
**DRAFT RECOMMENDATIONS
PREPARED BY
NEUTRAL**

June 25, 1993
Neutral's Draft

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NEUTRAL'S NOTE

This document is the latest draft of the progressive draft of the work of the Joint Working Group which I have prepared based upon discussions which have taken place at the meetings of the Joint Working Group from November, 1992 to June 25, 1993.

Throughout these recommendations the term "Protocol" is used. This term is intended to describe the Independent Claims Process as a whole and as reflected in these recommendations. It is intended that this Protocol would be implemented through the signing of an agreement signed by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.

There are certain issues which remain outstanding and which require further discussion before consensus is reached. These issues are listed in the attached Schedule and are marked throughout the draft in square brackets and identified as follows:

1. proposals made by the Federal Government are identified in bold faced type: e.g. [(FG) and that will increase the overall cost to the Federal Government...];
2. proposals made by First Nations are identified in bold faced italics: e.g. [(FN) *While it is not intended that this process...*]

Bonita J. Thompson, Q.C.
June 30, 1993

June 25, 1993
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INDIAN CLAIMS COMMISSION PROCEEDINGS

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INTRODUCTION

In October, 1990, a group of First Nation leaders met with Minister Siddon to discuss ways to improve the specific claims policy and process. Following this meeting the Chiefs' Committee on Claims was formed. This Committee was co-chaired by Chief Clarence T. Jules and Mr. Harry LaForme and was open to all interested First Nation leaders across Canada.

In December, 1990, the Chiefs' Committee submitted to Minister Siddon a report detailing First Nation concerns about the specific claims Policy and process. The report emphasized the following three criticisms:

- I. Not enough funds were available for settlements.
- II. The settlement process was inherently biased as the Federal Government attempted to fulfil its fiduciary obligations to Indian people at the same time it was defending the interests of the Crown.
- III. The Policy was too restrictive.

In April of 1991, the Federal Government responded to these concerns by: increasing settlement funds from approximately \$15 million to \$60 million per year; establishing the Indian Specific Claims Commission under the *Inquiries Act* to provide, on an interim basis, an independent review of government decisions relating to specific claims; removing the pre-Confederation bar from the policy; and creating a joint working group to review all aspects of the specific claims policy and process.

The Joint First Nations/Government Working Group on Specific Claims began meeting in February, 1992. It consisted of 8 First Nation representatives and 3 Federal Government representatives. A Protocol describing the role of the Joint Working Group and the working relationship among its members was signed in July, 1992 by Mr. Ovide Mercredi, the National Chief of the Assembly of First Nations and Mr. Tom Siddon, Minister of Indian Affairs and Northern Development.

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The Joint Working Group has met on 13 occasions over the past year and a half. It has reviewed all aspects of the specific claims policy and process.

This Joint Working Group report, signed by Chief Clarence T. Jules and John Graham as Co-chairs, recommends a number of changes for the consideration of the First Nations and the Federal Government. Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties [(FG) and that will not increase the overall cost to the Federal Government of the process of reaching settlements.] The Group has been sensitive to the importance of the continuing relationship between claimant bands and the Federal Government.

Great importance has been placed on introducing a large degree of independence into the claims resolution system. To this end it is proposed that an Independent Claims Body be established by an Act of Parliament. It is intended that this independent claims body would in time replace the Indian Specific Claims Commission.

[(FN) While it is not intended that this process will deal with comprehensive aboriginal title negotiations or bilateral treaty implementation negotiations, particularly in view of the other processes presently in place or contemplated to deal with those negotiations, it is recognized that aboriginal title or treaty rights could be elements of claims in this process.]

The following recommendations represent hard work and compromise by both parties in the sincere attempt to establish an effective, fair and equitable claims resolution system.

OVERVIEW

Throughout these recommendations the term "Protocol" is used. This term is intended to describe the Independent Claims Process as a whole and as reflected in these recommendations. It is intended that this Protocol would be implemented through the signing of an agreement signed by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy.

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THE OBJECTIVE

The objective of the Independent Claims Process, which shall be referred to as the "Protocol", is to settle claims brought by First Nation claimants against the Federal Government and, in some cases, provincial and territorial governments. The process for reaching settlements should be simple, clearly understood, accessible, flexible, creative, efficient, timely, and fair and equitable to the parties. The process must include ongoing impartial and independent assistance and review. The settlements reached should be clearly understood, final with respect to the issues resolved, fair and just, satisfactory to the parties, and capable of being implemented effectively.

THE GUIDING PRINCIPLES

The Protocol should

1. be consistent with the Crown's fiduciary relationship with First Nations and ensure that the Federal Government conducts itself in a manner that maintains the honour of the Crown,
2. ensure that First Nation claimants have access to resources to research and negotiate claims in an effective manner,
3. be compatible with the Federal Government and First Nations dealing with each other on a government to government basis,
4. be consistent with the Crown's Treaty relationship with First Nations and facilitate resolution of claims for non-fulfilment of treaty obligations,
5. encourage and facilitate negotiated settlements of First Nations' claims,
6. provide that, where appropriate, compensation not be limited to solely monetary considerations but also include land and resources,
7. take into account the historical, political, economic, social and cultural variations among the First Nations,

8. be capable of being easily modified from time to time and contain a built-in process for ongoing review,
9. ensure that First Nations are significantly involved in the development of proposed changes to the Protocol.
10. encourage and facilitate the participation of provincial and territorial governments, where appropriate.

INDEPENDENT CLAIMS PROCESS

There is an important role for an Independent Claims Body to play in the process for the resolution of claims made by First Nations against the Federal Government. An Independent Claims Body should be established which should

- be guided by the same objective and principles upon which the Protocol is based with specific guidance provided by the implementing agreement and legislation;
- have sufficient legislative authority and resources to ensure the expeditious resolution of the claims submitted to it;
- have assisting, monitoring and decision-making functions to assist the parties to the process to finally resolve any disputed issues;
- have a role to play in helping to ensure the implementation of claims settlements;
- have appointments to its membership made in accordance with the objective and principles upon which the Protocol is based.

The Protocol should be sensitive to regional concerns and the value of existing independent bodies performing similar functions as those recommended for the Independent Claims Body is recognized.

1. INDEPENDENT CLAIMS BODY

A. STRUCTURE

The Independent Claims Body should consist of three individuals:

- (a) one part-time member appointed by the Assembly of First Nations,
- (b) one part-time member appointed by the Federal Government, and
- (c) one full-time member, the Chair and the Chief Executive Office of the Independent Claims Body appointed by both the Federal Government and the Assembly of First Nations.

The members should be appointed for a term of five years subject to removal for cause. The qualifications of these individuals should be commensurate with the duties to be performed and the level of confidence necessary to perform these functions properly.

The Independent Claims Body should be responsible for the management and administration of the independent claims process as described in this Protocol.

B. STAFF

The Independent Claims Body should have sufficient staff to carry out its functions properly and to provide the necessary degree of continuity in its operations, but care should be taken not to overstaff the Independent Claims Body and cause cost inefficiencies. The Independent Claims Body staff should be knowledgeable in First Nation issues and claims against the Federal Government and in the functions and operations of government and should have special skills to allow them to discharge the case management functions of the Independent Claims Body, in particular, skills in dispute resolution techniques and effective communication.

C. INDEPENDENT ASSESSMENT PANELS

An Independent Assessment Panel should be responsible for assessing a claim made by First Nation claimants to determine if the Federal Government and First Nation claimants should commence negotiations to resolve the claim under the independent claims process. A Panel

should consist of three members constituted from time to time by the Independent Claims Body as necessary to assess a particular claim and in the following manner:

- (a) one member to be appointed from a standing roster of not less than 11 individuals named by the Assembly of First Nations;
- (b) one member to be appointed from a standing roster of not less than 11 individuals named by the Federal Government;
- (c) one member to be appointed from a standing roster of not less than 4 individuals jointly named by the Federal Government and the Assembly of First Nations. This member should be Chair of the Panel.

No individual should accept an appointment to a Panel if circumstances exist that give rise to justifiable doubts as to the individual's independence or impartiality in the particular claim to be assessed. The Panel members should have qualifications commensurate with the duties to be performed and the level of confidence necessary to perform these functions properly. It is considered desirable to have the individuals on the standing rosters named from representative regions of Canada. The Panels could request the Independent Claims Body to act as secretariat for these Panels or to provide any necessary technical support; however, the Panels should be totally independent of the Independent Claims Body.

The members of the standing roster jointly appointed by the Federal Government and Assembly of First Nations should be provided with funds to enable the members to meet on a regular basis as they determine necessary for the purpose of

- (a) discussing process issues,
- (b) sharing relevant information, and
- (c) promoting consistency of procedure and decision-making.

The Panels should have the necessary powers to carry out their responsibilities. These powers should provide flexibility to enable the Panel and the parties to conduct the proceedings in the most expeditious and appropriate manner and in accordance with the rules of natural justice. An assessment proceeding could be conducted on the basis of documents or with an oral hearing. The Panel should have the power to subpoena witnesses and documents to facilitate the proceedings for a particular matter.

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The Panel's consideration should be limited to the issues and evidence which were referred to in the submission of the claim by the First Nation claimants and the response of the Federal Government. This limitation is intended to ensure that the process is conducted in a fair and expeditious manner and is not intended to prevent the First Nation from raising new issues and evidence but rather that if such issues and evidence are raised that the Federal Government should first have the opportunity to consider those additional matters before they are raised before an Independent Assessment Panel.

D. FUNDING

Funding for the Independent Claims Body should be secured through a 5 year funding agreement signed by the Federal Government, the Assembly of First Nations and the Independent Claims Body. Funding for the Independent Claims Body should be limited to its operations, including the costs of the Independent Assessment Panels, and should not include any funding to be provided to First Nations for research, negotiation or litigation.

2. THE PROCEDURE

A. OPTIONAL ACCESS

First Nation claimants should have the option to commence the claims process by submitting their claim directly to the Federal Government or by submitting their claim through the independent claims process managed by the Independent Claims Body.

B. SUBMISSION OF CLAIM

(i) Submission Directly to the Independent Claims Body

On submission of a claim to the Independent Claims Body, the Body shall review the submission to verify that

- (a) the claimant is a First Nation,
- (b) the submission is described in such a way as to fall within the definition of a claim as described in the Protocol, and

- (c) the claim is not in litigation or if it is in litigation that the parties have agreed to submit the claim to the Protocol.

The Independent Claims Body may advise and assist the First Nation claimants and the Federal Government at the submission stage.

The Independent Claims Body will register the claim and convey it to the Federal Government.

The Independent Claims Body will constitute an Independent Assessment Panel to assess the claim unless the parties file with the Independent Claims Body an agreement to proceed with negotiation of the claim.

If the decision of the Independent Assessment Panel is not acceptable to either party, proceedings may be commenced in court to determine the matter. If proceedings are commenced because

- (a) the Federal Government does not accept the Panel's decision, the Federal Government will provide litigation funding, including funding for appeals, to the First Nation claimants, in accordance with any guidelines administered by the body or organization retained for that purpose (for further details see "Funding for First Nation Participants"), or
- (b) the First Nation claimants do not accept the Panel's decision, the Federal Government will not provide any litigation funding to the First Nation claimants.

[(FN) *The Federal Government may not rely upon any technical legal defences such as limitation periods or the doctrine of laches in these court proceedings.*

(FG) *The Federal Government may rely on any defences available to it in these court proceedings.]*

Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, [(FN) *including the extent to which the negotiations will be conducted on a "without prejudice" basis,*] if they proceed to negotiate the claim. [(FN) *Issues relating to communications with the general public should also be dealt with in the negotiation protocol*]. All negotiations shall be conducted in good faith.

[(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol as it relates to a particular claim shall be considered confidential matters between the parties].

(ii) *Submission directly to the Federal Government*

If the First Nation submits the claim directly to the Federal Government:

- (a) the Federal Government shall advise the Independent Claims Body of details of the claim made to permit the Independent Claims Body to act as a registrar of such claims;
- (b) the Federal Government shall advise the First Nation claimants and the Independent Claims Body if it will accept or reject the claim for negotiation of a settlement agreement and on what basis;
- (c) the First Nation claimants may appeal a rejection decision of the Federal Government to the Independent Claims Body which shall appoint an Independent Assessment Panel to assess the claim;
- (d) if the decision of the Independent Assessment Panel is not acceptable to either party, proceedings may be commenced in court to determine the matter. If proceedings are commenced because
 - (i) the Federal Government does not accept the Panel's decision, the Federal Government will provide litigation funding, including funding for appeals, to the First Nation claimants, in accordance with any guidelines administered by the body or organization retained for that purpose (for further details see "Funding for First Nation Participants"), or
 - (ii) the First Nation claimants do not accept the Panel's decision, the Federal Government will not provide any litigation funding to the First Nation claimants.

If negotiations commence, the Federal Government shall advise the Independent Claims Body. Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, [(FN) including the

extent to which negotiations will be conducted on a "without prejudice" basis.] [(FN) Issues relating to communications with the general public should also be dealt with in the negotiation protocol]. All negotiations shall be conducted in good faith.

[(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol as it relates to a particular claim shall be considered confidential matters between the parties.]

On request of both parties, the Independent Claims Body will perform any functions within its mandate to assist the parties in their negotiations and in the implementation of the settlement agreement.

C. *POWERS OF THE INDEPENDENT CLAIMS BODY*

If, after submission to the Independent Claims Body, the parties commence negotiation of the claim, the Independent Claims Body should, unless the parties agree otherwise,

- (a) monitor, assist and facilitate the negotiations to help to ensure that they proceed in good faith and in a timely manner,
- (b) recommend and facilitate conciliation or mediation to resolve all or any part of the claim,
- (c) facilitate binding arbitration, if agreed by the parties,
- (d) recommend and facilitate obtaining independent expert opinions and fact finding services, if and when needed, and
- (e) encourage the parties to conduct their negotiation process in accordance with the terms of reference which they have agreed to and, if necessary, require a party to provide an explanation of any failure to do so and give a direction requiring the party to remedy the failure.

To monitor the negotiations may include: following the proceedings; liaising between the parties and providing information to each of them; reviewing progress of the negotiations; acting as a

neutral chair in the negotiation sessions - recording agreements; requiring confidential presentation of rationales for settlement offers and rejections of offers.

To assist the negotiations may include: intervening when the process breaks down; conducting independent or directed research topics required to conduct the Independent Claims Body's other functions or conducting other research as requested by the parties to a claim; assisting the parties to a claim to obtain simultaneous interpretation services, where appropriate; assisting the parties to prepare protocols or terms of reference for negotiations and to prepare realistic negotiation timetables; on request of a party, reviewing a settlement agreement.

The Independent Claims Body should have sufficient power and access to sanctions to move the negotiation process along in a timely and efficient manner. Such sanctions should be exercised judiciously and appropriately taking into account all of the circumstances after consultation with both parties to a claim. The Independent Claims Body should have all the necessary powers to enable it

- (a) to make reports at any time to the First Nations and the Federal Government on any matter requiring the urgent attention of the Federal Government or the First Nations,
- (b) to penalize a party for failing to participate in the negotiations in good faith, including, but not limited to, assessing costs against a party, and
- (c) to conduct inquiries into the conduct of the parties in the negotiation process.

D. UNSUCCESSFUL NEGOTIATIONS

If negotiations have not successfully resolved all the issues in a claim, either party may apply to the Independent Claims Body to refer the disputed or unresolved issue to an Independent Assessment Panel for a non-binding recommendation. If the Independent Claims Body considers the application appropriate, it will appoint a Panel to make the recommendation or may make any other recommendation it considers appropriate in the circumstances to try to assist the parties to resolve the issue.

E. SUCCESSFUL NEGOTIATIONS

The Independent Claims Body will monitor and report on the implementation of the settlement agreements. To monitor the implementation of the settlement agreement may include: confirming timely payments of settlement amounts; confirming transfers of land or additions to reserves; encouraging prompt passage of required legislation; confirming establishment of required administrative processes, bodies or tribunals. Monitoring does not include any overseeing of how First Nation claimants utilize any settlement amounts received under the agreement.

F. ACCESS TO INDEPENDENT CLAIMS BODY DURING LITIGATION

At any time First Nation claimants may take a claim submitted to this independent claims process directly to the courts and in that event, the claim is considered to have been withdrawn from the process unless the parties agree otherwise.

If a claim is before the courts but the parties have agreed to attempt to settle the claim, the parties may request the Independent Claims Body to assist the parties to reach a negotiated settlement.

G. ADDITIONAL FUNCTIONS

The Independent Claims Body should have the following additional functions:

- (a) provide a data base of past settlement agreements;
- (b) educate the general public on the claims process, including developing visual and written materials on the process for use in First Nation communities;
- (c) monitor alienation of lands or resources during negotiations;
- (d) translate the Independent Claims Body's documentation as necessary in order to provide easier access to the Independent Claims Body's process;
- (e) identify the sources of information and training relating to negotiation skills, effective socio-economic development plans, etc.

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3. FUNDING FOR FIRST NATION PARTICIPATION

A. FUNDING FOR RESEARCH AND NEGOTIATION OF CLAIMS

The Independent Claims Body should not be involved in the administration or allocation of this funding; however, the Independent Claims Body should provide advice directly to the Joint Committee on Claims (see page 23 for a discussion of this Committee), and by means of its annual report on the funding levels required to permit First Nations to participate effectively under the Protocol.

The Joint Committee on Claims should, as part of the implementation stage of the Protocol, recommend guidelines to the Federal Government and First Nations on appropriate methods for allocating funds for these purposes and for accountability on use of those funds. The Committee may make recommendations to the Federal Government on annual funding requirements for these purposes after consultation with the Independent Claims Body.

[(FG) If a settlement agreement is reached, loans made available to First Nation claimants for funding negotiation participation should be reimbursed by the Federal Government based upon a pre - set formula. This formula should be developed by the Joint Committee on Claims as an implementation issue. First Nation claimants may make an application to the Independent Claims Body to increase the amount of reimbursement available under the formula where the circumstances would make it appropriate to do so. (FN) Funds made available to First Nation claimants to participate in negotiations should be provided as grants and not loans. These grants should be based on the needs of the First Nation claimants. First Nation claimants who have received a negotiation grant may make an application to the Independent Claims Body to increase the amount of the grant where the circumstances would make it appropriate to do so.]

B. FUNDING FOR BODY REPRESENTING FIRST NATIONS

In order to permit the Protocol to work effectively the *[(FN) Assembly of First Nations]* should be funded *[(FG) by means of a grant]* in order to provide policy support and a liaising function between the Joint Committee on Claims and First Nations.

The Assembly of First Nations should make appointments to the Independent Claims Body, the Joint Committee on Claims and any applicable rosters for Independent Assessment Panels established under the Protocol after any consultations it considered appropriate. A secretariat

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may be required to assist these ongoing functions. Funding would be part of a 5 year funding agreement agreed to by the Assembly of First Nations and the Federal Government.

COMMENT: The way in which the First Nations choose their representation in this process has an indirect impact on the Federal Government. Principles 1, 4 and 9 speak to the relationship between the Federal Government and First Nations. The Federal Government is not clear how it would fulfil the intent of these principles to those First Nations not represented by the Assembly of First Nations.

C. *LITIGATION FUNDING*

The Joint Committee on Claims should develop eligibility criteria and guidelines for the litigation funding to be provided by the Federal Government under this Protocol.

D. *ADMINISTRATION OF FUNDING*

The Joint Committee on Claims should retain an independent person or organization on contract who shall

- (a) administer the research, negotiation and litigation funds, and
- (b) allocate them in a manner consistent with any eligibility criteria and guidelines adopted by the Committee.

CLAIMS TO WHICH THIS PROTOCOL WILL APPLY

A. *DEFINITION*

A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where [(FG) the claimants have established an outstanding obligation / (FN) an outstanding obligation is established] which is derived from the law (common law, civil law, equity or statute) on the part of the Federal Government, including any [(FN) duties and] obligations that [(FN) may] arise from the fiduciary relationship between the First Nation claimants and the Crown. For the purposes of the Protocol [(FN) and without limiting the generality of the foregoing], an outstanding obligation arises in the following circumstances:

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- (a) the breach or non-fulfilment of a treaty or agreement between the Crown and the First Nation claimants;
- (b) a breach of an obligation arising out of the *Indian Act* or provisions of other statutes [(FN) *affecting Indians* / (FG) *relating specifically to Indians*] or lands reserved for Indians;
- (c) a breach of an obligation arising out of failure of the Federal Government to properly administer Indian funds, lands, resources or other assets, or
- (d) an illegal disposition of Indian land.

~~[(FN) The Protocol should also recognize claims where {the First Nation claimants establish/it is established} that:~~

- ~~(e) the Federal Government has lawfully damaged or disposed of Indian lands without providing [(FN) full] compensation, or~~
- ~~(f) an employee or agent of the Federal Government has acted in fraudulently in respect of any circumstances described in paragraphs (a) to (d)./~~

~~(FG) The Protocol should also recognize claims where {the First Nation claimants establish/it is established} that:~~

- ~~(e) the Federal Government has lawfully damaged or disposed of Indian lands without providing [(FN) full] compensation, or~~
- ~~(f) an employee or agent of the Federal Government has acted in fraudulently in respect of any circumstances described in paragraphs (a) to (d)./~~

COMMENT: The First Nations representatives wished clarification of the meaning or application of paragraph (e) and expressed the view that the issues in paragraphs (e) and (f) were included as obligations arising at law in any event. In response the Federal Government indicated that they would agree to delete the two paragraphs but that this should not be taken as any indication that they agreed that these two issues were included in the definition of the claim. They also indicated that they could not recall an instance of where paragraph (e) had been used.

[(FG) It is not intended that this Protocol deal with claims based upon aboriginal title or claims which would require the renegotiation of treaties. It is recognized that aboriginal title claims are being dealt with under other claim processes. It is also recognized that a

joint process for treaty clarification is under consideration by First Nations and the Federal Government.)

It is acknowledged that the interpretation of the application of the Protocol may be disputed by the Federal Government and First Nations. It is recognized that from the perspective of First Nations the appropriate interpretation to be given may be broader than that which the Federal Government may be inclined to take.

B. RECOMMENDATION FOR GRIEVANCES OUTSIDE PROTOCOL

There may be occasions when First Nation claimants make a submission to the process which may not be considered by the Federal Government or an Independent Assessment Panel to be a matter to which the Protocol strictly applies.

If the Independent Assessment Panel determines that the Protocol does not apply to a submission of a First Nation, the Panel should be encouraged to express an opinion on whether or not the circumstances of the submission would compel a reasonable and fair minded person to conclude that the circumstances necessitate some form of redress and to make recommendations on the process which might be followed to facilitate that discussion. It is also recognized that in exceptional cases it may be appropriate for an Independent Assessment Panel to recommend that some form of independent inquiry into the circumstances be held.

In circumstances clearly not referable to the Protocol in the first instance, it is recommended that First Nations as well as individuals or groups of individuals have access to and be encouraged to apply to an existing body, such as the Canadian Human Rights Commission, for consideration of their grievance if other available processes or avenues have been exhausted.

It is recommended that the Joint Committee on Claims closely monitor the circumstances which are not covered by the process to determine if further steps need to be taken to address these issues.

WHO MAY MAKE A CLAIM UNDER THE PROTOCOL

This process applies to First Nations.

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Where a claim is made against the Federal Government, the representatives of the claimants should be clearly identified and should clearly indicate any collective body and all those persons for whom those representatives are acting.

At an early stage in any settlement negotiations, the parties should discuss ratification requirements which should be incorporated into any settlement agreement.

The Federal Government and the representatives of the claimants should 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.

EXCHANGE OF INFORMATION

The Federal Government and First Nations claimants should communicate openly at all times to help to establish a cooperative environment which will encourage the settlement of claims.

A. FEDERAL GOVERNMENT DISCLOSURE

The Federal Government shall 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 shall 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 or were required to attempt to negotiate a settlement to the claim and upon which the Federal Government intends to rely.

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

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

B. FIRST NATION DISCLOSURE

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

The First Nation claimants shall 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 shall take place within a reasonable time after the documents become available to the First Nations.

These obligations are subject to any restrictions imposed by common law, legislation or regulation.

C. OBLIGATION TO DISCLOSE

If the Federal Government or the First Nation claimants have relevant documents which they are not required to disclose under this Protocol, the non-disclosing party should provide a list describing all of the undisclosed documents and the reasons for their non-disclosure to the other party.

SETTLEMENT PRINCIPLES

The following principles should be applied to settlement negotiations conducted under the Protocol:

1. There should be no reliance on [(FN) *any technical legal defences such as*] limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol. All relevant evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law. [(FN) *Limitation periods should be suspended while the parties are engaged in the independent claims process.*] (FG) First Nation claimants are encouraged to take any action necessary to protect the loss of their legal rights due to the

expiration of a limitation period while the parties are engaged in the independent claims process.]

2. The parties should identify and take any agreed upon steps, including maintaining confidentiality, to help to ensure that the price of any land which is subject of settlement negotiations does not become inflated by reason of those very settlement negotiations.

The Joint Committee on Claims should consider and recommend additional methods which could be used to help to avoid inflation of land values e.g. taking options to purchase on the land in question at a very early stage in the process.

3. Compensation should be [(FG) in accordance with recognized legal principles. / (FN) in amounts or forms which are consistent with the objectives and guiding principles of the Protocol.]

COMMENT: First Nation representatives also indicated that it was an option for consideration to delete paragraph 3 altogether.

4. The parties should make all reasonable efforts to ensure that the elements of any settlement agreement reached are most appropriate for the specific circumstances of the submission.

The Federal Government and First Nations encourage flexibility, innovation and creativity in addressing the matter of suitability of settlement proposals. Spiritual and cultural elements associated with unresolved issues should be addressed. [(FG) ~~Usual forms of compensation, such as money or land, may not adequately address these spiritual or cultural issues.~~] These issues could perhaps be addressed in some cases by focusing on forms of healing - ceremonial or otherwise, statements of reaffirmation of relationships, dedication of monuments or meaningful symbols, or public acknowledgement of wrongs committed.

It is recognized that innovative approaches may be the best or most appropriate way to address [(FG) losses relating to off reserve resource management issues] e.g. hunting, fishing, gathering, etc. In these cases, serious consideration will be given to joint management of resource agreements, revenue sharing agreements or economic development agreements as methods to deal with these complex issues.

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It was also recognized that it would be necessary and desirable in certain circumstances to involve the provinces or territories in many of these situations before they would be feasible. It is recognized that, where appropriate, provincial and territorial participation in the settlement of claims respecting resource issues be encouraged.

Resource management issues are not being adequately addressed at the present time but it is acknowledged that the following developments should facilitate progress in the near future:

- there is increased evidence of use of joint agreements to manage resources
- judicial decisions are providing clearer guidance to the parties on how loss of resources must be dealt with
- discussions on self-government may facilitate these types of settlement agreements
- current treaty-making processes are likely to address many of these issues in an innovative way.

5. Agreement on compensation principles should not be required as a condition to beginning settlement negotiations. [(FG) The parties should agree on compensation principles as early in the negotiation process as possible to avoid delays and frustration in the negotiation process.]

It is acknowledged that the Federal Government will develop negotiation instructions or guidelines for their negotiators across the country and that the guidelines to be used by First Nations may well be different from those used by the Federal Government. Before adoption or variation of any negotiating guidelines, the Federal Government shall provide the Joint Committee on Claims with copies of the draft guidelines for review and comment. These negotiating policies or guidelines will not be part of the agreement of the Protocol but they should be consistent with the objective and principles upon which the Protocol is based.

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PROCEDURAL RECOMMENDATIONS

A. INTERGOVERNMENTAL CONSULTATIONS

During negotiations and during the implementation stage of a settlement agreement every reasonable effort should be made to ensure that any necessary inter-agency or inter-governmental consultations take place in order to avoid unnecessary delays in implementation, in order to provide First Nation communities with practical information on realistic timetables for implementation of their agreement, and in order to avoid any unexpected surprises or internal conflicts at a late stage of the negotiations.

B. VISITING CLAIMANT COMMUNITIES

The Federal Government should continue its policy of visiting the aggrieved communities and becoming familiar first-hand with the concerns of the members of the communities. The more involved a community is in the actual preparation and negotiation of its submission the more likely the community will find the process acceptable and the settlement agreeable. If appropriate, negotiations should take place in the claimants' community. If appropriate, after taking into account the costs and benefits of doing so, Independent Assessment Panels should visit claimants' communities.

C. BETTER INFORMATION TO FIRST NATIONS

First Nations claimants should be given the opportunity to be more fully informed about the Protocol at a very early stage in their consideration of making a submission. Visual and written materials should be developed by the Independent Claims Body and disseminated by [(FG) the Assembly of First Nations] to assist First Nations communities to have a realistic appreciation of what they may expect out of the process and to have information

- about the experience of other communities in the process - where they were successful and where they had problems,
- how the process works and in what order steps must be taken,
- about how to manage human and financial resources effectively,
- about when and how to retain consultants and legal counsel, and
- about where additional information and support is available.

D. *BETTER PREPARATION FOR IMPLEMENTATION*

Where planning takes place in advance in a community and where the community has a vision of how it wishes to utilize settlement proceeds, the degree of satisfaction with the settlement increases and the level of long term benefit to the community also increases. Such advance planning is encouraged. The question of appropriate implementation should be an item on the negotiating protocol to be dealt with at the beginning of the settlement negotiation process. The Independent Claims Body should ensure that the question of implementation has been identified and considered as part of the preparation of the negotiation protocol but the Independent Claims Body should not be given any authority on how the question is to be dealt with by a First Nation.

E. *DATA BASE OF INFORMATION*

A repository of information about submissions made, negotiation protocols developed and settlement and implementation agreements and protocols reached under the old policy and the new process should be developed by the Independent Claims Body and made available for inspection and study.

THIRD PARTY INTERESTS

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

Where land is part of the settlement and is owed by the Federal Government to First Nation 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 Nation 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. The Independent Claims Body may facilitate the participation of these third parties in the settlement process.

Where appropriate, provincial and territorial participation in the settlement of claims respecting resource issues should be encouraged.

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, [(FN) *If requested by the First Nation claimants, the Federal Government will take all steps within its powers to ensure that the relevant provincial or territorial government participates in the negotiation process, particularly where*], especially where land or resources are at issue and the province or territory has

- (a) benefitted from a breach of an obligation arising at law,
- (b) has itself acted in such a way as to bring about a breach of an obligation arising at law to First Nation claimants, or
- (c) has been unjustly enriched as a result of juridical interpretation of historical events and constitutional division of powers.

COMMENT: The Federal Government representatives noted that the government will wish to give assurances to the public that as a general rule, their interests in land will not be disturbed by claims settlements negotiated between First Nations and the Federal Government.

EVALUATION

A. CHANGES TO THE INDEPENDENT CLAIMS PROCESS

First Nations and the Federal Government should

- (a) cooperate in the ongoing evaluation of Protocol,
- (b) make all reasonable efforts to reach consensus on any amendments or changes to a policy of the Federal Government respecting matters in the Protocol in order to achieve the Protocol's stated objective,

- (c) subject to the following provisions, no changes shall be made to the agreement which forms part of this Protocol unless these changes are agreed to by the parties and recorded in writing, and
- (d) subject to any mandatory legislative requirements, the parties to a particular claim may agree to changes in the Protocol for the purposes of settling that particular claim.

B. JOINT COMMITTEE ON CLAIMS

The Joint Committee on Claims should be established to carry out these joint evaluation activities and any other functions referred to in these recommendations. This Committee will consist of a small group of members appointed in equal numbers by the Federal Government and the Assembly of First Nations. The Committee will be co-chaired by one representative of each of the two appointing agencies.

The Committee will meet once in each calendar year or more often at the discretion of the co-chairs. This Committee will not have a permanent secretariat or facilities.

C. THE EVALUATION METHOD

The ongoing evaluation shall be conducted as follows:

1. the Independent Claims Body shall 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;
 - adequacy, allocation and availability of resources for an effective and efficient process;
 - performance and participation of the parties in the process;
 - recommendations for improvements including criteria for establishing any necessary priorities for resolving claims and for minimizing or removing any backlogs in claims.

The Minister of Indian Affairs must present a copy of the annual report of the Independent Claims Body to Parliament at the earliest opportunity after its publication.

A copy of the annual report must be presented by the Independent Claims Body to the Assembly of First Nations at the earliest opportunity after its publication.

2. the Independent Claims Body shall attend a meeting annually with the Joint Committee on Claims to present the annual report and to discuss its finding. The meeting will be called and chaired by the co-chairmen of the Joint Committee;
3. the First Nations and the Federal Government through the Joint Committee on Claims will cooperate in the conduct of an evaluation of the effectiveness of any claims research function 3 years after the Protocol has been implemented;
4. the First Nations and the Federal Government through the Joint Committee on Claims will cooperate in the conduct of a full evaluation of the effectiveness of the Protocol no later than 5 years after the Protocol have been implemented.
The funding required to conduct these stages of the evaluation process will be included in the budget of the Independent Claims Body.
5. it is recognized that the law is in an active state of evolution and that there may be additional matters which ought to be included in the Protocol as time passes. The Joint Committee on Claims should review annually, and more frequently if necessary, any changes in the law or other relevant developments in order to assess whether the Protocol ought to be amended or revised.

IMPLEMENTATION

A. STRUCTURE OF THE PROTOCOL

The independent claims process proposed in this Protocol should be implemented through the signing of an agreement by the Federal Government and the Assembly of First Nations, through the passage of an Act of Parliament and through Federal Government policy. The issues in the Protocol which are to be addressed specifically in the agreement, legislation and policy should be determined and recommended at the implementation stage. The agreement, legislation and policy used to implement this Protocol should be consistent with the stated objective of the Protocol and the principles upon which the Protocol is based.

The method of implementing the independent claims process is not intended in any way to crystallize or codify any legal rights which are evolving in the current legal environment.

B. STEPS IN IMPLEMENTATION

1. With agreement in principle on this Protocol, the Federal Government and the Assembly of First Nations should make their respective appointments to the Joint Committee on Claims.
2. The Joint Committee on Claims should perform the following duties:
 - (a) to determine and recommend the appropriate location for the issues in the Protocol in an agreement, in legislation or in government policy;
 - (b) to prepare and recommend a written agreement for execution by the Federal Government and the Assembly of First Nations;
 - (c) to [(FG) recommend the substance of proposed legislation];
 - (d) to prepare and recommend the five year funding agreements.
3. The Federal Government and the Assembly of First Nations should make the necessary appointments to
 - (a) the Independent Claims Body, and
 - (b) the rosters for the Independent Assessment Panels.
4. The Joint Committee on Claims should perform the following duties:
 - (a) to select and retain an independent person or organization to administer the funding for research, negotiation and litigation;
 - (b) to develop the guidelines and eligibility criteria for funding for research, negotiation and litigation.

**SUMMARY OF UNRESOLVED ISSUES
AS REPRESENTED BY FEDERAL GOVERNMENT**

[Listed Randomly]

1. UNRESOLVED ISSUE: Cost of the Independent Claims Process

FEDERAL GOVERNMENT:

Page 2 Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties *[(FG) and that will not increase the overall cost to the Federal Government of the process of reaching settlements.]*

FIRST NATIONS:

Page 2 Throughout its deliberations the Joint Working Group has emphasized the importance of designing a claims resolution system that will function in an effective and efficient manner to the benefit of both parties.

2. UNRESOLVED ISSUE: Are technical defences available to the Federal Government in court proceedings?

FIRST NATIONS:

Page 8 *[(FN) The Federal Government may not rely on any technical legal defences such as limitation periods or the doctrine of laches in these court proceedings.]*

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FEDERAL GOVERNMENT:

Page 8 [(FG) The Federal Government may rely on any defences available to it in these court proceedings.]

3. UNRESOLVED ISSUE: To what extent should the independent claims process be "without prejudice"?

FIRST NATIONS:

Page 8 Unless the parties agree otherwise, the parties shall prepare and submit to the Independent Claims Body a protocol setting out the details of their negotiation plan, [(FN) *including the extent to which the negotiations will be conducted on a "without prejudice" basis,*] if they proceed to negotiate the claim.

FEDERAL GOVERNMENT:

Page 9 [(FG) All aspects of the Protocol shall be considered to be conducted on a "without prejudice" basis, unless the parties agree otherwise, and except to the extent required by law or in order to permit the Independent Claims Body to perform its obligations under the Protocol, all aspects of the Protocol it relates to a particular claim shall be considered confidential matters between the parties].

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4. UNRESOLVED ISSUE: Dispossession of Third Parties

FIRST NATIONS:

Page 8 [(FN) *Issues relating to communications with the general public should also be dealt within the negotiation protocol.*]

FEDERAL GOVERNMENT:

Page 23 Comment: *The Federal Government representatives noted that the government will wish to give assurances to the public that as a general rule, their interests in land will not be disturbed by claims settlements negotiated between First Nations and the Federal Government.*

5. UNRESOLVED ISSUE: Funding for Negotiation of Claims

FEDERAL GOVERNMENT:

Page 13 [(FG) *If a settlement agreement is reached, loans made available to First Nation claimants for funding negotiation participation should be reimbursed by the Federal Government based upon a pre - set formula. This formula should be developed by the Joint Committee on Claims as an implementation issue. First Nation claimants may make an application to the Independent Claims Body to increase the amount of reimbursement available under the formula where the circumstances would make it appropriate to do so.*]

FIRST NATIONS:

Page 13 [(FN) *Funds made available to First Nation claimants to participate in negotiations should be provided as grants and not loans. These grants should*

be based on the needs of the First Nation claimants. First Nation claimants who have received a negotiation grant may make an application to the Independent Claims Body to increase the amount of the grant where the circumstances would make it appropriate to do so.)

6. UNRESOLVED ISSUE: Body Representing First Nations

FIRST NATIONS:

Page 13 In order to permit the Protocol to work effectively the [(FN) Assembly of First Nations] should be funded [(FG) by means of a grant] in order to provide policy support and a liaising function between the Joint Committee on Claims and First Nations.

Page 21 Visual and written materials should be developed by the Independent Claims Body and disseminated by [(FN) the Assembly of First Nations] to assist First Nations communities to have a realistic appreciation of what they may expect out of the process...

FEDERAL GOVERNMENT:

Page 13 COMMENT: The way in which the First Nations choose their representation in this process has an indirect impact on the Federal Government. Principles 1, 4 and 9 speak to the relationship between the Federal Government and First Nations. The Federal Government is not clear how it would fulfil the intent of these principles to those First Nations not represented by the Assembly of First Nations.

7. UNRESOLVED ISSUE: Burden of Proof

FIRST NATIONS:

Page 14 A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where (FN) *an outstanding obligation is established* which is derived from the law (common law, civil law, equity or statute) on the part of the Federal Government, including any [(FN) *duties and*] obligations that [(FN) *may*] arise from the fiduciary relationship between the First Nation claimants and the Crown.

FEDERAL GOVERNMENT:

Page 14 A submission of a claim by a First Nation or First Nations should be considered appropriate for settlement negotiations where [(FG) *the claimants have established an outstanding obligation*] which is derived from the law (common law, civil law, equity or statute)...

8. UNRESOLVED ISSUE: Limiting Outstanding Obligations derived from Law to a specified list.

FIRST NATIONS:

Page 14 For the purposes of the Protocol [(FN) *and without limiting the generality of the foregoing*], an outstanding obligation arises in the following circumstances:...

FEDERAL GOVERNMENT:

Page 14 For the purposes of the Protocol, an outstanding obligation arises in the following circumstances:...

9. UNRESOLVED ISSUE: **Claims based on Aboriginal Title or requiring Renegotiation of Treaties**

FEDERAL GOVERNMENT:

Pages 15
and 16

[(FG) It is not intended that this Protocol deal with claims based upon aboriginal title or claims which would require the renegotiation of treaties. It is recognized that aboriginal title claims are being dealt with under other claim processes. It is also recognized that a joint process for treaty clarification is under consideration by First Nations and the Federal Government.]

FIRST NATIONS:

Page 2

[(FN) While it is not intended that this process will deal with comprehensive aboriginal title negotiations or bilateral treaty implementation negotiations, particularly in view of the other processes presently in place or contemplated to deal with those negotiations, it is recognized that aboriginal title or treaty rights could be elements of claims in this process.]

10. UNRESOLVED ISSUE: **Exception of Technical Legal Defences during Negotiations**

FIRST NATIONS:

Page 18

There should be no reliance on [(FN) any technical legal defences such as] limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol.

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FEDERAL GOVERNMENT:

Page 18 There should be no reliance on limitation periods or the doctrine of laches so long as the parties continue to operate within the parameters of the Protocol.

11. UNRESOLVED ISSUE: *Compensation in accordance with Recognized Legal Principles*

FEDERAL GOVERNMENT:

Page 19 Compensation should be *[(FG) in accordance with recognized legal principles.*

FIRST NATIONS:

Page 19 Compensation should be *[(FN) in amounts or forms which are consistent with the objectives and guiding principles of the Protocol.]*

COMMENT: First Nation representatives also indicated that it was an option for consideration to delete paragraph 3 altogether.

12. UNRESOLVED ISSUE: *Suspension of Limitation Period during Negotiations*

FIRST NATIONS:

Page 18 *[(FN) Limitation periods should be suspended while the parties are engaged in the independent claims process.]*

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FEDERAL GOVERNMENT:

Pages 18
and 19

[(FG) First Nation claimants are encouraged to take any action necessary to protect the loss of their legal rights due to the expiration of a limitation period while the parties are engaged in the independent claims process.]

13. UNRESOLVED ISSUE: Responsibility of Federal Government for Provincial Involvement

FIRST NATIONS:

Page 23

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, [(FN) If requested by the First Nation claimants, the Federal Government will take all steps within its powers to ensure that the relevant provincial or territorial government participates in the negotiation process, particularly where], especially where land or resources are at issue and the province or territory has...

FEDERAL GOVERNMENT:

Page 23

Subject to the above, it is recognized that in many cases the participation of a provincial or territorial government is essential to the settlement of a claim, especially where land or resources are at issue and the province or territory has...

14. UNRESOLVED ISSUE: Releases/Surrenders

NO DRAFT FOR CONSIDERATION TO DATE

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NEUTRAL'S NOTE:

There remain unresolved issues identified throughout the draft which are not outlined above. These issues were not included in the summary of Federal Government representatives as significant issues for resolution. First Nation representatives did not summarize what they considered to be significant issues for resolution.