“ON A HUMAN RIGHTS FOUNDATION”

Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations’ Historical Losses

The BC Specific Claims Working Group Submission to the AFN-INAC Joint Technical Working Group on Specific Claims

July 24, 2017

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EXECUTIVE SUMMARY

Indigenous Nations in BC face the ongoing effects of grievous historical losses in their territories and have fought for years for redress within a discriminatory specific claims process in which they face marginalization and obstruction at every turn. In this submission to the AFN-INAC Joint Technical Working Group (JTWG) on Specific Claims, we describe and contextualize the perspectives and experiences of the BC claimant community, drawing in particular from the results of an online survey and the two-day "AFN Western Dialogue Session" held in Vancouver in June 2017.

Understanding the real effects of the current claims process on the claimant community is a prerequisite to any meaningful reform. Further, reform of specific claims must also be framed in the context of transforming the relationship between Indigenous Nations and Canada, guided by Indigenous rights–related principles, such as those expressed in the UN Declaration on the Rights of Indigenous Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination, and the "Calls to Action" of the Truth and Reconciliation Commission, as well as recent developments in Canadian law, such as the Supreme Court of Canada's decision in *Tsilhqot'in v. British Columbia*.

Overall, from the experiences of BC Nations, we have identified five action items that are essential to real claims reform:

(1) Jointly develop an independent process based on a Nation-to-Nation framework;
(2) Support Indigenous Nations' full and equal participation in all aspects of the specific claims process;
(3) Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws;
(4) Support the full range of functions of the Specific Claims Tribunal; and
(5) Enact real redress and restitution, rather than trying to minimize liability, with Indigenous Nations equal partners in determining remedies.

Through these actions, the specific claims system can be reformed to better adhere to Canada's international and domestic legal obligations and reflect a Nation-to-Nation relationship, in which Indigenous Nations' laws, experiences, and knowledge systematically shape claims processes. Canada and Indigenous Nations must be equal partners, whose negotiations are managed and mediated by a truly independent body. The JTWG has the opportunity now to strongly and unequivocally advocate for this process and the elements that will eradicate deeply entrenched power imbalances and discriminatory practices. Such steps are necessary for specific claims to move forward—as one BC Indigenous leader said at the dialogue session—"on a human rights foundation."

1. INTRODUCTION

To say that BC Indigenous Nations are "frustrated" or "disappointed" with the specific claims process would be to underrepresent the challenges of these Nations, who face the ongoing effects of grievous historical losses in their territories and have fought for years for redress within a discriminatory process in which they face marginalization and obstruction at every turn. The process is so systematically ineffective that many communities believe its true purpose is to thwart rather than advance claims resolution. As one chief recently said of his Nation's participation in specific claims, "I feel like we're dancing on the graves of our ancestors."

In this submission to the AFN-INAC Joint Technical Working Group (JTWG) on Specific Claims, we describe and contextualize the perspectives and experiences of the BC claimant community, particularly as represented in an online survey and at the two-day "AFN Western Dialogue Session" held in Vancouver in June 2017. Understanding the real effects of the current claims process on the claimant community is a prerequisite to any meaningful reform.

Reform of specific claims must also be framed in the context of transforming the relationship between Indigenous Nations and Canada, guided by Indigenous rights–related principles, such as those expressed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the "Calls to Action" of the Truth and Reconciliation Commission (TRC), as well as recent developments in Canadian law, such as the Supreme Court of Canada's *Tsilhqot'in* decision ("*Tsilhqot'in*"). This kind of framing was undertaken repeatedly by the representatives of BC Indigenous Nations and claims research organizations who participated in the survey and dialogue session—they expressed incredulity at how far removed the specific claims process is from the current legal reality of Indigenous rights, as well as from the reconciliatory language of the Justice At Last policy and the current Liberal government. "The process needs to be built on a human rights foundation," one Indigenous leader said at the dialogue session.

Overall, from the experiences of BC Nations (based primarily on our analysis of the survey and dialogue session outputs, but also on past work and reports on claims reform), we have identified five action items that are essential to real claims reform:

(1) Jointly develop an independent process based on a Nation-to-Nation framework;
(2) Support Indigenous Nations' full and equal participation in all aspects of the specific claims process;
(3) Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws;
(4) Support the full range of functions of the Specific Claims Tribunal; and
(5) Enact real redress and restitution, rather than trying to minimize liability, with Indigenous Nations equal partners in determining remedies.

Through these actions, the specific claims system can be reformed to better adhere to Canada's international and domestic legal obligations and reflect a Nation-to-Nation relationship, in which Indigenous Nations' laws, experiences, and knowledge systematically shape claims processes. Canada and Indigenous Nations must be equal partners, whose negotiations are managed and mediated by a truly independent body.

The distance between the current system and a more equal, just, and rights-based system is vast; claims processes have been plagued by inequality, underfunding, conflict of interest, and an adversarial and paternalistic approach. The JTWG has an opportunity to initiate a Nation-to-Nation, rights-based approach to begin to address systematic power imbalances. Furthermore, long-term vision and commitment are

needed. This vision must centre on a truly independent claims process, the elements of which we explore throughout this submission.

About the BC Specific Claims Working Group

The BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs (UBCIC) in 2013 and tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims as a national political agenda item. Throughout our work, we emphasize the historical uniqueness of colonization in BC and the need for a process that addresses the distinctive challenges of claims resolution in this province. Of the 370 claims now in progress in Canada, almost half (176) are in British Columbia.[1] Furthermore, 40 percent of "closed" claims and 60 percent of all claims that Canada has sent for judicial review are from BC. BC Nations are also deeply concerned about the resolution of their large value claims (currently defined as claims over $150 million) in a manner that is fair and transparent. The current claims process is clearly failing BC Nations.

Finding a process that works for the claims of BC Nations is essential, as unresolved claims have real, ongoing impacts on communities and cause delays in the system overall. Further, BC Nations and organizations have been at the forefront of claims reform for decades and have experience and insight that are essential to developing just processes for claims resolution. The BCSCWG is committed to working with Indigenous Nations, partner organizations, and government to advance the just and timely resolution of specific claims, particularly in BC.

2. METHODOLOGY

For this submission, we draw primarily from two sources of materials: results of a "BC First Nations Specific Claims Survey," conducted online between June 12 and July 7, and notes recorded during the AFN's Western Dialogue Session (in Vancouver on June 19–20, 2017). The survey had 19 respondents from across the province, including representatives of claimant communities of wide-ranging sizes and claims practitioners from multiple Claims Research Units (CRUs) and other organizations.

The dialogue session was attended by people representing a cross-section of BC Nations and organizations. It included "break out" sessions on four topics: negotiation and mediation, claims over $150 million, process and funding, and the Specific Claims Tribunal. The 85 pages of notes that we took during these sessions form a large part of the material on which this submission is based. We (the BCSCWG) also draw on reports, submissions, letters, and direction previously drafted or endorsed by BC Nations and the BCSCWG.

Overall, in this submission, we aim to reflect the views and interests of the BC claimant community. This report will be distributed to BC Indigenous Nations to demonstrate that we have heard and advanced their views. Our analysis of the input of BC Indigenous Nations clearly leads us to conclude that reform of the specific claims process must include fundamental, structural changes that will ultimately result in a fully independent process that involves the five fundamental changes outlined above. We also identify issues that may be most productively addressed through direct engagement between Canada and the BCSCWG.

[1] All statistics related to specific claims processes and settlements come from INAC's "Specific Claims Status Report" page (http://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx) and are based on reports generated on March 6, 2017.

3. PRINCIPLES OF A NATION-TO-NATION, RIGHTS-BASED APPROACH

As participants in the survey and dialogue session clearly articulated, the loss and damage of lands and resources have real, ongoing effects on the lives of communities, and unresolved claims perpetuate inequality and Indigenous Nations' sense of alienation within bureaucratic systems that are meant to provide redress. These participants repeatedly emphasized the fact that specific claims resolution is a human rights issue. In expressing the need for a Nation-to-Nation, rights-based approach, survey and dialogue session participants referred to broader legal and political frameworks in which specific claims must be understood, particularly the UNDRIP, ICERD, the TRC, and *Tsilhqot'in*. Within these frameworks, States have internationally recognized obligations to Indigenous Nations.

UN Declaration on the Rights of Indigenous Peoples

Article 28 of the UNDRIP states that Indigenous peoples have the right to redress in cases where their lands have been taken, used, or damaged without their "free, prior and informed consent" (FPIC); specific claims should be a critical mechanism for this kind of redress. Participants in the survey said that specific claims need to be better in line with the UNDRIP and the principle of FPIC. The UNDRIP recognizes the right of Indigenous peoples as self-determining Nations and affirms that they must have the authority to act in full and equal partnership with States—a position in line with the Nation-to-Nation approach that survey and dialogue session participants said is needed.[2]

International Convention on the Elimination of All Forms of Racial Discrimination

We heard clearly at the dialogue session that specific claims reform is an international human rights issue related to racial discrimination and that specific claims would be a topic presented at the upcoming meeting of the ICERD in Geneva. Article 5(a) of the ICERD stipulates that States must guarantee the right of everyone to equal treatment before all institutions and bodies administering justice. Participants in the dialogue session repeatedly identified the unequal treatment that permeates the structure of the specific claims process, describing Canada's paternalistic and discriminatory behaviour in all aspects of the process, particularly in negotiations. A 2017 submission from the UBCIC to ICERD notes that "the specific claims process has been plagued by institutionalized conflict of interest" and that Indigenous Nations "seek a truly independent process through which their claims can reach resolution."[3]

Truth and Reconciliation Commission "Calls to Action"

Participants also referred to the "Calls to Action" of the Truth and Reconciliation Commission, which recommend that Canada "adopt and implement the UN Declaration on the Rights of Indigenous Peoples as a framework for reconciliation." Further, the TRC recommends that Indigenous laws and legal traditions be recognized and integrated in "processes involving Treaties, land claims, and other constructive agreements." The recognition and inclusion of Indigenous laws and legal traditions within specific claims processes was a point raised multiple times during the dialogue session.

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[2] In addition to the UNDRIP, a second international declaration now affects the human rights of Indigenous Nations and the responsibilities of States in the Americas: the American Declaration on the Rights of Indigenous Peoples (adopted by the Organization of American States General Assembly in June 2016). See Paul Joffe, 2017, *Advancing Indigenous Peoples' Human Rights: New Developments in the Americas*. Available at http://quakerservice.ca/wp-content/uploads/2017/03/Advancing-IPs-Human-Rts-New-Devts-in-the-Americas-Joffe-FINAL-Jan-4-17.pdf.

[3] Union of BC Indian Chiefs, 2017, "Canada: Implementation of an Independent Process for the Resolution of Specific Claims." Submission to the UN Committee on the Elimination of Racial Discrimination, 93rd session.

Tsilhqot'in Nation v. British Columbia

Tsilhqot'in Nation v. British Columbia reflects the changing legal context of land rights in British Columbia. In this case, the court issued a declaration of Aboriginal Title to the Tsilhqot'in people and acknowledged "the sovereignty of Indigenous Nations—including their governance and decision-making authority over their title lands."[4] Participants in the dialogue session referred to the *Tsilhqot'in* decision when talking about how their Nations should have more power to shape specific claims processes, in line with the decision-making authority they legally hold in relation to their lands, particularly the court's ruling that governments must seek the consent of Indigenous people regarding their title lands. Overall, the legal implications of *Tsilhqot'in* are complex, but the case clearly indicates the unique circumstances of land rights in BC and the necessity of moving beyond the treaty process as well as the structure and obsolete doctrines underlying exiting claims resolution processes. The decision represents a milestone in the journey toward acknowledgement by Canadian legal systems of the authority and right to self-determination of BC Indigenous Nations.

The UNDRIP, ICERD, TRC, and the *Tsilhqot'in* decision all state that Indigenous laws and legal authority must be recognized and included in processes related to land claims. Overall, participants expressed the need for a Nation-to-Nation approach that reflects the legal and political realities of Indigenous rights.

4. FIVE CHANGES NEEDED IN SPECIFIC CLAIMS PROCESSES, BASED ON BC INDIGENOUS NATIONS' EXPERIENCES

Participants in the survey and at the dialogue session repeatedly emphasized the need for dramatic changes to the specific claims policy and processes—including the viewpoints and approaches governing the behaviour of those tasked with implementing them—such that Indigenous Nations and Canada can be equal partners in negotiating and settling historic grievances. Here we identify five action items for reform in specific claims processes, based on the experiences of BC Indigenous Nations:

(1) Jointly develop an independent process based on a Nation-to-Nation framework;
(2) Support Indigenous Nations' full and equal participation in all aspects of the specific claims process;
(3) Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws;
(4) Support the full range of functions of the Specific Claims Tribunal; and
(5) Enact real redress and restitution, rather than trying to minimize liability, with Indigenous Nations equal partners in determining remedies.

Under each recommendation, we identify the key elements of such an approach. (The full list of recommendations and their elements appears as a table in Appendix A.)

[4] Union of BC Indian Chiefs and Tsilhqot'in National Government, 2017, *Tsilhquot'in Nation v. British Columbia: Plain Language Version*, page 14.

4.1 Action Item: Jointly develop an independent process based on a Nation-to-Nation framework

KEY ELEMENTS

An independent process must include:

- Joint development based on a Nation-to-Nation framework that removes institutionalized conflict of interest
- Joint oversight and regular joint reviews

Participants in the dialogue session were critical of the current institutional structure of specific claims in two main, interlinked ways. First, participants repeatedly stated that Indigenous and Northern Affairs Canada (INAC) should not be in charge of specific claims processes. "INAC is the barrier," said one participant in the dialogue session. The current specific claims process is adversarial, participants said, with INAC seeking to "delay and derail" it at every turn. Overall, participants clearly stated that INAC should "not be in the business of reconciliation." This was a point that spurred strong agreement among participants, who were in critical of INAC's role in specific claims as essentially biased and self-serving.

Second, and even more fundamentally, participants were concerned about the power imbalance and conflict of interest that is present when Canada manages and adjudicates claims against itself. They said INAC (or any other federal department) should not be responsible for the oversight of claims or the dispersal of funds and assessment of claim validity. The issue of authority to determine claim validity was particularly important to participants: while they recognized that an agency in the Canadian federal government would, at some point, need to review claims, they stated clearly that this agency (whichever one it was) should not hold the authority to decide whether negotiation would occur. Under the current process, however, INAC decides whether Canada will accept a claim for negotiation, what type of negotiation will occur, and how much funding Indigenous Nations will (or will not) receive in order to participate. This system is an institutionalized conflict of interest that claims reform must eliminate.

Joint development based on a Nation-to-Nation framework that removes institutionalized conflict of interest

Participants discussed the need for a new institutional structure to manage specific claims—one that is independent of INAC and the Specific Claims Branch (SBC). Given the limited time frame and wide-ranging focus of the dialogue session, participants did not settle on a single way to reorganize the federal institutions involved in specific claims, but agreed that systemic, structural changes were vital to eliminating conflict of interest and problematic patterns of engagement in the process.[5] Participants discussed several options for an independent body that could fairly evaluate submissions from Indigenous Nations and Canada and then make recommendations for negotiation.

For example, participants suggested that claims could be filed with an independent body that would weigh submissions from Canada and Indigenous Nations on an equal footing and then oversee negotiations. It

[5] One participant suggested, however, that any reorganizations must not stall or delay claims currently underway in the process; he said that many communities had been working for years on their claims and any disruptions would create new delays and challenges.

was also suggested that the Tribunal, with a broadly expanded mandate, could resemble or incorporate principles of the Indian Specific Claims Commission (ISCC).[6]

The options discussed by participants varied but shared underlying principles. An independent process must (a) be jointly developed on a Nation-to-Nation framework; (b) facilitate fair, good faith negotiations; and (c) remove INAC from any role in assessing claims. Further, a new/independent body, conceived as a vehicle for resolution and reconciliation and entrusted with reviewing claims and mediating negotiations, would have the requisite authority to make binding decisions, with the Specific Claims Tribunal functioning as a secondary body to resolve political or legal impasses.

Joint oversight and regular joint reviews

From participants in the survey and dialogue session, we heard a call to develop an independent, Nation-to-Nation framework for specific claims resolution that reflects the new legal and political realities of Indigenous rights and the principles of reconciliation. Participants highlighted that the current relationship between Canada and Indigenous Nations is broken and can be fixed only if a framework is jointly developed and implemented. The exact form of this new framework—and the structure and relationship of the agencies involved—needs to be determined via a Nation-to-Nation process in which Canada and Indigenous Nations have joint oversight.

Further, this joint oversight must continue through the reform process and into ongoing governance of specific claims. It needs to transcend the politics of the day and be free from bureaucratic interpretation that undermines long-term processes of reconciliation. The full integration of Indigenous laws, legal orders, and traditions into specific claims—an essential step in achieving a rights-based, Nation-to-Nation approach—requires this kind of shared decision-making. As well, systematic joint reviews of the process, involving Indigenous Nations and Canada, should be established so that the ever-changing legal and political realities of Indigenous rights can be meaningfully integrated into specific claims processes.

[6] "The ISCC's mandate … is twofold: first, upon the request of a First Nation, it holds a public inquiry to review the Minister's decision when either the Minister has rejected its claim or the Minister has accepted the claim but there is a dispute over how to establish compensation; second, upon mutual agreement of a First Nation and the Department of Indian Affairs, the ISCC provides mediation support at any stage of the claims process, to assist the parties to reach a settlement." Minister of Public Works and Government Services Canada. 2009. *Final Report 1991–2009: A Unique Contribution to the Resolution of First Nations' Specific Claims in Canada*. Available at http://publications.gc.ca/site/eng/347894/publication.html.

4.2 Action Item: Support Indigenous Nations' full and equal participation in all aspects of the specific claims process

KEY ELEMENTS

Support for Indigenous Nations' full and equal participation must include:

- Full, fair, and independently administered funding
- Reliable, stable funding for development and support of claims
- Community capacity for claims preparation and oversight
- Transparency
- Fair and equal access to information

Overwhelmingly, participants articulated that in any Nation-to-Nation process, Indigenous Nations must have access to the resources, capacity, and information to participate fully and equally in all stages of the specific claims process. Further, representatives of any agency involved in negotiating claims must visit communities in order to understand the context of a claim and build relationships that facilitate claims resolution.

Full, fair, and independently administered funding

Funding is a key element of a Nation-to-Nation approach. Access to adequate resources is essential to a "level playing field," as participants said at the dialogue session. Survey respondents also suggested that funding approaches need to align with UNDRIP and FPIC; in other words, states are obligated to provide Indigenous Nations with access to resources to support their full and equal participation in claims processes. "Every phase of the process needs to be properly funded," said one respondent. Participants at the dialogue session repeatedly stated that the delays that plague the current system—which have meant that some claims have taken decades to resolve—are generated by years of system-wide under-resourcing.[7] In addition, participants at the dialogue session said that funding decisions need to be made by an independent body, so that allocations are made in a fair, systematic, and arm's-length way.

Reliable, stable funding for development and support of claims

Survey respondents and dialogue session participants particularly emphasized the need for adequate research funding for claims preparation. Further, they said, funding should be reliable and stable from year to year, to enable continuity in claims preparation. Participants also emphasized that these resources should be available not only to CRUs and larger research organizations but also to individual Nations seeking to do their own research. "Funding is a major wedge between First Nations and the specific claims process," said one participant at the dialogue session. Reliable and continuous funding is essential to enabling Indigenous Nations' full participation in claims processes—including their ability to develop and submit claims.

[7] The specific issue of Tribunal-related underfunding is described below, in section 4.4.

Community capacity for claims preparation and oversight

Participants repeatedly noted that many community-based activities for specific claims preparation went unrecognized by INAC's approach to funding the process. "INAC underestimates community involvement," said one participant at the dialogue session. Another noted that INAC would accept costs for legal counsel and other external costs, but that community consultation was usually better done by people internal to the Nation, and these activities were not appropriately recognized or funded. As well, another participant noted that oral history work was essential to preparing claims, but that these histories were under-acknowledged: INAC does not take into account the time necessary to conduct this essential work. In any rights-based, Nation-to-Nation process, the community-based work that goes into claims preparation must be recognized and adequately resourced.

Further, participants in the survey and dialogue session said that there needed to be support for community capacity building so that individual Nations could prepare their own claims or work more closely and effectively with CRUs. "Build capacity in communities for specific claims," recommended one survey respondent. Several representatives of Indigenous Nations who responded to the online survey and attended the dialogue session expressed a strong desire to develop and steward their own claims; however, many also suggested that their communities needed training and support to be able to do so. Indigenous Nations should have access to financial support, training, and resources that will enable them to conduct research and navigate the complexities of any specific claims process. Finding out the kinds of support communities need will involve research and consultation but is essential to an equal process wherein Indigenous Nations control information about their communities and can lead their own participation in claims processes.

These problems of chronic underfunding and the lack of support for community-based work can best be solved by developing a new process for funding, in which criteria are developed jointly by Canada and Indigenous Nations. These criteria could be reviewed at regular intervals, by Indigenous Nations and Canada, to evaluate their ongoing effectiveness and equity.

Transparency

INAC's poor and misleading communication with Indigenous Nations and the public at large was an issue noted in the OAG report and remarked on repeatedly by participants. Those who attended the dialogue session said that INAC's methods and tone of communication with them reflected a reluctance to treat them as equal partners in the process of claims resolution. Further, general disrespect, lack of openness, and inaccurate reporting have contributed to Indigenous Nations' intense distrust of INAC's willingness to assess claims fairly or negotiate in good faith. A firm commitment to transparency and full provision of information were requirements that participants emphasized in both the survey and the dialogue session. In a Nation-to-Nation framework, wherein Canada and Indigenous Nations negotiate to mutually agreeable outcomes, both sides must have clear and complete information regarding the process, including its timeline and standards (beyond the bare-bones outlines contained in the current system's policy and process guide).

Fair and equal access to information

An issue that came up in detail on the survey was that there are significant barriers for Indigenous Nations to be able to access information necessary for the development of their claims. Participants noted that it was extremely difficult to obtain necessary records from INAC in particular, and reported that informal processes put in place to facilitate access regularly result in unexplained, extra-legal omissions of records

as well as unreasonable delays acquiring records. Participants also described changes to the Indian Lands Registry System (ILRS) that limited access and created new delays and administrative burdens for specific claims researchers. Indigenous Nations must have confidence that they have full, timely access to all records necessary to their claims. Dialogue session participants noted, too, that Indigenous Nations and CRUs had to pay to access information that Canada could obtain at no cost. Parity in information access is a prerequisite of a Nation-to-Nation process. One survey participant recommended, as a first step, the creation of a working group that includes INAC staff (from regional offices and headquarters) to address barriers Indigenous Nations face in seeking access to records.

4.3 Action Item: Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws

KEY ELEMENTS

Development and implementation of these frameworks must include:

- Recognition and inclusion of Indigenous Nations' laws and the creation of protocols
- A process for large claims
- A process for claims Canada rejected when INAC was dealing with the "backlog"
- A process to fairly resolve closed claims
- Community visits and relationship building

Participants noted that—since the report of the Office of the Auditor General on specific claims in November 2016—Canada has already begun to change some of its negotiation strategies. For example, Canada seems to have ceased its practice of making one-time "take-it-or-leave-it" offers (a widespread practice used by INAC to clear the "backlog" of specific claims under review at the Specific Claims Branch). As well, Canada seems to have stopped the practice of accepting one small part of a claim and asking for blanket releases on the rest of it. Participants noticed and recognized these changes as a shift in the way that the Canada is negotiating.

However, these practices had serious effects on Indigenous Nations' views of the process as a whole and eroded their trust in Canada/INAC to fulfill the promises of Justice at Last. Participants at the dialogue session described working on a claim for years only to be given one-time, highly demeaning, "take-it-or-leave-it" offers via letter. For the recipients, these letters were emblematic of the indifference and patronizing nature of the system as a whole and of further evidence of the conflict of interest that sees Canada assessing the validity of claims against the state. Many Indigenous Nations have had a "terrible experience with Justice At Last," said one participant; as such, they do not trust the process.

Trust in the system will take time to build; fair and transparent negotiations in which Indigenous Nations and Canada are equal partners is the only way forward. Further, there are no protections in place to prevent such practices from happening again (for instance, if there was a change in government). As such, a new system, in which Canada and Indigenous Nations are equals in the process of negotiation and claims resolution must be created and formalized.

Recognition and inclusion of Indigenous Nations' legal systems and the creation of protocols

At the dialogue session, participants emphasized that there were separate systems at work—Indigenous and Canadian legal systems—and that the specific claims process needed to better reflect the Indigenous laws

of the Nation bringing forward a claim. As each Indigenous Nation has its own laws, the focus must be on legal pluralism within specific claims policies and processes. Participants said unequivocally that the assessment and negotiation processes were biased and unfair because they failed to consider and incorporate Indigenous legal principle and protocols. "Require culturally appropriate negotiations unique for each Nation," said one participant at the dialogue session. Other participants expressed this need for more culturally appropriate negotiation of claims. For instance, participants suggested that negotiation of claims should include community visits, structured according to community protocols and principles. Participants also emphasized the need to transform negotiation models away from standard templates developed by INAC, which have their roots in colonial premises whose endpoint is the disintegration of Indigenous sovereignty, and toward protocols developed with Indigenous Nations as equal partners such that they meaningfully incorporate Indigenous priorities, teachings, and legal principles.

A process for large claims

Participants at the dialogue session highlighted how large value claims (over $150 million) are ineligible for the Tribunal and subject to secret government Cabinet deliberations (from which Indigenous Nations are excluded). Participants also noted that, when claims do go to Cabinet, the resulting offers are typically very low. In addition, participants said that in the past, Canada has required that Indigenous Nations who submit a claim to the Specific Claims Branch must include a band council resolution stating that the claim will not exceed $150 million, in advance of any negotiated process or joint assessment.

The $150 million cap was set unilaterally by Canada and, as one participant noted, does not even take into account inflation. As well, in 2007, Canada and the AFN signed a political agreement which in part committed both to jointly developing a process to deal with large claims. However, Canada walked away from the process, leaving the issue of large claims unresolved. Many Indigenous Nations lack the capacity to take these large claims to court; as such these injustices go unresolved.

Although a large proportion of BC claims are small, the issue is nevertheless highly relevant to BC Indigenous Nations. For instance, Canada walked away from negotiations with the Okanagan Indian Band regarding a large commonage claim. Other participants highlighted how their large value claims remain dormant until an acceptable, fair process is developed, while in the interim their territorial lands are destroyed through illegal resource extraction and development, the impacts of which will never factor into any assessment of the claim. Any reform process that deals with large claims needs to include participation from BC Indigenous Nations, such that the unique issues within this province can be addressed.

A process for claims Canada rejected when INAC was dealing with the "backlog"

Participants repeatedly raised the question of why the rate of rejected claims is so high. Multiple participants agreed that this rate reinforces the idea that the current process is, as one participant said, a "failure process." Out of all the claims in Canada that have been rejected, 53 percent have come from BC. Since these rejections, there have been several Tribunal decisions and changes in case law and specific claims processes that likely affect how many of these rejected claims would be assessed today. (In particular, the Tribunal is, for the most part, validating claims that Canada rejected, such as the village site claim of the Williams Lake Indian Band.)

"There needs to be a process set in place for re-evaluating rejected claims," said one participant at the dialogue session, noting that the government would prefer claims to be left as rejected. For Indigenous

Nations, however, the participant said, these claims do not disappear. They still require resolution. Participants discussed the idea that Indigenous Nations could resubmit claims to put pressure on the government. Review of the current system must address this large number of rejected claims.

Survey and dialogue session participants did not discuss the specific characteristics of a process to address rejected claims.[8] However, we suggest that any process to address the rejected claims must (a) include funding to legally review SCT decisions and case law in the context of rejected claims and (b) permit these claims to be immediately eligible for review by the new, independent body.

A process to fairly resolve closed claims

Participants also raised the question of how, moving forward, the large percentage of closed claims in BC will be addressed. As mentioned, 40 percent of "closed" claims in Canada come from BC. Most of these were unilaterally declared "closed" by Canada, when in fact claims can only be closed when they reach resolution or the Indigenous Nation decides not to pursue them. In the BC case, a large number of claims were closed when Canada offered partial, take-it-or-leave-it offers that rejected the substantive portion of the claim. These offers are characterized by INAC as acceptances, but are de facto rejections: when Indigenous Nations do not respond, Canada closes the file. With these "closed" claims, Indigenous Nations are prevented from pursuing negotiations, an option that must remain open for there to be final resolution.

Claims cannot be closed without the consent of Indigenous Nations; such an action is directly contrary to any Nation-to-Nation, rights-based approach to specific claims. These so-called closed claims are in fact unresolved claims and, as such, must have avenues to resolution. Indigenous Nations must be funded and supported to achieve resolution of these claims, which would entail updating legal arguments and conducting any necessary supplementary research.

Through our connection with BC Indigenous Nations who have been affected by closed claims and because of the high percentage of BC claims that are closed, we at the BCSCWG are uniquely positioned to help develop a system for dealing with this issue, and we would like to be directly involved with Canada in the development of any related processes.

Community visits and relationship building

"Come visit us," said a representative of an Indigenous Nation at the dialogue session, recommending that the representatives involved in claims negotiation (currently INAC staff) should undertake regular community visits in order to build relationships that facilitate claims resolution. Participants wanted government representatives to see the effects of dispossessions and damaged lands and resources "on the ground" in order to understand the meaning of these losses in context; they felt that this kind of witnessing would facilitate resolution and the reconciliatory aims of the specific claims program overall. Further, participants discussed at length the fact that the government representatives who did visit lacked the authority to make decisions on most key aspects of the claim. In a Nation-to-Nation process, the people who visit the communities should have power to negotiate and jointly decide on claims issues.

[8] Participants did emphasize that while their claims are being rejected en masse, actions taken by the provincial government to establish agreements with Indigenous Nations (for example, reconciliation frameworks, as well as those dealing with forestry and economic development) fail to recognize and respect Indigenous Nations' inherent title and rights. As a result, territorial lands and resources are exploited by both the province and industry while Indigenous Nations incur cultural, political, and economic losses.

4.4 Action Item: Support the full range of functions of the Specific Claims Tribunal

KEY ELEMENTS

Support for the full range of the Tribunal's function must include:

- Providing the necessary resources for Tribunal processes
- "Good faith" participation in Tribunal hearings
- Respect for the authority of the Tribunal
- Establishment of regional tribunals/commissions that will be more accessible and responsive to communities.

Many participants in the survey dialogue session appreciated the potential function of the Specific Claims Tribunal as a body with the independence and reconciliatory aims to be able to resolve claims. However, they felt that its capacity and authority to adjudicate claims was being systematically undermined by a number of actions by the federal government. Furthermore, though participants generally felt that current Tribunal judges were fair and respectful, some did view the appointment of judges by Canada as a potential conflict of interest. Others were critical of the primacy given to Canadian law and legal institutions and the absence of Indigenous laws in the legal framework that determines the Tribunal process.

Participants at the dialogue session also noted that the Specific Claims Tribunal was at risk of becoming as expensive and litigious as court. In short, participants saw the opportunity for the Tribunal to be key part of a Nation-to-Nation strategy for specific claims resolution, but suggested that it needs the authority, resources, staff, assurance of independence, and expanded mediation and assessment mandate to be able to fulfill this role.

Providing the necessary resources for Tribunal processes

The Specific Claims Tribunal is underfunded and understaffed, as noted by participants in both the survey and dialogue session. As well, Indigenous Nations reported they do not receive adequate resources to prepare their claims for submission to the Tribunal and are not funded to participate in judicial reviews. The judicial reviews impose huge costs burdens on Indigenous Nations, who must participate in order to resolve their claims. Participants also noted that delays in having their claims heard at the Tribunal are increasing and credited this fact to ongoing and systemic under-resourcing. All aspects of the Tribunal process—from its internal judicial resources to the funding given to Indigenous Nations to prepare for hearings and additional legal proceedings—must be adequately and fairly funded.

"Good faith" participation in Tribunal hearings

The purpose of the Tribunal is to fairly adjudicate claims in an independent and balanced way, taking submissions from Canada and Indigenous Nations on equal standing. In such a process, Canada must negotiate in good faith. However, participants at the dialogue session noted that Canada's strategy at the Tribunal is adversarial and obstructionist. One survey participant noted that Canada would strategically delay proceedings by submitting large volumes of irrelevant materials. At any independent body (such as the Tribunal) tasked with providing a forum for fair decision-making on specific claims, Canada's "good faith" participation is essential to achieving any redress or reconciliatory outcomes.

Respect for the authority of the Tribunal

In addition, participants in both the survey and the dialogue session repeatedly noted that Canada was undermining the legislated finality of Tribunal decisions by sending those finding in favour of Indigenous Nations for judicial review. Federal legislation stipulates that all Tribunal decisions are to be final and binding and not subject to appeal. A judicial review provision exists for matters where the Tribunal's jurisdictional reach, procedures, and correct application of the law are at issue. However, Canada has been treating these processes as appeals, wherein the facts of a claims are re-tried. The authority of an independent body like the Tribunal must be respected: the scope of judicial review should be limited to the terms established in the Specific Claims Tribunal Act.

Establishment of regional tribunals/commissions that will be more accessible and responsive to communities

The Tribunal relies on specialized knowledge to fairly evaluate the complex historical fact patterns that comprise specific claims. Its appointed judges are meant to be specialists in the area of specific claims and Tribunal staff visit claim sites and claimant communities to gather and interpret evidence. (This specialized expertise, too, is another reason why the above-described judicial reviews/appeals are so problematic; other courts do not have the same qualifications to assess the facts of these unique cases.) Participants at the dialogue session suggested that the Tribunal should establish regional bodies to better develop this specialized knowledge and to be more accessible to communities—and thus engender trust.

4.5 Action Item: Enact real redress and restitution, rather than trying to minimize liability, with Indigenous Nations as equal partners in determining remedies.

KEY ELEMENTS

Real restitution and redress must include:

- A focus on reconciliation
- Indigenous Nations as equal partners in determining remedies
- Opportunities for inclusion of non-monetary items in negotiation
- Fair and reasonable settlements

The specific claims process was created to promote reconciliation between Canada and Indigenous Nations by Canada accepting responsibility for its failures to meet its historical legal obligations. However, Indigenous Nations involved in the process state that government representatives behave as though they were shuffling claims off a liability ledger. At the moment, one participant noted, Canada's approach to compensation is "paternalistic" and adversarial ("They fight tooth and nail to avoid admitting they owe First Nations anything," said one dialogue session participant.) As such, participants in the dialogue session strongly voiced the need for an approach to restitution that involves a focus on reconciliation, active involvement of Indigenous Nations in determining settlements, opportunities for inclusion of non-monetary items in negotiation, and—in the end—fair and reasonable settlements.

A focus on reconciliation

The aims of the specific claims process are explicitly reconciliatory: "Negotiated settlements are about justice, respect and reconciliation. They are not only about coming to terms with the past and respect for treaties but also about moving forward together to realize a better, shared future."[9] Good faith attempts to resolve claims necessarily involve more than trying to minimize claims settlement. "There needs to be a greater understanding of the value that First Nations have for their territories," said one participant at the dialogue session.

Indigenous Nations as equal partners in determining remedies

Participants in the dialogue session emphasized that, in a fair and equal process, Canada should not be in charge of unilaterally determining what constitutes a remedy for a historical breach. Cash-only settlements may not provide the sole or most appropriate remedy for past wrongs, participants suggested. Participants proposed that Indigenous Nations should be partners in negotiating a claim's value, explaining the cultural extent of the historical loss, as well as current infringements arising as a result of the loss, in order to determine what constitutes a just settlement. "First Nations people need to produce the solutions," said one participant at the dialogue session.

Opportunities for inclusion of non-monetary items in negotiations

In a true Nation-to-Nation process, in which Canada and Indigenous Nations negotiate to redress past wrongs, Indigenous Nations should be involved in deciding what constitutes restitution for their historical losses. A process that provides a means of exploring non-monetary options as a component of restitution is necessary for Indigenous Nations to control their own futures over the long term. Indigenous Nations, participants at the dialogue session said, should be able to define the scope of what constitutes meaningful restitution for historical wrongs; these Nations are the ones affected by the losses their communities faced.

Jurisdictional battles between the federal and provincial governments and outdated and legally disproved doctrines of Crown sovereignty should not impede the establishment of such a process; rather, provincial governments (which are subordinate/secondary to the Nation-to-Nation structure of redress) must be involved in creative discussions aimed at Indigenous-Crown reconciliation, which adhere to Indigenous legal principles as well as those articulated in Canadian jurisprudence. An important first step will be a process of research and engagement to better understand how Indigenous laws (including Indigenous protocols of negotiation and principles of redress) can be integrated into specific claims processes.

Fair and reasonable settlements

Participants at the dialogue session repeatedly stated that settlement offers systematically undervalued the losses associated with claims and showed no understanding of the importance of these lands to Indigenous Nations. Participants felt that Canada was trying to minimize liabilities at every turn, rather than trying to find a fair value that would resolve the claim. Participants agreed that Canada's assessments of claims were both secretive and offensively low (particularly in relation to the one-time offers on the so-called "small-value" claims, as discussed above). Compensation, participants suggested, should fully consider the meaning and impacts of loss of use.

[9] INAC, 2009, Specific Claims Policy and Process Guide, page 12.

The formula that Canada uses to purportedly bring historical claims up to present-day value—the 80/20 formula—was a subject of much discussion at the dialogue session. This way of calculating interest results in a significant undervaluing of historic losses. Participants at the dialogue session noted that this approach is exploitative and discriminatory, as it would not be used in settlement processes involving non-Indigenous individuals. Further, as one participant noted, were these losses to occur to someone non-Indigenous, settlement would include not just compensation for the dollar value of the loss, but also additional funds to cover what she called "restitution."

By "restitution," this participant meant payments additional to basic payment for lost lands or resources, in order to take into account the impacts of losses suffered by an Indigenous Nation as a result of a given historical wrong. This understanding of restitution is slightly different from that of the UNDRIP, in which "restitution" means restoring the lost lands or resources to the Indigenous Nation, and compensation is an alternative to this restoration.[10] However meanings of "restitution" share an emphasis on the need for fair, non-discriminatory redress that reflects the real effects of the losses suffered by Indigenous Nations.

5. SUMMARY

BC Indigenous Nations overwhelmingly agree that the specific claims process does not reflect the current legal and political rights of Indigenous Nations in Canada or the reconciliatory goals of Justice at Last. "First Nations are not seen as First Peoples," said one participant at the dialogue session, when describing the nature of the current relationship between government and Indigenous Nations. In general, participants in the survey and dialogue session expressed the need for Indigenous Nations to have a more active and engaged role in the specific claims process, one that reflects their standing as self-determining Nations working in partnership with each other and the Canadian government. Legal and policy frameworks such as the UNDRIP, ICERD, the TRC "Calls to Action," and the *Tsilhqot'in* decision recognize that land claims and other conflict resolution processes must take into account Indigenous sovereignty and integrate Indigenous laws if they are to reflect basic principles of human rights.

Our list of five actions, developed based on input from BC Indigenous Nations and organizations, reflects the need for a fundamental shift in the governance of specific claims. Overall, a fair and independent process is necessary—one in which Indigenous Nations and Canada meet as equal partners to determine meaningful redress of historic wrongs. Indigenous Nations must have the full resources, capacity, and information to act as equal partners in all aspects of this process. As the basic objective of specific claims is reconciliation, any approach to redressing historical wrongs must be guided by the overarching need to repair a broken relationship. This entails that Canada act honourably and in a spirit of equal partnership, rather than as an adversary.

Indigenous Nations in British Columbia, as elsewhere, have been engaged in discussions for a fair process for historical grievances since the 1940s, and have always understood what is needed: a fully resourced, independent, Nation-to-Nation process for resolving claims. The JTWG has the opportunity now to strongly

[10] Article 28(1) of the UNDRIP states that "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." UN Declaration on the Rights of Indigenous Peoples, 2007. Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

and unequivocally advocate for this process and the elements that will eradicate deeply entrenched power imbalances and discriminatory practices and create a fair, equitable, and just process for all Indigenous Nations. These actions are necessary for specific claims to move forward "on a human rights foundation."

APPENDIX A: SUMMARY TABLE OF RECOMMENDATIONS AND KEY ELEMENTS

ACTION	KEY ELEMENTS
1. Jointly develop an independent process based on a Nation-to-Nation framework	Joint development based on a Nation-to-Nation framework that removes institutionalized conflict of interest Joint oversight and regular joint reviews
2. Support Indigenous Nations' full and equal participation in all aspects of the specific claims process	Full, fair, and independently administered funding Reliable, stable funding for development and support of claims Community capacity for claims preparation and oversight Transparency Fair and equal access to information
3. Develop and implement negotiation and mediation strategies that respect and integrate Indigenous sovereignty and laws	Recognition and inclusion of Indigenous Nations' laws and the creation of protocols A process for large claims A process for claims Canada rejected when INAC was dealing with the "backlog" A process to fairly resolve closed claims Community visits and relationship building
4. Support the full range of functions of the Specific Claims Tribunal	Providing the necessary esources for Tribunal processes "Good faith" participation in Tribunal hearings Respect for the authority of the Tribunal

	Establishment of regional tribunals/commissions that will be more accessible and responsive to communities.
5. Enact real redress and restitution rather than trying to minimize liability, with Indigenous Nations as equal partners in determining remedies.	A focus on reconciliation Indigenous Nations as equal partners in determining remedies Opportunities for inclusion of non-monetary items in negotiation Fair and reasonable settlements