Assembly of First Nations
Technical Update on Specific Claims

November 2008

The New Specific Claims Process

The Assembly of First Nations (AFN) and the Government of Canada have continued to work on select issues relating to the establishment of the new process to address specific claims. On June 18, 2008, the *Specific Claims Tribunal Act* received Royal Assent and October 16, 2008, it came into force. While the Tribunal is now officially in place and an interim Registrar has been appointed (Mr. Wayne Garnons-Williams), judicial appointments have not been made and the design of the Tribunal's rules of procedure remain to be defined. This bulletin will set out those issues that have been under discussion, and the progress that has been made since our bulletin this past June.

Background

The Political Agreement signed by the National Chief and Minister Chuck Strahl on November 27, 2007, sets out a series of issues to be jointly discussed by Canada and the AFN. With Royal Assent, a Liaison & Oversight Committee (LOC) was formed, and a technical sub-committee began to meet to deal with the issues identified in the Political Agreement. The initial focus of this work has been on preparing for the coming into force of the new *Act*. This has included discussions on a number of areas, some of which were "collaborative," while others were more "informational," as follows:

1. A joint AFN-Canada submission on Tribunal rules;
2. The development and implementation of a (reasonable) Minimum Standard;
3. The 6-month pre-assessment period;
4. The 3-Year Clocks; and
5. The revised Specific Claims policy (replacing Outstanding Business).

1. Joint Submission on Tribunal Rules

In the Political Agreement, Canada and AFN agreed to develop a joint submission on the Tribunal's Rules of Practice and Procedure. These rules represent the basic structure / approach that the Tribunal will use for the adjudication of specific claims before it. As such, AFN is seeking to ensure that basic principles – such as a respect for First Nation protocols, the incorporation First Nations' cultural values, language requirements, etc. – are incorporated into the Tribunal process.

This submission is a recommendation and will be considered by the Tribunal at its own discretion. A submission by the AFN does not preclude others from making submissions. In fact, the *Act* provides that "interested parties", including First Nations, have the same opportunity to make independent submissions. However, it remains entirely within the purview of the Tribunal to determine which recommendations, if any, it will adopt.

2. The Minimum Standard

Owing to the fact that the Minister of Indian and Northern Affairs Canada (INAC) is under a three year deadline to review claim submissions, INAC developed a new Minimum Standard that must now be met when submitting a claim to Canada for negotiation. It is now publicly available and can be found on INAC's website at http://www.ainc-inac.gc.ca/al/ldc/spc/jal/mss-eng.asp. While the AFN had input into the development of the Minimum Standard, it was made clear that the federal officials had no obligation to accept the AFN's input as the Minimum Standard was being prepared under the exclusive authority of the Minister of INAC.

The federal standard sets the basic minimum requirements for the kind of information, and they way it must be presented, for a claim to proceed through the process. In short, for Canada to consider whether or not to accept or reject a specific claim, a claimant must first meet minimum information requirements with respect to the content of their claim.

First Nation claimants may opt to look beyond this Minimum Standard to include all of the evidence within their possession that may eventually go before the Tribunal to support their claim. It is important to be aware that Canada may take the position at the Tribunal that a claim submitted to Canada for assessment and/or negotiation must be essentially the same as that which proceeds to the Tribunal. However, there are different interpretations on the extent to which the *Act* allows a claimant to add to or refine their claim when engaged in the Tribunal process. Some indications suggest that Canada will advance an extremely narrow view with respect to the introduction of additional evidence. For example, Canada may argue that even very minor / reasonable alterations to a claim will

necessitate its being treated as a new claim and, therefore, that it would have to be re-filed with Canada. As a consequence, great care must be taken when submitting a claim for assessment / negotiation. Claimants must look ahead to the Tribunal stage to ensure that all foreseeable aspects of their claim are incorporated when filing the claim with Canada.

As such, the Minimum Standard represents only one of at least two hurdles that must be considered when submitting a claim to Canada. Claimants are advised to seek the advice of independent legal counsel in order to arrive at an approach that is suitable to the circumstances of a particular claim.

This situation raises many important questions with regard to how this new process will unfold. These include:

- How will the information submitted as a part of a specific claim be affected by new case law that emerges while a claim is in the Assessment or Negotiation phases?
- What requirements will there be with respect to the submission of evidence under the Minimum Standard versus before the Tribunal (e.g., oral histories)?
- How will claims be valued at the outset of the process versus before the Tribunal?
- How will these new potential requirements – for example with respect to research or legal counsel – be funded at the front end of the process?

While AFN has been able to discuss these issues with representatives from the federal government, it is clear that some of our perspectives differ in important respects. It is important for potential First Nation claimants to consider these questions with all of the appropriate information before them, recognizing that some of these questions will likely only be answered as a part of Tribunal deliberations or even through independent litigation.

3. The New 6-Month Pre-Assessment Period

A large part of the impetus of the new Specific Claims process has focused on eliminating the arbitrary ability of the Minister of Indian Affairs to control the claims process. However, Canada's interpretation of section 16(2) of the new *Act* is at odds with the AFN's understanding in this regard.

Canada has interpreted section 16(2) of the *Act* as providing the Minister with the ability to unilaterally determine when a claim has been "filed" rather than this being something that occurs objectively based on the date a claim is submitted. This interpretation is at odds with the intentions of the parties that Canada would no longer have unilateral control over the consideration of claims in any respect. The position of the AFN is that the statute initiates the first 3-year clock (see

below) when a claim satisfying the Minimum Standard has been filed, *not* when the Minister finds that it has been filed. This is a matter of interpretation that may only be resolved by the Tribunal itself.

4. The 3-Year Clocks

There are two 3-year clocks – or periods – that operate as a part of this new process. These clocks operate to ensure that a First Nation claimant has access to the Tribunal if a claim is not adequately resolved within a specific timeframe. The two 3-year clocks apply to:

- An ASSESSMENT phase – a 3-year period that begins when the Minister notifies a First Nation that a claim has been "filed" as a part of meeting the Minimum Standard (see above); and

- A NEGOTIATION phase – a 3-year period that begins once Canada accepts a claim for negotiation, or for those claims currently in negotiation, on the day in which the *Act* comes into force.

Here's how it works: A claimant submits its claim to Canada. If the claim complies with the Minimum Standard, Canada will have 3 years to either accept or reject the claim for negotiation with one of the following three outcomes:

i. If Canada accepts the claim for negotiation, Canada will have a further 3 years to negotiate a settlement. If a settlement is reached, the claim is resolved. If no settlement is reached, the claimant has the right to take its claim to the Tribunal for a binding determination on validity and compensation.

ii. If Canada rejects the claim for negotiation, the claimant has the right to take the claim to the Tribunal for a final and binding determination on validity and compensation.

iii. If Canada does not respond within 3 years, the claimant has the right to take the claim to the Tribunal for a final and binding determination on validity and compensation.

The fact that there are fixed timelines for the government ensures that First Nations will no longer have to wait indefinitely for a resolution of their claims – in each case a First Nation has the option of proceeding to the Tribunal for a binding determination. This said, the point at which the first 3-year clock (the Assessment phase) begins remains a significant issue of contention for the AFN.

5. The New Specific Claims Policy

Contrary to our understanding from the initiation of the reform process, the AFN was informed in September 2008 that Canada was revising the specific claims policy. This information was presented to us by INAC on the assumption that this would not be an area of joint collaboration between AFN and Canada as set out in the Political Agreement. After some discussions with Canada about this, it was agreed that members of the LOC sub-committee could review and provide input on a draft revised policy, on a without prejudice basis, but this was to take place within a very short timeframe (one week).

The AFN is concerned with both the process that was used to gather our input on the new policy, as well as some of the features that this new policy attempts to entrench relating to the issues set out above. However, in the spirit of openness and collaboration, the AFN reviewed the revised draft on a preliminary and without prejudice basis and provided its initial comments in a letter – this letter is now available on the AFN's website (www.afn.ca). A reply from INAC to our letter is still pending but will also be posted on the AFN website once it is received.

Concluding Comments

Although the AFN's engagement with Canada has not been without its challenges, we are confident that our engagement has and will continue to improve the policy and legislative initiatives of the federal government. The fact that the AFN is working with Canada on an initiative such as specific claims does not mean that the AFN endorses all of the outcomes, nor that all of the outcomes are necessarily the result of a collaborative process. We continue to achieve the best possible outcomes for First Nations based on the mandates that we have received from the Chiefs-in-Assembly and in our collaboration with our Chiefs Committee on Claims, as well as other groups and communities.

While many other issues remain to be discussed, the AFN will continue to engage in dialogue with First Nations and Chiefs on an on-going basis. We anticipate that addressing claims over $150 million will be the next substantive area of discussion and hope to engage claimants to this effect in November and as a part of the Special Chiefs Assembly in December.

For more information on any of this work, please contact Tonio Sadik at tsadik@afn.ca or 613-241-6789 (ext. 280).