



2019- 2020 ANNUAL REPORT



Specific Claims
Tribunal Canada

Tribunal des revendications
particulières Canada

Canada

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MESSAGE

FROM THE CHAIRPERSON

Since my appointment on November 26, 2009, I have been pleased to oversee the progress and development of this institution.

I present this final report as the founding Chairperson of the Specific Claims Tribunal.

Over the past decade the members of the Tribunal, with the support of capable and dedicated staff, have sought to uphold the solemn assurances of the Justice at Last policy by improving the specific claims process. The Specific Claims Tribunal has met that challenge by providing an independent venue for claims resolution and settlement. With over 95 active claims currently in the Tribunal process, confidence in the Tribunal is revealed by the increase in new claims filed every year. In recent years, the Tribunal has also promoted access to member-assisted mediation as an alternative to litigation for redress of claims.

Through our years of sustained efforts, the Tribunal has issued a full corpus of case law. As a member I have authored 24 decisions on various legal issues ranging from fiduciary law to equitable compensation. Every file has kept me inspired and impassioned by the complex matters of history and law.

Other successes include the establishment of a high-functioning Registry, a governance structure that ensures Tribunal independence, impartiality and fairness, an e-filing system that allows parties to file documents electronically, formulation of rules of practice and procedure reflecting needs of parties within proceedings and, within this past year alone, the implementation of a comprehensive case management system as well as full e-hearing capabilities to hold remote virtual hearings. We have recruited Tribunal staff full of heart and skill and pushed for new judicial appointments to manage our increasing caseload.

As my final hearings draw near, I can confidently report that despite unique difficulties caused by the coronavirus pandemic, the Tribunal remains resilient, strong and vibrant. Members continue to hold hearings, remain accessible to parties, and actively engaged in file management. I am grateful to my judicial colleagues. Their generous support in these unprecedented times has made my tenure of office less onerous. I would also like to acknowledge Tribunal staff. The continued administration of the Tribunal at the onset of the pandemic was made possible by their professionalism and dedication. To them I give my thanks; your continued support and contributions are greatly appreciated.

Yet for all our successes, challenges still remain. Many issues stem from processes that are outside the Tribunal yet influence our ability to resolve claims quickly and efficiently. As previously reported, inadequate funding continues to impair First Nations' access to the Tribunal both before and after claims are filed. As more claims now enter the compensation stage of litigation, the problem is exacerbated by upfront costs of expert reports. This can give rise to concerns regarding proportionality and the financing of litigation.

The government process for mandating negotiators also continues to impede the timely resolution of claims filed with the Tribunal when, while advancing toward a hearing before the Tribunal, necessary pre-hearing work is put on "hold" for negotiations. This includes situations in which funding to support negotiation workplans is not forthcoming in a timely way.

Challenges faced around appointments to the Tribunal are anticipated, particularly if a Chair successor is not designated well in advance to allow for an orderly handover. If appointment processes continue to take the many months to years that they have in the past, the Tribunal may be unable to perform its mandate upon the expiry of the terms of office of present members.

Finally, as the pandemic drives innovation in the justice sector, the Tribunal is now offering online virtual hearings. Many of these changes are likely to be permanent. Although the Tribunal endorses gains in efficiency that promote faster processing of claims, the intrinsic value of community-held hearings must be noted in this Annual Report, so that this hard work of reconciliation and the legacy it will leave is not a casualty of the crisis response to the COVID-19 pandemic. A strength of this institution is in oral history testimony given in Claimants' communities — these in-person hearings promote reconciliation and are an essential part of our process.

In closing, it has been a great honour and privilege holding office as Chairperson of the Tribunal for the past ten years. I know the Tribunal will carry on marking new achievements and making meaningful impact to improve the specific claims process.

Justice Harry A. Slade

Chairperson, Specific Claims Tribunal





ABOUT THE TRIBUNAL



The Specific Claims Tribunal, established on October 16, 2008, is part of the Federal Government's Justice at Last policy and the product of a historic joint initiative with the Assembly of First Nations aimed at accelerating the resolution of specific claims in order to provide justice for First Nations claimants and certainty for government, industry and all Canadians.

The Specific Claims process commences when a First Nation Claimant presents a claim to the Minister, Crown-Indigenous Relations, for a determination whether the claim will be accepted for negotiation. The claim is reviewed by the Specific Claims Branch of the Ministry. A legal opinion is prepared by departmental legal counsel. A recommendation then goes to the Minister.

The Tribunal has jurisdiction over Claims that are not accepted for negotiation within three years or, if accepted, have been in negotiation for three years without reaching a settlement. Proceedings before the Tribunal are neither an appeal nor a review of the Minister's decision.

The *Specific Claims Tribunal Act* provides for the appointment of Tribunal members from a roster of Superior Court Justices. This was intended to ensure the independence of the Tribunal.

WHAT IS A SPECIFIC CLAIM?

Specific claims can include alleged breaches of the Crown's legal obligations relating to treaties, reserve lands and resources, or First Nations' trust funds. The Tribunal is empowered to compensate Claimants for these breaches to a maximum of \$150 million. More particularly, specific claims are compensable claims related to:

- A failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
- A breach of a legal obligation of the Crown under any legislation "pertaining to Indians or lands reserved for Indians";
- An illegal lease or disposition of reserve lands;
- A breach of a legal obligation arising from the provision or non-provision of reserve lands;
- The Crown's administration of reserve lands, "Indian moneys" or other First Nations' assets;
- A failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
- Fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.





2019-2020

IN REVIEW

STAFFING

The Tribunal receives operational support from the Administrative Tribunals Support Service of Canada (ATSSC). The ATSSC provides staff, office accommodation, hearing venues, IT services, and the many other tools and services needed to support Tribunal operations.

As with other Tribunals serviced by the ATSSC, there is an assigned Executive Director responsible for the provision of services, supported by a part time administrative assistant.

The Tribunal is, for the most part, at the required staffing level for effective functioning in terms of administration. The Registrar now manages registry staff, and communication advisors and editors.

Tribunal members are supported by Legal Counsel in case management, hearing preparation and attendance, and legal research and analysis. We presently have four Counsel. Although they are employees of the ATSSC, their primary responsibility is direct support to Tribunal members. The independence of Tribunal members is protected by law and legal tradition. Legal Counsel in service to the Tribunal also function within legal norms of independence, which include the primacy of duty to the Tribunal.

The Tribunal recently welcomed a second legal counsel able to provide legal services in French. Our newest team member will assist with the Tribunal's largest proceeding thus far; a four-month expert evidence hearing scheduled to be held in Fall 2020.

FINANCES

At present the Specific Claims Tribunal appears to have adequate financial resources to effectively process the claims filed with it. Financial Statements are available through the ATSSC.

The Executive Director of the Tribunal was able to secure additional financial and staff resources needed to support a particularly complex and document-heavy file going forward in 2020.

THE TRIBUNAL'S WORK

The claims that come before the Tribunal are often complex on the facts and on application of the law. Many claims, even if relatively straightforward, go to a full hearing on the merits of validity and, if found valid, compensation. Preliminary applications pertaining to jurisdiction, the admissibility of evidence, and other matters often arise. The record frequently includes oral history, expert witness evidence and a voluminous documentary record, sometimes spanning well over a century.

The process before the Tribunal reflects stakeholders' interests and needs, and the objective of reconciliation. Hearings in Claimant's communities are an essential part of the process. This is not the norm in proceedings in the courts, where the stakeholders must attend at a courthouse to access the proceeding as participants or observers. It is not possible to schedule back-to-back hearings with court-like efficiency.

CASE MANAGEMENT SYSTEM

A notable accomplishment in 2019-20 was the development and limited implementation of a modernized case management system. The selected case management system will allow the Tribunal to deliver necessary services more efficiently and improve cost-effectiveness for all participants.





CLAIMS

Since 2011, the Tribunal has received a total of 124 claims. Their geographic distribution is as follows:



At present, we have 96 claims before the Tribunal. In 30 claims, the parties are actively pursuing alternative dispute resolution, either by negotiation or by Tribunal-assisted mediation.



CASE MANAGEMENT CONFERENCES

The Tribunal case manages all of its claims. Since the Tribunal opened its doors in 2011, it has held a total of 1,291 CMCs current to September 1, 2020. There were 190 CMCs in the 2019-20 fiscal year. Most are conducted by teleconference. Since the start of the COVID-19 pandemic, the Tribunal has held 99 CMCs.

HEARINGS

Where viva voce testimony is introduced in evidence, in-person hearings are held. This is the case with the introduction of oral history and expert testimony. Closing submissions on validity and compensation are held in person. The same is the case for applications that raise issues of jurisdiction and other contentious matters that cannot be resolved by agreement of the parties through case management. The Tribunal held a total of 12 hearings in the 2019-20 fiscal year. In the present circumstances of the pandemic, virtual hearings have replaced in-person hearings when appropriate.

ACCOMMODATING CULTURAL DIVERSITY AT THE SCT

The SCT has developed expertise in carrying out culturally sensitive adjudicative proceedings without compromising the integrity of the process. The *Specific Claims Tribunal Act* provides, at section 13, that the Tribunal may “take into consideration cultural diversity in developing and applying its rules of practice and procedure”.

Hearings in community: Hearings in Claimants’ communities are an essential part of the process, and are reconciliatory.

Site visits: The presiding member will, when requested, travel to the territory of the Claimant along with the parties, staff, and community members to view the land that is the subject matter of a Claim.

Ceremonies: Opening and closing ceremonies that are conducted by members of the Claimant's community often precede the formal opening of proceedings before the Tribunal. The Tribunal welcomes requests to participate in such ceremonies. Examples of ceremonies that the parties and Tribunal have participated in prior to, or after, a hearing include long house ceremonies involving song and dance, drumming ceremonies, smudging and pipe ceremonies.

Prayers: Welcome prayers are often offered at the outset of a hearing by a Chief, Elder, or other designate.

Oral History hearings: These hearings are often scheduled as early as possible in the life cycle of a claim before the Tribunal, in recognition of the importance of preserving the testimony of Elders. In some cases, a group of Elders participated in a truth-telling ceremony prior to the giving of testimony, and after having had the significance of the ceremony explained on the record, participation in the ceremony was accepted by the Tribunal in lieu of swearing or affirming the evidence.

Accommodating Language: The Tribunal welcomes witnesses who wish to testify in their mother tongues, with assistance of qualified interpreters. This is a regular aspect of hearings.

Professional Development: Ongoing professional development on matters relating to cultural diversity is encouraged.

JURISPRUDENCE

In 2019/20 the Tribunal issued written decisions addressing:

- Reserve creation and surrenders in Quebec (2020 TRPC 3)
- Surrenders and expropriations in Saskatchewan (2019 SCTC 5)
- Addition of individual intervenor to proceedings (2020 SCTC 2)
- Reserve creation in British Columbia (2020 SCTC 1, 2019 SCTC 4)

Since the Tribunal opened its doors in 2011, it has held a total of 1,291 CMCs current to September 1, 2020.

ADAPTING TO COVID-19

In the final weeks of the period covered by this report, Canada and its provinces declared a state of emergency. The effects of the coronavirus pandemic sent a shockwave in the public sector with a shutdown of Tribunal infrastructure starting March 16, 2020. All non-essential public servants, including Tribunal staff, were mandated to work from home to minimize the spread of COVID-19.

The Tribunal responded promptly by quickly implementing an e-hearing strategy to provide remote virtual hearings. By April 8, 2020, the Tribunal was successfully conducting online hearings by holding its first virtual expert hearing. Counsel for the parties was able to examine and cross examine an expert by video conference. The positive results and gains in efficiency achieved with online proceedings have motivated the Tribunal to move forward and faster with online services. Many of these implemented technological solutions will remain to some degree long after COVID-19 recedes.

The Tribunal has held six hearings since the start of the pandemic with few technical glitches to report. Four hearings were held by videoconference with access to online document sharing. Two hearings were held partially in person and partially remotely. The Tribunal member and legal counsel for Canada and the Claimant attended in person in a conference room while a virtual format was deployed for the Registry and certain participants following remotely. The Registry took care of coordinating testing of the videoconference platform, handling document retrieval and screen-sharing systems between participants, standardizing technology and implementing a back-up plan. These are examples of the innovative solutions the Tribunal has found to respond to the COVID-19 crisis.

Staff training, internet speed, the implications of electronic formats for Elder testimony and oral history, the electronic handling of exhibit marking, on-site tech managers and IT hardware in remote Claimant communities can and should be adequately addressed to ensure the continued success of online hearings.

The Tribunal remains committed to hearings in Claimant's communities as an essential part of our process, particularly for oral history hearings and site visits. These in-person hearings will resume once requested by the parties and as appropriate under the current circumstances.

Several scheduled hearings were postponed due to the pandemic. Recurrent challenges encountered included counsel for Canada struggling to contract experts, library closures causing delays in archival research, and travel restrictions preventing necessary site visits.





LOOKING AHEAD

TO 2020-2021

MEMBER COMPLEMENT

The *Specific Claims Tribunal Act* says that the Tribunal shall consist of no more than six full-time members; or any number of part-time members, or combination of full-time and part-time members, so long as the combined time devoted to their functions and duties does not exceed the combined time that would be devoted by six full-time members. The Governor in Council shall establish a roster of six to eighteen superior court judges to act as members of the Tribunal. The Chairperson and other members may be appointed from the roster by the Governor in Council. Each member shall be appointed for a term not exceeding five years and holds office so long as he or she remains a superior court judge. Each member, on the expiry of the first term of office, is eligible to be reappointed for one further term.

THE CURRENT MEMBER COMPLEMENT IS AS FOLLOWS:

Tribunal Member	Term Expiry	Full-time/Part-time	No. of Assigned Files
Justice H. Slade	December 11, 2020	Full-time (Chairperson)	13
Justice P. Mayer (bilingual)	May 18, 2023	Part-time	30
Justice W. Grist	September 5, 2022	Part-time	25
Justice V. Chiappetta	June 22, 2024	Full-time	25
		Sub-Total	93
Unassigned Files			3

The continued uncertainty around future appointments makes planning for the management of current and future claims challenging, particularly with respect to succession planning for December 2020. For a successful leadership transition to occur, succession planning must be made a priority.

Another particular need is for a member who is able to provide full legal services in French. We have one such part-time Member, Justice Paul Mayer, who currently holds all French files due to his dedication. With Quebec claims increasing—we currently have 17 such claims—a need has arisen for another bilingual member to spread the heavy caseload.

SOUNDING THE ALARM ON ACCESS

The key ongoing issue for 2019-2020 is whether the Tribunal is able to adequately fulfil its mandate where funding for the parties before it is inadequate. Delays related to funding approvals frequently cause amendments to case management schedules. In some instances, schedules that have been agreed to by the parties may be deferred repeatedly, leading to delays of many months before agreed actions can be taken, and adding years to the overall resolution of the claim. This situation impairs the ability of the Tribunal to deliver on its mandate and at times exerts counter-pressure on the parties' efforts to reconcile.

As more claims enter the compensation stage of litigation, issues around funding are exacerbated. Many Tribunal claims first go to a full hearing on the merits of validity and, if found valid, enter the compensation stage. The *Specific Claims Tribunal Act* bars defences based on the passage of time, leading to long time frames over which compensation must be assessed.

The key ongoing issue for 2019-2020 is whether the Tribunal is able to adequately fulfil its mandate where funding for the parties before it is inadequate.





Given inadequate funding structures this can give rise to concerns regarding the extensive upfront finances for litigation, in particular expert costs to assess compensation. Acquiring expert reports is one of the most expensive and time-consuming parts of our process. Narrowing the issues and limiting experts on both sides are envisioned solutions to remedy this issue.

In short, the Tribunal remains plagued by the parties' funding issues, and is concerned about its ongoing inability to perform its mandate adequately.

Specific Claims: Review by Specific Claims Branch and the Tribunal Process

Most Claims come to the Tribunal as a result of Ministerial non-acceptance for negotiation on the advice of the Specific Claims Branch (SCB) of the Ministry of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).

The Government of Canada is currently working with the Assembly of First Nations (AFN) and Indigenous partners to completely overhaul its specific claims policy and process. In 2017, the AFN and Canada formed a Joint Technical Working Group on the specific claims policy (JTWG). The JTWG has been tasked with working on process, policy and legislative reforms to the specific claims process. Their work includes exploring options on enhancing the independence of the process.

The Tribunal has made known its willingness to participate in this process as seen fit by the JTWG. The Tribunal renews its offer to act as an independent body in assessing validity earlier on in the claims process.

Justice

While justice is revealed in decisions of the Tribunal, a central aspect of justice is absent, namely First Nations access to the Tribunal. The Preamble asserts “the *right* of First Nations to choose and have access to a specific claims tribunal ...” (emphasis added)

We conclude that the funding limitations and the manner in which available funding is trickled out to First Nations Claimants amount to a denial of effective access to the Tribunal.



Negotiated Outcomes

The preferred route to settlement of Claims is negotiation. An objective of the Act is to “*create conditions that are appropriate for resolving valid claims through negotiations*”. Approximately a quarter of active claims before the Tribunal are now in negotiation and proceedings have been stayed to permit the Parties the time needed to achieve resolution. The Tribunal saw an uptick in settlements in 2019-2020, with 5 claims reaching final settlement and 9 claims having a consent order issued on a preliminary stage of the claim.

However, we remain concerned about the time it is taking to conclude claims. On one hand, negotiation is the preferred means of resolving claims. On the other, the unduly lengthy process of negotiation militates against claims being resolved in a timely way and, if negotiations fail, may result in claims not being heard for many years after being filed with the Tribunal.

Mediation

The Tribunal continues to offer Member-led mediation services. Where a party raises an interest in mediation at a case management conference, the Tribunal will discuss the possibility of engaging in mediation in accordance with the terms of Practice Direction #14.

Overall, the Tribunal continues to make progress in resolving outstanding specific claims. Progress to that end is constrained by the ongoing presence of the concerns set out above.



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