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SETTLING COMPREHENSIVE LAND CLAIMS

Mary C. Hurley
Social Affairs Division

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INTRODUCTION

Federal policy divides Aboriginal land claims into two broad categories:

- 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 non-fulfilment of treaties or other legal obligations, or from the alleged improper administration of lands and other assets under the *Indian Act* or other formal agreements.

The following paragraphs canvass topics relating to comprehensive land claims.

OVERVIEW

Aboriginal claims to outstanding land rights remained largely unconsidered by government well into the 20th century. From 1927 to 1951, the *Indian Act*[1] actually prohibited the use of band funds for claims against government.

In 1973, the first federal comprehensive land claim policy[2] renewed the treaty-making tradition in response to the landmark *Calder* decision of the Supreme Court of Canada.[3] *Calder* confirmed that Aboriginal peoples' historic occupation of the land gave rise to legal rights in the land that had survived European settlement. In a second pivotal development, "existing aboriginal and treaty rights" gained constitutional protection under section 35 of the

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1 R.S.C. 1985, c. I-5.

2 Department of Indian Affairs and Northern Development, "Statement Made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People," *Communiqué*, 8 August 1973. The policy was reaffirmed in *In All Fairness: A Native Claims Policy – Comprehensive Claims*, Department of Indian Affairs and Northern Development, Ottawa, 1981.

3 *Calder* v. *Attorney-General of B.C.*, [1973] S.C.R. 313. The policy was reaffirmed in *In All Fairness: A Native Claims Policy – Comprehensive Claims*, Department of Indian Affairs and Northern Development, Ottawa, 1981.

Constitution Act, 1982;[4] in 1983, subsection 35(3) explicitly confirmed that this protection extends to modern land claim agreements.

Revisions to the comprehensive land claims policy in 1986 provided for a broader scope of negotiable subject matters and outlined alternatives to the practice of requiring blanket extinguishment of Aboriginal rights in exchange for an agreement.[5] In 1993, the government's Federal Policy for the Settlement of Native Claims reiterated the objective of the comprehensive claim process as being "to negotiate modern treaties which 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."[6]

Between 1986 and 1995, recognition of the growing importance of self-government issues in claims negotiations led to incremental consideration of those issues in the land claim context. Federal policy in the early 1990s allowed for constitutionally entrenched commitments to negotiate self-government agreements in comprehensive land claim agreements. Since 1995, federal recognition of the inherent right of Aboriginal self-government as an existing section 35 right has meant that negotiated self-government rights may themselves attain section 35 protection within comprehensive land claim agreements.[7]

Those agreements concluded in the early 1990s thus contain commitments to negotiate self-government agreements. Most of those concluded since 1995 include constitutionally protected self-government chapters, some aspects of which are viewed by some critics as excessive and at odds with the constitutional division of powers.

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4 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Part II: Rights of the Aboriginal Peoples of Canada, http://laws.justice.gc.ca/en/const/9.html#anchorsc:7-bo-ga:l_II.

5 *Comprehensive Land Claims Policy*, Department of Indian Affairs and Northern Development, Ottawa, 1986.

6 *Federal Policy for the Settlement of Native Claims*, Department of Indian Affairs and Northern Development, Ottawa, 1993.

7 *Aboriginal Self-Government – The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Minister of Indian Affairs and Northern Development, Ottawa, 1995.

THE AGREEMENTS

A total of 23 comprehensive claims have been settled since 1973:

- *James Bay and Northern Quebec Agreement* (1975)[8] and *Northeastern Quebec Agreement* (1978);[9]
- *Inuvialuit Final Agreement*, western Arctic (1984);[10]
- *Gwich'in Agreement*, northwestern portion of the Northwest Territories and "primary use area" in Yukon (1992);[11]
- *Nunavut Land Claims Agreement*, eastern Arctic (1993);[12]
- Eleven *Yukon First Nation Final Agreements* through 2008, based on the *Council for Yukon Indians Umbrella Final Agreement* (1993);[13]
- *Sahtu Dene and Métis Agreement*, Mackenzie Valley, Northwest Territories (1994);[14]
- *Nisga'a Final Agreement*, Nass Valley, northern British Columbia (2000);[15]
- *Tlicho Agreement*, North Slave region, Northwest Territories (2003);[16]

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8 *James Bay and Northern Quebec Agreement and Complementary Agreements*, 1998 edition, Les Publications du Québec, Sainte-Foy, Québec, 1998, http://www.collectionscanada.gc.ca/webarchives/20071125190010/www.ainc-inac.gc.ca/pr/agr/que/jbnq_e.pdf.

9 *Northeastern Quebec Agreement*, Department of Indian Affairs and Northern Development, Ottawa, 1984, http://www.collectionscanada.gc.ca/webarchives/20071125204501/www.ainc-inac.gc.ca/pr/agr/que/neqa_e.pdf.

10 *Inuvialuit Final Agreement, as amended*, Inuvialuit Regional Corporation, Inuvik, 1987.

11 *Gwich'in Comprehensive Land Claim Agreement, Volumes 1 and 2*, Department of Indian Affairs and Northern Development, Ottawa, 1992, http://www.collectionscanada.gc.ca/webarchives/20071125165653/www.ainc-inac.gc.ca/pr/agr/gwich/gwic_e.pdf.

12 *Nunavut Land Claims Agreement*, Government of Nunavut, 1993, http://www.gov.nu.ca/hr/site/doc/nlca.pdf.

13 *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon*, Department of Indian Affairs and Northern Development, Ottawa, 1993, http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/ykn/umb/umb-eng.pdf.

14 *Sahtu Dene and Métis Comprehensive Land Claim Agreement*, Department of Indian Affairs and Northern Development, Ottawa, 1994, http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/sahtu/sahmet/sahmet-eng.pdf.

15 *Nisga'a Final Agreement*, Federal Treaty Negotiation Office (now Treaties and Aboriginal Government – Negotiations West), 1998, http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.pdf.

16 *Tlicho Agreement*, Queen's Printer for Canada, 2003, http://www.collectionscanada.gc.ca/webarchives/20071124232758/www.ainc-inac.gc.ca/pr/agr/nwts/tliagr2_e.pdf.

- *Labrador Inuit Agreement*, Labrador and Newfoundland (2005);[17]
- *Nunavik Inuit Land Claims Agreement*, Quebec (2006);[18]
- *Tsawwassen First Nation Final Agreement*, BC Lower Mainland (2007);[19] and
- *Maa-nulth First Nations Final Agreement*, Vancouver Island (2009). [20]

The agreements are signed by federal, provincial/ territorial and Aboriginal representatives, and provide for ratification by the Aboriginal party and government. Typically, they require Parliament to enact legislation giving effect to an agreement; with the exception of agreements "north of sixty" from 1984 to 1993, provincial/territorial settlement legislation has also been a condition of ratification. In the case of *Yukon Final Agreements*, federal legislation ratifying the initial four provided for Cabinet approval of subsequent agreements by the Governor in Council. All the listed land claim agreements have undergone full ratification processes.

Following ratification, it has not been uncommon for conflicts to arise between parties to the agreements as to the scope of their respective rights and obligations and their implementation. In 1998, the Auditor General issued a report critical of the federal role in land claim implementation on various counts;[21] a second report in 2003 observed ongoing shortcomings in the government's implementation practices with respect to the Gwich'in and Nunavut agreements.[22] It cautioned against unresolved disagreements over treaty interpretation or implementation. Other developments related to implementation issues include:

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17 *Labrador Inuit Land Claims Agreement*, Department of Indian Affairs and Northern Development, Ottawa, 2004, http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/labi/labi-eng.pdf.

18 Department of Indian Affairs and Northern Development, "The Nunavik Inuit Land Claims Agreement – The Agreement in Brief," Backgrounder, 28 March 2007, http://www.ainc-inac.gc.ca/ai/mr/nr/j-a2007/2-2855-bk-eng.asp.

19 *Tsawwassen First Nation Final Agreement*, Department of Indian Affairs and Northern Development, Vancouver, 2007, http://www.ainc-inac.gc.ca/ai/scr/bc/trts/agrmts/tfn/fa/tfnfa-eng.pdf.

20 *Maa-nulth First Nations Final Agreement*, Department of Indian Affairs and Northern Development, Vancouver, 2009.

21 Office of the Auditor General of Canada, "Indian and Northern Affairs Canada – Comprehensive Land Claims," Chapter 14 in *1998 September Report of the Auditor General of Canada*, http://www.oag-bvg.gc.ca/internet/English/parl_oag_199809_14_e_9320.html.

22 Office of the Auditor General of Canada, "Indian and Northern Affairs Canada – Transferring Federal Responsibilities to the North," Chapter 8 in *2003 November Report of the Auditor General of Canada*, http://www.oag-bvg.gc.ca/internet/docs/20031108ce.pdf.

- In February 2008, Canada and the Grand Council of the Crees in northern Quebec signed an agreement aimed at putting an end to controversy and litigation surrounding Canada's implementation of the 1975 *James Bay Agreement*.[23] Federal legislation to amend the 1984 *Cree-Naskapi (of Quebec) Act* in accordance with the terms of this "New Relationship Agreement" was adopted by both houses of Parliament in spring 2009 and has yet to come into force.[24]

- Aboriginal signatory groups formed the Land Claims Agreements Coalition[25] in 2003 to advocate for improved implementation policies and practices. In March 2009, Coalition members released their model treaty implementation policy.[26]

- In May 2008, a report of the Standing Senate Committee on Aboriginal Peoples recommended a number of reforms to federal implementation policy and practice, including greater collaboration with the Land Claims Agreements Coalition.[27]

- In December 2006, Nunavit Tunngavik Incorporated, representing Inuit beneficiaries under the *Nunavut Land Claims Agreement*, initiated legal proceedings against the federal government before the Nunavut Court of Justice, seeking $1 billion for non-implementation of numerous obligations under the Agreement. The case remains in the preliminary stages.[28]

Additional comprehensive land claims are at various stages in the negotiation process and involve groups in the Atlantic Provinces, Newfoundland and Labrador, Quebec, Ontario, Manitoba, Saskatchewan and the Northwest Territories. Most, however, are centred in British Columbia.[29]

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23 *Agreement Concerning a New Relationship Between the Government of Canada and the Cree of Eeyou Istchee*, 2008, http://www.ainc-inac.gc.ca/al/ldc/ccl/agr/croei/agrnr-eng.asp.

24 *An Act to amend the Cree-Naskapi (of Quebec) Act*, S.C. 2009, c. 12, http://www2.parl.gc.ca/content/hoc/Bills/402/Government/C-28/C-28_4/C-28_4.PDF.

25 For more information, see the Land Claims Agreements Coalition website at http://www.landclaimscoalition.ca/.

26 Land Claims Agreements Coalition, *Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties Between Aboriginal Peoples and the Crown*, November 2008, http://www.landclaimscoalition.ca/pdf/090303%20Policy%20Document%20-%20Release%20Version.pdf.

27 Senate, Standing Committee on Aboriginal Peoples, *Honouring the Spirit of Modern Treaties: Closing the Loopholes – Interim Report: Special Study on the Implementation of Modern Land Claims Agreements in Canada*, May 2008, http://www.parl.gc.ca/39/2/parlbus/commbus/senate/com-e/abor-e/rep-e/rep05may08-e.pdf.

28 Nunavut Court of Justice File No. 08-06-713CVC.

29 For a comprehensive review of existing claims and outstanding negotiations, see Department of Indian Affairs and Northern Development, "General Briefing Note on Self-Government and Claims Policy of Canada and the Status of Claims," August 2009.

BRITISH COLUMBIA TREATY PROCESS

The historic treaty process resulting in "numbered" land treaties in Ontario, the Prairie provinces and the present Northwest Territories was largely not entered into with British Columbia First Nations. Growing government acknowledgment of their concerns and claims in the 1970s and 1980s led to the establishment in 1993 of the British Columbia Treaty Commission (BCTC) process, by agreement among the federal and provincial governments and the First Nations Summit. Since its creation, the tripartite process has faced a number of challenges. Over the years, First Nations have expressed frustration with the perceived lack of progress at treaty tables, the protracted nature and expense of treaty talks, and the continued alienation of lands and resources while complex negotiations are taking place. These concerns appeared heightened following the 1997 *Delgamuukw* decision confirming the existence of Aboriginal title, owing to First Nations' perception that governmental parties have failed to take the ruling's requirements into account in negotiations. Recent occasional "incremental treaty agreements" and "interim measures agreements" between the province and individual First Nations communities that provide at least some treaty benefits pending the conclusion of the trilateral negotiation process are viewed by the BCTC as positive initiatives that should be employed more systematically.[30]

Of three final agreements reached to date under the BCTC process, two were approved by the First Nations parties. Ratification processes for the *Tsawwassen First Nation Final Agreement* and the *Maa-nulth First Nations Final Agreement* were completed in June 2008 and June 2009 respectively with the enactment of federal settlement legislation. The Lheidli T'enneh First Nation rejected a treaty settlement in March 2007. Five agreements-in-principle remain in the final stage of negotiations.[31]

Beginning in October 2006, over 60 First Nations communities engaged in the treaty process signed on to a Unity Protocol Agreement calling for a renewed "common table" process to remove barriers to negotiations resulting from what the signatories view as

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30 British Columbia Treaty Commission, *Annual Report 2008*, http://www.bctreaty.net/files/pdf_documents/2008_Annual_Report.pdf.

31 They involve the Sliammon First Nation, the Yale First Nation, the Yekooche First Nation, the In-SHUCK-ch Nation and the Sechelt Indian Band.

government parties' rigid negotiating positions in a number of key areas.[32] Although a series of trilateral talks in summer 2008 facilitated by the BCTC resulted in apparent identification of areas for future discussion, in August 2009 First Nations leaders expressed frustration at governments' perceived failure to advance the common table initiative in the intervening period or to address common table issues more fully.[33] At the same time, approximately 40% of BC First Nations communities are not participating in what they view as a flawed BCTC process; many have nevertheless entered into discussions with government on a range of land-related issues.

In 2006, separate audits of the BCTC process by federal and provincial auditors general observed that "results achieved are well below the three parties' initial expectations," and that First Nations and government parties hold "differing views on the nature of the treaties being negotiated."[34] In their view, the evolution of "other legal, economic, and political options" make it "challenging for the federal and B.C. provincial governments to offer benefits to First Nations that meet or exceed those available outside the treaty process." The Department accepted the federal Auditor General's recommendations for improvements to the process, including ongoing federal policy review, development of a consultation policy and improved management of negotiations.

Against this backdrop, a large number of First Nations groups have voiced mounting concern that "The New Relationship,"[35] a joint 2005 document in which the First Nations Leadership Council and the province agreed to "a new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights," has not thus far been reflected in government policy and practice. In August 2009, while the Speech from the Throne to open the province's 39th Parliament reaffirmed the government's

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32 They are certainty; the constitutional status of treaty lands; governance; co-management throughout traditional territories; fiscal relations and taxation; and fisheries.

33 "'Common Table' Unhappy with Progress," *Courier-Islander* [Campbell River, BC], 26 August 2009, http://www.canada.com/Common+table+unhappy+with+process/1929825/story.html.

34 Office of the Auditor General of Canada, "Federal Participation in the British Columbia Treaty Process – Indian and Northern Affairs Canada," Chapter 7 in *2006 November Report of the Auditor General of Canada*, http://www.oag-bvg.gc.ca/internet/docs/20061107ce.pdf.

35 Government of British Columbia, Ministry of Aboriginal Relations and Reconciliation, *The New Relationship*, 2005, http://www.newrelationship.gov.bc.ca/shared/downloads/new_relationship.pdf.

commitment to The New Relationship,[36] an All Chiefs Assembly appeared to question its continued viability.[37]

OVERLAP

A contentious matter highlighted by litigation – later suspended – over the first modern treaty in British Columbia concerned overlap between the land claim of the Nisga'a and those of neighbouring First Nations groups. The matter is not directly addressed in the *Nisga'a Agreement*, which does, however, allow for replacement rights in the event other land claim agreements adversely affect Nisga'a rights, including, implicitly, those related to land.

Disputes over the boundaries of traditional territories affect numerous ongoing comprehensive claims in British Columbia. As was the case for the Nisga'a treaty, court challenges were mounted to prevent conclusion of both the Tsawwassen[38] and Maa-nulth[39] Agreements, on the basis that it would interfere with neighbouring groups' own overlapping claims. In dismissing the challenges, BC courts relied, in part, on non-derogation terms in the agreements as evidence that they did not limit these claims.

Recent BCTC annual reports acknowledge the possibility that overlap issues may delay progress in negotiations, and the need for First Nations communities to resolve them. The Commission's increasing involvement in those issues includes a "shared territory" pilot project to assist First Nations communities in addressing territorial disputes early in the process,[40] and facilitation of dialogue among "overlap" First Nations in the final phases of negotiation.[41]

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36 Government of British Columbia, "Throne Speech Focuses on Strengthening British Columbia," News release, 25 August 2009, http://www2.news.gov.bc.ca/news_releases_2009-2013/2009PREM0028-000251.htm.

37 Union of British Columbia Indian Chiefs, "All Chiefs Assembly United in Rejection of Proposed [Recognition and Reconciliation] Legislation: The Legislation is Dead," News release, 28 August 2009, http://www.ubcic.bc.ca/News_Releases/UBCICNews08290901.htm.

38 *Cook* v. *The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722, 29 November 2007, http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/430467/2007BCSC1722.htm.

39 *Tseshaht First Nation* v. *Huu-ay-aht First Nation*, 2007 BCSC 1141, 27 July 2007, http://www.arvayfinlay.com/news/news-aug08-TseshahtVHuu-ay-aht.pdf.

40 British Columbia Treaty Commission, *Treaty Commission Update*, July 2008, http://www.bctreaty.net/files/pdf_documents/summer2008update.pdf.

41 British Columbia Treaty Commission, *Annual Report 2008*, note 30.

The matter of overlap is also a feature of both settled and outstanding claims in many other regions of the country, including the northern territories, northern Quebec, northern Manitoba, and Newfoundland and Labrador, and is addressed in various ways. For instance, treaties with Yukon First Nations, Nunavut Inuit, the Tlicho, and the Labrador Inuit all make provision for overlap situations, while the agreement with the Nunavik Inuit incorporates detailed overlap agreements with three neighbouring Aboriginal groups.

SURRENDER AND CERTAINTY

A long-standing issue associated with comprehensive claims has been the federal policy requirement that Aboriginal groups surrender their Aboriginal rights and title to lands and resources in exchange for defined rights set out in a land claim settlement. The dominant theme underlying federal policy in this matter, described in national interest terms, concerns the need to achieve "certainty" with respect to land and resource rights and interests. In 1995, reports of both the federal fact finder mandated to explore alternative models[42] and the Royal Commission on Aboriginal Peoples[43] suggested that certainty as to land-related rights might be achieved without this "extinguishment." United Nations bodies have urged Canada to abandon the practice.

Developments in the area have undoubtedly occurred. The language of cession, release and surrender typical of early land claim agreements has not been reiterated in more recent treaties, beginning with the 1998 *Nisga'a Agreement*. Some observers feel that essentially the same result flows from its "modified rights" approach that exhaustively defines Nisga'a section 35 rights and releases to Canada any Aboriginal right, including title, other than those described in the agreement. Alternative approaches have also been set out in the 2003 *Tlicho Agreement* and the *Nunavik Inuit Land Claims Agreement* (non-exercise or non-assertion), the 2005 *Labrador Inuit Agreement* (variation on the Nisga'a modified rights model), the 2004 *Agreement-in-Principle of a General Nature* with four Quebec Innu communities (suspension) and the 2006 *Tsawwassen First Nation Final Agreement* and *Maa-nulth Final Agreement* (modified rights).

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42 A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership*, Minister of Indian Affairs and Northern Development, Ottawa, 1995.

43 *Treaty-Making in the Spirit of Coexistence: An Alternative to Extinguishment*, Minister of Supply and Services Canada, Ottawa, 1995.

In its 2004 annual report, the BCTC commented that, although Canada and BC were in agreement that blanket extinguishment was not an option, "Canada continues to insist on a form of release that poses a serious challenge to First Nations."[44] In 2006, the UN Human Rights Committee called on Canada to ensure that alternatives to extinguishment in modern treaties do not, in practice, extinguish Aboriginal rights.[45] Similarly, the UN Committee on Economic, Social and Cultural Rights expressed concern that the new approaches "do not differ much from the extinguishment and surrender approach," and urged a re-examination of governmental policies and practices to ensure they do not result in extinguishment.[46] Certainty is among the key issues targeted for common table discussion in the Unity Protocol Agreement.

OUTSTANDING MATTERS

The Assembly of First Nations and other Aboriginal organizations have long advocated broad reform of comprehensive land claim policy. The initial meeting of the Joint Steering Committee established under the May 2005 First Nations – Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments[47] flagged land rights as one of three priority areas for review. In British Columbia, where the matter is a particularly key concern owing to the number and scope of outstanding claims, the November 2005 tripartite Transformative Change Accord[48] contained an undertaking to improve relationships, in part through the "review and renewal of claims."

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44 British Columbia Treaty Commission, *Consider a New Relationship,* Treaty Commission Annual Report 2004.

45 United Nations, *International Covenant on Civil and Political Rights*, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – Canada," CCPR/C/CAN/CO/5, 20 April 2006, http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf.

46 United Nations, Economic and Social Council, "Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights – Canada," E/C.12/CAN/CO/4; E/C.12/CAN/CO/5, 22 May 2006, http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/87793634eae60c00c12571ca00371262/$FILE/G0642783.pdf.

47 *First Nations – Federal Crown Political Accord on the Recognition and Implementation of First Nation Governments*, 31 May 2005, http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2005/02665afn.pdf.

48 *Transformative Change Accord between Government of British Columbia and Government of Canada and the Leadership Council Representing the First Nations of British Columbia*, 25 November 2005, http://www.newrelationship.gov.bc.ca/shared/downloads/transformative_change_accord.pdf.

The current status of these initiatives is not known, and the question of whether and how they or similar initiatives might be pursued in the current Parliament or subsequent ones remains to be determined. It is worth noting that because the existing federal approach to comprehensive claims has, since its inception, been policy-based rather than statutory, parliamentary involvement in policy reform measures would not be automatic.

In addition to policy considerations, completion of any of the comprehensive agreements under current negotiation would trigger ratification legislation in Parliament.

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