

Bill C-6: Specific Claims Resolution Act

ICB Technical Overview

Vision Statement

- To establish an independent and expert Commission and Tribunal to assist First Nations and Canada to settle or resolve specific claims in a fair, efficient and expeditious manner.

Goal and Objective

- Create an independent and impartial body designed to resolve and clear up the growing backlog of specific claims
- Remove the conflict of interest where Canada determines the validity and compensation criteria for claims settlements

Today's Situation

- Bill C- 60 was introduced in the House of Commons June 13, 2002. It has now passed second reading.
- It is to proceed to the Standing Committee this Fall.
- First Nation technicians and counsel have reviewed the Bill and agree that it is seriously flawed.
- It is not truly independent and does not retain the basic principles of the Joint Task Force
- Nor does it achieve the objectives identified in the Liberal Party's Red Book to work with First Nations to speed up the process
- Bill C-6 would create a system that is in key respects, worse than the current system.

Today's Situation

- 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
- Access to Tribunal is severely limited.
- Appointments are at the unilateral discretion of Canada for short terms.

Today's Situation

- Enables Government to closely control the pace of settlements and decisions.
- In fact, the federal government is rewarded for delaying the settlement of claims.
- Claims would be treated as a matter of discretionary spending which must be tightly controlled, instead of legal debts.
- Moreover, the conflict of interest in having Canada decide claims against itself remains and will be entrenched in legislation.

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

Key Problems with Bill C-6?

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”

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

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”

Key Problems with Bill C-6?

Independence and Impartiality of the Commission and Tribunal (cont')

- 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

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

Delay (cont')

- 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

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

Role of the AFN and 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”

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

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

Key Problems with Bill C-6?

Can the current problems be fixed?

- Very extensive redrafting would be required.
- 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.
- The Bill could be fixed if it were withdrawn and Canada returned to the table to work with First Nations in a constructive, cooperative approach.

Backlog of Specific Claims Continues to Grow

