ANNUAL REPORT

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

September 30, 2014

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 2014-15 fiscal year.

The primary focus of this report is on the statement called for by section 40(2).

The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. Nor is it, due to the imminent coming into force of section 376 of the *Economic Action Plan 2014 Act, No.* 1, which provides for the creation of the Administrative Tribunal Support Services Canada (ATSSC), assured of its ability to continue to function with adequate protection of its independence. These concerns have been raised with the Minister of Justice and the Minister of Aboriginal Affairs and Northern Development. There has been no adequate response from Government.

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.

I. Present Tribunal Membership

The present Members of the Tribunal include two of those initially appointed by Order in Council on November 27, 2009, and one appointed by Order in Council on December 13, 2012. They are, respectively, Justice Johanne Mainville, Quebec Superior Court, Justice Harry Slade, British Columbia Supreme Court, and Justice Larry Whalen, Ontario Superior 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 *Specific Claims Tribunal Rules of Practice and Procedure* (*Rules*).

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. Justice Patrick Smith returned to the Ontario Superior Court in July, 2013 and has not been available for assignments since. He officially resigned from the Tribunal as of June 30, 2014.

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

II. 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 liability.

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.

It seems unlikely that the Minister would reconsider the non-acceptance of a claim. I was, 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 as s 35 of the *Act* bars future claims on substantially the same facts at the conclusion of the claim before the Tribunal.

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. All but one of the claims that have gone to hearings on the merits have been heard in or near the claimant's communities.

III. Judicial Review

There is no appeal from decisions of the Tribunal. The *Act* does, however, provide for Judicial Review in the Federal Court of Appeal.

The Crown, Respondent, has filed an application for Judicial Review of the Tribunal decision in the Kitselas and Williams Lake matters. The Federal Court of Appeal in the Kitselas matter upheld the decision of the Tribunal, and no leave for appeal to the Supreme Court of Canada was sought. The Crown, Respondent, has filed an application for Judicial Review of the Tribunal's decision in the Williams Lake matter on March 28, 2014. The date has not yet been set for a hearing of the matter in the Federal Court of Appeal.

IV. Case Load

In the Annual Report dated September 30, 2011, the process for the creation of the *Rules* 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.

There were fewer than expected claims filed in the first year of operation. The pace has increased. I anticipate many more claims following the dismissal of the Crown application for Judicial Review of the *Kitselas First Nation and Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 decision on June 5, 2014 in *Her Majesty the Queen in Right of Canada and Kitselas First Nation*, 2014 FCA 150, as this resolves a legal issue common to 80 percent of potential claims from BC and others from Quebec and the Maritimes.

The Tribunal now has 61 active claims: BC: 21, Alberta: 10, Saskatchewan: 11, Manitoba: 5, Ontario: 2, Quebec: 11, New Brunswick: 1.

To date there have been eight full hearings on liability, one hearing on compensation. Six decisions have been released on liability, one on compensation. Two hearings on liability were heard in September, and decisions are reserved. A hearing on liability is scheduled for February, 2015. There have been many more evidentiary hearings, particularly in Quebec and BC. Several more are scheduled in BC in October 2014, and Quebec early in 2015.

The time lag from filing to hearing is due largely to the time needed by the parties for documentary research and disclosure. The burden of this falls primarily to the Crown. The retention of experts is also a factor contributing to delay.

Several decisions have been released on applications brought by Claimants, the Respondent (Crown) and Interveners. Case Management Conferences are presently consuming much of the time of the members.

All but the claims most recently filed are under case management. These will be case managed after the Crown files Responses and Judges are assigned to the claims.

V. 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. The insufficient number of Judges appointed to the Tribunal and the increasing number of claims has significantly decreased the frequency of presentations. This is regrettable as the Tribunal is at an early stage of operation and the stakeholders and public should continue to be informed on its jurisdiction and process.

VI. Clearing the Present Case Load

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.

VII. 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.

The expectation that one-half of the Tribunal members would be appointed from British Columbia appears to be based on a valid assumption since 42 percent of active claims filed thus far arise in British Columbia. If claims from Alberta and Saskatchewan are included, the percentage is 69.

British Columbia has received only one additional appointment to make up for my absence. This took place four years after my appointment as a full time member of the Tribunal. There is little likelihood of another appointment from that Court until an additional appointment is made to the Court based on the amendment.

The Quebec Court received its appointment as provided for by the amendment. However, the Tribunal has only one part time member from Quebec.

The Ontario Court received its two additional appointments, but the Tribunal has only one half time judge from that Court. There is a Toronto based member of that Court willing to accept a full time appointment for a term of five years. I have asked the Chief Justice of the Superior Court to nominate him for appointment to the Tribunal.

In short, 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 W.L. Whalen	December 13, 2016	Part-time (one-half)

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

This creates a problem that is particularly acute for Western Canada, where more than two thirds of the claims originate. Servicing these claims with members from the Ontario and Quebec Courts is excessively costly and inefficient.

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.

VIII. Part Time Appointments

Part-time appointments present special scheduling challenges for both the Tribunal and the courts. In our first Annual Report (2010) I 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.

The scheduling of pre-trial case management, including the hearing of applications and trials, can be complex.

The management of Claims by the assigned judge calls for flexibility and availability to complete pre-hearing matters and schedule a hearing on the merits. Part-time, in the case of Justice Mainville is structured as a six-month rotation with her court. Justice Whalen, as a supernumerary Judge, sits one half the days of a regular judge.

There is, I understand, no other judge from Quebec willing to serve on the Tribunal.

The process established by our *Rules* requires that the member assigned to a claim presides over pre-hearing management and the ultimate hearing of the claim. This ensures the efficient movement of claims 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 member assigned to the claim may 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, these realities must be accommodated 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.

The Tribunal should presently have at least two full time members and a sufficient number of part time members to bring the number up to four full time equivalents. This could be achieved by the appointment of a full time member from either the Ontario or Quebec Court, plus several part-time members from all three Courts.

If a full time Ontario judge is appointed, regular attendance in Ottawa would not be necessary. Periodic attendance in Ottawa would be desirable. When not here the judge could work from her or his resident courthouse, as I do when in Vancouver. With the periodic attendance of Justice Mainville during her six month

rotation with the Tribunal, we would have a core group in Ottawa to meet the needs discussed above.

The Ontario commitment of two judges could be filled with the appointment of a full time member, plus Justice Whalen and one more supernumerary judge contributing their sitting commitments to the Tribunal. Both could work out of their resident courthouses, as does Justice Whalen at present. Some time should be spent in Ottawa.

With me, another full time and three part time members the Tribunal would have three and a half full time equivalents.

To make up the four presently needed, a number of regular or supernumerary judges from BC and Quebec could be appointed part time to take assignments on an *ad hoc* basis.

IX. Present Registry Personnel

The *Act* calls for a "Registry" in the National Capital Region. This is not a registry in the sense that judges would understand it. It is a Government department that provides staff and all other resources to the Tribunal. 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 until November 1, 2014, the effective date of the *ATSSC*.

The Registry presently has a staff of eleven, with additional external resources contracted on an *ad hoc* basis. 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.

The "Registry", as presently constituted under the *Act*, will no longer be required when the *Administrative Tribunal Support Services Canada Act* comes into force, as it, the "Service", is to provide support to the Tribunal and 10 others. The principal office of the Service will be in the National Capital Region, although it may have offices elsewhere in Canada.

The prominence in number of claims from BC, Alberta and Saskatchewan (Approximately 69 percent) would justify a substantial relocation of Tribunal operations to Vancouver.

In the foreseeable future the centre for Tribunal operations will likely remain in Ottawa. A core group of members in attendance there is required, although not necessarily full time. I will often need to be present in Ottawa to deal with administrative matters. All members should spend some time in Ottawa. This would enable the sharing of experience, expertise, and the mutual support that nourishes us in our work. It would also provide a back up for me when absent and the opportunity for succession planning.

X. 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, of its efficiency and effectiveness of operation and of any other matters related to the *Act* that the Minister considers

appropriate within one year of the fifth anniversary of the coming into force of the *Act*. This review process is to give First Nations an opportunity to make representations.

The *Act* came into force on October 16, 2008. The commencement date for the conduct of the Ministerial review is at the latest October 16, 2014.

I 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. It is now 15 days away from the day upon which the review must commence.

XI. ***Administrative Tribunals Support Services Canada***

In February 2014, the Tribunal was advised by the Assistant Deputy Minister of Justice that the back offices of 11 federal tribunals, including the Tribunal, would be merged to achieve cost savings and efficiencies. Consultation with the Tribunal in this regard was so time limited as to be meaningless. Moreover, there was no consultation with First Nations before the Bill to create the Service was introduced, despite the requirements of section 41 of the *Act*.

Nonetheless, the *Act* was amended, eliminating the Registry (section 10) and eliminating the ability of the Tribunal Members to make Rules of respecting the duties of staff (section12). The Tribunal will no longer have a dedicated vote of funds. The resourcing of the Tribunal will be entirely in the discretion of the Chief Administrator of the *ATSSC*.

Concerns over the impact of the *ATSSC* on institutional and judicial independence of the Tribunal, both in fact and as perceived, and the lack of consultation with First Nations have not been addressed.

Respectfully submitted,

Justice Harry A. Slade
Chairperson, Specific Claims Tribunal