- Justice Delayed -

Assembly of First Nations

Submission to Canada for the Five Year Review of the

Specific Claims Action Plan: "Justice at Last"

March 31, 2012

1. Overview

Canada is required by its own policies to conduct a five-year review of its Specific Claims Action Plan: *Justice at Last*, announced in June 2007. *Justice at Last* was to create a set of reforms that would improve the entire system of resolving specific claims. This report outlines the findings of the Assembly of First Nations (AFN) on the outcomes of *Justice at Last* after five years.

Specific claims are historic grievances based on the unlawful or unjust deprivation of the lands or assets of a First Nation by the Crown. A massive backlog of unresolved claims had built up in the years leading up to 2007, and claimants did not perceive Canada's system for addressing such claims as either fair or efficient. This was also affirmed by a Senate Committee report, issued in December 2006, entitled "Negotiation or Confrontation: It's Canada's Choice". Under the old system, the Crown would essentially act as the final judge of claims against itself. Claimants would often have no practical access to the courts because they would be barred by statutes of limitations or unable to bear the costs of litigation.

Justice at Last undertook to address these issues and AFN agreed to work with Canada based on the commitments made in its new *Justice at Last* policy announcement (see http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/jal_1100100030459_eng.pdf).

The *Justice at Last* policy announcement sets out "four interdependent pillars" that provide a new policy rationale that is intended to improve the process of settling specific claims, as follows:

i. Creating "impartiality and fairness" through the creation of a new Independent Claims Tribunal with the power to make "binding decisions".
ii. Establishing "greater transparency" through "new funding arrangements" to determine "how well the government is handling claims" and whether "adequate funding is available".
iii. "Faster processing" of claims to "improve internal government procedures", with "separate arrangements" to handle claims over $150 million.

iv. "Better access to mediation" through a "neutral third party" where "every reasonable effort will be made to achieve negotiated settlements and cases would only go to the tribunal when all other avenues have been exhausted".

The AFN partnered with Canada to make the *Justice at Last* commitments operational and in the joint legislative development of the *Specific Claims Tribunal Act*, which established a new and independent claims tribunal.

The AFN and Canada also entered into a Political Agreement (Appendix 1). It called for co-operation and dialogue between the AFN and Canada as other aspects of the new system were developed and implemented.

2. Preparing this Submission

In an effort to ensure that AFN's comments with respect to this submission for the 5-year review are accurate and reflective of the experiences of claimants across Canada, AFN hosted two day-long "think tanks", on February 24 and March 15, 2012, in Vancouver and Ottawa respectively.

The objective of these think tanks was to provide practical information with respect to specific claims based on available resources through a series of morning presentations, and then to receive feedback from participants though a facilitated dialogue in the afternoon. Officials from the Specific Claims Branch (SCB) were also invited to deliver a presentation, but declined.

A background paper and other materials were made available to participants throughout the day, including a list of ten questions that were used as a basis for gathering input during the afternoon dialogue sessions (see Appendix 2).

In the end, the AFN was able to obtain a significant level of feedback from the more than 100 participants across the two think tanks in the form of both oral and written comments (see Appendix 3) - the input was virtually unanimous in its tone and content. The portrait that has emerged from these two think tanks is a profoundly distressing one.

This submission by the AFN seeks to describe the current specific claims process at "stage one" (i.e., the "assessment" of claims by Canada and the "negotiation" of settlements) and to provide constructive feedback and recommendations to Canada on an initiative that was truly groundbreaking in its inception. Sadly, over the intervening years, the original intent and commitments of *Justice at Last* appear to have been interpreted in manner and spirit so as to have created a process that is wholly inconsistent with the objectives and intentions of its original champions.

Of the bright spots that warrant acknowledgement in this submission there are two: the first pertains to the very productive process of collaboration that followed in the 10 months after the announcement of *Justice at* Last; the second to the ongoing potential of the Specific Claims Tribunal of Canada in leveling the playing field of specific claims adjudication that has long been so grossly tilted in Canada's favour. AFN's findings in this submission should not detract from either of these two important outcomes from the *Justice at Last* initiative.

3. Key Findings

Canada's current interpretation of the commitments made in *Justice at Last* does not fulfill the basic tenets of the new approach as captured by the four pillars. On this basis, the AFN wishes to advance the following observations with respect to Canada's current processing of specific claims:

- **a.** Canada has adopted a variety of hardball tactics to attempt to press claimants into improvident settlements;
    - **i.** Claims usually have many components. Where many claims have been "rejected" in their entirety, in other cases, Canada has accepted only one or two of the components (i.e., partial acceptance) and insisted that a settlement could only come with a release on all components;
    - **ii.** Another tactic appears to have been to accept a claim, but to limit the scope of what is compensable, or the methodology of calculating loss, so that the claimant would have to settle for a small fraction of what might objectively be deemed reasonable;

iii. Canada has also offered what is effectively a one-time "signing bonus" (e.g., $50,000), which has been interpreted by some to appear to take advantage of the impoverished positions that many First Nations find themselves in (and which places them at a disadvantage in terms of seeking to negotiate alternatives where the "bonus" is then lost);

b. Canada no longer seems to be evaluating claims in an impartial manner as a fiduciary, but instead is taking an adversarial approach to claims resolution;

c. Canada's interest in clearing the backlog of claims appears to have transformed its approach to one of a defendant attempting to minimize liability, including the use of pressure tactics against impoverished claimants, rather than reconciliation;

d. Canada's reporting of statistics with respect to the number of claims that have been "resolved" is profoundly misleading and paints a picture that is quite the opposite of the reality;

e. After an early flurry of settlements, Canada has either generally rejected claims outright or made offers that are grossly out of step with what might objectively be deemed fair or reasonable;

f. The form and content of legal opinions produced by Canada when evaluating claims has tended to be unsatisfactory. Many of those writing opinions appear to lack experience and the product of their work does not exhibit a meaningful appreciation of the issues;

g. Based on historical experience, the shared expectation among claims experts is that the "validity" of claims filed is in the neighbourhood of 70 percent. The actual rate of validation under *Justice at Last*, after an initial flurry of offers, is 20 percent or less.

h. Many claimants suggested that the "Minimum Standard" is being applied in an unreasonable manner. There is no sense that substantial compliance is sufficient. Formalistic quibbling, such as the appearance of annotations on a copy of a document are cited as grounds for refusing to consider the claim as "filed" (ironically, in one example provided at a think tank, the annotations on a document that caused delays had been made by a federal official in the first place);

i. Funding for claims research and negotiation is inadequate, especially in light of new requirements to meet the Minimum Standard and the potential that each claim has to proceed to the Tribunal.

j. Canada's policy of providing loans, not grants, for the cost of negotiations is operating unfairly. Costs that must be borne by all sides, such as conducting valuations, are placed on the claimant. The prospect of being in debt for the costs of its negotiation if no conclusion is reached puts pressure on claimants to accept weak offers. If a negotiation is reached, the reasonable transaction costs of arriving at it should not be borne by the claimant alone;

k. The Indian Specific Claims Commission (ISCC) has been eliminated. The ISCC was to assume a major role in alternate dispute resolution and currently, independent mediation through a neutral third party is unavailable;

l. There is no transparency in how policy decisions are made. Policy is established by various "committees" within the federal system, whose membership and guidelines are not revealed to claimants;

m. There is no transparency and opportunity to correct mistakes when claims are being considered by Canada. Once a claim is filed, the system "goes dark" – claimants are not told about questions or concerns on the part of those Justice officials evaluating a claim;

n. Transparency is lacking with respect to how claims are decided in individual cases. Reasons for rejected claims tend to be terse and uninformative;

o. Canada's objective in practice appears to have been to clear the backlog of claims from the books at the federal processing stage, thereby transferring the burden of actually resolving the claim to the Tribunal.

It is not reasonable to expect claimants to accept offers that are widely out of step with the prevailing commitments that were made in *Justice at Last.* As such, claims that are only partially accepted or contain onerous conditions must be considered as *de facto* rejections. The promise of *Justice at Last* with respect to federal processing has, therefore, not been fulfilled.

What Canada promised is that the federal processing stage would be improved; that the Tribunal was created to provide an incentive to settle claims reasonably, quickly and fairly at the federal processing stage. The Tribunal was not created to be the new home of the massive backlog of claims that are considered "unresolved" by First Nations.

This promise of Canada in *Justice at Last* is explicit:

> *"While these major changes will dramatically improve the specific claims process, the fundamental principles of the Specific Claims Policy will not change. The Government of Canada reaffirms that negotiation remains its preferred method to settle claims, as this is invariably more effective than confrontation and adversarial approaches."*

The claimant community is profoundly disappointed and frustrated by Canada's conduct. It does not believe that Canada is honouring its promises in *Justice in Last*. It has, in a manner that has never been announced or acknowledged, turned the federal processing stage into an arena where Canada appears to be no longer acting in good faith as a fiduciary, but instead is taking

every opportunity to merely minimize its liabilities. This approach is inconsistent with the principle of reconciliation that was explicitly embedded into the *Specific Claims Tribunal Act.*

4. A Review of the Data

While the federal system for processing claims at "stage one" has been deteriorating, a lack of transparency has made it difficult to assess how or why this is occurring. While Canada is a party to all cases, claimants are party only to their own claims(s) (often with strict federal provisions for confidentiality). It has, therefore, taken a considerable period of time for the claimant community to gather experiences and share them with each other to arrive at the grim assessment reported here. With the two think tanks carried out in February and March 2012 respectively, the claimant community's dissatisfaction with the current system was not only confirmed, but the depth and breadth of the dysfunction become overwhelmingly clear. In an effort to assess the validity of concerns expressed by the claimant community, AFN also undertook to review data that is available on the Specific Claims Branch website.

The reporting system used by Canada considers a claim "resolved" at stage one even when this reflects the outright "rejection" of a claim (i.e., no legal obligation). Even more troubling, however, are the many "offers" that have been made by Canada that amount to *de facto* rejections – that is – an "offer" to negotiate is not accepted by a claimant because:

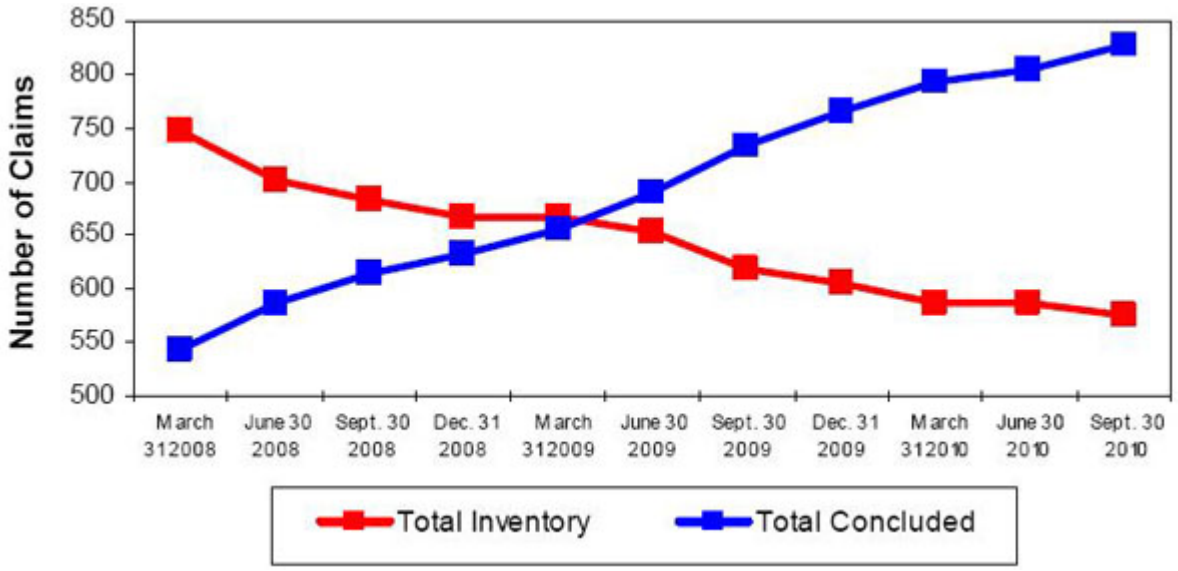
- It is ridiculously inadequate;
- It comes with many conditions;
- It reflects only a small portion of the entire claim, while requiring a release of the claim in its entirety; or
- Some combination of the three factors above.

These "offers to negotiate" are even more troubling than outright rejections due to how they have been represented by Canada. When these "offers" are rejected by a claimant, Canada reports this as a "file closure", which, by its own definition, amounts to a "resolved" claim.

Canada has, for example, displayed the following graph on its website to illustrate its success in "resolving" claims (see: http://www.aadnc-aandc.gc.ca/eng/1100100030541).

Resolving Specific Claims

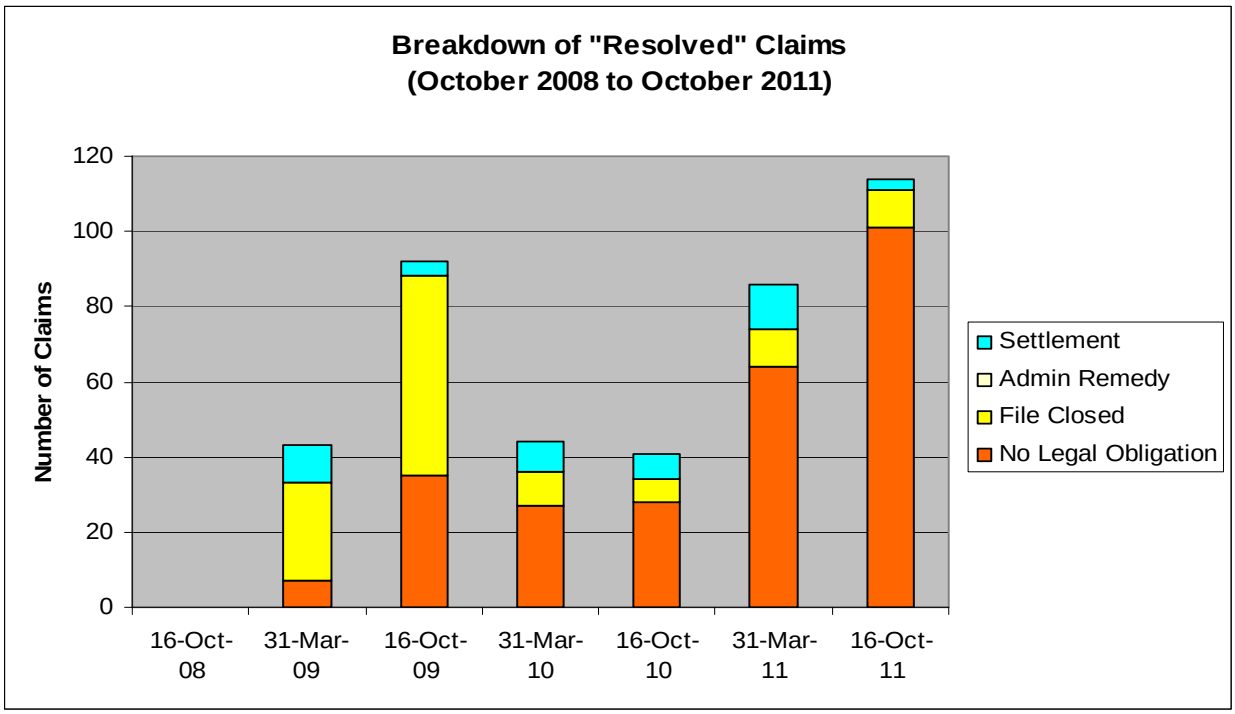
Results from March 2008 to September 2010



The overt suggestion in Canada's graph is that the number of "resolved" claims is increasingly rapidly (the blue line), while the inventory of claims – the so-called "backlog" – is diminishing almost as fast (the red line). The reality, however, is quite different.

The total number of actual claims "settlements" is only a small fraction of those defined as "resolved" by Canada (approximately 10 percent of the total). Of the 420 claims in this period described as "resolved" by Canada, only 44 represent actual "settlements". The entire balance – some 376 claims – has effectively been shunted to what will inevitably become a new backlog of claims before the Specific Claims Tribunal. As such, they should not be deemed "resolved".

A more honest reflection of what has transpired with respect to the processing of claims is reflected below in a graph that is based upon AFN's crunching of Specific Claims Branch data.



In this graph, which covers the first three years following the coming into force of the *Specific Claims Tribunal Act,* one sees that, in fact, only a tiny minority of the so-called "resolved" claims actually culminates in a "settlement" (the blue portion). The balance of claims – some 90 percent of the total – have either been "rejected" based on a finding of no legal obligation, or have been subject to "file closure" often due to the fact that Canada has made an offer to negotiate that was not acceptable to a claimant (e.g., a partial offer). Each of these latter two categories has effective access to the Tribunal. Such claims are hardly "resolved", and this misleading characterization represents a clear affront to the principle of reconciliation.

5. Recommendations

The new Tribunal remains available as the last resort and this may result in more positive outcomes for First Nations. Pursuing this last avenue of recourse will require extensive patience and capacity on the part of claimants, many of whom are impoverished. Further delays in justice will, in the interim, deny communities the resources they need to help overcome the

legacy of deprivation caused by historic wrongs, and it is likely that a new backlog of claims will emerge before the Tribunal as the claimant community shifts its attention there for the resolution of its grievances.

While the claimant community has confidence in the Tribunal, errors can be made even by the most capable adjudicators, and the imbalance in resources between claimants and Canada makes this potential even greater. The expense, delay and risk associated with pursuing the last resort of the Tribunal may result in many claimants giving up altogether, or yielding to the pressure of accepting improvident federal offers. Neither of these scenarios is adequate or acceptable. The legacy of each specific claim in Canada must be decided on its own merits, through a process that is fair and transparent for all parties involved. Only that will truly represent "Justice at Last".

To this end, the AFN wishes to advance a series of recommendations to address some of the perceived defects at the federal processing stage of specific claims resolution. There is no legislative imperative to prevent the federal system for processing specific claims to live up to its promise. Indeed, there are no publicly announced policies or guidelines that Canada would have to reverse. What is needed now is a restoration of the dialogue that characterized the establishment of the *Justice at Last* initiative in the first place.

The AFN hopes that Canada will come back to the table and work to realize the full promise of the *Justice at Last* initiative. If it does, it will find again a willing and constructive partner in the AFN.

1. Canada should reinvigorate the Joint Liaison and Oversight Committee as a joint forum for problem solving.
2. 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.
3. Adequate resources and training must be provided to all officials who are charged with evaluating and negotiating claims.

4. 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.

5. 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.

6. The Minimum Standard should be jointly reviewed so as to ensure that its formulation and application are reasonable.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

Appendix One

POLITICAL AGREEMENT BETWEEN THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT AND THE NATIONAL CHIEF OF THE ASSEMBLY OF FIRST NATIONS IN RELATION TO SPECIFIC CLAIMS REFORM

Whereas it is a legal and moral imperative of Canadians to address the Specific Land Claims of First Nations in a just and timely manner;

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

In our deliberations a number of issues have arisen that are either outside the Specific Claims process or are, by definition, not addressed in the draft Bill developed by the Specific Claims Joint Task Force;

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

Participation in Appointments to the Tribunal

The National Chief will be engaged in the process for recommending members of the Tribunal in a manner which respects the confidentiality of that process.

Reacquisition of Land and Additions to Reserve

While the Tribunal will, under the proposed Bill, only have jurisdiction to award monetary damages, the parties recognize the particular cultural, spiritual, social and economic significance to First Nations of the lands that have been lost. In situations where a First Nation seeks to re-acquire or replace lands that were the subject of a Specific Claim, the Minister will review with First Nations, policies and practices respecting additions to reserves with a view to ensuring that these policies and practices take into account the situation of bands to which the release provisions of the proposed Specific Claims Tribunal legislation apply. In particular, the Minister will provide priority to additions to reserve of lands affected by the consequences of the release provisions in the legislation or to lands required to replace them.

Treaty Process

The parties are committed to working together on a joint approach to address other treaty issues not addressed in the draft Specific Claims Tribunal legislation or the Specific Claims Policy. This joint engagement will begin with the First Nations/Federal Crown conference on historic treaties in early 2008.

Future Work

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

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

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

5-Year Review

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

Communications

To the extent possible, the parties will work together to produce and communicate information/materials designed to explain the proposed legislation, best practices and other matters within its mandate.

Acknowledgement

The parties acknowledge that this Agreement is not intended to affect their respective legal rights and obligations, but rather to reflect the mutual understanding and shared commitments of the parties.

Signed in Ottawa on November 27, 2007 By

National Chief Phil Fontaine
Assembly of First Nations

The Honourable Chuck Strahl
Minister of Indian Affairs and Northern Development
Federal Interlocutor for Métis and Non-Status Indians

Appendix Two

PLEASE PROVIDE US WITH YOUR FEEDBACK

Specific Claims Think Tank on Canada's 5-Year Review of "Justice at Last"

1) The definition of an "admissible" claim under the *Specific Claims Tribunal Act* and the Specific Claims Policy and Process Guide: Is it reasonable?

2) The adequacy of funding for claimants at all stages of the process: are there problems with the process of making funding available and how applicants are dealt with once funded?

3) The minimum standard: is this standard in fact "reasonable" as required by s. 16(2) of the *Specific Claims Tribunal Act*?

4) The quality of claims processing: are claimants being kept apprised of where a claim is in the process?

5) Claims accepted for negotiation: what is the experience at the negotiating table? Is Canada applying a three year cut-off? Is three years enough in practice? Is there adequate access to ADR / mediation throughout the process? What percentage of claims have received only "partial" offers to negotiate? Is the process for calculating compensation satisfactory?

6) Claims that are rejected: are claimants provided with sufficient information about why a claim has been rejected? What is the quality of reasoning provided? Do claimants have access to ADR / mediation upon rejection?

7) Access to the Tribunal: are the three year clocks (for assessment, and then negotiation) working adequately? Should changes be made to how claimants access the Tribunal?

8) Tribunal Rules: is the structure and administration of the Tribunal conducive to reaching settlements? Is the Tribunal's approach to case management flexible enough?

9) Role of the AFN: what kinds of advocacy can the AFN undertake to better support First Nations trying to advance their claims with Canada and the Tribunal?

10) Are there other issues that must be addressed?