Re-Engaging

Five-Year Review of the *Specific Claims Tribunal Act*

Report

Benoît Pelletier, Ministerial Special Representative

SEPTEMBER 2015

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The opinions and views outlined in this independent report are those of Mr. Benoît Pelletier, the Ministerial Special Representative on the Five-Year Review of the *Specific Claims Tribunal Act*. They are not necessarily the opinions or views of the Government of Canada.

LETTER TO THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT

Ottawa, September 29, 2015

RE: Report of the Ministerial Special Representative on the Five-Year Review of the *Specific Claims Tribunal Act*

Dear Minister:

Section 41 of the *Specific Claims Tribunal Act* requires that you, in your capacity as Minister of Aboriginal Affairs and Northern Development, undertake a review of the mandate and structure of the Specific Claims Tribunal, the efficiency and effectiveness of its operation, and other matters related to the Act, within a year of the Act's fifth anniversary. Section 41 also provides that First Nations be given an opportunity to make representations as part of that review.

In the fall of 2014, I was appointed the Ministerial Special Representative tasked with overseeing, facilitating and co-ordinating the legislated Five-Year Review of the *Specific Claims Tribunal Act*.

During the consultation period, which ended on May 15, 2015, I received representations from First Nations, First Nations organizations, and stakeholders. I travelled across the country and attended numerous meetings to hear and collect feedback. In addition, interested parties were provided with an opportunity to make online submissions through the Aboriginal Affairs and Northern Development Canada website, as well as via email. An engagement paper was also posted on the Department's website to facilitate feedback.

Overall, this engagement exercise, including the consultative process, elicited considerable participation across Canada, and was inclusive and receptive to all. More specifically, it was respectful towards First Nations, and was inspired by the spirit of reconciliation enshrined in both section 35 of the *Constitution Act, 1982* and in the *Specific Claims Tribunal Act*.

Please find attached the resulting report, entitled *Re-Engaging*. It identifies and addresses the many issues raised at meetings and in written correspondence, and reviews and discusses what I heard during the engagement process. It also contains a series of recommendations, which I believe will help you in fulfilling requirements of the *Specific Claims Tribunal Act* in relation to this Five-Year Review. My report addresses almost all — if not all — issues raised by the engagement paper entitled *Seeking Comments on the Five-Year Review of the* Specific Claims Tribunal Act.

That being said, I would like to emphasize the fact that many of the First Nations participating in this consultation expressed an interest in having my report made public before you submit your own report to Cabinet for approval, and to Parliament. They would also like their discussions to continue with Aboriginal Affairs and Northern Development Canada before you table your report — and of course beyond. I am confident that you will take these requests into consideration with an open mind.

I am also confident that the Five-Year Review over which I presided will result in a process of re-engagement from the federal government and First Nations when it comes to the fair, honourable and timely resolution of specific claims.

I would like to thank you for the opportunity to lead this important engagement process, and for the confidence you placed in me.

Sincerely,

Benoît Pelletier, O.Q., Ad. E., Doctor of Laws, Full-time Professor
Ministerial Special Representative, Five-Year Review
of the *Specific Claims Tribunal Act*

EXECUTIVE SUMMARY

Subsection 41(1) of the *Specific Claims Tribunal Act* provides that the Minister of Aboriginal Affairs and Northern Development shall undertake a review, (the "Five-Year Review"), of the mandate and structure of the Specific Claims Tribunal, of the efficiency and effectiveness of its operation, and of any other matters related to the Act, within one year of the fifth anniversary of the Act's coming into force. Subsections 41(2) and 41(3) of the Act provide that the Minister shall cause to be prepared, and sign, a report to be submitted to each House of Parliament.

This report, prepared by the Ministerial Special Representative, reflects the above-noted requirements. Throughout the engagement period for this Five-Year Review, First Nations were given an opportunity to make representations as outlined in subsection 41(1) of the *Specific Claims Tribunal Act*. The window for accepting submissions closed on May 15, 2015, and included a broad cross-section of First Nations, First Nations organizations, and stakeholders. During the engagement process, interested parties expressed various concerns regarding the Act and the Specific Claims Tribunal itself, as well as the filing, assessment and negotiation of specific claims.

A number of recommendations have been made throughout this report, under four general categories: (1) items for future consideration; (2) joint exploratory discussions; (3) changes to the *Specific Claims Tribunal Rules of Practice and Procedure* ("*Rules of Practice and Procedure*"); and, (4) other recommendations. The various recommendations contained in this report are summarized on pages 90 to 92.

None of this report's recommendations proposes immediate changes to the *Specific Claims Tribunal Act*, primarily because nothing raised during the consultation process warranted any pressing change. Secondly, it is not the Act itself that is the issue, as much as the way in which the parties and the Tribunal proceed, pursuant to the *Rules of Practice and Procedure*. Thirdly, the majority of representations were not about the Act itself, but rather about the Department's internal process. The latter subject is raised in Part Two of this report, entitled *Filing, Assessment and Negotiation of Claims at the Specific Claims Branch.*

That being said, this report does propose joint exploratory discussions and items for future consideration, which may result in eventual changes to the Act.

Any eventual changes to the *Specific Claims Tribunal Act*, including those that may be derived from this report, must be undertaken in cooperation with First Nations. Such cooperation is essential to the long-term reconciliation of both parties.

Overall, the report encourages re-engagement between the Government of Canada and First Nations. This would include comprehensive implementation of the principles contained in this report, regarding the fair, effective and efficient resolution of specific claims, in accordance with commitments made in 2007 as part of the *Justice At Last* initiative.

This report ultimately argues for a renewed and more positive process involving conciliation and engagement between the Government of Canada and First Nations, which has in turn inspired the report's title: *Re-Engaging*.

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INTRODUCTION

The principles upon which Canada's treaties with First Nations are founded, and which form the basis of the relationship between the Crown and First Nations in what is now Canada, were first articulated in the *Royal Proclamation* of 1763.[1] Since Canada's Confederation in 1867, these fundamental principles have guided the federal government's treaty-making with First Nations, have been enshrined in the *Indian Act*,[2] have been entrenched in the *Constitution Act, 1982*,[3] have been reiterated as public policy, and have been clarified through numerous court decisions. Together, these measures protect Canada's First Nations from wrongful alienation of their lands or mismanagement of other assets, and ensure that they are adequately compensated for transactions involving these assets.

As described in Canada's *Specific Claims Policy and Process Guide* ("*Specific Claims Policy*"),[4] "specific claims" are claims made by First Nations against the federal government with regard to the administration of land and other First Nations assets, and the fulfilment of Indian treaties. The *Specific Claims Policy* is an alternative to litigation before the courts, and is intended to provide an effective mechanism for the resolution of claims pertaining to First Nations' lands or assets, and/or breaches of the *Indian Act* or other statutory obligations. As the *Specific Claims Policy* states:

> The primary objective of the federal government with respect to the Specific Claims Policy is to discharge its lawful obligation, as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the federal government. The Specific Claims Policy establishes the principles and process for resolving specific claims through negotiation.[5]

The *Specific Claims Policy* is special in that, in 2008, its key elements were defined and delineated in the *Specific Claims Tribunal Act*.[6] The latter established the Specific Claims Tribunal as an independent body, with the authority to make binding decisions regarding the validity of specific claims, and the compensation owed to First Nations claimants.[7]

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[1] *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No.1.
[2] *Indian Act*, R.S.C., 1985, c. I–5.
[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (U.K.), reprinted in R.S.C., 1985, App. II, No. 44.
[4] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Policy and Process Guide*. Ottawa: Minister of Indian Affairs and Northern Development, 2009. Available online at: http://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506#chp4.
[5] *Ibid.,* p. 5.
[6] *Specific Claims Tribunal Act,* S.C. 2008, c. 22.
[7] *Ibid.*, Preamble.

At the time, the creation of the Specific Claims Tribunal was considered a significant advance in the resolution of specific claims. The Government of Canada and First Nations shared an expectation that the Tribunal would provide a simpler, faster approach to final and conclusive decisions.

With the passage of almost seven years since the *Specific Claims Tribunal Act* came into force on October 16, 2008, it is time to consider whether those expectations have been realized, and how the process might be improved.

That being said, it would be inappropriate in a document such as this to fundamentally review the mandate, structure and functioning of a Tribunal that seems, by and large, to be appreciated by First Nations. In fact, despite certain perceived flaws, the existence of the Specific Claims Tribunal itself has the full support of First Nations. They are proud of it, and have nothing but praise for the Chairperson and other members of the Tribunal. First Nations essentially support the Tribunal's standing and authority.

Further, it should not be forgotten that the *Specific Claims Tribunal Act* itself was developed jointly by the Government of Canada and the Assembly of First Nations. The process that led to joint development of the *Specific Claims Tribunal Act* deserves our respect. At the same time, this respect does not prevent my making recommendations aimed at improving the overall structure, functioning, efficiency and effectiveness of the Tribunal, in keeping with my mandate. First Nations want the current situation to change. They are dissatisfied with the way Canada deals with specific claims, and have expressed that dissatisfaction loudly and clearly.

The relationship between the federal government and the Assembly of First Nations is a crucial factor in any re-engagement process. It must be founded upon genuine respect for the bilateral engagement enshrined in the Political Agreement of November 27, 2007 ("Political Agreement").[8] Moreover, the Government of Canada should renew its engagement based on the *Specific Claims Action Plan: Justice At Last* ("*Justice At Last* initiative").[9]

The re-engagement I hope to see from the Government of Canada and First Nations falls largely within four major categories or approaches:

[8] Political Agreement of November 27, 2007, between the Honourable Chuck Strahl and AFN National Chief Phil Fontaine, in relation to specific claims reform.
[9] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Action Plan: Justice At Last*. Ottawa: Minister of Indian Affairs and Northern Development, 2007.

1. **Items for future consideration.** An array of important subjects and concerns that the Government of Canada has an interest in considering in future.

2. **Joint exploratory discussions.** The federal government should be willing to re-engage in exploratory discussions with First Nations, which would provide opportunities for regular consultation on implementation of the *Specific Claims Tribunal Act*.[10]

3. **Changes to the *Specific Claims Tribunal Rules of Practice and Procedure*[11] ("*Rules of Practice and Procedure*").** In keeping with section 12 of the *Specific Claims Tribunal Act*, it is suggested that the Tribunal's committee take into consideration this report's recommendations for changes to the *Rules of Practice and Procedure*.

4. **Other recommendations**. This category includes recommendations not covered in the approaches mentioned above.

It should be noted that, in this report, I do not recommend any immediate or urgent changes to the *Specific Claims Tribunal Act*, given that representations made during the consultation process do not reflect any such necessity. Considering the representations made during consultations, I have come to the conclusion that it is not the Act itself that is an issue, so much as the way in which the parties conduct themselves before the Tribunal, and the way in which the Tribunal proceeds pursuant to its *Rules of Practice and Procedure*. In addition, it should be noted that most of the issues raised by participants during the engagement process were external to the Act per se; instead, they related to the administrative procedures of the Specific Claims Branch. These latter issues are discussed in detail in Part Two: *Filing, Assessment and Negotiation of Claims at the Specific Claims Branch*.

As noted above, however, this report does contain recommendations within the context of joint exploratory discussions, or items for future consideration. These recommendations could ultimately result in amendments to the *Specific Claims Tribunal Act*. If that were to be the case, I propose that these changes — and any other changes to the Act — be discussed between the federal government and First Nations before coming into force.

[10] The composition, membership and terms of reference for the proposed joint exploratory discussions should be developed by the federal government, First Nations and their representative organizations.
[11] *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

PART ONE: THE *SPECIFIC CLAIMS TRIBUNAL ACT*[12]

The legacy of historical federal legislation continues to have an impact on First Nations' communities. Specific claims seek to resolve the lingering effects of historical wrongs against First Nations — wrongs often rooted in outmoded ideas, legislation and policies that Canada has since acknowledged and made a commitment to redress. Resolving specific claims in Canada is thus in the public interest, and will provide First Nations with greater legal certainty and peace of mind, while also clearing the way for greater economic and community development.

The Specific Claims Tribunal is crucial to resolution of many historical grievances, and was the outcome of a process of engagement and genuine creativity between the federal government and First Nations. As an adjudicative authority, it remains plugged into the extraordinary cultural diversity of First Nations — a cultural diversity that can sometimes make it difficult to effectively resolve specific claims.

In this section, I will examine a number of representations made during the engagement process regarding the mandate and structure of the Tribunal, the efficiency and effectiveness of its operation, and other matters related to the *Specific Claims Tribunal Act*.

THEME 1: ENGAGEMENT PROCESS

Commencing in the fall of 2014, a legislative review was undertaken by the Minister of Aboriginal Affairs and Northern Development, in accordance with subsection 41(1) of the *Specific Claims Tribunal Act*, which requires that the Minister conduct a review of the mandate, structure and operations of the Tribunal within one year of the fifth anniversary of its coming into force (i.e., October 16, 2013). This report is intended to assist the Minister in fulfilling the requirements of section 41 of the *Specific Claims Tribunal Act*, and addresses:

- the mandate and structure of the Tribunal;
- the efficiency and effectiveness of the Tribunal's operation; and
- other matters related to the Act considered appropriate by the Minister.[13]

The *Specific Claims Tribunal Act* requires that First Nations be given an opportunity to make representations[14] under the review process, as a legislative commitment from the Government of Canada. As part of the review, and under

[12] See Theme 2 of Part One: *Historical and Legislative Background to the* Specific Claims Tribunal Act.
[13] *Specific Claims Tribunal Act*, subsection 41(1).
[14] *Ibid*.

the terms of the Political Agreement, the Assembly of First Nations was also assured that it would be able to participate in the review.

Upon completion of the review, the Minister must prepare a report setting out a statement of any changes to the *Specific Claims Tribunal Act* that he or she recommends, including any changes to the Tribunal's functions, powers or duties.[15] The *Specific Claims Tribunal Act* requires that the Minister submit, to both the House of Commons and the Senate, a copy of the report on any of the first 90 days on which that House is sitting after the Minister signs the report. The Act further requires that each House refer the report to the appropriate House Committee.[16]

In the fall of 2014, the Minister of Aboriginal Affairs and Northern Development appointed me to conduct this review, and to lead an engagement with First Nations and other interested parties. In my role as Ministerial Special Representative, my work included holding meetings with the various parties involved with, or sharing an interest in, the Specific Claims Tribunal. I was also tasked with taking their suggestions into consideration when it came to determining how the Tribunal process could be improved. Engagement was undertaken through various means, including face-to-face meetings with First Nations and other interested parties, by email, and through other online tools.

As part of the engagement process, a paper seeking First Nations' input was posted on the Aboriginal Affairs and Northern Development Canada ("AANDC" or "the Department") website in mid-January 2015. The web material was initially to be posted for a period of three months, but was extended an extra month to May 15, 2015, in response to requests from interested parties for additional time to make submissions. Respondents were invited to provide their comments using an online comment box, by email, or by regular mail.

A social media campaign was also launched to increase public awareness of the review. The Assembly of First Nations publicized the review broadly as well, and convened two meetings of presentations to an expert panel (one in Toronto, and one in Vancouver) to seek input and explore the subject of the review.

In addition to web-based engagement and reply options, letters were sent from Minister Bernard Valcourt to the Chairperson of the Specific Claims Tribunal, the Assembly of First Nations National Chief, claimants and interveners involved in claims before the Tribunal, and several other Aboriginal organizations, informing them of the Five-Year Review, and inviting their participation through face-to-face meetings with the Ministerial Special Representative, if they so desired.

During the Five-Year Review engagement process, I met with the following First Nations, First Nations organizations, and other interested parties, to hear their

[15] *Ibid.*, subsection 41(2).
[16] *Ibid.*, subsection 41(3).

comments and receive their written submissions on the *Specific Claims Tribunal Act*, and their experiences with specific claims and the related processes:[17]

Feb. 20: The Honourable Justice Harry Slade (Specific Claims Tribunal) — Ottawa, ON
Feb. 26: Chief Ralph Dick (We Wai Kai First Nation) — Vancouver, BC
Feb. 27: Chief Wilfred Adam (Lake Babine First Nation) — Vancouver, BC
Feb. 27: The Union of British Columbia Indian Chiefs — Vancouver, BC
Mar. 10: The Assembly of First Nations — Expert Panel — Toronto, ON
Mar. 11: Chief Roland Twinn (Sawridge First Nation) — Edmonton, AB
Mar. 12: Boudreau Law (representing the Fisher River Cree Nation) — Winnipeg, MB
Mar. 12: David Chartrand (President, Manitoba Métis Federation) — Winnipeg, MB
Mar. 13: Gary Lipinski (President, Métis Nation of Ontario) — Toronto, ON
Mar. 18: Chief Matthew Todd Peigan (Pasqua First Nation) — Prince Albert, SK
Mar. 18: The Federation of Saskatchewan Indian Nations — Prince Albert, SK
Mar. 18: Chief David Scott (Kinistin Saulteaux Nation) — Prince Albert, SK
Mar. 20: Paul Williams (legal counsel – Aundeck Omni Kaning First Nation) — Toronto, ON
Mar. 25: Chief Christian Awashish (Atikamekw d'Opitciwan) — Quebec City, QC
Mar. 31: The Honourable Justice Harry Slade (Specific Claims Tribunal) — Ottawa, ON
Apr. 7: Peter DiGangi (Algonquin Nation Secretariat) — Gatineau, QC
Apr. 9: Chief Patricia Bernard (Madawaska Maliseet First Nation) — Edmunston, NB
Apr. 21: Jameela Jeeroburkhan, David Schulze, Marie-Ève Dumont, Nathan Richards and Denis Brassard (Dionne Schulze S.E.N.C. Attorneys) – Montréal, QC
May 4: National Chief Perry Bellegarde (Assembly of First Nations) — Ottawa, ON
May 11: Jerome Slavik (Ackroyd LLP) — Conference call
May 12: National Claims Research Directors Meeting — Ottawa, ON

The following is a list of written submissions that were received during the consultation period:

[17] While my objective was to meet personally with as many parties as possible who had expressed an interest in the review, some participants provided written submissions despite not being able to meet in person.

Author	Date of Submission	Title
Algonquin Nation Secretariat	March 10, 2015	Specific Claims and the *Specific Claims Tribunal Act*: Five Years Later
	April 7, 2015	Presentation to Mr. Benoît Pelletier, Minister's Special Representative, Aboriginal Affairs and Northern Development Canada, Specific Claims Tribunal Review
Assembly of First Nations	May 15, 2015	Specific Claims Review: Expert Based – Peoples Driven, Independent Expert Panel Report
Blood Tribe	March 11, 2015	Five-Year Review of the *Specific Claims Tribunal Act* (summary letter)
	March 24, 2015	Cover Letter and The Blood Tribe's Response and Comments on the Five-Year Review of the *Specific Claims Tribunal Act*
Canadian Bar Association	May 7, 2014	Letter sent by Tamra Thomson to Senator Day and James Rajotte, in its English and French versions
	April 2015	*Specific Claims Tribunal Act* Five-Year Review
Chief Justice Harry Slade and Alisa Lombard, Legal Counsel (on behalf of the Specific Claims Tribunal)	May 15, 2015	Submission to Dr. Benoît Pelletier, the Minister's Special Representative Respecting the Tribunal's Five-Year Review undertaken pursuant to section 41 of the *Specific Claims Tribunal Act*

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Conseil Tribal Mamuitun	Mars 2015	"Justice menacée" – Commentaires destinés au Canada concernant l'examen quinquennal de la *Loi sur le Tribunal des revendications particulières*
Innu Takuaikan Uashat Mak Mani-Utenam	April 2015	Réponse de Innu Takuaikan Uashat mak Mani-Utenam aux "Commentaires relatifs à l'examen quinquennal de la *Loi sur le Tribunal des revendications particulières*"
David Knoll (Knoll & Co.)	March 12, 2015	Letter to Minister's Special Representative Benoît Pelletier *re:* Five-Year Review of *Specific Claims Tribunal Act*
Federation of Saskatchewan Indian Nations	March 10, 2015	Five-Year Review – *Specific Claims Tribunal Act* (SCTA) (presented to the Expert Panel)
	April 14, 2015	*Specific Claims Tribunal Act* (SCTA) Submission for Five-Year Review
Fisher River Cree Nation	March 23, 2015	Letter to Mr. Benoît Pelletier *re: Specific Claims Tribunal Act* – Five-Year Review
G. Rangi Jeerakathil (MLT)	April 15, 2015	Five-Year Review of the *Specific Claims Tribunal Act*
Garwill Law Professional Corporation and Woods Lafortune, LLP	April 13, 2015	*Specific Claims Tribunal Act* Five-Year Review

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Jameela Jeeroburkhan (Dionne Schulze)	May 4, 2015	Examen quinquennal de la *Loi sur le Tribunal des revendications particulières* (LTRP) – Commentaires des Abénakis d'Odanak et de Wôlinak
Jason Madden (Pape Salter Teillet LLP)	March 12, 2015	*Métis Nation of Ontario Meeting on the Specific Claims Policy Review*
Jerome Slavik	May 14, 2015, at 11:49 a.m. May 14, 2015, at 12:16 p.m.	Email sent by Jerome Slavik to the attention of Mr. Benoît Pelletier Email sent by Jerome Slavik to the attention of Mr. Benoît Pelletier
Lake Babine Nation	Received February 27, 2015	Recommendations on the Five-Year Review Based on LBN's Experience
Manitoba Métis Federation Inc.	October 3, 2014 March 11, 2015	Letter to Minister Valcourt re: *Métis Consultation on Renewing the Federal Comprehensive Land Claims Policy* Presentation to Minister's Special Representative on the Renewal of the Federal Specific Claims Policy
National Research Directors	May 12, 2015	National Research Directors Submission to Five-Year Review of the *Specific Claims Tribunal Act*
Nlaka'Pamux Nation Tribal Council	March 25, 2015	Letter to Mr. Benoît Pelletier *re: Specific Claims Tribunal Act* – Five-Year Review
Paul Williams (Lawyer)	February 12 and March 19, 2015	Comments for the Five-Year Review of the *Specific Claims Tribunal Act*

	March 23, 2015	Letter to Mr. Benoît Pelletier following their meeting on the Five-Year Review of the *Specific Claims Tribunal Act*
Sawridge First Nation	March 11, 2015	Speaking Points for a Meeting with Ministerial Special Representative Benoît Pelletier and Letter to Prime Minister Stephen Harper
Union of British Columbia Indian Chiefs	April 15, 2015	Email sent by Jody Woods to the attention of Mr. Benoît Pelletier
	March 26, 2015	The Right to be heard: A Principles-Based Review of the *Specific Claims Tribunal Act*
	March 8, 2015 March 9, 2015	(a) Open Letter to Prime Minister Stephen Harper (b) In Bad Faith: *Justice at Last* and Canada's Failure to Resolve Specific Claim
We Wai Kai Nation	Received February 26, 2015	Specific Claims Tribunal Reasons on Application for Tsleil-Waututh Nation

It is important to note from the outset that, for the purposes of this report, I considered not only the observations of First Nations, First Nations organizations and various stakeholders, but also how the Government of Canada views the specific claims program. This, I believe, allowed for a well-rounded understanding of the subtleties and issues affecting this particular program.

That being said, I am fully aware that the Crown has specific duties under the Canadian Constitution. The Crown also has a responsibility to seek inspiration from international human rights instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples*.[18] These obligations or responsibilities should be duly taken into account when it comes to the specific claims process.

[18] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html [accessed June 3, 2015].

While there were a number of individual concerns and frustrations in relation to the Tribunal's processes, many of the same concerns were raised repeatedly, both during our meetings and in the volume of written submissions received. The report summarizes these common concerns under each of the main "themes" of the Five-Year Review, (as identified in section 41 of the *Specific Claims Tribunal Act),* following which I offer my analysis of the issue and my related recommendations.

This report is based on what I heard during these meetings, and what was submitted in writing, and contains recommendations as to how the Tribunal and its processes might be improved. A number of statements and questions are laid out below, although these are not the only comments that can be made with regard to each of the areas I reviewed.

This report is not intended to be comprehensive, exclusive of other potential considerations, or representative of any proposals or commitments from the Government of Canada for potential amendments to the existing legislation or related processes. In other words, the current report should not be viewed as a commitment by the Minister to recommend or make any amendment to existing legislation and/or the *Specific Claims Policy*.

Further, this report and its author are independent of the federal government. The opinions, comments and recommendations contained herein are accordingly mine, in my role as Ministerial Special Representative in relation to the Five-Year Review of the Specific Claims Tribunal.

This report is highly anticipated by many First Nations, First Nations organizations, and stakeholders.[19] Many parties have asked that this document be made public — a request that would be fulfilled at the Minister's discretion. Moreover, it is expected that First Nations and other interested parties will want to engage with Aboriginal Affairs and Northern Development Canada following the submission of my report and the tabling of the Minister's report. I hope the Minister will give serious consideration to this.

The engagement process and this report are just one step in what I expect will become an ongoing and evolving dialogue between all parties in relation to the Tribunal and specific claims. To facilitate this collective discourse, the Political Agreement is a possible model, representing a proven way of working together with First Nations. I sincerely hope that this review will provide a basis for an ongoing respectful and constructive relationship between the federal government and First Nations.

[19] I make a distinction between First Nations and First Nations organizations on the one hand, and stakeholders on the other. This distinction is based on the fact that First Nations and their representatives are not simply stakeholders — they are rights holders.

THEME 2: HISTORICAL AND LEGISLATIVE BACKGROUND TO THE SPECIFIC CLAIMS TRIBUNAL ACT

There have been numerous calls over the years for an independent body to adjudicate specific claims. In 1947, the Special Joint Committee of the Senate and House of Commons recommended, "That a commission [...] be set up with the least possible delay to enquire into the terms of the Indian treaties [...] and to appraise and settle in a just and equitable manner any claims to grievances arising thereunder."[20]

In 1961, this recommendation was reiterated by another Special Joint Committee of the Senate and House of Commons.[21]

In 1962, Prime Minister Diefenbaker's Cabinet approved draft legislation, which was never introduced in the House of Commons, due to an election call in 1963.

In 1963, although Prime Minister Pearson introduced Bill C-130, the *Indian Claims Act*,[22] he later withdrew the Bill to allow for consultation with First Nations.

In 1965, Prime Minister Pearson's government reintroduced the legislation. However, it eventually died on the order paper, because of an election that year.

In 1969, the federal government stated the importance of recognizing its legal obligations to First Nations, including the fulfilment of treaties.[23]

In 1973, this position was confirmed in the *Statement on Claims of Indians and Inuit People*.[24] The *Statement* was based on the *Calder*[25] decision, in which the Supreme Court of Canada recognized two broad categories of claims: "comprehensive claims", which are based on extant Aboriginal titles; and "specific claims", which arise when treaty or other legal obligations have not been honoured. At that time, the number of specific claims totalled 1,308.

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[20] Special Joint Committee of the Senate and the House of Commons, *Minutes of Proceedings and Evidence*, No. 41, 9 July 1947, Recommendation 2.
[21] Joint Committee of the Senate and the House of Commons on the *Indian Act*, *Minutes of Proceedings*, No. 16, May 30 to July 7, 1961.
[22] *An Act to provide for the disposition of Indian Claims*, Bill C-130. First Session, Twenty-Sixth Parliament, 12 Elizabeth II, 1963. First Reading, December 14, 1963.
[23] Canada. Department of Indian and Northern Affairs, "Statement of the Government of Canada on Indian Policy (The White Paper, 1969)". Presented to the First Session of the Twenty-eighth Parliament by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development. Ottawa, 1969. Online at: http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191.
[24] Department of Indian Affairs and Northern Development, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People", *Communiqué*, 8 August 1973.
[25] *Calder v. Attorney-General of B.C.,* [1973] S.C.R. 313.

In 1974, Canada created formal processes to address both types of claims, through the newly created Office of Native Claims, which included the Specific Claims Branch within the Department of Indian Affairs and Northern Development.

In 1979, an unpublished federal government report recommended the creation of an independent body that would, for all intents and purposes, perform as a specialized court.

In 1982, the current *Specific Claims Policy* was clearly outlined in the publication *Outstanding Business — A Native Claims Policy*.[26]

The *Specific Claims Policy* and program, however, were not without their detractors. Some First Nations and others felt that the process was neither independent nor impartial, and that federal control over the process represented an inherent conflict of interest. In 1983, the Penner Report on Indian Self-Government[27] recommended that an independent body for the resolution of specific claims be established, and that Canada work jointly with the Assembly of First Nations to develop a legislative policy.

Further calls for reform followed the crisis at Oka, Quebec, during the summer of 1990, when protesters clashed with police over proposals to develop lands that were the subject of a dispute. That same year, the House of Commons Standing Committee on Aboriginal Affairs reiterated the need for an independent claims body in its report *Unfinished Business: An Agenda for All Canadians in the 1990's*.[28]

Prime Minister Mulroney responded to calls for reform of the specific claims process, by announcing the creation of a joint working group by which representatives of the Assembly of First Nations and the Department of Indian Affairs and Northern Development would develop an independent dispute-resolution mechanism. The result was the establishment in 1991 of the Indian Specific Claims Commission. Upon request by a claimant First Nation, the Commission was mandated to provide mediation services and to conduct inquiries into specific claims that had not been accepted for negotiation by the federal government. Its powers, however, were limited to making recommendations; it had no authority to make binding decisions regarding specific claims.

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[26] Canada. Department of Indian Affairs and Northern Development. *Outstanding Business: A Native Claims Policy: Specific Claims*. Ottawa: Minister of Indian Affairs and Northern Development, 1982.

[27] House of Commons, Special Committee on *Indian Self-Government, Indian Self-Government in Canada: Report of the Special Committee* ("Penner Report"), 1983.

[28] Canada. Parliament. Senate. Standing Committee of Aboriginal Affairs. *Unfinished Business: An Agenda for All Canadians in the 1990s*, Ottawa: Minutes of Proceedings and Evidence, Issue No. 20, 31 January-21 February 1990, p. 3.

Calls for further reforms persisted. In its annual reports, the Indian Specific Claims Commission repeatedly requested an independent body with the power to make binding decisions, stating that it must also be seen as a viable, cost-efficient, and expeditious alternative to litigation. Similarly, the 1996 Final Report of the Royal Commission on Aboriginal Peoples[29] recommended an overhaul of the specific claims process and urged the establishment, by federal legislation, of a new, independent tribunal with powers to adjudicate and issue binding decisions for specific claims. These recommendations were also made in 1992, and again in 1996, by two joint working groups of the Assembly of First Nations and the Government of Canada.

In 1998, the federal government formally responded to the Final Report of the Royal Commission on Aboriginal Peoples with a commitment, *inter alia*, to create an independent specific claims body in cooperation with First Nations. That same year, the Canadian Bar Association recommended "the creation of a legislative-based Specific Claims Tribunal with a clearly defined mandate to adjudicate the resolution of specific claims."[30]

In 2002, Bill C-6, the *Specific Claims Resolution Act*,[31] was tabled in the House of Commons, proposing a number of reforms, including the establishment of an independent commission to negotiate specific claims, as well as an independent tribunal with the power to make binding decisions with respect to claim validity, and to determine compensation to a maximum value of $10 million. Although Bill C-6 was passed by both the House of Commons and the Senate, and was given Royal Assent in November 2003, the legislation was not supported by the Assembly of First Nations, and thus never came into force.

In 2006, the Standing Senate Committee on Aboriginal Peoples conducted a thorough review of the specific claims process and issued its recommendations in its final report, *Negotiations or Confrontations: It's Canada's Choice*.[32] In this report, the Committee focused on the lack of available independent adjudication and, among other things, recommended that the government create an independent claims court with true decision-making powers.

In June 2007, Prime Minister Harper and Phil Fontaine, National Chief of the Assembly of First Nations, jointly announced the *Justice At Last* initiative. This included fundamental reforms designed to accelerate the resolution of specific

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[29] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. Ottawa: Royal Commission on Aboriginal Peoples, 1996.
[30] A.R. Thompson, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An agenda for action* (Ottawa: Canadian Bar Association Committee on Aboriginal Rights in Canada, 1998).
[31] Bill C-6: *The Specific Claims Resolution Act*, 10 October 2002. See: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=E&ls=c6&Parl=37&Ses=2&source=library_prb.
[32] Canada. Parliament. Senate. Standing Committee on Aboriginal Peoples. *Negotiation of Confrontation: It's Canada's Choice*. Ottawa: Standing Committee on Aboriginal Peoples, 2006.

claims, provide justice for First Nations claimants, and provide certainty for all Canadians. The *Justice At Last* initiative acknowledged First Nations' concerns that the existing process was too slow, that there was a significant backlog of claims stuck in the assessment phase, and that some claims had remained unresolved for 20 years or more.

The *Justice At Last* initiative included several noteworthy reforms to the claims-resolution process, under the following four pillars:

- **Impartiality and fairness.** Creation of an independent claims tribunal capable of making binding decisions with regard to the validity and compensation of specific claims. This would bring greater fairness to the process.
- **Greater transparency.** More transparent arrangements for financial compensation, through dedicated funding for settlements.
- **Faster processing via three-year timeframes.** Improving internal government procedures, including practical measures to ensure faster processing of smaller claims, and more flexibility for extremely large claims.
- **Better access to mediation.** Refocusing the work of the Indian Specific Claims Commission to make better use of its services in dispute resolutions, once the new tribunal is in place.[33]

In the fall of 2007, the Government of Canada tabled Bill C-30, the *Specific Claims Tribunal Act*. The Act was given Royal Assent in June 2008, and came into force on October 16, 2008. The legislation created an adjudicative body called the Specific Claims Tribunal.[34] The Tribunal was clearly intended as a key part of an overall action plan designed to improve and accelerate the resolution of specific claims across the country.

The *Specific Claims Tribunal Act* is unique in that it entrenches government policy in legislation. Claims may be filed by the First Nation(s) suffering a purported loss. The Tribunal is an alternative to litigation before the courts, with a mandate to decide issues of validity and compensation (up to $150 million per individual claim) for specific claims. Tribunal decisions on compensation cannot include punitive damages, compensation for cultural and spiritual losses, or non-monetary compensation, such as land and resources.[35]

First Nations are also free to take their claims to other decision-makers, including courts, for resolution at any time, if they choose. The advantage of the Tribunal over other courts, of course, is that the Tribunal cannot apply any rule or doctrine that would have the effect of limiting claims against Canada, due to the passage

[33] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Action Plan: Justice At Last*. Ottawa: Minister of Indian Affairs and Northern Development, 2007, pp. 9 and 10.
[34] *Specific Claims Tribunal Act*, section 3. This section establishes the Specific Claims Tribunal.
[35] *Federal Courts Act*, R.S.C., 1985, c. F-7, paragraphs 20(1)(*a*) and 20(1)(*d*).

of time (limitations) or undue delay (laches). Tribunal decisions must also be guided by the provisions of the *Specific Claims Tribunal Act* and general legal principles.

Subject to conditions set out in the *Specific Claims Tribunal Act*,[36] there are four scenarios in which a First Nation may opt to file a claim with the Tribunal:

- If a claim has not been accepted for negotiation by the federal government.
- If the government fails to advise the First Nation, within three years of its claim having been filed with the Minister, whether or not the claim will be accepted for negotiation.
- If the government consents to filing a claim with the Tribunal at any stage in the negotiation process.
- If, after three years of negotiation, a claim has not been resolved by a final settlement agreement.

The Specific Claims Tribunal is comprised of members drawn from the existing bench of Superior Court judges in the provinces and territories. These individuals are appointed in accordance with the current process for judicial appointments to tribunals, which requires the consent of the judge in question, as well as that of his or her Chief Justice.

Although section 6 of the *Specific Claims Tribunal Act* provides for up to the equivalent of six full-time members appointed from a roster of six to 18 Superior Court judges, the Tribunal currently has the equivalent of only two full-time members (one full-time member and two part-time members). The Act permits the appointment of supernumerary judges as Tribunal members. One current member of the Tribunal is a supernumerary judge of the Ontario Superior Court of Justice. The Minister of Justice and his office undertake discussions with Chief Justices regarding new judges who would be willing to be named to the roster and serve as Tribunal members.

At present, First Nations have submitted a total of 70 claims to the Specific Claims Tribunal. Of these, 66 are active, and four have been withdrawn by the claimants.

To date, the Tribunal has rendered seven decisions regarding the validity of claims, and no complete decisions regarding compensation. Of the seven decisions on validity rendered thus far, Canada has applied for judicial review of two, (*Kitselas*[37] and *Williams Lake*[38]), while claimants (*Montreal Lake and Lac la*

[36] *Specific Claims Tribunal Act*, section 16.
[37] http://205.193.184.246/apption/cms/UploadedDocuments/20117003/052-SCT-7003-11-Doc21(typedsignature).pdf.
[38] http://205.193.184.246/apption/cms/UploadedDocuments/20117004/135-SCT-7004-11-Doc33(typedsignature)(1).pdf.

Ronge First Nations[39]) have applied for judicial review of one additional claim. In June 2014, the Federal Court of Appeal upheld the Tribunal's decision in *Kitselas*. The *Williams Lake* judicial-review hearing took place on May 11, 2015, but no decision has yet been rendered in the matter. In a decision dated June 26, 2015, the Federal Court of Appeal dismissed the *Montreal Lake and Lac la Ronge First Nations'* application for judicial review.

Based on a review of the Specific Claims Tribunal website,[40] there have been numerous interlocutory decisions (i.e., decisions not on validity or compensation) made by the Tribunal, both formally (in orders) and informally (i.e., in case management conferences).

It is noteworthy that the Specific Claims Tribunal did not become fully operational until June 2011. That same month, the Tribunal established its own *Rules of Practice and Procedure*, which are similar to rules of civil procedure enacted by the provinces and to the *Federal Courts Rules*. The first claim was submitted to the Tribunal in June 2011. The Tribunal rendered its first decision in June 2012.

THEME 3: MANDATE OF THE SPECIFIC CLAIMS TRIBUNAL

The Preamble to the *Specific Claims Tribunal Act* recognizes that addressing the specific claims of First Nations is in the interest of all Canadians, and that resolving those claims will promote reconciliation between First Nations and the Crown, as well as the development and self-sufficiency of First Nations. Further, it is recognized that there was a need to establish an independent tribunal that could resolve specific claims, and that was designed to respond to the specialized task of adjudicating such claims in accordance with law, in a just and timely manner.[41]

The mandate of the Specific Claims Tribunal is summarized in section 3 of the *Specific Claims Tribunal Act*, which states as follows:

> The purpose of this Act is to establish the Specific Claims Tribunal, the mandate of which is to decide issues of validity and compensation relating to specific claims of First Nations.[42]

Section 12 of the Act grants the Tribunal authority to make "general rules for carrying out the work of the Tribunal,"[43] including the use of mediation.[44]

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[39] http://www.sct-trp.ca/DecisionCourt/index_e.htm.
[40] http://www.sct-trp.ca/judg/index_e.asp.
[41] *Specific Claims Tribunal Act*, Preamble.
[42] *Ibid.*, section 3.
[43] *Ibid.*, section 12.
[44] *Ibid.*, paragraph 12(1)(*h*).

In general terms, the Specific Claims Tribunal has adjudicative functions, (i.e., the power to make binding decisions regarding validity and compensation), and the ability to make rules in its *Rules of Practice and Procedure*, in part for the purposes of mediation.

The following is a synopsis of what I heard from participants in the Five-Year Review engagement process in relation to possible changes in the mandate of the Specific Claims Tribunal, along with my reflections and recommendations.

Theme 3.1: Possible Expansion of the Tribunal's Mandate — Funding

During the Five-Year Review engagement process, some participants suggested that a branch or secretariat within the Tribunal be given the authority to hear submissions on funding specific claims. This mechanism would not require the Department's approval, nor any extensive bureaucratic process, in order to apply the current criteria for obtaining funding. This expanded role for the Tribunal and its proposed "funding branch" could include research funding, hiring experts, and projecting the costs of a Tribunal hearing.

First Nations must apply to Canada if they are seeking funding. Some participants mentioned that, although they have access to funding, the amount provided is not adequate to cover the actual costs. Many First Nations are deeply concerned about the manner in which Canada has opted to handle the funding of specific claims.

During the Five-Year Review engagement process, the federal government noted that, since the fall of 2008, it has provided over $50 million to First Nations and First Nations organizations to support the research and development of specific claims. Departmental officials have assured me that they will continue to work closely with First Nations and First Nations organizations as part of their annual work-planning process, ensuring that First Nations have the necessary support to advance priority claims.

Analysis/Reflection: Although an interesting suggestion, expansion of the Tribunal's mandate to include oversight of funding is not considered feasible, nor desirable, given that it is never a good idea to mix funding (the executive branch) with the judicial functions of an administrative entity such as the Specific Claims Tribunal. To allow the Tribunal, or even a branch or different secretariat of the Tribunal, to control or evaluate the funding for First Nations to pursue specific claims would violate the principles and appearance of impartiality and justice. These principles are well established in Canadian jurisprudence and, as stated

by the Supreme Court of Canada, an apprehension of bias based on judicial impartiality can be sufficient to invalidate a proceeding.[45]

Recommendations: The administration of funding to First Nations for specific claims by the Tribunal (or a body within the Tribunal) is not recommended.

Theme 3.2: Possible Expansion of the Tribunal's Mandate — Pre-Assessment and Review of Claims

During the Five-Year Review engagement process, some participants suggested that a preliminary assessment be undertaken by the Tribunal through case management, much as a statement of claim is filed in litigation. In other words, the Tribunal would conduct a "pre-assessment" of claims before Stage One (i.e., filing of a claim, followed with an assessment by the Specific Claims Branch). It was suggested that this could serve as a form of "reality check" before parties engaged in costly expert reports. A form of "mini-trial" was proposed, which would not only help the parties understand their respective positions, but would also secure a broad enough mandate to meaningfully engage in negotiation and settlement.

In such cases, the preliminary assessment might proceed as follows: a claim could be filed directly with the Tribunal, rather than with the Department. The Tribunal could then make a preliminary, non-binding assessment of the merits of the claim. This would give the Tribunal an opportunity to explore the strengths and weaknesses of the claim, and consider any opportunities for mediation without the need for a full hearing.

As expected, to ensure that the process remains impartial, some proposed that the Tribunal member who conducts the pre-assessment should not be the same as the member conducting the hearing. Some participants also suggested that, if the Tribunal were able to make non-binding findings at an early stage in the process, it might be easier to involve the provinces/territories in early pre-hearing mediation and settlement discussions. Pre-assessment might even help resolve any overlapping claims issues.

Another suggestion was that the Tribunal, in conducting a pre-assessment, apply the minimum standard to increase efficiency and help facilitate the assessment process at the Specific Claims Branch. The Tribunal would thus function like the Canadian Human Rights Commission, accepting claims submissions and assessing them against the minimum standard.

During the Five-Year Review engagement process, some participants asked whether or not an authority exists for the Tribunal to investigate claims that have

[45] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*), [1992] 1 S.C.R. 623, p. 17.

not been accepted by the federal government for negotiation. Clearly, there is some confusion in this regard, as the Tribunal is currently mandated to perform precisely that function.

Analysis/Reflection: The proposal that claims be submitted to the Specific Claims Tribunal for "pre-assessment" under the minimum standard of the *Specific Claims Policy* is not suitable at this time. The application of the minimum standard, for example, is a technical review that does not require the involvement of the Tribunal. This minimum standard exists to ensure that a claim submission contains adequate justification for an assessment by the federal government.

As for the proposal that the Specific Claims Tribunal conduct pre-assessments of claims based on their merits, this is not considered realistic under existing circumstances. It is also premature: it goes without saying that, were such a proposal be adopted, it would radically change the role of the Specific Claims Branch and the Tribunal. In addition, the Department is fully capable of undertaking claims assessments within its current mandate.

Moreover, as mentioned above, the Specific Claims Tribunal is currently mandated and resourced to evaluate claims that have not been accepted by the federal government for negotiation.

Recommendations: Suggestions that the Tribunal undertake a preliminary assessment of claims based on their merits, or assess specific claims against the minimum standard, are not considered viable options at this point in time. I recommend no changes in this regard, although they are interesting ideas that could be considered eventually by the Government of Canada.

Theme 3.3: Role of the Tribunal in Overseeing Negotiations

The current mandate of the Specific Claims Tribunal focuses on determining claim validity, along with an assessment of financial compensation when applicable. In addition to these decision-making responsibilities, some participants in the Five-Year Review engagement process suggested that the functions of the Specific Claims Tribunal be expanded to include oversight of the negotiation process.

Within this scenario, the two timeframes provided for in subsection 16(1) of the *Specific Claims Tribunal Act* would not be changed (see Theme 3.9 of Part One: *Three-Year Timeframes*). At the same time, however, the Specific Claims Tribunal would have the right to supervise negotiations upon a request from one or both parties. This option would only be viable, of course, at Stage Two (during negotiations), and not at Stage One (the point of filing and assessing).

Analysis/Reflection: Given the Tribunal's currently understaffed status, the imposition of additional roles is not a viable option.

Recommendations: In its current state, it would be unreasonable to consider expanding the Tribunal's role to include the overseeing of negotiations. This might, however, become a viable option if the Tribunal were allocated greater resources down the road. Although this would be a radical change, it is something that could be included in any joint exploratory discussions, precisely for that reason. This subject is further explored in Theme 3.9 of Part One: *Three-Year Timeframes*.

Theme 3.4: Role of the Tribunal in Mediation

During the engagement process, some participants expressed concern regarding promises made in the *Justice At Last* initiative, including a federal commitment to improve access to mediation. Some participants stressed the importance of the fourth pillar in the *Justice At Last* initiative, which was to refocus the work of the Indian Specific Claims Commission to make better use of its dispute-resolution services — once the new Tribunal was in place — including helping to overcome impasses at all stages in the process.

Some of those who participated in the Five-Year Review engagement process suggested reinstatement of the Indian Specific Claims Commission. Others recommended the creation of an independent mediation centre (in order to avoid federal conflict of interest), or the attachment of a mediation function to the Tribunal. Others have suggested contracting a private mediation firm, or — through a proposed partnership between the federal government and First Nations — developing a roster of mediators from which to choose, should both parties consent to mediation. Finally, others suggested an increased role for Tribunal members in mediation and settlement, earlier in the process, as Tribunal members would be more effective at facilitating a mediated outcome.

Another possibility raised during the engagement process was potential expansion of the Tribunal's role to include oversight of the mediation process, with the mutual consent of all parties.

As seen at the beginning of Theme 3 of Part One: *Mandate of the Specific Claims Tribunal*, section 12 of the *Specific Claims Tribunal Act* allows the Tribunal to create its own regulations with regard to mediation. By virtue of this provision, the Tribunal created rule 52 of the *Rules of Practice and Procedure*, which allows the parties, at any point during Tribunal proceedings, to enter into mutually consensual mediation, for which they would jointly choose a member of

the Tribunal (subject to availability), or a private mediator.[46] Rules 53 and 54 provide as follows:

> 53. (1) The mediator must be either a member of the Tribunal or a private mediator that is jointly selected by the parties.
> (2) Mediation by a Tribunal member is subject to the availability of the member and the resources of the Tribunal.
> (3) If the mediator is a member of the Tribunal, that member cannot preside over the hearing unless the parties consent.
>
> 54. Except with the written consent of the parties, all statements made and all documents disclosed during the mediation are made and disclosed without prejudice. However, documents disclosed during the mediation can be used at the hearing if they are otherwise available to the parties or the Tribunal in accordance with these Rules.[47]

Analysis/Reflection: In 1991, the Indian Specific Claims Commission was created pursuant to the *Inquiries Act*,[48] as an interim measure. Historically, it had facilitative goals to assist in the resolution of specific claims. These included improving access to mediation, and assisting First Nations and the federal government in mediating disputes, including the provision of better access to mediation, and making greater use of mediation services in stalled negotiations.

The Indian Specific Claims Commission, however, closed its doors on March 31, 2009.[49] Shortly thereafter, National Chief of the Assembly of First Nations, Shawn A-in-chut Atleo, sent a letter to the federal government[50] highlighting the intention of First Nations to work jointly with Canada through the Political Agreement, and develop a framework for an independent alternate dispute-resolution (ADR) centre.

The Assembly of First Nations subsequently made numerous suggestions for an ADR centre and mediation services about whose independence and impartiality First Nations could be assured, including: creating an ADR centre through legislation; attaching a mediation function to the Tribunal registrar; jointly developing a roster of mediators and signing contracts with them; contracting a private mediation firm; creating an ADR centre through a royal prerogative (Order in Council); and, linking to, or creating, a non-governmental organization to service ADR.

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[46] *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, rule 52.
[47] *Ibid.*, rules 53 and 54.
[48] R.S.C., 1985, c. I-11.
[49] Following a Federal Order in Council dated November 2007, the Indian Specific Claims Commission ceased its operations. See: http://www.aadnc-aandc.gc.ca/eng/1100100011078/1100100011079.
[50] Dated January 6, 2010.

In response, then-Minister of Indian Affairs, Chuck Strahl, indicated the federal government's refusal to fund the suggestions proposed by the Assembly of First Nations.[51] Instead, the government proposed an alternative in the form of mediation services available through the Department of Aboriginal Affairs and Northern Development Canada. The Department maintained that mediation under these conditions would be independent.

The April 2013 *Summative Evaluation of the Specific Claims Action Plan*[52] noted, in part, that among the key results that the Department wanted to achieve within the first three to five years of the coming into force of the *Specific Claims Tribunal Act,* was the "[e]stablishment and operation of mediation services for First Nations who are negotiating their specific claim with Canada."[53] However, the evaluators concluded:

> Though mediation services are available, access has been minimal under the current operational model, and therefore the fourth pillar of the Action Plan, better access to mediation, is not being achieved.[54]

The *Summative Evaluation* went on to recommend that the federal government "develop and implement a strategy to allow for greater use of mediation services" through discussions with First Nations leaders.[55]

There seems to be some confusion among First Nations claimants regarding the availability of mediation services relating to specific claims at both the negotiation and Tribunal stages. During the Five-Year Review engagement process, several participants seemed to confuse mediators contracted through the Department with AANDC employees.

Mediation services currently offered by the federal government remain a readily available option, albeit one that is apparently grossly underutilized. The government notes that, as of May 13, 2015, Aboriginal Affairs and Northern Development Canada had contracted mediation services on four files, only one of which was related to a specific claim. In addition to the above four mediation contracts, AANDC's Mediation Service Unit has had 14 expressions of interest since 2012 that did not, or have not as yet, materialized into contracts. Only two of those requests related to specific claims.

Mediation in the negotiation process can be a useful tool for all parties. Mediation can be a viable alternative to litigation, but it cannot be forced upon the parties in dispute. Ideally, mediation services would be available through a truly

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[51] Dated February 3, 2010.
[52] April 2013. Final report, Aboriginal Affairs and Northern Development Canada. "Summative Evaluation of the Specific Claims Action Plan, Project No. 12029". Government of Canada: Evaluation, Performance Measurement, and Review Branch — Audit and Evaluation Sector.
[53] *Ibid.*, p. ii.
[54] *Ibid.*, p. iii.
[55] *Ibid.*, p. iv.

independent ADR centre that is physically and administratively separate from the Department's operations. Alternatively, the Department could publicize the availability of existing independent mediation services to revive stalled settlement discussions.

Recommendations: If the use of mediation is limited by a lack of awareness regarding its availability, I would suggest that the federal government make it clear that mediation is a viable option, with mutual consent, and take steps to inform First Nations how mediation can be proposed, and what it might help accomplish, while also fully explaining the independent relationship of any proposed mediator.

Using the same logic as mentioned above (see Theme 3.3 of Part One: *Role of the Tribunal in Overseeing Negotiations*), I have difficulty comprehending the expansion of the Tribunal's role to include mediation, when there are hardly enough resources available to allow it to fulfil its current mandate. It is not recommended, therefore, that mediation be conducted by Tribunal members, in cases before the Tribunal. Unless and until the Tribunal is staffed with a full complement of members, adding mediation to the responsibilities of existing Tribunal members would place unreasonable demands on their time. In the event that the aforementioned occurs, expanding the Tribunal's role in this respect could, as with negotiation, be included as an option in any joint exploratory discussions.

Theme 3.5: Financial Jurisdiction

By virtue of paragraph 20(1)(*b*) of the *Specific Claims Tribunal Act*, the Tribunal has the authority to award appropriate financial compensation of up to $150 million for valid claims.

During the Five-Year Review engagement process, some First Nations participants expressed a desire for a limit higher than $150 million. They asserted that a claim is a claim is a claim, and that removing the $150 million cap would give more First Nations access to the Tribunal.

Analysis/Reflection: A number of factors were considered by the legislative branch in coming to the decision to place a $150-million limit on the Tribunal's jurisdiction:

- Firstly, it was considered imperative that the new body operate within a manageable fiscal framework, one element of which is a limit on the Tribunal's financial jurisdiction. The goal of the threshold is consistency in negotiated settlement agreements.

- Secondly, because claims in excess of $150 million tend to be more complex, and require greater resources and time to resolve, the *Specific Claims Tribunal Act* does not apply above this threshold. This ensures that larger claims will not drain the Tribunal's limited human and financial resources.
- Thirdly, this level of authority allows for the majority of claimants to have access to the Tribunal on issues of validity and compensation, should negotiations and dispute-resolution mechanisms prove unsuccessful. The limit on compensation allows the Tribunal to function within an accountable framework, while ensuring that most First Nations with claims in the current inventory have access to the Tribunal.

With regard to claims valued over $150 million, the *Specific Claims Policy* states as follows: "Claims valued over $150 million require the Minister to obtain a discrete mandate prior to being accepted for negotiation. 'Claims over $150 million' is not a new class or category of claim. These claims are still specific claims as defined in the *Specific Claims Policy*."[56]

There is, however, some uncertainty among First Nations claimants as to whether claims over $150 million do, in fact, constitute "specific claims as defined in the *Specific Claims Policy*." Oddly, there is no "definitions" section in the *Specific Claims Policy*. While it contains a glossary, the term "specific claim" is not one of the terms explained therein. The closest thing to a definition of "specific claim" is found under the "Policy" section of the document, which states:

> The term "specific claims," generally, refers to claims made by a First Nation against the federal government which relate to the administration of land and other First Nation assets and to the fulfilment of Indian treaties, although the treaties themselves are not open to renegotiation.[57]

The content of the *Specific Claims Policy* seems inconsistent with the *Justice At Last* initiative, which states:

> Separate arrangements will be established outside the specific claims process to handle larger claims, valued at $150 million or more. These relatively rare, but more difficult, claims bog down the system due to their size and complexity. Removing them from the specific claims process and dedicating separate resources to these files will speed up the processing of remaining claims.[58]

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[56] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Policy and Process Guide*. Ottawa: Minister of Indian Affairs and Northern Development, 2009, p. 11.
[57] *Ibid.*, p. 5.
[58] *Ibid.*, p. 10.

It should be noted that, under the *Specific Claims Tribunal Act*, a claim's eligibility for submission to the Tribunal is based primarily upon whether the claim has met the published minimum standard for claims submissions. The federal government's estimate of a claim's approximate value takes place after this minimum standard determination. It is important to remember that the valuation of a claim is primarily intended to determine into which category it falls for negotiation funding purposes. It is a preliminary estimate, and is not intended to be determinative of a claim's final value for claims negotiation or Tribunal purposes. All parties seem to agree that a claim's true value can only be agreed through engagement and dialogue at the negotiation table.

Furthermore, given the uncertainty regarding a claim's value in the early stages of the specific claims process, the Minister may accept the claim for negotiation if the federal government's assessment of a specific claim discloses an outstanding lawful obligation, regardless of its potential value. A discrete financial mandate is only required when the government is preparing to make a settlement offer in excess of $150 million.

Although a number of specific claims valued at more than $150 million have been settled through Cabinet mandates in the past, this apparent variance could, conceivably, lead to a situation in which the Government of Canada and First Nations claimants find themselves engaged in negotiations of a claim for which full compensation for the claimants' losses may not be available at the Tribunal.

Recommendations: In the Political Agreement, Canada and the Assembly of First Nations expressed their commitment to work together on *Specific Claims Policy* matters, including "claims that are excluded by the monetary cap or other provisions of the legislation." In this spirit, it is recommended that the process for resolution of claims over $150 million be a matter for joint exploratory discussions.

With regard to claims of more than $150 million, there does seem to be an inherent discrepancy in the definition of the term "specific claims" in the *Specific Claims Policy* and the *Justice At Last* initiative, which should be addressed. It is recommended that the Department review this discrepancy as soon as possible.

Regardless, for the aforementioned reasons, I do not believe the Specific Claims Tribunal is an appropriate forum for hearing claims over $150 million.

Theme 3.6: Jurisdiction Over the Acquisition of Lands

Under paragraph 20(1)(*a*) of the *Specific Claims Tribunal Act*, the Tribunal is authorized to award only monetary compensation. It cannot award land.

During the Five-Year Review engagement process, some participants suggested that the jurisdiction of the Specific Claims Tribunal be expanded to allow compensation that includes the acquisition of lands and reserves. Some said this could provide First Nations with an opportunity to regain lost lands and convert the newly acquired lands to reserves.

Analysis/Reflection: In actuality, First Nation claimants are free to use compensation awarded by the Tribunal to acquire additional lands on a willing buyer-willing seller basis. If they do this, they have the option of applying to the Minister to have those lands added to their reserves under the existing *Additions to Reserve Policy* of Aboriginal Affairs and Northern Development Canada. It is my understanding that the Department is considering improvements that would facilitate this option, by creating a trigger in its proposed new *Additions to Reserve Policy* (which was the subject of consultations with First Nations) to justify adding lands to reserves, pursuant to decisions of the Specific Claims Tribunal.

Recommendations: I believe that the federal government's existing policies and processes regarding the acquisition of lands adequately provide the mechanisms that some First Nations participants suggested during the Five-Year Review engagement process. Their suggestions would require significant expansion of the mandate and jurisdiction of the Specific Claims Tribunal. This is considered neither feasible nor necessary in helping First Nations to acquire land. I see no need to change the status quo in this regard.

Theme 3.7: Métis Access to the Specific Claims Tribunal

The Métis who participated in the Five-Year Review engagement process expressed a desire to have their exclusion from the *Specific Claims Tribunal Act* reconsidered as part of this review. They suggested that the Act be amended to allow the Tribunal to hear claims made by Métis governments or, alternatively, that a separate settlement process be developed in order to provide a proper forum, outside the courts, where claims could be brought and settlements negotiated.

Essentially, they believe they fall within the federal government's exclusive jurisdiction over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act*, *1867*[59] and they argue that, as a result, there is a clear obligation on the part of the Crown to negotiate established Métis rights and claims in good faith. In their opinion, this is what the courts have been urging for some time, and they are optimistic that, with *Daniels*,[60] the court will correlate the

[59] *Constitution Act*, *1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.
[60] Supreme Court hearing of appeal of *Daniels v. Canada,* [2014] FCA 101.

Crown's duty to consult with the determination that the Métis fall within subsection 91(24) of the *Constitution Act, 1867*.

Analysis/Reflection: The Métis people of Canada are considered "Aboriginal Peoples of Canada" by virtue of subsection 35(2) of the *Constitution Act, 1982*, and their treaty rights are confirmed in this same subsection. There are currently five Métis governments in Canada — British Columbia, Alberta, Saskatchewan, Manitoba and Ontario — for which, they believe, the Crown has outstanding legal obligations. The Métis feel that their rights are no less valid than those of First Nations or the Inuit within the Canadian legal hierarchy.

Despite this, at the moment, the Métis are excluded from the *Specific Claims Tribunal Act*. At the same time, it has repeatedly been said that Métis governments need a forum in which to bring their claims. Their concern is that, although they meet the "other" conditions[61] that would qualify them under the *Specific Claims Tribunal Act*, there remains no forum in which to settle their claims, because they are not recognized as "bands" under the *Indian Act*.

These issues have been recognized by the courts in Canada, as well as within the international community. For example, in the *Peepeekisis Band* decision,[62] Justice Mainville recognized that the Supreme Court of Canada granted the declaration in the *Manitoba Métis Federation v. Canada*[63] case because the Métis had no alternative means by which to have their claims resolved.
In its review of *Manitoba Métis Federation*, the Federal Court of Appeal found that First Nations could not plead a breach of the honour of the Crown, because they had an "alternative dispute resolution mechanism"[64] available to them.

This type of declaration regarding breach of the honour of the Crown was available to the Manitoba Métis Federation, because there was no other way to give effect to the honour of the Crown and advance reconciliation with the Métis. As a result, certain parties have expressed the need to make an alternative dispute-resolution mechanism available to the Métis for their specific claims-like breaches.[65]

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[61] For example, the existence of an agreement with Canada and a lawful/unfulfilled obligation, etc.
[62] *Peepeekisis Band v. Canada (Minister of Indian Affairs and Northern Development*), 2013 FCA 191, sections 59–60.
[63] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.
[64] The federal specific claims process.
[65] Specific breaches brought forward as an example are section 31 of the *Manitoba Act*, Treaty #3 Halfbreed Adhesions, Métis scrip process, etc.

In addition, in the *Report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples in Canada*,[66] the Rapporteur concluded:

> [68] [...] [T]he [G]overnment [of Canada] does not appear to have a coherent process or policy in place to address the land and compensation claims of the Métis people. [...] Canada should take active measures to develop [a] procedure for addressing Métis land claims, to avoid having to litigate cases individually, and enter into negotiations with Métis representatives to reach agreements towards this end.

Recommendations: The Government of Canada should tread carefully in this regard. Broadening the scope of the Specific Claims Tribunal to allow for the submission of Métis claims would surely frustrate those First Nations that are not recognized as "First Nations" within the meaning of section 2 of the *Specific Claims Tribunal Act*, because they have lost their status as "bands" under the *Indian Act*. As such, they have not retained the right to bring a specific claim, and/or have released their right to bring a specific claim.[67]

Although it might not be realistic to expand the scope of the *Specific Claims Tribunal Act* at this time, it is recommended that the federal government consult with the five Métis governments, with the goal of developing options for negotiating and resolving Métis claims. This could include the potential creation of a forum — perhaps external to the application of the *Specific Claims Tribunal Act* — where their claims could be heard.

I understand that the Minister has appointed another Ministerial Special Representative to consider issues between the Métis and the federal government.[68] Perhaps Métis participation in the Specific Claims process can be considered within that engagement.

Theme 3.8: Adversarial/Court-Like Nature of Tribunal Proceedings

During the Five-Year Review engagement process, I was often pressed about the cumbersome procedures involved in the Specific Claims Tribunal. Many participants noted that the Tribunal was originally conceived as an administrative process with simple, concise rules, allowing claims to be adjudicated in an efficient and cost-effective manner.

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[66] Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples in Canada*, James Anaya, United Nations General Assembly, 27th Session, Supp. No. 3, (2014), paragraphs 68 and 97.

[67] *Specific Claims Tribunal Act*, section 2 ["First Nation" (*a*) (*b*) and (*c*)].

[68] http://news.gc.ca/web/article-en.do?nid=984379

In contrast to that vision, some said that the Tribunal had evolved in an unexpected way — that it has essentially become a Superior Court. In addition, I heard that the Tribunal's approach to date encourages an adversarial relationship. It was also said that the *Rules of Practice and Procedure* closely mirror the rules of a superior or federal court. This, some said, unnecessarily complicates proceedings in a forum that they originally expected to be relatively simple and straightforward. The federal government has further noted that the formal court-like processes adopted by the Specific Claims Tribunal have contributed to increased costs for First Nations and the government alike.

An additional layer is added because, with bifurcation, there are typically two hearings in Specific Claims Tribunal proceedings: one on validity, and one on compensation. (See Theme 5.5 of Part One: *Bifurcation*.)

During the Five-Year Review engagement process, concern was expressed regarding delays at the Tribunal. Some said that the main reason for this is a lack of Tribunal members, while others suggested that undue delays are caused by the parties to a claim.

As a way of addressing undue delays caused by the parties, it was suggested that subsection 12(1) of the *Specific Claims Tribunal Act* be amended to allow the Tribunal to award costs on a punitive scale in cases where proceedings are unnecessarily delayed. By contrast, others emphasized the importance of procedural fairness, and the fact that this takes time.

Analysis/Reflection: The Specific Claims Tribunal embodies the processes and privileges of a Superior Court of record, as per section 13 of the *Specific Claims Tribunal Act*, which provides as follows:

> 13. (1) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may
>
> (a) determine any questions of law or fact in relation to any matter within its jurisdiction under this Act;
>
> (b) receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence;
>
> (c) take into consideration cultural diversity in developing and applying its rules of practice and procedure; and

> (d) award costs in accordance with its rules of practice and procedure.
>
> (2) The Tribunal shall deduct from any award of costs in favour of the claimant, any amount provided to the claimant by the Crown for the purpose of bringing the claim before the Tribunal.

While the *Specific Claims Tribunal Act* and the *Rules of Practice and Procedure* are very court-like, they include significant accommodations for First Nations, inasmuch as they do not permit the Crown to use defences based on Statutes of Limitation or the Doctrine of Laches. Furthermore, normal rules regarding hearsay evidence do not apply. These rules have required adjustment from standard litigation-management practice, which is all part and parcel of learning to work within a new process. Much of the early work, by all parties on Tribunal claims, involved learning how to navigate the Tribunal's unique requirements and *Rules of Practice and Procedure* (i.e., dealing with mandated deadlines, producing documents/evidence, and addressing issues surrounding settlement privilege). Many of these issues have now been resolved by the parties, and processes are being refined as the Tribunal's claim inventory matures and moves through different phases toward resolution.

With reconciliation the aim of the *Specific Claims Tribunal Act* and the Tribunal itself, it is important that all parties involved in a dispute — in particular, the Government of Canada and First Nations — use the approach, prescribed by Justice W.L. Whalen in *Tsleil-Waututh Nation*, to guide their actions. In his decision on the intervention application by the Leq'á:mel First Nation in the hearing of the Tsleil-Waututh Nation's claim, Justice Whalen noted that the purpose of the *Specific Claims Tribunal Act* in general, and of the Tribunal in particular, is to promote reconciliation. Justice Whalen stated:

> [40] The over-arching purpose of the *Specific Claims Tribunal Act*, which recognizes it is in the best interest of all Canadians that specific claims be resolved, is to promote reconciliation between the Crown and First Nations. Clearly, there is something significant to be reconciled. A "specific claim" is a long-standing term generally referring to monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets, and the fulfilment of treaties. For decades, specific claims have been a great source of frustration between First Nations and the Crown […]
>
> [42] The Preamble of the *Specific Claims Tribunal Act* also recognizes that "it is in the interests of all Canadians that the specific claims of First Nations be addressed." In other words, there is a national public interest in reconciling the historical tensions between Canada's First Nations and the larger Canadian community by means of fair and timely resolution of outstanding specific claims. As I see it, the public interest consists of two

> parts: (a) the interest of the Canadian people as a whole; and, (b) the interest of First Nations as an important component of the larger Canadian society. The goal is to resolve and reconcile the tensions, perceptions of injustice, and lingering frustrations that have evolved as a result of unresolved specific claims. […]
>
> […]
>
> [43] The *Specific Claims Tribunal Act* is also an important instrument of access to justice, which the Preamble of the *Specific Claims Tribunal Act* frames as a "right" of First Nations:
>
> > Recognizing that [...] the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations […]
> > It is notoriously obvious that many First Nations are of limited means. As part of its access to justice mandate, the Tribunal must (and perhaps especially) meet the needs of these communities too.[69]

With reconciliation being the aim of the *Specific Claims Tribunal Act* and the Tribunal, it is important that all parties involved in a dispute use the approach prescribed by Justice Whalen in *Tsleil-Waututh Nation* to guide their actions. It is certainly not by adopting a needlessly adversarial approach that the parties will achieve the reconciliation mentioned above, but rather by being flexible, with a willingness to compromise and act in good faith. It is clear that an open mind is preferable to hostility, and that discussion is preferable to litigation. The Specific Claims Tribunal is obviously a vehicle for reconciliation, but reconciliation is the responsibility of both the federal government and First Nations.

Recommendations: A simpler procedure, with rules that are clear and concise, would contribute to an accelerated and less-costly process. I recommend exploring amendments to the *Rules of Practice and Procedure* that would give the Tribunal a more clearly conciliatory role. This would help defuse the existing perception that the Tribunal takes an adversarial stance more reflective of a Superior Court.

The suggestion that subsection 12(1) of the Act be amended to allow the Tribunal to award costs on a punitive scale, in cases where proceedings are unnecessarily delayed, is considered contrary to procedural fairness and is therefore not recommended.

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[69] *Tsleil-Waututh Nation* v. *Her Majesty the Queen in Right of Canada*, 2014; *Specific Claims Tribunal* Act, section11, paragraphs 40–43 [*Tsleil-Waututh Nation*].

Theme 3.9: Three-Year Timeframes

The pertinence and possible abolition of the three-year time frames provided for in subsection 16(1) of the *Specific Claims Tribunal Act* were also raised during the Five-Year Review engagement process. The provision reads as follows:

> 16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and
> (a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;
> (b) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
> (c) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
> (d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

Although the prescribed timeframes were initially introduced to help First Nations, that is not how they are now perceived. Some First Nations believe the problem is not necessarily the timeframes themselves, but the way they are used. Some First Nations participants in the Five-Year Review described the Department's interpretation of section 16 as punitive and adversarial. They believe the three-year timeframes have simply become an operational model whereby the federal government addresses specific claims within three years, which does not necessarily translate into comprehensive assessment of claims and active negotiation. Some query why it takes the federal government three years to assess a claim if, as the federal government suggests, there is no claims backlog. Many First Nations suggested that these timeframes are mechanisms allowing the federal government to make "take-it-or-leave-it" offers on specific claims.

During the Five-Year Review engagement process, certain First Nations suggested that the current process for filing a claim is too time-consuming. Others perceive the assessment of claims as not proceeding fast enough. Whereas certain claims may require more careful analysis and consideration,[70] others may be more straightforward. There does not seem to be a consensus on this issue.[71]

[70] Given the longer history of interaction with settlers and the Crown, there is concern that the expedited process implemented by the Specific Claims Branch does not work for Quebec First Nations, especially since there are no treaties and no "treaty formulas" to apply. Their claims are very fact-specific and hard to generalize/streamline.

[71] For instance, some say the process after submission of a claim is still too time-consuming. They believe the Crown must expedite its claims review process.

On this subject, various suggestions were made, one of which was to abolish the timeframes so that claims could be filed directly with the Specific Claims Tribunal, thus circumventing the Specific Claims Branch entirely. I also heard a number of other interesting proposals during the Five-Year Review engagement process concerning the two timeframes.

One of these was to allow First Nations to bring claims before the Tribunal at the same time as they file with the Specific Claims Branch. It was suggested that this would abolish at least the first timeframe, and allow claims to be filed directly with the Tribunal, while the same file was being reviewed by the Specific Claims Branch. Within this model, the Tribunal would not hold any hearing for the period during which the claim was being reviewed by the Specific Claims Branch.

A second proposal was for the second timeframe to be abolished, in order to allow First Nations to simultaneously file their claims with the Tribunal while negotiating with the federal government, under the same conditions as the previous proposal.

A third proposal was for the two timeframes (or alternatively, one or the other) to be reduced to as little as six months.

Finally, a fourth proposal was for the second timeframe to be abolished in order to allow First Nations to file with the Tribunal at any moment during the negotiation phase. There is a subtle distinction to draw here between, on the one hand, claims being filed with the Tribunal for any reason during negotiations, and, on the other, claims being filed with the Tribunal after negotiations are over — if, for example, there is no desire to negotiate, or negotiations are not progressing. In the former case, the specific claim is submitted to the Tribunal where proceedings are suspended and negotiations continue. In the latter case, the specific claim is submitted to the Tribunal as soon as negotiations are no longer possible. Despite this distinction, both scenarios would require the abolition of subsection 16(1) of the *Specific Claims Tribunal Act*.

Analysis/Reflection: The three-year timeframe for the assessment of claims is not unreasonable, because the federal government requires sufficient time to conduct research and undertake a proper legal assessment of claims. The thee-year timeframe for the negotiation of claims is not unreasonable, either, considering the fact that some claims are so complex that the federal government needs at least that amount of time to negotiate adequately.[72]

These timeframes encourage the advancement of claims assessments and negotiations. Before they were established, it sometimes took well over three

[72] Some of the participants in the engagement process said that expediting the process would not allow for a full “unpacking” and consideration of the many complex facets of certain claims.

years before First Nations received a response from the Government of Canada and, sometimes, several more years to conclude negotiations.

Both timeframes seem to be a good idea in principle, as long as the federal government does not use them as a delaying mechanism, as some First Nations suggested.

Recommendations: The first and second proposals mentioned above are not considered feasible at this point, since the federal government cannot reasonably be expected to address a single claim in two concurrent and competing processes. The purpose of the *Specific Claims Policy*, and the government's stated objective in that regard, is to encourage the assessment and the negotiated settlement of claims without litigation. Allowing First Nations the option of submitting their claims to the Tribunal while they are still being assessed or negotiated might not only create a false inventory of claims, but also unfairly burden the resources of all parties and, to a certain extent, be contrary to the principles of justice.

The third proposal, suggesting that the length of the two existing timeframes — or one or the other — be reduced, does not appear desirable. As mentioned above, in most cases, the government needs three full years to properly assess claims, and may even require more time to negotiate them properly.

It is worth repeating that both three-year timeframes were jointly agreed upon as part of the *Justice At Last* initiative. They establish reasonable standards for the federal government to meet in assessing and negotiating claims, failing which the Tribunal becomes an option to First Nations for resolution. The agreed-upon process and timeframes are fair to all parties, and provide an acceptable mechanism for the assessment and negotiation of claims. I do not suggest any changes to the status quo with regard to the third proposal.

As for the fourth proposal, at first glance it appears advantageous to First Nations, allowing them to end negotiations before the timeframe expires, without necessarily waiting for the Minister's authorization, per paragraph 16(1)(*c*) of the *Specific Claims Tribunal Act*. However, this would necessarily impose repealing all of subsection 16(1) of the Act, which could result in longer delays for negotiations. The original intention of this provision — to protect First Nations — should not be forgotten here.

Notwithstanding the above, the three-year timeframes are a controversial subject, and raise major questions regarding the specific claims process. They continue to be the subject of debate, and should undoubtedly be included in any joint exploratory discussions.

THEME 4: STRUCTURE

This theme examines the structure of the Tribunal, and how it operates at present, in accordance with the Act and its own *Rules of Practice and Procedure.*

Theme 4.1: Independence of the Tribunal

It was suggested by some participants in the Five-Year Review engagement process that the independence of the Tribunal has been affected by repeal of section 10 of the *Specific Claims Tribunal Act*, and enactment of the *Administrative Tribunals Support Service of Canada Act* (ATSSCA).[73] Concern was also expressed that the coming into force of the ATSSCA, which transferred operations of the dedicated Tribunal registry to the Administrative Tribunals Support Service of Canada (ATSSC), would compromise the independence of the Specific Claims Tribunal. The ATSSC is responsible for providing administrative support services to 11 tribunals, including the Specific Claims Tribunal.

Some participants in the Five-Year Review engagement process asserted that deletion of section 10 of the *Specific Claims Tribunal Act* amounted to a breach of both judicial independence and of the constitutional convention regarding the arm's-length relationship expected between the executive and judicial branches of government. They were highly critical of this removal of administrative powers from the judiciary. In the minds of some, the Government of Canada is taking steps to reduce the Tribunal's independence.

Analysis/Reflection: In 2008, when the *Specific Claims Tribunal Act* came into force, section 10 created the Tribunal's registry as follows:

> (1) There shall be a registry of the Tribunal consisting of an office in the National Capital Region described in the schedule to the *National Capital Act*.
> (2) The registrar and any staff that is required for the proper conduct of the work of the Tribunal shall be appointed in accordance with the *Public Service Employment Act*.
> (3) The registrar is responsible for the management of the Tribunal's administrative affairs and the duties of the staff of the Tribunal.
> (4) The staff of the Tribunal shall be organized and the offices shall be operated in any manner that may be provided by the rules referred to in subsection 12(1).[74]

[73] *Administrative Tribunals Support Service of Canada Act,* S.C. 2014, c. 20, section 376.
[74] *Specific Claims Tribunal Act*, section 10 [*repealed*].

Subsection 12(1) of the *Specific Claims Tribunal Act* provided that:

> (1) A committee of no more than six Tribunal members, appointed by the Chairperson, may make general rules for carrying out the work of the Tribunal, the management of its internal affairs and the duties of its staff, as well as rules governing its practice and procedures […][75]

In November 2014, section 10 of the *Specific Claims Tribunal Act* was repealed, and the portion of subsection 12(1) quoted above was replaced with the following:

> (1) A committee of no more than six Tribunal members, appointed by the Chairperson, may make general rules for carrying out the work of the Tribunal and the management of its internal affairs, as well as rules governing its practice and procedures […][76]

It follows from these important amendments that the stand-alone registry of the Specific Claims Tribunal no longer exists. Furthermore, the Minister of Aboriginal Affairs and Northern Development is no longer responsible for the registry. In fact, the "super registry" that was created by enactment of the ATSSCA[77] falls under the responsibility of the Minister of Justice, by virtue of Part I.1 of the *Financial Administration Act*.[78]

Justice Slade has raised concerns about the Tribunal's real independence — or perception of independence — on several different occasions. For example, in his Annual Report, dated September 30, 2010, he stated:

> It is important that the independence of the Tribunal is assured, both in reality and public perception. The assurance of appropriate governance of the Tribunal, and adequate resources to support the work of the Tribunal, are, as aspects of adjudicative independence, key considerations. These have not, to date, been fully resolved.

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[75] *Ibid.*, subsection 12(1).

[76] Section 376 of the *Economic Action Plan Act 2014* enacted the *Administrative Tribunals Support Service of Canada Act*, which established the Administrative Tribunals Support Service of Canada (ATSSC) as a department. The ATSSC provides registry, administrative and other support services to 11 administrative tribunals, including the Specific Claims Tribunal. As a result, the registry of the Specific Claims Tribunal has ceased to exist, and has been removed from the *Specific Claims Tribunal Act* (section 469 of the *Economic Action Plan 2014 Act*). The staff and resources that currently support those tribunals have been transferred to the ATSSC. As for the replacement of a portion of subsection 12(1) of the *Specific Claims Tribunal* Act with a new text in which the words "and the duties of its staff" have been deleted, this has been done by virtue of section 470 of the *Economic Action Plan 2014 Act*.

[77] http://www.sct-trp.ca/pdf/AnnualReport-2013.pdf. The *Administrative Tribunals Support Service of Canada Act* was given Royal Assent on June 19, 2014, and came into force on November 1, 2014.

[78] *Financial Administration Act*, R.S.C., 1985, c. F-11.

In his report of September 30, 2014, Justice Slade referred to the Bill that was intended to create the Administrative Tribunals Support Service of Canada as follows:

> In February 2014, the Tribunal was advised by the Assistant Deputy Minister of Justice that the back offices of 11 federal tribunals, including the Tribunal, could be merged to achieve cost savings and efficiencies. Consultation with the Tribunal in this regard was so time limited as to be meaningless. Moreover, there was no consultation with First Nations before the Bill to create the Service was introduced, despite the requirements of section 41 of the Act.
>
> Nonetheless, the *Act* was amended, eliminating the Registry and eliminating the ability of the Tribunal Members to make rules of respecting the duties of staff […]. The Tribunal will no longer have a dedicated vote of funds. The resourcing of the Tribunal will be entirely [at] the discretion of the Chief Administrator of the ATSSC.
>
> Concerns over the impact of the ATSSC on [the] institutional and judicial independence of the Tribunal, both in fact and as perceived, and the lack of consultation with First Nations have not been addressed.

In apparent contrast to the concerns expressed by Justice Slade and others regarding the creation of the Administrative Tribunals Support Service of Canada, the home page of the Specific Claims Tribunal website includes the following assurance:

> Through the coming into force of the *Administrative Tribunals Support Service of Canada Act*, on November 1, 2014, the Government of Canada is consolidating the provision of support services to eleven administrative tribunals — including the Specific Claims Tribunal Canada — into a single organization, the Administrative Tribunals Support Service of Canada (ATSSC). This administrative change does not affect the mandate of the Specific Claims Tribunal. Case matters will continue to be filed, managed and safeguarded in accordance with existing Specific Claims Tribunal procedures.[79]

It should be noted that, during the Five-Year Review engagement process, none of the participants reported any concrete examples of detrimental impact on the Tribunal's registry services, as a consequence of the transfer of those responsibilities to the ATSSC.

[79] http://www.sct-trp.ca/hom/index_e.htm.

For its part, the federal government maintains that the elimination of the Specific Claims Tribunal registry, and the assumption of the registry's functions by the ATSSC, do not compromise the independence of the Tribunal. The government states that the issue of judicial independence was carefully considered when the legislation was being drafted, and that great care was taken to ensure that the Tribunal's independence would be preserved.

The government takes the position that the Tribunal can still perform its adjudicative function regarding specific claims with the same independence it had prior to enactment of the *Administrative Tribunals Support Service of Canada Act*, stating that the decision-making ability of the Tribunal provided for in the *Specific Claims Tribunal Act* — and the Tribunal's ability to manage specific claims according to its *Rules of Practice and Procedure* — have not changed. Furthermore, as a separate department within the federal public administration, the ATSSC has an arm's-length relationship with those departments involved in the representation of Canada before the Tribunal — namely, Aboriginal Affairs and Northern Development Canada, and the Department of Justice.

The matter of the tenure of Tribunal members — which is another issue relevant to the Tribunal's independence — is discussed in Theme 4.3 of Part One: *Tenure of Tribunal Members*.

Recommendations: Based on the information I have, I would suggest that there is no basis upon which to revisit the elimination of the Tribunal registry and its replacement with the ATSSC.

Theme 4.2: Number of Tribunal Members

During the Five-Year Review engagement process, some participants said that the Tribunal is unable to meet its objectives, because it does not have sufficient members to handle its caseload.

In his September 2014 report, Chairperson Slade issued a distress call implying that the Tribunal is currently in jeopardy. He expressed particular concern regarding the impact of chronic understaffing on the Tribunal's ability to function effectively:

> The Tribunal [does not have] a sufficient number of members to address its present and future caseload in a timely manner, if at all. Nor is it, due to the imminent coming into force of section 376 of the *Economic Action Plan 2014 Act, No. 1*, which provides for the creation of the Administrative Tribunal Support Services Canada (ATSSC), assured of its ability to continue to function with adequate protection of

> its independence. These concerns have been raised with the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development. There has been no adequate response from Government.
>
> Without the appointment of at least one additional full[-]time member and several part[-]time members, there will be unacceptable delays in servicing the current caseload, much less any new claims.
> I am the only full[-]time member, and the Chairperson of the Tribunal. My term expires in December 2015. Without the appointment of one [or] more full[-]time members in the interim, there will be no ability to implement a succession plan or service the caseload. The Tribunal will fail.

Some participants in the Five-Year Review engagement process noted that, even where there is interest among Superior Court judges in being appointed to the Tribunal, there can be other obstacles, including the requirement to source Chief Justices from provincial/territorial Superior Courts.

Analysis/Reflection: As noted earlier, the Specific Claims Tribunal is currently working at one-third the complement of members outlined in the *Specific Claims Tribunal Act*, with one full-time member and two part-time members (the equivalent of two full-time members). Because Tribunal members are drawn from provincial/territorial Superior Courts, this issue stems largely from factors that include too few judges identified by provincial/territorial Chief Justices, and too few appointments of judges as members of the Specific Claims Tribunal by the Governor in Council. If we also take the linguistic factor into account, there is currently only one part-time judge to hear specific claims in French.

This shortage of Tribunal members exists despite the federal government's apparent attempt to address the concerns of Chief Justices. It is noted that the federal government amended the *Judges Act* in 2008 to increase, from 30 to 50, the number of judicial salaries that may be paid for judges appointed to Superior Courts in the provinces.[80] Under these amendments, six new appointments were authorized to support the participation of Superior Court judges at the Tribunal.

The limited number of Specific Claims Tribunal members — coupled with the fact that their mandates are for limited periods and the fact that most are appointed on a part-time basis — may result in several changes of members for a single file. When it comes to the appointment of Tribunal members, I strongly believe that specific claims are so complex that they warrant the full-time attention of the members hearing them.

Section 6 of the *Specific Claims Tribunal Act* requires Tribunal members to be selected from a roster of six to 18 Superior Court judges, established by the

[80] *An Act to amend the Judges Act*, R.S.C., 1985. 2008, c. J-26, s. 1.

Governor in Council.[81] This contributes, without a doubt, to the prestige of the Tribunal. This is also, however, a double-edged sword, as it considerably limits the pool of potential candidates.

Recommendations: The appointment of more full-time Tribunal members, as outlined in subsection 6(4) of the *Specific Claims Tribunal Act*, would be ideal. I therefore urge the federal government to appoint Tribunal members as expeditiously as possible, in order to ensure the full complement of members, as outlined in the *Specific Claims Tribunal Act*. However, if that is not possible right now, at least one full-time member and several more part-time members should be appointed at the earliest possible date.

Further, I recommend that joint exploratory discussions be undertaken to consider the possible expansion of the scope of subsection 6(2) of the *Specific Claims Tribunal Act* to allow for the nomination of individuals, who may not necessarily be Superior Court judges, as adjudicators for the Specific Claims Tribunal. This could include retired judges from Superior or Federal Courts, or members of federal quasi-judicial tribunals. Some have proposed the nomination of provincial/territorial court judges to the Specific Claims Tribunal; however, I believe it would be inappropriate to nominate provincial/territorial judges to a federal institution.

I also recommend that, in joint exploratory discussions, consideration be given to the possible appointment of specialists with suitable qualifications as Tribunal members, rather than limiting the choice to Superior Court judges. Independent experts with litigation experience in the field of Aboriginal law and past involvement in court processes — such as lawyers, retired scholars and other legal practitioners — could be considered. If such a change were eventually implemented, a corresponding right to appeal Tribunal decisions, in addition to judicial review, should accompany any such change.

With regard to the previous two points, it should be noted that, since the appointment of retired judges or specialists does not involve any Chief Justices, such appointments could be made directly by the Governor in Council, thereby avoiding the above-noted challenges related to the involvement of Chief Justices.

Finally, consideration could be given, in joint exploratory discussions, to the possible appointment of prothonotaries to the Tribunal. This would lighten the burden of Tribunal members, as it has been suggested that procedural tasks are overwhelming members' schedules. These prothonotaries would have different duties, including dealing with preliminary motions and case management. The potential role of prothonotaries in a geographical context, as well as in case

[81] *Specific Claims Tribunal Act*, section 6. Subsection 6(2) defines the roster; subsection 6(3) determines the Chairperson and other members; and subsection 6(4) defines membership numbers for the Tribunal.

management, will be considered later in this report. (See Theme 4.4 of Part One: *Location of the Tribunal*).

Theme 4.3: Tenure of Tribunal Members

Although the matter of Tribunal members' tenure was not raised as an issue of concern by participants in the Five-Year Review engagement process, consideration of the appointment of members to the Tribunal prompted the following reflections on my part.

Analysis/Reflection: By virtue of section 7 of the *Specific Claims Tribunal Act,* Tribunal members have security of tenure in the form of fixed five-year terms, and are eligible for reappointment for one further term. Subject to these limits, Tribunal members hold office as long as they also remain Superior Court judges.[82]

Section 96 of the *Constitution Act*, *1867* protects the personal independence of Superior Court judges, as follows:

> 96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.[83]

This has a direct link with section 99 of the *Constitution Act*, *1867*, which states that judges hold their tenure "during good behaviour":

> 99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.
> (2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.[84]

Recommendations: In light of these legislative provisions, there is no need to further extend or limit the mandate of Tribunal members as per section 7 of the *Specific Claims Tribunal Act*. The status quo is constitutionally valid, as it sufficiently ensures the tenure of a Tribunal member for a reasonable amount of time, which may only be revoked for good cause.

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[82] *Ibid.*, section 7.
[83] *Constitution Act*, *1867*, 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5, section 96.
[84] *Ibid,* section 99.

Theme 4.4: Location of the Tribunal

The disproportionate geographical distribution of unresolved specific claims in British Columbia moved some participants in the Five-Year Review to request the presence of a Specific Claims Tribunal body in that region.

In addition, some participants in the Five-Year Review engagement process also suggested the hiring of prothonotaries in Vancouver and Ottawa, noting that such appointees could help alleviate frustrations within a geographical context. This suggestion is worth exploring. As noted previously (see Theme 4.1 of Part One: *Independence of the Tribunal*), the hiring of prothonotaries could help alleviate the workload of Specific Claims Tribunal members. Their potential role in case management is discussed further in Theme 5.1 of Part One: *Case Management*.

Analysis/Reflection: At present, 40% of specific claims come from British Columbia, with 60% of claims coming from British Columbia, Alberta and Saskatchewan combined. While the disproportionate geographical distribution of claims may add some justification to the proposal for a regional Tribunal presence, it should be noted that the volume of claims is not the only factor to be considered in such a decision; the complexity of claims is also a consideration.

Recommendations: Consideration should be given to the establishment of a less sophisticated Specific Claims Tribunal institutional presence in the form of a satellite Tribunal in Vancouver.

Theme 4.5: Transitional Provisions of the *Specific Claims Tribunal Act*

During the Five-Year Review engagement process, it was suggested that the transitional provisions set out in sections 42 and 43 of the *Specific Claims Tribunal Act* are no longer relevant, as they are now historical in nature, and should be repealed.

Some participants in the Five-Year Review also suggested that the transitional provisions be amended to make claims that had been considered by the former Indian Specific Claims Commission automatically eligible for submission to the Tribunal.

Analysis/Reflection: Sections 42 and 43 of the *Specific Claims Tribunal Act* are transitional provisions that address the status of claims submitted to the Minister, prior to the coming into force of the *Specific Claims Tribunal Act* on October 16, 2008.

Section 42 deems certain claims to have been filed with Minister: namely, those submitted to the Minister before the Act came into force; those based on any of

the grounds referred to in subsection 14(1); and those containing the kind of information that would meet the minimum standard.

Section 43 of the *Specific Claims Tribunal Act* provides clarification regarding the status of claims rejected by the Minister before October 16, 2008, as follows:

> 43. For greater certainty, if, before the coming into force of this Act, a First Nation has been notified by the Minister of his or her decision not to negotiate a claim, the First Nation may not file that claim with the Tribunal on the basis of that decision; but nothing prevents the First Nation from filing the claim with the Minister after the coming into force of this Act.

These provisions remain relevant. They provide useful information to First Nations with claims submitted to the Minister prior to the coming into force of the Act, and contain information on how such claims are affected by the new process established by the Act and the creation of the Tribunal.

With respect to the proposal that the transitional provisions of the Act be amended — in order to make claims previously considered by the former Indian Specific Claims Commission automatically eligible for submission to the Tribunal — this would obviate the minimum standard. This standard was developed jointly by the federal government and the Assembly of First Nations and, if circumvented, would deny the government an opportunity to effectively assess the allegations of such claims in light of new developments in case law, evidence, or legal advice. Furthermore, doing so could be seen as being prejudicial to other First Nations claimants, who are required to follow all the other provisions of the *Specific Claims Tribunal Act*, including fulfilment of the minimum standard, and who do not have expedited access to the Tribunal.

Recommendations: No action is recommended with regard to the transitional provisions. I do not recommend the repeal of these provisions, nor do I recommend any amendments to make claims previously considered by the Indian Specific Claims Commission automatically eligible for submission to the Specific Claims Tribunal.

THEME 5: EFFICIENCY

This theme examines the efficiency of the Specific Claims Tribunal in terms of its productivity. The *Oxford Dictionary* defines “efficiency” as “the state or quality of being efficient.”[85] With reference to a system or machine, Oxford defines the word “efficient” as “achieving maximum productivity with minimum wasted effort or expense.”[86]

[85] http://www.oxforddictionaries.com/definition/english/efficiency.
[86] http://www.oxforddictionaries.com/definition/english/efficient.

As noted above, several common themes were raised by participants in the Five-Year Review in relation to the Tribunal's caseload management, and various procedural matters that are operationalized through its *Rules of Practice and Procedure.*

The importance of the Tribunal's efficiency is highlighted in Justice W.L. Whalen's decision in *Tsleil-Waututh Nation*, which states:

> The *Specific Claims Tribunal Act* and *Rules* should be interpreted broadly to achieve their legislative purpose. This does not mean that standards of legal analysis should be compromised, especially where meaningful prejudice, delay, or waste might be occasioned. However, First Nations should be given a full and fair hearing appropriate to the *Specific Claims Tribunal Act*'s mandate of resolution and reconciliation. *The Tribunal's process should encourage First Nations to seek justice in an efficient, timely, and cost effective way, not discourage it.* Fairness, access to justice and application of the rule of law are fundamental to Canadian democracy.[87]

Once again, it should be noted that the Tribunal established its *Rules of Practice and Procedure* in June 2011, and the first claim was filed with the Tribunal that same month. As a result, this review covers a period of less than four years of Tribunal operations.

Theme 5.1: Case Management

The progress of claims before the Tribunal is monitored and guided through a regular case management conference[88] involving the parties' respective legal counsel (with or without representatives of the parties), along with any interveners that may be involved in the claim, and a Tribunal member.

Case-management conference procedures are set out under rules 47 to 51 of the *Rules of Practice and Procedure*. Rule 49(1) outlines the matters to be discussed at the first case management conference. Rule 49(2) describes procedural matters that the parties must be prepared to address at every case management conference, as follows:

> At every case management conference, the parties must be prepared to discuss any matter that may assist in the just, timely and cost-effective determination of an issue in relation to the specific claim [...].

[87] *Tsleil-Waututh Nation*, paragraph 44. [emphasis added].

[88] Case management conferences are frequently held in order to facilitate discussion regarding many aspects of the claims, including whether expert evidence will be necessary, and the length of time required to reasonably prepare for the case.

The purpose of case management conferences is to facilitate the fair resolution of specific claims issues, with consideration also given to expediency and cost-effectiveness.

Depending on the status of a particular claim, case management conferences are scheduled on a fairly regular basis, at which time specific tasks or projects are identified and assigned, and the parties are directed to report back to the Tribunal on the progress of that work by a specific date.

Participants in the Five-Year Review engagement process were generally of the opinion that case management conferences are highly effective in helping to advance claims through the Tribunal process in a timely and cost-effective manner.

Analysis/Reflection: Although not expressly required under the Tribunal's *Rules of Practice and Procedure,* case management conferences are normally presided over by the Tribunal member responsible for hearing the claim and rendering a decision in the matter.[89] This means that the Tribunal member (a Superior Court judge) is able to mediate or arbitrate any and all issues leading either to a settlement or a hearing at the Tribunal. Normally, this would not be problematic. However, given that the Tribunal is currently operating with the equivalent of only two full-time members, there is a risk that case management conferences — and, by extension, Tribunal proceedings as a whole — will be delayed.

There is no question that case management is important. The Tribunal is already attempting to improve its judicial efficiency by using teleconferencing and videoconferencing for matters of a procedural nature. This has worked quite well, and is discussed in greater detail in Theme 4.4 of Part One: *Location of the Tribunal*.

Recommendations: In order to avoid potential delays in case management, it is recommended that consideration be given, under the proposed joint exploratory discussions, to amending the Tribunal's *Rules of Practice and Procedure*, in order to allow case management conferences to be presided over by non-members such as prothonotaries, which could prove quite efficient.

[89] The Tribunal orders the parties to exchange lists of documents, sometimes subject to any additional documents pursuant to ongoing research. It uses case management conferences to address additional document production and timeframes. In reference to applications made before the Tribunal, rule 32(1)(*a*) of the *Rules of Practice and Procedure* suggests that case management conferences are to be presided over by a Tribunal member. Rule 32(2) indicates that, when a Tribunal member is unavailable, a different Tribunal member may hear an application made at a case management conference.

Theme 5.2: Exchange of Documents

The Tribunal has the power to make rules concerning the summoning of witnesses, document production and exchange, discovery, case management, and the acceptance, receipt and preservation of evidence.[90] During the Five-Year Review engagement process, some participants suggested that the exchange of documents between parties has been a significant factor in slowing the progress of some claims.

At present, the *Rules of Practice and Procedure* do not include any prescribed timeframe for the exchange of documents. If the supporting documentation is voluminous, it may take each party considerable time to collect, organize, and review the documentation before the necessary exchange takes place. This is especially true when a claim is amended at the Tribunal to include information or allegations that were not previously considered by the federal government.

As noted by the Chairperson of the Tribunal in the Tribunal's Annual Report, dated September 30, 2013:

> Although the process established by our *Rules* reduces the potential for costly and time[-]consuming pre-hearing applications, some litigation[-]like processes are unavoidable. Of these, the most significant is the production of relevant documents. In the process administered by the Specific Claims Branch, the parties are not obligated to make full disclosure. As the documentary record is generally in the possession of the Crown, counsel for the Crown have a heavy burden to locate and produce Crown documents that may be relevant. The resulting delays are not inordinate given the magnitude of the work.[91]

During the Five-Year Review engagement process, the federal government maintained that it always strives to balance the sometimes-competing pressures of the "fast, fair, and final" resolution of Tribunal claims. I have been told that the government seeks to complete the evidentiary record quickly without leaving gaps or overreaching itself, but this takes time and resources. It is conceivable, then, that what may be perceived from the First Nation's perspective as delaying tactics on the part of the Crown may be partly a product of the court-like context, and the need for an evidentiary record that is as complete as reasonably possible.

In order to avoid delays and to expedite matters, it has been suggested that both sides in a claim should strive to identify and adhere to reasonable timeframes for the exchange of documents, as laid out in the case management process.

[90] *Specific Claims Tribunal Act*, sections 12 and 13.
[91] http://www.sct-trp.ca/pdf/AnnualReport-2013.pdf.

It was also suggested that the *Rules of Practice and Procedure* be modified to provide for the full exchange of documents by all parties in a timely manner, through the establishment of specific timeframes. The number of days allowed would depend on whether or not the claim is identical to the one filed with the Department, thus reflecting a reasonable timeframe.

Analysis/Reflection: Every claim that comes before the Specific Claims Tribunal is based on a unique set of historical facts. Written evidence of the First Nation's grievance and associated losses is often found (in part, at least) in collections of historical documents that are specific to the First Nation's particular claim. It can take considerable time to assemble, catalogue, distribute and analyse these documents. This is especially true if — as is sometimes the case when a claim comes before the Tribunal — years have passed since the claim was first researched and submitted. During such delays, additional allegations may arise based on new case law, or the need for additional supporting documentation may have been identified.

The suggestion that the parties should strive to identify and adhere to reasonable time limits for the exchange of documents, under case management instructions, seems self-apparent. Cooperation of the parties before the Tribunal is expected, and I would suggest that the existing *Rules of Practice and Procedure* are sufficient to address any such challenges within their case management guidelines.

The suggestion that the *Rules of Practice and Procedure* could be altered to provide for the full exchange of documents by all parties in a timely manner, through the establishment of specific timeframes, is more problematic.

Some claims before the Tribunal are relatively simple, with limited evidence. Others are complex, requiring extensive supporting documentation. In short, a one-size-fits-all approach that establishes a single, fixed time limit for the exchange of documents in all claims is not likely to work.

Recommendations: For the reasons laid out above, it is not recommended that the *Rules of Practice and Procedure* be changed to provide for the full exchange of documents by all parties in a timely manner, through the establishment of specific timeframes.

Theme 5.3: Joint Statements and Common Books of Documents

Whenever possible, the parties before the Tribunal are encouraged, if not ordered[92] to work together to develop a "Joint Statement of Facts or Issues" to

[92] The Tribunal requires the claimant to provide the respondent with a draft agreed statement of facts and/or a draft agreed statement of issues by a specific date. It also orders the respondent to provide its response to these statements within a defined timeframe.

clearly identify the pertinent historical facts and/or issues of the claim in question. Similarly, parties to claims before the Tribunal often collaborate — and are encouraged to do so under the Tribunal's case management — on producing a Common Book of Documents.

The exercise of producing a Common Book of Documents can be particularly time-consuming, requiring not only the exchange of documents by each party, but also their respective consideration of documents produced by the other party. Ultimately, both parties must cooperate in order to reach agreement on which documents are relevant to the proceedings, and which are not.

As with the preparation of a Common Book of Documents, agreement on a Joint Statement of Facts or Issues helps to focus the parties (and the Tribunal) on the matters at the heart of a claim, while avoiding collateral distractions.

Analysis/Reflection: It is to be expected that a First Nation and the federal government will not necessarily agree on all facts and issues — or the interpretation of those facts and issues — with regard to a specific claim. That disagreement is likely one of the reasons for the claim being before the Tribunal in the first place. After all, it takes two to disagree.

As with regular litigation and other conflicts, specific claims originate from the parties' different interpretations of the facts. Under the existing processes, if a First Nation does not agree with the federal government's assessment under the *Specific Claims Policy*, it has the option of submitting its claim to the Tribunal for resolution. At the Tribunal, both parties hire experts and historians to shed light on the historical facts, and defend their theses on the interpretation of those facts. As a result, it is sometimes difficult or impossible for the parties to come to an agreement on the factual basis of a claim: claims are born from controversy on the interpretation of facts.

The drafting of a statement of fact is necessary exercise; it constitutes the foundation of a party's legal theory or position on a claim. It is only to be expected that the Tribunal will have to review two versions of a single story. This is one of the most important steps in its decision-making process.

Recommendations: While the preparation of a joint statement of fact or issues may cause frustration for parties before the Tribunal, both of these tools have proven useful in identifying common and divergent positions. It is suggested that the existing practices and processes are adequate. No changes are recommended.

Theme 5.4: Joint or Collective Claims

Every specific claim is fact-based, meaning that each is rooted in historical events, actions, or inaction. Although the historical circumstances behind the grievances in which specific claims are grounded are unique to the specific experience, location and losses suffered by the respective First Nations claimant, the types of breaches can often be categorized in more general terms.

For example, historical appropriations of reserve lands for railway purposes are the subject of various specific claims, some of which share common historical and legal information. Another common typology would be treaty agricultural-benefits claims, alleging failure on the part of the Crown to provide the farming implements promised under some treaties.

A further example of such commonalities would be when claims demand consideration of the same legal or procedural issues. If the Tribunal is considering arguments on such points, it makes sense to hear from all parties with similar vested interests.

It should be noted, however, that the interests considered above can be either complementary or competitive in nature. For example, some claims before the Tribunal involve conflicting assertions of interest in reserve lands. Others may involve First Nations that have not commenced any specific claims, but that retain a beneficial interest in lands or other assets comparable to those of a First Nations claimant currently before the Tribunal.

Depending on the commonalities, there seemed to be general agreement amongst participants in the Five-Year Review engagement process that there is considerable efficiency to be gained by grouping claims with similar issues, and hearing them concurrently.

Analysis/Reflection: Paragraph 8(2)(*b*) of the *Specific Claims Tribunal Act* already allows the Chairperson of the Tribunal to order the hearing of some specific claims, either together or consecutively, if they have issues of law or fact in common. Paragraph 8(2)(*c*) also allows the Chairperson to order that “specific claims be decided together if decisions with respect to the claims could be irreconcilable, or if the claims are subject to one claim limit.” The “one claim limit” referenced above relates to subsection 20(4) of the *Specific Claims Tribunal Act*, which states as follows:

> 20. (4) Two or more specific claims shall, for the purpose of paragraph (1)(*b*), be treated as one claim if they

> *(a)* are made by the same claimant and are based on the same or substantially the same facts; or
>
> (*b*) are made by different claimants, are based on the same or substantially the same facts and relate to the same assets.[93]

Section 35 of the *Specific Claims Tribunal Act* provides that if the Tribunal decides that a specific claim is invalid, each respondent is released from any cause of action, claim or liability arising out of the same — or substantially the same — facts upon which the claim is based. It also provides that, if the Tribunal awards compensation, the claimant shall indemnify each respondent against any amount that the respondent becomes liable to pay as a result of a claim, action, or other proceeding arising out of the same — or substantially the same — facts.

Section 22 of the *Specific Claims Tribunal Act* pertains to the notification of a province, First Nation or individual when, in the opinion of the Tribunal, its decision may affect the interests of another party. If notified under section 22, a party may apply to the Tribunal for party or intervenor status in the claim, under the terms outlined in sections 24 and 25 of the Act.

In addition to improving procedural efficiency, the measures described above help to ensure that all parties' interests are respected and protected to the greatest possible extent, that claims are resolved in a consistent manner, and that Tribunal decisions achieve the highest possible level of certainty and finality for all parties concerned.

Recommendations: The relevant sections, subsections and paragraphs of the *Specific Claims Tribunal Act* are adequate as they are. In their current form, they provide the discretion necessary for the Tribunal to ensure procedural efficiency in the presence of complementary or competing claims.

Theme 5.5: Bifurcation

The term "bifurcation" refers to the division of issues in a claim, allowing them to be considered at separate Tribunal hearings. Typically, a claim's validity is determined in a first hearing, after which the Tribunal renders its decision, considering the matter of compensation in a later hearing. Bifurcation allows the parties to focus their resources on the issue of a claim's validity first, and to address the appropriate compensation (if a claim is deemed valid) at a later date.

In practice, parties request the Tribunal's approval for bifurcation, which has become a relatively routine procedure. It has been suggested that the *Specific Claims Tribunal Act* could be amended to statutorily bifurcate validity and

[93] *Specific Claims Tribunal Act*, subsection 20(4).

compensation hearings (i.e., conducting validity and compensation hearings separately and sequentially).

Normally, the very reason for bifurcation is simplification and focus; however, some participants in the Five-Year Review engagement process said that, in smaller claims, bifurcation is not ideal, as it can complicate the proceedings unnecessarily. Some also said that bifurcation is no more desirable when it comes to larger and more complex claims, as it creates a doubling of procedures (evidence, etc.), rendering the proceedings more difficult to manage.

Analysis/Reflection: Rule 10 of the *Rules of Practice and Procedure* allows for hearings on validity and compensation to proceed separately, if so ordered by the Chairperson of the Tribunal.[94]

For some claims, validity and compensation are closely related, and their bifurcation would cause undue delays and unnecessarily complicate the process.

Recommendations: Given that the Tribunal should have the flexibility it needs to conduct hearings in a manner that serves the goal of resolving claims in an efficient and cost-effective way, bifurcation should remain a choice for the parties — subject to the Tribunal's approval — rather than being specifically prescribed in the *Specific Claims Tribunal Act*. Of course, where there is bifurcation, ideally the same Tribunal member would preside over both the validity and compensation hearings.

Theme 5.6: "Paper" Hearings

During the Five-Year Review engagement process, some participants suggested that validity hearings could be conducted as a paper-only summary process — with mutual consent of the parties — using the claim and evidence originally submitted to the Minister of Aboriginal Affairs and Northern Development. Others suggested that the validity phase should involve a face-to-face hearing, should any new documentation that might affect the claim's outcome have been uncovered since the original filing to the Specific Claims Branch.

Further, it was suggested that claims before the Tribunal be bifurcated so that the issue of a claim's validity could be determined via a paper exercise, with the issue of compensation determined subsequently (i.e., if the validity of the claim is confirmed).

Some parties expressed concern that paper hearings would strip the Tribunal of a portion of its independence in running the specific claims process, including its role in hearing evidence.

[94] These bifurcation orders are sometimes based on draft orders prepared by the parties.

At present, rules 17 and 18 of the *Rules of Practice and Procedure* require that all files be submitted electronically, unless a party acquires permission from the Tribunal to submit its documents in paper format. Some First Nations have suggested modifying these sections in order to provide more flexibility with regard to document submission. Allowing the submission of paper and oral evidence as the norm, rather than the exception, would give First Nations a chance to provide a full and comprehensive account of their claims, which are often based on oral history.[95]

The federal government is of the view that a summary process, including a paper hearing, is feasible and could save time and resources for all parties. The government has indicated that it is open to working with the Tribunal's Advisory Committee for the development and implementation of a summary process.

Analysis/Reflection: At present, the Tribunal's usual practice involves oral hearings, which typically demand extensive preparation, the exchange of documents and, possibly, the use of expert witnesses.

A paper hearing process could eliminate the Tribunal's powers in relation to discovery, document production and summoning witnesses, which can require significant commitments of time and resources by both parties. Under such a process, the claim and evidence submitted to the Tribunal would be identical to the claim and the evidence submitted to the Minister of Aboriginal Affairs and Northern Development as part of the specific claims process. In paper hearings, it would still be possible to capture oral history evidence in the form of sworn affidavits, or through other technologies that the Tribunal may permit. This exemplifies the flexibility of the Specific Claims Tribunal with regard to the allowance of oral evidence and oral history.

It is recognized, however, that some claims may be too complicated for such a summary process.[96] The suggested paper hearing approach would thus also have to provide for an opportunity for other evidence to be submitted at the validity stage, under exceptional circumstances.

Recommendations: Regardless of the consent of both parties to paper hearings, oral evidence should not be eliminated from a process rich in oral tradition. Whereas the paper record exists in files and dossiers, the cultural record of First Nations resides in the people and the land. First Nations often rely upon oral testimony, as this is an important source of their history, and the

[95] The allowance of oral history evidence can be found in rules 83 and 84 of the *Rules of Practice and Procedure*, which permit parties to enter such evidence, under the condition that they submit written notice of their intention to do so at least 90 days before the hearing.

[96] Some believe that expediting of claims through paper hearings does not allow for sufficient consideration of complex claims. Some claims would be denied a fair hearing, and others would not be assessed properly, due to streamlining.

foundation of their understanding of the events that form the basis of their specific claim. Furthermore, proceeding by way of a paper hearing would diminish the importance of community-based hearings, which have been vital to reconciliation.

Because of the importance of oral history, it is recommended that further consideration be given under joint exploratory discussions to the possibility of conducting Tribunal proceedings as "paper" hearings, ensuring full accommodation of Elders who may provide oral-history evidence. (See Theme 5.7: *Language and Translation* and Theme 5.8: *Cross-Examination*, both in Part One, for additional related discussion.)

Theme 5.7: Language and Translation

Rule 67 of the *Rules of Practice and Procedure* provides for the possibility of simultaneous translation for oral examinations, if the witness does not communicate readily in either of Canada's official languages.

During the Five-Year Review engagement process, some First Nations participants expressed concern regarding the integrity of such translations, which could have a negative impact on the Tribunal's decisions.

I also heard concerns regarding the availability of French-speaking Tribunal members and employees. Some suggested that the lack of French-language resources creates additional delays within the specific claims process. As mentioned earlier, there is currently only one part-time judge at the Specific Claims Tribunal who can hear specific claims in French and, allegedly, very few French-speaking Tribunal employees.

The federal government asserts that it is unaware of any delays caused by language barriers, and that it has sufficient resources to respond in either official language.

Analysis/Reflection: It is important to note that rule 67 of the *Rules of Practice and Procedure* states that it is the responsibility of the examining party to choose a suitably qualified translator, if its witness understands neither French nor English, or is hearing- or speech-impaired.

Regardless of the validity of the concerns reiterated above, the Tribunal should have the necessary facility to ensure that adequate translation of First Nations languages is available for claimants, if needed.

Recommendations: In light of these expressed concerns, there may be an eventual need for more French-speaking and Aboriginal-language interpreters at the Tribunal and the ATSSC to accommodate submissions and testimony in

languages other than English. It is recommended that the federal government and the Tribunal remain cognizant of these concerns, and consider allocating additional resources in this area.

Theme 5.8: Cross-Examination

During the Five-Year Review engagement process, many First Nations asked that cross-examination of witnesses be disallowed at the Specific Claims Tribunal. The main reason behind this request is the way in which cross-examinations are conducted — primarily with First Nation Elders, who may be intimidated by the experience.

Some First Nations participants also suggested that the removal of provisions for the cross-examination of witnesses in the *Specific Claims Tribunal Act* would lessen the adversarial nature of the proceedings.

Analysis/Reflection: It is very important to note that eliminating the cross-examination of witnesses would create a procedural imbalance, and go against the principle of procedural equity. Furthermore, witness testimonies are, especially in a specific claim, an essential piece of evidence, and important to the member's decision. During the case management stage, for example, when the parties participate in a preparatory conference, the judge is able to hear both parties' views and set the tone for the proceedings to come, including the cross-examination of potentially sensitive witnesses.

Paragraph 13(1)(*c*) of the *Specific Claims Tribunal Act* reads as follows:

> 13. (1) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may […]
> *(c) take into consideration cultural diversity in developing and applying its rules of practice and procedure*; […][97]

It should be clear that eliminating cross-examination is not an option. Furthermore, the tone of section 13 of the *Specific Claims Tribunal Act* seems adequate, and rules 70 to 71 of the *Rules of Practice and Procedure* allow a party to ask the member to limit examinations that are deemed oppressive, vexatious or unnecessary. A party may also request the suspension of an examination, and apply for directions from the member, if the examination is being conducted in an abusive manner.

[97] *Specific Claims Tribunal Act*, section 13 (emphasis added).

It is worth noting that, during the Five-Year Review engagement process, none of the First Nations participants provided any examples of improper cross-examination by the federal government. Similarly, the government stated that it knows of no Tribunal cases in which a First Nation's legal counsel has claimed that the government's cross-examination was improper or disrespectful to First Nations witnesses and, in particular, Elders. I was told that the government respects and recognizes the importance of oral history evidence, and seeks to accommodate the retention of that knowledge in a systematic way, by developing oral-history protocols that respectfully take into account the sensitivity of Elders' testimony. I would encourage all parties to work cooperatively in this regard.

Recommendations: As things stand, both the *Specific Claims Tribunal Act* and the *Rules of Practice and Procedure* already provide examples of the Tribunal's mandate for accommodation to cultural diversity in the trial procedure. No changes are recommended.

THEME 6: EFFECTIVENESS

This theme examines the effectiveness of the Specific Claims Tribunal. Again referring to the *Oxford Dictionary*, the word "effective" is defined as, "[t]he degree to which something is successful in producing a desired result; success."

It is fair to say that the "desired result" or "success" of the Tribunal would be the impartial resolution of claims, with certainty and finality for all parties concerned.

Theme 6.1: Provincial/Territorial Jurisdiction

Currently, the *Specific Claims Tribunal Act* applies to claims made against the federal government, rather than provincial/territorial governments. However, provinces and territories are often involved, or should be involved, when specific claims concern them.

During the Five-Year Review engagement process, some participants suggested that the *Specific Claims Tribunal Act* should be amended to apply directly to provinces and territories.

Analysis/Reflection: As it currently stands, the *Specific Claims Tribunal Act* is not automatically binding upon provincial/territorial governments or, by extension, upon municipalities. Provinces/territories can choose to participate voluntarily in the Tribunal process on a case-by-case basis, and must state in writing that they have taken the necessary steps to be bound by the Tribunal's decision. In addition, the Tribunal may award compensation against a province or a territory only if it is a party to the proceedings.

Subsection 22(1) of the *Specific Claims Tribunal Act* requires the Tribunal to send notice to a provincial government when provincial interests will be affected by a decision of the Specific Claims Tribunal. Section 23 of the *Specific Claims Tribunal Act* broadens jurisdiction of the Specific Claims Tribunal to the provinces, when the province is made a party to the specific claim. Subsection 35(1) of the *Interpretation Act* (R.S.C. 1985, c. I-21) provides that the word "province" means a province of Canada, and includes the Yukon, the Northwest Territories, and Nunavut. This means that, when the *Specific Claims Tribunal Act* uses the word "province," it also includes the territories.

It should be noted that, if a decision is made that affects both federal and provincial/territorial governments, with only federal government participation, the First Nation can pursue the provincial/territorial government for the same claim, because the Specific Claims Tribunal decision would be binding on the federal government alone. An endless process such as this is not desirable; hence the importance of greater inter-governmental discussion and cooperation.

Recommendations: The suggestion that the *Specific Claims Tribunal Act* should be amended to apply directly to provinces and territories is not possible, on a constitutional basis.

It is recommended, however, that the Government of Canada work to engage provincial/territorial governments, promoting the *Specific Claims Tribunal Act* and informing these governments of the various adjudicative options available, should a specific claim affect provincial/territorial interests. The federal government should contact the provinces and territories, and encourage them to engage in specific claims that would affect them at the Specific Claims Tribunal, in order to increase judicial efficiency.

Theme 6.2: Equitable Compensation

As previously noted, all specific claims are based on historical grievances. Currently, a claim may not be filed at the Tribunal if it is "based on events that occurred within the 15 years immediately preceding the date on which the claim was filed with the Minister."[98]

Section 20 of the *Specific Claims Tribunal Act* outlines the various criteria to be applied when, having confirmed the validity of a particular claim, the Tribunal must determine what compensation is appropriate. Such compensation is determined in light of the nature of the breach, or breaches, of the Crown's lawful obligations, and in light of the underlying legal principle of restitution, under which compensation is intended to restore claimants to the position in which they would have been, but for the breach. Compensation awarded by the Tribunal may be

[98] *Ibid.*, paragraph 15(1)(*a*).

based on the current unimproved market value of the subject lands, or it may be based on the historical value of the lands, depending on the circumstances of a claim. Because of the nature of specific claims, the value of historical losses — such as loss of use or injurious affection, for example — must normally be brought forward to determine their current equivalent.

One of the challenges the Specific Claims Tribunal will undoubtedly face in the near future is determining an approach to compensation, along with an appropriate means of determining the current equivalent value of historical losses. One option suggested during the Five-Year Review engagement process was the legislation of a standard methodology for determining the current value of historical losses.

Alternatively, it was suggested that using *net economic loss of use*[99] as a model would perhaps provide a fair assessment to First Nations.

Analysis/Reflection: The challenge inherent in the suggestion that a single, standard methodology be legislated would lie in finding a universal model that accommodates the diversity of claims, as well as the First Nations advancing the claims. Once again, I would suggest a one-size-fits-all approach is not realistic. No one formula can cover all circumstances, and the *Specific Claims Tribunal Act* already provides guidelines for the Tribunal to follow in matters of compensation.

Similarly, the suggested *net economic loss of use* model would entail determining the value of the opportunities lost by a First Nation, as a result of the alienation of reserve lands. I would note, however, that agricultural and other treaty-benefits claims before the Tribunal may not fit as neatly into this type of assessment model.

Recommendations: While an appropriate methodology for compensation could be set out in the *Rules of Practice and Procedure*,[100] valuations for loss in First Nations claims should be undertaken in a manner consistent with common law, as developed by the courts.[101] This provides the flexibility needed to adapt to the unique scenarios presented by each claim. Legislating such an approach is therefore not recommended.

Furthermore, at this point it is too early in the history of the Tribunal to determine exactly how it might approach evaluation; after all, the Tribunal has not yet

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[99] A net economic loss (or profit) is the amount by which allowable deductions — including opportunity costs, but excluding previous years' losses — are deducted from revenues earned (or profits/appreciation generated by the goods). See *Dayco Corporation v. Clayton, Commissioner of Revenue* [1967], 269 N.C. 490,153 S.E. 2nd 28. See also: http://www.investopedia.com/terms/e/economicprofit.asp.

[100] Not in the *Specific Claims Tribunal Act.*

[101] *Specific Claims Tribunal Act*, paragraph 20(1)(*c*).

rendered a complete decision on compensation. In fact, none of the claims currently before Tribunal has progressed to the compensation hearing stage.[102]

Theme 6.3: Treaty Implementation

The significance to First Nations of their treaties with the federal government cannot be overstated. Rooted in the principles of the *Royal Proclamation* of 1763, such treaties form the basis of the fiduciary relationship between the Government of Canada and First Nations. To many, the treaties are considered sacred, and violations of their terms and provisions raise genuine grievances.

When there is evidence that the promises and obligations set out in treaties were breached by the Government of Canada in the past, the *Specific Claims Policy* and program as a whole (including the Specific Claims Tribunal) are intended to provide an effective mechanism for the resolution of First Nations' grievances. Examples of these types of grievances include unfulfilled treaty land entitlements, the Crown's failure to provide agricultural implements, livestock, ammunition and twine, and/or other benefits promised under the respective treaties.

During the Five-Year Review engagement process, the federal government was criticized by some participants for its approach to certain treaty benefits claims currently before the Tribunal, some of which still remain unresolved after being accepted for negotiation by the government between 1995 and 1999. It was suggested that all treaty benefits claims, including treaty land entitlement claims, which — as was pointed out during the Five-Year Review engagement process — are the only class of claims involving constitutional rights, should be removed from the specific claims process. Instead, they could be addressed by an Office for Treaty Implementation, which might be modelled on the Office of Indian Residential Schools Resolution of Canada.

Analysis/Reflection: In direct reference to treaties with First Nations, and the importance of resolving specific claims, Aboriginal Affairs and Northern Development Canada states:

> Canada is committed to honouring its lawful obligations to First Nations. By addressing historical injustices that have undermined trust and co-operation, strong partnerships among Aboriginal peoples, governments and the private sector are emerging. In addition to building these partnerships, settling specific claims helps economic development on Aboriginal lands, and in surrounding communities.[103]

[102] As of this writing.
[103] Treaties with Aboriginal people in Canada, Aboriginal Affairs and Northern Development Canada website; see: http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292.

In a very real sense, then, the *Specific Claims Policy* and program — which provide First Nations with a process for the resolution of historical grievances through negotiation, without going to court — and the Specific Claims Tribunal comprise part of Canada's broader treaty-implementation process.

The Supreme Court of Canada has held that the wording of the treaties must "be given a just, broad and liberal construction"[104] and that "doubtful expressions [be] resolved in favour of [First Nations]."[105] Within that spirit, it is important that the Government of Canada implements the treaties fully with honour and purpose.

Recommendations: It is my opinion that the Specific Claims Tribunal is adequately mandated to address claims pertaining to treaty benefits and treaty implementation. The creation of what would essentially be another judicial level to address treaty issues and grievances is, therefore, not recommended at this time.

Theme 6.4: Orders for Costs

The *Rules of Practice and Procedure* address the matter of costs under rules 110 and 111. Rule 110 provides that the Tribunal may award costs after hearing either a specific claim or an application. Rule 111 outlines several factors to be considered by the Tribunal in deciding whether an award of costs is appropriate.

Perhaps because there have been few awards of costs to date, First Nations participants in the Five-Year Review seemed relatively unconcerned about the Tribunal's practices in this regard.

Many First Nations did, however, express a great deal of frustration about the level of funding provided to them by the federal government for their participation in the Tribunal process. Review participants complained that Tribunal funding was inadequate when compared with the overall cost of their actions. Several participants pointed out that carrying such expenses until a file is resolved can be a significant burden for small, financially challenged First Nations communities. The situation can be exacerbated if claimants have already taken on loan funding from the federal government during the negotiation phase of the specific claims process.[106]

Analysis/Reflection: Subsection 12(1) of the *Specific Claims Tribunal Act* authorizes a committee of Tribunal members, appointed by the Chairperson, to

[104] R. v. *Sioui,* [1990] 1 S.C.R. 1025 at 1036.
[105] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36.
[106] The Government of Canada offers loans to assist First Nations with negotiation costs, at 0% interest, with repayment to be recovered upon conclusion of a final settlement agreement. If negotiations are not successful, and repayment is not made, outstanding loans can count against a First Nation's credit rating.

make rules governing the Tribunal's practices and procedures for a variety of matters, including costs. Under subsection 12(3), the Tribunal's rules regarding costs must align with those of the Federal Court, subject to any modifications considered appropriate by the Tribunal. With reference to the funding provided by Canada to First Nations claimants, the Act also stipulates:

> The Tribunal shall deduct from any award of costs in favour of the claimant, any amount provided to the claimant by the Crown for the purpose of bringing the claim before he Tribunal.[107]

Recommendations: It is suggested that improvements in the way Canada makes funding available to help First Nations with costs related to resolving their specific claims before the Tribunal be considered as part of the proposed joint exploratory discussions.

Subject to the preceding paragraph regarding a review of financing, I believe the provisions of the *Specific Claims Tribunal Act* and the *Rules of Practice and Procedure* are adequate as they are. A legislative status quo seems to be the best option going forward.

Theme 6.5: Proportionality of Costs

The federal government currently offers contribution funding to support First Nations participation in Tribunal proceedings. The proportionality of costs is a matter that is largely affected by the necessity for expert witnesses and reports. In some cases, proceedings can become very expensive, with increased costs due to the passage of time between when the claim is filed, and when it is heard at the Tribunal; in certain cases, reports require updating.

During the Five-Year Review engagement process, many First Nations expressed concern about funding reductions, noting that not only is less money available to facilitate their participation in Tribunal proceedings, but that they are also being forced to incur increased costs at the Tribunal due to an excessively adversarial approach on the federal government's part.[108]

Analysis/Reflection: Prior to the *Justice At Last* initiative, it was not uncommon for the resolution of specific claims to take ten years or more. Such delays increased the risk that the amount of funding provided by the federal government to a claimant First Nation, to develop and advance its claim, could actually exceed the total value of the claim by the time settlement was finalized. This has since been attenuated with the implementation of the three-year timeframes

[107] *Specific Claims Tribunal Act*, at subsection 13(2).
[108] That approach, however may be partly attributable to the Tribunal's *Rules of Practice and Procedure*, which are very similar to those of provincial/territorial Superior Courts, requiring formal approaches and responses from all parties.

discussed in Theme 3.9 of Part One: *Three-Year Timeframes*. Because of a legislative obligation to operate within more restrictive timeframes, there is less likelihood of costs skyrocketing through a limitless process.

It follows, of course, that any effort from the federal government to shorten timeframes for the filing, assessment and negotiation of claims would help lower costs, thus making the value and cost of claims more proportional.

Recommendations: The proportionality of costs is a complicated issue with no obvious solution. It is suggested, however, that all parties make an effort to expedite the resolution of claims before the Tribunal, and seek to limit costs whenever possible. I would also suggest that the Tribunal could play a role in this regard by relaxing some of the formal requirements in its *Rules of Practice and Procedure*, and encouraging more cooperative relationships between the parties.[109]

It is recommended the Government of Canada show a greater willingness to accept the use by First Nations, at the Tribunal, of relevant studies undertaken within the context of negotiations. This includes, for example, expert reports (i.e., Loss of Use studies, survey analyses, expert appraisals, etc.) containing terms of reference that were jointly approved by the parties during negotiations. Ideally, this should obviate additional burdens of time and expense, when the information is already available.

Theme 6.6: Judicial Review

Subject to subsection 34(1) of the *Specific Claims Tribunal Act,* subsection 34(2) of the Act provides that the Tribunal's decisions are final and conclusive. This means that the Crown and First Nations are equally bound by decisions of the Specific Claims Tribunal. Subsection 34(1) of the *Specific Claims Tribunal Act*, however, allows any party to the claim to apply to the Federal Court of Appeal for judicial review of a Tribunal decision.[110]

With the possibility of judicial review, some First Nations questioned the binding nature of decisions made by the Specific Claims Tribunal. They wondered why the *Kitselas*[111] and *Williams Lake*[112] decisions had even gone to the Federal Court of Appeal, considering the final and conclusive nature of the Specific Claims Tribunal decisions. They proposed the abolition of judicial review.

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[109] The Tribunal already orders each party to notify the Tribunal, and one another, in writing of any intention to retain an expert, and to notify the Tribunal in writing of the name of their respective expert within a specific timeframe.
[110] The Tribunal normally requires a party seeking judicial review based on validity to notify it of procedures followed in the application for review, thus keeping the Tribunal informed at all times.
[111] *Kitselas First Nation v. Her Majesty the Queen in Right of Canada* [2014] SCT 7003 11.
[112] *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada* [2014] SCT 7004 11.

First Nations participants also mentioned issues raised by bifurcation, in which not one but two decisions could be judicially reviewed. Some suggested that the federal government currently uses section 34 of the *Specific Claims Tribunal Act* as a means of delaying resolution of specific claims.

Another proposal was to explicitly prescribe the standard of review of decisions made under the *Specific Claims Tribunal Act*, as the standard of reasonableness. The explicit mention of deference to the expertise of Specific Claims Tribunal members with regard to the Act would imply a higher standard in judicial review.

Analysis/Reflection: The federal government seems mindful of decisions of the Specific Claims Tribunal, even in light of the fact that the Tribunal is relatively new. Tribunal decisions on claims deal with broad legal issues that could have implications beyond the Tribunal context. For example, issues related to fiduciary duty — which form the basis for many specific claims — involve legal principles that transcend Aboriginal law. It should be remembered that the members of the Specific Claims Tribunal are Superior Court judges who are making decisions based on court-like rules of evidence and (in many cases) expert testimony.

The precedential value of Tribunal decisions, therefore, is important: where the facts are the same or substantially the same, the precedent should be applied. If, however, the facts are different, the precedent should not necessarily apply. That being said, it is undoubtedly desirable that the federal government respect precedents established by the Specific Claims Tribunal. As has been previously noted, however, the Specific Claims Tribunal is still relatively new. As such, there is little jurisprudence to establish precedents so far. Over time, the precedential value of decisions rendered by the Specific Claims Tribunal will increase.

Regardless of precedents, both parties have the right to seek judicial review of a decision of the Tribunal, irrespective of section 34 of the *Specific Claims Tribunal Act*.[113] The existence of a privative clause does not change the fact that, if a previous judge erred in law, and one of the parties exercises its inherent right to seek judicial review, the higher-court judge can correct the legal error using the degree of deference he or she deems appropriate within the context. This right derives from basic judicial principles, and cannot be called into question.

Recommendations: The proposal to abolish judicial review violates the principles of procedural fairness, and is not recommended.

[113] Not only can both parties request judicial review at the Federal Court of Appeal by virtue of section 34 of the *Specific Claims Tribunal Act*, but they can also request permission to appeal decisions from the Federal Court of Appeal to the Supreme Court of Canada. When there is bifurcation, we must wait for the question on validity to be definitively decided by the Federal Court of Appeal or the Supreme Court of Canada, before beginning to approach the question of compensation. It should also be noted that the Tribunal regularly requests the parties to keep it informed on procedures filed with the Federal Court of Appeal and Supreme Court of Canada.

Regardless of the applicable standard in judicial reviews (reasonableness or correctness), its determination is the responsibility of the appellate judge, based on facts and legal norms. I recommend, therefore, that explicitly requiring expertise for the Tribunal and its members should not be pursued, as doing so might add to the challenge of finding members for the already understaffed Tribunal.

Theme 6.7: Finality of Claims

Understandably, the Government of Canada, representing the interest of all Canadians, "requires certainty and finality when it settles a claim."[114] According to the *Justice At Last* initiative and the *Specific Claims Policy*, a central strategy for achieving certainty and finality in a specific claim settlement is the exchange of compensation from the Government of Canada in return for a release from the claimant First Nation that "ensure[s] the claim can never be reopened."[115] The *Justice At Last* initiative even goes on to say that "[t]he immediate priority is to bring justice to First Nations claimants with legitimate grievances, and certainty to government, industry and all Canadians."[116]

These are two sides of the same coin: the Government of Canada recognizes the importance of resolving the historical claims of First Nations on the one hand, while also recognizing the importance of ensuring that, once a specific claim is addressed, it can never again be brought before an administrative or judiciary body. In short, the Government of Canada wants to settle specific claims once and for all.

In accordance with commitments made by the federal government in the *Justice At Last* initiative, the Preamble of the *Specific Claims Tribunal Act* promotes the finality of specific claims for all parties involved.[117] However, four elements seem *a priori* to hinder this goal. The first is the resubmission of claims to the Department; the second is the lack of a statute of limitations; the third is the lack of delay for submission of specific claims to the Specific Claims Tribunal once they have been rejected or if negotiations with Canada fail; and the fourth is the

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[114] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Policy and Process Guide*. Ottawa: Minister of Indian Affairs and Northern Development, 2009. Available online at: http://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506#chp4, p. 7.
[115] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Action Plan: Justice At Last*. Ottawa: Minister of Indian Affairs and Northern Development, 2007, p. 3. See also the *Specific Claims Policy and Process Guide*, p. 7.
[116] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Action Plan: Justice At Last*. Ottawa: Minister of Indian Affairs and Northern Development, 2007, p. 12.
[117] The Preamble of the *Specific Claims Tribunal Act* recognizes "that it is in the interest of all Canadians that the specific claims of First Nations be addressed [and that] resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations […]."

15-year limit on claims, as laid out in paragraph 15(1)(*a*) of the *Specific Claims Tribunal Act*.

The first element occurs at the filing and assessment level of the current specific claims process structure. First Nations are able to resubmit rejected specific claims to the Department as they see fit. This, of course, does not promote finality.

The second element is the lack of a statute of limitations. Although this is discussed in Theme 3.8 of Part One: *Adversarial/Court-Like Nature of Tribunal Proceedings*, it is important to mention that section 19 of the *Specific Claims Tribunal Act* prohibits the Specific Claims Tribunal from considering any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown, due to the passage of time or delay. This includes the prohibition of any statute of limitations or doctrine of laches, which means that First Nations are able to bring a wide array of historical claims before the Specific Claims Tribunal. Once again, this element does not facilitate the finality of specific claims, as provided for in the Preamble of the *Specific Claims Tribunal Act*.

The third element is the lack of delay for submission of specific claims to the Tribunal, once they have either been rejected at the assessment level, or negotiations have failed. Currently, the only delays that exist within the specific claims process are the three-year timeframes discussed in Theme 3.9 of Part One of this report: *Three-Year Timeframes*. There is no requirement or incentive, however, for First Nations to submit their rejected claims to the Specific Claims Tribunal within a prescribed time period. This means that, should a specific claim be rejected or negotiations fail, First Nations have an unlimited amount of time in which to decide whether or not they will file their claim in the future for adjudication. This also counteracts finality.

The fourth element is the 15-year limitation set out in paragraph 15(1)(*a*) of the *Specific Claims Tribunal Act*. This provision, read *a contrario*, suggests that claims can be based on events that occurred 15 years, or more, prior to the date on which the claim is filed with the Minister. These are sometimes considered to be modern, not historical, specific claims. In that respect, some might believe that modern specific claims belong before regular courts of justice, rather than before the Specific Claims Tribunal.

Analysis/Reflection: Although it is clear that the four elements noted above do not promote finality, some of them are very important to the unique context of specific claims. For example, the lack of a statute of limitations or doctrine of laches is something that should remain intact at this point, as historical claims can be, by definition, centuries old. Furthermore, this element has been conceded by the Crown to First Nations for a certain period of time. For example, the *Specific Claims Policy* notes the following:

> First Nations with longstanding grievances will not have their claims rejected before they are even heard, because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the federal government is not going to refrain from negotiating claims on the basis that they are submitted too late (statutes of limitation) or because the First Nation has waited too long to present its claim (doctrine of laches).[118]

Regarding the ability of First Nations to resubmit their specific claims repeatedly to the Department after rejection, it may not be fair to prevent them from resubmitting their claims altogether. A compromise, however, could be drawn up, to include a procedure that would require submissions of previously rejected specific claims to include new supporting information and/or evidence, in order to be eligible. There could even be a compromise that would involve limiting the number of resubmissions. All this could be included within the context of proposed joint exploratory discussions between the federal government and First Nations.

As for the 15-year rule, it is appropriate, in my view, as is. Additional procedural limitations to the submission of specific claims would be unjust and go against the spirit of the *Specific Claims Tribunal Act*. As subsection 14(1) of the Act provides, a specific claim is born when there is a breach of legal obligation on the part of the Crown. In other words, even if a breach of the Crown's legal obligation is recent, it remains a breach nonetheless. Moreover, it should be noted that it is possible, even probable, that future specific claims will be based upon relatively recent events — when First Nations have generally had full access to independent legal advice, unlike an extended period during the 20th century.

Finally, I suggest in Theme 3.9 of Part One: *Three-Year Timeframes*, that the lack of a time limit for the submission of claims to the Specific Claims Tribunal remain as it is for now. In that same section, I also suggest that the development of a reasonable time limit should be a subject included in the joint exploratory discussions.

Recommendations: When it comes to the statute of limitations, the doctrine of laches, the 15-year rule, and the lack of time limit for submissions of claims to the Tribunal, I see no reason to change the status quo.

However, with regard to the resubmission of claims to the Specific Claims Branch, First Nations and the Department could come to a mutually beneficial agreement. Simply allowing exactly the same claims to be resubmitted multiple

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[118] Canada. Department of Indian Affairs and Northern Development. *Specific Claims Action Plan: Justice At Last*. Ottawa: Minister of Indian Affairs and Northern Development, 2007, at p. 3. See also the *Specific Claims Policy and Process Guide*, at p. 8.

times, following unfavourable decisions, could create an unnecessary inventory of claims.

One solution might be the creation of a reasonable set of conditions for the resubmission of claims, such as the discovery of new evidence. Another option would involve establishing a reasonable limit on the number of potential resubmissions. These options should be considered within the context of joint exploratory discussions.

THEME 7: OTHER MATTERS RELATED TO THE SPECIFIC CLAIMS TRIBUNAL ACT

Theme 7.1: Settlement Privilege

During the Five-Year Review engagement process, some First Nations suggested that the federal government sometimes asserts settlement privilege in proceedings before the Tribunal to prevent claimants from submitting documents produced within the context of the negotiation process. First Nations expressed frustration that Canada's position causes increased delays and costs to both parties (i.e., new expert report, appraisals, etc.).

The federal government, in turn, informed me that its consideration of whether or not to waive settlement privilege over expert reports is undertaken on a case-by-case basis, and that it does not arbitrarily withhold waiver.

Analysis/Reflection: Settlement privilege belongs to the parties in a negotiation process. This privilege attaches to communications involving concessions and compromises of position and/or communications aimed at reaching a settlement. As this privilege belongs to all parties to the negotiations, all parties must agree to waive this privilege, in order to allow the communications to be used in subsequent litigation. Within the context of specific claims negotiations, "settlement privilege" is sometimes confused with "solicitor-client privilege", which attaches to legal advice between a lawyer and client. Solicitor-client privilege is not unique to the Crown; it also applies to the legal advice shared between a First Nation and its legal counsel. Solicitor-client privilege may only be waived by the client.

As stated by the Supreme Court of Canada in two separate cases:

> At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. [...]

> The rule promotes honest and frank discussions between the parties, which can make it easier to reach a settlement.[119]
>
> And:
>
> Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement.[120]

It is clear, therefore, that waiver of settlement privilege requires the consent of both parties; settlement privilege cannot be waived unilaterally. The principle of settlement privilege is so fundamental to the concept of negotiations that it would be unreasonable and imprudent to propose any sort of blanket waiver. It also seems inappropriate, however, to require claimants to reproduce studies undertaken within the context of negotiations. This is considered to be especially true when it comes to cases in which the federal government has reviewed and approved the respective Terms of Reference, before approving the loan funding used by a First Nation to pay for those studies in the first place.

Recommendations: As discussed in Theme 6.5 of Part One: *Proportionality of Costs*, it is recommended that, in claims before the Tribunal, the federal government show greater willingness to consider waiving settlement privilege when it comes to expert reports — especially when the government has reviewed and approved the respective terms of reference before approving the loan funding used by the First Nation to pay for those studies in the first place. This could help lower costs by using evidence (such as a costly expert report, for example) that has already been acquired.

Theme 7.2: Information, Transparency and Access to Records

First Nations must provide the federal government with a certain amount of information supporting their claims. Some participants in the Five-Year Review engagement process stated that the government does not give sufficient reasons when claims are not accepted for negotiation. More specifically, some believe that the Specific Claims Branch is under the impression that its decisions are always correct, but note that the Branch could disclose more of its reasoning in order to help parties climb the procedural ladder.

Some mentioned a general lack of information and transparency, when it comes to rejection or partial acceptance letters, following the assessment phase of the specific claims process. First Nations stated that they often do not know why their

[119] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35, [2014] 1 S.C.R. 800.
[120] *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37, [2013] 2 S.C.R. 623.

claims have not been accepted, or have been only partially accepted, and they find it unfortunate that a lack of access to federal records can affect their ability to prepare their evidence for the Tribunal. As previously noted, certain participants claimed that the disclosure of documents is a problem, and that the federal government does not communicate effectively during the research phase.

First Nations described a dramatic deterioration, since 2008, in federal capacity when it comes to the retention of records, and First Nations' ability to access those records. There is concern over cutbacks to funding at Library and Archives Canada, and the destruction of records. There is also concern over the time it takes to get records from the government, and over appeals regarding the non-production of documents. This affects First Nations' ability to gather the evidence necessary to support their claims before the Tribunal. Since the federal government has primary legislative responsibility for Aboriginal Affairs, federal records are key in terms of documenting rights and claims. According to First Nations, this is becoming an increasingly significant barrier to providing evidence for their rights and claims. It is worth noting that First Nations concerns about the capacity of Library and Archives Canada are corroborated by researchers at the Specific Claims Branch, who have also experienced delays in accessing archival records.

Analysis/Reflection: During the Five-Year Review engagement process, the federal government informed me that correspondence sent to the Chief of a claimant First Nation, advising that a claim has not been accepted for negotiation, does in fact include the reasons for the government's decision, with respect to each and every allegation in the claim. This correspondence also includes contact information for both the Director of Negotiations and the appropriate Portfolio Manager, if additional information is desired.

The historical records on any given claim are not located in claim-specific repositories within Aboriginal Affairs and Northern Development Canada, or Library and Archives Canada. Some files can be easily found, but in many cases, the evidence required to tell the full story of a claim is located in repositories across the country, which are subject to retention rules, and may sometimes be non-circulating.

These records belong to all Canadians. They tell our common history, and must be adequately maintained, controlled and protected from loss. This means that the collection of the evidence needed for claims often takes time to locate, catalogue, and produce in a systematic way. This might result in some delays, but the federal government asserts that these are reasonable delays under the circumstances.

Recommendations: It is suggested that the Government of Canada and First Nations take a more collaborative approach towards achieving a greater level of information and transparency in relation to decisions by the Specific Claims

Branch. A similar approach is recommended with regard to ensuring mutually satisfactory access to historical records.

Theme 7.3: Further Review

As stated earlier, it took 32 months to open the Tribunal's doors after the *Specific Claims Tribunal Act* came into force in 2008. The Tribunal established its *Rules of Practice and Procedure* in June 2011, and the first claim was filed with the Tribunal that same month. The Tribunal rendered its first decision in June 2012. As of this writing, the Tribunal has issued seven decisions regarding claims' validity, and none regarding compensation.

During the consultation period, some First Nations suggested that a further review of the Tribunal would be warranted in the future.

Analysis/Reflection: It is clear that this report does not — and cannot — mark the end of the engagement process with First Nations in relation to specific claims. There may be revisions to the *Specific Claims Tribunal Act* in the future, as well as to the *Rules of Practice and Procedure*, all of which could stand to benefit from another review within five years of the Minister's tabling of his report, pursuant to subsection 41(3) of the *Specific Claims Tribunal Act*.

Further, another review in the foreseeable future would be enlightening. The relatively short functional history of the Specific Claims Tribunal limits the ability of this report to comment definitively on the mandate and structure of the Tribunal, the efficiency and effectiveness of its operation, and other matters related to the *Specific Claims Tribunal Act*.

Recommendations: It is recommended that the Minister of Aboriginal Affairs and Northern Development make a commitment to undertake a further review of the mandate and structure of the Tribunal, of the efficiency and effectiveness of its operation, and of other matters related to the *Specific Claims Tribunal Act*, on the five-year anniversary of the tabling of his report, as noted above. It is not necessary to change the Act in order to enshrine a requirement for further review; a strongly worded commitment from the Minister should be sufficient.

PART TWO: FILING, ASSESSMENT AND NEGOTIATION OF CLAIMS AT THE SPECIFIC CLAIMS BRANCH

In addition to the concerns and suggestions heard during the Five-Year Review process regarding the *Specific Claims Tribunal Act* and the Tribunal itself, a number of participants included comments concerning matters that are not directly related to the Act or the Tribunal. These matters are nonetheless important with regard to the submission, assessment and negotiation of specific claims. I have accordingly included these concerns below, in the interests of honesty and transparency with regard to the submissions of consulted parties. Additionally, subsection 41(2) of the *Specific Claims Tribunal Act* provides that this report comprehensively relay representations made by First Nations during the engagement process.

THEME 1: SUBMISSION OF SPECIFIC CLAIMS TO AN INDEPENDENT BODY

As discussed in Theme 3.2 of Part One: *Possible Expansion of the Tribunal's Mandate — Pre-Assessment and Review of Claims*, some First Nations suggested that specific claims be filed with the Tribunal for initial assessment, instead of with the Department. As noted in Theme 3.2, this idea is premature, considering the lack of resources available at the Tribunal, but could be the subject of joint exploratory discussions down the road, if certain conditions are met.

Some, however, suggested submitting specific claims for assessment against the minimum standard and/or the claim's merits, to neither the Department nor the Tribunal, but instead to an independent third-party institution or separate office.[121] They proposed the establishment of a separate office and process for dealing with the inventory of claims, which might help solve some of the issues currently afflicting the Specific Claims Tribunal.

Analysis/Reflection: At present, specific claims are submitted to Aboriginal Affairs and Northern Development Canada, and only claims that are found to meet the minimum standard are filed with the Minister.[122] It should be noted that the minimum standard relates to the "kinds of information" and "form and manner" that are required in order for a specific claims submission to be filed with the Minister.

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[121]This "assessment" would be to determine whether the minimum standard was met, as well as to assess the claim.

[122]*Specific Claims Tribunal Act*, subsection 16(3). Theme 4 of Part Two: *Application of the Minimum Standard* further addresses the minimum standard.

Regarding an assessment based on the merits of the claim, this is not to be confused with an assessment against the minimum standard. Rather, a claim submission is reviewed against a list of basic requirements (i.e., allegations, statement of facts, legible supporting documents, etc.) to ensure that Canada is in a position to assess the claim in an efficient and timely manner, once it is filed with the Minister.

Recommendations: The suggestion that another independent body be created to assess specific claims against the minimum standard, and/or evaluate them under the *Specific Claims Policy*, is not considered a viable option, and is not recommended.

THEME 2: INVOLVEMENT OF AN INDEPENDENT BODY WITH REGARD TO FUNDING

Some participants in the Five-Year Review engagement process suggested that evaluation of claimants' funding requirements could be undertaken by an independent body, (i.e., neither the Specific Claims Tribunal nor the Department), in order to review, attribute and verify the funding offered to First Nations in relation to specific claims, as well as to assist in research. They do not believe the federal government should assess requests for such funding. Instead, they feel this should be done by the equivalent of a commission.

Analysis/Reflection: Implementation of this suggestion seems unlikely. Allowing a third-party organization to control the purse strings of the federal government for the purpose of funding specific claims would be difficult to justify, given that these funds are provided by the Canadian public.

The Government of Canada must balance its obligations to First Nations and all Canadians under the *Justice At Last* initiative and the *Specific Claims Tribunal Act* with its other statutory duties and obligations (i.e., under the *Financial Administration Act*) to spend taxpayers' money wisely. In so doing, it is understood that the government must consider many competing priorities, facing the economic reality that there are limited funds with which to accomplish all of its goals.

Recommendations: The administration by an independent body of funding to First Nations in relation to specific claims is not recommended.

THEME 3: INVESTIGATION OF REJECTED CLAIMS BY AN INDEPENDENT BODY

In addition to suggestions made by some regarding assessment by the Tribunal of claims not accepted for negotiation, (see Theme 3.2 of Part One: *Possible Expansion of the Tribunal's Mandate — Pre-Assessment and Review of Claims*) some participants in the engagement process asked whether or not an authority should exist to investigate claims that are not accepted by the federal for negotiation, as the Indian Specific Claims Commission once did. This Commission did indeed review decisions by the Minister when they were not accepted for negotiation, and followed up by making non-binding recommendations regarding the validity of claims, as well as how claims should be evaluated during negotiations.[123]

Analysis/Reflection: The possibility of an independent body being established to evaluate claims that were not accepted by the federal government for negotiation would create an additional bureaucratic layer, and is not a viable option. Furthermore, this is precisely the function which the Specific Claims Tribunal is mandated to perform, and it should be given a chance to do so.

Recommendations: The establishment of a similar body with a mandate to review claims not accepted for negotiation is not recommended.

THEME 4: APPLICATION OF THE MINIMUM STANDARD

The *Justice At Last* initiative — including the establishment of a minimum standard as an access threshold to the specific claims process and the Specific Claims Tribunal — was developed jointly by the federal government and the Assembly of First Nations. As noted earlier, neither the merits nor the substance of a claim are assessed against the minimum standard. The purpose of the minimum standard is to ensure that claim submissions are complete to a minimum level of form and standard, in order to facilitate their timely assessment.

Subsection 16(1) of the *Specific Claims Tribunal Act* sets out certain requirements that must be met in order for a First Nation to file a claim with the Tribunal, the prerequisite being that the claim must have been previously filed with the Minister.

[123] Aboriginal Affairs and Northern Development Canada website: http://www.aadnc-aandc.gc.ca/eng/1100100011078/1100100011079

RE-ENGAGING

The *Specific Claims Tribunal Act* stipulates, under subsection 16(3):

> A claim is to be filed with the Minister only if it meets the Minimum Standard referred to in paragraph (2)(*a*) and is presented in the form and manner established under that paragraph.

The establishment of a "reasonable minimum standard" for the form and content of specific claims is also a legislative requirement under subsection 16(2) of the *Specific Claims Tribunal Act*.

In accordance with subsection 16(2) of the *Specific Claims Tribunal Act*, the minimum standard is posted on the Department's website, and appears in the *Specific Claims Policy*.

During the engagement process, several First Nations expressed concern regarding Canada's interpretation of the minimum standard. They also reported inconsistencies in its application, including changing the requirements: for instance, asking claimants to provide evidence of the value of the claim, when previously they were supposedly only asked to provide evidence supporting the validity of the claim.[124]

Some First Nations referred to instances in which documents they received from the Specific Claims Branch itself did not conform to the minimum standard. According to some, the federal government is imposing significant technical barriers by implementing unreasonable minimum standards for claim submissions to the Specific Claims Branch. They described this as the federal government arbitrarily turning away new claims, and expressed concern that these standards create unnecessary and expensive delays, and add substantial costs to the preparation of claims.

First Nations also assert that this additional financial burden is exacerbated by recent cutbacks in research funding, implemented by the Department. With less joint research being undertaken cooperatively during the assessment and negotiation phases of the specific claims process by both the federal government and First Nations, claimants are concerned that they are being burdened with additional work and financial pressures. Some are concerned that the minimum standard has been applied so stringently that it exceeds litigation standards, and is far too demanding on First Nations. The federal government, on the other hand, asserts that it engages with First Nations during the assessment of submissions to help them meet the minimum standard within the six-month timeframe.

Some participants in the Five-Year Review engagement process suggested amending the legislative provision to provide clarity and meaning to the concept of "minimum standard".

[124] It should be noted that the published minimum standard does not require such evidence.

Analysis/Reflection: It appears that the problem may not be with the content of the minimum standard itself, but with its alleged subjective interpretation.

Recommendations: I recommend that Canada undertake the development of training directives and guidelines for the objective interpretation and application of the minimum standard by staff. This would ensure that the standard is applied in a reasonable and consistent manner that focuses on identifying substantive claim deficiencies, as opposed to technical flaws. This would assist First Nations in improving the basis of their specific claims.

Additionally, I recommend that efforts be made by the federal government and First Nations, within the context of joint exploratory discussions to improve their interaction and cooperation with regard to application of the minimum standard. This might help enable claimants to meet the requirements of the minimum standard more easily.

THEME 5: PARTIAL ACCEPTANCE, SPLITTING AND BUNDLING

When a First Nation submits a specific claim to the Department, it often contains multiple allegations. When the latter relate to the same, or substantially the same, facts (including alternative allegations), these are addressed as a single claim submission by the Specific Claims Branch. When the allegations do not all relate to the same, or substantially the same, facts (i.e. the same transaction), it is considered that two or more "claims" are contained in one same submission. In the latter circumstance, a claim can be split (or severed), whereas in the former circumstances it cannot.

I was advised that First Nations perceive partial acceptance of claims as occurring when the federal government evaluates and accepts part of a claim at low value, rejects the rest, and asks for a release without compensation for the rejected portion. Releasing the Crown from all aspects and allegations of a claim raises apprehension among First Nations about giving up their right to pursue the settlement of rejected portions of their claims elsewhere.

Many describe this as a disingenuous approach that effectively leads to claims being rejected, not by the Crown, but by First Nations themselves. Through its actions, some say that the federal government is acting in bad faith to the detriment of all Canadians. They say that this is done on the basis of take-it-or-leave-it offers in which meaningful negotiation is not an option.

Some participants said that the federal government’s attempt to save money is, in fact, costing them more in the long run, due to the inability of the Tribunal to adjudicate partial acceptances and rejections from the Specific Claims Branch,

which have been brought forward by unsatisfied claimants. One reason for this inefficiency is the lack of resources providing access to justice for First Nations wishing to file a specific claim. It is widely perceived that the inventory of claims has simply been displaced from the Specific Claims Branch to the Tribunal.

Further, when a specific claim is partially accepted, First Nations say that claimants who refuse the partial acceptance are forced to bring the entirety of their claim before the Tribunal. It was also reported that some First Nations claimants are responding to the federal government's requirement for full releases on all aspects of a claim — even if its allegations are only partially accepted for negotiation — by withdrawing claims containing multiple allegations, splitting them into multiple single-allegation claims, and resubmitting them as individual claims for assessment by the Specific Claims Branch. It was stated that this has resulted in increased research, administrative and legal costs for First Nations, which are not supported by additional funding.

First Nations believe it would be acceptable if, when the Department partially accepts a claim, it only requires release from the allegations for which the First Nation is compensated. This would allow First Nations — if they so wish — to bring their remaining allegations before the Tribunal. First Nations believe that, in this way, the Tribunal would not be required to address the entirety of the original claim, but only those allegations still requiring adjudication.

Analysis/Reflection: If a single claim submission contains multiple, unrelated allegations, it would ultimately not make sense to address those issues together. In such cases, the federal government could legitimately sever claim submissions and treat them as two or more separate claims, in order to fully address the scope of each.

Similarly, it is a legitimate federal practice to treat multiple claim submissions pertaining to the same — or substantially the same — facts as one claim, subject to a single comprehensive assessment. As provided in paragraph 20(4)(*a*) of the *Specific Claims Tribunal Act*:

> (4) Two or more specific claims shall […] be treated as one claim if they (a) are made by the same claimant and are based on the same or substantially the same facts […].[125]

In my opinion, the practice of the Specific Claims Branch regarding the splitting or the bundling of claims is consistent with the Act and the practice of the Specific Claims Tribunal. To do otherwise would be neither efficient nor effective.

However, it might be pertinent for the Department to review its practice of requiring full releases as part of the settlement of partially accepted claims, as this may not be a viable long-term solution to specific claims.

[125] *Specific Claims Tribunal Act*, paragraph 20(4)(*b*).

Recommendations: I do not expect the Department to cease the splitting and bundling of claims, as this is a legitimate practice for the appropriate treatment of either distinct or similar specific claims, as the case may be.

I nonetheless recommend that the Government of Canada re-examine the accuracy of its practices regarding partial acceptance of claims, with a view to establishing a process under which portions of claims could be settled, with appropriate releases, while allowing the unaccepted portions to continue on to the Tribunal. In this way, the First Nations involved would have the option of bringing their remaining unanswered allegations before the Tribunal, without adding to an unnecessary accumulation of claims inventory.

THEME 6: NEGOTIATION OF CLAIMS

One of the greatest challenges facing the specific claims process as a whole, including proceedings before the Tribunal, is an apparent distrust of the federal government, shared by many First Nations. Several participants in this Five-Year Review reported a general deterioration in relationships at negotiation tables since 2008 — referring to the federal government practice of limiting face-to-face meetings[126] — coupled with settlement offers which, in their view, provide little opportunity for meaningful negotiation.

Some participants suggested that the Crown has adopted a narrow and legalistic approach to negotiations, as a way of closing as many files as possible, and that the government has adopted a "fight everything" position, taking an adversarial rather than conciliatory approach. First Nations suggest that the proportion of settled claims has decreased, and that the federal government is making final offers, and instructing First Nations to accept or reject a small financial settlement, rather than negotiating. Many participants in the Five-Year Review are urging the Government of Canada to approach specific claims with a different mindset, rather than the current take-it-or-leave-it approach which, in their opinion, includes offers of settlement that fall far short of a claim's true value.

Some First Nations stated that the *Summative Evaluation of the Specific Claims Action Plan*,[127] a report released in April 2013 by Aboriginal Affairs and Northern

[126] Over the course of negotiations of a specific claim, funding provided by the federal government is limited to nine face-to-face meetings with First Nations. Certain parties also mentioned the lack of travelling negotiators and, in general, the federal government's inability to meet and negotiate during this process.

[127] April 2013. Final report, Aboriginal Affairs and Northern Development Canada. "Summative Evaluation of the Specific Claims Action Plan, Project No. 12029". Government of Canada: Evaluation, Performance Measurement, and Review Branch — Audit and Evaluation Sector. As stated in the Evaluation's Executive Summary, "[t]he primary purpose of the evaluation is to obtain an independent and neutral perspective on how well the Action Plan is achieving its

Development Canada, provides clear indications that the federal government's policy is to close, rather than resolve, specific claims files.

Overall, First Nations are increasingly of the view that the specific claims negotiation process is ineffective, and is simply a step that they must endure in order to get their claims before the Tribunal for impartial adjudication.

With respect to "closed" files, I was told by Canada that files may be closed at the Specific Claims Branch for administrative reasons: namely, to facilitate the efficient allocation of resources within the Branch. Canada's practice is to close files after a period of time if a First Nation has not replied to Canada's acceptance letter or settlement offer, or if it has withdrawn from negotiations. That "closure" by the Specific Claims Branch, however, does not represent an absolute termination of, or decision on, a claim. If a First Nation wishes to renew its claim, based upon additional evidence or new case law, the option of submitting the claim again with the additional information remains.

In contrast to the above concerns expressed by some First Nations during the Five-Year Review engagement process, the federal government maintains that it makes a fair offer of settlement, based on its estimate of liability. More precisely, the Specific Claims Branch points to an undeniable level of success, having finalized over 120 negotiated specific claims settlements since 2007, representing approximately $2.2 billion in compensation. The federal government also informed me that its decision on whether to negotiate settlement of claims is not based upon any targeted rate of overall acceptance or rejection. On the contrary, it closely examines each claim, with supporting documentation, based on the *Specific Claims Policy* and applicable law.

Analysis/Reflection: The specific claims resolution process represents a continuum that starts with a First Nation's submission of a claim to the Specific Claims Branch for assessment, through to the negotiation process and, in some cases, before the Specific Claims Tribunal. These different stages are inseparable. In short, the Tribunal should be viewed as a last resort, and more emphasis should be placed on negotiation; First Nations cannot get to the Tribunal without going through the Specific Claims Branch.

Recommendations: It is suggested that the federal government and First Nations take steps to re-engage in meaningful and substantive negotiations of specific claims at the pre-Tribunal negotiation stage. In my opinion, there cannot be reconciliation without meaningful negotiation.

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expected outcomes. Evaluation results were based on the analysis and triangulation of data obtained through document and data review, file review and key informant interviews."

CONCLUSION

During the Five-Year Review engagement process, First Nations said the federal approach to the implementation of the *Justice At Last* initiative has considerably dampened the initial sense of optimism and confidence they felt about a new approach to resolving specific claims. Although the Specific Claims Tribunal offered a beacon of hope, First Nations remain deeply concerned about the manner in which the federal government has opted to handle specific claims. Many participants mentioned that specific claims will not be solved if the government continues to engage in its current practices, nor will they disappear without honourable leadership that respects the principles of justice, as articulated in the government's own policy documents.

Respondents appeared to feel that the Government of Canada has effectively abandoned negotiation as the preferred means of resolving specific claims. They further declared that, contrary to the promises articulated in the *Justice At Last* initiative, the government has allowed longstanding historical grievances to remain unsettled, thereby substantially increasing the uncertainty that these claims represent for all Canadians. They urged the Government of Canada to uphold the promises made in the *Justice At Last* initiative to settle specific claims through just, effective and efficient negotiations with First Nations, and to ensure that the human rights of First Nations are fully respected.

Moreover, First Nations challenged public assertions made by the Department of Aboriginal Affairs and Northern Development Canada that the *Justice At Last* initiative has been a success to date. They suggested that the federal government has drawn faulty conclusions regarding the success of this initiative, and alleged that its public statements — contained in reports, online publications, etc. — are misleading, implying significant resolution of claims and greatly overstating the actual rate of claims resolution.

In particular, First Nations asserted that rejection rates have significantly increased since 2007, from 46% to 85%. It was suggested that, by only partially accepting claims — or rejecting them outright — the federal government has created the illusion that a given file has been "addressed" when the file is actually being closed without further opportunity for discussion or negotiation. This leaves the Tribunal as the only recourse. They affirmed that federal publications, which suggest that the backlog of claims has been resolved, and that there are only a few potential claims left, misrepresent the volume of outstanding claims. They confirmed the existence of many claims that have yet to be brought to the Department, as they are still in the research and development stage, towards eventual submission.

In response, the Government of Canada says that, when the *Justice At Last* initiative was launched in 2007, there were nearly 800 outstanding claims in the specific claims inventory, with approximately 80% of those claims being

bottlenecked at the assessment stage. Since 2007, the inventory of claims at the assessment stage has been cleared.

The federal government emphasizes the success of the *Justice At Last* initiative, pointing out that, as of March 31, 2015, over 120 specific claims, representing about $2.2 billion in compensation, have been settled through negotiated settlement agreements since 2007. Since the establishment of the Specific Claims program in 1973, a total of 407 specific claims have been settled through negotiations, with compensation totalling $4,017,336,223.15 — or an average value of $9,870,604.97 per claim. Federal figures indicate that 125 of those settlements (or slightly more than 30% of the total number) have been negotiated since 2007, with compensation totalling $2,175,335,872.97 (or approximately 54% of the total paid since 1973). This represents an average value of $17,402,686.98 per claim.

Clearly, First Nations and the federal government differ in their analysis of statistics related to specific claims submissions, acceptances, negotiations and file closures. Despite the ambiguity surrounding these conflicting interpretations, however, this is not the forum for assessing the validity of their respective arguments, nor is there any reason to apportion blame to either party.

On the one hand, in light of everything I have heard and read throughout the consultation process, I do not believe that the Government of Canada has acted in bad faith from the adoption of the *Justice At Last* initiative to the present day. On the other hand, First Nations, First Nations organizations and different stakeholders unequivocally raised many serious concerns during the Five-Year Review that cannot be ignored. It is now the responsibility of the federal government and of First Nations and their representatives to address these concerns and issues in an effective manner, and within a spirit of reconciliation.

In this regard, I have proposed four approaches to resolving specific claims throughout this report. In the interests of clarity, a brief summary of these approaches follows.

The first involves essential topics that the Government of Canada should consider at some point in future.

The second is joint exploratory discussions between the federal government and First Nations. This would involve the government consulting with First Nations as rights-holders, with regard to administration of the *Specific Claims Tribunal Act*.

The third is the modification of a number of *Rules of Practice and Procedure.* The Specific Claims Tribunal committee, created under section 12 of the *Specific Claims Tribunal Act*, is urged to closely examine the recommendations made in this report.

The fourth contains recommendations that do not fall within the first three categories, but are nonetheless important to achievement of the goals set out in the preamble of the *Specific Claims Tribunal Act*.

These four approaches together point to another engagement between the federal government and First Nations, representing the mould from which the title of this report was cast: **Re-Engaging**.

Dialogue between First Nations and Aboriginal Affairs and Northern Development Canada must continue as a necessary constitutional requirement, and as a tacit condition of implementation of the *Specific Claims Tribunal Act*. It is of particular importance that potential changes to the current legal system be discussed with First Nations, in line with the conciliatory essence of the *Justice At Last* initiative, and Crown objectives.

Where there are specific claims to be resolved, a respectful approach will dictate a cooperative process, designed jointly by the federal government and First Nations for the undertaking of policies, action plans and laws such as the *Specific Claims Tribunal Act*.

SUMMARY OF RECOMMENDATIONS

1. **Items for eventual consideration by the Government of Canada**
   - Expand the Tribunal's role to include performing preliminary assessments of claims, based on the minimum standard or their merits (p. 28).
   - Take steps to ensure that First Nations are aware of the availability of, and conditions for, mediation with an independent mediator (p. 32).
   - Addressing the discrepancy between the *Specific Claims Policy* and the *Justice At Last* initiative with regard to specific claims over $150 million. It is suggested that the term "specific claims" be defined in the former in a way that is consistent with the latter (p. 34).
   - Develop, in association with the five Métis governments, a forum for resolving and/or negotiating the latter's specific claims (p. 37).
   - Create a satellite version of the Specific Claims Tribunal in Vancouver to deal with the large portion of specific claims that come from Western Canada (p. 51).
   - Allocate more resources for French-English and Aboriginal language interpreters to the Specific Claims Tribunal and the Administrative Tribunals Support Service of Canada, to accommodate French-specific claims and Aboriginal-language witnesses (pp. 62–63).
   - Develop a more effective method for educating and engaging provinces and territories with regard to specific claims that affect them, with the goal of increasing their participation in Tribunal proceedings and increasing judicial efficiency (p. 65).
   - Show greater willingness to waive settlement privilege during Tribunal proceedings, with regard to (but not limited to) expert reports and witnesses, and allow the use at the Tribunal of reports and evidence gathered and jointly approved by the federal government and First Nations during negotiations (pp. 70 and 76).
   - Develop a training program for Specific Claims Branch employees regarding the correct and consistent interpretation and application of the minimum standard, which focuses on fundamental deficiencies of a claim rather than procedural errors (p. 83).
   - Re-examine the Specific Claims Branch's practice of partial acceptance of claims, to ensure the proper application and appropriate exchange of release (p. 85).

2. **Joint exploratory discussions**
   - Subject to increasing resources at the Tribunal, change its role to include overseeing negotiations at Stage Two of the Specific Claims Branch process (p. 29).
   - Include mediation in the Tribunal's mandate, subject to the same condition as above (p. 32).
   - Work together with First Nations to develop a mutually agreed-upon method of addressing specific claims above $150 million (p. 34).

- Discuss the three-year timeframes and attenuate the controversy surrounding their application (p. 43).
- Expand the scope of subsection 6(2) of the *Specific Claims Tribunal Act*, in order to allow the nomination of Tribunal members who are not necessarily Superior Court judges to adjudicate at the Specific Claims Tribunal. This could include the nomination of retired judges from superior or federal courts, or members of quasi-judicial tribunals. The nomination of such members should be made directly by the Governor in Council (p. 49).
- Consider the appointment of specialists and independent experts, with suitable qualifications in the field of Aboriginal law, as members of the Tribunal. The nomination of such members should be made directly by the Governor in Council. If such a change were implemented, a corresponding right to appeal Tribunal decisions, in addition to judicial review, should be included (p. 49).
- Create a position for prothonotaries at the Tribunal, to lighten the burden on Tribunal members and assist them with particular procedural tasks. Develop a plan to modify the *Rules of Practice and Procedure* to allow prothonotaries to oversee case management conferences (pp. 49 and 54).
- Elaborate Tribunal proceedings to include paper hearings, while fully accommodating oral testimony as a vital part of First Nations evidence (p. 62).
- Improve the funding mechanism for First Nations' specific claims to better accommodate the latter's financial needs for Tribunal proceedings (p. 69).
- Develop reasonable conditions for the re-submission of the same specific claims to the Specific Claims Branch, as well as a reasonable limit on the number of re-submissions of said claims following unfavourable decisions from the latter (p. 75).
- Initiate a joint collaboration between Canada and First Nations towards improved communication and cooperation regarding the application of the minimum standard (p. 83).

3. Changes to the *Specific Claims Tribunal Rules of Practice and Procedure*

- Amend the *Rules of Practice and Procedure* to give the Tribunal a clear conciliatory role, rather than an adversarial one that is more reflective of a Superior Court (p. 40).
- Develop rules that are more flexible with regard to the formal requirements of expert witnesses and reports. Make these requirements more conducive to the expedited and collaborative resolution of specific claims (p. 70).

4. Other recommendations

- Discuss with First Nations any future amendments to the *Specific Claims Tribunal Act* — including those derived from this report — before their coming into force (p. 11).
- Appoint additional members to the Specific Claims Tribunal as expeditiously as possible — in particular, at least one more full-time member and several more part-time members, pursuant to subsection 6(4) of the *Specific Claims Tribunal Act* (p. 49).
- Within the context of proportionality of costs, First Nations and the Government of Canada must make efforts to resolve specific claims as expeditiously as possible, which will translate into limiting expenses associated with litigation (p. 70).
- First Nations and the Government of Canada must work together in order to achieve a level of information and transparency when it comes to decisions by the Specific Claims Branch, as well as access to historical records that is mutually satisfactory (pp. 77–78).
- Within five years of the tabling of the Minister's report,[128] the Minister of Aboriginal Affairs and Northern Development shall embark on another review of the mandate and structure of the Tribunal, the efficiency and effectiveness of its operation, and other matters related to the *Specific Claims Tribunal Act* (p. 78).
- In the spirit of reconciliation, the Government of Canada and First Nations must engage in meaningful negotiations with an earnest desire to resolve specific claims at the negotiation stage (p. 86).

[128] Which will be based on this report.