AFN – Specific Claims Reform Proposal

Independent Centre for the Resolution of Specific Claims (ICRSC)

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This Reform Proposal prepared by the Assembly of First Nations calls for the creation of the Independent Centre for the Resolution of Specific Claims (ICRSC). The ICRSC incorporates the adjudicative function of the existing Specific Claims Tribunal into a new, fully independent body established to resolve specific claims, Canada's outstanding lawful obligations to First Nations. The ICRSC will also house: The Commission, which will provide First Nations with a venue for facilitated negotiations; a Resource Hub, which will support First Nations in the development of their claims; a Funding Division, which will provide First Nations with financial resources to resolve their claims; and, a Registrar, which will manage the ICRSC's operations. The combined functions of the ICRSC will provide First Nations with a fair, independent, flexible, and efficient process to resolve their claims. The ICRSC will be based on the overarching principle that all claims should have equal access to a fair process of redress that fits the needs and priorities of the First Nation claimant. It will be fully independent, uphold the Honour of the Crown, reflect legal pluralism via the integration of Indigenous laws, and be free from arbitrary limits on financial compensation.

1.0 Executive Summary

The resolution of Canada's outstanding lawful obligations to First Nations requires a specific claims process that is independent, fair, open, transparent, and in compliance with domestic and international law. The existing specific claims process suffers from several flaws. Canada is in a position of conflict because it is the defendant to claims, determines the level and method of funding First Nations participation, reserves for itself a preliminary review of its legal obligations, and makes the final decision whether and what will be negotiated. Additionally, the existing specific claims process is slow, inflexible, and burdened by arbitrary limits on financial mandates. Finally, the specific claims process is unable to provide restitution to First Nations through the return of lands, territories, and resources. First Nations have long demanded that the specific claims process be reformed to eliminate Canada's conflict and address these issues. First Nations have also called for the process to recognize and respect Indigenous laws.

In 2016, Canada committed to working jointly with the Assembly of First Nations (AFN) to reform the specific claims process. In the same year, the Joint Technical Working Group (JTWG) was created to facilitate this reform process.[1] In 2018, Crown Indigenous Relations and Northern Affairs Canada (CIRNAC) received a mandate to explore what a fully independent specific claims process would look like. The AFN carried out engagement sessions with First Nations in all regions in 2019 to receive input on the reform of the specific claims process. The AFN drafted this reform proposal based on submissions received during the engagement sessions.

This reform proposal calls for the creation of the Independent Centre for the Resolution of Specific Claims (ICRSC or "the Centre"). The ICRSC will support and manage the specific claims process from claim preparation through to claim resolution. The ICRSC will be an independent body that combines the adjudicative function of the existing Tribunal with four other core

[1] The JTWG was created in 2016 as Canada sought to respond to the recommendations in the report of the Office of the Auditor General (*Report 6—First Nations Specific Claims—Indigenous and Northern Affairs Canada*; available at http://www.oag-bvg.gc.ca/internet/English/parl_oag_201611_06_e_41835.html). The JTWG is composed of representatives from Canada and the AFN, along with technical representatives from other organizations.

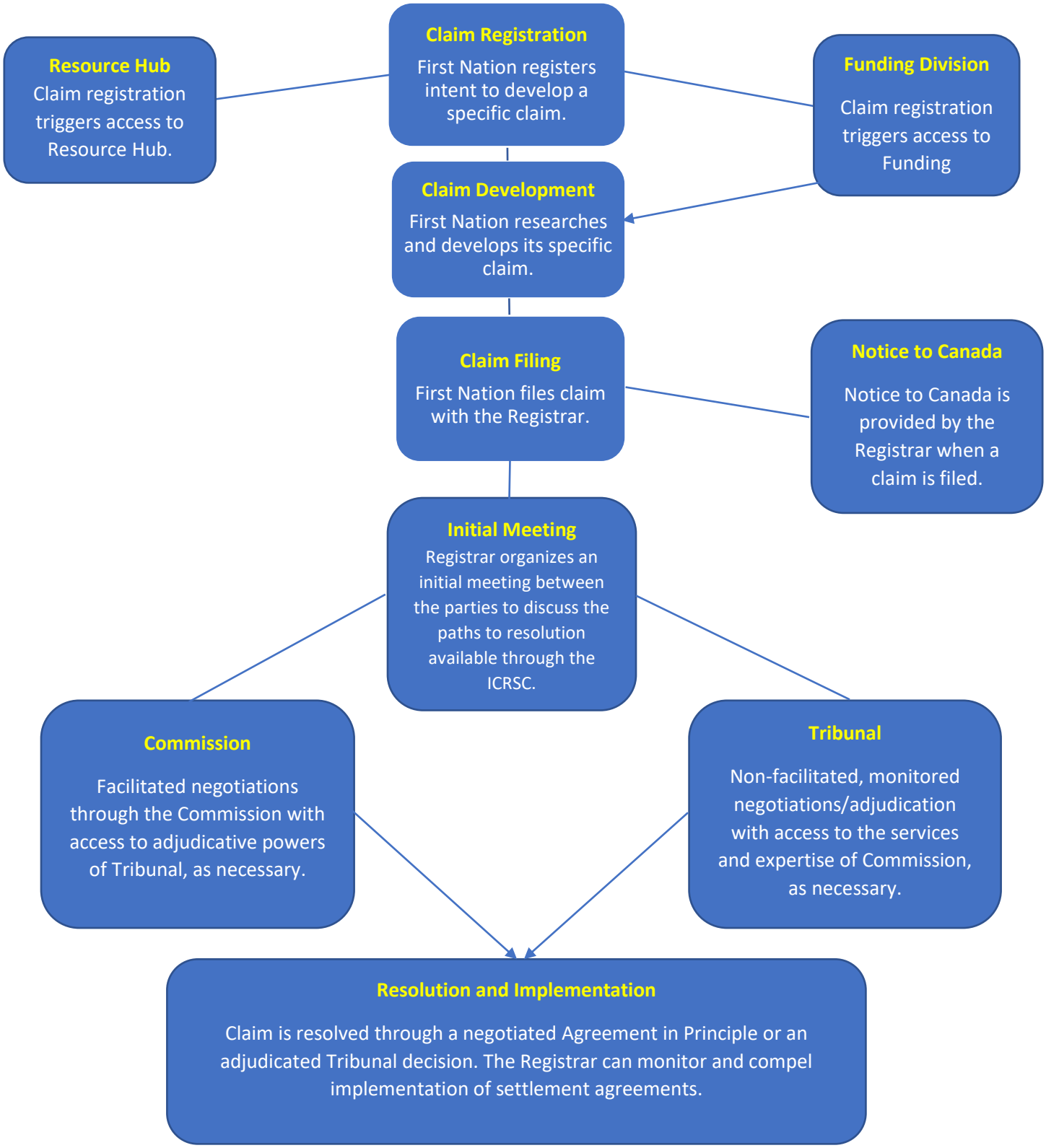
functions: the Registrar, the Funding Division, the Resource Hub, and the Commission. The Registrar will provide administrative infrastructure and manage specific claims. The Funding Division will administer funding to participating First Nations. The Resource Hub will store research materials and provide support to First Nations researchers. The Commission will facilitate the resolution of specific claims through negotiated settlements. Finally, the Tribunal will continue to play an adjudicative role throughout the ICRSC's resolution process.

The existing Tribunal and a newly established Commission will both operate under the ICRSC which will enable resolution of First Nations claims through facilitated negotiations and/or adjudication of all or parts of their claims. To this end, the Commission will provide First Nations with a venue for *facilitated* negotiations if they so choose. The Tribunal will continue to be an adjudicative body but will have expanded powers: parties at the Commission will be able to refer issues of fact and/or law to the Tribunal. Additionally, the Commission may prompt intervention by the Tribunal to impose penalties on parties for bad faith or uncooperative behaviour. The combined functions of the Tribunal and Commission will provide First Nations with a fair, flexible, and efficient process to resolve their claims. The Tribunal and Commission will operate in a complementary and mutually reinforcing manner.

A fundamental feature of the ICRSC will be the recognition of and respect for Indigenous laws. The ICRSC will support the recognition of the laws, legal orders, and dispute resolution mechanisms as articulated by participating First Nations. The recognition of Indigenous laws may impact the conduct of adjudication, dispute resolution, mediation, and negotiation. Through all of its core functions, the ICRSC will provide due recognition and respect to the Indigenous laws of participating First Nations. In doing so, the ICRSC will respect the diversity of laws and legal traditions that First Nations may choose to rely on. The ICRSC will be free from arbitrary limits on financial compensation. This means that there will be no financial limit on the jurisdiction of the Tribunal or the Commission. By recognizing Indigenous laws and eliminating arbitrary limits on compensation, the ICRSC will give First Nations access to a fair process of redress that fits their needs and priorities.

A system of governance will be established to ensure that the core functions of the ICRSC work in an efficient and complementary manner. The Advisory Committee on the Application of Indigenous Laws will assist the ICRSC with the application of the laws and protocols of participating First Nations. An Oversight Committee will be established to monitor the ICRSC's annual reporting on its core functions. Together, these mechanisms will facilitate the swift and just resolution of outstanding specific claims through the new, independent specific claims process.

2.0 The ICRSC Graphical Overview



3.0 Background

Specific claims are claims made by First Nations against Canada in relation to the non-fulfilment of a historic treaty, the mismanagement of First Nations land or assets, or the Crown's failure to fulfil its lawful obligations to First Nations. The specific claims process constitutes the central redress mechanism for resolving Canada's outstanding lawful obligations to First Nations. Since the 1940s, First Nations have advocated for a fair and fully independent specific claims process. During this time, Canada has maintained exclusive authority to assess whether it has breached a lawful obligation, to formulate policies that direct the funding of specific claims for development, and to determine whether claims will be negotiated.

To uphold the Honour of the Crown[2], Canada must ensure that it is not in a position of conflict. Currently, the Minister is responsible not only for the review of specific claims, but also for formulating the policy and process related to the development of specific claims and the conduct of their negotiation. These dual roles create a conflict of interest that directly impact the ability of First Nations to obtain justice and resolve their outstanding historical grievances. This has resulted in hundreds of specific claims remaining unresolved, rising costs, and further erosion of the relationship between the Crown and First Nations. This conflict of interest must be eliminated. While the Tribunal is an independent element of this process, it addresses only one element of independence: adjudication. Independent adjudication, however, does not ensure independence throughout the rest of the process, or for claims that are beyond the jurisdiction of the Tribunal.[3]

Canada must ensure that the specific claims process is consistent with the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). In particular, the specific claims process must be consistent with articles 18 and 26-28 of UNDRIP.

Article 8(2)(b) of UNDRIP provides that:

> States shall provide effective mechanisms for prevention of, and redress for:
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

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* This reform effort is expressly being undertaken *without prejudice* to First Nations currently involved in the existing specific claims process, including active negotiations and claims before the Specific Claims Tribunal.

[2] According to the Supreme Court of Canada, "[I]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 16 - 18. The Honour of the Crown dictates how obligations that attract it must be fulfilled including fiduciary obligations, treaty making, treaty interpretation and treaty and statutory obligations (*Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14 at paras. 36, 73. Such treaty and statutory obligations are the domain of the *Specific Claims Policy and Specific Claims Tribunal Act*, S.C.2008, c. 22.

[3] Moreover, some would argue that the Tribunal is not fully independent owing to federal control of funding and the registry's governance structure being controlled by the *Administrative Tribunal Support Services Canada Act*.

Article 18 of UNDRIP states that:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 of UNDRIP provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 26 of UNDRIP provides that:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 of UNDRIP states that Canada:

> shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[4]

Article 28 of UNDRIP provides that

> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

[4] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: Resolution, Adopted by the General Assembly, 2 October 2007, A/RES/61/295 at Article 27.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

The *United Nations Declaration on the Rights of Indigenous Peoples Act* obliges Canada to take all measures necessary to ensure that its laws and policies are consistent with UNDRIP.[5] In order to meet its obligations under domestic and international law, Canada must adopt a new approach to specific claims. This approach must eliminate Canada's conflict of interest throughout all aspects of claim resolution. Moreover, Canada must ensure that Indigenous laws, traditions, customs, and land tenure systems are given due recognition throughout the specific claims process. Failure to undertake this reform may lead to continued erosion of trust in the specific claims process.

3.1 Context for Reform

The current specific claims process is slow, inflexible, and characterized by a growing backlog of claims. As of March 22nd, 2022[6], there are:

- 162 claims "under assessment"
- 394 claims "in negotiations"
- 396 claims where "no lawful obligation [has been] found"
- 55 claims "in active litigation"
- 68 claims "active at the Specific Claims Tribunal" and
- 309 "file closed."[7]

In addition, large numbers of claims are currently being researched or are under development. More claims have yet to be identified.[8] It is against this growing volume of unresolved specific claims that the Joint Technical Working Group continues its work to transform the approach to settling specific claims.

Under the current process, the Tribunal is only available to First Nations who accept its restricted financial jurisdiction. First Nations have consistently pointed out that the $150 million limit on

[5] House of Commons of Canada, Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (2020).

[6] https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx as of March 1st, 2021. This figure is derived from data provided in the Specific Claims Branch's Online Reporting Centre, a public facing database that lists the status of claims submitted claims. It does not include the hundreds of claims that are currently being researched and developed. Currently public reporting for claims in development does not occur. Nor does it reflect the complexity of claims negotiations or accurately characterize the unresolved nature of claims whose files are administratively "closed".

[7] Large volumes of specific claims have been unilaterally rejected or "closed" by Canada. These claims remain unresolved.

[8] The number of these claims are not currently publicly tracked.

financial compensation through the Tribunal is an arbitrary barrier to justice. Furthermore, First Nations consistently report that funding and resources to pursue specific claims are insufficient.[9] Canada, on the other hand, has significant resources at its disposal to defend itself against specific claims.

The *Specific Claims Tribunal Act* was unilaterally amended in 2014 by Canada and subsumed into an administrative structure called the Administrative Tribunals Support Service of Canada (ATSSC). As a result, the Specific Claims Tribunal lost its dedicated registry and the ability to manage its own administrative affairs. Full independence requires the return of the Tribunal's dedicated registry, the return of Tribunal control over its administrative operations, and the removal of the Tribunal's administrative offices from a federal government department.

4.0 Process for Developing this Reform Proposal

Sparked by the legislated five-year review of the *Specific Claims Tribunal Act* and the 2016 report of the Office of the Auditor General, Canada committed to work jointly with the AFN and First Nations to substantively reform the specific claims process and policy. First Nations seek transformative change and a departure from the incremental efforts of the past. There exists a fundamental need for a truly independent process to address what First Nations have consistently identified as Canada's conflict of interest.[10]

To direct this work, the Chiefs-in-Assembly passed AFN Resolution 91-2017, *Support for a Fully Independent Specific Claims Process*, calling on Canada to work in equal partnership with the AFN and First Nations to develop a fully independent process with "the goal of achieving the just resolution of Canada's outstanding lawful obligations through good faith negotiations."[11] The Specific Claims Branch (SCB) committed to work with the AFN to explore what a fully independent specific claims process might look like and supported a First Nations led dialogue process

Acting upon the direction provided by the Chiefs-in-Assembly, the AFN, in coordination with its technical representatives on the JTWG carried out a national dialogue with First Nations. The AFN heard from First Nations on what a fully independent specific claims process should look like and developed this draft proposal.

The AFN hosted nine Regional Engagement Sessions, facilitating dialogue with First Nations about the creation of an independent specific claims process.[12] In addition, the JTWG received 14

[9] Insufficient funding may lead to specific claims being abandoned or delayed. Moreover, the claimant may need to accrue debt to pursue their claim. Overall, insufficient funding prevents access to justice.

[10] This was articulated at two AFN-led engagement sessions in 2017 convened to discuss the findings and recommendations of the Office of the Auditor General. See also, 2019 Specific Claims Reform, "Historical Review of Past Calls for an Independent Specific Claims Process" (2019).

[11] Assembly of First Nations, "Resolution 91-2017", available at https://www.afn.ca/resolutions/.

[12] For a complete summary of these sessions see: *Specific Claims Reform: A New Independent Specific Claims Resolution Process, Part One: Summary Report of the Regional Dialogue Sessions*. The Path to Resolution outlined herein is a result of the collective thought, expertise and experience generously shared by participants regarding

written submissions. Participants were clear about the need to ensure the independence of the specific claims process. First Nations and First Nation organizations echoed the “strident critique” of "Canada's control of the management and assessment of claims" in furtherance of its conflict of interest (giving itself control over access to funding, records, negotiations and adjudication) and "its reliance on Canada's system of common and civil law used to assess and adjudicate claims (that excludes Indigenous legal systems and protocols)."[13] Participants cautioned against accepting incremental changes to the specific claims process. Moreover, participants noted that interim changes often become entrenched and serve as an obstacle to desired, transformative change.

5.0 Proposal - Centre for the Resolution of Specific Claims

This proposal presents a model for a fully independent process that reflects the needs and priorities of First Nations. All functions within this independent process will operate within the ICRSC. The ICRSC will be a fully independent body separate from the current Specific Claims Branch (SCB).

The ICRSC will be the new, fully independent body established to resolve outstanding lawful obligations asserted against the Crown.[14] The ICRSC will support specific claims resolution from preparation through to negotiated or adjudicated resolution. The ICRSC will have five core functions: Registrar, Funding Division, Resource Centre, Commission, Tribunal.[15] This section outlines the structure, roles, and processes of the ICRSC, focusing on how the five core functions will facilitate claims resolution through a fair and independent process. The five core functions mutually reinforce one another using a principled approach, to create maximum flexibility and transparency throughout the resolution process.

Canada will benefit in several ways from the establishment of the ICRSC. The creation of a centralized bureaucracy for all specific claims will promote efficiency. Additionally, establishing the ICRSC will promote transparency and help create confidence in the specific claims process. This confidence is necessary to ensuring that the specific claims process is viewed as credible by First Nations. Finally, the establishment of a fully independent specific claims process is crucial to reconciliation between Canada and First Nations.

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the need to transform claims research and development, eliminate Canada's assessment of claims against itself, claims negotiation and mediation, and claims adjudication. The Path to Resolution is therefore to be read in conjunction with the *Part One: Summary Report of the Regional Dialogue Sessions*.

[13] British Columbia Specific Claims Working Group, December 18, 2019, p. 3 (summarizing numerous "strident critiques of [Canada's specific claims] policy and process") and p. 7.

[14] The ICRSC will be created by federal statute and will be subject to a five-year legislative and policy review.

[15] Variations of this five-part independent body were proposed during the regional engagement sessions and through the written submissions: BCSCWG, December 18, 2019 submission; Mohawk Council of Kahnawake, November 20, 2019 submission; Havlik Consulting Group (supported by the Acho Dene Koe First Nation); and a 'fast-track' process described by D. Janvier, Briefing Note, November 4, 2019; Anishinabek Nation, December 13, 2019, pp.1-4.

This proposed model enables First Nations to pursue a negotiated or adjudicated outcome at the commencement of the process. Throughout the process, parties in negotiation may decide to adjudicate all or part of a question of fact and/or law through the Tribunal. Consensus between parties is not necessary in order for issues to be referred to the Tribunal. This added flexibility and the ability for First Nations to have more options throughout the process, should serve to increase the pace of resolution of specific claims.

The ICRSC has five primary functions:

1. **Registrar**: The registrar will provide administrative infrastructure and management of specific claims;

2. **Funding Division**: The funding Division will administer funding to First Nations;

3. **Resource Hub**: The resource hub will serve as a central repository for research materials, assist with access to information and offer support and capacity building for First Nations;[16]

4. **Commission**: The Commission will provide a venue for facilitated negotiation;

5. **Tribunal**: The Tribunal will adjudicate claims, monitor non-facilitated negotiations, and enforce penalties where necessary.

The ICRSC will be mandated to ensure fairness, transparency, and open communication between all parties participating in claims resolution processes and will operate these core functions to ensure the degree of flexibility needed for the resolution of claims of different types, from all regions.

The ICRSC will operate with transparency and flexibility between core functions. This flexibility will enable the parties to resolve outstanding lawful obligations while avoiding silos that result in fiscally controlled stops and starts.[17] Collectively, a body of research, archival documents, Indigenous knowledge, expert reports, appraisals will become available, on consent, and will enable the ICRSC to facilitate sharing of knowledge transfer, and access to evidence that has not previously existed for First Nations. The ICRSC will be responsive to the diverse needs of First Nations and reflective of their legal protocols for resolving conflicts and historical grievances. Finally, the ICRSC may serve a public education function by educating the public on the nature of specific claims, advancing the understanding of lawful obligations, and informing the public on the necessity of resolution.

[16] The Resource Hub will complement but does not replace or invalidate the work of First Nations Claims Research Units or individual First Nations.

[17] The Algonquin Nation Secretariat's written submission describes the arbitrary divide between the current stages of the process, Dec. 12, 2019, p. 4-5.

5.1 Four Principles of Fairness

Throughout its functions, the ICRSC will put into action the following principles of fairness:

1. **The Honour of the Crown:** The specific claims process must be consistent with the Honour of the Crown.

2. **Independence of all Aspects of Claims Resolution:** The funding and oversight of claims must be handled independent of Canada.

3. **Recognition of Indigenous Laws:** The ICRSC will support the recognition of the laws, legal orders, and dispute resolution mechanisms as articulated by participating First Nations. The recognition of First Nations' laws may impact the conduct of adjudication, dispute resolution, mediation, and negotiation.

4. **No Arbitrary Limits on Compensation:** There will be no financial limit on the jurisdiction of the Tribunal or the Commission. First Nations should have access to a fair process of redress that fits their needs and priorities.[18]

5.2 Governance of the Specific Claims Process

A governance body will be jointly established to ensure that all core functions of the ICRSC work in an efficient and complementary fashion, and that the process encourages swift and just resolution of outstanding specific claims. Governance will be consistent with Articles 18 and 27 of UNDRIP and operate with the full and effective participation of First Nations. This will include equal representation from Canada and First Nations. The AFN will seek to create a joint selection process through a Chiefs-in-Assembly resolution to determine who will serve on the governance body.

5.3 Advisory Committee on Application of Indigenous Laws

The governance body will be required to create an Advisory Committee on the Application of Indigenous Laws (the Advisory Committee) to advise and inform the work of the ICRSC on an ongoing basis. The Advisory Committee will be made up of Indigenous experts. The Advisory Committee will seek to have broad representation from various regions to account for diverse Indigenous legal systems. This Advisory Committee must have representation on the existing Tribunal's Advisory Committee and may provide information and advice to any governance mechanism.

[18] The compensation of claims based upon legal principles results in claim settlements that may exceed the current financial limit of the Tribunal's jurisdiction. The Tribunal's limited financial jurisdiction has the effect of creating an unnecessary barrier to the resolution of claims. By delaying settlement, the potential value of a claim may quickly exceed the $150 million jurisdiction of the Tribunal and thereby incentivize Canada to put off settlement knowing this financial limit will ultimately "cap" its liability for claims at the Tribunal. There will be no financial limit on the jurisdiction of the ICRSC. Similarly, no claim is too low in value to be resolved at the ICRSC.

The Advisory Committee will offer guidance to the ICRSC on the application of Indigenous laws and protocols at all stages of the resolutions of specific claims. The Advisory Committee may assist the ICRSC with both procedural and substantive elements of the recognition of Indigenous laws. For example, the Advisory Committee may offer guidance on appropriate protocols for sharing evidence, best practices for incorporating Indigenous laws and ceremony in negotiations and Tribunal processes, and the management of sensitive information or traditional knowledge. The Advisory Committee will provide advice and assistance to the Resource Hub, as well as to all other functions of the ICRSC on the laws and protocols of First Nations.

5.4. Registrar

The Registrar will provide administrative infrastructure to the ICRSC in order to ensure its independence, accountability, and transparency.[19] The Registrar will provide basic information about the functions of the ICRSC, and the options First Nations can explore on their path to resolution. The Registrar will be responsible for the administrative management of claims filed with the ICRSC by First Nations. The Registrar will be fully independent from Canada. This will require, among other things, the removal of the Tribunal and its administrative infrastructure from the *Administrative Tribunals Support Service of Canada Act*.

Registering a claim with the ICRSC signals the First Nation's intent to research, develop, and articulate the evidentiary basis for its claim. Once a registered claim is developed, the First Nation may file it with the ICRSC and alert the Registrar as to whether the Nation wants to proceed directly to monitored negotiation/adjudication at the Tribunal or proceed to the Commission to participate in facilitated negotiation.

5.5. Funding Division

The Funding Division will provide funding to First Nations to support the resolution of their specific claims. Funding will be provided in a flexible manner to meet the needs of First Nations seeking to resolve their specific claims from development through to negotiation or adjudication. The Funding Division will ensure that First Nations have complete access to justice by providing sufficient financial resources. The criteria and process for receiving funding will be jointly developed with First Nations and transparently made available to First Nations, Canada and the public.

There is also a need for consistent, stable resources at the community level to support the research and development of specific claims. Grant funding must recognize and respect the needs associated with the recognition of Indigenous laws of participating First Nations. These needs may be related to ceremony, knowledge keepers, or Elders for example.

[19] It will be necessary to amend the *Administrative Tribunal Support Services Canada Act*, S.C. 2014, c. 20, s. 376 so that the activities of the Registrar will fall under the ICRSC.

5.6 Resource Hub

The Resource Hub will store a collective body of research materials, such as archival documents, First Nations accounts, and expert reports, to facilitate research for First Nations.[20] Registering a claim with the ICRSC triggers access to the Resource Hub. The Resource Hub will also provide training and skills development related to research and claim development. For example, the Resource Hub staff could train First Nations community researchers in accessing government repositories and archival records. First Nations have experienced difficulty accessing records and documents held by the federal government. The Resource Hub will help facilitate access to this information.

As both a repository and a training centre, the Resource Hub will offer supports for First Nations seeking to articulate their laws in relation to specific claims. This support will be offered early in the process. First Nations may need to undertake contemporary research in their communities and engage with community members to determine the specific laws that they will rely on. Early support from the Resource Hub will assist with this process.

The Resource Hub will ensure that the intellectual property rights of First Nations are protected. Informed by the Advisory Committee, rules and procedures will be developed to ensure that sensitive types of knowledge are protected from unwarranted access. As a general rule, documents disclosed by a party to the ICRSC for the purposes of a claim cannot be used for a different claim. There will be an exception where the First Nation who provided the records consents to them being accessible to other First Nations. The Resource Hub will respect this general principle.

Recording and sharing of this evidence must respect the relevant laws and protocols of the First Nation involved. The principles of ownership, control, access, and possession (OCAP™) could be used to guide the creation of rules and procedures for the Resource Hub.[21] Where appropriate, the Resource Hub will work with First Nations to develop protocol agreements related to information sharing and access.

5.7 Commission

The Commission will provide First Nations with a path to resolution through *facilitated* negotiation. Commissioners will be experts in alternative dispute resolution and will facilitate the negotiation of specific claims.[22] The objective is to reach a negotiated settlement in a fair, inclusive way that may incorporate the laws and dispute resolution mechanisms of First Nations.

[20] The Resource Hub will supplement, rather than replace the existing work of First Nations Claims Research Units and First Nations archives.

[21] The First Nations Information Governance Centre. Ownership, "Control, Access and Possession (OCAP™): The Path to First Nations Information Governance" (2014).

[22] A list of full-time commissioners could be created, similar to the list of judges at the Tribunal.

Through the integration of Indigenous Laws, the Commission will facilitate broader understandings of lawful obligations, losses, and alternate forms of remedy. The Commission will be able to sanction uncooperative parties and may prompt intervention by the Tribunal which will have legislative authority to impose penalties. Possible remedies at the Commission will not be restricted to financial compensation and may be informed by the laws of the First Nation. Resolution may incorporate Indigenous systems of restitution for what was fully lost in the breach of lawful obligation. This may result in the return of land, revenue sharing, compensation for loss of cultural knowledge connected with the breach, or multi-year financial settlements.

Commissioners will be qualified experts in claims and mediation with supplemental training where necessary and demonstrate substantive knowledge of the social, economic, political, and legal realities of First Nations communities. Commissioners will be jointly appointed by Canada and the AFN, and may consult with the Advisory Committee, the Indigenous Bar Association, and other bodies as needed.[23] Commissioners will not need to be judges but should have a strong background in alternative dispute resolution as well as an understanding of both Western and Indigenous legal traditions. As informed by the Advisory Committee, ongoing training will be provided to Commission members to supplement their experience.[24]

5.8 Tribunal

The Tribunal will continue to adjudicate all or parts of claims. In doing so, it may provide the parties with a tool that can facilitate a path to resolution by monitoring negotiation, enforcing penalties where necessary, providing mediation under certain circumstances, making rulings on specific issues of fact or law in order to facilitate negotiated settlements, and, where necessary, adjudicating claims and making binding rulings on liability and/or compensation subject only to judicial review. The Tribunal will be reformed to harmonize its administration with the ICRSC. A First Nation and Canada may quickly agree that the path to resolution should involve the adjudication of issues (fact and/or law) or they may agree to negotiate and seek recourse on discrete issues, questions, or impasses to the Tribunal on an as-needed basis. The Parties will have equal access to the functions of the Tribunal whether or not they have chosen facilitated negotiations through the Commission.

The Tribunal is currently staffed by Superior Court judges. For specific claims resolution to be inclusive of the laws and legal orders of First Nations, these judges will undergo cultural competency training[25]. Additionally, these judges will undergo training in relation to Indigenous legal traditions in general. As Justice Lance Finch noted, Canada has always been a "multi-jural

[23] BCSCWG, p. 1.

[24] The Governance Framework will be further articulated by the Advisory Committee. See Justice Finch and the Duty to Learn.

[25] "Inter-cultural competency training" is one of the Truth and Reconciliation Commission's Call to Action to the Legal Profession. What is being proposed here is more than continuing professional development and learning as a destination rather, what is envisioned is the inclusion of Indigenous laws and legal orders in the advancement of claims and analysis of lawful obligations.

nation," in fact if not in law.[26] In order to make space in the Canadian legal system for Indigenous laws, non-Indigenous legal practitioners have a duty to act with humility: "it is a matter of attempting," Justice Finch writes, "in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural." At the same time, greater Indigenous representation is needed on negotiating and decision-making bodies related to specific claims. To achieve this representation, the Tribunal may need to be opened to jurists beyond the Superior Court, such as provincial and Federal Court judges.

The Tribunal must be staffed by enough judges so that all First Nations can have their claims adjudicated in a timely manner. This may mean that more judges should be assigned to the Tribunal on both full and part-time bases. Additionally, where possible, the terms of judges should overlap so that there is greater continuity and transfer of institutional knowledge. It is also essential that there be enough judges at the Tribunal who can communicate in French, have knowledge of the civil law system in Quebec, and understand the unique history of Crown-Indigenous relations in each province.

5.9 Complementary Nature of the Tribunal and Commission

The ICRSC will house the existing Tribunal and a newly established Commission. The Tribunal and Commission will operate in a complementary and mutually reinforcing manner. For example, the parties could speed up the resolution of claims at the Commission by referring issues of fact and/or law to the Tribunal. This would enable parties to continue facilitated negotiations at the Commission while the Tribunal considers discrete issues. Moreover, First Nations could have important issues resolved without needing to file their entire claim with the Tribunal. Similarly, the Commission may prompt intervention by the Tribunal to impose penalties on parties for bad faith or uncooperative behaviour. Parties at the Tribunal may access the services and expertise of the Commission. The combined functions of the Tribunal and Commission will provide First Nations with a fair, flexible, and efficient process to resolve their claims.

6.0 Stage by Stage: How a New Independent Process Would Work

This section describes how each stage of the new **Independent Centre for the Resolution of Specific Claims** will function. Where relevant, we include a box identifying the sections of the *Specific Claims Tribunal Act* that will need to be amended to effect this new process.[27]

[26] Honourable Chief Justice Finch, Lance, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," p.4. Paper prepared for the Continuing Legal Education Society of British Columbia, November 2015. Cited in BC Specific Claims Working Group, December 18, 2019, p. 10.

[27] An overview of the current process is provided in Appendix A. A table summarizing the proposed changes is provided in Appendix B.

6.1 Claim Registration

At the new ICRSC, the First Nation will initiate the process by registering its intent to develop a claim through the Registrar.[28] Once the intent to develop a claim is registered, the Registrar will provide notice to Canada. The registrar will also provide the First Nations with information on how to access funding through the ICRSC's Funding Division and research support through the Resource Hub.

6.1.1 Access to Funding

The ICRSC will distribute funding through the Funding Division according to guidelines developed in partnership with the Advisory Committee. Funding will continue to be by non-repayable grant and will, when deemed necessary by the First Nation in accordance with the rules, be multi-year in nature. This grant funding is intended to facilitate the First Nation's research into whether there is an evidentiary basis upon which to assert that the Crown owes and breached a lawful obligation(s).

Grant funding is intended to enable the First Nation to research archival records as well as Indigenous laws, legal traditions, histories, and knowledge. All these types of evidence are to be given the same weight throughout the process. Grant funding must recognize and respect the needs of ceremony, knowledge keepers, and Elders. Similarly, the grant funding must recognize and respect the languages of the First Nation and facilitate translation through appropriate grant funding where necessary.

6.1.2 Access to the Resource Hub

Registering the claim also triggers access to the Resource Hub which will provide research support and access to a collection of research materials. The Resource Hub will help, as needed, in accessing this material as well as other material, such as documents held in government repositories. Other training for researchers, including on the articulation of Indigenous laws in relation to specific claims, may be provided by the Resource Hub.

The ICRSC will recognize and respect the worldviews, dispute resolution mechanisms and relationships of First Nations to territory. The new process must be informed by this expansive perspective, sourced in Indigenous laws and languages.[29] The Indigenous Advisory committee could play a role in informing this ongoing information process. The process will be flexible to enable the First Nation to allocate funds in a manner that best supports the resolution of their claim, including proceeding further with grant funding if their initial research substantiates that

[28] A variation of this trigger was advanced by the Havlik Consulting Group, December 13, 2019.

[29] For example, during the engagement session at Fort St. John, the participants spoke of "askwi pimachihown" and the spiritual and cultural values and obligations which are the framework for co-existence on/with/from the land and with "all our relations"; Anishinabek Nation, December 13, 2019, para. 1.

there is sufficient evidence to develop a claim. This flexibility may facilitate a First Nation advancing multiple lines of evidence across multiple lawful obligations.[30]

Rationale: There must be an independent claim registration mechanism for First Nations to initiate the specific claims process that ensures fairness and access sufficient to develop claims.

6.2 Claim Development

At the new ICRSC, First Nations will develop their registered specific claims. First Nations will have access to the Resource Hub which can, among other things, assist with accessing documents in repositories. First Nations are responsible for undertaking the research and legal analysis to determine whether the Crown owes an outstanding lawful obligation. Canada and First Nations will not collaborate to develop specific claims.[31] Canada is a party to each claim and the threshold question as to whether Canada has met its lawful obligation(s) remains unchanged.

No regard will be had at this preliminary stage to the potential value of a claim's compensation. There will be no financial limit on the jurisdiction of the ICRSC. The Tribunal and Commission will have jurisdiction over every claim that meets the criteria to ground a claim. Further, the settlement *value* of a claim in relation to the *cost* of settling it shall, in no way, impede access to justice and resolution. The criteria to ground a claim may be expanded to reflect losses not included in the status quo.

The evidentiary basis for a claim may include the laws, legal traditions, histories, and knowledge of the First Nation. These forms of evidence will receive the same weight as Canadian and provincial archival records. Specific claims will be developed by First Nations and will not be assessed by the Crown for their "validity." Rather, the First Nation will assert the basis upon which the Crown has an outstanding lawful obligation. If the First Nation intends to assert its laws as evidence, to establish its losses, to determine damages, or to determine an appropriate remedy, then the First Nation may require resources to establish the basis for its assertion. Guidelines established by the Advisory Committee, as well as the Commission or the Tribunal can assist First Nations in the assertion of their own laws.

Since the creation of the Specific Claims Policy and process, Canada has unilaterally closed hundreds of claims. These claims remain unresolved. Due to Canada's conflict of interest in the process, the closure of claims amounts to a denial of access to justice. In the new, fully independent process, First Nations will be able to develop and file previously closed claims.

Rationale: During claim development, First Nations should have fair, adequate, equal, and timely access to resources, supports, evidentiary materials and legal advice to develop their claims

[30] As noted by Callison & Hanna, p. 3, a First Nation may have multiple claims at one time but must proceed one at a time.

[31] Many First Nations rejected the idea of Canada "collaborating" in any way with a First Nation's development of its case. See Algonquin Nation Secretariat, December 12, 2019, p. 10.

independently as they see fit. First Nations may require time and resources to assert their Indigenous laws.

6.3 Claim Filing

At the new ICRSC, after a registered claim is researched and developed, the First Nation would file it with the ICRSC via the Registrar. The Registrar will share the filed claim with Canada. The First Nation can then decide how it want to proceed to resolve the claim:

- **Monitored / non-facilitated negotiation**: whereby the parties negotiate on their own, but the Tribunal monitors negotiations and the Parties can access the Tribunal to adjudicate discrete issues.
- **Facilitated Negotiation**: where the parties are assisted in their negotiation of the claim by the Commission.
- **Adjudication**: whereby the entirety of the claim is heard and decided by the Tribunal.

Rationale: First Nations must have flexibility to decide whether to access monitored/non-facilitated negotiation or adjudication at the Tribunal or, facilitated negotiation by the Commission.

6.3.1 Access Monitored/Non-Facilitated negotiations

At the new ICRSC, where a First Nation chooses monitored/non-facilitated negotiations, the Parties will define a reasonable period for review of the claim.[32] The Tribunal will monitor the progress of the Parties.

6.3.2 Access to the Facilitated Negotiations via the Commission

At the new ICRSC, the Commission's role will be to assist the parties to facilitate that path as best as possible with recourse to the Tribunal where matters of impasse arise.
Access to the Commission to negotiate a resolution can include alternate forms of restitution and Indigenous dispute resolution mechanisms. The Commission will recognize, respect, and integrate the plurality of legal traditions, worldviews, and dispute resolution mechanisms of participating First Nations. This means that a more expansive understanding of the definition of the loss of land and/or treaty rights and its impact on community may be at the heart of finding a path to resolution.[33]

6.3.3 Access to Adjudication

At the new ICRSC, the First Nation can choose to have all, or part of their claim adjudicated at the Tribunal for a binding decision.

6.4 Claim Review

[32] For example, a 120-day review period would be considered reasonable. The current 3-year review period is unreasonable.
[33] D. Janvier, Briefing Note, November 4, 2019, p. 2 for a description of win/win outcomes of claims settlements. See also Algonquin Nation Secretariat, December 12, 2019, p. 11.

At the new ICRSC, the purpose of claim review is not a unilateral assessment of its lawful obligation, but rather an opportunity for the Crown to determine how it views its participation on the path to resolution. The "validity" stage will be eliminated. Canada therefore no longer controls access to the process by its "acceptance" or "rejection" of a claim. Canada will be given a reasonable period to review the claim submitted to the CSRC. The sole purpose of the claim review is for the Crown to inform itself on how it will participate in the path chosen by the First Nation to resolution. The Crown will no longer use this stage to determine the process.

There will be no relationship between the potential value of a claim's compensation and First Nation's ability to obtain a resolution. There will be no financial limit on the jurisdiction of the Tribunal or the Commission. Additionally, no claim will be excluded from resolution processes because its value may exceed costs to settle. Every claim that meets the criteria to ground a claim will fit the jurisdiction of the Tribunal or the Commission.

Rationale: The resolution of specific claims must not be impeded by unilateral review and assessment of claim validity.

6.5 Initial Meeting(s) of the Parties

At the new ICRSC, the path to resolution will be non-adversarial and informed by the joint search for settlement that addresses the whole matter advanced by a First Nation. This initial meeting will present an opportunity for dialogue and engagement prior to any formal negotiations or adjudication.[34] Recognition and respect for Indigenous worldviews and relationships to territory are fundamental to ongoing and sustainable claims settlements.

The ICRSC Registrar will organize an initial meeting of all parties. The initial meeting will be chaired by a member of the Commission. The purpose of the meeting is to allow the parties to share their understanding of the claim, learn about the paths to resolution available through the ICRSC and for the First Nation to make an **informed** decision about which path it wants to take, either:

1. Non-facilitated, monitored negotiations/adjudication with access to mediation expertise of Commission.
2. Facilitated negotiations through the Commission with access to adjudicative powers of Tribunal.
3. Adjudication through the Tribunal

The outcome of the Initial meeting of the parties is an informed decision by the First Nation about which path it will take to resolution of its claim.

[34] A variation of this early dialogue was advanced by the Westaway Law Group, November 29, 2019, pp-4-5.

Rationale: Initial meetings of the parties must be timely, accommodate in-person and remote options, and have space for the inclusion of Indigenous ways of gathering and resolving disputes.

6.5.1 Non-facilitated, Monitored Negotiations or Adjudication through the Tribunal

Where the First Nation has chosen non-facilitated, monitored negotiations, the Parties will set a meeting with the Tribunal to discuss their preferred path to resolution (i.e., monitored negotiation and/or adjudication) toward cash settlements.

6.5.2 Facilitated Negotiations through the Commission

Where the First Nation has chosen to access the Commission, a meeting of the parties will be convened by the Commission to hear from the parties on the path to resolution and the range of remedies. Possible remedies will not be restricted to financial compensation and may be informed by the laws of the First Nation. Resolution may incorporate Indigenous systems of restitution for what was fully lost in the breach of lawful obligation. This may result in the return of land, revenue sharing, compensation for loss of cultural knowledge connected with the breach, or multi-year financial settlements. Specifically, the meeting at the Commission could:

1. convene discussions around which dispute resolution mechanisms could be considered;
2. facilitate awareness priorities and protocols and assess need for competency training;
3. facilitate a community visit prior to Canada conducting its own research.

A negotiated settlement is only possible where both parties agree. At a negotiation, nothing prevents the provinces from participating. For example, a claim settlement may include cash compensation and an Additions to Reserve component (or cash compensation to the province to create ATR). Other non-cash remedies could include shared-decision making over land use and revenue-sharing agreements.

6.6 Negotiation: The Path to Resolution

At the new ICRSC, the emphasis will be to resolve claims through negotiation. The parties must be prepared to fully explore all issues of fact and law, including Indigenous laws, understandings of loss, and types of evidence related to the resolution of the claim. This will require Canada to adapt its mandating process to support such an approach.[35] First Nations and Canada must be equipped and resourced to undertake their own appraisals and expert reports as needed.

Rationale: Negotiation must be guided by principles of access, flexibility, accountability, and fairness and have space for the inclusion of Indigenous dispute resolution mechanisms and legal orders. Negotiations should not be impeded by limited authorities or mandates.

6.6.1 Non facilitated / Monitored Negotiation

If the First Nation chooses non-facilitated negotiations the Tribunal will *monitor* the progress of negotiation. The parties may seek recourse from either the Commission to provide mediation services, or the Tribunal to resolve impasse, or regulate behaviour as needed. Parties will be able

[35] Anishinabek Nation, December 13, 2019, para. 6.

to access the Tribunal to adjudicate issues of fact and/or law at any time. The Tribunal will be able to resolve discrete issues of impasse without adjudicating the entire claim. The determination of bad faith conduct could be informed by Indigenous legal traditions. The SCTA will be amended to create this needed flexibility and clarify that issues of impasse may be referred from negotiation to adjudication for a decision.

6.6.2 Negotiation at the Commission

The Commission will facilitate negotiation. The Commission is founded on respect for the diversity of legal traditions and the equality of space needed for recording and preserving of Indigenous knowledge, legal traditions, and laws to bring an Indigenous understanding of what has given rise to the claim and the losses experienced. This sharing of knowledge and law will help to shape the range of remedies that might be negotiated.[36] In this regard, the Commission may play a role in developing collaborative principles and approaches as a foundation for compensation. This could help expedite the settlement of claims through negotiation.

The Commission acts as an independent party who has the power to regulate the behaviour of the parties in order to ensure good faith negotiations. Moreover, the Commission will have powers to seek the intervention of the Tribunal for adjudication on issues or to compel parties' behaviour.

If there are opposing expert opinions for example, the Commission will have the power to carry out its own research and compel its own experts. The Commission's independent expert report can be disclosed to the Tribunal. Similarly, the Commission will have powers to initiate independent historical research to assist on factual findings and/or seek independent legal opinion to be shared with the parties. If independent recommendations come from the Commission during negotiations, the parties cannot claim privilege. Neither party can prevent disclosure by the other party.

Similarly, the Commission must resolve, with the assistance of the Resource Hub, any barriers to access of information that may frustrate the path to resolution.[37]

6.7 Mediation

At the new ICRSC, First Nations and Canada will have more opportunity to engage mediation at both the Tribunal and the Commission. Further, mediation will be inclusive of dispute resolution protocols, procedures, and customary laws of participating First Nations.

[36] In its written submission, the BCSCWG has developed "Guiding Principles" for the Integration of Indigenous Legal Systems" that reflects the views expressed during many of the engagement sessions, in British Columbia and elsewhere.

[37] BCSCWG, December 18, 2019, pp. 7-8,17; Havlik Consulting Group, p. 3; Anishinabek Nation, paragraph 4.

Rationale: Mediation as a non-adversarial method of dispute resolution, including alternatives provided Indigenous knowledge and dispute resolution, will be encouraged and supported by the ICRSC.

6.7.1 Mediation at the Tribunal

At the Tribunal, where the parties cannot agree on the path forward to resolution, the Tribunal will make a recommendation as to whether there is anything to mediate. The Tribunal could recommend recourse to the Commission's powers and mediation expertise to strengthen the evidentiary basis of the claim or on consent of the parties, invite a Tribunal member to mediate negotiations.

6.7.2 Mediation at the Commission

The Commission will operate as a facilitator/mediator. The Commission will function similarly as the Tribunal in mediating claims. The fundamental difference is that the Commissioners, with equally significant expertise, need not be judges.

6.8 Progress/Timelines

At the new ICRSC, parties must meet regularly to maintain accountability for their progress. The ICRSC's annual public reporting on its core functions will include reporting on timelines, which will be made available to First Nations, to the public, and to Parliament.

Rationale: Frequent and transparent communications, regular and reasonable timelines, and reports of progress will help maintain accountability for progress.

6.8.1 Progress - Non-Facilitated, Monitored Negotiations

The Tribunal will report to the Registrar on the Parties' progress on the path to resolution agreed upon by the parties at their first meeting. The Tribunal will provide this report on an annual basis, at a minimum. The Registrar will include aggregate information about progress in the Centre's annual reports.

6.8.2 Progress at the Commission

The Commission will report to the Registrar on the Parties' progress on the path to resolution agreed upon by the parties at their first meeting. The Commission will provide this report on an annual basis, at a minimum. The registrar will include aggregate information about progress in the Centre's annual reports.

6.8.3 Progress - Adjudication

The Tribunal will report to the Registrar on the adjudication of claims. The Tribunal will provide this information as it adjudicates claims or on an annual basis, at a minimum. The Registrar will include aggregate information about progress in the Centre's annual reports.

6.9 Resolution

At the new ICRSC, the ICRSC will possess the mandate to see all claims resolved. The ICRSC will oversee or facilitate the development of an agreement in principle. There is no cap to settlement values and no claim too low in value to be resolved. In assisting the parties to build the terms of settlement, the ICRSC can introduce penalty clauses for non-compliance with provisions of the settlement agreement.

Rationale: The ICRSC must be empowered to facilitate resolution of all claims regardless of their value in a timely and transparent manner that is not dependent on delayed and secretive Departmental, Ministerial or Cabinet processes.

6.9.1 Non-Facilitated / Moderated Negotiations

If engaged in non-facilitated, monitored negotiation, the parties will report to the Registrar an Agreement in Principle. Under the oversight of the Tribunal, the Parties will set reasonable time frames for Canada to secure its mandate, depending on the context. First Nations may use the time to prepare for Ratification. If there is unreasonable or unjustified delay by Canada, the Tribunal may use its powers to exert penalties.

6.9.2 Resolution at the Commission

At the Commission, the Agreement in Principle is known to the Commission as the independent third party at the table throughout, and similarly sets a reasonable timeframe for Canada to secure its mandate. What is considered a reasonable amount of time will depend on the context. First Nations may use the time to prepare for Ratification. If there is unreasonable or unjustified delay by Canada, the Commission may refer to the Tribunal to use its powers to exert penalties.

6.10 Implementation of Settlement

In the new independent process, the Centre will have powers to monitor and compel implementation of settlement agreements.[38]

Rationale: Oversight is required to ensure timely, transparent, and complete implementation of settlements.

6.10.1 Implementation of non-Facilitated settlements

The Centre will remain empowered to compel implementation and issue penalties for failure to implement the terms of negotiated settlements or decisions.

6.10.2 Implementation at the Commission

The Commission will be able to monitor settlement implementation. Parties will be able to return to the Commission if the First Nation believes that Canada is frustrating implementation.

[38] Ratification is done by community determination.

The Commission would be able to refer the matter to the Tribunal who will remain empowered to compel implementation and issue penalties for failure to implement the terms of negotiated settlements or decisions.

6.11 Oversight

At the new ICRSC, to ensure transparency, the ICRSC will issue an annual report that covers the activities of its core functions. This report will be tabled with Parliament and First Nations, made public, and provided to relevant international mechanisms. An Oversight Committee will be created at the time the ICRSC is established by appointment of the AFN and Canada. A member of the Advisory Committee on the Application of Indigenous Laws and Tribunal Advisory Committee are each members of the Oversight Committee.[39] As well, the ICRSC will be created by federal statute and will require, at minimum, a five-year legislative and policy review. This review will be conducted jointly by Canada and First Nations. This review will consider expanding the roles and mandate of the ICRSC.

Through its own Governance body, the ICRSC must annually report its spending to Parliament and to First Nations via the AFN Annual General Assembly to ensure openness and transparency. As an added measure of audit transparency, the ICRSC could be brought within the mandate of the Office of the Auditor General of Canada.

Rationale: Oversight of ICRSC functions must not be unilateral, discretionary, or secretive.

7.0 Recognition of Indigenous Laws

The ICRSC will support the recognition of Indigenous laws, legal orders, and dispute resolution mechanisms as articulated by participating First Nations. The recognition of Indigenous laws may impact the conduct of adjudication, dispute resolution, mediation, and negotiation. Through all of its core functions, the ICRSC will provide due recognition and respect to the Indigenous laws of participating First Nations. In doing so, the ICRSC will respect the diversity of laws and legal traditions that First Nations may choose to rely on. The *Specific Claims Tribunal Act* may need to be amended to ensure substantive recognition of Indigenous laws throughout the specific claims process.

At a minimum, the recognition of Indigenous laws will include the six principles articulated by Justice Walkem.[40] These principles include:

Principle 1: Space for a plurality of legal traditions

[39] Mohawk Council of Kahnawake, November 20, 2019, described a "watchdog" organization to oversee the functioning of the Commission and report back to Parliament on its operations, p. 3.
[40] Ardith Walkem, “A New Way Forward: Incorporating Indigenous Laws and Legal Orders into Specific Claims Processes” (2018), BC Specific Claims Working Group.

Principle 2: Resolution is ongoing

Principle 3: Expanded notions of resolution (compensation-restitution)

Principle 4: A multi-perspective process is utilized reflecting Indigenous worldviews

Principle 5: Shared (not imposed) deliberations and decision-making are used

Principle 6: Expanded evidence is welcomed to support specific claims

7.1 Advisory Committee on the Application of Indigenous Laws

The Advisory Committee on the Application of Indigenous Laws will assist the ICRSC with the application of the laws and protocols of participating First Nations. The Advisory Committee will be made up of Indigenous experts. The Advisory Committee may provide information and advice to any governance mechanism. The Advisory Committee will also offer guidance to the ICRSC on the application of First Nations laws and protocols at all stages of the specific claims process. The Advisory Committee may offer guidance on appropriate protocols for sharing evidence, best practices for incorporating Indigenous laws and ceremony in negotiations and Tribunal processes, and the management of sensitive information or traditional knowledge.

7.2 Funding Division

The Funding Division will ensure that Indigenous laws of participating First Nations receive due recognition in the specific claims process. Specifically, funding will recognize and respect the needs associated with the recognition of Indigenous laws. These needs may be related to ceremony, knowledge keepers, or Elders for example. Similarly, the grant funding must recognize and respect the languages of the First Nation and facilitate translation where necessary. Significantly, funding may assist First Nations to research Indigenous laws, legal traditions, histories, and knowledge.

7.3 Resource Hub

As both a repository and a training centre, the Resource Hub will offer supports for First Nations seeking to articulate their laws in relation to specific claims. This support will be offered early in and throughout the process. First Nations may need to undertake contemporary research in their communities and engage with community members to determine the specific laws that they will rely on. Early support from the Resource Hub will assist with this process. The Resource Hub will also ensure that the intellectual property rights of First Nations are protected. Informed by the Advisory Committee, rules and procedures will be developed to ensure that sensitive types of knowledge are protected from unwarranted access. Recording and sharing of this evidence must respect the relevant laws and protocols of the First Nation involved.

7.4 Inclusion of Indigenous Laws in Negotiation at the Commission

The Commission will provide First Nations with a path to resolution through facilitated negotiation. The objective is to reach a negotiated settlement in a fair, inclusive way that may incorporate the laws and dispute resolution mechanisms of First Nations. Throughout the negotiation process, the Commission will facilitate broader understandings of lawful obligations,

losses, and alternate forms of remedy. The Commission will recognize, respect, and integrate the plurality of legal traditions, worldviews, and dispute resolution mechanisms of participating First Nations.

The Commission is founded on respect for the diversity of legal traditions and the equality of space needed for recording and preserving of Indigenous knowledge, legal traditions, and laws to bring an Indigenous understanding of what has given rise to the claim and the losses experienced. This sharing of knowledge and law will help to shape the range of remedies that might be negotiated. Where the First Nation has chosen to access the Commission, the initial meeting of the parties will be convened by the Commission to hear from the parties on the path to resolution and the range of remedies. Possible remedies will not be restricted to financial compensation and may be informed by the laws of the First Nation. Resolution may incorporate Indigenous systems of restitution for what was fully lost in the breach of lawful obligation. This may result in the return of land, revenue sharing, compensation for loss of cultural knowledge connected with the breach, or multi-year financial settlements.

The Commission could help to recognize Indigenous laws by incorporating participating First Nations' dispute resolution mechanisms into the negotiation process. At the initial meeting at the Commission, the parties may discuss the application of the First Nation's dispute resolution mechanism. The First Nation could describe how its dispute resolution mechanism addresses harm and resolves conflict. The Commission could facilitate this discussion by demonstrating areas of negotiation where the dispute resolution mechanism could have an impact.

7.5 Inclusion of Indigenous Laws in Negotiation and Adjudication at the Tribunal

During non-facilitated, monitored negotiations, First Nations will be able to rely on Indigenous knowledge, legal traditions, and laws to bring an Indigenous understanding of what has given rise to the claim and the losses experienced.

The Tribunal will continue to engage in adjudication in the new, fully independent system. Participating First Nations will be able to assert their own laws as evidence or to determine damages. The evidentiary basis for a claim may include the laws, legal traditions, histories, and knowledge of the First Nation. These forms of evidence will receive the same weight as Canadian and provincial archival records. Archival records, Indigenous laws, legal traditions, histories, and knowledge will be given the same weight throughout the adjudicative process.

8.0 Conclusion

For decades, First Nations have identified Canada's conflict of interest in the specific claims process as a key obstacle to justice and reconciliation. Canada is currently in a position of conflict because it is responsible for the creation of specific claims policy, the provision of funding to First Nations to pursue specific claims, and the review of specific claims. First Nations have demanded a fair process free from conflict of interest to resolve their specific claims. Additionally, the existing specific claims process is slow, inflexible, and burdened by arbitrary limits on financial

mandates. First Nations have long demanded that the specific claims process be reformed in order to address these issues. First Nations have also called for the process to recognize and respect Indigenous laws.

The AFN paid close attention to the views and recommendations shared by First Nations in engagement sessions across Canada. This proposal reflects these views and recommendations and envisions a fully Independent Centre for the Resolution of Specific Claims in accordance with UNDRIP. This Centre will be consistent with the Honour of the Crown, fully independent, provide due recognition to Indigenous laws, and be free from arbitrary limits on financial compensation.

The existing Tribunal and a newly established Commission will both operate under the ICRSC which will enable resolution of First Nations claims through facilitated negotiations and/or adjudication of all or parts of their claims. The combined functions of the Tribunal and Commission will provide First Nations with a fair, flexible, and efficient process to resolve their claims. The Tribunal and Commission will operate in a complementary and mutually reinforcing manner.

Appendix A: The Current Specific Claims Process

The Department has unilaterally developed a self-described four-stage process for resolving Specific Claims.[41]

1. **Claim Submission and Early Review**: The process begins when a First Nation submits a claim. The First Nation is responsible for researching its claim and ensuring it is accurate and complete. Within six months, the Minister will inform the First Nation whether the submission meets the minimum standard as required by the *Specific Claims Tribunal Act*. This early review of the claim submission is conducted jointly by the SCB and the Department of Justice. If a claim is found to meet the minimum standard, the First Nation is informed that the claim has been filed. The date of filing begins a three-year "research and assessment" stage.

2. **Assessment of Claim Submissions**: The Minister has three years in which to render a decision whether to accept a claim for negotiation. During this stage, Canada undertakes research to ensure all pertinent documents are gathered. The Department of Justice provides advice on whether a claim discloses a lawful obligation. If a claim is not accepted for negotiation, the First Nation is informed of the reasons for the decision and the First Nation may refer its claim to the Tribunal. If accepted for negotiation, the First Nation is informed of the basis for the negotiation and will be asked to indicate whether it is willing to engage in negotiations.

3. **Negotiation and Settlement**: Upon acceptance for negotiation of a claim by CIRNAC, the negotiation process begins. The First Nation may refer its claim to the Tribunal if, after three years,[42] a negotiated settlement has not been reached. The amount of the settlement determines which delegated authority can approve it. Claims between $50-$150 million require the approval of Treasury Board. The Minister has authority to approve mandates of up to $50 million; the Deputy Minister may approve claim settlements up to $7 million; the Senior Assistant Deputy Minister up to $1 million; and the Director General up to a $500 000 settlement claim. Claims under $150 million are paid out from the Specific Claims Settlement Fund, while claims which exceed that amount require Cabinet authority to settle and are paid out from Fiscal Framework funding. If an agreement between the First Nation and the federal government has been reached, the final settlement agreement is ratified and signed, final releases and compensation are provided, and the claim is settled.[43]

4. **The Specific Claims Tribunal**: Specific Claims may be filed with the Tribunal if any of the following four conditions have been met: (1) The Minister has not accepted the claim for negotiation (in whole or in part); (2) Three years have elapsed since the claim was filed and

[41] Evaluation of the Specific Claims Assessment and Settlement Process, February 2020, *The Specific Claims Process and Policy Guide,* (2010) https://www.rcaanc-cirnac.gc.ca/eng/1100100030291/1539617582343

[42] The three-year timeframe begins when the Minister notifies the First Nation of its acceptance of a claim for negotiation.

[43] *The Specific Claims Process and Policy Guide,* (2010), http://www.aadnc-aandc.gc.ca/eng/1100100030501/1100100030506.

the Minister has not notified the First Nation as to whether the claim has been accepted for negotiation; (3) During the first three years of negotiations, if the Minister gives written consent; and (4) Three years have elapsed since the claim was accepted for negotiation (in whole or in part) and it has not been resolved by a settlement agreement.

The *Specific Claims Tribunal Act* defines the types of claims that may be filed.[44] The Specific Claims Tribunal's Rules of Practice and Procedure establish the rules governing the practice and procedures of the Tribunal. The Tribunal is composed of a maximum of six full time Superior Court judges. Tribunal members hear arguments from both the claimant and Canada, and issue decisions regarding validity and compensation. The Tribunal process is often split into validity and compensation hearings. The Tribunal may order compensation of up to $150 million per claim. When a decision is made by the Tribunal, it is final and binding, though either party may seek judicial review of the decision at the Federal Court of Appeal.

[44] *Specific Claims Tribunal Act*, S.C. 2008, c. 22.

Appendix B: Summary of Proposed Changes for the Creation of an Independent Specific Claims Process

	Current Specific Claims Process	**Independent Specific Claims Process**
Organizational Structure	The SCB formulates specific claims policy, provides funding to First Nations, and reviews claims jointly with the Department of Justice. The Tribunal adjudicates specific claims.	All functions within the new process will operate within the Centre for the Resolution of Specific Claims.
Composition of the Tribunal	The Tribunal is currently composed of superior court judges.	The existing Tribunal would be migrated to the ICRSC. The Tribunal may need to be opened to provincial court judges to ensure greater Indigenous representation.
Independence of Process	Canada it is responsible for the creation of specific claims policy, the provision of funding to First Nations to pursue specific claims, and the review and assessment of specific claims	The ICRSC and its functions will operate independently from Canada.
Financial Jurisdiction	Section 20(1)(b) of the *Specific Claims Tribunal Act* prohibits the Tribunal from awarding total compensation in excess of $150 million.	There will be no financial limit on the jurisdiction of the Tribunal or the Commission.
Claim Research	First Nations are responsible for researching their own specific claims.	First Nations continue to be responsible for researching their own specific claims. The Resource Hub will assist First Nations research their specific claims and provide access to a repository of research materials.
Understandings of Loss	Section 20(1)(d)(i) of the *Specific Claims Tribunal Act* prohibits the Tribunal from awarding any compensation for punitive or exemplary damages. Section 20(1)(d)(ii) of the *Specific Claims Tribunal Act* prohibits the Tribunal from awarding any compensation for non-pecuniary harm or loss, including cultural or spiritual losses.	Compensable losses will be expanded to recognize Indigenous perspectives.
Timelines	The Minister informs the First Nation whether the claim submission meets	Where the First Nation has chosen to access the Tribunal, timelines

	the minimum standard within six months of submission. Once the Minister has determined that the claim meets the minimum standard, there is a three-year research and assessment process.	and protocols will be set at the initial meeting of the parties.
Funding	The SCB unilaterally creates the policy and processes related to specific claims funding.	The First Nation may request funding from the ICRSC Funding Division.
Flexibility for Participating First Nations	First Nations must begin by submitting their specific claim to the Minister. The Minister will inform the First Nation whether the submission meets the minimum standard as required by the Specific Claims Tribunal Act.	First Nations will be able to pursue a negotiated outcome or an adjudicated outcome at the commencement of the process. This option provides First Nations with flexibility on the path to resolution.
Claim Assessment	Canada determines whether it has an outstanding lawful obligation.	The “validity” stage will be eliminated. Canada therefore no longer controls access to the process by its "acceptance" or "rejection" of a claim.
Possible Remedies	Section 20(1)(a) of the *Specific Claims Tribunal Act* provides that the Tribunal shall award monetary compensation only.	The Tribunal will be able to provide financial compensation. The Commission will be able to provide an expanded range of remedies, including remedies beyond financial compensation.

Appendix C: Summary of Legislative Changes Required for the Creation of an Independent Specific Claims Process

Description of Relevant Sections of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22	**Amendments to the *Specific Claims Tribunal Act***
Section 2 sets out the definitions that apply in this Act.	Existing definitions may need to be amended and new definitions may need to be added.
Section 11 describes the function of the Tribunal, the holding of hearings, and the effect of a decision of a member of the Tribunal.	This section may need to be amended to recognize the new functions of the Tribunal and the application of First Nations laws during the hearing.
Section 13 sets out the powers of the Tribunal.	This section will be amended to recognize the Tribunal's new powers under the independent specific claims process. For example, the power to sanction unreasonable delay will need to be set out in this legislation.
Section 15(4) restricts First Nations from filing specific claims if the claim is not for any compensation, if the claim is for a remedy other than monetary compensation, or if the amount of the claim exceeds the claim limit.	This section will need to be revised or removed to enable First Nations to file specific claims for amounts greater than the current claim limit.
Section 16(1) provides that a First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and several procedural steps and periods of time have passed.	This section will need to be amended so that First Nations can file their specific claims directly with the Registrar.
Section 16(2) provides that the Minister shall establish and publish a minimum standard for claims to be filed.	This section will be amended or removed to eliminate the Minister's assessment of claim.
Section 20(1)(b) prevents the Tribunal from awarding total	There will be no financial limit on the jurisdiction of the Tribunal or the Commission. This section will need to be removed or amended to reflect this change.

compensation in excess of $150 million.	
Section 20(1)(d)(i) of the *Specific Claims Tribunal Act* prohibits the Tribunal from awarding any compensation for punitive or exemplary damages. Section 20(1)(d)(ii) of the *Specific Claims Tribunal Act* prohibits the Tribunal from awarding any compensation for non-pecuniary harm or loss, including cultural or spiritual losses.	These sections will need to be amended or removed so that compensable losses can be broadened to recognize Indigenous perspectives.
Section 21(1) of the *Specific Claims Tribunal Act* provides that claimants' interests and rights to the land are released if compensation is awarded for an unlawful disposition of all of the interests or rights of a claimant in or to land and the interests or rights have never been restored to the claimant.	This section may need to be amended to ensure that interests and rights in land are released only when the relief ordered is implemented.

*The Commission will either be established under its own legislation or through the *Specific Claims Tribunal Act*.

Appendix D: Incorporation of What We Heard from First Nations

What We Heard	Response
Canada is in a position of conflict of interest in relation to the specific claims process.	Canada's conflict of interest will be eliminated by the creation of the ICRSC. Each of the ICRSC's core functions will operate independently.
An independent specific claims mechanism should facilitate access to archival document and assist in the preservation of oral evidence.	The Resource Hub will assist First Nations specific claims researchers by facilitating access to and preservation of evidence.
There is a lack of flexibility in the specific claims process for participating First Nations. First Nations must submit their specific claims in the process unilaterally established by Canada.	First Nations will have the opportunity to pursue monitored negotiation/adjudication at the Tribunal or to pursue facilitated negotiation through the Commission.
The resolution of specific claims is a slow process.	The Tribunal and Commission will establish reasonable time periods for Canada to review specific claims. The Tribunal and Commission will have the powers to sanction unreasonable delay.
Funding must be provided to participating First Nations in a fairer and more predictable manner. Funding must be sufficient to enable First Nations to fully resolve their specific claims.	The Funding Division will distribute funding according to established rules and procedures in order to ensure that participating First Nations have the ability to resolve their specific claims.
The specific claims process requires greater transparency and oversight.	The ICRSC will report on its core functions annually to the AFN and to Parliament. Additionally, there will be a five-year legislative and policy review of the ICRSC.
The laws of First Nations must be recognized and respects throughout the specific claims process.	The laws of First Nations will be recognized and respected in the new specific claims process. The Advisory Council on the Application of Indigenous Laws will provide guidance to the ICRSC on the application of the laws of First Nations.