



SPECIFIC CLAIMS REVIEW: EXPERT BASED - PEOPLES DRIVEN

**ASSEMBLY OF FIRST NATIONS
INDEPENDENT EXPERT PANEL REPORT**

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1. Introduction

The *Specific Claims Tribunal Act, 2008*, was a landmark achievement in relations between Canada and First Nations. Developed in partnership between the Assembly of First Nations (AFN) and Canada, it created for the first time a specialized tribunal to which First Nations can bring the vast majority of specific claims that were not resolved through negotiation, for independent, binding and final adjudication.

Prior to the *Specific Claims Tribunal Act*, there was a very large and growing backlog of claims against the Crown by First Nations under its internal claims policy. In many cases, First Nations had no practical or legal access to the court system or any other form of independent adjudication. The Crown had the final say on claims against itself.

The situation produced injustice and frustration. First Nations who had lost lands or other assets as a result of Crown misconduct continued to suffer in their economic and social development. A huge and growing backlog of unresolved claims developed. Opportunities were lost for reconciliation and partnerships in development that could have benefited all concerned - First Nations, neighbouring communities and Canada as a whole. Some flashpoints occurred in relation to unresolved claims, such as Oka, Ipperwash and Caledonia. In 1991, after the Oka crisis, Canada established the Indian Specific Claims Commission (ISCC) to provide an alternative to the courts for First Nations for specific claims that were rejected by Canada. The ISCC could make non-binding decisions on these claims and also played a key role in mediation.

Not surprisingly, calls for reform to the specific claims process and policy have been made for decades. The principal concerns leading up to the government of Canada's release in 2007 of its Justice at Last policy statement were: inordinate delays in receiving a response to filed claims, the backlog of claims that resulted from the delays, the perceived conflict of interest that the government was in, and no access to an independent dispute resolution body.

The objectives of the Justice at Last initiative were to address these primary concerns. The measures outlined were:

- Impartiality and fairness through the creation of an independent tribunal to make binding decisions about claims rejected for negotiation or when negotiations fail;
- Greater transparency through dedicated funding for specific claims settlements;
- Faster processing of claims, a streamlined approach to processing to better address the diversity and complexity of specific claims as well as "special efforts" made to negotiate small value claims; and
- Better access to mediation by establishing an independent mediation body.

Justice at Last renewed and strengthened Canada's commitment to settle specific claims through negotiation instead of litigation. With Justice at Last, Canada had produced a visionary new proposal which emphasized a commitment to fairness and justice for First Nations and certainty for all Canadians, drawing upon earlier thinking from the engagement of AFN and Canada for the 1998 Joint Task Force Report.

In essence, Justice at Last provided that there would still be a "Stage One" in the specific claims system: claims would continue to be researched by First Nations and filed with Canada for evaluation and preferred resolution through negotiations. This stage of the process was to be expedited and

improved, and the parties would have access to alternate dispute resolution, including independent mediation.

Justice at Last also committed Canada to establish a new process, a "Stage Two", for claims not resolved at Stage One. Landmark legislation would be enacted. It would feature a new independent Specific Claims Tribunal. The Tribunal would be staffed by superior court judges - as many as the equivalent of six working full time.

The broad vision was that having access to independent and final adjudication on a timely basis at Stage Two would serve as further reinforcement to the commitment made by Canada to resolve matters through meaningful negotiations at Stage One. Doing so was seen to benefit all parties in light of the risks and costs associated with potential litigation. Creative solutions could be reached through negotiations that suited everyone's interests and values. Resolving claims through negotiation has been acknowledged for many years as the preferred method of promoting reconciliation between Canada and First Nations, and this was also explicitly set out in Justice at Last.

The *Specific Claims Tribunal Act* includes a provision for a five year review. The Minister must conduct the review and report to Parliament. The *Specific Claims Tribunal Act* expressly provides that the views of First Nations would be canvassed in the review.

Alongside the introduction of the *Specific Claims Tribunal Act* into the House of Commons in 2007 was a Political Agreement between the AFN and Canada. It celebrated the partnership of the AFN and Canada in producing the *Specific Claims Tribunal Act*, committed to various forms of continued dialogue and action between those partners, and assured the AFN of a role in the Five Year Review.

The Minister of Aboriginal Affairs and Northern Development Canada (AANDC) is currently conducting a review, using a Ministerial Special Representative (MSR) to canvass opinions from First Nations. The AFN has not been directly engaged so far in discussions with Canada. Canada has, however, supported an initiative by the AFN to conduct its own initial process to seek meaningful contributions from the claimant community and make representations.

Under direction from the National Chief and the AFN's Chiefs Committee on Claims, the AFN established the Terms of Reference for this independent Expert Panel in February 2015. The Terms of Reference are reproduced in Appendix A.

The Expert Panel invited submissions from across Canada and held a day of hearings in both Toronto and Vancouver during the month of March 2015.

The Expert Panel has paid careful attention to everything it has heard and read (a list of participants and links to written submissions can be found at Appendix B). Given the limitations of time and space it cannot paraphrase them all in detail, but the Expert Panel intends that the MSR and the Minister directly consult the input. As such, the Expert Panel formally submits these as part of its report. The inclusion of the submissions is also to ensure they form part of the public record.

The Expert Panel draws particular attention to "In Bad Faith", the report of the National Research Directors on specific claims. Its detailed documentation of concerns and outcomes are consistent with the most persistent concerns presented to the Expert Panel. This document represents the most comprehensive and up-to-date statistical analysis from the perspective of the claimant community.

What follows is the Expert Panel's own findings and recommendations.

2. Expert Panel Review Process

October 2013 marked the 5th anniversary of the coming into force of the *Specific Claims Tribunal Act*. The Act, and the companion Political Agreement entered into between the AFN and Canada in 2007, requires Canada to carry out a five year legislative review. In honouring these terms, the AFN established an independent Expert Panel to hold hearings and receive contributions for the development of recommendations to improve the Specific Claims process.

The Expert Panel members were:

- Delia Opekokew – Barrister & Solicitor and Expert Panel Chair;
- Bryan Schwartz – AFN counsel to the 1998 AFN-Canada Joint Task Force and the 2008 AFN-Canada working group on specific claims legislation; and
- Robert Winogron – federal counsel to the 1998 AFN-Canada Joint Task Force and the 2008 AFN-Canada working group on specific claims legislation.

The two independent Expert Panel hearings that took place, one in Toronto on March 10 and the other in Vancouver on March 26, heard a total of 23 oral presentations across these two sessions. The Expert Panel also received another seven distinct written submissions. Both events were live-streamed and are available in their entirety on the AFN website at <http://www.afn.ca/index.php/en/news-media/latest-news/Assembly-of-First-Nations-Specific-Claims-Review-Expert-Based-Peoples->

This review process was carried out parallel to Canada's five year review process, which has a mandate defined by Canada without consultation with the AFN or the claimant community, and which includes the unilateral appointment of Mr. Benoit Pelletier as the Special Representative to the Minister of Aboriginal Affairs, Bernard Valcourt. It is the expectation of this Panel that the Special Representative will take full account of the submissions made to it, along with the findings and recommendations of the Expert Panel itself. Similarly, as is recommended below, it is crucial that Canada re-engages with First Nations in a direct partnership aimed at resolving the problems that continue to plague the current process.

3. Summary

What the Expert Panel heard from dozens of in-person and written submissions was a message that was virtually unanimous. It was remarkably consistent in its marshalling of facts and concerns. It was rational and well-documented. At the same time, it was expressed in tones of profound disappointment:

- First Nations told us that the commitments made in Justice at Last, except for the creation of an independent tribunal have, regrettably, not been fulfilled.
- That the different components of the overall specific claims process are integrated; a change to one part of the process (e.g., at Stage One) will have impacts on another part of the process (e.g., at Stage Two).
- First Nations find that Stage One has become a forum for delaying and rejecting claims, not resolving them. First Nations report that due to very high claim rejection rates and file closures, the backlog of specific claims is effectively being shunted to Stage Two, the Tribunal.

- First Nations have a favourable view of the independence and calibre of the judges who are serving at Stage Two, and its flexible and culturally sensitive rule system. But First Nations are concerned that Canada has taken steps that have impaired the administrative autonomy of the Tribunal and that have left it understaffed in light of its existing and forthcoming case load. The 2014 Annual Report of the Chair of the Tribunal, Justice Harry Slade, reflects these same concerns.
- First Nations are concerned that the shift of the backlog to the under resourced Tribunal at Stage Two amounts to forcing them into an unfair war of attrition. After sustaining enduring losses from an original injury by the Crown, and devoting human and financial resources to a fruitless Stage One process, it can be particularly difficult for a claimant to continue at Stage Two where claimants are underfunded, and the Tribunal struggles with inadequate staffing and eroding independence.
- First Nations fear the system is simply moving the backlog of claims from Stage One to Stage Two, and then starving Stage Two; and this would be a disastrous result and a complete betrayal of the promise of Justice at Last.

The promise of Justice at Last can still be realized, but doing so will require renewed commitment and vision from Canada, and a fundamental shift in the way Canada engages with First Nations, including working in true partnership to engage in a process centred in negotiation, with proper oversight and accountability. The development of Justice at Last and the *Specific Claims Tribunal Act* was the product of meaningful collaboration, and thus, the fulfillment of these commitments should build on the strengths of previous work, while recognizing that a shift to true reconciliation is urgently needed.

4. Overarching Recommendation: The need for a renewed First Nations-Canada partnership in developing specific claims law and policy

Our primary recommendation, and the context within which all other concerns should be heard, is as follows:

RECOMMENDATION 1:

By far, the best way forward is to re-establish an ongoing joint discussion table at which First Nations and Canada work in partnership to assess and improve the progress of the claims system and propose changes, including legislative amendments, and that such a discussion table has an accountability and oversight mechanism to ensure that changes are properly implemented. It is also important that First Nations have a representative to coordinate their input and consent in such a dialogue. Given the important role that the AFN played in the development of the *Specific Claims Tribunal Act*, it would be worthwhile to rely upon the AFN as a basis for this ongoing partnership with Canada.

“Perhaps the most important suggestion that we can make along these lines, is that the federal government’s attitude and conduct must change if there is to be any meaningful movement towards the resolution of Specific Claims, and proper implementation of the Specific Claims Tribunal Act. Federal conduct and behaviour are the biggest barrier to allowing claims to have a fair hearing and being resolved.” – Algonquin Nation Secretariat

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“Reconciliation will require a considerable demonstration of trustworthiness on the part of Canada and a considerable leap of faith on the part of First Nations. What might help to facilitate this is some sort of oversight mechanism (...)”- Union of British Columbia Indian Chiefs

The Expert Panel has considered carefully all of the input it has received, and although most of the feedback was consistent, the message that was present in the totality of the contributions was the urgent need for Canada to meaningfully engage with First Nations and work with them as equal partners in addressing outstanding claims. An initial step is to re-establish a true partnership between First Nations and Canada before considering any specific courses of action. Thus, the Expert Panel wishes to emphasize that recommendations within this report are put forward as ideas that could and should form the basis of a renewed dialogue between First Nations and Canada. Similarly, the Expert Panel’s recommendations must be reviewed as a whole, whereby the implementation of specific recommendations in isolation, would not only be inappropriate, but potentially detrimental for all parties.

It has been demonstrated time and again that the best outcomes for both First Nations and Canada result from direct dialogue and commitment to joint problem solving. Conversely, we have seen that disappointment and frustration occurs when First Nations are not afforded the opportunity to meaningfully participate in decisions that have the potential to affect them.

There have been many decades of proposals for reforming the specific claims system prior to the enactment of the *Specific Claims Tribunal Act*. Progress was made when the AFN and Canada worked together, such as on the drafting of the historic 1998 Joint Task Force Report by officials of Canada. At the time, AFN and Canada worked together to achieve a consensus proposal that, while not immediately accepted, incorporated some of the key ideas that would eventually be included in the *Specific Claims Tribunal Act*. When the dialogue ended, and Canada proceeded to then finish developing legislation unilaterally, the result was the 2003 *Specific Claims Resolution Act* – which, in the end, was widely rejected by First Nations and never proclaimed into force.

The direct dialogue was restored in the wake of the release of Justice At Last, and it proved to be highly productive and ultimately successful in working out a detailed proposal that Parliament could adopt. The *Specific Claims Tribunal Act* states in its preamble that:

"Recognizing that

it is in the interests of all Canadians that the specific claims of First Nations be addressed;

the Assembly of First Nations and the Government of Canada have worked together on a legislative proposal from the Government of Canada culminating in the introduction of this Act".

The 2007 Political Agreement between the National Chief and the Minister expressly contemplated the continuation of the partnership relationship and includes the following language:

"The Minister and the National Chief celebrate the fact that we have developed together a draft Bill to address Specific Land Claims in a fair and final manner;

Therefore we believe it important to set out certain matters to be addressed as we continue to work in partnership in the further development of the Specific Claims process and other related issues (...)"

Future Work

In an effort to continue to seek out improvements to the way in which Specific Claims are resolved, the Minister and the National Chief are committed to work together to inform ongoing policy work associated with Specific Claims and other related matters addressed in this statement as necessary, including:

- *Claims that are excluded by the monetary cap or other provisions of the legislation;*
- *Assessing the processing of specific claims and making suggestions for improvements;*
- *Discussing any proposed regulations made under the legislation;*
- *Making a joint submission to the advisory committee of the Tribunal in respect of Tribunal rules;*
- *Review access to funding, including federal funding for claimants at various stages of the process.*

It is expected that the joint work will be carried out initially by the continuation of the Joint Task Force through to December 31, 2007, as set out in its Terms of Reference, and thereafter under the joint direction of the Minister and the National Chief in the form of a standing Specific Claims Liaison and Oversight Committee or similar body. Meetings will take place as necessary and at least twice per year in accordance with work plans to be jointly developed prior to December 31, 2007.

5-Year Review

"The Assembly of First Nations will participate in the 5-year review as set out in the Specific Claims Tribunal legislation."

Much progress was made when Canada and the AFN continued to work in partnership. They submitted a joint proposal to the Specific Claims Tribunal on its rules of procedure, which had a major influence on the final rules adopted by the Tribunal.

The partnership on policy, review, and reform contemplated by the 2007 Political Agreement has not, however, continued. The Joint Liaison and Oversight Committee, for example, could have been a forum for the constructive exchange of information and ideas, and discussion on issues arising out of the Stage One processing of claims; but this dialogue failed to materialize. Regrettably, Parliament later made changes with respect to the administrative autonomy of the Specific Claims Tribunal without prior engagement with the AFN or indeed the claimant community in any respect.

The Five Year Review of the *Specific Claims Tribunal Act* is now underway, but there has not yet been a provision made for the establishment of a process through which First Nations and Canada can work together. The federal process remains unilateral and opaque.

RECOMMENDATION 2:

The Expert Panel strongly recommends that as a first step in re-establishing an ongoing partnership between First Nations and Canada in reviewing and reforming the specific claims system, as was proposed in Recommendation 1, this five year review be completed in the manner in which the legislation itself was drafted: through direct and meaningful negotiations between Canada and First Nations. In such a forum, the concerns and proposals that we have heard or proposed could be combined with the input and concerns of Canada. The joint table could then consider perspectives from all sides, and work constructively to find solutions that are fair and practical to claimants and to Canada. As noted above, an oversight and accountability mechanism for this table is also important in charting the path forward.

There have been, and remain, many shared interests between First Nations and Canada:

- The resolution of longstanding injustices can restore some of the economic and social strength of communities and promote their self-sufficiency. By resolving past disputes fairly, a just system can facilitate new partnerships in which Canada and First Nations work effectively to promote shared interests, such as improving the quality of life for members of First Nation communities, promoting their economic prosperity and those of neighbouring communities, and enhancing the ability of the next generation of First Nations' citizens to contribute to both their own communities and to Canada as a whole.
- There is a shared interest in avoiding duplication, waste, and unnecessary delay in the system as a whole.
- There is a shared interest in providing forums for the parties to amicably, constructively and creatively work together to resolve old disputes and find common interests moving forward.
- There is a shared interest in having impartial, credible and efficient forums for dispute resolution when parties cannot agree so that disputes that cannot be settled are finally resolved in a manner that is considered legitimate to both sides, and ensures that the genuine merit of claims, rather than extraneous considerations, is the guideline for directing resources to claimants.
- Ultimately, there is a shared interest in promoting and advancing reconciliation.

These shared interests were recognized and acted upon by Canada and First Nations in producing *Justice at Last* and the *Specific Claims Tribunal Act*. First Nations are seeking a new relationship with Canada. True partnership however, must carry on at the implementation stage as well, and regrettably this has not taken place yet. This review provides an opportunity to build on strengths of past work, and to think of innovative ways to ensure that failures are not repeated. Hence, our recommendation stressing the importance of an accountability and oversight mechanism relating to any joint discussion process.

A central point to the key recommendation is the need to address the specific claims system as a whole, in an integrated manner. The Expert Panel believes that the entire range of issues at Stage One and Stage Two must be explored thoroughly in a five year review and result in effective refinements to the system, whether through changes in policy, process, or legislation. The severe limitations on settling claims at Stage One, for example, are having a major impact on the caseload and resources

“The specific claims process is intended to be an avenue toward reconciliation of Canada’s past wrongs. These breaches of the honour of the Crown are a shameful legacy of Canada’s history. The current process does not reflect the spirit of reconciliation and is a barrier to resolving historic wrongs.”- Tseshah First Nation

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“We see the issue of properly addressing Specific Claims as a lawful obligation on the part of the Crown and as a measuring stick of how it lives up to the honour of the Crown has failed to meet its legal obligations and to implement the constitutional principle of the honour of the Crown.” - Neskonalith Indian Band Member of the Secwepemc (Shuswap) Nation

needed at Stage Two, the Tribunal. The most just and practical reforms will improve the system as a whole, and consider how refinements in one part of the system can be adapted to and integrated with changes in another part, to the benefit of the system as a whole.

Due to the lack of access to independent mediation services and proper negotiation tables that First Nations have experienced, the Expert Panel heard proposals to abolish Stage One outright, and other proposals that would instead make more use at Stage One of the expertise and independence of judges who are at the centre of Stage Two. For example, the mediation role of the Tribunal could be extended to Stage One as well as Stage Two proceedings; legal questions might at Stage One be referred, unilaterally or by the consent of both parties, to the determination of the Tribunal, without sending the entire case there. For the Tribunal to effectively play a greater role at Stage One, however, it would be necessary to ensure that there are appropriate resources as well as rule changes put in place to ensure that the Tribunal could in practice effectively fulfill its new functions without impairing its ability to perform the functions it is already mandated to carry out.

We have heard from First Nations that Stage One has become a forum for rejecting and delaying claims, not resolving them. The backlog of specific claims is effectively moving to Stage Two, the Tribunal, rather than being resolved at Stage One. This means Canada has altered the role of the Tribunal from that of a final arbiter of justice when negotiations fail, to an inevitable part of the process.

First Nations have a favourable view of the independence and calibre of the judges who are serving on the Tribunal, and with its flexible and culturally sensitive rule system. First Nations however, are concerned that Canada has taken steps that have impaired the administrative autonomy of the Tribunal leaving it understaffed in light of its existing and forthcoming case load. An official and public report of the Chair of the Tribunal, Justice Harry Slade, reflects the same concerns. We heard some proposals to the effect that in light of the perceived futility of Stage One in its current form, it should be eliminated altogether. If this approach were taken, it would be all the more necessary to adjust the staffing and other resourcing of the Tribunal, along with recrafting its rules, so that the Tribunal could function efficiently and effectively to carry out both its existing and expanded mandate.

Regardless of how the final reallocation of functions takes place between Stages One and Two, the Expert Panel wishes to be clear about three overarching requirements for reform:

- **Adequate funding for claimants from initial research through to judicial review; for officials of Canada to make their own contribution; and for the Tribunal to effectively, efficiently and expeditiously carry out its independent and impartial role;**
- **A Stage One process that, to the extent retained, meaningfully contributes to just and timely settlements, rather than be a source of further delay and frustration; and**
- **A Stage Two process in which the Tribunal is administratively independent and has the judicial and administrative staff necessary to practically achieve its mandate.**

5. Stage One: Findings and Recommendations

A number of similar concerns were raised by multiple presenters both in oral presentations at the sessions held by the Expert Panel in Toronto and Vancouver, as well as in written contributions. The concerns generally dealt with the lack of appropriate funding at the research and negotiation stages, the government's conduct in negotiations, the lack of appropriate mediation services, the inappropriate use of the minimum standard, inefficiencies related to the use of reports and other materials produced during Stage One, and the restrictive definition of specific claims. Details related to some of these concerns, including statistical analysis, were set out in the National Claims Research Directors Report dated March 9, 2015, and the AFN State of Claims Newsletters (spring and fall of 2014); links to these documents can be found in Appendix C. Presentations to the Expert Panel expanded on some of the concerns.

5.1 Funding

The primary consistent concern regarding the entire specific claims process was the lack of appropriate funding at all stages – from claims research to preparing a submission, to engaging in negotiations, to the Tribunal process and judicial review. The claims process is involved and protracted and it is very difficult for a First Nation to advance a claim with inadequate resources.

Specific concerns included the designation of funding in this area as "program" funding rather than a more appropriate designation relating to meeting a lawful obligation. The implication of this designation was described as enabling an inappropriate degree of discretion over the flow of funding as opposed to providing sufficient funding to allow Canada to discharge its lawful obligations. Presenters also expressed concern that Government control of the funding for claimants to achieve justice in the case where Government is also always the defendant was inherently unacceptable given the obvious conflict of interest.

Furthermore, Canada's funding for claimants comes from an allotment of funds based upon its own estimation of the needs of the program. Presenters raised concerns about this restriction in funding and what was described as the misrepresentation of statistics suggesting that the number of claims filed was decreasing. Rather, this restriction in funding appears to be limiting the research and submission of claims thereby deferring their resolution of these claims for yet another generation. The Treaty and Aboriginal Rights Research Center of Manitoba presentation highlighted the severe cutbacks and restrictions on funding which the research centers are experiencing across the country and the resulting limitations on the research work they are able to conduct.

A lack of funding was also identified as inhibiting meaningful negotiations and, in many cases, eliminating negotiations entirely. A number of presenters stated that travel and in-person meetings have been severely restricted and funding is also an issue for First Nations when assessing

"Recent cuts of 50% to the specific claims research and development budget has had a severe impact on Indigenous Peoples ability to move forward and develop claims. There is not enough funding to carry out the research and development of claims and also formalize statements of claim for submission to Canada."-
Chief Judy Wilson
Neskonlith Indian Band
Member of the Secwepemc
(Shuswap) Nation

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"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." – David Knoll, Knoll & Co. Law Corp.

“One of the greatest obstacles in resolving claims is the lack of adequate funding for the development, assessment, and negotiation of specific claims. The limits on funding are felt both at the First Nation and Federal Government level.”
– Federation of Saskatchewan Indian Nations

settlement offers. We heard that where "take it or leave it" offers are presented, there is little or no explanation as to how the offer was arrived at, and that First Nations have insufficient funding to properly assess whether an offer is reasonable. Funding concerns were also raised with respect to negotiation funding provided with settlement offers. It was pointed out by presenters that this was usually insufficient to address basic assessment requirements of the claim; such as the reviewing Canada's offers and valuation.

There was also a concern raised about the pool of funding that is earmarked for both the research of claims and Tribunal matters. In the case where Tribunal matters demand a greater degree of funding, this is to the detriment of research funding. This creates an unnecessary conflict.

Funding was also raised as an issue with respect to judicial review, which will be commented upon below.

Presenters made the point that it is not only claimants who are underfunded from their perspective, but also funding for the internal operations of the federal officials needed to evaluate and negotiate claims.

The Expert Panel appreciates and respects that governments are looking to balance budgets, and to do so by minimizing administrative costs. As noted above, however, specific claims are not a routine program area by any means. An investment in finally resolving longstanding claims can alleviate the accumulation of harm, promote reconciliation, and facilitate economic development for the First Nation community concerned and its neighbours.

First Nations communities that have achieved reconciliation with the Crown over past grievances can be poised to better support the health, education and training of community members, and better assist their members to contribute to the growth of their own communities and to Canada as a whole.

RECOMMENDATION 3:

Given that all of the presentations raised the issue of inadequate funding, we recommend:

- Increasing in funding to previous levels where research was capable of being conducted properly and efficiently, and with administrative support;
- Examining the recommendation presented to us that funding should be made a function of the Tribunal instead of being housed in the Federal Government and described as a program. Under this recommendation, the legislation would be amended to include the receipt and distribution of all specific claims funding as one of the functions of the Tribunal;
- Restoring funding should to at least 2013 levels – and regularly adjusted to take into account inflation and other cost drivers – to facilitate meaningful research, and claim drafting;
- Making proper funding available to First Nations for negotiation. It would also enable First Nations to assess offers made where little or no information is presented on the rationale for the offer;
- Even where substantial information is provided by Canada with respect to an offer, Canada must make available the necessary funds for a First Nation to properly and independently assess an offer, to determine whether it is reasonable or whether another course of action is advisable.

5.2 Mediation

Presenters expressed concerns over of the issue of mediation in two respects: the availability of mediation services in the first place; and Canada's refusal to voluntarily participate in mediation at all.

In the view of the Expert Panel, access to and participation in mediation is a matter of good faith that is in keeping with the honour of the Crown and section 35 rights. The commitment in Justice at Last was to change the mandate of the Indian Specific Claims Commission to serve as a mediation body. Presenters expressed concern that the government's creation of a mediation unit within that same government - which is itself the defendant - does not reflect the principle of independence that is a cornerstone of mediation. Presenters also reported that government does not agree to mediation even when there is a request to do so.

"(...) the fourth pillar of the [Justice at Last] Action Plan, better access to mediation, is not being achieved. In our experience, when our First Nations have proposed mediation at the negotiation table, the response from Canada has been that Canada does not intend to change its position so mediation will not be helpful."- Federation of Saskatchewan Indian Nations

RECOMMENDATION 4:

- The same considerations on independence and impartiality which led to the creation of the Tribunal should also apply to mediation.
- Mediation at Stage One as well as Stage Two could be conducted under the auspices of the Tribunal and this function should be provided for in the *Specific Claims Tribunal Act*. The statutory provisions and rules of procedure of the Tribunal could be reviewed to see how alternate dispute resolution processes, including mediation, can be better defined and facilitated.
- Experience with the Indian Specific Claims Commission illustrates the benefits of mediation. The *Specific Claims Tribunal Act* or Rules might be refined to mandate at least an initial attempt at judge-supervised mediation in all instances and to leave the discretion of the Tribunal and the parties to identify where it should continue or where continuation would not be fruitful.

5.3 Minimum Standards

The *Specific Claims Tribunal Act* provides for the development of minimum standards in the filing of a specific claim. The *Specific Claims Tribunal Act* requires the Minister to develop the standards, but it was left for this development to occur outside of the Act. Presenters raised concerns about the interpretation of these standards by the Federal Government, and the fact that they were unilaterally set. Issues such as unclear photocopies or incomplete documents, even where the missing portions of the document were not relevant to the claim, were described as an inefficient and unfair interpretation

"We are not disagreeing that there should be standards regarding the form of a specific claim, only that the application of those standards should be done in a rational and common sense manner."- Chief Marjorie McRae, Gitanmaax Band

of the minimum standard that is being used to waste time and increase unwarranted costs to First Nations in the processing of claims. Presenters were emphatic that this unnecessarily strenuous minimum standards wasted time and costs have been very significant – sometimes hundreds of hours and thousands of dollars - with no funding available to support these.

RECOMMENDATION 5:

The *Specific Claims Tribunal Act* should be amended to define and bring oversight to the reform and, if necessary, interpretation and application of the Minimum Standard. For example, there could be provision for an expedited hearing by the Tribunal on whether the Minimum Standard has been met.

5.4. Negotiations

First Nations consistently expressed their strong willingness to negotiate. Yet, many presenters raised concerns over the state of negotiations. The main concern expressed was that there was no actual meaningful negotiation. Offers, described as "take it or leave it", were being presented to claimant First Nations with little or no flexibility or explanation. Presenters also stated that they could no longer contact Specific Claims Branch staff to discuss their claims and that in many instances negotiators would not negotiate nor meet on the claims. Where meetings take place, negotiators have no mandate to negotiate and no flexibility to make decisions. Presenters described negotiators as messengers of decisions already made. Presenters were most adamant about the unfairness of the current state of negotiations or lack thereof. The report of the National Claims Research Directors states that "Rigid, take-it-or-leave-it offers made without discussion or explanation, with fixed arbitrary deadlines do not constitute negotiations of any sort. They are ultimatums". The report also cites Justice Patrick Smith's findings in the Aundek Omni Kaning (AOK) Tribunal decision, describing the process for small value claims as:

"(...) paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of "good faith" required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court, in many decisions, has described as being the foundation of Canada's relationship with First Nations."

Concerns were also raised about partial acceptances. Specifically, partial acceptances have become common practice in which small portions of claims are accepted. Once this acceptance takes place, it is used to value claims without the opportunity of First Nations to have input into such valuations. Presenters also observed that this

"In all of Big Grassy's experience with the specific claims process there has never been any explanation for why Canada can't just come respectfully to our community and say: "we are sorry your land was taken by the Crown without compensation. We are prepared to make it right..."
- Chief Carl Tuesday, Big Grassy First Nation

"Regional negotiators need to be empowered to work closely with us to craft settlement agreements with respect that not all of our communities are the same, rather than being dictated to by those in Ottawa who do not yet understand this reality." – Chief Marjorie McRae, Gitanmaax Band

unilateral approach to valuing claims determines whether a claim will be negotiated by Canada and the extent to which the claimant will be funded to conduct negotiations. Furthermore, the Federal Government is demanding a release for entire claims, even though only parts of them are accepted. According to some submissions, this practice is placing "finality over fairness". It is argued that the practice is inefficient; the pursuit of blanket releases can prevent the partial resolution of some claims, and increase the case load at the Tribunal level. The practice encourages claimants to file a large number of individual claims in the first place, rather than bundling them. This is one more issue where a meaningful First Nations-Canada dialogue could contribute to finding common ground in the interests of both justice and efficiency. First Nations further objected that they are excluded from the process of valuing their claims for the purposes of initiating negotiations. As in other matters, say presenters, there is far too much of a unilateral and "take it or leave it" approach.

The challenge in being able to access the Tribunal was also raised. Presenters stated that in its current form, the *Specific Claims Tribunal Act* is being interpreted in a punitive way by the Specific Claims Branch. Access to the Tribunal at the negotiation and assessment stages would allow negotiations to proceed or terminate in a meaningful way. It is clear in some instances that negotiations are effectively at a standstill, yet the First Nation will not have a clear "no" that makes it straightforward for the claimant to access the Tribunal, rather than waiting for three years to elapse. This causes needless delay and costs for everyone. Thus, such availability would enhance negotiations for all parties and provide clarity at an early stage in the process without unnecessary cost and delay. This would also allow a party to go to the Tribunal to get discovery or production orders to use for research or in negotiations.

RECOMMENDATION 6:

- Canada must honour the commitment made in Justice at Last to make reasonable efforts to resolve claims fairly through negotiation at Stage One.
- Where claims are rejected, there should be a requirement on Canada to provide detailed, meaningful reasons for such rejection.
- Where claims are only partially accepted, detailed reasons should also be provided for such acceptance and rejection.
- First Nations should have an opportunity to provide input into any valuation process of their claims without prematurely having to advance a full case on valuation.
- Releases should only be requested in respect of those specific aspects of a claim that are accepted, leaving the claimant free to seek the independent adjudication of the Tribunal in other respects. Negotiators should possess mandates to communicate and negotiate with First Nations that are guided by principles of good faith and reconciliation. They should have mandates to make decisions and present offers at the negotiating table. Communication and negotiation in the form of in-person meetings should also be re-established.
- As at all stages, provision must be made to adequately fund claimants – and to provide sufficient support for federal officials to do their part. As noted elsewhere, the *Specific Claims Tribunal Act* could be revised to provide for Tribunal supervision of funding, rather than leaving ongoing concerns that Canada will not be wholly impartial about determining who will be supported, and to what extent, in respect of claims against itself.
- The *Specific Claims Tribunal Act* should be amended to permit a First Nation access to the Tribunal in the course of negotiating the claim without regard to a three year lapse. The trigger, at the election of the First Nation, would be an impasse in negotiations, not a rigid timeline. Similarly, it would also provide an incentive for Canada to engage more effectively in negotiations. It would also result in some cost reduction for both parties.
- The *Specific Claims Tribunal Act* could also be amended to provide for access to the Tribunal at both the assessment and negotiation stages. By agreement of the parties, or perhaps unilaterally in some well-defined cases, it should be possible to refer a question of law to the Tribunal without the necessity of referring the whole case.

5.5 Claims Not Addressed by the Specific Claims Process

“In order to participate in the process our people have to accept monetary compensation as the only remedy, when restitution of land would be the preferred method for us...” - Chief Judy Wilson, Neskonlith Indian Band Member of the Secwepemc (Shuswap) Nation

~

“We need a process to address claims over 150 million.” – Federation of Saskatchewan Indian Nations

~

“[Canada is] asking First Nations to deal with smaller claims without first having an avenue to resolve larger claims” – Tsuu T’ina Nation

Presenters raised issues with respect to claims that are too large and complex to be dealt with by the specific claims process. Some claims are simply too large and expensive to be adequately addressed by this process and are outside the jurisdictional limit of the Tribunal. Presenters expressed the frustration of First Nations with the lack of an adequate process to address these large claims and the damage to reconciliation and extraordinary cost of not finding adequate solutions. Claims have been brought to the United Nations and other measures have been considered in an effort to have these issues addressed. The Six Nations presentation to the Expert Panel observed that “what this uncertainty has done to relationships between neighbours in the region and how confrontations at development sites have virtually deterred all investment in the region.”

A number of presenters submitted that there should be no upper limit on the size of claims that can be brought to the Tribunal. The current dollar limit (\$150,000,000) will exclude more and more claims as time goes on due to the accrual of principal losses to First Nations (e.g., loss of use of their land) and the accrual of interest or inflation-adjustments as the value of losses is carried forward from the time incurred. It would be fundamentally unfair if delays outside of the control of the claimant worked to exclude the claim from access to the Tribunal. Discussion between First Nations and Canada could consider a one-time adjustment to the ceiling, or a regular annual escalator.

Presenters also raised issues related to the definition of a specific claim and examples of where a claim that calls out for justice does not fit within the strict definition of a specific claim under the current *Specific Claims Tribunal Act*. Presenters explained that whole categories of claims, which would otherwise be categorized as specific claims, would be excluded because they are arguably of an ongoing or variable nature. Presenters also expressed concerns relating to the requirement of extinguishment and the inability of the Tribunal to award land and how this limitation fails to recognize the inherent relationship and rights that First Nations have to the land as recognized by S. 35 of the *Constitution Act, 1982*.

RECOMMENDATION 7:

- Concerns were raised by many presents about various categories of claims that are excluded by the eligibility requirements of Specific Claims Tribunal process. The Political Agreement of 2007 called for further discussion of excluded claims, yet they have been the subject of little or no dialogue and certainly no progress. Excluded claims should be reviewed and resolved through the proposed partnership between First Nations and Canada presented at the outset of this report.
- Even if the ceiling on claims eligible for Tribunal adjudication is maintained, discussions could be had for stipulating guidelines on how these larger claims will be processed, and exploring ways in which even these larger claims might have some limited access to Tribunal processes, such as judge-supervised mediation.
- The Expert Panel recognizes that the *Specific Claims Tribunal Act* will not always be the most suitable forum for considering claims. The existence of the *Specific Claims Tribunal Act*, if properly implemented, will indeed be of crucial assistance in a wide variety of situations across Canada. But nothing in the Act precludes the development of other mechanisms, of an ad hoc or long term nature, that might be suited for particular kinds of claims. For example, there may be claims where there is a large measure of provincial involvement, and a tripartite Federal-Provincial-First Nations mechanism could be created to facilitate resolution.
- With some very large claims, new forums might be created that are well equipped to explore solutions such as achieving redress through creative means such as revenue-sharing arrangements rather than damage awards. Again, the proposed First Nations-Canada dialogue can be a useful forum for exploring innovations of this kind.

6. Stage Two: Findings and Recommendations

Most of the comments at our hearings concerned Stage One, as that is where most claimants currently are, and that has proven to be the area most unsatisfactory to the claimant community. The Expert Panel heard many positive comments about the Tribunal, including the manner in which its mandate, rules and actual practices have been culturally sensitive, such as visits by Tribunal members to the particular community that is advancing a claim. There have been no questions raised at all about the calibre or impartiality of those appointed. This does not mean that the claimant community agrees with every decision made – one claimant has already initiated a judicial review – but rather that the claimant community appears satisfied with the process to date.

6.1 Judges and Resources

The Tribunal is poised to take on a significantly higher volume of cases than originally contemplated. Presenters described the high rate of rejection at Stage One and the resulting transfer of the backlog from Stage One to Stage Two. Some claimants whose

"The community witnesses had an opportunity to share their knowledge and their stories with the Tribunal. Counsel for Canada cross-examined the witnesses, and that cross-examination was respectful." - Leah Pence, Legal Counsel to Williams Lake Indian Band

“Insufficient funding is an access to justice issue. It means that First Nations can’t even get through the door to the Tribunal because they can’t afford it.”

– Leah Pence, Mandell Pinder LLP, Legal Counsel to Williams Lake Indian Band

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“The number of claims already filed tell us there is a desperate need for the Tribunal. And we know there is a long line of claims waiting. Some First Nations are choosing to wait either because they cannot afford the (legal and other) costs not covered through the funding agreements or because they are waiting for a decision in a claim similar to theirs (...)” – Union of British Columbia Indian Chiefs

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“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.” – David Knoll, Knoll & Co. Law Corp.

claims were rejected or received unsatisfactory offers at Stage One have not yet filed at the Tribunal because they need to first marshal the necessary resources to continue. Sooner or later, however, many of them will. Many claimants have already filed at the Tribunal, making concerns over whether the Tribunal is adequately staffed and administratively independent even more acute.

Very strong concerns have been expressed at the hearings about whether the role of the Tribunal is in jeopardy in light of understaffing in terms of judges, loss of administrative distinctiveness and independence, and inadequate funding for claimants to participate in the process.

The concerns about understaffing and loss of administrative independence are consistent with the 2014 Report by the Chair of the Tribunal. The Report states plainly at its outset:

“The primary focus of this report is on the statement called for by section 40(2). The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. Nor is it, due to the imminent coming into force of section 376 of the Economic Action Plan 2014 Act, No. 1, which provides for the creation of the Administrative Tribunal Support Services Canada (ATSSC), assured of its ability to continue to function with adequate protection of its independence. These concerns have been raised with the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development. There has been no adequate response from Government.

Without the appointment of at least one additional full time member and several part time members, there will be unacceptable delays in servicing the current case load, much less any new claims.

I am the only full time member, and the Chairperson of the Tribunal. My term expires in December, 2015. Without the appointment of one or more full time members in the interim there will be no ability to implement a succession plan or service the case load. The Tribunal will fail.”

It should be noted that Justice Slade is focusing on the need to appoint at least one additional full time member to address the existing case load. The load however, is burgeoning as a result of a Stage One process that is rejecting claims in numbers far in excess of anything expected by the claimant community in light of past acceptance rates. A strong majority of adjudicated claims at the Tribunal, however, have been found to be valid, and the claimant community will increasingly have no choice but to go to the Tribunal with a desire to do so if it remains a credible source of fair and final adjudication.

RECOMMENDATION 8:

- The *Specific Claims Tribunal Act* provided for up to six full time judges or their equivalent to be appointed to the Tribunal. The Expert Panel strongly recommends that legislative amendments be considered to ensure that the full complement is in fact appointed, thereby facilitating effective access to justice, and that consideration be given to raising the statutorily defined number of positions in light of the burgeoning caseload of the Tribunal and in light of the fact that it might be called upon by other changes to exercise additional duties, such as supervising mediation services at Stage One.
- The Expert Panel further recommends that consideration be given to making judges of provincial courts eligible for appointments, as doing so might increase the ranks of independent and experienced jurists who might be willing to serve and whose participation could be accommodated by their chief judges.

6.2 Registry

Administrative independence is a concern raised over and over again in our hearings, as well as by Justice Slade. The *Specific Claims Tribunal Act* provided in s. 10 that there would be a distinct Registry to serve the process. As Justice Slade explains in his 2014 Annual Report:

"In February 2014, the Tribunal was advised by the Assistant Deputy Minister of Justice that the back offices of 11 federal tribunals, including the Tribunal, would be merged to achieve cost savings and efficiencies. Consultation with the Tribunal in this regard was so time limited as to be meaningless. Moreover, there was no consultation with First Nations before the Bill to create the Service was introduced, despite the requirements of section 41 of the Act. Nonetheless, the Act was amended, eliminating the Registry (section 10) and eliminating the ability of the Tribunal Members to make Rules of respecting the duties of staff (section 12). The Tribunal will no longer have a dedicated vote of funds. The resourcing of the Tribunal will be entirely in the discretion of the Chief Administrator of the ATSSC. Concerns over the impact of the ATSSC on institutional and judicial independence of the Tribunal, both in fact and as perceived, and the lack of consultation with First Nations have not been addressed."

A number of presenters indicated this is especially true if the Tribunal does take on additional roles such as administering research funding. The independence and budgetary discretion to carry out that role cannot be subsumed under or combined with an umbrella body.

"We remain very concerned that the federal government appears to be taking steps to reduce or eliminate the independence of the tribunal, and to hobble its operations. They are making a mockery of the Justice at Last initiative."-
Algonquin Nation Secretariat

RECOMMENDATION 9:

- Given the highly distinctive mandate and rules of the Specific Claims Tribunal, the Expert Panel joins with many presenters in recognizing the need for it to have its own Registry. All claims that the Tribunal hears are against the Crown, and it is especially important in this context that it be seen, and actually have the administrative independence required of an adjudicative body under Canadian legal traditions and relevant constitutional and quasi-constitutional norms. The Expert Panel wants to highlight that independence is not only a fundamental element of the Tribunal, but is particularly important if the Tribunal's roles are to be expanded.
- The Expert Panel recommends that at renewed and accountable partnership discussions between the First Nations and Canada on the Tribunal, the agenda include steps that can be taken administratively and legislatively to ensure that the Tribunal is adequately staffed, both in terms of judges and administrative support, and that its administrative distinctness and independence can be re-established.
- Any changes to the rules of the Specific Claims Tribunal can also be discussed in the partnership context. It is that forum that led to the joint recommendation by Canada and the AFN that made the original iteration of the rules so effective.

6.3 Expanding the Role of the Tribunal

Given the high level of disappointment and frustration expressed by the claimant community with Canada's failure to honour its commitments at Stage One, consideration should be given to a much expanded role for the Tribunal if that stage is maintained, such as supervising mediation at Stage One or the administration of claims funding; this expansion however is contingent on restoring its full independence. These points were reviewed in the previous section of this report.

Elimination of Stage One

Another alternative proposed by some presenters at the hearing was to eliminate Stage One altogether. This view posits that Stage One places the Crown in a uniquely favourable position compared to other litigants. It has ample opportunities to delay the resolution of claims. The Crown obtains discovery of the claimant's case without reciprocating. If Stage One is not leading to the fair and expeditious resolution of claims, then the Crown should be placed in essentially the same position as other defendants, and the process can begin at the Tribunal.

Eliminating Stage One might spare duplication and the wasting of resources and free up time and money for both claimants and Canada to focus on Stage Two.

If Stage One is eliminated, then discussions between First Nations and Canada could explore how Stage Two could be adapted accordingly. It would still be desirable for claimants and Canada to explore whether a claim can be resolved through negotiation and the rules might be adapted appropriately. For example, with the consent of the claimant, Canada might be afforded a period, such as six months, to consider whether it wishes to offer to negotiate the claim and on what terms. If the claimant agrees, Canada would not be obliged to file a detailed statement of defence, but instead would have a jointly agreed period of time and process (which might include mediation) to negotiate a resolution of the claim. Unlike Stage One, there would have to be consent by a claimant to a negotiation process before an adversarial process proceeds, the terms would have to be agreed upon, and the Tribunal would be able to supervise.

7. The Expert Panel's comments on the 19 questions raised by Canada

7.1 General

Scope of the questions: Canada's review focuses in the first eighteen questions on matters legislated in the current *Specific Claims Tribunal Act*. The provisions in the Act are part and parcel of a larger system of resolving claims including Stage One (federal evaluation and negotiation of claims). A five year review should consider all aspects of it. The scope of the five year review under s. 41 extends to "the efficiency and effectiveness of operation and of any other matters related to this Act that the Minister considers appropriate." Question 19 asks about such matters which could include core issues such as the adequate funding of claimants throughout all stages of the process. The Expert Panel believes that the entire range of issues at Stage One and Stage Two must be explored thoroughly in any five year review and result in effective refinements to the system, whether through changes in legislation or policy.

Who will answer the questions? This Report recommends in the strongest terms that the productive and fair way to address reforms to the *Specific Claims Tribunal Act* and processing system is to continue the partnership that led to the Act in the first place: a full engagement between First Nations and Canada with a view to identifying issues and resolving challenges in a creative and practical manner based on finding consensus between the partners.

The Expert Panel will now address the 19 questions in order; the following responses are based on the Panel's analysis resulting from their expertise and information received from First Nations:

1. Three year time frames: The Expert Panel heard repeatedly that there is too much potential at Stage One for delays that are unilaterally imposed by Canada and that do not contribute to the just resolution of claims. Canada can impose costs and potential delays of six years or more by unreasonable interpretation and application of the minimum standard for filing claims, or by evaluating claims or negotiating them in a manner that is not reasonably open-minded and not reasonably inclined towards finding a just resolution. Reform to legislation could eliminate Stage One, or provide that a claimant may unilaterally exit at any time.

There should be exploration, through a joint First Nations-Canada process to consider amendments, of the possibility of permitting early referrals to the Tribunal as to whether a claim satisfies the minimum standard. Another possibility is to eliminate Stage One altogether.

2. Referrals by Canada in special circumstances: First Nations consistently expressed that negotiations are their preferred way of resolving specific claims, allowing Canada the option of referring a claim to the Tribunal will mean that First Nations are, against their will, dragged into an adjudicative process that can be both lengthy and costly. Or, if Canada has the option of referring claims to the Tribunal, First Nations may be barred from accessing the Tribunal from the get go. This will invite more acrimony into the process and will not foster reconciliation. The Expert Panel has serious concerns with a proposal where the Crown could unilaterally attempt to force a First Nation to make a claim before the Tribunal. In this situation, where a First Nation is not willing to advance a claim, the proposal would seemingly allow the Crown to advance a claim and a defence of that claim unilaterally and have the Tribunal purport to extinguish the First Nation's s.35 rights. In rare cases where such a proposal would be feasible, the details would need to be discussed and agreed upon at a First Nation-Canada table. In addition, the Expert Panel has heard concerns and shares them with the potential deterrent effect it would

have on filing claims even at Stage One, and the potential for claims to be referred to a Tribunal that might remain understaffed and under resourced, thereby prejudicing the efficient handling of other claims, as well as the ones referred by Canada..

3. Transitional provisions: Repeal of provisions that might be spent should not take place without a joint First Nations-Canada discussion of whether there are any significant risks of actually prejudicing some claims. There should be a discussion about amending the transitional provisions so that claims filed previously with the Indian Claims Commission could be submitted at Stage One or directly to Stage Two without further formalities. Another concern raised regarding the repeal is that it could prevent access to justice for those First Nations who had rejected claims or partially accepted claims.
4. Expansion of functions: First Nations have registered their strong concerns that many Stage One processes, including claimant funding and mediation, are still affected by a perceived conflict of interest that arises when Canada considers claims against itself. The Expert Panel sees an expanded function for an independent Tribunal in various Stage One functions as an idea well worth exploring. These discussions would have to take into account whether the Tribunal has adequate resources to take on an increased role, and whether its own administrative independence from Canada is adequately secured.
5. Judicial review: The Expert Panel recommends that the overall system ensures adequate funding at the judicial review stage. Earlier stages, including Stage One filings and negotiations, and then Stage Two hearings at the Tribunal, may have left the claimant drained of resources needed to pursue judicial review. As judicial review decisions help to establish precedents that will govern many other cases, as well the particular dispute, both the interests of developing sound jurisprudence as well as fairness to a current claimant requires that the latter have sufficient resources to participate on an equal basis with Canada at "Stage Three", judicial review.
6. Structure of the Tribunal: The Expert Panel has found that the claimant community does not believe that the current staffing levels – which are far below the six authorized by the *Specific Claims Tribunal Act* – are sufficient to address the current case load. Justice Slade, in his report as Chair of the Tribunal has warned that the staffing level, along with concerns about administrative independence, threaten the viability of the Tribunal. The Expert Panel recommends that the legislation be changed to require at least six full time equivalent judges, and perhaps more, in light of the fact that the backlog appears to be moving from Stage One to Stage Two. An option that could be explored between AFN and Canada would be making provincial, as well as federally-appointed, judges eligible for service thereby potentially increasing the ranks of jurists who are independent, experienced and interested in serving. The Expert Panel also notes the concerns of the claimant community and of Justice Slade that the Tribunal lost its own registry due to unilateral actions of Parliament, and that the Registry should be restored.
7. Rules of procedure of *Specific Claims Tribunal Act*: The Expert Panel heard from claimants that they are pleased that the rules are flexible, emphasize case management, and are culturally sensitive. The Expert Panel notes that the current rules have been strongly influenced by a joint AFN-Canada submission to the Tribunal and are adapted to the special nature of the Tribunal. There is a strong emphasis in the rules on case management and adapting the process to the requirements of each particular case. Rule 2, for example, states that: "These Rules must be interpreted and applied so as to secure the just, timely and cost-effective resolution of specific claims while taking the cultural diversity and the distinctive character of specific claims into

account." The Expert Panel recommends that an AFN-Canada committee again meet to consider revisions to the rules, rather than having each side independently make recommendations. This should be done in coordination with the Tribunal's Rules Advisory Committee to broaden the oversight and be more inclusive of First Nations.

8. Bifurcation of claims: The Expert Panel is inclined to believe that bifurcation should be an option at the case management stage, and not imposed by legislation. Presenters thought this should be dealt with on a case by case basis and the Expert Panel agrees. Bifurcation can be useful, or it can further protract and add to the expense of a claim, depending on the circumstances. As in all matters, any adjustments concerning bifurcation should be discussed by AFN and Canada and decisions made by consensus rather than being unilaterally determined by Canada.
9. Paper hearings: The rules appear flexible enough to permit the parties to submit claims without oral hearings. It would be extremely rare for a claimant to waive oral argument. Emphasizing this option might open the door to Canada further restricting funding for claimants at the Tribunal stage; it might argue that oral argument is not necessary in some cases. Having regard to comments of presenters and upon reflection, this should be dealt with on a case by case basis under the rules of the Tribunal.
10. Equitable compensation: Right now compensation, including bringing forward the value of claims, is generally to be done in accordance with legal principles. The Expert Panel must recommend on this issue, as with others, against any attempt by Canada to unilaterally impose its own solution, rather than leaving it to the Tribunal or the Courts, with a view to determining whether a consensus is possible on any formula to replace the legal principles that are determined and applied by independent judges.
11. Exchange of documents: The Expert Panel would begin with the view that the existing rules, and case management under them, are the place to address these issues. In addition, exchange of documents as part of the process is a step that First Nations value and would reject any attempt to minimize. Document exchange is a useful part of the Tribunal process, and allegations that it places a burden on processing time are not consistent with the expeditious manner in which the Tribunal has released its decisions to date.
12. Expert witness reports: The Expert Panel has repeatedly heard concerns that Canada is adding to the cost and delay of proceedings by measures such as arguing that expert reports from Stage One cannot be used at Stage Two. The Expert Panel recommends that Canada and the AFN discuss changes to policies, Tribunal Rules or the legislation that would make the most efficient use of expert reports, including integrating their use at Stage One and Stage Two. At a table there could be discussion of various aspects of claimant funding, ensuring that there are adequate resources for preparing expert reports.
13. Proportionality of costs: The Expert Panel has heard concerns that with small claims, it is the approach of Canada that is rendering the cost of litigating them disproportionate to their actual value to the point that transaction costs can exceed the underlying value of the claim. First Nations expressed to the Panel that claims, regardless of their size, derive from a past grievance and the duty of the Crown to compensate the affected First Nation for wrong doings, and all claims deserve to be assessed in a just and well-resourced manner. Possible approaches to effectively and efficiently address smaller claims while maintaining a fair access to justice for all claimants could be explored by First Nations and Canada.

14. Improving the efficiency of the Tribunal: Any assessment of the efficiency of the Tribunal must take into account that it has never enjoyed the full complement of judges contemplated by the *Specific Claims Tribunal Act* and that its administrative independence was compromised by a legislated amalgamation of its registry with other tribunals without prior consultation with First Nations. Inquiring into ways to make the Tribunal more efficient cannot and should not overlook the overriding need to take action to provide adequate resources to the Tribunal and to restore its administrative independence. The Expert Panel has noted both the concerns of the claimant community and the Chair of the Tribunal that current staffing is inadequate. With the backlog being shifted from Stage One to Stage Two, the Tribunal may actually need more than the equivalent of six full time judges. The Expert Panel recommends that Canada and the AFN meet to arrive at a consensus on not only staffing, but other issues related to efficiency, such as minimizing overlap and duplication from Stage One and State Two (e.g., unnecessary second iterations of expert reports already prepared for Stage One). If the Tribunal is to assume more of a role in Stage One, such as supervising claims funding and mediation, it will need even further resources. The Expert Panel reiterates its suggestions that the administrative autonomy of the Registry be re-established, so that the administrative structure of the Tribunal is best able to efficiently and effectively address the very distinctive nature of the Tribunal's mandate.
15. Final adjudication: Amending the *Specific Claims Tribunal Act* to create a time limit for submission of eligible claims to the Tribunal for binding adjudication can be highly problematic for First Nations. With the current fiscal environment and an inadequately funded and implemented specific claims process, giving a time frame will by default further prevent First Nations to have access to justice. This is a query that can be better assessed at the ten year mark, contingent upon properly addressing current concerns of having a fully functional Tribunal and a negotiation centred specific claims process. At which point then a First Nations-Canada discussion of finality, in the sense of requiring a claimant to at some point access the Tribunal or forego its ability to access the Tribunal forever, could review the issue in its overall context, including releases, whether claimants have adequate funding to pursue specific claims, whether the process itself once initiated, is reasonably expeditious and culturally sensitive and whether confidence can remain in the independence of the Tribunal.
16. Effectiveness of the Tribunal: Key reforms could include streamlining or eliminating Stage One, providing for more of a Tribunal role at Stage One (such as supervising funding for claims research and negotiation, providing mediation services and so on), ensuring adequate judicial and support staffing of the Tribunal, re-establishing its own registry and administrative independence and ensuring adequate funding for claimants throughout. Canada should work with the Rules Advisory Committee on attempting to produce a joint submission on any review of the Tribunal rules, as it successfully did with respect to the Tribunal's original enactment of the rules.
17. The minimum standard: The Expert Panel heard many criticisms of the way in which the minimum standard has been interpreted and applied by Canada. First Nations and Canada, at a joint table, should discuss ways in which the standard can be defined and administered - including the possibility of expedited access to review by the Tribunal of disputes over it - to ensure that fairness and efficiency are achieved in a manner satisfactory to both the claimant community and Canada. This work may be properly carried out by the Rules Advisory Committee.

18. Further review: Given the many changes in the last five years on the specific claims front, the Expert Panel believes that another review in five, rather than ten, years is necessary, and that this could be another agenda item at a restored and accountable First Nations-Canada table. The Expert Panel further observes that the Political Agreement between Canada and the AFN contemplated a Joint Liaison and Oversight Committee of the AFN and Canada to provide regular discussion and monitoring of the system, and suggests that restoration of this process might be helpful to both sides, and provide necessary dialogue between more comprehensive reviews.

19. Other suggestions: The Expert Panel has canvassed a number of changes in the main body of this report. The appropriate forum to continue and resolve the discussion, in the view of the Expert Panel is a renewed AFN-Canada table, and unilateral actions by Canada would likely undermine public as well as claimant confidence in the system and lead to a situation where there is no reasonable recognition and reconciliation of various and sometimes competing interests. As previous exercises have shown (e.g., the 1998 Joint Task Force Report, the developing of the *Specific Claims Tribunal Act* itself, the joint submissions of Canada and the AFN on the Tribunal rules), a partnership relationship on the monitoring and oversight of the system is the proven, legitimate and effective path to ensuring a system is devised that justly and efficiently takes into account the interests of all parties, including their shared interests in the just and timely resolution of claims. A first step in this regard should include sharing the federal Ministerial Special Representative's report to the Minister with First Nations as the basis for a joint discussion about the road forward.

8. Concluding Observations

The resolution of claims tends to involve tensions between short and long term perspectives.

In the short term, the resolution of claims seems costly. Government time and attention must be paid to resolving longstanding injustices. Strained government budgets are called upon to resolve issues whose origins lie with long ago governments and whose immediate resolution appears to limit the ability of the current to address priorities, including balancing budgets. Unresolved breaches of lawful obligations are costly to First Nations and the impacts have been considerable. They continue to be felt and magnified as long as the claims are not resolved.

The resolution of claims, however, produces long term benefits. Communities can become more self-sufficient if they recover resources lost through earlier government errors. The removal of uncertainties and tensions resulting from longstanding grievances can facilitate economic development in First Nations and neighbouring communities alike.

The failure to resolve claims can also be more costly in the long run. The social and economic development of communities may be impaired while they remain unsettled. The cost of resolving claims can rise through time, including through the accumulation of interest - which in many cases may be compounding interest - on the value of assets withheld from a First Nation.

The Expert Panel heard repeatedly that claims do not fail to materialize merely because current governments do not fund claims research. First Nations become aware of them through a variety of means, including research on other claims, a review of developing case law and the insight of community members and leaders.

Claims unresolved at Stage One – federal evaluation and negotiation – do not disappear either. They will re-emerge sooner or later at Stage Two, in the courts, or in protracted political conflicts “on the ground”.

Claims unresolved at Stage Two – for example, because claimants do not have the immediate resources to press them – will continue to live in the memories and consciences of community members, and sooner or later be pursued.

Justice at Last was a political commitment to First Nations and Canadians to finally produce an efficient and fair system for resolving claims. The idea of a Tribunal has proved itself. But now, we have heard, the whole system is in danger of collapse. The failure to achieve a promise to create a fair overall system to resolve particular historical grievances will only produce another overarching dimension of injustice.

In maintaining overall perspective, it is worthwhile recalling the observations of the Senate Report, "Negotiation or Confrontation: It's Canada's Choice:

"Specific Claims are allegations of wrongdoing submitted to the Government of Canada by First Nations, that is, by Status Indian bands not by individual members of First Nations. These claims, which our witnesses explained are about fraud, theft of band monies, illegal taking of reserve lands and the government's failure to deliver reserve land promised under treaties, ARE taking generations to resolve. This is wrong! So wrong, in fact, that it has been called a human rights issue.

In his 2005 report to the United Nations Commission on Human Rights, Special Rapporteur Rodolfo Stavenhagen associated the numerous instances of Canadian federal, provincial and territorial governments failing to fulfil their obligations to Aboriginal peoples with the impoverishment and ill-health of Aboriginal people and with social strife. Aboriginal people are justifiably concerned about continuing inequalities in the attainment of economic and social rights, as well as the slow pace of effective recognition of their constitutional Aboriginal and treaty rights, and the concomitant redistribution of lands and resources that will be required to bring about sustainable economies and socio-political development.

The social and economic situation of Aboriginal people is among the most pressing human rights issues facing Canada according to the Canadian Human Rights Commission. In 2001, Jim Prentice, former Co-Chair, Indian Claims Commission (ICC) and present Minister of Indian Affairs and Northern Development, observed that: "The settlement of specific land claims is fundamentally a human rights issue."

As the United Nations Declaration of the Rights of Indigenous Peoples affirms in Article 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Within the Canadian legal system, as many who presented emphasized, the just resolution of specific claims is required by fundamental principles of Canada's own legal system. Specific claims often involve rights that are recognized and affirmed in s. 35 of the *Constitution Act, 1982*. As the Supreme Court of Canada has observed, in dealing with the rights of First Nations, the honour of the Crown is implicated. In many cases, the courts have found that Canada is a fiduciary, with all the accompanying obligations of acting diligently and in good faith to protect the interests of a First Nation that is relying upon. Fiduciary duties of the Crown can include the duty of the Crown to use its powers to redress earlier errors that it has made in fulfilling its obligations to a First Nation.

It is incumbent on Canada, given the social, economic, moral and legal implications of specific claims, to act with sincere commitment and intention to work with First Nations to ensure that, in practice as well as theory, there is a fair and effective system to resolve claims and promote reconciliation.

The idea of a partnership between First Nations and Canada to develop a fair system was signified by the creation of the *Specific Claims Tribunal Act* and Justice at Last, the proper fulfillment and implementation of the commitments made in those, can only be achieved by an accountable partnership with proper oversight. This is the surest path to realizing the promise of Justice at Last.

"What we need is an attitude shift on the part of Canada. A shift from "we have to win this claim" to "we have to resolve this claim." That attitude shift will have ripple effects (...)"
Union of British Columbia Indian Chiefs

Appendix A: Terms of Reference

ASSEMBLY OF FIRST NATIONS

SPECIFIC CLAIMS REVIEW

TERMS OF REFERENCE

February 24, 2015

Objective

The Assembly of First Nations (AFN) has appointed an independent Expert Panel to engage with First Nations and their representatives to develop an expert report with recommendations for improvements to the federal Specific Claims process relating to areas such as the preparation, submission and processing of claims and the advancement and adjudication of claims to the Specific Claims Tribunal of Canada.

Membership

The membership of the Expert Panel will consist of:

1. A chair to oversee and support the Expert Panel's deliberations and to speak on behalf of the Expert Panel; and
2. Two expert panellists with substantive expertise relating to Specific Claims to hear and interpret submissions of all kinds and to prepare the Final Report and recommendations.

Mandate

The Expert Panel will function independently to receive and assess information from First Nations and their representatives, and others as determined by the Expert Panel, and to use this information to make recommendations on improving the Specific Claims process and legislative amendments.

1. The Expert Panel will conduct two days of hearings with First Nations and their representatives as a basis for the development of recommendations.
2. The Expert Panel will receive written submissions from First Nations and their representatives as a basis for the development of recommendations.

The Expert Panel will develop a Final Report based on this information, which is to be delivered to the National Chief.

Decision-Making

1. Decisions of the Expert Panel shall be made by consensus.
2. Where a consensus cannot be reached, a decision will be made by majority vote of the Expert Panel.

3. Any matters that cannot be decided / resolved by the Expert Panel will be brought to the National Chief for direction.

Conflict and Confidential Information

1. The Expert Panel will address system issues, rather than commenting on the individual validity of any particular claim, past or present. For the sake of transparency, however, panelists will disclose the general nature of any particular claims they have been or are currently involved in as counsel. If for any reason a panelist is involved, or a panelist is not comfortable in making a particular observation, conclusion or recommendation, he or she may recuse themselves from that decision or recommendation and this shall be noted as a footnote in the Final Report.
2. No panelist will disclose confidential information that they have as a result of previous or current employment or other professional activities that is not otherwise available to the public.

Time Frame

The Expert Panel process will commence immediately and will remain in effect until April 15, 2015, consistent with the following timelines:

1. The Expert Panel will participate in two 1-day hearings to be held in March in Toronto and Vancouver, scheduled in coordination with Expert Panel members.
2. The Expert Panel will develop and deliver a first draft report with recommendations to the AFN by March 31, 2015.
3. A Final Report with recommendations will be provided to the National Chief by April 13, 2015.

Communications

The Expert Panel will not carry out any formal independent communication about the Expert Panel process or any issues that arise in conjunction with this process.

Other Matters

1. The Expert Panel process is intended to be a public, transparent process and may involve webcasting and other means of conveying information to the public.
2. Logistical, administrative and any other support will be provided to the Expert Panel by the AFN Secretariat.
3. All budgetary matters shall remain under the sole discretion of the AFN.
4. The Expert Panel shall meet via teleconference as necessary.

Appendix B: List of participants & link to their written presentations available at <http://www.afn.ca/index.php/en/policy-areas/land-rights-and-claims/key-issues-activities/participants-and-presentations>

Contributor	Presentation
Kathleen Lickers, Barrister & Solicitor Six Nations, Ontario	No presentation available
Jayne Benson, Specific Claims Director Federation of Saskatchewan Indian Nations (FSIN)	Five Year Review Specific Claims Tribunal Act (SCTA)
Luke Hunter, Land, Rights & Treaty Research Director Nishnawbe Aski Nation (NAN)	Presentation to AFN Specific Claims Review
Elder Lawrence Cheezie Smith Landing First Nation	No presentation available
Phil Monture, Land Rights Consultant Six Nations, Ontario	1- A Global Solution for the Six Nations of the Grand River (ppt) 2- The Honor of the Crown is at stake in dealing with Aboriginal Peoples
Alanna Trudeau, Community Engagement Coordinator Wikwemikong Islands	No presentation available
Russell Diabo, Policy Advisor Algonquin Nation Secretariat	Specific Claims & The Specific Claims Tribunal Act: Five Years Later
Ron Maurice, Legal Counsel Maurice Law	Specific Claims Policy – Five Year Review Process Notes for Presentation to Expert Panel
Jerome Slavik, Barrister & Solicitor Ackroyd LLP	Presentation to AFN Panel on Five Year Review of Justice At Last & The Specific Claims Tribunal Act
Jamie Tromp, Research & Negotiation Associate Havlik Metcs Limited	Five Year Review Specific Claims Tribunal Act (SCTA)
Chief Marjorie McRae Gitanmaax Band	Presentation to Expert Panel, AFN Specific Claims Review
Chief Jim Bear Brokenhead Ojibway Nation	Specific Claims Review Panel Presentation
Leah Pence, Legal Counsel Williams Lake Indian Band: T'exelc	Presentation on behalf of the Williams Lake Indian Band
Grand Chief Stewart Phillip, Jody Woods & Leah Pence Union of BC Indian Chiefs	1- The Right to Be Heard – A Principles-Based Review of the SCTA 2- An Open Letter to Prime Minister Stephen Harper on the Resolution of Specific Claims
Chief Judy Wilson Neskonlith Indian Band	Specific Claims & The Specific Claims Tribunal Act: Five Year Review A Presentation by the Neskonlith Indian Band Members of the Secwepemc (Shuswap) Nation
Chief Ted Roque Wahnapitae First Nation	No presentation available
Don Colborne, Barrister & Solicitor	Presentation of Big Grassy First Nation

Treaty 3	(Mishkosiiniiziibing)
Hugh Braker, Chief Councilor Tseshaht First Nation	Submission of the Tseshaht First Nation
Deb Abbott, Executive Director Nlaka'pamux Nation Tribal Council	Negotiation of "Small Value Claims": The NNTC Perspective
David Knoll, Barrister & Solicitor Knoll & Co	AFN – Specific Claims Review
Jim Big Plume, Claims Researcher Tsuu T'ina First Nation	Expert Panel Submissions Specific Claims Review Tsuu T'ina Nation
Blood Tribe	The Blood Tribe's Response & Comments on the 5-year Review of the SCTA
Conseil Tribal Mamuitun	1- "Justice menace" – Commentaires destinés au Canada concernant l'examen quinquennal de la Loi sur le Tribunal des revendications particulières 2- Loi sur le Tribunal des Revendications Lettre
Darwin Hanna, Barrister & Solicitor Callison & Hanna	AFN Specific Claims Review: Expert Based – Peoples Driven
Doig River First Nation	AFN Expert Panel on the Specific Claims Process
Chief Mary Lynn LaBillois Eel River Bar First Nation	Eel River Bar First Nation Claim
Chief Charlene Belleau Esk'etemc	Esk'etemc Specific Claims Submission to the AFN Specific Claims Review Panel: Delia Opekokew, Bryan Shwartz, Robert Winogron Map: Esk'etemc Traditional Territory Boundary Map: Esk'etemc Specific Claims Locations Questions for Further Consideration
Patricia Myran, Acting Director Treaty & Aboriginal Rights Research Centre of Manitoba	1- Submission to Specific Claims Review Expert Panel 2- Legal Counsel Contribution
Dr. Ian Johnson, Negotiator Kylaik Inc. Tim Labrande, Lawyer Librande Law Office	Submission to AFN Specific Claims Review Panel
Chief Joe Marshall, Executive Director Union of Nova Scotia Indians	1- In Bad Faith: Justice At Last & Canada's Failure to Resolve Specific Land Claims 2- An Open Letter to Prime Minister Stephen Harper on the Resolution of Specific Claims
Chief Roland Willson West Moberly First Nations	AFN Expert Panel on the Specific Claims Process
Whitefish Lake First Nation	15 Years of Failed Negotiations to Settle Our Outstanding Treaty Entitlements for Agricultural Benefits Pursuant to Treaty 8

Appendix C: Key reference documents

Federal Policy Statements

1. Justice At Last - <https://www.aadnc-aandc.gc.ca/eng/1100100030516/1100100030517>
2. Specific Claims Policy and Process Guide - http://www.afn.ca/uploads/files/sc/spec_-_specific_claims_policy_and_process_guide.pdf

AFN-Canada Joint Statements

1. The 1998 Joint Task Force Report - http://www.afn.ca/uploads/files/sc/spec_-_report_on_joint_first_nations__canada_task_force_on_specific_claims_policy_reform.pdf
2. Political Agreement on Specific Claims accompanying the enactment of the Specific Claim Tribunal Agreement - http://www.afn.ca/uploads/files/sc/spec__07_11_27_political_agreement_on_specific_claims.pdf

Legislation

1. The Specific Claims Tribunal Act; as originally enacted, and as amended - <https://www.canlii.org/en/ca/laws/stat/sc-2008-c-22/89209/sc-2008-c-22.html#history>

(Section 10, establishing the Registry, was repealed by the Economic Action Plan 2014 Act, No. 1, c. 20, s. 489)

Evaluations of the System - AFN

1. AFN State of Claims Newsletter - <http://www.afn.ca/index.php/en/policy-areas/land-rights-and-claims/key-issues-activities/state-of-claims-newsletter>

Evaluations of the System - Canada

1. Formative Evaluation - <https://www.aadnc-aandc.gc.ca/eng/1325103530142/1325103564092>
2. Implementation Evaluation - <https://www.aadnc-aandc.gc.ca/eng/1347993227260/1347993419535>
3. Summative Evaluation - <http://www.aadnc-aandc.gc.ca/eng/1385384648312/1385384701998>

Evaluation of the System - National Claims Research Directors Report

1. In Bad Faith: Justice At Last and Canada's Failure to Resolve Specific Claims, http://d3n8a8pro7vhmx.cloudfront.net/ubcic/legacy_url/230/InBadFaith_JusticeatLast_CanadaFailureResolveSpecificClaims.pdf?1426350065

Annual Report of the Chair of the Tribunal

1. 2014 Annual Report of Justice Slade - http://www.sct-trp.ca/repor/annu_e.htm

(This Report includes his warnings about under resourcing of the Tribunal and maintenance of its administrative independence).

Rules of the Specific Claims Tribunal

1. Specific Claims Tribunal Rules of Practice and Procedure - <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2011-119/index.html>

Report of the Standing Senate Committee on Aboriginal Peoples

1. 2006 Negotiation or Confrontation: It's Canada's Choice - <http://www.parl.gc.ca/Content/SEN/Committee/391/abor/rep/rep05dec06-e.pdf>