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Chair

Mr. Bruce Stanton

Standing Committee on Aboriginal Affairs and Northern Development

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● (0855)

[*English*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Good morning, members, guests, and witnesses.

It's great to see you here for our 51st meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Pursuant to Standing Order 108(2), we continue our consideration and study of the Specific Claims Tribunal process.

This morning we're delighted to have with us Justice Harry Slade, who is the chair of the Specific Claims Tribunal. With him, we also welcome Alisa Lombard. Alisa is the law clerk with the tribunal, I presume.

Justice Slade, perhaps you can introduce your other colleague...?

Oh, I'm sorry. Thank you. We also have with us Mr. Ed Ratushny.

Is that the correct pronunciation?

Professor Edward Ratushny (Professor, Common Law Section, Faculty of Law, University of Ottawa, As an Individual): [*Inaudible—Editor*]...Ukrainian.

The Chair: Okay. Welcome. We're delighted to have you here this morning.

As we customarily do, Justice Slade, we begin with an opening presentation or remarks from yourself for up to 10 minutes, after which we go to questions from members.

Please go ahead with your presentation. We welcome you here today.

Hon. Mr. Justice Harry Slade (Chairperson, Specific Claims Tribunal Canada): Thank you, Mr. Chairman.

I did prepare a paper, and I think the honourable members will perhaps be relieved that I don't propose to take you line by line through it, but I thought that in light of the question around the study on the Specific Claims Tribunal process, and on issues relating to a process where claims have a value exceeding $150 million, it might assist the honourable members to have a more fulsome statement of the tribunal's mandate and the process than time permits in an oral presentation.

I'd say first that the members of the tribunal recognize the importance of the government initiative in the advancement of Bill C-30, the Specific Claims Tribunal Act, and that this is in furtherance of an agreement with the Assembly of First Nations that also provides for the residential school apology, the Truth and Reconciliation Commission, and a new dialogue on larger questions around aboriginal rights and interests. It also acknowledges the support for the enactment of Bill C-30 by all parties. This is plainly a significant step toward the reconciliation called for by section 35 of the Constitution Act of 1982.

As a member of the tribunal, as chair of the tribunal, and as a judge, of course, I'm bound by principles of independence and the related duty of impartiality, so I must take great care not to comment on any matter that could come before the tribunal or before any court. The traditions of the judiciary and our constitutional relationship with the legislature and the executive branch say that I must avoid any comment on anything that might have a political aspect.

So with all that said, I'll start by observing that the act provides for court-like processes in the adjudication of claims, but it's notable that the preamble to the act speaks to an objective that some may see at odds with a court-like process, which by its nature is adversarial. I will present a couple of paragraphs from the preamble. In it, we have a statement that “resolving specific claims will promote a reconciliation between First nations and the Crown” and also a recognition of “the right of First Nations to choose and have access to a...tribunal to create conditions that are appropriate for resolving valid claims through negotiations”.

It's with this in mind that the rules of practice and procedure that the tribunal has established in consultation with an advisory committee made up of first nations organizations and representatives, members of Indian and Northern Affairs Canada, including the specific claims branch, and members of the Department of Justice, place a heavy emphasis on active case management of claims brought before the tribunal.

We've built in a rule that integrates mediation into our process. The idea here for the operation of the tribunal in the process is to identify, in the first instance, the core issues that go to the validity of a claim where validity is in issue.

● (0900)

Members of this committee will appreciate that some claims are likely to come to us not as a consequence of the rejection of the claim, but as a consequence of the claim having been in negotiation for three years without resolution. We're anticipating that some claims will require determination of validity and compensation, while others will require determination of compensation alone.

In case management, as with the courts these days, the tribunal will seek to identify the core issues around validity—the core issues going to the determination of compensation—in an initial effort to assist the parties in zeroing in on what really separates them, in the hope that it might better facilitate the negotiated resolution toward reconciliation that's contemplated by the preamble to the act.

This approach also promises a meaningful engagement of first nations peoples in the process, as negotiation and mediation is a process rather different from the adversarial-oriented processes before the court. It's important that some of the court-like processes be available. The act establishes finality where a claim is adjudicated on and is the subject of a ruling. Therefore, procedural fairness and substantive fairness require that full disclosure be made by both parties in the interest of leveling the playing field and ensuring that both parties—in particular, the claimants—can be satisfied that they're proceeding in a process that is fair and transparent.

We're hoping to open the doors in April this year. There are a few things left to be completed before we can do that. We have developed our rules of practice and procedure, but we're required by the Statutory Instruments Act to go through their process to conform our rules to federal drafting standards.

Our rules are examined by officers of the Department of Justice in this process to ensure their conformity with the provisions of our act. That's proving to be a somewhat longer process than I'd anticipated; it has the potential to delay the opening. But I'm confident that the folks in control of that process at the Department of Justice are applying themselves diligently to the task. Since arriving in Ottawa, I've learned a great deal about the pace at which things move through various offices. It's a little different from practising law or being a judge, that's for sure.

Our jurisdiction primarily relates to the taking of reserve lands, either under lawful authority where compensation has not been adequate, or without lawful authority. Part of our jurisdiction extends to matters where it's alleged that there are unfulfilled treaty promises, fraud by persons in positions of trust and authority, and misuse of Indian moneys, as that term is defined under the Indian Act.

Broadly stated, those are the matters that would come before the tribunal after being reviewed in the INAC specific claims branch process. Where the claim is rejected by the minister, it can come to us. After three years of negotiation without settlement, it can come to us.

● (0905)

At this point, it's difficult to say what resources, in terms of tribunal members, support staff, and funding, we'll require once fully operational. The geographic distribution of claims is to some extent reflected in the fact that amendments to the Judges Act that accompanied Bill C-30 gave British Columbia three more Superior Court judges, Ontario, two, and Quebec, one.

Our act provides for six full-time equivalents—a term I was not familiar with until I got to Ottawa—made up of up to 18 judges contributing no more than one-third of their time. I will say that this idea has presented some unique challenges that will need to be worked through in time, as part-time judges of course would have to have their tribunal work integrated with their rota in handling matters before the courts.

As you know—and of course it's central to the matter before you— the cap on compensation that can be awarded by the tribunal is $150 million. In the specific claims process, this raises some questions that at least I consider interesting.

For matters that come before the tribunal, of course, or through the specific claims branch, as I understand their process, the initial question is whether the claim is valid. If it's determined not to be valid, it's my understanding of the process that they really wouldn't get down to the question of the amount of compensation. Why would they? In many of these claims, to advance the compensation case would be extremely costly. There may be estimates of compensation indicated, but I very much doubt that those estimates would be authoritative in the sense of being supported perhaps by expert evidence on valuation. So in that process, if a claim is rejected, I'm at a bit of a loss to understand how it could be known that its value exceeds $150 million.

Now, turning to the process before the tribunal, I think the starting point for the documentation that the tribunal would have before it is the material that comprises the minimal standard, or meets the minimal standard, that the Specific Claims Tribunal Act provides for in section 16. That section requires claimants who are entering the Specific Claims Branch process to provide documentation that complies with the terms of a minimal standard document established by the minister—and the minister has done that—which of course is a public document.

● (0910)

That minimal standard document does not call on claimants to state the quantum of compensation sought, and in the process before the tribunal, the claimants, at the validity stage, would in my estimation be unlikely to have developed their case on compensation. It seems quite possible to me that a claim might be presented to the tribunal where the first issue is validity, without much of a handle on whether or not the claim is valued in excess of $150 million.

I can envision a scenario where we'd be in the process before the tribunal addressing validity and having it turn out, if validity is established, as hearing evidence that could establish a theory of compensation at a figure exceeding $150 million. Of course, at that point, the claimants would be facing our statute's limit of $150 million, and one might consider the question whether at that juncture the claimants would be pressed to continue in the process before the tribunal, knowing the statutory limit on compensation that can be awarded, or pursue other avenues toward the ultimate resolution of a claim validated by the tribunal.

That concludes my opening remarks. I hope I haven't gone too far over time. I welcome any questions the honourable members may have for me.

Thank you, Mr. Chairman, and thank you for your attention.

The Chair: Thank you very much, Justice Slade.

We will now go to questions from members, but I will just reiterate what we heard from Justice Slade this morning, which is that discussion around specific cases or interpretation of the law obviously will be an area that will be difficult for Justice Slade to comment on specifically. I just reiterate his earlier comments. We'll guide our questions accordingly.

Let's go to Mr. Russell.

This will be a seven-minute round.

Mr. Todd Russell (Labrador, Lib.): Thank you, Mr. Chair.

Good morning, Justice Slade. I want to welcome you and your colleagues to this study.

I was around this table—not this specific one, but the aboriginal affairs table—going on two and a half or three years ago when this particular piece of legislation was being driven in an expedited fashion, maybe a bit more expedited than some of the processes that you've been engaged in thus far. There was an urgency around getting this legislation through, not only on the part of the government, but on the part of the Assembly of First Nations as well. There was a huge backlog. We were given the numbers of 700-plus claims at the time and as high as 800-plus claims.

We're two and a half years out and we're not operational yet as such. I know that it takes some time to get such a complex process up and running, but there was an urgency expressed by the government and we're almost two and a half years out and we're not yet operational.

In your report, you state that there may be some friction. I don't know if that's the right word, but certainly you have some concerns about the interaction of the registry of the specific claims and the tribunal process itself, the independence, the control of the registry in terms of administration and things of that nature. Has any of that been addressed? Has that been an issue that has slowed down this process in terms of operationalizing the tribunal? Would you say that the tribunal aspect that you're more responsible for is further ahead than the registry itself?

My understanding from reading some of the material is that the registry is not yet up and running, and it won't be up and running for another month, when somebody can actually say that he put his claim before the specific claims registry. I just want you to comment on that.

As well, you raised a very good scenario with the claims over $150 million. When we discussed this legislation, there was sort of a parallel process that was supposed to take place about claims over $150 million.

What happens if an organization comes forward without establishing the compensation issue or the valuation? You validate the claim, you negotiate it, and then the tribunal says that a hell of a case has been made that compensation in excess of $150 million needs to be provided. Does the act then apply or does the ruling apply? You could award up to $150 million under the legislation, but in the compensation you adjudicate, for lack of a better word, you come down with a ruling for $250 million. What happens at that point?

I'm interested in the registry and the tribunal issue and this issue of over $150 million.

● (0915)

Mr. Justice Harry Slade: Mr. Chairman, these are important questions. I'll speak first to the honourable member's question about the time it's taking to get the tribunal operational.

We're close, but not quite there yet. The act came into force October 2008. I was one of the three judges first appointed to the tribunal on November 27, 2009. Concerns had developed prior to my appointment and the appointments of Justices Patrick Smith and Johanne Mainville. We initially took appointments for one year, as there were matters of concern to us and, I think it's fair to say, to other judges. Of course, it's important that judges view this tribunal as something they wish to participate in.

Initially, our mission was to address certain problems, one of which was the way the registry had been established. Of course, the registry, having a vote of funds, becomes a government department under the Financial Administration Act and has to have a deputy head, and that deputy head has various authorities. Under our act, the tribunal is said to have various authorities. There was a period during which it was difficult to reconcile the two.

Now, I'm happy to report, we're past all of that. We have recently been joined by a new registrar who is well experienced in court processes, who understands principles of judicial independence, and who understands the distinction between the authority of the tribunal as an adjudicative body and a rule-making body and that of the provider of corporate services to the tribunal, that being the registry. So we've cleared that hurdle.

Mr. Russell, you've made reference to my annual report that was filed on September 30 last, as required by section 40 of the act. There are still some concerns over resourcing, but the reality is that we're not really going to know what we need until we get up and running and see what comes in. I think there's going to be some fast footwork once that happens if we find ourselves short, but I'm confident that we'll receive the support we require financially to operate.

● (0920)

The Chair: We're running pretty close to the seven minutes, Justice Slade, so just a short response to the second part of Mr. Russell's questions would be great.

Mr. Justice Harry Slade: Well, on the $150 million, we can't exceed it, but if we've made a decision on validity and it proves that compensation in excess of $150 million is indicated, I think we could hear evidence of that. But we'd be constrained by the cap in any ruling we may make, and the claimant would be faced with a choice to proceed through with the tribunal or to pursue other avenues.

The Chair: Thank you, Mr. Russell.

[*Translation*]

I now invite Mr. Lemay to ask the second question.

Mr. Lemay, the floor is yours.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you.

Mr. Justice, I will let you—

[*English*]

Mr. Justice Harry Slade: Bear with me for just a moment, sir.

[*Translation*]

Mr. Marc Lemay: Is it working now?

Thank you, Mr. Justice, for being here today.

On behalf of the Bloc Québécois, I was significantly involved in setting up the Specific Claims Tribunal of Canada because we believed, and still believe, that it is a way that is and that must be efficient for resolving specific claims under $150 million, and there are an enormous number of them.

I read your report, in English and French, and one thing concerns me. When people acted so that we would adopt Bill C-130, which would set up the tribunal, we were assured that the Specific Claims Tribunal of Canada would be independent from Indian and Northern Affairs Canada. As a lawyer, I believe that this is extremely important. With respect, Mr. Justice, I have some doubts. Between what I see in your September 30 report and what you have said here today, it seems to me that there has been some development toward independence, which is extremely important. I don't need to remind a judge of the importance of a tribunal's independence. And as for the aboriginal communities listening to us today and who are going to appear before the tribunal, they do not necessarily know if you report to the Department of Indian Affairs and Northern Development. They feel that, if their claims were initially rejected, they are going to lose their time before the tribunal. This is my concern. We've been told that a judge of the Superior Court of Quebec would sit on the tribunal, while remaining a judge of the Superior Court of Quebec, which would ensure its independence.

I would like to be reassured about what you wrote on September 30 and what you have told us today. Your report also refers to the fact that there are still areas of concern regarding the current association of the tribunal clerk with Indian and Northern Affairs Canada—you wrote it in black and white—and the need to adopt an administration and governance model, and to define the powers.

You are doing an extraordinary job, I'm convinced of that, but how can we help you? Can we do something to ensure the independence of the tribunal so that you can render judicial decisions? Because it's your role and it needs to stay that way.

You can take the rest of the time allotted to me to answer this question because it's an extremely important concern for me.

● (0925)

[*English*]

Mr. Justice Harry Slade: Mr. Chairman, I thank Monsieur Lemay for this question.

I have identified in my annual report several areas of concern, as they go to both the reality and the perception of the independence of the tribunal.

Plainly, first nations peoples as claimants—and perhaps whether claimants or not—need to be satisfied that the tribunal is functioning as an independent adjudicative body. The Canadian public deserves that assurance as well.

There is a connection, albeit a rather distant one, between the tribunal and the ministry, INAC, in that the registry of the tribunal as a government department is listed under the Financial Administration Act as falling within the ministry of INAC as the "appropriate ministry".

Of course, claims that are rejected by that very minister find their way to the tribunal. I can't offer an opinion on whether that would raise a reasonable perception, in the mind of a well-informed person, of bias, in fact, or institutional bias. My own view is if that connection is not necessary, why would it exist, in that these claims are of a very sensitive nature.... But there it is.

Other concerns were raised in the report over the assurance of resources. We've made progress, but I have perhaps a little reluctantly come around to the view that we have adequate resources at the outset, on opening, and we'll have to look at that as matters proceed. I have every reason to hope and believe that we will receive the financial support we need.

One area of concern that lingers is, where are the judges going to work? I've set up shop here in Ottawa because I think the chairperson needs to be here. I'm a resident of Vancouver, and my spouse and my family are there. I can't speak for other judges, but how many are going to want to relocate to Ottawa, particularly if you're from Vancouver, if you get my drift...?

Voices: Oh, oh!

Mr. Justice Harry Slade: As for the idea of judges serving part-time, well, of course they will wish to know where are they going to work. Will they use their offices at the courthouses and their accustomed administrative and legal support staff, their law clerks? These facilities are provided by the provinces; therefore, in my respectful view, there needs to be some arrangement with the province that provides those resources. I understand that steps are being taken in that direction, but I don't know whether they have been concluded at this point.

● (0930)

The Chair: You'll have to wrap up there now.

Mr. Justice Harry Slade: There were a number of concerns. We've made very tangible progress on the practical stuff. With a new registrar, we have a lead in our registry now. We've effected some rather significant cost savings.

[*Translation*]

The Chair: Thank you, Mr. Lemay.

It is now over to Ms. Crowder for seven minutes.

[*English*]

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Mr. Chair.

Thank you, Justice Slade, and thanks to your team that is with you.

I'm from British Columbia, of course, and can well understand not wanting to set up shop in Ottawa. I love Ottawa, but....

Mr. Justice Harry Slade: We're on the same team this morning.

Ms. Jean Crowder: Yes, exactly.

I have a couple of questions around resources. Just for a point of clarification to help me understand how this works, does the tribunal itself have a separate budget from the registrar or does all money flow through the registrar's office?

Mr. Justice Harry Slade: There is no separate budget. This is one of the things I learned on the first day: that the vote has no line item.

Ms. Jean Crowder: Just so I'm understanding this, every dollar that you get has to flow through the registrar. You have no independent budget.

Mr. Justice Harry Slade: Correct.

Ms. Jean Crowder: Okay. That's problematic, then. My experience with other agencies that have been set up is that often there are budget negotiations that become very painful, and then a significant amount of your time and your senior staff's time is required in order to conduct those ongoing negotiations. I'll just set that aside for a moment.

I have another question around resources. It's two-pronged here. In your report, you outlined the fact that there are at least 74 claims that qualify for filing with the tribunal on the basis of rejection with the minister. Then you go on to talk about the potential numbers.

As of October 2011, there could be as many as 87 claims eligible, based on failure to conclude settlement after three years. That's one part. That's a significant number of claims and I don't know how that workload will line up, but it seems that with an equivalent of six FTEs, it's going to take a number of years to sort those out beyond the three years that are.... So that's one question: resources to actually deal with the claims that are coming through.

Second, in terms of resources, we understood that when first nations brought their claims before the tribunal, there would be additional funds for them in terms of presenting their claim before the tribunal. Are you aware of any allocation of funds for first nations once they get into the tribunal process?

Mr. Justice Harry Slade: Thank you.

Mr. Chairman and Ms. Crowder, the number of claims that will qualify for presentation to the tribunal has of course increased since my September 30 report. We're estimating—Ms. Lombard will correct me, perhaps—around 102 qualifying right away, on the basis of rejection, and more qualifying on the basis of three years in negotiation. Do I have that more or less correct?

Ms. Alisa Lombard (Law Clerk, Specific Claims Tribunal Canada): In fact, 74 qualify on the basis of rejection, and an additional 87 or 81 may qualify on October 16, 2011, on the basis of rejection—161 claims—

Mr. Justice Harry Slade: Yes, and of course there are many claims in the process, and I gather that the rejection rate historically runs around 35% or 40%, so we can anticipate claims becoming qualified for presentation...a considerable number.

● (0935)

Ms. Jean Crowder: Are there resources for first nations to present?

Mr. Justice Harry Slade: Yes. This is something I hear about but I have no personal knowledge of. What I hear is that there are discussions around this, but I really don't know the status of those. And of course, in the interests of a fair process, participants I think need to be resourced, but I cannot really speak to government responsibilities in relation to resourcing. That's outside....

Ms. Jean Crowder: No, and my question was simply whether you're aware.

I want to touch now on the rules of practice and procedure. Just so I'm clear on it, I know there were draft rules back in June, and now it sounds as if we've had a significant amount of back-and-forth. I'm not clear about the role of Indian and Northern Affairs and the Department of Justice in the rules of practice and procedure. I'm not a lawyer. I understand that there is this other body—the federal judicial rules—but I guess I'm a little concerned about what Monsieur Lemay touched on in terms of independence.

I'm a little concerned that Indian and Northern Affairs and the Department of Justice have some sort of influence on the rules of practice and procedure. It seems to me that those rules of practice and procedure are essential for judicial independence.

Mr. Justice Harry Slade: Yes, Mr. Chairman and Ms. Crowder.

The only involvement of INAC in the development of the rules we have prepared and put on our website in both official languages was as a member of the advisory committee. Our act provides that the chair can establish an advisory committee. We did that. We did a lot of good work with the advisory committee and received valuable input from all stakeholders.

We came up with a set of rules that appeared to be quite acceptable to the representatives of both the crown and the first nations and then learned that it was necessary to go through the process under the Statutory Instruments Act. That involves various branches of the Department of Justice. I'll be meeting with them this afternoon and tomorrow.

We've had numerous meetings. I've not seen the slightest indication that anybody is trying to change or alter the process we've provided for in our rules. It's a matter of bringing these into conformity with federal standards.

You take the Federal Court. When they embark on a rules project, they go through the same process. As a section 96 judge and as a long-time lawyer, it all seems a bit tedious, frankly, but I think they do good work. This is just the way it is, and we'll get through it as quickly as we can.

[*Translation*]

The Chair: Thank you, Ms. Crowder.

Your turn, Mr. Rickford. You have seven minutes.

[*English*]

Mr. Greg Rickford (Kenora, CPC): Thank you, Mr. Chair.

Thank you, Justice.

The first challenge I have today is actually asking my question sitting down. I remember fondly my first court appearance. I thought I had a rather eloquent opening statement. I proceeded before the justice, who knew I was fresh out of bar school, and I forgot to stand up.

[*Translation*]

It was a bit traumatic.

[*English*]

Here I am in front of the justice and I get to sit down. That's the first barrier overcome, Mr. Justice.

Voices: Oh, oh!

Mr. Greg Rickford: I have, I hope, two questions to get to.

I've scripted the first one to be clear. I'm cognizant of the principles of independence here in your comments with respect to procedurals in substantive fairness and the need for full disclosure and transparency. It has been suggested, Mr. Justice, that if new allegations and evidence are permitted to be introduced at the tribunal, they will not have been considered in the claims assessment process and will not have informed the decision of the minister in accepting or not accepting the claim for negotiation.

Broadly speaking, I was wondering if you can comment. Obviously there would be a larger evidentiary base than what would have been permitted in the initial submission of the claim. I'd like to give you, if I could, a couple of minutes to expound on that matter.

● (0940)

Mr. Justice Harry Slade: Yes, Mr. Rickford, this was a subject of quite a bit of discussion in the advisory committee. What happens if the claimant wishes to bring forward new evidence not previously presented to the minister in the assessment of the claim?

To my mind, the real question is whether it is or is not the same claim. I think you have to distinguish the claim itself and the basis for the claim from the evidence adduced in support of the claim.

I can't go too far on this question, because this could be a very live issue for decision by the tribunal. I will say that there seemed to be emerging kind of a consensus view that it would take some pretty significant new evidence to cause the matter to loop back through the specific claims branch process. More than that I'm afraid I can't say, because I might actually have to decide the issue one day.

Mr. Greg Rickford: I could appreciate that, Justice.

In my second question, I want to perhaps develop some of the issues around the rules of the practice and procedure draft that my colleague Jean Crowder raised. It's understood that a common concern expressed about the first draft of the rules of practice and procedure was that they were too court-like. You mentioned obviously that...and I agree with you, having been involved as legal counsel in the Indian residential school settlement with Justice Iacobucci, which actually was another chance I had to sit down to talk with a Supreme Court justice.

It was further understood that revisions to the rules would be to make them more flexible, but that court-like rules may be engaged at the discretion of the tribunal.

Mr. Justice Harry Slade: Yes.

Mr. Greg Rickford: How does this revision respond to that original concern?

Mr. Justice Harry Slade: Mr. Chairman and Mr. Rickford, the concern, and a well-founded concern in response to our first draft, was that the rules were too court-like and contemplate an adversarial process rather than a reconciliatory negotiated process. So after meeting with the advisory committee, we redid the rules to ensure that court-like processes would only be available at the direction of the case management tribunal member, so that neither party could present a flurry of applications to the tribunal and force the other party through a bunch of procedures that would be costly in terms of money and time.

It is my view that the availability of these procedures is important, though, because if the claim is to be determined with finality, it is fundamentally important to procedural and substantive fairness that the parties know the case they have to meet. In the specific claims branch process, of course, the crown is obliged to disclose nothing, whereas the claimant has to disclose virtually his whole case. So we're certainly not encouraging an adversarial-like process, but it needs to be transparent and it needs to be fair. So some court-like processes that would be available on application are, in my view, appropriate and necessary.

The Chair: You have 45 seconds, Mr. Rickford.

● (0945)

Mr. Greg Rickford: I appreciate that balancing test or challenge there, because I think it bears mentioning that the tribunal is really an end stage in an alternative dispute resolution process continuum, I think we would say, that's fundamentally different from, say, a trial in a court of the first instance, and the tribunal is effectively sitting as a final arbiter of claims that have already been subject to extensive review and analysis by both parties, so I can appreciate fully the challenges that lie there.

I don't have any questions at this time.

The Chair: Thank you very much, Mr. Rickford.

We have time for a few more questions, because we did get started a little later.

I have three people on the list. If we can keep that to four minutes perhaps, are you okay with that, members? We'll proceed on that basis and try to take it up to the hour at least.

Let's go ahead with Mr. Bagnell.

[*Translation*]

I would ask that you keep your remarks to four minutes.

[*English*]

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

I just have three questions. I'll give them all to you so you can manage your time in getting them all in with the three minutes you have left.

First, you said that an issue at the beginning, you thought, was that because you didn't know how big the claim was, how would you determine that if it's over $150,000...?

A voice: It's $150 million.

Hon. Larry Bagnell: Yes, that's $150 million. My understanding is that the first nation, unless they had specified it was over $150 million, could bring it to you, so that's not a problem. It could be determined in your process.

Second, I was happy when I heard from the department that hundreds of cases had been solved. I didn't realize that you hadn't done anything yet. I thought it was your great work. So it's great that the department has solved all of these so far. Maybe the fact that you exist inspired them. That's great.

But of the hundreds that are left, if there's only a budget of $250 million a year, and you could go to $150 million per case...it sounds as if it would take 100 years to solve the hundreds of cases that are left. So are there enough resources?

Last, is there any compensation for paying the claimants? I think Jean was getting at this. How does a first nation fund the legal appeal or just the expenses for good negotiators? In other processes with first nations, they get funded by government. Even in the courts, if you win a case, you often get funded by the courts.

Those are my questions.

Mr. Justice Harry Slade: Mr. Chairman and Mr. Bagnell, there will be cases where it is plain that the compensation side would exceed $150 million. That would exclude the matter from the jurisdiction of the tribunal—at least its monetary jurisdiction. I think there will be claims where it simply is not know; it could be of that magnitude, but it's simply not known when the matter comes before us. Many claims have been settled, and that's good news.

As for the $250 million annually against $2.5 billion over time, I understand this to be money that has been put aside, so to speak, by government. Our act doesn't limit us to making awards in any particular year—let's say fiscal year—that are restrained by the amount of money government has made available in its budgetary process. There's nothing in the act that imposes that restriction on the tribunal.

On the funding for claimants, I'm aware there's funding in the specific claims branch process; I don't know the status of funding for matters coming before us. I anticipate, as you've mentioned, sometimes court-ordered funding. Who knows? The tribunal may receive an application for an Okanagan order, as they're called.... Of course, I can't speak to the merits of that, as it could be a matter I'll have to decide.

Thanks for the questions.

● (0950)

The Chair: Thank you, Mr. Bagnell.

Mr. Rickford, go ahead, please, for four minutes.

Mr. Greg Rickford: Thank you, Chair.

Mr. Justice, in my review of this, I was thinking of the simplified procedure, rule 76, at the Ontario bar. In some regards, it's an opportunity for the parties to have principles of mediation and negotiation and facilitate an end to the process without an actual hearing. I think the tribunal expects to resolve the majority of grievances referred to it through mediation and negotiation rather than a hearing. The judges will have the ability to work with parties to help them focus on one or two core issues, and once those core issues are identified, the parties get a bit of a reality check. Sometimes that has a way of facilitating a resolution.

My question to you, Mr. Justice, is how this expectation is consistent with the mandate of the tribunal to make a final and binding decision and to do so in as expeditious a manner as possible?

Mr. Justice Harry Slade: Those two objectives on the surface seem somewhat at odds. To my mind, we are really guided by this legislation being one of several initiatives toward reconciliation. The preamble itself recognizes what our Supreme Court of Canada has often said: that the appropriate forum for the resolution of these often sensitive claims is negotiation.

In our regular courts, of course, judges today approach case management with a view to proportionality of pretrial procedures to the magnitude of the matter under litigation. That's appropriate for the tribunal and perhaps even more necessary. We're going to get every case into case management as quickly as we can, try to find out what the core issues are, and assist the parties toward a focus that enables effective negotiation.

We don't propose just to let them go and say, “Goodbye and come back when you need to see us again”. We'll require follow-up. If the matter simply isn't going to progress toward a consensual resolution, our intention is to schedule them to be heard without excessive delay: to shift them into high gear to get their evidence and witnesses organized, to deal where necessary with protocols for the introduction of oral history evidence that's respectful of the source of such evidence, and to do all the things they need to do to get to a hearing and get on with the hearing.

There are always points along the way where influence can be brought to bear to get people back to the table.

Mr. Greg Rickford: Thank you.

The Chair: Thank you, Mr. Rickford.

Monsieur Lemay, vous avez quatre minutes.

[*Translation*]

Mr. Marc Lemay: Thank you, Mr. Chair.

I certainly cannot impose any obligations on you. I think the first priority is to ensure that the tribunal operates independently, even though it will not become operational on April 1 and will be delayed by a month or two. Above all, no request should prevent you from moving forward because people might think that the tribunal was still part of the Department of Indian and Northern Affairs, which would create a potential conflict of interest.

I completely agree with what you said about the current fiscal year and the 2011-2012 fiscal year. There are four concerns that need to be addressed. And I think that is extremely important.

I am also on the Standing Committee on Justice and Human Rights. When Minister Nicholson appeared before that committee to explain Bill C-130, pursuant to which other judges would be appointed, he said that the registry of the tribunal would be located in Ottawa, but that the judges would remain in their respective provinces. I would humbly and respectfully say that I cannot see the judges in Vancouver or Winnipeg, with all due respect to them, travelling to Quebec to hear a specific claim. The same goes for the judges of the Superior Court of Québec going to Ontario or elsewhere to hear a case involving a specific claim. I felt better about that, but now, I must admit you are giving me some cause for concern. To my mind, it was obvious that the judges appointed to the tribunal would continue to perform their duties. They would stay in their judicial districts but be charged with certain functions of the Specific Claims Tribunal of Canada. That is what we were told at the Standing Committee on Justice and Human Rights in an effort to fast-track Bill C-130.

This morning, then, am I to understand that that may no longer be the case or that I misunderstood? Will that continue? Will the judges remain in their jurisdiction, in other words, in their registry? In the case of the Superior Court of Québec judges, obviously, Quebec is footing the bill, and we were ready for that. We were told it was the same for British Columbia, Manitoba and Ontario. I don't think a lot of negotiation is necessary. That is how it is, otherwise this registry will not work.

● (0955)

[*English*]

The Chair: I appreciate that you might be in a somewhat delicate area there, but do your best.

Mr. Justice Harry Slade: Well, thank you, Mr. Chairman.

It's critically important. I can only speak for myself, of course, but if I were in Vancouver and considering going on the tribunal part time, I would wish to know where I was going to work. Of course, with almost half of the claims arising in B.C., it is entirely appropriate that judges from that part of Canada would be able to hear these cases.

I would think that there will be hearings all over every province, and not necessarily in the major centres, but the question remains that if a judge is wondering about going on the tribunal for a period of six months, he or she will naturally want to know where the office will be and who the staff will be. Because the provinces provide courthouses and staff, it is a matter for resolution between the federal government and the provincial governments on the use of those facilities. With respect, it's not for the tribunal to go out and try to arrange this, because it's a matter of the fiscal relationship between Canada and the provinces.

Monsieur Lemay, I've read the Hansard, too, and I saw the very references that you referred to.

● (1000)

The Chair: *Merci, monsieur Lemay.*

Ms. Crowder.

Ms. Jean Crowder: Does the tribunal have the ability to award costs?

Mr. Justice Harry Slade: Yes.

Ms. Jean Crowder: Okay.

The Chair: Justice Slade, to you and your team with us today, I know that you gave this appearance very careful consideration. Frankly, we're delighted that you chose to take the time to join us. I think it will very much help inform our study that's in front of us right now. Thank you.

Members we will bid our guests adieu, suspend briefly, and then rejoin each other in camera for the remainder of our meeting.

[*Proceedings continue in camera*]

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