2017-2018 ANNUAL REPORT

Specific Claims Tribunal Canada

Tribunal des revendications particulières Canada

Canada

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MESSAGE
FROM THE CHAIRPERSON

As the Chairperson of the Specific Claims Tribunal, it is my pleasure to report to you on the various activities carried out by the Tribunal in the past fiscal year, and to draw attention to some of our upcoming challenges and opportunities.

We have performed our mandate to the best of our ability over the 2017-2018 fiscal year and will do so in the ensuing year. There are, however, impediments to the fulfillment of our mandate. These are largely beyond our control.

First, there are ongoing problems around our complement of members. Second, there are serious concerns that a lack of adequate funding has resulted in First Nations not having full access to the Tribunal. Third, the government process for mandating negotiators is an impediment to the timely resolution of Claims filed with the Tribunal when, while advancing toward a hearing before the Tribunal, necessary pre-hearing work is put on “hold” for negotiations.

Justice Harry A. Slade
Chairperson, Specific Claims Tribunal

ABOUT
THE TRIBUNAL

The Specific Claims Tribunal, established on October 16, 2008, is part of the Federal Government's Justice at Last policy and the product of a historic joint initiative with the Assembly of First Nations aimed at accelerating the resolution of specific claims in order to provide justice for First Nations claimants and certainty for government, industry and all Canadians.

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.

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

The Specific Claims Tribunal Act provides for the appointment of Tribunal members from a roster of Superior Court Justices. This was intended to ensure the independence of the Tribunal.

WHAT IS A SPECIFIC CLAIM?

Specific claims can include alleged breaches of treaties, fraud, illegal dispositions, or inadequate compensation, related to reserve lands. The Tribunal is empowered to compensate Claimants for these breaches, to a maximum of $150 million. More particularly, specific claims are compensable claims related to:

- 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;
- A breach of a legal obligation of the Crown under any legislation pertaining to Indians or lands reserved for Indians;
- An illegal lease or disposition of reserve lands;
- A breach of a legal obligation arising from the provision or non-provision of reserve lands;
- The Crown's administration of reserve lands, Indian moneys or other First Nations' assets;
- A failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
- Fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

2017-2018
IN REVIEW

STAFFING

The Tribunal is, for the most part, at the required staffing level for effective functioning in terms of administration, registry staff and judicial assistants. The Tribunal now has a Deputy Registrar who manages registry staff, judicial assistants and an administrative assistant. The one exception pertains to legal counsel able to provide full legal services in French. We have one such counsel, who manages due to her dedication and skills. We need another to spread the workload and provide coverage for holidays, conflicts, and other needs and responsibilities.

FINANCES

At present the Specific Claims Tribunal appears to have adequate financial resources to effectively process the claims filed with it. Financial Statements are available through the Administrative Tribunal Support Service of Canada (ATSSC).

There has been a movement toward negotiation of some Claims when pre-hearing steps have been taken in preparation for a hearing. For the reasons discussed below, negotiations are a mixed blessing. On one hand, negotiation is the preferred means of resolving Claims. On the other, the unduly lengthy process of negotiation militates against Claims being resolved in a timely way and, if negotiations fail, may result in Claims not being

heard for many years after being filed with the Tribunal. Mediation of Claims in negotiation would expedite settlements. Tribunal members are available to serve as mediators. If this practice grows our present allocation of funds will be inadequate.

THE TRIBUNAL'S WORK

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 applicationspertaining 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 well over a century.

The process before the Tribunal reflects stakeholders' interests and needs, and the objective of reconciliation. Hearings in Claimant's communities are an essential part of the process. This is not the norm in proceedings in the courts, where the stakeholders must attend at a courthouse to access the proceeding as participants or observers. It is not possible to schedule back to back hearings with court-like efficiency.

CLAIMS

Since 2011, the Tribunal has received a total of 93 claims. Their geographic distribution is as follows

At present, we have 75 claims before the Tribunal. 74 of these claims are active and are being case managed.

CASE MANAGEMENT CONFERENCES

Procedural matters are addressed in Case Management Conferences (CMC's). Since the Tribunal opened its doors in 2011, it has held a total of 895 CMCs current to September 01, 2018. There were 179 CMCs in the 2017-18 fiscal year, and most are conducted by teleconference.

HEARINGS

Where *viva voce* testimony is introduced in evidence, in-person hearings are held. This is the case with the introduction of oral history and expert testimony. Closing submissions on validity and compensation are held in person. The same is the case for applications that raise issues of jurisdiction and other contentious matters that cannot be resolved by agreement of the parties through case management. The Tribunal held a total of 24 hearings in the 2017-18 fiscal year.

ACCOMMODATING CULTURAL DIVERSITY AT THE SCT

The SCT has developed expertise in carrying out culturally sensitive adjudicative proceedings without compromising the integrity of the process. The Specific Claims Tribunal Act provides, at s. 13, that the Tribunal may "take into consideration cultural diversity in developing and applying its rules of practice and procedure".

Hearings in community: Hearings in Claimants' communities are an essential part of the process, and are reconciliatory.

Site visits: The presiding member will often travel to the area of land in question to view it, along with the parties, staff, and community members.

Ceremonies: Ceremonies that the parties and Tribunal have participated in prior to, or after, a hearing include long house ceremonies involving song and dance, and pipe ceremonies.

Prayer: Welcome prayers are often offered at the outset of a hearing by a Chief, Elder, or other designate.
Oral History hearings: These hearings are often scheduled as early as possible in the life cycle of a claim before the tribunal, in recognition of the importance of preserving the testimony of elders. In one case, a group of Elders participated in a truth-telling ceremony prior to the giving of testimony, and after having had the significance of the ceremony explained on the record, participation in the ceremony was accepted by the Tribunal in lieu of swearing or affirming the evidence.

Accommodating Language: The Tribunal welcomes witnesses who wish to testify in their mother tongues, with assistance of qualified interpreters, and this is a regular aspect of hearings.

JURISPRUDENCE

On April 26 2017, the Supreme Court of Canada heard, on appeal from the Federal Court of Appeal, the case of *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada*. The decision, released on February 2, 2018, affirms the jurisdiction of the Tribunal over pre-confederation Claims, the Tribunal's determination on Crown fiduciary duties, and the status of the Tribunal as an expert adjudicative entity.

In summary:
The Williams Lake Indian Band ("band") filed a claim with the Tribunal seeking compensation for the loss of part of its traditional territory, which included the site of a village near Williams Lake in British Columbia ("Village Lands"). Despite the Colonial enactment of the *Proclamation relating to acquisition of Land, 1860 ("Proclamation No. 15")*, under which "Indian settlements" were not available for preemption, officials responsible for implementing the preemption system took no steps to protect the Village Lands from preemption or mark them out as a reserve. After British Columbia joined Confederation, Canada assumed, under Article 13 of the *British Columbia Terms of Union ("Terms of Union")*, responsibility for the creation of Indian reserves according to a policy as liberal as the Colony's. The federal Crown officials acknowledged that the preemptions had been a mistake but were not prepared to interfere with settlers' rights. Instead, they allocated another tract of land to the band as a reserve.

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The Tribunal held a hearing on the validity of the claim, and concluded that the band had a valid specific claim for losses arising from the Crown's acts and omissions in relation to the Village Lands. It found that the Imperial Crown had owed, and breached, a legal obligation to the band in relation to the protection of its lands from preemption based on s. 14(1) (b) of the Act and that the Crown in right of Canada ("Canada") had owed, and breached, a fiduciary obligation to the band based on s. 14(1) (c). It further found that Canada could be held responsible under the Act for the band's preConfederation claim. Before the Tribunal ruled on compensation, Canada sought judicial review of the Tribunal's validity decision. The Federal Court of Appeal allowed Canada's application and dismissed the band's claim.

Chief Justice Wagner, writing for the majority (5-2-2), allowed the appeal and restored the Tribunal's decision. Notably, the Court held that the standard of review applicable to the Tribunal's findings of fact, mixed fact and law, and law were entitled to a reasonableness review.

The SCC's decision emphasized at the outset that, with respect to specific claims, "a just resolution of these types of claims is essential to the process of reconciliation…" and further stated at paragraph 38:

> **The Tribunal will continue to develop expertise in the application of fiduciary law in the historical contexts at issue in specific claims and familiarity with the large and specialized evidentiary records involved, which may include oral history, archival materials, anthropological and historical studies and archaeological reports. In light of these considerations, a reviewing court should exercise particular caution before interfering with a decision of the Tribunal on the basis that the facts as it has found them cannot reasonably support its conclusions about the existence and content of a fiduciary obligation [citation omitted].**

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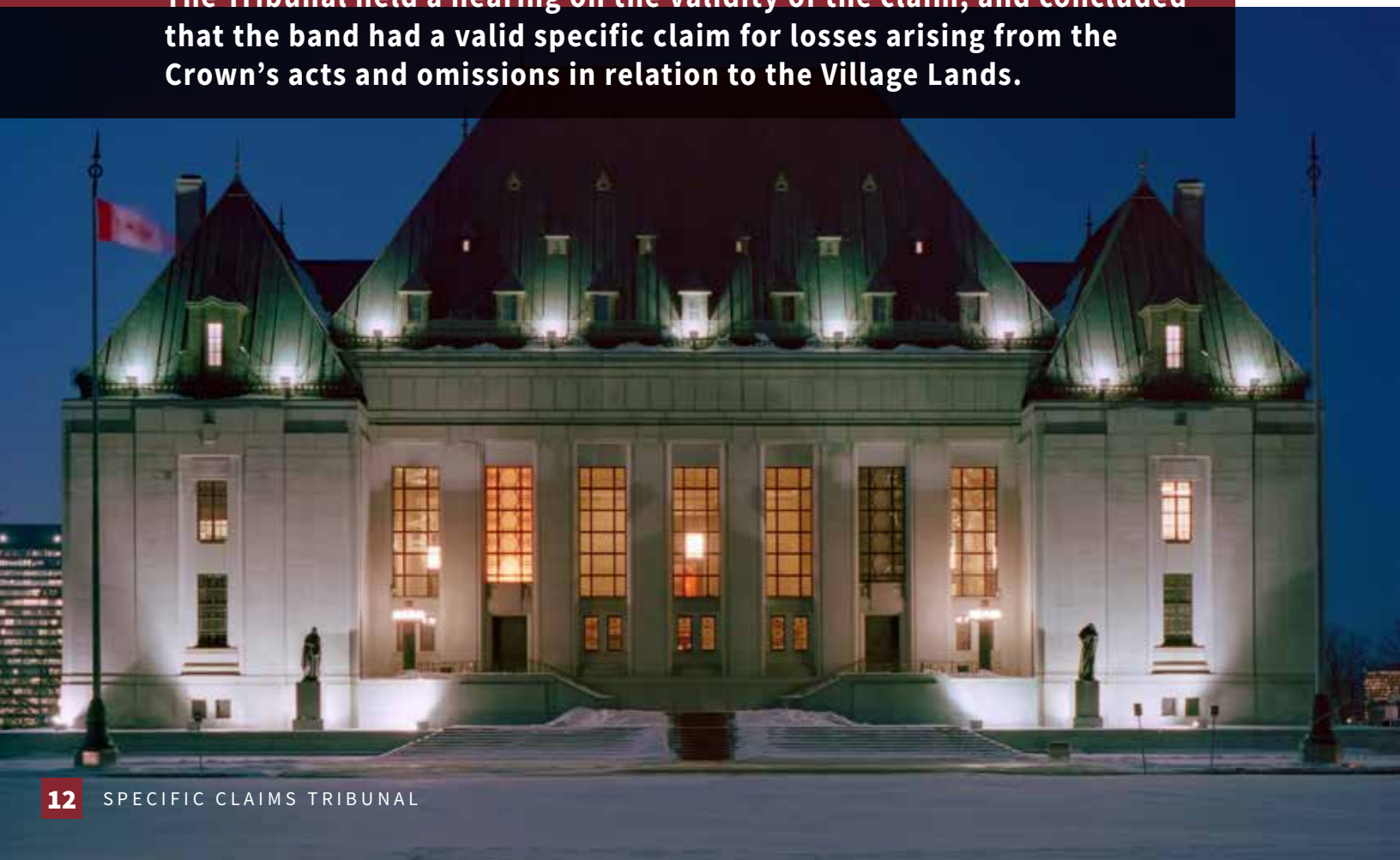

LOOKING AHEAD

TO 2018-2019

MEMBER COMPLEMENT

The Specific Claims Tribunal Act says that the Tribunal shall consist of no more than six full-time members; or any number of part-time members, or combination of full-time and part-time members, so long as the combined time devoted to their functions and duties does not exceed the combined time that would be devoted by six full-time members. The Governor in Council shall establish a roster of six to eighteen superior court judges to act as members of the Tribunal. The Chairperson and other members may be appointed from the roster by the Governor in Council. Each member shall be appointed for a term not exceeding five years and holds office so long as he or she remains a superior court judge. Each member, on the expiry of the first term of office, is eligible to be reappointed for one further term.

THE CURRENT MEMBER COMPLEMENT IS AS FOLLOWS:

Tribunal Member	Term Expiry	Full-time/Part-time	No. of Assigned Files
Justice H. Slade	December 11, 2020	Full-time (Chairperson)	13
Justice W.L. Whalen	April 1, 2019	Part-time	8
Justice P. Mayer (bilingual)	May 18, 2023	Part-time	32
Justice W. Grist	September 5, 2022	Part-time	22

As of April 2019 upon Justice Whalen's retirement, the Tribunal's complement of members will actually be fewer than as reported in our Annual Report dated September 2013, at which time there were a total of 42 active claims.

The continued uncertainty around future appointments makes it challenging to plan for management of current and future claims, as well as succession planning.

SOUNDING THE ALARM ON ACCESS

Perhaps the major issue on the horizon for 2018-2019 is the question of whether the Tribunal is able to adequately fulfil its mandate where funding for the parties before it is inadequate.

In an effort to offer more just and timely resolution of Claims, the Tribunal is preparing for the issuance of several new practice directions, on the matters of early case planning CMC's, Settlement Conferences, Mediation at the Tribunal, and Stays of Proceedings. However, such efforts will not succeed if parties are unable to fully participate in the process. Some background as to why these Directions were found to be necessary follows:

Mandate

The Tribunal is mandated "… to respond to the distinctive task of resolving such (i.e. Specific) Claims in a just and timely manner". The legislative objective is, in part, to "… create conditions that are appropriate for resolving valid claims through negotiations." (Preamble, *Specific Claims Tribunal Act*)

Advisory Committee

The Tribunal is concerned over its inability to adequately perform its mandate. We convened an Advisory Committee under s.12 (2) of the *Act* in order to present our concerns, identify internal and external impediments to an effective adjudication process, and, as provided for by S.12 (2), seek advice "… in the development of the

Perhaps the major issue on the horizon for 2018-2019 is the question of whether the Tribunal is able to adequately fulfil its mandate where funding for the parties before it is inadequate.

Tribunal's rules of practice and procedures, *including efficiencies*." (Emphasis added). As the process for rules amendment under the *Statutory Instruments Act*, RSC 1985, c. S-22 is cumbersome and lengthy we elected to use practice directions to establish efficiencies.

Over a period of 10 months we convened three meetings of the Committee, and received valuable input from all of the stakeholders.

Timeliness

Timely resolution of Claims before the Tribunal has eluded both the First Nations and the Crown. Most Claims are, on application of the Parties, bifurcated into a validity stage and, if the Claim is found valid, a subsequent compensation phase. The average time from filing of a Claim to a decision on the merits is 3.5 years. Where Claims have been found valid in law, the average time from filing to the ultimate resolution by an award of compensation is 5.2 years. However, these statistics do not reflect the whole picture. For example, of the 57 claims filed between 2011 and March 2014 (active for over/or close to five years), 41 are still before the Tribunal. Of the 41, there are 29 claims in which the parties have not yet scheduled a hearing on the merits.

Some delay in court-like processes is inevitable, as pre-hearing processes are time-consuming. But a time span of 63 months from date of filing is contrary to the performance of the mandate and unacceptable.The primary reason for delay in the Tribunal process is the lack of adequate resources available to both parties to diligently prosecute and defend Claims.

Most First Nations must rely on government funding to prepare Claims and engage in the process before the Tribunal. We conclude, based on information from First Nations representatives, that funding for Claims before the Tribunal is woefully inadequate. We also conclude that the process by which Crown lawyers access financial resources to carry out pre-hearing work impairs their ability to perform with due diligence.

Specific Claims: Review by Specific Claims Branch and the Tribunal Process

Most Claims come to us as a result of Ministerial non-acceptance for negotiation on the advice of the Specific Claims Branch (SCB) of the Ministry of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC). The SCB assesses Claims based on information provided by the Claimant and, presumably, its own research.

There is engagement with the Claimant in this process before a recommendation goes to the Minister. Expert reports may be obtained by the Claimant and the SCB, sometimes jointly.

Access to the record of the SCB in assessing Claims would enable the Tribunal to identify the core issues of fact and law early in the process and work with the Parties to establish an efficient plan for completion of necessary pre-hearing tasks. It would also enable Tribunal members to do sooner what they do as Justices presiding over matters before the courts, namely to assist counsel in identifying evidentiary needs, establish a litigation timetable, set a hearing date, and occasionally deliver reality checks to the Parties.

Material gathered by the SCB is not made available to the Tribunal as the Crown takes the position that all such material, even historical documents, is non-disclosable due to "negotiation privilege". Such is the case even when the Claim is not accepted for negotiation. Claimants query whether this is in keeping with the objectives of the *Act* and Crown Honour.

Justice

While justice is revealed in decisions of the Tribunal, a central aspect of justice is absent, namely First Nations access to the Tribunal. The Preamble asserts "the right of First Nations to choose and have access to a specific claims tribunal …" (emphasis added)We conclude that the funding limitations and the manner in which available funding is trickled out to First Nations Claimants amount to a denial of effective access to the Tribunal. Funding limitations and processes contribute in several ways to delay in proceedings before the tribunal.
An example: Bifurcation of validity and compensation has become the norm. This rarely occurs in proceedings before the courts. It is common practice before the Tribunal because the First Nations lack the financial resources to prepare their cases forcompensation at the outset. Were this not the case the time from filing to ultimate resolution would be much shorter.

Negotiated Outcomes

The preferred route to settlement of Claims is negotiation. An objective of the Act is to "*create conditions that are appropriate for resolving valid claims through negotiations*". Several Claims filed with the Tribunal are now in negotiation and proceedings have been stayed to permit the Parties the time needed to achieve resolution. We are concerned about the time it is taking to achieve this. In some files it has taken a year for the parties to enter into a Negotiation Protocol. Once the Negotiation Protocol is signed negotiations may commence. We have been given time estimates of two to five years for resolution.

What accounts for delay in negotiations? Through the advisory committee we now know that Crown negotiators do not arrive at the table with mandates permitting them to accept or make binding offers of settlement. The negotiation process has the Parties discussing in generality the merits of the Claim and feeling out each Party's sense of the monetary value of the Claim if accepted as valid. Expert reports may be obtained by each Party, or jointly, in an effort to measure the loss to the First Nation with precision. Response studies may be commissioned. The First Nation may lack the resources needed for full engagement, and line up with others for funding for the process. Crown representatives must go through the process for funding of reports they consider necessary. Years pass while in this process.

Settlement agreements are not entered at the negotiation table. The most that can be achieved is a "Memorandum of Understanding" by which the representatives of the Parties undertake to take such internal steps as required to make a legally enforceable agreement on the terms of settlement. On the Crown side the approvals can take, eight months or longer. The time varies with the amount of compensation set out in the Memorandum.

In matters before the courts, the norm is to set a trial date. In Quebec, plaintiffs must have their cases prepared to fix a trial date within six months of the establishment of a procedural protocol, which occurs shortly after the originating application is served on the defendant. In Ontario, actions are automatically dismissed if not set down for trial within five years of commencement.

In all jurisdictions the parties must complete their preparation and be ready to proceed on the date set for trial. Trials may in some circumstances be adjourned by consent or by order of the court if one party, for good reason, needs more time to prepare and is granted an adjournment on application. The fact that the parties

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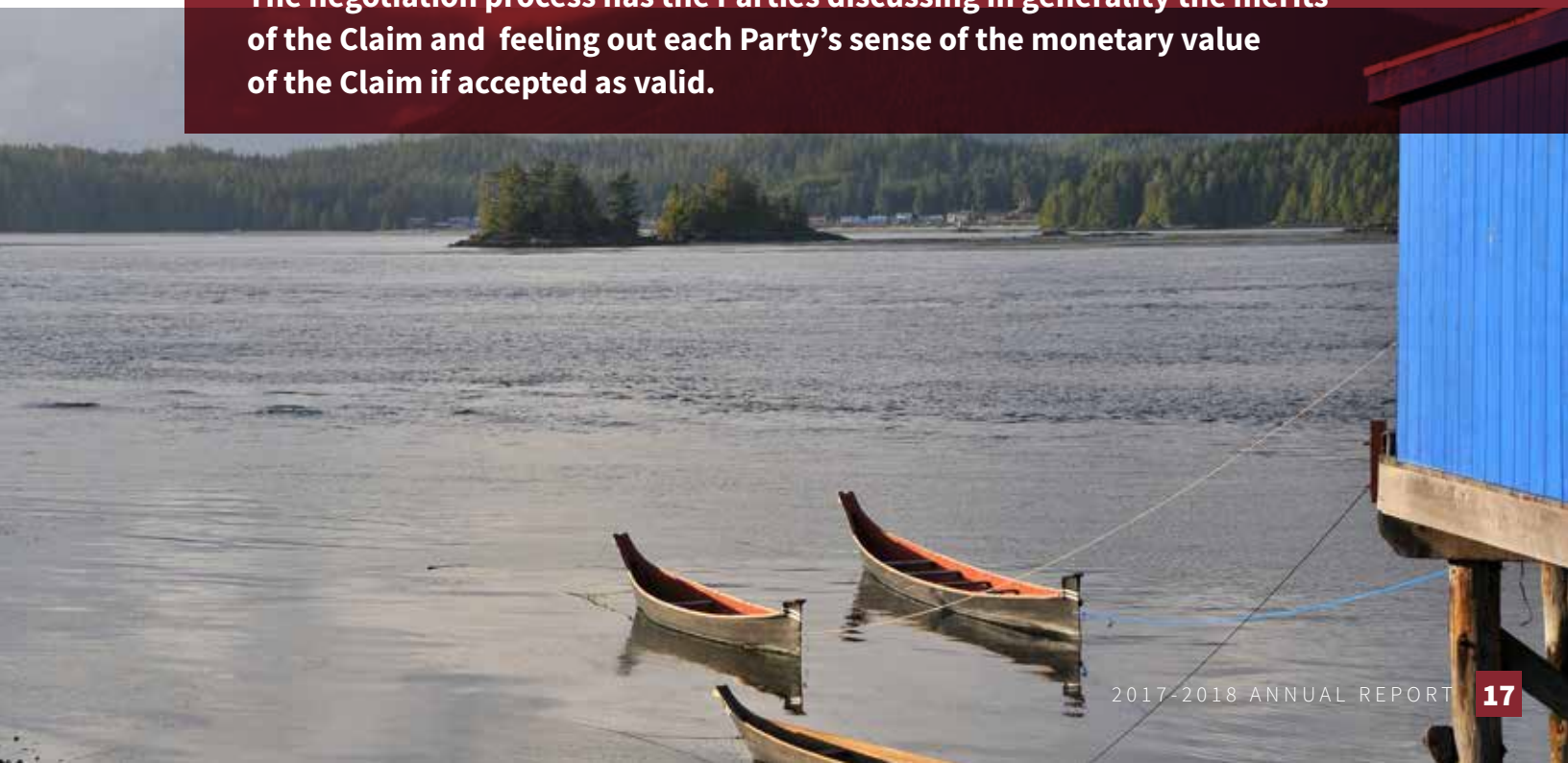

have entered settlement negotiations is not generally considered an adequate reason for adjournment. There is nothing that motivates parties to settle more than facing a set date for trial. Fully 90 percent of civil claims filed in the courts are resolved without trial.

In claims before the Tribunal we have been asked by the parties to put the entire pre-hearing process in abeyance by granting a stay of proceedings while the parties negotiate. Where these have settled it has taken two or more years. Some remain in abeyance indefinitely without tangible signs of progress. This is directly attributable to the absence of a mandate to commit the Crown to a binding resolution. If a Memorandum of Agreement is entered it then takes up to two years to obtain the approvals needed to form a binding agreement.

If the Crown does not obtain the necessary approvals there is no settlement, and the matter will return to the Tribunal after a delay of, in some cases, five or more years after the Claim has gone on hold. As all work has been on hold, the parties are left to initiate and complete all pre-hearing measures.

Why would a Claimant before the Tribunal agree to put the matter on hold for negotiations? It is because Claimants depend on funding to advance the litigation, and the programme for funding will not support concurrent proceedings before the Tribunal and costs of negotiation. This militates against resolution through negotiation while the Claim is active before the Tribunal. Pressure to settle vanishes.

Mediation

In the Federal Court a stay of proceedings may be granted for up to six months for negotiation on condition that the parties undertake to employ alternative dispute resolution to achieve a settlement. We have proposed a similar rule but have been informed that a binding settlement agreement within six months or even one year is impossible for the reasons above.

The Tribunal has in several Claims provided a member to serve as mediator. The results have been mixed. Where mediation succeeds, the time taken to achieve a Memorandum of Understanding is reduced. This, however, does not become a binding agreement until the government process for approval is completed. Technically the matter remains before the Tribunal, but efficiency in bringing the Claim to a final resolution is, contrary to our legislated mandate, absent.

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