Standing Committee on Aboriginal Peoples
Senate of Canada

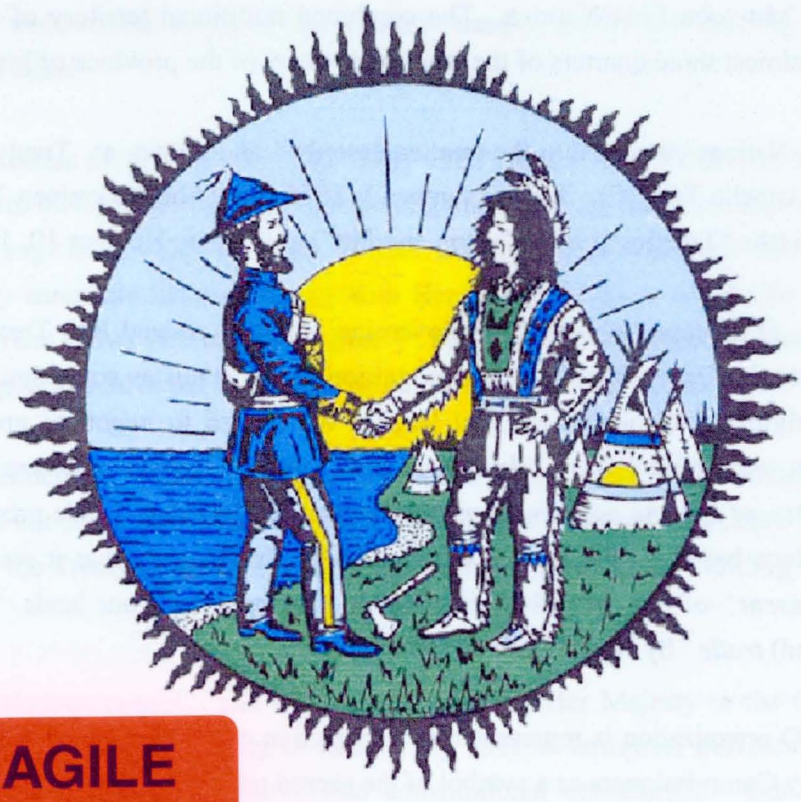
IN THE MATTER OF

BILL C-6, ***An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation and resolution of specific claims and to make related amendments to other Acts***

"The Specific Claims Resolution Act "

Submission of the
MANITOBA KEEWATINOWI OKIMAKANAK, INC.

May 27, 2003



Prior to the tabling of Bill C-6 by the Minister of Indian Affairs and Northern Development on October 9, 2002, the First Nations of Canada and the Government of Canada had expressed an interest in establishing a dispute resolution process to resolve existing and future First Nation claims against Canada. First Nations and Canada had previously agreed - as recommended by several Committees, Inquiries and Royal Commissions - that such a dispute and claims resolution process must be *jointly arrived at* through the mutual consent of First Nations and Canada, must be *independent* of perceived or actual undue influence by the government of Canada and must be *effective* in resolving claims. The Manitoba Keewatinowi Okimakanak, Inc. (MKO) continues to be supportive of the objective of establishing an Independent Claims Body.

It is with regret that MKO must advise this Committee that the mechanism proposed under Bill C-6 will not be joint, independent or effective.

MKO represents some 60,000 Treaty First Nations people who are members of the thirty northern-most Manitoba First Nations. The combined traditional territory of the MKO First Nations covers almost three quarters of the lands and waters of the province of Manitoba.

The MKO First Nations entered into the treaties described and known as Treaty Number Four, 1874 (the "Qu'Appelle Treaty"), Treaty Number 5, 1875-1910 (the "Winnipeg Treaty"), Treaty Number 6, 1876 (the "Treaties at Fort Carlton and Pitt") and Treaty Number 10, 1906-1908.

Our forefathers, as representatives of our Sovereign Nations, entered into Treaty negotiations with Her Majesty the Queen based on the recognition of our status as sovereign Nations and as holders of aboriginal title to our ancestral lands. We agreed to negotiate upon the express undertaking that we would jointly *"deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and* (our forefathers) *on the other."* We proceeded with the Treaty negotiations based on the further recognition by Her Majesty that it was necessary to *"obtain the consent"* of our forefathers in order to *"to open up"* our lands *"for settlement, immigration* (and) *trade"* by Her Majesty's *"other subjects"*.

Today, the MKO organization is represented by a depiction of the Treaty medal provided by her Majesty's Treaty Commissioners as a symbol of the sacred relationship that persists between our Nations and Her Majesty. The Treaty Medal clearly depicts a Treaty Commissioner entering into First Nation Lands - as a guest - to negotiate and enter into Treaty, to meet with and make an

agreement with the leadership of the government within the homelands of each First Nation. The Treaty medal represents our joint commitment to nation-building with the objectives of sharing, peace and goodwill and a relationship founded on principles of mutual faith, recognition, honour and respect.

Her Majesty sought the consent of our forefathers to share our ancestral lands and resources with settlers and it remains that our consent is required before changes to the terms of our Treaties will be accepted by our Nations or by our people. Mutual consent is the binding principle of Treaty.

A modern day Treaty is highly detailed and supported by legal opinion. The intent of the arrangement as expressed through the text of the modern Treaty document has all the "i's" dotted and the "t's"crossed, together with several schedules, appendices and maps. However, the original Treaties were entered into on the basis of faith, between peoples who spoke different languages and came from different cultures and societies in order to make a commitment to build a nation together and to share the lands that would be used by the settlers entering our homelands and First Nations alike.

The numbered Treaties of the late-1800's and early 1900's create a higher duty of honour for both parties and is more than just a matter of interpreting and honoring the specific words that appear in a modern arrangement. Our Treaties reflect the solemn commitment and faith of First Nations to jointly enter into nation-building with Her Majesty's government *"for as long as the sun shines, the grass grows and the rivers flow"*. This commitment incorporates the obligation to renew, develop, and evolve our nation-to-nation relationship as time goes by.

Our joint commitment to nation-building is not frozen at one moment in history, but must be understood in its contemporary form as events take place and as our respective Nations grow. Bill C-6 violates the Treaty relationship, our joint commitment to nation-building and the honour of the Crown.

The MKO First Nations cannot - and will not - accept that Her Majesty or the Government of Canada has, or ever had, the capacity to unilaterally alter or terminate our sacred relationship through subsequent domestic legislative and constitutional enactments. Our Treaties were entered into between Sovereign Nations and can only be modified or affected by the joint consent of the Treaty signatories. It is the position of the MKO First Nations that our Treaties

were entered into between Sovereign Nations and as such, our Treaties are not governed according to the domestic laws of Her Majesty's realms, but in accord with the International Law of Treaties.

The 1994 Draft United Nations Declaration on the Rights of Indigenous Peoples , and in particular, Article 36, provides that:

> *"Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned."*

Similarly, the Vienna Convention on the Law of Treaties [May 23, 1969], provides:

> *"every treaty in force is binding upon the parties to it and must be performed by them in good faith"* [Article 26], and;
>
> *"a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"* [Article 27], and;

Although it is now the second year of the 21st century, neither Her Majesty, the Government of Canada nor the Minister will dispute that the Treaty promises and provisions have yet to be fully implemented and that there have been frauds and abuses by officials of Government, particularly in relation to lands, moneys and other assets.

Establishing a joint and independent process for the resolution of disputes and claims between the Treaty signatories is consistent with the terms of Treaty and the promises of the Treaty Commissioners. Establishing a joint and independent process for the resolution of disputes and claims is also consistent with upholding the honour and the fiduciary duty of the Crown. The creation of a joint mechanism to resolve claims arising from breaches of the Treaties also expresses our enduring Treaty relationship in a contemporary form, while reflecting changing events and the evolving needs of our respective Nations.

On November 25, 1998 a Joint First Nations-Canada Task Force on Claims Policy Reform (JTF) presented the *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body* (*Drafting Instructions*), setting out the consensus resulting from this joint process. These *Drafting Instructions* set out the proposed structure of new federal legislation to establish an Independent Claims Body (ICB). In December, 1998, the Assembly of First Nations approved in principle the JTF *Drafting Instructions* by Resolution.

The 1998 JTF *Drafting Instructions* setting out the scope, powers and structure of an ICB represent the result and outcome of more than eighteen months of joint efforts by First Nations representatives and the federal departments of Indian Affairs and Justice. The ICB that would result from implementation of the 1998 JTF *Drafting Instructions* has been endorsed in principle by the Assembly of First Nations. The MKO First Nations provided their implicit support through MKO Resolution 2000-06-03 and their explicit support through Resolution 2001-06-31.

On June 13, 2002, the Minister of Indian and Northern Affairs introduced Bill C_60, "an act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation and resolution of specific claims and to make related amendments to other acts". Bill C-60 was also known as the *Specific Claims Resolution Act*.

The proposed legislation would have established the Canadian Centre for the Independent Resolution of First Nations Specific Claims. The *Specific Claims Resolution Act* has been reintroduced as Bill C-6 and was given first and second reading and referred to Committee on October 9, 2002.

MKO Resolution 2001-06-31 called on the Minister of Indian and Northern Affairs to ensure that any legislation establishing an Independent Claims Body (ICB) is consistent with the ICB model recommended by the Joint First Nations/Canada Task Force on Specific Claims (JTF).

Bill C-6 is not consistent with the recommendations of the Joint First Nations/Canada Task Force on Specific Claims in several important respects, including the independence of the claims commission, the structure of the claims commission and the appointment of Commissioners and Tribunal members, the effectiveness and efficiency of the claims commission, the scope of claims to be considered and the maximum amount of the compensation awards.

For example, under subsections 20(1) and 41(1) of Bill C-6, members of the Commission and

Tribunal, respectively, are appointed by the Governor in Council on the recommendation of the Minister. There is no provision for a joint recommendation by First Nations and the Crown. Under subsection 5(3) of the JTF instructions, persons are eligible to be appointed to the Commission and to the Tribunal only if they are recommended by the AFN and the Minister.

The report of the Joint First Nations - Canada Task Force on Specific Claims Policy Reform (1998: 14) states that:

> *"If the attached proposals are found acceptable and provide the basis for moving forward into implementation it is suggested that the First Nations and Canada begin to consider the types of* ***mutually acceptable individuals who should fill the key positions in the new body****. It may also be timely to consider the establishment of a joint advisory body to assist the new claims commission and tribunal in setting itself up."* [emphasis added]

Another difference between Bill C-6 and the legislative drafting instructions issued by the JTF relates to the matter of regional representation. Bill C-6 contains no provision for regional representation, whereas the JTF legislative drafting instructions state at subsections 5(4) and 20(4) that appointments shall be made having regard to regional representation in the membership of the Commission and the Tribunal, respectively. In that the four numbered Treaties entered into by the MKO First Nations contain promises specific to the Treaty lands and resources in question, the lack of regional representation is of considerable concern.

In terms of the legislative review process, subsection 41(1) of the JTF legislative drafting instructions states that the AFN and the Minister shall jointly undertake and complete a review of the administration of the Act, whereas subsection 76(1) of Bill C-6 states that the Minister shall undertake a complete review of the mandate and structure of the Centre, of its efficiency and effectiveness of operation and of any other matters related to this Act that the Minister considers appropriate.

The Joint First Nations - Canada Task Force on Specific Claims Policy Reform highlights the shortcomings of Bill C-6 (1998: 7):

> *"The need to eliminate the federal government's perceived conflict of interest in resolving claims against itself has now been widely acknowledged. The mandate of this*

task force was to provide a forum where federal and First Nation officials could cooperatively develop recommendations for the reform of Canada's policies. ... It is important to note that the underlying assumption for the Joint Task Force's work was that the goal of the exercise is to find a ***mutually acceptable means by which to settle claims*** [emphasis original]."

Clearly, without provisions for joint appointments and legislative review, Bill C-6 in its current form cannot eliminate any conflict of interest on the part of the Crown and therefore, does not represent a mutually acceptable means by which to settle claims.

Consistent with continuing Crown policy as established by the *Royal Proclamation*, the Supreme Court of Canada has recognized that a central purpose of the Treaties is to reconcile the original aboriginal title to the lands, waters and natural resources of what is now Canada. The significance of establishing a contemporary claims process that is joint, independent and effective and which reflects both our continuing commitment to nation-building and Crown policy cannot be overstated.

It is regrettable that the Honourable Members of the Commons Committee chose to set aside the submissions and recommendations of First Nations, including those of MKO, and report Bill C-6 to the House of Commons without amendment. It is with deep disappointment and alarm that the MKO First Nations have witnessed the Minister, the Commons Committee and the House of Commons set aside the joint recommendations contained in the November 25, 1998 *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body* and in so doing, set aside the nature of our joint Treaty relationship.

In his May 6, 2003 testimony before this Committee, Senior Legal Counsel for the Department of Indian and Northern Affairs Canada succinctly summarized the Joint Task Force process as:

> *"Over the two-year period that we looked at this question, we* (the Joint Task Force) *did a great deal of work and had strenuous debates and negotiations over the final recommendations to achieve our goals. It was a productive experience and one of the key features in that, in the end, the recommendations were all negotiated and agreed upon."*
> [emphasis added]

Also on May 6, 2003, several honourable senators also questioned the Minister and a departmental Senior Policy Advisor about their understanding as to the nature of First Nation opposition to Bill C-6. A single statement in Mr. Binda's testimony crystallizes both the Minister's breach of First Nation expectations and the fundamental basis of First Nation opposition to Bill C-6:

> *"When the JTF people were at the table - the First Nations and Canada - it was never thought that what they produced would be created."*

MKO welcomed the joint process followed in developing the 1998 *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body* and it was MKO's firm expectation that the results of the Joint Task Force process would be transferred into federal legislation establishing an Independent Claims Body. Government commitment to a joint legislative drafting process encouraged MKO political support for the JTF efforts, for the December, 1998 Assembly of First Nations resolution of endorsement and for the similar supporting MKO Assembly Resolutions.

The Minister and his officials also advised this Committee that "most of" or "the lion's share" of the *Legislative Drafting Instructions* were included in Bill C-6 and implied that this degree of government implementation of the joint recommendations should be the standard accepted by Parliament. Once again, it is this lower standard of government compliance with jointly *"negotiated and agreed upon"* recommendations that forms the basis for First Nations opposition to Bill C-6.

Former Treaty Commissioner and Lieutenant Governor of Manitoba, the Northwest Territories and Keewatin, Alexander Morris suggested that the standard be nothing less than the full implementation of negotiated arrangements between Her Majesty and the First Nations. As Treaty Commissioner, Alexander Morris negotiated Treaty numbers 3 through 6 with the First Nations of western Canada and, in 1876, concluded a treaty with refugee Sioux fleeing the United States Army. In his 1880 report dedicated to the former Governor General of Canada the Earl of Dufferin, *The Treaties of Canada with the Indians of Manitoba and the North_West Territories, including The Negotiations on which they were based*, Alexander Morris urged the government of Canada to ensure that the provisions of the Treaties he negotiated *"must be carried out with utmost good faith and the nicest exactness"*.

In order for our Treaty relationship and our joint commitment to nation-building to thrive and evolve in contemporary terms, it is essential that the Crown implement each of its commitments with integrity and honour. As part of these commitments, it is also essential that a joint, independent and effective mechanism be established to resolve claims related to the terms and promises of Treaty. This claims mechanism must be established and operate in accord with the process, spirit and intent of the original Treaty negotiations, of which the Joint Task Force process can be considered a contemporary reflection.

MKO calls upon the honourable senators to act as the present representatives of Her Majesty and to uphold the honour of the Crown. MKO suggests that a simple test and measurement be applied by the this Committee in its examination of Bill C-6:

- *does the claims resolution mechanism proposed by the Minister in Bill C-6 reflect all aspects of the recommended Independent Claims Body as jointly "negotiated and agreed upon" by the Joint Task Force, negotiating on behalf of the present representatives of the Treaty signatories?*

The MKO First Nations say that Bill C-6 fails this basic test and should be amended or rejected.

Secondly, MKO suggests that this Committee hold government fully accountable for its earlier commitments to the Joint Task Force process. It is essential for the protection of the Treaty relationship that the Crown act with the "nicest exactness" and that the Senate of Canada reject the form of legislatively imposed unilateralism being recommended by the Minister.

If it is now the view of government that the *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body* varies from the position of the Crown, then any variation or revisions must be jointly considered, negotiated and agreed upon, not imposed through an Act of Parliament.

With respect to Bill C-6 and the proposed establishment of an Independent Claims Body, the MKO First Nations recommend:

1. In that Bill C-6 affects the Treaty relationship and the honour of Crown, as well as the inherent, Treaty and aboriginal rights of First Nations, this Committee should ensure that all First Nations and First Nations organizations who desire to appear before this

Committee are afforded the opportunity;

2. This Committee report and recommend that the Senate of Canada and Government support the intent and objectives of the process initiated in 1997 through the Joint First Nations-Canada Task Force on Claims Policy Reform (JTF) and formally acknowledge the JTF process as a contemporary reflection of the process, spirit and intent of the Treaty relationship;

3. This Committee report and recommend that the Senate of Canada and Government support the establishment of an Independent Claims Body that would result from implementation of the November 25, 1998 *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body*;

4. This Committee report and recommend those amendments to Bill C-6 necessary to ensure that any Independent Claims Body established pursuant to a *Specific Claims Resolution Act* is in accord with the 1998 JTF *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body*, and;

5. In the event that the Minister of Indian Affairs and Northern Development, the Prime Minister and Government are unwilling to adopt the recommendations and amendments by this Committee, the Committee should further report and recommend that:

    a) Government withdraw Bill C-6, and;

    b) Government and First Nations re-establish the Joint Task Force process in order to consider, negotiate and agree upon any variations or revisions to the November 25, 1998 *Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body* as may be proposed by Canada.