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December 4, 2015

Via email: Alisa.Lombard@sct-trp.ca

Alisa Lombard
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Secretariat, Specific Claims Tribunal
4th Floor, Box 31
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Dear Ms. Lombard:

Re: Draft Practice Direction – Summary Process

I am writing for the Canadian Bar Association Aboriginal Law Section (CBA Section) in response to your letter of November 2, 2015, inviting Specific Claims Tribunal Advisory Committee participants to comment on the draft Practice Direction for a proposed Summary Process for the Tribunal. We appreciate our continued participation in the Tribunal's Advisory Committee.

Participation in a Summary Process

In the CBA Section's April 2015 submission to Benoît Pelletier, the Indian Affairs and Northern Development ministerial representative for the five-year review of the Specific Claims Tribunal Review, we stressed that the most important feature of any summary procedure for adjudicating a specific claim is that it be voluntary on the part of First Nation Claimants. Those claimants bear the burden of proving the validity of their claims, and must be allowed to make their case with the evidence they choose, subject to applicable rules of admissibility before the Tribunal.

As a specialized tribunal "designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner," the Specific Claims Tribunal must balance administrative expediency with respect for First Nations' right to bring claims before the Tribunal in the manner they see fit. This respect will contribute to the Tribunal's role in promoting reconciliation, as mandated in the preamble of its enabling legislation.

The CBA Section appreciates that the proposed application for a summary procedure requires both parties to consent that "the summary process is appropriate to dispose of the genuine issues in whole or in part" and that "the evidentiary basis is adequate…for a final or partial determination of

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the claim." These declarations in both the application and the response would effectively express parties' support for the summary trial process for all or part of the issues raised by the specific claim.

However, without explicitly stating that a First Nation Claimant's consent is required before an issue proceeds to a summary trial, the Practice Direction would allow for a dispute on which issues should be disposed of by the summary process. The Crown in Right of Canada could, for example, apply to have an entire claim adjudicated by summary process, while the First Nation could respond that the summary process is appropriate only to determine part of the claim. The Court appears to have the discretion to decide for the Crown in that case, which would compel the First Nation Claimant to prove its entire claim based on evidence available at the time of the Crown's application.

Our understanding of the wording around "partial determination of the claim" and "part" of the genuine issues raised by the claim would not limit the claim to only issues of validity and damages. Each of these major components to a specific claim hearing can consist of multiple issues, depending on how the First Nation has structured its claim and the Crown's response.

With that in mind, where a First Nation Claimant believes that new relevant evidence is necessary to determine one or more issues in a specific claim, the CBA Section believes that it should not be compelled to prove its case with the limited amount of evidence based on an application from the opposing party. The Practice Direction does not currently provide sufficient safeguards against such a situation. We believe that this could undermine First Nations' confidence in the summary process and potentially the adjudication of claims before the Tribunal more generally.

We offer two possible solutions to address this concern and ensure that First Nation Claimants are not compelled to submit issues in their claims to a summary process:

(i) Claimant consent could be added in subsection 5(1) as a condition for an order of a summary trial by the Tribunal, or

(ii) Claimant consent could be referred to in a preamble as an implicit feature of the summary process.

Relying on Additional Evidence

To clarify matters when a partially contested notice of application for summary trial is brought by either party, we suggest an amendment to state that "no reliance shall be placed *at the summary trial* on what might be adduced as evidence at a later stage of the proceeding" (subsection 4(2)). Where a Respondent seeks to circumscribe the scope of issues appropriate for determination by summary trial, its response will need to rely on evidence it anticipates being filed later in the proceeding, once the summary trial is completed.

Declarations of Disclosure

Both Applicants and Respondents in a summary process application will have to make declarations of disclosure. Certainly, the Crown in Right of Canada is better able to declare to the best of its knowledge that "full [or satisfactory] disclosure of all relevant materials in the possession and control of the Specific Claims Branch has been made." The Claimant can only declare whether it is *satisfied* with the disclosure to the extent of its knowledge at the time of the Application.

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The CBA Section thanks the Specific Claims Tribunal for the opportunity to provide input regarding the proposed Summary Process. We look forward to further discussion with the Tribunal on this and other matters.

Yours truly,

(original letter signed by Gaylene Schellenberg for Ming Song)

Ming Song
Chair, CBA Aboriginal Law Section