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February 9, 2015

Via email: mcu@justice.gc.ca; InfoPubs@aadnc-aandc.gc.ca

The Honourable Peter MacKay, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada
Justice
284 Wellington Street
Ottawa, ON K1A 0H8

The Honourable Bernard Valcourt, P.C., Q.C., M.P.
Minister of Aboriginal Affairs and Northern Development
Indian Affairs and Northern Development
Les Terrasses de la Chaudière
North Tower, 10 Wellington Street
Gatineau, QC K1A 0H4

Dear Ministers:

Re: Independence of the Specific Claims Tribunal

I write on behalf of the Aboriginal Law Section of the Canadian Bar Association (CBA Section) to express our concerns about the impact of the *Administrative Tribunals Support Service of Canada Act*[1] (ATSSCA) on the Specific Claims Tribunal (SCT). The CBA is a national association of 36,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section includes lawyers specializing in Aboriginal law. Many of our members have years of experience in specific claims and regularly appear before the SCT, as well as other federal administrative tribunals.

On May 7, 2014, the CBA wrote a letter expressing related concerns about Bill C-31, which proposed creating the ATSSCA. The CBA noted its support for innovations and enhanced efficiencies to improve the administration of justice and access to justice, but recommended removing the portion of Bill C-31 that would create the ATSSCA. Reasons for that position included the lack of advance consultation with the users of the various tribunals that would come under the ATSSCA, and the minimal scrutiny afforded for the proposal by including it in omnibus legislation. In addition to concerns about process, we stressed that the proposed changes would be incompatible with the requirement that tribunals exercising adjudicative functions remain institutionally independent and autonomous from government. We also noted serious concerns about access to justice, potential conflicts of interest and challenges to the expertise of tribunals that we anticipated as a result of the ATSSCA.

1 S.C. 2014, ch. 20, art. 376.

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Recent Legislative Changes

The ATSSCA came into force November 1, 2014[2] creating the Administrative Tribunals Support Services of Canada (ATSSC). The ATSSC is now the sole provider of facilities and support services for eleven federal administrative tribunals, including registry, administrative research and analysis services. The SCT is one of those eleven tribunals.[3]

Sections 9 and 10 of the ATSSCA empower the Chief Administrator to control the management of the ATSSC and all matters connected with it. The Chief Administrator reports to the Minister of Justice. The ATSSCA also deleted the SCT's registry (under section 10) and removed the power of the SCT Chair to make general rules governing the duties of staff (under section 12(1)).[4]

Specific Claims Tribunal

The SCT was created in 2008 by the *Specific Claims Tribunal Act*[5] (SCTA). This followed extensive consultations between the Department of Aboriginal Affairs and Northern Development and the Assembly of First Nations about how to address systemic problems in resolving First Nations' historic claims against Canada. The purpose of the SCTA is to allow such claims to be adjudicated by independent superior court judges in spite of any rule or doctrine that could have the effect of limiting claims or prescribing rights against Canada because of the passage of time or delay.[6]

Prior to 2008, the former Indian Claims Commission, the Royal Commission on Aboriginal Peoples and the Senate Committee on Aboriginal Peoples had all identified the need for an independent adjudicative body. Pursuant to the federal government's "Justice At Last" policy, Canada and the Assembly of First Nations jointly developed draft legislation that ultimately became the SCTA.

A hallmark of the SCTA is that tribunal members are superior court judges who agree to be appointed to serve in this process. While an adjudicative body, the SCT also has the statutory objective of reconciling disputes between First Nations and the Crown in right of Canada. This reconciliatory role is expressed in the Preamble: "resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations." In *Tseil-Waututh Nation v the Queen*, the SCT itself called reconciliation the "over-arching purpose" of the SCTA.[7]

Because the Crown is always a party adverse in interest to the claimant First Nation in SCTA proceedings, it is particularly vital that the SCT not only be, but be seen to be, clearly independent from the Government of Canada. Prior to enactment of the ATSSCA, independence of the SCT was safeguarded by several provisions of the SCTA:

- Panel members are sitting superior court judges picked from a roster maintained by the Governor in Council (section 6);
- Panel members have security of tenure in the form of fixed five-year terms, and are eligible for reappointments for one further term (section 7);

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2 Enacted by S.C., 2014 ch. 20, s. 376, in force November 1, 2014, see SI/2014-83.

3 Schedule to ATSSCA per section 2.

4 2014, c. 20, ss. 469 and 470.

5 S.C. 2008, c. 22.

6 *Canada v. Kitselas*, 2014 FCA 150 at para. 26.

7 *Tseil-Waututh Nation v the Queen*, 2014 SCT 11 at para. 40.

- A registry of the Tribunal had responsibility for the management of the Tribunal's administrative affairs and the duties of Tribunal staff (former section 10); and
- The Chair of the SCT had supervision and direction over the work of the Tribunal (section 6) and the power to make general rules governing the duties of its staff, including staff who worked in the registry (former section 12(1)).

Concerns and Recommendations

Unfortunately, the CBA's cautions about the ATSSC outlined in its May 2014 letter are proving well founded in relation to the SCT.

Examples of how the recent legislative changes compromise the independence of the judges who serve on the SCT include:

- Loss of a dedicated registry to support the SCT – the ATSSC incorporates the SCT registry within a multi-tribunal registry;
- Loss of statutory power of the SCT to make rules governing the duties of registry staff – now, that power resides solely with the Chief Administrator;
- Unstructured discretion to the Chief Administrator – ATSSCA provides no guidance to the Chief Administrator about the degree and scope of support that the ATSSC will provide to the SCT, nor does it give the SCT Chair any statutory mechanisms to consult with or direct the Chief Administrator on this issue;
- Relocating the SCT – the SCT will be moved from the current offices specifically built for its purposes, and re-housed in the National Capital Region along with some or all of the other tribunals subject to the ATSSCA.[8]

We are concerned about the institutional independence of the SCT, given the loss of a dedicated SCT registry and the SCT's power to make rules governing the duties of registry staff. The objective status or relationship of judicial independence provides assurance that the SCT has capacity to act in an independent manner and will in fact act in such a manner.[9] One of the three essential conditions for judicial independence of a tribunal is institutional independence for matters of administration bearing directly on the exercise of its judicial function.[10] This includes not only the assignment of judges, sittings of the court and court lists but also related matters of allocation of courtrooms and direction of administrative staff engaged in carrying out these functions.[11]

As of November 1, 2014, the SCT Chair still had power to direct the work of the tribunal itself, but not to set the duties of staff of the service provider i.e. the ATSSC. This is in marked contrast to the powers of Chief Justices of the Federal Courts under the *Courts Administration Service Act*[12] requiring the Chief Administrator to consult with Chief Justices about registry management for their courts. Further, that *Act* allows a Chief Justice to issue binding directions to the Chief Administrator about

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8 We understand that the Chief Administrator may move its offices into the space currently occupied by the SCT.

9 *Valente v. The Queen*, [1985] 2 S.C.R. 673 at 688.

10 *Ibid*., at 708.

11 *Ibid*., at 709.

12 S.C. 2002, c. 8.

any matter within the Chief Administrator's authority. In contrast, nothing in the ATSSCA limits or structures the discretion of the Chief Administrator for the administration of the SCT.

The SCTA states that the SCT has "all the powers, rights and privileges that are vested in a superior court of record" for the "due exercise of its jurisdiction".[13] But for the fact that the SCT cannot apply any rule or doctrine that has the effect of limiting specific claims against the Crown because of the passage of time, the SCT has express power to determine any questions of law or fact in relation to any matter within its jurisdiction.[14] The SCT can receive and accept evidence, and award remedies and costs. The procedures at hearings are similar to those of a court, though modified for the context of specific claims.[15] The SCTA provides that the decisions of the SCT are final and are only subject to judicial review, not appeal.[16] The SCT is not involved in crafting government policy.[17] The Crown is a party in every proceeding before the SCT and is bound by its decisions.

The Supreme Court of Canada has suggested that quasi-judicial tribunals like the SCT may attract a high degree of institutional independence from the executive branch.[18] In our view, the unstructured discretion provided to the Chief Administrator under the ATSSCA, combined with the reduction of the SCT's powers over registry services that support the SCT's work and the fact that the Crown is a party to every proceeding, calls into question whether the SCT retains the requisite independence from the executive branch of government.

Adding the particular context of specific claims, which are disputes against the Crown in right of Canada for alleged breaches of the Crown's lawful obligation, and the objective of reconciliation, it is vitally important that the SCT be truly independent from the federal government. First Nations and the public at large must have complete confidence in that independence, both in form and substance.

Apart from eroding the independence of the SCT, there are likely to be immediate practical consequences in terms of efficiency and access to justice as a result of recent changes. In *Halalt First Nation v the Queen*, the SCT referred to the preamble to the SCTA and acknowledged that the legislation was prompted by inordinate delays in resolving specific claims. It also confirmed that the role of the SCTA is to adjudicate these claims "in a just and timely manner."[19] The ATSSCA undermines this goal, replacing dedicated support services for the SCT with a rationed "shared services model" that threatens the ability of the SCT to expedite cases through case management, particularly by imposing time limits.[20] Nor are challenges to the efficient management of the SCT process freestanding. When this is considered with other government decisions, such as the gap between the permitted number of Tribunal members under the SCTA (up to six full time positions)[21] and the number of members actually appointed, the federal government's commitment to the goals of the SCTA may well be called into question.

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13 SCTA, section 13.

14 SCTA, s. 13(1)(b) and section 19; see also *Kitselas, supra* note 6 at para. 29.

15 *Halalt First Nation v. Her Majesty the Queen*, 2014 SCTC 12 at paras. 44-47.

16 SCTA, section 34(1) and (2).

17 *Kitselas, supra* note 6 at para. 30.

18 *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at 894-897; *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at 794-795.

19 *Halalt*, *supra* note 15 at para 62.

20 SCTA. S 12. Ss 12(1)(h) and 12 (1)(k).

21 SCTA, s 6 (4).

In our view, legislative amendments are required to restructure the discretion of the Chief Administrator for the SCT (and the other administrative tribunals with sitting judges as panel members, such as the Competition Tribunal and the Public Servants Disclosure Protection Tribunal). The Chief Administrator's discretion should be structured, at a minimum, to parallel the consultation and direction requirements in the *Court Administration Services Act*.

Without this amendment, superior court judges may justifiably be concerned with the future independence of the SCT and the perceived integrity of their office, and decline appointments to serve as tribunal members. As the third branch of government, the judiciary understandably takes its independence from the executive branch seriously. At present, two of three members of the SCT are serving second terms, so will be ineligible for reappointment at the end of those terms.[22] Without new appointees, only one part-time member will remain, and whether that member will volunteer for reappointment in 2016 is unclear. If judges either from the current roster or from the superior courts are reluctant to serve, the worthy policy objective of reconciliation in "Justice at Last" (and the fundamental reconciliatory purpose of the SCTA) cannot be achieved. That cannot have been the intent of Parliament when enacting ATSSCA.

The CBA Section understands that there are plans to relocate the SCT to the Justice Canada building. First Nation litigants arriving to litigate claims *against* the Crown before the SCT may well have reason to pause when they see the tribunal housed with Justice Canada. It is difficult to overemphasize that the SCT must be reasonably perceived to be independent by all who come before it, particularly First Nations. Housing it with one of the parties will undermine this perception, and erode the promise of reconciliation intended by "Justice at Last". Again, we do not believe thwarting this policy objective of government could have been the intent of Parliament when enacting ATSSCA.

We note that section 41 of the SCTA requires that the Minister of Aboriginal Affairs and Northern Development review the mandate and structure of the SCT, its efficiency and effectiveness and any other matter under the SCTA five years after the Act came in force (October 16, 2014).[23] We look forward to participating in the review and to commenting further on the mandate and structure of the SCT, as well as its efficiency and effectiveness. The five year review would also be a timely opportunity to address and rectify any issues touching on the judicial independence of the judges serving on the SCT.

Thank you for considering the views of the CBA Section.

Yours truly,

(original signed by Gaylene Schellenberg for Michael Jerch)

Michael Jerch
Chair, Aboriginal Law Section

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22 Annual Report of the Chairperson of the Specific Claims Tribunal, September 30, 2014, pages 3, 4 and 10.

23 *Ibid*., page 15.