SPEAKING NOTES FOR ASSEMBLY OF FIRST NATIONS NATIONAL CHIEF MATTHEW COON COME ON BILL C-6: THE SPECIFIC CLAIMS RESOLUTION ACT

"A CAP ON JUSTICE"

November 28, 2002

CHECK AGAINST DELIVERY

Speaking Notes for AFN National Chief Matthew Coon Come on Bill C-6: The Specific Claims Resolution Act

Introduction

- *Wachiya (Traditional Greeting)*

- I want to thank the members of the Standing Committee for being here today so we can present you with our concerns about Bill C-6: The Specific Claims Resolution Act.

- By way of a brief introduction, my name is Matthew Coon Come, National Chief of the Assembly of First Nations.

- The AFN is the national organization representing First Nations citizens in Canada, including our citizens living on-reserve and in urban and rural areas.

- Every Chief in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens. The AFN is a truly representative and accountable body. It is not a dues-paying organization or an interest group.

- There are about 80 First Nations in Canada and 633 First Nations communities.

- First Nations – or Indians - are one of three Aboriginal peoples recognized in Canada's *Constitution Act* of 1982. The other two are the Metis and the Inuit.

- We share many common goals as Aboriginal peoples, but First Nations have our own unique issues because of our unique relationship and status with Canada and the Canadian state.

- I do not want to take up too much time on the history of that relationship because we have an important piece of legislation in front of us. I want to allow as much time as possible for questions and answers so we can have an open and constructive dialogue.

- I am more than willing to brief the Standing Committee, formally or informally, at any time on the nature of our relationship, our history, and the fundamental issues facing First Nations and Canada.

- The Bill we're looking at today goes to the heart of those fundamental issues. Land is central to our identity as First Nations peoples.

- That is not a simple platitude – it is a reality. The land shaped the way our peoples think, it shaped our societies, our values, our languages and worldview.

The AFN's Position on Bill C-6

- The position of the Assembly of First Nations on Bill C-6 is clear.
- Our position is that Bill C-6 is fundamentally flawed, must be withdrawn and revamped through a return to a cooperative approach. First Nations cannot accept it.
- We agree we need legislation and a new process to deal with claims. But Bill C-6 is beyond amendments – a few amendments will not repair those fundamental problems.
- The Chiefs in Assembly at our AGA passed a resolution by consensus affirming this position.
- On the positive side, there is already a Joint Task Force Report that provides the right way to go about this.
- Contrary to a myth that is being promoted in some circles, the Assembly of First Nations is not rejecting everything. In fact, the Assembly worked with Canada to set up the interim Claims Commission, which is evidence by the existence of a second Order in Council empowering the Commission.
- First Nations are not just a special interest group or a lobby group. First Nations are owed fiduciary obligations by the Crown.
- The existing Aboriginal and Treaty rights of First Nations are recognized and affirmed in the constitution because of our special relationship to the Crown.
- First Nations have a special relationship because we were here first and facilitated the peaceful building of this country through the treaties, in which we agreed to share with the newcomers in return for the protection of the Crown and a secure livelihood.
- Little did our ancestors know that we would be left destitute and without access to adequate land and resources. Even the little reserves we were left with have been whittled away through questionable transactions that give rise to specific claims.
- Even the terms "land claim" and "specific claim" are inaccurate. Why should First Nations have to claim back our own lands? – to put it in terms Canadians understand, if you sell your land and the buyer doesn't pay, do you not still own your land?
- Now, I can give you a broad outline of our key concerns with the legislation and talk about why it is fundamentally flawed.

The Need to Deal with Unfinished Business

- The intent of Bill C-6 is, supposedly, to establish a process for the **fair** and **just** resolution of First Nations specific claims. To be truly fair and just the process must be perceived as such by the aggrieved. The defendant can't be the judge. Everyone would agree that is not justice.

- Specific claims are legal liabilities arising from the government's administration of Indian lands and other assets, as well as the non-fulfillment of specific Treaty provisions or statutory requirements.

- We have to keep that point in mind during this discussion: First Nations legitimate claims are NOT discretionary spending. They are lawful obligations. They are legal liabilities owed by the Crown to First Nations. As such they form part of the rule of law in Canada.

- The First Peoples of this land were once the sole inhabitants. Now, reserve lands represent less than 1% of the land in this country.

- Right now there is a backlog of 600 claims in the system. The pile is getting higher every day. And Canada's potential liabilities are getting higher every day. No one knows how many claims have been removed or haven't even been filed because of the perceived unfairness of the process.

- On the one hand, Canada says these claims are a priority but they only have a dozen lawyers working on them. There are 87 lawyers working on the Residential Schools issue alone.

- Don't get me wrong – the more resources working on Residential Schools the better. That's another area for reconciliation – where justice delayed will be justice denied. But that's another speech.

- My point is that it's in our mutual interest to create a fair and efficient process for resolving First Nations claims.

- There are legal and moral arguments. There are also pressing economic arguments.

- Unresolved claims create a climate of uncertainty for business, investment and economic development. That is not good for First Nations and it's not good for Canada.

- Business and Corporate Canada have been pushing the government to deal with these issues for years.

- In recent years Canada's highest Courts have been defining the fiduciary obligations of the Crown. It is clear that the government and developers have a duty to consult

First Nations and, in some cases, obtain consent before taking actions that infringe upon their rights

- The burden is even more onerous when it comes to specific claims. One need only refer to the Supreme Court of Canada *Guerin* decision of 1984 to see that the honour of the Crown is always at stake in such matters.

- Resolving these issues is a fundamental component of reconciling First Nations and Canada so we can move forward, as partners, into the future.

The Joint Task Force

- There is an existing model for a claims process that achieves this goal, and it has the support of First Nations. It was also supported by the federal government.

- That model is the report of the Joint First Nations-Canada Task Force on Claims Policy Reform.

- The Joint Task Force was established several years ago. Its members were First Nations technicians, and officials from the Department of Indian Affairs and the Department of Justice.

- The Joint Task Force delivered its report in 1998. This work was used as the foundation to create a claims resolution process that is truly fair, independent, effective and efficient.

- Where Bill C-6 fails, the Joint Task Force succeeds. I would encourage all of you to review that report before you begin trying to amend Bill C-6.

- On Tuesday Minister Nault acknowledged that the Joint Task Force model is an ideal approach. He said the problem was with the resources required. Why then do we not start with the Joint Task Force model, retain its fundamental principles and find the necessary resources in the federal budget surplus that was referred to other day?

- Why is it that this government can find necessary resources when it wants to for other issues, but not the original inhabitants of this country? We are asking you to agree with us that this issue if one of the highest priorities of this country – justice for First Nations.

- When the federal government and the AFN set up the Joint Task Force we negotiated in good faith. We left the table believing we had an agreement.

- The Minister spoke about trust in his presentation. How can there be trust when after working diligently and in good faith over many years and reaching an agreement one party simply discards the agreement and comes back with its own version?

- When Minister Nault introduced his Claims legislation in the last session of Parliament (as Bill C-60) the first thing we did was to compare it to the Joint Task Force report.

- There's a little bit of the Joint Task Force in there. But the key, essential elements of a fair, independent, effective and efficient claims resolution process are NOT there.

- Without these essential elements in place, the Bill will not succeed. It will make a bad situation worse.

- **The Members of the Standing Committee should be aware of the long-term liabilities of this Bill.**

The AFN's Key Concerns on Bill C-6

- The AFN has identified a number of key concerns.

- First, there is an inherent **conflict of interest** in the new legislation.

- Canada is already judge and jury in the current process. The new legislation retains that conflict and adds new elements.

- The federal government retains the sole authority over appointments to the Commission and Tribunal, and retains authority over the processing of claims. This undermines the perceived "independence" of the Tribunal and the Commission.

- Appointments will be made on the recommendation of the Minister, who is the same person responsible for defending the Crown against these claims.

- There was no attempt to incorporate a joint approval mechanism. These appointments cannot be left to the whims of whatever Minister happens to be in office.

- Despite claims to the contrary, consultations on appointments to the interim Indian Claims Commission were sporadic at best.

- This is a conflict situation, and it creates a system that could be ripe for political patronage. What happened to the merit principle that is supposed to be the standard for hiring?

- There are many qualified First Nations individuals, with no political connections, who should be eligible for these positions.

- We should all accept the principle that: Any claims process must be legitimate, fair and just; and seen to be legitimate, fair and just by everyone involved.

- Another concern. This Bill has been characterized as **"institutionalizing delay"**.

- Bill C-6 does not provide for any effective time-lines under the Commission process. The Minister can simply hold-off making a decision. And First Nations are left waiting for a "resolution" process to begin.

- The **cap** on claims that can go to the Tribunal will be another step backward. This is going to **severely limit the ability of First Nations to use the Tribunal**.

- How can the federal government put a "cap on justice"? Minister Nault was right in his presentation when he said there is no precedent for this proposed process – there really is no precedent for this travesty of justice found anywhere in the world. Where else would a country say we can't afford justice... We can't afford human rights...We can't afford to right a wrong.

- First Nations looking to use the Tribunal have to waive federal liability over $7 million dollars. Most claims exceed that amount so right away the majority of First Nations are excluded from the Tribunal.

- This proposed cap also removes the incentive for effective negotiations through the Commission. One of the main problems with the current system is this very lack of any incentive to reach a negotiated settlement.

- Right now, there is one final option open to First Nations. They can take rejected claims to the Indian Claims Commission, which uses mediation and a public inquiries process.

- Once Bill C-6 is passed, the ICC will be gone and that option will be gone. First Nations with claims over $7 million – which is the majority of claims – will have no alternatives but the Courts.

- Under the current system, imperfect as it is, First Nations at least have access to a Commission of Inquiry if their claims are rejected. Regardless of the value of their claim.

- This ties into another major concern of the legislation – the Bill does not provide a **substantial financial commitment to resolve claims**. A cynic could say it seems more about limiting federal liability than in settling claims.

- I realize federal legislation has to speak to fiscal realities, but I remind you that our claims are lawful and legal obligations on the part of Canada.

- You cannot put a cap on justice.

- As representatives of the Crown you have responsibilities. Your dedication should be not only to responsible fiscal management, but to your sacred responsibility as partners in the Confederation.

- Which will the Crown honour – the Treaty or the spreadsheet? First Nations view our Treaties and agreements as sacred documents that symbolize our original relationship. Our Treaties are legally and morally binding documents. They allowed for the peaceful settlement of Canada. They have the same status as articles of confederation.

- The **definition of a specific claim** in Bill C-6 is another point of contention.

- The definition has been narrowed. It's more restrictive than the current definition. Bill C-6 excludes claims arising from unilateral undertakings of the Crown and modern land claim agreements. It also narrows specific Treaty obligations to land or other assets.

- The **structure and procedures** for the proposed Centre are also more narrow and prescriptive than the flexibility recommended by the Joint Task Force.

- And finally, the legislation calls for a **review of the new claims system,** and this review is entirely at the discretion of the Minister. This is another example of a conflict of interest being built into the system.

Concluding Remarks

- Those are our major concerns about Bill C-6. It is inherently flawed and will not accomplish what it is set-up to do.

- First Nations and Canada can agree on one thing: we do need legislation in this area. But not THIS legislation.

- We have an opportunity to do things right, and we have a plan that we agreed was workable.

- Let's work together to implement the Joint Task Force model and get started on a process that really will resolve these long-standing claims.

- I agree with the Minister that the Joint Task Force model would provide an important precedent in this world, but this legislation will not.

- In our view, this bill is contrary to principles of natural justice, and its financial limitations will not substantially improve the lives of First Nation peoples.

- There is a better approach than creating legislation and imposing it on First Nations.

- I've always said: if the government tries to do things for us, they will fail. If they do things with us, we all succeed.

- The government of Canada has a fiduciary duty to First Nations. It's been recognized and upheld by the Supreme Court, most notably in the *Guerin* decision which clearly ruled that the highest standard of conduct must be applied in assessing the government's actions.

- The fiduciary duty compels the government to act in the best interests of First Nations and to consult with First Nations where our rights may be affected.

- In this case, Canada has not fulfilled its fiduciary duty. Bill C-6 does not represent the work of the Joint Task Force, work that was negotiated in good faith.

- Bill C-6 was re-introduced in the House after we made our concerns known and after we had requested a return to the cooperative development of legislation.

- It now falls to you, the Standing Committee, to carry out that fiduciary duty and uphold the honour of the Crown by withdrawing this legislation. Please don't just go through the motions and make this a hollow process.

- No one wants the Courts to become the only option. Courts are divisive and costly. And, as legislators, I'm sure you do not want the court taking the lead on policy.

- We can make better use of our collective resources by dedicating ourselves to a constructive approach that embraces both our best interests.

- First Nations would rather negotiate than litigate. But we need a claims body with an independent Tribunal so these negotiations are effective.

- If the government believes this, then withdraw this legislation.

- We will NOT need to start from square one. The work has already been done.

- Let's sit down and take another look at the Joint Task Force report. Partnership is and always will be the key. That's the spirit of our original relationship, and it was re-affirmed in the Gathering Strength policy.

- That policy will be five years old this coming January. This is an opportunity to make that anniversary a celebration.

- We want to work on this issue. We want to move forward. We are seeking a path to reconciliation, recognition and respect.

- *Meegwetch!*