



FIRST NATIONS SUMMIT

**To: The Standing Committee on Aboriginal Affairs,
Northern Development and Natural Resources**

From: The First Nations Summit

Date: November 27, 2002

Re: Bill C-6 - Proposed Specific Claims Resolution Act

Because of the short notice provided to the First Nations Summit and the very limited amount of time available to make the presentation, this memorandum has been prepared as speaking notes rather than as a detailed legal analysis.

The memorandum has been divided into four separate parts that we believe will assist in an oral presentation. These are:

1. The shortcomings in the current specific claims policy.
2. How Bill C-6 proposes to address the shortcomings.
3. The shortcomings in Bill C-6.
4. Recommendations.

If, after the presentation, the Standing Committee would like a more thorough legal or political analysis, we would be pleased to provide one.

1. Shortcomings in the Current Specific Claims Policy

The current Federal specific claims policy, contained in the document entitled "Outstanding Business", was established in 1982 at a time when the Federal government was becoming increasingly aware of its potential legal liability for the mismanagement of First Nations' lands and assets, the abuse of power, fraud and incompetence.

However, the policy reflects the era in which it was established. It is worthwhile to remember that this policy precedes the *Guerin* decision, precedes the residential school scandals and was developed at a time when a significant amount of historical information about the management of Indians' affairs was not available to First Nations.



Since this policy was established, courts have provided a great deal more guidance as to the fiduciary duty of the Federal Crown and the right of First Nations to be consulted.

Some of the shortcomings of the policy are as follows:

- The current specific claims policy was established unilaterally and without First Nation consultation.
- As a consequence, the negotiation process is weighted heavily in favour of the Federal government, a fact that works against the actual resolution of claims.
- The Federal government maintains the dominant position in the process through the access to funding, the sole discretion to determine whether a claim is acceptable for negotiations, the refusal to provide Department of Justice rationale when a claim is rejected, and the unilateral determination of the appropriate method for calculating compensation and for discounting for risk.
- The current specific claims policy suffers because there is not internal policy capacity to compel the Federal government.
- Even in situations where the Indian Claims Commission has become involved, the Federal government is free to, and often does, totally ignore the recommendations of the Commission.
- Because the process was established unilaterally, it lacks fairness. In effect, the playing field is not level.
- This lack of fairness is reflected in a number of elements of the policy.
 - There is a profound discrepancy in the resources available to the two parties to prepare for and negotiate a claim. First Nation funding is invariably inadequate and often tied to multiple levels of Federal bureaucracy.
 - While settlement agreements usually provide for cost recovery for First Nations, the inadequacy of funding from the beginning of the process increases the pressure on First Nations to settle.
 - The lack of fairness is further reflected by the fact that while a First Nation claimant is required to set out the factual basis of the claim and to provide legal justification to substantiate a negotiation, the Federal government, and specifically the Department of Justice, is under no obligation to provide any legal justification for rejecting a claim.



- The current specific claims process also lacks impartiality.
 - Presently, there is no way to compel the Federal government regardless of the evidence for the soundness of a First Nations legal argument.
 - Although the Indian Claims Commission has authority to make recommendations, the Federal government, on many occasions, has simply chosen to ignore them.
- The specific claims process, at the present time, is neither timely or efficient.
 - Many unresolved claims have been lingering for two decades.
 - Moreover, the problem is getting worse since there are currently over 500 specific claims awaiting resolution with 50 to 60 new claims being filed each year. It is our understanding that there are approximately 8 to 10 claims settled nationally each year.
- Much of the delay in resolving claims stems from the inability or unwillingness of the Federal Department of Justice to respond in a timely manner.
 - Almost all claims take a minimum of two years simply to get a legal analysis from the Department of Justice.
- Because of the lack of fairness in the process and the inability to compel the Federal government, Federal negotiators often make “take it or leave it” demands that exceed Federal requirements for resolution of a claim and put extreme pressure on First Nation negotiators in their efforts to present a proposed settlement to membership.
 - Federal negotiators will often demand a surrender and an indemnity that far exceeds the fact situation in the claim and becomes problematic at the requisite membership meeting.
 - In addition, in claims for monetary compensation based on historic loss, Federal negotiators are unprepared to calculate this loss in current dollars by compounding the interest on the original loss. They take the position that the calculation of loss should be based on applying the consumer price index or some blend of consumer price index and bank interest tables. The consequence of utilizing this method results in a much lower settlement amount for the First Nation. However, in the *Cape Mudge* decision, Mr. Justice Titlebaum suggests that the most appropriate method to calculate loss is by compounding interest on the original loss.



- The specific claims policy is also flawed by the extremely limited capacity of Federal negotiators to offer land as a form of compensation or to ensure that any lands so provided would be reserve lands under the *Indian Act*.

2. How Bill C-6 Proposes to Address the Shortcomings of the Current Policy

In 1998 a Federal/First Nations Joint Task Force prepared a report that identified these problems and suggested a model for a specific claims process based on fundamental principles of a fairness, impartiality and timeliness.

Unfortunately, Bill C-6 diverges significantly from the recommendations in the Joint Task Force Report and renders a process that, once again, is heavily weighted in favour of the Federal government and will do little to expedite claims or alleviate the backlog of existing claims.

Nonetheless, Bill C-6 attempts to address some of the problems in the system in the following manner:

- It attempts to introduce some degree of impartiality by establishing the Canadian Centre for Independent Resolution of First Nations Specific Claims.
- It attempts to enhance the administrative efficiency of the process by establishing the Commission Division of the Centre.
- It attempts to provide First Nations with more efficient access to funding by permitting the Commission to establish criteria for the provision of funding.
- It attempts to provide assistance to First Nations through the Commission in the preparation and expeditious processing of claims by providing the Commission with powers to:
 - Administer funds.
 - Arrange for research.
 - Foster dispute resolution processes.
 - Convene preparatory meetings.
- It attempts to create a degree of fairness and level playing field by establishing the Tribunal Division of the Centre.



- It does so by granting the Tribunal quasi-judicial powers to
 - Hold hearings.
 - Establish panels.
 - Determine questions of law.
 - Summon witnesses.
 - Receive evidence including oral history.
 - Determine interlocutory issues.
 - Make binding decisions on the extent of responsibility.
 - Make binding decisions on issues of compensation up to a maximum of \$7,000,000.
- It contemplates a more equitable system of calculating compensation by
 - Empowering the Commission to assist the parties to resolve the issue of compensation.
 - Requiring that compensation shall be calculated based on principles applied by courts.

3. The Shortcomings in Bill C-6

Despite the efforts of Bill C-6 to address the obvious problems in the current specific claims policy, the legislation in its current form often tends to perpetuate many of these same problems.

- To the extent that claims are not being resolved in a timely manner, Bill C-6 does nothing to ensure that the Federal response time, and in particular the time taken by the Department of Justice to provide a legal analysis, will be any faster.
 - The legislation provides no penalty for unnecessary delay.
 - The legislation provides no assurance that the Department of Justice will employ additional manpower to expedite these claims.



- To the extent that the Federal government has maintained an unfair advantage by withholding legal analysis, there is no requirement in the legislation for the exchange of legal opinions.
- To the extent that the legislation attempts to establish a degree of impartiality by empowering the Tribunal to compel the Federal government, that power is limited to claims of less than \$7,000,000. Therefore, it only partially levels the playing field.
- Although the Commission is vested with the authority to administer funds, that administration is subject to the appropriation of those funds. Therefore, there is no assurance that the gross disparity in resources will be addressed.
- This policy is, in certain ways, more restrictive in terms of the types of claims that can be accepted. In particular, claims that involve matters within the past 15 years and claims that are currently before the courts are no longer acceptable for negotiation.
- A very serious problem exists with section 57(1) which provides that, if compensation is awarded by the Tribunal in relation to the unlawful disposition of reserve lands, all of the rights or interests of the claimant in the lands are extinguished. In effect, although the original unlawful disposition pertains to the First Nation interest in reserve land, the award of compensation would result in the extinguishment of the First Nation's aboriginal title in the land. This could have profound effects for First Nations seeking to negotiate treaties.
- To the extent that the legislation seeks to achieve impartiality in the process, the requirement that appointments to the Commission and Tribunal are matters solely in the control of the Minister of Indian Affairs has the effect of denying impartiality.
- There does not appear to be any mechanism apart from the courts in which to address claims larger than \$7,000,000 if the Federal government refuses to negotiate those claims. Currently, there is recourse in such situations to the Indian Claims Commission.

4. Recommendations

In order to enhance this legislation and to better ensure that the objectives of First Nations are met in the specific claims process, the First Nations Summit recommends amending Bill C-6 in the following manner:

- i Provide First Nations with an opportunity equivalent to that of the Minister of Indian Affairs to make appointments to the Commission and to the Tribunal.
- ii Include a section in the legislation that would financially penalize the Federal government for unnecessary delays in analysing or processing a specific claim.



- Đ Ensure that there is a quid pro quo on the exchange of all legal positions and justification for positions taken.
- Ñ Ensure that Federal negotiators have the capacity to offer First Nation claimants land where the claim is based on the loss of land, or ensure that, if a First Nation purchases land in such a situation, that land will become reserve land.
- Ò Amend section 57(1) to make it clear that there is no extinguishment of a First Nation's aboriginal title where the claim relates solely to a First Nation's interest in reserve land.
- Ó Delete the provisions that would deny a claim because a First Nation has commenced litigation in relation to those matters or where the matters have occurred within the past 15 years.
- Ô Eliminate the \$7,000,000 cap on claims that can be heard by the Tribunal.

