ANNUAL REPORT

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

September 30, 2013

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.
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> (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.
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> (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 2012-13 fiscal year.

Tribunal Membership

The present Members of the Tribunal include those initially appointed by Order in Council on November 27, 2009. They are Justice Johanne Mainville, Quebec Superior Court, Justice Patrick Smith, Ontario Superior Court and Justice Harry Slade, British Columbia Supreme Court.

The initial appointments were for a term of one year. These were best characterized as interim appointments. This gave us time to:

1. assess the institutional framework for the operation of the Tribunal, to ensure tribunal independence,
2. identify and implement steps to establish adequate physical plant, support staff and technological support,
3. commence the development of the *Tribunal Rules of Practice and Procedure*.

The *Act* provides for the appointment of Superior Court Justices to a roster, from which a further appointment is required to establish the Justice as a Member of the Tribunal.

The *Act* provides for the appointment of up to six full-time Tribunal Members. The judicial complement may be comprised of up to eighteen part-time Members, or a combination of full and part-time Members, provided that the time expended by all appointed Members does not, in the aggregate, exceed six full-time equivalents.

As the end of the term of the interim appointments approached, Justices Mainville, Smith and Slade volunteered for reappointment. All were appointed to the roster. Justice Mainville was appointed from the roster for a term of one year. Justice Smith was appointed for a term of two years. Justice Slade was reappointed, as a Member and Chairperson, for a further five years.

On December 20, 2011, Justice Mainville was appointed for a further part-time term of five years. On December 13, 2012, Justice Patrick Smith and Justice W.L. Whalen were both appointed as part-time Members for terms of four years.

There is, at present, one full-time Tribunal Member and three part-time Members. The former is from British Columbia. Two are from the Ontario Court and one from the Quebec Court.

There are two other Superior Court Judges on the roster, both from the British Columbia Supreme Court.

Registry Personnel

The Registry of the Tribunal is a Department within the meaning of that term in the *Financial Administration Act*. The Registrar, as the senior officer of the Registry, is the Deputy Head of the Department.

Mr. Raynald Chartrand is the Registrar. Mr. Chartrand also serves as Registrar and Deputy Head of the Competition Tribunal.

The Registry presently has a staff of eleven. Their roles include finance, accounting, tech support, claims registry services and legal services.

From time to time, several members of the staff provide services to other federal government departments. This cost saving measure was taken at the initiative of the Registrar.

Mr. Chartrand has also arranged for the services of a registry officer employed at the Federal Court in Vancouver. Approximately one-half of the filed claims arise in British Columbia and Alberta. The assistance of Vancouver Federal

Court support staff, and the availability of Federal Court hearing rooms, is of considerable value.

The Registry is now managing a total of 42 active claims. The Tribunal will require the support of additional registry staff in the very near future.

The Registry has a website, www.sct-trp.ca.

The Registry

In the Annual Report dated September 30, 2011, the process for the creation of the *Tribunal Rules of Practice and Procedure* was explained. The *Rules* were published in the Canada Gazette on June 22, 2011.

As the official publication of the *Rules* was imminent, the Tribunal directed the opening of the Registry for the filing of claims on June 1, 2011.

The Tribunal web site contains information on all filed claims. This includes all filed documents, dates of scheduled hearings, formal orders, and reasons for decisions in both pre-hearing applications and hearings on the merits.

The number of filed claims by province is set out below:

- New Brunswick: 1
- Quebec: 8
- Ontario: 2
- Manitoba: 3
- Saskatchewan: 5
- Alberta: 9
- British Columbia: 14

Claims Management

As required by our *Rules*, all claims come under case management by an assigned Tribunal Member following the filing of the Response of the Crown.

A significant difference between actions brought in the Provincial Superior Courts and claims brought before the Tribunal has to do with factors bearing on whether the matter will proceed to a hearing on the merits.

Only a small percentage of actions brought in the Superior Courts proceed to trial. Most settle without placing long term demands on judicial resources.

In the Courts, parties often settle cases in the course of case management. This may occur after a judge assists the parties in identifying the central issue and providing a general assessment of areas of strength and weakness in the position of the parties. Case management judges often encourage negotiations, including the use of alternate dispute resolution.

Although the *Rules* of the Tribunal provide for mediation, it seems unlikely that the pattern in the courts will emerge, at least in the near term, with claims before the Tribunal. Claims become eligible for filing in the Registry only after they have been submitted to the Minister under the process administered by the Specific Claims Branch (SCB) of the Ministry of Aboriginal Affairs and Northern Development. The SCB assesses the evidentiary basis for the claim, and refers the matter, with its report, to the Department of Justice for an opinion on whether the evidence points to a failure on the part of the Crown to meet its legal obligations. If the Minister does not accept the claim for negotiation or the claim is accepted and three years pass without a resolution, the claim may be brought before the Tribunal. If the Crown and a claimant become disposed to enter negotiations after

a claim is filed with the Tribunal, a decision at the Ministerial level may be required before negotiations could take place.

We were, at an early stage, given to understand that the SCB envisioned the Tribunal basing decisions on the limited evidentiary record established in the SCB process leading to Ministerial acceptance for negotiation or rejection. This, if so, was ill conceived. In practice before the Tribunal, both parties undertake research and consult experts to ensure that all relevant documents are disclosed. This is costly and time consuming, but unavoidable.

The objectives of claim management by the presiding Tribunal Member include the following:

- Identification of issues of fact and law, and related positions of the parties.
- Identification of persons other than the Claimant and Crown that may be affected by a decision of the Tribunal, for the purposes of section 22 of the *Act.*
- Identification of Pre-Hearing Applications by either party.
- Exploration of the potential for without prejudice negotiation, including mediation.
- Identification of the sources of evidence, including historical documentation, oral history, other testimony, and expert opinion evidence.
- Preparation of Common Books of Documents and Legal Authorities.
- Development of an Agreed Statement of Facts.
- Exchange of written memoranda of fact and law.
- Hearings logistics, including hearings in the community of the Claimant.

While the pace of progress with claims before the Tribunal is expeditious compared to litigation in the courts, the necessary pre-hearing preparation can rarely be completed in 12 months, and will often take longer.

There is much to recommend the conduct of hearings in the community of the Claimant. Access to a fair and culturally sensitive process contributes to the confidence of the Claimant community and the public generally in the work of the Tribunal. Parties need to know that they have been heard, whatever the outcome. Several claims that have gone to hearing have been heard in the claimant's respective communities.

The first claim heard, that was brought by the Osoyoos Indian Band, concluded on May 31, 2012. The Tribunal released its decision on July 4, 2012. The decision is published on the Tribunal web site, www.sct-trp.ca.

These claims have been heard to date:

1. *Osoyoos First Nation v HMQC*
2. *Kitselas First Nation v HMQC*
3. *Williams Lake Indian Band v HMQC*
4. *Popkum First Nation v HMQC*

Pre-hearing applications have been heard on numerous claims, other such applications are pending. These include challenges to the jurisdiction of the Tribunal, applications for intervention and party status, and applications for the consolidation of claims for hearing.

A decision on the merits of the Kitselas claim was released on February 19, 2013. Decisions are pending in the Williams Lake and Popkum claims. Decisions in jurisdictional applications in the Doig River and Blueberry River claims are also pending.

The Crown, Respondent, has filed an application for Judicial Review of the Tribunal decision in the Kitselas matter. This proceeding in the Federal Court of Appeal has not yet been set down for hearing.

Other Tribunal Activities

Members of the Tribunal are engaged in the revision of the *Rules*, and the issuance of Practice Directions, based on the experience gained to date on the practical needs of claims management.

Members of the Tribunal have attended as presenters at numerous conferences to provide information on the make-up of the Tribunal, its jurisdiction, the process before the Tribunal, and the issues that arise in filed claims.

Resources

Support Services

The Registry continues to achieve economies by sharing staff with other government departments. This is less the case than in the past fiscal year, as the volume of claims filed with the Tribunal has increased. It is anticipated that filings will reach a level during the current fiscal year that will require the full time dedication of existing staff and additional staff.

The Registry worked closely with Central Agencies Ministers Office to obtain funding to continue to process claims efficiently. A Treasury Board submission requesting funding for another three years was approved on September 26, 2013.

Judicial Resources

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.

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.

This concept of one-half of the Tribunal members being appointed from British Columbia appears to be based on a valid assumption since 32 percent of claims filed thus far arise in British Columbia. If claims from Alberta are included, the percentage is 51, or approximately one-half.

In our Annual Report dated September 30, 2011, it was noted that there were no Federal/Provincial agreements to provide for the use of provincial superior court premises and staff by Tribunal members. This was the case when the first appointments were made to the Tribunal in November 2009, and was not resolved until August 29, 2012. The Registrar now has entered into agreements with the provincial authorities in British Columbia, Ontario and Quebec. These provide for the reimbursement of expenses incurred by the provinces due to the appointment of judges to offset the time expended by the Tribunal members.

Unfortunately, the number of Tribunal members falls far short of the numbers contemplated by the *Act*, namely, the equivalent of the combined services of six full-time judges. This also was the number of additional judicial

positions that were created by amendments to the *Judges Act*. This is the situation at present:

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

In other words, the current membership is the equivalent of two and one-half judges rather than six.

This creates a problem that is particularly acute for British Columbia and Alberta, which are covered by only one judge, rather than the three that were anticipated to cover claims from the region that generates approximately one-half of the claims. Servicing these claims with members from the Ontario and Quebec Courts is inefficient and wasteful. At present there is no alternative as we have only one member from the British Columbia Court.

We understand that appointments of judges who volunteer to serve on the Tribunal by the Minister of Justice are made with the consent of his or her Chief Justice. The former chief justice of the British Columbia superior court and one of its judges recently consented to the judge's part-time appointment to the Tribunal, which the Chairperson would welcome. However the Minister has not acted on this recommendation. Of course, that is the Government's prerogative but even one additional part-time appointment from British Columbia would be of great assistance to the Tribunal in fulfilling its statutory responsibilities.

Pursuant to Section 40(1) of the *Specific Claims Tribunal Act* we advise that the Tribunal will not have "a sufficient number of members, to address its case load" in the following fiscal year. We do not need the full complement of SCT members, or equivalents, at present. We could make do with four additional part-time members, ideally two from British Columbia, one from Quebec, and one from Ontario.

There is a further factor that inhibits the appointment of additional judges as members of the Tribunal. The mere creation of additional judicial positions does not provide additional judges to the courts if the Government does not actually appoint judges to fill all vacancies. It is understandable that a chief justice would be reluctant to consent to a judge being relieved of judicial duties to serve on the Tribunal when their court is already short of judges and struggling to meet its own workload.

Part-time appointments present special scheduling challenges for both the Tribunal and the courts. In our first Annual Report (2010) we stated that it was not possible, based on the information then available, to assess whether part-time service on the Tribunal is practical, or efficient. We noted that 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 an assignment, have a termination date. The scheduling of pre-trial case management, including the hearing of applications and trials, can be complex.

Our current experience is that those anticipated concerns are very real. Part-time, in the cases of Justices Mainville, Smith and Whalen is structured as

a six-month rotation with their respective courts. Justices Mainville and Smith are with the Tribunal from January to June. Justice Whalen is with the Tribunal from July to December.

The process established by our *Rules of Practice* requires that the member assigned to a claim presides over pre-hearing management and the ultimate hearing of the claim. This provides for efficiency in moving a claim from filing through to a hearing on the merits and a decision. The six month rotation model for part-time members impedes the progress of claims as the first member assigned to the claim will not be available for case management or the ultimate hearing for long periods of time. Claims end up being handled by two or more members. This results in delay, duplication of effort, and increased costs.

However, this is a reality that we must accommodate while doing everything possible to maintain public confidence in this process. Additional appointments are crucial in this respect and a small price to pay in order to avoid disappointing the expectations of First Nations that many of their historical grievances will be addressed and resolved in a fair and timely manner.

Expectations, Reality, and the Future

The Tribunal now has over two years of experience with the receipt and management of claims, including the trial of preliminary issues and claims on their merits.

Our expectation was that the Tribunal would be deluged with claims. This was based on information that there were in excess of 400 eligible claims. The pace of filings was, however, slow at the outset.

It is not surprising that potential claimants would hold off until the process before the Tribunal unfolds, and the outcomes become a matter of record. The pace of filings has increased in recent months.

The preamble to the *Act* calls for a Tribunal designed to respond to the task of adjudicating claims "in accordance with law and in a just and timely manner". It has taken longer than anticipated to take claims from their filing date through to hearings. Although the process established by our *Rules* reduces the potential for costly and time consuming pre-hearing applications, some litigation like processes are unavoidable. Of these, the most significant is the production of relevant documents. In the process administered by the Specific Claims Branch the parties are not obligated to make full disclosure. As the documentary record is generally in the possession of the Crown, counsel for the Crown have a heavy burden to locate and produce Crown documents that may be relevant. The resulting delays are not inordinate given the magnitude of the work.

We are pleased to report that our process has not, in practice, become the war of attrition so often seen in the courts.

Our hope at this early stage is that the Tribunal's process is seen by the public, including First Nations, as fair, and the outcomes just. Of course we cannot conduct a poll. Informal communications suggest that we are on the right track.

Provision had been made by Government for the financial resources presently needed to enable us to function with the required independence and efficient handling of claims. An adequate complement of judicial members, is

necessary if we are to achieve the important objective of government in advancing the legislative proposal that culminated in the introduction of the *Act*, and of the will of Parliament in enacting it into law.

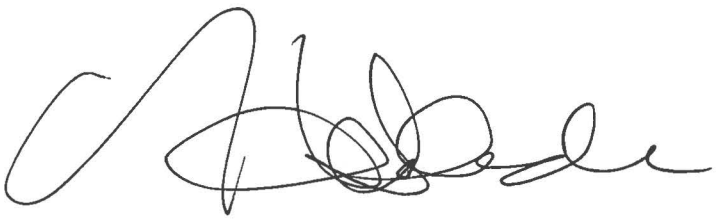
Five Year Review

Section 41 (1) of the *Act* calls on the Minister to undertake a review of the mandate and structure of the Tribunal and of its efficiency and effectiveness of operation within one year of the fifth anniversary of the coming into force of the *Act*.

The *Act* came into force on October 16, 2008. The commencement date for the conduct of the Ministerial review is October 16, 2013.

We would be pleased to participate in the review by explaining our process as it plays out in practice and advising of changes which may contribute to the fulfillment of the Tribunal's mandate. Dialogue among First Nations representatives, Ministerial Officials, and the Tribunal, is essential. The personal attention of both the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development is much to be desired.

Respectfully submitted,



Justice Harry A. Slade
Chairperson, Specific Claims Tribunal