal Interlocutor for Métis and Non-Status Indians

Specific Claims

Promises spanning the centuries

The Royal Proclamation of 1763 was an expression of the special relationship between the Crown and Aboriginal peoples in what is now Canada. It set out procedures for the Crown to acquire lands from First Nations. These procedures have remained guiding principles for treaty-making and land surrenders since 1763.

Over the past three hundred years, British and later Canadian governments have entered into various treaties with First Nations. Through many of these agreements, First Nations surrendered their interest in the land in exchange for one-time or ongoing benefits, ongoing rights and reserve lands. This allowed for the peaceful settlement and development of much of Canada.

In 1876, the Government of Canada passed the ***Indian Act***. The ***Act*** gave the government responsibilities over many aspects of the lives of First Nations. It covers the management of assets and reserve lands, including those lands provided to First Nations through treaty-making.

In a general sense, First Nations' "***specific claims***" arise from the failure of the federal government to live up to its legal obligations originating with historic treaties, the ***Indian Act*** or other formal agreements between First Nations and the Crown. There is another type of claim in Canada, called comprehensive claims or modern treaties; unlike specific claims, these claims relate to Aboriginal rights and title and arise in areas of Canada where Aboriginal land rights have not been dealt with by treaty or through other legal means.

WHERE CLAIMS COME FROM

The relationship between Aboriginal and non-Aboriginal peoples in Canada began centuries ago, at the time of first contact between the two groups. Since the early 1700s, British and later Canadian governments have entered into treaties with different First Nations across the country often to purchase, or have Indian lands ceded, to the Crown. Additional federal obligations arose in 1876 when the *Indian Act* was passed. Among other things, the *Act* made the Crown responsible for managing reserve lands and certain monies belonging to First Nations.

Over time, this historic relationship has been put to the test. There have been instances in which the Crown has not fulfilled its treaty obligations or has mismanaged First Nation funds or other assets. First Nations, like all Canadians, expect their legal rights to be respected and upheld.

The past cannot be changed, but yesterday's injustices can be corrected. Canadians' commitment to justice demands that these legal obligations are discharged and our outstanding debts to First Nations paid in full.

THE CASE FOR TAKING ACTION

The Government of Canada is accountable for legally-binding treaties and agreements signed by previous governments between the Crown and First Nations and has a duty to honour past commitments made with First Nations. Centuries may have passed since a treaty was signed, but this does not diminish Canada's obligation to keep its promises.

There are two ways to settle these issues – through negotiation or litigation. First Nations are free to choose either option as both processes are always voluntary. However, legal challenges can be divisive and divert money that could be better spent in communities than in the courts.

The Government of Canada prefers to resolve claims by negotiating settlements with First Nations. In contrast to litigation, negotiated settlements are jointly developed by the parties working together to ensure fairness for all. 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.

BENEFITS FOR ALL CANADIANS

To honour its outstanding obligations, Canada negotiates settlements with First Nations and, in some cases, the province or territory. Negotiated settlements provide First Nations with financial compensation for past damages. Sometimes these settlements include money to purchase land to replace land improperly taken from a First Nation. In all cases, First Nations, in return for this compensation, provide Canada with releases that ensure the claim can never be re-opened.

This certainty brings benefits to First Nations, governments, industry and area communities. A key obstacle to the growth of First Nation businesses is acquiring the investment and loan capital that companies need to prosper. With confusion over land or resource ownership removed, the door is open to expanded opportunities, including joint ventures with non-Aboriginal businesses. Land-related settlements also bring closure for non-Aboriginal people who live or work on lands subject to a claim. Settled claims enable First Nations and all investors to proceed with confidence.

Through settlements, First Nations receive new funds to invest in areas that produce tangible improvements in the lives of their members – whether training to create career options for young people, residential housing and other community infrastructure, or economic development opportunities. What is good for First Nations is also good for their neighbours. Economies are not bound by geography or identity. Vibrant First Nation economies generate a wealth of social and economic benefits that spill over into neighbouring communities, creating greater prosperity for all Canadians.

Ultimately, righting past wrongs is simply the right thing to do. Settling claims helps Canadians come to terms with our history while bringing closure to longstanding grievances for First Nations. Most important, it fosters better relations among First Nations and other Canadians, so we can move forward together to realize a better, shared future.

There are currently nearly 800 outstanding claims in Canada, with roughly 630 of these stuck in bottlenecks at the front end of the system. Since 1973, about 282 specific claims have been resolved through negotiated settlements. Canada's contribution to these settlements has ranged in value from $15,000 to $125 million, with an average settlement value of $6.5 million. At present, 123 specific claims are under negotiation.

Foundations of the Specific Claims Policy

A "specific claim" is a claim made by a First Nation against the federal government relating to the non-fulfillment of an historic treaty or the mismanagement of First Nation land or other assets. Only claims submitted by First Nations are covered by this policy. The government recognizes that a specific claim exists when a First Nation establishes that the Crown has a lawful obligation because it has:

- failed to uphold a treaty or other agreement between First Nations and the Government of Canada
- breached the *Indian Act* or other statutory responsibility
- mismanaged First Nation funds or other assets
- illegally sold or otherwise disposed of First Nation land

Program principles

- First Nation participation in the process is completely voluntary.
- Before a claim can be accepted for negotiation, the claim must show that Canada has an outstanding lawful obligation.
- Once a claim is accepted for negotiation, any eventual compensation is based on established legal principles and supported by facts that can be verified, as needed, such as land appraisals or loss of use studies.
- The interests of third parties have to be taken into account during negotiations. Private property is not on the table, nor are private property owners asked to sell their land unwillingly. If land changes hands, this can only happen on a willing-seller/willing-buyer basis.
- Negotiations lead to "win-win" situations that balance the rights of all Canadians; they ensure that settlements lead to a just resolution of First Nations' claims and are fair to all parties.

Specific Claims JUSTICE

THE CHALLENGES

Specific claims deal with events that need to have taken place at least 15 years prior to the First Nation submitting their claim; however, they often relate to exceptionally old events – sometimes dating back centuries. As a consequence, it can be very difficult to establish the facts, a process that is both time consuming and costly. It can also be challenging to establish the current financial value of lost assets or usage of land, factors considered in deciding a reasonable settlement.

The resulting delays in resolving these longstanding grievances, coupled with the original failure to fulfil past commitments, have increased frustration among First Nations. They question the fairness of a system where the government is defendant and judge deciding on the legitimacy of claims. They complain, too, about the current lack of transparency in public reporting to judge the validity of their criticisms or gauge just how well the government is handling specific claims.

Another frequent complaint relates to limited human and financial resources – something public reports currently fail to shed light on – to fix the many problems in the system. The specific claims program has come under enormous pressure, with the number of claims in the federal system doubling between 1993 and 2006.

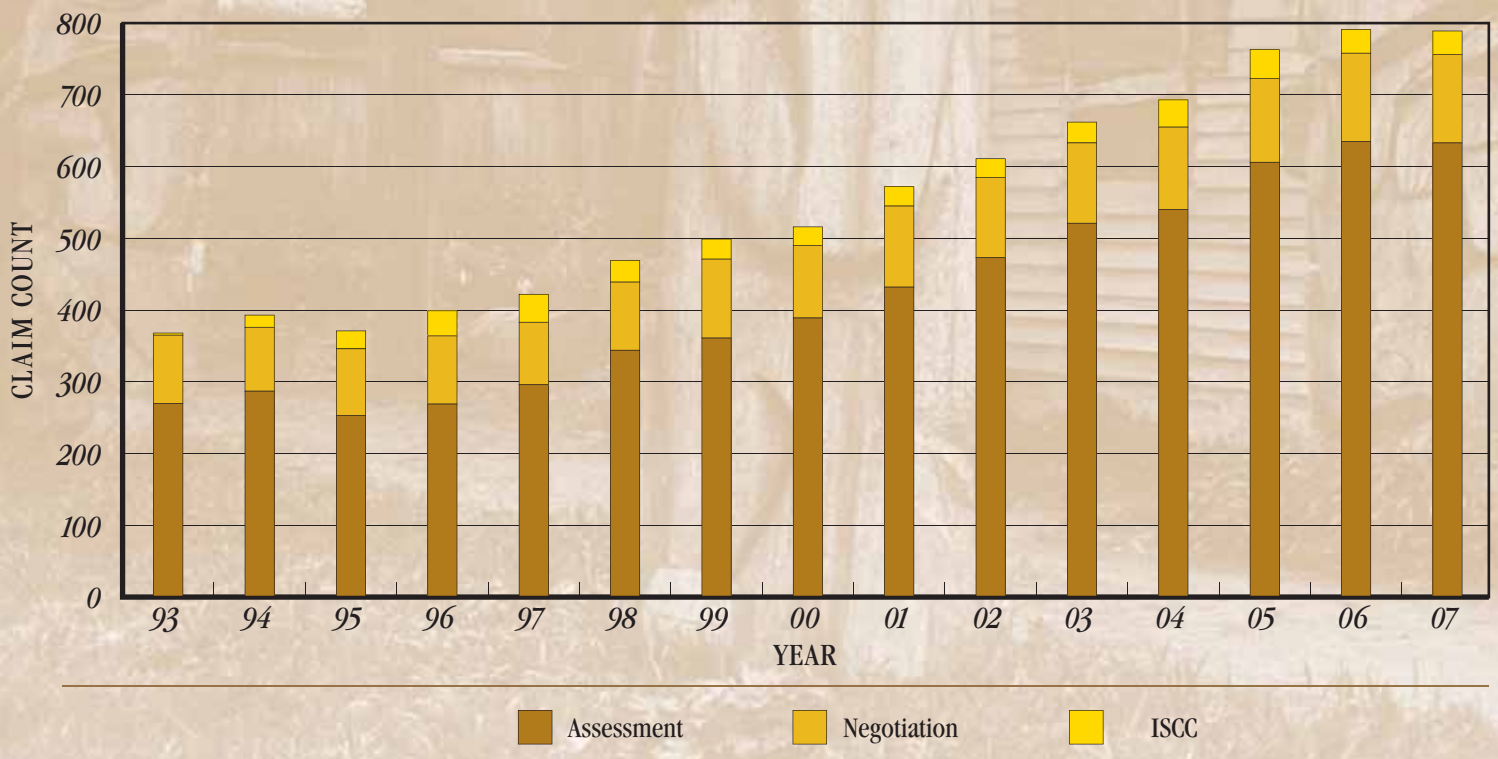
There is a logjam of claims stuck in the system awaiting attention and action. About 70% of unresolved claims are bottlenecked at the front end of the process at the assessment stage.

The average processing time for a claim is now approximately 13 years. Since two times more claims are submitted each year than are resolved, the inventory and backlog continue to grow. This has led to repeated calls from all quarters for more resources to speed up the process.

A further issue demanding urgent attention is the need to keep pace with current trends in dispute resolution. Success at the negotiation stage does not depend on Canada alone. It requires finding common ground between the partners at the table. Mediation and arbitration services are often helpful in settling disputes. However, they are frequently unavailable or under-utilized in stalled negotiations.

All of these problems have been long discussed and well-documented, most recently in *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* in 2006.

GROWTH OF SPECIFIC CLAIMS IN FEDERAL SYSTEM: 1993-2007



AT LAST

The current specific claims process

The present process begins when a First Nation formally submits its claim, including its legal arguments in support of the claim, to Canada. A complete and thorough assessment is then conducted by Canada, including a legal review by its legal advisors in the Department of Justice. Claims are accepted for negotiation when Canada concludes that it owes an outstanding lawful obligation to a First Nation.

If an outstanding lawful obligation is found and damages are owed, Canada offers to negotiate a settlement with the First Nation. As a first step, Canada and the First Nation generally negotiate a Protocol Agreement. This creates a framework for negotiations and a process for information-sharing.

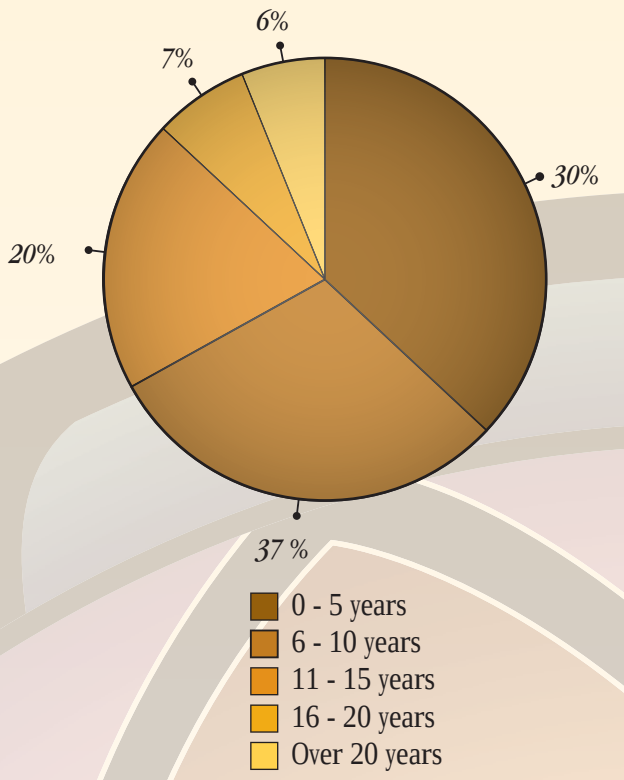
The negotiators then develop a work plan. They also need to agree how to determine the amount of compensation that will be paid to the First Nation when the claim is settled. Studies on economic losses caused by the claim are often done to help negotiators start discussions on how much compensation would be fair to resolve the claim.

Once the parties reach a consensus, the text of a legal agreement is drafted and then submitted to a vote by the First Nation. Following a favourable vote and approval by Canada, the settlement becomes legally binding on the parties. The final step is to implement the settlement. This includes the payment of cash and, in some cases, the transfer of land, as appropriate.

If a lawful obligation is not found and the claim is rejected by Canada, the First Nation can refer its claim to the Indian Specific Claims Commission (ISCC) to conduct an independent review of the government's decision. If requested, the Commission can also provide mediation services to help Canada and the First Nation reach an agreement. While this body does important work, the ISCC does not have the power to make binding decisions. Alternatively, the First Nation can pursue its claim through the courts.

DURATION OF SPECIFIC CLAIMS PROCESSING

First Nation, ISCC and Canada



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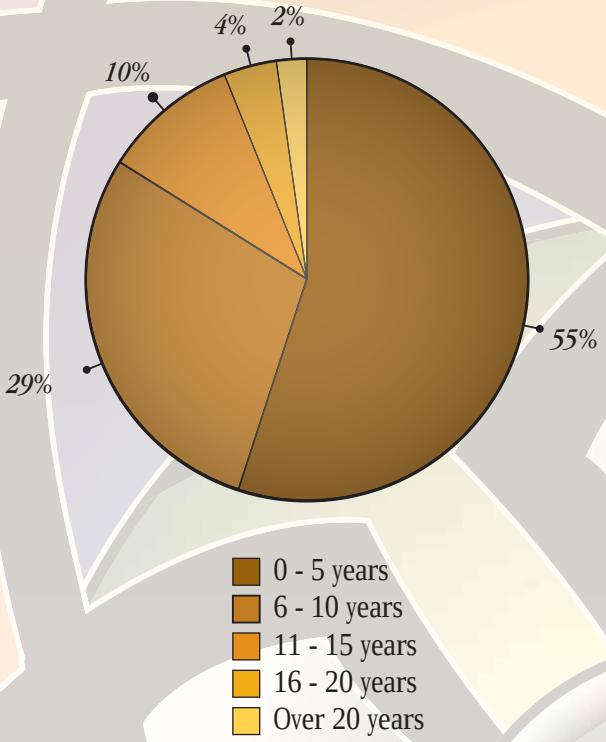
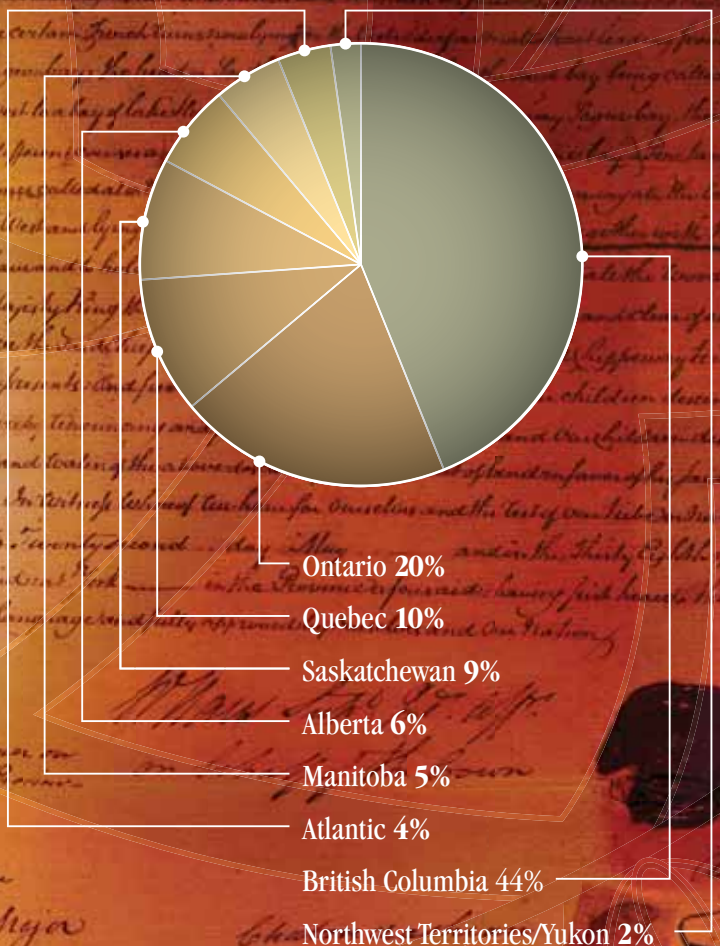


Charts include times for assessment and negotiation.

Specific Claims

LOCATION OF SPECIFIC CLAIMS ACROSS CANADA



Close, but not close enough

1947 - Special Joint Committee of the Senate and House of Commons recommends the creation of an Indian claims commission

1950 - John Diefenbaker, Opposition leader, argues for an independent claims commission

1961 - A Joint Committee of the Senate and House of Commons calls for an Indian claims commission

1965 - Legislation to establish an Indian claims commission dies on the order paper

1973 - Canada's Specific Claims Policy established to assist First Nations in addressing their claims through negotiations with the government as an alternative to litigation. The policy was clarified in 1982 with the publication of ***Outstanding Business: A Native Claims Policy, Specific Claims*** wherein Canada commits to uphold its responsibilities to *Indian Act* bands when treaty or other legal obligations have not been honoured

1979 - An unpublished report prepared for Canada cites "conflicting duties" in the federal government's involvement in claims settlements and recommends an impartial, independent body be established

AT LAST

1983 - The 'Penner' report calls for a quasi-judicial process for managing failed negotiations and the neutral facilitation of negotiated settlements

1990 - The House of Commons Standing Committee on Aboriginal Affairs report highlights proposals for an independent claims body. A joint Canada-First Nations working group looks at creating a permanent, legislated entity with tribunal-like powers

1991 - Indian Specific Claims Commission created

1996 - Royal Commission on Aboriginal Peoples recommends an Independent Lands and Treaties Tribunal be established to replace the ISCC

1998 - Joint First Nations-Canada Task Force on Specific Claims Policy Reform recommends an independent commission to assess claims as well as a tribunal to assist in resolving disputes

2003 - Bill C-6, the ***Specific Claims Resolution Act***, receives Royal Assent; it would allow binding decisions on the validity of claims and compensation amounts valued at up to $10 million, but is rejected by First Nations and never implemented

Specific Claims

TAKING ACTION ON OUTSTANDING BUSINESS

This situation cannot be allowed to deteriorate further. It is unacceptable that, in the 21st century, hundreds of grievances dating back hundreds of years remain unsettled. This outstanding business does a disservice to all concerned.

To rectify this situation, Canada will re-engineer the system and retool the specific claims process to contemporary standards. The federal action plan will accelerate the resolution of specific claims, providing justice to First Nation claimants and certainty for all Canadians.

Specific Claims: Justice At Last offers a complete package that includes all of the elements essential to address First Nations' historic grievances. The *Specific Claims Action Plan* is fair, transparent, efficient and respectful.

The new tools and structures respond to First Nations' concerns as well as the key recommendations in the Senate Committee's report. They build on the lessons learned from experience and are shaped by past consultations with First Nations and other key stakeholders.

HIGHLIGHTS OF CANADA'S *SPECIFIC CLAIMS ACTION PLAN:*

- *creation of an independent tribunal to bring greater fairness to the process*
- *more transparent arrangements for financial compensation through dedicated funding for settlements*
- *practical measures to ensure faster processing on smaller claims and more flexibility for extremely large claims*
- *refocusing the work of the current Commission to make better use of its services in dispute resolutions once the new tribunal is in place*

Specific Claims: JUSTICE AT LAST

Canada's comprehensive Action Plan on specific claims has four interdependent pillars:

1) Impartiality and fairness: An Independent Claims Tribunal

Although negotiations will always be the first choice, Canada will create an independent tribunal that can make binding decisions where claims are rejected for negotiation or when negotiations fail. This was one of the main recommendations in the report of the Standing Senate Committee on Aboriginal Peoples. The independent tribunal will be made up of retired or sitting judges. These judges will have the necessary experience, capacity and credibility to examine historical facts and evidence and to address complex legal questions surrounding Canada's legal obligations and determine appropriate levels of compensation.

There are three scenarios in which a First Nation could file a claim with the tribunal:

- when a claim is not accepted for negotiation by Canada;
- in cases where all parties agree that a claim that has already been accepted should be referred for a binding decision; or,
- after three years of unsuccessful negotiations.

In the first scenario, the tribunal would look strictly at questions of history and law to determine whether Canada has an outstanding lawful obligation under the Specific Claims Policy. Under the latter two scenarios, the tribunal would apply a rigorous process to establish how much monetary compensation is owed to the First Nation. In all cases, these interventions will bring greater fairness to the process while accelerating the settlement of outstanding claims.

Decisions of the tribunal would not address claims valued at over $150 million, land or resources, punitive damages, cultural and spiritual losses, or non-financial compensation. Nor would they be binding on other levels of government, although provincial/territorial governments would be free to participate on a voluntary basis. Once operational, the tribunal will issue periodic reports to keep governments, legislatures and taxpayers up to date on its activities.

2) Greater transparency: Dedicated Funding for Settlement

New funding arrangements will be put in place that are more transparent and which better meet the needs of the revamped program. Finding information about spending on specific claims is not easy the way proposed spending has been presented to Parliament and others. This makes it difficult for interested Canadians to determine how well the government is handling claims or even whether adequate funding is available.

Substantial and visible funding dedicated to specific claims settlements will address this lack of transparency. This will underscore Canada's commitment to honour its outstanding debts to First Nations.

There would be two triggers for authorized payments, which would have an upper limit of $250 million per year or $150 million per settlement:

- jointly approved specific claims settlements; or
- tribunal decisions.

To hold government to account, explicit targets will be set for resolving outstanding claims and results of these efforts routinely reported so Canadians can judge for themselves whether government is delivering on its commitment to resolve outstanding specific claims.

Specific Claims: JUSTICE AT LAST (cont.)

3) Faster processing: Improving internal government procedures

To complement the work of the new tribunal, changes will be made to improve INAC's internal processes.

The goal is for all new claims to receive a preliminary assessment within six months to identify those that qualify for negotiation and to sort them for faster processing. Similar claims will be bundled at the research and assessment stages to speed up decisions regarding their validity. Small value claims will undergo an expedited legal review to quickly conclude whether they will be accepted for negotiation.

There will be a streamlined approach to processing in order to better address the diversity and complexity of specific claims. Special efforts will be made to negotiate small value claims – which account for about 50% of cases now in the system – more quickly.

Separate arrangements will be established outside the specific claims process to handle larger claims, valued at $150 million or more. These relatively rare, but more difficult, claims bog down the system due to their size and complexity. Removing them from the specific claims process and dedicating separate resources to these files will speed up the processing of remaining claims.

Greater use will be made of existing data bases and other easily accessible research sources to support the early review process. This will also help to accelerate claims settlements.

4) Better access to mediation: Refocusing the work of the current Claims Commission

Every reasonable effort will be made to achieve negotiated settlements and cases would only go to the tribunal when all other avenues have been exhausted. Before that happens, Canada and First Nations must have somewhere to turn when negotiations sour. Mediation is an excellent tool that can help parties in a dispute to reach mutually beneficial agreements. Canada recognizes that this tool should be used more often in stalled negotiations and is committed to increasing its use in the future.

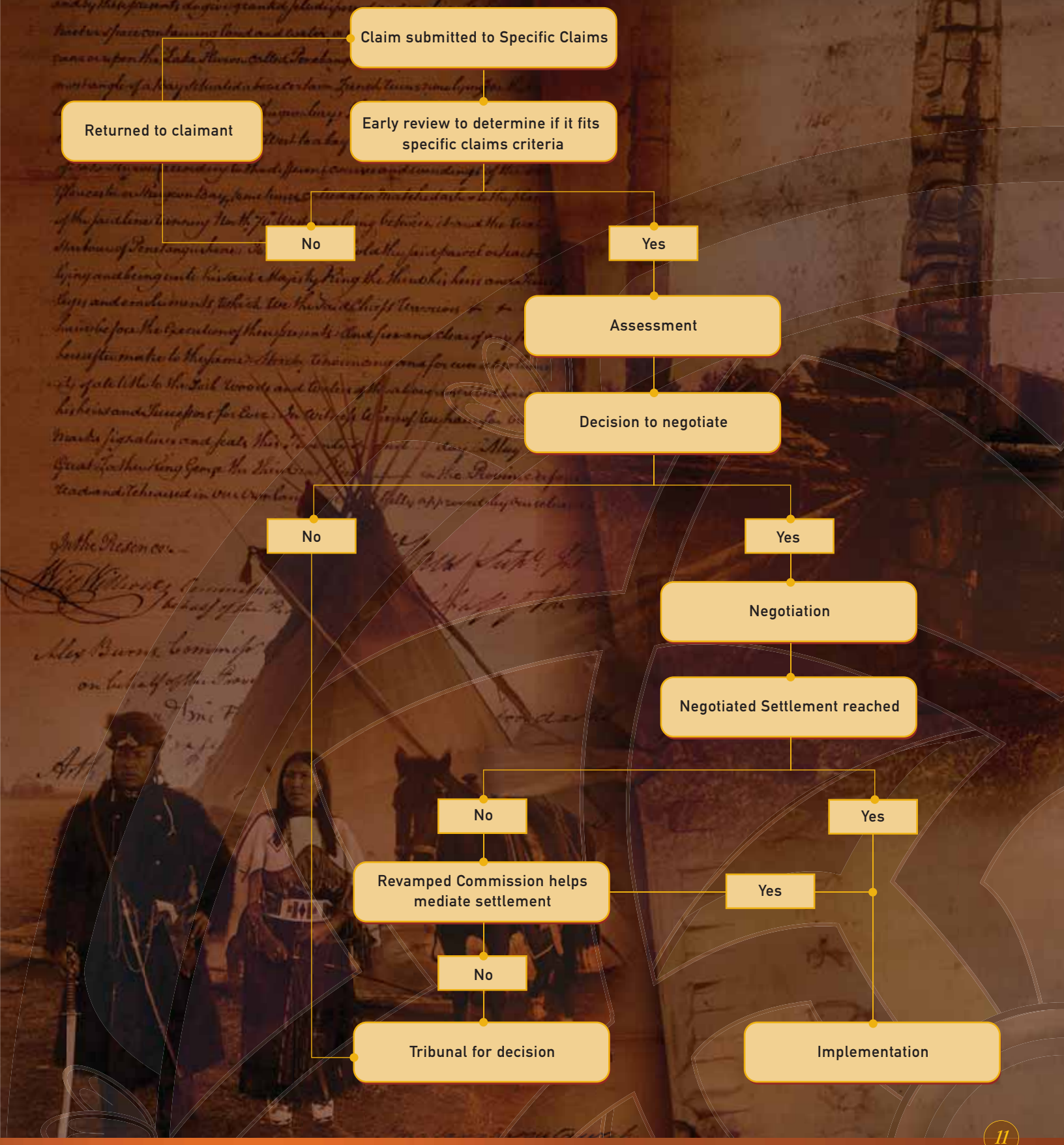
The Indian Specific Claims Commission has been of assistance to Canada and First Nations over the years, providing valuable facilitation and mediation services. Once the new tribunal is in place, it will be important not to lose the Commission's experience and expertise in this crucial area.

To make sure this doesn't happen, the ISCC will no longer conduct any new inquiries into claims that have been rejected. Its mandate will be changed to focus exclusively on resolution services. These services can help Canada and First Nations in overcoming impasses at all stages of the process. As a neutral third party, the revitalized Commission would only consider claims as defined by the Specific Claims Policy.

A transition plan will be developed to ensure that work presently underway by the current Commission can be properly completed in the coming year, if that is the wish of the First Nation with the rejected claim.

AT LAST

NEW SPECIFIC CLAIMS PROCESS:



RETAINING WHAT ALREADY WORKS

While these major changes will dramatically improve the specific claims process, the fundamental principles of the Specific Claims Policy will not change. The Government of Canada reaffirms that negotiation remains its preferred method to settle claims, as this is invariably more effective than confrontation and adversarial approaches.

The test of confirming an outstanding lawful obligation – the core of the current policy – is an appropriate measure by which Canada can determine the debt it owes to First Nations. This approach provides an objective measure that ensures fairness for all.

The Government of Canada also continues to depend on willing partners to make this plan work. The federal government does not have exclusive jurisdiction over these issues or sole liability for specific claims. Almost all pre-Confederation claims and those south of 60 involve Crown lands. Under Canadian law, the provinces are the owners of most Crown lands. As well, since provinces and municipalities make many of the development decisions that impact lands that may be the subject of specific claims, they need to be a part of this process.

Ultimately, resolving this outstanding business is a national problem which requires a national solution that is in the national interest.

NEXT STEPS

Over the summer of 2007, discussions will take place between federal officials and First Nation leaders as work to implement these changes proceeds. Discussions will focus on transforming the Indian Specific Claims Commission and on shaping the legislation intended for introduction in Fall 2007.

As there have been numerous studies and extensive consultations with First Nations on these issues in the past, the goal is to conclude these discussions quickly so legislation can be brought forward in the fall of 2007. A work plan will be developed to move forward on the changes and ensure a smooth transition to the new system during the coming year.

MOVING FORWARD

This Action Plan is the first step in an ongoing process to reform the specific claims program to resolve these longstanding issues for all time.

The immediate priority is to bring justice to First Nation claimants with legitimate grievances and certainty to government, industry and all Canadians. By ensuring impartiality and fairness, greater transparency, faster processing and better access to mediation, this plan will achieve the objective of restoring confidence in the integrity and effectiveness of the system to resolve specific claims. Equally important, as Canada fulfils its lawful obligations to First Nations and eliminates the backlog in the system, taxpayers will be relieved of this outstanding debt.

Over the longer term, the Government of Canada is committed to working with First Nations to develop other options to further enhance the process. A five-year review is envisioned to assess progress and make ongoing improvements to the system as required.

It is in the best interests of all Canadians to bring closure to First Nations' grievances and put the mistakes of the past behind us. In doing so, we can move forward together in a spirit of partnership and put our joint energies into building a better future.

If you wish to get more information on this initiative or to share your views on related implementation matters (such as refocusing the work of the current Commission and/or improving information sharing on specific claims in general), please contact us at:

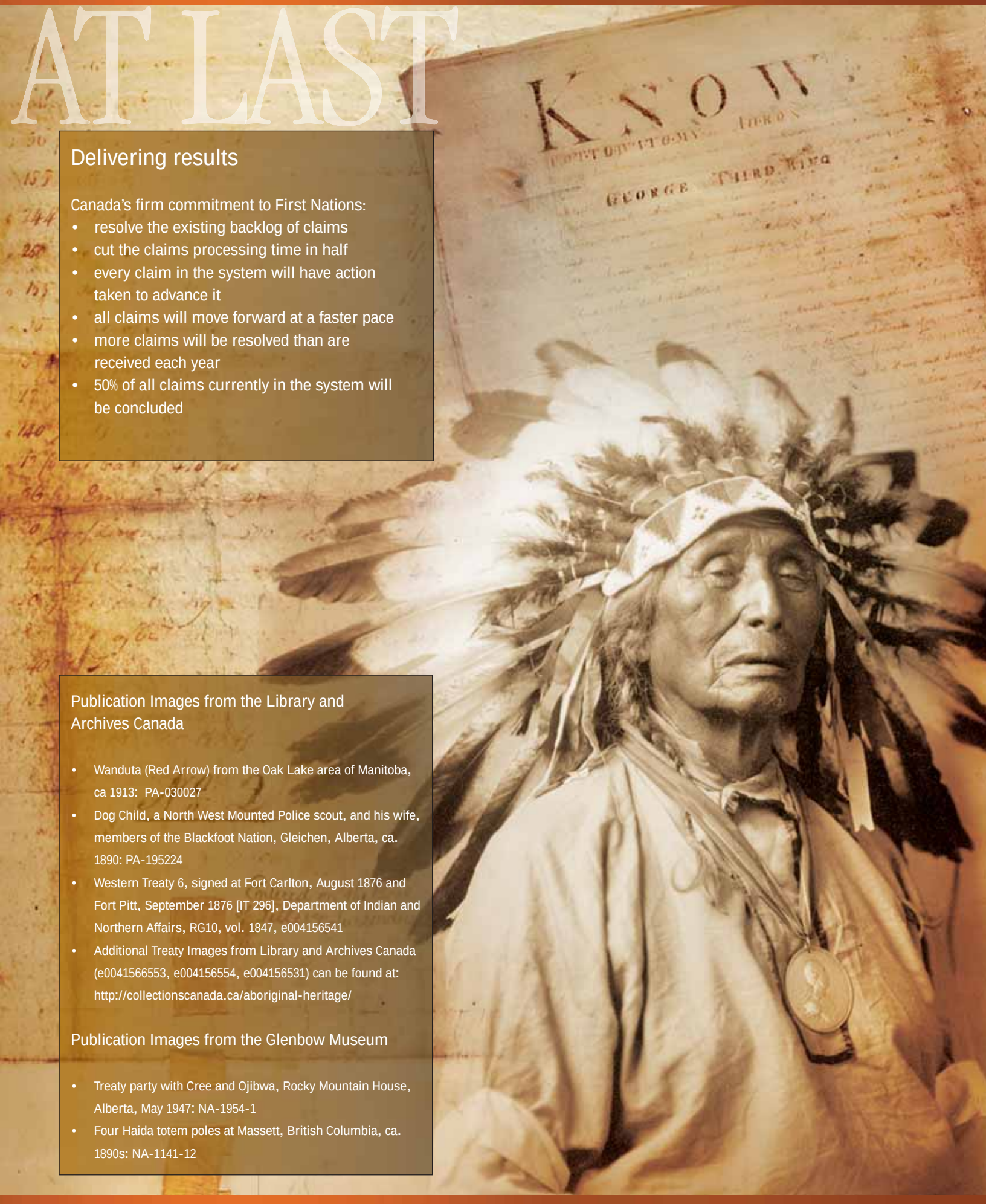
Indian and Northern Affairs Canada
10 Wellington Street, Room 1660
Gatineau, QC K1A 0H4
E-mail: engagement@ainc-inac.gc.ca
Web: www.ainc-inac.gc.ca
Toll free number: 1-800-567-9604
TTY (toll free): 1-866-553-0554

AT LAST

Delivering results

Canada's firm commitment to First Nations:

- resolve the existing backlog of claims
- cut the claims processing time in half
- every claim in the system will have action taken to advance it
- all claims will move forward at a faster pace
- more claims will be resolved than are received each year
- 50% of all claims currently in the system will be concluded



Publication Images from the Library and Archives Canada

- Wanduta (Red Arrow) from the Oak Lake area of Manitoba, ca 1913: PA-030027
- Dog Child, a North West Mounted Police scout, and his wife, members of the Blackfoot Nation, Gleichen, Alberta, ca. 1890: PA-195224
- Western Treaty 6, signed at Fort Carlton, August 1876 and Fort Pitt, September 1876 [IT 296], Department of Indian and Northern Affairs, RG10, vol. 1847, e004156541
- Additional Treaty Images from Library and Archives Canada (e0041566553, e004156554, e004156531) can be found at: http://collectionscanada.ca/aboriginal-heritage/

Publication Images from the Glenbow Museum

- Treaty party with Cree and Ojibwa, Rocky Mountain House, Alberta, May 1947: NA-1954-1
- Four Haida totem poles at Massett, British Columbia, ca. 1890s: NA-1141-12