

**Presentation to National Claims Research Workshop
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**Re: Update on the Joint First Nations-Canada Task Force on
Claims Policy Reform and the Proposed Independent
Claims Body**

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Background

For many year First Nations and others have called for the establishment of an independent body to resolve outstanding claims and eliminate the federal government's conflict of interest in managing the resolution of claims against itself. The mandate of the Joint First Nations-Canada Task Force on Claims Policy Reform is to provide a forum where federal and First Nation officials could cooperatively develop recommendations on the reform of Canada's claims policies. First Nation task force representatives operate under the direction of the AFN Executive and Chiefs Committee on Claims. Federal representatives worked under the direction of senior DIAND officials.

The commitment to this type of process followed up on the federal government's *Red Book* commitment to work with First Nations to design a new independent claims body. This commitment was consistent with the recent *RCAP Report* recommendations and many years of similar recommendations by First Nations and independent observers. This commitment was further affirmed in the subsequent *Gathering Strength* and *Agenda for Action* policies of the federal government, which convey Canada's commitment to building a new relationship with First Nations, based on partnership, trust and mutual respect.

The Task Force is a technical table composed of regional First Nation representatives and federal officials from Indian Affairs and Justice. It began its work in earnest in the Spring of 1997 and has reached agreement on detailed recommendations with respect to the major elements of new process for addressing what have come to be referred to as *specific claims*. We have now identified the required structures, basic procedures and required legislative measures that would establish a truly independent claims body that should be more fair, effective and efficient than the admittedly inadequate policy that exists today.

These recommendations have been articulated in the form of drafting instructions, which represent of joint product of the efforts of leaders and officials from both sides. A great deal of technical assessment and legal analysis had to

be undertaken since the Joint Task Force undertook its task to develop proposals for an independent claims body over a year and a half ago. The proposals are in some sense a product of many years of experience and calls for fundamental reform. Anticipating that there were no major problems, the Task Force had even begun to prepare a model of what the basic elements for a legislative bill might look like.

It should be noted that it had been expected that pending agreement on the recommendations, these proposals were to go forward to Cabinet last June, but were postponed. In fact, a number of earlier dates had been targeted. The delay was required in order to address the federal requirement for a fiscal framework. The Task Force was directed to work on a fiscal framework over the summer and has sought to satisfy the federal need for financial "predictability". This aspect was time-consuming because it was found that building a fiscal framework had fundamental implications for key elements of the proposed model for an independent process.

The Proposed Model

The key features of this proposal are comprised of a commission to facilitate negotiations and a tribunal to resolve disputes. The commission will provide a more level playing field for negotiations by its independent facilitation, which can draw upon the entire range of alternative dispute mechanisms to assist the parties in reaching final settlements that will be satisfactory to both sides. These range from mere facilitation of meetings, all forms of mediation and possibly arbitration if the parties agree. It need intervene only to the extent required by the parties in their efforts to reach a resolution.

The proposed tribunal on the other hand would be a last resort; a quasi-judicial body available to make a final binding determination, whether with respect to the validity of claims, discreet legal issues that prevent progress in negotiations or on compensation to be awarded claimants in lieu of damages to First Nation communities. It is very crucial to note that the tribunal element is essential in the proposed process, as its very presence is intended to provide incentive for the parties to conduct negotiations in good faith and reach timely settlements. This is a key difference from the current process, where there is no incentive for timely and efficient settlements to be reached.

It should be noted that despite the wish of many First Nations, outstanding lawful obligations and grievances related to aboriginal title and rights are specifically excluded from this proposed process. The federal government insisted on this exclusion, although it did agree that the issue could be revisited upon the five-year review that is recommended. It was agreed that a separate review of federal comprehensive claims policy would be included in the National Delgamuukw Review process that is now being initiated.

Main Elements of JTF Proposals

The main features of the model recommended by the Joint Task Force include:

- The removal of Canada's underlying conflict of interest through the creation of a truly independent mechanism, which would report directly to Parliament and the First Nations;
- The establishment of a commission to facilitate and ensure good faith negotiations by providing appropriate mechanisms for dispute resolution (alternative dispute resolution);
- The establishment of a tribunal that would be available to claimants to resolve legal disputes when negotiations fail that can make binding decisions on the validity of grievances, compensation criteria and award compensation (subject to reaching an agreement on a fiscal framework);
- Expanded definitions of what types of issues could be brought forward that will clearly include all legal and equitable obligations arising from the fiduciary relationship and the honour of the Crown;
- Flexibility to accommodate regional diversity and complement existing or future regional mechanisms;
- The capacity to offer innovative means of resolving outstanding grievances;
- A legislative base for the new settlement process to ensure adequate authority, impartiality and secure financing;
- Independent funding for First Nation research, submission and negotiation;
- A joint review after the first five-year period, which would assess the effectiveness of the process and consider matters that could not be addressed at this time (eg. The inclusion of lawful obligations arising from site-specific aboriginal rights).

It is important to note that the JTF did a lot of work, reviewing and debating a wide range of options in arriving at the recommendations. The suggested model was thought to be the best course in terms of eliminating the Crown's conflict of interest in dealing with claims against itself. The JTF proposal aimed to achieve fairness, efficiency and effectiveness in the process for settling specific claims. All agreed that these reasonable expectations are sorely missing under the current process.

The Fiscal Framework

To meet the federal government's need for a fiscal framework the Task Force had to engage in a great deal of analysis and discussion. In order to meet the objectives of both parties, it has been concluded that such a framework could be provided by a budgetary allocation. It would mean that the system would be put on hold if the budget allocation were expended during the time period projected for that budget.

This approach, while not completely satisfactory, seemed to be the only way to meet both the federal need for control of spending and the First Nation need to ensure the independence of the tribunal is not prejudiced by the imposition of a direct cap on its ability to determine compensation.

During the JTF discussions on the proposed budgetary allocation, federal officials raised concerns that this approach might be undermined if a very large claim drained the bulk of this budget. This presented the possibility that the allocation could be expended early on in the allocation period, thereby freezing all claims in the system until a new budgetary allocation was made. First Nations had difficulty with federal suggestions that large claims might be excluded from the process.

The Chiefs Committee reaffirmed the principle that First Nation specific claims have equal access to the independent process. Discussions to identify various options to address this concern have been superseded by recent indications that the very idea of a tribunal may not be acceptable.

Current Status

At a meeting on October 19, 1998, the Minister advised the National Chief and members of the Chiefs Committee on Claims that she is prepared to go forward to Cabinet with the JTF proposal for an Independent Claims Body, but she cannot guarantee that it will be accepted.

The Minister agrees that the JTF model would be the best way to resolve specific claims. However, her assessment of broad government support is that the JTF proposal may be "pushed back" by other departments. The climate for initiating a tribunal is not good at this time, in view of the recent controversy surrounding the recent Human Rights Commission Tribunal pay equity decision. She also indicated that the impact of the global economic crisis on Canada further contributes to this negative climate.

The Minister proposed that we look at the possibility of a staged approach, whereby Cabinet would be presented with the complete vision and asked to

*Financially independent study.
400 claims in process x 505 mil =
505 million.*

consider the option of implementing the model in stages, perhaps beginning with the Commission function. As its effectiveness is proven the Tribunal could be implemented later on.

The Chiefs Committee on Claims discussed her proposal and did not feel it was acceptable. Such an approach would clearly not immediately address the main objective, which is to eliminate the federal government's conflict of interest in dealing with claims against itself. However, the Chiefs directed that the Task Force examine what options the Minister's proposal might entail and will meet to consider how to proceed soon when fully briefed after this week's JTF meeting.

The Chiefs Committee viewed the news that the tribunal component may not be acceptable as a step back from what had been agreed upon at the technical table. There had been no previous indication that this part of the proposal would be a problem, as all of the appropriate government officials had been briefed on the discussions throughout the process.

Both sides of the Joint Task Force process are disappointed with the prospect that proposals that were so carefully developed, in a clear spirit of partnership and cooperation, may not be accepted. This work represents a significant period of painstaking effort by all involved to build a solution that would meet the needs of both parties. Its objective has been to help First Nations and Canada devise a realistic solution to a long-standing problem that will only grow in magnitude if more effective measures to adequately resolve such grievances are not soon implemented.

At this point it is not clear when Cabinet might consider the proposals. The Chiefs had wanted the new body in place by April of 1999. Pending Cabinet approval, a draft bill would need to be finalized and the legislation introduced in the House. There would then be the Standing Committee process and required readings. If passed, the legislation would then need to be proclaimed before its implementation. Assuming the tribunal issue can be resolved, it is not clear whether this might be possible before April of next year.

Lobby and Communications

The AFN began an orderly lobby effort in the middle of the summer in order to brief Ministers who are members of the Cabinet Committee on the Social Union and their staffs. These meetings were viewed as positive in gaining support for the concept of an independent body to help resolve outstanding claims. However, the effort was temporarily suspended when it became clear that concerns about financial implications were being raised amongst the Ministers. As the JTF had not completed its discussion of these aspects of the proposal, it

was thought the effort could be resumed once the proposals were finalized and the various cost projection scenarios were developed.

In view of the new concerns now being raised about the tribunal, the Chiefs feel there is a new urgency to step up the lobby effort in order to educate and build support at all levels of government, as well as the general public, media, corporate and business sectors. The AFN has been developing an extensive communications plan, to focus on a broader audience.

The AFN has coordinated the development of various materials for First Nations to use in building support for an independent claims process. These include initial drafts for an Aide Memoire to brief Cabinet Ministers and a general Fact Sheet to provide a general background on First Nation land claims, which should be available soon. The AFN will also be compiling extensive background materials that should assist First Nations in their lobby efforts.

It is extremely important that a consistent message about the importance of implementing these proposals be coordinated in all regions to build a broad base of support for going ahead with promised reform.

There are also discussions on proposals for a joint communications plan with DIAND. Such a joint communications effort assumes, of course, that we are moving forward together in partnership toward a new process that will meet the needs of all parties in settling these outstanding claims.