

Specific Claims Tribunal Canada Tribunal des revendications particulières Canada

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ANNUAL REPORT

For Presentation to the Honourable John Duncan
Minister of Indian Affairs and Northern Development

September 30, 2010

Section 40 of the Specific Claims Tribunal Act, S.C. 2008, c. 22, 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 required by section 40, subsections (1) and (2). My Tribunal colleagues concur fully with the contents of this report, hence my use throughout of the plural reference "we".

I. CONTEXT

The present members of the Tribunal, Justice Johanne Mainville, Justice Patrick Smith, and Justice Harry Slade, Chairperson of the Tribunal, were appointed

by Order in Council on November 27, 2009. The appointments are for a term of one year. We are the first Tribunal members appointed since the Act came into force on October 16, 2008.

The context in which these appointments were made will assist the Honourable Minister, and the members of both Houses of Parliament, in their understanding of the contents of this Report.

Section 10(1) of the Act calls for the establishment of the Registry of the Tribunal, to be located in the National Capital Region. Subsection 10(2) provides for the appointment of a Registrar, and the employment of staff as required for the proper conduct of the work of the Tribunal. The Registrar is responsible, under subsection 10(3), for the management of the Tribunal's administrative affairs and the duties of the staff of the Tribunal. The staff of the Tribunal is to be organized in the manner provided for by rules established by a committee of Tribunal members appointed by the Chairperson (subsection 12(1)). The rule-making authority includes general rules for carrying out the work of the Tribunal, the management of its internal affairs, and the duties of its staff.

As noted above, the first appointments to the Tribunal were made on November 27, 2009. This was shortly after the Chief Justices of the British Columbia, Ontario, and Quebec Superior Courts put forward our names for consideration by the Governor in Council.

Justices Slade, Smith, and Mainville are, respectively, members of the Superior Courts of British Columbia, Ontario, and Quebec.

The process for the appointment of the present members reflects a commitment made by the Honourable Minister of Justice to the Chief Justices. In particular, that only those justices who consent to being appointed to the Tribunal, and whose Chief Justice consents, will be considered for appointment to the Tribunal.

The Registry was established before the appointment of justices to the Tribunal. We understand that the intention was to proceed toward the creation of a functional registry pending the appointment of members of the Tribunal. To further that objective, an acting Registrar was appointed, and an organizational chart was prepared. Staff were hired, and office space was secured and renovated. This included the construction of a hearing room. This work was undertaken before we were appointed to the Tribunal

The policies that reflect Federal standards for financial accountability and employment fall under the authority of the Registrar.

In January 2009, the acting Registrar made a presentation to the Chief Justices of the Superior Courts of each Province. In May 2009, the Chief Justices of the British Columbia, Ontario, and Quebec courts each designated a Justice from their respective courts to constitute a Steering Group. The present judicial members of the Tribunal were the persons designated.

Members of the Steering Group maintained contact with the acting Registrar, in order to remain informed of steps underway to establish a functioning Registry. All remained fully engaged in their judicial responsibilities.

In October 2009, the Chief Justice of the British Columbia Supreme Court requested the advice of the Steering Group with respect to appointments to the Tribunal. After the receipt of recommendations from the Steering Group, Chief Justice Bauman wrote to the Chief Justices of Ontario and Quebec, with suggestions for the terms on which justices from the three courts might be appointed. The Chief Justices then jointly wrote to the Minister of Justice to advance the names of the members of the Steering Group for appointment to the Tribunal. The appointments were made, as noted above, for a one-year term. The Chief Justices' letter also speaks to the tasks envisioned for the named justices for the term of their appointments.

II. RATIONALE FOR LIMITED TERM APPOINTMENTS

Members of the judiciary will, when considering whether to make an important commitment, wish to make their decision on an informed basis. This is particularly so when considering an important role in a process to address a subject matter in which there is both a general public interest, and an identifiable group that may be affected by their decisions. It is important that the independence of the Tribunal is assured, both in reality and public perception. The assurance of appropriate governance of the Tribunal, and adequate resources to support the work of the Tribunal, are, as aspects of adjudicative independence, key considerations. These have not, to date, been fully resolved.

The members of the Steering Group, and our judicial colleagues, required information on a number of matters, including the following:

1. The role of the Minister of Indian Affairs and Northern Development, and that of the National Chief of the Assembly of First Nations, in the process for the appointment of justices to the Tribunal. An agreement, entitled "Political Agreement" made between the Minister and the National Chief on November 27, 2007, includes the following statement:

"The National Chief will be engaged in the process for recommending members of the tribunal in a manner which respects the confidentiality of that process."

Clarification of the roles of the Minister and the National Chief in the process for appointment was required in order that justices who may consider volunteering for an appointment could be satisfied that the process does not compromise, in fact or as a matter of perception, the adjudicative role played by members of the Tribunal.

2. Concerns for independence arise out of the governance arrangement put in place by the establishment of the Registry of the Tribunal. It is a

Department, listed under the *Financial Administration Act* as falling under the authority of the Minister of Indian Affairs and Northern Development as the “appropriate Minister”.

In the policy-based specific claims process, it is the Minister of Indian Affairs and Northern Development who ultimately determines whether a specific claim will be accepted for negotiation, or rejected. Rejection establishes a basis for taking the specific claim to the Tribunal.

The departmental affiliation of the Registry with the Ministry may be seen by some as compromising Tribunal independence. This is, in part, because the governance arrangement establishes the Registry as the entity with exclusive control over funds voted by Treasury Board to support the operation of the Tribunal. The Registry also exercises control over all other resources required by the Tribunal to conduct its operations. This, in addition to raising a concern over the perception of independence, conflicts with the above-referenced authorities of the Tribunal under the *Act* with respect to rules governing the work of the Tribunal, the management of its internal affairs, and the duties of its staff.

3. The information available to the Steering Group on the workload of the Tribunal was limited, and not adequate to support even the most basic assessment of the demands that would face justices as Tribunal members.
4. Due to the inability to perform even the most basic workload assessment, it was not possible to identify the physical and human resources, and related costs, as required to support the work of the Tribunal.
5. The *Act* does not expressly assure that the tenure of a Tribunal member may only be removed for good cause.

The foregoing are matters that had to be taken up with senior government officials.

Also apparent was the need to assess:

1. The likely demands on the time of members of the Tribunal. This is required in order to assess the optimal length of term for full-time appointments, and whether part-time appointments are practical. Information on the nature and scope of proceedings before the Tribunal is required, in order that potential conflicts between work as justices of the Courts, and work as Tribunal members, be identified.
2. In light of the assessment of workload, an assessment of the adequacy of the physical facilities to be used by the Tribunal, employment roles, technological support, and generally all resource needs and associated costs was required.

The Tribunal members must establish rules, including the rules of procedure that govern proceedings before the Tribunal. Clear and comprehensive rules of practice and procedure are necessary to ensure substantive and procedural fairness to all participants in proceedings before the Tribunal.

The objective of the present members of the Tribunal has been to carry out the tasks identified above, and to report to their Chief Justices, in order that, in turn, informed decisions can be made by those justices who may consider participation as members of the Tribunal.

We believe it would be unwise to open the Tribunal for the filing of claims until we can report fully on the status of all matters set out above. It will then be possible to determine whether the judicial complement, as contemplated by the Act, will be filled.

III. ACTIVITY REPORT: NOVEMBER 27, 2009 - MARCH 31, 2010

Although appointed last November, the holiday season and prior judicial assignments militated against a significant contribution of time to Tribunal matters until early spring 2010.

Lessons learned since our appointments are instructive on questions around the efficacy of part-time service on the Tribunal, and demands associated with full-time participation. Delay, due to the challenges of the transition away from judicial work and participation in the Tribunal is a factor to be considered in determining whether part-time service on the Tribunal is practical and efficient, and on the duration of full-time appointments.

We have requested, and received, further information on both the number and potential magnitude of claims that qualify for filing. While this information helps toward an assessment of workload, we have concluded that it will not be possible to assess future workload until the Tribunal commences operation. There are, at present, at least 74 claims that qualify for filing with the Tribunal on the basis of rejection by the Minister. There are 577 claims in the process administered by the specific claims branch of the Ministry. Of these, 181 are categorized as in "active or inactive" negotiation. There are 396 claims at various stages of assessment. Historical acceptance/rejection rates suggest that a significant number of these may, based on rejection, become eligible for filing with the Tribunal. As of October 2011, as many as 87 claims could become eligible based on failure to conclude a settlement after three years from the date of acceptance.

We have consulted extensively with persons experienced in the process before the Specific Claims Branch of the Ministry, and before the Indian Specific Claims Commission. This has given us a sense of the expectations of claimants, their political representatives, and government personnel with a past history of involvement in specific claims.

It was necessary for us to gain an understanding of the machinery of government. This includes policies, processes, and authorities that have a bearing

on the resourcing and administration of the Tribunal. This has informed our ability to consider the implications of the existing governance structure for the reality and appearance of Tribunal independence, and to propose measures to address any concerns. We have engaged with senior government officials and others to assist us toward the resolution of concerns of this nature.

We requested clarification with respect to the above-mentioned paragraph of the Political Agreement from the AFN, and from Ministers of the Crown. The Minister of Justice, by letter dated August 3, 2010, has provided the sought-after clarification. We are reassured by the contents of his letter.

Our concerns over governance and administration of the Registry and staff are the subject of ongoing discussions between the Tribunal and senior government officials. Our discussions address a matter of principle, independence, and practical aspects such as the use of resources provided by the Provinces for the support of the judiciary acting as Tribunal members.

Central to the government's view on the functioning of the Tribunal was an assumption that resources provided by the Provinces would be available to Tribunal members. We understand that officials from the Department of Justice are now in discussions with senior officers of the Provincial departments of the Attorney General with respect to the use of support resources provided by the Provinces. As a back-up contingency plan, additional space adjacent to the present Registry and Tribunal offices has been secured.

Prior to our appointment, 18 Registry staff positions had been identified. Of the 11 that have been filled, 10 employment roles relate predominantly to the corporate obligations of the Registry. These include the acquisition of materials, development of computer software, and compliance with policies governing procurement and expenditures. Some roles are directed to reporting on expenditures, administration of federal workforce policies, and staff performance. Only one filled position is directed to the future adjudicative work of the members of the Tribunal.

Some aspects of the job descriptions prepared for front line Registry officers were not appropriate to that role. The tasks set out in these job descriptions could have led to inappropriate communications with claimants. Work is underway toward the preparation, classification, and posting of revised employment roles.

No provision has been made to date for the funding of employment roles that are necessary for judicial support. These include administrative assistants, law clerks, and legal counsel. Preparatory work to define those roles and related qualifications is in progress. Until these positions are filled we will lack the necessary support for the adjudicative work of the Tribunal. We must be permitted to participate in the process for selection of staff to fill these positions.

A comprehensive draft of the Rules of Practice and Procedure has been prepared and posted on the Registry website in both official languages. Submissions have been received from numerous interested persons and organizations. An advisory committee has been appointed pursuant to subsection 12(2) of the *Act*, and we are engaged in consultation with the advisory committee toward the further development and completion of the Rules.

Senior Registry personnel were, prior to our appointments, committed to electronic filings in the Registry, and paperless hearings. We agree with this objective, with some qualifications. Court officials, Tribunal officials, judges and Tribunal members in the Federal Court, Superior Courts, and other tribunals, report that paperless hearings, while desirable, are difficult to achieve. We are optimistic that paper may be kept to a minimum, and that electronic filings and paperless hearings will be substantially achieved. The software is under development, and any additional hardware required for implementation will be identified and obtained.

There was no provision in the Treasury Board vote for funds to reimburse the Tribunal members for their travel and accommodation expenses. The travel, accommodation and incidental expenses have been substantial, as none of the Tribunal members are Ottawa residents. Arrangements had to be made to assure the reimbursement of Tribunal members' expenses by the Office of the

Commissioner for Judicial Affairs, and, in turn, the recovery by the Office of the Commissioner from the Registry. This was not provided for in the financial projections and hence did not appear as an item in the Treasury Board vote. These expenses must continue to be recoverable under sections 56 and 57(3) of the Judges Act, the normal mechanism for reimbursement of judicial expenses when, at the request of government, they work on matters outside of their regular judicial duties

As the Treasury Board vote of funds for the Registry was based on a projection that did not take account of the possibility that further office accommodation may need to be secured, and reconfigured, that staff must include judicial support staff, or that expenses of judges must be reimbursed, we are working with the Registrar on an assessment of funding needs and a submission to Treasury Board for the remainder of the current fiscal year, and the fiscal year commencing April 1, 2011.

IV. REMAINDER OF CURRENT FISCAL YEAR, AND 2011-2012 FISCAL

We hope to complete the work necessary to open the Registry for the filing of Specific Claims, and commence case management, by the end of the first quarter of the 2011 calendar year. This work includes the completion of the Rules of Practice and Procedure, the completion of the software and hardware required for electronic filings and hearings, staffing of employment roles directed to the support of judicial members of the Tribunal, and the identification and development of necessary office accommodation and hearing venues.

Since we received the Minister of Justice's letter dated August 4, 2010, we have commenced a dialogue with senior government officials in the Department of Justice over the following concerns:

1. the present association of the Registry and the Tribunal with the Ministry of Indian Affairs and Northern Development;

2. the need for the adoption of a governance and administrative model, and the definition of the respective authorities of the senior administrator of the Registry, and the Chairperson of the Tribunal, that remove any apparent or real conflict. There is an existing model, in particular the Courts Administration Services Act. This establishes corporate governance in the areas of funding, human resources, and accountability, on terms that protect the independence of the Federal Court, and the role and authority of the Chief Justice of that court. A similar model would be appropriate for Tribunal governance;
3. the matter of the proposed use by the Tribunal of resources provided by the Provinces for the support of the Superior Court judiciary;
4. an appropriate job description for the senior administrator of the Registry and appropriate qualifications for that position. The present statement of qualifications does not ensure the employment of a senior administrator with experience in the functioning of adjudicative tribunals. This position calls for a person with an understanding of legal principles that apply to the operation of courts. These include principles of judicial independence as enshrined in the common law of Canada, and as reflected in provisions of the Judges Act governing reimbursement and accountability for expenses incurred by the judiciary while serving on federal commissions of inquiry and tribunals.

It is vital that this dialogue continue during this fiscal year, and beyond. This does not mean that commencement of Tribunal operations turns on a full resolution of our concerns. However, physical plant requirements and the employment of Registry personnel, with appropriate qualifications, are necessary for the commencement of Tribunal operations.

V. MEMBERSHIP OF TRIBUNAL

Subsection 6(2) of the Act calls for a roster of six to eighteen Superior Court judges to act as members of the Tribunal. Subsection 6(4) calls for the appointment

of any number of part-time members, or combination of full-time and part-time members, with the restriction that the combined time devoted to Tribunal duties must not exceed the combined time that would be devoted by six full-time members.

Subsection 7(1) of the Act stipulates that each member be appointed for a term not exceeding five years. Subsection 7(2) provides that a member is, on expiry of the first term of office, eligible for re-appointment for a further term.

The enactment of the Specific Claims Tribunal Act was accompanied by amendments to the Judges Act to provide for three additional appointments to the Superior Court of British Columbia, two to the Ontario Superior Court, and one to the Superior Court of Quebec. While appointments to the Tribunal are not limited to justices from these three courts, it appears that the companion amendments to the Judges Act are intended to reflect, generally, the regional sources of known and anticipated specific claims. We note that at least 40% of specific claims that qualify for filing with the Tribunal arise in British Columbia alone.

For reasons explained in this report, the names of the present members of the Tribunal were put forward by their respective Chief Justices. Each member was appointed for a one year term.

It is not, at present, possible to fully assess the demands on members of the Tribunal.

Much of the work of the present members of the Tribunal has been directed to the creation of foundation for operations that is practical and efficient, and that operates, in reality and perception, independently of interested parties. This work, which may only be carried out with the active participation of government, has not been completed.

If it were assumed that the Registry and Tribunal were fully functional as of today, questions would remain in the following areas:

1. the availability of Superior Court justices from each region, willing to volunteer for appointment to the Tribunal;
2. in relation to item #1, above, the efficacy of part-time service on the Tribunal, and concerns that may arise over commitment for a five-year term.

It is not possible, based on the information presently available, to assess whether part-time service on the Tribunal is practical, or efficient. It is not infrequent that case assignments, whether to justices serving in that capacity, or as members of a tribunal, do not feature a fixed date at which the demands on the time of the assigned member will be known, and do not, at the commencement of the assignment, have a termination date. The scheduling of pre-trial case management, including the hearing of applications and trials, can be complex. This may be rendered more complex by the need to coordinate similar attendances that arise in proceedings before the Tribunal. This would apply where Tribunal membership is part-time, and to a lesser extent if full-time. This is because judicial assignments do not, necessarily terminate as of a known date. It has been the experience of the three present members of the Tribunal that all have remained seized of matters assigned to them prior to their appointments to the Tribunal. This is unavoidable.

It will not be possible to assess the workload demands of the Tribunal until sometime after the Registry commences receiving claims and case management by Tribunal members proceeds.

As discussed above, work is in progress to put in place the elements that are essential to the operation of the Tribunal. These include the completion of the rules, the electronic Registry, staff qualified to support Tribunal members in their adjudicative role, and office/hearing accommodation. It is much to be desired that other concerns be addressed. The latter, however, need not hold up the commencement of operations. We hope that commitments to maintain the dialogue on the latter, based on respect for our concerns, will be made by appropriate government officials.

The basic conditions for commencing Registry and Tribunal operations will not be in place by November 27, 2010. We will not be in a position to assess the resources required to manage the workload until well into the 2011-2012 fiscal year. The present members have, accordingly, advised their respective Chief Justices of their willingness to continue the work for another year. Justice Slade, Chairperson, and Tribunal member Justice Smith would consider longer term commitments, in order that further recommendations on the composition of the Tribunal could be made following the end of the 2011-2012 fiscal year. If re-appointed, we wish our present roles on the Tribunal to be continued. Our ongoing commitment to continue this work is, of course, contingent on assurances that the Tribunal's reasonable resource needs will be addressed, in compliance with the generally applicable rules governing budgets, expenditures, and the provisions of the Judges Act.

The reason for our proposal for an ongoing, time-limited, engagement is largely the same as it was prior to our appointments. It is vital that we be in a position to report fully to our Chief Justices, in order that they may report to members of our Courts, on all matters that are likely to be of concern when considering participation in the important work of this Tribunal. To achieve this, an assessment of workload demands, and of all resources necessary to meet those demands, would be undertaken after the Registry commences the receipt of claims, and Tribunal members have gained experience in the management of claims toward their ultimate resolution. We expect that this will establish a basis for recommendations on the make-up of the Tribunal before the end of our ongoing, time-limited engagement, and for the longer term beyond that date.

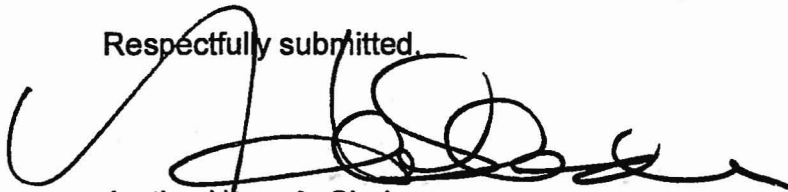
There is a present need to assess the adequacy of funding for Tribunal support for the current fiscal year. The review must extend to the 2011-2012 fiscal year. This must take into account staffing, the provision of office and hearing room facilities, and other support for judicial members of the Tribunal. Committed funding must take account of both operating and capital needs. It should be possible, sometime around the middle of the next fiscal year, to prepare a submission for a longer term.

The Tribunal will need ongoing cooperation and support from senior officials of affected ministries.

VI. CLOSING COMMENT

This report is not intended to level criticism for measures taken prior to, or since, our appointments to the Tribunal. Our involvement in this past year have brought perspectives and concerns to the fore that could only have been identified with the direct involvement of justices and the support of our Chief Justices.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Harry A. Slade', written over the text 'Respectfully submitted,'.

Justice Harry A. Slade
Chairperson, Specific Claims Tribunal

