



Aboriginal Self-Government in the Northwest Territories

Supplementary Booklet 1

Aboriginal Peoples and the Crown –
A Changing Relationship

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Introduction

Before the European states established colonies in the Americas, **Aboriginal peoples** governed their own affairs. The colonial powers claimed sovereignty in North America on the basis of "discovery" but in practice their power was gradually built up by trade and settlement, warfare and diplomacy.

Many of the early Aboriginal **treaties** aimed at "peace and friendship" with Aboriginal peoples and colonial documents from the earlier period refer to Aboriginal peoples as "allies" rather than as "subjects". Treaty making with Aboriginal peoples and the recognition of **Aboriginal rights** and title were part of the process by which the colonial powers established themselves.

The *Royal Proclamation*

Even after the British had defeated the French in North America, it remained important for them to maintain good relations with Aboriginal peoples. This required the control of non-Aboriginal settlement and careful dealings with Aboriginal peoples over their lands.

The ***Royal Proclamation*** of 1763 is the most important statement of British policy towards Aboriginal peoples in North America. The *Proclamation* called for friendly relations with the Aboriginal peoples and noted that "great Frauds and Abuses" had occurred in land dealings. From the date of the *Proclamation* on, only the **Crown** could legally buy Aboriginal lands and any such sale had to be made at a "public Meeting or Assembly of the said **Indians** to be held for that Purpose." The *Proclamation* reserved existing Aboriginal lands for the "several Nations or Tribes of Indians" and required all non-Aboriginal persons living on these lands "forthwith to remove themselves..."

The *Royal Proclamation* has been called the **Magna Carta** of the Aboriginal peoples. Although there has been disagreement on whether or not the *Proclamation* applies in law to the NWT, it still set out certain principles for dealings between the Crown and the Aboriginal peoples. The Government of Canada promised to follow these principles in Rupert's Land and the **North-Western Territory** after 1870. The special responsibilities of the Crown for Aboriginal peoples can be traced back to the role of protector that the Crown took on under the *Proclamation*.

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Royal Proclamation of 1763 is important for establishing that:

- Aboriginal peoples had an interest in certain lands;
- this interest belonged to the "tribe" or "nation", not to individuals;
- only the Crown could buy or accept Aboriginal lands;

- the Crown was required to obtain lands from Aboriginal peoples by agreement;
- any unsold or unsurrendered Aboriginal lands were reserved to the exclusive use of Aboriginal peoples;
- the Aboriginal peoples were under the protection of the Crown.

Note: Key words are identified in BOLD text and defined in a listing of Key Words and Ideas on page 12 of this booklet. Other key words are defined where they occur in the text.

Treaty-Making

The principles outlined in the *Royal Proclamation* were generally followed in the negotiation of treaties in the following years. Most of these early treaties were simple land sales, but in some cases the treaties also included hunting and fishing rights. Annual treaty payments ("annuities") first appeared in a treaty in 1818 and after that became normal.

Aboriginal

people were important in helping European explorers, traders and officials in northern Canada. A few important examples from the early period include:

- *Thandethur*: A Chipewyan woman who negotiated peace between the Chipewyans and the Cree and so made it possible for the Hudson's Bay Company to build Fort Prince of Wales (near Churchill, Manitoba) and begin direct trading with the Chipewyans. Though still a teenager when she died in 1717, she impressed the Governor James Knight, who remarked on her high spirits and said that she had the firmest resolve that he had ever encountered.
- *Matonabbee*: A Chipewyan trading captain who was adopted by the Metis Governor Moses Norton, representing the

Hudson's Bay Company at Fort Prince of Wales. Matonabbee, who spoke Chipewyan, Cree and English, accompanied the Hudson's Bay Company officer, Samuel Hearne, on travels to the mouth of the Coppermine River from 1770-72.

- *Awgeenah*: Accompanied Hearne and Matonabbee to the Coppermine River in 1772 and Alexander Mackenzie to the Arctic Ocean in 1788-89.
- *Akaitcho*: A Chipewyan leader who helped British navy explorers, Sir John Franklin and George Back, to find their way overland in the Canadian Sub-arctic and Arctic. Made peace with the Dogribs in 1823.
- *Edzo*: A Dogrib leader who made peace with the Chipewyans under Akaitcho near Snare Lake in 1823.

The Rupert's Land and North-Western Territory Transfer



The Hudson's Bay Company in its later role.
photo: NWT Archives

When the Dominion of Canada was set up in 1867, it did not include any of the territories of the Hudson's Bay Company. These territories, called "Rupert's Land and the North-Western Territory" were administered by the Company under a Charter granted by King Charles II of England in 1670. From the time of confederation, the Canadian government made it clear that it wanted Rupert's Land and the North-Western Territory to be part of Canada.

The Hudson's Bay Company gave up its **Royal Charter** in 1870, in exchange for cash and other compensation. Great Britain then transferred Rupert's Land and the North-Western Territory to Canada. The British **Order-in-Council** of 1870, which carried out this transfer, included a requirement that:

"Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government..."

In accordance with this requirement, Treaties 8 and 11 were negotiated by the Canadian government with the **Dene** of the NWT.

Treaties 8 and 11

Before the beginning of modern land claims negotiations, two treaties - Treaty 8 and Treaty 11 – were therefore signed in the area of the present NWT.

The main aim of the Canadian government in signing Treaties 8 and 11 was to get the cooperation of the Dene in the opening up of the North. The Yukon gold rush of 1898 and the discovery of oil at Norman Wells in 1920 were the immediate concerns leading to the negotiations.

The negotiations for Treaty 8 were conducted in the summer of 1899 with the "Cree, Beaver, Chipewyan, and

other Indians inhabiting the district..." and the treaty was signed at Lesser Slave Lake in northern Alberta on June 21, 1899. **Adhesions** to the Treaty were signed in the NWT in 1900. Treaty 11 was signed by the Crown and representatives of "the Slave, Dogrib, Loucheux, Hare and other Indians..." in 1921. An adhesion to Treaty 11 was signed at Fort Liard in 1922.



Tent for treaty payments at Fort Rae, 1925.
photo: NWT Archives

Metis, Inuvialuit and the Treaties

Some Metis joined Treaties 8 & 11 and so became "Treaty Indians". However, most Metis were given "scrip" instead of treaty rights. Scrip was a government certificate that could be exchanged for land or money. Money scrip worth \$240 or land

scrip of 240 acres (just under 1 square kilometer) was given for each Metis family head and child.

In 1929 there were discussions in Aklavik on bringing some of the Inuvialuit under Treaty 11. The Inuvialuit rejected this proposal.

the written terms of Treaties 8 and 11 are similar to those of the treaties signed throughout western Canada. The main features, according to the texts, are:

- the purpose was to establish "peace and goodwill" between the Dene and the Crown's other subjects;
- the Dene are stated as giving up their rights to their lands to the Crown;
- the Crown guaranteed the right to hunt, trap and fish throughout the Treaty area, subject to regulation, except in those areas taken up for settlement, mining, timber cutting, etc;
- reserves were to be set aside on the formula of one square mile (2.59 square kilometers) per family of five;
- a cash payment of \$32 for Chiefs, \$22 for Headmen, and \$12 for all others, following signing;
- annual Treaty payments of \$25 for Chiefs, \$15 for Headmen and \$5 for all others;
- the Crown was to pay the salaries of teachers to instruct the Dene;
- agricultural assistance and equipment was to be provided;
- the Dene promised to act as "good and loyal subjects of Her Majesty", to obey the law and to maintain peace with other subjects of the Crown.

There has been disagreement between the federal government and the Dene over the basic nature of the treaties. The Dene interpretation of Treaties 8 and 11 is based on the testimony of elders rather than upon the written texts. The Dene viewed the treaties as agreements of "peace and friendship" rather than as agreements to give up Aboriginal rights or title. The federal government has viewed the treaties as agreements that gave up Aboriginal rights or title in exchange for the benefits and promises made in the treaties.

Whether or not Treaties 8 and 11 ended **Aboriginal title** in the NWT is a question that came to a head in the *Paulette* case in 1973. This case arose from a Dene attempt to file a **caveat** on certain Crown lands. The Dene argued in court that the written version of the treaties did not reflect the understanding of the Dene who signed them. In the Supreme Court of the NWT, Justice Morrow found that, "...notwithstanding the language of the two treaties, there [is] a sufficient doubt on the facts that aboriginal title was extinguished..." to justify the filing of a caveat until the issue of Aboriginal title was settled. The Supreme Court of Canada later ruled that the caveat could not be filed on Crown lands but the courts did not rule on the basic issue

of whether or not Aboriginal title was in fact given up by signing the treaties.

In the 1970s, the Government of Canada decided to negotiate comprehensive land claims settlements throughout the NWT, including in the areas covered by Treaties 8 and 11. The *Paulette* case, and Dene opposition to the federal interpretation of the treaties, doubtless played a part in this decision. However, the federal decision was also based upon the fact that the Dene had never received the **reserve** lands that they were entitled to under the written terms of



Signing of the NWT Dene-Metis land claim agreement - in - principle in Rae in 1988. *Standing left to right:* Jim Rabesca and Bill Erasmus. *Seated left to right (front row):* Prime Minister Brian Mulroney, Joe Rabesca and Mike Paulette.

photo: NWT Archives

the treaties. This created the possibility for the federal government (if the Dene agreed) of not following a **treaty land entitlement** approach but of following an approach for the settlement of land claims across the North that would be similar for Treaty and non-Treaty Indians, Metis and Inuit. On this basis the federal government agreed to negotiate a land claim with the Dene and Metis of the NWT in 1976 and 1977. Formal negotiations began in 1981.

The **Inuvialuit** began land claim negotiations in the mid-1970's, and the *Inuvialuit Final Agreement* was signed in 1984. But attempts to reach a single **land claim agreement** for all the Dene and **Metis** of the NWT broke down in 1990. Claims negotiations then shifted to a regional basis. The Gwich'in signed a land claim agreement in 1992, and the Sahtu Dene and Metis in 1994. The Dogrib negotiated an agreement-in-principle to settle their land claim and provide for **self-government** in 1999.

the following are some of the features of land claims agreements which have been concluded in the NWT:

Inuvialuit Final Agreement

	(June 25, 1984)
Beneficiaries	2500
Settlement Region	435,000 square kilometers
Inuvialuit surface title	91,000 square kilometers
Inuvialuit sub-surface title	10,920 square kilometers
Cash compensation	\$45 million (1977 value)
Economic Enhancement Fund	\$10 million
Social Development Fund	\$7.5 million

Gwich'in Comprehensive Land Claims Agreement

	(April 22, 1992)
Beneficiaries	2200
Settlement Area	59,800 square kilometers
Gwich'in NWT surface title	22,331 square kilometers
Gwich'in NWT sub-surface title	6158 square kilometers
Gwich'in Yukon surface title	1554 square kilometers
Financial payment	\$75 million (1990 value)
Resource royalties	for every year, 7.5% of the first 2 million in the Mackenzie Valley & 1.5% of any additional royalties

Sahtu Dene and Metis Comprehensive Land Claim Agreement

	(September 6, 1993)
Beneficiaries	2200
Settlement Area	280,238 square kilometers
Sahtu surface title	41,437 square kilometers
Sahtu sub-surface title	1813 square kilometers
Financial payment	\$75 million (1990 value)
Resource royalties	for every year, 7.5% of the first 2 million in the Mackenzie Valley & 1.5% of any additional royalties

The *Indian Act*

Parliament passed the first *Indian Act* in 1876 to create a legal framework for Indian reserves and communities. This was mainly to try to control Indian political, cultural and economic practices. The long-term goal was to assimilate Indians into the wider society by ending their distinct way of life.

The Government of Canada's use of the *Indian Act* in this way did not respect Aboriginal and **treaty rights**. The treaties were meant to be agreements but the *Indian Act* was imposed. And it was the *Indian Act*, rather than the treaties, which governed Aboriginal communities in most ways once reserves were set up.

The *Indian Act* has therefore been criticized for infringing on the right of self-government and for breaking the spirit of the treaties. It has also been criticized for being discriminatory and infringing on human rights (as understood today) throughout much of its history. The *Act's* "membership" sections before 1985 are the best-known example. These took away legal recognition ("status") from any Indian woman who married a non-Indian (including another Aboriginal person who was not recognized as a status Indian under the *Act*). Women and their children in this situation were denied the benefits (including treaty rights) given to persons recognized as status Indians under the *Act*, and had no legal right to live on reserve lands.

In southern Canada, the *Indian Act* has protected reserve lands to some extent. Many parts of the present Act give the Crown a trust or **fiduciary responsibility** for things like the management of Indian land, money and property, in order to protect this land, money and property. But the *Indian Act* gives control to the Minister of Indian Affairs and Northern Development rather than to the Aboriginal people to whom the land, money or property belongs. In such ways, the *Act* is not consistent with Aboriginal self-government.

Bill C-31 The membership sections of the *Indian Act*, concerning marriage to non-Indian males, were challenged by Jeanette Lavell and Yvonne Bedard in the Supreme Court of Canada in 1973. A majority of the judges of the Supreme Court upheld these provisions of the *Indian Act*.

In 1981, Sandra Lovelace further challenged these provisions of the *Indian Act* before the United Nations Human Rights Committee. In this case, the Committee found that these sections of the *Act* violated the *International Covenant on Civil and Political Rights*.

As a result of such actions, section 35 of the *Constitution Act* of 1982 was changed in 1983 to make it clear that Aboriginal and treaty rights were guaranteed equally to men and women. In addition, Aboriginal women and their children who lost their Indian status and their band membership through marriage to a non-Indian were able to have their status and band membership restored through the enactment of Bill C-31, *An Act to Amend the Indian Act*, in 1985. However, in many cases the children or grandchildren of reinstated persons are not recognized under the *Indian Act*.

Application of the *Indian Act* in the NWT

Following the signing of Treaties 8 and 11, **band** councils under the *Indian Act* were set up in the NWT. But the only reserves that have been set up are at Hay River and Salt Plain. Because the *Indian Act* mainly applies to communities located on reserves, the *Act* has not had as much importance in the NWT as in southern Canada. But even in the North the *Indian Act* has affected the lives of Aboriginal people. The membership sections are an example of this.

Changing Directions

Government policy towards **Aboriginal peoples** has shifted many times since the first European settlements and trading posts were set up in North America. Over the years Aboriginal rights and title have sometimes been upheld and sometimes denied. Assimilation and protection, paternalism and self-determination have all been expressed in government policy at various times.



The Gwich'in Comprehensive Land Claims Agreement is signed in 1993. *Left to right*, President Willard Hagen (Gwich'in Tribal Council), Minister Tom Siddon (DIAND), and Premier Nellie Cournoyea (GNWT)

photo: Gwich'in Tribal Council

The main period of treaty-making in Canada after confederation came to an end with the signing of Treaty 11 in the NWT in 1921 and the adhesions to Treaty 9 in northern Ontario in 1929-30. Attempts to deal with Aboriginal rights and title then stopped in Canada for about 40 years. In fact, the *Indian Act* was changed in 1927 to make the raising of money for land claims an offence that could be punished by a term in jail. This section of the *Indian Act* was not repealed until 1951.

Federal policy on land claims was changed by the Supreme Court of Canada's decision in the 1973 *Calder* case. In this case, the Supreme Court split over the question of whether the Nisga'a continued to have Aboriginal title in British Columbia. In August of the same year, the federal government announced a policy for the settlement of Aboriginal land claims by negotiation. This policy, which has since been reviewed and changed, marks the beginning of the modern land claims process in Canada.

Self-Government and Constitutional Recognition

Most Aboriginal peoples have seen land claim settlements as only part of a broader requirement to deal with their rights. Thus, when steps began to patriate the Constitution of Canada in the 1970s, Aboriginal organizations tried to influence this process with the aim of protecting Aboriginal and treaty rights. These efforts led to a major Aboriginal lobby in 1981 which won wide support in Canada and overseas. The entire Legislative Assembly of the NWT travelled to Ottawa in 1981 to talk to Members of Parliament and support the recognition of Aboriginal and treaty rights in the constitution, as well as to let MPs know of other territorial concerns with the constitutional proposals then being put forward.

As a result of all these efforts, Sections 25 and 35 (protecting Aboriginal and treaty rights) were included in the *Constitution Act, 1982*. The constitutional recognition of Aboriginal and treaty rights was therefore part of the national consensus that was built to support **patriation** of the constitution.

But although the constitution recognizes Aboriginal and treaty rights, it does not say what these rights are in detail. A particular concern of Aboriginal peoples has been the right of self-government.

A series of special constitutional conferences was held for the purpose of discussing Aboriginal constitutional concerns between 1982 and 1986. The Aboriginal right of self-government was the most prominent subject in these discussions. But although there was a great deal of federal, provincial and territorial support for dealing with Aboriginal self-government as a constitutionally protected right, there was not enough agreement around the table to reach a constitutional agreement on this subject.

The 1987 Meech Lake constitutional accord failed to deal with Aboriginal interests. The attempt to deal with federal-Quebec issues, and by-pass Aboriginal and northern concerns, resulted in the failure of the Meech Lake Accord in 1990. Elijah Harper's role in expressing Aboriginal opposition, in the Manitoba Legislative Assembly, was especially important.

In later constitutional discussions, the *Charlottetown Accord* of 1992 would have recognized self-government as a constitutionally protected Aboriginal right. Throughout the *Charlottetown Accord* discussions, as in earlier constitutional conferences, the GNWT supported a constitutional amendment that would entrench Aboriginal self-government. However, the *Charlottetown Accord* dealt with many issues besides self-government, and in the end was rejected in a national referendum.

In 1994, the Government of Canada proposed that, instead of amending the constitution to explicitly recognize the inherent right of self-government, it would negotiate self-government **agreements** on the understanding that the inherent right of self-government is an existing right already recognized in section 35 of the *Constitution Act, 1982*. In this way, the federal government acknowledged that Aboriginal peoples have an inherent right of self-government. In 1995, the federal government released its policy guide, *Aboriginal Self-Government - The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, often referred to as "the inherent right policy". This outlines the federal government's present approach to the inherent right of self-government.

Key Words and Ideas

Aboriginal Government

A government which represents and serves an Aboriginal people.

Aboriginal Peoples

The descendants of the original peoples of Canada. Section 35 (2) of the *Constitution Act, 1982* defines the Aboriginal peoples as Indians, Inuit and Metis.

Aboriginal Right

A right of an Aboriginal people stemming from the use of certain areas in the period before European settlement. Aboriginal rights are subject to interpretation and judgement by the courts but, as a minimum, include the right to hunt and fish and follow the traditions of an Aboriginal people. Aboriginal people, the federal government, the GNWT and some provincial governments consider self-government to be an Aboriginal right.

Aboriginal Title

The terms "Aboriginal rights" and "Aboriginal title" are sometimes used interchangeably. Recent court decisions suggest that Aboriginal title means the right to occupy and use a certain area of land, and is a type of Aboriginal right. Aboriginal customs, practices and traditions are another type of Aboriginal right that can be distinguished from Aboriginal title.

Adhesion

An Aboriginal people who did not sign a treaty when it was negotiated could later sign a document accepting the treaty. This said that those signing it agreed to "adhere to", or accept, the treaty.

Agreement-in-Principle (AIP)

A draft agreement between an Aboriginal people and the Crown to settle land claims or self-government rights. When completed, the AIP is subject to approval by the Aboriginal people and governments involved.

Band

A local grouping of Indian people as defined in Section 2 of the *Indian Act*. Many bands are known as First Nations.

Caveat

A warning. In the *Paulette* case, the Dene attempted to file a formal notice or warning of a claim against the land with the Registrar of Land Titles.

Crown

The Queen is the formal head of the government in Canada. For this reason, the government is often called "the Crown". For the same reason, agreements with the government are called agreements with "Her Majesty".

Dene

Aboriginal peoples of the Mackenzie Valley, from Inuvik and Aklavik southwards. Dene groups in the NWT include the Gwich'in, Sahtu Dene, Dogrib, Chipewyan and South Slavey. Dene speak languages that are distinct from one group to another, but which belong to the same general family.

Fiduciary Responsibility

The duty of the Crown to act in the best interests of an Aboriginal group on particular matters. The fiduciary duty gives the Crown the obligation to deal with treaty or land claim obligations through a fair process.

Indian

Section 91 (24) of the *Constitution Act, 1867* gives the federal government responsibility for "Indians, and Lands reserved for the Indians". The *Indian Act* was passed by Parliament under this constitutional authority.

Inuvialuit

The Inuit of the Mackenzie Delta and Beaufort Sea region.

Land Claim Agreement

An agreement between an Aboriginal people and the Crown dealing with Aboriginal title in a geographic area. Land claim agreements deal with things like the rights of governments and Aboriginal people to land and resources, wildlife management and cash compensation. Land claim agreements may also deal with self-government.

Magna Carta

A Charter granted by King John of England in 1215. Magna Carta is the source of many of the liberties of British subjects.

Metis

Historically, people of both Aboriginal and non-Aboriginal origins mainly located in the prairie provinces and the NWT. Metis belong to a distinct group and are defined in the constitution as one of the Aboriginal peoples of Canada.

North-Western Territory

19th Century and early 20th Century legal documents refer to the "North-western Territory", the "North-Western Territories", the "North-West Territories" and the "North-west Territories". The spelling of the "Northwest Territories" became standard in the first part of the 20th Century.

Public Government

A government which represents and serves all residents in an area. The federal, provincial, territorial and municipal governments are all "public governments".

Order-in-Council

An Order made by the King or Queen, the Governor General or a Lieutenant Governor, on the advice of Cabinet.

Patriation

Before 1982, Canada had to get the British Parliament to make important changes to its constitution. Patriation meant making the constitution so that it could be changed by the federal and provincial governments, following certain procedures, without needing to go to the British Parliament.

Public Government

A government which represents and serves all residents in an area. The federal, provincial, territorial and municipal governments are all "public governments".

Reserve

Defined in Section 2 of the *Indian Act* as an area of land that has been set aside for an Indian Band. Under the *Indian Act* the Crown has the title to Indian reserve land.

Royal Charter

A document through which the King or Queen grants certain rights or privileges to a person or a group of people..

Royal Proclamation

A formal declaration by the King or Queen on a matter of government.

Self-Government

The regulation by an Aboriginal people of its own affairs through an Aboriginal government.

Self-Government Agreement

A formal agreement between an Aboriginal people and the federal, provincial or territorial governments that deals with things like the powers of an Aboriginal government and its relationship to public governments.

Treaty

A formal agreement between an Aboriginal people and the Crown. Under Section 35 (3) of the *Constitution Act, 1982* "treaties" include recent land claim agreements as well as older agreements like Treaties 8 and 11.

Treaty Land Entitlement

A term used by the federal government for the entitlement or right of an Aboriginal people to have certain lands set aside for them on the basis of a treaty such as treaties 8 and 11.

Treaty Right

A right recognized in or granted by a treaty. Treaty rights may include verbal (unwritten) promises made when the treaty was negotiated.