CANADA'S COMMENTS ON DRAFT RULES OF PRACTICE AND PROCEDURE OF THE SPECIFIC CLAIMS TRIBUNAL OF CANADA

JULY 23, 2010

PART I: GENERAL COMMENTS

What follows are Canada's general comments on the Draft Rules of Practice and Procedure of the Specific Claims Tribunal (the Tribunal). These comments are being respectfully provided with a view to assisting the Tribunal in the development of a process that will achieve the long-standing goal of resolving specific claims in a just and timely manner. They reflect our best understanding of how specific claims are handled within the Ministry, as well as the policy and legal objectives that underpin the *Specific Claims Tribunal Act*.

The Specific Claims Tribunal was established as a key element of the specific claims reform initiative known as "Justice at Last", the primary goal of which was to reduce the large inventory of specific claims awaiting resolution. The Tribunal is the end stage in an alternative dispute resolution process continuum and was envisaged as being fundamentally different from a trial court of first instance. An abbreviated, expedited process of decision making by the Tribunal was therefore seen as desirable and possible because the parties will have spent years jointly exploring the issues and evidence prior to any claim coming to the Tribunal. Each party will already know the other's case and will have exhausted settlement options. They will be seeking the expertise of the Tribunal to arrive at a final binding decision on the limited matters still in dispute, based solely on the allegations and evidence originally submitted to the Minister of Indian Affairs and Northern Development (the Minister).

Since 2008 Canada has, and continues to, significantly reduce the inventory of claims at the research, assessment and negotiation stages of the specific claims process. Our view has been that the hoped for efficiencies obtainable before the Tribunal for the final resolution of longstanding specific claims would best be achieved if the Tribunal's practices and procedure are very different from those of civil trial courts.

PROCEDURE

We submit that the proposed rules are not as efficient as they might be from a procedural perspective. The proposed rules of practice and procedure are very similar to those of superior trial courts throughout Canada, where the parties do not know each other's cases, and appear to effectively restart the specific claims

process by permitting new allegations and evidence, engaging in extensive discoveries, encouraging new negotiations through mediation, and allowing parties to remedy gaps in their cases which have already been evaluated by the Minister.

KNOWING THE CLAIM

It may be helpful for you to have details on what happens to a claim when it is filed with the Minister.

When a claim is filed, it is given an early assessment to ensure that it meets the minimum standard established by the Minister. The minimum standard sets out what **must** be filed: (1) a claim document containing allegations, legal arguments, a statement of facts, a list of authorities, and a statement that compensation is being claimed; (2) an historical report; and (3) supporting documents. Once it has been agreed that the claim meets the minimum standard, it is considered filed with the Minister. That material is what forms the record which will be assessed so that a decision can be made on whether or not to accept the claim for negotiation.

The Specific Claims Branch research analyst will prepare the claim package so that it can be sent to the Department of Justice for a legal opinion. If there are any obvious gaps in the historical report, some documents may be added (they will be provided to the First Nation), or an historical report may be commissioned. That package is then sent to the Department of Justice and a lawyer is assigned to provide an opinion as to whether or not there is an outstanding lawful obligation owing to the First Nation pursuant to the Specific Claims policy. If, either before or after the First Nation has been notified of the Minister's decision to accept or deny the claim for negotiation, the First Nation decides that it wants to add allegations or evidence, the claim must be resubmitted and the process begins again. If the claim is accepted for negotiation, the First Nation and the Crown deal only with the allegations and evidence which formed the claim filed with the Minister. If the First Nation wishes to raise new allegations, it must resubmit the claim. If the claim is not accepted for negotiation, that decision is based on a consideration of the allegations and evidence contained in the claim filed with the Minister, and if the First Nation wishes to supplement that record, it must resubmit.

By the time a claim could potentially be filed with the Tribunal, both parties have had extensive opportunities to consider the allegations and evidence contained in the claim, and have based their decisions on that material only. This is not a situation analogous to a Statement of Claim filed with a court which contains allegations, facts and prayers for relief which have not been considered in any

other forum. When a specific claim reaches the Tribunal, it has already been the subject of extensive review and analysis. If new allegations and evidence are permitted to be introduced at the Tribunal stage, they will not have been considered in the claims' assessment process, and will not have informed the decision of the Minister in accepting or rejecting the claim.

Our concern is that allowing new allegations and evidence to be introduced at the Tribunal stage, requiring extensive document production and lengthy discoveries, will cause major delays in the process and, could diminish any benefits to First Nations and the Crown in choosing the Tribunal over traditional litigation in the courts. The Tribunal is, in effect, sitting as the final arbiter of claims that have already been subject to extensive review and analysis, rather than as a court of first instance. If the Tribunal allows new allegations and evidence to be introduced, there is the potential to create a significant backlog of claims at this stage, rather than encouraging First Nations to submit their best claims at the beginning of the specific claims process.

NOT KNOWING THE CLAIM

Value

When a First Nation files a claim with the Minister, there is no requirement to include information related to the value of that claim. Few First Nations include such information when initially filing a claim. The logic behind the policy is that the time, cost and energy expended in gathering information related to the value of a claim would be wasted if a claim is not accepted for negotiation. There could be a temptation to conclude that now that there is a tribunal, such information could, in fact, be useful. Such a presumption, however, would not necessarily be accurate. Compensation models used by parties in a negotiation are frequently different from the valuation process provided for in the *Specific Claims Tribunal Act*.

Therefore when a claim is filed with the Minister, there is usually no information related to compensation. When a claim is filed with the Tribunal, it is likely that there will similarly be no such information. Having no information on compensation (that is the actual value of a claim) relates directly to a number of provisions in the rules, both specified and implied.

The sections in the rules on case management provide that one of the matters to be addressed is the "Proportionality of pre-hearing procedures to the apparent monetary value of the claim, including the application of the rules set out in Parts 8-12". With little or no information on the value of a claim, gauging the appropriateness of pre-hearing procedures will be difficult if not impossible. As well, even if some information was available on the value of a claim, the value

could fluctuate considerably when further information is received and depending on the factors in play. If procedural rules are governed by an estimation which is unclear at best, then the parties are left with no clear guidance at the outset on process, preparation cost and time. Please see also comments under the "Hearings Options" section below.

New Grounds

When a First Nation files a claim with the Minister, it is that claim which the Minister reviews to arrive at a decision as to accept the claim for negotiations. The Minister's consideration of that claim is the basis for eligibility of a claim to be filed with the tribunal under s.16 of the Act. The rules in their current form authorize a claimant to introduce new allegations which have not been considered by the Minister if they are based on "substantially the same facts as the claim presented to the Minister". The concern is that new allegations could, in fact, be an entirely new claim.

EVIDENCE

First Nations are encouraged to present their best case when submitting their claims to the Minister for consideration. In a situation where a claim is not accepted for negotiation, the Crown provides a detailed reply to the First Nation outlining the reasons for the Minister's decision. Rule 8 provides that the Tribunal may point out any "gap" in the proof of the case and allow a party to remedy it. Rule 8 appears to provide a party with an opportunity to add to the claim, and does not require that party to present its best case.

Rule 56 (2)(c) makes hearsay evidence "presumptively admissible" without any limitation. However, the rule dealing with an "expanded hearing" requires hearsay evidence to meet the test of necessity and reliability (Rule 57 (4)).

Rule 108 deals with oral history evidence, and appears to be aimed at the communication of the history and traditions of the First Nation claimant. This type of evidence does not appear relevant in a hearing which is to adjudicate on whether the specific claim gives rise to a lawful obligation owing by the Crown to the First Nation, based on a specific set of facts at an identified point in time. Any other oral evidence, we suggest, is hearsay and should meet the test articulated in Rule 57(4).

We submit that the rules dealing with extensive document production and lengthy discoveries may not be necessary if the evidence before the Tribunal is the claim and supporting documentation which were filed with the Minister at the initiation of the process. The legal avenue for a party disagreeing with a judgment of the Tribunal is judicial review. It is unusual for a tribunal to have significant

transcription of evidence, as in a judicial review of a decision of an administrative tribunal; the Federal Court is not sitting in appeal.

It is our understanding that the rules, as currently drafted, could effectively create new claims before the Tribunal by permitting wide-ranging evidentiary inquiries which the parties had voluntarily chosen not to pursue earlier in the specific claims process when the Minister was reviewing the claims.

PARTIES

The SCTA permits four entities to be parties before the Tribunal: the claimant First Nation, the Crown, a province or territory (should it attorn to the Tribunal's jurisdiction), and another First Nation added as a party under s. 24. In addition, other First Nations and/or persons to whom notice has been provided may intervene with leave of the Tribunal.

However, the Rules dealing with joinder of necessary parties seem to contemplate "every person whose presence is necessary" becoming a party to the proceeding. It also speaks to "any other person" being "jointly entitled" to relief. We submit that the only proper claimant in a specific claim is a First Nation; individuals cannot make or benefit from a specific claim except through their First Nation. The rules on joinder seem unnecessary in light of the provisions of the SCTA.

HEARINGS OPTIONS

We note that the rules provide for a series of options for the hearings process. Also, the definition of "written hearing" does not specify that it is on the record. However, it is our understanding that it is on the record since an expanded hearing includes *viva voce* evidence. The rules provide that the default option is an oral hearing. Given the provisions in the Act related to efficiency and expediency, as well as the requirement that the claim filed with the Tribunal be the one filed with the Minister, the default option would seem to be a written hearing on the record.

Bifurcation
As stated above, claims which are submitted to the Minister deal with the issue of validity and not with compensation. The claims filed with the Tribunal will likely also contain detailed evidence related only to the issue of liability. The rules seem to deal only with the issue of liability, particularly where hearings are on the record. There appears to be no requirement to file evidence related to compensation. It is unclear how the Tribunal would discharge its function of providing a ruling on validity and compensation owing given this structure.

There also appears to be no accommodation for a bifurcated process: one which would allow for the case on liability to go in and then an adjournment, if required, to allow the parties to mount a case on compensation. The only adjournment provided for is to conduct mediation, however, this is presumably on consent.

REACHING A FINAL DECISION

The specific claims policy is a dispute resolution mechanism designed to settle claims. A claim filed with the Minister is analyzed and a decision is made whether or not to accept it for negotiation. If accepted, the negotiation process is initiated. In either case, accepted or not, a claim's potential for being negotiated is examined by the Minister and his officials. Whether accepted for negotiation or not, a claim could end up being filed with the tribunal and when a claim is filed with the Tribunal, the potential for negotiation has been canvassed. As a result, the prospects for mediation are limited. Although the provisions are unclear, it appears that mediation would have to be on consent of all parties.

One of the criticisms of the *Specific Claims Resolution Act*, the predecessor to the *Specific Claims Tribunal Act* was that it provided for a two stage process: a ruling that a claim was valid resulted in a loop back to negotiations. If negotiations failed, then a claim would be brought back for a decision on compensation. The criticism was that this would likely cause inordinate delay and that by the Tribunal stage, prospects for resolution had been thoroughly canvassed and would not likely be fruitful. As a result, the current Act does not provide for a return to negotiations but states that the Tribunal is responsible for holding hearings to decide the validity of claims and any compensation arising from those claims.

In addition, the mediation provision which specifies that each party have "direct access to a representative of each party authorized to bind the party to make binding offers of settlement and written terms of any settlement concluded in the course of mediation" is virtually unworkable in the government context. To bind government requires at times a decision of Treasury Board and other central agencies depending on the terms of an agreement. In practical terms, it would be highly unlikely that official could have direct access to all of the persons and/or bodies required in all circumstances to achieve this goal.

Canada recognizes and very much appreciates the considerable amount of work that has gone into the development of these draft rules. We are keenly interested in promoting an efficient and just Tribunal process. It is with this goal in mind that we have respectfully provided the above general thematic comments.

In the next section, we have set out specific comments on individual rules.

PART II: COMMENTS ON SPECIFIC RULES

GENERAL COMMENTS:

- The rules should indicate the section of the *Specific Claims Tribunal Act* to which they refer. This would facilitate reference to the Act and show consistency between the Act and the Rules.

COMMENTS ON SPECIFIC RULES:

Rule 2: Application and Interpretation

2. (1) These Rules apply to all proceedings before the Specific Claims Tribunal.

- Specify that the rules are made in accordance with s. 12 of the *Specific Claims Tribunal Act*.

Rule 3: Definitions

- A definition of "filed with the Minister" should be added and should be in line with the meaning and intent of the Act (s.16).

"Claim"

"Claim" means the Declaration of Claim filed in the Registry to initiate a Proceeding before the Tribunal, together with the Particulars;

- A clearer definition should be provided and refer to the content and not the form ("Declaration of claim" is defined as being a document). Claim could be defined as the claim filed with the Minister pursuant to s. 16 of the Act and is the content of the Declaration of Claim.

"Claims Registrar" and **"Claims Registry"**

"Claims Registrar" means the person appointed to that office by Process Rule ___;

"Claims Registry" means the registry prescribed by Process Rule ___;

- Each of "Claims Registrar" and "Claims Registry" are defined by reference to a process described in future Rules, as yet unnumbered. There do not appear to be any such Rules in the current draft. Care will be required to ensure there is no confusion between these terms and the "Registrar" and "Registry" established by the legislation itself. Rules 18 and 20 make reference to the role of the claims registrar and the claims registry but without any indication how they are to be identified or how their roles relate to those of the Registrar and Registry of the Tribunal.

"Filed Claim"

"Filed Claim" means a specific claim asserting one or more of the grounds provided for in s. 14 of the Act;

- The definition of "Filed Claim" does not seem accurate. A Filed Claim is not only a specific claim which asserts the required grounds, it is also one which has been filed with the Minister, and the Tribunal.

"Opening Address"

"Opening Address" means an oral presentation of the perspective of the First Nation on the significance of the specific claim, made by one or more elders or other members of the First Nation claimant;

- See comments under Rule 56(8)

"Order"

"Order" includes a final judgment or decision of the Tribunal; and a decision or other disposition of the Tribunal other than a final judgement or decision;

- The defined term, "Order," seems cumbersome. Perhaps the following wording could be used:

  "Order" means a decision, judgment or other disposition of the Tribunal, whether final or not;

"Particulars"

"Particulars" means the material required by subsection 2 of the Declaration of Claim and the Response;

- Should refer to the material required by Rules 20(2) and 21(1)(b).

"Registrar"

"Registrar" means the person appointed as a registrar pursuant to section 10 of the Act, and who, as a Deputy Head within the meaning of the Financial Administration Act, has the responsibilities and authority of that office;

- This definition should be shortened to refer only to the appointment of the Registrar pursuant to section 10 of the Act. There is no need to state the deputy head status of the Registrar.

"Registry"

"Registry" means the registry of the Tribunal established pursuant to section 10(1) of the Act and, as a department under the Financial Administration Act, is presided over by the Minister;

- For the purposes of the FAA the Minister is responsible for reporting to Cabinet on the activities of the Tribunal and Registry. The words after "Act" should be deleted.

"Specific Claim"

"Specific Claim" means a claim brought by a First Nation against the Crown in Right of Canada for compensation, based on one or more of the grounds set out in s. 14(1)(a)-(f) of the Act, and filed;

- Would be more consistent to use the definition of Specific Claim that is contained in the Act.

PART 1 – GENERAL RULES AND PROCEDURES

Rule 4: Cultural diversity

4. (1) The Tribunal shall take into account cultural diversity in applying its rules of practice and procedure. With respect to making any orders or directions this may include:

> ***(a) directing that oral history evidence be taken in settings with which the witnesses are familiar, and in a manner respectful of the witnesses' language and the culture and traditions of the First Nation;***
>
> ***(b) arranging for the oral hearing to take place within the community of the claimant First Nation ;***
>
> ***(c) arranging for the pre-hearing taking and preservation of oral history, oral tradition, or other evidence sought to be adduced by a party.***
>
> ***(d) arranging for translation services;***
>
> ***(e) other directions as may appear necessary to preserve oral history that might, but for such measures, not be available at the hearing of the claim.***

- If the rules use the terms oral history and oral traditions, they should be defined and differentiated from each other as there is no generally accepted meaning of these terms.

- Reference s. 13 (c) of the Act.

Rule 5: Objective of Rules

(2) The Tribunal may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the Superior Court of the province to which the subject-matter of the proceeding most closely relates.

- It would be helpful to clarify what exactly this section is intended to address. Section 26 (1) of the *Specific Claims Tribunal Act* allows the Tribunal to conduct its hearings in any manner it considers fit (although subject to the Act), so this Rule may not be necessary.

- Referring to the practice of the Superior Court of the province to which the subject-matter of the proceeding most closely relates would establish a patchwork of varying Tribunal procedures across Canada, and encourage dispute over which provincial rules were most appropriate. If any reference to superior court rules is needed, the Federal Court rules would be a consistent point of reference. It is noted that the specific claims policy, which is the basis of the alternative dispute resolution option, is a federal policy applied nationally.

Defects in form and procedure

Rule 6:

(4) Where, on an application, the Tribunal finds that a party has not complied with these rules, the Tribunal may, by order,

> ***(a) dismiss the application, where it was not brought within a reasonable time after the moving party became aware of the irregularity;***
>
> ***(b) grant any amendments required to address the irregularity; or***
>
> ***(c) set aside the proceeding, in whole or in part.***

- Rule 6(4)(a) to (c) deals with the orders the Tribunal can make in the face of a procedural irregularity. 6 (4)(b) - an amendment - appears to deal only with irregularities in form, which leaves the options for dealing with procedural irregularities either setting aside the proceeding (in whole or in part), or a dismissal of the application for being out of time. The Tribunal should also have the power to make any order necessary to cure a procedural irregularity. On its face, subsection (b) isn't sufficient.

Rule 8:

At any time before judgment is given in a proceeding, the Tribunal may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these Rules and permit the party to remedy it on such conditions as the Tribunal considers just.

- As the Tribunal will be ruling on a matter which has been previously reviewed by the Minister, pointing out any gap in the proof of the case may require new evidence which has not previously been considered by the Minister. Such a rule could allow the introduction of new evidence of which the Minister and other parties had no prior knowledge. This could lead to a protracted pattern

of one party introducing new material after a case is closed, the other parties being forced to respond and new gaps being created.

- Also under this Rule, the hearing may have been completed and the Tribunal writing its decision when it realizes that one of the parties has not completely addressed the proof of a matter. Any request for further proof at that point may further prolong the proceeding.

Representation by Legal Counsel

Rule 9:

9. All persons and parties to proceedings before the Tribunal shall be represented by legal counsel except with leave of the Tribunal. Such leave will be granted only in exceptional circumstances, and only when the Tribunal is satisfied that the proposed representative has sufficient experience and skills to adequately represent the First Nation in advancing the specific claim before the Tribunal.

- The Rule begins by requiring "all persons and parties" to be represented, and then goes on to speak only of First Nation representation. Rule should consistently apply to all parties.

Counsel of Record

Rule 10:

10. (1) A counsel who signs a document filed pursuant to these Rules on behalf of any party shall be the counsel of record for the party commencing on the date of filing and continuing until a change, if any, is made.

(2) A party in a proceeding may change the party's counsel of record by;

(a) filing with the claims registry a Notice of Change of counsel of record signed by the new counsel;

(b) serving a copy of the Notice on the former counsel and every other party in the proceeding; and

(c) filing with the claims registry proof of service of the Notice.

- Need to clarify whether a "representative" needs to comply with this Rule if he or she is not a lawyer. As well, does a "representative" need to comply with Rules 11, 12, 41, 45, 46, 55, 60(f)(iii), 75(1)(a), 70(4), 79(3), 106(4), 108(h), 122(2)(f), and 123(1)(d).

Combining Proceedings

14. The Tribunal may, on its own initiative or application by a party, combine two or more proceedings.

- Rule provides the Tribunal discretionary power to combine proceedings. This may conflict with s. 20(4) of the Act which provides that, in certain circumstances, claims "shall" be treated as one.

Computation, Extension and Abridgement of Time

Rule 15:

15. (1) Subject to subsections (2) and (3), the computation of time under these rules, or under an order of the Tribunal, is governed by sections 26 to 30 of the Interpretation Act.

(2) Where a period of less than seven days is provided for in these rules or fixed by an order of the Tribunal, a day that is a holiday shall not be included in computing the period.

(3) Unless otherwise directed by the Tribunal, a day that falls within the Christmas recess shall not be included in the computation of time under these rules for filing, amending or serving a document.

- Should give the citation to identify the *Interpretation Act.*

Rule 16:

16. (1) Subject to subsections (2) and (3), a period provided by these rules may be extended once by filing the consent in writing of all parties.

(2) An extension of a period under subsection (1) shall not exceed one half of the period sought to be extended.

(3) No extension may be made on consent of the parties in respect of a period fixed by an order of the Tribunal without leave of the Tribunal.

(4) On motion, the Tribunal may extend or abridge a period provided by these rules or fixed by an order.

(5) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(6) If it is fair and equitable to do so, the Tribunal may extend or abridge the time limits fixed by these rules or otherwise fixed by the Tribunal, either before or after their expiry.

- Rules 16(4) and (6) seem almost identical in effect, and should be combined.

- Rule 16 (5): Should provide that an application for an extension of time be brought before (take out the "or after") the period sought to be extended. Rule 6 appears to give enough room for reason of fairness to submit an application for an extension of time after the end of the period sought to be extended, which should only happen in exceptional circumstances. Strict timelines may be problematic in the compensation phase of a hearing when it is very possible that neither party has any evidence of the value of the claim.

PART 2 – PLEADINGS

Rule 20: Initiation of Proceedings by filing Declaration of Claim

20. (1) A proceeding shall be commenced by filing a document in Form ____, in the claims registry. The document shall contain: a heading "Declaration of Claim", the text of which shall set out, in numbered paragraphs:

(a) that the claimant is a First Nation within the meaning of s. 2 of the Act;

(b) that the claim is made against Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development;

(c) the ground or grounds for the specific claim, as set out in s. 14(1)(a)-(f) of the Act;

(d) the cause or causes of action asserted by the claimant;

(e) allegations of fact which, if proven, would establish a cause of action in law;

(f) the basis, under s. 20(1)(e)-(h) of the Act on which compensation is sought to be determined.

(g) that the First Nation has complied with the requirements of s. 16(1) of the Act;

(2) in a schedule to the Declaration of Claim, further details, in conformity with the minimum standard established by the Minister pursuant to s. 16(2)(a) of the Act, including:

(a) a list of allegations based on one or more of the grounds related to the validity of the claim, as set out in the specific claims policy;

(b) legal arguments supporting each allegation; Page 10

(c) a statement of the facts supporting the allegations;

(d) a statement that compensation is being claimed;

(e) a list of authorities with citations, including treaties, statutes, case law and law journal articles, that support the allegations (copies not required);

(f) a historical report, including references to supporting documents, outlining the factual circumstances surrounding the allegations;

(g) complete copies of primary documents and relevant excerpts of secondary documents relied upon to support the allegations included in the claim document and referred to in the historical report;

(3) The First Nation shall, on filing the Declaration of Claim, file an original or certified true copy of a resolution of the Council of the First Nation that the claim is submitted on the authority of the Council of the First Nation on behalf of the First Nation.

- Recommend wording changes, to maintain parallelism with Rule 21, and to promote clarity, for example:

(1) A First Nation may commence a proceeding by filing a Declaration of Claim in Form ___ .

(2) The Declaration of Claim must include the following, set out in numbered paragraphs:

(a) a statement that the claimant is a First Nation…
(b) a statement that the claim is made against…
(c) the ground or grounds for the specific claim, …
(d) the cause of causes of action
(e) allegations of fact…
(f) the basis…
(g) a statement that the First Nation…; and
(h) a schedule containing the particulars referred to in Rule 20(3).

- The Rule should refer to s. 20 because ss. 20(1)(e)-(h) do not cover all bases of compensation. The rule should also state that compensation should be based on legal principles.

- Rule 20(2)(a) refers to the "grounds …as set out in the specific claims policy". Once the claim reaches the Tribunal, it is governed by the provisions of the Act, in this situation s. 14.

- Rule 20(2)(e) allows a claimant to refer to "law journal articles" in support of an allegation in a Declaration of Claim. Everything else in (e) are documents that, in and of themselves, could affect the rights and obligations of the parties. A law journal article, however, is not of the same nature. If used, it is in support of a party's advocacy only. It could not prove or disprove a material fact, and it, in and of itself, cannot give rise to rights and obligations.

- Rule 20(2)(g) makes reference to "secondary documents" that are relied upon to support the allegations in a Declaration of Claim. There are concerns that such documents would be used as evidence to support a claim; they are in the nature of an interpretation of facts, and not facts in and of themselves. If parties want to rely on secondary source documents in support of a claim, there should be some method of testing the validity of the analysis.

Rule 21: Response

21. (1) The Minister shall, within 30 days after the date of the filing of the Declaration of Claim, file a Response in Form ___.

(2) The Response must include:

(a) a general statement setting out the following:

(i) whether the claim, as filed with the Minister, has been accepted for negotiation;

(ii) whether, for the purpose of the proceeding, the claim is accepted subject to reaching agreement on compensation, and, if so, which of the compensation criteria set out in s. 20(1)(e)-(h) the Minister considers applicable;

(b) particulars, including:

(i) a statement whether the Crown admits or denies the allegations of fact set out in the Declaration of Claim;

(ii) a statement of alleged facts relied on by the Crown to answer the claimants' allegations of fact;

(iii) legal arguments in support of the position taken by the Crown on the applicability to the facts of the cause or causes of action asserted by the claimant;

- In Rule 21(2)(a)(i), the verb tense is incorrect in that any acceptance of the claim for negotiation was in the past. If the claim is at the Tribunal, negotiations have terminated. There is also a concern that this statement may constitute an admission by the Crown that the claim is valid. The Crown should not be prejudiced from the outset by the fact that negotiations were conducted.

- In Rule 21(2)(a)(ii), the reference to "subject to reaching agreement on compensation" is inappropriate in the context of a Tribunal proceeding where the parties are seeking a final judgment. If this is intended to solicit the view of the Crown on whether or not there is an admission of validity, and then go on to ask its view on the appropriate compensation under the Act, it must be clarified.

- Rule 21(2)(b) is unclear, and potentially problematic. If it covers historical reports "previously obtained by the Minister" in other proceedings and/or for purposes other than the resolution of disputes, this rule could result in different procedures, depending on whether there is an historical report squarely upon the issue in dispute, a tangential report, or no report at all. Rule 21(2)(b)(ii) might suffice, perhaps with an amendment along these lines "a statement of alleged facts relied on by the Crown with available supporting documents ...", particularly since expert evidence is allowed at the hearing under Rule 56(2)(b).

- In Rule 21(2)(b)(iii) the phrase "…the applicability to the facts of the cause of action…", should mean "…the applicability **of** the facts …" In terms of the particulars respecting legal arguments, it may be difficult to provide comprehensive arguments within 30 days if the First Nation has modified its specific claim submission to include new facts and evidence in its Declaration of Claim and these have not been previously considered by the Minister.

- Rule 21(2)(b)(v), is unclear as to whether the Tribunal is requiring that particulars of any historical report be disclosed or is asking that the report itself be disclosed. Rule 21 indicates that the Response "must include" Canada's historical report whereas the same imperative language is not used in Rule 20 dealing with what the claimant would need to provide. If historical reports are being compelled, then presumably the same standard should apply to all parties. In addition, while the documents in the historical report may not be subject to settlement privilege, if the report was generated in the course of negotiations, the historical report itself is likely subject to settlement privilege which raises concerns as to how to deal with such a request.

- The draft Tribunal Rules do not define what "primary documents" and "secondary documents" are and so there is no way to know what these references mean, nor how to distinguish between the two categories of documents.

Rule 22: Amendments

22. (1) The Tribunal may, on application, allow a party to amend a Declaration of Claim or Response, on such terms as will ensure procedural fairness to the parties.

(2) A claimant may not amend a Declaration of Claim to raise any ground for the claim not previously set out in the claim filed with the Minister, except where such ground relies on substantially the same facts as the claim presented to the Minister pursuant to s. 16(3) of the Act.

(3) No amendment shall be allowed under subsection (1) during or after a hearing unless:

(a) the purpose is to make the pleading accord with the issues at the hearing;

(b) a new hearing is ordered; or

(c) the other parties are given an opportunity to prepare to meet any new or amended allegations.

(3) Unless the Tribunal orders otherwise, where these Rules provide for doing an act or taking a step in a proceeding within a prescribed period after the service or filing of a document and that document is subsequently amended in accordance with these Rules, the period shall be calculated from the day of service or filing of the amended document, as the case may be.

- Of general concern with Rule 22 is that it appears to be addressing amendments as though the claim filed with the Tribunal is, in effect, the commencement of a stand-alone process before an adjudicative body of first instance. The Tribunal is, however, the last stage of a much lengthier process which commences with the submission of a claim by a First Nation to the Minister. That claim progresses through various stages until it ultimately is accepted for negotiations (or not accepted) by the Minister. If negotiations take place, they may continue for some years, and are based on the acceptance by the Minister of the original submission. S. 16(1) of the Act states: "A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister…" If amendments are allowed, the new claim has not been "previously filed" nor considered by the Minister. If Rule 22 purports to expand on the right of a First Nation to have a claim adjudicated upon which has **not** been "filed with the Minister", this is likely beyond the statutory authority of the Tribunal. From a practical perspective, allegations and/or evidence which are added at this stage would unnecessarily prolong the time required to have a claim dealt with by the Tribunal. The remedy for a First Nation wishing to expand or augment its claim is to resubmit the claim to the Minister for further consideration.

- Rule 22(2) states that "A claimant may not amend a Declaration of Claim to raise any ground for the claim not previously set out in the claim filed with the Minister…" There should be a comparable provision providing that "A claimant may not **file** a Declaration of Claim that raises any ground for the claim not previously set out in the claim filed with the Minister."

- Rule 22(2) should state: "the same facts as the claim **filed** with the Minister…"

PART 3 – FILING AND SERVICE OF DOCUMENTS

Rule 23:

23. (1) The Declaration of Claim, Response, and other documents provided for by these rules, must be filed with the claims registry, The Specific Claims Tribunal, 427 Laurier St. W., 4th floor, Ottawa, Ontario.

(2) The parties shall file their documents by electronic transmission.

(3) The parties shall also file with the claims registry a paper copy of:

(a) by the claimant, that part of the Declaration of Claim provided for in Rule 20(1);

(b) by the Crown, that part of the Response provided for in Rule 21(2).

(4) Documents filed by electronic transmission shall, subject to Rule 24, constitute the original.

(5) An intervenor shall use the same medium (electronic or paper) as required of the parties.

(6) Subject to subrule (7), only those paper documents that are printed on 21.5 cm x 28 cm (letter size) paper and that have numbered pages may be filed.

(7) A paper document that is not printed on 21.5 cm x 28 cm paper and that cannot reasonably be converted to that format by the person filing it may be filed in its existing format.

- Under Rule 23 (3) (b), the Respondent is required to file a paper copy of the entire contents of its Reponses. However, under Rule 23 (3) (a), the Claimant is required only to file a paper copy of the contents of its Declaration of Claim - it is not required to file a paper copy of the contents of its Schedule to the Declaration of Claim. For example, the Respondent must file a paper copy of all of the primary documents it is relying upon; however, the Claimant is not required to file a paper copy of all of the primary documents the Claimant is relying upon. All parties should be required to file a similar set of documents.

Rule 28: Maintenance of document

28. (1) All documents referred to in these rules must be maintained in paper form by the party or intervenor filing the document until one year after the hearing or settlement of the claim.

(2) Upon request of the Tribunal, the party or intervenor filing the statement made under oath or solemn affirmation must provide the original signed document for review.

- A party should be entitled to see the original as well.

- Rule 28 requires the parties to maintain paper copies of documents for only a year after the hearing or settlement. The time should run from one year after the Tribunal judgment was rendered to prevent premature destruction of the paper file.

Rule 32: Without confidentiality order

32. A party or intervenor who wishes to assert confidentiality in a document to be filed that is not covered by a confidentiality order shall

(a) file a public version of the document that does not include the confidential information;

(b) provide the registry with a version of the document marked "confidential" that includes and identifies the confidential information that has been deleted from the public version filed under paragraph (a); and

(c) bring an application to the Tribunal for an order allowing it to file the confidential version.

- Rule 32(c) refers to a party making an application to the Tribunal for an order allowing it to file a confidential version of a document. This application seems to be described in Rules 85 and 86. These rules should reference each other.

Rule 36: General

36. Documents may be filed with the Tribunal by any of the methods provided in this rule, but the date and time of filing will be the date and time of the acceptance of the document by the claims registrar, and the filing of the document in the claims registry.

- It is unclear what "acceptance" means. The rule should clarify whether it only means receipt or whether there is some kind of process of assessment to determine acceptability.

- This rule purports to state that "the date and time of filing" of a document with the Tribunal will be established as the date and time that something happens. However, two actions are provided as being "the date and time of filing": "the date and time of the acceptance of the document by the claims registrar" and "the filing of the document in the claims registry". If these are two different situations which may occur at different times, they should not both be identified as constituting "the date and time of filing". If these are not two different situations which may occur at different times, then only one should be referred to as constituting "the date and time of filing".

- See also the difference between the French and English versions of this Rule. The ambiguity raised in the English version does not appear in the French one.

Rule 37: General

37. Documents delivered or served by facsimile shall not exceed fifty pages in length unless prior permission is obtained from the recipient.

- Rule 37 refers to documents delivered or served by facsimile, but the definition section defines "serve" as "to deliver a document". It is unclear what is intended by the use of the two terms in Rule 37. "Deliver" doesn't seem to appear anywhere else in the rules as a term with a meaning distinct from "serve". (See also Rule 40(a))

Rules 38 – 41: Service

Service on the Crown

38. Service of a Declaration of Claim on the Crown is sufficient if served on the Deputy Attorney General of Canada in accordance with subsection 23(2) of the Crown Liability and Proceeding Act.

Service on the Attorney General of a Province or Territory

39. Service of a document on the Attorney General of a province or territory may be served at the office of the Attorney General, or mailed by registered mail to the office of the Attorney General for the province or territory.

Service on a First Nation

40. A document that is required to be served on a claimant First Nation shall be served in one of the following ways:

(a) delivered to or served directly on the Chief of the First Nation;

(b) sent by regular first class mail, registered mail, or courier, including priority post, addressed to the address of the First Nation's administrative office;

(c) sent by transmission of a facsimile of the document to the last known facsimile telephone number of the First Nation's administrative office;

- Rule 40 does not contemplate either that service on the counsel of record or on a representative other than a counsel of record could constitute service. Service on a counsel of record should suffice as service. In order to accord with Rule 9, as well, which contemplates representation by someone other than a counsel of record, it would seem to have to be permissible to be able to serve a document on a representative other than a counsel of record.

Service of Other Documents

41. Service of a document other than a Declaration of Claim or Response shall be effected

(a) by leaving a copy of the document at the counsel's business address;

(b) by sending a copy of the document to the counsel by facsimile transmission;

(c) by sending a copy of the document to the counsel by registered mail and by obtaining an acknowledgement of receipt signed and dated by the counsel or by someone on behalf of the counsel;

(d) by electronic transmission to the counsel, who shall within 24 hours send an acknowledgement of receipt; or

(e) in any other manner that the Tribunal may order.

- It is unclear whether service could also be validly effected if it is made in accordance with s. 4 of the *Crown Liability and Proceedings (Provincial Court)*

Regulations, such as by delivering the Declaration of Claim to the Vancouver Regional Office of Justice at 840 Howe Street.

- These Rules appear to differentiate between service of a pleading and service of other documents. However, the Rules seem to be inconsistent in what they are referring to. Rule 38 refers to service of a Declaration of Claim (on the federal Crown). Rule 39 refers to service of any document on a provincial or territorial Attorney General. Rule 40 refers to service of any document on a First Nation. Rule 41 sets out how a document other than a pleading may be served. One solution might be to have separate rules dealing with the service of pleadings and the service of other documents.

- Consider, as the British Columbia Supreme Court does, different terms to denote the different kinds of 'service'. The more formal 'service' of pleadings would be called 'service'. The less formal 'service' of other documents would be called 'delivery'. Some documents are required to be served; others may be delivered.

- Rule 41(a) could provide "leaving a copy of the document at the business address of the counsel of record".

- Rule 41(b) could provide at the end, "… facsimile transmission, in accordance with Rule 42".

- Rule 41(c) could provide at the end, "… of the counsel, in accordance with Rule 46".

- Rule 41(d) could provide after the word "counsel", "in accordance with Rule 43".

PART 4 – JOINDER OF NECESSARY PARTIES

Rule 47: General Rule

47. (1) Every person whose presence is necessary to enable the Tribunal to adjudicate effectively and completely on the issues in a proceeding, subject to each such person coming within the jurisdiction of the Tribunal, shall be joined as a party to the proceeding.

(2) A claimant who claims relief to which any other person is jointly entitled with the claimant shall join, as a party to the proceeding, each person so entitled.

(3) Where:

> ***(a) two or more claimants assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;***
>
> ***(b) a common question of law or fact may arise in relation to two or more claims; or***
>
> ***(c) the joining of two or more claims in the same proceeding may promote the convenient administration of justice;***

the claims may be joined in the same proceeding.

(4) Two or more persons may be joined as respondents where,

> ***(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;***
>
> ***(b) a common question of law or fact may arise in the proceeding;***
>
> ***(c) there is doubt as to the person or persons from whom the claimant is entitled to relief;***
>
> ***(d) damage or loss has been caused to the same claimant by more than one person or party, whether or not there is any factual connection between the several claims apart from the involvement of the claimant, and there is doubt as to the person or persons from whom the claimant is entitled to relief or the respective amounts for which each may be liable; or***
>
> ***(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice.***

(5) The Tribunal may order that any person or party who ought to have been joined as a party or whose presence as a party is necessary to enable the Tribunal to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.

(6) At any stage of a proceeding the Tribunal may by order add, delete or substitute a party or correct the name of a party incorrectly

named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

- Rule 47: The rule gives jurisdiction to the Tribunal to impose the presence/participation of a person that goes beyond the jurisdiction of the Tribunal under the Act (See also the definition of the term "party" at sections 2, 23, 24, and 25 of the SCTA).

- Also, it would be impractical to attempt to force a First Nation, for example, to become a claimant if that First Nation was unwilling, unable or unprepared to become a claimant at the relevant time (See s. 5 of the SCTA).

- The Act provides for parties and intervenors to be added under s. 22 (notice), s. 23 (provinces on consent), s. 24 (First Nations by way of applications), and s. 25 (intervention by way of leave).

- S. 26 empowers the Tribunal to conduct its hearings in any manner that it considers fit, however, that is subject to the Act. As a result, certain of the provisions under rule 47 would seem to conflict under the Act.

- Rule 47(2) – If a First Nation does not think another First Nation is entitled, it should not be forced to add them as a party. Also, "persons" are not entitled to any relief nor to be made parties under the Act.

- Rule 47(4) – This is beyond the jurisdiction of the Tribunal – i.e. Provinces cannot be joined as respondents without their agreement. "Respondent" is an undefined term in either Act or rules. Even with consent, no one other than Canada or provinces could be joined as respondents before the Tribunal.

- 47(4)(d) - This provision isn't clear. It is understood that there could be more than one respondent. The reference to "separate claims" is unclear if there is only one claimant.

- Rule 47(5) and (6) – The Tribunal has no jurisdiction under the Act to make such orders. Provinces must attorn to the Tribunal's jurisdiction and other First Nations must apply to become parties.

Notice When Third Parties Affected

Rules 50 – 54 (General Comments)

50. (1) If the Tribunal's decision of an issue in relation to a specific claim may significantly affect the interests of a third party including a province, First Nation or person, the Tribunal shall so notify them.

The parties may make submissions to the Tribunal as to whose interests might be affected.

(2) Failure to provide notice does not invalidate any decision of the Tribunal.

(3) The Tribunal has jurisdiction with respect to a province only if the province consents to and is granted party status.

51. If the Crown alleges that a province that has been notified is wholly or partly at fault for the claimant's losses, the Tribunal shall grant the province party status provided that the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal.

52. If the Crown does not allege that a province that has been notified is wholly or partly at fault for the claimant's losses, the Tribunal may, on application by the province, grant the province party status if the Tribunal considers it a necessary or proper party and provided that the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal.

53. The Tribunal may, on application by a First Nation to whom notice is provided, grant the First Nation party status if the Tribunal considers it a necessary or proper party.

54. (1) A First Nation or person to who notice is provided may, with leave of the Tribunal, intervene before it, to make representations in respect of any matter that affects the First Nation or person.

(2) In exercising its discretion under subsection (1), the Tribunal shall consider all relevant factors, including the effect that granting intervenor status would have on the cost and length of the hearing.

- Rules 50-54 of the Draft Rules are nearly identical to ss. 22-25 of the Act, and therefore are unnecessary.

PART 5 – SCOPE OF HEARING

Rule 55: General

General

55. (1) The hearing of all claims will, unless otherwise ordered by the Case Management Tribunal, be conducted as oral hearings.

(2) Counsel for the claimant shall, in all hearings, provide written submissions setting out, in numbered paragraphs, a summary of the evidence relied on by the claimant to support findings of fact, and legal argument in support of the relief claimed.

(3) Counsel for the Crown shall, in all hearings, provide written submissions setting out, in numbered paragraphs, a summary of the

evidence relied on by the claimant to support findings of fact, and legal argument in opposition to the relief claimed.

(4) The parties may, by joint application, request that the Tribunal proceed by way of a hearing on the record without an oral hearing. Where such a request is granted, the claimant may present a written address in lieu of an Opening Address.

- It would be more consistent with the legislative intention of an expeditious and cost-effective process if hearings were conducted on the record.

- Subrules (1) and (4) seem to relate to each other, and subrules (2) and (3) seem to relate to each other. Subrules (2) and (3) should stay in under the "General" heading of Rule 55 and subrules (1) and (4) should be put under their own rule entitled, "Nature of Hearing".

- Rule 55(1) – This wording is confusing, especially in respect of the concepts of "hearings on the record" and "Expanded Hearings" introduced later. The following language is suggested to replace 55(1):

  > (1) Unless otherwise ordered by the Tribunal, all claims will be heard by oral hearing, whether conducted on the record or as an expanded hearing.

- Rules 55(2) and (3) both refer to counsel setting out "evidence relied on … to support findings of fact…" It would be more appropriately stated as "evidence relied on … to support its allegations of fact".

- Rules 55(2) and (3) appear to be created for a body which is reviewing facts which have already been gathered by the parties, which is consistent with the legislative intent in establishing the Tribunal. Elsewhere in the rules broad new fact finding appears to be contemplated as part of the hearing process, which would not permit claimants and the Crown to set out a summary of evidence and facts in advance of the hearing. It is unclear how *viva voce* evidence would be introduced if all parties are required to provide summaries of their submissions prior to beginning an oral hearing.

- Rule 55(3) refers, incorrectly, to counsel for the Crown setting out "a summary of the evidence relied on by the claimant…" This likely should refer to "the Crown".

- Rule 55(3) refers to the Crown's "legal argument in opposition to the relief claimed". To provide for a more nuanced response by the Crown, as well as some admissions, it may be more appropriate to refer to, "legal argument in respect of the relief claimed".

Rule 56: Hearing on the Record

56. (1) For the purpose of this rule "record" includes:

(a) the Declaration of claim;

(b) the Response;

(c) any amendments to the Declaration of claim or Response, and all material provided pursuant to Rules 20 and 21;

(d) such further evidence, not included in the claim presented to the Minister, as the Tribunal may, on application, permit;

(e) written submissions on the facts and the law as related to the subject matter of the claim, the grounds under s. 14 of the Act, and any asserted cause or causes of action.

(2) All evidence included in subrules (1)(a)-(d), including, without limitation:

(a) evidence of oral history and tradition;

(b) expert evidence, and ;

(c) hearsay evidence;

is presumptively admissible for the purposes of a hearing on the record and an expanded hearing.

(3) In all cases in which there is a hearing on the record, each party will serve on every other party an affidavit deposing that it has, to the full extent of that party's knowledge, information and belief, disclosed to all other parties all documents relevant to any matter in issue in the specific claim that are or have been in that party's possession, control or power.

(4) The Tribunal hearing the claim on the record may accord to each piece of evidence the weight it considers appropriate.

(5) A party may apply to the Tribunal to rule on the admissibility of evidence presumed admissible by subrule (2).

(6) A party bringing an application under subrule (5) shall file:

> ***(a) full and detailed written grounds for the application, and any evidence relied on in support of such grounds, and***
>
> ***(b) where evidence in relied on that is not included in the Declaration of Claim or the Response, an affidavit setting out the additional evidence relied on by the applicant.***

(7) The Tribunal may make any order it considers necessary to facilitate the expeditious setting of an early date for the hearing of the claim on the record.

(8) The claimant may make an oral presentation at the commencement of the oral hearing.

(9) Evidence that does not form part of the record shall not be introduced at a hearing on the record.

(10) the Tribunal shall convene a case management conference for submissions from the parties on which of rules set out in Parts 8-12 will apply to a claim to be heard on the record.

- Rule 56(2) is too broad in making all evidence of any sort presumptively admissible, regardless of relevance, reliability or necessity.

- In *Benoit v. Canada*, [2003] 3 C.N.L.R. 20 (para. 113), the Federal Court of Appeal found that oral history evidence cannot be accepted, per se, as factual

unless it has undergone critical scrutiny. In *Mitchell v. M.N.R.* [2001] SCC 33, McLachlin C.J. noted that the court has not mandated the blanket admissibility of oral history evidence and that admissibility must be determined on a case-by-case basis, and that oral histories are admissible "where they are both useful and reasonably reliable."

- Rule 56(2)(c), which allows the admission of hearsay evidence, is too general. The essential point is covered in Rule 56(2)(a). Rule 56(2)(c) effectively eliminates the distinction between Elders, other members of a First Nation, and the general public.

- The evidence referred to in Rule 56(2) – and, in particular, the evidence referred to in Rule 56(2)(a) and (c) – is presumptively admissible for both a hearing on the record and an expanded hearing. However, it could be so potentially prejudicial that it should not be allowed before the Tribunal. A better approach would be to require a party, when relying either on oral history or hearsay evidence, to provide a précis of that evidence to the other party and the Tribunal, in case an application needs to be brought under Rule 56(5).

- Hearsay evidence is referred to in Rule 56(2). A test for the admission of hearsay evidence is referred to in Rule 57(4). There should be a cross-reference.

- In Rule 56(3), the standard required – the deponent must depose that it has disclosed "all documents relevant to any matter in issue in the specific claim that are or have been in that party's possession, control or power" - is an incredibly high standard. This standard is no longer adhered to in many civil courts around the world. It has been abandoned as being too high a standard, resulting in the production of too many documents. For example, the B.C. Supreme Court is departing from this onerous standard on July 1, 2010. To require Canada's compliance with the standard set out in Rule 56(3) will result in extremely lengthy document disclosure delays, as Canada's holdings of 'all relevant documents' is extensive and often unknown until significant research has been conducted. It is further noted that during the research stage of the specific claims process the Crown provides copies of all documents that are uncovered that are not included in the First Nation's submission but that are being relied upon in the assessment of the claim.

- The timing required for the serving of the Affidavit of Documents referred to in Rule 56(3) is unclear.

- Rule 56(3) is redundant given the obligation in Rule 78(1).

- Hearsay evidence appears to be "presumptively admissible": see Rule 56 (2) (c). Under Rule 56 (4), the Tribunal hearing the claim "On the Record" may accord to each piece of evidence the weight it considers appropriate. However, the test for the admission of hearsay in the Expanded Hearing is more rigorous. Under Rule 57 (4), "Hearsay evidence is admissible if it meets the test of necessity and reliability, to a standard that takes into account the circumstances and time at which the events giving rise to the claim took place." This more rigorous standard should govern the admissibility of hearsay in every instance, notwithstanding the manner of the hearing (written, on the record, or expanded).

- Rule 56(6) is not a sufficient check, and could indeed add to the length and complexity of the proceeding without increasing the probative value of the record.

- Rule 56(8): The purpose of this rule is unclear. The significance of a specific claim does not seem to be relevant to whether it is meritorious. The dissatisfaction and sense of unfairness of a First Nation claimant could be amplified where it has made such an opening address and the claim is ultimately found to be without merit. Such an address could also give rise to an apprehension of bias.

- Rule 56(8) appears to be a drafting error. The claimant would not make an oral presentation in a hearing on the record.

- Rule 56(8): It is unclear why the Crown does not have an opportunity to make an oral presentation during an oral hearing like the claimant does.

Rule 57: Expanded Hearing

57. (1) "Expanded Hearing" means a process that provides for:

(a) the hearing of viva voce evidence, including oral history

(b) formal filing of historical or other written records

(c) expert reports and testimony

(d) cross-examination.

(2) A party may apply to the tribunal for an order that the hearing of a claim proceed as an expanded hearing.

(3) The provisions of Rule 55 apply, except where inconsistent with Rule 56, to an expanded hearing.

(4) Hearsay evidence is admissible if it meets the test of necessity and reliability, to a standard that takes into account the circumstances and time at which the events giving rise to the claim took place.

(5) Documentary evidence that contains the opinions of persons directly involved in the transactions asserted by the claimant to give rise to a cause of action, may be admitted in evidence by the Tribunal

(6) The Tribunal shall convene a case management conference for submissions from the parties on which of rules set out in Parts 8-12 will apply to a claim heard by way of an expanded hearing.

- Rule 57(1)(b): The word "formal" does not add anything to the concept of "filing". Consider, "the introduction into evidence of historical…"

- Rule 57(3): This subrule is unclear. It seems to say that the provisions of Rule 55 apply to expanded hearings, except where they are inconsistent with Rule 56. But Rule 56 does not apply to expanded hearings.

- Rule 57(4) is problematic from several perspectives. First, it codifies a common law standard which may change the next time the Supreme Court of Canada considers hearsay evidence. Second, the Tribunal appears to be lowering the common law standard. The common law standard may already accommodate the Tribunal's concerns. The Tribunal's proposed standard could result in evidence prejudicial to the Crown being admitted. This rule could alternately read:

  > (4) In deciding whether it will admit hearsay evidence, the Tribunal will consider the legal test for such admissibility as well as arguments as to whether factors particular to the specific claim ought to compel admission of the evidence.

PART 6 – CASE MANAGEMENT

Rule 58: Case Management

58. (1) The Tribunal shall, as soon as is practicable after a claim is filed, contact the parties to schedule a case management conference.

(2) Written notice of the conference shall be given by the Claims Registrar to the parties and to such other persons as the Tribunal presiding over the case management considers appropriate.

- It would be more appropriate for the Tribunal to schedule a case management conference as soon as practicable after "*a Response*" (and not a claim) is filed.

Matters to address under case management

Rule 59: ***Matters that may be addressed during case management include the following:***

(a) scope of the hearing, including the application of Rules 56 and 57;

(b) Identification of the proper parties and intervenors, if any;

(c) Simplification, elimination or settlement of issues;

(d) facts and documents that may be agreed upon by the parties;

(e) Any pending or anticipated motions and a date for the hearing of motions.

(f) The presentation of oral and written argument by each party;

(g) The use of mediation or alternative dispute resolution mechanisms within a framework, including time line;

(h) The official language to be used for the pleadings and the hearing, as well as the language in which each witness called by the First Nations claimant shall testify;

(i) Translation and interpretation, including simultaneous interpretation at the hearing;

(j) The application and timing of processes for discovery of documents, examinations for discovery and interrogatories;

(k) The intention of parties to adduce expert evidence, and the timing for exchange of expert reports;

(l) The submission of oral history evidence;

(m) Matters relating to confidentiality of documents or of oral proceedings;

(n) The method of retaining or recording evidence for the purposes of ensuring that a complete written hearing record can be assembled in case of judicial review;

(o) Proportionality of pre-hearing procedures to the apparent monetary value of the claim, including the application of the rules set out in Parts 8-12;

(p) ***Any other matters that may assist in the just and expeditious disposition of the issues in the proceedings.***

- Rule 59(o) suggests that pre-hearing procedures be proportionate to the apparent monetary value of the claim. This seems to be the only direct reference to predetermined value in the rules. It would be useful to consider a bifurcated hearing, the purpose being to identify that the work required to determine the value of a claim is not typically done by either the First Nation or Canada until the claim is in negotiation or, stated in the language of the Act, has been found to be valid. Essentially, the monetary value of a claim is not likely to be known by either party at the time of a case management meeting.

Rule 60:

60. The scheduling framework that a Tribunal may order may include:

(a) Dates for the completion of the pleadings, the hearings of applications, examinations, answering undertakings, pre-trial discovery and any other procedural issues that will require determination by the Court.

(b) Time-line for the exchange of serving and filing of the various documents related to the hearing, including affidavits of documents, joint briefs of authorities and agreed books of documents;

(c) Time-line to be followed by the intervenors;

(d) The scheduling of the experts and of the oral history witnesses.

(e) Start date, duration as well as the time allotted for various stages within the hearing;

(f) Location of the hearing, which may include the claimant community, and notably:

(i) the availability of a suitable hearing room;

(ii) the facilitation of access by members of the community (ies) affected by the claim;

(iii) the availability of suitable accommodation for the Tribunal, tribunal staff, counsel, witnesses, and other necessary participants in the hearing;

(iv) responsibility for costs associated with the conduct of hearings;

(v) any other relevant factors.

- Rule 60(f)(iv) appears to contemplate making orders for costs of hearings in communities which would be beyond the jurisdiction of the Tribunal. Likewise Crown counsel would generally not have any authority to voluntarily agree to cover such costs. S. 12(3) of the Act states: "The Tribunal's rules respecting costs shall accord with the rules of the Federal Court, with any modifications that the Tribunal considers appropriate." Those "modifications" could not extend the statutory jurisdiction of the Tribunal to order a party to pay the corporate costs of the Tribunal itself.

Rule 63:

63. Each party shall submit a written case management brief.

- It is unclear what is to be included in the case management brief referred to in Rule 63.

65. Unless the Tribunal or the presiding judge directs otherwise, the counsel of record for the parties, and the parties or their authorized representative, shall participate in a case management conference. The participation of interveners at case management conferences is at the discretion of the Tribunal.

- The phrase "or the presiding judge" should be deleted.

PART 7 – MEDIATION

Rule 74: General

74. (1) The mediation shall, whether conducted by a member of the Tribunal or another mediator named by the parties, unless the Case Management Tribunal orders otherwise, address all issues that arise in relation to the claim, including the provisions of any settlement agreement;

(2) An order for a stay of proceedings pending mediation may include:

(a) a requirement that the process of mediation be attended, or that each party have direct access to, a representative of each party authorized to bind the party to make binding offers of settlement and written terms of any settlement concluded in the course of mediation;

(b) a requirement for a formal mediation agreement;

(3) The Tribunal may stay further proceedings, in whole or in part, pending the conclusion of the mediation. In that event, In that event, the Tribunal will, by order:

(a) name the mediator;

(b) establish the period of the stay;

(c) provide for periodic reporting by the parties to the Case Management Tribunal on the mediation schedule, and their respective assessments whether progress is being made.

- It is unclear whether mediation is entirely on consent.

- Canada's strict system of high level financial approvals, some of which require approvals from Treasury Board, would not permit the attendance of, or direct access to "a representative of each party authorized to bind the party" at a mediation session.

PART 8 – DISCLOSURE

- **General Comments:** The disclosure requirements are very broad and wide ranging. As the Tribunal is the last phase in what is usually a multi-year extended process of claim reviews and sometimes negotiation, thousands of documents may have been generated that could theoretically fall within the scope of the proposed Part 8, but which are irrelevant to the underlying facts of the claim.

- While historical documents would not generally be subject to legal privilege, most of the documents that the parties prepare to engage in the negotiation of a specific claim would presumably attract settlement privilege. Examples of settlement privilege documents would be historical reports prepared by Canada's researcher and experts reports that have been obtained by the

  parties in negotiating the specific claim. As legal advice constitutes a core component of the review of specific claim submission, there will additionally be a considerable volume of material over which solicitor-client privilege must be claimed. Such privilege claims could generate disputes between the parties which might consume considerable time and divert the Tribunal from ruling on the merits of claims.

- It is noted that claimant First Nations have full access to Government of Canada records, subject only to privacy legislation.

Rule 77 – Documents

77. (1) Every document relevant to any matter in issue in a claim that is or has been in the possession, control or power of a party to the claim shall be disclosed whether or not privilege is claimed in respect of the document.

(2) Unless otherwise ordered by the Tribunal, disclosure shall include at least disclosure of all documents on which a party proposes to rely at a hearing, including any expert reports.

(3) At any stage in the proceedings, the Tribunal, whether through the case management presiding judge or the hearing presiding judge, may make orders with respect to disclosure, including the production of documents, summaries of what potential witnesses are expected to say, or pre-hearing examination of one or more potential witnesses.

(4) Unless the Tribunal otherwise orders or directs, a party must disclose to the other parties the documents on which it proposes to rely:

(a) at the time it files the claim or defence, if the document already exists;

(b) within ten days of the document's finalization, if the document did not exist at the time of filing the claim or defence;

(c) in any event, at least sixty days before the hearing.

(5) Disclosure to a party's legal counsel or representative is deemed disclosure to the party.

- Rule 77(1) - This Rule provides that the parties cannot prevent disclosure even where a party claims privilege over a document. This is contrary to s. 13(b) of the Act and doesn't seem to square with Rule 78(2)(b) or Rule 79(1), the latter of which do recognize a party's right to assert privilege.

- Given the provisions in Rules 78 and 79, which preserve confidentiality over privileged documents, this rule at least needs to clarify that only disclosure of the existence of documents is required, not the documents themselves. The British Columbia Supreme Court's current rules on document discovery require (a) the delivery of a list of document; (b) the right of inspection of documents in a list; and (c) the production of copies of documents. Canada maintains that broadly importing civil action rules into the context of the Specific Claims Tribunal is inappropriate for an expeditious hearing where the parties already know all of the relevant facts.

- The test set out in Rule 77(1) is, as stated above in reference to Rule 56(3), a very high and aging standard, which is an enunciation of the Peruvian Guano

test. It will be both time-consuming for the Crown to comply with this standard and of questionable utility, given the departure from this test in civil courts around the world.

- Rule 77(3) refers inappropriately to "presiding judge".

- Rule 77(4)(a) refers to "… the time it files the claim or defence…" This should read, "… the time it files the Declaration of Claim or Response".

- Rule 77(4)(a) requires the disclosure of all documents on which a party intends to rely at the hearing at the time of the filing of its pleading. In the case of Canada, this means there will be a maximum of 45 days (if the extension is granted) to determine all of the documents on which we wish to rely at the hearing. This timeline seems impossible to meet. The claimant, on the other hand, has unlimited time to prepare to meet this standard before it files its Declaration of Claim.

Rule 78: Affidavit of Documents

78. (1) A party shall serve on every other party an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the claim that are or have been in the party's possession, control or power.

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document

relevant to any matter in issue in the action other than those listed in the affidavit.

(4) Legal counsel for each party shall certify on the affidavit of documents that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at the hearing of the claim.

- It is assumed that Rule 77 disclosure is in the form of an affidavit of documents as provided for in Rule 78. Not entirely clear as currently drafted.

- Rule 78(3): It may not be possible for any party to accurately make this statement. In the case of Canada, electronic communications in particular may range widely across the government.

- Rule 78(4): There must be some clarification as to whether anyone has any obligation, should a party be represented by a non-lawyer.

Rule 79: Inspection of Documents

79. (1)A party who serves on another party a request to inspect documents is entitled to inspect any document that is not privileged

and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating claim, pleadings or an affidavit served by the other party.

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some

other convenient place, and shall at the time and place named make the documents available for inspection.

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the hearing of the claim.

(5) The Tribunal may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

(6) Where privilege is claimed for a document, the Tribunal may inspect the document to determine the validity of the claim.

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy.

(8) Where a document may become relevant only after the determination of an issue in the claim and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the Tribunal on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

- To be conceptually consistent, Rule 79(1) should read, "A party may serve a request to inspect documents on a party who has delivered an affidavit of documents in accordance with Rule 78."

- Rule 79(2): the reference to "originating claim" should be deleted as it is covered by the term "pleadings", which is a defined term.

PART 9 – ORAL EXAMINATION

Rule 89:

89. "Examination" means, for the purposes of rules governing oral examination:

(a) an examination for discovery;

(b) the taking of evidence out of court for use at trial; or

(c) a cross-examination on an affidavit;

- The terms "court" and "trial" are used improperly throughout this section.

Rule 90: Manner of Examination

90. (1) A party may conduct an examination for discovery by way of both an oral and a written examination with leave of the Court or with the consent of the person being examined and all other parties entitled to examine that person.

(2) The Tribunal may order that an examination out of court be recorded by video recording or conducted by video-conference or any other form of electronic communication.

(3) Unless the parties agree, the Tribunal may order that an examination take place in the claimant's community, if the circumstances requires it and notably when the persons to be examined is an elder.

(4) Where two or more parties are entitled to examine a person, the examination for discovery shall be by way of an oral examination,

except with leave of the Court or with the consent of the person being examined and all other parties entitled to examine that person.

- The word "court and the phrase "with leave of the Court," are not appropriate and even if "Tribunal" is substituted for "court", the purpose and meaning of the Rule are still unclear. Does it mean that, with leave of the Tribunal, an examining party is entitled to an examination for discovery both orally and in writing? If so, this subrule should be clarified. If the norm is an oral examination for discovery, per Rule 91, it should be so stated.

Rule 95: Direction to Attend

95. (1)A party who intends to conduct an oral examination shall serve a direction to attend on the person to be examined and a copy thereof on every other party.

(2) A direction to attend may direct the person to be examined to produce for inspection at the examination

(a) in respect of an examination for discovery, all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the claim;

(b) in respect of the taking of evidence for use at trial, all documents and other material in that person's possession, power or control that are relevant to the matters in issue in the claim;

(c) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion.

(3) A direction to attend an oral examination shall be served

(a) where the person to be examined is an adverse party, at least six days before the day of the proposed examination;

(b) where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination;

or

(c) where the person is to be cross-examined on an affidavit filed in support of a motion, at least 24 hours before the hearing of the motion.

- Rule 95(3)(a) - The person to be examined is not, himself or herself, an adverse party.

Rule 98: Examining party to provide interpreter

98. (1) Where a person to be examined on an oral examination understands neither French nor English or is deaf or mute, the examining party shall arrange for the attendance and pay the fees and disbursements of an independent and competent person to accurately interpret everything said during the examination, other than statements that the attending parties agree to exclude from the record.

(2) Where an interpreter is required because the examining party wishes to conduct an oral examination and the person to be examined wishes to be examined in an other language than the one chosen by the examining party, the examining party shall, subject to any order of the Case Management Tribunal, pay the fees and disbursements of an independent and competent interpreter.

(3) Before aiding in the examination of a witness, an interpreter shall take an oath as to the performance of his or her duties.

- The reference to "neither French nor English" is problematic. If everyone except for the person to be examined speaks English, and the person to be examined speaks only French, the examining party still ought to provide an interpreter. This rule should be reworded.

Rule 99: Production of documents on examination

99. (1) Subject to subsection (2), a person who is to be examined on an examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted.

(2) On application, the Tribunal may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Tribunal is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of

documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

- The mandatory nature of Rule 99(1) conflicts with the permissive nature of the demand for the production of documents at an examination that may be made in the Direction to Attend referred to in Rule 95(2)(a). Both of those provisions conflict with the nature of the same requirement referred to in Rule 79(4)(a).

Rule 103: Failure to attend or misconduct

103. Where a person fails to attend an examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order, the Tribunal may

(a) order the person to attend or re-attend, as the case may be, at his or her own expense;
(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;
(c) strike all or part of the person's evidence, including an affidavit made by the person;
(d) dismiss the proceeding or give judgment by default, as the case may be; or
(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

- Rule 103 should include refusing to affirm.

PART 10 – PRESERVATION OF EVIDENCE BEFORE COMMENCEMENT OF A HEARING

Rule 107:

107. (1) On application, the Tribunal may order the examination of a person for the purpose of recording evidence for use at a hearing of the specific claim.

(2) In making an order under subsection (1), the Tribunal may consider

(a) the expected absence of the person at the time of trial;

(b) the age or any infirmity of the person;

(c) the distance the person resides from the place of trial;

(d) the expense of having the person attend at trial, and

(e) the language, culture and traditions of the witness.

(3) In an order under subsection (1), or on the subsequent motion of a party, the Tribunal may give directions regarding the time, place, manner and costs of the examination, notice to be given to the person being examined and to other parties, the attendance of witnesses and the production of requested documents or material.

(4) On application, the Tribunal may order the further examination, before him or her or before a person designated by him or her, of any witness examined under subsection (1), and if such an examination is not conducted, the Tribunal may refuse to admit the evidence of that witness.

(5) Unless the Tribunal orders otherwise, evidence obtained on an examination under subsections (1) or (4) may, without further proof, be used in evidence by any party.

- This contemplates that if evidence is taken before the hearing, and then also taken before a Tribunal member, all of that evidence can be used. In the litigation context, the general rule is that if commission evidence has been taken but then the witness is able to testify at trial, the commission evidence is disregarded in favour of the evidence given at trial.

PART 11 – ORAL HISTORY AND EXPERT EVIDENCE

Rule 108: Oral history evidence

108. The Tribunal conducting the hearing may issue directions that establish procedures for assessing the admissibility of oral history evidence to be given by a witness. Among other things, the Tribunal may require the counsel to outline that traditions of the people they represent relating to the questions of:

(a) How the oral history, stories, legends, customs and traditions are preserved;

(b) Protocol governing the identity of persons who keep and are entitled to relate oral history or traditions;

(c) The community practice with respect to safeguarding the integrity of its oral history or traditions, stories, legends and traditions;

(d) Personal information concerning the attributes of the witness relating to his or her ability to recount hearsay evidence of oral history or traditions, practices, events, customs or traditions;

(e) Evidence of the sources of the witness, his or her relationship to those sources and the general reputation of the source;

(f) Who will be called at trial to relate such evidence, and the reasons they are being called to testify;

(g) Pre-hearing disclosure of such evidence;

(h) The presentation of oral history or traditions by witnesses at trial, including the manner in which objections may be made by opposing counsel;

(i) Any other information that might bear on the reliability of the proposed evidence relating to oral history or tradition.

- If "[t]he Tribunal conducting the hearing" may issue these directions, it is unclear how it then can give directions for the "(g) Pre-hearing disclosure of such evidence." There needs to be a process for determining the admissibility of oral history evidence prior to the hearing.

- The information provided by counsel under Rule 108 should be in the form of evidence, not simply representations of Counsel.

Rule 109: Expert Evidence

109. Experts' reports shall include or be accompanied by supplementary material that includes the following:

(a) the expert's acknowledgement that the duty of the expert is to advise the Tribunal impartially on matters within the expert's area of expertise, and that this duty overrides any duty to the party to the proceeding;

(b) the expert's resume, and a statement as to how his or her training, education and experience qualifies him or her to produce the report;

(c) an account of the nature of the request or any directions received from any party to prepare the report;

(d) the facts and assumptions on which the report's conclusion is based;

(e) if the report is a response to another expert report, an indication of the points of agreement and disagreement;

(f) disclosure of any matters that fall outside the expert's area of expertise;

(g) identification of any literature or other materials specifically relied upon in support of the opinions;

(h) any caveats or qualifications necessary to render the report complete and accurate.

- Rule 109 (a) - If expert evidence can be used by either party or as a response to another expert report, how can the expert advise the Tribunal "impartially" on matters within the expert's area of expertise. They are being called upon to support one position or another.

- There appears to be no ability to challenge the admissibility of expert evidence or establish or test the qualifications of experts.

Rules 110 & 116: Expert Evidence and Examination of expert witness

110. At the hearing, the expert's evidence shall ordinarily consist of submitting the written report, providing a concise summary of the key points, and shall not involve reading the report into the record. The expert shall be subject to cross examination.

116. A report referred to in this rule shall not be read aloud at the hearing but the expert witness may be examined in chief for the purpose of summarizing or highlighting the evidence contained in the report and may be cross-examined and re-examined.

- Rules 110 and 116 are largely duplicative and should be reduced to one rule.

Rule 117: Tribunal appointed expert

117. (1) The Tribunal may, at any time, by order appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding.

(2) The parties may jointly recommend an expert to the Tribunal.

(3) The parties may make submissions about the terms of the order.

(4) The order shall contain the following information:

(a) the name of the expert being appinted and the expert's qualifications;

(b) the instructions given to the expert with respect to the preparation of the report;

(c) the questions to be posed to the expert;

(d) the date on which the report of the expert is to be provided to the Tribunal;

(e) the nature and extent of the expert's participation in the proceeding; and

(f) the remuneration to be paid to the expert.

(5) The claim registrar shall serve a copy of the repot on every party and any intervenor.

(6) The report shall be made part of the case record.

(7) Any party may file a written response to the expert's report and may examine the expert. The order and nature of such examinations shall be determined by the Tribunal.

(8) The Tribunal may order the expert to make a further or supplementary report, and subrules (4) to (7) apply to that report.

(9) The liability for payment of the remuneration of the expert shall be determined by the Tribunal at any time after the conclusion of the hearing following receipt of submissions on that issue.

- Rule 117 allows Tribunal members to appoint experts. The parties would not have control over the qualifications of the experts, and there is no indication

that the parties would have access to their findings, including the right to cross-examine the experts.

- Since the Tribunal may not have a budget for this expert undertaking, Rule 117(9) notes that "liability for payment of the remuneration of the expert shall be determined by the Tribunal at any time after the conclusion of the hearing following receipt of submission on that issue." The Tribunal would not likely have jurisdiction to make such an order. It is Canada's position that the calling of expertise before the Tribunal should be limited to witnesses chosen by the parties themselves.

PART 12 - AFFIDAVITS

Rule 118: Affidavit, Evidence and Examination

118. (1) Affidavits shall be drawn in the first person.

(2) Where an affidavit is made by a deponent who is blind or illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read to the deponent and that the deponent appeared to understand it.

(3) Where an affidavit is written in French or in English language for a deponent who does not understand that language, the affidavit shall be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath as to the performance of his or her duties, and contain a jurat in Form _____.

(4) Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

- Rule 118 should include affirming.

PART 13 – ADJUCATIVE HEARING: MANAGEMENT CONFERENCE

Rule 121:

121. (1) Unless the Tribunal directs otherwise, a case management conference shall be scheduled before the Tribunal member who will preside at the hearing.

- The same wording "case management conference", used in Rule 58, is used again in Rule 121 to refer to the conference held before the tribunal member who will preside at the hearing. The use of the same term in different contexts could create confusion.

Rule 122:

122. (1) The parties shall, not later than 30 days from the commencement date of the hearing, file a memorandum accompanied by a copy of all documents that may be of assistance for the Tribunal.

(2) The memorandum shall contain:

(a) a concise statement of the nature of the proceeding;

(b) any admission of the party;

(c) the factual and legal contentions of the party;

(d) a statement of the issues to be determined at the hearing;

(e) a list of matters that the parties would like to address;

(f) a certification by counsel of a party proposing to call oral history evidence that pre-hearing disclosure of such evidence is complete and that each witness who will give such evidence has advised of their role in the proceeding;

(g) a list of the name of the witnesses, the object of their testimony and the language in which each of them will testify;

(h) a list of exhibits disclosed to the other parties.

- The document referred to in Rule 122 is not different from the document referred to in Rules 55(2) and (3). These two documents seem to be duplicative.