CHIEFS COMMITTEE ON CLAIMS

FIRST NATIONS SUBMISSION ON CLAIMS*

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OTTAWA

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CONTENTS

PURPOSE OF THIS DOCUMENT

On October 10, 1990, the Government of Canada, through the Minister of Indian Affairs, requested the views of First Nations' leaders on changes to be made to current federal policy concerning the resolution of land claims and rights issues. The Minister advised that the federal government wanted a submission to cabinet on this issue by December, prior to the adjournment of Parliament. A Committee of First Nation leaders was struck.

In the past forty days meetings with Chiefs, elders, legal counsel and other advisors have been held across the country. Needless to say, given the limited time made available, it has not been possible for all First Nations to consider the issues in detail. Nevertheless, a broadly based consensus has emerged on major points of principle. The following pages reflect the priorities of the First Nations as understood by this Committee. These principles are so fundamental and uncontentious that the Committee felt they should be put forward, notwithstanding that further detailed recommendations will have to be ratified by the First Nations. Meaningful consultation with First Nations on issues which affect them is *not only desirable, it is prescribed by law. If there is to be real consultation* by the federal government on land claims issues, we believe it will have to take into account the principles set out in this submission. For the government to do otherwise would be unconscionable.

This document will make clear that what is required is a completely new approach to the resolution of First Nations' claims and other aboriginal and Treaty rights issues. Clearly it is not possible to provide a detailed legislative framework for such changes in forty days. Accordingly, this document should be viewed as a statement of fundamental principles which must form the basis for future discussions between First Nations and the Government of Canada.

BACKGROUND

The events of the past several months have caused Canadians to question the way that governments have been approaching aboriginal rights and claims. For two decades First Nations have experienced intense frustration with the existing claims process. Independent commentators have unanimously observed that the current federal policy is unfair and unjust. The Government of Canada has no option but to re-evaluate the existing approach and make fundamental changes. Recent decisions by the Supreme Court of Canada have also provided a clear indication that changes are needed.[1]

While the profound inadequacies of the existing claims policies have been identified time and again by independent commentators over the past two decades, the confrontations at Oka and elsewhere highlight the consequences of failing to address those inadequacies in a fundamental way.

[1] *R. v. Sioui*, [1990] 1 SCR 1025, 70 DLR (4th), [1990] 3 CNLR 127; R. v. Sparrow, [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] 3 CNLR 160.

Section 35 of the Constitution Act enshrines as part of the fundamental law of Canada the protection of inherent, aboriginal and Treaty rights. Recent court decisions by the Supreme Court of Canada re-enforce the concept that the Crown stands in a trust relationship to the First Nations and their rights. Yet the Government of Canada has done nothing to give life to these principles. Instead, the First Nations of Canada are left with a bitter, unresolved legacy. Their legal rights to their traditional lands, as recognized by the Supreme Court of Canada, for the most part have been denied. As an example, the Canadian Bar Association reported that in Saskatchewan alone the federal government has failed to provide some 1.1 million acres of lands promised under Treaty over a century ago.[2] Across Canada, First Nations entered into treaties on the basis that their hunting and fishing rights were guaranteed, only to see those rights violated by regulations.[3] It is unfortunate that few Canadians are aware of the lengths to which governments have gone to ensure that First Nations' land rights could not be enforced. Until 1951 it was a criminal offence to raise money for aboriginal claims to be advanced in the courts.

Despite developments in the law which now make clear that the governments must honour their obligations to respect and protect inherent, aboriginal and Treaty rights, Canada has, to date, failed to initiate any process to implement its legal and moral obligations to First Nations. In particular, the federal policy on specific land claims is sorely out of keeping with judicial declarations as to what Canada's lawful obligations are. This policy, developed unilaterally by the federal government, reflects no effort whatsoever to ensure that a remedy is provided in all cases where a government has violated a legal obligation toward First Nations. Indeed, it is a policy which sets out criteria expressly designed to minimize Canada's lawful obligations, arbitrarily excluding a wide range of legally valid claims. Claims based on wrongs committed prior to Confederation are excluded. Claims for violation of hunting and fishing rights (where there is no corresponding claim for land) are also excluded.[4]

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[2] Canadian Bar Association, Special Committee Report, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: CBA, 1988).

[3] These examples are by no means the exception. In the case of the Brunswick House First Nation in Ontario their traditional lands, including their reserve, were declared a game preserve where hunting was completely prohibited. Throughout the country First Nations have found the government slow to recognize Treaty and aboriginal land entitlement, while at the same time the government has managed to find six times as much land for national parks as for Indian reserves.

Less than 0.5% of Canada's land mass is currently recognized by the federal government as "lands reserved for Indians." This is not enough to provide for either the immediate or future economic needs of the First Nations, and it does not accurately reflect the actual amount of lands and resources necessary for the economic self-sufficiency of the First Nations.

It appears that Canadians agree. According to an October 1990 poll conducted nationally by Angus Reid: "It is important to note that Canadians apparently believe that a large amount of land should be turned over to aboriginal peoples – the average response was a remarkable 21% of the total land in the province, with little variation across regions." Given these statistics, it is clear that government is not only out of step with the law on these issues, but is also out of step with public opinion.

[4] Even where violation of hunting and fishing rights is related to the land claim, the federal government policy is to refuse compensation for the loss of hunting and fishing rights unless the claimant First Nation used to organize their hunting and fishing through an economic collective.

The current process provides for no independent review of decisions as to the validity of claims or the amount of compensation to be paid for claims. The justification for the rejection of claims is rarely given. Thus, the Government of Canada acts as defendant, trustee charged with protecting First Nations' interests, as well as judge and jury on all claims made against it.

Compounding these deficiencies is the fact that to date the federal government has refused to assign adequate resources to the resolution of these claims. While more than 500 specific claims have been filed with the federal government since 1973 (when the claims policy was adopted) they have been settled at the rate of three per year. Every year in which justice is delayed is a year in which justice is denied.

In the result, First Nations are left with no option but to engage in protracted and costly legal battles against the provincial and federal governments. These normally have to proceed to the highest courts of the land over a period of several years. Time and again, the First Nations are successful in the courts, and yet the Government of Canada does nothing to change either its laws, its policies or its attitudes.

What emerges, then, is that the federal government has failed to ensure that legitimate First Nations' claims are redressed. This is a critical issue, not only for First Nations whose rights are threatened, but also for all Canadians who live in a society that purports to value the rule of law.[5] We believe that Canadians, if they knew the facts, would not support the continuance of a system which perpetuates this injustice. Fundamental reform to Canadian policy dealing with inherent, aboriginal and Treaty rights has been recommended by groups as diverse as the Canadian Bar Association, the Canadian Human Rights Commission, the all party Special Committee on Self-Government, the Indian Commission of Ontario and the Supreme Court of Canada.[6] Constructive changes must now be made.

Government policy is in violation of the spirit of equality and respect memorialized in the Two Row Wampum Treaty which was originally made between the Iroquois nations and the Dutch. The duty to uphold this historic compact was transferred to the other European powers by succession through the Covenant Chain. This is a treaty of peace and friendship. In the Wampum belt, rows of coloured beads signified the two parties. The three beads in the middle, which signify peace, friendship and respect, symbolize distinctness on the one hand, but also symbolize a bridge between the nations, which represents coexistence. This allowed for a relationship in which the nations would live together, but also confirmed that each nation would demonstrate mutual respect for the laws, customs, and ways of the other. We are compelled to give effect to the spirit of this agreement.

We believe that Canadians will now decide to give meaning to the existing constitutional and legal guarantees which apply to First Nations, and to fulfil the terms of all

[5] In *Sparrow* the Supreme Court stated that "government objectives ... may be superficially neutral but ... constitute *de facto* threats to the existence of aboriginal rights and interests." *Sparrow*, note 1 at 1110.

[6] We also note that in 1979 Gerard La Forest, now a justice of the Supreme Court of Canada, was commissioned by Canada to review the government's specific claims policy. He criticized the lack of independence of the process and recommended that an independent tribunal be appointed. His report was ignored.

Treaties with First Nations, whether entered into before or after Confederation.[7] The policy of the Government of Canada must actively ensure that these rights are respected and that forums exist for their preservation and protection. And while the Courts should always remain an alternative for First Nations, to force them to resort to the Courts in most cases in order to protect their rights is nothing short of oppressive.

Currently there is a distinction created in federal government policy between "specific" and "comprehensive" claims, the first referring to certain prescribed kinds of claims under Treaties and the Indian Act, and the second referring to claims based on aboriginal rights (in areas where no Treaty was signed).[8]

This division results in certain types of legally valid claims being totally ignored. While this Committee has been asked by the government to focus on so-called "specific claims," our report must emphasize that this distinction is both artificial and has no basis in law. Further, any reform in the area of specific claims must not occur in isolation.

The Canadian Human Rights Commission has characterized the situation of First Nations in Canada as a "national tragedy." The Commission was not speaking only of specific claims policy. Respect for inherent, aboriginal and Treaty rights, promoting economic development and self-determination: all are areas which require immediate examination by First Nations and governments alike.

This Committee expects and desires that joint reform of the claims policy in Canada will only be a first step in a new cooperative effort to ensure that governments honour their obligations to First Nations. First Nations must once again become respected and vital partners in the future development of Canada. Canadians should not settle for less.

RECOMMENDATIONS

The following recommendations are with respect to policy development, process implementation and legal process. The timeframe for the adoption of these recommendations is from January through September, 1991. However, it should be noted that some of the recommendations are with respect to ongoing initiatives which will take place well into the future.

POLICY DEVELOPMENT

Immediate Measures

The Government of Canada must make the following public commitments to the First Nations:

1. The claims policy must be fundamentally reformed, so that an approach is developed which is consistent, at a minimum, with the standards of fairness and equity, and

[7] It is shocking to learn that not only are the ancient Treaties violated, but so are the modern ones. The James Bay Cree have had to sue the federal government for breach of the terms of their land settlement reached in 1975. Governments have simply refused to live up to the terms of this agreement.

[8] Areas within Canada that are still covered by aboriginal title, and therefore subject to "comprehensive claims," include large areas of Quebec and British Columbia, the Maritimes, Northwest Territories, the Yukon, and parts of Ontario and Alberta.

the obligations of the Crown as set out in such court judgments as *Sparrow*, *Sioui*, and *Simon*, as well as the *Constitution Act, 1982*.

2. The development of claims policy will be the joint undertaking of government and First Nations.

3. The independent claims resolution process (or processes) will operate in an impartial manner guided by recognized principles of law, equity and fairness.

4. The settlement of claims will not be solely financial or monetary transactions. Furthermore, settlements must take into account the cultural, economic, social and spiritual significance of the loss to the First Nations. A commitment must be made to make lands and natural resources available for the settlement of claims, as well as all other appropriate remedies (including environmental concerns) in keeping with the aspirations of First Nations.

5. The need for certainty in claims settlements will not require the extinguishment of inherent, aboriginal or Treaty rights. Nor will First Nations be required to contract out of rules of law or principles of interpretation favourable to them as part of any claims settlement or Treaty implementation agreement.[9]

6. First Nations will be fully indemnified for all costs necessarily incurred in the development, submission and resolution of their claims.

7. Treaties (including pre-Confederation Treaties) which have been negotiated between the Crown and First Nations to date will be implemented on the basis of recognized principles of law, equity and fairness.

8. No Treaty-making, Treaty implementation or other claims settlement process shall require the exclusion of self-government arrangements reflecting the inherent rights and jurisdiction of First Nations. Such arrangements may be included within Section 35 of the Constitution.

9. Where the parties agree that there is a valid claim, or where a duly mandated independent body deems the claim valid, governments will thereafter be prevented from alienating any interest in the lands covered by the claims (including, without limitation, the issuing of any licences, permits or other rights of access, use, or occupation) except as agreed to by the First Nations party to the settlement.

[9] The federal government's practice today is to insist that all land claims agreements must contain provisions which extinguish the aboriginal rights of the First Nations, rather than allowing for their continuation and protection. The rationale given for this practice is the need for "certainty," by which government really means "finality." First Nations find this repugnant, since claims settlements are intended to affirm their continuing and special relationship with the Crown, not end it. Further, the government requires that rules of interpretation developed in cases such as *Nowegijick* and *Simon* be specifically excluded, so that these legal developments cannot be relied upon by the First Nations who have fought so hard for them through the courts.

Subsequent Measures

10. A joint working group must be formed, composed of federal government and First Nation representatives, appointed by and responsible to the parties for the purpose of:

    (a) developing mutually acceptable claims policies consistent with the spirit and recommendations set out in this document;

    (b) planning the implementation of policy changes which would ensure the negotiation of pre-Confederation claims, the protection of inherent, aboriginal and Treaty rights and the elimination of Crown reliance on technical defenses, and other issues as agreed upon;

    (c) implementing a review of existing federal and provincial agreements, legislation, regulations and policy which impinge upon existing aboriginal and Treaty rights and which continue to create new claims; and

    (d) performing such other responsibilities as may be agreed upon.

11. Consistent with a commitment previously made by the Minister of Indian and Northern Affairs, until a new approach is developed jointly and implemented to the satisfaction of the First Nations, claims presently within the existing process should be settled expeditiously at the option of the First Nation(s) party to the settlement.

12. Implementation of claims policy must be monitored and reviewed by an independent body on a regular basis in order to ensure fairness and consistency and to deal with further policy issues as they arise.

PROCESS CONSIDERATIONS

The fundamental principle that must be applied to resolution of claims is independence of the process from government. The challenge is to establish a new process which may include First Nations' territorial variations, without impeding the resolution of claims which are in the current system and could be resolved if adequate motivation and resources are brought to bear.

Immediate Measures

13. The necessary resources must be allocated to resolve claims currently within the existing process at the option of the First Nations concerned.

14. Government must undertake with First Nations, through the joint working group referred to in recommendation 10 above, to establish and implement an independent claims process with sufficient flexibility to ensure equity and fairness in addressing First Nations territorial diversities.

Subsequent Measures

Obviously, there will be a need for detailed discussions on the scope and nature of the mandate of any proposed independent body (or bodies). The joint working group should address these matters taking into account the following recommendations:

15. The claims process (or processes) must be managed by an independent and impartial body (or bodies) with authority to ensure expeditious resolution of claims submitted.

16. The independent claims body should have authority to, among other things:

    (a) give directions to the parties to complete tasks, reconsider positions, address issues, and otherwise advance a staged process carefully managed to ensure maximum cooperation from the parties;

    (b) recommend or refer matters to conciliation, mediation or non-binding arbitration for the purpose of resolving issues arising in the course of validation and negotiation;

    (c) make determinations as to breaches of fiduciary obligation and other grounds for claims, which determinations shall have precedential value;

    (d) obtain independent legal opinions and advice to assist in the resolution of issues and factual questions; and

    (e) refer issues to binding determination directly by way of stated case to a court or tribunal.

17. Governments should accept the burden of showing that their conduct, in relation to any claim, is or was consistent with their legal and equitable obligations to the First Nation.

18. The independent claims body should develop rules of procedure for the submission and treatment of claims.

19. The federal government and the First Nations should establish a mutually acceptable mechanism for review of, or appeal from, determinations made in the claims process(es).

20. Following the implementation of the new claims policy and process (or processes), there should be periodic joint reviews of the process(es) conducted by government and the First Nations.

21. First Nations should be provided with all information available to governments in order to properly develop, submit and negotiate their claims.

LEGAL PROCESS

For many reasons First Nations have not found the court process effective, either as a supplement or substitute for the settlement of claims by negotiation. The following recommendations are intended to remedy defects in the court process:

22. Governments should accept the legal burden of showing that their conduct in relation to any Indian claim is or was consistent with their legal and equitable obligations to the First Nations.

23. In cases involving aboriginal title, such title should be presumed to exist in favour of the aboriginal occupants of their territory subject only to disproof by the Crown.

24. Immediate statutory change must be effected to eliminate Crown reliance on the following technical defences in court proceedings:

    (a) Crown immunity from suit;

    (b) Act of State;

    (c) statutes of limitation; and

    (d) the doctrines of laches, estoppel, and acquiescence.

25. Claims issues in courts or other adjudicative bodies should be heard by persons who have received special training in the nature and history of claims issues, the unique nature of inherent, aboriginal and Treaty rights, as well as the culture and spirituality of aboriginal peoples.

26. Litigation or reference of a particular claim or issue therein should be available to First Nations as an alternative to the negotiation process. But provision for such litigation must be seen as part of the overall claims policy: funding should be provided for the advancement of aboriginal, Treaty and other Indian rights claims in courts.[10]

27. Special provision must be made to enable First Nations to secure now, in an admissible form, the evidence of community elders with respect to claims issues.

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[10] Following the passage of the *Constitution Act, 1982*, Canada set aside resources under the Court Challenges Program for test cases related to the Charter of Rights and Freedoms, and language cases. This program is administered by a third party to ensure fairness, and has access to substantial funding for test case litigation.

However, cases related to aboriginal and Treaty rights and section 35 of the *Constitution Act, 1982*, cannot be resourced from the Court Challenges Program. The federal government has retained control over these cases through the "Test Cases Funding Program," which is administered by the Department of Indian Affairs. So, even for litigation, government has applied a double standard when it comes to aboriginal and Treaty rights, and has worked to maintain its conflict of interest and control.

FINANCIAL IMPLICATIONS

The perception that settling claims will represent a significant drain upon the federal treasury is inaccurate. Implicit in this assumption is the notion that somehow settling claims is optional and at the discretion of government. The reality is that claims have a legal and moral basis, and failure to address them expeditiously can only result in much greater cost and liability into the future.

The ultimate cost of implementing an independent and impartial process to resolve claims fairly and expeditiously cannot be specifically identified at this time. However, the necessary tasks are known. Each of these tasks must be adequately resourced if the overall objectives are to be achieved.

The economic benefits to native and non-native communities which are derived from the settlement of claims cannot be overlooked. This is an area in which Canada can demonstrate its commitment to assisting aboriginal people in improving their standard of living, reducing dependence and pursuing economic development.

Consideration must be given to the following:

FINANCIAL RESOURCES

A. Policy Development

Sufficient funding must be provided to enable First Nations to participate effectively in the joint development of policy. Funding must be provided on a national and regional basis to ensure that all First Nations have the opportunity to participate.

B. Claims Research

There needs to be more financial resources allocated for claims research. Funds for researching the basis of claims must be administered independently from government to ensure fairness. As well, terms of reference for research funding need to be expanded to provide First Nations with the flexibility to undertake the kind of research they feel necessary to establish the basis of a claim.

C. Claims Management

Of equal importance, any independent claims body must be adequately resourced to deal efficiently and effectively with the claims submitted to it. First Nations must have adequate resources to negotiate claims with government. Such negotiations should never be prejudiced by a lack of funds or access to the legal, technical and administrative support required to achieve parity with the government.

Provision must be made for full indemnification of all costs necessarily incurred by First Nations in the development, submission and resolution of their claims.

D. Settlements

An essential element of the commitment to settle claims is the immediate allocation of significantly increased funding to be available for claims settlements. An alternative to the current method of budgeting would be to fund settlements out of Consolidated Revenues in the same manner that court judgments against the Crown are paid.

LANDS AND RESOURCES

Lands, natural resources and jurisdiction are also crucial elements to settlement of claims. Governments must consider the significant benefits of utilizing elements other than monetary payment to settle claims. Native communities should feel that long-standing matters have been resolved fairly and in accordance with their aspirations for present and future generations.

HUMAN RESOURCES

It is clear that new and more personnel will be required if claims are to be settled at a faster pace. This will be the case for all levels within governments, as well as for First Nations and the independent claims body (or bodies).

Claims resolution requires people with specialized training and experience. Competent technicians, legal counsel and negotiators are key to any successful process.

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OTHER DEPARTMENTS

The Minister and the Department of Indian Affairs alone cannot reasonably be expected to fulfil obligations to which the whole of the government is a party. The federal Crown, as a whole, must begin to accept responsibility for honouring its constitutional, legal, and other responsibilities to First Nations. Many existing problems relate to the fact that the federal departments with authority to deal with critical aspects of land claims and land rights are not at the table. Issues will not be solved unless the ones who have the requisite authority and mandate are there. The involvement of Indian Affairs officials cannot and should not prevent the other members of cabinet from fulfilling their obligations. This will mean that the senior members of cabinet, and their respective departments, must not only acknowledge that they have responsibilities to fulfil, but they must also put into place the capacity to deal with the issues and with the First Nations' leadership.

Some federal government departments involved will include, but not be limited to:

Justice: They have a constitutional requirement to advise the federal government on its obligations. They need to fulfil this requirement in keeping with the dictates of the Supreme Court of Canada respecting a "non-adversarial" approach, as well as the honour of the Crown. This department must acknowledge and deal with the real and potential

conflict of interest it finds itself in, or else run the risk of creating a whole new class of claims. It will mean a completely different role for them, and different mechanisms to promote advocacy and contact with the First Nations.

Federal/Provincial Relations (FPRO): Since many issues related to the settlement of claims/rights issues affect the provinces (see below), this office needs to be more directly involved in the implementation of claims policy.

Department of Public Works (DPW): In terms of dealing with claims settlements, DPW has a role to play since they administer federal lands and buildings which could, in certain cases, be used in land claims settlements. Federal lands provide a concrete supplement/alternative in cases where the existence of third parties or provincial interests make the setting aside of lands difficult. Again, this should be viewed as part of the government's approach to claims policy.

Finance: This department is key in current federal government decision making. Since additional financial and human resources are required to settle claims and fulfil governmental obligations, this department is a key participant.

Other departments such as Fisheries and Oceans, Environment, Treasury Board, Energy, Mines and Resources, National Health and Welfare, etc., will also have to acknowledge their role in the fulfilment of the Crown's constitutional and moral obligations. Further work and discussion on their specific roles will take place as this process unfolds.

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FEDERAL/PROVINCIAL CONSIDERATIONS

Several aspects of the relations between First Nations and the federal and provincial governments will be affected by new initiatives to resolve claims. The most apparent of these involves the need to allocate lands and natural resources, currently under provincial control, as part of claims settlements. In some cases, this will affect the provincial tax base.

Less apparent, but equally important, is the fact that existing provincial laws, or provincial enforcement of federal laws, will undoubtedly create new grievances through fresh violations of inherent, aboriginal and Treaty rights. Ideally, provinces will develop their own claims policies consistent with federal and First Nations objectives and will participate in the claims resolution process. Alternatively, the federal government may need to exercise its powers pursuant to section 91(24) and other provisions of the Constitution, in order to:

- invalidate the application of provincial laws with respect to First Nations, particularly where such laws are inconsistent with inherent, aboriginal and Treaty rights; or

- expropriate lands and dedicate natural resources for the settlement of claims.

It should be noted that provinces have been the principal beneficiaries of Treaties and past encroachments on inherent, aboriginal and Treaty rights. They too have constitutional obligations to respect and uphold these rights.

The process of legislative review, recommended as part of claims policy development, will disclose, as well, claims arising out of past federal/provincial agreements concerning Indian interests. The "Cut-off" lands and the "resumption" powers in British Columbia are examples of this. A further example is the loss by First Nations in Ontario of one half of mineral revenues to the province under a federal-provincial agreement legislated in 1924. The same division of mineral royalties applies in British Columbia for precious metals. In the Prairie Provinces, the Natural Resources Transfer Agreements respecting lands and resources will continue to give rise to grievances. Serious effort must be made to resolve these grievances.

In New Brunswick, and possibly Nova Scotia and Ontario, First Nations lost both the use of and right to compensation for surrendered lands not actually sold by Canada before defective federal/provincial agreements were put in place. The intent of those agreements was to avoid that result. The same situation may be true today if reserve lands were surrendered for sale in Quebec or Prince Edward Island because there are no agreements with those provinces to protect the Indian interest in reserve lands. Apart from these considerations, several processes are under way to explore the fundamental relationships between provinces and regions, or some of them, in a federal state.

Especially in Quebec, where some form of severed sovereignty is under active consideration, the federal obligation to protect inherent, aboriginal and Treaty rights must be asserted. This would include, in any event, the preservation of constitutional means to settle existing claims and prevent new claims arising out of any constitutional change inconsistent with First Nations' rights.

One of the major factors which has stalled or prevented claims settlements in the past is the inevitable federal/provincial dispute over the financing of payments to First Nations. As stated above, this issue may require the federal government to exercise constitutional powers which will necessarily affect provincial interests. Even the perceived potential for the exercise of this power may have some useful effect in convincing the provinces to cooperate in the settlement of claims.

From the First Nations' perspective, which is supported by law, the Crown in Right of Canada is the party constitutionally responsible for all aspects of the fundamental relationship with First Nations, including the resourcing of claims settlements. Any question of recovering some or all funds from provinces is of secondary importance to them. That reality suggests that some form of arbitration will be needed in order to adjust accounts between Canada and the provinces in respect of claims settlements with First Nations. The First Nations will require some mechanism to ensure that this arbitration process is consistent with their interests.

Every effort should be made to ensure that provinces are involved in negotiations on claims where such provincial involvement is deemed to be desirable or necessary by the First Nation. This will help to ensure, legally and politically, that claims will be settled in the most timely manner. It is possible that the governments of the Yukon and Northwest Territories would be agreeable to act in a manner which would help to set the stage for provincial participation elsewhere.

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COMMUNICATIONS

It should be understood that communications with the general public and First Nations communities will be essential to the successful implementation of the claims policy and process review. Key elements of the strategy will include educating the Canadian public as to the historical background and nature of Indian claims in Canada, current issues in claims negotiations and settlements, deficiencies in the current claims policy and process, and the reasons and necessity for the changes recommended here. The public should also be advised as to the nature of the mandate of the joint working group referred to in recommendation 10 and the timeframe in which its work will be completed.

MARCH 21, 1991

RESPONSE OF NATIONAL CHIEFS COMMITTEE ON CLAIMS TO INITIATIVES OUTLINED BY MINISTER T. SIDDON ON JANUARY 31, 1991

WHEREAS on September 25, 1990, Prime Minister Brian Mulroney advised the House of Commons that the Government of Canada is committed to a plan of action with respect to the aboriginal people of Canada which is based on four main agenda items, the most urgent of which, he said, was action on land claims; furthermore, the Prime Minister said, "consultation with aboriginal peoples and respect for the fiduciary responsibilities of the Crown toward them will be built into the process from the start," leading in the end to "a new relationship between aboriginal and non-aboriginal Canadians based on human dignity, trust and respect."

AND WHEREAS in response to a request for advice on land claims reform by Minister Siddon, a national committee of Chiefs was established and after nation-wide consultations tabled its recommendations on December 14, 1990 in a document entitled "First Nations Submissions on Claims";

AND WHEREAS the detailed recommendations of the Chiefs Committee were approved in principle by separate resolutions by Chiefs of Alberta and Ontario and at a national assembly of Chiefs of the Assembly of First Nations;

AND WHEREAS on January 31, 1991, Minister Siddon offered his response to the Chiefs Committee, outlining five main areas in which he proposed to make immediate recommendations to Cabinet, all as summarized in a letter from him to the co-Chairs of the Committee dated February 18, 1991, a letter in which the Minister confirmed that he seeks the public support of Chiefs for the initiatives he proposed;

AND WHEREAS any future process for the resolution of Indian claims should be clearly premised on the existence of aboriginal and treaty rights (including those recognized by the Royal Proclamation of 1763) and the inherent justice of respecting those rights;

AND WHEREAS the "First Nations Submission on Claims" remains, in the view of the Committee, the appropriate basis for any future constructive dialogue between First Nations and the Government of Canada in relation to the development of policies concerning First Nations' land rights and claims;

Subsequent deliberations of the Chiefs Committee to review the Minister's proposals have confirmed the following:

I. The Chiefs Committee has not altered its position, as set out in its submission of December 14, 1990, either regarding the fundamental unacceptability of the existing federal claims resolution policy and process, or regarding the detailed recommendations for change made in the December 14, 1990 submission.

II. The Chiefs Committee is offering this response to the Minister's proposed initiatives in light of the obvious and pressing need for immediate progress on land claims, while recognizing that key issues in land claims resolution (including both policy and process) remain unsatisfactory to First Nations and unresolved.

III. In light of the position of the Chief's Committee as described above, this response to the Minister's comments should not and cannot be interpreted as implying First Nations' or the Committee's consent to any aspects of current government policy with respect to land claims, or as prejudicing the assertion of any aboriginal, treaty or other rights or claims of First Nations.

On the initiatives proposed by the Minister (as set out in his letter of February 18, 1991) the Committee's response is as follows:

1. Additional Resources

The Committee welcomes the Minister's proposal in this regard as a necessary change. The Committee would reject, however, the concept of imposing arbitrary fixed annual ceilings on claims settlements. Although no one can be certain of the ultimate cost of a fair settlement process what is required is the devotion of adequate resources at all levels for a fair and expeditious settlement of all claims, and in particular of adequate funding of the research and negotiation costs of First Nations and the cost of operating any independent process. The Committee also believes that the Government of Canada should ensure that personnel hired to supervise or participate on its behalf in the settlement process are adequately trained and are mandated to seek just settlements for First Nations claims.

The Committee's detailed recommendations with respect to resources are set out on pages 11 and 12 of the December 14 submission.

2. Specific Claims Commission

First Nations have consistently sought, and independent commentators have repeatedly recommended, an independent review of claims, so that Canada will not act as both defendant and judge of claims and to ensure that all claims settlements are fair and expeditious. The establishment of an independent claims commission would be a positive development, provided that:

i) any independent commission must be entitled to review both aspects of the settlement process, i.e. validation (including interpretation of the validation standards) and the determination of the form and amount of compensation;

ii) the commission must have "teeth" – it must have the capacity to break the impasses which invariably arise during claims negotiations. Canada should be willing, where requested, to enter into agreements with claimants at the outset of negotiations whereby negotiation deadlines may be set and impasses resolved through a fair process in defined circumstances without the need for the subsequent consent of all parties at every

stage. The Committee's detailed recommendations in this regard are set out in recommendations 15 through 21 of the December 14 submission;

iii) the commission must be adequately financed to fulfil its mandate;

iv) the order-in-council or other authority establishing the commission should state that this claims appeal and review process it supervises is without prejudice to the right of claimants to proceed to court, it they choose, and to any First Nations treaty and aboriginal rights as well as all other rights First Nations have or may have in law; and

v) the mandate of the Commission should be consistent with its independence from the parties; the detailed mandate of the Commission and the mechanism for appointing members to the Commission should be finalized only after consultation with First Nation leaders.

The above powers should pose no difficulties for the Government, given that the Minister has previously indicated his willingness to establish a special court for the resolution of land claims.

3. "Fast Tracking" of Certain Claims

The Minister's comments to date have not provided sufficient detail to permit evaluation of this proposed initiative and, indeed, several Committee members question whether First Nations would benefit from the proposed separation of claims valued at less than $500,000. However, any acceleration of the existing settlement process would be welcome, provided that all First Nation claimants still have the right of appeal to the proposed claims commission.

4. Willingness To Negotiate Pre-Confederation Claims

This reversal of an arbitrary exclusion of many valid claims is very welcome, although if a fair, expeditious claims resolution process is not established the benefits of this proposal will be illusory. While Canada's desire for provincial cost-sharing of these claims is noted, Canada's commitment to resolve pre-Confederation claims cannot be contingent on provincial involvement.

5. Establishment of Joint Working Group

This was recommended by the Committee and remains a welcome and essential aspect of claims reform, although the Minister's comments in this regard did not outline in detail the proposed mandate of the group.

Required:

i) The working group's mandate should be to review all outstanding issues of claims resolution policy and process (including those detailed in the December 14, 1990 Chiefs' submission) with a view to making recommendations on what is necessary to create a fair and just policy and process.

ii) A reasonable time-frame for completion of the group's work must be established (for example, to make its initial report within six months).

iii) Canada must make a commitment to implement the working group's recommendations upon request.

iv) The working group must be adequately funded to fulfil its mandate.

v) The members of the working group should be jointly appointed by Canada and First Nations.

vi) The Chair should be occupied by one intimately knowledgeable about all aspects of claims negotiations; experienced in the area of consensus decision making; respected by all parties; and preferably an Indian.

6. Other Issues

No initiative on "specific claims" reform will diminish the need for the Government of Canada to deal independently and quickly with the other critical issues identified in the past by aboriginal groups and by the Government of Canada. Those issues certainly include treaty land entitlement, comprehensive claims settlement, comprehensive treaty enforcement (and/or renegotiation where appropriate) and the other three "pillars" of the Government's agenda as outlined in the Prime Minister's September 1990 address: namely, economic and social conditions on reserves, the relationship between aboriginal peoples and governments, and the concerns of aboriginal peoples in contemporary Canadian life.

7. Conclusion

If the Government of Canada is willing to embrace the above recommendations, the Chiefs Committee will view the new initiative as a positive one, an important beginning on the road toward providing a system that will permit fair and rapid settlement of First Nations' claims. Finally, it will augur the beginning of the new relationship between aboriginal and non-aboriginal Canadians envisaged by Prime Minister Mulroney in his address to the House of Commons. If, on the other hand, the Government is not willing to accept even these minimal recommendations on the resolution of land claims, First Nations will be forced to conclude that the Government is not and never was committed to a fair settlement of native claims.