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# **International Convention on the Elimination of All Forms of Racial Discrimination**

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**Interim Report in follow-up to the review of  
Canada's Seventeenth and Eighteenth Reports**

**July 2009**

## Introduction

1. On February 20 to 21, 2007, Canada appeared before the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD) for the review of its combined Seventeenth and Eighteenth Reports on the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). In its concluding observations following the review, the UN Committee asked Canada to submit, within one year, information with respect to four of its recommendations (in paragraphs 14, 21, 22 and 26). The Committee subsequently requested additional information, which is also provided herein.

**Recommendation 14:** *While acknowledging the State party's national security concerns, the Committee underlines the obligation of the State party to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin. The Committee urges the State party to continue to review existing national security measures, and to ensure that individuals are not targeted on the ground of race or ethnicity. The Committee also recommends that the State party undertake sensitisation campaigns to protect persons and groups from stereotypes associating them with terrorism. The Committee further recommends that the State party consider amending the Anti-terrorism Act to include an explicit anti-discrimination clause.*

## National Security Measures and the Anti-terrorism Act

2. Canada's law enforcement and security intelligence professionals investigate threats to national security and criminality and do not target any community, group, or faith. Canada does not agree that the *Anti-terrorism Act* (ATA) should contain a specific anti-discrimination clause. The Act in its content and application is subject to the constitutional prohibition against discrimination set out in the Canadian *Charter of Rights and Freedoms*.
3. The ATA has undergone a mandatory parliamentary review in accordance with section 145 of the Act. The review was carried out by two Parliamentary committees. The Special Senate Committee on the Anti-terrorism Act tabled its report, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, on February 22, 2007.<sup>1</sup> The House of Commons Subcommittee on Public Safety and National Security tabled its final report, *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act*

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<sup>1</sup> Available online at: <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm#PDF%20FORMAT>. The Special Senate Committee also issued a supplementary report in March 2007 that commented on the Supreme Court of Canada's *Charkaoui* decision and the immigration security certificate process. It is available online at: <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep04mar07-e.htm>.

*and Related Issues*, on March 27, 2007.<sup>2</sup> The Government of Canada tabled its response to the findings of the House of Commons Subcommittee on July 18, 2007.<sup>3</sup> The Special Senate Committee did not request a response.

4. As discussed in Canada's Seventeenth and Eighteenth Reports on the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the ATA provides a detailed two-part definition of "terrorist activity" in section 83.01(1) of the *Criminal Code*, which applies to activities inside or outside Canada. Satisfying either part of the definition constitutes a "terrorist activity." The stand-alone or general definition of "terrorist activity" in s. 83.01(1)(b) defines "terrorist activity" to include acts or omissions committed in whole or in part, "for a political, religious, or ideological purpose, objective or cause" in addition to other requirements. Court cases are divided as to whether this motive requirement is constitutional.<sup>4</sup>
5. In their reports on the review of the ATA, the two Parliamentary committees differed as to whether this motive element should continue to be part of the definition of "terrorist activity." The Special Senate Committee concurred with certain witnesses who claimed that requiring the police to examine motive, and prosecutors to prove that a terrorist act or omission has been undertaken for a political, religious or ideological purpose, objective or cause, may unwittingly target some segments of Canada's population and encourage racial and religious profiling during investigations. It therefore recommended that this motive element be removed from the definition.
6. The House of Commons Subcommittee indicated that, to sever the motive element from the definition would result in the Crown having one less element of the criminal offence to prove beyond a reasonable doubt, thereby removing a safeguard that is built into the definition. The Subcommittee consequently recommended that the motive element of the definition of the "terrorist activity" be retained. The Government of Canada concurs with the Subcommittee recommendation but may reconsider the definition of "terrorist activity" in light of judicial assessment once litigation in relation to the motive requirement has been decided by the courts.
7. While the issue of whether a non-discrimination clause should be inserted into the legislation was raised by some witnesses before both committees reviewing the ATA, neither committee made a specific recommendation to that effect. However, both Parliamentary committees have expressed concern over the issue of racial profiling and discrimination. The Special Senate Committee made

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<sup>2</sup> Available online at:

<http://www2.parl.gc.ca/content/hoc/Committee/391/SECU/Reports/RP2798914/sterrp07/sterrp07-e.pdf>.

<sup>3</sup> Available online at:

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066235&Language=E&Mode=1&Parl=39&Ses=1>.

<sup>4</sup> For example, *R. v. Khawaja*, [2006] O.J. No. 4245 held that the motive requirement was unconstitutional, while *United States v. Nadarajah*, 2009 CanLII 9482 and *R. c. Namouh*, 2009 QCCQ 5833 upheld the constitutionality of the requirement.

recommendations in this regard, whereas the House of Commons Subcommittee did not.

8. The Government of Canada believes that domestic laws, most notably the *Canadian Charter of Rights and Freedoms* and the *Canadian Human Rights Act*, already provide a range of legislative measures to prohibit discrimination based on race, colour, religion, ethnic origin and other grounds, in all government activity. The Government is also carrying on work in relation to the issue of racial profiling, and is committed to furthering the goal of non-discrimination whether through legislative or non-legislative measures.

### **Sensitization campaigns**

9. The Government of Canada's national police service and security intelligence professionals are committed to unbiased and respectful treatment of all people, while ensuring the safety and security of Canada and Canadians.
10. Under the "Bias-Free Policing" strategy, bias-free policing means equitable treatment of all persons by employees of the national police service in the performance of their duties, in accordance with the law and without abusing their authority regardless of an individual's race, national or ethnic origin, color, religion, gender, sexual orientation, marital status, age, mental or physical disability, citizenship, family status, socio-economic status, or a conviction for which a pardon has been granted. This strategy has been introduced in the Royal Canadian Mounted Police training academy and diversity training continues to be integrated into its field coaching program. This training will continue into the supervisor and manager development programs and at the Executive Officer Development level for all employees within the national police service.
11. Additionally, intelligence officers receive cultural diversity training in order that they may understand and appreciate the different cultural environments in which they operate.
12. The Cross-Cultural Roundtable on Security, created in 2005, engages Canadians and the Government of Canada in an ongoing dialogue on national security in a diverse and pluralistic society. The Roundtable:
  - Provides insights on how national security measures may impact Canada's diverse communities;
  - Promotes the protection of civil order, mutual respect and common understanding; and
  - Facilitates a broad exchange of information between the government and communities on the impact of national security issues consistent with Canadian rights and responsibilities.

13. The Roundtable's membership includes men and women from many different ethnic, racial, cultural and religious backgrounds. It meets formally two to four times a year. To date, twelve formal meetings have been held. During their meetings, Roundtable members have an opportunity to hear from senior officials and policy-makers from the Departments of Public Safety and Department of Justice, as well as representatives from other federal departments and agencies, on a wide variety issues.
14. Roundtable members are informed, and are often consulted, on the development of new policies and programs related to national security. They have, for instance, examined and contributed to a number of policy and program areas including: border, marine, and airport security, transportation security, cultural and sensitivity training, the review of the *Anti-terrorism Act*, security certificates, hate-crime, radicalization, and the financing of terrorism and organized crime.
15. Roundtable members also facilitate engagement with Canadians through their own outreach efforts, as well as by participating in activities organized by, and involving, Government of Canada officials. For instance, in 2009, Roundtable members participated in information sessions organized with newcomers to Canada in Fredericton, New Brunswick, and Calgary, Alberta, and also engaged with youth in a dialogue on radicalization leading to violence.
16. The Government of Canada also undertakes sensitization activities related to racism and racial discrimination that impact on the protection of ethnocultural and ethnoracial communities from prejudice and stereotypes. For example, under *Canada's Action Plan against Racism* described in the Canada's Seventeenth and Eighteenth ICERD Reports, in 2006-2007 the Government's Justice Partnership and Innovation Program funded a number of anti-racism projects, including a project organized by the National Anti-Racism Council of Canada, which brought together participants to discuss, review and develop strategies to address the overrepresentation of Aboriginal peoples and people of African and Asian descent in the criminal justice system.
17. Relevant initiatives undertaken by provincial and territorial governments include:
  - An Aboriginal Awareness Course in New Brunswick;
  - A Government of Quebec policy entitled *La diversité : une valeur ajoutée* [Diversity: An Added Value] that promotes participation of all in Quebec's development and sets out measures against racism and racial discrimination, including awareness campaigns aiming at recognizing and combating prejudice, stereotypes and discriminatory practices;
  - A series of youth-led workshops, supported by the Government of British Columbia, explored concepts of race and racism, and challenged notions of terrorism.

18. In addition, federal, provincial and territorial human rights commissions, established under their respective human rights legislation, work to prevent discrimination by undertaking human rights education and promotional activities.

**Recommendation 21:** *In light of article 5 e) and of general recommendation 23 (1997) on the rights of indigenous peoples, the Committee urges the State party to allocate sufficient resources to remove the obstacles that prevent the enjoyment of economic, social and cultural rights by Aboriginal peoples. The Committee also once again requests that the State party provide information on limitations imposed on the use by Aboriginal people of their land, in its next periodic report, and that it fully implement the 1996 recommendations of the Royal Commission on Aboriginal Peoples without further delay.*

### **Measures to enhance the social, economic and cultural rights of Aboriginal people**

19. The Aboriginal population of Canada consists of Indians<sup>5</sup>, Métis and Inuit. The Government of Canada has a number of measures in place to improve the socio-economic status of Aboriginal people, including, but not limited to income assistance. Other measures include:
- The new *Federal Framework for Aboriginal Economic Development* will focus the federal government's actions – from programs to legislation to partnerships – to increase the participation of First Nations, Inuit and Métis peoples in the Canadian economy and improve economic actions for Aboriginal peoples in all parts of Canada.
  - The *Aboriginal Head Start*, an early intervention program for First Nations, Inuit and Métis children and their families, prepares young Aboriginal children for school by meeting their spiritual, emotional, intellectual and physical needs.
  - Through the implementation of the enhanced prevention focused approach for First Nations Child and Family Services, the Government of Canada is working with First Nations to ensure that children and families receive the supports they need to prevent the types of crises that lead to intervention and family breakdown.
  - New investments for the *Family Violence Prevention Program* include targeted support for the construction of five new shelters and increased operational support to new and existing networks of shelters.
  - A number of program changes aimed at improving the effectiveness of the Program in First Nations communities on-reserve include, a new shelter funding

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<sup>5</sup> Indians are commonly referred to as First Nations.

formula and allocation methodology for prevention projects - both designed to meet regional needs within a national framework.

- The *Northern Housing Trust* helps meet short-term pressures with regard to the supply of affordable housing in the North.
  - An *Off-Reserve Aboriginal Housing Trust* helps provinces address short-term housing needs for Aboriginal Canadians living off-reserve.
  - Through the *Aboriginal Health Human Resources Initiative*, health human resources strategies responding to the unique needs and diversity among Aboriginal people are being developed and implemented while providing the right balance and numbers of Aboriginal health care providers; increasing the level of cultural competency of all health care providers; and responding to the health services issues and priorities while integrating with the pan-Canadian Health Human Resources Strategy. The goal of this collaboration is to reduce the gap in health status that exists between Aboriginal people and the rest of the Canadian population, through improved access to health care, and the resultant better health outcomes.
20. There are also measures in place in the provinces and territories to enhance the economic, social and cultural rights enjoyed by Aboriginal people.
21. On November 30, 2007, the federal government announced it had ratified an Agreement-in-Principle (AIP) with the Federation of Newfoundland Indians (FNI). Under the terms of the AIP, members of the FNI will be recognized as an Indian band. The AIP sets the stage for the negotiation of a Final Agreement that will see the members of the FNI receiving federal Aboriginal specific programs for non-insured health benefits, post-secondary education, economic development and core funding.
22. The Government of Newfoundland and Labrador supported the 2008 annual Aboriginal Women's Conference in the province, with the theme "The Path to Economic Prosperity." A National Aboriginal Women's Summit was held in Newfoundland in 2007. It brought together about 150 Aboriginal women from across Canada to discuss issues and recommendations around the theme of "Strong Women, Strong Communities."
23. In December 2007, Prince Edward Island (PEI) signed a Partnership Agreement with the federal government and the Mi'kmaq of Prince Edward Island to demonstrate their commitment to work together to achieve positive results and improve the quality of life of the Mi'kmaq of PEI. The Partnership Agreement focuses on areas of mutual and practical concern such as health, education, child welfare and justice.



24. In Nova Scotia, the Tripartite Forum Fund for Social and Economic Change, established under the Mi'kmaq-Nova Scotia-Canada Tripartite Forum (<http://www.tripartiteforum.com>) supports projects aimed at improving the well-being of Nova Scotia First Nations communities. For example:
- *Environmental Scan of Human Resources in Early Childhood Programs in Mi'kmaq Communities in Nova Scotia Project*: an environmental scan of present and future human resource needs for early childhood programs and services in twelve Mi'kmaw communities in the province;
  - *Mi'kmaq Language and Band Operated and Nova Scotia Provincial Schools: An Assessment and Implementation Initiative*: focused on the preservation of the Mi'kmaq language. This longitudinal research project is a collaborative works between the community-based expertise on Mi'kmaq Education and McGill University's professional expertise in First Nations education, linguistics, student learning and assessment;
  - *Family Violence & Aboriginal Communities: Building Our Knowledge and Direction through Community Based Research and Community Forums*: research to develop culturally appropriate and effective intervention models that address family violence within the context of Mi'kmaw communities in Nova Scotia.
25. Measures in New Brunswick include the Aboriginal Employment Strategy, the Aboriginal Health Transition Fund, the Joint Economic Development Initiative, the Enhanced New Brunswick/First Nation Education Programs and Services Agreement, the Mi'kmaq, Maliseet, Province of New Brunswick Relationship Building Bilateral Agreement, and the Tripartite Relations Agreement (ongoing negotiations).
26. The Enhanced New Brunswick/First Nation Education Programs and Services Agreement has been signed by 12 First Nations with the Government of New Brunswick, and negotiations are ongoing with the remaining four First Nations. The Agreement responds to the unique needs of First Nation learners. In addition, New Brunswick has developed a provincial education strategy to direct strategic activities encompassed in the Agreement. The strategy will outline strategic directions for First Nation education in order to: engage individuals and communities, preserve First Nation culture and traditions, and foster the importance of lifelong learning in First Nation communities.
27. At the First Nations Socio-Economic Forum held in Québec in October 2006, representatives of the Government of Québec, Government of Canada, Assembly of First Nations of Québec and Labrador, and civil society met to address the socio-economic prospects for First Nations peoples and discussed issues such as: economy and employment; health, social services and children's services; culture



and education; and infrastructure and sustainable community development. A tripartite follow-up mechanism was agreed to at the event.

28. A separate meeting was held in August 2007, called Katimajit, in order for the Inuit people to express their priorities in more detail. The following issues were discussed: economy and employment; health, social services and early childhood; culture and education; infrastructure and dwelling; and the environment and sustainable community development. A working group made up representatives of the provincial ministries most concerned with the issues raised will continue to ensure the follow-up and the implementation of the commitments made at Katimajit.
29. Ontario has established a political forum with the Nishnawbe Aski Nation (NAN), a provincial-territorial organization representing 49 First Nations in Northern Ontario, called the Northern Table. The objective of the Northern Table is to create a new working relationship among the NAN and the province, based on a commitment to positive and meaningful change. This working relationship commits the parties to develop and discuss ways to provide increased economic benefits to NAN First Nations. As well, Ontario launched an Aboriginal Education Strategy in January 2007 aimed at improving the academic achievement for First Nations, Métis and Inuit students who attend provincially funded schools.
30. The Urban Aboriginal Task Force Study is an initiative of the Ontario Federation of Indian Friendship Centres and the Ontario Native Women's Association supported by the Government of Canada and the provincial government. It is a community-based study of urban Aboriginal people in five Ontario locations. The site reports contain findings from each city, along with recommendations to address issues facing urban Aboriginal people. The Task Force's work will support policy and program initiatives that are developed in partnership with Aboriginal organizations and designed for Aboriginal people in urban areas.
31. The establishment of the First Peoples' Economic Growth Fund, funded by the Government of Manitoba, is designed to support First Nations business development and help address the gap in standard of living between aboriginal peoples and other Manitobans.
32. In Alberta, *Strengthening Relationships*, the Government of Alberta's Aboriginal Policy Framework, was released following extensive consultation with Aboriginal communities across the province and other interested parties. It sets out the basic structure for Alberta government policies that address the needs of First Nations, Métis and other Aboriginal people in Alberta. It proposes a path to the future that emphasizes well-being, self-reliance, effective consultation regarding resource and economic development, partnerships and the clarification of roles and responsibilities.
33. As indicated in the 2004 report, *First Nations in Alberta: A Focus on Health Service Use*, First Nations peoples are much more prone to injuries, diabetes, mental health

problems, respiratory disease, heart disease and certain health problems among children. The Government of Alberta has been reviewing the Aboriginal Health Strategy (AHS), created in 1995, to address the disparity in health status between Aboriginal peoples and the general population. Examples of Aboriginal health programs and initiatives in Alberta include:

- *Mobile Diabetes Screening Initiative in Off-Reserve Aboriginal Communities:* deploys a mobile team to screen for diabetes and related complications in 21 Aboriginal off-reserve and remote communities, directing at-risk patients for follow-up to the appropriate agencies and health care providers.
  - *Aboriginal Youth Suicide Prevention Strategy:* the four major objectives are: (1) support communities to identify strengths and build capacity to prevent youth suicide; (2) support a province-wide education and training implementation plan; (3) develop an awareness and education strategy with communities to prevent youth suicide; and (4) establish partnerships to support research and program evaluation to inform future planning.
34. The *Aboriginal Training-to-Employment Program* supports the development of partnerships with First Nations, Métis and other Aboriginal communities and groups to facilitate the participation of Aboriginal people in training projects and employment. It provides unemployed or underemployed Aboriginal people (primarily living off-reserve) with the skills needed for sustained employment in occupations with long-term employment prospects. Through partnerships between the private sector, government and Aboriginal people, specific training is developed to meet industry's skills needs.
35. In 2008, under the First Nations, Métis and Inuit Workforce Planning Initiative, the Alberta Government appointed a legislative committee to engage with First Nation and Métis leaders and other stakeholders to develop collaborative workforce action plans. The overall objective of the initiative is to increase the labour market and economic participation of Aboriginal people in Alberta.
36. Measures of the Government of the Northwest Territories include a supplementary health benefits program specifically for indigenous Métis residents. The *Métis Health Benefits Program* provides additional health benefits similar to Non-Insured Health Benefits, but at a coverage level of 100%.
37. Individual agreements have been established with the 14 Yukon First Nations, through the Northern Housing Trust, to address the significant and pressing housing needs in First Nation communities.
38. Working in direct partnership with Yukon First Nation Governments, the Yukon Government administers the *Northern Strategy Trust Fund* whose purpose is to support strategic projects consistent with the seven pillars of the Yukon Chapter of the *Northern Strategy*, namely:

1. Strengthening Governance, Partnerships and Institutions;
2. Establishing Strong Foundations for Sustainable Economic Development;
3. Protecting the Environment;
4. Building Healthy and Safe Communities;
5. Reinforcing Sovereignty, National Security and Circumpolar Cooperation;
6. Preserving, Revitalizing, and Promoting Culture and Identity; and,
7. Developing Northern Science and Research.

### **Limitations on land use by Aboriginal people**

39. In Canada, Aboriginal people may own and/or live on private lands. They are subject to the same limitations on the use of such lands as are other Canadians.
40. Aboriginal people may also live on Indian reserves. Reserves are tracts of land that have been set apart by the Crown for the use and benefit of Indian bands. The *Indian Act* contains a detailed set of rules about the uses to which reserves may be put. The legislation stipulates that a reserve can only be used for the welfare of a band. For some uses, the band's consent is required; for other uses, it is not (e.g. permits to third parties that are less than one year do not require consent). Revenues derived from the exploitation of lands in a reserve must also be used for the benefit of the band. A band cannot dispose of its interests in a reserve to anyone except the Government of Canada. The Government of Canada may take up or permit provinces, municipal or local authorities, or corporations to take up lands in a reserve for public purposes without the consent of the band. In managing a band's interest in reserve land, the Government of Canada has a fiduciary duty to act in the best interests of the band.
41. The Government of Canada has taken measures to provide bands with more control over the use of reserves. The *First Nations Land Management Act* (FNLMA)<sup>6</sup> allows bands to opt out of the land management sections of the *Indian Act*<sup>7</sup> and establish their own land management regimes on reserves. At present, 22 bands operate under their own land codes under the FNLMA.
42. Some bands may live on lands that have been set aside by the Crown but do not qualify as reserves under the *Indian Act*. Again, in managing a band's interest in lands that have been set aside, the Government of Canada has a fiduciary duty to act in the best interests of the band.
43. Aboriginal people may also live on lands to which they have acquired rights through a modern treaty, which are tripartite negotiations between the federal government, provincial/territorial government and Aboriginal group/government.

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<sup>6</sup> Available online at: <http://laws.justice.gc.ca/en/F-11.8/index.html>.

<sup>7</sup> Available online at: <http://laws.justice.gc.ca/en/I-5/>.

44. Some Aboriginal groups in Canada claim to have Aboriginal title to lands that they traditionally occupied. Depending on the circumstances, the title to the lands in dispute may currently be held by the federal and/or provincial Crown and/or private landowners.
45. Several Aboriginal groups are claiming, but have not yet proven, Aboriginal title in court. Other groups are pursuing claims to lands through negotiation processes. In the meantime, governments cannot unilaterally make land use decisions about Crown lands that might adversely affect Aboriginal title. Governments have a duty to consult and if necessary accommodate the relevant Aboriginal groups before making such decisions.
46. If proven in court, Aboriginal title will be constitutionally protected under section 35 of the *Constitution Act*<sup>8</sup> and will permit an Aboriginal group the right to the exclusive use and occupation of lands. The courts have said that Aboriginal title would be subject to both internal and external limits. In regard to internal limits, an Aboriginal group could not use the land in a way that was irreconcilable with the nature of the group's attachment to the lands. As for external limits, Aboriginal title could be overridden or infringed by legislation, regulation or other government action. In order for an infringement to be upheld by the courts, governments would have to demonstrate that there is a valid legislative objective for the infringement. With respect to lands and resources, permissible objectives may include but are not limited to the development and management of agriculture, forestry, mining and hydroelectric power, and conservation of the environment and endangered species. Governments would also have to show that the infringement at issue is reasonable. What is reasonable will vary according to the circumstances. In the majority of cases, governments will have to show that they adequately consulted the Aboriginal group holding title. Accommodation or consent of the Aboriginal group may also be required.

### **Royal Commission on Aboriginal Peoples**

47. As stated during Canada's appearance before the CERD in 2007, the Royal Commission on Aboriginal Peoples (RCAP) Final Report was released in November 1996. It argued for a new relationship between the Crown and Aboriginal people based on four principles – mutual recognition, mutual respect, sharing and mutual responsibility – and identified four pillars on which a new relationship could be built: treaties; governance; lands and resources; and economic development.
48. While the findings of the Royal Commission are not binding on any party, the RCAP Final Report contains 440 recommendations, including 357 which relate directly or indirectly to the federal government and 83 towards other parties (e.g., provinces/ territories, First Nations, other institutions).

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<sup>8</sup> Available online at: [http://laws.justice.gc.ca/en/const/annex\\_e.html#II](http://laws.justice.gc.ca/en/const/annex_e.html#II).

49. In response to the myriad of individual recommendations of the RCAP Final Report, in 1998, the Government of Canada developed a long-term, broad-based policy approach designed to increase the quality of life of Aboriginal people and to promote self-sufficiency. Addressing the underlying principles of the Report and its recommendations, Canada's response to RCAP is outlined in *Gathering Strength - Canada's Aboriginal Action Plan*. The Action Plan focuses on: renewing partnerships; strengthening governance; developing a new fiscal relationship; and supporting strong communities, people and economies. This Action Plan has begun to address many of the RCAP's recommendations.

**Recommendation 22:** *In line with the recognition by the State party of the inherent right of self-government of Aboriginal peoples under section 35 of the Constitution Act, 1982, the Committee recommends the State party to ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts. Treaties concluded with First Nations should provide for periodic review, including by third parties, where possible.*

### **Aboriginal Land Claims**

50. Canada is continually seeking to improve land claims processes, whose goal is not to restrict the progressive development of Aboriginal rights, but rather to reconcile competing interests in a manner that allows for harmonious co-existence of Aboriginal and non-Aboriginal Canadians.
51. The Government of Canada is of the view that negotiation processes provide the best means for engaging Aboriginal groups, and provincial and territorial governments in considering pragmatic, practical options that respond to different needs across the country. Noting that modern treaty negotiations involve many stakeholders and complex issues, which result in a lengthy process, twenty-two modern treaties have been reached to date, an independent specific claims tribunal has been established by statute, and procedural efficiencies resulted in 117 specific claims being addressed in 2008-2009.
52. In 2008, the Government of Canada completed three final agreements with seven First Nations in British Columbia (one final agreement covers five First Nations) and the Inuit of Northern Québec. As well, the Government of Canada has also reached final agreements in British Columbia with the Maa-nulth, Tsawwassen, and Lheidli T'enneh First Nations. The Maanulth agreement received Royal Assent on June 19, 2009 and the Twawwasen agreement came into effect on April 3, 2009. The first agreements to be completed under the British Columbia treaty process,

these negotiations were completed in twelve years - three years less than the current average.

53. In December 2006, the Government of Canada signed a final agreement with the Makivik Corporation, representing the Nunavik Inuit of Northern Québec. This agreement addresses some outstanding issues from the James Bay and Northern Québec Agreement with respect to offshore claims. That settlement was endorsed by 78% of eligible voters. The Nunavik Inuit Land Claim Agreement Act received Royal Assent on February 14, 2008.
54. In Prince Edward Island the government has attempted to reconcile the needs of the Mi'kmaq people for land for economic and social purposes with the government's responsibility to manage the land base in the province for the benefit of all residents. The province has given government-owned lands in fee simple to the off-Reserve Mi'kmaq, represented by the Native Council of Prince Edward Island, as they requested it.
55. In June 2007, the Province of Nova Scotia, the Mi'kmaq of Nova Scotia and the Government of Canada agreed to pilot a Consultation Terms of Reference for a one-year period. The Terms of Reference were developed under the 2002 Umbrella Agreement and are intended to address the nature of, and the process regarding, the requirement of governments to consult with the Mi'kmaq of Nova Scotia.
56. Also in June 2007, the Government of Nova Scotia released its Interim Consultation Policy for consulting with Aboriginal peoples. The policy was developed internally as a multi-departmental effort, and is an interim step, with a more permanent and comprehensive policy to follow. This interim policy is consistent with the Consultation Terms of Reference and does not apply to discussions on issues where claimed treaty, title and Aboriginal rights are not an issue.
57. On February 23, 2007, Nova Scotia, the Government of Canada and the Assembly of Nova Scotia Mi'kmaq Chiefs entered into a Framework Agreement that provides a road map for negotiations of Aboriginal and treaty rights in Nova Scotia and provides a listing of potential topics for negotiations. An electronic version of these documents can be found at <http://www.gov.ns.ca/abor/>.
58. Since October 2003, the Ontario government has settled five land claims. Prior to 2003, the province signed 17 land claims settlements and land-related agreements. Ontario is reviewing the recommendations made by Justice Linden in his final report of the Ipperwash Inquiry and is considering reforms to Ontario's land claims process. Ontario is also reviewing the Government of Canada's proposal for a specific-claims tribunal and how the province could work with this proposed framework.



59. Québec's recognition of Aboriginal land rights are guiding the negotiations with the First Nations in the province, most notably with the Innus for l'Entente de principe d'ordre général entre les Premières Nations de Mamuitun et de Nutashkuan et le gouvernement du Québec et le gouvernement du Canada.
60. First Nations in Manitoba are generally not seeking to negotiate treaties, since they are already part of the historic treaties. The agreements reached work within the framework of the existing historic treaties and do not seek to revise or compromise the treaty rights. A clear example is the Treaty Land Entitlement Framework Agreement (signed in 1997) that provides that the agreement addresses the per capita land entitlement provisions of the treaties, and includes principles for selecting lands that enable the unfulfilled provisions of the treaties to be resolved. However, the Government of Manitoba has participated extensively in negotiation of claims with the Government of Canada and First Nations or other Aboriginal groups, most notably those for treaty land entitlement and for effects of hydro-electric development. These negotiations have been very successful, with most resulting in agreements that resolve the issues in a manner satisfactory to all parties.
61. In the Yukon, 11 of the 14 First Nations have signed comprehensive land claim agreements. The outstanding three (White River, Liard and Ross River Dena Council) have said that they are not interested in an agreement based on the Umbrella Final Agreement model at this time. A federal envoy was tasked with meeting with the three First Nations who have not yet settled to see if/how any progress could be made. As well, the Yukon Government consulted with these three First Nations on whether to extend the interim protection orders that protect agreed-to land selections, until such time as a land claim agreement is signed. The interim protection orders were then renewed for a further five years.

### **Proof of Aboriginal Title**

62. In Canada, there have been a number of approaches adopted, as well as developments in the jurisprudence, that serve to make litigation involving complex claims of Aboriginal title more efficient and effective, thereby helping to ensure that such claims are not litigated at a disproportionate cost to Aboriginal communities and other parties to the litigation. These include:

#### *Pleadings*

63. Federal Crown counsel are expected to engage opposing parties wherever possible and early on in an effort to narrow the issues in dispute, to make admissions on the basis of good information or evidence, and to attempt to resolve claims where there is a legal basis to do so. Many of the Aboriginal title cases originate in British Columbia and the Government of Canada is prepared to meet with First Nations and provincial officials to discuss other ways to make such litigation more efficient. Similarly, the Government of British Columbia has indicated an increased willingness to consider admissions on standing, rights and title on a case-by-case basis.



### *Oral History Evidence*

64. Canadian courts have recognized the need to apply the traditional rules of evidence flexibly in the context of claims for Aboriginal rights and title. For example, oral history evidence, which is a feature that is unique to Aboriginal litigation, is accepted by Canadian courts as a valid source of evidence. The federal Department of Justice continues to examine internally and with stakeholders issues such as whether and how oral history evidence should be produced before and at trial; how best to preserve the testimony of elders of advanced age and to accommodate elders' testimony at trial; and how oral history evidence should be evaluated by trial judges. Lawyers for the Government of Canada presented a discussion paper on these issues in February 2008 to the Federal Court Bench and Indigenous Bar Association and to the Canadian Bar Association, Aboriginal Law Section.

### *Funding*

65. Access to Canadian courts for Aboriginal claimants is assisted through the federal *Indian Test Case Funding Contribution Program*. Where the Program criteria are met, contributions are made for the legal and associated costs of Indian-related cases which have the potential to become judicial precedents. Moreover, in some Aboriginal title cases, Canadian courts have made advanced-costs orders against the Crown, pursuant to which the Crown was required to fund the costs associated with advancing First Nations' title claims.

### *Pre-proof Consultation*

66. Canadian courts have held that the Crown (both federal and provincial) has a duty to consult with Aboriginal groups and, where appropriate, to accommodate their interests in situations where the Crown has knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect those potential rights. Aboriginal groups thus have new judicial remedies for Crown conduct, even before their claimed rights and title are proven.

### **Additional information requested by the Committee**

67. By letters dated August 15, 2008 and March 13, 2009, the Committee made supplementary requests for Canada to provide information in its interim report regarding several situations involving Aboriginal communities in Alberta, British Columbia and Ontario. Canada has thus included the information requested as part of its periodic reporting. Although these calls for additional information originated from submissions referred to the Committee's Working Group on Early Warning and Urgent Action, the provision of the information by Canada in no way constitutes agreement that these situations are appropriate for consideration under the Early Warning and Urgent Action Procedure. Furthermore, as the Committee is aware, Canada has not entered a declaration under Article 14 of the Convention and

does not recognize the competence of the Committee to receive or consider complaints by individuals or groups of individuals.

### **Lubicon Lake Band (Alberta)**

68. The Aboriginal title claim of the Lubicon Lake First Nation and Canada's actions in response have previously been considered in detail by the United Nations Human Rights Committee (1990 and 2006), and they are currently being reviewed by the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples. Canada has already submitted detailed information to both mechanisms, including a June 2009 response to the Special Rapporteur. The following is a summary of on-going attempts to negotiate a resolution of the claim.
69. The Government of Canada and the Province of Alberta have engaged for many years in negotiations with the Lubicon Lake Nation in respect of its claim related to an area of land known as the tear drop. The Governments of Canada and Alberta take the position that this area is covered by the terms of Treaty No. 8 and was ceded and surrendered to the Crown in exchange for various treaty rights and benefits, including the right to hunt, fish and trap in Treaty No. 8 territory and to an amount of reserve land.<sup>9</sup>
70. By 2003 substantial agreement had been reached on many aspects of the Lubicon Lake Nation claim, including the location and amount of proposed reserve land and the details for building a new community at Lubicon Lake. However, the Lubicon Lake Nation rejected proposals regarding self-government and compensation which ultimately led to the breakdown of negotiations. A further offer was made by the Government of Canada in 2006, which was also rejected by the Lubicon Lake Nation.
71. The Governments of Canada and Alberta continue to make serious efforts to carry on negotiations with the Lubicon Lake Nation. Additionally, the Province of Alberta, which has jurisdiction over land and resources within the province, continues to prohibit new resource development, including oil and gas extraction activities, within the proposed reserve land of the Lubicon Lake Nation, and the Government of Canada continues to take positive measures in order to improve the housing and living conditions of the Lubicon Lake Nation.
72. Since February of 2007, the Government of Canada has been exploring with the Lubicon Lake Nation the possibility of appointing a Special Representative, chosen with the Lubicon's agreement, who would determine whether there are any areas of compromise and flexibility in the mandates of each of the parties. The Lubicon Lake Nation has rejected this proposed process. The Governments of Canada and

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<sup>9</sup> Some historic treaties provided for the surrender of lands traditionally used by Indian bands in return for the creation of reserves and some rights to continue to use the traditional lands that were surrendered. Under domestic law, the reserves that were created by Canada are for the exclusive use and occupation of Indian bands.

Alberta are ready and willing to resume negotiations at any time should the Lubicon Lake Nation be willing to return to the negotiating table.

*Status of proceedings with respect to the construction of the pipeline*

73. The proposed North Central Corridor (NCC) Pipeline, by the private corporation TransCanada and its wholly owned subsidiary NOVA Gas Transmission Ltd. (NGTL), traverses both provincial Crown (government-owned) land and privately held land. For 75 percent of its route the NCC pipeline will run parallel to existing pipeline facilities. The proposed NCC pipeline route is not near the settlements of the Lubicon Lake Nation and would not cross through the proposed reserve land of the Lubicon Lake Nation.
74. In October 2008, the Alberta Utilities Commission (AUC), a provincial regulatory agency, approved the NCC pipeline project. The Lubicon Lake Nation was consulted before the project was approved by the AUC, and was also afforded several opportunities to voice its concerns directly to TransCanada/NGTL, the Province of Alberta, and before the AUC. The Lubicon Lake Nation participated in the consultation processes but did not provide details with respect to its asserted rights in relation to the proposed pipeline, the nature of those rights, or the potential impacts that the proposed pipeline could have on those rights. In April 2008 the AUC indicated that it would be prepared to accept additional information from the Lubicon Lake Nation, but no additional information was filed with the AUC. The Lubicon Lake Nation did not seek leave to appeal the AUC's decision to the Alberta Courts.
75. As of April 2009, jurisdiction over the project has been transferred to the National Energy Board, an independent regulatory agency of the Government of Canada. As a result of this jurisdictional change, it is the Government of Canada's understanding that TransCanada will be implementing another public consultation and communications program that will include Aboriginal communities. Additionally, it is the understanding of the Governments of Canada and Alberta that TransCanada, and its wholly owned subsidiary NGTL, remain committed to continued discussions with the Lubicon Lake Nation about its concerns and economic development opportunities that may arise in conjunction with the NCC pipeline project.

**Tsawwassen First Nation / Lheidli Tenne'h First Nation / Xaxli'p First Nation/ Southern Secwepemc First Nation (British Columbia)**

76. The Committee has requested information on the standards of fairness and transparency in relation to the negotiations held under the British Columbia Treaty Commission process for resolving claims with the Tsawwassen First Nation, the Lheidli Tenne'h First Nation, and the Xaxli'p First Nation development. The Committee has also requested information on the "Sun Peaks Ski Resort" that some allege is being developed without the appropriate involvement of neighbouring

Aboriginal communities. The lands and events in question are within the jurisdiction of the Province of British Columbia.

*Tsawwassen Treaty*<sup>10</sup>

77. On July 25, 2007, the Tsawwassen First Nation Treaty was ratified by a democratic vote undertaken by the Tsawwassen First Nation. Of 187 registered voters of the Tsawwassen First Nation, 130 voted in favour (approximately 70 percent). The Tsawwassen First Nation Final Agreement was ratified by the Legislature of the Province of British Columbia on November 7, 2007 and by the Parliament of Canada, receiving Royal Assent on June 26, 2008. The Treaty came into effect on April 3, 2009.<sup>11</sup>
78. Treaties concluded under the British Columbia Treaty Process recognize and affirm existing Aboriginal rights, including Aboriginal title, of the treaty First Nation and provide for the continuation of the First Nation's Aboriginal rights as modified by the treaty. All rights enshrined in the treaty are constitutionally guaranteed under section 35 of the Canadian constitution. These aspects are reflected in the Tsawwassen First Nation Final Agreement.<sup>12</sup>
79. In advance of the vote undertaken by the Tsawwassen First Nation on ratification of the Final Agreement, the Province of British Columbia provided a capital grant to the Tsawwassen First Nation to help defray the costs of conducting democratic ratification procedures. Following ratification, the Tsawwassen First Nation Band Council, at its sole discretion, provided Band elders over 60 years of age with a payment of \$15,000 ("elder benefits"). Drawn from the Provincial capital grant and consistent with other modern treaties ratified in Canada, these payments permit the elders, whom given their age may not benefit from the longer term economic gains, to immediately participate in the future benefits of the Tsawwassen Treaty.<sup>13</sup> Other than the small number of elders receiving elder benefits, no eligible Tsawwassen First Nation voters received any financial compensation from the Tsawwassen First Nation or from any Government.

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<sup>10</sup> See generally the British Columbia Ministry of Aboriginal Relations and Reconciliation website: [http://www.treaties.gov.bc.ca/treaties\\_tsawwassen.html](http://www.treaties.gov.bc.ca/treaties_tsawwassen.html).

<sup>11</sup> See generally <http://www.tsawwassenfirstnation.com>.

<sup>12</sup> *Tsawwassen First Nation Final Agreement*, preamble, states in part: "The Tsawwassen First Nation's existing Aboriginal rights are recognized and affirmed by the *Constitution Act, 1982*, and the Parties have negotiated this agreement under the British Columbia Treaty Commission process to provide certainty in respect of those rights and to allow them to continue and to have the effect and be exercised as set out in this Agreement." Chapter 2, section 13: "Despite the common law, as a result of this Agreement and the Settlement Legislation, the aboriginal rights, including the aboriginal title, of Tsawwassen First Nation, as they existed anywhere in Canada before the Effective Date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement." See also: [http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn\\_fa.pdf](http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf).

<sup>13</sup> Initially, eighteen Tsawwassen First Nation elders received benefits. Regrettably, two elders from the community passed away before implementation of the treaty. Since ratification, four additional elders have received benefits.

*Lheidli Tenne'h First Nation Final Agreement*

80. On October 29, 2006, the Lheidli Tenne'h First Nation Final Agreement (the "Lheidli Tenne'h Treaty")<sup>14</sup> was initialled by the Lheidli Tenne'h First Nation, and the Governments of Canada and British Columbia. However, on March 30, 2007, Lheidli Tenne'h First Nation members voted against ratification of the Treaty (111 in favour; 123 against). Of the 273 registered voters, 234 voted.
81. Subsequently, the Lheidli T'enneh leadership have expressed an interest in engaging the community in a discussion of its future objectives with respect to the Lheidli T'enneh Treaty. Lheidli T'enneh has initiated a community engagement process with the objective of completing a report with recommendations to its membership by December 2009. Presently, a member of the Lheidli Tenne'h First Nation is consulting with fellow First Nation members to ascertain the level of interest in holding a community-wide referendum on whether or not the Lheidli T'enneh First Nation should proceed with a second vote on ratification of the Lheidli T'enneh Treaty. If the initiative receives sufficient support, the referendum would be held in December 2009. The Governments of Canada and British Columbia have also requested that a community-wide referendum vote occur and precede any such potential second ratification vote.

*Xaxli'p First Nation*

82. First Nations involved in the British Columbia Treaty Process have the option to accept monies in the form of loans to support their involvement in voluntary treaty negotiations. First Nations electing to accept loans, sign agreements to repay the monies upon the earlier of the expiration of a loan agreement or the conclusion of a treaty. Monies were loaned to the Xaxli'p First Nation to participate in the British Columbia Treaty Process. In 2001, the Xaxli'p First Nation withdrew from Treaty negotiations and in November, 2006, the loan agreement expired. Although the Government of Canada offered to extend the Xaxli'p First Nation's loan agreement, the Xaxli'p First Nation has declined.
83. In 2008, the Government of Canada wrote to the Xaxli'p First Nation to state that the obligation to repay the loan amount had been placed into abeyance by the federal government. There is no present effort by the Government of Canada to collect any amount loaned to the Xaxli'p First Nation for participation in the British Columbia Treaty Process.

*Southern Secwepemc First Nation*

84. The Sun Peaks Resort is located in south central British Columbia and is not in any way connected to the Vancouver 2010 Olympic Games. The Sun Peaks Resort has worked successfully with Aboriginal groups, including entering into joint real

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<sup>14</sup> Available online at : <http://www.gov.bc.ca/arr/firstnation/lheidli/default.html>.

estate development projects with both the Little Shuswap and the Whispering Pines Indian Bands, respectively. Both bands are members of the Secwepemc Nation.<sup>15</sup> In addition, Sun Peaks Resort received the ISO 14001 designation recognizing the resort's environmental policies and practices. It was the first ski resort in North America to receive this designation.

85. In Fall 2000, a small number of members of the Adams Lake and the Neskonalith Indian Bands<sup>16</sup> established a protest camp at the Sun Peaks Resort, alleging the area is traditional land. Again, the protests were not connected to Canada's successful bid for the 2010 Winter Olympics. The camp was left undisturbed until June 28, 2001, at which time Sun Peaks Resort sent a letter to the protesters, seeking an end to the camp by July 6, 2001. All but three protesters voluntarily left the camp.<sup>17</sup> Sun Peaks successfully undertook civil action relating to the remaining protesters. The judge granted an injunction, ordering the protestors to leave on July 18, 2001 but noted that the protest activities could be carried out on other land.<sup>18</sup> The protesters who chose to stay at the camp were initially arrested, however, they were later acquitted of all charges.
86. Subsequently, protesters constructed two roadblocks on August 24, 2001 and December 28, 2001, respectively ("the 2001 roadblocks"). The 2001 roadblocks were set up on the major access highway to the village of Sun Peaks. Protesters blocked all passage, effectively preventing travel on the highway for any purpose. Tactics included the use of fire, pallets, posts, rocks, large wood blocks, and the protesters themselves to barricade the highway.<sup>19</sup> In total, only four charges were laid relating to criminal intimidation and mischief. Although the four protesters were convicted, none served any time in prison.
87. There are many examples of First Nations successfully challenging governmental decisions in Canadian courts on the basis of asserted, but unproven Aboriginal rights, and successfully enjoining developmental and other activities until proper consultation and reasonable accommodation of asserted Aboriginal rights occurs. Protesters at the Sun Peaks Resort elected not to pursue constitutionally protected rights through judicial processes or through their First Nation leadership. Instead, they acted extra-judicially.<sup>20</sup> The activities of the protesters were not sponsored by either of the Adams Lake or Neskonalith Bands, nor by the larger Secwepemc Nation.

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<sup>15</sup> Five of the 17 bands making up the Secwepemc Nation are engaged in the BC Treaty Process.

<sup>16</sup> Adams Lake and Neskonalith are only 2 of the 17 Bands of the Secwepemc Nation.

<sup>17</sup> *Sun Peaks Resort Corp. v. Billy*, 2001 BCSC 1056, at para. 13, available at: <http://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc1056/2001bcsc1056.html>.

<sup>18</sup> *Ibid*, at para. 22, "The number of people in actual occupation has been few, and...the kind of activities and dissemination of information by the defendants can be moved to Crown land, in a manner that would not interfere with the rights of the plaintiff [Sun Peaks]."

<sup>19</sup> *R. v. Manuel* 2008 BCCA 143, available at: <http://www.courts.gov.bc.ca/Jdb-txt/CA/08/01/2008BCCA0143.htm>.

<sup>20</sup> See <http://www.courts.gov.bc.ca/Jdb-txt/CA/08/01/2008BCCA0143.htm>.



88. British Columbia and Canada are committed to fulfill their duty to consult and, where appropriate, accommodate Aboriginal groups asserting constitutionally protected Aboriginal rights.

### **Kitchenuhmaykoosib Inninuwug (Ontario)**

89. The Committee has requested information on the allegations submitted by the Kitchenuhmaykoosib Inninuwug (KI) to the effect that lands which they have traditionally used are being privatized without their consent for the benefit of mining and energy companies. The Committee also seeks information regarding the arrests of several KI community members related to their objections to this alleged privatization. The lands and events in question fall within the jurisdiction of the Province of Ontario, in central Canada.
90. In 1929, KI (formerly part of Big Trout Lake First Nation) signed a treaty of adhesion to Treaty No. 9, which was made between the Crown and several First Nations in 1905 and 1906. Under the terms of the treaty, KI surrendered its Aboriginal title to the lands it had traditionally used, and those lands became Crown land under the jurisdiction and control of the Province of Ontario. In return, the Government of Canada granted KI reserve land and the right to pursue traditional harvesting activities throughout the surrendered tract of land, such as hunting, trapping and fishing. As set out in the treaty, this right is "subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty" and subject to land that "may be required or taken up from time to time for settlement, mining, lumbering, trading and other purposes." One such purpose provided for in Ontario legislation is the taking up of land for mineral exploration by mining companies operating in the province.
91. The matters giving rise to KI's letter to the Committee involve the mineral exploration company Platinex Inc. (Platinex), which currently has unpatented mining claims and leases covering approximately 19 sq km of the approximately 23,000 sq km of lands within what KI asserts as its traditional territory, surrendered under Treaty No. 9. These 19 sq km are not within any First Nation's reserve boundaries, but are on provincial Crown lands. Under Ontario's *Mining Act*, Platinex is permitted to conduct limited exploration of potential mining resources in the area covered by the leases and unpatented claims. These actions do not constitute a privatization of the public lands at issue (they remain provincial Crown lands), nor do they displace KI from their reserve land. Platinex's exploration activities are not taking place nor are they contemplated to take place on any of KI's reserve lands.
92. In 2006, Platinex commenced a court action seeking damages from KI arising from KI's opposition to Platinex's plans to undertake limited exploratory activities in the off-reserve area at issue. KI filed a counterclaim, seeking an injunction against Platinex. In July 2006, a judge of the Ontario Superior Court of Justice granted an interim injunction to KI, which temporarily prevented the exploratory activities



contemplated by Platinex. In May 2007, Platinex obtained an order from the same judge permitting it to proceed with its exploration plans under the supervision of the court. This order included court supervised consultation between the Province of Ontario, Platinex and KI. The court considered any potential adverse impacts of the exploration on the land, KI's harvesting activities under Treaty No. 9, and on the KI community and culture, and determined that there was no conclusive evidence of harm.<sup>21</sup>

93. In October 2007, Platinex obtained a further order from the court allowing it to undertake archaeological pre-screening that would identify any culturally sensitive sites in the area prior to any limited exploratory drilling. That court order expressly prohibited KI and its community members from interfering with Platinex' planned activities. Notwithstanding the court order, KI members prevented Platinex from undertaking the archaeological research by protesting at the community airstrip and threatening to bar Platinex from accessing the exploration site. No one was arrested, but Platinex later applied to the court for an order to find the protesters were in contempt of the October 2007 court order. That court application was heard in December 2007, and KI members admitted that they had taken steps in contravention of the court order. Six KI members were subsequently found by the court to be in contempt of the court's order, and they were sentenced by the Judge to a term of six months imprisonment.<sup>22</sup> This sentence was appealed, without opposition by the Province of Ontario. At the appeal, Ontario supported the early release of the KI members. These individuals were released, after having served approximately two months of their six month sentences.
94. The Government of Ontario's position at the court hearing was that reconciliation has been identified by Canadian courts as the mechanism to facilitate and effect the full participation of Aboriginal peoples in a shared Canadian sovereignty. Consultation and, where appropriate, accommodation have been identified as the means of promoting dialogue and reaching an understanding leading to reconciliation. The appellate court agreed with this submission, and observed that the dispute between KI and Platinex would only be resolved through continued negotiations.<sup>23</sup> To this end, Ontario is continuing in its efforts to pursue and facilitate a resolution to the dispute.
95. The Government of Ontario has taken active steps to ensure that mining activity in the Province is undertaken in a manner consistent with the recognition and affirmation of existing constitutionally protected Aboriginal and treaty rights. On April 30, 2009, the Government of Ontario introduced Bill 173, the *Mining*

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<sup>21</sup> *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation & A.G. Ontario*, 2007 CanLII 16637 (ON S.C.) [*Platinex* (2007)], at paras. 157-60, 169-70, available at:

<http://www.canlii.org/en/on/onsc/doc/2007/2007canlii16637/2007canlii16637.html>.

<sup>22</sup> *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (ON S.C.), available at: <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii11049/2008canlii11049.html>.

<sup>23</sup> *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 (CanLII), available at: <http://www.canlii.org/en/on/onca/doc/2008/2008onca533/2008onca533.html>.

*Amendment Act, 2009* in the provincial legislature.<sup>24</sup> Key provisions of the Bill propose notification of Aboriginal communities regarding claim and exploration activities by mining companies, Aboriginal consultation and accommodation requirements and a process to address disputes relating to Aboriginal consultation.

96. As described above, the Ontario courts have duly considered the existing and asserted constitutionally protected Aboriginal and treaty rights of KI, including any duty to consult or accommodate those rights.<sup>25</sup>

### **Further Initiatives:**

97. This report would also like to highlight two additional initiatives of note with respect to Aboriginal Peoples: Bill C-30, *Specific Claims Tribunal Act* and the Indian Residential Schools Settlement Agreement.

### **Bill C-30, *Specific Claims Tribunal Act***

98. The Government of Canada acknowledges that it has not always fulfilled its legal obligations to First Nations; the Specific Claims process is intended to address these grievances. The federal policy statement *Outstanding Business* outlines four conditions under which a lawful obligation might arise: the non-fulfilment of a treaty or agreement between First Nations and the Crown; a breach of an obligation arising out of the *Indian Act* or other statutes pertaining to First Nations and regulations thereunder; a breach of an obligation arising out of government administration of Indian funds or other assets or an illegal disposition of First Nation land. The two other circumstances under which the government would be prepared to negotiate are: failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority, or fraud in connection with the acquisition or disposition of Indian reserve land by employees.
99. Establishing a specific claims tribunal with the authority to make binding decisions was one of the four pillars of *Justice at Last, Canada's Action Plan for Specific Claims* announced on June 12, 2007. The other components of the plan are: dedicated funding for the settlement of specific claims, faster processing of claims and better access to mediation services to help the parties reach negotiated settlement agreements. These four pillars will fundamentally alter the way in which specific claims are resolved; the end result will be a faster, fairer and more transparent process.

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<sup>24</sup> See: [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=2170](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2170).

<sup>25</sup> *Platinex v. Kitchenuhmaykoosib Inninuwig First Nation, et al.*, 2006 CanLII 26171 (ON S.C.), at paras. 79-80, 83, and 89, available at: <http://www.canlii.org/en/on/onsc/doc/2006/2006canlii26171/2006canlii26171.html>; *Platinex* (2007), *supra* at paras. 147-48, 150, 154-55, 157-60.

100. On November 27, 2007, the Government of Canada introduced Bill C-30, the *Specific Claims Tribunal Act*. Bill C-30 was adopted by the Senate on June 12, 2008 and received Royal Assent on June 18, 2008.
101. Developed in collaboration with the Assembly of First Nations, Bill C-30 established a Tribunal, staffed by superior court judges, to render final binding decisions on specific claims that have been rejected for negotiations or that have been accepted for negotiations, but not resolved within the time frame set out in the proposed legislation.
102. First Nations are able to file their claims with the Tribunal under three circumstances: when a claim has been rejected for negotiations, including claims that have been "deemed rejected" because three years passed and the First Nation did not receive a response as to whether the claim had been accepted or rejected for negotiations, at any point in the negotiations process with the Minister's consent, or after three years of negotiations without the Minister's consent. The Tribunal would determine compensation for valid claims in accordance with the legislation and legal principles applied by the courts. Although the Tribunal would hear all varieties of specific claims, including those related to land, it would award monetary compensation only.

### **Indian Residential Schools Settlement Agreement**

103. The largest class action settlement in Canadian history, the Indian Residential Schools Settlement Agreement received court approval on March 21, 2007, with the full support of all parties involved: the Government of Canada, legal counsel for former students, Churches, the Assembly of First Nations, and Inuit Representatives. Implementation began September 19, 2007. The Settlement Agreement includes the following:
  - Common Experience Payment (CEP) to be paid to all eligible former students who resided at a recognized Residential School (\$1.9B set aside). As of January 2008, about 86,000 applications had been received for the CEP. Over two thirds of these have been processed, and approximately \$1B has been paid out in CEP claims to date.
  - Independent Assessment Process (IAP) for claims of sexual and serious physical abuse; \$960M has been allocated to pay for claims settled by the IAP.
  - Truth and Reconciliation Commission that will hear from survivors and report to the Canadian public on what happened in Indian residential schools (IRS) attended by First Nations, Inuit, and Métis children, as well as the lasting legacy of these institutions.
  - Commemoration Activities - a total of \$20M has been allocated over five years to support activities to memorialize the legacy of IRS.
  - Measures to support healing such as the Indian Residential School Health Support Program and an endowment to the Aboriginal Healing Foundation.
104. The Indian Residential Schools Settlement Agreement signals a historic shift in relations with Aboriginal people in Canada, the Church entities, and the

Government of Canada. The Agreement is an excellent example of an honourable and collaborative approach to the development of solutions for long-standing grievances.

105. On June 11, 2008, the Government of Canada offered a Statement of Apology to former students of Indian Residential Schools. The Apology was comprehensive, and was mirrored by statements from leaders of all Opposition parties in the House of Commons. Indigenous leaders were present in the House of Commons and responded. The Apology recognized the suffering of students and families from the residential school system and its continuing impact on Aboriginal cultures, heritage and community. It was well received by Indigenous leaders and many survivors and, coupled with substantive reparations in the Settlement Agreement, indicates the sincerity of all parties to develop a new working relationship.

**Recommendation 26:** *The Committee recommends that the State party take the necessary measures to ensure access to justice for all persons within its jurisdiction without discrimination. In this connection, the Committee urges the State party to reinstate the Court Challenges Program, or devise a functional replacement mechanism with equivalent effect, as a matter of priority.*

106. Canada feels strongly that the *Canadian Charter of Rights and Freedoms* entrenches equal rights for its citizens and that access to justice, particularly for vulnerable groups, is an important principle in ensuring procedural equality.
107. The Government of Canada approaches access to justice broadly. While it does not target initiatives at particular ethnocultural and ethnoracial communities, it has many programs and services in place to ensure that Canada has an accessible and responsive justice system that meets the needs of its citizens.
108. With a view of increasing access to justice, the Government of Canada administers special funding programs that include the:
- *Access to Justice in Both Official Languages Support Fund* that responds to the needs of official language minority communities across Canada by providing core funding to the French-speaking lawyers associations and their national federation, and supporting community projects that are designed to increase awareness about accessing the justice system in either official language;
  - *Drug Treatment Court Funding Program* that supports the use of alternatives to incarceration with a particular focus on Aboriginal men and women, and street prostitutes;
  - *Victims Fund* that ensures that victims of crime and their families are aware of their role in the criminal justice system, and the legal services and assistance available to them.

## Partnerships

109. Access to justice is also assured through partnerships between the Government of Canada, other levels of government and non-government organizations (NGOs). Through the *Access to Justice in Both Official Languages Support Fund* described above, the Government of Canada has created a consultation mechanism with provincial and territorial governments, as well as NGOs. The Government of Canada also provides core funding to designated provincial public legal education and information organizations whose activities provide members of the public with legal information to make informed decisions and participate effectively in the justice system. Other partnership examples include legal aid, the Aboriginal Justice Strategy and the Aboriginal Courtwork Program, which are outlined below.

### *Legal Aid*

110. The federal government contributes 36% for legal aid services in criminal law in the provinces and territories through cost-sharing agreements.
111. Under Newfoundland and Labrador's *Northern Strategic Plan*, the province has introduced Legal Aid Community Resource Workers in Labrador who explore the use of sentencing circles and alternate justice approaches.
112. In 2006, in Québec, the legal aid process was changed particularly to expand eligibility and therefore accessibility. By 2010, an increasing number of people will be eligible for legal aid services.
113. Several of Ontario's access to justice programs are channelled through Legal Aid Ontario (LAO), which promotes access to justice for low-income individuals by providing legal aid services in a cost-effective and efficient manner. The LAO funds a number of specialized clinics including the Toronto Legal Service and the Aboriginal Legal Services Clinic, which is devoted to helping Aboriginal people with respect to their justice issues.
114. Manitoba's Legal Aid program is not limited to issuance of certificates to provide counsel for individuals relating to specific charges but also has an active Public Interest Law Centre (PILC) that focuses on cases that have a broad public interest component that include a focus on the needs of Aboriginal and other minority groups. More information on the PILC is available at:  
<http://www.publicinterestlawcentre.ca/cases/>.
115. The Saskatchewan Legal Aid Commission continues to identify and address any barriers to service to clients, especially in rural and remote communities. Through Legal Aid's website, there is information on family law issues, with links to other information on family law matters. To improve services to family law clients, Legal Aid continues to designate lawyer positions for family law and has even designated a specific office to solely deal with family issues. Saskatchewan Legal

Aid also partners with community groups to provide legal education to high risk groups. For example, innovative theatre presentations covering common scenarios that would often confront youth, draw on interactive tools to give participants an opportunity to direct the story line and see the consequences of their choices.

116. In the Northwest Territories, access to justice is facilitated through the Legal Services Board, which provides legal aid to qualified candidates. Free family mediation services are also available for separating parents that have children.

#### *Aboriginal Justice Strategy*

117. The *Aboriginal Justice Strategy (AJS)* is composed of community-based justice programs that are cost-shared between the Government of Canada and provincial and territorial governments, and self-government negotiations in the field of administration of justice. The AJS strengthens the links between Aboriginal communities and the mainstream justice system by supporting diversion, sentencing and family mediation programs. It enables access to community-based justice programs in approximately 400 Aboriginal communities in all 13 jurisdictions in Canada.
118. Prince Edward Island's cost-shared Aboriginal Justice Program (AJP) is operated by the Mi'kmaq Confederacy of Prince Edward Island. It reports to an advisory committee made up of representatives of the two reserves in the province (Lennox Island and Abegweit First Nations), Prince Edward Island's Aboriginal Women's Association, and the Native Council of Prince Edward Island. The overall purpose of the AJP is to facilitate Aboriginal people's greater involvement in the administration of justice and to reduce and prevent crime and victimization using a holistic approach to justice, prevention and rehabilitation. This includes the facilitation of Conflict Resolution Circles, Intervention Circles and Sentencing Circles by trained Circle Keepers.
119. The Ontario government's cost-shared AJP has been established in conjunction with Indian Friendship Associations, Indian bands, and on Indian reserves throughout the province. The AJP is engaged in diversion and rehabilitation programs.
120. Through the Aboriginal Justice Strategy, the Government of Manitoba co-funds several restorative justice programs that are supported by the leadership in the communities they serve and have had many successes in diversionary and alternative sentencing models. It has two trilateral agreements in place: the St. Theresa Point Youth Court, which provides restorative justice alternatives for accused persons 12 years of age and older; and the Manitoba Keewatinook Ininew Okimowin (MKO) First Nations Justice Strategy, which operates a Judicial Justice of the Peace Court in five First Nations communities. The current Judicial Justice of the Peace holds court in the traditional Cree language of these communities.



121. Manitoba also supports the Onashowewin project in Winnipeg and 12 active Justice Committees in First Nations Communities in rural Manitoba that employ restorative justice principles to cases that are referred to them by the Crown and police.

#### *Aboriginal Courtwork Program*

122. The *Aboriginal Courtwork Program (ACW)*, also a cost-shared program, provided direct services to all Aboriginal people (adults and youth) charged with an offence, to help ensure fair, equitable and culturally-sensitive treatment by the criminal justice system. The ACW is national in scope and is accessible to all Aboriginal people regardless of status or residency.

### **Provincial and Territorial Programs and Services**

123. The *Violence Prevention Initiative* of the Government of Newfoundland and Labrador includes a multilingual court preparation website for child victims; specialized family violence treatment courts; and evaluation and monitoring of the implementation of the *Family Violence Prevention Act*. The province has also implemented a *Poverty Reduction Strategy* that incorporates an alternate justice program and a *Northern Strategic Plan for Labrador* that includes an Aboriginal interpreting initiative.
124. The core programming of Nova Scotia's Mi'kmaq Legal Support Network (MLSN) consists of the Mi'kmaw Courtworker program and the Mi'kmaq Customary Law program.
125. Nova Scotia has initiated a three year Victim Services pilot program focusing on Mi'kmaq communities. A needs assessment is being carried out. A specialized model of service delivery for Aboriginal victims of crime will be developed using the information from the assessment, which will be piloted in the Eskasoni community. A full time Aboriginal victim services officer fluent in the Mi'kmaq language will be hired for the pilot period.
126. In October of 2007, the Nova Scotia Human Rights Commission released a report and action plan on the Investigation and Resolution of Aboriginal Complaints. Details of this action plan can be found at [www.gov.ns.ca/humanrights/](http://www.gov.ns.ca/humanrights/).
127. Québec has several measures to improve services for Aboriginal people relating to the justice system, including an accreditation process for Aboriginal interpreters and the development of legal lexicons in Aboriginal languages. As well, through agreements with the Government of Québec, Aboriginal communities may be recognized as prosecuting parties under the *Highway Safety Code* as special Aboriginal police forces and constables, and can issue notices of violations on behalf of the *Directeur de poursuites criminelles et pénales*.



128. Under Québec's Crime Victims' Assistance Centres, established in regions with a strong Aboriginal population as well as Nunavik, efforts are being made to recruit indigenous personnel. The recruiting of Aboriginal personnel is also favoured for communities established in urban areas. Additionally, approximately 15 Aboriginal communities in Québec have established Community Justice Committees for the purpose of conflict resolution.
129. In Ontario, the Victim Services Secretariat provides or supports services for victims of crime through community-based initiatives such as the Victim Crisis and Referral Service, the court-based Victim/Witness Assistance Program and Crown attorneys involved with victims and witnesses in preparing cases. The Office for Victims of Crime is also working to strengthen victims' services by consulting with victims and advising government on ways to ensure that the principles of the *Victims' Bill of Rights* are respected.
130. The Government of Manitoba has undertaken several initiatives on behalf of victims of crime, many of whom are from minority groups. Manitoba's Crime Victims Support Workers provide support, information, short-term counselling, advocacy and court preparation to victims of crime. For Aboriginal women and their children, these initiatives include:
- *Victims' Rights Support Service*: works with victims of the most serious crimes or their designated family members as outlined under *The Victims' Bill of Rights*;
  - *Domestic Violence Support Service*: assists victims of domestic violence where criminal charges have been laid or may be laid against their partners;
  - *Child Victim Support Service*: helps children and youth who are victims of abuse and adult survivors of sexual abuse who are involved in the criminal court process; and,
  - *Victim/Witness Assistance Program*: provides information and support to victims and witnesses subpoenaed for provincial or Queen's Bench court.
131. The Government of Saskatchewan has been studying the issue of access to justice, including family and youth issues, access to information, services and, in particular, child protection issues, family violence and Aboriginal inclusion issues. It has created the Family Law Information Centre and a Support Variation Project. The project is for parents with limited income wanting to make changes to an order of agreement for support. Eligible parents can apply for a facilitated variation process, where they are assisted to come to an agreement regarding changes to child support. Another initiative is an Access Facilitation Pilot Project that is targeted to low income families. Eligible parties receive assistance from a team of parenting, legal and conflict resolution professionals. After attending information sessions, participants enter a mediation process, through the Dispute Resolution Office, for the purpose of reaching agreement on access arrangements.

132. In Saskatchewan, sixty-nine of the 72 First Nations and some Métis organizations are involved in delivering community justice programs that meet the unique needs of their communities and draw on their cultural practices. These programs provide services such as resolving adult alternative measures and youth extrajudicial sanctions referrals, supporting victims, supervising offenders in some locations, and providing public education.
133. The Saskatchewan Provincial Court has an Aboriginal Court Party, as well as a Cree Court Party that conducts court in Cree. There are also Court sittings on 14 First Nation Reserves. As well, work is continuing to appoint Cree and Dene speaking Justices of the Peace, improve Cree and Dene translation services in northern Saskatchewan, and implement court videoconferencing projects in some communities.
134. The Government of Alberta has numerous Aboriginal Justice Initiatives that can be found at: <http://www.justice.gov.ab.ca/aboriginal/default.aspx?id=4930>. It has also opened Law Information Centres in two cities. For those who choose to represent themselves in civil and criminal cases, these new centres assist individuals to avoid costly errors and delays by providing greater access to legal support and information about court processes. The Centres also offer support in filling out forms and documentation and provide referrals to legal representation available through various non-profit agencies. All services provided are free.
135. Another provincial initiative in Alberta is the Legal Representation for Children and Youth (LRCY) under the Office of the Child and Youth Advocate. LRCY is responsible for the appointment of lawyers for children and youth receiving services under the *Child, Youth and Family Enhancement Act* or the *Protection of Sexually Exploited Children Act*. The LRCY has implemented pre-service training for potential roster lawyers and held its first session in October 2007 where there were 13 participants.
136. In the Northwest Territories, it is the practice of Territorial and Supreme Court judges to travel on circuit in communities throughout the region to hold civil and criminal trials. The Chief Judge of the Territorial Court and the Senior Judge of the Supreme Court schedule the time and location of court proceedings. This allows accused individuals to face trial within their own community as opposed to being flown to a larger centre.
137. The Courts often require interpreters in order to ensure that accused persons or witnesses can be understood and the general public can understand the proceedings. The Northwest Territories *Official Languages Act* and the *Canadian Charter of Rights and Freedoms* oblige the territorial government to provide interpreters for criminal and other cases where necessary. Both the Supreme and Territorial Courts have recently directed that in communities outside of Yellowknife, Hay River, Inuvik and Fort Smith, interpretation in the local aboriginal languages be made available as a matter of course at each sitting of the court. Additionally, materials

regarding family law programs, such as mediation, parenting after separation, etc. are all published in Aboriginal languages and are distributed within communities.

138. In the Yukon, the Community Wellness Court provides support and services to offenders with mental health, cognitive or addiction issues; about half of these are First Nations.

### **Court Challenges Program**

139. While the Court Challenges Program has not been reinstated, the Government of Canada is establishing a new program to support official language minority communities to assert their linguistic rights. With an annual investment of \$1.5 million, this program stresses better understanding of linguistic rights through public education, offers access to mediation and arbitration, and supports litigation that helps clarify linguistic rights when test cases are involved.
140. Canada continues to contribute to the promotion and protection of the rights of Canadians, through legislation and institutions such as courts, statutory bodies (variously known as commissions, boards, committees or tribunals) and ombudsmen, and through various policies and programs, for example, through the Human Rights Program of the Department of Canadian Heritage, Multiculturalism Program of Citizenship and Immigration Canada, and the Women's Program of Status of Women Canada.