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An Overview of Modern Treaties

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Introduction

The Land Claims Agreements Coalition is made up of the Aboriginal governments or organizations that represent the Aboriginal peoples who have signed modern treaties.
The Coalition was founded in 2003 following the discussion, among modern treaty signatories, of implementation problems. The Coalition's purpose is the complete implementation of our treaties.
The Coalition is an informal organization and each of our members represents itself on its own treaty matters.
The Coalition is a forum for our members, and we act together on broad policy matters.

Each modern treaty, or comprehensive land claims agreement, has its own unique features and must be interpreted in its own terms.

In general modern treaties deal with land ownership, cash compensation, land-related rights, wildlife management, harvesting rights, self-government, aspects of governance, and some other matters.

Constitutional Status of Treaties and Treaty Rights: *Constitution Act, 1982*

Aboriginal rights and freedoms not affected by Charter
25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Rights of the Aboriginal Peoples of Canada
Recognition of existing aboriginal and treaty rights
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Eras of Treaty Making

The historical background to the treaty-making process provides a context for the understanding of the negotiation and implementation of modern treaties.

For current purposes we can recognize three major phases of treaty making in Canada:

1. Pre-confederation
2. The numbered treaties (1867 to 20th century)
3. Modern treaties (1973 to present).

There is an historical gap in the period between the signing of the numbered treaties and the commencement of the modern treaty-making process.
In 1927 the *Indian Act* was amended to make it illegal to raise money for the purpose of pursuing land claims, and this prohibition remained in effect until 1951.

Despite the repeal of this section, modern treaty negotiations didn't begin until the 1970s, to an important extent as a result of legal actions launched by Aboriginal peoples..

The Royal Proclamation of 1763

By the KING.

A PROCLAMATION.

GEORGE R.

GOD save the KING.

The Royal Proclamation of 1763 is important for setting out certain principles which have underlain the negotiation of historic and modern treaties in Canada.

One of the key reasons for issuing the Proclamation was the British desire to keep good relations with Aboriginal peoples and avoid further conflict. The Seven Years' War was followed by the war with Pontiac and British resources were strained.

The Royal Proclamation noted that "great Frauds and Abuses have been committed in purchasing Lands of the Indians," and private land deals with Aboriginal people were thus made illegal. Henceforth Indian lands "shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians." In other words, after 1763 only the Crown could purchase Indian lands. Further, "all Persons . . . upon any Lands not having been ceded to or purchased by us . . . [are] forthwith to remove themselves from such Settlements."

Numerous treaties, often of peace and friendship, were made with Aboriginal peoples in the 17th and 18th centuries, but the Royal Proclamation of 1763 formalized the principles and process whereby the purchase and cession of lands from Aboriginal peoples was to be carried out.

Post-Confederation Treaties

When confederation occurred in 1867, the intent of the Canadian government was to take over Hudson Bay Company territories – the North and the Prairies - and expand to include British Columbia. There was, at the time, a concern that American settlement in these areas could lead to their annexation by the United States: this a Canadian presence needed to be established. A petition was made to the Crown for the transfer of Hudson's Bay territories to Canada, and an undertaking was given that Aboriginal people on those lands would be dealt with in an equitable manner. The "numbered treaties" represented the government's method for meeting this undertaking.

The numbered treaties run from Treaty 1 (1871) to 11 (1921). Some of their main features can be summarized as follows:

- They were made with the Queen or King "of Great Britain and Ireland."
- Their stated purpose was to open the land for settlement, trade, mining, lumbering, etc.
- They stated that the Indian signatories "cede, release, surrender and yield up all their rights, titles and privileges whatsoever to the lands" in exchange for hunting, fishing, and trapping rights,[1] the setting aside of reserves, and other rights and benefits.
- Indian reserves were provided for on the formula (in most treaties) of one square mile per family of five,[2] or (in other treaties) of 160 acres per family of five. [3]
- The treaties provided for cash payments and annuities (usually $5 a year).
- Other provisions included tools and agricultural equipment (Treaty 8 and others); cattle; salaries of teachers; school buildings; educational equipment; and a medicine chest (Treaty 6).

Above: historic treaty areas.[4] *This map shows the old pre-confederation "peace and friendship" treaties in the*

[1] Not in Treaties 1 and 2.
[2] Treaties 3, 4, 6, 8. 9, 10 and 11.
[3] Treaties 1, 2, 5

Maritimes, the 1850 Robinson Treaties, the 1923 Williams Treaties, and other treaties in Ontario, as well as the post-confederation "numbered" treaties running west and north, from the Ontario-Quebec boundary to the Mackenzie River delta.

The circumstances in which each of the treaties was negotiated were highly variable. In some cases the signing process was remarkably brief. In other cases there were lengthy negotiations.

The historic treaties included legal formulations, geographic specifications and other features that could not have been exactly translated, and the understandings of the Aboriginal signatories would have diverged considerably, at least in some regards, from that of the representatives of the Crown.

The courts have indicated that, in considering the terms of the treaties, the "honour of the Crown" must be upheld, and no appearance of "sharp dealing" is to be sanctioned. The treaties are to be given "a fair, large and liberal construction in favour of the Indians," and they include oral as well as written terms. In addition, the history and oral traditions of the people concerned, and the circumstances at the time of treaty-making, are to be considered in determining the treaty's effect.

Although the period of historic treaty-making may be seen as ending with the completion of Treaty 11 in 1921, or with the Williams treaties of 1923, "adhesions" to the numbered treaties continued long after these dates.[5] For example, the north-western part of Ontario was covered by adhesions to Treaty 9, which were signed in 1929-30. In more recent years, the McLeod Lake Indian Band in British Columbia signed an adhesion to Treaty 8 in March, 2000.

Modern Treaties

Modern treaties, or comprehensive land claims agreements, are more complex and detailed documents than the historic treaties. For example the Nunavut Land Claims Agreement comprises forty-two articles and runs to 282 pages. The James Bay and Northern Quebec Agreement runs to 455 pages.

Modern treaties are generally negotiated where Aboriginal rights and title have not been dealt with in previous treaties, such as the numbered treaties. They deal with Aboriginal rights and title flowing from prior land use and occupancy, and are recognized in S. 35 of the *Constitution Act, 1982*.

The Alaskan Settlement: A Forerunner of Canadian Modern Treaties

The 1971 *Alaska Native Claims Settlement Act* was the first modern settlement of Aboriginal rights and title issues in North America.

Alaska became a state in the United States in 1959, and the *Alaska Statehood Act* authorized the state to select almost 417,000 square kilometres of land from the "public domain" (under federal administration). Lands to which Alaska Natives held rights or title were exempted, but the state government regarded lands used by Alaska Natives for "subsistence" purposes as available for selection, leading to challenges to state land selections and eventually to a federally-imposed land freeze.

Through the settlement, roughly 10% of the State, both surface and subsurface, was transferred to twelve Alaska Native regional, and one hundred and seventy-two village, share-based corporations. In addition, approximately $962.5 million was paid to the regional corporations from Congressional appropriations and through royalty shares.

In contrast to Canadian modern treaties, the Alaska settlement was put together in Congress, with a great deal of lobbying by the Alaska Federation of Natives, oil companies and others. Despite the uniqueness of the

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[4] http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf

[5] 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.

process, the Alaska settlement was important in changing the orientation towards the settlement of Aboriginal rights and title. It marked an American policy shift from tribal governments to Native-owned corporations, and from Bureau of Indian Affairs administration of lands to Alaska Native corporate land ownership. A number of Aboriginal groups in Canada went to Alaska to learn about this settlement.

Comprehensive Land Claims in Canada

In contrast to the Alaskan settlement – which was negotiated through the legislative process - modern treaties in Canada are arrived at by direct negotiations. Federal negotiators' mandates are approved by the federal Cabinet. Once negotiations are completed, agreements are ratified by the Aboriginal party by referendum and by Parliament through settlement legislation.

In 1969 a *Statement of the Government of Canada on Indian Policy* (the "White Paper") dismissed Aboriginal land claims as "general and undefined". Also in 1969, Prime Minister Trudeau expressed the view that "we must not sign treaties amongst ourselves".

A number of factors were responsible for reversing the government's approach, but resource development and litigation were critical, and a federal land claims policy was adopted in 1973. In1974 an Office of Native Claims was established within DIAND to review and negotiate both specific and comprehensive claims.[6]

Important legal cases from this period include:

- **1973 *Calder*** (Supreme Court of Canada) signaled the beginning of modern land claims in Canada. This case involved Nisga'a title in British Columbia, and six of the seven judges of the Supreme Court of Canada agreed that Aboriginal rights stemmed from the prior occupancy of Aboriginal peoples. However, the court divided three-to-three on whether or not the Nisga'a's Aboriginal title had been extinguished or still continued. A seventh judge dismissed the suit on a technical basis, without expressing any views on the substance of the case. The federal government announced a policy for the negotiation of land claims later that year.
- **1973 *Kanatewat*** (Quebec Superior Court) provided an injunction to stop hydro development work in James Bay because Aboriginal rights in the region had not been dealt with. The injunction was overturned, but negotiations began between the Quebec and federal governments and the Crees and Inuit of northern Quebec.
- **1973 *Paulette*** (Supreme Court of the NWT) raised the issue of continuing Dene Aboriginal title in the Mackenzie Valley, Dene argued that Treaties 8 and 11 had not extinguished their Aboriginal title and had attempted to register a "caution" on Crown lands in the NWT. Upon appeal, the Supreme Court of Canada found that a caution could not be registered on unpatented Crown land, but did not rule on the question of whether or not Aboriginal title continued in the NWT.
- **1978 *Baker Lake*** (Federal Court of Canada) found that Inuit in the Baker Lake area continued to hold Aboriginal rights. However, Justice Mahoney also found that the permits and authorizations that were being challenged through the lawsuit did not in fact infringe on Inuit rights.

Announced in 1973, the federal land claims policy was spelled out in greater detail in 1981 (*In All Fairness*) and substantially revised in 1986-87 (*Comprehensive Land Claims Policy*). It was further updated in *Resolving Aboriginal Claims* in 2003.

In 1990, the federal government lifted the limit, it had established, of not negotiating more than six comprehensive land claims at any one time.

In British Columbia a distinct British Columbia Treaty Process was agreed to between the federal government, the Government of British Columbia, and the First Nations Summit in 1992.

[6] The Office of Native Claims continued to operate until 1981. Since that date its functions have generally been subsumed within other branches within DIAND.

The Chief Commissioner of the BC Treaty Process is appointed by agreement of the three parties. Two of the four Commissioners are nominated by the First Nations Summit, one by the Government of British Columbia, and one by the federal government.

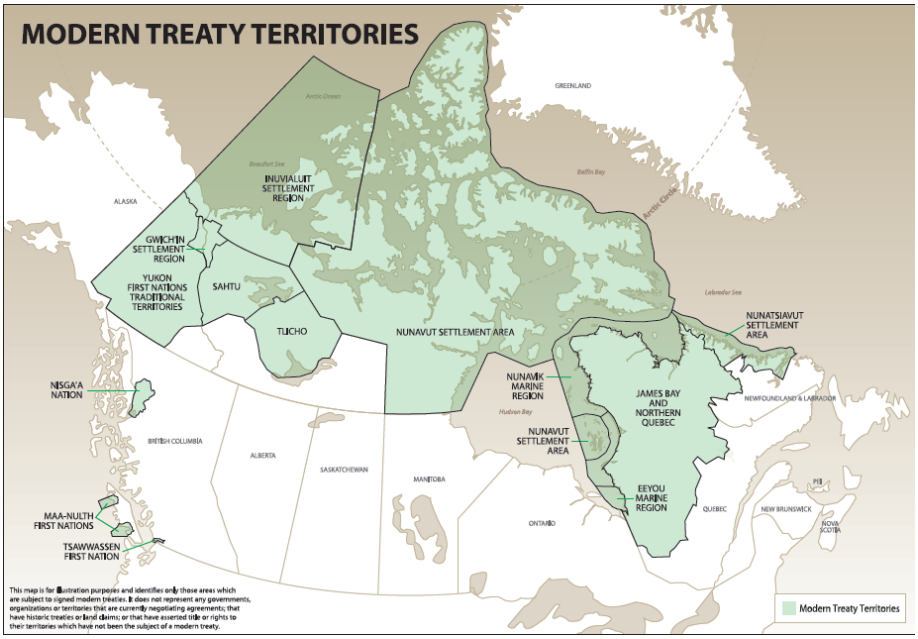
"The Treaty Commission's primary role is to oversee the negotiation process and to ensure the parties are being effective and making progress in the negotiations. . . . In addition to facilitation duties, the Treaty Commission is responsible for allocating negotiation support funding to First Nations and providing public information and education."[7]

Self-Government and Modern Treaties

Self-government is as important as land ownership to Aboriginal peoples, but the relationship between them is handled very differently from one treaty to another. Broadly, this relation has been handled in one of three ways:

(1) Both self-government and land arrangements are provided for, in varying ways, in the agreements themselves: e.g. Nisga'a Final Agreement (2000), Tlicho Land Claims and Self-Government Agreement (2003), Labrador Inuit Land Claims Agreement (2005);
(2) Self-government arrangements are negotiated parallel to land claims negotiations, but self-government is negotiated through a separate agreement: e.g. 11 Yukon First Nation Self-Government Agreements (1995-2006);
(3) The land claims agreement provides for the negotiation of self-government at a later date and the self-government agreements will not provide treaty rights protection under Section 35 of the *Constitution Act, 1982*: e.g. Gwich'in Comprehensive Land Claim Agreement (1992), Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993).

The Nunavut Land Claims Agreement (NLCA) does not fit neatly into any of the above categories, since Nunavut Inuit were seeking the creation of a new territory, rather than a form of Aboriginal self-government as usually understood. In late 1991 a critical meeting took place between the Tungavik Federation of Nunavut (TFN) and DIAND Minister Siddon, at which Minister Siddon agreed on wording to include in the NLCA providing for the creation of Nunavut. Article 4 of the NLCA provided for the negotiation of a Nunavut Political Accord, distinct from the NLCA, and the passage of legislation establishing Nunavut in conjunction with legislation ratifying the NLCA.



The above map shows where modern treaties have been concluded since 1975 (DIAND 2011).

[7] http://www.bctreaty.net/files/faqs.php

A List of Modern Treaties

Newfoundland & Labrador
- Labrador Inuit Land Claims Agreement (2005)

Quebec
- James Bay and Northern Quebec Agreement (1975)
- North-Eastern Quebec Agreement (1978)

Nunavut
- Nunavut Land Claims Agreement (1993)
- Nunavik Inuit Land Claims Agreement (2008)
- Eeyou Istchee Land Claims Agreement (2011)

Northwest Territories
- Inuvialuit Final Agreement (1984)
- Gwich'in Comprehensive Land Claims Agreement (1992)
- Sahtu Dene & Metis Comprehensive Land Claim Agreement (1994)
- Tlicho Land Claims & Self-Government Agreement (2003)

Yukon[8]
- Champagne and Aishihik First Nations Final Agreement (1995)
- First Nation of Na-Cho Nyäk Dun Final Agreement (1995)
- Teslin Tlingit Council Final Agreement (1995)
- Vuntut Gwitchin First Nation Final Agreement (1995)
- Little Salmon/Carmacks First Nation Final Agreement (1997)
- Selkirk First Nation Final Agreement (1997)
- Tr'ondëk Hwëch'in Final Agreement (1998)
- Ta'an Kwächän Council Final Agreement (2002)
- Kluane First Nation Final Agreement (2004)
- Kwanlin Dün First Nation Final Agreement (2005)
- Carcross/Tagish First Nation Final Agreement (2006)

British Columbia
- Nisga'a Final Agreement (2000)
- Tsawwassen First Nation Final Agreement (2009)
- Maa-Nulth Final Agreement (2012)

Above: The signing of the Nunavut Land Claims Agreement, 1993 [Photo © Hans Blohm].

[8] An "Umbrella Final Agreement" was signed Between Yukon First Nations and the federal government in 1993. This is not a modern treaty, but it provided a framework for the negotiation of the eleven Yukon final agreements that have followed.

Case Study: Nunavut Land Claims Agreement (NLCA)

- 1971: Inuit Tapirisat of Canada (ITC) (now Inuit Tapiriit Kanatami) established.
- 1973: Work began on an NWT Inuit Land Use and Occupancy study.
- 1976: NWT Inuit Land Use and Occupancy study published. This three-volume study documented and mapped the extent and intensity of the use of land and marine areas by approximately 85% of Inuit hunters in the (pre-division) Northwest Territories.
- 1976: ITC tabled a proposal for settlement of NWT Inuit land claims, including the establishment of a Nunavut Territory.
- 1976: Facing development pressures in the Beaufort Sea region, Inuvialuit decided to negotiate a separate land claims agreement to cover their own region, separate from Inuit of the Central and Eastern Arctic.
- 1978: Inuvialuit signed an Agreement-in-Principle for a Western Arctic land claims agreement.
- 1982: 56.5% of NWT voters supported division of the territory in a territorial plebiscite.
- 1982: Nunavut Constitutional Forum established to work on division of the NWT, a boundary for division, and political development in the Nunavut area.
- 1982: Tungavik Federation of Nunavut (TFN) established to represent Nunavut Inuit in land claims negotiations.
- 1984: Inuvialuit Final Agreement signed.
- 1990: TFN, federal government and GNWT signed an Agreement-in-Principle for the Nunavut Land Claims Agreement (NLCA).
- 1991: John Parker recommended a land claims settlement boundary between Inuit and Dene in the NWT.
- 1991: Minister Siddon and TFN agreed on wording for Article 4, providing for the establishment of a Nunavut government, in the NLCA.
- 1992: NWT residents approved the Inuit-Dene land claims boundary line (as recommended by John Parker) as the political division boundary between Nunavut and the western NWT.
- 1992: Nunavut Political Accord, provided for in Article 4 of the NLCA, signed by Minister of DIAND, TFN and GNWT.
- 1992: Inuit approved NLCA by referendum.
- 1993: NLCA signed by Prime Minister of Canada, TFN and Government of NWT.

Current Modern Treaty Negotiations

Above: modern treaty negotiations currently underway (DIAND, 2011).