

# **ANNUAL REPORT**

For Presentation to the Honourable Carolyn Bennett  
Minister of Crown-Indigenous Relations and Northern Affairs

September 28, 2017

## **I. STATUTORY REQUIREMENT**

Section 40 of the *Specific Claims Tribunal Act*, SC 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 on 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 2016-17 fiscal year.

## II. MEMBERS

### 1) **Current Tribunal Member Complement**

<b>Tribunal Member</b>	<b>Term Expiry</b>	<b>Full-time/Part-time</b>	<b>No. of Assigned Files</b>
Justice H. Slade	December 11, 2020	Full-time (Chairperson)	19
Justice W.L. Whalen	April 1, 2019	Part-time	16
Justice P. Mayer	May 18, 2018	Part-time	22
Justice W. Grist	May 18, 2018	Part-time	11
Justice B. MacDougall	July 31, 2017	Part-time	10

Justice Larry Whalen, a part-time member, was reappointed to the Tribunal in December 2016 for a term ending on April 1, 2019. As this is his second term, he will be ineligible for reappointment, pursuant to subsection 7(2) of the *Act*.

Of the present Tribunal complement, only Justice Paul Mayer and Justice William Grist are eligible for reappointment. Their terms expire on May 18, 2018. As Justice Grist is a supernumerary judge, his is a part-time appointment and will continue as such if reappointed. Justice Mayer is a full-time judge from the Quebec Superior Court, and serves on the Tribunal part-time. He presides over claims in both official languages. Of the present membership, only Justice Mayer can be reappointed on a full-time basis.

Justice Barry MacDougall's term expired on July 31, 2017. As he has reached the mandatory retirement age, he is not eligible for reappointment. By November 28, 2017, it is anticipated that he will have completed three decisions on matters he heard prior to the end of his term, based on my authorization to do so pursuant to section 9 of the *Act*.

I am the only full-time member. My term expires in 2020.

The appointment of new Tribunal members is a lengthy process with a number of steps as follows:

1. A superior court judge volunteers to be appointed to the Tribunal;
2. The Chief Justice of that judge's court nominates the judge;
3. The Judicial Affairs Advisor reviews and recommends the nomination to the Minister of Justice and Attorney General of Canada for appointment;
4. The Minister recommends the appointment to Cabinet; and,
5. Cabinet approves the appointment by Order in Council.

I am currently in communication with the Minister's Judicial Affairs Advisor in order to identify potential candidates and to initiate the process for appointment.

Once again, the Tribunal does not have a full complement of judges. The continued uncertainty around future appointments makes it challenging to plan for management of current and future claims.

Most of the present members are on two year appointments. Most claims take over two years from the date of filing to a finding on validity. Short term appointments and the appointment of judges approaching retirement may result in an assigned judge being unable to see a claim through to completion. This gives rise to another problem; if the judge has heard evidence the application of the "he who hears" rule is required to hear closing submissions and of course render a decision. As most claims take longer than two years from the date of filing to the issuance of a decision on validity it may not be possible to ensure that the assigned member can hear all parts of a claim and issue a decision within the term of his/her appointment.

One may fairly ask why it takes over two years to get a claim to hearing. There are several reasons:

1. The record is rarely complete at the time of filing with the Tribunal. There is no assurance that the claims, as presented to the Minister in the process before the Specific Claims Branch, contain a record of all potentially relevant documents. It is in the interest of both parties that the claim proceed on as full an evidentiary base as can, within reason, be found. The parties are required to make full disclosure. This and the professional responsibilities of Counsel for Canada to their client, calls for archival research.
2. If the Claimant intends to introduce evidence of oral history and tradition and expert opinion evidence, preparation may be delayed until disclosure is substantially complete.
3. When a Claimant introduces an expert report, the Respondent must have adequate time to consider the report and, if considered necessary, to commission a report in response.
4. The Parties generally want to schedule oral examination and cross examination of community and expert witnesses.
5. More generally, delay seems to be attributable to Claimants lacking sufficient funds to undertake the pre-hearing procedures in a timely way. It appears that this is a problem facing Counsel for Canada as well. Moreover, the time taken for compliance with government rules for contracting seems inordinately lengthy.

### **III. THE NATURE OF THE WORK**

The claims that come before the Tribunal are complex on the facts and on application of the law. Most claims 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.

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.")

The experience of our predecessor, the Indian Specific Claims Commission, was similar. It had a much larger budget and far more resources than are available to the Tribunal.

### **IV. SCHEDULING AND LOGISTICS**

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.

In Superior courts, approximately 10% of civil cases go to a full trial on the merits as most are settled. This has not proven to be the case with specific claims before the Tribunal. Cases in the courts that engage Indigenous interests often take 10 years or more to bring from filing to conclusion. Some take far longer. 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.

## **V. WORKLOAD AND PROGRESS**

### **1) Present Caseload**

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.

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

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.

Procedural matters are addressed in CMCs. Since the Tribunal opened its doors in 2011, it has held a total of 695 CMCs current to September 14, 2017. There were 160 CMCs in the 2016-17 fiscal year, and 81 CMCs to date in fiscal year 2017-18. Most are conducted by teleconference.

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 18 hearings in the 2016-17 fiscal year, and 17 so far in fiscal year 2017-18. Oral history evidence and closing submissions are held in or near the Claimant's community.

## **VI. STAFFING**

Thanks to the capable efforts of our Executive Director, the Tribunal is now almost at the required staffing level for legal counsel, registry staff and judicial assistants. The Tribunal now has a Deputy Registrar who manages registry staff, judicial assistants and an administrative assistant.

## **VII. FINANCIAL**

At present the Specific Claims Tribunal appears to have adequate financial resources to effectively process the claims filed with it.

## **VIII. UPDATE ON ADVISORY COMMITTEE AND SUMMARY PROCESS**

The Government of Canada has indicated in a recent statement that the existing specific claims policy and process will be completely overhauled, in cooperation and collaboration with Indigenous Peoples, including the Assembly of First Nations. Some of that work will be done as part of the efforts of the Working Group of Ministers on the Review of Laws and Policies announced by the Prime Minister on February 22, 2017 (Joint Statement from the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, and the Honourable Carolyn Bennett, Minister of Crown-Indigenous Relations and Northern Affairs, dated September 6, 2017). At the time of writing this report, the Specific Claims Tribunal has not been consulted regarding revisions to specific claims policy and process. I have written to the Ministers and made known the willingness of the Tribunal to participate as they may see fit.

The Tribunal will be convening a meeting of the Advisory Committee in the fall of 2017. A letter to the Advisory Committee highlights the following new trends:

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; and,
3. 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.

We have invited Advisory Committee participants to help us understand the reasons for these new trends as well as to discuss long standing questions and raise any other concerns they may have. To the extent that concerns may be addressed by further development of the Rules, these would be up for discussion.

#### **IX. SUPREME COURT OF CANADA HEARING – WILLIAMS LAKE**

On April 26, 2017, the Supreme Court of Canada heard an appeal of the Federal Court of Appeal’s decision, 2016 FCA 63, on the judicial review of the Specific Claims Tribunal’s decision in *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3. The Specific Claims Tribunal intervened on the issue of standard of review.

The Supreme Court of Canada reserved judgement.

#### **X. SPECIFIC CLAIMS TRIBUNAL DECISIONS ON COMPENSATION**

In December 2016, the Tribunal issued two decisions awarding compensation:

- *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; and,
- *Beardy’s & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15.

## **XI. FINANCIAL REPORTS**

The *Act* requires the delivery of financial reports to the Minister with the delivery of the annual report. Since the advent of the Administrative Tribunals Support Service of Canada, financial reports are no longer available to the Tribunal.

Respectfully submitted,

Justice Harry A. Slade  
Chairperson, Specific Claims Tribunal