Will the New Specific Claims Process Address the Faults of the Current Process?

The Position of the Assembly of First Nations

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Introduction

It is an honour to be asked to address this conference at such a crucial time in the history of the specific claims process in Canada. While I will refer to the position of the Assembly of First Nations, many of the views expressed here are my own, based on many years of experience dealing with such claims, both at the community level and in First Nation efforts to change the federal policy process.

I am not a lawyer and claim no expertise in the field of law. Readers are advised to consult legal counsel in terms of any legal references that follow. However, the effort here is to promote thought and debate concerning a general First Nations perspective on the issues pertinent to specific claims.

The new claims process that is proposed under the Government of Canada's Bill C-6, the ***Specific Claims Resolution Act***, falls far short of First Nation expectations. It offers little hope of addressing the growing backlog of specific claims in our lifetime. First Nations do not believe the proposed mechanism is truly an independent process and are trying to secure the federal government's cooperation in overhauling the legislative proposal.

The need for an independent process to address specific claims has been recognized both within and outside government for over fifty years. The Indian Claims Commission has summarized the general history of efforts at claims policy reform and that information is available on its web-site.[1]

Important highlights include a report commissioned by the government in 1981 by Gerard La Forest, QC, in which the creation of "an independent administrative tribunal" to resolve claims was recommended.[2] In 1988 the Canadian Bar Association acknowledged its serious concern that Aboriginal peoples suffer injustice at the hands of the legal system and recommended the establishment of an independent claims body.[3]

Most recently, the Royal Commission on Aboriginal Peoples recommended the establishment of an independent body to address disputes and grievance between First Nations and the Crown. This body would have a much broader mandate than what we are considering at this time in terms of specific claims.

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[1] Indian Claims Commission, "http://www.indianclaims.ca".

[2] "Report on Administrative Processes for the Resolution of Specific Indian Claims", Gerard V. Laforest, Q.C., Prepared for the Office of Native Claims, 1981.

[3] "Aboriginal Rights in Canada: An Agenda for Action", Andrew R. Thompson, Canadian Bar Association, 1988.

It is important to note that in the view of First Nations and many independent observers, the issue of outstanding lawful obligations goes far beyond the narrow definition of specific claims under discussion here. The Crown has lawful obligations with respect to aboriginal and treaty rights which are the subject of broad current debate in Canada and provide the backdrop to this particular set of outstanding issues.

It is the view of most First Nations that the federal government is in a conflict of interest when it deals with any of these issues concerning its legal and constitutional duties. It is now widely acknowledged in Canadian law that the Crown in Right of Canada is in a fiduciary relationship to First Nations. While there are different aspects to this fiduciary relationship, a primary concern of First Nations that is often not clearly articulated is the concern with this conflict, wherein the federal government has a fiduciary duty to First Nations, while at the same time having a responsibility to serve the interests of a wider Canadian public, Parliament and Crown interests generally.

This conflict is no where more apparent than in addressing specific claims. The conflict between fulfilling outstanding obligations to "Indians" and protecting the Crown against liability is most apparent in this area of law. Specific claims, under the current federal policy, arise from specific actions or omissions on the part of the Government of Canada concerning "Indian" reserve lands or other assets, as well as specific treaty provisions.

The Guerin decision clearly established that the Crown's obligations concerning the specific interests of a band were of fiduciary nature and therefore imposed the highest standards of conduct upon those acting on the Crown's behalf.[4] Guerin and other decisions have reaffirmed that in such cases, the "honour of the Crown is always at stake" and there should be no "sharp dealing". However, the existence of hundreds, perhaps thousands of claims that lawful obligations of the Crown have been breached raises many questions concerning how such grievances should be addressed.

First Nation Efforts to Secure and Independent Claims Body

First Nations have for many years sought to establish an independent claims body to address grievances against the Crown. Since its inception, First Nations have called for the reform of federal claims policy. It should be recalled that outstanding land claims and treaty rights were amongst the strongest arguments First Nations put forward in opposing the federal government's "White Paper Policy" in 1969, which proposed eliminating the Indian Act and making First Nations Peoples just like any other citizen.

The fact is, the Crown does have legal obligations to First Nations. It is also a fact that First Nations have collective rights in Canadian law. All these issue have been clarified and more clearly defined over the years following 1969, yet there is a glaring lack of progress on resolving outstanding grievances and clarifying the relationship of First

[4] *Guerin v. The Queen*, [1984] 2 S.C.R. 335

Nations to Canada. Even with the inclusion of section 35, recognizing existing aboriginal and treaty rights, in Canada's Constitution Act, 1982, these issues have eluded consistent resolution.

The so-called "Oka crisis" in 1990 brought the issue of land claims back into the consciousness of Canadians. First Nations were appalled at the Government of Canada's self-serving communications efforts in the early days of that conflict. DIAND press releases touted the merits of the very policies that had failed to address the claims of the Mohawks at Kanesatake. The federal description of its specific and comprehensive claims policies would leave the uninformed reader with the impression that Canada had made available to First Nations fair and effective claims resolution processes.

First Nations were well aware of the myriad of problems with federal claims policies. The Assembly of First Nations responded to the DIAND Communiqués at the time by producing a point by point refutation entitled, "Doublespeak of the 90's: A Comparison of Federal Government and First Nation Perception of Land Claims Process".[5] The National Chief at the time, Georges Erasmus also held a press conference at which this paper and "AFN's Critique of Federal Government Land Claims Policies" were distributed to the media.[6]

These papers had an impact at that important time in that the government of the day could not dispute many of the problems with claims policy and process that were clearly articulated by the AFN. Following discussions with the Minister, who invited the AFN to provide recommendations, the Chiefs Committee on Claims was established. The Chiefs Committee lead an effort to gather input from every region of the country which produced the "First Nation Submission on Claims" , which was immediately adopted by the Chiefs in Assembly and forwarded to the Minister of the day, Thomas Siddon.[7]

The First Nations Submission on Claims set out general principles to guide the reform of federal claims policy. It included 27 recommendations that addressed many of the fundamental problems we are still attempting to address today. Similar to the later RCAP Report, it recommended an independent claims resolution process based on legal principles that would be a joint undertaking of First Nations and Canada. It also ignored federal policy categories and addressed all forms of grievances including aboriginal rights, title and treaty implementation, as well as specific claims.

In January of 1991, Minister Siddon's met with the Chiefs Committee. He said that it would be difficult to undertake all the recommended changes at once and that it would have to be done incrementally. He had already made public statements about settling all the outstanding specific claims before the year 2000. This is when the Conservative

[5] "Doublespeak of the 90's: A Comparison of Federal Government and First Nation Perception of Land Claims Process", Assembly of First Nations, August, 1990.

[6] "AFN's Critique of Federal Government Land Claims Policies", Assembly of First Nations, August 21, 1990.

[7] "First Nations Submission on Claims", Assembly of First Nations, December 14, 1990.

Government of the time issued its "four pillars" policy, which included a five point proposal for specific claims. In addition to adding additional financial resources to the process, providing for the acceptance of pre-confederation claims and a fast track process for claims under $50,000, the federal initiative called for the establishment of a Joint Working Group to develop a new, improved policy process and an interim Indian Claims Commission to, in the Minister's words, "provide a degree of fairness under the existing policy".

The Chiefs Committee met again to consider the federal offer and responded with a counter-proposal in which it was agreed to accept the Minister's offer, if First Nations were involved in developing the detailed terms of reference and would have input on appointments for the interim commission. Months of silence ensued and the AFN was completely taken by surprise when the Canada announced the establishment of the Indian Claims Commission in July of 1991.

The announcement was not well received by the First Nations, especially when it was found that the Order in Council establishing the Commission incorporated the existing specific claims policy criteria. There was real concern that the very policy First Nations sought to change was being entrenched in a form of subordinate legislation.

The federal mandate further called for First Nations to submit for further appointments to the Commission. First Nations refused to do so for nearly a year, until the federal government agreed to sit down with First Nation representatives and further refine the Commissions mandate. This is why there is a second Order-in-Council in 1992, which clarifies the Commission to be an interim measure, while First Nations and Canada devise a new process through the Joint Working Group.

The Joint Working Group (JWG), composed of federal officials and regional First Nation representatives, undertook discussions from November of 1992 through June of 1993. The initial discussions produced an immediate deadlock on a whole range of issues and a neutral facilitator was brought in. Bonita Thompson, QC, was an expert in alternative dispute resolution and she issued draft recommendations on June 25, 1993, while noting there were remained 14 outstanding issues which required further discussion before consensus is reached.[8]

JWG discussions never resumed as a federal election was called for that Fall. The Liberal Party issued its original Red Book of promises, which was accompanied by a Liberal Aboriginal Platform issued in Saskatoon by Jean Chretien on October 8, 1993.[9] At the time, the Liberal Platform was quite impressive to First Nations as it made an extensive list of promises, including nearly two and a half pages on the "Restoration of Lands and Resources".[10]

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[8] "Draft Recommendations Prepared by Neutral", Bonita J. Thompson, QC, Singleton, Urquhart, Macdonald, June 25, 1993.

[9] "The Aboriginal Peoples of Canada", Liberal Party of Canada, September, 1993.

[10] Ibid., pp.10-12.

The Liberal Aboriginal Platform of 1993 acknowledged that major reforms were required to put claims policies in "step with the legal and political evolution of Aboriginal and treaty rights". It further acknowledged that only 44 specific claims had been settled in twenty years under the policy and detailed the major problems with both specific and comprehensive claims. Most importantly, it promised a "Liberal Government, in consultation with Aboriginal peoples, would undertake a major overhaul of the federal claims policy on a national basis".[11]

Most importantly, the Liberal Party promised it would, "create, in cooperation with Aboriginal peoples, an independent Claims Commission, for both specific and comprehensive claims. Its mandate will be jointly developed……composed of members jointly selected". It went on to promise such things as time-frames, addressing treaty implementation and a role in the implementation of claims agreements.[12] Three years later the Royal Commission on Aboriginal Peoples issued its report which made similar recommendations.

The Joint First Nations-Canada Task Force on Federal Claims Policy Reform

It took nearly three years before the AFN got the Liberal Government to agree to sit down and establish a process to address claims policy. In February of 1997, the Joint Task Force (JTF), a group composed of federal officials and regional First Nation representatives, began work in earnest to develop recommendations for claims policy reform.

The JTF was immediately more successful than the previous Joint Working Group discussion, as it took into account the lessons learned about alternative dispute resolution learned in the early 1990's. The JTF set about its work through an interest-based approach to discussions, rather than the positional type bargaining approach that had characterized the earlier effort. It set out identifying those elements for a proposal that both First Nations and Canada could agree upon and a structure and process began to emerge,

These discussions were reinforced in early 1998 when the federal government issued its "Gathering Strength" policy in response to the RCAP report. "Gathering Strength" promised a new relationship and partnership with Aboriginal peoples, as well as increased access to lands and resources.[13]

Further to this policy, the Minister of Indian Affairs also issued the "Agenda for Action with First Nations", which promised a combination of new initiatives that would build on

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[11] Ibid., p. 11.

[12] Ibid., p. 12.

[13] "Gathering Strength: Canada's Aboriginal Action Plan", Government of Canada, Ottawa, 1998.

the RCAP report and "Gathering Strength".[14] The specific agenda promised to build consensus on a range of issues, including an, "Independent Claims Body…with structure and powers to be developed in a joint process between the federal government and First Nations".[15]

These various explicit promises from a succession of governments throughout the 1990's obviously left First Nations with the expectation that the reform of federal claims policy was to be a joint undertaking. That is why First Nations were very apprehensive when the federal government took eighteen months to respond to the tabling of an interim report in November of 1998.

The JTF Report identified the required structures, basic procedures and required legislative measures that would establish a truly independent claims body that should be more fair, effective and efficient. The recommendations had been articulated in the form of drafting instructions in order to facilitate implementation.

The key features of the JTF proposal are comprised of a commission to facilitate negotiations and a tribunal to resolve disputes. The commission will provide a more level playing field for negotiations by its independent facilitation, which can draw upon the entire range of alternative dispute mechanisms to assist the parties in reaching final settlements that will be satisfactory to both sides. These range from mere facilitation of meetings, all forms of mediation and possibly arbitration if the parties agree. The Commmission need intervene only to the extent required by the parties in their efforts to reach a resolution.

The proposed tribunal on the other hand would be a last resort; a quasi-judicial body available to make a final binding determination, whether with respect to the validity of claims, discreet legal issues that prevent progress in negotiations or on compensation to be awarded claimants in lieu of damages to First Nation communities. It is very crucial to note that the tribunal element is essential in the proposed process, as its very presence is intended to provide incentive for the parties to conduct negotiations in good faith and reach timely settlements. This is a key difference from the current process, where there is no incentive for timely and efficient settlements to be reached.

It should be noted that despite the wish of many First Nations, outstanding lawful obligations and grievances related to aboriginal title and rights are specifically excluded from this proposed process. The federal government insisted on this exclusion, although it did agree that the issue could be revisited upon the five-year review that is recommended.

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[14] "An Agenda for Action with First Nations", Minister of Indian Affairs and Northern Development, Ottawa, 1998.

[15] Ibid. p. 5.

An important consideration for Joint Task Force participants had been the refusal of of officials from Central Agencies like Treasury Board, Finance and Privy Council to participate in the discussions. It was believed that their participation would have contributed important practical input in the development of recommendations. Although these agencies were briefed periodically, they would not participate directly.

Main Elements of Joint Task Force Proposals

The main features of the model recommended by the Joint Task Force include:

- The removal of Canada's underlying conflict of interest through the creation of a truly independent mechanism, which would report directly to Parliament and the First Nations;

- The establishment of a commission to facilitate and ensure good faith negotiations by providing appropriate mechanisms for dispute resolution (alternative dispute resolution);

- The establishment of a tribunal that would be available to claimants to resolve legal disputes when negotiations fail that can make binding decisions on the validity of grievances, compensation criteria and award compensation (subject to reaching an agreement on a fiscal framework);

- Expanded definitions of what types of issues could be brought forward that will clearly include all legal and equitable obligations arising from the fiduciary relationship and the honour of the Crown;

- Flexibility to accommodate regional diversity and complement existing or future regional mechanisms;

- The capacity to offer innovative means of resolving outstanding grievances;

- A legislative base for the new settlement process to ensure adequate authority, impartiality and secure financing;

- Independent funding for First Nation research, submission and negotiation;

- A joint review after the first five-year period, which would assess the effectiveness of the process and consider matters that could not be addressed at this time (eg. The inclusion of lawful obligations arising from site-specific aboriginal rights).

It is important to note that the JTF did a lot of work and reviewed a wide range of options in arriving at the recommendations. The suggested model was thought to be the best course in terms of eliminating the Crown's conflict of interest in dealing with claims against itself. The JTF proposal aimed to achieve fairness, efficiency and effectiveness in

the process for settling specific claims, all of which it was agreed are sorely missing under the current process.

A Fiscal Framework

The Joint Task Force was prepared to issue a report in June of 1998 for review by Cabinet, but this was postponed when the JTF was informed that a delay was required in order to address the federal requirement for a fiscal framework. The Task Force was directed to work on a fiscal framework over the summer and had sought to satisfy the federal need for financial "predictability". This aspect was time-consuming because it was found that building a fiscal framework had fundamental implications for key elements of the proposed model for an independent process.

To meet the federal government's need for a fiscal framework the Task Force had to engage in a great deal of analysis and discussion. In order to meet the objectives of both parties, it has been concluded that such a framework could be provided by a budgetary allocation. It would mean that the system would be put on hold if the budget allocation were expended during the time period projected for that budget.

This approach, while not completely satisfactory, seemed to be the only way to meet both the federal need for control of spending and the First Nation need to ensure the independence of the tribunal and its ability to determine compensation is not prejudiced by the imposition of a cap on individual claims.

During the JTF discussions on the proposed budgetary allocation, federal officials raised concerns that this approach might be undermined if a very large claim drained the bulk of this budget. This presented the possibility that the allocation could be expended early on in the allocation period, thereby freezing all claims in the system until a new budgetary allocation was made.

First Nations had difficulty with federal suggestions that large claims might be excluded from the process. The Chiefs Committee on Claims and Chiefs in Assembly repeatedly reaffirmed the principle that First Nation specific claims have equal access to the independent process. It was not understood how a cap could be imposed on achieving justice in outstanding lawful obligations.

Conflicting Interests in Specific Claims and the Role of a Fiduciary

As previously noted First Nations firmly believe that the existing approach to specific claims is characterized by a conflicting interest in the federal government managing claims against itself. It is understood that a primary duty of a fiduciary is not to put itself in a conflict of interest. When grievances arise concerning the fulfillment of such fiduciary duties, the logical step is for an independent party to be charged with facilitating the resolution of such grievances.

First Nation claims against the Crown are adversarial in nature. That is why the Joint Task Force agreed that specific claims should retain the designation as "claims". Although First Nations view labeling aboriginal and treaty rights issues as claims to be inappropriate, the nature of specific claims arising from the breach of Crown obligations under statute or specific treaty provisions, are appropriately designated as claims. These are legal issues, which leave little to speculation as they are based on factual breaches of specific lawful obligations.

Most reasonable people would agree that when a party has a responsibility to two parties who are in dispute, the party should remove itself from unilaterally determining the ultimate resolution of that dispute. It should not manipulate the proceedings toward resolution. Unfortunately, that is the current situation that has existed for more 30 years under the existing policy and process.

Contingent Liabilities and Outstanding Lawful Obligations

The Government of Canada currently identifies contingent liabilities in the Public Accounts that may arise under land claim negotiations or court proceedings. The figure now stands at $ 1.5 billion, including specific and comprehensive claims. First Nations believe that the cost of settling or resolving specific claims is not an unquantifiable black hole of unlimited liability.

Considering that the bulk of specific claims relate to fiduciary obligations of the Crown, it reasonable to assume that a responsible government would assess these potential debts against the Crown and make provision to identify and settle them within a reasonable time-frame. Unfortunately, First Nation specific claims are not accorded the priority given to other forms of federal debt.

The Government of Canada views the settlement specific claims within a social policy framework that does not adequately differentiate between social programs and outstanding legal liabilities. This further exasperates the conflict of interest referred to above and places the settlement of specific claims within an inappropriate context. It certainly doesn't account for the established legal principles for the conduct of a fiduciary.

First Nations understood that a fiduciary should act in accordance with the highest standards of conduct, should entertain no sharp dealing and should acknowledge that in such matters the honour of the Crown is always at stake. However, these principles do not appear to guide the federal government in its approach to managing the settlement of specific claims.

Federal Proposals

First Nations had adopted the JTF Report, in principle on only a month after it was issued and considered it to be a jointly agreed upon set of recommendations. The Government of Canada first introduced its proposal to develop legislation for an Independent Claims Body in May of 2000, fully eighteen months after the Joint Task Force Report was tabled.

First Nations were extremely concerned that the federal proposal deviated from fundamental principles that were the foundation for the Joint Task Force Report. The AFN immediately identified a number of key concerns with the federal proposal and sought to clarify these matters with both the Minister and federal officials.

Many of the questions could not be answered. Many First Nations understand the claims process far better than federal officials and could not see how some of aspects of the federal proposal would work in reality. Although pressured to promote the federal proposal, the AFN leadership, insisted that outstanding questions be clarified before First Nations be asked to make a decision on the federal proposal.

This effort to clarify key aspects of the federal proposal went on for nearly two years without adequate answers. In an effort to prompt progress in the matter, the National Chief wrote the Minister on December 14, 2001, identifying again the key problems with the federal proposal and suggesting possible ideas that might lead to a resolution that would be positive for both sides.[16]

Finally, in February of 2002, the Minister responded to the AFN with a letter which confirmed the worst fears of First Nations.[17] The tone and content of the letter was neither conciliatory nor did it offer solutions to the problems identified by First Nations. The Chiefs Committee on Claims concluded that if the federal government was not prepared to address the concerns repeatedly articulated by First Nations, the federal proposal would amount to a step backwards in the resolution of specific claims.[18]

There were further meetings with the Minister, at which it appeared some of the key problems might be addressed after all. However, Bill C-6o was introduced in the House of Commons on June 13, 2002, without those issues being addressed.[19] The Bill itself has raised new concerns about the independence and effectiveness of the proposed body.

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[16] Correspondence, National Chief Coon Come to Minister Robert Nault, December 14, 2001.

[17] Corrspondence, Minister Robert Nault to National Chief Coon Come, February 8, 2002.

[18] AFN Press Release, "AFN Seeks Fair and Effective New Body to Resolve Claims", February 15, 2002.

[19] Bill C-6, ***An Act to Establish the Canadian Centre for the Independent Resolution of First Nations Specific Claim to Provide for the Filing, Negotiation and Resolution of Specific Claims and to Make Related Amendments to Other Acts***, The Minister of Indian Affairs and Northern Development, House of Commons of Canada, First Reading, June 13, 2002.

The AFN's Position with Regard to Bill C-6

The Chiefs in Assembly clarified the AFN's initial position on Bill C-6 by referring to the cooperative work of the Joint Task Force in contrast to the "unilateral and arbitrary approach" of the federal government in the development of Bill C-6, identified the key problems and directed as follows:

- ***the Chiefs in Assembly do not support Bill C-6 in its present form; and***

- ***that the Chiefs Committee on Claims shall meet as early as is practical to receive detailed analysis of the Bill and to develop a strategy to implement the required amendments to Bill C-6 and if it is not possible, take steps to oppose the Bill.***[20]

First Nation Concerns with Bill C-6, *The Specific Claims Resolution Act*

Dr. Bryan Schwartz, Legal Counsel on the Independent Claims Body to the AFN worked with the AFN Technical Group, composed of First Nation technicians from across Canada, to develop a detailed analysis.[21] The following is a synopsis in point form, of the AFN analysis.

Key Problems with Bill C-6:

- Definition of a claim
- Access to the Tribunal
- Access of Claims to Independent Inquiries and Reports
- Independence and Impartiality of the Commission and Tribunal
- Delay
- Procedural Flexibility and Fairness
- Structure of the New System
- Role of the AFN and Joint Review
- Regional Considerations
- Relation of the Tribunal to the Courts

[20] AFN Annual General Assembly Resolution No. 8/2002, ***Canada's Specific Claims Body – Bill C-6, Kahnawake, Quebec, July 17, 2002.***.

[21] ***Legal Analysis of Bill C-6***, Dr. Bryan Schwartz, Legal Counsel to the Assembly of First Nations on specific claims, September 3, 2002.

Definition of Specific Claims

- More narrow than the current definition, excluding "unilateral undertakings" of the Crown, modern land claims agreements and narrowing specific treaty obligations to land
- Sec. 26, "any legislation of Canada" could exclude Royal Proclamation and UK statutes
- Although adds "pre-confederation" claims, more expert analysis required
- JTF had built on existing criteria in light of case law, adding "breach of fiduciary obligations"

Access to the Tribunal

- $7m cap will exclude most claims from access to Tribunal
- cap removes incentive that would drive negotiation process for large claims
- creates bias toward small claims
- cap can be lowered as well as raised
- cap may include interest, as well as legal and other costs
- ICC says of 120 claims dealt with, only 3 valued under $7m
- 8 of last 14 claims settlements over $7m

Access of Claims to Independent Inquiries and Reports

- No comparable access to public inquiries as with present ICC
- No requirement for reports, recommendations or subpoena of federal evidence
- Under this Bill Canada can simply prevent access to inquiries, non-binding arbitration, etc. by simply not accepting or rejecting any claim

Independence and Impartiality of the Commission and Tribunal

- All appointments vested in federal government on recommendation of the very Minister responsible for creating and defending Crown from such claims
- No constitutional doctrine requires appointments to be made by Cabinet only
- Short terms of appointment create reasonable apprehension of bias as appointees up for re-appointment
- Lack of neutral or joint input on appointments and review of process calls into question use of term "independent"
- Inconsistent with most modern land claims agreements, which include provision for dispute resolution by joint or neutral appointments
- Conflict of interest entrenched rather than eliminated
- Liberal Red Book had promised joint appointments
- JTF had recommended appointments be made from joint list of candidates

Delay

- Objective of ICB was to be expeditious resolution of claims
- System must have something to move things along
- Under Bill C-6, all claims initially controlled by federal government who determine

how long it will "consider" claim
■Bill provides for "statutorily authorized delay"
■Far too many opportunities for federal government to delay claims
■Does not require bad faith, simply a lack of resources to delay process
■There is no price for delay, in fact federal government is rewarded for delay
■To go to Tribunal claimant must prove ADR exhausted
■Quota on Tribunal Claims unilaterally controlled by Cabinet with maximum of 7 claims per year
■JTF had required only one meeting of parties before claimant could go to Tribunal

Procedural Flexibility and Fairness

■Bill C-6 requires First Nation claimants to submit all facts and law of their claim to the Commission, before even going to Tribunal
■No such requirement for federal government to disclose reasons or evidence to Commission
■The only way such rules could emerge is unilateral action by one party
■JTF gave Commission and Tribunal broad discretion over procedures

Structure of the New System

■Bill C-6 does not preserve two part body as proposed by JTF
■A Chief Executive Officer added which may have conflicting duties with the Chief Commissioner
■Lines of authority not clear

Role of the AFN and Lack of Joint Review

■JTF called for joint partnership approach on appointments and review of system
■Bill C-6 does not mention AFN or First Nations having any role at all
■Minister has authority to review the process unilaterally
■Lack of First Nations input entrenches conflict of interest
■No price for delay and no incentive to resolve matters, while "liability bomb" of $1.5 billion will have "manifest consequences"

Regional Considerations

■JTF called for regional representation in appointments
■No such consideration required in Bill C-6
■Bill requires offices to be in Ottawa
■Rules out regional offices
■Contributes to perception body is under control of Ottawa

Relation of the Tribunal to the Courts

■JTF gave Tribunal discretion to determine compensation in accordance with legal

principles
- Bill C-6 dictates that Tribunal must follow "principles applied by Courts"
- No clear meaning, but could limit flexibility of Tribunal
- reference to judicial review was implicit under JTF, but explicit reference in the Bill is like an invitation to federal court to be aggressive with this Tribunal's decisions

Another underlying problem, which is perhaps the greatest of all, is the fact that no new significant financial commitment has been made to support the new process. Financing is to be done by shifting around existing resources. It is difficult to imagine the rate of settlement increasing under such circumstances.

Can the current problems be fixed?

The AFN's assessment of this flawed legislation indicates that very extensive redrafting would be required to fix it. It is unlikely that the Parliamentary Standing Committee could secure the necessary refinements or undertake such major revisions. It is also understood that Parliamentary Committees cannot change a Bills' financial implications. Most of the problems with the Bill arise directly out of financial considerations.

The Bill could be fixed if it was withdrawn and Canada returned to the table to work with First Nations in a constructive and cooperative approach. Experience has shown that government officials on their own cannot address all practical aspects of designing a truly independent mechanism. First Nation expertise is required if practical issues are to be addressed. However, this seems improbable in light of the Liberal Government's abandonment of the partnership approach set out in ***Gathering Strength***.

The argument of many federal officials is that this is a window of opportunity to get a body established, despite certain limitations. If it is established, the pressure will be on the Government of Canada to make it work, as it will report to directly to Parliament. This will keep delay tactics from being abused. Adjustments and improvements can be made upon the review.

First Nations are skeptical of such arguments, as they have heard it all before. After all, it was twelve years ago when Minister Siddon said change must take place incrementally, "we cannot do it all at once". Meanwhile the backlog continues to grow, outstripping the rate of settlements under the current process.

There are at least 580 claims in the backlog. It is estimated there may be anywhere from one to two thousand more claims to be submitted. If the current rate of settlement is not expected to increase, it is not hard to imagine how many centuries we are looking at. It is often asked, what group of Canadians would accept such treatment of their legal claims against the government?