

LEGISLATIVE ASSEMBLY OF THE  
NORTHWEST TERRITORIES  
10<sup>TH</sup> ASSEMBLY, 6<sup>TH</sup> SESSION

TABLED DOCUMENT NO. 1-85(3)

TABLED ON OCTOBER 16, 1985

Tabled Document No. 1-85 (3)  
Tabled Oct. 16/85

SUBMISSION OF THE GOVERNMENT  
OF THE NORTHWEST TERRITORIES  
TO THE  
COMPREHENSIVE CLAIMS POLICY REVIEW  
TASK FORCE



# Aboriginal Rights and Constitutional Development

**SUBMISSION OF THE GOVERNMENT  
OF THE NORTHWEST TERRITORIES  
TO THE  
COMPREHENSIVE CLAIMS POLICY REVIEW  
TASK FORCE**

**September 24, 1985**

## Introduction

On July 4, 1985, the Honourable David Crombie, the Minister of Indian and Northern Affairs struck a special Task Force to review the current comprehensive aboriginal claims policy of the Federal Government, and recommend changes by the end of November, 1985. Its work will be of no small importance to the future of the aboriginal peoples of Canada, especially when viewed in the light of the First Ministers' Conferences and the slow progress being made in that forum. All parties involved are concerned with long delays in the process of settling claims and amendments to the policy are necessary to enable more expeditious resolution.

The Government of the Northwest Territories has, over the past ten years or so, accumulated considerable experience respecting the problems, issues and concerns related to comprehensive claims negotiations. In participating in this review, the GNWT feels it can provide the Federal Task Force with useful and insightful recommendations for its consideration.

The paper and recommendations touch on most of the topics and issues contained in the Task Force's Terms of Reference. However, the issue of linkages between claims, aboriginal self-government, amendment of the Canadian Constitution, political and constitutional development in the NWT, including devolution and division, and the role of the GNWT at the negotiation tables have not been addressed here. These matters are to be addressed by the NWT Legislative Assembly during the October 1985 Session and a separate discussion paper is being prepared for that purpose. Once direction has been provided by the Assembly on these important and complex issues, the Government will be in a position to provide the Task Force with recommendations.

**(a) The goals and objectives of comprehensive claims policy.**

The fundamental goal of the new policy must be, however ambitious, to make just at last the social compact that history has decreed must exist, for better or for worse, between the aboriginal people and the newcomers of this country. Comprehensive claims concern only a portion of Canada's aboriginal people directly but are of national importance. This is because they afford an opportunity to establish new principles to govern the relationship between aboriginal and non-aboriginal peoples. Putting to rights a relationship that, in its long past has so often been characterised by exploitation, may be a challenge beyond the power of a single administration or even the vision of a single generation. But it must be tried if there is to be any chance of success. Good faith and a search for equity should be the leading characteristics of a new policy.

By DIAND's own assessment (see "Review of the Comprehensive Claims Process", Departmental Audit Branch, October 1983, p.13) there may be as many as 41 comprehensive claims in the course of time. One may be certain that the situations of these claimants will be very varied and that, consequently, fair and equitable settlements will, in their details, vary accordingly. The GNWT considers, therefore, that a comprehensive claims policy should be open rather than limiting. The policy should not in any way amount to a "barebones" general Agreement-in-Principle. It should not attempt to determine the outcome of claims before they are even submitted.

In the negotiating process it is always the claimant groups which develop proposals for consideration at the table. The current practice of appointing chief negotiators from outside the ranks of government, which the GNWT supports, allows the government to select for these crucial positions persons of exceptional calibre who enjoy the confidence of Cabinet but are free from the constraints of Public Service. Provided there is a policy giving guidance on matters of national interest, Cabinet should entrust its negotiators with wide discretion in the conduct and content of negotiations.

The policy should serve as a guide to claimants. It should briefly address the general parameters within which it is currently thought negotiations should take place. But if a proposal is submitted dealing with a matter upon which the guide is silent, that, in itself, should not involve the conclusion that the matter is non-negotiable. We know, that probably without exception, settlements will involve land and resources, harvesting rights, compensation, management structures - including participation in public government management regimes, social and economic provisions, matters relating to language and culture, and the various agencies necessary for implementation. The policy should refer briefly to these items because the government should be concerned that claimants do not omit from their settlements any elements that would be to their benefit - but point out that innovative proposals not contemplated in the policy guide may yet be considered.

Recommendation 1

The new comprehensive claims policy should reflect the recent developments in Canada's constitutional thinking with respect to the first inhabitants of Canada, the aboriginal peoples. Thus the policy should be characterised principally by a spirit of justice and equity and a desire to advance aboriginal rights and freedoms.

Such a policy will encourage a negotiating atmosphere of good faith among all parties. It will be open rather than limiting and, at the same time, a clear guide to the Federal Government's position on matters of national interest.

Recommendation 2

Chief Negotiators should be appointed by Cabinet and should be granted wide discretionary powers within the parameters of the policy.

- (b) Issues relating to aboriginal title, including: the finality of settlements; extinguishment; and, aboriginal title superseded by law;

The question of extinguishment really goes to the heart of claims policy. Should a settlement be in the nature of a contract in which consideration in the form of a surrender of aboriginal claims is necessary? Or should a settlement be in the nature of a social compact? If it is the latter it is up to the parties to the compact to make their own rules, to establish a modus vivendi. The Government of the Northwest Territories is aware that the Extinguishment requirement causes real bitterness among comprehensive claimant groups which believe that settlements should affirm, not extinguish, aboriginal rights. During this policy review aboriginal groups will be devoting considerable energy to proposing alternatives to this policy.

This government supports the position that holds that settlements should affirm rights, not extinguish them. At the same time, it must be acknowledged that economic life would be fearfully disrupted if there were not certainty in some areas. Thus the Government of the Northwest Territories does not doubt that title to, and interests in, lands and resources, Crown and Aboriginal, must be established with certainty.

But it seems unconscionable to insist upon a finality that precludes discussion at some future time of matters not addressed in the settlement. It is entirely possible that there are aboriginal rights not presently understood, the recognition of which may one day benefit both aboriginal groups and the nation as a whole.

Judges often call the Constitution a living tree, one that bears all the marks of its age but is yet able to generate new growth. This is how land claims agreements must be unless they are to be fossils in a generation or two. To allow this involves a repudiation of the sentiment of the "In All Fairness" policy that **"the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future"**. Underlying this statement is that discredited old idea that, if only done right, the aboriginal problem will be solved. The Government of the Northwest Territories urges the Federal Government to adopt a new policy which acknowledges that the solution to aboriginal and non-aboriginal relations lies in creating an ongoing and vibrant relationship, not in a once and for all real estate deal.



Recommendation 3

Settlements should affirm, not extinguish, rights. Settlements should be final only with respect to the rights with which they deal, in order to ensure a sufficient degree of certainty with respect to land and resources.

- (c) Issues relating to the scope of negotiations, including, surface and subsurface rights to lands and rights to other resources; resource revenue sharing; the roles and powers of management bodies concerned with land, resources and the environment, and of other bodies established under claims agreements; offshore rights and management; third party interests; compensation and other forms of economic assistance; the suspension of development activities during negotiations; interim agreements; the ratification, implementation and enforcement of agreements; and the amendment of agreements;

Surface rights to Land

The selection of lands by Aboriginal peoples should not be generally subject to the restriction in "In All Fairness" that they be lands currently used and occupied. Such a restriction overlooks two relevant considerations:

- 1) Virtually all aboriginal people, being hunters and gatherers, were traditionally nomadic, in response to the distribution of wildlife. The policy should recognize that an area allowed to lie fallow, so to speak, may resume its former importance at another time.
- 2) There are cases where current non-use of land is principally a consequence of relocation of native communities by government decree within the last one or two generations. A restriction on selection for this reason could scarcely be considered equitable. The population increase among aboriginal people, furthermore, may require the reestablishment of old communities in the future.

Recommendation 4

Land selection should be limited to lands to which claimants can show use and occupancy historically or currently.

"In all Fairness" stated that non-aboriginal people who have acquired rights in the area claimed are equally deserving of consideration. This statement appears to be an implicit denial of any underlying aboriginal title. Such a denial is consistent with the former federal policy but, in the opinion of the GNWT, is of doubtful validity. It is enough to say that third party interests will be dealt with equitably.

Recommendation 5

Third party interests must be dealt with equitably. But the existence of a third party interest should not be seen as having displaced the Aboriginal interest. Expropriation for just compensation may therefore be considered in appropriate cases.

Taking basic access rights into consideration, as the former policy required, is clearly necessary and sensible.

Recommendation 6

Rights of access to aboriginal lands, by government and the public, must be considered and provided for in the claim settlement.

Obviously settlement lands should not be subject to unlimited expropriation powers.

Recommendation 7

Settlement lands would be subject to expropriation only if such expropriation were exercised fairly and equitably.

Meaningful and influential aboriginal involvement in land management and planning decisions on Crown lands which are subject to aboriginal use has been an important settlement component to date. The new policy should provide for it also. The policy should, for example, recognize that it has already been acknowledged in the June 18, 1984 Letter of Agreement on Northern Land Use Planning that an effective land use planning process requires the active participation of the Government of Canada, the Government of the Northwest Territories and regional and territorial organizations representing aboriginal people. Based on that Agreement, land use planning provisions were negotiated and agreed to in the TFN claim.

Recommendation 8

There must be meaningful and influential aboriginal involvement in land management and planning decisions on Crown Lands.

### Subsurface Rights

Selection of areas with subsurface rights should be as negotiable as selection of lands and subject to the same criteria. It is nonsense to stipulate, as "In All Fairness" did, that subsurface rights be granted in order that they not be developed. Environmental impact review boards and other management regimes are the appropriate agencies for determining which areas should not be disturbed. Not all claimant groups will be able to show use and occupancy of lands and waters the subsurface resources of which are valuable. Surely those which can, however, should be allowed to share in those resources. The guiding principle should be reasonableness, to be determined in the give and take of negotiations.

#### Recommendation 9

The purpose of aboriginal subsurface title to land should be to provide beneficiaries with the opportunity to develop the subsurface resources.

### Resource Revenue Sharing

"In All Fairness" was silent on resource revenue sharing but claimant groups have met with resistance to suggestions that general resource revenue sharing schemes be considered. The determination that compensation payments be specific and finite seems to have been expanded to a principle which holds that a claimant group cannot secure a benefit of any kind where its ultimate value cannot be presently determined.

It is the GNWT's recommendation that negotiations should seek resource revenue sharing formulae. There is inherent justice in a formula which generates revenue:

- a) only when mining, hydrocarbon and hydro-electric production occurs, and
- b) as long as the production activity and its associated disturbance continues.

There is, furthermore, justice in an agreement which avoids the gambling element inherent in selection of lands the true value of which is not known at the time of selection.

An aboriginal interest in resources is likely to foster a new and cooperative spirit between government, industry and aboriginal groups.

Recommendation 10

The new policy should provide for a royalty interest for the aboriginal people in the resources of the claim area. The royalty share of the beneficiaries should continue as long as the resource continues.

Management Bodies

Great difficulty has been experienced at negotiations with respect to the powers that wildlife boards should have. Mr. Bob Mitchell, the former chief negotiator on the TFN claim, at a conference in Yellowknife, stated the problem with great clarity. His remarks are reproduced here:

In connection with the wildlife agreement, after having offered the advisory board and having that rebuffed at the table, the government introduced the prospect that we would agree to an advisory board with more teeth, whose recommendations were more than merely "advisory." It was one thing to introduce that; it was quite another to put any flesh on the principle. Clearly, if we were going to settle that issue, we had to move in that direction.

The discussion then became: What did we mean by teeth? What sort of mechanisms could be set up that would make the board's role more than merely advisory? That took us directly into the question of the willingness of the departments to allow Inuit to participate meaningfully in decision making. It was very tough. We eventually came up with a plan whereby a wildlife management board composed of representatives of Inuit and of government, four from each, would have a mandate including all questions related to the management of wildlife. That board would be supported by staff and would have access to all the data that it would need to make decisions. Its decisions would be communicated to the minister responsible. If the minister took no action on the decision, the decision would become binding after a certain period of time. If the minister took exception to the decision, he could disallow it and send it back to the board with his reasons. The board would then have an opportunity to reconsider the question and, if it was so inclined, to amend its decision. Finally, if the minister remained unsatisfied with the amended decision, he could do what he wanted. After all, he is the ultimate authority in our system, and I think properly so. That idea gained a measure of acceptance at senior levels of the federal bureaucracy, sufficient acceptance for me to conclude an agreement on the basis of it; however, the departments concerned, two in particular, were just not going to live with it. The basis for not living with it was simply that it diminished the power of their ministers.

As I said at the outset, I regard negotiations in many areas of land claims as a question of sharing control. That cannot happen, at least not easily, from the government's point of view if there are departments that absolutely refuse to share any of the control. I am not tarring all federal departments with that brush, and certainly not departments of the territorial government, because the territorial government has a very progressive position on this question.

A couple of the federal departments, however, just dug in their heels and refused, and said, "no way, we are not going to go along with this." Their position is totally inconsistent with the concept enunciated by the government ten years ago and restated in *In All Fairness*. I think that concept involves a sharing of control, a sharing of power, and that it is absolutely incumbent upon the bureaucracies involved to understand and to accept that sharing is an integral part of the land-claims policy. Until they do, I believe that the land-claims process is going to have difficulties, and, indeed, may not work. (*National and Regional Interests in the North*, Canadian Arctic Resources Committee, Ottawa, 1984, pp. 37-38).

The GNWT repudiates the notion that mere advisory powers are the most that can be negotiated by claimants. As with land management and planning, the policy with respect to wildlife management should provide for meaningful and influential aboriginal involvement in decision making. The Government of the Northwest Territories endorses the kind of mechanism described by Mr. Mitchell and has supported proposals embodying these powers advanced by the Dene/Metis and TFN.

A breakthrough by the new federal administration on this question would undoubtedly be conducive to much more rapid progress in claims.

The parliamentary principle of ministerial authority does not preclude the establishment of regulatory boards to which powers are delegated by the Minister in question or the Cabinet as a whole. A great number of such boards or commissions exist today, federally and provincially, and are well-established, powerful and shielded by law or policy from direct Ministerial or Cabinet control.

Clear direction is needed on this question in a new policy. Unless the policy declares that these boards may have "teeth" there will be a continuation of the unyielding bureaucratic stand against them that Mr. Mitchell described.

Recommendation 11

There must be meaningful and influential aboriginal involvement in wildlife management bodies. These management boards must be more than advisory.

Offshore

"In All Fairness" was silent on the offshore. For Inuit, in particular, the offshore is at least as important as land. It is the GNWT view that, within the limits of its jurisdiction and the requirements of national sovereignty, Canada should be as open to negotiating with the Inuit with respect to the offshore as it is with respect to land.

It is time for Canada to acknowledge the importance, for her own sovereignty, of the Inuit presence in the Arctic.

Recommendation 12

Within the limits of its jurisdiction and subject to the requirements of sovereignty, Canada should be as open to negotiating with aboriginal groups with respect to the Offshore as it is with respect to land.



Third Party Interests

As stated above, third party interests should be dealt with equitably. But the Government of the Northwest Territories considers that the aboriginal interest in the land cannot be treated as if a third party interest automatically displaces it.

See Recommendation #5

Compensation and other forms of economic assistance

The GNWT considers that the Canadian taxpayers are entitled to know the specific burden they are to bear. It is important to distinguish, though, between compensation payments, which should be specific and finite, and any revenues that flow to beneficiaries because of resource revenue benefits. There has been a tendency to say that because these payments must be finite it is necessary to "cap" all revenues of any kind.

Settlements must not be allowed to be regarded in anyway as substitutes for government programs that may exist from time to time. A tendency for this to happen was observed in a review of the James Bay Agreement.

Recommendation 13

Compensation payments should be definite and certain. Settlements must not be allowed to be regarded in any way as substitutes for government programs that may exist from time to time.

Interim Agreements

Interim agreements have always been a contentious issue during claims negotiations. There are both positive and negative aspects to implementing components of agreements prior to an overall agreement-in-principle or even a final agreement. Interim agreements would certainly aid in focusing more attention on implementation costs and problems and the practical application of structures, processes and procedures agreed to at negotiations. Such agreements would also enable the parties to analyse new regimes in operation and determine whether adjustments are necessary prior to a final settlement.

It may however be difficult to unravel what has been done once an interim agreement is in place and could limit the give and take of negotiations. Another factor is the availability of resources, especially human resources. Pursuing the implementation of an interim agreement may take away the aboriginal peoples' limited resources from negotiations and further delay the settlement of claims.

The GNWT believes there is significant merit to the concept of interim agreements. It would be to this government's advantage, for example, to implement the wildlife provisions of the Inuit claim soon in order that it might gain some practical experience with the new management regime and make appropriate adjustments prior to a final settlement. However, because of the dangers noted above, the GNWT recommends that the implementation of interim agreements only be contemplated after an overall-agreement-in-principle is in place and that the Federal Government agrees to provide both the claimant groups and the GNWT with the necessary resources to implement them successfully while at the same time continue negotiations toward final settlements.

Recommendation 14

Interim Agreements should be implemented where appropriate, but only after an overall Agreement-in-Principle is in place.

Ratification, Implementation and Enforcement of Agreements

A typical comprehensive claims settlement establishes two kinds of permanent bureaucracy. There are the corporations which the beneficiaries establish and control to administer the various elements of the settlement and there are the new management and review agencies which consist generally of government and beneficiaries but also, on occasion, of representatives from the public or industry.

Generally, the tendency has been for the settlement to place full financial responsibility for the support of the aboriginal corporate structures in the hands of the beneficiaries, and the bulk - but not all - of the financial responsibility for the management and review agencies with government.

The cost of maintaining these systems is going to be considerable, and it is a mistake to leave the matter of cost as a detail to be addressed during the implementation. The GNWT recommends that, while with respect to the purely aboriginal corporate structures the hands of the beneficiaries should not be tied, much more thought should be given in any set of negotiations to the nature and costs of the various agencies that they establish. A final agreement should address these matters in such a way that beneficiaries enjoy a reasonable certainty that the structures created for implementation will be not financially starved out of effective existence. The task force should note this problem in the context of the Inuvialuit Final Agreement which created a number of agencies that still, over a year after proclamation, exist only on paper.

Recommendation 15

The nature, levels and sources of funding of land claims agreement structures for which governments bear a responsibility should be established in the Agreements, not left as a detail to be worked out later.

It is clear too, that aboriginal populations generally have a woefully inadequate number of people with appropriate skills to administer land claims settlements.

This is part of a larger problem with which this Government is grappling, not without success. But it is an enormous challenge. The Government of the Northwest Territories proposes that the new policy identify professional and vocational preparation as a pre-settlement requirement, to be addressed by governments and aboriginal organizations and to be resourced by Canada.

Recommendation 16

Professional and vocational preparation for Land Claims Settlement administration should be identified as a pre-settlement requirement, to be addressed by governments and aboriginal organizations and to be resourced by Canada.

Amendment of Agreements

By finding an alternative to extinguishment and by recognizing the dynamic nature of comprehensive claims under a new policy, this government believes that the amenability of agreements to necessary amendment will be enhanced.

- (d) Issues relating to overlap, including: claims that overlap provincial or territorial boundaries; and, claims that overlap other claims;

It is important that overlap areas be identified early in negotiations so as to afford joint users a reasonable period to reach agreement. The GNWT considers that overlap issues are best resolved by the joint users.

But it is a resolution that needs time to be formulated and where overlap occurs - it invariably has in the North, the policy should encourage early discussions between the claimant groups.

Aboriginal land use and occupancy has its own boundaries and if they coincide with modern political boundaries it is an accident. Claimants who find themselves in this situation must be entitled in both or all jurisdictions.

Recommendation 17

Overlap should be resolved primarily by claimant groups among themselves. But the policy should require overlap negotiations to be addressed early in the negotiation process.

Recommendation 18

Where a settlement area falls within more than one government jurisdiction, claimants' rights should be respected and enforced in both or all government jurisdictions, as the case may be.

**(e) Claims Funding**

Under the present policy, where a comprehensive claimant group is accepted for negotiations, the money the group obtains to do its work becomes a debt to the Federal Government, to be redeemed as a first charge against the settlement compensation package. It is interest-free until the Agreement-in-Principle is reached, whereupon it is interest-bearing until the Final Agreement is arrived at.

The Government of the Northwest Territories does not believe it is appropriate that the aboriginal people should have to pay for just settlements. Negotiations should be funded by contribution.

Recommendation 19

Claimants should not have to pay for negotiations out of the compensation package. Canada should fund negotiations by contribution.

- (h) Issues relating to process, including: access to negotiations, that is the review and acceptance of prospective claims, and the number of claims that are negotiated at any given time; the structure and resources of federal negotiating teams, including the manner of appointment of chief federal negotiators, the role of claimant groups in that process, and the financial and human resources made available to chief federal negotiators; and, the mandates and accountability of chief federal negotiators; it being understood that the Task Force shall respect the view, shared by both the Federal Government and the major claimant groups, that any claims process must be based on negotiation.

The estimate by the Department of Indian Affairs and Northern Development's Audit Branch that Canada may be dealing with forty odd comprehensive claims is one indication that the settlements of claims is a long-term prospect. It is a complex matter and has much that is significant to the country as a whole. There is a view, expressed in the Penner report, for example, that the settlement of claims is worthy of much greater consideration by Parliament than it presently gets. This is the concept of legislating the process. By an Act of Parliament, a parliamentary definition would be given to the objectives of comprehensive claims. The Act would provide for a commissioner who, like the Official Languages' Commissioner and others, would report to Parliament every year.

The commission would be responsible for the determination of the matters enumerated in term of reference (h), and others, according to the principles established in the Act. The overseeing of implementation, for example, could be a responsibility of the commissioner. A creature of Parliament, the commission's decisions would be subject to judicial review. The proposal is not one for a large operation, quite the opposite. In terms of resources it might actually be cheaper than the present bureaucratic regime. The commissioner would be an overseer rather than a doer, a guardian of the process, and accountable to Parliament.

Should the recommendation that negotiations be funded by contribution be accepted in a new policy, the allocation of the resources appropriated by Parliament for the purpose, both to federal negotiators and their teams, and claimant groups, would be the responsibility of the commissioner.

The Government of the Northwest Territories finds this view compelling but is also alert to the possibility that an Act of Parliament, being so much less amenable to modification than a simple policy, could actually become a hindrance rather than a help to the process.

Recommendation 20

The Government of the Northwest Territories recommends that the Task Force explore the concept of legislating the process further in order to determine whether the benefits of parliamentary definition and accountability outweigh the loss of flexibility caused by the corresponding restraint on Executive action.













