TOWARD A RENEWED APPROACH TO RESOLVING SPECIFIC CLAIMS: A DRAFT Resource Paper to support an Institute on Governance-hosted dialogue with subject matter experts on Specific Claims

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Introduction

Specific claims are claims made by First Nations against the Government of Canada for failing to discharge its lawful responsibilities to respect historic treaties or its lawful obligations for the management of Indian lands and monies. Examples include claims that Canada did not provide all of the reserve land promised under a historic treaty signed with the Crown, Canada sold reserve lands without a First Nation's proper consent, and Canada failed to protect and preserve a First Nation's interest in land lease arrangements with third parties.

Since the 1970s, Canada has attempted to resolve claims associated with these grievances through an evolving dispute settlement process. Despite a number of efforts to improve how specific claims are settled, the process continues to be criticized for a number of reasons.

In September 2017, the Minister of Crown-Indigenous Relations and Northern Affairs and the then-Minister of Justice issued a joint statement committing to a complete overhaul of the specific claims policy, in co-operation and collaboration with First Nations, including working with the Assembly of First Nations. Reforms to the specific claims policy and process were to include consideration of the Auditor General's report, as well as the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, and recent decisions of the Specific Claims Tribunal and the courts.

In her mandate letter of 2017, the Minister of Crown-Indigenous Relations and Northern Affairs Canada was directed to ensure that "in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs towards Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach." Acknowledging and addressing the harm caused by past grievances are important steps in advancing reconciliation and consistent with Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples.

The Specific Claims Branch, Crown-Indigenous Relations and Northern Affairs, is working together with the Assembly of First Nations through a Joint Task Force, which has been asked to co-develop changes to the Specific Claims Policy and process. The Joint Task Force will be conducting an extensive engagement with First Nations in furtherance of this objective.

In support of its consideration of its policy imperatives and processes, the Specific Claims Branch has contracted the Institute on Governance to organize a dialogue with experts associated with the specific claims process to discuss several key themes related to the program. The Institute on Governance will support a facilitated, open discussion with experts to delve deeply into these themes

The Background, below, sets out a summary of the most recent reform attempts, as well as subsequent reports and reviews setting out the challenges with the current policy and process. These are more completely reviewed in annexes A and B. Following the Background is a set of possible Thematic Questions which could be used to guide the dialogue.

The intention of these materials is to assist in ensuring that all are on a reasonably level playing field in terms of the current context, and to promote efficient and effective use of the dialogue time. These materials are not intended to control or constrain discussion.

Background

The last major change to the specific claims process was in 2007, expressed through a policy statement entitled, Justice at Last: Specific Claims Action Plan (described in more detail below). The major elements of the policy were impartiality and fairness (through the establishment of the Specific Claims Tribunal), greater transparency (through new funding arrangements), faster processing (through legislated time-frames, streamlined claims processes, “triaging” claims based on their monetary value), and improving access to mediation (through new services to help parties reach negotiated settlements). Justice at Last was developed in collaboration with First Nations and, when announced, was broadly supported. However, there is dissatisfaction with the policy’s implementation.

In 2015, the AFN’s Independent Expert Panel concluded that First Nations are dissatisfied with: the implementation of the 2007 process reforms; Canada’s perceived arbitrary and adversarial nature of proceedings before the Specific Claims Tribunal; lack of adequate funding to support First Nations throughout the process, including before the Specific Claims Tribunal; the lack of transparency with respect to the administration of funding to support First Nations; and a lack of availability of independent mediation services.

In November 2016, the Auditor General, echoed many of the AFN’s concerns, and concluded that “deficiencies in the specific claims process” are impeding the resolution of claims; specifically: inadequate funding, insufficient information sharing between Canada and First Nations, and Canada’s apparent lack of responsiveness to Tribunal decisions, including missing opportunities to resolve outstanding grievances. In May 2017, the House of Commons Standing Committee on Public Accounts confirmed the conclusions in the Auditor General’s Report.

In February 2018, the House of Commons Standing Committee on Indigenous and Northern Affairs, reported that the process is too adversarial, does not take account of Indigenous cultures, lacks independence and transparency, and that funding to First Nations is insufficient. A clear message from First Nations, from the Auditor General and from both Standing Committees has been that Canada needs to engage with First Nations to develop and maintain a meaningful and respectful process for the resolution of specific claims.

The Government of Canada is committed to renewing its relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership. In the context of Reconciliation, specific claim settlements help to right past wrongs, renew relationships and advance reconciliation in a way that respects the rights of First Nations and all Canadians. Canada is working with the Assembly of First Nations, First Nations and other interested parties in a spirit of co-operation and renewal to find fair and practical ways to improve the specific claims process. These discussions began in June 2016.

Priorities that have been identified to date include:

- the need for funding to support the research and development of claims
- the process to resolve claims with a value greater than $150 million
- the use of mediation in negotiation processes

- clarity with respect to public reporting

This ongoing work is looking at recent court and tribunal decisions and previous reviews of the process, including the recommendations for reforms made in the following reports:

- Report by the House of Commons Standing Committee on Indigenous and Northern Affairs
- Report by the House of Commons Standing Committee on Public Accounts
- Auditor General's report on specific claims
- Five-year review of the Specific Claims Tribunal Act
- Justice Delayed, Assembly of First Nations, Submission to Canada for the Five Year Review of the Specific Claims Action Plan: “Justice at Last,” March 2012

The Assembly of First Nations was extensively involved in the development of Justice at Last, the last round of major reforms to the specific claims process in 2007, and the Minister has undertaken a co-development approach to this round of reforms as well. In June 2016, the Assembly of First Nations – Canada Joint Technical Working Group on Specific Claims (“Working Group”) was created to continue the work to co-develop fair and practical measures to improve the specific claims process.

In Budget 2019, the Government of Canada’s announced its intention to renew and replenish funding for the Specific Claims Settlement Fund of up to $3.1 billion over three years, starting in 2019–20. The Budget also proposed to provide additional support of $40 million over five years, starting in 2019–20, to First Nations to help research and develop their claims.

A Dialogue on Specific Claims: Thematic Questions

1. ***How can the claims settlement process balance the imperatives of fair restitution and reconciliation?***

> *Reconciliation is a process of healing relationships that requires public truth sharing, apology, and commemoration that acknowledge and redress past harms.*
>
> Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6, Page 16

The preamble of the Specific Claims Tribunal Act recognizes that: "it is in the interests of all Canadians that the specific claims of First Nations be addressed; [and] resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations…."

The Standing Committee on Indigenous and Northern Affairs noted: "redress for historical injustices is a key element in advancing reconciliation." Yet, the Assembly of First Nations echoed the sentiments of other observers in their report, Justice Delayed: "Canada's interest in clearing the backlog of claims appears to have transformed its approach to one of a defendant attempting to minimize liability…rather than reconciliation."

To many, the adversarial and litigious nature of the claim settlement process often obscures the stated recognition of the importance of addressing historical grievances as part of the process of reconciliation.

To many, Canada's perceived role as both actor and judge in validating claims is also determinantal to the notions of trust and fairness that are necessary preconditions to advancing reconciliation.

And further, the Crown's approach to managing its fiduciary obligations would appear to most as motivated by limiting the Crown's liability, rather than acting in the best interest of those to whom a fiduciary obligation is owed.

2. ***What steps can be taken to improve the specific claims resolution process?***

> *It is my pleasure to outline in this booklet the actions Canada's New Government plans to take to accelerate the resolution of specific claims in order to provide justice for First Nation claimants and certainty for government, industry and all Canadians. After years of debate, we are taking a new, decisive approach to restore confidence in the integrity and effectiveness of the process to resolve specific claims.*
>
> The Honourable Jim Prentice
> Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, Minister's Message, Justice at Last

Reports and studies that have examined the specific claims process have consistently recommended improvements to the specific claims process to ensure greater transparency,

fairness and speed. More recently, the 2016 OAG identified three barriers – too few opportunities for negotiation, insufficient funding and inadequate information sharing – that undermine the achievement of the government's and First Nations' commitment to the just and final resolution of specific claims.

"When First Nations cannot resolve their claims, they withdraw them, or take them to court or to the Specific Claims Tribunal. These alternatives have resulted in further delays, which can lead to higher costs for government, uncertainty for all Canadians, and further strain on government and First Nations relations."

3. ***How can claims settlements contribute to self-determination/self-government and/or better socio-economic outcomes?***

> *Vibrant First Nation economies generate a wealth of social and economic benefits that spill over into neighbouring communities, creating greater prosperity for all Canadians.*
> Justice at Last: Specific Claims Action Plan

The intended consequences of specific claim settlements have been stated to include opportunities and investments in greater self-determination, self-government, and community and economic development. However, very little evidence appears to exist that quantify the relationship between claims settlements and socio-economic outcomes.

The National Indigenous Economic Development Board released a study in 2015 that examined the economic and fiscal benefits of urban additions to reserves, including the importance of other factors for generating First Nation and regional economic and fiscal benefits, including I infrastructure and services, governance, land management, own source revenues, and community support.

ANNEX A: Summary of *Justice at Last: Specific Claims Action Plan*

In 2007, Indigenous and Northern Affairs Canada introduced Justice at Last: Specific Claims Action Plan. In 2008, Parliament passed the Specific Claims Tribunal Act, which among other things established the Specific Claims Tribunal. This Act was developed in collaboration with the Assembly of First Nations. Justice at Last took effect in 2008 and was designed to:

- address the backlog of claims and their slow resolution,
- settle specific claims preferably through negotiation, and
- compensate First Nations for past damages associated with Canada's outstanding lawful obligations.

In return for this compensation, First Nations agree to never reopen these claims. As stated in Justice at Last, this finality provides certainty for First Nations, government, businesses, and communities.

Justice at Last also initiated a fundamental reform of the specific claims process. As part of this reform, the government committed to the following four pillars. Indigenous and Northern Affairs Canada was tasked with incorporating them into its process for resolving specific claims.

Impartiality and fairness
Established the Specific Claims Tribunal, an independent claims tribunal with the power to make binding decisions on the validity of claims and on compensation of up to $150 million. The Specific Claims Tribunal Act provides for organizing, operating, and accessing the Tribunal.

Greater transparency
Established new funding arrangements with dedicated (publicly committed) funding of $250 million per year for 10 years (for a total of $2.5 billion) to fund claim settlements and Tribunal awards of up to $150 million in a manner that enhances public awareness.

Faster processing
Legislated a three-year time frame in which the government can assess a claim before a First Nation can access the Specific Claims Tribunal.

Adopted a streamlined approach to ensure faster processing of claims, such as expedited procedures for negotiating small-value claims (up to $3 million).

Removed large-value claims of over $150 million from the specific claims process (to be addressed through a separate process that requires Cabinet approval for settlement funding).

Better access to mediation
Committed to establish mediation services intended to help the parties to reach negotiated settlement

ANNEX B: Summary of Recent Studies and Reports

The following section summarizes recent relevant studies and reports. Given the purpose of the dialogue, the summaries focus on issues and recommendations.

Indigenous Land Rights: Towards Respect and Implementation, Report of the Standing Committee on Indigenous and Northern Affairs, February 2018

The House of Commons Standing Committee on Indigenous and Northern Affairs released its study on comprehensive land claims, self-government agreements and specific claims in February 2018.

Generally, with regard to specific claims, the Committee heard that the process is adversarial, does not take into account Indigenous cultures, values and laws, lacks independence and transparency and that funding for research and participation in the process is insufficient and unpredictable. Indigenous communities further expressed concerns over the very premise of the specific claims process, stating that it is "re-victimizing those who were wronged by Canada's past actions."

It was the view of the Committee that, in its current form, the government's policies and processes prevent Indigenous communities from achieving a fair resolution of their claims. Further, the Committee found that the current processes cannot efficiently achieve the goals set by the federal government, as evidenced by the high number of unresolved claims.

The Committee describes many concerns raised by witnesses about the specific claims policy and process, including the various stages of the specific claims process, from researching to funding to settling claims, and the Specific Claims Tribunal process.

Funding

Funding is critical to researching claims and participating in negotiations. However, the Committee found that funding for research has been reduced and meeting minimum standards for filing specific claims is increasingly difficult, resulting in further delays. Funding does not take into account the actual costs of negotiations, and is not available to First Nations in cases where the government has sought a judicial review of a decision. Funding through annual contribution agreements were also identified as barriers to greater stability and better planning. The Committee also heard concerns regarding loan funding, which affects First Nations' ability to effectively participate in the specific claims process. Evidence also suggests that loan funding is provided in an unpredictable and less than transparent manner.

Assessment of Specific Claims

The Committee found that the criteria for evaluating claims and the federal government's approach in the early stages of the process impede First Nations' access to the process as well as the settlement of specific claims. The evaluation criteria and requirements relating to minimum standards were criticized as being too limiting, in the former case (exclusions in the federal policy are a long-standing issue), and too onerous and often irrelevant, in the latter case.

Many concerns were raised with respect to the independence and transparency of the specific claims process: including a lack of impartiality and, with Canada operating as both an arbitrator

and a party to the process, an apparent conflict of interest. The assessment process is considered arbitrary and unaccountable, and criteria are not well communicated or understood.

Other concerns were raised regarding the calculation of the value of claims, including the ratio of simple to compound interest is determining compensation, as well as the government's treatment of both low value and high value claims.

Negotiation of Specific Claims

The Committee found a number of concerns relating to the adversarial negotiation process, although some concession was given to recent "creative" approaches to negotiation. The limited access to mediation was also identified as a barrier to the settlement of claims.

Specific Claims Settlement

The Committee found that the current compensation scheme is neither comprehensive nor adequate as the practice of returning land is virtually non-existent and compensation for harms is limited to monetary compensation. And the calculation of the compensation takes into only expropriation-related costs, but not the injury and nature of the harm.

Other concerns were noted relating to the additions to reserve process, which was described "long and arduous," and not "meaningfully increas[e] the total reserve lands of First Nations," due to a number of challenges, including insufficient land allocation, obstacles to land selection and acquisition, third party interests, municipal relations, loss of use and opportunities, and the lengthy and complex additions to reserve process.

Specific Claims Tribunal

The Standing found that the Specific Claims Tribunal is generally achieving its objectives, although the proceedings are considered by some to be long and difficult. The government's adversarial and perceived "hard line" approach is considered inconsistent with the flexibility advocated by the Supreme Court of Canada with regard to Indigenous issues. The Committee also heard advocacy for expanding the role of the Specific Claims Tribunal, including in the granting of compensation.

The Committee was of the view that urgent reforms are needed to ensure that the specific claims policy and process are fair, just and transparent. According to the Committee, these reforms must take place in partnership with First Nation communities and take into account the loss of Indigenous laws, culture, governance, language and identity.

The Committee was encouraged by the involvement of the AFN in the Joint Technical Working Group on Specific Claims. The Committee did acknowledge, however, that First Nations have been involved in many working groups and studies have made similar recommendations over the years, often leading to little practical change.

The Committee made the following recommendations related to specific claims:

- That Indigenous and Northern Affairs Canada broaden the criteria considered when accepting or rejecting a claim for negotiation and implement policies to improve

communication and transparency in the assessment phase of the specific claims process, and that an independent body for the review and assessment of specific claims be considered.

- That Indigenous and Northern Affairs Canada, in partnership with First Nations, reform the specific claims policy and where applicable amend the Specific Claims Tribunal Act to:
    - Incorporate First Nations cultures, knowledge and languages in the specific claims policy and process, where possible;
    - Ensure First Nations are provided with information regarding their claims and rationale for decisions made at all stages of the specific claims process;
    - Ensure First Nations are involved and appropriately supported in determining the value of their specific claim(s);
    - Review and broaden the criteria in the financial formula that Indigenous and Northern Affairs Canada uses to determine an appropriate offer of settlement, including a review of the 80/20 rule and increased use of land transfers as compensation;
    - Expand the eligibility criteria for specific claims to include claims based on the non-fulfilment of treaty rights;
    - Review the $150 million maximum compensation cap for claims resolved through the Specific Claims Tribunal.

- That Indigenous and Northern Affairs Canada immediately work with First Nations communities and specific claim research organizations to develop a funding framework that provides sufficient funding for the research and development of specific claims and that the department ensure stable, predictable and long-term funding going forward.

- That Indigenous and Northern Affairs Canada, with regard to all Treaty Land Entitlement or Additions to Reserve lands, ensure First Nations have access to dispute resolution mechanisms and resources to negotiate and plan with municipalities (land use, urban reserves, road building and service agreements) and third party interests (conversion of land to reserve status).

- That Indigenous and Northern Affairs Canada increase funding and resources to support environmental assessments, surveys and necessary federal activities to conclude the Additions to Reserve process in a timely manner.

- That Indigenous and Northern Affairs Canada develop an improved process for educating and engaging third parties and local community members at every stage of a comprehensive or specific claim.

- That Indigenous and Northern Affairs Canada work with the Indigenous communities and organizations to develop a mandatory education and training program for all officials working on specific claims, comprehensive land claims, and self-government agreements; and that Indigenous and Northern Affairs Canada launch a public education campaign to educate all Canadians on the importance of the land claims process in reconciling harms that have resulted throughout Canadian history through the expropriation of traditional land, the unfulfillment of treaty commitments, and a policy of assumed crown sovereignty.

- That the Government of Canada, in implementing the preceding recommendations and proposed initiatives, be guided by the Principles and Minimum Standards set out in the United Nations Declaration on the Rights of Indigenous Peoples.

Report of the House of Commons Standing Committee on Public Accounts, Report 6, First Nations Specific Claims, Of the Fall 2016 Reports of the Auditor General of Canada, May 2017

On 15 February 2017, the House of Commons Standing Committee on Public Accounts held a hearing on the performance audit conducted by the Auditor General of Canada to determine whether the Department adequately managed the resolution of First Nations specific claims

The Committee agreed with the OAG in finding that Indigenous and Northern Affairs Canada has been deficient in managing the resolution of First Nations specific claims, and funding cuts and the lack of information sharing between the Department and First Nations posed barriers to First Nations' access to the process for resolving specific claims.

The OAG also found that Indigenous and Northern Affairs Canada "failed to increase the use of mediation services and did not use available information and feedback to improve program performance."

Lastly, the OAG found that Indigenous and Northern Affairs Canada's "selective reporting on the specific claims process provided an incomplete picture of results, which made it difficult for parliamentarians and Canadians to accurately assess overall program success."

In their report, the Committee made five recommendations that sought the information needed to assess whether Indigenous and Northern Affairs Canada has properly addressed these deficiencies. According to the Committee: "In order to provide First Nations—who have long had grievances related to the non-fulfillment of historic treaties and the mismanagement of Indian lands and monies—with Justice at Last, the federal government must ensure that the specific claims process delivers real results."

Recommendation 1 - Results of the Specific Claims Process and the Goals of Justice at Last

That, by 30 April 2018, Indigenous and Northern Affairs Canada present a report to the House of Commons Standing Committee on Public Accounts detailing how it has increased the rate at which claims are resolved through negotiations in line with the aims of Justice at Last.

Recommendation 2 - Barriers in the Specific Claims Process

That, by 30 April 2018, Indigenous and Northern Affairs Canada present a report to the House of Commons Standing Committee on Public Accounts detailing what progress has been made with regard to negotiation practices for small-value claims; developing and implementing a strategy to use mediation more frequently; and, updating its website to reflect the full range of negotiation practices for all types of specific claims.

Recommendation 3 - The Department's Role in Funding First Nations

That, by 30 April 2018, Indigenous and Northern Affairs Canada present a report to the House of Commons Standing Committee on Public Accounts detailing what progress has been made with regard to developing a clear and consistent methodology for funding to First Nations to adequately support the research and preparation of claims; developing evidence-based methodology for loan funding to adequately support First Nations' participation in the negotiation process; and, ensuring First Nations are made aware of the facts on which the Department of Justice Canada will rely to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada.

Recommendation 4 - Use of Available Information and Feedback to Improve the Specific Claims Process

That, by 30 April 2018, Indigenous and Northern Affairs Canada present a report to the House of Commons Standing Committee on Public Accounts detailing what progress has been made with regard to developing practices to gather, monitor, and respond to information and feedback about the specific claims process.

Recommendation 5 - Departmental Reporting on the Specific Claims Process

That, by 30 April 2018, Indigenous and Northern Affairs Canada present a report to the House of Commons Standing Committee on Public Accounts that provides complete information about the specific claims process to allow the government and Canadians to assess real results, and confirm that the Department is keeping the information about the specific claims process on its website up to date.

To note, the OAG drew the Committee's attention to the Department's assertion that, as of 31 July 2016, 136 claims were settled under Justice at Last. However, the OAG is of the opinion that "only 47 of these 136 claims were settled through the process reforms introduced by Justice at Last. The remaining 89 claims were already in negotiation, were close to settlement, or had already been settled (as was the case with 28 of these claims) before the Specific Claims Tribunal Act and the associated process reforms came into effect. According to the Department, as of July 2016, $2.3 billion had been paid to First Nations for specific claim settlements. Of this amount, 98 percent was used to settle the 89 claims described above.

Report 6, First Nations Specific Claims—Indigenous and Northern Affairs Canada, Reports of the Auditor General of Canada, Fall 2016

The audit of the Auditor General of Canada focused on whether Indigenous and Northern Affairs Canada adequately managed the resolution of First Nations specific claims.

Specifically, the Auditor General examined the design and implementation of the systems and practices of Indigenous and Northern Affairs Canada to determine whether it adequately managed the specific claims process to provide reasonable assurance that:

- First Nations had adequate access to the specific claims process,
- claims were resolved and documented in line with selected aims of Justice at Last, and
- complete results were reported to allow Parliament and Canadians to understand how well the government was handling specific claims.

Overall, the Auditor General found that Indigenous and Northern Affairs Canada did not adequately manage the resolution of First Nations specific claims. The Department's reforms to the process introduced barriers that hindered First Nations' access to the specific claims process and impeded the resolution of claims. These barriers included certain practices that did not encourage negotiations; cuts to funding for claims preparation and negotiation; and limited information sharing between the Department and First Nations. The Auditor General also found that the Department was aware of First Nations' concerns about these barriers, but was unable to demonstrate that it had a formal process to gather, monitor, and respond to information and feedback about these concerns and make required improvements.

The Auditor General's findings were:

- results of the specific claims process were inconsistent with the outcomes envisioned under Justice at Last
- barriers in Indigenous and Northern Affairs Canada's specific claims process hindered the resolution of some First Nations claims
- Indigenous and Northern Affairs Canada did not use available information and feedback to improve implementation of the specific claims process
- Indigenous and Northern Affairs Canada's reporting on the specific claims process presented an incomplete picture of actual results

The Auditor General's recommendations were:

- In collaboration with First Nations, Indigenous and Northern Affairs Canada should review its systems and practices to understand why the majority of claims are not settled through negotiation and to improve the resolution of claims in line with the aims of Justice at Last.

- In cooperation with First Nations, Indigenous and Northern Affairs Canada should make its negotiation practices to expedite small-value claims (up to $3 million) acceptable to both parties.

- Indigenous and Northern Affairs Canada should work with First Nations to develop and implement a strategy to use mediation more frequently.

- Indigenous and Northern Affairs Canada should update its website to reflect the full range of negotiation practices for all types of specific claims.

- In cooperation with First Nations, Indigenous and Northern Affairs Canada should develop a clear and consistent methodology for funding to First Nations to adequately support the research and preparation of claims.

- In cooperation with First Nations, Indigenous and Northern Affairs Canada should develop evidence-based methodology for loan funding to adequately support First Nations' participation in the negotiation process.

- Indigenous and Northern Affairs Canada should work with First Nations to ensure that its process to resolve claims includes a step where First Nations are made aware of the

facts that the Department of Justice Canada will rely on to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada.

- In collaboration with First Nations, Indigenous and Northern Affairs Canada should develop practices to gather, monitor, and respond to information and feedback about the specific claims process. These practices should be designed to improve the specific claims process and its outcomes.

- Indigenous and Northern Affairs Canada should clearly report complete information about the specific claims process to allow the government and Canadians to assess real results.

- Indigenous and Northern Affairs Canada should keep the information on the specific claims process on its website up to date.

Indigenous and Northern Affairs Canada agreed with all the recommendations.

Five-Year Review of the Specific Claims Tribunal Act, Report, Benoît Pelletier, Ministerial Special Representative, September 2015

The Specific Claims Tribunal Act requires that the Minister of Aboriginal Affairs and Northern Development undertake a review of the mandate and structure of the Specific Claims Tribunal, of the efficiency and effectiveness of its operation, and of any other matters related to the Act, within one year of the fifth anniversary of the Act's coming into force.

This report, prepared by a Ministerial Special Representative, was completed in September 2015. Although the report did not propose changes to the Specific Claims Tribunal Act, it did propose joint exploratory discussions and items for future consideration.

Summary of Recommendations

Items for eventual consideration by the Government of Canada

- Expand the Tribunal's role to include performing preliminary assessments of claims, based on the minimum standard or their merits.
- Take steps to ensure that First Nations are aware of the availability of, and conditions for, mediation with an independent mediator.
- Addressing the discrepancy between the Specific Claims Policy and the Justice at Last initiative with regard to specific claims over $150 million. It is suggested that the term "specific claims" be defined in the former in a way that is consistent with the latter.
- Develop, in association with the five Métis governments, a forum for resolving and/or negotiating the latter's specific claims.
- Create a satellite version of the Specific Claims Tribunal in Vancouver to deal with the large portion of specific claims that come from Western Canada.
- Allocate more resources for French-English and Aboriginal language interpreters to the Specific Claims Tribunal and the Administrative Tribunals Support Service of Canada, to accommodate French-specific claims and Aboriginal-language witnesses.

- Develop a more effective method for educating and engaging provinces and territories with regard to specific claims that affect them, with the goal of increasing their participation in Tribunal proceedings and increasing judicial efficiency.
- Show greater willingness to waive settlement privilege during Tribunal proceedings, with regard to (but not limited to) expert reports and witnesses, and allow the use at the Tribunal of reports and evidence gathered and jointly approved by the federal government and First Nations during negotiations.
- Develop a training program for Specific Claims Branch employees regarding the correct and consistent interpretation and application of the minimum standard, which focuses on fundamental deficiencies of a claim rather than procedural errors.
- Re-examine the Specific Claims Branch's practice of partial acceptance of claims, to ensure the proper application and appropriate exchange of release.

Joint exploratory discussions

- Subject to increasing resources at the Tribunal, change its role to include overseeing negotiations at Stage Two of the Specific Claims Branch process.
- Include mediation in the Tribunal's mandate, subject to the same condition as above.
- Work together with First Nations to develop a mutually agreed-upon method of addressing specific claims above $150 million.
- Discuss the three-year timeframes and attenuate the controversy surrounding their application.
- Expand the scope of subsection 6(2) of the Specific Claims Tribunal Act, in order to allow the nomination of Tribunal members who are not necessarily Superior Court judges to adjudicate at the Specific Claims Tribunal. This could include the nomination of retired judges from superior or federal courts, or members of quasi-judicial tribunals. The nomination of such members should be made directly by the Governor in Council.
- Consider the appointment of specialists and independent experts, with suitable qualifications in the field of Aboriginal law, as members of the Tribunal. The nomination of such members should be made directly by the Governor in Council. If such a change were implemented, a corresponding right to appeal Tribunal decisions, in addition to judicial review, should be included.
- Create a position for prothonotaries at the Tribunal, to lighten the burden on Tribunal members and assist them with particular procedural tasks. Develop a plan to modify the Rules of Practice and Procedure to allow prothonotaries to oversee case management conferences.
- Elaborate Tribunal proceedings to include paper hearings, while fully accommodating oral testimony as a vital part of First Nations evidence.
- Improve the funding mechanism for First Nations' specific claims to better accommodate the latter's financial needs for Tribunal proceedings.
- Develop reasonable conditions for the re-submission of the same specific claims to the Specific Claims Branch, as well as a reasonable limit on the number of re-submissions of said claims following unfavourable decisions from the latter.
- Initiate a joint collaboration between Canada and First Nations towards improved communication and cooperation regarding the application of the minimum standard.

Changes to the Specific Claims Tribunal Rules of Practice and Procedure

- Amend the Rules of Practice and Procedure to give the Tribunal a clear conciliatory role, rather than an adversarial one that is more reflective of a Superior Court.
- Develop rules that are more flexible with regard to the formal requirements of expert witnesses and reports. Make these requirements more conducive to the expedited and collaborative resolution of specific claims.

Other recommendations

- Discuss with First Nations any future amendments to the Specific Claims Tribunal Act — including those derived from this report — before their coming into force.
- Appoint additional members to the Specific Claims Tribunal as expeditiously as possible — in particular, at least one more full-time member and several more part-time members, pursuant to subsection 6(4) of the Specific Claims Tribunal Act.
- Within the context of proportionality of costs, First Nations and the Government of Canada must make efforts to resolve specific claims as expeditiously as possible, which will translate into limiting expenses associated with litigation.
- First Nations and the Government of Canada must work together in order to achieve a level of information and transparency when it comes to decisions by the Specific Claims Branch, as well as access to historical records that is mutually satisfactory.
- Within five years of the tabling of the Minister's report, the Minister of Aboriginal Affairs and Northern Development shall embark on another review of the mandate and structure of the Tribunal, the efficiency and effectiveness of its operation, and other matters related to the Specific Claims Tribunal Act.
- In the spirit of reconciliation, the Government of Canada and First Nations must engage in meaningful negotiations with an earnest desire to resolve specific claims at the negotiation stage.

Justice Delayed, Assembly of First Nations, Submission to Canada for the Five Year Review of the Specific Claims Action Plan: "Justice at Last," March 2012

The Assembly of First Nations outlined its own findings on the outcomes of Justice at Last after five years. These findings were the product of two think tanks designed to provide practical information with respect to specific claims based on available resources through a series of presentations and feedback from participants though facilitated dialogue. More than 100 participants provided feedback in the form of both oral and written comments.

The Assembly of First Nations provided the following recommendations:

Canada should reinvigorate the Joint Liaison and Oversight Committee as a joint forum for problem solving.

- Canada should issue a clear and public Ministerial directive to the bureaucracy that in "stage one" (the federal processing stage), Canada is not an adversary attempting to minimize liability through all means fair or foul, but a fiduciary attempting in good faith to conscientiously evaluate claims on their merits, and thereby restore and enhance the honour of the Crown consistent with the principle of reconciliation.
- Adequate resources and training must be provided to all officials who are charged with evaluating and negotiating claims.

- Resources must be provided to all claimants at all stages of the claims process and must be provided at levels commensurate with the new demands on claimants at the filing stage, as well as in the event that they go before the Tribunal.
- Before rejecting a claim, Canada should provide claimants with the opportunity to correct mistakes that may lead to more productive outcomes. This should include the possibility of dispute resolution.
- The Minimum Standard should be jointly reviewed so as to ensure that its formulation and application are reasonable.
- There should be a ready route to the Tribunal for claims that were already considered by the Indian Specific Claims Commission, rather than forcing these claimants to go through six years or more of “stage one” processing.
- Canada must ensure that all aspects of a claim are considered fairly and on its merits. Canada should stop using the negotiation of one aspect of a claim as leverage to force the claimant to abandon pursuing the rest of the claim at the Tribunal, or to accept an arbitrary and lowball compensation envelope where this is seen as strategic.
- An independent body should be established to oversee claims processing and funding. This would include the provision of alternative dispute resolution services / mediation at the federal processing stage.
- At the negotiations stage, it should be the claimant’s choice whether to proceed to the Tribunal, and the three-year window should not be turned into a weapon against claimants who need more time to conduct negotiations with an adequate basis of information and community consultation.
- The reporting of claims statistics by Canada should be carried out by an independent or arms-length body to ensure that information is represented objectively and without bias.
- Efforts should be made to continue to engage Parliamentary Committees to gather information and make recommendations with respect to the administration of the new claims system.