Analysis of Bill C-6: Executive Summary

Introduction

The federal government currently decides internally and secretly whether specific claims are valid or not. Compensation is determined through negotiations, with a high level of federal control over the rules being applied. The government is in a "conflict of interest". It is both defendant and adjudicator.

Although there have been several initiatives to set up an independent, effective system to resolve these claims, the most promising one is in the Joint Task Force's Report of 1998. This was the product of joint discussions between officials from the Assembly of First Nations and from the federal government. In a spirit of partnership, each side found ways to address the concerns raised by the other. The result of those discussions was a detailed and technically sound bill for a system to resolve specific claims.

This JTF bill proposed a jointly-appointed Commission and Tribunal that provided for the effective, fair and expeditious resolution of all claims within a reasonable fiscal framework.

Senior levels of the federal government did not accept the JTF Report. Instead, federal officials broke off the joint problem-solving approach with the AFN. They began unilaterally devising and drafting what has become the government's Bill C-6.

Under Bill C-6 the federal government retains its domination over the system. It does not create an independent and impartial body designed to clear up the huge backlog of claims. Instead, the Bill enables the government to closely control the pace of settlements and decisions. Access to the Tribunal is severely limited, appointments are at the unilateral discretion of Canada for short terms, and the federal government is rewarded for delaying the settlement of claims. Claims are treated as a matter of discretionary spending which must be tightly controlled, instead of legal debts. The conflict of interest in having Canada decide claims against itself remains and is entrenched in legislation.

It is the view of all First Nations' technicians and counsel who participate in the AFN's specific claims working group that Bill C-6 does not retain the basic elements of the JTF Bill. It does not achieve the objectives identified in the Liberal Party's Red Books.

In fact, Bill C-6 would create a system that is worse than the current system which at least allows all claimants to obtain a public investigation, a report, and a non-binding recommendation on their claim from the Indian Claims Commission (ICC). Bill C-6 does not allow this independent, public review for claims above the cap.

It should be possible to achieve a middle ground, with the federal government recognizing that it cannot strictly control the pace at which these legal debts are paid, but in which claims are resolved in an orderly fashion, and at a pace capable of clearing up the backlog in a reasonable time The JTF made a serious proposal in this respect. Bill C-6 would not achieve any such moderate approach.

Specific problems with Bill C-6

1. Definition of Specific Claims

The approach of the Joint Task Force was to build on the definition in the official federal policy statement, *Outstanding Business (1982),* with a modest expansion in light of case-law over the past decades.

Bill C-6 narrows the definition of claims compared even to current federal policy. It excludes (i) obligations arising under treaties or agreements that do not deal with land and assets (as in both *Outstanding Business* and the JTF); (ii) unilateral federal undertakings to provide lands or assets (as in JTF); and (iii) claims based on laws of Canada that were originally United Kingdom statutes or royal proclamations (as in JTF).

Bill C-6 also adds a list of claims that cannot be filed. These include: claims less than 15 years old; claims based on land claims agreement entered into from 1974 onwards; claims based on an agreement listed in a schedule to the bill; claims concerning the delivery of funding or programs relating to policing, regulatory enforcement, correction, educations, health, child protection or social assistance, or similar public programs or services; claims based on agreement that provides for "another mechanism for the resolution of disputes"; and claims based on aboriginal rights or title.

2. Access to the Tribunal

The JTF placed no limit on the size of individual claims that could be brought to the Tribunal.

Bill C-6 denies access to all claims over a cap, which is set out at $7 millions. That amount can be unilaterally defined by the federal cabinet. It can be lowered, as well as raised.

AFN expects that the clear majority of claims will be worth above the cap. Federal projections to the contrary seem to under estimate the value of claims. The ICC says that of the 120 specific claims they have dealt with, only three were worth less than $7 millions.

3. Access of Claims to Independent Inquiries and Reports

Under the current system, First Nations' have the right to request an investigation and report by the Indian Claims Commission after a claim is rejected by Canada. The ICC has a duty to proceed to do so. The Inquiries Act gives it the powers to compel the production of documents and order witnesses to appear. ICC reports are released publicly. They carry the moral authority and prestige of that whole body.

Under the JTF's bill, First Nations would have access to the Tribunal to obtain binding decisions on both validity and compensation.

- There is no such option under Bill C-6 for claims over the cap. A First Nation with a claim worth more than the cap might in theory persuade the Commission to appoint a "non-binding arbitrator", but nothing in the government's bill gives this arbitrator the legal authority of the ICC, nor would any report carry the same weight. Under Bill C-6, Canada can prevent a claimant from ever even asking for non-binding arbitration by simply not saying whether it will accept or reject a claim.

4. Independence and Impartiality of the Commission and Tribunal

The JTF called for appointments and their renewals to be made by the federal cabinet from lists jointly prepared by the AFN and the Minister.

- Bill C-6 instead states that all appointments and renewals will be made by the cabinet, on the Minister's recommendation. Appointments are all for short terms, so appointees will be seen as concerned about being reappointed by the federal side. They will not be seen as impartial.

- There is no constitutional rule or principle that requires federal control over appointments. There are domestic and international precedents for balanced and impartial systems of appointments.

- The federal government also has further control over the bodies through its ability to add more members to the tribunal or commission when it wants to. If it is dissatisfied with the performance of either, it could simply add members of its own choosing.

5. Delay

Delay is a major problem in the current system. It explains much of the current backlog.

Under the current system, a First Nation can at least argue before the ICC that a delay by the federal government in responding to a claim counts as "constructive denial, and that there should therefore be a public inquiry.

The JTF Model Bill allowed a First Nation to refer a claim to the Tribunal for a binding decision at any time after one meeting with the federal government.

Bill C-6 by contrast provides a framework that authorizes and rewards the federal government for delay. There are many possibilities for delay:

- No claim can proceed to alternate dispute resolution administered (ADR) supervised by the Commission, or to the Tribunal, unless the Minister has first considered it and either accepted it for negotiations or rejected it.

- Bill C-6 says that no delay in responding can ever constitute "constructive denial."

- If a First Nation ever amends a claim during Commission proceedings, the claim cannot proceed to the Commission until the Minister has "considered" the amendment.

- Since a First Nation cannot take a claim to the Tribunal until ADR is exhausted, the federal government can delay claims by the pace of its participation in ADR.

- The government can unilaterally delay the pace at which the Tribunal considers claims by unilaterally lowering the cap on the overall amount of potential awards that a Tribunal can issue in a given year.

- At the front end, the government can request additional "preparatory meetings," even if the First Nation does not see them as being necessary or useful.

- Even if a claim gets to the Tribunal for validation, the claimant cannot seek an award of the compensation at the same time, but must go back through the entire Commission process before it can return to the Tribunal for an award of compensation.

The fact that interest and costs are included in the cap means the government would be rewarded for these delays, as the real value of the claim declines. The First Nation would be under great pressure to settle its claim for less than fair value.

6. Procedural Flexibility and Fairness

The JTF gave a truly independent Commission and Tribunal broad discretion over procedures to be used in

processing a claim.

- The rules under C-6 favor the government by requiring the First Nation to disclose all the facts and law it is relying on in support of its claim, even before it reaches the Tribunal. There is no requirement in the statute that the government disclose its evidence or legal arguments prior to the Tribunal stage, or even that it provide reasons for rejecting a claim.

7. Structure of the New System

Bill C-6 does not preserve the same formal institutional structure of a two-part body with a Commission and Tribunal, as proposed by the JTF.

- Under C-6, a "Centre for the Independent Resolution of First Nations Specific Claims" is added with its own Chief Executive Officer. The latter might, or might not, turn out to be the same individual as the Chief Commissioner. The lines of authority and accountability between the Centre/Chief Executive and Commission/Commissioner are unclear.

8. Joint Review of the System by the AFN and the Minister?

The JTF Model Bill required that there be a review of the new system conducted jointly by the AFN and the Minister within five years.

- In Bill C-6, the Minister conducts the review unilaterally.

9. The Role of the AFN in the Bill

The JTF called for a joint partnership arrangement between the AFN and the federal government in appointments, renewals, and in the review of the operation of the system.

- Bill C-6 does not mention the participation of the AFN.

10. Regional Participation

The JTF proposal required that those making appointments to the Commission and the Tribunal take into account "regional representation".

- There is no comparable reference in Bill C-6. Instead, it says that the office of the Centre must be in Ottawa. This could further contribute to the perception that the body is under the control of the federal government.

11. Relation of the Tribunal to the Courts

The JTF bill gave the Tribunal some discretion to determine how compensation would be fixed.

- Bill C-6 dictates that the Tribunal must follow "principles applied by Courts." This phrase has no clear meaning. It could limit the flexibility of the Tribunal to adopt innovative approaches.

The JTF said that Tribunal decisions are final and binding for all purposes and are not subject to appeal. It did not expressly state that decisions are subject to judicial review under the Federal Court Act, but this was probably implicit.

- Bill C-6 makes accessibility to judicial review explicit. This might be a signal for the Federal Courts to adopt a more aggressive approach to Tribunal decisions in light of the express invitation for them to review Tribunal decisions.

Conclusions

The spirit and substance of the JTF Report has not been embodied in the proposal before Parliament. Bill C-6 replaces key elements of the JTF draft with provisions that undermine the whole intent of creating an independent process for the fair and expeditious resolution of claims. In fact, the government's bill contains many new elements that are retrograde even in comparison with the current system.

Although it would be preferable to amend Bill C-6 through Parliamentary Committee hearings to the point that it could lead to a genuinely effective and fair system, it is very difficult to see a realistic prospect for achieving this. Very extensive redrafting would be required. While Committees have the technical ability, and sometimes the political clout, to secure refinements to government bills, they generally do not undertake major revisions.

It is hoped that the government will recognize that Bill C-6 is not faithful to the spirit of the JTF, is not consistent with Red Book promises, and is not productive of a system that a reasonable person would regard as a progressive step towards justice and finality.

What is needed is a return to the cooperative, partnership relationship of the JTF and its work. The AFN participated constructively, positively and in good faith in the JTF, and looks forward to seeing a bill that is reasonably faithful to its spirit and features. It is the federal government which, unfortunately, has so far said "no" to building on that constructive attempt to improve the current system. A return to the joint process of drafting a bill is the best way to develop legislation that resolves claims in a manner acceptable both to First Nations and Canada, and that will result in finality on these issues.