THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Specific Claims Tribunal Rules of Practice and Procedure

CANADIAN BAR ASSOCIATION
ABORIGINAL LAW SECTION

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66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1
tel/tél. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

PREFACE

The Canadian Bar Association is a national association representing 40,000 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 CBA Aboriginal Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Aboriginal Section.

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I. INTRODUCTION

In August 2025, the Specific Claims Tribunal (SCT) circulated a discussion paper to the SCT Advisory Committee titled "Revising the *Rules of Practice and Procedure*" (Discussion Paper), which summarizes key issues and potential solutions related to the *Specific Claims Tribunal Rules of Practice and Procedure* (Rules), which the SCT has gathered through consultation with stakeholder groups. The SCT is seeking consensus from the SCT Advisory Committee regarding the most appropriate solutions, following which the SCT will release a public statement about its intentions to update the Rules and invite public comments.

As a member of the SCT Advisory Committee, the Canadian Bar Association's National Aboriginal Section (CBA Section) has prepared this submission on behalf of the CBA in the latter's capacity as a national association of over 40,000 lawyers, law students, notaries, and academics, whose mandate includes seeking improvement in the law and the administration of justice. Although the CBA Section includes lawyers representing a spectrum of clients involved in Aboriginal law matters, the subject-matter experts involved in the present submission have experience as Claimant counsel before the SCT, at the negotiating table, and in developing specific claims for filing with the Minister of Crown-Indigenous Relations.

The CBA Section appreciates the opportunity to comment on changes to the existing Rules in its capacity as member of the SCT Advisory Committee. In commenting on the Rules, the CBA Section underscores the Tribunal's distinctive statutory task of adjudicating claims "in accordance with law and in a just and timely manner," as set out in the Preamble to the *Specific Claims Tribunal Act* (Act).

A. Systemic issues affecting efficiencies

The CBA Section renews concerns it has raised in the past, including whether the Tribunal has sufficient judicial resources to fulfill this mandate, the appointment of only one francophone judge and the absence of any judge from Quebec. The CBA Section notes that systemic considerations of these kinds affect the efficiencies of the practice and procedure of the Tribunal, which fall squarely into the Advisory Committee's mandate under section 12(2) of the Act.

As an example of such efficiency in relation to Rule 52, the CBA Section continues to favour the use of mediation by the Tribunal and believes that it could resolve discrete issues that arise in litigation or in the negotiation of specific claims. To this end, for francophone First Nations to benefit from mediation, it is essential that at least two judges capable of hearing proceedings in French be always named to the Tribunal.

As will be discussed throughout this submission, many of the reforms recommended by the CBA Section aim to clarify the procedural tools available to parties before the SCT. These recommendations should not be taken to suggest that, without such amendments to the Rules, the SCT lacks the authority to implement these procedures, particularly when the parties present a supporting legal basis to the Tribunal. Rules 2 to 5 provide the SCT with flexibility in both the Rules' application and in making orders on matters not explicitly in the Rules, including the power to borrow from the Federal Courts Rules where appropriate. The CBA Section emphasizes the overarching principles that proceedings should be just, timely, and cost-effective (**Rule 2**), and highlights the Tribunal's discretion to vary or dispense with compliance with its Rules where appropriate (**Rule 4(1)**). Additionally, s. 13(1) of the Act invests the Tribunal with the general powers of a superior court of record with respect to "matters necessary or proper for the due exercise of its jurisdiction."

B. Indigenous Custom, Culture and Legal Traditions

The Discussion Paper reflects on the SCT's role in advancing reconciliation and summarizes concerns about adversarial approaches, including the presentation of oral history evidence. The SCT raises the possibility of revising the Rules to limit cross-examination of community witnesses.

The CBA Section agrees with the importance of ensuring any cross-examination of community witnesses remains respectful and trauma informed. It may be helpful to require the Crown (or adversarial Claimant in a multiparty proceeding) to limit cross-examination to questions connected to specific assertions of fact that a community witness has testified about that contradict that cross-examining party's own statement of facts.

C. Representation by non-lawyers

Rule 6(2) allows First Nations to be represented by non-lawyers before the Tribunal where leave is granted. The CBA Section proposes that the SCT develop a Practice Direction for non-lawyers seeking to represent First Nations that sets out criteria about when leave might be granted and, if granted, explains the SCT's expectations to ensure appropriate communication between the non-lawyer, the Tribunal and legal counsel for other parties. Similarly, **Rule 6(3)** allows individuals to represent

themselves before the SCT presumably upon receipt of a notice under s. 22 of the Act and if granted leave to intervene in accordance with s. 25 of the Act. Again, a Practice Direction to guide the conduct of such individuals can help to ensure their intervention does not undermine the principes of a just, timely and cost-effective resolution of specific claims.

D. Bifurcation

Rule 10 permits bifurcating proceedings between a hearing of the merits of the specific claim and, if successful, the settling of compensation owed. Recent case law has established that, when bifurcation is contested, it will only be ordered where there is "specific and compelling evidence that to do so will advance the mandate of the Tribunal."[1] The Discussion Paper invited feedback on whether the newly-revised approach to bifurcation adequately addresses the challenges the procedure can create, or if further steps are needed.

While respecting these principles, the CBA Section notes that multi-party proceedings may introduce complexities that justify further subdivision of SCT proceedings. The growing number of specific claims involving multiple First Nation parties, many of which arise following notices granted under s. 22 of the Act, creates potential multiple Claimants who have not participated equally in the preparation of the specific claim. Additional preliminary hearings or stages is favorable than to determine the appropriate potential Claimants and to allow all Claimants to become better acquainted with the claim. Bifurcation may also be how the original Claimant planned its claim, despite objections from new Claimants. In these circumstances, additional preliminary hearings/stages may be the most just and cost-effective method for the parties to resolve the claim, even if it does not appear to be the timeliest. In a multi-party scenario, it is almost inevitable that further subdivision of the proceeding will be contested by one of the parties (likely the original Claimant). It may be that the requirement for "specific and compelling evidence" places too heavy an onus on the Claimants favoring subdivision in such circumstances, which may in turn work against the SCT's purposes.

E. E-filing

Many Rules do not provide for e-filing which has become the primary means for filing and serving documents before the SCT. Instead, Practice Direction no. 9 has been adopted to amend **sub-rules 17(1)**, **17(3)**, **22(2)** and **28(1)** as well as **Rules 18** and **21**. Concretely, Practice Direction no. 9 replaces many aspects of the Rules. The CBA Section recommends an amendment to the Rules to reflect the contents of Practice Direction no. 9.

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1 *Red Pheasant Cree Nation v. Her Majesty the Queen in Right of Canada*, 2021 SCTC 3, para. 12 ("*Red Pheasant*"): online

Rule 13 could be amended to allow the creation and maintenance of an electronic copy as well as paper copies of the pleadings cited in this rule. Similarly, **Rule 17** should be amended to prescribe the filing of documents by e-filing rather than email.

Rule 15 should also be amended to reflect Practice Direction no. 5. The latter provides that a document "filed at or before 23:59:59, Ottawa local time, on a business day is deemed to have been filed on that day. A document filed on a holiday or weekend is deemed to have been filed on the next business day."

F. Solicitor's Certificate

Rule 28(1) offers two means of proving service: (a) by affidavit or (b) by admission of the party served. The CBA Section recommends the addition of a third option, a certificate by legal counsel, similar to the solicitor's certificate provided by Rule 146(b) of the *Federal Courts Rules*. Unlike an affidavit of service, the certificate of legal counsel dispenses with the requirement of a sworn document before a commissioner of oath.

G. Claimant's Reply and amendment of pleadings

The CBA Section recommends the addition of a Rule providing for the right to a written reply for a Claimant and Applicant. Additionally, following the disclosure of evidence, the Rules should provide the Claimant and the Defendant the right to amend respectively the Declaration of Claim and the Response.

H. Additional parties, interveners – multiple Claimants

In recent years, overlapping interests in land and in treaty annuities have given rise to multiple First Nations being granted notices under s.22 in specific claims. For example, we are aware of three related claims in which 36 individual First Nations and one tribal alliance were sent s. 22 notices. Although receiving notice under s. 22 of the Act does not automatically make the person notified a party or an intervener, it does create the potential for complex, multi-claimant specific claims. This may not be contemplated by the Act nor is any procedure provided specifically for such multi-First Nation claims in the Rules.

It is critical that unique procedures be developed for such claims. These claims may be best suited for SCT-appointed experts to address the historic record. They may also require further subdivision of the proceedings to determine discrete factual or legal issues, such as who the appropriate claimants are, and to balance First Nations' needs who have not benefited of years preparing their claim to get up-to-

speed with the need to prevent claimants with the least evidence, and/or claimants who are the least prepared or interested in a litigated resolution, from stalling the entire process.

The SCT retains the right to limit the intervention and party status of First Nations in these claims under sections 24 and 25 of the Act. However, once the Tribunal has determined that multiple First Nations have an interest in the claim sufficient to grant them each Claimant status, the question arises as to whether each Claimant will present its own evidence to establish the Crown's liability and its own theory of compensation. In these instances, one or more Claimants might apply to the Tribunal to have the matter treated as a representative action in accordance with Rule 114 of the *Federal Courts Rules*.

Rule 114(1) of the *Federal Courts Rules* sets out the test to be met by a claimant seeking to act in a representative capacity. Notably, the conditions to bring representative proceedings set out at Rule 114(1) are like the conditions to certify a class proceeding set out at Rule 334.16(1) of the same.[2] As such, some class action jurisprudence may be instructive guidance in the context of representative actions but is not necessarily applicable to representative actions.[3]

The Rules to bring representative proceedings (Rule 114) and related to certify a class proceeding (at Rule 334.16(1)) both require the applicant to demonstrate that there are **common issues**; that the **proposed manner of proceeding is preferable**, and will **promote the just and efficient** resolution of the matter; and that the proposed representative can **adequately represent** the other parties on whose behalf the applicant seeks to act.[4]

Rule 334.16(1) of the *Federal Courts Rules* codifies the certification test from the leading case on class actions, *Western Canadian Shopping Centres Inc v Dutton*.[5] It stands for the proposition that class actions should proceed where the following conditions are met:

i. the class is capable of clear definition;
ii. there are issues of law and fact common to all class members;
iii. success for one class member means success for all; and
iv. the proposed representative adequately represents the interests of the class.[6]

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2 *Federal Court Rules*, SOR/98-106, Rule 114: online & Rule 334.16.: online.

3 See e.g. *Enge v Canada*, 2017 FC 932 at para 121: online ("While the Court's comments [in *Dutton*, regarding the test for certification] were made in the context of class actions, they are also relevant in the case of representative proceedings")

4 *Western Canadian Shopping Centers Inc v Dutton*, 2001 SCC 46: online.

5 *Western Canadian Shopping Centers Inc v Dutton*, 2001 SCC 46.

6 *Ibid.*

Certification of a class action is a more onerous and rigorous test with distinct requirements, such as a defined class (Rule 334.16(1)(b)) and a litigation plan (Rule 334.16(1)(e)(ii)). These distinct requirements do not apply to representative proceedings.

Criteria set out at Rule 114(1)(c) requires the court to consider if the "the representative can fairly and adequately represent the interests of the represented persons".[7] This criterion is similar to the final step of the *Dutton* test, which requires that "the proposed representative adequately represents the interests of the class".[8] In *Dutton*, the Supreme Court of Canada explained what factors a Court may consider when assessing whether the proposed representative is "adequate":

> …In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class…(emphasis added)[9]

In the context of applying Rule 114 specifically, the Federal Court have considered several additional factors when considering whether an applicant can "fairly and adequately" represent the interests of a group. These include:

i. the applicant's knowledge and expertise regarding the facts and issues involved;[10]
ii. the applicant's expertise and any prior experience pursuing litigation;[11]
iii. whether the applicant has capacity (or "energy") to represent the group;[12]

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7 *Federal Court Rules*, SOR/98-106, Rule 114(1)(b): online.

8 *Western Canadian Shopping Centres Inc v. Dutton*, 2001 SCC 46: online.

9 *Dutton*, *supra* at para. 41.

10 See e.g. *Jones v Canada (Attorney General)*, 2015 FC 1372 at para 75: online [*sub nom Canada (Royal Mounted Police) v Canada*] ("required knowledge"); Egan 2017 FC 932 paras 122-123 ("necessary knowledge of the facts and issues involved in this application");

11 *Egen v .Canada* (*Minister of Indian Affairs)* 2017 FC 932 paras 122: online ("demonstrated through his leadership role in the Mandeville case that he has … the ability to successfully assert section 35 Aboriginal harvesting rights on behalf of the members of the NSMA")

12 See e.g. *Jones v Canada (Attorney General)*, 2015 FC 1372: online [*sub nom Canada (Royal Mounted Police) v Canada*] ("the .. energy");

iv. whether the applicant shares common perspective with the larger group;[13]

v. the expertise and experience of legal counsel, including whether they have experience successfully litigating similar claims.[14]

vi. whether the applicant has a plan for how to consult with members and/or keep them informed, and to ensure it considers diverging viewpoints;[15]

vii. The timing of the application, as it may inform the motivation for seeking to represent and whether meant to help or to hinder;[16]

The CBA Section suggests an additional factor: whether the applicant has the authorization of the Claimants it proposes to represent.

The CBA Section is not advocating the compulsory transformation of all multi-claimant specific claims into representative proceedings. Nor is this the appropriate vehicle to determine whether a First Nation has sufficient interest in a specific claim to be a Claimant. However, there may be instances where such a procedure provides a useful tool for a multi-claimant proceeding that might otherwise be unduly drawn out, costly and unwieldly.

The CBA Section recommends an additional Rule with respect to representative proceedings before the Tribunal, adapted from Rule 114 (1) of the Federal Courts Rules:

> **(1)** Where the Tribunal has granted multiple First Nations party status under s. 24 of the *Specific Claims Tribunal Act*, one or more Claimants may apply to have the proceedings dealt with as a representative proceeding. Such an application may be granted based on consideration of the following conditions:
>
> (a) the issues asserted by the representative and the represented parties (i) are common issues of law and fact and there are no issues affecting only some of those persons, or (ii) relate to a collective interest shared by those parties;
>
> (b) the representative is authorized to act on behalf of the represented parties;

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13 *Wesley v Canada,* 2017 FC 725 at para 19-20: online (Federal Court was unsatisfied that the applicant could fairly and adequately represent the represented group in a situation where the applicant was a dissident member seeking an ex post facto veto over the actions of the Band)

14 *Supra*, *Egan* paras 122 ("Mr. Enge is, moreover, represented by experienced counsel who successfully prosecuted the Mandeville case on behalf of Mr. Enge and the members of the NSMA").

15 *Wesley v. Canada*, 2017 FC 725 at para 21: online ("There are other reasons why Yahaan is not an appropriate person to act in a representative capacity. For one, he has not explained how he can fairly and adequately represent the interests of those members of the Gitwilgyoots who oppose his view and with whom he has not consulted, as required by Rule 114(1)(c). Acting in a representative capacity is not a platform for unilateral decision-making or indifference to the wishes of the collective").

16 *Supra*, at para 22 It is of additional significance that Yahaan was content with the consultations between the Bands and the Crown until very late in the process. His very late intervention and his occupation of Lelu Island are both obvious attempts to frustrate the will of the majority of the Coast Tsimshian people who are satisfied with the resulting accommodations and benefits. The fair and adequate representation required by Rule 114(1)(c) has not been demonstrated based on Yahaan's conduct to date").

(c) the representative can fairly and adequately represent the interests of the represented parties; and

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

(2) At any time, the Tribunal may

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the Represented parties;

(c) impose any conditions on the settlement process of a representative proceeding that the Tribunal considers appropriate; and

(d) provide for the replacement of the representative if that Claimant is unable to represent the interests of the represented parties fairly and adequately.

(3) An order in a representative proceeding is binding on the represented parties unless otherwise ordered by the Tribunal.

(4) The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Tribunal.

Cost sanctions, case management, and procedural timelines

The Discussion Paper invites feedback on SCT's current approach to case management. **Rule 49(2)** provides for a non-exhaustive list of matters that can be discussed at any case management conference (CMC) "to assist in the just, timely and cost-effective determination" of an issue in relation to the specific claim. The CBA Section emphasizes the importance of discussing procedural timelines (**Rule 24(2)(i))** at each case management conference. Parties should commit to firm timelines authorized by SCT's directives. If parties cannot commit to these timelines at a CMC, they should commit to a date by which such timelines will be fixed.

The CBA Section recommends that cost measures be attached to unjustified (or insufficiently justified) breaches of fixed procedural timelines. This requires a reconsideration of the approach to costs established in SCT case law.

The CBA Section acknowledges the principled approach the SCT has taken towards costs award in the context of preliminary applications. In those instances, costs will only be considered where there is "reprehensible, egregious or outrageous" conduct of a party: *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v. Her Majesty the Queen in Right of Canada*, 2012 SCTC 6 (CanLII), <https://canlii.ca/t/h3z7r>.

It is not the CBA Section's intention to abandon this approach nor to advocate for an automatic cost system. However, **Rule 111(1)(b)** mandates the SCT to consider, when awarding costs, "whether a party has failed to comply with an order of the Tribunal." **Rule 111(1)(b),** as it applies to compliance with procedural timelines, has not been applied much by the Tribunal, likely because of the high bar set by *Big Grassy*. The CBA Section asks the SCT to consider awarding costs against a party that fails to adhere to a procedural timeline without sufficient justification. This does not remove the Tribunal's ability to exercise flexibility and understanding given "the distinctive character of specific claims" (**Rule 2**).

The CBA recommends the following addition to **Rule 111(1)(b):**

> "(b) whether a party has failed to comply with an order of the Tribunal, <u>including a procedural timeline authorized by the Tribunal</u>;"

I. Expert evidence

The CBA Section acknowledges that the preparation of expert reports is likely the greatest cause of delayed proceedings before the Tribunal.

In some cases, new reports are necessary for old claims where new archival documents become available or new legal issues are raised by case law since the claim was filed with the Minister. However, in many cases, the issues on the merits of the claim are the same as those examined by the parties at the research or negotiation stages of the claim. In those claims, parties should be allowed to rely on existing expert reports in the interest of judicial efficiency and reduced costs while taking those steps necessary to protect settlement privilege.[17]

Although the use of joint experts or a limited number of experts might reduce these delays, these options must remain discretionary for the parties based on the nature of the controversies between them.

J. Segmentation

The Discussion Paper proposed the consolidation of oral history, expert evidence, and oral submissions, contrary to the SCT's current segmentation process.

For many First Nations, there may be very good reason to hold the oral history hearing earlier in the process (i.e. witness health and availability), before the parties are ready to make oral submissions, for

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17 *Supra*, note 1, para. 33-35.

instance. While having the option to consolidate hearings may be useful in some circumstances, a presumption in favour of consolidation may be a step too far.

K. Applying the minimum standard

The Discussion Paper mentions situations that have arisen where the Crown's evidence does not meet the Crown's own minimum standards required of First Nations claimants for their submissions. The SCT position is that the current rules have proven adequate to deal with these infrequent issues about the quality of evidence but it acknowledges that some delay and expense was experienced by the Claimants in these situations and is open to suggestions.

The CBA Section agrees that the SCT has the necessary authority in the existing Rules to address this issue. However, to avoid further delays and expense to Claimants, rather than revising the Rules, the SCT could consider either a Practice Direction on minimum standards or setting out the expectations at the first CMC part of the procedural timeline requirements. The Crown would then be on notice, and a costs sanction for failure to comply (leading to delays in the procedural timeline) could be warranted.

L. Advanced costs

In its letter of November 23, 2021, to the SCT, the CBA Section recommended a change to the Rules to provide for the awarding of costs in advance of a hearing. To be clear, the CBA Section's position is not that the SCT Act or its Rules prohibits application for advanced, interim or provisional costs. The Act attributes to the SCT "all the powers, rights and privileges that are vested in a superior court of record" (s. 13, Act). The power to award interim costs is part of the inherent powers of a superior court over cost awards.[18]

However, to the extent that the Rules are meant to guide parties before the SCT, it would assist Claimants if the Rules provided for how and when to bring an application for advanced costs early in the proceedings. Advanced cost applications, like existing **Rule 110** cost motions could be offset by any funding provided to the Claimant by the Government of Canada under its Specific Claims Tribunal funding programme. However, as these resources have been significantly diminished in recent years, First Nations must turn to the SCT to order the resources necessary to have their specific claims heard in the most just and timely manner.

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18 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), [2003] 3 SCR 371 (*Okanagan*), para. 1: online.

An award for advanced costs can remain discretionary on the part of the SCT and can be based on the existing Supreme Court of Canada case law in this regard.[19] The three requirements for an award of advanced costs are (i) impecuniosity, (ii) a *prima facie* meritorious case, and (iii) issues of public importance.[20] Given that the SCT executes its mandate to resolve specific claims "in the interests of all Canadians" and to "promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations,"[21] the CBA Section believes that all specific claims involve issues of public importance. An application for advanced costs before the SCT could, therefore, be focused solely on the issues of impecuniosity of the First Nation and whether there is a *prima facie* meritorious case to be funded.

M. Leave and notices of applications

Rule 30 provides for leave before making an application to the SCT *except* for an application referred to in the Act. Act, s. 24 refers to applications for First Nations to join as parties, which, read alongside **Rule 30,** suggests that leave is not required. However, Practice Direction 18 sets out a requirement that First Nations wishing to apply for party status apply for leave first.

The CBA Section recommends the SCT address this apparently contradiction between the Act and Practice Direction 18 to clarify when leave is required. The requirement for leave seems like an unnecessary formality in these circumstances – the SCT form combines the application for leave and notice of application, so parties submit both at once and it is unclear what separate test (if any) the SCT applies at the leave stage.

II. CONCLUSION

The CBA Section submits the present comments for review by the SCT and the other members of the Advisory Committee and looks forward to further discussion on these issues. We welcome the opportunity to review and comment on the submissions of other members of the Advisory Committee in the spirit of collaboration and to support the Tribunal in fulfilling its mandate.

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19 *Anderson v. Alberta*, 2022 SCC 6, [2022] 1 S.C.R. 29: online ("*Anderson*"); *Okanagan*, *ibid*.

20 *Ibid*, para. 24.

21 *Specific Claims Tribunal Act,* (S.C. 2008, c. 22)Preamble: online.