

## ANNUAL REPORT

For Presentation to the Honourable Bernard Valcourt  
Minister of Aboriginal Affairs and Northern Development Canada

September 30, 2015

### **I. OVERVIEW**

Section 40 of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, (the *Act*) provides that:

40.(1) The Chairperson shall submit an annual report on the work of the Tribunal in a fiscal year and its projected activities for the following fiscal year to the Minister within six months after the end of that fiscal year, including the financial statements of the Tribunal and any report of them of the Auditor General of Canada.

(2) The annual report may include a statement on whether the Tribunal had sufficient resources, including a sufficient number of members, to address its case load in the past fiscal year and whether it will have sufficient resources for the following fiscal year.

(3) The Minister shall submit a copy of the report to each House of Parliament on any of the first 30 days on which that House is sitting after the report is submitted to the Minister.

This is the Report made pursuant to section 40, subsections (1) and (2) of the *Act*, for the 2014-15 fiscal year.

As was the case in my 2014 Annual Report, the primary focus of this report is on the statement called for by subsection 40(2).

The 2014 Annual Report was, in compliance with the *Act*, sent to the Minister on September 30, 2014, and tabled in both Houses of Parliament in early November, 2014. There have, however, been no new appointments to the Tribunal.

The 2014 Annual Report said:

*The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all.*

(...)

*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.*

*I am the only full time member, and the Chairperson of the Tribunal. My term expires in December, 2015. Without the appointment of one or more full time members in the interim there will be no ability to implement a succession plan or service the case load. The Tribunal will fail.* [emphasis in original]

The number of claims has increased since the presentation of the 2014 Annual Report. There have been no new appointments to date. The Tribunal cannot move its inventory of Claims forward at an acceptable pace until further appointments are made.

## **II. WORKLOAD AND PROGRESS**

### **1) Caseload**

The Tribunal has a total of 66 active claims. Their geographic distribution is as follows:

- 22 in British Columbia;
- 10 in Alberta;
- 12 in Saskatchewan;
- 7 in Manitoba;
- 3 in Ontario;
- 11 in Quebec; and,
- 1 in New Brunswick.

The majority of claims are categorized as reserve creation claims, Treaty promise claims and administration of reserve lands or Indian assets claims. Most, if not all claims allege a breach of the Crown's fiduciary obligations.

The Tribunal currently has 50 claims in active case management. Our past experience suggests that any given claim requires approximately 18 Case Management Conferences (CMC) to bring to a full hearing on the merits. Since the Tribunal opened its door in 2011, it has held a total of 388 CMCs and 52 hearings.

The Tribunal's claim related activities has almost doubled in the last year when compared to the previous year, and would more than double this year when compared with last year's figures if the judicial complement were adequate to respond to the caseload.

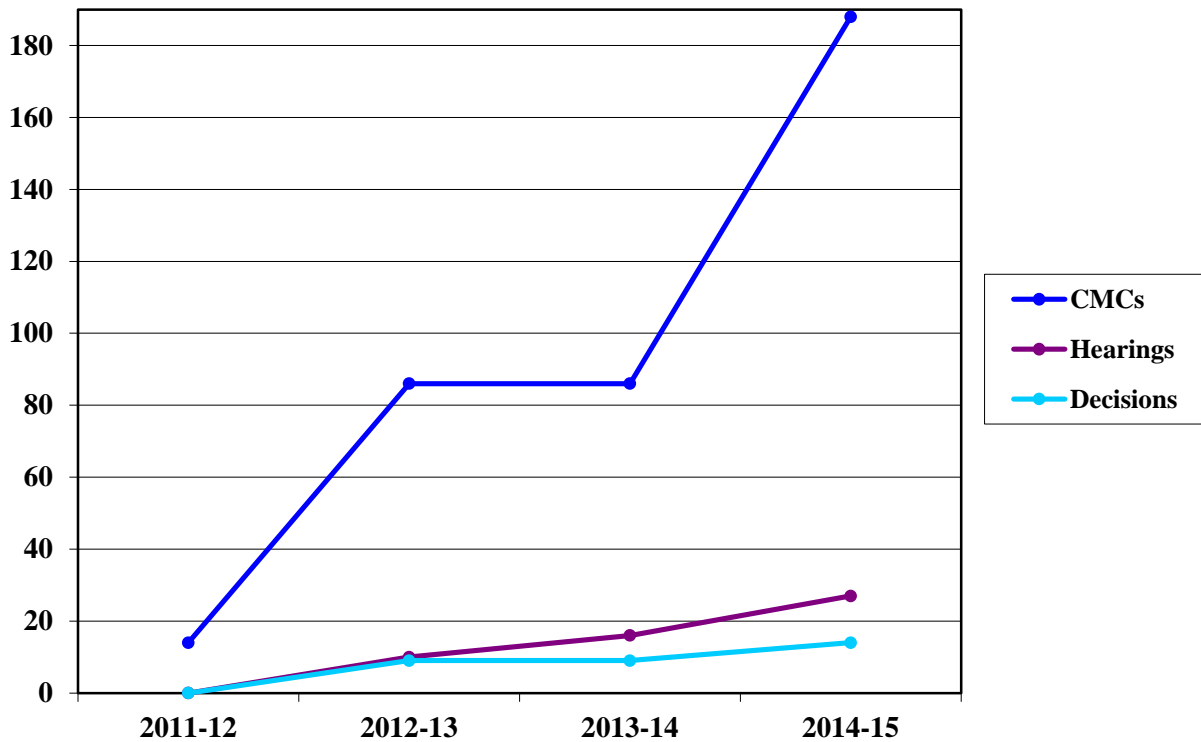
## **2) Claim Assignment and Progress**

Mainville J, who is appointed as a part-time member, currently carries 14 claims. Whalen J, who is supernumerary, dedicates more time than that required for supernumerary judges, carries a caseload of 19 claims. I, a full-time member, carry a caseload of 27 claims. The office of the Chairperson carries administrative responsibilities. With the creation of the Administrative Tribunal Support Services

Canada (ATSSC), my administrative duties consume substantially more time than in years past.

Six claims remain unassigned. These range in filing dates from September 4, 2014 to August 15, 2015. The appointment of another two full time judges would ensure that unassigned claims are assigned and further permit a reassignment of claims currently assigned to existing Tribunal members carrying unmanageable caseloads.

Five claims are scheduled for hearings in 2015-16. The 50 claims in active case management are ready to proceed to hearing in the 2015-16 fiscal year. We have neither the judicial resources nor the staff to bring all the claims that are ready to hearing within a reasonable time. *Figure A* below demonstrates the Tribunal's plateau in operations, when compared to its caseload, resulting from its inadequate resourcing:



Note: April 1, 2015 to September 30, 2015 data is included in fiscal year 2014-2015. From April 1, 2015 to September 30, 2015, the Tribunal has conducted 70 CMCs, 12 hearings and issued 4 decisions. It is anticipated that those figures will more than double, possibly triple by 2015-16 fiscal year end.

### **3) Clearing the Case Load**

The 2014 Annual Report said:

*My **conservative** estimate of the number of member days to clear the current inventory is 611, or approximately 122 weeks. This includes case management and hearings on liability. As hearings are generally held in the Claimant's community, travel days are included.*

*Hearings are bifurcated into liability and compensation phases. The above estimate does not take account of claims that proceed to the compensation phase.*

*My estimate does not include writing days. My experience and that of other members is that the decisions take longer to write than most of those we decide as judges. This applies to both applications and final decisions.*

*The logistics of community hearings do not allow for back to back hearings in common locations, as in the courts.*

*It would, in the present circumstances, take the present members much longer than two years to clear just the existing case load, even without accounting for claims yet to be filed.*  
[emphasis in original]

With the additional claims, the number of member days needed to clear the inventory has increased.

The complexity of claims that come before the Tribunal cannot be understated. Most claims go to a full hearing on the merits of validity and 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.

The Indian Claims Commission in the United States was created by statute in 1946 and concluded its work 32 years later in 1978. It was similarly mandated.

Its final report describes an experience, in all respects, remarkably similar to this Tribunal's thus far. Notably, the final report says:

The apparent slow process of the Commission's early work and the probability of the job being a protracted one troubled Congress. Chief Commissioner Witt often explained that the nature of the litigation precluded quick resolutions. Justice Department representative Perry Morton concurred with Witt stating, "there is nothing as complex as these cases."

(United States Indian Claim Commission: Final Report (United States: Government Printing Office, 1978), at 6, citing U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 9390 for the Appropriations for Interior and Related Agencies for 1957*, 84th Cong., 2nd sess., 1956, 552-58. In 1846 the Attorney General of the United States wrote in his report to the President: "There is nothing in the whole compass of our laws so hard to bring within precise definition or logical or scientific arrangement as the relation in which the Indian stands to the United States.")

In Superior courts, approximately 10% of civil cases go to a full trial on the merits as most are settled. Cases that resemble the complexity of specific claims cases often take 10 years or more to bring from filing to conclusion. Some have taken as much as 30 years. The Tribunal has generally rendered decisions on the merits within three years of filing. Though processes can always be improved, the Tribunal functions at light speed when compared to traditional litigation in the courts and other Tribunals with similar mandates, both domestically and internationally.

I am proud of the Tribunal's accomplishments to date and recognize that its successes were made achievable with a fraction of the financial and human resources allotted to similar endeavors. The Tribunal's success is a direct result of Tribunal Member commitment, experience and work ethic, all of which is supported by the committed and qualified adjudicative support staff.

### **III. RESOURCES**

#### **1) Judicial**

##### **a. Current Tribunal Member Complement**

<b>Tribunal Member</b>	<b>Term Expiry</b>	<b>Full-time / Part-time</b>
Justice Harry Slade	December 11, 2015	Full-time (Chairperson)
Justice Joanne Mainville	December 20, 2016	Part-time (one-half)
Justice W.L. Whalen	December 13, 2016	Part-time (one-half)

##### **b. Judicial Complement Concerns**

In light of the present conditions, I have not yet volunteered for a further term.

If I volunteer, it will be for the Ministers of Justice and the Department of Aboriginal Affairs and Northern Development Canada to decide whether to recommend my reappointment, and for the Cabinet to decide whether to recommend the same to the Governor in Council.

There is little likelihood that this will occur until a Cabinet is appointed after the October 19, 2015, election result is known.

A shortage of judicial members has resulted in an increased inability of the Tribunal to deliver on its mandate. One example of many is the recent adjournment of proceedings in a claim scheduled for mid-October, 2015, due to the operation of the “he who hears must decide” rule. This rule of natural justice stands for the proposition that the decision maker who hears the evidence must also hear the arguments on the merit and make a decision.

Since my reappointment is uncertain at this juncture, and since no new appointments have been made, the parties cannot be certain that the Judge who hears the oral history portion of the claim will hear the arguments on the merits of the claim. This scenario would have been avoided had I of been in a position to reassign the claim to a tribunal member with a longer mandate or if my reappointment was assured.

Proceeding times are now protracted as a direct result of the inadequate judicial complement. The Tribunal cannot not adjudicate specific claims in an expeditious and timely manner. The Tribunal cannot fulfill a portion of its statutory mandate.

## **2) Financial**

The ATSSC has earmarked funds for support of the Tribunal based largely on amounts drawn over the last few years. There is generally a surplus at fiscal year end. This is due to the inability to service the caseload. Funding based on past years experience as a measure of need for the future will, if more members are appointed, result in a shortfall. More claims will be heard, which means additional staff and hearing expenses.

Section 40 of the *SCTA* requires the provision of the Tribunal's financial statements with the Annual Report. The financial statements have not been provided with this report as I have not received them from the ATSSC.

## **3) Personnel**

Currently, the Tribunal has eight staff. The Tribunal needs at least four more staff, specifically in the legal services section and the Registry services section. These two sections provide the members with adjudicative support, ranging from



research, writing and legal advisory services to hearing logistics and planning. The Registry is the point of contact for the parties and the public and arranges all aspects of logistics for hearings wherever they may be held.

Staff of the ATSSC are responsible for assessing staffing needs and implementing a staffing plan. The Tribunal lacks adequate support in areas that are critical to the discharge of its mandate. This is attributable in part to increased workplace stress and consequential stress leave. Concerns expressed in relation to the workload have gone largely unaddressed. For this and other reasons discussed below, the service level compares poorly to that provided by the former stand alone registry and registrar. This is a serious concern going to the adequacy of human and other resources to support the work of the Tribunal.

There has been a reduction in the number of on location staff providing direct services to the work of Tribunal members, while the number of senior managers and the resulting workload of existing staff dedicated to their activities has increased since the advent of the ATSSC. If measures have been initiated to address adjudicative support staffing concerns, none have been concluded to date.

The *ATSSC Act*, enacted pursuant to the *Economic Action Plan 2015 Act, No. 1*, consequentially amended the *Specific Claims Tribunal Act* effective November 1, 2014. The Tribunal no longer has a dedicated registry and no longer can make rules with respect to the duties of staff. This has resulted in uncertainty among staff over their authority to comply with requests from Tribunal members to make all necessary arrangements for hearings. Requests for travel, accommodation and logistical arrangements have become more cumbersome, and created uncertainty with staff over their ability to comply with member's requests.

Unnecessary conflict with management over compliance with member's requests has affected staff morale.

The Tribunal was previously serviced by a dedicated department of the Ministry of AANDC. The department head had extensive experience in servicing Courts, and a thorough understanding of and respect for the principles of adjudicative independence. Since the advent of the ATSSC, this experience is no longer present. In the result, conflicts have arisen over the role, responsibilities and professional obligations of in house legal counsel and the security of confidential and privileged information.

Prior to the coming into force of the ATSSC, all staff employed at the SCT followed mandatory cultural awareness or competency training. Most Tribunal proceedings occur in First Nations communities. Staff often interacts with Indigenous Peoples. Due to this and the nature of the Tribunal's work, cultural training was provided when requested by the Chairperson. Despite several requests, there has been no cultural competency training for new staff.

#### **IV. FIVE YEAR REVIEW**

The Tribunal received notice on October 16, 2014 from Minister Valcourt that the five year review provided for by section 41 of the *Act* would soon commence. The Minister acknowledged the need for the Chairperson to play a role in the review process.

The Minister appointed Mr. Benoit Pelletier as his Special Representative in the conduct of the review.

Mr. Pelletier and staff met with the Chairperson and Legal Counsel on February 20, 2015 to discuss the role the Tribunal could play in the review process.

At the next meeting, held on March 31, 2015. Mr. Pelletier informed us of concerns and proposals expressed in sessions with the Claimant community, other Aboriginal groups, and interested Departments of Government. He asked for the views of the Tribunal on these concerns and proposals, which included significant changes to the implementation of the Specific Claims Policy (Justice at Last).

Mr. Pelletier was given the Tribunal's Submission on May 15, 2015. This responds to stakeholder's concerns, and offers process alternatives which, if implemented, should provide greater transparency at the stage of Ministerial review of Claims and expedite and reduce the cost of proceedings before the Tribunal. The submission is posted on the Tribunal's website: <http://www.sct-trp.ca/pdf/Submission%20SCT%20May%2015%202015.pdf>.

## **V. ADVISORY COMMITTEE AND SUMMARY PROCESS**

The Tribunal's Submission on the five review contains proposals that would, if acted on, require amendments to the *Act*. It also speaks of changes to the process before the Tribunal that do not require amendments to the *Act*. These could be introduced by amendments to the Tribunal Rules of Practice and Procedure to establish a process for summary hearings.

The Tribunal may draw upon the expertise of an advisory committee in the development of its rules of practice and procedure. The advisory committee was convened on June 23, 2015 to discuss the institution of a summary process before the Tribunal.

A draft proposal will be provided to the Advisory Committee in October, 2015 for review and discussion.

Respectfully submitted,

Justice Harry A. Slade  
Chairperson, Specific Claims Tribunal