Submission to the Rules Committee

Specific Claims Tribunal of Canada
Draft Rules of Practice and Procedure dated June 8, 2010

Submitted on behalf of

Union of British Columbia Indian Chiefs and
Nlaka'pamux Nation Tribal Council

July 24, 2010

Introduction

The Union of B.C. Indian Chiefs ("UBCIC") has provided specific claims research services to First Nations in British Columbia since 1970. UBCIC houses the oldest, largest and most experienced Specific Claims Research Program in the Province and has been involved in researching and advancing over 380 specific claims for 125 B.C. First Nations. Currently, UBCIC represents over 80 First Nations and is working on 120 specific claims.

In addition to ongoing specific claims research, UBCIC focuses on providing B.C. First Nations with up to date information on specific claims policy and advocating for specific claims policy reform. Since our inception we have consistently advocated and promoted the fair, just and timely resolution of specific claims including the establishment of an independent, adjudicative body able to make decisions binding on Canada.

The Nlaka'pamux Nation Tribal Council ("NNTC") has since 1985 undertaken the research and development of over 175 specific claims on behalf of the Nlaka'pamux communities located along the Fraser and Thompson watersheds. The NNTC specific claims program arose out of a commitment made by then Minister David Crombie to expeditiously address the NNTC members' specific claims grievances in relation to the railway rights of way that had severed reserve lands, and in particular, had severed access to fisheries. This commitment was made at the time when the Nlaka'pamux (and other Fraser and Thompson River communities) fought CN Railway's plan to twin-track the line – a plan that was enjoined by court order in 1985. Most of these grievances remain unresolved.

Our two organizations join in this submission with a view to providing the Rules Committee with a B.C. First Nations' perspective. The submission rests on the experience of B.C. First Nation communities who over the past thirty and more years have engaged in all phases of the specific claims process, including research, claim development, claim submission, negotiation, mediation and settlement (or absence of settlement). Our communities have also participated in all phases of the Indian Claims Commission ("ICC") inquiry process, up to and including Canada's acceptance (or rejection) of the ICC's recommendations.

The Guiding Principles for the Tribunal's Rules

In its publication *Justice at Last* (2007)[1], the Government of Canada made substantive commitments to First Nations (and to all Canadians) that the historical grievances of First Nations would be resolved. Following on these commitments, the *Specific Claims Tribunal Act*[2] (the "Act") was enacted and the Specific Claims Tribunal was charged with the responsibility, as a body entirely independent of the federal government having the power to make binding decisions, to determine the resolution of First Nations' specific claims. Under the Act, the Tribunal is empowered to develop its own rules of practice and procedure. These must of course be consistent with the Act, but they must also be in keeping with the spirit of the commitments made to First Nations in *Justice at Last*. The foundational principles underlying these commitments include mediation, negotiation, flexibility, cultural sensitivity, and fairness. These basic principles call for an adjudicative process that does not polarize, but reconciles; that is simple, fresh, creative, and uniquely appropriate to the systemic historical grievances of First Nations; and that serves as an inspirational model capable of providing finality in a manner that is efficient, respectful and fair.

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[1] *Justice at Last* can be found at: http://www.ainc-inac.gc.ca/al/ldc/spc/pubs/jal/jal-eng.asp
[2] 2008, c. 22

These principles, in our view, mean focusing on practices and procedures such as those suggested below.

Mediation

- The Tribunal should explore with the parties the possibility of mediation as an alternative to a hearing at every opportunity. For example, the possibility of mediation could be a required agenda item at every case management conference.

Negotiation

- The Rules should encourage and facilitate the parties negotiating their own satisfactory resolution. For example, the Rules could provide that, at any stage of the proceedings, the claim before the Tribunal will be held in abeyance whenever the parties jointly agree to negotiate.

Flexibility

- The Rules must have sufficient scope to accommodate claims arising from many different circumstances in diverse First Nation communities. For instance, in B.C., there are 203 Bands, some having a membership of less than 50 people, some having a membership of more than 3,000, and with the exception of Treaty 8 and the pre-confederation Douglas Treaties on Vancouver Island, there are no historical Treaties. The reserve creation process prior to and after confederation carved out of First Nations' traditional territories, some lands to be set aside as reserves. Currently, there are 1,680 such reserves in B.C. The Rules need to be responsive to the nature of claims and the nature of the claimants.

Fairness

- The Tribunal's Rules must ensure a claims resolution process accessible to all First Nations, whatever their financial circumstances (rich or poor), their geographical location (remote or urban), and the nature and size of the claim.

Fairness in this regard needs to inform the entire process, from the submission of the claim to the final resolution.

- An adversarial process like that available in a courtroom in a large city, is not a fair or appropriate approach to the resolution of historical wrongdoings by Canada in its administration and management of First Nation lands and other assets. An accessible process needs to be understandable to the claimants; technical language requiring familiarity with adversarial engagement does not work. Plain language is needed. Cross-examination of First Nation community members should only be available in the most exceptional circumstances on application. Other non-adversarial mechanisms to permit evidence to be given and opportunities for questions or clarification about that evidence should be adopted in the Rules.

Cultural Sensitivity

- The Rules should reflect that the Tribunal recognizes the importance of seeing the people in the place where the claim arose, whether that is near or far from a major centre. For example, the Rules could provide that when a claim is filed with the Tribunal, a First Nation may request that the hearing be held in their community, and that such requests will be reasonably accommodated.

Overview of the Draft Rules

The UBCIC/NNTC wish to say that there are concepts in the draft Rules that we support. These include provisions that foresee hearings in First Nation communities, provisions that tend toward mediation and other alternative dispute resolution mechanisms, as well as case management to assist the parties in streamlining the process to correspond with the nature of the claim. We also support the idea of options and flexibility in the hearing process, including the options of written and oral hearing as appropriate to the claim.

Overall however, the orientation of the draft Rules is out of step with the underlying purpose and objectives of Canada's commitments to resolve specific claims, commitments which precipitated the creation of the Tribunal. From the beginning of the federal government's specific claims process, it was recognized that the adversarial, rule-bound, unfamiliar court process was not the

appropriate forum for resolution of these historical grievances. An alternative dispute resolution process, appropriate to the subject matter, was desirable; indeed necessary.

The Rules of the Tribunal must reflect the history and purpose of specific claims resolution. The Rules must be understandable and accessible. They must be geared to the claimants - Aboriginal people - who are not ordinary litigants, because specific claims is not ordinary litigation. Aboriginal claimants have been invited and encouraged by Canada to bring forward historic grievances in this process. The very existence of the specific claims process is a response to systemic historic grievances. The process embodied in the Rules must reflect this fact, and must also be understandable to Aboriginal people, affordable and fair, and provide for a place where it is possible for the people to give their evidence without feeling embarrassed, frightened, or intimidated.

The focus and orientation of the draft Rules do not reflect this process – the draft Rules are technical, complex, and not relevant to specific claims, nor are they accessible to Aboriginal claimants. There are too many opportunities to get mired in technicalities and delays that have nothing to do with the merits of the claim. The draft Rules portray a lawyer's world – the world of disclosure and discovery, joinder and costs. This legalistic model is unnecessary and inappropriate.

Given the history of reserve creation in British Columbia, it is not surprising that the nature and monetary value of First Nations' specific claims is diverse. The Tribunal's Rules should be flexible enough to accommodate this fact. At the same time, First Nations need to know what they can expect for their particular claim. The Rules should allow First Nations to select from various options those procedures that are most suited to how their claim should be determined. As drafted, the Tribunal's Rules create a wide spectrum of complex possibilities, and no certainty as to what process and procedures will or will not apply. This uncertainty is a significant disincentive to First Nations in British Columbia pursuing resolution of many of their claims at the Tribunal. Nearly 50% of all filed claims in Canada are from British Columbia.[3]

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[3] Status Report on Specific Claims found on the Internet at http://www.ainc-inac.gc.ca/

Many of these claims are for compensation amounts of less than $1 million.[4] For example, in recent years Canada has settled several claims in British Columbia based on its failure to protect First Nation reserved graveyards in the 20th century. Most of these claims were settled for less than $1 million and some for as little as $240,000.[5] Given the complex and lengthy discovery process provided for under the draft Rules, a First Nation would likely be hesitant to initiate a time-consuming and lengthy process before the Tribunal in the hopes of, at best, receiving a relatively small amount of compensation for these types of claims.

This would be particularly regrettable given that regardless of the compensation amount, the importance of settling the claim and having Canada acknowledge the historic wrong is of great value to First Nations, especially as cultural losses are so often at stake. This form of redress and reconciliation would be foreclosed to many First Nations under the current draft Rules.

Finally, in our submission, the draft Rules are inconsistent and lack clarity. Examples here include:

- several types of hearings are provided for but it is unclear what kind of hearings these are and under what circumstances they would be held. For instance, what are expanded hearings and when would they be held? what is an adjudicative hearing? as opposed to an oral hearing?

- there are several terms for 'claim' defined in the draft Rules ('claim', 'filed claim', 'specific claim'), but it is unclear what the difference between them is;

- provisions limiting "the record" appear to be inconsistent with provisions for extensive discovery and disclosure procedures.

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[4] Settlement Report on Specific Claims Report as of 2010/07/12, Indian and Northern Affairs Canada found on the Internet at: http://ainc-inac.gc.ca/ Since 1974, 77 per cent of all B.C. claims that have settled were for compensation amounts of less than $1 million.

[5] *Ibid.*

Specific Rules, Specific Concerns

We set out below detailed submissions regarding those rules which in our view are either unclear or inapt to the specific claims process. We do not address specific rules, but rather, we discuss topics that in our submission require a different approach than that taken in the draft Rules.

We have not attempted in this submission to address a number of technical defects in the language of the draft Rules – for example, the use in some places of the words 'plaintiffs' or 'defendants' and other such issues. We simply ask the Rules Committee to closely review these aspects.

(a) Disclosure, discovery and the "record"

In our submission, there is an inconsistency between the extensive disclosure and discovery provisions on the one hand, and the provision limiting the "record" to what is filed with the Minister. These are two extremes, and it is not clear how both of these trends in the draft Rules can be implemented.

The UBCIC/NNTC recommend that the Rules support a process that both acknowledges the original claim materials and provides a generous and liberal opportunity to address research gaps and file new documents.

Considering the binding nature of the Tribunal's decisions and the automatic release provisions, it is essential that First Nations have a full opportunity to file relevant evidence with the Tribunal. There is no apparent reason why the Tribunal should be limited to the evidence that was before the Minister. The Tribunal is adjudicating the merits of the claim, not the merits of the Minister's decision. The fact is that evidence relating to historical specific claims is not always immediately available. Moreover, the Act anticipates at least three years from the time the claim is filed with the Minister until it may be filed with the Tribunal, and if negotiations between the parties are not successful, then at least six years will have passed. Over these years, there will likely be case law that will affect not only the principles to be applied in understanding the Crown's legal obligations but also the treatment of the evidence in support of the claims. In addition, over time new technology and other discoveries can be expected to improve access to relevant historical documents.

In the former specific claims process, new documentary evidence frequently came to light after the claim was filed, and this evidence was filed with the Minister when it became available. Canada has lately adopted a new practice that denies First Nations the opportunity to file any new evidence or information after the claim is filed with the Minister. First Nations must withdraw the claim and re-submit it as a new claim with the new evidence included. This involves significant cost and delay and is an additional drain on the human and financial resources of First Nations. As a result, there is currently built into the specific claims process a strong disincentive against filing new evidence when the claim is before the Minister. Limiting the record before the Tribunal to what was filed with the Minister in these circumstances would be unfair and not conducive to a full and complete hearing of the claim.

On the other hand, a full discovery and disclosure procedure is too unwieldy, expensive and complex, given the nature of specific claims – where for the most part, the documentary record has already been produced and is well known to Canada and the First Nation.

(b) Examination of Witnesses

The nature of specific claims involving historical grievances relating to the Crown's conduct means that most of the evidence in specific claims is in the form of documents. Witnesses would mostly comprise members of the Aboriginal community speaking about the peoples' use of the land, and the impact of losing it. With the exception of expert witnesses, there are seldom Crown witnesses. The provisions in the draft Rules for pre-hearing and in-hearing examination of witnesses including cross-examination, are onerous and a burden on First Nations, and are inappropriate in the vast majority of circumstances. The ICC adopted a successful model for dealing with community evidence, and the UBCIC/NNTC recommend the Rules Committee consider a similar approach to evidence.

(c) Legal Counsel

The requirement for legal counsel (unless leave is granted) in and of itself is a statement of just how complex and court-like the draft Rules are. We urge the Rules Committee to ensure that the Tribunal's rules and procedures are simple and understandable and accessible to lay people,

so that Aboriginal people have a choice about who will represent them and are not *required* to retain legal counsel.

The UBCIC/NNTC note that, in the past, it was against the law for Aboriginal people to hire lawyers to advance their land claims; it is ironic that the draft Rules now require them to hire lawyers to advance their claims.

The requirement of legal counsel also raises the issue of funding. Will Canada make funding available to cover the full cost of retaining legal counsel? While clearly funding is not within the purview of the Tribunal, it is nevertheless important that the Tribunal be aware that the requirement of legal counsel without provision for sufficient funding could potentially act as a bar to First Nations pursuing their claims before the Tribunal.

(d) Costs

In our submission, costs have no place in the context of specific claims. First Nations are not ordinary litigants. First Nations are invited and encouraged by Canada to submit specific claims. Most First Nations in B.C. have one or more claims, and it is essential that the entire specific claims process, including the opportunity to have the claim determined by the Tribunal, be accessible to them.

Costs are a penalty that under the draft Rules may be levied against First Nations simply because they have advanced a specific claim before the Tribunal. The specific claims process is about reconciliation and resolution of historic grievances, which is entirely inconsistent with the concept of risk and winning or losing that informs issues of costs. The underlying notion of specific claims – that there are systemic errors in how Canada historically dealt with reserve lands – and that First Nations are invited to submit their claims based on these historic wrongdoings – means that the process of filing and advancing the claims through the specific claims process should be a matter of right. There is no justifiable reason why the risk of costs should be introduced. The settlement of historic grievances is understood to be a responsibility of Canada and we see no legitimate principle being served in First Nations being penalized for pursuing specific claims by having costs awarded against them.

(e) Joinder

The draft Rules are too broad regarding joinder and, in our submission, go beyond the Act (which provides for adding First Nations and the Province only). Expansive joinder is inconsistent with the nature of specific claims, which are essentially, claims by First Nations against Canada. Further, such broad joinder provisions may result in an overly costly and complex process.

(f) Rules re: Two-phased hearing

The Rules should make provision for the possibility of a two-phased hearing (validation and then compensation), where appropriate. First Nations should not incur the cost of producing expert valuation or appraisal evidence before it is known that the claim is validated. First Nations are not funded to produce this evidence ahead of time. Once validated, the Tribunal might encourage the parties to negotiate the settlement of the compensation before being required to finally determine that issue.

The Tribunal Could Operate as a Commission of Inquiry

Nothing in the Act requires the Tribunal to operate as a court of law. The Tribunal is to set its own rules of procedure and may decide that the flexible and open procedures of an administrative tribunal or commission of inquiry are appropriate given the subject matter and the overall purpose of the specific claims process. There are a number of precedent bodies who have developed creative and effective rules and procedures designed to determine aboriginal claims in a fair, flexible and accessible manner. One such body was the ICC. While not perfectly analogous to the Tribunal, the ICC developed a number of practices and procedures that recognized the unique framework of specific claims – in particular, rules relating to the giving of *viva voce* community evidence, cross-examination, and the introduction of new documentary evidence. Another cogent example is the Treaty of Waitangi Tribunal which, though also not a perfect analogue for this Tribunal's purpose and function, does fulfill a similar role in adjudicating historical claims against the Crown by indigenous people with the ultimate goal of redress and reconciliation.

The Waitangi Tribunal operates as a commission of inquiry in adherence to the rules of natural justice but is not beholden to procedures of court (see "Waitangi Tribunal Practice Notes: Guide to the Practice and Procedure of the Waitangi Tribunal").[6] While its general recommendations are not binding on the Crown, it may make recommendations regarding the return or resumption of certain lands that are binding on the Crown, and its reports often form the impetus for and basis of subsequent negotiated settlements.

In comparison to the Tribunal's draft Rules, the Waitangi Tribunal's procedures are much more flexible and attempt to de-emphasize the adversarial nature of the proceedings while preserving procedural fairness and creating a forum for fair and transparent adjudication. For example, while claimants have the right to appear before the Waitangi Tribunal, legal counsel or another agent acting on behalf of a claimant require leave of the Waitangi Tribunal. In this way, while the Waitangi Tribunal expects and encourages claimants to engage legal counsel, it recognizes that lack of legal counsel should not be a barrier to access to justice ("Waitangi Tribunal Practice Notes", s. 2.13 Appearance by counsel or other representative).

Also, there is no formal discovery process at the Waitangi Tribunal. Instead, the parties are encouraged to cooperate in developing the necessary documentary record, while the Waitangi Tribunal retains the power to order production if necessary ("Waitangi Tribunal Practice Notes", s. 4.9 Disclosure of Documents).

From the very outset of adjudicating a claim, the Waitangi Tribunal emphasizes the role of conferences to simplify and expedite the hearing of a claim ("Waitangi Tribunal Practice Notes", s. 5.1 Conferences). Before a hearing begins, conferences are held for a wide range of purposes, including identification of issues, identification of points requiring response by either party, production of documents and the possibility of mediation or negotiation. The Waitangi Tribunal's hearings, including the venue and order and subject of submissions, are also intended to encourage Maori participation and respect for Maori traditions while ensuring procedural fairness ("Waitangi Tribunal Practice Notes", s. 5.3 Disclosure of Documents, s. 5.4 Hearing Agenda and 5.6 Initial and Later Hearings, and s. 5.8 Presentation of Evidence). While like the

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[6] http://www.waitangitribunal.govt.nz/doclibrary/public/GuidetoPractice2009.pdf

Tribunal, the Waitangi Tribunal provides for the right of cross-examination, in practice the extent and nature of any cross-examination is dependent on the specific situation and is respectful of the special nature of the hearings and the scope and nature of the claim ("Waitangi Tribunal Practice Notes", s. 5.10 Cross-Examination).

In the case of the Tribunal, the principle of cultural diversity is set out in the preamble and early in the draft Rules (Rule 4). However, the draft Rules then track more closely the rules of court that apply to an adversarial process between litigants, and in our submission, are not culturally appropriate, sensitive, or responsive to specific claims or Aboriginal claimants. Here too we recommend that the Rules Committee give consideration to adopt more of the approach taken by the ICC and by the Waitangi Tribunal.

Summary

The UBCIC/NNTC respectfully request the Rules Committee to re-orient the fundamental premises of the draft Rules so that the Tribunal's Rules of Practice and Procedure accord with the Government of Canada's stated objectives of resolving historical specific grievances in an expeditious and non-adversarial forum. As well, the Rules should be clear on a process that is accessible to all First Nations whether their claims are large or small, because regardless of the monetary value of the claim, an acknowledgement of wrongdoing by Canada is invaluable. Many First Nations in the Province of British Columbia continue to await this moment. The Tribunal should seize the opportunity entrusted to it by the Act, and guided by the principles for *Justice at Last*.

We are available to meet with the Rules Committee to further discuss these issues if that would be helpful.