Update on ICB

Draft of March 4, 2002

Background:

The Minister of Indian Affairs finally responded to the National Chief's letter of December 14th, 2001, in which the primary concerns of First Nations with the federal proposal for an ICB were articulated. These were areas of concern that remained in question from the technical group meetings conducted between June and November of 2001. Not every issue of concern was raised as it was felt only the most glaring issues would be pursued at that time.

In his response the Minister articulated the Government of Canada's "current view" on these aspects of the federal ICB proposal. Federal officials insist the Minister remains open to dialogue on the ICB.

Appendix A (attached) provides a summary of the basic issues raised by AFN, the Minister's response and considerations arising from discussion with the Chiefs Committee on Claims.

Chiefs Committee on Claims

The Minister's response was further confirmed with federal officials at the Chiefs Committee on Claims Meeting in Vancouver, February 13 and 14, 2002. The Minister's response basically confirmed that there is no movement from Canada's initial proposal from May of 2000. It simply affirms some of the worst fears of First Nations.

The appointments to the Commission and Tribunal will at Canada's sole discretion, upon recommendation by the Minister. It is newly confirmed that legal costs and interest will be added to compensation in counting toward the cap of $5 million. It also indicates the cap will be in the legislation, but can be varied by the Governor in Council.

The Minister also invites AFN's input for "mutually agreeable approaches to address" the "community assent" issue. On this point, the Chiefs Committee indicated this requirement should be removed altogether. Federal officials have asked staff whether we will be preparing anything on this issue.

Federal officials stressed that the Minister indicates he remains open to dialogue in the first line of the last paragraph of the letter. However, the Chiefs Committee clearly felt that the tone of the Minister's letter was not very conciliatory, considering the crucial significance of their concerns with the federal proposal's shortcomings.

The Chief's indicated to the federal officials that one must pretty much read between the lines in the Minister's letter to see where there may be room for discussion. The letter makes reference to Canada's "current view", but does not provide any indication of whether any flexibility is possible before legislative drafting might commence.

In terms of dialogue at the regional and community level, the Minister does not directly respond to AFN's proposal to continue coordinating and refers to the role of the Special Federal Representative by maintaining "regular dialogue with the AFN leadership and technical representatives, as well as with community and tribal council leaders".

Conclusions

It appears to be an unfortunate reality in these times that this long-sought initiative is now being colored by the poor state of political relations engendered by Canada's governance legislative initiative. While the ICB initiative has been in development through several phases for nearly twelve years, the Chiefs assume the Minister will be taking the same unilateral approach to ICB legislation. His letter did not allay such fears.

Overall, it is our legal counsel's opinion that the limitations and qualifications that have been imposed on the JTF model in the federal proposal make it a step backwards for First Nations. Rather than eliminating the conflict of interest, it will increase it. Instead of making the claims process more fair, effective and efficient, it may add a new layer of bureaucracy to the process.

The Chiefs Committee on Claims agree with this assessment and are recommending the AFN pursue dialogue with the Minister to see what can be done to remove these short-comings. They have called for the following:

- **The new ICB must be independent and impartial.**
- **The new ICB should resolve claims expeditiously.**
- **There must be fair treatment for all claims.**
- **The process must respect the authority of representative bodies of First Nations.**

The Chiefs Committee recommends that the AFN pursue dialogue at the highest levels with the Minister and Prime Minister on this important initiative, before legislation is drafted. It is clearly felt that to enshrine the ICB in legislation with the serious flaws identified above, would represent a major step backward and could continue to deny justice to First Nations for generations to come.

The National Chief and Chair of the Chiefs Committee are pursuing meetings with the Minister, but it does not appear he can meet with them for some time.

APPENDIX A

Summary and Considerations from Minister's Response on ICB

What follows is a summary of the basic issues raised by the AFN in the National Chief's letter of December 14, 2001, the Minister's response of February 8, 2002 and considerations arising from discussion with the AFN Chiefs Committee on Claims, February 13 and 14, 2002.

Issues, Minister's Response and Considerations from Chiefs Committee Discussion:

1. The proposal to give the federal government the final say over appointments brings into question the independence of the claims body.

The Minister: *Given the quasi-judicial nature of the Tribunal's authority, the Government of Canada is of the current view that the Governor in Council should have final say regarding appointments to the ICB.*

Considerations: Legal Counsel advises that there is no legal requirement that the Governor in Council have final say over appointments. The federal proposal also indicates that the same Minister who will defend the Crown against such claims will make recommendations for appointments.

It is typical in contemporary practice, such as in comprehensive land claim settlement agreements, that dispute resolution mechanisms consist of a neutral or joint appointment process.

Another point raised by legal counsel in the short term of 3-year appointments for adjudicators, is the potential for conflicting interests if adjudicators must issue rulings while being considered for re-appointment.

2. Any cap must not include post-filing interest and legal costs.

The Minister: *At present, it is contemplated that the $5 million cap on the decision-making authority of the Tribunal would include legal costs and interest from the time a claim is filed.*

Considerations: The cap on Tribunal compensation awards will in effect, be lower than $5 million if legal costs and interest count against it. It is not clear whether negotiation loans and the costs of community approval processes will also count towards the cap.

In addition, his letter indicates that the cap would be set out in the legislation, with the possibility for change by the Governor in Council. This is contrary to the previous insistence by federal officials that the cap would not be in the legislation, but would be set out in regulations.

3. Community ratification.

The Minister: *I would suggest it is in the interests of both First Nations and Canada to take a cautious approach to referral of a claim to the Tribunal. One approach to deter third party challenges of the type identified above…would be to build into the legislation a requirement that the First Nation could proceed to take its claim to the Tribunal only after it had sought and obtained community approval. In my view, the approval process, while formal and quantifiable in nature, would not need to be a particularly onerous one…There may be other mutually agreeable approaches to address this important issue, and I would welcome your thoughts at your earliest opportunity.*

Considerations: With respect to community approval before First Nations can access the Tribunal, the Minister indicates flexibility and invites AFN suggestions on how this might be accomplished in practice. He indicates the process must be "formal and quantifiable".

While federal officials are attempting to follow up on the Minister's invitation to the AFN to suggest how community assent might be obtained, the Chiefs Committee is unified in its opposition to any such requirement.

4. Handling of larger claims.

The Minister: *On the matter of larger claims, I envision that the $5 million cap would be set in legislation with a provision for revision by the Governor in Council. This could arise, for example, from a review of the ICB following an initial operating period.*

I would note that, under ICB legislation, the Commission would have the power of recommendation regarding both validation and compensation on claims of any size through its arbitration function, where both parties agree to that form of alternative dispute resolution.

Considerations: The minister emphasizes there is no cap on settlements that can be negotiated under the Commission process and offers the opportunity to assess changing the cap upon the three-year review. However, he does not adequately address the removal of the incentive the Tribunal represents for effective negotiations or the lack of alternatives for larger claims.

The letter also makes vague reference to the proposed Commission having the "power of recommendation regarding both validation and compensation on claims of any size through its arbitration function, where both parties agree to that form of alternative dispute resolution". This reference is apparently in response to the AFN's expression that the federal proposal leaves First Nations worse off than at present where the existing ICC can make recommendations without limitation, but does not need agreement from the federal government to make such recommendations. If that be the case, then this is not that significant, as the Commission would only have the power to make such recommendations where the federal government agrees to arbitration of such issues.

5. Introduction of the ICB and Community Response

The Minister: *Canada is committed to working with the AFN to introduce the ICB legislative initiative. I concur with your assessment that it is essential that there be dialogue on the ICB initiative with First Nations at the community and regional level. I believe that the involvement of Mr. Edward John will help us achieve our shared objective.*

Considerations: In regard to our call for the Minister to support AFN's coordination of information and securing First Nation responses at the regional and community levels, the Minister refers to the "Chief Federal Representative" helping us in this regard. The concern of legal counsel is that Mr. John's meetings with First Nations should not be construed as adequate consultation. When asked directly at the Chiefs Committee Meeting, Mr. John responded that as far as he is concerned, he is merely providing information briefings and relating back the concerns raised.

Our main concern here is that First Nations have not been afforded the opportunity to make a collective decision on the federal proposal. This could not be done before now, as adequate information on how the proposal would work was not available. This was the purpose of technical discussions over the past year, but federal officials could not answer the key questions finally addressed in the Minister's letter.

Additional Concerns

Beyond the above issues, there are two additional concerns, that have not been clearly raised with Canada, but which must be considered in assessing the federal proposal. We did not raise these concerns in detail, as we did not want to be seen as nit-picking and focused on the most fundamental issues, although these are important considerations as well.

Firstly, the federal proposal does not contemplate a substantive increase in the existing federal budget for all aspects of specific claims. Basically what is proposed shuffles existing resources. The concern is that the existing budgets are not enough to begin

reducing the backlog of 550 claims in any substantive way, let alone an expected 1,000 more claims projected for future submission.

In light of all the limitations and qualifications that distort the original intent of the Joint Task Force model, there is a fear that the federal government is merely transferring an existing inadequate and faulty process to an independent body, which can be blamed for a lack of progress instead of DIAND.

The continuance of loan funding under the Commission's administration reflects this lack of commitment to fundamental change. The JTF had recommended that funding be handled by an arms-length body from the Commission, thereby reducing conflict and preserving its credibility with First Nations.

Secondly, the federal proposal says the Minister will table the ICB's Annual Report with Parliament. This is appears to maintain a sense of conflicting interests in that the very Minister charged with defending the Crown against such claims, also controls the ICB's access to Parliament. Combining this with the Minister's authority to recommend candidates for appointment to the ICB, further reinforces a growing sense that the proposed legislation will increase the conflict of interest, rather than eliminate it.