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 9th, 2015

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9. Fall 2014. "Specific Claims Survey." Union of B.C. Indian Chiefs. An informal, qualitative survey developed by the Union of B.C. Indian Chiefs Research Department in consultation with other Claims Research Units and distributed to CRUs across Canada and individual First Nations. It was conducted in August 2014 to which 16 Claims Research Units responded representing 282 First Nations and 339 claims from across Canada. It is important to note this survey only represents the experiences of the respondents and the number of respondent Claims Research Units (CRUS) is far lower than the total number of CRUs that are currently operational. Though the survey is not comprehensive, it provides a representative look into First Nations experiences with the process.

EXECUTIVE SUMMARY

This report addresses five incorrect conclusions and misleading statements made by Aboriginal Affairs and Northern Development Canada (AANDC) regarding the success of the Government of Canada's *Specific Claims Action Plan: Justice At Last*, its official policy for resolving specific claims since 2007.

The need for this report is urgent, since Canada has made public its intention to effectively terminate the *Justice At Last* program in the 2016-2017 fiscal year by discontinuing program funding. AANDC rationalizes this decision in light of false statements that *Justice At Last* has met its objectives.

The overarching objective of *Justice At Last* is the just, fair and timely resolution of specific claims through negotiations with First Nations claimants. Achieving this primary objective will also relieve Canadian taxpayers of these outstanding debts to First Nations, achieve justice for First Nations and legal certainty for all Canadians and foster Crown-First Nations reconciliation.

AANDC highlights five achievements that provide evidence of *Justice At Last*'s success:

1. Fewer specific claims are entering the system
2. The backlog of specific claims has been eliminated
3. Specific claims that have been accepted by the Minister are being negotiated
4. Access to mediation has been successfully established for First Nations
5. The Specific Claims Tribunal is fulfilling its legislative requirements and is meeting the expectations of First Nations by providing a final, just, and timely mechanism for resolving claims

An analysis of AANDC data and input from First Nations currently involved in the specific claims process shows that contrary to AANDC reports and public announcements, the five achievements outlined above have not been attained.

First, the number of specific claims entering the system is increasing due to the Specific Claims Branch's internal policy of accepting for negotiation only minor portions of claim submissions and demanding legal releases of liability on the bulk of substantive allegations. This is forcing First Nations to file as separate claims, related but distinct events/issues which might otherwise have been grouped together in one claim. The effect is an increase in the number of new claims to be filed with the Specific Claims Branch.

Second, the backlog of claims has not been eliminated with any finality since the vast majority of claims still remain unresolved. AANDC's widespread rejection of the majority of claims that formed the backlog has resulted in these longstanding grievances being transferred to the Specific Claims Tribunal or returned to the system in the form of multiple discrete allegations.

Third, Canada refuses to negotiate the majority of claims accepted by the Minister despite publicly reporting otherwise. In practice, AANDC unilaterally and without consultation imposes a preliminary value upon each claim. The Specific Claims Branch identifies the majority of these claims as "small value" claims and denies First Nations the opportunity to negotiate them. First Nations are receiving limited take-it-or-leave-it offers with arbitrary, short deadlines in which to accept or reject them. The basis for Canada's offer is often not provided. Negotiation and its attendant protocols are inoperative and refused outright by Specific Claims Branch officials.

Fourth, despite a public commitment to work jointly with First Nations to develop a mediation unit, Canada unilaterally established a mediation service, administered by AANDC staff within AANDC offices. First Nations have publicly criticized this mediation unit for its appearance of conflict of interest. First Nations' requests for mediation services are routinely denied by Specific Claims Branch officials. Further, with the prevalence of "take-it-or-leave it" offers there is much less opportunity for mediation.

Lastly, the Specific Claims Tribunal, mandated to provide First Nations with a legal mechanism for obtaining binding decisions on the validity of claims rejected by Canada or in stalled negotiations, is seeing its independence, authority and legitimacy undermined and resources curtailed by the government who currently lauds it as one of its successes.[a]

This report challenges Canada's statements about the success of *Justice At Last* and also advances recommendations to realign the specific claims resolution process *in practice* with the principles of *Justice At Last*.

[a] Canada's 2013-2014 *Report on Plans and Priorities* lists Specific Claims under its "Co-operative Relationships Program" which "seeks reconciliation and the strengthening of the relationship between governments and Aboriginal groups through mutual respect, trust, understanding, shared responsibilities, accountability and dialogue. ... Through relationships built on trust, respectful partnerships will be established which may ultimately help to contribute to the strengthening of the social, economic and cultural well-being of Aboriginal communities and ultimately more active participation and engagement in the broader Canadian society. Online at: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/2013-14RPP_pdf_1363177576527_eng.pdf

INTRODUCTION

Our intent in writing this report is to respond as a matter of public record to Aboriginal Affairs and Northern Development Canada (AANDC) internal reviews, reports, official public announcements and comments regarding the success of the Government of Canada's 2007 Specific Claims Action Plan, *Justice At Last.* A widely circulated public evaluation of this kind is urgently required as these reports contain misleading statements and erroneous conclusions due to AANDC's selective interpretation of incomplete data collected and produced by the Specific Claims Branch. AANDC's use of its own publications and contracted studies to analyze its own performance and formulate conclusions about the implementation of *Justice At Last* is skewed toward reporting successful outcomes while masking its fundamental failure to uphold public commitments made to First Nations and all Canadians to ensure fairness, transparency and the just resolution of outstanding claims.

AANDC's actual departmental practices and their consequences for First Nations claims directly contradict all reports of success and accomplishment. Through drastic funding cuts to claims in research and development, the rejection of most claims during assessment or negotiations, settlement processes that leave little or no room for good faith negotiation, and attempts to compromise and challenge the authority and the legitimacy of the Specific Claims Tribunal, the Government of Canada is effectively abandoning the very initiative that it introduced and now lauds as an example of positive change in Crown-First Nations relations.

The implications of this cannot be understated: hundreds of claims will be left unresolved, yet again leaving First Nations communities with increasing frustration and little recourse. Meanwhile, false reports of successful outcomes and of fulfilling commitments to First Nations have clearly informed AANDC's 2014-15 *Report on Plans and Priorities* which reveals that planned spending dollars for the Aboriginal Rights and Interests Program will be reduced by almost 60% in the 2016-2017 fiscal year as a result of "the sunset of funding … for Justice At Last: Specific Claims Action Plan."[1] The planned termination of *Justice At Last* and the absence of any discussion with First Nations about this plan reflect AANDC's preoccupation with expediency at the expense of justice and its misplaced confidence that the Canadian public will simply applaud the apparent cost savings. It is shortsighted in the extreme. Hundreds of unresolved claims will linger without any process for settling these outstanding grievances, inviting confrontation and further conflict.

To address AANDC reports of its achievements and the perceived suitability of "sunsetting" *Justice At Last*, this report examines the five key achievements AANDC attributes to its implementation of the *Justice At Last* policy:

1. Fewer specific claims are entering the system
2. The backlog of specific claims has been eliminated
3. Specific claims that have been accepted by the Minister are being negotiated
4. Access to mediation has been successfully established for First Nations
5. The Specific Claims Tribunal is fulfilling its legislative requirements and is meeting the expectations of First Nations in providing a final, just, and timely mechanism for resolving claims

This report also considers how these results have been obtained by examining Canada's interpretation of its own data on specific claims. This evaluation will also review additional available data and input from First Nations engaged in the specific claims process to provide a balanced account of the achievements of *Justice at Last*. It advances a series of recommendations to resolve the hundreds of specific claims accepted by Canada, but denied negotiations, and those awaiting research, development and submission to the Specific Claims Branch.

BACKGROUND

For almost 50 years, First Nations in Canada have sought an independent and impartial process for the resolution of historical land and treaty related grievances. In 1973, Canada acknowledged the need to address these longstanding injustices when it announced a policy for the resolution of specific claims, formally articulated in 1982 in a document called *Outstanding Business: A Native Claims Policy*.[2] The policy provided a framework for assessing "specific claims," defined as claims dealing with Canada's failure to fulfill historical lawful obligations to protect reserve lands and assets from alienation,

encroachment and mismanagement. The policy was established as a mechanism to address and compensate First Nations for historical injustices through negotiated settlements in the interest of fairness and reconciliation. The specific claims process was also a means of documenting and recognizing past wrongs and resulting loss as well as providing a way forward toward establishing Crown-First Nations trust and reconciliation.

In practice, the specific claims process has been characterized by an inherent conflict of interest, absence of timelines for resolving claims, an increasing and insurmountable backlog of claims awaiting legal opinions on validity, and a lack of funding for research and negotiation.

JUSTICE AT LAST – COMMITMENT TO A NEW APPROACH

In 2007, then Minister of Indian Affairs Jim Prentice introduced the *Specific Claims Action Plan*, characterized as a dramatic reformation of Canada's specific claims policy. The plan, titled *Justice at Last*, was structured around four independent "pillars" that addressed both the abysmal backlog of claims (about 800)[3] that had languished for years while awaiting legal opinions and the glaring conflict of interest whereby Canada assessed claims against itself. The pillars included:

1. Impartiality and fairness through the creation of an independent, binding tribunal to make decisions about claims rejected for negotiation or when negotiations fail
2. Greater transparency through dedicated funding for specific claims settlements
3. Faster processing of claims via more human and financial resources, a streamlined approach to processing to better address the diversity and complexity of specific claims as well as "special efforts" made to negotiate small value claims which account for about half of claims in the system
4. Better access to mediation by establishing an independent mediation body to help to jump-start stalled negotiations and lead to "mutually beneficial agreements"[4]

Most importantly, *Justice at Last* renewed and strengthened Canada's commitment to settle specific claims through negotiation instead of litigation:

> *The Government of Canada prefers to resolve claims by negotiating settlements with First Nations. In contrast to litigation, negotiated settlements are jointly developed by the parties working together to ensure fairness for all. Negotiations are less adversarial, more cost-effective and avoid the risks of court-imposed settlements where outcomes can be uncertain. Just as important, they help build relationships and generate multiple benefits for all Canadians.*[5]

Canada claimed the four pillars articulated in *Justice At Last* together with a commitment to fair negotiations would restore confidence in the specific claims resolution process and settle the mounting burden of debt these specific claims represent:

> *The immediate priority is to bring justice to First Nation claimants with legitimate grievances and certainty to government, industry and all Canadians. By ensuring impartiality and fairness, greater transparency, faster processing and better access to mediation, this plan will achieve the objective of restoring confidence in the integrity and effectiveness of the system to resolve specific claims. Equally important, as Canada fulfils its lawful obligations to First Nations and eliminates the backlog in the system, taxpayers will be relieved of this outstanding debt.*[6]

Canada also claimed that settling the outstanding debt owed to First Nations would result in certainty for government, industry and local residents as well as increased economic opportunities for First Nations through the availability of settlement funds to invest in their communities. And most importantly, First Nations would achieve long sought-after justice, which would in turn foster reconciliation:

> *Ultimately, righting past wrongs is simply the right thing to do. Settling claims helps Canadians come to terms with our history while bringing closure to longstanding grievances for First Nations. Most important, it fosters better relations among First Nations and other Canadians, so we can move forward together to realize a better, shared future.*[7]

When introducing the *Specific Claims Tribunal Act* to the Canadian Parliament in 2008, then Indian Affairs Minister Chuck Strahl described it as a means of bringing about justice:

> *The proposed legislation is also historic because when we think deeply about this, this new approach is about more than specific claims. It is about achieving fundamental justice and fairness. It is about building a stronger and more stable economy and ensuring equal opportunity for all Canadians to work and prosper. It is about creating legal certainty for first nations and their partners in industry and area communities. Most important, it is about enabling members of first nations and their fellow Canadians to move on and move forward together.* [8]

THE SPECIFIC CLAIMS PROCESS

AANDC's *Specific Claims Policy and Process Guide* describes the specific claims process as comprised of four stages:

1. **Submission.** A First Nation submits its claim to the Minister.
2. **Early Review: Minimum Standard.** The Minister reviews the submission within 6 months for compliance with a Minimum Standard articulated in the policy. A claim is deemed filed when the Minister notifies a First Nation in writing that its claim submission meets the Minimum Standard.
3. **Research and Assessment.** The Minister has three years to assess the validity of the claim and either accept it for negotiation or reject the claim on the grounds that Canada has no lawful obligation regarding the allegation made by the First Nation. If a claim is rejected for negotiation, a First Nation may file its claim with the Specific Claims Tribunal for a decision on validity and compensation.
4. **Negotiation and Settlement.** If a claim is accepted for negotiation, negotiations will begin. If after three years no resolution has been achieved, a First Nation has the option of withdrawing and filing its claim with the Specific Claims Tribunal for a binding decision on compensation.[9]

AANDC's breakdown of the specific claims process omits the Claim Research and Development stage. This is the pre-submission stage during which a First Nation researches and prepares the claim for submission to the Minister. Preparing specific claims for filing with the Minister is a difficult, specialized, time-consuming and costly task; not one entered into lightly by First Nations. The 2006 Senate Standing Committee report on Aboriginal Peoples noted:

> *…First Nations do not make allegations against the government without going to considerable trouble. The claimant band (First Nation) first must locate, acquire, and assemble ample supporting documentation, then outline thoroughly the meaning of all evidence with respect to the allegations and, finally, acquire legal analysis prior to submitting a Specific Claim*.[10]

AANDC's public reporting on specific claims neglects data concerning specific claims in Research and Development, leaving an important stage of the process out of any performance evaluation or public reporting, despite its ready access to this data. AANDC provides research and development funding annually to Claims Research Units and individual First Nations to carry out the complex and costly work of gathering historical evidence from public and private record repositories, conducting the requisite legal analysis and preparing the claim submission in accordance with the Minimum Standard. [b]

Research and development are integral to a First Nation's claim submission, resulting in the formal allegation, supporting evidence and legal justification of the claim. This stage of the process, which may take from six months to five years depending on the complexity of the claim and the availability of resources, is funded by AANDC based on detailed work plans provided by First Nations that report the status of pre-submission claims. Any comprehensive and accurate evaluation of the achievements of the specific claims process must also include the Research and Development stage since it provides information on the actual number of claims in the system and would permit AANDC to make informed projections

[b] The *Policy and Process Guide* stipulates, "First Nations are responsible for researching their own claims and submitting those claims in accordance with the Minimum Standard." 2009. Guide. Indian and Northern Affairs Canada. "The Specific Claims Policy and Process Guide." Ottawa: Minister of Public Works and Government Services Canada, p. 10.

regarding future claims activity. This data is available from AANDC's Funding Services Negotiations Unit (FSAGNU) of the Treaty and Aboriginal Governance Sector.

Analysis of AANDC's Five Stated Achievements

AANDC highlights the following five assertions as primary achievements of *Justice At Last*:

1. Fewer specific claims are entering the system
2. The backlog of specific claims has been eliminated
3. Specific claims that have been accepted by the Minister are being negotiated
4. Access to mediation has been successfully established for First Nations
5. The Specific Claims Tribunal is fulfilling its legislative requirements and meeting the expectations of First Nations by providing a final, just, and timely mechanism for resolving claims

Each of these assertions will now be examined in more detail.

1. Fewer Specific Claims Are Entering the System

Public reporting by AANDC states First Nations are submitting fewer claims which creates the false impression that there are fewer claims in the overall system and that the need for the specific claims process, and its attendant funding, is diminishing. In its 2013 *Summative Evaluation*, AANDC reports that fewer claims are submitted to the Minister each year. The report lists the number of new claims submitted for the fiscal years 2008-2009 to 2011-2012 and concludes there has been a slow decrease in the number of new claims, first to 49 in 2010-2011 and a further decrease to 35 in 2011-2012.[11] AANDC includes the following graph to substantiate this claim:[12]

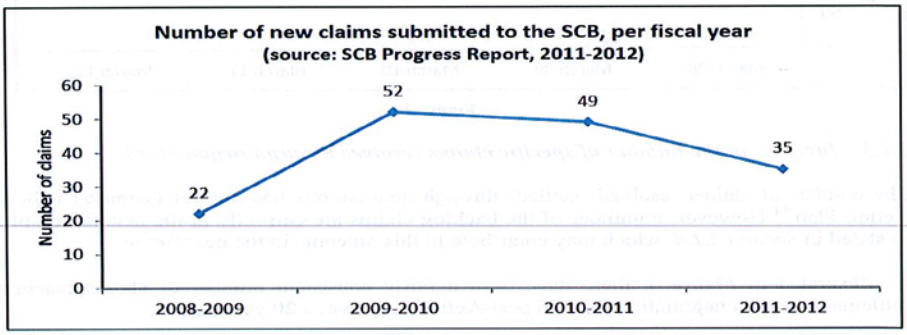


Figure 1

Claims In Research and Development Excluded From Data

These figures ignore AANDC data that tracks claims currently in Research and Development (i.e. those claims that are currently being prepared by First Nations to be submitted to the Minister). First Nations report the status of these claims annually to FSAGNU, the division of AANDC that funds First Nations to research claims. However, a *Specific Claims Survey* conducted in 2014 provides some helpful information.

Of the 339 claims represented in the *Specific Claims Survey*, respondents identified 230 that are currently in Research and Development. These claims will be filed with the Minister in the coming years but are not reflected in AANDC's reports. Without reference to claims in development, Canada's data suggests that the submission of specific claims is diminishing. This is not the case.

AANDC's figures relating to the decrease in new filed claims do not take into account two important factors that have lengthened the time needed to develop specific claims. The first is AANDC's refusal to accept additional evidence and submissions after claims are filed with the Minister. Whereas previously, First Nations had multiple opportunities to make

additional submissions, including in response to the SCB confirming research, now all possible bases must be covered by the initial (and only) submission. The second factor that has come into play is AANDC's rigid application of the Minimum Standard. First Nations are required to meet rigorous rules of document production well above litigation standards, including providing transcripts of a substantial portion of historical document collections. AANDC now devotes substantial SCB resources (previously devoted to confirming research and historical reviews of the substantive issues of claims) to policing First Nation adherence to these standards. Claims are routinely bounced for even minor document issues. Both of these factors have a chilling effect on the filing of claims, with First Nations engaged in a much more prolonged and expensive research and document preparation process. Ironically, First Nations have observed that while imposing the strictest rules on First Nations research, AANDC routinely produces sub-standard documents that contravene the Minimum Standard.

Claims on 2014 CRU Work Plans

The number of claims to be filed in the future is likely much higher than the survey results suggest since only a portion of Canada's approximately 600 recognized First Nations[13] participated in the survey. Further, specific claims that were not funded at the time of the survey are not reflected in the statistics presented. For instance, one respondent identified 40 new claims for which the claims research unit (CRU) did not receive funding in the 2013-2014 fiscal year (and therefore could not advance). It is also important to note that in 2014-2015, CRUs across Canada received significant funding cuts from AANDC, some upwards of 60%.

New Claims:

Of the 230 claims represented in the survey in Research and Development, 76 (33%) were identified as "new" for the 2014-2015 fiscal year. The survey also asked respondents to project the number of new claims they anticipated adding in the next five years. Respondents projected approximately 200-300 new claims would be added in the next five years.

Where do New Claims Come From?

Historically, specific claims arose in the following ways:

- Research or a legal evaluation of one issue uncovers evidence for another specific claim
- A First Nation's Chief and Council may identify an issue that fits within the specific claims policy
- A community member identifies an issue that he or she believes may give rise to a specific claim

Since *Justice at Last*, we have seen a dramatic increase in the number of new claims being developed. This is in part a direct result of Canada's practice of partial acceptances whereby Canada offers to negotiate the least substantive portions of a claim while demanding a full and final legal release on the remaining allegations made in a specific claim submission. Agreeing to accept Canada's terms as a precondition for negotiating the claim means that a First Nation *cannot pursue the rejected portions of its claim* at the Specific Claims Tribunal or via other mechanisms. The 2014 *Specific Claims Survey* strongly suggests that most First Nations do not accept these offers, in large part, because they exclude the substantive allegations made in the First Nations' specific claims.[14]

As an initial response to this practice, First Nations withdrew many of their multiple issue claims and resubmitted them as multiple individual claims. This increased in the number of new specific claims in the system has resulted in more research, administrative and legal costs that are not supported by additional research funding.

An increase in new claims can also be expected with the clarifications of factual and legal issues coming out of the Tribunal decisions. These decisions will clarify many previously unsettled questions relating to the content and breach of Canada's legal obligations in typical specific claim *scenarios* as well as applicable compensation principles.

The Minimum Standard as Gatekeeper

The specific claims policy that arose out of *Justice at Last* includes a new "Minimum Standard for Filing a Specific Claim Submission with the Minister of Aboriginal Affairs and Northern Development Canada."[15] The Minimum Standard is a set of requirements created by the Specific Claims Branch (SCB) regarding the type of information a First Nation must include in its specific claim submission and the way that information must be presented to be considered officially filed by the SCB.

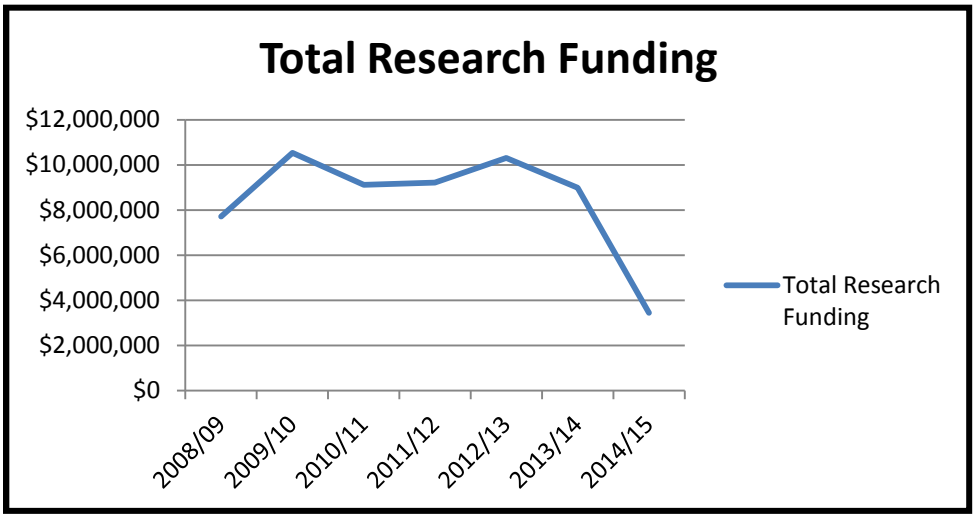
The application of the Minimum Standard should be reasonable and reflect best practices in research. However, the SCB applies the Minimum Standard in an inconsistent and onerous manner, creating hundreds of hours of additional work by a First Nation in order to meet SCB's formal requirements and have its claim submission deemed filed by the Minister (the first step in AANDC's specific claims process).[c]

SCB's unreasonable application of the Minimum Standard is imposing burdensome costs and delays on First Nations preparing specific claims, which is impacting First Nations' ability to complete new claim submissions and skewing the official figures regarding new claims entering the system as a result since Canada reports a reduction in the numbers of new claims being submitted.[d] Respondents to the *Specific Claims Survey* have expressed concern that SCB's unreasonable application of the Minimum Standard is a deliberate attempt to restrict the number of new claims on its inventory.

Research Funding

AANDC is aware of the increase of claims in Research and Development as this is detailed in CRUs' Biannual Work Plans provided to AANDC.

Despite this increase in new claims, in February 2014, CRUs and First Nations received 30-60% cuts to their research funding for specific claims, justified in part by AANDC's figures on claims submitted to SCB. The chart below, derived from funding data provided by FSAGNU, shows research funding levels from 2008 to 2014/15.



CRUs report that cuts to research funding levels has severely impeded their ability to advance the claims that are currently on their work plans or to begin work on new claims. Massive cuts to specific claims research funding have made AANDC's expectation of fewer claims being submitted a self-fulfilling prophecy. The principal implication of this is that First Nations are being denied access to justice.

2. The Backlog is Eliminated

Public reporting by AANDC states the backlog of claims awaiting resolution prior to *Justice At Last* has been eliminated. AANDC contends that specific claims in the backlog as of October 2008 have been reviewed, assessed and either concluded

[c] First Nations report that SCB is imposing unreasonable demands for transcriptions of fully legible, sometimes typed documents; demanding photocopies of entire books that are readily available; and, demanding the replacement of documents that contain small marks (sometimes made by AANDC officials themselves).

[d] Respondents to the *Specific Claims Survey* indicate they regularly spend 50-100 hours per claims preparing or upgrading claims so that they meet the minimum standard. They identify most of this work as unnecessary and suggest that the standards applied to specific claims far exceed those required for regular court setting.

or in negotiations.[e] Yet, AANDC's own data demonstrates that the majority of these claims remain unresolved. They have either been rejected, in which case they will seek resolution at the Specific Claims Tribunal, or concluded without finality through arbitrary file closures, in which case they will likely be resubmitted or filed with the Specific Claims Tribunal.

WHAT IS THE BACKLOG?

Justice At Last identified "nearly 800 outstanding claims in Canada**,** with roughly 630 of these stuck in bottlenecks at the front end of the system."[16] Elsewhere in the document the "bottleneck" of claims is highlighted as a growing problem and a key impetus for Canada's development of its *Specific Claims Action Plan*:

> *…The specific claims program has come under enormous pressure, with the number of claims in the federal system doubling between 1993 and 2006. There is a logjam of claims stuck in the system awaiting attention and action. About 70% of unresolved claims are bottlenecked at the front end of the process at the assessment stage.*
>
> *The average processing time for a claim is now approximately 13 years. Since two times more claims are submitted each year than are resolved, the inventory and backlog continue to grow. This has led to repeated calls from all quarters for more resources to speed up the process.*[17]

First Nations, CRUs, and advocacy groups had been voicing strong objections to Canada's delayed response to claim submissions for years. The bottleneck was largely identified as a function of a shortage of lawyers at the Department of Justice being assigned First Nations' specific claim submissions to assess whether Canada had any outstanding legal obligation. This resulted in First Nations waiting years, often decades, to receive notification as to whether their claim would be accepted for negotiation.

As stated in *Justice at Last*, "Canada's firm commitment to First Nations" included a promise to "resolve the existing backlog of claims" and that "50% of all claims currently in the system will be concluded."[18] These results were to be achieved by increasing resources, legislating a three-year timeline for Canada to provide a First Nation with a decision on their claim's validity, bundling small claims at SCB's internal research and assessment stages, "to speed up decisions regarding their validity," taking a "streamlined approach to processing," and taking advantage of existing resources to support the early review process.[19] Additionally, Canada would undertake "special efforts" to negotiate "small value claims – which account for about 50% of cases now in the system" more quickly.[20]

Thus, when AANDC officials refer to the backlog they mean "claims in assessment at the time the *Specific Claims Tribunal Act* came into effect"[21] on October 16, 2008. They include all claims (approximately 800) filed with the Specific Claims Branch on or before that date.

CANADA ASSERTS THE BACKLOG HAS BEEN ELIMINATED

According to AANDC's April 2013 *Summative Evaluation*, one of the key results that AANDC set out to achieve in the first three to five years of the *Specific Claims Action Plan* was a "Complete review and assessment of all existing and new specific claims by the end of the fiscal year 2010-2011."[22] The report asserts "The backlog of claims in assessment at the time the *Specific Claims Tribunal Act* came into effect has been cleared."[23] It further states:

> *The Specific Claims Branch has eliminated the backlog of claims that were in the research and assessment stage at the time that the* Specific Claims Tribunal Act *came into effect in October 2008. … In October 2008, a total of 541*

[e] AANDC website describes the review and assessment stage as follows: When a claim is being assessed, this means that Canada is completing a historical and legal review of the facts of the claim to determine whether it owes a lawful obligation to the First Nation. This phase of the process has three steps:

Step 1 – **Research:** The First Nation has submitted its claim to Canada and the claim meets the Minimum Standard for claim submissions. Canada is reviewing the historical research submitted by the First Nation to support its claim.

Step 2 – **Department of Justice preparing legal opinion:** At this stage, the claim is with the Department of Justice where a legal analysis is conducted to determine whether there is an outstanding lawful obligation to the First Nation.

Step 3 – **Legal opinion signed:** The Department of Justice has completed its legal analysis of the claim, which is being reviewed by Aboriginal Affairs and Northern Development Canada; a decision is pending from Canada on whether to accept the claim for negotiation.

Online at: https://www.aadnc-aandc.gc.ca/eng/1100100030300/1100100030301

> *files were in research and assessment. Three years later, in October 2011, all these files had been assessed and all of the associated First Nation claimants had been informed about the outcome of that assessment.*
>
> *With the backlog cleared, the Specific Claims Branch does not anticipate difficulties in completing the research and assessment process for new claims submitted by First Nations. …*[24]

AANDC's announcement of its clearing of the backlog has led the Specific Claims Branch to contemplate redefining its role in the claims process:

> *The transition from the SCB Repackaged Claims to the SCB Historical Review recognizes the end an era. Free from years of accumulated pressure from the Backlog, SCB can return to the grassroots of in-house research, taking the lead in becoming the expert on research methodology and historical elements as they relate to the allegations of the First Nation's claim.*[25]

The claims that formed the backlog are reported on the Specific Claims Branch's online *Status Report on Specific Claims*. Claim assessment categories include:

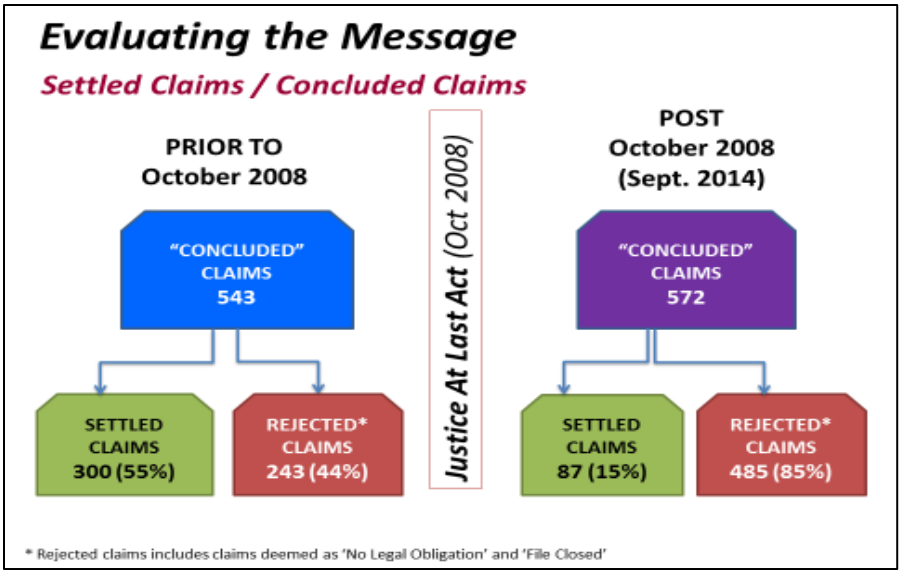
Under Assessment Research	In Negotiations	Concluded
• Justice Department Preparing Legal Opinion • Legal Opinion Signed	• Active • Inactive	• Settled Through Negotiations • No Lawful Obligation Found • Resolved Through Administrative Remedy • File Closed

Of the 800 claims AANDC included in the backlog in October 2008, 600 (75%) have been officially "concluded" without finality, according to the *Summative Evaluation*: 292 of these have been rejected outright (in Canada's view that they have not disclosed any outstanding legal obligation), and 308 have had their files closed[f]. In actuality, 75% of the backlog remains.

The Assembly of First Nations examined AANDC's publicly available data on concluded claims prior to and after the implementation of *Justice At Last*. Their review found that the number of concluded claims did not differ significantly between the two periods (543 prior to October 2008 and 572 after October 2008).

However, prior to *Justice At Last*, 300 claims (55%) were settled through negotiations, compared with only 87 (15%) under *Justice At Last*; 243 claims (44%) were either rejected or had their files closed prior to *Justice At Last*, while 485 (85%) of claims were rejected or had their files closed under the *Justice At Last* policy. Canada has dealt with the backlog of claims by failing to resolve the vast majority of them:[26]

[f] According to AANDC file closure is defined as "claims that would not fall within the scope of the Specific Claims Policy, a First Nation that would decide to withdraw its claims or to reject an offer made by Canada." See the *Summative Evaluation,* p. 18 for more information.



"Concluded Without Finality:" Two New Backlogs or the Same Old Backlog?

The *Summative Evaluation* additionally categorizes concluded claims in two ways: concluded "with finality" and concluded "without finality." Claims concluded with finality are those that received a "complete and final redress of the claim." [27] Claims concluded without finality are those where "no lawful obligation" was found or the claim file was "closed." [28]

The *Summative Evaluation* reports that, "Significant numbers of specific claims have been concluded without finality: There are hundreds of claims that could be proceeding to the Tribunal, or resubmitted as a new claim to the specific claims process." [29] One of the recommendations that emerged from the *Summative Evaluation* was that AANDC develop a risk strategy to "manage the large number of claims that are considered 'concluded' by AANDC but which have the potential to be submitted to the Tribunal or submitted as a new claim to the specific claims process." [30] The "Management Response" to this recommendation was to commit to undertaking a specific claims risk assessment framework. [31] The impact of this framework on actual claims resolution is not known and First Nations have not been invited to participate. [g]

Backlog Still Persists if Claims are Not Concluded with Finality

Contrary to AANDC statements and reports, the backlog has not been eliminated. It persists in the form of unresolved claims. The backlog has been repackaged and effectively transferred to the Specific Claims Tribunal or returned to the pre-submission stage in the form of new claims re-entering the process.

The astonishing numbers of unresolved claims due to rejections and file closures are completely at odds with the Government of Canada's statements in *Justice At Last* and the entire rationale for eschewing litigation in favour of establishing a claims resolution process:

> *Canadians' commitment to justice demands that these legal obligations are discharged and our outstanding debts to First Nations paid in full.* [32]

And:

> *The Government of Canada is accountable for legally-binding treaties and agreements signed by previous governments between the Crown and First Nations and has a duty to honour past commitments made with First Nations. Centuries may have passed since a treaty was signed, but this does not diminish Canada's obligation to keep its promises.* [33]

[g] Information surrounding the Specific Claims risk assessment framework is currently the subject of an Access to Information Request.

Statements in the *Summative Evaluation* suggest the policies flowing from *Justice at Last* stand apart from its guiding principles:

> *As every stage of the specific claims process is voluntary, it is important to note that the specific claim process does not force a claim to be addressed with finality. A First Nation chooses to submit a claim, to negotiate it with Canada, and to decide whether or not to accept a settlement agreement. Furthermore, it is only a First Nation that can make the decision to submit a claim to the Tribunal. Likewise, Canada assesses whether the claim has validity and determines whether or not to enter into negotiations and what would be considered fair compensation.*
>
> *Therefore, the specific claims process is designed to achieve finality but it does not guarantee that finality will happen in all cases. This is particularly evident by the claims that Canada determined did not disclose an outstanding lawful obligation and the claims falling under the file closure category, which includes, amongst others, claims where a First Nations decide not to accept the settlement offer. AANDC considers these claims to be concluded but First Nations have not provided Canada with a release and an indemnity with respect to these claims. Therefore, there is a risk that a number of these claims can be submitted to the Specific Claims Tribunal or submitted as a new claim to the specific claims process at any point in the future.*[34]

While the specific claims process may not "force a claim to be addressed with finality" or guarantee finality, *Justice at Last* does promise a fair, collaborative approach geared towards claims resolution, not simply claims processing.

The Link Between the Backlog, Funding and Claims Resolution

An AANDC 2014-2015 planning document[35] suggests the trend will be to continue dramatic cuts to specific claims funding that will effectively phase out *Justice at Last* by 2016. Tables A and B below show that planned spending dollars for the Aboriginal Rights and Interests Program and the Specific Claims Program in particular will be reduced by almost 60% in the 2016-2017 fiscal year as a result of "the sunset[h] of funding and associated FTEs for Justice At Last: Specific Claims Action Plan."[36] The planned termination of *Justice At Last* with the resulting massive funding cuts would mean essentially the end of the specific claims process, and the abandonment by Canada of hundreds of new claims that are currently in the system and that continue to come to light, as well as the vast majority of claims reported to be cleared from the backlog that are still unresolved.

Table A: Planned Spending on the Aboriginal Rights and Interests[i] Program[37]

Budgetary Financial Resources (dollars)				Human Resources (FTEs)		
2014–2015 Main Estimates	2014–2015 Planned Spending	2015–2016 Planned Spending	2016–2017 Planned Spending	2014–2015	2015–2016	2016–2017
826,318,323	826,318,323	810,894,607	339,129,838	266	259	226

P 1.2 Aboriginal Rights and Interests is the reorganization of the former P 1.2 Co-operative Relationships.

The decrease in 2015–2016 primarily reflects the sunset of funding and associated FTEs for the reconciliation and management of Métis Aboriginal rights, while the decrease in 2016–2017 primarily reflects the sunset of funding and associated FTEs for Justice at Last: Specific Claims Action Plan.

[h] AANDC's report defines a "Sunset Program" as a time-limited program that does not have ongoing funding or policy authority. When the program is set to expire, a decision must be made as to whether to continue the program. In the case of a renewal, the decision specifies the scope, funding level and duration.

[i] According to the document, " The Aboriginal Rights and Interests Program contributes to The Government Strategic Outcome. It seeks to strengthen collaboration between governments and Aboriginal groups through mutual respect, trust, understanding, shared responsibilities, accountability, dialogue and negotiation concerning the rights and interests of Aboriginal peoples.

Table B: Planned Spending on the Specific Claims Sub-Program[38]

Budgetary Financial Resources (dollars)			Human Resources (FTEs)		
2014–2015 Planned Spending	2015–2016 Planned Spending	2016–2017 Planned Spending	2014–2015	2015–2016	2016–2017
735,583,085	731,770,925	262,192,631	77	77	44

AANDC is proceeding as if Pillar 3 of *Justice at Last* - faster processing of claims - has been fulfilled. In actuality, AANDC's handling of the backlog by rejecting or closing claims and transferring the burden to the Specific Claims Tribunal or to the front end of the process undermines the principal objective of *Justice At Last*: the just resolution of specific claims through meaningful negotiation.

3. Claims Accepted By The Minister Are Being Negotiated

Public reporting by AANDC asserts Canada is negotiating claims fairly, has developed a process to negotiate small value claims and is currently negotiating a greater number of claims than prior to *Justice at Last*. Each of these assertions is false.

According to the Government of Canada, *Justice At Last* represents a "new, decisive approach to restore confidence in the integrity and effectiveness of the process to resolve specific claims."[39] *Justice At Last* itself is replete with references to the benefits of negotiating settlements with First Nations as opposed to litigating specific claims in court:

> *… To honour its obligations and right these past wrongs, Canada negotiates settlements that provide justice to First Nation claimants as well as fairness and certainty for all Canadians. Negotiation is always better than confrontation in securing peaceful settlements that respect the interests of all parties.*[40]
>
> *The Government of Canada prefers to resolve claims by negotiating settlements with First Nations. In contrast to litigation, negotiated settlements are jointly developed by the parties working together to ensure fairness for all. Negotiations are less adversarial, more cost-effective and avoid the risks of court-imposed settlements where outcomes can be uncertain. Just as important, they help build relationships and generate multiple benefits for all Canadians.*[41]
>
> *Negotiations lead to "win-win" situations that balance the rights of all Canadians; they ensure that settlements lead to a just resolution of First Nations' claims and are fair to all parties.*[42]
>
> *The Government of Canada reaffirms that negotiation remains its preferred method to settle claims, as this is invariably more effective than confrontation and adversarial approaches.*[43]

According to *Justice At Last*, negotiations provide justice and certainty, are collaborative and less adversarial, lead to fair resolutions, and are more effective than the confrontational approach modeled in the courts.

The Negotiation Process outlined in *Justice at Last*

Justice At Last contains a useful description of the specific claims negotiation process itself:

> *If an outstanding lawful obligation is found and damages are owed, Canada offers to negotiate a settlement with the First Nation. As a first step, Canada and the First Nation generally negotiate a Protocol Agreement. This creates a framework for negotiations and a process for information-sharing.*
>
> *The negotiators then develop a work plan. They also need to agree how to determine the amount of compensation that will be paid to the First Nation when the claim is settled. Studies on economic losses caused by the claim are often done to help negotiators start discussions on how much compensation would be fair to resolve the claim.*

> *Once the parties reach a consensus, the text of a legal agreement is drafted and then submitted to a vote by the First Nation. Following a favourable vote and approval by Canada, the settlement becomes legally binding on the parties. The final step is to implement the settlement. This includes the payment of cash and, in some cases, the transfer of land, as appropriate.*[44]

This approach is reflected in AANDC's *Guide to the Specific Claims Negotiation Process,* which details the nine steps involved in the process:[45]

> **STEP 1: Claim Accepted for Negotiation:** Following a historical and legal review, specific claims are accepted for negotiation when Canada concludes it has an outstanding lawful obligation to the First Nation.
>
> **STEP 2: Joint Negotiation Protocol Agreement Reached:** This is an agreement that sets out the process and "ground rules" for negotiations. It includes studies, timetables, etc.
>
> **STEP 3: Studies/Research on Compensation:** Research and studies help negotiators determine the amount of compensation that should be paid to a First Nation when its claim is settled.
>
> **STEP 4: Discussions on Compensation:** The negotiators review the studies and work to reach consensus on how much compensation would be fair to settle the claim.
>
> **STEP 5: Settlement Proposal and Drafting of a Final Settlement Agreement:** The negotiators agree on the key terms of a proposed settlement. The settlement agreement is then drafted.
>
> **STEP 6: Settlement Agreement Initialed by Negotiators:** Negotiators for the First Nation and the government initial the agreement.
>
> **STEP 7: First Nation Ratification Vote:** First Nation members have an opportunity to say yes or no to the settlement agreement through a community vote.
>
> **STEP 8: Ratification by Canada:** If approved by the First Nation membership, the next step is for the First Nation leadership and the Minister of Indian Affairs and Northern Development to sign the settlement agreement.
>
> **STEP 9: Implementation of the Agreement:** Land is transferred, or cash is paid, as appropriate.

At odds with both this description in *Justice At Last* and AANDC's *Guide* is the treatment of both "small value" and "large value"[j] specific claims that AANDC asserts it accepts for negotiation.

Small Value Claims Removed from Access to Negotiations

Justice At Last promises to introduce a procedure to quickly negotiate "small value" claims in its discussion of Canada's commitment to Pillar 3, faster processing and improving internal government procedures:

> *The goal is for all new claims to receive a preliminary assessment within six months to identify those that qualify for negotiation and to sort them for faster processing. Similar claims will be bundled at the research and assessment stages to speed up decisions regarding their validity. Small value claims will undergo an expedited legal review to quickly conclude whether they will be accepted for negotiation.*
>
> *… Special efforts will be made to negotiate small value claims – which account for about 50% of cases now in the system – more quickly.*[46]

[j] JAL defines "large value" claims as those valued over $150 million and provides that "Separate arrangements will be established outside the specific claims process" to handle these claims which Canada views as "relatively rare but more difficult." As it stands, no separate process has been developed to resolve these claims. They are referred to Cabinet and the process for dealing with them has never been formally articulated.

Justice At Last does not define "small value" claims or ascribe a compensation amount to them. However, evidence summarized by Justice Patrick Smith in the Aundek Omni Kaning (AOK) Tribunal decision helps to clarify AANDC's internal policy:

> *A small value claim is one which Canada believes, at the time the letter of acceptance is written, could be settled for compensation of less than three (3) million dollars.*[47]

The AOK decision also revealed that a determination of claim valuation occurs during the "Early Review Process" prior to a claim being accepted for negotiation. During this process, a claim is reviewed by AANDC's Valuation and Mandating Unit of the Specific Claims Branch "…to set a preliminary value for the claim. This is the stage where a claim may be categorized as a small value claim, although the preliminary value may be adjusted at a later date."[48] Following the early review, the Specific Claims Branch forwards its recommendation, including the determined preliminary value of a claim, to the Claims Advisory Committee, which is made up of AANDC senior officials.

In April 2014, the National Claims Research Directors (NCRD) received from the Specific Claims Branch a copy of the "Early Review Process Briefing Document,"[49] currently used in the preliminary assessment of specific claims. The document showed that a preliminary valuation of a claim is completed at this stage. A claim is categorized according to one of the following values:

- Small value - under $3 million
- Normal value - between $3 and $150 million[k]
- Large value - over $150 million
- "Unsure" of value[50]

There is no clear indication of how this early valuation is determined. Responding to questions in May 2014 about the rationale, process, criteria, and authority for making claim valuations prior to accepting claims for negotiation, Kathy Green, the Director of Research and Policy at the Specific Claims Branch, stated that early claim valuations are made for the purpose of assigning proportional resources to process a claim, and that a valuation is made by reviewing the value of other similar claims. She stated that no formal valuation assessments are conducted, nor are First Nations claimants funded or invited to provide input at this stage. Ms. Green assured the National Claims Research Directors (NCRD) in attendance at the meeting that the valuation amount is not fixed, nor does it determine how an accepted claim will be negotiated.

Despite this assurance, the valuation categories in the Early Review Process document coincide with the approach to negotiations being undertaken by the Specific Claims Branch. In the AOK hearings at the Tribunal, AANDC officials indicated that claim valuation for the purposes of determining negotiation approaches does occur during the early review process.

Evidence given in the AOK hearing has confirmed that First Nations are categorically excluded from the process of valuating their claims for the purposes of initiating negotiations. As summarized by Justice Smith, "A claimant is not consulted or does not participate in the calculation of the preliminary value of a small value claim or the classification of the claim as a small value claim."[51]

Claims that are unilaterally valued by Canada at less than $3 million enter into an "expedited legal review"[52] process whereby there are excluded from eligibility for negotiation loan funding and from engaging in "negotiation activity." According to Justice Smith's summation of the evidence presented at the AOK hearing,

[k] "Normal value" claims, that is, claims accepted for negotiation and valued by Canada between $3illion and 150 million, are eligible for limited loan funding. A First Nation whose claim is placed into this category may apply for loan funding which "may cover the costs of paying the claimant's negotiators, legal counsel, consultants, travel, meeting facilities, meals, accommodation, appraisers, economists, actuaries and ratification of the settlement."[k] Despite the nominal designations, survey data acquired from First Nations and Claims Research Units across Canada reveals that "normal" claims form a significant minority of claims accepted for negotiation by the Specific Claims Branch.

> *For a small value claim there is no loan funding available because Canada does not expect any significant negotiation activity. Instead, the offer of settlement made by Canada includes a lump sum to cover costs.*[53]

Discrepancies in Public Reporting about Claims in Negotiations

First Nations with claims that Canada has valued under $3 million receive a take-it or-leave-it offer of one-time lump sum payments, usually up to $50,000, to cover the legal costs of reviewing and responding to Canada's terms of acceptance of the claim and settlement offer, as well as obtaining community input and direction. These claims are reported to the public as "in negotiations."[54]

The Specific Claims Branch does not make information on claim value and related approaches to negotiations publicly available. However, *Justice At Last* cited the percentage of small value claims at 50% when it was announced in 2007.[l]

Regardless, Specific Claims Branch expects no "significant negotiation activity"[55] to take place regarding the majority of claims it reports as *accepted for negotiation*.

The Meaning of "Negotiation"

Negotiation is a process by which an agreement between parties is reached through discussion and compromise, that is, engaging in back and forth communication with each other with the sincere intention of reaching a voluntary agreement.

Justice Patrick Smith of the Specific Claims Tribunal has clarified that in the context of section 16(1)(a) of the *Specific Claims Tribunal Act* and of Aboriginal claims, negotiation requires:

> *…consistency with s. 35 of the* Constitution Act, 1982*, the principles of reconciliation and "good faith", and the honour of the Crown. Interpretation should be liberal and generous with respect to ambiguities, which should be resolved in favour of First Nations.*[56]

If a commitment to negotiated settlements as articulated in *Justice At Last* underpins Canada's specific claims resolution policy, and if negotiation and a non-adversarial position drive Canada's approach to settling its debts to First Nations communities, how is it that the majority of claims accepted for negotiation are not expected to generate any significant negotiation activity? What is happening instead?

The Specific Claims Negotiation Process is not being Followed

Instead of initiating a process of negotiation beginning with a Joint Negotiation Protocol Agreement as described in the *Guide to the Specific Claims Negotiation Process*, a First Nation receives a notification letter that its specific claim has been accepted for negotiation. If Canada has designated the claim "small value," these letters are accompanied or followed by a non-negotiable offer of settlement, a one-time sum to cover legal costs and a 60 to 90 day deadline to accept and respond to the offer or have the claim file closed.[57] File closures result in the Specific Claims Branch stopping all work on the claim and devoting no more internal resources to it. The claim has effectively come to an end unless the First Nation submits new evidence warranting reconsideration of the claim.[58] The claim is reported as "File Closed" on the *Status Report on Specific Claims,* which is publicly available on AANDC's website and is considered a "concluded" claim for both internal and public statistical and evaluative purposes.[59]

According to the 2014 *Specific Claims Survey*, many of the "small value" claims accepted for negotiation are, in actuality, minor portions of larger, more complex claims. As discussed above, the substantive allegations are routinely rejected by Canada or Canada limits the extent of its liability to extremely narrow, severed timeframes. The unilateral calculation of claim values by SCB is determined based on only the accepted, usually minor, allegations. Thus, the practice of partial acceptances has become a tool to divert larger claims into the "small value" claims category and address claims quickly at the expense of fair negotiations and fair compensation.

[l] The number of claims that have been unilaterally assessed as "small value" – and therefore eligible for the "expedited settlement process" is currently the subject of an Access to Information Request.

In addition to Canada making "take-it-or-leave-it" offers, the small value settlement offers are conditional upon the First Nation signing a full and final legal release on the entirety of the claim submission, preventing a First Nation from reopening the substantive allegations at any time in the future through any other process.[60] 80% of respondents to the *Specific Claims Survey* have received partial offers on relatively small portions of their claims while 75% indicated they received demands for releases on rejected allegations that they identify as substantive.[61]

In the AOK Tribunal case and in other First Nations' accounts, these non-negotiable settlement offers are considered by the First Nation to be wholly inadequate and often insulting; the one-time payment to cover legal costs in lieu of a meaningful negotiation process is an exploitation of the real poverty experienced by most First Nations communities in Canada.

One BC First Nation articulated its dissatisfaction with Canada's practices in a February 2012 letter to its AANDC negotiator:

> *[The First Nation] would rather leave this outstanding grievance for a just and fair resolution to be achieved by one of our future generations than allow this generation, and in particular this Council, to sign a deal that is so fundamentally flawed and so fundamentally underestimates the strength and resolve of our community.*
>
> *Some of the reasons for our decision to wholly reject Canada's settlement offer include the following considerations. Firstly, the amount of the offer is an insult. It takes the most minimalist and technical approach to the wrong and assigns the least financial value possible. … Secondly, the enticement of the negotiation expenses - $50,000.00 - is not something [the First Nation] is prepared to bite at. Obviously, and as you are no doubt aware, our community could certainly put $50,000.00 to good use and benefit. These are monies that are needed in and by our community. However, there is a principle here, and [the First Nation] is resolved not to fall for Canada's trickery. In talking with the leaders of other First Nations, we learned that they have also been offered very, very little value to the wrong but significant monies (at least significant for these communities) as "expenses" to settle the claim. Canada's approach is dishonourable – either taking, or attempting to take, advantage of our poverty. Each specific claim is significant. In each case, we relied on Canada to administer and manage our lands to our best use and benefit. And then, when many decades later, Canada agrees that perhaps things could have been done better, the offer to settle raises instead a new grievance. As I say, [the First Nation] has decided to reject Canada's offer, to not fall for the carrot, and leave the door open for a truly negotiated settlement in the future.*[62]

The lump-sum "negotiations" payments are insufficient for First Nations to assess, to attempt to negotiate, and to respond to all aspects of Canada's offers. First Nations' attempts to communicate with Canada regarding the take-it-or-leave-it settlement offers are routinely dismissed, leading Justice Smith to characterize the process for small value claims as:

> *…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.*[63]

Rigid, take-it-or-leave-it offers made without discussion or explanation, with fixed arbitrary deadlines do not constitute negotiations of any sort. They are ultimatums.

Misleading Reports of More Claims in Negotiations

As a matter of internal policy, Canada refuses to negotiate "small value" claims, which account for most claims in the system. Yet, AANDC publicly reports that, "…the total number of claims in negotiation has increased significantly under the Action Plan [*Justice At Last*]."[64] AANDC states the number of claims in negotiation in 2012 was double the number in negotiation in 2008, and in 2013, reported 280 claims in negotiation.

A critical review of the publicly accessible *Specific Claims Status Report* completed in September and November 2014 found 92 claims currently in negotiation, suggesting that in the 19 months since AANDC's report, close to 200 claims have been settled through negotiations. Yet the Status Report clearly indicates that approximately only 20 claims have been settled in that time period.[65]

AANDC also reports on a "Historical Acceptance Rate" (HAR) as a measure of its success in dealing with specific claims. The HAR refers to the "…proportion of all claims researched and assessed since 1973 where Canada concluded that a claim disclosed an outstanding lawful obligation,"[66] meaning, the proportion of claims submitted that are accepted for negotiations. In the five years since the implementation of *Justice at Last*, the average annual HAR is reported at 64%, yet the inventory records that only about 15% of submitted claims result in negotiated settlements.

AANDC's 2013-14 Departmental Performance Report indicates that, "Canada is negotiating 100% of the 231 claims accepted for negotiation." If these statistics hold true, Canada is clearly including its one-time, take-it-or-leave-it offers to First Nations with small value claims in its negotiation total. We know that, in actuality, the majority of claims are being effectively barred from any negotiation process whatsoever. This is not conjecture. It is confirmed by AANDC's own definition of its small claims expedited settlement process and by Justice Patrick Smith in the AOK Tribunal decision.

Public Reports via the House of Commons Standing Committee on Aboriginal Affairs

Public reporting on the status of specific claims also occurs in the form of studies performed by the Standing Committee on Aboriginal Affairs and Northern Development,[67] whereby departmental officials report to Parliament on the status of the Specific Claims Program. In October 2011, Director General of the Specific Claims Branch Anik Dupont testified and answered questions about the nature of claim negotiations:

> ***Mr. David Wilks (Kootenay—Columbia, CP****C):*
> *… I specifically just want to talk about the offer, and arguably it's probably one of the more important parts of the negotiation. But in terms of the offer, do first nations agree to negotiate with Canada? And are first nations consulted before a settlement offer is made?*
>
> ***Ms. Anik Dupont:***
> *When the minister accepts the claim for negotiations, a letter is sent to the first nation, which explains what is the basis on which we agreed to negotiate. Following this, the first nation has to confirm its agreement with a band council resolution to the department stating that it agrees with the terms of the letter and that it wishes to commence negotiations.*
>
> *Sometimes through studies or other work that we look at, we value what the claim is, what the components of the claim are. So either the studies or the work at the table are done—sometimes jointly, sometimes by the first nation—to inform and develop what we believe is the value of the claim. That work is all done jointly with the first nation.*
>
> *Then once the negotiators have an idea of what the value of the claim is, the negotiator has to seek a mandate to be able to present the first nation with an offer.*
>
> *So the first nations have a general idea of where we're going and what we're going to be looking at by way of compensation. The negotiator comes in, develops the mandate, seeks approval for it, and then goes back to the first nation and presents a written offer to the first nation explaining how we arrived at this offer.*
>
> ***Mr. David Wilks:***
> *To clarify, the joint research and discussions take place with both parties?*

> ***Ms. Anik Dupont**:*
> *Yes. Sometimes the first nation may wish to do their own research, and sometimes we do it jointly. It's all worked out. Each and every table is different, for a variety of different reasons.*[68]

Ms. Dupont's statement that the work of determining settlement offers is "all done jointly with the first nation" is a misrepresentation of the facts. This may be true for larger valued claims, but it is certainly untrue of the process for small value claims. It contradicts statements made by AANDC staff under oath. It contradicts statements made by Kathy Green (second in rank to Ms. Dupont) to the Research Directors from CRUs Canada wide, and it contradicts the reported experiences of First Nations and their legal counsel attempting to negotiate their specific claims.

A First Nations Tool Becomes an "Operational Model"

Why is Canada abandoning both the principles and practice of negotiation as articulated in *Justice At Last* for the majority of claims it explicitly accepts for negotiation?

According to section 16 of the *Specific Claims Tribunal Act* a First Nation may file a claim with the Tribunal if it has been rejected or if "… three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement."[69]

In other words, a First Nation may access the Specific Claims Tribunal if, after three years of negotiations, the First Nation assesses that negotiations are not occurring in a satisfactory way. This three-year timeline was intended as a tool for First Nations to compel Canada to negotiate and resolve specific claims in good faith. First Nations are not obligated to file claims with the Tribunal. In fact, if First Nations are content with the progress of negotiations, they may opt to continue talks beyond three years.

However, Canada has been using the legislated three-year timeline as an "operational model" whereby Canada has internally determined it must "address" specific claims within this time period. AANDC's April 2011 *Formative Evaluation of the Specific Claims Action Plan* states:

> *In reviewing the negotiation process in light of the Action Plan, INAC decided the Department would attempt to negotiate and settle all valid claims within a three-year period following the notice from the Minister to the First Nation claimant offering to negotiate a settlement.*
>
> *In practical terms, this decision became an operational model. …*[70]

In theory, the operational model functions to conclude negotiations within a three-year time period, which AANDC officials agree is their interpretation of the Act.[71] In practice, the operational model derails negotiations by ignoring the intent of the legislated timeline, which is to compel Canada to negotiate. As articulated in the *Formative Evaluation*:

> *Nowhere in the* Specific Claims Tribunal Act *or in the Specific Claims Policy itself, is there an obligation to negotiate a settlement within three years. ... Evidence gathered as part of this evaluation indicates that there is little incentive for a First Nation to abandon a negotiation table and turn to the Tribunal simply because this option has become available.*

and,

> *… that this operational model will not be sustainable for larger and more complex claims.*[72]

Canada is prioritizing expediency over its duty to negotiate in good faith. This outcome was observed in the *Formative Evaluation*:

> *Finding from the evaluation suggests that INAC's negotiators may appear more prompt to table so-called* final *offers, which have little chance of being accepted by First Nations, in order to close a file before the end of the three-year period.*[73]

This timeline is also described by Anik Dupont in her October 2011 testimony to the Standing Committee:

> ***Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC)**:*
> *First, how does the department decide to end the negotiations?*
>
> ***Ms. Anik Dupont:***
> *Do you mean to conclude negotiations or...?*
>
> ***Mr. Rob Clarke:***
> *Yes.*
>
> ***Ms. Anik Dupont:***
> *Well, in the course of the negotiations, once we've established that we have an understanding of what the claim looks like and how we're going to be compensating, and once we put a value to what the claim is, we come in to get a mandate to settle these claims.*
>
> *Then, once an offer is made to the first nation and they make the decision whether or not to accept the claim, if they accept it we finalize. They may have a ratification vote, depending; there are thresholds for ratification. If the first nation votes in favour and they agree to the settlement and to the trust, we seek approval to ratify the agreement. Then we make payment to the first nation.*
>
> ***Mr. Rob Clarke:***
> *Do the first nations want to continue with negotiations past the three years?*
>
> ***Ms. Anik Dupont:***
> *I guess from the first nations' point of view, it's getting used to the concept that we come in and this will take three years. It's been a difficult adaptation for everyone when it comes to the pace and how we need to focus more at the tables.*
>
> *The first nations sometimes feel that, yes, they are being pushed and shoved through the process, but we have a lot of discussions with them, and they understand that the ultimate goal is for us to get them in front of a settlement sooner rather than later.*[74]

The deadlines being imposed on First Nations by the Specific Claims Branch to accept Canada's offers are wholly artificial since there is nothing in the Act or policy suggesting Canada will terminate negotiations at the end of three years. There are also arbitrary deadlines imposed on First Nations with "small value" claims, where they are given 60 or 90 days to accept Canada's one-time settlement offer. Since Canada is either refusing to negotiate small value claims or terminating negotiations, it is clear that the bureaucratic imperative to close files quickly in a pantomime of efficiency and public accountability trumps good faith negotiations to resolve specific claims with finality and in the spirit of reconciliation. As AANDC's *Formative Evaluation* observes:

> *Finding from the evaluation suggests that INAC's negotiators may appear more prompt to table so-called* final offers*, which have little chance of being accepted by First Nations, in order to close a file before the end of the three-year period. ... What appears concerning, however, is the extent of the increase in the number of files closed. This is six to eight times higher than what was experienced before the Action Plan.*[75]

4. Access to Mediation has been Established for First Nations

Public reporting by AANDC asserts Canada has created better access to mediation for First Nations engaged in the specific claims negotiation process and that First Nations are not using the mediation services available to them. This assertion needs to be addressed as it creates the false impression that First Nations are refusing to avail themselves of a viable dispute resolution alternative.

The *Specific Claims Action Plan* promised "better access to mediation" through a "neutral third party" where "Every reasonable effort will be made to achieve negotiated settlements and cases would only go to the tribunal when all other avenues have been exhausted."[76]

As a performance measure, AANDC tasked itself with the following: "Through discussions with First Nation leaders, develop and implement a strategy to allow for greater use of mediation services."[77] ANNDC reports that "access to mediation has been achieved; however, parties are not making use of the better access to mediation."[78] Despite these commitments and public reports, in fact there are very few opportunities for mediation in the specific claims process; and where mediation is a real option, independent services have not been provided to First Nations who request them.

What is Mediation?

AANDC's "Frequently Asked Questions – About Mediation Services for Claim Negotiations" website describes mediation as:

> *…an important and valuable mechanism to assist the parties in a dispute to overcome obstacles or impasses and reach negotiated agreements.*
>
> *Mediators employ various tools, including facilitated communications, problem-solving and option-building to help the negotiating parties to effectively and efficiently reach mutually acceptable agreements and settlements. Mediators do not have the authority to impose binding solutions, but instead encourage the parties to resolve issues collaboratively.*[79]

The Creation of a Mediation Centre

Our records indicate that, in 2008, the Assembly of First Nations (AFN) and Canada began to jointly develop a framework for a new Alternate Dispute Resolution Centre for specific claims negotiations. However, Canada subsequently ended discussions with the AFN on this matter.

Instead, AANDC established a unit within its own offices to administer and provide mediation services from within the Department. Then Minister Strahl's justification for this was articulated in a letter to the National Chief Shawn Atleo: "it is my position that independent mediation services to parties during specific claim negotiations can most effectively and efficiently be provided through the Department."[80] Rather than establishing a neutral, independent mediation body as promised in *Justice At Last*, AANDC officials unilaterally developed a roster of mediators, and the mediation unit is housed in AANDC offices. The AFN opposed AANDC's mediation schemes as indicated in this 2010 letter from the AFN National Chief to then Minister Chuck Strahl:

> *…the key elements of independence and neutrality that are the cornerstone to facilitation / mediation services are severely compromised by this final option.*
>
> *…*
>
> *The impartial nature of the services needed by the parties – require these services to be administered and provided by a neutral party that is not in any way otherwise involved in the issue(s). The Department's option eliminates impartiality. This option has the* appearance *of bias since the Department would be in the position of convening the alternative dispute resolution process and participate as a party.*[81]

AANDC's *Summative Evaluation* suggests that First Nations are not taking advantage of mediation services because they may not be aware of them. However, the report provides no data to support this assumption. Further, the AFN as well as other First Nations organizations have demonstrated their knowledge of AANDC's mediation unit through their widespread and public opposition to it. As noted above, the degradation of the negotiation process especially in relation to small claims means that there is much less opportunity for mediation in the specific claims process. Another reason why First Nations are not using AANDC's mediation scheme for specific claims is because it is not perceived as independent, since it was established and is administrated by AANDC. A First Nation may also be reluctant to request mediation if they believe Canada will not consent as it would constitute waste of time and resources.

The few First Nations who have attempted to access mediation have reported that Canada either refused to engage or walked away after mediation began; the perception exits that Canada will not agree to mediation in most cases. As identified in the 2014 *Specific Claims Survey*, of 283 First Nations, only two First Nations sought mediation for their claims. In both cases, they indicated Canada agreed to and then walked away from mediation.[82]

5. The Specific Claims Tribunal is Fulfilling its Legislative Requirements and Meeting First Nations' Expectations

Public reporting by AANDC states that the creation of the Specific Claims Tribunal is one of the primary achievements of its *Specific Claims Action Plan*. The *Summative Evaluation* reports that:

> *The Specific Claims Tribunal has been established, including the Registry, which supports the work of the Tribunal.*[83]

and

> *Over time, negotiated settlements, decisions from the Tribunal and the body of law that will emerge from the Tribunal are expected to contribute to a greater level of justice and certainty.*[84]

The Tribunal was established through the *Specific Claims Tribunal Act* on October 17, 2008, and it became operational in June 2011. To date, the Tribunal has issued a number of decisions which have helped to clarify procedural, factual, and legal issues common to many specific claims and have paved the way for the resolution of a number of claims with similar issues.[85] The Tribunal process, if properly resourced, can be expected to result in future in a predictable legal framework for the often complex issues advanced in specific claims, thus greatly enhancing the prospect of claim resolution and reconciliation through negotiated settlement agreements. Yet despite its early successes and future promise, Canada is currently imposing changes to the Tribunal that are significantly compromising the Tribunal's independence, perceived legitimacy, and continued operations.

Principles Behind the Creation of the Specific Claims Tribunal

The first pillar of *Justice at Last* is impartiality and fairness through the creation of an independent claims tribunal. *Justice at Last* states:

> *…Canada will create an independent tribunal that can make binding decisions where claims are rejected for negotiation or when negotiations fail. … The independent tribunal will be made up of retired or sitting judges. These judges will have the necessary experience, capacity and credibility to examine historical facts and evidence and to address complex legal questions surrounding Canada's legal obligations and determine appropriate levels of compensation.*
>
> *There are three scenarios in which a First Nation could file a claim with the Tribunal:*
>
> - *when a claim is not accepted for negotiation by Canada;*
> - *in cases where all parties agree that a claim that has already been accepted should be referred for a binding decision; or,*
> - *after three years of unsuccessful negotiations.*

> *… In all cases, these interventions will bring greater fairness to the process while accelerating the settlement of outstanding claims.*[86]

The Tribunal has the authority to make final and binding decisions on specific claims, which according to then Department of Justice Lawyer Robert Winogren are subject only to judicial review, which he described as:

> *…a process wherein if the jurisdiction of the tribunal is in question, then that jurisdiction can be questioned; otherwise it's a final decision.*
>
> *…*
>
> *There are no appeal provisions, so the case can't be reconsidered on its merits. ... The only provision for review is judicial review, which is an administrative remedy, available when a judge exceeds his jurisdiction*.[87]

DISSOLUTION OF A DEDICATED REGISTRY: TRIBUNAL'S INDEPENDENCE UNDERMINED

In June 2014 Canada passed the *Administrative Tribunals Support Services of Canada Act* (*ATSSCA*), which came into force on November 1, 2014. The *Act* established the Administrative Tribunals Support Services of Canada to "consolidate the provision of support services to 11 administrative tribunals by way of a single, integrated organization."[88] As a result, the Registry of Specific Claims ceased its operations on October 31, 2014 and its staff and resources have been transferred to the ATSSC. The ATSSC is now responsible for determining administrative procedures and providing all facilities and support services, including financial, research and analysis services, to the Specific Claims Tribunal.[89]

The Registry, which had its origins in the *Specific Claims Tribunal Act*, was described as being responsible for:

> *…managing the processing of claims including: intake and tracking of submitted claims; managing the logistics of proceedings (including scheduling of proceedings); processing warrants, subpoenas, and writs; managing information and records; and providing services to the public in both official languages.* [90]

Prior to the transfer of its financial and human resources to the ATSSC, the Registry emphasized the crucial importance of fulfilling its mandate:

> *… These services support the independent resolution of claims fairly, without delay, and with an efficient, effective, and economic application of resources. The Registry must exercise these functions in a manner that protects the administrative and adjudicative independence of the Specific Claims Tribunal.* ***Independence is central to the role of the Specific Claims Tribunal and its ability to resolve claims fairly****.*[91] [emphasis added]

While the federal government asserts that: "Decision-making independence in relation to the tribunals' adjudicative and substantive functions (including investigation and mediation) will be fully preserved, and the tribunals will maintain control over their rules and procedures,"[92] First Nations have grave concerns that the Tribunal's power to make decisions on spending and resource allocation will be significantly hampered under the new administrative service. These concerns are compounded by the fact that any loss of financial independence could, in effect, represent diminished operational control.

Further, First Nations are also concerned that the Tribunal's independence will be significantly compromised as the service will lack the requisite understanding of the complexities involved in the Tribunal fulfilling its mandate. The Tribunal is predicated upon judicial independence from the Government of Canada. Any curtailment of the Tribunal's independence puts the legitimacy of the Tribunal at risk.

Understaffing and Underfunding Impairing the Tribunal's Ability to Function

On November 14th, 2014 the Chair of the Specific Claims Tribunal, Justice Harry Slade, released his Annual Report. Justice Slade warns that crippling understaffing and considerable funding shortfalls will impair the ability of the Tribunal to function:

> *The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. Nor is it, … assured of its ability to continue to function with adequate protection of its independence.*
>
> *…The Tribunal will fail.*[93]

Justice Slade states that, despite raising these concerns with the Ministers of Justice and Aboriginal Affairs, "There has been no adequate response from Government."[94]

For a body of law to emerge from the Tribunal that contributes to "a greater level of justice and certainty," the Tribunal must be properly staffed and resourced in accordance with the provisions of the *Specific Claims Tribunal Act* and must be permitted the independence needed to conduct its work in accordance with the rationale articulated in *Justice At Last*.

Funding for First Nations Participation at the Tribunal Resulting in Depleted Research Budgets

A First Nation who files a claim with the Specific Claims Tribunal receives contribution funding authorized and distributed through AANDC's Funding Services for Aboriginal Governance and Negotiation Unit (FSAGNU). This contribution funding is drawn from AANDC's total annual budget for the research and development of specific claims, which totaled $6 million in the 2014-1015 fiscal year.

In 2014-15, claims research units across Canada received 30 to 60 percent cuts to their annual funding for the research and development of specific claims. At a May 2014 national meeting FSAGNU officials informed directors of claims research units that of the $6 million allocated to claims research and development in 2014-2015, $2 million had been set aside to cover the costs of First Nations taking claims to the Tribunal.[95]

As the Specific Claims Branch is rejecting claims in higher numbers and refusing to negotiate the majority of claims, the Tribunal will see dramatic increases in the number of claims awaiting final resolution. Funding for claims at the Tribunal will have a direct, adverse effect on research funding; in fact, First Nations Tribunal funding will be at the expense of research and development funding in a cycle of diminishing returns: the more claims that the Tribunal is forced to hear because Canada will not resolve claims through negotiations, the less money there is to conduct the research necessary to advance claims to the Tribunal.

Legislated Five Year Review of the *SCTA*

October 16, 2013 marked the fifth anniversary of the coming into force of the *Specific Claims Tribunal Act*. The Act stipulates that within one year of the anniversary the Minister must conduct a review "of the mandate and structure of the Tribunal, of its efficiency and effectiveness of operation and of any other matters related to [the Act]"[96] and that First Nations must be given an opportunity to make representations as part of the review. There has been no formal invitation to First Nations specifically to make submissions to the review, however, Canada has released an "engagement paper" titled *Seeking Comment on the Five Year Review of the Specific Claims Tribunal Act* and invited all Canadians to make electronic submissions by April 15, 2015. Upon examination it appears that Canada's formal engagement process consists of responding to questions that are focused on the Tribunal's expediency and efficiency and implicitly suggest the Tribunal's shortcomings are administrative problems to be solved by transferring select power from the Tribunal to another administrative body, rather than addressing Canada's substantial and chronic under-resourcing of the Tribunal. It also severs the operation of the Tribunal from the concrete application of the specific claims policy and the implementation of internal directives that directly impact the case load and expectations of the Tribunal.

RECOMMENDATIONS

OVERALL

The failure of *Justice at Last* reflects a deep and growing rift between First Nations and the Crown – one that is characterized by a profound mistrust towards government processes, systems, promises, and, most importantly, honour. All recommendations below are prefaced by the overarching need for joint oversight of the process moving forward if trust is ever to be rebuilt. Further, hundreds of claims under the current process have been left in limbo – returning us to a time when a massive backlog of unresolved claims characterized the claims process. These recommendations provide Canada with tangible, achievable steps that can be taken to finally achieve *Justice at Last*.

RESOURCING/FUNDING

1. Immediately restore and increase funding to research and develop specific claims based on the number of new claims in development and taking into account that the research must be comprehensive and that documents must meet the Minimum Standard. Some of this funding could be redirected from the Specific Claims Branch who report a reduced work plan. Immediate restoration of specific claims research funding would allow current and new claims to be researched and developed giving these claims access to the resolution promised by *Justice at Last*.
2. Provide funding to the Tribunal to adequately address the volume of claims that can be expected to be filed with the Tribunal due to the large number of rejected claims and file closures.
3. Provide adequate funding to First Nations who have claims filed with the Tribunal.
4. Provide resources to all claimants at all stages of the claims process at levels commensurate with the new demands on claimants at the filing stage, as well as in the event that they go before the Tribunal.
5. Renew commitment to annual specific claims settlement fund at current or increased levels.
6. Provide funding for First Nations to initiate and participate in Judicial Reviews of Tribunal decisions commensurate with the resources available to Canada to engage in Judicial review.

NEGOTIATIONS AND MEDIATION

7. Abandon the practice of partial acceptances with blanket releases. Releases should only be considered for allegations that have been resolved - not on rejected allegations (which can access the Tribunal).
8. Abandon the practice of making settlement offers, unilateral decisions and underfunding – because these approaches undermine reconciliation and true resolution.
9. Abandon the practice of assigning value to a claim without consultation with First Nations. AANDC officials are not qualified to make these valuations and their unilateral imposition undermines negotiations.
10. Unpin imposed claim value from negotiation strategies. Process "small value" claims in the same way as "normal" claims. These are historical grievances that require reconciliation and acknowledgement.
11. Immediately cease referring to the issuance of non-negotiable, final, take-it-or-leave-it offers as "negotiation."
12. Abandon conflict-of-interest laden mediation services established by AANDC and reconvene discussions with the Assembly of First Nations to establish a truly independent Mediation Centre.
13. Under this new, independent Mediation Centre, identify and develop opportunities for mediation, and engage in mediation with First Nations.

PUBLIC REPORTING

14. Through meaningful dialogue with First Nations, jointly develop and apply performance measures to assess the clearing of the backlog. These should be guided by the principle that claims in the backlog are only cleared when they are concluded with finality. Reporting should be based on these performance measures.
15. Incorporate data on claims that are currently in Research and Development into reports and projections.
16. Public reporting should be explicit about claims that have been accepted/negotiated/expedited offer rejected etc.
17. Public reporting should indicate which negotiation scheme a claim has entered into (expedited/small claims, etc.) – until this practice is halted.

OVERSIGHT

18. Convene a Senate Standing Committee Study into *Justice at Last* in which First Nations are directly involved.

TRIBUNAL

19. Restore the independence of the Tribunal by keeping the administration of the Tribunal separate from the centralized administrative unit created by recent legislation.
20. Work with the Judiciary to ensure the Tribunal is adequately staffed.
21. Integrate Tribunal decisions into the assessment of claims.
22. Create a streamlined process whereby First Nations can request that that their rejected or closed claims be re-assessed in light of Tribunal decisions.

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