

ANNUAL REPORT

For Presentation to the Honourable Carolyn Bennett
Minister of Indigenous and Northern Affairs Canada

September 30, 2016

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 2015-16 fiscal year.

II. NEW MEMBERS

We welcome three new members who were appointed to the Tribunal in May 2016. It took well over one year after nomination by their respective Chief Justices for the appointments to be made.

Two members, Paul Mayer J. (Quebec) and William Grist J. (British Columbia) were appointed part-time for a term of two years. Barry MacDougall J. (Ontario) was appointed part-time for a term ending July 2017, which date coincides with his reaching mandatory retirement age.

Justices MacDougall and Grist are supernumerary judges, and are available to the Tribunal for all of their half-time annual service commitments.

The short terms of the appointments is such that the concerns over the adequacy of judicial resources remain.

III. MEMBERS

1) Current Tribunal Member Complement

Tribunal Member	Term Expiry	Full-time / Part-time
Justice H. Slade	December 11, 2020	Full-time (Chairperson)
Justice J. Mainville	December 20, 2016	Part-time
Justice W.L. Whalen	December 13, 2016	Part-time
Justice P. Mayer	May 18, 2018	Part-time
Justice W. Grist	May 18, 2018	Part-time
Justice B. MacDougall	July 31, 2017	Part-time

Justice Larry Whalen's appointment to the Tribunal expires in December 2016. He has volunteered for reappointment with the approval of Heather Smith

C.J. I have asked the Minister of Justice to take his nomination forward to Cabinet before his present term expires.

Justice Mainville's appointment expires in December 2016. As she has served for two terms the *Act* does not permit her further reappointment.

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

IV. 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.

V. 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. As far as I know, only two of the filed claims has settled, and those have not been fully concluded.

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.

VI. LIMITED AND SHORT TERM APPOINTMENTS

It typically takes two years or longer to move a claim from filing to conclusion. Some take considerably longer. When a member is appointed for a two year term, the continuity of his/her participation as a presiding member up to

conclusion is compromised early in the first year. The resulting problem is acute if the member has heard evidence, as closing submissions may have to be made before another member. In that circumstance, the Tribunal cannot ensure that there is full compliance with the principles of natural justice. If one or both parties will not agree, in advance, to one member hearing evidence and another hearing closing submissions and rendering a decision, the result may be delay awaiting the appointment of a member with a full term to serve. This can be ameliorated if the member may be reappointed for a second term, but of course this requires a willing judge and Chief Justice, and reappointment by the Governor in Council.

VII. WORKLOAD AND PROGRESS

1) Case Load, 2014-15

The 2015 Annual Report repeated what the 2014 Annual Report said:

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.
[emphasis in original]

2) Present Caseload

There is at present no current estimate of time to clear the backlog.

The Tribunal has a total of 72 claims, current to September 8, 2016. Their geographic distribution is as follows:

- 25 in British Columbia;
- 11 in Alberta;
- 13 in Saskatchewan;
- 8 in Manitoba;
- 3 in Ontario;
- 11 in Quebec; and,
- 1 in New Brunswick.

The claims generally arise out of reserve creation claims, treaties and administration of reserve lands or other Indian assets. Most allege a breach of the Crown's fiduciary obligations.

Some of the filed claims are, for various reasons, dormant. Of the 72, 55 are active and being case managed.

Our past experience suggests that any given claim requires approximately 18 Case Management Conferences (CMCs) to bring to a full hearing on the merits.

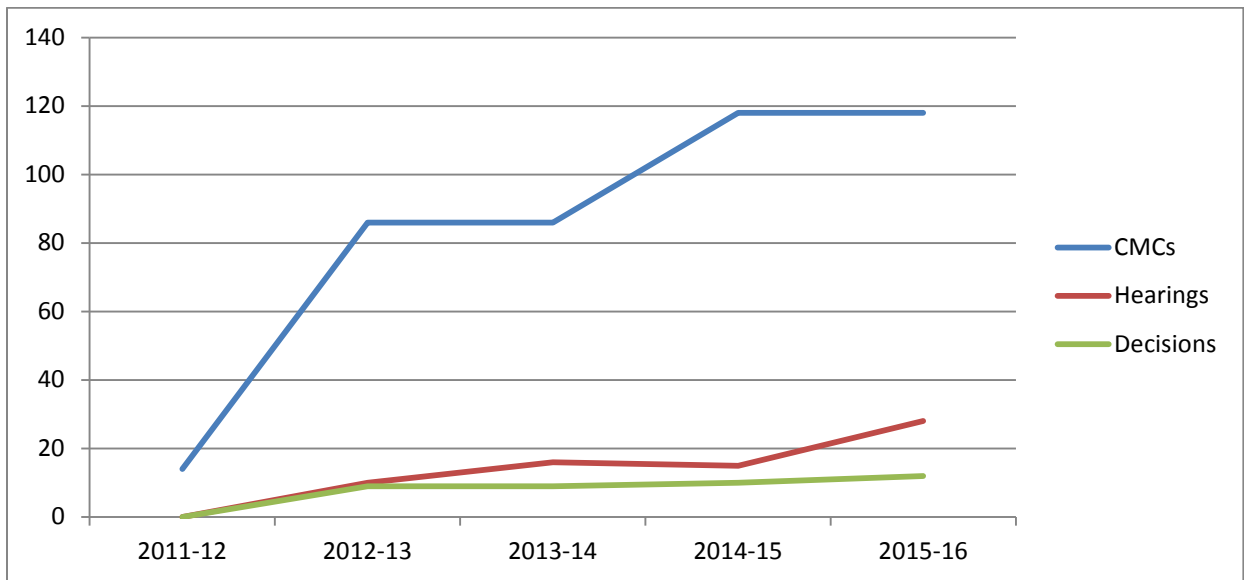
Procedural matters are addressed in CMCs. Since the Tribunal opened its doors in 2011, it has held a total of 510 CMCs current to September 8, 2016. There were 118 CMCs in the 2015-16 fiscal year, and 58 CMCs to date in fiscal year 2016-17. Most are conducted by teleconference.

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 28 hearings in the 2015-16 fiscal year, and 10 so far in fiscal year 2016-17. Oral history evidence and closing submissions are held in or near the Claimant's community.

3) Claim Assignments and Progress

Figure A below demonstrates the Tribunal's plateau in operations, when compared to its caseload, resulting from its inadequate resourcing:



Note: April 1, 2016 to September 8, 2016, the Tribunal has conducted 58 CMCs, 10 hearings and issued 7 decisions.

Before the appointments last May it was not possible to schedule hearings of claims approaching the required state of readiness.

Many of the 55 claims in active case management will be ready to proceed to hearing in the 2016-17 fiscal year.

VIII. AUDITOR GENERAL OF CANADA AUDITS

The Tribunal was consulted on two separate Office of the Auditor General of Canada audits:

1. The Governor in Council Appointment Process in Administrative Tribunals – released Spring 2016; and,
2. The Specific Claims Process – report is anticipated to be tabled in November 2016.

Findings in the first audit reflect and support the above concerns:

3.18 Two of the tribunals, the Specific Claims Tribunal Canada and the Competition Tribunal, have members who are sitting judges. The Minister of Justice is therefore responsible, together with the portfolio minister, for making recommendations for all appointments to the Specific Claims Tribunal Canada and for judicial appointments to the Competition Tribunal. Other stakeholders involved in these appointments are the chief justices of the superior courts, including the Federal Court, from which the proposed members are to be drawn. These chief justices recommend judges from their courts (if the judges themselves agree) to the Minister of Justice to sit on the tribunals. A separate agency, the Office of the Commissioner for Federal Judicial Affairs Canada, on behalf of the Minister of Justice, has responsibility for administering appointments of judges to the superior courts, including the Federal Court.

...

3.40 *At the Specific Claims Tribunal Canada, where members must be superior court judges, a 2014 analysis indicated that it required one additional full-time member and “a sufficient number of part-time members to bring the number up to four full-time equivalents.” Despite this need, which was confirmed by the Department of Justice Canada, no appointment was made to the Tribunal between 2012 and the end of our audit period. After the audit period, Tribunal officials told us that this need had increased to six judicial members. A shortage of appointees at this Tribunal means further delays in addressing First Nations claims in a timely manner. Tribunal officials told us they had to inform interested parties that the Tribunal could not confirm hearing dates due to the lack of available judges. [emphasis added]*

...

3.74 We concluded that issues remained in the timely appointment of qualified individuals being made to selected administrative tribunals, which affected continuity of service to Canadians. Many key positions have sat vacant for long periods. These delays affected decision timelines for tribunals, which in turn affected individual Canadians and other stakeholders. While the Privy Council Office has issued guidance on the appointment process, this guidance is not

available on its website and does not address all types of appointments or explain any exceptions to the process, such as the appointment of judges to tribunals.

The Tribunal presently has the equivalent of three and one half full-time members. Without further appointments the number will, at the end of December 2016, be reduced to two and one half and, in July 2017, two.

Despite the new appointments, the Tribunal lacks an adequate complement of members as needed to adjudicate claims in a timely manner.

There is an urgent need to engage with officials in the Ministry of Justice to address the chronic shortage of members. It is, in my respectful opinion, a systemic problem with its origin in the framework for appointments set out in the *Act*. Where judicial complements of the courts at statutory levels are not maintained the problems inherent in the application of the *Act* are exacerbated. This is particularly so in Ontario, Quebec, and British Columbia, as it is from those provinces that judges are nominated for membership in the Tribunal.

IX. STAFFING

Prior to the new appointments the Tribunal lacked adequate human resources. This was due in part to the absence of two of our Legal Counsel on maternity leave.

With the appointment of additional members, additional support staff are needed.

Staffing processes have been underway for quite some time. Thanks to the capable efforts of our Executive Director, we have recently secured more legal and research support staff, but are not back up to the number we had last fall. This may be ameliorated somewhat when staff return from leave.

X. FINANCIAL

The Administrative Tribunals Support Service of Canada (ATSSC) has earmarked funds for support of the Tribunal based largely on amounts drawn over the last few years. There is generally a surplus at fiscal year end. This has been due to the inability to service the caseload due to the lack of an adequate complement of members. Funding based on past years experience as a measure of need for the future may, with more members appointed, result in a shortfall. More claims will be heard, which means additional staff and hearing expenses.

XI. FIVE-YEAR REVIEW

The Tribunal received notice on October 16, 2014 from Minister Valcourt that the five-year review provided for by section 41 of the *Act* would soon commence. The Minister acknowledged the need for the Chairperson to play a role in the review process.

The Minister appointed Dr. Benoît Pelletier as his Special Representative in the conduct of the review.

Dr. Pelletier and his staff met with the Chairperson and Legal Counsel on February 20, 2015 to discuss the role the Tribunal could play in the review process.

At the next meeting, held on March 31, 2015, Dr. Pelletier informed us of concerns and proposals expressed in sessions with the Claimant community, other Aboriginal groups, and interested Departments of Government. He asked for the views of the Tribunal on these concerns and proposals, which included significant changes to the implementation of the Specific Claims Policy (Justice at Last).

Dr. Pelletier was given the Tribunal's Submission on May 15, 2015. This responds to stakeholder's concerns, and offers process alternatives which, if

implemented, should provide greater transparency at the stage of Ministerial review of claims and expedite and reduce the cost of proceedings before the Tribunal. The submission is posted on the Tribunal's website: http://www.sct-tp.ca/pdf/Submission-May_15_2015.pdf.

Very few of the stakeholder and Tribunal's concerns are met by the recommendations made by Dr. Pelletier. I am, with respect, not fully in agreement.

The government's intentions with respect to the five-year review are not yet known. The Minister's Report was, under the *Act*, due in October 2015. The delay has until recently been due to events beyond anyone's control.

XII. ADVISORY COMMITTEE AND SUMMARY PROCESS

The Tribunal's Advisory Committee was re-convened on May 6, 2016 to discuss the preservation of oral history evidence and measures that may be taken to reduce the cost and time taken to bring claims to completion. I anticipate further work with the committee.

XIII. 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 ATSSC financial reports are no longer available to the Tribunal.

Respectfully submitted,

Justice Harry A. Slade
Chairperson, Specific Claims Tribunal