

ANNUAL REPORT

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

September 28, 2012

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.

(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 2011-12 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 myself, Justice Harry Slade, British Columbia Supreme Court.

The initial appointments were for a term of 1 year. These were best characterized as interim appointments. This reflected the need, viewed from the judicial perspective, 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*.

As the end of the term of the interim appointments approached, the above-named Justices volunteered for reappointment, with the approval of their respective Chief Justices. Justice Mainville was appointed for a term of one year, and Justice Smith for a term of two years. I was reappointed, as a member and Chairperson, for a further period of five years.

On December 20, 2011, Justice Mainville was appointed, by Order in Council, for a part-time term of five years.

On December 20, 2011, Justice Jocelyn Geoffroy of the Quebec Superior Court was appointed, by Order in Council, for a part-time term of one year.

Section 6(2) of the *Act* calls for the establishment of "... a roster of 6 to 18 Superior Court Judges to act as members of the Tribunal." The present members were appointed to the roster and then from the roster to the Tribunal. There are three Superior Court Judges on the roster, Justice Barbara Fisher, Justice Paul Pearlman, both of the British Columbia Supreme Court, and Justice Larry Whalen of the Ontario Superior 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, also as provided for in the *Financial Administration Act*.

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.

Several of the staff are on secondment from other government departments. We hope that they will elect to become permanent staff.

From time to time 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 in the Federal Courts at Vancouver. As approximately one-half of the filed claims arise in British Columbia and Alberta, the assistance of Vancouver Federal Courts support staff, and the availability of Federal Courts hearing rooms, is of considerable value.

The Registry is now managing a total of 30 active claims. The Tribunal will require the support of additional registry staff in the very near future.

Opening of 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 particulars of all filed claims. This includes particulars of scheduled hearings, formal orders, and reasons for decisions in both pre-trial applications and hearings on the merits.

A list and brief description of claims filed, by province of origin, is attached as attachment 'A'.

The information on the particulars on each claim, and present status of the proceeding before the Tribunal, are available on the web site.

Claims Management

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

An important 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 Provincial Superior Courts proceed to trial. Most settle without placing significant 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. It is noted that the Rules of the Tribunal provide for mediation.

It seems unlikely that this pattern will emerge, at least in the near term, in relation to 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 tendered 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, where the claim is accepted and three years elapse without a resolution, the claim may be brought before the Tribunal. It therefore appears that a decision at the Ministerial level would be required before negotiations could be undertaken after a claim is brought before the Tribunal.

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

- The 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.
- Hearings logistics, including hearings in the community of the Claimant.

The first hearing of a claim, in Osoyoos Indian Band, was 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.

There is much to gain from 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.

There are presently two claims set-down for hearing. Both arise in British Columbia. The claim of the Williams Lake Indian Band, *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, is scheduled for hearing in the Claimants community at Williams Lake, commencing October 10, 2012. The claim of the Kitselas First Nation, *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, is set-down to be heard in the Claimants community near Terrace B.C., commencing November 20, 2012.

Pre-hearing and, procedural, 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.

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.

Future Appointments to 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.

On the enactment of the *Act*, companion amendments to the *Judges Act* came into force. These provided for the appointment of three additional Superior Court Justices for British Columbia, two for Ontario, and one for Quebec.

There are, at present, two full-time Tribunal Members and two part-time Members. The former are from, respectively, the British Columbia and Ontario Courts. The latter are from the Quebec Court.

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.

As noted above, there are at present two British Columbia Justices and one Ontario Justice named on the roster.

In the 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 remained the case as at September 30, 2011. This has been a significant obstacle in the way of additional appointments from the British Columbia Court. To date only one

Tribunal Member is from that Court. As 36 percent of claims filed thus far arise in British Columbia, and, if claims from Alberta are included, the percentage is 48, logistics and cost considerations favour the appointment to the Tribunal of additional Justices from British Columbia. At present, part-time appointments would meet our needs.

On August 29, 2012, the Registrar entered into an agreement with British Columbia which provides for compensation out of Registry funds for services provided by the Province. This has removed the obstacle to the pronouncement in force of amendments to the Province's Supreme Court Act which provide for the reception of the three additional Judges provided for by the above-mentioned amendment to the federal *Judges Act*.

The availability of B.C. justices for appointment to the Tribunal may nevertheless be affected by the timing of new appointments to the Court.

The Chairperson and a representative of the Federal Ministry of Justice maintain contact over appointments to the Tribunal.

Support Services

The Registry has, in consultation with the Chairperson, achieved economies by sharing with other Government Departments. With a growing number of filed claims, the Tribunal will require the full-time dedication of existing staff, and additional staff.

Funding for the Tribunal is sun-setting at the end of March 2013. The Registrar has already begun discussions to get additional funding to provide resolution and final binding decisions to claims being filed with the Tribunal.

Unresolved claims create uncertainty and impair Crown/Indigenous reconciliation. Support from Cabinet is essential for obtaining the appropriate level of funding and enable the Tribunal to continue to meet its mandate.

Respectfully submitted,

Justice Harry A. Slade
Chairperson, Specific Claims Tribunal