

LAND CLAIMS AGREEMENTS COALITION



Council of Yukon First Nations
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HONOUR, SPIRIT AND INTENT: A MODEL CANADIAN POLICY ON THE FULL IMPLEMENTATION OF MODERN TREATIES BETWEEN ABORIGINAL PEOPLES AND THE CROWN

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Foreword

When explorers from Europe arrived in North America they “discovered” a continent occupied and governed by Aboriginal peoples. In subsequent decades and centuries the relationship between the original peoples and the growing number of settlers and immigrants was complex and sometimes difficult. But looking back, it is important to note that Crown-Aboriginal treaties were a central mechanism used in Canada to avoid conflict and to constructively define the relationship between Aboriginal peoples and newcomers. The *Royal Proclamation of 1763* affirmed treaty-making as the key element of the policy of the Crown toward Aboriginal peoples. This approach was continued in British North America following the American Revolution, and by the Government of Canada after Confederation.

Treaty-making occurred as early as the 1600s. Beginning in 1871, numbered treaties were concluded on the Prairies, in northern Ontario, in northeastern British Columbia and in part of the Northwest Territories. With the exception of a limited number of adhesions to the numbered treaties, treaty-making came to a halt in the 1920s, leaving much of northern Canada, most of British Columbia and Québec, and all of Labrador without treaties. In 1927, the *Indian Act* was amended to make it illegal for Aboriginal peoples to raise money to press land claims. Treaty-making, in its modern form, began in the 1970s – prompted by the 1973 decision of the Supreme Court of Canada concerning the Aboriginal title of the Nisga’a Nation in British Columbia. Litigation involving the James Bay Crees in Québec, the Dene of the Mackenzie Valley and the Inuit of Baker Lake provided further impetus.

Since then, nineteen modern treaties – sometimes referred to as comprehensive land claims agreements – have been negotiated and ratified. These modern treaties concern more than half of the lands, waters and natural resources of Canada.

The Government of Canada’s policy toward the negotiation and settlement of comprehensive land claims was formalized in 1981 and revised and expanded in 1986. In 1982, Section 35 was added to Canada’s Constitution, which recognized and affirmed the existing Aboriginal and treaty rights of Aboriginal peoples in Canada. In 1983 it was explicitly confirmed in subsection 35(3) that section 35 “treaty rights” include those contained in modern land claims agreements. In 1995 the Inherent Right Policy provided for the negotiation of Aboriginal self-government as a component of modern treaties.

Modern treaties are essential building blocks of Canada, and are intended to formalize the relationship between Aboriginal peoples and the Crown. They are entered into to protect the rights of Aboriginal signatories; ensure their continuity as peoples; provide for their political, social, economic and cultural development. This is why the implementation of modern treaties between Aboriginal peoples and the Crown is of national importance, and even attracts international interest.

The number of modern treaties continues to grow, and we now have years of experience in implementation that is both affirmative and problematic. Although much has been accomplished of which we can be proud, modern treaties are far-reaching and sometimes complex. All parties agree that implementation is a challenge and takes forethought, cooperation and, above all, ongoing attention and commitment. While the content of modern treaties varies from agreement to agreement, implementing them requires trust as well firm and enduring cooperation between the Crown and Aboriginal signatories.

In responding to the recommendations and requests of Aboriginal peoples with modern treaties, the Government of Canada will adopt a Land Claims Agreements Implementation Policy that provides a framework to promote the effective implementation of diverse modern land claims agreements.

As its title suggests, the purpose of this Policy is to ensure that modern treaties are fully implemented in accordance with their provisions, their overall objectives, and their spirit and intent. The Policy is not intended to re-write modern treaties or to create new and un contemplated responsibilities, legally binding or otherwise.

Rather, the Policy lays out the firm commitment of the Government of Canada that federal Ministers, departments and agencies will work diligently with their Aboriginal counterparts to achieve the objectives of modern treaties in a lasting, generous and flexible manner.

Such an evolving and beneficial approach is consistent with long-standing Canadian governmental practice in all other inter-governmental contexts. The Aboriginal land claims agreements context cannot be permitted to languish as an unintended exception.

There have been positive developments in the decades since the first modern land claims agreement in Canada. However there is still more to be done before Aboriginal peoples and all Canadians alike enjoy the many benefits and achieve the overall objectives of our modern treaties.

Introduction

“The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”

*Supreme Court of Canada, Haida Nation v. British Columbia
(Minister of Forests), 2004*

“The settling of comprehensive land claims and self-government agreements (such as those of Nunavut or James Bay) are important milestones in the solution of outstanding human rights concerns of Aboriginal people. They do not, in themselves, resolve many of the human rights grievances afflicting Aboriginal communities and do require more political will regarding implementation, responsive institutional mechanisms, effective dispute resolution mechanisms, and stricter monitoring procedures at all levels.”

*United Nations Special Rapporteur on the Situation of Human Rights and
Fundamental Freedoms of Indigenous People, Report on Canada, 2004*

Modern treaties are negotiated between the Crown and Canadian Aboriginal peoples who generally have not entered into “historic” treaties.

Modern treaties affirm the complex and multifaceted nation-to-nation and government-to-government relationships between Aboriginal peoples and Canada. They currently reconcile the Aboriginal peoples’ title to their traditional lands and resources with the Crowns’ subsequent occupation and use of more than half of the lands, waters and natural resources of Canada.

Each modern treaty is unique, but all articulate rights to be exercised by Aboriginal signatories, often also involve recognition of Aboriginal self-government or provide for a restructuring of public government. Basically, the Crown’s claims in respect of Aboriginal peoples’ traditional lands, waters and natural resources are clarified, to the great benefit of all Canadian peoples.

The Crown has, upon ratification of each modern treaty, been able to proceed immediately to manage, develop and dispose of lands and natural resources in reliance upon the terms of the treaty concerned. The promised benefits to Aboriginal peoples, on the other hand, are often incremental and spread out over many years. This fact requires the Government of Canada to ensure that treaty rights are respected now and in coming years and decades, and that the obligations, ongoing objectives, and spirit and intent of modern treaties are fulfilled. The intent of this Policy is to ensure that this is the case.

Modern treaties address such matters as:

- Ownership and use of lands, waters and natural resources including the subsurface;
- Management of land, waters, and natural resources, including fish and wildlife;
- Harvesting of fish and wildlife;
- Environmental protection and assessment;
- Economic development;
- Employment;
- Government contracting;
- Capital transfers;
- Royalties from resource development;
- Impact benefit agreements;
- Parks and conservation areas;
- Social and cultural enhancement;
- The continuing application of ordinary Aboriginal and other general programming and funds; and
- Self-government and public government arrangements.

When ratified, modern treaties become part of the law of the land. The treaty rights they contain are constitutionally recognized and affirmed, and the terms of these agreements thus take precedence over the other laws and policies in Canada.

It is important that modern treaties be implemented and interpreted, consistent with their spirit, in a manner that responds to changing circumstances. Aboriginal peoples rely upon them to chart their paths into the future, just as the Crown is able to use them to bring about overall public policy objectives.

The Crown and Aboriginal signatories to these agreements must therefore work together in creative partnerships, if modern treaties are to be used to full advantage in accordance with their modern purposes of reconciliation, development, and nation-building.

Each modern treaty reflects the aspirations and cultural diversity of the Aboriginal signatories, and the political and other circumstances prevailing when agreements were negotiated. The Land Claims Agreements Implementation Policy respects the differences between modern treaties, and is not intended to promote an inflexible approach to their implementation. Nothing in this policy should be viewed as a substitute for any existing process, plan, obligation, or objective for the implementation of individual land claim agreements that has been worked out by the Parties to those agreements. This policy is meant to strengthen, and not to replace, whatever arrangements currently exist in respect of the implementation of each treaty agreement.

The core commitment of this policy is that the Government of Canada will work with Aboriginal signatories to ensure that each modern treaty is fully implemented consistent with its spirit and intent, the developmental objectives of treaty-making in Canada, and the honour of the Crown.

The Modern Treaty Relationship Between the Crown and Aboriginal Peoples

Modern treaties confirm enduring relationships between the Crown and Aboriginal peoples that engage and rest upon the “honour of the Crown.” These agreements formally enable Aboriginal signatories to “become part of Canada”. As quoted above, the Supreme Court of Canada has ruled that in all dealings with Aboriginal peoples from the assertion of sovereignty to the resolution of claims and implementation of treaties, the Crown must act honourably to reconcile the pre-existence of Aboriginal societies with the sovereignty of the Crown.

The treaty relationship lies not with any single government department or agency, but with the Crown as a whole as represented by the Government of Canada. In practical terms this requires *all* agencies of the Government of Canada whose mandates and activities intersect (or may do so) with modern treaties to do their full part to implement them meaningfully.

Every department and agency of the Government of Canada has the responsibility to ensure that its duties and activities are carried out in a manner consistent with the obligations of modern treaties and contribute to the ongoing achievement of the objectives of these agreements. This puts a premium on coordination between federal departments and agencies, and with provincial and territorial governments. The Government of Canada will bring about effective coordination between federal departments and agencies to properly meet the obligations, objectives, and spirit and intent, of modern treaties. Moreover the Government of Canada will also cooperate with provincial and territorial governments; however, the Government of Canada will ensure that it meets its own ongoing modern treaty obligations and fulfills their objectives, regardless of particular steps other levels of government may take.

Obligations and Objectives

Provisions in modern treaties confer or affirm many important rights belonging to Aboriginal signatories and place lasting obligations on the Government of Canada that are enforceable in the courts. As stated in the 1986 Comprehensive Land Claims Policy, the Government of Canada takes a broad view of the purpose and intent of these agreements as to:

“encourage self-reliance and economic development as well as cultural and social well-being. Land claims negotiations should look to the future and should provide a means whereby Aboriginal groups and the federal government can pursue shared objectives such as self-government and economic development.”

Such objectives provide the context within which treaty obligations and objectives must be met.

The socio-economic development objectives of modern treaties include benefits that Aboriginal peoples, like all other peoples in Canada, should be *entitled to take for granted*, at least to an average level already generally achieved in non-Aboriginal Canada. Importantly, this standard is already enshrined in the Canadian Constitution, in subsection 36(1), which states that all governments in Canada are committed to promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparity in opportunities; and providing essential public services of reasonable quality to all Canadians.

As noted by the Canadian Human Rights Commission, and other authorities in Canada and internationally, disparities between the living standards and other opportunities of Aboriginal peoples in Canada vis-à-vis those generally enjoyed by all other Canadians are persistent and pronounced. Regrettably, these disparities continue to characterize many signatory communities of modern land claims agreements.

The Auditor General of Canada has urged the Government of Canada and Aboriginal signatories to focus on achieving measurable results against stated objectives when implementing land claims and self-government agreements. The Government of Canada accepts this recommendation and will approach the ongoing implementation of land claims and self-government agreements so as to achieve their developmental objectives with measurable outcomes.

The Government of Canada acknowledges that narrow and technical understandings and interpretations of its modern treaty obligations have, in the past, sometimes hindered effective implementation of agreements. To develop a broader appreciation of the nature of obligations and objectives, and to design implementation activities to achieve objectives, requires extensive discussion with Aboriginal signatories in the context of individual agreements. The Government of Canada proposes to engage treaty signatories in such discussions with the aim of injecting new energy, generosity and goodwill into the implementation of modern treaties.

These instruments are important building blocks of confederation. The rights of Aboriginal peoples contained in these modern agreements are no less a part of the Canadian constitutional landscape than any other Canadian constituting arrangements.

Self-Government

Self-government is a right that Aboriginal peoples have exercised in Canada since long before newcomers came to this land and there is an integral relationship between modern treaties and self-government by the Aboriginal signatories. This relationship is expressed in various ways. In some cases self-government arrangements are established outside the land claims agreement. In some cases there is a self-government agreement that is parallel or subsequent to the land claims agreement, and in some cases self-government provisions are fully or partially set out in the text of the land claims agreement itself. In some cases, self-governing aspirations are expressed through the establishment of new institutions of public government, in accordance with the agreement.

In all cases, the dynamic implementation of self-government arrangements is essential to the proper implementation of land claims agreements. This includes both recognition of the jurisdictions and duties for which the Aboriginal government is responsible, and the negotiation of stable, predictable and adequate funding arrangements that are based on the objective evaluation of the costs of governing and the social, economic and cultural needs of Aboriginal peoples.

Implementation Panels and Committees

Implementation committees, panels or other entities, in which the parties to the treaties discuss, negotiate and, in some instances, direct implementation, have been put in place for many of the modern treaties. If modern treaties are to achieve their objectives it is essential that these structures work effectively, efficiently, and creatively. The Government of Canada will continue to approach all implementation discussions and negotiations in good faith and generously, leaving narrow and technical approaches behind it, and will bring forward appropriately coordinated perspectives and positions. Further, the Government of Canada's representatives on these structures will be senior officials with clear mandates and authority to address implementation questions, resolve implementation issues, and set long-term directions. Representatives of federal departments and agencies with appropriate expertise, programmatic responsibilities, and authority will participate directly in implementation panels and committees when requested.

Implementation Plans and Fiscal Agreements

The 1986 Comprehensive Land Claims Policy requires plans to be developed to implement modern treaties. Such plans often identify the agencies of the Government of Canada responsible for implementing specific obligations and detailed budgets of institutions established pursuant to agreements. The Government of Canada reaffirms its commitment to negotiate in good faith with Aboriginal signatories to conclude multi-year implementation plans and fiscal agreements and arrangements. Further, the Government of Canada will incorporate the results of evaluations, reviews and audits of implementation experience in negotiating amendments and renewals of implementation plans and fiscal agreements. While specifying who does what is an essential component of implementation planning, finalized implementation plans and fiscal agreements should, as far as possible, be creative and adaptive documents that identify implementation priorities and enable parties to channel financial and personnel resources accordingly. The Government of Canada will consider, on a case-by-case basis, the need to periodically amend implementation plans and fiscal agreements to achieve mutually agreed objectives.

Moreover, if desired by the Aboriginal party, the Government of Canada will negotiate the development of implementation plans and fiscal agreements for modern treaties, concluded prior to 1986, for matters not yet fully implemented.

Financing Implementation of Modern Treaties

Aboriginal peoples face the same need for adequate and sustainable levels of funding to meet the objective needs and aspirations of their peoples as the other constituent part of the modern Canadian state. This is the legitimate expectation of one of the three constitutional orders of government in Canada. The Government of Canada undertakes to provide sufficient funding to fully implement the objectives of modern treaties, and will work in good faith with Aboriginal signatories to determine these requirements and ensure that funding is provided on a timely basis.

Parliament plays the central role in authorizing the expenditure of public moneys by agencies and departments of the Government of Canada. Modern treaties deal with issues that cross departmental boundaries, and financing their implementation does not always fit neatly within the Government of Canada's departmental budgetary system. The Government of Canada will therefore work with Aboriginal signatories to remove structural and procedural barriers in the current budgetary system, in order to expedite the ongoing implementation of all modern treaties.

Resolving Disputes

Many modern treaties specify means such as mediation and arbitration to resolve disputes between the federal Crown, or other governments, and Aboriginal parties. In some cases dispute resolution mechanisms are provided for in a companion agreement. The Government of Canada undertakes to ensure effective use of the dispute resolution mechanisms in agreements to resolve disputes. In addition, the Government of Canada will use such techniques as mediation, joint research, and joint information gathering and monitoring to resolve disputes, and, on a case-by-case basis, binding arbitration of disputes, including disputes of a financial nature. The Government of Canada does so with the understanding that these approaches to dispute resolution are preferable to both litigation and to the emergence of conflict as may occur when there is litigation.

In those cases where the use of binding arbitration requires the consent of both parties, the Government of Canada's consent will never be withheld as a matter of course, but only in rare and exceptional circumstances where it is demonstrably reasonable and justifiable to do so.

Public Policy and Implementing Modern Treaties

While Aboriginal signatories are entitled to the particular rights and benefits enshrined in their treaties, they remain entitled to all of the rights, privileges, programs and benefits available to other Aboriginal, and to non-Aboriginal, communities, citizens and residents in Canada generally.

There is great need in Aboriginal settlement areas to coordinate implementation of modern treaties with the many Canadian economic, social, cultural, language, environmental and other public policy objectives that have made Canada one of the most developed countries of the world. This is particularly the case in relation to such key areas as economic and business development, housing, education and training, community infrastructure and capacity building—essential processes that equip Aboriginal signatories to take full advantage of the developmental objectives of modern treaties.

Similarly, the Government of Canada will use the institutions and processes established through modern treaties to achieve other compatible policy objectives in treaty settlement areas, such as ensuring that resource development is environmentally and socially sustainable and equitable, and promotes public health and well-being.

The challenge before the Government of Canada is to implement modern treaties as a normal and accepted part of the way in which it carries out its business of national good governance. The Government of Canada will work with Aboriginal signatories to this end, to ascertain how best to co-ordinate implementation of modern treaties with other public policy processes.

Review and Evaluation

Most modern treaties put in place methods to periodically review and evaluate implementation with a view to improving the efficiency and effectiveness of decision-making. The Government of Canada will undertake or participate in evaluative processes that generate objective data that reveal whether, how, and how well modern treaties are being implemented, particularly concerning the social economic, cultural impacts of implementation on the lives and well-being of Aboriginal peoples. All parties to treaties need to know if implementation of modern treaties is moving Aboriginal signatories in the direction of achieving their long-term social, cultural, and economic objectives. The Government of Canada is committed to working with Aboriginal signatories to develop and refine indicators to measure progress to achieve the social, cultural, economic and other objectives of modern treaties, and to use evaluative results to improve implementation planning and decision-making.

Institutional Arrangements

In order to ensure a consistently beneficial approach toward implementation of modern treaties across the Government of Canada, and to ensure the objectivity of data upon which implementation decisions are based, the Government of Canada will, in active partnership with Aboriginal signatories, propose legislation to establish a Land Claims Agreements Implementation Commission. The Commission will evaluate and promote the implementation of modern treaties and advise the Government of Canada and Aboriginal signatories accordingly. The Commission of Modern Treaties will report periodically to the Parliament of Canada.

Aboriginal signatories to modern treaties and the Auditor General of Canada will be invited to work closely with the Government of Canada to design the Commission's mandate and the legislation to give it effect.

In addition, the Government of Canada will establish a Cabinet Committee on Aboriginal Affairs to oversee and co-ordinate the involvement of federal agencies in treaty implementation activities. A committee of senior civil servants will provide the Cabinet Committee with advice and recommendations and carry out its instructions. The job performance evaluation of members of the committee will take into consideration implementation of modern treaties.

Public Information and Education

Notwithstanding the constitutionally recognized and affirmed status and wide geographical application of modern treaties, and their extensive implications for third parties and fundamental role in improving the socio-economic well-being of Aboriginal signatories, few Canadians adequately understand or appreciate their national importance or the international interest they generate. That the Government of Canada has negotiated far reaching accommodations with Aboriginal peoples through modern treaties is of considerable interest and concern to countries in Asia, Africa, Latin America and elsewhere seeking to accommodate Aboriginal peoples or other minorities in those countries, and also to international organizations such as the United Nations, the Organization of American States and the Commonwealth.

The Government of Canada will work with Aboriginal signatories to develop, and distribute information to promote greater public and international understanding of the importance of modern treaties and their role in Canada. As well, federal Crown agencies including the Department of Foreign Affairs, the Canadian International Development Agency and the International Development Research Centre will work with Aboriginal signatories to bring modern treaty experience to bear in the exercise of Canada's foreign and development assistance policies.