IN ALL FAIRNESS

A NATIVE CLAIMS POLICY

Canada

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COMPREHENSIVE CLAIMS

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The artwork on the cover is from
Pitaloosie Saila of Cape Dorset

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FOREWORD

For some years now, the Government of Canada has been engaged in attempting to resolve what have come to be known as Comprehensive Native Land Claims, through a negotiation process. There has been moderate success but much more remains to be done. The purpose of this book is to set out for the consideration of all Canadians what the government proposes as the way forward.

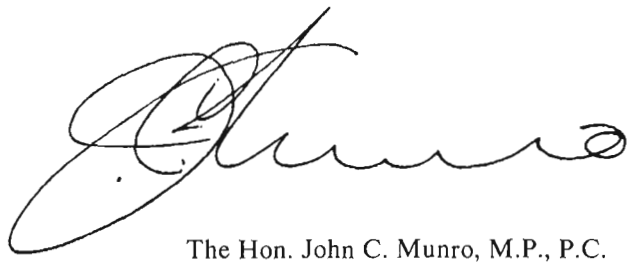
I say *all* Canadians advisedly: I hope this book will be looked at by Natives and non-Natives, by northerners and southerners, by those among us who seek to conserve and by those among us who seek to develop.

What this statement contains above all, in this time of political uncertainty and general financial restraint, is a formal re-affirmation of a commitment: that commitment is to bring to a full and satisfactory conclusion, the resolution of Native land claims.

All Canadians would agree that claims have been left unresolved for too long. My wish is that this book will give all interested persons an idea of the depth of my personal commitment as well as the government's to endorsing, developing and implementing the policy initiated by one of my predecessors, the Honourable Jean Chrétien.

Essentially what is being addressed here are claims based on the concept of "aboriginal title"—their history, current activities surrounding them, and our proposals for dealing with them in the future. While this statement is concerned with claims of this nature it does not preclude government consideration of claims relating to historic loss of lands by particular bands or groups of bands. Indeed, the government, in consultation with Indian organizations across Canada, is currently reviewing its policy with respect to specific claims over a wide spectrum of historic grievances—unfulfilled treaty obligations, administration of Indian assets under the Indian Act and other matters requiring attention. A further statement on government intentions in the area of specific claims will be issued upon completion of that review process.

I ask for the support and understanding of all Canadians: individuals, associations and special interest groups of all kinds. At a time when our country is struggling to redefine itself, to determine what kind of a future we want for everyone in this land, we must in all fairness pay particular attention to the needs and aspirations of Native people without whose good faith and support we cannot fulfill the promise that is Canada.



The Hon. John C. Munro, M.P., P.C.
Minister of Indian Affairs
and Northern Development

PART ONE

INTRODUCTION

Indian and Inuit people through their associations have presented formal land claims to the Government of Canada for large areas of the country. In response to their claims, the government has three major objectives:

1. To respond to the call for recognition of Native land rights by negotiating fair and equitable settlements;
2. To ensure that settlement of these claims will allow Native people to live in the way they wish;
3. That the terms of settlement of these claims will respect the rights of all other people.

The present policy statement is meant to elaborate the Government of Canada's commitment to the Native people of Canada in the resolution of these claims. Comprehensive land claims relate to the traditional use and occupancy and the special relationships that Native people have had with the land since time immemorial.

By negotiating comprehensive land claims settlements with Native people, the government intends that all aspects of aboriginal land rights are addressed on a local and regional basis. These aspects run the gamut of hunting, fishing and trapping, which are as much cultural as economic activities, to those more personal and communal ways of expression such as arts, crafts, language and customs. They also include provisions for meaningful participation in contemporary society and economic development on Native lands.

Native groups have been demanding recognition for particular rights and the federal government has said that it is prepared to work with Native people after patriation to determine appropriate definitions of these rights. The government has also stated that patriation of the Constitution will in no way affect any existing rights and any rights and freedoms that may be acquired by way of a land claims settlement. Negotiations are already underway with some native groups to settle their land claims and others will begin in the very near future.

It is intended that these settlements will do much in the way of helping to protect and promote Indian and Inuit peoples' sense of identity. This identity goes far beyond the basic human needs of food, clothing and shelter. The Canadian government wishes to see its original people obtain satisfaction and from this blossom socially, culturally and economically.

Recently greater attention has been given to land claims. The various demands for natural resources, vast amounts of which have been discovered in some of the areas being claimed, have pressed Native people to present their formal land claims to the government. This is not to say that the first and only reason for settling claims is development, because the government has accepted claims for negotiation in areas where development is not imminent. Rather, it is a matter of policy that the government is willing to negotiate settlements. Since 1973, the federal government has operated under a policy that acknowledges Native interests in certain land areas claimed and that allows for the negotiation of settlements for claims where these interests can be shown not to have been previously resolved.

Development has only served to make the settlement of these claims more urgent to some native groups. The government recognizes the urgency to settle land claims as quickly and effectively as possible in order that the interests of Native people be protected in the wake of development, in a way that offers them a choice of lifestyles.

When working to protect Native interests, respect for the rights of other Canadians must be maintained during the negotiation process and in the terms of settlement. It serves no just purpose if the terms of settlement ignore or arbitrarily infringe upon the rights of other citizens. Just as much as this policy addresses the land rights issues of Native people, it also respects the rights of all other Canadians.

What follows in this book, then, is an attempt to give a context in which to understand what has happened so far, and to give some indication as to how the Government of Canada intends to proceed in the years to come in relation to the question of comprehensive land claims.

EARLY POLICY

It is important to know something of how successive regimes have dealt with comprehensive claims historically, in order to understand how procedures for the future have evolved.

The best known expression of British colonial policy towards Indians is to be found in the Royal Proclamation of 1763:

> ". . .We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection and Dominion for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid:
>
> and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained."

This proclamation acknowledged the Native peoples' interest in the land they inhabited and it was a matter of policy that this interest be dealt with so that orderly settlement could be provided for. This was illustrated by the Robinson treaties as well as others.

Following Confederation, this was the policy adopted by the Government of Canada; the result was a series of formal treaties or agreements—in Ontario, the Prairie Provinces, the Mackenzie Valley and the north-eastern part of British Columbia. By and large, these early agreements addressed themselves to matters of land (reserves), cash annuities, education and the granting of hunting privileges.

In the 1920s most of the unsettled areas in which future development or settlement was anticipated had been covered by treaty or other arrangements. Because this process was not completed, Indians and Inuit in the areas not covered were forced to press their claims through submissions to the federal Parliament, through the courts and through personal intervention.

It should not surprise anyone that this situation was not satisfactory.

RECENT HISTORY

Prior to 1973 the government held that aboriginal title claims were not susceptible to easy or simple categorization; that such claims represented, for historical and geographical reasons, such a bewildering and confusing array of concepts as to make it extremely difficult to either the courts of the land or the government of the day to deal with them in a way that satisfied anyone. Consequently, it was decided such claims could not be recognized.

However, by early 1973 the whole question of claims based on aboriginal title again became a central issue; the decision of the Supreme Court of Canada in the Calder Case, an action concerning the right of assertion of Native title by the Nishga Indians of British Columbia, established the pressing importance of this matter. Six of the judges acknowledged the existence of aboriginal title. The court itself, however, while dismissing the claim on a technicality, split evenly (three-three) on the matter raised: did the native or aboriginal title still apply or had it lapsed? At the same time, the Cree of James Bay and the Inuit of Arctic Québec were trying to protect their position in the face of the James Bay Hydro Electric project.

It is from these actions that the current method of dealing with Native claims emerged.

A policy statement in 1973 covered two areas of contention. The first was concerned with the government's lawful obligations to Indian people. By this was meant the questions arising from the grievances that Indian people might have about fulfillment of existing treaties or the actual administration of lands and other assets under the various Indian Acts.

The policy statement acknowledged another factor that needed to be dealt with. Because of historical reasons — continuing use and occupancy of traditional lands — there were areas in which Native people clearly still had aboriginal interests. Furthermore these interests had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests. Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping, land title, money, as well as other rights and benefits, in exchange for a release of the general and undefined Native title, such claims came to be called comprehensive claims.

In short, the statement indicated two new approaches in respect to comprehensive claims. The first was that the federal government was prepared to accept land claims based on traditional use and occupancy and second, that although any acceptance of such a claim would not be an admission of legal liability, the federal government was willing to negotiate settlements of such claims.

THE 1973 POLICY IMPLEMENTED

Several Native groups have entered into negotiations with federal, provincial and territorial governments. Two final agreements which are consistent with this policy have been reached, with the full participation of the Province of Québec; one with the Cree and Inuit of James Bay in 1975, the other with the Naskapis of Schefferville in 1978. In the Western Arctic Region of the Northwest Territories, an agreement in principle was negotiated and signed in October of 1978 with the Committee for Original Peoples' Entitlement (COPE) representing the Inuvialuit of the Western Arctic Region. Currently in the Yukon, the Council for Yukon Indians (CYI) and the federal government, with the full participation of the Government of the Yukon Territory, is in the process of agreeing in principle on a negotiated settlement. The Inuit Tapirisat of Canada (ITC) representing the Inuit of the Central and Eastern Arctic, are presently at the negotiating table with the federal and territorial governments. In addition, negotiations commenced recently with representatives of the Dene and Métis of the Mackenzie Valley and the Nishga Tribal Council in British Columbia.

Several other native groups are in different stages of preparation for negotiations. These include the Labrador Inuit Association and the Naskapi Montagnais-Innu Association in Labrador; *le Conseil Attikamek-Montagnais* on the north shore of the St. Lawrence river in Québec; Kitwancool, Kitamaat Village, Gitksan-Carrier Tribal Council, and the Association of United Tahltans from British Columbia.

The claims presented by all of the above have been accepted for negotiation by the Minister on behalf of the Government of Canada. A word is in order, therefore, about how these claims are treated.

The Office of Native Claims (ONC) was established in 1974 to represent the Minister of Indian Affairs and Northern Development and the federal government, for the purposes of settling comprehensive claims and specific claims through the negotiation of agreements. Comprehensive claims submitted to ONC are carefully analyzed in terms of both their historical accuracy and legal merit, the latter being done by the Department of Justice. Claimant groups are required to provide as much information and documentation as possible in support of their claim.

Meetings are held where necessary in order to clarify any points that seem subject to misinterpretation. Finally, the documents are sent to the Minister of Indian Affairs and Northern Development for his formal response on behalf of the Government of Canada. If the claim is denied the claimant

group is given a full explanation for the decision. If accepted, the Office of Native Claims is authorized to initiate negotiations for a settlement under the direction of the Minister. In certain instances, the Minister may appoint a negotiator from outside the Public Service to lead the negotiations.

Funding for researching, developing and negotiating Native claims is provided by other sections of the Department in the form of contributions and loans. Where the grounds of a claim have still to be established, contributions may be made to help with the process. Loans are made to claimants whose claims are accepted for negotiation, for the purpose of further developing their positions and the actual conduct of negotiations. Once the claim is settled, these loans are repayable as a first charge against monetary compensation that may be granted.

The status of the comprehensive claims already on record are outlined in an Appendix to this document. It will be seen that some claims have only recently been presented and accepted for negotiation.

A description of the objectives we hope to achieve in the negotiating process and some of the steps we think necessary to improve this important function will be found in the second part of this book.

PART TWO

Future Treatment

The following pages contain what the federal government considers to be the essential factors necessary for the achievement of comprehensive land claims settlements. Very careful consideration was given to each of the principles discussed but was not limited to these alone. These considerations have evolved from past experience in the area of land claims negotiations, here in Canada and in other countries, as well as from views expressed over the years by Native people in Canada.

BASIC GUIDELINES

When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future. In other words, any land claims settlement will be final. The negotiations are designed to deal with non-political matters arising from the notion of aboriginal land rights such as, lands, cash compensation, wildlife rights, and may include self-government on a local basis.

The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits.

ALTERNATIVES CONSIDERED

When the federal government was reviewing its policy on comprehensive native land claims, it looked at the experience of some other countries such as Australia, the United States, New Zealand and Greenland to see how they approached settlement of claims. Two in particular, the United States and Australia, were more thoroughly studied because in both cases major settlements of aboriginal claims have been achieved and because there are many similarities to our own situation. The Alaska Native Claims Settlement Act of 1971 was passed in favour of the first inhabitants of that state; in Australia's northern Territory, the Australian Aboriginal Land Rights (Northern Territory) Act was passed in 1976.

In both cases, although processes other than direct negotiations were employed, Native people had a marked input into the settlements and on what forms they should take. In Alaska, for example, hearings were held before a Congressional committee and representation was made on behalf of Native people. In Australia, a government-appointed Lands Commission, charged with preparing legislation, heard testimony from different aboriginal tribes. The outcome in both cases was that land and other benefits were provided to the Native groups despite pressure from other interests. In neither case were the demands of the Native groups fully met, however, and whether such a model of settlement is to be preferred to negotiated settlement remains to be seen.

Further alternatives considered by the government included arbitration, mediation and the courts. There are drawbacks to all three approaches.

For example, while a court may be able to render a judgement on, say, the status of lands, it is unable to grant land as compensation or to formulate particular schemes that would meet the needs of the plaintiff. In general, it can be said that the courts have not been found by the Native peoples to be the best instrument by which to pursue claims.

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.

Thus the negotiation process is seen by the Canadian government as the best means of meeting the legitimate concerns of the Native people in the area of comprehensive claims. It is a process which allows a good deal of elasticity in approach to the concerns of the Native people; it is at once an expression and mutual appreciation of the rights and values of all parties in Canada. And an important factor that cannot be discounted—the government is fully committed to its success.

BENEFITS

Lands

Lands selected by Natives for their continuing use should be traditional land that they currently use and occupy; but persons of non-Native origin who have acquired for various purposes, rights in the land in the area claimed, are equally deserving of consideration. Their rights and interests must be dealt with equitably.

Other basic access rights must be taken into consideration: rights of access such as transportation routes within and through a settlement area; rights of way for necessary government purposes; rights of access to holders of subsurface rights for exploration, development and production of resources, subject to fair compensation as mutually agreed either through negotiation or arbitration.

Similarly, special protection must be ensured against unlimited expropriation powers in the case of lands granted in settlement. Meaningful and influential Native involvement in land management and planning decisions on Crown lands could be initiated and strengthened by providing membership on those appropriate boards and committees whose decisions affect the lives of their communities.

Where Natives use land lying in more than one jurisdiction, and in the event that this use cannot be continued through mutual agreement among the competing parties, compensation must be paid or specific wildlife harvesting rights granted, subject to the general public laws existing within the area in dispute.

Even where jurisdictions are not at issue, some lands are used by more than one native group. Where this sort of overlapping exists and where there appears to be no ready agreement among the different users, some appropriate and timely means must be found to resolve the differences. Until this is done, no land in these areas will be granted.

Again, the motive for approaching land selection in this way is to protect the rights of Canadians, Native and non-Native alike, who might be affected by the settlement. Furthermore, it is designed to encourage Native people to participate actively in the fair and equitable negotiations that surround these decisions.

Wildlife

In addition to dealing with the protection of their rights to hunt, fish and trap, the settlements should provide for the involvement of Native people in a much wider spectrum of activities affecting the whole area of wildlife. This could include, for example, fuller participation in wildlife management, such as making recommendations to the government on the establishment and maintenance of wildlife quotas or providing advice on the formulation of management policies and other related matters.

Generally, the settlements may provide for prescribed preferential rights to wildlife on Crown lands. Exclusive rights would be limited to fee simple or the equivalent Native lands or to specified species elsewhere. All areas, whether they include those for exclusive Native use or shared by the general public will continue to be subject to the existing general laws as they apply to hunting, fishing and trapping; they will be further subject to present and future sound conservation policies and public safety measures.

In any event, the settlements will clearly define the terms on which Native people will have access to wildlife resources on Crown lands. Any exceptions to the laws that generally apply to these areas will be clearly outlined, again taking into consideration any rights acquired by non-Native users.

Subsurface Rights

The federal government is prepared to include subsurface rights in comprehensive land claim settlements in certain cases. The motive for granting such rights is to provide Native people with the opportunity and the incentive to participate in resource development. Granting subsurface rights close to communities and in critical wildlife habitat areas would be a protective measure designed to eliminate any possibility of granting resource development rights to any prospective developer in conflict with the wishes of a local community.

Monetary Compensation

This can take various forms including cash, government bonds and other forms of debentures.

But no matter how these capital transfers take place, the amounts negotiated must be specific and finite. As to when payments should be made, negotiations would be tailored to meet the needs of various Native groups and government.

OTHER PROVISIONS

Corporate Structures

One of the mutual goals of comprehensive land claims settlements is to give the beneficiaries control over their own affairs. With this in mind, the government recognizes that Native-controlled mechanisms will be established to facilitate the lasting participation of all the beneficiaries of the settlement. These devices will primarily be designed, staffed, and their decisions implemented by Native people; they should protect and enhance their assets through sound management practices.

Taxation

All compensation monies to be paid under proposed settlements will be regarded as capital transfers and will be exempt from all taxation.

However, incomes derived from such compensation shall be subject to the usual provisions of the Income Tax Act.

Except in relation to municipal services, unimproved lands may also be protected from property taxation.

Programs

Unless agreed to by the parties, proposed settlements will not diminish the eligibility of beneficiaries to current and future programs. Access to such programs will be in accordance with the current approved criteria.

It is not intended that new indeterminate programs geared solely to Natives be provided by the federal government in settlements. Nevertheless, it is possible to refocus normal government resources to enhance the efficiency of existing programs and to achieve mutually agreed upon ends.

PROCEDURES

Process

Current practices in relation to determining the validity of claims will continue to be used.

Those potential claimant groups requiring assistance in the preparation of a claim will be given straightforward indications of the many aspects of settlement that may need to be considered and upon which the government is prepared to proceed.

Negotiations with a group will occur only if and when their claim has been accepted. Negotiations will then take place only with those persons who have been duly mandated to represent the claimant groups.

Claimant groups should have enough money to develop and negotiate their claims, however, the spending restraints of government and their limits will be kept in mind.

Negotiations concerning claims North of 60° will be bilateral between the claimant groups and the federal government leading to federally legislated settlements. However, provision will be made for the territorial governments to be involved in the negotiations under the leadership of the federal government.

Where claims fall in provincial areas of jurisdiction and in those cases where provincial interests and responsibilities are affected, provinces must be involved in claims negotiations in order to arrive at fully equitable settlements.

Eligibility

Those who benefit from the settlements must be Canadian citizens of Native descent from the claimed area, as defined by mutually agreed criteria. Examples in the past of such criteria have included such conditions as: percentage of Native blood, persons adopted by Natives according to traditional customs, and, where cases merit, people who are considered Native by a determination of a majority of the Native community.

In short, conditions for eligibility are negotiable. Persons living in the area of negotiated settlements who have already benefitted under a previous settlement with the Government of Canada are not eligible for benefits under another one.

Persons who are not subject to the Indian Act in no way become subject to the Act by virtue of a land claims settlement.

APPENDIX

To date, success in the settlement of comprehensive claims has been limited to the *James Bay and Northern Québec Agreement of 1975* and the supplementary *Northeastern Québec Agreement of 1978*. These agreements, which are currently being implemented pursuant to Québec and federal legislation, provided for the ownership of land; exclusive hunting, fishing and trapping rights; substantial participatory roles in the management of local and regional governments; financial compensation, control over education and social and economic benefits.

An Agreement-in-Principle, signed in 1978 with the Committee for Original Peoples' Entitlement (COPE), representing approximately 2,500 Inuit of the Western Arctic region was to have had a final agreement by October 31, 1979. Negotiations were delayed as a result of the 1979 general election, but the way was cleared for intensive discussions with the appointment of a new chief government negotiator in June 1980. After several months of unsuccessful negotiations, meetings were suspended in December 1980. It is hoped that negotiations translating the Agreement-in-Principle into a Final Agreement will resume in the near future.

In the Yukon, as a result of fresh initiatives, including the appointment of a new chief government negotiator, in May 1980, considerable progress is being made in the negotiations with the Council for Yukon Indians (CYI) which represents 5,000-6,000 Status and non-Status Indians. The goal here is to finalize an Agreement-in-Principle by the summer of 1982.

In 1977 the Inuit Tapirisat of Canada (ITC) submitted, on behalf of some 13,500 Inuit in the Central and Eastern Arctic of the Northwest Territories, a proposal for a new territory of Nunavut, to encompass all lands north of the treeline. The proposal contained provisions respecting land, wildlife, compensation and other elements of a claim. Until late 1980 little progress was made, since government policy distinguished between the process of constitutional change and the negotiated settlement of a claim. Late in 1979, the ITC agreed to separate the claims and constitutional processes; and in August 1980, a chief government negotiator—a new position—was appointed to conduct negotiation of the claims elements. Negotiation from late 1980 until late October 1981 has resulted in the initialing, in Frobisher Bay, of an agreement-in-principle on wildlife harvesting rights. Negotiations on the claims elements continue, in tandem with efforts on both sides to resolve the question of political development.

The Dene Nation and the Métis Association of the Mackenzie Valley, NWT presented separate claims in 1976 and 1977 respectively, but since the two claims did not reflect the actual degree of mutual interest among the native population, negotiation did not commence, and loan funding for research and development pertaining to claims was suspended by government between October 1978 and April 1980.

In April 1980 funding was resumed on the understanding that the Dene Nation would represent all the native beneficiaries during negotiation of the claims. In April 1981, a chief government negotiator was appointed and several negotiation sessions have been held to clarify principles.

In British Columbia, the potential for negotiating the Nishga claim is tenuous due primarily to the apprehension with which the provincial government approaches the possibility of unextinguished Native title within the province, and the doubt which the province has as to whether it should accept any responsibility to compensate Native people for the loss of use and occupancy of traditional lands. Nevertheless in June of this year a fulltime chief government negotiator was appointed by the Minister to negotiate a settlement and the province has agreed to participate in the negotiations. Preliminary negotiations with the Nishga Tribal Council got underway earlier this fall.

The federal government has also accepted claims for negotiation from, the Association of United Tahltans, the Gitksan-Carrier Tribal Council, the Kitwancool Band and the Kitamaat Village Council. These claims will be negotiated once the implications of the Nishga claim negotiations are apparent. Claims from the Nuu-Chah-Nulth, Haida and Heiltsuk are presently under review.

Claims on behalf of Naskapi-Montagnais Indians and the Inuit in Labrador were accepted for negotiation by the federal government in 1978. The Province of Newfoundland confirmed its willingness to participate in tripartite negotiations of these claims in September 1980. Bilateral discussions are planned to clarify the role and responsibilities that each government will assume in these negotiations.

The claim of *le Conseil Attikamek-Montagnais*, representing Montagnais and Attikamek bands living on the north shores of the St. Lawrence and St. Maurice rivers, was accepted by the federal government in October 1979, and has been met by a willingness to participate in negotiations by the provincial government. The claim will be negotiated in a tripartite forum. *Le Conseil Attikamek-Montagnais* is currently completing its research with the view to entering early negotiations.