

## Fraser Institute: Property Rights for Everyone, Just not Indians

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**IT'S ALWAYS INTERESTING TO READ** what Tom Flanagan has to say about First Nations, if only because no one can accuse him of using a dog whistle—his views are clear and plain. The most recent article, “*Specific Claims and the Well-being of First Nations*”, released on June 21st—National Indigenous Day, no less—is a case in point.<sup>1</sup> Unfortunately, for a subject that is deserving of informed debate, Mr. Flanagan’s analysis relies on incorrect assumptions and incomplete information, which may well mislead. This short article will attempt to provide a partial antidote.

What is a Specific Claim? A Specific Claim basically relates to federal mismanagement of First Nation lands or assets. The reason why these claims exist is because, as a result of legislation and policy (including the Indian Act), the federal government took control of all aspects of the management and disposal of First Nation lands and assets.<sup>2</sup> First Nations had no choice in the selection of their trustee, and no oversight. And government made a mess of it, which has been well documented, with examples to be found across the country, from pre-Confederation days right up to the present.

In some cases, elected officials and federal bureaucrats worked together to appropriate First Nation assets for their own personal gain.<sup>3</sup> Other times it was just incompetence or indifference that led to the loss or degradation of First Nation assets.

**Regardless of the cause, the result has been the widespread stripping and diminishment of First Nation assets through time which, together with other measures (such as the residential schools), has contributed to the impoverishment and marginalization of First Nations.**

According to Mr. Flanagan, Specific Claims are only notionally based, with an elastic definition, intended to allow greedy First Nations and a compliant federal government to milk the treasury, as a means of salving white guilt.

In fact, Specific Claims are legal obligations of the government of Canada which must meet rigorous factual and legal tests before they are entertained, let alone settled. And they are based on clear definitions, which include:

- A failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
- A breach of a legal obligation of the Crown under the Indian Act or any other legislation pertaining to Indians or lands reserved for Indians;

- A breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands;
- An illegal disposition by the Crown of reserve lands;
- A failure to provide adequate compensation for reserve lands taken or damaged by the Crown;
- Fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.<sup>4</sup>

These are not imaginary grievances. In fact, they are real enough that the federal Public Accounts carry a contingent liability of \$5.3 billion solely for the Specific Claims of which Canada is aware.<sup>5</sup> This will give readers an idea of the magnitude of the problem.

One would think that Mr. Flanagan would be all for the sanctity of property rights, the protection of the citizenry from arbitrary state action, and the right of due process. But apparently not when it comes to First Nations.

**It's perverse to suggest, as Mr. Flanagan does, that First Nations should be suspect, or even blameworthy, simply because they seek to recover assets that have been unlawfully or fraudulently taken or withheld by government.**

Contrary to what the article implies, the Specific Claims process itself is not a cakewalk. Once received by Canada, claims are subject to factual verification, counter-research, legal review and risk assessment. They are not accepted for negotiation unless the Department of Justice determines that if it went to court, the Crown would likely lose, and potentially lose big. An example of the latter can be found in the recent settlement negotiations related to the 1923 Williams Treaty, where \$1 billion is on the table.<sup>6</sup>

Mr. Flanagan looks at the increasing volume of claims being filed and suggests that it is a result of opportunism.

**Another way of looking at those numbers is that they are simply evidence of the massive scale and scope of federal mismanagement. It's like a forensic audit of a corrupt organization: the more you look, the more you find.**

In this light, it seems rather uncharitable to blame First Nations for trying to uncover the true extent of the mismanagement of their assets, and to seek redress.

As for the benefits of resolving Specific Claims, it's difficult to recall anyone suggesting that this alone would solve the many challenges facing First Nations today. The economic and social damage experienced by First Nations has been so profound that there is no one solution and it won't happen overnight. In this context, resolving Specific Claims are simply one part of the mix of measures that are required—and an important one, since they help to restore their assets of land and capital.

It is true that there is little in the literature assessing Specific Claims from an economic perspective. In the mid-1990s there was a series of studies which tried to identify the potential economic benefits of settling claims, but none of them were definitive. For our purposes, the most relevant finding came from a study on Comprehensive Claims settlements prepared for the BC and federal governments in 1995, which concluded that "Evidence of settlement benefits has, in virtually all cases, taken some time to become apparent and sometimes appears in forms that are not initially anticipated."<sup>7</sup> This is also true of Specific Claims.

Applying a strictly quantitative analysis does not provide a clear picture of the benefits of resolving claims, and the Community Well Being Index (CWB) is not necessarily the best measure to use, as Flanagan does.<sup>8</sup> The CWB tracks per capita income, education, housing and labour force participation, but does not take into account other factors, such as land base, cultural integrity and health.

Individual First Nations take different approaches and have differing expectations regarding claims settlements.<sup>9</sup> Often claims settlements are structured so that a portion of the proceeds are distributed on a per capita basis, with the remainder divided between land acquisition, economic development, cultural renewal and other community priorities. Anyone who thinks that First Nations are profligate when it comes to the management of settlement proceeds would do well to take a close look at real-world examples.

One also needs to consider the significant benefits which go to surrounding non-Indigenous communities when a claim is settled: lands purchased from third parties, building materials, increased purchase of goods and services, etc.

The question of benefit—short and long term—is an important area for further study and discussion, calling for the development of accurate tools which provide qualitative, as well as quantitative measures.

Regarding Mr. Flanagan's conclusion that there needs to be a time limit imposed on the resolution of Specific Claims, this would have the result of denying due process. As explained, it takes time to document and negotiate or adjudicate these claims. The actions which gave rise to Specific Claims occurred over the course of the past century and a half.

**In this context, it is not surprising that it will take longer than 40 years to resolve them, particularly if the process is to be evidence-based and not just a giveaway.**

And the process of resolving claims is itself evolving, as it should, in an effort to provide an effective and equitable remedy, and an alternative to the costs and delays inherent in the courts.

Ironically, it was the Harper government—which Flanagan had various roles in—that did much to frustrate the resolution of Specific Claims during its years in power, notwithstanding Jim Prentice's success in getting the Specific Claims Tribunal Act adopted. Some call it “the lost decade”. These efforts are well-documented and went far beyond the budgetary curbs imposed to achieve deficit reduction—including measures such as a refusal to employ mediation or spiking the rejection rate.<sup>10</sup>

In the end, all parties have a responsibility to try and ensure that these matters are dealt with fairly and expeditiously. But the starting point needs to be a recognition of the legitimacy of First Nation property rights, the protection of First Nations from arbitrary state action, and the right of redress via due process.

## ENDNOTES

- <sup>1</sup>Tom Flanagan, *Specific Claims and the Well-being of First Nations* (Fraser Institute, 2018)
- <sup>2</sup>Hence the application of fiduciary principles to many First Nation claims. *Guerin v. The Queen* (1984). [1984] 2 SCR 335. <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do>>
- <sup>3</sup>For an excellent review of the rapaciousness of the Laurier Liberals on the prairies, see Peggy Martin-McGuire, *First Nation Land Surrenders on the Prairies, 1896-1911* (Ottawa: Indian Claims Commission, September 1998).
- <sup>4</sup>Canada, *The Specific Claims Policy and Process guide* (Ottawa: IAND, 2009)
- <sup>5</sup>Canada, *Public Accounts, 2017, Vol 1, Section 2, Consolidated Financial Statements of the Government of Canada and Report and Observations of the Auditor General of Canada, Note 6*. There is another \$5.2 billion set aside for contingent liabilities related to unextinguished Aboriginal title (“Comprehensive claims”), and an additional \$9.3 billion for other claims and litigation (some, though not all of which are First Nation related).
- <sup>6</sup>“Williams Treaties First Nations vote to approve \$1.1 billion settlement proposal”, *Toronto Star*, 27 June, 2018.
- <sup>7</sup>ARA Consulting Group, “Social and Economic Impacts of Aboriginal land Claim Settlements: A Case Study Analysis - Final Report” (December 1995 - Prepared for BC Ministry of Aboriginal Affairs & Federal Treaty Negotiation Office): p. 10.
- <sup>8</sup>The Auditor General of Canada has found that “Indigenous Services Canada’s main measure of socio-economic well-being on reserves, the Community Well-Being index, was not comprehensive. While the index included Statistics Canada data on education, employment, income, and housing, it omitted several aspects of well-being that are also important to First Nations people—such as health, environment, language, and culture.” See Section 5.17: [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201805\\_05\\_e\\_43037.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_05_e_43037.html)
- <sup>9</sup>ARA Consulting Group, “Social and Economic Impacts of Aboriginal land Claim Settlements: A Case Study Analysis - Final Report” (December 1995 - Prepared for BC ministry of Aboriginal Affairs & Federal Treaty Negotiation Office): p 9.
- <sup>10</sup>Auditor General of Canada (2016). Report 6, *First Nations Specific Claims, Indigenous and Northern Affairs Canada*. <[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201611\\_06\\_e\\_41835.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html)> ; *In Bad faith: 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); Canada, *Specific Claims Tribunal Annual reports, 2010-2016*. <[http://www.sct-trp.ca/repor/annu\\_e.htm](http://www.sct-trp.ca/repor/annu_e.htm)> ; Assembly of First Nations, *Independent Expert Panel Report, “Specific Claims Review - Expert Based - Peoples Driven”* (15 May, 2015); *No Access, No Justice: Canada’s Implementation of Justice at Last and the Failure to Resolve Claims* (Joint Submission by Directors of Claims Research Units from Across Canada to the Performance Audit of the Specific Claims Action Plan (20 June 2016)