AFN – SPECIFIC CLAIMS REVIEW  
(Submission by David Knoll)

The following submission is in response to the request by AFN for contributions to the Expert Panel charged with holding hearings and receiving contributions for the development of recommendations to improve the Specific Claims process. These hearings are part of the five year legislative review of the Specific Claims Tribunal Act and Political Agreement.

SYNOPSIS

If the federal government is seriously committed to improve the effectiveness of the claim resolution process, as well as the Tribunal’s operations and mandate, including any expansion of its mandate as discussed in this submission, serious consideration must be given to providing First Nations, the Department and Tribunal with adequate personnel and financial resources to administer and conduct their affairs efficiently and effectively. Contrary to the federal government’s commitment under the much heralded Action Plan, the recent trend, it appears to me, has been to reduce the effectiveness and efficiency of the specific claims and Tribunal resolution processes through insufficient funding and personnel resources; through Departmental restrictions on negotiations and limited mandates; by consolidating administrative matters that compromises the Tribunals independence and by failing to provide sufficient superior court judges for the Tribunal to deal with an increasing case load. Unless this trend is reversed, the objective of the claims process to resolve claims through negotiation will be meaningless and, as the Tribunal warned in its last Annual Report, the operation of the Tribunal is headed for failure.

CONTEXT FOR THIS SUBMISSION

Government consideration of approaches to address historic grievances related to unfilled treaty promises or breaches thereof, including breaches of obligations arising from the administration of First Nation lands and assets date back to the 1940s and 1950s. The Special Committee of the Senate and House of Commons in 1947 and Joint Committee to review Indian Affairs policy in 1959 both recommended an independent tribunal or Commission to address these outstanding issues. Bill C-130 introduced in 1963 sought the establishment of commission to consider claims concerning the taking
of land and their disposal without compensation or unconscionable consideration, as well as failure to discharge treaty obligations and failure of the Crown to act fairly and honourably with the Indians.

With the introduction of the Specific Claims Policy in 1973 and the revised Policy in 1982, the Department noted arguments in favour of some supervisory role for a third party in the process due to criticisms of the inequity and conflict of interest whereby Justice and Office of Native Claims consider the historic and legal merits of claims brought against the Crown. Later in 1993, acknowledging concerns about this inequity, the Director General noted significant movement in the development of an independent claims process following the recommendations of a Neutral Party prepared by a Joint Working Group.

The Indian Claims Commission, during its tenure, made frequent recommendations in its Annual Reports for changes to the existing policy suggesting an independent claims process free from conflict of interest. The Royal Commission on Aboriginal Affairs recommended in 1996 the legislative creation of an independent federal tribunal with jurisdiction over the settlement of specific claims, including reviewing the adequacy of federal funding, monitoring the good faith of the negotiation process and making binding orders where there is a breach of a lawful obligation, including providing an appropriate remedy.

The federal government’s “Action Plan” in 1997 made a commitment, in part, to establish an independent claims body to be developed through a joint process. That Joint Task Force in 1998 proposed the establishment of an independent claims body composed of a Commission whose focus would be on the preparation, negotiation, funding, mediation and settlement of specific claims. This independent body would be also composed of a Tribunal of experts to make final determinations on issues of validation and compensation.

None of the federal commissions, standing committees, panels, task forces or reports that considered or recommended the establishments of an independent claims body, considered litigation as the preferred means of resolving specific claims. The government’s articulated policy objectives in 1981 was a rejection of tribunals, courts or arbitration as the preferred approach to settling claims. After considering the questionable success of these approaches in Australia, Greenland, New Zealand and
the U.S., Canada’s preference was a “negotiated process”. The 1982 specific claims policy pamphlet “Outstanding Business: A Native Claims Policy” emphasized that negotiation “was the preferred means of settlement by the government.”

To summarize, the focus of First Nations and government, including recommendations from various panels, commissions and reports leading up to the 2007 pronouncement of *Justice at Last: Canada’s Specific Claims Action Plan* and passage of the *Specific Claims Tribunal Act* in 2008, was to emphasize negotiations as the preferred means of resolving specific claims through some sort of an independent claims process.

**SPECIFIC CLAIMS PROCESS**

**Current Reality:**

The stated objectives of Canada’s *Action Plan*, articulated in *Justice at Last*, was to “retool the specific claims process in order to bring justice to First Nations and certainty to all Canadians”. It proposed to do this by resolving “historic grievances co-operatively through negotiation.” However, instead of establishing an independent administrative body to deal with both the claims process and adjudication of claims, the government merely created the Specific Claims Tribunal limited to determining of issues of validation and compensation. The Department retained jurisdiction over the processing of claims through a revised *Specific Claims and Process Guide* designed, it asserted, “to dramatically improve the specific claims process and reduce the backlog of specific claims.” The *Guide* emphasized that “negotiation remains the preferred means of settlement by the federal government.”

Given the stated objectives of the *Action Plan* and *Process Guide*, has the “retooled” process resulted in grievances being dealt with through more cooperative negotiations? Has the claims process “dramatically” improved and enhanced the processing of claims by eliminating barriers to negotiation? The reality, in my experience, is quite the opposite. In the province of Saskatchewan that I’m most familiar with, based on the Department’s own data, of the 70 outstanding claims since 2008 only 1% of the claims have been settled, seventy-two percent (72%) have been “concluded” either through rejection, file closings or litigation. Of those claims considered still in “negotiation” some have been
presented with “take it or leave it offers” or have been delayed years awaiting mandate approval. Any concept of meaningful and good faith negotiations has been undermined by funding cut backs to not only First Nations but also within the Department. Face to face negotiations have been basically eliminated due to travel restrictions and federal negotiators have limited mandates to negotiate anything beyond pre-determined compensation figures. No funding is made available to First Nations for negotiations except if a First Nation agrees to a settlement proposal. Mandates for settlement offers seem to be held hostage by political expediency. I believe these circumstances are similar in other provinces.

The current focus of claims resolution appears to be to punt validation or compensation issues, particularly difficult ones, to the Tribunal rather than resolve them through negotiation. Once the claim is before the Tribunal, instructions to Justice appear to be to litigate all the way with no option to negotiate or to examine alternative approaches to the resolution of an issue.

**Negotiation or Litigation:**

The sad irony is that while superior courts in Canada are encouraging the reconciliation of aboriginal claims through meaningful negotiated settlements. And while the Claims Policy, including past statements and priorities of the federal government on the best approach to the resolution of claims, has advocated and encouraged the settlement of claims through good faith negotiations, the opposite and more adversarial approach appears to be taking place. This is unfortunate because First Nations facing the opportunity to resolve longstanding historic grievances do not see litigation before the Tribunal, no matter how sensitive it is in the process to their culture, as the preferred and most desirable means of settling claims. The current specific claims process, in my view, appears to be gutted, through various administrative, financial and perhaps political means, of its original claims policy objectives. First Nation options appear to be more and more limited to actions before the Tribunal or regular courts, a claims resolution process repeatedly disapproved of by the federal government as the preferred approach.
**Funding Allocation:**

Currently funding for specific claim preparation and negotiations, as well as funding for proceedings before the Tribunal, is administered by funding services within the Department of Indian and Northern Affairs. With funding cut-backs it has been difficult for First Nations to access adequate funding to advance claims through the claims and tribunal process. This includes inadequate financial and, consequentially, inadequate personnel resources to efficiently and effectively process claims through the Specific Claims branch, as well as through Justice. With fewer resources available to First Nations to submit and negotiate claims and fewer resources within the Department to consider and determine validation and negotiate claims, the entire objective of the Policy and government’s Action Plan is subverted. The same applies to inadequate financial resources to proceed with claims before the Tribunal. If the federal government is serious about outstanding historic grievances being resolved through the specific claims and Tribunal process then significant attention needs to be paid to adequate funding of both.

The limited funding available for the submission and negotiation of claims should not be the source of funding for Tribunal proceedings as well, which appears to be the case. The small funding pie set aside for dealing with specific claims under the Policy should not be sliced up to fund proceedings and operations of the Tribunal as well. Separate and adequate funding needs to be provided for both.

**Minimum standards:**

Claims submissions are required to meet certain reasonable minimum standards under s.16(2) of the *Specific Claims Tribunal Act* in order for a claim to be filed with the Minister. The discretion of whether the claim submission has met the minimum standard is determined by the Specific Claims branch of the Department. The Department has given itself 6 months to make this determination. First Nations have found compliance with the minimum standard requirement to be excessively and unnecessarily onerous and costly, leaving the Department with the discretion to unilaterally determine what claims are filed or not filed with the Minister. Rather than being required to meet reasonable minimum standards, many First Nations have found they have been required to meet unreasonably
high standards in the filing of their claims. With claims funding cut back compliance with more rigorous expectations has proven difficult and costly to meet.

The Tribunal should be given the mandate to exercise some supervisory or monitoring role over the determination of whether a reasonable minimum standard has been met for a claim to be filed with the Minister. After all, these are the very claim submissions and supporting documents that might be later brought before them for a determination on the merits of a claim.

**Timelines:**

There are certain time periods and conditions set out under s.16(1) of the Act which have to be met in order for a First Nation to file a claim with the Tribunal. The three year time frame set for a determination by the Minister of whether a claim will or will not be accepted for negotiation, after which a claim may be filed with the Tribunal, is excessive, in my opinion. While a time frame might be reasonable with the resources available to the Government, both within the Department and Justice, however, it should not take them three years to consider the merits of a claim.

As for the three year negotiation period for a settlement to be reached, after which, if unsuccessful, the issue of compensation can be brought before the Tribunal, this is unnecessary under the circumstances where pre-determined offers are made by Canada on a “take it or leave it” basis - where no negotiations actually take place – or where the parties have reached an impasse within the three year period. Section 16(1)(d) should be amended to read that a claim can be filed with the Tribunal at any time during the three year negotiation period where negotiations have reached an impasse.

Finally, the three year period or any revised period, particularly on complex claims, should not be the be all and end all of the Department’s consideration. If the Minister is close to a decision on whether or not to accept a claim for negotiation, the parties should be able to agree to extend the time period before consideration of whether to proceed to the Tribunal.
Validation of Claims for Negotiation:

The claims process and consideration of whether to accept claims for negotiation remains with the Department rather than an independent body so the conflict of interest, that was of concern by previous commissions, standing committees, Joint Task Forces and reports, remains. Although I remain a strong proponent of an independent claims resolution process, it is unlikely that this will be established in the near future. With funding and personnel cut-backs within the Department, as well as for claims preparation and negotiation, one can speculate that specific claims might be actually phased out in the not to distant future rather than improved, much less administered by an independent claims body. There appears to be no federal appetite to improve the efficiency and effectiveness of the specific claims process. Any efforts at improvement appear directed at the Tribunal.

Any recent letters from the Minister accepting claims for negotiation have a clear focus on potential litigation with an eye on Tribunal proceedings. Letters now come not only “without prejudice” but with clear notice that if negotiations fail the acceptance letter cannot be used before the Tribunal. The explanation is that the letter is protected by settlement privilege. Two of the pre-conditions for filing with the Tribunal are evidence under s.16 of the Act that the Minister has either notified the First Nation in writing that his decision is not to negotiate a claim or three years have elapsed from the time the Minister has notified the First Nation of his decision to negotiate a claim. It should be made clear in the Act that a copy of the Minister’s letter is one of the pre-conditions for filing with the Tribunal.

Negotiation of Claims:

Negotiations for claims accepted for negotiation have basically ceased operation. Offers are often on a “take it or leave it” basis grounded on pre-determined methodologies and values leaving little, if any room for meaningful negotiation. Negotiation loan funding in now only provided after the fact if there is an agreed upon settlement. For more complex cases of greater value negotiations can only commence upon agreement with a Negotiation Protocol restricted by all sorts of limitations and constraints on what can be used should negotiations fail and the matter proceed to the Tribunal on compensation. Limits are even placed on the ability of First Nations to share information with other First Nations negotiating similar claims. More controversially, the government insists that not only
are materials, information and positions arising from negotiations privileged but all previous claims submission material filed with the Department is also privileged. Few negotiations can proceed under such Negotiation Protocol arrangements.

Then there are mandate issues. The federal negotiators have limited mandates confined to basically pre-determined positions. They are, in effect, merely messengers of a pre-determined settlement offer. No meaningful negotiations can take place under those circumstances. Even if some kind of negotiations actually take place, it is difficult, if not impossible, to change the federal negotiators mandate. In some instances agreements reached at the negotiation table required a new mandate or were subsequently reversed in Ottawa.

Furthermore, due to funding cut-backs federal negotiators have little ability to personally meet for negotiations due to travel restrictions. The suggestion is to conduct such negotiations by conference call. Effective and meaningful negotiations cannot take place under these circumstances.

If the federal government is serious about resolving specific claims through meaningful and good faith negotiations it has to give its federal negotiators flexible mandates, adequate resources to federal and First Nation negotiators to meet at the negotiation table and conditions under which both parties can engage in effective negotiations without an eye on potential litigation.

**Mediation:**

The *Action Plan* emphasized the need to achieve negotiated settlements. Access to the Tribunal would be only after all other avenues have been exhausted. One of the avenues to assist in a negotiated settlement, particularly where negotiations have broken down, was mediation. The *Action Plan* noted the success of the Indian Claims Commission in facilitating and mediating negotiated settlements. The plan was to transform the mandate of the Indian Claims Commission “to focus exclusively on resolution services.” This has not happened. Instead the AANDC have, I believe, set up a roster of mediators or mediation services but this process has not been utilized. When some First Nations actually approached the Department to access this service, there was surprise and uncertainty as to
how, if at all, to proceed. Any mediation services, as a valuable claims resolution tool, should be made available but independent from the Department and independently funded.

**SPECIFIC CLAIMS TRIBUNAL**

**Jurisdiction over rejected claims:**

The mandate of the Tribunal is to hear and decide issues of validation and compensation brought by a First Nation where the Minister has either decided not to negotiate a claim (i.e. the claim has not met the criteria for validation under s.14 of the Act) or negotiations have failed (i.e. a validly accepted claim has not been settled through negotiation). The Tribunal does not have the mandate to hear claims where the allegations have been accepted for negotiation under s.14 criteria.

What has happened, however, is that in circumstances where negotiations have broken down or where there are a number of claim allegations, some of which have been accepted for negotiation and others rejected, the Department has pursued the merits of all the allegations, including those accepted for negotiation. The Department has not restricted itself to litigating only those aspects of a claim that were rejected for negotiation. If there are other allegations in the claim that were accepted for negotiation the Department has closed the file and thereby forcing the First Nation to now litigate aspects of the claim that were accepted for negotiation. The position of Justice is that the acceptance letter was on a without prejudice basis and once in court all allegations can be reviewed.

It should be made clear in the Act that the mandate of the Tribunal is to only hear claims rejected for negotiation or where negotiations have broken down on compensation or settlement issues. For the Crown to bring forward, directly or indirectly, the merits of allegations previously accepted for negotiation is not only bad faith but increases the time and costs of the Tribunal process. The Tribunal should have the mandate to review the question of whether a claim is properly before them based on whether it is rejected or not.
**Ability of Crown to file:**

One question in the review process is whether to permit the Crown to file an action before the Tribunal. The *Specific Claims Tribunal Act* currently only permits First Nations to file claims before the Tribunal. One of the circumstances referenced for reasons to permit this would be in cases where a First Nation repeatedly submits the same or essentially the same claim more than once while Canada’s position remains unchanged. A claim filed by Justice and a decision rendered by the Tribunal would help bring finality to the claim. This is a dubious reason for opening the door for the Crown to bring forward claims. The Department has mechanisms within the specific claims policy and process to address these types of situations without recourse to the Tribunal.

To open the door to Crown filings could result in a flood of claims being referenced to the Tribunal on issues of validation and compensation without having to resort to the specific claims validation and negotiation process. The point of First Nation reference to the Tribunal is because it is the Crown, against whom allegations are raised, which is making determinations of validation and compensation that the First Nation might wish the Tribunal to review. It is, in part, this potential conflict of interest that is under review. Such would not be the case for the Crown.

**Transitional provisions:**

Another stated reason for review is to determine whether to repeal the transitional provisions under s.42 of the *Act* and delete “For greater certainty” preceding s.43. I see no reason for retaining s.42 since these transitional provisions have already been exhausted. Nor do I see a reason for retaining the “For greater certainty” provision, not only because such wording is irrelevant if s. 42 is repealed but also because it’s not needed for clarification of s.43. However, I do have concerns about the operation and effect of s.43 itself.

Section 43 prevents a First Nation from filing a claim before the Tribunal if the claim has been rejected prior to the *Specific Claims Tribunal Act* coming into force in October 2008. However, the First Nation can submit another claim with Specific Claims, which is, essentially, resubmitting the same claim and starting all over, in Canada’s view. Canada considers the resubmitted claim as a new
claim submission. Any such submitted (resubmitted) claim must then meet the minimum standard test and wait through the three year validation phase, even though the claim had previously been considered and rejected by the Department most likely years ago.

If s.43 is to be retained, the Tribunal should, in my view, have the mandate to review the resubmitted claim with authority to:

a) Review the resubmitted claim to determine if the submission and supporting documents are essentially the same as previously submitted and decide whether the First Nation can directly file a claim with the Tribunal based on the previous rejection; or

b) If the resubmitted claim is significantly different from what was previously submitted, with new arguments and documentary material, then the Tribunal member should determine if the claim should be filed directly with the Minister for consideration under the Policy, bypassing the minimum standards requirement, if such is the view of the Tribunal member.

There is also the issue of whether the Department will fund or adequately fund resubmitted claims. In my experience some funding has been provided. I’m not sure whether this has been the experience of others. However, with funding cut-backs the funding of resubmitted claims is an uncertain prospect for the future. If s.43 is retained, then adequate funding should be made available to First Nations to resubmit their claims as new claims.

**Funding of Tribunal Process:**

Funding for actions before the Tribunal is by way of contribution funding arrangements with the First Nation on a year to year basis, based on a workplan and budget prepared by the First Nation and approved by the Department. This has proven somewhat problematic for a number of reasons:

a) it is difficult to anticipate in advance, during the course of Tribunal proceedings, what will need to be covered; will there be a demand for particulars, Elders’ testimony, expert reports, motions on procedural matters etc.;
b) funding is sometimes inadequate to cover anticipated, much less unanticipated, procedural matters and requires supplementary funding requests;

c) since funding is provided to the First Nation by way of contribution agreement, this is often a lengthy process and sometimes results in funding not being provided on a timely basis or not being provided to and by the First Nation for the purposes it was intended;

d) funding that has been provided but unused at the end of the fiscal year must be returned even though proceedings are ongoing, often requiring a request for funding in the next fiscal year on matters previously requested and funded but not yet utilized for that purpose because of delays in the process or unexpected interventions on other matters; and

e) personnel at funding services are not sufficiently familiar with legal procedures before the Tribunal to adequately judge the financial costs involved in the process.

The Tribunal, in my opinion, should have some oversight over funding matters in proceedings before it. It is more familiar with procedural matters that will require funding so that proceedings can move along smoothly without undue delay because of funding issues. Whether this requires administrative control over funding or oversight of the administration of funding through the Department perhaps does not matter as long as adequate financial resources are available to efficiently process claims before the Tribunal.

**Funding of Tribunal:**

A larger funding question is whether there will be adequate funding of the Tribunal itself. As was noted by the Tribunal in its Annual Report, with the coming into force of s. 376 of the *Economic Action Plan 2014 Act* and the establishment of the Administrative Tribunal Support Services Canada, the result was, without consultation with First Nations, repeal of s.10 of the *Specific Claims Tribunal Act*. This amendment to the *Act* eliminated the Tribunal registry and Tribunal control over staff funding. As the Annual Report notes, “The resourcing of the Tribunal will be entirely in the discretion of the Chief Administrator of the ATSSC.” This strikes at the independence of the Tribunal as originally envisaged and provided for under the *Act.*
Apart from this, the Tribunal has an inadequate number of superior court judges available to handle the increasing number of claims brought before it. There is only one full time and two part time members to service 61 active claims. Without additional members to handle the growing case load, the Annual Report predicts the Tribunal will eventually fail. If superior court judges are unavailable because of shortages at the provincial level, then the federal government, I would suggest, has to find some way, in consultation with its aboriginal partners, to appoint additional superior court judges to be assigned, either full time or from a roster, to the Tribunal sufficient to at least meet the complement of six full time members under s.6(4)(a) and (b) of the Act.

If the jurisdiction and mandate of the Tribunal is to be expanded to take into consideration many of the matters discussed and recommended in this submission, then no question personnel and financial resources of the Tribunal will have to be increased. There is no point in considering the expansion of the Tribunal’s mandate if existing resources are insufficient for the Tribunal to even manage its current case load and administrative functions.

**Judicial review:**

In terms of judicial review applications under s.34 of the Act, it would seem only fair that First Nations should be funded for any judicial review application brought by the Crown. Decisions of the Tribunal are to be final and binding. The First Nation should not bear the financial burden of having to address a judicial review application before the Federal Court of Appeal brought by the Crown. The Crown has the financial resources for such an application but the First Nation is faced with finding its own source of funding for proceedings over which it has no choice.

Judicial review applications brought by a First Nation arising from factual or legal errors in a Tribunal decision should also receive funding. There is no reason why a First Nation should not have the financial resources that the Crown does to pursue an application.
Case Management process:

Proceedings before the Tribunal could be improved, I feel, by permitting a Tribunal member through Case Management, prior to any Hearing, to consider alternative ways of resolving the claim without further time and costs. This should be a required step in the process once, perhaps, the Common Book of Documents, Agreed Statement of Facts and Agreed Statement of Issues have been filed, preliminary motions have been completed and any Elders’ testimony has been disclosed, but before Arguments are presented and a Hearing is held. By this time the Case Management Judge would have a good handle on the evidence and issues at stake.

This suggested procedure is not new since similar procedures are in place in provincial superior courts throughout the country. The Tribunal does have jurisdiction to make rules and has made rules governing mediation as part of case management. The Rules state that this must be discussed at the first case management conference and lays out, under Rules 52-54, how it might be conducted. However, mediation has not been utilized to date, nor has mediation been established as a requirement before proceeding to a Hearing on the merits of a claim.

So far proceedings on compensation have not reached the stage on any claims before the Tribunal, to my knowledge, where mediation has been utilized or suggested as an option.

All this is subject to the willingness of the parties, particularly the Crown, to consider alternative ways of resolving the claim before a Hearing. Currently there is no indication that the Department of Indian Affairs has provided instructions to Justice to consider any resolution other than a final determination by the Tribunal. This is understandable, in part, because the Minister has already rejected the claim and is unlikely to reverse his position before the Tribunal on an issue of validation. However, by the time all the evidence is before the Tribunal, including evidence that might not have been considered by the Minister, perhaps the opportunity for reconsideration should be available to the Crown and First Nation where mediation and a negotiated settlement can be reached without recourse to a binding decision from the Tribunal on validation and possibly compensation.
**Rules of Practice and Procedure:**

The question has been raised as to how the Tribunal’s Rules of Practice and Procedure might be amended to improve the Tribunal’s efficiency. As I understand it from the Tribunal’s most recent Annual Report, Tribunal members are currently engaged in amendments to the Rules to increase efficiency, including the issuance of Practice Directions.

**Bifurcation:**

The review raised the question of whether bifurcation of validation and compensation should be legislatively required. Bifurcation of a Hearing on validity and compensation has been a common practice upon consent of the parties and approval by the Tribunal, in my experience. It has not been a set requirement by the Tribunal. It has been utilized in practice depending on the merits and effectiveness of such a procedure. There appears to be no need to amend the legislation to bifurcate the two steps since the parties may agree it makes sense to deal with both the validation and compensation phases of the Hearing at the same time.

**Hearings based on written argument:**

There may be instances where discrete points of law or claim submissions on an issue of validity could be heard by written argument, with supporting evidence, subject to consent of the parties. This would avoid more extensive and costly procedural steps in the process, resulting in a more expeditious resolution of the case. However, if the First Nation wishes the Tribunal to render a decision, without a formal Hearing, based just on the claim submission and supporting material originally filed with the Minister, then this should be left entirely to the discretion of the First Nation. I would anticipate this would be a rare occurrence since it would likely exclude any consideration of the claim submission by the Department. Furthermore, many claims will have been submitted and under consideration by the Department for years, resulting in possible changes in the case law during intervening years that would require updating in proceedings before the Tribunal. The First Nation would be reluctant to rely on dated arguments and evidence originally submitted.
**Equitable compensation:**

Under s.26 of the *Act*, the Tribunal, in making a decision on compensation, can only award monetary compensation that is below $150 million. The limit to merely monetary compensation is problematic when the claim is for the wrongful surrender or alienation of reserve land and assets. Monetary compensation does not factor in the return of reserve land or other assets wrongfully taken. The Tribunal should be able, within the $150 million limit, to take into consideration, in calculating compensation, the costs and other factors involved in the reacquisition of lands and assets. The First Nation should not be faced, at the end of the compensation process, with something less than what they lost.

One of the questions in review is whether to amend the *Specific Claims Tribunal Act* to legislate a standard methodology for determining the current value of historic losses. Under s.20 and s.21 of the *Act*, the Tribunal is given wide latitude and flexibility in determining compensation based on compensation principles under the law as applied by the courts. To set a standard methodology for determining historic losses would, in my view, compromise the flexibility currently available to the Tribunal in determining those losses and would fail to take into account the variable historical circumstances that gave rise to these losses. Furthermore, determining the appropriate standard methodology to use in calculating historic losses would not likely be mutually agreed upon.

**Exchange of documents:**

The review inquires how the exchange of documents might be improved. The exchange does slow down the process but it is difficult to determine how this might be expedited. For the claimants, the documents to be filed are usually those that were originally submitted as part of the specific claims process. The claimants are unaware, however, of the nature and extent of the documents possessed by the Department and Justice. The requirement is full disclosure, including all the relevant documentary material used by Canada in the determination of whether the claim should be accepted for negotiation. The parties usually prepare an index of the documents in their possession to avoid duplication. The compilation of the documents is then digitally recorded along with hard copies, once the parties agree
on the material for filing. Sometimes it is uncertain who takes the lead in compiling the record. Often it is Justice, in my experience.

What might be of assistance is if a third party could coordinate, collate and organize the evidentiary record. From my recollection, it was staff within the Indian Claims Commission who did this before hearings were conducted. The respective parties merely submitted what they had in their possession to the ICC who digitally recorded the material and provided copies to each party. This circumvented repeated transactions between the parties to identify documents, coordinate their efforts, avoid duplication, and incur additional costs. The previous exercise of recording the documentary evidence before the ICC, in my view, was much more efficient and less costly and time consuming for the parties. Perhaps it could be better coordinated at the Tribunal level with staff dedicated for this purpose.

**Expert Witnesses/Reports:**

Expert witnesses and their reports are most frequently provided at the compensation phase of any settlement negotiations; not usually during the validation phase. The methodology used for determining appropriate compensation and the required studies to cover the nature of the losses incurred are areas where expert advice is sought. I suspect this will be the case before the Tribunal. These reports are often costly and time consuming. The only other expert evidence is Elders’ testimony which is usually conducted with cultural sensitivity but is not necessarily time consuming or costly.

The question raised is how can progress on claims be balanced with the need for additional expert reports or other evidence? This is possibly determined by whether expert evidence has been previously provided during the original claims process or whether it will be addressed for the first time before the Tribunal. In the first instance, if an expert report or reports have been provided by one party or the other, it can be arguably utilized by either before the Tribunal without further additional expert evidence, unless cross-examination is sought. This might not be possible if both parties in the claims process jointly engaged an expert to provide a report. Likely both parties would then have to agree on submitting the report before the Tribunal.
In the second instance, where no previous consideration of compensation has been contemplated following a finding of validation, the parties will have to consider whether expert evidence is required in determining appropriate compensation. Previous practices and understandings on what losses should be considered under the claims process and how compensation is calculated in determining the present value of a loss might not be appropriate. I suspect the parties and the Tribunal would work this out.

It is uncertain during the compensation phase of a Hearing, whether it will be the Tribunal that will be determining compensation or whether the Tribunal would permit the parties to engage in a negotiation process. Negotiation appears to be contemplated since the Tribunal Rules permit settlement offers to be made and mediation is an option that can be pursued. This phase of the Hearing is the point in the process where a mediator is most likely to be utilized and be most effective.

**Final Adjudication:**

The question raised is whether to amend the *Specific Claims Tribunal Act* to create a time for submission of claim before the Tribunal. Canada’s concern is that without such time a limit it is uncertain when a specific claim is truly concluded. While this concern is understandable it is uncertain how this might be effectively addressed. Often it is unclear under the Specific Claims process when a claim is considered concluded. Some First Nations might be contemplating, awaiting or in negotiations and others considering resubmission of claims they felt either inadequate or rejected. In other words, when does time start if a time limit is to be placed on access to the Tribunal? Time limitations would have to take into consideration, as well, the time frames set out in the *Act* for when claims can be brought before the Tribunal. Any time frame would have take into account a significant degree of flexibility for First Nations to seek resolution of their claim, either through the claims process or before the Tribunal.
FINAL THOUGHTS

The Action Plan was to retool the specific claims process to bring justice to First Nations and resolve historic grievances co-operatively through negotiation. What has been experienced since the Action Plan and passage of the Act is a quantitative and qualitative reduction in the efficiency and effectiveness of the claims process. There is little, if any, resolution of historic grievances through co-operative negotiation. In the absence of an effective claims process or effective negotiations the focus on settling specific claims has shifted to actions before the Tribunal. Unfortunately, this is an adversarial adjudicatory process handled primarily by lawyers with little engagement by First Nations in the process. If the federal government is serious about settling historic grievances that have haunted First Nations for generations and thereby achieve a fair and just reconciliation that engages First Nations in the process, litigation or improvement to the litigation process should not be focus of claims policy? The federal government, I believe, has to seriously reconsider litigation as the preferred approach to the resolution of specific claims. If such is not the preference, then First Nations need to see a commitment to meaningful and effective improvements to the claims process that actively involves First Nations, collaboratively and co-operatively with the Department, in the submission, consideration and negotiated settlement of specific claims.