WEST MOBERLY FIRST NATIONS

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VIA EMAIL

Specific Claims Review
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Attention: Expert Panel

Dear Panel:

Re: Assembly of First Nations Expert Panel on the Specific Claims process

West Moberly First Nations ("WMFN") is a Treaty No. 8 First Nation with reserve lands located in northeastern British Columbia. We provide this submission to support the Assembly of First Nations ("AFN") Expert Panel in developing recommendations to improve the Specific Claims process, including recommendations relating to the federal government's five-year review of the *Specific Claims Tribunal Act*.

Executive Summary

In order to improve the Specific Claims process, we recommend the following:

1. That the AFN advocate for Canada to prioritize resolving high-level policy and budgetary issues that result in delays and changes to the negotiation table.

2. That the AFN advocate to resolve larger budgetary and appointment issues related to the Specific Claims Tribunal, notwithstanding that the federal government has chosen to focus on smaller administrative issues in its review of the *Specific Claims Tribunal Act*.

3. That the AFN advocate for amendments to the *Specific Claims Tribunal Act* and changes to federal policy regarding the scope, substance and types of hearings that can be brought to the Specific Claims Tribunal.

Introduction

WMFN's ancestors, along with the now Halfway River First Nation ("HRFN"), were members of the Hudson's Hope Band who came under Treaty No. 8 in 1914. Canada set aside West Moberly Lake Indian Reserve No. 168A for the Hudson's Hope Band in 1916 and Halfway River Reserve No. 168 in 1925. In 1977, the Hudson's Hope Band divided into two Nations, WMFN

and HRFN. At present, members of WMFN reside on IR No. 168A and throughout Canada in general

In January 1996, WMFN submitted its Treaty Land Entitlement Claim ("TLE Claim") to the Office of Native Claims Canada accepted the TLE Claim for negotiation in 1998 but was unable to appoint a negotiation team for several years. In 2002 Canada appointed its first negotiation team and negotiations commenced, but at the end of 2004 Canada suspended negotiations. Negotiations resumed in 2006 with a new federal negotiation team but Canada changed its team again two years later in 2008.

At the time of Canada's 5-year review of the Specific Claims policy in 2012, WMFN's negotiations were effectively stalled while Canada considered its position on several key outstanding issues at the table. We provided a submission on the 5-year review of the Specific Claims policy and reported that WMFNs claims remained "unresolved and stalled in the negotiation process". As of 2015, Canada has unilaterally ended negotiations while it seeks a financial mandate. WMFN continues to seek resolution of key issues within the negotiations but Canada has refused to negotiate further during the financial mandating process.

In addition to the TLE Claim, WMFN has filed three Specific Claims concerning outstanding provisions of Treaty No. 8 which have received partial acceptances since Canada introduced *Justice at Last* in 2007. WMFN is currently negotiating one of those claims on an infrequent basis and awaits Canada to complete mandating on another of the claims. Canada has accepted the third claim as a "low value" claim which purportedly could be resolved in an "expedited negotiation process"; however Canada has taken no steps to resolve this claim since accepting it for "negotiation" in 2011.

WMFN's Submissions

Our comments are focused on two main categories within the specific claims process: 1) negotiation/settlement process (or lack thereof); and 2) the Specific Claims Tribunal, particularly regarding funding cuts and Canada's proposed changes to the *Specific Claims Tribunal Act*.

a. Resolve inordinate and prejudicial delays in claim resolution

Aboriginal Affairs and Northern Development ("AANDC") has reported that it intends to "phase out" *Justice at Last* funding support by 2016 and plans to reduce its human resources dedicated to the program by almost 50% in the same period. Notwithstanding, AANDC says it will continue to negotiate with claimants and "make best efforts to negotiate settlements" within 3 years. [1]

Given WMFN's experience at the negotiation table since *Justice at Last* was introduced, it is impossible to understand how funding cuts will resolve the systematic issues that we have experienced at the negotiation level.

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[1] Canada, Aboriginal Affairs and Northern Development Canada and Canadian Polar Commission: "2014 – 2015 Report on Plans and Priorities" at 28, online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/ai_rpp-est-2014-15_1393530232789_eng.pdf [accessed March 23, 2015]

We ask that AFN advocate for Canada to prioritize resolving high-level policy and budgetary issues that result in delays and changes to the negotiation table.

Since the five-year anniversary of *Justice at Last* in 2012, WMFN has had at least five different lead or assistant negotiators and three different Department of Justice lawyers assigned to the negotiation table. Canada has assigned federal negotiators who unilaterally change course from their predecessors or who have been given little background on the files and arrive unprepared to engage in ongoing negotiations. In 2014 alone, WMFN met with four different federal negotiation teams.

In the same period, Canada has cut its travel budget for its negotiation teams and has unilaterally cancelled scheduled negotiations and declined requests to meet by conference call. WMFN held two in-person meetings with Canada during 2014, one of which was a meeting in December 2014 to introduce a new lead negotiator to the table. During that meeting, WMFN had been at the negotiation table since 2002 and was advised by the new federal team that it would need to be "patient".

In the face of punitive budget cuts to the *Justice at Last* program funding, we see little hope for resolution of such issues.

We cannot overstate how difficult it has become for Chief and Council to explain such delays to members and our potential post-settlement economic partners. Chief, Council and members continue to meet to discuss land selection, prepare for developing a settlement trust review, complete internal studies and consider the long-term planning necessary for TLE settlement. We have spent countless hours preparing for a negotiation and elusive settlement that has been decades in the making yet we are advised by federal negotiators that we should be "patient" while Canada unilaterally ends negotiation during its financial mandating process.

Canada's refusal to negotiate during its financial mandating process precludes good faith negotiation on numerous other unresolved aspects of the claim. For example, TLE settlements require complicated settlement agreements that could be negotiated separate and apart from financial mandating. We are losing valuable time waiting for Canada to complete one piece of a complicated claim. We have also lost the ability to negotiate on the scope of that financial mandate. As a result, we are unable to discuss crucial elements of a proposed TLE trust fund with our members as Canada has provided no details whatsoever on a potential range compensation settlement, despite the fact that TLE settlements in other provinces have historically been large settlements which will require complex trust planning with our community and advisors.

It is almost trite to say that Canada's negotiation delays directly impact our membership. In the **17 years** since WMFN's TLE claims was accepted for negotiation, we have lost elders and members who will never see the benefits of this settlement. Some of these elders and members were actively involved in the TLE process and attended many meetings. To say that the Nation is frustrated is an understatement. The claims process has failed our members in every way possible.

Canada's delays also directly impact our ability to exercise our Treaty rights and select TLE settlement lands in our territory. Shale gas development has exploded over the past 10 years and lands which were once "open and suitable for selection" are now destroyed by fracking and other forms of resource development. Our Treaty territory is now unrecognizable in many places. While Canada and the Province acknowledge an outstanding obligation to the First Nations concerning these lands, they both appear content to continue to alienate them from the First Nations at an alarming rate, as evidenced by the environmental approval by both levels of government of the Site C dam, over the active objections of our Nation.

b. Reinstate adequate funding support for complex long-standing TLE claims

We ask that AFN advocate for Canada to reinstate adequate funding support for the resolution of Specific Claims, particularly regarding claims regarding outstanding treaty obligations that will require complex settlement agreements, extensive community consultation and a significant amount of internal work to analyze and evaluate the various issues within the claim.

In 2013, even AANDC recognized that the numbers of claims settled through negotiations "had not increased under the Action Plan".[2] In our view, Canada has focused its resources on revising the initial review, research and assessment stages of the specific claims process (however effectual or not) rather than engaging in good faith negotiations and settlement of accepted claims. We suggest that justice lies in resolving claims not unduly prolonging them.

We are also concerned about the impact of drastic cuts to negotiation funding for First Nations in the negotiation process. WMFN's loan funding has been reduced by almost **85**% since the 5-year anniversary of *Justice at Last*. In 2013, Canada stated its intention to cap loan funding for claims over $3 million to $142,500 per year with a total of $427,500 funding maximum over 5 years. However, in WMFN's experience over the past two years, Canada does not even provide this amount for negotiation of ongoing Specific Claims. Thus, what is already a diminished amount of loan funding is actually even more punitive than on its face. This approach also disregards the complicated nature of a TLE claim and determines funding support as equal for claims between $3 and up to $150 million dollars. It is simply unreasonable to fund a claim with a potential compensation settlement of $3 million dollars at the same rate as a TLE claim that could be valued at the ceiling of $150 million dollars in some situations.

1. Specific Claims Tribunal

a. Limited review mandate

We have reviewed AANDC's engagement letter regarding the five-year review of the *Specific Claims Tribunal Act*, particularly regarding the Specific Claims Tribunal itself ("SCT" or "Tribunal").

As a general comment, AANDC's approach to this review is unduly limited, ineffectual and disrespectful to the unique nature of First Nations' involvement in the Specific Claims process.

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[2] Government of Canada, Aboriginal Affairs and Northern Development Canada, "Summative Evaluation of the Specific Claims Action Plan" (April 2013) at 15

We received no invitation from the federal government to participate in the legislative review and were only informed of the process through our contacts with other First Nations and First Nation organizations. On reviewing the AANDC website, we understand that AANDC will be accepting emails or form submission on its internal website but we see no indication that AANDC will reach out to First Nations to actually conduct an effective review of the SCT and its process.

Further, AANDC has limited its review to the "efficiency and effectiveness" of the Tribunal and has ignored the larger systemic budgetary and political issues related to the Tribunal. It has also missed this opportunity to review more broadly the effectiveness of the claims process under *Justice at Last* generally, including the claims research, submission and negotiation process.

We provide the following comments to support AFN's review but take particular issue with the marginalization of First Nations from the limited AANDC review.

b. "Expansion" of the Specific Claims Tribunal Functions

In its engagement letter, AANDC asks for suggestions on whether services to parties could be improved by expanding the function of the SCT, including whether the SCT should become involved in the negotiation process. While WMFN would be interested in any remedy that could better move the negotiation process towards resolution, we cannot understand how the SCT's services could be expanded when the Tribunal itself has said it cannot function with the services it has currently been mandated to fulfill.

On September 30, 2014, Justice Harry Slade reported to the Minister of AANDC as follows:

> The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. ... These concerns have been raised with the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development. There has been no adequate response from Government. Without the appointment of at least one additional full time member and several part time members, there will be unacceptable delays in servicing the current case load, much less any new claims.[3]

The *Specific Claims Tribunal Act* allows for up to six full-time members, which can include both full and part-time members. Currently, the Tribunal is operating with the equivalent of two full-time judges instead of six.[4] In the "conservative estimate" of Justice Slade, the Tribunal would require "much longer than two years" to clear the present case load of the SCT, which does not include claims yet to be filed.[5] Justice Slade also notes that the problem is "particularly acute

[3] Specific Claims Tribunal Annual Report (September 30, 2014), online http://www.sct-trp.ca/pdf/Annual%20Report%202014.pdf at 2 [accessed March 23, 2015] ("SCT Annual Report")
[4] Specific Claims Tribunal Canada, "Members", http://www.sct-trp.ca/chai/index_e.htm [accessed March 22, 2015]
[5] SCT Annual Report, *supra* note 3 at 9

for Western Canada, where more than two thirds of the claims originate".[6] In sum, Justice Slade advises that without the appointment of more full time members, "the tribunal will fail".[7]

In our view, the expert panel should recommend that Canada adequately resource the Tribunal and respond to the Tribunal's own reports that it requires a larger compliment of Tribunal members.

c. Bifurcated claims/evidentiary issues

In its engagement letter, AANDC suggests that the *Specific Claims Tribunal Act* could be amended to bifurcate validity and compensation hearings rather than seek the SCT's approval for such requests. The Tribunal must be flexible. Sometimes bifurcation would not work in the interests of a just and expeditious resolution of the claim at issue.

In cases where claims have been accepted for negotiation but a settlement has not been negotiated within the legislated time period, validity should not be at issue. Canada has taken the position that all negotiations, including the acceptance of the claim for negotiation, are without prejudice to its position at the SCT. Accordingly, a Nation can engage in years of negotiation only to be forced with a choice to "start from scratch" at the SCT if such negotiations did not result in a settlement. In cases where a claim was accepted for negotiation prior to the *Specific Claims Tribunal Act* coming into force, such as our TLE Claim, these negotiations could have been taking place for well over a decade.

While we understand that without prejudice negotiation can be useful to encourage resolution of claims, where the admission of liability provided by Canada for the purposes of negotiation is shielded under the cloak of "without prejudice", it deters the First Nation from accessing the Tribunal. This is particularly offensive when the claim at issue involves the fulfillment of an outstanding Treaty obligation, where the First Nation has been waiting for over a century for it to be fulfilled while the Crown continues to take the benefit of the Treaty relationship for the purposes of land and resource development. The *Specific Claims Tribunal Act* should be amended to allow for a compensation hearing to be held <u>without</u> an assessment of validity where the claim involves outstanding Treaty obligations and has been accepted for negotiation. This could allow a significant number of claims to move ahead on compensation without facing the cost and delay of litigating validity for all parties involved. Accordingly, we recommend advocating for stronger statutory language to provide better choices for First Nations considering whether to pursue a claim before the Tribunal.

Canada's policy position of not allowing expert reports that have been commissioned in negotiations to be brought before the SCT if negotiations fail is also problematic. Nations must consider abandoning years of expensive and directly relevant work if it wants to pursue a claim before the SCT. Given the minimal funding that is available for claims bere the SCT, commissioning new reports will be at the First Nation's own expense. We see little utility in this approach but have had no success in renegotiating the terms of Canada's negotiation protocol

[6] SCT Annual Report, *supra* note 3 at 11
[7] SCT Annual Report, *supra* note 3 at 2

agreements on this term. Accordingly, we recommend that AFN advocate for Canada take a more practical approach to the SCT process to allow for the use of expert reports and additional evidence that have been developed at the negotiation table.

Conclusion

Whereas Justice Slade has expressed concern about the potential failure of the Tribunal (which is a concern we share), WMFN is ultimately concerned about the failure of the Specific Claims process in its entirety. WMFN filed its TLE claim almost twenty years ago. Since 2007, despite the noble language of *Justice at Last*, we have seen little tangible progress to report to our members. Our territory is increasingly fractured by large-scale industrial development which diminishes our potential settlement lands exponentially with each new project. Our members have been denied benefits of settlement for a further eight years. Canada's long-time intransigence to resolve TLE claims in British Columbia combined with budget reductions for the Specific Claims department gives little reason to believe that the Specific Claims process will provide a fair settlement for a claim legitimately owed to Treaty 8 First Nations.

In 2007, Canada announced that *Justice At Last* was intended to "restore confidence in the integrity and effectiveness of the process to resolve specific claims". In 2015, we report that our confidence in the integrity of the process has been diminished, not restored.

We ask that the Expert Panel convey our submissions to the AFN and seek full resolution of all Specific Claims in a timely fashion. Canada's inordinate delays have been to the prejudice of our Nation for an unconscionable period of time that cannot be considered "just".

Sincerely,

Chief Roland Willson
West Moberly First Nations

cc. West Moberly First Nations Councillors Laura Desjarlais, Dean Dokkie and Tim Davis