“LITIGATION AS USUAL”? Reforming Canada’s Conduct at the Specific Claims Tribunal

June 13, 2018

A discussion paper by the BC Specific Claims Working Group

EXECUTIVE SUMMARY

The Specific Claims Tribunal was established in 2008 to "respond to the distinctive task of adjudicating [specific] claims in accordance with law and in a just and timely manner." [1] It is an essential body for conflict resolution, accountability, and redress for the historical grievances of Indigenous Nations.

Indigenous Nations have expressed frustration with Canada's conduct at the Tribunal; they have described feeling "disrespected" by Canada's efforts to undermine their claims or the proceedings overall. We understand that Canada is interested in feedback on its conduct at the Tribunal, such that this conduct can be addressed and Canada can play a more positive role in helping the Tribunal achieve its mandate – and so that Canada's own stated aims of a more cooperative and renewed relationship with Indigenous Nations can be met.

In our research, we developed in-depth surveys to share with BC Indigenous Nations and their legal counsel regarding their experiences with Canada's conduct at the Tribunal. The responses we received, which cover 60 percent of all BC claims that have been heard at the Tribunal, revealed a very clear pattern. They coalesced around 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.

Survey respondents described these challenges as occurring at almost every stage of Tribunal proceedings. The pattern was so strong that we were immediately led to ask larger questions about the function of the Tribunal in relation to government mandates and the aims of reconciliation and redress overall. As a group of Indigenous leaders and claims technicians involved in specific claims reform, we wanted to generate discussion on the root causes of these challenges, such that any reform initiatives focus not only on procedural changes but also on larger issues affecting claims resolution overall. In our analysis, we identify a contradiction between Canada's public statements on reconciliation (and on avoiding adversarial litigation) and its interest in minimizing liability and mitigating risk. Recognizing this central tension in Canada's position is a critical part of advancing claims discussions and ensuring fair processes.

We end the paper with six questions to facilitate ongoing dialogue regarding how to address the challenges identified in the research. We hope that these can be discussed among Indigenous Nations, Canada, the Tribunal, and others in the claimant community. We also propose, under each question, some possible next steps for consideration. These are steps that were either directly proposed by survey respondents or that follow from the issues raised within their responses.

[1] *Specific Claims Tribunal Act*, S.C. 2008, c. 22, preamble. Available at http://laws-lois.justice.gc.ca/eng/acts/S-15.36/FullText.html.

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1.0. INTRODUCTION

The Specific Claims Tribunal was established by legislation in 2008 to "respond to the distinctive task of adjudicating [specific] claims in accordance with law and in a just and timely manner." [2] This body was created in part to address the conflict of interest and imbalance of power that occur when Canada adjudicates claims against itself: Indigenous Nations whose claims have been rejected by Canada can now take these claims to the Tribunal. Thus, the Tribunal is an essential body for conflict resolution, accountability, and redress for the historical grievances of Indigenous Nations.

Indigenous Nations in BC, however, have expressed frustration at Canada's conduct at the Tribunal; they repeatedly describe feeling "disrespected" by Canada's efforts to undermine their claims or the proceedings overall. We understand that Canada is interested in feedback on its conduct at the Tribunal, such that this conduct can be addressed and Canada can play a more positive role in helping the Tribunal achieve its mandate – and so that Canada's own stated aims of a more cooperative and renewed relationship with Indigenous Nations can be met.

For this research, we first sought feedback (via surveys) from BC Indigenous Nations and their legal counsel regarding Canada's conduct during all stages of Tribunal proceedings. A very clear pattern emerged in the responses. Survey responses coalesced around 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, and
3. Lengthy delays that stall proceedings and increase costs and create uncertainties for Indigenous Nations.

Survey respondents described these challenges as occurring at almost every stage of Tribunal proceedings. The pattern was so strong that we were immediately led to ask larger questions about the function of the Tribunal in relation to government mandates and the aims of reconciliation and redress overall. As a group of Indigenous leaders and claims technicians involved in specific claims reform, we wanted to generate discussion on the root causes of these challenges, such that any reform initiatives focus not only on procedural changes but also on larger issues affecting claims resolution overall. In our analysis, we identify a contradiction between Canada's public statements on reconciliation (and on avoiding adversarial litigation) and its interest in minimizing liability and mitigating risk (which is clearly stated within its own internal reviews). Recognizing this central tension in Canada's position is a critical part of advancing claims discussions and ensuring fair processes.

[2] *Specific Claims Tribunal Act*, S.C. 2008, c. 22, preamble. Available at http://laws-lois.justice.gc.ca/eng/acts/S-15.36/FullText.html.

In this report, we first present our findings, describing the three challenges faced by Indigenous Nations at the Tribunal and demonstrating that these challenges are linked (often in compounding ways) and have effects on all Tribunal proceedings. Next, we analyze these findings in relation to the "distinctive task" of the Tribunal and to Canada's departmental mandates. We explore the question of whether conduct at the Tribunal should be "litigation as usual," given the Tribunal's reconciliation-oriented mandate, and the need for Canada's conduct and its instructions to counsel to reflect that. We end our report with six questions for discussion by involved parties to advance ongoing dialogue about the Tribunal's role as a body for reconciliation and redress.

1.1. About the BC Specific Claims Working Group

The BC Specific Claims Working Group (BCSCWG) is a group of Indigenous leaders and specific claims technicians, created via resolution by the Union of BC Indian Chiefs (UBCIC) in 2013 and tasked with advocating for the fair and just resolution of BC specific claims and advancing specific claims as a national political agenda item. Throughout our work, we emphasize the historical uniqueness of colonization in BC and the need for a process that addresses the distinctive challenges of claims resolution in this province.

This research project on Canada's conduct at the Tribunal is part of a broader process of direct engagement between the BCSCWG and Canada to advance collaboration and a rights-based approach to claims resolution. This project focuses on the experiences of BC Nations at the Tribunal; however, as we explain in section 4.6, further research is needed such that feedback from Indigenous Nations across Canada can be sought.

2.0. FINDINGS

In this study, we heard from a total of 17 survey respondents: 8 from Indigenous Nations and 9 from legal counsel.[3] (The two surveys that we distributed are included with this report as appendices 1 and 2.) Several of the lawyers had worked on more than one claim that had been heard at the Tribunal. We also created a brief follow-up survey to legal counsel regarding the way that claims start "de novo" at the Tribunal (appendix 3); to this survey, we had 6 responses. (For a complete summary of our methods, see appendix 4.)

Because of our working group's focus on BC, we sought responses only from BC Nations and their legal counsel; our study does not examine the experiences of Nations in the rest of Canada. A total of 32 claims from BC Indigenous Nations have gone to the Specific Claims Tribunal.[4] Thus, out of the 90 claims at the Tribunal (as of April 12, 2018), 36 percent have come from BC. Our survey responses cover at least 60 percent of the BC claims that have been heard at the Tribunal. However, this study cannot be considered a definitive assessment of the issue, given its

[3] Throughout this report, we use the term "respondent" to refer to the people who have responded to our survey (i.e. not to be confused with Canada's role as "respondent" at the Tribunal).
[4] Specific Claims Tribunal, 2017. *Annual Report.* Specific Claims Tribunal of Canada. September 28, 2017. Available at http://www.sct-trp.ca/pdf/2017_Annual_Report-eng.pdf.

regional focus; as such, we have produced a "discussion paper," to facilitate dialogue among all groups involved with Tribunal proceedings.

Among our respondents, Indigenous Nations went to the Tribunal because Canada had refused to negotiate (or failed to negotiate in good faith, offering low-ball, one-time, "take-it-or-leave-it" offers) or the time period of negotiation had elapsed. Legal counsel identified the specific issues raised in the claims: the breaches of fiduciary duty and failure to provide any or adequate land or compensation, as well as issues involving resource losses were predominant (see figure 1). Issues related to railways and rights-of-way through reserves were also significant. Further, according to legal counsel and practitioners, claims went to the Tribunal for decisions on both validity and compensation (although many were bifurcated).

Figure 1. "Word cloud" of survey responses from legal counsel and claims practitioners to the question, "In brief, what were the issues raised in these claims?"

In survey responses, a clear pattern emerged. In identifying barriers to claims resolution, respondents repeatedly emphasized three challenges: an adversarial legal approach, delays and missed deadlines, and the inadequacy or inequality of resources. These three challenges often compound one another and – survey responses show – affect many of the activities throughout Tribunal proceedings.

2.1. Challenge 1: An Adversarial Legal Approach

At the root of the challenges described by Indigenous Nations and their lawyers at the Tribunal is an adversarial approach by Canada's legal counsel. Survey responses reveal that legal counsel for Canada often treat Tribunal processes as regular court proceedings, deploying "standard litigation conduct," wrote one survey respondent. Survey respondents described how Canada's lawyers used adversarial strategies and explored all avenues and tactics to challenge or undermine claims, including delaying the Tribunal process at many turns. These findings are not new: since the inception of the Tribunal, the adversarial nature of Canada's conduct has been well documented and publicized.[5] However, this feedback was at the heart of the survey responses we received and it remains important information for Canada (and the Tribunal and other involved parties) to hear and to continue to discuss.

[5] See, for example, Roshan Danesh and Jessica Dickson, 2015. "Alternative Dispute Resolution and Aboriginal-Crown Reconciliation in Canada." In *Contemporary Tendencies in Mediation*, Humberto dalla Berndardina de Pinho (Madrid: Editorial Dykinson), 75. The authors describe criticisms of Canada's adversarial approach that have appeared in (a) the AFN's five-year review of the Tribunal, (b) the testimony of Justice Harry Slade to the Commons Committee on Aboriginal Affairs in 2011, and (c) the *Aundeck Omni Kaning* case.

2.1.1. "Advancing all possible arguments"

Survey respondents noted that Canada asserted all possible arguments, including those that were very weak or without merit. One survey respondent characterized some arguments as "preposterous and insulting." Yet another noted that Canada was "taking unreasonable positions on well-settled legal issues," such as fiduciary relationships and equitable compensation. "Canada vigorously defends their undefendable positions," wrote one lawyer.

Canada's arguments and approach of "assertively advancing all potential defences that could defeat the claim" might be acceptable in "normal litigation," but most survey respondents believed that such tactics were out of place at a body with a mandate emphasizing reconciliation.

2.1.2. Obstructionist tactics

Further, as we explain throughout this report, respondents were also critical of certain tactics that they saw as obstructionist, including the "dumping" of thousands of pages of irrelevant documents very late in the process, such that proceedings were delayed. One respondent stated, "Canada has done everything possible to obstruct progress." Another respondent, this one from an Indigenous Nation, wrote, "The lawyers simply try any possible maneuver to screw the First Nations over yet again." In a subsequent section, we describe how adversarial conduct can create barriers, delays, and costs at almost every stage of the Tribunal process.

2.2. Challenge 2: Inadequate and Unequal Access to Resources

Among all survey respondents, 94 percent said that they did not receive adequate funding to develop claims and advance them at the Tribunal. The Tribunal process is very expensive, due to legal fees and expert costs. As one lawyer noted, to advance claims at the Tribunal requires a significant amount of legal work due to the "documentary and oral history processes that are required": "All of it is time consuming and hearings are often in remote communities," this respondent wrote.[6]

These costs are higher than the funds Nations receive to advance their claims. Four respondents sought to quantify this gap between funds received and costs, placing the percentage of funds received at between around 30 and 60 percent of total costs. Indigenous Nations wind up being responsible for the shortfall. "The First Nation had to make up the difference," wrote one lawyer. "We have outstanding debts to our legal counsel," wrote the representative of one Indigenous Nation. In short, as one lawyer wrote, "First Nations are shouldering a lot of the expense of pursuing claims at the Tribunal; knowing of these costs may deter other First Nations from filing claims with the Tribunal at all."

[6] As we explain below, in-community hearings are an essential part of the reconciliatory process; thus, the travel costs for legal counsel and other hearing participants must be fully considered within funding planning and allocations.

This lack of funding has created uneven playing fields in Tribunal processes. Respondents suggested that Canada spends a far higher amount on its own legal counsel as evidenced, in part, by the size of their legal teams, and, by connection, the number of "lawyer hours." One respondent wrote:

> Canada appears to apply far more legal resources to fighting these claims than it allows to First Nations to advance them. It is impossible to look behind the curtain to determine how many lawyer hours Canada spends on these claims but from comments that Canada's lawyers have made and from the number of lawyers on Canada's litigation teams, I suspect that Canada's lawyer hours may be double or more than what it provides to fund First Nation participation. I also suspect that this estimate is on the low side. Of course this is impressionistic: I can't prove it.

We do not have complete information on the discrepancy between the funds Canada allocates to Indigenous Nations and the funds dedicated to fighting claims. However, survey respondents identified the risk that underfunding of Indigenous Nations is exacerbating power imbalances and undermining the fairness of the Tribunal. Certainly, Indigenous Nations are concerned about this imbalance. As one representative of an Indigenous Nation wrote: "Canada has endless funding for legions of lawyers and experts… The process is seriously unbalanced." Another wrote, "It felt unfair that Canada was willing to fund extensive research to invalidate the claim."

2.3. Challenge 3: Delays and Missed Deadlines

We asked respondents (a) the process for setting the timeline or schedule for claims with which they were involved, and (b) whether claims then followed these timelines.

All respondents said that timelines and schedules are agreed upon by parties at case management conferences, with the supervision of the Tribunal. Such schedules are "informed by the time [needed] to assemble documents and commission expert reports," a respondent explained. (It is important to note that some parts of the process, such as the period of time within which Canada has to respond to a Nation's Declaration of Claim or the time periods for filing or responding to expert reports are set out in the Tribunal's Rules of Procedures.) One respondent from an Indigenous Nation noted that Canada was "regularly requesting more time than reasonable given the size and nature of a claim." A lawyer stated that deadlines were "often very generous to Canada."

As to whether claims followed the timelines, 56 percent of respondents to the survey for legal counsel said no. Several respondents then noted that Canada did not adhere to the timelines:

- "Canada would request extensions after agreement."
- "Canada has not been meeting its deadlines in the timeline."
- "Canada has persistently failed to meet timelines (often with impunity)."
- "Canada requested the delays."
- Claims "have taken years to get to hearings because of Canada's continuous and regular delay of various deadlines."

When we asked respondents whether the timelines followed met their expectations for how long it would take to pursue a claim at the Tribunal, the answer was a resounding no. One lawyer wrote, "Our clients expected the process before the Tribunal to be an expedited one, and did not anticipate waiting over two years to get to a hearing." "We hoped the claims would be resolved within two years," said another respondent. As we next explain, respondents identified several reasons for Canada's failure to meet these schedules, creating delays at many stages of the process.

2.3.1. Delays: "Months stretched into years"

Survey respondents did seem to believe that the Tribunal wanted proceedings to move efficiently. One noted: "the Tribunal itself seemed to try and move things along as quickly as possible. Justice Slade was clear to both sides that he wanted schedules to be cleared for the Tribunal's calendar."[7]

However, survey respondents described how Tribunal proceedings are plagued by delays and missed deadlines, to the point where respondents can see delays as a tactic, as part of an attempt by Canada to stall or thwart claims resolution. One representative of an Indigenous Nation wrote: "Delays are always a tactic. The process gets drawn out over years." On the survey for legal counsel and claims practitioners, we asked, "Have the Nation(s) you represented experienced delays at any part of the Tribunal process?" and one hundred percent of respondents said yes. They then identified many specific ways that Canada generated delays (box 1).

- Canada's approval process for the mandate was too lengthy.
- Canada was delayed responding to the Declaration of Claim.
- Canada requested extensions to review pre-filed evidence.
- Canada was "continually stalling and postponing hearings and case management conferences."
- Canada commissioned many or late-stage expert reports. Their approval regimes for retaining experts was too lengthy.
- Canada asked for more time to conduct research into matters clearly within the pleadings on the basis that Canada was "not aware" of the issue initially.
- Canada decided to conduct additional archival research and also provided large amounts of materials that greatly slowed the process.
- Canada needed extra time to complete its internal pre-hearing processes.
- Canada made a last-minute disclosure of documents (which revealed a new theory of the claim and had to be responded to).
- Canada asked to split final argument from evidence hearings.
- Canada delayed resiling from a discredited position.
- Canada was awaiting a decision at the SCT and would not agree to a next step in the process.
- Canada promises settlement proposals but the Indigenous Nation receives nothing.

Box 1. Examples of how Canada created delays in Tribunal proceedings, according to survey respondents.

[7] Only one participant mentioned delays that were caused by Tribunal, noting that availability of judges had delayed hearings.

Survey respondents also noted that these delays have real effects on Indigenous Nations. “During these drawn-out waits, some of our Elders who held a lot of knowledge have passed,” wrote one representative of an Indigenous Nation. (Survey respondents’ descriptions of the financial impacts of these delays are summarized below.)

2.4. The effects of the three challenges on Tribunal proceedings

Above we have identified three challenges that our survey respondents described. Survey responses regarding the specific proceedings at the Tribunal demonstrate that these three challenges are linked:

- Adversarial conduct includes tactics that result in delays, such as over-disclosure and the advancement of discredited legal positions.
- Adversarial conduct also results in additional costs for Indigenous Nations, who must pay legal counsel to respond to vast document disclosure and to all the arguments that Canada advances.
- Delays also result in additional costs for Indigenous Nations. One lawyer noted that, while funds for preliminary procedural steps can be adequate, if anything unexpected happens (e.g. “disclosure by Canada of hundreds of additional archival documents”), funding is inadequate. This inadequacy has two causes: (1) Claimants are asked to anticipate the steps that will occur over the course of the year and, if proceedings are delayed, the Nation loses the opportunity to use that funding in subsequent years; and (2) Once a claim is before the Tribunal, little or no funding for research is available. However, when Canada introduces new documents (sometimes by the “hundreds or thousands,” one lawyer noted), new research is required.

In this way, the three challenges are connected in often compounding ways. Further, these challenges affect efficiency and efficacy throughout Tribunal proceedings. In this section, we outline survey responses regarding several stages of these Tribunal proceedings; in each, we explain the barriers and specific problems participating Nations and their legal counsel described, with particular emphasis on Canada’s conduct throughout.

2.4.1. Declaration of Claim

We asked respondents how they would characterize Canada’s response to the Declaration of Claim. Across both surveys, respondents characterized Canada’s response in consistent ways.

Adversarial conduct: Canada was adversarial and sought to deny and defend against the claim in every possible way: “Canada responded with denial and resistance,” wrote the representative of one Indigenous Nation. “They were clear that they did not consider our claim to have any merit.” Another lawyer stated that Canada “also sets out the various ways in which it is not (entirely) to blame by highlighting where the Province or third parties may have some responsibility as a way to limit its own liability.”

Regarding Canada's response to the Declaration of Claim, one lawyer wrote: "This is the way Canada litigates. If this process was meant to be more reconciliation oriented than the ordinary adversarial court process, this has not happened."

Funding issues: Out of seven respondents to a question on funding for the Declaration of Claim (in the survey for legal counsel), three said they received no funding at all to prepare and file a claim. A key issue for those that did receive funding was that these resources were only provided after the Declaration of Claim was filed; Nations had to cover the costs initially. "This could be a hurdle for some Nations (especially smaller ones)," wrote the survey respondent.

Delays: Respondents noted that Canada was slow and delays were introduced. "Every possible roadblock was introduced to stall the matter getting to the Tribunal," wrote one representative of an Indigenous Nation. The process was "slow and formal," wrote another representative of an Indigenous Nation.

2.4.2. Case Management Conferences

Delays and adversarial conduct: Two respondents noted that Canada was causing delays during CMC proceedings. One lawyer said that Canada was "regularly requesting to delay various deadlines, previously agreed to by the parties." Another noted that Canada "dragged its feet through the case management process," stalling the process by raising issues that this lawyer saw as irrelevant or involving other groups (e.g. notifying other Nations who Canada suggested had an interest in the claim, even when no interest was apparent; engaging experts to produce reports on points that could be treated as legal issues). Again, the issue of the "document dump" arose in an answer to the question on the CMCs (a topic discussed further below, in the section on document disclosure). Another respondent noted that often the same issues are discussed repeatedly at each CMC; this respondent felt that the meetings retread the same ground, over and over, which affects the efficiency of the process.

2.4.3. Access to the SCB record in the claims process

Delays and adversarial conduct: One issue raised by legal counsel who responded to the survey pertains to a view expressed by legal counsel for Canada that hearings before the Tribunal are "de novo" such that previously filed claim materials are presumptively inadmissible. (This would include research reports, jointly commissioned reports, testimony that may have been provided to the Indian Claims Commission, Specific Claims Branch (SCB) opinions providing rationales for rejecting claims, and other such materials.) Because SCB's rejection letters and opinions are not disclosed as part of the Tribunal's processes, and because Canada's legal counsel takes the position that these materials are privileged, Indigenous Nations are at a disadvantage, not knowing the arguments that Canada has made in the past for rejecting a claim or denying liability and what Canada relies on to support its position. Survey respondents were concerned about a lack of transparency in claims proceedings and a re-treading of well-studied and documented grounds.

Further, survey respondents raised the issue that Indigenous Nations' own materials that were filed with the SCB may not be treated as admissible or reliable before the Tribunal. In general, lawyers

responding to the survey suggested that they were, for the most part, able to bring forward and admit all the evidence of the claim during the Tribunal hearings. In some claims, however, they were able to admit only portions of past research. Further, one respondent reported that the "Crown will not allow a First Nation to use a person as an expert who was a joint expert at the Specific Claims level which lengthens the process and increases the cost." One lawyer suggested that it could in fact be disrespectful to Nations who have worked on claims for many years – in some cases, decades – that they must start again at Tribunal hearings.

We sent follow-up questions to legal counsel respondents, asking, "At any point in the Tribunal proceedings, did you request disclosure of SCB materials or anything related to the Branch's decision on the claim? Why or why not?" Most lawyers did not ask for the materials, saying that they had enough of the SCB's reports and materials for their purposes. One lawyer did describe asking for this disclosure: "I was hoping to see their analysis and legal opinion but, as expected, they claimed privilege."

2.4.4. Document disclosure

Adversarial conduct and delays: Survey respondents repeatedly identified Canada's practices of document disclosure as problematic. In particular, respondents described instances where Canada "dumped" large volumes of materials, often late in the proceedings. One respondent called this practice "over-disclosure." Five direct quotes from survey respondents illustrate this point:

- "The document disclosure process has been a very time consuming one and it causes significant delays to be forced to review thousands of documents with limited relevance or that are duplicates of those already in the record."
- "Canada provided over 1000 documents. Review was onerous and could have been avoided with more care on Canada's part."
- Canada undertook a "late disclosure of documents or a document dump of thousands of (largely irrelevant) documents – very late in the day admission."
- "As noted above, in some claims Canada has disclosed many hundreds of irrelevant documents, leading to lots of time and cost for review. There should be a way to curtail this type of document dump. On other cases, Canada has disclosed new documents very late in the day. This is inappropriate."
- "Canada has been regularly disclosing several hundred documents from additional research it has carried out after a Declaration of Claim is filed. Often most of the documents are of very little (if any) relevance, but the Nation still needs to review the documents."

We include these quotes in full because they create a clear and consistent picture of the problem of over-disclosure and the release of large volumes of documents at certain stages in the process.

Funding issues: As we described above, this over-disclosure puts Indigenous Nations at a disadvantage because they lack the lawyer hours to be able to meaningfully respond to large volumes of new materials. As well, Nations must identify their proposed work in advance and so, when they face unexpected new work, they face extra costs with no way to request additional resources. Paying these costs can impose a significant financial burden on Nations.

2.4.5. Identification of issues

Adversarial conduct: One lawyer described Canada's adversarial conduct in this context, saying that "Canada throws every defense it can think of at the wall to see if any will stick." Another respondent noted Canada demands too much detail on issues advanced by Nations. This request is problematic when (a) the issues are already clear and/or (b) when finding out further detail requires further expert evidence, but Nations do not receive funding for expert reports until the claim has been officially filed with the Tribunal.

Delays: Increasingly, the Tribunal is asking that the issues in the claim be identified jointly by the parties. However, survey respondents noted that counsel were often not able to agree on issues in all claims. One respondent noted that the Tribunal should "not spend too much time encouraging the parties to 'agree' on a list of 'common issues,'" because the areas of agreement/disagreement should be clear from the Declaration of Claim and Canada's response to it.

2.4.6. Expert reports

Funding issues and delays: Expert reports are a source of much cost and delay in Tribunal proceedings, a point noted repeatedly by respondents to both surveys. Lawyers summarized the problem this way:

- "The other process that has been very time consuming and delayed the opportunity to get on for an early hearing is the increasing expectation that the parties will be delivering expert reports (e.g. historical, appraisal, other issues). It takes a long time to find, retain, instruct experts and to receive the expert's work."
- "Preparation, review and response to expert reports is one of the most costly and time-consuming steps in the process. Where Canada or the Tribunal suggests that an expert report is needed on a particular issue, this can delay the hearing for upwards of a year."

This "increasing expectation that the parties will deliver expert reports" can mean that "legal issues" are treated as subjects in need of external expertise, noted one lawyer. Documentary and legal issues that could have been resolved among parties in other ways are seen to require costly and extensive research by experts. The emphasis on expert reports creates an imbalance in the process, one that strongly favours Canada, since Canada has the resources to outlast delays, hire experts, and engage with large volumes of materials.

Some respondents said that Canada caused particular delay with its expert reports. One representative of an Indigenous Nation wrote, "We have been waiting on Canada's expert reports for an unacceptable amount of time." Another lawyer described how a community s/he represented did, in fact, wait more than a year to receive an expert report from Canada. Yet another lawyer noted that Canada regularly used the retaining of experts for expert reports as a reason to push back agreed-upon deadlines. Yet another suggested that Canada was "regularly and repeatedly seeking to postpone deadlines for expert reports." "Typically," said one representative of an Indigenous Nation, "it feels like endless delays."

2.4.7. Presentation of oral history evidence

Adversarial conduct: Only two respondents made comments on Canada's conduct during the presentation of oral history evidence. Both were from Indigenous Nations and both suggested that Canada's legal counsel were antagonistic regarding oral history and other oral evidence provided by community members:

- "The oral history evidence that we submitted was not respected by their legal counsel and they made it clear that they felt it was irrelevant to the case and a waste of time to travel to the community to hear it."
- "They were somewhat condescending regarding Elder testimony and it is clear that their position is of legal opposition to ours."

These quotes suggest that representatives of at least some Indigenous Nations feel that oral history is undervalued and that Elders and community witnesses have been treated as if they were simply witnesses in a more adversarial legal context.[8]

2.4.8. Hearings

The Tribunal holds hearings both in communities and at larger centres.

In general, respondents explained that in-community hearings were often respectfully conducted and are important parts of a reconciliatory process. Two thirds of Indigenous respondents reported that the Tribunal had held hearings in their home communities. Indigenous Nations appreciated the fact of these community hearings: "We are grateful that the Hearings are being held in our community," wrote one respondent. "Holding hearings in the community is essential to the reconciliation process," wrote another.

These community hearings enabled Indigenous Nations to demonstrate the facts and effects of their claims "on the ground," in ways that they believed had a powerful effect on the course of the claim overall: "We were able to visually show the Tribunal the alienated lands which we believe was powerful," wrote one respondent. Further, respondents explained that legal counsel for Canada appeared to be less adversarial during community hearings. One wrote: "This is where I feel Canada's representatives began to concede the validity of our case. When it came time for the hearing they seemed to be more accepting of our position. They were respectful to those giving testimony and seemed to enjoy listening to our stories."

Further, representatives of Indigenous Nations explained that local hearings meant more opportunity for participation and witnessing by community members, as compared with hearings

[8] One reviewer of this discussion paper asked whether survey respondents provided any description of Tribunal conduct in relation to the presentation of oral history evidence. Because the surveys focused on Canada's conduct, most responses did not address the approach or behaviour of Tribunal judges, lawyers, or staff. However, one survey respondent, a representative of an Indigenous Nation, did write: "Respectful Justice Harry Slade was very good at listening and clarifying when members testified."

held in urban centres. This opportunity was meaningful to respondents: “It was important to have this long standing historical breach by Canada dealt with in front of [our] citizens,” wrote one.

Meanwhile, respondents suggested that, in the other hearings, Canada’s conduct was often more adversarial.

Adversarial conduct: One lawyer summed up the issue this way: “Canada’s conduct was respectful, even if the arguments made were not.” “Canada acted as it would in any judicial process,” said one representative of an Indigenous Nation. Another called Canada’s conduct, a “normal adversarial approach.” Others agreed with the idea that the approach was “adversarial,” but disagreed that this way of proceeding should be “normal”:

- “It felt like Canada was coming from a place of mistrust and that every word of our members was not correct or true.” [Representative of an Indigenous Nation]
- “Counsel for Canada on some of the claims made it clear that Canada intended to appeal any decision in favour of the First Nation.” [Lawyer]

One respondent said that Canada’s lawyers were “somewhat condescending” regarding Elder testimony. A representative of an Indigenous Nation explained how the Tribunal process was alienating for Elders: “The proceedings are excessively formal and intimidating. The Elders that we brought to attend were very uncomfortable and required continuous explanations of what was transpiring. They found it all meaningless and would not attend any further hearings.”

2.4.9. Mediation

Adversarial conduct: The majority of respondents (both from Indigenous Nations and from legal counsel/claims practitioners) did not participate in mediation processes at the Tribunal. One lawyer noted that, when the Tribunal judges proposed mediation, the counsel for the Crown indicated “they have no mandate to pursue mediation.”

2.4.10. Abeyance

We asked survey respondents if they had experience with claims being put on hold (into abeyance) during Tribunal proceedings. Among all participants, 70 percent had experience with claims being put into abeyance. We also asked participants who – i.e. which party – had made the request to the Tribunal for claims to be put on hold in this way. Respondents told us that in some cases, Canada requested this abeyance; in other cases, it was the Nation; in yet other cases, it was a joint decision (“by agreement of the parties,” one lawyer wrote). The abeyance issue is still developing; its effect on the ability of the Tribunal to resolve claims in a “just and timely way” requires further study.

Delays: Delays relating to abeyance did arise in responses in the surveys. For instance, one Indigenous Nation reported that, “We put our proceedings in abeyance and we still have no settlement today.” We sent follow-up questions to legal counsel who had responded to the initial survey, confirming which claims had been in abeyance and what the outcomes were. In general, as one respondent said, “It’s too early to comment on the process.”

2.4.11. Judicial reviews

Adversarial conduct: Half of all survey respondents had been involved in claims that were sent for judicial review. In general terms, in BC, five out of the six applications for judicial review were brought by Canada, and the one application filed by a First Nation has since been discontinued. When asked what Canada could do to advance reconciliation at the Tribunal, multiple respondents said that Canada should stop sending Tribunal decisions for judicial review. "Canada should not be allowed to appeal and make communities continue an already exhausting fight," wrote the representative of one Indigenous Nation.

3.0. ANALYSIS

Responses to our surveys revealed that challenges with Canada's conduct at the Tribunal are far more than interpersonal; the challenges do not arise with one legal team or another. Rather, they are structural and institutional. Here we explore how the Tribunal's role of providing "just and timely" resolution of claims is undermined by the litigious, adversarial approach taken by Canada's legal counsel at the Tribunal.

As counsel for Canada, these lawyers seek to represent their client's "interest." We recognize that what it means to represent Canada's "interest" when responding to a claim filed with the Tribunal will vary based on the specific facts and allegations raised in each claim. However, we use the term "interest" here in a broader sense, based on what is revealed through Canada's own materials (described below) that speak to minimizing financial liability and mitigating risk. And we identify a tension between Canada's public commitment to reconciliation, on the one hand, and its assumed interest in minimizing financial liability and mitigating risk.

This tension, we argue, is at the root of the three challenges we have identified in this report. It explains Canada's conduct: Canada needs to be seen to be addressing its lawful obligations and there are "reputational risks" if the Tribunal proceedings prove ineffective.[9] At the same time, however, Canada is defending against potential liability and financial consequences, and is managing those risks. This analysis leads us to ask if Canada's behaviour, as evident in the three themes we identified in the responses to the surveys, is a direct result of its efforts to mitigate its risks.

3.1. The Tribunal's "distinctive task"

The Tribunal was developed to help address the concerns of Indigenous Nations regarding the conflict of interest that exists when Canada is sole arbiter of claims against itself. In 2006, *Negotiation or Confrontation*, the final report of the Standing Senate Committee on Aboriginal

[9] An internal AANDC Program Risk Assessment (from 2014) identifies this "reputational risk": it notes the Tribunal was "meant to offer a place for FN to go that was independent of the government and expedient"; see Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014. Received via ATIP request (request number A201401448) (available upon request to the BCSCWG).

Peoples Special Study on Federal Specific Claims Processes, emphasized this conflict of interest as being a key problem identified by Indigenous Nations and others:

> The Committee recognizes that too many legitimate grievances are festering and the treaties are remaining unfulfilled. Many observers of and participants in the process traced this lack of progress to the inherent or apparent conflict of interest wherein a department that is the object of the complaints is also the one who has to resolve [them]. The Committee is very aware that this is why First Nations, as well as the numerous respected academics, jurists, and public policy commentators who have examined this subject over the last sixty years have consistently recommended the establishment of a truly independent body to handle these historic grievances.[10]

In short, lack of independence is at the root of Indigenous Nations' longstanding distrust of specific claims processes. This conflict of interest also creates "a certain reticence on the part of the Crown, which has little to gain by a generous interpretation of its lawful obligations to Indigenous people or of its own honour in dealing with them."[11]

The Tribunal, created in 2008, was among multiple "very necessary and overdue changes" to "help restore confidence in the integrity and effectiveness of the process to resolve specific claims."[12] It is a unique body, with the "distinctive task" of adjudicating specific claims. The Tribunal was created under the first of four pillars in the federal government's 2007 action plan, Justice At Last – the "impartiality and fairness" pillar. The Tribunal is a conflict resolution body, designed to "make binding decisions where claims are rejected for negotiation or when negotiations fail."[13]

Yet the purpose of this body is broader, directed toward reconciliation and a more positive reconstitution of relations in Canada. Justice At Last situates these changes within a broader aim of social change and redress for past wrongs:

> Ultimately, righting past wrongs is simply the right thing to do. Settling claims helps Canadians come to terms with our history while bringing closure to longstanding grievances for First Nations. Most important, it fosters better relations among First Nations and other Canadians, so we can move forward together to realize a better, shared future.[14]

In short, the Tribunal is mandated with the unique task of settling claims in accordance with law – offering a fair and timely process for recognizing historical wrongs and providing redress to Indigenous Nations who have faced historical losses – while also advancing a larger project of

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[10] *Negotiation or Confrontation: Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on Federal Specific Claims Processes*.
[11] Jane Dickson, 2018. *By Law or In Justice* (Vancouver, BC: UBC Press), 5.
[12] Indian and Northern Affairs Canada, 2007. *Specific Claims: Justice At Last*. Indian and Northern Affairs Canada. Page 3. Available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/jal_1100100030459_eng.pdf
[13] INAC, Justice At Last.
[14] INAC, Justice At Last, page 3.

reconfiguring relations "among First Nations and other Canadians" in a more positive way. Reconciliation has been built into the aims of the Tribunal since the outset.[15]

3.2. The current mandate of INAC

For decades, Indigenous leaders have condemned the adversarial nature of the day-to-day practices within Indian Affairs (under various iterations). In 1964, George Manual, then-co-chair of the National Indian Advisory Council, stated: "There is a common belief among us that the primary problem lay with Indian Affairs, and the relations the bureaucracy maintained with our people"; the 1996 Royal Commission on Aboriginal Peoples reported on the department's "adversarial attitude toward First Nations." [16]

The current government publicly identifies reconciliation as a central goal, and the ministerial mandate for Indigenous and Northern Affairs Canada (INAC) reflects this stated position.[17] INAC is currently tasked with renewing the nation-to-nation relationship between Canada and Indigenous peoples, such that it is based on "the recognition of rights, respect, co-operation, and partnership."[18]

The government also publicly describes its effort to move away from adversarial and litigious approaches to resolving conflicts between Canada and Indigenous Nations. In his mandate letter to the Minister, the prime minister writes that Minister Bennett should (with the Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples) "ensure that both in our dispute resolution mechanisms and litigation we advance positions that are consistent with the resolution of past wrongs towards Indigenous Peoples, promote co-operation over adversarial processes, and move towards a recognition of rights approach."[19]

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[15] A full discussion of the meaning and political significance of the concept of reconciliation is outside the scope of this paper. In short, the Union of BC Indian Chiefs, as part of the First Nations Leadership Council, endorses a view that reconciliation means reconciling sovereignties of Indigenous Nations and the Crown, with "its ultimate expression being in developing shared and collaborative patterns of how sovereigns interact with each other with respect to governing and making decisions" (see First Nations Leadership Council, 2013. *Advancing an Indigenous Framework for Consultation and Accommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group*, page. 11). In the context of specific claims, however, the idea of reconciliation means addressing historical wrongs, so that justice is achieved, grievances do not go ignored, and relations between Indigenous and non-Indigenous Canadians are reconstituted in a more positive way. "Negotiated settlements are about justice, respect and reconciliation," reads the *Specific Claims Policy and Process Guide* (INAC, 2009). "They are not only about coming to terms with the past and respect for treaties but also about moving forward together to realize a better, shared future."

[16] Royal Commission on Aboriginal Peoples, Lands and Resources. Final report (vol. 2, chap. 4, sec. 5.4). Available at: http://sclaimswp.bryan-schwartz.com/wp-content/uploads/images/stories/specific_claims_docs/04-RCAP_CRPA/RCAP-Vol2-Ch4-LandsResourcesPART-B.pdf

[17] The department responsible for Indigenous Affairs has had many name changes over the period we discuss. Rather than introduce all these different names, we call the department "INAC" throughout.

[18] Prime Minister Justin Trudeau, 2017, "Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter," October 4, 2017. Available at https://pm.gc.ca/eng/minister-crown-indigenous-relations-and-northern-affairs-mandate-letter

[19] Ibid.

Adversarial legal conduct at the Tribunal, such as our survey respondents described, is directly contrary to INAC's stated mandate and inconsistent with the aim of resolving past wrongs.

It is important to note, however, as the Royal Commission on Aboriginal Peoples did, that "all institutions, if they are in existence long enough, develop a corporate memory. Policies may change over time, but … practices – the mix of training and inherited ways of doing things that govern how employees work – do not change nearly so quickly."[20] Indigenous Nations and organizations, given their long history of engagement with government institutions and their experience of these institutions' corporate memory, always look to practices (and outcomes) rather than to policies and public statements when assessing the effectiveness of any political change.

Underfunding of Indigenous Nations is one way that INAC has undermined the efficacy of the Tribunal. In his five-year review of the *Specific Claims Tribunal Act* in 2015, Ministerial Special Representative Benoit Pelletier recommended that Canada should undertake "joint exploratory discussions" to "improve the funding mechanism for First Nations' specific claims to better accommodate the latter's financial needs for Tribunal proceedings."[21] However, three years later, these joint discussions have not occurred.

3.3. The role of the Department of Justice: "Respectful litigation"?

INAC is represented in Tribunal proceedings by legal counsel from the Department of Justice (DoJ).[22] The relationship between INAC and the DoJ in Tribunal proceedings is that of solicitor-client. The extent to which the Tribunal's mandate and the current Liberal government's oft-stated focus on a "renewed, nation-to-nation relationship" have influenced the actions of the DoJ lawyers remains unclear; because of solicitor-client privilege, the SCB instructions to DoJ are not publicly available.

The DoJ, too, however, is tasked with litigating in a less adversarial manner. In her 2016 *Litigation Year in Review*, Minister Wilson-Raybould emphasized "respectful litigation" as a key way that the government sought to "shape the conduct of Indigenous litigation."[23] The report notes that the government has made an effort to "make admissions wherever possible, including both admissions of fact and admissions relevant to the establishment of Aboriginal rights and title." The report also notes that Canada has "in several cases," "made the decision not to appeal or seek judicial review, reflecting an acknowledgment of Canada's responsibility to redress past wrongs."

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[20] Royal Commission on Aboriginal Peoples, Lands and Resources. Final report (vol. 2, chap. 4, sec. 5.4). Available at: http://sclaimswp.bryan-schwartz.com/wp-content/uploads/images/stories/specific_claims_docs/04-RCAP_CRPA/RCAP-Vol2-Ch4-LandsResourcesPART-B.pdf

[21] Benoit Pelletier, 2015. *Re-Engaging: Five-Year Review of the* Specific Claims Tribunal Act. Available at: https://www.aadnc-aandc.gc.ca/eng/1469128451288/1469128528280

[22] One reviewer of this discussion paper asked us to note that the counsel for Canada at the Tribunal is not the same as the counsel at the Specific Claims Branch (though of course both sets of legal counsel come from within DoJ). Further analysis of the impact of this shift is needed to understand the effects of changing counsel (e.g. on resources, relationship-building, lawyer conduct overall).

[23] 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.

Further, in September 2017, when Canada withdrew its application for judicial review of the compensation awarded in the Huu-ay-aht First Nation's logging claim, Ministers Wilson-Raybould and Bennett released a joint statement that read: "The Huu-ay-aht First Nation has waited far too long for the Government of Canada to make amends for past wrongs… and while we disagree with the formula to award compensation determined by the Tribunal, the Government has taken this decision in the interest of moving past this case and advancing reconciliation."[24] This withdrawal of the judicial review application was an important public acknowledgement of responsibility.

3.4. The impact of the change in government?

It is still too early to assess the impacts of Canada's general shift toward "respectful litigation" on Tribunal proceedings. Our survey respondents have described experiences at the Tribunal from 2011 onwards; the majority of these experiences took place while a different government was in power. Out of all 32 claims from BC, three-quarters were filed before November 2016 and the change of government (only 8 out of the 32 claims have been filed since the Liberal government took power). We did not ask survey respondents to specify whether their experiences at the Tribunal took place before or after this November 2015 change. As such, we do not have survey responses addressing the question as to whether the change in government has affected Canada's conduct at the Tribunal (a topic that could be addressed in future research).

One survey respondent, a lawyer, did describe a recent shift in the behaviour of legal counsel for Canada, noting that Canada's conduct during the Tribunal proceedings was: "Mixed. Initially very confrontational and aggressive, less so in most cases now." The same respondent also noted that Canada's response to the Declaration of Claim was "initially more confrontation[al], lately more reasonable." In a follow-up email, when asked for an opinion as to why this change had happened, this person replied, "It's due to the change from Harper to Trudeau." However, this lawyer was the only survey respondent who identified this shift. Our findings in this study suggest that DoJ lawyers continue to act in an adversarial manner that is contrary to the mandate of its client, INAC, and of the Minister of Justice.

3.5. Defining Canada's "interests"

Our research shows that Canada uses "standard litigation conduct" at the Tribunal. "Canada is litigating as we would expect them to if we were in court," wrote one lawyer. There is a clear disconnect between Canada's public commitments to more cooperative, reconciliation-oriented approaches (as seen in departmental mandates, among other communications) and the entrenched adversarial approach that has become routine in claims resolution processes at the Tribunal.

While Canada's public statements demonstrate a willingness to participate fully in these processes, Canada's behaviour at the Tribunal is indicative of other, bottom-line–related interests. As described above, Canada's interest in legitimacy depends on being seen to be addressing its legal obligations and participating in fair processes for claims resolution, but this need for legitimacy is

[24] See "Joint Statement from Ministers Wilson-Raybould and Bennett regarding Huu-ay-aht First Nation Litigation," September 6, 2017. Available at: http://www.justice.gc.ca/eng/news-nouv/stat_huuayaht-decl_huuayaht.html

in tension with its other interests. Specifically, the adversarial conduct by Canada's legal counsel at the Tribunal – so thoroughly described by survey respondents – may be a result of underlying interests related to minimizing financial liability and mitigating risks.

3.5.1. Minimizing financial liability

INAC has "currently recorded a provision of $15,064,295,000 as an estimate of the likely liability" resulting from all claims and litigation.[25] In 2009, specific claims were valued at approximately $5.4 billion.[26] However, this liability is difficult to calculate, in part because it is based on "averages for similar claims without taking into consideration location and size."[27] (As well, a 2012–2013 audit of AANDC support to the specific claims program expressed concern that the information systems from which contingent liabilities are calculated needed to be better integrated and managed; there were risks to "timeliness, accuracy and completeness of data."[28])

A 2014 evaluation of the Specific Claims Branch noted that the "current level of funding for settlement may be insufficient to address the expected volume of compensation that will be needed."[29] An audit of all of INAC's contingent liabilities is planned for 2017–2018.[30] However, it is clear that the material liability of Canada to Indigenous Nations in the specific claims process is an ongoing concern for INAC, the agencies that audit it, and Canada more generally.

3.5.2. Mitigating risk

Concern with the risk of claims is built into Canada's approach to resolving specific claims, including the way that the DoJ produces its legal opinions. The department has clearly articulated a "risk-based approach whereby the expected level of risk associated with a claim is taken into account when preparing the opinion."[31] A 2014 evaluation of the Specific Claims Action Plan noted: "Since Aboriginal law is constantly evolving, the Department of Justice Canada assesses

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[25] See Indigenous and Northern Affairs Canada, 2017. Financial Statements for the Year Ended March 31, 2017. Available at: https://www.aadnc-aandc.gc.ca/eng/1506088853301/1506088945817#chp08. (We do not know if this liability calculation covers DoJ costs.)

[26] See Audit and Assurance Services Branch, 2009. Indian and Northern Affairs Canada: Internal Audit Report: Audit of Liabilities. Project #07-30. June 2009. Available at: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/lia_1100100011334_eng.pdf. (We do not know the time frame over which this is calculated – i.e. $5.4 billion over how many years?)

[27] Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014. Received via ATIP request (request number A201401448).

[28] Audit and Assurance Services Branch, 2012. Internal Audit Report: Audit of AANDC Support to the Specific Claims Process. Project No. 12-14. November 2012. Available at: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/au_scp_1375188449984_eng.pdf.

[29] Evaluation, Performance Measurement, and Review Branch Audit and Evaluation Sector. 2013. *Summative of the Specific Claims Action Plan.* Project No. 12029. Page iv. Available at: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev_spcap_1385136300660_eng.pdf

[30] Indigenous and Northern Affairs Canada, 2017. *Risk-Based Audit Plan 2017-2018 to 2019-2020.* Available at: https://www.aadnc-aandc.gc.ca/eng/1501256343646/1501256530438

[31] Evaluation, Performance Measurement, and Review Branch, Audit and Evaluation Sector, 2011. *Formative Evaluation of the Specific Claims Action Plan*. Project No. 10005. Page 26. Available at https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev_pubs_ev_spc_1324067374857_eng.pdf

whether a claim presents a level of risk that is low, balanced, or high. This assessment is also communicated to INAC, along with the opinion itself."[32]

The Tribunal creates increased legal risks for Canada. A 2014 internal risk assessment of Aboriginal and Northern Development Canada (AANDC) programs notes:

> Involvement of the Specific Claims Tribunal as an independent body to adjudicate claims and determine settlements increases risk that the Tribunal will issue multiple settlements for claims that had been initially rejected by the Department and/or that the Tribunal expands the applications of the Crown's fiduciary obligations where the DOJ has already opined that none exist.[33]

In other words, there is a risk that "Tribunal decisions on validity could impact the legal assessment of unresolved claims should they be resubmitted to the Specific Claims Branch."[34] The Tribunal has the potential to set precedents that increase future liabilities.

However, if the Tribunal proves ineffective or slow in resolving claims, Canada faces the risk that Indigenous Nations will take their claims to court. That internal risk assessment also notes that "if FN do not use the Tribunal process and resort to the courts, this may result in increased litigation costs."[35] (For BC Nations, advancing claims, court is not possible, given statutes of limitation, but court remains an option for claimant Nations from some other provinces.)

These risks illustrate the contradiction in Canada's position – the tension between the pressure to resolve claims (as part of a project of reconciliation) and the aim of avoiding liability, particularly beyond what has already been accounted for by past government audits and assessments. This tension, we believe, explains Canada's conduct at the Tribunal and the way that legal counsel must appear to be seen to be participating fully, but are tasked with representing their client's interest.

4.0. DISCUSSION QUESTIONS

Our research suggests that there are three structural and systemic challenges related to Canada's conduct at the Tribunal that are undermining the body's reconciliatory aims and belying Canada's reconciliatory statements. These challenges are generated by a systemic disconnect between Canada's public promises of reconciliation and its other, more structural interests in issues related to liability.

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[32] Evaluation, Performance Measurement, and Review Branch, Audit and Evaluation Sector, 2011. *Formative Evaluation of the Specific Claims Action Plan*. Project No. 10005. Page 26. Available at https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/aev_pubs_ev_spc_1324067374857_eng.pdf

[33] Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014. Received via ATIP request (request number A201401448).

[34] Evaluation, Performance Measurement, and Review Branch Audit and Evaluation Sector. 2013. *Summative of the Specific Claims Action Plan.* Project No. 12029. Page iii. Available at: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev_spcap_1385136300660_eng.pdf

[35] Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014. Received via ATIP request (request number A201401448).

Given that the Tribunal is a conflict resolution body, the parties will most likely come to the process with different – often opposing – positions. As such, it is important to ask questions about how the Tribunal fits into a broader landscape of redress and reconciliation and the ways that Canada should act in Tribunal proceedings as a result. Here we raise six such questions. We hope that these can be discussed among Indigenous Nations, Canada, the Tribunal, and others in the claimant community. We also propose, under each question, some possible next steps (including several recommended by survey respondents), for consideration. A short version of these questions and steps appears as appendix 5.

4.1. What do reconciliation and a "renewed relationship" look like at a conflict-resolution mechanism like the Tribunal?

The Tribunal heard its first claim in 2011; seven years later, it is still a relatively new body. Much social, political, and legal innovation continues to be required as the Tribunal responds to its "distinctive task." This distinctive task involves advancing reconciliation between two parties whose positions are often that of opposition, coming to the Tribunal, as they do, to resolve a conflict. In this first question, we explore possible next steps that involve everyone in processes that can work to reconfigure relationships in a more positive, reconciliation-oriented way.

Possible next steps (involving all participants):

- **Continue to hold community hearings and visits**. Indigenous Nations want Canada's representatives to continue to come and see the effects of these historical losses "on the ground." The vast majority of respondents' feedback suggests that these in-community events are powerful and rewarding for community members and helpful in elucidating both the facts and effects of a historical loss. These community hearings constitute a visible, public effort to account for the damaging effects of the Crown's historical breaches.
- **Develop a plan for historical and cultural education of parties involved in Tribunal proceedings**. Legal counsel who represent Canada before the Tribunal should have a duty to learn about the history and structures that gave rise to the claim and about the people who continue to feel the effects of historical losses. One representative of an Indigenous Nation said that representatives of Canada should: "Learn. Know where residential schools were and know our land and history." Another wrote that Canada should: "Provide more training on cultural understandings of First Nations people, their society, structures, and history. This will enable legal professionals to adjust their behavior to be more respectful of First Nations."
- **Emphasize timeliness**. Survey respondents described the problem that, when claims are delayed, Elders can pass away before they are able to share their knowledge. All parties can work together to address this serious concern, perhaps by exploring options for expedited proceedings in certain claims, such as a summary process.
- **Develop training in mediation and alternative dispute resolution for participants**. One survey respondent, in a follow-up discussion, said that most people participating in Tribunal proceedings – including legal counsel for Indigenous Nations – have no specialized training and, when in doubt, "look to court rules." Training around alternative dispute resolution (ADR) and mediation could help participants develop tools to participate in proceedings in more conciliatory ways. However, ADR can be "imbued with cultural

norms and worldviews that don't match with the purpose of reconciliation."[36] As such, more research and innovation around ADR that is attuned to Indigenous laws, legal traditions, and worldviews related to resolving conflict could support ongoing learning in mediation and ADR among Tribunal participants.

- **Explore issues of representation.** When the Royal Commission on Aboriginal People recommended creation of a Tribunal, it suggested that the body should include Aboriginal People.[37] Similarly, the Waitangi Tribunal of New Zealand (which formed, in part, a model for Canada's Tribunal) has inquiries of three to seven members, and each panel must have at least one Māori member.[38] Changes to the legal structure of the Tribunal would require significant consultation. However, all groups involved with the Tribunal can explore opportunities to increase representation of Indigenous peoples, such as having Indigenous advisors at hearings.

4.2. What should Canada's conduct look like at in this conflict resolution body?

Overtly adversarial actions as well as legal steps to undermine the authority of the Tribunal clearly have no place at a body intended to advance reconciliation; we describe some such issues below. However, our research clearly raises the question of how legal counsel for Canada can advance positions that are (at least in some respects) in opposition to Indigenous Nations, without undermining the proceedings or the functionality of the Tribunal overall. Part of this involves a willingness (and a mandate) to negotiate early on; another part involves, as one representative of an Indigenous Nation said, a "willingness to accept past wrongs."

Next steps (for Canada):

- **Cease adversarial tactics to undermine proceedings**. Certain adversarial tactics to stall or thwart proceedings – such as over-disclosure – clearly have no place in a process that aims to "foster better relations." Canada can immediately end tactics such as the practices of over-disclosure.
- **Treat Tribunal decisions as final and binding, and limit applications for judicial review**. A judicial review provision exists for matters where the Tribunal's jurisdictional reach, procedures and correct application of the law are at issue; a judicial review should not be treated like an appeal.
- **Cease claiming settlement privilege at the start of Tribunal proceedings.** Canada should disclose materials from claims at SCB, including the legal reasons for SCB's decision on a claim. "Canada should share with the Claimant all of the information it used to deny the claim pre-Tribunal," recommended one lawyer. (Justice Slade has said that the practice of claiming settlement privilege in this way "seems unnecessarily adversarial."[39])

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[36] See, for example, Roshan Danesh and Jessica Dickson, 2015. "Alternative Dispute Resolution and Aboriginal-Crown Reconciliation in Canada." In *Contemporary Tendencies in Mediation*, Humberto dalla Berndardina de Pinho (Madrid: Editorial Dykinson), 90.

[37] Report of the Royal Commission on Aboriginal People, October 1996, pp. 584, 585.

[38] Waitangi Tribunal, 2018. "Members of the Waitangi Tribunal." Available at https://www.waitangitribunal.govt.nz/about-waitangi-tribunal/members-of-the-waitangi-tribunal/

[39] Chief Justice Harry Slade & Alisa Lombard. 2015. *Submission*. Five-Year Review of the Specific Claims Tribunal Act, page 10. Available at http://www.sct-trp.ca/pdf/Submission-May_15_2015.pdf

- **Stick to timelines.** Again and again, respondents made timeline-related recommendations: "Delaying hearings for years significantly increases costs of participation and undermines the relationship with First Nations," wrote one lawyer. "Speed things up and stop stalling," said one Indigenous survey respondent. "If Canada was more respectful of the costs and the calendar of First Nations that would be helpful," wrote another.
- **Use a proactive strategy for claims resolution by negotiation and mediation, rather than using settlements as a late-in-the-game option**. This was a specific recommendation by survey respondents. Part of this change means that Canada must provide its legal counsel with the mandate to settle; one survey respondent suggested that Canada should "significantly streamline their mandating process."
- **Redefine Canada's "interest" with reconciliation in mind.** All lawyers, including DoJ lawyers, are duty-bound to represent their client's interests, and our research suggests that Canada's "interests" might currently be defined in terms that emphasize minimizing liability at the expense of reconciliation. As James Anaya, special rapporteur on the rights of Indigenous Peoples wrote in 2014, "An overarching concern is that the Government appears to view the overall interests of Canadians as adverse to aboriginal interests, rather than encompassing them."[40] A broad discussion is needed on what constitutes Canada's "interest" in relation to Indigenous Nations and redress for historical wrongs. This discussion might in turn help to shape CIRNAC's instructions to DoJ (which are currently unknown to us because of solicitor-client privilege).
- **Explore options for interpreting the law with a view to reconciliation.** The law can be interpreted in different ways; survey respondents made several recommendations as to how Canada could interpret the law in a more reconciliatory manner. (For example, one respondent suggested that Canada could approach the claim by asking "What would acting in good faith in the interest of the beneficiary look like?") A legal research and education program on good-faith, reconciliation-oriented legal arguments would support DoJ lawyers in navigating the tensions in their position.

4.3. How can fairness, sufficiency, and predictability of resources be improved?

Resources for Indigenous Nations are insufficient and Nations often end up bearing the additional costs. Funding should be predictable, adequate, and fair, and no Indigenous Nation should feel as though it cannot pursue or resolve its claim at the Tribunal because of lack of funding.

Next steps (for Canada):

- **Address the problems in the way Indigenous Nations are funded to prepare a Declaration of Claim (and communicate these funding processes to Indigenous Nations).** An administrative barrier prevents Indigenous Nations from claiming costs for a Declaration of Claim that they filed in a previous fiscal year. For example, if a Nation files a Declaration of Claim in March and tries to claim the costs in April, they won't be able to. We understand that there might be arrangements to address this problem, but these arrangements need to be better communicated to Indigenous Nations.

[40] James Anaya, 2014. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*. Human Rights Council, Twenty-seventh session, agenda item 3, United Nations General Assembly. Available at: http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf

- **Directly address the concern that Canada is vastly outspending Indigenous Nations in Tribunal proceedings**: Increased transparency on Canada's expenditures – even just in terms of money spent per claim – would help parties to make decisions about how resources should be allocated.
- **Work with Indigenous Nations to address the issue of unequal and inadequate funding.** Survey respondents made several specific recommendations as to how funding could be made more fair and predictable (see box 2). However, any new approach to funding Indigenous Nations' participation at the Tribunal should be jointly developed with Indigenous Nations from across Canada. This is the same recommendation made by Benoit Pelletier in his five-year review (described above): joint discussion to "improve the funding mechanism" so Indigenous Nations' financial needs at the Tribunal can be better met.[41]

Possible changes to funding procedures

- Indigenous Nations could submit a claim at the end of a fiscal year that reflects actual costs.
- Canada should come up with a standard schedule of expectations. Canada should make funds available to contract the field reports.
- The amount per hour for legal fees is too low.
- Nations should be allowed to roll funding over from year to year, especially when the anticipated schedule of how a claim will proceed before the Tribunal gets altered or delayed.

Areas where additional funding is needed

- Canada needs to make more funds available for processes such as preparing a common book of documents, an agreed statement of facts, and an agreed statement of issues.
- Canada needs to provide more funding for travel to remote areas and communities.
- Canada needs to provide more funding for evidentiary hearings.
- Canada needs to provide funding to Nations when Canada seeks a judicial review of a Tribunal decision.
- Canada needs to provide additional funding for research and document review.
- Canada needs to provide adequate funding for expert reports.
- Funding can be exhausted by the numerous preliminary steps in a proceeding; more funding is required for the hearings in a specific claim.

Box 2. Specific recommendations for funding changes, as made by respondents to the two surveys

4.4. How are Tribunal decisions feeding back into processes of claims assessment and negotiation?

The Tribunal is the conflict resolution body within a broader specific claims resolution process. When it was proposed, Canada promised that Tribunal findings would be integrated into internal

[41] Benoit Pelletier, 2015. *Re-Engaging: Five-Year Review of the* Specific Claims Tribunal Act. Available at: https://www.aadnc-aandc.gc.ca/eng/1469128451288/1469128528280

decision-making at the SCB regarding claim validity and compensation. However, while Canada has claimed it has a process for evaluating rejected claims in light of Tribunal decisions,[42] this process is either not in practice or is not communicated to Indigenous Nations. A specific mechanism by which Tribunal decisions would affect claims assessment and negotiation has not been clearly articulated. This lack of transparency compounds a power imbalance; Indigenous Nations lack information on how their claims might be re-evaluated as a result of Tribunal decisions.

The call for ongoing, iterative integration of Tribunal decisions into ongoing SCB decision-making is longstanding. A 2015 presentation from the UBCIC to the AFN review panel stated that Tribunal decisions "must be used to inform the negotiation tables. Tribunal decisions need to be respected and implemented."[43] The Tribunal, in para. 41 of *Tsleil-Waututh Nation v. Canada*, 2014 SCTC 11, stated: "The legal principles developed and applied by the Tribunal are intended to offer a framework that will facilitate resolution not only through adjudication but also through negotiation, which may hopefully reduce the necessity of litigation."

The Tribunal is one piece in a larger process of redress for historical wrongs – the conflict resolution piece – its legal findings must influence other parts of the process such that future conflicts on similar issues can be reduced or addressed in less adversarial ways.

Next steps (for Canada):

- **Share information on the specific mechanism through which Tribunal decisions are being integrated into claims assessment and negotiation at SCB. If no such mechanism exists, undertake a legal review and create one.** The pathway through which Tribunal decisions influence ongoing claims decision-making needs to be clearly identified and publicly articulated.
- **Create a fund for Indigenous Nations to update their claims to be resubmitted for negotiation.**

4.5. What can the Tribunal itself do to address some of the challenges described in this report?

A former commissioner at the Indian Specific Claims Commission writes that "between the apparently pugnacious approach of Indian Affairs and the independent but necessarily legalistic focus of the Specific Claims Tribunal, there is precious little middle ground for a non-adversarial approach in which law, rights, history, and coexistence can achieve a balance."[44]

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[42] Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014, page 4. Received via ATIP request (request number A201401448).

[43] Union of BC Indian Chiefs, 2015. *The Right to Be Heard: A Principles-Based Review of the Specific Claims Tribunal Act*. Presentation to AFN Specific Claims Review Panel. Speaking notes for Grand Chief Stewart Phillip (UBCIC), Leah Pence (Mandell Pinder LLP), and Jody Woods (UBCIC Research). Available by request to the UBCIC.

[44] Jane Dickson, 2018. *By Law or In Justice: The Indian Specific Claims Commission and the Struggle for Indigenous Justice*. Vancouver, BC: Purich Books (UBC Press), page 9.

This commissioner characterizes the Tribunal's focus as "necessarily legalistic." Survey responses, however, encourage us to consider ways that the Tribunal might become less "court-like" – and perhaps begin to occupy some of the "middle ground" that the Commissioner describes. In this section, we explore both options within the current "legalistic" framework as well as additional possibilities for expanding the function of the Tribunal to alleviate some of the challenges identified in this report.

Next steps (for the Tribunal):

- **Enforce its role as timekeeper**. The Tribunal has expressed concerns over delays, but has not imposed sanctions when they occur. Delays and missed deadlines have significant effects on Indigenous Nations' capacity to participate in Tribunal proceedings. Survey respondents recommended that Canada be held more accountable for meeting agreed-upon timelines. Further, the reasons for any delay need to be better communicated to Indigenous Nations and their legal counsel – e.g. explaining why it takes so long. A party could apply for costs due to delay, but this could affect both parties and may add to the adversarial nature of the proceedings.
- **Provide recommendations where funding shortfalls impair an Indigenous Nation's ability to take necessary steps in preparation for a hearing.** If Canada makes last-minute submissions or delays proceedings, the effects on Indigenous Nations' funding could be discussed among all parties. However, the Tribunal cannot order funding on its own initiative; the *Specific Claims Tribunal Act* does not provide for allocation of funding by the Tribunal. If the department responsible for funding claimants was required to consider Tribunal recommendations for funding, the Tribunal could take a more active role in ensuring that Indigenous Nations have adequate funds to advance their claims at this body.
- **Facilitate early discussions on the necessity of expert reports.** One reviewer of this paper suggested that the Tribunal could, early in the process, engage parties more fully on whether there is a need for an expert report on a matter.
- **Build capacity for mediation**. Our research suggests that an increasing number of claims are going into "abeyance." As we describe above, there is a risk that such abeyances could increase delays and the Tribunal has now begun to maintain oversight on negotiations within these "pauses" of proceedings. As such, there is the possibility for the Tribunal – or an independent mediator – to play a more hands-on mediation role during these periods.[45] (However, the Tribunal has noted that additional resources are required if it is to take on an expanded role as a mediator.[46] Similarly, it would need additional resources if it were to take on the role of overseeing a separate mediator.)

[45] However, for mediation to be successful, Canada will need to be willing to participate. Justice Slade, in his submission to the five-year review, wrote, "The claimants almost always express a willingness to engage in mediation. The Crown invariably refuses to engage in mediation." Slade and Lombard, 2015, Submission to the Five-Year Review, page 12. Available at http://www.sct-trp.ca/pdf/Submission-May_15_2015.pdf.

[46] Slade and Lombard, 2015, Submission to the Five-Year Review, page 15, section 11. Available at http://www.sct-trp.ca/pdf/Submission-May_15_2015.pdf.

4.6. What have been the experiences of Indigenous Nations outside BC in proceedings before the Tribunal?

For this research, we solicited the opinions of BC Indigenous Nations; among responses arose the clear themes around which we have structured this report. However, broader research, involving Indigenous Nations across Canada, must be undertaken, particularly on specific procedural or funding-related issues that need to be addressed.

Next steps (for Canada and Indigenous Nations and organizations):

- **Canvass Indigenous Nations across Canada regarding their experiences at the Tribunal.** One option would be to make a procedural survey (like the ones we created; see appendices 1 and 2) available to Nations in other regions, such that they can comment on Canada's conduct and provide specific feedback.
- **Circulate this discussion paper among Indigenous Nations, involved departments, the Tribunal, and other interested groups, such as claims research directors**.

Our research suggests that a strategic and focused attention to ongoing institutional learning and innovation is needed such that Tribunal proceedings can continue to evolve toward fulfilling its mandate of "just and timely" resolution of claims. We intend this discussion paper as a step in that direction – an attempt to continue to advance the views of BC Indigenous Nations (and their legal counsel) within a broader national dialogue.

APPENDIX 1

Canada's Conduct at the Specific Claims Tribunal
A SURVEY FOR INDIGENOUS NATIONS

HELP MAKE AN IMPACT:

We are seeking your feedback on Canada's conduct at the Specific Claims Tribunal. We will use the information you provide to advocate for Tribunal processes that are more fair, timely, and effective at resolving claims.

From the survey results, we will write a short report (with recommendations) that we will share with all participating Indigenous Nations, their legal counsel, Canada, and the Tribunal.

ABOUT THIS SURVEY:

It will take about 15 minutes to complete.

Please feel free to skip any questions that are not relevant to your experience.

We are asking legal counsel to fill out surveys, too.

All information will be made anonymous – you and your Nation will not be identified by name in any materials related to this survey.

QUESTIONS:

1. Name

2. First Nation

3. Basis of claim

4. Why did your Nation's claim go to the Specific Claims Tribunal?

5. Overall, how would you describe Canada's conduct during the Tribunal's proceedings? Please provide examples if possible.

6. Did your Nation experience delays at any part of the Tribunal process? [Yes/No] If your Nation experienced any delays, please provide more information and describe any aspects of Canada's conduct that you feel are relevant. What caused the delay(s)? What were the effects of the delay(s)? Also, please tell us any recommendations you'd make about how to avoid delays in the future.

7. Did your Nation receive adequate funding to develop your claim and advance it at the Tribunal? [Yes/No] If not, in what ways was the funding inadequate? What were the effects of the inadequate funding?

8. Do you have any recommendations about the funding that Indigenous Nations receive for Tribunal processes? Please describe any aspects of Canada's conduct that you feel are relevant.

9. How would you describe Canada's response to your Declaration of Claim (when you originally filed your claim at the Specific Claims Tribunal)?

10. As relevant, please describe Canada's conduct at any other steps in the Tribunal process (for example: case management conferences, document disclosure, identification of issues, expert reports, affidavits, applications, pre-hearing conferences, oral history evidence, written submissions).

11. Were any hearings held in your community? [Yes/No] If so please describe your experience of these hearings. Please describe any aspects of Canada's conduct that you feel are relevant.

12. Did your Nation try to enter into mediation at any point in the process? [Yes/No] If so, what happened? If your Nation did enter into mediation with Canada, how would you describe that experience? Please describe any aspects of Canada's conduct that you feel are relevant.

13. How would you describe your Nation's experiences during the actual Tribunal hearings? Please describe any aspects of Canada's conduct that you feel are relevant.

14. Was your claim put on hold (into abeyance) at any point during Tribunal processes? [Yes/No] If so, who requested to put the claim into abeyance? What happened after that? Please describe any aspects of Canada's conduct that you feel are relevant.

15. Was the Tribunal's decision in your claim the subject of an application for judicial review to the Federal Court of Appeal? [Yes/No]

16. Did your Nation's claim reach resolution at the Tribunal?

17. If your claim reached resolution, did this happen in a "just and timely" way? [Yes/No] If so, please describe what factors made this "just and timely" resolution possible. If not, please describe any barriers your Nation faced in having its claim resolved. Please describe any aspects of Canada's conduct that you feel are relevant.

18. What recommendations would you make to Canada regarding its conduct at the Tribunal?

19. What steps could Canada take to advance reconciliation at the Tribunal?

20. Is there anything else you would like to tell us?

21. Would you be willing to answer some follow-up questions, either by email or in a short interview? [Yes/No] If so, please provide your phone number and/or email address.

22. Can you recommend any other people who you think we should contract to participate in this survey? [Yes/No] If so, please provide their name and phone number and/or email address.

APPENDIX 2

Canada's Conduct at the Specific Claims Tribunal
A SURVEY FOR LEGAL COUNSEL AND OTHER CLAIMS PRACTITIONERS

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 Tribunal processes that are more fair, timely, and effective at resolving claims.

From the survey results, we will write a short report (with recommendations) that we will share with all participating Indigenous Nations, their legal counsel and other claims practitioners, and with Canada and the Tribunal.

ABOUT THIS SURVEY

The survey contains 30 questions. We estimate that it will take about 25–30 minutes to complete in its entirety. Please answer whatever questions you can; all information you can offer is very helpful.

We are asking Indigenous Nations to fill out surveys, too. If you wish to consult with the Nations you represent, or run your answers past them, please feel free to do so.

All information will be made anonymous – you and the Nation(s) you represented at the Tribunal will not be identified in any materials related to this survey. However, if confidentiality is a concern, please feel free to answer questions in a general way from your experience (i.e. without reference to specific Nations) and to skip questions 1, 2, 4, and 19.

QUESTIONS:

1. Name

2. Firm or organization

3. How many claims have you pursued at the Tribunal?

4. Which Nation(s) have you represented at the Tribunal?

5. In brief, what were the issues raised in these claims?

6. What was each Nation's formal intention in taking the claim to the Tribunal (i.e. validation, determination of compensation, or both)?

7. Overall, how would you describe Canada's conduct during the Tribunal proceedings?

8. What was the process for setting the timeline or schedule for the claim(s) in which you were involved?

9. In your experience, do claims at the Tribunal follow the timelines that are created? [Yes/No] Please explain. Also, please describe any aspects of Canada's conduct that might be relevant.

10. With each claim, how long was the time between: (a) When the Nation filed its Declaration of Claim and the Response from Canada was issued? (Under Rule 42 of the Tribunal's Rules of Procedure, Canada should respond within 30 days of receiving the Declaration of Claim); (b) When the nation filed its Declaration of Claim and the first case management conference?; (c) The first case management conference and the start of the hearing?

11. Did these time frames meet your expectations about how long it would take to pursue a claim at the Tribunal? [Yes/No] Please explain. Please describe any aspects of Canada's conduct that you feel are relevant.

12. Have the Nation(s) you represented experienced delays at any part of the Tribunal process? [Yes/No] If so, at what parts of the process? What caused the delays? What were the effects of the delays? Please describe any aspects of Canada's conduct that you feel are relevant. Also, please describe any recommendations you have about how to avoid or curtail delays in the future.

13. Overall, did the Nation(s) you represent receive adequate funding to develop a claim and advance it at the Tribunal? [Yes/No] If not, in what ways was the funding inadequate? What were the effects of the inadequate funding?

14. Did the Nation(s) you represented receive funding to prepare and file a Declaration of Claim? [Yes/No] Please explain. If the Nation(s) did receive funding, was the funding adequate?

15. Do you have any recommendations about the funding that Indigenous Nations receive for Tribunal processes? Please explain. Please describe any aspects of Canada's conduct that you feel are relevant.

16. As applicable, very briefly describe your experience with any of the following steps and processes. Please describe any aspects of Canada's conduct that you feel are relevant: (a) case management conferences; (b) development of procedural timelines; (c) provision of notice; (d) document disclosure; (e) identification of issues; (f) expert reports – preparation, review, and response; (g) affidavits – preparation and cross-examination; (h) development of and response to applications; (i) pre-hearing conferences; (j) presentation of oral history evidence; (k) written submissions – preparation, review, and response; (l) other steps – please specify.

17. Please use this space, if you wish, to elaborate on any of the process-related issues you raised above (in question 16). Please describe any aspects of Canada's conduct that you feel are relevant.

18. How would you describe Canada's response to the Declaration(s) of Claim you filed?

19. Was mediation proposed at any point in the Tribunal process with which you were involved? [Yes/No] If so, who proposed it? Did the mediation occur? Why or why not? If it did, please describe your experience of the mediation processes. In all responses, please note any aspects of Canada's conduct that you feel are relevant.

20. Did any of the claims with which you were involved enter into abeyance? [Yes/No] If so, how many claims? Who initiated this process of putting the claims into abeyance? What happened? What were your expectations of the process and were they met? Please describe any aspects of Canada's conduct that you feel are relevant.

21. Were any hearings held in the community or communities of the Indigenous Nation(s) you represented? [Yes/No] If so, please describe your experience of these hearings. Please describe any aspect of Canada's conduct that you feel are relevant.

22. Have the claim(s) you represented reached resolution at the Tribunal?

23. If the claim(s) reached resolution, did this happen in a “just and timely” way? [Yes/No] If so, please describe what factors made this “just and timely” resolution possible. If not, please describe any barriers Nation(s) faced in having their claims resolved.

24. How would you describe Canada’s conduct during the actual Tribunal hearings? Please provide examples, if possible.

25. Was the Tribunal’s decision in any claim(s) you represented the subject of an application for judicial review to the Federal Court of Appeal under s. 34 of the Specific Claims Tribunal Act?

26. What recommendations would you make to Canada regarding its conduct at the Tribunal?

27. Would you be willing to answer some follow-up questions, either by email or in a short interview? [Yes/No] If so, please provide your phone number and/or email address.

28. What steps could Canada take to advance reconciliation at the Tribunal?

29. Can you recommend any other people you think we should contact to participate in this survey? [Yes/No] If so, please provide their name and phone number and/or email address.

30. Is there anything else you would like to tell us?

APPENDIX 3

SURVEY

Disclosure of Past Claims Materials During Tribunal Processes

1. Your name

2. At any point in the Tribunal proceedings, did you request disclosure of SCB materials or anything related to the Branch's decision on the claim? [Yes/No] Why or why not? What would be the utility of these materials within the proceedings?

3. If you did request the materials, what happened? What was the effect of this outcome on the Tribunal processes and how the claim proceeded? Can you describe Canada's conduct during this process?

4. What proportion of the Nation's own research materials from the claim were you able to bring forward into the Tribunal proceedings? Please describe any effects of this decision on your ability to advance the claim.

5. Please let us know if you have any additional comments on this issue.

APPENDIX 4

METHODS

We undertook this project in six phases:

1. We developed two online surveys to solicit feedback from Indigenous Nations and legal counsel regarding Canada's conduct at the Tribunal. Both surveys are included, as appendix 2 and appendix 3, in this report.
2. Our legal counsel reviewed the survey questions, in relation to the "Specific Claims Tribunal Rules of Practice and Procedure" and suggested changes, which we incorporated.
3. We sent the survey link to BC Indigenous Nations and legal counsel who have had experiences at the Tribunal. We also sent some follow-up questions to legal counsel, including questions about abeyance processes and the approach of treating a claim at the Tribunal as a *de novo* claim. A short survey addressing the issue of starting claims anew at the Tribunal appears as appendix 4 in this report.
4. We also reviewed publicly available documentation related to Tribunal decisions and procedures, such as the information related to claims processing that is available online at the Tribunal website. We sent some follow-up questions to Tribunal staff.
5. To write the draft report, we first synthesized the responses and analyzed them by theme and issue area. We included six questions for discussion, as well as some possible next steps, based on the ideas and proposals of survey respondents.
6. The report was sent to all BCSCWG members and legal counsel for peer review. We integrated all feedback to produce a final report, to be shared with all participants, the Tribunal, research directors, and Canada.

APPENDIX 5

Discussion Questions and Possible Next Steps

1. What do reconciliation and a "renewed relationship" look like at a conflict-resolution mechanism like the Tribunal?

Possible next steps (involving all participants):

- Continue to hold community hearings and visits.
- Develop a plan for historical and cultural education of parties involved in Tribunal proceedings.
- Emphasize timeliness.
- Develop training in mediation and alternative dispute resolution for participants.
- Explore issues of representation.

2. What should Canada's conduct look like at in this conflict resolution body?

Next steps (for Canada):

- Cease adversarial tactics to undermine proceedings.
- Treat Tribunal decisions as final and binding, and limit applications for judicial review.
- Cease claiming settlement privilege at the start of Tribunal proceedings.
- Stick to timelines.
- Use a proactive strategy for claims resolution by negotiation and mediation, rather than using settlements as a late-in-the-game option.
- Redefine Canada's "interest" with reconciliation in mind.
- Explore options for interpreting the law with a view to reconciliation.

3. How can fairness, sufficiency, and predictability of resources be improved?

Next steps (for Canada):

- Address the problems in the way Indigenous Nations are funded to prepare a Declaration of Claim (and communicate these funding processes to Indigenous Nations).
- Directly address the concern that Canada is vastly outspending Indigenous Nations in Tribunal proceedings.
- Work with Indigenous Nations to address the issue of unequal and inadequate funding.

4. How are Tribunal decisions feeding back into processes of claims assessment and negotiation?

Next steps (for Canada):

- Share information on the specific mechanism through which Tribunal decisions are being integrated into claims assessment and negotiation at SCB. If no such mechanism exists, undertake a legal review and create one.
- Create a fund for Indigenous Nations to update their claims to be resubmitted for negotiation.

5. What can the Tribunal itself do to address some of the challenges described in this report?

Next steps (for the Tribunal):

- Enforce its role as timekeeper.
- Provide recommendations where funding shortfalls impair an Indigenous Nation's ability to take necessary steps in preparation for a hearing.
- Facilitate early discussions on the necessity of expert reports**.**
- Build capacity for mediation.

6. What have been the experiences of Indigenous Nations outside BC in proceedings before the Tribunal?

Next steps (for Canada and Indigenous Nations and organizations):

- Canvass Indigenous Nations across Canada regarding their experiences at the Tribunal.
- Circulate this discussion paper among Indigenous Nations, involved departments, the Tribunal, and other interested groups, such as claims research directors.