STANDING COMMITTEE ON ABORIGINAL AFFAIRS, NORTHERN DEVELOPMENT AND NATURAL RESOURCES

COMITÉ PERMANENT DES AFFAIRES AUTOCHTONES, DU DÉVELOPPEMENT DU GRAND NORD ET DES RESSOURCES NATURELLES

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, May 29, 2001

• 1113

[*English*]

The Chair (Ms. Nancy Karetak-Lindell (Nunavut, Lib.)): The meeting is called to order.

On our agenda this morning for Tuesday, May 29, pursuant to Standing Order 108(2), we have a meeting on the 1999-2000 annual report of the Indian Claims Commission. We thought we would invite the commission to talk about their latest report and any questions that members might have on specific claims.

We have before us the co-chairs of the commission, Mr. James Prentice and Mr. Daniel Bellegarde. I give you ten minutes between the two of you to address the committee and then we'll have questions and answers.

Please go ahead, Mr. Prentice.

Mr. James Prentice (Co-Chair, Indian Claims Commission): Thank you, Madam Chairperson.

My name is Jim Prentice. I'm from Calgary. I'm the co-chair of the Indian Claims Commission. I'm proud to be here today with Dan Bellegarde, who is the other co-chair of the commission. Mr. Bellegarde and I have been working together as co-chairs of this commission since 1994, as aboriginal and non-aboriginal representatives respectively. I'm very proud to serve with him.

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On behalf of the Indian Claims Commission, Madam Chairperson, we would like to thank you for the opportunity to speak to your committee.

We are accompanied today by a number of other commissioners. Commissioners Augustine and Purdy are present today. In addition, one of our most recent commission appointees, Commissioner Dupuis, is also present with us today.

We would like to begin by acknowledging the work that a number of other Canadians have invested in this commission as commissioners—specifically former chief commissioner Harry Laforme, who is now a judge on the Ontario Superior Court, former commissioner Aurélien Gill, who is now a senator and I believe is present here today, as well. Senator Gill is a special friend of the commission, and I thank him for coming. And of course Elijah Harper has previously sat on the commission.

I would like the record as well to reflect two commissioners we have lost: Commissioner Hamelin, who passed away a number of years ago while a commissioner, and Carole Corcoran, a very distinguished aboriginal Canadian, who passed away several months ago while she was a commissioner of this commission. She was a Dene from Fort Nelson and had a very distinguished record as a Canadian advocating on behalf of aboriginal people. So we thank them and recognize the work they have put into the commission as well.

The attendance today, Madam Chairperson and members of the committee, is a meaningful one because there is an important historical relationship between the work of this committee and the Indian Claims Commission. In fact, I think it would be fair to say that this committee—or more accurately, the predecessors to this committee—has been one of the primary parliamentary architects on the subject of the independent claims body. This committee on three occasions—in 1947, 1958, and 1990 and 1991—advocated the creation of an independent claims body in Canada to adjudicate specific claims in a manner that was just and fair to aboriginal Canadians.

So there has indeed been a very close relationship between this committee and our commission. In particular, I would draw your attention to the excellent work of this committee in a report following Oka. As I have said many times, and Commissioner Bellegarde agrees, this commission really embodies a consensus that existed in Canada that in the days following Oka there was a better way to resolve these kinds of grievances.

It is important to recognize that the current Indian Claims Commission resulted directly from the recommendation of your committee in a report entitled *The Summer of 1990*, the fifth report of the Standing Committee on Aboriginal Affairs. At that time your committee recommended that the government establish a body independent of government to conduct an independent review of the validity of claims and compensation and to make recommendations to the government on acceptance of claims for negotiation. So our commission very much arose from work of your committee.

I reference this because in the paper Commissioner Bellegarde and I have presented to you, we have referred to human rights, justice, and the need for an independent claims body in Canada.

In the most recent report of our commission, which has been tabled, we fundamentally make the point that the resolution of specific claims in Canada is a very important matter, and that the time has come for the Government of Canada after some 53 years to take the next step and to create a

fully empowered independent claims body. This is the central thesis of our commission's report, and it is the matter concerning which we would like to speak to you today.

We regard the resolution of specific claims not as a government program, but rather as a justice and human rights issue. We believe that at the end of the day Canadian society will in fact be judged on the way in which these claims are adjudicated in our country.

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In our view, both aboriginal and non-aboriginal Canadians expect and deserve a properly functioning system to adjudicate specific claims. It is fair to say that in the absence of some sort of immediate institutional change, the specific claims process in Canada will continue to limp along towards an inevitable collapse.

Both Commissioner Bellegarde and I are repeatedly on record as saying that the current system is effectively gridlocked, and that some form of institutional change—reform—is essential, and that the need for that is very pressing.

In each of our commission's annual reports since 1994, we have made this recommendation repeatedly—time and time again—that Canada and first nations should work together on the creation of an independent claims body; that this body should have a legislated mandate; and that it should have the capacity to make binding decisions regarding breaches of lawful obligation and the adjudication of these historical grievances and the compensation that follows from them.

A second recommendation we have made in this annual report, and which we have repeatedly made on previous occasions, is that Canada needs to increase the level of funding available to the Department of Justice and to the Department of Indian Affairs specific claims branch to a level commensurate with the number of outstanding claims that are awaiting negotiation.

In the paper we have filed with you today there is an appendix, which has a breakdown of the number of claims. I think it's worth pausing to consider this, because it clearly outlines the scope and magnitude of the problem we are speaking of.

There are at the present time some 1,071 claims in the specific claims process. Perhaps we do a disservice by speaking of these as specific claims and using the parlance—if you will—of the legal profession. These are essentially 1,071 cases of historical grievances—disputes—which have the potential to become lawsuits involving the Government of Canada and our first peoples.

As you can see from the appendix in our paper, some 47 of these claims are presently in active litigation. Some 61 are presently before the Indian Claims Commission. There are approximately 115 claims currently in negotiation.

What is meaningful and important about this chart is that there are 408 claims that are categorized as “under review”. These are 408 situations where the Government of Canada has not yet either obtained a legal opinion itself or taken a position on the validity of the claim. These 408 claims are essentially backlogged or gridlocked in the system. These represent

aboriginal communities with important historical grievances that are unable essentially to get to first base in having these claims adjudicated under the present system.

As we have referenced elsewhere in the paper, if one examines the history since 1973, claims are being resolved by the government and first nations at the rate of fewer than eight per year. Judged against the approximately 650 claims in the system at this time, you can see that it is going to take a very long time to resolve. Justice delayed is justice denied. Our commission is of the view that this is a human rights issue and a justice issue that needs to be addressed forthwith.

We should speak briefly about the current Indian Claims Commission. I'm unsure as to whether all of you are familiar with the role of the present commission.

The vantage point of the present commission is unique in Canadian history. It is the only independent body created by the Government of Canada that has been mandated to investigate and report into these grievances.

At this point the commission has been involved in approximately 100 claims across Canada. This is a sizeable sample size—perhaps as many as one-tenth of the known claims that exist. The commission has released very detailed inquiry reports into more than 50 of these claims. Our reports are detailed, well researched, and subject to vigorous legal scrutiny.

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In a number of important areas the commission has had a direct bearing upon government policy. In a number of cases, such as treaty land entitlement issues, the government's policy has been reversed and changed in response to the commission's reports. In another area, namely the very difficult Canadian history on the prairies, involving what are known as the prairie land surrenders of the Oliver era at the turn of the century, which is a very disturbing period in Canadian history, it is our commission that has brought these events to light and has adjudicated a number of important claims brought forward by first nations.

All of this is to say that this commission has had a great deal of experience at this point. And frankly, the Indian Claims Commission right now is the only post-Oka institutional improvement in this country. It is the only fundamental change with respect to specific claims that has been made in the time since Oka.

The commission has a limited mandate, and this is the problem. The present commission has powers only to make recommendations to the Government of Canada. This is a fundamental weakness of the current body. The commission does not have the authority to make any decisions, even on procedural matters, that bind either the Government of Canada or a first nation. Certainly the commission has no powers to make an adjudicative decision that is binding either as to validity of a claim or as to compensation on the Government of Canada. This commission is proud of the work it has done, but it depends entirely upon moral suasion, credibility, and integrity to be successful. Absent that, this commission has no authority whatsoever.

Over the past 53 years in Canada there has been a consensus repeated time and time again that what is needed in this country is an independent body to adjudicate claims and to make binding decisions. This is not a novel idea. This idea surfaced in this country in the hands of your committee 53 years ago. In the 53 years that have followed, your committee has on several occasions repeated that conclusion. Virtually every respected academic person in this area—jurist, lawyer, aboriginal leader—has taken the same position: that the creation of an independent permanent body and a truly independent and empowered body is important.

We are accompanied today by Kathleen Lickers, who is immediately behind me. Kathleen Lickers is a young aboriginal lawyer in this country. She is from the Six Nations—a first nation in Ontario. I think it is poignant, and worth pointing out to you today, that when your committee first came up with this idea in 1947, it was Kathleen Lickers' grandfather who was your lawyer. At that time, Norman Lickers was Canada's first aboriginal lawyer. A special committee, a joint committee of the House of Commons and Senate, was struck to investigate this matter, and her grandfather, Canada's first aboriginal lawyer, was retained as independent counsel to that committee.

Now, one must question in these circumstances why in the ensuing 53 years these steps have not been taken and why some 53 years later the granddaughter of someone who worked on the concept developed by this committee would still be advocating that the same thing should happen, and that this would be a just and a civil thing to take place in this country. This is something we should all pause and consider. It would be one thing if the idea lacked merit or was doubtful or controversial or questionable, but virtually everyone who has examined this for the last half century has agreed that this step is necessary.

• 1130

In this context, Mr. Bellegarde and I would like to leave you with the thought that your committee has a special role, a special history, and an important responsibility in this area, just as our commission does. I will not take you through the 53-year history. It is presented in the paper; you can review it as well as I can. It underscores all of the work on this subject that has been done by many people, including the Canadian Bar Association.

Once again, to help focus some of your thoughts I ask you to visualize this: A first nation in this country has an historical grievance; the first nation we are speaking of is typically an underfunded community living in relatively impoverished circumstances on the fringe of our very wealthy society; it has an historical grievance—perhaps a questionable land surrender, perhaps a matter of a breach of a fiduciary duty—but a grievance needing to be considered. Currently, this first nation can bring its grievance before the courts, but of course it takes a great deal of money, time, and energy to do this.

The specific claims policy of the Government of Canada is the alternative available to this first nation. The Government of Canada is the defendant in this system. The Government of Canada is also the judge. Once they are submitted by the first nation, the Government of Canada judges these claims based on the legal advice of its own lawyers; the Government of Canada therefore is also the lawyer. The Government of Canada adjudicates the claim based on the legal advice, but

refuses to provide the legal opinion to the first nation, because it is subject to solicitor-client privilege.

I add to this the fact that most of the poor communities we speak of are able to access funding only through funding programs administered by the Government of Canada, so in a sense the Government of Canada is also the funding agent.

This entire process currently takes anywhere from 15 to 20 years from the time a claim is submitted by a first nation until it is resolved—if in fact it is fortunate enough to have it resolved, since most claims are not resolved. That's 15 to 20 years.

During this time it is the Government of Canada's policy not to allow the first nation to proceed with litigation. It will not allow the first nation to access the court system, and if it does access the court system, there's a default and the first nation is essentially removed from the specific claims process.

We have said it is inevitable at some time in the future that lawyers, jurists, and politicians looking at this entire situation and will say to themselves and to Canadians, “What were these people thinking?”

In these circumstances our commission has pressed forward. We operate on the philosophy that although this commission isn't perfect and it is inevitable it will be replaced by a permanent, independent claims body, this commission will have been an important foundation for that institutional change. We operate by attempting to shine, as we say, the harsh light of disclosure on these historical grievances, and on the belief that justice will be inevitable, because in a democracy governed by the rule of law, eventually there will be no place to hide and justice will be done in the context of these historical grievances.

We would like to leave with you the thought that your committee has an important role to play in this entire matter. If institutional reform is to come in this country, it will only come with the encouragement and the wisdom of parliamentarians such as yourselves. Fifty-three years is a long time, and we hope your committee will see the wisdom of pressing forward on this matter.

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Commissioner Bellegarde and I offer these comments. We discussed this ahead of time and agreed that one of us would make the presentation. Both of us are certainly available to answer any questions you have.

Thank you for your time.

The Chair: Thank you so much.

We'll start with Mr. Marceau.

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Jacques Cartier, BQ): Thank you, Madam Chair. Thank you, gentlemen, for coming here today and for your very interesting presentation.

Let me start by asking you the following question. Your 1999-2000 report does not contain any new recommendations. You merely reiterate recommendations made in previous years, noting that they are still valid.

I don't know whether you realize it or not, but this committee engaged in a rather heated debate over the fact that no commission is able to obtain a response from the government to a report that it has tabled.

In your opinion, why are your recommendations, many of which are quite valid, either set aside, shelved or forgotten?

[*English*]

Mr. Daniel J. Bellegarde (Co-Chair, Indian Claims Commission): Thank you very much.

Good morning, Madam Chair and members of the committee.

The question has a great deal to do with the kind of public policy development under consideration right now by the Government of Canada through a consultation process with the Assembly of First Nations. As a commission of inquiry, a secondary part of our mandate invlolves the responsibility or opportunity of presenting to the Government of Canada any recommendations on suggested policy changes, including those we have recommended time and time again.

I brought up this issue of why some of our recommendations were not being responded to with the former Minister of Indian Affairs at a meeting in Vancouver several years ago. Perhaps it would be best for Canada to answer this question, but the answer from my perspective as a commissioner is the government's involvement in an ongoing consultative and developmental process with the Assembly of First Nations chiefs' committee on claims called the joint task force.

Having said this, though, the commission has for ten years consistently made these recommendations. I would concede that work has been done by the parties, but I would also say that the results are not forthcoming. It is the lack of results we truly wish to impress upon this committee—the lack of results in relation to our specific recommendations on the creation of the independent claims body, but also on our recommendation that a concurrent level of resources be available to either the Office of Native Claims or a new independent claims body, allowing for the rapid settlement of those claims found to be valid.

I don't want to be an apologist for the federal government in this case; nor do I wish to advocate on behalf of the first nations. But in terms of the actual development of the independent claims body, the lack of results speaks to a lack of political will, perhaps on both sides in the issue.

Certainly we have not seen the results we would have seen if the process had been essentially supported by both sides.

• 1140 

[*Translation*]

Mr. Richard Marceau: What is your annual operating budget and how many employees do you have?

[*English*]

Mr. Daniel Bellegarde: The annual budget this year is $5.7 million. I believe we have 40 employees, and half of them are aboriginal.

[*Translation*]

Mr. Richard Marceau: Returning to the proposal calling for the creation of a fully empowered independent claims tribunal, could you explain to me why you consider this to be a desirable option? Before being elected to Parliament, I worked in the field of labour law and parties always viewed arbitration as a second- best solution. Parties by far preferred face-to-face negotiation as a means of achieving the most satisfactory results possible.

By acknowledging your desire for an independent tribunal the decisions of which would be binding, aren't you in fact admitting that the negotiation process is a failure? Aren't you saying that negotiations will never work, that there is an absence of political will on the part of the parties and that the process is doomed to failure?

[*English*]

Mr. Daniel Bellegarde: Yes, I would suggest it is an admission of failure. At least.... Again, I hesitate to speak for Canada or for the Assembly of First Nations, but as an observer of the process and as a participant in a commission of inquiry, I would suggest that the specific claims policy is indeed a failure, and this is evident throughout our submission to this committee.

I wish to make one thing clear, though. The joint task force made up of representatives of the Assembly of First Nations in Canada issued a report and we have read it. The report has a recommendation for an independent claims body with two components. The first component is to be an Indian claims commission—not ours, but another legislated one to in fact do the kinds of things you spoke about in labour law: mediation and/or binding arbitration, if this is the wish of the parties involved. But at the same time, there is to be an independent claims tribunal.

Perhaps 80% or 90% of the claims will go through the commission process to be validated, negotiated, and to have a settlement reached. But if it can't be reached through this process, there has to be another body in place that can make binding decisions on whether the claim is valid or

not. This is the model the joint task force put forward. It is the recommendation from the task force.

This not part of the commission mandate, as I said, but as an observer I would estimate that perhaps 10% of the claims may go to the tribunal. The rest would hopefully be settled through a commission process, including mediation and assisted negotiation.

[*Translation*]

Mr. Richard Marceau: This tribunal is perforce administrative in nature. Since the stakes are so high, it's entirely possible that this tribunal's decisions will be cited and that in any event, we will wind up in Superior Court, Appeals Court or even the Supreme Court and that this merely becomes another step in the adjudication process. I can't see a party that is dissatisfied with an administrative tribunal ruling not try to get the matter referred to a judicial tribunal and eventually even to the Supreme Court.

[*English*]

Mr. Daniel Bellegarde: It's a possibility. There's always a possibility that those last avenues of appeal are open to individuals within Canada.

But if I may bring it back just a bit, the main issue we have spoken about in our submissions—and that all the experts in the last 50-odd years, as Jim has mentioned, have spoken about—is not so much that, but rather the kind of injustice present within a specific claims policy, whereby the claims brought against Canada are judged by the Government of Canada itself. It is a clear conflict of interest. That is the main purpose for the independent claims body.

• 1145 

As well, the independent claims body, we believe, will be in a position to accelerate the validation or non-validation of claims, and to rapidly accelerate—if the resources are made available—the negotiation and settlement of the claims. That is the main purpose of our recommendations for the independent body.

At the end of the day, it may in fact go to the court system. But again, we're looking for expedience. We're looking for justice. We're looking for a fairer way to deal with the claims situation in this country.

[*Translation*]

Mr. Richard Marceau: Do I have any time remaining or is that it for me?

[*English*]

The Chair: We've been very generous, and we've given you ten minutes.

[*Translation*]

Mr. Richard Marceau: Thank you, Madam Chair.

[*English*]

The Chair: I'm going to let Mr. Finlay have an opportunity to put forth his question.

Mr. John Finlay (Oxford, Lib.): Thank you, Madam Chair.

Thank you, commissioners. I think you've just stated the nub of the problem. I'm not sure I like your use of the word “expediency”—“expediency” is to act fast and regret, and at leisure you can cry over your mistakes.

We're not really in that ball game. Justice, yes, and some speed, but it takes cooperation; it takes the kind of thing the royal commission pointed out. We may be getting there. But I agree with you, at the rate we're going, it's not very fast.

I'd like to know, to whom is the commission going to be accountable? To whom is the body that is going to make these binding decisions going to be accountable?

It seems to me what we're hung up on here.... If I can go to page 20 of your report, there are a number of things you present that let us know the minister and the government have been working on this. It doesn't always fall out quite as quickly as we'd like.

On page 20 you say that the recommendations of the joint task force on this independent tribunal, presented to the minister in November 1998, and subsequently considered by cabinet, were not accepted by Canada in their entirety.

Then you mention that a new model was presented in June by the Minister of Indian Affairs to the Chief of the Assembly of First Nations, and that

> It was stated by the Minister that the recommendations of the Joint Task Force formed `a significant part' of the model, however, it appears that there are significant differences. For example, the minister's proposal contemplates a $5 million cap on individual damage awards, and does not provide for the same level of funding to pursue claims that was contemplated by the Joint Task Force.

Well isn't that too bad. Maybe a cap is necessary. It's not somebody else's money. It's the taxpayers of Canada's money. The citizens of Canada's money. Anything the minister comes up with is not going to be carte blanche right down the line, quite clearly. It again needs some negotiation.

You go on to say:

> The Minister responded to the National Chief on March 21, 2001 with an elaboration of the key features of the proposed model, however, there has been no further progress to date.

That brings me to my question. What, if any, is the ICC's role in this process between the AFN and the government? Please expand on your statement that it's gridlocked owing to the absence of successfully completed negotiations on the establishment of a new claims body. Is this the only factor that contributes to the gridlock? What is the underlying factor?

Mr. James Prentice: I'll try to respond to your question.

The difficulty over the last ten years has been the inability of the government and the AFN, as represented by the chiefs' committee on claims and the AFN executive, to agree upon what this new independent claims body would look like.

• 1150 

I would like to emphasize, to go back to Mr. Marceau's very good point, that when I speak of a commission, we are talking about a body that would have tribunal capacity—adjudicative capacity—and a capacity for a commission or mediation or those kinds of responsibilities, because both the government and aboriginal people in this country have reached a consensus on one point, and that is that they do not want, in all of these cases, an independent solution imposed upon them. They want to see a body that provides for mediation and a commission-type of approach where the government and the aboriginal community work together to try to solve the claim.

The problem with the current system is that in the absence of some binding tribunal, the system has no policeman, if you will. There is no one who can push the parties along. So Commissioner Bellegarde is quite right. It may be, at the end of the day, that only 10% of the claims actually go before the tribunal for adjudication, but it's the fact that this is possible, that it's a reality, that in a sense drives the whole system and makes it work. That is what is missing now, and why, at the present time, the system isn't working.

To come back to your question, there has been a failure to agree on a number of important matters relating to the new body. I think you would be fair in pointing out that the most fundamental issue is the $5 million cap. That is probably, I think it's fair to say, the most difficult issue right now between the government and the AFN and others.

As a commission, we have not been involved in the development of this model. We have been largely bystanders to the process. We have participated in reviewing what has transpired between the government and the AFN, but this is not our model and we have not been asked to put forward our critique of the model by anyone, to this point.

One thought I would like to leave with you is that if in its wisdom, this committee feels that is a desirable thing, we would be pleased to come back and put our thoughts before you. I would also like to say that the commission operates very much on a consensus amongst the commissioners

who have been appointed, aboriginal and non-aboriginal, and we do not have a position as a commission on the $5 million cap at this point.

Clearly it raises important public policy questions. Should there be a cap? Should this tribunal have unlimited authority? If there is a cap, should it be at $5 million? Would $5 million allow these 1,071 claims to access the tribunal? What happens with a system where there is a cap and some claims can go to the tribunal while others can't? What sort of system does that create?

I would leave one question with you, and that's if we can agree as Canadians to create an independent body with expertise and well-qualified people to make these decisions, what is the merit in allowing that kind of body to hear only the small claims, and to send the more complicated claims into the judicial system to be heard by people who may not have the same degree of expertise as the commission of which we are speaking?

So these are all important questions and we would be happy to take part in the dialogue that needs to happen.

I hope I've answered your questions.

Mr. John Finlay: Well, I agree they're all important questions, but the ultimate question I asked you've also answered, and that is that the guy who pays the piper calls the tune. And I don't think you'd get something through Parliament that said this totally independent tribunal will decide, with no cap, no control, no limit, nothing. That subverts it into, in my view, what we are for, and we have to find a way....

I don't say that we shouldn't follow this path. I quite agree with you. It's too slow. After all, here we have Bill S-24 and it's been ten years since Oka, and this is not really a final settlement. But it's an interim agreement. It at least marks something going forward.

• 1155 

We all have to learn this business. Obviously you've learned it. I'm learning it as I come. There are no instant solutions, nothing is fast. We have to deal with these opinions of the first nations, and they must be respected. In the end there has to be what you're asking for. I think you make a good suggestion, and the committee will be able to discuss it, but it's not going to happen next year.

Mr. James Prentice: Could I just leave one thought with you as well, following up on your comment?

I came originally to this commission as someone with a background in claims. Frankly, I had never represented a first nation. My own particular window into this was that I had been retained as counsel for a provincial government, the Government of Alberta, on a land claim in the 1980s. That was my first exposure to this whole field.

One thing non-aboriginal Canadians need to appreciate is that these claims are not going away. It's not as though they will go away or be resolved by our not dealing with them. From a non-aboriginal perspective, they continue to become more difficult and more and more expensive to resolve. That's not to say anyone should rush in, making mistakes or doing things rashly, but the perspective Dan and I and other commissioners have tried to bring is to say, whether you look at this from the perspective of aboriginal Canadians or non-aboriginal Canadians, something has to be done, because this is a poor legacy to leave for all our children, and it will just get more expensive.

Mr. John Finlay: I wouldn't disagree with one word you've said. That's what I've learned over the last six years.

The Chair: Thank you, Mr. Finlay.

I guess Mr. Vellacott would like to wait a little bit before he gets his seven minutes, so I'll give you your next round, Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Thank you, Madam Chair.

First off, I'd like to welcome my colleague Maurice Vellacott who is just back from a trip to Israel. Welcome to our committee.

I have two fairly quick questions.

Firstly, anything that affects the Indian claims tribunal also affects the provinces a great deal. What role, if any, would the provinces play in this adjudication tribunal the decisions of which would be binding?

Secondly, would this tribunal focus solely on aboriginal land claims, or would it also deal with the problems of native women who are seeking a divorce and who do not have the same rights as non- native women when it comes to the division of assets upon the dissolution of a marriage?

Summing up, what role would the provinces play? Would the tribunal focus solely on land claims or would it consider other matters?

[*English*]

Mr. James Prentice: I think your questions can be answered very directly.

With respect to the provinces, the current constitutional situation is that the Government of Canada could not create an independent claims body that would buy into the provincial governments. The federal proposal on the table now allows for a buy-in, if you will, by a specific provincial government on a case-by-case basis. So a provincial government could agree to be bound by the decision of the commission. In our experience over the last ten years, the provincial

governments tend to monitor the work of the commission. They have observers attend at some of our sessions, but they have not taken any direct role whatsoever.

With respect to your second question, Dan may have some thoughts as well. The tribunal that has been discussed for these many years would have a very clear jurisdiction, a jurisdiction to deal with collective rights, outstanding lawful obligations that are owed to first nations per se. It would not have the ability to adjudicate individual rights or some of the issues you may be referring to.

[*Translation*]

Mr. Richard Marceau: Thank you.

• 1200 

[*English*]

Mr. Daniel Bellegarde: If I may, sir, the question of provincial involvement, of course, differs across the country. In the prairies, for instance, the Natural Resources Transfer Agreement actually compels the provinces to provide land in treaty land entitlement situations, and they have done so in Manitoba, Saskatchewan and Alberta. So their involvement is there, as part of their constitutional obligations under the NRTA.

Of course, British Columbia is directly involved because of underlying title, and Ontario as well. So the legal and constitutional involvement of provincial governments differs across the country, but they are viewed as important players in the process.

I concur with my colleague that there is a very specific purpose and a very specific scope for this proposed independent claims body, and that's just to deal with the area of claims, whether it's land or related to IMAP or Indian Act administration.

[*Translation*]

Mr. Richard Marceau: Thank you. That's all for me.

[*English*]

The Chair: Mr. Godfrey.

Mr. John Godfrey (Don Valley West, Lib.): Just following up on what Mr. Finlay said, as you look around the world or this country, do you have any model of an independent claims tribunal of any sort, on any subject, in any country, where a government is potentially exposed to limitless liability? That's the first question.

My second question is that even under a model with no cap—hence the possibility for limitless liability—would active litigation always be an option? In other words, could people always elect to take the active litigation route, or would all claims be forced into this tribunal?

Third, would decisions made by such a body have a finality to them? Would that be it, in terms of not coming back at some future time with a redefinition of rights, so the whole thing could be opened again? How final would the decision be?

Fourth, the work you've done seems to have been quite effective, on the cases you've dealt with, but there don't seem to be enough resources at play, at both your end, to be able to deal with the work of alternative dispute mechanisms, and at the government end, to be able to process them faster.

Would it get you anywhere if you had more resources to do your work and the government had more resources to respond in a timely manner, so the rate of processing went up, which might in fact draw more claims into that process because it wouldn't take 15 or 20 years?

Those are my four little questions.

Mr. Daniel Bellegarde: Sir, I'll try to respond to the last question first, in terms of whether or not we have the resources. You have to understand that the Indian Claims Commission is at the back end of the claims process. Our mandate is to look at claims that have been rejected by the crown. It's like an appeal body, and that's why we have our rigorous investigation and our community visits. That's why it's such a rigorous process. It's not the final appeal, but it is the appeal that has been set up.

This claims process has been managed since the early 1970s, since the 1973 Calder decision. Quite frankly, I don't believe the federal government had anticipated such a mass of claims coming forward. The last major change to policy, or at least to the codification of the policy, was in 1982. That was almost 20 years ago.

The claims are continuing to come forward, and I actually think they're accelerating. The system hasn't managed to adapt itself to that kind of influx of claims, and that's why the gridlock is happening. So more resources are definitely required.

One other point before Mr. Prentice addresses the legal question is that there have been other institutions in other countries. The primary one that has full binding power behind its country's constitution is the U.S. Claims Court, which adjudicated for 20 years in the 1940s and 1950s, I believe, on claims brought by the tribes in the United States. There's the New Zealand Waitangi Tribunal, pursuant to the Treaty of Waitangi, which deals with Maori claims against New Zealand. There's also the native land claims tribunal from Australia, which deals with aboriginal claims against the Australian government. So those are some examples. Whether or not they're the model that fits Canada, I cannot say right now. But there are institutions in place in other parts of the world.

• 1205 

Mr. James Prentice: There's quite a bit to talk about with the four questions. Before I lose my train of thought, I would just add a comment to Dan's on the question of effectiveness—your fourth question.

The absence of resources for the current commission is not an issue. The current commission is funded at the level of $5.7 million. We take some pride in how this commission has been administered since its creation. The commission has returned budgetary surpluses to the Government of Canada every year, in many cases significant budgetary surpluses.

So we're not here to tell you that the commission does not receive enough budgetary allocation to do its job; that's not the problem. The problem is this commission doesn't have the ability to make binding decisions. That's a significant issue. The second significant issue is the Government of Canada cannot keep up with the level of claims activity that is taking place.

We did a brief scan several weeks ago of claims where the commission was involved, in a mediation capacity. As I recall, in essentially every single claim the commission had been involved in as a mediator, the Government of Canada was on either its second or third lawyer, and second or third negotiator—in some cases its fourth lawyer. We're speaking of claims in mediation over a seven-year period.

In situations where we're involved in an adjudicative sort of role, where there's a hearing taking place, we are encountering delays of six months to in excess of a year, waiting for the Government of Canada to keep up to the process, just because it doesn't have enough lawyers, researchers, and knowledgeable people on the claims. That is becoming a significant problem. It is beginning to impair the credibility of the commission itself.

Of course, the commission has no capacity to make a binding decision, in that context, and force the government to do anything on any timetable. That's a problem. We are concerned whether the existing commission is fulfilling a useful role. It was clearly an experiment. It has been working, but it is threatened at this point because if the government cannot keep up and doesn't act on the decisions of the commission, at some point it will impair all the credibility of the body itself. That would be a big step backwards.

Coming back to your other question on limitless liability, it seems to me the models that need to be examined, as Dan says, are the Waitangi Tribunal in New Zealand; the land claims court that was used in the United States for a period of time; some of the recent developments in South Africa, frankly; and the Australian tribunal. I can't tell you, as we sit here today, whether any of those bodies have limitless liability, to use your terms. I don't believe they do. I believe they are all, in some way, circumscribed in their authority. But that needs to be considered.

In terms of limitless liability, we have that situation in Canada today. Limitless liability resides with the judiciary. A point I should have made, I suppose, on Mr. Finlay's earlier comments is that it's not as though by not creating an independent claims body we are somehow limiting Canada's liability. That liability remains; it's just accessed in a different way, through the court system. In fact, some of the most significant decisions on claims in this country, with enormous financial consequences, have been made by the courts.

• 1210

So really, all we're talking about is what is the proper authority, the most expert body, the most effective body to eliminate this horrendous backlog of claims and historical grievances. As I said, clearly the subject of a cap raise is an important public policy question, but I would certainly ask you to consider whether a cap at $5 million is an appropriate level or not.

The Chair: Thank you.

I'll give Mr. Vellacott an opportunity.

Mr. Maurice Vellacott (Saskatoon—Wanuskewin, Canadian Alliance): I'll just ask my question. I trust you'll forgive me. Just respond in a capsule version if this question was asked before I was here.

As Richard mentioned, it's rather interesting to come back from a land where there are claims and disputes going on for thousands of years. They approach it rather differently from the mechanisms of tribunals or bodies, often with some of the violence that has been there in the last number of weeks. So I'm glad we have something, I hope it can work. But I do have some questions.

First, with the adjudicators of the ICC, give me an idea of the composition of that body. What's the make-up of that? How are they selected?

Mr. Daniel Bellegarde: At the Indian Claims Commission at the present time we don't consider ourselves to be adjudicators, because we haven't, of course, got the binding authority to compel the parties to accept our recommendations. We are more of an administrative tribunal with advisory and recommendation powers. But this present commission has commissioners appointed through Order in Council, usually after consultation between Indian Affairs and the Assembly of First Nations as to the make-up of the tribunal. They're looking, of course, at geographic, gender, and aboriginal versus non-aboriginal factors as well.

As to the new, as they call it, independent claims body, I don't think they have yet arrived at a decision, but the recommendation, I believe, from the joint task force was that the individuals be experts and have good background and experience, not necessarily as lawyers, but perhaps that might come out at the end of the day—they may perhaps be judges, I don't know. I would not presume to speak on behalf of the Assembly of First Nations or INAC, nor would I preempt any kind of negotiations they are involved in, hopefully towards the implementation of the legislation that will lead to this independent claims body.

That certainly is one issue that has to be dealt with, exactly how the tribunal itself is made up, but also how the commissioners, the other part of the independent claims body, are selected. I think that's what's probably still under negotiation or discussion, if it is.

Mr. Maurice Vellacott: So at present are there certain ratios, so many aboriginals, so many non-aboriginals? Do you have any kind of quota as to who you want on that or how that's determined? Is it random?

Mr. Daniel Bellegarde: I'm not sure, but I believe there is an agreement between the AFN and INAC that there would be consultation and the names would be put forward after an agreement between INAC and the AFN. The names are put forward, and of course, it's up to the Governor in Council or the Privy Council to recommend them to the Prime Minister's Office for appointment, as I understand the process.

Mr. Maurice Vellacott: So ultimately, the Prime Minister's Office has control over those.

Mr. Daniel Bellegarde: The appointments of commissioners, yes.

Mr. Maurice Vellacott: So with the new independent body, you have no idea how they would be chosen.

Mr. Daniel Bellegarde: I'm not sure. As I say, I don't preempt any negotiations, and it's not our place to do so, but I know a couple of things were discussed. One was a process that would be akin to the appointing of judges, I believe, in this country—Jim could speak to this far better than I—where there's a committee or a formal process, a judicial council I believe. That could be an appropriate mechanism. To achieve true independence of the AFN or first nations and of Canada, you're going to have to arrive at something that clearly provides that independence in the selection of commissioners and of tribunal members.

Mr. James Prentice: I'm not sure if this adds anything or not.

• 1215 

The current commissioners are essentially balanced between aboriginal and non-aboriginal. At various points in our history the balance has been slightly one way or the other. I think at this point we are probably awaiting the appointment of another aboriginal Canadian, but the commission has been roughly in balance.

I would also like to leave with you the thought that we also take pride in the fact that on this commission, aboriginal and non-aboriginal Canadians have been able to work together in a consensus way, and I think the decisions the commission has made reflect real objectivity and impartiality.

The commission has made a number of decisions in support of first nations, but it has also made some very significant decisions that have been in favour of the Government of Canada, on, for example, the largest claim in the province of Saskatchewan, which the commission felt was not an outstanding claim. The first nation actually took that decision on to the Saskatchewan judicial system and has been advocating the claim in the judicial system. So it's important to note that there has been balance and objectivity with having—

Mr. Maurice Vellacott: Actually, James, my question is going in that direction in a bit of a follow-up to your comments. One could speak of just sheer numbers, but some may be smaller claims going one way and a big claim going in a different direction, so I would want to get beyond this recitation of three going for the government's side and three maybe more biased toward the aboriginal side.

Would you have a sense, in terms of dollar figures, or the bigger picture, whether it seems to be biased one way or the other? Specifically, would it be possible that the government would be going slowly because maybe regarding the sheer dollar figure it may be more biased in terms of a greater empathy toward the native claims? Do you understand my question?

Mr. James Prentice: I understand your question.

Mr. Maurice Vellacott: Not just sheer numbers.

Mr. James Prentice: I prefer not to use the word “bias”. I don't think there's any bias on the part of the commission. We try—

Mr. Maurice Vellacott: You used the words “goes toward the government” or “goes in the other direction”.

Mr. James Prentice: Yes.

Mr. Maurice Vellacott: In your terms, then, in terms of the dollar figure, not sheer numbers but in terms of the proportion of dollars, would you say it tends to go more toward the government side or more toward the other? Then my question from there is, is it possible that a government, of whatever particular stripe, would go slowly on that if they felt that it was, as somebody implied before, a limitless possibility, and concerns that way?

Mr. James Prentice: If a future commission weren't functioning properly and objectively, certainly it's the prerogative of the Government of Canada, in consultation, to replace the commissioners. What we're talking about is a tribunal that would have authority, but would also have responsibilities to conduct itself in a judicial way.

Mr. Maurice Vellacott: Without going so far as replacing them in this realm of politics and Parliament, and so on, they can also just simply delay implementation and drag their feet that way too. You're obviously aware of that.

Mr. James Prentice: Yes.

Mr. Maurice Vellacott: It's not a matter of just replacing. You can, in effect, do the same without having actual replacement.

Mr. James Prentice: I don't believe that's what's happening at the present time, but I respect your question.

In terms of dollar amounts of this commission's decisions, it's not possible to say what the consequences are. Our commission has been involved in decisions on whether claims are valid or not. The claims then go back to the government to be negotiated.

I can say that there are several hundred million dollars of settlement offers on the table from the government arising from the commission's work.

The last time I checked, which was a couple of years ago, the decisions of the commission in about two-thirds of the situations upheld the validity of a claim, and in about one-third of the cases, denied the validity of a claim, roughly that ratio.

Mr. Maurice Vellacott: But you can't put a dollar figure on that either way. You can say two-thirds to one-third, but you can't say that one-third denied—

Mr. James Prentice: Translated into *x* dollars?

Mr. Maurice Vellacott: Yes.

Mr. James Prentice: No, we've never looked at that.

I don't know if I've answered all your questions or not.

Mr. Maurice Vellacott: Partly you have. I wondered if you were conjecturing personally. Saskatchewan is my home province, and to say that a claim went the government way there as opposed to another....

Mr. James Prentice: Yes.

• 1220 

Mr. Maurice Vellacott: I would be surprised that you'd make that kind of assessment.

So is that more of a personal comment, then? Or do you have a kind of criterion by which you feel that you really know or have some inner sense that this is what it should be, so as to judge that it goes the way of the first nations or—

Mr. James Prentice: I'm just pointing out that there have been significant claims that have come to the commission from communities.

Mr. Maurice Vellacott: Right.

Mr. James Prentice: The commission has looked at these and discharged its responsibility and felt that the claim was not a valid one. One of the ones I speak of was in Saskatchewan. That's all I'm saying.

Mr. Maurice Vellacott: Okay.

Mr. James Prentice: There have also been many claims in Saskatchewan that the commission has investigated and found to be valid.

Mr. Daniel Bellegarde: Perhaps for clarification, as I mentioned, we don't take a look at claims at the front end when they first come, when they are first submitted to Canada. We take a look at the claims after they have been rejected. So our purpose is to look at the rejection and to say whether or not that claim was validly rejected. That is why the statement was made that it went in not so much the government's favour, that the recommendation in fact supported the government's decision not to validate, or our recommendation supported the first nation's claim for validation.

After that, it goes up to the parties, and the government can reject the recommendation. Of course, the first nation can reject the recommendation if it's against them, and they can take it further into the court system, which La Ronge has done in Saskatchewan.

Mr. Maurice Vellacott: Thank you.

The Chair: We'll go to Mr. Godfrey for the next round, and then back to one of you, and then Mr. Finlay.

Mr. John Godfrey: It's a complex process, so I'm trying to work it out to make sure I've got this completely right.

As I understand, every year into this current total universe of 1,071 claims, there are new claims coming in. What sort of rate are they coming in at—roughly, ballpark? I guess it varies from year to year, but I gather they're gaining on you.

Mr. Daniel Bellegarde: We have the figures here someplace, but on average, I think there are about 60 claims coming in every year.

Mr. John Godfrey: Sixty claims.

Mr. Daniel Bellegarde: It varies from year to year, depending on the amount of money assigned, and there's a cap as well on the amount of money available for land claims settlement through the Office of Native Claims. I believe it can rise as high as fourteen and as low as seven. It depends again on the size of the claim that is negotiated and settled, because if you have a large claim worth $90 million, of course, you can settle five, six, or ten claims under that amount. So it depends on what claim is being dealt with.

I think that's probably one of the reasons there's such a length of time. The average time for claim settlement, from research, legal submissions, to final settlement, if it's successful, is anywhere from twelve to twenty years.

Mr. John Godfrey: Because you're at the end of the process, you strip out all the ones in active litigation. They're taking another route. You'll never see them. Some of the ones you've actually dealt with may go back into litigation. So one issue in terms of the bottleneck is the capacity of

the department to negotiate something that is a yea or a nay and then gets appealed to you. So the reason you have sufficient resources for the task at hand is that there's not enough coming out of the departmental hopper, so to speak.

What would it do if, on the negotiation side, the department applied a whole bunch more resources just to speed that up and then get it to you? When I read your report, the work you have done seems to have been quite useful, at least in resolving a lot of these disputes. Would we ever gain on this process if the department just put more hands on deck and found the lawyers and went through it at a faster rate? That may, in turn, put more strain on your resources. Unfortunately, we don't have that problem yet, but is that part of an answer?

Mr. James Prentice: The short answer to your question is yes. It would do a lot of good.

As I said at the outset, there are two parallel recommendations we make. One is the need for new bodies, but the other is that the government allocate sufficient resources commensurate with the size of the problem, and that isn't happening.

• 1225 

There are cases now where the government is waiting a year, two years, three years, four years for a legal opinion before they can essentially take the first step. We now are facing situations where claimant first nations are applying to the commission, arguing that we should take the case on because the government has defaulted for so long in responding that it should be treated as tantamount to a rejection. There's one case where the first nation's been waiting for Canada to get a legal opinion for 15 years.

Mr. John Godfrey: How long did you say?

Mr. James Prentice: I said 15.

Mr. John Godfrey: Are you going to take it on those grounds?

Mr. James Prentice: That has not been decided yet. It's an issue that's before us.

The Chair: Mr. Finlay.

Mr. John Finlay: Madam Chair, following on what Mr. Godfrey was saying, I'm looking at appendix A. I'm going to ask what I hope are some fairly simple questions. There are 1,071 claims in this process since its inception, I take it, which was 19—

Mr. James Prentice: That would be since 1982, when this specific claims policy.... I'll check that.

Mr. John Finlay: Thank you. Where it says “settled, 251”, were any of those settled with the department before they got to you? Or do it mean settled by mediation before the ICC?

Mr. James Prentice: No. That means there have been 251 claims settled by the department in this roughly 20-year history we're speaking of. There would be only a small number of those where the commission has been involved.

Mr. John Finlay: But there would be a small number?

Mr. James Prentice: There would be some, yes.

Mr. John Finlay: The 408 under review, are those the ones where the first nation has taken some action, saying they have a specific claim, in addition to all the others?

Mr. James Prentice: The first nation has submitted a claim to the Government of Canada.

Mr. John Finlay: Right. “Before the ICC” means the government has responded to something, but the first nation is not happy with it, or agreement hasn't been reached, and you are assisting. Does “active litigation” mean claims you have refused or not been able to deal with, so that they have bypassed the ICC and gone to the courts?

Mr. James Prentice: Once again, these would be 47 cases where the government has rejected a claim. It is in litigation. It may or may not have had a history at our commission—probably only a small number would have.

Mr. John Finlay: So that's the alternative route.

Then it says “115 in negotiation”. That means some that were under review are in negotiation with the ministry or the department.

Mr. James Prentice: Correct. The department would have lawyers and negotiators involved in 115 cases in negotiation.

Mr. John Finlay: Right. That leaves me with the last yellow piece, claims rejected by you, closed because they ran out of money or they decided to take no further action.

Mr. James Prentice: These would be cases where the department has reviewed the claim, rejected it as a valid claim, and from the government's point of view, they've closed the file, but there's been no further action by the band. That's not to say the problem has been resolved, but the government's position is that it's not a valid claim, and the band hasn't gone to court or to our commission.

Mr. John Finlay: Would they still have the opportunity to do that, if they wanted to?

Mr. James Prentice: They would still have the opportunity to go to court. They would also still have the opportunity, if it's rejected, to come to the commission.

Mr. John Finlay: They've all been rejected, haven't they, the yellow ones?

Mr. James Prentice: They've all been rejected by the government, but not by the commission.

Mr. John Finlay: But not by the commission?

• 1230

Mr. James Prentice: Correct.

Mr. John Finlay: Okay.

Mr. James Prentice: Dan may have some comments.

Mr. Daniel Bellegarde: I would add that one can argue at great length about what the source of the statistics is. We've tried to use the government's own statistics. These figures actually come from INAC.

Mr. John Finlay: Thank you.

Mr. John Godfrey: But the rejected could include things you rejected and things the court rejected, as well as things the government rejected. Is that the overall category of rejection?

Mr. James Prentice: I believe that's correct.

The Chair: There seem to be no further questions coming from the members, so I would like to thank you for coming before the committee this morning and adding further enlightenment on what the commission does and what you hope to be doing in the future. I thank everyone for coming in this morning and the witnesses for coming before us. If you have any closing remarks, we have a few minutes.

Mr. James Prentice: It's been a pleasure and an honour for us to be here. We wish you well. I do hope you will take the time to look back on your committee's history in all of this. We certainly see a very important role for your committee in helping to make some of these important changes a reality in this country.

Thank you.

Mr. Daniel Bellegarde: I also wish to thank the committee. I would also make one recommendation, although it's not within the mandate of the Indian Claims Commission and we have no role to play in the area of either economic development or self-government.

I will leave this copy with you. It's called *Assessing the Fiscal Impacts of Settling Specific Claims*. It's done by Fiscal Realities of Kamloops. This information, of course, is not necessarily that of the AFN or of Indian and Northern Affairs. It not only talks there about the legal requirements to settle claims, but also makes a strong case for an economic and self-government rationale for claims settlement. The comparison they make is between cost minimalization, i.e. the cost of the legal obligations, which of course Canada wishes to minimize, and the cost of

investment promotion. In a case like Kahkewistahaw, which lost 35,000 acres of prime land in southern Saskatchewan in the early 1900s and now has an opportunity, because the claim is now under negotiation and close to settlement, there could a reinvestment of the lost income.

It's an interesting paper, and I think, as well as looking at the legal aspects of claim settlements and the legal obligations on both sides of treaties and other issues, we have to look at the current public policy concerning not only economic development in first nation communities and, of course, the impact on the wider society, but also self-government and the relationship of claims. I think, if I may say so, this committee might like to look at this paper in that light.

Thank you, Madam Chair. I appreciate the opportunity.

The Chair: Thank you, all.

The meeting is adjourned.