THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Tribunal des revendications particulières : Règles concernant la pratique et la procédure

SECTION NATIONALE DU DROIT DES AUTOCHTONES
ASSOCIATION DU BARREAU CANADIEN

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AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe plus de 37 000 juristes, dont des avocats, des notaires, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section nationale du droit des autochtones de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et approuvé à titre de déclaration publique de la Section nationale du droit des autochtones de l'Association du Barreau canadien.

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I. INTRODUCTION

La Section nationale du droit des autochtones de l'Association du Barreau canadien (Section de l'ABC) est heureuse de pouvoir présenter ses commentaires sur le projet de Règles concernant la pratique et la procédure proposé par le Comité des règles du Tribunal des revendications particulières. La Section de l'ABC comprend des juristes de toutes les régions du Canada ayant une vaste expérience dans le domaine des revendications particulières. Bien que nous approuvions cette consultation, nous estimons qu'un délai plus long devrait être prévu pour la présentation de commentaires détaillés sur cet important projet de règles. Nous soumettons des commentaires préliminaires. Si les délais étaient prolongés, nous serions heureux de pouvoir les approfondir, voire de proposer d'autres libellés précis à l'égard de certaines règles proposées.

La Section de l'ABC a examiné le projet de règles dans le contexte de la création même du Tribunal des revendications particulières (le Tribunal) et de la longue évolution de la Politique sur les revendications particulières (PRP). Depuis le début des années 1970, le processus des revendications particulières a laissé entrevoir un meilleur accès à la justice pour les Premières Nations souhaitant faire valoir que la Couronne avait manqué à une obligation fiduciaire légale envers elles[1].

Malheureusement, la PRP n'a pas tenu ses promesses. Vingt-cinq ans plus tard[2], le premier ministre a annoncé l'initiative « La justice, enfin », reconnaissant les lacunes de la PRP et proposant une vaste démarche visant à amener un changement positif. L'initiative comprend la création d'un tribunal exécutoire auquel les Premières Nations peuvent soumettre des

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1 Le fascicule « Dossier en souffrance » que le ministère des Affaires indiennes et du Nord a publié en 1982 est la première publication officielle énonçant la PRP telle que nous la connaissons. Auparavant, la PRP était davantage une politique officieuse, non publiée.

2 Voir l'annonce faite par le gouvernement en juin 2007.

revendications soit que le gouvernement fédéral a rejetées, soit à l'égard desquelles les négociations ont échoué même si le gouvernement fédéral les avait acceptées. Le titre même de l'initiative semble admettre tacitement qu'à bien des égards, le processus des revendications particulières n'a pas réalisé son objet ou pleinement assuré la justice aux Premières Nations.

Le préambule de la *Loi sur le Tribunal des revendications particulières* (la Loi) décrit ses principes directeurs et insiste sur l'objectif d'un rapprochement entre Sa Majesté et les Premières Nations[3]. Le rapprochement est aussi un aspect important de la jurisprudence touchant les droits ancestraux ou issus de traités[4]. Dans le contexte du règlement de revendications particulières, le rapprochement comporte des dimensions touchant à la fois le fond et la procédure. Des aspects de fond sont soulevés dans de nombreuses instances devant le Tribunal, et les aspects procéduraux sont pertinents au sujet en cause ici, à savoir les règles et la procédure qui régissent le Tribunal dans son rôle particulier.

Le Tribunal a reconnu que « l'unicité » des revendications particulières exige des adaptations aux règles de pratique et de procédure. Le paragraphe 5(1) du projet de règles prévoit ceci :

> *Les présentes règles doivent recevoir une interprétation large afin de permettre d'apporter une solution juste et rapide au litige et d'assurer que les affaires soient tranchées de façon équitable, dans les meilleurs délais tout en tenant compte de l'unicité des revendications particulières.*

Bien que le projet de règles propose diverses adaptations utiles, nous croyons qu'il en faut davantage pour concrétiser la promesse de l'initiative « La justice, enfin », et notamment pour servir l'objectif du rapprochement et reconnaître « l'unicité » des revendications particulières. Encore une fois, le rapprochement peut seulement être réalisé par des processus qui intègrent l'équité procédurale et qui, sur le fond, produisent des résultats satisfaisants.

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3 Le cinquième paragraphe du préambule du document *Tribunal des revendications particulières du Canada – Règles concernant la pratique et la procédure* indique que : « l'alinéa 13(1)*c*) de la *Loi sur le Tribunal des revendications particulières* prévoit que le règlement des revendications particulières constitue un moyen de favoriser le rapprochement entre Sa Majesté et les Premières Nations et autorise le Tribunal à tenir compte de la diversité culturelle dans l'élaboration et l'application de ses règles de procédure ».

4 *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, et de nombreuses autres affaires.

Depuis quelques années, les tribunaux canadiens ont de plus en plus adopté des changements procéduraux qui favorisent la délimitation des enjeux, les règlements négociés des différends, le recours à des facilitateurs et médiateurs neutres ainsi que d'autres moyens innovateurs de régler les différends d'une façon plus informelle, juste, rapide et peu coûteuse. Cependant, le Tribunal semble relever d'un modèle judiciaire formel, et le projet de règles ressemble en conséquences à des règles de tribunaux, fût-ce avec certaines adaptations. Le projet de règles reproduit un processus hautement structuré semblable à celui d'un procès, comprenant des plaidoiries, des formalités élaborées de communication de documents et des interrogatoires préalables. Du reste, il ne tient pas compte des importants échanges d'information qui ont lieu entre les parties à toutes les revendications avant l'introduction d'une procédure devant le Tribunal.

Un formalisme excessif peut prolonger les instances et augmenter les coûts et le temps nécessaire au règlement de revendications. Tous ces éléments sont particulièrement onéreux pour les Premières Nations. Les Premières Nations ont besoin d'un mécanisme efficace, économique et équitable pour régler les revendications sans avoir à faire un procès. Nous estimons qu'une solution plus souple et plus innovatrice serait plus propice au regard du caractère distinct des revendications particulières et de la volonté d'assurer un rapprochement. À notre avis, le Tribunal a besoin de la souplesse procédurale voulue pour faire office d'agent de rapprochement tout en servant d'instance judiciaire de dernier recours.

Comme point de départ, nous suggérons que le Tribunal se prévale des meilleures pratiques et règles de procédure déjà utilisées dans le système judiciaire canadien. Une plus grande précision sur les changements à la procédure nécessaires pour exécuter le mandat du Tribunal exigera une meilleure compréhension de ce que le paragraphe 5(1) du projet de règles appelle à juste titre « l'unicité » des revendications particulières, y compris les éléments suivants :

- la partie intimée sera toujours la Couronne du chef du Canada[5];
- le requérant sera toujours une Première Nation;

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5 Il pourrait s'agir de la Couronne du chef d'une province, dans l'éventualité improbable où une province aurait acquiescé à la compétence du Tribunal.

- pendant de nombreuses années, les Premières Nations ont été privées d'un accès efficace à la justice[6];
- le processus des revendications particulières a jusqu'à présent été conçu, mis en œuvre, contrôlé et dirigé par la Couronne;
- les allégations substantielles seront toujours fondées sur un manquement de la part de la Couronne à une obligation fiduciaire légale envers une Première Nation et sur un rapport de forces inégal entre les parties;
- de nombreux manquements allégués de la Couronne auront causé des torts durables au tissu économique et social de la Première Nation;
- vu la disparité des ressources accessibles à la Couronne et aux Premières Nations présentant des revendications particulières à l'encontre de la Couronne, la participation à la préparation et la négociation de revendications particulières a jusqu'à présent été financée par la Couronne au moyen d'ententes de prêts et de contributions;
- la Couronne a eu comme pratique, comme l'exige la PRP, de payer les dépens raisonnables de la Première Nation, y compris en renonçant au remboursement de prêts, en plus du dédommagement prévu par le règlement d'une revendication particulière;
- les Premières Nations n'ont en aucun cas été exposées au risque de devoir payer les dépens de la Couronne à l'extérieur d'un tribunal.

Ce contexte unique exige de l'innovation, de la souplesse et de la sensibilité en matière de procédure, de façon à procurer une amélioration par rapport à la procédure des tribunaux ordinaires en reconnaissance de « l'unicité » des revendications particulières. Pour assurer un rapprochement, il faut nécessairement comprendre l'histoire et la situation des parties ainsi que le détail des conséquences historiques et contemporaines de leurs actions passées et présentes; il faut aussi un nouveau processus approprié et un éventail de recours. Bien que le Tribunal soit limité dans les remèdes qu'il peut octroyer, il peut promouvoir le rapprochement dans le cadre du mandat que lui confie la loi.

Le rapprochement exige aussi une compréhension de l'histoire de 27 ans de la PRP. À notre avis, les règles doivent tenir compte du contexte historique, de la politique et de la réalité

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6 *Loi des Indiens*, S.R.C. 1927, ch. 98, art. 141 :

> Quiconque, sans le consentement du superintendant général exprimé par écrit, reçoit, obtient, sollicite d'un Indien ou lui demande un versement ou une contribution ou la promesse d'un versement ou d'une contribution dans le but de prélever des fonds ou de fournir de l'argent en vue de la poursuite d'une réclamation que la tribu ou bande indienne à laquelle appartient cet Indien, ou dont il est membre, a ou est réputée avoir pour le recouvrement d'une créance ou de deniers au bénéfice de la ladite tribu ou bande, est coupable d'une infraction et, sur déclaration sommaire de culpabilité, passible pour chaque pareille infraction d'une amende de cinquante à deux cents dollars, ou d'emprisonnement pour toute période n'excédant pas deux mois.

actuelles de la PRP, et de la situation des parties afin que soient possibles un rapprochement et l'équité aussi bien dans le processus que dans son issue. Il faut, à ce titre, prendre en compte les implications et les conséquences, pour les Premières Nations, des politiques et pratiques de la Direction générale des revendications particulières et des relations contemporaines entre les parties sur les plans politique, juridique et fiscal. Pour favoriser la compréhension nécessaire dans cette optique, nous recommandons que le Tribunal entende les points de vue de représentants choisis de la Couronne, des Premières Nations, des organisations des Premières Nations et des professionnels des revendications particulières au sujet de leurs années d'expérience avec la PRP.

RECOMMANDATION

La Section de l'ABC recommande que le Tribunal consulte des représentants de la Couronne, des Premières Nations, des organisations des Premières Nations et des professionnels des revendications particulières au sujet de leurs années d'expérience avec la PRP, afin de veiller à ce que les règles soient conçues de façon à assurer autant que possible le rapprochement et l'équité.

II. CONSEQUENCE OF DEFECTS IN FORM AND PROCEDURE

Draft Rule 6(4) describes the Tribunal's remedies where a party has not complied with the Rules. One remedy is to "set aside the proceeding, in whole or in part." It is unclear what the effect of setting aside a proceeding would be, and whether such an order would prejudice the claimant First Nation in bringing another proceeding. The impact of the Draft Rule should be clarified so that "setting aside" the proceeding would not be interpreted as a decision that the claim is invalid within the meaning of section 35 of the *Act*. Otherwise, the effect could be releasing each respondent and imposing duties on the claimant First Nation to indemnify each respondent as the result of a procedural failure.

RECOMMENDATION

The CBA Section recommends that Rule 6 be clarified as to the effect of setting aside a proceeding, such that the decision to set aside a proceeding is not a decision respecting the validity of the claim under section 35 of the Act.

III. APPLICATION TO THE TRIBUNAL FOR RULINGS OR DIRECTIONS

The Rules should provide for early applications to the Tribunal to address preliminary matters and for free-standing applications on matters of law outside of the formal process initiated by Draft Rule 20. We suggest a summary application process to move an issue to the Tribunal on the filing of an abbreviated record, including the original statement of claim as filed by the claimant, the letter of acceptance from the Minister and a statement outlining the issue on which the First Nation seeks the Tribunal's intervention. The Minister could be required to respond within a fixed time (30 days) and then case management under Draft Rule 59, adapted to this expedited process, could be engaged, with full consideration of the elements under that Rule and the evidentiary requirements of the application.

RECOMMENDATION

The CBA Section recommends the Rules include a summary application process for moving an issue to the Tribunal to address preliminary matters and for free-standing applications on matters of law.

IV. APPLICATION FOR ADVANCE CROWN DISCLOSURE

One example of a preliminary matter that could be addressed by the Tribunal is an application for early Crown disclosure or production of documents. While a claimant First Nation generally discloses all evidence, expert reports and legal arguments as part of its claim submission, the Crown is not required to do the same, and may not disclose any evidence, expert reports or legal arguments for its acceptance or rejection of the claim. Prior to proceedings before the Tribunal beginning, disclosure between the parties is generally unequal.

Accordingly, we suggest that the Rules should allow a First Nation to apply to the Tribunal before it files a Declaration of Claim, seeking an order directing the Crown to (a) provide a statement of the facts and law relied upon to reject the claim, and (b) disclose to the First Nation every document relevant to the claim in their possession.

RECOMMENDATION

The CBA Section recommends that the Rules be amended to allow a First Nation to seek an order directing the Crown to provide a statement of

facts and law relied up in rejecting the claim, and disclose to the First Nation all documents relevant to the claim.

This information is required for the First Nation to make an informed decision about commencing proceedings. With it, the First Nation may choose not to commence proceedings, determine that further research of facts or law is required, or simply proceed with filing.

V. APPLICATION ON A POINT OF LAW

In our view, the Rules should permit the Tribunal to determine a point of law on the application of any First Nation with a claim at any stage of the specific claim process. An application might be made concerning a legal issue that goes to validation, or an issue that arises in negotiations on compensation. Both require reliance on the relevant principles of law and equity.

The Tribunal may serve the parties best, not by deciding the entirety of a claim, but by simply providing an opinion regarding a particular legal issue in dispute. The Rules should foster negotiated resolutions, while also providing an adjudicative forum of last resort. In many cases the most effective way to do this could be by providing an opinion on legal issues that act as barriers to a negotiated settlement.

Draft Rule 61 does provide the Tribunal with discretion to deal with "all matters that arise prior to the hearing on its merits" but this seems to deal only with interlocutory matters after the claim has been filed with the Tribunal under Draft Rule 20. It does not appear to contemplate dealing with a claim issue on its merits by way of a declaration or motion prior to the filing of a claim with the Tribunal. The Rules should be supplemented by a summary application process that does not require a claimant First Nation to initiate a full proceeding under Draft Rule 20, but rather allows it to present an issue to the Tribunal for an opinion. Alternatively, the Tribunal could, of its own motion or on the motion of a First Nation, convene a hearing with notice to interested parties and issue a non-binding advisory opinion on legal issues creating difficulties in specific claims negotiations.

RECOMMENDATION

The CBA Section recommends that the Rules include a summary application process to allow a First Nation to present an issue to the

Tribunal for an opinion at any stage in the process. As an alternative, the Tribunal could, of its own motion or on the motion of a First Nation, convene a hearing with notice to interested parties and issue a non-binding advisory opinion on legal issues creating difficulties in specific claims negotiations.

VI. COMMENCING A CLAIM

The Draft Rules provide only one process to commence a claim. Draft Rule 20 requires that a claimant must file information relating to *both* the grounds for the claim (section 14(a)-(f) of the *Act*) and the basis for calculating compensation (section 20(e)-(h) of the *Act*). The Draft Rules do not distinguish between claims accepted for negotiation but not yet settled after years of negotiations (section 16(1)(d) of the *Act*), and claims the Minister has rejected (section 16(1)(a) of the *Act*). These are very different situations and require different procedures.

To promote resolution of claims in a timely and cost effective manner, the Rules must provide different processes depending on how the claim arrived at the Tribunal. In our view, the Rules should presume that the issues of liability and remedy are bifurcated. A claimant First Nation should be able to place *either* the issue of liability or the issue of compensation before the Tribunal. To illustrate, we examine the two ways in which a claim can reach the Tribunal.

RECOMMENDATION

The CBA Section recommends that the Rules provide different processes depending on whether the claim has been accepted but not settled, or rejected for negotiation.

A. Where Negotiations Have Failed

Section 16 (1)(d) of the *Act* gives the Tribunal jurisdiction where an accepted claim has been in negotiations for three years. By that time, the claimant First Nation will have already spent many years establishing the factual and legal basis of its claim. To accept a specific claim for negotiations, the SCB (with advice from Justice Canada) must find the Crown has breached a "lawful obligation" to the claimant First Nation. This process is generally referred to as

"validating a claim" or "accepting a claim for negotiation."[7] Initiating negotiations is recognized by both parties as an explicit acceptance of Crown liability by the Department of Indian Affairs and Northern Development (DIAND) on legal grounds. Unlike negotiations in the context of resolving litigation where risk-adjusted exploratory negotiations may occur without admission of liability, the SCB does not enter claims negotiations without first accepting liability.

In our view, it is contrary of the spirit of "Justice At Last" which represents the promise of a better specific claim resolution process, and of the principle of reconciliation, to require First Nations who have already convinced SCB and its legal advisers of the legal merit of a specific claim to then have to litigate the matter afresh before the Tribunal. We suggest that the Rules recognize that if a First Nation claimant submits its claim after three years of unsuccessful negotiations following its acceptance by SCB, the First Nation should have the option of placing the issue of compensation alone before the Tribunal. It should not be open to the Crown to retract its acceptance of liability.

B. Where a Claim has been Rejected

Section 16(1)(d) of the Act confers jurisdiction upon the Tribunal where a specific claim has been rejected by the Minister. By the time this jurisdiction can be invoked, the claimant First Nation will have spent years attempting to establish the factual and legal basis of its claim. In addition, by using the SCP to advance its claim as opposed to initiating court proceedings, the claimant First Nation has elected to pursue a negotiated resolution of its claim.

If a claim has been rejected by SCB, and the Tribunal finds in a claimant's favour on that issue, only three options are available under the Draft Rules.

- The Tribunal will determine the issue of compensation in a vacuum, specifically in the absence of expert evidence as to valuation, loss of use, or other important considerations. These types of reports are invariably only commissioned by the parties *after* validation, because the details of validation act as important input into the assessment process in these reports.
- Expert evidence will be prepared and presented within the context of the Tribunal process, so the advantages of the Tribunal process over litigation are diminished.

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7 Validation was a term generally used by DIAND prior to the introduction of the *Specific Claims Tribunal Act* and associated policies.

- The case will be stayed for mediation, and by Draft Rule 59(3)(b) the stay will be for a fixed period of time.

We believe that the Rules should provide that a claimant First Nation may place the issue of validity alone before the Tribunal. If successful, the First Nation should have the option of proceeding into negotiations with the Crown instead of having to prove its case for compensation before the Tribunal. The Tribunal proceeding could then be adjourned *sine die* or perhaps until the First Nation indicates that its attempt to negotiate has been unsuccessful after three years.

If a claim has not been accepted, the parties would not yet have attempted to establish the basis of compensation pursuant to Draft Rule 20(1)(f), nor would they have addressed valuation assumptions or methodologies, much less tried to negotiate a resolution. Negotiations remain the preferred means of claim resolution, as noted in "Justice at Last."[8] The Rules, in other words, should not prevent a First Nation from employing negotiations to compel instead use of an adjudicative process to resolve its specific claim.

VII. UNDUE BURDEN ON FIRST NATIONS

Draft Rule 20 places an undue burden on First Nations. Only after a First Nation claimant files all the material required by the Draft Rule would the Crown be required to decide if it will contest acceptance, or only put compensation at issue (Draft Rule 21(2)).

In specific claims negotiations, the issues of validation and compensation are addressed sequentially, so there is a *de facto* bifurcation of the issues built into the SCP process. The validation process occupies the first phase and usually takes many years. Only if successful is it necessary for the claimant First Nation even to consider the basis and valuation of compensation. Further, the practice in specific claims negotiations has, for many years, emphasized the *joint* valuation of loss by the parties through co-operative discussions.

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[8] From "Justice at Last", page 2:

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

Typically, methodologies and assumptions are jointly developed and experts are jointly retained using terms of reference jointly drafted by the parties.

Proceedings before the Tribunal should respect this general pattern. The First Nation should not have to address the valuation of its claim until after it has been accepted. Once it has established validity, a co-operative process of joint valuation should be at least attempted before a binding Tribunal award can be sought. The single entry process proposed in Draft Rule 20 is inconsistent with the structure of the specific claim process, would sometimes deprive a claimant from using negotiations and would impose an unreasonable burden on the claimant First Nation.

The practical impact of Draft Rule 20 is to create a significant disincentive for First Nation claimants to avail themselves of recourse to the Tribunal if there is an impasse or excessive delay in negotiations, as this would apparently result in losing the Crown's concession that the claim has been accepted for negotiation. It may also cause them to lose the opportunity to establish a co-operative process for determining compensation by forcing them into a purely adjudicative proceeding before the parties have had the opportunity to address compensation principles and supporting data. At best, this would mean that resolving a claim would be delayed further while the claimant convinces the Tribunal of something the Crown has already conceded, also creating the possibility of the Crown changing its position on liability. At worst, it could have the unintended consequence of prejudicing First Nation claimants currently in negotiations. By avoiding settlement, the Crown could in effect require the First Nation to re-prove its claim before the Tribunal. This unintended and potentially even coercive effect could adversely impact First Nations in negotiations.

If an accepted claim fails to be resolved by negotiation, then the Crown alone decides if the issue of validating the claim (i.e. proving the other grounds set out in section 14) must also be proven again by the claimant before the Tribunal. Currently, there are claims in the SCB filed prior to the effective date of the Act that have been in negotiations for years, some for over a decade. Forcing First Nation claimants to now re-prove the legal foundation for an already validated claim would be an unnecessary and undue duplication of effort and resources.

VIII. PROCESSES DEPENDING ON JURISDICTION

To promote reconciliation, to reflect the distinctive character of specific claims and to use resources efficiently, we believe that the Rules should provide separate processes for:

- those claims that have been validated by the SCB but not settled after three years in negotiations; and
- those claims that have not been validated by the SCB and where the claimant First Nation seeks to negotiate compensation before placing the issue of compensation before the Tribunal.

Draft Rule 20 should provide that a Declaration of Claim include, *inter alia*:

- which of the "triggers" in section 16(1) of the *Act* has prompted the filing;
- the relief sought by the claimant First Nation (validation and/or compensation); and
- the option to seek relief with respect to both validity and compensation but to adjourn or stay the matter indefinitely once validity has been determined to permit negotiations on compensation to occur.

RECOMMENDATION

> **The CBA Section recommends that the Rules allow for filing two separate forms of Declaration of Claim: the first related to the liability of the Crown and the second related to the quantum of compensation, should liability be established either through Crown concession or Tribunal ruling. The latter would contain new materials developed by the parties during the course of negotiations, such as jointly commissioned expert reports.**

Finally, we note that the claimant First Nation may be unable to set out the basis for compensation under Draft Rule 20(1)(f) until it has a ruling on the nature and scope of the Crown's liability from the Tribunal.

If argued that the Tribunal cannot decide solely on the validity of a claim because that would be in the nature of declaratory relief, contrary to section 20(1)(a) of the *Act* limiting a decision to monetary compensation, we would note that bifurcating validity and compensation is implicit in the *Act* itself. For example, the opening words of sections 19 and 20 of the *Act* clearly distinguish between instances in which the Tribunal is "deciding the issue of the validity of a

specific claim" on the one hand and "making a decision on the issue of compensation for a specific claim" on the other.

IX. PARTLY VALIDATED CLAIMS

The Draft Rules should be amended to provide sufficient flexibility where the SCB has validated part of a claim and rejected another part. For example, in claims based on mismanagement of sales of reserve land, the First Nation's claim may be based on alleged mismanagement of "parcels A-Z". However, the Crown may validate only the claim for "parcels A-C". In such circumstances, the Rules should allow the First Nation the option of pursuing a claim before the Tribunal on just the matters where there is disagreement between the parties – in this example, the Tribunal would cover only "parcels D-Z".

Similarly, the Crown may accept a claim based on some but not all grounds asserted by the claimant. In that situation, the claimant should not be compelled to re-argue the grounds on which the Crown has conceded liability. It would be waste of the Tribunal's resources to force parties to file the whole claim, including those portions that have been validated.

X. REQUIREMENT TO PLEAD CAUSES OF ACTION

Draft Rule 20 (1)(d) requires the claimant First Nation to set out "the cause or causes of action asserted by the claimant," in addition to identifying "the ground or grounds" for the specific claim (Draft Rule 20 (1)(c)).

The *SCTA* section 14 defines specific claims by reference to specified grounds for compensation. Many of the grounds listed in that section could describe common law or equitable causes of action. However, there is no requirement that claims are being made pursuant to a common law or equitable cause of action. Draft Rule 20(1)(d) appears to be an additional requirement not contemplated by the Act.

RECOMMENDATION

The CBA Section recommends that Rule 20(1)(d) be deleted.

XI. REFERENCE TO SPECIFIC CLAIMS POLICY

Draft Rule 20(2)(a) refers to the "grounds related to the validity of the claim, as set out in the specific claims policy", but "specific claims policy" is not defined in either the Act or the Draft Rules. This Draft Rule might refer to the 1982 specific claims policy booklet entitled "Unfinished Business," which was amended twice in the 1990's yet never republished with the amendments,[9] the policy statement "Justice at Last" or the "Specific Claims Policy and Process Guide"[10] published by the DIAND in 2009. It could also include references to various informal but consistent specific claims practices that have emerged, particularly in the last three years in response to the *SCTA*. In our view, the only relevant grounds are those set out in the *Act* itself, and those are set out in Draft Rule 20(1)(c).

RECOMMENDATION

The CBA Section recommends that reference to "as set out in the specific claims policy" be deleted in Rule 20(2)(a).

XII. FILING AND SERVICE OF DOCUMENTS WITH LEGAL COUNSEL

Draft Rule 40 deals with service on a First Nation and provides that the documents required to be served can be delivered directly to the Chief or to the First Nation's administrative office. Given the resources and workload on First Nations' administrative offices, we suggest that this section be changed to mandate service to the First Nation's counsel of record, and only if no counsel of record, then the First Nation's administrative offices. Alternatively, service should be affected by delivering documents directly to both the counsel of record and the First Nation's administrative offices.

RECOMMENDATION

The CBA Section recommends that Draft Rule 40 be amended to mandate service to the First Nation's counsel of record, if any.

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9 Removing a bar against pre-Confederation claims and removing the need for Justice Canada approval for payment of legal fees of a claimant First Nation.

10 www.ainc-inac.gc.ca/al/ldc/spc/plc/plc-eng.asp

XIII. JOINDER OF NECESSARY PARTIES

Under Draft Rule 47(1):

> *(1) Every person whose presence is necessary to enable the Tribunal to adjudicate effectively and completely on the issues in a proceeding, subject to each such person coming within the jurisdiction of the Tribunal, shall be joined as a party to the proceeding.*
>
> *(2) A claimant who claims relief to which any other person alleges being jointly entitled with the claimant shall join, as a party to the proceeding, each person so entitled.*

We suggest that the Rule requires additional clarification as to its application and scope. It is unclear who the necessary parties referred to might be. Under the SCP, the only parties are the claimant First Nation and the Crown. The only other parties potentially under the jurisdiction of the Tribunal might be another claimant First Nation or a province that agrees to be a party pursuant to provisions under section 23 of the *Act* and Draft Rules 50 and 51. Other "persons" can become interveners as section 22 of the *Act* makes clear, but such a person does not appear to come under the jurisdiction of the Tribunal as "a party to the proceeding."

Draft Rule 47 (3) relates to the joinder of claims made by "two or more claimants", which we assume refers to two or more claimant First Nations. However, Draft Rule 47(3)(a) appears to overlap with section 20(4) of the Act, where two or more specific claims are treated as one.

The same comments apply to Draft Rules 47(2) and (5). It is unclear who the "other person" or "party" is that may be entitled to join or should be joined.

Draft Rule 47(4) refers to joinder of two or more persons as respondents. Specific claims are claims against the Crown for a breach of a lawful obligation. The Crown is the only possible respondent other than a province that, as described earlier, has agreed to become a party, or perhaps another First Nation (for example if the beneficial ownership of a reserve is in dispute by two or more First Nations).

RECOMMENDATION

The CBA Section recommends that Rule 47 be further clarified.

XIV. FIRST NATION INTERVENTIONS

Section 25 of the *Act* permits interventions, with leave, where the Tribunal has given notice under section 22 of the *Act* to a "province, First Nation or person" whose interests might be significantly affected by a Tribunal decision.

Draft Rules 50 through 54 provide for interventions before the Tribunal. The Draft Rules do not, however, provide that a First Nation that may be significantly affected by a claim should have the right to apply for intervenor status before the Tribunal if it has not received notice under section 22. Rather, the procedure appears to be that either the parties to the Claim or the Tribunal must first provide notice to First Nations who may be significantly affected.

However, First Nations who believe they are significantly affected by a claim, but have not received notice from the Tribunal seem unable to independently apply to the Tribunal for intervenor status. We question how the Tribunal and parties to a proceeding would know which other First Nations may be significantly affected by decisions to be made by the Tribunal, and who those other First Nations may be.

In the area of specific claims, there are many sub-categories of claims that raise similar, if not identical issues. Some examples of these sub-categories are:

- treaty land entitlement claims;
- other treaty non-fulfilment claims;
- invalid surrender claims;
- improvident surrender claims;
- financial mismanagement claims;
- flooding of reserve claims; and
- claims arising out of misuse of the Crown's expropriation powers.

First Nations with claims similar to one before the Tribunal could easily consider that their interests may be affected by the Tribunal's decision. In the early years of the operation of the Tribunal, in particular, interventions are likely to be the rule and not the exception as precedent is developed and both claimant First Nations and the Crown become familiar with decisions of the Tribunal on issues that arise in multiple claims.

In our view, there should be a general Rule permitting a First Nation to decide whether to apply to intervene on a matter it believes may significantly affect its interests. A revised Rule might permit the First Nation to ask for notice under section 22 of the *Act*, and then apply for intervener status, or it might simply establish a general right to apply for that status. It could be left to the Tribunal's discretion in considering such an application to determine, among other considerations, whether the proposed intervenor's interest will be significantly impacted by a decision, the effect that granting intervenor status would have on the cost and length of the hearing, and other factors that the Tribunal must consider under section 25(2) of the *Act*.

Two types of interventions are common in court rules: interventions as added parties and interventions as a friend of the court. Both should be permitted in this context, so long as the intervention would not unduly prejudice the parties to the matter.

Facilitating First Nation interventions would also enable the Tribunal to render decisions based on more complete submissions and better awareness of the likely impact of a decision on First Nations generally. It would also minimize the risk of duplicate claims before the Tribunal, resulting in a more efficient use of judicial resources.

RECOMMENDATION

The CBA Section recommends that the Rules include an amendment to permit applications for intervenor status by First Nations to the Tribunal.

XV. CASE MANAGEMENT

According to Draft Rule 59, the Tribunal must contact the parties to schedule a case management conference "as soon as is practicable *after a claim* is filed" (emphasis added). This suggests that case management would take place *before* the Response is filed.

This raises a couple of issues. First, the Tribunal would only have access to the First Nation's perspective on the claim when the case management conference takes place. The Crown may be advantaged by hearing comments from the Tribunal about strengths and weaknesses of the claimant's case. However, the claimant and Tribunal would be only guessing as to the Crown's likely position in the case. In addition, not knowing the Crown's response makes it difficult to address the matters under Draft Rule 59.

We suggest an amendment to establish that case management commence only after the Response has been filed, unless the claimant specifically waives that requirement. While this may add to the waiting time before the Tribunal convenes the parties to consider matters under Draft Rule 59, it is fair to require that all "cards are on the table" before the Tribunal meets with the parties.

RECOMMENDATION

The CBA Section recommends that Rule 59 be amended to state that case management commence only after the Response has been filed, unless the claimant specifically waives that requirement.

XVI. SUPPLEMENTARY EVIDENCE AND LEGAL SUBMISSIONS

The law assumes that the Crown knows its outstanding treaty obligations and has a duty to proactively fulfill these obligations. However, the practice does not always meet this legal ideal.

Regrettably, the Crown does not always proactively attempt to fulfill outstanding lawful obligations under historic treaties and often the content of a particular outstanding lawful obligation is only fully examined and researched after a First Nation submits a claim to the SCB. However most, if not all, of the historical documentary evidence is held by the Crown. As a result, it is common for new evidence to come to light after the claims submission is filed with the SCB. The reality is that the Crown may not seek out the evidence until the claim is filed and it must respond.

The current policy of the SCB is to treat *any* supplementary evidence or legal arguments submitted by a First Nation after the First Nation receives a letter indicating the claim has met the minimum standards as constituting "a new claims submission." In short, once the claim has been accepted as meeting the minimum standards, it is "sealed" and any further submissions (even though they may only relate to existing evidence or legal arguments, and not new grounds) constitute a "new submission" and the entire claim must go back to the start of the queue. Consequently, the claim would be taken out of the validation process and have to go through the six-month minimum standards review again, restarting the three-year time period for the Minister to validate claim.

As a consequence, many First Nations instead choose not to provide supplemental evidence or legal arguments, preferring instead to submit them to the Tribunal if the Crown refuses to accept the claim for negotiation. The general presumption is that the Tribunal will hear all evidence and legal arguments in support of the claim, even evidence not submitted to the SCB.

Furthermore, due to a lack of resources, many First Nations' claims only meet the minimum standards for a submission. The funding provided to First Nations to submit claims does not cover the costs incurred to compile comprehensive historical research and legal arguments. In many cases, First Nations will do their best with limited resources and file only enough to justify a validation, but will rely on the opportunity to provide additional evidence and develop further historical and legal arguments once they understand the factual and legal basis of the Crown's rejection of their claim. Again, the Crown possesses most of the historical records and it is difficult (sometimes impossible) to know in advance what evidence the Crown will rely on to reject a claim. For First Nations, there may well be new evidence and legal arguments they wish to put forward to the Tribunal that are not part of the original claim.

To give an example, the SCB's 1998 Guidelines for Historic Treaty Land Entitlement (TLE) Shortfall set out criteria for exempting Band members from being counted for purposes of treaty land entitlement. One criterion excludes Indians of non-Aboriginal origin, and some First Nations say this particular exemption has no basis in law. The SCB maintains that First Nations must provide historical evidence of the Aboriginal background of each person for whom a TLE is sought. First Nations maintain that the onus and burden is on the Crown to prove that a person on a treaty pay list is not an Aboriginal person. Given this fundamental difference over the law and the burden of proof, many First Nations have either refused or been unable to conduct this research. Consequently, the SCB has refused to count these people towards TLE, resulting in either a rejection of the claim or a negotiating position that excludes these individuals.

In none of these claims has the First Nation changed the grounds of the claim as set out in section 14(1)(a)-(f) of the *SCTA*.[11] Rather, it is submitting new evidence that may come forward after the initial submission because of:

- the discovery of new historical references or materials;
- oral evidence (it has not been common practice, for example, to submit oral evidence as part of the original claim submission, but only should the matter go before another body such as the now defunct Indian Specific Claims Commission or the Tribunal);
- academic articles or experts' reports on other similar claims written after the acceptance of the claim for review;
- supplementary historical research or historical analysis in response to documents which the Crown has uncovered and forwarded to the First Nation during their review of the claim; and
- new legal arguments that arise because of changes in the case law or a review of the original submission by newly appointed legal counsel, or even possibly as a result of decisions that may be rendered by the Tribunal.

The key provisions of the Draft Rules relating to this matter are:

Paragraph 3 of the *Preamble*:

Fairness to the parties, and the public interest, is served by Rules of Procedure that ensure that all processes for the discovery of relevant evidence is available to the parties, within a

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11 s.14(1)(a)-(f) of the *Specific Claims Tribunal Act*:

> 14.(1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> (b) a breach of a legal obligation of the Crown under the Indian Act or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> (d) an illegal lease or disposition by the Crown of reserve lands;
>
> (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
>
> (f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

transparent adjudicative process that will result in findings of fact based on an evidentiary foundation that reflects full disclosure.

Draft Rule 8:

At any time before judgment is given in a proceeding, the Tribunal may draw the attention of a party to any gap in the proof of its case or to any noncompliance with these Rules and permit the party to remedy it on such conditions as the Tribunal considers just.

Draft Rule 20(1):

A proceeding shall be commenced by filing a document in Form ____ ("Filed Claim"), in the claims registry. The document shall contain: a heading "Declaration of Claim", the text of which shall set out, in numbered paragraphs:

…

(e) allegations of fact which, if proven, would establish a cause of action in law;

Draft Rule 20(2)(c):

.. in a schedule to the Declaration of Claim, further details, in conformity with the minimum standard established by the Minister pursuant to s. 16(2)(a) of the Act, including:

…

(b) legal arguments supporting each allegation;

(c) a statement of the facts supporting the allegations;

Draft Rule 22(2):

A claimant may not amend a Declaration of Claim to raise any ground for the claim not previously set out in the claim filed with the Minister, except where such ground relies on substantially the same facts as the claim presented to the Minister pursuant to s. 16(3) of the Act.

Draft Rule 77(1) mandates full disclosure by the parties of relevant materials.[12]

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12 Section 77(1):

> Every document relevant to any matter in issue in a claim that is or has been in the possession, control or power of a party to the claim shall be disclosed whether or not privilege is claimed in respect of the document.

Draft Rule 21(2) presumably relates to additional grounds for the claim, rather than supplementary evidentiary or legal arguments in support of the existing grounds. Presumably, therefore, so long as the basis of the claim remains the same, First Nations could submit supplementary expert reports, evidence and legal arguments under Draft Rules 20(1)(e) and 20(2)(c) than were filed with SCB. This would give First Nations an opportunity to refine their expert reports and arguments to address the basis for rejection by the SCB or if new material has come to light.

However, Draft Rule 56(1)(d) casts doubt on this presumption. It provides:

> *For the purpose of this rule "record" includes:*
> *...*
> *(d) such further evidence, not included in the claim presented to the Minister, as the Tribunal may, on application, permit;*

Draft Rule 56(2) adds to the uncertainty. It reads:

> *56. (2) All evidence included in subrules (1)(a)-(d), including, without limitation:*
> *(a) evidence of oral history and tradition;*
> *(b) expert evidence, and*
> *(c) hearsay evidence;*
> *is presumptively admissible for the purposes of a Written Hearing and an Expanded Hearing.*

While the Draft Rules appear to allow for new facts and arguments, they should explicitly clarify that in light of SCB practice, it will accept supplemental evidence and legal arguments not submitted to the SCB as part of the original claim, providing that the grounds of the claim do not change.

If the Tribunal will not accept supplementary evidence and legal arguments, then a claimant First Nation would have to choose between proceeding without all relevant evidence, or recommencing their claim from the beginning and delaying resolution for another two to four years. Neither of these options promotes reconciliation or fairness.

RECOMMENDATION

> **The CBA Section recommends that the Rules explicitly state that the Tribunal will accept supplemental evidence and legal arguments not**

submitted to the SCB as part of the original claim, provided that the grounds of the claim do not change.

XVII. DISCLOSURE AND DISCOVERY

We are concerned about the disclosure and discovery provisions in parts 8 and 9 of the Draft Rules (Draft Rules 77 through 106). They are similar to rules of civil procedure, and may be appropriate where parties have no pre-existing relations, and require extensive discovery to know the case to be met. However, in the specific claims context, parties will have had extensive dealings over many years and the claimant's case will be familiar to the Crown as a result of the claim submission and pre-validation process. Proceedings before the Tribunal are a last step after years of attempt at resolution.

An enormous record will already have been prepared by the claimant. In particular, with respect to disclosure and discovery, if a First Nation's specific claim has to meet the minimum standards referred to in section 16(3) of the Act to be filed with the Minister; it must already include all the allegations, historical report, legal submissions and supporting documents, including affidavit and expert reports. Material submitted by the claimant First Nation to the Tribunal has typically been in the Crown's possession for many years. As such, the disclosure requirement really applies mainly to the Crown, as the First Nation will not have seen the Crown's evidence to refute its allegations, other than perhaps counter-research or "confirming" research that the Crown has chosen to share with the First Nation.

Extensive and unnecessary disclosure and discovery will inevitably make the Tribunal process significantly more expensive than it needs to be. The Draft Rules concerning an affidavit of documents, inspection of documents, and so on, are all redundant and unnecessary for the claim filed by a First Nation. This increased cost will disproportionately affect First Nation claimants, particularly if there is an inadequate funding regime and First Nations are vulnerable to adverse costs awards.

In particular, an oral examination for discovery should be described in the Rules as exceptional. Most claims tend to rely on historical documents rather than memories of witnesses so examinations for discovery would not generally be helpful. The option could remain for the minority of cases where it would be beneficial, but we suggest that the Rules should not assume examinations will commonly occur.

The extensive and formal discovery contemplated by the Draft Rules (including undertakings and examination on undertakings) may delay the resolution of specific claims for a number of years, and given the level of disclosure already demanded of First Nations, is unnecessary. In our view, the Rules should focus greater attention on tools such as exchange of lists of documents, requests to admit facts and preparation of joint statements of fact.

RECOMMENDATION

The CBA Section recommends that the Rules make it clear that oral discovery is to be in exceptional circumstances rather than part of regular pre-adjudication procedure.

XVIII. COSTS

Section 12(3) of the *Act* provides:

> *The Tribunal's rules respecting costs shall accord with the rules of the Federal Court, with any modifications that the Tribunal considers appropriate.*

The Draft Rules provide:

> *131. (1) The Tribunal shall have full discretionary power over the amounts and allocation of costs and the determination of by whom they are to be paid.*
>
> *(2) In exercising its discretion, the Tribunal shall take into consideration the rules of the Federal Court respecting costs, the case law applicable in such matters, and the particular circumstances of each case.*
>
> *(3) Costs may be taxed before the Claims Registrar.*

We believe that the costs provisions in the Rules should contain additional "modifications" to reflect what Draft Rule 5(1) describes as the "distinctive character of specific claims." The SCP has provided an alternative to litigation that minimizes financial risk to claimant First Nations, and one that does not result in legal prejudice in relation to the claim itself unless and until it is settled. However, under the proposed Draft Rules, the Tribunal would not only make final determinations with prejudice to the claim, but claimant First Nations may also be liable for their own costs and even to pay the costs of the Crown. It is as yet unknown whether the federal government will provide funding outside of the costs regime of the Tribunal for First Nations to bring proceedings before the Tribunal.

RECOMMENDATION

The CBA Section recommends that the cost provisions contain additional "modifications" to reflect what Rule 5 describes as the "distinctive character of specific claims."

We believe that leaving the matter of costs as proposed could deter many claimant First Nations from seeking a Tribunal determination of a meritorious claim. The risk to a First Nation of not collecting costs or risking having to indemnify the Crown removes a significant benefit that the SCP has offered over the litigation process. The availability of research and negotiation funding from the Crown has enabled First Nations to use the SCP process with minimal financial risk.

Given the length of time and amount of money it can take for a First Nation to proceed through the steps required by the SCP, the cost provisions of the Rules should contain language mandating the Tribunal to consider the *actual* legal, consulting, administrative and other costs of the First Nation in preparing, submitting and negotiating the claim. Cost awards should not be limited to the Tribunal process, but include those incurred throughout the entire claims process.

RECOMMENDATION

The CBA Section recommends that the cost provisions of the Rules require the Tribunal to consider the *actual* legal, consulting, administrative and other costs of the First Nation in preparing, submitting and negotiating the claim. Awards should include those costs incurred throughout the entire claims process.

In particular, based on the submissions of the parties, the Tribunal should consider evidence of their conduct during negotiations, including:

- evidence of bad faith in negotiations;
- causes of delay;
- the legal and methodological basis of offers by the parties; and
- other factors which may have contributed to the claim not settling and proceeding to the Tribunal.

Such scrutiny in the context of cost awards may eventually assist in improving the conduct of parties and prospects for settlement.

We also recommend that the Rules be amended to provide that the case management process (Draft Rules 59-70) include a determination (subject to later amendment) of a budget for the case, and the right of the Tribunal to require the Crown to provide funding. If this is done, there may be no need for the Rules to deal with a cost award at the time the Tribunal makes its decision.

RECOMMENDATION

The CBA Section recommends amendments to provide that the case management process (Rules 59-70) include a determination (subject to later amendment) of a budget for the case, and the right of the Tribunal to require the Crown to provide funding.

The Federal Court now permits an award of interim advance costs, applying the Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.R. 371.[13] However, while such costs awards in favour of First Nations are both discretionary and exceptional in the court system, the "distinctive character" of specific claims should make them a matter of course before the Tribunal. In our submission Draft Rule 131 should be amended to provide that context.

The former *Specific Claims Resolution Act*[14] (SCRA) would have established a "Canadian Centre for the Independent Resolution of First Nations Specific Claims," with a Commission Division and a Tribunal Division. The *SCTA* contains no parallel to the Commission Division, whose functions were as follows:

> *Functions*
>
> *23. The Commission is responsible for*
>
> *(a) administering funding for the research, preparation and conduct by first nations of specific claims;*

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13 See *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* [2008] 3 C.N.L.R. 136 (F.C.), per Hugessen J.

14 S.C. 2003, c. 23, (SCRA). It was never implemented.

> *(b) assisting the parties in the effective use of appropriate dispute resolution processes at any time to facilitate the resolution of specific claims under this Act; and*
>
> *(c) referring to the Tribunal issues of validity or compensation.*
>
> *Powers and duties*
>
> *24. The Commission, in carrying out its functions, may*
>
> *(a) make rules of procedure for specific claims under this Act, except with respect to proceedings before the Tribunal;*
>
> *(b) establish, in accordance with any appropriation or allotment of funds to the Centre for these purposes, criteria for the provision of funding to first nations for research, preparation and conduct of specific claims, and allocate the funds in accordance with those criteria;*
>
> *(c) arrange for any research, or expert or technical studies, agreed to by the parties;*
>
> *(d) assist the parties to resolve any interlocutory issues; and*
>
> *(e) foster, at all times, the effective use of appropriate dispute resolution processes — including facilitated negotiation, mediation, non-binding arbitration and, with the consent of the parties, binding arbitration — for the resolution of specific claims.*

The SCRA, in other words, would have placed funding issues in the hands of an independent commission. However, the current *Act* contains no similar provisions. Instead, it leaves funding in the sole discretion of the Crown and, through its jurisdiction to award costs, the Tribunal. Furthermore, by exposing claimant First Nations to the prospect of adverse costs rulings, the *Act* creates new financial risks for First Nations in the specific claims process in addition to the new legal risks that arise from the "with prejudice" nature of Tribunal proceedings.

In our view, the Rules on costs should be developed so costs could be awarded against a claimant First Nation only if the claim was frivolous, vexatious or without merit, or if the claimant rejected an offer to settle that was fair and reasonable having regard to the final outcome. That issue could be canvassed at case management before a hearing was set and the Tribunal hearing the claim would, at the end of the hearing process, make a ruling as to whether the case fell within those parameters and so cost consequences were appropriate. This would allow claimant First Nations to enter the hearing process with full knowledge that the claim was likely to attract an adverse costs award if the claimant did not succeed.

RECOMMENDATION

The CBA Section recommends that the Rules on costs should be developed so costs may be awarded against a claimant First Nation only if the claim was frivolous, vexatious or without merit, or if the claimant rejected an offer to settle that was fair and reasonable having regard to the final outcome.

As a final comment on costs, we believe that parties should be encouraged to make reasonable and *bona fide* offers to settle in advance of a hearing. A Rule developed to support offers to settle could be considered in assessing costs at the end of the process. This would encourage the parties to take a close hard look at their cases before going ahead with an expensive hearing.

XIX. CONCLUSION

The CBA Section recognizes that the Draft Rules are comprehensive, and appreciate the Tribunal's efforts to consult with interested parties about those Rules. However, we believe that the Draft Rules require additional consideration and further adaptations to ensure they reflect the "distinctive character" of specific claims, and we have made a number of suggestions in that regard.

These procedural adaptations should encourage a level playing field between parties, and make it easier for claimant First Nations to access the Tribunal. They should enable the Tribunal to work toward an expeditious and inexpensive resolution of specific claims for the benefit of all involved. They should establish a procedural framework that acknowledges the extensive dealings that the parties have already had before a matter comes to the Tribunal, and that encourages the identification and narrowing of the issues that divide them regarding liability. They should encourage the joint assessment of compensation before resorting to an adversarial process on that subject. They should not compound the legal prejudice that accompanies a Tribunal hearing, with the financial prejudice to a claimant First Nation that would result from an adverse costs award. With sufficient time, the CBA Section would welcome the opportunity to assist the Rules Committee further, either through elaborating on our current suggestions or even by providing specific proposed wording.

We would again encourage the Tribunal to consider hearing from parties knowledgeable about the history and practical application of the SCP, inviting key representatives from the Crown, First Nations, First Nation organizations and specific claim professionals so that they may share their over a quarter century of experience working within the SCP. The members of the Tribunal would, in our view, gain important insight into the procedural adaptations required given the distinctive character of specific claims.

Finally, we wish to reiterate our appreciation for this opportunity to provide our views on this vitally important matter.

XX. SUMMARY OF RECOMMENDATIONS

1. The CBA Section recommends that the Tribunal consult with representatives from the Crown, First Nations, First Nation organizations and specific claim professionals about their years of experience working with SCP to ensure the Rules are designed to achieve reconciliation and fairness as much as possible.

2. The CBA Section recommends that Rule 6 be clarified as to the effect of setting aside a proceeding, such that the decision to set aside a proceeding is not a decision respecting the validity of the claim under section 35 of the Act.

3. The CBA Section recommends the Rules include a summary application process for moving an issue to the Tribunal to address preliminary matters and for free-standing applications on matters of law.

4. The CBA Section recommends that the Rules be amended to allow a First Nation to seek an order directing the Crown to provide a statement of facts and law relied up in rejecting the claim, and disclose to the First Nation all documents relevant to the claim.

5. The CBA Section recommends that the Rules include a summary application process to allow a First Nation to present an issue to the Tribunal for an opinion at any stage in the process. As an alternative, the Tribunal could, of its own motion or on the motion of a First Nation, convene a hearing with notice to interested parties, issue a non-binding advisory opinion on legal issues that are creating difficulties in specific claims negotiations.

6. The CBA Section recommends that the Rules provide different processes depending on whether the claim has been accepted but not settled, or rejected for negotiation.

7. The CBA Section recommends that the Rules allow for filing two separate

forms of Declaration of Claim: the first related to the liability of the Crown and the second related to the quantum of compensation, should liability be established either through Crown concession or Tribunal ruling. The latter would contain new materials developed by the parties during the course of negotiations, such as jointly commissioned expert reports.

8. The CBA Section recommends that Rule 20(1)(d) be deleted.

9. The CBA Section recommends that reference to "as set out in the specific claims policy" be deleted in Rule 20(2)(a).

10. The CBA Section recommends that Rule 40 be amended to mandate service to the First Nation's counsel of record, if any.

11. The CBA Section recommends that Rule 47 be further clarified.

12. The CBA Section recommends that the Rules include an amendment to permit applications for intervener status by First Nations to the Tribunal.

13. The CBA Section recommends that Rule 59 be amended to state that case management commence only after the Response has been filed, unless the claimant specifically waives that requirement.

14. The CBA Section recommends that the Rules explicitly state that the Tribunal will accept supplemental evidence and legal arguments not submitted to the SCB as part of the original claim, providing that the grounds of the claim do not change.

15. The CBA Section recommends that the Rules make it clear that oral discovery is to be in exceptional circumstances rather than part of regular pre-adjudication procedure.

16. The CBA Section recommends that the cost provisions contain additional "modifications" to reflect what Rule 5 describes as the "distinctive character of specific claims."

17. The CBA Section recommends that the cost provisions of the Rules require the Tribunal to consider the *actual* legal, consulting, administrative and other costs of the First Nation in preparing, submitting and negotiating the claim. Awards should include those costs incurred throughout the entire claims process.

18. The CBA Section recommends amendments to provide that the case management process (Rules 59-70) include a determination (subject to later amendment) of a budget for the case, and the right of the Tribunal to require the Crown to provide funding.

19. The CBA Section recommends that the Rules on costs should be developed so costs may be awarded against a claimant First Nation only if the claim was frivolous, vexatious or without merit, or if the claimant rejected an offer to settle that was fair and reasonable having regard to the final outcome.