Land Claims Agreements Coalition

Submission to the Standing Committee on Aboriginal Affairs and Northern Development

May 12, 2009

“A Legacy of Colonialism and Paternalism”

“L’importance des traités à l’époque actuelle
Dans Rassembler nos forces : le plan d’action du Canada pour les questions autochtones, publié le 7 janvier 1998, le gouvernement du Canada affirmait que les traités tant historiques que modernes continueront à jouer un rôle clé dans les rapports futurs entre les Autochtones et la Couronne. Le gouvernement fédéral est d’avis que les traités, de même que les rapports qu’ils établissent, peuvent frayer la voie à un avenir commun. Les rapports continus fondés sur un traité forment un cadre de droits et de responsabilités mutuels qui permet aux Autochtones et aux non-Autochtones de profiter ensemble des avantages qu’offre le Canada.”

Government of Canada

A. Summary

1. Since 1975, the Government of Canada has entered into 21 treaties with Aboriginal peoples, applying to Aboriginal traditional lands encompassing more than half of the lands and waters of Canada and the immense resources they contain.

2. These modern treaties are essential constitutional building blocks of Canada, and are intended to formalize the relationship between Aboriginal peoples and the Crown.

3. Modern treaties are intended to improve the social, cultural, political and economic well-being of Aboriginal people, while providing all signatories a mutual foundation for the beneficial and sustainable development and use of Aboriginal peoples’ traditional lands and resources.

4. Unfortunately, the evidence is extensive that the Government of Canada has failed to fully and meaningfully implement the spirit and intent – as well as the broad socio-economic objectives – of modern land agreements.

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1 Standing Senate Committee on Aboriginal Peoples, Honouring the Spirit of Modern Treaties: Closing the Loopholes, May 2008, at p. viii (www.parl.gc.ca/39/2/parlbus/commmbus/senate/com-e/abor-e/rep-e/rep05may08-e.pdf - accessed 4 May, 2009); see paragraph 29 of this brief, below.

5. This failure is inconsistent with the status of aboriginal and treaty rights in the Constitution of Canada, many judgments of the Supreme Court of Canada, Canada’s international human rights obligations, and the honour of the Crown.

6. If socio-economic conditions among the signatory Aboriginal peoples continue to fail to improve meaningfully after the signing of treaties, other Aboriginal peoples may conclude that there is no benefit flowing from such agreements.

7. Effective implementation of modern land agreements requires the Crown to work with the Aboriginal signatories in nation-to-nation and government-to-government relationships. Unfortunately, this has seldom happened, as the Crown has often refused to meet or engage meaningfully with the leaders of these Aboriginal treaty organizations.

8. A new national policy is urgently required to address the current crisis and ensure that all agencies of the Crown implement modern treaties fully, according to their letter, their spirit and intent, and the fundamental objectives they embody. Accordingly, the Land Claims Agreements Coalition (the “Coalition”) has developed a model policy: “Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties between Aboriginal Peoples and the Crown.”

9. The future survival and well-being of Aboriginal peoples, and the honour of the Crown and of all Canadians, depends on a turnaround of the Government of Canada’s approach, and ongoing full implementation of all modern treaties with Aboriginal peoples.

10. The Coalition calls on this Committee to recommend that the Government of Canada:
   a) adopt and promptly implement a new modern treaty implementation policy, consistent with the Coalition’s Model Policy;
   b) establish a Land Claims Agreements Implementation Commission;
   c) establish a Cabinet Committee on Aboriginal Affairs to oversee and coordinate the involvement of all involved federal agencies in treaty implementation activities;
   d) Appoint a Chief Federal Negotiator, jointly with the Coalition.

B. The Land Claims Agreements Coalition

11. The Land Claims Agreements Coalition consists of all Aboriginal signatories to modern treaties (comprehensive land claims and self-government agreements) in Canada. A list of the modern treaties entered into by Coalition members is attached.

12. The first “modern land claims agreement” between Aboriginal peoples and the Crown in right of Canada was entered into in 1975. Since then, 21 modern treaties have been implemented.

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negotiated, applying to Aboriginal traditional lands encompassing more than half of the lands and waters of Canada and the immense resources they contain.

13. These agreements represent “basic building blocks in the creation of our country.”

14. The rights provided for in these agreements are part of the Canadian constitutional landscape and are protected by s.35 of the Constitution Act, 1982.

C. The issue: Canada’s modern treaty implementation policy and practice

15. In December 2006, Leaders and Representatives of the Land Claims Agreements Coalition assembled in Ottawa to discuss how Canada is doing in honouring the modern treaty undertakings it made to Aboriginal peoples over the past thirty years. They declared that:

Through these modern treaty agreements, Ottawa made important and solemn treaty promises enshrined in the constitution in return for reconciling Crown and aboriginal sovereignties and clearing the way for development in more than half of Canada’s land mass and the immense resources it contains. More than three years ago, the signatories of all major modern treaties wrote to the Government of Canada. We called for the mutual development of a new federal Policy to fully implement the fundamental objectives of these important agreements. No meaningful progress has yet been made, and the federal Crown has essentially rebuffed efforts to engage constructively. No progress has been made since that time.

16. Modern land claims agreements were negotiated in good faith with the sincere belief that they would deliver a turning point in the difficult circumstances of many of Canada’s Aboriginal peoples.

17. For Aboriginal signatories, land claims and related self-government agreements were and are intended to bring about social, economic, environmental and cultural improvements, including in following categories:
   a) social and cultural well-being and development;
   b) economic self-reliance through developmental success and participation;
   c) growth and stability of Aboriginal populations in their traditional territories;
   d) environmental protection; and
   e) cultural and linguistic protection and enhancement.

18. Some individual progress has been made in modern treaty implementation. In 2008 the Grand Council of the Crees (Eeyou Istchee) entered into a New Relationship Agreement with the Government of Canada, some 33 years after entering into its treaty with Canada.

19. However, overall, members of the Coalition are frustrated and disappointed that the Government of Canada is fulfilling neither its obligations in full under these

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agreements, nor their spirit and intent, and that consequently modern treaties are failing to achieve their overall fundamental objectives.

20. Most conspicuously lacking from the federal approach to implementing, as well as negotiating land claims agreements, has been any apparent awareness that comprehensive land claims agreements should serve to bring about the affirmative inclusion of Aboriginal peoples into the regional, provincial/territorial and national economies of which they and their lands and resources are part, and, over time, to improve the material well being of Aboriginal peoples while enriching the country as a whole.

21. Modern treaties are not, in and of themselves, a “panacea for Aboriginal peoples.” It is the fulfillment of the objectives set out in these agreements that matters. As reported by Prof. Martin Papillon in a report for the Institute for Research on Public Policy:

   In and of themselves, treaties do not change the socio-economic conditions and overall well-being of communities, nor do they radically alter the colonial structure that Daniel Salée identifies in his study for the IRPP as one of the main explanations for the ‘glacial pace’ of changes in the living conditions of Canadian Aboriginal peoples. But, over time, and with proactive leadership and collaboration between all parties involved, CLCAs [Comprehensive Land Claims Agreements] can become the instruments whereby Aboriginal peoples establish a governance relationship that better reflects their social, economic and political aspirations.

   Governments should therefore acknowledge that land claims settlements are much more than land transactions: they are living documents that establish broad parameters for a decolonizing relationship that is bound to change as the conditions and priorities of the Aboriginal signatories change.7

22. While the Government of Canada has enunciated its objectives many times, for example in its 1986 Comprehensive Land Claims policy, it has not worked consistently, conscientiously or evenly to support the full extent of the land claims agreements.

23. The Government of Canada’s 1986 Comprehensive Land Claims policy stated:

   ... land claims negotiations are more than real estate transactions. In defining their relationships, Aboriginal peoples 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 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.

24. This policy objective still enjoys the support of Aboriginal peoples in Canada and is directly incorporated in some land claims agreements.

25. However, in the universal experience of the members of the Coalition, the ink is barely dry on each land claims agreement before the federal government abandons any talk of the broad objectives of the agreement, and proceeds instead on the government officials’ insistence that the government’s sole responsibility is to fulfil the narrow legal obligations set out in the agreement.

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26. The Cree-Naskapi Commission, an independent federal land claims agreement review body, stated in its 1995 Annual Report to the Parliament of Canada:

In the course of Canadian history, a notion persists that governments make promises to induce natives to surrender their lands and other rights and then routinely break these promises, frequently hiding behind legal technicalities. Regrettably, the evidence supporting this notion is extensive. [Emphasis added]

27. The members of the Coalition are not aware of any policy having been explicitly adopted by the Government of Canada that the objectives of entering into the land claim agreement are to be forgotten or ignored once it has obtained the Aboriginal signatures on the document. And yet that appears to have become the entrenched attitude of Department of Indian and Northern Affairs (“INAC”).

28. This attitude has led at least some of the Aboriginal peoples in Canada who have entered in good faith into these modern land claims agreements to conclude that there have been deliberate, continuing efforts on the part the federal Crown to minimize, frustrate and even extinguish the rights and benefits the Aboriginal parties expected would accrue from their treaties.

29. Government authorities within Canada have repeatedly echoed the concerns raised by the Coalition. Most recently, in May 2008, the Standing Senate Committee on Aboriginal Peoples reported:

Treaties are solemn agreements that set out promises, obligations, and benefits for both the Aboriginal peoples and the Crown in right of Canada. The Government of Canada acknowledges that these agreements represent the “basic building blocks in the creation of our country.” …

However… the committee is troubled by the narrow approach to treaty implementation adopted by the federal government. Federal practices and policy in this regard have resulted in the diminishment of the benefits and rights promised to Aboriginal peoples under these agreements…

[W]ithout the funds necessary to promote political, social and cultural development, the preservation and transmission of Aboriginal cultures to future generations cannot occur as envisioned by the treaties…

Our present study on the federal role in implementing modern treaty obligations, along with the Committee’s previous studies on specific claims, economic development and the delivery of safe drinking water to First Nations communities, suggest to us that there are deep structural reasons for the government’s failure to make measurable and meaningful progress on issues affecting Aboriginal Canadians. We believe much of this failure rests with the institutional role and mandate of the Department of Indian Affairs and Northern Development Canada (DIAND), a department which is steeped in a legacy of colonialism and paternalism… [W]e find that the Department’s ability to make meaningful improvements in the lives of Aboriginal peoples and its performance generally is woefully inadequate.

We endorse the view that failure to properly implement the provisions of modern treaties puts Canada at risk for generating new legions of broken promises. However we are convinced that these challenges can be overcome. The honour of the Crown rests upon it.8 [Emphasis added.]

30. Regarding the federal Government of Canada’s approach to treaty implementation, the Senate Committee on Aboriginal Peoples further reported:

The government’s focus… has largely been to discharge its obligations in a narrow sense, rather than working to achieve the full benefit of the reconciliation promised by treaties. This, in our view, is a diminished and restricted reading of treaty-making and treaty implementation… The result is that broader considerations of economic and social well-being are set aside.9 [Emphasis added]

31. In October 2007, the Auditor General of Canada reported on implementation of one of the earliest modern treaties (signed in 1984). Her report noted:

3.92 Although the Inuvialuit Final Agreement has existed for 23 years, INAC [the Department of Indian and Northern Affairs Canada] has yet to demonstrate the leadership and the commitment necessary to meet federal obligations and achieve the objectives of the Agreement.10

32. The Auditor General’s 2007 report noted the lack of any change of approach by INAC since the Auditor General raised similar concerns in 200311, stating:

3.83 We found that INAC… has taken no action to develop performance indicators or to ensure measurement of progress toward achievement of the principles that the Agreement embodies. Department officials describe these as being Inuvialuit principles, not principles to which Canada adheres. INAC officials emphasize that the Agreement does not impart any federal obligation to realize these goals...

3.84 We are concerned that the Department is not focused on achieving the goals expressed in the Agreement.12 [Emphasis Added.]

33. International authorities have also taken note of the Coalition’s serious concerns, in relation to Canada’s compliance with international treaties to which it is a signatory. For example, in his 2004 report to the Economic and Social Council of the United Nations, the U.N. Special Rapporteur on human rights and indigenous issues stated:

… the Land Claims Agreement Coalition [has] called upon the federal Government of Canada to pay urgent attention to full and meaningful implementation of the socio-economic and developmental objectives of these agreements, warning that if conditions among signatory peoples continue to fail to improve meaningfully after the signing of such agreements, other Aboriginal peoples may conclude that there is no benefit flowing from such agreements.13 [Emphasis added.]

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D. Toward a new national policy on land claims agreement implementation

34. The Government of Canada’s approach to implementing modern treaties entered into with Aboriginal peoples in Canada needs to be changed if it is to adhere to the legal, constitutional, and human rights reality and imperatives of these agreements. What is called for is a change in the perspective, indeed in the very culture of the Government of Canada in respect of its view of the new relationships set out in land claims and self-government agreements.

35. The Coalition has long called for a new land claims implementation policy. Toward this goal, the Coalition released its “Four-Ten Declaration” 14 in 2006. That declaration articulated “4 Points” for a renewed relationship with the Government of Canada:

   a) Recognition that the Crown in right of Canada, not INAC, is party to land claims agreements and self-government agreements;
   b) A federal commitment to achieve the broad objectives of modern treaties, as opposed to mere technical compliance with narrowly defined obligations;
   c) Implementation handled by senior officials representing the entire Canadian government; and
   d) An independent implementation and review body.

36. These “4 Points” are elaborated upon by “10 Fundamental Principles” concerning a new land claims implementation policy in Canada, which include:

   1. The history of nation-to-nation contact and interaction between the Crown and the aboriginal peoples in Canada has created an enduring relationship between the Crown and aboriginal peoples, one that is fundamentally predicated on the honour of the Crown.
   3. “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] S.C.R. 73.
   5. Treaties and land claims agreements between the Crown and Aboriginal peoples are acknowledged to be “basic building blocks in the creation of our country …[T]reaties – both historical and modern – and the relationship they represent provide a basis for developing a strengthened and forward-looking partnership with Aboriginal people.” Government of Canada, “Gathering Strength – Canada’s Aboriginal Action Plan”, 1997.
   7. Modern land claims agreements, which give rise to treaty rights, are multi-faceted, and the ongoing rights they affirm are, among other things, constitutional, statutory, contractual, fiduciary, and in keeping with the “living tree” principle of Canadian law, evolving and progressive in nature.

8. The negotiation and implementation of modern land claims agreements, and their ancillary agreements, engage the honour of the Crown, and demand results and ongoing outcomes that are just...

9. The treaty rights arising from modern land claims agreements express the mutual desire of the Crown and aboriginal peoples in Canada to reconcile through sharing the lands, resources and natural wealth of this subcontinent in a manner that is equitable and just – no longer so as to solely assimilate, take or extinguish the interest of the aboriginal peoples involved, but rather so as to implement mutual objectives that will ensure their socio-economic, political and cultural survival, well-being and development as peoples.

10. Aboriginal and treaty rights are human rights, and they are not amenable to extinguishment as a matter of respect for Canada’s international human rights obligations.

37. In its May 2008 report, the Standing Senate Committee on Aboriginal Peoples of the Parliament of Canada recommended that the Government of Canada, in collaboration with the Land Claims Agreements Coalition and its present and future members, take immediate steps to develop a new national land claims implementation policy, based on the principles laid out by the Coalition.\(^{15}\)

38. Unfortunately, the effort to engage the Government of Canada in a meaningful policy development process has not yet made progress, as the Crown has often refused to engage meaningfully with the Coalition and/or leaders of Aboriginal treaty organizations.\(^{16}\)


40. The core commitment of the Model Canadian 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.

41. In recognition of the fact that the treaty relationship lies not with any single government department or agency, but with the Crown as a whole, the Model Canadian Policy requires every agency of the Government of Canada 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.

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42. Under the *Model Canadian Policy* the Government of Canada would commit to these, and other, key policy directions:
   a) Focus on achieving measurable results against stated objectives when implementing land claims and self-government agreements;
   b) Implement dynamic self-government arrangements and negotiate stable, predictable and adequate funding arrangements;
   c) Appoint senior officials to represent the government on implementation panels and committees;
   d) Negotiate in good faith with Aboriginal signatories to conclude multi-year implementation plans and fiscal agreements and arrangements;
   e) Provide sufficient and timely funding to fully implement the objectives of modern treaties;
   f) Effectively use dispute resolution mechanisms in agreements to resolve disputes;
   g) Use the institutions and processes established through modern treaties to achieve other compatible policy objectives in treaty settlement areas;
   h) Undertake or participate in evaluative processes that generate objective data that reveal whether, how, and how well modern treaties are being implemented;
   i) 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.
43. The Coalition believes that such a policy is urgently required to ensure that all agencies of the Government of Canada implement modern treaties fully, according to their letter, their spirit and intent, and the fundamental objectives they embody.
44. Regrettably, the current Minister of Indian and Northern Affairs responded to the release of the LCAC Model Policy – the product of a full consensus of all modern treaties entities about both its content and necessity – by expressing doubts regarding the need for new national treaty implementation policy.

G. Conclusion

45. The situation of Aboriginal peoples in Canada remains the most pressing human rights issue facing Canadians.
46. The “glacial pace” of changes in the living conditions of Aboriginal peoples in Canada is attributable in part to the Government of Canada’s failure to fully, meaningfully, and universally implement the spirit and intent and broad socio-economic objectives of land claims agreements with Aboriginal peoples in Canada.
47. The fulfillment of the broad socio-economic objectives of modern treaties must be undertaken – because it is the obligation of the Government of Canada; because it is in Canada’s national and international interest to do so; because the future survival and well-being of Aboriginal peoples depends on it, and because the honour of the Crown – and the honour of all Canadians – likewise depends on it.

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18 CBC North Iqaluit Regional Radio English: “Strahl isn’t certain national treaty implementation policy is needed” (Tuesday, March 31, 2009 – 12:30)
48. A new Canadian treaty implementation policy is urgently required to ensure that all agencies of the Government of Canada implement modern treaties fully, according to their letter, their spirit and intent, and the fundamental objectives they embody.

49. The Coalition respectfully calls on the Committee to recommend:

   THAT the Government of Canada adopt and implement a new Policy on the Full Implementation of Modern Treaties Between Aboriginal Peoples and the Crown, consistent with the Land Claims Agreements Coalition’s “Four-Ten Declaration” and “Model Canadian Policy,” in full consultation with the Land Claims Agreements Coalition;

   THAT the Government of Canada draft and promptly introduce legislation to establish a Land Claims Agreements Implementation Commission, in cooperation with the Aboriginal signatories to modern treaties;

   THAT the Government of Canada establish a Cabinet Committee on Aboriginal Affairs to oversee and coordinate the full involvement of federal agencies in ongoing treaty implementation activities; and

   THAT the periodic negotiation of implementation funding for Canada’s obligations under modern land claims agreements be led by a Chief Federal Negotiator appointed jointly by the Minister of Indian Affairs and Northern Development and the Land Claims Agreements Coalition.

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Appendices

Appendix “A”: Land Claims Agreements in Canada / Accords sur des revendications territoriales au Canada


Appendix “C”: Land Claims Agreements Coalition, “Four-Ten” Declaration of Dedication and Commitment, December 2006


Appendix “E”: Land Claims Agreement Coalition, Summary of Activities and Timelines 2003-2009