Specific Claims Tribunal Canada /

Tribunal des revendications particulières du Canada

Advisory Committee Meeting of May 31, 2011

Réunion du Comité Consultatif du 31 mai 2011

Held in Ottawa, Ontario

Tenue à Ottawa, Ontario

Transcripts

Justice Slade	Welcome, I'm sure you've all received the letter indicating our intention to commence with the receipt of claims filings effective June 1st. It's quite the moment for us as it heralds' the imminent ability to do the real work of Judges and I can say for myself and for my colleagues that it's been a unique form of trial working to establish the foundation for the Tribunal's operation, something that's quite outside any skill sets that I've developed over the years of practice but here we are. It seems that we're able to launch. Let me first introduce my colleagues though you know you they are. Justice Johanne Mainville, Justice Patrick Smith. Many of you will have met our Registrar Raynald Chartrand, who has joined us fairly recently and has proven invaluable in assisting us in taking the steps required in way of building the infrastructure for the Tribunal such that we're able to commence operations. Todd Tyrie, our IT leader is with us. Alisa Lombard, who has been a law clerk to the Tribunal and an article student with myself as her principle and who signed the rolls just the other day to become a member of the Ontario Bar; so I'm delighted that we now have a lawyer with both the Common Law and the Civil Law degree and many languages and many skills as part of the team here. Mylène Smith is here as well working as an assistant with Mr. Chartrand and serving the Tribunal in that respect. Just a few preliminaries, this meeting is being recorded so it's important that prior to speaking you turn on the microphone. There seems to be some construction noise out on the streets so there may be times when you'll have to speak with a long house voice. Of course, it's necessary that after speaking, the microphone be turned off so others may turn theirs on. In order that the transcript be usable, please state your name prior to speaking. By the way, there is a transcription of the last meeting that's now available. Cell phones, blackberries, please turn off or at least to vibrate. I was in court one day and a cell phone went off and everybody was looking for the culprit and it turned out I was the culprit. There are a couple of break out rooms for committee members if you require that. I understand that Jeffrey Scott is with us by teleconference. Are you picking up?
Jeff Scott	Yes, I'm here Justice Slade.
Justice Slade	And Michele Ellison, you're with us?
Michele Ellison	Yes
Justice Slade	And Lysane Cree, from Hutchins?
Lysanne Cree	Yes, hi.
Alan Pratt	Hi, it's Alan Pratt. I chose to attend by telephone as well.
Justice Slade	Ok thanks Mr. Pratt. And I failed to mention that our registry officer, Guillaume Phaneuf is also with us. Guillaume has extensive experience in real registry matters as distinct from registry as government department responsible for corporate matters and we're very fortunate to have him together with Raynald Chartrand who also has extensive experience in, what I call, real registry matters. Now, the rules, those of you who have had an opportunity to review them and, they were just sent out yesterday, will have noticed that they are remarkably dissimilar to those that were prepared in consultation with the Advisory Committee. To explain that, it turned out that the Rules came within the meaning of regulation under the *Statutory Instruments Act*. I asked for and received an opinion from the Deputy Minister of Justice confirming his view that the *Statutory Instruments Act* applied, I pretty much concluded it did but in order to put the record straight requested that opinion and received it. That meant having to go through the procedure driven by the *Statutory Instruments Act* to establish the Rules such that they could take legal effect as rules governing the process before the Tribunal to the extent at least that Rules are required to augment the provisions of the Act itself. It's a bit of an odd thing in my view, that you can't engage the *Statutory Instruments Act* process until you deliver your proposed Rules in both official languages to whoever it is you have to send them to as ordained by the Act but there it is. So that happened in late October and November and then the process ordained by the *Statutory Instruments Act*, kicked in and that involved they're constituting a team of Anglophone and francophone lawyers whose mandate lies and is to basically rewrite your Rules in both official languages and in consultation with the client and of course, in that view of the world the Tribunal is the client. This was somewhat arguous as Justice Mainville, Justice Smith and I were pressed to explain clause by clause how we saw our Rules informing the process

	that the Tribunal would use and claimants and respondents would be guided by toward the Case Management and where necessary, the ultimate adjudication of Specific Claims. So I think it was a learning process for them and for us. It was not until late last week that the work product of that undertaking was delivered to us and after a few little bit of toing and froing with respect to some of the provisions, we've finally received a stamped copy of the Rules that enables us to, as a Tribunal, to put them formally into effect which we will be doing tomorrow. The Rules, as I've mentioned look very different than the Rules that we developed in consultation with the Advisory Committee. We're pretty satisfied though that the process that we and the committee envisioned for proceedings before the Tribunal has been preserved. To the extent that there are gaps in the Rules and by gap, I refer to process that seems to have been dropped from the Rules, we're going to infill with practice directions. An area where we had some difficulty in preserving the Rules included the provisions for mediation with which some members of the Advisory Committee expressed some satisfaction. Be assured that the process that we had envisaged as reflected in the Rules as they were developed with the Advisory Committee, we intend to preserve with guidance in the form of practice directions. So, that's basically the story on the Rules. Of course, Rules can be amended as necessary from time to time and we do expect that once up and running we're going to find various gray areas or areas where the further development of the Rules will be indicated. Now that we're familiar with the *Statutory Instruments Act* process, I think we'll be able to move things along a little more smartly but do understand that in the process we've been through and in any process that we may yet have to pursue around Rules revision, we're not in control of that. Something a bit difficult for Judges to swallow. So, where are we really? Well, we intend to open the doors for the filing of claims as indicated in yesterday's letter. There are however, a number of challenges yet to overcome if we are to get on with active case management and the adjudication of claims. When the *Specific Claims Tribunal Act* received royal assent, in June of 2008, and when it came into force in October of 2008, it's clear that the federal government anticipated that by the time it came into force, it would be capable of functioning. Of course, there were no Judges appointed to the Tribunal at October 2008 and none until November 27, 2009, when Justices Smith, Mainville and myself were appointed. That delay reflects the absence of consultation with the Chief Justices and the Senior Judiciary around the very idea of constituting a Tribunal to which the Members would be Section 96 Superior Court Judges. The three of us were on a Steering Group that had a look at this matter prior to our appointment and we concluded that it was necessary for somebody to actually get in there and do a closer analysis of what was required to get the Tribunal up and running. So, the three of us signed on for one year. We've all been reappointed back in November 2010. We all volunteered for reappointment not withstanding that a number of concerns that we had centering in large measure on Tribunal and Judicial independence had been addressed. But, we've made sufficient progress that we felt confident that any outstanding matters could be resolved at least to the extent necessary to make personal commitments and to participate in the recruitment of our colleagues to serve on the Tribunal. As I'm sure you're aware, there was a companion legislation to the Act that, in a way of amendments to the Judges Act, that gave British Columbia three more Judges, Ontario 2 and Quebec 1 for a total of 6. The vision driving the Act was that it would be staffed by Superior Court Judges to the extent of 6 full-time equivalents which could be made up of up to 18 Judges serving part-time. Among our concerns, was the practicality of serving part-time as a Justice of the Superior Court and as a Member of an adjudicative Tribunal. Those concerns have not been fully resolved and I don't think they will be until we're up and running and see what claims are filed, face the challenges around management of those claims, an assessment of their magnitude and an assessment of what it's going to take in the way of judicial resources to deal effectively and efficiently with management and adjudication of claims. Speeches made in both houses by Senior Ministers of Government at the time the Act was going through indicated that work was being done with the Provincial Attorneys General to establish the foundation for Tribunal operations. That of course is necessary as the Provinces are responsible constitutionally for the administration of justices and provide the courthouses and support staff for all Section 96 Superior Court Judges, so obviously when the Judges Act is amended to provide for further appointments to the Superior Courts, there needs to be

	consultation with the Ministries of the Attorneys General to ensure that the resources will be made available to support further appointments to the various courts. Of course, none of this was done and it remains undone to this day and that's a particular problem in British Columbia as we're a relatively small court. We have no room at the courthouse to appoint three additional Judges which require the development of three further judicial chambers and adjustments to staffing which would involve both a capital and an ongoing operating expense. It's the position of the Ministry of Justice that it's for the Tribunal to sort out the financial matters with the Provinces. At this moment, we don't anticipate that that will present significant difficulties with Ontario and Quebec but given the smaller size of the British Columbia Supreme Court and the challenges around accommodating further Judges, the matter is very much unresolved there and reluctantly, given that the appropriate officers of the federal government have decline to pursue terms with the Province, it's been left to the Tribunal to do that and Mr. Chartrand is working on that. However, we're somewhat impaired in that regard by the budgetary constraints that we face. Our budget is $2.8 million a year. Once the registry is fully staffed, the cost of salaries and benefits will amount to approximately $1.5 million. We don't have a million dollars to give to anybody to build more judicial chambers in British Columbia or anywhere else and we have some indication of the Provinces' expectations for a federal contribution on ongoing operating costs associated with the appointment of three additional Judges and we lack sufficient funds to fully meet what we understand at the moment, to be provincial expectations in that regard. This is in no way intended to be critical of the Provincial Ministry of the Attorney General in British Columbia. They after all, have the responsibility to provide for Judge's accommodation and support. It is plainly the federal view that Judges in British Columbia and the other Provinces would work out of their resident courthouses. No arrangements were made to facilitate that, it's left to us and it being left to us, the assumption has to be that we have to fund it out of our own budget and while we might be able to get up and running, we won't be running for very long if we don't get more money. That being so, all we can do at present is open the doors for the filing of claims. We expect that the Rules will be complied with respect to the filing of declaration of claims and the filing of responses within the time prescribed by the Rules. Beyond that, there are serious questions over our ability to embark on active case management which we consider critical to the proper advancement of claims before the Tribunal. I should also mention, or perhaps shouldn't but will that there is not yet proclaimed an amendment to the Supreme Court Act of British Columbia that would as necessary to accommodate the three additional judicial appointments provided for in the British Columbia court by the amendment of the Judge's Act and it appears at this time that the necessary amendment to the Provincial legislation won't take place until financial matters are resolved. So this is not a happy situation from my perspective as Chairperson of the Tribunal or my colleagues but it is what it is. Consistent with past practice, I will be ensuring that updates are put on our website so that stakeholders will know how we're developing in getting the Tribunal fully functional. So, there it is. We're open for filings. By the way, all indications are that easily 40% of the claims that would qualify for filing with the Tribunal come from British Columbia hence the importance of ensuring that the foundation for Tribunal operations is well established in British Columbia and that's not to diminish the importance of having the foundation blocks there in Ontario and Quebec. So, is there any comment or question around what I've presented thus far? Alright, some opening comments from Tribunal Members on mediation. As you know, we've taken very seriously the mandate of the Tribunal and with particular reference to its reconciliatory objective and, provision is made in the Act for Rules governing among other things mediation. While the Act contemplates an adjudicative process, Members of the Advisory Committee all around were concerned that our first cut at the Rules created too much of a court-like environment for the advancement of claims in that it made available virtually all of the processes that are available in the Superior Courts for the litigation of claims. We've addressed that primarily by making those processes available only at the direction of the case management Tribunal Member so as to avoid a proliferation of applications from claimants or the respondent except in the context of case management where there could be an assessment of the real need for processes for discovery of documents, examination for discovery and the like. On the suggestion by many members of the Advisory committee that we put some

	emphasis on mediation, we have included requirements for discussion and mediation at the initial and subsequent case management conferences. In the courts and our work in the courts as Judges of course and in my tenure on the bench, I have seen more and more emphasis on judicial attempts to narrow issues such that the litigants might be better equipped to have a go at reaching consensual resolution of matters brought to the court. The practice in Ontario has certainly been similar I'm told my Justice Smith and others in that court and the simple fact is that if Judges don't get involved actively in assisting the parties to come to terms, the system would tend to bog down and we would be waiting forever for a trial. This is a practice that I favor and my colleagues favor for assisting the parties in determining whether they are able to come to terms and as you probably know, in the courts, Judges in some types of cases are actively encouraging mediation when the issues have narrowed somewhat. So we envision that Judges serving on the Tribunal will be assisting the parties and identifying threshold issues be they around claims acceptance or negotiations where claims have been accepted toward an agreement on compensation. But of course this brings me back to resources and questions around the adequacy of resources available to the Tribunal to engage as Tribunal members in mediation. So we can explore that a little more fully in the course of the day. We sent out some material on mediation, we were very pleased to receive the consensus document from First Nations groups and Advisors and look forward to hearing more from you on that subject and I think I would prefer to have the folks that are advancing the consensus document speak first before we respond to it.
Justice Smith	Good morning ladies and gentlemen. It's Justice Smith for the record. When we decided to draft something with respect to mediation, of course mediation can mean many things to many people, and rather than go off on various tangents we decided to look about and see if we could find somebody who really knew something about mediation which is probably a good thing to do. So after a bit of a search, we were able to find Leslie MacLeod sitting next to me and I would just like to tell you a little bit about her and her experience. She is an expert in mediation. She is a Professor at Osgood Law School where she directs the Masters in Law program in Alternative Dispute Resolution. But more importantly than being an academic and I think this is absolutely critical, she is a mediator which she does on a day by day basis in addition to her responsibilities at the Faculty at Osgood Law. And, she has been involved in many complexed mediations so she knows the ins and outs and that is why we retained her as our expert. Leslie guided us with respect to creating the guidelines and documents that you have been sent. She is here today. I guess who better to respond to questions about mediation when the time comes to respond. She will be addressing those and also telling you about the philosophy and about the mechanics of how mediation can work. So we can enter into a dialogue with respect to that with her and on that note you will hear from her in a minute.
Justice Slade	Thanks Patrick. Leslie my apology for not introducing you earlier. Well, I very much am looking forward to hearing more on the vision presented in the consensus document. I think we are ahead of schedule.
Justice Smith	We are. It rarely happens in a court of law. Good news for the Tribunal.
Justice Slade	May I then turn it over to those who wish to speak to the consensus document? Although of course we've all read it, it would be very helpful to hear from you on just what it is you seek to achieve in the Tribunal's engagement in mediation; so there it is. Kathleen you appear to be ready to speak.
Kathleen Lickers	Thank you Justice Slade. Good morning, my name is Kathleen Lickers for the record. I am an external advisor to the Assembly of First Nations and I have been asked to lead the presentation of our consensus document but certainly welcome further input and the voice of those around the table that helped to shape it and invite them to do so as we go throughout the day. I want to begin by first thanking the Tribunal members for the opportunity to reconvene as the Advisory Committee again and for taking the opportunity to explore the provision of mediation services and understanding very much in the materials that you recently provided to us that and in particular the formalization of the rules of practice that the real details of mediation will find themselves in a form of guidelines. So to the extent that this is an opportunity to give some reflection in advance of those guidelines and in particular in advance of the actual exercise of the use of mediation and mediation mandate of the Tribunal. Following from your

	remarks this morning Justice Slade it is somewhat disheartening to hear the state of development and being able to truly see the exercise of the Tribunal's mandate that we all worked diligently to ensure provided what has been called for; an arms-length independent process for the resolution of outstanding specific claims and the fact that we are at the precipice of it being able to exercise that mandate with some serious impediment is disheartening. There is no doubt but that the expectations amongst First Nations that are in the process of the Specific claims spectrum and we describe in our paper the spectrum from the point of filing through the point of resolution that there has always been a need for and will continue to have a need for there to be an entity, a body that is independent of the parties and nowhere is that more obvious than when First Nations are at the negotiation table once they get there. So what we see today is an opportunity to explore that opportunity and where there is the need for the clear implementation and a clear understanding of how that is going to operate. If you are a First Nation who has had their claim partially accepted and are about to enter into negotiation where you may need the assistance of a neutral third party in the form of mediation services what shape is that going to take in Canada? And right now we have before us based on the information that we have the knowledge that the *Specific Claims Act* in the legislation and now the rules shape the opportunity for mediation services to be provided through this Tribunal. We also are aware that Indian and Northern Affairs Canada has the intention to provide mediation services to potentially that same class of claimants, to those claimants that are at a negotiation table. So to the extent that we are looking at the same class of claimants, we need to understand and have a greater certainty in going forward as to how that is going to operate. This would be I think a different discussion if we were talking about mediation services being provided to different claimants or at different point along the spectrum of specific claims. If we were talking about providing meditation services to claimants not only at a negotiation table but that isn't in what we understanding to be developing what we are talking about. We are not talking about distinct elements of the spectrum. It is the fact that we are talking about the same point of negotiation. Having said that, we very much are encouraged by the fact that the Tribunal views the use and active use of case management to be the point in which mediation may be explored and to the extent that that presents the opportunity before the Tribunal, we encourage the active use of case management for those purposes. We also recognize that in the exploration and the use of the Tribunal's case management process that mediation not only becomes complimentary to case management but may itself provide the forum by which parties can explore a mediated resolution without the need for a hearing. That, that active use of mediation may be one in which a final determination by the Tribunal is averted because the parties are able to reach a mutual agreement to their satisfaction. To the extent that that is what is envisioned, we encourage that the active use of that for those purposes as well. But what grounds the active use of that and the viability of that is the fact that those would be services that would be provided by a neutral to the negotiations in of itself and we have always viewed and welcomed the actual creation of this Tribunal as the pillar of neutrality, as the pillar of being arms-length from either party. It goes without saying that that is one of the foundational elements of providing alternative dispute resolution. They are not particularly interested or have an interest in any outcome to the dispute in of itself. Where we are concerned with what is potentially developing in that the Tribunal has the authority to create its mediation mandate and that Indian and Northern Affairs Canada intends to develop the same services. What has always been a concern from the very initial discussion of ways of going forward with the delivery of mediation and let me just segue back for a brief moment in time; prior to the Bill being proclaimed, the expectation and the recognition of mediation, ADR type services to First Nations and the Government of Canada being delivered at that point in time through what was the Indian Specific Claims Commission, the expectations and the intention going back to 2007 was that that arm of its mandate would survive, that there was a viability to that organization's use of that process. As we all know, everyone around the table knows that isn't what has transpired and the wholesale closure of the Commission for that mandate as well left a gap, left a gap and has left a gap for even those First Nations that are actively in negotiations right now. The discussion of what should then replace the Commission if it is not going to survive then what should actually replace that service was the subject of much discussion and many options were

	explored and Indian and Northern Affairs Canada made the decision that they saw the provision of these services as something that could be delivered internally and they have not departed from that perspective. What is particularly discouraging about that is that that decision point has not itself allowed for the fact that we know more now. So therefore that approach should too be allowed to evolve in our view. We know more now because the Tribunal has been created, we know more now because the Tribunal has created its rules, we know more now because of the additional information around your brochure, the mediation agreement and the fact that there is the intention to create a guideline. We know more now then what we did together jointly back in 2007, 2008 through 2009. So now that we know more about what this Institution intends to do for the same class of claimants, we believe that this is an opportunity for us to think through the better coordination of efforts. Because at the end of the day, it is the First Nation and Canada who are at the table who need the third party for whatever reason, for whatever impasse they may or may not reach or decide they do need that neutral at the table. Now that we know more, we want to avoid multiple forums, we want to avoid the duplication of resources which frankly becomes even more important given the context of your opening remarks that if there is the delivery of mediation services to the same group of people then for all of the pillars around fairness, neutrality and impartiality then we are at a loss to truly understand why we would be creating multiple forums and resourcing that way..And, we speak quite directly to that in our submission. So wanting to avoid the potential for creating multiple sites and the cost of doing that if that means that the cost of having these services provided and in resourcing multiple sites results in the inability to effectively provide them in any one service. If we are going to split ourselves in multiple sites and not do it effectively on either end, who ultimately wins in that circumstance when impasse has the potential and has had the effect of further delaying the effective and speedy resolution of specific claims which leads us exactly to why we saw the need for the Tribunal in the first place. So having the opportunity for the Tribunal, now that it is here, for it to actively exercise its mediation services; if we are going to start on this road, down this road together as being where the intersection of opportunity comes at the negotiation table then let's do it well, let's resource it well. That serves both parties to the table to the best of all our collective abilities that's what we would like to see happen and we see that by having the services, we use the term centralized but that is really to say to avoid the multiple sites of how this becomes operational when it isn't the same group of people or the same class of claimants and not diverting our attention away from what needs to happen in bringing an effective and speedy resolution away from that as the objective versus in what forum are we going to go to. There is also another driver as to why the arms-length institution that we now have in this country through the Specific Claims Tribunal is effective and is an effective driver. That is, when we met with you as a group back in October and the discussion about how case management and mediation might be applied, the willingness to use the other power and authority not only in the Act but in the Rules themselves, the drivers around timeline, the drivers around reporting, the framework by which mediation gets delivered in the context of the other rules is in our view the kind of framework that would be very effective in driving settlement. Knowing that this is a happening in the context helps to shape the conduct of the parties at the table or at least have the expectation that is, that would be an effective means of doing that. What we have less understanding of is in the delivery of mediation services elsewhere. That framework has not been defined. So again, if we're delivering mediation services to the same class of claimants; one, there is a framework that we understand, there is a framework that First Nations will understand in the accessibility of it versus something that is not as well defined and to state the very obvious will be delivered by the Government of Canada through Indian and Northern Affairs Canada which is always a party to the claim in negotiations. So to the extent that we are talking about the delivery of mediation services which as Ms MacLeod's material and the brochures rightly establishes; this is about bringing fairness, the neutrality, the impartiality to the actual service being provided. There is no assurance as to that other option but here we are again talking about the role that Canada might play in providing services at the same time that they are a party. Now we can have a discussion around what safeguards internally might be created but the reality is that real or perceived, they are always a party to the negotiations themselves. In going forward with where the opportunity might lie with First Nations making use

	of the Tribunal, one element that we would hope to be able to explore today is where both Canada and the First Nation may agree on the need and the use for an independent third party to the table. How they go about filing their claim to the Tribunal if that is the only service that is being sought and is there a way for the initial filing through the declaration? Is there flexibility in our thinking around how that actually could be initiated by a First Nation claimant and the Government of Canada if that is the only service that is being asked of. It's an element of our discussion that we didn't truly explore when we saw each other back in October but it is one that again, now that we know more, has the potential to be something we believe we should explore and think through and talk through. So we've set that out in terms of that being yet again another opportunity that leads us directly back to wanting to avoid the duplication of processes of services being provided in multiple locations. At the very end of the day, we are talking about what parties need at the table once they get there. And, to the extent that the expertise around this table, is one which is well grounded in experience collectively, and there are able minds around the room to be able to think through and envision that this question really does come at the need to assist the parties to the final resolution of a settlement agreement which they have spent years seeking. To the extent to which that we can think through those processes and to do it well; to do it well, that the duplication of resources made rather than sacrifice the service because it is not done well in either location, but do to I it well and to do it soundly in one is ultimately what we are most interested in achieving. So I will leave my comments there and as we explore various elements of this throughout the day again I welcome the perspective and voices of my colleagues who participated in shaping this document.
Justice Slade	Thank you Ms. Lickers. If I may at this juncture, an observation and a question or two. I'm aware that the ISCC had a budget around $7 million a year and are you able to make any kind of assessment of the percentage proportion of work that the ISCC did in the area of mediation? Is it a quarter of the work, half the work, three quarters of it? I know that their real mandate was to hear concerns from First Nations and make recommendations to Government but I take it that they got pretty active in mediation. Do you have any sense of that Ms. Lickers?
Ms Lickers	It represented over a third as I recall of their ultimate budget just mediation. Now one of the pillars of the Commission's work in every enquiry; and let me explain the use of that mandate occurred in two different but related elements. In their process, the use of what they refer to as planning conferences which has some analogist role to what is envisioned with case management. It was the initial meeting of the parties, it was the exploration and refinement of issues, it was the discussion of the evidentiary record, it was the discussion of whether or not oral history would form part of the whole of the evidentiary record but more importantly it represented the opportunity to explore whether or not an enquiry was necessary. Could they avert that while they explored the claim together? And there were often, there were many instances in which stale-dated claims or claims that had been so long in the process that there had been substantial changes in the law, there was further evidence discovered that claims would turn away from looking at an enquiry to a negotiation and when we reached that point, when the parties would reach that determination, the mediation function would fully take over. The Commission also used its mediation mandate solely to serve where they were asked jointly the active negotiations of claims themselves. So there were two elements to the development of that part of its office. But at the end as an annualized budget of $7 million it represented just over a third as I recall.
Justice Slade	Did the ISCC cover costs associated with mediation and in that connection were the mediators part of the ISCC or were they outside people with the requisite experience and skills or some combination of the two? The central question is who was paying the costs?
Ms Lickers	The mediation services were entirely funded. Funded all parties First Nations, Canada through the Commission's budget. So the convening of meeting rooms, primarily, that was the primary need is the space. The space to bring parties together. The participation of and certainly my colleagues from the Specific Claims Branch can confirm this element of it but where parties were at a negotiation, the funding of the participants for the Government of Canada as well as for First Nation were funded through a different process. So the Commission's funding and support for the mediation was in providing the mediator and that was done in-house. There was one Director of Mediation, Ralph Brant. Justice Robert Reid, bless his heart was the initial

	resident expert that developed the mediation mandate of the Commission and upon his retirement, Ralph Brant took over the role and he was the mediator. There was no use or contracting with external mediators outside of Ralph Brant but his salary and his services were funded by the Commission. The support for the representatives of the parties, my understanding was that it was always dealt with through other loan agreements, other contribution agreement as between the parties through the negotiation process itself.
Justice Slade	Just to make it entirely clear, the concern that you are speaking to on behalf of the Assembly of First Nations is that if there is to be a mediation facility it would be under the auspices of an institution that functions as independently as can be from the Ministry and from Government generally. As the ISCC was a Commission of Enquiry, it would be seen to have the requisite independence. Ms Lickers is indicating in the affirmative. I just want to make sure that I am grasping the point Ms Lickers with respect to avoidance of duplication. Is it that if the parties should find their way into mediation via the efforts of the Tribunal and narrow the issues or by availing themselves of mediation at the stage in the process before there is a basis to take the matter to the Tribunal, that there be some infrastructure, I will call it, that would permit mediation whether it comes from the work of the Tribunal with the parties or prior to the Tribunal's involvement that avoids a duplication of services. Presumably one interest there would be to develop some expertise among mediators around matters of this nature which I think are somewhat unique. I've covered a bit there but if you are able to confirm that at least I'm receiving it as delivered I would be grateful
Ms Lickers	That's exactly right and the thinking behind looking at this as what we know right now the potential for duplication comes from the fact that we are talking about servicing the same people or potentially the same class of claimants which are those at the negotiation table. If we were talking about the provision of mediation services to other claimants, if the Tribunal knowing its mandate was servicing those claimant communities coming to it for everything that is set out in the Act and the Rules and INAC was talking about the delivery of services that was different that reached either a point in time along the spectrum that did not cover the same people, than we wouldn't be talking about duplication. But, it is because you are seeking to service the same class and dividing what is being described as a very limited pot of resources in two locations when the service that potentially is funded, what is being funded is the mediators themselves. Now there is nothing that prevents any First Nation or Government of Canada negotiation table currently from accessing a private mediator today. If they have the resources, many don't, which is why we are having this discussion but if they are able, there is nothing that prevent them from taking that step today and what is encouraging about the discussion and the rules and the brochure and the materials that we have thus far is that the Tribunal is open to how they may coordinate themselves with such private mediators and that being a viable opportunity. That it's not one or the other; there is the potential for the parties to build on what they might have already done before they come to the Tribunal. It is the cost of providing that neutrality that is really the issue. So whether it is provided through the way Indian and Northern Affairs Canada want to approach it or the Tribunal, it's the servicing and it's the funding of the meeting space, the mediator, that expertise and being able over time, because the real test of this is going to come over time, is the actual shaping of an expertise around mediation to specific claims in Canada. That potential to centralize that service has also the potential to develop an expertise that currently doesn't exist. There are pockets of expertise but the centralizing ultimately also serves not only the tables that would be active today but into the future. So that's the duplication.
Justice Slade	Yes thank you Ms. Lickers. Mr. Jones
Roger Jones	Thank you Mr. Justice Slade and good morning to the other Justices and people around the table. My name is Roger Jones and I am here on behalf of the Assembly of First Nations. Kathleen has responded accurately to the questions that you posed about the perspective around our expectations regarding the mediation component of this whole exercise of the resolution of specific claims. I was involved, as was my colleague Bon Winogron in the development of the Specific Claims Tribunal legislation which you know we took from the policy announcement of the Government of Canada through Justice At Last through to developing the legislation which was ultimately passed and put into effect and we were guided a lot by work

	that had been done previously through the Justice Department and through Assembly of First Nations and other First Nations representatives from across the Country. One thing was certain as we engaged in the discussion about what the legislation and the Tribunal was going to look like, was the premise that the Indian Claims Commission was going to continue as a meditative body. Now mind you it was going to have to undergo some form of transformation from a body that had an enquiry function and a mediation function but as Kathleen pointed out, it had a record and a reputation around both functions and certainly had developed some expertise around being able to take creative and imaginative approaches to deal with both enquiries and mediation. So absolutely the premise was that it was going to continue, and certainly from our perspective, we envisioned that the Specific Claims mediation service would continue to essentially serve specific claims resolution process but also hopefully being able to serve also the Tribunal mediation and case management requirements. At least that's the deal we put forth on behalf of the Assembly of First Nations and I think it was premised on a couple of important principles. One avoidance of duplication and perhaps to ensure better coordination between the Specific claims process of negotiation and the requirement for mediation, the roles and functions of the Tribunal and trying to make all of it work seamlessly so that cost issues and expertise could be managed as effectively as possible. So we had those discussions within the process of development. So it was obviously a huge surprise to us when the rules of the game changed again. After having gone through the discussions and the agreement on the nature of the Tribunal and the legislation and then all of a sudden to see the elimination of one of those foundations which help shape the outcome. Just as a matter of background and I don't think I've misrepresented anything that certainly we put forth in the developmental process but of course as I said my colleague Bon Winogron was part of that process as well. Thank you.
Justice Slade	I think perhaps this would be a good time to take a break. Time limits are more observed in the breach than in the observance. I see we provided for half hour. That should give us an opportunity to regroup. By the way, I think I should mention at this point that I've expressed concerns that we at the Tribunal have about resourcing and dealing with the provinces. I certainly am not inviting representatives of the Crown to respond in any way to that. I know that is not why you are here. I offer this up by way of an explanation of the limits that we foresee and that are real around fully engaging the process provided for by the Rules. One area of particular interest of course, that the other party to these claims may have some observations or may not, is a question in my mind as to whether from the perspective of representatives of the Crown, the fact that the matter is now before the Tribunal indicates a fixed mindset that all options for consensual resolution have been exhausted. So I will leave that question hanging in the air. All right, with that we will take a half hour break.

BREAK

Justice Slade	Time to call our meeting back to order. Before going to the agenda item, I invite Canada's observations on the subject at hand. I thought I would enquire whether anyone else on the First Nations side of these matters wishes to comment on mediation. I see a hand. Mr. Benson.
Jayme Benson	Thanks a lot I did not know if we would get a chance this morning or this afternoon. But because FSIN was part of the consensus document really what I would be doing is just following up with most of what Kathleen said. Actually, most of my work is involved in negotiation tables right now. I know we have four tables where I'm chairing and working with the First Nations as well where we have the possibility that mediation might actually be required. So I am kind of speaking more from a practical experience and what we see on the ground. I think for Saskatchewan First Nations, the settlement of claims is extremely important. I think we've had a fairly good success rate there. So when it comes to something like mediation, I think following up with what Kathleen said, I think it would be important if First Nations are going to access mediation services that they perceive those services as independent. I think there would be some reluctance to access a center that was housed within the Department. Even though the mediators themselves may be independent

	and the intentions may be good, I think there would be some reluctance, that there would be a perception that that is not independent. From a practical stand point as well, I think there was a lot of commitment in Justice of last to mediations on the ground I have to say practically, I don't see the same commitment in terms of times when we've raised mediation at the negotiation tables I can't think of a single instance where it's actually been agreed to by the parties. I know Kathleen talked a lot about the Indian Claims Commission's role in terms of mediation, but I would say that when they were active at the tables, it was more a facilitation role than in was actually active mediation. I think they chaired the meetings, they set up the meetings. There was some sort of quasi mediation within the discussions but in terms of actual both parties agreeing to mediation, I haven't seen that happen a lot. So I think there has to be a consideration on all parties if they're going to put this commitment in mediation is it actually going to be used. I think that given the limited amount of resources out there, I think there has to be some questioning about whether a mediation center is set up with its costs and is that where we want to use the resources. I mean right now there is no reason why, at any table, a mediator couldn't be brought in. I have a mediator sitting right beside me. Let say we are at negotiations with Canada on one of those four files, both parties agree to mediation. The way the structure works in terms of bringing in experts, we can access loan funding to provide experts. Why couldn't First Nations simply be provided with funding to access a mediator and provide someone that is independent? What I don't want to see if we have limited resources, is a lot of money putting in to create structures that might not be used; I want to see those resources used as effectively as possible. If there is going to be this emphasis on mediation and we're going to put money into it, that there's a real commitment to use it and I haven't really seen that. The other thing I think that I would raise is the circumstances under which mediation services could be accessed. I get the sense sometimes we are only talking about situations where you're in negotiations and the Government and the First Nations come to an impasse to access mediation. I think that mediation could also be useful in other parts of the process even at sort of the research stage, the stage where you are looking before you get into negotiations. I think a lot of time and to give a lot of credit to the people we work with from the Government of Canada in Saskatchewan, we've had a pretty good success rate at the negotiation tables simply because we have a good relationship and we can sit down and talk and it works really well. At other stages of process I don't see that same ability to do that and work through issues. So therefore I think mediation services shouldn't just be limited to that particular instance. I think they would be as useful or in some cases more useful at other stages of the process. Another question is if you are going to sort of put something in terms of mediation, are there circumstances in negotiations other than just a dispute between Canada and the First Nations where mediation might be helpful. I know, we're dealing with one claim right now and it's a multi-plan claim and we may need mediation but not between the Government and the First Nations its between the First Nations because you are dealing with an issue, that once there is a settlement, distribution. So I think that if we are going to look at mediation, we really need to give some consideration in terms of when we can use it and what we can use it for. And, I think that it should be flexible in that sense and not sort of limited to these very narrow sorts of circumstances. Those are kind of some of my thoughts on that. I would say that it does cause me concerns in terms of some of the comments you made earlier about the resourcing because I think from Saskatchewan's perspective, we've had a good success rate in settling claims but this Tribunal was seen as something very important to Saskatchewan First Nations. Saskatchewan participated in the working group that set it up. Saskatchewan has always been one of the advocates for an independent Tribunal and I think it's important that that Tribunal be resourced adequately because you are going to get a lot of claims. I've already got a lot of calls from First Nations asking when will the Tribunal open so we can file. And, because of the October 2011 deadline for the 3 years, we are getting more responses back from Canada and in cases where those are rejections, the First Nations are going to want to file with the Tribunal and just hearing what you are talking about resources, I am not sure how you will be able to handle even our caseload let alone the rest of the Country unless it's resourced adequately. Those are kind of my feelings from our

	perspective and I just thought I would share those. Also, we support what Kathleen said in the consensus document. There were a lot of good points made in there.
Justice Slade	Thanks Mr. Benson. What I think I am hearing is that although the Saskatchewan First Nations haven't availed themselves of mediation or the process around claims acceptance in negotiations hasn't employed mediation as such, that from the First Nations' perspective at least there is a will to pursue mediation where an impasse is encountered.
Jayme Benson	That's definitely true and we have actually raised or asked for mediation at a couple of tables but we got reluctance from the side of Canada on that. Again it's just a question of the commitment to it.
Justice Slade	Of course you've shaken me up badly with your estimate of the amount of work that we will have to do. By the way one might say well why are you even opening the doors if you don't think that you're going to have the resources to deal with case management and adjudication of claims? We've struggle with that but it's the view of the members of the Tribunal that the Tribunal has to become a credible Institution and it cannot do that until the doors are opened for the filing of claims. We are well aware that if we falter it will send the sort of signals to claimants and the Crown that are not the right kind of signals but what else can we do? Until we open, we won't know the volume of claims; until we know the volume of claims and get working on at least some of them, we won't really know what resources we require. Until we know what resources we require we won't know whether we can manage it with our funding at current levels. Every indication presently is no! But until we are able to credibly say to Treasury Board that we lack adequate funds, the advice I've received is that they won't really listen to us. So, you know at some point one has to figure out whether it's the chicken or the egg that comes first and so we will open the doors and make that decision and it is probably more of an egg than a chicken at this point. Are there any other comments? Yes Ms Abbott
Ms Abbott	Good morning and thank you for allowing me to make a few comments. Just to pick up on the point that was made earlier by Mr. Benson; if we could really look at the mediation and the scope of the mediation as an example in the research stage, I work with 11 communities and we are a part of a larger group of 30 communities and we have a number of issues that are very similar and if we can create some common foundational information where we are not duplicating the effort and show that we have an opportunity for cost efficiency. In our participation with the 30 communities, we share information with respect to research but if we could reduce the amount of efforts in that process and really look for the positive opportunities where as you say the Tribunal is breaking new ground and we have to be able to be in a place of giving the communities reassurance because so many of our communities have been managed and marginalized and they are looking for an opportunity for better outcomes. So we need to strive for something that will give reassurance back to our Leaders in our communities. We started this process in 1985 when the CN decided they were going to twin track and it's been a long journey and we currently have 102 claims in the system and that's just maybe one third of the work that's ahead of us. So we definitely would look for where we can create some early wins. Thank you.
Justice Slade	Thank you Ms Abbott. The communities that you're involved with or represent, where are they located primarily or is that even a sensible question?
Ms Abbott	In the Fraser Canyon corridor from Cash Creek down to Hope and so we've got two railways, a Hydro right of way highway and so many of our community reserves are cut by all those developments and the cumulative effect is immense.
Justice Slade	So we are looking at British Columbia then presumably the twin tracking would take the corridor that would be sought – would it be right down to Vancouver?
	Yes, yes
Justice Slade	How many did you say?
	Well we are currently working with 30 communities.
Justice Slade	Is there anyone else on the First Nations side of the discussion? M. Brassard?
M. Brassard	Bonjour, mon nom est Denis Brassard, je travaille pour le Conseil Tribal Mamuitun du Québec. Ce que je veux commencer par dire c'est qu'au cours des derniers mois et des dernières années en discutant avec d'autres Premières Nations au travers le Canada, moi en tout cas, mon impression personnelle c'est qu'il y a un taux de rejets des revendications

	particulières qui est de plus en plus élevé de la part du Canada; qui est plus élevé qu'il l'était en tout cas avant le mois d'octobre 2008 et ça ça m'inquiète beaucoup parce que de toute évidence toutes ces revendications rejetées vont se retrouver devant le Tribunal des Revendications particulières un jour ou l'autre étant donné que c'est la dernière instance disponible. Alors, il va y avoir beaucoup de revendications qui vont aboutir ici c'est évident et l'espèce de backlog qu'on avait avec les affaires indiennes va se retrouver ici. Et, lorsque je lis la brochure sur la médiation que vous avez transmise il est écrit que les médiateurs seront pris à même le personnel, les juges du Tribunal ou bien si il n'y a pas assez de ressources, que ça va être des gens de l'extérieur. Alors, selon moi ce qui semble de toute évidence de ce qui va arriver, c'est que ces médiateurs là vont tous devoir provenir de l'extérieur. Ça c'est évident. Je ne vois pas qu'il y a aucun juge qui ait une charge de travail qui lui permette de faire de la médiation parce que de la façon dont c'est écrit dans le document c'est comme si les juges ont le temps, ils vont pouvoir faire la médiation. La médiation étant quelque chose de secondaire au travail qui va être fait. Alors à mon avis, il y a un problème là. Je voulais savoir également si- c'est peut-être plus une question qu'un commentaire mais parce que ce n'est pas abordé dans le document – je voulais savoir également si lorsqu'une revendication – par exemple lorsque les normes minimales ne sont pas atteintes selon le Canada, est-ce que le Tribunal va pouvoir se prononcer là-dessus. Est-ce que le Tribunal va pouvoir aborder ce genre de problème là. Est-ce que c'est le genre de dossiers que le Tribunal va vouloir adresser? Je voudrais aussi ne pas oublier de vous dire que nous sommes bien sûr au Conseil Tribal d'accord avec le document qui a été déposé par l'APN et que les déclarations de madame Lickers ce matin, nous les partageons entièrement ça c'est bien certain. Nous, nous pensons que la médiation est un processus qui demande et qui exige une neutralité, une indépendance totale. Si il y a une apparence de conflit d'intérêts si la médiation doit de près ou de loin être reliée au ministère des affaires indiennes au Canada, je suis certain que les Premières Nations ne voudront pas y participer, ne voudront pas faire confiance au processus. Alors pour nous il est très important que les Premières Nations aient accès donc à un processus de médiation qui soit totalement indépendant et neutre et que toutes les étapes de la procédure de la revendication particulière du Canada puissent faire l'objet d'une médiation. Non seulement au niveau de la négociation mais au niveau des étapes préliminaires de validation des revendications et d'acceptation même que ce soit une revendication possiblement qui peut être examinée par le Tribunal. J'aurais quelques questions un peu techniques. En autre, quand on dit que les négociateurs devront probablement provenir en grande partie du secteur privé, est-ce que ce sont les Premières Nations qui devront assumer les frais? C'est ce que le document semble indiquer. Pour nous c'est surement un frein à l'idée d'entrer dans la médiation et ça ce rapporte à mes commentaires du début concernant le fait que je ne considère pas que les juges vont avoir le temps de faire de la médiation bien bien dans cette façon de faire là. Il y a un passage où ça dit également que « even where liabilities are loosely contested » quand je lis cette phrase là, l'attitude du Canada m'interpelle beaucoup parce que lorsqu'on lit les lettres du Canada concernant une revendication, j'ai de la difficulté à exprimer la façon mais le document semble dire que le Canada va accepter de négocier des dossiers même si la validité de la revendication est sérieusement contestée. Je trouve que c'est un peu une contradiction parce que le Canada est habituellement très rapide à rejeter une revendication alors je ne vois pas que le Canada accepte de négocier ou de faire une médiation si la validité même de la revendication est fortement contestée. Quand elle est fortement contestée ça ne prend pas de temps qu'on apprend que la revendication est rejetée par le Canada. J'avais aussi un commentaire un peu plus loin dans le document quand on dit que la médiation doit identifier au départ les je vais le lire en anglais « the core issues that may stand in the way of a negotiated resolution » donc quand on dit que la médiation doit d'abord se pencher sur les intérêts et les problèmes fondamentaux que pose la revendication, je considère deux choses, on peut l'interpréter de deux façons. On peut l'interpréter d'une façon très légaliste qui dit que est-que il y a une obligation légale qui n'a pas été respectée par le Canada sur un point bien précis et est-ce que c'est ce point bien précis qui est la base de la revendication et qui est ce qu'on appelle « the core issue ». Ça c'est une façon de

	l'interpréter. Une autre façon d'interpréter c'est est-ce que la Première Nation va se réconcilier avec le Canada. Puis ça c'est très différent, c'est très différent parce que l'on sent que quand on dépose une revendication particulière et que le Canada nous répond finalement sur la validité on sent qu'il y a seulement l'aspect légaliste qui est mis de l'avant ou sur lequel il y a une position qui est prise. Pour moi, la médiation ce que ça pourrait faire c'est aller au-delà de cette position légaliste et de dire on veut se réconcilier avec la Première Nation. On a une chance ici de faire la paix avec la Première Nation sur une revendication bien précise, bien identifiée du passé et la médiation dans ma tête à moi, elle permettrait de faire ça, d'aller au-delà de l'aspect légal et de dire on veut faire la paix. Il est arrivé des évènements malencontreux. Il est arrivé des évènements qui ont entraîné des dommages et des pertes pour une Première Nation dans le passé parfois il y a très longtemps. Peut-être que les obligations légales, le manquement peut-être qu'il n'est pas totalement clair du côté du Canada mais nous on pense que la médiation c'est une occasion en or pour faire la paix avec la Première Nation sur ce problème là, sur la revendication en question sur les pertes en question et c'est pour ça l'importance d'un processus de médiation qui soit totalement neutre et indépendant. Sinon les Premières Nations ne voudront pas participer, ils vont penser qu'il y a des intérêts du Canada qui sont impliqués. Alors je me disais également que j'espère qu'on va pouvoir réagir après la présentation du Canada soit après le lunch ou autrement – j'avais aussi des questions pour eux. Merci
Justice Slade	Thank you M. Brassard. All of these are important questions to address to the extent we can in this meeting. One of your questions resonates in particular with me. This idea that in the Specific Claims Branch process it seems that claims are sometimes accepted on the basis that there is doubt around the existence of a legal obligation but the claim is nevertheless accepted on the basis that, of course on the without prejudice basis as to that issue but accepted with a view to determining whether an agreement can be made on compensation in circumstances in which the Crown has made it clear that it in its negotiations will take account of its own doubt as to the existence of a legal obligation and a question in my mind is, does that remain the practice at the Specific Claims Branch? I can say that in the long past when I was Counsel for First Nations that claims I was helping with were accepted on that basis. If that continues to be the case, then I wonder what the question would be for the Tribunal, the matter having been brought to the Tribunal say after the 3 year period of negotiations without a resolution has been accepted. If the question then is around the validity of the claim, the next question to my mind would be if in case management the core issue around validity was a subject of scrutiny and it turned out that there was some encouragement from a member of the Tribunal to both parties to get back around the table and of course we often do that in the courts. Is there some potential for take up of that invitation that may even include mediation which could well get the parties into something beyond the question around the validity of the claim and down to what it's really going to take to settle it. So that is something that has been on our mind as members of the Tribunal and as you alluded to that M. Brassard, I don't mind telling you that that is something we're very interested in hearing about and hope to in the course of this day if Crown representatives here today are able to assist us with that. Of course all of this is in the spirit of not trying to pin anybody down but rather get a sense of what we are facing and a sense of the willingness of both sides to engage in ADR in the interest of giving effect to the reconciliatory objectives of the legislation. So is there anyone else speaking on the First Nations side, or from the First Nations' perspective who would wish to speak at this time? Yes Miss Montour
Eliza Montour	Good morning, Eliza Montour for the record. I represent the Anishinabek Nation who is a PTO for 40 First Nations in Ontario. Currently we've been involved in the submission process; we did the research – researchers give me their reports and I do their legal submissions. One of the things I think I guess is to support my colleagues who spoke around the table and we have to look from our perspective essentially – I go out and I am at the ground roots level and one of the things that I notice all the time is that claims are very personal to the First Nations. And so the objective here and always has been in claims is reconciliation and I think with mediation it has to be neutral and has to be independent. I just want to stress that. Just a simple comment to stress that neutrality is necessary to

	reconciliation. ok
Justice Slade	Thank you Ms Montour. Now any of the participants by way of conference call who wish to weigh in on the subject.
Alan Pratt	Its Alan Pratt here Justice Slade. I will take my turn following Mr. Devlin as part of the CBA presentation.
Justice Slade	Ok thank you. Well I'll turn then to Mr. Devlin.
Mr. Chris Devlin	Thank you and I understand on the agenda that we will have an opportunity to speak after Canada's submission and I am looking forward to hearing Canada's presentation as well. I think we will make our comments then.
Justice Slade	Alright – well it seems that the attention has turned to Canada's representative so I'd invite any of you who wish to speak to the matter to do so. Ms McCurry
Ms McCurry	Good morning Justice Slade. For the record I'm Pamela McCurry, Assistant Deputy Attorney General for Aboriginal Affairs at the Department of Justice and good morning other Justices and colleagues around the table. We very much appreciate the opportunity to come today together with you to discuss our respective views on mediation in this unique and important tribunal process. My colleague Anik Dupont who, as you know, as Director General for the Specific Claims Branch in Indian and Northern Affairs or Aboriginal Affairs Canada will provide comments from a policy and practice perspective as well. I am sure that will be helpful to you. But I would like to address some of the Department of Justice considerations related to mediation and the Tribunal and I will be brief. You will recall that in our last meeting I expressed some thoughts about mediation before the Tribunal and some of the challenges that we face with regard to it. Following that meeting and in response to the Tribunal's invitation for comments, I set out Canada's comments on the Rules and the issue of mediation in a letter dated November the 15th, 2010. Canada maintains the view that mediation can be useful in some situations and is not useful in others. And I am going to take a few moments to elaborate on that. It's important to note that one unique feature of this Tribunal is that when a claim arrives at its doorstep it has already been through an Alternative Dispute Resolution Process. Its only when claimed are not settled through that ADR process that they may be filed with the Tribunal. Once a file gets to the Tribunal it therefore has a history. As well, the Tribunal has a legislatively mandated process which sets out parameters for mediation in the context of case management. There have been some recent reported comments that there is an expectation that a large majority of claims filed with the Tribunal will go back into the Specific Claims Section for negotiation. Our view is that is simply not possible under the legislation. Claims enter the Specific Claims Process when they are filed with the Minister by First Nations and our view is that there is no mechanism and indeed no jurisdiction to send claims back into that process whether that is explicitly or implicitly. Ms. Dupont will have more to say about that. In terms of consent, we do remain encouraged by your recognition that the principle of consent is greatly important. Indeed mediation can only really be effective if the parties are willing and able to enter into a consensual process. Canada is motivated to see how we can use case management and how it can lead to resolution. But we will be cautious entering into mediation where we feel that it is unlikely to be productive. I do want to stress that this does not reflect the mindset against mediation but rather a considered approach to how we understand how the Tribunal is mandated by Parliament. Accordingly, as we've previously indicated, Canada is prepared to explore a limited scope for mediation within the case management process and we are quite prepared on a case by case basis to be very transparent about our logic, our rationale behind the position that we take. While it is difficult to articulate mediation principles in the abstract, generally speaking Canada will on consent mediate procedural issues, review procedural issues as internal process issues within case management which if resolved, can assist in moving the case forward. Canada does not, however, consider it appropriate to mediate questions of law; legal questions and conclusions by their nature are not amenable in our view to mediation. In other words, Canada is not prepared to mediate its decision in a particular case that there has been no lawful obligation established. That said, we think that all parties can and will be learning by experience as we move through the various files and we will work with all concerned to explore opportunities for resolution. We welcome the fact

	that you have engaged Ms. Leslie MacLeod as an expert in mediation and were looking forward to hearing her perspective on mediation and would even welcome further opportunities to engage with her in discussing how this should go. With that I will turn to my colleague.
Ms. Anik Dupont	Good morning Justice Slade, Justice Mainville and Justice Smith. Thank you very much. I would like to echo Pam's comments about we welcome the opportunity to meet once again and discuss the issue of the mediation but before we get to that, I would certainly want to acknowledge and congratulate you on the fact that we have the set of rules now on how to operate and I know that it was quite a task to get to that but I think it is no means a minor event its quite a big event and I think that for us it represents yet another step as we move towards addressing all the expectations and what people wanted to get out of Justice at last. Anyway I thought it was worth a mention certainly because it is a big step in that process. I guess from our perspective, speaking about the specific claims process and the policy – although and don't take this as a negative thing – it continues to be the approach that we want is to get to a negotiated settlement and to settle the claims and so to get to a final settlement with First Nations. In the hope of that, not that we would limit, but I guess that we would hope that we are able to get to a settlement without having to come to the Tribunal to have it settled for us. That is where all our efforts are being done and we have had a lot of success since the coming into Justice at last, we've had this past year quite huge successes by way of settlement across the country and we continue to strive towards that in our work. In listening to Jayme's comments actually Saskatchewan happens to be where our highest success rate is in the settlement of specific claims and the additions to reserve process that stem from that and I think I agree with Jayme at lot has to do with the relationship that has developed on the ground there and we continue to strive to that. A couple of points that were made as well are that when we look at the question of the ISCC and from a negotiations perspective, I agree with Jayme that the role for the most part of the ISCC and I am not diminishing their role was a question of –it was more facilitation not mediation. There is a distinct difference between the two and so there is of course nervousness among the parties to take the big leap of faith into going into mediation because it represents something very different than what the processes are. We have in the Department, we take mediation very seriously. It was one of the pillars of Justice at Last, the better access to mediation. The Government of Canada has taken an approach to that and on that just a couple of comments. The intent for the Department is not – we will not be doing the mediation. We will contract outside mediators to do the mediations. We will simply be an administrator of a list of mediators. We have and continue at any Table right now, if people wish to prevail themselves of a mediator, we have entered into – there have been mediation services, mediators that have been appointed to the Tables. We provide the funding to the First Nations to cover the cost of the mediators. In most cases, it is the First Nations who come back to the Table with recommendations for a mediator. To my knowledge, we have not refused, who the suggestion has been and it's worked out very well. That is available now and it has been available for years and even after the ISCC it was something that we had to keep up so that there wasn't a void and that the First Nations could have access to that. That's still ongoing. Internally for our negotiators and I wanted to admit that when we talked about the commitment of the Government of Canada to these processes is that as I stated the negotiators were mostly used to have facilitators at Tables. So we have in the course of the work that we've been doing in Specific Claims Branch we also engage expertise in way of mediation. We had sessions set up where all our employees who are involved in the negotiation, whether they are negotiators or a researcher or an analyst on the file has been exposed and informed of what is mediation; to get them comfortable with the notion of using mediators. By nature, just as an aside, negotiators which I was for a good twenty years, we're control freaks of our table and handing over the controls of the Table to an outside source to have an issue that needs to be looked at by an Independent Third Party is a difficult step and so it is not something that is taken lightly and we have actively been encouraging and having our staff well informed with regard to the mediation, what is available, where would you need mediation and all of that and we continue to encourage that

	at all the Tables. Of course as Pam was mentioning, there may be issues that to us we agree that we may disagree with the First Nations that even if we were to have a mediator on a given issue we wouldn't be able to settle it, there might be issues behind there and there are various scenarios we could get into. But that being said, we are very opened to the use of mediation within the context of negotiations and certainly I encourage my staff if there is an issue to avail themselves of that. So that is very important for us as well. We want I guess from our perspective, from the time that we accept the claim for negotiations, strive for a negotiated settlement and avail ourselves of the tools that are available, mediation being one. I have said repeatedly to my staff that the day files leave negotiations and find themselves at the Tribunal that to me, I said if I was sitting at the Tribunal the first question that I would be asking the parties would be did you consider mediation? And that, I believe is part of our responsibility at the Table to make sure, is it something, are we really at an impasse or can we work this out or is there some type of help that we can go and get. So to us again the focus is always on the settlement of these claims successfully and to the benefit of both parties at the Table so we will certainly continue to strive for that as well. So it is not a concept that we are against and it is something that we will look at. In addressing the other point that has come up is the question of mediation in the front end of the process and that is something that people have raised. When Justice at Last came into force we had a fundamental change of our process and our approach. We had because of the legislative timeframe, because of the Tribunal because of the process and the framework of Justice at Last is that we had to change the way we were doing business. And whether people want to admit it or not, at the front end of the process there was a very involved process in the development and the filing of a claim between the Department and the First Nations. And, there is no doubt that we have had to change that relationship because of what I stated before, the changes in the process. And, we hear that from the First Nations that they feel that there is no longer this dialogue between the department at the Researchers and that they feel that we are not having the same conversation, we are very guarded, we don't want to kind of show our cards I guess or be as helpful as we were before in assisting the First Nations to develop their claim. We are working on that. We, in the process of doing our work and the specific claims process and the policy we had an evaluation done where we engaged with First Nations, the AFN participated as a sounding board from the people who are in the process and who are participating. Like you, we started down the path with the Act and a new process and we had to make choices about the different steps of the process where we were going to focus as everything had to be crunched into 3 years. Did we get everything right? I am not so sure we did! And in the case where we did not get it right, the evaluation that we are doing is informing us as to maybe the pendulum has swung too far that way, maybe we need to readjust. I think it's the same case we'll have with the Tribunal. We have had to make so many assumptions into the process because we don't know. We don't know how many claims are going to be here, we don't know the types of claims are going to be here. We don't know it, we've had to make the same assumptions and go down the road that we believe was keeping us to meet all our obligations under the process. For us, we need to look at that more how our process has evolved; have we evolved in the right way and continue with the help because we use our negotiation tables a lot as a sounding board and an area where we can take the pulse of how First Nations feel at the Table. As we look at are there areas of improvement because I believe there are and I think that as we move forward we need to look for that. Although the question of mediation for us at the front end of the process is not something we were amenable to, we are focused solely on the negotiation aspect but certainly are we opened to changing the process or the type of conversation we are having at the front end of the process. What we are hearing back is so strong that we have to look at it and see, without compromising the process and maintaining the integrity of the process and also operating within the act and the process that has been done through Justice at Last. We may need to look at that. I believe that was it, I think I've addressed a lot of the points that were made.
Justice Slade	Thank you Ms. McCurry and Ms Dupont. Just a question or two that comes out of your response Ms McCurry. I am not clear at all on what mediation of a procedural issue as

	opposed to a substantive issue – I am wondering where that would be necessary because the Tribunal will be overseeing and guiding the disposition of procedural issues. If that it's the only opportunity from the Department of Justice's perspective for mediation, it doesn't seem to me that it will have any place in the process at all. Now as for the question around mediation of questions of law, I hear the concern but it does lead me to enquire and it may be that there will be no answer to my question until we actually start receiving claims and case managing them. But, we are all curious from the Tribunal side on whether it will be the general practice that we'll have to decide issues of validity in relation to claims that comes to us as a consequence of a failure to reach agreement after 3 years of negotiations. And, of course, if in relation to virtually every claim that come before us we're looking at questions of validity then that has very significant implications for workload and in turn very significant implications for resourcing. Is there anything, any sense of what sorts of issues we are going to be dealing with. My assumption and correct me if I'm mistaken is that where a claim is accepted for negotiations, it's accepted on a without prejudice basis as to liability and perhaps my question comes down to something as simple as Am I correct?
Ms. Pam McCurry	Thanks' Justice Slade, it's absolutely a core question and I am just going to pass it to my colleague Ron Stevenson.
Mr. Ron Stevenson	Thank you Justice Slade. I'll answer a couple of aspects of your question. But I will start off by sharing the qualification you stated that sometimes it is preferable to wait until real cases get in front of the Tribunal. So what I am saying as to be against that backdrop. But I think there is a link between what we refer to as procedural issues and the question you are raising as to How a claim makes the transition from the specific claims process into the Tribunal process. In all cases, where there has been an acceptance there will be a communication of general reasons but our expectation is that that won't be sufficient to actually found the adjudication of a case in front of the Tribunal. There will be discussions about the precise basis of the claim and when we talk about procedural issues often we are talking about the fine tuning of a claim – exactly what are we dealing with. And the statute , has pretty specific provisions for dealing including some provisions that result in the elimination of claims at the end of the process. So when we talk about procedures, we are talking about the win and win process of clarifying what the claim is, so we are looking for precision. That is the first part but you know I think to get to the second part it's important to really emphasize that when it makes the transition from the specific claims process into the Tribunal process it is not a continuation of negotiation. When we say that we are opened to procedural issues, I don't understand what we are saying as only procedural issues? We clearly have expressed a concern about the mediation of pure issues of law and I think that is general in the mediation literature that among the cases that are productive for negotiations, clear divisions of law aren't a very strong candidate. We also have expressed a concern about cases where there have been extensive negotiations and exchange of offer and an impasse so we start off with the presumption that there will be some reluctance to immediately go into mediation because we've already been involved in processes that have the key element of mediation. But that doesn't mean that there aren't classes of issues where the issue might be appropriate. You know that the Tribunal certainly has jurisdiction to address compensation issues that haven't been addressed by the parties and so we might want to look at an appropriate case by case basis for those kinds of areas where mediation might be productive. But all we can really do at this stage is set up broad parameters and it's only through building experience through particular cases that we'll be able to develop a sense of exactly how we work together and make this an effective, productive process.
Justice Slade	I am curious as to how it is that the process before the Specific Claims Branch that engages the Specific Claims Branch can be seen as an ADR process. Is there an independent person who is prepared to listen to the arguments forthcoming from the parties and offer up reality checks and move things along in that fashion? I am not aware that that is so within that process. So, that's a question and if the answer is no then it would seem that there's been no recourse to ADR and the first time it could come up is if a Tribunal member suggests that this is an alternative to going straight to adjudication. So I am hoping you can help me with that.

Ms Dupont	The process itself is voluntary. I mean we enter into what both parties at the Table; it is an ADR because it's the alternative to going to Court; it's coming into our process and trying to negotiate a settlement with regard to a specific claim. If there are issues of dispute as I mentioned before and the parties feel that they need the assistance to get through some of those disputes, there are tools available like there always have been as I stated before. We have prevailed ourselves of getting mediators or experts to come in and speak to whether there is a question on forestry or minerals or something like that. We often pull in people who are experts in the field of the issues that we're debating at the Table. Our negotiators themselves from both parties are very good at keeping the process moving and trying to find solutions and I think that is why we've had the success on settlements that we have been settling so many claims. So for us, from a negotiations point of view in the processes it's kind of – we've put all the best efforts to get to a deal. The First Nations prevailed themselves of the possibility to come to the Tribunal to say well we are not getting a deal, Tribunal can you render a decision on this claim. It is an end to a process for us I guess in the way of addressing the claim. I don't know if that answers your question.
Justice Slade	Not really. It is starting to sound to me like once a claim is filed its going to go to adjudication and because it takes two parties to get it back into negotiations and we're very mindful of the obligation and the mandate of the Tribunal to adjudicate claims where everyone benefits from finality but we are also mindful that zero sum game is at variance with the reconciliatory objective that is set out in the preamble and the specific empowerment of the Tribunal to create rules for mediation. Now we've already indicated that mediation would only proceed with the consent of both parties and I don't know where the idea comes from that we can send issues back into the Specific Claims Branch process. I would be happy to be corrected, but I don't see us having the authority to do that. If it's been taken by anybody that Tribunal members efforts to bring about conditions in which the matter can be returned to negotiations with some hope of consensual outcome, that means sending it, ordering it sent back into the Specific Claims Branch process; well that is just incorrect. But as we see in conventional litigation before the courts, judges get involved in identifying core issues where the contestants quite naturally have different perspectives and often produce an array of issues from both sides that, when looked at by an experienced independent and neutral judge tend to winnow down to one or two core issues and getting rid of peripheral issues and getting down to core issues where there is some credible voice that suggest that here is your core issue or core issues often creates an environment or creates a condition in which effective negotiations can take place. That after all is part of what the preamble to our Act specifies, creating the conditions in which effective negotiations can take place. It that is taken to mean that we think we can send it back to the Specific Claims Branch, well of course we can't, but there has to be some meaning given to reconciliation and to the authority to include mediation otherwise it's just another litigation process which is pretty well established that it's not a cost efficient or time effective way of determining important claims. It would be somewhat comforting to know that the Tribunal members' efforts are not going to be entirely misdirected as a consequence of a hard position taken by either party and if we have to deal with validity of claims that have been in negotiations for three years, then my concern over resources is exacerbated not ameliorated. So of course representatives of the Crown here today can't commit to anything that determines how a particular claim will be responded to when it comes before the Tribunal but my hope is given that the whole context of the meeting is around mediation, to get some indication that the engagement before the Tribunal will be receptive from both the claimant and the Crown's perspective on efforts to bring about conditions in which negotiations toward resolution can take place which may include mediation. I suppose I invite comments from any of the participants in this meeting on that very subject from the First Nations' perspective, from the Crown's perspective.
Roger Jones	Justice Slade, Roger Jones for the record. This conversation brings to mind one of the practices that I've seen in the years that I've been involved on these matters. Generally, First Nations and Crown relationship matters and I am particularly pleased to have Ms MacLeod around this table and in particular to share this perspective I have about this discussion. One of the things that have always bugged me about the relationship is how at

	some point or another, the Crown, and this is particularly through Indian Affairs, has the habit of appropriating language and defining it in a manner as will advance and serve its purposes. A couple of examples that come to mind. Years ago, First Nations Leadership across this country decided that they did not want to be referred to as Indians because it was a mislabel. So the leadership decided well if the debate about Canada is about two founding nations, we want to be reflected in that debate and quite frankly we're the first nation is really what they decided. And so, that was intended to move away from the language used by the Government to define who we are. It didn't take long before the Government started to use in their legislation through definitions and appropriate First Nations and the legislation would say "for purposes of this Act, First Nations means bands" so right back to where they wanted us. And then another example is, again through the constitutional process back in the 80s in trying to make some headway on what section 35 was all about, First Nations leadership said well those are inherent rights. The constitution doesn't create them, the common law did not create them; those pre-existed all of that reality. Sometime in the mid-90s the Government comes up with its inherent rights policy which is a policy of avoidance not about rights recognition and rights implementation but rights avoidance. So there has always been some effort at taking the language and defining it in a way really to maintain the status quo and hope that things are going to miraculously change by redefining words and by rewriting history as well. It is obvious to me that just in this discussion we certainly need to be on the same page about what mediation means and I am thankful to the Tribunal for having the forethought to engage an expert on what that means and hopefully we are going to be able to share the same understanding about what it means as a result of the work that you have done and the work that you will be doing and enlighten all of us around the table at the same time so that we are all working from the same page on the issue. Meegwetch.
Justice Slade	Thank you Mr. Jones. I note the time, we're late for lunch and that is never a good thing. Unless somebody wishes to speak before we break, I propose we now take an hour -
Alan Pratt	Justice Slade, its Alan Pratt on the telephone for the record. Ms MacLeod mentioned a letter that she had written I think it was November of last year. I wonder if over the lunch hour the federal representatives might consider whether that is something that can be made available to the committee since it seems to from what I understood, it seems to set out Canada's position on the proper scope of mediation. I know I am speaking out of turn but I thought that since we are having a break, they might have the opportunity to discuss it over lunch.
Ms McCurry	Certainly from our perspective we sent it to the Tribunal and if the Tribunal wants to share that it's fine with us.
Justice Slade	I was actually going to offer to do that. I am sure we can access it fairly readily and get it out to you folks that are not in the room here and to everyone else. It was November 10th? I remember that letter. I don't remember more recent things but… we'll do that then and the speaker who raised the question, so we can have it for the transcript.
Alan Pratt	It's Alan Pratt, I am here representing the Canadian Bar Association.
Justice Slade	Okay, thanks Mr. Pratt. Lunch time
	LUNCH
Justice Slade	The letter that Mr. Pratt requested has been circulated in hard copy here and sent electronically to those who are calling in. We do propose to have Leslie speak thoughts about mediation but before doing that, I thought I would see if there are any observations or comments or points that anybody would care to advance before we proceed with that.
Mr. Devlin	It's now an appropriate time for our comments. Its Christopher Devlin from the CBA for the record and on the line is Alan Pratt. I will start off and Alan will make some comments as well. First of all thank you for inviting us to participate again in the Advisory Committee. We really appreciate having the opportunity to have input. We don't have a formal submission for the mediation component the way we did for the Rules in the fall, but we do have some comments that we can make. Generally speaking we support the consensus document that

	was prepared by the First Nations and the CBA long has advocated for Alternate Dispute Resolution and mediation as part of working through litigation and I think that has an even greater role to play in this process, in the Specific Claims Process. Both Mr. Pratt and I were troubled to hear about the resourcing issues that the Tribunal faces and that led us to think a little about the mediation bifurcation that seems to be happening between the Tribunal's mandate and sort of the mediation that the Department is bringing in-house. Although we know that neither the Department's representatives here nor the Tribunal really can't comment on it, it does seem that given the legislative mandate of the Tribunal to engage in mediation as part of resolving specific claims, the resources that may be allocated within the department perhaps could be allocated or shifted over to the Tribunal so that it is adequately resourced to fulfill its mandate under the Act to provide mediation but obviously that's for powers greater than us to decide. There is also the concern, and we share this with the First Nations, that of the independence and neutrality of the mediators and we haven't seen what the Department's mediation services would look like so it is difficult for us to assess to the degree to which those mediators would be independent and neutral. Although we did hear Ms Dupont talk about that so it will be encouraging to see how the department structures that and we may have further comments on that as time goes by. I have just two more quick comments to make and this is somewhat in response to the discussion this morning but now that we have the letter in front of us from the Department from November I can really hone in on this. Canada in its letter says that it doesn't regard it as appropriate to submit questions of law to mediation and then it goes on to also say that it is not appropriate to have mediation for claims that have already been subject to negotiation under the Specific Claims Process. Just two points there, first and this is sort of speaking as a practitioner on the substantive point of law, it can be very useful particularly where parties get positional on their legal interpretation of the issues at play to have a judge be very frank with them in the course of a judicial mediation to say that dog won't hunt if you adjudicate this. It's not a formal judicial opinion but it can be very helpful in moving through roadblocks. Everybody can lawyer up, everybody does lawyer up and lawyers, as we all know, have a plethora of opinions about what the law, how the law, substantive law applies to the fact pattern. It can be very helpful to have someone who is in an adjudicative role who is used to weighing these things say I am not deciding but I am suggesting that your particular interpretation might not carry the day and that will affect parties, the risk assessment and of course that will help with possible mediation. That is my first point. The second point dovetails in that which is on the claims that have already been in substantive negotiations. I think Justice Slade you mentioned this this morning but those substantive negotiations aren't being facilitated by anybody. These are really two parties sitting down trying to negotiate a claim. But there is no facilitator in the room. You have two parties that have different interest trying to come to a settlement and again what the Specific Claims Tribunal offers is that first chance to sort of make a pitch and have a mediator help the parties get a sense of perspective on the positions. Particularly when the negotiations break down it could be because the parties have ultimately become positional about some key issues and having that mediator and, as I said earlier a member of the Tribunal sitting Judge as the mediator can be very helpful in getting the parties to work past those positions and see a different perspective that they may not want to run in front of a sitting Tribunal. They may change their risk assessment and that may lead to a settlement without the need of a full adjudication. Those are my initial comments and I see that Justice Slade perhaps want to speak but I know that Mr. Pratt has some issues to make too.
Mr. Pratt	It's Alan Pratt for the record. Joining Mr. Devlin as representative from the CBA, the Canadian Bar Association on the Advisory Committee. I think I would echo much of what was said by many of the people before lunch and I don't want to prolong the discussion unnecessarily but I think it is appropriate to begin despite the pessimism on certain front, I would like to congratulate the Tribunal for reaching a milestone and it is a genuinely important milestone that we now have a binding Tribunal with its doors ready to open within hours and it will be opened for business and I particularly want to congratulate the three members of the Tribunal, Justices Slade, Smith and Mainville for your perseverance and obvious optimism despite the road you have been forced to travel and on behalf of all of us, I

	think you have stuck with it to get to the point where at least we have a Tribunal with its doors open. That's a very big milestone for all of us. I do want to take up on something that Roger Jones said this morning and that was that when the Specific Claims Tribunal Act was developed, the common expectation was that there would be a mediation body in existence parallel to the Tribunal and it was suppose to be the Specific Claims Commission or something called the Indian Specific Claims Commission or Indian Claims Commission with a re-engineered mandate. Now we are proposed to have a unit of roster mediators operating within the department. I won't repeat the concerns regarding the appearance of independence and the concerns that that creates. What I would predict is that if the only mediators to which we have access, practical access in the sense of free are those on DIAN's roster, many First Nations will have a difficulty seeing that process as a credible alternative and I won't go into what Jayme and others have said, Chris as well. This will I think mean that more claims than less will find their way to the Tribunal and in many of those cases I think the First Nations claimant and the Crown representatives will have different perspectives of the purpose of what they are doing. The Crown will see that either there are legal issues which can't be mediated or there are negotiation issues that can't be resolved or haven't been resolved and therefore the issues are ripe for adjudication where the First Nations claimant will be seeking possibly for the first time a hearing in front of somebody independent who might help them secure the negotiated settlement that they wanted all along. So there may be quite a serious mismatch in the expectations and I think what that is going to do is create greater demand upon the Tribunal, greater demand for resources for the Tribunal and the reason simply is that the promised independent mediation body has fallen through and First Nations will look to the Tribunal to fill that gap in a large measure and of course the Tribunal in its not necessarily mediation function but in a sort of pre-hearing function will of course act as judges always do to try to purge list of matters that don't need to go to trial and to find a sufficient common ground to have the parties negotiate their own way out of the dispute. We had a previous legislative model, the *Specific Claims Resolution Act* a parallel Commission and Tribunal and I am hoping that when it comes time to have our 5-year review of the *Tribunal Act* that some kind of an amendment along those lines to add that kind of a statutory body may be on the agenda. With that, I believe that it has been a very interesting day so far and again we do congratulate the Tribunal on its milestone. I agree also with the comments about the Indian Claims Commission. It never was a mediation body, it did use its pre-hearing planning conferences in a somewhat aggressive way and in an effective way to help the parties settle many claims but really only provided facilitation which in itself is a very valuable service. So I think that those are really the only comments I wish to add. I had a question of the Justices and that is as members of this committee, we are an Advisory Committee with respect to the Rules, is it the expectation of the Tribunal that you will refer draft guidelines or practice directions to this committee as well?
Justice Slade	Thank you Mr. Devlin, Mr. Pratt. As for Mr. Pratt's question, in order that we can get our process operating without further delay, I anticipate that we will be issuing practice guidelines but we would prefer to avoid putting them forward for comments and further meetings. I think we'll proceed to implement practice guidelines but of course we're always open to any suggestions the Advisory Committee may have to reconsider or expand on those. So practice guideline or practice guidelines we'll issue but that need not be the end of the story it could be in a sense the beginning. We will have practice guidelines on the initial case management conference to augment what is said in the Rules, practice guidelines in other areas. We would like to get on with functioning but we are always open to any consensus or other suggestion from members of the Advisory Committee. But there may be a time lag in really getting into operations due to concerns around resourcing. We are moving as quickly as possible to address the situation particularly in British Columbia so if we find we are held up and find that we have time to consult in relation to practice guidelines we will but please don't be offended if we simply issue them and put them into effect while welcoming any concerns or suggestions. As for the judicial or tribunal member role in facilitating the identification of issues and processes following on that, I have asked Justice Smith to speak to that with respect to the practice in Ontario.

Justice Smith	Thank you. Just to give you some idea of how the case management is going to make a huge difference and its approach at least in Ontario and from my perspective it will be similarly approached. It's a pretty frank and full discussion so when you walk in the room it's not warm and fuzzy anymore. Its let cut to the chase, what are the issues and tribunal members are going to give you a real hard time if you are way off on left field on that issue. And as you said, you're quite right you are going to hear that dog isn't going to hunt and don't waste anybody's time and let's have a discussion about that. If that leads to the opportunity of mediation, we are going to reach down in the mediation tool box and if it is worthwhile, off you go but subject to the control and oversight of the case management judge so you don't just drift off to la la land. The claims once they are filed are going to get resolved or heard. There not just going to drift and go to sleep because there is going to be tension on the line and the tension is going to be held by the case management judge riding herd all the way through. And, that is why the Rules were drafted the way they are and why the case management member will be consistent as far as possible right through so that Tribunal members will know intimately everything about the case; will know you, your position and it will hopefully get refined and progressed step by step along the way so that you are not starting from scratch. There won't be any slack, you will either mediate, negotiate, discuss it, resolve it or it's going to a hearing in some form. So, in Ontario that is exactly what happens. Most judges are, I hate to you the word aggressive because it's pretty blunt, aggressive, but helpfully aggressive with respect to a case. There is no time to be talking nonsense or wasting anybody's time once your inside the Tribunal's walls be prepared to fish or cut bait. So, as I said, in our tool box we will have all sorts of things that are going to help you to resolve. Either you are going to get a big judicial push or you're going to mediate, or you're going to negotiate, or you're going to discuss or you're going to do something but it's going to move along one way or the other. I hope that you like that approach and that it's going to be helpful to you. On the resource side of things, Anik Dupont just agreed to give us a third of her budget. Thank you very much. That resolves the resource problem. (laughter).
Justice Slade	Yes Ms Corbiere
Ms. Corbiere	For the records it is Dianne Corbiere from the Indigenous Bar Association. I too would like to congratulate the Justices in getting this off the ground. I am not just with the Indigenous Bar Association I am also a practitioner. What I wanted to share is based on what's evolved. Of course we are heartened by the efforts of the Assembly of First Nations in their consensus document and First Nations of what they contributed and from listening, I agree with Ms Lickers, I think I am disheartened to hear what is coming from our counterparts in the Department of Justice. But when I look at the mediation documents that are being put forward and Alan Pratt probably knows because we worked on a case together. We've had the benefit of the judiciary in Ontario where there is a move amongst Justices to take a role as part of the reconciliation process. They're really embracing these principles and they will take us through a facilitation, mediation process some hybrid if you will and it is like Chris Devlin is saying, it is really beneficial because the Justices, they don't mess around and when I look at the Rules and it says if there is a Tribunal member available. Based on what I am hearing here today, if you are developing guidelines, unfortunately because the Department of Justice and its client are not willing to entertaining to a serious dialogue with the Assembly of First Nations on a consensus, perhaps like a Tribunal process of mediators, it looks like you are going to have to do the job of facilitation and mediation as well. And, I don't see anything in the Rules that would prevent you from doing what Chris Devlin is saying; I mean it's not in the Ontario rules either but I have been in the Court where Judges have said this really needs to be mediated. I've got a judge sitting on break right now and it really motivates parties because you know it's like moving the process along. But this is more particular, it is about what you started with Justice Slade, it's about reconciliation and if that means you got to push the parties because the resourcing isn't there. The other thing I wanted to say about this is it's very important to have skilled mediators. I have also been part of the Ontario process where it was mandatory mediation and it was ineffective because the parties weren't really coming together etc. and it wasn't being case managed by the judges. So yes you could wander off and also the mediators don't really know the issues.

	The other thing about the reconciliation process that we're talking about is it's important to have the requisite knowledge. Impartiality is of utmost but also having knowledge of the issues and the parties. No one is going to disagree with you that this is probably the most complicated constitutional issue that goes up before any court. I mean, if you look at the length of any of these title cases or treaty cases like they're the longest cases of most other cases. It looks to me like if we are not going to get to consensus on the need for mediation, you are hearing from First Nations that it's a must. IBA put forward it's a must; CBA is saying it's important and I am really happy to hear from Justice Smith to use the Ontario example cause unfortunately, it looks like unless the Department of Justice and the Assembly of First Nations are going to pull up their sleeves and recommend the consensus approach, it is going to be you pushing us to mediation and I can see that being as a benefit. From my perspective now the other thing that I want to say on the record is it's awful to hear that the resourcing is already being taken away from the important work that you are doing. So I hope that our counterparts here will stress to their clients and people about the importance of this work. It is not enough just to have Rules and to open the doors for our clients but our clients have expectations. First Nations have expectations that there is going to be Justice at Last and if we just open the doors for claims and then close the doors for everything else that's inexcusable and it's not in the spirit of reconciliation. Thank you again and I would like to say meegwetch.
Justice Smith	I just want to add one thing about resources. I was just kidding about Ms Dupont. We intend as best we can within the limits of our jurisdiction to really push to get more resources so we will make a Treasury Board Submission; but what would really help is if everybody around this table supported that. Because sooner or later we will get more resources but better sooner than later and it won't be until probably Fall as I understand it that we will be able to get a Treasury Board submission before the Treasury Board. And, hopefully by then we will have some data from the claims that are filed which will be very helpful because it will be specific and won't simply be assumptions. We intend to do whatever we can to try to get those resources.
Mr. Benson	I just had a few comments before we move on to kind of Leslie's presentation. I think Saskatchewan would welcome the kind of approach you are talking about, a fairly aggressive approach. I do have some concerns coming out of some of the comments this morning which have been reinforced by this letter about the commitment to mediation. As I think Mr. Devlin pointed out, sort of two sentences that concern me the most are: the one Canada does not regard it appropriate to submit questions of law, substantive matters to mediation. Having been involved in the claims process as most of you know it is really a question of trying to apply the law to particularly set of facts and what occurred historically and often times there are things that arise as roadblock are substantive issues and they are not necessarily strict questions of law. They often have a legal component to it but they could be a question of interpretation of facts or how the law applies to those facts and that kind of things and we've been fortunate in negotiations when those issues have arisen in many cases to be able to walk through them and talk to them. To me those are precisely the kind of issues that should be resolved through mediation and where a mediator would help. And then the second sentence the one that seems to preclude mediation in cases where claims have gone through the negotiation process. My understanding was that was precisely where we see the most mediation and so I guess I am kind of confused when they are talking about only in cases of procedural issues would mediation be acceptable to Canada. I am trying to actually think of situations where mediation would apply and then it raises a question in my mind if there is not a commitment to mediation I think following up on what you said why is this center being opened up, what is it going to do and you know maybe the resources should be used elsewhere. We need a frank discussion if there is not going to be a commitment to mediation for substantive issues and for claims in negotiations well then let's not pretend there is and then maybe if everything has to be adjudicated, that's going to be the position parties take than at least put the resources to do that. My guess is it will cost a lot more than trying to mediate things. I am seeing a lot of concerns from what I have read. I hope that it is more like the process Justice Smith is talking about where the parties try to

	work through things whether it's a substantive issue, whether it's a claim in negotiation, whether it requires mediation or case management whatever we can do to avoid having to go through the time, the cost, the risk of adjudication. In my mind that is the whole purpose of the process. Those are my comments.
Justice Slade	Thanks for that Mr. Benson. I had the same question in my mind. Actually as Mr. Benson had raised, if questions of law which often are mixed law and facts are not from Canada's perspective an appropriate matter for mediation and the mediation is not accepted where there has been negotiations under the Specific Claims process I cannot help but wonder what there is to mediate. Now Mr. Stevenson you indicated that it would be the basis for the claim, clarifying what the claim is; well that's what Tribunal members are going to do; that's the whole point of what we require in the Rules for the declaration of claim and the response and our case management rule that tells the parties what they have to come to a case management conference prepared to discuss. That is all about winnowing out the core issues. I don't see referring that kind of thing to mediation if indeed it proves out that Canada's position is as set out in the letter from Ms. McCurry. Surely a question would arise as to why the legislature characterized our role and part as reconciliatory and why the legislator saw fit to empower us to make rules governing mediation. So with others in the room, I am struggling a bit with that and of course the implication of this for our process tends to inform us on our resource needs. Whether there is an appetite for mediation, yes resources will be required. If it's all litigation, resources deployed in another way will be required but it's a matter of some concern and I suppose it will be for the parties respectively on a particular claim to raise whatever challenge they may see fit in circumstances where mediation is indicated and recommended but not taken up. Yes Ms Lickers
Ms Lickers	I have a question if I can pose it now and perhaps have it answered maybe not immediately but at some point before we leave each other today. That is, the preempting discussions that led us to this hearing was Canada through Indian and Northern Affairs Canada making the decision to deliver mediation services through an internal process. Given the correspondence of the 15th of November, the question that comes to my mind in excluding a number of classes of scope captured by those services not only is it a question for, as we are speaking to it, for the Tribunal but who is served by INAC's internal process as well. Who is left when you exclude the classes of cases as you describe them on the 15th of November? Who is going to benefit and who is captured by what is thought to be an internal process, internal insofar as that service is being delivered from within the Department. As a secondary or supplementary element to this discussion that we are having as to how this might be delivered by the Tribunal.
Ms McCurry	It's Pamela McCurry speaking for the record. What is important to understand is that from our perspective the mediation, facilitation that is proposed to be housed within INAC is directed at the spec claims negotiation process that takes place before a file reaches the Tribunal so that's what it's directed at. It's not intended to provide services or to engage the Tribunal. It's really prior to the Tribunal. So there is a bright line in our view. In other words between pre-Tribunal and Tribunal and this service, which again is not intended to engage INAC directly in mediation but simply intended to act as a service that will offer a list of names that parties can choose among to provide mediation services. That's all about the spec claims policy based negotiation process.
Mr. Pratt	It's Alan Pratt representing the CBA on the line. Just a follow–up question to that maybe for Ms McCurry and Mr. Stevenson. In that situation, I think that you would think that whether it's before the Tribunal or prior to the breakdown of negotiations Canada would not submit what you saw as a legal issue to mediation?
Ms McCurry	It's the same position.
Justice Slade	I think before we move on, just an observation concerning the role of the ISCC. I did read their closing report and noted that reference is made to having conducted a number of mediations and of course I am well aware that the ISCC played a role toward facilitation of resolutions short of mediation. But, I'd assume that many of the techniques used in that facilitation come within the broader ADR title and thus would employ techniques familiar to mediators. It seemed apparent to me that the extent to which the ISCC engaged in all of that

	from their closing report tended to support Ms Lickers' assessment of the resources that were deployed in that direction. So with that perhaps, Leslie if I could ask you to speak to mediation as we've discussed it, thoughts that have been advanced thanks to your good efforts notwithstanding that the scope for mediation as we have it around the table today doesn't seem to be particularly favorable. And by the way I am taking it without anybody on the First Nations side of the discussion; taking it from the general comments that there's a real desire on the part of claimants, claimant groups to avail themselves of mediation services. If I'm mistaken I'm happy to be corrected. With that Leslie
Leslie MacLeod	Thank you Justice Slade, its Leslie MacLeod for the record. I would like to acknowledge and thank Justice Slade and Justice Mainville and Justice Smith for involving me in this discussion and I know they've made a tremendous amount of progress on the various tasks that they faced with the assistance of the Tribunal staff and I feel quite privileged to be brought into this issue with respect to mediation because I do think it has real potential to be of assistance to the parties. At the end of the day that is what we are looking at, assisting the parties in the effective and efficient resolution of the claims. I don't know where to start because there have been so many points made here and on one hand I can see my role as potentially mediating here some of the differences and even tough Justice Slade indicated you know there are some real differences and I can feel around the table some disappointment in terms of where we might be in relation to the use of mediation with respect to these claims. The mediator in me also sees the prospect of conciliation or resolution. In other words the opportunity to do some co-design and perhaps to get over some of the issues of concerns. So on one hand I can see doing that today and using some time to see if we can't get over some of these issues. It also occurred to me in listening to you this morning and I thought the discussion was a very good one that there may be some differences in view as to what actual words mean and I thought perhaps we could talk a little about that. Because sometimes we resist things because we have the notion that it means something that others don't think it means. I thought perhaps I could at least in a rough way summarize what some of the issues are as I heard them and where there might be consensus. And hopefully you will forgive me if I reach a little bit because I'm an optimist by nature. Let me just start with the issues. I think one of the issues is whether mediation can or should be used. I think that there is consensus that mediation can be used in the claims that we are speaking of. The legislative framework allows for it, in fact promotes this, the history with respect to these sorts of claims suggests reconciliation something that goes beyond adjudication and I think there is acknowledgement around this table that mediation can be used; the issue about whether it should be used or the circumstances in which it should be used is a little bit more complex given the views. We can come back to that issue. Who mediates? We've talked about judges, Tribunal members as mediators. There has been some frank discussion I think about the resourcing issues and some of the pressures that are going to be on Tribunal members which might impede their ability to be the mediators or the exclusive mediators in this particular system. We've discussed having external mediators and you all have raised some very important points about process expertise and substantive expertise and experience and credibility amongst the mediators. And, I would suggest to you that all of those things are extremely important no matter what happens. I would also point out that at least in the early thinking and what you see reflected in the document before you is that there was also the notion of co-mediation. I don't think that was mentioned today but that's another model of mediation where you can bring together people with different experiences and levels of knowledge might be helpful. A third issue - what body or bodies are going to provide mediation services or mediation support. So I've been educated today with respect to what is happening through the Specific Claims Branch, through the auspices of the Government of Canada, I've heard the concerns that have been raised, there have been notions of services in both camps if you will; the idea of a centralized body – I was imagining a kind of virtual service also being possible and query who is ultimately responsible for that; is it the Tribunal or is it shared etc. The question of payment is the next issue. Who pays? Under what circumstances? Or who reimburses? If its Tribunal members that are providing their services I presume it follows and that was the

	early sense; that those services would be provided at no additional costs to the parties. If it's not the Tribunal members? Well then, if its independent mediators are they provided through some funding formula to the parties, do the parties pay themselves. A real tricky issue is what can be or what will be mediated and we've just been discussing that issue and I don't think the question came back squarely to the Government of Canada on that question to clarify what you mean in the letter. I have some comments on that myself which I can come back to. Let me make a few comments just broadly and generally about the use of mediation in situations where the ultimate result is an adjudicative result. And I speak largely from my experience in Ontario going back a number of years a decade plus I was the Assistant Deputy Attorney General responsible for civil and constitutional law for Ontario and responsible for some other portfolios and it was my pleasant task to be involved in the introduction of mandatory mediation. Some people respect me for it, some people don't. With respect to the litigation, a civil non family cases and Toronto and Ottawa are two examples where we have mandatory mediation to this day. And clearly the design of mandatory mediation had and it has its issues but I would say in large part it has been a real success and a very good percentage of claims get out of the system and get out of the system very early based on mediated results. Going back to 1994, I received a lot of critique from those who opposed as a matter of principle mandatory mediation, the oxymoron they called it and parties were often apt to refuse to mediate where they knew they had a legal obligation parties often came with counsel showed up and would say to me and other mediators as well, we've shown up now we can leave, we've met our obligation. And I would say to them ok we're here give me 20 minutes, let just see what we can do in 20 minutes and if we are not making any progress you can leave. I would suggest, and this is anecdotal evidence, but I would suggest those cases were as likely to resolve amicably then others. So in other words, the fact that they were mandatory mediation, the fact that people came in very resistant to the notion of being mediated upon didn't have an obvious negative effect. Now I would say you are lucky here, it's not even mandatory. Right! It could be worse if you're resistant to mediation in any way, could be worse, it could be mandatory. But at the end of the day, the outcome even in a mandatory mediation, the outcome must be consensual. One of the things I would put out to the table is, what is to be lost by trying mediation assuming the mediation has the constituent element that you've said are important, and that I think you'd all agree are important. Quality mediators, people who are trained, people who have all the attributes of excellent mediators. So what is to be lost? Because you will never be forced into a mediation. While I am on the point of categories of mediation, we've talked about voluntary mediation; that is the model that is being promoted. There is mandatory mediation at least at this point that's not under contemplation here and then there's what's called compulsory. And that is where a judge, you can imagine it happening potentially here, says and now I highly recommend that you go mediate. It's not mandatory but it is suggested very strongly and some would say inherent in that is a message of some compulsion. I am not saying that would happen here although building on what Justice Smith said about taking an aggressive approach, one might say there would be some elements potentially of compulsory mediation. But again I ask what is to be lost? If one can have a quality discussion even if you can mediate the ultimate resolution successfully, in other words you don't get a full settlement. Mediation can be successful, it can have a number of positive effects which might serve the adjudicative process better in terms of limiting issues, better understanding of each other's position etc. Let's talk a little bit about terminology. So negotiation: negotiation involves a communication between two or more parties, say that two parties without third party intervention. You've mentioned facilitation, and facilitation and I am simplifying this but facilitation involves the intervention of a third party traditionally an independent objective third party into the discussions and the facilitator to use the term traditionally supports the communication but not necessarily with the intention of supporting an outcome where as a mediator does all the things that a facilitator does and generally more and the mediator is there to support in any way possible the negotiation between the parties to an outcome, to a conclusion if at all possible. It is more of an interventionist role and the model that is being suggested for this Tribunal is that

	it be interest-based but also allow for reality check. There is always a spectrum. This model suggests that there is room for the mediator to be somewhat more interventionist than a pure interest-based mediator and certainly more interventionist than a facilitator. And then of course there is adjudication. And, as Justice Slade said earlier, adjudication as important as it is – and I don't hear anyone around the Table suggesting that we shouldn't have adjudication, it's critical and there will be issues that are best taken through the adjudicative process to and through a hearing and to decision. Most adjudicative processes in the jurisdictions I'm familiar with in Canada have traditionally or have increasingly more recently added what we'll call ADR components. Mediation is one of the most obvious and prevalent ADR processes that are used in Tribunals provincially and federally are using mediation more and more and I would suggest with tremendous success. To me the notion of setting up a new Tribunal, and particularly a Tribunal that is dealing with historical issues of the complexity and the importance of the ones that you are dealing with, especially a Tribunal that has been created with the notion of reconciliation at its core is one that is to my mind, a prime candidate for the effective us of mediation. One of the courses that I teach is entitled "Dispute Analysis and Process Design" and what the title suggest is in any case where you are looking at designing a process or processes to resolve issues you have to be sensitive to the nature of the disputes, the participants, the relationships and it has to be sensitive to the needs of the parties and to the results you want. And here there are concerns and clearly the Government of Canada has expressed concerns about mediation and how it might be used. I can respond or at least add to the responses at least to some degree. I would also like to acknowledge that it is difficult to predict before you are into mediation what it's going to look like, what sort of outcomes might result and there can be some resistance to that new world. Going back to the letter because the letter seems to be central to the Government's current position on this issue and because a number of you have expressed views on it and I am just going to speak from my experience; my experience as a mediator in particular and as a teacher. In terms of submitting questions of law to mediation, from my experience that is not usually done. In other words, if I'm the mediator, people don't submit a question of law to me for mediation. In fact, what they are often doing is suspending the question of law so we can have discussions as to how to resolve the matter given that there are two very different positions on the question of law. Also as it has been noted before, it may be that, as a mediator I'm asked to express a view, call it a reality check, a view, an opinion non binding as to the relative merit of the two positions on the question of law which the parties may or may not take into account when they do their risk analysis in terms of what they are going to do by way of settlement. I may be missing something here but from my experience I've never had someone submit a question of law to me to mediate in those stark terms. In terms of the second point, it's not appropriate to consider issues if they have already been subject to negotiation. Well the literature would show, and experience would say that it's in those cases where negotiations have been unsuccessful that the intervention of a mediator might just and often does break down the barrier, assist the party in finding innovative ways to resolve it, provide a view that is helpful; does something to change the dynamic and in fact it is sometimes the case that I mediate cases that have already been mediated. In other words there can even be a mediation that hasn't been successful, some time passes; with the passage of time there is new information, people assess their case differently and they may even have a second mediation with the same mediator or with a different mediator. So I would suggest to you that ADR processes can be sequenced and can be used very effectively and a very traditional sequencing or stepping within the Canadian justice system is negotiation, mediation, adjudication. That is classic. All to say the fact that negotiations have been unsuccessful to me does not suggest that mediation won't have some value-added. I think we've talked about procedural matters. With mediation sometimes you have to take a leap of faith and I think this will be the case for all of you, in terms of potentially submitting to mediation issues that you might be quite discouraged about. You might be quite unhappy about the history of the negotiation on certain issues and you might think that mediation will not be of assistance be it conducted by Tribunal members or otherwise. But I think if you take that leap of faith and if you enjoy the same experience of other Tribunal that

	have done it you'll be pleasantly surprised and you'll find that a good percentage of your cases are resolved in hold or in part. Those were some overall comments that I wanted to make in light of what I had heard or what I've read but I am in the hands of the Chair as to whether or not I entertain some questions, if people have questions about experience or terminology or anything else. Why don't we try to work through some of these issues and see if we can come to any consensus or do anything else.
Justice Slade	Well first, any questions of Leslie around what has been presented thus far?
Justice Smith	With respect to finding mediators that are independent, that are not members of the Tribunal, is that a difficult thing? Or are there quite a few people out there who would be suitable for specific claims, fully independent, professional, trained, reliable etc.
Leslie MacLeod	I think it would be quite easy to find people who are sufficiently trained, experienced, interested in the work and would have the kind of qualifications that would be acceptable to both parties. I think the one hesitation I would have is the degree to which the parties would insist on x number of years experience with specific claims for example. That will narrow your pool. But I am quite confident, at least within the larger centers, that there would be a significant pool of mediators for your consideration and if indeed you've already started developing a list or you have a list, I presume that has been your experience.
Anik Dupont	Thank you. Yes it has been. I guess the one issue I think we need to kind of square off is that I think we are talking about mediation in two different contexts. We are speaking about mediation within the confines of the Tribunal and also mediation within the context of negotiation which is what we've done a lot of work with. Where the sector, the Treaties and Aboriginal Government people are setting up this roster of mediators and we've gone to great lengths in looking at all of that and speaking to people and First Nations and developing criteria because we want to cast a net of course and try to gather as much as the expertise that is out there and we did go and speak to a lot of organizations who offer mediation services. We also spoke to a lot of First Nations because yes there are accredited mediators but there are also members of First Nations or Chiefs who are recognized by a First Nation, who they know a lot of the history on a file or who may have certain experiences that the table would consider an expert in their own field and that we would not want to exclude them because they don't have the accreditation of being mediators. So that is also something that we took into consideration in developing the roster. Ultimately, we are all working at trying to "dénouer une impasse" but I don't know how to say it in English. – resolve. Of course we have to think about what issues come up, what type of expertise do we need? We are not looking at a narrow description or just a specific, we're looking at a wide range of issues that we may want to have specialist in under various criteria of course so as to be as inclusive as possible and recognize our partners in the process which are First Nations and some suggestions that they may have as to who they see as suitable mediators as well.
Leslie MacLeod	Leslie MacLeod again. I think it might be helpful if we had clarity. So when I use the term mediator I am thinking of independent of the parties so not a Chief of a First Nation unless that person has achieved a reputation as now acceptable as a neutral third party as opposed to an expert. The Tribunal may engage experts but I am thinking of something quite different. So the mediator not being an expert might have expertise but not an expert in the classic sense but someone who is separate from the parties, who is independent who has if not formal training has the experience in the field, has been grand-parented if you will as a mediator. And I can imagine, and I just put this out on the table, I can imagine a notion of a roster where the parties have agreed in advance that the people, the ten, the twenty, however many people on this roster have been accepted and endorsed by the relevant parties and they may be used under whatever terms and paid however it is determined they be paid and there is joint input in the selection of those people.
Anik Dupont	Yes, that is exactly what the intent is. In developing the request for proposal, we are also bound, as the members of the Tribunal will attest, we have rules that we have to follow when we are looking at types of contracts. The role of the Department in all of this is strictly to manage that list. We will not be guiding the tables. The parties will have access to this list, negotiators will say to us we need somebody in the expertise of Forestry because we are

	having a dispute on how to establish loss on the forestry. They will look at the forestry category where they will have names. All of this is provided to the negotiators at the parties. The decision is made there. We do not implicate ourselves into the selection; all they say, they come back to us and say ok we would like this person; we do the paperwork, we take that burden away, we provide the cost, we pay for that and the persons produces themselves at the Table so we do not get involved in the selection, we do the paperwork because we leave it to the Tables to do the work that we've been discussing when we talk about mediation, we are knocking off all of this pretty quickly , this is the fifth time we've had the discussion for the terms of reference and we still can't get it so in order for us and the other thing that although we have not been saying but you have to remember in the case of our negotiations is we have a three year framework to which we operate under because we want to get to a settlement as quickly as possible to make progress. That has always been the biggest complaint, it takes us so long to get through the process, so we are mindful of that and that is how we are trying to achieve it. That is basically at the Table what happens. If we are going to resolve this issue, we are going to have to go out and seek somebody's advice because we are just not finding common grounds here and that is where the discussion happens. So there is no intervention from our perspective as to well you should be taking this person, you should be taking that person, we just kind of administer the roster.
Leslie MacLeod	Point of clarification, Leslie MacLeod again. Is the expert in Forestry the mediator? Because I think what I'm talking about and the only thing I've got in my mind is the mediator. That is where we may be talking about different things.
Anik Dupont	It could be the request for a mediator or it could be also, when we speak about the various stages of ADR, we talk about facilitation. That is also why we are broadening. We may need a mediator who has to come in and because we are at odds, we have fundamental disagreements on a point where we need to hand that over to somebody to say, this is what we are saying, this is what the other party is saying – we're just not speaking the same language and we're not getting to that. So there is that spectrum that we may consider but we also will consider if there are very pointed issues at tables, we may be discussing and trying to resolve the issue, we need an expert and it's kind of a facilitation if you wish because you are bringing somebody from the outside who has that expertise who can lift the parties off from the claim at hand where you are so focused on your issue and say in actuality forestry has evolved and you guys should be kind of migrating towards that. That is also how we see utilizing it within the context of negotiations.
Justice Slade	A distinction has been made between mediation within the Specific Claims Branch process and mediation in the process before the Tribunal. Well and fine I suppose that a mediation facility has been established for the former but how would that avail the latter. We have claims and it sounds like we are going to get a good many claims that have been through the process as it exist today that have not involved ADR and, with respect, I don't think you can characterize the conduct of two party negotiations without any facilitation as ADR or mediation. So, we anticipate that some of the claims that come to us will have been rejected many years ago, others have been in negotiations for a very long time and get to us because it's October 2011 that have never been ADRd at all. What about those claims? By our calculation, there are a least 171 that will be eligible and my guest is there will be many more. If there is no willingness to consider mediation on issues of validity and no willingness to consider mediation where the claims have been in the process; where would any willingness to mediate manifest itself in relation to claims before the Tribunal? Would it be a matter of looping the claim back through the Specific Claims Branch process to have added for an open-ended period of time without Tribunal jurisdiction to hold people's feet to the fire and if so how would that enable the Tribunal to deliver on its mandate to bring these matters to a close in a cost effective and timely way. I am really quite at a loss to understand the implication of not considering mediation on the two important bases on which claims can come to the Tribunal in relation to existing claims that are ripe for filing as of October 2011 or as of today. I am sure we would all be assisted by some explanation of that.
Mr. Stevenson	Part of the problem we may have here is that we are dealing with abstract questions that may well be best worked out in practice. We all come to this work with perspectives and

	maybe it would be appropriate to share some of the perspective we have for this. We are not at a process building at this stage at all. Parliament has done that work for us. We have a statute that is in place and our job is to interpret and apply that statute. You refer to the fact that the preamble refers to reconciliation but we don't see reconciliation as contrasted to adjudication. In fact, it is crystal clear and the preamble itself refers to this. Adjudication of disputes is part and parcel of reconciliation and likewise while the statute refers to mediation, it's in the context of case management. So the idea of mediation is from the perspective that we are reflecting part of the adjudicative process and frankly I don't think it is fair to suggest that we are stating categorical rules that say we will never use mediation in a particular area. We've been asked for and have given general guidance on classes of cases that we think would be more appropriate and classes of cases that we think would be less appropriate. Our expectation is that how those general rules work out will be through the hard work of rolling up your sleeves and dealing with individual cases. And if there is a core in the message we're given is that particularly in the context of an adjudicative process the principle of consent is in fact very important. Every party has a right to look at the case, including its history and including its future to assess do we think that an extra step will be propitious for that particular case. And so you know I go back to the point that this is the kind of issue that we are probably going to work out through the process of just developing and dealing with the scheme that Parliament has laid out.
Justice Slade	Mr. Stevenson but what is the 'this' in that proposition. What is it that we can anticipate, we might receive some consensus from the parties to mediate if we are excluding from the get go issues around validity and issues around compensation where it's been in negotiations. I am trying to understand and perhaps everybody else understands it but I wonder what the 'this' is.
Ron Stevenson	Ron Stevenson again. It is important to understand again that we are not stating that there will never be a consideration of these mechanisms. But let's take the "Coutu" cases. Issues of reviews of validity; we've already formed the view that's very carefully considered based on a lot of work and you know the presumption will be that we will continue that position unless something significant changes. What we've indicated is a case by case that there might be a consideration but it's fair to state, as a general rule that if it's an issue of law that divides the parties, we have been brought before an adjudicative process, we all do our job and we respond to the adjudicative process. Now, case management means that all Counsel listen and respond and one of the message we are delivering is we fully understand these cases will be case managed but what we are resisting is a uniform rule that they automatically default to a mediation step. Likewise, on claims that have been through negotiations, it is very frequently the case that the Crown will have presented an offer and we will have hit an impasse and we may feel that there may not be any more room and that is a perspective that a party can quite legitimately take. And so again, case by case we will be in a position of assessing under the guidance of the Tribunal and as we understand the case whether we think mediation will be a helpful step. That is why we are trying to reinforce the fact that this is case by case.
Justice Slade	Thank you for that. That's helpful.
Jayme Benson	Just a couple of things, actually more to what Anik was talking about. Although I would add one thing to it. Our understanding was that the statute part was one component of Justice at Last but that it was wider than that. So, I would think that some of the wording in Justice at Last made commitments outside of just the statute part of it in terms of the role of mediation. So assuming that the Government is still committed to Justice at Last as a whole and not simply the statute part of it, I think that when we are looking at mediation we have to look at it in that context because we took it as a larger package and not just simply the statute itself. I just wanted to point that out. In terms of what Anik was talking about in terms of the roster, in negotiations we are often required to bring an expert whether it's forestry or agriculture and often times we do joint studies and we agree and that is not a problem usually but I think the concern at this point is the administration of it being within the department. I don't think we'd necessarily have any concerns with jointly agreeing on mediators or even if there was a roster that was somewhat jointly prepared that you could use, go outside of it, not go outside

	of it. I don't think that is the concern, I think the concern is there would be a perception even if the administration's within the department that would give the perception of it not being independent and that is more the concern then the roster and that kind of thing and practically speaking because we are successful in finding experts in all these other areas I don't actually just see why we don't treat mediators exactly the same way. We don't have an administrative body in the department or anywhere else that has rosters of these experts. We sit down at the negotiation Table, we generally know who the experts are in forestry. We say, is this person ok, we agree, we do the terms of reference jointly and then present them usually to sometime one or two peoples, we get quotes and then go from there. So I think that administrative part within the department seems to be the hesitancy on our side. Does that make sense?
Anik Dupont	I take your point Jayme. The one thing and I will say that my branch is not involved in all of this work, it is another area of our sector and there are reasons why. You know, we are trying although I know people want it to be independent but that is why we are not involved in the whole development of the criteria and all of that. It is being handled by another sector. The department has always when mediation has been a requirement whether it is in the context of specific claims, ? Claims, self-government negotiations and also from other departments who have come to us to say do you have any people that you know to do that. But the government as a whole is now structuring itself for contracts and it's a bit, if you'll forgive me the administrative interlude but it's important, are now pushing to have these master service agreement where you house a variety of experts by expertise where you only enter into a standing offer an it is to reduce the amount of contracting work and paper work. We were getting a lot of push back at the tables to use this list of mediators which we felt in some cases may not be the exact type of skill set that we require and that is why the concept of a roster came in. It was kind of to pull that more into the purposes of our process of negotiations whether there being specific claims or others and that is why it was done like that. It was to try to bring it more in line with our line of business, to assist us more so that is why that route was taken in the context we are talking about here.
Jayme Benson	Because of the way the process works and we avoid sort of the constraints to the Government contracting process with the other experts is that the First Nations receive funding and then the contract is actually between the First Nations and the expert, not between Canada and the experts. So we basically bypass the whole standing offer restrictions process and that is kind of the way we do it in the other cases.
Anik Dupont	It's Anik again. No that is effectively, we now have 2 tables out of 178 in negotiations that have mediators and that is what we have done. We flowed the funding through the First Nations and it makes it a lot easier on everybody and a lot easier on us. But when we were thinking forward, if we are to make best efforts to get to a settlement in three years, we are going to want to have easy access, quickly and in a more organized fashion. That is why we went down this road. We saw that we may not have only two tables meeting, we may have seventy-five tables while we are pulling in people to do it this way would be something a lot easier and faster for everyone involved.
Ms. Lickers	I just want to use this opportunity on the record today to clarify that in the discussions and Ms Dupont in referring to consulting with First Nations in the development of the roster that the Assembly of First Nations has not participated in that discussion. And the reason being is, in following our hearing in October, again going back to my comments this morning, when we knew more about the development of this Tribunal and the application and development of its rules of practice as an expression of the legislation and we knew more, we thought it was the opportunity to then look at how all of these pieces will shape themselves out when the ultimate objective is in mediation being but one Alternative Dispute Resolution process that there was an opportunity to look at a discussion that INAC had initiated when the ICC was closed. The aspiration remains that there needs to be a center or an institution that represents ADR for First Nations within the Specific Claims process. The intersection of opportunity today is because we are talking about it in the context of negotiations. But there is a broader range of opportunities at the whole of the spectrum of the Specific Claims process that we have not lost sight of that as the ultimate objective and the ultimate goal but

	we are prepared to isolate our sort of view of it and particularly the desire to avoid multiple processes in getting us to serve to the best of our abilities the tables that actually need the use of an independent third party. The part of our discussion this afternoon and I am encouraged by Mr. Stevenson's remarks about being more prepared to assess mediation, the use of mediation services on a case by case basis. And that kind of flexibility of thinking and of thoughtfulness is the kind of thinking that we are encouraged to hear and to see reflected. It would have been an appropriate expression on the 15th of November that that same sentiment of flexibility of thought in case by case and assessing each case on its merit for its own history in the process as opposed to stating quite positionally things that may or may not fall within the lines of the Tribunal. There is one area though that I do really want to clarify and that is in the envisioning of a service being delivered within the department as Ms. McCurry has described this afternoon; there is sort of this line in the sand between activity pre-Tribunal and activity Tribunal and post filing. That sets in motion again we are talking about multiple sites for the same purpose. If a First Nation and Canada are at a negotiation table together, correct me if I am wrong but my understanding of what you are describing is INAC through its roster will service, provide the mediation services to that Table should the parties consent to those services being needed. Hopefully they reach a settlement resolution but if they do not within a three year period of time and they find themselves in need of the services of the Tribunal that even though they've had a mediator that they – in what you are saying- will they or will they not avail themselves of the mediation that is available to the Tribunal, simply because that would have been exhausted in a process that you have already undertaken together. So now it truly is about adjudication because you've set up a process, you've created the roster, you've gone through that process now you are before the Tribunal, there is no further opportunity for that element of their authority, it's really all about adjudication now. In creating that line, I am trying to understand what prompts the need for the line.
Pam McCurry	It's Pam McCurry. When I referred to the line, what I was attempting to explain was how we were proposing to deal with mediation in terms of setting up this service, this roster. What I was saying was that what INAC is attempting to put in place is really a mechanism through which parties who are at the table in a negotiation process, the spec claims policy base negotiation process, it would facilitate them having access to mediators on whatever issues they decide they need assistance with. So that was the point of the bright line that I was describing and it was in response to the notion that we could have mediation services that would run across both the negotiated policy base process and the Tribunal process and that is what I was addressing. In terms of mediation in the context of the Tribunal, I think we've said it in various ways and Ron has just repeated our position that we have a general orientation obviously, we have concerns around the use of mediation in the Tribunal process. We will approach it cautiously obviously but as I indicated at the beginning we will look at it on a case by case basis where there are opportunities we feel are in the interest of all parties we would seek to avail ourselves of those opportunities and we'll make our rationale in any case explicit.
Justice Slade	I take it then, if this roster of mediators was established and the First Nations was confident that the mediators were functioning independently that should there be an agreement in the Tribunal process to take the matter to mediation, there would be no obstacle to using a mediator from that roster.
Eliza Montour	Eliza Montour for the record. Miss Dupont, I just wanted a point of clarification here. You had said with the roster and you are going to do the administration but you are also going to be paying for it and so that's out. Did I hear you correctly? Because I would say that if ICBI is going to be paying for it; that takes away the neutrality again.
Anik Dupont	I guess I don't preface my, when I make the comment that I am speaking on behalf of SCB or the Department of Indian Affairs or the Government of Canada. What we are saying is that, in the case of mediation at the table, we would cover the cost if we need to or if it is easier and we flow the funds through the First Nations that's what we do. What we want I guess to put out there is that we would not expect or want to overburden either the First Nations with the extra cost of the mediator. That's what I am saying is that the cost will be covered it

	won't be – at the tables saying to the First Nations – you want this go to mediation, you guys pay for it – it's like we agree it's going to mediation, this is how much it is going to cost and there are funds that are set aside to cover that and again we don't preclude on how, who is going to actually pay the bill or how the mechanics are going to be. If it's easier for the First Nations to pay themselves for whatever reason we'd flow the funds or we'd pay. It's that neutral cost to the parties and it's not even Specific Claims Branch that is paying, we are just basically getting the service. It's another area that will be covering those costs.
Justice Slade	Ms.Corbiere Did you wish to way in before our break.
Ms Corbiere	Again, Ms. Corbiere. I think that you've asked the question and you got the answer that AFN has been saying that they didn't want to see and that is absent any other process that can be done consensus base since you already got this roster could this group avail itself of that but that's the problem from the get go. They are saying oh we've consulted the First Nations. Well what First Nations, AFN has just publicly stated that they weren't involved in a joint process to develop a process of even creating a roster. I think this recent answer is exactly what AFN was recommending against so I just wanted to say that.
Justice Slade	Thank you – time for a break

BREAK

Justice Slade	Sorry to have kept you waiting, I just want to sort of give something of an assurance to both groups in the sense that we have the Crown represented here and representatives of First Nations. The context for this meeting, for the discussion of this meeting is mediation. We are not from the Tribunal's perspective proceeding on any kind of premise that mediation will occur or be recommended in every matter that comes before the Tribunal. We feel the question really is around the willingness of the parties to consider mediation were in case management the presiding Tribunal member, working with the parties, eliciting the issues, determining whether there's a real potential to narrow the issues, identifies or the parties identify an area that might lend itself to mediation. So I would not wish anybody to leave this meeting thinking from either side so to speak that the Tribunal's motive is to bully everybody into mediation in every case, it's more a matter of identifying opportunities and making recommendations for consideration by the parties. And, I feel that this discussion has been helpful because while I fully appreciate that the consideration would be on a case by case basis if the proposal or suggestion was forthcoming from the presiding case management member of the Tribunal, it's something that both parties would give fair consideration. And I think that is what I've heard all around. If there is anyone who think that is not quite where we've gotten today, I certainly welcome hearing that if anyone wants to speak to it. Assuming or anticipating that there may be a scenario where mediation is indicated, that something that the parties are prepared to consider, a couple of questions arise. One is how the parties engage in that mediation and to that end we've provided some material and in as much as we've used up most of the day, I don't know that this would be the time to look at that in particular. The discussion today has tended to inform us on what we might do to tune up the material already circulated and possibly invite some comments on that in competition with the jack hammer (laughter). But the other thing is the idea of a roster, it sounds like quite a big thing to establish a roster and I am not so sure that it is and Leslie if you had any thoughts you would like to share on creating a roster and how that can happen, it might be helpful.
Leslie MacLeod	It is Leslie MacLeod. In response to your question Justice Slade, there are a number of rosters that have been developed across the country and we've heard today about a model and it certainly can be done. Often time, and again I will speak from my own experience in developing rosters in public sector situations, where there is a public interest, often there is a call for people to present cvs and an application to be on a roster; that is sometimes followed by interviews of potential candidates and that is something that I would recommend. I have been involved in selecting people for rosters without interviews and sometimes people's paper qualifications can be quite fine and then you learn when you interview them that there

	is some dissonance or they don't have the kind of temperament perhaps that would be ideal for the situation. So there can be interviews as well, it's important that those that are going to select from the roster, I think particularly in the context of specific claims and what we heard today that there be participation by the parties in the process that is used to select people for the roster. I've been involved in panels where I have gone across the country or I should say across the province of Ontario in terms of selecting people from different centers. That is something you might want to keep in mind. Are you looking to have people, just by way of example, mediators that are operating just out of Ottawa or do you want to have a regional representation and I see some body language around this table that suggest that you would want at least to consider having at least regional representation and course that has all sort of positive implications for cultural issues, for cost-effectiveness, timeliness, etc. You have to be really clear on the qualifications and experience that you are looking for. So you have to give some forethought to what your objectives are in developing a roster, how many people you want to have on the roster, what kind of commitment you are looking for in advance from those people and this is all sometimes hard to predict because in early days you won't know exactly what the need might be. So you might want to go smaller rather than larger to begin with. You'd want to look at whether or not you will require that those mediators no matter what their level of experience or qualification get training. Get training in the specific nuances related to specific claims, get training in terms of potentially levels of consistency in how the mediation will run and having said that of course every mediator will bring his or her individual style and to some extent approach but that would be I think for the parties to give their views on, for the Tribunal to take into consideration. Of course I mention party involvement but it could be that the Tribunal simply develops the roster on its own and it makes those people available and then you would be called on to trust the expertise of the Tribunal and the good judgment of the Tribunal in developing the roster. There will be of course the issue of compensation; how will the mediators be paid or reimbursed for their services, logistic issues about where they will hold their mediation but I can imagine and envision from the discussion a kind of virtual mediation operation, a virtual mediation program that does not have to have a building and a whole lot of staff and a whole lot of support but has some management through the Tribunal and then a lot of party involvement in terms, for example, selecting from the roster, liaising directly with the mediator, figuring out dates and what not with the mediator, of course keeping in mind the timelines that would be set by the case management Tribunal member. So I think there are a lot of administrative matters that would have to be looked at but I think it is all quite achievable and it is something that you all might have specific views on in terms of the qualities you would like to see in mediators and the aspects in terms of the selection process that you think would be important, whether you are involved in the selection process or not.
Kathleen Lickers	Ms MacLeod, if I could ask you a question at this point in your presentation. What has been your experience in referencing the fact that there have been other rosters developed across the country? What is your awareness or knowledge of those rosters and their development being developed by either one of the parties or the development being having some relationship to one of the parties?
Leslie MacLeod	I am just doing a mental mapping, just going through the ones I've been involved with. So let me give you some examples. The largest roster that I've been involved in was a roster developed for mandatory mediation for the Province of Ontario for civil cases. There was a mediation committee that was developed, I was a member of that committee; and we did it through paper application and then once people were on the roster they could be selected by the parties and if the parties didn't select in time they were appointed by the Court. And so there, the ultimate users of the process, in other words plaintiffs and defendants were not specifically at the table doing the selecting. I am thinking of a Resource Ministry that had issues of dispute as between industry and environmental concerns and the ministry decided to have mediation and arbitration rosters developed throughout the province and there I went out with a representative of industry and a representative of environmental concerns and we travelled around Ontario as a threesome and interviewed people who had submitted applications. If a roster is developed by one of the parties or is very closely affiliated with

	one of the parties to the exclusion of the other then its credibility will depend on or the usefulness of that roster will depend on whether or not parties are willing to use it. So ideally, I would say it would be helpful to have people that are of sufficient credibility whether the parties are involved in the selection process or not, they will be used. Otherwise, why have a roster? So the risk you run if one party is disproportionately involved in the development of this roster is that the other party won't use it.
Justice Slade	Several have spoken of sort of a mistrust of anything that is administered or even funded by government. The reality though seems to be that if particular services provided for, it will be funded by government. Indeed, the Tribunal is funded by government as really are the Courts. I will put it as a proposition but maybe it's a question. If the Tribunal were to establish a roster, just as there would be nothing to prevent the Tribunal referring to a mediator on a roster established by Indian Affairs presumably there wouldn't be anything that would militate against the Specific Claims Branch if it was persuaded to enter mediation, using a mediator who's name appears on the Tribunal roster so to speak. We're going to give some thoughts to identifying people who might be available and qualified if that would assist toward the identification of roster mediators in whom both parties to any anticipated mediation may have confidence then we are all a little bit ahead of the game, it seems to me. I will not ask people to respond to that but it is something we are going to chew over a bit and after Justices Smith and Mainville wring my neck for proposing it. Not to mention our Registrar wondering where the money is going to come from.
Justice Smith	If you like the idea of a virtual roster, and I am getting the impression that you do, and if you are ok with the Tribunal going out and creating the virtual roster, as long as it meets all the checklist, reliability, independence, competence, all that sort of stuff then we can take the ball and run with it and then we can develop a resourcing application that allows us to fund it. That would be part of a submission to Treasury Board for funding so that the money for the mediators would come directly from that funding source through the Tribunal and not be tainted by coming from any specific branches of the Government. If you are ok with that general concept, it gives us enough to sort of inch forward checking back with you along the way if we are on the right track. If we are not on the right track, tell us now. It's ok – good.
Debbie Abbott	I was just going to confirm that I support that recommendation. I think that we really need to encourage our people to feel comfortable with the process and I know one of the things that comes forward very quickly for me is ok, another process, here we go again, we're a cottage industry and so we would like to keep this process where people feel quite comfortable with the Tribunal bringing forward the process in a good way.
Justice Mainville	I would like to add one thing to what Justice Smith just said. We are ready to develop a virtual roster and make a request for funding but I would strongly, and I say it by experience, I would strongly recommend that you continue both together your negotiations to get also things organized and appropriate funding. Because it is one thing to say that I am going to try but it doesn't mean that we're going to get it; that we will be able to get the funding.
Ron Stevenson	One observation and it flows from the point we've made about the take up in mediation will be assessed on a case by case basis. Just to raise the obvious point that sometimes building experience, finding out how mediation is used, how frequently is it resorted to might be necessary before building the apparatus. And it's related to a more general point; for us the Tribunal process isn't a continuation of the negotiation process its part and parcel of adjudication. So that with limited caution only.
Justice Slade	I think that is quite fair and most things start with baby steps and confidence building as you say Ron. But the idea of building a roster with virtual access doesn't seem to me to be that large an undertaking and if the Tribunal under its auspices can do anything to improve the confidence of the parties in mediators who may be available, of course we would hope to do that.
Ms. Lickers	I just want to be sure that, I want to be absolutely clear and understanding that when we leave this room what our responsibilities will be in carrying forward. In the Tribunal's development of a roster which I fully support, I think it's a great idea, not only because you will need and the expectations just to forecast a bit in terms of this discussion the use, the utility of providing those services and than having a ready list of individuals who would be at

	the ready to provide those services but where we began this morning in saying that there was yet another initiative underway for a different part of the process that in duplicating resources and wanting to avoid the duplication of resources is one where the department's development of a roster to service negotiation tables that will remain a different roster or have we reached a point where we are only talking about the creation of one roster and we will use our collective discussion, collective thoughts that we have been having so far around the criteria for that roster, the posting of that RFP and the responses from that RFP that would have to engage with the Tribunal. So there is more of a collective work on one roster that will serve two purposes versus back to two rosters. I just want to be clear on where we are with each other.
Justice Slade	Well something that is really one of the very challenging things about this particular assignment and secondment for all of us has been the need to work through all of these policies and laws and what have you, determining what you can and can't do in terms of spending money. I don't really see the identification of experienced mediators who would be suited to serve in advancing negotiations be they in the Specific Claims Branch process or in circumstances where the Tribunal has spotted and the parties have accepted that mediation would be maybe helpful. I don't really see and I am happy to be corrected on this but at the stage of establishing the roster, do you really need to go through all this process with a request for proposals and what have you? Initially, at least, it's a question of identifying people who both parties either trust or have no reason to distrust and if it comes down to actually using one of those people, then could it not simply be on an ad hoc basis, some arrangements tailored to the exigencies of the situation that permits the person to be appointed and get on with his or her work with the parties. It is kind of a question.
Anik Dupont	It is unfortunate that I don't have the person from our department who is kind of leading all of this but in discussions, and I take your point about the AFN participating in the process because they wanted to see where all of this was going to land. Still the conversation has continued between us and the AFN and just to take your point after we've received, after the RFP has been and we receive all the submissions we have invited the AFN again to say, once we get them all, if you want to sit down and we'll review them together as part of the committee. We are trying to be inclusive as to how we establish the roster and that is one of the things we had been thinking about is that we can do that. Technically, because I haven't been intimately involved in the creation, I believe they have been broad enough in what they are searching by way of mandate as to subject matter. I don't know if we've actually and I could be wrong so don't quote me on this, I don't think we've made it so specifically that it has to be within the confines of a Specific Claims negotiation you can only take you know. I think we've made it broad enough because we've had other departments, we have a case in B.C. where the Department of Transport has contacted us because we often deal with either aboriginal issues or technical issues so other departments come to us to see do you have a tool that we can use, or do you have an expert and that is how we do. So I would hope that it is structured in such a way and I think the phase we are in and I think it's broad enough that we could do it, I don't see what would be the impediment, I don't think we've put it so narrowly that it's only us that can use it. If the argument is there to go and take from it I'm sure arrangements can be developed to cater to that. But again I must admit I do not know the fine details of how it was written out. It is something I could certainly have someone from the organization contact you. Her name is Joelle Monmini. She is the Director General of the Negotiations East and because I am sure they would be happy to come and explain to you what the process; how the mechanics of how of it works, how they put it together and we can certainly do that.
Leslie MacLeod	It's Leslie MacLeod. If I understood Ms. Licker's question. At least a couple of things were raised by it and Justice Slade and Ms. Dupont have spoken about the contracting and the development of the roster issue with respect to the Specific Claims Branch part of the work. As I see it there is something in motion there. It's already underway and there has been perhaps not the kind of participation that there might be in the future from AFN so there is an opportunity for collaboration there and to develop ideally through consensus something that will be effective. As I understand it and Justice Slade, Justice Smith, Justice Mainville will

	correct me if I am wrong here but what we might talk about more, what I might assist with would be the process vis-à-vis the Tribunal. In order words, whatever is going to happen there with the Specific Claims Branch will happen. Then the notion that I think there is consensus about at this table is that the Tribunal will take responsibility to work on a model that builds in many of the things we have been talking about that is a virtual model that includes a roster. I can imagine two things. One that the people who are accepted on to the Specific Claims Branch roster if that goes ahead as envisioned would be potentially identical to the people, although will be separate, to the people who are on the roster for the Tribunal. It could be that some of them are on one roster and some are on the other. I think it is also possible that there may be a qualification for inclusion on the Tribunal's roster that would not be a qualification for inclusion on the Branch's roster. And what comes to mind specifically is knowledge, training with respect to substantive outcomes, precedents, court decisions what have you that might be relevant. In other words, if one of the expectation of the Tribunal is that the mediator may give a reality check, a view; then that person will have to have that kind of expertise which may or may not be the case for your roster. I don't know. I don't think there is anything inherently wrong with having two rosters which may have some overlap. I suppose, theoretically, the same mediator might continue on the same case or not. So these are all design issues that would have to be thought through but I think for our purposes we would be talking about our virtual mediation program that includes a roster that starts when the case comes to the Tribunal.
Justice Slade	(inaudible)….First Nations claimants that avoids the problems identified, well maybe we are all a bit further ahead. Miss Corbiere
Ms. Corbiere	I just have a further clarification. I look again, my focus is on the draft rules and the draft documentation put forward and are we saying, and I am hearing the Justices saying it would be great once we've come up with something that there be support from the group. Are we saying when you go to Treasury Board – like the way it is drafted now it seems to suggest that the private rosters would be funded by the parties and the mediation services of the Tribunal members may or may not be funded by the Tribunal? So I think First Nations will need to know. Because as Kathleen submitted this morning, last I checked, a lot of these First Nations can't afford the processing and Ms. MacLeod, you have the benefit of this in Ontario. If you look at the Environmental Review Tribunal process, mediation is fully covered by the Tribunal and that is one of the best advantages of it because there are people who can't afford the mediation and then you have skilled mediators that are engaged in that process. So I guess I am sort of wondering on a process basis, are we moving from this document, are we moving from that position looking at potentially at some full funding?
Justice Slade	If there is mediation by a member of the Tribunal of course that is free of charge to the parties. But the question there is Human Resources so at this moment it does not seem all that likely that members of the Tribunal, given that we are short in numbers and will remain so for a while would include active participation in mediation. So that leaves it to the private sector and it seems that everybody recognizes that most First Nations are ill equipped to fund that role but my impression is that the thought has already been given and perhaps even commitments to government funding of mediation where both parties agree to enter mediation. If that would apply in the Specific Claims Branch process I wonder why it wouldn't if you are in the Tribunal process. Probably not here with any kind of mandate to make any commitments on this sort, but you know, am I way off track by supposing that if there is funding for mediation entered by consent in one process it would be a little unusual to think that it would not be available in another process where both parties consent.
Raynald Chartrand	If I may add, I think the point that funding is lacking for the organization has been raised a number of times here. There is no doubt that we will have to go for a Treasury Board Submission eventually. But, with the climate going on right now at Treasury Board, in terms of getting additional funding and so on and so forth, we have to be very careful. It is a good idea for the Tribunal to fund all of these things but before we can say yes go ahead, we need the money in our bank account and right now we are not there yet. We won't be able to go to Treasury Board before September or October and we might not even get an answer before a few months after that. So it is a good idea, but I think we have to be very careful with the

	funding issues.
Pamela McCurry	Thank you Justice Slade. Just a few comments on some of the discussion that we've been having. I would like to repeat what Ron Stevenson laid out. I think we have to build this as we get there. There are a lot of uncertainties as we move forward and what you've clearly seen from our perspective is a certain degree of caution moving forward. From our perspective Leslie you've talked about the natural progression of things, where you start with negotiations, you move to mediation and you get to adjudication. And from a federal perspective the Tribunal is at that place through that continuum and so to a large extent that is the framework within which we are operating and it's where we are coming from. So we see a targeted use for mediation and we do hope that the mediation we get into, and obviously this will be part of our assessment, will it produce results that serve the interests of both parties. Just to help you understand perhaps where we are coming from, we do promote a step by step approach. In terms of funding we are simply not prepared, in a position whatsoever to talk about that. In a typical situation where you are in adjudication, the parties do fund mediation but we are just completely not in a position to talk about that today.
Ms Montour	Good afternoon, Eliza Montour for the record. I would I say this, I guess bluntly. I can support the Tribunal going through with a roster and the Anishinabek Nation can support that. I think we have chased each other around the mulberry bush here and we realize that INAC is going to continue on with this roster which again I would like to say that the Anishinabek Nation hasn't supported or does not support and go on record to say that as far as I know no other Nation has been consulted on the development of the roster. So I can't see our First Nations using it very often and I think that would be, what we said at the onset, a duplication of services and wasting of resources. Just a couple of comments there.
Justice Slade	Ok, well it is 4:10. Shall we call it a day and look forward to happier times. Not that the times are unhappy. Or is there anybody else who wish to contribute. Yes Ms. Abbott
Ms. Abbott	I was asked to bring forward the question – is there anything certain that we can tell our clients at this point regarding funding for Specific Claims files with the Tribunal or this there any word as to when information regarding funding will become available?
Justice Slade	Of course, the Tribunal as such is not a funding institution. So we'll have to turn it over to government representatives.
Anik Dupont	Yes there will be funding available for First Nations and there is a working group between our funding services and representatives of the AFN who are developing funding guidelines. A lot of our information is going to be on our website as it is for the entire process and so there is work and there will be funding made available. We hope to have that finalized shortly because tomorrow is the opening. Again, resourcing is a common theme and a common struggle that all of us together will be faced in it. Just to put people's mind at ease there is some funding that has been made available for the participation in the Tribunal and again, I guess just to kind of go back to a point, we have to see how we go along. In discussions that we have continually on the process, a lot of discussion and when Justice at Last was developed – I make the analogy to people that it was developed at 60,000 feet and we're all now landed on the runway and we're faced with real hard issues every day of how this is all working out and I think that at the end of the day we're all working towards the same goal and that is to facilitate and expedite the settlement of specific claims and that is our ultimate goal and I think we share all of that and so it is actually good to have these types of discussions. So we don't have everything mapped out and sometimes we look like we are stumbling but it's just that we are trying to get everything up to par and at least get people engaged and involved in the process with the appropriate tools. That is what I wanted to say about the work we are doing and the importance of having these discussions. Thank you.
Kathleen Lickers	I just want to close by extending my thank you to the Tribunal and the colleagues around the table for the opportunity to explore this element of the Tribunal's mandate as my experience was in October it was illuminating for a number of issues and we'll only know the true test of all of this once the Tribunal is underway. So I wish you much success tomorrow and the days ahead in undertaking your important work because it represents a body in Canada was a long time in coming and people welcome the opportunity for the impartiality of a process,

	into this process and mediation being the subject of our discussion today is but one component of that. In going forward I am encouraged by the further discussion on a decision but the further thinking that might go in to the creation of the Tribunal's virtual roster and certainly to the extent that the Assembly of First Nations can be supportive in the fiscal discussions that would go forward or however that needs to go forward in the future. We would be very supportive of that. I cannot answer for the Assembly this afternoon in going forward from today in the further shaping of the roster to be developed by the department for the reasons which we expressed in our written material; for all of the reasons around impartiality and neutrality given the relationship of the parties but I am encouraged and thank you Ms. MacLeod for your perspective and expertise that you provided in your material as well as to the table today and we will certainly look to some of those examples that you provided about roster development where a party was involved. That may further illuminate discussions going forward so thank you for that. Thank you very much
Justice Slade	Thank you and we look forward to getting on with it; lurching along, stumbling here and there and getting back up and off we go. Thanks.