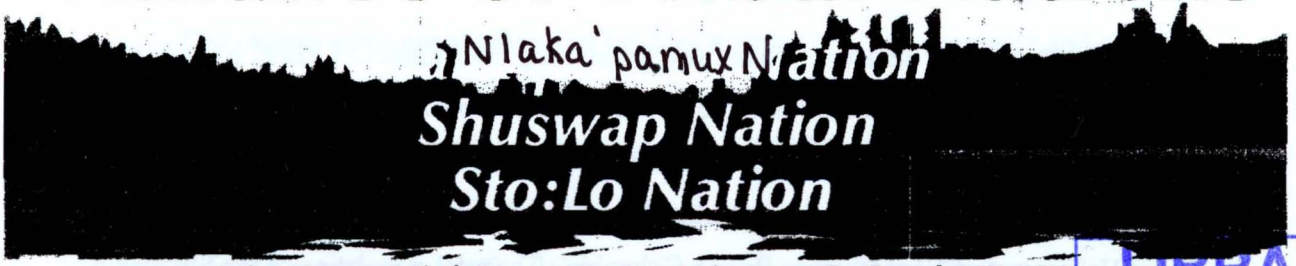
Alliance of Tribal Nations



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BRIEF TO THE SENATE STANDING COMMITTEE ON ABORIGINAL PEOPLES

ON

BILL C-6

"THE SPECIFIC CLAIMS RESOLUTION ACT"

PRESENTED ON BEHALF OF THE ALLIANCE OF TRIBAL NATIONS

BY

GRAND CHIEF CLARENCE PENNIER

***STO:LO YEWAL SYIAM*, STO:LO NATION**

JUNE 4, 2003

Good evening, Senators. Thank you for inviting the Alliance of Tribal Nations to make this presentation to you on Bill C-6, *The Specific Claims Resolution Act*. My name is Clarence Pennier. I am a Grand Chief and the elected *Sto:lo Yewal Syiam*, the political leader of the Sto:lo Nation. Our peoples' traditional territory encompasses the Fraser River Valley east of Vancouver in British Columbia. The total population of the Sto:lo Nation is over 6,000, with most of our citizens being young people under the age of 25 years. For our Nation, the quest for justice and a fair resolution of our bands' many specific claims is tied directly to the quality of life our youth and future generations will be able to enjoy.

I am appearing before you tonight on behalf of the Alliance of Tribal Nations, whose membership includes most of the 24 bands comprising the Sto:lo Nation, as well as several more bands of the Shuswap Nation. The Alliance of Tribal Nations was established in 1985 by three tribal organizations to support our peoples' efforts to stop the Canadian National Railway from twin-tracking its main line through the Thompson and Fraser River valleys. The Fraser River Valley is where our home and fisheries have been located since time immemorial. It is also the location of British Columbia's main transportation and utility corridor. Through the Alliance, our efforts were successful and the CNR was stopped in its tracks, literally.

Over the past 18 years, the Alliance also has been mandated to research and develop specific claims against the Government of Canada on behalf of our membership. To date, over 50 specific claims have been researched by the Alliance, with another 20 at various stages in the research process. Most of these claims involve the improper taking of railway rights-of-way by the CNR and CPR from our bands' small reserve land-base. These claims generally include impacts from railway construction and operations on riverbank erosion, farmland, timber, traditional-use sites and fish habitat. It is important to note that our reserve lands also are crossed by major highways, telephone lines, fibre optic cables, hydro transmission lines and natural gas pipelines.

Our reserve lands are small in size but they have a very high economic and social value to our people. Given their location in the Fraser Valley corridor, they also have a very high value to the economy of the Lower Mainland of BC as a whole.

Over the years, our member bands have been cautious about prematurely submitting their completed specific claims to the government. This is because of Canada's ongoing conflict-of-interest in the current specific claims process, the lengthy delays in the process, the huge backlog of claims awaiting validation by the Minister, and the failure of government policy to accommodate significant advances in the definition of our legal rights in court. The members of the Alliance have submitted a dozen claims to Canada for resolution through its specific claims process. To date, none of these claims have been settled. (Beyond the railway claims, Sto:lo bands have many other potential specific claims that have not yet been researched.)

Our member bands are anxious to settle their specific claims. In recent years, we looked forward with anticipation to a meaningful reform of the specific claims process based on the *Joint Task Force Report* of 1998. Upon that basis, we thought we might be able to submit our specific claims to a resolution process that was truly independent, fair and timely. Instead, the Minister of Indian Affairs unilaterally brought forward Bill C-6, *"The Specific Claims Resolution Act"* – a measure that fails miserably on all three counts.

Senators, the Alliance of Tribal Nations has reviewed the testimony given to you by most of the previous speakers, including the Assembly of First Nations. We share all of the fundamental concerns about Bill C-6 expressed by the AFN. These are outlined by the Alliance in Document 1 of the Appendix to this brief. We believe that this piece of legislation is so flawed and so different from the *Joint Task Force Report* that, if passed in its present form, it will create a process that is even worse than what we have at present. In this regard, I recommend to you a guiding principle of medical practice: *above all else, do no harm*.

I realize that our time before you tonight is short. I do not want to repeat what others have already said. So, in our presentation we will focus primarily on one major

component of Bill C-6 – Section 26 – and we will also refer to one major omission from the Bill: the lack of a non-derogation clause. Before I do so, I wish to comment briefly on the process that has moved Bill C-6 through Parliament to this point.

Senators, others have informed you that when Bill C-6 came before the House of Commons Standing Committee on Aboriginal Affairs a great many First Nations asked to appear and testify but were turned away. The Alliance of Tribal Nations was one of the few "lucky" invitees. However, in our case, the Commons Committee allowed Councilor Ken Malloway only 5 minutes to make our presentation on Bill C-6, with another 10 minutes for questions. We found our time allocation, as well as the general timeline that the Commons Committee followed on this Bill, to be wholly inadequate and extremely disrespectful to our Nations.

The Minister of Indian Affairs failed to consult First Nations on Bill C-6 prior to its introduction in Parliament. It was "fast-tracked" by the Commons Committee and rammed through Third Reading in the House. The Alliance of Tribal Nations knows all about fast tracks – and we know when our Nations are being railroaded!

Now Bill C-6 is in the Senate, the chamber of Parliament charged with the constitutional responsibility to give "sober, second thought" to legislation passed by the Commons. If ever there was a bill in need of a careful "rethink" by the Senate, it is Bill C-6.

In our Sto:lo communities, we cherish and respect our elders because of their knowledge, wisdom and experience. Senators, you are the "elders" of Canada's Parliament. In a similar spirit of respect, I encourage you now to apply your knowledge, wisdom and experience to the task before you – and to do so in a thorough, deliberate manner.

With respect, I encourage you to take the time necessary to hear from all the First Nations who wish to testify before you on Bill C-6. (In doing this, you can repair some of the recent damage done by the Other Chamber to Parliament's reputation amongst our people.)

With respect, I encourage you to recall Dr. Bryan Schwartz and Mr. Rolland Pangowish of the Assembly of First Nations so that they can complete their testimony and provide you with a full, in-depth analysis of Bill C-6 and how it differs fundamentally from the draft bill set out in the *Joint Task Force Report.*

With respect, I also encourage you to seek advice from independent experts, such as Mr. Justice Gerrard LaForest and the Canadian Bar Association.

The Alliance of Tribal Nations believes that the Parliament of Canada has a fiduciary obligation to consult fully and meaningfully with First Nations when it considers legislation that directly impacts on our peoples' rights and interests. We believe that this duty overrides any fast-track legislative timetables manufactured to burnish the "legacy" of a retiring Prime Minister.

Respectfully, we urge this Committee of the Senate to do its duty.

Take the time needed to hear what our people have to say about Bill C-6.

Take the time to hear what the experts have to say.

Take the time to deliberate on how best to address the numerous weaknesses in this Bill, as well as the Bill's total lack of support by First Nations.

If this means that your work on Bill C-6 is not completed by the time Parliament recesses for the summer, so be it. Our Nations will see that as a sign of respect and will thank you for carrying out your fiduciary duties conscientiously.

Now , I will turn to the two substantive issues I mentioned earlier.

The Alliance of Tribal Nations calls the Committee's attention to a substantive and important omission from Bill C-6: **the lack of a non-derogation clause**. We note that a non-derogation clause was included in the draft bill developed by Canada and our First Nations in the *Joint Task Force Report.* Its absence from Bill C-6 therefore arouses our suspicion. We are aware that the Department of Justice wants to strike out all non-derogation clauses from existing federal laws retroactively. This arouses our suspicion even more. It is only natural that we consider the lack of a non-derogation clause in Bill C-6 to be a threat to our First Nations' rights and interests. If non-derogation clauses did

not help protect our rights, would the Department of Justice be making such a big deal about getting rid of them?

I do not want to repeat what others have already said about the lack of a non-derogation clause in Bill C-6. Instead, I refer the Committee to the concerns raised on this subject by the Assembly of First Nations. The AFN's concerns are shared equally by the Alliance of Tribal Nations. In the end, if Bill C-6 is to be passed by Parliament, it must include a non-derogation clause.

The second fundamental concern we wish to raise in this presentation is **Section 26 of Bill C-6.** This section sets out key policy changes intended to govern the submission of specific claims to the proposed Commission. It is among the most damaging provisions in the Bill for First Nations in British Columbia.

Senators, 44% of the specific claims submitted to Canada since 1970 have come from First Nations in British Columbia. Out of the 506 claims in the current "backlog" awaiting action by Canada, 246, or 48%, are from First Nations in BC.[1] Clearly, the impacts and outcomes of Bill C-6 will affect more claims from BC than from any other region in Canada. We ask you to give this fact special consideration.

In British Columbia, Indian reserves were established in three ways:

-- by treaties in southern Vancouver Island and in the northeast part of the Province;

-- by unilateral undertakings of Crown agents, such as colonial governors and Indian reserve commissioners; and lastly,

-- pursuant to legislation that established a Royal Commission from 1913 to 1916, known as the McKenna-McBride Commission.

Most Indian reserves in British Columbia were established by unilateral undertakings of the Crown – by Governor James Douglas from 1848 to 1865, by other colonial officials from 1866 to 1871, and then by Indian reserve commissioners from

[1] Data from Specific Claims Branch, DIAND: "National Mini Summary," "Summary by Province – B.C." and "Public Information Status Report – British Columbia Specific Claims." All SCB information covers the period 1 April 1970 to 30 June 2002. Also, please refer to Charts 1 and 2 appended to this brief.

1875 to 1910. Many specific claims from First Nations in BC involve unilateral Crown undertakings to set aside reserve lands.

I know first-hand from my work with the Sto:lo Nation and the Alliance of Tribal Nations that the Department of Justice refuses to accept specific claims based on unilateral Crown undertakings – particularly when they concern the size and location of reserve allotments and the failure to set aside reserves pursuant to instructions. The Department of Justice takes a very narrow position: *such unilateral undertakings never create lawful obligations on the Crown.* It is this limited Department of Justice position that is set out in Section 26, paragraph (1) of Bill C-6.

It is NOT a view accepted by First Nations.

It is NOT a view supported by the Courts.

The Department of Justice's rejection of lawful claims based on unilateral Crown undertakings was contested before the Supreme Court of Canada three years ago in the *Ross River* case. The Sto:lo Nation intervened in *Ross River* as part of a coalition of "interested" First Nations in BC who wished to challenge the DOJ on this very issue. In the end, the Supreme Court of Canada rejected the position of the Department of Justice, ruling on this point that unilateral undertakings by Crown agents could indeed create lawful obligations on the Crown.

Last Fall, when we first had an opportunity to review Bill C-6, we were astonished and outraged to find that Section 26 incorporated the same narrow position on unilateral undertakings that was rejected by the Supreme Court of Canada less than two years ago! In Section 26, paragraph (1), the Department of Justice hopes to entrenched in statute its failed legal position, in order to limit up-front the kinds of specific claims that the proposed Commission and Tribunal could accept for negotiation and settlement. This is extremely unfair to our Nations – and it is illegal!

Section 26, paragraph (1)(a) limits Canada's lawful obligations to those arising from an agreement, a treaty, or from Canadian or colonial legislation. Lawful obligations concerning Indian lands that arise from unilateral Crown undertakings, such as Imperial instructions, Letters Patent, orders-in-council, instructions to Crown agents and

commitments made on the ground by Crown agents to First Nations, are excluded from these criteria. Specific claims based on such unilateral Crown undertakings would be barred by statute from being filed with the Commission! Litigation would be the only option available to First Nations for settlement of these claims – assuming they could afford the cost.

In British Columbia, an entire class of pre-confederation claims, known as "Douglas Reserve" claims, would be barred at the door of the Commission. Numerous other specific claims in BC involve the establishment, or failure to establish Indian reserves by Indian reserve commissioners and they too would be barred at the Commission's door.

Let me give you a quick example of the kind of specific claims that would be barred from the proposed Commission and Tribunal under Bill C-6.

In 1863, Sir James Douglas, Governor of the Colony of British Columbia, instructed the Royal Engineers to consult with the chiefs of the Sto:lo Nation and to set aside reserves for each community that would enclose and protect all our villages, fisheries and gardens. Already, white settlers were flooding into the Fraser Valley because of its agricultural potential. The Royal Engineers carried out their instructions and in 1864 set aside and marked out on the ground 15 reserves for the Sto:lo communities comprising a total of 40,000 acres. The Royal Engineers drew a large sketch map showing the location and boundaries of these reserves, as well as the amount of acreage in each.

In 1865, a new colonial administration came to power dominated by settler interests. In 1868, the Chief Commissioner of Lands and Works decided that the Sto:lo "Douglas Reserves" were too large and unilaterally proceeded to reduce them in size. By the end of that year, our Sto:lo communities were left with 22 small reserves, comprising only 3,761 acres – or a reduction of over 90%! No compensation was ever paid to our people.

Between 1870 and 1874, our chiefs petitioned the Colonial Governor of BC and the new federal Indian Commissioner, protesting the loss of our reserve lands – but to no

avail. In 1879, some of our remaining reserves were enlarged a bit by the Reserve Commissioner of the day – but we were still left with less than 15% of the acreage of our original "Douglas Reserves" and the Government of Canada refused to pay compensation for the loss.

In 1997, thirteen bands of the Sto:lo Naion submitted a specifc claim to the Government of Canada for restoration of their "Douglas Reserve" lands or some other acceptable remedy. In 1999, the Government rejected the claim. It is now pending a hearing before the Interim Indian Claims Commission.

Meanwhile, our "Douglas Reserve" lands continue to be alienated by the federal and provincial governments, making them unavailable for settlement of either specific claims or treaties.

I call the Senators attention to the recent experience of one of the thirteen claimant bands, Soowahlie, whose "Dougals Reserve" lands encompass the site of Canadian Forces Base Chilliwack, which was closed by the Federal Government in 1997. A small portion of the huge military base was set aside for possible treaty or claim settlements but the lands set aside are mostly contaminated from military use. The rest of the base, including 388 former military housing units, has been given to the Canada Lands Company for redevelopment purposes. Because of Canada's rejection of this specific claim – a claim based on a unilateral undertaking of the Crown in 1864 – and because of Canada's action to alienate the most valuable land under claim, the Soowahlie Band has been forced to go to court.

Instead of economic and social benefits from a negotiated settlement of their "Douglas Reserve" claim, the people of Soowahlie face significant legal costs and deferral of key economic and social development initiatives. As I said at the outset, above all else, it is our young people who will benefit the most from claims settlements but they are also the ones who will pay the highest price if Canada continues to deny its lawful obligations to our people.

The experience of the Soowahlie Band shows that, instead of reducing litigation and legal costs to First Nations and to the taxpayers of Canada, litigation of specific claims is certain to increase if Bill C-6 is passed and proclaimed in its present form.

The Sto:lo "Douglas Reserve" claim is but one of many specific claims from First Nations in BC that involve unilateral undertakings by the Crown. The Alliance of Tribal Nations has done a summary evaluation of the specific claims from BC currently in the "backlog" plus the 27 BC claims that Canada has already rejected. Our conclusion is that almost 30% of these BC claims would be barred from being filed with the Commission under the criteria set out in Section 26, paragraph (1).[2]

For First Nations in BC, Bill C-6 is not a specific claims resolution act. It is a specific claims extinguishment act!

The Alliance of Tribal Nations notes that the Federation of Saskatchewan Indian Nations has proposed to you that all of the wording in Section 26 be deleted and that the wording from section 10, paragraph (1) of the draft bill in the *Joint Task Force Report* be substituted in its place. We believe that this change would be a significant improvement in the Bill. But by itself, it is not nearly enough.

For this change to be operational, the $7 million cap on claims for validation by the proposed Tribunal would have to be eliminated. If this were done, then the same would have to be done for the cap on claim settlement dollars that the Tribunal could award. And so on.

The Alliance of Tribal Nations remains convinced that the flaws in Bill C-6 are so fundamental and so numerous that the best course of action is a complete overhaul of the Bill, in consultation with First Nations, to bring it into line with the provisions of the *Joint Task Force Report*.

To date, the Minister of Indian Affairs has refused to withdraw the Bill and return to the table with our nations. He claims that Bill C-6 is the same as the *Joint Task Force*

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[2] Data from SCB, DIAND: "Public Information Status Report – British Columbia Specific Claims" for the period 1 April 1970 to 30 June 2002. Includes BC claims in current backlog and BC claims previously rejected (total = 273). Does not include BC claims currently in active negotiations, those referred to the ICC, or those classified as "inactive" or "file closed" by the SCB.

Report, except for two provisions: the "cap" and the appointment process. Either the Minister is grossly uninformed about his own bill, or he is deliberately misleading Parliament. Either he and his officials should be censured for incompetence, or the Minister deserves to be found in contempt of Parliament.

The Minister is not the only one who can sit down with our people to overhaul Bill C-6. The House of Commons Standing Committee on Aboriginal Affairs could have done so – but chose instead to fast-track the Bill and allowed no substantive amendments.

Now the Bill is before this Senate Committee. You too have an opportunity, through these hearings, to extend and deepen your consideration of this Bill. You have an opportunity to overhaul it in partnership with our First Nations.

On behalf of the Alliance of Tribal Nations, I respectfully recommend that you take up this challenge and pursue this very course of action.

Thank you, Senators, for your time and attention. I am happy to answer any questions you may have.

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Alliance of Tribal Nations
June 4, 2003

APPENDIX

DOCUMENT AND CHARTS