



AFN Regional Engagement Sessions: *Developing an Independent Specific Claims Process*

Séances régionales de mobilisation de l'AFN :
Élaboration d'un processus indépendant pour les revendications particulières

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TOPICS FOR DISCUSSION

A Unique, Timely Opportunity

Since the Fall 2016 Report of the Auditor General of Canada¹, officials of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) and the Assembly of First Nations (AFN) have been engaged in discussions at a Joint Technical Working Group to identify fair and practical measures to positively improve the specific claims process. First Nations have been calling for an independent specific claims resolution process for over 40 years; today First Nations have an important opportunity to substantively shape and inform the discussion to transform this process.

The AFN is hosting regional dialogue sessions to hear from First Nations who have an interest in fundamentally changing the process for resolving specific claims in Canada. We have an important opportunity to push for transformative change guided by Indigenous rights-related principles such as those expressed in the *UN Declaration on the Rights of Indigenous Peoples*, and the “Calls to Action” of the Truth and Reconciliation Commission, as well as recent developments in Canadian law, and our own Indigenous legal orders.

Key Principles

Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples provides that:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

To initiate a fulsome discussion based on an implementation of Article 27, and echoing what First Nations have identified as essential to a new process, we have included below five key principles that must inform any future independent specific claims process:

- Fairness
- Independence

¹ In the fall of 2016, the Office of the Auditor General determined that the Department of Indigenous Affairs had mismanaged the specific claims process by introducing multiple barriers that hindered Indigenous Nations' access to the process and impeded the resolution of claims. Office of the Auditor General, 2016. Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada. November 2016. Available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html



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- Impartiality
- Openness
- Transparency

There are also five basic components that may make up a new independent claims resolution process, and we ask that in preparation for the engagement sessions, you consider how the above principles may shape them. The components we have identified are the following:

- Funding Approach
- Claim Research and Development
- Claims Resolution
- Adjudication
- Implementation and Reconciliation

Please review the following outline for breakout discussions that will take place throughout the engagement session and bring your ideas forward! We look forward to productive, forward-thinking discussions.



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Breakout Session – Funding Approach

The purpose of this session is to provide an opportunity for participants to discuss how funding structures can be redesigned to facilitate independence and to ensure specific claims resolution processes are adequately resourced.

Focus

- Article 39 of the UN Declaration on the Rights of Indigenous Peoples sets out Indigenous peoples' right to have "access to financial and technical assistance from States... for the enjoyment of the rights articulated in the Declaration."
- Currently, research, negotiation, and taking claims to the Tribunal are each funded from different sources in government. These sources reflect separate and discrete stages in the current claims process rather than a "claim continuum" which includes all aspects of a claims resolution process (such as developing plans, obtaining records, writing reports, collecting oral evidence, commissioning expert reports, legal review, claim drafting, filing, negotiations, Tribunal processes, and implementation).
- First Nations have identified underfunding across the claim continuum as a key issue and have indicated underfunding creates barriers to accessing justice (including recourse to the Tribunal).
- First Nations agreed with the Auditor General of Canada on the need for a transparent funding methodology. For First Nations that may involve a process that facilitates stable, predictable, multi-year funding.
- The Auditor General's (2016) report recommended that in cooperation with First Nations, Canada should develop evidence-based methodology for loan funding to adequately support First Nations' participation in the negotiation process.
- First Nations have stated that Canada's access to (human and financial) resources far surpasses their own, resulting in inequalities. Canada has stated that the amount of funding available to support First Nations in claims research, negotiation and adjudication will always be limited by several factors.

Questions

Imagining an entirely new and independent process, please consider the following questions:



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- Considering the claims resolution process as a continuum rather than separate stages, how could funding be structured to ensure fair and equitable access to justice as articulated in the UN Declaration on the Rights of Indigenous Peoples?
- What role, if any, could CIRNA play in administering funding in a new independent process? How could claims funding be administered to ensure transparency?
- Evidence used to support specific claims submissions and negotiations has associated costs (for example, gathering and copying documents, recording oral history, contracting experts to prepare reports). How could an independent process better ensure fair and equal access to the funding necessary to acquire all the evidence necessary to support claims?
- What are some ways funding can be more equitable, transparent, and responsive to community needs?
- Are there principles or elements within your community's Indigenous laws or dispute resolution mechanisms that could help ensure fair, transparent, and equitable resources distribution to ensure full access to justice? How? Can you think of examples that might apply to funding access in an independent claims process?



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Breakout Session – Claim Research and Development

The purpose of this session is to provide an opportunity for participants to discuss how the identification, research, and development of specific claims can be redesigned within an independent process.

Focus

- First Nations have identified access to information as key barriers to claim development.
- First Nations have identified community capacity building as necessary but lacking under the current system (for example, skills development, conducting community-based research).
- First Nations have identified the need for Canada's representatives to visit communities and see claim-impacted territories within context of Indigenous community values and laws in order to understand the loss and asserted issues.
- First Nations have identified the preservation of oral resources/traditional knowledge as a key and urgent priority.
- The Auditor General's (2016) report recommended that in cooperation with First Nations, Canada should develop clear and consistent methodology for funding to First Nation to adequately support the research and preparation of claims.

Questions

- Could an independent process contribute to developing research capacity in your community? How?
- Should representatives from Canada visit your community during the claims development process to learn about the loss created by the specific claim? Why or why not?
- Could an independent claims resolution process help to preserve oral testimony and documentary records? How?
- Could an independent process be structured to improve the research and development of claims? How? What role would you like First Nations to play in the research process?



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- Could an independent body facilitate the co-development of your claims with Canada? In what ways? Does this interest you?
- Could your community's dispute resolution mechanisms contribute to the development of claims? In what ways?



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Breakout Session – Claim Resolution (Negotiation, Mediation)

The purpose of this session is to provide an opportunity for participants to discuss how an independent claims resolution process can support negotiations and mediation.

Focus

- Canada controls and administers funding and decides whether claims against itself are valid and eligible for negotiation. First Nations have identified this as a conflict of interest and a key barrier to resolving outstanding legal obligations.
- Resolving specific claims in a manner that is expeditious and satisfactory to First Nations and Canada requires that the process have a high level of credibility, at all stages, for all parties.
- First Nations have identified the importance of integrating Indigenous legal orders into the specific claims resolution process.
- Some First Nations and Canada have expressed a desire that claims resolution support an ongoing relationship rather than being viewed as one-time gestures, and thereby serve broader objectives of advancing reconciliation in Canada. Some First Nations have identified the need for alternate forms of remedy outside of cash settlements. These could be explored to assist in achieving settlements.
- The ability of First Nations and Canada to resolve claims through good faith negotiation requires a high degree of transparency and openness during negotiations, and an overall commitment to fairness in the process and outcomes.
- Some First Nations have identified the need for Canada's officials to participate in cultural competency training informed by Indigenous laws. This training could assist in establishing conditions for effective claim resolution.
- The Auditor General's (2016) report states the following 3 recommendations; 1) in cooperation with First Nations, Canada should make its negotiation practices to expedite small-value claims (up to \$3 million) acceptable to both parties, 2) Canada should work with First Nations to develop and implement a strategy to use mediation more frequently, and 3) Canada should update its website to reflect the full range of negotiation practices for all types of specific claims.



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Questions

- Could an independent process shape the way claims are evaluated? How?
- Do you see the Tribunal playing a role in claim assessment/evaluation?
- What role could an independent body play to ensure fairness, transparency and equality in negotiations?
- How should claims access negotiations in an independent process?
- How could an independent process ensure timeliness?
- In what ways could an independent process ensure fair, timely and transparent communication between all parties?
- In what ways could an independent body ensure that alternate forms of remedy are available to First Nations?
- In what ways could an independent process ensure two-way disclosure of materials and information?
- What needs to happen for an independent body to effectively facilitate mediation?
- In what ways can an independent process support or ensure the integration of Indigenous laws into claims resolution?



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Breakout Session – Claim Adjudication

The purpose of this session is to provide an opportunity for participants to discuss the role and function of binding adjudication – such as the Specific Claims Tribunal - in an independent process.

Focus

- The issues and recommendations identified by First Nations to the AFN Expert Panel during the legislative five-year review of the Specific Claims Tribunal and communicated to Canada remain outstanding.
- First Nations have articulated that all claims should have access to independent adjudication, regardless of perceived claim value.
- Some First Nations have expressed an interest in having recourse to the Tribunal's mediation function, at the earliest opportunity and on discrete issues of impasse rather than the whole of the claim.
- Some First Nations have expressed concern with Canada's conduct at the Tribunal.
- The Auditor General's (2016) report recommended that Canada should work with First Nations to ensure that its process to resolve claims includes a step where First Nations are made aware of the fact that the Department of Justice will rely on to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada.

Questions

- Could an independent process be structured to facilitate greater access to adjudication? How?
- At what time in the claims process should independent binding adjudication occur?
- In your experience, what are the strengths/weaknesses of the Tribunal? Is it fair, transparent?



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- Could your community's Indigenous laws be activated to improve the experience of adjudication and adjudicated resolution? How?



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Claim Implementation and Reconciliation

The purpose of this session is provide an opportunity to consider priorities for building trust and repairing the relationship between First Nations and the Crown after a negotiated or adjudicated settlement of a claim has been reached. **This topic will not be directly addressed in breakout sessions but should be incorporated into the dialogue as appropriate.**

Focus

- First Nations often express frustration with the length of time it takes to resolve their claims. Canada shares a desire to increase the pace of claims resolution.
- First Nations and Canada have expressed a desire that claims resolution serve broader objectives of reconciliation in Canada.
- Some First Nations have articulated the importance of recognizing that redress can have an ongoing aspect and support an on-going relationship.
- First Nations have stressed the importance that joint oversight of claim resolution and implementation processes be available to ensure timeliness, transparency and fairness.
- First Nations have stressed the importance that joint oversight and regular reviews of policy implementation continue in a systematic way going forward.
- The Auditor General's (2016) report recommended that in collaboration with First Nations, Canada should develop practices to gather, monitor, and respond to information and feedback about the specific claims process. These practices should be designed to improve the specific claims process and outcomes.

Questions

- Does claims resolutions advance reconciliation?
- Can an independent process contribute to reconciliation? How?
- What outcomes do you consider important to the specific claims process?
- What would give you confidence that the process was achieving its desired outcome?



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- Could/Should an independent process support joint oversight of claims resolution including settlement and implementation. How?
- Should an independent process support joint oversight and implementation of any new policy and procedural changes? How?