Legislative Summary **LS-592E**

BILL C-30: THE SPECIFIC CLAIMS TRIBUNAL ACT

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LEGISLATIVE HISTORY OF BILL C-30

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	27 November 2007
Second Reading:	10 December 2007
Committee Report:	5 May 2008
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Third Reading:	13 May 2008

SENATE	
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Second Reading:	27 May 2008
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Report Stage:	
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Statutes of Canada

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print.**

Legislative history by Michel Bédard

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TABLE OF CONTENTS

Page

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BILL C-30: THE SPECIFIC CLAIMS TRIBUNAL ACT*

Bill C-30, the Specific Claims Tribunal Act, received first reading in the House of Commons on 27 November 2007 and was referred to the House Standing Committee on Aboriginal Affairs and Northern Development following second reading on 10 December. The legislation modifies the current specific claims process by establishing a Tribunal composed of superior court judges with authority to make binding decisions on the validity of claims and compensation awards, to a prescribed maximum of $150 million per claim. This is the second legislative initiative within the past five years to propose the sort of reforms to the specific claims system that have long been under consideration by Aboriginal, government and other stakeholders and observers. **Following extensive consideration by the House Committee over the course of twelve meetings from 6 February to 16 April, Bill C-30 was adopted on 30 April with two opposition amendments. On 13 May, the legislation was adopted by the House without further changes and introduced in the Senate.**

BACKGROUND

Beginning in the early 1970s, federal policy has described two broad categories of Aboriginal "claims," and outlined measures for dealing with them. Comprehensive claims involve assertions of unextinguished Aboriginal title to land and resources. Specific claims declare grievances over Canada's alleged failures to discharge specific obligations to First Nations groups (*Indian Act* "bands") under a number of headings. The following survey provides a context for Bill C-30's proposed reform of the specific claims system.(1)

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) All documents referred to are available from the author upon request, and/or from the Parliamentary Information and Research Service.

A. Prior to 1973

1. Parliamentary Reports

Assertions of outstanding commitments owed by Canada to First Nations groups remained largely unconsidered by government well into the 20th century. From 1927 to 1951, the *Indian Act* prohibited the use of band funds for claims against government. In 1947, the special joint committee of the Senate and House of Commons struck to examine the *Indian Act* and other Indian Affairs matters recommended, *inter alia*, the immediate establishment of a "Claims Commission" "to inquire into the terms of all Indian treaties … and to appraise and settle in a just and equitable manner any claims or grievances arising thereunder."(2) The 1959-1961 joint committee on Indian Affairs also advocated an "Indian Claims Commission" "to hear the British Columbia and Oka land questions and other matters."(3)

2. Government Legislation

In 1963 and 1965, the Liberal government revived a draft legislative initiative of the previous Conservative regime with the introduction of An Act to provide for the Disposition of Indian Claims (Bills C-130 and C-123). The bill would, *inter alia*, have established a five-member Commission with binding decision-making authority over five broad classes of claims,(4) as well as the power to award financial compensation – with no prescribed limit – and to fund claimants' research of their claims. Bill C-123 died on the *Order Paper* and was not reinstated.

3. The White Paper

In 1969, the Liberal government issued its controversial – later withdrawn – White Paper on Indian Policy.(5) It proposed repeal of the *Indian Act* and the termination of distinct "Indian" legal status, while acknowledging the existence of limited government

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(2) Special Joint Committee of the Senate and the House of Commons, *Minutes of Proceedings and Evidence*, No. 41, 9 July 1947, Recommendation 2. Not coincidentally, in 1946 Congress had enacted legislation to establish an Indian Claims Commission for the adjudication of a broad range of claims against the United States.

(3) Joint Committee of the Senate and the House of Commons on the *Indian Act*, *Minutes of Proceedings*, No. 16, 30 May – 7 July 1961.

(4) These included claims related to unextinguished Aboriginal title; uncompensated or inadequately compensated disposition of reserve lands; undischarged obligations under agreements, including treaties; mismanagement of trust funds; and failure of the Crown "to act fairly or honourably" with Indians.

(5) "Statement of the Government of Canada on Indian Policy, 1969."

obligations toward Indians. Accordingly, a Claims Commissioner was appointed to consider and make recommendations for the resolution of specific grievances, serving from 1969-1977. First Nations groups objected to this limited and, in their view, ineffective mandate.

B. Developments from 1973 to 1990

1. The *Calder* Decision

The 1973 decision of the Supreme Court of Canada in *Calder et al.* v. *Attorney General of British Columbia*[6] confirmed that Aboriginal peoples' historic occupation of the land gave rise to legal rights in the land that survived European settlement. The decision influenced the federal government to undertake not only first-time processes for the negotiation of comprehensive land claims, but also new processes for resolving specific claims.[7]

2. Office of Native Claims (ONC)

In 1974, the ONC was established within the Department of Indian Affairs and Northern Development (DIAND), with the dual role of reviewing Indian claims arising from governmental failure to discharge "lawful obligations" and representing the government in negotiations with First Nations groups. A 1979 report to the ONC described the "familiar situation where a government agency has conflicting duties in relation to Indian claims," and concluded that "[t]he need for impartiality and the appearance of impartiality as well as finality … strongly argue [*sic*] for the establishment of an independent body separate from departmental structures for the settlement of specific claims."[8]

3. New Specific Claims Policy

In 1982, acknowledging that its specific claims policies to date had proved lacking,[9] the federal government issued *Outstanding Business: A Native Claims Policy – Specific Claims*.[10] Under the policy, claimants were required to establish the existence of one

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(6) [1973] S.C.R. 313.

(7) Department of Indian Affairs and Northern Development, *Communiqué*, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," 8 August 1973.

(8) Gérard La Forest, *Report on Administrative Processes for the Resolution of Specific Indian Claims*, Ottawa, DIAND, 1979, unpublished, pp. 17, 64.

(9) From 1970 through 1981, of 250 claims submitted, 12 had been settled.

(10) Minister of Supply and Services, Ottawa, 1982. In 1981, the federal government had released *In All Fairness: A Native Claims Policy – Comprehensive Claims*.

of four outstanding "lawful obligations,"[11] or of two reserve-related circumstances.[12] The claim evaluation process entailed review by the ONC; referral to the federal Department of Justice (DOJ) for legal advice; ministerial acceptance or rejection of the claim; and negotiation of definitive settlements of accepted claims. Finally, *Outstanding Business* articulated guidelines for the submission of claims and general criteria governing compensation, which did not include a monetary cap.

First Nations groups and others criticized these policy measures and their implementation. A primary objection concerned Canada's continued involvement in the claims process, which was seen to represent an inherent conflict of interest. In 1983, the Penner Report on Indian Self-Government considered claims-related issues, including the 1982 model, and issued a strong recommendation for a new claims policy, with a legislated process to be negotiated between Canada and First Nations representatives. The Report proposed that legislation provide for both a neutral party to facilitate negotiated settlements, and a quasi-judicial process for instances of failed negotiations.[13]

A 1990 Report of the House of Commons Standing Committee on Aboriginal Affairs noted, without making specific recommendations, the ongoing "high level of dissatisfaction" with claims policies, the "very slow rate" of processing, and the "recurring suggestion [that the process] should be managed or monitored by a body or bodies independent of [DIAND and the DOJ]."[14]

C. Developments from 1991 to 2002

1. Further Reform

In 1986, the specific claim of the Mohawks of Kanesatake was rejected. In 1990, a portion of the territory claimed served as the focus of dispute with the neighbouring municipality of Oka. Events of the summer of 1990 prompted both renewed calls for review of claims processes and a measure of government responsiveness.

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(11) These were: non-fulfilment of a treaty or agreement, breach of an obligation under the *Indian Act* or another statute related to Indians, breach of an obligation in administration of Indian funds or other assets and unlawful disposition of reserve land.

(12) These were: failure to provide compensation for reserve lands damaged or taken by the government, and clear cases of fraud in acquiring or disposing of reserve land by federal employees or agents.

(13) *Report of the House of Commons Special Committee on Indian Self-Government*, Minutes of Proceedings, Issue No. 40, 12 and 20 October 1983, p. 115.

(14) *Unfinished Business: An Agenda for All Canadians in the 1990's*, Minutes of Proceedings and Evidence, Issue No. 20, 31 January – 21 February 1990, p. 3.

A December 1990 study by the Assembly of First Nations (AFN) Chiefs Committee on Claims prepared at the request of the Minister of Indian Affairs (Minister) recommended fundamental reforms to overall claims policy,(15) including the establishment of a joint AFN-DIAND working group to develop an independent claims process.(16) Subsequent initiatives announced by then Prime Minister Mulroney in April 1991(17) included a joint working group to review *specific* claims policy and, as an interim measure, creation of a "Specific Land Claim Commission" as an "independent dispute resolution mechanism."

2. Indian Specific Claims Commission (ICC)

By Order in Council,(18) the ICC was established under Part I of the *Inquiries Act* as a temporary, independent advisory body with six Commissioners mandated to review specific claims rejected by government and to issue non-binding decisions.(19) In the ensuing years, this limited mandate and the perceived lack of government action on ICC recommendations have frustrated Commission members and Aboriginal claimants.

In its Annual Report for 2000-2001,(20) the ICC observed that the specific claims process remained "painfully slow" and "in gridlock." Commissioners called for increased federal funding and resources to improve the situation and reiterated their long-standing view of the "pressing need" for an independent claims body to "remove the bottleneck … and [to advance settlement of] hundreds of existing and future First Nation land claims."(21)

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(15) The Assembly of First Nations, and First Nations generally, have traditionally not subscribed to the federal policy distinction between comprehensive and specific claims, describing it as arbitrary and without legal basis.

(16) Assembly of First Nations, Chiefs Committee on Claims, *First Nations Submission on Claims*, Ottawa, 14 December 1990.

(17) The government proposed fast-tracking claims of under $500,000; removing the exclusion of pre-Confederation claims; increasing the value of settlements within the Minister's approval authority; and devoting additional resources to the specific claim process.

(18) P.C. 1991-1329, as amended by P.C. 1992-1730.

(19) The ICC may also undertake an inquiry when a claim has been accepted for negotiation but compensation criteria are in dispute. Under the ICC's dual mandate, it may, at the parties' request, provide mediation to help them settle disputes by mutual agreement at any point in the specific claim process.

(20) Indian Claims Commission, *Annual Report 2000-2001*, Minister of Public Works and Government Services Canada, Ottawa, 2001. This and other ICC publications may be reviewed at http://www.indianclaims.ca/publications/default-en.asp?lang_update=1.

(21) In 2001, the then ICC Co-Chairs told the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources that the specific claim situation was reaching "crisis proportions" and characterized the need for a "permanent, fully empowered" independent claims tribunal as a human rights matter. See: *Evidence*, Meeting No. 18, 29 May 2001.

The ICC's 2001-2002 Report[22] appealed to the government to act: "An independent claims body is urgently needed to bring justice and fairness to the specific land claims system. The creation of such a body would be in the best interest not just of First Nations but of all Canadians."

3. Royal Commission on Aboriginal Peoples (RCAP)

In its 1996 Final Report, the RCAP underscored the need for structural change in the handling of Aboriginal land claims. It recommended, *inter alia*, the establishment by federal statute of an independent Aboriginal Lands and Treaties Tribunal that would replace the ICC and, in the area of specific claims, review federal funding to claimants; monitor negotiations and issue binding orders; and adjudicate claims referred by claimants, providing remedies where appropriate.[23]

4. Joint AFN-Government Working Groups

In 1992, Canada and the AFN had agreed to undertake concurrent review of specific claims policy and process, and to make recommendations for reform. The Working Group did not reach consensus on all issues prior to the expiry of its mandate in 1993, but its shared view of the need for an independent process was underscored in draft recommendations proposing legislation to create an Independent Claims Body (ICB).

In 1996, a second Joint First Nations–Canada Task Force (JTF) began considering the structure and authority of such a body. The JTF's 1998 Report[24] set out a draft legislative proposal for a reformed specific claims process, defining its key features as including:

- elimination of Canada's conflict of interest through an independent legislative mechanism, to report directly to Parliament and First Nations;
- establishment of both a Commission to facilitate negotiations, and a Tribunal to resolve disputes in cases of failed negotiations;

(22) Indian Claims Commission, *Annual Report 2001-2002*, Minister of Public Works and Government Services Canada, Ottawa, 2002.

(23) *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, *Restructuring the Relationship*, Part Two, Chapter 4, "Lands and Resources," p. 591 et seq., Recommendations 2.4.29-2.4.33.

(24) Assembly of First Nations and Specific Claims Branch, DIAND, *Report of the Joint First Nations-Canada Task Force on Specific Claims Policy Reform* (JTF Report), Ottawa, 1998, pp. 9-10.

- tribunal authority to make binding decisions on the validity of claims, compensation criteria and compensation awards, subject to:
  - a budgetary allocation of settlement funds over a five-year period;
- definition of issues within the jurisdiction of the Commission;
- independent funding for First Nations research and negotiations; and
- joint review after five years, to include consideration of outstanding matters such as lawful obligations arising from Aboriginal rights.

Under the JTF draft legislation, only persons recommended by both the AFN and the Minister were eligible for appointment to either proposed body.

5. Government Response

The creation of some form of ICB with broader powers had been on the Liberal government's agenda since the 1993 pre-election Red Book.(25) In May 2000, the AFN Executive Committee considered a federal proposal featuring elements of the 1998 JTF model, and expressed concern over key differences with it, including, most notably, a $5-million cap on individual Tribunal compensation awards(26) and a federally controlled rather than a joint appointment process. Joint technical discussions on the federal proposal occurred over the ensuing period.

D. Bill C-6, The *Specific Claims Resolution Act*(27)

The *Specific Claims Resolution Act* (Bill C-6) was introduced in the House of Commons in October 2002.(28) It was intended to modify the existing specific claim process by creating a new administrative body consisting of a Commission to facilitate claims negotiation

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(25) Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada*, Ottawa, 1993, p. 103. See also *Securing Our Future Together: Preparing Canada for the 21st Century*, Ottawa, 1997, p. 80; *Gathering Strength: Canada's Aboriginal Action Plan*, 1998.

(26) In May 2001, AFN Confederacy of Nations Resolution 10/2001 "encourage[d] the Minister to ensure that the new [ICB] is truly independent by removing the proposed monetary limitation on its jurisdiction and ensuring that adequate resources are provided."

(27) Legislative Summary LS-431E, entitled *Bill C-6: The Specific Claims Resolution Act*, as well as the full legislative history of Bill C-6, are available on the LEGISinfo website at: http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Session=11&query=3139&List=toc.

(28) The bill was originally introduced in the 1st session of the 37th Parliament as Bill C-60, but died on the *Order Paper* when Parliament was prorogued in September 2002.

and dispute resolution, and a Tribunal to make binding decisions on the validity of claims and compensation awards, to a prescribed maximum of $10 million per claim, with the government having sole authority over the appointment process.

Although the then Minister maintained that the proposed simplified process for resolving claims would foster improved economic development for First Nations communities, with the Commission and Tribunal serving as neutral arm's-length bodies,(29) the AFN and others found several aspects of the bill problematic.(30) In July 2002, the AFN Annual General Assembly adopted a resolution of non-support for the legislation based, in part, on the view that the bill would not make the process fairer, more efficient or transparent, differed significantly from JTF proposals, and could create a claims process worse than the current system.(31) First Nations witnesses from across the country were unanimous in expressing similar concerns in House and Senate Committee hearings.(32)

Adopted by the House and the Senate in March and October 2003 respectively, Bill C-6 received Royal Assent in November 2003. Although duly enacted,(33) the legislation has not been proclaimed in force.

E. Subsequent Developments

1. Parliamentary Committees

In fall 2005, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development initiated a study of the specific claims process,(34) over the course of which DIAND and DOJ representatives, the Indian Claims Commissioner, and negotiators and counsel representing First Nations claimants articulated a range of concerns. Witnesses stressed, in particular, excessive delay throughout the process, as well as the growing numbers of

(29) House of Commons, *Debates*, 18 June 2002.

(30) They included potential lack of independence resulting from the bill's appointment process, the capped claim limit and the lack of a strengthened financial commitment to the resolution of specific claims.

(31) AGA Resolution No. 8, July 2002.

(32) House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, Meetings No. 7 and 8, 27-28 November 2002; Standing Senate Committee on Aboriginal Peoples, *Evidence*, Issues 13-18, 30 April – 11 June 2003.

(33) S.C. 2003, c. 23.

(34) For the text of the motion adopted by the Committee for the purpose of its specific claims study, see House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Minutes of Proceedings*, Meeting No. 43, 4 October 2005, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=129448.

unresolved claims, a general lack of resources, and the government's conflicting roles in the process.(35) Several witnesses stressed the importance of remaining focused on the purpose of the specific claims system, namely the settlement of First Nations grievances against the federal Crown for its failure to fulfil legal obligations.

The House Committee's study was not completed, owing to the dissolution of Parliament in November 2005. However, in May 2006, the Senate authorized the Standing Senate Committee on Aboriginal Peoples to undertake a broad study of specific claims policy and processes. From June through November 2006, First Nations and other witnesses from all regions, echoing the evidence heard by the House Committee, highlighted significant deficiencies of and extreme frustration with the existing system. The Senate Committee's final report chronicled their concerns, noting that most witnesses favoured "[t]he establishment of an independent body for resolving Specific Claims through a cooperative effort by First Nations and Canada," as well as improved DIAND and DOJ processes, and enhanced resources dedicated to the resolution of specific claims.(36) The Committee therefore recommended, *inter alia*, increased funds for claims settlements; the joint establishment of an independent claims body with authority to resolve claims; repeal of Bill C-6; and the allocation of additional monetary and human resources to DIAND and DOJ for the purpose of improving the specific claims process, as well as to claimant groups for the purpose of researching claims.

2. "Specific Claims Action Plan"

On 12 June 2007, the Prime Minister, accompanied by the AFN National Chief, announced a plan to reform the specific claims system and address the mounting number of outstanding claims. Reflecting the Senate Committee's recommendations, its key components called for creation of a tribunal "staffed with impartial judges who would make final decisions on claims when negotiations fail"; "dedicated funding for settlements" of $250 million a year for ten years; improvements in the processing of claims; and enhancement of the existing Indian Claims Commission's dispute resolution function. The plan included provision for discussions

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(35) House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, Meetings 48 through 51, 27 October and 1, 3 and 15 November 2005.

(36) *Negotiation or Confrontation: It's Canada's Choice*, Final Report of the Standing Senate Committee on Aboriginal Peoples Special Study on the Federal Specific Claims Process, December 2006, http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep05dec06-e.pdf.

between government officials and First Nations leaders which, building on previous joint work, would focus on shaping legislation for early introduction and on modifying the role of the ICC.(37)

Accordingly, Bill C-30 represents the product of the joint Canada-AFN Task Force formed to consider the government's proposal for new specific claims legislation.(38) Its 27 November introduction was accompanied by the release of a DIAND-AFN Political Agreement aimed at providing for additional discussion of matters not addressed in the legislation.(39)

DESCRIPTION AND ANALYSIS

The Specific Claims Tribunal Act (SCTA or Bill C-30) consists of a preamble, 53 clauses and a Schedule. This paper considers selected significant elements of the legislation, with reference to similar or divergent aspects of the 2003 *Specific Claims Resolution Act* (Bill C-6) and the 1998 JTF Report and draft legislation where relevant. Related provisions may be discussed together rather than in numerical order. Some overlap may be noted.

A. Preamble and Introductory Provisions (clauses 2-5)

A preamble is an interpretive measure employed to establish a context and rationale for legislation. The Preamble preceding the SCTA's substantive provisions refers, *inter alia*, to the need for an independent tribunal for the timely adjudication of claims and to the right of First Nations claimants to have access to such a body; it also points to Bill C-30 as the product of collaboration between the government and the AFN.

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(37) Office of the Prime Minister, "Prime Minister Harper announces major reforms to address the backlog of Aboriginal treaty claims," 12 June 2007. The full text of the announcement is available at: http://www.pm.gc.ca/eng/media.asp?category=1&id=1695. The text of the Action Plan is available at: http://www.ainc-inac.gc.ca/ps/clm/pln-eng.pdf.

(38) Department of Indian Affairs and Northern Development, "Canada's New Government and Assembly of First Nations strike specific claims task force," News release, Ottawa, 25 July 2007.

(39) Department of Indian Affairs and Northern Development, "Political Agreement between the Minister of Indian Affairs and Northern Development and the National Chief of the Assembly of First Nations in relation to Specific Claims Reform," Ottawa, 27 November 2007. Under the Agreement, joint work on improving the resolution of specific claims through discussion of matters such as claimant funding, processing of claims and resource issues is to be carried out "under the joint direction of the Minister and the National Chief in the form of a standing Specific Claims Liaison and Oversight Committee." The text of the Agreement is available at http://www.ainc-inac.gc.ca/ps/clm/agr-sgnd-eng.asp or http://www.afn.ca/misc/SC-PA.pdf.

Under the bill's definition section (clause 2):

- "First Nation" means a band as defined in the *Indian Act* (*a*) or one of a limited number of former bands that has either retained the right to bring a specific claim under the terms of a comprehensive land claim agreement (*b*), or that is no longer a band under an Act or agreement related to self-government listed in the Schedule and has not released its right to lodge a specific claim (*c*).(40)

- A "party" to a specific claim is "any claimant," by definition a First Nation, the federal Crown, and any province or First Nation with party status under the bill.(41)

The SCTA's stated purpose is to create a Specific Claims Tribunal (Tribunal) with decision-making authority over the validity of claims and related compensation awards (clause 3). Application clauses stipulate that the legislation has precedence over inconsistent or conflicting federal legislation (clause 4), and affects a First Nation's rights "only if the First Nation chooses to file a specific claim with the Tribunal," and only to the extent the Act provides for in explicit terms (clause 5). The former stipulation is commonly found in legislation ratifying constitutionally protected comprehensive land claim agreements; the rationale underlying its use in this context is unclear. The latter stipulation does not define "rights." It differentiates implicitly between the filing of a claim with the Minister, a non-adjudicative entity, and filing with the Tribunal, by definition an adjudicative body to whose authority a First Nation that meets the bill's conditions for access may choose or decline to submit.

Like Bill C-6, the SCTA does not contain a "non-derogation" clause providing that the legislation is not to be construed as violating Aboriginal rights, as was recommended by the JTF draft legislation.

B. Specific Claims Tribunal (clauses 6-38)

1. Establishment of Tribunal (clauses 6-9)

Clause 6 establishes the Specific Claims Tribunal, consisting of a maximum of six full-time members – or the equivalent in combined time of full- and part-time members – drawn from a roster of 6 to 18 superior court judges and appointed for five-year terms that may

(40) Scheduled acts and agreements include, in Part 1, the *Cree-Naskapi (of Quebec) Act*, the *Kanesatake Interim Land Base Governance Act*, the *Nisga'a Final Agreement Act*, the *Yukon First Nations Self-Government Act*, the *Tlicho Land Claims and Self-Government Act*, and, in Part 2, eleven Yukon First Nations Self-Government Agreements. See clause 15(1) under B.2, Prohibited Claims.

(41) See clauses 23 and 24.

be renewed once (clause 7). The Tribunal's composition of "section 96" judges[42] represents a significant difference with Bill C-6, which required only that a majority of adjudicators appointed to its quasi-judicial body be members of a provincial bar.

The Governor in Council both sets up the roster of judges and appoints members from it to the Tribunal. The absence of a joint appointment process became one of the principal objections of First Nations spokespersons to Bill C-6 in 2003; it also differs from the scheme proposed in the 1998 JTF draft legislation, which made eligibility for appointment contingent on joint AFN-ministerial recommendations.[43] The DIAND-AFN Political Agreement provides that "[t]he National Chief will be engaged in the process for recommending members of the Tribunal." The Agreement does not define the nature or scope of that engagement, leaving open the question of why this approach has been adopted, rather than legislating First Nations' participation in the appointment process. In 2003, Bill C-6 required that the Minister enable claimants to make representations concerning appointments, albeit without also requiring any response to those representations.

The SCTA does not specify how the Tribunal Chair is selected for that office from among appointed members. It does describe her or his supervisory role over the work of the Tribunal and its members, and gives the Chair sole authority, on application by any party, to issue orders respecting how certain claims will be treated by the Tribunal. She or he may order that specific claims sharing issues of fact or law be heard together; that distinct claims be subject to one claim limit; and that claims be *decided* together, either to avoid irreconcilable conclusions or if one claim limit applies (clause 8). Although not explicitly stated, it would appear that, in any of these instances, the claims in question may have been made by the same or different claimant First Nations.[44]

2. Tribunal Powers and Functions (clauses 11-13)

The Tribunal's primary responsibility is to hold hearings, with single-member panels, for the purpose of deciding the validity of and compensation arising from specific claims (clause 11). A committee of members "may" make rules to govern Tribunal proceedings and

(42) Section 96 of the *Constitution Act, 1867* authorizes the Governor in Council to make appointments to superior courts in the provinces. Provincial legislatures are responsible for the organization of provincial courts under subsection 92(14) of that Act.

(43) The JTF draft, unlike the SCTA, also required that regional representation be taken into account in the appointment process.

(44) Whereas Bill C-30 confers authority to make these orders on a single *judicial* decision-maker, the capacity to order joint hearings or decisions under Bill C-6 was vested in a Tribunal panel of unspecified composition, while panels of three to five adjudicators were to be responsible for decisions as to joint claim limits.

practice – and may set up a committee of interested parties to provide advice as to their development (clause 12(2))[45] – in matters such as giving notice, presentation of arguments, summoning witnesses, production of documents, introduction of evidence, "imposition of time limits" and costs (clause 12(1)). These areas largely duplicate those set out in both Bill C-6 and JTF draft legislation, the one notable addition being a case-management category that is a common feature of superior court processes. It may be noted that, whereas the JTF model proposed that rules for the imposition of time limits pertain explicitly to the time "within which hearings must be held and decisions must be made," Bill C-30 does not specify what activities might be subject to Tribunal rules in this area. Nor does the bill set out elsewhere any time frames within which Tribunal functions, in particular those underscored by the JTF, must be exercised.

Reflecting the Tribunal's judicial make-up, Bill C-30 describes Tribunal powers in broad terms, as encompassing all the powers and privileges of a superior court with respect to witnesses, documents, enforcement of orders "and other matters necessary or proper for the due exercise of its jurisdiction." Whereas the powers of panels of adjudicators under Bill C-6 were exhaustively defined, the Tribunal's powers under the SCTA, being those of a superior court, are undoubtedly broader than those enumerated as examples at clause 13. These include determinations of questions of law and fact (*a*), reception of evidence (*b*), the awarding of costs (*d*) and, particular to the specific claims context, the taking into account of cultural diversity in the application of rules (*c*). Clause 13 also requires that an award of costs to a claimant be reduced by any amount received from the Crown in order to bring the claim to the Tribunal.

3. Process Related to Specific Claims (clauses 14-16)

a. Grounds for a Specific Claim (clause 14)

Under Bill C-30, a First Nation is entitled to file a claim for "compensation for its losses" arising from any of six prescribed grounds related to breach or non-fulfilment of lawful obligations or flawed transactions involving reserve lands. While the grounds set out at clause 14 generally mirror those established in 1982 in *Outstanding Business*,[46] and included in Bill C-6 and/or JTF draft legislation, there are exceptions.

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(45) The November 2007 Political Agreement provides for a joint DIAND-AFN submission on Tribunal rules to the advisory committee.

(46) See notes 11 and 12.

The SCTA narrows the grounds for claiming compensation based on breach or non-fulfilment of fiduciary obligations that were more broadly recognized, in both Bill C-6 and the JTF draft, as being among the legal obligations whose breach or non-fulfilment might be at issue in more than one category of specific claim.(47) The bill makes it clear that it is not only the administration of reserve lands, but their provision, that may also occasion a breach of a legal obligation, "including unilateral undertakings that give rise to a fiduciary obligation at law" (clause 14(1)(*c*)). **The House of Commons Aboriginal Affairs Committee amended the provision to ensure that the ground also covers historical circumstances that may have arisen in some regions involving the *non-provision* of reserve lands.** The rationale for this subject matter being the sole legal obligation of a potentially fiduciary nature acknowledged in clause 14 is unclear.(48) The JTF model included breach of legal obligation arising from a unilateral undertaking on the part of the Crown as just one of the contexts that might give rise to fiduciary obligations.

Bill C-30 also explicitly acknowledges the practical reality, in the context of the taking of or damage to reserve lands by the Crown under lawful authority, that legitimate claims may be based on the *inadequacy* of compensation received rather than on the absence of any compensation (clause 14(1)(*e*)).

The legislation reiterates modifications to traditional grounds that were set out in the unproclaimed Bill C-6. In future, a claim based on non-fulfilment of a lawful obligation arising under a treaty or agreement will have to relate to "the provision of lands or other assets" (clause 14(1)(*a*)).(49) While most treaty-related specific claims listed in DIAND documentation do involve land, the effect of this addition may be to preclude future specific claims based on

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(47) A "fiduciary" is "one who holds anything in trust," or "who holds a position of trust or confidence with respect to someone else." A "fiduciary relationship" is one in which someone in a position of trust has "rights and powers which he is bound to exercise for the benefit" of another. The Supreme Court of Canada has established that in the unique context of Crown-Aboriginal relations, the fiduciary relationship between the Crown and Aboriginal peoples that may give rise to fiduciary obligations is *sui generis*, or one of a kind. For more on this topic, see *The Crown's Fiduciary Relationship with Aboriginal Peoples*, PRB 00-09, Parliamentary Information and Research Service, Library of Parliament, prepared by the author in December 2002.

(48) It may be that the government considers this form of undertaking the most likely basis for specific claims raising fiduciary aspects, or that the clause reflects the government's approach to recent Supreme Court of Canada case law indicating that not all obligations arising within a fiduciary relationship are necessarily fiduciary in nature: see *Wewaykum Indian Band* v. *Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45.

(49) The term "assets" is defined, at clause 2, as "tangible property."

treaty provisions that are unrelated to land and "assets."[50] In addition, reflecting the historically frequent leasing of First Nations lands, illegal lease of reserve lands is added to the ground related to illegal disposition of those lands (clause 14(1)(*d*)).

b. Prohibited Claims (clause 15; related clause 37)

The SCTA lists categories of claims that may not be filed, including those that are:

- based on an agreement that provides for a different dispute resolution mechanism;
- based on a post-1973 land claim agreement, a scheduled Act or agreement, or an Act or agreement related to either category;
- related to the delivery or funding of public programs or services such as education, health, regulatory enforcement or social assistance;
- related to events occurring in the 15 years preceding the claim;
- based on Aboriginal rights or title; and
- based on treaty rights related to ongoing activities such as harvesting (clause 15(1)).

With the exception of a new bar to claims based on treaty rights, these prohibitions are identical to those set out in Bill C-6.[51] The rationale for excluding claims involving public program delivery or funding, or events in the recent past, is unclear. With respect to the latter prohibition, the 15-year cut-off may reflect departmental practice, although no such policy is explicitly stated in *Outstanding Business*. The exclusion of claims involving the prescribed category of treaty rights reflects the explicitly limited scope of treaty-related claims under clause 14(1)(*a*), with the result that any such claims would have to be advanced in a different forum.

The prohibition of specific claims alleging Aboriginal title is a continuation of federal policy set out in *Outstanding Business* and elsewhere, under which title is viewed as a comprehensive claim matter. The issue of "site-specific" Aboriginal rights – i.e., those that do

(50) For example, many treaties contain provisions related to the education of First Nations signatories; Treaty 6 also contains an explicit medicine clause. This condition, combined with the prohibition in clause 15(1)(*d*) against the filing of claims related to the delivery or funding of programs related to, *inter alia*, health or education would not appear to allow a specific claim based on such provisions.

(51) The JTF draft legislation would not have prohibited claims under these headings, with the exception of those based on Aboriginal rights or title.

not involve title per se – is touched upon in the 1998 JTF Report, which noted the First Nations perspective that they "can suffer damage due to infringement on such rights, but they do not have access to comprehensive claim negotiations. … [S]uch issues are no less lawful obligations than any other specific claim." The JTF draft legislation would have enabled the Commission to process a claim based on Aboriginal rights or title with the agreement of the parties, and would also have authorized all treaty-related claims.

It may be noted that the non-statutory DIAND-AFN Political Agreement of November 2007 lists claims excluded by Bill C-30 among the matters in relation to which the parties "are committed to work together to inform ongoing policy work."

In addition to substantive prohibitions, Bill C-30 provides that a claim may not be filed (1) when the same assets – including lands – or facts are at issue in unadjourned proceedings between the Crown and the First Nation before an adjudicative body other than the Tribunal *and* (2) irreconcilable decisions could result (clause 15(3)). Similarly, a claim is discontinued if, during the SCTA process, a claimant initiates, takes new steps in, or does not adjourn such a proceeding (clause 37). Claims that are not seeking compensation, are seeking a remedy that is not monetary or that exceed the claim limit of $150 million[(52)] are also precluded (clause 15(4)).

c. Filing of Claims (clause 16; related transitional clauses 42-43)

Under the SCTA, specific claims may not be filed with the Tribunal directly, and may be filed only under prescribed conditions. Claimants must first file their claim with the Minister (clause 16(1)) in the prescribed form and with the prescribed content (clauses 16(2) and (3)), and thereafter may file with the Tribunal only if:

- in the decisional, pre-negotiation phase, the Minister has either notified the claimant of a decision not to negotiate all or part of the claim, or has failed to notify the claimant of any decision within three years of the claim being filed; and

- in the negotiation phase, the Minister has either consented to the filing of the claim with the Tribunal, or the claim has not been finally resolved within three years of the Minister's decision to negotiate (clause 16(1)).

(52) See clause 20(1)(*b*).

That is, under the SCTA, decisions as to whether claims are to be negotiated remain with the Minister. The bill allows the Minister three years to determine that issue and, in the event of a positive decision, an additional three years to complete negotiation of the claim. In some instances, this may mean that a claimant with a valid claim or claims will, in the absence of ministerial consent, be precluded from approaching the Tribunal for six years following the filing of their claim(s) with the Minister. As noted above, Bill C-30 does not subject Tribunal operations to any time limitations.

In addition, the SCTA's transitional clauses deal with the administrative treatment of specific claims (1) submitted or (2) being negotiated prior to the coming into force of the legislation, for purposes of the clause 16 timeline governing access to the Tribunal. The former are deemed to have been filed, and the Minister is deemed to have notified the claimant of a decision to negotiate the latter, on the day the bill takes effect (clause 42(1)). Accordingly, within six months of that day the Minister is required to examine each such claim – excluding those concerning which a decision has been made not to negotiate – and to notify claimants of the effective date of their claim submission or the Minister's decision to negotiate (clause 42(2)).[53] The practical effect of clause 42 is to return the clause 16 clock to zero for all claimants with active claims, irrespective of when their claim was submitted, or a decision to negotiate the claim was made, under the pre-SCTA system.

Claimants notified of a decision not to negotiate a claim prior to the coming into effect of Bill C-30 may not file the claim with the Tribunal under clause 16 on the basis of that decision, but may resubmit the claim after the legislation is in force (clause 43). The purpose of and rationale for delaying access to the Tribunal for these claimants are unclear.

It would not appear clause 43 is intended to "cover" claims currently before or that have been dealt with by the Indian Specific Claims Commission following a negative decision. Neither Bill C-30 nor the Political Agreement provides explicitly for the transitional treatment of such claims, or makes any reference to the ICC.[54]

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(53) Claims that do not contain the information required by clause 16(2) may nevertheless be deemed to have been filed on the day the legislation takes effect if that deficiency is remedied within six months of the Minister's request for additional information (clauses 42(2)(*c*) and (3)(*a*)), failing which the claim will be filed on the date the information is received (clause 42(3)(*b*)).

(54) According to AFN documentation, it would appear there is agreement that these claims "ought to be given the option to proceed to the Tribunal rather than re-filing [the claim] with the federal government." See: Assembly of First Nations, "A Guide to the New Approach for Resolving Specific Claims," Ottawa, November 2007, http://www.afn.ca/misc/SC-guide.pdf.

4. Tribunal Hearings and Decisions (clauses 17-38)

a. General (clauses 17-18; related clauses 26-27)

Provisions under this heading closely resemble their counterparts in Bill C-6. The SCTA authorizes the Tribunal to hold hearings when and where it decides (clause 18) and in "any manner [it] considers fit" (clause 26). Hearings must be public, unless the Tribunal decides on application by a party that the need for confidentiality outweighs the public interest (clause 27). On application, the Tribunal may, at any time, order that a claim be wholly or partly struck for prescribed reasons (clause 17).(55)

b. Decisions on Validity and Compensation (clauses 19-20)

Bill C-6 treated the determination of a claim's validity and that of compensation as distinct processes. The SCTA does not specify whether Tribunal hearings will deal with questions of validity and compensation concurrently, or whether, following a positive decision on validity, the claimant will be required to enter negotiations with the Minister on compensation.(56)

1) Validity (clause 19; related clause 29)

As was the case under Bill C-6, the Tribunal may not, when deciding on the validity of a specific claim, consider any legal rule or doctrine that would limit the claim on the basis of time elapsed or delay. Subject to this stipulation, the Crown is entitled to raise any defence before the Tribunal that would be available to it in court proceedings (clause 29).(57)

2) Compensation (clause 20; related clause 36)

Under clause 20(1), Tribunal decisions on compensation must be confined to monetary awards (*a*), which must neither exceed $150 million for a given claim (*b*)(58) nor include punitive or non-pecuniary damages (*d*). In all cases, the standard of "just compensation"

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(55) A claim may be struck because it does not fall within the grounds set out at clause 14, has not been filed by a First Nation, is frivolous or premature, or may not be continued per clause 37, that is, owing to non-adjourned proceedings against the Crown relating to the same facts or assets.

(56) AFN documentation suggests both issues will be determined in one proceeding. See note 54.

(57) This is the gist of section 24 of the *Crown Liability and Proceedings Act*, to which clause 29 refers.

(58) The treatment of claims excluded by the monetary cap is among the topics for further discussion under the DIAND-AFN Political Agreement.

applies (*c*). For purposes of the claim limit, the Tribunal must treat two or more specific claims as one claim, whether made by the same or by different claimants, when they are based on the same facts *and*, in the case of different claimants, relate to the same assets (clause 20(4)).[59]

In addition, Bill C-30 requires the Tribunal to limit compensation awards against the Crown to the extent of its fault in the event of third party causation of or contribution to a claimant's losses (clause 20(1)(*i*)). Should the Tribunal decide that a province with party status[60] caused or contributed to those losses in a given case, it *may* award compensation against the province to the extent of its fault (clause 20(6)).

The SCTA also prescribes the bases on which compensation awards are to be calculated in relation to various categories of claims (clause 20(1)(*d*) through (*h*)). For example, where a claimant establishes that inadequate compensation was paid in the past in relation to lands taken under legal authority, the Tribunal "shall award compensation equal to the market value of [the lands] at the time they were taken brought forward to the current value of the loss, in accordance with legal principles" (*e*). Where a claimant establishes that lands claimed were not lawfully surrendered, the Tribunal "shall award compensation equal to the unimproved market value of the lands" (*g*). Furthermore, the Tribunal must, having calculated the compensation award, deduct from it the current value of any benefit "received by the claimant in relation to the subject-matter of the specific claim" (clause 20(3)). The specific context this stipulation appears designed to address is unclear.

Under Bill C-30, as under Bill C-6, the Crown may pay an award of compensation in instalments over no more than five years from the date of the Tribunal's decision (clause 36(1)).[61]

3) Unlawful Disposition of Reserve Lands (clause 21)

Like Bill C-6, the SCTA makes special provision for compensation awards in relation to some specific claims based on illegal disposition of reserve lands. It stipulates that, where compensation is awarded for a claimant First Nations community's losses arising from the

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(59) This requirement is distinct from the Tribunal Chair's authority under clause 8 to order, on application by a party, that distinct claims be subject to one claim limit. Where claims of different claimants are treated as one for purposes of the claim limit, the SCTA, like Bill C-6, requires the Tribunal to apportion the total compensation award equitably (clause 20(5)).

(60) See clause 23.

(61) Unpaid balance will bear simple interest from the date of the award at the Bank of Canada's overnight rate plus 2.5% (clause 36(2)).

unlawful disposition of all its interests in and to land *that have not been restored*, the claimant's interests in the land are "released."(62) In this case, the claimant reserves the right to initiate proceedings against a province that was not a party to the claim (clause 21(1)). In the event of compensation awarded for unlawful disposition of a partial interest in reserve land, the person having the partial interest is deemed to have had it as if the disposition had been lawful (clause 21(2)).(63)

c. Other Process Matters (clauses 22-33)

Under other SCTA provisions related to the Tribunal process:

- If the Tribunal considers that its decision on a specific claim could affect the interests of a province, First Nation or person, the Tribunal must so notify that entity or person (clause 22).

- The Tribunal may not exercise jurisdiction over a province unless it has party status, which the Tribunal *must* grant in the event the Crown alleges that a duly notified province bears or shares responsibility for a claimant's losses. In cases where no provincial responsibility is alleged, the Tribunal *may* allow a province's application for party status (clause 23).(64)

- The Tribunal also has discretion to grant status to a duly notified First Nation on its application (clause 24) and may further grant leave to a duly notified First Nation or person to intervene before it (clause 25). Bill C-30 does not provide for the latter to obtain party status.

- A party may withdraw an issue from the Tribunal's consideration any time before the latter decides the issue. Such withdrawal does not preclude consideration of the matter at a later date (clause 30).(65)

- The SCTA provides that evidence presented during a Tribunal hearing is not admissible in any other proceeding, with the exception of judicial review (clause 31).

- All Tribunal decisions must be in written form and must be published (clause 33).

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(62) Normally, under the *Indian Act*, a First Nations community's interests in reserve lands may not be surrendered in whole or in part unless the surrender is made to the Crown, approved by a majority of the community's electors, and accepted by the Governor in Council. The DIAND-AFN Political Agreement provides for the review of policies and practices related to additions to reserve for First Nations communities affected by the SCTA's release provision that seek to re-acquire or replace lands lost.

(63) It is unlikely that the bill's reference to unlawful disposition of "land" in the first case and of "reserve land" in the second is significant, since the relevant ground for filing a specific claim set out at clause 14 refers to the illegal disposition of "reserve lands."

(64) In both cases, the province must certify that it has taken steps to be bound by the Tribunal's decisions.

(65) The JTF draft legislation proposed that withdrawal from a hearing following referral on validity or compensation precluded subsequent referral on the same issue.

d. Effect of Panel Decisions (clauses 34-35)

Under the SCTA, Tribunal decisions are subject to judicial review by the Federal Court of Appeal[66] under the *Federal Courts Act*[67] (clause 34(1)). Unlike an appeal process, judicial review does not allow a court to replace the challenged decision. Rather, if that decision is found to be flawed on the basis of well-defined legal grounds, it will be set aside and the matter will typically be returned to the Tribunal for reconsideration.

Tribunal decisions will be "final and conclusive between the parties in all proceedings in any court or tribunal" that are based on the same facts, and will not be subject to review (clause 34(2)). This formulation differs from that of Bill C-6, which also explicitly prohibited appeals of panel decisions, raising an interpretive issue as to whether and under what circumstances appeals of Tribunal decisions may be possible.

The SCTA also sets out "release and indemnity" provisions identical to those in Bill C-6 (clause 35). They stipulate that in the event of (1) a Tribunal order that a claim is invalid or (2) a Tribunal award of compensation for a specific claim:

- any respondent party is released from any further action/claim by or liability to the claimant First Nation or its members of any kind that is based on the same facts as the original claim (*a*); and

- the claimant will be obliged to indemnify any respondent party against any amount for which the latter becomes liable as a result of a proceeding for damages initiated by the claimant or its members "*against any other person*," where this proceeding is based on the same facts as the original claim (*b*).

Assuming that clause 35(*b*) is designed to prevent "double compensation" for a single claim, clarification may be required to ensure its effect is not somewhat broader. That is, that the provision does not capture, for example, a claimant who initiates an action in damages against a province that was not a party to the original claim,[68] when clause 21, described above,

(66) Bill C-6 did not specify whether review would be undertaken by single Federal Court judges or appellate panels under the then *Federal Court Act*. The JTF draft legislation had recommended that the Federal Court of Appeal be the reviewing body.

(67) R.S.C. 1985, c. F-7.

(68) See clause 23.

explicitly authorizes a claimant to take such an action.(69) This and other similarly ambiguous circumstances may raise questions as to the absence of any exceptions or ceiling to this indemnification obligation.

C. General (clauses 39-41; Schedule)

Under Bill C-30, the Governor in Council may make regulations to add any agreement related to Aboriginal self-government to Part 2 of the Schedule (clause 39),(70) which currently lists 11 Yukon First Nations communities with broad self-government agreements in place.(71)

Clause 40 of Bill C-30 requires the Tribunal Chair to submit an annual report to the Minister of Indian Affairs. Interestingly, in light of the chronic resource shortages that have been underscored by critics of the existing specific claim process, the report *may* include "a statement on whether the Tribunal had sufficient resources, including a sufficient number of members, to address its case load." The legislation does not provide for any ministerial or departmental remedial action in the event the report points to inadequate resources.

The SCTA review mechanism obliges the Minister of Indian Affairs to conduct a broad review of the Tribunal's mandate, functions and effectiveness within six years of the bill's coming into force.(72) Under the SCTA, as under Bill C-6, "the Minister shall give First Nations an opportunity to make representations" during the review process (clause 41(1)). The AFN-DIAND Political Agreement of November 2007 provides for the participation of the AFN in the review, without specifying the nature or scope of that participation. Bill C-30 also requires the Minister to prepare a report – including any recommendations for change – within a year of the review for submission to both Houses of Parliament (clause 41(2)). **The House Committee amended this provision to stipulate that the report should also contain "the representations which have been made by First Nations."**

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(69) This could be the case if the term "any other person" includes the province, and the province were to add the federal Crown as a co-respondent/defendant to any action initiated by the claimant without the latter's involvement.

(70) Bill C-6 also authorized the Cabinet to prescribe anything that might be prescribed under the legislation.

(71) These agreements under the 1993 Umbrella Final Agreement with the Council of Yukon First Nations are not constitutionally protected under section 35 of the *Constitution Act, 1982*. Additions to Part 2 of the Schedule may eventually include agreements with the three Yukon communities with which final land claim and self-government agreements have not been concluded.

(72) This scheme differs from that proposed in Bill C-6 and the JTF draft legislation: the former proposed review of the Centre it established within three to five years of the bill's taking effect, while the latter proposed a joint AFN-DIAND review every five years.

D. Consequential Amendments, Repeal and Coming into Force (clauses 44-53)

Bill C-30 repeals the *Specific Claims Resolution Act* (clause 52).

The bill's consequential amendments provide for the addition of the Tribunal, as a new public service body, to the schedules of the *Access to Information Act*, the *Financial Administration Act*, the *Privacy Act* and the *Public Service Superannuation Act*. Bill C-30 also adds the Tribunal to the list of bodies over which the Federal Court of Appeal has judicial review jurisdiction under the *Federal Courts Act* (clauses 44 to 51).[(73)]

The SCTA is to take effect 120 days after Royal Assent (clause 53).

COMMENTARY

Published reaction to Bill C-30 has not been extensive and has been limited, in the main, to that of a modest number of First Nations spokespersons. No editorial comment on the bill has been noted to date.

First Nations responses to the government's proposed reforms of the specific claims systems were reported first in relation to the Prime Minister's June 2007 announcement of the Specific Claims Action Plan, and may be described as tentative or mixed. Assembly of First Nations National Chief Fontaine participated at and endorsed the Prime Minister's announcement, describing it as a "positive response to what our people have advocated for decades." The BC First Nations Leadership Council expressed cautious optimism about the establishment of an independent body with authority to make binding decisions, declaring it long overdue, while also noting the need for an effective policy approach to be inclusive of all claims regardless of size and scope, and for full First Nations involvement in the development of legislation and policy. A resolution adopted at the AFN's July 2007 Annual General Assembly did not explicitly endorse the Action Plan, but directed AFN negotiators, *inter alia*, to advocate for implementation of recommendations in the December 2006 Senate Committee report as well as reforms proposed in the 1998 JTF Report; an expanded specific claim definition; sufficient resources to reduce the backlog of claims to 3 to 5 years; and a formal role in the appointment of the Tribunal's members.

(73) See clause 34(1).

Some First Nations focus group participants viewed proposed reforms as potentially progressive, while others doubted they would be put in place. A former co-chair of the 1998 JTF process questioned whether the government's plan would, in practice, assure independence and speed, noting that the government would be maintaining its decision-making role, with subsequent access to the Tribunal conditional on time factors or the parties' agreement.

The second phase of reported reactions to the specific claim reform package related to the introduction of the SCTA. In anticipation of the bill's introduction, the Chair of the BC Specific Claims Committee Chair advised the AFN National Chief of concerns among BC communities relating primarily to the absence of prior consultation about the contents of the legislation, and the $150 million claim limit that, in his view, would leave the resolution of larger claims at the government's discretion. The treatment of key issues in a separate political accord and the retention of full federal authority over appointments to the Tribunal were also raised as matters of concern.

On 27 November National Chief Fontaine welcomed Bill C-30 and the signing of the Political Agreement as "significant milestones," expressing confidence in the legislation as a joint product and describing the AFN-government process as a "model of partnership that could serve as a precedent" for further collaborative development of policy and legislation. In his view, Bill C-30 and the Agreement establish "a comprehensive approach to resolve specific claims" for which he anticipated significant support in Parliament.

The National Chief acknowledged criticism about the consultation process, adding however that "[a]t some point, we have to say what we have is as good as we're going to get," and that a good product had been achieved with Bill C-30. In turn, the BC spokesperson indicated that, while BC First Nations communities had ongoing concerns, the bill would be welcomed by most First Nations and would streamline the existing process. He concurred with the National Chief that the SCTA was "the most we're going to get." In Manitoba, the Chief of the Roseau River First Nation described the bill as a positive development to deal with ongoing frustration over land claims, adding that "[a]nything is better than what we had."

In reported commentary specific to Ontario, a spokesperson for the Mohawks of the Bay of Quinte viewed the SCTA's restriction to monetary compensation and prohibition of land compensation as significant flaws in the government proposal. The provincial Minister of Aboriginal Affairs took the position that the legislation was "useful for the very few claims that involve money and only money," but would not apply to a majority of specific claims in the province. Similarly, the Grand Council Chief of the Union of Ontario Indians suggested there was little point in bringing forward legislation to clear the claims backlog if Ontario's needs

were not addressed. The federal Minister of Indian Affairs maintained, in response, that most outstanding claims in Ontario are covered by the legislation, and that the Tribunal "will hear [land-related claims], but cannot award land as compensation."

Finally, a resolution adopted on 12 December 2007 by the AFN Special Chiefs Assembly, without explicitly approving the SCTA, encouraged First Nations to participate in the parliamentary process related to Bill C-30, and to recommend options, through the committee process, to address any oustanding concerns about the bill. The resolution directed the AFN to facilitate this regional and community participation, and directed the National Chief, in particular, to strongly advocate for the development of a process to address claims by First Nations the government considers "landless" or "unrecognized." It further called on government to, *inter alia*, ensure allocation of sufficient resources for all aspects of the specific claims process, as well as for full First Nations involvement in the tasks identified in the Political Agreement.

APPENDIX

SPECIFIC CLAIM DATA

The "National Mini Summary" issued by DIAND's Specific Claims Branch indicates that between 1 April 1970 and 30 September 2007:

- 284 of 1,366 specific claims advanced had been settled; and
- the 853 unresolved claims were in various stages of review by DIAND's Specific Claims Branch, claimants or the DOJ (612), in active/inactive negotiation (138), in active litigation (69), or before the ICC (34).(1)

A review of the Mini Summary by Province indicates that:

- over 50% of outstanding specific claims originated in First Nations communities in British Columbia (373) and Ontario (189);
- a significant percentage of outstanding claims had been pending for 10 or more years, and many had been initiated 15 to 25 years ago.(2)

Costs associated with some existing settlements are available from a variety of federal and provincial government sources. By way of example, documentation related to specific claim settlements in Saskatchewan from the mid-1980s through 2007 shows that:

- The cost to the federal and provincial governments of 30 treaty land entitlement (TLE)(3) claims settled with Saskatchewan First Nations totalled over $549 million, most to be paid by the federal government. Individual settlements ranged from about $3.1 million to $62.4 million, and averaged over $17 million.(4)
- 16 non-TLE specific claims in Saskatchewan cost a total of about $301 million. Individual settlements ranged from just over $400,000 to $94.6 million.(5)

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(1) The remainder have been closed (98), found to disclose no lawful obligation (96) or referred for administrative remedy (35). The National Mini Summary may be reviewed at: http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf. Provincial Mini Summaries may be reviewed at: http://www.ainc-inac.gc.ca/ps/clm/msp_e.pdf.

(2) DIAND, Specific Claims Branch, Public Information Status Reports, http://www.ainc-inac.gc.ca/ps/clm/pis_e.html.

(3) TLEs are a class of specific claim asserting that Canada did not provide the reserve land promised under treaty.

(4) Saskatchewan, Department of First Nations and Métis Relations, "Treaty Land Entitlement First Nations," http://www.fnmr.gov.sk.ca/lands/tle/tlefn-chart/.

(5) Saskatchewan, Department of First Nations and Métis Relations, "Specific Claims," http://www.fnmr.gov.sk.ca/lands/specific-claims/.