Specific Claims Tribunal Canada /

Tribunal des revendications particulières du Canada

Advisory Committee Meeting of October 5, 2010

Réunion du Comité Consultatif du 5 octobre 2010

Held in Ottawa, Ontario

Tenue à Ottawa, Ontario

Justice Slade:	Justice Mainville of the Québec Superior Court a colleague of the Tribunal and to the left Patrick Smith, a Judge from the Superior Court of Ontario. The three of us were appointed to the Tribunal on November 27th last year and it's been an interesting and challenging time for us to leave our routine as Justices and the courts and enter into a forum that is in large measure in progress. I should also introduce our Registrar Veda Weselake seated to the left of Justice Smith and our technical wizard Todd Tyrie and Mylène Smith our assistant and Julie is busy handing out materials that were kindly provided by the Assembly of First Nations. I thought I would start with something of an update on where matters stand with respect to the getting the rubber on the road so to speak. I am sure there have been certain frustrations amongst First Nation's claimants around the question of when the Registry will be open for filing and when the Tribunal will be ready to commence with the management of claims brought before us and to deal with the substance of the claims both as to validity and compensation. So I hope you'll forgive me for what might seem to be a slight winded explanation but I think it's important that all understands what transpired thus far. As you know the *Specific Claims Tribunal Act* last came into force some time ago back in October 2008. A Registry was established not long after the *Act* came into force and the Registry was staffed by a Registrar, Deputy Registrar and a number of people in important roles that relate primarily to the Corporate existence of the Tribunal. Federal funding was available by a Treasury Board vote for the funds of operations of the Tribunal and the three of us have learned a lot about the rules that govern the expenditure of public funds and accountability for those funds. You may wonder why it took until November 27th, 2009, over a year to see the first appointments to the Tribunal. You might also wonder why there are three of us when the *Act* contemplated that there would be up to 6 full time Tribunal members or up to 18 part-time members. The *Act* contemplates the equivalent of 6 full time Justices serving on the Tribunal. I haven't heard the term full time equivalent before my participation in the Tribunal but that's how we are described so you are looking at three full-time equivalence. The *Act* as you know provides for the appointment of Superior Court Judges. We understand that the value of independence is enshrined in the *Act* and extremely important and consideration for claimants of First Nation Organizations and the Crown independence is assured by the utilization of Superior Court Judges as Tribunal members. The *Act* doesn't spell it out but companion amendment of T*he Judges Act* that came into force with T*he Specific Claims Tribunal Act* provided for the appointment of three additional judges in BC, two in Ontario and one in Québec. We understand that this was intended to reflect the regional spread of claims, at least 40 percent of which arise in British Columbia. The *Act* calls for the Registry to be in the National Capital Region and the three of us have been primarily engaged here in our work to create a foundation for operation of the Tribunal and to develop rules of practices and procedure. We will consider it important that access to the Tribunal be in the regions and we recognize the importance to First Nations of an opportunity to have the process unfold within First Nation communities. Now there were, I'll tell you, concerns from the outset amongst the Judiciary over the protection of adjudicative independence and these were concerns of course for the subject of discussion among our colleagues and respected courts and of course our Chief Justices . Participation as a member of the Tribunal is a matter of choice for judges. We have an assurance from the Minister of Justice that only judges who volunteer and whose names are put forward by their Chief Justices will become members of the Tribunal. Independence is something judges value very highly for obvious reasons. One aspect of independence is resourcing; no judge wants to find himself or herself in a process that is under-resourced. The opening of the Registry and the initiation of the process towards the ultimate disposition of claims requires adequate resources -- no judge would wish to be member of a Tribunal that cannot fulfill its mandate for lack of resources. This is one important concern that emerged early in the day and we have been working with the assistance of Ms. Weselake and Registry staff to assess the existing resources to look at the kind of resources we think we'll need to do our work and associated requirements

	for funding. Until judges became involved in this Tribunal of course, the judicial perspective on independence could not be fully recognized and embraced. It's an important and honorable initiative on the part of the proponents and those involved in getting this legislation in place in particular the Assembly of First Nations and the Minister of Indian Affairs and Northern Development and the government of course in embracing the reality of the process that specific claims was wanting a very material respect and that being in the absence of an independent body to adjudicate claims. Another matter that concerned the judiciary was to ensure that governance of the Tribunal be appropriate. Of course as judges we all work in court houses where there's a separation between administrative and judicial functions and it is important that the authority of judges be recognized and respected in the governance model. There are good models for this and the Superior Courts situated in the provinces and of course the Federal Court. Central to the judicial concern is that we don't stop being judges; therefore, our reputation for independence and fairness as members of Tribunal could bear on the perception of our independence and fairness in our regular jobs as judges. In January 2009, the Chief Justices received a presentation from the then acting Registrar; this in turn led to the Chief Justices of BC, Ontario and Québec appointing a steering group comprised of myself, Justice Mainville and Justice Smith. It was mandated to monitor the steps that were then underway to establish the Registry and to create the process for the hearing of claims. This in turn led to the appointment of the three of us. Our mandate as we defined it was not to establish the Tribunal immediately as a functioning entity. There was much work to be done including the establishment of the Rules of Practice and Procedure and before that could be done, and hear again I emphasize the need for appropriate governance and resourcing all on terms that would ensure that the Tribunal could function independently as mandated by the Act. We've made progress on all fronts but their remains some outstanding concerns. As you know, section 40 of *the Act* requires that the Chairperson deliver an annual report to the Minister setting out the activities of the Tribunal for the past fiscal year and the activities of the Tribunal forecast for the next fiscal year. It's a bit of a clangner that the reports due in the middle of what is the next fiscal year. I have delivered my report to the Minister on September 30th; it projects the activities of the Tribunal not just for the current fiscal year but for the next following fiscal year. Tabled in both houses of Parliament within 30 days of delivery to the Minister so that I'd expect that that will become public fairly shortly and it has a more fulsome explanation of our activities since our appointments and what we see for the future. Now, the Tribunal has a very different mandate and hence different responsibilities than the Indian Specific Claims Commission (ISCC) but within the mandate of the Tribunal is the value of promoting reconciliation and this is something that members of the Tribunal presently and in the future take very very seriously. Of course the ISCC could only make recommendations and it was for the Minister to determine whether they would be accepted or rejected. Our mandate is to adjudicate and render decisions that are binding on both parties to claims; therefore the process must differ from that of the ISCC and there is a much higher need to be and in fact to seem to be independent of interested parties and representative organization. This necessity affects the manner in content of communications between the Tribunal, Registry staff and the parties to claims. It indicates indeed for somewhat greater formality. However we recognized that *the Act* stated value of recognizing cultural diversity calls for a process that is not ruled bound and formal as that before the Superior Courts of Canada. The Tribunal is unique among adjudicative body given the nature and the prominence and the public importance of issues over land. We believe that an Ottawa centric institution would not serve well the mandate of the Tribunal and the needs of the claimants and the Crown alike. Therefore we hope down the road to establish a tangible presence for the Tribunal in the regions. I don't wish personally to be primarily an Ottawa resident forever, my home is in Vancouver. Ottawa is a nice enough place but, you know, Vancouver well! Now ultimately we see the composition of the Tribunal being

	informed by what we learn from the first year of actual operations. It won't be until we get the doors open and start working with claimants and the Crown in the process that we'll really know what the demands will be, what the resource requirements will be, and what the proper and effective and efficient composition of the Tribunal will be. Will it be 6 full time members, will it be mix of full time members and part time members? I'll tell you that the transition that the three of us have gone through from full time justices to members of the Tribunal has been challenging. It takes several months in the least to make the transition to primary work on Tribunal matters. All three of us remain seized of matters that were before us while discharging our responsibilities as judges. We're learning something about the integration and the challenges in the way of integration of work as Justices and Tribunal Members. But we have to get going and to that end we have made a preliminary assessment of the resources that will be required and we're working with the proper persons in government to ensure that we have the resources to get the rubber on the road and get claims through a process. Now reconciliation, there's a bit of a challenge around serving the value of reconciliation by means of an adjudicative Tribunal that can render final decisions binding on everybody. Court processes are to some extent a zero sum game, you succeed, you fail. We believe that the Tribunal, in the interest of reconciliation, should play an active role in assisting the parties towards consensual resolution of issues that arise within Specific Claims. The ownership of the outcome is a very important thing to all parties opposing interest whether they be appearing before the courts or before an administrative adjudicative Tribunal. That being so, we are determined that there're will be active case management of all claims, in order that the issues can be elicited, the peripheral issues put aside, the central issues can be identified and Judges, Tribunal Members may serve to assist the parties with what in our line of work as judges we call reality checks. We hope that active case management will facilitate consensual resolution. To that end, it is our hope that through case management, matters can be identified that may create new opportunities for mediated resolution. We're aware of concerns that an alternate dispute resolution mechanism that was understood to be part of the new relationship, has not been put in place, thus heightening the need for a mediation services by members of the Tribunals within a process that would keep the claims once filed alive, ensure that jurisdiction is retained by the Tribunal but create new opportunities for consensual resolution. Mediation of course requires the agreement of both parties. The cultural sensitivity is particularly relevant to questions that may arise over the introduction of oral history. We will be developing principles to guide the parties to ensure that the process is respectful of aboriginal values and protocols around the keeping and the speaking of oral history while at the same time taking account of the provisions of *the Act* that contemplates that parties should not be taken by surprise by evidence presented and that the state that cross examination must be available of persons called upon to give evidence by a party adverse an interest. We believe that our principles that will be applied in case management can ensure compliance with *the Act* while ensuring that the process is respectful of the position in their communities and in Canada generally of Elders who are called upon by a party to speak to oral history. We expect that proceedings before the Tribunal will be respectful and civil. Now turning to the process, today there are some guidelines that I hope all will observe. As in court all cell phones should be turned off. By the way I had an occasion on which in court a cell phone started to ring, counsel were scrambling to find their phones make sure they were off, well it was my cell phone. I didn't bring it, just in case. Now I'd ask that each person state his or her name prior to speaking we are recording and ultimately I expect that a transcript will be made of our discussion here today and it's particularly important for those that are not physically present to know who had spoken. Please speak clearly in the microphone as I am trying to do. Translation is provided through the microphone by selecting the French or English language. If you find you need additional translation devices, Todd will assist you. After speaking, please make sure to turn off the microphone by pressing the button, I think it's the one to the left, because if we have too many mics on, it may create feedback in the recording system. Now, we have an agenda that's been circulated and there are some time allocations.

	I've already used up more than the time allotted to me, I guess that's the prerogative of the Chairperson of the Tribunal but we are going to try to keep to the time allotments that are set out in the agenda. On behalf of my colleagues and for myself, I thank those who have made submissions; they have been very thoughtful and very instructive and our response to them are set out in the website posting back in August. We've all read and re-read the submissions, so people will naturally wish to speak to the matters that have been raised, recitation of all points made in each submission is unnecessary. We thank the members of the Advisory Committee for the development of the consensus document and in particular thank the Assembly of First Nations representatives for their assistance in bringing the Advisory Committee together toward the preparation of that document. So with that, could we then, or may I ask that each delegate introduce themselves and name their organization so we have that for the record so to speak. So I would suggest that we go clockwise and if Ms. Schellenberg could start.
Gaylene Schellenberg:	INAUDIBLE
Brad Regehr:	I am Brad Regehr, I'm a private practitioner with the law firm Darcy in Winnipeg, I'm also chair of the National Aboriginal Law Section with the Canadian Bar Association
Alan Pratt:	Good morning, I am Alan Pratt, I am a sole practitioner in beautiful downtown Dunrobin, Ontario which is about 50 kilometers from here, practicing mostly in the claims field. I am here as part of the Canadian Bar Association delegation.
Chris Devlin:	Good morning, my name is Christopher Devlin, I'm a private practitioner from Victoria BC, law firm Devlin Gualess and I am here as a member of the Canadian Bar Association Aboriginal Law Section and I am here with them as a delegation today.
Jodie Woods:	Good morning, my name is Jodie Woods, I am the Research Director of the Specific Claims program at the Union of BC Indian Chief.
Denis Brassard :	Bonjour, mon nom est Denis Brassard, je suis coordonnateur des revendications particulières pour le Conseil Tribal Mamuitun du Québec.
David Knoll:	My name is David Knoll, I am legal counsel with the FSIN.
Jamie Benson:	Jamie Benson, I'm with the Federation of Saskatchewan Indian Nation.
Deborah Freedman:	Deborah Freedman, I am general counsel director with Specific Claims legal services department of Justice.
Pamela McCurry:	I am Pamela McCurry, I am the Assistant Deputy Attorney General for Aboriginal Affairs, Department of Justice.
Anik Dupont:	Good morning, Anik Dupont, Director General, Specific Claims Branch at Indian Affairs
Kathy Green:	My name is Kathy Green, I am the Director of policy and research assistant specific claims branch at Indian and Northern Affairs.:
Kathleen Lickers:	Good morning, I am Kathleen Lickers, former commission counsel to the Indian Specific Claims and I am also now a private practitioner of my own law practice and an advisor to the Assembly of First Nations on Specific Claims.
Tonio Sadik:	Good morning, my name is Tonio Sadik, I am the Senior Director of Strategic Policy Planning and Law at the Assembly of First Nations.
Bryan Schwartz:	Good morning, my name is Bryan Schwartz, I am a law practitioner in Manitoba and a legal

	consultant at the Assembly of First Nations.
Roger Jones:	Inaudible
Dianne Corbière:	Good morning, I am Dianne Corbière, I am with the Indigenous Bar Association and I am past president, I am here of the behalf of our President who is on a cruise in Greece so he couldn't be with us today and I am pleased to be here.
Justice Slade:	Well that's no excuse
Angely Pacis:	Good morning, my name is Angely Pacis, I am an articling student standing here presently for Peter Hutchins, Peter W. Hutchins Legal Inc., I am also accompanied with Lysane Cree who is on her way. She had trouble on the ferry coming from Montreal .
Justice Slade:	All right, thank you. Alright, well if I can find the agenda, let's get started. By the way paperwork isn't my forté. My assistant in Vancouver is I can tell you much missed. The first presenter here would be the Assembly of First Nations so let's then proceed.
Bryan Schwartz:	Good morning Justices, good morning everyone. We at the Assembly of First Nations certainly share your sense of this as a momentous occasion. It is also a historical occasion, meaning the *Specific Claims Tribunal Act* refers to pre-confederation claims, treaties and proclamations dating back a hundreds of years which might eventually be the subject of litigation in front of the Tribunal. And the efforts to achieve this point that we have an independent Tribunal with adjudicative powers goes back over half a century to the first legislative proposals to the early 60's. There's folks in this room who are veterans of the AFN federal partnership in crafting legislation. David Knoll and Jamie Benson for example we're involved in the joint task force that produced the path breaking 1998 report. So this looking like a very historic occasion. The way in which we've attempted to structure our response was in a way that was compliant with what we understood the Tribunal wanted from us. We structured the response around the August 13th feedback from the Tribunal. We also attempted to consult with other First Nations organizations involved in this process and produced a consensus document. We were optimistic going in because the independently produced material had very similar themes and perspective and we were quite easily able to arrive at the consensus you have in front of you. Many of us got together with scheduled delegation yesterday to verify, make sure everybody had a heads up on the trust we were going to speak to today, it was a amicable meeting. There was one point, the expansion of claims point which the difference of perspective, every significant difference of perspective between First Nations and Canada continues. We'll speak to that so you'll have our perspective. The Tribunal has already indicated that if an agreement can't be reached the resolution is to decide on a case by case basis, frankly that's where we expect you'll probably be headed after you hear from both of us. But we will try to give you the First Nations perspective on that, how we view the new evidence, new allegations issue. I'll also take your directives from this morning, we are not here to decide everything today, you got our material, I'll just highlight some key points. We've distributed the statement of principles that we agreed upon with Canada in producing the joint submissions. The prominence of those principles was the *Specific Claims Tribunal Act* itself, those principles are an attempt to fulfill what we thought was expressly set out in or implied by the actual structure of *Specific Claims Tribunal Act*, so the sequence is with Canada and partnership distilling what we thought the key principles were and an attempting to realize those and an actual set of draft rules. And with respect where there's continued controversy and uncertainties we still believe it might be useful to look back at those agreed upon set of principles. Which of course, you don't have to agree upon but we agreed with Canada and the very specific proposals that we agreed upon with Canada back then. The first point in the Tribunal's comment of Article 16 was a court-like issue. Assembly of First

	Nations and Canada fully agree that this is an adjudicative process, there's many other kinds of forms associated with Specific Claims and the Federal processing to ADR before a claim is filed and so on. This is an adjudicative process and we fully agree that procedural fairness is a fundamental principle of principle 9. The very first principle, we agreed upon with Canada was the distinctive approach that is independent adjudication can take place in a number of different ways, we can have all the formal court processes, you have a very flexible process of commercial and international arbitration which is basically you gotta be fair but make it up as you go along. We're hoping to windup somewhere in between here, some basic structure from the rules but with a fair amount of flexibility. First Nations and Canada continue to agree on the very high importance of case management being the medium to achieve two kinds of flexibility. One is to reflect the distinctive nature of Specific Claims as a category of legal disputes and the other is to reflect the distinctiveness among different specific claims. There will be quite a small amount that are extremely complex legally, where for some of the claims the real dispute will be factual not legal. The instruments that give rise to claims, their history, the nature of the relationship between the parties vary drastically so case management again can be an opportunity to adapt the process. Not only to the nature of specific claims in general, but the particularity of the case. With respect to details, very briefly, we suggest that the Tribunal draft rules certainly acknowledge the importance of case management, just to nail some points where we were reading the submissions where there seem to be some request for just a bit more certainty. To make it clear if it's not clear already, that the case management Tribunal members have the authority to issue binding orders, it's just not a form of discussion but binding orders can be issued. To make it clear to who is going to appoint the case management Tribunal members raised that point, the joint submission of Canada and suggested that the Chair person would appoint the case management Tribunal in each case. And to make it clear I think that's why we understood it was implicit but just to make it clear that these are different individual so the Tribunal deciding the merit stage, it's not the same Tribunal as the case management stage. With respect to discovering disclosure, a balance has to be achieved between principles of procedural fairness which are extremely important and First Nations, certainly including the Assembly of First Nations very much welcome the recognition by the Tribunal in its comments of the importance of discovery and production. This is point B, on page 2. The Tribunal recognizes, that you may see some documents and find some information that you have not discovered before despite your best efforts over years and years of pressing a claim, you may not actually get to the discovery and production stage. There are many asymmetries in the process, that doesn't mean that the parties are in the same position as the statute sees them. The way this process works is a very very heavy responsibility of disclosure in the part of a claimant right from the very outset at the title process stage, tell us your claim, Federal governments taken a very strong view about, tell everything from the beginning or you have to start over, on the other hand Federal government has not yet committed to saying ok here's our response at the processing stage, here are the detailed reasons why we agree or don't agree with your claim and here's all the evidence we have. So it's very important, particularly to First Nations that the discovery process be available and be available to every extent available to a Chief Justice in a particular case. On the other hand, principle 5 is efficiency and timeliness. And there's another asymmetry here, which is the imbalance of resources between the two sides. First Nations cannot win trench war, by the time you got to the Tribunal you may have pressed your claim for a year, waited until this new system has been established, there's a 3 year clock for validation, there's another metric for the minimum, there's another 3 years for negotiation before the clock runs out on that and you come to the Tribunal with the absolute minimum. Federal government suggested although respectfully we don't agree, that they can add more time to the front end to see whether appointment claim meets the minimum standards. We won't dwell on that. To suffice, there's a strong difference of opinion on that whether the federal government can effectively add

	to that already 6 year clock. Once you get to the Tribunal, the Federal government has resources that the claimant frequently doesn't. The claimant sometimes doesn't have resources precisely because of the subject matter of specific claims. You did things that took away our resources, our ability to be self efficient; we're trying to press a claim, hard to do because you took away our resources. I say all that because that's why there's some hesitation by First Nations to commit, that in every case they'll be the full panaplete disclosure and production. It's not a lack of concern just to get necessary information, it's just a concern that the laboriousness expense and delay of doing it that way when it's not necessary may be prohibited to a First Nation to achieve justice. So appropriate bounds is what we respectfully suggest that case management can be based on that respect. We have suggested that the detailed discovery rules can be option templates set out in the rules but the case management would judge on a case by case basis whether that option would be pursued. It wouldn't be presumption of default; this is what we ordinarily do unless there's a strong reason to do otherwise. Case management would decide with an open mind how to achieve principle 5 efficiency and timeliness. Oral history, we've got the points in our brief, Justice Slade you've already spoke to them in your comments so I won't relay them. We thought that the approach taken in the original joint submission, particularly in sections 10.5 to 10.8 on cultural diversity, and the particular section on oral history were more welcoming and accepting of oral history than the first draft of the Tribunal rules, which with respect to the First Nations, for the very concern that they somehow sent the signal that oral history was presumptively problematic and so on. So we would like to see, if possible, something closer to the joint rules that were proposed by Canada and the Assembly of First Nations on the oral history point. I will take a bit of time on the so called expansion of claims, we're just using the title from the Tribunal's comments, we're not going to agree with Canada on this. We had a lively and candid exchange of views on this where we're trying to grasp the rules and I certainly don't expect a turn around on Canada on this, and frankly, we don't expect the Tribunal to suddenly say your right Assembly of First Nation here's your rules. We just want to take this opportunity to explain with respect to the Tribunal the way First Nation's view this matter. The union of BC Indian Chiefs in their brief put it pretty succinctly. The Specific Claims Tribunal adjudicates the merits of claims, it doesn't adjudicate the merits of Canada's initial deliberation on the claim. It's not a judicial review process, Canada suggested in its brief that this is in effect not a court, its first instance, well we disagree with that, we believe this is effectively a count of first instance. So when we get to the Tribunal, it's not a claim that has been thoroughly canvassed from all sides as suggested by the Federal brief, it's a claim for which First Nations have been expected to fully put forward their case. Without having production and discovery process, without necessarily having any detailed response in Federal government suggesting concerns, without having a chance perhaps to response to federal concerns without being told well you've changed your claim start all over again with the clock running. There's a very serious asymmetry in the way the process works. We were suggested we couldn't possibly have the intent of framers of the *Act* to say that you can't introduce new evidence. Why would there be a discovery and production process built right in the rules if you couldn't raise new evidence and what would be the point of raising new evidence if you couldn't make reasonable adjustments to the way you framed your claim. Now it is true that there is a constraint in the *Specific Claims Tribunal Act*, that it has to be the claim filed with the Minister. We expect on a case by case basis, arguments will be made as to what counts as a sufficient departure that you can say it's no longer essentially the same claim. But when First Nations argue these claims, they will no don't doubt argue that you have to interpret the same claim in light of the purpose of the *Act* to provide an effective form. To provide a fair form so that First Nations aren't told after 6 or 7 or 10 years that they have to go back to the starting line again. The federal government has identified this as a jurisdictional issue and they are right and jurisdictional issues can quickly be raised by Canada when they get to the Tribunal and then the Tribunal can raise these points on its own motion. Perspectively putting the jurisdictional points apart from its merit is that jurisdiction cuts both ways. It's a serious error to assume jurisdiction you don't have, it's a serious error to

	decline jurisdiction that you do have. So you have our submission on expansion of claims. The statutory instructions, we say, allow for a great deal of flexibility with respect to new evidence, respect to refining the content of the claim in light of new evidence. Things will happen between the time when the claim is filed and new evidence will emerge as a result of historians, evidence discovered by the federal government may come to the attention of the claimant, new case law may emerge and we look forward to having an opportunity in front of the Tribunal to argue as to how the *Act* can be interpreted in light of those practical realities. Point 3 is bifurcation. The statute, in our view, does contemplate or allow for bifurcation. Bifurcation meaning first merits, then remedies and it's really the statute. It's clear that two channels are involved. Section 16(1)a) talks about validity, Section 16(1)b) at the negotiation stage talks about arguing about compensation, so whether it's a 3 year clock or a 6 year clock cumulatively it depends whether it's dispute is about validity or if it was a dispute about compensation. Furthermore, the act isn't even clear in Sections 18, 19 and 20. Section 19 talks about that issue of validity, Section 20 talks about that issue of compensation. So principle 3 again is the pre-imminence of statutory instructions but the statute itself contemplates that validity is one issue, compensation is another issue, section 19 says that issue of validity, section 20 talks about that issue of compensation. We believe that the statutory instructions provided efficient flexibility that a Tribunal vested with the matter can decide to do it in two stages and that this can be advantageous for all concerned. Resources of the Tribunal, certainly sparring the First Nation, for having to exhaustively document its compensation case not knowing which part is going to be held valid if any and same for the point of view of the government of Canada. Now as we understand it and Canada speaks for itself respectively they can elaborate their perspective. Some concern about in between these two stages. Is Canada going to be forced to unwelcome mediation but what we understood the Tribunal's comments to be based on mediation as essentially a consensual process. We are not opposing that there's value to the prolonged process in which the federal government is there against its will. On the other hand we think in the real world, Canada might discover that actually it's very useful from the perspective of Canada as well as First Nations to have an intermediate mediation. We could dwell on our concerns about mediation and our disappointments at the, from our perspective, the promise of Justice at Last that there would be a robust ADR process at stage one, that hasn't been realized yet but with respect, Justice Slade you already recognized most of our concerns so I won't dwell on that. But it is a serious one and we certainly are our own perplex view that it could turn out that the only place for mediation to be really happening in an effective and robust way will turn out to be in front of the Tribunal. Point 5 is joinder, again principle 3 permits the statutory instructions so I don't want to dwell on that. The August 13th response undertook, as we understood it, that there's a smooth integration of the *Act* itself with the joinder provisions of the rules. Just one other point, I believe this is raised by the Federation of Saskatchewan Indian Nations among others. They correctly, in our view, identified this concern. What if you're a third party, you're First Nation, you're very concerned as to how this point is going to be decided, but the Tribunal, and for possibly very understandable reasons, doesn't send you a notification. There should be a process where we can go to the Tribunal and say, we'd like to be notified so that we can have a chance to intervene and all First Nations are agreed that that's a tangible proposal.
Bryan Schwartz:	Set out a series of factors but we thought the public interest factor that was set out in those rules which is that the Tribunal would take into account the public interest in bringing out claims which generally result in practicing costs not being awarded against the First Nation. When the first draft of the Tribunal's rules came out, and the Tribunal acknowledged it was a great of deal of consent about First Nation's, about being tacked with costs if you were unsuccessful, even if you reasonably brought a reasonable claim and this could have a real deterrent effect on First Nations proceeding to the Tribunal. The latest suggestion is, we understand the comment, as perhaps cost would be rewarded in the rarest of cases against either side. We were wanting to put forward for your consideration, a slightly more nuanced position, which is that the AFN is an

	asymmetrical position but in our view, if a First Nation has incurred very substantial expenses not funded by Canada to bring its claim in front of the Tribunal and it can't recover those, even on a tariff basis, reasonable compensation principle will not be realized. You guys spend a couple of hundred thousand dollars to litigate a five hundred thousand cut-off claim and you can't get cost against Canada, that's a very significant uncompensated loss. On the other hand, if the AFN continues to lead with First Nations that the statute should not encourage the award of cost against First Nations except in rare and exceptional cases dealing with inappropriate conduct before the Tribunal. So some sort of disposition on costs that would reflect those principles would be what First Nations are looking for. Again, with respect to what you've already spoken on the issue of cultural diversity, the principle point being oral history, though I don't have to revisit that. I'll just say in closing that in addition to have an opportunity to address these points from a legal perspective, we have in the room on the First Nation's side and on the independent body, CBA side, all kinds of individuals who have a tremendous amount of practical experience in the field. We're hoping that one of the useful features of this day will be some of the other First Nation's delegations with the independent organizations, as well as Canada from its own perspective, will be able to speak to these issues from the point of view of individuals who had very long experience in the trenches and can bring a practical perspective to some of the points that in this initial brief, we've approached from a little more legalistic perspective. I'm happy to answer any question that you may have at this point or later in the day. I'll finish a little earlier here, trying to get us back on track. Thank you very much.
Justice Slade:	Alright, thanks Mr. Schwartz. I don't think I'll comment with respect to the fresh evidence concern beyond saying that the Tribunal Members are very mindful that this process is intended to bring finality to issues that it's presented with and in particular Section 35(A) of the *Act* would preclude the bringing of a claim arising out of the same or substantially the same facts on which the claim is based. It seems to me that the objective of finality would not be served that well by a process that could put the claimant and the Crown into another process if further facts unknown to the parties became known subsequent to the disposition of a claim thus placing both parties in a position of having to debate the question, perhaps before Court, whether the new information would or would not establish a claim that is based on the same or substantially the same fact so. Of course we look forward to hearing the contrary view from those present on behalf of the Crown but I thought I would just emphasize at this point that we are very much concerned that the process delivered on its promise.
Justice Mainville:	Alright, I have a question, one comment that you mention that you used to suggest that a case management Tribunal be different than the merits Tribunal and I would like to get a little bit more comments from you on this issue. I just want to emphasize that in Québec in the Superior Court and I know that this is not the same case in the other provinces but in the Superior Court it is the same in the complex, the complicated case, the same judge is appointed to do the case management and to hear the merits of the case for a simple reason, it's easier for the judges because he has a good understanding of the case. It was with the parties all the time and unless he feel that he heard things during the case management that can compromise his independence, he's going to stay on to hear the merits of the case and it has its advantage that instead to give the case to a new judge who didn't have a clue, who doesn't have a clue about the case, about what's going on. Of course in Québec its clear the case, the judges who act as a mediator will never hear the case. So I would just like to get your comments on this.
Bryan Schwartz:	Thank you. What I would like to do is have a chance to think that over and then give you a more considerate response. I can tell you that the thinking going in as your question of joint submission was it should be different folks because of that concern about what were going to frankly tell you we have this and we have that, that will potentially create concerns about impartiality when it gets to the merit. On that note, the same folks keep talking about being flexible and being able to adapt a particular process. We haven't been provoked to think or re-think that now we have which was out of your question so I'd like to have the chance to

	talk that over with some other folks and get back to you in a more considerate way.
Justice Slade:	Thank you. I mentioned that the process before the Courts in British Columbia is pretty much the same as in Québec. When we are assigned a case, we have case management and it's also anticipated that we'll also be the trial judge. If in a case management, the judge considers himself or herself in any way compromised, sometimes a little bit of pressure is put on people to sit at the table and see if they can come up with a settlement. Sometimes that pressure includes a view of the alternate disposition of a particular issue and in those circumstances of course, the case management judge will not be the trial judge.
Justice Smith:	Professor, just one question. I'd appreciate hearing your views on joinder and you know all the nuances on joinder, and we've read your submissions on that. Specifically as it affects the possibility of limiting the claim limit of 150 thousand dollars minimum. Now, if this is joinder how does it affect the claim limit, if at all?
Bryan Schwartz:	I just want to make sure I have the technical details right. My recollection is the statute has the provision against claim splitting which is artificially chopping up the claim in different pieces in attempt to evade a hundred fifty millions dollars. Again on that one, I just want to make sure I give you a considered response, just think that over with our folks and get back to you on it.
Justice Slade:	Absolutely, I am told that we have some technical challenges around translation and perhaps we should take a break to see if that can be sorted out. How much time do you anticipate?
Justice Slade:	Ok we'll take 10 minute break, there's coffee.

BREAK

Justice Slade:	It seems that we are having some technical problems with the links between the mics and the translation facility. So we may have to ask presenters to approach this microphone to Justice Smith's immediate left just to ensure that everything is picked up. Something I think I failed to mention in my introduction was that our hope, it's more than a hope, it's a hope based on where we think we are at the moment is to have the Registry open for filings and commence our case management sometime in the first quarter of the new calendar year. Alright, well with that well Professor Schwartz, did you wish at this time to continue?
Bryan Schwartz:	Very briefly, we've had our minds open about using the same Tribunal Members for both stages, there seems to be a very significant need for it. We're going to give it a bit more headway before giving a definite answer. We are certainly not starting with matters of rejection by any means, we didn't think about it earlier. On respect, I can speak to very briefly about the technical chapter in more detail but I am looking at it more closely since that there is an anti-claim splitting rule in the *Specific Claims Tribunal Act*. It sets out with precision what counts as means to split a claim, take essentially one claim and try to seek the cap by splitting it. That provision would not apply to a situation which you've joined in a hearing of one case the adjudication of two distinctive specific claims. An individual claim is subject to the claim splitting rule but as long as if you join 5 different claims which are a hundred million dollars and there are legitimately generally distinctive defined in the *Act* then it's within the jurisdiction of the Tribunal to hear those two together so that's our submission on that.
Justice Slade	Ok thank you. Excuse me. Now the agenda for the morning contemplates presentations by other First Nation's groups and may I ask if there is anybody here representing other First Nations organizations who wish to speak at this time.

David Knoll:	My name is David Knoll and I would like to make just a few points on much of what the AFN just covered but maybe expand and elaborate a little bit and raise some new points as well. I understand that there's people online that may also want to speak at some point. I also have Jamie Benson with me who's worked just as long as I have on claims submissions and preparation and he may have something that he may want to contribute as well. I just want to follow up on maybe about 5 points some of which are an elaboration on what the AFN has already presented sort of a consensus but also some points that weren't covered and then some short little snappers at the end that we already raised that we might want to point out again. On the question of disclosure and discovery just to expand a bit on what the AFN has mentioned. Some of these claims have been in the system since the early 90', then in 1998, the department of Indian and Northern Affairs gave the opportunity to the First Nations within a period of 6 months to clarify the submission that had been within the system for quite a few years. Some of the First Nations have the ability to do that, some of the First Nations did not have the ability to do that. During that period of time, the chief in counsels have been changed, legal counsel may have changed, researchers may have changed, the law has changed. Many of the First Nations, once they got after the 6 months period and then they were advised that their claim has met the minimum standard and then they're waiting for a decision and they are still waiting for a decision, they realize that the clock is ticking. They may in fact if they don't get a decision, they may be appearing before the Tribunal, they go back and they look at the evidence again and then they retain new legal counsel who looks at it with fresh eyes. There's new evidence, the lawyer may say there's gaps in the evidence, there's new case law and then they go back to the department of Indian Affairs, the department says no I am sorry you can't raise anything new because it's already been filed with the Minister. It's already met the minimum standard so the First Nation isn't able to, present new evidence or new arguments without having the claim go back all the way to the beginning and have to wait for another 3 years or whatever how long it takes in the system. So when it comes to the Tribunal, and file with the Tribunal, then the question is once when they get to the case management, they get full disclosure, they request all the gaps in the evidence, they find out maybe for the first time what Justices position has been and they get full disclosure from the Crown. Our argument is that at that point, there should be the opportunity for the First Nations to see the full evidence, full transparency on the part of the First Nation, both in terms of the evidence and all the gaps in the evidence that they weren't able to obtain in the first instance but also an opportunity, in light of all the legal arguments that they first maybe have heard and suggested and maybe an opportunity in the case management to get all that disclosure and bring that forward to be confined in what they can argue in the evidence suggest the minimum standard that would create, in our submission, a lot of problems in equity and create difficulties even in front of the Tribunal to get a full and fair judgment. If we don't have full disclosure that's one point we want to make. On the determination, we also feel that some of these claims are at an impasse because there are particular points, not the full merits of the claim but there are particular points and issues that they would like to bring forward and have the Tribunal determine without the need for a full out blown hearing. Just one or few issues for example, some of the treaty land entitlement issues involve certain criteria to determine who you should count in deciding reserve acreage at the time of treaty. Now there's a number of criteria that apply and there might be one issue involving one of the criteria that's applicable in determining whether the First Nation received their full quantum of land. So it's just one issue they don't want a full blown hearing they just want to determine whether that is one point that could resolve the impasse. Now the problem is you have to file a claim before the Tribunal on the merits or can you have that one point determined before it gets to the Tribunal. We see that there may be a problem with the Tribunal hearing a particular point in issue prior to it being filed. It's only after the claim is filed that you can make a determination on a particular point but submitting it would seem fair that in the process the First Nation should have the opportunity before it even gets to the Tribunal to have those particular points determined. That would expedite the resolution of claims and have that settled before it even reaches the Tribunal.

	On the separation of claims there's a term used by AFN called bifurcation, which I hadn't heard before. I'd have to look it up in the dictionary, but anyway, separation of the claims between validation and compensation. I think the concern that the FSIN had is that if a claim has been accepted for negotiation and it's been validated and the claim reaches an impasse at the negotiation stage, so the issue coming before the Tribunal is really compensation, does that raise a prospect as far as Canada is concerned that the issue of validation is now an open question? Our concern is that having spent ten-fifteen years resolving the claim, looking at all the issues, going through Justice to make a determination on whether the claim should be accepted for negotiation as a breach of lawful obligation. Justice finally comes back and advises the First Nation and says yes your claim has been accepted for negotiations, then spend 3 to 5 years trying to negotiate a resolution of the claim, you reach an impasse, you bring it to the Tribunal and the Canada says, "well oops now we have to go back and validation is an issue." We think it's unfair and inequitable for the First Nations then to argue validation after it's already been accepted after considerable consideration by the department of Justice. The sole issue before the Tribunal should be the issue of compensation not validation. There is also the question of when a claim is prepared. There are a number of arguments that are made in support of a breach of a lawful obligation. There could be an argument that the Crown breached its lawful obligation in the unlawful taking of reserve land but also subsequently an argument could be made that in the management of the settlement funds and resources, Canada breached a lawful obligation in managing the settlement proceeds. Canada then accepts partially the claim on the breach of fiduciary but doesn't accept the claim on the wrongful surrender. So the question then becomes if you bring the wrongful surrender before the Tribunal, can you negotiate and continue to negotiate the breach of the fiduciary obligation? We would say that the First Nations should have the opportunity to continue to negotiation on the basis of the claim was accepted and raise the issue of, before the Tribunal, on the basis of which the claim was rejected without having to re-argue the claim that had already been accepted. I think the issue of cost has already been covered, I don't think I need to re-cover that but we do have concerns with First Nations having to incur the cost or have cost awarded against them for a claim brought before the Tribunal in cases where both the preparation and filing of the claim and as well as the claim brought before the Tribunal will be funded. The question is what kind of cost would be awarded against the First Nation other than perhaps bad faith, and issues of bad faith on the parties in the proceedings before the Tribunal. That would be the only place I can think of where cost might be awarded, I can't see costs being leveled. The question is what cost would the Crown be seeking, a return of the funds, negotiation on funding and research funding? I'm not sure what costs the Crown would be seeking against a First Nations if they were unsuccessful at the Tribunal level. Some quick points I want to cover. Service of the various proceedings should not be limited just to the Chief in Counsel, but it should also be submitted to the legal counsel. There shouldn't be a limit on, we would submit a limit on who can represent a First Nation. Many of the people who participate in the preparation and submission of claims are not legal counsel, they're familiar with a claim, and they could make adequate representation before the Tribunal without the necessity of having legal counsel unless the proceedings before the Tribunal are so complex that they may need a legal counsel. Also we would submit that a group of First Nations should be able to bring a claim before the Tribunal and it not be limited to just one First Nation. There are some cases where reserves have been set aside hay land and they're all alleging a breach of lawful obligation so the group of First Nations may want to bring a claim not just one First Nation. We already mentioned intervention; some First Nations may want to make application to intervene. And finally, there was some reference in the rules and procedures or was it the legislation, I am not sure, that the filing had to be electronic and we were concerned that most of the documents especially those that have been in the system for many many years are paper documents and the claim as filed with the department and all the documents we would submit should be submitted as filed without the necessity of First Nations having to put it all in electronic form. Some of them are having difficulty finding the resources to electronically file these things in CD or PDF them, or

	whatever way electronically. Those are all my submissions, Jayme, I am not sure if you want to add anything?
Justice Slade:	Thank you. And food for thought and hoping that there's some engagement of the part of the Crown representatives here on some of the questions that you and Mr. Schwartz have raised. Is there anybody else here or afar and linked up by telephone who would wish at this time to say a few words from the perspective of another First Nations organization?
Clo Ostrove:	I am Clo Ostrove. INAUDIBLE
Justice Slade:	Alright, thanks Clo and we haven't sat in the same room for quite some time and I regret that we don't have the opportunity today but welcome.
Clo Ostrove:	Thank you so much. You know, we feel it would be of assistance to have the rules expressed again, some principles that indicate the protocol that will be followed so that Elders coming forward can have some idea of what to expect. And you know, we would urge that there be a protocol that describes we'll call it a softer approach to cross-examination then what we see in the court rooms. So we gave our submission earlier, we were pleased to have the opportunity here with the Tribunal and respond to them and pleased for the opportunity today to emphasize the points of the court from our perspective.
Justice Slade:	Well thank you Ms. Ostrove. I would say at this time that the Tribunal Members recognize that a one size fits all approach to the elicitation of oral history and testing oral history in the process is probably not appropriate. We're very mindful that different nations have, that among nations, there are different protocols and structures around the speaking to oral history. We hope to craft an approach that offers some general principles. That the matter of oral history where relevant to claim will adapt to the particular concerns of the First Nation bringing the claim. This, we feel, is something that can be addressed in case management and of course we'll be looking to the parties and legal counsel to assist us in this endeavor to be respectful of diverse understandings of the presentation of oral history. So we're very much focused on the question and hope to not lay down ironclad principles but rather have local concerns reflected in how the elicitation of oral history will be treated.
Clo Ostrove:	And I should say that we agree that there should not be ironclad rules that are bolted in every situation but even in the description of the kind that you've just gone through that says you know, there will be an opportunity to figure out how oral history evidence will be taken to discuss, cultural practices in the community, just so there's something in the rules to point the work assessed.
Justice Slade:	I am sure that many of you are aware that the Federal court is engaged in a process with the Indigenous Bar Association, the Canadian Bar Association and the Department of Justice around these very matters and Chief Justice Lufty of the Federal Court kindly invited the Tribunal to

	participate in that process and to that end, I attended a meeting of Elders at Turtle Lodge near Winnipeg a couple weeks ago and anticipate continued involvement in that process.
Jody Woods:	My name is Jody Woods, I'm with the Union of BC Indian Chiefs. I very much appreciate the tone that you've set for this well it's formal it's not uncomfortable and that's a big deal to me. I am very immersed in several aspects of claims productions at the research and the research administration level for a claims research association in BC. I am knowledgeable about the issues that we're discussing and in spite of this I have admittedly struggled to understand some of the legal and technical terminology and concepts that have been articulated in pretty much all aspects of this and in some of the conversations that we've had in the draft rules and in submissions and things like that. And I think I say this mostly because I am thinking about the accessibility of the Tribunal and I think in terms of encouraging First Nations to use the Tribunal as a mechanism to resolve claims. It just has to be beard in mind in terms of the drafting and the language in the rules that it's not easy for us to understand, for those of us perhaps without law degrees to understand. And I feel fairly knowledgeable about this generally anyway. I just sort of wanted to get that on record and I appreciate it, thank you.
Justice Slade:	Thank you Ms. Woods. You know various Superior Courts, in recent years have gone through rules revision exercises and we've seen new rules developed and proportionality is a very significant aspect of new rules and driven by a concern over access to Justice. More accurately put is the absence of that, of access to Justice. The plain language in the rules is much to be desired and an emphasis on helping the protagonist get to a yes of their own creation much to be desired. Alright, Mr. Brassard.
Denis Brassard:	Bonjour, mon nom est Denis Brassard, je coordonne les revendications particulières du Conseil Tribal Mamuitun qui représente plusieurs communautés Inouï au Québec. Je fais ce travail depuis environ 25 ans. J'ai vu passer toute sorte d'initiatives fédérales pour essayer d'aller plus vite, de régler plus rapidement les revendications particulières mais c'est quelque chose qui est très long et très frustrant. Je devais être accompagné par notre conseiller juridique mais malheureusement il ne peut pas être ici aujourd'hui, il est en cour. Le Conseil Tribal Mamuitun m'a transmits des conseils.
Justice Slade:	Is anybody getting the translation?
Denis Brassard:	On recommence au début? Alors je vais lire des notes que j'ai mis par écrit en l'absence de notre conseiller juridique. Le Conseil Tribal Mamuitun a transmis des commentaires au Tribunal des revendications particulières il y a quelques semaines mais nous avons deux commentaires principaux sur lesquels nous allons insister. Notre premier commentaire concerne la possibilité de déposer de nouvelles preuves devant le Tribunal des revendications particulières. Nous croyons que les Premières Nations devraient avoir le droit de déposer de nouvelles preuves. Selon nous ce droit est nécessaire parce que nous croyons une entente négocier est toujours préférable a une décision imposer par un Tribunal. Nous croyons qu'en déposant de nouvelles preuves cela obligera le Canada à examiner plus attentivement notre revendication. Le nouveau Tribunal ne doit pas devenir le cimetière des causes perdues. Il faut plutôt que le Tribunal soit une dernière chance pour les Premières Nations et le Canada de trouver une solution alors différents. Nous sommes persuadés que la possibilité de déposer de nouvelles preuves va amener le Canada et les Premières Nations à s'assoir pour négocier des ententes. Notre deuxième commentaire concerne l'utilisation de l'histoire orale comme élément de preuve déposé devant le Tribunal des revendications particulières. Nous somme préoccuper par le fait que le Tribunal pourrait s'objecter au témoignage d'un ainé si celui ci fait état de nouvelles preuves dans son témoignage. Vous devez savoir que les témoignages d'ainés sont des éléments de preuve très sensible et très précieux. Pour avoir déjà participé aux audiences de la Commission des revendications particulières il y a quelque année, je peux vous dire que c'est très

	difficile de convaincre des ainées de venir témoigner. Dans notre communauté les ainées ont encore un sentiment d'infériorité et de culpabilité qui date d'une autre époque du passé. Et je ne voudrais pas que les règles du nouveau Tribunal soit un frein à la participation des ainés dans la recherche de la justice. Merci.
Justice Mainville:	Merci monsieur Brassard.
Justice Slade:	Thank you Mr. Brassard. Are there any other presenters who wish to speak on behalf of First Nations organizations at this time? Alright, well the next matter on our agenda is a presentation on behalf of Canada. And again I believe I'll have to invite you Ms. McCurry to use this mic.
Pamela McCurry:	My name is Pamela McCurry, again I am the Assistant Deputy Attorney General, Aboriginal Affairs at the Department of Justice. I think it's fair to say that Canada is a stakeholder with a special interest in how the Tribunal operates and then the functioning of the rules as we will be a party in each and every case before the Tribunal. We do very sincerely thank the Tribunal for the opportunity to be heard in this discussion on the ongoing formulation of the rules. We think it's important to emphasize that the starting point in assessing the purpose of the Tribunal is the *Justice at Last* to the *Specific Claims Action Plan* that was announced in 2007. *Justice at Last* expresses a vision of a just, expeditious, timely, efficient and very importantly a final process. The Tribunal is of course one of the main pillars of *Justice at Last*. And it is important that the statute be interpreted in a fashion that maximizes the achievement of these important goals. The Tribunal is mandated to set its own rules of process. In Canada's view, the Tribunal's process should be flexible, respect the jurisdictional limits of the *Act* of course and be driven by efficiency and expediency. Canada acknowledges and welcomes the revision that the Tribunal has already made to the draft rules. We know that for example that the Tribunal has acknowledged that key stakeholders expressed concern that the rules reflected a process that was too court like. The Tribunal has indicated a willingness to reflect efficiency as long as those changes do not come at the expense of procedural fairness. The Tribunal has expressed similarly a willingness to relax rules related to disclosure, oral examination, oral history and expert evidence. We know that those rules are to be applied only to the extent ordered by the Tribunal in the course of case management. And the Tribunal has acknowledged that key stakeholders have questioned the use of mediation within the Tribunal process. And the Tribunal has clarified that mediation will only take place with the consent of the parties. Canada is pleased with the direction that these changes represent. With respect we see further room for adjustment to ensure that the implementation of the rules very much support the overall objectives of the legislation. What I would like to focus on this morning, is the importance of 3 foundational ideas and ensuring that the objectives of the *Act* and Justice at Last are supported. And those are jurisdiction, case management and proportionality. I am also going to address mediation, oral history and reconciliation. In terms of jurisdictional limits, the *Specific Claims Tribunal Act* creates a targeted limited mandate Tribunal. The *Act* allows the Tribunal to determine any questions of law or facts in relations to any matter which in its jurisdiction, receive and accept evidence and in matters relating to the exercise of its jurisdiction, exercise the powers, rights and privileges as a Superior Court. So it's clear and I think we would all agree that the Tribunal may not exceed the jurisdiction given to it by the *Act*. Under the *Act,* the Tribunal is only to hear the claim that was filed with the Minister, a claim that is other than that contemplated by the *Act* is beyond the scope we submit of the Tribunal's jurisdiction. Questions of jurisdiction of course should be determined on a case by case basis and can be dealt with by way of application as contested matters arise. On case management, Canada strongly supports the use of case management. We believe it should be used to promote an efficient process to advance claims in a timely manner and to police

	the steps in the process. We don't believe that case management should be used to advance the settlement of weak claims and it should not be applied with uniformity in every case. I would cite the work that we did with the AFN and preparing proposed rules which were submitted in I believe January. If case management is to be implied, we suggest a time limit such as the ones we proposed in Canada AFN draft rules be applied. I think we suggested limits of 60 days could be used as a guideline. Proportionality, we think should be applied across the board in implementing the rules. That to ensure the efficiency of the Tribunal process. We think the complexity of the claim should govern the application of the rules. Some examples of what we mean by that include case management. The Federal Court rules, we know, provides an interesting example of proportionate application of case management. That body limits use of intense case management to instances of where the complexibility of a case warrants close supervision. In document disclosure, the current draft rules provides for disclosure of every document relevant to any matter as well as an affidavit of document and documentary inspection production of documents from non parties. This may be well excessive in those cases and may need the Tribunal to consider documents unrelated to the claim, the danger of course that the Tribunal may stray from the jurisdictional limits imposed by the *Act*. Again we think that documentary disclosure should be proportional to the complexity of the claim. In discovery, the current draft rules provide for written and oral discovery and production of documents at examination for discovery. In our view, discovery should only occur where appropriate. For example the full discovery may be limited to the preparation of a compensation phase hearing, while an abbreviated process of discovery will reflect efficiency in the validity phase. I am going to move on to mediation within the Tribunal process. Of course Canada supports the opportunity for mediation on consent of the parties and where we'll move process forward, expeditiously and in line with the objectives of the *Act*. All mediation conducted within the Tribunal process must be done under the opuses of the statute and within the context of case management. The statute does not confirm, we believe any ability for the Tribunal or the parties to refer the matter back to the Minister for reassessment. What we clearly want to avoid here is the spec claims process that First Nations have already been through being reengaged in factor and appearance. In terms of oral history evidence, Canada believes that this issue should be dealt in a respectful manner on a case by case basis with considerations going to weight. I will make a last comment on reconciliation, which of course is a very important value in this process and in the spec claims process. While Canada appreciates and respects the importance of reconciliation, we would be concerns if the principle of reconciliation is viewed as providing a supplemental mandate to the Tribunal. Canada is of the view that reconciliation will be achieved through a fair, expeditious and final resolution of historic claims within the framework of the *Act*. Those are our comments.
Justice Slade:	Alright, thank you Ms. McCurry. It may not be the forum to fully address concerns around additional evidence Ms. McCurry but, for the moment, I feel I probably have. The concern over the jurisdiction of the Tribunal appears to have its basis in the proposition that the claim is strictly limited to material presented in compliance with the minimum standard established by the Minister. Of course under Section 16(3), it provides that a claim has to be filed with the Minister only if the information in it meets the minimum standard. And Section 16(2)a), requires that the minimum standard be complied with as a condition of filing the claim with the Minister. So I don't want to put you or your colleagues in an uncomfortable position but I will confess some difficulty in understanding the proposition that the claim which is defined, specific

	claim is defined by reference to Section 14, would if further information is provided as a result among other things in the discovery process would exceed the jurisdiction of the Tribunal. There's a big question mark hovering over my head on that one and I think my colleagues share that. Now again, I certainly would respect any disinclination on your part to get into this question and but I am quite content to leave it but the Members of the Tribunal are having some difficulty understanding how permitting further evidence not provided in the material or filed in compliance with the minimum standard could exceed the jurisdiction of the Tribunal. Section 16 seems to be directed at what can be filed with the Minister but that definition of specific claim is referable to Section 14, which sets out ground and Section 14, doesn't go further than that I can leave it to you to use your best own judgment in whether it's appropriate to respond at this time to that concern which we share or speak further to the matter down the road and of course we've flagged the inclination at this point to determine such matter on a case by case basis but we are here to hear from everybody and nothing is set in stone.
Pamela McCurry:	Sure. Justice Slade, I can provide maybe a quick answer and then we could elaborate later as we get into discussion. It's not Canada's view that no new evidence should be admitted before the Tribunal. It's Canada's view that evidence should not operate to change the nature of the claim.
Justice Slade:	Well, that's very helpful to have that and I thank you for that. Would an example be that perhaps a claim is advanced based entirely on a failure to comply would say the surrender provisions of the *Indian Act*, and the claimant would having done further research, find a basis for previously not advanced based on breach of fiduciary duty where there has been compliance with the statute would then in Canada's view constitute a new claim thus necessitating a return to the specific claim process. Is that the sort of thing?
Pamela McCurry	It's the sort of things we're talking about, yes.
Justice Slade:	Well, thank you.
Pamela McCurry:	Ok.
Justice Mainville	My question is regarding the concern raised by Mr. Knoll. You did not raise yourself this issue but I would like to ask you the question. You mentioned that some First Nations might have difficulty to file electronic document for question of resources and I would like to know what is the habit or what Canada when you receive a case of document, do you scan all the documents or do you just use the paper?
Anik Dupont:	I'm looking at colleagues who are amerced in the process. I understand we have, I am not sure are all the documents scanned?
Anik Dupont:	All documents are scanned but we received it in the way that it is submitted.
Justice Mainville:	Ok, thank you.
Justice Slade:	And just to pick up on something you've expressed Ms. McCurry. Proportionality is very much a factor in our case management agenda but of course appreciate that when a claim is filed the Tribunal is really not in a position to assess the issues, their complexity and we would avoid at all cost prejudging any matters that really have to be fleshed out in case management so it is part of the exercise of case management and proportionality.
Pamela McCurry:	Thank you Justice Slade, I think that's what we anticipate.
Justice Slade:	Thank you. Alright, now the agenda calls for presentations by respectively the Canadian Bar Association and the Indigenous Bar Association, so we'll go in that order.

Brad Regehr:	Good morning, I am Brad Regehr, Chair of the National Law Section of the Canadian Bar Association. I am just going to provide some few opening comments. I want to first of all thank the Tribunal for accepting the submission of the National Aboriginal Law Section on behalf of the Canadian Bar Association. The CBA is a national organization representing 37 thousands jurists which includes lawyers, notaries, law teachers, students. Our approach to law reform of course is to seek improvements to the law and the administration of justice and the National Aboriginal Law Section has practitioners who are experts and who have interest in Aboriginal Law matters including specific claims matters. And the submission that was provided to the Tribunal was the submission of that section. We appreciate the responses of the Tribunal to our submission as well as the opportunity to engage in dialogue with the Tribunal on the development of the rules of practice and procedure. Our focus this morning will be on 5 key areas not our entire submission and Alan, I'm going to invite Alan Pratt to come up and address those 5 key issues. Thank you
Justice Slade:	Yes thank you Mr. Regehr. Mr. Pratt.
Alan Pratt:	Members of the Tribunal and other colleagues, it is an honor and a pleasure to be here and we all have a sense of the historic importance of the establishment of this Tribunal and we all have strong interest in making sure it works as advertised. Ah I will add to what Brad said in our introduction that in preparing the submission for which we did file. We've consulted with as many senior claims practitioners as we could find who are members of the Canadian Bar Association and it reflects the input of actually a good number of people through the room wearing other hats today but also had input into the submission of the Canadian Bar Association. There are 5 points as Brad mentioned that the Tribunal both today and in your memo that was tabled I believe in August indicated intention to make amendment to the rules that were, from our perspective responsive to the submissions of many of the parties who've made submission responses to the submissions that were made by the Canadian Bar Association. I am going to speak in a moment to 5 points where we haven't yet seen an indication as to whether matters we raised shall be the subject of amendments. But I think it's important and I hope I have the liberty to have a couple of minutes on making 2 points about the Tribunal and in particular the relationship between the work of a Tribunal and a specific claim policy, a specific claims process. The first one is that the Tribunal has jurisdiction only when a First Nation takes the claim there. So, it is truly a voluntary process from the point of view of First Nations and I say this because the First Nations do have alternatives, they have the alternative of, you know the Members of the Tribunal in your regular job as you put it Justice Slade. But the Tribunal does need to, I think have advantages and from the point of view of First Nations and those who advise or they'll go somewhere else. So, I say that not at all to suggest that the Tribunal should be that one way or the other but from a process point of view, from a respectful point of view, from a cultural point of view, from a time and a resourceful interview the Tribunal will be a better forum to take claims and perhaps will also offer a better prospect point of view for resolution to agreement. And secondly, as a claims practitioner for many years now I have been part of, we've all been part of a process which, a specific claims process which has very little downside other than time and money. In other words you cannot prejudice the First Nations rights by botching a specific claims or having someone sit on it for 10 years or doing anything other than a settlement agreement which is voted on and approved by the members. We are now facing, moving these claims into a final process and I mention this because I think that the idea that the claim, we're going to have much discussion I think about what a claim is and the extend of with the documents are filed with the Minister for instance become a thing that the Tribunal has jurisdiction over. But in taking it onto a final form it would be our submission that's reflected in our documents. There should be every attempt to make sure the best claim be put forward and dealt with in that final fashion because

	otherwise First Nations could be prejudice if they are somehow through the application of the statute and the rules forced to rally on some older, less well documented, less well argued, less well expressed version of their claim, they will suffer and the purpose of the *Act* will be defeated. So that's two, I guess initial comments. We did make the following 5 points in our written submission that we haven't yet seen any reactions. So I do want to briefly point to them. The first one, on page 4 of our submission is that Rule 6(4), provides, gives the Tribunal the remedies to satisfy the proceeding for defects in form and procedure and our concern was that it's one thing to boot a claim out of the Tribunal without prejudice, it's another thing if the disposition, if that rule is with prejudice to the claim itself and we would like, we would strongly recommend that the Tribunal verify that defect and form of procedure cannot cause a First Nation to lose its claim, it can't be with prejudice.
Justice Slade:	Forgive me sir, forgive me for interrupting Mr. Pratt but I can say right off that defects in form are not to deprive a claimant of their claim, that would be most unusual.
Alan Pratt:	It's clear. (LAUGHTER)
Justice Slade:	Ok, thank you.
Alan Pratt:	It would have been very surprising to us if that were your intention but that would be very helpful to us. I think others have mentioned, Mr. Knoll in a very slightly different context, mentioned the idea of a very partly validated claim, an example might be that, we gave two examples in our submission. One is where a claim is made and let's say 5 basis for the claim are set out by the claimant and Canada agrees with two of them or 3 of them or something less than 5. We are suggesting that the First Nations shouldn't have to go back to square one, and have to establish the points that the Crown has already agreed with us, with the First Nation. Another example might be that an allegation applies to some land but not all land and there is an acceptance of part of the claim. Mr. Knoll suggested that the First Nations should have the option to negotiate the part that is accepted and then take the other parts to the Tribunal that makes a great deal of sense. We, I think made this slightly narrower point that the First Nations should not have to go to the Tribunal to re-argue the things that it has already persuaded Canada. So I think that's implicit but that was another point. We made a point, the 3rd one is a reference to the specific claims policy in the rules. The specific claims policy, we recommend that it should refer to the first set to the ground and the A*ct* itself. The policy itself is a curious thing, you'll be spending a good part of your time worrying about it I think. It was an *Act* in the 70's, written out in the 80's, amended but not re-published in the early 90's and then re-published last year in a brand new document and so the policy does change, there tends not to be consultation or if there's consultation, it must be limited because I never hear about it. So we would rather see the rules refer more precisely to the grounds in the *Act* rather than the policy. The policy is what governs our dealings with Specific Claims Branch before we get to you. But once we get to you, we think that the *Act* should be applicable and not the policy. The 4th point has been made as well that the First Nations should have the right to intervene before the Tribunal without the additional step of being given notice by the Tribunal. It is likely as we say in our submission that in the early days of your operations there will be an intense level of interest in the first proceedings. We can expect that many First Nations will be concerned that their rights might be affected by certainly the early decisions and interveners will, will be flocking to your door. It is not to suggest that everybody should be entering in every case, First Nations should have the right, we suggest to intervene upon persuading the Tribunal that their rights may be affected as in a normal Court would. The last point relates to cost. Within a few comments this morning about costs and I think the comments that have been made are essentially consistent with what we submitted but the one

	thing we don't know, that no one knows, unless our Federal friends know, none of the rest of us know, how First Nations may or may not be funded when they do take claims to the Tribunal. So to have a cost regime developed in isolation from knowledge of a funding regime seems consistently incomplete if nothing else. The Courts as you know, have developed jurisprudence based on the Okanogan case for interim advance cost, I would not, we would not recommend that that be the test for the Tribunal order advance cost. But we think that the Tribunal should have the jurisdiction to award advance cost if the First Nation can persuade you that it does not have the resources, does not have adequate or reasonable resources to take its claim to a process which of course is with prejudice to the claim. So we would say that the idea in our submission was that cost should be used only in response to the conduct of the party. If we assume the worst and First Nations are not adequately funded and the only place they have to go is the Tribunal for their claims or the Courts for that matter where their claim will be dealt with in the final matter, then justice will not be served if First Nations don't have the resources to do it properly. I think those were the points we had. Thank you.
Justice Slade:	Thank you.
Justice Smith:	On the question of funding, what discussions have taken place, if any, how do you see funding being addressed for claims that are coming before the Tribunal?
Alan Pratt:	Well I don't know and I don't think the Canadian Bar Association knows. I would think AFN and Canada would be better position to speak to that.
Justice Smith:	Right, sure, go ahead.
Anik Dupont:	If it's any response from the Specific Branch at Indian and Northern Affairs and we are actually working with the AFN to develop funding guidelines for First Nations and because there is some funding available for First Nations who wish to bring claims to the Tribunal so that work is ongoing and once they are finalize we'll be putting them up on our website for people to know with the information on claims submission guidelines as well so that all the information will be there, so there is consideration.
Justice Smith:	Any idea of the timeframe? Just so we can take that into consideration when we're finishing our rules and getting ready to roll.
Anik Dupont:	We have to have them in very short order in order to implement for next fiscal year. They will be done and published by the end of this fiscal.
Justice Smith:	And that is when?
Anik Dupont:	March 31.
Justice Smith:	Right, thank you.
Justice Slade:	Alright, thanks for now. Next on our agenda is the Indigenous Bar Association.
Diane Corbière:	Bonjour, my spirit name is spirit of the dear women, my clan is the bear clan, as I recall Brad's is as well and I am from Tingey First Nations. I am here on behalf of the Indigenous Bar Association and I am very pleased to be here. It's important to engage in these types of activities and I say that, I think that the Indigenous Bar Association has been participating in taking up the challenge of consensus. I think we, like the AFN took your words of trying to reach a consensus to come to this meeting and we have seen in the AFN's brief that they have taken the comments provided by the Indigenous Bar Association and now. Submissions so I think from the AFN's perspective, they have taken up the challenge that you have put forward and we appreciate that because it's important and it's not to say that you know…

	The other important point is I agree with the CBA on all points and it happens often. I think that one of the things the IBA would like see is an ongoing relationship with the advisory committee. It's important to continue the dialogue as Justice Slade has said the Indigenous Bar Association initiated you know an Elders working group with the Federal Court and Justice Lutfy and we've been partnering mainly with the Canadian Bar Association on that initiative. I think Chris was probably the head of the CBA when this was initiated, I think I was the president of the IBA at the time. And it's been several years and just so that the Judges know the Courts have not engaged the practitioners who practice in Aboriginal law in any kind of rules committee you know prior to this and I think it's a really important initiative. I think that the emphasize that the Indigenous Bar Association brings to the table on the reconciliation of Indigenous Laws customs, traditions and practices is important. And I think that you know the emphasis that we put on oral history is and that we focus on oral history, we share all the concerns that were raised. I mean you know, I can always think, we spend a lot of time personally with these Elders because we are not just lawyers. These Elders are from our community as in the Indigenous Bar. So we have to wear several hats, you know we are advocates for you know the Crown or for First Nations you know. But we also know these Elders personally and take their guidance because we respect the laws that they share and the history that they share. So the work that the Federal Court is doing and I am glad that the Tribunal is going to participate as well on working with Elders and oral history is really important. And every day we sit with the Elders , you know we don't anticipate a lot of things and one of the things for example that is not going to be covered by the rules you know I just was thinking about you know the elder abuse is what they were exposed to. If any of you have ever been cross-examine you can only imagine what it is like for an elder to be cross-examined, it's never an easy feet. But I was also thinking, you know like some of these Elders are now actively engaged in the residential school process in the independent assessment process. And they are being cross-examined by department of justice lawyers presently. And one of the things that won't be covered by the rules but I am sure that now we are going to have to think about is I don't want to think that those Elders will be cross-examined in a spec claims case by the same ones that talked about their sexual abuses and their incidences of abuse. This is not in the spirit of reconciliation and you know I just thought of that now. The other thing, I am just pleased to be here and I hope that we can continue the dialogue. I wanted to say that it was the Indigenous Bar Association that raised the issue of the case management judge. You know dealing with the issues on the merits and all the dealings with the case. We only raised it in the sense that, as you know, well we knew in BC and Québec are the only ones that deal with it in the way you described. And one of the things I'd like in the spirit of consensus is if the Justice from Ontario could explain why it was that Ontario doesn't follow this practice. They made a reason, a considered decision not to proceed with dealing with case management in that fashion. So I know you put the question to the AFN but maybe when we get into consensus discussion, I'd really like to hear from Ontario Justice, because they made that decision already. I think we've heard from some of our BC practitioners and some of these are ground breaking cases where yes it seemed to have worked. The justices from British Columbia are dealing with Aboriginal title cases right now and they are dealing with case management, and making case management decisions and then proceeding to deal with all the case on the merits. So I'd like to hear a bit more from yourselves this afternoon. That's all I wanted to say, I think that, as you will see if you, like a true lawyer go through all the submissions and then find out that there are more similarities in this room than differences that we can tell then I think that there is a great deal of consensus. So if there is that process this afternoon, I look forward to participating.
Justice Slade:	Thank you. Alright now miraculously, we are actually slightly ahead of schedule assuming that there are not other presentations but the miracle may vanish. Are there other presentations for this part of our agenda. Hi Mr. Scott, thank you for joining us. Please proceed.
Jeff Scott (Teleconference)	I'll be very brief. I am lawyer from Regina. I am very interested. INAUDIBLE
Justice Slade:	Well thank you Mr. Scott, I should mention that the first submission the Tribunal received in

	response to this invitation was from Mr. Scott. It was focused primarily on unrealistic time periods for expert reports and I can assure you Mr. Scott and others present that we listened to that so thank you again. Any other comments for the morning part of our proceedings. Alright.
Unknown Speaker:	Inaudible
Justice Slade:	Yes by all means. Something before I forget. I am aware that some folks have other commitments and travel plans. You know if it's necessary to leave for any reason we don't need any formality around that. So there it is, if there's a plane to catch, a new baby just delivered something like that. Ok.
Angely Pacis:	I'm Angely Pacis from Hutchins Legal Inc., I just have a question that could be pondered during lunch period. If there's going to be a bifurcation of a claim and the Tribunal will consider the compensation question and no evidence is being put forward for the valuation of the claim, I'm wondering how will that be tackled and whether if possibly in the funding guidelines whether if that's being right now projected as part of the plan of how would that evidence develop, the future evaluation etc. for compensation. How would that be worked into? It's probably not going to happen in the policy process but I guess it's going to happen as a pre-hearing process. So that was just the question I had.
Justice Slade:	Thank you for that, I, we were wondering to, you know Justice Mainville and I were involved in the specific claims process and practice and I wondered if the process requires of First Nations in presenting a claim that they also present their material on the amount of compensation. I mean, plainly there has to be a claim for compensation but does the process require a First Nation's claimant that they present in compliance with the minimum standard material going to the quantum or amount compensation. Why don't we leave that for the time being, it's very much a question that's been on my mind and thank you for raising it for us. Madame Registrar, If I understand, if I correctly understand there will be some lunch brought?
Veda Weselake:	It's outside.
Justice Slade:	It's outside, there we go. We'll go and take a break until 1:30 and thank you for your contributions this morning.

AFTERNOON SESSION

Justice Slade:	As you know, we intended to commence with commentary on morning presentations but before we start with that, Justice Smith will speak to the question that was raised around the practice in the Ontario Courts concerning Case Management and trial assignments.
Justice Smith:	I don't speak for the Superior Court of Ontario nor was I part of the Rules Committee but I can tell you what I surmise. The approach that we're giving to cases in Ontario is very aggressive case management and I think that's driven by the tremendous back log in Ontario civil cases. And so when we embark upon the Case Management, I can tell you what my perspective is, I am extremely aggressive, I'm there to really roll up my sleeves, I work hard to prepare for them, I ask counsel to come really prepared, it's not just a short little meeting, like "how are you, have a good time, good luck at the trial". I'm there to try to settle the cases and to give meaningful input to the parties. And they want my opinion. We canvass the bar, they want to know what I think of their case and whether they're going to succeed or fail on specific issues of law, rulings of fact, that sort of thing. Now, if I can't, in some cases, you can't do that. For example, you've got a case where you've got a particular point that's a fact that you have to determine and you have maybe four different versions that are going to come from four different witnesses or two different witnesses, whatever, well it's a matter of credibility and the

	trial judge is going to be able to make that assessment on paper and I wouldn't dare try to. So you can't. But in other cases, where there's a clear cut and clearly defined issue that parties want the judge to tell them what you're thinking. Which way you're going to go with the trial judge. Now, having done that. Both parties don't want that judge to rule against in sort of a hypothetical way of speaking in the case conference to be the trial judge because you've already declared the course of where you're going and it wouldn't be a fair thing for the parties if there was a trial. But I can tell you one thing, it sure promotes the settlement talk and cuts right to the chase. Now, with this particular circumstance, it's a different ball game. And, I hear what you're saying, we're going to certainly talk about that. But that's a little bit of perspective as to why Ontario is different. You know the Toronto back log figures are horrendous and some of these cases are hugely expensive and could take months and months to actually try. The parties really want you to roll up your sleeves and give it to them straight and that's what we do and that's why often we're burned as a trial judge. Now if they were to say to me, "you know Justice Smith, we hear what you said and we uniformly, consensually agree that you can be the trial", I'd think about it as long as everybody put that on the record. Because I don't want to have another judge go through spending sometimes days preparing for this thing, reading briefings, it's a waste of everybody's time. But again, I wouldn't want to prejudice any one of the parties and if anyone said to me "thank you very much your honor, we've heard what you had to say but no we agree that it would be more appropriate to have somebody else sit on the trial, I respect that and fine I've done my job but I can tell you that the settlement rate with such an approach at the case conference is huge. And there are certain judges that are particularly adept at it and their targeted for the complicated cases and the parties really appreciate it. It's a huge savings in money. And we all know how fun trials are, they're terrible. They're a last resort, so expensive, so emotionally draining so we really give it our best shot at the case conference. I hope that answers your questions.
Justice Slade:	To think to the diligence in which British Columbia Judges are renowned, we don't have quite the back log that they do in Ontario. I will pay for that. Similar approach in BC, to case management. Our rules permit and even contemplate that the case management judge would be the trial judge but of course if you express a view and the parties are concerned then somebody else will get assigned the trial. As for the rules, well at the present, as I recall will put forward the case management Tribunal member from having the hearing before him or her. I think we can dispense of that with such that the case management Tribunal member would be able to hear the matter but the same sort of rules would govern. Should the case management judge express the view or if the parties, one party or the other is not comfortable with the case management Tribunal member proceeding with the hearing of the claim, then, we'd want to be told and somebody else would be assigned. There's a thing that we do in BC and I believe elsewhere it's, if the case management judge works with the parties to narrow the issues, there will often be a settlement conference presided over by another judge. In such that the case management judge who's presumptantly in BC, the trial Judge, would not be tainted so to speak for having pronounced a likely outcome on the particular issue. We're all concerned here, I believe that everybody in this room is concerned over the back log and we feel that the case management is to help people get the settlement and thus clear up the backlog and be able to deal with in an efficiently and cost-effectively way claims that qualify for filing and claims that may in the future. Alright, before inviting commentary on the morning presentations, we think that sessions are fair game but we recognize that people from the various First Nations and other organizations and Canada may not be in a position to respond to questions and I think it's particularly so in Canada's representatives here and questions are fair but I'd ask that you all respect any limits that there may be on the ability of representatives here to answer those questions. So with that, I'd invite the AFN's representatives to provide whatever commentary it sees fit.
Bryan Schwartz:	Good afternoon everyone. We can be extremely brief. Just a few points and observations on what we've heard and very few of them. On the new evidence point, we appreciate the clarification provided today by Canada. The

	question of what changes the nature of a claim is a federal one and may be left to a case by case determination. Any change to the nature of the case is a substantial change and a substantial change is a fundamental change and we take a rather cautious approach to attempting to define that doctrine in any particular cases. Our concern was identified by some First Nation's groups and we'll leave it to the FSIN to develop this by one comment made by Canada. Perhaps it's just a question of getting some clarification and I'll leave that to the FSIN. But it's basically about this idea of not looping back to the Minister for a decision once the claim is before the Tribunal. Concerns the FSIN can elaborate on is what's the point of mediation if you can't go back to the Minister to get a fresh look at the matter. There's just two other points that I want to address and in the process point which will be what we propose to leave to later in the afternoon with a follow-up. The two points are the same judge case management issue. Again, we have an open mind about that, we're looking forward to the discussion in the spirit of consensus building that Diane referred. I'm just wondering if it's one of many matters that could be left to the further discretion of the Tribunal but then that raises a question, we have no fixed view of traffic control area. Is there a presumptive rule that the same judge does it in less and is it the same judge does it with the consent of the parties? If one of the parties doesn't think the same judge should hear the merit, is the case management judge the final arbiter whether they continue or is there recourse to the chair? No positions on that, just questions that might be usefully clarified. Then again, it may be that the rules don't have to either say yes or no, it's to be more nuanced then that and give the Tribunal and the parties a chance to make different decisions in the context of different cases and to live and learn from experience. With respect to cost, we are looking forward to the opportunity discussing Canada's proposal on funding for the appearances before the Tribunal. Any clarification we might get might be useful in terms of clarifying if that's feasible to do the joint submission that Canada and AFN have already made on costs. In terms of limitations to what we can do, the AFN's limitations here are to some extent self imposed, we're not particularly inhibited about not having our own instructions. We think the process as a whole has benefited greatly from the fact that we've attempted to work in partnership with Canada in joint submissions. So when these issues like same judge at case management or the further refinement of cost proposal we'd rather have the chance after today's meeting to work with Canada to see if we can make a refined joint submission rather than to shoot from the hip today and try and maintain that partnership. Similarly, we've appreciated this chance to try and identify consensus among First Nations. So we'd like to every extent possible before we make definitive submissions at some point, to have an opportunity to do both. To see if we can form a cross point and the same judge point or any other thing that comes up where we don't already have a joint submission and to see if we can work out a joint one with Canada and also make sure, to every extent possible, that we've identified that that's also a consensus to First Nation's positions. We expect a follow-up, my colleague Tonio Sadik will be speaking about that again in the afternoon. It's probably pre-mature to talk about follow-ups. Suffice it to say that we certainly think that this process has been a useful one. It's identified some issues that might need some further thinking all around and we'd like to talk about some opportunity to do that with the Tribunal. Unless there are any questions, that's all we have to add.
Justice Slade:	Thank you.
Pamela McCurry:	Thank you for the opportunity to comment on what we've heard from other parties. We'll be brief as well. A few matters on which I think, I'm not sure that people are clear on Canada's view. In terms of oral history, we too believe that oral history has to be handled in a respectful

	manner. Our sense is that admissibility, the question of admissibility, should be handled within the case management process goes to the question of relevance. Similarly, it leaves the issue of weight to be decided by the Tribunal at the hearing stage. In terms of cross-examination, we're certainly mindful of the concerns that have been expressed and our intention would be, certainly, to handle any cross-examination in a respectful way. Justice Slade, you mentioned the work that is ongoing at the Federal Court, and certainly the Department of Justice is participating in that. And so, like you, we look forward to taking advantage of that work, to help inform our shared view on how we can approach oral history in the Tribunal setting. Case management, we agree with others that case management should not be applied in cookie cutter fashion. We talked earlier about the principle of proportionality and we think in line with all aspects of the claim that we would expect that case management would be handled on a basis of the claim itself. There may be instances where we're not that far apart, so we would look to the case management judge to provide guidance on that. On the question of whether or not case management decisions are binding, we drive a distinction between process issues and substantive issues. We believe that the case management judge's decision on process issues should, of course, be binding because the whole point of case management is to move efficiently through the process. Our position is that on substantive issues that the case management judge's decisions would not be binding. We would expect that it would be the decision of the sitting judge at the hearing. I'll move to the length issue which is, should we have the same judge sitting on case management as we do on the hearing. We think that there are benefits that could be realized but we think that the better view is to say that it should be on consent so that we could all have an appreciation of what we're dealing with and on whether or not it should be beneficial. It certainly, on its face, offers some attractive benefits. So we're certainly not against it, but we feel that an opportunity to discuss case management would probably be lawful for both the parties. An issue was raised around whether the case management process could be used, and this is what we heard, before a claim would actually be filed with the Tribunal, in an effort to resolve issues that would at that point be in the spec claims process. That's something that we would not support. Our concern would be that in our view, that would be counter to the Act while, in the spec claims process, our expectation is that each party can bring their best to the table and that when that effort is brought to the Tribunal, we think that would cause some significant challenges to mix the processes. So we would caution against that. On the issue of costs, we're not really hearing any disagreement around the table. As reflected in our joint submission, the AFN and Canada's view is that cause should be awarded only on the basis of that conduct. The issue of bifurcation has come up in a couple of different ways. There's a lot of attempt to address each of the ways in which you've heard it, separately. The first way which was discussed was having regards to circumstances where Canada may have accepted a claim, and therefore may be seen as having viewed the claim as being valid. Talks of failed negotiations and so the First Nations filed the claim before the Tribunal largely on the contemplation issue. Canada's view is that we will not uniformly ask that validity be reopened when a claim is filed before the Tribunal. In fact, as far as we possibly can, we would like that issue to be closed and to be able to move on to compensation. However, there may be circumstances where we discover new gaps in the evidence. Evidence comes forward or whether there be a shift in the law we would suggest that the Tribunal come up with a final solution that we take another look at the validity aspect. So, moving forward, we would hope that that would occur in some circumstances but it may incur depending on the file. We wouldn't want to close the opportunity for the Tribunal to look at validity again. We see this as being, to stand back from this. It's linked to the discussion that we had this morning around the submittance of new evidence. Our view remains the same, in that we are very much parallel views, coherent views is that new evidence, we certainly support the admission of new

	evidence so long as it doesn't change the nature of the claim and that would include new law which has, where we're now aware of, through the passage of time. Similarly with our view on whether validity should be reopened. It's the balance of procedural fairness on both accounts. The second way in which bifurcation was raised this morning as we understood it was in situations where you have the partial rejection of a claim in the spec claims process, so part of the claim that was filed with the Minister is rejected, part of the claim is accepted and is moving through the negotiation process. My understanding is that what was being advanced was that the rejected element of the claim be, the First Nations be free to put that part of the claim to the Tribunal, and all of the rest of it continue through negotiations. And our view is that, where those aspects of the claim filed with the Minister are severable on the facts, we don't see any problem with them moving, advancing on those facts, where they're severable on the facts. Where, however, the claim, those aspects of the claim are not severable on the facts, we will really think it would be difficult if not impossible to actually achieve finality in the Tribunal setting because we would have something else playing out in another forum. It would operate against the effectiveness of the Tribunal in that to have that kind of situation play out. So again, where the fact is severable, yes, where the facts are not severable, we think that it would undermine both parties to have the issues being dealt with in two forums. Those conclude our comments. Thank you.
Justice Smith:	We heard the AFN talk about the suggestion that it should be time to allow for the discussion of the joint submission, perhaps other joint submissions might be able to be forthcoming. What do you have to say about that and specifically do you agree? What about time frame?
Pamela McCurry:	The clock is ticking. We would certainly appreciate the opportunity to continue discussion with the AFN and others on the Rules. In terms of timing, we are in a fairly tight timeline and I understand that you're supposed to have rules, more or less in final form around the end of October, early November. You know, we would be happy to operate within that time frame. If others are agreeable to that, we could, if we need another week to get together, to provide further comments to you that might fit into your time. But we'll work with whatever timing that suits your end.
Justice Slade:	Where a claim is brought to the Tribunal on a basis that it is rejected by the Minister, I'm wondering how the Tribunal could deal with both the validation and compensation in one hearing. It strikes me that claimants may not be addressing compensation as the quantum at all in their advancing the claim in the Specific Claims Branch process and if they do speak to compensation, it may well be that they haven't addressed it fully, and one could understand that given that, getting expert opinion and the like to support quantum claim can be costly and time consuming. So, if the Tribunal has put forward a claim that addresses only validation, it strikes us that the idea that dealing with the claim fazes the validation in the first phase retaining jurisdiction and leaving it to the parties where a claim is found valid by the Tribunal would be a process that may well lead to settlement and perhaps avoid both parties having to incur significant expenses before they know whether or not the claim will be considered valid by the Tribunal. Are you able to speak to that?
Pamela McCurry:	We very much understand the challenges inherent with dealing with both validity and compensation issues. Certainly from the perspective of First Nations, we, in the context of the Spec Claims process, we don't encourage First Nations, necessarily to work on compensation until we've had a finding of validity because of the expenses you mentioned involved in it. So we would, in the context of the Tribunal, see it as a very reasonable approach within stages. Finding of validity first and then moving on to compensation second.
Justice Slade:	Well then, we're left with Mr. Knoll
Chris Devlin:	We actually don't have any substantive further comment to make. I think because our presentations sort of ask for everyone else this morning to respond that way. So we have a few concluding comments that we can make and we say that later or we can say that now. Really it's just that we appreciate the opportunity to be a part of this process. We think it's a

	very exciting part of the reform and very much the CBA's mandate. We would very much appreciate the opportunity to be able to comment on the next draft of the Rules, if any additional comments are welcomed. If there's any additional help that we can provide, we would like to do that either in writing or in a meeting like this. And again, we appreciate that there may be an immediate time frame on that at the extent that we're able to be of assistance, we would like to be.
Justice Slade:	Alright thanks Mr. Devlin and forgive me for calling you Mr. Knoll, I don't know whether I've flattered you both or insulted one or the other. So, Mr. Knoll, yes.
Davie Knoll:	I also want to thank the Tribunal Members for the opportunity to make presentations on behalf of the FSIN. We've sort of raised certain points that are issues in the specific claims process that we've been involved in over the years since the early 80s. But there are a couple of points that I'd like clarification from and maybe Canada and Justice is not in a position this time to respond. I understand and appreciate that Justice has indicated, and Canada has indicated that they are prepared to accept new evidence as long as the substance of the claim is not altered in any particular way but then they also on the other hand, indicated that they were reluctant to have the matter for efficiency or expediency returned back to the Minister for reconsideration and this seems to be inconsistent with the original position. If in fact, Canada is prepared to look at new evidence, consider new evidence in the case management process, or through a mediation process and they clearly see through the introduction of new evidence, the writing is on the wall. On the question of validation, why wouldn't Canada want to reconsider their position instead of going through a full blown hearing? I'd just like to give an example, an experience that we went through. This is a question of reserve or the question of what is a reserve set aside for a group of bands and this is considered hay lands. And then the question became, in taking the hay land from this group, was their surrender declared or not declared, set aside by order in council. Canada's original position was to reject the claim. It just so happened that on another claim we ran across the Justice opinion on another hay land claim, had indicated that, yes a surrender was declared, that was submitted back to Canada, may we consider their position that they accept the claim for negotiation? This is a case of new evidence coming forward in Canada. In considering if this happens at the case management level, with new evidence being submitted, we were just wondering if maybe Canada would consider the opportunity to go back and reconsider that position. One other point, I can appreciate Canada taking the position that, during the specific claims process, if there's a particular issue in feud or the parties have reached an impasse on a particular issue, and it can't be resolved, maybe this is a claim that comes before the Tribunal in its entirety of the claim and not accepted for negotiation rather than having that issue determined before the Tribunal on that specific point and then trying to continue the negotiation. I'm wondering if Canada might be able to consider the possibility that on a particular point, during the specific claims process in dispute, with the consent of both parties, Canada and the First Nations on bringing that matter forward to the Tribunal, just on that note, whether they would be receptive to considering that instead of going through a full blown hearing. Those are all of my comments.
Justice Slade:	Thank you Mr. Knoll. Is there anybody else that would wish to contribute at this point? I'm left wondering about the position of the First Nation's representatives and the views of the Crown with respect to cost. My understanding from Mr. Schwartz and others is that there should be different rules that would apply to Canada and First Nations with respect to costs. That seems to be premise on the understanding that Canada has very significant resources and the First Nation's claimants are not similarly resourced. Hence, as I understand the proposition, the Tribunal should be able to make an award of costs in the event that a claim is validated. But if the claim is found not valid, that the same relief would not be available in respect to the First Nation's claimant. Have I caught the essence of that concern?
Unknown Speaker:	Canada's latest comment, I just want to go back to the joint submission. The joint submission with a whole bunch of factors that can be taken into account and awarded costs. It says that there could be awarded costs against either side. One of the factors was public interest in

	bringing the claim. Our expectations but perhaps could have been an unfulfilled hope, was that ordinarily, if a reasonable claim is brought, the Tribunal would look at the public intersect factor and not award costs against First Nations. At the same, if the successful claims, our hope is that the Tribunal would look at all the factors including succession and say you're not fully compensating First Nations, if you don't get at least some of your costs. So, the joint submission doesn't have a rigid rule, it has a set of factors. Candidly of course, it could be interpreted by different Tribunals in different ways by the context of each case. Our hope or expectation was that would result in the general end of cases in compensation for the successful First Nation claimant but that the public interest factor would militate against Canada recovering would not preclude of course for Canada recovering in cases of inappropriate conduct in the actual litigation. But that's how we understand the existing rule and I want to be clear of course, it could be interpreted as different in different cases but that's the way we hoped or expected it would be applied in practice. The way we hoped it would be applied, if the role could be further clarified, preferably of course with consent of Canada to make that clear, that would be a step forward. A rule which basic presumptively says nobody gets any costs does have the potential disadvantage for First Nations with less than full compensation. Again, my example of the cut-off point would be if it cost you $200 000.00 to litigate even a $200 000.00 cutoff claim and all you have are net balances aggravation but no real compensation. So, that's the basic policy thing to which you were coming from, we're not averse to, and we certainly look forward to seeing if it's possible to clarify a position about Canada and AFN with respect to this particular issue. With the qualification, it would be much easier to make progress on this, at least to have an enlightened discussion if that was done at the same time as Canada gave us some clarification of what sort of funding would be available to claimants. We don't have that right now. You're early indications going back to Justice At Last and frequently asked questions if there will be a funding program. At this point, no First Nations know what that funding program will be, what's the adequacy? So we might be able to do a better job, both from Canada and AFN, in providing submissions of this if we had the benefit of clarification of Canada's position on this.
Justice Slade:	There's a bit of a quanundrum here, it seems to me, it's been said that the potential for awarded costs against the First Nations would be to discourage claimants from coming forward but we won't know until sometime in April, perhaps or by the end of the fiscal year what Canada will provide in the way of support for claimants before the Tribunal. We want to get the Rules in place and if we're unable to do that fully on the question of costs, the opening of the Registry for filing could be delayed, so I think that we would encourage Canada and groups representing First Nation's in claims either legally or at a collective tribal council and political level to put your heads together as soon as you can and see if you can come up with something that's acceptable to both. The rules around costs and other rules for the matter, in one sense are a work in progress, and I know that with other rules that came into effect in British Columbia in July, there's already been problems identified and that after a couple of years of hard work by a bunch of very knowledgeable people around rules so it would be a fantasy to think that the rules that the Tribunal puts in place is the last word on it. However, we need to get this Tribunal operating and we feel that everybody should live with the rules for a while until we get a better handle on the volume and type of claims that come before the Tribunal, get into case management, identify problems that have a bearing on rules will reveal themselves and down the road sometime, as we all gain experience with this new process, we'll revisit the rules. Ongoing process initiated on the release of the rules as we, the Tribunal Members, determine them to be has some built in practical problems. We don't know at this time, how many judges are going to put their hands up. Right now, you've got 3 full-time judges, we think that once the filing is commenced and case management commences, we're going to be pretty busy and until we're able to report further to our colleagues in our various courts, about what they're getting themselves into, if they volunteer, it will be just a few full-time members. So, we're

	concerned about the ethicacy of an ongoing process of the rules assessment process. We believe firmly in the view that we need to get the rules in place and live with them for a while. Then have another look at it and as you know, as matters stand, the Chairperson's obliged by Section 40 to report to the Minister annually. That might be a good time at which to speak to creating a forum for rules revision. My guess is next September will be too early for that because realistically, the Tribunal will not be functioning with rules and all resources that requires them to, as I mentioned earlier, sometime in the first quarter of the calendar year. So, let's say we get under way in the end of March, well seven months in, I'm skeptical that we would be in a position to assess how well or poorly certain of the rules are working. We'll always be concerned about it but we've really like to get under way and without distractions. While we do the work that First Nations and Canada expect us to do. Are there any other voices looking to be heard?
Barry Schwartz:	Just for information, the argumentative in any way, just to clarify our thinking on a couple of points. On the question of same judge for both purposes, or to be precise, same Tribunal Member, I just want to point out that the existing joint submission between Canada and AFN, is 9.14 which doesn't absolutely preclude the same member presiding over both but the rule is unless both parties consent. That would be the position that Canada has put forward. So, I might have contributed a bit to the lack of credit because I was talking about the existing rules precluding it but, I meant presumptively preclude that it allows with consent of both parties. That's the existing state of the joint submission but again there's other options. Presumptively the same person unless there's an objection or something. We have an open mind about that. Just for an informal look at it, more clearly, just because there's been so many documents, there's a cost provision, I'm talking about section 18 of the original joint submission. They allow cost reward against either side within, and invites the Tribunal to consider a list of specific factors and then any other matter that is considered relevant. So it was a very broad description. The specific subsection that I was referring to was the public interest criteria on which we were hoping would be construed as inviting the court to consider given the nature of specific claims in the public interest and consistent with the spirit of statute that claimants could enter the process without fear of costs being awarded against them and at some time even if they're unsuccessful, they might get awarded costs based on the equities of the situation. So thank you very much.
Justice Slade:	Ms. McCurry
Pamela McCurry:	Just clarity on the question of costs, Canada stands by the joint submission. What we were merely referring to on the question of cost was that Canada would not be seeking costs against First Nations other than a situation of bad conduct.
Unknown Speaker:	I have one thought. This flows from some of the discussion we've had earlier about the claim and whether its fixed in time or whether we expanded through new evidence and so on. And the claim, in my language meaning the original claim, then something different will be subject of discussion but I'm assuming that the rules will provide for a record of documents that include the original claim submission and other documents. So far, I think we've been discussing only the record which goes to the question of validation reliability. It occurred to me sitting here that we haven't talked about the record of negotiations because of the ways, as you know, the Tribunal can have jurisdiction over a claim is if a claim has been accepted and been in negotiations for 3 years without success. Does the record of those negotiations, which would include such things as studies commissioned by the parties, often jointly, usually jointly, almost uniformly jointly, become part of record before the Tribunal or would we be starting from scratch? And I guess this is a decision for discussion that partly is a question, what are the rules that will provide for a presumption that the record of negotiations for those three years or however long the parties have been in negotiations, as to the appraisals they've done will become part of the record for the compensation determination by the commission, Tribunal pardon me. One of the complications I've done, we universally sit down at the begin of negotiation process that enter into a protocol which protects the discussions, the information that's generated through confidentiality undertakings and privilege. So, I guess there's a

	question of whether these work product of the negotiations would become, would privilege be waved? Would Canada have to waive the privilege? Would the First Nation have to waive the privilege? That's something that the Tribunal could provide for in the rules, I would certainly like to see that the work that has been done by parties at the table not wasted and become part of what the Tribunal has to deal with and determine the compensation. Anyway, maybe that's opening up a whole new can of worms but I think it's something important that we haven't really talked about here today.
Justice Slade:	Thank you, we've struggled among us with similar questions around privilege documents and it would be helpful to have all perspectives on that in the interest of getting the real issues identified through case management. There's something to be said for the case management Tribunal Member knowing where you've been. Whether that would be facilitated by full disclosure of the type of material that you've mentioned or something short of that, who knows. It's certainly a point that I hope parties will be able to engage on, tell us something.
Pamela McCurry:	Our sense on this is that we have to start with the basics which includes the fact that negotiations are conducted on a without prejudice basis. In the courts of the spec claims process, that works for both parties and we wouldn't want to find yourself in the situation where that process if somehow altered in a way that means that we don't bring our best to the table for both the legal and policy perspective. What we could see moving forward though in order to facilitate work of the Tribunal is if through the case management procedure, the parties could get together and perhaps work towards an agreed upon joint record that could be placed before the Tribunal. Then that would allow us to look on a case by case basis until what would be helpful and what might not work from an adjudicative setting.
Justice Slade:	There is another question that occurred to us. The Act provides that all documents filed with the Tribunal are public and we're aware and I think that a growing awareness of the sensitivity of some of the material that claimants in Canada might wish to have the Tribunal seek and that can include oral history as I'm understanding it. There are the presentation of oral history for the Tribunal at a hearing can be impeded by the fact that it's being advanced in an unfamiliar forum and if the rules contemplate some notice as general as it may be, it's the content of the anticipated evidence that might be seen by some as being an impediment to introducing that kind of evidence. There may be documents that are considered sensitive and private. There may be materials developed in the course of negotiations that both would not wish to have all over the internet. We thought one would approach that, may be to have the Tribunal receive material but filing would be by agreement of the parties or by order of case management member of the Tribunal so that what ends up in the public record is the material that the presiding member would actually look at part of the body based on which a decision on the findings of the fact would be made. So I need to throw that out for any thoughts anyone might have on this or am I concerned about something that should not be of concern.
Pamela McCurry:	Thank you. I think, I think I'd like to reserve on this one and talk with other yea.
Justice Smith:	Just on that note, it was suggested that there be refinement on some of these discussions. Can some of them can take place today, maybe during a break? Because you know what happens when we leave the building, everyone goes home, you get involved in other matter, I just wondered if, we'll allow you to discuss this, like if you want to consult with your colleagues on that and maybe have the chance to talk to other people.
Justice Slade:	Perhaps in a bit we can make a break, take a break so you can consider that and after we leave we'll lock the doors. (LAUGHTER) Alright, is there anything anybody would like to raise for further discussion perhaps something that we haven't touched on or something that refines something that we have. Well, let's take a break. Mr. Knoll's.
David Knoll:	Alan raised an interesting point on the negotiation compensation side of things. 3 years or more of efforts have gone into negotiations with extensive loss of law study, sometimes amounting to hundreds of thousands of dollars involving experts on loss of use of timber, of

	land, appraisals, the whole works. When it comes to an impasse of the compensation side, the question becomes what do you file with the Tribunal on the compensation issue. These negotiations are privileged, but what did you file, you know in front of the Tribunal on the compensation, can you file all these reports or not. What can you actually file in determining the compensation issue? You can't get to refining things at the case management level until you file something. So I guess my question is, Canada, on stuff like that what do we file? I can see that maybe there's an agreement in advance with Canada that some of these studies could be filed and without prejudice discussions and the negotiations of course that can't be disclosed but maybe some of the studies could be, that's just an open question. I just think that Alan raised a good point.
Alan Pratt:	And now speaking as a private practitioner and not a representative of CBA but I've had to deal with the issue of negotiation privilege and it seems to me that negotiation privilege is, can't be waived by just one party. It has to be waived by all parties, so one party says no they have a Vito. A strong policy reasons for that is within the common law. That said, I think that their Tribunal rules could be, could enable motions to be brought by a party saying notwithstanding. The first thing is that if the parties agree, we got all the expensive reports, we want to put them up on compensation, great, you guys don't have to worry about it because the parties agree but what where the rules come in is well suppose the parties don't agree as to which expense report should be put before the Tribunal on compensation and which shouldn't. In those cases the Tribunal should be able to have a hearing where notwithstanding the privilege that it might be in the public interest if a party can make the case that the privilege should, should not be allowed to be inserted in the circumstances given a variety of factors now leaves us. I am not suggesting we have a whole drafting exercise but that there are times when the Court may wish to go and may need to go beyond this sort of privilege and I think there are rare examples of the law where you can do that. It's my no means absolute and there are times when these things have to be dealt with and there's greater public trust in getting to that information and that a party holds to that information certain privilege strategically and that the Tribunal should be able to have a mechanisms to deal with that so that's where I think the rules can come in. If parties can agree, well great, it's only when they can't agree.
Unknown Speaker:	I am not sure if I'm wearing a CBA hat at the moment or not but given the practicalities of it as David mentioned, there can be an enormous investment of time and resources at the negotiation table govern by privilege and confidentiality agreement. From my perspective this is me an individual practitioner, is that we always have trouble finding enough qualified experts on any topic. It may be a large appraisal, it may be timber study, it may be an agriculture study, it may be forestry. Usually the parties at the table will agree on an expert and who's lucky to be the best expert on any given study and usually the distance between that person and the next best person rather a large gap in many cases. So what happens if we together commission and neither side can use the best person because that person is off limits. I think that would not be in anyone's interest but we do have to overcome the questions of privilege. I think it's, I am just raising it because I think it's a big practical issue and I think led in the wrong way it can lead to waste of resources and of quality evidence.
Kathleen Lickers:	Over the course of the break we did work through internal caucus and then with a brief meeting with Canada, confirm that we have in our perspective reached, certainly clarification this afternoon. You have our joint AFN Canada submission but through clarification this afternoon, you've reached consensus on many aspects of what was raised this afternoon and do not feel the need for us to go away from today to work on further joint submissions. We would like to now clearly confirm on the record, on this transcript for you, what the clarifications we agree with and go forward on that basis. First on the aspects of case management, we agree as Canada has stated as well that the role of the case management Tribunal member may go forward to hear the merits of the cases as well on consent of the parties.

	On the matter of cost, we further confirm Canada's clarification this afternoon and agree with their confirmation that Canada will not seek cost against the first nation but for conduct. Thirdly on the issue of bifurcation, we agree with moving forward in stages and with the clarification provided by Canada that they will not uniformly ask that validity be reopened at the Tribunal. However, there may be exceptional circumstances that may prompt another look at validity and we accept that as well. And then finally for the record, with respect to partial acceptance, we agree and go forward on the basis that where a claim may be severable on the facts, that the claim may proceed on two tracks remain in negotiation and go forward on the issues to the Tribunal. However, we also recognize as was clarified, that where a claim is not severable on the facts then to proceed on two tracks may operate unfairly and undermine both processes and we accept that as well. So with those 4 elements of clarifications provided in our agreement to them we wanted to state clearly on the transcript of today's discussion that there isn't a need from our perspective to return to a joint submission to you.
Justice Slade:	That's very helpful, thank you. Is there anyone else that wishes to speak before we offer some concluding comments? Yes, Mr. Sadik.
Tonio Sadik:	It's Tonia Sadik, Assembly of First Nations. By way of concluding comments, first I wanted to offer our collective thanks for this opportunity. I think there's a consensus certainly among the first nations group that this has been a very productive day and that it has been a useful exercise more generally to have the opportunity to collaborate with the other parties around the table and try to seek consensus and share ideas and talk about our respectful submissions. So we're grateful for that and it gives us a lot of hope in terms of the future liability of this Tribunal. Now in the context of that, I know that there have been two issues that have been raised that have been touched upon and perhaps for the purposes of clarification I would just ask if we could just be very clear on what to go forward is with respect to the next draft of the rules, being the specific question and secondly with respect to the ongoing perhaps ADHOC operations of this advisory committee. In respect of the rules, when we had a pre-meeting yesterday that involved all of the members of this advisory committee, the 11th group that were represented on it, there was a consensus reached to request today in this meeting that in fact consistent with the original direction that has been provided by the Tribunal in terms of issuing its first set of rules for comment that there would be a second round. We are fully aware of the time constraint and certainly don't want to suggest that there any interest here to delay that process but if there were an opportunity we would ask if it could be clarified as to whether there may be another opportunity to review the next draft prior to finalization. And I would offer particularly as what was say today in terms of the timing and the need to get the rules and the next opportunity that might emerge to review those rules to which it sounds it could be well over a year off that while there's an interest, particularly given their longevity that, perhaps even a brief window if we can coordinate that amongst ourselves to provide rapid response input or whatever it is deemed appropriate on the part of the Tribunal and it's really in relation to that as well that the work that has gone into establishing this meeting and again having a meaningful dialogue, I am feeling that this is productive, whether there is some direction or suggestion that could be made as to whether we should continue to see ourselves as a body that may called upon at the leisure of the Tribunal. Thank you.
Justice Slade:	Any others? Yes, Ms. McCurry.
Pamela McCurry:	This appears to work. Is it working? Yes its working ok excellent. I would just like to make one clarification to the clarification with our agreement with the AFN and it doesn't change our position. Just on the bifurcation issue, Canada will only exceptionally seek a review of validity

	and those exceptional circumstances would be as I stated earlier whether there is a new fact, whether we've discovered a gap in the evidentiary basis that we are now filling and or where there is new law. Right, just so for clarification on that one. Ok? Otherwise, I think we've made our views hopefully quite clear on other issues as well. We want to thank you as well for the opportunity for this discussion, it's been very very fruitful. We look forward to working with our colleagues on another draft if that's possible and we'll be of any help we can possibly. Thank you.
Justice Slade:	Well, this is been very informative and we really appreciate the openness of the discussion here today and the information that we've received. It's great that substantial agreement has been reached on number of very significant questions. We are very concerned about getting the rules in place, we'll consider what's been suggested about follow up. Our inclination at this time is to put something out on the website with notice to all members of the committee that try to capture what we understand to be matters of agreements indicate where we intend to go on matters that, on other matters that have been canvas already, that there's some discussions that we already or haven't explored fully today and look to responses to that communication. We are going to be meeting next Monday and Tuesday with someone we've retained, Tuesday and Wednesday yes, to assist us in drafting the rules. The last thing, well it will not serve us to get in to drafting by committee. So our present view and we will re-examine this but our present view is that we'd like to get out onto the website and directly to participants a summary of what we understand has been achieved by consensus, our view on how that should be reflected in the rules and address other significant matters. You know getting another complete draft and posting it and inviting further submissions is not our preferred route. You know, there's been concerns expressed at some quarters thankfully not from First Nations or organizations or counsel or the department of justice, or many Crown officials over getting the Tribunal up and running. We want at least to be able to establish that we have our rules in place and at present the tenure of the 3 members of the Tribunal runs out on November 27th, so we are very very highly motivated to get this done. I can tell you that all 3 of us have offered to accept an appointment for an extended term but of course it is for the executive branch of the governor in council to make that decision. We are still a little bit tentative here because all of our concerns, that you will see once my interim report is made public, have not been fully resolved. We think we're well on the way but it's a big commitment for us, we're a long way from home and you know to go a long long term without being fully satisfied that we've got the resources and appropriate governance in place to enable the Tribunal to do its work. We're having to hold back a bit. Who knows how that message will be received by those who have the power of appointment, we don't know. That being so, we want to get as much done as we can and of course if it transpires that we know before November 27th that we'll still be on this Tribunal then we can breathe a little easier but right now we don't know.
Justice Slade:	We want time to get the process going before entering any process for further examination of the rules and we're determined on that but we will discuss. We'll go from here with the process that we are engaged in today but I've outline generally the view that we came in with and it's driven by the factors I've mentioned to you. And thank you, this is been a good day. You know we're all feeling a bit of anxiety over it. You know we've had to make some decision earlier on, on how to go about, dealing with these rules so we put a kitchen sink in front of us and through everything in there. You know we knew that some of it would be not welcomed and we appreciate how diplomatic everybody's been with respect to that but we've established an advisory committee right off the bat. Who do you have and where do you draw a line? Well the line got drawn by those who took the time and trouble to make submissions and you know the dialogue at this meeting has a proof now the value of our strategy whatever anybody else think of it. So again thank you and we look forward to further communications. Just down the road sometime, we'll be seeing some of you, but I won't say see you in court. No matter how many times you proof read a document it

	still shows up as court rather than Tribunal. So alright thank you.
Justice Smith:	I just want to say one thing, maybe a couple of things. I'd anticipated this being a far more negative process, I thought that you were going to be snarling and biting at each other and it would be acrimonious and not very pleasant at all. So big surprise to me that you came here and first of all said you had jointly been able to agree on certain things and it's been very pleasant, productive, intelligent, thoughtful process and I am very encouraged by it. I think it's just great, a big surprise for me. I hope that the message that you get from us, the message I am getting from you, you're really committed to this, I hope you're getting the same message from us because we're really committed. We've been away from home for over a year and a half, you know maybe away from home for another year and half. And so, I mean as much as I like Ottawa, I do like my house and my wife and my cottage and everything else so we're committed to this too. We want to get it right and we want to be able to stand back collectively. I think you feel the same way and say boy what a great job this is, this is really working. I mean it's not perfect, it's going to be tweaked as we go along, you know over the course of time and yes you're going to be part of that process as others will be but by large it's addressing and fulfilling the promise that was made and that will be a great thing. Bringing justice to claims that have been languishing and haven't been served well by systems in place and for our judiciary to be part of that process. I think this mind bogging, it's a wonderful experience. I am leaving here thankful and very encouraged, thank you.
Justice Slade:	You can tell that Justice Smith is primary experiences is with Ontario style litigation. (LAUGHTER) We are a little more laid back out West you know. (LAUGHTER)
Justice Mainville:	Alors, je vais adresser quelques mots en français puisqu'après tout, c'est quant même un Tribunal qui est bilingue ici. Et simplement pour mentionner que je joint, évidement je joint mes confrères, mes collègues dans la position qu'ils viennent d'exprimer, effectivement et beaucoup d'enthousiasme. Lorsque nous avons accepté d'agir sur le Tribunal, nous avons rencontré en cour de route plusieurs obstacles auxquels on s'attendait pas, mais on voit qu'on a bon espoir que les choses vont aller vers le mieux dans le meilleurs délais et je vous remercie de votre participation. Ca été très, très, apprécié. Alors bon retour pour ceux qui retourne ailleurs qu'à Ottawa.