BRIEFING NOTE

TO: BC Specific Claims Working Group
FROM: Jody Woods
DATE: August 30, 2021
RE: Threats to Specific Claims Tribunal's institutional independence

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PURPOSE

To provide the BC Specific Claims Working Group with an update on threats to the Specific Claims Tribunal's institutional independence almost seven years after the passing of the *Administrative Tribunals Support Service of Canada Act* (ATSSCA).

RECOMMENDATIONS

1. Engage competent and experienced legal counsel to prepare a legal opinion on the independence of the Tribunal for presentation to the BCSCWG;
2. Draft a letter to the current Chairperson of the Tribunal, Justice Chiappetta, outlining claimant community concerns reflecting the notions raised in the legal opinion, as appropriate;
3. File an Access to Information request pertaining to the SCT's current institutional independence protections, and specifically request documents relating to a recent Judge's prompt departure from the SCT, status of appointment of new Québec Judge for replacement, BC Judge for Justice Slade's replacement; and,
4. Share briefing materials with the AFN CCoLTR and National Claims Research Directors.

BACKGROUND

Establishment of the Specific Claims Tribunal and First Nation's Expectations from the stand alone, dedicated Registry and the Tribunal Member's statutory power to make rules governing the duties of Tribunal staff

- The Specific Claims Tribunal (Tribunal) was established in October 2008 as an independent adjudicative body able to make final, binding decisions on specific claims (validity and compensation).
- The Tribunal is an integral component of Canada's Specific Claims Action Plan (Justice At Last), introduced by the Harper government in 2007 and lauded by Canada as bringing "impartiality and fairness" to the specific claims process. The creation of the Tribunal was in direct response to the 2006 report by the Standing Senate Committee on Aboriginal Peoples (*Negotiation or Confrontation: It's Canada's Choice*), which, on the basis of testimony and written submissions made by First Nations, claims practitioners, lawyers, legal scholars, and government representatives, including then Aboriginal Affairs Minister Jim Prentice, recommended establishing an independent claims resolution body within two years, in full partnership with First Nations. Its stated purpose is to resolve specific claims to promote Indigenous-Crown reconciliation.
- First Nations regard the independence of the Tribunal and its ability to make final and binding decisions as a fundamental aspect of its legitimacy as an adjudicator of First Nations' historical claims against the Crown.

- When passed in 2008, the *Specific Claims Tribunal Act* provided that the Tribunal's adjudicative membership would consist of independent superior court judges, and that the Tribunal would have its own dedicated Registry (section 10, since repealed), with an office in the National Capital Region. Additionally, the Act provided that the Tribunal's judges would have the power to make rules regarding Tribunal and Registry staff (section 12, repealed), and that the registrar (a "Deputy Head" under the *Financial Administration Act*) would be responsible for managing the Tribunal's work, including the duties and staff of the Tribunal. The Deputy Head at that time was accountable to the Tribunal as an institution, as originally intended by the original version of the *SCTA*. Legal Counsel to the Tribunal was engaged at the time pursuant to an exception granted by the Department of Justice who recognized the inherent conflict of interest in providing legal counsel to the Judges while also defending Canada in claims before the Tribunal. An access to information request to both the DOJ and the SCT should result in a production of the same.

The Administrative Tribunals Support Service Act (ATSSCA)

- In the spring of 2014, the Harper government introduced Bill C-31, an omnibus bill designed to implement their "Economic Action Plan". Part 6, Div 29 of this bill introduced the *ATSSCA* to "provide registry, administrative and other support services to 11 administrative tribunals". The bill stipulated that "The staff and resources that currently support those tribunals will be transferred to the ATSSC. The legislation ensures the continuing independence of the tribunals and the fairness of their proceedings. The tribunals will maintain their separate identities under their current ministerial portfolios and their members and chairs will retain control of their adjudicative procedures and other substantive functions."
- The result of Bill C-31 would be the Tribunal's loss of its dedicated Registry and loss of control over its administrative operations, such as staffing and budgets. Its administrative offices would also now be housed within a federal government department, accountable to the Minister of Justice.
- After the bill was introduced, then Tribunal Chair Justice Harry Slade openly expressed significant concerns with the proposed ATSSCA, writing in his 2014 Annual Report that the Tribunal could not be "assured of its ability to continue to function with adequate protection of its independence". Justice Slade reported that he was informed by the ADM of Justice in February 2014 that the offices of 11 federal tribunals, including the Specific Claims Tribunal, "would be merged to achieve cost savings and efficiencies" and that "[c]onsultation with the Tribunal in this regard was so time limited as to be meaningless. Moreover, there was no consultation with First Nations before the Bill to create the Service was introduced, despite the requirements of section 41 of the *Act*."
    - Section 41 of the SCTA set out the Act's review and reporting requirements. Section 41(1) provided that within one year of the fifth anniversary of the Act's coming into force, the Minister must undertake a review of the Tribunal and allow First Nations to make representations. Section 41(2) provided that the Minister's report, due one year after the review, must provide a statement of any changes to the Act, "including any changes to the Tribunal's functions, powers duties that the Minister recommends and the representations which have been made by First Nations."
- Justice Slade also noted that the SCTA was amended "eliminating the Registry (section 10) and eliminating the ability of the Tribunal Members to make Rules respecting the duties of staff (section 12)." Justice Slade added that as a result, the Tribunal would no longer have a

dedicated vote of funds and that "resourcing of the Tribunal will be entirely in the discretion of the Chief Administrator of the *ATSSC*."

- Importantly, he reported that "Concerns over the impact of the *ATSSC* on institutional and judicial independence of the Tribunal, both in fact and as perceived, and the lack of consultation with First Nations have not been addressed."
- The ATSSCA was passed in November 2014 without consultation with First Nations, and repealed provisions in the SCTA for an independent Registry and subsumed the SCT registry services into an umbrella service that reports to the federal Department of Justice.

Formal Responses to the Passing of the ATSSCA

- In August 2015, **the Canadian Bar Association passed resolution 15-02-A**, *Independence of the Specific Claims Tribunal*, recognizing the independent adjudicative function of the Tribunal, and the threats to the Tribunal's independence posed by the ATSSCA's consolidation of registry and core mandate services to various federal Tribunals. The resolution referenced a warning issued by the CBA to the federal government, presumably before the ATSSCA was passed, "that loss of administrative and judicial independence would be a likely result, and that loss would be particularly critical for bodies with an independent judicial function, like the Specific Claims Tribunal", particularly given the current restraints on the Tribunal's resources. The resolution called on Canada to reaffirm its unqualified support for the independence of the Tribunal by adequately staffing and resourcing it on an ongoing basis, restoring a dedicated registry to support the Tribunal and removing the Tribunal from the operations of the ATSSCA.
- In September 2015, **the UBCIC Chiefs in Assembly passed resolution 2015-38** expressing full support for the CBA resolution and calling on Canada to fulfill its public commitments to resolve specific claims in a just, fair, and timely manner.
- Justice Slade raised his concerns about the threats to the independence of the Tribunal both before and after the passing of the ATSSCA in correspondence with the Prime Minister Stephen Harper, Attorney-General and Minister of Justice Peter MacKay, and Minister of Aboriginal Affairs, which we received pursuant to an access to information request.
- Specifically, Justice Slade's Annual Report of 2015 addressed various resource related independence concerns, and said "The Tribunal no longer has a dedicated registry and no longer can make rules with respect to the duties of staff. This has resulted in uncertainty among staff over their authority to comply with requests from Tribunal members to make all necessary arrangements for hearings".
- The Tribunal's five-year review identified concerns over compromised institutional/Tribunal independence resulting from the ATSSCA, which remained unresolved in 2015. The Annual Report recommended additional measures to increase the independence inherent in the specific claims resolution process, including advance interim costs. At para 90, the review said:

> … removing the Tribunal from the Schedule of tribunals listed in the *ATSSC Act* would give effect to the original intention of the stakeholders in the historic joint effort leading to the introduction of the *SCTA*. Restoration of the stand-alone registry, dedicated vote of funds, and ability to establish duties of staff would improve Tribunal efficiency and **make it less vulnerable to a challenge of its independence based on institutional bias**. [Emphasis added]

CURRENT STATUS

- In August, 2021, former senior legal counsel to the Tribunal, Alisa Lombard, alerted Jody Woods about her growing concerns about the erosion of the Tribunal's independence since the coming into force of the ATSSCA almost seven years ago. Her overarching concern is that, since the introduction of the ATSSCA, there is no identifiable structural or legislative mechanism in place that can guarantee the protection of the Tribunal's independence. The guarantee of independence that existed in 2008 through the SCTA was unilaterally removed when the Act was amended in 2014 to accommodate the creation of the ATSSCA. This was done without consulting First Nations or obtaining their consent and contravenes the *UN Declaration on the Rights of Indigenous Peoples*. In the past, Alisa Lombard highlighted the following issues:
    - Subsuming the administration of the Specific Claims Tribunal with other federal tribunals via the ATSSCA ignores the significant differences between these bodies in terms of their particular mandates and the distinct requirement of independence that each body requires.
    - The Tribunal has an exceptionally high requirement for independence due to the national importance of resolving First Nations' claims in a just and fair manner in accordance with Tribunal's reconciliatory aims, the need for First Nations to have confidence in the fairness and impartiality of Tribunal processes, and the relative complexity of specific claims.
    - The Tribunal's legal counsel – lawyers whose client is the institution itself, not lawyers representing any of the parties to a claim – routinely assist the Tribunal by providing advice in specialized areas of the law to assist the members during claim adjudication, further to Judge's instructions. In particular, Judges new to the Tribunal and the historical issues heard by the Tribunal rely on legal counsel to give them advice that helps them frame decisions in areas of law that are unfamiliar to them, often novel, and of national importance. As such, the Tribunal's lawyers require significant expertise in particular fields of law to be effective (for example, fiduciary and trust law, principles such as the honour of the Crown, constitutional law, aboriginal law, etc.).
    - The new Chair of the Tribunal is new to these issues, based on an assessment of her experience as published, and would presumably be heavily reliant on legal counsel. If there is no one there with the requisite expertise and experience to advise her, challenges are foreseeable, such as slower processes, more costly proceedings, and a greater likelihood of judicial reviews, or decisions that err on the side of the status quo without taking well-founded, necessary risks to nurture newly sheened, yet clearly correct, law (such as Williams Lake, Kitselas and Beardy's & Okemasis).
    - Since 2014 the ATSSC, which is an arm of the federal Department of Justice, has assumed responsibility for assigning lawyers to the Tribunal, and legal counsel employed at the ATSSC routinely fail to see the need for such expertise. As a result, the pool of lawyers now working at the Tribunal lack the requisite degree of expertise it had when it had a standalone Registry and was statutorily empowered to determine the duties of its staff under sections 10 and 12 of the original SCTA.
- The newer lawyers placed at the Tribunal by the ATSSC, foreseeably made necessary by an exodus of expert lawyers in the relevant legal fields, are less likely to grasp the national importance of claims resolution, understand the issues on which they are advising, or be capable of culturally diverse legal practice in this context. There is not a single First Nations legal advisor at the Tribunal at present, compared to there being two in 2016. Further, they fail to consider the overall objective of the Tribunal, which is the fair resolution of claims, in a timely

and cost-effective manner, to further reconciliation. The lawyers now working for the Tribunal may not comprehend what is at stake when the Tribunal's independence is at risk of being compromised.

- We have been informed that the lawyers that possessed this understanding as well as the requisite expertise have departed the employ of the SCT. Independence challenges may well be involved, as they were for previous lawyers. First Nations may regard this as an effort to control the legal advice that Tribunal judges are receiving in the oversight and mandate alignment of the institution itself, but also in the quality of advice they receive and the expertise to which they have access in adjudicating specific claims.