UNIVERSAL PERIODIC REVIEW OF CANADA

Submission of the Land Claims Agreements Coalition (LCAC)
to the United Nations Human Rights Council

September 8, 2008

APPENDICES "B" - "D"

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APPENDIX "B"

LAND CLAIMS AGREEMENTS COALITION
"FOUR-TEN" DECLARATION OF DEDICATION AND COMMITMENT

December 2006

"FOUR-TEN" DECLARATION OF DEDICATION AND COMMITMENT

Ottawa, December 2006

1. The first "modern land claims agreement" between Aboriginal peoples and the federal Crown was entered into in 1975. Since then, 19 modern treaties applying to Aboriginal traditional lands encompassing more than half of the lands and waters of Canada and the immense resources they contain have been negotiated by the Government of Canada and Aboriginal peoples and ratified by Parliament.

2. For Canada, land claim agreements provide a basis for the shared beneficial usage of lands and natural resources, facilitating economic development on treaty lands, and also providing means for Aboriginal peoples to consent to and benefit from development within their traditional territories.

3. For Aboriginal signatories, land claim agreements are intended to enable economic, social, and cultural development, environmental protection, and self-government. The rights defined in comprehensive land claim agreements are recognized and affirmed in Canada's Constitution.

4. In November 2003, leaders representing the Aboriginal peoples of Canada that have entered into Land Claims Agreements since 1975 gathered in Ottawa at *Redefining Relationships: Learning from a Decade of Land Claims Implementation*. The Land Claims Agreement Coalition ("LCAC") was established, involving all of the beneficiary or signatory organizations or governments of the "modern" land claims agreements in Canada.

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5. In the face of persistent challenges in implementation of their land claims agreements, leaders at *Redefining Relationships* articulated "4 Points" for a renewed relationship with the federal government of Canada:

LCAC "4 Points"

1. Recognition that the Crown in right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements.

2. There must be a federal commitment to achieve the broad objectives of the land claims agreements and self-government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.

3. Implementation must be handled by appropriate senior level federal officials representing the entire Canadian government.

4. There must be an independent implementation and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Auditor General's department, or a similar office reporting directly to Parliament. Annual reports will be prepared by this office, in consultation with Groups with land claims agreements.

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6. LCAC leaders and organizations have elaborated upon these "4 Points" in 2005 with the following "10 Fundamental Principles" respecting modern land claims agreements and their proper implementation by the federal Crown:

LCAC "10 Fundamental Principles"

A new land claims implementation policy must be situated in the following context:

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.

2. "[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries." *Supreme Court of Canada*.[1]

3. "The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." *Supreme Court of Canada*.[2]

4. Relations between the Crown and Aboriginal peoples have been and will always be manifested in a wide variety of political and legal arrangements and instruments. No single political or legal arrangement or instrument can be said to comprehensively express the dimensions, in breadth, depth or time, of the ongoing and evolving relationship that connects the Crown and an aboriginal people.

1. *Van der Peet*, [1996] 2 S.C.R. 507 at para 30.
2. *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.C. 73 at para 17, quoting *Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010* at para. 186, quoting *R. v. Van der Peet, [1996] 2 S.C.R. 507* at para. 31.

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*.[3]

6. Among the key political and legal instruments that affirm the relationship between the Crown and Aboriginal people are modern land claims agreements, and ancillary agreements such as implementation and self-government agreements that attach to or follow from land claims agreements.

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. "Where treaties remain to be concluded, the honour of the Crown requires negotiations *leading to a just settlement of Aboriginal claims*." *Supreme Court of Canada*.[4]

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. "The situation of the Aboriginal peoples remains the most pressing human rights issue facing Canadians…. [T]he practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the [International] Covenant [on Civil and Political Rights]." *United Nations Human Rights Committee*.[5]

3. Gathering Strength -- Canada's Aboriginal Action Plan. QS-6121-000-EE-A1 Catalogue No. R32-189-1997E. ISBN 0-662-26427-4.
4. *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.C. 73 at para. 20 , quoting *R. v. Sparrow, [1990] 1 S.C.R. 1075*, at pp. 1105-6; "Section 35 calls for a just settlement for aboriginal peoples." *Sparrow v. The Queen*, [1990] 1 S.C.R. at 1106.
5. *Concluding Observations of the Human Rights Committee - Canada*. 07/04/99 CCPR/C/79/Add.105.

7. These 4 Points and 10 Principles are now known as the "LCAC Four-Ten".

8. Consistent with the LCAC Four-Ten, members of the Land Claim Agreements Coalition will continue to undertake information sharing, joint activities and coordination, mutual encouragement and support, advocacy, policy development, Canadian and international public education, inclusion of new land claims agreement entities, appropriate contact and efforts with governments, and such other future steps as may be decided by Coalition participants.

9. The task at hand is to implement the modern land claims agreements in ways that bring political, economic and social justice to their signatory nations and their members and that achieve in full measure, the letter, spirit, intent and lasting objectives of modern land claims agreements with the federal Crown.

10. THE LAND CLAIMS AGREEMENT COALITION IS DEDICATED AND COMMITTED TO ACHIEVING THESE NECESSARY AND IMPORTANT GOALS, FOR THE BENEFIT AND DEVELOPMENT OF ALL LAND CLAIMS AGREEMENT ORGANIZATIONS, GOVERNMENTS AND BENEFICIARIES AND ALSO FOR THE BENEFIT AND SELF-RESPECT OF ALL CANADIANS.

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APPENDIX "C"

LAND CLAIMS AGREEMENTS COALITION
A NEW LAND CLAIMS IMPLEMENTATION POLICY
(2004 Working Paper)

A New Land Claims Implementation Policy

... 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.

- Federal Comprehensive Claims Policy, 1986

A vision for the future should build on recognition of the rights of Aboriginal people and on the treaty relationship. Beginning almost 300 years ago, treaties were signed between the British Crown and many First Nations living in what was to become Canada. These treaties between the Crown and First Nations are basic building blocks in the creation of our country.

… The federal government believes that treaties — both historical and modern — and the relationship they represent provide a basis for developing a strengthened and forward-looking partnership with Aboriginal people.

- Gathering Strength – Canada's Aboriginal Action Plan, 1997

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LAND CLAIM AGREEMENT COALITION

On November 11 to 13, 2003, Aboriginal leaders representing all of the Aboriginal peoples of Canada who have entered into land claims agreements since 1975 met together in Ottawa. *Redefining Relationships: Learning from a decade of Land Claims Implementation* was a two-day conference of more than 350 people including Aboriginal leaders, as well as policy makers and politicians. Following the conference, and in light of the common concerns that had been discussed over the course of the two days, participants issued a joint statement calling on the Government of Canada to develop a new land claims implementation policy in close consultation with Aboriginal governments and organizations who have achieved land claims agreements.

The coalition of Aboriginal peoples from all regions of Canada presents a remarkable opportunity for learning from the experience and sophistication of the peoples for whom land claims agreements are a concrete reality with which they are living, not a mere dream for the future. The members of the coalition offer to the Government of Canada the chance to enter into a mutual discourse by which we can together build on our mutual experience, so that the promise of our agreements can be realized.

The leaders agreed that key elements of this new policy must include:

1. *Recognition that the Crown in right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements.*

2. *There must be a federal commitment to achieve the broad objectives of the land claims agreements and self government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.*

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3. *Implementation must be handled by appropriate senior level federal officials representing the entire Canadian government.*

4. *There must be an independent implementation audit and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Auditor General's department, or a similar office reporting directly to Parliament. Annual reports will be prepared by this office, in consultation with groups with land claims agreements.*

Each of these points is discussed below.

1. ***Recognition that the Crown in right of Canada, not the Department of Indian Affairs and Northern Development, is party to our land claims agreements and self-government agreements***.

Relationship is with the Crown, not with Government Departments

As a matter of law, it is clear that land claims agreements or modern treaties, and self-government agreements entered into pursuant to those agreements, are between Aboriginal peoples and the Crown. In some instances they include only the Crown in right of Canada; in others they include the Crown in right of a province.

But, while this is clearly set out in each and every agreement, the Government of Canada has long treated those agreements as though they were merely contracts with the Department of Indian Affairs and Northern Development, or with other departments in respect of particular matters. (For example the Department of Fisheries and Oceans in respect of fishery components, or the Department of the Environment in respect of environmental assessment.)

There has not appeared to be any understanding that these agreements are not ordinary contracts, nor has there been any senior oversight of the agreements by institutions that transcend the various departments of the federal government. This has led to a lack of coordination and oversight, the assignment of junior officials with little or no authority to the files, and departments avoiding responsibility by referring various controversies to other departments.

A New Attitude

The institutional framework of the federal government's approach to implementing these modern treaties needs to be changed if it is to adhere to the legal and constitutional reality 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.

This could be achieved in a number of ways. One positive step would be the establishment of a direct and ongoing relationship with senior members of the federal executive, through, for example, the Cabinet Committee on Aboriginal Affairs. An additional possibility would include appropriate means to maintain an ongoing relationship with other Parliamentarians, through House of Commons and Senate Committees, as well as individual Members and Senators.

As set out below, members of the Coalition propose that they could work directly with the Cabinet Committee on Aboriginal Affairs to formulate and adopt a clear statement of measurable objectives for the implementation of land claims agreements. We further propose that an independent implementation audit and review body be established to monitor the achievement of those objectives and to report annually to Parliament.

2. ***There must be a federal commitment to achieve the broad objectives of the land claims agreements and self government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations***.

Objectives and Obligations

It is important to distinguish between the objectives of land claims agreements and the obligations of the parties under those agreements.

The Government of Canada has enunciated its objectives many times, for example in its 1986 Comprehensive Land Claims policy, as well as in its predecessor policy *In All Fairness*. It has reiterated those objectives in public statements during land claims negotiations, as well as during the public debates that have accompanied the finalization of agreements and during the ratification process.

The federal government's1986 policy is quite clear on the point. While stating that a primary purpose of comprehensive land claims agreements is to "provide certainty and clarity to ownership of land and resources", the policy also stressed that:

> *... 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.*

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This policy objective still enjoys the support of Aboriginal peoples and is directly incorporated in some land claims agreements. Achieving social, cultural and economic objectives through implementation of comprehensive land claims agreements requires continual effort and commitment by the parties to those agreements in order to build relationships, to enable Aboriginal peoples to chart their paths in a profoundly and rapidly changing world, to use the agreements as tools or mechanisms to build capacity, to solve developmental problems, and to achieve national or regional policy objectives that may lie outside the limited formal ambit of the agreements themselves.

Other Statements of Federal Policy

Other sources of federal government objectives are set out in broad policy statements, including various Speeches from the Throne, and in the policy statements surrounding self government negotiations, such as *Gathering Strength* announced in 1997. By way of example, *Gathering Strength* stated that the policy seeks:

- *A new partnership among Aboriginal people and other Canadians that reflects our mutual interdependence and enables us to work together to build a better future;*
- *Financially viable Aboriginal governments able to generate their own revenues and able to operate with secure, predictable government transfers;*
- *Aboriginal governments reflective of, and responsive to, their communities= needs and values; and*
- *A quality of life for Aboriginal people like other Canadians.*

Gathering Strength referred explicitly to the role of modern treaties in meeting these objectives; indeed, it stated that the treaties, including modern treaties, and the relationship they represent, provide a basis for developing a "strengthened and forward-looking partnership with Aboriginal people."

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Similar objectives were enunciated in this year's Speech from the Throne:

> *Aboriginal Canadians have not fully shared in our nation's good fortune. While some progress has been made, the conditions in far too many Aboriginal communities can only be described as shameful. This offends our values. It is in our collective interest to turn the corner. And we must start now.*
>
> *Our goal is to see Aboriginal children get a better start in life as a foundation for greater progress in acquiring the education and work-force skills needed to succeed. Our goal is to see real economic opportunities for Aboriginal individuals and communities.*
>
> *To see Aboriginal Canadians participating fully in national life, on the basis of historic rights and agreements - with greater economic self-reliance, a better quality of life.*

These, and similar statements of the objectives of Aboriginal policy in general, and of land claims agreements in particular, have been used to persuade Canadians to support the settlement of land claims agreements, and have been relied upon by Aboriginal peoples who have bound their destinies to these hard won modern treaties.

Objectives Must Not be Abandoned

However, in the experience of the members of the Coalition, the ink is barely dry on each land claims agreement before the federal government, and especially its officials, abandons any talk of those objectives, and proceeds instead on the basis that the government's sole responsibility is to fulfil the narrow legal obligations set out in the agreement, in the hope, presumably that everything

will work out.[1] 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 agreement are to be forgotten or ignored once it has obtained the Aboriginal signatures on the document. And yet that has become the entrenched attitude of Department of Indian Affairs and Northern Development.

This attitude has led at least some of the Aboriginal peoples 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.

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[1] *See for example comments made by Assistant Deputy Minister Michel Roy on November 13, 2003 at the* Redefining Relationships *conference held in Ottawa:*

> *It seems that more and more the implementation of comprehensive land claims agreements is approached with the perception that our global governmental relationships should be defined on the basis of implementing the objectives and the spirit and intent of these agreements. While we do not dispute the importance of meeting the objectives of the agreements, it must be recognized that all the parties agreed that the best way to meet the objectives is to fulfil the obligations as set out in the agreements and detailed in the implementation plans. Therefore we believe that an important factor for the success of implementation is the fulfillment of these obligations. We have to recognize the fact that both the comprehensive land claims agreements and implementation plans are negotiated and agreed to by all the parties as the means to fulfil the agreements.*

With respect, it is simply wrong to suggest that, in agreeing to the land claims agreements and implementation plans, the Aboriginal parties abandoned their understanding that the objectives of the agreements would be pursued in ways beyond the mere fulfillment of obligations.

Such a view was corroborated by, for example, the federal Cree-Naskapi Commission in its 1995 Annual Report to Parliament. The Commission, an independent body, stated:

> *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.*

Some have stated that a "two-step" policy of extinguishment of Aboriginal and treaty rights can be seen in the federal neglect of what had been considered to be mutual objectives and commitments. As the first step, governments make promises to induce natives to surrender or otherwise provide so-called certainty in respect of their lands and other rights. Then, as the federal government's commitment to the objectives and ongoing obligations under the treaty begins to wane, chronic disagreements between the parties emerge about the meaning of the various treaty provisions, litigation ensues, and little regard is had to whether the objectives are being achieved.

If this deterioration in the relationship is allowed to continue, some fear that the federal government will, as it has done in the past, seek to negotiate new "implementation" agreements, under which the original agreements and objectives would be replaced by a simple buy-out and extinguishment of those rights, under which the Aboriginal party would receive once-only cash payments, be required to provide indemnifications to the Crown, and a federal statute substituting the termination agreement for the earlier treaty would be enacted.

Rather than allowing the apprehension of a two-step policy of extinguishment to continue to grow, surely it would be more appropriate for the federal Crown to instead reaffirm its commitment to the timely and responsible implementation of both its obligations and the objectives of modern land claims agreements.

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The Auditor General's 2003 Report

In her most recent report, the Auditor General identified the federal government's focus on discharging obligations rather than meeting objectives to be a matter of fundamental disagreement between her office and the Department of Indian Affairs and Northern Development.

The Auditor General found:

> *8.2 For example, INAC seems focussed on fulfilling the letter of the land claims' implementation plans but not the spirit. Officials may believe that they have met their obligations, but in fact they have not worked to support the full intent of the land claims agreements.*

In paragraph 8.10, she continued:

> ***The Department has responded.*** *While the Department agrees with many of our recommendations, it fundamentally disagrees with our view of the way success for implementing land claims should be measured. The Department defines success as fulfilling the specific obligations as set out in the agreements and plans. We believe that results matter too, and that the Department should be giving them more attention.*

And, in her conclusion, the Auditor General summarized the problem:

> *8.94* ***Co-operation among all parties.*** *The success of the land claims agreements in contributing to the long-term economic prospects of the beneficiaries is not the sole responsibility of the federal government. These agreements require all parties to work together in the best interests of both the beneficiaries and all Canadians. When goodwill breaks down, it often indicates a failure to co-operate among all the parties. As the Eastmain decision stated, that co-operation should reflect " . . . good faith and reasonableness on both sides and [presume] that each party respects the obligations that it assumes toward the other."*

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***Department's response**. The comments on the emphasis on obligations instead of objectives represent an area of fundamental disagreement between the Department and the Office of the Auditor General.*

While the Department does not dispute the importance of meeting the objectives of the agreements, it must be recognized that all parties have determined that the best way to meet the objectives is to fulfill the obligations as set out in the agreements and detailed in the implementation plans. Therefore, the success of implementation must be defined through the fulfillment of those obligations.

Moreover, more often than not, federal lawyers and officials interpret those treaty obligations in a narrow, legalistic way that does not appear to include consideration of the original objectives. Efforts by Aboriginal groups to obtain interpretations of their agreements by reference to what had been considered to be shared objectives, are often met with accusations that the group is somehow trying to renegotiate the agreement and to improve its terms.

Similarly, federal officials have displayed a consistent aversion to the use of arbitration in respect of any financial topics, and have resisted agreeing to joint research projects, outside legal opinions, or the establishment of effective information gathering and monitoring systems

There is no doubt that ongoing treaty obligations are important and effective processes to ensure that obligations are fulfilled must be continued and improved upon. Attention can and should be given to how to improve upon dispute resolution and problem solving under each agreement. It may be that a new comprehensive claims agreement or modern treaty implementation tribunal could be established to assist in this process.

But there is also no doubt that a single minded focus on the fulfillment of the letter of the obligations set out in land claims agreements inevitably results in the parties being locked into adversarial positions as to the proper interpretation of legal language, rather than engaged in a collaborative exercise of striving to achieve what were believed to be shared goals.

A New Way to Ensure that Objectives are Achieved

Accordingly, we suggest that, in addition to the ongoing processes set out in the various land claims agreements to review and ensure the fulfilment of ongoing treaty obligations, including implementation reports and dispute resolution, there should be established a new process or processes to assess the results of land claims agreements and to measure those results against a well-defined set of objectives - a measuring stick.

The articulation of these objectives should not be unduly complex or controversial. As set out above there have been ample statements over the years by both the Government of Canada and Aboriginal peoples describing the objectives of land claims agreements, and it should not be difficult to compile and consolidate these points into a single statement of mutual objectives against which the results can be assessed.

This statement of objectives should be compiled at a senior political level, between federal ministers on the one hand and the leaders of the Aboriginal groups in the Coalition on the other. The Cabinet Committee on Aboriginal Affairs might be an appropriate forum for this work, on the part of the federal government. An important role might also be served by other Parliamentarians, through House of Commons and Senate Committees, as well as individual Members and Senators.

In light of the fact that Indian and Northern Affairs "fundamentally disagrees" with this approach, it would not be the proper department or level within the federal government to direct or oversee this effort.

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What Sort of Objectives should be Addressed?

Objectives of land claims and related self-government agreements can be seen to fall into at least the following categories in which improvements should occur:

- social well-being;
- economic self-reliance through success and participation;
- growth and stability of Aboriginal populations in their traditional territories;
- environmental protection; and
- cultural and linguistic protection and enhancement.

These are not intended to be vague or meaningless categories, but rather a way to organize the goals that Canada and Aboriginal groups have always espoused, but which current federal policy neither measures nor pursues in the implementation of land claims and self-government agreements. It is clear that there is a better way.

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 as powerful economic planning tools to shape the pattern of public sector and private sector investment, to bring about the 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. Land claims agreements can and should be regarded as important vehicles for the achievement of public policy goals, including conservation, promoting economic development, maintaining populations in remote areas of the country, and, generally, ensuring the survival, viability and well-being of Aboriginal peoples as distinct collectivities.

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Failure to use Agreements as Economic or Social Planning Tools

But there are a number of indicators that demonstrate that current federal comprehensive land claims policy is completely uninterested in agreements being designed and implemented as economic or social planning tools. Here are just a few examples.

- There appears to have been no in-depth economic analysis done by the federal government on the overall impact of all existing land claims agreements, nor of the potential impact of any contemplated new land claims agreement prior to its conclusion.

- Federal government teams assembled to negotiate and implement land claims agreements contain no, or virtually no, representation from the federal government's core economic ministries.

- There is a sustaining myth that land claims agreements can achieve a level of "finality" that allows for effortless and non-contentious implementation. This myth is fundamentally at odds with the need for interconnecting societies to renew their relationships over time and to commit to adjusting approaches to achieve the parties' agreed upon objectives.

- Contrary to the stated objectives of the parties, the provisions of land claims agreements are treated by the federal government as being fundamentally static from the perspective of both demographic and environmental change. In a world where demographics define the destiny of peoples, and the prospects for far-reaching environmental change are accelerating (global warming et al.), this approach is unrealistic and deadening.

- There is a reticence on the part of the federal government to acknowledge that on-going data gathering and analysis are a necessary part of the evaluation of the impact, and of the relative success or failure, of agreements over time.

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- As described above, there is an institutional viewpoint within the federal government that a land claim agreement can be said to have been successfully implemented if federal contractual commitments have been discharged in a way that withstands legal challenge. The tests of whether or not the Aboriginal party is materially better off, or the economic prospects for the country as a whole have been enhanced, are left out of the picture.

- The concept of "investment", and associated concepts such as opportunity cost and risk-benefit analysis are absent from the negotiation and implementation of land claims agreements. There is a built-in assumption that the federal government's *status quo* level of expenditure to economically and socially marginalized Aboriginal people is unchangeable. Accordingly, federal negotiators and officials are not mandated to seek out measures which would simultaneously accelerate the material development of Aboriginal societies while at the same time contribute to the long term health of Canada's public finances.

- There has been little or no attention given to communicating with third parties as to the opportunities for mutually beneficial relationships offered to them as a result of land claims agreements.

- Implementation negotiations appear to not be informed in any way by a candid appraisal of the economic activity and potential of the region in which they take place, and hence the concrete possibilities for economic partnership and inclusion – and barriers to that inclusion — are underestimated or ignored.

Put succinctly, current federal land claims policy provides little incentive, and offers little scope, for imagination, creativity, and shared rewards.

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Problems can be Remedied

Nonetheless, Coalition members believe that the situation can be remedied. We can and should easily agree on a list of generally accepted social, economic, environmental and cultural standards and objectives, as well as the factors that could be usefully considered in assessing the extent to which those objectives are met over time.

For example, we might rely on existing objectives to which Canada is already formally committed, and on indicators as those that are widely used internationally and nationally to measure the well being of peoples and populations.

We should consider the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights*, (the "ICESCR") to which Canada is a signatory. The United Nations Human Rights Committee and the United Nations Committee on Economic Social and Cultural Rights have both ruled that the many important socio-economic rights in the ICESCR are applicable to Aboriginal peoples in Canada without discrimination, and the government of Canada has formally declared this to be official government policy.

The United Nations has a standard human resource development index (HDI) to which we might refer.[2] There are similar well-accepted sets of standards and factors that could be used to guide the development of the appropriate standards with which to measure the success of the implementation of land claims agreements.

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[2] *The Human Development Index (HDI) is only partially useful in terms of measurable objectives, because it is so broad-ranging (composite index of life expectancy, average income per capita and literacy and mean years of schooling). In the context of treaty implementation in a highly developed country such as Canada it would additionally be necessary to direct focus to the important issues of capacity of the Canadian Crown and also of lands and resources access and control (for which employment alone might be a poor proxy).*

In some areas of Canada, the Department of Indian Affairs and Northern Development has agreed to an evaluation framework that has been developed to measure progress towards many of these objectives. While the framework has had problems, it appears that, despite its institutional reluctance, the Department has committed itself to improving the indicators and data over the next two years. There has also been the development in Canada of the "Genuine Progress Indicators".

The point of all of this is that there are both well-known and some new and innovative indicators that take a more accurate snapshot of "progress" than was previously thought possible. Members of the Coalition believe that reference can be made to all of these sources in order to quickly agree on the appropriate tools for this important task.

Once the applicable and appropriate objectives and factors have been identified and articulated, there should be immediate studies to establish base line data against which future progress, or lack thereof, can be measured and assessed. In carrying out these studies and assessments, regard should be had to the criteria for good reporting set out in the Auditor General's report.

It should be emphasized that nothing we are proposing in this paper should be viewed as a substitute for any existing process, plan, obligation, or objective for the implementation a land claim agreement. Our proposal is meant to augment whatever currently exists for the implementation of these agreements.

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3. Implementation must be handled by appropriate senior level federal officials representing the entire Canadian government.

Implementation Committees and Implementation Plans should be Enhanced

Even if a new means for defining and measuring results is established, there remains the need for implementation to be handled on an ongoing basis by much more senior officials, who are able to represent the entire Canadian government. Currently, implementation committees include relatively junior officials of the Department of Indian Affairs and Northern Development. However well-meaning they may be, these officials do not typically have the authority within that department, much less over other departments, to be able to ensure that implementation issues are promptly and appropriately dealt with. This inevitably results in unnecessary frustration, discord and disputes.

Implementation officials must have adequate seniority, and a mandate that includes all of the Departments that are assigned responsibility for implementing the Crown's obligations under the agreements. Moreover, their responsibilities must include addressing the agreed-upon objectives and carry with them a commitment to evaluating results. Implementation plans should be improved by the inclusion of strategic planning against the objectives, and not remain a mere listing of the obligations that are already set out in the land claims and related self-government agreements.

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4. *There must be an independent implementation audit and review body, separate from the Department of Indian Affairs and Northern Development. This could be the Auditor General's department, or a similar office reporting directly to Parliament. Annual reports will be prepared by this office, in consultation with groups with land claims agreements.*

A New Audit and Review Body

After the statement of objectives has been established, as described under Point 2 above, there should be an ongoing process of measurement and review of the actual results of the land claims agreements (and self-government agreements entered into pursuant to land claims agreements) in light of these objectives. In addition to the necessary on-going monitoring and evaluation by the parties, a review must also be carried out by an independent body, and not by any of the individual departments charged with fulfilling the terms of the agreements, especially the Department of Indian Affairs and Northern Development.

The independent body must include Aboriginal representation, and should prepare annual reports to Parliament. The work could appropriately be done under the auspices of the Auditor General's department, or it could be a completely new institution.

CONCLUSION:

The Canadian people in general, and Aboriginal people in particular, have invested heavily in the negotiation and conclusion of comprehensive land claims agreements, in the consummation of modern treaties. They have done so in the belief that doing so was necessary, not simply to obtain greater legal clarity, but also in the belief that doing so was necessary to establishing concrete measures that would bring about social, economic and cultural benefits to all Canadians.

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It is remarkable that, having invested so heavily to achieve these salutary goals, the Government of Canada has developed no means to measure whether its investment is successful. The Department of Indian Affairs and Northern Development seems to be at best indifferent, and at worst opposed, to an examination of whether the overall policy is achieving the intended consequences.

As the Auditor General reported, such an attitude makes it less likely that the parties' shared objectives will be realized, and makes it more likely that the Canadian people will tire of continuing the investment. Moreover, if the Government of Canada hopes to conclude treaties with those First Nations and other Aboriginal peoples who have not yet entered into land claims agreements, surely it will need to demonstrate that land claims agreements do offer measurable, concrete benefits towards addressing their needs and aspirations. Surely the federal government will need to be able to count on those Aboriginal peoples who have already started down this path to confirm that this was a worthwhile choice.

Canada's record in respect of socio-economic development and social inclusion has been a positive one in a number of important respects, and Canada's success stories have attracted favourable international attention. More than any other state facing the challenge of gross disparities between segments of society, Canada has had the popular good-will, the territory and resources, the governmental capacity, the foundation of existing constitutional, legal, policy and treaty frameworks, and the economic means to succeed. The fulfillment of the objectives of modern land claims agreements, and associated self-government agreements, must be undertaken, not only because it is in the national interest to do so.

The task is not a difficult one. It should be started now.

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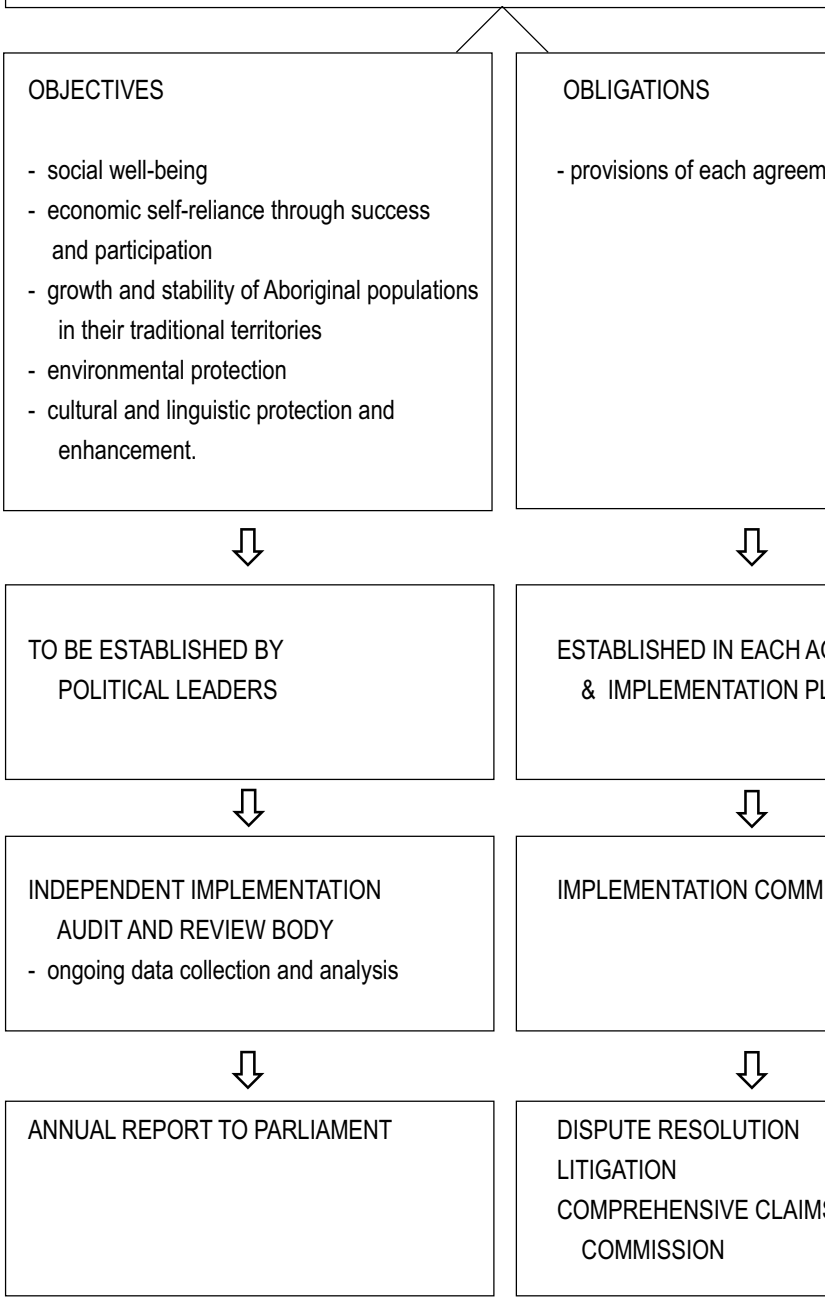

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Submission of the Land Claims Agreements Coalition (LCAC)
to the United Nations Human Rights Council
September 8, 2008

APPENDIX "D"

STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES
Honouring the Spirit of Modern Treaties: Closing the Loopholes
May 2008

HONOURING THE SPIRIT OF MODERN TREATIES: CLOSING THE LOOPHOLES

Interim Report

Special Study on the implementation of comprehensive land claims agreements in Canada

The Honourable Gerry St. Germain, P.C.
Chair

The Honourable Nick Sibbeston
Deputy Chair

Standing Senate Committee on Aboriginal Peoples

May 2008

Ce document est disponible en français.

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MEMBERSHIP iii
ORDER OF REFERENCE v
CHAIR'S FOREWORD vii
I. SETTING THE CONTEXT 1
A. Comprehensive Land Claims Agreements 1
B. The Committee's Decision and Process 3
C. Core Principles 4
D. The Implementation Phase 7
E. The Role of the Department of Indian Affairs and Northern Development 8
II. IMPLEMENTATION CHALLENGES: WHAT THE COMMITTEE HEARD 11
I. Restrictive Policy Approaches 11
A. Divergent Approaches to Implementation: Spirit and Intent 11
B. Federal Reluctance to Refer Matters to Arbitration 17
II. Lack of Effective Structures and Processes for Implementation 20
A. Government Coordination of Federal Obligations 20
B. Matters Related to Funding 25
III. FINDINGS AND CONLUSIONS 35
I. The Need for a New Policy Approach on Implementation 35
RECOMMENDATION #1 41
II. Need for Institutional Reforms 41
RECOMMENDATION #2 49
RECOMMENDATION #3 51
RECOMMENDATION #4 54
CONCLUDING REMARKS 55
Appendix A I
List of Comprehensive Land Claims Agreements I
Appendix B III
Land Claims Agreement Coalition Four-Ten Declaration III
Appendix C VII
Nunavut Tunnagivik Incorporated: nine points for a new land claims agreements implementation policy VII
Appendix D IX
List Of Witnesses And Briefs IX

MEMBERSHIP

THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES
39TH PARLIAMENT, 2ND SESSION
(October 16, 2007 -)

The Honourable Gerry St. Germain, P.C.
Chair

The Honourable Nick G. Sibbeston
Deputy Chair

and

The Honourable Senators:

Larry W. Campbell
Roméo Dallaire
Lillian Eva Dyck
Aurélien Gill
Leonard Gustafson
*Céline Hervieux Payette, P.C. (or Claudette Tardif)
Elizabeth Hubley
*Marjory LeBreton, P.C. (or Gerald Comeau)
Sandra Lovelace Nicholas
Robert W. Peterson
Hugh Segal

*Ex officio members

Other Senators who have participated from time to time on this study:
The Honourable Senators Meighen, Oliver, Watt and Zimmer.

Committee Clerk:
Marcy Zlotnick

Analyst from the Parliamentary Information and Research Service of the Library of Parliament:
Tonina Simeone

ORDER OF REFERENCE

Extract from the *Journals of the Senate* of Wednesday, November 21, 2007:

The Honourable Senator Peterson moved, seconded by the Honourable Senator Tardif:

That the Standing Senate Committee on Aboriginal Peoples be authorized to examine and report on the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Metis peoples and on other matters generally relating to the Aboriginal Peoples of Canada; and

That the Committee submit its final report to the Senate no later than December 31, 2008.

The question being put on the motion, it was adopted.

Paul C. Bélisle

Clerk of the Senate

CHAIR'S FOREWORD

I am pleased to present the 5th report of the Senate Standing Committee on Aboriginal Peoples, which examined matters affecting the implementation of comprehensive land claims agreements, more generally known as modern day treaties. I submit this report on the Committee's behalf.

The negotiation of constitutionally-protected comprehensive land claims agreements is an extraordinary accomplishment of which we can all be proud. 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". For Aboriginal peoples, the purpose of treaties has always been to have their rights and their lands recognized and respected. Treaties also serve to establish stable, peaceful and beneficial relationships that provide the basis for forward looking partnerships with the Crown, wherein Aboriginal peoples can rebuild their nations, regain their autonomy and work toward a better future within the country. After all, the Aboriginal peoples are founding partners in the creation of Canada.

In addition, it must be understood that treaties are 'living' agreements: constitutional arrangements for the people and the land they occupy. The proper implementation of treaties is essential to ensuring cooperative relations. Treaties guarantee Aboriginal peoples a degree of autonomy over their political, social and cultural institutions so as to allow the preservation and transmission of their cultures to future generations.

The effective implementation of modern treaties takes enormous commitment, cooperation and trust among all partners. However, the committee finds the challenges related to the implementation of modern treaties have meant that the achievements these agreements represent are often overshadowed. In particular, 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. These benefits and rights

were negotiated in good faith in exchange for ceding title claims to vast areas of their traditional lands.

Both government and Aboriginal parties must honour the treaties and, resolve all disputes to the mutual benefit of the treaty signatories. However, without 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.. Where disputes arise in the implementation of treaties, harmonious resolution must be found through appropriate alternative dispute resolution mechanisms, including mediation and arbitration.

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. While we acknowledge the dedication of individuals who serve within the Department, we find that the Department's ability to make meaningful improvements in the lives of Aboriginal peoples and its performance generally is woefully inadequate. Broader institutional changes are required if long-lasting progress and reconciliation is to be achieved. It is not surprising to find that DIAND cannot be a successful defender and promoter of the Crown's interests and simultaneously honourably defend and promote the interests of the Aboriginal peoples of Canada. Therefore, replacing the Department of Indian and Northern Affairs Canada with a direct institutional role between the federal Crown and Aboriginal peoples as partners should be given active consideration.

Finally, 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. And the honour of the Crown is the honour of all Canadians.

On behalf of the Committee, I want to express our gratitude to the witnesses who appeared before us to share their experiences, insights and recommendations. I also thank those who made written submissions to assist the Committee in its process. I also want to acknowledge the dedication and commitment of my colleagues on the committee.

A summary of the Report's Recommendations is as follows:

RECOMMENDATION #1

The Government of Canada abandon its practice of systematically refusing to consent to arbitration and, 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 endorsed by the members of the Land Claims Agreement Coalition, and to include:

- **Clear and enforceable directives, that include firm time limits to compel the parties' use of arbitration under comprehensive land claims agreements; and that these directives be applied in connection to all matters eligible for arbitration, and in particular, financial matters; and,**

- **Clear and enforceable directives to ensure funding is delivered to Aboriginal signatories within specific time limits, and that it is: (i) fully consistent with the terms of the agreements and (ii) adequate to satisfy all requirements of the Implementation Plans.**

RECOMMENDATION #2

That the Government of Canada, in collaboration with the Lands Claims Agreements Coalition and its present and future members, take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission, to oversee the implementation of comprehensive land claims agreements, including financial matters.

That the mandate of the Commission be developed jointly with the Land Claims Agreements Coalition and its members.

RECOMMENDATION #3

The Clerk of the Privy Council take immediate steps to establish a senior level working group, to include officials from Treasury Board Secretariat, the Privy Council Office and Department of Finance, and senior officials from the Department of Indian Affairs and Northern Development and all other departments and agencies with treaty-related responsibilities, to revisit the authorities, roles, responsibilities and capacities respecting the coordination of federal obligations under comprehensive land claims agreements, with a view to establishing clear guidelines identifying:

- **Respective roles and responsibilities for coordinating federal obligations under comprehensive land claims agreements;**
- **The manner in which government departments will participate in the treaty implementation process;**
- **The provision of central agency direction, guidance and support in assisting federal departments meet Government of Canada treaty obligations;**
- **The development of a government-wide strategy for monitoring and reporting on federal implementation obligations;**

- **The development of transparent, flexible, and timely funding processes and fiscal planning procedures, in accordance with a formal program management process, to support the spirit and intent of the terms and conditions of Agreements; and**
- **The development of a formal education and training program for federal officials with responsibilities for treaty implementation.**

The Clerk of the Privy Council table these guidelines with this Committee by March 31, 2009.

RECOMMENDATION #4

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, reporting directly to the Minister of Indian Affairs and Northern Development.

Sincerely,

GERRY ST. GERMAIN, P.C.

Chair

I. SETTING THE CONTEXT

A. Comprehensive Land Claims Agreements

Beginning in the 19th century up to the early 20th century, the Crown entered into treaties with Indian nations.[1] Known as the numbered treaties[2], Indian Nations ceded vast tracts of land to the Crown in exchange for certain benefits. These historical treaties cover most of the land in northwestern Ontario and the Prairie Provinces, as well as parts of the Northwest Territories and the Yukon. The Douglas Treaties and part of Treaty 8 extend into British Columbia.

Since 1973, the Government of Canada has been engaged in a renewed process of treaty-making with Aboriginal peoples. The government's willingness to negotiate comprehensive land claims settlements was largely a result of the Supreme Court of Canada's landmark decision in *Calder et al.* v. *Attorney General of British Columbia*.[3] The Court's ruling confirmed that Aboriginal peoples' historic occupation of the land gave rise to legal rights in the land that survived European settlement. That same year, in response to the Court's landmark decision, the federal government created the Office of Native Claims, an entirely new section within the Department of Indian Affairs and Northern Development, that would receive and resolve claims under a new policy to deal with the settlement of Aboriginal land claims.

Federal land claims policy recognizes two broad categories of claims: Comprehensive land claims are based on the assertion of continuing Aboriginal rights and title that have not been dealt with by treaty or other legal means. Specific land claims arise from alleged

[1] The earliest treaties signed between Indian Nations and the Crown were the Peace and Friendship Treaties in eastern North America. These 18th century treaties, however, did not cede land. Rather they were primarily concerned with guaranteeing certain harvesting rights to Indians in exchange for military alliances and peaceful relations with settlers.
[2] The numbered treaties were signed between 1871 and 1921. There are 11 numbered treaties in total.
[3] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313

non-fulfilment of (historic) treaties and other related matters.[4] Having addressed issues related to specific claims in a previous report, they will not be dealt with here.[5]

The purpose of achieving treaty settlements, as stated in the federal government's 1986 Comprehensive Land Claims Policy, "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."[6] In 1982, in a pivotal development, the "existing aboriginal and treaty rights" of Aboriginal peoples were recognized and affirmed under section 35 of the *Constitution Act, 1982*. Section 35 of the *Constitution Act* states:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

In 1983, subsection 35(3) explicitly confirmed that constitutional protection extends to modern land claim agreements.[7] The constitutional recognition of Aboriginal and treaty rights has had a profound impact on Crown-Aboriginal relations.

Comprehensive land claims agreements cover a wide range of issues such as: jurisdiction over lands and resources, harvesting rights, subsurface rights, resource-revenue sharing, land and resource management, environmental management and, as of 1986, harvesting rights in offshore areas. Since 1995, the negotiation of constitutionally-entrenched self-government arrangements has also been provided for within the context of land claim

---

[4] Library of Parliament, Mary Hurley, *Settling Comprehensive Land Claims*, 24 October 2007. This document can be consulted on line at: http://lpintrabp.parl.gc.ca/apps/tips/tips-cont-e.asp?Heading=14&TIP=48

[5] Standing Senate Committee on Aboriginal Peoples, *Negotiation or Confrontation: It's Canada's Choice*, December 2006. This report can be consulted on line at: http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/abor-e/rep-e/rep05dec06-e.pdf

[6] This objective was reiterated in the government's 1993 *Federal Policy for the Settlement of Native Claims* which states that settlements are to "provide clear, certain and long-lasting definition of rights to land and resources, [exchanging] undefined Aboriginal rights for a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements" that "cannot be altered without the concurrence of the claimant group." See, Mary Hurley, *Settling Comprehensive Land Claims.*

[7] Ibid.

negotiations.[8] Clearly these are complex documents which often take many years of painstaking negotiations among federal, provincial, territorial and Aboriginal governments to conclude. By all accounts, they are remarkable nation-building achievements.

Since first announcing its claims policy in 1973, twenty-one comprehensive claim agreements have been signed and ratified (see Appendix A).[9] The agreements cover roughly 40% of Canada's land mass including parts of the Yukon, Northwest Territories, British Columbia, Quebec, Labrador and all of Nunavut. Comprehensive land claims agreements have been concluded with each of the three Aboriginal groups identified under the Constitution – Indians, Inuit and Mètis. Additional comprehensive land claims agreements are in various stages of negotiations in Ontario, Quebec, Newfoundland and Labrador, the Maritime Provinces, Manitoba, Saskatchewan and the Northwest Territories. However, most are centred in British Columbia. [10]

B. The Committee's Decision and Process

In October 2007, the Auditor General of Canada released a report examining the federal role in implementing obligations under the *Inuvialuit Final Agreement*. An earlier report, in 2003, looked at the government's implementation practices with respect to the Nunavut and Gwich'in land claims agreements. In each case, the Auditor General of Canada found troubling deficiencies in their implementation and concluded that the Department of Indian Affairs and Northern Development had not worked to support the full intent of those agreements, focusing on fulfilling the letter of these agreements but not the spirit. In 2003, frustrated by the ongoing challenges in the implementation of their agreements, Aboriginal signatories to modern land claim agreements formed the

[8] In 1995 the federal government announced its policy on *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. It provided for the negotiation of Aboriginal self-government as a component of modern treaties. This document is available on line at: http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html

[9] Federal ratification is pending for two additional agreements, both of which emanate from British Columbia. These are the Tsawwassen and the Maa' nulth final comprehensive land claims agreements.
[10] Library of Parliament, Mary Hurley, *Settling Comprehensive Land Claims*, 24 October 2007.

Land Claims Agreements Coalition to press for improved implementation policies and practices. [11]

In fall 2007, the Standing Senate Committee on Aboriginal Peoples received general briefings on implementation of modern land claim agreements from the Office of the Auditor General of Canada and the Land Claims Agreements Coalition. Both underscored the key points that land claim agreements are modern treaties which set out rights that are affirmed and recognized by the Constitution. Their effective implementation is essential to bringing about the reconciliation of Aboriginal and non-Aboriginal peoples. Accordingly, the Committee decided, on 14 December 2007, to undertake an examination of issues concerning the implementation of comprehensive land claim agreements. The Committee convened nine meetings from January to April 2008 on this issue and now reports on its findings.

This represents the first time a Parliamentary Committee has studied the matter.

C. Core Principles

The constitutional recognition of Aboriginal and treaty rights has profound implications for the relationship between Aboriginal peoples and the Crown. The Committee has been mindful, in pursuing this study, that the conclusion of constitutionally protected modern treaties represents an important aspect of this new stage in Crown-Aboriginal relations. In this light, our examination of the *implementation* of federal obligations under these agreements has been informed by consideration of a number of core principles articulated in the Supreme Court of Canada's leading decisions on the interpretation and application of section 35 of the *Constitution Act, 1982*: that the purpose of section 35 is the reconciliation of the prior occupation of Aboriginal societies with the sovereignty of the

[11] Members of the Land Claims Agreements Coalition are, from east to west: from Labrador, Nunatsiavut Government; from Quebec, Grand Council of the Crees, Naskapi Nation and Makivik Corporation; from Nunavut, Nunavut Tunngavik Incorporated; from the Northwest Territories, Inuvialuit Regional Corporation, Gwich'in Tribal Council, Sahtu Secretariat Incorporated and Tlicho Government; from the Yukon, Council of the Yukon First Nations; and from British Columbia, Nisga'a Nation.

Crown,[12] that the Crown's relationship with Aboriginal peoples is a fiduciary one, and in particular, that the honour of the Crown is at stake in *all* its dealings with Aboriginal peoples.[13]

We think it useful to highlight certain of the Court's statements in these areas.

The *Van der Peet* decision affirmed the special constitutional status of Aboriginal peoples under section 35 arising from their prior occupation, concluding that "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[14] The objective of reconciliation has been a recurrent theme in subsequent rulings.

Under the landmark *Sparrow* decision, the guiding principle for section 35 is that

> the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[15]

Sparrow also confirmed that "the honour of the Crown is at stake in dealings with aboriginal peoples".[16]

This principle was underscored and expanded upon in the subsequent *Haida Nation* decision, in which the Court stressed that it

> is not a mere incantation, but rather a core precept that finds its application in concrete practices.

[12] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507.
[13] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.
[14] *Van der Peet*, note X, par. 31.
[15] *Sparrow*, note X., p. 1108.
[16] *Ibid.*, p. 1114.

> . . . 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.[17]

Of particular interest to the Committee in the context of this study, the *Haida Nation* decision considers the application of the principle to the modern treaty-making process, observing that:

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" . . .
>
> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims . . . Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" . . . This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.[18]

The companion *Taku River* decision made the further significant point that

> The Crown's Honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*.[19]

It is with these key principles in mind that the Committee turns its attention to a consideration of the evidence related to the implementation of federal obligations under modern land claim agreements.

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[17] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, par. 16-17.
[18] *Ibid.*, par. 19-20.

[19] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, par. 24.

D. The Implementation Phase

Land claims are not designed to end relationships between governments and Aboriginal groups; they are designed to change them.[20]

The negotiation of modern treaties takes Aboriginal signatories only partway in achieving their objectives. Of equal importance is the effective implementation of their respective agreements. Accordingly, any promise of a renewed relationship between the Crown and Aboriginal peoples lies not only in negotiating modern treaties, but also in their full and proper implementation. The fact that implementation marks the beginning of a new phase in Crown-Aboriginal relations is recognized by the Department of Indian Affairs and Northern Development ("DIAND"). The Department's 2003 Implementation Handbook states, in part, that:

> Implementation is not a passing phase, but rather an enduring one, marking a new relationship among the parties – the federal government, the Aboriginal group and the provincial or territorial government involved.[21]

While treaty settlements provide for an initial transfer of land and cash compensation, they also involve numerous, on-going obligations that require both the separate and joint participation of the parties. Given the nature and scope of modern treaty settlements, their successful implementation is an enormous task and critical to achieving the intent of these Agreements.

Comprehensive land claims agreements reached after 1986 require the negotiation of implementation plans.[22] These plans identify hundreds of implementation projects and activities in varying degrees of detail. Implementation plans are attached to final settlement agreements but are not part of them. With some exceptions, these Plans are not

[20] *Evidence*, 11 December 2007.
[21] Department of Indian Affairs and Northern Development, *Implementation of Comprehensive Land Claim and Self-Government Agreements: A Handbook for the Use of Federal Officials*, 2003, p. 6. [Hereafter referred to as the *Implementation Handbook*].
[22] The federal government's 1986 *Comprehensive Land Claims Policy* states that "final agreements must be accompanied by implementation plans."

intended to provide for contractual obligations. It is the view of the Department that, given the need for flexibility, implementation plans should act more as a guide. The 2003 departmental handbook states, in part, that:

> The federal preference is that the implementation plan not be a legally binding document, but rather an operational and management tool that describes the parties' understanding as to how the obligations in the final agreement will be fulfilled.[23]

Although they accompany final agreements, implementation plans do not receive constitutional protection under section 35 of the *Constitution Act, 1982*. In addition, financial payments identified in the implementation plans or fiscal financing agreements, in the case of self-government agreements, are subject to appropriation by Parliament through the estimates process. Generally, implementation plans are for a period of ten years. Fiscal Financing Agreements are negotiated for a five-year period.

E. The Role of the Department of Indian Affairs and Northern Development

The Department of Indian Affairs and Northern Development has primary, but not exclusive, responsibility for meeting the federal government's constitutional, treaty, political and legal obligations to First Nations, Inuit and Northerners. Its authority derives largely from the *Department of Indian Affairs and Northern Development Act*, the *Indian Act*, territorial acts and legal obligations arising from section 91(24) of the *Constitution Act, 1867*.[24] As such it is the lead federal representative in the negotiations of modern land claim agreements, with the participation of other government departments, as appropriate. According to departmental documents:

> INAC negotiates comprehensive and specific land claims and self government agreements on behalf of the federal government, *oversees*

[23] Implementation Handbook, p. 11.

[24] Section 91(24) of the *Constitution Act, 1867*, conferred upon the federal Crown the legislative authority for "Indians and lands reserved for the Indians."

implementation of settlements and promotes economic development. [25] [Emphasis Added]

The Department's Implementation Branch (Claims and Indian Government Sector) "plans, monitors and manages the implementation of comprehensive land claims and self-government agreements". The Branch negotiates Implementation Plans and Fiscal Transfer Agreements which accompany self-government and modern land claims agreements. It is also responsible for monitoring and coordinating federal responsibilities under these agreements on behalf of the Government of Canada.

The responsibilities of the Implementation Branch are:[26]

- to negotiate and re-negotiate implementation plans and financial arrangements with the other parties to comprehensive land claims and self-government agreements;
- to monitor the implementation activities of DIAND and other federal government departments, ensuring that Canada honours all of its obligations as set out in final agreements;
- to work with the other parties to ensure that the implementation of final agreements goes smoothly and to resolve any issues pertaining to the implementation process as they arise;
- to carry out strategic planning, policy development, and research and analysis pertaining to implementation processes;
- to process GIC or ministerial appointments to the various organizations that are established to implement settled land claims agreements and to provide funding for these organizations;
- to prepare annual public reports on the status of implementation of each agreement;
- to promote awareness of the importance of comprehensive land claims and self-government agreement implementation, including the management of government-to-government relationships;
- to manage the implementation of the James Bay and Northern Quebec Agreement (JBNQA) and the Northeastern Quebec Agreement (NEQA) relating to the Cree, Inuit and Naskapi of Quebec.

[25] Department of Indian Affairs and Northern Development, "Mandate, Roles and Responsibilities," this document is available online at: http://www.ainc-inac.gc.ca/ai/mand-eng.pdf.

[26] Additional information regarding the Department's Implementation Branch is available online at: http://www.aincinac.gc.ca/ps/clm/impb_e.html.

II. IMPLEMENTATION CHALLENGES: WHAT THE COMMITTEE HEARD

Negotiation of a claim settlement is only half the battle and implementation is the other half.[27]

The implementation of comprehensive land claims agreements has been the subject of considerable discussion and frustration among Aboriginal signatories. The testimony received by the Committee reveals a consensus on many of the major issues impeding the effective implementation of comprehensive land claims agreements. These issues are simultaneously both philosophical and structural. Key areas of difficulty arise in ensuring that appropriate processes and structures for implementation are put in place and with the government's policy approach to implementation.

I. Restrictive Policy Approaches

A. Divergent Approaches to Implementation: Spirit and Intent

Aboriginal signatories to land claims agreements have been critical of the federal government's approach to treaty implementation which they perceive as being primarily focussed on fulfilling the narrow, technical obligations set out in modern treaties, rather than working to achieve the overall objectives of the entire agreement. Representatives of the Land Claims Agreements Coalition told us that:

> part of the frustration that coalition members find is that the Government of Canada is singularly concerned with merely fulfilling what it calls the obligations, the narrow, technically-defined legalistic obligations — what they have to do — and is not sufficiently concerned with…working to achieve the overall broad objectives of the entire agreement.[28]

[27] Evelyn Peters, "Federal and Provincial Responsibilities for the Cree Naskapi and Inuit Under the James Bay and Northern Quebec, and Northeastern Quebec, Agreements", in David Hawkes ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*, 173-242. Ottawa. Carleton University Press, 1989.
[28] *Evidence*, 4 December 2007.

This view is supported by the findings of the Auditor General of Canada who, in successive reports, concluded that the federal government "seems focussed on fulfilling the letter of the land claim's implementation plans but not the spirit" and that it has not worked to "support the full intent of the land claims agreements." Commenting specifically on the federal approach with respect to the *Inuvialuit Final Agreement*, the Auditor General stated, in part, that DIAND officials do not view it as the Department's responsibility to achieve the basic goals of the Agreement, describing them as Inuvialuit goals, not Canada's. They stated that the Agreement obliges them neither to achieve these goals nor to measure progress toward them.[29]

According to the Land Claims Agreements Coalition, this attitude has led some Aboriginal groups to conclude that there have been "deliberate and continuing efforts on the part of the federal government to minimize, frustrate and even extinguish the rights and benefits that Aboriginal parties expected would flow from their treaties."[30] Kevin McKay spoke to us of the frustration experienced by the Nisga'a Nation by Canada's apparent failure to recognize the basic goals of their Agreement:

> We made a number of compromises during the treaty negotiation process. These compromises were hard fought and, we felt, necessary to make the Treaty a reality and to achieve recognition of our inherent right of self-government. However, we now find ourselves in the same frustrating position of having to continue to fight with government to ensure that these opportunities are properly implemented and that the spirit and intent of our Treaty is being respected.[31]

Aboriginal signatories to treaty settlements do not view their Agreements with the Crown as fixed contracts, but rather as a means to establish ongoing political and legal relationships between the Crown and Aboriginal societies. "Treaty-making" explains Frank Cassidy "cannot be seen as a way in which to end the Aboriginal issue", rather, it must be seen as a "process which establishes a new and more positive relationship

[29] Office of the Auditor General of Canada, 2007 Report of the Auditor General of Canada. Chapter 3, *Inuvialuit Final Agreement*, Ottawa, 2007.
[30] Land Claims Agreements Coalition, *A New Land Claims Implementation Policy*, discussion paper tabled with the Committee.
[31] *Evidence*, 27 February 2008.

between particular Aboriginal groups and the Crown."[32] The Committee agrees. Treaties, historic and modern, are not the end, but the beginning of a new relationship between the Crown and Aboriginal peoples. James Eetoolook, Acting President of Nunavut Tunngavik Incorporated ("NTI") described the ongoing nature of the relationship between the Inuit and the Crown brought about through the treaty-making and treaty-implementation this way:

> [Our Agreement] was the beginning of a new relationship between us and the Government of Canada. This was not a-cash-for-land transaction…When we signed, we saw it as a new covenant that would shape our place in Canada for generations to come.[33]

The federal government, however, appears far more concerned with concluding agreements than with implementing them. Michael Wernick, Deputy Minister of the Department of Indian Affairs and Northern Development, told the Committee that:

> The tendency is that once the announcement of [an Agreement] is finished and the cameras have been shut off and we are on to implementation that people do not spend as much time on implementation issues. That is something that happens in government.[34]

In testimony to the Committee, officials from the Office of the Auditor General told us that one of the key reasons the Department has made modest progress on these issues is a lack of sustained management attention resulting from the high turnover rate of senior officials. Accordingly, the leadership and commitment required to successfully move issues forward is lacking within the Department. Further, the constant rotation of senior officials and deputy ministers makes it difficult to achieve policy continuity and coherence.[35]

This finding was supported by the testimony of the Deputy Minister who told us that: "[T]he turnover of ministers combined with the turnover of deputy ministers really is an

[32] Frank Cassidy, *Canadian Update – The Modern treaty process and Aboriginal Governments in British Columbia*, Aboriginal Law Bulletin, 1993.
[33] *Evidence*, 26 February 2008.
[34] *Evidence*, 12 February 2008.
[35] *Evidence*, 11 December 2007.

obstacle to implementation and follow-through."[36] The lack of sustained management attention results in a much greater focus within the Department on short-term initiatives. Officials from the Auditor General's office told us that while "there seems to be a lot of attention and energy that goes into short-term activities" much less attention is directed to "activities that are longer term and maybe not quite so public.[37]

The tendency among federal officials to ascribe lesser importance to implementation is reflected in the internal structures of government. Where there are senior-level, interdepartmental committees to deal with the negotiation of settlements, no similar structures have been created to manage the implementation of those same agreements. Again, officials from the Office of the Auditor General told us that:

> Another important point that should be noted is that in the negotiation of agreements, INAC, Indian and Northern Affairs Canada, chairs an interdepartmental committee. It has everyone around the table and they work toward what they will negotiate – bottom lines, departmental responsibilities. My understanding through the course of the audit is that this approach does not exist on the implementation side.[38]

Witnesses have suggested to us that one apt analogy to describe the divergent approaches to implementation held by the parties is that of a marriage and divorce:

> By and large, from the Aboriginal signatory side, entering into a land claims agreement is analogous to entering into a marriage: working out respective roles and responsibilities, communicating and sharing in order to have a happy and prosperous life together. Whereas from the Government of Canada's side, it seems, on the contrary, to be regarded more as a divorce: we work out an agreement, we divide up the assets, we determine the monthly or annual payments and ask what exactly do I have to do and not a penny more in order to avoid being sued or seeing each other any more than we have to.[39]

The Committee believes that any meaningful approach to treaty implementation can not be focused solely on fulfilling, narrowly, the legal and technical obligations identified in

[36] *Evidence*, 12 February 2008.
[37] *Evidence*, December 11, 2007.
[38] Ibid.
[39] *Evidence*, December 4, 2007.

modern treaties. We agree with Thomas Berger that any approach to implementation must be premised on the following underlying considerations:[40]

- The status of land claims agreements as constitutional documents;
- Principle that the Honour of the Crown must be observed in all its dealings; and
- The terms of the Agreement itself.

The federal approach to implementation, however, has been largely, if not exclusively, restricted to the last point identified by Mr. Berger. Federal officials appearing before the Committee have suggested that most federal obligations set out in modern treaty agreements are being met, and in this sense, federal implementation obligations are being managed successfully. The government's focus, in this regard, however, has largely been to discharge its obligations in a narrow sense, rather than working to achieve the full breath of reconciliation promised by treaties. This, in our view, is a diminished and restricted reading of treaty-making and treaty implementation.

The full and proper implementation of modern treaties extends beyond merely fulfilling the performance requirements in a contract. John Merritt, quite sensibly, told the Committee that agreements can hardly be said to be successfully implemented if its fundamental objectives have not been met:

> You cannot take an approach to implementation commitments that essentially equates all the elements. If you are not fulfilling the core commitments, the fact that you are scoring heavily on the trivial matters is of little importance to anyone. The attempt to reduce this to a small-scale accounting exercise is in itself a major barrier in terms of people adopting the attitudes necessary for success.[41]

[40] Thomas Berger, *Keynote Address*, Achieving Objectives Conference, Gatineau, Quebec, 28 June 2006.
[41] *Evidence*, 2 April 2008.

Similarly, the President of Nisga'a Nation, Nelson Leeson, stated:

> For us implementation is more than merely completing a check list of narrowly defined legal obligations set out in the treaties. *Implementation requires a mutual commitment to making the treaties work*, to achieving shared objectives. The Federal Government apparently does not agree.[42] [Emphasis Added]

The Committee believes that any promise of reconciliation can only be brought about when implementation is construed broadly and with a view to achieving the objectives set out in modern treaty settlements. We find, however, that government continues to approach these agreements as fundamentally contractual matters, despite the fact that rights flowing from these agreements are recognized and affirmed in the constitution and form part of the supreme law of the land. The result is that broader considerations of economic and social well-being are set aside. In their discussion paper, the Land Claims Agreements Coalition stated:

> [T]here is an institutional viewpoint within the federal government that a land claim agreement can be said to have been successfully implemented if federal contractual commitments have been discharged in a way that withstands legal challenge. The tests of whether or not the Aboriginal party is materially better off, or the economic prospects as a whole have been enhanced, are left out of the picture.[43]

The federal approach to implementation, does not, in our view, accord with a purposive reading of section 35 of the *Constitution Act, 1982*, notably, that of reconciliation and renewal. A narrow approach to implementation, we contend, does not reflect the spirit of reconciliation and will likely result in continued frustration, mutual dissatisfaction and increased litigation against the federal government.

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[42] Nelson Leeson, President, Nisga'a Nation, *Implementing Change: Lessons Learned in the First Six Years of the Nisga'a Final Agreement*, speech delivered on 28 June 2006 at the Achieving Objectives Conference held in Gatineau, Quebec.

[43] Land Claims Agreements Coalition, *Discussion Paper*, document tabled with the Committee, p. 15.

B. Federal Reluctance to Refer Matters to Arbitration

With the exception of the 1975 *James Bay and Northern Quebec Agreement*, modern land claims agreements include chapters that specifically identify a range of processes that would resolve disputes among parties when they arise. These mechanisms include arbitration panels with the authority to make binding decisions. With the exception of the *Inuvialuit Final Agreement*, the consent of each affected party is required in order to refer disputes related to Agreements to arbitration.

The Committee expected that the inclusion of these mechanisms would have been of considerable assistance to the parties in resolving impasses over funding and other implementation matters. This has not been the case. Witnesses have testified that there has been an almost universal refusal by the federal government to submit to these processes despite their having been negotiated and included in final agreements. Jim Aldridge told the Committee that:

> The Government of Canada includes the possibility of arbitration in each land claims agreement that it signs and then, particularly if money is involved, it refuses to consent to arbitration. This practice really must stop.[44]

Consistently, witnesses cited the federal government's inflexibility to the use of agreed-upon arbitration processes to be one of the most significant barriers impeding the effective implementation of Agreements. Criticisms of federal intransigence in this respect are widespread. John Merritt told us that:

> The fourth factor [impeding implementation] is the effectiveness of dispute resolution mechanisms that exist both within agreements and in laws of general application. These mechanisms that are available are not being used because of the ingrained federal belief that one party to a two-party contract should veto all solutions that are not its first preference.[45]

[44] *Evidence*, 2 April 2008.
[45] *Evidence*, 2 April 2008.

Similarly, in a second independent review of the *Nunavut Land Claims Agreement*, released in May 2006, Joanne Johnson of PricewaterhouseCoopers found that:

> [T]he most significant factor limiting successful implementation is the lack of an effective dispute resolution mechanism or process. There is an arbitration clause in the Land Claim Agreement, but it has never been used. Consequently, disputes may last for years, without any resolution or plan for achieving resolution.[46]

In her review of implementation issues concerning the Gwich'in and Nunavut land claims agreements the Auditor General of Canada was unable to cite a single instance in which an issue had come before arbitration panels since the settlement of these land claims. Dr. Richard Van Loon, a former Associate Deputy Minister of Indian and Northern Affairs Canada, explained that the government's aversion to use arbitration to settle implementation issues is due largely to financial considerations and a desire to maintain control over determinations related to such matters. He states, in part, that:

> There is a view inside government, right or wrong, that arbitrators tend to view the capacity of government to pay money as infinite. Therefore, the arbitration settlements of financial issues tend, in government's view, to fall on the much-too-generous side. That certainly makes the Department of Finance and the Treasury Board very reluctant to approve any kind of arbitration about anything that has to do with money in land claims settlements. In addition to that, because arbitration is an uncontrolled situation as far as government is concerned…that also lends a reluctance to use arbitration.[47]

The government's reluctance to refer impasses concerning financial matters to arbitration led the Auditor General of Canada to conclude that "any belief that arbitration is there to resolve money-related disputes, and make land claims work more effectively, is an illusion."[48]

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[46] *Evidence*, 5 March 2008.
[47] *Evidence*, 9 April 2008.
[48] Office of the Auditor General of Canada, 2003 Report of the Auditor General of Canada. Chapter 8, *Indian and Northern Affairs Canada – Transferring Federal Responsibilities to the North*, Ottawa, 2007, p. 9.

Most disturbing to members of this Committee is that the federal government's practice of consistently refusing to consent to arbitration has undermined the renewed relationships that treaties sought to establish. Aboriginal signatories are left with no meaningful recourse to the arbitration mechanisms available to them under their Agreements, and, as a result, forces disputes to the courts. A case in point is the litigation brought forward by the Inuit of Nunavut after having unsuccessfully attempted to have their issues arbitrated. The Inuvialuit commented generally on this issue, observing that:

> Currently there appears to be no recourse to resolve these fundamental differences between the parties to the land claims agreements. This is more than a breach of the agreement because the disagreement is largely about the level of commitment to achieve the spirit and intent or purpose of the agreement. If you are unable to implement that together what are your options; go to court like the Cree have done for the past 30 years?[49]

The negative impact of unresolved disputes on Crown-Inuit relations was articulated to us by Joanne Johnson:

> Moreover, trust has become a serious issue; trust is something that you either build or destroy with every interaction. Without a clear dispute resolution process, with consequences, there can be no hope for resolving the current disputes or engendering trust.[50]

The federal government is in the position to determine the manner and the degree to which federal obligations under land claims agreements are performed. In the Committee's view, the federal practice of consistently refusing to consent to arbitration undermines the process of reconciliation and obstructs the ability of Aboriginal signatories to secure the performance of the terms of their agreements.

Based on the preponderance of evidence before us, we can only conclude that arbitration processes provided for in modern land claims agreements could not have been negotiated with any genuine acceptance by the federal government that they would, in fact, ever be used, even if only rarely. Federal practices in this regard, we contend, are inconsistent

[49] Submission tabled by the Inuvialuit to the Committee on 24 April 2008, p. 2.
[50] *Evidence*, 5 March 2008.

with both the honour of the Crown and the government's fiduciary relationship with Aboriginal peoples and are destructive to the process of reconciliation.

II. Lack of Effective Structures and Processes for Implementation

While witnesses appearing before the Committee may disagree on how specific provisions of agreements are to be interpreted, there appears to be no such disagreement respecting the inadequacy of existing structures and processes currently in place to implement modern treaties. In discussing implementation difficulties with respect to the 1975 *James Bay and Northern Quebec Agreement*, Bill Namagoose told the Committee: "In our experience with the implementation of the *James Bay and Northern Quebec Agreement*, the federal government tried to use their existing systems to implement it, and that led to failure."[51] Similarly, the Auditor General of Canada observed that implementation problems for the *Inuvialuit Final Agreement* can, in part, be ascribed to inadequate implementation structures and processes:

> Though the *Inuvialuit Final Agreement* is a constitutionally protected agreement, the federal government has not met some of its significant obligations, often because it has not established the necessary processes and procedures or identified who was responsible for taking various actions. [52]

The Committee finds that issues in this regard relate largely to federal funding practices and the effective coordination of government treaty obligations.

A. Government Coordination of Federal Obligations

Comprehensive land claims agreements, as we have already noted, are complex documents covering a wide range of subject matters. While the Department of Indian Affairs and Northern Development is the federal lead, successfully implementing many

[51] *Evidence*, 26 February 2008.
[52] 2007 Report of the Auditor General of Canada.

of the provisions of land claim agreements naturally requires the involvement of several departments. Achieving effective coordination among and within government departments, however, is a major challenge.

Successive reports of the Auditor General of Canada have pointed to serious deficiencies in the Department's ability to facilitate the successful implementation of comprehensive land claim agreements. Among the key findings were that the Department lacks a strategic approach for implementing federal obligations, it has not established processes and procedures to identify who is responsible for various actions, and it does not adequately report on the costs of implementing agreements. These are fundamental deficiencies that hinder the effective implementation of constitutionally-protected agreements.

In her audit on the implementation of federal obligations with respect to the *Inuvialuit Final Agreement*, the Auditor General of Canada found that, after more than two decades, there was still no strategic plan in place to coordinate federal responsibilities under the Agreement:

> Twenty-three years after the Agreement came into effect, INAC still has not developed a strategy for implementing it. INAC has never formally identified federal obligations under the Agreement or determined which federal departments were responsible for which obligations. It has not developed a plan to ensure that federal obligations are met. The Department does not have a strategic approach to identify and implement Canada's obligations, nor does it monitor how Canada fulfills them.[53]

Signatories to modern land claims agreements have been quite critical of the lack of federal government coordination of its treaty obligations. They, quite rightly, argue that their treaties are with the Crown and not with individual government departments. Nevertheless, the current federal approach forces them to deal with various departments to ensure that treaty obligations are being met. This can often be an expensive, time-consuming and frustrating experience.

[53] Ibid.

While the Department of Indian Affairs and Northern Development is responsible for managing the implementation of federal obligations, and bears significant accountability for results[54], it is not the only government department with responsibilities under those agreements. However, part of the problem, we were told, is that the Department of Indian Affairs and Northern Development, lacking the necessary authority, can not compel other government departments to comply with their responsibilities. "This is the paradox" Jim Aldridge remarked, that "under the *Department of Indian Affairs and Northern Development Act*, DIAND is accountable to Parliament for the implementation of modern treaties. However, Parliament, and the government, has failed to give DIAND the authority and means to do so."[55] The Council of Yukon First Nations stated they did not believe the Department of Indian Affairs and Northern Development "has been successful in informing and securing the compliance of other federal departments with respect to Canada's obligations pursuant to the Agreements."[56] Similarly, Kevin McKay told us that:

> Currently, a great part of the frustration that the Nisþa'a have felt in implementing our Treaty is the lack of clout the Department of Indian Affairs and Northern Development appears to have with the other federal departments. Even when the Department is trying its hardest and doing its best to bring about the objectives of the agreement, it is often frustrated when it arrives at other departments to find that it has insufficient clout with those other departments. The other departments consider it to be the Department of Indian and Northern Affair's agreement and not theirs. In this way, they fail to acknowledge our nation-to-nation relationship with Canada, something that we fought so hard to achieve through the negotiation of our Treaty.[57]

[54] Office of the Auditor General of Canada. 1998 Report of the Auditor General of Canada. Chapter 14, *Indian and Northern Affairs Canada – Comprehensive Land Claims*, Ottawa, 1998.
[55] *Evidence*, 8 April 2008.
[56] *Evidence*, 13 February 2008.
[57] *Evidence*, 27 February 2008.

In a frank exchange, for which members of this Committee are appreciative, the Deputy Minister of Indian and Northern Affairs Canada, Michael Wernick, spoke of the challenges his department faces with respect to the coordination of federal obligations:

> A challenge that our department faces…is that…we are not solely responsible for implementation or in possession of all the levers and tools related to implementation…*we have had difficulty in the past fully engaging other government departments in implementation of these agreements. More often than not, these agreements are presumed by our colleagues to be the responsibility of our department.* As a department there is only so much we can unilaterally accomplish in fulfillment of the terms of implementation without the full participation of our colleagues right across the government.[58] [Emphasis Added]

Witnesses told us that government departments do not fully appreciate that treaty obligations bind the Government of Canada and not simply the Department of Indian Affairs and Northern Development. Accordingly, the Committee is concerned with the issue of accountability, or more precisely, how to ensure that *all* government departments with treaty-related responsibilities take action on their obligations.

Our concern is shared by the signatories to land claims agreements. The fact that effective accountability is complicated when initiatives cut across several departments was highlighted by NTI:

> Many federal agencies have significant roles in implementing land claims agreements. Federal agencies have to be fully engaged, involved and orchestrated, if the Crown's obligations and duties under our agreement are to be carried out. The record indicates that we cannot rely on DIAND to conduct the federal orchestra. This raises a major question: should we get a new conductor? [59]

The Deputy Minister also remarked that, in his view, one of the key issues in implementing comprehensive land claims agreements is related to accountability. To address this deficiency, he suggested that Treasury Board Secretariat ("TBS") could assume responsibility to ensure that government departments were meeting their

[58] *Evidence*, 12 February 2008.
[59] *Evidence*, 26 February 2008.

respective treaty obligations. In a similar vein, Aboriginal signatories have suggested that the Privy Council Office ("PCO") should have the authority to ensure federal departments take a coordinated approach in fulfilling the Crown's modern treaty obligations.

The challenge of working horizontally to implement government initiatives, and the role of central agencies and line departments, has been the focus of much debate in public administration circles. A 2004 study titled "*The Horizontal Challenge: Line Departments, Central Agencies and Leadership*" found that:

> The predominant culture of the public service as well as the accountability framework in place does not provide an organizational environment that is conducive to extensive interdepartmental coordination and collaboration. Consequently, even the presence of good will by some key departmental officials, the active intervention of central agencies is perceived to be essential. They have a key role in establishing horizontal initiatives, and they should also offer direct assistance to the collaboration and coordination processes.[60]

The evidence before this Committee suggests that the Department of Indian Affairs and Northern Development has not been effective in coordinating the Crown's responsibilities under land claims agreements. The Committee recognizes that while the Department is the federal lead on these matters, it is not solely responsible for implementation of federal obligations. However, while the Department cannot act alone in implementing agreements, it clearly needs to demonstrate greater leadership and strategic focus in meeting the obligations and objectives set out in those agreements. The Committee is convinced that ensuring greater coordination and accountability among, and within federal departments, will require significant changes in existing structures and processes.

[60] Herman Bakvis and Luc Juillet, Canada School of Public Service, *The Horizontal Challenge: Line Departments, the Central Agencies and Leadership,* Ottawa, 2004, p. 52.

B. Matters Related to Funding

Comprehensive land claims agreements establish a range of governance structures, including, for example, resource and co-management boards, which operate for the benefit of all Canadians. Without adequate resources, and human resource capacity, these are likely to operate ineffectively and inefficiently. In our view, inadequate and unstable funding may preclude Aboriginal signatory nations from exercising the very autonomy that was negotiated and established under their Agreements.

Comprehensive land claim agreements and accompanying Implementation Plans identify numerous, on-going obligations. According to the Department's Implementation Handbook:

> Implementation plans or associated fiscal agreements provide for a negotiated level of implementation funding (distinct from settlement payments under land claim agreements) to enable delivery of a variety of implementation activities."[61]

Implementation funding, however, is often provided by governments with a questionable appreciation of the actual costs of implementing on-going treaty obligations. In her review of the Gwich'in and Nunavut land claims agreements, for example, the Auditor General found that DIAND did not know the cost of carrying out on-going federal responsibilities under these agreements. Thus, while an agreement's financial compensation package are generally well known, the costs associated with implementing an agreement are "identified only on a piecemeal basis, or not at all."[62]

In their appearance before the Committee, officials from the Office of the Auditor General told us that they did not feel that the focus and resources have been there on an *ongoing* basis to properly implement modern treaties.

[61] Implementation Handbook, p. 29.
[62] 1998 Report of the Auditor General.

> What we did observe in the audit is quite consistent with what we have seen elsewhere, in that a lot of effort, a lot of focus is on the short term. When the agreement was signed, we noted that the initial transactions happened by and large; obviously, the money got transferred so the focus was on that – that was done. Most of the land got transferred. Then they ran into problems and they did not have processes to obtain solutions. *However…on an ongoing basis has the focus been there and have resources been arranged for that purpose? It would appear not.*[63] [Emphasis Added]

The Committee would have expected that, in negotiating funding levels required to fulfil treaty obligations, a certain degree of stability would be provided to the beneficiaries. However, time and again, witnesses told us that far from achieving a level of fiscal certainty, they experience chronic problems in securing the provision of timely, adequate funding to meet the various undertakings set out in the agreements. Funding shortfalls limit the ability of Aboriginal signatories to properly discharge their treaty responsibilities and restrict enjoyment of the rights promised to them under their Agreements. Chief Joe Linklater told us that:

> The other aspect is that in negotiating the drawdown of programs and services, we found that the programs we have drawn on were inadequate to begin with. We have drawn down programs that were underfunded and, as a result, through our self-government arrangements, we took on underfunded programs and applied them to more people.[64]

The Committee also notes that there are unacceptable delays in renegotiating implementation funding, both with respect to implementation plans and fiscal financing arrangements. Agreements require the periodic renewal of funding (every five or ten years) for ongoing commitments. According to the Department's Implementation Handbook:

> where a need for additional funding has been established, the federal implementation manager must seek either a reallocation from within the Implementation Plan or additional comprehensive land claim funding from INAC or from Treasury Board.[65]

[63] *Evidence*, 11 December 2007.
[64] *Evidence*, 13 February 2008.
[65] Implementation Handbook, p. 29.

The Deputy Minister of DIAND acknowledged that the current appropriation process is "too sticky, too slow and too cumbersome."[66] In testimony to this Committee, the Deputy Minister described the difficulty in securing funding for on-going obligations in comparison to the one-time transfer of treaty settlement monies which have statutory authority, once an agreement is ratified and enacted. He states:

> I do not think we do a great job at the renewal of those fiscal transfers because we take a long time to negotiate small amounts of money, but that is where some of the misunderstanding is. We do not have those kinds of monies in the departmental budget. The easy parts, like the initial capital transfer…flow easily because they are usually in the federal statute. For the ongoing funding of something like the water board in Nunavut or a regulatory thing in the Gwich'in area, we have to go back and get that money out of normal appropriation processes of Parliament and through Treasury Board, and that has been a slow and ponderous process, frustrating to us and to Aboriginal groups.[67]

According to Mr. Wernick, difficulties arise is securing approval for additional funding from the central agencies and related internal negotiations with other government departments. He goes on to state:

> Mr. Sewell spent the best part of a year haggling with the centre over appropriate funding levels for the Nunavut regulatory bodies. We spent the good part of a year arguing about the implementation of the next cycle of Nisga'a agreements. I do not see any alternatives. That is how money is appropriated in our system. All we can do is work hard with our central agency colleagues and other departments to make sure they understand these are ongoing relationships between the Crown and the other partner in the treaty.[68]

The effects of this internal "haggling" on Aboriginal governments are significant. Keven McKay told the Committee the Nisga'a are presently in the eighth year of their five-year fiscal financing agreement. According to NTI, the "lengthy process associated with finding adequate funding for Canada to fulfill [its] obligations has delayed the conclusion, not only of the above agreements, but also the negotiation of others in line

[66] *Evidence*, 12 February 2008.
[67] *Evidence*, 12 February 2008.
[68] *Evidence*, 12 February 2008.

behind them."[69]As a result of these delays, signatory nations are left in a state of uncertainty as to whether they will have sufficient funds to deliver on their responsibilities to their citizens. Jim Aldridge was even more pointed in his remarks:

> In the meantime, for Nisga'a, who are in year eight of our five-year agreement, NTI in year fourteen of their ten-year agreement, Yukon in year nine of their five-year agreement, the government is pocketing savings… My clients are going out of pocket covering the time that the government, as testified to this committee, was haggling with the centre. My clients are bleeding while that is taking place.[70]

The Committee finds that delays in renegotiating funding are a persistent and recurring problem. The Inuit of Nunavut have yet to renegotiate a renewal of their implementation contract which expired in 2003. Consequently, many of the bodies established under their Agreement, such as the Nunavut Impact and Review Board, the Nunavut Water Board and the Nunavut Planning Commission, are unable to properly discharge a number of their key responsibilities. Equally troublesome to this Committee, it seems the federal negotiator was given authority to discuss only modest adjustments to the initial ten-year 1993 implementation contract and refused to engage in an evaluation of original funding assumptions. This practice, in our opinion, is contrary to the Department's own guidelines which provide that: "The renewal process offers an opportunity to revisit assumptions and to examine how activities are carried out" and that this "may lead to a new set of planning and costing assumptions to guide the next implementation period."[71]

The Committee appreciates that implementation funding is a matter negotiated between the parties. Nevertheless, it appears to us that the substantive negotiations with respect to implementation funding take place within government, and the Aboriginal side is left to negotiate only at the margins. Repeatedly, witnesses indicated that when negotiating implementation funding, federal officials rarely offer a clear rationale or business case to

[69] Nunavut Tunngavik Incorporated, Submission to the Committee, p. 14.
[70] *Evidence*, 2 April 2008.
[71] Implementation Handbook, p. 33.

signatories in relation to the determination of funding levels. More commonly, we are told, there is a "take-it-or-leave-approach". NTI officials told the Committee that:

> We thought that the implementation chapters in their agreement would provide greater certainty in terms of the long-term fiscal relationship. We did begin the process of identifying the responsibility, the timing of it and who was responsible, with the idea of generating a cost associated with those line items…Unfortunately, the government of the day just picked a number out of the air, and as the Chief said, it was take it or leave it.[72]

Similarly, Jim Aldridge observed:

> [T]he way it ends up working is officials in departments within the Government of Canada negotiate internally no matter how long that takes, in a way that is completely not transparent to the Aboriginal group and then presents the Aboriginal people with the *fait accompli*.
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> After the internal haggling is complete and when federal officials obtain a mandate, they will present the Nisga'a Nation with a *fait accompli* to be taken or left. No negotiations will have occurred and the Nisga'a will be told, "Sorry, that's all the money that we have in our mandate." [73]

Not only is it unclear to signatories the criteria by which federal officials calculate and determine funding levels, they also contend that these calculations are not based on supporting the objectives of the agreements. In testimony to the Committee, Richard Van Loon suggested that any expectation "that there will be something other than normal program budgeting to deal with comprehensive claims implementation may not be particularly realistic" adding that "it really does not matter inside government whether we are talking about something which is constitutionally protected or not."[74]

[72] *Evidence*, 26 February 2008.
[73] *Evidence*, 2 April 2008.
[74] *Evidence*, 2 April 2008.

Witnesses were critical of what they perceive to be a minimalist federal approach to the funding of treaty obligations. Bill Namagoose, Executive Director of the Grand Council of the Crees, told us that:

> Five years after the Agreement was signed the Federal officials were pretending that the implementation of the *James Bay and Northern Quebec Agreement* would cost a couple of million dollars more to implement. By 1980 our communities were suffering from a Walkerton type epidemic. People were dying as a result.[75]

Similarly, John Merritt identified these practices as a key obstacle to the proper implementation of land claims agreements and suggested:

> [I]n the internal negotiations within the federal government over implementation on specific agreements, the operative test is not – as observed by the Auditor General and many others – what must we do in order to make progress against objectives; *it is what minimal investments we can make to avoid being sued.* [76][Emphasis Added]

Aboriginal signatories view their treaties with the Crown as marking a new stage in the relationship. These agreements include promises of ongoing rights and obligations. This appears, at least on the surface, to be recognized by government, which describes the implementation phase of treaty-making as "not a passing phase, but an enduring one, marking a new relationship among the parties".[77] The devil, as always, is in the details.

According to the Department's Implementation Handbook we find evidence that these criticisms are justified. Under the "Renewal of Implementation Documents" section of the Handbook, the Department acknowledges that the renewal of implementation plans and the renegotiation of implementation funding is a relatively new business for officials.

[75] *Evidence*, 26 February 2008.
[76] *Evidence*, 2 April 2008.
[77] Implementation Handbook, p. 6.

What is telling, however, is the expectation that these negotiations will diminish and cease over time as federal obligations are discharged. The Implementation Handbook states:

> It is expected that the task and content of renewing a given implementation plan will diminish over time as the activities required to meet the Final Agreement obligations are completed. Eventually, the complexities involved in renewing a given implementation plan should diminish significantly and the relationship between the parties will continue primarily on the basis of the parameters established within the Final Agreement for that relationship.[78]

The above statement suggests to us that the long federal view of treaty implementation is one of finality and not, in fact, an "enduring phase in the relationship". In testimony to the Committee, Bill Namagoose alluded that the underlying purpose of federal funding practices is to terminate federal obligations under treaties. He states:

> We understand that the federal government wants to terminate treaties. There is a treaty-busting mentality in the bureaucracy. For example, in our treaty, we have a provision for community centres to be built in each community. INAC's position is that there should be only one community centre built for each community and that would be it, so that treaty obligation is terminated.
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> Our perception is that community centres should be built for each generation in a perpetual nature, and we would negotiate the lifetime cycle of a community centre. We believe every generation of Cree is entitled to a community centre. It is not a one-time obligation. It is a perpetual obligation. That is why it took so long to come to an agreement, because we want to preserve the perpetual nature of the treaty for many generations.[79]

[78] Implementation Handbook, p. 32.
[79] *Evidence*, 26 February 2008.

Members of this Committee are also deeply troubled by the fact that some Aboriginal signatories are forced to use settlement monies to implement their treaty obligations. In their submission to this Committee, the Gwich'in Tribal Council (GTC) stated:

> Current funding levels have not been adequate for the GTC to discharge its implementation obligations. Over most of the implementation period, funding levels have been reduced from year to year and the GTC has found it necessary to supplement federal government implementation funding, mainly with money from settlement funds. No party has ever disputed that settlement funds are not intended to be used for implementation.[80]

Disturbingly, we find such cases are not isolated. In reviewing federal funding practices under the *James Bay and Northern Quebec Agreement* Wendy Moss concluded:

> One result of the federal funding practices has been that the Crees have had to use some of the compensation moneys for the provision of basic services and infrastructure such as housing. This has been a chronic problem since the signing, and *while it does not involve a technical breach of the treaty text, it unequivocally violates the spirit and intent as understood by the Crees.*[81] [Emphasis Added]

Members of the Committee understand that governments have competing obligations, each exerting its own fiscal pressures on the public purse. However, we are not convinced that negotiation practices around implementation funding are largely about the Crown's fiscal capacities to meet those obligations. Rather, based on the testimony we have received along with consideration of past reports and reviews concerning implementation matters, we find there is often a lack of political will to implement, fully, the spirit and intent of agreements. In our view, there appears to be federal resistance to fund treaties beyond the technical, legal obligations. Such practices minimize the scope and substance of treaty rights and may deny Aboriginal signatories the full enjoyment of the rights and benefits promised to them under their Agreements. Having obtained these Agreements, and certainty over the ownership of lands and resources, the benefits to the Crown are

[80] Gwich'in Tribal Council, Submission to the Committee tabled 11 March 2003.
[81] Moss, Wendy. "The Implementation of the James Bay and Northern Quebec Agreement," p.684-94, in Brad Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*. Ottawa. Carleton University Press, 1989.

immediate and ongoing. Government interest in fully funding and implementing agreements, to their full potential, may therefore be limited. However, we are of the firm view that such practices undermine the spirit and intent of agreements and bring dishonour to the Crown.

III. FINDINGS AND CONLUSIONS

Having considered the evidence before us, it is clear to this Committee that current federal policy and organizational structures are ill-suited to manage the implementation of modern treaties and the complex issues that arise from these agreements. Repeatedly, witnesses have indicated the major challenges relating to the implementation of modern treaties relate largely to the lack of overall government coordination of federal obligations and federal policies that undermine the commitments made in land claims agreements. Consequently, they suggest there must be a fundamental shift in the structures and policy approaches of the federal government if treaties are to be properly implemented. Otherwise, as Jim Aldridge remarked, the genuine and effective realization of treaties will likely remain "a mere platitude" to which federal officials "pay lip service before carrying on with business as usual."[82] The Committee agrees.

I. The Need for a New Policy Approach on Implementation

The 1986 federal policy on comprehensive land claims deals only briefly with the issue of implementation. We reproduce it here in its entirety:

> 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 related 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 negotiation process will take account of the federal regulatory reform policy and the Citizen's Code of regulatory fairness, and the final agreements and implementation plans will provide for regulatory impact assessments.[83]

[82] *Evidence*, 2 April 2008.
[83] Government of Canada, *Comprehensive Land Claims Policy*, Ottawa, 1986, p.25.

Apart from its remarkable brevity, the government's policy statement on implementation is more process than actual policy. It is of little surprise, then, the statement is effectively silent on goals and objectives respecting the implementation of modern treaties.

Witnesses testifying before this Committee suggested that the Government of Canada's implementation efforts are governed by a policy that is "thin and outdated". Of particular concern is that current government policy and practices do not reflect the renewed nation-to-nation relationship that treaties represent. There is growing frustration among signatory nations with government implementation practices they perceive as being insufficiently concerned with, and indifferent to, the economic and social objectives of modern land claims agreements. In their written submission to the Committee, Nellie Cournoyea, Chair and CEO of the Inuvialuit Regional Corporation, stated that:

> [T]he government does not want to change their relationship to that of a government to government relationship with clear obligations set out in an agreement. This negotiation experience is what Aboriginal groups currently in negotiations are experiencing and what is making it difficult to achieve future comprehensive land claim and self-government agreements.[84]

While many political statements have been made by governments acknowledging the significance of the new relationship brought about through modern treaties, those statements have yet to find their way into policy in any significant manner. Rather, experience suggests that attempts to address the implementation concerns of Aboriginal signatories through existing policies have not been successful.[85] Current implementation practices, as we have discussed, appear largely to address the interests of government and minimize costs with the least disruption to existing processes. In our view, this leads to policies and practices that are out of step with the very nature of the issues they are supposed to resolve.

[84] Inuvialuit Submission.
[85] On the issue of federal policies that limit or restrict the implementation of land claims and self-government agreements see testimony provided by the Council of Yukon First Nations, 13 February 2008.

In 2003, Aboriginal signatories met in Ottawa to discuss the ongoing challenges in implementation of their land claims agreements. There was consensus among signatory nations that a new land claims implementation policy was required; one that sets out "clear rules to oversee a government-wide approach to claims implementation and to resolve disputes between the parties in a manner that would provide accountability and monitoring of the parties' obligations to these important and historical agreements."[86] At that meeting, members of the Land Claims Agreements Coalition called on the Government of Canada to develop a new land claims implementation policy, based on four key points:

- First, a recognition that the Crown in right of Canada, not the Department of Indian and Northern Affairs Canada, is party to land claims agreements and self-government agreements.

- Second, there must be a federal commitment to achieve the broad objectives of the lands claims agreements and self-government agreements within the context of the new relationships as opposed to mere technical compliance with narrowly-defined obligations. This must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.

- Third, implementation must be handled by appropriate senior-level federal officials representing the entire Canadian government.

- Fourth, there must be an independent implementation and review body separate from the Department of Indian and Northern Affairs Canada, INAC. This could be the Auditor General's department or a similar office reporting directly to Parliament.

In 2005, the Land Claims Agreements Coalition elaborated on these "4 Points" and set out an additional "10 Fundamental Principles" to anchor a new land claims implementation policy. The document, which has become known as the "LCAC Four-Ten" is appended to this report. Together, these would provide a framework to "achieve in full measure, the letter, spirit, intent and lasting objectives of modern land claims agreements with the federal Crown."[87]

[86] Inuvialuit submission, p.4.
[87] Land Claims Agreements Coalition, *Discussion Paper*.

In our view, a significant reason for the failure of current federal implementation practices has to do with the developing law on Aboriginal rights. Based on the evidence before this Committee, we believe that the principles articulated by the Supreme Court of Canada in landmark section 35 cases dealing with Aboriginal and treaty rights, and acknowledged by the Coalition's "Ten Principles", are still not adequately reflected in the application of government practices and policies in this regard. Concepts such as the honour of the Crown, the government's fiduciary relationship to Aboriginal peoples and the constitutional affirmation and protection of Aboriginal and treaty rights deserve a more meaningful expression. As this has yet to happen, government continues to take a narrow view of what is required to fulfil its responsibilities under land claims agreements.

The Committee has carefully considered the Land Claims Agreements Coalition's proposed principles and points, and we conclude that as long as these fundamental issues are ignored or set aside, implementation problems will persist. For this reason, members of the Committee do not share the Deputy Minister's view that an implementation policy is not as important as "feedback and accountability measures that keep people on track."[88] Nor are we confident that the administrative solutions put forward by federal officials - which include proposals for a renewed management framework and streamlined funding process - can adequately address these issues. Such measures, we believe, will only leave more critical questions to be dealt with later. On this point, we agree with John Merritt, who told the Committee:

> Modest administrative changes will not solve central political, policy and fiscal problems. For example, they will not change the situation identified by Deputy Minister Wernick back in February who told you he cannot compel anyone outside DIAND to implement land claims agreements.[89]

The Committee is of the firm opinion that until, and unless, there is a fundamental, attitudinal shift, neither the federal government nor Aboriginal signatories will achieve the shared objectives set out in these agreements. Accordingly, we believe the connection between implementation of comprehensive land claims agreements and the constitutional

[88] *Evidence*, 12 February 2008.
[89] *Evidence*, 2 April 2008.

principles governing Aboriginal and treaty rights, as well as recognition of the political relationship between Aboriginal peoples and the Crown, must be given a more meaningful expression in practice.

In addition, Committee members have expressed deep concern with the rigid and inflexible positions concerning the use of arbitration and the determination of implementation funding. We find these positions have led government to unilaterally define implementation practices in a restrictive manner, rendering arbitration provisions "toothless tigers". We do not feel that a single party to an agreement should have the unilateral discretion to effectively bar issues from being referred to arbitration. A new federal land claims implementation policy, therefore, must also establish clear guidelines for the use of arbitration to preclude open-ended impasses. We cannot underscore enough that the federal practice of consistently refusing to refer matters to arbitration should not be tolerated and that such practices, in our view, are not in keeping with the honour of the Crown.

Guidelines for adequate and stable funding of implementation obligations and objectives are also clearly required. The evidence in this respect is troublesome and suggests that once having concluded a modern treaty, government is far less inclined to invest in its proper implementation.

The Committee further finds that matters to be addressed by a new land claims implementation policy should reflect the nine points set out by NTI in their submission to this Committee. These include, for example, commitments to ensure government officials have appropriate mandates to comply with obligations and bring a coordinated approach to their implementation, that results should be measured against stated objectives, that structural barriers in the budgetary system are addressed, and acknowledgement that treaties are with the Crown and treated as such. A policy that addresses these matters seems imminently reasonable to us. We append NTI's nine points to our report.

Based on the evidence before this Committee, we find that without a fundamental reassessment of current federal implementation practices, and a political commitment to amend these practices through a new land claims implementation policy, the inevitable consequence will be to perpetuate the inadequate attempts at implementation we see today. Accordingly, this Committee recommends that:

RECOMMENDATION #1

The Government of Canada abandon its practice of systematically refusing to consent to arbitration and, 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 endorsed by the members of the Land Claims Agreement Coalition, and to include:

- **Clear and enforceable directives, that include firm time limits to compel the parties' use of arbitration under comprehensive land claims agreements; and that these directives be applied in connection to all matters eligible for arbitration, and in particular, financial matters; and,**

- **Clear and enforceable directives to ensure funding is delivered to Aboriginal signatories within specific time limits, and that it is: (i) fully consistent with the terms of the agreements and (ii) adequate to satisfy all requirements of the Implementation Plans.**

II. Need for Institutional Reforms

Since the signing of the first modern treaty in 1975, the federal government has not established any significant new structures or mechanisms to ensure that treaty provisions are effectively carried out. Nor, it appears, was it sufficiently prepared for the costs of implementing these agreements. Our findings on this matter are not new. In 1985, the *Task Force to Review Comprehensive Claims Policy* found that:

> After the signing of treaties or recent claims agreements, the federal government, lacking a strategy or structure for implementing the terms, often has failed to meet either the spirit or letter of its commitments. Little

> consideration has been given to the administrative and other costs of implementation.[90]

The Land Claims Agreements Coalition as well as the individual signatories to land claims agreements noted that institutional changes are required if their Agreements are to be properly implemented. For several reasons, witnesses did not see the Department of Indian Affairs and Northern Development as the most appropriate institution to properly implement treaties. This view is based, in part, on the Department's apparent difficulty in coordinating federal obligations and securing the compliance of other federal departments with respect to Canada's obligations pursuant to these agreements. The Nisga'a remarked that:

> Currently, a great part of the frustration that the NisÞa'a have felt in implementing our Treaty is the lack of clout the Department of Indian Affairs and Northern Development appears to have with the other federal departments. Even when the Department is trying its hardest and doing its best to bring about the objectives of the agreement, it is often frustrated when it arrives at other departments to find that it has insufficient clout with those other departments. The other departments consider it to be the Department of Indian and Northern Affair's agreement and not theirs. In this way, they fail to acknowledge our nation-to-nation relationship with Canada, something that we fought so hard to achieve through the negotiation of our Treaty.[91]

The inclination of departmental officials to approach treaty implementation as a discretionary policy matter is also a source of ongoing frustration to signatory nations and is reflected in concerns over the manner in which implementation funding is determined and secured. The Cree Naskapi Commission has commented extensively on these issues over the years:

> Indian Affairs ... see the implementation of treaty provisions as an aspect of Indian Affairs policy. As a policy, it can, of course, vary according to budgetary and other considerations. So the act of implementing treaty provisions is seen as essentially similar to other policy-making, priority-setting and program-management functions of the government ... The

[90] Canada, Report of the Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements*, Ottawa, 1985, p. 94.
[91] *Evidence*, 27 February 2008.

> problem is that governments have consistently failed to understand that treaty obligations are enforceable, that there are rules for interpreting them and they cannot be juggled with competing "policy options".[92]

Although the Department has a mandate to implement treaties on behalf of Canada, Aboriginal witnesses felt that its limitations as a line department have compromised the ability of the Government of Canada to meet its legal obligations, and ultimately, to uphold the honour of the Crown. Kevin McKay stated that:

> Our treaties are with the Government of Canada, but, when federal agencies ignore their obligations under our Agreements, who can hold them accountable? Until someone is in charge and accepts responsibility for implementation, the objectives of our agreement won't be attained and the honour of the Crown won't be upheld.

Witnesses also felt strongly that the Department of Indian Affairs and Northern Development has, at best sought to minimize, and more routinely ignored, the fundamental objectives of their Agreements. This view is supported by the findings of the Auditor General who stated that:

> INAC officials have said that they do not view it as the Department's responsibility to achieve the basic goals of the Agreement, describing them as Inuvialuit goals, not Canada's. They stated that the Agreement obliges them neither to achieve these goals nor measure progress toward them.[93]

To address these implementation challenges, signatories indicated that an independent agency, outside the Department of Indian Affairs and Northern Development, with the authority to review and oversee the implementation and the fulfilment of Canada's obligations under modern land claims agreements, was required. This institutional reform appears even more relevant because of federal reluctance to refer impasses to arbitration.

[92] Cree Naskapi Commission, *1998 Report of the Cree-Naskapi Commission*, 1998, pp. 4-6.
[93] October 2007 report of the Auditor General.

Recommendations for an independent body or tribunal to deal with modern treaty implementation issues have been advanced in past inquiries examining these issues. In February 2000, this Committee recommended that:

> A new Office of Aboriginal Relations be established through legislation by the federal government to assume responsibilities for negotiating and implementing relationships with all Aboriginal peoples. This office should be located outside the Department of Indian Affairs and Northern Development. The Committee further recommends this Office be organized with two distinct and separate units: a Treaty and Agreements Negotiations Division and a Treaty and Agreements Implementation Secretariat.[94]

In 1985, the report of the *Task Force to Review Comprehensive Claims Policy* recommended there be a Commissioner for Aboriginal Land Claims Agreements to monitor the effectiveness of implementation.

The 1996 *Report of the Royal Commission on Aboriginal Peoples* dealt extensively with the need to restructure Aboriginal-Crown relations. The Commission concluded that the Department of Indian Affairs and Northern Development could not contribute to the development of a sound foundation within the Government of Canada for the new relationships envisioned.[95] The Report went on to state that because treaties are not self-implementing, there exists a need for institutional arrangements to "prevent the erosion of confidence in the foundations of the new relationship."[96] The Commission recommended

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[94] Standing Senate Committee on Aboriginal Peoples, *Forging New Relationships: Aboriginal Governance in Canada*, February 2000.

[95] RCAP recommendations included dismantling the Department of Indian Affairs and Northern Development and creating two new departments: one, a Department of Aboriginal Relations to discharge responsibilities pertaining to the negotiation and implementation of treaties, self-government, claims and related agreements, and the second, a Department of Indian and Inuit Services to manage residual relationships based on the *Indian Act*, other federal legislation and program and service delivery arrangements. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples Volume 2: Restructuring the Relationship*, 1996, pp. 354-355 and 364.

[96] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples Volume 2: Restructuring the Relationship*, 1996, Part 4, p. 591.

the creation of a tribunal, by federal statute, whose jurisdiction would include, among other things, reviewing the adequacy of federal funding to Aboriginal parties.

In 1999, the United Nations Special Rapporteur on the Human Rights of Indigenous Peoples, Miguel Alfonso Martinez, wrote that within states with sizeable indigenous populations, there should be an entirely new, special jurisdiction to deal exclusively with indigenous issues, independent of existing governmental structures. This new jurisdiction would gradually replace the existing government branches now in charge of these issues. According to the Special Rapporteur, one the principal branches of this new jurisdiction would be:

> An advisory conflict resolution body to which all disputes, *including those relating to treaty implementation*, arising between indigenous and non-indigenous individuals, entities and institutions (including government institutions) should be mandatorily submitted, and which would be empowered to encourage and conduct negotiations between the interested parties and to issue the recommendations considered pertinent to resolve the controversy.[97] [Emphasis Added]

In New Zealand, the Waitangi Tribunal, established by legislation in 1975, adjudicates claims arising from the Treaty of Waitangi. Its decisions are not binding on the parties, but rather are recommendations made to the Minister of Maori Affairs and cabinet. Government is free to accept or reject the recommendations of the Tribunal and claimants must use political and societal pressure to ensure that recommendations are acted upon by government.

[97] United Nations, Economic and Social Council, Commission on Human Rights, *Human Rights of Indigenous Peoples*, Final Report by Miguel Alfonso Martinez, Special Rapporteur, June 1999, par. 307-308.

The Land Claims Agreements Coalition and individual signatories have put forward two recommendations for institutional reform to address ongoing implementation challenges. They are:

- The establishment of an independent treaty commission, to be established by statute and perhaps housed in the Office of the Auditor General of Canada, to audit and review implementation of agreements.

- The establishment of a secretariat or "Bureau of Modern Treaties" within government, for example the Privy Council Office, to ensure that the federal government takes a co-ordinated perspective in fulfilling the Crown's modern day treaty responsibilities.

The Committee has carefully considered these proposals and we have sought to ensure that recommendations requiring machinery of government changes are appropriate and will be effective in ensuring progress toward the full and proper implementation of land claims agreements.

We are not persuaded that establishing an independent agency within the Office of the Auditor General of Canada to oversee the implementation of modern land claims agreements, should it be given a similar mandate, is the most appropriate model. We find it would duplicate, to a great extent, the role of the Auditor General. The Auditor General currently reports annually to Parliament on various matters concerning federal activities with respect to First Nations issues. These performance audits are invaluable in assisting parliamentarians examine government activities and hold it to account for its actions. We appreciate, however, that the focus of these audits is not solely on treaty implementation matters and that the Auditor General routinely examines a range of federal programs and services targeted to First Nations. Recognizing this limitation, the **Committee strongly urges the Auditor General of Canada to undertake annual audits of federal responsibilities regarding the implementation of comprehensive land claims agreements.**

We do not feel, however, that another agency, reporting directly to Parliament, will have the necessary influence among government departments and central agencies required to

achieve practical results. In our view, any independent body which would oversee matters respecting the implementation of modern treaties should be able to make the kinds of recommendations that fall outside the mandate of the Auditor General of Canada. The Auditor General looks primarily at administrative issues and whether federal programs are delivered in compliance with established policies, whether these are managed efficiently and if appropriate systems are in place to measure and report on program effectiveness. The Auditor General, however, does not comment on policy matters, nor does it recommend changes to legislation or the appropriate allocation of resources. Thus, by their very nature, performance audits can not cover the full scope of issues relating to the implementation of comprehensive land claims agreements.

That said, however, the Committee is strongly convinced of the need for a neutral, independent body to monitor and oversee the implementation of comprehensive land claims agreements. We are aware that creating new structures is always a difficult task, but no less is required to ensure the persistent challenges regarding treaty implementation are properly addressed. Such a body, in our view, must have the authority to oversee all implementation matters, including financial matters, and make recommendations to the parties. This body would submit its recommendations directly to the Minister of Indian Affairs and Northern Development and to cabinet as well as the signatory nations to the Agreements. However, because the proper implementation of land claims agreements are matters of significant national interest, it would also submit annual reports to Parliament. These reports would be reviewed by the appropriate committee of each House of Parliament.

The Committee notes that an important factor contributing to the measure of success enjoyed by the Waitangi Tribunal rests with its credibility. For this reason, we strongly believe this body should be chaired by a high-ranking official and that it should be staffed with experts in this area, including, equal Aboriginal representation.

The Committee believes that modern land claims agreements are fundamental to the renewed relationship between the Crown and Aboriginal peoples. The full and proper

implementation of these Agreements is a matter of significant national interest, benefiting all Canadians. The settlement of these Agreements engenders a great deal of hope and optimism for a brighter future for Aboriginal Canadians. They also bring greater certainty and economic benefits to Canada as a whole. In light of the ongoing challenges in the implementation of these Agreements and the need for better institutional structures to deal with these challenges, the Committee recommends:

RECOMMENDATION #2

That the Government of Canada, in collaboration with the Lands Claims Agreements Coalition and its present and future members, take immediate steps to establish an independent body, through legislation, such as a Modern Treaty Commission, to oversee the implementation of comprehensive land claims agreements, including financial matters.

That the mandate of the Commission be developed jointly with the Land Claims Agreements Coalition and its members.

The Committee is also convinced that a coordinating body within government is essential. As a line department, DIAND is limited in its ability and authority to coordinate implementation obligations on behalf of the federal government. Moreover, given the sheer volume of activities undertaken by the Department, the Implementation Branch must not only seek the engagement of other government departments, but must also compete with other priorities within its own Department. Richard Van Loon commented that: "Claims settlements and claims are only part of [DIAND's] responsibilities, and claimant groups are a minority of Aboriginal people."[98]

However, we are strongly of the view that DIAND is currently ill-equipped, in terms of its authority, to ensure government coordination of its obligations under land claims agreements. On this point, the Committee respectfully disagrees with the statements made by Michel Roy, Senior Assistant Deputy Minister, Claims and Indian Government, Department of Indian Affairs and Northern Development, that the Department of Indian and Northern Affairs is "well positioned to provide ongoing leadership with respect to implementation" and that "INAC is well positioned to implement the agreements"[99]. In fact, this Committee finds there is ample evidence to dispute these statements.

[98] *Evidence*, 9 April 2008.
[99] *Evidence*, 1 April 2008.

A central agency, such as the Privy Council Office or Treasury Board Secretariat, would, at least in theory, be more appropriate in terms of its authorities and leverage with other federal departments, to overcome the limitations currently facing the Department in coordinating federal treaty obligations. The Committee acknowledges that a significant disadvantage of this approach is that it requires a central agency, which delivers no programs, to "run a program". Richard Van Loon, in his testimony, stated emphatically that: "The machinery of government does not make that kind of use of Privy Council Office. I can understand its appeal from outside, but it is a concept which will not have any traction in government."[100]

The Committee has reflected extensively on whether a coordinating secretariat would be best placed within the Privy Council Office. The fact, however, that PCO officials did not accept our invitation to appear before the Committee on this issue suggests to us that these matters are not a priority for the agency, and will likely remain a low priority until there is explicit political direction.

The Committee is faced with the following dilemma: the Department of Indian Affairs and Northern Development, as the federal lead on implementation matters, appears to lack the necessary authority to ensure the effective coordination of federal responsibilities. On the other hand, central agencies, such as the Privy Council Office, which do have authority to command the attention of federal departments, may not accept that this responsibility falls within their mandates.

Having considered the evidence before us, we conclude that whichever approach is ultimately adopted to ensure the effective coordination of federal treaty obligations within government, it must incorporate sufficient authority to secure the compliance of all government departments in meeting federal commitments under land claims agreements, including financial obligations. The Committee anticipates that this responsibility will ultimately be assumed by the Modern Treaty Commission. Until this transition occurs, however, the Committee recommends that:

[100] *Evidence*, 9 April 2008.

RECOMMENDATION #3

The Clerk of the Privy Council take immediate steps to establish a senior level working group, to include officials from Treasury Board Secretariat, the Privy Council Office and Department of Finance, and senior officials from the Department of Indian Affairs and Northern Development and all other departments and agencies with treaty-related responsibilities, to revisit the authorities, roles, responsibilities and capacities respecting the coordination of federal obligations under comprehensive land claims agreements, with a view to establishing clear guidelines identifying:

- **Respective roles and responsibilities for coordinating federal obligations under comprehensive land claims agreements;**
- **The manner in which government departments will participate in the treaty implementation process;**
- **The provision of central agency direction, guidance and support in assisting federal departments meet Government of Canada treaty obligations;**
- **The development of a government-wide strategy for monitoring and reporting on federal implementation obligations;**
- **The development of transparent, flexible, and timely funding processes and fiscal planning procedures, in accordance with a formal program management process, to support the spirit and intent of the terms and conditions of Agreements; and**
- **The development of a formal education and training program for federal officials with responsibilities for treaty implementation.**

The Clerk of the Privy Council table these guidelines with this Committee by March 31, 2009.

With respect to implementation funding, the evidence before the Committee on this issue is of significant concern to us. We are deeply troubled that the scope and substance of negotiated treaty rights may be minimized through inadequate implementation funding. We are persuaded that there is a disincentive among federal officials and central agencies to fund treaties beyond the technical, legal obligations. While these practices may not, strictly speaking, breach treaty obligations, we find they are inconsistent with the honourable purpose of treaty-making.

Treaty-making and treaty implementation are not separate concepts. Both engage the honour of the Crown. The operative test, as John Merritt, pointed out must not be "what minimal investments can the government make to avoid being sued". Rather, the controlling question, in the Committee's view, and as stated by the Supreme Court of Canada must be "what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal Peoples with respect to the interests at stake."[101] We find the government's approach, rather than advancing the "interests at stake" uses its discretionary funding power to restrict them.

In our view, the lack of political engagement at senior ministerial levels in negotiating implementation funding is a critical deficiency. Federal funding of implementation obligations is managed as another departmental program. Officials go cap-in-hand to central agencies for modest increases in their "program budgets". This approach seems to us to represent a failure to understand the purpose of treaty-making and treaty-implementation. Treaties are with the Crown and not with any one department. They are nation-to-nation agreements and cannot be treated as another departmental program line item. As such the executive branch of government must be fully engaged, not only in the negotiation of modern treaties, but in their implementation as well.

Where this has occurred, the results have been positive. For example, following long-standing implementation conflicts, in 2007, the Government of Canada and the Quebec

[101] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, par.62.

Cree came to an agreement respecting the implementation of federal obligations. *The Agreement Concerning a New Relationship between the Government of Canada and the Cree of Eeyou Istchee* includes a financial package of up to $1.4 billion to facilitate the implementation of Canada's obligations under the 1975 *James Bay and Northern Quebec Agreement*.[102] Of particular interest to this Committee was the appointment of a Mr. Raymond Chrètien to act as Chief Federal Negotiator. Essentially, this elevated negotiations to the political level, while still engaging the bureaucracy. Mr. Chrètien spoke to us of this two-pronged approach. He stated that "direct communications with the politicians, especially the Minister" were held but "also with PCO and occasionally with the PMO, while working with the bureaucracy."[103]

The Committee notes that resolution of the implementation of federal obligations under the JBNQA occurred within a unique context. The JBNQA, as the first modern treaty, did not provide for implementation plans or dispute resolution processes. However, we are convinced that where there is political will, commitment and engagement, advances in resolving impasses and other implementation matters are more likely. The political engagement and recognition of the Ministers of the Crown is necessary, in our view, to ensure that Canada upholds its obligations. Accordingly, the Committee recommends that:

[102] The new agreement resolves long-standing disputes and court proceedings related to the implementation of the JBNQA, and secures agreement between Canada and the Crees on the manner for implementing certain of Canada's JBNQA obligations for the next 20 years.

[103] *Evidence*, 12 March 2008.

RECOMMENDATION #4

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, reporting directly to the Minister of Indian Affairs and Northern Development.

CONCLUDING REMARKS

Signatory nations to comprehensive land claims agreements have every right to expect their treaties will be respected and the commitments made therein will be honoured. All Canadians, Aboriginal and non-Aboriginal alike, have the right to expect that when the Government of Canada makes solemn commitments, it will, in good faith, keep its promises.

We find, however, that the continuing challenges related to the implementation of modern treaties have meant that the achievement these Agreements represent has often been overshadowed. Failure to fully implement modern treaties and to honour their spirit and intent is, as Justice Binnie remarked in *Mikisew Cree First Nation v. Canada*, "as destructive of the process of reconciliation as some of the larger and more explosive controversies." [104] Clearly another approach to implementation is required. In the words of Tony Penikett:

> These treaties, which are appended to the Constitution as expressions of section 35 rights, represent enormous nation-building achievements for Canada. However, failure to faithfully implement the provisions of these treaties as negotiated puts Canada at risk of generating new legends of broken promises for our country. This is not a trivial matter.[105]

We could not agree more.

[104] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, par.1.

[105] *Evidence*, 2 April 2008.

Appendix A

List of Comprehensive Land Claims Agreements

- James Bay and Northern Quebec Agreement (1975) and Northeastern Quebec (1978);
- Inuvialuit Final Agreement, western Arctic (1984);
- Gwich'in Agreement, northwestern portion of the Northwest Territories and "primary use area" in Yukon (1992);
- Nunavut Land Claims Agreement, eastern Arctic (1993);
- Eleven Yukon First Nation Final Agreements through 2005, based on the Council for Yukon Indians Umbrella Final Agreement (1993);
- Sahtu Dene and Métis Agreement, Mackenzie Valley, Northwest Territories (1994);
- Nisga' Nass Valley, northern British Columbia (2000).
- Tlicho Agreement, North Slave region, Northwest Territories (2003); and
- Labrador Inuit Agreement, Labrador and Newfoundland (2005);
- Nunavuk Inuit Land Claims Agreement, northeastern Quebec (2008).

Appendix B

Land Claims Agreement Coalition Four-Ten Declaration

LCAC "4 Points":

1. recognition that the crown in right of Canada, not the Department of Indian affairs and Northern Development, is party to our land claims agreements and self-government agreements.

2. there must be a federal commitment to achieve the broad objectives of the land claims agreements and self-government agreements within the context of the new relationships, as opposed to mere technical compliance with narrowly defined obligations. this must include, but not be limited to, ensuring adequate funding to achieve these objectives and obligations.

3. Implementation must be handled by appropriate senior level federal officials representing the entire Canadian government.

4. there must be an independent implementation and review body, separate from the Department of Indian affairs and Northern Development. this could be the auditor General's department, or a similar office reporting directly to Parliament. annual reports will be prepared by this office, in consultation with Groups with land claims agreements.

LCAC "10 Fundamental Principles":

A new land claims implementation policy must be situated in the following context:

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.

2. "[t]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35 (1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."

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

4. relations between the crown and aboriginal peoples have been and will always be manifested in a wide variety of political and legal arrangements and instruments. No single political or legal arrangement or instrument can be said to comprehensively express the dimensions, in breadth, depth or time, of the ongoing and evolving relationship that connects the crown and an aboriginal people.

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."

6. among the key political and legal instruments that affirm the relationship between the crown and aboriginal people are modern land claims agreements, and ancillary agreements such as implementation and self-government agreements that attach to or follow from land claims agreements.

7. modern land claims agreements, which give rise to treaty rights, are multifaceted, 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. "where treaties remain to be concluded, the honour of the crown requires negotiations *leading to a just settlement of Aboriginal claims."*

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. "the situation of the aboriginal peoples remains the most pressing human rights issue facing canadians… [t]he practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the [International] covenant [on civil and Political rights]."

Appendix C

Nunavut Tunnagivik Incorporated: nine points for a new land claims agreements implementation policy

1. Acknowledges that modern treaties are solemn, constitutional documents and that the honour of the Crown demands that they be fully and comprehensively implemented;

2. Acknowledges that modern treaties are between Aboriginal signatories and the Crown, not the Department of Indian Affairs and Northern Development, and commits all agencies of the Government of Canada to comply with them;
3. Commits the Government of Canada to efficient and effective interdepartmental and intergovernmental co-ordination to implement modern treaties;

4. Accepts the recommendations of the Auditor General of Canada that implementation ensure that results are measured against stated objectives;

5. Ensures that senior representatives of the Government of Canada, with clear mandates and authority bring co-ordinated, government-wide perspectives to modern treaty implementation;

6. Commits to incorporate the recommendations of independent reviews into the work of implementation panels and committees;

7. Commits to remove structural and procedural barriers in the budgetary system of the Government of Canada which impede full implementation;

8. Commits to resolving disputes, including those of a financial nature, through mediation, joint research, external legal opinions, joint information gathering, monitoring and arbitration; and

9. Promotes implementation of modern treaties to achieve social, economic, cultural and environmental policy objectives.

Appendix D

List Of Witnesses And Briefs

Agency and Spokesperson	Meeting Date	Brief
Representatives of the Land Claims Agreements Coalition **Nisga'a Nation** • Kevin McKay, Executive Chairperson • Jim Aldridge, Legal Counsel **Nunavut Tunngavik Inc.** • Joe Kunuk, CEO • John Merritt, Constitutional and Legislative Advisor • Udlu Hanson, Senior Policy Liaison	04.12.2007	X
Office of the Auditor General of Canada • Sheila Fraser, Auditor General of Canada • Ronald Campbell, Assistant Auditor General • Frank Barrett, Principal	11.12.2007	
Department of Indian Affairs and Northern Development • Michael Wernick, Deputy Minister • Terry Sewell, Director General, Implementation Branch, Claims and Indian Government • Michel Roy, Assistant Deputy Minister, Claims and Indian Government	12.02.2008	

Vuntut Gwitchin First Nation • Joe Linklater, Chief **Ta'an Kwach'an Council** • Ruth Massie, Chief **Champagne & Aishihik First Nations** • Fran Asp, Senior Official for Intergovernmental Affairs **Yukon Self Governing First Nations** • Albert Peter, Senior Official for Intergovernmental Affairs	13.02.2008	
Nunavut Tunngavik Inc. • James Eetoolook, Acting President • Alastair Campbell, Senior Policy Advisor • Terry Fenge, Consultant **Grand Council of the Crees** • Brian Craig, Director of Federal Relations • Bill Namagoose, Executive Director	26.02.2008	X
Nisga'a Lisims Government • Kevin McKay, Chairperson	27.02.2008	
PricewaterhouseCoopers • Joanne Johnson, Director - Advisory Services • Roxanne L. Anderson, Partner - Advisory Services	05.03.2008	
As individuals • Raymond Chrétien, Partner and Strategic Advisor - Fasken, Martineau, DuMoulin LLP • Anne Drost, Partner - Fasken, Martineau, DuMoulin LLP	12.03.2008	

Department of Indian Affairs and Northern Development • Mavis Dellert, Acting Director General, Implementation Branch • Michel Roy, Senior Assistant Deputy Minister, Claims and Indian Government **Finance Canada** • Yves Giroux, Director, Social Policy, Federal-Provincial Relations and Social Policy Branch • Greg Gallo, Chief, Aboriginal Policy, Social Policy **Treasury Board of Canada, Secretariat** • Bruno Jean, Principal Analyst, Indian Affairs and Health, Social and Cultural Sector **Public Works and Government Services Canada** • Pat Gibson, Director, Acquisition Policy & Process Directorate • Sue Morgan, Director General, Risk, Integrity and Strategic Management **Parks Canada Agency** • Brendan O'Donnell, Senior Advisor, Aboriginal Affairs • Doug C Stewart, Director General, National Parks • Peter Larivière, Aboriginal Policy and Negotiations Advisor **Fisheries and Oceans Canada** • Ian Redmond, Chief, Special Projects, Aboriginal Policy and Governance Directorate	01.04.2008	

Nisga'a Nation • Jim Aldridge, Legal Counsel **Nunavut Tunngavik Inc.** • John Merritt, Constitutional and Legislative Advisor **As an individual** • Tony Penikett	02.04.2008	
As an individual • Richard Van Loon	09.04.2008	
Inuvialuit Regional Corporation		X
Gwich'in Tribal Council		X