THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES

EVIDENCE

OTTAWA, Wednesday, May 28, 2008

The Standing Senate Committee on Aboriginal Peoples, to which was referred Bill C-30, An Act to establish the Specific Claims Tribunal and to make consequential amendments to other acts, met this day at 6:30 p.m. to give consideration to the bill.

Senator Gerry St. Germain (*Chair*) in the chair.

[English]

The Chair: This evening, we begin consideration of Bill C-30, the Specific Claims Tribunal Act.

With us are three panels of witnesses. The first panel consists of the Minister of Indian Affairs and Northern Development and his officials. Second, we will hear from Phil Fontaine, National Chief of the Assembly of First Nations. The third panel consists of Bryan Schwartz, Professor at the University of Manitoba's Faculty of Law, and Shawn Atleo, Regional Chief, British Columbia Assembly of First Nations.

I am honoured to chair this committee. I am Senator St. Germain from the Province of British Columbia. On my left is Senator Hubley from Prince Edward Island. Next to her is Senator Dallaire from the Province of Quebec. Next to Senator Dallaire is Senator Dyck from Saskatchewan. On my right is the deputy chair, Senator Sibbeston from the Northwest Territories. Beside him is Senator Peterson from Saskatchewan. Next to Senator Peterson is Senator Lovelace Nicholas. Just being seated is a good friend from Saskatchewan, Senator Gustafson.

Bill C-30 received first reading in the other place on November 27, 2007. The legislation modifies the current specific claims process by establishing a tribunal composed of superior court judges with the authority to make binding decisions on the validity of the claims and compensation awards to a maximum of $150 million per claim. This is the second legislative initiative within the past five years to propose the sort of reforms to the specific claims system that have long been under consideration by Aboriginals, governments and other stakeholders and observers.

Following extensive consideration by the House of Commons committee over the course of 12 meetings, from February 6 to April 16, Bill C-30 was adopted on April 30 with two opposition amendments. On May 13, the legislation was adopted by the other place without further changes.

I am sure Minister Strahl will tell us more about Bill C-30. Here to assist him and the committee are officials from the Department of Indian and Northern Affairs: Lynne Partel, Acting Executive Director, Specific Claims Reform Initiative, and Robert Winogron, Senior Counsel, Specific Claims, Justice Canada.

I understand, minister, that you wish to make some brief remarks. Once you have made your presentation, I am sure senators will have questions for you.

Before you begin your presentation, allow me to say the members of the committee are pleased that the government acted in such a forthright manner to implement the recommendations made by this committee through our report, *Negotiation or Confrontation: It's Canada's Choice*. It was clear to us that the Prime Minister and particularly your predecessor, Minister Prentice, recognized the gross injustices of allowing these specific claims to languish for too long in an inefficient claims process. It is simply not right to allow the legal liabilities of Canada to sit unresolved for decades.

Minister Strahl, you are to be commended for your hard work in seeing to the collaborative processes of drafting this legislation, completing and carrying it through the other place to now appearing before our Senate committee this evening. I am aware there are concerns about some aspects of the bill and perhaps you will be able to share with this committee the details of the bill.

Minister, the floor is yours.

Hon. Charles Strahl, P.C., M.P., Minister, Indian and Northern Affairs Canada: Thank you. Senators, I will be referencing your report and many others in my brief remarks.

[Translation]

Mr. Chairman, thank you for the opportunity to address committee members as you review Bill C-30, the Specific Claims Tribunal Act.

[English]

As we all know, members of this committee played an important role in the development of this legislation. Nearly two years ago, you undertook a study of the issues related to unresolved specific claims. That committee report, which you have shown already, *Negotiation or Confrontation: It's Canada's Choice*, has been an invaluable source of information and insight and I would like to thank you, Mr. Chairman, and your committee members for the hard work on this challenging and complex question. As you say, this has been tried before, unsuccessfully. We are so close to the finish line here, I can almost taste it. I am delighted to be here this evening. I hope your investigations tonight go well.

As I am sure you are aware, the recommendations in your report comprised some of the major considerations in our action plan on specific claims launched last year. I believe the legislation before you is important for two main reasons. First, Bill C-30 proposes to establish an independent tribunal that will ensure timely and fair resolution to specific claims and bring certainty to this process. Second, it is a crucial component of a larger plan to improve the specific claims process announced by Prime Minister Harper in June of last year.

It is important to recognize at the outset that the action plan and the tribunal in no way diminish this government's commitment to negotiate settlements. Negotiation remains the best way to settle specific claims. Negotiation and reaching an agreement brings people together and fosters mutual respect. Negotiated settlements enable people to put the past behind them and plan for the future. That is why I am so proud that our government has settled 54 specific claims this past year, shattering any of the previous records and vastly improving upon the average of 14 per year that was the previous norm. I am delighted that those negotiated settlements are on the increase.

Unfortunately, not all First Nations claimants have been able to successfully negotiate an agreement because several obstacles stand in the way. Many studies, such as the one completed by your committee, have helped identify and analyze these obstacles. With the creation of an independent specific claims tribunal, Bill C-30 will begin to address these — and the resolution of specific claims will become faster, fairer and more transparent.

The specific claims tribunal created by Bill C-30 is something of a fail-safe mechanism, if you will — an independent means of resolving claims. The tribunal, in combination with the timelines established in Bill C-30, assure all parties that claims will be resolved in fair and timely manner. As the national chief of the Assembly of First Nations said during his appearance before the Standing Committee on Aboriginal Affairs and Northern Development in April: “While no system will ever be perfect, I suggest to you that Bill C-30, together with the political agreement, satisfies the elements of an effective system and will bring about much-needed change that we have worked many years to achieve.”

I expect that members of the committee are already familiar with the components of Bill C-30 — that it is at the sole discretion of the First Nation whether to file a specific claim with the tribunal; that the tribunal's rulings will be binding, subject only to judicial review; that the tribunal can award up to $150 million per claim and, while it cannot award land, this money can be used to buy land from willing sellers. It is important to emphasize that well over 90 per cent of claims are for $150 million or less, so the tribunal will be empowered to deal with the vast majority of the claims.

Rather than go over these in detail, I would like to focus tonight on the impact the legislation will have on Canadians. As I see it, there are three main benefits to the legislation. The first is addressing past injustices. That is why we call it justice at last; it is addressing past injustices. The second is supporting economic and social development. The third is strengthening relations between First Nations and neighbouring communities.

First and foremost, our goal is to achieve justice. Legitimate specific claims left unresolved divide communities and hurt us all. By resolving these claims, Bill C-30 and the action plan will bring closure to long-standing grievances and foster improved relationships.

A second important goal involves fostering economic and social development, particularly in First Nation communities. I know members of the committee are well aware of the positive impacts that settled claims can have on First Nations. In another report this

committee tabled last year, *Sharing Canada's Prosperity — A Hand Up, Not A Handout*, settlements were described as "… essential to 'unlocking' economic opportunities for Aboriginal people."

Negotiations have successfully resolved more than 280 specific claims in the past 35 years and, for many First Nations, these settlements have served as a springboard towards social and economic development.

The resulting success is evident. An example: Sturgeon Lake First Nation in Saskatchewan used money from a specific claims settlement to open a gas bar and grocery store. This business provides steady employment for a dozen members of the First Nation and generates hundreds of thousands of dollars in profit each year, money that the band invests back into the community.

[Translation]

Very recently, I visited the First Nation of Madawaska, in New Brunswick, with which we reached an agreement. This agreement provides, in fact, for the launching of a major economic development project along the very heavily travelled number 2 Highway.

[English]

The third outcome of settled claims will be closer relations between First Nations and neighbouring communities. As the record shows, the economic and social development activities spurred by settlements do not end at the boundaries of reserves. They extend into nearby regions. Entrepreneurs both on- and off-reserve establish business partnerships with First Nations and buy services from nearby municipalities. Cultural festivals attract people from neighbouring communities. All of these activities help generate goodwill and establish lasting relationships between First Nations and non-Aboriginal communities.

I have another small but telling example. Last year a specific claim settlement was negotiated with Kitigan Zibi First Nation, located about 90 minutes north of Ottawa, near Maniwaki, Quebec. Under the settlement, the First Nation acquired a small parcel of land near the bridge into town. That land had been a contentious issue dividing the Maniwaki residents and the First Nation members for many decades. As a gesture of goodwill, the First Nation built a public park on the land and now people from both communities enjoy that park together. It is a great symbolic gesture that has gone far to bring those

communities together.

Bill C-30 is part of a larger plan on specific claims. I am sure committee members are familiar with the other elements of the plan — $250 million per year to fund settlements, the overhaul of administrative practices, and better access to mediation.

I am equally confident that members of this committee understand the benefits of this legislation and are aware of the positive manner in which it was received in the other place. Allow me to cite a quote from testimony provided to this committee and duly noted in its report on specific claims. Bryan Schwartz stated:

The money to pay out claims is money that, if it were in First Nations' possession, would contribute to their human growth, their investment in human capital, their education and welfare, and thus build stronger communities of talented people to contribute to local economies and to participate in professions and occupations.

As you can see, Bill C-30 is about much more than creating a new tribunal. It is about righting old wrongs. It is about establishing a new relationship with First Nations — one based on mutual respect, trust and partnership.

[Translation]

As you can see, Bill C-30 is about much more than creating a new tribunal. It is about righting old wrongs and establishing a new relationship with the First Nations, one based on mutual respect, trust and partnership. I therefore encourage members of this committee to support the Bill.

[English]

I encourage all members to support this bill. I look forward to your deliberations. Thank you.

The Chair: Thank you, minister. Justice as last. It is beautiful. I do not know where that came from, but those people should be recognized. It certainly rectifies injustices.

Senator Sibbeston: I want to thank you. Much as we are sitting here now, a couple years ago our committee dealt with the question of specific claims and the problems that existed by our country not dealing with specific claims in a proper manner. We wrote a report

Negotiation or Confrontation: It's Canada's Choice. Obviously it is Canada's choice to negotiate. I thank you for the government having developed this bill.

The matter of an independent body, which is central to this bill, has been an elusive one for the government and Aboriginal people. It has been something that has been discussed since about 1947. A special joint committee of the House of Commons and Senate dealt with this matter. Again, in 1961, a joint committee recommended that there be such a body created and an independent report called for a quasi-judicial process to settle claims.

In 2003, we dealt with it and passed the Specific Claims Resolution Act, which was not quite what the Aboriginal people requested. It has been a real quest.

Finally, we have reached the point where an independent judicial body will be created. I thank you for making it possible.

While I think it is good that this body will be created, I am concerned whether the resources that you have to deal with specific claims will be put into this negotiation process and the independent body you will establish. Does the department have plans for how to move from this stage to the new stage we are about to embark upon with an independent body?

Mr. Strahl: It was one of the concerns raised by people who gave testimony and helped with drafting the bill. The resource issue is important. We addressed the resources necessary to staff the tribunal — that is, the judges who will be required.
Minister Nicholson discussed those resources that the judges themselves will need before a Senate committee earlier in addressing another bill. We also have addressed the issue of resources that First Nations may need for negotiations, et cetera.

There is also a review process built into this bill. After five years, if we can show that we could do better or more, we do not have to wait for another 60 years to improve it. There is a process to review as we proceed.

The safeguards are there. The resources are in place. I am convinced they are talking to my departmental officials. The safeguard is the review that is in the legislation. That will assure people that we will get it right.

Senator Sibbeston: We ought to focus on this bill and the provisions of it, particularly the

central part, which is the independent body. Last November, there was also an announcement that, apart from agreement on provisions of this bill, there was also a political agreement on other aspects and concerns that may not fit within this bill. How is that going and what are the terms of that agreement?

Mr. Strahl: It was important to have what we call the political side agreements. They were not in the body of the bill, but were co-signed by National Chief Phil Fontaine and me. It was negotiated on the same principles that guided us on the bill. A political accord lays out several things the national chief and I are to do together.

For example, an historic treaty conference was held in Saskatoon a couple months ago. That was one thing in the accord that had never been done before. There were 700 or 800 people in attendance. It was based on this political document.

There is more to do on the mechanics of implementing treaties and on claims over $150 million. We need to do work at a political level to discuss how to deal with other outstanding issues that did not fit the parameters of the bill. However, they were, and are, important for all the reasons you stated earlier and that were in my speech about long-term reconciliation, economic opportunities and making sure things do not slip through the cracks.

If a bill covers 90 per cent of the work list, the other 10 per cent has to be done. We want to work together with the national chief and I have spoken to him about this. The first steps have already been taken. We will develop a work plan to ensure that we cover off many of the other issues.

That is why the political accord was created and why we attach a lot of significance to it. The national chief can speak to himself. However, we want to ensure that we get answers for people who legitimately say the bill does not cover everything. They are right. It covers 90 per cent of what we want to do. The other 10 per cent is still significant and we want to get that done too.

Senator Peterson: We are truly at a milestone here in meeting our obligations to First Nations people.

I have three short questions. You say the tribunal's decisions would be subject only to a judicial review. What would be an example of that?

Mr. Strahl: I will get our legal beagle to answer what that would look like.

Robert Winogron, Senior Counsel, Specific Claims, Justice Canada: Judicial review is essentially a remedy where, if the tribunal has gone so far outside of its jurisdiction, so far beyond its mandate, that it is a finding that is patently unreasonable, then this type of judicial review is triggered. It is only in those types of circumstances that decisions are reviewed. Otherwise, the decisions of the tribunal are final and binding.

Senator Peterson: I thought the $150 million was the only cap. Are you saying there could be other things?

Mr. Winogron: No, they are two different things. The $150 million is the jurisdictional limit on the size of claims that can go to the tribunal. Judicial review is a review of the decisions in a certain narrow, limited set of circumstances.

Senator Peterson: Is there financial assistance to the First Nations people to prepare their presentations to the tribunal?

Mr. Strahl: Yes, there is. There are provisions on that. They are usually in the form of a loan made to First Nations. Perhaps Ms. Partel would like to talk about the increase. There will be increased numbers, likely, so perhaps she could address that detail.

Lynne Partel, Acting Executive Director, Specific Claims Reform Initiative, Indian and Northern Affairs Canada: I do not have numbers for you, but certainly there will be. We are looking at increasing the amount of funding. Funding is a mix of grant funding and loan funding. First Nations will have grant funding in order to prepare and submit their claims for the assessment process. Once they are into the negotiation process, loan funding is provided and grant funding is then provided for their work with the tribunal if, in fact, their claim ends up at the tribunal.

Senator Peterson: Where will the tribunal be located? Will it have a physical presence somewhere, and would that somewhere be where the clients are rather than here?

Ms. Partel: The tribunal will have a registry, which will be the body that will provide administrative support to the tribunal. That will be located in the National Capital Region, and that is set out in the bill. However, certainly, it is up to the tribunal itself to determine where they might sit. Obviously, specific claims are across the nation.

Mr. Strahl: It is not a standing tribunal. The tribunal is selected from senior judges, so they could be a different mix of people, depending on what the chief justices and others have. These will likely be senior judges because these cases tend to be very complex. As Ms. Partel has said, they could sit as is most desirable, and they could be made up in different parts of the country, as required. In other words, there is some flexibility. It is not as though you have to come to the Supreme Court of Canada in front of the same seven judges. This is a panel of three judges, selected for optimal reasons, who can address those issues in different regions of the country. To make it easier on all concerned, I will guess that they will do a lot of their work in the field, but the registry itself will be here.

Ms. Partel: That is correct.

Senator Hubley: I would like to ask a question from your presentation where you mentioned it is important to emphasize that well over 90 per cent of the claims are for $150 million or less, so the tribunal will be empowered to deal with the majority of these claims.

Will there be specific timelines for the initial stages of negotiation, and then timelines for the tribunals to hear and eventually settle those claims?

Mr. Strahl: We will get someone here to correct me when I stray from the facts, but I understand that there are two three-year periods involved. There is a three-year period when you table your information. In other words, there is an obligation on First Nations to have a presentation as complete as possible, ready to table with the tribunal. In other words, you cannot say, “I have a case and here it is,” and then just start adding to it as time goes on. You have to get your work together, do your research and then present the argument.

Then there is a three-year period for the tribunal to analyze this.

Am I right?

Ms. Partel: You are right up to the point about the tribunal. Once the claim is considered filed by the minister, there may be some back and forth to ensure the minimum requirements for filing are met, and those requirements are something we will come to agreement upon jointly with the AFN, Assembly of First Nations, through the liaison and oversight committee. That is the political agreement I am referring to.

Then there will be three years for assessment to take place as to whether the claim is acceptable as a specific claim or not. After that point, if the claim is rejected, then the claim is eligible to be brought forward to the tribunal. Of course, this is at the discretion of the First Nation to bring it forward to the tribunal.

There is, however, another three-year period that Minister Strahl was probably referring to. That is the three-year period for negotiation of the claim, just to keep in mind that 90 per cent of the claims that go into the negotiation process result in a settlement.

If there is no settlement after three years, the First Nation may then put the claim before the tribunal. However, if the parties to the negotiation agree, the timeline for negotiations can be extended. That is up to the parties, if the negotiations are going well.

Then, if it goes to the tribunal, it is the tribunal that decides what the timeline will be. There is not a three-year timeline. However, in the preamble to the bill, you will notice there are a number of clauses that relate to claims being looked at in an expeditious manner by the tribunal. We are not expecting long cases.

Mr. Strahl: The fact that the tribunal is made up of judges will also ensure that happens. The judges I am familiar with — and I do not claim any expertise in this — will not let people rag the puck, as they say.

Senator Lovelace Nicholas: My question concerns the First Nations that do not agree with this tribunal bill. What happens to their land claims, and do they have recourse?

Mr. Strahl: If you are talking about First Nations that have specific claims, it is completely at the discretion of the First Nation whether they want to use the tribunal or not. They may want to pursue a negotiated settlement. We are hoping that most of them are done by negotiations. You have a pretty good track record.

The fact that the tribunal is there as an option tells all negotiators to get serious in a hurry because they are on expeditious timelines to get it done. Negotiations will take on an increasing sense of urgency for us all because they will see that, if they cannot negotiate it, there is a chance it will get kicked out to this other tribunal. That will naturally speed things up.

There was a First Nation in my office recently who said that they do not like this bill and

do not want to use. I said, “That is perfect. Don't use it.” They insisted that they really do not want to use it and I said it is completely at their discretion. That assurance must be given because, in the end, some people might want to go to court over this. That is why we say it is at their discretion. That gives them confidence, knowing there is serious negotiation. There are also mediation services spoken of, but in the end it is at the discretion of the First Nation.

That is on the general issue of land claims, not specific claims, but other issues such as outstanding land claims of which British Columbia has many because much of it is not covered by treaty. This bill is not meant to address that. This is only for specific claims, and that covers all kinds of historic grievances where there is an obligation of the federal government to redress old wrongs, but that is not a treaty issue or a land title issue per se.

Senator Lovelace Nicholas: What about the land claims that go beyond the $150 million cap? Do they have to go to court?

Mr. Strahl: That is one issue that the national chief and I have targeted. The Assembly of First Nations believes that there are about 20 of those cases in the country, but there may be more coming. We never know with these things. We will be talking about processes to make that work as well as possible.

Again, the preference is negotiation. I was in northern Alberta a few months ago where we signed an agreement in principle with the Bigstone Cree Nation. This involves $300 million and 140,000 acres of land. There are all kinds of transfers of schools and buildings. It is a complex claim that would not fit in here. It is possible to negotiate those; we need only sit down with willing partners and negotiate. I am hopeful that is the way to do it. The Assembly of First Nations and I will be sitting down to talk about ways to expedite large spec claims.

Senator Lovelace Nicholas: Thank you.

Senator Dyck: I am honoured to be present this evening. I am hoping this will be another historic moment in the history of negotiations with First Nations people.

I would like to return to the question Senator Hubley raised with regard to timing. As you said in your remarks, one of the goals of establishing a tribunal is to ensure timely resolution. It is my understanding, although I may be wrong, that First Nations file

specific claims with your office first, and you have a three-year timeline to decide whether it should go forward to the tribunal, and you then have another three years before it can actually go to the tribunal. It may be six years before the First Nation is able to reach the process.

Are you confident that most of these claims will not be in your office for the three-year period? Do you think that your office will be able to deal with them expeditiously?

Mr. Strahl: That speaks to the resource issue again, senator. That is a valid question. As I mentioned earlier, the bill provides for a review if things are not proceeding as we think they will. We think we have the resources ready. If it proves to be more complex or the evaluation takes longer, there is a review process provided for in the bill.

I return to the idea that even six years is lightspeed compared to some of the cases across the country on which I have been privileged to sign off. People have told me that they have been waiting for 40 years, that their grandfather started their spec claim. They have pictures of people who were involved and are long since deceased.

While six years is a long time, it is often a complex legal assessment process ensuring that Canada understands its obligation. The last thing we want is to put in a timeline so tight that you have to make a decision in six months. That does not give time for a review or a Department-of-Justice analysis. We do need a little time, but six years will seem very quick overall compared to what we have had.

Even within that, there is a chance to review if there is a consistent pattern of us falling short in some way. I am confident that we have the resources, and it is a relatively short time compared to the status quo.

Senator Dyck: If in less than five years you find you need additional resources, could you add resources before the five-year period is up?

Mr. Strahl: Part of our political agreement is assessing the processing of specific claims and making suggestions for improvements. There are provisions in this for ongoing review. One of the reasons the political agreement is in there is that we do not have to wait for five years. The parliamentarians felt that having it in there means that, if I change portfolios, it will not be dropped. It will still happen, which is why it is legislated. Part of the political agreement that I have signed on behalf of the government is to do exactly the

kind of review you have described.

Senator Dyck: Since you raised the issue of political agreements, does that cover input by First Nations with regard to the people who are appointed as members of the tribunal?

Mr. Strahl: Yes, it does. The national chief will be engaged in a process for recommending members of the tribunal. The tribunal is made up of judges, of course, and the judges are Order-in-Council appointments so they come from a pool, as is laid out in the legislation, but the national chief is consulted about recommendations for that. In the end, based on this agreement, the government has to appoint judges and consult with the national chief, but the wording of the agreement includes consultation and recommendations.

Senator Dallaire: A number of times we have heard witnesses indicate that the Crown does not necessarily always act in good faith. Even though there may be a legal responsibility, it is not necessarily applied or interpreted that way. That is often raised with respect to the Crown deciding it does not want to participate in negotiations and simply waiting for something to happen and responding to crises. We can go back many governments for evidence of that.

The side note to clause 30 is “withdrawal,” and I want to understand that. Clause 30(1) says:

A party may withdraw an issue from the Tribunal at any time before the Tribunal gives its decision on it, and in such a case, the Tribunal shall not render a decision on it.

What happens if the government does that? Is there an instrument that kicks in that does not permit this to be stalled? I am most worried about the Crown being fully responsible as it is the ultimate authority. Can it pull the plug on something when it does not suit and sit there with it?

Mr. Strahl: Mr. Winogron is here to explain the legal text.

Mr. Winogron: The significance of this provision is a safety for the First Nation claimant. It is the First Nation claimant that is entitled to withdraw its claim up until the point of decision. The claimant is making the claim. Certainly, the government would not be entitled to withdraw any part of it since it is not the government's claim. The only thing

that the government would be entitled to do involves its own issue, which is a matter of defence. If the Crown has raised a defence and wants to withdraw that defence, it is entitled to do so. The importance of this section is that, if a First Nation feels it is in its best interests to withdraw its claim at some point before the decision, then it is entitled to do so with no repercussions in terms of bringing the claim forward at a later time. There are perhaps some cost repercussions but no others.

Senator Dallaire: The way it is written, that is what it means?

Mr. Winogron: Yes.

Mr. Strahl: The word "party" is the First Nation. The government cannot truncate the process by pulling out at the last minute because they do not like it. We both must be bound by the decision of the tribunal. If there was a precedent-setting decision at another table, a First Nation might say that they want to consider their position. This will give them an opt-out clause. This is another protection for First Nations.

I agree with your summation, senator. When you are deciding whether you like the case and how it will be negotiated, you are judge, jury, executioner and a lot of other things. That creates a sense of injustice for First Nations. The government does not do that now. Once it goes to the tribunal, the government says, "It is out of our hands. We no longer do those things."

Senator Dallaire: Can I find another clause in here that gives me that fuzzy feeling you just described in here, since it does not become apparent in clause 30? Is it so defined in this proposed act that this is exactly how the government sees its activities, or is it by deduction?

Mr. Winogron: I think it is by cumulative design. First, claimants are entitled to bring claims statutorily. This statute will allow claimants to bring claims. There is nothing that the government can do to prevent that; the legislation authorizes it. Proposed section 30 states that a party can withdraw an issue. If it is the claimant's issue, however, the government cannot withdraw it.

Senator Dallaire: I am more worried about the government pulling a defensive move by withdrawing and holding back its arguments and process, and so on. I am not sure.

Mr. Winogron: It is true that the government will be able to make its case. If it feels that it should rely on a certain defence, then it will put forward that defence. It is the government's option to consider that. In the end, if the government do not want to avail themselves of that particular defence, they can withdraw that defence. However, that does not infringe or harm the plaintiff's case. In fact, it makes it stronger because a portion of the defence is removed.

Senator Dallaire: Should the government pull out, is there a time limit within which it would have to return to the table with its defence as deemed adequate by the judges themselves, or is there another clause on that?

Mr. Winogron: The party is entitled to withdraw up to the point of decision. For example, prior to the cases being closed, the Crown can stand up and state that the government is relying on a certain defence but wishes to withdraw that defence and concede a certain point — that is to say, we are not liable on this ground. The case proceeds in that fashion and that defence is no longer applicable.

Senator Dallaire: It is not because our defence has not been adequate in presenting our position; we are pulling out.

Mr. Winogron: It could be for any number of reasons.

Senator Dallaire: Is there no time limit when that happens?

Mr. Winogron: The time limit is up to the point of decision.

Senator Dallaire: Yes, but that could be delayed. There is this gut feeling that the Crown can manoeuvre a bit. I was trying to correlate this with something that says that the Crown will no longer be fiddling. There is a spirit behind this which is not necessarily well articulated — namely, that we want to play fair and to get this thing sorted out. That is what I feel. When “party” was written instead of “First Nations”, for example, I had some concern there.

I will leave that with you. You have explained the position of the government; it is just a matter of whether or not that intent was completely covered.

Mr. Strahl: That is a good question to put to some of the other witnesses you have here about why they feel it was important. I feel it is another safeguard for First Nations.

Senator Dallaire: Yes, as long as it is for them.

Mr. Strahl: It could be for either. This is a legal argument. From my observation, right up to the time of the decision, someone can say, "I just saw a court case resolved last week. The court came down like a ton of bricks here." The First Nation might then say, "Hold it, then. I must reconsider my position here. The decision has not been rendered yet, so I want to pull something back. I do not want that ruled on." It might be a case where the government says the same thing — namely, "I do not want to proceed with the argument that I was making because it no longer makes sense, or it does not buttress the case." It is at the discretion of the First Nation to say that they want to pull back. That is for them to decide.

Senator Dallaire: They have been pulled through the wringer before.

Let us say we are as expeditious as we usually are and we get this thing through by the ending of this session. Therefore, 120 days is put into effect, which means October. Do you actually have in your funding line right now the ability to build that infrastructure? I speak of people and of O and M, and so on, and not just the six judges but everything else around it. Do you have in your budget, in addition to your normal budget line of $150 million, starting in the fiscal year — maybe not this year but fiscal year 2009-10 — new money for that requirement or are you absorbing that within your own capacities right now?

Mr. Strahl: On a technicality, if you will — and I have been saying this publicly because this is not a technicality — I have been talking about the $2.5 billion commitment of new money for this over the next 10 years. The truth is that, to get your hands on that money, it must go through a treasury board process. That treasury board process is what it is — meaning it is allocated and is in the fiscal framework, but to get the actual money signed off by the treasury board is their process itself. The budget has been approved by Parliament and the money is there. For example, we have already started the transformative work on the old commission itself to move toward more of a mediation process because we are anticipating this is coming.

Things are already in process and I anticipate no problems. However, I want to be contextually correct: It needs a treasury board signature to make it happen. However, the legislation is not passed so I cannot go ahead with the next step.

Senator Dallaire: We are on net with that. What I am saying, though, is that treasury board will not look at you if you do not have this preplanned in your budget lines. The PYs, person years, or the cash or new dollars are in your budget line and you have to go through the process. If that is the case, that is fine.

Mr. Strahl: We are on the same wavelength. I wanted to be technically correct. I cannot say the money is there until the legislation passes, but it is there just panting and gnawing at the door waiting to be done as quickly as possible.

Senator Gustafson: I have one short question but, first, I would like to congratulate the minister and our chair. I think this committee has done an excellent job with a very difficult situation.

I have one question. The tribunal can award up to $150 million per claim. Does that indicate there could be a number of claims under one caption?

Mr. Strahl: No, some claims are more than $150 million for a singular claim. If someone said, “My lands were taken improperly when the lake was flooded,” you cannot say, “The lake flooded my land. I was not compensated and I want five $100 million claims.” That is one claim. You cannot be cute with that. The land that was flooded, for example, is for whatever it was worth. You cannot say that is five claims.

On the other hand, one First Nation may have five separate claims on separate things but you cannot divide and conquer, if you will. It may affect what some people will claim. Some people may say, “I think it is worth $152 million and change but I want to get it into the tribunal so I will say $150 million. I can be guaranteed a quicker result.” It is completely at the discretion of the First Nation.

Senator Sibbeston: I wanted to tell the minister that, with this bill, we will have resolved a long-standing issue between the First Nations people and the federal government. That is really good.

I notice clause 18 in the bill excludes modern comprehensive claims. Therefore, this bill will not apply to the modern land claims that have been renegotiated since the 1970s.

I should just tell you that our committee has been dealing with the matter of implementation of land claims. That is another big issue. That is kind of the modern

version of all these specific claims. Our committee has just completed a report adopted in the Senate yesterday called *Honouring the Spirit of Modern Treaties: Closing the Loopholes*.

Since you are in such a positive, enlightened state in dealing with things, would you as minister talk about your willingness to deal with this problem? This emergence of modern land claims also has to be dealt with.

Mr. Strahl: I have not had a chance to look at the report yet. I cannot comment on your actual report. I expect it will be thorough, like much of your other work.

Modern comprehensive claims is an outstanding issue. In the political agreement, we wanted to talk about treaties. I mentioned the historic treaty conference we had and these issues are coming up with regularity. For example, what does “access to a medicine chest” mean in a modern world?

It is a question that needs to be dealt with. I am feeling generous tonight but reluctant to comment on your report, per se. However, I look forward to it and it is an issue identified, in part, in the political agreement. However, I have no doubt that your report will have some recommendations I will be eager to look at.

Senator Sibbeston: It is not an issue of interpreting things. It is really an issue of implementation. In all the modern treaties, there are provisions for dealing with dispute resolution. However, the federal government has not really wanted to take advantage of those provisions. Therefore, it is oftentimes a matter of interpretation and a question of implementation of the modern issues.

Our report will have all the steps you need to take in order to resolve this issue. We really encourage you to do as you have done with this report: You followed it and we have this good result. Similarly, we have a draft report that you can take. Next fall, we will see you with either a bill or a policy that will help resolve that problem. If we work together, we can accomplish a great deal for our country.

Mr. Strahl: Thank you. I look forward to the report. I do feel the desire to suddenly shout “debate, debate!” because I feel I need to get into the nuts and bolts of it. I will look at the report. I know it is an issue, of course. I look forward to seeing your report. I am sure it is a thoughtful one. It is already identified as an issue in the political accord. What you are

dealing with is very timely.

The Chair: Thank you, colleagues. Senator Gustafson made mention of you and I but, minister, I want you to know that all the members at this table participated and contributed. This is not an effort that is about me. It is about "us" and working together in the spirit of resolving this huge injustice that sat out there.

As you say, "justice at last." The honour of the Crown is at stake and you provided us the vehicle to bring honour back in these particular areas. I want to thank you for coming this evening on short notice. You delivered your message with excellence like you always do.

As a fellow British Columbian, I am really proud of you. Thank you, other witnesses, for coming tonight. If you have something you want to say, minister, you may have the last word.

Mr. Strahl: There are two things in closing. I have been pleasantly surprised in this portfolio — surprised at how not only this committee, but the committee of the House of Commons, have worked hard and well to get things done. In a minority Parliament, you never know what will happen. However, even though the issues are difficult, complex and fraught with emotion, the committees in both places have done their work. That is a tribute to everybody who has taken this issue seriously. This is kind of above partisanship, if you will. This will be a great historic triumph for the Canadian Parliament and not just for a political party, you, me or anyone else. I give my compliments all around to both committees of both Houses.

I want to close with this: One of the other benefits of this is that it has shown what can happen when we work closely with First Nations, in this case, specifically the Assembly of First Nations, on the drafting of the legislation. My hat is off to them. I think you have mentioned, senator: We have been down, we have seen attempts, not been happy, but they said, "Okay we will do it and we will try it." To their credit, what we came up with is this bill, largely unchanged through the committee process because the work was done so well at the organization and government level, in a government-to-government relationship.

I talked about relationship building but one of the great benefits of this was to show the critics who said, "You guys will not be able to pull this off." They have been waiting 60 years to get this right. As Chief Lawrence Joseph said, "In all these years working in government and as a First Nation leader, this is probably one of the finest example of what

can happen when you work together."

There is a lesson in that for all of us. I take that as a lesson, personally, and all of us as governments and leaders can take to heart that, once again, working together is a better result than an antagonistic or confrontational route.

The Chair: When you go back to the other place, thank them. We thank all of them, from the Prime Minister right through to every member in the House of Commons.

Mr. Strahl: Thank you very much.

The Chair: Our second witness returns before the committee having recently testified on Bill C-292, the Kelowna Accord. It is always a pleasure to welcome Phil Fontaine, National Chief of the Assembly of First Nations. He is from Manitoba, one of the greatest places in the world. There is no question that all of us who came from there or are still there contribute greatly; Chief Fontaine has done that.

Candice Metallic is with Mr. Fontaine this evening as legal counsel. Chief, I understand you are on a tight timeline because you have a lot of fish to fry within the next while.

Honourable senators, we have a half hour with the national chief.

Phil Fontaine, National Chief, Assembly of First Nations: Thank you, Mr. Chair and committee members. First, we want to express our thanks to the Senate committee for providing us an opportunity to come and speak about an issue that is very important to First Nations.

I want to express my appreciation to your chair, Senator St. Germain, and all committee members who have worked so diligently to bring forward the work that forms the basis for the process that has brought us here to talk about Bill C-30 and its final stages. I am referring to the report entitled *Negotiation or Confrontation: It's Canada's Choice*. Without that report, I am not sure we would be here this evening at all.

I am also joined by Tonio Sadik, one of our senior analysts with the Assembly of First Nations.

What I would like to do this evening is read into the record the presentation I made to the standing committee in the other place. We want to be consistent with our position. We

made our position very clear there, and we do not want to deviate from it in any way. That way, people will not come at us later and ask, “Why did you say this on that issue and you said something else before the Senate committee?”

On behalf of the Assembly of First Nations, I thank the chair and committee members for the invitation to appear before you.

As you know, the Assembly of First Nations is the national First Nations organization representing over 630 First Nation governments in Canada.

First Nations leadership, as well as the AFN leadership, are democratically elected. Our organization derives its instructions and, indeed, its mandate from chiefs who meet in regular assembly meetings. We represent all First Nations, regardless of whether they live in urban communities or on reserve, and regardless of gender.

Throughout the novel process that led to the formation of Bill C-30, we were consistent and clear with the federal government on one important point. While we respect their political process and all it entailed, we expected them to reciprocate and respect ours.

It was in this spirit that I requested to appear, as I did at the end of those hearings, and accepted the invitation to be here this evening. I wanted to ensure that all First Nation representatives who wished to submit testimony before me on the other side could do so freely and unencumbered by the position taken by the Assembly of First Nations, particularly since we were so directly involved in the development of Bill C-30, as described to you by Minister Strahl in his testimony this evening.

If individual First Nations have expressed a desire for amendments to this legislation, then it was their prerogative to advance those amendments. This should not be construed as dissent; this is democracy at work. The Assembly of First Nations fully respects the voices of all chiefs and First Nations people.

As I prepared for this presentation, I reflected on the long history of active engagement we have had on this issue with successive governments. Throughout the deliberations, we asked people to be mindful that the ultimate objective of Bill C-30 was to improve the specific claims resolution system in Canada.

The current process is fraught with conflict of interest and inordinate delays, it lacks

critical independence, and it is severely underfunded. This has resulted in an enormous backlog of over 1,000 unresolved claims. An effective system must be fair, independent, efficient, expeditious and well resourced. While no system will ever be perfect, I suggest to you that Bill C-30, together with the political agreement, satisfies the elements of an effective system and will bring about much-needed change that we have worked many years to achieve.

Prior to the establishment of the Indian Specific Claims Commission in the early 1990s, the Assembly of First Nations has been active in trying to improve the federal system that deals with the resolution of specific claims in Canada.

In 1996, Canada initiated the joint task force process. This process was effective in bringing together regional representatives to make recommendations with respect to the existing system, culminating in a proposal for the adoption of a model bill that would create an improved system based on key recommendations that included — and I will cite five items — the elimination of Canada's conflict of interest through an independent legislative mechanism; the establishment of a commission to facilitate negotiations; the establishment of a tribunal to resolve disputes and cases of failed negotiations, with the authority to make binding decisions; independent funding for First Nations research and negotiations; and a joint review after five years to include consideration of outstanding matters such as lawful obligations arising from Aboriginal rights.

Unfortunately, the report issued in 1998 was never implemented. In the intervening period, we have seen other attempts to address problems with the current system, most notably the Specific Claims Resolution Act, Bill C-6, and subsequent attempts to improve that legislation.

In December 2006, as I noted, you submitted your report. This ground-breaking Senate report represented an important element in enabling the then Minister of Indian Affairs, Jim Prentice, to advance significant reforms related to specific claims.

It must be stressed that the Assembly of First Nations was not involved in establishing the parameters of the plan to develop the legislation. We were, however, subsequently invited to participate in the announcement last year and to collaborate with Canada to jointly develop legislation based on the parameters set out in “Justice at Last,” Canada's proposal to reform the specific claims legislation.

While the process that ensued should be seen as a success in the context of this initiative, this success has not defined a new approach or relationship when it comes to law and policy development in other areas affecting First Nations peoples.

Bill C-30 represents a tremendous collaborative effort between First Nations and the federal government at achieving agreement on the design, composition and mandate of an independent specific claims tribunal. The successive elements of this mutual development were, first, that the legislated drafting process incorporated interests that have already been identified as critical to success, mainly through work that had been conducted over many years, including the work of the 1998 joint task force report. From this standpoint, the main thrust of this initiative embodied the shared objective.

Second, with a shared objective, the approach that was used to advance this initiative involved constructive collaboration and cooperation. It included AFN representation at all levels and was guided by both a senior political forum and a senior technical committee.

We have always maintained that meaningful, up-front engagement with First Nations is more efficient and effective than unilateral, top-down-imposed processes. Bill C-30 and the political agreement are examples of this. In fact, despite the various proposals for amendment, the majority of witnesses who have appeared before you have admitted that this bill will improve the claims resolution system.

The Assembly of First Nations has extensive experience in facilitating First Nation/Crown discussions on law and policy change, which I note is distinct from federal, legal obligations to consult with First Nations on matters affecting our rights and interests.

It is clear through case law and our clearly stated position that the Assembly of First Nations cannot serve as the Crown's agent to conduct consultations or as a replacement for direct consultations with First Nations. However, our proven track record in advocacy, communications and analysis supports both the Crown's and First Nations' efforts to consult effectively. This said, never has the AFN committed to undertake the government's responsibility to consult with First Nations about Bill C-30. That remains a legal, federal responsibility.

Rather, the Assembly of First Nations undertook to first ensure the perspective of First Nations were central to the legislative drafting process and, second, to help inform First Nations to engage our citizens in dialogue on the contents of the bill and political

agreement.

We have made every effort to live up to our obligations while respecting the federal government's repeated insistence on the confidentiality of the discussions. While respecting the concern of confidentiality, we did everything in our power to get information to our people. We provided updates to our people as often as we could during the process, again fully respecting the government's need for confidentiality.

Once the legislation was publicly available, we conducted an intensive national campaign to inform First Nations about it. We visited virtually every region in Canada in what was less than a two-week window of opportunity, and we mailed out a comprehensive summary of our accomplishments on the very day that the legislation became public.

First Nations were calling for more information and engagement throughout our collaboration with the government, yet we respected the confidentiality as a condition of the federal process. We have honoured our commitment to confidentiality no less than we expect the members of this committee to honour the right of First Nations to appear before them and propose amendments. This does not mean that things have gone wrong. Quite simply, it is an indication that things have gone right.

No legislation or public policy will ever address all the concerns or issues of the people whom it impacts. However, by involving our people in its development and allowing the diverse First Nations interests to be heard, the government will have utilized the ingredients for a more positive outcome.

It has been our experience — and this is borne out in the process resulting in the Specific Claims Tribunal Act — that joint policy and legislative development processes are the best means for reaching sustainable, accountable and innovative development on issues that directly affect First Nations.

We encourage the government to learn from the success of this process and to apply it to other policy areas where First Nations rights and interests are affected — for example, with safe drinking water, the apology to First Nations survivors for their residential school experience, and the OAS, Organization of American States, draft declaration on the rights of indigenous people, among others.

However, to date, as seen in other policy areas such as matrimonial real property, the

repeal of section 67 of the Canadian Human Rights Act, Bill C-21, and the Fisheries Act renewal, we have been unable to replicate the collaborative process of Bill C-30. It is unfortunate and regrettable that, as of yet, we have not been able to forge an open, ongoing, reliable and stable relationship with the government that meaningfully reflects and respects the government-to-government relationship between First Nations and the government.

I note what the minister said to you in his testimony when he talked about the relationship that is one based on government to government. That is absolutely critical, indeed essential, to the success of anything we do with the government, in any policy area, whether we are talking about policy development or policy implementation. We achieve success if we work together and respect this important principle of government to government. It is not government imposing its will on us.

The Chair: Thank you, national chief. Do you have time for questions, national chief?

Mr. Fontaine: Yes, sir.

Senator Dallaire: I do not have that same affection for Manitoba because I spent most of my time in Shilo, which is a freezing desert in the winter. In the summer, it is quite warm. Clear Lake is pretty good.

The Chair: Senator Dallaire, that is where we send Quebecers. That is the best we have.

Senator Dallaire: In the review process, we have heard often that you are not getting any implementation of land claims; you are not getting people to participate in solving them; there are delays. There is supposed to be a five-year review and some have been 30 years, et cetera.

I have particularly looked at the review process here. You have five years, then a year maximum to do the review, then a year maximum to write the report of that review, then 90 days to submit it to the House of Commons and the Senate for committee review. We are nearly seven-and-a-half years into the process and it is only going to committee.

Was there not a desire to try to force them to bring about a legislative process to amend this should it not meet the requirement, versus a reporting process, and then a review, and then maybe committees and then to start a legislative process? You might be 10 years

down the road with that process. Why should five years be that reference point? Would three years not be sufficient to get enough experience on that?

Mr. Fontaine: First, it is important to note the comparison between what this legislation proposes to do and what we have had in the past. We did not have the luxury of five years or ten years. We were dealing with a system that was unable to resolve, in a fair and just way, specific claims over the last 60 years. There have been successive attempts, as you know, to try to rectify this problem.

We have this legislation. It has been noted that this was a collaborative process. We also understood that the legislation, as drafted, was not going to be able to resolve all of the issues — for example, the larger claims. That is why we insisted that there be a political agreement that was, in effect, in tandem with the legislation, to deal with these unforeseen problems. We believe that the five-year reference point should be seen as the maximum time allowed to resolve. It does not go beyond that.

Senator Dallaire: Without insisting on legislation to amend this act, you certainly are holding them accountable to the five years. The wording in here is: In carrying out the review, the Minister shall give First Nations an opportunity to make representations … and the representations which have been made by First Nations. Is that strong enough to hold their feet to the fire, that they will produce something in conjunction with the First Nations?

Mr. Fontaine: We believe that it provides us the kind of assurance and, indeed, the comfort that we are looking for. There are many checks and balances. There are committees such as this one. There is the committee on the other side. There are various political processes that we can engage in.

The important thing here is that all of the commitments that have been made, those expressed in legislation, those that have been expressed in presentations such as the one previous to this, are all part of the public record. I believe any government would be hard pressed to go against those very public commitments.

Senator Dallaire: I have an observation I would like to introduce with this bill. Because of time frames and so on, when this bill is approved, they have 120 days to implement it. I think we should call the minister back by 120 days in order to demonstrate to us that the treasury board submission has been done, that the resources have been established, and

that the funding has been allocated and approved to start the exercise, because he has six months after this thing has been implemented to start getting claims mobile.

If you have a piece of legislation going in where you know you have to go to treasury board and you have a good chance of this passing through, which the optimism of the minister demonstrated, his department should already have the treasury board submission ready and not started after. I would indicate that as an observation only because timing is not insignificant in this thing.

The Chair: We have a broad enough reference as a committee that, if we as a committee want to do it, Senator Dallaire, we have that option. It is on the record. I am sure that you will be here to make sure the record is refreshed in our minds.

Senator Dallaire: I will, with your support, sir.

Senator Hubley: My question has to do with the costs to the First Nations to bring forward their claims and if there are, in fact, resources available to you.

Mr. Fontaine: If we are talking about the current system, because that is all we have at the moment — this has not received Royal Assent or been brought into force — that has always been one of the biggest challenges faced by the claims process: to have the resources to do the necessary research to put their claim together, to retain legal counsel to represent their legal interests, and to make sure that their interests are being treated fairly and justly.

The process at every level has been underfunded. If we are talking about the internal mechanism in the department of Indian and northern affairs, that has been severely underfunded. At every level, this process has been underfunded, so we should not be surprised that we have ended up with approximately 1,300 specific claims outstanding. That is contrary to the approximately 800 figure used by the department. We know that the number is much higher. It has been a huge problem.

Senator Hubley: Do you see any relief within this new bill for that?

Mr. Fontaine: Yes. To make the point that I made in response to Senator Dallaire's question, we have a political agreement. There is a review process. This is a matter that must be resolved politically between the minister representing the department and other

ministers, if we have to engage them, and of course us and the claimant groups.

Senator Hubley: On the costs, the bill at (2) on page 7 reads:

The Tribunal shall deduct from any award of costs in favour of the claimant, any amount provided to the claimant by the Crown for the purpose of bringing the claim before the Tribunal.

Do you understand that one?

Senator Dallaire: Yes. That means that whatever it costs them to defend themselves will be taken out of the amount they have been able to get out of the process.

Mr. Fontaine: What I would like to do, senator, is add to my response to your first question and then ask Candice Metallic to respond to your more recent question.

The political agreement is very specific to the issue of the funding. The specific reference is to review access to funding, including federal funding for claimants at various stages of the process. One has to read into this and conclude that the resources that are required to move the process forward to the point where the tribunal considers the claim are in place. The government has an obligation to ensure that claimant groups have access to fair resources to move their claims forward.

Candice Metallic, Legal Counsel, Assembly of First Nations: I will address your question on costs. Under the current process, First Nations have access to funding from the federal government to bring a claim before the Indian Specific Claims Commission, which is the current non-binding process. We wanted to ensure that First Nation claimants had access to similar resources within the new framework, so we received that assurance from the federal government. When we were discussing this particular clause, the federal government wanted to ensure that, at the end of the day when the tribunal makes a decision, the First Nation claimant would not be able to claim costs they had received from the federal government in the first place to prepare and advance their claims. That is what that clause is essentially about. It ensures the First Nation cannot claim for costs that were paid by the federal government.

Mr. Fontaine: There is one other important point that I would ask Tonio Sadik to speak to.

Tonio Sadik, Senior Analyst, Assembly of First Nations: There was also a funding principles document agreed to in the context of the joint task force work that will guide further discussions about how First Nations are funded through this process, and presumably that would inform the adequacy the national chief spoke to in this context.

Senator Dyck: Senator Dallaire asked the previous panel about clause 30, which says that a party may withdraw an issue from the tribunal. The minister indicated that that meant it applied only to the First Nation. However, the definition in the bill says that a "party" can be the Crown or any province or First Nation. Clause 23(2) says:

If the Crown alleges that a province that has been notified...is wholly or partly at fault for the claimant's losses...

— then the province can become a party.

Are you confident that in this case "party" means First Nation, or should it read "First Nation may withdraw"? Is it still open to interpretation or covered by the political agreement that it is specifically meant to prevent either the Crown or the province from stopping the process?

Ms. Metallic: During the negotiations, the intentions of the parties negotiating was for that to apply to the First Nation claimant. If, for example, the First Nation wanted to withdraw from the tribunal to negotiate, if the Crown expressed a desire to negotiate, whatever the circumstances were, the First Nation would be able to do that.

I was listening to Senator Dallaire's question to the minister. Upon reviewing it, I agree it could have been clearer that that was the intention. However, it was the intention of the parties negotiating that the First Nation claimant be entitled to withdraw an issue. I will stress that it is not withdraw the claim; it is withdraw the issue. The First Nation may choose to withdraw the entire claim if they choose, but it also relates to an issue only.

Senator Dyck: Is it fair for me to ask for a suggested amendment? Do you believe that this clause should be amended to make it clearer? It seems that this section is open to interpretation. Should it be amended to make it clearer? If so, what would the amendment be?

Mr. Fontaine: Mr. Chair, we worked diligently in this collaborative process. We believe

that we covered all the major points, and they are incorporated into the various sections of the legislation. We view this as an urgent matter. We want to move it forward so that it receives Royal Assent. I do not know if an amendment would result in a delay of this review process.

The Chair: There is no question but that it would, Mr. Fontaine.

Mr. Fontaine: We refer all matters that are not explicitly covered here to the political agreement. The political agreement is really the deal of those matters that cannot be resolved in the legislation. If a problem arose because of this, and an interpretation was advanced that resulted in it becoming an impediment, I would refer the matter to a political process for resolution.

The Chair: Is that satisfactory?

Senator Dyck: I certainly took heart from hearing you say the minister has gone on record saying that the interpretation was that it should be the First Nations.

Mr. Fontaine: The fallback position is the five-year review process. That will facilitate a resolution if there is an outstanding matter.

Senator Sibbeston: Just as I commended Minister Strahl for his and the government's effort in coming forth with this bill, I want to commend you, Mr. Fontaine, for your role. This has been a collaborative and joint effort by yourself and the federal government. I want to thank you and recognize that this bill would not have been possible without you. I thank you for believing in the system we have in Canada. As First Nation leaders, it is so easy to dismiss the federal government because there have been so many times in our history when the government has acted dishonourably. I commend you for being open and willing to cooperate with this government at this stage.

I also want to commend you for the initiative and leadership you have shown on the residential schools issue. I know that you were instrumental in taking the initiative and eventually getting the federal government to agree with the solutions you proposed. What we have with regard to the resolution of the residential schools issue is, in part, thanks to you. I want to thank you for that and for your good leadership.

Senator Lovelace Nicholas: My question involves Crown lands set aside for First Nations

people in the event of a land claim. There is Crown land set aside for First Nations people in New Brunswick, although I do not know about elsewhere. If the Tobique First Nation, for example, made a land claim, could they include as part of their claim Crown lands set aside for First Nations people?

Mr. Fontaine: I do not know if there is any reason why those could not be included.

Senator Lovelace Nicholas: My concern is that there is all this land there and we have no access to it. It is set aside for First Nations and, if there is no access to these lands, then would someone stop a certain band from using them in part of their land claims?

Mr. Fontaine: This particular process deals with specific claims that result from a breach of the treaty, whether we are talking about an improper surrender, legal surrender or tuft of land. The matter that you raise, I think, would be addressed through a comprehensive claim.

Senator Lovelace Nicholas: Okay, thank you.

Mr. Fontaine: Do you mind if I comment on your good words, Senator Sibbeston?

You are absolutely right: This is a process that required trust on our part. As I pointed out previously, we both were facing some risks in this undertaking. However, both parties brought trust to the table and, as a result, we achieved real success here, a success that is important to Canada's future.

It was not my efforts alone that made this possible. I had some very good people who worked for me. I want to read into the record the people who were part of the joint task force as well as the technical working group, the transition working group and the process working group. In this way, when people review this matter, they will know who these people are.

We have the joint task force co-chaired ably by Regional Chief Shawn Atleo, supported by Regional Chief Lawrence Joseph from Saskatchewan and Regional Chief Willie Littlechild from Alberta. Roger Augustine was my chief of staff. The technical working group included Tonio Sadik, legal counsel Brian Schwartz, lawyer Roger Jones and Candice Metallic who you have already heard from here. We have the transition working group: Kathleen Lickers and Jaime Benson.

The processing working group was comprised of Ralph Abramson, Peter Di Gangi and Ken Malloway. Of course, Jerome Slavik was always very able and always provided sound advice.

That was our team, and a lot of credit must go to these good and able people.

The Chair: I think it is important that their names be on the record because of the contribution they have made.

Senator Peterson: I note that, if you are successful in an award, the Crown has the option of paying you out over five years. I do not know if it is satisfactory to you or, more importantly, would you get some documents you can take to the bank to receive the money? Obviously, if you are looking to have economic development, you want to have the money working.

I assume you would get some type of document and take it to the bank to get your money right away.

Mr. Fontaine: The matter you referred to here is a tribunal decision. The tribunal makes the decision as to how the money rolls out. I do not know if there is a condition that states this has to be paid out over five years and only within that five-year period.

Senator Peterson: They have up to five years in the act, at their discretion. They may decide to pay it. However, if they elected to pay it out in instalments, I would think the First Nations would be anxious to receive the money. I would also think there would be some type of documentation provided by the government to take to the bank and say, “Here. We want the $50 million now and here is how it will be paid out.”

Ms. Metallic: I think the written decision of the tribunal would be sufficient to take to a bank to prove that the First Nation claimant is owed a debt from the federal government.

When you look at the legislation, the decision is binding upon the federal government. Therefore, there is no doubt that money would be forthcoming. That would be an adequate source of security for a bank.

In terms of five-year instalments, that is payment over five years at a maximum. Due to the fact the awards can be anywhere from $0 to $150 million, the federal government

needed room to be able to plan for that allocation of so many claims over any fiscal year. Of course, the government can decide to pay it out all at once.

However, we also wanted to ensure that the First Nations had instalments, that the federal government could not wait for five years and then pay it all to the First Nations. We wanted the First Nations to have access to resources for every year up to a maximum of five years.

Mr. Fontaine: The matter you referred to, senator, is akin to a letter of comfort. In the final analysis, it is the financial institution's decision whether to accept that "letter of comfort" or the tribunal decision.

Senator Peterson: They have flexibility. I hope you feel comfortable with your flexibility and that there is nothing in there that says you cannot do that.

The Chair: The other thing that should be on the record for the public watching this is that the remaining unpaid balance — Bank of Canada's overnight rate on that day plus 2.5 per cent — is payable to the First Nation.

Colleagues, I have just scanned this political agreement. We have been focusing on the legislation. Is this historical in itself? Have there been documents like it established before accompanying legislation?

Mr. Fontaine: This is unprecedented. It is directly linked to legislation that has to do with fair and just resolution of specific claims. It gives us the kind of comfort we were seeking because we knew that the legislation would not be perfect. We all knew that. We had to make provision for unforeseen situations.

In certain situations, there are some matters that are best resolved through the political process — governments interacting and engaging with other governments. In this case, we are talking about a distinct group of people who ought to be recognized.

I take what the minister said seriously; I listened very carefully when he talked about this process. He talked about it in these terms — government to government. That is so important to the work we are engaged in. I was very pleased to hear that.

The Chair: Colleagues, I too would like to pay tribute to the leadership and the trust that National Chief Fontaine has put into the process. This is a historic moment, and is a

moment we are proud of as a committee. This is our report about negotiation and confrontation; it is Canada's choice.

I do not think I have ever seen legislation come as close to mirroring a report as this has. To you and your people, I thank you and I thank them for the diligence and the great and collaborative work they have put into this. Senator Sibbeston referred to it in a different way and you have spoken about it. I do not think we should ever let perfection become the enemy of the good. By virtue of that, I think the negotiated position we are at which establishes legislation, and the supporting document of the political agreement, make tremendous gains for First Nations people right across this country. It was long overdue and we thank you from the bottom of our hearts. Good luck and God bless.

Our last panel, ladies and gentlemen, features Bryan Schwartz, Asper Professor of International Business and Trade Law, University of Manitoba, and Shawn Atleo, Regional Chief for British Columbia Assembly of First Nations. We appreciate you travelling here on such short notice. We are anxious to hear when you have to say. I think it has been agreed that Regional Chief Atleo will begin. You have the floor, sir.

Shawn Atleo, Regional Chief, British Columbia Assembly of First Nations: Thank you. It is truly an honour and a privilege to be here before you this evening. We will move quickly into my presentation. Mr. Schwartz and I will share the presentation on what I hope we will look back upon as an historic evening.

I appear here this evening in my capacity as former co-chair, as the national chief indicated, of the joint task force which I was honoured to carry out with Bruce Carson from the Prime Minister's Office. I have been centrally involved in the process that led to the development of the bill as well as a companion political agreement. Therefore, I want to focus my comments on process.

First, I wish to acknowledge the important work of this committee and the important contribution that was made through the report from December 2006 entitled *Negotiation or Confrontation: It's Canada's Choice*. As alluded to this evening, I hope that First Nations, this committee, the government and Canadians, together, see that we are in a moment at this time in history that we should be grasping. Any success we have had is shared; it is yours as well.

Bill C-30 represents a sincere and meaningful effort in achieving consensus on a fair and

just specific claims tribunal process. While Bill C-30 is not perfect, the proposed specific claims tribunal will be an important tool and institution to help expedite the settlement of specific claims. There are still inadequacies in the overall specific claims policy and process, but many of these matters are identified for parallel resolution in the companion political agreement which has been referenced here. It is critically important to highlight the importance not only of Bill C-30 passing but also of ensuring that the political agreement is implemented fully, completely and in a timely fashion. They work together in tandem and must be considered as parallel efforts.

This kind of comprehensive approach could only have been arrived at through cooperative and constructive engagement between First Nations and the federal government. The process was essential to a successful outcome. You have had discussions about its potential in other areas. The conversation around comprehensive claims stands out to me as one example, as well as the conversation the committee has been having around the important conversation about implementation of modern day treaties. There are lessons to be learned in the process we are concluding here.

The work on Bill C-30 represents a tremendous collaborative effort between First Nations and the federal government at achieving agreement on the design, composition and mandate of an independent specific claims tribunal. Both parties were able to draw on their own insights and experience and, further, the legislative drafting process incorporated interests that had already been identified as critical to success, informed by work that had been conducted over many years such as the 1998 joint task force report.

From this standpoint, the main thrust of this initiative embodied a shared objective. The approach that was used to advance this initiative involved constructive collaboration and cooperation and included AFN representation at all levels and regional involvement on a number of working groups, guided by a senior political forum and a senior technical committee that the national chief referenced.

AFN has always maintained that meaningful, up-front engagement with First Nations is more efficient and effective than unilateral, top-down-imposed processes. We can see in Bill C-30, in the political agreement, that this approach can produce real results to issues that have been unresolved for decades.

It is important that our people and our leadership, in particular amongst First Nations like me, be students of the history of these things because they go back such a long time. For

us in British Columbia, the recent passing of late Frank Calder stands out because it was with the Calder case in British Columbia when this issue was first coming to prominence.

In March 2005, the First Nations leadership adopted the report called *Our Nations Our Governments: Choosing Our Own Paths*. It is a document I co-authored as part of my work as regional chief with the Assembly of First Nations. This report was the culmination of a national First Nations dialogue about First Nations government, treaty implementation and the resolution of claims, both specific and comprehensive.

There is a wealth of information and good ideas contained in this report. Two important principles in the report that are captured in the work on the specific claims tribunal are that policy and legislative development by the Crown affecting First Nations should be done jointly by consensus and, second, that institutional development, as in the case of the specific claims tribunal, was required to assist the process of reconciliation.

In May 2005, First Nations and the Crown entered into a political accord that committed the parties to work together jointly on an agreed-upon agenda which included specific claims. As far as the AFN is concerned, the 2005 report and the political accord provided the guidance and, importantly for us, the mandate to accept the invitation from the Prime Minister and former Minister Prentice to engage with the Crown on the development of the specific claims bill.

As a member of the joint task force, I want to endorse the process we undertook to develop this legislation and political agreement, of course, mentioning again that it is not perfect either.

For example, the invitation from the Prime Minister and Minister Prentice was based on a fixed cabinet mandate, as the national chief was referencing, expressed in the announcement “Justice at Last” from June 12, 2007, and there was a predefinition for the framework and many of the principles for establishment of the specific claims tribunal and other related work prior to our mutual agreement.

It is worth noting that the majority of amendments proposed by First Nations at the House of Commons standing committee, which I had the privilege of presenting to, related to issues that were beyond negotiation because they spoke to the limited government mandate in which we had no role in establishing.

Therefore, of course, it would have been more desirable to commence the joint work with a clean slate but we were left with the choice of engaging in a process that, while limited, was nevertheless meaningful and substantial and not negotiating at all. Additionally, it is our understanding that some important principles were established in the cabinet mandate that were necessary to provide comfort and some assurances to ministers of the Crown regarding the calculated risks inherent in establishing an alternative dispute resolution mechanism. One of these principles is reflected in the requirement that tribunal members have to be sitting judges who have the training and experience to adjudicate wisely and responsibly.

The second principle was the establishment of the $150-million limit. As we understand, it is the imposition of a monetary cap in general, an across-the-board measure by government applicable generally in all circumstances to avoid the issuance of a blank cheque to a tribunal.

As you know, tribunals do not necessarily operate with all the constraints imposed on the courts relating to evidence, procedure and such. These constraints have been used by the Crown in their litigation to help defeat or minimize expensive claims brought by parties that have been previously wronged in some fashion by government, law or policy. All this is to say that, despite the various proposals for amendment at the House standing committee, the majority of witnesses who appeared acknowledged that, even with its limits, this bill would represent an improvement over the existing resolution system.

The commencement of the joint process began with developing a terms of reference for the joint task force and the elaboration of a work plan. The parties agreed to use certain documents as foundational pieces, such as the 1998 task force report I referenced earlier. This was very important to our progress and success. The first joint task force report, for example, produced the model bill that was instructive to our work.

Two other important information pieces were the Specific Claims Resolution Act and, of course, the Senate report produced by this committee. From there, we developed an outline for the proposed bill and worked jointly based on consensus to put substance into the outline. The existence of a senior political committee, this joint task force, to oversee the work of the technical level legislative working group was instrumental in connection to the political aspect here. Furthermore, the development of a companion political agreement was another vehicle to move beyond the limits of a legislative approach to address challenges that, in the past, have impeded progress and consensus.

The AFN has made its best efforts to engage First Nations throughout this process, while being respectful of the parameters over which we have limited control, most notably of course the need for cabinet confidentiality with regard to the evolving bill. The access to the drafting process of the bill was vital so that we could see the language being considered and ensure that optimal language was included in the bill.

However, the process of legislative drafting was quick, which presented certain challenges. Knowing that the normal course of legislative development can be 18 to 24 months, in this case the time period was roughly five months. We held an intensive round of regional dialogue sessions across almost every part of Canada but, clearly, this and of itself does not satisfy the need for First Nations to become fully informed about the work at hand, nor does it discharge, as the national chief alluded to, the federal duty to consult First Nations.

Of course, everyone must acknowledge that federal politics factors into this as well, and this has been discussed tonight: The issue of time frames, confidence votes and potential election calls are a daily reality for Parliament. This has to be considered as well as its impact on First Nations. In spite of these realities and the complexity of the issues at hand, we achieved our objectives. I believe both the process and the products are equally important and informative in this regard.

Therefore, in conclusion, I urge this committee to confirm its support for the bill. It was a tremendous honour and privilege to be asked by the national chief to co-chair this initiative. Thank you for giving me the opportunity to offer my thoughts.

Bryan Schwartz, Asper Professor of International Business and Trade Law, Faculty of Law, University of Manitoba: I gave a speech on the proposed bill a couple of weeks ago in Vancouver. As I mentioned to several committee members informally, it was entitled “Specific Claims, An Overnight Success After 60 Years.”

This is about my third or fourth appearance here. I was here in 2002 pleading unsuccessfully for amendments to Bill C-6. I was here at the time you were beginning to consider the pivotal contribution that this committee made to the negotiation of confrontation report. I said at the time, without any inside knowledge whatever, it seemed to me that there was an extraordinary convergence of historical reasons why we could actually succeed this time. It is a great source of satisfaction to see that here we are with a bill that is not only okay, but I think a very solid contribution and a landmark

achievement.

Certainly, it is not ideal. Nothing that comes out of a collaborative political process will ever be ideal, but an outstanding achievement, one whose intrinsic merits and craftsmanship deserve great respect.

Why did things go right this time? People tend to do a post-mortem but not a postpartum. People do not tend to analyze success perhaps as much as failure. However, it is worth learning what went right so we can do it again. Amongst the things that went right is one I have already mentioned implicitly, which was the parliamentary contribution to the process. Here your committee made an important contribution to building up the momentum and many of the concepts and formulations you had about specific claims being a moral imperative, not just discretionary programming spending, is reflected in the preamble of the bill. The idea that there must be an independent dispute settling body is reflected in the substance of the bill. The idea that this bill should be achieved by negotiation was something you recommended, and that was pivotal in producing the quality of legislation we have. The idea that resolving claims would contribute to economic development and reconciliation is again reflected in express language in the preamble of the bill. Therefore, you do see an extraordinary correspondence between the contributions of this committee and both the legislation and the political agreement.

The idea of ongoing oversight and concern is an attractive one. Senator Dallaire has referred to this. We have an outstanding structure. It will only be successful in practice if there is the additional commitment of resources, attention and willingness to sit down and work with the Assembly of First Nations to make the practicalities work. After all, the bill is basically a framework for a tribunal and does not really address in legislation issues like funding claimants to make their claims, the internal processing by justice. That was not the aim of the bill. I would not criticize the bill for that but we do say in the political accord there should be ongoing discussions, and it is ongoing parliamentary oversight of that that would be useful.

What else went right? At the technical level, there was a serious commitment by the federal government, as well as the Assembly of First Nations, to engage in these discussions to send top-flight people to it, and a successful technique we used was to get straight to the drafting of legislation rather than just discussing things conceptually. You can agree on principles and when you get into the detail all of a sudden you discover you did not have the agreement you thought you did. The federal government gave us

extraordinary access to the actual language of drafting legislation and that was a very successful experiment.

There must also be a link between the technical and political levels. This time, there was a political oversight process to ensure the technical people had a reality check. Bruce Carson led that up for the federal government and vice chief Atleo for the Assembly of First Nations.

The 1998 task force report, which I participated in, was path-breaking in terms of producing concepts that are now reflected in the bill. Ultimately, it did not succeed because it did not have the political connection. It was to some extent technocrats getting ahead of where the political will had been developed.

Those culminations of intensive technical engagement, connecting that on an ongoing basis with political level and parliamentary oversight, seems to be a formula that worked this time, and I believe could work in many other areas of policy development. For example, with respect to treaty clauses, I have not read your report yet, but I look forward to doing so, and maybe the same process would work with visiting certain treaty clauses that are common in a number of treaties. There are other areas where there is a need for joint policy development.

With respect to the bill, you are familiar with the details on all the important measures. It makes substantial progress. The independence issue is addressed by having judges and the political agreement addressing the AFN role in appointments.

Expeditiousness is absolutely essential, and we have the time frames, the three-year check points. By historical standards, that is a great step forward. The element of cultural sensitivity is addressed in the legislation. To make that real, we have to draft proper tribunal rules.

There is a commitment in the political agreement for the federal government and the AFN to work together in making a joint recommendation on what the tribunal rules will look like. Hopefully, that will be as successful as our other joint exercises.

Within the jurisdiction of the tribunal, $150 million means most claims are addressed in terms of financial limits, and there have been significant improvements in the clarification of what the criteria are for having access. For example, the unilateral undertakings issue is

the assurance that Wewaykum claims, which are of great concern in British Columbia, will be addressed, which has been done in a satisfactory fashion now. We have gotten most of the way.

Jointly, the other place clarified the language further in one of the only two amendments they passed, so I think we are there now.

We do have unfinished business, and members of the committee have referred to it. The rules of the tribunal will be crucial. If we replicate the Federal Court rules, there is no point. You do not want cumbersome rules that put parties to great expense and time; you want rules that get business done quickly and fairly.

Minimum filing requirements are important. We will try and negotiate that. There must be adequate funding for claimants. That is absolutely crucial. For claims above $150 million, there is a commitment in the political agreement that there will be discussions as to how to ensure they are treated equitably and get adequate attention.

They do not have access to this process in the areas they will be if and when the legislation is amended. In the meantime, people with $150 million claims do not have access other than the courts, which is rather inaccessible in many ways. They do not have access to independent dispute resolution, so it is important that the commitment to addressing claims above the cap be dealt with seriously in the years ahead.

There is a question of claimants who do not have band status. It was dealt with recently in the Supreme Court of Canada with the Papaschase case. There is a commitment to start to deal with that, which is important, in addition to reserve policy, a question implicitly raised by Senator Lovelace Nicholas. It is also something we are supposed to work on.

Hopefully, it will not be a question of saying we have the legislation; let us move on to other things. Realizing the promise of the legislation will require resources and ongoing attention.

I do agree with the note of urgency contained in the national chief's remarks and in vice chief Atleo's remarks. Anything can happen in politics. I did not expect when Prime Minister Trudeau announced his resignation that it was the prelude to his serving another term in office and patriating the Constitution.

Things happen. It would be distressing, to say the least, if after 60 years of effort we get within an angstrom unit of the finish line and something miscarries as a result of events in the minority Parliament — not that I know of any imminent crises, but anything could happen, so the faster this is enacted and given Royal Assent, the less we would be tempting providence. There is an old saying that you should never say out loud that you are happy because God might be listening. We can tempt providence less if, with respect, this can be passed quickly.

I have been an academic in this area and have spoken in this capacity now, as I have done several earlier times with this committee. I did have the honour of working with an outstanding group of people at the Assembly of First Nations, in addition to those mentioned by the national chief for whom I have the highest regard. Jennifer Brennan was also involved in number of our committee meetings.

On the federal side, even though we did not always agree and sometimes our agreements were quite strenuous, we worked with outstanding and committed people, such as Sylvia Duquette and Diana Watson and, at the political level, John Sebastian Rao and Bruce Carson.

Even if all the structural conditions are there but you do not have good people, it will still not work. Good people are never enough; we have proved that several times. You need the structural conditions of the political engagement, parliamentary oversight and so on. I do not think we could have succeeded in this time frame if there were not outstanding people on both sides.

Bob Winogron and I have been on opposite and collaborative sides of this going all the way back to 1997. I would like to make special recognition of his contribution.

This is irrelevant, but I articled at federal justice and decided I was not a bureaucrat because I do not deal well with getting approvals from everyone. It just was not me. I exercised my right to become an academic and speak freely and engage my constitutional right to be ignored.

Mr. Winogron has been the person who had to work stuff through the system. I am sure it was 10 times harder than it looked, and it looked really hard. It has always been a great honour working with him.

I do think this is a rare moment in history. This is a problem that has proved intractable for 60 years, and there has been tremendous progress, hopefully the beginning of even more progress. There will be the review and the engagement over the next five years. I consider it a great honour and privilege, one of the great professional successes in my life to have been lucky enough to be associated with this.

The Chair: Thank you, Professor Schwartz.

Senator Dallaire: The political agreement, which is a new document to me, is dated November 27, 2007, and has been referred to as the basis of this legislation. In the preamble, I read that the Assembly of First Nations and the Government of Canada have worked together on a legislative proposal with the Government of Canada culminating in the introduction of this act.

I do not see anywhere else in the act this cordial intent created, nor on its continuity, because it often refers to the draft legislation. Is this binding to ministers of the Crown ad infinitum?

Mr. Schwartz: It is a political agreement and has the status of any other political agreement. It is not legislatively protected. Therefore, you can make an argument that if the federal government changes its mind in two years, it could. It is not embodied in the legislation.

The federal government did not want to refer to it in the legislation because they were concerned that some of the political promises would then be taken as politically binding. No doubt there would be a significant price to be paid in credibility and good relations if the letter and spirit of the political agreement were not honoured, however.

Notwithstanding some previous agreements, which did not seem to be followed through, we are hoping and have some measure of optimism that, given all the goodwill on this particular file to date, that will continue. Certainly, parliamentary oversight to that effect would be most welcome.

Mr. Atleo: If I may add, it is an important question when that speaks to the discussion that has already taken place to a certain extent this evening, which I really appreciate — that is, this committee participating in supporting the implementation of the political agreement and the steps alluded to earlier as well around the implementation of the bill itself.

It is a solemn act when the national chief and the minister sign on to say they will get on with this effort and these aspects we were unable to conclude in the body of the legislation. Nevertheless, we set out a broader piece of work.

It is important that evenings like this are on the public record, when we hear from the minister and the national chief. As the former task force co-chair, I would encourage, as I am sure Mr. Carson would, that the respective principals get on with their responsibilities in the oversight immediately, as soon as this bill is brought into force, if not the conversations to begin before that.

The issue of trust is critically important. That, senator, is an important point you make. If this is about developing a new relationship, then we have to build this trust together. A truly collaborative exercise should result in that.

Understanding what Professor Schwartz has said on the legalities of the political accord, there is something much broader here that I hope we can collectively agree is in place.

Senator Dallaire: My point may come to an observation.

This is not an insignificant piece of paper. It covers all the other angles. Although the term "political" may seem pejorative in regards to "legalese," it is the Crown and a minister of the Crown signing a formal document with other nations in the country. It would behove us to come back to this periodically to make an independent double-check on exactly what is happening around this piece of legislation using this document.

The Chair: You want to keep us working, Senator Dallaire.

Senator Dallaire: You keep me up past my bedtime as it is, Mr. Chair.

Mr. Atleo: This is an important conversation. Notwithstanding, as we heard the minister say earlier, over 90 per cent of the claims are included in what has been described here. Nevertheless, there are those identified in the political accord and claims over $150 million are still claims.

The political accord in my view is an expression of not leaving anyone behind. We must vigorously implement the spirit and intent of the political agreement together with the bill. There are First Nations that deserve a fair hearing as well and the government has heard

about them in the interventions made to the committee.

In my view, the political accord is a solemn agreement that we jointly need to ensure is implemented in a vigorous fashion.

Senator Hubley: I have a question on the funding. The June 2007 announcement of the new process provided for dedicated funding for settlements. It was $250 million per year over a 10-year period with an upper claim limit of $150 million.

The minister feels that the funding will be sufficient. I would like you to comment on that with a view to ensuring there will be a sufficient number of claims settled yearly and that funding will be sufficient to do that. Also, on what basis was the amount of the annual dedicated fund determined?

Mr. Schwartz: We read it in Specific Claims: Justice as Last. In earlier years, the AFN and the federal government had a different sense of what the average settlement would be. We disagreed on how it could be extrapolated from history. If you asked the AFN what it takes to settle 30 to 50 claims per year, I suspect it would have been higher.

I want to make a few points about the $250 million. As I understand it, that does not include the cost of administration, which is important. You have to fund the people bringing the claims, the system and the federal bureaucracy to handle the claims. It also would not include settlements above the cap that would be funded by separate cabinet mandates.

Mr. Atleo: It is important for us to retain perspective. I know in my work in British Columbia there is one small First Nation on the west coast of Vancouver Island that estimated the outstanding comprehensive claim they would bring would be in the billions. That is only one of the 633 across this country.

First, this exercise is about a shared view of a process that needed vast improvement. Second, there is a tremendous backlog that is growing on an annual basis. It is about playing catch-up.

The reason I strongly believe this is a significant moment is that we are doing exactly that. There is an acknowledgment that the status quo is not sufficient.

Is it full justice at last? The historians will reflect on that and say it was a significant

improvement, a measure of justice at last.

It is important to keep these things in perspective and see it as an important step in a long journey and a historical one at that.

The Chair: Professor Schwartz, why did things go right? They went right because of people like you who have dedicated a lot to these particular issues and the leadership of people like Shawn Atleo, a great British Columbian from the province that I represent, and others.

It often goes without mention that the people who surround this chair, starting with the interpreters: Aline Fontaine from Manitoba, niece of the national chief; Hayden Trenholm and Stephen Stewart who are the assistants of Senator Sibbeston and I; Lisa Patterson; Library of Parliament analysts Tonina Simeone and Mary Hurley; and our clerk, Marcy Zlotnick. Everyone helps. It is a joint effort. We have had the privilege of being allowed to study this. We were given the privilege by virtue of our Senate appointments to do this.

It is an indication that the Senate can do tremendous work and has in the past. I can assure you that each and every one of you, including people from the PMO, the AFN, Minister Prentice and Minister Strahl's offices have contributed greatly to this. I believe that is why things went right.

I want to thank both of you for having appeared before the committee. You were concise, precise and to the point. That is what it is all about in getting this done. You have clearly cited the urgency and everyone has put forward the urgency of getting this done so that it does not die on an order paper as a result of prorogation. As Professor Schwartz pointed out, anything can happen.

I would like direction from the committee to proceed to clause-by-clause: Senator Sibbeston, Senator Peterson, Senator Lovelace Nicholas, Senator Dyck, Senator Dallaire, Senator Hubley and Senator Gustafson.

We are no longer being televised but we are in open committee. It has been agreed that the committee proceed to clause-by-clause consideration of Bill C-30, an act to establish the Specific Claims Tribunal and to make consequential amendments to other Acts.

Is it agreed that clauses be grouped by subject heading?

Hon. Senators: Agreed.

The Chair: Carried. Shall the title stand postponed?

Hon. Senators: Agreed.

The Chair: Shall the preamble stand postponed?

Hon. Senators: Agreed.

The Chair: Shall clause 1, which contains the short title, stand postponed?

Hon. Senators: Agreed.

The Chair: Shall clause 2 under the heading Interpretation carry?

Hon. Senators: Agreed.

The Chair: Carried. Shall clauses 3 to 5 under the heading Purpose and Application of Act carry?

Hon. Senators: Agreed.

The Chair: Carried. Shall clauses 6 to 38 under the heading Specific Claims Tribunal carry?

Hon. Senators: Agreed.

The Chair: Shall clauses 39 to 41 under the heading General carry?

Hon. Senators: Agreed.

The Chair: Shall clauses 42 to 43 under the heading Transitional Provisions carry?

Hon. Senators: Agreed.

The Chair: Shall clauses 44 to 51 under the heading Consequential Amendments carry?

Hon. Senators: Agreed.

The Chair: Shall clause 52 under the heading Repeal carry?

Hon. Senators: Agreed.

The Chair: Shall clause 53 under the heading Coming Into Force carry?

Hon. Senators: Agreed.

The Chair: Shall the Schedule carry?

Hon. Senators: Agreed.

The Chair: Shall clause 1, which contains the short title, carry?

Hon. Senators: Agreed.

The Chair: Shall the preamble carry?

Hon. Senators: Agreed.

The Chair: Shall the title carry?

Hon. Senators: Agreed.

The Chair: Shall the bill carry?

Hon. Senators: Agreed.

The Chair: Does the committee wish to consider appending observations to the report?

Senator Sibbeston: No. What is that?

The Chair: You can make observations.

Senator Dallaire: I do this in our collegial atmosphere. I did not get a warm fuzzy feeling

from the minister or from his staff that they have the implementation of this bill in hand within the time frames that are even articulated in the bill. If this thing goes through now, it will be approved over the next couple of weeks, which means that by October, he and his staff should be prepared to start work. I do not hold us to an observation, Mr. Chair, however, I would like a consensus that we would request the minister or deputy minister in November, which is a month after it should be implemented, to provide a review of how they are established to implement the act — organizational, funding, procedures, infrastructure — in order to meet this challenge. I bring you back to my personal experience, if I may. When we had stuff like this going forward from the department where I worked, we concurrently had a staff working on the treasury board submission because that could stall you for months. I am flexible, Mr. Chair, and perhaps colleagues would agree that we put that in our back file. It is not because he is a bad guy.

The Chair: Even if you and I and everyone else is removed from this committee, the clerk can record this and we can discuss it at a steering committee level to respond to your concerns.

Senator Dallaire: That would be fine. If the steering committee could do a review of that and I am advised if the steering committee is yea or nay, then we can discuss it subsequently.

Senator Sibbeston: The committee can make a motion to revisit the whole issue of implementation in the fall. As a member of the steering committee, I am totally in accord and I sense that Senator Hubley shares the sentiment. It need not be referred to a steering committee if we make a motion to have such a review and hearing with the minister in the fall. That would satisfy us.

Senator Dallaire: Is that binding?

The Chair: Prorogation could destroy all the work we have done, but a sessional change does not destroy it.

Senator Dallaire: That would be first class.

Senator Sibbeston: Perhaps Senator Dallaire's words can be put as a motion for us to vote on. That can be on the record for our action this fall.

Senator Peterson: For some additional comfort, I was filling in for another senator on the legal and constitution affairs committee, prior to this meeting, where they considered Bill C-31, an act to amend the Judges Act, to provide judges for this specific claims tribunal. It is moving right along and there was no push back at all. It gives a bit of comfort knowing that they are ahead of the curve.

The Chair: Bill C-31 is tied into Bill C-30 because the judges will be added to the judicial body in the country. It is all taking place. We can deal with it through a steering committee with you. I am prepared to make a commitment to you that we will review this with you as a steering committee and as a full committee as to when we want to do this.

Senator Gustafson: My feeling was that it was all negotiated in good faith. We are asking for something that is in the bill.

Senator Dallaire: The other bill, not this bill, does not necessarily reflect the nuts and bolts of how they will implement it within the department. One of our problems is that many of the witnesses have told us that the department does not have the resources because they were not allocated. They were not totally clear on whether the funding line was in the estimates for approval this fiscal year. I did not ask him for this fiscal year so I referred to the next fiscal year. It would be only reasonable and to their advantage to demonstrate that the bureaucrats are getting on with the bill.

The Chair: I have just been informed by an official from Justice Canada that the political accord is public and on the website and assures the funding aspect. If the committee wants it included in the observations, we can include the political accord, if that is possible.

I think observations may delay it but we can make reference to it, okay?

Senator Dallaire: All right.

Senator Hubley: The only reason I would prefer that we did not go with observations is because I was convinced tonight of the genuine feeling among the parties that they were satisfied and willing to accept what they considered was perhaps small and not perfect, as they said a couple of times. However, I do not want to do anything more if they are willing to accept it. I think I have done my job and have a great deal of faith in what has happened. I do not want to take away from that. I may regret this down the road.

Senator Dallaire: I used the term “observation” only as one of the instruments.

The Chair: I will commit to Senator Dallaire that his request will not fall on deaf ears.

Senator Dallaire: It is in the minutes. Thank you very much.

The Chair: Is it agreed that I report this bill to the Senate?

Hon. Senators: Agreed.

The Chair: Any senators against?

Hon. Senators: No.

The Chair: Any other business?

Senator Sibbeston: What can we do tomorrow to give third reading to this bill? Last day we had leave of the House to give third reading, and these sorts of things have happened to bills that we want passed expeditiously in the Senate. On my part, I would work with our leadership to see whether they will agree to grant leave to give this bill third reading tomorrow and conclude it.

Senator Gustafson is the only person here from the other party, so if you in turn, or yourself, Mr. Chair, talk with your leadership to see whether we can have unanimous agreement that we give third reading to this bill tomorrow, perhaps it would be possible.

The Chair: As you know, I make no bones about it, I have to be somewhere, and most of you know why. I do not have to be here. Senator Gustafson — and if he is not here Senator Sibbeston or Senator Hubley — can report the bill back to the Senate. Does anyone want to speak on third reading?

Senator Dallaire: You would not be back in time?

The Chair: I will not be here tomorrow, but I am back next week.

Senator Dallaire: I thought the ceremony was here in Ottawa.

The Chair: The AFN?

Senator Dallaire: Yes.

The Chair: All of this is important, but my survival is pretty important as well, and we will leave it at that. I am not threatened by an angry wife of 47 years, but having said that, I have to be somewhere and I have no choice.

Senator Sibbeston: Mr. Chair, if you would undertake to speak to your leader and Senator Gustafson likewise, I would appreciate it.

Senator Gustafson: I might be gone, too.

Senator Sibbeston: I will be here tomorrow. We will work with the leadership and the rest of our colleagues to seek third reading.

Senator Dallaire: We can wait for you to be back. You have been chairing this.

Senator Peterson: Tuesday would be an option, would it not?

The Chair: Yes, Tuesday would be an option. We are sitting next week, so we will do it on Tuesday if you want.

Senator Sibbeston: The sky may fall over the weekend.

The Chair: I hope not. We have passed the legislation. Is there anything else?

Senator Sibbeston: No.

The Chair: The meeting is adjourned.

The committee adjourned.
