



**Fall 2016**

## **Reports of the Auditor General of Canada**

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### **REPORT 6**

**First Nations Specific Claims—Indigenous and Northern  
Affairs Canada**



Office of the  
Auditor General  
of Canada

Bureau du  
vérificateur général  
du Canada

## Performance audit reports

This report presents the results of a performance audit conducted by the Office of the Auditor General of Canada under the authority of the *Auditor General Act*.

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- gather the evidence necessary to assess performance against the criteria,
- report both positive and negative findings,
- conclude against the established audit objectives, and
- make recommendations for improvement when there are significant differences between criteria and assessed performance.

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# Introduction

## Background

### Specific claims

6.1 First Nations have long had grievances related to the non-fulfillment of historic treaties or the mismanagement of Indian lands and monies. The Government of Canada has made successive attempts to address these issues.

6.2 In 1948, a joint committee of the House of Commons and Senate acknowledged the need to appraise and settle First Nations claims and grievances in a just and equitable manner. The committee also recommended the creation of an independent administrative tribunal to adjudicate Indian claims and grievances.

6.3 In 1973, the federal government established a policy and process to resolve outstanding First Nations claims. In 1982, the government refined the policy and process for the assessment and negotiation of specific claims. The goal of the policy was always to resolve claims through negotiation in the interest of fairness and reconciliation without involving the courts.

6.4 Specific claims generally refer to claims made by First Nations against the federal government. These claims relate to the administration of land and other First Nations assets and to the fulfillment of Indian treaties, although the treaties themselves are not open to renegotiation. Exhibit 6.1 provides some examples of the types of issues that could be the basis for specific claims.

### Exhibit 6.1 Examples of specific claims filed by First Nations

- A flood control dyke and road were constructed on a First Nation's reserve without either the First Nation's consent or proper compensation.
- The Government of Canada did not provide all of the reserve land promised under a historic treaty signed with the Crown.
- Reserve lands were sold by the federal government without the First Nation's proper consent.
- Parcels of reserve land were used to construct a section of railway in the late 1800s. After the land was abandoned by the railway company, the land was used for a pipeline. The First Nation claimed that the government failed to protect and preserve the First Nation's interest in the reserve land when the railway stopped using the land for railway purposes.

Source: Adapted from Indigenous and Northern Affairs Canada's Guide to the Specific Claims Negotiation Process

6.5 In 2006, the Standing Senate Committee on Aboriginal Peoples released a special study on specific claims. The report, entitled *Negotiation or Confrontation: It's Canada's Choice*, found the specific claims process to be both fraught with delay and so ineffective that it worked against the government's objectives. The study reported that the government still judged and determined compensation for claims made against itself. Consequently, the government had not addressed First Nations' concerns regarding the independence of the process. Additionally, the Committee heard that the process was confusing, complicated, time-consuming, expensive, adversarial, and legalistic. The Committee recommended that the government establish an independent body to resolve specific claims, dedicate a fund for specific claims settlements, and improve the specific claims process by providing additional resources.

6.6 Data from Indigenous and Northern Affairs Canada shows that by 2007, more than 800 specific claims were outstanding in Canada. According to the Department, in the years before 2007, it took an average of 13 years to resolve a specific claim, and First Nations had submitted claims twice as fast as the Department had addressed them. First Nations were frustrated with this delay and with the government's failure to fulfill past commitments.

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#### Justice at Last

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

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

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

6.9 Justice at Last also initiated a fundamental reform of the specific claims process. As part of this reform, the government committed to four pillars (Exhibit 6.2), and Indigenous and Northern Affairs Canada was tasked with incorporating them into its process for resolving specific claims.

## Exhibit 6.2 Pillars of Justice at Last: Specific Claims Action Plan

Pillar	Government's implementation
Impartiality and fairness	<ul style="list-style-type: none"> <li>Established the Specific Claims Tribunal, an independent claims tribunal with the power to make binding decisions on the validity of claims and on compensation of up to \$150 million. The <i>Specific Claims Tribunal Act</i> provides for organizing, operating, and accessing the Tribunal.</li> </ul>
Greater transparency	<ul style="list-style-type: none"> <li>Established new funding arrangements with dedicated (publicly committed) funding of \$250 million per year for 10 years (for a total of \$2.5 billion) to fund claim settlements and Tribunal awards of up to \$150 million in a manner that enhances public awareness.</li> </ul>
Faster processing	<ul style="list-style-type: none"> <li>Legislated a three-year time frame in which the government can assess a claim before a First Nation can access the Specific Claims Tribunal.</li> <li>Adopted a streamlined approach to ensure faster processing of claims, such as expedited procedures for negotiating small-value claims (up to \$3 million).</li> <li>Removed large-value claims of over \$150 million from the specific claims process (to be addressed through a separate process that requires Cabinet approval for settlement funding).</li> </ul>
Better access to mediation	<ul style="list-style-type: none"> <li>Committed to establish mediation services intended to help the parties to reach negotiated settlement.</li> </ul>
Source: Indigenous and Northern Affairs Canada	

### Roles and responsibilities

6.10 Indigenous and Northern Affairs Canada and the Department of Justice Canada both have roles and responsibilities under Justice at Last:

- Indigenous and Northern Affairs Canada is responsible for assessing and negotiating specific claims on behalf of the Government of Canada and for ensuring that Justice at Last is implemented cost-effectively. This accountability also extends to monitoring and reporting activities and results.
- The Department of Justice Canada advises Indigenous and Northern Affairs Canada on whether a specific claim discloses an outstanding lawful obligation for Canada, offers legal advice to Indigenous and Northern Affairs Canada during negotiations, and represents Canada before the Specific Claims Tribunal and the courts.

6.11 Justice at Last included operating funding for the specific claims process and contribution and loan funding for First Nations to participate in the process. Using Indigenous and Northern Affairs Canada's unaudited data, we calculated that federal expenditures for operations, maintenance, and salaries averaged about \$16.6 million per year from the 2013–14 to 2015–16 fiscal years. During the same period, funding to support First Nations' participation in the specific claims process dropped from about \$14 million in the 2013–14 fiscal year to an average of \$9 million in the following two fiscal years (Exhibit 6.3).

**Exhibit 6.3 Actual federal expenditures for specific claims and funding to First Nations claimants**  
(in \$ millions)

<b>Federal expenditures</b>	<b>2013–14</b>	<b>2014–15</b>	<b>2015–16</b>
Indigenous and Northern Affairs Canada*	\$8.2	\$7.8	\$7.8
Department of Justice Canada**	\$8.7	\$8.7	\$8.7
Total federal expenditures	\$16.9	\$16.5	\$16.5
<b>Funding to First Nations claimants</b>	<b>2013–14</b>	<b>2014–15</b>	<b>2015–16</b>
Contribution funding for research	\$7.8	\$4.7	\$4.7
Loan funding for negotiations	\$6.1	\$3.6	\$5.0
Total funding	\$13.9	\$8.3	\$9.7
*Amounts include expenditures for operations, maintenance, and salaries.			
**Amounts include expenditures for salaries.			
Source: Indigenous and Northern Affairs Canada data (unaudited)			

## Focus of the audit

6.12 This audit focused on whether Indigenous and Northern Affairs Canada adequately managed the resolution of First Nations specific claims.

6.13 This audit is important for two main reasons. First, there have been instances where the Crown has not fulfilled its treaty obligations or has mismanaged First Nations' funds or other assets. Second, the government committed to fundamental changes to the specific claims process through Justice at Last: Specific Claims Action Plan to address these historical obligations.

6.14 We examined the design and implementation of the systems and practices of Indigenous and Northern Affairs Canada to determine whether it adequately managed the specific claims process to provide reasonable assurance that

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

6.15 We interviewed First Nations and organizations representing First Nations, but we did not audit their performance. We did not examine the operations of the Specific Claims Tribunal or the content, quality, or appropriateness of Tribunal decisions on the validity of claims or the amounts of compensation. We also did not examine the content, quality,



or appropriateness of legal advice provided by the Department of Justice Canada or of decisions by Indigenous and Northern Affairs Canada on the validity of specific claim submissions or compensation.

6.16 More details about the audit objective, scope, approach, and criteria are in **About the Audit** at the end of this report (see pages 21–23).

## Findings, Recommendations, and Responses

### Resolving specific claims

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#### Overall message



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

6.18 This is important because on many occasions, the government has acknowledged its outstanding lawful obligations to First Nations. The government committed, most recently in 2007, to address these obligations with a reformed process to resolve specific claims. The Department acknowledged the need to adequately assist First Nations to participate in the specific claims process. This process emphasizes negotiating settlements as the primary vehicle for resolving claims. When First Nations cannot settle claims through this process, they may withdraw their claims or pursue them through the Specific Claims Tribunal or the courts. These alternatives have led to further delays and could lead to higher costs for both the government and First Nations, and to strained relations between the two parties.

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#### Context

6.19 Claims preparation is complex. Most claims address complicated historical issues and often include hundreds of pages of documents. Claims research units outside of Indigenous and Northern Affairs Canada usually conduct claims research on behalf of First Nations, though some First Nations research claims themselves. Claims research units told us that it took an average of 3 to 5 years and sometimes up to 10 years to research a specific claim.

6.20 Once a claim is filed, the Minister has three years to assess whether the government has an outstanding lawful obligation. Not all claims represent an outstanding lawful obligation for the government. At the end of the assessment, the Department offers to negotiate claims when an outstanding lawful obligation is found. Exhibit 6.4 illustrates the process.

## Results of the specific claims process were inconsistent with the outcomes envisioned under Justice at Last

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### What we found

6.21 We found that the outcomes envisioned under Justice at Last: Specific Claims Action Plan were not achieved. Justice at Last envisioned that more claims would be resolved than received each year. However, we found that Indigenous and Northern Affairs Canada did not achieve this result in six of the eight years since Justice at Last came into force. The Department also stated that every reasonable effort would be made to achieve negotiated settlements and that the vast majority of specific claims that enter into a negotiation process would likely be resolved by a settlement agreement. We found that of the claims that entered the negotiation process, more were either **closed** or moved to litigation in courts or at the Tribunal than were resolved through negotiation. In addition, the Department used mediation services to overcome impasses in negotiation only once since these services were established in 2012.

6.22 Our analysis supporting this finding presents what we examined and discusses

- claims settled through negotiation, and
- rate of claims settlement.

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### Why this finding matters

6.23 This finding matters because the Government of Canada committed to fundamentally reform the specific claims process to improve the resolution of claims. When a claim is unresolved, the outstanding lawful obligation remains. In these cases, a future resolution of the claim could cost Canada and First Nations more than either would have incurred had they settled the claim earlier. These outcomes can undermine the relationship between First Nations and Canada. When claims are unresolved, both parties fail to achieve the certainty, finality, and justice envisioned by Justice at Last.

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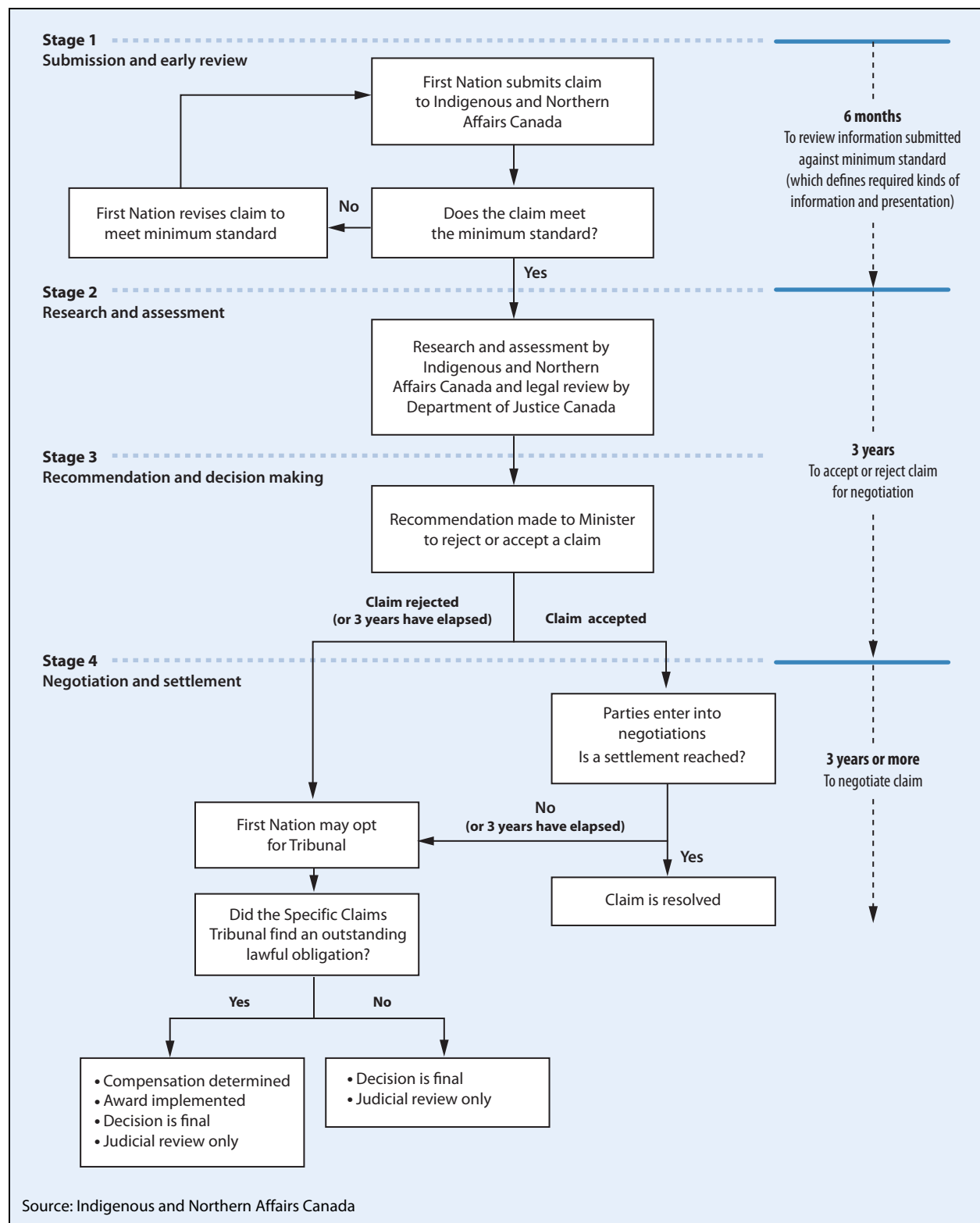
### Recommendation

6.24 Our recommendation in this area of examination appears at paragraph 6.32.

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**Closed claim**—A claim that is closed during negotiations because a First Nation does not accept or respond to a settlement offer, or decides to withdraw its claim. When a claim is closed, negotiations cease, the government's outstanding lawful obligation remains, and the claim is unresolved.

## Exhibit 6.4 The specific claims process has four stages



**6.25 What we examined.** We examined whether the results of the specific claims process reflected the outcomes envisioned under Justice at Last. The Department stated that claims would be resolved through the specific claims process more quickly than they were resolved before Justice at Last came into effect. The Department also stated that it would settle the vast majority of claims accepted for negotiation, use every reasonable effort to settle claims, and resolve more claims than it received each year. In addition, it committed to increasing the use of mediation to help reach negotiated settlements.

**6.26** We examined the results to date of the Justice at Last specific claims process using the Department's specific claims database. We paid particular attention to the eight-year period from 16 October 2008, when Justice at Last came into effect, to the end of the audit period, 31 July 2016. We reviewed a sample of 38 settled claims and 13 closed claims to examine whether the Department followed its publicly stated negotiation practices and resolution commitments.

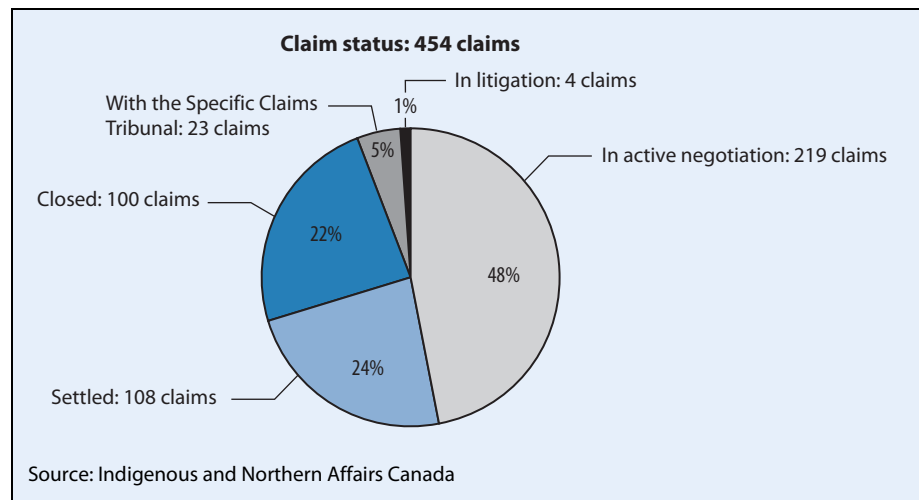
**6.27 Claims settled through negotiation.** The Department expected that the majority of specific claims accepted for negotiation would likely be resolved by a settlement agreement. This expectation was captured in the Department's Specific Claims Policy and Process Guide. A final settlement agreement means that both Canada and the First Nation have resolved the outstanding lawful obligation and that neither party will reopen the agreement. However, when a claim is closed during negotiation, the government's outstanding lawful obligation remains and the claim is unresolved.

**6.28** We found that the Department had closed roughly the same number of claims during negotiation as it had settled (Exhibit 6.5). The results to date are not in line with some of the expected results of the specific claims process.

**6.29** Claims in negotiation may be closed for one of two reasons: the First Nation did not accept or respond to a settlement offer, or the First Nation decided to withdraw its claim. Based on information provided by the Department, we noted that 86 percent of the closed claims were closed because the First Nation did not respond to or did not accept a settlement offer.

**6.30** Claims accepted for negotiation have been determined by the Department to disclose an outstanding lawful obligation. According to the outcomes envisioned under Justice at Last, before the Department closed a claim, the parties should have tried to settle the claim by using the mediation services established under Justice at Last. We found the parties, in fact, used mediation only once. Based on our review of a sample of closed claims, we did not find any suggestion by either party to use mediation services either before or after the file was closed.

**Exhibit 6.5 Indigenous and Northern Affairs Canada closed about the same number of files as it settled (16 October 2008 to 31 July 2016)**



**6.31 Rate of claims settlement.** The Department committed to research and assess claims (stage 2 of the specific claims process) within three years, and established a three-year operational time frame (guideline) for the negotiation and settlement of claims where an outstanding lawful obligation was found (stage 4). We found that in the research and assessment stage (stage 2), the Department met its commitment to research and assess claims within three years. We found that in the negotiation and settlement stage (stage 4), the database showed that the Department met the three-year negotiation time frame for 108 settled claims. The processing time for negotiation and settlement for the majority of these claims was longer than three years, but the date recorded in the database for the Department's offer to negotiate was set to coincide with the start of Justice at Last (16 October 2008). For example, one claim we reviewed was first submitted in 1987, and its processing time was just over 26 years before it was settled. However, the Department's database showed that the claim's processing time was just under 5 years. We also found that 219 claims had been in active negotiation for a median of 5 years.

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

***The Department's response.*** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process.

## Barriers in Indigenous and Northern Affairs Canada's specific claims process hindered the resolution of some First Nations claims

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### What we found

6.33 We found that three significant barriers impeded the resolution of some specific claims: certain of Indigenous and Northern Affairs Canada's practices did not encourage negotiations, funding to First Nations was arbitrary and inconsistent, and information sharing between the Department and First Nations was limited.

6.34 Our analysis supporting this finding presents what we examined and discusses

- negotiations,
- funding, and
- information sharing.

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### Why this finding matters

6.35 This finding matters because the barriers we identified undermined the achievement of the government's and First Nations' commitment to the just and final resolution of specific claims. When First Nations cannot resolve their claims, they withdraw them, or take them to court or to the Specific Claims Tribunal. These alternatives have resulted in further delays, which can lead to higher costs for government, uncertainty for all Canadians, and further strain on government and First Nations relations.

6.36 These barriers point to a need for the Department to improve how it manages the process to better meet the outcomes envisioned under Justice at Last.

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### Recommendations

6.37 Our recommendations in this area of examination appear at paragraphs 6.45, 6.46, 6.47, 6.52, 6.53, and 6.55.

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### Analysis to support this finding

6.38 **What we examined.** Using the same sample described in paragraph 6.25, we assessed whether the Department's negotiation practices were consistent with the negotiation practices described in Justice at Last. We examined the Department's documented negotiation practices. We examined how it determined and allocated funding for claim preparation and negotiation, and whether this process facilitated First Nations' access to the specific claims process. We also examined whether the Department had reasonable assurance that it had been providing adequate information and support to facilitate First Nations' access to the specific claims process.

6.39 **Negotiations.** When the Government of Canada announced its plan to improve and speed up the resolution of First Nations specific claims, it emphasized that it preferred to use negotiation to achieve these aims. The government stated that negotiated settlements would be jointly developed by all parties, ensuring fairness for all involved. To this end, the published process for the negotiation of specific claims includes steps that call for participation by both parties, research and studies to help determine compensation, and discussion and agreement on the terms of negotiation and settlement.

6.40 When introducing the reformed specific claims process, the government further noted that it would make special efforts to negotiate small-value claims (up to \$3 million) more quickly, because at the time, these claims accounted for about half of the claims being processed, and the government thought that they could be resolved quickly. In 2011, without input from First Nations, the Department developed a separate process to expedite the negotiation of small-value claims. In our view, the following characteristics of this new process introduced barriers to negotiations that were inconsistent with Justice at Last:

- The Department determined by itself whether a claim should be classified as a small-value claim.
- The Department determined by itself the compensation offer. It also decided that studies that can be used to help determine claim value could be undertaken only in exceptional circumstances. We found that First Nations were not provided with the information the Department used to arrive at an offer. First Nations therefore had no means to determine what new evidence the Department would require to revise an offer if First Nations deemed the offer unacceptable. As well, the Department's letter of offer to compensate First Nations claimants for small-value claims did not invite discussion or negotiation about compensation.
- The Department decided that a negotiation plan would not be jointly prepared for small-value claims. The expedited process did not require discussion and agreement from First Nations on a claim's terms of negotiation.

6.41 These negotiation practices for small-value claims were the subject of a decision from the Specific Claims Tribunal. The decision stated that "while Canada suggests that the expedited process is designed to speed up the settlement process, the process effectively prevented any meaningful negotiation from taking place" and that this process was "paternalistic, self-serving, arbitrary and disrespectful of First Nations."

6.42 We also found that the Department did not publish the negotiation process for small-value claims. We saw no evidence that the Department informed First Nations that the negotiation process published on its website did not apply to small-value claims. Department officials told us that First Nations were informed of the process when their negotiations started. This practice did not support First Nations' access to the specific claims process.

6.43 In another example, since the Department established mediation as an alternative dispute resolution tool for negotiation in 2012, the parties exercised this option only once, even though the Department had committed to increase its use. Both Department officials and the Assembly of First Nations told us that they had initially worked together to establish mediation services for specific claims. However, to save money, these mediation services were housed within the Department despite First Nations' concerns that this arrangement would compromise the independence and use of these services. The Assembly told the Department that Canada's approach to mediation did not meet the principles of neutrality and independence, and that this shortcoming was an ongoing concern.

6.44 Finally, the Department committed in Justice at Last to establish separate arrangements outside the specific claims process to negotiate large-value claims (over \$150 million). In a 2007 political agreement on specific claims, Canada and the Assembly of First Nations committed to work together to develop this large-value claims process. We found that the Department and the Assembly had initially worked together on this issue and, in 2009, jointly developed a draft process. The Assembly told us that it wanted to continue working on the process, but the Department told the Assembly in 2011 to remove this item from its work plan. The Department did not respond to requests to provide evidence of further collaboration with the Assembly on this issue between 2011 and 2015. In 2015, the Department received Cabinet approval for the process, but the steps were not communicated to First Nations.

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

***The Department's response.** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including negotiation practices.*

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



***The Department's response.*** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the use of mediation services.

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

***The Department's response.*** Agreed. Shared Services Canada has implemented new requirements for departmental websites. Indigenous and Northern Affairs Canada is currently updating its website in accordance with Treasury Board of Canada Secretariat guidelines.

**6.48 Funding.** First Nations are responsible for submitting claims according to a minimum standard established by the Department. This minimum standard defines the required kinds of information and presentation. Claims research and preparation is a complex process. The Department committed to provide funding to First Nations to help them to adequately research specific claims. We noted annual funding to First Nations for claims research decreased by 40 percent from \$7.8 million in the 2013–14 fiscal year to \$4.7 million in the 2014–15 fiscal year. According to Department officials, this funding decrease was undertaken as part of the Deficit Reduction Action Plan.

**6.49** Department officials told us that they did not have a formula for allocating funding for claims research. We found that the absence of methodology resulted in funding cuts that were arbitrary and unevenly distributed.

**6.50** In response to a survey we conducted of claims research units across the country, the units told us that funding cuts presented a barrier for First Nations claims preparation. Specifically, these research cuts had prolonged the claims preparation process. One research organization in Manitoba told us that it was unable to submit new claims, because funding cuts limited its resources to one full-time person and two temporary researchers to serve 53 First Nations. A claims research organization in British Columbia told us that funding cuts meant that each of the 10 First Nations they served could submit one claim every 10 years.

**6.51** The Department committed to provide loan funding to First Nations claimants to enable them to participate fully in a negotiation process at levels equitable with the government. It was unable to explain why the funding provided was considered adequate to assist First Nations to negotiate their claims at equitable levels with the government. For example, we found that the Department arbitrarily set the maximum amount of a loan that could be provided to a First Nation at \$142,500 per

year or \$427,500 over three years. We found a departmental study that suggested annual funding of \$240,000 for a First Nation to negotiate a specific claim.

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

***The Department's response.** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the development, with claims research units, of a clear and consistent methodology for providing support for the research and preparation of claims.*

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

***The Department's response.** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the development of a methodology to support First Nations' participation in negotiations.*

**6.54 Information sharing.** Before Justice at Last came into effect, Indigenous and Northern Affairs Canada developed a historical report on a claim, which set out the relevant factual history of events that gave rise to the claim. Before sending the report to the Department of Justice Canada for a legal opinion, Indigenous and Northern Affairs Canada shared drafts of the report with First Nations to obtain their input. After 2008, Indigenous and Northern Affairs Canada no longer shared the report with First Nations before sending it to the Department of Justice Canada. Consequently, after Justice at Last came into effect, First Nations were not made aware of Indigenous and Northern Affairs Canada's analysis and interpretation of the claims submission. It is our view that this awareness is necessary to understand the factual basis for a legal opinion and help resolve a claim.

**6.55 Recommendation.** Indigenous and Northern Affairs Canada should work with First Nations to ensure that its process to resolve claims includes a step where First Nations are made aware of the facts that the Department of Justice Canada will rely on to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada.

***The Department's response.** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including early responses to evidentiary issues.*

## Indigenous and Northern Affairs Canada did not use available information and feedback to improve implementation of the specific claims process

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### What we found

6.56 We found that Indigenous and Northern Affairs Canada had a process to consider the impact of decisions from the Specific Claims Tribunal, but was unable to provide us with evidence that it had a formal process to identify improvements and make required changes. We also found no evidence that the Department improved the specific claims process by using formal feedback from internal and external parties on the specific claims process or information regarding First Nations' concerns about this process.

6.57 Our analysis supporting this finding presents what we examined and discusses

- Specific Claims Tribunal decisions,
- internal evaluations, and
- information from First Nations.

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### Why this finding matters

6.58 This finding matters because the Government of Canada has committed to resolve specific claims more quickly, fairly, and transparently. Meeting this commitment requires continual improvement of the claims process, which is achieved, in part, through management's attention to available information and feedback. Paying attention to feedback, especially when problems are identified, can lead to improvements that are more in line with the aims of Justice at Last. These improvements could include resolving claims more quickly, negotiating more settlements, and improving relations between government and First Nations.

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### Recommendation

6.59 Our recommendation in this area of examination appears at paragraph 6.66.

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### Analysis to support this finding

6.60 **What we examined.** We examined whether the Department formally responded to feedback on the specific claims process. We examined the Department's responses to different types of feedback from the following sources: decisions from the Specific Claims Tribunal, recommendations from the Department's internal evaluations, and information from First Nations.

6.61 **Specific Claims Tribunal decisions.** We noted that since 2009, the Specific Claims Tribunal disagreed with 12 of the Department's 14 decisions to not accept a specific claim because the claim was not found to disclose an outstanding lawful obligation. The Department told us that there was a process to consider Specific Claims Tribunal decisions. However, it was unable to provide us with evidence that it had a formal process to identify improvements and make required changes.

6.62 **Internal evaluations.** We found that the Department's internal evaluations of Justice at Last made recommendations to improve claims processing. For instance, one evaluation recommended that the Department develop and implement a strategy to use mediation services more frequently. The Department disagreed with the recommendation and stated that Justice at Last committed it to provide better access to mediation, not ensure more frequent use. In our view the Department's interpretation was incorrect. Justice at Last states, "Canada recognizes that this tool [mediation] should be used more often in stalled negotiations and is committed to increasing its use in the future."

6.63 As another example of an internal evaluation recommendation to improve claims processing, in 2011 an evaluation recommended that the Department communicate information to stakeholders regarding the process for claims over \$150 million (see paragraph 6.44). We found that the Department agreed with this recommendation but did not implement it.

6.64 **Information from First Nations.** During this audit, we received considerable information from First Nations and from First Nations organizations about their concerns about the specific claims process. We found that these same concerns were expressed to the Department. Department officials told us that changes were being made to the specific claims practices in response to these concerns. However, it was unable to provide us with evidence of formal, documented changes to any of the current specific claims practices.

6.65 As another example of First Nations' concerns about the specific claims process, First Nations informed the Department that they were concerned about the independence of mediation services housed within it. The Department did not address this problem to increase the use of mediation services.

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

***The Department's response.** Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including establishing clearer terminology and common understandings of what information is reported.*

## Reporting results

### Indigenous and Northern Affairs Canada's reporting on the specific claims process presented an incomplete picture of actual results

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#### Overall message



6.67 Overall, we found that Indigenous and Northern Affairs Canada's public reports were incomplete and did not contain the information needed to understand the actual results of the specific claims process. More specifically, the Department did not publicly report some negative results of the process.

6.68 This is important because the government has been trying for several decades to implement an effective process to resolve specific claims and discharge the Crown's outstanding lawful obligations to First Nations. Incomplete reporting may lead to faulty conclusions about program success.

6.69 Our analysis supporting this finding presents what we examined and discusses

- incomplete reporting, and
- specific claims website.

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#### Context

6.70 The Department committed to publicly report on the results of the specific claims process. Accurate performance information is essential to support informed decisions. The Department committed to routinely report results of the specific claims process, so that parliamentarians and Canadians can judge whether the government is delivering on its commitment to resolve outstanding specific claims.

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#### Recommendations

6.71 Our recommendations in this area of examination appear at paragraphs 6.79 and 6.80.

6.72 **What we examined.** We examined the Department's specific claims database to determine the results achieved by the specific claims process. We then compared these results against the Department's public reporting to determine whether the results were accurately reported. We looked at

- annual departmental performance reports, and
- information available on the Department's website.

6.73 **Incomplete reporting.** We found that some results were either not reported publicly or not reported clearly. The Department's public reporting of results was incomplete and masked actual outcomes. In our view, parliamentarians and Canadians would, therefore, have difficulty understanding the real results of Justice at Last.

6.74 For example, according to the Department, as of 31 July 2016, 136 claims were settled under the Justice at Last reforms using funds that became available through the Justice at Last process. However, in our view, only 47 of these 136 claims were settled through the process reforms introduced by Justice at Last. The remaining 89 claims were already in negotiation, were close to settlement, or had already been settled (as was the case with 28 of these claims) before the *Specific Claims Tribunal Act* and the associated process reforms came into effect. According to the Department, as of July 2016, \$2.3 billion had been paid to First Nations for specific claim settlements. Of this amount, 98 percent was used to settle the 89 claims described above.

6.75 We found that the Department used only 2 percent (\$51 million) of the \$2.3 billion to settle 47 claims that it had assessed, negotiated, and settled under the reformed process. Exhibit 6.6 shows the breakdown of the funding used to settle claims.

6.76 In its Progress Report—Specific Claims 2012–2013, the Department reported that Canada had delivered on all four of the Justice at Last commitments. We disagree with this statement. We found that the Department did not deliver on its commitment to increase the use of mediation services. It used these services only once after they were established in 2012. We also found that it did not deliver on its commitment to improve its internal processes. We found that significant barriers impeded the resolution of specific claims, as described in paragraphs 6.33–6.55.

**Exhibit 6.6** Indigenous and Northern Affairs Canada did not apply Justice at Last reforms to most claims paid from the \$2.5 billion settlement fund

Claim type and settlement value	Total number of claims	Settlement total as of 31 July 2016 (in \$ millions)	Claims already in negotiation on 16 October 2008		Claims assessed and negotiated after 16 October 2008	
			Number	Settlement (in \$ millions)	Number	Settlement (in \$ millions)
Large-value claims (above \$150 million)	2	538.5	2	538.5	0	0
Regular claims (\$3 million to \$150 million)	43	1,672.4	39	1,639.2	4	33.2
Small-value claims (up to \$3 million)	91	49.6	48	31.6	43	18.0
<b>Total</b>	<b>136</b>	<b>2,260.5</b>	<b>89*</b>	<b>2,209.3</b>	<b>47</b>	<b>51.2</b>
<p>* This number includes 28 claims that were settled and compensated before the <i>Specific Claims Tribunal Act</i> and the associated process reforms came into effect.</p> <p>Source: Indigenous and Northern Affairs Canada data as of 31 July 2016 (unaudited)</p>						

6.77 **Specific claims website.** The Department's specific claims website includes both performance information and a searchable public report for information about individual specific claims. We found that the searchable report was up to date; however, it did not reveal the history of a claim before October 2008, when Justice at Last came into force. For example, we reviewed 38 settled claims as part of our sample and found that the average time to reach a settlement was approximately 11 years. However, the Department presented information in the searchable report in a way that showed the average time to be about 4.7 years. In our view, parliamentarians and Canadians have received an incomplete view of how long it takes for a claim to be processed.

6.78 We also found that the claims settlement statistics reported on the Department's website stopped at March 2014 and the most recent annual progress report was for the 2012–13 fiscal year. Department officials told us that reporting on Justice at Last had “run its course” and was an initiative of the previous government. In 2015, the Department discontinued its web-based specific claims progress report. This discontinuation is contrary to a key goal of Justice at Last, which is to bring greater transparency to the specific claims process. This transparency allows parliamentarians and Canadians to judge for themselves how the government is delivering on its commitment to resolve specific claims.

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

*The Department's response.* Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including establishing clearer terminology and common understanding of what information is reported.

*Indigenous and Northern Affairs Canada continuously improves its reporting requirements to align with Privy Council Office, Treasury Board of Canada Secretariat, and Department of Finance Canada requirements.*

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

*The Department's response.* Agreed. Indigenous and Northern Affairs Canada will ensure that the information on its website is updated in accordance with the web renewal initiative driven by Shared Services Canada and in accordance with Treasury Board of Canada Secretariat guidelines.

## Conclusion

6.81 We concluded that Indigenous and Northern Affairs Canada did not adequately manage the resolution of First Nations specific claims as defined for the purpose of this audit. Funding cuts and lack of information sharing between the Department and First Nations posed barriers to First Nations' access to the process for resolving specific claims.

6.82 Indigenous and Northern Affairs Canada met its commitment to assess specific claims in three years. Certain systems and practices that the Department put in place to accelerate the negotiation of claims hindered the resolution of some First Nations claims. The Department failed to increase the use of mediation services and did not use available information and feedback to improve program performance.

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



## About the Audit

The Office of the Auditor General's responsibility was to conduct an independent examination of Indigenous and Northern Affairs Canada's First Nations specific claims process, to provide objective information, advice, and assurance to assist Parliament in its scrutiny of the government's management of resources and programs.

All of the audit work in this report was conducted in accordance with the standards for assurance engagements set out by the Chartered Professional Accountants of Canada (CPA Canada) in the CPA Canada Handbook—Assurance. While the Office adopts these standards as the minimum requirement for our audits, we also draw upon the standards and practices of other disciplines.

As part of our regular audit process, we obtained management's confirmation that the findings in this report are factually based.

### Objective

The objective of this audit was to assess whether Indigenous and Northern Affairs Canada adequately managed the resolution of First Nations specific claims.

For the purpose of this audit, "adequately managed the resolution of First Nations specific claims" means that the Department designed and implemented systems and practices that provided it with reasonable assurance that

- First Nations had adequate access to the specific claims process,
- claims were resolved and documented in line with selected aims of the Justice at Last: Specific Claims Action Plan process renewal document, and
- results of specific claims were publicly reported in a manner that was complete.

### Scope and approach

The audit focused on the design and implementation of Indigenous and Northern Affairs Canada's systems and practices intended to achieve the selected aims stated in Justice at Last and the completeness of Indigenous and Northern Affairs Canada's reporting and communication of results. We did not examine the quality of legal advice provided by the Department of Justice Canada or the appropriateness of decisions taken by Indigenous and Northern Affairs Canada or the Specific Claims Tribunal regarding validity or compensation amounts.

The audit involved an examination of key documents, departmental guidance, practices, and communication products, as well as interviews with Department officials, and representatives from the Department of Justice Canada, the Administrative Tribunals Support Service of Canada, and the Specific Claims Tribunal.

Our work included the review and testing of 38 of the 47 claims settled since the introduction of Justice at Last on 16 October 2008 to determine whether Indigenous and Northern Affairs Canada followed its publicly stated negotiation practices and resolution commitments. We also selected a second judgmental sample of 13 closed claims. These claims were selected based on attributes of interest, such as the partial acceptance of a specific claim, value of the proposed compensation,

activities undertaken by Indigenous and Northern Affairs Canada to obtain a settlement, use of mediation, and communications between the Department and the First Nations claimant. We undertook a full assessment of the Department's specific claims database to determine the rate of claim resolution. The Office developed an electronic survey (with a response rate of 87 percent) and administered it to 17 claims research units across Canada to gather information on funding and communications with the Department.

In addition, we met with representatives from First Nations communities in two regions to obtain their views and perspectives. We also met with but did not audit the operations of the claims research units that work for First Nations.

## Criteria

Criteria	Sources
<b>To assess whether Indigenous and Northern Affairs Canada adequately managed the resolution of First Nations specific claims, we used the following criteria:</b>	
Indigenous and Northern Affairs Canada has reasonable assurance that First Nations have adequate access to the process for resolving specific claims.	<ul style="list-style-type: none"> <li>Justice at Last: Specific Claims Action Plan</li> <li><i>Specific Claims Tribunal Act</i></li> <li>Performance Measurement Strategy: 1.2.2 Specific Claims—Strategic Outcome: The Government, Indigenous and Northern Affairs Canada, 2014</li> </ul>
Indigenous and Northern Affairs Canada has reasonable assurance that specific claims are resolved in line with the following selected principles: <ul style="list-style-type: none"> <li>accelerated resolution through imposed timelines,</li> <li>a preference for negotiated settlement, and</li> <li>availability of mediation services that assist in the achievement of negotiated settlements.</li> </ul>	<ul style="list-style-type: none"> <li>Justice at Last: Specific Claims Action Plan</li> <li><i>Specific Claims Tribunal Act</i></li> <li>The Specific Claims Policy and Process Guide, Indigenous and Northern Affairs Canada</li> <li>Performance Measurement Strategy: 1.2.2 Specific Claims—Strategic Outcome: The Government, Indigenous and Northern Affairs Canada, 2014</li> </ul>
Indigenous and Northern Affairs Canada publicly reports in a complete manner on the resolution of specific claims through the specific claims process.	<ul style="list-style-type: none"> <li>Policy on Management, Resources and Results Structures, Treasury Board, 2012</li> <li>Policy on Transfer Payments, Treasury Board, 2008</li> <li>Performance Measurement Strategy: 1.2.2 Specific Claims—Strategic Outcome: The Government, Indigenous and Northern Affairs Canada, 2014</li> </ul>

As part of our regular audit planning process, we sought the acknowledgement of management that the criteria to be used in the audit were suitable. Management declined to provide this acknowledgement and instead deferred to our expertise as the auditor in this regard.

## Period covered by the audit

The audit covered the period between January 2015 and July 2016. Audit work for this report also involved the examination of material from earlier periods as required to gather evidence to conclude against specific criteria. Audit work for this report was completed on 31 July 2016.

## Audit team

Assistant Auditor General: Jerome Berthelette

Principal: Joe Martire

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Sophie Chen

Stacey Wowchuk

# List of Recommendations

The following is a list of recommendations found in this report. The number in front of the recommendation indicates the paragraph where it appears in the report. The numbers in parentheses indicate the paragraphs where the topic is discussed.

Recommendation	Response
<b>Resolving specific claims</b>	
<b>6.32</b> In collaboration with First Nations, Indigenous and Northern Affairs Canada should review its systems and practices to understand why the majority of claims are not settled through negotiation and to improve the resolution of claims in line with the aims of Justice at Last. (6.21–6.31)	<b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process.
<b>6.45</b> In cooperation with First Nations, Indigenous and Northern Affairs Canada should make its negotiation practices to expedite small-value claims (up to \$3 million) acceptable to both parties. (6.33–6.44)	<b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including negotiation practices.
<b>6.46</b> Indigenous and Northern Affairs Canada should work with First Nations to develop and implement a strategy to use mediation more frequently. (6.33–6.44)	<b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the use of mediation services.
<b>6.47</b> Indigenous and Northern Affairs Canada should update its website to reflect the full range of negotiation practices for all types of specific claims. (6.33–6.44)	<b>The Department's response.</b> Agreed. Shared Services Canada has implemented new requirements for departmental websites. Indigenous and Northern Affairs Canada is currently updating its website in accordance with Treasury Board of Canada Secretariat guidelines.
<b>6.52</b> In cooperation with First Nations, Indigenous and Northern Affairs Canada should develop a clear and consistent methodology for funding to First Nations to adequately support the research and preparation of claims. (6.33–6.38, 6.48–6.51)	<b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the development, with claims research units, of a clear and consistent methodology for providing support for the research and preparation of claims.

Recommendation	Response
<p><b>6.53</b> In cooperation with First Nations, Indigenous and Northern Affairs Canada should develop evidence-based methodology for loan funding to adequately support First Nations' participation in the negotiation process. <b>(6.33–6.38, 6.48–6.51)</b></p> <p><b>6.55</b> Indigenous and Northern Affairs Canada should work with First Nations to ensure that its process to resolve claims includes a step where First Nations are made aware of the facts that the Department of Justice Canada will rely on to assess whether First Nations claims disclose an outstanding lawful obligation for the Government of Canada. <b>(6.33–6.38, 6.54)</b></p> <p><b>6.66</b> In collaboration with First Nations, Indigenous and Northern Affairs Canada should develop practices to gather, monitor, and respond to information and feedback about the specific claims process. These practices should be designed to improve the specific claims process and its outcomes. <b>(6.56–6.65)</b></p>	<p><b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including the development of a methodology to support First Nations' participation in negotiations.</p> <p><b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including early responses to evidentiary issues.</p> <p><b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including establishing clearer terminology and common understandings of what information is reported.</p>
<p><b>Reporting results</b></p> <p><b>6.79</b> Indigenous and Northern Affairs Canada should clearly report complete information about the specific claims process to allow the government and Canadians to assess real results. <b>(6.72–6.78)</b></p> <p><b>6.80</b> Indigenous and Northern Affairs Canada should keep the information on the specific claims process on its website up to date. <b>(6.72–6.78)</b></p>	<p><b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada is currently working with the Assembly of First Nations to establish a process in which Canada will work collaboratively with First Nations to identify fair and practical measures to improve the specific claims process, including establishing clearer terminology and common understanding of what information is reported.</p> <p>Indigenous and Northern Affairs Canada continuously improves its reporting requirements to align with Privy Council Office, Treasury Board of Canada Secretariat, and Department of Finance Canada requirements.</p> <p><b>The Department's response.</b> Agreed. Indigenous and Northern Affairs Canada will ensure that the information on its website is updated in accordance with the web renewal initiative driven by Shared Services Canada and in accordance with Treasury Board of Canada Secretariat guidelines.</p>