



2021- 2022 ANNUAL REPORT



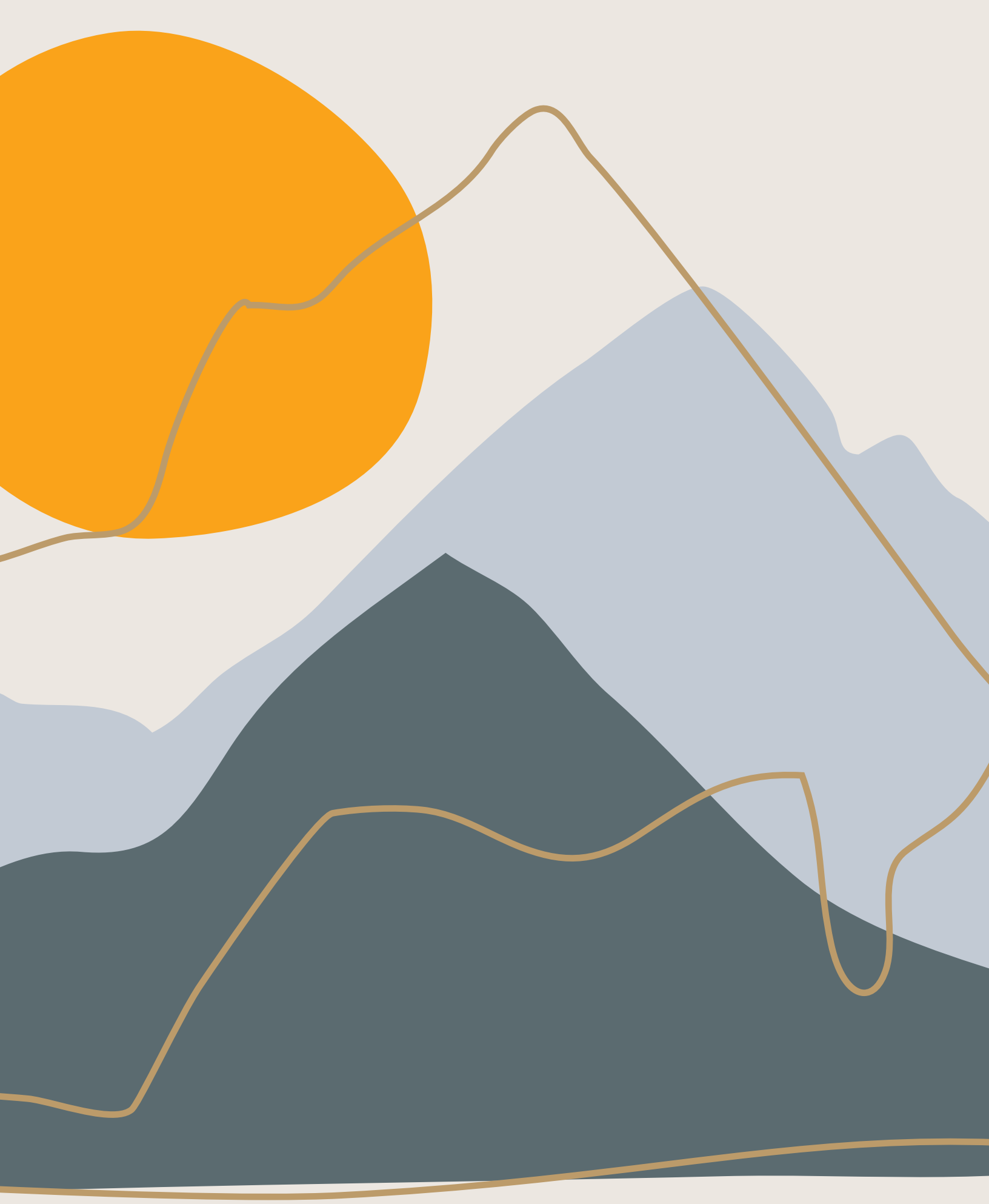
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MESSAGE

FROM THE CHAIRPERSON



Having completed my first full year in the role of Chairperson of the Specific Claims Tribunal, it is my pleasure to present the annual report of the Tribunal for the fiscal year 2021-2022.

This year marks the Tribunal's tenth year of hearing claims and, with such a milestone, there is much to reflect upon. First and foremost is the fact that the Tribunal was intended to be a temporary solution to the overwhelming number of specific claims not being resolved in a timely manner, but has lasted significantly longer than expected, becoming a quasi-permanent institution and an important tool for First Nations to receive justice, with an ever-growing caseload.

It is also important to reflect on the past two years specifically, with particular attention to the ongoing COVID-19 pandemic. Although the Tribunal's work was and continues to be significantly affected by the pandemic, the Tribunal held a total of 21 virtual hearings during the fiscal year and hearings held in claimants' communities have resumed in 2022-2023 given that Tribunal members and staff are again permitted to travel. We also continue to make virtual hearings available where appropriate. At the beginning of the new fiscal year the Tribunal finds itself quite busy, and eager to return to First Nations' communities.

As mentioned, this Tribunal was created partly to be a temporary solution to the problem of delay experienced by First Nations in bringing forward specific claims against the Crown. Unfortunately, these same First Nations have not always found efficient resolution at the Tribunal. According to the Preamble of the *Specific Claims Tribunal Act*, SC 2008, c 22, the Tribunal has a mandate to "promote reconciliation between First Nations and the Crown" by adjudicating specific claims "in accordance with [the] law and in a just and timely manner": as we have heard from stakeholders, however, the timeliness of adjudication leaves plenty to be desired. The Tribunal is committed to addressing this delay and, as promised in last year's annual report, has sought the advisory committee's help to reflect on whether the current *Rules of Practice and Procedure* of the Tribunal could be revised to assist the Tribunal in fulfilling its mandate. The committee's work is expected to wrap up this year, and changes to the rules will follow as warranted. The Tribunal remains open to additional suggestions that will help address delay.

The Tribunal is also pleased to report that in April and May 2022 it welcomed two new members: the Honourable Diane MacDonald of the British Columbia Supreme Court, and the Honourable J. Danie Roy of the New Brunswick Court of Queen's Bench. Justice MacDonald will hear claims in English while Justice Roy will hear claims in both English and French.

Finally, I want to thank the Tribunal's members and staff for all of their efforts, especially during the pandemic. Our team of determined and dedicated professionals responded to the challenges of the last few years with aplomb and will no doubt continue to do so.

Justice Victoria Chiappetta
Chairperson, Specific Claims Tribunal



ABOUT THE TRIBUNAL



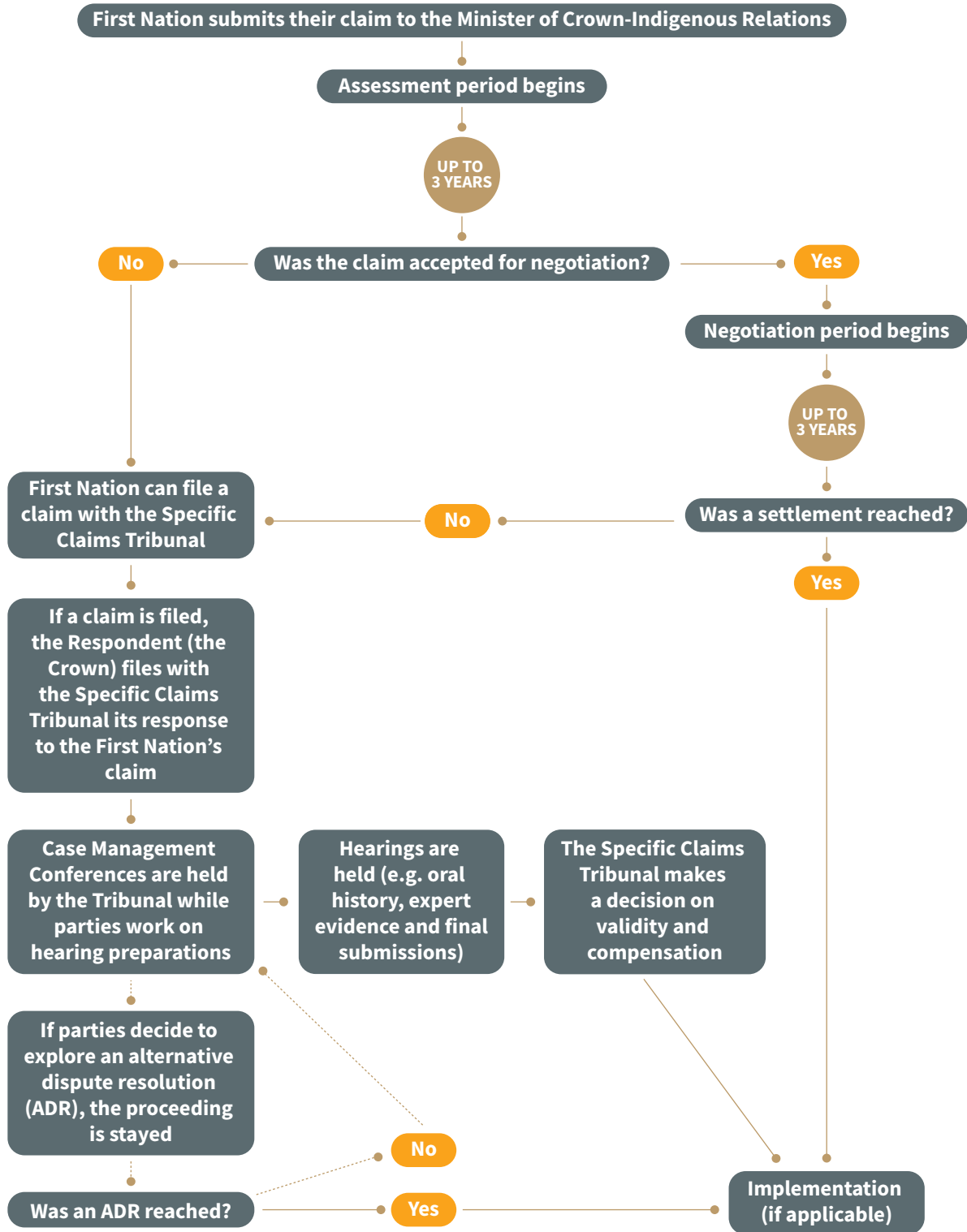
OVERVIEW

The Specific Claims Tribunal (Tribunal), established on October 16, 2008, is part of the federal government's *Justice at Last* policy and the product of a historic joint initiative with the Assembly of First Nations aimed at accelerating the resolution of specific claims in order to provide justice for First Nations claimants and certainty for government, industry and all Canadians.

The specific claims process commences when a First Nation claimant presents a claim to the Minister of Crown-Indigenous Relations, for a determination on whether the claim will be accepted for negotiation. The claim is reviewed by the Specific Claims Branch of the Ministry. A legal opinion is prepared by departmental legal counsel. A recommendation then goes to the Minister.

The Tribunal has jurisdiction over claims that are not accepted for negotiation within three years or, if accepted, have been in negotiation for three years without reaching a settlement. Proceedings before the Tribunal are neither an appeal nor a review of the Minister's decision.

The flow chart below provides a general view of the specific claims process.





WHAT IS A SPECIFIC CLAIM?

Specific claims can include alleged breaches of the Crown's legal obligations relating to treaties, reserve lands and resources, or First Nations' trust funds. The Tribunal is empowered to compensate claimants for these breaches to a maximum of \$150 million. More particularly, specific claims are compensable claims related to:

- a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
- a breach of a legal obligation of the Crown under any legislation "pertaining to Indians or lands reserved for Indians";
- an illegal lease or disposition of reserve lands;
- a breach of a legal obligation arising from the provision or non-provision of reserve lands;
- the Crown's administration of reserve lands, "Indian moneys" or other First Nations' assets;
- a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or,
- fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

THE TRIBUNAL'S WORK

The claims that come before the Tribunal are often complex on the facts and on application of the law. Many claims, even if relatively straightforward, 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 well over a century.

The process before the Tribunal reflects stakeholders' interests and needs, and the objective of reconciliation. Hearings in claimants' communities are an essential part of the process. This is not the norm in court proceedings, where the stakeholders must attend at a courthouse to access the proceeding as participants or observers. Thus, it is not possible for the Tribunal to schedule back-to-back hearings with court-like efficiency.

ACCOMMODATING CULTURAL DIVERSITY

The *Specific Claims Tribunal Act* provides, at section 13, that the Tribunal may “take into consideration cultural diversity in developing and applying its rules of practice and procedure”. The Tribunal has developed expertise in carrying out culturally sensitive adjudicative proceedings without compromising the integrity of the process:

Oral History Hearings: These hearings, held in claimants’ communities, are often scheduled as early as possible in the life cycle of a claim before the Tribunal, in recognition of the importance of preserving the testimony of Elders. They are an essential part of the process and are reconciliatory.

In some cases, a truth-telling ceremony given by a group of Elders prior to the giving of testimony can be accepted by the Tribunal in lieu of swearing or affirming the evidence.

Site Visits: The presiding member will, when requested, travel to the claimant’s territory along with the parties, staff, and community members to view the land that is the subject of a claim.

Ceremonies: Opening and closing ceremonies are sometimes conducted by members of the claimant’s community prior to, or after, proceedings before the Tribunal. The Tribunal welcomes requests to participate in such ceremonies. Examples of these ceremonies include long house ceremonies involving song and dance, drumming ceremonies, smudging and pipe ceremonies.

Prayers: Welcome prayers are often offered at the outset of a hearing by a Chief, Elder, or other designate.

Accommodating Language: The Tribunal welcomes witnesses who wish to testify in their mother tongues, with the assistance of qualified interpreters. This is a regular aspect of hearings.

In addition to the above, the Tribunal encourages ongoing professional development for Tribunal members and staff on matters relating to cultural diversity.



2021-2022

IN REVIEW



OUR PEOPLE

Tribunal Members

The *Specific Claims Tribunal Act* says that the Tribunal shall consist of no more than six full-time members; or any number of part-time members, or combination of full-time and part-time members, so long as the combined time devoted to their functions and duties does not exceed the combined time that would be devoted by six full-time members.

The Governor in Council shall establish a roster of six to eighteen superior court judges to act as members of the Tribunal. The Chairperson and other members may be appointed from the roster by the Governor in Council. Each member shall be appointed for a term not exceeding five years and holds office so long as the member remains a superior court judge. Each member, on the expiry of the first term of office, is eligible to be reappointed for one further term.

The Tribunal members who held office during the fiscal year are as follows:

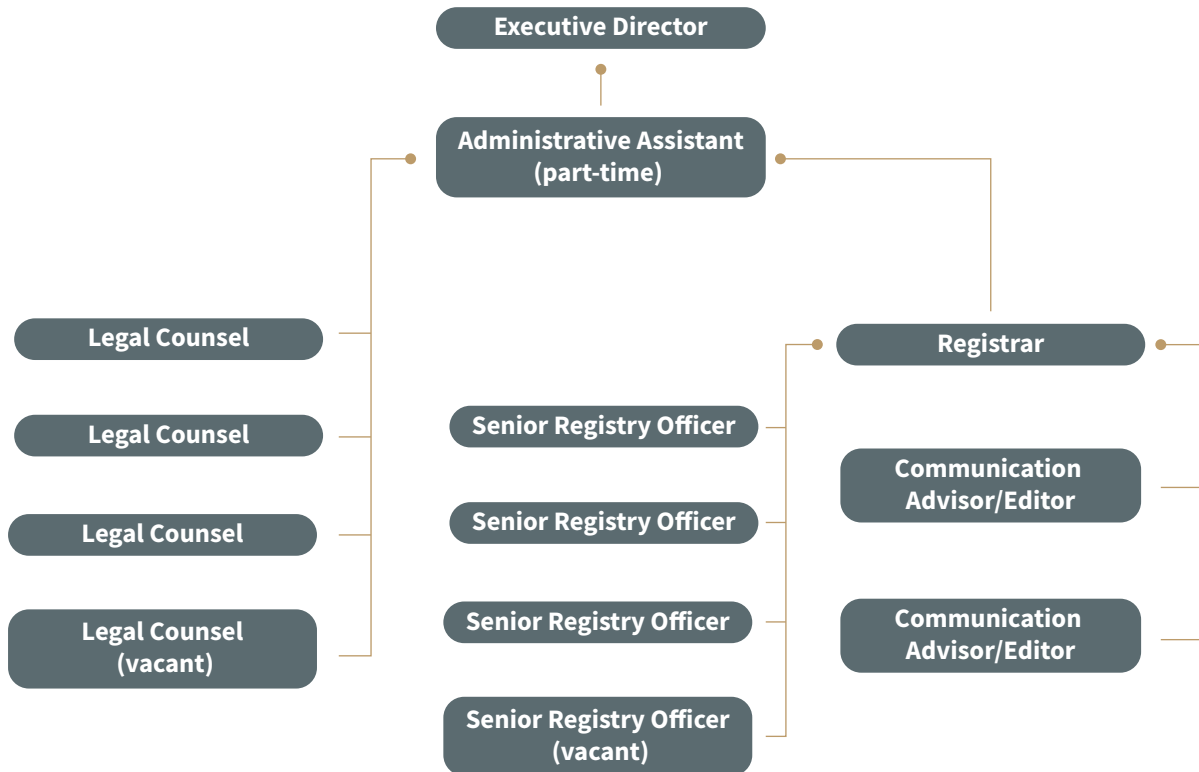
Tribunal Member	Appointment Date	Term Expiry	Full-time/Part-time
Justice V. Chiappetta	December 11, 2020	June 22, 2024	Full-time (Chairperson)
Justice W. Grist	May 18, 2016	September 5, 2022	Part-time (Member)
Justice P. Mayer	May 18, 2016	May 18, 2023	Part-time (Member)
Justice T. Ducharme	April 13, 2021	April 13, 2026	Part-time (Member)

Tribunal Staff

The Tribunal receives operational support from the Administrative Tribunals Support Service of Canada (ATSSC). The ATSSC provides staff, office accommodation, hearing venues, IT services, and the many other tools and services needed to support Tribunal operations.

The Tribunal is, for the most part, at the required staffing level for effective functioning in terms of administration. The Tribunal consists of 13 public servant positions, one of which is part-time. Of the 13 positions, two are currently vacant.

Organization Chart as of March 31, 2022



As with other tribunals serviced by the ATSSC, there is an assigned executive director responsible for the provision of services, supported by an administrative assistant. The registrar manages registry staff, and communication advisors and editors, while legal counsel’s primary responsibility is direct support to Tribunal members even though they are employees of the ATSSC. The independence of Tribunal members is protected by law and legal tradition. Legal counsel in service to the Tribunal also function within legal norms of independence, which include the primacy of duty to the Tribunal.

FINANCES

In 2021-2022, the Tribunal had adequate financial resources to effectively manage its caseload. The table below is the Tribunal's financial statement for the fiscal year:

Details of Financial Results by Object (thousands of dollars)			Actual Expense 2021-2022
Goods and services	Transport-Communications (02)	Total	20.46
	Information (03)	Total	14.01
	Professional Services (04)	Total	161.96
	Rentals (05)	Total	0.109
	Repair and Maintenance (06)	Total	-
	Materials and Supplies (07)	Total	5.18
	Machinery and Equipment (09)	Total	16.70
	Other Subsidies and Payments (12)	Total	-
		Total Goods and Services	218.42
Personnel	Salaries and Wages	Total	980.36
	Contributions to Employee Benefit Plans	Total	145.09
		Total for Personnel	1,125.45
		GRAND TOTAL	1,343.87

CASELOAD

Geographical Distribution

A total of five new claims were filed with the Tribunal in the fiscal year 2021-2022, bringing the total of claims filed with the Tribunal since it opened its doors in 2011 to 135 claims. The geographic distribution of all claims is as follows:



Case Management

The Tribunal case manages all of its claims. On March 31, 2022, 43 claims had closed, leaving 92 claims before the Tribunal. During 2021-2022, the Tribunal held a total of 158 case management conferences, mostly held by teleconference.

ALTERNATE OUTCOMES

An objective of the *Act* is to “create conditions that are appropriate for resolving valid claims through negotiations”. Although the Tribunal continued to offer Tribunal member-led mediation services when a party raises an interest in mediation, the preferred route to settlement of claims is negotiation.

As of March 31, 2022, approximately 32% of active claims before the Tribunal, i.e., 29 claims, were stayed further to the Parties’ request to allow them to actively pursue alternative dispute resolution, mainly through negotiations.

The Tribunal saw nine claims reaching final settlement in 2021-2022 and two claims having a consent order issued on a preliminary stage of the claim. This brings the total of claims settled between the parties to 27, and a total of 14 active claims having resolved the preliminary stage of the claim.

Overall, the Tribunal remains concerned about the time it is taking to conclude claims. On one hand, negotiation is the preferred means of resolving claims. On the other, the unduly lengthy process of negotiation militates against claims being resolved in a timely way and, if negotiations fail, may result in claims not being heard for many years after being filed with the Tribunal.

WEBSITE RENEWAL

Over the course of the fiscal year 2021-2022, the Tribunal diligently worked on renewing and improving its website to cater to organizational and user needs. The newly-designed website was officially launched on March 31, 2022, making it more user-friendly, streamlined and compliant with web accessibility guidelines and official language requirements.

JURISPRUDENCE

The Tribunal issued a decision on compensation, a decision on validity, and seven decisions on Applications in fiscal year 2021-2022.

In *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2021 SCTC 2, the Tribunal awarded total compensation of \$4,756,726 for losses flowing from impaired access to the Siska Indian Band's fishing stations caused by a railway line through the Siska Indian Band reserve land. Compensation was assessed taking into account losses including the cost of obtaining salmon to replace the Siska Indian Band's foregone annual salmon harvest due to the construction of the railway.

In *Kwakiutl v Her Majesty the Queen in Right of Canada*, 2022 SCTC 1, the Tribunal held that the Claimant had not established the validity of its Claim. Kwakiutl claimed that under the terms of the 1851 Fort Rupert Treaties, the Crown should have recognized, as a reserve, a site on the northeast shore of Vancouver Island where it historically produced coal for trade to the Hudson's Bay Company. The Tribunal held that the common intention which best reconciled the Parties to the Fort Rupert Treaties' interests was that control of the site was to be transferred to the Hudson's Bay Company, and that the Crown did not have an obligation under the Fort Rupert Treaties to recognize the site as a reserve.

In *Red Pheasant Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 3, a decision on two Applications, the Tribunal revisited the test on bifurcation established in *Kahkewistahaw First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 5. It found that, in cases where parties disagree on whether to bifurcate a claim, bifurcation should be granted only in those exceptional cases wherein there is specific and compelling evidence that to do so will advance the mandate of the Tribunal to adjudicate specific claims in a just and timely manner.

The Tribunal also examined an Application seeking to enter into evidence an expert report jointly commissioned by the Parties for the purpose of negotiations and subject to settlement privilege. The Tribunal admitted the report into evidence, finding that the public interest of promoting reconciliation and First Nations' self-sufficiency by the adjudication of specific claims in a just and timely manner outweighed the public interest in encouraging settlement such that the justice of that Claim required that there be an exception to settlement privilege.

The other six decisions on Applications issued by the Tribunal are as follows:

- *Kahkewistahaw Band #72 v Her Majesty the Queen in Right of Canada*, 2021 SCTC 4, regarding whether the level of complexity of a claim amounts to "specific and compelling" evidence sufficient to justify the bifurcation of the proceeding;
- *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 5, regarding an Application to bifurcate the Claim;
- *Muskowekwan First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 6, regarding an Application to bifurcate the Claim;
- *Enoch Cree Nation v Her Majesty the Queen in Right of Canada*, 2022 SCTC 2, regarding an Application to set aside an earlier order, made on consent of the Parties, to bifurcate the Claim;
- *Cook's Ferry Indian Band v Her Majesty the Queen in Right of Canada*, 2022 SCTC 3, regarding whether to send notice under section 22 of the *Specific Claims Tribunal Act*, SC 2008, c 22, to a third party whose rights may be affected by a decision of the Tribunal; and,
- *Atikameksheng Anishnawbek v Her Majesty the Queen in Right of Canada*, 2022 SCTC 4, regarding whether the Tribunal can hear a claim despite it having been determined in part in the courts of provincial jurisdiction, and whether this would be contrary to issue estoppel.



LOOKING AHEAD

TO 2022-2023

REVIEW OF THE SPECIFIC CLAIMS TRIBUNAL RULES OF PRACTICE AND PROCEDURE

As promised in last year's annual report, the Tribunal began the process of reviewing its current *Rules of Practice and Procedure* to improve efficiencies and reflect new processes that have surfaced over the years, such as virtual hearings. Building on prior consultations held in 2017, the process began with a meeting between the Tribunal's Chairperson and members of the advisory committee, namely representatives from the Assembly of First Nations, the Department of Justice, the Specific Claims Branch, and the Canadian Bar Association. A round of written comments from these stakeholders followed. The Tribunal expects to release a position paper summarizing and responding to the feedback it received in the near future, which will lead to further consultative steps. Following this consultation process, the Tribunal expects to be in a position to know how best to implement any necessary changes.

TRIBUNAL APPOINTMENTS

The Tribunal welcomed two new part-time members at the beginning of fiscal year 2022-2023, which included the appointment of a fully bilingual member. The timing of these appointments was crucial given that one of the Tribunal's current members will retire in September 2022, and the term of the Tribunal's only bilingual member will expire in May 2023. Although the Tribunal is relieved that these two members were appointed, the need for a sufficient number of members continues to make it challenging to plan for the management of current and future claims. The Tribunal hopes for more member appointments to assist current members in moving claims as efficiently and effectively as possible.