THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Specific Claims Tribunal Act
Five Year Review

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The CBA National Aboriginal Law Section (CBA Section) appreciates the opportunity to provide comments for the five year review of the *Specific Claims Tribunal Act* (*SCTA*). Our members are experts in aboriginal law from all parts of Canada, and we have extensive experience relevant to this review.

II. GENERAL COMMENTS

To begin, the CBA Section has some general comments about the Specific Claims Tribunal's (SCT or Tribunal) mandate and structure, effectiveness and efficiency, as well as the review itself.

A. Process

Section 41(1) of the *SCTA* states (our emphasis):

> 41. (1) Within one year after the fifth anniversary of the coming into force of this Act, the Minister shall undertake a review of the mandate and structure of the Tribunal, of its efficiency and effectiveness of operation and of any other matters related to this Act that the Minister considers appropriate. In carrying out the review, *the Minister shall give First Nations an opportunity to make representations*.

The five year review is intended to give First Nations an opportunity to make representations. We question whether the process provided fulfills the statutory – and arguably constitutional – requirements of consultation with First Nations.

We understand that a letter from the Minister was sent to those First Nations with Specific Claims before the Tribunal on January 28, 2015. The letter invited comments to the Minister's special representative concerning the five year review, without a specific end date for such comments. Some weeks later, a due date of April 15 2015 was posted on the Aboriginal Affairs and Northern Development Canada (AANDC) website.

We suggest that the time allowed for First Nations to comment on the mandate, structure, efficiency and effectiveness of the operation of the Tribunal, as well as respond to the nineteen questions included in the Minister's engagement paper, is insufficient for First Nations to make representations informed by the requisite consultation with their membership and legal counsel. The input of elders or other community members who are involved as witnesses to claims is invaluable to assess, among other things, whether the Tribunal is suitably exercising its power to "take into consideration cultural diversity in developing and applying its rules of practice and procedure," as provided under section 13(1)(c) of the *SCTA*.

The present review was initiated well beyond the five year period after the *SCTA* came into force (in 2008), and we suggest that delay does not justify abbreviating consultations with First Nations to the point of making them less than meaningful.

B. Efficiency and Effectiveness

The SCT has an important mandate, but is insufficiently resourced. That reality has implications for the Tribunal's efficiency and effectiveness.

Lack of judges

One of the most pressing problems currently facing the SCT is the lack of judges. The SCT now functions with one full-time member and two part-time members. The *SCTA* provides for the appointment of an equivalent of up to six full-time members, which can be divided among a combination of full-time and part-time members (section 6(4)). The SCT is operating with less than one-third of the members envisioned as necessary under the *SCTA*.

We cannot assess the adequacy of the number of judges to be appointed to the Tribunal under section 6, as the number of judges appointed has fallen so short of what is anticipated by that section. It is not a matter of changing the law – it is a matter of implementing the law in a responsible way.

There is no reason from the standpoint of the Tribunal's function for appointments to expire after five years or for a judge's total tenure to be limited to 10 years. This leaves open the possibility that reappointments will be affected by partisan considerations.[1]

1 CBA Section letter to Ministers Peter MacKay and Bernard Valcourt, February 9, 2015, in Appendix A.

As of September 2014, there are 61 active claims in the Tribunal process, a quarter originating in British Columbia, although only one judge is located there.[2] The SCT Chair foresees an increase in the volume of claims in the future.[3] The SCT's most recent *Annual Report* emphasized the gravity of the problem caused by the lack of judges:[4]

> The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all…
>
> Without the appointment of at least one additional full time member and several part time members, there will be unacceptable delays in servicing the current case load, much less any new claims.
>
> I am the only full time member, and the Chairperson of the Tribunal. My term expires in December, 2015. *Without the appointment of one or more full time members in the interim there will be no ability to implement a succession plan or service the case load. The Tribunal will fail*.

We recommend that the Justice Minister increase the number of appointments to the Tribunal within the limits provided by section 6(4) of the *SCTA*. We do not foresee at this time the need to amend the *SCTA* to increase the maximum number of appointments allowed.

RECOMMENDATION:

1. **The CBA Aboriginal Law Section recommends that the Justice Minister increase the number of appointments to the Tribunal within the limits provided by section 6(4) of the *SCTA*.**

Funding for preparing claims before filing

Funding for First Nation claimants at the SCT is provided on a discretionary basis by the Funding Services for Aboriginal Governance and Negotiations Unit (FSAGNU). When granted, it is partial funding and remains at the discretion of annual Parliamentary allocations,[5] which appears to be the only document explaining First Nation funding at the SCT.

No funding is provided until the First Nation claimant files its claim. Once the claim is filed, the claimant can apply for funding for all activities related to the preparation of the Statement of Claim that took place in the same fiscal year.

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2 SCT *Annual Report*, September 30, 2014, at 4, 7.

3 *Ibid*. at 7.

4 *Ibid.* at 2, our emphasis.

5 See Canada, "Fact Sheet - At a Glance: The Specific Claims Tribunal Act." See also: www.aadnc-aandc.gc.ca/eng/1100100030306/1100100030307).

Until a specific claim is filed with the Tribunal, a First Nation receives no funding to assess the financial value of its claim. Normally, this kind of evaluation is an important preliminary step for potential litigants in weighing whether or not to go to court. In the specific claims process, First Nations often must decide whether to pursue litigation with only a vague notion of the financial compensation available if they succeed. To be better informed about the possible outcomes, a First Nation must subsidize what can be a costly assessment of the value of its claim.

We recommend that First Nation claimants be given funding for a preliminary assessment of the financial value of their claim before filing a Statement of Claim, and that the funding be provided for activities in years prior to filing the Statement of Claim. Funding should not be contingent on filing a Statement of Claim, as the evaluation might lead a First Nation to conclude that the specific claim in not worth pursuing at the SCT. Whether or not the claim is pursued, advance funding for the evaluation of claims would ensure that First Nations are better informed about what they stand to gain by pursuing claims at the SCT.

RECOMMENDATION:

2. **The CBA Aboriginal Law Section recommends that First Nation claimants be given funding for a preliminary assessment of the financial value of their claim in advance of filing a Statement of Claim and that the funding be provided for activities in years prior to filing the Statement of Claim.**

Funding specific claims at the Ministerial stage

When considering the efficiency and effectiveness of the SCT's operations, reference must be made to the Ministerial stage of the Specific Claims process. That is historically the stage when the First Nation becomes aware of the evidentiary essence of its claim. First Nations claimants, however, have noticed a dramatic decrease in funding for specific claims at the Ministerial stage since the *SCTA* came into force. The Union of BC Indian Chiefs, for example, estimates that these cuts ranged from 35% to 60% in the 2014-2015 fiscal year.[6] Presumably, the decrease in funding for research and legal analysis at the Ministerial stage is to offset the new budgetary allocations to provide claimant funding at the SCT. However, the result is that little funding is available at the Ministerial stage to pursue the research and legal analysis necessary for First Nations to assess and inform the Crown if a valid claim exists that should be settled.

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6 See UBIC press release, February 20, 2014, available online: www.ubcic.bc.ca/News_Releases/UBCICNews02201401.html#axzz3UefZBHcW).

Insufficiently researched claims at the Ministerial stage may result in more refused claims by the Minister. First Nations would then need to pursue claims at the SCT where they would begin the bulk of their evidentiary work. This would mean greater delays in settling claims at the SCT.

Insufficient funding for research and legal analysis at the Ministerial stage will also effectively eliminate the so-called "negotiation stage" of the process, which is intended to be the foundation of the Specific Claims policy. The preamble of the *SCTA* outlines the role of the Tribunal as a compliment to the process of negotiation between First Nations and the Crown in resolving historic grievances:

> Recognizing that…*the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations.*

However, where funding is limited or unavailable to research claims in preparation for negotiations, the Ministerial stage simply puts the Crown on notice about the possibility of a claim that will eventually go to the SCT for litigation. Instead of restoring adequate funding levels for research and development of claims at the Ministerial stage, AANDC's Report on Plans and Priorities in 2014-2015 seems to reveal plans to further reduce funding by 2016-2017 to one-third the current insufficient levels.[7]

We recommend that the government allocate the budget necessary to properly fund the preparation of specific claims at both the Ministerial stage and at the Tribunal. This will optimize the efficiency and effectiveness of the Tribunal's activities and encourage settling of claims before they reach the Tribunal.

RECOMMENDATION:

3. **The CBA Aboriginal Law Section recommends that the government allocate the budget necessary to properly fund the preparation of specific claims at both the Ministerial stage and at the SCT.**

Lack of French-language staff

French-speaking claimants (largely in Quebec) note that only two clerks at the Tribunal are able to converse in French and only one is able to write in French. The dedication of these staff

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7 See sub-program 1.2.2. in Aboriginal Affairs and Northern Development Canada - *Report on Plans and Priorities*, 2014-15, available online: www.aadnc-andc.gc.ca/eng/1389718323634/1389718386428#SP1_2_2.

members is noteworthy, but they alone cannot respond to the 11 specific claims filed in Quebec as of September 2014.[8] Nor can they respond to the possible increased caseload from French-speaking First Nations.

Arguably, the incorporation of the SCT's administrative staff within Administrative Tribunal Support Services Canada (ATSSC) in November 2014 could provide greater access to French-speaking administrative staff. However, that advantage is offset by the fact that it does not provide specialized staff knowledgeable of the procedural history of the claims nor clerks privy to the discussions at case management conferences on a regular basis. All First Nation claimants before the SCT should be able to have access to knowledgeable, specialized SCT staff able to communicate in the official language chosen by the First Nation.

RECOMMENDATION:

4. **The CBA Aboriginal Law Section recommends that more staff capable of speaking and writing in French be assigned to the SCT's work.**

The CBA Section has expressed related concerns about the SCT's registrar staff becoming part of the ATSSC in a February 2015 letter to Ministers Peter MacKay and Bernard Valcourt (see Appendix A, for ease of reference).

C. Judicial Independence

The CBA Section has also outlined concerns about the impact of scarce resources and new administrative structures on judicial independence at the SCT. Again, please refer to the February 2015 letter at Appendix A for more detail.

D. Release and Indemnification of Section 35 on Facts, not Issues

The release provision of the *SCTA* is insufficiently responsive to historical claims that may come before the SCT. It needs greater flexibility to avoid inadvertently precluding separate historical claims from being litigated at different times, if based on the same underlying historical facts.

Section 35 of the *SCTA* provides that with an SCT order that a claim is invalid or a SCT award of compensation for a specific claim:

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8 *Supra*, note 2.

(a) respondents are released from any further action, claim by or liability to the claimant First Nation or its members of any kind that is based on the same facts as the original claim; and

(b) the claimant must indemnify any respondent against any amount for which the latter becomes liable as a result of a proceeding for damages initiated by the claimant or its members "against any other person," where this proceeding is based on the same facts as the original claim.

Assuming sub-section 35(b) is designed to prevent "double compensation" for a single claim, it requires clarification so its effect is not interpreted more broadly. It should not capture, for example, a claimant who initiates an action in damages against a province or territory that was not a party to the original claim when section 21 explicitly authorizes a claimant to take such an action. This and other similarly ambiguous circumstances raise questions about the absence of any exceptions or ceiling to this indemnification obligation.

Many specific claims from Treaty provisions can arise from the same historical facts, especially the historical record and the intent of the parties at the time the Treaty was made. Whether the claim is for treaty land entitlement (TLE), annuity arrears, ammunition and twine, agricultural benefits, education or welfare and relief, the underlying facts of the population of the band at the time of Treaty, the band's location, the oral promises made to the band and so on all are a necessary part of the asserted Treaty right. The release provision under section 35 could preclude a First Nation from litigating, for example, its claim to ammunition and twine before the SCT, while it negotiates its TLE claim with Canada. Both claims draw on similar historical facts (e.g. population) at the time the band entered the Treaty. Should those TLE negotiations fail and the band files the TLE claim with the SCT, section 35 could preclude the TLE claim from being filed if there is an earlier award or dismissal of the ammunition and twine claim by the Tribunal on the same historical facts.

The Specific Claims Policy and, as statutory extension of that policy, the SCT, is intended to address longstanding First Nation grievances against Canada. While no First Nation should be able to re-litigate a specific legal issue once it is finally adjudicated or settled, the *SCTA* needs to recognize that many historical claims arise from similar historical facts. The *SCTA* should not put First Nations to the harsh choice of deciding whether to file, as a bundle, all specific claims arising from the same historical facts at once. That could not have been the intent of section 35, and is certainly contrary to the Specific Claims Policy's goal of honourable resolution of claims.

We suggest the *SCTA* be amended to apply the statutory release and indemnity to specific legal issues but not necessarily the same historical facts. Like the *SCTA* prohibition against applying statutory or equitable limitation periods, the release provisions should not be used to prevent a First Nation from filing a separate claim with the SCT that may draw on the same or similar historical facts of a previously filed claim that has been settled or finally adjudicated.

RECOMMENDATION:

5. **The CBA Aboriginal Law Section recommends that the *SCTA* be amended to apply the statutory release and indemnity to specific legal issues but not necessarily the same historical facts.**

III. RESPONSE TO CONSULTATION QUESTIONS

We address selected questions in the AANDC engagement paper, Seeking Comments on the Five Year Review of the *Specific Claims Tribunal Act*.

Question 1: In your view, what are the strengths and weaknesses of the three year time frames set out in s. 16(1) of the *Specific Claims Tribunal Act*.

We respond to this first question from two perspectives. We consider first the implication that filing claims after three years may be characterized as a "speak now or forever hold your peace" direction to First Nations. This is an important issue, especially if suggestions that Canada may phase out the specific claims process in the relatively near future are accurate. Next, we consider why claimants should be required to wait three years for the assessment process in the absence of a backlog, and why claims in negotiation must wait three years unless Canada concedes that the parties are at an impasse.

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The CBA Section opposes imposing any time limit in the *SCTA* within which First Nations must file specific claims with the Tribunal. Any limit would be contrary to the purpose of specific claims resolution.

The specific claims process is not an insurance policy. Of course, Canada may prefer to know when all specific claims are either resolved or time-barred from being adjudicated. To some degree, Canada has that certainty now – many historic claims would likely be time-barred were they brought in the superior courts of justice.

The Specific Claims Policy was designed to ameliorate this potential injustice. The policy acknowledged that an honourable resolution of First Nation historic grievances was not achievable through the regular court system, and required a solution that did not rely on statutory (or equitable) limitation periods. The *SCTA* is consistent with that policy approach to the resolution of historical claims – the SCT cannot apply statutory or equitable limitations as a legal principle when considering claims. To change this fundamental approach to the resolution of specific claims would effectively obliterate the Specific Claims Policy. That is not the intent of the *SCTA* nor should it be of any amendments.

First Nations often experience barriers to the pursuit of their historical claims against Canada. Knowing that a claim in law and fact actually exists requires research and legal advice, and then financial resources to prosecute the claim. The Specific Claims Policy provided funding for research and legal advice, and funding and opportunity to negotiate these claims. Only when the negotiation process fails (either because Canada rejects the claim for negotiation or the negotiations themselves fail to achieve a settlement) should the SCT be approached. In this light, the SCT is not a court of first instance but rather a court of last resort. To require First Nations to file claims before the SCT within a certain time or be statute-barred from doing so would ignore these obstacles and this process of claims resolution.

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The three year time frame is a response to the situation that existed when the *SCTA* was enacted. Approximately 550 claims in the specific claims process had not been assessed, even though many had been in the assessment phase for more than a decade.

The solution to this problematic situation was an expedited method of reviewing claims in the assessment backlog. This cleared the backlog, but at some expense in terms of offsetting defects in the specific claims process. The expedited process meant that the significant majority of assessments in the first three years of the *SCTA* consisted of summary rejections or acceptances of the claims for negotiation, reflecting a degree of curtailed analysis. First Nations cannot offer any input in the assessment process after the initial filing of a claim without re-setting the clock for assessment to three years. If a First Nation asks for clarification of the reasons for rejecting a claim or offers information that addresses these reasons, they may either submit the information and wait three years for a response, or use the information before the SCT.

Another concern with the three year assessment period arises out of incorrect assumptions when the legislation was drafted, which in turn has contributed to underfunding the SCT since

its creation. At the time of the Senate investigation into the specific claims process, historic statistics revealed that, over 30 years, approximately 70% of claims had been accepted (ultimately) for negotiations and 30% rejected. Between 2008 and 2012,[9] the percentage of claims rejected dramatically exceeded 30%:

- In 2008-2009, 44% of completed assessments were rejections.
- In 2009-2010, 61% of completed assessments were rejections.
- In 2010-2011, 75% of completed assessments were rejections.
- In 2011-2012, 41% of completed assessments were rejections.

In these four years, assessments were completed on 549 claims, of which 297 (54%) were rejected. If 30% of the completed assessments were rejected (as was the case historically), only 164 claims would have been rejected. Over four years, 133 more claims could be referred to the SCT than the estimates that determined the initial resourcing of the SCT. If anything, this number is low, given the number of impoverished validations that from the standpoint of the First Nation were indistinguishable from rejections.

Going forward, the original justification for a three year assessment period (a backlog of over 500 claims) has disappeared. As of March 15, 2015, only 93 claims were under assessment, and legal opinions have been signed on 23 of these claims. There is little justification for retaining a three year time frame before filed claims are deemed rejected.

There is no reason to retain both a three year time frame for negotiations and the requirement that both parties agree that negotiations on a claim have reached an impasse before the negotiations have been ongoing for three years. First Nations suggest that impasses most often occur near the beginning of negotiations over the primary positions of the parties, rather than later in the process after negotiations have progressed for some time.

While 65 claims are currently being handled by the Specific Claims Branch, both before the matter is referred to Justice Canada and after it is returned with a signed legal opinion, it might be appropriate to shorten the three year assessment period legislatively. However, a legislative change would not address the most significant failing of the current process of assessing claims. That could be best addressed by changing the approach adopted by the Specific Claims Branch when the objective was to deal with a huge backlog. Canada should now allow a more iterative

[9] The annual reports on the specific claims process for 2012-2013 and 2013-2014 do not allow a calculation of the number of claims accepted and rejected.

process in the assessment of claims, with the three year deadline in the legislation remaining in place.

Unfortunately, the fairness in negotiations can only be addressed with an amendment to section 16(1) of the *SCTA* to allow a claim to be filed with the SCT if an impasse has been reached in negotiations, without the need for the consent of the Minister.

Question 2: In your opinion, what would be the advantages and/or disadvantages of Canada having the option of referring claims to the Tribunal for adjudication, in addition to the option currently available to First Nations?

In the engagement paper, AANDC proposes amending the *SCTA* so Canada could bring a claim before the SCT of its own accord. This would constitute a radical transformation of the SCT's purpose and the specific claims process as a whole, and the CBA Section does not support it.

Granting Canada the right to bring a claim before the Tribunal would transform the SCT from a voluntary judicial forum where First Nations can choose to bring a claim to a body before which a First Nation could be compelled to appear. The proposed amendment would undermine a key purpose of the SCT as stated in section 5 of the *SCTA*: "This Act affects the rights of a First Nation *only if the First Nation chooses to file a specific claim with the Tribunal* and only to the extent that this Act expressly provides" (our emphasis).

The preamble of the *SCTA* also recognizes that the voluntary nature of the SCT process for First Nations can foster effective negotiation with the Crown: "the right of First Nations to choose and have access to a specific claims tribunal will create conditions that are appropriate for resolving valid claims through negotiations…".

One of the tenets of the specific claims policy, as recognized in the engagement paper, is its voluntary nature. This is at the foundation of the policy and Action Plan set out by in the 2007 document, *Specific Claims: Justice at Last*:

> There are two ways to settle these issues (giving rise to Specific Claims) – through negotiation or litigation. *First Nations are free to choose either option as both processes are always voluntary. However, legal challenges can be divisive and divert money that could be better spent in communities than in the courts.*[10] (our emphasis)

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10 INAC, *Specific Claims: Justice at Last* (Ottawa, 2007) at 2, available on-line: www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/jal_1100100030459_eng.pdf.

Precisely because litigation can be so costly – even when partially funded, as is the case for First Nations before the SCT – First Nations should not be compelled to engage in litigation before the SCT.

We also question whether this transformation of the SCT's purpose is warranted given the problem presented in the engagement paper. The paper suggests that Canada should be able to refer claims to the SCT to prevent a First Nation from repeatedly submitting similar claims to the Minister for negotiation.

Canada already has the power to refuse to negotiate a claim it has refused in the past, if the grounds on which the refusal was based still apply. Canada might also choose to refuse funding to a First Nation that proposes a claim essentially like one already refused. If the funding decision complies with the principles of administrative law, it is an option already available to Canada. It is unclear how compelling a First Nation to try its claim before the SCT will resolve an issue that appears to have built-in solutions at the Ministerial phase of the process.

RECOMMENDATION:

6. **The CBA Aboriginal Law Section recommends against any amendment to the *Specific Claims Tribunal Act* allowing Canada to bring a specific claim before the Tribunal of its own accord.**

Question 3: In your view, what are the advantages or disadvantages of repealing section 42 of the *Specific Claims Tribunal Act* and amending section 43 of the Act by deleting the words "For greater certainty," from the first line?

Section 42 and the first three words of section 43 serve no remaining purpose. Since we have already recommended that the law be amended with regard to the filing of claims, we suggest that section 42 also be repealed and section 43 amended by removing the first three words.

Question 4: In what ways would you suggest the function of the Specific Claims Tribunal might be expanded to improve services to the parties?

The engagement paper suggests expanding the Tribunal's functions to include oversight related to the negotiation process, including court-directed mediation if both parties consent. In principle, court-directed mediation or dispute resolution could be an excellent means of achieving settlement, particularly where negotiation between the parties have reached an impasse and the parties agree that certain discrete issues could benefit from judicial guidance.

We have recommended that section 16(1) of the *SCTA* be modified to allow First Nations to file a claim with the Tribunal if negotiations with the Crown reach an impasse before the three-year delay period. Expanding the Tribunal's mandate to include a role in negotiation, however, could offer an alternative way to resolve such an impasse without definitively ending negotiations. Instead, parties might refer discrete controversial issues to the Tribunal in either a formal summary judgment procedure or a more informal and confidential dispute resolution process. Both would allow the parties to benefit from the views of the Tribunal without the expense of filing and defending the entire claim before the Tribunal.

Ideally, court-directed mediation should be available to the parties at any stage of proceeding, even if a claim has been filed with the Tribunal.

However, the Tribunal's mandate should not be expanded unless the Tribunal is provided with at least the requisite resources to fulfil its current mandate, which we have noted is not currently the case. We would support an expansion of the Tribunal's mandate to oversee matters arising in the negotiation of specific claims and to include a court-directed mediation process for the Crown and First Nations at any stage of the specific claims process, provided there is a corresponding expansion of the human and financial resources necessary to fulfil that mandate.

Question 7: In your opinion, how could the Tribunal's Rules of Practice and Procedure be amended to improve the Tribunal's efficiency, effectiveness and ensure the timely adjudication of claims?

Question 11 contains our response to both questions 7 and 11.

Question 8: In your opinion, what are the advantages and disadvantages of statutorily bifurcating validity and compensation hearings?

The CBA Section supports the division of issues in a claim so they can be considered in separate SCT hearings (bifurcation). The decision to bifurcate should be at the discretion of the SCT panel on application by one or both parties, rather than adding a statutory requirement to bifurcate to the *SCTA*.

Bifurcation is often a strategic issue for the parties. Litigation is expensive and time-consuming. Not unlike other kinds of litigation (e.g. negligence claims), parties may dispute liability and then settle compensation once liability is determined. First Nations may not have the financial means to litigate both liability and compensation at the same time – if a liability hearing results in an affirmative decision for the First Nation, it knows investing in the compensation phase of the

litigation is warranted. The reverse is also true – if a First Nation loses a liability decision, then it has not thrown good money after bad by also having prepared (and made the investment) for the compensation issue should the claim be bifurcated.

Bifurcation may also be used strategically to prolong litigation. A party wishing to expend the resources of a less well-funded adversary may seek to bifurcate to increase the length of the litigation process and the potential costs.

For these reasons, the decision to bifurcate a claim should remain at the discretion of the SCT, if a party applies for bifurcation. The SCT can then weigh the evidence and arguments of both parties to make the appropriate decision in the circumstances. This is preferable to amending the *SCTA* to require bifurcation of claims.

RECOMMENDATION:

7. **The CBA Aboriginal Law Section recommends that the decision to bifurcate a claim should remain at the discretion of the SCT, if a party applies for bifurcation.**

Question 9: Paper Hearings to Determine Validity and Compensation

The engagement paper suggests providing an expedited process for the validity phase of bifurcated claims before the Tribunal based on supporting documents submitted to the Minister at the Ministerial stage of the specific claims process.

There may be instances where an expedited process would be warranted, particularly if the First Nation claimant does not intend to introduce new evidence before the Tribunal. However, a claimant can make that decision only if it knows what evidence Canada intends to introduce in its defence. Canada would therefore still have to disclose to the First Nation any additional evidence it intended to rely on that had not been submitted at the Ministerial stage.

As the claimant has the burden of proving the validity of its claim, it should be the only party able to ask the court for an expedited paper hearing, subject to the Crown's right to oppose the motion. Allowing the Crown to compel an expedited hearing would limit the evidence a First Nation can rely on to prove its claim, and turn a new adjudicative process into a judicial review of the Minister's refusal of the claim. Many First Nations prepared their evidence at the Ministerial stage years earlier. Forcing it to rely solely on that evidence undermines the fact-finding process and denies the SCT the best evidence available at the time of the hearing.

RECOMMENDATION:

8. **The CBA Aboriginal Law Section recommends that expedited paper hearings only be a possibility when the First Nation claimant, being informed of the evidence on which Canada intends to rely in its defence, elects to proceed in this manner.**

Question 10: In your opinion, what are the advantages or disadvantages of amending the *Specific Claims Tribunal Act* to legislate a standard methodology for determining the current value of historic losses?

No such amendment should be considered. The appropriate method of calculating damages (particularly equitable damages where breaches of fiduciary duty have been established) is part of the dynamic process of the development of the law, and cannot be made into a simple template. A legislated methodology would serve only as an additional cap on damages.

Question 11 (and question 7): In your opinion, how might the exchange of documents be expedited at the Tribunal?

Leading up to the creation of the Tribunal, there were two prevalent views about its function. One was that the Tribunal would act as a second hearing, where claimants would have the same opportunity (and responsibility) as plaintiffs in litigation to establish a case on an empty palette. The other was that the Tribunal would act as a modified appellate Court, reviewing whether the Minister had erred in assessing a claim. While the legislation mandates neither function, the rules are modelled on a Federal Court trial process, and are more consistent with the fresh hearing approach.

Unfortunately, Justice Canada's position on procedural matters has led to a hybrid process that mixes the alternative models to provide the worst of both. This is reflected in the position that although the Minister's decision is crucial to the SCT process, it is treated as irrelevant and many of the materials on which it was based cannot be produced before the Tribunal. Canada has taken the position that all materials filed as part of a claim submission (including the initial submission) are inadmissible because of negotiation privilege, with the exception of unannotated historical records. First Nations that have already incurred the expense of preparing an expert report must repeat the process before the Tribunal. What was intended to be an expedited process increasingly resembles traditional litigation, both in time and cost.

The position taken by Justice Canada is not prescribed in the law itself, so no amendment is required. But we suggest the rules provide that the original claim submission and any additional historical records unearthed through the assessment process be the base of the documentary record before the Tribunal (excluding privileged documents, namely "value added" materials created in the claims assessment process such as analysis prepared by Specific Claims Branch, legal opinions or recommendations to the Minister). First Nations should have the option either to supplement this record with additional evidence or to make legal argument before the SCT based on the record of the assessment process. Canada should only be permitted to enter new evidence or witnesses if the claimant elects to do so.

Question 12: In your opinion, how can the progress of claims before the Tribunal be balanced with the need for additional expert reports or other evidence?

The role of expert witnesses in complex civil litigation is well established. Many specific claims before the Tribunal require some measure of expert evidence on history, historical geography, anthropology, valuation and so on to be properly adjudicated.

The integrity of the Tribunal's adjudication process should not be compromised by foregoing expert evidence, even for claims of relatively modest value. In many situations, parties engaged the experts as part of the claims evaluation or negotiation process, before the claim was filed with the SCT. Parties can invest considerable amounts in expert reports in the negotiation process, especially in larger claims. Often these reports were funded by negotiation loan funding to the First Nation and may even be joint reports funded out of the negotiation loan funding and the Specific Claims Branch's annual funding. Negotiation privilege does not allow these relevant reports to be used before the SCT, so parties must duplicate them at unnecessary expense of time and money.

The *SCTA* should be amended to allow a party to apply to use the reports submitted in the claims process before the SCT. The Tribunal should have statutory discretion to waive the negotiation privilege over reports if the public interest in the efficient and effective resolution of specific claims outweighs the private interest in protecting negotiation privilege. This could speed up the litigation process, as parties would not need to commission reports after the claim was filed but could rely on reports already completed. The Tribunal would benefit from the expert opinion evidence it needs to properly adjudicate the claim without forcing the parties to invest twice in the same report.

RECOMMENDATION:

9. **The CBA Aboriginal Law Section recommends that the *SCTA* be amended to allow a party to apply to use existing expert reports in claims before the SCT.**

Question 17: In your opinion, what are the advantages and disadvantages of the Minimum Standard for specific claim submissions?

To the extent that the Minimum Standard assists in submitting claims in a form that they can be assessed, it can play a positive role. What cannot be justified is the process by which all claims, regardless of whether they meet the Minimum Standard, have six months added to the three years for assessment of claims. Because the Minimum Standard deals with form rather than substance, a cursory review of the submission can determine whether the Minimum Standard is met. The current practice allows six months before the Specific Claims Branch is required to take a first look at the submission, which unnecessarily prolongs the process.

If a submission does not satisfy the Minimum Standard, it is appropriate to return the document to the claimant for deficiencies to be rectified. The three year assessment period will not begin until the corrected document is returned to Canada. However, if a claim submission complies with the Minimum Standard, the short time it takes to determine that can easily be subsumed in the subsequent three years.

IV. CONCLUSION

The CBA Section supports ongoing regular reviews of the *SCTA* at appropriate intervals, and appreciates the opportunity to contribute to this five year review of the *SCTA*. We would be pleased to respond to any further questions about our views.

V. SUMMARY OF RECOMMENDATIONS

1. **The CBA Aboriginal Law Section recommends that the Justice Minister increase the number of appointments to the Tribunal within the limits provided by section 6(4) of the *SCTA*.**

2. **The CBA Aboriginal Law Section recommends that First Nation claimants be given funding for a preliminary assessment of the financial value of their claim in advance of filing a Statement of Claim and that the funding be provided for activities in years prior to filing the Statement of Claim.**

3. **The CBA Aboriginal Law Section recommends that the government allocate the budget necessary to properly fund the preparation of specific claims at both the Ministerial stage and at the SCT.**

4. **The CBA Aboriginal Law Section recommends that more staff capable of speaking and writing in French be assigned to the SCT's work.**

5. **The CBA Aboriginal Law Section recommends that the *SCTA* be amended to apply the statutory release and indemnity to specific legal issues but not necessarily the same historical facts.**

6. **The CBA Aboriginal Law Section recommends against any amendment to the *Specific Claims Tribunal Act* allowing Canada to bring a specific claim before the Tribunal of its own accord.**

7. **The CBA Aboriginal Law Section recommends that the decision to bifurcate a claim should remain at the discretion of the SCT, if a party applies for bifurcation.**

8. **The CBA Aboriginal Law Section recommends that expedited paper hearings only be a possibility when the First Nation claimant, being informed of the evidence on which Canada intends to rely in its defence, elects to proceed in this manner.**

9. **The CBA Aboriginal Law Section recommends that the SCTA be amended to allow a party to apply to use existing expert reports in claims before the SCT.**

THE CANADIAN BAR ASSOCIATION
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Appendix A: Letter from Section Chair, Michael Jerch to Ministers MacKay and Valcourt:

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

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

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.

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

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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.

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);
- 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

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

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

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 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

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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.

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.

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.

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

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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).

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

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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23 *Ibid*., page 15.