Legislative Summary **LS-431E**

BILL C-6: THE SPECIFIC CLAIMS RESOLUTION ACT

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LEGISLATIVE HISTORY OF BILL C-6

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	9 October 2002	First Reading:	19 March 2003
Second Reading:	9 October 2002	Second Reading:	2 April 2003
Committee Report:	6 December 2002	Committee Report:	12 June 2003
Report Stage:	4 February 2003	Report Stage:	19 June 2003*
Third Reading:	18 March 2003	Third Reading:	21 October 2003

Message sent to House of Commons: 21 October 2003
Concurrence in Senate amendments: 4 November 2003

Royal Assent: 7 November 2003

Statutes of Canada 2003, c.23

* The Bill, as amended, was not read a third time but was referred back to the Standing Senate Committee on Aboriginal Peoples "for the purpose of studying the impact on Bill C-6 of the recent Supreme Court decision recognizing the Metis people as a distinct Aboriginal Nation": 25 September 2003

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

Legislative history by Peter Niemczak

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BILL C-6: THE SPECIFIC CLAIMS RESOLUTION ACT*

Bill C-6, An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation and resolution of specific claims and to make related amendments to other Acts, was introduced in the House of Commons, read a second time and deemed referred to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources (the House Committee) on 9 October 2002.(1) The bill modifies the current specific claim process by creating a new administrative body that will include a Commission to facilitate claims negotiation and dispute resolution, as well as a Tribunal to make binding decisions on the validity of claims and compensation awards, to a prescribed maximum per claim. This initiative has long been under consideration by Aboriginal, government, and other stakeholders and observers.

Following the House Committee's consideration of witness testimony in hearings held 26 through 28 November 2002, Bill C-6 was reported back to the House on 6 December with several technical government amendments and one process-related opposition amendment. The bill underwent report stage debate on 7 and 8 February and was adopted by the House, as amended, on 18 March 2003.

Bill C-6 was given first reading by the Senate on 19 March and was referred to the Standing Senate Committee on Aboriginal Peoples (the Senate Committee) on 2 April, following second reading debate. On 12 June, at the conclusion of its hearings

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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) 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 on 16 September 2002. By motion adopted 7 October 2002, the House of Commons provided for the reintroduction in the 2nd session of legislation that had not received Royal Assent. The bills would be reinstated at the same stage in the legislative process they had reached when the previous session was prorogued.

held from 30 April to 11 June 2003, the Senate Committee reported the bill back to the Senate with a number of government-approved substantive amendments, as well as supplementary observations. Report stage debate on Bill C-6 began on 19 June 2003, when the Senate rose, and resumed on 16 September.

In an unusual development, on 25 September the bill was referred back to the Senate Committee "for the purpose of studying the impact on Bill C-6 of the recent Supreme Court decision recognizing the Metis people as a distinct Aboriginal Nation." Additional hearings on this topic were held from 30 September to 2 October 2003. Bill C-6 was reported back to the Senate without further amendment on 7 October, and the bill was adopted, as amended, on 21 October.

Procedurally, full Senate endorsement of amendments made in committee requires that the affected legislation be returned to the House for its consideration of the modifications. Accordingly, on 21 October a message was delivered from the Senate to the House to advise the latter of Senate amendments to Bill C-6. On 4 November 2003 the House of Commons concurred with the Senate amendments by a vote of 121-104.

BACKGROUND

Beginning in the early 1970s, Canada has instituted policies describing two broad categories of Aboriginal "claims" and outlining 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-6's proposed reform of the specific claim system.(2)

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,

(2) All documents referred to are available from the author upon request, and/or from the Library of Parliament's Information and Documentation Branch.

the *Indian Act* prohibited the use of band funds for claims against government. In 1947, the special Senate-Commons committee 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."(3) 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."(4)

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,(5) 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* in fall 1965 and was not reinstated.

3. The White Paper

In 1969, the Liberal government issued its controversial – later withdrawn – White Paper on Indian Policy.(6) It proposed repeal of the *Indian Act* and the termination of distinct "Indian" legal status, while acknowledging the existence of limited government 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.

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(3) 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.

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

(5) 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.

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

B. Developments from 1973-1990

1. The *Calder* Decision

The 1973 decision of the Supreme Court of Canada in *Calder et al.* v. *Attorney General of British Columbia*[7] 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.[8]

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."[9]

3. New Specific Claims Policy

In 1982, acknowledging that its specific claims policies to date had proved lacking,[10] the federal government issued *Outstanding Business: A Native Claims Policy – Specific Claims*.[11] Under the policy, claimants were required to establish the existence of one

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(7) [1973] S.C.R. 313.

(8) 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.

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

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

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

of four outstanding "lawful obligations,"[12] or of two reserve-related circumstances.[13] 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 considered it "imperative that the new process be shielded from political intervention," and proposed that legislation provide for both a neutral party to facilitate negotiated settlements, and a quasi-judicial process for instances of failed negotiations.[14]

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]."[15]

C. Developments from 1991

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

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(12) 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.

(13) 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.

(14) *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.

(15) *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.

Municipality of Oka. Events of the summer of 1990 prompted both renewed calls for review of claims processes, and a measure of government responsiveness.

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,[16] including the establishment of a joint AFN-DIAND working group to develop an independent claims process.[17] Subsequent initiatives announced by then Prime Minister Mulroney in April 1991[18] 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,[19] 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. 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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(16) The Assembly of First Nations, and First Nations generally, have generally not subscribed to the federal policy distinction between comprehensive and specific claims, describing it as arbitrary and without legal basis.

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

(18) 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.

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

(20) Indian Claims Commission, *Annual Report 2000-2001* (Ottawa: Minister of Public Works and Government Services Canada, 2001). The Report noted that, since its creation in 1991, the ICC had completed 55 inquiries. This and other ICC publications may be reviewed at http://www.indianclaims.ca/english/pub/pub.htm.

(21) In May 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: *Evidence*, Meeting No. 18, 29 May 2001.

3. Royal Commission on Aboriginal Peoples

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 which 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.(22)

4. Joint AFN-Government Working Groups

In July 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(23) 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;
- 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.

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(22) *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.

(23) 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.

5. Government Response

The creation of some form of ICB with broader powers has been on the Liberal government's agenda since the 1993 pre-election Red Book.(24) 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(25) and a federally controlled rather than a joint appointment process. Joint technical discussions on the federal proposal occurred in the ensuing period and, in October 2001, the Minister appointed a Chief Federal Representative for the ICB to inform First Nations communities and their organizations on the proposed body, and to work with the parties on outstanding ICB-related issues.(26)

D. Specific Claim Data

The "National Mini-Summary" issued by DIAND's Specific Claims Branch indicates that 252 of 1,201 specific claims advanced between 1 April 1970 and 30 June 2003 have been settled. The 771 unresolved claims are either in various stages of review (551), active/inactive negotiation (118), active litigation (73) or before the ICC (29).(27) Over 50% of outstanding specific claims have been filed by First Nations in the western provinces. It has been estimated that approximately 60 specific claims continue to be submitted to the federal government annually.(28)

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(24) 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, at http://www.inac.gc.ca/strength/change/html.

(25) 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."

(26) These developments are attested to in AFN documentation on the ICB process, at http://www.afn.ca/Programs/Treaties%20and%20Lands%20Unit/Independentclaims.htm. The documents indicate that in February 2002, the AFN Chiefs Committee on Claims concluded that it could not recommend First Nations endorsement of the federal proposal in its present form, and that the issues should be addressed at the political level.

(27) The remainder have been closed (70), found to disclose no lawful obligation (73) or resolved administratively (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.

(28) ICC Commissioner and former Co-Chair Daniel Bellegarde, in his 29 May 2001 testimony before the House Committee on Aboriginal Affairs, Note 21.

Costs associated with 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 and Alberta since the mid-1980s shows that:

- The cost to the federal and provincial governments of 29 settled treaty land entitlement (TLE)[29] claims with Saskatchewan First Nations totals over $539 million, most to be paid by the federal government. Individual settlements range from about $3.1 million to $62.4 million, and average over $18.5 million;[30]

- The cost of 11 settled TLE claims in Alberta is about $160.7 million, the provincial share being approximately one-third of that total, and the range of settlements being from $3 million to $31 million;[31]

- Twelve non-TLE specific claims in Saskatchewan cost a total of about $128.6 million. Individual settlements range from just over $400,000 to $34.5 million.[32]

DESCRIPTION AND ANALYSIS

The Specific Claims Resolution Act (SCRA or the bill)**, as amended by the Senate Committee,** consists of **88** clauses, divided in five parts, and a Schedule. This paper considers selected significant elements of the legislation, with reference to 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. Introductory provisions (clauses 2 and 3)

Under Bill C-6'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*),

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

(30) Saskatchewan, Department of Intergovernmental and Aboriginal Affairs, "Treaty Land Entitlement First Nations," available at http://www.iaa.gov.sk.ca/aboriginal/html/ILR/TLE/1stNations.htm.

(31) Alberta, Ministry of Aboriginal Affairs and Northern Development, "Treaty Land Entitlement Claims," available at http://www.aand.gov.ab.ca/media/treaty_land_entitlement_claims.pdf. In two cases, Canada undertook to provide, in addition, about $64.5 million for capital construction costs on new First Nations reserves resulting from the settlements.

(32) Department of Indian Affairs and Northern Development, Saskatchewan Region, unpublished document, November 2001.

or that is no longer a band under an Act or agreement related to self-government listed in the Schedule and that has not released its right to lodge a specific claim (*c*).[33] A "party" to a specific claim is: "any claimant" – by definition a First Nation; the federal Crown; and any province with party status under the bill. The SCRA's purpose clause is stated simply as the establishment of the Centre for the resolution of specific claims, as detailed further below (clause 3).

The bill 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.[34]

B. Part 1: Canadian Centre for the Independent Resolution of First Nations Specific Claims (clauses 4-19; related clauses 20(3), 22(1), 43(1))

Part 1 deals largely with organizational and administrative matters. The Canadian Centre for the Independent Resolution of First Nations Specific Claims (Centre) is to comprise a Chief Executive Officer (CEO), appointed by the Governor in Council on the recommendation of the Minister for a maximum five-year, renewable term of office, as well as two Divisions, the Commission and the Tribunal, whose respective roles and powers are set out at Parts 2 and 3 of the SCRA (clauses 5 and 8(1)-(2)). The JTF draft legislation did not envisage a separate CEO office, but rather that the Chief Commissioner and the Chief Adjudicator would each serve as the CEO of her/his respective Division.[35]

The Centre is to be responsible for "administering the affairs" of the Commission and, with prescribed exceptions,[36] those of the Tribunal; providing relevant translation and interpretation services; and informing the public about specific claims, the SCRA and its Divisions (clause 6). It may be worth noting that under clauses 22(1) and 43(1), the Chief Commissioner and Chief Adjudicator are also given responsibility for the "management of the

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(33) Scheduled acts and agreements include 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*, and eight Yukon First Nations Self-Government Agreements. See clause 26(2) under C.2, Process Relating to Specific Claims.

(34) JTF Report, "Proposed Final Draft of Legislative Drafting Instructions for an Independent Claims Body" (JTF Draft), section 4.

(35) *Ibid.*, subsections 6(1) and 21(1).

(36) See discussion of clause 43 under D.1, Composition and Role.

business and affairs" of her/his respective Division. The practical implications of this apparently dual attribution of authority over Commission and Tribunal affairs on their daily operations are unclear.

Bill C-6 provides that the CEO

- is to supervise and direct the Centre's work and staff (clause 7);
- is to have the rank of a deputy head – the equivalent, generally, of deputy minister rank[37] – for purposes of the *Financial Administration Act* (FAA)[38] (clause 9(1));
- may be appointed on a full-time or part-time basis (clause 8(4)-(5));
- may not act in a manner inconsistent with the office of CEO, but may also serve as Chief Commissioner (clause 8(6)).

The latter two points should be considered with clause 20(3), which stipulates that the Chief Commissioner must be appointed on a full-time basis. Taken together, the provisions highlight a potential conflict, in that if an individual were to be appointed as both CEO and Chief Commissioner, that combined role would represent more than a full-time position.

The SCRA establishes the Centre as a "separate employer" for public service personnel purposes (clause 10),[39] with exclusive authority over personnel management and labour relations.[40] Like the ICC, the Centre is to be located in the National Capital Region (clause 16). The federal Auditor General will be responsible for auditing and reporting on the Centre's accounts on an annual basis, while the Centre must present an annual report to the Minister to be tabled in both Houses of Parliament within 30 sitting days (clauses 17-18). It is

(37) See definition at subsection 2(1) of the *Public Service Employment Act*, R.S.C. 1985, c. P-33.

(38) Under subsection 12(1) of the FAA, R.S.C. 1985, c. F-11, the Treasury Board "may authorize the deputy head of a department or the chief executive officer of any portion of the public service to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board in relation to personnel management in the public service and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted."

(39) All employees in the federal public service are employed by the Crown. For bodies specified in Part II of Schedule I to the *Public Service Staff Relations Act*, the listed separate employers serve as the representatives of Her Majesty. In practice, that designation allows a measure of autonomy in the exercise of authority as an employer. Other separate employers include the Canada Customs and Revenue Agency, C.S.I.S., the National Research Council, the Office of the Auditor General, the Parks Canada Agency, and so forth.

(40) A non-exhaustive listing of specific exercises of that authority generally reflects those set out in the FAA for the Treasury Board, and includes matters such as remuneration, hours of work, awards, disciplinary standards and training (clause 11).

also required to submit a quarterly report detailing the compensation payable for resolved specific claims, as a result of either Tribunal decisions or other processes (clause 19).

C. Part 2: Commission (clauses 20-40**; related clause 76.1**)

1. Composition and Role (clauses 20-25)

The Commission will consist of full-time Chief and Vice-Chief Commissioners, to hold office for a maximum five-year, renewable term, and up to five additional full-time or part-time commissioners,(41) who will serve a maximum three-year renewable term. Commissioners will be appointed by the Governor in Council on the Minister's recommendation (clause 20). This appointment scheme appears generally comparable to those in other federal legislation.(42) In the specific claim context, it differs from that proposed in the JTF draft legislation in two significant respects: in not making eligibility for appointment contingent on joint AFN-ministerial recommendations, or requiring that regional representation be taken into account in the appointment process.(43)

In partial response to First Nations concerns about the lack of a joint appointment process in Bill C-6, the Senate Committee added a new provision requiring that, prior to making recommendations on appointments to the Centre,(44) the Minister "shall" enable claimants(45) to make representations concerning those appointments within a prescribed time period (clause 76.1). The amendment does not require the Minister to respond to those representations, nor to revise the appointment process set out in the bill as introduced.

Bill C-6 provides that the Commission will be responsible for

- administering funding for a First Nation to research, prepare and conduct its claim(s);(46)

(41) Under clause 20(2), the Governor in Council may increase or reduce that number at any time.

(42) See, for example, Part II of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, relating to the composition of the Canadian Human Rights Commission.

(43) JTF Draft, subsections 5(3)-(4).

(44) **That is, appointments as CEO under clause 5, or to the Commission or Tribunal under clauses 20(1) and 41(1) respectively**.

(45) **Defined for purposes of the new provision in an additional Senate Committee amendment, applicable during the first year of its implementation, as claimants under either the SCRA or the government's specific claims policy (new clause 77.1).**

(46) Under clause 25, no participant in the administration of funding for a specific claim may take part in a preparatory meeting or a dispute resolution process related to that claim.

- assisting the parties to use dispute resolution processes at any time to resolve specific claims; and

- referring issues of validity or compensation to the Tribunal (clause 23).

In carrying out these responsibilities, the Commission "may"

- establish rules of procedure for specific claims, not including Tribunal proceedings;

- establish criteria for funding a First Nation to develop its claim(s), and allocate funds accordingly;
- arrange for research and/or studies "agreed to by the parties";

- assist in the resolution of prescribed interlocutory [not final] issues;(47) and

- promote the use of dispute resolution processes, including negotiation, mediation, non-binding arbitration and, if the parties consent, binding arbitration (clause 24).

The JTF draft legislation required the Commission to establish policies on the resolution of claims by binding arbitration and to provide for it "on the request of the parties."(48)

The Commission's powers and duties do not explicitly include the establishment of a time frame for the processing of specific claims; it is not clear whether this matter might be covered by "rules of procedure." Time factors are not dealt with elsewhere in Part 2.

2. Process Relating to Specific Claims (clauses 26-40)

a. Filing Claims (clauses 26-27; related clauses 36(1), 74)

Under Bill C-6, 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 (clause 26(1)). The grounds set out at clause 26 generally mirror those established in 1982 in *Outstanding Business*,(49) and listed in the JTF draft legislation.(50) In a noteworthy addition – also recommended by the JTF – the SCRA

(47) See discussion of clause 47 under D.2, Panels, Hearings and Decisions.

(48) JTF Draft, paragraphs 12(1)(*a*), (*g*).

(49) See notes 12 and 13.

(50) JTF Draft, subsection 10(1). Unlike the JTF model, the SCRA does not include breach of lawful obligation arising from a unilateral undertaking on the part of the Crown.

explicitly includes fiduciary obligations among the legal obligations whose breach or non-fulfilment may be at issue in a specific claim.(51) The bill does modify some existing grounds. Under Bill C-6 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."(52) 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 treaty provisions that are unrelated to land and "assets."(53)

The legislation does not define compensation, suggesting that, as is the case under *Outstanding Business*, it need be not be limited to monetary awards.(54) Nor does the bill place a limit on the value of claims filed. DIAND documentation confirms that all claims "regardless of value [will] have access to the Commission and use of its services"(55) (emphasis added). The Commission must give notice that a specific claim has been filed to every province, First Nation or person whose interests might, according to information provided by a party to the claim, be affected by it (clause 36(1)).

Bill C-6 also 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;

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(51) 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 obligation owed by the Crown 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 Research Branch, prepared by the author in August 2000.

(52) Illegal lease of reserve land is also added to the ground related to illegal disposition of those lands.

(53) For example, many treaties contain provisions related to the education of Aboriginal signatories; Treaty 6 also contains an explicit medicine clause. This condition, combined with the prohibition in clause 26(2)(*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.

(54) The bill does, however, appear to limit compensation possibilities to historical losses; the JTF draft would have allowed claims based on potential losses, with the Minister's consent: JTF Draft, subsection 10(2).

(55) DIAND, *Backgrounder*, "Canadian Centre for the Independent Resolution of First Nations Specific Claims," Ottawa, 13 June 2002, on-line at http://www.ainc-inac.gc.ca/nr/prs/m-a2002/02156bk_e.html.

- related to the delivery or funding of public programs or services such as education, health, or social assistance;
- related to events occurring in the 15 years preceding the claim;
- based on Aboriginal rights or title (clause 26(2)).

The rationale for prohibiting claims involving either the funding or delivery of public programs(56) 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 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 not involve title *per se* – is touched upon in the 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 issue was "flagged for inclusion in the five-year review of the [recommended] new process."(57) 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.(58)

In addition to substantive prohibitions, Bill C-6 provides that a claim may not be filed (1) when the same assets 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 26(3)). Similarly, a claim will not be continued if, during the SCRA process, a claimant initiates, takes new steps in, or does not adjourn such a proceeding (clause 74).

The JTF draft legislation would not have prohibited the filing of substantive claims described in clause 26(2), with the exception of those based on Aboriginal rights or title, and would have prohibited filing claims that are the subject of ongoing proceedings, as described in clause 26(3).(59)

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(56) See note 51.

(57) JTF Report, p. 11.

(58) JTF Draft, subsection 12(4).

(59) *Ibid.*, subsection 10(3).

b. Preparatory meetings (clauses 28-30)

Under the SCRA, the Commission must call the parties to a preparatory meeting to review a filed claim and issues relevant to it (clause 28(1)).[60] Claimants may amend their claim(s) during or after the preparatory process (clause 29). When that process is completed, the Commission must suspend proceedings related to the claim until the Minister decides whether to negotiate it (clause 30(1)). In making that decision, the Minister may not consider any legal rule or doctrine that would limit the claim on the basis of time elapsed or delay (clause 30(2)). This stipulation is consistent with the claim-assessment policy set out in *Outstanding Business*, which also provides, however, that in the event of litigation, the government reserves the right to plead all available defences, including limitation periods.[61]

As in the rest of Part 2, the SCRA does not set time limits for the Minister's decision-making process. It does oblige the Minister to report to the Commission "at least every six months" on the status of the review, the expected date of her/his decision, and reasons for requiring additional time (clause 30(3)). The bill also provides that no passage of time between the submission of a claim to the Minister and her/his decision "may be considered . . . a decision not to negotiate" (clause 30(4)).

c. Validity of claims (clauses 31-32; related clauses 37, 56)

Following the Minister's decision not to negotiate a claim, the Commission must, at the request of a claimant, assist the parties to try to resolve the issue of the claim's validity using dispute resolution process(es) (clause 31).[62] At the parties' request, it must also allow a province, First Nation or person to be consulted during such a process, or a province or First Nation to participate as a party to it (clause 37).

The Commission is further required to act upon the request of a claimant to refer the question of validity to the Tribunal if it is satisfied that the claim is complete and has been considered by the Minister; dispute resolution processes have been exhausted; and the claimant has waived compensation for the claim in excess of the claim limit that is currently set under

(60) Additional preparatory meetings "may" be called at the request of a party, as may community meetings, "when appropriate," to enable broader involvement in preparing the claim (clause 28(2)).

(61) See discussion of clauses 54 and 64 under D.2, Panels, Hearings and Decisions.

(62) A claimant might also opt to leave the SCRA process at this point, either abandoning the claim or choosing to pursue it in the courts.

clause 56 at $7 million (clause 32(1)). It is unclear why such a waiver is required as a condition of referral to the Tribunal on the threshold question of a claim's validity.

Under *Outstanding Business*, a rejected claim could be re-submitted "should new evidence be located or additional legal arguments produced." Bill C-6 does not address the question of whether a withdrawn claim or a claim that has not been accepted for negotiation may be re-filed at a later date.

d. Compensation (clauses 33-35)

As the bill's structure makes clear, the SCRA treats the determination of a claim's validity and that of compensation as distinct processes. Following a ministerial decision to negotiate or a positive Tribunal decision on validity, the Commission must assist the parties to resolve the matter of compensation, using dispute resolution processes (clause 33).[63] The bill makes no further mention of the clause 32(1) waiver on compensation that a claimant must have completed in order to gain access to the Tribunal at the validity phase, leaving open the question of how or whether this waiver might influence the compensation phase before the Commission for affected claimants.

At a claimant's request, the Commission is obliged to refer the issue of compensation to the Tribunal if it is satisfied that:

- the claim's compensation component is complete and has been considered by the Minister during the dispute resolution process;
- dispute resolution processes have been exhausted;
- only monetary compensation is being claimed[64];
- the claimant has waived compensation in excess of the claim limit;
- the amount remaining in the compensation fund for the fiscal year is at least equal to the claim limit, using the bill's prescribed calculation[65] (clause 35(1)).[66]

(63) A claimant may, as at the preparatory stage, amend the claim to clarify or expand upon its position on the compensation component (clause 34).

(64) This is consistent with the proposal in JTF draft legislation: JTF Draft, subsection 12(3).

(65) The calculation involves (1) subtracting the amount of compensation awarded by the Tribunal in a fiscal year from the maximum compensation that may be awarded in that year, (2) multiplying the claim limit by the number of referrals to the Tribunal on the issue of compensation that have not been decided and (3) subtracting the result of (2) from the result of (1): e.g., $75 million – $28 million = $47 million; 4 x $7 million = $28 million; $47 million – $28 million = $19 million.

(66) Referrals on both validity and compensation must include the issue of allocation of responsibility between or among the respondent [defendant] parties at the request of a party (clauses 32(3) and 35(3)).

The last of these criteria could, in practice, prevent the Commission from referring one or more claims in respect of which all other conditions are met. The bill does not indicate how claims with pending compensation questions are to be managed. As previously mentioned, the JTF Report recommended a budgetary allocation over a five-year period, noting that "when the amount paid in settlements by negotiated agreement or Tribunal rulings [over the five-year period] reaches a certain pre-determined point, it will trigger a pause in the Tribunal case-load, until the next budgetary allocation is determined."(67)

e. General (clauses 36-40; related clauses 75 **and 76.2**)

The SCRA prohibits Centre appointees, employees and contractors from disclosing or giving evidence about claim-related information or documentation obtained during the course of their employment without the parties' consent (clause 38); the prohibition is subject to the public nature of the documents filed with the Commission and Tribunal (clause 75(1)).(68) Evidence presented during the course of dispute resolution under Part 2 is inadmissible before the Tribunal or in other proceedings unless all parties consent (clause 40)).

Under Bill C-6, Centre personnel are prohibited from representing a party before the Tribunal, while contractors hired to work on a specific claim may not represent a party on that claim (clause 39). **Under an analogous provision adopted by the Senate Committee, appointees to the Centre are also precluded from acting for a party on a specific claim they either worked on or knew of while in office. The amendment further provides that no appointee may work for DIAND or a First Nation that had a pending specific claim during her/his term in office for a period of one year (clause 76.2). While the latter provision responds in some measure to First Nations concerns that the Centre might, in practice, be unduly influenced by federal public service views, it would appear that witnesses' apprehension in this regard encompassed all Centre personnel and was not limited to movement between the Centre and DIAND.**

(67) JTF Report, p. 11. The Report acknowledged that coming to an agreement on the fiscal framework for specific claim settlements had proved most difficult.

(68) The Commission or Tribunal may, at a party's request, protect the confidentiality of a filed document if it concludes that the applicant's interest in non-disclosure outweighs the public interest (clause 75(2)).

D. Part 3: Tribunal (clauses 41-73)

1. Composition and Role (clauses 41-46; related clause 56(2))

The SCRA's administrative provisions relating to the appointment (by Governor in Council on the Minister's recommendation), numbers (maximum of seven, including a full-time Chief and Vice-Chief), terms of office (renewable, maximum of five or three years) and remuneration of the Tribunal's adjudicators largely correspond to those of Part 2 with respect to the Commission (clauses 41-42) and are generally in line with analogous measures in other federal legislation.(69) In provisions specific to Part 3: a majority of those appointed as adjudicators must be members of a provincial bar or the Chambre des notaires du Québec (clause 41(2)) and, in addition to the general managerial role assigned to both the Chief Commissioner and Chief Adjudicator, the latter's responsibilities related to striking panels and setting the Tribunal's rules are set out in explicit terms (clause 43(1)).

The Tribunal's chief responsibilities are to hold hearings and decide issues related to specific claims (clause 44). It "may" make rules for panel proceedings and practice in matters such as, *inter alia*, giving notice, presentation of arguments, summoning witnesses, production of documents, introduction of evidence and "imposition of time limits" (clause 45(1)).(70) These areas are generally consistent with those in which other adjudicative bodies are authorized to make rules, and set out in JTF draft legislation.(71) 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-6 does not specify what activities might be subject to Tribunal rules in this area. It does authorize a Tribunal panel to modify any time limit set by those rules, as did the JTF proposal (clause 46(*h*)).

Generally speaking, the exhaustive list of panel powers set out at clause 46 may be divided between those similar to the powers of administrative tribunals generally, and those particular to the specific claim context. The former, most of which reflect the JTF draft legislation,(72) include determinations of questions of law and fact within jurisdiction (*a*), witness and evidence-related authorities (*e*, *f*) and the awarding of costs (*i*).

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(69) See Part III of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, relating to the composition of the Canadian Human Rights Tribunal.

(70) Tribunal rules must be publicly available (clause 45(2)).

(71) JTF Draft, subsection 38(1).

(72) *Ibid.*, section 31.

Under the latter, panels may suspend hearings or delay decisions (*d*) – to await relevant court decisions, to allow the parties to resolve an issue or to prepare further, and so forth – and consider cultural diversity when applying the Tribunal's process (*g*). They may also order: that claims with issues in common be heard together or consecutively (*b*); that claims be decided together if individual decisions could be irreconcilable, or if the claims, whether made by the same or different claimants, are subject to one claim limit ((*c*), clause 56(2)). Neither of these matters is addressed directly in the JTF draft legislation.(73)

2. Panels, Hearings and Decisions (clauses 47-73)

Provisions under this heading set out the framework for the Tribunal's operations and address related matters.

a. Interlocutory and other applications (clauses 47-51)

Bill C-6 authorizes the Tribunal to deal with defined interlocutory issues. **As amended by the Senate Committee,** it provides that a party to a claim may ask the Tribunal to determine (1) **to summon witnesses or order that documents be produced in relation to a claim before the Commission;** (2) whether the claim that is the subject of the application and any other should be heard together or consecutively or decided together; and (3) any other issue that will enable dispute resolution processes to go forward, provided the parties to the claim consent (clause 47).

According to the bill's sponsor in the Senate, the amendment respecting the Tribunal's interlocutory authority is intended to enhance the parties' information-gathering capacity with respect to claims before the Commission, while placing the authority to compel with the Tribunal rather than the Commission seeks to preserve the latter's role as facilitator.

Applications under clause 47 will be decided by panels of one to three adjudicators (clauses 48-49).

A party to a claim may also apply to the Tribunal for an order that a claim be wholly or partially struck for prescribed reasons(74) (clause 50), a decision as to whether the

(73) The JTF model required that a panel not hold a hearing in the event of "competing claims": JTF Draft, subsection 27(3).

(74) A claim may be struck because it does not fall within the grounds set out at clause 26, has not been filed by a First Nation, is frivolous or premature, or may not be continued per clause 74, that is, owing to non-adjourned proceedings against the Crown before an external court or tribunal relating to the same facts or assets.

claim and any other are subject to one claim limit under clause 56(2), or a decision on any issue on which the parties consent (clause 51). Decisions under clause 51 will be final. A decision that one claim limit applies to two or more claims would necessarily occur prior to a compensation decision/calculation under clause 56. Applications under clauses 50-51, as well as referrals on validity and compensation, are to be dealt with by panels of three to five adjudicators (clause 52).

b. Decisions on validity and compensation (clauses 54-56)

i. Validity (clause 54; related clause 64)

As is the case for a Minister's decision on whether to negotiate a specific claim, a Tribunal panel 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 (clause 54). 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 64).[(75)]

ii. Compensation (clause 56; related clauses 46(*c*), 51(*a*), 65, 73, 77)

A Tribunal panel deciding the matter of compensation

- must calculate the pecuniary losses involved in the claim to either the prescribed limit that may be set under the Governor in Council's regulatory authority (clause 77), or a maximum of **$10** million dollars,
- may not award punitive or non-pecuniary damages,
- must award compensation against any respondent party in proportion to its responsibility (clause 56(1)),[(76)] and
- must treat two or more claims as one claim for purposes of the claim limit when (1) made by the same claimant and based on the same facts or (2) made by different claimants, based on the same facts and related to the same assets[(77)] (clause 56(2)).

(75) This is the gist of section 24 of the *Crown Liability and Proceedings Act* to which clause 64 refers.

(76) A panel's decision as to responsibility may conclude that any respondent is, or all respondents are, either not responsible or not wholly responsible for the claim (clause 55).

(77) If the claims are made by different claimants, the panel must apportion the total amount awarded equitably (clause 56(3)).

The bill's original claim limit of $7 million dollars was raised to $10 million by a Senate Committee amendment. Because First Nations witnesses before both House and Senate Committees identified the legislated compensation limit as a key flaw in Bill C-6, one that would deny access to the Tribunal for the majority of claimants, this amendment may not represent a significant change for First Nations with specific claims.

Under the SCRA's references to clause 56(2) and its single claim limit for more than one claim,

- the Tribunal's clause 46(*c*) authority to order that claims be decided together because they are subject to one limit under clause 56(2) is stated permissively;
- clause 46 does not authorize a panel to decide whether claims are in fact subject to one claim limit;
- notwithstanding clause 46(*c*), a Tribunal panel must decide claims together, unless the parties agree otherwise, if it determines that they are subject to one claim limit under clause 56(2) [or that they raise common issues resulting in a risk of irreconcilable decisions] (clause 65);
- the Tribunal is authorized by clause 51(*a*) to decide, on application by a party, whether claims are subject to one limit under clause 56(2).

The interaction among clauses 46(*c*), 51(*a*), 56(2) and 65 and the conditions for their combined application in practice appear somewhat unclear.

An additional matter worth noting in relation to clause 56 is that First Nations communities with valid claims may opt against seeking referral to the Tribunal on questions of compensation, whether because their claims exceed the limit and they are not prepared to complete the prescribed waiver, or for some other reason. This raises the issue of how the SCRA process might affect the decisions of First Nations communities with large specific claims.

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 73(1)).[78]

iii. Unlawful disposition or lease of reserve lands (clause 57)

Under section 39 of 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

(78) Unpaid balance will bear interest at the lowest bank rate (clause 73(2)).

Crown, approved by a majority of the community's electors, and accepted by the Governor in Council. The SCRA provides for by-passing the normal section 39 processes in the context of some specific claims based on illegal disposition or lease of reserve lands. It stipulates that, notwithstanding section 39, where compensation is awarded for a claimant First Nations community's losses arising from the unlawful disposition of reserve lands that have not been restored, the claimant's interests in the lands are extinguished. In this case, the claimant reserves the right to initiate proceedings against a province that was not party to the claim (clause 57(1)). Section 39 is also rendered inapplicable in the case of compensation awarded for the unexpired portion of a lease that was concluded by the Crown in violation of the claimant's rights, while third-party interests for the remainder of that period are protected (clause 57(2)).

c. Other process matters (clauses 59-70)

Under other SCRA provisions related to the Tribunal process,

- If a panel considers that its decision could affect their interests, the Tribunal must give notice of a claim to third parties that were not previously notified by the Commission (clause 59). It must also grant a province party status in relation to a claim, provided it submits to the Tribunal's jurisdiction (clause 60).(79)

- Tribunal panel hearings are to be public, unless a panel decides on application by a party that the need for confidentiality outweighs the public interest (clause 62).

- If a panel considering a specific claim is of the view (1) that a First Nation has another claim or potential claim based on the same facts or assets or (2) that any other claim or potential claim should be before the Tribunal in order to enable resolution of the original claim before it, it must suspend proceedings in relation to that claim until such time as the other claim or potential claim is also before the Tribunal (clause 66).

Clause 66 is concerned with related claims. The JTF model would have authorized, but not required, a panel to "adjourn generally or discontinue" a hearing that had been commenced if it determined that a "competing claim" existed.(80) Clause 66 requires the panel to "suspend" its hearing. The bill appears to presuppose that a First Nation with a potential specific claim will file it to facilitate resolution of the original claim, and does not address the

(79) The JTF draft legislation would have authorized a Tribunal panel to grant a province, First Nation or person intervener status, and party status to a First Nation as well as to a province: JTF Draft, section 29.

(80) *Ibid*., section 34.

possibility that it might not do so. Nor does it prescribe a time frame for the suspension of proceedings.

- A party may withdraw "an issue" from the Tribunal's consideration any time before the latter decides the issue, with such withdrawal not precluding consideration of the matter at a later date (clause 67). Under Bill C-6, the term "issue" includes validity, compensation, interlocutory matters under clause 47 and "any other issue" under clause 51. The JTF draft legislation proposed that withdrawal from a hearing following referral on validity or compensation precluded subsequent referral on the same issue.(81)

- As was recommended by the JTF draft legislation,(82) the SCRA provides that evidence presented during a panel hearing is not admissible in any other proceeding with the exception of judicial review (clause 68).

- All panel decisions must be made in writing, to be published in accordance with the Tribunal's selected method (clause 70).

d. Effect of panel decisions (clauses 71-72)

Under Bill C-6, Tribunal panel decisions are to be subject to judicial review by judges of the Federal Court of Canada's Trial Division(83) under the *Federal Court Act*(84) (clause 71(1)). Unlike an appeal process, judicial review does not allow a judge to replace the administrative tribunal's 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 be returned to the tribunal for reconsideration.

Panel decisions are not otherwise subject to appeal or review and, with the exception of decisions on clause 47 interlocutory issues, are "final and conclusive between the parties in all proceedings in any court or tribunal" that are based on the same facts (clause 71(2)).(85) In the sole exception to this *res judicata*(86) condition, a panel's decision that a

(81) *Ibid.*, subsection 33(1).

(82) *Ibid.*, section 39.

(83) The JTF draft legislation had recommended that the Federal Court of Appeal be the reviewing Court: *ibid*., section 45.

(84) R.S.C. 1985, c. F-7. The SCRA's sole non-substantive co-ordinating amendment relates simply to an anticipated change of the legislation's title to the *Federal Courts Act* (clause 84).

(85) The JTF draft legislation proposed a less comprehensive "privative" provision that would have made panel decisions "final and binding for all purposes and not subject to appeal": JTF Draft, subsection 35(1).

(86) The phrase means "a thing adjudged," or a matter that has been finally decided on its merits and that cannot be litigated again between the same parties.

claim is valid is to be conclusive only for purposes of the SCRA, and evidence of it will be inadmissible before any court other than in a judicial review proceeding[87] (clause 71(3)). This provision would come into play, for example, when a First Nation whose claim had been ruled valid by a panel opted, for whatever reason, to initiate court action at the compensation stage.

Bill C-6 also sets out "release and indemnity" provisions. They stipulate that in the event of (1) a panel order that a claim is invalid or (2) a panel award of compensation for a specific claim,

- any respondent party – by definition the federal and/or provincial Crown(s) – 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 (clause 72(*a*));

- the claimant will be obliged to indemnify any respondent party against any amount that the latter becomes liable to pay as a result of a proceeding for damages initiated by the claimant or its members "against any other person" that is based on the same facts as the original claim (clause 72(*b*)).

Assuming that clause 72(*b*) is designed to prevent "double compensation" for a single claim, it may be that its effect is somewhat broader. The provision would capture, for example, a claimant who initiates an action in damages against a province that did not submit to the Tribunal's jurisdiction and that was therefore not a party to the original claim.[88] Yet clause 57, described above, explicitly authorizes a claimant to take such an action. This and other potentially similar circumstances may raise questions as to the absence of any exceptions or ceiling to this indemnification obligation.[89]

E. Part 4: General (clauses 74-77; related clauses 56(1), 32(1)(*c*), 35(1)(*d*); Schedule)

As introduced, the SCRA required the Minister to conduct a review of the Centre within three to five years of the bill's coming into force, and to table the ensuing report,

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(87) The JTF draft legislation proposed that panel decisions on both validity and compensation not be admissible before another adjudicative body "for the purpose of obtaining compensation or any other remedy": JTF Draft, subsection 35(2).

(88) See clause 60.

(89) This is the case because "any other person" – such as a province, under clause 57 – might add the federal Crown as a co-respondent/defendant to any action initiated by the claimant without the latter's involvement or consent. Similarly, a court adjudicating in such a proceeding and not bound by the SCRA might apportion damages against the federal Crown that were not sought by the claimant.

including any recommendations for change, to both Houses of Parliament (clause 76). The sole opposition amendment adopted by the House Committee would have required that the Minister's clause 76 report be reviewed by the House of Commons Standing Committee on Aboriginal Affairs. Under a further Report Stage government amendment, "each House shall refer the [Minister's] report to the appropriate committee of that House."

The Bill C-6 review scheme differs from that of the JTF draft legislation, which proposed a joint AFN-DIAND review every five years.(90) **Under a Senate Committee amendment, "the Minister shall give to first nations an opportunity to make representations" during the review process.**

Under Bill C-6, the Governor in Council may make regulations to add any agreement related to Aboriginal self-government to the Schedule, and to prescribe anything that may be prescribed under the legislation (clause 77). The former will likely include, in the short term, agreements with Yukon First Nations that are in the final stages of the land claim and self-government negotiation process. The latter includes the claim limit under clause 56(1), as previously mentioned, and the form of the waiver a claimant must complete in order to gain access to the Tribunal under clauses 32(1)(*c*) and 35(1)(*d*).

F. Part 5: Consequential Amendments, Co-ordinating Amendment and Coming into Force (clauses 78-85)

The consequential amendments provide essentially for the addition of references to the Centre, as a new public service body, to statutes such as the *Access to Information Act*, the *Financial Administration Act*, the *Public Service Staff Relations Act* and so forth (clauses 78-83).

The SCRA's provisions are to take effect by order of the Governor in Council (clause 85). According to DIAND documentation, the Centre is expected to be operational about a year following Royal Assent, when it will replace the ICC; claims currently before the latter will be addressed prior to its decommissioning.(91)

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(90) JTF Draft, section 41.

(91) DIAND, "Questions and answers: Canadian Centre for the Independent Resolution of First Nations Specific Claims," Information Kit distributed 13 June 2002.

COMMENTARY

Since the SCRA's initial introduction in June 2002, reaction to it has, not surprisingly, come in the main from First Nations organizations whose constituents stand to be the most directly affected by it. At that time, then National Chief of the Assembly of First Nations Matthew Coon Come observed that, despite major concerns, he looked forward to the legislative process to address the need for important changes to the bill. Key areas identified by the AFN and others included the potential lack of independence of the bill's appointment process, the capped claim limit and the lack of a significantly strengthened financial commitment to the resolution of specific claims.

In second reading debate in the House of Commons following the bill's original introduction, the Minister of Indian Affairs noted that under the SCRA, resolving claims through the proposed simplified process would foster improved economic development for First Nations communities, while the Commission and Tribunal would be neutral arm's-length bodies, enhancing transparency and eliminating perceived conflict of interest. Departmental documentation further noted that the SCRA did not prevent the Minister from consulting with First Nations on appointments to the Centre, and that the claim limit was subject to eventual regulatory review.

In July 2002, the Assembly of First Nations Annual General Assembly adopted a resolution of non-support for the legislation "in its present form" based, in part, on the view that: the bill would not make the process fairer, more efficient or transparent; it differed significantly from Joint Task Force proposals; it would not provide an independent process, and could create a claims process worse than the current system.

In House Committee hearings held 26 through 28 November 2002, First Nations witnesses from across the country representing national and regional organizations as well as individual communities were unanimous in concluding that the bill, as introduced, did not retain basic elements of the JTF model and would not establish a satisfactory process for the adjudication of specific claims. Primary concerns raised largely echoed those of the AFN National Chief and General Assembly resolution outlined above, and stressed issues of independence, fairness and timeliness. First Nations witnesses suggested the legislation would not reduce claims-related litigation, and were critical of the lack of consultation preceding the legislation's introduction, as well as of the expedited nature of the legislative and committee process in relation to Bill C-6. Many described the bill as "fatally flawed" and called for it to be withdrawn in favour of a renewed joint process.

Then Chief Commissioner of the Indian Claims Commission Phil Fontaine portrayed the bill as one containing both strengths – such as the creation of an independent Tribunal and the focus on alternative dispute resolution – and weaknesses, such as the cap on compensation and continued ministerial control of the process. He emphasized the importance of respecting fundamental principles, including independence and access to justice, in the creation and operation of a specific claims body.

The Senate Committee's more protracted hearings from April to June 2003 elicited views essentially reflecting those outlined above from the Assembly of First Nations and other First Nations witnesses, and the newly appointed ICC Chief Commissioner Renée Dupuis.

First Nations spokespersons responding to the Senate Committee's amendments to Bill C-6 generally viewed them as inadequate to resolve the legislation's perceived flaws and omissions. In a letter dated 2 October 2003 to the Chair of the Senate Committee, recently re-elected AFN National Chief Phil Fontaine echoed this view. He was also critical of the government's failure to restore a joint process with the AFN to achieve a more satisfactory specific claims process.

Following House of Commons concurrence with Senate amendments, the National Chief expressed disappointment that First Nations opposition to Bill C-6 had not been heeded by the government. Others predicted that the legislation would be challenged in the courts.

The relatively scarce editorial commentary on the specific claims bill included the observation that while reforms to the specific claims system were welcome and necessary, in particular the finality of Tribunal decisions, questions remained as to how the new system would deal with larger claims.