BRIEFING

Standing Committee on Indigenous and Northern Affairs

Justice Harry Slade, Chairperson, Specific Claims Tribunal Canada

October 19, 2017 - Ottawa, Ontario

I. BACKGROUND

[1] The *Specific Claims Tribunal Act*, the product of the historic joint effort between the Assembly of First Nations and the Government of Canada, was proclaimed into law on October 16, 2008. This followed over 30 years of discussions, failed legislative initiatives, studies, reports and negotiations on how to best reform the specific claims process, culminating in the *Justice at Last* Policy announced by Minister Strahl in 2007.

[2] The Specific Claims process commences when a First Nation Claimant presents a Claim to the Minister, Crown-Indigenous Relations and Northern Affairs, for a determination whether the Claim will be accepted for negotiation. The claim is reviewed by the Specific Claims Branch of the Ministry. A legal opinion is prepared by departmental legal counsel. A recommendation then goes to the Minister.

[3] The Tribunal has jurisdiction over Claims that are not accepted for negotiation within three years or, if accepted, have been in negotiation for three years without reaching a settlement.

[4] Proceedings before the Tribunal are neither an appeal nor a review of the Minister's decision.

[5] The *SCTAct* provides for the appointment of Tribunal members from a roster of Superior Court Justices. This was intended to ensure the independence of the Tribunal.

[6] Tribunal members consulted with stakeholders who participated as members of an advisory committee constituted under the *SCTAct*, section 12(2) in drafting the Tribunal's Rules of Practice and Procedure. The Tribunal opened for the filing of claims in June, 2011.

II. SUBSTANCE AND PROCESS

[7] The claims that come before the Tribunal are often complex on the facts and on application of the law. Most claims, even if relatively straightforward, go to a full hearing on the merits of validity and, if found valid, compensation. Preliminary applications pertaining to jurisdiction, the admissibility of evidence, and other matters often arise. The record frequently includes oral history, expert witness evidence and a voluminous documentary record, sometimes spanning a century.

[8] Hearings in Claimants' communities are an essential part of the process, and are reconciliatory.

III. CLAIMS FILED

[9] Since 2011, the Tribunal has received a total of 90 claims. Their geographic distribution is as follows:

- 32 in British Columbia;
- 12 in Alberta;
- 17 in Saskatchewan;
- 8 in Manitoba;
- 6 in Ontario;
- 12 in Quebec; and,
- 3 in New Brunswick.

[10] At present, we have 78 claims before the Tribunal. 64 of these claims are active and are being case managed.

[11] The claims generally arise over the performance of Crown duties in relation to reserve creation, treaties and administration of reserve lands. Most allege a breach of the Crown's fiduciary obligations.

IV. POLICY REVIEW

[12] On September 6, 2017, Ministers Wilson-Raybould and Bennett jointly released a statement which reads, in part:

> … Canada believes the existing specific claims policy and process …, are not in keeping with a recognition of rights, or a reconciliation-based approach to addressing issues between the Crown and Indigenous peoples. Canada is working to completely overhaul the policy, in co-operation and collaboration with Indigenous Peoples,

[13] Historically, the Specific Claims Policy and Process have been developed and administered by the Specific Claims Branch of the Ministry of Indian Affairs and Northern Development Canada. These are now within the Ministry of Crown-Indigenous Relations and Northern Affairs.

[14] The past involvement of Ministers of Justice has been limited to appointment of judges as Tribunal members, as Government-Judiciary relations fall within the Ministry of Justice. We (not the "Royal We", but the Tribunal), consider the new involvement of the Minister of Justice in reforms to the Specific Claims policy and process a positive development.

[15] We welcome the Policy review and hope that this presentation will be helpful to the Standing Committee.

V. SIX YEARS OUT: TRIBUNAL EXPERIENCE AND PERSPECTIVE

[16] The information and concerns set out below are not intended to be critical of the Ministers of the Crown presently responsible for Crown-Indigenous relations.

[17] From the advent of the Tribunal to the present it has been apparent that the Respondent, Canada's, conduct of proceedings before the Tribunal has been directed by the Specific Claims Branch (SCB).

[18] It has become apparent based on information received in the course of advisory committee proceedings and case management of Claims that the internal policies and practices of the Specific Claims Branch (SCB) have been in place both before and after the 2008 policy review and creation of the Tribunal. Certain of these policies have also been revealed in Claims

before the Tribunal in *Halalt First Nation v Her Majesty the Queen in Right of Canada* and *Beardy's & Okemasis Band # 96 and # 97 v Her Majesty the Queen in Right of Canada*.

VI. LACK OF TRANSPARENCY IN SPECIFIC CLAIMS BRANCH PROCESSES

[19] Claimants have, in the course of case management, expressed concerns over practices at the initial stage of the Claims process that the Claimant community believe are at odds with the overall objectives of the Specific Claims Policy.

[20] At the outset of the Tribunal process we discuss the intended means of proof of the grounds for the Claim. In all cases the primary evidence is documentary. Claimants tell us that although they have produced their documents and other evidence, including will-say statements, expert reports and legal briefs as part of their submission to the Minister, they have not been provided with any other material the Specific Claims Branch has considered when determining whether to recommend acceptance of the Claim for negotiation. When Claims are not accepted the Claimant is not given a full explanation of the basis in fact or law for the decision.

[21] We also receive Claims that have been accepted for negotiation but remain unresolved. In negotiations the parties may jointly or independently commission expert reports related to Claim validity or compensation. These are generally not made available to the Tribunal as the Crown objects to their introduction based on negotiation privilege.

[22] The Tribunal recognizes that the parties are free to pursue their own strategies in proceedings before the Tribunal. However, the lack of transparency in the SCB process and reliance on claims of settlement privilege and negotiation privilege protract the Tribunal proceeding due to the need to start anew with disclosure of documents and preparation of expert reports. When Claimants have relied on evidence of oral tradition and history their sources may no longer be alive, as the period between the original filing with the SCB and with the Tribunal may be as long as fifteen years. In the result the proceedings become protracted, inefficient and unduly costly.

[23] Tribunal access to the full record in the SCB process would enable the Tribunal to identify the central issues of fact and law. If the parties are open to an early assessment of the merits of a Claim, disclosure of the SCB record would assist.

VII. THE *SCTACT*; NEGOTIATION

[24] The *SCTAct* recognizes that outcomes are best achieved through negotiation. The preamble to the *SCTAct* includes the following:

> the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations; [underlining added]

[25] In matters before the Courts, negotiation is encouraged well before the Court makes binding findings on liability ("validity").

[26] Participation in negotiations is voluntary. Both sides must buy-in for it to work.

[27] It was apparent at the outset that Crown representatives had no interest in the Tribunal fostering or facilitating negotiations. At the first meeting of the Advisory Committee in 2009 we mentioned the existence in the Courts of rules based procedures and the role of judges in fostering negotiation, including mediation. Claimant, SCB, and DOJ representatives were present. The response from Crown representatives was to the effect that there was no role the Tribunal could play as the Claims before it had not been accepted for negotiation by the Minister, therefore the only role for the Tribunal was to hear the matters to their conclusion and render a decision. This treats all Claims before the Tribunal as presumptively "invalid". This seems contrary to the goal of reconciliation.

[28] In the Courts, most civil proceedings are resolved before trial. This is due in part to the fact that the parties are facing an outcome that cannot be predicted with certainty. The reality of a trial date is a powerful incentive for negotiation.

[29] There has been a recent change. We are now receiving joint applications (Claimant and Respondent) to hold our process in abeyance while the parties enter "discussions", which may result in negotiation. In any case, the "discussions" start with establishing a "Negotiation Protocol", which takes a year or so. Once this is settled the negotiation may commence. We have been given time estimates of two to five years!

[30] We are at a loss to understand why it would take a year to set the table for negotiation and several years to reach a settlement.

[31] A central reason for the 2008 policy changes and creation of the Tribunal was delay in the process of the initial Claims review.

[32] The Tribunal has heard Claims that languished for twelve years before receipt of a response from past Ministers. Negotiation of accepted Claims has also proceeded at a snail's pace; Claimants were left waiting for years for responses to settlement proposals and counter proposals from Canada. It was due to these delays that the three year rule for claims review by the SCB and negotiation of accepted Claims was established.

[33] Long abeyances have a ring of "Back to the Future".

[34] It is neither necessary nor desirable to suspend the pre-hearing procedures that must be completed to establish the record before the Tribunal and thus be unable to set a hearing date because the parties are in negotiations or "discussing" the possibility. Once the Courthouse steps no longer loom the time pressure for resolution vanishes.

[35] Now, our enquiry for the rationale for putting claims in abeyance for negotiation. We recently convened an advisory committee meeting for discussion of several matters, one of which was:

> 1. In numerous claims, the parties have made a joint request to put the claim in abeyance for negotiation without rules based time limits, commitments to Dispute Resolution including mediation, or periodic reporting on the efficacy of the process.

[36] Based on information received in case management and in discussions with the advisory committee it is evident that the reason for holding the Tribunal process in abeyance is a policy of the SCB. The policy requires the Claimant to agree to put Tribunal proceedings in abeyance as a condition of entering negotiations.

[37] The provenance of this policy predates the creation of the Tribunal. Specific Claims Policy precludes the acceptance of Claims for negotiation while the matter is being actively litigated. This condition appears in the *SCTAct*;

> **s.15(3)** A First Nation may not file a claim if
>
> **(a)** there are proceedings before a court or tribunal <u>other than the Tribunal</u> that relate to the same land or other assets and could result in a decision irreconcilable

> with that of the claim, or that are based on the same or substantially the same facts;
>
> **(b)** the First Nation and the Crown are parties to those proceedings; and
>
> **(c)** the proceedings have not been adjourned. [underlining added]

[38] However, the policy is misapplied as it contravenes s.15(3)(a), which contemplates that negotiation of Claims may proceed while the Claim is before the Tribunal.

[39] It was also revealed in the course of case management and advisory committee meetings that the Ministry's policies do not allow simultaneous funding for proceedings before the Tribunal and negotiations.

[40] These policy based strictures militate against the Tribunal fostering negotiated outcomes in matters before it. This is at odds with the practice before the Courts. Of even greater concern, they give rise to Claimant concerns over good faith in negotiations.

VIII. MEDIATION

[41] It is now commonplace for the Rules of Court to provide for settlement conferences. In some jurisdictions there are provisions for "mini-trials". The parties put forward their arguments; the Court provides a non-binding opinion on liability. In most cases the matter is quickly resolved in the ensuing negotiation.

[42] It is also commonplace for Courts to recommend mediation by a member of the Court or an outside mediator.

[43] Parliament intended that mediation be available for the resolution of Claims before the Tribunal. The *SCTAct* provides:

> **12(1)** A committee of no more than six Tribunal members, appointed by the Chairperson, may make general rules for carrying out the work of the Tribunal and the management of its internal affairs, as well as rules governing its practice and procedures, including rules governing
> …
>
> **(h)** case management, <u>including pre-hearing conferences and the use of mediation</u> . [underlining added]

[44] Tribunal members routinely enquire in case management whether mediation is desired. Claimants are generally receptive, even welcoming. Not so the Respondent.

[45] It is generally understood that mediation was one of the pillars of the "New Relationship" called for by the 2008 policy review. This was never implemented.

[46] The failure to establish mediation in the Claims process has been raised at every meeting of the Advisory Committee. First Nation stakeholders consider this a betrayal of the commitments made by Canada at the time the *SCTAct* came into force. The refusal to embrace mediation is, at the least, a failure to give effect to the intention behind the *SCTAct*.

[47] We strongly encourage both First Nations and Canada to be open to exploring how the Tribunal can help with settlement negotiations through mediation or other dispute resolution mechanisms. As superior court justices, our Tribunal members all have many years of experience mediating disputes before the courts.

IX. CLAIMS FILINGS AND PROGRESS: FUNDING

[48] The Tribunal also sought feedback from the Advisory Committee on the following:

1. The pace of filings with the Tribunal has slowed over the past three years;
2. Claims are proceeding to hearing more slowly than anticipated.

[49] We are told that the slow progress of filed Claims is due to lack of adequate funding to Claimants.

[50] It has been recognized since the first Specific Claims process was created in 1976 that the First Nations would be unable to vindicate their Claims if financial support was not provided. We understand that there were funding cutbacks during the previous administration.

[51] Funding inadequacy is not exclusive to Claimants. In case management we have been informed by Respondent's Counsel that inadequate funding and the bureaucratic process for awarding contracts prevent them from timely completion of pre-hearing documentary research and reports.

X. COMPREHENSIVE CLAIMS

[52] We have added this section on Comprehensive Claims in response to questions from Committee members.

[53] Claims by Indigenous groups to interests in land and resources, i.e. Aboriginal Title, are addressed under the Comprehensive Claims policy. The SCT has no mandate or jurisdiction over these matters.

[54] The policy provides for the negotiation of Comprehensive Claims. When the claimed territory is Provincial land, tripartite negotiations involving the Province, Canada, and the indigenous group are the norm. Negotiations are voluntary. There is no federal legislation establishing a process against which progress may be measured. There is no independent body with a legislated mandate and power to direct the progress of the negotiation and exercise oversight of the conduct of the parties.

[55] The desired outcome is a modern Treaty. These, however, are slow in the making, generally taking decades. In the meantime, population growth and resource development continues within the claimed territories, which can deplete the value of the land claimed even as Treaties are being negotiated. Claimant groups find themselves left with little choice but to seek injunctive relief from the courts.

[56] At present, the only alternative to policy based negotiations is the courts. Actions for declaration of Aboriginal Title tend to be protracted, costly and divisive. The Claim will either succeed or fail. If successful there remains a long way to go before internal governance of the land and the relationship with other interests, including Canada, the Province, and municipalities can be settled.

[57] Many point to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a model for reconciliation. However, the UNDRIP call for recognition of Indigenous ownership and full control of traditional territories could not be implemented without identifying the Indigenous title holding polities, their territories, and how those interests are to be reconciled with each other and with non-Indigenous interests. Indigenous governance powers

and constitutionally assigned powers of governance must also be reconciled on terms that take account of the Canadian common law of Aboriginal Title.

[58] In Australia and New Zealand there are Tribunals mandated and empowered to foster consensus through a negotiation process in which the powers and good faith obligations of the parties are balanced and progress is measurable. The objectives include the identification of the Indigenous rights holders, agreement on, and legal affirmation of their land, resource, and governance interests as reconciled with other, non-Indigenous, interests.

[59] UNDRIP calls for just such a process:

> *Article 27*
>
> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

[60] Based on Article 46, Implementation of Article 27 would not undermine the territorial integrity of the Nation-State of Canada or the fundamental rights and freedoms of its peoples;

> *Article 46*
>
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for

meeting the just and most compelling requirements of a democratic society.

Respectfully submitted,

Justice Harry Slade, Chairperson, Specific Claims Tribunal Canada