THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 23, 2021

Via email: claims.revendications@sct-trp.ca

The Honourable Justice Victoria Chiappetta
Chairperson
Specific Claims Tribunal Canada Advisory Committee
400-427 Laurier Ave W., Box 31
Ottawa, ON K1R 7Y2

Dear Justice Chiappetta:

Re: Specific Claims Tribunal

I am writing on behalf of the Aboriginal Law Section of the Canadian Bar Association (CBA Section) following our October 28, 2021, meeting with the Specific Claims Tribunal's Advisory Committee (Committee). Further to your request for written feedback on issues of importance to the Specific Claims Tribunal (SCT), we are pleased to comment on relevant questions below.

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 Aboriginal law from across the country, and frequently contributes to legislative and national policy initiatives.

The CBA Section has enjoyed a constructive dialogue with the SCT as a member of the Committee. We address the following issues with the view of making the SCT more efficient and flexible:

- French-speaking judges at the SCT
- Member from the Superior Court of Québec
- Role of SCT legal staff in supporting the expertise of members and in maintaining judicial independence
- Integrating virtual hearings into the tool bag of the SCT
- Access to claim documents on the SCT website
- Creative case management
- Creative cost awards

1. French-speaking judges at the SCT

Access to justice lies at the heart of the CBA's mandate and includes access to judges in the official language of the parties' choice. The absence of a French-speaking member at the SCT is an access to justice issue for French-speaking First Nations.

We believe at least two French-speaking members are necessary to provide First Nation claimants with access to mediation. The CBA Section understands that the SCT does not appoint its members. We plan to write to the Minister of Crown-Indigenous Relations in this regard.

2. Member from the Superior Court of Quebec

Similarly, specific claims in Quebec require an understanding of civil property law which judges from other provinces might not possess. To ensure the SCT has the judicial expertise to hear claims from all jurisdictions in Canada, the CBA Section believes at least one member should be from the Superior Court of Quebec. This is not a concern about regional parity, but rather about legal expertise and claimants' confidence in the SCT's competency. The CBA Section asks to remain informed of progress on this matter and offers to assist by following up with the Minister.

Role of SCT legal staff in supporting the expertise of members and in maintaining judicial independence

As expressed in comments to the Senate Committee on National Finance on May 4, 2014[1], and in a letter to the Minister of Justice and Minister of Aboriginal Affairs (as the position was known then) on February 9, 2015,[2] the CBA has an ongoing concern with the Administrative Tribunal Support Services of Canada's (ATSSC) role in administrating the SCT's affairs that affect institutional and judicial independence. In 2015, the CBA urged[3] the federal government to demonstrate its support for the SCT's independence by adequately staffing and resourcing it, restoring it with a dedicated registry and removing it from the operations of the ATSCC.

In the absence of these last two elements – a dedicated registry and withdrawal from the ATSCC – the CBA Section wishes to continue its ongoing dialogue with the SCT about members' ability to adequately and independently adjudicate as s. 96 judges. One aspect of judicial independence is the members' reliance on staff lawyers to support them in areas of law where a file might require added expertise (for example, Aboriginal law or Quebec property or procedural law). The CBA Section asks to what extent the SCT can select lawyers who have the required expertise to hear claims, perhaps in areas where members might need added support? Although not a long-term solution, is the SCT able to assign Quebec lawyers to a non-Quebec member hearing a claim in Quebec to address some of the concerns raised above in Title 2?

Additionally, what measures are taken to preserve the independence of these lawyers in their mandate to support judges on files? Are these lawyers shared with other administrative tribunals served by the ATSSC, so that their breadth of knowledge becomes less specialized?

3. Integrating virtual hearings into the SCT's tool bag

The CBA Section is committed to preserving an SCT process that is credible to First Nation claimants, enhances reconciliation and recognizes cultural diversity and the distinctive character of

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1 Standing Senate Committee on National Finance

2 CBA Section Submission on the Independence of the Specific Claims Tribunal

3 CBA Resolution 15-02-A Independence of the Specific Claims Tribunal

specific claims. These are fundamental guiding principles for the interpretation and the application of the SCT's activities, outlined in section 2 of the SCT Rules.[4] In-community hearings have been a distinctive feature of the SCT's activities in conformity with these guiding principles. In-community hearings are particularly important for community witnesses and giving oral history evidence before the SCT, but also to give community members access to the hearing of their claim. The CBA Section believes that the goal of reconciliation and the commitment of the SCT to a fair resolution of specific claims requires in-community hearings to be maintained and reinforced. Any modification of the rules to allow the possibility of virtual hearings must maintain the right of claimants to have in-community hearings for all or part of their proceedings, particularly at the validity stage when the history and facts of the claim are being aired.

Apart from in-person community hearings, in-person hearings generally remain a preferred method of hearing a claim for what was envisioned, at the SCT's inception, as an itinerant tribunal. Although less accessible to remote First Nation community members than in-person community hearings, in-person hearings in urban locations can be attended by First Nation leadership, members near or living in those cities and expert witnesses, all of whom are visible to judge and legal counsel (unlike in virtual hearings). This humanizes the process and offers non-verbal communication, which is an integral part of the trial process. In-person hearings also guard against virtual trial fatigue and frustrations related to bandwidth, server and hardware difficulties. These final aspects can be particularly challenging when reviewing large volumes of historical documents as the SCT must do at trial.

However, if the parties agree that a virtual hearing is in the interest of justice and the presiding judge agrees that its advantages outweigh its limitations, the CBA Section supports integrating virtual hearings into the SCT procedures. The SCT Rules advocate flexibility to serve the interests of justice and reconciliation between the parties. Virtual hearings – like mediation – can be a tool available to the parties when they elect to use it. It should not be imposed on them for convenience or resourcing reasons.

4. Access to claim documents on the SCT website

Until this year, the SCT website gave access to most SCT documents in each claim (Case Management Conference minutes, directives and orders). This allowed the public and legal counsel to remain easily informed of a claims' status and contributed to the accessibility and transparency of SCT's activities. The CBA Section understands that those documents were removed because of official language requirements. Ideally, we would like these documents to be returned to the SCT website. If not possible, an electronic docket like that of the Federal Courts can be an appropriate solution.

5. Creative case management

The CBA Section suggests that an opportunity for better efficiency of claims resolution lies in more creative and active case management. Under Rule 49(1), the parties must address how best to conduct proceedings, so they remain proportionate to the amount in dispute and the importance and complexity of the issues involved. At subsequent case management conferences under Rule 49(2), the parties can address all types of topics related to evidence, disclosure, narrowing of issues for hearing and procedural timelines. There already is significant latitude for SCT members to require parties to focus their efforts and to cooperate. If more explicit authority is helpful, additional elements for Rule 49(2) could be drawn from Federal Court Rule 263[5] (Pre-Trial Conference) which lists additional topics such as admissions, advisability of an appointed assessor and "any other matter that may promote the timely and just disposition of the action".

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4 Specific Claims Tribunal Rules of Practice and Procedure (SOR/2011-119)

5 Federal Court Rules, SOR 98/106

For expert evidence in particular, the issues of joining and limiting the number of experts could and should be considered as part of creative case management. For example, where an avalanche of experts appears likely on one topic, the SCT has the power under Rule 89 to appoint an independent expert. This power can be exercised to focus the expert evidence, as parties would still have the right to file responding expert reports in response. Alternatively, the parties can agree, through active case management and creative application of the existing rules, to a jointly appointed expert. In terms of amendments to the SCT Rules, joint experts could be explicitly allowed, as permitted under Federal Court Rule 52.1(2). Limits on the number of experts could be added as well, like requiring leave to call more than five expert witnesses under Federal Court Rule 52.4. Finally, the Rules could require experts to conference in advance of a hearing, like Federal Court Rule 52.6(1). These additional kinds of rules can offer more incentive to address the efficient resolution of claims during the case management process without creating unfairness for the parties before the SCT.

6. Creative costs awards

A creative approach to costs can also advance claims more efficiently. If the SCT signals, through costs awards after applications pursuant to Rule 110(1), that time-wasting preliminary objections will not be sanctioned, it can reduce the number of pre-hearing applications. In addition, Rule 110(2) could be revised to allow for costs in advance of a hearing. Often, First Nations do not have comparable resources to the government. The Specific Claims Branch offers little funding to First Nations to file claims with the SCT. If the rules allowed costs paid in advance by the government to First Nations according to the test in *BC. v. Okanagan Indian Band,*[6] it would not only supplement First Nation budgets to move claims along but also serve as a useful tool to focus both parties on what is necessary to get the job done fairly.

We thank the SCT for inviting us to propose these brief written suggestions. We value our ongoing relationship and look forward to assisting the Tribunal through the Advisory Committee. We look forward to discussing these points with you, the Committee, and other members of the SCT.

Sincerely,

(*original letter signed by Julie Terrien for Claire Truesdale)*

Claire Truesdale
Chair, Aboriginal Law Section

cc. Specific Claims Tribunal Advisory Committee members

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6 2003 SCC 71