

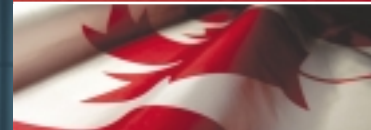


Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

# Resolving Aboriginal Claims

A Practical Guide to Canadian Experiences



Canada

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# 1. Introduction and Context

*"Canada is a test case for a grand notion - the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences. The story of Canada is the story of many such peoples, trying and failing and trying again to live together in peace and harmony."*

Royal Commission on Aboriginal Peoples, 1996

## Introduction


This paper on Aboriginal rights and title responds to widespread international interest in the Canadian context. Its primary objective is to share the Government of Canada's domestic experience of these issues with other nations interested in initiating and implementing similar processes with the goal of resolving outstanding Aboriginal claims to lands, resources and self-government.

This is also a contribution to the understanding of the international community regarding these issues in the context of the United Nations General Assembly's Decade of the World's Indigenous People (1995-2004), the Third Summit of the Americas and its Plan of Action, the creation of the UN Draft Declaration on the Rights of Indigenous Peoples, and the creation of the OAS Draft American Declaration on the Rights of Indigenous Peoples.

Finally, this guide is a response to the growing interest of Aboriginal organizations and communities in building closer links among themselves internationally, in order to get to know more about each other, share their common concerns, problems and conflicts, and initiate a broader search for strategic policies to tackle these issues.

### Landmark Events in the Development of the Concept of Aboriginal Rights and Title in Canada

- **1763** - Royal Proclamation marked British control over all of North America east of the Mississippi. Decried that, from this date forward, only the British Crown could deal with Indians on land issues
- **1764-1923** - a series of treaties were signed with Aboriginal groups. Some of the pre-confederation and all of the post-confederation treaties addressed reserve lands, hunting, fishing, trapping rights, annuities and other benefits
- **1867** - the Dominion of Canada proclaimed the *Constitution Act, 1867*. This set out the legislative authorities of the federal Parliament and provincial legislatures. Section 91 (24) gave the Parliament of Canada authority over "Indians, and lands reserved for the Indians"
- **1876** - *Indian Act* first enacted. Under this legislation, the Canadian Government regulated almost every aspect of the daily life of Aboriginal peoples
- **1939** - the Supreme Court of Canada ruled that the term "Indians" in section 91 (24) of the *Constitution Act, 1867* includes the Inuit
- **1969** - the federal White Paper called for a repeal of the *Indian Act* and an end to special status for Aboriginal peoples. Due to protests, it was withdrawn in 1971
- **1969** - *Calder* case launched, concerning Aboriginal title claimed by the Nisga'a in British Columbia. The 1973 Supreme Court of Canada decision led the federal government to develop policies for land claims
- **1982** - *Constitution Act* provided that "existing Aboriginal and treaty rights" are recognized and affirmed (section 35(1)) and that "the Aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada (section 35(2))
- **1983** - Section 35 amended to provide for Constitutional recognition of rights acquired through both existing and future land claim agreements. Rights were guaranteed equally to male and female persons, and there was a commitment to consult Aboriginal peoples prior to certain constitutional changes affecting them
- **1995** - *Inherent Right Policy* recognized the inherent right of Aboriginal peoples to self-government as an Aboriginal right within section 35 of the *Constitution Act, 1982*.



This document translates complex legal, historical and political issues into more easily understood text. While all attempts at accuracy have been made, errors or omissions may have occurred. The views expressed in this paper do not necessarily represent the official policies or legal positions of the Government of Canada.

## Brief History of Government-Aboriginal Relations and Evolution of Federal Policy on Aboriginal Peoples

Aboriginal peoples have occupied the lands of what is known today as Canada since time immemorial, and have many individual societies with their own heritages, languages, cultures, spiritual beliefs and contemporary issues. For instance, in Canada there are more than 600 First Nation communities (a term that came into common usage in the 1970s to replace the word "Indian," which many people found offensive), and the Inuit and Métis, that comprise 52 nations or cultural groups, 11 major linguistic families and more than 50 Aboriginal languages.

Historically, Aboriginal communities on Canada's east coast, in the central plains and around the Mackenzie and Yukon River basins were mainly nomadic hunters and gatherers, while the more sedentary communities on the Pacific coast harvested salmon, shellfish and whales from the sea. The Inuit of Canada's North hunted and fished through the Arctic barrens while Aboriginal communities around the Great Lakes were mainly sedentary and agricultural.

Today, there are approximately 2,300 reserves across the country, comprising more than 28,000 square kilometres (about the size of

Belgium). In addition, between 1975 and 2002, over 800,000 square kilometres of land have come under the direct control of Aboriginal groups through the comprehensive claims process. The Specific Claims program has enabled First Nations to acquire 861,683 square kilometres of land. Some reserves (originally rural) have gradually been surrounded by major cities such as Montreal, Vancouver, and Calgary. Around 60 per cent of Status Indians live on reserves. According to the 1996 national census, almost 50 per cent of Canada's Aboriginal population (Status and non-Status Indians, Inuit and Métis) now lives in an urban centre.

The Métis began as the offspring of three distinct peoples: Aboriginal, and English or French settlers. By the beginning of the nineteenth century, significant numbers of Métis peoples were living across the Prairie provinces. Their mixed heritage, combined with their experience as intermediaries between the factions competing for trade and territory, resulted in their emergence as distinct peoples with their own culture, institutions and ways of life.

Today, Aboriginal peoples seek a quality of life that other Canadians take for granted. The Aboriginal population is experiencing a baby boom and there remain unresolved grievances rooted in the past dealing with residential schools, land claims and the treaty relationship. Aboriginal people are more likely to be recipients of social welfare, to be unemployed, to be incarcerated, to live in poverty, to face increased health risks and to commit suicide than other people in Canada.

Together with Aboriginal peoples, the Government of Canada is transforming the federal approach to indigenous issues from an



earlier focus on "rights" and "grievances," into an integrated approach to quality of life, encompassing economic development, human capital, community infrastructure and governance. Comprehensive land claims negotiations remain an integral component of this agenda through the provision of an increased land base to Aboriginal groups within the process.

Government-Aboriginal relations can be divided into four historical periods:

- Contact/Cooperation (1600-1800)
- Decline/Assimilation (1800-1946)
- Aboriginal Revival (1946-1969)
- Reconciliation and Renewal (1969-Present).

### Contact/Cooperation (1600-1800)

In the 18<sup>th</sup> Century, the French and British were competing for control of lands in North America. The two colonial powers formed strategic alliances with Aboriginal groups to help them advance their respective colonial interests in the continent. For example, in what is now New Brunswick and Nova Scotia, the British made a series of "Peace and Friendship" treaties with the Mi'kmaq and Maliseet tribes between 1725 and 1779.

By the early 1760s, the British had established themselves as the dominant colonial power in North America. The *Royal Proclamation of 1763* prohibited the purchase of Aboriginal lands by any party other than the Crown. The Crown could purchase land from an Aboriginal group that had agreed to the sale at a public meeting of the group. The *Royal Proclamation* set the stage for the negotiation of legally binding agreements with Aboriginal peoples on a wide variety of issues.


### Decline/Assimilation (1800-1946)

Several treaties were signed after the Royal Proclamation and before Confederation in 1867. These include the Upper Canada Treaties (1764-1862, Ontario) and the Douglas Treaties (1850-1854, British Columbia). Under these treaties, the Aboriginal groups surrendered interests in land in exchange for other benefits that could include reserves, annuities or other types of payment, and certain rights to hunt and fish.

In 1867, Ontario and Quebec were joined with Nova Scotia and New Brunswick to form the Dominion of Canada. Today, Canada is not only an independent democracy, but also a federal state, with 10 provinces and three territories.

The national Parliament has power "to make laws for the peace, order and good government of Canada." Exclusive national powers include the following: taxation; defence; regulation of trade and commerce; "the public debt and property" (this enables Canada to make grants for a wide range of purposes to individuals or to provinces); the post office; the census and statistics; defence; the fisheries; international or interprovincial "works and undertakings" (including railways); and Indians and lands reserved for the Indians. The provincial legislatures have power over direct taxation in the province, natural resources, health and education, municipal institutions, local works and undertakings, and other issues of local concern.

Between 1871 and 1921, the Crown entered into treaties with various Aboriginal groups that enabled the Canadian government to actively pursue agriculture, settlement and resource development of the Canadian West and North. Because they are numbered 1 to 11, these treaties are often referred to as the "Numbered Treaties." The Numbered Treaties cover



Northern Ontario, Manitoba, Saskatchewan, Alberta, and portions of the Yukon, the Northwest Territories and British Columbia.

Under the Numbered Treaties, the Aboriginal groups who occupied these territories ceded vast tracts of land to the Crown. In exchange, the treaties provided for reserve lands and other benefits such as agricultural equipment and livestock, annuities, ammunition, gratuities, clothing and certain rights to hunt and fish on unoccupied Crown lands. The Crown also made promises regarding the maintenance of schools on reserves, or the provision of teachers or educational assistance to the Aboriginal groups. Treaty No. 6 also included the promise of a medicine chest.

For most Aboriginal peoples, however, settling in a permanent community was a new experience. The substantial reduction of their traditional hunting and fishing grounds made them highly dependent on non-traditional sources of livelihood and federal government support.

In 1876, the Government of Canada passed the *Indian Act*, which regulates aspects of daily life of Status Indians living on reserve. The act has been amended several times, most recently in 1985. Among its many provisions, the act establishes the structure for band governance, addresses education of Status Indians, and requires the Minister of Indian Affairs and Northern Development to manage certain monies belonging to First Nations, to manage Indian lands, and to approve or disallow First Nations bylaws.

During the first half of the 20<sup>th</sup> century, governments made several successive attempts to assimilate Aboriginal peoples into mainstream society. Many indigenous children were removed from their families and sent to

"residential schools" located away from their communities. These children were often forbidden to speak their own languages or to practice their cultures. While attempts at assimilation were ultimately unsuccessful, they helped contribute to the political, cultural and economic decline of many Aboriginal communities.

## Aboriginal Revival (1946-1969)

At the end of World War II, a greater sensitivity to the culture and heritage of indigenous peoples began to develop in Canada. At the same time, a new generation of Aboriginal leaders made great efforts to attain a fair and just consideration of their rights, and urged the government to make changes in Aboriginal policy.

In 1946, the Canadian Parliament established a special joint committee of the Senate and the House of Commons to consider a review of the *Indian Act*. Aboriginal leaders addressing the committee spoke out against the government's policy of assimilation and the power exercised by government officials over their daily affairs. The *Indian Act* was thoroughly reviewed in 1951 and some amendments were made.

Canada also began to implement policies to improve the living conditions of Aboriginal peoples. These included the recognition of the distinctiveness and richness of Aboriginal cultures, the dismantling of assimilationist policies, programs and supporting infrastructure (e.g., residential schools), the granting to Aboriginal people of citizenship and the right to vote in federal and provincial elections (in 1960, Aboriginal people were granted the federal vote - by 1968 all provinces had followed suit), and enhanced economic support. Partially as a result of these policies, improvements were made in the health, education and economic status of Aboriginal people by the mid 1960s.





In 1969, the Government of Canada released the "Statement of the Government of Canada on Indian Policy" (the "White Paper"), which proposed the elimination of the Department of Indian Affairs and the *Indian Act*, and the transfer of responsibility for Indian peoples to the provinces. Objections by Aboriginal leaders that this policy would ignore treaty and other rights led to the withdrawal of the White Paper by the federal government.

## Reconciliation and Renewal (1969-Present)

In 1969, the Nisga'a First Nation commenced litigation in which they claimed they had legal title to their traditional territory. The British Columbia Supreme Court rejected the Nisga'a arguments and ruled that no Aboriginal title existed. The Nisga'a took their case to the Supreme Court of Canada, which, while ruling against the Nisga'a on a technicality, ruled that the Nisga'a had a pre-existing title to the land based on their longtime occupation, possession and use of the traditional territory. The Court was evenly split on the issue of whether the Nisga'a title to the land had been extinguished when British Columbia joined the Canadian Confederation.

Following this case, the federal government opened the Native Claims Office in 1973 to negotiate with First Nations in areas of the country not covered by historic treaties, as well as to resolve, through negotiation, disputes related to treaty entitlements and related lawful obligations.

Existing Aboriginal and treaty rights were recognized and affirmed in the *Constitution Act, 1982*. Prior to 1982, the Crown could unilaterally extinguish aboriginal rights if it did so with plain and clear intent. Since 1982, however,

### Key Developments on Aboriginal Land and Resource Issues

- **1973** - Supreme Court of Canada divided in the *Calder* case on the issue of whether the Aboriginal title of the Nisga'a had survived until modern times. All judges recognized that Aboriginal title existed as a concept in Canadian common law, though they differed on the test necessary for its extinguishment
- **1973** - Government responded to *Calder* with the creation of an *Office of Native Claims*
- **1975** - *James Bay and Northern Quebec Agreement (JBNQA)* was the first comprehensive land claim settlement. Federal and Quebec governments, Hydro-Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association were party to this agreement
- **1982** - existing Aboriginal and treaty rights were recognized and affirmed in the *Constitution Act, 1982*
- **1986** - significant amendments to the federal comprehensive land claims policy were announced, following an extensive period of consultation with Aboriginal groups. Key changes to the policy included the development of alternatives to blanket extinguishment of Aboriginal rights
- **1990** - lifting of the limit of six comprehensive land claims under negotiation at any one time
- **1990** - in the *Sparrow* case, the Supreme Court held that the plaintiffs, the Musqueam Indian Band, had an Aboriginal right to fish for food, social and ceremonial purposes. The Court also found there is a fiduciary relationship between the Crown and Aboriginal peoples and section 35 of the *Constitution Act, 1982* must be interpreted consistent with this. The Court placed a high burden on the Crown to justify any infringement of rights protected by section 35
- **1993** - establishment of the British Columbia Treaty Commission (BCTC), an independent tripartite commission with the mandate to oversee the negotiation of claims in British Columbia
- **1998** - in the *Delgamuukw* case, the Supreme Court made general pronouncements on the scope and content of Aboriginal title
- **1999** - in the *Marshall* case, the Supreme Court ruled that there is an implied term in the Treaties of 1760-61 granting Mi'kmaq signatories a right to engage in traditional resource harvesting activities, including for purpose of sale, to the extent required to provide for a moderate livelihood. The Court clarified principles of evidence for interpretation of Indian historical treaties. In a clarification of its first decision, the Court stressed that the Crown can accommodate the historical involvement by non-Aboriginal persons in the resource industry in regulating a treaty right
- **2000** - the Nisga'a Final Agreement was concluded, marking the first time in Canadian history that both the land claim settlement and self-government arrangements were negotiated at the same time and given constitutional protection in a treaty
- **1975-2004** - sixteen comprehensive claims have been settled in Canada since the announcement of the Government of Canada's claims policy in 1973, the most recent being those of the eight Yukon First Nations, the Nisga'a Agreement, and the Tlicho Agreement.

the Crown no longer has that power, although the Crown can still infringe upon existing Aboriginal rights if it satisfies the justification test established by the Courts.

Following an extensive period of consultation with Aboriginal groups, in December 1986 significant amendments to the federal comprehensive land claims policy were announced, including:

- openness to the development of alternatives to blanket extinguishment of Aboriginal rights
- provision for the inclusion in settlement agreements of offshore wildlife harvesting rights, resource-revenue sharing, Aboriginal participation in environmental decision-making, and self-government arrangements
- provision for the establishment of interim measures to protect Aboriginal interests during negotiations
- the negotiation of implementation plans to accompany final agreements.

In 1990, the government announced that a six-claim limit on the number of comprehensive land claims negotiations the government would undertake at any one time had been eliminated, and the process was to be expanded.

Over the past 30 years, the Canadian courts have begun to define Aboriginal rights. For example, in 1990 the Supreme Court of Canada concluded in the *Sparrow* decision that the Musqueam Indian Band had an existing Aboriginal right to fish subject to justifiable limits such as conservation and public safety. This is just one example of an Aboriginal right. So far, Canadian law has confirmed that Aboriginal rights:

- exist in law
- may range from rights not intimately tied to a specific area of land, to site-specific rights, to Aboriginal title, which is a right to exclusive use and occupancy of land
- are site, fact and group-specific
- are not absolute and may be justifiably infringed by the Crown.

A number of Supreme Court of Canada decisions have also made reference to Aboriginal title. The most important of these is the 1997 *Delgamuukw* decision, in which the court said that:

- Aboriginal title is a communal right
- Aboriginal title, like other types of Aboriginal rights, is protected under section 35 of the *Constitution Act, 1982*
- Aboriginal title lands can only be surrendered to the federal Crown
- Aboriginal title lands must not be put to a use which is irreconcilable with the nature of the group's attachment to the land
- in order for the Crown to justify an infringement of Aboriginal title, it must demonstrate a compelling and substantive legislative objective, it must have consulted with the Aboriginal group prior to acting and, in some cases, compensation may be required.

Due to evidentiary problems with the case, the Supreme Court of Canada found that a new trial was required to determine whether the plaintiffs enjoy the claimed Aboriginal title. The Court also strongly urged the litigants to turn to the negotiation process as the preferred means of resolving these issues.

Despite such findings, the Supreme Court has remained silent, for the most part, on the actual *content* of Aboriginal rights, and the extent and



nature of these rights has been the subject of considerable debate. The Court has indicated on numerous occasions that negotiations are the best way to resolve issues associated with Aboriginal rights and title.

In the past, the provinces were not involved in negotiations with First Nations because the Government of Canada generally negotiated treaties in advance of settler populations and the creation of provincial governments. Today, however, most of the lands and resources which are the subject of comprehensive land claims negotiations are under provincial jurisdiction. Moreover, by establishing certainty of title to land and resources, claim settlements benefit the provinces. Canada therefore takes the position that provinces must participate in negotiations and contribute to the costs of the settlement.

Although land and resources in Canada's territories (the Yukon, the Northwest Territories, and Nunavut), are under federal jurisdiction, territorial governments fully participate in land claim settlement negotiations and in the implementation of resulting Final Agreements.

In 1995, the Government of Canada adopted policy which recognized the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. The *Inherent Right Policy* is based on the assumption that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The subject matters over which Aboriginal groups exercise self-government powers are set out in negotiated agreements.

In April 1991, Canada created a *Royal Commission on Aboriginal Peoples (RCAP)* to examine Aboriginal issues. In response to the 1996 *RCAP* report, the Government of Canada announced *Gathering Strength: Canada's Aboriginal Action Plan* in January 1998. This plan reaffirmed that treaties will continue to be central to future government-Aboriginal relations.

In addition to the programs outlined above, the Government of Canada has also recognized the need to modernize the *Indian Act*, and legislation has been introduced to provide more effective tools for accountability and community governance.

*The Government's vision for the future of Aboriginal peoples is enabling them to achieve the same standard of living, quality of life and opportunity equal to those of other Canadians and to live self-reliantly while all Canadians are enriched by Aboriginal cultures and are committed to the fair sharing of the potential of their nation.* ('Building a New Partnership', Department of Foreign Affairs and International Trade paper, 1995.)



## 2. Types of Aboriginal Claims Processes

*"There are a number of compelling advantages to the negotiation process, as the Federal Government sees it. The format permits Natives not only to express their opinions and state their grievances, but it further allows them to participate in the formulation of the terms of their own settlement. When a settlement is reached, after mutual agreement between the parties, a claim then can be dealt with once and for all. Once this is achieved, the claim is nullified."*

*"In All Fairness: A Native Claims Policy," Indian and Northern Affairs Canada paper, Ottawa, 1981.*

There are three types of Aboriginal land claim processes in Canada:

- Comprehensive land claims are based on the concept of continuing Aboriginal rights and title which have not been dealt with by treaty or other legal means
- Specific claims are claims arising from alleged non-fulfilment of Indian treaties and other lawful obligations, or the improper administration of lands and other assets under the *Indian Act* or formal agreements
- Other claims are claims which do not meet the strict acceptance criteria of the above two programs, but which nonetheless have merit. A number of these claims have been accepted by Canada as requiring resolution through negotiation.

In addition to the claims, the federal government is also open to the negotiation of self-government agreements with Aboriginal groups, sometimes as part of a comprehensive land claim.

### Federal Policy for the Settlement of Aboriginal Land Claims

In order for its comprehensive land claims submission to be accepted, an Aboriginal group must demonstrate all of the following:

- the Aboriginal group is and was an organized society
- the organized group has occupied a specific territory over which it asserts Aboriginal title from time immemorial, and the traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations
- the occupation of the territory by the Aboriginal party was largely to the exclusion of other organized societies
- the Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes
- the group's Aboriginal title and rights to resource use have not been dealt with by treaty
- Aboriginal title has not been eliminated by other lawful means.

In British Columbia, Aboriginal groups do not need to provide the same evidence of prior occupation as in the rest of the country.

## COMPREHENSIVE LAND CLAIMS

Overview: the primary purpose of comprehensive land claims settlements is to conclude agreements with Aboriginal peoples that will resolve the legal ambiguities associated with the common law concept of Aboriginal rights. The objective is to negotiate modern treaties which provide certainty and clarity of rights to ownership and use of lands and resources for



all parties. The process is intended to result in agreement on the rights Aboriginal peoples will have in the future with respect to lands and resources. Through the negotiations, the Aboriginal party secures a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.

Comprehensive land claim agreements define a wide range of rights, responsibilities and benefits, including ownership of lands, fisheries and wildlife harvesting rights, participation in land and resource management, financial compensation, resource revenue sharing and economic development projects. Settlements are intended to ensure that the interests of Aboriginal groups in resource management and environmental protection are recognized, and that claimants share in the benefits of development.

Since 1973, 16 comprehensive land claim agreements have been signed in Canada covering about 40 percent of its sovereign territory. At present, the Government of Canada has provided over 70 mandates to negotiate comprehensive land claims settlements with Aboriginal groups and provincial and territorial governments. Negotiation processes are currently underway in five Canadian provinces (Newfoundland and Labrador, Nova Scotia, Quebec, Ontario and British Columbia) and three territories (Nunavut, Northwest Territories and Yukon). The establishment of comprehensive claims processes is being considered in the provinces of New Brunswick and Prince Edward Island. Approximately 43 percent of the Aboriginal population currently involved in these processes resides in British Columbia where 53 claims have been accepted for negotiation and where Agreement-in-Principle negotiations are proceeding at over 40 negotiation tables.


## Claims Costs and Benefits

The key to understanding the economic benefits of settling comprehensive land claims lies in understanding the negative impact that unsettled claims have on local and regional development. For instance, in the early 1990's an independent consulting firm estimated the cost to British Columbia of not settling land claims was \$1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone. On the other hand, it is projected that the economic stability generated by settling comprehensive land claims in BC will produce an increase in provincial gross domestic product of \$2-2.5 million for every \$1 million of government expenditure on the settlements.

Economic stability will create a climate that encourages private investment, leading to increased economic activity, and new partnerships between Aboriginal and non-Aboriginal groups.

### Summary of Benefits of Settling Land Claims: The Canadian Government's View

- gives certainty to ownership and use of lands and resources
- propels economic growth by giving certainty and clear rules to investors and the public in general
- promotes and strengthens social partnerships between the government and First Nations and among First Nations groups themselves
- encourages Aboriginal self-reliance
- builds a new and more progressive relationship with Aboriginal peoples, based on mutual respect and trust
- avoids expensive lawsuits
- promotes investment and employment.



In financial terms, the federal government leads the process of establishing cost-sharing arrangements with the relevant province/territory in order to financially support the settlement of claims and attain certainty. Today, the federal government has cost-sharing arrangements with all provinces involved in comprehensive land claim negotiations.

## SPECIFIC CLAIMS

Overview and Policy Rationale: Canada's Specific Claims Policy was established to allow First Nations to have their claims appropriately addressed through negotiations with the government, rather than going through the courts. Claims are accepted when it is determined that Canada has breached its lawful obligation to a First Nation through:

- the non-fulfilment of a treaty or other agreement
- the breach of an *Indian Act* or other statutory responsibility
- the breach of an obligation arising out of government administration of First Nation funds or other assets
- an illegal sale or other disposition of First Nation land by government.

If a specific claim is rejected for negotiation because Canada has determined that the claim does not meet any of the eligibility criteria, a First Nation has the following options: to resubmit the claim along with new evidence and/or legal arguments; to litigate; or to petition the Indian Specific Claims Commission (ISCC) to request an inquiry. The ISCC is an independent federal commission whose mandate is to conduct inquiries and make recommendations on the validity of claims not accepted by Canada,

as well as on which compensation criteria apply in the negotiation of a settlement, if there is a disagreement over this issue.

## Policy Evolution

In 1973, the Department of Indian and Northern Affairs (INAC) created the *Office of Native Claims* to deal with both specific and comprehensive land claims. By 1981, however, only 12 of the approximately 250 specific claims submitted to the government had been settled. As a result, a broad consultation process with First Nations leaders was commenced to find feasible ways to improve both policy and process. Subsequently, the government decided to no longer apply the statutes of limitations and the doctrine of laches (common law rules allowing courts to turn down claims where the claimant had waited too long to make a claim) in relation to Aboriginal claims. Both policies had prevented several specific claims from being accepted, causing criticism from First Nations leaders.

In 1991, following additional consultations with First Nations leaders, Canada again changed the process for the resolution of specific claims. For instance, it quadrupled funding for specific claims compensations (from \$15 million to \$60 million), created a "fast track" process for smaller claims (those under \$500,000), lifted restrictions on the number of claims that could be negotiated at any one time, and established the ISCC.

As of March 31, 2003, 1,185 specific claims have been received; 540 cases are under review; 112 are in negotiation (93 active negotiations and 19 inactive negotiations); and 251 claims have been settled. The remaining 282 cases have been addressed in a variety of alternative



## SPECIFIC CLAIMS PROCESS SUMMARY

| STEP                             | ACTION  |
|----------------------------------|---|
| Submission of Claim              | The process begins with a formal claim submission by the First Nation.  |
| Research of Claim                | To assess whether or not to accept the claim for negotiation, INAC undertakes an assessment and the Department of Justice formulates a legal opinion.   |
| Acceptance or Rejection of Claim | The Government of Canada informs the First Nation of the decision. If a lawful obligation is <b>not</b> found, the First Nation can submit more information, ask the <i>Indian Specific Claims Commission</i> (ISCC) to intervene, or litigate. If a lawful obligation is found, the claim goes into negotiation. |
| Negotiations                     | After creating a general framework for negotiations, the parties work toward a Settlement Agreement. Following ratification, the Settlement Agreement is executed by INAC's Minister. Usually, a signing ceremony is held to mark the end of negotiations.  |
| Implementation                   | Transfer of land and/or cash (as appropriate).  |

ways. Through specific claims settlements, First Nations have received more than \$1.7 billion as well as the ability to acquire 3,486,372 acres of land. Of these resources provided to First Nations, the federal share was \$1.52 billion and 2,523.717 acres of land. Provinces contributed \$278.4 million and 962,655 acres of land.

### Future Directions:

On June 13, 2002, INAC introduced the *Specific Claims Resolution Act* to facilitate the settlement of specific claims across the country. The proposed legislation would bring greater transparency, efficiency and fairness to the specific claims process.

The proposed legislation would establish the *Canadian Centre for the Independent Resolution of First Nations Specific Claims* (the Centre) to replace the ISCC and would have a Commission division and a Tribunal division that would have two distinct functions: the

Commission to facilitate negotiations and the Tribunal to resolve disputes. The Commission would enable the resolution of all claims regardless of value, drawing upon the entire range of dispute resolution mechanisms to assist the parties to a specific claim in reaching a final settlement. In contrast, the adjudicative tribunal would be available to First Nations, as a last recourse, to make final binding decisions on the validity of specific claims that have been rejected by Canada, and cash compensation on valid claims up to a maximum of \$10 million. From a review of the claims settled to date, the majority are below \$7 million. The bill sets out that the tribunal would also provide cash compensation on valid claims up to a maximum of \$10 million.



## OTHER CLAIMS

These are claims that, despite having a legitimate basis, do not meet the criteria set for either comprehensive or specific land claims. By "legitimate basis," the Government of Canada means morally rather than legally binding obligations (as is the case with specific and comprehensive land claims). There are basically two types of other claims:

- 1) Claims related to Aboriginal title: these are cases in which Aboriginal title was legally dealt with but did not meet reasonable standards for the time they were signed.
- 2) Claims relating to federal government responsibility: when a claim does not meet the criteria set up for a specific claim but the government believes the claim has moral grounds to be accepted and dealt with through alternative legal means.





# 3. Comprehensive Land Claims Process

Comprehensive land claims are negotiated by the federal government, the relevant provincial or territorial government, and the Aboriginal group. INAC's *Comprehensive Claims Branch* (CCB) represents Canada in negotiations with Aboriginal groups outside of British Columbia (the Federal Treaty Negotiation Office is responsible for claims within British Columbia). Generally, a core federal team will consist of a Chief Federal Negotiator, legal counsel, and several other negotiators or analysts.

As negotiations progress and issues unfold, representatives from different government departments – including Parks Canada Agency, Environment Canada, Fisheries and Oceans Canada, Natural Resources Canada, Canadian Heritage – take part in the negotiations, either by joining the core team in person or by providing recommendations or guidelines.

## CLAIM STAGES: THE SIX STEP PROCESS

### 1. Submission of Claim:

The claims process begins with the preparation of a statement of claim that includes supporting materials. This statement identifies the Aboriginal group and the general geographic area of its traditional territory.

Under Canada's comprehensive land claims policy, a well-supported claim is characterized by the following:

- clear articulation of claim
- evidence supporting the claim
- a good document index

### Process Purpose

The following are the objectives that a comprehensive land claim process is generally expected to achieve for the federal, provincial or territorial governments and the Aboriginal group (objectives can vary from one group to another):

- provide certainty of ownership, use and management of land and resources
- clarify the rights and duties of the federal and provincial or territorial governments and the Aboriginal group
- establish the rights and duties that other Canadians will have on the lands that the Aboriginal group claims
- determine how and to what extent lands and resources from both within and outside the settlement area will be managed by the federal and provincial/territorial governments and the Aboriginal group
- provide a clear set of rules for Aboriginal self-government (its powers and jurisdictions) and how these will work with the powers and jurisdictions of other government levels
- set the amount of the cash settlement (and payment schedule) to be given by the federal government to the Aboriginal group
- support and strengthen Aboriginal ways of life, which may include traditional and sustainable relationships with the land.

- an index to records research
- the number of Aboriginal bands involved in the claim
- the population of the claimant group
- the geographic area of the claim
- a plan to address potential disputes arising from overlapping claims with neighbouring Aboriginal groups.

Local sources of evidence may include the following: Band Council Office records; church records; cemeteries; birth, baptism, marriage and death records; mission diaries or "journals"; general records; printed reports; church stories; Aboriginal organizations; local government and local history museums; land titles or "registry" offices; provincial government



records; provincial archives; museums, libraries, archives and private collections; and, INAC regional and district offices.

Federal sources of evidence may include: the *National Archives of Canada*; records of the *Department of Indian and Northern Affairs Canada*; records of the Secretary of State; records of the *Department of the Interior*; records of the *Northern Affairs Branch*; records of the *Department of Citizenship and Immigration*; records of New France; British military and colonial records; early land records; fur trade records; Church records; Prime Minister's papers; papers of missionaries, explorers and others; pictures, maps, and sound film archives; and, several other sources.

## 2. Acceptance of Claim:

INAC's Minister, with the advice of the Minister of the Department of Justice, makes the final decision as to whether or not a comprehensive land claim submitted by an Aboriginal group will be accepted for negotiation.

Assessing a claim for acceptance demands a thorough analysis of the case presented by the Aboriginal group. All the information submitted by the Aboriginal group is reviewed and researched by the government. Once the review and research process concludes, the government sends its own findings to the claimant Aboriginal group along with an explanatory letter indicating whether further research is required. In some cases, the assessment process can take a long time, particularly when it involves the corroboration of archaeological research.

If a claim is not accepted for negotiation, the Minister will explain the reasons for rejecting the claim to the Aboriginal group in a thorough and detailed manner.

## 3. Framework Agreement:

Once a claim has been accepted, the Aboriginal group and the federal and provincial/territorial governments initiate a first round of negotiations in order to determine the subject matters to be addressed in the settlement negotiations.

Essentially, the Framework Agreement serves as an agenda for negotiations, listing all substantive issues to be covered in more detail as negotiations progress. At this first stage of negotiation, the parties involved agree on issues to be discussed, how they will be discussed, and a workplan for reaching an Agreement-in-Principle.

All claims are unique and, therefore, issues central to one Aboriginal group may not be relevant to another. For instance, harvesting rights to traditional resources such as the caribou could be central to one group; for another, harvesting rights to medicinal plants may be of more importance.

## 4. Agreement-in-Principle (AIP):

This is the deal-making stage, the phase where the parties reach agreements on the substance of the issues that will form the Final Agreement. The AIP is the result of a thorough and detailed scrutiny of the issues identified in the Framework Agreement. It must contain the most important points to be agreed upon by the parties. The parties must establish a process for ratification of the AIP and the Final Agreement and set up a mechanism to develop an implementation plan.

## 5. Final Agreement and Ratification:

As negotiations move from a basic Framework Agreement to an AIP and from there to a Final



Agreement, the nature and expertise of consultations evolves accordingly. In Final Agreement negotiations, Canada obtains advice from consultants and working groups in order to guarantee that legal, economic, environmental, labour, resources, and social concerns are appraised and agreed upon by the parties. All groups are given a public forum to share information with local stakeholders and federal and provincial negotiators and provide advice on the issues under negotiation.

Government negotiators must make clear official positions and interests, supply background information on the topics under discussion, and brief the different Working Groups on the status of negotiations at all times. During negotiations leading to the Final Agreement there should be no need to renegotiate the terms and conditions agreed to in the AIP.

## 6. Implementation:

The parties develop strategies to put in place all the provisions of the Final Agreement. Along with legal drafting and land titling, this can be one of the most time consuming and complex assignments within the negotiation process.

The implementation process has two stages:

- the implementation plan
- the monitoring and management of the agreed activities.

Implementation plans are separate from the Final Agreement and are not constitutionally protected. Implementation negotiators become involved in the process at the AIP stage and the implementation plan starts to take shape as the Final Agreement nears completion. The Final Agreement identifies what

must be accomplished to execute the treaty, while the plan identifies who will do the tasks identified, when they will be done, and what resources will be made available to execute them. As an example, an agreement may call for the creation of a joint fisheries management committee. In such a case, the implementation plan would include the following details:

- process for the establishment of the committee
- how many members will represent each party and what mechanism(s) will be used to appoint them
- procedures, policies and guidelines for business
- funding to be allocated to the committee over specific periods of time.

Implementation management should be an ongoing, iterative process characterized by regular monitoring, feedback and corrective action. The focus of the parties should be on keeping pace with the letter and intent of the obligations contained in the Final Agreement, maintaining a sound working relationship, and resolving implementation issues before they become disputes.

At the commencement of implementation management, boards or commissions identified in the comprehensive land claim agreement are created, appointments to those bodies are processed, funds begin to flow for undertaking identified activities, and progress begins to be monitored and reports prepared with respect to meeting obligations. For self-government agreements, Aboriginal groups will begin to exercise their jurisdictions as provided for in the self-government agreement and implementation documents. Implementation committees are established and meetings held with the other parties to discuss any implementation issues.

A mechanism to monitor the implementation of the agreement may be set out in the general provisions of the implementation plan, but usually merits a separate section in the implementation plan. Monitoring includes: overseeing the progress of implementation; addressing issues relating to implementation; amending the implementation plan in light of changing circumstances; and, conducting any periodic reviews.

## THE PROCESS IN BRITISH COLUMBIA (BC)

Unlike the comprehensive land claims process elsewhere in Canada, in British Columbia the federal government does not accept or reject particular claims. Instead, the British Columbia Treaty Commission (BCTC) oversees a process which, at least in the first two stages, is much less formal than in the rest of the country.

### The British Columbia Treaty Commission (BCTC)

The BCTC consists of four Commissioners and a Chief Commissioner who represent its three founders and principals as follows: two representatives from the First Nations Summit, one from British Columbia, and one from the federal government. The Commissioners are responsible for nominating the Chief Commissioner who will be the full-time Chief Executive Officer of the BCTC and chair its meetings. All nominees are appointed by the Lieutenant Governor in Council of British Columbia, the Governor in Council of Canada and the First Nations Summit. Commissioners are appointed for a two-year term and the Chief Commissioner for a three-year term.

This is in part because both the federal and provincial governments acknowledge the likelihood that much of British Columbia is encumbered with unextinguished Aboriginal rights.

The BCTC is the independent keeper of the BC treaty process. Its primary role is to oversee the negotiation process to make sure that the

parties are being effective and making progress in negotiations. In carrying out the recommendations of the BC Claims Task Force, the Treaty Commission has three roles—facilitation, funding, and public information and education.

## BCTC Process - Stages 1-2

1. Statement of Intent: a First Nation files with the BCTC a Statement of Intent to negotiate with Canada and BC. The Statement of Intent:

- identifies the First Nation's governing body and the people that body represents
- shows that the governing body has a mandate to enter the treaty process
- describes the geographic area of the First Nation's traditional territory in BC
- identifies any overlaps in territory with other First Nations.

2. Readiness to Negotiate: the BCTC must convene an initial meeting of the three parties within 45 days of receiving a Statement of Intent. This meeting allows the BCTC and the parties to exchange information, consider the criteria for determining the parties' readiness to negotiate, and generally identify issues of concern. Each party must demonstrate that it has:

- a commitment to negotiate
- a qualified negotiator who has been given a clear mandate
- sufficient resources to undertake negotiations
- a ratification procedure.

Stages 3-6 are for the most part identical to those in the rest of the country. The BCTC is able to provide dispute resolution services throughout the process if a request for such services is made by the parties to a given set of negotiations.

## STRUCTURE OF COMPREHENSIVE LAND CLAIM NEGOTIATIONS IN CANADA

### Main Table

The Main Table is where the substantive negotiations take place, in the presence of the Chief Negotiators of all parties. Main Table negotiations may be open to the public and the media, as is often the case under the BC Treaty Process. During some sessions, however, negotiators require privacy to exchange views in a more discreet manner, brainstorm, and explore feasible alternatives to disagreements away from public scrutiny.

### Working Groups

A typical land claims negotiation process deals with hundreds of issues, but most of the technical and detailed work is done by Working Groups whose main function is to focus on practical rather than strategic issues.

The Working Groups are created by and placed under the supervision of the Main Table to produce work that must be approved by the Chief Negotiators. This model works well because it leaves technical issues to experts who can work out practical solutions to particular problems. Often, Working Groups can find solutions to problems that seem almost insurmountable to Chief Negotiators. In addition, Working Groups are responsible for narrowing down the scope of issues before these are brought to the Main Table for further discussion and decision-making.

### Legal Drafting

As negotiations proceed from a general discussion of interests to reaching agreement on specific issues, legal drafting work assumes


greater and greater importance. The text of the AIP and the Final Agreement must reflect accurately and precisely all agreements the parties have reached on each issue brought to the table. All parties must work together in phrasing agreements on highly contentious issues in legal language which must stand the test of time. While much of the technical drafting can be accomplished by a small group with legal expertise, their work needs to be approved and sometimes renegotiated by the Chief Negotiators at the Main Table.

## OTHER ASPECTS OF THE COMPREHENSIVE LAND CLAIMS PROCESS

### Financial Aspects: Preparation and Negotiation Costs

The federal government provides contribution funding to First Nations interested in presenting land claims in accordance with federal claims policies. Such contributions cover the costs of legal, land title and historical research that help the Aboriginal group in its submission of a land claim. Depending on the complexity of the claim at stake, a research contribution could total up to \$3.5 million, allocated during many fiscal years.

When an Aboriginal claim is approved for negotiation by INAC, contribution funding ends and a government loan enables the Aboriginal party to cover negotiations-related expenses. Loan funding will continue throughout the process or until INAC decides to halt a process that does not show progress. The current policy, which is under review, is that the loan is recoverable as a first charge upon settlement of the claim, unless otherwise stated in a final claim settlement agreement



reached between the parties to negotiation. Provincial and territorial governments also contribute to cover the costs of settling land claims but the percentage of their share is lower than the federal contribution.

The land claims process deals with complex issues and questions. As a result, it is often lengthy. Reaching a Final Agreement can take from 5 to 20 years, and the cost of negotiating a comprehensive land claim varies between \$15 and \$50 million.

### Remunerations and other costs

The federal government recognizes that comprehensive land claims negotiations are complex enough to demand the full-time dedication of several individuals for the Aboriginal group, and the part-time efforts of several more. Payments for salaries and benefits are deducted from the final cash settlement. As negotiations advance, the number of persons on the negotiating team of the Aboriginal group is likely to grow, but the funding for the Aboriginal team will often be limited to cover the expenses of five persons (a typical team composition). The Aboriginal group can invite as many team members to participate in negotiations as they consider appropriate, but will do so at their own expense.

Legal/consulting and travel costs are generally the most expensive items for parties. In Canada, travel costs are often high due to the size of the country and the remoteness of some Aboriginal communities. Contractors and consultants, as well as specialized legal advice, are often required as negotiations progress.

Once negotiations begin, the Aboriginal group must make a commitment to submit regular progress reports and financial statements, and

agree to collaborate with annual audits conducted by the federal government to ensure sound financial management.

Acceptable expenses include the following:

- travel, accommodation and meals
- legal and professional fees
- consultation
- interpretation and translation
- land surveys
- public information/education
- administration and related expenditures.

Some restrictions apply to the loan granted by the government to the Aboriginal group. For instance, loan funds cannot be used to sue the Crown or any other party without a written authorization issued by INAC's Minister.

### Overlaps

Traditional territories can and do overlap. This is especially true in British Columbia, where there are often multiple overlapping claims. Overlaps may arise from many causes: a tradition of sharing territory for the use of specific resources; movements of families or tribes; or longstanding disputes. Where overlaps represent a tradition of sharing between Aboriginal groups, this can be acknowledged for treaty purposes.

When an Aboriginal group commences treaty negotiations, it must have the authority to speak for the traditional territory and resources that it claims. If there are significant unresolved overlaps, then that authority is in question. If the Aboriginal group is to make progress in treaty negotiations, overlaps must be resolved so that the parties can make arrangements without fear of a competing claim to the territory or resource.



### Approach to Resolving Conflicts Resulting from Overlapping Land Claims

- in the event of overlapping land claims, Aboriginal groups favour the resolution of the dispute through negotiation committees comprised of a combination of community leaders and elders
- if two or more Aboriginal groups are unable to reach an agreement, the Canadian government will offer to assist them, generally by providing financial assistance for neutral mediation or facilitation services
- in instances where the overlapping claimant groups favour a government intervention, Canada will engage in overlap discussions at the invitation of the groups in question
- in cases where all attempts at resolving overlaps fail, non-derogation language may be added to settlement agreements stating the agreements are without prejudice to the rights of groups with overlapping claims
- at the moment, Aboriginal groups are exploring additional approaches to solve land disputes among themselves that are acceptable to the federal/provincial/territorial governments.

Ideally, competing Aboriginal claims over a territory should be resolved before reaching an AIP, but this is not a compulsory requirement.

### Interim Measures Agreements

Canada supports incremental steps in treaty-making that contribute to governance and economic development. Such tailored and incremental approaches must be developed with input from all parties and reflect collective objectives and expectations.

Appropriate incremental measures can play a significant role in developing the experience and capacity that Aboriginal groups need to productively engage in treaty negotiations. Such measures can also contribute to a greater understanding within Aboriginal communities of some of the potential benefits that a treaty can provide. Innovative and practical incremental measures can be effective tools in making sure the treaty process meets the circumstances of individual communities. Interim

Measures Agreements (IMAs) and Treaty Related Measures (TRMs) are incremental steps which can be taken toward finalizing a comprehensive land claim.

IMAs provide for the protection, management or use of land and resources before treaties are concluded. The agreements are designed to deliver immediate benefits to Aboriginal groups, serve as building blocks for final treaties, and provide a greater degree of certainty for land management and for business development. IMAs may provide funding for land protection, economic development studies and joint venture development, land-use planning, governance development, and cultural heritage initiatives. Most IMAs are time-limited, in order to provide an incentive for all parties to continue work toward a Final Agreement.

In British Columbia, TRMs must be directly linked to the treaty process. TRMs address matters critical to the resolution of final treaties and the costs are shared by BC and Canada. For example, land protection agreements can set aside important parcels of land for inclusion in a potential treaty settlement.

### Negotiation Preparedness

The Negotiations Preparedness Initiative (NPI) funded more than 80 proposals in 2001-02, enabling Aboriginal groups to enhance their capacities to negotiate the land and resources components of their comprehensive claims settlements. Of the funding allocated, 45 per cent went to projects under the British Columbia Capacity Initiative. Among these were projects to compile traditional resource information, develop geographic information systems, plan for resource development and management, and promote skills training.

**Yukon First Nation Traditional Territories  
Territoires Traditionnels des Premières Nations du Yukon**

**Settled Traditional Territories /  
Territoires Traditionnels - Ententes conclues:**

- Y1 - Champagne & Aishihik First Nations (Haines Junction)
- Y2 - First Nation of Na-Cho Nyak Dun (Mayo)
- Y3 - Little Salmon / Carmacks First Nations
- Y4 - Selkirk First Nation (Pelly Crossing)
- Y5 - Teslin Tlingit Council
- Y6 - Tron Dek Hwetch'in First Nations (Dawson)
- Y7 - Vuntut Gwich'in First Nation (Old Crow)
- Y12 - Ta'an Kwach'an Council (Lake Laberge)
- Y13 - Tetlit Gwich'in Tribal Council

**Unsettled Traditional Territories /  
Territoires Traditionnels - Non résolues:**

- Y8 - White River (Beaver Creek) / Kluneh (Burwash Landing) First Nations
- Y9 - Carcross / Tagish First Nation
- Y10 - Kwanlin Dun First Nation (Whitehorse)
- Y11 - Kaska Dene Nation

**B.C. Treaty Negotiations - Land Claims  
Négociations du traité de la C.-B.- Revendications territoriales**

**Settled Land Claims / Revendications territoriales - Ententes conclues :**

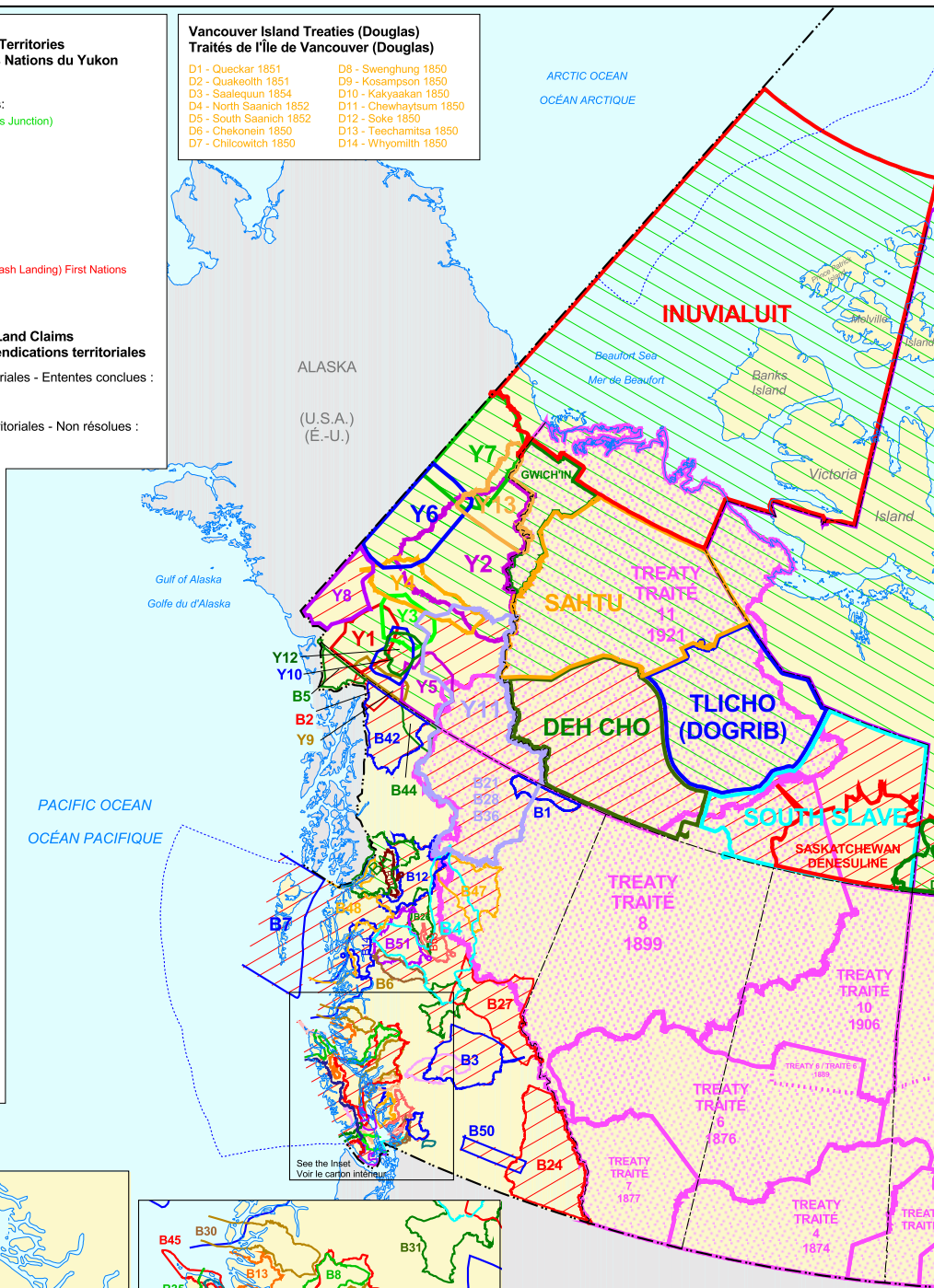
- BA - Nisga'a Lisims Government

**Unsettled Land Claims / Revendications territoriales - Non résolues :**

- B1 - Acho Dene Koe First Nation
- B2 - Carcross/Tagish First Nation
- B3 - Cariboo Tribal Council
- B4 - Carrier Sekani Tribal Council
- B5 - Champagne and Aishihik First Nations
- B6 - Cheslatta Carrier Nation
- B7 - Haida Nation
- B8 - Da'naxda'xw / Awaetala Nation
- B9 - Dittidaht First Nation
- B10 - Esketemc First Nation (Alkali Lake)
- B11 - Gitanyow Hereditary Chiefs
- B12 - Gitksan Hereditary Chiefs
- B13 - Gwa'-Sala-Nakwaxda'xw Nation
- B14 - Haisla Nation
- B15 - Hamatla Treaty Society
- B16 - Heiltsuk Nation
- B17 - Homalco Band
- B18 - Hul'qum'num Treaty Group
- B19 - Hupacasath First Nation
- B20 - In-SHUCh'ich Council
- B21 - Kaska Dene Council
- B22 - Katzie Indian Band
- B23 - Klahoose Nation
- B24 - Kluneh / Kinbasket Treaty Council
- B25 - Kwakwaka'wakw First Nation
- B26 - Lake Babine Nation
- B27 - Lheidli T'enneh Band
- B28 - Liard First Nation
- B29 - Musqueam Nation
- B30 - Namgis First Nation
- B31 - Nazko Indian Band
- B32 - Nuu-chah-nulth Tribal Council
- B33 - Owekeeno Nation
- B34 - Pacheedaht First Nation
- B35 - Quatsino First Nation
- B36 - Ross River Dena Council
- B37 - Sechelt Nation
- B38 - Sliammon Indian Band
- B39 - Snuneymuxw First Nation
- B40 - Squamish Nation
- B41 - Stó:Lo Nation
- B42 - Taku River Tlingit Tribal Council
- B43 - Te'Mexw Treaty Association
- B44 - Teslin Tlingit Council
- B45 - Tl'atlashtwaia First Nation
- B46 - Tsawwassen First Nation
- B47 - Tsay Keh Dene Band
- B48 - Tsimshian Nation
- B49 - Tseil-Waututh Nation
- B50 - Westbank First Nation
- B51 - Wet'suwet'en Hereditary Chiefs
- B52 - Yale First Nation
- B53 - Yekooche First Nation

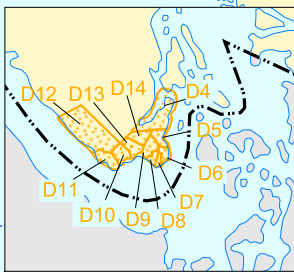
**Vancouver Island Treaties (Douglas)  
Traité de l'île de Vancouver (Douglas)**

- |                         |                        |
|-------------------------|------------------------|
| D1 - Quecar 1851        | D8 - Swenghung 1850    |
| D2 - Quakeoith 1851     | D9 - Kosampson 1850    |
| D3 - Saalequun 1854     | D10 - Kakyasakam 1850  |
| D4 - North Saanich 1852 | D11 - Chewhaytsam 1850 |
| D5 - South Saanich 1852 | D12 - Soke 1850        |
| D6 - Chekonein 1850     | D13 - Teechamitsa 1850 |
| D7 - Chilcowich 1850    | D14 - Whyomilth 1850   |



**Vancouver Island Treaties  
(Douglas)**

**Traité de l'île de Vancouver  
(Douglas)**



The lines on this map represent the approximate boundaries of traditional territories described in First Nation Statements of Intent to negotiate treaties which have been submitted to, and accepted by the B.C. Treaty Commission. They are illustrative only and may be updated in the future. Publication of this map does not imply that the First Nations, the Province of BC, or the Government of Canada have agreed to the boundaries shown.

Les lignes sur cette carte représentent les limites approximatives des territoires traditionnels décrites dans la Déclaration d'intention des Premières Nations pour négocier les traités qui ont été soumis et acceptés par la Commission du traité de la C.-B. Elles sont seulement illustratives et peuvent être mises à jour dans le futur. La publication de cette carte n'implique pas que les Premières Nations, la province de la C.-B., ou le Gouvernement du Canada ont consenti aux limites montrées.





**Canada** Natural Resources Canada / Ressources naturelles Canada  
**Treaties and Comprehensive Land Claims in Canada**  
**Traité et revendications territoriales globales au Canada**

October 2003 Edition / Édition octobre 2003  
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Scale 1:18 000 000 or one centimetre represents 180 kilometres  
 Echelle 1: 18 000 000 ou un centimètre représente 180 kilomètres

Lambert Conformal Conic Projection, Standard Parrallèles 49° N and 77° N  
 Projection conique conforme de Lambert, parallèles d'échelle conservés à 49° N et 77° N

Note: The lines on this map represent approximate boundaries for illustrative purposes.  
 Note: Les lignes sur cette carte représentent les limites approximatives à des fins d'illustration.

| LEGEND   | LÉGENDE   |
|--|---|
| Land Claims Status / Situation actuelle des revendications territoriales |   |
| Settled Land Claim Area  | Région visée par le règlement de revendication territoriale |
| Unsettled Land Claim   | Revendication territoriale - Non résolue                    |
| Historic Treaty  | Traité historique   |
| Historic Treaty Adhesion   | Adhésion au traité historique                               |
| Peace and Friendship Treaty  | Traité de paix et d'amitié                                  |
| Vancouver Island Treaty (Douglas)  | Traité de l'île de Vancouver (Douglas)                      |
| Provincial, Territorial Boundary   | Limite provinciale ou territoriale                          |
| International Boundary   | Frontière internationale                                    |
| 200 Mile Limit   | Limite de 200 mile  |

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## Third Party Consultations

Third parties, such as regional businesses and local communities, have a vital role to play in the comprehensive land claims process in Canada. Public understanding is necessary to support the resolution of these longstanding issues. Therefore, there is significant third party consultation in the negotiation process. Such consultation addresses the concerns and interests of all concerned parties and fosters positive relations between Aboriginal peoples and neighbouring communities. Third party consultation also ensures the eventual settlement is as balanced as possible and helps facilitate positive economic outcomes for all involved, aboriginal and non-aboriginal.

In British Columbia, public consultation is a major priority during treaty negotiations. Key interest groups throughout the province provide input on the interests of business, labour, environment, recreation, fish and wildlife organizations and municipalities. The Government of Canada also consults at the local level with representatives of social and economic groups. These third parties advise negotiators on specific regional issues that must be considered in negotiations.

## Third Party Compensation

While it is the preference of the federal government to avoid any negative social or economic impacts of comprehensive land claims settlements on third parties, where such impacts take place, compensation may be in order. Forestry and fisheries are two examples of economic sectors where the economic interests of third parties may be affected, and this must be taken into account by federal and provincial negotiators. A bilateral federal/provincial committee is often formed to deal with such issues.

## Legislative Consultation

Legislation at the provincial and federal level is necessary to ratify a treaty. Federal and provincial legislative measures may differ considerably from each other, and it is possible Aboriginal groups could take issue with both of them. While it is not mandatory to reach agreement on legislation related to the treaty, by achieving a workable accord the potential for future legal battles can be diminished.

## Local Government Relations

Given the importance of intergovernmental relations at the local level, it is important to develop the channels and means of cooperation between the Aboriginal group and neighbouring local governments early in the negotiation process.

## *Indian Act* Transition

During negotiations, it is necessary to plan for the smooth transition from the provisions of the *Indian Act* to the provisions of the Final Agreement. Post-treaty, some or all aspects of the *Indian Act* will no longer apply to the members of the Aboriginal group in question. The parties must also devise ways to preserve those aspects of the *Indian Act* that the claimant group might have an interest in keeping.

## Complementary Agreements

These are administrative agreements made between the federal or provincial government and an Aboriginal group that can accompany the treaty. Unlike the treaty, however, such agreements do not receive constitutional protection.



Complementary agreements are usually time-limited and can be renewed or renegotiated prior to expiry. Some examples include:

- access agreements to lands included in the treaty for government and third parties
- good neighbour agreements
- commercial trapping arrangements
- land and resource management arrangements within the traditional territory
- economic development agreements
- park management arrangements.

## Ratification

In order to confer community legitimacy on the Final Agreement, it must be ratified by the Aboriginal group. Referenda have been identified as the ideal way to reinforce the validity of Final Agreements and ensure their acceptance by the justice system in the event any party should challenge their validity in the future. To date, the federal government has generally required an absolute majority of eligible Aboriginal group members to vote in favour of the settlement before the Final Agreement can be put into effect.

In addition to the referendum held by the Aboriginal party, the provincial and federal governments must also ratify the treaty through voting in the provincial legislature and the federal Parliament.

In Canada, the Final Agreement needs to be translated into both official languages, English and French, and may also be translated into the language of the Aboriginal group.



## 4. Issues to be Negotiated within the Comprehensive Land Claims Process

Treaty negotiations identify and define a range of rights and obligations including: existing and future interests in land; renewable and non-renewable resources; fisheries and wildlife; structures and authorities of government; relationship of laws; fiscal relations and so on. Since most issues under discussion will receive constitutional protection, treaty arrangements must stand the test of time.

This chapter briefly describes some of the issues under negotiation within Canada.

### Cash Component

A Final Agreement specifies the total amount of the cash settlement to be provided by the federal government to the respective Aboriginal group (through the government that represents it) as part of the land claim settlement. The amount of the cash settlement component and its form of payment by the federal government are central issues, as is the repayment schedule of the federal loan that enabled the Aboriginal group to pursue the land claim settlement.

### Certainty

Certainty over ownership and use of lands and resources is one of the primary goals of land claims negotiations. A clear definition of the respective rights and obligations of Aboriginal groups and other citizens is needed in all aspects of the comprehensive land claims process, including the provisions of the Final Agreement.

In the past, the Government of Canada required Aboriginal groups to "cede, release and surrender" their undefined aboriginal rights in exchange for a set of defined treaty rights. This is referred to as the "extinguishment model," which many Aboriginal groups consider to be unacceptable by today's standards.

In recent years, new approaches to achieving certainty have been developed as a result of comprehensive land claims negotiations. These include the "modified rights model" pioneered in the Nisga'a negotiations, and the "non-assertion model". Under the modified rights model, aboriginal rights are not extinguished, but are modified into the rights articulated and defined in the treaty. Under the non-assertion model, Aboriginal rights are not extinguished, and the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to assert no other Aboriginal rights.

### Commercial Recreation

The terms, conditions, and locations of potential commercial recreational ventures must be negotiated. Such agreements can focus on the co-management of, or non-restricted access to, provincial/federal Crown lands for commercial recreational purposes such as eco-tourism, guiding, and outfitting.



## Cultural Artifacts

In some negotiations, an Aboriginal group may consider it important to preserve sites that have been traditionally significant to them for cultural or spiritual reasons. These sites may include fish camps, trading posts, old missions, and historical and burial sites. For some Aboriginal peoples, archeological evidence such as moose and caribou skin clothing, stone axes and other tools that were used by their ancestors may also have a spiritual value.

In other cases, the parties must identify and list the cultural artifacts that may be returned to an Aboriginal group by national and/or provincial museums. As part of the AIP stage, discussions may focus on the cultural items that should be returned to the Aboriginal group and the ones that could remain in their current locations, as well as provisions to guide the negotiation of custodial agreements between the Aboriginal group and the museum in question.

## Dispute Resolution

Dispute resolution is an essential element in modern treaties in Canada and most Final Agreements devote a chapter to outlining the process to be used to resolve potential disputes in the post-settlement environment. Dispute resolution can include a variety of approaches, including negotiation, mediation and arbitration. The option of litigation remains if all other efforts fail.

## Financial Transfers

In connection with a self-government arrangement, the parties negotiate an agreement (typically called a fiscal financing arrangement or

a financial transfer agreement) relating the amount of funding the Aboriginal government would receive from Canada in support of the operation of the Aboriginal government. These arrangements are typically five year agreements that include descriptions of funding levels, payment schedules, accountability provisions, information exchanges, annual adjustments and review and renewal processes.

Given the Government of Canada's view that the costs of self-government should be shared among the federal, provincial/territorial, and Aboriginal governments, another consideration for the parties is the extent to which the Aboriginal government's own sources of revenue would be taken into account when setting funding levels. It should be noted that claims and self-government arrangements often provide Aboriginal governments with access to new sources of revenues, such as taxation powers. The overall goal is to reduce the reliance of Aboriginal governments on transfers over time.

## Fisheries

In some negotiations, fish is a central topic because of its importance to the relevant Aboriginal group's diet and culture, as well as to the economy of entire regions. In such cases, fisheries can be among the most important and complex of subjects. Agreement may be required on the following issues:

- agreement on allocations of fish species for food, social and ceremonial purposes, and/or to expedite participation in the commercial fishery
- creating a conservation trust
- confirming the custodial or managerial role of the Aboriginal group in the settlement area fisheries

- allocation of the resource internal to the Aboriginal group.

Innovative management tools have been implemented in some areas of the country where Fisheries Management working groups have brought together commercial, sports, and Aboriginal fishermen with federal and provincial officials.

## Forestry

These discussions focus primarily on who is entitled to cut down trees, where such activities would take place in the settlement area, and for what purposes. Areas of agreement which need to be reached include:

- the annual admissible cut in the lands under claim
- forest practices and standards on treaty settlement lands
- recommendations for transition actions.

In general, land claims do not give ownership of trees to the claimant Aboriginal group except on private treaty settlement lands. In some land claim settlements, the treaty does not guarantee a permanent supply of trees for individual or commercial uses and does not entitle the relevant Aboriginal group to compensation for damage or loss of trees with the exception of those located within the group's private lands.

In other land claim negotiations, however, forestry can be a central topic, particularly when an Aboriginal group considers gaining access to forest tenure and management a primary objective of its land claim (to protect old-growth forests or spur economic development, for example). In such cases, forest tenure may be negotiated with the Aboriginal

group off settlement lands, allowing the Aboriginal group an annual allowable cut to be managed, in general, under applicable provincial law.

## Parks and Protected Areas

The creation, use, and management of parks and protected areas within an Aboriginal group's traditional territory is often quite an emotional issue, as in the past parks and protected areas had generally been created without consulting the affected Aboriginal group. Often, the creation of parks and protected areas had the effect of limiting the hunting, fishing and gathering rights of Aboriginal groups, as well as limiting access to important cultural and spiritual sites.

Issues associated with the negotiation of this subject include:

- confirming the demarcations made in mapping the traditional territory
- the creation of special management areas
- the potential for renewable resource harvesting within parks and protected areas
- cooperation in future planning and management
- planning for the possible creation of future parks and protected areas within the traditional territory.

## Plants

Where plants are relevant to the claimant group, the parties must identify which plants within the settlement area the Aboriginal group has a particular interest in articulating rights to gather and use for purposes including food, medicine, cultural expression, hunting, trapping or fishing. Issues include:



### The Canadian Approach: How Would a National Park Be Created and Managed in a Settlement Area?

- National Park creation and management within a settlement area will be in consultation with the affected Aboriginal group
- agreements could allow the affected Aboriginal group to hunt, trap, fish and gather plants for non-commercial purposes within the National Park
- any changes to park boundaries would need to be agreed to by the respective Aboriginal group and the government
- if a park is approved by both parties, a Park Management Committee could be established to look after the park
- the Committee could have representation from both the Aboriginal group and Canada
- a park management plan would be the guide for preserving the park and its resources such as fish and wildlife
- if commercial activities relating to wildlife and tourism are authorized in the park, the Aboriginal group could have the right to refuse the issuance of new licenses for these activities
- the Aboriginal group could have priority for available jobs.

Among the benefits found in existing cooperative management agreements are:

- improved sustainability of resources through integrated management
- enhanced social and economic benefits for local Aboriginal peoples
- reasserted and protected Aboriginal and treaty rights
- reduced conflicts over resource use and development through participatory democracy.

- identifying sites where plants can be gathered
- control (or licensing) of individuals gathering such plants.

In general, the government's position on gathering rights for plants is that they cannot be collected in national parks or on lands owned by the Crown where the plant gathering can go against other uses such as forestry, unless special agreements to do so under specific conditions can be reached.

## Subsurface Resources


This can also be a sensitive issue, especially where conditions for oil and gas or mineral exploration may occur. In such instances, a Final Agreement can include mechanisms by which a potential developer would consult the respective Aboriginal government and neighbouring communities to determine the environmental impact of exploration, its effects on wildlife harvesting, the location of camps and facilities, employment and business prospects for the Aboriginal group, and processes for further consultations.

In British Columbia, ownership of subsurface resources is typically included in settlement lands, except where such rights have already been allocated. In other parts of Canada, ownership of subsurface resources may vary from negotiation to negotiation.

## Taxation

There is a limited tax exemption for the property of "Indians" where the property is situated on a reserve. This legislative tax exemption is currently contained in section 87 of the *Indian Act*, and has existed in some form since before Confederation. The purpose of the exemption has always been to preserve the entitlements of "Indian" peoples to their reserve lands and to ensure that the use of their property on their reserve lands was not eroded by the ability of governments to tax.

The continuation of the exemption is linked to the status of the lands. If the land is no longer federal land reserved for Indians (a reserve), the exemption will cease to apply. When the exemption ceases to exist, there is a strong motivation for the Aboriginal governments to



enter into direct taxation agreements with the federal government. In these agreements the Aboriginal government levies a tax similar to the income tax or the Goods and Services Tax and Canada will vacate the tax room being exercised by the Aboriginal government. These types of agreements provide the Aboriginal government with a source of revenue. In addition, the tax paid by the members, and possibly non-members, is directed to the Aboriginal government, and these tax agreements maintain the integrity of the tax system (ensuring an integrated system with no tax havens or areas of higher taxation). Note that the Aboriginal governments may be able to enter into a similar type of arrangement with the applicable provincial or territorial government.

## Traditional Knowledge

This is an issue in which Aboriginal peoples from several countries have shown a tremendous interest either as part of land claims and/or broader Aboriginal rights' initiatives.

Canada takes the position there can be indirect protection of Aboriginal traditional knowledge through the designation of certain sites as protected, or through arrangements for resource management. In addition, intellectual property can be protected through conventional copyright/patent laws.

## Water

In Canada, water is a common resource. As a result, ownership of water resources is not conferred on individuals or groups. Issues associated with the negotiation of this subject include:

- evaluating the economic and technical details linked to water provisions in the settlement area
- technical matters such as volumes, flow, licenses and reservation of water for domestic, industrial and agricultural pursuits.

This is often a sensitive issue in negotiations where water has a sacred connotation to the Aboriginal group.

## Wildlife

Issues associated with the negotiation of this subject include:

- hunting and trapping quotas
- conservation issues (the identification and protection of endangered species)
- exchange or trade of wildlife and wildlife products with other Aboriginal peoples
- relationship between the federal, provincial, and Aboriginal governments on matters related to the planning, management and protection of wildlife populations
- methods that can be used for harvesting wildlife
- hunting for commercial purposes (including naturalist activities such as guiding and outfitting for sport hunting and/or fishing).

In cases where fisheries are not central to settlement negotiations, it is included as wildlife along with other animals and birds.





## 5. The Land Selection Process

**B**efore substantive negotiations on the topic of lands can commence in earnest, all parties require a common understanding of the facts. As a result, the following tasks should be completed early in the AIP stage:

- production of a map demarcating all the lands claimed by the Aboriginal group
- full legal description of the boundaries to be surveyed
- survey of the adjacent lands to the claimed area
- municipal lands within the claimed settlement area must also be demarcated.

### Existing Interests

Third party interests within the settlement area (see Land Selection section below) must be identified, and a determination reached whether these should remain in the settlement area (under protection) or be removed or replaced.

### Roads and Access

The parties require a common understanding of the various types of existing roads on potential settlement lands. These might range from provincial highways to secondary highways and/or forestry access roads. Right-of-way agreements for secondary roads and access rights of non-Aboriginal users (commercial in particular) to travel on the Aboriginal group's lands and waters are also important issues.

In most agreements, it has been determined that commercial travellers are authorized to use navigable rivers and waterways, portages

and waterfront lands within settlement lands, but must inform the Aboriginal government in advance and refrain from the following: building camps or structures, making major changes, causing damage to the land, and conducting any other commercial activities except travelling.

### Land Title

The issue of land title can prove thorny, and agreement on this should be reached prior to final land selection. Traditionally, Aboriginal land tenure systems were communal. They blended concepts of universal access and benefit within the group, universal participation and consensus in territorial management, and largely porous boundaries according to social rules. Land, wildlife, and other natural resources were never considered commodities that could be reduced to property.

Today, however, as Aboriginal groups in Canada are increasingly participating in the wider economy, a reconciliation of Aboriginal concepts of land tenure with federal and provincial land survey and registration systems is occurring. In some treaties, Aboriginal groups have negotiated the power to develop their own land registry systems, although to date none have chosen to exercise this authority. At the same time, Aboriginal groups are also considering the possibility of applying a minimal survey system for lands not targeted for development, and a more defined system where economic activities and development would be concentrated.

## Land Selection

Land selection negotiations start during the AIP stage and are closely linked with related issues including: land ownership and access; wildlife harvesting and management; water rights management; forestry; parks and protected areas; environmental management; subsurface resources; and, municipal lands chapters. Ideally, land selection should be completed during the AIP stage, but in many cases the final selection is concluded with the Final Agreement.

Federal principles for land selection include the following:

- the needs and the interests of the Aboriginal group should be acknowledged in detail
- the interests of existing third parties within the settlement area should be respected
- land selection should promote and sustain the economic development potential of the settlement area, including that of neighbouring communities
- appropriate public lands should be retained for residential, commercial, industrial and recreational uses that can nurture future economic growth, development and improved infrastructure in the aboriginal and non-aboriginal communities
- lands to be acquired by the Aboriginal group should be representative of the overall topography and quality of the lands of the settlement area
- governments should avoid land selection in areas where there are overlapping claims by two or more Aboriginal groups
- enough Crown land should be left around each community for public purposes that include recreation and wildlife harvesting.

Prior to land selection negotiations, the federal and provincial land selection teams request, verify, check and analyse data on government and third party interests for the region, including, but not limited to:

- reservations to the Crown
- land grants and titled lands
- surface leases
- rights-of-way
- land use permits
- quarrying permits
- water use permits and licenses
- commercial fishing licenses
- timber permits
- mineral claims and leases, including oil and gas exploration licenses and agreements
- harvesting agreements
- guide outfitter and lodge licenses
- parks and protected areas
- cattle grazing leases
- harbour and airport authorities
- hazardous waste sites.

The parties prepare a comprehensive and user-friendly database of third party interests in the lands at stake, which are plotted on a 1:250,000 scale base map. Such maps are then used to help focus land selection negotiations with the claimant group.

Aboriginal interests in land selection include:

- residential
- cultural and spiritual
- economic (lands suitable for economic development as well as lands suitable for resource extraction)
- social and recreational.

The actual process of selecting lands often includes a great deal of community consultation for the Aboriginal group in question. This can be among the most emotional components of treaty making, as Aboriginal persons must



reconcile their cultural and historical connection to all of their traditional territory with the requirement to choose specific sites where their ownership will be recognized by all parties.

For the government negotiators, the process of land selection includes a great deal of consultation with aboriginal and non-aboriginal groups alike. Guided tours of the traditional territories are necessary to enhance their understanding of the history of the area, as well as to shed more light on the Aboriginal perspective towards lands and natural resources.

The following lands are generally excluded from selection:

- lands owned in fee-simple
- lands under lease, license or agreement for sale
- lands occupied by, transferred to, or reserved to any government department or agency from the federal, provincial or municipal level
- lands occupied by or needed for community infrastructure projects
- lands in national or provincial parks, protected areas and/or critical wildlife habitat
- public highways and winter roads.

Privately owned lands may be acquired by governments for treaty settlement purposes on a willing-buyer, willing-seller basis. All other third party interests in lands and resources are normally honoured.

## Finalizing Land Selection Negotiations

The following steps can be used by the parties to finalize land selection negotiations:

- using as a guide the interests expressed by the Aboriginal Group based on the larger scale maps already produced, the federal and provincial teams prepare 1:50,000 scale maps of specific areas of the traditional territory
- detailed and sometimes time-consuming negotiations ensue - it is often necessary for government negotiators to visit the lands in question to acquire a first-hand knowledge of the geography, history and economic development potential of the lands as well as to better understand the connection the Aboriginal group has with the land
- the federal and provincial teams set draft land selection schedules, to eventually be affixed to the Final Agreement
- the parties finalize the maps needed to withdraw the selected lands from the inventory of available lands
- governments review the maps and proceed to withdraw the lands from the inventory of available lands
- the parties conduct a 60-day public review and consultation on the land selection to ensure no legal interests have been negatively effected
- maps are ratified or amended based on the results of the 60-day public review.



## 6. Self-Government

The Government of Canada's policy recognizing the inherent right of Aboriginal peoples to self-government as an Aboriginal right within section 35 of the *Constitution Act, 1982*, was set out in the *Inherent Right Policy* in 1995. This constituted a major step forward in government-Aboriginal relations, and made the right to self-government a primary policy focus for the negotiation and implementation of practical arrangements.

Self-government negotiations are open to Aboriginal peoples who live on reserves and are covered by the *Indian Act*, as well as other Aboriginal peoples. Access is not limited to Aboriginal peoples who meet the criteria to negotiate a comprehensive, specific or other land claim. Generally, Aboriginal groups negotiating a comprehensive land claim can negotiate self-government arrangements as part of that claim.

One of the main objectives in contemporary government-Aboriginal relations is the negotiation of stable government structures capable of delivering the programs and services required by Aboriginal constituencies in a sustainable manner that helps develop greater Aboriginal self-reliance. Aboriginal government structures should be designed to work well with other levels of government.

Another objective of self-government is to assist First Nations in protecting their culture and heritage, and to allow them to manage their own lands, resources and assets. Aboriginal self-government will give First Nations the legitimate tools they need to make a tangible, positive difference in the lives of

### Self-Government Aspects Considered Integral to Aboriginal Peoples and Essential to Their Operation as a Government:

- governing structures, internal constitution, elections
- membership
- marriage
- adoption and child welfare
- Aboriginal languages, culture and religions
- internal taxation systems
- education
- health
- management of capital
- hunting, fishing, trapping on Aboriginal lands
- administration and enforcement of Aboriginal laws
- policing
- property rights
- public works
- housing
- local transportation
- licensing and regulation of businesses on Aboriginal land
- land management
- agriculture.

### Aspects Considered to be Beyond Those Integral and Internal to Aboriginal Peoples but for Which the Canadian Government Would be Willing to Negotiate Some Measure of Jurisdiction or Authority:

- divorce
- labour/training
- administration and enforcement of laws of other jurisdictions
- penitentiaries and parole
- environmental protection, assessment and pollution prevention
- fisheries co-management
- gaming
- emergency preparedness and response support
- migratory birds co-management.

### Issues NOT subject to Negotiation as part of Self-Government Agreements:

There are a number of subject matters where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority. These subject matters cannot be characterized as either integral to Aboriginal cultures, or internal to Aboriginal groups. They can be grouped under two headings:

- powers related to Canadian sovereignty, defence and external relations; and,
- other national interest powers.

In these areas, it is essential that the federal government retain its law-making authority.



Aboriginal peoples and enable them to exercise greater control over their lives.

Federal and provincial laws will continue to apply to First Nation lands, including federal laws such as the Criminal Code, the Canadian Environmental Assessment Act and the Fisheries Act. Canada's view is that federal, provincial, and First Nation laws will all apply to First Nation land at the same time, even when they pertain to the same subject matter, and that priority rules will be included to deal with conflicts between the laws.

First Nation laws will, for the most part, be focused on matters that are internal to a First Nation and integral to its culture. Clarity and harmony between the First Nation, federal and provincial jurisdictions will be established through detailed, clear and precise definitions of First Nation law making power, and the inclusion of rules of priority to deal with conflicts.

Canada remains clear that its national sovereignty must in no way be affected by self-government negotiations and agreements. Self-government arrangements resulting from treaties must operate within the Canadian Constitution and will not result in sovereign states or autonomous enclaves within the boundaries of Canada. The authority of Aboriginal groups must be exercised within the Canadian constitutional framework.

The Government is committed to the principle that the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the Charter. Self-government agreements, including treaties, will therefore have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments

and institutions in relation to all matters within their respective jurisdictions and authorities.


The Charter itself already contains a provision directing that it must be interpreted in a manner that respects Aboriginal and treaty rights, which would include, under the federal approach, the inherent right. The Charter is thus designed to ensure a sensitive balance between individual rights and freedoms, and the unique values and traditions of Aboriginal peoples in Canada.

## Key Principles for Implementing the Federal Approach to Self-Government

The government's view on Aboriginal self-government recognizes the principle that the "one-size-fits-all" approach is not viable. As a result, self-government agreements can take many different forms depending on the structure, culture, needs and strengths of each Aboriginal group.

There are different governance structures in Canada today. These include: public government, like that of the Inuit in Northern Quebec and Nunavut; a community-based arrangement like that of the Sechelt band of British Columbia; and more complex arrangements such as the Nisga'a Agreement which involves a Nisga'a constitution and provisions for the establishment of Aboriginal courts.

Funding is provided by the federal government to the Aboriginal group to support them through comprehensive claims and self-government negotiations. The funding can take the form of a loan (in comprehensive land claim negotiations) or a contribution (in self-government negotiations separate from comprehensive land claim negotiations). Federal funding for



the implementation of self-government provisions comes from sources already allocated to federal government departments whose responsibilities will be transferred to the Aboriginal government. In addition, Canada provides some short-term implementation funding.

For monies received from the federal government, Aboriginal groups are financially accountable to Canada. In addition, Aboriginal groups must be as politically and financially accountable to their constituencies as other levels of government, through principles of transparency, disclosure and redress. Public accounts must be made available and annual public audits must be conducted. The financial records must comply with standard accounting practices of governments in Canada.

The financing of Aboriginal land claims and self-government is considered a joint responsibility of the federal, provincial/territorial, and Aboriginal governments. In support of this principle, the parties to the negotiations determine within government-to-government fiscal agreements the extent to which a new Aboriginal government's own-source revenues will be used to offset federal/provincial/territorial government funding.

For more information on self-government negotiations, including the current status of on-going negotiations, please consult the INAC web site: <http://www.ainc-inac.gc.ca>



## Conclusion

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*"For too long, the voices of Aboriginal peoples have not been heard in the councils of government or in the management of their own economic, social and cultural affairs. Too many still live in grinding poverty and lack the tools necessary to improve their quality of life. To overcome these challenges we must enter into a true dialogue and a true partnership with the goal of building a better future."*

*Canada's Prime Minister, Jean Chrétien, in a letter sent to delegates attending the first Indigenous Peoples Summit of the Americas, Ottawa, March 2001.*

Critics of Canada's comprehensive land claims process state it is taking too much time to produce results. This is hardly surprising. The comprehensive land claims process deals with issues of great complexity, must reconcile an Aboriginal sense of historic injustice with a government desire for a process which looks to the future, and must build trust between Aboriginal and non-Aboriginal negotiation teams, as well as between Aboriginal and non-Aboriginal populations and communities.


It stands to reason that the negotiation of comprehensive land claims and self-government agreements takes time. These processes are intended to fundamentally change the relationship between Aboriginal peoples, the province or territory in question, and Canada, a relationship that has been unsatisfactory for several hundred years.

In these negotiations, representatives of different cultures set out to achieve a common understanding. The negotiations are complicated by the fact that three different parties (the First Nation, Canada, and the province or territory in question) come together in negotiations with differing, and often competing, sets of needs, interests, and aspirations. Often, Aboriginal groups feel that governments have

a history of making decisions that affect Aboriginal peoples, without first undertaking appropriate consultation.

Good faith can only be built slowly, and the importance of interpersonal relationships cannot be overestimated. In building trust and nurturing relationships, it is sometimes the smallest things that have the largest impact:

- respect the cultural traditions of the Aboriginal group with whom the negotiations are taking place
- promise only that which the government can deliver
- avoid confrontation when communicating interests and positions
- reflect the interests of the Aboriginal group - they need to realize the government and its representatives understand and respect their perspectives and positions
- wherever possible, maintain the composition of the negotiation team over time: many Aboriginal groups and their leaders place emphasis on personal relationships in negotiations as important as these
- visit the Aboriginal communities in question on a frequent basis, talking to elders, and promoting joint social events and activities such as meals, fishing trips, and visits to culturally significant sites.



More often than not, the length of time necessary to build trust and conduct negotiations can be the negotiators' best friend. Time allows negotiators from all parties to reflect upon entrenched positions and come back to the negotiating table in a more conciliatory spirit. In some instances, land claims negotiations have collapsed on the verge of signing a Final Agreement, but the passage of time has allowed the parties to return to the negotiating table and work out their disagreements.

Also crucial to the long-term success of the process is keeping both Aboriginal and non-Aboriginal communities well-informed and educated on the purpose and status of Aboriginal land claims negotiations. The Canadian process allows Aboriginal peoples not only to express their views and state their grievances, but also to participate in the formulation of the terms and conditions of their own settlement. It also gives other Canadians the opportunity to express their concerns through the consultation process.

The degree of skepticism among third parties prior to the beginning of land claim negotiations is often high. Opponents to Aboriginal land claim settlements have attempted to highlight the aspects of the land claim process and its implementation that they would label as "negative," yet there has not been a single case where the resolution of an Aboriginal land claim has resulted in economic or political chaos in Canada. In addition, no major confrontation or threat involving national security or sovereignty has occurred as a result of the Aboriginal land claims process.

In the Canadian context, business leaders were generally opposed to negotiations in the early stages of the land claims process because of concerns that Aboriginals would prevent resource-based development ventures post-settlement.

Over time, business leaders have embraced the claims process and pushed for certainty. As the claims process has advanced, business leaders and non-Aboriginal communities have found that the injection of federal cash in a region through a land claim settlement often stimulates and helps diversify the local economy.

## Social and Economic Impact of the Aboriginal Land Claims Settlements Process in the Canadian Context

To date, data regarding changing socio-economic conditions does not exist for Aboriginal groups who have achieved a comprehensive land claim with the federal and provincial/territorial governments. By all measures currently available, however, consequences appear to be positive. Collective ownership, access to and co-management of land, economic opportunities, capital, and resources revenue as well as the creation of governance structures to manage these resources have created and expanded a wide range of Aboriginal businesses.

Thanks in large part to the certainty and resources, both fiscal and natural, that come with Final Agreements, Aboriginal groups in Canada are poised to become key partners in some of North America's major economic projects including Voisey's Bay Nickel Development, the Alaska Pipeline project, the MacKenzie Valley Natural Gas Pipeline Project, as well as diamond projects in the Northwest Territories and Nunavut.

Each Aboriginal group takes a different approach to the capital transfer that comes with settling a comprehensive land claim. Some groups have opted for focusing their investments in regional ventures while others





have decided to invest most of their capital more broadly in ventures outside their regions. The new breed of empowered Aboriginal Canadians who now exercise a much greater level of control over their traditional territories and resources are not opposing new economic ventures proposed by non-Aboriginal business groups in their lands. Aboriginal groups do generally demand that suggested ventures be fair to them and not threaten their values and traditions. Non-Aboriginal Canadians, meanwhile, have adjusted well to the new agreements and demands, political systems have adapted, and businesses have quickly found new forms of managing post-settlement conditions. For instance, many businesses are capitalizing on new opportunities through joint-ventures with Aboriginal entrepreneurs.

Aboriginal peoples with modern-day treaties are using their new resources to participate in broader contexts and interact more actively with non-Aboriginal Canadians, making the latter more aware of the richness and diversity of Aboriginal cultures. Moreover, land claims settlements and self-government arrangements have given Aboriginal peoples better tools with which to preserve their traditions and cultures. This has led to a greater number of non-Aboriginal Canadians becoming more interested in Aboriginal cultures. Together, Aboriginal and non-Aboriginal Canadians are building cultural bridges that are enhancing mutual understanding and respect. The Nisga'a, for example, have founded an institution named "Nisga'a House of Wisdom" which offers Nisga'a-based post-secondary programs that attract scholars from as far away as Japan, Europe, China, and New Zealand.

Overall, Aboriginal land claim settlements have not produced the political and economic disruption, disharmony, and dislocation that its strongest critics foresaw. While the land claims

process has not provided instant solutions to the long standing problems associated with Aboriginal poverty, Aboriginal social and economic indicators are gradually improving.

Canada sees the process of settling Aboriginal claims as a bridge to a future where Aboriginal communities operate under a system of government created by Aboriginal peoples for Aboriginal peoples. A future where leaders are less accountable to the federal government and more accountable to their own communities. A future where First Nation communities are more self-reliant and self-sufficient. A future where communities offer the stability that will lead to economic development, dignity and hope.



# Annexes :

\*Map of Treaties and Comprehensive Land Claims in Canada on pages 20-21.

## Summary of Comprehensive Land Claims Settled as of August 2003 in Canada

| Agreement   | Year brought into effect | Land  | Population                 |
|---|--------------------------|---|----------------------------|
| James Bay and Northern Quebec Agreement   | 1975                     | 5,290 sq km   | 12,103 Cree<br>8,643 Inuit |
| Northeastern Quebec Agreement   | 1978                     | Integrated into above agreement   | 600 Naskapi                |
| Inuvialuit  | 1984                     | 435,000 sq km   | 2500                       |
| Gwich'in  | 1992                     | 57,000 sq km  | 2300                       |
| Nunavut Territory   | 1993                     | 1.9 million sq km   | 19,000 Inuit               |
| Sahtu Dene and Metis  | 1994                     | 280,278 sq km   | 2400                       |
| Nisga'a   | 2000                     | 2,000 sq km   | 6,000 Nisga'a              |
| Tlicho  | 2004 (estimated)         | 39,000 sq km  | 3,500                      |
| <b>Eight Final Agreements were also signed with Yukon First Nations based on the Yukon Indians Umbrella Final Agreement of 1993, which also included Self-Government agreements with:</b>   |                          |   |                            |
| The Vuntut Gwich'in First Nation  | 1995                     | 41,439 sq km<br>(it includes the area claimed by 6 additional groups who are in the process of reaching a Final Agreement ) | 8000                       |
| The First Nation of Nacho Nyak Dun  | 1995                     |   |                            |
| The Teslin Tlingit Council  | 1995                     |   |                            |
| The Champagne and Aishihik First Nations  | 1995                     |   |                            |
| The Little Salmo/Carmacks First Nation  | 1997                     |   |                            |
| The Selkirk First Nation  | 1997                     |   |                            |
| The Tr'ondek Hwech'in First Nation  | 1998                     |   |                            |
| The Ta'an Kwach'an Council  | 2002                     |   |                            |
| <p>The above claims cover 4 million sq. km of Canadian territory – about the size of the combined territories of Mexico, Venezuela and Colombia, or slightly less than the combined areas of Argentina and Peru – and were supplemented by capital transfers to Aboriginal groups of \$2.2 billion.</p> |                          |   |                            |



# Profile of Canada's Aboriginal Peoples

The *Constitution Act, 1982*, recognizes three groups of Aboriginal peoples -- Indians, Inuit and Métis. In addition, the Indian Act delineates the legal definitions that apply to Status Indians in Canada: a Status Indian is an Indian person who is registered under the *Indian Act*. Métis peoples are of mixed First Nations and European ancestry, who identify themselves as Métis. The Inuit are the Aboriginal peoples of Arctic Canada and live primarily in Nunavut, the Northwest Territories and northern parts of Labrador and Quebec. The Inuit do not live on reserves and are not covered by the *Indian Act*.

INAC's core responsibilities with respect to Aboriginal peoples are primarily related to Status Indians living on reserves, and the Inuit. INAC is responsible for the delivery of provincial-type programs and services on reserves. In the North, INAC works in cooperation with Inuit and other Aboriginal communities to develop governance structures and to finalize and implement land claims and self-government agreements. Given the unique context of Canada's North, and in accordance with the federal policy on Aboriginal self-government, some agreements also include Métis north of 60° latitude.

Based on 1998 projections, Status Indians living on reserves represent about 61 percent of the Status Indian population. There are 445,436 on-reserve Status Indians and 285,139 who reside off-reserve. In total, there are 614 First Nations communities, comprising 52 nations or cultural groups and more than 50 languages. About 61 percent of First Nations communities have fewer than 500 residents -- only six percent have more than 2,000.

Overall, 34.6 percent of on-reserve Status Indians live in urban areas, while 44.6 percent live in rural areas; 17.0 percent live in special-access areas and 3.7 percent in remote zones.

The on-reserve Status Indian population is expected to increase by 57.9 percent from 2003 to 2021, compared with 12.0 percent for the Canadian population as a whole. About 40.4 percent of the Status Indian population is under the age of 19, compared with 25.2 percent for the Canadian population.

In Canada's North, which occupies 40 percent of Canada's land mass, there are three territories consisting of some 96 organized communities, most of them home to small populations of First Nations, Métis or Inuit. Widespread distribution of the population increases the cost of providing services. Some 92,300 residents are scattered across this area; Nunavut's population is 26,700, while there are 37,100 people in the Northwest Territories and 28,500 in the Yukon.

The population in the North is young, with 43.6 percent of the population under the age of 25. A little over half of the population is Aboriginal, varying from 85.7 percent in Nunavut to about 51 percent in the Northwest Territories and about 24.5 percent in the Yukon. There are few reserves.



## Glossary of Terms

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### Aboriginal peoples

"Aboriginal peoples" refers to the original peoples of North America and their descendants. The Canadian Constitution (*Constitution Act, 1982*) recognizes three groups of Aboriginal peoples — Indians, Métis and Inuit. These are separate peoples with unique heritages, languages, cultural practices, and spiritual beliefs.

### Aboriginal rights

Rights that some Aboriginal peoples of Canada hold as a result of their ancestors' long-standing use and occupancy of the land. The rights of certain Aboriginal peoples to hunt, trap and fish on ancestral lands are examples of Aboriginal rights. Aboriginal rights vary from group to group depending on the customs, practices, traditions, treaties, and agreements that have formed part of their distinctive cultures.

### Aboriginal self-government

Governments designed, established and administered by Aboriginal peoples under the Canadian Constitution through a process of negotiation with Canada and, where applicable, the provincial government.

### Aboriginal title

A legal term that recognizes an Aboriginal interest in the land. It is based on the long-standing use and occupancy of the land by today's Aboriginal peoples as the descendants of the original inhabitants of Canada.

### band

A band is a body of Indians for whose collective use and benefit lands have been set apart or money is held by the Crown, or declared to be a band for the purposes of the Indian Act. Each band has its own governing band council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election, or sometimes through custom. The members of a band generally share common values, traditions and practices rooted in their ancestral heritage. Today, many bands prefer to be known as First Nations.

### band council

This is the governing body for a band. It usually consists of a chief and councillors, who are elected for two or three-year terms (under the Indian Act or band custom) to carry out band business, which may include: education; water, sewer and fire services; by-laws; community buildings; schools; roads; and other community businesses and services.

### First Nation(s)

A term that came into common usage in the 1970s to replace the word "Indian," which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term "First Nations peoples" refers to the Indian peoples in Canada, both Status and Non-Status. Some Indian peoples have also adopted the term "First Nation" to replace the word "band" in the name of their community.



## Indian

The term "Indian" collectively describes all the Aboriginal peoples in Canada who are not Inuit or Métis. Indian peoples are one of three peoples recognized as Aboriginal in the *Constitution Act, 1982*. It specifies that Aboriginal peoples in Canada consist of the Indian, Inuit and Métis peoples.

There are three categories of Indians in Canada: Status Indians, Non-Status Indians and Treaty Indians.

## Status Indians

Status Indians are people who are entitled to have their names included on the Indian Register, an official list maintained by the federal government. Certain criteria determine who can be registered as a Status Indian. Only Status Indians are recognized as Indians under the *Indian Act*, which defines an Indian as "a person who, pursuant to this Act, is registered as an Indian or is entitled to be registered as an Indian." Status Indians are entitled to certain rights and benefits under the law.

## Non-Status Indians

Non-Status Indians are people who consider themselves Indians or members of a First Nation but whom the Government of Canada does not recognize as Indians under the *Indian Act*, either because they are unable to prove their status or have lost their status rights. Many Indian people in Canada, especially women, lost their Indian status through discriminatory practices in the past. Non-Status Indians are not entitled to the same rights and benefits available to Status Indians.

## Treaty Indian

A Status Indian who belongs to a First Nation that signed a treaty with the Crown.

## Indian Act

Canadian federal legislation, first passed in 1876, and amended several times since. It sets out certain federal government obligations and regulates the management of Indian reserve lands, Indian moneys and other resources. Among its many provisions, the *Indian Act* currently requires the Minister of Indian Affairs and Northern Development to manage Indian lands and certain moneys belonging to First Nations, and to approve or disallow First Nations by-laws. In 2001, the national initiative *Communities First: First Nations Governance* was launched, to consult with First Nations peoples on the issues of governance under the *Indian Act*.

## Inuit

Inuit are the Aboriginal peoples of Arctic Canada. Inuit live primarily in Nunavut, the Northwest Territories and northern parts of Labrador and Quebec. They have traditionally lived above the treeline in the area bordered by the Mackenzie Delta in the west, the Labrador coast in the east, the southern point of Hudson Bay in the south, and the High Arctic islands in the north.

Inuit are not covered by the *Indian Act*. However, in 1939 the Supreme Court interpreted the federal government's power to make laws affecting "Indians, and Lands reserved for the Indians" as extending to Inuit.

The word "Inuit" means "the people" in Inuktitut, the Inuit language, and is the term by which Inuit refer to themselves. Avoid using the term "Inuit people" as the use of "people" is redundant. The term "Eskimo," applied to Inuit by European explorers, is no longer used in Canada.

## land claims

In 1973, the federal government recognized two broad classes of claims — comprehensive and specific. *Comprehensive claims* are based on the assessment that there may be continuing Aboriginal rights to lands and natural resources. These kinds of claims come up in those parts of Canada where Aboriginal title has not previously been dealt with by treaty and other legal means. The claims are called "comprehensive" because of their wide scope. They include such things as land title, fishing and trapping rights, and financial compensation. *Specific claims* deal with specific grievances that First Nations may have regarding the fulfilment of treaties. Specific claims also cover grievances relating to the administration of First Nations lands and assets under the *Indian Act*.

## Métis

The word "Métis" is French for "mixed blood." The Canadian Constitution recognizes Métis people as one of the three Aboriginal peoples.

Historically, the term "Métis" applied to the children of French fur traders and Cree women in the Prairies, and of English and Scottish traders and Dene women in the North. Today, the term is used broadly to describe peoples with mixed First Nations and European ancestry who *identify* themselves as Métis, distinct from Indian peoples, Inuit, or non-Aboriginal people. (Many Canadians have mixed Aboriginal and non-Aboriginal ancestry, but not all identify themselves as Métis.) Note that Métis organizations in Canada have differing criteria about who qualifies as a Métis person.

## Nunavut

The territory created in the Canadian North on April 1, 1999 when the former Northwest Territories was divided in two. Nunavut means

"our land" in Inuktitut. Inuit, whose ancestors inhabited these lands for thousands of years, make up 85 percent of the population of Nunavut. The territory has its own public government.

## off-reserve

A term used to describe people, services or objects that are not part of a reserve, but relate to First Nations.

## oral history

Evidence taken from the spoken words of people who have knowledge of past events and traditions. This oral history is often recorded on tape and then put in writing. It is used in history books and to document land claims.

## reserve

A reserve is tract of land, the legal title to which is held by the Crown, set apart for the use and benefit of an Indian band. Some bands have more than one reserve. Many First Nations now prefer the term "First Nation community," and no longer use "reserve."

## surrender

A formal agreement by which a band consents to give up part or all of its rights and interests in a reserve. Reserve lands can be surrendered for sale or for lease, on certain conditions.

## tribe

A tribe is a group of Native Americans sharing a common language and culture. The term is used frequently in the United States, but only in a few areas of Canada (e.g., the Blood Tribe in Alberta).