

**BILL C-37: CLAIM SETTLEMENTS (ALBERTA AND  
SASKATCHEWAN) IMPLEMENTATION ACT**

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## LEGISLATIVE HISTORY OF BILL C-37

| HOUSE OF COMMONS  |                  | SENATE            |                  |
|-------------------|------------------|-------------------|------------------|
| Bill Stage        | Date             | Bill Stage        | Date             |
| First Reading:    | 17 October 2001  | First Reading:    | 4 December 2001  |
| Second Reading:   | 22 October 2001  | Second Reading:   | 17 December 2001 |
| Committee Report: | 28 November 2001 | Committee Report: | 19 February 2002 |
| Report Stage:     | 3 December 2001  | Report Stage:     |                  |
| Third Reading:    | 3 December 2001  | Third Reading:    | 20 February 2002 |

Royal Assent: 21 March 2002

Statutes of Canada 2002, c.3

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-37: CLAIM SETTLEMENTS (ALBERTA AND SASKATCHEWAN)  
IMPLEMENTATION ACT\*

Bill C-37, the Claim Settlements (Alberta and Saskatchewan) Implementation Act, was introduced in the House of Commons on 17 October 2001. The legislation is intended to facilitate implementing land claim settlements – primarily those resolving treaty land entitlement and specific claims – that entail expansion of the reserve land base of concerned First Nation communities in Alberta and Saskatchewan. Bill C-37 provides procedural mechanisms to achieve this aim for communities that elect to opt into the bill's scheme; it is not required to give effect to the relevant settlement agreements. Bill C-37 resembles legislation enacted in October 2000 relating to analogous claim settlements in Manitoba.<sup>(1)</sup>

**Following second reading on 22 October 2001, Bill C-37 was referred to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources for its consideration. The bill was reported back to the House without amendments on 28 November 2001 and adopted on 3 December.**

**Bill C-37 had a similarly uneventful passage through the Senate from 4 December 2001 to 20 February 2002.**

## BACKGROUND

### A. Land Claims

Long-standing federal government policy divides land claims into two broad categories: comprehensive and specific. Comprehensive land claims are based on the assertion

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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) Part 2 of the *Manitoba Claim Settlements Implementation Act*, S.C. 2000, c. 33.

of continuing Aboriginal rights and title that have not been dealt with by treaty or any other legal means, for example in British Columbia. Bill C-37 does not address this class of claim.

Specific claims maintain that Canada has failed to honour a “lawful obligation,” defined by government policy as non-fulfilment of a treaty or other agreement, breach of an *Indian Act* or other statutory responsibility, breach of a duty in the government’s administration of First Nations monetary or other assets, or illegal government surrender of First Nation land. Treaty land entitlement (TLE) claims – a class of specific claim – assert that Canada did not provide the reserve land promised under treaty.<sup>(2)</sup> A TLE claim may be either an initial or late entitlement claim, arising when a First Nation group maintains that it never received the land promised, or a shortfall claim alleging that the full amount of reserve land owed was not set aside.

According to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND), of the 1,089 specific claims submitted between April 1970 and 30 June 2001, a total of 227 specific claims had been settled,<sup>(3)</sup> of which 44 were in Saskatchewan, and 30 were in Alberta.<sup>(4)</sup>

## B. The Situation in Saskatchewan

### 1. TLE Claims

In September 1992, following years of negotiations concerning the federal Crown’s outstanding obligations – under Treaties 4 (1874), 6 (1876) and 10 (1906) – to set aside land as reserves,<sup>(5)</sup> the *Saskatchewan Treaty Land Entitlement Framework Agreement* (the Framework Agreement) was signed by Saskatchewan, Canada, the Federation of Saskatchewan Indians (FSIN) and 25 First Nations communities.

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(2) For example, Treaties 1, 2 and 5 provided that each family of five would receive 160 acres; Treaties 3, 4, and 6 through 11 pledged a square mile for each family of five.

(3) Specific Claims Branch, “National Mini Summary,” available via the Department of Indian Affairs and Northern Development website, at [http://www.ainc-inac.gc.ca/ps/clm/nms\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/nms_e.pdf).

(4) Specific Claims Branch, “Mini Summary by Province,” available at [http://www.ainc-inac.gc.ca/ps/clm/msp\\_e.pdf](http://www.ainc-inac.gc.ca/ps/clm/msp_e.pdf).

(5) Treaties 2, 5 and 8 are also represented in Saskatchewan.

Saskatchewan's involvement in the TLE process arises from the 1930 *Natural Resources Transfer Agreement* (NRTA),<sup>(6)</sup> under which Canada transferred most federal Crown land and minerals in the province to Saskatchewan (section 1) in return for the latter's commitment to make unoccupied Crown lands available to be set aside as reserves in fulfilment of Canada's treaty obligations (section 10). TLE negotiations in the province were complicated, in part, by the scarcity of productive unoccupied Crown land, particularly in southern Saskatchewan, that might adequately serve the interests of affected First Nations communities or "Entitlement Bands."

This and other practical concerns were ultimately resolved in the Framework Agreement.<sup>(7)</sup> Reduced to its essence,<sup>(8)</sup> this complex document provided that settlement funds of approximately \$440 million would be paid out over a 12-year period to enable each signatory First Nation to purchase, from its respective portion of these monies, the amount of land to which it was entitled (whether private land, or federal or provincial Crown land) on a "willing seller-willing buyer" basis. The total acreage potentially involved was approximately 1.56 million acres.<sup>(9)</sup> Under a cost-sharing agreement, the federal government assumed 70% of the overall costs of the settlement, with Saskatchewan covering the remaining 30%.<sup>(10)</sup>

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(6) The *Constitution Act, 1930*.

(7) The Framework Agreement was negotiated on the basis of recommendations by the Office of the Treaty Commissioner, established in 1989, whose key role included developing an "equity formula" designed to establish an outstanding acreage amount and a monetary payment based on this acreage for each Entitlement First Nation.

(8) A thorough review of TLE background and contents of the Framework Agreement may be consulted on the "Indian Lands and Resources" page of Saskatchewan's Intergovernmental and Aboriginal Affairs Department website, at <http://www.iaa.gov.sk.ca/>.

(9) Under the Framework Agreement, an Entitlement First Nation community is obliged to use entitlement monies to acquire entitlement land with acreage at least equal to its "shortfall acres," i.e., the minimal acreage that must be purchased and set apart as reserve land. Once its shortfall acres have been achieved, the community has more flexibility with settlement monies, and can elect to purchase additional land, or to use the funds for purposes such as economic development projects.

(10) The province also agreed to reimburse Canada up to 19% of its costs from provincial savings realized by the transfer of northern communities to reserve status. The Framework Agreement established two tax loss compensation funds totalling \$50 million to assist in offsetting the loss of tax revenues to be experienced by rural municipalities and school boards following the setting apart of non-taxable reserve land.

In 1993, Parliament enacted the *Saskatchewan Treaty Land Entitlement Act*<sup>(11)</sup> (Saskatchewan TLE Act) as part of the Framework Agreement's complex implementation process requiring companion provincial legislation, negotiation and ratification of individual "Band Specific Agreements" and trust agreements, and eventual acquisition of land and creation of reserves.<sup>(12)</sup> Since then, four separate but similar TLE agreements – to which the Saskatchewan TLE Act applies – have been reached, bringing the total number of Saskatchewan First Nations communities with TLE claim settlements to 29. All are scheduled in Bill C-37.

The total cost of TLE settlements in the province to date is \$539 million; the total land entitlement is just over 2 million acres. According to DIAND officials, approximately 399,000 acres have attained reserve status thus far through the TLE process. Sixteen Entitlement First Nations communities have achieved their shortfall acres.

## 2. Non-TLE Specific Claims

Federal government documents list ten First Nations groups with specific claim settlements containing as yet unimplemented reserve expansion commitments.<sup>(13)</sup> All ten are scheduled in Bill C-37.<sup>(14)</sup> The settlements provide for monies which may be spent to either purchase land for reserves on a "willing seller-willing buyer" basis or otherwise, in accordance with the terms of their individual trust agreements. DIAND figures show a total cost for these ten settlements of about \$112 million, and a total acreage of up to 142,000. To date, about 39,000 acres have been set aside as reserves under non-TLE specific claim settlements.

Because non-TLE specific claims involve matters solely between the affected First Nations community and the federal government, provincial participation is largely limited

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(11) S.C. 1993, c. 11. For a complete review of this legislation, see Legislative Summary LS-166, entitled *Bill 104: The Saskatchewan Treaty Land Entitlement Act*, prepared by Katharine Dunkley of the Parliamentary Research Branch, Library of Parliament, in March 1993.

(12) Among other things, the federal legislation confirmed the NRTA Amendment Agreement at Schedule I by which Canada released Saskatchewan from its section 10 obligations for "Entitlement Bands" under prescribed conditions.

(13) A few of these groups are also signatory to TLE settlements.

(14) The bill's schedule of existing specific claim settlements does not include those with the Canoe Lake (\$12 million) and Sturgeon Lake (\$4.5 million) First Nations communities, as neither included acreage that might be used for reserve creation. Hence the bill would not apply to these settlements.

to providing assistance, where possible, to smooth the transfer of land to reserve status, for example by identifying third-party interests on land selected by affected First Nations.<sup>(15)</sup>

### 3. Pending Claims

Specific Claims Branch figures to 30 June 2001 indicate that 57 claims are either under review by the government (30), in negotiation (10), in litigation (1), or under review by the Indian Claims Commission (16).<sup>(16)</sup>

## C. The Situation in Alberta

### 1. TLE Claims

Treaties 6 (1876), 7 (1877) and 8 (1899) are represented in Alberta, where TLE settlements result from agreements with individual communities rather than the broad framework approach taken in Saskatchewan and Manitoba. Alberta's involvement, like that of Saskatchewan, arises from NRTA obligations to transfer unoccupied Crown lands back to the federal Crown to enable the latter to fulfil treaty obligations. Most TLE settlements in Alberta, unlike those in Saskatchewan, do provide for the transfer of provincial crown lands, rather than "willing seller-willing buyer" land purchases.

DIAND documents outline six TLE settlements concluded with Alberta First Nations communities since 1991 and scheduled in Bill C-37.<sup>(17)</sup> According to DIAND figures, they supply about 130,000 acres (2,500 from the federal Crown) for addition to the communities' reserve land base – with further provision for the purchase of 12,000 acres on a "willing seller-willing buyer" basis – and total compensation of about \$133 million, Alberta's share being about \$22.7 million.<sup>(18)</sup>

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(15) In March 2000, Canada and Saskatchewan concluded a memorandum of Agreement on "Facilitation of the Implementation of Specific Claim Settlements."

(16) See "Mini Summary by Province," note 4.

(17) Alberta government online documents list 11 TLE settlements since 1986. According to DIAND officials, the remaining five have been largely implemented.

(18) As in Saskatchewan, Canada releases Alberta from its NRTA obligations with respect to any First Nation with a settled TLE claim in exchange for the province's commitment to contribute vacant provincial land or cash to the TLE settlements.



## 2. Non-TLE Specific Claims

Three Alberta specific claim settlements outlined in DIAND material and scheduled in Bill C-37 entail unimplemented commitments to add about 22,500 acres to the reserve land base of the communities concerned, at a total cost of about \$132.5 million.

## 3. Pending Claims

Specific Claims Branch figures to 30 June 2001 indicate that 52 claims are either under review by the government (25), in negotiation (18), in litigation (8), or under review by the Indian Claims Commission (1).<sup>(19)</sup>

### D. Reserve Expansion

Under subsection 91(24) of the *Constitution Act, 1867*, Parliament has exclusive legislative authority over “Indians and Lands reserved for the Indians.” The *Indian Act* represents the principal expression of federal authority over First Nations communities and the land reserved by the Crown, as the legal title holder of all reserves, for First Nations’ use and benefit, but it does not provide for the expansion of reserve land. Rather, this matter is dealt with under the federal “Additions to Reserves” (ATR) policy, which sets out acceptable grounds for expansion,<sup>(20)</sup> including specific claims settlements and procedural requirements. The ATR process, culminating in an Order in Council granting reserve status, can take up to three years.

The ATR process is not the only factor to complicate and delay reserve expansion. Generally speaking, federal legislation – including the *Indian Act* – has not taken account of the expansion process and does not adequately accommodate public or private third-party interests on land that may be selected for reserve status. Under the *Indian Act*, for example, a First Nation is authorized to create interests only on land that already has reserve status.<sup>(21)</sup> As a result, claim settlements with reserve expansion commitments require existing

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(19) See “Mini Summary by Province,” note 4.

(20) These include enhancing the geographic integrity of an existing reserve, meeting mounting community-development or housing needs and, in the majority of cases, settling historical grievances.

(21) The *Indian Act* defines “reserve” to include “designated lands,” and defines designated lands as “a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests.” Under the Act, “surrendered lands” means “a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.”

third-party interests on land that is selected for expansion to be cleared, or accommodated by a method acceptable to Canada, the third party and the First Nation. Only then is the land transferred to Canada and reserve status granted, and the third-party interest re-instated with the consent of the First Nation.

Parliament has attempted to resolve these obstacles to reserve expansion. The 1993 Saskatchewan TLE Act discussed above provided for Entitlement First Nations to consent to the granting of interests on “pre-reserve” land, thereby providing some degree of protection for third-party interests. However, this pre-reserve designation authority was limited to lands that had already been acquired and to pre-existing interests. In 2000, Part II of the *Manitoba Claim Settlements Implementation Act* (Manitoba TLE Act) sought to remedy these limitations for Manitoba First Nations that opted into the legislation’s scheme for facilitating reserve expansion under their claim settlements. The Manitoba TLE Act authorized the Minister, rather than the Governor in Council, to grant reserve status. It also enabled First Nations to designate both existing and new rights and interests on “pre-reserve” lands during the reserve expansion process, the intention being to enhance commercial certainty for third parties and First Nations.

DIAND documents suggest that the majority of land selections under existing and future Alberta and Saskatchewan claim settlements will be affected by at least one encumbrance, public or private. Bill C-37 is intended to effect, for First Nations communities in these provinces, improved reserve expansion processes analogous to those set out in the Manitoba TLE Act. The bill will also make minor amendments to the Manitoba TLE Act, and amend the Saskatchewan TLE Act to clarify that one pre-reserve designation scheme applies to any Saskatchewan TLE settlement.

## DESCRIPTION AND ANALYSIS

Bill C-37 consists of 14 clauses and a Schedule. The following description will focus on the most significant aspects of the proposed legislation.

### A. Application (clause 3)

Clause 3 provides the mechanism by which the legislation becomes applicable to an individual claim settlement agreement (agreement) involving reserve expansion/creation. For

a concluded agreement enumerated in the schedule and discussed above, a resolution of the First Nation Council assenting to the bill's application will suffice. In order for Bill C-37 to apply to a future agreement, the agreement must contain a stipulation to that effect.

#### B. Setting Aside of Reserves and Third-party Interests (clauses 5-7)

These are the bill's pivotal provisions. Clause 5(1) authorizes the Minister to set apart federal Crown lands as reserve lands in accordance with an agreement covered by the legislation. Federal Crown lands include those to which the federal Crown already holds title, or whose title is transferred to the federal Crown for the purpose of reserve expansion/creation. This ministerial authority will replace the current Order in Council process in the case of individual claim settlements for which the clause 3 "opt-in" has been exercised.

Reserve lands set apart by the Minister are subject to third-party rights or interests (e.g., leases, rights of way, mineral interests) if: (1) their continuation complies with the terms of the agreement in question; (2) they were granted under the *Federal Real Property and Federal Immovables Act*<sup>(22)</sup>; or (3) they are granted in accordance with the designation and permit processes outlined at clauses 6 and 7 of Bill C-37 (clause 5(2)). It is anticipated that the third option will be the preferred one.

##### 1. Designation (clause 6)

As previously mentioned, under the *Indian Act* the designation process may only be effected for existing reserves. Clause 6 of Bill C-37 addresses the designation by a First Nation community and the granting by the Minister of third-party interests on pre-reserve land. It is worth underscoring that, because designation of lands represents a form of surrender and, like a surrender, must be made to the Crown, only the Crown may actually grant the designated right or interest. Clause 6 provides that, for agreements covered by the legislation:

- A First Nation may designate any existing or first-time right or interest in lands that its council has requested be set apart as a reserve at any time in the land identification process,

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(22) Clause 5(2)(b) recognizes that the real property legislation – authorizing Canada to take title to lands that are subject to interests, to cancel those interests, and to grant them again – does not currently deal with interests on additions to reserves.

either before the lands are transferred to the federal Crown or before the Minister has actually set those lands apart as a reserve (clause 6(1)).

- Any such designation is subject to *Indian Act* provisions governing the designation process. Section 39 of that Act, for example, sets out procedural safeguards that render any designation void unless it is made to the Crown, assented to by a prescribed number of the First Nation community's electors, and accepted by the Governor in Council. Under Bill C-37, references to the Governor in Council are to be read as references to the Minister (clause 6(2)).
- If the Minister accepts the First Nation's designation, she/he may grant the third-party interest before reserve status is attained (clause 6(3)). However, both the designation and the granting of the interest become effective only if and when the lands are actually set apart as a reserve. If the targeted lands are not subsequently set apart, the designation is without effect. If reserve status is conferred, the designated interest and resulting grant are deemed to have been effected under the *Indian Act*, thus ensuring that the third-party interests are covered by that Act and other federal legislation that applies to reserves (clauses 6(3) – 6(5)).

## 2. Permits (clause 7)

Section 28 of the *Indian Act* authorizes the Minister to issue a written permit granting the right to occupy, use, reside on or exercise rights on reserve land for limited purposes and periods. Clause 7 of Bill C-37 outlines measures for the ministerial issuance of permits on pre-reserve land that reflect the terms of section 28, while allowing for permits relating to existing or new third-party interests to be granted at any time in the reserve expansion/creation process (clause 7(1)). Like clause 6, clause 7 addresses the timing of consents to third-party interests rather than the process by which such interests are approved under the *Indian Act*. As is the case with designation, permits issued under clause 7 will take effect only when the lands in question attain reserve status (Clause 7(2)), at which time the permits will be deemed to have been issued under the *Indian Act* to ensure the application to them of federal legislation that generally applies on reserves (clause 7(3)).

## 3. Related Amendments (clauses 8-14)

Clauses 9 and 10 of Bill C-37 amend sections 12 and 13 of the Manitoba TLE Act of 2000 by adding deeming provisions with respect to the taking effect of designations and

permits that are analogous to those of clauses 6 and 7 outlined above. The modification aims to ensure consistency between provisions of the Manitoba legislation and those of Bill C-37.

Clauses 12 and 13 modify provisions of the Saskatchewan TLE Act of 1993 as follows.

- Section 3 of that Act is amended with a view to ensuring that any agreement similar to the NRTA Amendment Agreement<sup>(23)</sup> and concluded in association with a claim settlement agreement based on the Framework Agreement is confirmed by the section;
- Section 9 of that Act, which authorizes more limited pre-reserve designations than those of Bill C-37, is modified by the addition of provisions under which the section ceases to apply to a TLE agreement – existing or future – if the concerned First Nation community has opted into the Bill C-37 scheme. In other words, the amendment is to ensure that only one pre-reserve designation system applies to a given agreement.

#### COMMENTARY

**Bill C-37 addresses a particular technical legal context and, as anticipated, appeared not to attract the attention of unaffected individuals or groups. In addition, neither potentially affected First Nations communities in Alberta and Saskatchewan nor their organizations requested to appear before the Parliamentary committees considering the legislation or made written submissions concerning it.**

**Before the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, an official from the Alberta Ministry of Aboriginal and Northern Affairs underscored the likely need for additional legislative or regulatory action to more fully facilitate reserve creation. In his view, this objective requires establishment of a surface rights regime to provide access over reserve lands to owners or lessees of subsurface mines and minerals.**

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(23) See note 12.