Six Nations of the Grand River

THE INADEQUACY OF THE FEDERAL CLAIMS POLICY AND PROCESS

The following is an amalgamated summary of the criticisms by First Nations of the existing Federal Claims Policy and Process:

Burden of Proof

The first flaw in the Federal Land Claims Policy is the very name itself - "Land Claims". In fact the term **"Land Claim"** is itself both **a misleading title** and an insult to First Nations. If there is any doubt as to ownership, the benefit of the doubt must go to the original owners - the First Nations. Why should we have to claim our own lands? The **burden of proof** of legal title or interest in First Nations lands must rest with Canada.

Extinguishment and Arbitrary Categories

The Policy is based on the **false** assumption that First Nations' titles to their lands were extinguished by treaties. This is clearly wrong and must be corrected. First Nations are not prepared to extinguish any of their rights in their traditional territories for any amount, let alone for amounts of a few thousand dollars in compensation. Canada and First Nations must work together to agree on a standard for legal certainty.

It is also based on this false assumption that the Policy creates an arbitrary distinction between comprehensive claims and specific claims. All issues available for negotiation under the Comprehensive Claims Policy, including *Self Government* should also be available for negotiation in the Specific Claims forum. This distinction has also operated to deny many claims (Rights Assertions) by First Nations in Ontario. In their view the underlying title has not been surrendered or dealt with and should be dealt with on the same basis as comprehensive claims.

Limited Scope of Negotiations - Inequality of Parties

Another false assumption is that our sovereignty and inherent right to self government was somehow lost through treaties. As a result, the Policy does not provide a forum for First
Nations to negotiate on a government to government basis, as full and equal parties. The **full range** of First Nations treaty and aboriginal **rights** issues would include self government and self-determination, land, water and resource issues, and fiscal and revenue sharing issues as determined by each First Nation.

The Claims Policy **ignores** the very instruments whereby the federal government claims to have obtained title to our lands and resources - **the Treaties**. If there is any doubt as to the title or ownership to land, it is the treaties which must be re-opened or amended to correct past injustices.

Unilateral Development of the Process

The Federal Claims Policy was developed unilaterally and without substantive consultation or consent of the First Nations. This situation cannot continue. Any future process must be jointly agreed to and formulated with the First Nations.

Conflict of Interest

The process is not based on standards of *fairness and equity.* The federal government acts as defendant, judge, and jury which puts it into a *conflict of interest* situation. The Deputy Minister of Indian Affairs who makes the funding decision also decides the validity and settlement value of any claim. This conflict is all the more evident because of the fiduciary role and responsibility that the Crown has to protect the interests of the First Nations. It is simply against all the rules of natural justice that *one of the parties* to a dispute is allowed to control and decide the outcome of the process.

Limited Alternatives and Technical Defenses

First Nations have **only one process - specific claims** - by which they can address their rights and grievances. They can ask the Specific Claims Commission to rule on questions of validity and compensation once their position has been rejected by the federal government; however, the Claims Commission can only make recommendations to the very government who committed the injustice.

The only other alternative is litigation in the Canadian courts of law, which is really no alternative. Canadian courts of law are highly adversarial and base its decisions on precedents which in many cases did not involve First Nations. Canadian courts do not understand aboriginal concepts of law and are expensive in terms of time, money and people. First Nations have limited resources and are not allowed to use their claims funding for court cases.

Courts have also shown an inability to deal with the larger social, cultural and political issues often raised by First Nations in land rights negotiations. Courts have great difficulty in recognizing the special attachment and value that the land holds for First Nations. Courts' processes also isolate First Nations from the process by which they are seeking justice. And finally, Canadian courts are still, after all, the courts of one of the parties in the dispute.

If First Nations go to court, Canada has stated that it will use **technical and time limitation defenses** in spite of the fact that First Nations could not legally pursue land

claims until as recently as 1951. The Ontario Provincial government has recently introduced legislation which would impose severe time and technical limitations on First Nations land rights assertions (claims).

Standards of Validity - "Lawful Obligation"

The criteria for determining **validity** of land rights assertions (claims) is based on a totally arbitrary, self serving and undefined policy of **"lawful obligation" which dates back to Canada's 1969 White Paper Policy**. Much has changed since that time in the recognition of First Nations legal rights, yet Canada clings to this outdated concept. Aboriginal title has been recognized. Aboriginal and Treaty Rights are protected in the Constitution of Canada. The Supreme Court has recognized a fiduciary trust obligation on the part of the federal government and the inherent right of self government is supposed to be the Federal Policy of the day. It is time for Canada to update its validity standard based on contemporary aboriginal law and government policy.

Lawful obligation has come to mean in practice that a First Nations land rights assertion (claim) is valid only if, in the opinion of a Department of Justice lawyer, the Crown would lose the case in court. This standard is simply meant to minimize government liability and is not based on standards of natural justice. It automatically blocks First Nations from seeking redress for breaches of the promises and obligations contained in treaties such as guarantees of hunting, fishing, trapping and gathering rights. It also ignores the implementation of the spirit and intent of treaties as understood by First Nations and protected in the Constitution of Canada.

Rules of Evidence

First Nations have unique traditions of recording history which are equally valid and precise as the written history used in courts. First Nations' recording of history included the use of customs such as wampum belts and strings, traditional teachings and first hand accounts passed on orally and personally from generation to generation. First Nations must be allowed to use their traditional methods of recording historical events to support and prove a valid land rights assertion (claim).

Disclosure

First Nations are expected to present the legal basis for a claim. However, there is no such reciprocal duty on the part of the Crown. The legal opinions that are provided by the Department of Justice, which form the basis for the rejection of a claim, are not even shared with the First Nation once the claim is rejected. The validity of a claim is determined in secrecy. This is simply against the rules of natural justice and cannot be tolerated.

Political Interference

Once a claim is recommended for acceptance as valid it is sent to the Minister of Indian Affairs for approval. This constitutes direct political interference. In a court of law politicians are fired when they try to influence judges. Why should the standard of non-interference be any less for First Nations?

Funding for Claimants

First Nations have very limited access to other financial resources to develop and present their land rights assertions. Funding is currently provided to First Nations by the federal government in the form of a loan once First Nations claims are accepted for negotiation. The level of financial support is totally determined by the federal government. The amount of funding made available to First Nations can dramatically affect the quality of the claim put forward. The federal role of determining funding levels again represents a major conflict of interest. If the federal government wants a claim to *go away,* all they have to do is simply stop funding it. First Nations cannot compete with the massive resources available to the federal government to disprove a claim.

Inconsistent and Arbitrary Policy Application

The Claims Policy is applied in an inconsistent and highly arbitrary manner depending far too much on the Senior Bureaucrat or Justice Advisor assigned to the claim. The policy and process is entirely controlled by federal bureaucrats who often lack authority to conclude settlements and bind the Crown. These individuals can make or break a claim. In several cases federal negotiators have agreed to a settlement only to return weeks later and rescind their agreement. The Department of Justice wears too many hats, as lawyers, advisors, facilitators or negotiators, which create barriers to the efficiency and fairness of the process.

Slowness of the Process

The entire process is unreasonably slow. At any stage of the process the First Nations' claims can be put on hold for years often without valid explanations or reasons. Once a claim is accepted for negotiation, which can often take several years, there are often further delays in negotiations for compensation. In some cases it takes just over the 7 year Statute of Limitations period to validate a claim.

Compensation Criteria

The claims process uses arbitrary standards such as **"degree of doubt", "discounting" and "special value to the owner"**. If in the opinion of the Crown

negotiators there is a degree of doubt as to the status of the land, the compensation offered will be reduced. The compensation offered will also be lowered based on the Justice lawyers' opinions of the chances of success had the claim gone to court. Finally no additional compensation will be offered based on the special value of the land to the owner. This automatically rules out all First Nations lands and resources because of the special relationship that First Nations have with the land and the special value it holds for them collectively.

The Policy recognizes that compensation can be offered based on **loss of use** of the land. It is simply impossible to put a dollar value on the significance that land holds for First Nations. It is an inherent part of who they were and who they will become. This standard shifts the burden of proof on First Nations for how the land would likely have been used. This is an unreasonable burden asking First Nations to predict *historical might-have-beens*. One thing is certain however: First Nations management of their traditional lands would have resulted in far less destruction of the environment in the development of these lands. There must be a way of evaluating the value of the destruction to First Nations lands and resources that could have been avoided had First Nations continued to exercise their stewardship over First Nations lands and resources.

Environmental Reclamation

The cost of environmental reclamation of traditional First Nations lands and resources is making settlements insurmountable. First Nations lands which are returned as part of a settlement must be returned as much as possible to their original pristine state. All costs to accomplish this must be assumed by the federal and provincial governments.

Interim Measures

Currently there is nothing stopping the federal or provincial governments from disposing of, selling, degrading or destroying the First Nations lands or resources which are the object or subject of the process.