

DRAFT
(Not Officially Approved)

JOINT WORKING GROUP

January 26-27, 1993
Winnipeg, Manitoba

Present

First Nations

Chief Dennis WhiteBird (A/cochair)
Matthew Bellegarde
Maurice J. Kistabish
Rick Hatchette
Ralph Abramson
Steve Didzena
Andy Sky
Don Jones (Jan. 27 only)
Lawrence Whitehead
Rolland Pangowish
Chris Printup

Government of Canada

John Graham (Co-Chair)
Laurie Klee
Bill Kilfoyle

Consultant

Bonita Thompson

1. Opening Prayer

Elder Mervin HuntingHawk began the meeting with a pipe ceremony.

2. Minutes

Bill Kilfoyle noted that the scheduled meeting of the NCC with the federal government did not occur. The agreed on approach is to process two "claims" the NCC will bring forward. If these claims meet the policy criteria, except for the fact that the groups bringing them forward are not Indian Bands, then DIAND will discuss these cases and possible policy ramifications with central agencies.

Harry LaForme has been invited to meet with the Joint Working Group during our February meeting in Ottawa. Rolland will follow up on this. The Group would like detailed information on the organization and functions of the Commission. Both Manny Jules and John Graham will speak at the TARR Centre banquet.

John Graham will follow up with Manny about a possible meeting with Ontario Gov. officials in February.

JAN 29 1993

The 93/94 estimates will be tabled by the government in mid-February. The implications, if any, for claims will be an item on our February meeting.

Bill Kilfoyle noted that he and Rolland are discussing the 93/94 JWG budget. Bill stated that it is very unlikely that the budget for the JWG will be found outside the Department.

Coopers Lybrand will make a presentation to the Chiefs' Committee on Claims this Friday.

The Minutes were adopted.

3. Principles

The group agreed on the following changes to the Principles statement:

Recognize a) existing principles #2 and #5 would be combined to ~~reorganize~~ that Honour of the Crown is an aspect of the fiduciary relationship of the Crown with the First Nations. The new principles would read

be consistent with the federal government's fiduciary relationship with First Nations and ensure that the federal government conducts itself in a manner which maintains the honour of the Crown.

b) adding a new principle on treaties which would read as follows:

be consistent with the federal government's Treaty relationships with First Nations and facilitate the resolution of claims for non-fulfilment of Treaty obligations.

The complete set of principles, as revised, is attached.

4. Protocol versus a Federal Government Policy

The federal government representatives elaborated on the proposal that John Graham had outlined in his letter to Chief Jules on Jan. 19, 1993. Specifically, the federal government is proposing that the Joint Working Group work towards producing a protocol for all of the process issues relating to the settlement of claims. Thus a protocol, under this proposal, would include the structure, mandate and membership of the neutral independent review organization(s), procedures for allocating research funding, etc.

Under the proposal, the federal government policy would deal with non-process type matters such as validation and compensation criteria. The federal representatives went on to note that the government is anxious to have a policy that works to the satisfaction of First Nations and will therefore be working hard in the JWG to achieve a consensus on this policy.

After some discussion, the First Nation representatives agreed to bring this matter to the Chiefs' Committee on Claims. The JWG will return to this topic at its next meeting.

5. Elements of the Protocol

The JWG agreed to the attached text covering five specific subjects to be included in the protocol, subject to the important qualification that their final approval depended on the resolution of the protocol versus policy matter described above. There is one outstanding issue under Third Parties which the group will need to return to.

6. Proposed Changes to the Neutral's Drafts

To reduce confusion, both parties agreed that, in proposing changes to the drafts produced by Bonita, each side will indicate clearly the wording changes proposed vis-a-vis her original. Specifically, each side will place the neutral draft on the left side of the page, the proposal on the right side with the changes underlined.

7. Royal Commission

Following up on an approach agreed to by Manny Jules and John Graham subsequent to their meeting with the Specific Claims Commission, the First Nations' representatives have invited the Royal Commission to meet with the JWG in February. Details as to time and place need to be worked out.

8. Process to Resolve Claims

The JWG turned its attention to the documents produced by Bonita relating to the process to resolve claims. Bonita will modify the "Summary of Needs and Interests" statement. We'll come back to this at a future meeting.

Bonita then made a short presentation on dispute resolution issues and design questions; the group then discussed items II B + C in the Specific Claims Negotiation Outline, prepared by Bonita. (This document

was distributed with the December minutes.)

We agreed that the process to resolve claims would be the central topic for our February meeting, the aim of which would be to sketch out some possible options and approaches. A second topic at our February meeting will be item " III A Remedies/Compensation."

9. Quarterly Report

The Group asked Rolland and Bill to prepare a draft quarterly report for discussion at our next meeting. 4

10. Process Manual For Specific Claims

Bill provided the rationale for why the department has put out a process manual during the work of the Joint Working Group. It was first distributed to the JWG members at our August meeting in Kamloops. The manual is an interim measure to ensure consistency in the handling of claims and to better explain how the existing policy works. Bill noted that the Forward states that the manual will be revised to reflect any changes that may result from recommendations of the JWG.

^{3.} Maurice Kistabish noted that the manual is not yet available in French. Bill undertook to send him a copy in French as soon as the translation is available.

The JWG, for the record, made it clear that the JWG has not approved this document nor has it had any involvement in its production.

11. February Meeting

The February meeting will take place in Ottawa at the Conference Centre. Bill will reserve a suitable room.

12. Provincial Study

Rolland will follow up with the federal representatives on the proposed implementation of this study.

JWG PROPOSED POLICY/PROTOCOL
OBJECTIVES, PRINCIPLES AND SPECIFICS

Editorial Note

The Joint Working Group has agreed to this Objectives Statement and Statement of Principles, subject to the following qualifications:

- each side would seek reactions from their colleagues or constituencies and based on their reactions there will be further discussions and modifications;
- the group will need to come back to both Statements as more detailed discussions evolve, either to add to the Statements or modify, where appropriate; and,
- squared bracketed words or phrases require further discussion and thought.

The order of the listed principles is random and does not reflect any priority of importance.

The Government of Canada and the First Nations agree on the following objective for the new specific claims policy/protocol.

Objective:

The objective of the policy/protocol is to settle claims brought by First Nation claimants against the federal government and, in some cases, provincial governments, whereby the process for reaching settlements is:

- simple and clearly understood;
- accessible;
- flexible and creative;
- efficient;
- timely;
- fair to the parties;

and includes ongoing impartial and independent assistance and review, and the settlements reached are:

- clearly understood;
- final with respect to the issues resolved;
- fair and just;
- satisfactory to the parties; and,
- capable of being implemented effectively.

The Government of Canada and the First Nations agree that in order to achieve the objective of the new specific claims policy/protocol, the following principles will be used as a guide in the resolution of claims:

Principles:

The new policy/protocol will

1. encourage and facilitate the participation of provincial governments, where appropriate;
2. be consistent with the federal government's fiduciary relationship with First Nations and ensure that the federal government conducts itself in a manner that maintains the honour of the Crown;
3. ensure that First Nations claimants have access to resources to research and negotiate claims in an effective manner;
4. be compatible with the federal government and First Nations dealing with each other on a government to government basis;
5. be consistent with the federal government's Treaty relationship with First Nations and facilitate resolution of claims for non-fulfillment of treaty obligations;
6. encourage and facilitate negotiated settlements of First Nations claims;
7. provide that, where appropriate, compensation not be limited to solely monetary considerations but also include access to land and resources;
8. take into account the historical, political, economic, social and cultural variations among the First Nations;
9. be capable of being easily modified from time to time and contain a built-in process for ongoing policy review;
10. ensure that First Nations are involved in the development of proposed changes to the policy.

Specifics:

1. AUTHORITY/RATIFICATION

The Protocol should reflect the following:

First Nations and the Federal Government agree that

- (a) where a Claim is made against the Federal Government, the representative of the claimants will be clearly identified and will clearly indicate any collective body and all those persons for whom that representative is acting,
- (b) at an early stage in any settlement negotiations, the parties will discuss ratification requirements which will be incorporated into any settlement agreement, and
- (c) the Federal Government and the representatives of the claimants will make all reasonable efforts to resolve any differences arising between them on any authority issues relating to research, negotiation or ratification of a Claim, without unduly delaying consideration of the Claim.

2. CHANGES TO THE POLICY/PROTOCOL

The Protocol should reflect the following:

First Nations and the Federal Government agree that

- (a) they will cooperate in the ongoing evaluation of this Protocol and Policy as described in this Protocol,
- (b) they will make all reasonable efforts to reach consensus on any amendments or changes to the Policy in order to achieve its stated objective,
- (c) subject to the terms of the Protocol itself, no changes shall be made to the Protocol unless these changes are agreed to by the parties and recorded in writing, and
- (d) the parties to a particular claim may agree to changes in the Protocol for the purposes of settling that particular Claim.

3. EVALUATION OF THE POLICY/PROTOCOL

The Protocol should reflect the following:

The First Nations and Federal Government agree that:

There is to be an ongoing formal evaluation process to be carried out on the Protocol and the Policy to ensure that they meet their stated objectives and to ensure that they are being implemented according to the common intentions of the parties. The First Nations and the Federal Government will cooperate with each other to carry out these evaluations and to attempt to reach consensus on any changes to the Protocol and the Policy to improve their effectiveness. Both parties recognize the value of utilizing an independent body to participate in this evaluation process by monitoring implementation of the Protocol and the Policy, by reporting its findings and by making recommendations for change.

In the first few years of the operation of Protocol and the Policy, the evaluation process will concern itself principally with "finetuning". After 4 or 5 years, the evaluation process will concern itself with measuring the success of the Protocol and the Policy in meeting their stated objectives.

The ongoing evaluation will be conducted as follows:

- 1. a neutral body will publish an annual report covering the following topics:
 - a factual summary of Claims activity over the past year, i.e. Claims submitted, accepted, negotiated, resolved, etc.;
 - impacts of settlements on affected communities;
 - performance and participation of the parties in the process;
 - recommendations for improvements;
- 2. a neutral body will convene an annual meeting of representatives of the Federal Government and representatives of the First Nations to present the report and to discuss its findings;

3. the First Nations and the Federal Government will cooperate in the conduct of an evaluation of the effectiveness of any claims research function 3 years after the Protocol has been implemented to determine if the Protocol has been fully implemented and to determine if the objectives of the Protocol have been met;
4. the First Nations and the Federal Government will cooperate in the conduct of a full evaluation of the effectiveness of the Protocol and the Policy no later than 5 years after the Protocol and the Policy have been implemented and will address at least the following issues:
 - have the Protocol and the Policy been effectively implemented?
 - what impact have the Protocol and the Policy had?
 - have the Protocol and Policy objectives been realized and the Protocol and Policy principles been respected?
 - is the neutral body's role appropriate? Is the role cost-effective?
 - have the Protocol and the Policy been successful? Should they be retained, dropped or modified?

The funding required to conduct these stages of the evaluation process will be included in the budget of a neutral body, the sources of which are as set out in the Protocol.

4. DISCLOSURE OF DOCUMENTS

The Protocol should reflect the following:

Lack of trust appears to be a clear factor in limiting more open sharing of information - particularly from the point of view of the First Nations. It was agreed by both parties that if the process for resolving claims was more credible and there was a greater sense of good faith, that there was greater likelihood of more timely and fuller disclosure of information. It was also agreed that more disclosure would also increase the possibility of early settlement of the dispute.

The Federal Government and First Nations claimants will communicate openly at all times to help to establish a cooperative environment which will encourage the settlement of Claims where it is appropriate to do so and which will provide the claimants with sufficient information to permit them to properly and appropriately consider their options.

The First Nations and the Federal Government agree that:

The Federal Government will provide copies of all relevant historical and factual documents, of which the Federal Government is aware, as well as any historical or factual summaries prepared by the Specific Claims and Treaty Land Entitlement Branch which are relevant to a Claim.

The Federal Government will provide copies of all relevant appraisals and other studies

- (a) which were commissioned before the Federal Government received notice of the Claim, or
- (b) which have been commissioned after both parties agreed to attempt to negotiate a settlement to the Claim and upon which the Federal Government intends to rely.

These obligations are subject to any restrictions imposed by common law, legislation or regulation, e.g. the Privacy Act; the Access to Information Act.

Disclosure of documents will take place within a reasonable time after the documents become available to the Federal Government.

First Nations claimants will provide copies of all relevant historical and factual documents of which the First Nations claimants are aware, as well as any historical reports and factual summaries which are relevant to a Claim.

The First Nations claimants will provide copies of all relevant appraisals and other studies

- (a) which were not commissioned in anticipation of making a Claim or in anticipation of litigation in respect of a Claim, or
- (b) upon which the claimants intend to rely.

Disclosure of documents will take place within a reasonable time after the documents become available to the First Nations.

[NEUTRAL NOTE: From the First Nations perspective, the consensus on disclosure is conditional on the involvement of a neutral body to track the performance of the parties in the process. It is intended that this involvement will help to ensure good faith.]

5. THIRD PARTY INTERESTS

The Protocol should reflect the following:

The Federal Government and First Nations agree that:

Where land is part of the settlement and is owed by the Federal Government to First Nations claimants, the Federal Government acknowledges that it has responsibility for and will deal with any affected third party interests. In balancing any competing interests between First Nations claimants and third party interests, the Federal Government will give appropriate weight to its fiduciary relationship with First Nations.

The process for settlement of any Claims should be flexible enough to permit the participation of third parties where the First Nation claimants and the Federal Government agree to such participation and agree that it is critical to settlement. The nature of that participation will be determined on a case by case basis by both parties.

First Nations claimants have no responsibility for third party interests affected by their Claim unless responsibility for such interests has been accepted by the First Nations claimants through negotiations with the Federal Government.