ASSEMBLY OF FIRST NATIONS

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AFN COMMENTS ON THE SPECIFIC CLAIMS TRIBUNAL OF CANADA'S DRAFT RULES OF PRACTICE AND PROCEDURE

The Assembly of First Nations (AFN) has now had a chance to review the draft Rules of Practice and Procedure (the "Draft Rules") of the Specific Claims Tribunal of Canada. In a broad way, the Draft Rules reflect much of the structure proposed in the earlier joint submission of proposed rules by the AFN and Canada (the "Joint Submission") to the Tribunal. With respect, however, the Draft Rules depart from the Joint Submission in two broad respects – and these are a source of profound concern.

The AFN believes that both issues can be redressed through refinements to the Draft Rules, and calls on members of the Rules Committee to carefully review these comments so as to avoid future difficulties relating to role and function of the Tribunal as it begins to hear cases. The risk, we would submit, is one whereby the Tribunal is liable to replicate, rather than resolve, the failure of the court system to afford an accessible and just mechanism for definitively resolving specific claims.

1. **The first major area of concern is that the Draft Rules, in a number of respects, adopt too readily a mindset that the Tribunal is simply a court by another name – rather than a distinctive body that has been created because court processes can be prohibitively complex, protracted and expensive for First Nations, and insufficiently geared to the particular nature of specific claims.**

The very first principle identified in our earlier Joint Submission - which is the product of both Canada and the AFN - is that "*the rules of the Tribunal must be adapted to the specific nature of specific claims, rather than simply following standard court procedures*". The Joint Submission allows for considerably more flexibility in how the adjudication of a claim is adapted to the nature of the claim and the preferences of the parties and, with that, the possibility for less cumbersome, time-consuming and expensive procedures.

Indeed, in a number of cases, the Draft Rules appear to have cut-and-pasted standard court procedures in a manner that does not respond to the particular needs of creating a just and effective Tribunal system, and in some cases are contrary to the *Specific Claims Tribunal Act* ("SCTA"). Some particular concerns include:

- Section 5(2) of the Draft Rules refers to court rules as well as tribunal rules. The Joint Submission refers only to the latter. The invitation to refer to court rules is unnecessary and likely to lead to the excessive incorporation of traditional court processes;

- Section 6(4) of the Draft Rules limits the remedy for non-compliance narrowly, rather than allowing a broad range of options; the Joint Submission, Section 2.6, allows for a broad range of remedial options;

- Section 9 of the Draft Rules presumptively excludes non-lawyers as representatives; the Joint Submission, Section 6, is more open ended, while still allowing the exclusion of representatives who are not effective. Specific claims are often prepared and submitted by non-lawyers who are highly experienced and experts in their field, including the applicable legal doctrines;

- Section 14 of the Draft Rules (joining of proceedings) and Section 47 (joinder of "any persons" who are necessary parties) applies court concepts to a context in which joinder will rarely be sensible, practical, or fair, or compatible with the statute. The SCTA contemplates a narrow spectrum of participants in any individual case. Only a First Nation can file a claim, and only the Crown can be a defendant; SCTA, Section 14. Claims cannot simply be filed with the Tribunal; each individual claimant must follow a line that begins with filing a claim for consideration by the Minister. The process can take six or more years. It is not possible to simply add another claimant who has not gone through the initial process. The class of respondents is limited to the federal Crown or provincial Crowns who submit to the jurisdiction of the Tribunal. The Act carefully, narrowly and specifically states the parties who may be added or who may intervene and the conditions under which they may do so. Specifically, a province has a right to be a party only if it has been given notice by the federal Crown that it is partly or wholly responsible for the applicant's loss and the province submits to the jurisdiction of the Tribunal. First Nations and other third parties may be added as interveners - not parties - if and only if they have been given notice by the Tribunal that their interests may be affected and they apply and the Tribunal chooses to grant leave after considering whether doing so would add to the complexity and length of the hearing. The Draft Rules provisions on joinder would override a narrow regime on interventions, in which participation is restricted by conditions and must be actively sought, and requires the Tribunal's approval. Instead, the Draft Rules provide for the mandatory inclusion of parties who are "necessary and proper". The rules for adding parties and interveners are stated clearly and precisely in the SCTA, and the joinder provisions of Part 4 are not compatible with the letter of the law or the intent behind those rules, which is guided by the distinctive nature of specific claims and the need for expeditious and efficient dispute resolution.

- Part 2, on pleadings, again includes some features that inappropriately appear to cut-and-paste court rules. Section 20(d) provides that a First Nation must state "the cause or causes of action asserted by the claimants". The SCTA establishes the grounds on which a claim may be based, and they do not all require that the Crown

has carried out an act which was unlawful according to the law at the time. It is not necessary, appropriate or compatible with the SCTA to require any "cause of action" stipulation by the applicant;

- Part 15, on costs, provides that the Tribunal, in exercising its full discretion, shall take into account "the rules of the Federal Court". The Joint Submission, Section 18, by contrast, more clearly takes into account the distinctive nature of specific claims, including mandating consideration that the public interest in bringing the claim be taken into account. Indeed, the AFN expects that Canada itself will provide significant sources of funding to assist claimants in processing claims before the Tribunal. The reference to court rules in the Draft Rules and the absence of any other expressly stated guiding factors is liable to lead Tribunal members to routinely award costs against First Nations' claimants who are unsuccessful. Doing so can be harsh and unfair to a First Nation that has been pursuing justice for its people in good faith. The excessive risk of an adverse award of costs may deter meritorious claims from being brought forward to the Tribunal at all;

- With respect to pre-hearing discovery and production processes, the Draft Rules again raise concerns about the cut-and-paste adoption of formal and standard court procedures. A minor, but revelatory slip, is that Section 90(4) even refers to "leave of the Court" rather than Tribunal (other sections of the Draft Rules that refer to a court or a judge, rather than a tribunal or a member, include Sections 60, 65, 83, 87, 89, 92 and 124). Parts 8 through 12 of the Draft Rules provide for court-like rules on production of documents, examination of witnesses, expert evidence and preservation of evidence. Some of these provisions are liable, in many cases, to present First Nations' applicants with unmanageable expense and delay. The Joint Submission provided for broad discretion at the case management stage with respect to a variety of pre-hearing processes. If the Tribunal wishes to adopt "template rules" along the lines of Parts 8 and 12, it should be made clear that:

    - Template rules do not presumptively apply, but will be used only when the Tribunal determines it is appropriate to do so in light of the need for "just and timely resolution of disputes" (SCTA, Section 1). Section 57(6) is not sufficiently clear in this respect; rather, the impression left by the Draft Rules as a whole may well be that there is a presumption that Parts 8 through 12 apply;

    - The template rules may in each case be adapted in light of the submissions of the parties and all the circumstances of the case, rather than focusing the exercise of discretion on "proportionality" - the extent of procedures in comparison with the "apparent monetary value of the claim" (Draft Rules, Section 59(o)). A claim where there is a large amount of money might in some cases be appropriately settled by simple and expeditious procedures, and a claim that might appear small might be very important (in light of the economic disadvantage of the First Nation or the spiritual and cultural importance of righting a particular wrong) and be of such a nature that more extensive procedures are the most appropriate ones.

The SCTA itself creates a procedural regime that permits the Tribunal to adapt the hearing process in each case to the particular circumstances and submissions of the parties:

> *26. (1) Subject to this Act, the Tribunal shall conduct its hearings in any manner that it considers fit.*

It also contemplates that rules may be adapted. Particularly in the early stages of the development of the Tribunal, the rules should not unduly restrict the ability of Tribunal members, whether acting as case management officials or adjudicators on the merits of a dispute. The Joint Submission advisedly adopted this flexible approach. It even makes clear that it may be necessary for a member who is hearing the merits to revise some of the provisions made at the case management stage.

2. A second major area of concern for the AFN is the extent and manner in which the Draft Rules attempt to address the issue of the extent to which an initial filing with the Minister limits the scope of proceedings at the Tribunal Stage.

The claims system has two stages: assessment by the Minister, and Tribunal proceedings when the assessment stage does not resolve the claim in a timely and satisfactory manner from the perspective of the First Nation. Section 16(2) of the SCTA authorizes the Minister to establish a "reasonable minimum standard" for the assessment stage. Section 16(1) provides that a First Nation may file a claim with the Tribunal "only if the claim has been previously filed with the Minister".

The question then arises: to what extent does the initial filing with the Minister constrain the applicant in submitting its case to the Tribunal?

This is an important and complex issue that would be best decided on a case-by-case basis where there can be full argument by both sides and particular decisions can be made in light of all relevant circumstances.

In the logic of the SCTA it is clear that initial filings on the facts cannot and should not be rigidly constrained. On the contrary, the SCTA contemplates a discovery stage at the Tribunal. Indeed, it must be kept in mind that this might be the first time an applicant actually obtains access to some of the crucial information pertaining to its claim. There would be little point in providing for discovery if the factual information that arises could not be used in a manner that ultimately informs the case.

The nature of the first stage, the "assessment" process, also suggests that an unduly narrow construction should not be placed on the requirement in Section 16(1) that the claim be the same one that was put before the Minister for assessment. Six years or more can pass before a claimant files their claim and then has a right to refer the case to the Tribunal. Canada even claims - with no justification from the perspective of the AFN - that it has a further period, prior to the six years, to determine whether a claim satisfies its "minimum standard". As consequence, the actual period between initial filing and referral to the Tribunal may well exceed six years.

During this gap of six-plus years, much can happen. There could, for example, be new case law that invites the refinement of the framing of a claim. New historical evidence might be uncovered that was not obtainable earlier through reasonable effort. The federal government might respond to a filing with questions or might provide reasons for rejecting it. Indeed, the AFN's view is that Canada is legally required, pursuant to the honour of the Crown and its fiduciary obligations, to handle the processing stage in a fair and reasonable manner, including alerting the applicant to potential reasons for rejecting a claim and providing a reasonable explanation if it does so. Canada's feedback may make it entirely reasonable and appropriate for an applicant to revise its claim.

The need to construe the SCTA in light of its objects and purposes, including providing a fair, efficient and timely system, means that there cannot be an unduly rigid or restrictive approach to determining, at the assessment stage, whether any alteration or supplementation of an initial filing means that the claim is a new one, leading the "three year clocks" to start all over again.

- Section 20(2) of the Draft Rules requires the applicant, in a schedule, to provide "further detail, in conformity with the minimum standard established by the Minister pursuant to 16(2)(a) of the Act". It is not clear whether the intent is for the applicant to submit its initial filing with the Minister or whether it is supposed to file a document at the Tribunal stage that follows the format prescribed by the Minister for initial filings at the assessment stage.

- Section 56(2) provides that in a hearing on the record the applicant may include "such further evidence, not included in the claim presented to the Minister, as the Tribunal may, on application, permit". The implication is that there is a presumptive exclusion, in at least this kind of hearing, of additional evidence.

The AFN in no way suggests that Section 16(1) questions cannot or should not be raised in cases at the Tribunal. Canada would remain free to raise objections to jurisdiction, amendments or the introduction of evidence, based on Section 16(1). If the issue is jurisdiction, the Tribunal can raise the Section 16(1) issue on its own motion. There should, however, be no deliberate or inadvertent prejudging of how Section 16(1) issues should be resolved at the general rule-making stage, rather than permitting them to be worked out in the context of an actual adjudication.

The AFN respectfully submits that there is no need for the Rules to address the Section 16(1) issue. Rather, the Tribunal must construe the "same claim" requirement with due regard to the language and objects of the SCTA, and in the context of the distinctive nature of the specific claims process and the individual facts of a case. The Joint Submission's avoidance of any prejudgment on the issue was prudent and intentional.

Further Process

The AFN appreciates this opportunity to comment on the Tribunal's Draft Rules.

As the foregoing comments indicate, the AFN does have two very serious concerns about the Draft Rules as currently proposed. However, the AFN also believes that these concerns can be addressed in a satisfactory manner through a limited series of amendments to the proposed Draft Rules.

The AFN would welcome the opportunity to meet with the Tribunal to elaborate on its concerns or to participate in a stakeholder's advisory group as contemplated by Section 13 of the SCTA.