Item 4b 18/05 #2
Extended Report

TO THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

Third Session: New York: May 10-21, 2004

SUMMARY OF SUBMISSION BY THE ASSOCIATION OF IROQUOIS AND ALLIED INDIANS (AIAI) ON THE CANADIAN SYSTEM OF SETTLING FIRST NATION LAND CLAIMS AND RELATED CLAIMS

Association of Iroquois and Allied Indians

I am the Grand Chief of the Association of Iroquois and Allied Indians, which represents eight First Nation communities and is part of the larger Ontario Political Confederacy representing134 First Nation communities.

Recommendations:

1. First Nations have exhausted all domestic political and legal recourse to persuade Canada to meet its obligation to establish a land claims system that respects rights and fosters national reconciliation. Therefore, international intervention is sought and required with respect to Canada's Bill C-6, the "Specific Claims Resolution Act".

2. The AIAI respectfully asks the Permanent Forum on Indigenous Issues to make the following conclusions and recommendations:

(i) *The Permanent Forum shall utilize its mandate to prepare and disseminate information, and to provide expert advice and recommendations on Canada's Bill C-6 to the UN Economic and Social Council (ECOSC).*

(ii) *The Permanent Forum shall establish a special investigation into Canada's land claims policy. The study or investigation should address itself to the potential role of UN organs and agencies in providing more adequate safeguards on independence, monitoring and oversight of Canadian land claim practices. The study should include at least one hearing, in New York or Canada, at which First Nations are invited to provide their evidence, information, views and recommendations.*

(iii) *Pending the independent international review, the Permanent Forum shall urge Canada to suspend any further implementation of Bill C-6 and to re-start government-to-government discussions with First Nations in Canada on a new claims process consistent with international and domestic constitutional standards, and supportive of the objective of national reconciliation and healing.*

Canada

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1 The Association of Iroquois and Allied Indians (AIAI) is an organization that represents the political and other interests of the following eight (8) First Nations in the province of Ontario, Canada: (1) Batchewana First Nation of Ojibways; (2) Caldwell First Nation; (3) Delaware Nation [Moravian of the Thames]; (4) Hiawatha First Nation; (5) Mississaugas of the New Credit; (6) Mohawks of the Bay of Quinte; (7) Oneida Nation of the Thames; and, (8) Wahta Mohawks. These communities have a total First Nation citizen population of approximately 18,000. The governments of the eight AIAI First Nations work closely on a range of issues with the other 126 First Nations in Ontario and the 600 plus First Nations in the rest of Canada.

The Canadian System on First Nation Land Claims and Related Claims

2 In 1969 the federal government of Canada tabled the infamous White Paper, which called for the levelling of "special" First Nation rights. Canada withdrew the White Paper because of the

vigorous reaction by First Nations and, to a lesser extent, the Canadian public. Along with other considerations, this led the federal government in or about 1970 to develop a formal policy on the handling of certain historical claims *from* First Nations. Up until that time, historical grievances from First Nations were largely ignored by the federal government, forcing First Nations to go to court or abandon their claims.

3 The Specific *Claims* policy of the federal government was outlined in a document known as "Outstanding Business". The policy generally applies to First Nations that are covered by historical Treaties and that have "reserve" land under the federal Indian Act. Specific claims relate to disputes over reserve land and other specific entitlements based on Treaty (eg. the payment of *monies* or "annuities"). Disputes over reserve land encompass boundary calculations, expropriations, and the "surrender" of reserve land. The federal government refuses to deal with "program" (egs. health and education) disputes related to Treaties.

4 The administrative Specific Claims policy has been in place for about 35 years. Yet, it has done little to diminish the huge backlog of First *Nation* claims. Only about 262 claims have been settled during this period, a very unimpressive rate of about 7 per year. The eight First Nations of AIAI alone have about 100 unsettled specific claims! Most of the claims settled so far have been of a relatively minor or technical nature. The federal government has steadfastly stonewalled major claims involving relatively large *amounts* of land and money. The day of reckoning has been deferred, leading to increased tension between First Nations and Canada.

5 A significant limitation of the Specific Claims policy is its narrow focus on Indian Act reserve land. This ignores the First Nation right to share in the lands and resources of their off-reserve traditional territory. The reserve land based of all First Nations amounts to less than 1% of the total land mass in Canada, far less than the area set aside for parks.

6 Another fundamental problem with the Specific Claims policy is the "judge and jury" position of Canada. Federal researchers evaluate the facts of a claim and federal lawyers determine whether a claim is liable. This puts the federal government in a fundamental conflict of interest.

7 Another problem with the claims system is the artificial cap on settlements imposed by Canada. It its annual budgeting, the federal Department of Indian Affairs sets aside a certain amount of money for the settlement of all First Nation claims. The annual cap makes it practically impossible to settle significant claims.

8 The provinces are not directly involved in the federal claims process. As the provinces generally control the off-reserve area, this means that settlements under the federal system must be financial in nature. This is a fundamental problem, as land is everything for First Nations.

9 These are just some of the flaws in the Specific Claims policy. Others are outlined in the full AIAI submission, which has been provided to the Permanent Forum. The inadequacy of the policy has led to delay and frustration. There has been a complete failure to achieve any national

reconciliation and healing over First Nation historical grievances. The Supreme Court of Canada has stated that such reconciliation is the primary objective of section 35 of the Canadian Constitution Act, 1982, which recognizes Aboriginal and Treaty rights.

10 The national First Nation organization, the Assembly of First Nations (AFN), has engaged in lengthy negotiations with Canada aimed at reforming the Specific Claims policy. A Joint Task Force (JTF), made up of federal and First Nation officials, arrived at a mutually agreeable set of recommendations, featuring independent review and monitoring of claims.

11 In a shocking and disappointing move, the federal government dismissed the carefully crafted recommendations of the JTF. Instead, Canada introduced Bill C-6 (the Specific Claims Resolution Act). All First Nations opposed Bill C-6. Yet, Canada rammed the measure through Parliament in late 2003. The federal action was in violation of its legal obligation to consult First Nations in a reasonable way on proposals likely to impact on First Nation rights.

12 The Tribunal and other components of Bill C-6 repeat the problems of the Specific Claims process. There is no independence, as all Tribunal members are appointed by the federal government for limited terms. Many kinds of claims (egs. programs and pre-Confederation) are not eligible. The process is not binding in relation to large claims (over $10 million).

13 While the Bill was passed by Parliament, it has yet to be "proclaimed". The new Prime Minister (Mr. Paul Martin) has said on numerous occasions that he wants to engage First Nations

in a new and positive relationship. In that spirit, the AFN and other First Nation organizations have asked the federal government to abandon Bill C-6 and return to collaborative reform of the claims system. The federal government has continued with pre-implementation of the Bill.

Conclusion and Recommendations

14 First Nations have exhausted all domestic political and legal recourse to persuade Canada to meet its obligation to establish a land claims system that respects rights and fosters national reconciliation. Therefore, international intervention is sought and required.

15 The AIAI respectfully asks the Permanent Forum on Indigenous Issues to make the following conclusions and recommendations:

(1) *The Permanent Forum shall utilize its mandate to prepare and disseminate information, and to provide expert advice and recommendations in this matter to the UN Economic and Social Council (ECOSC).*

(2) *The Permanent Forum shall establish a special investigation into Canada's land claims policy. The study or investigation should address itself to the potential role of UN organs and agencies in providing more adequate safeguards on independence, monitoring and oversight of Canadian land claim practices. The study should include at least one hearing, in New York or Canada, at which First Nations are invited to provide their evidence, information, views and recommendations.*

(3) *Pending the independent international review, the Permanent Forum shall urge Canada to suspend any further implementation of Bill C-6 and to re-start government-to-government discussions with First Nations in Canada on a new claims process consistent with international and domestic constitutional standards, and supportive of the objective of national reconciliation and healing.*

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Association of Iroquois and Allied Indians (AIAI)

1 The Association of Iroquois Allied Indians (AIAI) is an organization that represents the political and other interests of the following eight (8) First Nations in the province of Ontario, Canada: (1) Batchewana First Nation of Ojibways; (2) Caldwell First Nation; (3) Delaware Nation [Moravian of the Thames]; (4) Hiawatha First Nation; (5) Mississaugas of the New Credit; (6) Mohawks of the Bay of Quinte; (7) Oneida Nation of the Thames; and, (8) Wahta Mohawks. These communities have a total First Nation citizen population of approximately, 18,000.

2 There are 134 First Nation communities in the province of Ontario and there are over 600 communities in all of Canada. These communities relate to much larger nations of Indigenous Peoples, such as the Mohawk, Cree, and Ojibway. Among the 10 Canadian provinces and 3 territories, Ontario has the largest population of First Nation citizens.

3 The eight AIAI communities work closely with the other 126 First Nations in Ontario through participation in Annual and Special Chiefs Assemblies. For example, this year's All Ontario Chiefs Conference (AOCC) will be held in the AIAI First Nation of Hiawatha this June 15 to 17. AIAI can report at this Conference on its presentation to the Permanent Forum on Indigenous Issues and seek feedback. In addition to participation in Ontario-wide Chiefs Assemblies, the AIAI Grand Chief is a member of the Ontario Political Confederacy (PC), which is the recognized executive or cabinet-like body for Ontario First Nations between Assemblies. The PC meets about once a month and provides direction on issues such as international rights and the Canadian land claims process.

4 The eight AIAI communities are also linked to the 600 plus First Nations across Canada. The Ontario Regional Chief, who is a member of the PC, sits on the Executive of the national organization, the Assembly of First Nations (AFN). AIAI Chiefs regularly attend AFN meetings, such as national Confederacies and Chiefs Assemblies. Over the last several years, the AFN has managed First Nation participation in discussions with the federal government of Canada on land claims policy, including the Joint Task Force process.

The Canadian System on First Nation Land Claims and Related Claims

5 In 1969, in a now infamous "White Paper", the federal government of Canada recommended the levelling of all "special" rights associated with First Nations. Instead, First

Nation citizens should be treated equally with other Canadian citizens. There was no formal policy for the management of historical land claims by First Nations. First Nations with historical grievances were generally forced to resort to the domestic court system, with its daunting problems of uncertainty and cost.

6 The White Paper was vigorously attacked by First Nations across Canada, to the point where the federal government officially withdrew the document. This reversal, along with other considerations, led the federal government in or about 1970 to develop a formal policy on the handling of certain historical claims from First Nations. The federal government was also apparently motivated by certain domestic judicial rulings, such as the decision of the Supreme Court of Canada in the *Calder* case dealing with the Aboriginal Title of the Nishga people of British Columbia. The initial land claims policy of the federal government was developed without First Nation input.

7 The Canadian claims policy made a basic distinction between two kinds of claims, a distinction which is maintained to this day, albeit in a more refined form. The Comprehensive Claims Policy is intended to deal with Aboriginal Title claims by First Nations (or groups of First Nations) that have not signed a Treaty with Canada or a predecessor colonial government. Where Aboriginal Title is certified, Canada is open to the negotiation of a comprehensive agreement or modern day Treaty. Previously, Treaty making was only regulated by the terms of the Royal Proclamation of 1763. In the comprehensive claim process, First Nations are obliged to make major concessions to Canada in terms of the effective surrender of Aboriginal Title and the

extension of taxation.

8 The second branch of the Canadian system is the Specific Claims Policy. Specific Claims are in contrast to Comprehensive Claims. The Specific Claims Policy generally applies to First Nations that are covered by historical Treaties and that have "reserve" land under the federal Indian Act. Specific claims relate to disputes over reserve land and other specific entitlements based on Treaty (eg. the payment of monies or "annuities"). Disputes over reserve land encompass boundary calculations, expropriation, and the "surrender" of land.

9 There are certain kinds of dispute relating to the implementation of Treaties that the federal government has consistently refused to deal with, as specific claims or otherwise. In particular, the federal government has refused to deal with program claims stemming from Treaties. This is an unfair and unreasonable exclusion. Many Treaties in Canada refer, for example, to enriched programming in areas such as education and health. The federal government refuses to deal with such matters and takes the self-serving position that the contemporary array of programs available to all First Nations more than satisfies the program commitments made in any Treaty. Yet, the reality is that the programs generally available to First Nations in areas such as health and education are sub-standard compared to the Canadian norm.

10 Another significant limitation of the specific claims policy is its focus on Indian Act reserve land. First Nations, including those under Treaty, claim substantial land and resource sharing rights to the traditional territory off-reserve. However, the Specific Claim Policy

generally ignores the off-reserve territorial rights of First Nations. The focus on reserve land is very prejudicial to First Nations as the reserve land base is very restricted. It has been calculated that the reserve land base of all First Nations amounts to less than 1% of the total land mass of Canada. This is far less than the land and water set aside by Canada for parks and other conservation areas.

11 As of the early 1970's, when the government of Canada introduced the modern claims policy, there was a huge and unknowable backlog of claims. The backlog was worth billions of dollars. The existence of the backlog was not surprising, as the government of Canada did not have an official claims policy until the early 1970's. In 1969, the government of Canada was of a mind to deny the existence of claims altogether. Up until the Indian Act amendments of 1951, it was illegal for First Nations to access their trust funds in order to retain legal counsel to prosecute land claims.

12 The implementation of the Specific Claims Policy since the early 1970's has necessarily had some impact on the huge backlog of First Nation claims. However, the rate of progress has seemingly been of a geological nature. In the 35 or so years that the Specific Claims policy has been in place, only about 262 claims have been settled; most of these have been a relatively minor or technical nature. The government of Canada has not allocated the human and financial resources necessary to cut through the backlog of claims at a rapid pace. As a result, First Nation resentment over the delay in processing historical claims has only continued to increase. It is not unusual for larger and more complex claims to take up to twenty (20) years to process. The eight

communities of AIAI alone have over 100 active and unresolved claims!

13 Undue delay in the processing of claims also serves to escalate the overall cost of settlement. The effect of inflation and interest rate calculations means that the backlog of claims that existed in 1970, which is still largely in place, is now phenomenally more expensive to settle. This ever increasing cost of settlement tends to attract criticism from the Canadian public, and leads to a deterioration of relations between First Nations and that public. This is unfortunate and unfair as the delay in the processing of claims is solely attributable to the actions and inactions of Canada.

14 The phrase "specific claims" may create the impression of relatively small or technical claims - that is certainly the way Canada handles and treats them. However, nothing could be further from the truth. The fact is that most if not all of the 600 plus First Nations have some claims or potential claims. Many First Nations have a large number of related and separate claims. This is particularly true in the southern part of Canada where there is a history of colonial and Canadian governments taking First Nation reserve land in the most dubious circumstances.

15 The claims are numerous. In addition, many of the claims are very serious. While some of the thousands of claims may involve a few hectares, many of the claims involve much larger areas. Some claims involve hundreds of square kilometres of the richest land in Canada (eg. Six Nations of the Grand River).

16 In some claim situations, First Nations lost their entire original reserve areas and were displaced many kilometres away (egs. New Credit First Nation and the Brunswick House First Nation). Claims on this scale, which are not uncommon by any means, are not mere technical or "specific" claims. Rather, they bring into play the very being and spirit of the affected First Nations. These are peoples who were promised equitable treatment by the Canadian government (or its colonial predecessor), but were physically displaced and saw their very existence put into jeopardy.

17 Many of the claims involve the most egregious and shocking circumstances. Even in the case of very old claims, it is difficult to read some of the claim summaries without feeling angry and ashamed. The Canadian government, and its colonial predecessors, were subject to a very high duty to protect the interests and rights of the First Nations. Yet, in thousands of claim cases, the Canadian government was either negligent or directly culpable. On a wholesale basis, First Nation reserve land was expropriated and sold in dubious circumstances. Land was flooded for the purpose of hydroelectric development. Land was expropriated for railroads, highways, and army bases. Reserves were transformed into game preserves and parks. In most cases, the affected communities were frozen out of the related economic development.

18 Many claims involve the mishandling of trust monies by the federal government. After land was sold or expropriated, often in the most dubious of circumstances, some funds were collected on behalf of the First Nations (egs. timber and mining licences). To make matters even worse, the inadequate amounts of money received on behalf of the First Nations were then

mismanaged or even misappropriated by the Canadian government.

19 Many of the First Nations affected by land and money claims should have had secure financial futures. A hundred years or more ago, many First Nations happened to have reserve land in strategic locations, based on potential for mining, forestry, hydro development, etc. If these assets had been managed prudently and on normal commercial terms, the relevant First Nations should have become prosperous on an indefinite basis. The opposite in fact happened. In practically all cases, the most valuable assets of First Nations were handed over to the provinces and/or private interests at a fraction of their real value. In many cases, the affected First Nations were even wholly displaced to permit the exploitation of their erstwhile assets. The financial prospects of these First Nations were absolutely ruined. In the ultimate irony, some segments of the Canadian public and even some elements in Canadian government now chastise these First Nations for their impoverished state.

20 It can be seen that many of these claims are not really "specific" at all. Rather, they are fundamental and all-encompassing, at least for the First Nations involved. They are not just about some bits of money and land. Rather, they are about the prospect of reconciliation between First Nations and Canada. As long as such claims remain unsettled on generous terms, there is a

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20 It can be seen that many of these claims are not really "specific" at all. Rather, they are fundamental and all-encompassing, at least for the First Nations involved. They are not just about some bits of money and land. Rather, they are about the prospect of reconciliation between First Nations and Canada. As long as such claims remain unsettled on generous terms, there is a gaping and festering wound in Canadian society. The equitable settlement of these claims is all about social and historical reconciliation between the original Peoples and the settler governments. Until this reconciliation occurs, Canadian society cannot be said to be truly whole. The deferral of the claims is short term thinking at its worst. It only means that the day of

reckoning and reconciliation will come later and will be more expensive, and not just in terms of money and land. Until reconciliation is achieved, there will continue to be symptoms of unrest and unease between First Nations and Canada.

21 As a result of the administration of the claims process since the early 1970's and its involvement with First Nations going back to Canadian Confederation (1867), the government of Canada is intimately familiar with the land grabs and other misappropriations perpetrated against most First Nations. In many cases, First Nations have been displaced from their original communities. In many cases, it will take generations for First Nations to fully recover, socially, economically, and culturally. In spite of this knowledge of the gut-wrenching histories of many First Nations, the federal government has done a very poor job of sharing relevant and positive information with the Canadian public.

22 As a result, the Canadian public is generally unaware of the claims history of First Nations. Many Canadians seem quite unsympathetic with the situation of First Nations. Many believe that First Nations are somehow to blame for current deplorable social and economic conditions, which, in the North in particular, approach Third World levels. Many view claim settlements, which are sometimes publicized, as unwarranted bonuses or gifts to communities that already receive too much money from the federal government. Nothing, of course, could be further from the truth.

23 The widespread nature of such wrongheaded and disturbing views is attributable to the

failure of Canada to provide information to the Canadian public about the real history of First Nations. The failure of Canada to act in this instance may be deliberate policy. If the Canadian public knew the details of the injustices perpetrated against First Nations over the last hundred years and more, it is certain that the public would put more pressure on the federal government to settle claims in a generous and expeditious manner. The opposite is in fact the case right now. Because of the relative ignorance of the Canadian public, there is little or no pressure on the federal government to settle claims. In fact, if there is any pressure at all, there is episodic pressure on Canada not to settle claims, and to leave First Nations to their own devices. The federal government has done little or nothing to dispel the popular notion that claims are unfounded and drain the federal treasury. This kind of corrosive thinking pits First Nations against the Canadian public

24 This deplorable situation suits the interests of Canada. It can settle claims in a miserly fashion and at a snail's pace without risking any adverse reaction from the Canadian public. In terms of public pressure, Canada effectively has a free hand to settle (or not settle) claims if and when it wants to. It take the most outrageous positions in negotiations and in court, without fear of any retribution from its voting constituency. The result is consistent with the overall approach of Canada on First Nation claims. It wants a free hand to deal with claims, with little or no outside scrutiny or regulation. As a result, it is very difficult for First Nations to advance their claims at a reasonable pace. They are at the mercy of the federal government.

25 There are many fundamental problems with the specific claims process put into place by

Canada. First, there is what is sometimes referred to as the "judge and jury" problem. The specific claims handled by Canada are, of course, against Canada. Canada is directly implicated in the alleged illegal conduct and, if the claim is successful, Canada will have to pay compensation. Yet, in a direct conflict of interest, Canada has established a system where Canada itself determines the key issues of liability (or claim "validity") and the level of compensation, assuming a claim is validated. In other words, Canada is judge and jury in proceedings involving its own culpability and affecting its own purse.

26 Canada receives claims prepared by First Nations and evaluates them within the Department of Indian and Northern Affairs Canada (INAC). That Department has historical researchers on staff and contract who evaluate the research submitted by the First Nation. As with all components of the claims process, the research phase in underfunded and understaffed. Once the research phase is completed, which may take years, the claim is sent to the federal Department of Justice (or Justice Canada). These are the lawyers of the federal government. Essentially, these federal lawyers must determine if their own client, i.e. the federal government, acted illegally and should pay compensation. There is a reasonable suspicion that federal lawyers who are too ready to find in favour of First Nations are not likely to stay around for long. The Justice section handling claims is understaffed and otherwise under-resourced. As a result, the Justice review phase may take years to complete. The Justice review phase is largely a black box for First Nations; input by the claimant communities is not encouraged.

27 If and when a claim is validated, in whole or in part, the federal government makes an

internal determination as to what level of compensation is appropriate. It then engages the First Nation in an adversarial *negotiation* over the level of compensation. Federal officials in this process are generally motivated to settle as low as possible.

28 An overview of the *claims* system reveals the extent of the "judge and jury" problem. The federal government has complete discretion over which claims are dealt with, validated, and settled. The conflict of interest is obvious. The federal government is disinclined to find itself liable in claim situations, *especially in* larger claims. Even where the facts and law appear to point to federal liability, Canada can simply make a determination that it will not deal with the claim, i.e. it will not make a finding against itself.

29 The conflict of interest (the "judge and jury" problem) at the heart of the Canadian claims process makes it impossible for First Nations to be comfortable with the process. In a fair system, there would be a *comforting* sense of a fair hearing, even if the ultimate result is not the desired one. This is not the case with the federal claims system. When a claim is not validated, the First Nation may believe, with some reason, that the claim was not handled fairly by the lawyers and other officials of the federal government. Even where there is a financial settlement, the First Nation may believe that the federal officials applied undue pressure to obtain an unreasonably low settlement range. So, the overall result is very unsatisfactory. Even when claims are settled, there is a *lingering* sense of unfairness. The process is not able to achieve the key aim of historical reconciliation.

33 Another principal problem with the claims system is the artificial cap on settlements imposed by Canada. In its annual budgeting process, INAC sets aside a certain amount of money for the settlement of all First Nation claims in Canada. This amount is determined by Canada and there is no realistic chance of input from First Nations.

34 The annual financial cap imposed by Canada has several negative effects. For one thing, it makes it very difficult to settle larger claims. The settlement of a single large claim would seriously deplete the annual settlement budget, and would only leave room for the settlement of some smaller claims. Also, the cap has the effect of delaying the settlement of all claims, big and small. Regardless of the merits of particular claims, settlements have to be spaced out over a period of years in order to accomodate the federal settlement cap. So, meritorious claims get caught in the bottleneck.

35 The settlement cap accentuates the sense of unfairness and arbitrariness with the claims system. First Nations with otherwise solid claims are put off for long periods, i.e. until room under the settlement cap is freed up. In most cases, this final delay comes after years of delay caused by other problems in the system. Problems associated with the settlement cap reduce the potential of the claims system leading to a reconciliation between First Nations and Canada.

36 Another significant problem with the claims system is the extent to which Canada forces First Nations to choose between the administrative claims system and the domestic court system. The policy of the federal government is that it will not deal with a claim in its administrative

system if the First Nation decides to advance the same claim in court. As soon as the First Nation pushes the matter in court, the federal government will suspend the administrative claim file and will suspend all funding to the First Nation.

37 The claims policy in this regard makes it very difficult for First Nations to exercise their right to access the Canadian court system. Most First Nations do not have the financial resources to sustain a lengthy court battle against the federal government. In court, the federal government practice is to fight claims tooth-and-nail; for example, the federal government will argue that a claim is statute-barred because of delay, even though the same technicality will not be raised in the administrative claims process.

38 The policy reflects a deep-seated and long-term concern that the federal government has about First Nations having ready access to the domestic courts. As noted, the Indian Act before 1951 actually prohibited First Nations from using their trust funds to hire lawyers to prosecute land claims. The federal government is concerned because it does not have direct control over the court system. The courts may issue large judgments against Canada and at times deemed appropriate by the courts, not Canada. A multitude of court judgments would completely upset the annual settlement capping mechanism that is so important to Canada. The federal government obviously prefers the administrative claims system, where the federal government controls all components (research, liability, compensation, and timing).

39 The effective exclusion of First Nations from the domestic court system adds to the

overall sense of unfairness. If the federal government is not playing fair in the administrative process, First Nations do not have any real recourse. Their only options are to abandon a claim or wait out the federal government. Again, there is an undermining of the opportunity to seek a reconciliation between First Nations and Canada over historical grievances.

40 Another major problem with the administrative claims system is the way the federal government allocates funding after a claim is "validated" by the Department of Justice. Validation occurs when the federal Department of Justice determines that the federal government is wholly or partly liable in relation to a particular claim. It may take years to reach the point of validation, because of the many delays inherent in the system. Up until the point of validation, the federal government provides some grant money to First Nations for the development of claims. This grant money is usually filtered through a regional First Nation organization focussed on claim work. The grant money is usually the bare minimum required to move a claim along at the snail's pace favoured by the federal government.

41 After validation, the federal government takes a radically different approach to process funding, with negative consequences for the First Nation. Grant funding is no longer available after validation. Instead, process funding is only advanced by Canada on a loan basis. The amount of process funding borrowed by the First Nation is eventually deducted from the final compensation package for the validated claim.

42 The system of borrowing against the final settlement has several negatives consequences

for First Nations. An obvious negative consequence is that a First Nation caught up in this process ends up with less money in terms of final compensation. This effect may be quite substantial in a drawn-out negotiation, where experts are hired and other special costs are necessary. Another negative consequence is that the First Nation will feel pressured to cut corners in the negotiation process, in order to reduce the cost of negotiation. For example, the hiring of an additional expert might be highly desirable in order to justify a higher compensation package; however, the First Nation may be reluctant to hire the expert, fearing that the cost consequences. Another negative consequence is that the federal government may use its control over the loan funding program to put pressure on a First Nation to settle at the low end of the possible range. The federal government can delay the negotiations whenever it wants to, thereby increasing the cost pressure on a First Nation.

43 Federal control over the post-validation loan program only increases the sense of unfairness with the entire claims process. Again, this reduces the prospect that the claims process may result in a reconciliation between First Nations and Canada, at least in relation to historical grievances. On the contrary, even where there are settlements, the loan program may foster long-term bitterness.

44 Another major problem with the specific claims policy of the federal government has been its relative lack of security and stability from a legal point of view.

45 The claims policy was instituted in or about 1970, in the wake of the 1969 *White* Paper

fiasco. It was set up as a mere policy, with no statutory base, even in relation to the Indian Act. As there was no statute in place, the federal government allocated funds pursuant to its general spending power under the Canadian Constitution and its jurisdiction in relation to First Nations. As the policy was only a policy, there was never any guarantee of long-term continuity. The federal government always had the option of cancelling the policy at any time.

46 While the federal government never did in fact cancel the policy outright, it frequently took advantage of the flexible nature of a policy. Unlike statutes, policies are easy to change. Over the years, the federal government made frequent adjustments to the claims policy, with little or no input from First Nations. The federal government ignored First Nation requests for a more equitable claims system guaranteed by statute or some other legal means.

47 Major changes were made to the Canadian Constitution in 1982. In particular, section 35 of the Constitution Act, 1982 was added, which protects Aboriginal and Treaty rights. This might have been expected to lead to an overhaul of the federal claims policy, making it more equitable and secure. Unfortunately, that did not happen. The federal government continued to exert absolute control over the process through its claims policy and continued to restrict the funding available for process and settlement.

48 In or about 1994 the federal government did make a tentative move to add some structure to the claims process. In particular, it established a national Claims Commission, with a mandate to review claims rejected in whole or in part by the Department of Indian Affairs. The

Commission was appointed by the federal government and had a budget set by the federal government.

49 The Claims Commission was not secured by statute. Further, the Commission did not have any actual decision-making authority binding on the federal government. The Commission had the power to review claim decisions and make recommendations. However, such recommendations were not binding on the federal government. Uncomfortable results could simply be ignored. As a result, many First Nations voted simply did not take their claims to the Commission, even when faced with a negative ruling in the federal claims process.

50 The Commission was a kind of add-on to the existing administrative claims process. The Commission did not really address the many and continuing negatives of the ongoing federal claims process. Still, the Claims Commission did a lot of excellent work within the constraints of the system, and, in spite of everything, helped to facilitate some settlements.

51 Given the limited nature of the reform implied by the Claims Commission, it is hardly surprising that First Nations continued to press Canada for an overhaul of the claims system. The reform movement was supported by many of the recommendations of the report of the Royal Commission on Aboriginal Peoples in 1996.

52 Seemingly interminable discussions with the federal government over claims policy were coordinated on the First Nation side by the national organization, the Assembly of First Nations

(AFN). Some advances were made, but the federal government was always reluctant to agree to a package that would really make a difference. According to First Nations, that package had to include an independent semi-judicial tribunal with a jurisdiction to issue binding decisions against the federal government, with no pre-set cap on financial awards. This kind of package would get around many of the negatives of the administrative claims system in place since 1970.

53 The discussions between the AFN and Canada lasted literally for years, with breaks and slow periods here and there. Ironically, the expensive and interminable negotiation mirrored the way most actual claims are handled in the federal system. The so-called Joint Task Force on Claims Resolution (JTF), involving First Nation and federal officials, arrived at a set of mutually agreeable recommendations for the reform of the claims process. These recommendations featured review of claims independent of the federal government. In the end, the federal government betrayed the JTF process and walked away from the mutual recommendations developed by its own officials. Eventually, in or about 2002, the federal government decided unilaterally to impose closure on the discussion with First Nations on claim reform.

54 The federal government introduced Bill C-6, the Specific Claims Resolution Act. On the positive side, the Bill represented a first-time statutory codification of certain aspects of the claim process. The process would no longer be a mere policy and therefore subject to federal change, with little or no advance notice. Instead, there would be a statutory codification, creating some measure of security and longevity. In the future, substantial change would require some notice and debate in the Canadian Parliament.

55 While, to be fair, there are some pluses, the First Nation position is that the negatives of the Bill outweigh those pluses. The Bill establishes a Tribunal with decision-making authority over some claims. However, Tribunal members are appointed by the federal government and they are subject to limited five-year terms. Therefore, it is practically certain that the Tribunal will be slanted toward the federal perspective. The Bill creates a cumbersome bureaucratic process that is guaranteed to delay the settlement of most claims.

56 The Tribunal established by the Bill does not have unlimited financial jurisdiction. Rather, settlements that can be imposed by the Tribunal are limited by a financial cap determined by the federal government ($10 million). In other words, the binding jurisdiction of the Tribunal is limited to relatively small claims. The annual claims settlement budget of the federal government will also continue to be a limiting factor. First Nations with larger claims will still be subject to the bad old process, with all its elements of unfairness and delay. It is obvious that the federal government wants to continue to hold the purse strings.

57 Another significant problem with the claims Tribunal Bill is that it artificially cuts off certain kinds of claims. These limitations are above and beyond the settlement dollar limitation noted above. Thus, the Tribunal will not be able to deal with claims relating to programs (eg. health and education), even though many Treaties in fact deal with education, health, and other programs. Also, the Tribunal will not have binding jurisdiction in relation to the vast off-reserve area. Also, the new process will not be able to deal with pre-Confederation (1867) Treaties.

58 Not surprisingly, all First Nations in Canada opposed passage of the Bill. There was a

vigorous lobby to stop the Bill. However, the federal government pushed aside the First Nation opposition and used its Parliamentary majority to pass the Bill into law in late 2003. The procedure used by Canada in the House of Commons and the Senate was draconian and was in clear violation of the constitutional obligation of Canada to consult First Nations in a reasonable way on measures likely to affect their Aboriginal and Treaty rights. This is an obligation confirmed many times over by the Supreme Court of Canada in rulings such as *Sparrow* and *Delgamuuk*. Potential First Nation witnesses, such as AIAI, were refused any opportunity to present to the parliamentary committees considering Bill C-6. First Nation witnesses who did make it through were generally restricted to 5 minutes each. The federal government used closure procedures to effectively limit debate on the Bill. The federal government rammed through its law with little or no modification based on the protests and suggestions of First Nations. Even then the Bill only passed with a few votes to spare. The parliamentary spectacle was shameful and was a breach of the honour of the Crown in right of Canada due to First Nations. The record confirmed that the federal government takes an adversarial stance on First Nation claims and fails to position the issue in the appropriate context of national healing and reconciliation.

59 The Bill was approved by Parliament. However, it has yet to be proclaimed into force by the federal government. Nevertheless, the federal government is actively involved in pre-implementation steps, such as the transition from the Claims Commission to the new Tribunal under Bill C-6. All First Nations in Canada would like to see Canada do the right thing and refrain from proclaiming the legislation and activating it from a legal point of view. There is the

last chance for the Canadian government to *listen* to First Nations and build a claims system consistent with domestic constitutional and international standards. There is a new Prime Minister in Canada (Right Honourable Paul Martin) and he has expressed the wish to enter a new positive relationship with First Nations. In particular, at the historic Roundtable meeting with First Nation leaders on April 19, 2004, the new Prime Minister expressed a new commitment to work cooperatively with First Nations. A tangible act of good faith would be for the new Prime Minister to announce that Bill C-6 will not be proclaimed into force and that government-to-government discussions with First Nations will be resumed.

60 The AIAI respectfully urges the Permanent Forum on Indigenous Issues to recommend that the federal government of Canada take the rightful steps of putting Bill C-6 permanently on the shelf and re-starting discussions with First Nations on a mutually agreeable land claims process. If the federal government proclaims Bill C-6 and persists with its implementation, it is practically certain that a new round of reform discussion will be required within five years. Bill C-6 will make things worse and will set back the overall relationship between First Nations and Canada.

61 Even the new statutory system under Bill C-6 suffers from the defect, inherited from the administrative claims policy, that provincial governments are not bound by the process. This is a federal process. Provinces may choose to cooperate, but they are not bound to do so. This is a significant stumbling block as many claim histories involve federal and provincial authorities; for example, hydro electric and highway expropriations necessarily involve provincial governments

and agencies. When the relevant provincial government or agency is not involved, it becomes necessary for the First Nation to either abandon its claim against the province, or bring separate proceedings, whether of an administrative or judicial nature.

62 Some provinces have advanced claim resolution systems that can be accessed by First Nations, parallel to the federal system. That is not the case in Ontario. The province of Ontario does deal with claims, but on a piecemeal and unpredictable basis. There is no statutory foundation for the Ontario approach to claims. An institution known as the Indian Commission of Ontario (ICO) was in place for about twenty years, with a mandate to facilitate claims involving Canada and Ontario. However, sadly, the ICO was dismantled in 2000 as a result of actions by the federal government.

63 Another difficulty posed by the lack of provincial involvement in the federal claim system comes at the stage of compensation. If only the federal government is involved, then compensation can only come in the form of money, not land. This is because the off-reserve land base is generally controlled by the province. Even if the First Nation can use some of the compensation money to buy land, it is not possible to transfer the land to reserve control without the support of the province. This is a fundamental problem as access to land is critical to the survival and development of First Nations.

64 The new federal statutory system under Bill C-6 does not address the fundamental problem of the lack of provincial involvement in the claim process.

Closing Comments

65 First Nation claims are not minor or technical matters. Many claims are about major acts of malfeasance and negligence by the federal government and its surrogates. In many cases, First Nations were effectively robbed of their most valuable assets (egs. mining and forestry), and relegated to a future of poverty. In other cases, entire communities were displaced in order to accomodate development and other settler needs. These are major grievances and they stand in the way of any kind of eventual reconciliation between First Nations and the nation state of Canada. Until the grievances are resolved in an equitable and generous spirit, there will be a tear in the social fabric of Canada. The healing will not be complete. This problem should be approached from the perspective of national reconciliation and healing, based on international models such as South Africa.

66 Unfortunately, the federal government has taken a narrow and selfish view of claim resolution. For decades, Canada had no formal claims policy whatsoever. The reality of historical grievances, just like the reality of residential school abuse, was simply ignored by Canada. Up until 1951, there was a provision in the Indian Act that discouraged First Nations from hiring lawyers to prosecute claims.

67 In 1969 the federal government actually proposed to eliminate all "special" rights for First Nations. They would be treated like other Canadians, and, in the mix, their grievances

would be buried once and for all. The Treaties would be ignored. The overwhelming negative reaction to the infamous White Paper of 1969 forced the federal government to recant. Canada then established an administrative process to deal with claims.

68 The claims process established in the early 1970's has stayed more or less intact to this day, almost 35 years later. This inertia is surprising given the passage of sec. 35 of the Constitution Act of 1982, which protects Aboriginal and Treaty rights.

69 The claims process is replete with fundamental problems prejudicial to First Nations. The federal government controls the process funding and ultimately determines which claims to accept. This puts the federal government in a direct conflict of interest. The federal government caps the amount of money available each year for the settlement of claims, making it difficult for larger claims to ever get settled. Most claims take years and years to settle. If First Nations choose to take their claims to the domestic court system, the federal government withdraws all process funding and contests the claims in the most adversarial fashion possible. The federal claims process is not binding on provincial governments, making it difficult to settle cross-jurisdictional claims, which are quite common.

70 There have been discussions over several years about the reform of the claims process. Unfortunately, these discussions were cut short by the federal government when it imposed Bill C-6, legislation to establish a claims tribunal. While there are some positive aspects to the legislation, it has generally been condemned by most First Nations. It will do more harm than

good, as it is yet another instance of the federal government attempting to impose its will on First Nations. This does not augur well for the next generation of work on First Nation claims.

71 At a micro level, the claims process is about dealing with individual grievances - determining liability and settling on compensation. In that context, the federal claims process has sorted through some claims over the years. However, it is much more important to think about the claims process in a macro or broader societal context. In that context, the claims process is or should be about healing and reconciliation between First Nations and Canada as a whole. It is absolutely necessary for Canada to be fair and generous about the settlement of all reasonable claims. Otherwise, the sense of grievance based on the claims will continue to fester and cause all manner of social disruption and dysfunction.

72 Canada must come to terms with the body of claims. This is in the best interest of all Canadian citizens. Unfortunately, the current claims system, even as adjusted by recent legislation, falls far short of the mark. It is absolutely critical for the government of Canada to sit down with First Nations and agree on a new equitable process. First Nations remain open to this kind of nation-to-nation dialogue. Mindless implementation by Canada of the new legislation will simply pore vinegar into old wounds and will inevitably have tragic consequences for First Nations and Canada as a whole.

73 First Nations in Canada, including AIAI, have exhausted all domestic political and legal recourse to persuade and/or oblige Canada to meet its domestic and international obligations to