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Comprehensive Land Claims Policy

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I am very pleased to provide, through this booklet, further details with regard to the comprehensive land claims policy that I announced in the House of Commons in December of last year.

This policy is the result of a thorough process of consultation and review carried out over a two year period by the Government of Canada. During this period we discussed comprehensive land claims policy with aboriginal peoples, with other governments in Canada and with interested Canadians in general. An important part of this process was the work of the Task Force to Review Comprehensive Claims Policy under the chairmanship of Murray Coolican. The recommendations contained in the report of the task force, as well as reports and assessments from other sources, have been given full consideration in the development of this policy.

I would like to take this opportunity to thank all those who have taken the time to provide us with their views on this important matter. Aboriginal leaders, my counterparts in various provincial governments, the leaders of the territorial governments and representatives of many other groups as well as individual Canadians have all helped shape this policy by their thoughtful and considered expression of views.

The Honourable Bill McKnight
*Minister of Indian Affairs
and Northern Development*

Introduction



Aboriginal peoples have always claimed a special relationship to the land as the basis for their cultural distinctiveness and special aboriginal status. Recognition of this relationship through the settlement of claims based upon aboriginal title is a fundamental objective of aboriginal peoples. The fair and equitable resolution of such claims is also a major priority of the Government of Canada.

There is no clear definition of the term “aboriginal title”. For aboriginal peoples, the term is bound up with a concept of self-identity and self-determination. For lawyers, it is one which has been referred to in case law for many years, but which has eluded judicial definition. For many non-aboriginal Canadians, it is a term that evokes a wide range of reactions, from sympathy to concern.

Although Canadians have inherited the uncertainty and the legal ambiguities surrounding “aboriginal title”, they have also inherited a way for addressing such ambiguities: treaty-making. From colonial times, and into the first half-century of Confederation, the Crown entered into treaties with aboriginal peoples to define the respective rights of the parties to the use and enjoyment of lands traditionally occupied by aboriginal people. In the aftermath of the 1973 Supreme Court of Canada decision in the case of *Calder v. the Attorney General of British Columbia*, the tradition of treaty-making was renewed in the form of a comprehensive land claims policy. In August 1973, the Minister of Indian Affairs and Northern Develop-

ment announced that the government was prepared to negotiate comprehensive land claims with aboriginal groups where their traditional and continuing interest in the lands concerned could be established. In return for this interest, an agreed form of compensation or benefit would be provided to the aboriginal group concerned.

Large parts of Canada continue to be used by aboriginal groups living in their traditional territories. The basis for any comprehensive land claims policy, therefore, is self-evident. It is the fulfillment of the treaty process through the conclusion of land claims agreements with aboriginal groups that continue to use and occupy traditional lands and whose aboriginal title has not been dealt with by treaty or superseded by law.

The federal government's approach in this important matter has been to seek to clarify the land and resource rights of aboriginal claimants, governments and the private sector, through the negotiation of settlement agreements. Through such negotiations, a range of land and resource-related matters has been addressed, including land ownership, and the right to the use and management of wildlife and renewable resources. Other topics directly or indirectly linked to land and resources have also been dealt with in the context of these negotiations. Claims settlements have thus provided an opportunity for government and claimants to redefine the most fundamental aspects of their relationship by a process of negotiation.

The last review of the comprehensive land claims policy occurred in 1981. Since that time, there has been growing dissatisfaction with certain features of the policy. Serious concern has been expressed at the rate of progress in negotiations and at the growing inconsistency between comprehensive land claims policy and other federal policy initiatives. Aboriginal groups have particularly objected to the practice of seeking to extinguish all aboriginal rights and interests in and to the settlement area in exchange for the benefits provided through the settlement agreement. They have been concerned that other rights, that may be unrelated to the disposition of lands and resources, might be affected in the process. Further, they have seen this "blanket extinguishment" approach as inconsistent with the constitutional recognition and affirmation of existing aboriginal rights in section 35 of the *Constitution Act, 1982* and with the process of seeking to define such rights in constitutional discussions.

To deal with such concerns, to ensure consistency with other policy positions, particularly on aboriginal self-government, and to expedite negotiations, the Government of Canada adopted a revised comprehensive land claims policy in December 1986. To address these matters, the revised policy contains provisions for new ap-

proaches to the cession and surrender of title, self-government, wildlife and environmental management, the inclusion of offshore areas in negotiations, resource revenue-sharing and negotiating procedures. Where no changes have been made in the policy and procedures, the provisions of the previous policy will remain in effect.

This revised policy will guide the federal government's approach in all negotiations, which will take place without prejudice to the legal rights of the parties. However, the unique circumstances of each claim will be taken into account by the government in applying the policy in individual cases. As part of this process, discussions will be held with claimant groups, territorial governments and of course, where their interests are affected, with provincial governments. Completed settlements and treaties will not be reopened or affected by the policy changes.

This booklet sets out the elements of the revised policy. It is not a statement of law. The procedures to be followed in submitting and negotiating the settlement of land claims are also described. There are six main sections: objectives; scope of negotiations; self-government; involvement of provincial and territorial governments; protection of aboriginal and non-aboriginal interests; and procedures.

Objectives



The Government of Canada is committed to the resolution of comprehensive land claims through the negotiation of settlement agreements. Such agreements must be equitable to aboriginal people and other Canadians, and must represent final settlements of land claims.

The purpose of settlement agreements is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where aboriginal title has not been dealt with by treaty or superseded by law. Final settlements must therefore result in certainty and predictability with respect to the use and disposition of lands affected by the settlements. When the agreement comes into effect, certainty will be established as to ownership rights and the application of laws. Predictability will be established for the future as to how the applicable provisions may be changed and in what circumstances. In this process the claimant group will receive defined rights, compensation and other benefits in exchange for relinquishing rights relating to the title claimed over all or part of the land in question.

However, it is recognized that land claims negotiations are more than real estate transactions. In defining their relationships, aboriginal people and the Government of Canada will want to ensure that the continuing interests of claimants in settlement areas are recognized. This will encourage self-reliance and economic develop-

ment 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.

The federal government will also seek to ensure consistency between the comprehensive land claims policy and other federal policies for aboriginal people, for the Northwest Territories and Yukon, and for Canada as a whole. In addition, an equitable application of the policy means that the overall fairness of settlements must be ensured.

Scope of Negotiations



As the main purpose of comprehensive land claims negotiations is to clarify rights in relation to lands and resources, land and resource-related topics will provide the principal focus of negotiations. However, claims settlements are also a means whereby aboriginal groups can obtain some of the tools to capture economic opportunities and establish the means whereby they can make decisions about future renewable resource use. Other issues related to land and renewable resource management, as well as the interests of other affected parties, will also be an integral part of negotiations.

The Government of Canada is therefore prepared to address a range of issues within the framework of the policy. These can include land selection, self-government, environmental management, resource revenue-sharing, hunting, fishing and trapping rights, and other topics. The precise choice of topics that the parties agree to discuss in negotiations, and the parameters of these negotiations, will be identified in individual cases in framework agreements which will be negotiated in the preliminary negotiations.

Alternatives to Extinguishment

Above all other issues, the requirement that aboriginal groups agree to the extinguishment of *all* aboriginal rights and title as part of a claims settlement has provoked strong reactions from aboriginal

people. The federal government has examined this feature of the former policy carefully and has concluded that alternatives to extinguishment may be considered provided that certainty in respect of lands and resources is established.

Acceptable options are:

- (1) the cession and surrender of aboriginal title throughout the settlement area in return for the grant to the beneficiaries of defined rights in specified or reserved areas and other defined rights applicable to the entire settlement area; or
- (2) the cession and surrender of aboriginal title in non-reserved areas, while:
 - allowing any aboriginal title that exists to continue in specified or reserved areas;
 - granting to beneficiaries defined rights applicable to the entire settlement area.

In advancing these proposals, certain steps will be followed. The particular approach to be used to obtain certainty will be discussed in individual negotiations and the precise wording will be subject to agreement between the parties. The Department of Justice will be consulted so that the legal implications of the approach and language used to attain certainty are properly understood. In those cases where provincial lands are involved, the province must play a major part in determining the approach to be followed.

It is important to recognize that the aboriginal rights to be released in the claims process are only those related to the use of and title to land and resources. Other aboriginal rights, to the extent they are defined through the constitutional process or recognized by the courts, are not affected by the policy.

Lands

The land area claimed by an aboriginal group will be a key subject for the negotiations. Lands selected by beneficiaries for their continuing use should be traditional terrestrial lands that are currently used and occupied.

Where more than one claimant group utilizes common areas of land and resources, and the claimants cannot agree on boundaries, resource access or land-sharing arrangements, no lands will be granted to any group in the contested area until the dispute is resolved.

In cases where a claimant group currently utilizes resources in a province or territory other than that in which its communities are located, the range of benefits available to the group outside the province or territory of residence will be determined by negotiation with the province or territory involved and with any other aboriginal groups which can establish competing claims to the land.

The content of such negotiations will be identified in framework agreements.

Offshore Areas

In many cases, the areas traditionally used by aboriginal groups to pursue their way of life include offshore areas. In such cases, negotiations concerning harvesting rights in offshore areas will be conducted, to the extent possible, in accordance with the same principles as those which apply to terrestrial areas. Participation in environmental management regimes and resource revenue-sharing arrangements may also be negotiated with respect to offshore areas.

Wildlife

The continuing economic, social and cultural importance of hunting, fishing and trapping for many aboriginal communities is recognized by the federal government. Accordingly, settlements may provide for preferential wildlife harvesting rights for beneficiaries on unoccupied Crown lands. There may be exclusive harvesting rights exercised by settlement beneficiaries on selected lands, or preferential rights for particular species throughout the settlement area or within specified parts of the settlement area. In all cases, settlements will clearly define the terms by which beneficiaries will have access to wildlife resources.

Unless otherwise provided for in the terms of settlements, laws of general application respecting hunting, fishing and trapping activities, including public safety and conservation measures, will apply to beneficiaries.

Subsurface Rights

Subsurface resources fall within either federal or provincial jurisdiction. In areas of federal jurisdiction, subsurface rights on some federal Crown lands and on settlement lands held by beneficiaries may be provided through claims settlements.

Granting subsurface rights close to communities, or in critical wildlife habitat areas, would serve as a way to avoid land use conflict in key areas. Such subsurface rights may also, in appropriate circumstances, provide beneficiaries with the opportunity and incentive to participate in and benefit from resource development.

Resource Revenue-Sharing

Many claimants live in areas of Canada where the development of non-renewable resources is and will remain a major economic activity. In order that beneficiaries may share in the revenues from such developments, the federal government is prepared to negotiate resource revenue-sharing arrangements with claimant groups. Such arrangements would provide a percentage of federal royalties derived from the extraction of resources in the settlement area, including offshore areas.

Revenue-sharing arrangements will not imply resource ownership rights, and will not result in the establishment of joint management boards to manage subsurface and sub-sea resources. In addition, the federal government will maintain responsibility for resource revenue instruments and must maintain its ability to adjust the fiscal regime.

Resource revenue-sharing may be subject to limitations either by:

- an absolute dollar cap; or
- a time cap of not less than fifty years from the first payment of the royalty share (which arrangements will be renegotiable); or
- a reducing percentage of royalties generated.

Any negotiations or arrangements between the federal and territorial governments regarding possible resource revenue-sharing must respect any arrangements made in this regard through claims settlements. The federal government will consult affected claimant groups regarding the implications for unresolved claims of any proposed federal-territorial arrangements on resource revenues.

Environmental Management

Settlements are expected to recognize particular aboriginal interests in relation to environmental concerns particularly as these concerns relate to wildlife management and the use of water and land. Provision for the exercise of such interests may be afforded through membership on advisory committees, boards and similar bodies or through participation in government bodies that have decision-making powers. Such arrangements must recognize that the government has an overriding obligation to protect the interests of all users, to ensure resource conservation, to respect international agreements, and to manage renewable resources within its jurisdiction.

Compensation

Monetary compensation may comprise various forms of capital transfers, including cash, resource revenue-sharing, or government bonds.

Where applicable, the amount will be clearly defined in the agreement, and no advance on the monetary compensation components of settlements will be provided before final settlement is reached. The amount of compensation may be adjusted depending upon other arrangements negotiated in settlement agreements. For example, the amount of cash compensation may be reduced in accordance with arrangements concerning resource revenue-sharing. Outstanding debts owed by the claimant group to the federal Crown will be deducted from final settlements.

Management of Settlement Assets

Corporate structures provided for in settlements must be designed by claimant groups to provide for the protection and enhancement of settlement assets based on sound management practices and democratic control by the beneficiaries.

Programs

Beneficiaries of land claims settlements will retain their eligibility for government programs. Benefits received under such programs will be determined by general program criteria established from time to time.

Taxation

Cash compensation payable under a settlement will be regarded as a capital transfer and will be exempt from taxation. However, any income derived from such compensation will be subject to the provisions of the *Income Tax Act*. Other elements of compensation, such as a share of resource revenues, will be subject to prevailing taxation legislation and practices.

Unimproved lands may be exempted from property taxation except in relation to municipal services.

Beneficiaries

Those who benefit from settlements must be Canadian citizens of aboriginal ancestry from the settlement area, or their descendants, or other persons as defined by mutually-agreed criteria. Beneficiaries cannot have previously benefitted from another comprehensive claims settlement.

The definition of beneficiaries will not affect the status of persons pursuant to the *Indian Act*.

Self-Government



The previous comprehensive land claims policy allowed for the negotiation of self-government on a local basis. This meant that a limited range of local institutions could be established by statutory means in a settlement area. The inclusion of a broader range of self-government matters in claims negotiations became an increasingly important issue as a result of recent governmental initiatives and policies respecting self-government. In reviewing this feature of the policy, a major consideration was to ensure consistency between this policy and other government measures.

Self-government has been referred to as the key to change for aboriginal peoples. The federal government's policy approach to self-government is to acknowledge the desire expressed by communities to exercise greater control and authority over the management of their affairs. This may result in the establishment of different types of institutions in different parts of the country which reflect the particular circumstances of each distinct aboriginal group or community. The objectives of the government's policy on community self-government are based on the principles that local control and decision-making must be substantially increased; that flexibility is needed to recognize diverse needs, traditions and cultures; and that greater accountability to community members must be achieved. Any particular approach to community self-govern-

ment must respect existing constitutional principles and be consistent with government practices.

In the territories, self-governing objectives are also being advanced through institutions of public government and through the representation of aboriginal people on governing bodies that manage discrete activities or which have broad governing authority over activities in a given area or region. In this way, political rights would not be reserved exclusively to aboriginal people, but aboriginal interests would be incorporated and represented in institutions of public government.

In the context of the comprehensive land claims policy, self-government is an issue that is tied closely to the expressed need of aboriginal peoples for continuing involvement in the management of land and resources as well as in the development of self-governing institutions that recognize their place in Canadian society. The circumstances in which the negotiation of self-government matters in claims areas would be appropriate could include community-based self-government regimes on designated lands. In other cases, measures which support the direct participation of aboriginal representatives in management boards could be adopted to ensure appropriate representation of interests in decision-making processes, subject to the application of such federal and provincial legislation to those areas.

The precise nature of self-government matters to be negotiated will need to be set out in framework agreements. In keeping with the federal government's general policy on self-government, aboriginal people themselves will play the major role in defining the content of self-governing arrangements, subject to existing constitutional principles and practice. The actual negotiation of self-government institutions will occur pursuant to the agreement. Legislation will be required to establish the scope of law-making authority granted to any new institutions or bodies. Finally, as a matter of policy, most aspects of such arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force.

Involvement of Provincial and Territorial Governments



The federal government has jurisdiction in relation to Indians and Indian lands. Most other lands and resources, except in the territories, fall under provincial jurisdiction. For this reason, the participation of provincial governments in the negotiation of claims within their jurisdiction will be strongly encouraged and is essential to any negotiation of settlements involving areas of provincial jurisdiction or provincial lands and resources. Consistent with this approach, the federal government maintains the position that provincial governments should contribute to claims settlements in exchange for the certainty of title they receive through them.

In the territories, lands and resources fall under federal jurisdiction. Negotiations in these areas will be bilateral in nature leading to federally-legislated settlements complemented by territorial legislation as required. Territorial governments will participate fully in the application of land claims policy and in negotiations, under the leadership of the federal government.

Protection of Aboriginal and Non-Aboriginal Interests



Settlements must respect the rights and interests of aboriginal and non-aboriginal people alike. Through the negotiating process, claimants will have an opportunity to participate actively in the equitable reconciliation of these interests.

Aboriginal Rights

It is important to re-emphasize that under this policy, only land-related rights are at issue in negotiations and may be affected by the measures used to establish certainty in settlements. Any other rights which may exist will remain unaffected by comprehensive land claims agreements.

Appropriate interim measures may be established to protect aboriginal interests while the claim is being negotiated. These measures will be identified in initial negotiating mandates in specific cases.

Public and Third Party Interests

In attempting to define the rights of aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third party interests will be respected in the negotiation of claims settlements and, if affected,

will be dealt with equitably. Provision must be made for protecting the current interests of non-aboriginal subsistence users and for the right of the general public to enjoy recreational activities, hunting and fishing on Crown lands, subject to laws of general application.

Information about the general status and progress of negotiations will be made available to the public. In addition, part of the mandate of federal negotiators will be to maintain appropriate and effective communication with those third parties whose interests are directly connected to issues under negotiation.

Public Access

Settlements will provide for innocent public access to selected or retained aboriginal lands and for right-of-way for necessary public purposes. Access rights pertaining to transportation routes in and through the settlement area must also be provided for.

Holders of subsurface rights must have access to settlement lands, where necessary, for the exploration, development and production of resources. The exercise of such rights will be subject to fair compensation as determined through timely negotiations or by arbitration.

Lands granted to beneficiaries through settlements will be protected from the exercise of unlimited expropriation powers.

Procedures



Statement of Claim

The claims process begins with the preparation of a statement of claim and appropriate supporting materials by the claimant group. A statement of claim should contain the following elements:

- (1) a statement that the claimant group has not previously adhered to treaty;
- (2) a documented statement from the claimant group that it has traditionally used and occupied the territory in question and that this use and occupation continues;
- (3) a description of the extent and location of such land use and occupancy, together with a map outlining the approximate boundaries;
- (4) identification of the claimant group including the names of the bands, tribes or communities on whose behalf the claim is being made, the claimant's linguistic and cultural affiliation, and approximate population figures for the claimant group.

Acceptance of Claims

Upon receipt of a statement of claim, the Minister of Indian Affairs and Northern Development will review the submission and accompanying documentation and seek the advice of the Minister of Justice as to its acceptability according to legal criteria. The claimant

group will be advised by the Minister of Indian Affairs and Northern Development, within twelve months, as to whether the claim is accepted or rejected. In the event that a claim is rejected, reasons will be provided in writing to the claimant group.

Preliminary Negotiations

Negotiations towards the development of a framework agreement will be initiated when the Minister of Indian Affairs and Northern Development judges the likelihood of successful negotiations to be high, the settlement of claims in the area to be a priority, and where active provincial and territorial involvement may be obtained as necessary. Negotiations will be conducted only with groups duly mandated by the claimants they represent, to the satisfaction of the Minister.

Senior federal negotiators will be appointed by the Minister from within or outside the public service, as appropriate, and will receive initial negotiating mandates from the federal government.

Bilateral discussions will be held with the provincial or territorial governments concerned regarding their participation in negotiations.

Framework Agreements

Framework agreements will be negotiated and will determine the scope, process, topics, and parameters for negotiation. Approaches to obtaining certainty with respect to lands and resources, and the order and timeframe of negotiations will also be provided for in the framework agreements.

Framework agreements, and substantial changes to them, will be considered and approved by the federal government.

Agreements-in-Principle

Agreements-in-principle will require endorsement by the claimant group. This may be provided by resolutions of assemblies or by band council resolutions.

Agreements-in-principle will also be considered and approved by the federal government.

Final Agreements

Final agreements, accompanied by implementation plans, will require the approval of the federal government and must be formally ratified by the aboriginal claimants.

Settlement legislation will be passed to give effect to the agreements reached.

Implementation

Final agreements must be accompanied by implementation plans.

All elements of agreements related to land, title, quantum of resources (where applicable) and financial arrangements will be final.

Provisions relating to management and decision-making agencies will be subject to review from time to time, as agreed, and subject to legislative amendment where the parties agree that specific provisions are unworkable, obsolete or no longer desirable.

The negotiating process will take account of the federal regulatory reform policy and Citizen's Code of regulatory fairness, and the final agreements and implementation plans will provide for regulatory impact assessments.

Comprehensive Land Claims Steering Committee

A committee composed of Assistant Deputy Ministers from government agencies and departments most involved in claims negotiations will be established. The committee will review and provide advice to Ministers on negotiating mandates, the negotiating process, framework agreements, agreements-in-principle and final agreements.

Information

For more information about the comprehensive land claims policy, contact the Self-Government Sector, Department of Indian Affairs and Northern Development, 10 Wellington Street, Hull, Quebec K1A 0H4.