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Mr. Lloyd St. Amand

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● (0905)

[*English*]

The Chair (Mr. Lloyd St. Amand (Brant, Lib.)): Good morning, ladies and gentlemen.

I see it's a few minutes after nine. Our quorum for hearing presentations from witnesses is actually three and we are in excess of that number, so I think it's appropriate that we convene the meeting.

Before us today are Messieurs Alan Pratt, Peter Hutchins, Charles Harnick, and Al Gross.

Welcome, gentlemen, and good morning.

The floor is yours, fellows. We're indifferent as to the speaking order. We're pleased you're here. Your presentations will obviously be important for us, but if you wish, you can decide amongst yourselves who will proceed. The order of witnesses would have Mr. Pratt, Mr. Hutchins, Mr. Harnick, and then Mr. Gross, but we're not necessarily bound by that.

Mr. Alan Pratt (Lawyer, Alan Pratt, Barrister & Solicitor, As an Individual): Thank you.

I'm glad I'm lead-off this morning, Mr. Chair, and I'm happy to do that.

I'd like to thank the committee for the invitation. It is a pleasure, an honour, that I am here to address this committee as both a private citizen of Canada—I'm not speaking here on behalf of any client—and also as a legal practitioner, one whose practice is limited to the rights of first nations. The one time I was here before, I was here at the request of a client and was addressing their interests, so I am somewhat more liberated today in the sense that I am speaking about my own experience and my own views on the issues of specific claims, speaking as a citizen, as a very interested citizen, and I think, because of my experience, as an informed citizen.

I have provided to the committee a written presentation. Time will not permit me to read it,and everyone here is literate. I understand that it has been translated. I would ask that it become part of the record of my appearance here today, if possible. I will not speak directly to the paper. I will try to touch upon the highlights and my submissions and recommendations to the committee in a few short minutes.

The Chair: Mr. Pratt, it will become part of the record.

Mr. Alan Pratt: Thank you.

Statement by Mr. Alan Pratt:

Opening Remarks

First of all, I am very pleased that the Standing Committee has decided to conduct a study of specific claims. This issue has received much attention due to the Specific Claims Resolution Act, but we are still awaiting concrete action to improve the specific claims process.

I am appearing before this Committee as a private citizen, and also as a lawyer whose practice largely involves the preparation and negotiation of specific claims.

In both capacities I have serious concerns about the government of Canada's commitment to specific claims, and to Canada's capacity to address specific claims. My concern is not about the personal commitment of members of the public service who work in the claims field; it is with the institutional problems of lack of political will to make changes, combined with the consequences of Canada's deep conflicts of interest which together have led to a disgraceful lack of progress.

Above all, I am concerned that the government of Canada does not understand the important role of what Canada calls specific claims in the overall goals of dealing with the shameful history of our country in dealing with aboriginal peoples.

Twenty years of work on the agenda for specific claims reform appear to have left us with the same old system firmly in place, with a highly unpopular piece of legislation on the books, having been passed by Parliament and received Royal assent, but not in force. I would like to think that the process of joint policy development that is described in the May 31 Political Accord will restart yet another joint process to come up with a new system and new institutions.

In the meantime specific claims continue to be researched, submitted, accepted, rejected and settled.

My own experience with specific claims dates back to the first specific claim I submitted to Canada in 1985. Since then I have identified claims for research; drafted statements of claim; had claims accepted; had claims rejected; had claims rejected and then accepted, and settled claims.

My present practice includes active specific claim negotiations in all parts of Ontario, and in Saskatchewan and Alberta.

I bring the perspective of a claims practitioner. I would like to suggest some things that can — and in my view must — be done now.

"Outstanding Business" in Context: It appears that the Specific Claims Resolution Act is dead in the water. Minister Scott has apparently assured the Assembly of First Nations that he will not proclaim it in force. That leaves us with the policy contained in the Outstanding Business booklet, published in 1982.

First, I would like to pose a very general question: What exactly is the Specific Claims Policy? My answer is this:

First, it is a policy enacted by a fiduciary to deal with its breaches of "lawful obligation" towards First Nations as their fiduciary.

Second, that fiduciary is the Crown, and the Crown is always under an obligation of fair and honourable dealing towards First Nations but at the same time is in a profound conflict of interest in assessing and remedying its own liability.

Third, when we apply or interpret the Policy, we must realize that it was drafted at a time when the existence of the Crown's fiduciary duty was not legally established.

It was not until November, 1984 that the Supreme Court of Canada released its decision in Guerin v. The Queen which established that the Crown in its dealings with reserve land had a fiduciary duty. Since then we have had many important court decisions on the Crown's duty, both in substantive terms and in terms of how it must conduct itself in dealings with the rights of First Nations.

There are a number of serious problems with the Specific Claims Policy as a policy and with the contemporary practice of specific claims assessment, negotiation and resolution. I will mention the following: delay and understaffing; the unfairness of the assessment process; the lack of funding for negotiations; the rules governing compensation and other remedies; the lack of jurisprudence; a tendency to engage in constitutional "ping pong" with provincial governments (at least in Ontario); and the lack of an independent and effective appeal body at any stage of the process.

These complaints can be understood as the result of two facts: Canada is in a deep conflict of interest in relation to its past breaches of duty; there is apparently no will within the government of Canada to take to heart its fiduciary duties in relation to remedying past breaches of fiduciary and other duties.

What is a Specific Claim?

It is vital that we begin by appreciating what specific claims are. They are the negotiation of compensation or redress for breaches of the Crown's duties towards First Nations. They may relate to a breach of a treaty, or a wrongful taking of a reserve, or fraud in relation to a First Nation's trust accounts.

Every First Nation has probably suffered many of these breaches. These breaches are the legacy of negligence and breach of promise that has led to First Nations on the whole being impoverished today instead of having the material means to establish wholesome economies and societies.

And thus it is clear to me that it is vital that we understand the remedial purpose of the specific claims policy as including the reconciliation of our past history of neglect and breach of faith with our current acceptance that the Crown must be honourable.

Settling a specific claim not only undoes a past injustice; it puts resources into the hands of a First Nation that is seed capital for their future. Specific claims relate to matters that also caused damage to the social fabric of First Nations.

The settling of a past specific claim should also act as a societal catharsis for the grievance that has resulted from a past wrong, a catharsis for the First Nation and for our society at large, represented by the Crown. Settlements have an important economic value; indeed First Nations have few ways to attempt to secure valuable land and cash compensation for past wrongs.

They also have value in clearing the air about historical wrongs, in bringing truth and reconciliation so that the parties can move forward unencumbered by their harmful legacy.

The Specific Claims Resolution Act:

This Act has been passed by Parliament and received Royal Assent. However, the Minister of Indian Affairs has said it will not be proclaimed in force. This state of affairs has to be addressed if we are going to begin to apply the rule of law to this field.

What does it mean to have a law that had made it through the legislative process and is in this kind of legal limbo? It is not alive, nor is it dead; but certainly it is beginning to smell.

The Act is a bad piece of legislation, for reasons this Committee has studied at length. My concerns have been legal and practical, not political in nature. I have serious fears that the Act would have made an already dysfunctional claims process worse. I am fairly sure it would have done nothing of any real significance to help. Certainly, it failed completely to remedy the problems with the present specific claims system that I, and many others, have identified and tried to work around over the years.

The Act did not address, other than in a superficial way, the lack of independence in the claims process. It did not address at all the delays built into the process that are caused by government underfunding and understaffing.

A Typical Specific Claim Today:

It may be interesting for the Committee to hear about the "typical" experience of a First Nation in specific claims today.

The first thing is to identify and research a claim. This takes research staff and legal advice. The funding for research and claims submission has been slashed in recent years.

Once a claim is researched, a legal opinion is usually obtained to define the legal issue. A claim submission is prepared with the input of the researcher and legal counsel. It has now been about five years since the process began, assuming funding was available. If there is no funding, the claim remains unidentified, the compensation owing growing year by year.

Any claim that is submitted to the Specific Claims Branch today will take at least 5 years and probably considerably more for a response on its merits. As I understand the process, because of staffing problems, each newly submitted claim first sits unattended and unnoticed for at least two years. When it finally receives any attention, it is then subjected to the process of "confirming research" which largely redoes what the claimant First Nation did in the first place to support the claim.

Once that is done, the claim disappears into a black hole called the Department of Justice. Two, three or four years later a "legal opinion" is alleged to exist. It is then subjected to "peer review" within the Department of Justice. This can easily take another year or more.

A "Claims Advisory Committee" of the Department of Indian Affairs decides whether the Department will accept its legal advice. If the Claims Advisory Committee comes to a negative conclusion, the claim will be rejected. If all goes well, some summary of the conclusions of this opinion is then conveyed to the First Nation, and the claim is accepted. It is now probably eight years since the claim was submitted, and a least twelve or thirteen years since the First Nation started the process.

If the First Nation is lucky, and the claim is accepted, it then waits for a negotiator to be appointed.

Specific Claims negotiators burn out quickly. When they are first assigned, they know nothing about claims. By the time they know the job they are ready to retire or are burned out.

In addition, in the next two or three years, most of the experienced claims analysts and negotiators are going to retire. Things are probably going to get very much worse in the near future. On the other hand, it may be an opportunity to attempt some new ideas.

In my opinion, the federal government is going to have to hire more outside negotiators. There are many people in the private sector with excellent experience.

Outside negotiators can also provide government Departments with honest advice in a way that staff negotiators cannot. They can bring a perspective from the "real" world outside the federal bureaucracy. They can and should have better access to the higher echelons in the bureaucracy and Ministers' offices.

Once started, negotiations will usually take five years or more. So that assuming a normal path, a "typical" specific claim takes the better part of twenty years from start to finish.

Few claims proceed so smoothly. Claims that are rejected can be appealed to the Indian Claims Commission, which has the power only to recommend. The same legal advisers who opposed the acceptance of a claim then get to advise the Minister of Indian Affairs to reject the Commission's report. It is a wonder that any claims get accepted at all; a miracle that any manage to settle.

Department of Justice:

I save much of my scorn in relation to the current specific claims system for the role of the Department of Justice. There are some fine lawyers working in the unit that advises Specific Claims Branch. There are not enough of them, and there are certainly not enough who understand the body of law that applies to breaches of the Crown's duties.

Most of the delay in getting new claims reviewed and accepted is blamed by Specific Claims Branch on the Department of Justice. The negotiation of specific claims is plagued by limitations based on what the Department of Justice says exist in law. They will insist that only economic but not social impacts are to be compensated, a conclusion I regard as legally dubious.

They will insist as well that no admission of liability ever takes place. Acceptance of claims is always without admission of legal liability, as even are the settlement agreements themselves. This makes for a limited and curious form of reconciliation in the eyes of anyone who is not a lawyer.

Finally, the advice of the Department of Justice is that the goal of specific claims resolution is "certainty" in the form of surrenders of lands that are subject to a claim. I understand why the federal government might want certainty, but there are instances where this does not represent an honourable reconciliation of rights.

Specific Claims and the Honour of the Crown:

My contention has been for many years that the Specific Claims Policy must be measured against the honour of the Crown. In order to fulfill its purpose, it must provide for improved access to justice as compared with the court system. In two ways at least, it succeeds: In particular, by setting aside limitations and other technical defences, the Policy clears the way to an examination of the merits of claims; By providing some resources for negotiations (albeit through loans secured by promissory notes), the Policy does improve access for claimant First Nations to a negotiated resolution. T

he Crown, First Nations and the courts all agree that principled negotiations are to be preferred over costly and uncertain court proceedings. But negotiations without principles, or negotiations based on the principles of the stronger party, cannot be legitimate; particularly when fiduciary breaches are being addressed and it is the fiduciary that wants to establish the principles. The specific claims process must have access to meaningful third party assistance. The conflicts of interest that are built into a fiduciary establishing a dispute resolution system to address and remedy its own mistakes are clear.

I also do not rule out an improved role for the courts if the Crown can get over the attitude that it must be negotiate or litigate. Sometimes in order to negotiate properly the parties need a real answer on a point of law. The "scorched earth" litigation culture of the federal government in First Nations litigation can and must be changed.

I am open to the idea that Commissions and Tribunals can be created that will improve on the current situation. The Specific Claims Resolution Act failed to establish independent and useful institutions, particularly in the case of the Tribunal. The Commission might have worked, but the legislation hamstrung it from the outset.

Getting the government of Canada to permit a truly independent body to come into existence with a real mandate to resolve these stains on the honour of the Crown will take a real departure from the ways of the past.

The government of Canada has recently admitted at the Aboriginal Roundtable and in the May 31 Political Accord that its past ways of operating and creating policies will no longer be followed. If this is a real change in attitude, the path may be clear to try some new ideas.

One of those ideas has to be a willingness to look at non-economic impacts caused by breaches of the Crown's duty. Sometimes the circumstances of a specific claim caused deep changes to the social fabric of a First Nation, in some cases making the difference between a healthy functioning community and one that is reduced to dependence. This phenomenon is not uncommon and results in serious human and economic costs.

It may be that only a heartfelt apology will suffice to reconcile First Nations and the Crown in such cases. It may also be that some additional compensation can permit the First Nation to establish language and cultural programs to mitigate social and cultural losses.

In other cases the Crown should accept that its obligation is to reacquire lands that were taken but never surrendered, even if the lands are occupied, not to limit the options to compensation in exchange for a reluctant surrender, while offering no real alternative.

At present there is no place in specific claims negotiations for these ideas, and nowhere for First Nations to go to discuss them with any hope of achieving change.

Research and Negotiation Funding:

One of the most scandalous issues, and the easiest for this Committee and other Parliamentarians to rectify, is the way that the research and funding of specific claims has either stagnated or become less.

The government of Canada seems to have determined that one of the ways to nip claims in the bud is to make sure that no funding is provided to research them. My information on this is anecdotal, but consistent across the country. This will ensure that the cost of settling these lawful claims will continue to escalate into the future. It is "pound foolish."

The annual budget for negotiating specific claims (i.e. those claims that make it through the gauntlet and are accepted) is about $9 million, which may sound like a lot of money. But is not. There are 85 claims in active negotiations at the moment. That is just over $100,000.00 per claim. But many of these claims are worth tens of millions of dollars each, or more.

But it is worse than that. The negotiation of specific claims includes the kinds of things that one would normally think of, such as: Cost of a negotiator; Cost for Chiefs and Council members and often elders and interpreters to attend negotiations; Cost of legal counsel; Cost of obtaining other advice from appraisers and consultants on valuation and mapping and other issues; Cost of communicating with First Nation members, local politicians and the public generally; Travel and meeting costs; and so on.

A large part of the budget is spent on commissioning studies by various kinds of experts to determine what land was actually affected and then what actually is owing. Specific claims settlements are not arrived at from thin air. The amounts negotiated have to be based on real analysis and this requires many kinds of professional expertise.

A positive development in recent years is the evolution of a practice of commissioning these studies jointly. However, an absolutely scandalous fact is that the Specific Claims Branch has no money to conduct appraisals or other studies to justify large expenditures of public funds in a claim settlement.

How, then are these studies paid for? Well, the way it works is that the parties will agree on a study and who should do it. They will work together to agree on terms of reference. This is all very healthy. By doing studies jointly the parties have less to argue about at the end.

But when it comes time to pay the consultant, the federal government tells the First Nation that it has no allocation of funds to pay the consultant. The First Nation must borrow the entire amount from the negotiation loans program, including the federal government's share of contributing to the studies.

And this is why, of the $9 million in negotiations funding, a very large portion (I would say some millions of it) actually goes to pay for the federal government's share of mapping, appraisal and loss of use studies! But that's not all! The First Nation, which was wronged in the first place, has to sign promissory notes promising to repay all of the negotiation loans, including the federal government's share!

So the federal government, having admitted having breached a fiduciary duty, must twist the arm of the First Nation to go into debt to pay for the federal government's share of determining how much the federal government owes. This is a shameful situation.

If the Specific Claims Branch had a few million dollars of its own to spend, the entire $9 million could be used by First Nations to negotiate specific claims. It would still not be enough but it would put more resources into the hands of First Nations to negotiate than is available to them now.

Recommendations:

I have a few particular recommendations for this Committee. Some of these involve going back to the drawing board and continuing the process of reforming the entire specific claims system: The Specific Claims Resolution Act must be repealed and its corpse given a respectful burial; Work must begin again on a new piece of legislation to give effect to the recommendations of the Joint Task Force on Specific Claims. I believe that, in the long term, the Department that has breached its duties should not have the responsibility to sit in judgment over its own breaches; There should be a new Department or Secretariat charged with implementing the honour of the Crown in relation to treaties, aboriginal rights and title and addressing the horrendous past breaches of duty that we call specific claims, and so I urge you to consider governmental restructuring to remove the conflicts of interest insofar as possible.

I realize that these long term structural changes are probably not the focus of this Committee's study at the moment. In the meantime, we cannot afford to wait, and so I have made another list of things that might be easier to fix: The problems of staffing in Specific Claims Branch and the Department of Justice unit that supports and advises them must be solved; Some legal issues need to be addressed by courts by agreeing to put legal issues to the courts without engaging in "scorched earth" litigation in which the rules of civil procedure are abused in order to deplete First Nations' resources and will to resist; New money must be put into claims research, to be provided to First Nations; The budget for specific claims negotiations must be increased, first by appropriating more money for the overall budget; and second, by terminating the practice of using First Nations' funding for federal obligations; Specific Claims Branch must be allocated some money of its own to pay for its share of studies and also to hire more experienced outside negotiators and other advisers who are not captive of the conventional mindset within the bureaucracy; Negotiations must be broadened to address social and cultural damage caused by the Crown's breaches of duty and faith; Finally, the government of Canada must learn to apologize if it takes seriously the need for reconciliation and closure.

On this last point, the government of New Zealand has learned this lesson. I attach an apology taken from a 1997 settlement with the Ngäi Tahu people. By contrast, all specific claims settlement agreements contain this clause or something like it:

No Admission of Fact or Liability:

This Settlement Agreement is entered into by Canada and [name of First Nation], without any admission of fact or liability whatsoever with respect to the Claim.

There is still a need to talk about the bigger issues. I think we need to go back and heed the studies that have made recommendations to improve the specific claims system. That may take time. In the meantime, I offer these simple recommendations, as well as the reminder that justice delayed is justice denied.

Mr. Alan Pratt: I've been thinking a great deal in the last few days about the Kashechewan situation, which is of course not isolated in Canada. It makes us all think about the conditions of poverty, poor housing, poor health, poor living standards, poor economic opportunities, social problems, violence, and crime, the many difficulties facing first nations and other aboriginal people.

As a way of opening my comments, I will say the ways of repairing the damage are many and complex, but I have given thought to this over more than twenty years. The causes are simple and can be stated in a single proposition, and that is that the Crown has failed to honour and implement its treaty obligations and the aboriginal treaty rights of the aboriginal peoples of Canada. That is the cause of Kashechewan and the many difficulties that are so easy for us all to see and so difficult to rectify.

If we diagnose the cause in that way and try to understand what it might mean today in contemporary terms—in legal, policy, and ethical terms as well—for the Crown to now recognize the errors of the past and to come up with a new way of relating to first nations and other aboriginal people, then a process of healing, reconciliation, and redress might be fashioned. That is the challenge facing Canada.

Let us ask ourselves further, what is the Crown? The Crown includes the parliamentarians sitting here; the parliamentarians sitting in the House of Commons, your colleagues; the Senate; the Prime Minister and his cabinet; and all of the officials and bureaucrats who work for you and for all of us, because the Crown is our state personified. It is all of us.

Our topic here today is that of specific claims. Specific claims, it's important for me to remind everyone, are the debris of past breaches of the Crown's lawful obligations. They are the debris and wreckage left by consistent systemic negligence and failure to honour treaties, aboriginal rights, and aboriginal title. In the specific case of specific claims, we are talking about wrongs committed or failures with respect to lands and money most of the time.

Specific claims, in my opinion—and I've done this for a living since 1985—are probably simply the single most significant cause of poverty among first nations today. When we come to examining the process of rectifying specific claims and settling specific claims, we are talking about diagnosing past errors of a legal character. We are talking about turning those past errors today into capital in the form of land, compensation, and possibly other assets that will become the seeds for a healthy economy. They are also, or should be, a major source of societal recognition of the past wrongs and a recognition that a new form of reconciliation, redress, and harmony can be brought to the relationship.

I have provided in my paper an example of an apology contained in a treaty settlement—it's in the last two or three pages of my paper—in New Zealand. In preparing for this conference...I read this apology in 1997. It is from the Ngäi Tahu deed of settlement, which was a Maori settlement in 1997.

● (0910)

I've gone back to the website of the office of treaty negotiations in New Zealand. I have found additional and more recent agreements in which the Crown, in settling with Maori people under their Treaty of Waitangi, have not only acknowledged in the settlement agreement the Maori language by putting major sections of the agreement in the Maori language, but have also set out in great detail the Maori history. They have set out in great detail the wrongs committed by the Crown. They have acknowledged fulsomely the damage caused by the Crown to the Maori by treating them wrongly in the past.

The Crown has then apologized openly and without reservation, in addition to providing financial compensation, economic opportunities, and other benefits.

Another feature of those agreements is that the Crown acknowledges that the Maori are accepting less than they should get if they were to receive full compensation. They have acknowledged in their agreements that in accepting less than they are truly entitled to, the Maori people are making a contribution to the future of the state of New Zealand.

That is the type of template we in Canada have been avoiding for years and decades. It is the type of template that must be brought into the thinking in specific claims, in which, yes, we are settling legal wrongs.

I am a lawyer. That is what I do. That is what I identify and argue. I argue the law. When we settle a claim, we are not simply settling reluctantly and minimally the legal entitlement to compensation. We should be indicating that a new era of reconciliation and harmony comes into being with the settlement of one of these claims.

That is a long-winded introduction. I have used up my time with that.

I have, in my paper, set out some recommendations to this committee. I have done a number of other things. I have listed the steps that are taken in specific claims today. I have shown that it takes twenty years for a typical claim to go from the beginning to the end, assuming there is money along the way and assuming everything goes smoothly. If everything goes smoothly, it takes twenty years.

I have shown why there is not enough money at the research side at the front end to identify claims. I make the case that claims that are not identified because of lack of research funding do not go away, as those who may try to control them or manage them in that way would like to think. Instead, they increase in cost. With interest, with the passage of time, they become more expensive, eventually, to settle, so minimizing the amount of money available at the front end for research is pound foolish and is going to increase the liability ultimately borne by the crown, which means all of us.

At the negotiations level, about $9 million a year is available to negotiate those few claims that make it through the gauntlet. A scandalous fact is that millions of that $9 million that Parliament has appropriated for the negotiation of first nations is spent by the federal Crown to pay for the federal Crown's share of conducting appraisals and other studies to put a value on specific claims. That is millions of dollars—because Parliament has not seen fit to appropriate to specific claims a budget for that purpose.

Nobody likes the system, but it is a scandal. If we are looking at short-term recommendations to alleviate the conditions of specific claims, it is not my job to get the people I negotiate with more money, but in this case appropriating a sum of money for specific claims will make things a great deal easier.

I will take questions, obviously, once the other speakers have spoken, but I have both long-term and short-term recommendations in my paper. I hope the committee has had an opportunity to review them, or takes the opportunity after I have had a chance to speak.

● (0915)

Once again, I thank you for the opportunity.

I could easily speak for hours on this subject, and I apologize if I've abused my time allotment.

Thank you.

The Chair: Thank you, Mr. Pratt.

No, you haven't abused your time in any way.

Time permitting at the end of many rounds of questioning, however, we'll have a closing statement by each of you. If you want to harness your thoughts in the expectation that you may have a minute or two to wrap up at the end, please feel free to do so.

Mr. Hutchins, please.

Mr. Peter Hutchins (Lawyer, Hutchins Grant & Associates, As an Individual): Thank you, Mr. Chairman, *monsieur le président*, honourable members, *mesdames et messieurs*. I'm honoured to appear before you to address the vital question of process, which quite frankly is sick and needs assistance. Of course, we've been saying this for how many years, and the patient continues to deteriorate.

As Alan Pratt did, I should disclose that my practice is particularly with aboriginal peoples. I've been practising in the area for more than 30 years, representing aboriginal peoples both in litigation and in negotiations. I will have something to say about litigation.

I might also mention that later this month, I've been asked to address the commissioners of the Indian Claims Commission specifically on pre-Confederation claims. I consider that an honour as well, and I consider it a positive step that the commissioners and the commission are looking for guidance and are interested in hearing the various views. So I'll be there with a representative of the Department of Justice for discussions with the commissioners.

I should also mention that in September I was invited to address the Federal Court judges at a judicial institute seminar in Montebello on the specific issue of what to do about complex aboriginal litigation and how to improve the situation. I raise that because throughout the writings on the claims process—and indeed in the bill that has been adopted and in the past policies—there's a suggestion that there really is no place for litigation, that we have to find another way and put litigation in the courts aside. I will be making representations to the effect that I'm not entirely convinced.

So I wanted to mention this example of where the Federal Court of Canada is trying very hard to improve the situation in which aboriginal litigants, and indeed litigants in aboriginal litigation, find themselves before the courts. The courts themselves are working on improving and making more accessible the institution that, as far as I'm concerned, remains vital in the entire process of seeking reconciliation between the Crown and aboriginal peoples.

We all know the adage that time heals. In the case of specific claims, time does not heal. In fact, time complicates and exacerbates the malady. It actually can kill the possibility of a principled and equitable solution. It kills hope, and it kills goodwill.

I'd like to give one example of a client in British Columbia. I'm sure the committee has heard many others. This one is the Hagwilget First Nation in British Columbia. It arises out of the destruction of their fisheries. The event took place in 1959. Legal proceedings were filed in 1985. The first nation decided to have recourse to the specific claims process in 1998, placed the litigation in abeyance, and filed its historical legal report in the year 2001.

This first nation has been told that because of the backlog in British Columbia for specific claims, it will take an estimated twenty years from now to have the justice opinion rendered and get the process under way. In light of that, of course, the first nation has decided to go back to court and seek recourse in the courts.

Interestingly, already that first nation has been faced with a barrage of preliminary proceedings by the Crown.

● (0920)

I raise this because we're asking what's happening here. Justice could not find the lawyers and the resources to assess a claim, and the client is told that it's going to take twenty years to have the claim assessed. Yet the minute the issue moves back into the courts, there are unlimited resources to throw into the litigation. I think it's not really a question of no resources; it's where they are being put and where the priority is being placed.

There are many other examples. Kanesatake is an interesting one, of course, which was identified in 1961 by the joint committee of the Senate and the House of Commons on Indian affairs as a priority, along with the B.C. claims. We all know that nothing happened there, and we all paid the price in 1990. As a matter of fact, the crisis in 1990 led to the creation of the Indian Claims Commission.

Of course, there are structural problems.

The systemic problems in the claims process are poignant in the fact that the process actually deals with two layers of Crown duties. The first layer is the constitutional duty flowing from the Constitution, flowing from section 91(24) and section 35, which overarches the Crown and first nation or aboriginal relationships. The second layer, which Alan mentioned, is the treaty promises, the explicit or implicit promises that have flowed from the Crown to particular claimants.

The process is frankly about promises made and promises accepted for consideration and then broken or not fulfilled. The Supreme Court of Canada, in the Quebec succession reference, while discussing the contribution of aboriginal peoples to the building of Canada, spoke of the promises made to them by successive governments and the promise of section 35.

I would like to address one issue in the process that I think this committee could look into and others should take note of. It's the issue of adjudication as opposed to accommodation. One of the important questions that should be asked is this: should the specific claims process be focused on adjudication or accommodation and reconciliation, as the Supreme Court has mentioned?

I would certainly say that the recent decision of the Supreme Court in Haida instructs us that it is the latter, and it is accommodation that we should be seeking. You will remember that in Haida the court dealt with questions as to the duty of the Crown towards aboriginal peoples, first nations, before the rights had been established or accepted by the Crown. There's a real analogy here for the specific claims policy.

The court advised that the entire spectrum and continuum of aboriginal and Crown relations should be coloured by honourable conduct by the Crown. Perhaps later on during question period, we can explore the importance of the Haida decision. But Haida certainly directs that there are imperatives and duties to seek solutions and accommodation without requiring the adjudication of claims.

Quite frankly, the adjudication of claims is what causes the backlog in this process. It's not so much the work of the Indian Claims Commission or the work of the negotiators. It's the problem of getting an opinion out of the government as to whether the Crown is prepared to engage in negotiations on a specific claim. That's where the backlog is, and that's what we have to deal with systemically and structurally.

On the question of alternatives to litigation, the specific claims process is often sold as an alternative to problematic litigation. The idea is to present an alternative to litigation. If that is the idea, then I have two propositions.

First, as I said, the focus in the claims process should not be on adjudication; it should be on accommodation. The process should not focus on adjudication on the legal basis of claims, and it should certainly not be held hostage by the Crown's opinion of the legality of a claim. The process should be about doing the right thing.

● (0925)

Secondly, the courts should continue to be important actors rendering service to the parties in two respects. One is by continuing to provide dispute resolution where necessary—and the courts again and again have said that they are ready and willing to assist in negotiations. You'll remember what the chief justice said in Delgamuukw, that of course the negotiations are the best way to settle disputes, but always "reinforced by the judgments of this court". Those are the words of the chief justice. Two, the courts should continue to provide general direction to the Crown and aboriginal peoples in the matter of rights, obligations, and the appropriate conduct of both parties. And that's absolutely key.

I do want to suggest to the committee that while we talk about the need to dispense with litigation, we have to remember that this litigation, certainly in the last 30 years, has led to a dramatic change in the relationship between the Crown and the aboriginal peoples of Canada. We have received terrific direction from the Supreme Court of Canada; the problem is how often that actually is followed.

I want to end with just some brief recommendations, and then we can explore this at the time of questions.

The committee should identify, therefore, the principles and directions from the Supreme Court of Canada on appropriate Crown conduct and should commence a dialogue with the Government of Canada on these matters. The committee should strongly recommend that the adjudicative aspect of the claims process be eliminated. The Crown's legal review as a threshold phase should be eliminated and the parties should move into negotiations with a view to identifying concrete solutions.

The federal Crown should acknowledge that it is the Crown that is ultimately responsible towards aboriginal peoples under the Constitution of Canada and it should not involve the first nations and aboriginal peoples in interjurisdictional disputes about which the Crown is responsible. And that is clear from the written and unwritten elements of the Constitution of Canada.

Finally—and this is important, I'd like to explore it further—I would like to suggest that the committee consider the possibility of grouping claims into categories or classes and recommending that claims with similar characteristics be negotiated together. Categories or classes could be by subject matter; they could be by historical period, by geographical location, or otherwise. We have a possible model in the current initiative of the federal government on residential school claims. There are other models such as the B.C. cut-off claims, where that specific claim is being dealt with separately and more expeditiously.

The Chair: Thank you, Mr. Hutchins. You have five seconds, sir.

Mr. Peter Hutchins: Thank you, Chair.

I'd just like to end by saying that the idea is to accelerate the process, lighten the burden on individual first nations, and establish a consistent, coherent, and principled approach to these claims.

Thank you very much. I welcome the chance to discuss this further with the committee.

● (0930)

The Chair: Mr. Harnick.

Mr. Charles Harnick (Lawyer, Counsel Public Affairs Inc., As an Individual): Thank you very much, Mr. Chair. I'm honoured to have been asked to appear here today, and I thank you for the opportunity.

My remarks will be very brief. I will say at the outset I am a federal negotiator and I wish to confine the comments I make to the negotiation process.

I know you've heard much about what happens in the period before the claim is accepted for negotiation. I can't comment on that other than anecdotally, knowing a little bit about it and what the process is before it becomes part of a negotiation table. You've heard much about that.

What I do want to comment on is the process that takes place once the claim has been accepted, and how the focus at that time becomes very much a focus to determine damages. I don't know if anyone has appeared before the committee and spoken much about that, but the process within the specific claims process is designed to determine damages. It's designed quite uniquely to provide parties at negotiation tables the opportunity to work together to determine what those damages are. I want to give you some examples of that.

One of the things in specific claims that you would negotiate if you're dealing with an issue of land is the need to appraise the land to determine the current unimproved market value. In order to do that, you need two appraisals. The parties must work together and hopefully agree on doing the study jointly. That's certainly the best course to take. Exhaustive time is spent determining at the negotiation table the terms of reference that are going out to the appraisers to direct them in their task. By that, the unique aspects of the claim, and certainly the unique aspects as they pertain to land and what has to be valued, have to be agreed on at the table. There are issues on boundaries, mapping, geographic sensitivities. The parties work together. They have the opportunity to work together to jointly determine those terms of reference and to determine who should be the appraisers who come out to make the assessment.

The reports are ultimately prepared. It takes some time. My experience says that those reports could be completed within perhaps less than a year and preliminary reports are provided to the parties in the interim. The parties review them. The parties give direction to appraisers and the final report generally comes in within a year or two. In the meantime, while the appraisers are doing their work, the parties direct their attention to determination of the loss of use and loss of opportunity. The issues around loss of use and loss of opportunity, since the property or the land since the first nations have been denied use of the land, that broad category of loss of use is something that over time has increased in scope. I suspect that Alan will tell me I'm wrong, but certainly the kinds of claims around loss of use have been expanding and are quite broad.

The difficulty with determining loss of use at a negotiating table is that you have to make certain assumptions and try to agree at the table as to what would have happened if the first nation had remained on the land. You could go back many years. Some of these claims are pre-Confederation claims. How do you determine what the course of history would have been? It's a great challenge to a negotiation table, and again, it's up to the parties either to say we can't agree and we do our own studies, which I think is regrettable....

● (0935)

But the great opportunity is for the parties at the table to in fact agree and commission the kinds of studies they need that will bring data back to the table but will permit them to assess those damages. And by that I mean a determination of what occupations and what endeavours would have taken place on the land. Would it have been agriculture? Would it have been tourism? Would it have been forestry? Would it have been aggregates or any other occupations that the land would have provided an opportunity to partake in?

Those are very difficult issues, because you don't know what history would have been, and the parties work jointly to make that determination and to develop that stream of data. And oftentimes the parties can find, if they can't make those determinations, they have scope and latitude to look at other ways that might provide them with answers to determine the value of that loss of use.

The hallmark of all of these studies, I believe, is the fact that they're done jointly and they're done within a reasonable amount of time. While the appraisers are out appraising, terms of reference are developed, experts in the various areas such as tourism, agriculture, forestry are retained and reports are prepared. And those too can be done within a year or two, maybe three. But I think that if the terms of reference are clear and people have worked together, it enhances the ability to move the claim through this process.

I think one of the other hallmarks of what happens at a good negotiation table is that the parties trust one another, they develop relationships with one another that are positive, and there's a genuine sharing of information, and this makes the table work.

There's one other aspect I want to talk about, in looking at the motion before the committee, that involves the Indian Claims Commission. My experience with the Indian Claims Commission has been very positive. The Indian Claims Commission members are facilitators at tables in which I am involved and administrators. They facilitate the discussion. They keep us on topic. They determine what the decisions and the undertakings have been. They ensure that we comply with the undertakings and the decisions made, and they do administrative work for the table that permits us to continue to move along. They act as study coordinator. It's all very important and all keeping the table moving. These are very important aspects, and I have nothing but positive things to say about the facilitative and administrative function that, in my experience, they have performed.

But one caution I wish to leave with the committee is that I think you would defeat the purpose of what the Indian Claims Commission does if you were to recommend that they become more of an adjudicative, or arbitration, or even mediation-based function for the tables they serve. And I believe that because I think if that becomes the case and if that becomes the role of the Indian Claims Commission, the parties will stop working jointly together. Every time a difficult decision comes before the parties, the parties will say, let's take it to arbitration, or let's take it to mediation, and the ability to work together and share information, I think, will be lost. Decision-making of that nature takes time, and I think that more time will be spent at the table by the parties positioning themselves for ultimate quasi-judicial proceedings than time being spent productively advancing the claim.

● (0940)

I say that as a caution. I think the function that the Indian Claims Commission now performs is very positive. If they perhaps had more money in their budget, they could help more in the area of dealing with coordinating studies. They are pressed for that. They are limited in scope, but I think that certainly the facilitative and administrative functions they perform have been very positive.

I urge you not to take the position that they should become an adjudicative function, because that would destroy the positive joint working relationships that should exist at a negotiation table and that bring these claims to fruition.

Again, I appreciate the opportunity to appear, and I look forward to your questions.

The Chair: Thank you, Mr. Harnick.

Mr. Gross.

Mr. Al Gross (Negociator, As an Individual): Thank you, Mr. Chairman and other assembled members.

I completed a full career with Indian Affairs and Northern Development Canada. My work, for many years, was in relation to the administration of reserve land and other federal statutory obligations, and specific claims settlements. I retired from the federal public service in 1996.

As far as specific claims are concerned, since 1996 I have been involved as a chief federal negotiator on a project basis only. My involvement in the specific claims process before 1996, to some degree, was in all aspects of it. Since 1996 I have been involved in only a few settlement negotiations, which is basically the last stage in the process.

I'm here today as a private individual, at the invitation of the committee, to share my experiences in the specific claims settlement process. I'm happy to do that. I do not represent any particular interest or interest group.

Specific claims are not straightforward matters. These claims are based on complicated and complex issues. The roots of most claims go back many years and are part of the history of the country as it developed to what we know today. Research by first nations to develop a claim, and research by Indian Affairs and Northern Development Canada to confirm the basis of the claim, is complex and time-consuming. I believe both parties are working to find ways to increase efficiency and reduce the time. This is an area, in my opinion, that requires continued focus.

The next phase, the determination of a legal obligation, is the heart of the specific claims policy. The work here is no less complex and time-consuming than the first stage. Again, I believe attention has been focused on improving the turnaround time for legal opinions. In my view, more dedicated lawyers, and the ways and means to retain them once they have experience, are needed for this work.

My major role in the specific claims settlement process has been as a chief federal negotiator. While I have no specific count of successful settlements that I have been involved in, the number is more than 50. A negotiation will be successful if all parties agree, are clear on what is being negotiated, and develop a degree of trust around the table.

In addition, the time-consuming study process required to support and provide a comfort level about the compensation to the public and the first nation membership must have a clear focus and be carefully managed. To achieve this, with the complex issues that are sometimes near or over a century old and that involve provincial governments, is a challenge. In my view, clearer negotiating mandates at the beginning, experienced people on the negotiating teams, Indian Claims Commission facilitation for some files, use of settlement models from previous settlements, and a focused funding program to resource first nation negotiating teams are some of the key requirements for success.

Efforts should continue and be enhanced to improve on these and other requirements.

These are my comments. Thank you very much.

The Chair: Thank you, Mr. Gross.

We'll commence our first round of questioning.

Mr. Harrison, please.

Mr. Jeremy Harrison (Desnethé—Missinippi—Churchill River, CPC): Thank you, Mr. Chair.

I would very much like to thank our witnesses here today. We have some of the leading practitioners in the field, and I think the insights we heard here were very valuable. I know I, for one, found them very valuable.

I told this story in committee here before, but I'd like to thank Mr. Pratt for commenting on the economic impact, the effective poverty, that the dragging out of these claims can have. I know the Flying Dust First Nation has had a specific claim they've been pursuing for over twenty years now. It's a railway bed claim on the northern side of the community of Meadow Lake, where development should be taking place in the community but isn't because of the fact that there's a lot of economic uncertainty owing to the fact that this is claimed land. If this had been dealt with rather than development taking place on the west side of town, development would be taking place on the first nation land, which would benefit both the community and the first nation. There are very real economic impacts the dragging out of these claims has.

There was a comment made by Mr. Hutchins on the litigation front. The current chief of the Meadow Lake Tribal Council, who at that time was the chief of the Flying Dust reserve, told me that if it had been litigated out, obviously this would have been decided upon already. This has been over twenty years, but working collaboratively with the government really hasn't gotten the first nation much further ahead.

Mr. Pratt talked about how, if everything goes smoothly, it can take twenty years or longer for this process. I'm wondering if I could get a comment from the lawyers as to what pitfalls first nations have run into along the way and how much delay those pitfalls can cause.

● (0945)

Mr. Alan Pratt: The first pitfall is of course that the claim has to be identified. When I came into the field more than twenty years ago, I didn't think much about that. Clients would come to me, hand me a research report, and say, here are the facts. I'd say, oh, my god, this is such a mess. We'd go off and apply some law to it and that would be that.

Over time I've realized that claims don't get identified on their own. There has to be historical research within a perspective of understanding what legal obligations and rights existed and what legal rights may have been infringed. The first pitfall is in deciding whether they are claims at all.

One of my great concerns is that I hear anecdotally from friends in the research community that they are being starved for funds, so claims that exist, that have a value, and that will have a value and a cost to the state a hundred years from today are not being identified and brought into the system. That's the first one.

The second one is that at the point when claims have been researched, the challenge with respect to people like Peter and me—we are both experienced people—is that first nations don't always know where to go to get a proper opinion. It's hit and miss.

Let's say they have a good opinion and a good submission to be presented; the next pitfall is the Department of Justice. Let me echo some of the comments from my colleagues here about the value of collaboration in this. I've worked very hard to be collaborative. If I'm involved, I have to say at the outset to the Department of Indian Affairs, let me talk to a lawyer and let me explain what we think the claim is; let me explain what we think the issues are and what opinions need to be done. I can think of one case where I did that five times. I had five meetings with five Justice lawyers; I briefed them one after another, and within months they were gone off to some better job in Fisheries and Oceans or somewhere else. That's a huge problem.

I have had a number of claims rejected by Canada, and I can think of three offhand. I've gone to the Indian Claims Commission, which is valuable and didn't exist before 1991, have initiated the inquiry process, and as a result of discussions to prepare for the inquiry have secured a commitment by the specific claims branch to conduct a fresh legal opinion once we had talked about the issues, and in three cases those claims were accepted. Two of them were settled, and the other one I'm negotiating with Mr. Harnick right now.

That's another pitfall. There's not only a waiting list at the Department of Justice, there's a turnover and there's a terrible lack of corporate memory and expertise built up within the Department of Justice unit that supports specific claims, and then there's no consistency.

I agree with my colleagues that we should have a collaborative approach even if we are limited to legal factors, which I don't think we should be. I don't think there's any reason why we should be, but if we are, let's at least engage in the process of identifying the issues and narrowing them as much as we can.

Then of course you have at the negotiation level, even for getting an accepted claim into negotiations, a backlog in appointing negotiators. I pointed out in my paper that in my informal conversations with specific claims officials, many of whom are friends of mine, I've learned that many, if not most, of the experienced people are retiring in the next two or three years. There is going to be a terrible lack of corporate memory, collective skill, and wisdom. Sometimes you wait for a considerable amount of time to get a negotiator appointed, and then of course when we are in negotiations....

I agree with Mr. Harnick's comments about the value of collaboration and joint studies. I praised that process in my submission. I agree with it. I also agree with Peter that the courts should be there to help the process. We very frequently run into an issue where there's a genuine difference of opinion on a point of law. It happens very often. We have no capacity to say to pause this, run off and get a ruling, collaborate on how we present the facts and the issue to the courts, get an answer, and then come back and start back into it. We should be able to do that.

● (0950)

I describe in my paper the scorched earth policy of litigation by the federal government in aboriginal claims. As Peter said, they will throw out everything to stop you. They will abuse the rules of civil procedure. They will grind you into the ground, so that you are not trotting off with a specific claims process gladly, as a better alternative. You are compelled to do it because the alternative is so much worse, so much more expensive, so much more uncertain. Then, after twenty years, you may go back and say, well, maybe we should have taken this thing into court, because the alternative that should be better is so much worse.

So you're damned if you do and damned if you don't, if I can put it that way.

Perhaps I've taken up too much of my time again.

The Chair: Mr. Harrison, you have about a minute.

Mr. Jeremy Harrison: Perhaps we can hear from Mr. Hutchins.

Mr. Peter Hutchins: I will take thirty seconds, since I was well over my time at the opening. I just wanted to raise four points.

First of all, on the problem of mandate of the negotiators, I've encountered that. Hours, days, weeks are spent on discussing what the mandate of the negotiator is. Under specific claims, of course, the mandate does not include such things as harvesting rights, an apology, or even the land or often the granting of land. These are issues of vital importance to the first nations. So the mandate of the federal negotiators is the first point.

The second point is legal assessment. I've been in a situation in which the claim disappears into legal assessment for literally years, without any participation by the claimant. I think the claimant or the claimant's counsel should be involved and work collaboratively at that point in the legal assessment of the claim.

Third, there is time that it takes and the loss of evidence. This is key in the Hagwilget situation that I mentioned. There are elders who just won't be with us in twenty years, and it's a very difficult decision for the band to take, for the first nation to take. Should they litigate now while the evidence is there, or do they wait and lose the evidence?

Finally, I'd like to reiterate that, as Alan said again, the specific claims policy should be seen as a complement to litigation, should work with the dispute resolution mechanism that we have in this country from the courts.

Thank you very much.

The Chair: Thank you, Mr. Harrison.

Mr. Cleary, please.

[*Translation*]

Mr. Bernard Cleary (Louis-Saint-Laurent, BQ): Gentlemen, thank you for your extremely enlightening presentations.

As an aboriginal negotiator, I have been involved in negotiating a number of specific claims. In my view, one of the problems—which you have mentioned—has always been the initiation of negotiations. You mentioned the mandate. In my view, that is the starting point for negotiations, and is therefore extremely important. You know, as I do, that a claim focusing on the failure to perform an administrative act is very different from a claim focusing on failure to perform as a trustee. I have no need to tell you that we often tend to focus on administrative failure.

At the outset, when the process is initiated, there is not enough debate with aboriginal groups. The concept of the mandate is the most important of all in the negotiation process. Yet, all too often negotiators are not involved in establishing the mandate. As a result, once the mandate is established, they have no choice but to remain within its boundaries. I would like to know your views on this.

I also have another question, this time on arbitration. I agree with those who believe that arbitration speeds up the process enormously. Many specific claims would be settled if there was a sound arbitration system in place, preferably an enforceable system that would enable genuine debate, so that resolution could be moved along and so that the process did not drag out indefinitely.

This would also be helped along by the fact that all authorities involved would come under the Government of Canada. Regardless of whether one is dealing with the Department of Justice or with Indian and Northern Affairs Canada, one is still dealing with the Government of Canada. Similarly, when one deals with a commission, such dealings are based on a mandate established by the Government of Canada.

I have put my questions. I don't know which of you would like to answer.

● (0955)

Mr. Peter Hutchins: Thank you, Mr. Cleary. With respect to the mandate, I quite agree that this is a crucial step which determines the decisions that follow. The problem is twofold.

First of all, there is a problem with process. What are the instructions given to the negotiator or negotiators involved? That is where the committee might be called upon to make recommendations, in order to improve the mandates given or alter the scope of the specific claims process in order to take in topics that interest and affect the first nations. The mandate must be determined at the outset, and if instructions regarding the process are given to the principal stakeholders, this will save a great deal of time once the parties sit down at the negotiating table.

Second, even though I'm not against arbitration, there are times when the arbitration process involves just as much work, time and preparation as litigation. Thus, the issue is whether it's preferable to choose the arbitration process, which is often highly confidential and focuses on a very specific issue, but may not yield the same results as those seen in other claims resolved by arbitration.

Before the courts, all kinds of problems arise at present. However, as I said, the federal government is making efforts to improve the situation and to make the court process more accessible and more fair. I believe that the advantage of the legal system is that precedents and principles are established, precedents that other first nations can then use.

The question then becomes choosing between arbitration and the courts, and this is the aspect that worries me somewhat. A closed, private and confidential process can take just as much time and money, but does it genuinely contribute to the improvement of our specific claims structure, which as a whole affects not only a single first nation but all first nations across Canada with the same problems? Those are my comments.

● (1000)

[*English*]

The Chair: Does somebody else wish to comment for a minute or less? Mr. Harnick.

Mr. Charles Harnick: Just very briefly, at a negotiation table, the very first thing you do is develop a negotiation protocol very much related to the mandate. All parties are at the table, the mandate is discussed, and people have an opportunity to learn and ask questions about the mandate. Flowing from that, a negotiation protocol is developed that basically sets the rules for the table and the understanding of the table. I think that's a very important aspect of the claim.

I want to make a comment about the issue of adjudication or litigation. The one comment I have to make is that if you're talking about litigation and adjudication in the context of negotiations, once you enter into issues around litigation and arbitration, there's a winner and there's a loser. If issues around negotiation are going to flow into arbitration and into litigation, then I think you run the danger of paralyzing the table that you're trying to move, because people then are positioning themselves to be a winner on the issue and they stop negotiating. In my experience, they start positioning themselves for arbitration instead of resolving the issues they can resolve at the table.

So you have to be very careful with the use of litigation and the use of arbitration around the negotiation table. Outside of that, it's always left to the parties as to whether they want to negotiate or whether they want to litigate, but once you're within the system of negotiation, you run the risk of paralyzing the negotiations.

The Chair: Thank you, Mr. Harnick.

Mr. Valley.

Mr. Roger Valley (Kenora, Lib.): Thank you, Chairman.

Thank you, gentlemen, for coming today.

In every meeting I try to avoid falling into the trap of commenting on lawyers, but I did find some humour, Mr. Pratt. I don't think you realized how much you were complaining that you had to work with lawyers. I thought that was a bit humorous in a very serious situation.

You mentioned something I do know a little bit about. I've had the good fortune to meet with the parliamentarians from New Zealand. You spoke about the issues with the Maori, some of the things they made, and you've given us some information that we'll have time to read later.

How much of the success in New Zealand—and you're obviously knowledgeable about this—in their Parliament, in some of the steps they've taken forward, is due to the excellent leadership they have now, and probably had in the past, by the elected Maori members?

Mr. Alan Pratt: I'm pleased and flattered that you think I would know how to answer that question, Mr. Valley. I don't know how to answer your question directly, and I apologize. I'm actually heading to New Zealand in a couple of weeks. I hope to be able to talk to some people who may help me understand that better.

But I can say that in the mid-nineties I was privileged to be asked by the Royal Commission on Aboriginal Peoples to work with them, and I helped them write a portion of their final report. As part of that work I investigated the operation of the Waitangi Tribunal. In some of the court decisions in New Zealand, the court described the treaty as one embodying a principle of partnership very parallel to our own legal analysis of treaties, I think.

In New Zealand they had the benefit of having a smaller, more homogenous population generally, a larger population of Maori as a percentage of the overall population, and a single treaty that applied to the entire country. So a more consistent set of principles could be developed pursuant to the Treaty of Waitangi Act. My sense is they had very strong and focused leadership and perhaps a slightly simpler task on the Crown side, with fewer variations in the types of rights and issues that came forward.

But my comment was more that for the Crown in right of New Zealand—and I have one of their recent settlements with me, which I'd be happy to leave with the committee—it is the same queen making the apology as we have. It's Queen Elizabeth II operating under the same type of constitutional structure. There is no constitutional reason why the Crown can't apologize for its wrongs. The Crown can save a great deal of money and create a great deal of goodwill with a clear, unambiguous, unqualified apology when circumstances warrant.

The question of leadership is a very important one. We need that leadership in Canada. The leadership in Canada on the aboriginal side has a much more difficult job because there are many treaties, there are many areas without treaties, many areas with modern treaties, and many areas seeking to enter treaties. But the point I was making is simply that there is no reason in law, politics, or constitutional convention for the Crown not to be able to say it is sorry.

● (1005)

Mr. Roger Valley: Thank you. I like your analogy that we can learn from other areas of the world and other leadership.

You mentioned...and it was repeated by Mr. Harrison's story of twenty years with one of his communities that he has to deal with. I'm just wondering how much time is taken up from the other side of the....

Part of your argument, Mr. Pratt, is the difficulties in switching lawyers. How would you and Mr. Hutchins deal with the issue when you go into a case and know it's going to take you twenty years? How do you earn a living at something like that? You have to move on, you have to work, and you have to move things forward. From the other side of the coin, how do you stay on track to deal with that issue?

Mr. Alan Pratt: I am 54 years old, Mr. Valley, and new claims that come to me today are ones I will not see to the end; I know that. Ten years before I am planning to contemplate retirement, I am already trying to calculate in my mind whether I can expect to close some of my files. It's an excellent question. No one has asked me that before.

It is very difficult to sustain faith in the system, to feel the burden of my first nation clients who come to me with some hope—not necessarily complete hope—that I might be able to help them get some justice, and to know full well I may well not be able to do it in my lifetime or theirs. It's a very difficult part of this job.

Mr. Roger Valley: Mr. Hutchins?

Mr. Peter Hutchins: I'm certainly not going to reveal to the committee where I am, at what point in my career, but I might just say that obviously this is a problem. As Alan says, it's one of the difficult questions that one has to discuss with clients, whether you're talking about litigation or a claims process: when will there be closure?

One point that I raised earlier is worth coming back to. One of the very difficult situations, and one poignant, sad situation, is the loss of the knowledge of the elders in these communities. I have clients who are very concerned that elders are leaving the communities, that they're losing that knowledge. How do we deal with that? One of the ways we deal with it, certainly in one of the cases I'm involved in, is increasingly to take the evidence. Whether we're ready for trial or not, and whether we're ready to proceed into the specific claims process, I think we have a duty to assist first nations and aboriginal communities to collect their oral history, their oral traditions, the knowledge of their elders, and preserve it.

One of the things we say to perhaps encourage clients and first nations is that whatever happens, there is an incredibly useful exercise here in just collecting the history of the community. Whether it's used before a court, or whether it's used in a specific claims process, or whether it's simply used for future generations, at least it has been done. That's one way of dealing with this terrible problem of delays, whether you're before the courts or before the specific claims process.

● (1010)

The Chair: Mr. Harrison.

Mr. Jeremy Harrison: Thank you, Mr. Chair.

I'm very concerned to hear about the turnover, of problems dealing with five lawyers—having to brief five lawyers from the Department of Justice—and the loss of corporate memory. This is something we didn't hear when we had the actual bureaucrats responsible for these things before us a couple of days ago, which I think is interesting. I wish the parliamentary secretary could have heard this, but I'm sure the government members will be passing it along to both her and the minister.

I was very interested in one particular comment about the mechanism to get a legal opinion when there is a difference of opinion as to a legal issue in the discussions. I'm interested in knowing how that's currently handled. When there is a fundamental difference of opinion, what happens?

Mr. Alan Pratt: Thank you for that question, Mr. Harrison.

The Government of Canada, of course, does not share its legal opinions with first nations. They are privileged. The practice has evolved somewhat, and in many respects the process has been improving in small ways.

Let's say the claim is accepted. The first nation will receive a letter from the minister announcing that the claim is accepted. A second letter will come from the assistant deputy minister—Michel Roy, whom I believe you heard from last week, currently writes those letters—and it will set out the basis of accepting the claim. That is what I would call a paraphrase or a distillation of the legal conclusions. It's based upon legal advice, but we are not given the legal analysis. The first nation is basically told that if it wants to negotiate, it has to pass a band council resolution accepting the negotiations on the basis described in Monsieur Roy's letter.

There is an opportunity, if there is a problem, to get clarification. There's an opportunity to go off to the Indian Claims Commission if the first nation doesn't accept the basis of the acceptance. If the letter comes the other way and says no, then there's an opportunity to go to the Indian Claims Commission.

I was privileged to be the one of the first counsel to take a claim to the Indian Claims Commission inquiry process and for the first time be able to see in person a Justice lawyer stand up in a public place and tell the world what Canada's legal position was. It was a great moment for that reason only.

But apart from that, the commission is problematic for me, because it has only the power to make recommendations and is now accountable to the Minister of Indian Affairs, which is an aspect of the deep, abiding conflict of interest that is at the root of our problem.

There is no acceptable process, Mr. Harrison. That's the answer.

Let me just add one final comment. I know I'm running off at the mouth a little bit.

Once we're in negotiations, the same applies. If Mr. Harnick and I are at a table and we have a disagreement—his lawyer and I disagree on the compensation principles that apply—we have no way of parking that issue and stepping out and getting advice or mediation or arbitration. We should have that opportunity. I disagree with Mr. Harnick to that extent; I think we should have that.

● (1015)

Mr. Jeremy Harrison: No, and I think that's a very good point.

What would it take for this change to be made, where a legal opinion could be solicited from the court on a particular issue that would, I imagine, expedite the process fairly significantly, if this was a major point of contention in the discussions? Maybe I could get some comments on that.

Mr. Peter Hutchins: I don't think we have to completely deconstruct the process to achieve that. Basically, if there is to be an adjudicative process, a process, or a stage in the process where the acceptability of the claim and the legality, if you will, of the claim is to be determined, then I think it should be an open process—I agree with Alan—as we do before the courts.

Of course, clients have the right to have counsel and to have opinions given to them on a confidential basis, but that's not what we're talking about here. We're talking about the Crown, the Government of Canada, taking a legal position on a claim and saying, “We will talk to you” or “We won't talk to you”. That, in my view, is not confidential. It's not lawyer-client privileged. It's the legal position of a party that should be revealed and should be debated.

The Chair: Mr. Harnick, did you wish to make a comment?

Mr. Charles Harnick: It should not be misconstrued that I don't think the suggestion that Alan has made and that Peter has made that we go out and try to resolve a legal point if there is no case law that definitively resolves it.... It's an idea that's certainly worth looking at, and I think that's different from arbitrating factual situations in the course of negotiations. You've got a legal point. You've got two lawyers who both disagree and who would both agree that maybe it's an issue the courts should resolve.

So I don't want it to be construed that this is something I'm opposed to. That's a very different issue from running an arbitration around factual situations that occur at the table.

The Chair: That exhausts Mr. Harrison's time.

I have, I believe, Mr. Smith from the government side, and then Mr. Ménard.

Mr. David Smith (Pontiac, Lib.): My first question would go to Mr. Pratt.

Our main objective of the committee is to try to see why it takes so long for these communities to bring their claims and to be at the end of these claims. You have the experience of having worked with the Specific Claims Commission and with certain clients and certain claims. Could you give me a short overview? If we transfer to you the responsibility to find the solutions to this so we can accelerate the exercise, what would be your specific interventions? What would you suggest?

Mr. Alan Pratt: That's another wonderful question that no one has ever asked me before.

I think there are short- and long-term measures that need to be looked at. In my own approach, I would tend to begin by planning the long-term measures. That would include eliminating, to the extent possible, the conflicts of interest that currently apply. It would be by putting in motion initiatives that seem to be contemplated by the recent political accord and the round table process that the Prime Minister has headed, to come to grips with the fundamental issue of non-implementation of rights and fiduciary duties.

In the short term, it is very important that the Specific Claims Resolution Act be repealed and buried. I believe it has introduced a new problem for us, because it is now in a field that should be governed by the rule of law. It is in a state of limbo. It is very unpopular. I personally believe it would be unworkable. It is a very poor solution to the problems, and not a solution to many of the problems. I think the fact that it is sitting as a statute of Canada in limbo causes problems within the bureaucracy. I think they are uncertain. They don't know what their future is. It causes problems for the Indian Claims Commission; they don't know what their future is. It causes problems for first nations. So we need to remove the uncertainty created by that act, and my recommendation is to get it repealed, first of all.

Secondly, there needs to be funding injected into the research end and into the negotiations end. Some of that money should go to government, should go to the department. The government should have good lawyers; it should be able to attract good negotiators; it should be able to go outside the public service to hire people like Mr. Gross and Mr. Harnick who bring experience and some measure of objectivity to the process. I think that's an important, immediate thing, that a little bit of money could do a great deal of good.

If I were in charge, I believe I would be working again to implement the recommendations of the joint task force on specific claims. I would be looking at the creation of structures within which negotiations could take place. I would not want to jettison or discard the collaborative principle that Mr. Harnick has spoken about. I believe in that wholeheartedly.

I believe there has to be a change in the litigation culture of the Crown, where unlimited resources are thrown in an abusive manner against the beneficiaries of fiduciary duties and resources are withheld that could support an honourable resolution of these claims in a preferable and friendly manner.

I think the last two pages of my paper contain that short summary, and I would get to work on that if I were running this government. I'm not, and you are, and I wish you well.

● (1020)

Mr. David Smith: Thank you, Mr. Pratt.

Mr. Gross, with your experience as an ex-federal employee, a senior federal employee, and as a negotiator, based on what was said here today and based on your experience, how would you foresee positive change where we could accelerate the process in these claims?

Mr. Al Gross: Mr. Smith, in my opening comments, I indicated I'd been away from everything except for the negotiation end for the last 10 years, so I make my comments with that covenant.

I do believe that more resources and more focus are required in the area of the first nations' work to prepare claims and Canada's work to review those claims. When the claim comes down to the negotiating table, where that collaboration and cooperation in that stage worked really well, then it's easier to define the mandate that we talked about here. If you have a well-defined mandate, then you're going to be successful at the negotiation table, and you'll develop that relationship that you need to settle the claim.

I can't comment on the details, because I know a lot of work has been done to improve the turnaround time in that area. My only point is that it's at the first nation level as well as at the departmental level, in the research and the counter-research of those files, where some support is needed.

On the other area, there were some comments about corporate memory in the justice system. I made that comment as well. I believe this is complex work and it takes special skill to deal in this work. There are very good people in the system. In many cases, when they learn the work, when they become really productive, they often move on to better roles. That applies in the legal area as well as in the departmental area in the first nation level. So whatever the committee can come up with for initiatives or programs to retain people for a time in those roles once they learn the job would be a focus that I would recommend.

The other comment I made is on getting into the negotiation, where I've done most of my work. I talked about using settlement models from past settlements. One of the long, time-consuming initiatives in the negotiation—Mr. Harnick referred to it, as did some of the other panel members—is the study process needed to rationalize a settlement for the public and for the comfort of first nation members who have to vote on the settlement to conclude it. That study process is long and it's expensive.

There are now several settled files that were based on long detailed studies and some good work. I believe there is probably an opportunity to take some of that information and come up with some settlement models. Agriculture is an example, loss of traditional use, tourism, some of those. Develop a model, and if you get a new claim, plug in the variables, arrive at an outcome. Then the experts for the first nation and the experts for Canada could look at the model, look at the way it was used, and provide advice to their respective clients on whether or not it's a fair and reasonable approach. If you could do something like that, you would cut off a lot of the time in a negotiation process.

Those are my views.

● (1025)

The Chair: Thank you, Mr. Gross.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Mr. Chairman, while I am probably the member of this committee with the least experience in dealing with such problems, I did garner some as the Quebec Minister of Public Security, at a time when I had grave concerns that we would experience a second Oka crisis. I had excellent relations with Indian chiefs, and was therefore able to weather my own storm, the Oka pot crisis, in a dignified manner.

I have been a member of this committee for less than three weeks. I am beginning to get to grips with the specific claims at stake, thanks to the help of Mr. Cleary. Indeed, I am currently reading his book and am finding it to be highly edifying.

I was absolutely scandalized to learn of the delays encountered in settling claims. As a lawyer, I have always maintained that delay is a gangrene in any legal system. The Americans say: “Justice delayed, justice denied.” This morning, you have helped me to gain a greater understanding of the situation, for example, the fact that evidence disappears.

The wise words said to me by one of my colleagues several years ago continually spring to mind when I reflect upon your problems: “While governments may sometimes be blind, they are never deaf.” I cannot say what that means to you, but if I were Indian, I have a fair idea of what it would mean to me. I think that the aboriginal community has shown infinite patience.

I believe that the time has come for us to act. I believe that my colleagues in the committee are willing to leave aside party politics and take action. I believe that we have identified an area where we could introduce improvements. It seems clear that the primary delay, the blocking point, the most significant bottleneck, occurs at the stage where the Department of Justice is asked to provide an opinion. I also believe that, following that, the process for negotiating compensation could be improved.

I believe that it was of Ms. Duquette, from the Department of Justice, that I asked how many lawyers would be required. She currently has 22. After some thought, she replied that between 50 and 60 would be needed. From this morning's debate, I understand these lawyers would require practical experience and training. However, do you feel that this is an area in which performance could be improved in the short term? I am fully cognizant of what you said, Mr. Pratt, and I am bearing it in mind.

Were we to start work on this immediately, would we be heading in the right direction?

Mr. Peter Hutchins: Mr. Ménard, allow me to begin by answering your question. Mr. Pratt and myself identified that there was a problem at the Department of Justice review stage. An increase in resources and the number of lawyers available could well improve the situation.

I would, however, like to return to one of the recommendations that I made in my opening remarks, and which, I feel, will allow me also to answer Mr. Smith's question. One of the problems is that the process takes into consideration individual claims. This means that each first nation must furnish evidence and the Department of Justice must study all of the claims submitted by all of the first nations.

I wonder whether there would be any means of dividing the claims into categories. For example, we could group together all claims pertaining to first nations who lost their land to the railways, or all those concerning first nations peoples from British Columbia who lost some of their land following a royal inquiry commission.

Some of the issues at stake have been experienced at a nationwide level. Rather than having 250 or 500 individual claims in a process which requires a review by the Department of Justice, we could perhaps have 50 comprehensive claims, organized by category. This would allow us to resolve the matter of legal opinions on questions which affect several first nations groups.

I would strongly advise the committee to give consideration to this approach. In doing so, we could remove a huge burden from the shoulders of the individual first nations communities. Furthermore, it would allow us to pool resources and create a form of jurisprudence in terms of standards and precedents, which could serve as a guide to other people and first nations undertaking the process.

● (1030)

[*English*]

The Chair: Thank you, Mr. Hutchins.

Thank you, Mr. Ménard. That absolutely consumes your five minutes.

I know Mr. Harnick is under severe time constraints. As I indicated, though, I wanted an opportunity for each of you to present.

Mr. Harnick, if you wish, for a minute or two, to make any concluding comments, we'd welcome them. But you're under no obligation to say anything further.

Mr. Charles Harnick: I wish again to thank the committee for inviting me. My apologies for having to leave a few minutes early. I've found this debate and discussion interesting, worthwhile, and I wish the committee well in their endeavours. It's a very important area, and the fact that it's being studied is very positive.

Thank you.

The Chair: Thank you very much for coming.

Ms. Karetak-Lindell.

Ms. Nancy Karetak-Lindell (Nunavut, Lib.): Some of these questions I addressed with the last witnesses, and I'm quite interested in the pre-Confederation cases and how they are addressed, because as you all know, with all first peoples of Canada it is an oral history versus a written record chronology. And that I think has been part of our difficulty in getting the credibility for those records, the oral records, versus text.

I'm wondering if that's part of the problem. You hit the nail on the head: that it's a matter of time, it's a race against time. I see it in my own communities, where elders are passing away and taking that knowledge with them. Is it part of the problem that it is oral history versus a written record? Do you find that the credibility of those witnesses is lessened when it becomes second or third generation down? And I think that would be more the case, of course, with the older cases. Some of them, as you say, are pre-Confederation.

My second question is on something Mr. Pratt mentioned: the recent round table discussions and comments the Prime Minister has made publicly. Has that changed the atmosphere of the discussions, both between negotiators...? I'm sorry that Mr. Harnick has gone, because I imagine he's the government counsel, but have you noticed whether there has been a change in some of the focus in where the federal government is coming from or in the mandate given to the negotiators?

● (1035)

Mr. Alan Pratt: I don't mind starting on this one.

On the latter point, I'd like to say that at a number of negotiation tables, including specific claims but not only specific claims, this issue has come up of whether the round table discussions about a different approach and the political accord in particular make an immediate difference. Negotiators always say it might one day, it doesn't today, because the policy development hasn't taken place and instructions on mandating haven't changed, but there's a hope in the air that one day we may have a better set of tools to work with.

On the issue of pre-Confederation claims, I almost put that into my paper and I decided at the last moment not to, but it's a very important issue, and I'll leave it to Peter and others to talk about the oral history aspect of your question.

We have in the Constitution Act, 1867, sections 111 and 112. Section 111 says that the Government of Canada assumes the debts and liabilities of the provinces on Confederation, and from my point of view, in negotiating with the federal government that's where the matter stops. If there's a pre-Confederation claim, the federal government assumes liability. However, section 112 says the provinces are conjointly liable to the federal government for any debts over $62.5 million in 1867. The federal government and the provinces, in a classic issue of federal-provincial ping-pong, each claim that the other is 100% responsible at the end of the day for pre-Confederation claims. That issue is being fought very slowly through the courts.

In the meantime, we've found that first nations come to negotiation tables and are told by the federal government, “We have accepted your claim, we're negotiating your claim, but we may not be able to settle your claim because at the end of the day, when we have the whole thing negotiated, we may receive legal advice that we should send the bill to the province”. It's a very major issue. It's an issue for the federal and provincial governments to sort out as part of their overall job of making Confederation work and paying what should be paid, and it should not be an issue at individual claims at negotiation tables. It has become an issue at individual claims negotiation tables. It does not belong there.

Mr. Peter Hutchins: On the oral history question, this is a good example of where the courts can give, and in fact have been giving, direction, and we should be listening. For many years governments were not accepting oral history, certainly not at the same level as documentary history. One needed documents to actually establish a credible case.

The courts have said, starting with Delgamuukw, and even before Delgamuukw, Taylor and Williams, but in Delgamuukw and the Mitchell case the Supreme Court has been very clear that oral history must be given equal weight. This is a direction that applies not only in the courts, but in my opinion, in specific claims policy, in the comprehensive claim policy, the Crown is bound, as are all citizens of Canada, by that direction.

Oral history is an absolutely essential aspect of most claims, not just pre-Confederation claims, as you know, but most claims. One of the challenges is to convince the Crown to accept it. The other challenge is to gather it and to gather it in a way that will be useful not just to the community but before the courts or before the claims policy. Actually, this committee could turn its attention to some directions as to how to ensure that oral history—oral evidence that is collected by communities—is used, is allowed into the claims process, and that further time and resources are not wasted on arguing whether the recording was done properly and who the witnesses were, but really to give some guidelines as to how to collect this oral evidence and to direct the actors in the claims process to accept, use, listen, and learn from the oral evidence.

● (1040)

The Chair: It's technically Mr. Harrison's time now, but he has no further questions, and we'll go back to the government side.

If you wish to continue, Mr. Gross, in response to Ms. Karetak-Lindell's questions, there are an additional five minutes. You don't necessarily need to consume all five minutes, but government questions will be for the next five minutes.

Mr. Al Gross: I won't consume it. I only wanted to confirm and agree with my colleague Alan that for central initiatives like the round table and stuff, the tables I work with have created this hope that there will be better tools to work with in the future.

The Chair: Thank you.

Mr. Valley.

Mr. Roger Valley: Thank you, Mr. Chair.

We've learned some very interesting things. We thought twenty years was long, and now you've explained to us that the province and the federal government have been fighting about this for 138 years. It's amazing. I guess there are some long timelines here.

I have a couple of questions for Mr. Gross. You mentioned that everyone is trying to work towards reducing the timelines. But are we improving? Are we getting better at this, considering the number of cases that are coming in?

Mr. Al Gross: I can't comment on the number of cases that are coming in, because I don't know the information. I can only talk about the impact at the table.

As I indicated, I believe there's a more collaborative approach on some of the work to arrive at a claim and to arrive at an acceptance claim. I find it easier at the table to agree on the key mandate of what is being negotiated and how we are going to approach it. That understanding seems to be there. If it's there, you can settle.

I believe there's an improvement in the way things are working, but whether or not there's enough improvement to have an impact on backlogs, I don't know.

Mr. Roger Valley: You mentioned one other thing in your opening comments. You mentioned some of the challenges that you have in working with the extremely long timelines. You mentioned that it's anything from pre-Confederation to 100 years for some of these issues, and you also mentioned the provincial government.

From your experience as a negotiator, which one is more difficult? Is it the length of time of the claims or is it working with other jurisdictions?

Mr. Al Gross: It's probably more difficult working with other jurisdictions, if they've had no experience in dealing with the federal government and first nations on a claim.

As an example, we finished a claim in one of the provinces, and the province had never been involved in a settlement that involved providing crown land and providing money so that the first nation could re-purchase the land that was lost in the surrender claim. The element of funds to purchase land over a long period of time was new to that particular province. It took a long time. It probably delayed us for several months or a couple of years, because there was a need for new policy on all the steps.

I expect now that the experience is over, and it can be looked at to inform future negotiations, it'll be easier to do claims. Once a provincial jurisdiction has been involved in a set of claims, it's probably easier to deal with.

Mr. Roger Valley: Thank you.

One of the things that we've heard follows along on the lines of Ms. Karetak-Lindell's questioning.

To the two gentlemen, Mr. Hutchins and Mr. Pratt, on the discussions going on at the tables and everything else, in a lot of ways the federal government is looking at the fact that part of the problem in the past has been risk management. It seems that for everything we do, all we do is look at what risk there is in it. We're hoping to get out of that.

I assume that both of you would have a comment on that. I can't imagine the effort and the resources that we expend on trying to manage the risk, when we should be looking at the opportunity.

● (1045)

Mr. Alan Pratt: I couldn't agree more, Mr. Valley.

Certainly, one of the difficult issues for me as a lawyer is, of course, that one of the big problems is law and lawyers here. You've mentioned that, and you found it funny. I guess I don't always find it humorous.

But I think a legalistic approach gets in the way much of the time, and I think looking at claims exclusively as legal liabilities has two sides. One, it gives us a framework within which we can establish liability, because there are rules established by the courts. On the other hand, from Canada's point of view, there's the culture deeply embedded in the federal government of looking at these things as attacks upon the federal government that have to be defended or managed, or as you say, the risks have to be weighed. It deflects a great deal, I think, from the proper inquiry, which should be based upon the principles underlying the round table process, implementing the honour of the Crown.

So instead of looking at the specific claims system as a better form of adjusting, as you would with an insurance company.... The specific claims branch has been a bunch of insurance adjusters trying to manage risk and getting away with settling for what can be achieved. I think a new paradigm...that may be a word I shouldn't be using, because it's become a bit of a cliché, but I think we do need to have a different approach.

To answer Monsieur Ménard's question, yes, I have no problem finding more jobs for lawyers if they can be trained. How could I say no, being one? But that reinforces the legalistic core of the question, which is, is there a legal liability or not? Sometimes it is necessary to answer those questions. It's a necessary starting point to resolve a claim. But it should not be the only thing we are looking at, I think.

The Chair: Thank you, Mr. Pratt.

The last questions will be allowed to Mr. Cleary. Then if each of you wishes at the end of Mr. Cleary's questions to wrap up in two minutes, that'll be fine. I'll just caution you that I will verbally interrupt at the two-minute mark, because we're under some time constraints.

Mr. Cleary, please.

[*Translation*]

Mr. Bernard Cleary: It was remarked earlier that one of the most important factors was to streamline the process as much as possible. Certain solutions were proposed, such as categorizing the claims. However, I was wondering whether your thought process was taking you any further. Some components of the process are redundant today. I am thinking of the tendency to endlessly illustrate the same point, when hundreds of similar arguments have already been voiced in studies and discussions.

Would that not be a means of streamlining and simplifying the process, of cutting through the dross to get to the heart of the matter, in other words negotiation and a rapid solution to the problem? That is my question to you, as in my view, it could be a very useful approach.

Mr. Peter Hutchins: To my mind, one of the problems is exactly the focus on procedure and process that you mention. I have already been involved in negotiations where 80 per cent of the time was spent discussing where we were in the process, what the process was, and what stage we had reached. I recall how things were done in Quebec in 1974-75, at the time of the James Bay and Northern Quebec Agreement. This is an example which I often raise. I know that there have been problems with the agreement, but it was negotiated in the space of two years: one year for the agreement in principle and one year for the treaty.

In the present climate, it took 14 years to settle with the Nisga'a. Some groups in Quebec have been waiting for a settlement for the past 30 years. The problem is exactly that the process is too rigid.

I am therefore in complete agreement with you, Mr. Cleary, when you say that we should perhaps do away with certain procedural aspects and focus on practical matters. What solution will allow us to help these people? In 1975, we had the necessary political will to find solutions and get them down on paper.

● (1050)

[*English*]

The Chair: Mr. Pratt.

Mr. Alan Pratt: Let me take a few seconds as well. I agree with what Peter Hutchins said earlier—and I don't know how it would work—about creating categories of claims with common issues. I think that's a very important point. I agree with Mr. Gross when he says we have a body of experience upon which we can draw because we have appraised so many acres of land and done so many studies.

But the problem in implementing that and taking advantage of that kind of thinking is, as Peter says, that negotiations are closed and confidential to date. When my clients and the federal government commission an appraisal report or a study, we are doing it within an agreement that says it's confidential to us and is legally privileged and protected from disclosure, so that we are unable, in a broader sense, to take advantage fully of that learning. It's because of the nature of the negotiation process: it is closed, it is confidential.

I agree with Mr. Hutchins that we need to bring some greater openness. We need to start building precedents and jurisprudence so that people can come along in our shadow or our wake and not have to learn it the way we have, which was by struggling away for twenty years, but can step into it where there's a public, open, clear way of doing these things and a body of knowledge they can inherit and use from the beginning.

I think that's very important. The closed and secret nature of the negotiations is something imposed by the legal culture within which we are operating. It is settling a legal dispute, and there is legal confidentiality and legal privilege and legal protection.

If we change that model and make it a more public and more open model, I think we all can benefit from the past studies, the past work, and our ability to say, well, there are five claims with a common issue; let's deal with that issue; then there are five negotiation tables that will not have to negotiate that issue.

The Chair: Thank you very much, Mr. Pratt, and thank you, Mr. Cleary.

I'd be happy to allow each of you to conclude. And let me in a sincere way apologize for making you feel that you're under the gun. I'm a lawyer myself. At all costs, be fair—be fair to witnesses, to those who want to question—so we try as much as we are able to allot time in a pretty fair fashion.

In the spirit of fairness, as Mr. Gross was the last person to provide opening remarks, he may wish to start with his two minutes of concluding remarks.

Mr. Al Gross: Thank you, Mr. Chair.

I have no concluding comments other than to say I appreciate and was honoured to have the opportunity to come here to share my experience, and I wish the committee well in the work. As Mr. Harnick indicated when he left, and I agree, this is an important piece of work, and I wish you well.

The Chair: Thank you very much, Mr. Gross.

Mr. Hutchins.

Mr. Peter Hutchins: Thank you, Mr. Chair.

I'd like to conclude first of all by thanking the committee for this opportunity and perhaps reiterate the recommendations I made at the outset, which I think are worthy of the committee's consideration.

The first is to identify the legal principles that have been developed by the Supreme Court of Canada and that could be useful in the specific claims policy, and to almost make that a code that applies to the actors.

The second is that the Crown's legal review, as a threshold phase, be eliminated, for all the reasons that my friend Mr. Alan Pratt has mentioned, and that the parties should move into negotiations on concrete, practical issues, finding closure.

Third is that the federal government should acknowledge that it is the Crown that's ultimately responsible towards aboriginal peoples under the Constitution of Canada, for pre-Confederation claims and for post-Confederation claims, and not put the burden on first nations or claimant groups to get involved in the constitutional wrangling.

The fourth, finally, is to reiterate the suggestion I made, and that Mr. Alan Pratt has supported—and I'm most grateful for that—to think about grouping claims and creating classes of claims, eliminating the burden on individual first nations. Quite frankly, I think that is a place to start and it would contribute enormously.

Thank you very much to the members of the committee.

● (1055)

The Chair: Thank you, Mr. Hutchins.

Mr. Pratt.

Mr. Alan Pratt: Thank you, Mr. Chairman and members.

Once again, it's with great honour and gratitude that I come here. I won't, I hope, repeat what I said at the beginning and in my somewhat long-winded answers to your very good questions.

I am very pleased, as a Canadian citizen, that this committee has chosen to look at the issue. I believe this committee has, in the last couple of years, acquired a great deal of experience and knowledge through hearing about problems inherent in the specific claims system. It is my fervent hope as a Canadian citizen, whether or not I make my livelihood by serving first nations, that the Government of Canada begins to understand and act upon the understanding that a healthy future relationship with first nations depends upon an honourable way of dealing.

The present system is staffed by people of goodwill and good faith. And I don't for one moment wish anyone to think that I am criticizing the personal commitment of any of the officials who are in the system, but the structure of the system is deeply flawed. It has a conflict of interest at its core. That conflict of interest leads to underfunding, understaffing, poor morale within the federal system and, I think, a very wrong-headed approach to specific claims reform, which was evidenced in the form and structure of the Specific Claims Resolution Act.

With those comments, I am very pleased that you are looking at this issue and I thank the committee on behalf of all my clients. I know you are extremely interested and taking it very seriously and I thank you and congratulate you for that.

Thank you again for the invitation.

The Chair: Thank you, Mr. Pratt.

To each of you again, our thanks on behalf of the committee for your cogent and insightful comments that show your experience. Thanks for presenting to us this morning.

As far as the committee members are concerned, our next meeting will be at 3:30 p.m., Tuesday, November 15. A notice will be forthcoming.

The meeting is adjourned.

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