2018-2019

2018-2019 ANNUAL REPORT

Specific Claims Tribunal Canada

Tribunal des revendications particulières Canada

Canada

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MESSAGE
FROM THE CHAIRPERSON

As the Chairperson of the Specific Claims Tribunal, it is my pleasure to report to you on the various activities carried out by the Tribunal in the past fiscal year, and to draw attention to some of our upcoming challenges and opportunities.

We have performed our mandate to the best of our ability over the 2018-2019 fiscal year and will do so in the ensuing year. There are, however, ongoing impediments to the fulfillment of our mandate. These 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.

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.

The Tribunal has an ongoing and acute need to develop and implement a comprehensive and up-to-date case management system as well as full e-hearing capabilities. Progress to this end is impeded by government practices which seek uniformity of systems across numerous tribunals despite material differences in their mandates and hearing processes.

Challenges faced around appointments to the Tribunal are anticipated. 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.

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 and Northern Affairs, for a determination whether the Claim will be accepted for negotiation. The claim is reviewed by the Specific Claims Branch of the Department. 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.

2018-2019
IN REVIEW

STAFFING

The Tribunal is, for the most part, at the required staffing level for effective functioning in terms of administration. The Deputy Registrar now manages registry staff, communication advisors and editors, and an administrative assistant. The one exception pertains to legal counsel. The Tribunal is conducting an organizational review of the legal team, considering the Tribunal's need for long-term specialized expertise. A particular need is for counsel who are able to provide full legal services in French. We have one such counsel, who manages due to her dedication and skills. We need another to spread the workload and provide coverage for holidays, conflicts, and other needs and responsibilities.

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 Administrative Tribunal Support Service of Canada (ATSSC).

There has been a movement toward negotiation of some Claims when pre-hearing steps have been taken in preparation for a hearing. For the reasons discussed below, negotiations were a mixed blessing in 2017/18 and remained so in 2018/19. 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.

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.

The documentary complexity of specific claims and the volume of travel to communities across Canada indicate that significant gains in efficiency could be achieved with an update to the Tribunal's administrative toolbox. A fully operational e-hearing strategy and modernized case management system would allow the Tribunal to deliver necessary services more efficiently and would improve cost-effectiveness for all participants.

CLAIMS

Since 2011, the Tribunal has received a total of 106 claims. Their geographic distribution is as follows:

At present, we have 82 claims before the Tribunal. In 28, 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 1090 CMCs current to September 1, 2019. There were 229 CMCs in the 2018-19 fiscal year. Most are conducted by teleconference.

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 21 hearings in the 2018-19 fiscal year.

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 often travel to the area of land in question to view it, along with the parties, staff, and community members.

Ceremonies: Opening and closing ceremonies that are conducted by members of the Claimant's community are often part of Tribunal's proceedings. 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.

Prayer: 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.

JURISPRUDENCE

In 2018/19 the Tribunal issued written decisions addressing:

- Reserve creation in British Columbia (2018 SCTC 6; 2019 SCTC 1; 2019 SCTC 2)
- Compensation for breaches of fiduciary duty during the administration of reserve lands (2018 SCTC 5)
- Stays of proceedings (2018 SCTC 7);
- The addition of parties and intervenors to proceedings (2018 SCTC 4; 2018 SCTC 8); and
- Examinations for discovery (2018 SCTC 3).

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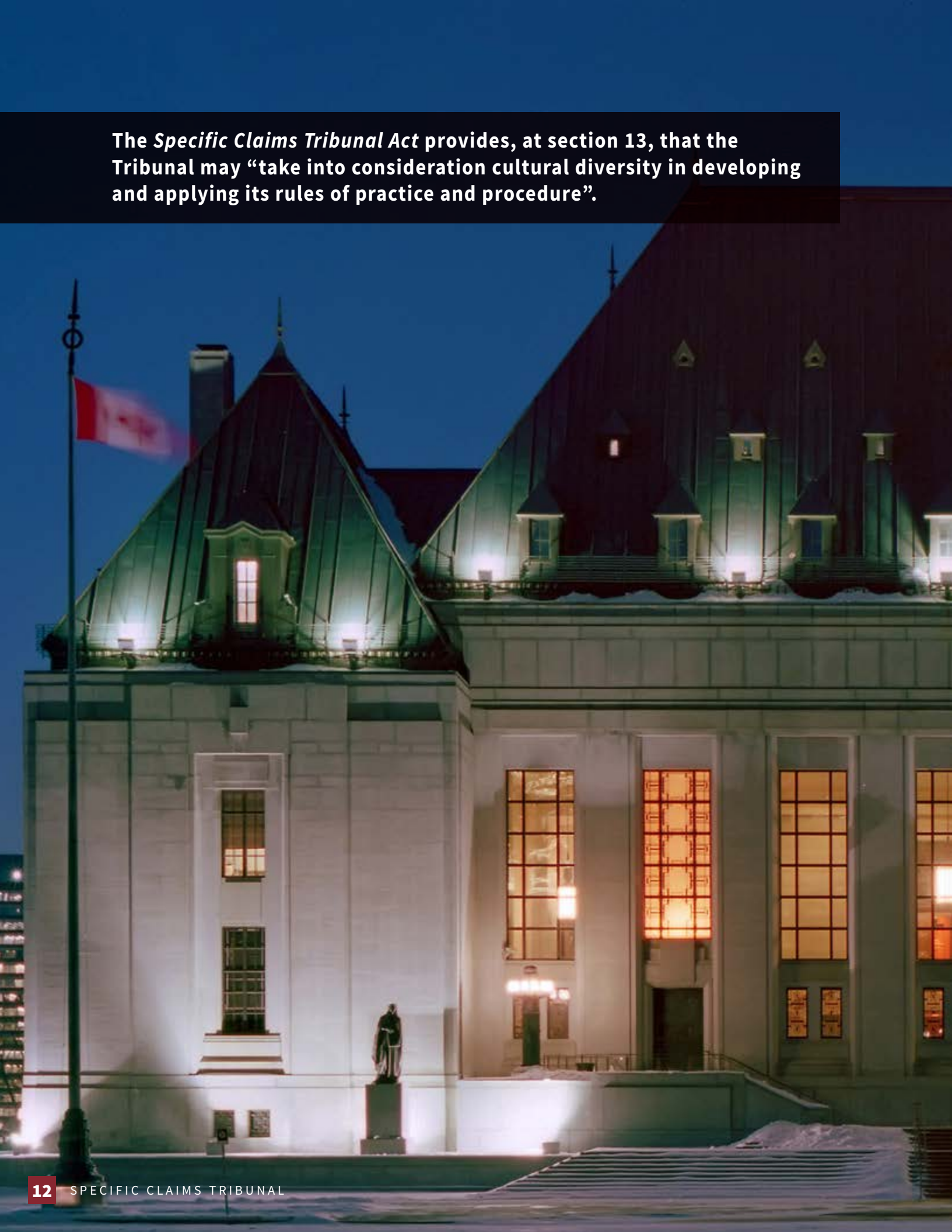


LOOKING AHEAD
TO 2019-2020

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)	16
Justice P. Mayer (bilingual)	May 18, 2023	Part-time	29
Justice W. Grist	September 5, 2022	Part-time	24
Justice V. Chiappetta	June 22, 2024	Full-time	5
		SUB-TOTAL	**74**
Unassigned Files			**8**

This past fiscal year was the last year at the Tribunal for Justice Whalen, who served the Tribunal from December, 2012 through July, 2019 and contributed greatly to its growth and development.

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.

SOUNDING THE ALARM ON ACCESS

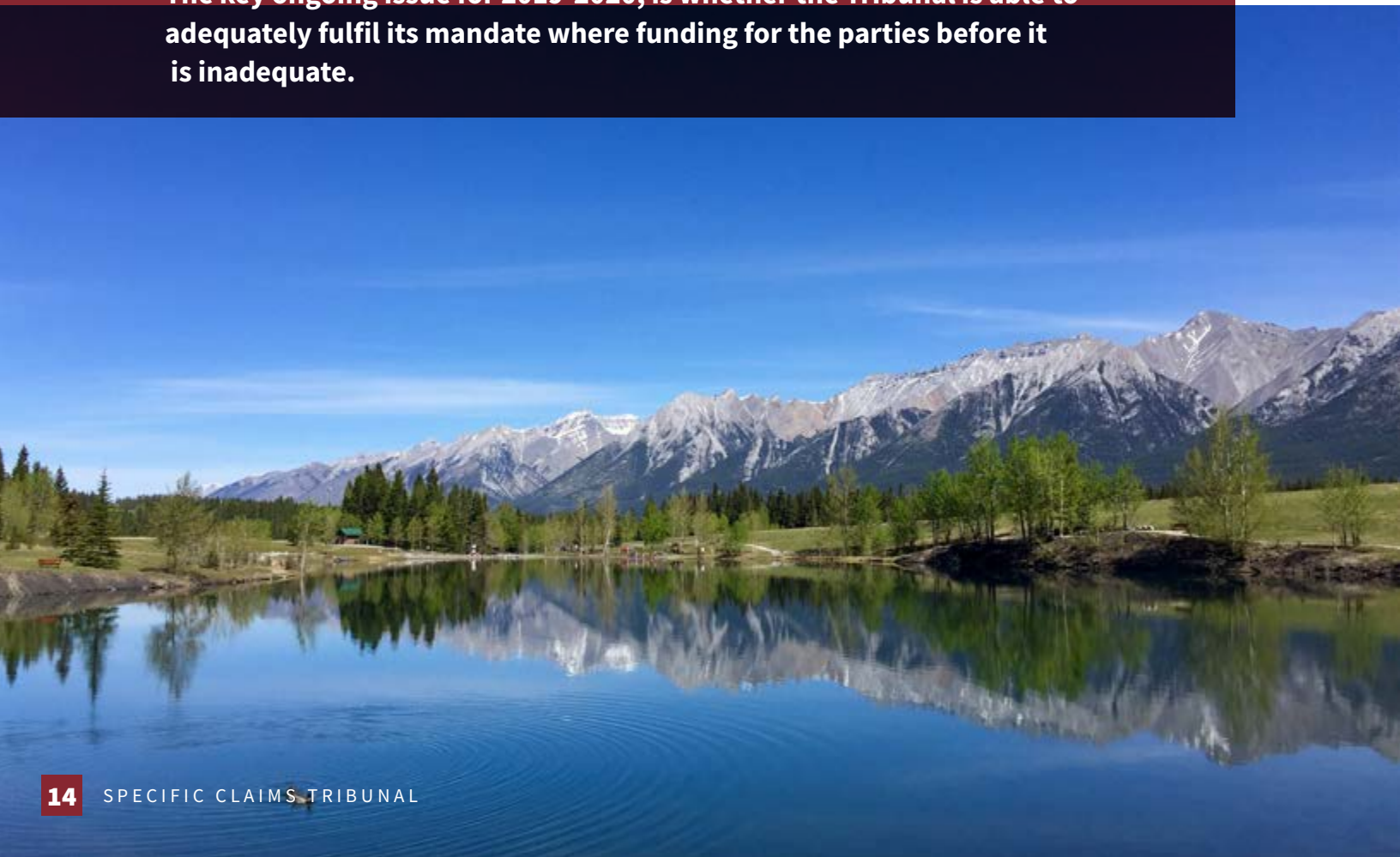
The key ongoing issue for 2019-2020 is whether the Tribunal is able to adequately fulfil its mandate where funding for the parties before it is inadequate. Delays related to funding approvals frequently cause amendments to case management schedules. In some instances, schedules that have been agreed to be 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.

In an effort to offer more just and timely resolution of Claims, the Tribunal implemented several new practice directions in 2018-19, on the matters of early case planning CMCs, Settlement Conferences, Mediation at the Tribunal, and Stays of Proceedings. However, such efforts will not succeed if parties are unable to fully participate in the process. Nearly a year after implementing the new Practice Directions, 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 us 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 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.



The SCB assesses Claims based on information provided by the Claimant and, presumably, its own research. There is engagement with the Claimant in this process before a recommendation goes to the Minister. Expert reports may be obtained by the Claimant and the SCB, sometimes jointly.

Access to the record of the SCB in assessing Claims would enable the Tribunal to identify the core issues of fact and law early in the process and work with the Parties to establish an efficient plan for completion of necessary pre-hearing tasks. It would also enable Tribunal members to do sooner what they do as Justices presiding over matters before the courts, namely to assist counsel in identifying evidentiary needs, establish a litigation timetable, set a hearing date, and occasionally deliver reality checks to the Parties.

Often, only a limited amount of the material gathered by the SCB is made available to the Tribunal, as the Crown takes the position that most such material, excepting unannotated historical documents, is non-disclosable due to "negotiation privilege". Such is the case even when the Claim is not accepted for negotiation. Claimants query whether this is in keeping with the objectives of the *Act* and Crown Honour.

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.

Funding limitations and processes contribute in several ways to delay in proceedings before the Tribunal. An example: Bifurcation of validity and compensation has become the norm. This rarely occurs in proceedings before the courts. It is common practice before the Tribunal because the First Nations lack the financial resources to prepare their cases for compensation at the outset. Were this not the case, the time from filing to ultimate resolution would be much shorter.

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 third 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 2018-2019, with nine claims reaching final settlement and two 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.

What accounts for delay in negotiations? Through the advisory committee we now know that Crown negotiators do not arrive at the table with mandates permitting them to accept or make binding offers of settlement. The negotiation process has the Parties discussing in generality the merits of the Claim and feeling out each Party's sense of the monetary value of the Claim, if accepted as valid. Expert reports may be obtained by each Party, or jointly, in an effort to measure the loss to the First Nation with precision. Response studies may be commissioned. The First Nation may lack the resources needed for full engagement, and line up with others for funding for the process. Crown representatives must go through the process for funding of reports they consider necessary. Years pass while in this process.

Settlement agreements are not entered at the negotiation table. The most that can be achieved is a "Memorandum of Understanding" by which the representatives of the Parties undertake to take such internal steps as required to make a legally enforceable agreement on the terms of settlement. On the Crown side the approvals can take 8 months or longer. The time varies with the amount of compensation set out in the Memorandum.

In matters before the courts, the norm is to set a trial date. In Quebec, plaintiffs must have their cases prepared to fix a trial date within six months of the establishment of a procedural protocol, which occurs shortly after the originating application is served on the defendant. In Ontario, actions are automatically dismissed if not set down for trial within five years of commencement.

In all jurisdictions the parties must complete their preparation and be ready to proceed on the date set for trial. Trials may, in some circumstances be adjourned by consent or by order of the court if one party, for good reason, needs more time to prepare and is granted an adjournment on application. The fact that the parties have entered settlement negotiations is not generally considered an adequate reason for adjournment. There is nothing that motivates parties to settle more than facing a set date for trial. Fully, 90 percent of civil claims filed in the courts are resolved without trial.

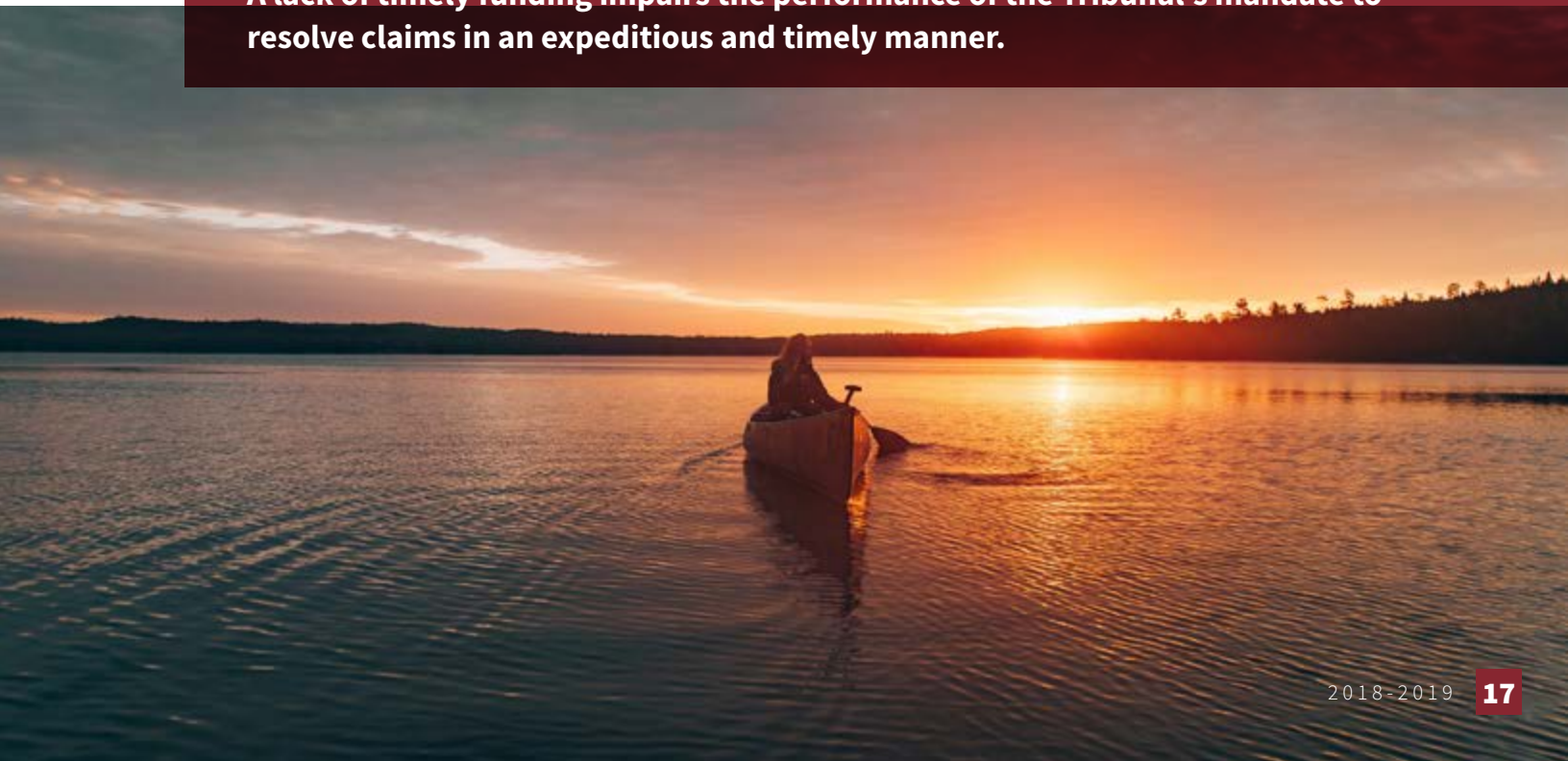
In claims before the Tribunal we have been asked by the parties to put the entire pre-hearing process in abeyance by granting a stay of proceedings while the parties negotiate. The Tribunal seeks, through case management and a new Practice Direction #15, to pursue our mandate for timely resolution. However, settlement continues to take a long time. Often delays in the Crown receiving a mandate and funding delays in negotiation contribute to the protracted nature of the settlement process.

For example, in a recent claim, the parties approached the Tribunal for a stay of proceedings to pursue settlement. The stay was granted, which meant that the parties could put their preparations for a hearing on hold.

Multiple CMCs were held and work plans to settle the claim were submitted for the Tribunal's approval. The work plans called for an expert report on the question of compensation. The terms of reference for the expert report were placed on hold for months, taking well over a year after the initial stay was granted to finalize.

The Claimants advise that progress has been limited over this time period given a complete absence of funding to support their participation. The negotiations remain at a standstill although work on the expert report has begun in the expectation that funding will soon be forthcoming. No progress has been made toward preparation for hearing.

A lack of timely funding impairs the performance of the Tribunal's mandate to resolve claims in an expeditious and timely manner.



This example is regrettably, more the norm than the exception for Claims filed with the Tribunal, then put on hold in the Tribunal process to enable the parties to pursue negotiations.

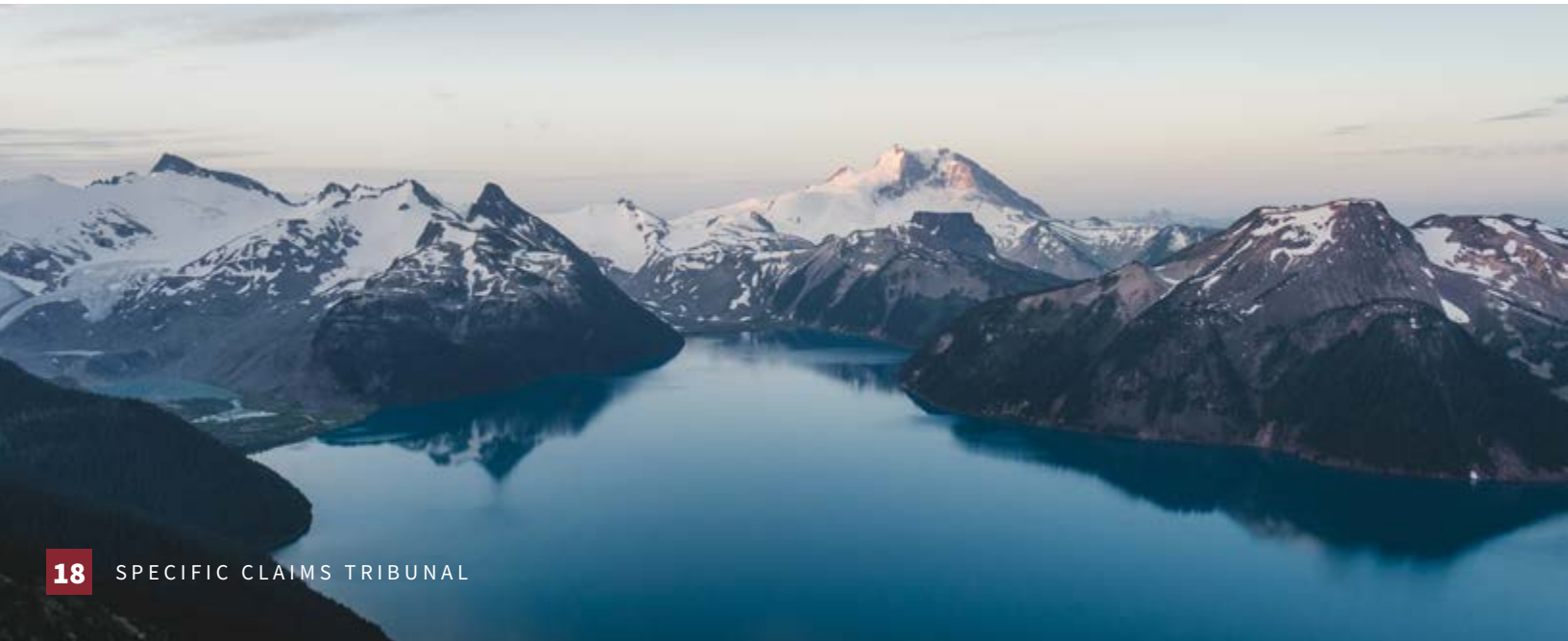
This lack of timely funding impairs the performance of the Tribunal's mandate to resolve claims in an expeditious and timely manner. It is also the case that funding shortfalls prevent Claimants from prosecuting their Claims diligently before the Tribunal. When the Crown makes overtures for negotiation, the Claimant is put at a disadvantage. If unable to complete the preparatory work for a hearing the time pressure for settlement vanishes, and negotiations proceed at a snail's pace due to inadequate funding. Even once a settlement is agreed in principle, if the Crown does not obtain the necessary approvals, there is no settlement and the matter will return to the Tribunal after a delay of, in some cases, five or more years after the Claim has gone on hold. As all work has been on hold, the parties are left to initiate and complete all pre-hearing measures. The Tribunal attempts to mitigate this risk through case management.

Mediation

In the Federal Court, a stay of proceedings may be granted for up to six months for negotiation on condition that the parties undertake to employ alternative dispute resolution to achieve a settlement. We frequently hear in case management that a binding settlement agreement within six months or even one year is impossible for the reasons above. When the Tribunal grants a stay of proceedings for six months, the parties frequently return to request multiple further stays of proceedings.

The Tribunal has in several Claims provided a member to serve as mediator. The results have been mixed. Where mediation succeeds, the time taken to achieve a Memorandum of Understanding is reduced. This, however, does not become a binding agreement until the government process for approval is completed. Technically the matter remains before the Tribunal, but efficiency in bringing the Claim to a final resolution is, contrary to our legislated mandate, absent.

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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