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Chair

Mr. Bruce Stanton

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● (0850)

[*Translation*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Good morning, members, witnesses and guests.

This is the 50th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Pursuant to Standing Order 108 (2), we will be studying the specific claims tribunal process.

[*English*]

This will be our first meeting on the study of specific claims, and in particular, claims that exceed the threshold that was specified in the specific claims policy and law, that being $150 million. As I say, this will be the first of our meetings on this particular study.

Members, before we proceed, I just want to let you know that we do have a fair bit of committee business today. The agenda will show that we have the first hour set aside for our witnesses. I do think we can probably go a little beyond that first hour if necessary, but I will want to leave at least 45 minutes for our committee business. We will proceed accordingly.

With that, I would like to welcome Colleen Swords, associate deputy minister with the Department of Indian Affairs and Northern Development.

If Ms. Dupont arrives in time, perhaps you can introduce her at that time, Colleen. Then we will go to our next witness.

We'll take each of your presentations in order, and then we'll go to questions from members.

Ms. Swords, please go ahead with your presentation for up to 10 minutes.

Ms. Colleen Swords (Associate Deputy Minister, Department of Indian Affairs and Northern Development): Thank you, Mr. Chairman.

Good morning, members of the committee.

It is a pleasure to be here, and I thank the committee for the opportunity to contribute to its study of the Specific Claims Tribunal process and the process for addressing specific claims with a value above $150 million. I am hoping that my colleague, Anik Dupont, will join us shortly.

I have a brief opening statement, after which we would be happy to answer any questions the committee may have.

[*Translation*]

As you are aware, the specific claims process is a dispute resolution option available to first nations as an alternative to litigation. The primary objective of the process is to discharge outstanding lawful obligations to first nations through negotiated settlement agreements.

The Prime Minister announced the Justice at Last initiative in June 2007. This initiative launched a fundamental reform of the specific claims process and was intended to correct a perceived conflict of interest in the process where the government both assessed and decided the disposition of claims. Justice at Last was also meant to correct process deficiencies that had, over time, led to the accumulation of a large backlog of unresolved claims.

The cornerstone of the Justice at Last initiative was the Specific Claims Tribunal Act, a federal statute jointly developed with the Assembly of First Nations and pursuant to which the Specific Claims Tribunal was created. The tribunal is fully independent from the government. It has the authority to make binding decisions with respect to the validity of specific claims and to make financial awards up to a maximum of $150 million. The tribunal resolves concerns about the perceived conflict of interest in the process.

The tribunal will provide first nations with a final and binding decision with respect to the resolution of their grievances when it has not been possible to reach a negotiated settlement. The tribunal offers a final step in the alternative dispute resolution process.

[*English*]

As an independent body, the Specific Claims Tribunal is responsible for developing its own rules and procedure. The Government of Canada provided comments on the draft rules of practice and procedure that were made available by the tribunal and participated in a meeting of the rules advisory committee that was convened by the chairperson of the tribunal in October. I'll defer further comment on the tribunal to my colleague from the Ministry of Justice.

The specific claims policy and process was not designed to deal with exceptionally large-value claims. The Justice at Last initiative recognized that specific claims valued at more than $150 million involve a level of complexity and fiscal significance that warrants a different type of consideration. The process for addressing large-value claims is essentially the cabinet process. Claims valued at over $150 million require the minister to obtain a discrete mandate prior to being accepted for negotiation.

With respect to potentially large-value claims that were accepted for negotiation prior to Justice at Last, discussions with first nations continue. I want to emphasize at this point that there are very few large-value claims. A careful review of our inventory of specific claims reveals no claims with a potential value over $150 million other than those currently in the process.

In keeping with the November 2007 political agreement between the Government of Canada and the Assembly of First Nations, senior officials from the department met with representatives of the Assembly of First Nations to discuss the large-value claims process on a number of occasions during 2009, and also participated in a think tank on the subject sponsored by the AFN.

The views of the AFN, of first nations, and of their legal representatives are well understood by the Government of Canada.

Funding for the settlement of specific claims and awards made by the tribunal is accessed through the $2.5 billion specific claims settlement fund. This was established as part of the Justice at Last initiative. The settlement of large-value claims, that is, claims over $150 million, is not sourced from the settlement fund, but rather from the fiscal framework.

In closing, I would like to provide you with a summary of the progress being made to resolve the backlog of claims that had accumulated prior to the Justice at Last initiative. As of October 16, 2008, when the Specific Claims Tribunal Act came into force, a total of 541 claims were under assessment and a further 144 claims under negotiation. By February 15 of this year, 2011, the backlog of claims under assessment had been reduced to 270 claims and the backlog of claims remaining in negotiations totalled 90.

As you are aware, the Specific Claims Tribunal sets out three-year timeframes for the assessment and negotiation respectively of specific claims. There is every expectation that by October 16, 2011, the minister will have advised all first nations with backlog claims in the assessment stage of the specific claims process of a decision on whether to accept their claims for negotiation. Plans are also in place to ensure that tables that are nearing completion are appropriately mandated to secure settlement agreements.

Since April 1, 2010, this fiscal year, 12 specific claims have been settled at a value of almost $507 million, which is the most money that's been paid out in a single fiscal year since the inception of the policy.

While significant progress has been made, a great deal of work remains to be done, and we expect the coming year to be very busy before the middle of October of this year. We will be continuing to strive to address the backlog of claims and maintain an efficient, effective, and fair process to respond to and resolve new claims.

Thank you very much for your time. I welcome the opportunity to respond to any questions you may have.

● (0855)

[*Translation*]

The Chair: Thank you, Ms. Swords.

We will now welcome Pamela McCurry, Assistant Deputy Attorney General in the Aboriginal Affairs Portfolio at the Department of Justice, as well as Deborah Friedman, General Counsel and Director of the Specific Claims Section, also in the Aboriginal Affairs Portfolio at the Department of Justice.

[*English*]

I think Ms. McCurry is going to go ahead.

We'll go ahead with our presentation and then go directly to questions from members.

Ms. McCurry, go ahead.

Ms. Pamela McCurry (Assistant Deputy Attorney General, Aboriginal Affairs Portfolio, Department of Justice): Thank you, Mr. Chair, and thank you for the invitation to appear before you today.

Appearing with me, as you've said, is Ms. Deborah Friedman, who is the general counsel for the specific claims group of the Department of Justice and the legal services unit at INAC.

[*Translation*]

The Department of Justice and the Department of Indian Affairs and Northern Development are key partners in implementing Canada's Specific Claims Action Plan, known as the Justice at Last initiative and undertaken in June 2007. Implementing that plan has been and remains a priority for the Department of Justice.

[*English*]

I'd like to briefly do three things: first, tell you about the role of the Department of Justice in the establishment of the Specific Claims Tribunal, including the appointment process; second, update the committee on our department's efforts to clear the backlog of specific claims; and finally, give you an overview of some of the internal process efficiencies we've put in place to speed up the process.

As my colleague, Ms. Swords, has said, the Specific Claims Tribunal is the cornerstone of the Justice at Last initiative. It is an independent federal body, composed of judges, and it has the authority to make final and binding decisions on Canada and first nations on the validity of specific claims that have not been resolved through negotiations. The tribunal can award compensation to a maximum of $150 million.

Most recently, on November 26, 2010, the Minister of Justice announced the appointment of the current members for a further five-year, three-year, and one-year term respectively. As well, the minister announced the addition of three justices to the roster of Superior Court judges who may be appointed to the tribunal at a later date. These are: Mr. Justice W. Larry Whalen, of the Superior Court of Justice of Ontario; Madam Justice Barbara L. Fisher, of the Supreme Court of B.C.; and Mr. Justice Paul Pearlman, also of the Supreme Court of British Columbia.

I'd like to take a moment to comment in greater detail on the judicial appointment process of the Specific Claims Tribunal members. The Minister of Justice, of course, plays an important role in the appointment process. However, the selection of judges to be members of any tribunal must be consistent with constitutional principles around judicial independence. Chief justices alone are responsible for all matters touching on the judicial functions of their courts, including direction over the assignment of judges. This principle also applies to decisions regarding the assignment of judges to acting capacities other than as judges of their courts and includes judges sitting as members of the Specific Claims Tribunal.

The chief justices must be free to decide which judges will be available to hear tribunal matters. In doing so, they take into account the overall priorities of their courts and their assessment of the experience and capacity of individual members of their courts. As well, in order to protect their security of tenure, individual judges must also consent to any proposed appointment to a tribunal.

In the case of the Specific Claims Tribunal, it's important to note that the political agreement signed by the Minister of Indian Affairs and the National Chief of the Assembly of First Nations provided that the national chief "will be engaged in the process for recommending members of the Tribunal in a manner which respects the confidentiality of that process". This political agreement was negotiated under the auspices of the Canada-AFN joint task force.

The intention of the commitment was to publicly signal that the views of the national chief on the qualifications of potential tribunal members would be taken into consideration, but the ultimate decision in relation to the appointment of tribunal members remains that of the Governor in Council. I want to make it clear that the provision in the political agreement in no way compromised the integrity of the appointment process. This issue was raised by the chairperson of the tribunal in his annual report, and it has been satisfactorily addressed with the tribunal members by the Minister of Justice.

The Minister of Justice therefore received the views of the AFN on the qualifications and experience of potential tribunal members, and he shared them with the chief justices of the relevant courts. The chief justices subsequently provided the Minister of Justice with the proposal of names of those to serve on the tribunal. Ultimately, the minister made recommendations to the Governor in Council, who is, as I mentioned, under section 6 of the act, the person actually empowered to make the appointments.

As you can see, the appointment of the members of this tribunal was a complex and time-consuming process that involved a number of steps and important considerations. Once the members were appointed, the tribunal became a fully functioning, independent administrative body. Neither government nor any other institution can tell the tribunal how to conduct its business.

Under the Financial Administration Act, the registrar of the tribunal carries out the functions of a deputy head of the registry and, as such, is responsible for the overall management of tribunal operations and budget, under the direction of the tribunal chairperson. The registry is a federal government department that reports through the Minister of Indian Affairs to Parliament. This is the usual reporting process for federal boards and tribunals and does not compromise the independent nature of the tribunal.

The tribunal has consulted with the Department of Justice regarding matters of administration. For example, in July 2010, we met with the chairperson to hear concerns about operational issues. Justice was able to suggest approaches that would assist the tribunal in a manner that was appropriate in light of its arm's-length relationship with us.

● (0900)

The tribunal is a statutory body with the power to make its own rules of process and procedures. That said, pursuant to a political agreement between the AFN and the Minister of Indian Affairs, officials from the Department of Justice and the Department of Indian Affairs worked together with the AFN to prepare a joint submission on the proposed rules of practice and procedure. This submission was provided to the tribunal in December 2009.

The tribunal members of course published their own version of the rules of practice and procedure in June 2010. Canada, through my office, was one of 11 stakeholders that provided comments to the tribunal. These 11 stakeholders later formed an advisory committee, which met with the tribunal members in October 2010.

Following these meetings, the tribunal released a final draft of the rules. The draft sets out a flexible process, and it also makes reference to practice guidelines, which to our knowledge have not yet been developed. The Department of Justice has offered assistance to the tribunal as part of the advisory committee if there are any further discussions on the development of these practice guidelines.

The tribunal is now working closely with the legislative drafting section of the Department of Justice to finalize the rules for publication in the *Canada Gazette*, part II. It's expected that the rules will be in place shortly and that first nations will be in a position to file claims with the tribunal by the end of April 2011.

I'd like to now speak very briefly about the progress of the Department of Justice in clearing the backlog of specific claims in the inventory. This is of course an integral component to the success of the Justice at Last initiative.

As you've already heard, the Specific Claims Tribunal Act sets out strict timeframes for Canada to assess and respond both to new claims and to those claims that were in the inventory at the time the legislation came into force. At that time, there were 541 claims in the inventory, many of which were waiting for the Department of Justice to provide legal advice.

I'm very proud to report that we have made significant progress, and that as of February 2011, the Department of Justice has only 95 legal opinions to prepare in respect of claims in the backlog. In other words, we've cleared approximately 80% of the backlog that had accumulated over 30 years.

In order to achieve this success, the department recognized that we needed to do more than receive new resources. We needed to change our approach. We worked closely with the Department of Indian Affairs to identify opportunities for reducing the volume of materials reviewed and to ensure that the packages were complete with documents before they were submitted to the department for review.

We also implemented a number of internal process efficiencies aimed at reducing the length of time it took us to prepare legal opinions. We structured work teams in order to leverage knowledge and expertise, we bundled similar types of claims, and, where possible, we prepared foundational legal opinions respecting those groups of claims.

Most significantly, the Department of Justice developed a streamlined process for providing legal advice on smaller-valued and less complex specific claims and provided that within no more than 20 working days. Considering that a large percentage of the claims in the inventory are of a smaller value, use of this expedited process has had a tremendous impact on our success.

For more complex claims with an anticipated value that is of larger value, but under $150 million, the department continues to prepare a standard legal opinion; however, this work is now being done within 60 days. This is a significant reduction in time compared to a period in which opinions took sometimes several years to complete.

There is still much work to be done, but the department is dedicated to ensuring that all remaining backlogged claims receive a legal assessment and put the Minister of Indian Affairs in a position to respond before the three-year statutory time limit.

I'd like to turn very quickly to the department's role in respect of claims that are valued at over $150 million. When a claim is filed with the Minister of Indian Affairs and Northern Development, the size of the claim is not always known. The Department of Justice is asked to prepare a legal opinion pursuant to the specific claims policy on whether an outstanding lawful obligation exists. Where the size exceeds the limit of the policy and the tribunal's jurisdiction, meaning it's valued at over $150 million, following a legal opinion having been given, we continue to play a supporting role in cabinet's consideration of these claims.

In closing, the Department of Justice remains committed to the successful implementation of Justice at Last to the benefit of first nations people and all Canadians.

Thank you very much for this time. I welcome the opportunity to answer any questions of the committee.

Merci.

● (0905)

The Chair: Thank you very much, Ms. McCurry.

Now we'll go to questions from members. We're going to begin with a seven-minute round, starting with Mr. Bagnell.

Go ahead.

Hon. Larry Bagnell (Yukon, Lib.): Thank you, Mr. Chair.

Thank you for being here. That was pretty helpful information.

This study is primarily on claims over $150 million, so I assume that most of the questions will be on that. I have a couple of questions on the ones under, though, because you did talk about those as well.

I'm getting some mixed messages on the numbers of claims that are left. The national summary of status report of two weeks ago suggested that 529 claims are left; 360 are in assessment and 169 are in negotiation.

Ms. Swords, I think you just said that 270 are under assessment and 90 are under negotiation, which is over 150 less than those statistics.

Can you...?

● (0910)

Ms. Colleen Swords: Certainly, Mr. Bagnell, but first perhaps I could introduce my colleague Anik Dupont. She is the director general of the specific claims branch, treaties and aboriginal government sector, and she is an expert on all of the numbers.

I believe you'll find that the difference in the numbers is accounted for by the fact that I was talking just about the backlog that was in existence in October 2008. We still get new requests for specific claims consideration. I think the numbers you were referring to earlier would include the entire backlog plus the new ones that have come in.

I can ask my colleague to verify that.

Ms. Anik Dupont (Director General, Specific Claims Branch, Department of Indian Affairs and Northern Development): No, that's exactly it.

At the time the legislation came into force, we had over 800 claims in total. Our goal was, of course, with the three-year timeframes, to reduce the inventory. We always report on the backlog claims, but since the legislation came into force, there's been 109 new claims.

Hon. Larry Bagnell: I think you referred to 12 that had been recently settled for $507,000 or something, which works out to about $42,000. Is that the average claim? For those, would that be the average amount of a settled claim?

Ms. Colleen Swords: That's million: it's $500 million.

Hon. Larry Bagnell: So it's $500 million for 12 claims?

Ms. Colleen Swords: Yes, that's right.

Some of them would be larger than others. They are quite variable in the amounts, so you can't really say there's an average. I think there is one that's under $3 million or $4 billion, and then there's one that's over $100 million. They do vary in amount.

Hon. Larry Bagnell: You're talking about the ones that are over $150 million, then?

Ms. Colleen Swords: No, no; for the ones that we've settled for the $500 million, I think most of them are under $150 million, or they fall into the $150 million category.

Hon. Larry Bagnell: Okay, but if you divide the number of projects, I think it works out to some $40,000, on average.

Ms. Colleen Swords: I'm sorry, I'm not sure I know what you're dividing.

Hon. Larry Bagnell: If you take the number of settled claims and you divide the total money spent, what is the average amount, just roughly?

Ms. Colleen Swords: Well, over $500 million worth of claims have been paid out this fiscal year, since April 1, for the 12, so I'm not sure how you'd get $43,000.

There are 12 claims that have been settled for over $500 million this fiscal year. It's very difficult to do an average, because some of them are quite small in relative terms and some of them are larger.

We can get you a complete list of each one, if you'd like.

Hon. Larry Bagnell: Okay.

But at those types of rates, it looks like...and there's only $250,000 a year in the budget, right?

Ms. Colleen Swords: No: $250 million.

Hon. Larry Bagnell: Oh, $250 million a year; right.

Ms. Colleen Swords: It's $250 million a year for 10 years, but there's the possibility of rolling it forward. Through supplementaries, if we haven't used an amount in a year, we seek approval from Parliament to carry it forward to a year when there would be more settlements. That's what we have done this year.

Hon. Larry Bagnell: Right.

If all the claims were settled at the present rates, roughly when would they all be settled?

Ms. Colleen Swords: That depends very much on how the claims end up getting settled. If they're settled through negotiations, there is the three-year time period for assessment and then there is the three-year period for negotiation.

Hon. Larry Bagnell: No, I'm just saying at the rates they're going now.

Ms. Colleen Swords: After that, it would be up to the first nation to decide if they're not satisfied with the result of the assessment. If, for example, they're told, “We don't think there's a lawful obligation, and therefore we're not going to negotiate”, the way the tribunal act is set up is that the first nation then has the option to go to the tribunal.

So it's very hard to say how long it will take, because—

Hon. Larry Bagnell: Based on how long it's taking right now, if it carries on exactly as it is, when would they all be settled?

Ms. Colleen Swords: Anik, do you want to take that one?

Ms. Anik Dupont: What happens is that with every claim, once it is filed, there's a three-year timeframe. So as we keep getting claims, it takes three years for assessment, plus another three years for negotiations. We make best efforts to conclude the settlements within that three-year mark, but they may run over. It's difficult to say, because we don't know what's coming in. There's been a constant stream of claims being filed.

● (0915)

Hon. Larry Bagnell: Okay.

Let's go to the claims over $150 million. You said the only ones were the ones in the inventory. How many is that?

Ms. Colleen Swords: Again, it's difficult to determine exactly the number that for sure are over $150 million. I want to start with a bit of a caveat. Sometimes people look at a first nation's set of claims and say they're over $150 million, but in fact there could be 10, 15 or 28 smaller ones that together add up to more than $150 million. In the inventory that we had, there were six that we thought or the first nation thought were over $150 million.

One which we've just settled is Bigstone Cree, although in fact it's one of the ones where there are actually three subcategories to it, so technically it's not over $150 million when you think of it as a separate individual.

There's the Fort William boundary claim, which was initially thought to be just over $150 million, but it has been settled for under $150 million.

There are four others where we're still in discussions. Those four others are ones where it remains to be seen whether they're over $150 million or not, but the first nations believe that an individual single claim is over $150 million. There's the Dundee township specific claim for Akwesasne. There's—

The Chair: *D'accord*. Just go ahead and finish up. We are over time.

Ms. Colleen Swords: There's the Seigneury of Sault St. Louis specific claim for Kahnawake. There's the Coldwater-Narrows specific claim, and there's the 1910 surrender specific claim for Siksika.

Again, I add the caveat that those are ones where the first nations have indicated they believe their claim is more than $150 million.

[*Translation*]

The Chair: Thank you, Mr. Bagnell.

It is now over to Mr. Lemay for seven minutes.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you all for being here.

I listened very closely to what you said, and the lawyer in me quickly rose to the surface. I don't want to spend half the day on it, but as far as the Specific Claims Tribunal of Canada goes, everything is now settled, things are moving along and it is going well. The feedback and the reports suggest that it seems to be on the right track.

Ms. Swords, I am having a bit of trouble with your numbers. I met with representatives of the Six Nations, and they have several billion dollars in claims. I am referring to the Six Nations band in and around Toronto. Do you make a distinction between specific claims and land claims? Do you see a fundamental difference there, or can they be dealt with together?

Ms. Colleen Swords: Mr. Lemay, I will answer in English, if you do not mind.

Mr. Marc Lemay: Fine.

Ms. Colleen Swords: I apologize, but I want to be as clear as possible.

[*English*]

Yes, there's a very big difference between a land claim and a specific claim. Specific claims relate to a claim under a treaty where there's an allegation that the government didn't fulfill the treaty or in some way didn't do what it had promised to do, or it can relate to mishandling of assets or funds of a first nation. Land claims relate to when there wasn't a treaty put in effect in the first place and there's still an outstanding claim to land.

You raise an interesting point on the Six Nations. I asked the same question myself: where do the Six Nations fit in? The answer is that they fall into that category where they have about 28 different specific claims. One of them was settled, but there are another 27 individual ones that collectively may add up to over $150 million, but individually none of them does. They're currently in litigation.

If you remember, the Specific Claims Tribunal process is an alternative dispute resolution process: you negotiate, and failing negotiations, you go to the tribunal. The 27 Six Nations specific claims that aren't resolved are in litigation. We're also engaged in trying to have discussions with them about how we handle the 27. Do we try to deal with individual ones? Do we deal with them collectively? It's a very complex file.

● (0920)

[*Translation*]

Mr. Marc Lemay: Not only is it a complex file, but it is also one that is very hard to approach. To my mind, it is the approach that matters.

The Mohawks, who will be appearing before the committee even though we have met with just about all of them here, do not recognize or have a hard time recognizing the Assembly of First Nations. They are totally off on their own, whether it be the Akwesasne, Kanesatake or Kahnawake community, and that is just in Quebec. I will let my Ontario colleagues speak to the communities in Ontario.

Is there no way to resolve disputes through mediation, a mediator, or if we take the idea a bit further, through binding arbitration? As you, yourself, said, you still have to go to cabinet for claims over $150 million. So government intervention can still impede the negotiations process, given that you have to seek a mandate from cabinet, which often results in an altered mandate and so forth. But if these files were put before the Specific Claims Tribunal of Canada, the tribunal's decision would be final and conclusive, and would not be subject to appeal.

I read everything produced by the Senate on the topic, and I have the same question. Would it not be possible to pursue mediation, for example, or even binding arbitration that would be binding on the two parties? Basically, the problem is finding a resolution that is binding on both parties. I am, of course, referring to specific claims valued at more than $150 million. I am not talking about land claims, which are a whole other can of worms, according to what you told us.

I am wondering whether we could not find a solution where you would not always be required, even at the justice level, to go to cabinet, to keep going back and forth for years on end, because it is not a matter of months, but years.

[*English*]

Ms. Colleen Swords: The process in place with respect to claims over $150 million does require that we go to cabinet. It would be up to cabinet, not up to us, to determine what ways there may be to resolve a particular claim that's over $150 million. It would be necessary for us to go to cabinet, fully explain the whole claim, and then make suggestions about possible ways to resolve it.

[*Translation*]

Mr. Marc Lemay: Forgive me for interrupting, Ms. Swords, but I would like to know who decided on the policy requiring you to go to cabinet. Was it the minister? Was it cabinet? Whose decision was it to have a policy requiring you to constantly go before cabinet? I could not find the answer in the documentation.

[*English*]

Ms. Colleen Swords: Well, basically, the tribunal act itself says they don't have jurisdiction to make an award over $150 million, so the legislation sets the $150-million limit.

Then it's essentially the ministers in cabinet who've decided that for over $150 million, we need to go to cabinet. I think when Minister Strahl appeared before the committee several times in the past, he has explained that the process for over $150 million requires going to cabinet for a negotiating mandate.

[*Translation*]

Mr. Marc Lemay: Even for the $250 million a year for 10 years, which adds up to over $2 billion, you are required to go back to cabinet?

Let's assume you reach an agreement with Kanesatake for $151 million, would you still have to go to cabinet?

Pardon me, Ms. Swords, the reason I am asking is that our Mohawk friends will be appearing before the committee in a few days, and I would like to be able to give them the answers to these questions.

The Chair: Could you give a brief answer?

[*English*]

Ms. Colleen Swords: I hope that if the claim were to be resolved for over $150 million, there would be some way to resolve it quickly, but essentially, over $150 million, the Minister of Indian Affairs does not have the authority to settle pursuant to the specific claims policy that has been in place under the Justice at Last initiative. For anything over $150 million, he has to go to cabinet.

● (0925)

[*Translation*]

The Chair: Thank you, Mr. Lemay.

It is now over to Ms. Crowder for seven minutes.

[*English*]

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Mr. Chair.

Thank you for coming before the committee today.

I, too, have a couple of questions on numbers. I pulled this off the website yesterday, the "National Summary on Specific Claims. It's from February 28. Is this the most up-to-date record of the numbers? It says there are 526 claims in progress, 893 concluded, and 77 in active litigation. Are these the most up-to-date numbers?

Ms. Anik Dupont: Yes.

Ms. Jean Crowder: What I'm understanding you to say is that since the coming into force there have actually been 109 brand new claims filed. These would be claims that were not refreshed. These would be brand new claims.

Ms. Anik Dupont: Yes, that's correct.

Ms. Jean Crowder: Okay. So these are the most accurate numbers.

Ms. Anik Dupont: Yes.

On the claims concluded, the eight hundred—

Ms. Jean Crowder: Yes, the total is 893 concluded.

Ms. Anik Dupont: That's cumulative since the policy was in place.

Ms. Jean Crowder: Okay.

The other question I have on this number is about the 265 "No Lawful Obligation found". Would those then be eligible to go to the tribunal if the first nations so chose? So theoretically, of the 100%, there could be 265 in the hopper to go to the tribunal.

Ms. Anik Dupont: Yes.

Ms. Jean Crowder: On the files closed, the 252, would that have been a mutual closure or would that have been no action or....

Ms. Anik Dupont: It's both. Sometimes it's at the request of the first nation, and sometimes there has just been no activity and we have no response from the first nation so we close the file.

Ms. Jean Crowder: So if there has been no response from the first nation they would still be in the loop, though, if they chose to respond?

Ms. Anik Dupont: If they chose to reactivate their file.

Ms. Jean Crowder: So those could become active at some point.

Ms. Anik Dupont: Yes.

Ms. Jean Crowder: Okay.

As another note on numbers, just so it's on the record, 46% of the specific claims inventory comes from British Columbia, which is an extremely high number given that we have so few treaties. I just want that on the record.

And of course we all know that any new treaty signed won't be eligible under the specific claims policy because of the 1973 cut-off, correct?

In the Justice at Last specific claims action plan, it is noted that "in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal". Have there been any of those where they have been in negotiation and the minister has consented that they go to tribunal?

Ms. Anik Dupont: Not to date, no.

Ms. Jean Crowder: Because the tribunal is in progress, are we aware of any claims that people have signalled an intention to file before the tribunal?

I know that in your presentation, Ms. McCurry, you said that by the end of April 2011 first nations will be able to file their claims with the tribunal. Is it possible for them to signal that intention now?

Ms. Pamela McCurry: It is possible,but it's not likely. It would be in general conversation. It wouldn't be an official signalling until the time.

Ms. Jean Crowder: So they can't officially signal until approximately April 2011?

Ms. Pamela McCurry: That's when they can file, yes.

Ms. Jean Crowder: That's when they can file.

Ms. Swords, I want to come back to your presentation.

My apologies to all the lawyers here, but this sounds like it's been written by a lawyer. On page 6—

[*Translation*]

Mr. Marc Lemay: Hang on a minute! That is dangerous. Point of order, Mr. Chair!

Some hon. members: Oh, oh!

[*English*]

Ms. Jean Crowder: Self-disclosure: my son is a lawyer.

On page 6 in the English version, the middle paragraph has to do with the political agreement between the Government of Canada and the Assembly of First Nations, and says that representatives of the AFN met on a number of occasions during 2009, and then later in that paragraph it says they "are well understood by the Government of Canada". That sounds to me like there isn't an agreement on how large claims are going to be handled. It sounds like, "We hear what the AFN is saying, and we understand it, but so what?"

So can you tell me, since 2009, how many meetings have happened with the AFN around claims over $150 million and if there has been an agreement between the government and the Assembly of First Nations about how this will proceed? Because I just want to turn quickly to the political agreement: it said that future work would include "claims that are excluded by the monetary cap or other provisions of the legislation". Then, of course, the joint work plan also talks about the process for claims in excess of $50 million.

It was fairly wide open, but in your view, is the Assembly of First Nations in agreement with the government's view on claims over $150 million? Or the department's view, I should say, because you're speaking for the department....

● (0930)

Ms. Colleen Swords: I'll just make a few comments and then ask Anik to answer the question about how many times we've met with the AFN. I think if you look at the political agreement, it says that we're "committed to work together to inform ongoing policy work". So it didn't commit us to work together to finalize any agreement; it was to inform.

So the purpose of that statement you're referring to from my opening statement is to say that we have been informed by these discussions, there is clearly a lot of common ground in terms of the value of trying to reach negotiated settlements, and—

Ms. Jean Crowder: Could you tell me what the differences are?

Ms. Colleen Swords: I think when you look at the issues around the cabinet process...one can't change the cabinet process alone. The cabinet process is confidential. It has set up long-standing procedures on how it operates. In terms of how presentations would be made to cabinet, it would follow cabinet procedures.

My understanding is that the AFN would like, for example, to have the first nation appear before cabinet or make their own presentation. That's not likely to happen under the current cabinet process, and in fact is one maybe better suited to a court or whatever. It's a different sort of process.

So there are issues that fall outside our ability to change with respect to how the cabinet process works.

Ms. Jean Crowder: Are there other differences in the view...? It seems a large one in terms of first nations ability to make a presentation directly to cabinet. Are there other major differences in the process over $150 million?

Ms. Colleen Swords: Well, the process over $150 million, as I said, is really going to cabinet, so it's not a process that has the same kind of timelines as the Specific Claims Tribunal and the process for under $150 million.

Ms. Jean Crowder: So timelines are an issue in terms of...?

Ms. Colleen Swords: I don't know about exactly timelines, because I'm not sure how you ever put a timeline around cabinet, and I'm not sure that—

Ms. Jean Crowder: I guess what I'm trying to get to at the heart of it is.... We'll hear from the Assembly of First Nations, but it's always interesting to hear how the Assembly of First Nations views the process versus how Indian and Northern Affairs views the process. I'm trying to get a handle on, from your perspective, what are the key stumbling blocks around the Assembly of First Nations and you and whoever else is involved—I guess Justice—for the process for those greater than $150 million.

The Chair: We are out of time there, so just a short response, if we can.

Ms. Jean Crowder: Thank you.

Ms. Colleen Swords: If we could, we'll answer on the number of times we've met.

Ms. Anik Dupont: We'll have to reconfirm later, but we had about six or seven meetings, and the think tank with the AFN.

Ms. Jean Crowder: Thank you.

The Chair: Thank you, Ms. Crowder.

Let's go to Mr. Rickford for seven minutes.

Mr. Greg Rickford (Kenora, CPC): Thank you, Mr. Chair.

Thank you to the witnesses. Your speeches this morning actually answered a number of preliminary questions as we embark on this process.

I want to thank the Library of Parliament. The preparation actually gives quite a useful breakdown in appendix A on the specific claims process. It's familiar to me as a nurse because it's laid out in an algorithmic kind of way. It's quite useful to sort of follow through that.

I want to also congratulate you on your important work on the backlog. I assume that the ability to work through this isn't just the fact that you, as a matter of policy, place a great emphasis on having a departmental finely tuned machine, but also the fact, it appears to me, that it was so extensively engaged and consulted on in cooperation with the AFN that the government was able to bring something forward that everybody could work with. Congratulations in that regard.

I was actually with the minister in Fort William not too long ago when we made that announcement. I can tell you that these presentations in the community go a long way to deal with long-standing issues that really put the nation in the best position to move forward. We're excited for Fort William and, to that extent, the City of Thunder Bay as things go.

I have a preliminary question, born a little bit out of curiosity, but attached to the substantive point I want to try to flesh out. My first question is, why has a limit of $150 million been put on settlements since Justice at Last? Where does that figure come from? How do we get there? This is a segue into my hopefully meatier question.

Ms. Swords, maybe you can answer that.

Ms. Colleen Swords: Certainly, Mr. Rickford.

I might mention, too, as you're looking at this chart, I agree that it's a very handy one.

● (0935)

Mr. Greg Rickford: It's great, yes.

Ms. Colleen Swords: It's on the department's website, and it's in the materials in the specific claims process that are widely disseminated, so it's a good document.

The $150 million that was in the Justice at Last initiative really is a bit of a bright-line test. It was an attempt to try to say that we want to put in place a process, an alternative dispute settlement process, that will allow claims that are under a certain amount to proceed more quickly.

The ones that are over $150 million are considered to be, by virtue of their size, their complexity...and sometimes complexity just means they go back 200 years, and there's a lot of research needed to really try to evaluate them. The theory was if you remove them from the process, then you can move more quickly on the ones that are under $150 million. You can deal with a set amount of money, the $2.5 billion that has been set aside to deal with the ones that are under $150 million, and deal with them more quickly.

Ms. Anik Dupont: Absolutely. We had a claim that we settled this year in B.C. that was a highway-taking; it took us close to seven years to resolve because we had to deal with the municipalities, the rights-of-way, and getting all the necessary permits. The claim itself was worth $300,000. Sometimes the complexity is there even below $150 million.

Mr. Greg Rickford: To go back to you, Ms. Swords, you raised this in your presentation. How do you decide.... Or, let's say, what is the determining factor—or factors—to deal with a claim that may go over $150 million where there's an aggregate of claims from one specific community? What are the factors there to say, okay, under the subcategories, we're going to deal with these individually as under $150 million, versus saying to put them together and it would go into a claim that would exceed $150 million?

For me, that's a difficult question, so I would like you to take the last few minutes that I have and speak to that. For me, as I understand this, I want to be clear on those issues.

Ms. Colleen Swords: I'm going to ask my colleague from the Department of Justice to answer as well.

I think there's an issue around whether all of the claims that you might want to aggregate would indeed be ones where the federal government has a lawful obligation.

Mr. Greg Rickford: Fair enough.

Ms. Colleen Swords: In some cases they might not be. You may want to deal with them together process-wise, but in fact, vis-à-vis the process itself, they are each individually under $150 million, legally speaking.

I'll ask my colleague to respond.

Ms. Pamela McCurry: Sure. I can add a little bit to that.

When we're looking at the claims for the purposes of determining whether or not we think there's an outstanding legal obligation, the claims would be based on sets of facts. If we were to look at a number of claims and determine that these individual claims were actually based on the same set of facts and raised the same set of issues, then we would likely suggest that we could look at these things together.

However, often the claims are not based on the same set of facts and don't raise the same sets of issues. They can be quite distinct even though they come from the same first nation.

Mr. Greg Rickford: I understand.

How much time do we have?

The Chair: You have another minute, Mr. Rickford.

Mr. Greg Rickford: Thanks.

Very briefly, I'll just ask the last question here. I was looking through how the specific claims process relates to the Specific Claims Tribunal. I just want to sort out a couple of details.

What will the purpose of mediation be at the tribunal? Obviously, I have a basic assumption that negotiation will have preceded a reference to the tribunal. But is there a process built in there somewhere, where there's ongoing discussion? Would that come in the form of case management, for example?

Ms. Pamela McCurry: Yes. As part of the discussions with the tribunal in October 2010, that's when the issue of mediation was really discussed. The tribunal members would like to.... It's authorized under section 12, I believe, that they can make rules respecting mediation. Our perspective is that mediation is appropriate in the context of case management to improve efficiencies in terms of resolution.

● (0940)

Mr. Greg Rickford: Has it? Will it?

Ms. Pamela McCurry: Well, there's clearly more work to be done on that. I believe that just recently, in a letter, Mr. Justice Slade, who is the chair of tribunal, invited the advisory committee to participate in discussions around mediation. It's also mediation on consent, which is an important factor. We'll have an opportunity to flesh out all of that soon.

Mr. Greg Rickford: Thank you.

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

Now we'll go to the five-minute round, and we'll welcome Ms. Fry.

Hon. Hedy Fry (Vancouver Centre, Lib.): Thank you very much, Mr. Chair.

I would like to look at appendix A again, please, if you don't mind, the schematic. Thank you.

I notice that the second little bar says “Claim meets Minimum Standard”. First, there's, “First Nation (FN) submits claim“, and then it says ”Claim meets Minimum Standard”. What is the minimum standard that those claims must meet? Is it just a dollar value?

Ms. Colleen Swords: I'll ask my colleague to respond, but essentially, it relates to the quantity and quality of the information provided. It is more than just claiming X for *x* amount of dollars.

Hon. Hedy Fry: Okay. Can you tell me what those criteria are?

Ms. Anik Dupont: Ms. Swords is right. It's on our website. It's basically to guide the first nations that want to submit claims. There's the minimum requirement for documents and there is a way the information is to be presented to make it a lot easier for faster processing of claims. The first nations can now go on our website to get that guidance.

Hon. Hedy Fry: Thank you.

As we move along through the schematic, it says, yes, the claim has been accepted for assessment and accepted for negotiation. What are the criteria for accepting for negotiation?

Ms. Colleen Swords: Well, the primary criterion is whether there's a lawful obligation on the part of the federal government.

Hon. Hedy Fry: The only criterion or the primary one?

Ms. Colleen Swords: Only or primary?

A voice: [*Inaudible—Editor*]

Hon. Hedy Fry: The only one? Okay. Thank you.

I just want to note here that the tribunal process, you say, is final. I note that at the very bottom of the chart it says “Judicial review only”. Does that mean it really isn't fully final and you could trigger a judicial review if the first nation in question doesn't agree with the final decision of the tribunal?

Ms. Pamela McCurry: There is access to the Federal Court for a judicial review under the statute in I think section 31. Primarily, the issues would go to questions of jurisdiction.

Hon. Hedy Fry: I have one final question. I know that we're talking about the specific claims process here, but what happens with the treaty negotiations in B.C. that seem to have been going on for 20 years now? What is happening to those? Can you explain that to me quickly?

Ms. Colleen Swords: The treaty process is continuing. It's quite different from the specific claims process, because it relates to situations where there isn't a treaty in place. There is a treaty commission, and we are working closely with them. The minister recently appointed a special representative to see whether there are ways to try to speed things up and to try to deal with the ones that are closer to settlement as quickly as possible.

Hon. Hedy Fry: Thank you.

The Chair: Thank you very much, Ms. Fry.

We'll go to Mr. Weston for up to five minutes.

Mr. John Weston (West Vancouver—Sunshine Coast—Sea to Sky Country, CPC): To respond to Ms. Crowder, I just want to say that some of my best friends are lawyers.

Voices: Oh, oh!

Mr. John Weston: I have been involved with the council for specific claims in British Columbia. Maybe you and my clients crossed paths at some point. Who knows?

I obviously applaud the streamlining process. Very big strides have been made there. Clearly, other countries looking at us would applaud the value of justice that is being served here, in the sense of really attending to the needs of people who feel that they've been left out of a system and are being brought back in. So to whatever extent you're contributing to those things, I think Canadians have to be very proud.

Can you perhaps go back to the question of what the future holds in terms of future claims arising? Is there an end point? Can we point to some sense that at the end of the day there will be no more claims? How do we do that?

You said that we're monitoring, that we're keeping on top of this by applying ourselves to higher levels of complexity. Over $150 million now, we have this new process. Cabinet is more involved in monitoring. But what can we say, going forward in the future, is the end point so that first nations and other Canadians can say

[*Translation*]

there is an end to this process, there will be no other claims?

[*English*]

Ms. Colleen Swords: That's a very difficult question to answer. Essentially, the process we have in place envisages a special $2.5 billion over 10 years to try to deal with claims under $150 million, which we would hope and expect would be a large majority of the claims.

I don't know that we will ever be able to say we will never see another specific claim in the future. I mean, a claim is something that a first nation can put forward. But they do relate to things that have gone on in the past, and I'd like to think that as time has passed, Canada, Canadians, and the government have become better at understanding what its obligations are and are abiding by them.

● (0945)

Mr. John Weston: Ms. Swords, do you think that by offering a more streamlined process, and by making it clearer by putting the things you're talking about on the website, we're perhaps giving people a sense that now is the time to present their claims, and that we are consolidating them and getting on with the process of national reconciliation?

Ms. Colleen Swords: That's a very good way to put it. Indeed, we're concentrating attention and effort over this period to try to make sure we can deal with these lingering outstanding claims.

Mr. John Weston: Are there any other comments from Justice?

Ms. Pamela McCurry: The statute—and Justice at Last in general—goes a long way to achieving the objectives it set out, which is all about reconciliation. It takes the form of better transparency, better access, and much greater efficiency. All of that does add up to justice.

Mr. John Weston: This is a subjective question, but can you comment on the response of first nations people to these initiatives? Is there a sense of optimism, a sense of commitment to the process? One could envision a world in which they were totally outside the process, alienated and unhappy. I'm getting the sense that's not the case and people are committed to getting this done together.

Ms. Anik Dupont: We have a bit of both. There are some first nations that really like the process because it has been streamlined, and they know that if they file a claim, in three years they will get a response, and the negotiations are more focused.

But there's a balance. We also hear from our negotiation tables that first nations feel rushed and pushed through the process. Whereas before Justice at Last sometimes we could be at a table for seven or ten years, now, of course, they feel a bit pushed and shoved because we're getting to the point quicker and trying to do more, so it has been an adjustment for them as well. It's a bit of both.

Of course, in the end they get results much faster, but when they are in the process that's some of the feedback we're getting. You might hear some of that from the people who come before you.

Mr. John Weston: I can say from personal experience that the McLeod Lake Indian Band specific claims claimants found that as the process got clearer and clearer, the results were better. They were happily surprised that there really was some finality.

Are there any other comments on the certainty, the finality?

The Chair: Unfortunately, that's about all. Believe it or not, it goes rather quickly.

Thank you very much, Mr. Weston. Do you have just a short comment? I know that some of the other speakers went over time.

Mr. John Weston: I think for everybody in the room, a sense of certainty and finality is a value we're all striving for, and I'm hearing that we've moved in that direction through this process.

And you're shaking your heads. I'm taking that as a "yes" for the record.

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

[*Translation*]

Mr. Lemay, you have the floor for five minutes.

Mr. Marc Lemay: I wish I could be as optimistic as my friend Mr. Weston, who is brimming with optimism. But I am not so sure it is the same everywhere, as we will see in the weeks ahead.

It is easy to file a specific claim when a train, a highway or a Hydro-Québec pole encroaches on aboriginal land, on a reserve. The issue is complicated, yes, but it is still physically tangible. What I am looking for is a solution in those cases where a treaty was not respected, where there are claims. I want a solution that can solve the cases of the Mohawks, the Six Nations of the Grand River band, the communities of Akwesasne and Kanesatake. Those are the main outstanding claims. I know there are many in British Columbia, and I will let my colleagues from that part of the country talk about those, but when I consider the case of the Mohawks, I do not see a light at the end of the tunnel. I am not sure what you think, but I do not see one—and I have tried. When you meet with them, you understand that there are no options.

That is the rationale behind my suggestion. Is there no way to impose a mediation or binding arbitration process in these kinds of cases? Could that be a possibility?

● (0950)

Ms. Anik Dupont: Thank you, Mr. Lemay.

In the case of the Mohawks, the files are quite complex. The history of Canada and Quebec really come into play. As for the Akwesasne and Dundee files, we have actually made some real progress at the bargaining table, and we are doing a very good job working with the groups. The process is a bit longer, because their approach is different, and we are having to come together on and revise our approach in order to get there. Nevertheless, we are very close to settling a specific claim in this case, and we are in talks with another group.

As for mediation, obviously both parties have to agree to that approach and on the issues that the mediation will cover. Sometimes, that is where the assessment is toughest, because we cannot even agree on the terms of the mediation, or we cannot use mediation for a matter of policy. Our policy is clear, we have parameters we must respect. Sometimes, we have no flexibility. Even if we had a mediator, we could not always go in the same direction as the first nation.

Mr. Marc Lemay: So you are bound by the policy in place, and first nations have to know that even before they think about filing a claim. Is it the same with the Department of Justice?

[*English*]

Ms. Pamela McCurry: Well, we operate within the policy.

[*Translation*]

Mr. Marc Lemay: If aboriginals want to file a claim and initiate a negotiation process, the first principle is to respect the policy. What happens if they do not want to respect it? Does it end there? Do you hit a deadlock?

Ms. Anik Dupont: Yes, but they can always go through the courts, which is another option.

Mr. Marc Lemay: Would there be a benefit in—and this is the lawyer in me talking, whether Ms. Crowder likes it or not—dividing a claim, in order to go before the Specific Claims Tribunal of Canada with two or three claims, where each does not exceed $150 million? Forgive me, but I tend to look at things through the legal lens.

[*English*]

That's a good question, isn't it?

Voices: Oh, oh!

Ms. Pamela McCurry: It depends again on the relationship of the facts. It's not a good idea to try to divide claims where they essentially deal with one set of facts and present one set of issues.

[*Translation*]

Mr. Marc Lemay: In a case involving three communities, would there be a benefit in combining them? Does the process allow for that?

Ms. Anik Dupont: Yes, that is possible. Certain bargaining tables across Canada have a number of groups present.

Mr. Marc Lemay: Thank you.

The Chair: Thank you, Mr. Lemay.

[*English*]

I'm going to ask a brief question in one of the government spots. The question is for Ms. McCurry.

In our study we've tended to focus, and we are focused, on those specific claims that are above the $150-million threshold. This gives rise to the question of the degree of involvement of the Specific Claims Tribunal. Is there any role whatsoever for the tribunal in this process?

Ms. Pamela McCurry: No. The specific claims act, which creates the tribunal, sets an upper limit of their jurisdiction at $150 million.

● (0955)

The Chair: So not even in the case, for example, when a claim is submitted and the amount is uncertain. What actually establishes the trigger to put it over that threshold? Is it an assertion of what the applicant believes is the value?

Ms. Pamela McCurry: It's interesting, because I think that often when these claims come in under the specific claims process, the dollar amount is not actually indicated. It's discovered through the process of analysis. It is sometimes indicated, but the—

The Chair: But there is some justification of that at some point.

Ms. Pamela McCurry: That's right. If matters are to go to the tribunal, obviously because of the triggers to get to the tribunal you will have had an opportunity to place some value on the claim.

The Chair: If that were the case, clearly it would be outside the realm of the tribunal.

Ms. Friedman, your hand is up.

Ms. Deborah Friedman (General Counsel and Director, Specific Claims Section, Aboriginal Affairs Portfolio, Department of Justice): Just to build on what Ms. McCurry was saying, it's the legislation that puts a limit on what the tribunal can award as a monetary compensation. It is limited to monetary compensation of $150 million. What this would mean is that when a claim is before the tribunal, as often happens in court, you would have an evidentiary record. The tribunal would be considering that evidentiary record to discern the compensation to be awarded. It's going to happen over the course of the process before the claim is in front of the tribunal. The members will be looking at the evidence.

The Chair: When they first start out in the process, it may well be that the tribunal could have a role, but it depends. Through the course of the evidentiary process, if it becomes clear the number is over the threshold, then they're into a different process, which you described earlier.

Ms. Deborah Friedman: The first nation would be aware of the legislation and their counsel certainly would be aware of that upper limit. Similarly, one could draw the analogy of going to small claims court in many jurisdictions, where there is a maximum which the court can award. When claimants file their claims before that body, they're aware of the upper limit. That would be the same case here for first nations.

The Chair: Thank you very much.

We'll go to Ms. Crowder for the last question and then we'll wrap up.

Ms. Jean Crowder: Mr. Chair, I have a couple of quick questions.

Going back to claims that are in litigation, I believe that Delta Cree is one of those. I know there was a back-and-forth going on with the government over access to documents in regard to the Delta Cree and the Manitoba hydro project. So they're not included in the specific claims numbers, I assume.

There are 77 claims listed here that are in active litigation. Do we have any sense of how many of those 77 could be claims over $150 million?

Ms. Anik Dupont: No, I don't know the answer, but we can look —

Ms. Jean Crowder: Could you? Because that could be a significant workload that's coming down the pike.

Ms. Deborah Friedman: I would just add that it may not be possible at this stage. If they're in active litigation, the claimants obviously have filed pleadings, and those pleadings may not necessarily set out the dollar upper limit. We could look at that, but it may not necessarily be discerned from that—

Ms. Jean Crowder: It could be a significant number. I don't know...of this 77 in active litigation, would that include people like Six Nations, like Delta Cree?

Ms. Anik Dupont: It would have had to come into the specific claims process and then move to litigation. That's how we track them. Because they can always at some point drop the litigation and want to come back into the process.

Ms. Jean Crowder: Is there a way for us to know how many in litigation are outside the specific claims process?

Ms. Anik Dupont: Of those 77?

Ms. Jean Crowder: No. Can you tell us how many first nations are in litigation around specific claims?

Ms. Deborah Friedman: Once again, first nations may file before a court and have the matter in litigation, and there are a number of grounds upon which they're bringing that claim. Some of those grounds may mirror the grounds available under the specific claims policy, but in many cases they may be much broader in terms of the nature of the relief they are seeking from the court and the foundation.

Ms. Jean Crowder: So in other words.... I can't remember the accounting term for this, but maybe somebody could help me out. I mean, there's an unfunded liability out there, right? I don't know if that's the exact accounting term. We have all these claims in litigation and there's going to be an obligation to government at some point.

Do we have a handle on what that might look like? I'm sure departments somewhere have done some sort of estimate about the dollar figures on this.

● (1000)

Ms. Pamela McCurry: We do have figures on the global outstanding contingent liability, but they would be comprised of a number of different things.

Ms. Jean Crowder: Contingent liability, yes.

Ms. Pamela McCurry: Yes. We do have that, but again, it represents a mixed bag—

Ms. Jean Crowder: Can we get those numbers?

Ms. Pamela McCurry: Sure.

Ms. Jean Crowder: Just quickly, I want to confirm what I've heard. The mediation by consent means that both parties have to agree to the mediation, so even in the Justice at Last specific claims action plan, where it talks about mediation, it doesn't actually say that as clearly in here.

So on mediation, the government must agree to mediation. If a first nation signals it wants mediation, the government must agree, for all the reasons you outlined. Is that correct? The government has to be willing to mediate.

Ms. Colleen Swords: I don't think it's mediation if one party is not agreeing; it's more like some form of arbitration or imposed solution.

Ms. Jean Crowder: It's been a problem with the land claims implementation when first nations have been willing to mediate and the government isn't willing to come to the table, for a variety of reasons. I understand that. Just so people understand, it's not a tool where a first nations gets to signal what they want to do. The government has to be at the table.

The Chair: Thanks, Ms. Crowder.

We'll have a short question from Ms. Neville as well.

Hon. Anita Neville (Winnipeg South Centre, Lib.): Very quickly, much of the questioning is around the claims over $150 million. As you're all undoubtedly aware, there was a lot of controversy when we dealt with this legislation on it being capped, and many of the questions have focused on that.

Can you give us anything you have in writing that deals with guidelines, processes, or whatever for claims that are potentially over $150 million or claims that are over $150 million and what supports you provide, as well as that ambiguous area where you don't know what it will be? Do you have materials you could give the committee?

Ms. Colleen Swords: In the material on our website and in the documentation, there's one paragraph that basically says that for claims over $150 million it's the cabinet process.

Hon. Anita Neville: But you said that you provide support to the cabinet process on the $150 million. Do you have guidelines? Maybe you can't give them to us, but I'd like to know a little more about the claims over $150 million or the borderline area.

Ms. Colleen Swords: I think we can get you some information about the assistance we provide to first nations as they're trying to develop a claim and—

Hon. Anita Neville: That would be helpful.

Ms. Colleen Swords: I think it would apply whether it's over or under $150 million. That may help to answer some of your question.

Hon. Anita Neville: Thank you.

The Chair: Thank you, members.

[*Translation*]

I would like to thank the witnesses for their presentations this morning.

[*English*]

I'm sure you're going to very much help inform our report when the time comes.

Members, we're going to suspend briefly while we bid adieu to our guests this morning, and then we will be back in camera for our committee business.

[*Proceedings continue in camera*]

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