# Evaluation of the Specific Claims Assessment and Settlement Process

## WRITTEN SUBMISSION

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# Contents

# INVOLVEMENT WITH THE SPECIFIC CLAIMS PROCESS

## 1.1 How have you been involved with the Specific Claims Process, especially the assessment and settlement parts of the process?

I have worked in the Union of BC Indian Chiefs Research Department for 19 years; I have been the research director for 18. In this capacity, I coordinate and chair the annual research director's meeting and, as a member of the National Claims Research Workshop Planning Committee, I coordinate an annual national workshop for claims researchers across Canada. I am also part of the CRU-NSD Working Group (i.e. the Claims Research Unit–Negotiation Support Directorate Working Group). I also work with the National Claims Research Directors group to advance issues related to specific claims research; the NCRD has made submissions to several review and evaluation processes related to specific claims and also to access to information and privacy legislation.

I am also involved in other capacities supporting advocacy and ongoing reforms to specific claims processes (including assessment and settlement):

- I am a member of the AFN-Canada Joint Technical Working Group (JTWG);
- I sit on the Specific Claims Tribunal Advisory Committee;
- I am the technical lead on the BC Specific Claims Working Group (BCSCWG), which advocates for a just and fair specific claims process and seeks to advance the specific needs and concerns of BC Indigenous Nations (whose claims represent 40 to 50 percent of total claims in Canada) and works regularly with CIRNAC senior management (DG and ADM);
- I am the BC technical representative on the Assembly of First Nations (AFN) Chiefs Committee on Lands, Territories and Resources.

# RELEVANCE

## 2. CONTINUED NEED

## 2.1 Over the period from April 1, 2013 to March 31, 2020, what were the issues and requirements faced by First Nations concerning specific claims? Did these continue and/or change during this time period? [Ind. 1.1.1]

Indigenous Nations and their organizations across Canada who are participating in the specific claims process require regular updates and responsive communication regarding the issues that affect them. The claims process is complex and rules, policies, and guidelines change regularly.
Canada, however, has continually failed to communicate with Indigenous Nations regarding the specific claims process; Nations find out about changes only after they have been made and on an ad hoc basis. Members of the claimant community must investigate issues as they arise and must continually (and repeatedly) press SCB for even basic information about changes to the program.

This lack of communication and transparency has been consistent throughout the period under review and was emphasized in the 2016 report by the Office of the Auditor General and the follow-up study by the Standing Committee on Public Accounts.[1] However, in the period under review, we have continued to see a lack of communication regarding basic program processes. For example:

[1] Office of the Auditor General, 2016. *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. Fall 2016. Available at https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html and Standing Committee on Public Accounts. 2017. Report 23: Report 6, First Nations Specific Claims, of the Fall 206 Reports of the Auditor General of Canada. Available at https://www.ourcommons.ca/DocumentViewer/en/42-1/PACP/report-23/page-18

- This year, Canada introduced changes to negotiation (loan) funding. While some of these changes are positive, others have the potential to introduce barriers for Nations. These policy changes were communicated to Nations on a one-by-one basis, at negotiation tables. Only through word of mouth did the claimant community begin to hear about these changes.
- In the context of COVID-19, there was a complete lack of communication and consistency with Indigenous Nations and organizations. Messaging from Canada varied widely, even within regions, leaving Nations in the dark about how – even if – their claims would proceed.
- The public-facing SCB database on claims status provides limited "summary" information on claims, very few search options, misleading information on "closed claims" (including in this category claims that Canada had rejected or which were part of unjust processes under Justice and Last), and no details on claims processing at SCB (and when, in 2018, in a joint research project with Canada on "closed and rejected claims," the BCSCWG requested details on "small-claims" processing and claims closure, SCB repeatedly promised to share the information but then failed to do so, despite numerous follow-up requests);
- Recent changes to research funding templates were imposed at the time of funding, with no advance warning or input sought from Indigenous Nations;
- No notice was given of departmental changes and reorganizations (i.e. the creation of new directorates within SCB) – Indigenous Nations and organizations received no information about these changes until Indigenous representative groups heard (in passing) of the change and complained about the total lack of information given.

A systematic approach to communications is needed. A basic approach could include regular bulletins; this type of document must be a real attempt to communicate updates and engage Indigenous Nations in dialogue, rather than a PR-style brochure lauding departmental achievements. At the very least, basic information about the program and any changes must be clearly and effectively communicated on the departmental website via an easily navigable information architecture. This communication could happen via the regions; however, for this approach to be effective, coordination between headquarters and the regions needs to be streamlined and greatly improved.

The problem, however, runs deeper. Decision-making about the specific claims process must be a joint process; Canada should not be in a position to make these secretive and unilateral decisions. An independent body, governed in a joint way, and in open and transparent dialogue with all parties, would render this problem of secrecy and poor communication obsolete.

### 2.4 Did the Specific Claims Program continue to be required to address the issues and requirements? [Ind. 1.2.1]

No, the current specific claims process has failed to address the issues and requirements. It has failed to uphold Canada's legal obligations and advance reconciliatory aims.

A process for resolving breaches of Canada's fiduciary responsibility with regards to Indigenous lands, assets, and treaties is essential. At the start of the period under review, our claims research program had 165 claims; we now have 190. There are hundreds of breaches that require redress, and – in spite of the "settlement success" that Canada posts on its website – the process is slow and systematically biased against Indigenous Nations.

No immediate end to the need to resolve claims is on the horizon. Claims continue to arise as historical breaches are newly uncovered and as Canada creates new breaches. For example, investigations into the building of the original Trans Mountain Pipeline have revealed that construction resulted in the decimation of at least 58 archaeological sites in BC, including village and burial sites; these findings could potentially result in new specific claims. The planned expansion of the pipeline in BC will likely create many new breaches related to the right-of-way; fifteen years from now, many new claims could arise.

The current process is limited at its root structure by a built-in conflict of interest. Canada is in the position of overseeing, assessing, and evaluating claims against itself. The specific claims program is essential, but an independent claims resolution process is needed. The current process creates many delays and barriers to resolution. It is fraught with obfuscation, a lack of clarity and communication; claims are not being resolved quickly. An independent process that facilitates multiple pathways to resolution will create efficiency and fairness in a process where these have always been lacking.

### 2.5 Do you have any concerns about the program's consistency with the United Nations Declaration on the Rights of Indigenous Peoples? [Ind. 1.3.1]

I have four primary concerns in relation to Canada's failure to meet its obligations under the UN Declaration:

1. Article 27 states that the process should be "fair, independent, impartial, and transparent." These characteristics are interlinked; the failure to create an independent system leads to one in which Canada makes closed-door and unilateral decisions and fails to communicate with Nations. Canada regularly talks about "bringing more independence to the process"; this, however, is different than an independent process. Since the program's inception, Indigenous Nations have been clear about the need for *full* independence. Until that independence is achieved, the program will be fraught with mistrust and delay. Until then, the system will be providing remedies that Canada has determined (based on its own laws and economics) and there will be no effective remedy at all for claims over $150 million (see my comments in section 14.2).
2. Article 8 (2b) describes the creation of "effective mechanisms"; mechanisms cannot be effective without adequate resources of operations. Systemic underfunding means that Nations cannot always access necessary records to complete historical research, cannot hire enough staff to research all the claims that require this work or the electronic and physical infrastructure to safeguard this information, may have to defer legal analyses or claim preparation, cannot afford the costs of negotiating their claims for years while loan funding eats away at potential settlements, and cannot afford to seek adjudicated resolution at the Specific Claims Tribunal. The Tribunal itself often indicates that it lacks funding for adjudicators. In addition, BCSCWG research has shown that Indigenous Nations are chronically underfunded to participate effectively at the Tribunal. For example, the declaration of claim, a key and required part of the process that can cost thousands of dollars, is often not funded at all. The Tribunal mechanism is only effective if Indigenous Nations can access it and use it optimally.
3. Article 27 also describes the inclusion of Indigenous laws in processes to resolve land-related conflicts. The BC Specific Claims Working Group has been researching Indigenous legal traditions related to providing redress for historical losses.[2] A fully independent process must include the integration of Indigenous laws; otherwise, all of the background legal framings will be Canada's and the process will fail to reflect the legal pluralism of a true Nation-to-Nation approach.

[2] BC Specific Claims Working Group. 2018a. *A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes*. August 2018. Available at https://www.ourlawsarisefromtheland.org/discussion-paper . See also the *Our Laws Arise from the Land* online resource: https://www.ourlawsarisefromtheland.org/

4. Article 31 states that Nations have the right to be given both financial and technical assistance from States in order that they might enjoy the rights described in the declaration. Throughout this response, I point out the many ways that funding shortfalls and resource limitations inhibit Nations' full and fair access to the specific claims process – the process of redress that is their right under UNDRIP.
5. Article 40 states that Indigenous peoples have the right to "prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties" and that such decision "shall give due consideration to… the legal systems of the indigenous peoples concerned." The current system, then, fails to live up to this article, due to a lack of a "fair and just process" (see my comments on point 1, above) and failure to integrate Indigenous laws (see my comments on point 3, above).

### 2.6 Do you have any concerns about the program's consistency with the Truth and Reconciliation Commission's calls to action? [Ind. 1.3.2]

First, it is important to note that the term "program" is inaccurate since it situates specific claims in a category with many other administrative responsibilities of the federal government. Specific claims resolution is not merely a discretionary program to be administered (especially not unilaterally, by Canada); rather, claims are legal obligations owed by the Crown to First Nations as a result of Crown misconduct and failures to uphold laws and fulfill legal obligations. They must be prioritized as such, rather than diluted in a sea of government management objectives. Full enactment of Canada's responsibilities must be guided by the honour of the Crown and adhere to international human rights instruments, and requires a fair and independent process in which Canada and Indigenous Nations are on equal legal standing.

Indigenous leaders who sit as representatives on the BC Specific Claims Working Group regularly express skepticism and dismay regarding the vast difference between Canada's public commitments to reconciliation and its actions on the ground. I wish to echo their sentiments: the difference between the public language and the experiences of Nations is vast. The federal government's purchase of the Trans Mountain pipeline – which will cause many new infringements on Indigenous rights – is emblematic of this disconnect. But it occurs in many other, daily ways. For example, Canada opts for symbolic displays of reconciliation, but steers clear of any substantive change that will result in a redistribution of authority. Canada conducts cultural competency training for its employees but fails to involve Nations as equal partners in the basic decision-making surrounding specific claims (see, for example, my descriptions in sections 2.1, 5.2, 8.1, and 14.1, which describe Canada's unilateral changes around negotiation and funding guidelines).

Again, article 45 (iv) of the Calls to Action explicitly state that Canada needs to integrate Indigenous laws and legal traditions in "negotiation and implementation processes involving Treaties, land claims, and other constructive agreements." The Truth and Reconciliation Commission (TRC) calls attention to the fact that reconciliation entails "[reconciling] Aboriginal and Crown constitutional and legal orders." Canada has yet to commit to this integration of Indigenous laws in the specific claims process.

## 3. ALIGNMENT

### 3.1 Do you think the program is aligned with the federal government's objective to foster nation-to-nation relationships and advance reconciliation with First Nations? [Ind. 2.1.1]

There is a contradiction in the very question: the idea of a specific claims "program" conflicts with the basic idea of a Nation-to-Nation approach. Specific claims are not a managerial unit. Canada should not be the party

"overseeing" a "program." An independent body is needed so that the relationship fostered by the specific claims process is a Nation-to-Nation one.

The federal, publicly stated goal of reconciliation – based on principles unilaterally defined by the government – cannot exist separate from the relationship itself. Reconciliation cannot be defined by one party; it needs to be worked on, on an ongoing basis, with Indigenous Nations.

In the period under study, as I understand it, the number of active tables where representatives from Nations and Canada are meeting has increased. This is one indicator that could be studied; it could reflect the present government's willingness to meet Nations directly – on a Nation to Nation basis – to resolve claims. However, it is important to note that this kind of discretionary action does not reflect a system-wide shift in the relationship; rather, it occurs at the whim of the current government. And, since the outcomes of and Canada's conduct at many of these additional tables is still unclear, the overall benefit remains to be seen.

## DESIGN AND DELIVERY

### 4. INCORPORATION OF EXISTING POLICY

4.1 How well do you think that each of the following has been incorporated into the program's current design, including its processes? How well do you think each was actually put into practice in how the program was delivered?

- Impartiality and fairness (for example, independence in the process) [Ind. 3.1.1]
- Greater accountability and transparency [Ind. 3.1.2]
- More rapid processing [Ind. 3.1.3]
- Improved access to mediation. [Ind. 3.1.4]

**Impartiality and fairness:** Canada is in a conflict of interest that impedes its representatives' ability to be impartial and fair. Canada is the decision-maker on claims. While Canada's publicly stated goals are reconciliation and the restoration of its relationships with Indigenous Nations, internal goals focus more on risk mitigation and minimizing liability.[3] These goals compete for priority and make it impossible for Canada to be truly impartial. Indigenous Nations experience this tension in Canada's aims as contradictory, even dishonest (see, for example, the BCSCWG report on Canada's conduct at the Specific Claims Tribunal[4]) – the talk of reconciliation on the one hand and the experience of adversarial or obstructionist conduct on the other. (See my answers in 14.2 on the instructions given to DOJ lawyers about how speak about compensation; the recommended tone is one of condescension.) The result is widespread mistrust in the system and in the messages from SCB representatives.

With respect to fairness, I would like to raise two main issues: Canada oversees funding allocations across the process, despite being one of the parties to the dispute. This is an issue of fundamental unfairness. Canada is also not transparent about its internal funding and so Nations are left in the dark as to how much Canada spends to respond to claims versus how much Nations receive to advance them. Funding allocations need to be public so that fairness can be assessed; at present, there is a widespread view that Canada has access to limitless

[3] See the BC Specific Claims Working Group, 2018b. "Litigation as Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal. June 13, 2018. Available at www.ubcic.bc.ca/publications. See also Aboriginal and Northern Development Canada, 2014. AANDC Program Risk Assessment. February 2014. Received via ATIP request (request number A201401448).
[4] BC Specific Claims Working Group, 2018b. *"Litigation as Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal.* June 13, 2018. Available at www.ubcic.bc.ca/publications.

resources while Nations struggle to stretch their funds and often end up paying out of pocket. Without financial transparency, distrust in the process is widespread.

Second, Nations and their organizations face barriers in accessing information – challenges that Canada does not face. Despite a clear right of access affirmed by Canadian courts and articulated in international human rights instruments, Indigenous Nations' access to information is impeded by Canada's overarching conflict of interest. Most documentary evidence necessary for substantiating Nations' claims and grievances against the Crown is currently controlled by Canada, in the possession of federal departments, such as Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). Canada is in a clear conflict of interest since it can control what information is available in claims against it. Informal access protocols developed in 1999 to alleviate the need to go through formal access to information procedures, while initially constructive, have been rendered ineffective due to non-cooperation, non-disclosure, and unreasonable delay, a corollary of Canada's adversarial approach to specific claims resolution.[5]

For example, CIRNAC's Indian Lands Registry System is a key database for historical and current legal instruments crucial to substantiating claims. It is heavily used and relied on by the claimant community. New privacy restrictions introduced in 2017 meant that full access was no longer available publicly online, but after much advocacy we were granted access to CIRNAC's internal database, Citrix, to access records. Access to Citrix is vital for the research community, particularly during COVID-19, when on-site government offices and records repository are closed for in-person appointments. For three months this database has been non-functional, with no explanation given, no announcement made, and no alternative provided. We also have no timeline for when access will be restored.

**Greater accountability and transparency**: My responses throughout this questionnaire speak to ongoing concerns about communications and transparency. Transparency remains limited (see my answer to question 2.1); lack of communication is a longstanding challenge, repeatedly identified by Nations and program reviews and audits as a barrier to access. Public access to data is constrained in many ways. For example, outside researchers seeking to use the SCB claims database will encounter many limits, a lack of searchability, and a much more limited set of data than is internally available to SCB staff. I provided examples of this during my interview.

The OAG report strongly condemns INAC's approach to public reporting. It notes that monitoring and reporting of activities and results are an essential part of INAC's accountability for specific claims overall. And yet, the OAG report finds, INAC's "public reports were incomplete and did not contain the information needed to understand the actual results of the specific claims process. More specifically, the Department did not publicly report some negative results of the process." In short, public reporting worked to conceal the barriers created by implementation of Justice at Last and create false representations of success.[6] The JTWG was originally struck to address these issues.

Clear and proactive communication will be essential to rebuilding trust in the process and moving toward a working relationship. Communication must be regular and transparent. Furthermore, it must be bilateral: the Department needs to create regular opportunities for feedback from CRUs and Indigenous Nations. To this end,

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[5] National Claims Research Directors. *The Impacts of Bill C-58 on First Nations' Access to Information: A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs*. March 20, 2019.

[6] The OAG report recommended: INAC should clearly report complete information about the specific claims process to allow the government and Canadians to assess real results; INAC should update its website to reflect the full range of negotiation practices for all types of specific claims; INAC should keep the information on the specific claims process on its website up to date.

we have three immediate action items that will begin to create trust in the Department and build a foundation for an ongoing working relationship:

- Create regular opportunities for Indigenous Nations and CRUs to provide input into policy changes and the Department's practices. To facilitate this engagement, provide special bulletins on any upcoming changes to program policy and practices (including concrete details on how these changes will affect the preparation, submission, and negotiation of claims).
- Continue working with Indigenous Nations and CRUs to jointly develop clear and reasonable guidelines pertaining to the minimum standard and minor technical issues. Communicate these guidelines to all Indigenous Nations and claim practitioners.
- Provide regular updates to Indigenous Nations and CRUs on program operations and results.

**More rapid processing**: The story of claims processing is complex. We at UBCIC collect and update data on this regularly. Under Justice At Last, and the effort to "clear the backlog" of claims, many claims were closed or rejected or negotiation conditions were made so difficult that Nations were unable to proceed. This kind of "clearing" of claims is not an achievement worth pursuing; it is not an approach reflecting the honour of the Crown.[7]

One measure that we have been tracking is Canada's ability to meet its legislated three-year timeframe to respond to claims; the BCSCWG has produced two reports on the subject.[8] Our research has found that, in the majority of cases, Canada has been failing to meet the three-year deadline. The initial report (in November 2018) found that Canada failed to meet the deadline in 65 percent of cases filed between January 1, 2014 and November 10, 2015; the second report (in May 2019) found that, out of the 70 late claims identified in the first report, Canada had still failed to respond to 44 of them (that is 63 percent). When Canada fails to meet deadlines or adhere to legislated timelines, it harms the relationship and perpetuates distrust.

Canada has failed to be accountable for these delays. They have not provided a rationale for what is clearly an ongoing problem. Instead, they have suggested that Nations take the claim to the Tribunal, as is their right once the three-year deadline has passed. But the role of the Tribunal is not to assess and resolve all claims; its position is more specialized, as an adjudicator. The backlog of cases at the Tribunal will continue to grow; in annual reports to Parliament, the Tribunal chair regularly draws attention to the shortage of judicial appointments to fill the full complement of judges to deal with the growing caseload, as well as insufficient funding provided to Nations to take their claims to the Tribunal. These factors make the Tribunal a non-viable option for many Nations.

Since Justice At Last, Canada has stated that negotiation is its preferred method of resolution; this deferral of responsibility onto the Tribunal shows that Canada has failed to create the conditions for full and fair access to negotiations. The failure to meet legislated timelines undermines the stated goals of the process by offloading claims into an adversarial and adjudicative process that does not foster good relations or reconciliation.

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[7] National Claims Research Directors. 2015. *In Bad Faith:* Justice at Last *and Canada's Failure to Resolve Specific Claims*, Joint Report presented to Prime Minister Stephen Harper, prepared by National Claims Research Directors (March 9, 2015). Available at https://www.ubcic.bc.ca/ubcic_publications.

[8] BC Specific Claims Working Group. 2018c. *A New Claims Backlog: Canada's Failure to Meet the Three-Year Legislated Timeline to Respond to Specific Claims*. November 26, 2018. Available at: www.ubcic.bc.ca/publications; BC Specific Claims Working Group. 2019. *Back to the Backlog: Canada's Inaction on Late Specific Claims Assessment.* May 2, 2019. Available at www.ubcic.bc.cap/publications.

**Improved access to mediation**: In theory, mediation could be an important tool for resolving claims fairly and efficiently and in a collaborative way. During your period of study, there are two stages of the specific claims process at which Indigenous Nations and Canada may access mediation: during negotiations and at the Tribunal. Evidence cited in the OAG's report demonstrates that Canada has only participated in "limited" mediation; that First Nations almost universally view the mediation centre available during the negotiations phase as "not independent" and "not neutral"; and that, at the Tribunal, Canada routinely has refused to participate in mediation.

The inability to create access to mediation has been a major failure. The history is complex and reaches back to times before the period under study. The Indian Specific Claims Commission (1992–2008) was meant to be a mediation body but it lacked the authority to make its decisions binding. After the closure of the ISCC, the department responsible for Indigenous Affairs created its own mediation office. Many Nations distrusted this internal process, which was housed in a government building. Further, when Nations did seek to pursue mediation, Canada often refused to come to the table.[9] (Canada should not deny Nations access to mediation when it is requested.) This was at the time when Canada was focused on clearing the backlog – a cross-cutting mission that undermined the stated reconciliatory goals of the process. The OAG found that – even though a mediation body was established in 2012 – by 2016, parties exercised the option for mediation only one time.[10] Further research is needed to see if the historical, long-term lack of access to mediation is persisting under current processes.

## 5. PROGRAM DELIVERY STRUCTURES

### 5.1 What do you think has worked well due to the program's delivery structures? Please give any examples of notable successes. Were these successes replicated more widely? [Ind. 3.2.1]

Over the period under review, any successes of the process must be considered in relation to the structural inequity and bias (with all its procedural effects) that result from Canada's conflict of interest. Proportionally, the difference is vast. I can offer examples of two standalone "successes" (though it is important to note that both of these have arisen because of the diligence and advocacy of the claims community, rather than as a result of any proactive action by Canada).

First, the Negotiation Services Directorate has been responsive to feedback from the National Claims Research Directors and others. The NSD has sought to respond to issues raised by the claimant community, supported the reinstatement of the CRU-NSD Working Group, and been willing to provide updates at events in the research community. While NSD has made unilateral changes to funding guidelines and application processes and failed to communicate these to Nations, this body has sought to address barriers created by these changes (and, in some cases, revert the changes) and committed to communicating more effectively and proactively in future.

Second, in recent years, when the BCSCWG or others in the claimant community have brought issues to the attention of SCB, SCB has also responded directly and made commitments to address the issues. As well, SCB has shown willingness to meet with the BCSCWG and learn about current views and perspectives in the claimant community, such as the application of Indigenous laws in claims processes. Whether this willingness to hear from the claimant community results in concrete changes at SCB remains to be seen. Further, I cannot comment

[9] National Claims Research Directors. 2015. *In Bad Faith: Justice At Last and Canada's Failure to Resolve Specific Claims. Joint Report Presented to Prime Minister Stephen Harper*. March 9, 2015. Available at www.ubcic.bc.ca/publications

[10] Office of the Auditor General, 2016. *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. Fall 2016. Available at https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html

on whether individual Nations or other organizations have had a similar lines of communication open up with SCB; as such, I cannot comment on whether these successes were replicated widely.

### 5.2 What do you think has not worked well? Please give any examples of notable challenges. Were these challenges addressed? [Ind. 3.2.1]

As I described in detail in section 2.1, lack of transparency and communication has been a systemic problem with specific claims processes since their inception and continues to be a challenge for the claimant community today. Two examples of recent unilateral government actions that were made without communication with rightsholders were changes to research funding guidelines and changes to negotiation (loan) funding. In both cases, changes resulted in potential new barriers to Indigenous Nations' full and equal participation in the process; in both cases, the changes were made without consultation and were not communicated to Nations in any clear or systematic way.

## 6. GOVERNANCE

### 6.1 What do you think has worked well due to the program's governance bodies, and specifically, the Claims Advisory Committee and the Specific Claims Joint Technical Working Group? Please give any examples of notable successes. Were these successes replicated more widely? [Ind. 3.2.2]

**The Claims Advisory Committee**: Despite direct involvement with claims reform and work across parties, organizations, and regions, my understanding of the composition, work, authorities and accountability of the CAC is limited to a very general knowledge that it is made up of senior officials who review claims assessed by SCB. If this body works in a governance capacity related to specific claims, then there is a serious issue of accountability. Indigenous Nations and organizations have not been informed.

**The Joint Technical Working Group**: The Joint Technical Working Group is not a governance body; it is a technical advisory committee. The JTWG does not reflect the rightsholders, the Indigenous Nations across Canada. When the JTWG makes proposals these must be vetted by the Chiefs Committee (on the AFN side) and the minister (on Canada's side). What the JTWG does is make recommendations based on technical expertise and the solicited input of Indigenous Nations. A main success of the JTWG is that it has taken onboard recommendations of Indigenous Nations at the two AFN-led engagement sessions; specifically, the JTWG has heard Nations' call for structural, fundamental change and the creation of an independent process, one that integrates Indigenous laws. The JTWG has also carefully examined the history of specific claims reform and recognized that *throughout* the decades, many review processes have made the call for independence. With this historical view and the consideration of current views of Nations, the JTWG has worked hard to develop a specific claims process that will result in a more fair and just approach to addressing historical wrongs. (While this work is underway, however, Canada has continued to implement unilateral changes that undermine the working relationship and may create barriers to Nations' full and fair access to redress. Again, these changes underscore the need for a fully independent process.)

It is essential that the critical, good faith work of the JTWG be honoured by Canada via support for the creation of an independent process; failure to offer this support will create further distrust in Canada's intentions and the specific claims process as a whole.

### 6.2 What do you think has not worked well? Please give any examples of notable challenges. Were these challenges addressed? [Ind. 3.2.2]

Through engagement sessions – first on addressing OAG recommendations and then on the creation of an independent process – the AFN side of the JTWG has sought to solicit the direct feedback of rightsholders. The AFN side of the JTWG has since been working very hard to integrate this feedback into a proposal for an independent process. Canada's support for the independent process, however, remains uncertain.

The JTWG is small and lacks regional representation. Further, in spite of confidentiality agreements signed, we have not been able to review much of the data that Canada holds. For example, two years ago, I asked for information on funding; this was not provided. In the end, the JTWG is a small group with incomplete information access. It is hobbled in this way.

## 7. ROLES AND RESPONSIBILITIES

### 7.1 Do you think that the roles and responsibilities of all stakeholders involved in governance and program delivery are clear? Do you think that all these stakeholders understand their roles and responsibilities? [Ind. 3.2.3]

Many Nations and Chiefs object to the term "stakeholder," which is bureaucratic language that reflects an idea that representatives from different groups have an equal "stake" and should therefore have an equal say. To many Nations and their representatives, this language pushes aside the main fact at the root of all specific claims processes: Indigenous Nations have specific, unique, and inalienable rights; they are "rightsholders." Infringements on their rights are what brings them to the process in the first place. Their rights should not be set in equivalency to the "stake" that other parties might have.

My understanding is that this question about roles was not intended to include the roles of rightsholders, which is a gap that should be explored. I understand you want to know if departmental representatives have been fulfilling their roles. I will start by saying I am not always certain what CIRNA roles are or what criteria I am supposed to measure this against.

In terms of roles and responsibilities on the government side, I would say that the systems surrounding specific claims often feel opaque and impenetrable. It is not always clear to claimant communities who is responsible for what activities; my above (brief) discussion about the Claims Advisory Committee (in response to question 6.1) can serve as an example. A Nation submits a claim; three years down the road, they may receive letter offering to negotiate on some of the allegations. What informs this letter of offer? On what basis are the decisions made and by whom? Though the public language is of resolution, it is not clear how the people and conversations behind the scenes (DOJ lawyers, SCB analysts, the Minister) work to translate that public goal into real outcomes via concrete action. We do not know who is looking at a claim and how competing goals and priorities – i.e. the risk management, described above – enter the decision. Nations do not know what process a claim goes through when it is assessed. There is a lack of transparency about roles and responsibility. Recent changes to SCB, including its migration to a different sector and the creation or redistribution of four new directorates does not make this any clearer. Who does what and how do these responsibilities intersect? The claimant community has not been informed.

## 8. SUPPORTS AND CAPACITIES

### 8.1 Do you think that First Nations and their advisors are aware of the resources available to them? Please elaborate for the following specific items:

- the amounts and types of funding, e.g., for research, for participating in the process
- available services such as mediation
- access to documents for research [Ind. 3.3.1]

**The amounts and types of funding:** For the most part, the claims research community is now aware of funding available and of changes made to funding (though these changes were not announced or explained initially; NSD began communicating with the claims community about such changes only after the NCRD began investigating and published a report[11]) The National Claims Research Directors (NCRD) group circulates information on any changes to funding guidelines and processes, keeping one another informed. As well, the NCRD recently pushed for the reinstatement of the CRU-NSD Working Group on research funding; this is a key mechanism for dialogue around claims funding and supports the development of funding procedures that reflect the non-linear nature of claims research on the ground. It is also an important site for funding-related communications. The NCRD also organizes annual meetings for the directors and workshops for the whole claimant community; these events are important for keeping people informed about the resources available to them. The NSD has expressed interest in improving communications and maintaining ongoing dialogue; the CRU-NSD Working Group is an important step in this direction. It is because of this network that communication happens, not because of SCB.

In other parts of the process, Nations and the claimant community are less well informed. Despite discussions regarding joint decision-making in the specific claims process, Canada has continued to make unilateral changes – changes that Nations often find out about only on a case-by-case basis, as the specific issues arise. For example, Canada recently changed its negotiation (loan) funding guidelines without consulting or even informing Nations.

**Available services such as mediation**: See my answer re: mediation in question 4.1, above. In general, the issue has been a lack of a fair and impartial body for mediation – not Indigenous Nations' lack of awareness about the existence of the option. A new independent process will address the issue of the lack of fair mediation processes as part of a broader set of changes that will tackle the structural bias that results from conflict of interest in the system.

**Access to documents and records**: Nations are aware that records exist; the problem is that they are routinely denied equal access to the documents they require to substantiate their claims. Access to documents and records is often hampered by technical restrictions imbedded in access to information legislation, and complicated, protracted, and non-transparent review mechanisms. Their informal requests for records are hampered by Canada's non-cooperation, non-disclosure, and unreasonable delay.[12] See my answer in 4.1, above.

### 8.2 Are First Nations making full use of these resources? Why? Why not? [Ind. 3.3.2]

[11] National Claims Research Directors, 2020. *Specific Claims Research Funding: Emerging Challenges and Principles for Collaboration*. July 6, 2020. Available at www.ubcic.bc.ca/publications

[12] National Claims Research Directors. 2019. *The Impacts of Bill C-58 on First Nations' Access to Information: A Discussion Paper Following the Review of Bill C-58 by the Senate Committee on Legal and Constitutional Affairs*. March 20, 2019.

Indigenous Nations make full use of the resources available because they are under-resourced. They work strategically and systematically to maximize funds given to them. At UBCIC Research, we are always thinking of ways to create efficiencies, such as by gathering materials on multiple claims during any visit to archives and digitizing materials. Claims Research Units such as UBCIC have economies of scale and decades of combined research experience that result in efficiencies and cost-savings overall. Nations at the Tribunal use their full allocation of resources and then still find that they need to use their own funds to continue advancing their claims.[13]

In the current claims process, which costs Nations more than they are allocated, they are often put in the difficult position of choosing how to allocate scarce community resources; this is not only unfair, but an effect that runs directly contrary to the stated reconciliatory aims of the program. Further, the fact that the process takes so long is another downward pressure on Nations, who await settlements and lose out on millions of dollars in interest or potential revenues.

### 8.3 Is First Nations' capacity a barrier or constraint to pursuing specific claims and can you give any specific examples where this has been the case? [Ind. 3.3.3]

It is not my place to comment on Nations' capacities internally and any challenges they might face in pursuing their claims. Instead, I would build on my comments above (question 8.2) about the lack of adequate resources. In our research project on Canada's conduct at the Specific Claims Tribunal, we conducted multiple surveys and found that Nations were systematically underfunded and had to draw on own-source revenue to advance claims.[14] These costs create real strain on Nations, as well as a sense of distrust in the system, generating the idea that Canada has limitless resources to fight claims but Nations are reallocating their own funds to advance them.

Further, there has been some discussion on converting current loan funding (i.e. that supports Nations in negotiating specific claims) to contribution funding; that is, Nations would not have to pay back the funds that they spent in demonstrating that Canada failed to meet its lawful obligations. Several review processes, including the 2018 House of Commons Standing Committee on Indigenous and Northern Affairs (INAN) study of comprehensive and specific claims, have found that contribution funding has long been requested by Nations and would be more reflective of reconciliatory action than loan funding. [15]

## 9. PREVIOUS AUDITS AND EVALUATIONS

### 9.1 Has implementation of the recommendations from previous audits and evaluations had the desired results? Please give examples, both positive and negative. [Ind. 3.4.2]

Audits and evaluations repeatedly identify the same issues, such as underfunding and lack of transparency and communication. The fact that so many external reviews of the process keep identifying the same problems –

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[13] BC Specific Claims Working Group, 2018b. *"Litigation as Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal.* June 13, 2018. Available at www.ubcic.bc.ca/publications.

[14] BC Specific Claims Working Group, 2018b. *"Litigation as Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal.* June 13, 2018. Available at www.ubcic.bc.ca/publications.

[15] "The Committee heard that loan funding prevents [Nations] from negotiating on an even playing field with the federal government, especially when the process drags on for years," said the INAN report (page 24). See House of Commons Standing Committee on Indigenous and Northern Affairs. 2018. *Indigenous Land Rights: Towards Respect and Implementation.* Available at https://www.ourcommons.ca/Content/Committee/421/INAN/Reports/RP9684841/inanrp12/inanrp12-e.pdf

such as the lack of communication, transparency, or ability to address feedback – is a clear sign that the problems are larger and cannot be fixed by small administrative changes or department reorganizations or re-namings. The problems are institutional; the are a result of the conflict of interest in the current system. No matter its recent talk of reconciliation, Canada has a longstanding and well-demonstrated interest in mitigating risk and minimizing liability. Canada cannot be in a position of overseeing the process of claims against itself; a fully independent process is needed.

## 10. GENDER-BASED ANALYSIS

### 10.1 To what extent do you think that there are gender-based considerations that are or are not being accounted for in the design and delivery of the program, including its outcomes? [Ind. 3.5.1]

We have recently initiated a research project into how the lands, cultural practices, and rights of Indigenous women often went unrecognized and therefore unprotected. Looking at specific claims through the lens of gender, we see that losses affecting women have been overlooked in process of redress. More research is needed, but there is certainly a bias there that needs to be addressed. We will provide more information on our research to all parties as it progresses.

## 11. PERFORMANCE MEASUREMENT

### 11.2 How well do you think that the program is sharing its performance information with stakeholders? [Ind. 3.6.2]

See question 2.1, above.

At presentations and other communications, SCB provides updates on claims that have reached resolution, often by region. This information, however, can often be misleading, painting a picture of success but devoid of context such as processing delays. What would be more useful is a complete, searchable, publicly accessible database so that the public and the claimant community can have access to SCB performance data that is most relevant to the specific questions at hand. While SCB does offer a public facing claims status database, it is difficult to navigate and provides incomplete information. This is an issue we have raised for years.

A real assessment of SCB's performance must include ongoing accountability related to (a) the recommendations of the OAG and the Committee on Public Accounts, which were based on a thorough review that included engagement of Nations and the rest of the claims community; and (b) its progress toward an independent process.

### 11.3 How useful is the performance information about the program, for the program's stakeholders and for the program itself? [Ind. 3.6.3]

See my response to 11.2.

We consult the SCB database (the "Specific Claims Reporting Centre") regularly and often to assess the general progress of claims, track Canada's progress in addressing its missed three-year deadlines, inform Nations about the status of their claims, etc. While the data is useful, the public interface is not user friendly and does not allow us to query in useful ways, creating huge burdens as we have to download and manually navigate the data.

## 12. BEST PRACTICES

### 12.1 Can you give examples of internal best practices that have been incorporated more widely into the program? Internal means best practices coming from within the program itself. [Ind. 3.7.2]

I am not familiar with SCB's internal decision-making related to best practices or with what modes of practice have originated within the branch, but I can think of one example: at the time of Justice At Last was implemented, Canada imposed a new "Minimum Standard for Claims Submission" – a technical best practices standard that claims had to meet in order to be deemed presented to the Minister. These include directives related to document quality, transcriptions, citations, etc. From about 2011 forward, Nations and CRUs began reporting that SCB had been unreasonably applying the Minimum Standard, demanding that Nations meet rigorous rules of document production well above litigation standards, including providing transcripts of a substantial portion of historical document collections. Claims were routinely bounced for even minor document issues, creating significant delays in claims processing and, ultimately, resolution.

In our response to this, we updated our internal transcription guidelines to capture every possible reason why a document might not meet the standard as Canada was applying it. We also requested a copy of Canada's Early Review Document including transcription guidelines (we eventually obtained the document via an Access to Information request). SCB's transcription guidelines were a two-page, high-level overview that did not provide details or examples or reflect best practices in a meaningful way. These guidelines could not account for why many claims were sent back to Indigenous Nations for not meeting the Minimum Standard with respect to transcriptions or document quality.

The guide we produced in order that our claims would be deemed filed is a 31-page detailed guide with examples and clear instructions that respond to how Canada *actually* applied best practices. In this case internal best practices did not align with best practices generally or with Canada's own application of the Minimum Standard. Ironically, Nations observed that while imposing the strictest rules on First Nations research, SCB routinely produced sub-standard documents and transcriptions that contravened its own Minimum Standard. This is an example of how internal best practices approaches were used to delay and challenge claims resolution, rather than advancing it.

### 12.2 Can you give examples of external best practices that have been incorporated into the program? External means best practices coming from outside the program. [Ind. 3.7.2]

Two best practices of external origin are (a) the inclusion of oral history and (b) a greater emphasis on negotiation. It is important to note the many decades of advocacy by Indigenous Nations and organizations that precipitated these changes, even if the changes themselves were made by government bodies.

The inclusion of oral history evidence is an essential part of a more fair and just specific claims process, as the written record is biased toward settler histories and interpretations. Ongoing "best practices" learning within SCB regarding oral history is needed and should be part of a broader dialogue regarding evidence and the integration of Indigenous knowledge and laws. A Standing Senate Committee in 2006 noted that Indigenous Affairs researchers lacked the knowledge and experience to work with oral history evidence.[16] Learning about oral histories is ongoing, as case law changes and perspectives are changing on the role of Indigenous laws in

[16] St. Germain, G. and N. Sibbeston. 2006. *Negotiation or Confrontation: It's Canada's Choice. Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process*. December 2006. Page 16. Available at https://sencanada.ca/Content/SEN/Committee/391/abor/rep/rep05dec06-e.pdf

claims processes – research and dialogue is needed. However, the basic fact of the inclusion of oral histories is a "best practices" advancement.

The current government's emphasis on negotiation – on reaching resolution via dialogue – is a welcome improvement over previous practices (such as the one-time "take it or leave it" offers on "small-value" claims). From what I hear or see regarding negotiation practices, Canada's conduct has improved and there is a greater emphasis on dialogue and reaching shared understanding (though issues of underfunding and unilateral program changes continue to arise).

### 12.3 How well do you think the program is identifying and sharing best practices? Consider both internal and external best practices. [Ind. 3.7.1]

Through what process does SCB identify and share best practices? Though I am involved in several review processes, I do not know of a specific, regularized mechanism through which SCB identifies best practices or makes decisions about which of these practices to integrate into its programs. We are not even sure how (or if) SCB integrates SCT decisions or changes in law into its programs in consistent and ongoing ways. This speaks to the lack of transparency in the program itself.

In terms of the CIRNAC's ability to integrate feedback or address concerns regarding its practices, it is important to recall that the 2016 OAG report stated, as part of its "overall message," that "the Department was aware of First Nations' concerns about these barriers [to access of the program], but was unable to demonstrate that it had a formal process to gather, monitor, and respond to information and feedback about these concerns [of Indigenous Nations] and make required improvements."[17] This has not changed.

Structures of dialogue and engagement are lacking; so, too, are transparent processes for program reform and integration of changing ideas of "best practices." The JTWG, intended to oversee the government's response to the OAG report, has often encountered barriers to information access, as Canada has refused to share certain critical information, such as about claims funding.

Canada's conduct and practices are, in general, the effect of larger structural issues in specific claims. Even beneficial changes can be reverted at any moment, without consultation or communication with Nations. Thus, the issue of "best practices" must be considered in relation to the bigger issue, which is the lack of independence in the process.

## EFFECTIVENESS

### 13. ACHIEVEMENT OF OUTCOMES

### 13.1 To what extent do you think that the program has contributed to "Justice for Claimants"? What are the criteria that determine your response to this question of Justice? [Ind. 4.2.1.3]

Any answer to this question must first address regional variation and the definition of what constitutes "justice."

The unique history of colonization in BC has created a reserve geography that has resulted in many specific claims. Regularly 40 to 50 percent of claims arise from BC, so biases and inefficiencies in the system affect BC

[17] Office of the Auditor General, 2016. *Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*. Fall 2016. Available at https://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html

Nations disproportionally. BC claims constitute approximately half of all claims where Canada has found "no lawful obligation."[18] Claimants in BC were hit particularly hard by the policy changes in the "Justice At Last" era, such as cuts to funding, high claim rejection rate, unilateral claim file closure without any resolution, and the creation of a deeply unfair processes for so-called "small-value" claims. During this time, a high proportion of claims ended up at the SCT (and, subsequently, many were sent from the SCT for judicial review). (In the end, SCT decisions have been largely in favour of Nations, indicating that the rejections were out of step with law.) The specific claims process has historically been systematically ineffective for BC Nations, who are given inadequate opportunity to negotiate their claims through fair and equal processes.

Any successes that Canada has made in offering cash settlements must be understood within a recontextualized notion of "justice." Each Nation has its own perspectives and laws on what would constitute full or fair redress for the losses it suffered. Many, however, would disagree with the idea that a one-time cash settlement – seen as an end to the issue by Canada, rather than the beginning of an improved and ongoing relationship – constitutes a "just" result. (For a helpful summary regarding Indigenous Nations' views on loss and remedies, see Ardith Walkem's video introduction to the concept of "Our Laws Arise from the Land."[19]) Indigenous Nations need to be able to define what constitutes justice relative to the specific losses suffered. In short, there is a major "justice" deficit in BC that recent changes and efforts have failed to address.

### 13.2 To what extent do you think that the program has provided Certainty? For government? For industry? For all Canadians? What are the criteria that determine your response to this question of Certainty? [Ind. 4.2.2.1]

Indigenous Nations, their representative organizations, and the rest of the claimant community reject outright the language of certainty. The idea of "certainty" reflects a desire for one-time fixes – a desire to check a box and move on. It is based on the idea that Canada will offer cash settlements and then the problem will be solved and dealt with, the slate wiped clear for new developments and initiatives. It is reminiscent of the single-minded drive to "clear the backlog" at any cost – including addressing some claims via a narrow, fast-tracked, and exclusionary "small-value claims" process. From an Indigenous legal perspective, the purpose of a process is repairing a broken relationship – a relationship that will then be maintained into the future and renewed on an ongoing basis.[20] The point is not, then, to "close the deal" and move on.

The priority must be achieving justice, not certainty. Certainty is not a relevant metric for specific claims. Nations with specific claims have been at the whim of governments for generations – facing uncertainty, for example, about whether they will have a proper village site for their community or whether they will ever be paid for the timber that the federal government illegally cut from their lands and sold … and then facing uncertainty about when or if the process for redress will ever address their claims. To ask for "certainty" now is to ignore the complex relationships that have evolved over hundreds of years, based on a drastic imbalance of power – relationships the Prime Minister describes as being the most important to him and to Canada.[21] Further, new

[18] It is important to note: we cannot give conclusive information about closed and rejected claims because SCB has refused to share data on these subjects, despite regular promises and our repeated requests.
[19] Walkem, A. 2019. Video Introduction: "Our Laws Arise from the Land." Available at https://www.ourlawsarisefromtheland.org/discussion-paper
[20] For more information on the approach to resolution and redress within Indigenous legal traditions, please see www.ourlawsarisefromtheland.org.
[21] "No relationship is more important to Canada than the relationship with Indigenous Peoples, Trudeau regularly states. See, for example, this statement on National Aboriginal Day: https://pm.gc.ca/en/news/statements/2017/06/21/statement-prime-minister-canada-national-aboriginal-day

specific claims continue to arise as (a) historical breaches are newly uncovered; and (b) Canada is repeatedly creating new breaches of its fiduciary obligations to protect the lands and assets of Indigenous Nations and to respect the terms of treaties. Indigenous Nations face a great deal of uncertainty about the protection of their rights; as such, the landscape of specific claims, going forward, remains uncertain.

### 13.3 To what extent do you think the program has contributed to advancing the work of reconciliation between governments and First Nations? What are the criteria that determine your response to this question on reconciliation? [Ind. 4.3.2.2]

See my answer to question 2.6, above. The government's public language around reconciliation has not been matched by the kind of action and transformative change that would begin to re-build Crown-Indigenous relations. Specific claims processes are still plagued by lack of communication and dialogue with the rightsholders (see my response to question 2.1) – Indigenous Nations are repeatedly excluded from decisions-making processes in which they should be full partners. A real step toward repairing the relationship would be to create a fully independent process – one in which decisions are made jointly and the process is overseen by an independent body, rather than one of the parties. Individual wrongs can then be addressed within a fair framework as a starting point for reconciliation.

## EFFICIENCY AND ECONOMY: RESOURCE UTILIZATION IN RELATION TO OUTPUTS AND PROGRESS

### 14. EFFICIENCY AND ECONOMY

### 14.1 Overall, do you think that the program has been well managed. Do you think that it has provided good value-for-money? [Ind. 5.1.2]

No, the specific claims process has not been well-managed. Please see, for example, my comments on poor communication practices and lack of transparency (question 2.1); the failure to meet the three-year deadline (question 4.1); and delays, inconsistency, and problematic messaging re: SCB efforts during COVID (question 2.1). With respect to "value for money," information on Canada's internal allocations in specific claims not publicly available; we do not know, for example, how much Canada spends on legal counsel at the SCT. As such, I would not be able to offer an assessment of Canada's spending.

Overall, however, Canada's concern with value for money actually contributes to systematic bias and imbalance in the system. It creates the idea that specific claims funding is discretionary, when in fact the process arises as a result of Canada's failure to uphold its lawful obligations. Further, this concern with value for money has led to underfunding of Nations' participation at the SCT (meaning that Nations have had to use their own resources, a contravention of UNDRIP Article 39); it has led Canada to exclude "small-value" claims from fair negotiation practices (though this small-value claims process no longer exists, its negative effects on claim resolution and Crown-Indigenous relations have yet to be addressed); it has led Canada, in recent negotiation (loan) funding guidelines to limit Nations' access to expert reports. These provisions of the guidelines were so concerning that the BCSCWG commissioned a legal review which found that the guidelines created:

- Barriers to commissioning expert reports: The guidelines state that all expert reports must be carried out jointly between an Indigenous Nation claimant and Canada, except in rare circumstances. There is

no rationale for this requirement and will likely add significant delay to resolution, and create undue pressure on a Indigenous Nation to accept Canada's experts who may apply principles that undermine a Nation's negotiating position. There are no guidelines regarding how or under what circumstances Indigenous Nations can commission their own expert reports, leaving a great deal of uncertainty as to whether Nations will be able to commission these reports at all. Further, there is no justification given for the limit on funding for Indigenous Nations' commission of expert reports. This limit thus seems arbitrarily imposed, but it could affect the capacity of Nations to commission reports or influence them to retain underqualified experts. While some Nations may see benefits in undertaking joint studies with Canada, the requirement stating that all Nations must do so sacrifices flexibility and fairness for Indigenous Nations in favour of a rigid approach that benefits Canada. Such a change should have been discussed thoroughly and explicitly with Nations and their representatives.

- Limits on overall negotiation costs based on the value of the claim: Canada states that loan funding cannot exceed the amount of settlement for the claim. Canada provides no justification for this guideline, which will increase uncertainty about how much funding is available to negotiate a claim. Canada often drastically undervalues claims; valuations often reveal that a claim is worth 5-10 times the amount of the settlement for the claim. The effect is that Nations may be underfunded on valid (small) claims. Further, a Nation might choose to settle a small claim for a lower amount than it might have otherwise negotiated, fearing negotiation cost overruns. (The guidelines caution that "First Nations with low-value claims should be cautious about the total size of negotiation loans incurred.")
- Communication issues: It appears that these new guidelines are being applied to claimant Nations on a case-by-case basis. We are not aware that Canada has made any announcements; nor has it made any changes to the policy documents on the Specific Claims website. This ad hoc, unilateral approach is indicative of ongoing problems related to transparency and communications.

The fact that "value-for-money" is a metric in Canada's consideration of the success and management of the program is yet another indicator that an independent process is needed. How can the process be focused on justice and the creation of right relations when one of the parties is focused on costs – and this party oversees the process? When an independent body is created, it must also include an independent funding mechanism, one that can make fair and transparent decisions about resource allocation.

### 14.2 To what extent has each of the following factors facilitated or hindered the program's achievement of outcomes:

- legal counsel from DOJ [Ind. 5.2.1.1]
- the capacity and work of the Tribunal [Ind. 5.2.1.2]
- the expertise and capacity of CIRNAC [Ind. 5.2.1.3]
- the staffing of the Specific Claims Branch [Ind. 5.2.1.4]
- procurement of services to support the claims process [Ind. 5.2.1.5]
- amounts, sustainability and predictability of funding [Ind. 5.2.1.6]

**Legal Counsel from DOJ**: Legal counsel from DOJ have hindered the achievement of outcomes. There is no transparency – Nations and organizations are given no information on the relationship between DOJ advice and SCB decisions.

Further, DOJ's approach to litigation is actively adversarial. A file I received via ATIP in 2018 demonstrated that DOJ lawyers were being actively coached in being condescending in their responses to claimants' arguments

regarding just compensation.[22] The advice was given as "tips on how to appear as a compensation expert." Here is one example of such a "tip": "When an opposing counsel mentions 'most advantageous use,' give a knowing smile and comment, 'Well, now, that characterization is not completely accurate, is it?'" This is a clear example of a biased, adversarial, and condescending approach in claims proceedings.

In our 2018 report on Canada's conduct at the SCT (*"Litigation as Usual?"*), we shared the findings that legal counsel for Canada continued to deploy adversarial tactics and arguments at the Tribunal, an approach that undermined the reconciliatory aims of this body and the claims program overall.[23] Further research is needed to determine whether the approaches of DOJ lawyers have changed under the present government (respondents to our surveys had mostly been involved in SCT proceedings that predated the change of government).

**The capacity and work of the Tribunal**: The Specific Claims Tribunal has been an essential body in the fair adjudication of specific claims. It has applied a reconciliation-focused lens in its decisions, deploying a broader understanding of the meaning and impacts of the historical wrongs Nations have faced, rather than using a narrow emphasis on cash and the economics of loss. The SCT has been hindered in its effectiveness by a lack of capacity (in his 2018–2019 annual report, SCT Chair Justice Harry Slade wrote that "inadequate funding continues to impair First Nations' access to the Tribunal both before and after Claims are filed.")[24]

Further, there is a $150 million cap on the settlement values that the Tribunal may award to claimant Nations. If legal principles are applied, many claims should in fact result settlements over this amount. In the current process, claims over $150 million must go to Cabinet to be approved (in a closed-door process in which there is no transparency or dialogue). As a principle of justice, no claim should be too large (or too small) in value to be fairly resolved in an open and transparent way.

**The expertise and capacity of CIRNAC**: CIRNAC representatives commonly acknowledge a lack of capacity and resources as a limiting factor on the functionality of the process. For instance the BCSCWG reported in its 2019 report *Back to the Backlog*, Canada repeatedly told Nations (in public events and in communications to claimants) that it lacks resources and capacity to conduct assessments in line with its legislated responsibilities.[25]

**The staffing of the Specific Claims Branch:** I have been involved with specific claims for almost twenty years and during this time I have seen a two-fold problem: long-term retention of staff exhibiting adversarial rather than reconciliatory approaches to claims resolution, contributing to some of the problems identified by Nations and the OAG; and a high turnover of staff with new ideas or approaches. High-ranking staff responsible for implementing approaches that are now acknowledged as unjust and deeply problematic (such as operational approaches to addressing the backlog) were kept on in high-level decision-making roles even after these

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[22] Indigenous and Northern Affairs Canada. 2018. "DOJ General Compensation Principles Paper." Accessed via ATIP. File number A-2017-01734.

[23] BC Specific Claims Working Group, 2018b. *"Litigation as Usual"? Reforming Canada's Conduct at the Specific Claims Tribunal.* June 13, 2018. Available at www.ubcic.bc.ca/publications.

[24] Specific Claims Tribunal Canada, 2019. *2018–2019 Annual Report.* September 24, 2019. Page 5. Available at https://www.sct-trp.ca/pdf/ST223-SCT_AR_2019_Eng_Sept_24.pdf. The report also identifies several ongoing challenges that have their origins in processes outside Tribunal control, such as the government process for mandating negotiators.

[25] BC Specific Claims Working Group. 2019. *Back to the Backlog: Canada's Inaction on Late Specific Claims Assessment.* May 2, 2019. Available at www.ubcic.bc.cap/publications.

approaches were identified (by the OAG and in Tribunal decisions[26]) as undermining the reconciliatory goals of Justice At Last.

The effectiveness of the specific claims process is strongly determined by how staff at SCB decide internally (and typically with no involvement of Indigenous Nations) to implement specific claims policies, as much as the policies themselves. It is my experience that an adversarial approach to administering the program has spillover effects and Nations and organizations have difficulty finding allies within SCB – or when productive working relationships are built, staff on the SCB side often have short tenures in the branch and then move on.

**Procurement of services to support the claims process:** I have no idea because that process is not open or public.

**Amounts, stability, and predictability of funding**: Lack of adequate, secure, predictable funding is an issue that cuts across many aspects of the specific claims process; see my responses to questions 2.5, 8.2, 8.3, 9.1, 13.1, 14.1, and 14.2. Recent announcements that research units and Nations can now access multi-year funding and exercise greater flexibility in the allocation of these funds are welcome but again this is at the whim of the current government. Further, BCSCWG research and AFN engagement sessions have found that Nations are concerned about an imbalance in resources – Nations have explained that they have limited access to funds to advance claims whereas Canada has (what often appears to be) unlimited funds to fight them. As such, equity and fairness of funding needs to be a key consideration.

### 14.3 Can you provide examples where changes and improvements have been made to the program that have improved its efficiency and economy? [Ind. 5.2.2]

In recent years, the government has made three main changes that will improve the economy and efficiency of the program overall.

First, this current government restored research funding to levels that existed prior to significant cuts in 2013–2014 and offered further support (though has not committed to continuing beyond its five-year commitment, and[27] has indicated that funding restoration must be justified by higher claim submission rates, the "value for money" principle at work instead of ensuring access to justice). Well-supported research and claim development has positive effects on the efficiency and economy of the entire process, as the fact pattern is clearer, the legal arguments are deeply grounded in the historical record, and community involvement is better supported.

A second change is that Canada has begun to offer upfront funding for negotiation as well as pre-negotiation support. This is a clear improvement as it enables Nations to participate more fully and effectively as negotiations begin. (It is important to note, however, that Canada did not communicate these changes to Nations. As well, this funding is still loan funding, despite Nations' ongoing and repeated calls for it to be turned into contribution funding.)

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[26] In his procedural decision on Canada's application to have Aundeck Omni Kaning's claim removed from the Tribunal's jurisdiction, Justice Patrick Smith observed Canada's position on negotiating small value claims is "frankly, paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of "good faith" required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court, in many decisions, has described as being the foundation of Canada's relationship with First Nations" AOK v Canada, 2014, SCT-3001-12

[27] SCB Presentation to 2019 National Annual Research Directors Meeting, May 2019, Ottawa

A third positive change is the 2020 reinstatement of the CRU-NSD Funding Services Working Group, a body of claims practitioners and government representatives that can facilitate dialogue on important issues related to claims funding and ensure that procedures for funding research reflect the real, non-linear, and complex nature of the work.

# WRAP-UP

## 15. ADDITIONAL SUCCESSES, CHALLENGES, AND LESSONS LEARNED

### 15.1 In addition to factors you have already mentioned, are there any notable successes or things that have worked well for the program that you would like to highlight? [Ind. 6.1.2]

I have identified throughout this document several initiatives from SCB and CIRNAC that have resulted in benefits for the overall effectiveness of the program (e.g. Canada's increased willingness to negotiate and the reinstatement of the working group on research funding). It is important to note, however, that these changes are at the discretion of the current government and communicated to Nations on an ad hoc and limited basis. There is no guarantee that a future government will retain these changes; there is no structure or effective communication mechanism through which Nations are made partners in decision-making. A more fair, just, and independent process needs to be created and protected in legislation.

### 15.2 In addition to factors you have already mentioned, are there any notable challenges or things that have not worked well for the program that you would like to highlight? [Ind. 6.2.2]

Overall, the net effect of the process has been a further degradation of Crown-Indigenous relations. It is important to understand not only the administrative issues and management-related problems, but the effects of these problems on claimant communities – and the persistence of these negative effects over time, historically. The problem is cyclical: poor relations build distrust, which then harms the effectiveness of negotiations and the process as a whole. In a 2017 submission to the BC AFN engagement process, the BCSCWG wrote the following:

> To say that BC Indigenous Nations are "frustrated" or "disappointed" with the specific claims process would be to underrepresent the challenges of these Nations, who face the ongoing effects of grievous historical losses in their territories and have fought for years for redress within a discriminatory process in which they face marginalization and obstruction at every turn. The process is so systematically ineffective that many communities believe its true purpose is to thwart rather than advance claims resolution. As one chief recently said of his Nation's participation in specific claims, "I feel like we're dancing on the graves of our ancestors." [28]

It is important to seek out feedback that Nations have given regarding their experiences with the claims process and the effect of these experiences over time. As I suggest in section 16.3, speaking with Indigenous Nations and their representative organizations directly is best. Other reports on engagement processes will also be useful, as these include quotes from Nations – see, for example, the AFN "What We Heard" document from the 2019 AFN engagement sessions, the 2017 BCSCWG submission to the AFN engagement session *("On A Human Rights*

[28] BC Specific Claims Working Group. 2017. "On a Human Rights Foundation: Creating a Nation-to-Nation, Rights-Based Approach for Addressing Indigenous Nations' Historical Losses. BC Specific Claims Working Group Submission to the AFN-INAC Joint Technical Working Group on Specific Claims. July 24, 2017. Available at www.ubcic.bc.ca/publications

*Foundation"*), and the INAN final report on its 2018 study on Indigenous Land Rights. Full citations of these studies are available in the bibliography.

Again, it is important to note that real assessment of SCB's performance would be ongoing accountability related to (a) the recommendations of the OAG and the Committee on Public Accounts, which were based on a thorough review that included engagement of Nations and the rest of the claims community; and (b) its progress toward an independent process.

## 16. YOUR EXPECTATIONS AND ADVICE

### 16.1 What are your expectations of this evaluation of the Specific Claims Assessment and Settlement Process?

I have participated in numerous previous evaluations of specific claims processes like this one (as well as in several other reviews, including the OAG audit and the 2018 INAN study). My experience has shown me that these reviews tend to identify the same problems, over and over again, such as the lack of communication and transparency by federal agencies and a failure to involve the rightsholders in decision-making processes critical to the effectiveness and fairness of the program. Members within review processes then learn about the problems that Indigenous Nations have identified for decades. The real issue is that these problems have a shared root: the lack of a fair and independent process. It is my hope that this current review will connect the management, operation, and smaller decisions around policy and process with the systemic problems that exist within specific claims processes overall.

### 16.2 Are there any areas, topics or cases you think we need to make sure we focus on?

I would recommend that you look into the case of the Nlaka'pamux pilot study on bundling/grouping claims for faster and fairer resolution. This initiative sought to find a new way to address the many egregious harms caused by developments in the Nlaka'pamux reserve lands in the Fraser Canyon. I cannot provide much detail as I was not directly involved. In general, however, the pilot was intended to explore how claims that rose from a shared pattern of events could be grouped and resolved more efficiently, fairly, and effectively. It could have provided a model for other groups of claims with shared histories. Canada, however, backed away from this pilot without explanation for several years. In January 2020, after the pilot project was discussed publicly at "Our Gathering", in Vancouver, SCB agreed to fund the project.

### 16.3 Are there others you feel we should speak to?

I understand that the study has had some trouble connecting with the research directors at Claims Research Units. I would recommend that the evaluators redouble their efforts and try to connect with CRUs. It might be important to try to connect by phone; some CRUs received the evaluation emails out of the blue and were unfamiliar with the process and unsure of what would be required.

You could also speak to specific Indigenous Nations who are actively engaged in specific claims processes, including Sumas First Nation, Penticton Indian Band, T'it'q'et First Nation, Neskonlith Indian Band, and Snuneymuxw First Nation. It is essential that the rightsholders be involved in the evaluation of specific claims policies and processes.

Finally, you could speak to the co-chairs of the BC Specific Claims Working Group, Kukpi7 Judy Wilson and Chief Dalton Silver, as well as the BC Representative to the AFN'S Chiefs Committee on Lands, Territories and Resources, Chief Mark Point.

### 16.4 Do you have any relevant documentation and data that you feel we should look at?

Please see the reports that are referenced (with links) within this report; we have cited several documents and reports from the BCSCWG, the NCRD, and others. I recommend that you review these reports. I also recommend that you review the Public Accounts Committee Report that tracked Canada's progress on the 2016 OAG report.[29] We have also provided a detailed bibliography and have attached or provided links to relevant reports and documents.

As well, please speak to the AFN about accessing their "What We Heard" document on the 2019 engagement sessions regarding an independent process; this lengthy document describes in detail the priority and concerns of Indigenous Nations. It also describes the numerous reform initiatives that have occurred prior to the current JTWG review; some familiarity with these processes and their main conclusions is essential context for understanding (a) the need for reform and (b) the fact that this need for reform to address the underlying inequity and systemic conflict of interest has been repeatedly and publicly acknowledged by Indigenous Nations and independent reviewers/observers over many decades.

### 16.5 Do you have any final observations or comments that you would like to make?

I would like to request that there be a "peer review" process when the report is first drafted – a time when people who have been interviewed for or made contributions to the study can review the report and provide comments. As well, I would like to invite the evaluation committee to present its findings to the National Claims Research Directors at a workshop or Zoom meeting, so that NCRD members can be informed about changes that are being made or recommended in relation to specific claims processes. I would be happy to set up this opportunity.

[29] House of Commons Standing Committeee on Public Accounts. 2017. *Report 23: Report 6, First Nations Specific Claims, of the Fall 206 Reports of the Auditor General of Canada.* Available at https://www.ourcommons.ca/DocumentViewer/en/42-1/PACP/report-23/page-18

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