SPECIFIC CLAIMS TRIBUNAL CANADA

SUBMISSION

Submitted to Dr. Benoit Pelletier, the Minister's Special Representative Respecting the Tribunal's Five Year Review undertaken pursuant to section 41 of the *Specific Claims Tribunal Act.*

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This Submission discusses matters raised by stakeholders consulted by the Minister's Special Representative in furtherance of the Review. It also sets out our thoughts on measures that may improve the Specific Claims process generally, including the operations of the Tribunal in the performance of its mandate.

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I. Introduction

[1] At a meeting on March 31, 2015, the Chairperson of the Specific Claims Tribunal (SCT), Justice Harry Slade, undertook to provide our views in relation to matters that we were advised had been raised in consultations between the Minister's Special Representative and various stakeholders in the course of the Minister's five-year review. We understand that the mandate of the Minister's representative is not limited to the recommendation of changes to the *Specific Claims Tribunal Act* (*SCTA*). This makes sense, as the principles of the specific claims policy and the *SCTA* that govern eligibility of Claims in both processes should operate in harmony. This, as revealed by the decision of the Tribunal in *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 (*Beardy's*), is not the case at present.

[2] This submission is not limited to comments on matters raised by stakeholders. It includes responses to questions posed by the Minister.

[3] The Minister's representative is aware of the SCT's current challenges as detailed in Justice Slade's 2014 Annual Report, including:

- the SCT's chronic deficiency of judicial resources; and,
- concerns over compromised institutional/tribunal independence resulting from the government's implementation of the *Administrative Tribunals Support Service of Canada* (*ATSSC) Act*.

[4] These remain unresolved. Without systemic resolution, they will hinder the success of many if not all of our suggestions, should they become implemented in the Specific Claims processes.

[5] Our submissions reflect the understanding that the Minister's representative's report to the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) is to make recommendations concerning both phases of the Specific Claims process. Amendments to the *SCTA* may require changes to the policy, *Outstanding Business*, in order that the two operate in harmony.

[6] The *SCTA* provides for an adjudicative process. Natural justice is the cornerstone of all adjudicative processes. As an extension of the executive branch of government with an adjudicative mandate, emphasizing independence and reconciliation, the Tribunal must adopt processes that adhere to principles of natural justice. The need is particularly acute as the mandate of the Tribunal is the adjudication of First Nations' claims which assert the failure of

the Crown to meet its lawful obligations. The Tribunal's submissions are underpinned by these principles.

II. Stakeholders Concerns and Proposals

A. Concerns

- Time taken to prepare for and conclude a hearing.
- Lack of a Summary process.
- Cost of proceedings before the Tribunal, primarily legal fees.
- Control of funding by AANDC and lack of adequate funding when provided.
- No provision for Métis claims.
- No Crown take up on mediated settlement discussions.
- Tribunal decisions not final due to access to Judicial Review.

B. Proposals for Process Change

[7] The creation of the Tribunal, in furtherance of the government commitments set out in *Justice at Last*, has established a phase of the overall process for resolution of Specific Claims in which the principles of natural justice are observed. The Tribunal is independent. The process is even handed and transparent. Decisions are made based on material in the public record. Hearings are conducted in public.

[8] The changes to *Outstanding Business* have not provided measures that would ensure transparency or meaningful engagement with claimants in the Specific Claims Branch (SCB) process. The decision of the Tribunal in *Beardy's* reveals that claims in the SCB process may be recommended for rejection by the Minister based on internal policies of the SCB that do not appear in the policy as published and that have not otherwise been widely disclosed to First Nations. First Nations have a reasonable expectation that claims in the SCB process will be assessed on their factual and legal merits, not on policy grounds that nowhere appear in the published claims policy.

[9] The changes to *Outstanding Business* have provided for access to the Tribunal when a claim has remained in the SCB process for three years without a response from the Minister. Claims filed with the Tribunal that were presented to the Minister under the previous iteration of *Outstanding Business* reveal that First Nations have waited up to fifteen years for a response. This change does not, however, guarantee a response from the Minister within three years from the date of filing.

[10] As the outcome of a Tribunal decision is final, and bars all future claims based on substantially the same facts, costly pre-hearing processes are unavoidable if the objective is a just

outcome (For a full explanation, see the decision in *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12) (*Halalt*). With that said, we support the goal of changes in the Tribunal process to ensure timeliness and accessibility.

[11] Several of the options discussed below contemplate an expanded role for the Tribunal in the intake and early assessment of Specific Claims. All would require additional resources for the Tribunal:

1. A two stage process, modelled on the process established under the *Canadian Human Rights Act* (RSC 1985, c H-6) (*CHRA*).
2. An optional Summary Trial process before the Tribunal. The pre-hearing procedures would be more limited than those available for a full hearing before the Tribunal.
3. A mandatory early, non-binding, judicial opinion on the merits of a claim (an "Early-Assessment").
4. In some circumstances, mandatory mediation.
5. Case management by prothonotaries or other non-judges.
6. Changes to current Tribunal jurisdiction.

[12] It must be noted again that the Tribunal's chronic under-resourcing presents a major obstacle to its existing workload, let alone any expansion of its role and functions.

III. Discussion

A. The Canadian Human Rights Commission Model

[13] A modified Canadian Human Rights Commission (CHRC)/Canadian Human Rights Tribunal (CHRT) model for the intake and early resolution of Specific Claims has been proposed. This would require the creation of the equivalent of the CHRC in the specific claims process, a Specific Claims Commission (Commission).

[14] We understand that the rationale is the creation of an opportunity to resolve a claim without having to go through the potentially lengthy and costly process of a full hearing before the Tribunal. The following questions arise:

1. Would the Commission assess whether the claim comes within the jurisdiction of the Tribunal and make a preliminary assessment of the merits?

2. If the claim establishes a *prima facie* breach of lawful obligation, would the role of the Commission be to recommend that the Minister agree to enter negotiations and direct Departmental officials accordingly?

3. If original claim submissions would be made to the Commission, would this mean the elimination of the Specific Claims Branch (SCB) of the AANDC Ministry? If not, the result could be an additional layer of process, with the potential for additional delay and expense.

4. Would it, like the CHRC, function as a forum in which a decision whether to refer the claim to the Tribunal for hearing would be made if not resolved at that level? If a less formal venue for early claim resolution is the function of the Commission, would it assess the merits of the claim based on presentations by the claimant and the Minister, and facilitate discussions in the interest of an early settlement? Failing settlement, would it make and report its findings?

[15] The adaptation of the process under the *CHRA* to Specific Claims could result in improvements to the process of taking claims from initial presentation to final resolution in a number of ways:

1. Improved independence: The Commission would not be a department under the direction of the Minister, AANDC, which is closely identified with the defendant, the Crown.

2. Fairness and transparency: Claimants in the SCB process must set out the evidence and legal analysis based on which they allege the existence and breach of a lawful obligation of the Crown. However, claimants are not assured of access to the factual research or legal analysis relied on by the SCB, the Crown agency responsible for recommendations to the Minister. On filing, the Commission could give notice of a pending claim to a re-mandated SCB, which would, in its discretion, conduct research and analysis. Bilateral disclosure would facilitate the exploration of a potential resolution.

3. Expedited resolution: The Commission process would ensure the early exchange of information and identify possibilities for resolution. Failing resolution at that stage, the Commission could make a recommendation to the Minister based on its assessment of the merits of the claim. If the Minister declines to accept the claim for negotiation, the matter would go before the Tribunal. The combined timeline for the Commission report and the Minister's response could be much shorter than the present three years.

4. Early resolution would reduce the cost to both parties.

5. The Commission could assess the level of funding needed to enable the claimant to advance its claim, and make recommendations to the funding agency. A role in the approval of funding may be considered. The British Columbia Treaty Commission (BCTC) is involved in funding. Its funding process merits study.

[16] This model could result in increased operating costs, as the Commission would function independently of the Tribunal. It would have to be adequately resourced by new personnel, premises, and technology.

[17] Of greater concern is that it would in part preserve the *status quo*, as there would be no judicial assessment of the merits of claims in the process of the Commission.

B. Summary Proceedings

[18] After the November, 2009, appointment of Justices Mainville, Smith, and Slade as members of the Tribunal, we invited submissions on the elements of the Tribunal process and the rules governing the proceedings. We then appointed an advisory committee under section 12(2) of the *SCTA* to assist in the development of the *Specific Claims Tribunal Rules of Practice and Procedure* [*Rules*].

[19] Some participants, in particular representatives of the SCB, anticipated that the Tribunal would adopt a process that called for no more than a review of the evidence and legal arguments in the claims as presented under the SCB process, and responsive material from the Crown.

[20] There is no Crown disclosure requirement in the SCB process. The claimant may never have been informed of the contents of material taken into account in the development of its recommendation to the Minister whether to accept a claim for negotiation. The Crown's legal analysis is not shared, yet is relied on, with no opportunity for the claimant to respond.

[21] The committee of Tribunal members, constituted under section 12(1) of the *SCTA*, concluded that a process with these limitations would not result in the adjudication of claims in a demonstrably fair and transparent manner. The *SCTA* provides the Tribunal with powers to ensure that the parties make disclosure of all potentially relevant documents and to give the parties the full opportunity to introduce documentary evidence, expert reports and oral history if any. Time must also be allowed for pre-hearing exchange of legal memoranda.

[22] Parties need adequate time to enter the hearing fully prepared. This is critically important as the *SCTA*, section 35, bars all future claims based on substantially the same facts as a claim that has been upheld or dismissed by the Tribunal. The *SCTA*, section 34, provides that the Tribunal's decisions are final and conclusive between the parties in any court or proceeding, subject to judicial review at the Federal Court of Appeal. This degree of finality underscores the importance of claimant access to pre-hearing disclosure.

[23] The Tribunal imposes intensive case management. This ensures procedural fairness throughout the progress of a claim from filing to hearing. Regrettably, because the process needs to ensure fairness, proceedings and costs may be protracted.

[24] Summary trial processes are commonplace in the courts. The Tribunal process is already similar in some respects, as the evidence in both is generally limited to documents and in a summary trial, affidavits. Both can involve complex legal questions, specific claims almost invariably do.

[25] There is, however, some potential for a more abbreviated process before the Tribunal than at present. If there was full disclosure to the claimant of all material relied on by the SCB at that stage of the claim, and no obstacles to the Tribunal considering material prepared after the claim is presented to the SCB, including joint reports, the evidentiary base may be adequate for final determination of the claim. Both parties would provide written submissions of fact and law, just as is done in summary trials in the courts.

[26] There is a feature that all summary trial processes have in common. If the presiding Justice considers the matter unsuitable for determination by summary trial, the matter is referred to the trial list for a full evidentiary hearing. This should apply to matters before the Tribunal.

[27] A summary trial process could be established by amendment to the Tribunal *Rules*. Amendment of the *SCTA* would not be required.

[28] We are re-constituting an advisory committee under section 12(2) of the *SCTA* and hope to work with stakeholders on a Summary Proceeding format and associated amendments to the *Rules* and practice directions.

C. Early, non-binding, Assessment of Merits (EA)

[29] We understand that stakeholders have proposed the early review by the Tribunal of the merits of the claim. A supplement or alternative to the summary trial could be a non-binding Judicial opinion based on a hearing of the same categories of material presented in a summary trial.

[30] This could replace the SCB process. The initial claim filing would be with the Tribunal. If the opinion found that a potentially valid claim had been made out, the Minister would be left to decide whether to accept the claim for negotiation. If the opinion was to the contrary, the First Nation would have more information on which to decide whether to proceed further.

[31] If the claim is accepted by the Minister, there should be mandatory mediation of settlement negotiations if after six months there is no resolution.

[32] It would be determined early in case management whether an EA should be held. This would not require the consent of the parties. If the Tribunal had the necessary resources, the EA would be conducted and a non-binding opinion delivered within four months of the Crown response to the declaration of claim. The claimant and the Minister would have four months from the non-binding opinion to decide how to proceed. If the Minister does not accept the claim for negotiation, case management to ready it for hearing would commence immediately. If the Minister accepts the claim for negotiation and the claim is not settled within twelve months from acceptance by the Minister, the claimant could elect to return to the Tribunal.

[33] If the opinion raises questions over the merits of the claim, the claimant will be better able to decide whether to proceed.

[34] The Justice that conducted the EA would not preside over a full hearing on validity without the consent of both parties, and of course could recuse in any event.

[35] We emphasize that this would not be a resurrection of the process of the Indian Specific Claims Commission. The Tribunal would remain an adjudicator. It would not become an investigator.

D. Mediation

[36] In proceedings before the Tribunal, Crown counsel invariably claim settlement privilege over all material generated jointly or by either party in the course of any discussions that may have taken place while the SCB is preparing its recommendation to the Minister or in the course of negotiation of an accepted claim. This includes any reports that were prepared jointly. This, as a general practice, seems unnecessarily adversarial. If the same position was taken in mediation it would result in a loss of progress previously made. The mediator could seek disclosure orders from the Tribunal.

[37] The mediator should have the authority to refer questions of law to the Tribunal. This would include questions over the obligation on both parties to negotiate in good faith.

E. The Benefits

[38] Provision for both Summary Trials and EA's would result in:

1. Expedited processes for independent judicial assessment of the merits of the claim.
2. Potential for greatly reduced cost to both parties.
3. Minister retains discretion whether to accept claim.
4. Mediation required if claim accepted and progress in negotiation is stalled.
5. Parties chances of "owning" the outcome improved.
6. Reduction by one half or more of the present three year period from filing claims to eligibility for full hearing before Tribunal.
7. Assures independence of decision maker, fairness and transparency throughout the Specific Claims process.

[39] As the prerogative of the Minister to accept or reject claims would be preserved, this is the preferred option.

[40] The *Rules* could provide for Summary Trials and EA's. However, amendments to the *SCTA* and *Outstanding Business* would be needed to produce the desired outcome of transparency, efficiency, effective mediation and just outcomes throughout the Specific Claims process.

F. Prothonotaries in Early Case Management

[41] Case management is an important stage of the SCT's process where issues are narrowed, timelines are set for the production of evidence and preliminary matters are dealt with expediently, thus minimizing the need to hold formal hearings on applications.

[42] Endorsements and Orders establish timelines in order to ensure a claim proceeds in a timely manner. In the case management process, much of the Judge's time is dedicated to facilitate claim preparation, which is not the best use of what is currently scarce judicial resources.

[43] Due to the relative complexity of the legal and evidentiary issues that arise in specific claims, Tribunal members will not want to lose the opportunity provided by case management to become familiar with the entire case. Prothonotaries will advise judges of important developments, and report on the case management process prior to a final hearing.

[44] Availability of prothonotaries with the requisite level of education, experience[1] and geographic convenience could assist in relatively non-contentious aspects of the process. They could also assist in other procedural aspects such as the taxation of costs.

[45] Including Prothonotaries in Tribunal proceedings requires an amendment to the *SCTA*.

G. Expansion of Tribunal Jurisdiction

a. Funding or Advance Interim Costs

[46] Funding to claimants is controlled by AANDC. We understand that stakeholders say that funding, which enables claimants to research and pursue their claims at the SCB and the SCT, wants in independence.

[47] It is not appropriate that judges administer applications for funding.

[48] The Superior Courts have the power to order advance funding based on factors established in *Okanagan Indian Band v Canada*, 2003 SCC 71, [2003] 3 SCR 371 (*Okanagan*). As there has not been an *Okanagan* application to the Tribunal it is not known whether the Tribunal has the power to order advance costs.

[49] A funding process that is independent of the Ministry could be developed around the principles enunciated in *Okanagan.* The Tribunal could have jurisdiction to review funding decisions for adherence to these principles. Alternatively a funding ombudsperson or

[1] Lawyers, litigation experience, background with court processes, possibly resident in Vancouver.

prothonotaries could take on the role of determining whether claimants qualify for advance interim costs on the basis of already established legal, not policy based, principles. If a CHRC/CHRT model is adopted, the Commission could deal with funding.

[50] The British Columbia Treaty Commission (BCTC) has the legislative authority to make funding decisions to parties involved in its process. A study of how this authority is structured practically, without regard to end results, may point to valuable lessons learned and may serve as a starting point for a new explicit authority under the *SCTA*.

[51] Legislative and regulatory amendments would be required.

b. Mediation

[52] A mediation service was established as a part of the *Justice at Last* policy. It is our understanding that the SCB has established a roster of mediators but that the service is not being used due to the claimant's perspective that it is not sufficiently independent.

[53] We raised the subject of mediation with the advisory committee (section 12(2), *SCTA*). SCB representatives, apparently speaking for the Minister, stated that mediation was not an option as a legal opinion on a matter at issue had been sought and accepted by the Minister. Tribunal Members reminded the Crown that a legal opinion was simply a submission, in no way more important than the submission of the claimant. The Crown should still be open to mediation.

[54] The Tribunal has the legislative power to provide mediation services to parties, and has regulated mediation in *Rules* 52 to 54 of its *Rules*. The claimants almost always express a willingness to engage in mediation. The Crown invariably refuses to engage in mediation. As a result, the Tribunal has not been engaged in the mediation of a single claim.

[55] An examination of the National Native Title Tribunal's (Australia) and the Waitangi Tribunal's (New Zealand) approach to mediation in historic claims between Indigenous Nations and the Crown may produce valuable lessons learned.

c. Métis Claims

[56] In *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623, the Supreme Court held that the Crown had failed to act in accord with its honourable obligations to the Métis in the implementation of the *Manitoba Act*, SC 1870, c 3. The remedy was limited to a Declaration. Access to the Tribunal would provide for a tangible remedy and a means to restore Crown honour.

[57] Amendments to the *SCTA* would be required.

d. Judicial Review

[58] We understand stakeholders expressed a desire to limit the availability of judicial review. This would translate to a strengthening of the statute's privative clause (section 34, *SCTA*). The SCT has no particular view on this, other than to emphasize the importance of the judicial review mechanism and its role in ensuring adherence to principles of natural justice.

[59] The "reasonableness" standard of review generally applies where Tribunal members are experts in the law, and have experience on the ground, in the field in which they exercise their statutory mandate.

[60] Recruitment to the Tribunal is already difficult, given the specialized and complex areas of law in which it adjudicates. Placing any expertise requirements on Tribunal members would make recruitment even more difficult. Requiring expertise in support of the judicial function, as discussed below, is a better alternative.

[61] A brief paper entitled "*The Specific Claims Tribunal: An Overview of the Judicial Review Remedy*" prepared for presentation at a specific claims gathering is appended to highlight the remedy's inextricable ties to natural justice, its critical importance where novel legal issues arise, and how the remedy differs from an appeal. The paper was intended for an audience of stakeholders. The paper is appended as Schedule A.

[62] Since the Federal Court of Appeal's decision in *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6, any variations to the judicial review remedy would likely require legislative amendments to the privative clause.

e. Institutional Presence in Vancouver

[63] Over three quarters of claims filed with the Tribunal arise in provinces west of Manitoba, the large majority of which arise in British Columbia and Alberta. The majority of hearings are conducted in claimant's communities or in an urban center accessible to its members. This policy has been adopted by the Tribunal pursuant to its statutory authority, and advances the Tribunal's objective of reconciliation. Access to community members also contributes to transparency. The SCT could reduce its travel costs with an institutional presence in Vancouver.

[64] Establishing an institutional presence in Vancouver would not require legislative amendments due to the recent repeal of section 10 of the *SCTA*, though it would require the authorization of the Chief Administrator pursuant to section 4(2) of the *ATSSC Act*, SC 2014, c 20, s 376.

H. Judicial Appointments

[65] The Minister might consider appointments from courts other than British Columbia, Ontario and Quebec. The Chairperson has been in touch with Chief Justices in New Brunswick, Nova Scotia and Manitoba, all of whom were open to considering appointments from their courts. Several have members who would seriously consider volunteering for appointment to the Tribunal. This would not require amendment of the *SCTA*.

[66] The Minister might consider measures to facilitate the recruitment of judges to the Tribunal. The areas of law on which the Tribunal focuses are specialized, evolving and highly complex. Assured availability of expert support may encourage superior court judges without a background in these areas of law to put their names forward for the Tribunal. The *SCTA* could be amended to provide for adjudicative support for Tribunal members by subject-matter experts, and enable judges to secure such expertise as they see fit.

I. Provincial Involvement in SCT Proceedings

[67] The Tribunal may award compensation against a province to the extent that the province was at fault in causing or contributing to the loss if:

- the province is a party (section 23(1), *SCTA*); and,
- the Tribunal finds the province has caused or contributed to the acts or omissions alleged by the claimant, or the loss arising from the same (section 20(6), *SCTA*).

[68] The Tribunal shall award compensation against the Crown only to the extent that it is at fault for the loss if the Tribunal finds that a third party caused or contributed to the acts or omissions referred to in section 14(1) or the losses arising from those acts or omissions (section 20(1), *SCTA*).

[69] The *SCTA* provides for the option of a province becoming a party to Tribunal proceedings.

[70] At the first Case Management Conference (CMC) the parties must discuss "...whether the interests of a province...might be significantly affected by a decision of the Tribunal": (Rule 49(1), *Rules*). The same may be discussed at subsequent CMCs as well (Rule 49(2), *Rules*).

[71] Based on CMC discussions, the Tribunal may issue a section 22 (1) Notice to a province if it is of the opinion that the province's interests may be significantly affected.

[72] The Tribunal has jurisdiction in respect of a province only if it is seeks and is granted party status (section 23(1), *SCTA*). If Canada alleges that a province is at fault, in whole or in

part, and the province has been issued a section 22 notice, the Tribunal must grant the province party status "...provided the province certifies in writing that it has taken the steps necessary for it to be bound by decisions of the Tribunal" (section 23(2), *SCTA*).

[73] The Tribunal has issued 18 section 22 notices since the commencement of operations, most often to the province of British Columbia. Neither BC, nor any other province, has applied to become a party in Tribunal proceedings.

[74] The *SCTA* cannot, due to the division of powers, provide a process to remedy a shortfall in compensation owed to a claimant where there the province is not a party before it.

[75] A claimant First Nation's interests and rights to land are released where a determination of invalidity or award for compensation is made under the *SCTA* (section 35, *SCTA*, section 21(1), *SCTA*). The ability to proceed against a Province for compensation is not affected (section 21(1), *SCTA*). However, the claimant's ability to bring a court action in the circumstances of section 21(1) is illusory because the action would be barred by statute of limitations in the province.

[76] The scheme of the *SCTA* gives rise to a risk that a First Nation with a valid claim may only be able to recover a portion of compensation owed to them in the Tribunal process. This risk is acute in reserve creation claims in BC and is contrary to the *SCTA*'s objectives of finality and reconciliation.

[77] A practical solution to the *SCTA*'s jurisdictional limitations described above could be remedied by the same kind of cooperative process that led to the *British Columbia Indian Cut-offs Lands Settlement Act*, SC 1984, c 2 (Cut-Off Claims), which remains a precedent for Federal-Provincial co-operation on the resolution of First Nation claims.

[78] Cut-Off Claims, had they not been settled, would be eligible for presentation to the Minister under the policy, and for filing with the Tribunal under section 14(1)(*c*). These claims arose out of the loss of land provisionally set apart as reserve due to the recommendations of the McKenna-McBride Agreement, 1913. After lengthy negotiations between First Nations, Canada and British Columbia, a tri-partite agreement was concluded. It provided for the return of Cut-Off land that remained with the Province and payment of compensation by Canada for land that had been alienated.

[79] If the provinces became parties to proceedings before the Tribunal, and a province was found responsible in whole or in part for a loss to a First Nation, full compensation for the loss would result. It would be salutary for Canada, and in keeping with the legal precept of the Honour of the Crown, to engage the provinces to this end.

IV. Response to Questions set out in the document "Seeking Comments on the Five-Year Review of the *Specific Claims Tribunal Act.*"

Question 1: In your view, what are the strengths and weaknesses of the three year time frames set out in s 16(1) of the *Specific Claims Tribunal Act*?

[80] The three year time frame may, when a claim has been accepted for negotiation, enable the parties to form a relationship outside of the more adversarial litigation process. It may, however, allow stalemated negotiations to languish unnecessarily where a decision on a discrete legal issue would enable the parties to resolve the claim with a final settlement agreement. Mediation, with the ability to refer a question to the Tribunal, would assist.

[81] A three year delay from the date of filing a claim for consideration by the Minister is a great improvement over the time taken under the former process, which typically took five to fifteen years. It is still much longer than required to assess the factual and legal merits of a claim after receipt of a First Nation claim that satisfies the Minimum Standard. The turnaround time for claims before the Tribunal is shorter than three years despite the need for document discovery, the presentation of oral history and expert reports, and pre-hearing preparation and exchange of legal briefs.

Question 2: In your opinion, what would be the advantages and/or disadvantages of Canada having the option of referring claims to the Tribunal for adjudication, in addition to the option currently available to First Nations?

[82] This may result in a more expeditious resolution of claims where the First Nation elects not to file a claim with the SCT, but repeatedly re-files substantially the same claim under the Policy. This is the circumstance described in the discussion paper (same claim filed and rejected 3 times).

[83] A First Nation's option to file a claim with the Tribunal is framed as a "right" in the preamble to the *SCTA*. It is the First Nation's choice. If Canada is to have the option of referring claims to the Tribunal for adjudication, departure from this principle may be problematic, largely for resourcing reasons. Where a First Nation does not have the resources to pursue a specific claim at the Tribunal, they would be forced into the Tribunal process, carrying the burden of proof, in what would potentially be the absence of funding and other resources to enable it to properly frame and argue its claim. This is particularly problematic as decisions rendered by the Tribunal are final, and bar future claims on substantially the same facts. The potential for unfairness would be mitigated if the Tribunal was empowered to order advance funding.

Question 3: In your view, what are the advantages or disadvantages of repealing Section 42 of the *Specific Claims Tribunal Act* and amending Section 43 of the *Act* by deleting the words "For greater certainty," from the first line?

[84] Though the transitional provisions may appear to have lapsed at first glance, section 42 alone establishes that claims filed prior to the coming into force of the *SCTA* are "deemed filed" on the coming into force of the *SCTA*.

[85] Section 42(1) must be read with sub-sections (2) to (4), which are intended to impose the "Minimum Standard" on claims filed before the *SCTA* came into force. This, combined with section 43, means that previously filed claims must satisfy the Minimum Standard and, if they don't, are not eligible for filing with the Tribunal until three years after re-filing. The decision of the Minister under sub-sections 42(2) to (4) is in fact made by the SCB. The SCB process is not transparent, and it is now known that its advice to the Minister may be based on undisclosed criteria.

[86] There may be claims filed in the past that in fact meet the Minimum Standard, but have not been deemed filed under section 42. If the claimant files the claim with the Tribunal, it should be within its jurisdiction to determine whether it provides adequate notice to the Minister of the facts and law relied on to permit assessment by the SCB or its successor in that role.

[87] To the extent that the transitional provisions may bar claims being filed with the Tribunal without a remedy, we recommend that they be repealed or amended, and other provisions of the *SCTA* be amended in conformity.

Question 4: In what ways would you suggest the function of the Specific Claims Tribunal might be expanded to improve services to parties?

[88] See submissions generally, all of which are focused on the administration of the policy and the expansion of the Tribunal's functions to improve services to parties in a fair and transparent process from the initial filing of claims through to their ultimate resolution.

Question 5: In your opinion, how might Section 34 of the *Specific Claims Tribunal Act* be amended to improve the right of either party to the proceedings to challenge a Tribunal decision?

[89] See submissions, "Judicial Review", at paras 58-62.

Question 6: How would you suggest the structure of the Specific Claims Tribunal could be improved?

[90] See submissions generally. In addition, removing the Tribunal from the Schedule of tribunals listed in the *ATSSC Act* would give effect to the original intention of the stakeholders in the historic joint effort leading to the introduction of the *SCTA*. Restoration of the stand-alone registry, dedicated vote of funds, and ability to establish duties of staff would improve Tribunal efficiency and make it less vulnerable to a challenge of its independence based on institutional bias.

Question 7: In your opinion, could the Tribunal's Rules of Practice and Procedure be amended to improve the Tribunal's efficiency, effectiveness and ensure a timely adjudication of claims?

[91] Yes. See submissions, "Summary Proceedings" at paras 18-28 and "Early Assessment" at paras 29-35 and submissions generally.

Question 8: In your opinion, what are the advantages and disadvantages of statutorily bifurcating validity and compensation hearings?

[92] Bifurcation prevents putting the parties to the task of making their cases on compensation before a decision on the validity of the claim is made. Bifurcation significantly reduces both cost and delay where a claim is found invalid.

[93] It is generally neither cost effective nor expeditious to bifurcate claims where the issues of compensation and validity are inextricably intertwined (for example, adequacy of compensation for lands taken under lawful authority, losses resulting from the mismanagement of Indian monies and other assets). Validity in these circumstances depends in part on evidence of the amount of the monetary loss. In the case of land, this would be the same evidence needed in the compensation phase, namely evidence of the value of the land at the time of the taking.

[94] An amendment providing for bifurcation of the hearing of validity and compensation issues is unnecessary as this is done routinely where warranted. Moreover, it would fetter the discretion of the presiding member to manage the distinctive task of adjudicating specific claims, and in some cases create unnecessary delay and cost.

Question 9: What is your opinion regarding the suggestion that validity hearings could be conducted as a summary process, upon mutual consent of the parties, using the claim and evidence which was originally submitted to the Minister of Aboriginal Affairs and Northern Development?

[95] See submissions, “Summary Proceedings” at paras 18-28 and “Early Assessment” at paras 29-35.

[96] “[T]he Tribunal’s decisions are final and conclusive between the parties in all proceedings in any court or tribunal arising out the same or substantially the same facts” (*SCTA*, sections 34(2)).

[97] A summary process based on the original materials filed with the Minister alone prevents the claimant from compelling the disclosure of evidence in the Crown’s possession not shared with the claimant during the SCB process. It would also limit the ability of the Claimant to make arguments that take into account the development of the law since the filing of the claim, which can span over a decade. This is potentially unfair to both parties. The Tribunal must be in a position to ensure a complete record is before it. We refer to the Tribunal decision in *Halalt* for a full analysis.

Question 10: In your opinion, what are the advantages or disadvantages of amending the *Specific Claims Tribunal Act* to legislate a standard methodology for determining the current value of historic losses?

[98] The *SCTA* currently provides that compensation for historic losses brought forward ought to be decided “based on the principles applied by the courts.” The application of common law principles of compensation to specific claims will depend on the facts and findings on validity.

[99] The calculation of compensation in relation to the current value of historic claims is squarely before the Tribunal in a number of claims. The principles applied by the courts in matters of compensation for the current value of historic losses are complex and merit a proper and complete legal analysis in their application to claims before the Tribunal. This must be left to the law as found by the courts and the Tribunal, not policy. Once the principles are established with more certainty, a standard methodology may be fleshed out. Unilaterally establishing a standard methodology for compensation on the current value of historic claims at this juncture would have the undesirable effect of preventing the development of the law and, potentially, legislating the position of the Crown.

[100] The Tribunal will hear a claim on compensation in September, 2015 which may answer the question. As it is an issue in many claims, interveners will make representations at the hearing. Pre-empting an independent legal analysis of the calculation of compensation may result in calculations that are incorrect at law, creating a risk for legal inconsistencies and a lack of flexibility for the Tribunal to consider ongoing development of the law.

Question 11: In your opinion, how might the exchange of documents be expedited by the Tribunal?

[101] Full disclosure is an aspect of procedural fairness. The delay involved in the exchange of documents is generally attributable to the Crown, which, understandably, requires time to conduct research in order to meet the obligation of full disclosure to the claimant. Expediency cannot eclipse the Tribunal's obligation to adjudicate claims fairly.

[102] If the Crown disclosed its documents to the claimants in the SCB process, as the claimant must do, document exchange at the Tribunal level may be expedited.

[103] In cases of inordinate delay in document production, the Tribunal could set fixed dates and use its enforcement powers if they are not met.

[104] We occasionally receive applications for the exclusion of evidence. These add to cost and time. The Tribunal is not bound by the rules of evidence, except where privilege is asserted. Issues over the contents of documents are generally concerned with weight, and are best resolved at the hearing on the merits.

Question 12: In your opinion, how can the progress of claims before the Tribunal be balanced with the need for additional expert reports or other evidence?

[105] See submissions, "Summary Proceedings" at paras 18-28 and "Early Assessment" at paras 29-35.

[106] Expert reports, often jointly undertaken, are normally produced during the course of negotiations. There are occasions on which reports are commissioned at the claims submission stage in the SCB process. The Crown has invariably contested the admissibility of these reports on the basis that they are subject to settlement privilege. This seems unnecessarily adversarial, and contributes to delay.

[107] The internal instruction and approvals process that Crown Counsel must undertake to retain experts adds to delay.

Question 13: In your opinion, how can the need for additional research and/or expert reports be respected, while maintaining proportionality between the costs of such work and the value of the claim?

[108] See submissions "Summary Proceedings" at paras 18-28 and "Early Assessment" at paras 29-35.

Question 14: How would you suggest the efficiency of the SCT could be improved?

[109] See submissions generally.

Question 15: In your opinion, what are the advantages or disadvantages of amending the *Specific Claims Tribunal Act* to create a time limit for submission of eligible claims to the Tribunal for binding adjudication?

[110] Limiting a First Nations ability to file a claim with the Tribunal based on the lapse of time would have the effect of limiting a "right" recognized in the policy and the *SCTA*. It would, in effect, introduce a limitation period. The introduction of defences based on the passage of time would be contrary to the intent of the Specific Claims Policy ever since its advent.

[111] Where a First Nation wishes to access the Tribunal but cannot due to lack of resources. In the result, Canada will have no assurance that a specific claims is every tru*ly r*esolved with finality.

Question 16: How would you suggest the effectiveness of the *Specific Claims Tribunal Act* be improved?

[112] See submissions, generally.

Question 17: What are the advantages and disadvantages of the Minimum standard for specific claim submissions?

[113] As a part of the SCB process, we presume it assists civil servants in ensuring the baseline quality of submissions. Minimum requirements in the submission of a claim to the Minister does not concern the Tribunal process and its mandate as a fresh jurisdiction. See above under Question 3.

Question 18: Is a further review of the *Specific Claims Tribunal* warranted at the ten year anniversary of the *Specific Claims Tribunal Act* or, alternatively, when would you suggest a review might be undertaken, if at all?

[114] It is difficult to foresee what may arise. For example, it was not anticipated at the coming into force of the *SCTA* that shortly before the five-year review (*SCTA*, section 41) was set to commence, the *SCTA* would be amended in an Omnibus budget bill to change the Tribunal's support structure and remove its ability to make rules governing the duties of staff.

[115] The *SCTA* should be the subject of periodic review, and 10 years from its coming into force seems as appropriate a time as any.

[116] The *SCTA* represents an historic joint effort between the government of Canada and First Nations. This ought not to be lost from sight when the government desires to amend it. This was the purpose of section 41. Submissions from First Nations were not sought when the *SCTA* was amended by the *ATSSC Act* and consequential amendments.

[117] We suggest that when any amendments to the *SCTA* contained in any bill, omnibus or otherwise, are sought, a review of the kind provided in section 41 should be triggered. This in keeping with the honour of the Crown.

Question 19: What suggestions would you like to make concerning other matters related to the *Specific Claims Tribunal Act*?

[118] See submissions generally.

May 15, 2015

HARRY SLADE

Hon. Harry Slade, Q.C., Chairperson

ALISA LOMBARD

Alisa Lombard, B.S.Sc., LL.L., JD, Legal Counsel

SCHEDULE A

THE *SPECIFIC CLAIMS TRIBUNAL*:

AN OVERVIEW OF THE JUDICIAL REVIEW REMEDY

AFN Specific Claims Gathering
March 4, 2014 - Vancouver, BC

Prepared by:
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I. INTRODUCTION

This gathering reflects on all levels of the specific claims process for the purposes of informing the 5-year legislative review provided for at section 41 of the *Specific Claims Tribunal Act*[1] (*SCTA).*

The creation of the Specific Claims Tribunal (SCT) resulted from an historic joint effort between the Assembly of First Nations and the Government of Canada. It features independence as its central attribute. The SCT is statutorily mandated to approach the distinctive task of adjudicating specific claims, finally and conclusively, on issues of validity and compensation. It is the scope of finality and conclusiveness that apply to SCT decisions that brings us here to explain the mechanism of judicial review provided for in the *SCTA*, its legal parameters, and its practical significance.

II. FIDUCIARY LAW IN THE SPECIFIC CLAIMS CONTEXT

There are challenges to Claimants, the Respondent and the SCT in the application of fiduciary law to claims under the *SCTA*. This area of the law, as a whole, is under development. Section 14 of the *SCTA* establishes the grounds upon which a claim may be filed with the SCT.[2]

Claims are required by the *SCTA* to demonstrate a breach of legal obligation to establish a right to compensation. Claims thus far allege breaches of fiduciary duty based on a finding of a breach of a legal obligation in relation to one of the grounds listed in s 14 of the *SCTA*, which if proven may have the effect of validating a claim. Legal obligations may arise out of the fiduciary relationship between the Crown and First Nations. The fiduciary relationship arises out of the principle of the honour of the Crown. In some circumstances, fiduciary duties flow from the

[1] *Specific Claims Tribunal Act*, SC 2008, c 22.

[2] **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 fulfill 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. (*SCTA*, s 14)

fiduciary relationship. If a fiduciary duty is found to exist, the SCT must then define the duty in the circumstances. Once the duty is defined, it becomes the work of the SCT to determine, in accordance with legal principles, whether that duty has been breached by the Crown. Arriving at a decision involves a very complex consideration of all issues, evidence, and arguments put before the SCT by the Claimant First Nation and the Respondent Crown.

The *SCTA* provides for the application of fiduciary law.[3] If the SCT should conclude that fiduciary principles do not apply to a particular fact situation set out in a claim, or that if they do apply they have not been breached, the remedy available to the Claimant is to seek judicial review in the Federal Court of Appeal. The same remedy applies where a fiduciary duty has been found to exist and breached, and the Respondent wishes the matter considered by the Federal Court of Appeal.

III. THE JUDICIAL REVIEW MECHANISM

Judicial review is a mechanism by which the constitutional powers of the executive, legislative and judicial branches of government are balanced with the statutory authority granted to administrative and judicial decision-makers in areas defined by legislation.

1. Judicial Review is not an Appeal

Unlike judicial review, an appeal is characterized by a fulsome review of a decision and arises from either statutory authority, or the inherent or statutory jurisdiction of Superior, Appeal and Supreme Courts. An appeal may be a re-hearing of an entire case, or it may be restricted to a higher Court's review of whether the decision-maker whose decision is under appeal: misapplied the law; came to an incorrect factual finding; acted beyond their jurisdiction; abused their powers; were biased; and/or considered evidence which ought not to have been considered, or failed to consider evidence that ought to have been considered.

Judicial review is a mechanism by which a higher court reviews the legal or factual findings of a lower court or administrative tribunal. The SCT is such a tribunal. Judicial review may be mandated by statute, as is the case with the *SCTA*.

The powers of a Court on judicial review are more limited. Generally, a court may set aside the decision on review only if the tribunal erred on a pure question of law, failed to apply principles of fairness, exceeded its statutory jurisdiction, or was unreasonable.

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[3] 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:

> (*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; (*SCTA*, ss 14(1)) [Emphasis added]

A party, either a Claimant First Nation, or the Respondent Canada, who obtains an unfavorable decision, may file an application for judicial review of that decision within 30 days of the decision having been issued.[4]

An important question on judicial review has to do with the standard applied by the reviewing court in its assessment of the decision under review. The standard of review depends on a series of considerations, and results in a sliding-scale of powers exercised by the reviewing court.

2. The Two Standards of Judicial Review

Reasonableness and correctness are the two (2) existing standards of review applicable on a judicial review application.[5]

When applying the reasonableness standard, deference is owed to the decision-maker. A decision is unreasonable where it is "not supported by any reasons that can stand up to a somewhat probing examination,"[6] and where "there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."[7]

Correctness applies where lesser, or no, deference is owed to the decision-maker as a result of the outcomes of the applicable legal test (the functional and pragmatic approach, discussed below). Where the reviewing court is not required to be deferential, it will review the decision on the basis of whether it is correct in law, and may substitute its own opinion for that of the decision-maker. The following types of questions have been found to attract a correctness standard of review:

- true questions of constitutional law and the division of powers;[8]
- true questions of jurisdiction relating to whether the decision-maker properly exercised its authority pursuant to its enabling legislation;[9]
- questions of law that are of central importance to the legal system as a whole and outside the adjudicator's specialized expertise,[10] as determined in the "expertise" portion of the *Pushpanathan* test; and,
- questions regarding jurisdictional spheres between competing specialized tribunals[11]

[4] 34. (1) A decision of the Tribunal is subject to judicial review under section 28 of the *Federal Courts Act*. (*SCTA*), ss 34(1)).
[5] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].
[6] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 56 [*Southam*].
[7] *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55.
[8] *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, *Crevier v Quebec*, [1981] 2 SCR 220.
[9] *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19, [2004] 1 SCR 485.
[10] *Toronto (City) v CUPE, Local 79*,2003 SCC 63, [2003] 3 SCR 77 at para 62, per LeBel J.
[11] *Regina Police Association v Regina (City) Police Commissioners*, 2000 SCC 14, [2000] 1 SCR 360.

a. Standard of Review Analysis: the Functional and Pragmatic Approach

A determination by *the Federal Court of Appeal on which standard of review ough*t to apply to a judicial review involves the application of the "functional and pragmatic approach". This approach comprises the four (4) contextual factors established in *Pushpanathan v Canada (Minister of Citizenship and immigration)*[12]:

1. the presence or absence of a privative clause or an appeal;
2. the expertise of the tribunal relative to that of the Federal Court of Appeal on the issue before them ;
3. the purpose of the act as a whole and the privative clause in particular; and,
4. an identification of the nature of the issue under review (whether it is a question of law, fact or mixed law and fact).

A privative clause is a statutory provision that attempts to exclude or restrict the depth of the higher Court's reviewing abilities. The *SCTA*'s privative clause[13] provides that SCT decisions are final and conclusive. The Federal Court of Appeal's interpretation of the strength of the language contained in the privative clause has a bearing on the analysis on the level of deference it will give to the decision-maker.

The level of recognition of tribunal expertise is the most important factor in the standard of review analysis.[14] Factors such as the different types of expertise, relative expertise and how the expertise is established are all relevant at this stage of the analysis. In this regard, the Supreme Court of Canada says,

> …a decision which involves in some degree the application of a highly specialized expertise will militate in favour of a high degree of deference, and towards a standard of review at the patent unreasonableness[15] end of the spectrum."[16]

The Federal Court of Appeal's consideration of the functional and pragmatic approach and its standard of review analysis will ultimately result in a determination of whether the Court will show deference to the SCT, or not. If the Court is deferential, the standard of review of reasonableness will apply. If the Court is not deferential, the standard of review of correctness will apply.

A decision in a particular set of circumstances is not indicative of an identical result in all circumstances. Once basic principles of review are established in relation to the SCT, in particular in relation to its expertise, parties will benefit from a greater understanding of the standard of judicial review applicable to SCT decisions on matters arising on judicial review. Clarity on these matters is in the best interest of all parties, and the SCT alike.

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[12] *Pushpanathan v Canada (Minister of Citizenship and immigration)*, [1998] 1 SCR 982 [*Pushpanathan*].

[13] 34. (2) Subject to subsection (1), the Tribunal's decisions are final and conclusive between the parties in all proceedings in any court or tribunal arising out of the same or substantially the same facts and are not subject to review.

[14] *Southam, supra* note 6 at para 50.

[15] Note: In *Dunsmuir*¸ the patent unreasonableness standard of review was subsumed into the reasonableness standard of review. Patent unreasonableness is no longer a current standard of review at law.

[16] *Pushpanathan, supra* note 12 at para 35.

IV. CONCLUSIONS

The very important question of which standard of review applies to SCT decisions cannot be resolved at the SCT, but can be resolved at the Federal Court of Appeal. The central issue in this regard is whether the Federal Court of Appeal must be deferential to the Tribunal, or whether a strict standard of correctness applies to decisions made by the Tribunal.[17] The applicable standard of review will vary in accordance with the type of question under review. As such, the same standard of review may not apply in all cases.

Proceedings on judicial review, where taken, have cost and time consequences to both parties. However, it is important that fiduciary law and the powers of the SCT evolve through decisions of the SCT and in some issues of general importance to claims, by the Federal Court of Appeal on judicial review. In some matters, the ultimate recourse may be to the Supreme Court of Canada. The outcomes, be it in the Federal Court of Appeal, or ultimately the Supreme Court of Canada, would establish binding precedent on the standard by which decisions are to be reviewed and on the application of fiduciary law to specific claims.

Unfortunately, proceedings taken after a decision of the SCT, whether by the Claimant First Nation or the Respondent Canada, results in additional cost and delayed outcomes.

Reconciliation and finality may, at this early stage in the life of the SCT, require a thorough and complete exposition of the law by a reviewing court in the context of specific claims heard by the SCT.

[17] *For the Tribunal's position on the applicable standard of review, see its memorandum of fact and law filed in the Federal Court of Appeal in Her Majesty the Queen in Right of Canada v Kitselas First Nation et al. (FCA File number: T-107-13)*