Canada's Conduct at the Specific Claims Tribunal & the Need for Reform

July 4, 2019

A follow-up report by the BC Specific Claims Working Group

1.0 INTRODUCTION

In September 2017, then Director General of the Specific Claims Branch (SCB), Stephen Gagnon, asked the BC Specific Claims Working Group (BCSCWG) [1] to study Canada's conduct at the Tribunal and make recommendations aimed at rebuilding and improving the relationship between Canada and Indigenous Nations. [2] The BCSCWG agreed to conduct the study in conjunction with our work on two other projects undertaken to advance an approach to claims resolution aligned with the *United Nations Declaration on the Rights of Indigenous Peoples*. [3] This report builds on an initial study, released in June 2018, which was focused on the experiences of British Columbia Indigenous Nations at the Tribunal. We were interested in examining the experiences of Indigenous Nations outside of BC using the same framework of questions and analysis.

This report analyzes Canada's conduct at the Specific Claims Tribunal. It argues that the challenges with Canada's conduct at this body are a result of institutionalized and systemic bias that exists across specific claims processes as a whole.

The 2018 report identified a very clear pattern of behaviour by Canada at the Tribunal. Specifically, an adversarial legal approach by Canada's legal counsel, a lack of resources, and lengthy delays that increase costs and uncertainties for Indigenous Nations. We concluded our study with six discussion questions and associated potential next steps aimed at initiating an active dialogue between Canada, Indigenous Nations, and the Specific Claims Tribunal to address our findings.

Discussion question number six asked about the experiences of Indigenous Nations outside BC in relation to Tribunal proceedings and suggested canvassing Nations outside BC regarding their experiences. In this current report, the BCSCWG addresses this question: it presents findings from a national survey in relation to these three challenges. Thus, it is broader in scope, focusing on the experiences of the members of the claimant community nationally; we received a total of fourteen responses from Indigenous Nations and legal counsel representing 33 claims at the Tribunal from several provinces, approximately 45 percent of Tribunal claims at the time of survey.[4] We also asked a series of follow-up questions and undertook additional legal and historical policy-related analysis to further explore the structural, procedural issues that present barriers to the successful resolution of Indigenous Nations' claims at the Tribunal.

In short, the evidence we gathered strongly supports the findings of the 2018 report. Reports of the three challenges identified by representatives of BC Nations were widely echoed nationally. Canada's conduct, as one survey respondent says, "burdens and complicates" the claims resolution process.

At the same time, the Tribunal's ability to meet its mandate for "just and timely" resolution of claims must be analyzed in relation to claims processes overall. During the last eleven months of our research, other

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[1] The 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 resolution as a key component of reconciliation between Indigenous peoples and Canada.

[2] Canada's concerns arose after representatives attended two events where the experiences of Indigenous Nations at the Tribunal were discussed at length: the 2016 National Claims Research Workshop and the January 2017 Specific Claims Tribunal Advisory Committee meeting. The Director General's request that the BCSCWG examine Canada's conduct at the SCT appeared to arise out of genuine interest in addressing and improving the negative experiences of Indigenous Nations.

[3] The two other ongoing projects are: 1) Integrating Indigenous Laws and Legal Orders into Specific Claims Processes, and 2) Creation of a Fair and Systemic Approach to Address Closed and Rejected BC Claims.

[4] Including Alberta, Ontario, and Quebec; some legal counsel who responded did also represent BC Indigenous Nations, as well as Nations from other provinces.

systemic issues have arisen within specific claims processes that affect the ability of Indigenous Nations to see their claims resolved at the Tribunal. For example, in November 2018, research by the BC Specific Claims Working Group found that Canada is failing to meet its legislated three-year deadline to respond to claims from Indigenous Nations;[5] a follow-up study demonstrates this pattern is continuing.[6] In other words, delays at the initial assessment stage[7] could mean that responsibility for claims resolution is being offloaded to the Tribunal – even though this body faces its own significant delays as a result of funding shortfalls and lack of judicial appointments.[8]

The Tribunal responded to our first report at the June 2018 meeting of the Tribunal Advisory Committee. Further, the Tribunal has undertaken steps that work to address some of the challenges raised by the BC claimant community in the first study; we describe these here, where relevant. However, our focus is on the actions Canada must take to address the problems identified. We note that to date we have received no response from SCB to our June 2018 report, neither to the findings, nor the comprehensive discussion questions and recommendations for next steps to reinforce the Tribunal's reconciliation-oriented mandate.

In developing reforms, the institutionalized nature of Canada's resistance to meaningful change (and its emphasis on minimizing liability and mitigating risk, as described in detail in the 2018 report) must be emphasized and addressed directly; it is not sufficient for Canada to state generalized aims of collaboration and reconciliation, given the history of barriers Indigenous Nations have faced in seeing their claims resolved and the false public assurances they continue to receive from Canada.

Given the conflict of interest inherent in the specific claims process, the Tribunal has become an essential body for fair and just claims resolution. Out of all respondents, 93 percent said that they would go to the Tribunal again for claims resolution.[9] Our primary aim in this follow-up report is to advocate for strategic, systemic changes that can support fair and timely resolution of claims processes, including via the Tribunal.

To this end, we advance the following recommendations such that the challenges facing Indigenous Nations regarding the resolution of their claims may be addressed in a systemic way:

1. Address conflict of interest via creation of a truly independent specific claims process;
2. Integrate, in a systematic, transparent, and permanent way, the honour of the Crown into the mechanisms by which legal instructions are developed, such that litigation becomes less adversarial and more oriented toward reconciliation;
3. Provide adequate resources across the specific claims system;
4. Address the issue of systematic bias and discrimination within institutional culture and the imperative to integrate Indigenous legal orders such that they are on par with Western legal traditions.

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[5] BC Specific Claims Working Group, *A New Claims Backlog: Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims,* November 26, 2018.

[6] BC Specific Claims Working Group, *Back to the Backlog: Canada's Inaction on Late Specific Claims Assessments,* May 2, 2019.

[7] Some Nations report being told by federal negotiators that these delays are because government has prioritized advancing negotiations, citing increased numbers of negotiation tables and more collaborative work; internal government resources are consequently stretched thin, presumably too thin to provide outstanding claim assessments.

[8] Specific Claims Tribunal Canada, *2017-2018 Annual Report*.

[9] The only one who said that they would not go again in future explained that "we have already raised the issue and the community has invested enough time and money," a response that suggests that the community had just one specific claim or issue to advance, or that it wouldn't be viable or desirable for them to repeat the experience.

2.0 BACKGROUND

2.1 The First Report: Analysis Based on a BC Regional Survey

In June 2018, the BC Specific Claims Working Group released an in-depth analysis of Canada's conduct at the Specific Claims Tribunal. This research was requested specifically by the Director General of CIRNAC's Specific Claims Branch in response to reports from representatives of Indigenous Nations who described feeling "disrespected" by Canada's behaviour at the Tribunal.

This first report was called *"Litigation As Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal*. It was based on surveys of Indigenous claimant Nations in BC and their legal counsel. The research identified a very clear pattern. Namely, it showed three fundamental and interlinked challenges:

1. An adversarial legal approach by Canada's legal counsel,
2. A lack of resources that creates an imbalance in power and capacity in which Indigenous Nations are at a disadvantage,
3. Lengthy delays that stall proceedings and increase costs and create uncertainties for Indigenous Nations.

The report sought to identify underlying causes of these challenges. In doing so, it identified a contradiction between Canada's public statements on reconciliation and its interest in minimizing liability and mitigating risk, which is exacerbated due to Canada's inherent conflict of interest in its role within the claims process. The report concluded, "Recognizing this central tension in Canada's position is a critical part of advancing claims discussions and ensuring fair processes."

This report was shared widely among Tribunal-involved parties. The findings were presented at the National Research Directors Workshop (Ottawa, May 2018), a Tribunal Advisory Committee Meeting (Ottawa, June 2018), the Union of BC Indian Chiefs Annual General Assembly (Kamloops, October 2018), the National Claims Research Workshop (Dartmouth, October 2018), as well as meetings of the AFN-Canada Joint Technical Working Group on Specific Claims Reform (Ottawa, 2018) and the AFN Chiefs Committee on Lands, Territories, and Resources (Toronto, November 2018). The BCSCWG received feedback from many perspectives. Further, as explained below, the Tribunal has sought to address some of the challenges identified in the report, particularly via changes to practice directions.

2.2 Current Report: A National, System-Wide Perspective

Since that initial report was made public, the BCSCWG has addressed discussion question six and responded to feedback from Indigenous Nations and organizations outside of BC asking us to expand the scope of the study. We created a national survey (available in both French and English; see appendix A and appendix B), asked a series of follow up questions, and undertook legal and historical policy analysis regarding the structural, systemic issues identified in the initial report.

As well, issues that arose during the course of our research have led us to analyze our survey results in relation to specific claims processes more broadly, including claims assessment and negotiation outside the Tribunal. As we describe throughout this report, institutionalized bias (resulting from a conflict of

interest), chronic underfunding, and widespread delays are evident across the system, in ways that directly affect the Tribunal's capacity to fulfill its mandate.[10]

3.0 FINDINGS: A NATIONAL AND SYSTEM-WIDE PERSPECTIVE

Our national survey produced findings that support and extend those in the initial (June 2018) study: Canada's conduct frequently undermines its own reconciliatory objectives as well as the reconciliatory aims of the Tribunal as set out in the *Specific Claims Tribunal Act*. As one survey respondent wrote: "Canada's conduct can burden and complicate a case, which can be contrary to the Tribunal's purpose." Here, we present the findings of the national survey in relation to the three challenges: an adversarial approach, a lack of resources, and delays. First, however, we explore respondents' views regarding the purpose of the Tribunal, as a conflict resolution body that is distinctive from other legal contexts.

3.1 The Purpose of the Tribunal

The Tribunal is a quasi-judicial conflict resolution body at which parties hold different and often opposing positions; further, it is a system structured around Western legal norms and processes of argument, such that these positions can be advanced. Thus, one might ask, "Is this process not inherently adversarial?" In that view, Canada's conduct – including any effort or tactic to undermine Indigenous claimants' positions – could be seen as legitimate. "Canada's main goal is to win their case, which is what I would expect," wrote one survey respondent.

However, as we described in our initial report, the purpose of the Tribunal is broader, directed toward reconciliation and more positive reconstitution of relations in Canada. As we explained, this purpose of the Tribunal is outlined in the 2007 Justice At Last action plan and in the *Specific Claims Tribunal Act*. Survey respondents widely echoed this view that the Tribunal should not just be an ordinary adversarial legal process. As such, Canada's goals at this body must be broader than minimizing liability and mitigating risk.

With some exceptions, most respondents to the national survey felt that Canada's approach must be unique to the context of resolving historical claims, with a view to achieving justice for past wrongs, but that Canada has yet to enact such an approach: "Canada's main goal is to deny any legal responsibility for the claim," wrote one respondent; another wrote that Canada's main goal was to "defend the Crown and minimize the liability of the government." "Canada's main goal is to stall proceedings for as long as possible and to ensure they don't pay out more than they have to," wrote another respondent.

Another such response is worth quoting at length:

> We are under the impression that Canada mainly wishes to minimize the extent of its obligations. We understand that it is valid for a party to seek to limit its responsibility, but within the specific context of the Specific Claims process and Canada's role in it, should they not seek to understand or define the extent of their obligations rather than look to minimize them? For example, in our case, Canada put a lot of effort in limiting the scope of its fiduciary duty [with] regard to its legislative and executive powers from the government's perspective, without considering the perspective of the First Nation and its situation.

[10] These are exacerbated by CIRNAC's poor and misleading communication about policies that directly impact access to the Tribunal. See the BCSCWG's report, *Back to the Backlog: Canada's Inaction on Late Specific Claim Assessments*, May 2, 2019. The BCSCWG is currently studying Canada's claims negotiation practices, comparing them to public statements lauding advances in this area.

In other words, Canada must accept the full extent of its lawful obligations, and working with Nations to pursue fair resolution, rather than trying to limit the scope of its responsibilities. As another respondent wrote, "[Canada should] be willing to understand the issues and try to come to resolution," but instead, "views the proceedings as too confrontational."

Some interviewees felt that in the context of the Tribunal, a process focused on reconciliation, the burden of proof should shift away from Indigenous Nations (who, as we soon describe, often face financially strained circumstances) to Canada. One respondent wrote: "We believe that the burden of proof should be ascribed to Canada and not the First Nations… It should be incumbent [on] Canada to show the Tribunal it adequately fulfilled its duties toward the First Nation with regard to the claim made."

This willingness to try to understand claims (and the experience of the Nations who advance them) and to accept responsibility for these past wrongs would result in different conduct and approach to legal argument than Canada has thus far advanced at the Tribunal. One survey respondent wrote that Canada should "Be ready to make concessions, even admissions, to avoid added delays and costs. This would be a sign of willingness and good faith to First Nations." Another wrote that the "first step is to acknowledge that past governments were in the wrong and actually work to rectify those losses in real and meaningful ways – it is clear on an international level that there have been injustices, just own up to it."

However, as we next describe, Canada's conduct at this body continues to be adamantly adversarial, with arguments based on denial and tactics intended to delay or stall proceedings.

3.2 An Adversarial Approach by Canada's Legal Counsel

In the 2018 report we identified two ways in which Canada's legal counsel was acting to create barriers to reconciliatory claims resolution: advancing all possible arguments (including those that were discredited or even, as one survey respondent said, "preposterous and insulting") and using obstructionist tactics, such as "document dumping." Responses in our second (national) survey widely echoed these initial findings; in this section, we present these responses. We then also explore whether these conflict-based ways of addressing Indigenous Nations' claims are changing under the current government, which has repeatedly publicly stated its aim of advancing less adversarial legal approaches.[11]

3.2.1. "Advancing all possible arguments"

Respondents in the national survey identified many ways in which Canada's legal approach was adversarial, focused on strenuous denial of responsibility for any past wrongs and failure to accept even basic and well-established evidence or facts. Respondents wrote:

- "[Canada] Denied any liability. No recognition of its fiduciary duties. Discharged its responsibilities onto the province. Denies and belittles the stories of the past. Appealing the Tribunal's rulings [to] the Court of Appeals or the Supreme Court."
- "The federal government fought tooth and nail on every issue that arose, and conceded nothing, even [on] less important issues."
- "[Canada's] adversarial stance hinders the rapid resolution of claims, either because it has to adjudicate preliminary matters or because Canada makes no admission of facts."
- "Canada's prosecutors object to the evidence, and sometimes to the elders' testimony."
- "Canada negotiates Agreed Statements of Fact with a view to obtaining even the most minimal advantages. Canada urges narrow interpretation of existing jurisprudence. They advance legal and

[11] See Attorney General of Canada's *Directive on Civil Litigation Involving Indigenous Peoples*, January 11, 2019. Accessed at https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html

> factual positions that they know or should know cannot be correct. The litigators move by muscle memory resisting and blocking wherever possible. They have clearly not received the memo about reconciliation."

Further, some of these arguments were viewed as out-dated and offensive. One wrote that "[Canada used] offensive arguments that ignore the Supreme Court's assertions."

In short, survey respondents were clear that Canada's approach to legal argumentation at the Tribunal was far from reconciliation-oriented. Its publicly stated intention to pursue reconciliation is not reflected in the experiences survey respondents describe. (In section 4, where we identify recommendations for reform, we explore the legal basis for a more reconciliation-oriented approach to legal argument.)

3.2.2. Impact on Mediation

The Tribunal has been taking up its role and capacity as a mediator of specific claims: "The Tribunal has in several Claims provided a member to serve as mediator," the Tribunal's annual report explains. Practice directions dated October 12, 2018 state that the objective of mediation is to "establish a Memorandum of Understanding between the designated representatives of the parties on terms that provide for a final resolution of the claim."[12] These practice directions build on relevant sections of the *Specific Claims Tribunal Act* to explain the procedures by which Tribunal members will mediate claims.

The Tribunal's increasing opportunities to mediate claims are fairly recent, starting largely in 2018.[13] Whether these mediation efforts will be supported by Canada on an ongoing basis remains to be seen. However, based on past experiences, several survey respondents suggested that Canada's conduct has precluded or stalled mediation processes:

- "Canada's Justice lawyers' priority seems to be to settle claims in their favour, which, as advocates, is understandable, but Canada should equally use the mediation process, which they do not appear to be doing."
- "Canada rejected suggestions for mediation."
- "I have proposed it [mediation]: always declined by Canada."
- "On one occasion, legal counsel for Canada informed me that they were instructed to mention mediation by the client (DIAND). However, when I asked what they proposed to mediate, they had no idea and had no instructions to change their legal position on anything in their defence."

Canada's adversarial approach has been, in general, in the past, a barrier to mediation. The experience of claimant Nations in relation to more recent proceedings will require further review and research. The Tribunal annual report states that efforts to mediate claims have been "mixed" and raises concerns about timeliness and efficiency.[14] The burden will be on Canada to demonstrate a willingness to participate in good faith.

3.2.3. Document Dumping and Other "Tactics"

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[12] Specific Claims Tribunal Canada, *Practice Direction #14*, October 12, 2018. Accessed at https://www.sct-trp.ca/pract/direc-14_e.htm.

[13] A November 15, 2014 letter from the Assistant Deputy Attorney General to the Tribunal's Rules Committee articulated Canada's position that Canada would only consider "a limited scope of mediation within the case management process." At a May 2016 Tribunal Advisory Committee meeting, Tribunal Chair Justice Slade indicated that Canada refused to participate in every instance where a First Nation requested mediation services at the Tribunal.

[14] Specific Claims Tribunal. 2018. *2017–18 Annual Report: Specific Claims Tribunal of* Canada, page 18. Available at https://www.sct-trp.ca/pdf/2017-18-AnnualReport-eng.pdf.

In the national survey, respondents described instances of "document dumping" (the eleventh-hour submission of materials that inhibited the ability of Indigenous Nations' legal counsel to respond to Canada's arguments) and other obstructionist tactics. In this national survey, this issue was less emphasized; however, it still arose without any direct question on this topic. Here are three responses on this topic:

- In one case, a survey respondent said, Canada provided the counsel of Indigenous Nations with ten rulings at the last minute, "hindering our ability to adequately respond to their arguments."
- Another survey respondent said, "Canada's approach seems to be to throw everything at the wall and see what sticks. They produce huge numbers of documents (most of which are irrelevant but still require review to ensure that they are) … The First Nation, of course, must respond to everything – no matter how obviously wrong."[15]
- A third respondent said, "Canada files large numbers of documents in batches over time. These documents are often irrelevant or of little relevance… Canada's written submissions are excessively long."

3.2.4. Follow-Up: A Change in Behaviour?

Survey respondents did not characterize this conduct as bad behaviour on the part of specific individuals; contrary to concerns raised after we released our first report in June,[16] no one in either survey suggested that Canada's legal counsel behaved in a discourteous fashion. As one respondent said: "On a personal level, all exchanges were friendly. However, on many occasions the strategy used or the arguments made were unreasonable." Another wrote, "Canada has been fairly respectful but at the same time adversarial." These conduct-related issues are related to legal tactics and arguments.[17]

One survey respondent said that Canada's failure to make concessions was limiting options for claims resolution at the Tribunal. They wrote: "The Tribunal should be able to favour negotiation or mediation between parties. Given that the federal government doesn't want to concede anything, this is impossible."

It is important to note, some respondents in the national survey did note that there had been a change in the behaviour of Canada's legal counsel.[18] Under the current Liberal government, some respondents said, conduct by Canada's counsel had become less adversarial than it had been under the previous government:

- "Since the Liberals have taken office, there is less delay, and a willingness to look at claims seriously."
- "I have noticed changes. These have been positive. Canada has been more willing to discuss issues and try to resolve and/or try to come to a settlement."

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[15] First Nations are required to respond to vast amounts of irrelevant material, and this places a tremendous burden on their ability to practice due diligence and manage with already very limited resources.

[16] This concern was expressed at the June 2018 meeting of the Tribunal Advisory Committee where the BCSCWG study was presented to committee members. Those in attendance interpreted our systemic critique of Canada's aggressively adversarial approach as criticism of the behavior of particular individuals, and suggested our report lacked necessary balance since it focused exclusively on Canada's conduct. However, we have been clear that our criticism is structural and systemic, and that the DG of Specific Claims asked us to make Canada's conduct the object of study.

[17] At the 2019 Research Directors Meeting in Ottawa, Tribunal Chair Harry Slade addressed the issue of Canada's adversarial approach and tactics such as 'document dumping' in response to a draft version of this report. He stated that he had observed improvements in Canada's conduct recently, but also remarked that such tactics are a reasonable part of the process of adjudication at the Tribunal. However, we contend that the reconciliatory aim of the Tribunal should hold Canada to a standard of conduct that would make such tactics unacceptable and note that First Nations are not provided with the resources necessary to respond to tactics, i.e. resources to review thousands of pages of additional documents or pay the additional legal fees that result from protracted delays.

[18] The survey asked: "If you have pursued more than one claim at the Tribunal, have you noticed any changes in Canada's conduct over time? If so, please describe whether you think these changes have had a positive or negative effect on claims resolution. (Which changes have helped? Which have caused challenges?)"

One respondent noted that the government had recently (in some cases) been more open to negotiation: "This willingness to negotiate is positive," the respondent wrote, "as long as the bargaining teams – which are not the same as litigation teams – are willing to make certain concessions, which at this point remains uncertain."[19]

This apparent change follows public announcements by the Liberal government regarding its intention to move beyond adversarial approaches in order to build Crown-Indigenous relations. For example, in her 2016 *Litigation Year in Review*, then Minister Wilson-Raybould emphasized "respectful litigation" as a key way that the government sought to "shape the conduct of Indigenous litigation."[20]

While we welcome such behavioural changes, they are at the discretion of government, and often inconsistent. For example, one member of the claimant community, in response to our follow-up questions, has stated that "while DOJ lawyers are polite and personable we have not experienced any change in Canada's litigation style. The much-discussed DOJ memo that directs a more reconciliatory approach to litigation does not seem to have had much, if any effect." Further, such changes, when they do occur, are not backed by legislation that will outlast a single government's term; they are subject to the whims of governing party.

3.3 A Lack of Resources that Creates an Imbalance in Power and Capacity in which Indigenous Nations are at a Disadvantage

"The Specific Claims Branch is terrible with funding," wrote one survey respondent. Across all survey responses, the sentiment was unanimous: claims processes are underfunded. The result is delays and a significant burden on Indigenous Nations, who must often contribute other funds to the process. Those lacking additional funds to redirect toward the costs of taking their claims to the Tribunal are denied justice outright.

3.3.1. Chronic Underfunding Across the System

In our initial study, we reported that many survey respondents believed that, to advance their claims, Indigenous Nations received a fraction of what Canada itself paid to defend against them. We do not have access to information about the funds Canada uses to argue against the specific claims of Indigenous Nations. In its 2017-18 annual report, the Tribunal wrote that funds for legal counsel – for both the Indigenous Nations and the Crown – was "woefully inadequate."[21] (This underfunding, the Tribunal noted, was "the primary reason for delay in the Tribunal process"; chronic lack of funds directly impacts the Tribunal's ability to oversee a "timely" process.) The Tribunal further reports that "the funding limitations and the manner in which available funding is trickled out to First Nations amounts to a denial of effective access to the Tribunal."[22]

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[19] Since conducting the survey, the BCSCWG has received regular feedback that Canada's willingness to negotiate First Nations specific claims in good faith is disingenuous. Nations describe significant under-resourcing, inexplicable delays in agreeing to negotiation work plans, and repeated refusals to meet with any regularity to keep negotiations active and progressing. Nations' experiences with negotiations will be the subject of a future report.

[20] Attorney General of Canada Jody Wilson-Raybould, 2017. "Litigation Year in Review," Department of Justice, p. 8. Available at http://www.justice.gc.ca/eng/trans/lyr-alr/pdf/lyr2016.pdf.

[21] Specific Claims Tribunal of Canada. *2017-18 Annual Report: Specific Claims Tribunal of Canada*. Available at https://www.sct-trp.ca/pdf/2017-18-AnnualReport-eng.pdf

[22] Specific Claims Tribunal of Canada. *2017-18 Annual Report: Specific Claims Tribunal of Canada*. Available at https://www.sct-trp.ca/pdf/2017-18-AnnualReport-eng.pdf

But underfunding is an issue across the system, and this affects Tribunal effectiveness overall. For example, research by the BCSCWG found that Canada was failing to meet its three-year deadline to respond to claim submissions by Indigenous Nations at an increasing rate.[23] Under the *Specific Claims Tribunal Act*, Canada has three years to inform an Indigenous Nation whether a claim will be accepted for negotiation. The report found: "Canada has missed the legislated deadline to respond to 65 percent of claims filed nationwide between January 2014 and November 2015. According to the report, the vast majority of these claims have already been reviewed by the Department of Justice and are stalled at the Specific Claims Branch."[24] One lawyer, when asked about these delays, said, "It is currently the norm that Canada is not meeting the three-year deadline and it has been that way since at least August of 2017."

In an open letter accompanying the report, the Union of BC Indian Chiefs asked Minister Bennett for an explanation of the delays but received no response.[25] Staff at the Specific Claims Branch (SCB) (the department responsible for the missed three-year deadlines) have suggested, via informal communications, that the cause of these delays is chronic under-resourcing. Whether the delays can be explained by lack of resources remains an open question; however, underfunding is a clear issue within this process.

Follow-up research conducted in April 2019 demonstrates that Canada missed the assessment deadline in 11 of 12 additional claims.[26]

These missed three-year deadlines are relevant to Tribunal proceedings. Section 16(1) of the Specific Claims Tribunal Act sets out the conditions under which a First Nation may file a claim with the Tribunal if the claim has been filed with the Minister, including subsection (b), which allows a claim to be filed with the Tribunal if:

> three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;

Missing these deadlines *en masse* shifts the burden of claims resolution and the responsibility and work of reconciliation from the department to the Tribunal. Staff at SCB make this connection directly. A representative of one Indigenous Nation facing delays as a result of SCB's missing of the three-year time frame wrote that "It was explained to us [by SCB] that we could either wait for a response or take our claim to the Tribunal." Meanwhile, as we next explain, Indigenous Nations receive inadequate funds to take their claims to the Tribunal.

3.3.2. The Burden of Costs for Indigenous Nations

Again, while we cannot comment on the impacts of underfunding for Canada's defense of its claims (or on the amount of funding Canada received to litigate the claims of Indigenous Nations), it is clear, as the Tribunal has so powerfully stated, that underfunding is a barrier to access to justice via the Tribunal for many Indigenous Nations. "There are serious concerns that a lack of adequate funding has resulted in First

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[23] Union of BC Indian Chiefs, 2018. *A New Claims Backlog: Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims*. November 26, 2018. Available at https://www.ubcic.bc.ca/open_letter_to_ministers_carolyn_bennett_nov2018.

[24] Union of BC Indian Chiefs, 2018. Open Letter to Minister Carolyn Bennett: Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims. November 26, 2018. Available at: https://www.ubcic.bc.ca/open_letter_to_ministers_carolyn_bennett_nov2018

[25] Open Letter from UBCIC Executive to Minister Carolyn Bennett, "Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims," November 26, 2018.

[26] BC Specific Claims Working Group, *Back to the Backlog: Canada's Inaction on Late Specific Claims Assessments,* May 2, 2019.

Nations not having full access to the Tribunal," wrote Justice Harry Slade in his Message from the Chair in the Tribunal's 2017-18 annual report.[27]

One hundred percent of respondents to the national survey stated that funding for Indigenous Nations to pursue claims at the Tribunal was insufficient. These respondents identified different parts of the process as being underfunded, from the preparation of Declarations of Claim, documentary research and legal analysis to different aspects of the litigation. Wrote one respondent, "the funding is insufficient to cover all expenses").

Responding to questions regarding the costs, time, and federal government funding available to prepare Declarations of Claim, claims practitioners and Indigenous Nations stated unequivocally that there is no advanced funding available to cover even a portion of the on average $10,000 to $20,000 legal costs involved in preparing them. This is particularly alarming since a Declaration of Claim is the instrument required to file a claim at the Tribunal and initiate the process, as set out in Part 5 of the SCT's Rules of Practice and Procedure.[28] It is also the mechanism by which a First Nation becomes eligible for funding.

Because of these funding shortfalls, Indigenous Nations end up covering a significant proportion of the costs of taking their claims to the Tribunal, often being forced to borrow from other programs or take on the burden of additional loans. Respondents explained:

- "The funds received are always a fraction of what is requested, and what it costs to bring the claim to the Tribunal. With every year that goes by, the funds decrease."
- "The First Nation had to contribute large sums of money to develop and advance these claims."
- "The Nation struggled to pay the excess costs and was often late paying."

The survey asked, "If the Nation(s) did end up covering some Tribunal costs, please provide an estimate of what percentage of the overall costs the Nation covered." Survey respondents' answers to this question varied. Three respondents estimated the percentage at 50 percent. Overall, the respondents' estimates for the proportion of costs covered by Indigenous Nations ranged from 25 to 90 percent.

One respondent made the powerful point that in-kind community contributions are not factored into the total accountings of costs for Indigenous Nations participating at the Tribunal; if they were, the proportion of the total costs paid directly by Indigenous Nations would be much higher. The respondent wrote: "The process was started … years ago by a former Chief of the Nation and he did all of his research on his own time along with Elders and leadership … I don't think that you can put a price on the work that has been done to date – I would say that this alone was 80% or more of what was needed to move these forward" [text shortened to preserve confidentiality]. In other words, current accounting goes only a short way to explaining the relative contributions of Indigenous Nations to the advancement of their claims.

The lack of resources and the burden of additional costs on Indigenous Nations has serious effects on Nations' ability to advance and resolve its claims. One survey respondent said "Fewer legal resources dedicated to the case; at times an inducement to negotiate; at times the choice to not pursue additional expert review." The conclusion here is that the Tribunal is becoming either untenable, or Nations have no funding to obtain expert reports that would support their claims, compromising their participation as well as the outcomes of Tribunal decisions. Another survey respondent, a lawyer, wrote, "One of the two communities we represent has more financial trouble than the other and had to look to a prompt processing of the claim, due to an inability to sustain the long-term cost of research tied to said claim." This highlights how

[27] Justice Harry Slade, 2018. "Message from the Chair." In *2017-18 Annual Report: Specific Claims Tribunal of Canada*. Available at https://www.sct-trp.ca/pdf/2017-18-AnnualReport-eng.pdf

[28] See the SCTC website: https://www.sct-trp.ca/fili/index_e.htm.

underfunding – and discretionary funding – jeopardizes the claims of less well-resourced communities, a profound injustice about which all parties involved must be very concerned.

One respondent made a connection between resources and the burden of proof, arguing that Canada had more resources yet the burden of proof was on Indigenous Nations to prove their case, "despite their means," rather than on Canada. Respondents clearly perceive inequity that they believe exacerbates the unfairness of an overall power imbalance. True reconciliation is impossible under these circumstances.

Furthermore, this lack of resources has impacts on the community more broadly, as well as on Crown-Indigenous relations. Survey respondents wrote:

- "The effect is that the immediate needs of the community are not met and adds to negative feelings against the government."
- "Any own source funding takes away the First Nation's ability to fund education, language preservation, economic development, social programs, governance – the whole 9 yards. The Minister recognizes this but has not yet taken the steps necessary to level the playing field."

In other words, the lack of sufficient funds to pursue historical claims is resulting in further inequities, compounding the original breaches set out in the claims themselves, exacerbating inequality and resulting poverty. This directly contradicts the reconciliatory objective – righting past wrongs – of the specific claims process. As we explain below in our recommendations, the provision of adequate funds for claims resolution is a human right and must be addressed.

3.4 Lengthy Delays that Stall Proceedings, Increase Costs and Create Uncertainties for Indigenous Nations

In the 2018 report, the BCSCWG found that delays were widespread and so common that many claimants and their counsel had started to see actions by Canada that stalled proceedings as "tactics." The points at which Canada delayed the process were many and varied, including approving mandates, responding to Declarations of Claim, repeated extension requests, postponing hearings and case management conferences, commissioning late-stage expert reports and conducting extensive late-stage research, making last minute document disclosures, refusing to resile from discredited positions, and promising settlement proposals that never materialize.[29]

In this national survey, responses were more mixed. The survey asks if claim(s) proceedings follow the timelines agreed upon by both parties at the beginning of the process. Responses suggest timelines are being met only half of the time. Here are the responses of the thirteen people who responded to this question:

- "Yes": 5
- "No": 6
- "Sort of"/ "don't know": 2

The survey also asked if the claim(s) faced delays at any point in the Tribunal proceedings.[30] Out of the eleven responses we received, eight said that yes, the claims faced delays (73 percent). In short, the issue of delays continues to be pervasive.

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[29] BCSCWG, "Litigation As Usual"?, p. 6.

[30] The question read: "Did the claim(s) face delays at any point in the Tribunal proceedings? If so, please explain what happened (and at what point in the process and why). If not, please explain what made it possible for your claim to proceed in a timely way. Please describe any aspects of Canada's conduct that you feel are relevant."

In terms of the causes of these delays and Canada's conduct, two key patterns emerged in the responses of survey participants. First, several responses were critical of Canada's conduct in general, including views such as "Canada does what it can to delay the process" and "Canada demands more time for every stage in the proceedings." Second, participants sought to locate the point at which delays occurred. They emphasized in particular two points of proceedings that caused delays: the granting of mandates for Canada's legal counsel and the creation of expert reports. The creation of expert reports is a lengthy process for all parties, but the granting of mandates is an institutional issue that Canada can directly address.

4.0 RECOMMENDATIONS

The responses to our national survey powerfully support our findings in the 2018 study of Canada's conduct at the Tribunal. The three challenges we identified – adversarial conduct, underfunding, and delays – have been part of the experience of the surveyed claimant community, across the board. We can now clearly say that these are not just BC problems.

4.1 Address the Conflict of Interest Within Specific Claims

Contrary to Canada's numerous public statements[31] that claims processes are slow but generally consistent and fair, Canada has, in fact, mismanaged claims processes since these programs began and to a startling degree over the past decade (as found by the Office of the Auditor General[32]). At the root of this mismanagement and the delays more broadly is an untenable conflict of interest: Canada oversees and funds the process but, as a respondent in claims, has an interest in delay, denial, obfuscation, and underfunding. For decades, Indigenous Nations have called for a truly independent process, one that would deal with claims in a fair and timely way.

The Tribunal was specifically created to mitigate this problem of conflict of interest and to introduce independence and fairness into the specific claims process. Justice At Last described this body as one of four fundamental reforms (or "pillars") and it has become an essential body for claims resolution; as described above, 93 percent of survey respondents said they would take claims to the Tribunal again in the future.

However, our research shows that the Tribunal's effectiveness must be considered in relation to the specific claims process as a whole. Certain problems deriving directly from Canada's conflict of interest can be addressed by the oversight and practice directions of the Tribunal to a certain extent, though, as our research shows, these problems create barriers to the full and equal participation of Indigenous Nations at the Tribunal and to claims resolution overall. However, other, institutional issues – particularly underfunding, but also delays in other parts of the system that result in an offloading of claims to the Tribunal – hamper the ability of the Tribunal to fulfill its mandate.

It is our intention that our study encourage and inform further dialogue and discussion amongst Indigenous Nations regarding the creation of a truly independent specific claims process. The current government has repeatedly promised to initiate a national engagement initiative so that Indigenous Nations can provide input into what such an independent specific claims process would look like. We have learned that the Minister has recently committed necessary funding to conduct engagement sessions across Canada during

[31] For example, SCB Negotiations Director Natalie Neville announced to attendees at the BC Joint Gathering in January 2019 that the specific claims process is "not perfect but is a program that works."
[32] Office of the Auditor General, 2016. *Report 6 – First Nations Specific Claims – Indigenous and Northern Affairs Canada.* November 2016. Available at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html

the summer and fall of 2019. However, the success of the engagement sessions is predicated upon Canada providing funding for all Indigenous Nations to attend and participate if they choose to do so.

4.2 Uphold the Honour of the Crown in Legal Arguments

As we explained above, survey respondents widely felt that the legal arguments advanced by Canada's counsel at the Tribunal were unnecessarily adversarial and, as such, failed to uphold the "honour of the Crown," a common law doctrine that Canadian courts have recognized as "the centrepiece of Crown-Indigenous relations" and a "constitutional guiding principle" for achieving reconciliation.[33] Importantly, the courts have emphasized that the honour of the Crown "is not mere incantation, but rather a core precept that finds its application in concrete practices" and "speaks to how obligations that attract it must be fulfilled."[34]

The Specific Claims Tribunal is tasked with making final binding decisions to resolve claims for the purpose of fostering reconciliation. Given the Tribunal's reconciliatory objective, it is possible to identify three actions that Canada can take to advance the honour of the Crown in this context:[35]

1. Refrain from paternalistic positions that situate Canada as the party with exclusive power over the process and the parameters of specific claims. Meet Indigenous Nations at the Tribunal as partners who have been historically wronged, entitled to fairness, openness, and transparency, and able to advance Indigenous protocols and legal orders, thus reflecting the reconciliatory objectives of the Tribunal in its conduct.

2. Consider the (financial) circumstances of the claimant, such that Canada refrains from aggressive litigation tactics that are inappropriate when dealing with Nations with extremely limited resources. Refrain from using Nations' historical poverty – a direct consequence of colonialism – as a rationale for denying just levels of compensation to ensure Nations' continuing hardship.

3. Refrain from frivolous positions that result in excessive delay and hardship for Indigenous claimants.

Because Canada has so publicly promised to reform its adversarial approach to litigation, it must be more transparent regarding how decisions about legal conduct are made. Specifically, Canada should increase transparency on the processes by which legal instructions are given. Throughout our research, we were repeatedly told that Canada could not provide information on legal instructions because of solicitor-client privilege. While we understand that Canada cannot share the content of legal instructions, it could be more transparent about how these instructions are developed and which departments are responsible. Thus, the relevant departments can be held accountable for an approach to litigation (though not for instructions on an individual case-by-base basis).

4.3 Provide Adequate Resources Across the Specific Claims System

A lack of sufficient funds for claims resolution is an access to justice issue – and therefore a human rights issue. Article 28 of the *UN Declaration on the Rights of Indigenous Peoples* says that "Indigenous people

[33] Alisa Lombard and Aubrey Charette, *Crown Honour and the SCT: Honourable Litigation? September 13, 2018*.
[34] Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, quoted in Lombard and Charette.
[35] Lombard and Charette, *Crown Honour and the SCT: Honourable Litigation? September 13, 2018*.

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."

Furthermore, as we explained above, Nations that are less well-resourced are less likely to be able to pursue a full process to resolve their claims – or to even take their claims to the Tribunal in the first place. The risk here is of the exacerbation of inequalities and of a downward pressure on poorer Nations, a risk about which all Tribunal-involved parties should be deeply concerned.

Survey respondents had many recommendations regarding how Canada should address the underfunding of claimants:

- "Subsidize both sides similarly. The First Nation often has fewer means even though it must provide a similar standard of proof as that which is filed by the Crown. This could allow us to better respond, to ensure the presence of experts, etc."
- "Funding received from the government disproportionate compared to the government's ability to [represent] itself. Therefore, get fair funding to increase the First Nation's ability to develop its evidence, grow its expert resources, lawyers, etc."
- "Be sure that funding keeps up with expenses. Keep track of the activities accrued during the same fiscal year, as well as special circumstances. In some cases, for example, more than one hearing occurs in the same year (testimonies, preliminary exceptions, arguments). The First Nation then has a choice between reporting some activities the following year (and delaying the process), or assuming a larger part of the expenses for the current year."
- "Following a grant of core funding commensurate with the original needs and complexity of the claim, Canada should also systematically offer the First Nation the same means and resources that Canada invested in the case."

In general, these recommendations centre on the need to (a) create funding that covers the full costs of developing claims and advancing them at the Tribunal and (b) address any inequalities within the system regarding how much funding Nations are given to advance their claims relative to the funds Canada receives to defend against them.

4.4 Address the Issue of Systemic Bias Within Institutional Culture via Training and Education

Our research has shown that, while political language might change, such as to reflect reconciliatory aims, bureaucratic structures and processes are deeply entrenched. They reflect their histories, including the histories of top-down, unilateral, and deeply biased decision-making and approaches to service delivery. Our reports strongly suggest that organizational culture needs to be transformed in a targeted and systemic way. Extensive training of current staff is an important part of any interim or ongoing measure to reform claims.

At the dialogue session in Vancouver in June 2017, representatives of BC Nations repeatedly stated that "INAC is the barrier" and should not be in charge of specific claims. They said that the department sought to delay and derail the process at every turn.[36]

[36] BC Specific Claims Working Group, 2017, *On a Human Rights Foundation: Creating a Nation-to-Nation, Rights-Based Approach to Addressing Indigenous Nations' Historical Losses.*

Our research has led us to explore the need to integrate Indigenous laws and legal orders into specific claims processes, as well as the role of historical education and intercultural competency training for bureaucrats and others involved in claims processes. Other institutions and organizations have pursued such training:

- The Truth and Reconciliation Commission and law societies across Canada have both challenged members of the legal profession to develop inter-cultural competency.[37]
- Library and Archives Canada has sought regularized and structured training to advance civil servants' knowledge of the context and history within which Crown-Indigenous relations now exist.[38] So far, LAC has offered this program approximately ten times over the course of a year and a half, in both French and English.[39]

5.0 CONCLUSION

When it comes to SCT practice there is still a wide delta between Canada's high-level chat about "reconciliation" and the way that Canada fights these claims.

Survey Respondent

Our recommendations are the product of two comprehensive reports based on the experiences of Indigenous Nations at the Specific Claims Tribunal, who have highlighted Canada's adversarial legal approach, failure to provide adequate funding for them to participate effectively, and bad faith delay tactics denying them access to justice for historical wrongs. If Canada intends to honour its commitment to reconciliation with Indigenous Nations, SCB officials must engage in an open, constructive dialogue with Indigenous Nations and their representative organizations regarding the findings and recommendations set out in both BCSCWG reports and provide adequate resources to ensure the full participation of Indigenous Nations.

In the absence of an independent specific claims assessment process, the Specific Claims Tribunal is the primary mechanism for achieving justice and restitution for Canada's failure to fulfill its legal obligations to Indigenous Nations and to uphold its commitment to implement the *UN Declaration on the Rights of Indigenous Peoples*.

The possibility of renewed nation-to-nation relationships, reconciliation, and justice depends on Canada making this dialogue with Indigenous Nations a priority.

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[37] See Action #27, Truth and Reconciliation Commission "Calls to Action," which calls on the Federation of Canadian Law Societies to "Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti- racism." See also the Law Society of Ontario, "Equality, Diversity and Inclusion" (March 2018), available at https://www.lsuc.on.ca/EDI/. The Law Society of British Columbia adopted a Truth and Reconciliation Action Plan in July 2018, which envisions, amongst other things, greater Indigenous representation in the law society, more inter-cultural training for lawyers and reviewing all of its policies and practices to remove barriers for Indigenous people; see Grand Chief Ed John, Nancy Merill, John Borrows, Craig Ferris, Dewan Lawton, Claire Marshall, Michael McDonald, Ardith Walkem, Truth and Reconciliation Action Plan, (The Law Society of British Columbia, 2018), available online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/TruthandReconciationActionPlan2018.pdf.

[38] Kairos, 2018. "History of the Blanket Exercise." Available at https://www.kairosblanketexercise.org/about/.

[39] As part of an ongoing BCSCWG study on incorporating Indigenous laws and legal orders into specific claims processes, the principal researcher on the project modified the Kairos blanket exercise for a specific claims context with the aim of developing an intercultural competency workshop for SCB staff.

APPENDIX A

NATIONAL SURVEY

Canada's Conduct at the Specific Claims Tribunal

HELP MAKE AN IMPACT

We are seeking your feedback on Canada's conduct at the Specific Claims Tribunal. We will use information you provide to advocate for changes to Tribunal processes where necessary.

From the survey results, we will write a short report that we will share with all participating Indigenous Nations, their legal counsel, the Tribunal, other claims practitioners, Canada, and groups involved with reform of specific claims.

ABOUT THIS SURVEY

The survey contains 23 questions. We estimate that it will take about 20 minutes to complete.

Please answer whatever questions you can; all information you can offer is very helpful. Feel free to skip any questions that are not relevant to your experience.

All information will be made anonymous. No individuals, Nations, organizations, or firms will be identified by name in any materials related to this survey. However, if you are concerned about confidentiality, please feel free to answer questions in a general way (i.e. without reference to any specific Nation or Nations) and to skip questions 1, 2, 19, 21, 22, and 23.

1. Name
2. Nation, firm, or organization
3. In what way are you involved with specific claims?
4. How many claims have you been involved with at the Tribunal?
5. Based on what you know of the Tribunal, would you take a claim to this body in the future? Yes/No. Please explain the reasons why or why not.
6. Did your experiences at the Tribunal meet your expectations? Yes/No. Why or why not? Please explain.
7. Did the claim(s) you were involved with at the Tribunal reach resolution? If so, did this happen in a "just and timely" way? Please explain your experience.
8. In general, how would you describe Canada's conduct during Tribunal proceedings? Please provide examples where possible.
9. What do you think is the role of the Tribunal? Please describe any aspects of Canada's conduct that support or detract from this purpose.
10. If you have pursued more than one claim at the Tribunal, have you noticed any changes in Canada's conduct over time? If so, please describe whether you think these changes have had a positive or negative effect on claims resolution. (Which changes have helped? Which have caused challenges?)
11. In your opinion, what is Canada's main goal or priority during Tribunal proceedings? Please explain what has given you this impression.

12. What steps could Canada take during proceedings at the Tribunal to advance reconciliation? How should Canada conduct itself? What impact would these actions have on your Nation (or the Nation(s) you represent)?
13. Did your Nation (or the Nation(s) you represent) receive adequate funding to develop the claim and advance it at the Tribunal? Yes/No. Comments:
14. If the Nation(s) did end up covering some Tribunal costs, please provide an estimate of what percentage of the overall costs the Nation covered.
15. If the Nation(s) did end up covering Tribunal costs, please describe the effects of these expenses on the Nation.
16. Were the Nation's original claim submission and historical record provided to the Tribunal? If not, do you know why? If they were excluded, did this have any effect on the costs faced by the Nation? Please explain.
17. Do you have any recommendations about the funding that Nations receive for Tribunal processes?
18. Did the claim(s) proceedings follow the timelines agreed upon by both parties at the beginning of the process? Please describe any aspects of Canada's conduct that you feel are relevant.
19. Did the claim face any delays at any point in the Tribunal proceedings? If so, please explain what happened (and at what part of the process and why). If not, please explain what made it possible for your claim to proceed in a timely way. Please describe any aspects of Canada's conduct that you feel are relevant.
20. Were you involved in any community hearings? If so, please describe the experience of these hearings. Please describe any aspects of Canada's conduct that you feel are relevant.
21. Did the claim go into mediation at any point? If not, why not? If so, who requested mediation? And how would you describe the experience? Please describe any aspects of Canada's conduct that you feel are relevant.
22. Have you been involved in a claim that was put on hold during Tribunal processes? (This kind of hold used to be called an "abeyance" but is now called a "stay of proceedings.") What happened after the claim was put on hold? Please describe any aspects of Canada's conduct that you feel are relevant.
23. Was the Tribunal's decision in any claims you were involved with the subject of an application for judicial review to the Federal Court of Appeal? If so, who applied for judicial review? What was the nation's experience of the judicial review process? Please describe any aspects of Canada's conduct that you feel are relevant.

APPENDIX B

Sondage National

Le comportement du gouvernement fédéral au Tribunal des revendications particulières

AIDEZ-VOUS À FAIRE UNE DIFFÉRENCE

Nous voulons vos commentaires au sujet du comportement du gouvernement du Canada au Tribunal des revendications particulières (TRP). Avec l'information que vous fournirez, nous avons l'intention de demander des changements aux procédures du Tribunal.

Les résultats du sondage nous aideront dans la rédaction d'un bref rapport que nous partagerons avec toutes les Premières Nations qui y participent, leurs conseillers juridiques, le Tribunal, les autres professionnels des revendications, le gouvernement du Canada, et avec tous ceux qui œuvrent pour apporter des réformes aux revendications particulières.

À propos du questionnaire

Ce sondage compte 23 questions. Nous estimons qu'il prend environ 20 minutes à compléter.

Veuillez répondre à toutes les questions pour lesquelles vous avez des informations : toutes les informations sont importantes. Sentez-vous à l'aise de ne pas répondre à toute question non-pertinente à votre expérience.

L'ensemble de l'information va demeurer anonyme. Le nom des individus, des Premières Nations, des institutions, ou des sociétés ne sera aucunement identifié dans le matériel lié à ce sondage. Cependant, si la confidentialité des réponses vous préoccupe, veuillez répondre aux questions de manière générale (p. ex. sans faire référence à une Première Nation ou à des nations en particulier) et ne répondez pas aux questions 1, 2, 19, 21, et 23.

1. Nom

2. Première Nation, société, ou institution

3. De quelle façon êtes-vous impliqué dans le processus des revendications particulières?

4. Combien de revendications avez-vous présentées au Tribunal?

5. Selon vos connaissances ou expériences passées du Tribunal, pensez-vous soumettre une autre revendication devant ce Tribunal dans le futur? Oui/non. Veuillez en expliquer les raisons.

6. Votre expérience au Tribunal a-t-elle répondu à vos attentes? Oui/non. Veuillez en expliquer les raisons.

7. Les revendications dont vous avez fait part au Tribunal ont-elles été résolues? Si oui, selon vous, est-ce que l'expérience s'est déroulée de manière « équitable et dans les meilleurs délais » ? Veuillez décrire votre expérience.

8. En général, comment décririez-vous le comportement du gouvernement fédéral durant les procédures du Tribunal? Si possible, veuillez fournir des exemples.

9. À votre avis, quel est le rôle du Tribunal? Décrivez tout aspect du comportement du gouvernement fédéral qui vient appuyer ou nuire à l'objectif du Tribunal.

10. Si vous avez présenté plus d'une revendication au Tribunal, avez-vous remarqué des changements dans le comportement du gouvernement fédéral au fil du temps? Si oui, veuillez décrire si vous pensez que ces changements ont eu un effet positif ou négatif sur le règlement des revendications. (Quels changements ont aidé? Lesquels ont créé des obstacles?)

11. Selon vous, quel est le but principal, ou la priorité principale, durant les procédures du Tribunal? Veuillez expliquer ce qui vous a donné cette impression.

12. Quelles sont les mesures que le gouvernement du Canada pourrait prendre durant les procédures du Tribunal dans le but pour favoriser la réconciliation? Quels devraient être le rôle et le comportement du gouvernement du Canada, selon vous? Quel serait l'impact de telles mesures sur votre Première Nation (ou celles que vous représentez)?

13. Votre Première Nation (ou les nations que vous représentez) a-t-elle reçu les fonds nécessaires pour développer la demande de revendication et la soumettre au Tribunal? Oui/non. Commentaires.

14. Si la Première Nation a fini par payer des coûts du Tribunal, veuillez estimer le pourcentage du coût global que la Première Nation a payé.

15. Si la Première Nation a fini par payer les coûts du Tribunal, veuillez décrire l'effet de ces frais sur la Première Nation.

16. La demande initiale de revendication et le dossier historique de la Première Nation ont-ils été fournis au Tribunal? Si non, savez-vous pourquoi? S'ils ont été exclus, est-ce que ceci a eu un effet sur les dépenses occasionnées par la Première Nation? Veuillez expliquer.

17. Avez-vous des recommandations au sujet du financement que les Premières Nations reçoivent pour les procédures du Tribunal?

18. Les procédures de chaque revendication ont-elles suivi le calendrier convenu par les deux parties au début du processus? Veuillez décrire tout aspect du comportement du gouvernement fédéral que vous trouvez pertinent.

19. Le dossier de revendication a-t-il subi un retard quelconque durant les procédures du Tribunal? Si oui, veuillez expliquer ce qui s'est passé (et à quel moment durant le processus et pourquoi). Si non, veuillez expliquer ce qui a permis que votre demande de revendication ait suivi les délais prescrits. Veuillez décrire tout aspect du comportement du gouvernement fédéral que vous trouvez pertinent.

20. Avez-vous assisté à des audiences dans la communauté? Si oui, veuillez décrire votre expérience. Veuillez décrire tout aspect du comportement du gouvernement fédéral que vous trouvez pertinent.

21. Le dossier de revendication est-il passé par le processus de médiation? Si non, pourquoi? Si oui, qui l'a demandé ? Comment décririez-vous l'expérience? Veuillez décrire tout aspect de la procédure que vous trouvez pertinent.

22. Avez-vous été impliqué avec un dossier de revendication qui a été suspendu durant les procédures du Tribunal ? (Ce type de suspension s'appelait un « suspens » auparavant, mais s'appelle maintenant un « sursis à statuer ».) Qu'est-ce qui est arrivé après que la revendication ait été suspendue? Veuillez décrire tout aspect du comportement du gouvernement fédéral que vous trouvez pertinent.

23. Dans votre cas, la décision du Tribunal a-t-elle été le sujet d'une demande de révision judiciaire à la Cour d'appel fédéral? Si oui, qui a présenté cette demande? Quelle était l'expérience de la Première

Nation à la procédure de révision judiciaire? Veuillez décrire tout aspect du comportement du gouvernement fédéral que vous trouvez pertinent.