THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-30
Specific Claims Tribunal Act

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

Bill C-30
Specific Claims Tribunal Act

I. INTRODUCTION

The National Aboriginal Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on Bill C-30, *Specific Claims Tribunal Act*. The CBA Section generally supports the passage of the Bill. Legislative reform of the specific claims process is long overdue. The Bill would establish a much-needed independent tribunal with power to decide some long standing claims between First Nations and the Crown.

While we support the intention of the Bill, we believe that it should be improved before it is passed. As currently drafted, the Bill would unduly restrict the Tribunal's jurisdiction, impose an unfair cap on compensation the Tribunal may award, offer too broad a release clause and allow the possibility of fresh litigation respecting "deemed rejections". In this submission, we will highlight these structural and legal shortcomings and recommend that they be remedied before the Bill progresses through the legislative process.

II. CBA SECTION'S 2006 SUBMISSION

The CBA Section supports the specific claims process as a necessary alternative to litigation for resolving historic claims of First Nations against Canada. However the process designed by the federal government has been clearly unable to cope with the sheer volume of claims from First Nations.

In December 2006, the CBA Section prepared a submission entitled *Examination of Canada's Specific Claims Policy* for the Senate Standing Committee on Aboriginal People (Senate Committee). In its submission, the CBA Section identified several areas for reform of the specific claims process. A major concern was the lack of an independent

body to review Ministerial decisions to reject claims and to make decisions binding on the federal government. One of our suggestions was that difficult issues might be referred to an impartial lawyer or former judge.[1] The views expressed in this submission are consistent with the CBA Section's earlier submission.

III. GENERAL COMMENTS

Bill C-30 is a welcome reform to the specific claims process. It is important that the Bill was drafted in consultation with the Assembly of First Nations. The proposed legislation would create the Specific Claims Tribunal which, unlike the Indian Claims Commission (ICC), would have power to make binding decisions about outstanding historic claims of First Nations.

Under section 6 of the Bill, the Tribunal would be comprised of superior court judges picked from a roster maintained by the Governor in Council. Another possibility would be to draw upon a panel of lawyers, retired judges and other professionals with specific expertise in the field, similar to the rosters established for other specialized administrative tribunals such as the Immigration and Refugee Board or Workers' Compensation Boards.

Assuming the Bill is adopted with its current proposal for composition of the Tribunal, we affirm the CBA's support of the merit principle in judicial appointments and for the federal government to ensure a better reflection of Indigenous legal systems in judicial appointments by particularly focusing on appointment of Aboriginal judges to the Tribunal.[2]

Section 3 articulates the purpose of the Act, to decide issues of validity and compensation relating to specific claims. Prudently, under section 5, the Act would only apply to claims that a First Nation chooses to file with the new Specific Claims Tribunal.

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1 Canadian Bar Association, *Examination of Canada's Specific Claims Policy*, November 2006, at 6.

2 Canadian Bar Association, Resolution 05-01-A, "Recognition of Legal Pluralism in Judicial Appointments", (Ottawa, CBA, August 2005).

The main remedial feature of the Bill would be to impose clearer timelines for the specific claims process. Section 16(1)(a) states that a First Nation can file a claim with the Tribunal if the Minister takes more than three years to decide whether or not to accept the claim for negotiations. Similarly, section 16(1)(c) states that a First Nation can file a claim with the Tribunal if it takes longer than three years to negotiate a claim accepted by the Minister.

The Tribunal would have the power to issue final and conclusive decisions for compensation respecting claims under sections 14, 17, 20, and 34(2). Its decisions would be subject to judicial review by the Federal Court. Effectively, the Tribunal would be a specialized "inferior" court for specific claims relating to compensation. We suggest that consideration should also be given to an internal administrative appeal process, in addition to judicial review by the Federal Court, to allow for the possibility of appeal on the facts, as well as for error of law.

RECOMMENDATION:

> **The CBA Section recommends that Bill C-30 be amended to include an internal administrative appeal process in addition to judicial review by the Federal Court.**

Section 19 of the Bill contains an important provision that would recognize the long standing, historical nature of specific claims. It would prohibit the Tribunal from considering limitation periods and doctrines such as laches. Given the significant time that often passes between when the federal government breaches its lawful obligation to when a First Nation is able to file a specific claim about that breach, this is a positive development.

An interesting proposal in the Bill is the power of the Tribunal to make orders and awards against provinces under sections 20(6), 21 and 22. While limited to provinces that voluntarily become parties before the Tribunal (section 23(1)), this still appears to be an effective and necessary power. In our view, provincial involvement is key to the success of this legislation. The CBA Section commends the proposal for a venue allowing

provinces to participate in resolving specific claims, and urges provinces to accept that opportunity.

The Bill opens broad possibilities for law reform. The Senate Committee's 2006 report on specific claims spent considerable time discussing the inadequate resources at Indian and Northern Affairs Canada (INAC) and the Department of Justice to process specific claims.[3]

The Bill is also the result of a Political Agreement between the federal government and the Assembly of First Nations,[4] which includes the federal government's commitment to introduce remedial legislation to address the backlog of claims.[5] Equally important is the federal government's commitment to provide adequate financial resources to allow the internal processing of specific claims to be effective and expeditious. Without that commitment, Bill C-30 could give the superficial illusion that problems with specific claims have been addressed without actually dealing with the underlying problems of INAC internal processes and policies that have led to the current problems. In our view, both the Bill and the financial commitments outlined in the Political Agreement are necessary for true reform of the specific claims process.

The CBA Section reiterates what several witnesses before the Senate Committee highlighted. Reforms to the specific claims process should not be overly legalistic or inflexible, but rather must be well informed and non-partisan.[6] Certainly, the preamble to Bill C-30 recognizes that:

> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner.

The rules of natural justice undoubtedly apply to the procedures adopted by the Tribunal (section 12(1)), but little will be gained by the Tribunal adopting procedures for discovery

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3 "Negotiation or Confrontation: It's Canada's Choice", Final Report of the Standing Senate Committee on Aboriginal Peoples, Special Study on the Federal Specific Claims Process, December 2006, at 14-15, 39.

4 Political Agreement between the Minister of Indian Affairs and Northern Development and the National Chief of the Assembly of First Nations in relation to Specific Claims Reform.

5 *Ibid*. at 1.

6 Senate Committee Final Report, *supra*, at 22.

and hearings that mirror civil procedure in the superior courts. The CBA Section believes that a fair, just and timely resolution of specific claims calls for adjudication that does not entail the long, costly and frequently acrimonious battles that First Nations often face when bringing historic claims against the federal government through the court system.

IV. LIMITS TO JURISDICTION

Section 14(1) would limit the Tribunal's jurisdiction to claims for compensation for loss on six specific grounds:

> (a) a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation - pertaining to Indians or lands reserved for Indians - of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (c) a breach of a legal obligation arising from the Crown's provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> (d) an illegal lease or disposition by the Crown of reserve lands;
>
> (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
>
> (f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

The CBA Section has three concerns with the proposed limits to jurisdiction. First, while the six grounds would cover most claims against the federal government under the specific claims process, the Tribunal would be limited to awarding only financial compensation. First Nations are specifically prohibited from filing claims seeking remedies other than "monetary compensation", according to section 15(3)(b), so cannot seek land.

This is problematic in the context of land-based specific claims, such as treaty land entitlement (TLE) claims. TLE claims are for reserve lands that many treaties provide as a matter of right, yet which the federal government never set aside for the First Nation. While section 15(2) would not prevent a First Nation from filing a TLE claim with the Tribunal, the Tribunal could not make orders about how much land and the nature of any

land that must be set aside to rectify the breach of the Treaty, according to sections 15(4)(b) and 20(1)(a). While the federal government is not a signatory, Article 28 of the UN *Declaration on the Rights of Indigenous Peoples*, recently adopted by the UN General Assembly, provides a reference in this regard.[7]

RECOMMENDATION:

The CBA Section recommends that the Tribunal be empowered, at the very least, to make declarations respecting land quantum and the nature of such lands owed by Canada to a First Nation.

Second, there is a prohibition against claims based on treaty rights "related to activities of an ongoing and variable nature such as harvesting rights" in section 15(1)(g). This appears to be directed at treaty rights such as hunting, fishing and trapping. While the CBA Section is not suggesting that the Tribunal should have jurisdiction regarding the present exercise of such rights, historic claims arise from the denial of such rights in which the federal government may have been complicit. For example, a number of historic treaties provide for a right to trap. In the early twentieth century, many provinces enacted legislation respecting registered trap lines. First Nations saw new "registered" trap lines owned by non-Aboriginal trappers super-imposed over their traditional trap lines. To the extent that Canada was historically involved in this process, compensation ought to be available to the First Nation.

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[7] Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

RECOMMENDATION:

The CBA Section recommends that the Tribunal be empowered to award compensation based on historic wrongs arising from Treaty rights to activities of an ongoing and variable nature, such as harvesting rights.

Third, section 14(1)(c) refers expressly to "unilateral undertakings that give rise to a *fiduciary* obligation at law" (emphasis added). Our experience is that the Crown does not view some of its obligations as being fiduciary in nature, but may describe such duties as being either quasi-fiduciary or *sui generis* in nature.

Accordingly, the word "fiduciary" in this clause may be too limiting. If a unilateral undertaking creates any obligation at law, fiduciary or otherwise, that claim should be justifiable under this process. The word would have the effect of continuing an unnecessary debate about the extent of the fiduciary nature of the Crown's obligations in certain situations and would leave any claim which give rise to obligations in law under similar doctrines to be un-actionable.

RECOMMENDATION:

The CBA Section recommends that the word "fiduciary" be deleted in subsection 14(1)(c).

V. LIMITS TO THE TRIBUNAL'S MONETARY JURISDICTION

A peculiar aspect of the Bill is what seems to be a rather arbitrary limit on the Tribunal's monetary jurisdiction. Section 20(1)(b) limits the compensation that the Tribunal may award to $150 million and section 15(4)(c) says that a First Nation may not file a claim for more than this amount.

This limit could also operate to preclude the Tribunal from adjudicating ancient, historic claims which are relatively straightforward in nature, but simply because of the time elapsed are now expensive to settle. This is an inappropriate restriction. If a claim is found to be relatively straightforward in nature, but only due to the passage of time is now

worth more than $150 million, the Tribunal should have jurisdiction to consider the claim and award the appropriate amount of compensation.

In our view, there should not be an absolute cap on the amount that the Tribunal may award in compensation. Rather, the Bill should be amended so that $150 million is a provisional cap subject to the Tribunal's ability to assess the complexity of a claim.

RECOMMENDATION:

The CBA Section recommends that there not be a blanket cap on the amount that the Tribunal may award in compensation but rather that Bill C-30 contain a provisional cap of $150 million, subject to the Tribunal's ability to assess the complexity of a claim.

The rest of section 20(1) allows the Tribunal to use principles of compensation applied by the court. We are concerned that the wording of section 20(1) could lead to the interpretation that awards of equitable compensation are unavailable. At a minimum, the references to "legal principles" should instead read, "legal and equitable principles".[8]

RECOMMENDATION:

The CBA Section recommends that the wording of section 20(1) make it clear that awards of equitable compensation are available.

One such principle is equitable compensation for breaches of fiduciary duties by the Crown, recently endorsed by the Ontario Court of Appeal in *Whitefish Lake Indian Band v. Canada*.[9] The breach in that case occurred in 1886, and the main issue on appeal was how to bring forward the damages to 2007 dollars. The Court accepted that equitable compensation is available and a tool to use in assessing equitable damages can be compound interest.

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8 *Whitefish Lake Band of Indians v. Canada (Attorney General)*, 2007 ON.C.A. 744.

9 *Ibid.*

This case demonstrates that, although the facts of a claim might be relatively straightforward (and in *Whitefish*, the breach of fiduciary duty was admitted by the federal government), the calculation of compensation to account for the passage of time might easily move a claim over the proposed monetary limit, unfairly depriving the Tribunal of jurisdiction.

VI. RELEASE BY FIRST NATION

Where the Tribunal has reached a final decision, whether the First Nations has succeeded or not (i.e., whether the claim has been found invalid or the Tribunal has awarded compensation), section 35(1)(a) would provide for a broad release clause:

> each respondent is released from any cause of action, claim or liability to the claimant and any of its member of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claims is based.

The broad wording of this clause appears to encompass even those claims expressly removed from the Tribunal's jurisdiction, such as claims for loss of a cultural or spiritual nature arising from the breach of a legal obligation of the Crown in respect of First Nations lands or assets (see section 20(1)(d)(ii)). While the status of such claims is currently uncertain under the law, it is possible that they could eventually be recognized as compensable claims. The wording of the release clause in Bill C-30 would preclude First Nations who have proceeded under the *Specific Claims Tribunal Act* from ever bringing such a claim. In our view, this is an unfair limit to be imposed on First Nation's rights, especially since they are precluded from making such claims before the Tribunal.

RECOMMENDATION:

The CBA Section recommends that more specific language be used in section 35 to refer to a release or indemnity only for the same "causes of action", not for the "same facts".

It is also inappropriate to legislate that the First Nation should indemnify the Crown for claims of its members that can not be brought into the process. For example, the First Nation may not be able, in law, to seek claims for general personal damages suffered by its

members. If the First Nation is compensated only for the land value, it should not be compelled to indemnify the Crown for those personal claims of its members.

Similarly, if a specific claim by a First Nation fails as a result of an issue such as standing, there should be no release of the claim as against other parties.

RECOMMENDATION:

The CBA Section recommends that the word "invalid" in the introduction to section 35 refer only to cases where standing was found to be held by the First Nation.

VII. POSSIBILITY OF DEEMED REJECTIONS

Uncertainty is built into the two proposed three-year timelines in Bill C-30, noted above. Pursuant to sections 16(2) and (3), all claims would have to meet a "reasonable minimum standard" of key information, the standard to be established by the Minister. If a claim does not meet the standard, then the timelines under section 16(1) would not begin to run.

Under the ICC, a doctrine emerged called "deemed rejections". According to this doctrine, the ICC would hold inquiries about claims which had neither been accepted nor rejected by the Minister if a sufficiently long period of time had elapsed since the filing of the claim.

The CBA Section is concerned about the possibility of a new area of "deemed rejections" emerging, as First Nations litigate the reasonableness of the minimum standards for information and as the Minister may rely on this provision to delay acceptance or rejection of submitted claims. One purpose of the specific claims process and the proposed Tribunal in Bill C-30 is to provide an alternative to litigation. Sections 16(2) and (3) could give rise to a new kind of procedural litigation, namely whether the Minister's standards are indeed "reasonable" and, if so, whether the First Nation has met the standards.

RECOMMENDATION:

The CBA Section recommends that Bill C-30 set out the minimum requirements to be included in a claim for the timelines under

section 16(1) to begin to run, rather than leave that to the Minister to determine.

The minimum standards might include:

a) name of First Nation;

b) a statement of the claim;

c) a detailed review of all material facts to the claim;

d) a description and analysis of legal issues respecting the claim;

e) a chronological list of all documents supporting the claim; and

f) a compendium of all these documents.

VIII. CONCLUSION

The CBA Section recognizes that Bill C-30 represents an important, necessary step forward to address systemic problems within the federal specific claims process. However, we believe that the Bill can be improved, and have recommended specific changes that we believe should be made before the Bill is passed into law.