Rules of Practice and Procedure

On June 8th, we published the initial draft of the Tribunal's Rules of Practice and Procedure.

In response to our invitation, we received written submissions from the following organizations and individuals:

- Anishinabek Nation
- Assembly of First Nations
- Canadian Bar Association
- Conseil tribal Mamuitun
- Department of Justice, Government of Canada
- Federation of Saskatchewan Indian Nations
- Hutchins Legal Inc.
- Indigenous Bar Association
- Jeffrey D. Scott Legal Professional Corporation
- Ratcliff & Company
- Union of BC Indian Chiefs and Nlaka'pamux Nation Tribal Council

Some submissions were comprehensive, others were focused on one or more specific provisions of the draft rules. All were informative and instructive on revisions to better give effect to the objectives of the Specific Claims Tribunal Act.

These major areas of concern have been advanced:

1. The Draft Rules, considered in their entirety, suggest a Court-like process. This is perceived to be contrary to the Specific Claims Tribunal Act, which calls for a process for the efficient and cost-effective determination of specific claims.
2. From a claimant's perspective, the requirement for an order of the Tribunal to supplement the evidence presented to the Minister places an unduly restrictive limitation on the material that may be

presented in support of a specific claim before the Tribunal. From the Department of Justice's perspective, the existing provision for the submission of further material creates the potential for the alteration of the claim as presented to the Specific Claims Branch.

3. Absence of processes that are tailored to the particular issues that claimants seek to have the Tribunal adjudicate. In particular, the lack of a distinction between claims rejected by the Minister and claims in negotiation for three years without resolution.

4. From the perspective of groups who represent claimants, the absence of adequate provision for the separation of validation and compensation phases in relation to claims presented on the basis of rejection in the specific claims process.

5. A need for clarification of provisions for joinder of parties and interveners.

6. Potentially onerous provisions for the award of costs against an unsuccessful claimant.

This memorandum will discuss each of the foregoing, and indicate the direction the Tribunal would take in revising the draft rules.

In the further development of the Rules, the Tribunal must be guided by several constraints and principles, as follows:

1. The provisions of the Specific Claims Tribunal Act. It is noteworthy that the Act represents the joint effort of the Assembly of First Nations and the Government of Canada.

2. As a primary objective of the Act, the just determination of specific claims, adjudicated in accordance with law. This is a compelling requirement, in the light of s. 34(2) of the Act, which provides that "…the Tribunal's decisions are final and conclusive between the parties in all proceedings in any Court or Tribunal arising out of the

same or substantially the same facts and are not subject to review." While questions may arise over the applicable standard of review, the provision of judicial review in the Federal Court of Appeal (s. 34(1)) establishes a basis for review of the Tribunal's decisions on the applicable law.

3. The requirements of procedural fairness, as affirmed by the provision for judicial review by the Federal Court of Appeal. Procedural fairness requires that the Crown has proper notice of the basis in fact and in law on which the claim was advanced, and the claimant must know the basis in fact and law for the Crown's opposition to the claim.

4. Procedural fairness also dictates that each party have proper notice of the position and the basis for the position of the other, with regard to both the claim and the provisions of the Act governing compensation.

5. The adjudication of specific claims is a distinctive task, directed in part to reconciliation between First Nations and the Crown. Recognition and sensitivity to cultural diversity, including First Nation's practices in the preservation and protection of oral history.

With this said, we turn to the concerns raised by the submissions:

Court-like Process

The provisions of the Act, which reflect the joint effort of the AFN and the Government, call on the Tribunal to adjudicate specific claims in accordance with law. Tribunal Members are required to be Superior Court Judges. Numerous sections of the Act contemplate Rules that incorporate conventional litigation processes. We refer to the following:

1. Section 12(1), which includes provision for the giving of notice, the presentation of the position of the parties on matters of fact or law,

summoning of witnesses, production and service of documents, discovery proceedings, pre-hearing taking and preservation of evidence, and case management.

2. Section 13(1), which also speaks in part to court-like processes.

3. Sections 22 – 25, which provide for the joinder of affected persons, as parties or interveners.

4. Section 28, which provides that a party may cross-examine a witness as of right, if called by a party adverse in interest.

There are, in addition, important provisions that give the Tribunal latitude in the development of its Rules of Practice and Procedure. We refer in particular to subsection 13(1)(b), which enables the Tribunal to receive evidence, including oral history, whether or not it would be admissible in a court of law, and subsection (c), which permits the Tribunal to take into consideration cultural diversity in developing and applying its Rules of Practice and Procedure.

The importance of procedural fairness is noted above. This calls for clear rules that govern notice, disclosure, and all matters that prevent a better resourced party from gaining an advantage. The rules proposed jointly by the AFN and the Department of Justice reflect these procedural considerations. The joint rules do not, however, adequately provide for discovery and other processes that will ensure both substantive and procedural fairness.

The availability of processes for disclosure is of particular importance to First Nation claimants, as section 34(2) of the Act provides for finality. The Tribunal believes that full disclosure of all potentially relevant evidence is required to assure both substantive and procedural fairness. The primary burden of disclosure is with the Crown, as the grounds for specific claims, set out in section 14 of the Act, all relate to acts or omissions of the Crown in relation to fulfillment of treaty promises, the alienation or non-provision of reserve lands, illegal disposition of reserve lands, failure to provide adequate compensation for reserved lands taken under legal authority, misuse of Indian monies, and fraud by agents of the Crown. It is, in our view, imperative that full

disclosure be available to claimants, as, after adjudicative disposition of the claim by the Tribunal, no claim may be advanced by the claimant on substantially the same facts. It can be determined in case management whether all parties are satisfied with the disclosure each has made.

The foregoing considerations also establish the requirement for fair notice of evidence on which the claim, as generally stated in the Declaration of Claim and the Crown's Response, will be based. The provisions of the draft Rule that call upon the claimant to set out the causes of action asserted against the Crown are not intended to restrict the legal basis on which it is claimed that the Crown is liable on one or more of the grounds set out in s. 14 of the Act. The rules must not, however, preclude the presentation of new or novel theories of law grounded in the unique relationship between First Nations and the Crown. To accommodate the concern raised by several First Nation organizations, we will remove the requirement that the Declaration of Claim state a cause of action. This does not mean that claimants will not be required at some point in the process to assert a basis in law for their claims.

In light of the concerns presented in numerous of the submissions, we propose to amend the draft rules to impose limitations on access to the full array of processes set out in parts 8 to 12 of the Draft Rules. Certain of the processes will be invoked only if the parties agree, or the presiding member of the Tribunal orders their application after hearing submissions from the parties. Where procedural rules are found to apply, they will apply only to the extent required to ensure fairness, taking into account both cost and avoidance of undue delay.

Expansion of Claim

The existing Draft Rules provide for the introduction of evidence and argument not previously presented to the Specific Claims Branch.

The Assembly of First Nations and other claimants groups are concerned that the bar is set too high for the admission of fresh evidence and other material.

The Department of Justice is concerned that the filing of any further material in support of a specific claim that was not previously presented to the Specific Claims Branch may make the claim a different claim. This, in its opinion, would necessitate a return to the process administered by the Specific Claims Branch of the Ministry of Indian Affairs.

It is regrettable that this concern, although known to the Assembly of First Nations and the Department of Justice, was not resolved before they undertook their joint effort to draft the existing provisions of the Act. We invite the AFN and the Department of Justice to make every effort to resolve this concern by agreement, and make a joint submission to the Tribunal if agreement can be reached.

In the meantime, we have concluded that the finality provisions of the Act would, if there is no provision for the introduction of further evidence and arguments based on the application of the law to the facts, operate unjustly to the detriment of First Nations claimants. In the absence of an agreement between the Assembly of First Nations and Government that addresses this concern to the satisfaction of the Tribunal, it will be a matter for the presiding Tribunal Members to determine, on a case by case basis whether the introduction of material that does not form part of the material filed with the Specific Claims Branch violates the definition of "Specific Claim" as set out in s. 2 of the Act and, if so, whether this deprives the Tribunal of jurisdiction over the claim.

Tailoring of Process to Basis for the Specific Claim

The Rules will be amended to distinguish between claims presented for validation and compensation, and claims where the only issue is compensation. Processes appropriate to each type of claim contemplated by the Act will be established. Rules governing the disclosure of positions and the basis on which such claims are advanced will be established for each category of claim under s. 16 of the Act.

Where, in respect of a claim advanced due to rejection by the Minister, the Rules will provide, in the event that the Tribunal validates the claim, for an opportunity for the parties to negotiate compensation. The Rules providing for mediation with both parties'

consent may be of some utility at this stage. It is proposed that the Tribunal retain jurisdiction over the claim in the event that, after a reasonable period for negotiation, the parties fail to reach agreement.

The Draft Rules will be amended to provide more clearly for the hearing and decision of any issue that arises in a specific claim. It would make good sense for this option to be available while a claim is in negotiation. This, like the provision for mediation, would be intended to promote settlement.

Mediation

The rules governing access to mediation will be expanded upon.

Joinder

The provisions for joinder of parties and interveners will be revised to make it clear that it is directed primarily to the requirements of sections 22-25 of the Act.

Costs

The Draft Rules will be revised to provide for the award of costs only in limited circumstances, generally related to conduct of a party.

Cultural Diversity

The focus of the Rules, with regard to oral history, should be on weight, not admissibility. There will be revisions to the Draft Rules to address, in the course of case management, protocols for the presentation of oral history. More generally, the protocols may also address claimants concerns over respect for language, style of communications, cultural practices, and speaking protocols.

General

We have, in this memorandum, addressed what we understand to be the most significant concerns raised in the thorough submissions we have received. Although this memorandum does not deal with each of the many helpful suggestions, we will take all into account in establishing the Rules of Practice and Procedure.

Advisory Committee

On June 8, we indicated that there would be a second comprehensive draft of the Rules, and an opportunity for further submissions. In light of the comprehensive submissions received in response to the initial draft, it is our present view that the publication of a second draft for submissions is, at this time, unnecessary.

Several groups have requested that we establish an advisory committee pursuant to our discretionary power under s. 12(2) of the Act. Now that we have input from representative groups and individuals, all those listed on page 1 are invited to form an advisory committee.

We ask that the advisory committee focus on the matters discussed above, having regard for our preferences for addressing the concerns that have been raised. We will, of course, consider any input the committee provides.

It is not proposed that the advisory committee engage directly with the Tribunal in the detailed drafting of the rules, although any suggestions would be considered.

We would find it helpful if members of the advisory committee reach consensus on the principles governing the further development of the rules of practice and procedure.

We will give serious consideration to any suggestions from the committee. The ultimate responsibility for the rules is, of course, with the Tribunal.

As August is now upon us, we propose to meet with the advisory committee in the latter part of September. We hope that this will afford the committee time to seek consensus where it can be found, and to identify areas of disagreement.

We ask that the advisory committee appoint a person with the authority to arrange meeting dates on behalf of all members of the committee. That person will be the contact person, and will discuss meeting arrangements with the Registrar.

I regret to advise that the vote of funds for the operation of the Registry of the Tribunal makes no provision for funding the advisory committee. The Specific Claims Registry was established as a government department before the appointment of the members of the Tribunal. It is listed under the Financial Administration Act under Indian Affairs as the “Appropriate Ministry”. The Registrar is, under the Financial Administration Act, the Deputy Head of the department. The Registrar has control of the funds allotted by the government to operate the Tribunal. No funds were allocated to the defrayment of costs incurred by an advisory committee.

Any written submissions from the advisory committee may be made by:

(1)	e-mail to the following address:	sctrules@sct-trp.ca
(2)	by facsimile transmission to:	613.943.0586
(3)	by mail, hand delivery, or courier to:	Rules Committee 427 Laurier Avenue West, 4th Floor Box/C.P. 31 Ottawa, ON K1R 7Y2

Sincerely,

Justice Harry Slade,
Chair