

# BACK TO THE BACKLOG:

## Canada's Inaction on Late Specific Claims Assessments

Prepared by the BC Specific Claims Working Group  
May 2, 2019

### INTRODUCTION

On November 26, 2018, the BC Specific Claims Working Group (BCSCWG)<sup>1</sup> released a report entitled, *A NEW CLAIMS BACKLOG: Canada's Failure to Meet the Legislated Three-Year Deadline to Respond to Specific Claims*. The report detailed research into how consistently Canada is missing its legislated three-year deadline to assess Indigenous Nations'<sup>2</sup> claims and how Canada communicates with Indigenous Nations about delays.

Our findings demonstrated that, of 107 claims filed between January 1, 2014 and November 10, 2015, Canada failed to respond to 92 (86 percent) within the three-year deadline. At the time of our study, 69<sup>3</sup> of these missed assessments were still outstanding. This amounted to 65 percent of all claims filed. In 97 percent of these cases, legal opinions were signed by the Department of Justice (DOJ) well in advance of the three-year deadline – nine months, on average – suggesting the delays are occurring at the Specific Claims Branch (SCB) during the last part of the assessment phase. Our findings also demonstrated that in the vast majority of cases, respondents indicated that SCB did not communicate directly with Indigenous Nations about these delays.

Based on these findings, we made five recommendations:

1. Communicate with Indigenous Nations waiting for late claim assessments and provide a full and clear explanation as to why SCB has missed its legislated timeline to respond.
2. Work with each affected Indigenous Nation to establish a jointly agreed upon path forward, including, where applicable, new timelines.
3. Include a list of all viable options to ensure a specific claim has access to justice.
4. If the Specific Claims Tribunal is included among these options, provide up-front funding for Indigenous Nations to prepare a Declaration of Claim.
5. Work with Indigenous Nations and their representative organizations to develop and communicate a remedial plan to deal with this growing backlog.

On January 29, 2019, at a Joint Gathering in Vancouver<sup>4</sup>, BC, Specific Claims Branch Negotiations Director Natalie Neville reported that Canada had a plan in place to address the

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<sup>1</sup> 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.

<sup>2</sup> In our report we use both “Indigenous Nation” and “First Nation” when referring to claimants, the latter in direct connection with legislation and policy since this is the term used in these contexts.

<sup>3</sup> Our report also included one additional late claim filed in November 2013. As of April 23, 2019, this claim is still outstanding.

<sup>4</sup> The event was cohosted by the BC Leadership Council and Indigenous Services Canada and attended by Indigenous Nations from across BC.

backlog of claims identified in the BCSCWG report. In light of these assurances, the BCSCWG has reviewed the status of these delayed claims to assess Canada’s progress with respect to claims assessment and communications and to the above recommendations. This report summarizes these findings using data compiled as of April 23, 2019.<sup>5</sup>

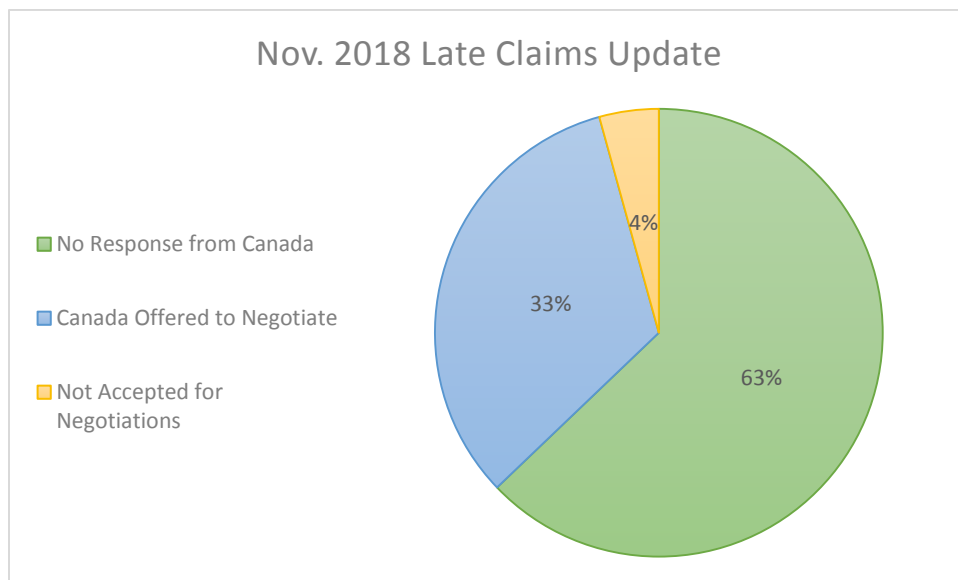
## FINDINGS

### Missed Deadlines

By conducting a supplementary review of Canada’s Status Report on Specific Claims on April 23, 2019, we ascertained that of the 70 outstanding late claims identified in November 2018:

- 44 claims (63 percent) still have no response<sup>6</sup> from Canada;
- 23 claims (33 percent) have offers to negotiate from Canada;
- 3 claims (4 percent) were rejected by Canada<sup>7</sup>.

Of the 23 claims that received offers from Canada, 4 are listed as “Claimant Agreed to Negotiate”.



<sup>5</sup> Since BC Nations’ claims account for the majority of claims in the specific claims process, periodic regional analysis is focused on BC claims.

<sup>6</sup> “Response” refers to a letter of offer to negotiate or a letter rejecting the claim.

<sup>7</sup> We note a positive increase in the number of offers to negotiate. On the surface, this represents an important shift in past behaviours that could lead to more claims being resolved. However, Research Directors and Indigenous Nations’ legal counsel report several concerns regarding negotiations. Indigenous Nations are subject to underfunding and significant delays. Further, Canada’s negotiations unit routinely fails to assign negotiators, finalize work plans, notify claimants of funding opportunities, or commit to regular meetings, which they attribute to underfunding. We have also received reports that Canada’s negotiators attempt to significantly narrow the scope of Nations’ claims and refuse to fund claim development. There are clearly emerging issues with respect to negotiations that the BCSCWG will examine in a future report.

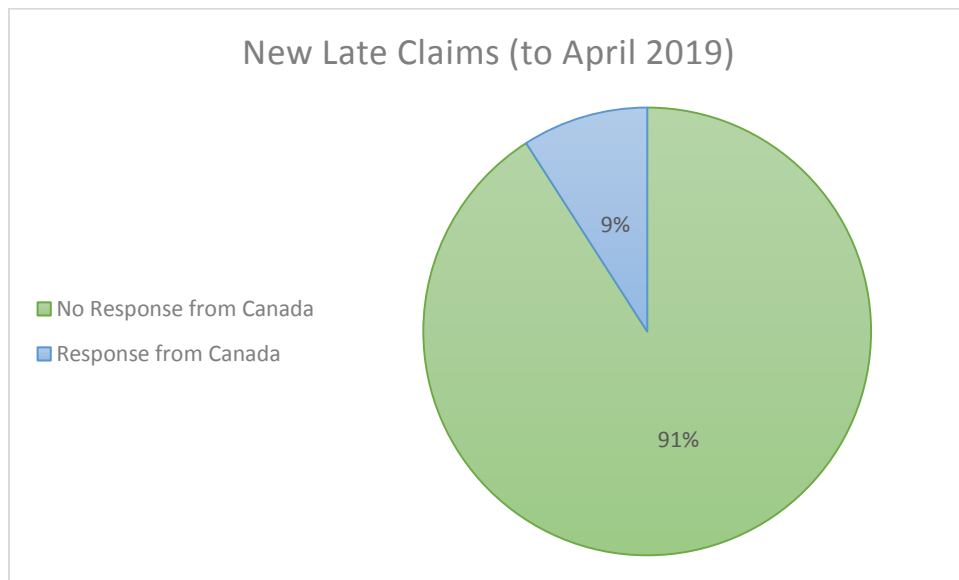
The updated dataset suggests that Canada has sent out a number of late responses (in the form of acceptance or rejection letters) to Nations in BC – the region most affected according to our last report (46 of 70 late claims):

- 10 of 26 responses sent by Canada to late claims identified in our November 2018 report came from December 13-20, 2018;
  - 9 of those 10 were sent to BC First Nations;
- 8 of 26 responses were sent out from February 6-22, 2019;
  - 6 of those 8 were sent to BC First Nations.

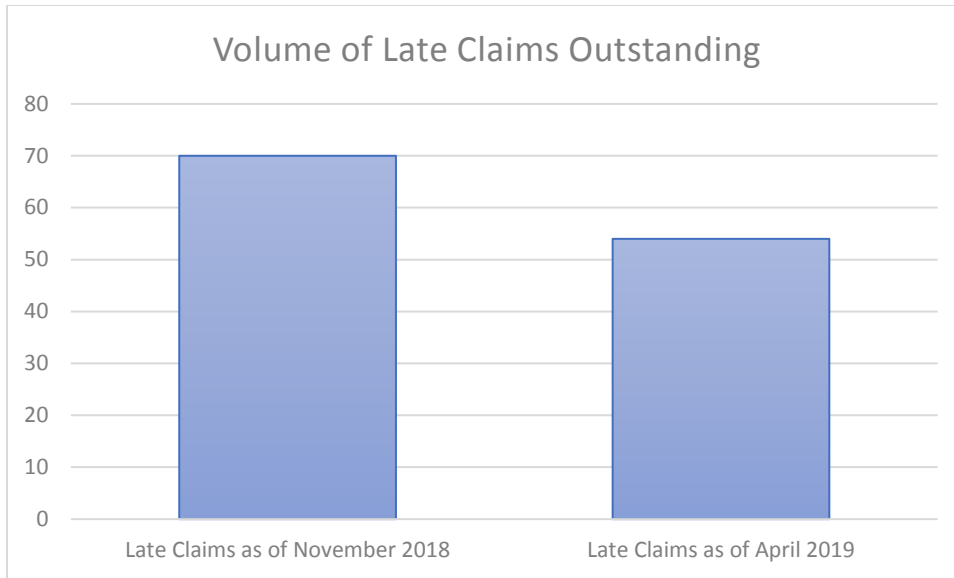
We have also learned directly from claimants that Canada appears to have sent letters acknowledging delays to impacted Nations. These will be discussed below.

While there has been an overall decrease in the number of outstanding late claims, the 26 completed assessments were significantly late - by an average of 8 months and 2 days. Further, **Canada has continued to miss the legislated three-year deadline on new claims where the three-year threshold has passed.**

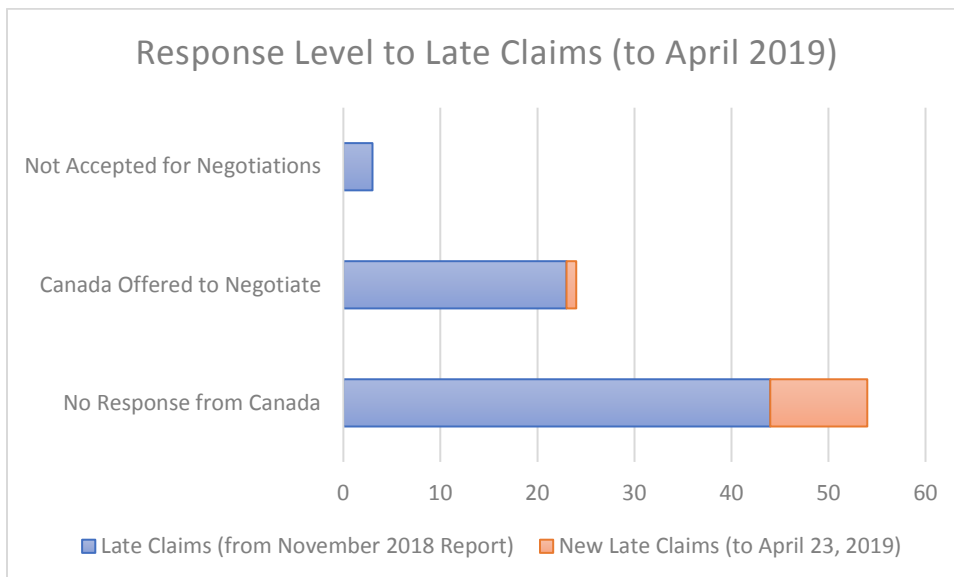
Our analysis shows that 11 of 12 claims that reached the three-year deadline after November 2018 have not received claim assessments from SCB. Of the 11 claims, only 1 (9 percent) has since received a response – 2 months and 14 days past the deadline – and the remaining 10 (91 percent) are still unaddressed according to the Status Report. As of April 23, 2019, these 10 claims are late by an average of 1 month and 27 days.



As a result, the total backlog of unanswered claims that have missed the three-year deadline now stands at 54. This is an overall decrease of 16 (23 percent) from the November 2018 figure of 70 late claims.



It must be noted, however, that despite having made some offers, Canada continues to miss the three-year deadline at a distressing rate<sup>8</sup> - of the 12 claims that reached the deadline between our November and April reports, Canada missed the deadline on 11 (92 percent).



Seventy-three percent of responses to late claims (from November 10, 2018 to April 23, 2019) are to BC Nations. This may reflect an intentional pattern or strategy by Canada in addressing late claims; likely it reflects the pre-existing geographical overrepresentation of BC Nations in claims that have missed the three-year deadline (67 percent in our November 2018 report).

<sup>8</sup> 2014 - 35 claims filed. 23 missed deadlines [66 percent].  
 2015 - 72 claims filed to November 10. 69 missed deadlines [96 percent].  
 2015/16 - 12 claims filed from Nov. 10 to April 23. 11 missed deadlines [92 percent].

While Canada appears to have made some effort to reduce the volume of late claims – sending offers to 37 percent of claims identified in our November 2018 report – it is deceptive to focus only on the reduced late claim volume. The clock continues to tick. **The remaining 44 claims (63 percent) are now late by an average of 10 months and 19 days.** If we include the 10 additional unanswered claims that have missed the three-year deadline since November, the remaining 54 outstanding claims are now late by an average of 9 months and 1 day. For context, the 70 claims in our November report were late by an average of 5 months and 17 days.

## Poor Communication with Indigenous Nations

Our November report assessed the type, consistency, and quality of communications by Canada. For this we relied on the SCB online inventory and information from the claimant community. Our findings indicated that Canada was not communicating to Indigenous Nations about late claim assessments.

### Canada's Public Response

While the BCSCWG has received no formal response from CIRNAC to its November report, SCB has addressed the report's findings at several public gatherings. On December 13, 2018, SCB Director General Stefan Matiation presented at the Pacific Business and Law Institute's conference on specific claims, where he told attendees that SCB wants to return to meeting the three-year deadline, but it would "take a while to get resources better aligned with commitments."<sup>9</sup> Mr. Matiation gave no indication of how long it would take to secure adequate resources to meet these legislated timeframes.

Negotiations Director Natalie Neville addressed the backlog at the January 2019 Joint Gathering held in Vancouver, BC. At the specific claims breakout session, Ms. Neville expressed concern at the backlog of unassessed claims but reassured Nations in attendance that SCB had a plan in place to resolve it and assess claims on time.<sup>10</sup> Despite numerous public commitments to work in full partnership with Indigenous Nations to jointly develop policies and practices that directly affect them<sup>11</sup>, this plan has never been discussed with Indigenous Nations; in addition to taking a unilateral approach yet again, no details about the plan were provided in response to Indigenous Nations' inquiries.

Despite SCB's assurances of the existence of a plan, our review of the SCB database from November 2018 to April 23, 2019 and feedback from representatives of Indigenous organizations and Nations shows the continuation of a consistent pattern of minimal and misleading

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<sup>9</sup> Stefan Matiation, December 13, 2018. Comments presented at the Pacific Business and Law Institute's conference, *Specific Claims*. Mr. Matiation also noted that SCB was under intense scrutiny from the departments of finance and justice, due to the proportion of Canada's contingent liability represented by unresolved specific claims (35 percent). He made this comment in response to questions about allocation of additional resources to deal with the backlog and developing an independent assessment process.


<sup>10</sup> Natalie Neville, January 22, 2019. Comments presented at the BC Joint Gathering in Vancouver. Ms. Neville added that clearing the backlog would place pressure on negotiations processes and that CIRNAC was looking at the best way to allocate limited resources.

<sup>11</sup> A human right as articulated in article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which Canada has committed to implementing.

communication, despite SCB officials pointing to improved communication as evidence of the Liberal government’s success in repairing its relationship with Indigenous Nations.<sup>12</sup>

## Reports from Indigenous Nations and Their Representatives

We canvassed claimants to ascertain whether and how Canada has communicated with them about missed deadlines. Respondents consistently reported that they received “form letters” from Canada such as the following example:

 Affaires autochtones et du Nord Canada / Indigenous and Northern Affairs Canada

WITHOUT PREJUDICE  
Votre référence - Your Ref  
Notre référence - Our Ref

JAN ## 2019

Chief #####  
##### First Nation  
#####  
BC #####

Dear Chief #####


I am writing to you regarding the ##### specific claim received from the ##### First Nation that was filed with the Minister of Crown-Indigenous Relations on #####, 2016. I wish to acknowledge that the Minister’s decision in respect of that claim is now late according to the three year timeframe set out in the *Specific Claims Tribunal Act*.

I wish to assure you that every effort is being made to finalize Canada’s position and that a response will be provided to you as soon as possible. Should you wish to discuss the claim further, I can be reached at (819) 953-2595.

I recognize that the ##### specific claim is important to you and your community. I look forward to working collaboratively with you to achieve its resolution.

I appreciate your continued patience.

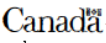
Sincerely,



KathyGreen

Director, Research and Policy  
Specific Claims Branch

c.c.: ##### LLP



The letters do not provide an explanation for the delay; nor do they identify timelines for when the assessments will be completed. Respondents made the following comments about the letters:

- “Chiefs won’t be satisfied with a form letter.”
- “Still no indication about how long this will take.”
- “They know there is no consequence for failing to meet the SCTA timelines.”
- “Same old delays.”

<sup>12</sup> Improved communications were cited by both Mr. Matiation and Ms. Neville as examples of positive change regarding CIRNAC’s management of specific claims.

- “I do not find them [the letters] even slightly helpful. What I have never seen is a coherent explanation of why they are taking so long.”
- “The government can do better – we have one that is over a year beyond the three year maximum. That is after sitting for 6 months in “minimum standards”. So they have had it 4.5 years. This is unconscionable.”

Several claimants report a slight variation in the form letters. This version of the letter rationalizes the delay in reaching an assessment by informing the Nation that Canada is waiting for the outcome of a particular court decision. The decision in question has since been released, but the affected Nations still have not received their assessment.

We also canvassed claimants to assess and understand how Canada was working with them to address the late assessments. Respondents report that, aside from a general invitation to “discuss the claim further” in the form letter, little to no effort has been made to work with individual Nations to develop a jointly agreed upon path forward or establish new timelines. Not a single respondent reported that representatives from Canada contacted them to work on this.

Further, Nations who reached out to Canada after receiving the form letter are being told by government officials that government has prioritized advancing negotiations, citing increased numbers of negotiation tables<sup>13</sup> and more collaborative work. Indigenous Nations also report being told that internal resources are stretched thin, presumably too thin to provide outstanding claim assessments. One respondent observed: “The Chief was very frustrated to not receive a response. There were conversations going on in the fall between our lawyer and SCB about how busy they were but that something was in the works.” This assessment is still outstanding. One claimant indicated they requested a meeting to address missed deadlines. They report: “There has been no response. Not even a form letter response.”

The offer in these letters to work “collaboratively with you to achieve [the claim’s] resolution” was also met with considerable suspicion. One respondent commented, “Given the department’s track record of underfunding First Nations participation in all stages of the specific claims process, and SCB’s historic mischaracterization of ultimatums as offers to ‘negotiate’ one can’t help but wonder what ‘collaboration’ really means in this instance.”

Claimants indicated they were not made aware of how they might proceed in the absence of receipt of the SCB assessment. While some knew they could, for instance, qualify to take their claim to the Specific Claims Tribunal, others did not know this was an option: “Is there any way to force Canada to respond ... [I think] there’s really no other mechanism. Canada is failing on its own legislated accountability.” Other respondents suggested their Chiefs were considering political escalation if the delay continued. One respondent lamented: “What are we supposed to do in the meantime?”

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<sup>13</sup> First Nations’ reports on the status and quality of specific claim negotiations show this statement to be fundamentally misleading. See footnote 5.

## Canada's Failure to Implement BCSCWG Recommendations

In our November report, we made five recommendations to Canada. Based on our review of the data and information provided from Indigenous Nations and their representatives, we conclude the following:

*Recommendation 1. Communicate with Indigenous Nations waiting for late claim assessments and provide a full and clear explanation as to why SCB has missed its legislated deadline to respond.*

Canada continues to not make any serious effort to communicate with Indigenous Nations who are waiting for assessments once the three-year deadline has passed. Indigenous Nations have clearly stated that the form letters issued by Canada are inadequate.

*Recommendation 2. Work with each affected Indigenous Nation to establish a jointly agreed upon path forward, including, where applicable, new timelines.*

Canada is not working with Indigenous Nations or their representatives to discuss or develop viable solutions going forward. Indigenous Nations are receiving cursory responses and minimal information.

*Recommendation 3. Include a list of all viable options to ensure a specific claim has access to justice.*

Canada is not providing Indigenous Nations with a complete list of options or discussing the implications of the options going forward.

*Recommendation 4. If the Specific Claims Tribunal is included among these options, provide up-front funding for Indigenous Nations to prepare a Declaration of Claim.*

We cannot ascertain whether this recommendation has been addressed in any way. In fact, we see significant evidence that Canada continues to create barriers that have prevented the Tribunal from functioning at optimum capacity and efficiency and impeded Nations' access to the Tribunal.

Indigenous Nations have for years identified underfunding as a key barrier hindering access to the Tribunal. This includes underfunding (or failure to fund) Declarations of Claim – the sometimes prohibitively expensive mechanisms by which Indigenous Nations qualify to receive funding. This is confirmed by a recent study by the BC Specific Claims Working Group and by Tribunal Chair Justice Harry Slade in his 2018 Annual Report, which concludes that “funding for Claims before the Tribunal is woefully inadequate” and that “funding limitations and the manner in which available funding is trickled out to Indigenous Nations Claimants amount to a denial of effective access to the Tribunal.”<sup>14</sup>

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<sup>14</sup> The Crown-Indigenous Relations and Northern Affairs website indicates that Tribunal funding for First Nations is a discretionary expense related to annual budget disbursements; while it states that every effort will be made to provide funding for the equivalent of two years at the Tribunal, the Tribunal Chair cites 5.2 years as the average length of time for a single claim to be granted a decision and links the issue of timelines to funding inadequacies. The Tribunal's 2018 Annual Report concludes that “funding limitations and the manner in which available funding is trickled out to First Nations Claimants amount to a denial of effective access to the Tribunal.”



**Recommendation 5.** *Work with Indigenous Nations and their representative organizations to develop and communicate a remedial plan to deal with this growing backlog.*

While Canada pays public lip service to its development of a plan, any such endeavor has been a unilateral undertaking. Indigenous Nations and their representatives have received no details about what this plan entails. On the contrary, when pressed, SCB officials cite a lack of resources and pressure from the finance department to excuse its failure to curtail the backlog. The BCSCWG has received no formal response to date on its November report.

## CONCLUSION

This follow-up study demonstrates that Canada is continuing to miss the legislated three-year timeline to assess specific claims. Further, Canada has taken only the most cursory action toward rectifying its previous failure to communicate with Indigenous Nations affected by the delays. The Specific Claims Branch is continuing its practice of internally developing solutions without the full participation of Indigenous Nations partners, citing unilaterally conceived plans for addressing the backlog that have yet to materialize or be described in any detail. Lastly, there is no indication that Canada will implement the recommendations made by the BCSCWG in our November report.

We reiterate that the consequences of Canada repeatedly missing its legislated timelines are significant for Indigenous Nations. These claims are active, yet do not have timely access to negotiations. Under the *Specific Claims Tribunal Act* these claims are eligible for the Specific Claims Tribunal, but access to this adjudicative process is hindered by Canada's failure to adequately fund Indigenous Nations claimants to prepare a Declaration of Claim or to fully participate in all Tribunal processes until a decision is reached.

### Recommendation

In light of Canada's failure to respond to the BCSCWG's November report and take adequate measures to address the backlog of claims, we must repeat our five recommendations (listed above).

We further request a meeting between SCB officials and the BCSCWG to discuss the backlog and a path forward that puts Indigenous Nations' access to justice at the centre of proposed solutions.