Presentation to the Senate Standing Committee on Aboriginal Affairs
on
Bill C-6

Specific Claims Resolution Act

by

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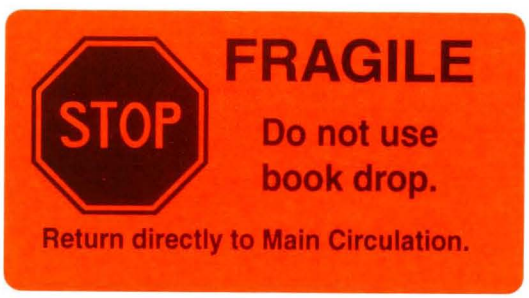

Ottawa, Ontario
May 27, 2003

Introduction and Overview

We participate in this process on behalf of Manitoba First Nations. I am the Manitoba representative on the Chiefs Committee on Claims, a national body established in the early 1990's. One of the primary objectives of the Chiefs Committee on Claims was, and continues to be, to achieve positive claims policy reform in order to establish a fairer, more transparent, effective and efficient, independent claims resolution process in Canada. I am also the Chairperson of the Treaty & Aboriginal Rights Research [T.A.R.R.] Centre of Manitoba. The T.A.R.R. Centre has been actively involved in the research and development of specific claims for our member First Nations for more than twenty years. We have also provided technical and historical research services to member First Nations in the negotiation of claims accepted by Canada. In addition, the Centre participated in the Joint First Nation/Canada Task Force on Claims that issued its report and recommendations on specific claim policy reform in November 1998. It is based on this extensive experience in the specific claims process that we offer these comments on Bill C-6 "Specific Claims Resolution Act."

It is the Centre's opinion that Bill C-6 is deeply flawed in a number of significant respects. Because of Canada's unilateral power of appointments and re-appointments to the body to be established under Bill C-6, we believe the independence of the body will be severely compromised. We believe that the body will be neither effective nor efficient as there are no time-frames to the stages of the process set out under Bill C-6. It is our opinion that Bill C-6 offers the unfortunate prospects for indefinite delays in the process. The new claims body will not be fair as Canada retains an unacceptable amount of control over the process. In short, we believe that a new claims policy and process under Bill C-6 will not represent a step forward in the specific claim resolution process: in most respects it would be a step backwards. Instead of efficiently and effectively addressing the outstanding backlog of claims already in the system, currently estimated at 600, we believe the new process will result in an ever increasing backlog of claims.

It is our opinion that because of the many significant flaws and defects of Bill C-6, the bill should be withdrawn. We believe the only way in which a new and truly independent claims body can be developed is through a joint First Nation/Canada process such as the Joint Task Force on Claims [JTF]. The JTF Report of November 1998, which was the product of a joint approach to

It is the position of the T.A.R.R. Centre of Manitoba that Bill C-6 should be withdrawn. The Centre believes that the only way a new body to deal with specific claims will stand a realistic chance of being successful is through the re-establishment of a First Nation/Canada process to jointly develop a workable model. The JTF process showed that this is clearly possible. Unilateral federal development and implementation of a new specific claim resolution process will not work. We suggest that the claims body envisioned under Bill C-6 is not independent or fair. Canada retains an unacceptable degree of control over the process both in terms of appointments and re-appointments and in the manner in which claims are processed in the system. The narrowing of the definition of "specific claim" and the capping of claims at $7 Million are also problematic. We believe that there are too many flaws and deficiencies in Bill C-6 for it to stand any realistic chance of success.

This body, the Senate Standing Committee on Aboriginal Affairs, has the opportunity to greatly influence the future of the specific claims resolution process in Canada. By agreeing to Bill C-6, we believe, you will be making a bad situation even worse. It is our opinion that the process under Bill C-6 is a step backwards from the current flawed process.

By rejecting Bill C-6, you can help to re-establish a required joint approach to specific claim policy reform to ensure that an independent, fair, efficient and effective claims body can be developed and implemented.

Thank you.

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specific claim policy reform, is proof of what can be accomplished through a cooperative effort. What is required is a return to a cooperative joint approach in order to develop a truly independent claims body that is fair, effective and efficient.

Background Information on the T.A.R.R. Centre of Manitoba

The T.A.R.R. Centre was established in 1982 to aid its Manitoba First Nation membership in the research and development of specific claims. T.A.R.R. was originally a program administered by the Manitoba Indian Brotherhood. In the early 1980s, the First Nations of Manitoba decided to remove T.A.R.R. from the structure of any provincial or regional First Nation political body and establish it as a separate body to work exclusively on specific claims on behalf of its member First Nations. The Centre is still directly accountable to its member First Nations though a Board of Directors selected from the various regions in Manitoba. This Board oversees the activities of the Centre, in terms of both its research and financial expenditures. At present, the Centre has a 51 Manitoba First Nation membership. The Centre operates two research offices, the primary research office in Winnipeg and another research office in northern Manitoba in Thompson. Attached to this presentation is a brochure on the Centre.

Specific Claims in Manitoba

Since its establishment, the primary function of the T.A.R.R. Centre has been the research and development of specific claims on behalf of our First Nation membership. We have undertaken research on a wide variety of claim issues from illegal reserve land surrenders to Treaty land entitlement (reserve land owed to First Nations under the terms of Treaty). We have uncovered a significant number of historical situations where, as a result of federal government action or inaction, Manitoba First Nations suffered losses for which redress is required. During the time since the Treaties were signed in Manitoba and Reserve land was set aside for Manitoba First Nations according to the terms of those Treaties, there have been many instances when Canada did not act in the best interest of the First Nations in relation to protection of these Reserve land bases. In addition, the terms of the Treaties have not always been fulfilled, in some cases relative to the extent of Reserve land provided; in other cases, by failure to abide by the terms of Treaty in protecting other rights embodied therein, such as hunting, trapping, fishing and gathering rights. Canada has not always acted in the best interest of First Nations and protected their rights. As a result, claims can and do arise.

Since its establishment, the T.A.R.R. Centre has operated under the federal specific claims policy. We have researched and developed claims on behalf of our member First Nations and have provided other assistance in the various stages of the specific claims process. Throughout this process, the Centre and its member First Nations have recognized and commented on the inherent inequity of and conflict of interest embodied in the federal specific claims policy In the specific claims process, Canada judges claims against itself. Claims are submitted to Canada, Canada judges the merits of the claims, and makes the decision on whether to accept the claim for settlement negotiations. It has been the experience of the Centre that Canada's primary motivation in the claims process has not been the fair and expeditious resolution of these long outstanding grievances, but rather to seek ways to minimize its own liability in relation to these matters. This has been our experience in both the validation stage of the process (the determination of whether a claim has been established) and the settlement negotiations (the process of establishing adequate compensation for losses suffered). Canada, it seems, seeks to deny claims rather than accept them, and if it cannot deny the existence of claims, it seeks to minimize its own liability in the negotiation process. Throughout the process, Canada is in control and moving at a creeping pace, and when it does move, the primary motivation is its own self interest, not the just and timely settlement of these outstanding grievances. It is a frustrating process for First Nations in at least three respects; first, at the start of the process the odds are stacked against them as Canada acts as judge, jury and protector of the federal interest, in a clear conflict of interest situation, First Nations would argue; secondly, the claim review process is neither timely nor efficient, with First Nations having to wait, in some cases, over five years before their claim is responded to by Canada; and thirdly, even if a claim is accepted for negotiations, this process can be long and frustrating with Canada seeking to minimize its own liability rather than fairly settle the matter. In addition, it is the Centre's opinion that the specific claims policy has not kept pace with either case law on claim related issues or the recommendations of the body Canada itself created to review rejected claims - the Indian Claims Commission. The existing specific claims process has insulated the federal government and kept Canada in almost total control, to the detriment of the fair and timely resolution of these issues of such importance to First Nations.

Specific Claim Policy Reform

In spite of the efforts of First Nation to secure the establishment of a fairer, more effective and efficient and independent process to deal with outstanding claims, and the commentary and support from many other interested impartial parties for such action, these efforts have not met with success. After the events of the Summer of 1990 focussed the attention of our country and the world on the inadequacies of the claims process in Canada, First Nations were led to believe by Canada that a sincere joint First Nation/Canada effort would be made to develop and implement substantive changes to the way specific claims are dealt within Canada. There were two attempts at joint First Nation/Canada specific claim policy reform. The first was the Joint Working Group [JWG] in the early to mid 1990s. This process was not successful. From the perspective of the First Nation representatives involved (the Centre having had representation at both the political and technical level in the JWG), the primary reason for the failure of the JWG was the reluctance of Canada to yield up control of the specific claim resolution process to an independent body. Canada was more concerned in protecting its control of the process.

In the mid 1990s, another joint First Nation/Canada specific claim policy reform process was established. This process, the Joint First Nation/Canada Task Force on Specific Claim Policy Reform [JTF], involved technical representation from both First Nation and Canada who came together regularly and frequently over a two-year period to attempt to develop a new independent process for resolving specific claims in Canada. Again, First Nations were led to believe that Canada would make a sincere effort to develop a new and independent specific claim policy and process. This belief was reinforced by commitments to this in the Liberal Party policy statements on Aboriginal issues and by reference to the need for an independent claims body by the Royal Commission on Aboriginal Peoples (1996).

From the First Nations' perspective, the JTF process was a marked improvement over the failed JWG approach. Perhaps the most significant difference between the two processes was that instead of the two sides assuming positions on the issues under consideration in the process, the parties worked cooperatively to find workable solutions that were fair to both sides. The effort was to develop the best possible model that would stand a realistic chance of success. It was the

view of the First Nation side of the process that the federal representatives on the JTF were far more receptive to developing workable solutions to issues of common concern, rather than protecting Canada's control of the process. The JTF process was not an easy one as the parties faced many difficult issues to overcome. However, by working together in a cooperative manner, the parties were able to develop workable yet reasonable solutions to the issues confronting. It must be stressed that in the interests of coming to agreement on a common plan, both sides had to make concessions. The result of this process was the JTF Report of November 1998.

The JTF Report outlined what the parties involved believed to be a fair and workable model for a mechanism to hear and attempt to resolve specific claims in Canada. The key element of the JTF process was that it was a joint effort with both First Nation and federal officials working together to develop reasonable and workable solutions to the problems inherent in the current process. From the perspective of the First Nation representatives, one of the primary flaws in the current process is the degree of control held by Canada. As mentioned, under the current process, Canada not only judges claims against itself but also maintains an unacceptable amount of control of all stages of the process, from the funding of First Nation research and development of claims to the negotiations of accepted claims. It was clear to the First Nation representatives that not only should control of the process be placed in the hands of a party independent of either side, there should be tight but reasonable time-frames governing all stages of the process. This was critical to the First Nation side. In addition, it was important to design a process that could realistically expect to begin reducing the outstanding backlog of claims already in existence while accommodating and addressing new claims into the system. It was key that any new process be adequately funded.

In November 1998, the JTF issued its report. The product of this joint First Nation effort was a model for a new specific claims policy and process that would correct the many flaws and deficiencies in the current process. The conflict of interest was removed by having a truly independent body judge the merits of claims and provide aid in the negotiations of accepted claims. Throughout the process developed by the JTF there would be realistic time-frames governing the activities of both sides. What was key is that the body could actually enforce its

decisions. The issue of independence was addressed in a number of ways, including having both First Nations and Canada involved in the selection of personnel for key positions within the new body. This was critical as it was of no small importance that these key positions should be filled with persons acceptable and accountable to both sides in the process. Claims of any size could be referred to the body, and the financial predictability required by Canada was secured in the form of a Five-Year Compensation Amount (or FYCA), setting out the amount of settlement compensation to be made available in a five year period. This was an important issue for Canada, and the JTF was able to develop a workable solution to address the federal concern.

In December 1998, the First Nations of Canada endorsed the JTF Report and accepted the JTF model as the preferred one for an independent claims body. It was believed at the time that once federal concurrence to the JTF Report and recommendations was given, the parties could begin to jointly implement the jointly developed plan. Since the JTF model was jointly developed, it was felt that federal endorsement of the model should be a matter of course.

It was not until the Spring of 2000 that Canada responded to the JTF Report. Much to the concern of First Nations, the federal response did not conform to the JTF model. From the First Nations' perspective, the federal proposal for an independent claims body reflected retention of an acceptable amount of federal control of the process. Appointments to the body were to be done unilaterally by Canada with no substantive input from First Nations. Other key elements of the JTF model were altered to reflect federal control of the process. In the period between the Spring of 2000 to the Spring of 2002, First Nations voiced their problems with the federal proposal and attempted to draw Canada into a substantive dialogue on the important issue. Although there were some limited discussions on the matter, there was little dialogue of a substantive nature.

In June 2002, with no advance notification, Bill C-60 was introduced in Parliament. The Bill rapidly went through First and Second Readings. Although Bill C-60 did not make it to Third Reading before Parliament was dissolved for the Summer of 2002. The Bill was re-introduced as Bill C-6 in October 2002 at the same stage of the process as Bill C-60. In December 2002, there was a limited Parliamentary Standing Committee Hearing process that considered the Bill and

heard from limited representations from First Nations and others. The vast majority of presentations outlined the many problems with Bill C-6 and called for its withdrawal. Although the opposition members put forward some proposed amendments to the Bill that could have corrected some of the Bill's deficiencies, none of the changes were passed and the Bill moved through the Parliamentary stages of the process virtually unaltered.

Bill C-6 - An Unacceptable Model for an Independent Claims Body

In the Parliamentary Standing Committee limited hearings on Bill C-6, the Centre was one of the few First Nation groups that were allowed to present on the bill. The majority of the groups who made application to appear before the Committee were not given that opportunity. This included many First Nations and First Nation organizations, as well as other interested third parties such as the Canadian Bar Association and some church groups.

A brief outline of some of the Centre's concerns with Bill C-6 are:

1 Independence: Under Bill C-6, Canada has unilateral power of appointments to the new claims body. If the body is to be independent, both parties involved, Canada and First Nations, should have had input into these selections. Canada also retains exclusive power of reappointment, thereby potentially affecting the impartiality of the body. The Centre sincerely believes that in order for the body to be independent, both Canada and First Nations must have real input into the selection of personnel for key positions within that body. If only one side has input, there is a danger that the body will perceive itself as being accountable to that one side. A truly independent body must be accountable to both sides involved in the process. This is not the case under Bill C-6. The body would be subject to review in a 3 - 5-year period after its establishment, but Canada would again have exclusive control of this process, with no provision for real input from either First Nations or impartial parties.

2. Efficient and Effective: We are most disturbed over the lack of time-frames for various stages of the claims resolution process in Bill C-6. In order for the process to be efficient

and effective, tight but realistic time-frames should be put in place to prevent bottlenecks in the process and to ensure that the parties proceed in a timely fashion. These time-frames would apply equally to both sides - First Nations and Canada. The current specific claims policy has no time-frames and this has been partially responsible for the existing backlog of more than 500 claims in the system.

Under Bill C-6, the function of the Commission is not to aid the parties to resolve the claim at issue through direct discussions, as was the case in the JTF model. The primary function of the Commission stage is to facilitate preparation of submissions to the INAC Minister who would have an indefinite period of time to respond on the matter. The Bill states that nothing further can be done on the issue until the Minister responds. This can only increase the outstanding backlog of claims.

3. Fair: Under Bill C-6 Canada would still exercise overriding control over the process. The definition of "claim" in the bill is more restrictive than the current definition, thereby precluding many important issues from the process. By limiting the process for binding decisions to claims $7 Million or less, a further significant number of claims will be denied access to a claim resolution alternative to litigation. If the costs of negotiations, including resources for required legal and other technical services and any accrued interest on settlements are to be drawn from overall settlements, as we speculate it is intended to be the case, this further prejudices First Nations from achieving fair settlement of legitimate claims.

4. Structure: We believe that there are some serious flaws in the structure of the body described in Bill C-6. There is provision for the creation of a "Chief Executive Officer" position which we believe is not only unnecessary but would also cause future administrative problems. Under the JTF model the Chief Commissioner was the "Chief Executive Officer" and it was clear who would be responsible for the day-to-day operations of the body. If both a "Chief Executive Officer" and a "Chief Commissioner" are in place, we can foresee future problems relative to authority and control in the body.