# 37th PARLIAMENT, 2nd SESSION

# Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources

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CANADA

# Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources

NUMBER 005 • 2nd SESSION • 37th PARLIAMENT

**EVIDENCE**

## Tuesday, November 26, 2002

***[Recorded by Electronic Apparatus]***

(1100)

[*English*]

**The Chair (Mr. Raymond Bonin (Nickel Belt, Lib.)):** I call the meeting to order. Welcome, everyone.

The order of the day is Bill C-6, an act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation, and resolution to specific claims, and to make related amendments to other acts.

Today we are pleased to welcome the Honourable Robert Nault, Minister of Indian Affairs and Northern Development. The minister is accompanied by Mr. Bob Winogron and Mr. Barry Dewar.

I welcome you and invite you to make your presentation, Minister, which will be followed by a period of questions and answers. This part of our meeting will last for one hour, until 12 noon.

Mr. Minister.

**Hon. Robert D. Nault (Minister of Indian Affairs and Northern Development):** Thank you very much, Mr. Chairman and colleagues.

As our chairman has said, Mr. Winogron is with me from Justice, and Mr. Barry Dewar is our ADM of claims and Indian government.

Mr. Chairman, as is pretty standard practice for me, I will start with our opening and prepared text and then I will be prepared to answer all your questions.

As you are aware, I've introduced a series of progressive measures in recent months to enable first nations to accelerate their transition toward self-government and greater economic independence. These include the proposed first nations governance act, the first nations fiscal and statistical management act, as well as recent steps to open up the First Nations Land Management Act.

Each of these bills puts new tools of economic self-sufficiency into the hands of first nations. Each plays a fundamental and complementary role in advancing our agenda of building stronger, healthier communities and a better quality of life for aboriginal people.

Equally crucial is the bill before us today. This bill flows from the Liberal Party red book commitments and is the result of many years of study and discussion of how to best address the many specific claims that have arisen in the course of Canada's relationship with first nations.

Our goal in putting the specific claims resolution act forward is quite simply to improve the present process of resolving these claims. The proposed specific claims resolution act will provide a firm foundation for the faster, fairer, and more transparent processing and settlement of specific claims.

The Canadian Centre for the Independent Resolution of First Nations Specific Claims created by this act will thereby remove an enormous roadblock to economic development by improving

first nations access to lands and resources. This will allow them to get on with the business of developing their communities, attracting investment, and shaping their own destiny.

As the recent Speech from the Throne reinforced, this has been our overarching objective since this government took office. We have acknowledged that new ways of solving old problems have to be found. We have recognized that aboriginal people have legitimate and long-standing grievances that, as a nation, we have a duty to address.

Some of these grievances are the result of the failure of successive generations to uphold some of the promises made by our forefathers. At that time, the crown agreed to provide sufficient lands for reserves and to manage that land and other first nations assets according to a high standard of conduct. Over the years, first nations complaints about how the crown was discharging its responsibilities grew.

Historically, there were few avenues for redress. For example, between 1927 and 1951, the Indian Act hindered first nations by requiring them to get government permission if they wanted to use their own money to advance their claims. As a result, grievances accumulated and the relationship between first nations and the federal government suffered.

In 1973, the Liberal government of the day responded by announcing a specific claims process to resolve these issues out of court. The initial goal was not only to address our legal liability, it was also equally important to begin to deal with the historical sense of injustice on the part of many first nations that was impeding progress in other areas of our relationship.

Since then our policy has been clarified and expanded on two occasions: in 1982 and again in 1991. The purpose then, as now, was to introduce greater fairness and efficiency in the process, and we have had some success in dealing with these historic grievances.

(1105)

Mr. Chairman, for the committee's information, at present a total of 232 agreements worth more than $1.3 billion have been ratified, adding more than 16,000 square kilometres to reserve lands across the country. Quick math will show, if you average it out, that that's about $5.6 million per claim.

However successful our approach has been, nearly 600 claims have been added to the inventory of unsettled claims since then. In part, the growing number of claims is due to improved research capacity all across Canada. Formerly little known areas of our national history have now come to light through the efforts of academic historians as well as government and first nations claim researchers.

In part, this growth is also due to court cases that have clarified the scope of the legal doctrines that underpin Canada's relationship with first nations. Many earlier claims that were rejected on the basis of our understanding of the law at that time are being specific claims.

Frankly, this growth in claims is also due to our inability to move them more quickly through the current specific claims process. Delay in settling claims is costly because specific claims are historical in nature. The longer they remain unresolved, the more it costs to settle them and the longer first nations have to wait to receive a settlement that is just.

Mr. Chairman, despite the improvements brought about in 1991, when we beefed up the human and financial resources committed to claims resolution, the current process still drags on far too long and eats up too many internal government resources. Not surprisingly, many first nations have become frustrated and resentful of the entire claims resolution process. They have come to distrust a system they believe to be unbalanced and unfair.

First nations perceive Canada to be in a conflict of interest because it controls their funding to participate in negotiations. It decides the claims it is willing to negotiate and sets out the criteria on which it is willing to base compensation. The lack of confidence in the process can make negotiations difficult and it encourages some first nations to resort to the courts. But, Mr. Chairman, winner-take-all solutions, as you know, are risky for all concerned. We know that negotiation is preferable to litigation. First nations have told us so.

We want to create a more independent process for resolving claims, a more neutral system that will level the playing field for negotiation to resolve claims more efficiently--most importantly, Mr. Chairman, a system that will allow first nations to capitalize on increased opportunities for economic development by fostering a climate of trust, cooperation, and certainty.

I'm sure you've been told that a few years ago a joint Canada-first nations task force of expert advisers looked into the claims process, building on past decades of study, to design a model claims resolution body. The proposed Specific Claims Resolution Act reflects the essential elements of this ideal model, tempered, Mr. Chairman--and I emphasize tempered--by current fiscal realities.

The bill before you would establish a claims resolution centre with two divisions. The first is a commission to facilitate negotiated settlements using modern dispute resolution techniques. The second is a quasi-judicial tribunal to make final decisions on claim validity and compensation for claims up to $7 million in value--I want to emphasize, Mr. Chairman, that it's our belief that those are the majority of claims, $7 million or less--if dispute resolution cannot produce a negotiated outcome. Both divisions would be overseen by a chief executive officer, whose responsibility would be to manage the day-to-day administration of this new body.

(1110)

This centre would replace the Indian Claims Commission, which was set up in 1991 as an interim measure while the idea of an independent body was under discussion with first nations. The Indian Claims Commission—which is limited to providing advice to Canada and to offering mediation and other alternative dispute resolution services to the parties—has itself called for the creation of an independent body capable of making binding rulings.

Mr. Chairman, we should not forget that the Indian Claims Commission has enjoyed some measure of success during its tenure, and I'm sure its chief commissioner will speak to this in his presentation. It has demonstrated the value of developing a complete historical record, including oral evidence and history, consulting elders, and involving the community in public hearings. Above all, it has shown that alternative dispute resolution processes do work.

Mr. Chairman, I would expect that the new centre would want to build on the experience and expertise of the Indian Claims Commission in developing its own processes and procedures. I would equally expect that the Indian Claims Commission would play a leading role in designing transition measures from the present process, once the centre is up and running. While many claimants may wish to remain in the current process, others may well wish to transfer their claims immediately to the new centre. If so, it will be imperative that their rights be protected, and that the progress they may have made to date in advancing their claims be safeguarded during the transition to the new centre.

Along with the Indian Claims Commission, I would expect that first nations will also want to add their views about how best to ensure a smooth transition of existing claims to the new centre, once it's up and running.

Mr. Chairman, the main purpose of this new centre will be to bring greater independence, efficiency, transparency, and finality to the process of addressing these claims. First nations have long complained about the current process. This should help alleviate their concerns.

The centre will help Canada and first nations negotiate in a cooperative, rather than a confrontational, manner. For example, with Bill C-6, the negotiating parties would have access to commission-sponsored facilitation, mediation, non-binding arbitration, and—with mutual consent—binding arbitration. It would provide modern dispute resolution techniques that would help us reconcile our differences, so we can reach agreement more quickly.

Mr. Chairman, constructive new tools would reinforce that both the federal government and first nations would rather negotiate than litigate. The centre would also remove a key source of perceived bias by taking over funding for first nations participation in the process, which is currently managed by my department. With the emphasis on negotiation, the tribunal would be used only as a last resort, Mr. Chairman. I want to stress—and I hope this is the case—that the tribunal would be used only as a last resort. In the event that negotiations do not lead to a resolution of the claim, the tribunal would be able to make binding decisions about the validity of and compensation for claims up to $7 million.

Some have asked, “What happens to the larger claims?” We believe these disputes are best addressed in negotiations, where the parties can work out solutions, assisted by the new commission. This would allow the tribunal to focus on cutting through the impasses and moving the more straightforward claims to resolution.

Mr. Chairman, in the interests of cost effectiveness, efficiency, and fairness to the other claimants, we don't want the tribunal to get bogged down on one or two extremely large cases

and delay access to the tribunal for others. I believe that would defeat one of the purposes for which the tribunal is being created.

(1115)

Should negotiations on the larger, more complex claims prove unsuccessful, the courts would continue to offer a forum in which the complexities can be carefully examined and where the parties can appeal decisions they feel are incorrect.

Mr. Chair, you will undoubtedly hear from first nations representatives that this bill falls short of their expectations. It's true they would prefer the ideal model proposed by the joint task force that was premised on huge increases in the claims settlement budget. Frankly, so would I, but such a proposal is simply unrealistic in today's economic environment when the government is faced with many competing priorities. We simply do not have the money, the people, or the time to address every issue that has arisen in the relationship between Canada and first nations in the model that was presented jointly between ourselves as a government and the first nations.

But, Mr. Chair, we can move forward with initiatives that move the yardsticks, and that is what I'm proposing to do here. I say let's say get on with the job of resolving these claims under this positive addition to the process. Let's give this new body a chance to prove itself and be successful.

Then let's come back to the question of funding and build on its success. The proposed Specific Claims Resolution Act represents a significant improvement over the way we now deal with specific claims. While the current backlog of claims won't be erased overnight, the centre will create a more efficient and cost-effective method of settling these claims.

Faster claims processing will allow the economic benefits of these claims to be realized by first nations more quickly and will remove the current cloud of uncertainty that hinders resource development in some areas of Canada.

Mr. Chairman, these are not mere administrative measures, but a reflection of a reconciliation long in the making and long overdue. Bill C-6 will help to lay the groundwork for a renewed relationship between first nations and the Government of Canada.

In this context I want to reiterate a point I have made many times before in other contexts: a better quality of life for first nations people cannot happen without an economy.

Resolving claims will provide cash and land, but that is only part of the equation. Removing a long-standing impediment to a better relationship by addressing these grievances is equally vital. This bill is aimed at both those goals. I'm here today to encourage you to seize the potential of this progressive legislation.

Making change takes the leadership of many; it takes all of us to do it, and I encourage you to get on with just that.

Mr. Chairman, those are my remarks, and I'm now open for questions.

**The Chair:** Thank you very much, Mr. Minister. Before we go to questions I'll share with you that the committee made a decision by vote on a strategy for doing the work on this bill. The decision was that we would have public hearings today for two hours and again on Thursday for two hours, and then go to clause-by-clause.

I received a number of requests to appear. After my asking permission of committee members, they allowed me to plan a consultation tomorrow from 3:30 p.m. until 9:30 p.m. to permit members six hours to hear from those people who have asked. So the committee changed the strategy to accommodate people who wanted to participate, and I commend them for that.

Colleagues, the issue today is specific claims resolutions, so we're going to be asking you to ask specific questions. The first round is four minutes. Is that agreed? Do you want a chance at a second round or do you want a longer first round and no second round?

(1120)

**Mr. Maurice Vellacott (Saskatoon—Wanuskewin, Canadian Alliance):** I'm sorry, Mr. Chair, I thought we had a process of nine minutes for the opposition, then alternating back and forth for seven minutes.

**The Chair:** I'll go to the rule of nine and seven, but it means we won't even finish the first round.

**Mr. Maurice Vellacott:** That's fine.

**The Chair:** Do you want me to follow the rules?

**An hon. member:** Follow the rules.

**The Chair:** I'll follow the rules: Mr. Vellacott for nine minutes--nine minutes is the total for the question and the answer. Although the minister is my colleague, I will cut him off after nine minutes, as I would anyone else on the committee.

Mr. Vellacott.

**Mr. Maurice Vellacott:** Thank you, Mr. Minister, for being here today.

There's a document, and you're probably well aware of it, where it claims that of 120 claims the ICC has dealt with, only three were settled for less than the $7 million. So in the interest of wanting to expedite more claims and move this along, and of a transparent process and so on, I'm very intrigued with why we'd have a cap of $7 million when in fact only three in 120 of them have been settled under that amount. That would be my first question.

**Mr. Robert Nault:** Mr. Chairman, I'm not sure I know where the member got his information. The ICC does not approve any claims; therefore, the ICC could not have that kind of structure. The ICC recommends validation of a particular claim to the Government of Canada and is restricted in its role in that regard.

Without getting into the details, our understanding of the claims that have been approved over the last number of years is that the average result of those claims is $5.6 million, to the tune of some $1.3 billion so far. And as you know, there is a significant backlog of around 600 claims still out there.

**Mr. Maurice Vellacott:** You're saying that the ICC has dealt with more than 120 claims? Is that what I understand you are saying?

My source, Ms. Kathleen Lickers, the commission counsel for the Indian Claims Commission, says that of the 120 claims ICC had dealt with, only three were eventually settled for less than $7 million. I think it's a crucial bit of information if we're setting a cap of $7 million.

It might be somewhat a window dressing if in fact we have very few that would even be addressed by way of this particular body. But I need to get some clarification, as it seems we're dealing with a different pool of information here, obviously, if you're going by some different averages.

**Mr. Robert Nault:** Mr. Chairman, all I can say to the member again is based on the claims that have been settled. If you're referring to 120 claims that were looked at by the ICC and the ones that have been approved at this point, we can give you that information. But at this point I don't have that at my fingertips.

**Mr. Maurice Vellacott:** If my facts and figures are right from Ms. Kathleen Lickers, the commission counsel for the Indian Claims Commission, my contention is that in the absence of anything otherwise...I'm thinking off the start here that this may be basically dealing with very few, if any, and may be so much window dressing. I understand in good faith your department

certainly wants to see these forward--I do--and yet it would appear from those facts and figures that that would not be the case.

My next question would be this: what is the amount of money your department would commit on an annual basis to settle claims if we're moving away from the five-year period we had before?

**Mr. Robert Nault:** Mr. Chairman, I'll give you the straight answer to that: $75 million is the budget for specific claims on an annual basis. But I also want to premise that answer with the reality that we've never stuck to $75 million yet. Last year we spent $150 million on claims.

Any larger claim we settle goes to Treasury Board and Finance for the financial resources, because they would eat up our claims envelope all in one claim. For example, we settled a claim yesterday in Saskatchewan that cost us $95 million. Of course, that claim would not be able to be settled under our $75 million. Just for your own information, in 1999-2000 the department spent $99 million on claims; in 2000-2001, $94 million; and, as I said earlier, in 2001-2002, $150 million.

So the claims envelope of $75 million is used obviously, as all governments do, as an administrative structure to be able to report to Parliament. If we go outside of that, we have to report to you on the other claims we settled using the fiscal framework and the agreement we have with Treasury Board and with Finance, which is that if we have larger claims we'll have to approach them individually in order to resolve them.

Secondly, I want to go back to your first question because you're leaving the impression that the tribunal is the be-all and end-all of the process. The objective of the tribunal is a tribunal of last resort. The real, important structure in this process is the commission. The commission itself is intended to negotiate all claims, no matter whether it's $7 million or $100 million. The objective of that is to bring the modern tools of mediation, of arbitration, of dispute resolution, and with the fairness of independent people at the commission, to allow us to find a way to resolve these cases without proceeding to court. And even though the commission tribunal will be another process, that does not stop first nations and/or the Government of Canada from choosing to go to court instead of resolving the claims at this process.

(1125)

**Mr. Maurice Vellacott:** I understand, of course, that the intent is to keep it away from that long, drawn-out, extracted process, so I guess I'll let others pick up that line of reasoning. But I'm still of the view that this will cover very few, because the one you referred to yesterday would obviously not have been arbitrated in this kind of venue or with this new centre.

**Mr. Robert Nault:** The member is factually incorrect. And he should not say that the claim of $95 million that was settled yesterday would not go to the commission. In fact, it would.

**Mr. Maurice Vellacott:** It would go to the tribunal.

**Mr. Robert Nault:** It could not go to the tribunal. It could if they wanted to accept a $7 million cap.

**Mr. Maurice Vellacott:** But they wouldn't.

**Mr. Robert Nault:** The fact remains that we negotiated this claim out of court a number of months ago, and it was ratified yesterday. This claim would go to the commission, just like any other claim. So to leave the impression with people around the table that these claims would not be able to go to the commission is factually incorrect.

**Mr. Maurice Vellacott:** Theoretically we could argue that, but there's going to be a tremendous backlog, just by way of the mechanism being set up here, it seems.

We also wanted movement forward in this whole thing, but there is an absence of timelines--at least I don't see them here anywhere. Can you comment on the absence of a statutory timeframe in the processing of specific claims? Why are there no specific one-year, or whatever, deadlines or timelines? Otherwise, the government is in a position where they can kind of stall it, for one reason or another, and maybe not give any reason. So I think we have concerns, and maybe you have a way of addressing that.

**Mr. Robert Nault:** I think that's what's unique about this model, which is different from the model that exists today. Keep in mind that these are legal discussions and legal arguments that are being made between our justice lawyers or negotiators who were put on the file, who in most cases are lawyers, with the objective of arguing whether we think we have a legal obligation to settle a specific claim that's put forward to the government.

Always keep that in mind in all these discussions, because the issue you presented leaves Canada with the opportunity to argue in court that we don't have a legal obligation to put forward financial resources and/or potentially land, in this specific case.

On your question of how best to advance the agenda of moving these claims more efficiently through the system, I understand it presently takes, on average, close to five years for every claim to be validated, and that can still be the case under the old system.

Under the new system, it is expected that the Government of Canada, the minister, will be asked every six months to report to the commission on why we're not validating a claim. If we are prepared to validate the claim and we need more time, we have to report to the commission asking for it and giving reasons why. The objective of that is to try to move the government along and allow this to move quicker than it does presently.

It's our hope that within six months, or longer if we signal to the commission we need more time to look at very articulate legal arguments--

(1130)

**Mr. Maurice Vellacott:** If I can just interject--

[*Translation*]

**The Chair:** Mr. Loubier, you have seven minutes.

[*English*]

Mr. Vellacott, I gave you an extra 30 seconds for clarification before.

[*Translation*]

**Mr. Yvan Loubier (Saint-Hyacinthe—Bagot, BQ):** Thank you Mr. Chairman. Good morning, Mr. Minister.

When I read your bill and when I listen to you, Mr. Minister, I am somewhat skeptical, because you keep saying that the new entities will be more independent and that there will be more objectivity in dealing with claims, but you are quite directly involved in the appointment process. So I ask myself this question about objectivity: can you be both judge and defendant when analyzing the specific claims of aboriginal nations and at the same time claim that this is a new process which is independent and which can produce absolutely objective decisions? I am as skeptical as the first nations, on the one hand about such declarations, and on the other hand in light of the bill.

[*English*]

**Mr. Robert Nault:** The objective of this work has been ongoing over a number of years. Just to take people back, this discussion of having an independent commission and tribunal has been ongoing since the fifties. As I understand my history, this is the third attempt. It is the furthest we have been to getting agreement by government and first nations on having a commission and tribunal of this nature attempted in Canada.

Do we have some history in this regard? In this area, the answer is no. Is this an attempt by Canada, in good faith, to improve the way we deal with specific claims? I think the answer to that would be a resounding yes. Do we have assurances that this will work? The answer to that is no. Obviously the best advice we have received from the joint task force, our own legal advisers, and from those who have been in the business for a number of years, is that this will have an impact on improving our abilities to get claims resolved in a much quicker fashion—and in a fairer way, without the government having to be, as Mr. Loubier has put it, judge and jury. This is the objective of the exercise.

As you might have noticed in the bill, we've built in a review after three to five years. The objective would be for ourselves and first nations—as represented at the joint task force by the AFN—to look at the success of the commission or tribunal, and to review it, in the understanding that if the financial needs are not there, as is being suggested by some around the table, and if the cap has had a major impact on our abilities to do our job, they will be reviewed and can be changed through regulation.

At the same time, Mr. Chairman, there are no guarantees that this will be respected and that people will use the tribunal. The tribunal's objective is to make sure a decision is final and settled, and that the decision is respected. Now, if the first nation and/or the Government of Canada does not want to go to the tribunal for resolution of a claim, this is their prerogative, as it still stands under the bill. This will only work if both the government and first nations governments respect the process.

So there's a lot at stake here. We do recognize that there is no model like this in the world. There are some variations of the model in other locations, but this has never been attempted. That's why we have built in the three- to five-year review, to deal with some of the issues and the scepticism of some that this is not a step forward. I can assure you, Mr. Chairman, I wouldn't be sitting here if I didn't think it was a step forward.

(1135)

[*Translation*]

**The Chair:** Mr. Loubier, the seven-minute period is yours. If you wish to interrupt the witness, that is acceptable.

**Mr. Yvan Loubier:** I was going to suggest it, Mr. Chairman, because the answers are very long. I would have been satisfied with a shorter answer.

**The Chair:** [*Editor's note: inaudible*]

**Mr. Yvan Loubier:** Thank you, Mr. Chairman.

I have another question for the minister. You talk of trust and you also say that the process can work and that it can be more efficient than what we have seen up to now, but at the same time, for a process to be efficient, Mr. Minister, it needs resources. When you say that resources are limited, I will admit that there are other competing priorities, but when issues drag on for decades and decades, if there is a political will to resolve them--you mentioned earlier that you wanted to pursue these issues-- adequate resources need to be devoted to them. However, there is no significant increase in resources to resolve these claims once and for all. At the present time, we are well beyond a balanced budget, with surpluses of more than $9 or $10 billion per year for the past five years.Your government prefers to use all of that to pay down the debt rather than rebalancing things to meet different needs, including those of the first nations. So we are very doubtful of your sincerity and your political will when you say that you want to improve things, that you want to accelerate things to avoid going to court.

When I look, today, at the non-objectivity in the appointment of members and the lack of resources, I see that all the conditions are there, including the dissatisfaction of the first nations, for the first nations to continue to go to higher courts, because for the past 30 years, unlike the government, these courts have decided in favour of the first nations.

So, what do you answer to that? I am somewhat skeptical about your bill, for all these reasons. I am also skeptical because you say that there is a political will, but at the same time, you cannot get the adequate resources from your cabinet.

[*English*]

**Mr. Robert Nault:** Mr. Chairman, I want to re-emphasize that the annual settlement budget of $75 million is a requirement. Through the Financial Administration Act, we must have a budget for these particular areas of our work.

I emphasize that we've also built a process within government to allow us to go outside of the $75 million. As I mentioned, last year we spent $150 million on claims, so I think we have shown that we believe, as I think all members of Parliament do, that if we have a legal obligation

to settle claims and we have the liabilities already on the books of the Government of Canada, it's to our benefit to find ways to make it happen in short order.

**The Chair:** Mr. Proctor.

**Mr. Dick Proctor (Palliser, NDP):** Thank you very much, Mr. Chair.

I think there would be many Canadians, Mr. Minister, who would not agree with your very first sentence that this is a series of progressive measures. If you look at the response from the AFN and other organizations, they feel they're very regressive, that they're dictatorial or unilateral. You said a minute ago in response to Monsieur Loubier's question that both sides need to respect the process.

I guess my initial question, then, is, aren't you concerned, given the reaction that you've had to this bill, that we're starting off on the wrong foot here?

**Mr. Robert Nault:** No, Mr. Chairman. If Mr. Proctor will look at the record, the AFN has never agreed with a bill that Parliament has put forward in the time that I've been a member of Parliament, and I suspect even longer. They have always been, as is their right, concerned about certain issues within bills.

Quite frankly, it's my sense that the AFN is structured in such a way that it's very difficult for them, with all the different interests across the country they represent, to sit in front of us and say they totally support a bill of the Government of Canada. So I'm not surprised that the AFN is not supporting this in its total form. But I do believe that in our relationship there are many we've talked to who believe that these are very progressive steps forward.

We can, of course, do nothing and stay with the system we have presently. That is an option. I don't believe it's a very good option. I see this as an extremely positive step forward.

Is it everything the AFN and others would want? Absolutely not, because in a perfect world.... If as a representative of farmers you came to Parliament...they don't always get what they want.

We have a budget we have to accept. Yes, I have said publicly and have made the comment that we wished we had more money in the budget. We're not sure whether we need it at this point, until the commission and tribunal are set up and proven to be successful.

Are we going outside of our budget? Yes, we have. I alluded to the last three fiscal years in a row that show the goodwill the government has and the legal obligations we have. So should we not move ahead unless we get absolute concurrence by the AFN or other groups? I think, Mr.

Chairman, that would be a big mistake. We have a legal and moral obligation to improve the lives of first nations citizens. If we wait to have complete agreement with everyone, we will continue to be in a stalled mode, as we have been for the last 30 years.

(1140)

**Mr. Dick Proctor:** Thank you.

Mr. Minister, don't you think it's a bit breathtaking for you to come here today and say you'd like to do more but money is an issue, we just haven't got the resources? We can spend $1 billion for security. We'll be asked to spend billions more on Thursday for health care. We can spend $100 million for new jets. But when it comes to first nations people, people who have been at the bottom of the list since Confederation, we're saying in effect, you have to wait a little longer; we don't have the resources. I can't help but be astonished at that line of reasoning.

**Mr. Robert Nault:** Mr. Chairman, let me go back to the question that was asked by the Alliance party, just to give Mr. Proctor a sense of how I see this unfolding.

If in fact we agree that every claim that's validated can go to the commission for modern resolution processes, which, of course, include mediation, facilitation, and arbitration, both non-binding and binding, and if in fact one of those claims happens to be $50 million--let's use that as an example for people who are listening--and we get agreement, the minister will have a legal obligation to go back to Finance and Treasury Board to get that money, but we have to have a budget to start the process with.

What we have been saying to you all along is that the argument that's being put, that this won't work because there's not enough money--when in fact we've never stayed within our budget yet--doesn't hold a lot of water. That argument, really, is false. The fact is we will have the money available to resolve our legal obligations. The problem we have today is not the money; it's the process that takes anywhere from three to five years to get a simple validation--and we then end up being judge and jury. The objective is to create a process that allows more fairness in the system.

That's what I would hope, Mr. Chairman, you would focus your attention on. So far, no one has focused attention on whether the process works. They're most interested in how much money the government is prepared to put in. In essence, we can't get around the fact that we owe on a series of claims, because they're already validated and we already are negotiating them. Quite frankly, if this is the only argument being presented to you by individuals who are briefing you, I think we have a pretty good piece of work here, because it's really about the process that I'm concerned.

**The Chair:** Mr. Mark.

**Mr. Inky Mark (Dauphin—Swan River, PC):** In essence, Mr. Chair, that's why we're here today. We're exercising our democratic process, and I know Canadians want this issue resolved; they want to move on. They also want a fair process, a process of access to decision-making, as well as one that respects their historical rights.

You indicated that the balance is between greater fairness and efficiency, but I need to go back to the whole issue of process, because that's the criticism I hear: the process of how you came up with the bill, the process of access to inputs. As you know, many years have been spent on the joint task force, so that's one of the questions. There are a lot of concerns.

On the surface it sounds reasonable. Here we have a piece of legislation that's going to deal with an issue that's been outstanding for many years. Then I hear on the other side of the equation that the aboriginal community may, as you said, not agree with your process and take everything to the courts. From that perspective, what do we gain? At the same time, you appoint all the people to the commission. What kind of process is that? It's not too democratic, in my estimation.

(1145)

**Mr. Robert Nault:** Mr. Chairman, let me, if I can, deal with that issue for Mr. Mark .

I've heard this discussion about appointment of commissioners for quite some time. On the one hand, people are sitting here around the table saying they really like the ICC: “It's a great body and we want to keep it”--and by the way, through order in council we appointed those commissioners. So I would hope we would be somewhat consistent in our argument. If we think we did a pretty good job as a government appointing credible and quality people at the ICC, we can't turn around in the second breath and say, what a terrible thing that the order in council process--which is done in all levels of government, provincial, territorial, and federal--is somehow not going to give us the quality people.

Mr. Chairman, I think this government and this country has proven we can appoint quality people to commissions and tribunals right across this country to do the job. We will do it in consultation with first nations organizations, as we have done in the past. I think the commissioners on the ICC are quality people, capable of doing an extremely good job with a very severe mandate--a restricted mandate--based on an interim step the Tories put in in 1991.

If some of you were here at that time, you would have remembered--and I want to bring you back to that time in 1991, because I was a member of Parliament and I suspect I was a member of that committee--what occurred in 1991 is the AFN opposed that too. They are now arguing it's a great thing. They opposed the First Nations Land Management Act. They are now arguing:

“First nations? How fast can I get in?” So I don't accept the argument some days that this isn't a good step forward and that we can't appoint good commissioners.

Would I have liked it, Mr. Chairman, to be maybe be a little different? I would have had to set, as you know, a precedent of taking away the prerogative of the Prime Minister and the order in council process, and I understand most people would accept the argument that this is not on. So we will do our best to make sure the best commissioners are appointed to represent the process so it will have credibility, because we have a lot at stake if there is no credibility.

**Mr. Inky Mark:** The question isn't about you making appointments. The question is about access to who should be appointed. I think that should be the question asked. In other words, ask for input from the aboriginal community as to who the credible people are who perhaps may be suited to sit on the commission. You can make the appointments. No one questions your authority to do that.

**Mr. Robert Nault:** Mr. Chairman, without being too partisan, there are some first nations people who would suggest that Mr. Fontaine wasn't a good choice as commissioner. I happen to think he was, because I had a little bit of a role to play in appointing Mr. Fontaine. So, really, that's a difficult issue to deal with.

Will we ask for advice? Absolutely. Do we need a mix between native and non-native commissioners? I think we do. Will we have the best legal minds? I'm told--and I haven't followed this through to its final conclusion--that there are many qualified individuals already contacting our office suggesting they would like to be on this commission and tribunal because they see this as a tremendous improvement over the process that exists today.

I only offer you that as my sense of why I think it does work, and it has worked previously. For example, the Human Rights Commission, Mr. Chairman, is appointed by the government. Do you think those people are not independent? Read their reports and you'll notice that they can do a very active and capable job. I think Canada has a reputation of allowing the independent nature of these appointments to come to the forefront after the appointment is made.

**The Chair:** Mr. Godfrey.

**Mr. John Godfrey (Don Valley West, Lib.):** Thank you, Minister, for coming here today and for laying out the rationale for this legislation.

It seems to me that we're confronted with an irresistible force and an immovable object in a way, which is the process, on the one hand, and the money on the other.

I was heartened by the reference in your speech to the fact that the joint task force really posed the ideal model, and in a perfect world that's the one you would like too, but there are financial constraints.

I guess the thing I'm trying to get clear in my own mind is that the less perfect model is predicated on there being less money and in a sense a less efficient processing of claims that would lead to larger sums of money at the end.

I could live with that if I thought there would be some increase of efficiency in the processing of claims, that it would be fairer and faster and that the result of that would be that you would be in a better position to make the overage claims, that is, above $75 million every year, as you have been doing, that you would have more validated claims ready to be processed and to take to Treasury Board and all the rest of it than would otherwise be the case under the current situation. In other words, the sheer logic of getting the stuff through faster--not as fast as perhaps we'd like but faster--actually makes the case for more money every year more compelling.

I'd be interested in your reaction to that.

(1150)

**Mr. Robert Nault:** Mr. Chairman, one of the important process questions is, how does this move the government to be more efficient in resolving, for example, just the backlog itself, which is substantial?

The way the commission is structured allows the commissioners to put a tremendous amount of pressure on the government and on the minister to react to those claims that are already validated. One of those ways, of course, is their requirement that the minister report every six months on the progress of the claims and where they're at.

Then, Mr. Chairman--this is something I think is extremely important--the commission has the capacity to write an annual report that the minister has to table to Parliament on a yearly basis. I think that pressure itself will have an effect, and the fact that we no longer are judge and jury, because this is very much an independent commission. Contrary to what a lot of people are saying, these commissioners will be appointed for their competence, not because they have some sort of connection to a political party of any sort. We have been good, I believe, in doing that and I think we'll continue to do that.

I think the bill itself, if you read the details of how the commission will operate, allows for the pressure of dealing with those claims and to make the argument, because it's been extremely hard under the present process--and I say this to Mr. Godfrey because it's a fact--for this minister to make an argument that I need more money. I have made the argument to the Minister of Finance,

I can assure you, that I expect we will meet our legal obligations as a government, because they're on the books of the nation now. His argument is, “Show me you need more money and we're prepared to look at it”.

I give you that in open forum as a commitment by this minister and this government that this is the objective of this exercise.

**Mr. John Godfrey:** Well, then, I assume that when we did the three-year review, one of the crude measures of success would be if we actually kept increasing the amount of money the Government of Canada makes available every year to settle claims, because we'd have more ready to go and there'd be more pressure and more transparency in the process.

**Mr. Robert Nault:** No, Mr. Chairman, not exactly. I think the proof will be how many claims we settle, not how much money we spend. If a claim is worth $1 million, it's just as important to our relationship with the first nation as if it's $100 million. I think we have to keep our heads around that issue. Our problem is, we are so slow dealing even with small claims, the way the process is structured, that the backlog is getting larger and larger. I don't see it the same way necessarily, but the obvious argument is, if we spent $150 million last year and it looks as if this year we'll spend over $200 million, it's pretty obvious we are meeting our obligation under the old system, or trying to. But I think we'll be under more pressure under the new.

**The Chair:** Colleagues, I will offer you a 30-second question, and after, the minister if he chooses to will respond to those questions in his closing remarks. I will stick to the 30 seconds, for specific questions.

Mr. Pallister.

**Mr. Brian Pallister (Portage—Lisgar, Canadian Alliance):** Thanks for being here, Mr. Minister. Your party made a commitment to a joint appointment process in the red book in 1993, and subsequent to that the JTF recommendations were exactly that. Why did you depart from those recommendations and those promises?

**The Chair:** Monsieur Loubier.

[*Translation*]

**Mr. Yvan Loubier:** In your presentation, you say:

> ...I've introduced a series of progressive measures [...] to enable the First Nations to accelerate their transition toward self-government and greater economic independence.

I would like to ask you, Mr. Minister, if you intend to contact Ted Moses, Grand Chief of the Cree, who is waiting for federal participation to be established as part of the treaty signed with the Quebec government, commonly known as La Paix des braves (Peace of the Brave). He has been waiting for your call for two weeks.

(1155)

[*English*]

**The Chair:** Mr. Proctor.

**Mr. Dick Proctor:** Mr. Minister, you said the AFN has never agreed with anything DIAND has come out with, and with this bill, if I count them up, there are something like 67 objections to Bill C-6. How can you square that and say this is a positive step forward?

**The Chair:** Mr. Mark.

**Mr. Inky Mark:** Under the circumstances, will the minister invoke the six-month delay, and can it be repeated?

**The Chair:** Is there anyone on the government side?

Mr. Minister, please make your closing remarks.

**Mr. Robert Nault:** Thank you very much, Mr. Chairman.

I'll start with maybe working backwards and address the issue of the six months. I think the way the bill is structured, if I'm not mistaken, is that if I am to go past the six months, I would have to give reasons for the delay.

For example, if it's a very large claim, with a lot of complexities and legal arguments, it will take some time for Justice to give the minister the analysis and the way to move forward. So we would have to give that reasoning, which at this point we don't. We don't have to give any reason why validation takes five years, seven years, ten years in some cases. This is an issue I think that will improve our abilities to work together.

As far as the grand chief is concerned, Mr. Loubier, I will make sure I call him, if he's looking to talk to me. I didn't know he was. I can do that since I have a very good relationship with the grand chief.

(1200)

**Mr. Yvan Loubier:** It's been two weeks.

**Mr. Robert Nault:** I wasn't aware of that.

On the issue of the appointments, the appointments, Mr. Chairman, are I think the prerogative through order in council. This would be a departure from our way of appointing, through order in council, that both Canada and the provinces have been involved in since the formation of Canada. We believe we can appoint, in consultation with first nations, credible commissioners who will be independent and do their job effectively.

Mr. Chairman, on the technical issues that were brought forward yesterday, I could probably find my lawyers who would give you a whole series of technical arguments of why this is an extremely good move forward. I understand there's been a technical document that says this might happen or this might not happen.

I can't predict because there is no tribunal or commission like this that's ever been attempted in Canada, and I doubt very much anyone else can crystal ball whether we will be successful or not. This is an attempt to get out of being judge and jury by this minister and this government, based on our commitments. As I said, it's not a perfect model because we have fiscal issues that we always have to deal with. But does the commission allow for modern tools of dealing with grievances without the courts? I believe it does. Does the tribunal allow us to deal with claims of $7 million or less as a last resort? Yes, it does.

You may also know that originally the bill had us having to go to Parliament to increase the cap. I specifically requested it be put in regulation so that at the three-year review, if in fact the $7 million is an impediment, I have every interest of course, because I want this to be successful,

to argue with my colleagues that it should be increased, and then we'll have a better understanding of whether this will be successful. This is another tool for us to use in our arsenal, if we like, in working towards resolving these claims. It's not the only one because we have others already. They're not being diminished. We hope this is strengthening the process. I want to encourage you, even though some will argue it's not perfect, to move forward with this significant improvement through the whole issue of trying to resolve specific claims and the grievances of the past, because they have a huge impact economically; they have a huge impact on our relationship.

When I go and spend time with chief and council in their community on a claim that's even $200,000, $300,000, $400,000, $500,000, it's as important to them because of the issue of what occurred to cause that claim as it is because of how much money is on the table. So we need to get these claims cleaned up.

Mr. Chairman, in the short time I've had, I want to thank the committee. I understand we will be together on more than one occasion this next number of months, and I look forward to your wise counsel in making sure that one, and one thing only, occurs: that we improve the lives of aboriginal people. Debate is nice, but sooner or later you have to get on with doing what's necessary to improve the lives of those people. It's certainly obvious to all of us that it needs to be done.

So with that, thank you, Mr. Chairman, and I wish you all the best.

**The Chair:** Thank you very much, Mr. Minister, and your colleagues.

Now, we will proceed to the next hearing, from the Indian Claims Commission. I invite you to join us. We will not suspend proceedings. We will continue.

We welcome, from the Indian Claims Commission, Phil Fontaine, chief commissioner; Renée Dupuis, commissioner; and Kathleen Lickers, commission counsel.

Welcome. I invite you to make a presentation of 15 minutes or less, at which point we will continue with questions.

Mr. Fontaine.

**Mr. Phil Fontaine (Chief Commissioner, Indian Claims Commission):** Thank you, Mr. Chairman and committee members.

It is a pleasure to appear before you today to give you the views of the Indian Claims Commission on Bill C-6. As pointed out by the chairman, joining me at the table are Commissioner Renée Dupuis and Kathleen Lickers, chief commission counsel for the Indian Claims Commission. Other members of the commission and our senior staff are also in the committee room.

You should know that in arriving at our position in the course of the past year, we met with Chief Edward John, the minister's liaison person with respect to this bill, with staff members from the Department of Indian Affairs who were involved in the development of the bill, and with representatives of the Assembly of First Nations.

As helpful and informative as those discussions were, and I'm sure you will be hearing from all of those people, we have our own expertise and history to draw on. We are a unique body in Canada. No one else has the experience the Indian Claims Commission has. We feel that because of our 11-year history as a commission, in this field we have a unique perspective and one that may be of interest to your committee.

Members of the committee were sent a detailed statement of our position concerning specific claims and Bill C-6 in particular. It is not my intention today to read that paper. I will highlight parts of it and answer any questions the committee may have.

As you can see from our paper, the tabling of Bill C-6 is just one of a number of initiatives over the last 57 years that have dealt with the issue of specific land claims. The federal government first looked at the claims process in 1946 and has done so regularly since then.

The first suggestion for the establishment of a claims commission was made in 1948. Our commission was created by an order in council in 1991. It was to be an interim measure. Eleven years is quite an interim.

Beginning in 1994 and consistently every year since then we have recommended the establishment of an independent claims body. There is a lot of history to this file. I could easily use all the time you have allotted us going through that litany of good intentions and half-hearted attempts to do the right thing.

Instead, Mr. Chairman and committee members, I will go directly to our views on Bill C-6. As I said earlier, we are a unique organization with a unique perspective. Our experience leads us to believe that a number of fundamental principles--and I wish to underline “fundamental principles”--exist that cannot be ignored in the establishment of an independent claims body.

The list we have compiled is not exhaustive. It derives from our belief that Canadians want to see that justice and fairness are achieved in the settlement of specific claims. We believe such a claims body must be independent, must have the authority to make binding decisions, must be a viable alternative to litigation, must include the right for first nations to provide oral testimony of their history, must provide mechanisms for alternative dispute resolution, must ensure access to justice, must ensure access to information, and finally must ensure the primacy of the fiduciary relationship between first nations and the federal crown.

Mr. Chairman, I would like to expound briefly on each of these principles, and first, independence. It is our view that to be independent a body must be self-governing and not dependent on an outside body, such as the department or the minister, for its validity. In the context of the claims body, independence also means impartiality, neutrality, procedural fairness, and objectivity. We believe that if the new centre envisioned by this bill is to have any hope of success, it is vital that the principle of independence and its related concepts must exist in fact and be perceived to exist by the parties involved and by the public. This perception would be greatly enhanced if there were a consultative process involving representatives of first nations for the appointments to the commission and the tribunal. We are also concerned that the centre's independence is compromised by its lack of authority to compel the involved parties to act.

(1205)

Second, the authority of an independent body to make binding decisions is necessary to a fair and just claims process. It is important that this authority apply to the procedures of the process as well as the determination of the final outcome. We know from our own experience how frustrating it can be when one party or the other can impede the process by delays or other unreasonable barriers. There are provisions in the bill that empower the minister to control when and if the commission or tribunal may act. These take away the ability of the centre to control its own process.

Third, for the new centre and its process to be successful, it must be seen by first nations as a viable alternative to the courts and litigation. It must be seen to be speedy, cost-effective, and final.

Fourth, our commission, and more recently the courts, have recognized the importance of first nations oral history to the claims process. We are pleased to see the bill recognizes this, and we would like to emphasize how crucial it is that the oral evidence be taken early rather than later in the process.

Fifth on our list is the need for alternative dispute resolution as an important aspect of the claims process. We can't overstate the need to support ADR, with the necessary resources, both human and financial, to ensure the process works for all the parties.

Sixth is access to justice. First nations must have reasonable access to the process in order to ensure justice is both done and seen to be done. The gathering of oral evidence and the provision of the necessary funding are important to the first nations participation in the process. We are concerned that limitations to the tribunal, especially the financial cap on the tribunal and the unknown prescribed limits to the necessary funding, are among a number of aspects of the new legislation that may seriously interfere with the access to justice principle.

The seventh principle is access to information. First nations wishing to use the claims process are limited by their ability to access government documents. Ready access to all appropriate files means that the first nation can be better prepared as it goes through the process. This is simply a matter of fairness and efficiency.

Last on our list is the primacy of the federal government's fiduciary relationship with first nations. We are pleased the bill introduces fiduciary obligations as an element of the type of claims first nations may bring forward. However, we are concerned that the constitutional principle is in danger of being compromised by transferring responsibility to third parties, such as provincial governments. Unfortunately, the bill contains a number of provisions that diminish federal responsibility.

Our obligation as a commission has always been to social justice. There must be adequate dollars available for settling claims. Adequate compensation will create an entirely new set of problems. We find it difficult to see how finality can be achieved if first nations do not receive proper compensation.

Based on our 11 years of experience, the commission believes that in dealing with the issues and substance of first nations specific claims, these eight principles are the minimum standard that need to be met. We are not suggesting to the committee how to achieve these principles in the bill, but we invite the committee as it goes through the bill clause by clause to measure the provisions of the bill against these principles.

We think there are clauses in Bill C-6 where the principles of independence, the authority to make binding decisions, access to justice, and the primacy of the fiduciary responsibility are found wanting. We have outlined some of our concerns in greater detail in our paper.

(1210)

Having said that, there are aspects of Bill C-6 that we support. These are elements that the commission has advocated for some time and that we continue to believe are essential to the creation of the new claims body. We support the completely independent tribunal, we support the emphasis on alternative dispute resolution, we support inclusion in the legislation of fiduciary obligation, we support inclusion of oral history in the claims process, and we support the review process that is independent of government and that includes the centre, first nations, as well as government.

In conclusion, Mr. Chairman, the message we bring you today is that we believe Bill C-6 has both strengths and weaknesses. We ask you to consider the principles we have outlined to look at what the legislation is trying to achieve and to try to find a balance between the two.

I want to thank you for this opportunity to appear before your committee.

What I would suggest to you, Mr. Chairman and committee members, is to depart from the previous presentation in terms of the interaction that ought to take place between committee members and ourselves, and that Commissioner Dupuis and Chief Commission Counsel Kathleen Lickers will also participate in the exchange that will take place. If absolutely necessary, we wish to feel free to call on other commission members who are present here who have much longer experience than either Commissioner Dupuis or I in the working of the independent claims commission over the last 11 years.

Thank you.

(1215)

**The Chair:** Thank you very much, Mr. Fontaine, for your presentation. To members, I encourage members to manage the few minutes I allow them, but I do encourage as much participation in helping us provide information to members as we can have. So, yes, in my view, we should invite to respond whomever the person is in the best position to answer whatever question is asked.

For the first round, we'll start with the official opposition for nine minutes.

Mr. Pallister.

**Mr. Brian Pallister:** Greetings, sir.

Would you please comment on the government's decision not to endorse the joint appointment process of the Canadian Centre for the Independent Resolution of First Nations Specific Claims, which was recommended to them and which they previously committed to?

**Mr. Phil Fontaine:** We believe this particular issue has been addressed in part by the previous witness, the Minister of Indian Affairs, and it will be addressed by others who will be appearing before the committee. In the past practice, as you know, there was consultation that took place between government and aboriginal organizations as to the appointment of commissioners to the commission. The outcome of the consultative process in the appointments of commissioners resulted in a diverse group of people being appointed to the commission.

If I can speak in general terms of the success that the Indian Claims Commission has achieved over the last 11 years, that particular approach worked and worked satisfactorily. So I would expect that, as I said, this particular matter will be addressed in significantly more detail by others who will follow me before this committee.

**Mr. Brian Pallister:** I'm asking just for your view on whether this should be included in the bill. Should we require consultation with the AFN on appointment to the commission?

**Mr. Phil Fontaine:** We've indicated in the more detailed presentation, given our reference to the eight principles including independence and access, that it's a matter that ought to be considered very seriously in this process of establishing this body.

**Mr. Brian Pallister:** Secondly, and this a relatively specific question I think, do you endorse the joint task force report recommendation that there be a regional consideration given to appointments? Do you share that view?

**Mr. Phil Fontaine:** If one looks at our work over the last 11 years and given the fact that we're a neutral body and we've tried to maintain the sense of neutrality in all of our work, you can see that we've approached this matter seriously. The issue here specifically has to do with what we consider is a public policy matter and is one best addressed, as I indicated, by the previous witness and the Assembly of First Nations and others. Clearly, it is one issue that merited a lot of discussion and I'm certain will receive much more attention in the days to come.

(1220)

**Mr. Brian Pallister:** Are you concerned that the independence you alluded to, which is so critical to the success of your organization, will be called into question by the very fact that the minister who is charged with defending the crown against claims is also the minister who is now, under this proposal, recommending all appointments?

[*Translation*]

**Ms. Renée Dupuis (Commissioner, Indian Claims Commission of Canada):** With your permission, I will tell you that in my opinion, the current commission, which includes people appointed by the government on the recommendation of the Minister of Indian Affairs, as is also the case for other federal administrative bodies, has demonstrated, over the 11 years of its existence, that a sufficiently broad representation can very well be achieved. In fact, it includes representatives of the first nations, non-aboriginal people, and individuals representing all regions. This is important, as specific claims deal with problems that can vary from one region to another.

[*English*]

**Mr. Brian Pallister:** We're running out of time. This isn't what I'm asking.

I apologize for interjecting, but there is a shortness of time and so on. My understanding is, Mr. Fontaine, that you said publicly, prior to the introduction of this legislation, that the current process was unfair and that it constituted a clear conflict of interest. To defend the current process.... I'm just curious. There seems to be a contradiction here.

Perhaps in saying that, you're not alluding to the questions I'm addressing here, issues of appointment. Maybe you could clarify how the current process is unfair and constitutes a conflict of interest when the government is not proposing to make significant change to the way in which your commission is appointed. If there is a conflict of interest existing in your present situation, then there certainly would be thereafter, if there is no change in the appointment process.

**Ms. Kathleen Lickers (Commission Counsel, Indian Claims Commission):** Perhaps I may attempt to answer you, Mr. Chairman and Mr. Pallister. In the appearance of the co-chairs to the Indian Claims Commission in May of 2001 to the standing committee, the brief we presented at that time spoke of the status quo and the role that Canada plays in its role, as we use the terminology, as judge and jury. It was a concept to which the minister himself spoke this morning.

In our presentation to you today, under the principle of independence, we speak of the role the minister will have in the centre's business and we outline for you in this paper and in this document where the principle of independence, as a minimum standard to be reflected in a new centre, can be met by our definition of independence. So I would point you to that document.

**Mr. Brian Pallister:** But I guess it's not in the bill.

This is my quick question. You were the one, Ms. Lickers, who said that 3 of 120 claims would be under the $7 million cap, so is this not problematic? Is it window dressing that we have this new body with some bells and whistles and so on, but to settle what? Would that be 3 of 120? I suppose over time, with the cost of inflation and so on, that may be down to less than that, or zero. I have a problem with setting up a body and all the other things around it with maybe settling very few, if any, claims.

**Ms. Kathleen Lickers:** Perhaps I may speak to the source you're quoting, Mr. Vellacott.

When asked by the Assembly of First Nations about the experience of the Indian Claims Commission, my answer was and is that in the commission's 11 years of experience we have looked at more than 100 requests for inquiry. That is at the end of the process. Where first nations have gone before the specific claims branch, the minister has made a decision to reject the claim as being valid and first nations in this country currently have the alternative to come

before the Indian Claims Commission for a review of that decision. In 11 years, of those numbers, our experience has been that only three have been of the value of $7 million or less.

I can only speak to you about our experience.

(1225)

[*Translation*]

**The Chair:** Mr. Loubier, you have the floor.

**Mr. Yvan Loubier:** I will comment on what Ms. Lickers said earlier. In light of all the kind things the minister told us, I, too, would have liked to ask him other questions on the independence of the commission and tribunal. First, one thing does not seem clear to me for the moment: how can it be said that the process will be independent if the government maintains its control on virtually the entire process, whether it be the appointments, duration or compensations? How can that be objectivity and independence?

Second, as regards the answer you just gave us, I will say that objectivity is a fine concept, but when partners such as the aboriginal people are excluded from the appointment process, the perception of objectivity is what becomes important, as is the case for conflicts of interest. This is how I understand the issue right now.

I have only been my party's critic for a few months, but as regards this issue, I have come to the conclusion that two options are possible. The first option is that we negotiate nation to nation and one to one; in this case, when the process is implemented, including new institutions and representation, the choice of the people represented as part of these institutions must be made by mutual agreement. The other option is to continue as in the past with the Indian Act and determine that the government makes the decisions, even though the process in place for the past thirty years did not yield conclusive results in terms of settlements.

I would like to hear your comments on this, as I am rather confused. I hear the minister and I also hear you talk of independence and objectivity, but when things are coldly analyzed, what we have is in fact the absence of objectivity and independence.

[*English*]

**Ms. Kathleen Lickers:** Mr. Chairman, in your deliberations and when you have had time to consider our brief in greater detail, I would point you specifically to page 17 of our brief. But to answer your question, in the commission's view, under this bill the minister's role in the process

and his relationship to the centre goes beyond a supervisory role as to how we see independence and how the commission has viewed independence. Our greatest concern, as we say it on page 17 of our brief, with the minister's relationship to the centre is the commission's lack of authority to compel both parties to act, not just the Department of Indian Affairs and Canada as a party to the process, but first nations as well.

**Mr. Phil Fontaine:** May I contribute very briefly?

If we weren't clear enough with our previous response to the issue of appointments to the commission, I would in this case also refer you to page 16 of our more detailed brief that speaks to this issue more clearly.

Perhaps I may, for the record, state that a consultative process to appointments that involves representatives of aboriginal peoples or organizations is essential to the quality of representation of aboriginal and non-aboriginal commissioners and tribunalists and staff. We feel this is key to this whole process.

[*Translation*]

**Mr. Yvan Loubier:** Fine, Mr. Fontaine. I would have a last question to ask you. I wanted to ask the minister earlier, but I could not do so because of the restrictions we have in questioning. According to the minister's argument regarding the $7 million ceiling per case, this would not prevent us from having out-of-court settlements of several million dollars, despite the $7 million ceiling associated with the process that brings us to the new tribunal.

So, I would have liked to put the following question to the minister, but I would like to know what you think about it, Mr. Fontaine, Ms. Dupuis or Ms. Lickers. Why maintain this $7 million ceiling if, in the end, it is not that important and we can go beyond it, if we can have out-of-court settlements, and if the government must meet its fiduciary and legal obligations?

(1230)

[*English*]

**Mr. Phil Fontaine:** We can only go by our experience over the last 11 years. Here again, our more detailed presentation speaks to this issue more significantly. The point, quite simply, is that a restriction of this type will limit accessibility.

Since 1991, the commission has held inquiries into 56--that's the specific number--rejected claims. Of these, 24 were accepted for negotiation or settled. As pointed out by commission

counsel, of those, in all but three cases the settlement exceeded $7 million. We believe, given our experience, that a significant proportion of these claims will be excluded from much of the process that's intended to address them.

We believe, as we've said--and we'd like to emphasis this as clearly as we can--a key principle at stake here is that the settlement of specific claims is not about social programs but about lawful obligations based on early transactions.

[*Translation*]

**Mr. Yvan Loubier:** Fine. I just have a question for clarification. I may have misunderstood, but oral tradition evidence, for example, is still not considered in analyzing your claims. Am I wrong? Is it not considered at all? It is well known that oral tradition is very important in the history of aboriginal peoples.

**Ms. Renée Dupuis:** If you refer to page 20 of the English version of our submission, you will see that our commission is happy with the fact that the possibility of considering oral history is included in the bill, as this is already part of the current commission's practices and procedures. Therefore, we are happy with this and we insist on the fact that, as this is a critical aspect of the demonstration that the first nations need to make, it should be included very early in the process.

[*English*]

**The Chair:** Mr. Proctor.

**Mr. Dick Proctor:** Thank you, Chairman, and thanks to the ICC.

In the minister's presentation just before yours, on this point of the consultative process respecting appointments, it seemed to me he was endeavouring to go some distance to say he had consulted in the past and basically urge a “trust me” approach, that “I will do that in the future”.

To the commission specifically, does that allay your fear sufficiently, or do you still think changes need to be made in this aspect of the consultative process for the appointments?

**Mr. Phil Fontaine:** As we have indicated, and I hope we were clear enough in this regard, there was in fact a consultative process that was the practice for previous appointments.

Government, through order in council, made their decision based on the consultation that took place. This was a precedent first established when commissioners were first appointed in 1992.

Given our experience, the appointments that have been made worked well and enabled us to achieve the kind of success we've been able to achieve in the 11 years we've been around. The approach we've taken to reaching decisions within the commission's business has been based on consensus.

To the extent possible, there has been geographic and gender-based representation on the commission. At certain points, there have been more commissioners of aboriginal ancestry. Today we have a situation where we have four commissioners who are non-aboriginal in ancestry and three who are aboriginal. So there has been a balance during the years we've existed.

**Mr. Dick Proctor:** Some people have raised a concern about regional representation and the fact that the office is located in Ottawa. Do you folks have a view on that, or do you think it's covered off well enough also?

(1235)

**Mr. Phil Fontaine:** The requirement that we be situated in the national capital region does not pose, at least from our experience, a major problem. We are quite certain this will not pose a problem in the future.

**Mr. Dick Proctor:** What is the view of the ICC with regard to this cap? We're hearing it's going to impede or it's going to speed up the process. I know about the “3 of the 120”--that answer--but generally speaking, do you think this has the possibility to speed up some of these claims and move them along faster? What's the view of the ICC on that, with your experience?

**Ms. Kathleen Lickers:** Mr. Chairman and Mr. Proctor, let me answer that question. The commission has looked at the financial cap through the principle of access to justice and how to ensure that first nations participation can be enhanced through the centre's objectives. Our concern has been with the complicated formula that is referred to in the bill. In our experience and in our view, this may in fact operate to limit some first nations from accessing the commission and the tribunal's process.

The exact extent of the funding under the proposed legislation is not yet known. There are certain prescribed limits that are yet to be enunciated, and I'm specifically talking about the

amount of money that will be set aside for the tribunal to operate. It's the relationship between the commission's operations and when the commission can act to refer a matter to the tribunal that we have identified as a specific matter of concern, a concern that not only relates to the ability of first nations to use the process but functions as an access issue for first nations coming to the commission.

**Mr. Dick Proctor:** The minister said in his statement, I think, that the average elapsed time on these claims was about five years. Do you think that can be speeded up as a result of this proposed change? Has anybody done any thinking on that issue?

[*Translation*]

**Ms. Renée Dupuis:** In our document, we have tried to indicate to your committee a certain number of conditions for making the process more efficient and enabling the first nations to have access to the government records that determine the possibility of establishing their claims. The objective would be that the access be direct, that the centre itself control its procedure, i.e. it would not be dependent on the minister to speed up the process, and that dispute settlements be controlled; in short, that the commission really have the authority to carry out procedures and dispute settlement mechanisms, for example, within specific timeframes.

According to us, a certain number of conditions are required to meet this objective.

[*English*]

**The Chair:** Mr. Mark.

**Mr. Inky Mark:** Thank you, Mr. Chairman.

Welcome to the committee. I know your independence, as has been emphasized, is very important--and the work you do, as well as your 11 years.

I will begin by quoting what you wrote down on page 1, paragraph 2, because we need your assistance and your views as well. The document says, “In our view, at the end of the day, the question you must ask yourselves is whether this proposed legislation, when measured against these principles”--I understand this to be your “fundamental principles”--“represents the best process for resolving these long, outstanding disputes.”

If you put that through your litmus test of your “fundamental principles”, does Bill C-6 pass the litmus test?

(1240)

**Mr. Phil Fontaine:** What we have tried to point out in our brief presentation here is that, with regard to some principles, obviously the legislation as drafted is deficient, and we've indicated what those areas are. We've talked about, more specifically and in more detail in the presentation that we submitted to you, the principles of independence, the authority to make binding decisions, access to justice, and the primacy of the fiduciary responsibility.

But we've also indicated that we support the fact that we have a completely independent tribunal. The emphasis on ADR, the inclusion in the legislation of fiduciary obligation--and this is, might I state, precedent setting and really of great importance--and the inclusion of oral history that in fact is something that has been a practice of the Indian Claims Commission and preceded the Supreme Court decision of Delgamuukw by some years....

**Mr. Inky Mark:** Are you telling me directly that in light of where we're going and where we're coming from, this bill is a positive step forward, and basically you're saying indirectly you support the legislation?

**Mr. Phil Fontaine:** What we said, if I can refer once again to the principles that we believe are the basic requirements that must be met in order to ensure that justice and fairness in fact--

**Mr. Inky Mark:** You're asking us the question as members of the committee, right? But I'm asking you the question.

**Mr. Phil Fontaine:** Well, what we've asked you to do, Mr. Mark, is to assess the legislation against what we believe are the basic requirements, the basic and most fundamental principles that must be met in order for you to make that determination. We've tried to make it very clear as well that there are some areas where we believe there are some positive features to the bill, and there are some areas where there are deficiencies.

**Mr. Inky Mark:** The overall picture is that it is a step forward in terms of resolving claims.

**Mr. Phil Fontaine:** Well, I will go back. I'm not trying to engage in a debate with you, Mr. Mark; I'm just trying to make sure we are clear in our position regarding the legislation.

We feel that, given our 11 years of experience and the fact that we are a neutral body--we don't speak for or represent the interests of government and neither do we speak for or represent the interests of the claimant groups here--this is something that I'm sure will be determined by others who come before the committee here.

**Mr. Inky Mark:** I realize that, but common sense and rationality dictates that we're either not going anywhere, or going backwards, or moving ahead.

So that's the only question I ask. Are we moving ahead with this bill, Bill C-6?

**Mr. Phil Fontaine:** If I may once again try to be clear about this, Mr. Mark, we believe the fact that there are a number of areas where there is now legislation, that this is now legislated, is an important move forward. I don't think one can dispute that fact.

**Mr. Inky Mark:** Thank you.

**The Chair:** Ms. Karetak-Lindell.

**Ms. Nancy Karetak-Lindell (Nunavut, Lib.):** I want to base my questions more on your section on primacy of the fiduciary relationship between the first nations and the federal crown and the fact that you feel there are certain sections of the bill that refer to third-party involvement. You feel that might slow down the process if it involves provincial governments that are not interested in settling claims. But when you refer to third parties, would you also include groups that are in overlapping issues, let's say other land claims agreements that have already been settled?

We know there are some claims, even with my own Nunavut Land Claims Agreement, where there are some overlapping issues and some grievances against how the land was given out in those agreements. Could you comment on that?

I'd like you to comment also on the fact that I looked through it and I don't see any time limits involved for the third parties. Do you think if there were some way of putting a time limit as to when these third parties could respond, that would also make the claims move forward in some

timely manner? I know one of the greatest complaints we've heard is the time and money involved in just moving these claims along.

I know Mr. Mark asked one of the questions I was going to address, about whether this is at least a step forward in resolving some of the outstanding claims.

Thank you.

(1245)

[*Translation*]

**Ms. Renée Dupuis:** To answer the first part of your question, I would say that according to us, including the federal crown fiduciary obligation in the legislation is a good thing, in the sense that this privileged relationship would thus be confirmed.

The purpose is to establish a system that would be more efficient and allow for a final settlement of claims; however, we believe the federal crown fiduciary obligation would be lessened if the tribunal had the possibility of dividing the responsibility between the federal crown and a provincial crown, for example.

Currently, we are trying to avoid having such a process used to create a new problem. This could eventually force a first nation to follow two procedures: a first one in the current context, and a second one before another court to obtain a payment that would fall under provincial responsibility, and because the tribunal here would have decided that 40% is federal, and 60% is provincial.

[*English*]

**Ms. Nancy Karetak-Lindell:** I know you addressed the part about the provinces, but how about overlapping issues or when they involve another land claims agreement? Are you talking about them as also being third-party issues in your section on page 25?

**Ms. Kathleen Lickers:** To answer the question, Mr. Chairman, we haven't specifically identified them as, as you say, third parties. There are provisions in the act that empower the centre to join issues where first nations are bringing issues--either one first nation is bringing issues that relate to the same land base or where multiple first nations are bringing claims forward to the same resource--that we haven't characterized as a third party necessarily, but certainly it opens the question as to the authority and the power of the commission to control its own process, and it certainly has that authority under provisions of this bill to design its own

rules of procedure. That will certainly have to be a component of its work in defining when and how parties would be added to a particular claim.

What we have spoken to quite directly is the fact that this bill would be substantially improved if the commission and the centre were given the authority to compel the parties to act. One of the things we have spoken to quite directly is the fact that there is a provision in this bill that removes from the commission the power to decide a matter before the minister actually takes a position on a claim.

We have in our 11 years of experience referred to that as deeming claims to be rejected. In this bill as it's currently proposed, that is addressed quite directly to say that no time lapse until the minister takes a position can be considered to be a deemed rejection, and we have spoken to that in our presentation.

(1250)

**The Chair:** Twenty seconds.

**Ms. Nancy Karetak-Lindell:** When you were saying that the centre will have the authority to make rules and regulations, does that include time limits as to when these third parties can respond?

**Ms. Kathleen Lickers:** To answer your question, yes, there certainly is within the scope of defining procedures, but what is not in this legislation is the authority to enforce procedures.

**The Chair:** Thank you. We have time for a one-minute question, as we did before, to be answered by our witnesses if they choose to do that when time is allocated for final comments, and the time that will remain will be about five minutes.

Mr. Vellacott, one minute.

**Mr. Maurice Vellacott:** Yes. Given the fact that there really is no greater independence, in fact no independence that I see here because there's not a joint approval process, and combine that with the fact of the $7 million tribunal cap and then the potential for indefinite delay by the government--and I want to get this from a legal counsel point of view--with those three things, what's all the hoopla about, and how are we any farther ahead, Ms. Lickers, on this from a

strictly...? I know it's awkward for you as commission members to be responding. You need to be careful because the minister reads transcripts and so on, but can you tell me why or how are we any better ahead from our old situation by this bill when there's no independence, when there's the potential for delay indefinitely by government, and also the $7 million tribunal cap, which means very few are going to be settled under this body anyway?

[*Translation*]

**The Chair:** Mr. Loubier, you have the floor.

**Mr. Yvan Loubier:** I would like to know what the new process requires in cases--there have been some in the past, and it could happen again--where specific claims affect provincial jurisdictions. How does the commission deal with these types of claims?

I will ask a second question, if I may, Mr. Chairman. Mr. Fontaine, you have just explained to me that, for several years, there has been a fairly equal representation of aboriginal peoples and others within the commission, and that up to now, this had produced good results.

In light of this experience, would it not be indicated, for other types of bills, such as that on governance, to involve members of the first nations in the committee's work? It was proposed, and it was rejected by the Liberal majority, but would it not be indicated to adopt this kind of more constructive cooperation between the two nations?

[*English*]

**The Chair:** Mr. Proctor.

**Mr. Dick Proctor:** Thank you. I don't know whether the ICC presentation was available before, but since I'm filling in for a colleague, I had not seen it until earlier today.

What strikes me is the amount of time the ICC devotes in its brief to this whole matter of independence. You're quoting from Supreme Court decisions and the fact that the minister is involved. The question I have at the end of those three and a half pages is, does the ICC have some advice for this committee on how we might deal better with this matter of independence?

**The Chair:** Mr. Mark.

**Mr. Inky Mark:** Thank you, Mr. Chair.

ICC stated that the current claims process is unfair and constitutes a conflict of interest. Maybe you could elaborate. Where is the conflict in the present system, and how is that eliminated by Bill C-6?

**The Chair:** Monsieur Serré.

[*Translation*]

**Mr. Benoît Serré (Timiskaming—Cochrane, Lib.):** Thank you, Mr. Chairman.

I have a quite simple question to ask Ms. Dupuis; it is in the same vein as Mr. Mark's comments. I hope to get a clear enough answer. I know that you noted gaps in Bill C-6, but if you had a choice between the status quo and this bill, which would you choose?

[*English*]

**The Chair:** Now I invite our guests to present final remarks, closing remarks, and include any answers to the questions, if you wish.

Mr. Fontaine.

**Mr. Phil Fontaine:** If I may, I will make some general remarks, and then, as requested by one of the committee members, call on Commission Counsel Kathleen Lickers or Commissioner Dupuis to speak.

The Indian Claims Commission, during the 11 years that we were an interim body, advocated consistently and over time that what was needed was an independent body to deal with specific claims, and if I might say, even with the limitations that were imposed on the work of the Indian Claims Commission, I think we were successful in most of our undertakings. We were as fair as we needed to be, and the reports we submitted to government, with clear recommendations, resulted in some significant benefits accruing to claimant groups. The most recent example of that was the one mentioned in the previous presentation by Minister Nault, the Kahkewistahaw claim.

So at every opportunity we stated our position clearly, that the limitations we had to work with were unacceptable, and we indicated our position over and over again that what was needed was an independent body. So, as we said, we ask you respectfully to consider the draft legislation that is before you against the principles we've listed here as absolutely essential.

As we pointed out, we've tried to be clear about that. There are some areas where we believe the legislation doesn't go far enough and is left wanting. There are areas where we believe it meets the test of the standards we've set. So we want to be clear about the kind of balance that we believe is absolutely essential. But we leave it to your determination to make the call on it.

(1255)

**Ms. Kathleen Lickers:** Mr. Chairman, if I could perhaps answer both Mr. Vellacott and Mr. Proctor's questions directed to independence, let me attempt to do so.

What the Indian Claims Commission has said in our brief and in our presentation to you today is that on the principle of independence, in our view, it would be an improvement under the current legislation, if in fact the commission were empowered and given the authority to control its own process, for the commission to have the capacity to make determinations as to when and what matters went before the tribunal, and not to have that decision in particular too closely linked to the decision of the Minister of Indian Affairs.

That's what we have spoken to, and Mr. Vellacott, when you speak to the removal of or perhaps the perpetuation of the judge and jury role that both the minister and others have spoken of in what has been the status quo, in our view, while this bill appears to remove the conflict of interest, the reason we have spent three and a half pages of this document outlining this particular principle is because on its face it looks as though there is a removal of this role, but on closer inspection it may not be the judge and jury decision-making power that the minister has had up until today. But there are other elements of the commission and the centre's workings that are too closely aligned. That's what we detail and why it takes us three and a half pages to do that.

[*Translation*]

**Ms. Renée Dupuis:** If I may, I would quickly add that the committee is invited. I want to say very clearly that the elements of the bill that we support ultimately come down to the creation of a tribunal which is totally independent from the government and which will have the authority to decide on validity and specific claim compensation issues; the fact that this is included in an act, unlike what is the case now; the fact that the fiduciary obligation is recognized and included in the legislation; and finally the fact that the evidence of the existence of communities, provided by oral history, is also included. Obviously, these are improvements to the current process.

(1300)

[*English*]

**The Chair:** I thank you very much. Your contribution was valuable to the members of the committee.

We will adjourn this meeting. The committee is scheduled for another meeting from the other department at 3:30.

Thank you all.