THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

August 17, 2018

Via email: Jennifer.Campbell@AGR.GC.CA

Ms. Jennifer Campbell
Legal Counsel
Specific Claims Tribunal
427 Laurier Avenue West, 4th floor
PO Box 31
Ottawa, ON, K1R 7Y2

Dear Ms. Campbell,

Re: Draft practice directions on mediation, early case planning, settlement conference and stay of proceedings for negotiation

I am writing on behalf of the National Aboriginal Law Section of the Canadian Bar Association (CBA Section) which sits as a member of the Specific Claims Tribunal's Advisory Committee. We wish to comment on the Tribunal's four draft practice directions circulated among Advisory Committee members prior to the last meeting on June 27, 2018.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section represents lawyers who specialize in indigenous law from across the country, and frequently contributes to legislative and national policy initiatives.

General comments

In general, the CBA Section believes that any additional steps in the trial management process require the Tribunal to be attuned to any financial implications of those additional procedural steps. The UBCIC discussion paper presented on June 27 to the Advisory Committee mentioned that First Nation representatives who participated in the research leading up to that paper received 30% to 60% of requested funding.[1] The CBA Section sees this as a reasonable figure.

[1] BC Specific Claims Working Group, *"LITIGATION AS USUAL"? Reforming Canada's Conduct at the Specific Claims Tribunal*, June 13 2018, at 4.

While the Tribunal has no power over these funding levels, we ask that it consider the financial implications of its decisions as submitted to it by claimant counsel. Claimants often have access to significantly less resources than respondents.

If not already the Tribunal's practice, we recommend that the final practice directions be sent to the Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) funding unit to ensure they are informed about new activities potentially available at the Tribunal, and able to determine appropriate funding levels for those activities.

We also suggest that the Tribunal's next annual report reiterate the need for increased funding for parties before the Tribunal to accelerate the resolution of claims.

Early Case Planning Practice Direction

This practice direction provides for an Early Case Planning case management conference, to follow the initial case management conference. At the planning conference, if the claim is before the Tribunal because it was not accepted for negotiation by the Specific Claims Branch (SCB) of CIRNAC, the claimant will disclose materials submitted to the SCB at the ministerial level of the claim, and the respondent will disclose its legal and factual basis for non-disclosure.

As well, both parties will prepare what appear to be detailed briefs summarizing the legal and factual basis for their respective positions. The briefs will also identify where expert evidence may be required, whether a joint expert might be retained, whether oral history is anticipated and the proposed timelines for these and anticipated steps.

At the June 27 meeting, Justice Slade explained that the intention of the Early Case Planning practice direction is to put all the documents filed at the ministerial level before the Tribunal, so it may evaluate what evidence is necessary at the beginning of the Tribunal process. However, these documents do not automatically become evidence before the Tribunal and this planning will not prevent parties from doing additional research if they determine it is necessary.

It would assist the parties for the practice direction to state explicitly that disclosure in the course of an Early Case Planning conference, including disclosure to the Tribunal, does not make the disclosed materials evidence in the claim unless filed by one or more party in the course of proceedings. Also, it should be clear that the existence of an expert report or documentary evidence on a given factual issue will not preclude a party from seeking to obtain further or updated evidence on the same issue if the party takes the position that further investigation is necessary.

Additionally, we suggest that paragraph 3.6 include a second sentence as follows: "These estimates can be subject to modification on the request of a party as trial preparation proceeds and where adequate explanation is given."

We question whether a summary of the allegations of fact and the legal basis for the positions taken by each party is necessary when they have produced sufficiently detailed pleadings. To the extent that the parties refer to their pleadings in identifying issues for expert evidence, the summary seems superfluous. However, the Tribunal could also direct one or both parties to produce summaries if it finds that a party's pleading is insufficiently clear.

Consistent with our general comments, we ask the Tribunal to consider the financial implications that claimant counsel might raise, including those related to the scheduling of Early Case Planning.

Mediation Practice Direction (revised by the Tribunal)

The Tribunal's revised draft practice direction on Mediation gives guidance about the Tribunal's mediation mandate in the *Specific Claims Tribunal Act*, article 12(1)(h).

We suggest eliminating the examples at paragraphs 4.2. (a) and (b), as they may or may not be relevant to mediation before the Tribunal and seem particular to mediation of compensation in a bifurcated proceeding. As well, the language in these paragraphs does not mirror the language of the Act, which could lead to confusion.

There appears to be some discrepancy between the French and English versions of the document. At paragraph 7, Authority to Settle / Authorisation de conclure un règlement, the English version refers to "an agreement in principle settling the claim," while the French version refers to "une entente de règlement de la revendication." We imagine that the English version reflects the Tribunal's intention, as it would be more likely that party representatives in mediation would be mandated to reach an agreement in principle (entente de principe) rather than a final settlement agreement.

We support having a roster of mediators maintained by the Tribunal to assist in mediations in both French and English.

Settlement Conference Practice Direction

This practice direction appears to empower the Tribunal – by its own initiative or at the request of one or more parties – to initiate settlement discussions between the parties at any time after the Early Case Planning conference.

However, no criteria are given for when the Tribunal might judge that a settlement conference should be called. In the proposed Stay of Proceedings for Negotiation practice direction, paragraph 7 provides for the Tribunal to order a settlement conference when parties request a stay of proceedings. Further criteria when no request for a stay has been made would be helpful for the parties to better understand when the Tribunal might call such a settlement conference.

Returning to our earlier comments on funding, we reiterate that the Tribunal must take serious account of requests from claimants about the cost of a settlement conference when the claimant does not believe settlement is likely.

Stay of Proceedings for Negotiation Practice Direction

This practice direction received most comments from CBA Section members practicing in the area of specific claims. Many intimately understand the need for strong controls to prevent one or more parties from abandoning claims indefinitely under the pretext of negotiation. We appreciate the Tribunal setting explicit standards and timelines to prevent that conduct.

That being said, the long list of requirements for proceedings to be suspended could take a significant time to produce, forcing parties to remain at the Tribunal while engaged in initial negotiations. Certainly, this list appears to prevent parties who have received a successful decision on the merits in a bifurcated claim from immediately suspending proceedings to pursue compensation negotiation.

If the Tribunal becomes aware of parties attempting to respond to one or more elements assessed to obtain a stay of proceedings and parties are not asked by the Tribunal to both ready their claim for trial and negotiate the elements in paragraphs 2.1 through 2.3, remaining before the Tribunal during negotiations should not pose a logistical problem for claimants. However, it could create a funding

issue as funding before the Tribunal is unpredictable and insufficient. Negotiation funding (also offered by CIRNAC), while not necessarily complete, is more predictable. However, it is unavailable while the specific claim is actively before the Tribunal. There could, therefore, be financial benefits for claimants to be before the negotiation funding unit instead of the Tribunal's funding unit.

Unless funding levels change at CIRNAC, the Tribunal will need to consider the financial implications on claimants of its refusal to suspend proceedings, particularly when raised by the claimant.

As we understand an agreement in principle in the settlement of a specific claim, it is the draft settlement agreement that parties take back to their respective authorities for approval. Requiring it while before the Tribunal would be essentially requiring the bulk of negotiations to happen while a claim remains active before the Tribunal.

For the timelines for suspension, the CBA Section requests that paragraphs 4, 5 and 6 of this draft practice direction be interpreted as allowing renewable six-month terms for suspension of proceedings if requested jointly by the parties. Limiting suspension to six months to a year does not allow the parties to instruct experts and receive the type of expertise that might be necessary to reach an informed settlement. The CBA Section favours the six-month intervals to allow the parties to set goals for their negotiations so they can report back to the Tribunal on their progress.

We hope that these comments will prove useful for the Tribunal and be considered in any revisions to your practice directions. We appreciate the opportunity to offer input and welcome any comments or questions.

Yours truly,

(*original letter signed by Gaylene Schellenberg for Krista Robertson)*

Krista Robertson
Chair, National Aboriginal Law Section