Crown-Indigenous Relations and Northern Affairs Canada
Relations Couronne-Autochtones et Affaires du Nord Canada

Crown-Indigenous Relations in Canada: Rights, Needs and Interests

An Overview

July 2019

Canada

Understanding the Context

THE “SETTLEMENT” OF CANADA

HISTORICAL BACKGROUND ON THE RIGHTS-BASED RELATIONSHIP

- The *Royal Proclamation of 1763*:
  - Articulated core elements of the relationship between First Nations and the Crown
  - Recognized First Nations' rights in Canada
  - Defined the enduring treaty-making process
- Historic treaty-making (early 17th century-1923)
- Canada's *Constitution Act, 1867*: codified the colonial relationship between the Crown and Indigenous peoples
- The *Indian Act* (1876): imposition of Crown control + assimilation
- Other injustices:
  - Indian Residential Schools
  - Forced relocations
  - The Pass System

Largely respectful relations between treaty partners → systems of assimilation and colonization

PURPOSES AND EVOLUTION OF HISTORIC TREATY-MAKING

The Covenant Chain of treaties, Wampum belts (early 17th century to early 18th century)

Upper Canada Land Surrenders (1764-1862)

Establishing terms of first formal relationships between Indigenous peoples and Europeans

Ensuring military alliances in the period of colonial power conflicts in North America

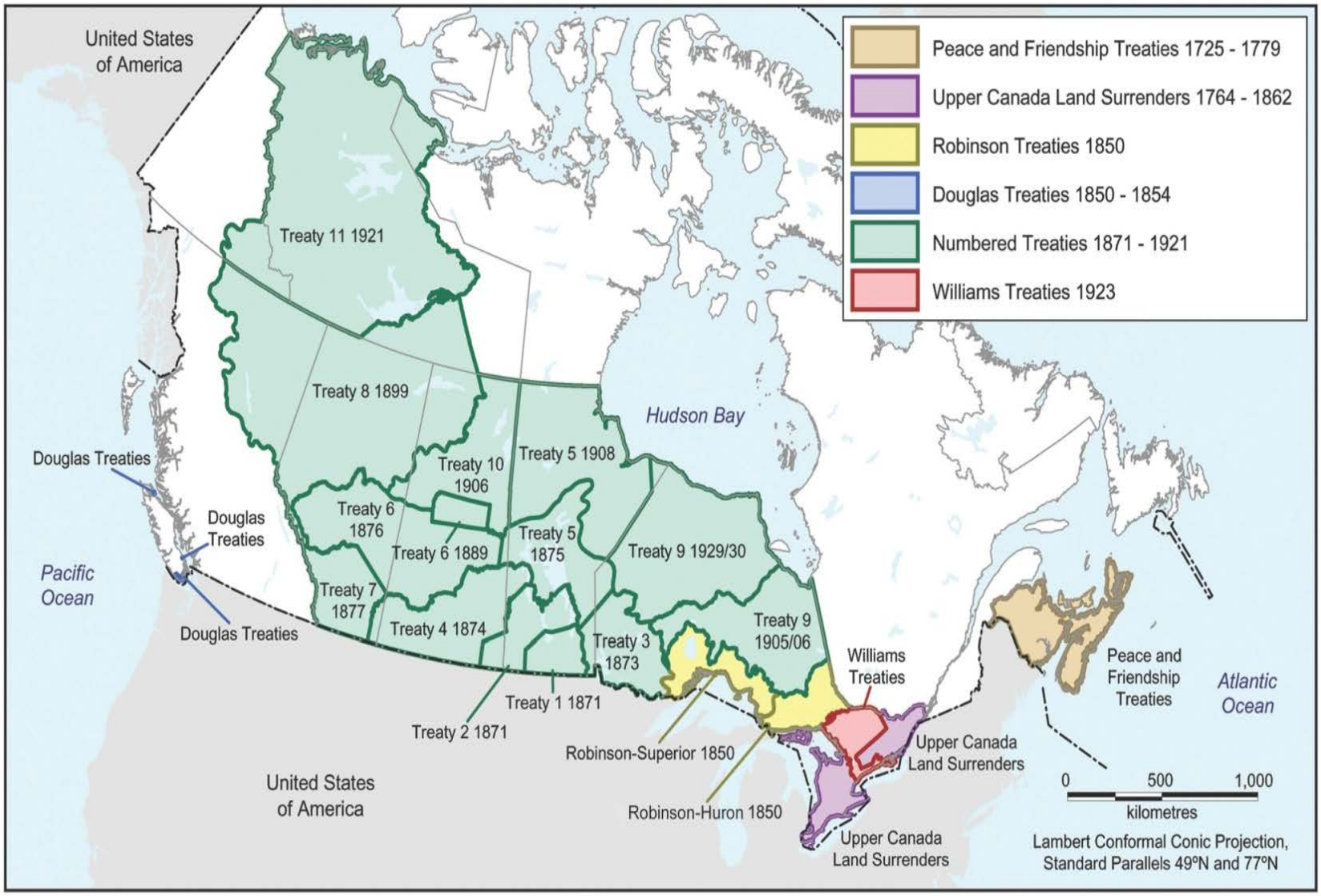
Making arrangements for security and trade

Opening lands up for development and settlement + establishing Crown sovereignty and control

Peace and Neutrality Treaties (1701-1760), Peace and Friendship Treaties (1725-1779)

Robinson Treaties (1850), Douglas Treaties (1850-1854), Numbered Treaties (1871-1921), Williams Treaties (1923)

HISTORIC TREATIES RECOGNIZED BY CANADA



Note:

While there are two recognised historic treaties in Québec, the 1760 Treaty of Swegatchy and the Huron-British Treaty, neither of these treaties have a clearly identified land base, Consequently, they cannot be identified on a map.

Modern Approaches: “Full and Final Settlement”

PURSUING LEGAL AND ECONOMIC CERTAINTY

A NEW ERA FOR THE CROWN-INDIGENOUS RELATIONSHIP

- ***Calder v British Columbia (Attorney General)*** (Supreme Court of Canada, 1973):
  - First acknowledgement of enduring Indigenous rights in Canada, including pre-contact and continuing title to land → pushed Canada to address neglected issues
  - **Resulting uncertainty over Indigenous rights, including land rights → risks to investment and development + legal risk related to past Crown conduct**
- August 1973: Government of Canada responds to *Calder*; accepts legitimacy of both "comprehensive land claims" and "specific claims"
  - Intent: to achieve legal and economic certainty over land and rights
  - Resulting policies (1973):
    - **Comprehensive land claims**: settlements to include lands and implementation of other rights based on "traditional" use and occupancy of lands, where rights have not already been addressed by treaty
    - **Specific claims**: settlements to address Crown wrongdoing related to treaty fulfillment and management of Indigenous land and other assets (*Statement on Claims of Indian and Inuit People*)

Despite rapid evolution of the Indigenous rights doctrine, the *Indian Act* remains in force and continues to influence the substance and nature of the Crown-Indigenous relationship

EARLY EVOLUTION OF THE MODERN RELATIONSHIP

The ***Constitution Act, 1982***:

- ✓ **Section 25**: acknowledges the *Royal Proclamation of 1763* as a source of rights for "aboriginal Peoples of Canada"
- ✓ **Section 35** : constitutionally protects "Aboriginal and treaty rights"

- Comprehensive claims created new gaps and uncertainties
- Expert reports in the 1980s and early 1990s made the case for recognizing an inherent right of self-government as a section 35 Aboriginal right
- The *Inherent Right Policy* (1995) recognized that self-government is an inherent right of Indigenous Peoples under section 35 and provided for its negotiation with or without a land component
- The comprehensive and specific claims policies were updated throughout the 1980s and 1990s to respond to the changing legal and policy landscape of the rights-based relationship

SECTION 35: THE CONSTITUTIONAL PROMISE OF RIGHTS-BASED RECONCILIATION

- "***35.*** *(1) The* ***existing aboriginal and treaty rights*** *of the aboriginal peoples of Canada are hereby* ***recognized and affirmed****.*

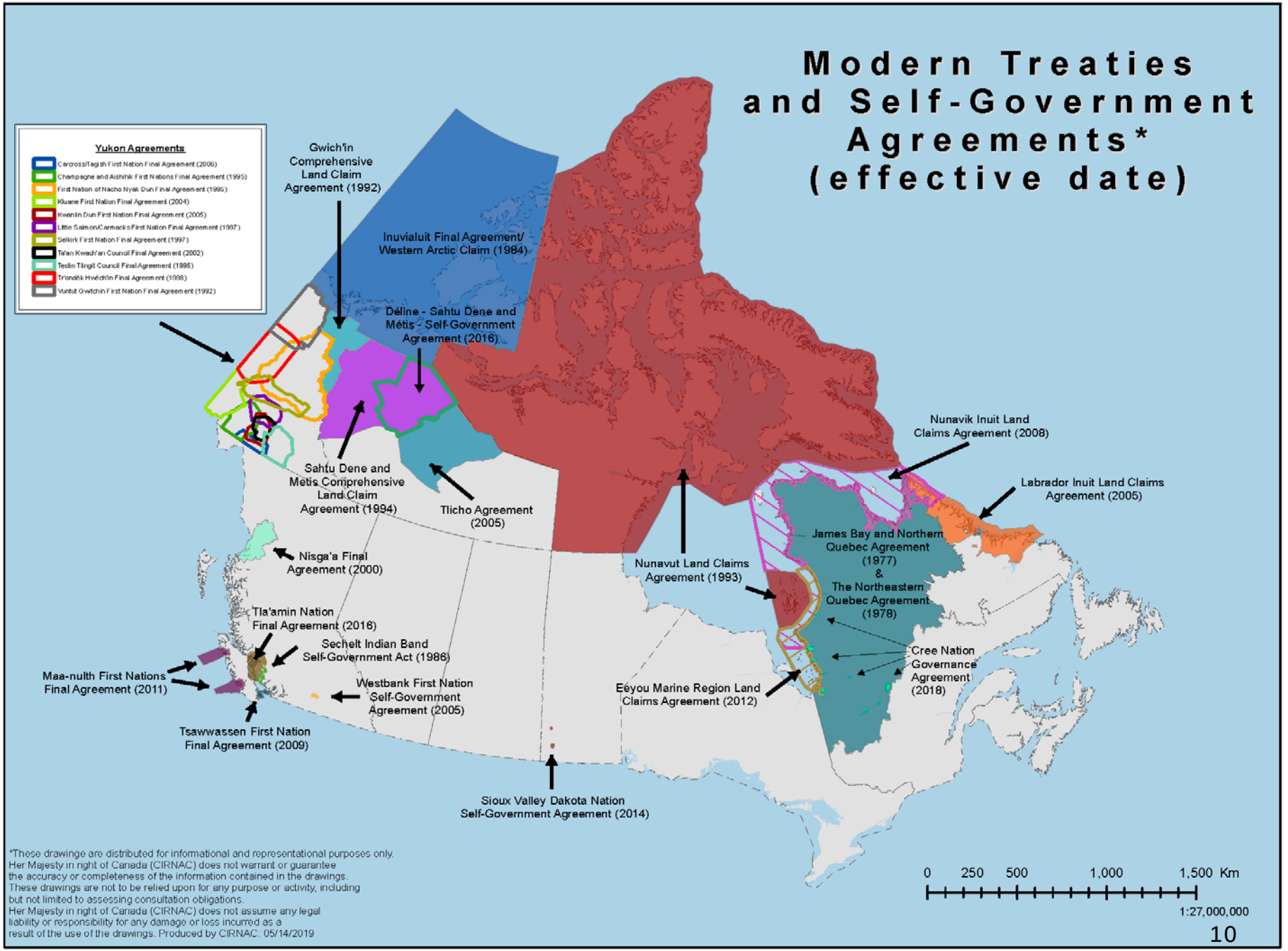
  […]

  Land claims agreements

  (3) For greater certainty, in subsection (1) ***"treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired****."*
- Section 35 also:
  - defines "aboriginal peoples of Canada" as First Nations, Inuit and Métis
  - guarantees the rights it recognizes and affirms equally to men and women; and,
  - commits to a constitutional conference including "representatives of the aboriginal peoples of Canada" on any changes to any of the constitutional provisions referring to Indigenous peoples

The understanding of section 35 has evolved over the past 3 decades:

- *R v Van der Peet* (1996, Supreme Court of Canada): section 35 provides the framework for reconciling the **pre-existence of Indigenous peoples** with the **sovereignty of the Crown**
- *Haida Nation v British Columbia (Minister of Forests)* (2004, Supreme Court of Canada):
  - Treaties serve to reconcile **pre-existing Indigenous sovereignty** with **assumed Crown sovereignty**, to define the rights guaranteed by section 35
  - Section 35 is a **promise of rights recognition**
- *Beckman v Little Salmon/Carmacks First Nation* (2010, Supreme Court of Canada): **reconciliation** in a mutually respectful, long-term relationship between Indigenous peoples and other Canadians is the purpose of section 35



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DRIVERS OF REFORM

Rights-Based Agreements

- Canada has negotiated a total of 43 **modern treaties and self-government agreements**—but results have been slow:
  - Time-consuming and costly negotiation process created disincentives to engaging in and concluding negotiations
  - Resulting agreements are static; adapting to changing circumstances is difficult
  - Federal negotiation mandates are pre-determined and unilateral
  - Lack of sufficient flexibility to address the objectives of Indigenous groups
  - Very little consideration given to implementation
  - Perception of Métis exclusion
  - Self-government agreements did not address governance capacity needs
- In 2016, Canada committed to implementing the United Nations Declaration on the Rights of Indigenous peoples, consistent with the Canadian Constitution
- In recent years, the findings of expert Ministerial Special Representatives have confirmed these issues, and suggested that Canada shift to more **flexible** and **responsive** policies

Specific Claims

- Longstanding issues have also been identified with respect to **specific claims**:
  - Canada's perceived arbitrary and biased approach to the assessment of claims
  - Perceived lack of meaningful negotiations
  - Long timelines for reaching resolution
  - Insufficient funding to support First Nations during the negotiation process
  - Lack of transparency in the administration of funding to support First Nations
  - Adversarial nature of proceedings before the Specific Claims Tribunal
  - Lack of availability of independent mediation services
  - Reform implementation problems
- In 2016, Canada committed to implementing the United Nations Declaration on the Rights of Indigenous peoples, consistent with the Canadian Constitution
- **Key ongoing issue**: perception of built-in bias because Canada determines whether it will negotiate the settlement of claims made against it

Moving Forward Together

FOCUSING ON RIGHTS RECOGNITION AND IMPLEMENTATION

CANADA'S POLICY DIRECTION ON RIGHTS-BASED AGREEMENTS

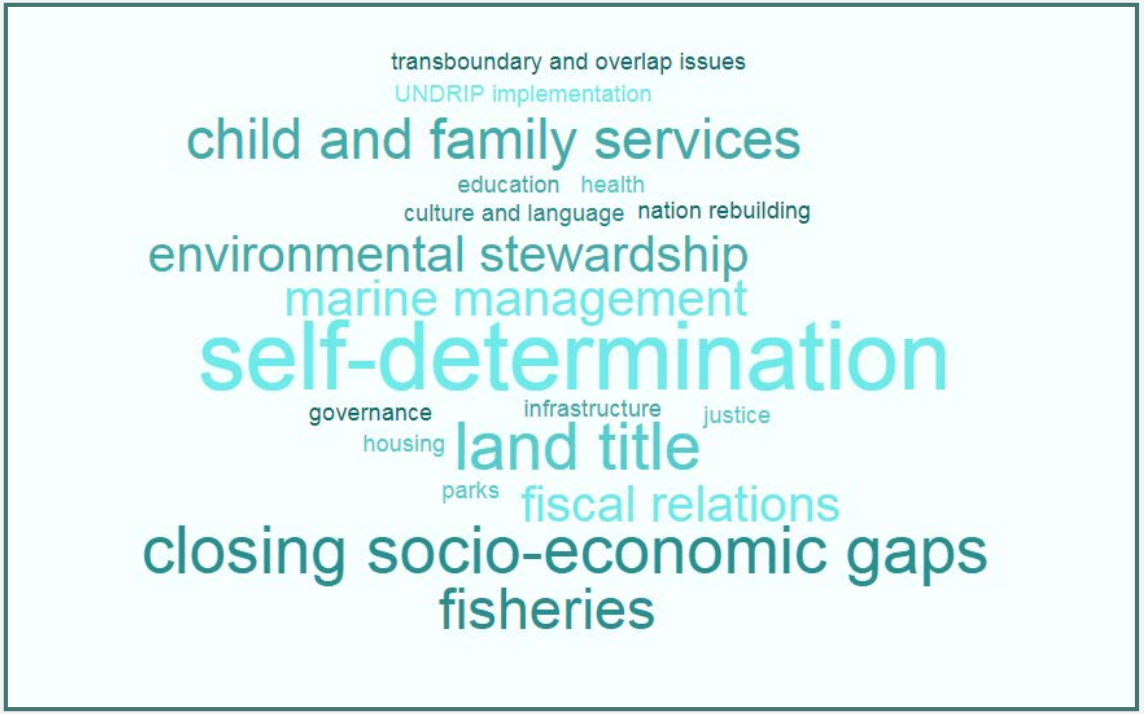
SHARED GOAL: Ensure that Indigenous rights are meaningfully recognized and implemented in the context of a renewed Nation-to-Nation, Government-to-Government, and Inuit-to-Crown relationships based on the recognition of rights, respect, cooperation and partnership

Moving From…	To…
1. Rights must be claimed and proven	1. Rights are recognized as pre-existing
2. Rights extinguishment, definition and modification to achieve certainty ("cede, release and surrender")	2. Flexible agreements that include mechanisms for predictable evolution of rights
3. Full and final settlements	3. Living agreements
4. Negotiation mandates are unilaterally developed by Canada	4. The parties co-develop the negotiation mandate at the table, based on interests
5. Funding and fiscal relationship does not necessarily account for broader socio-economic considerations	5. Funding and fiscal relationship prioritizes fostering self-determination AND opportunities to close socio-economic gaps

As the Crown and Indigenous peoples move towards a renewed relationship and reconciliation, their joint work will continue to be founded on and guided by section 35 of the *Constitution Act, 1982*

CURRENT APPROACH TO NEGOTIATING COLLECTIVE RIGHTS-BASED AGREEMENTS

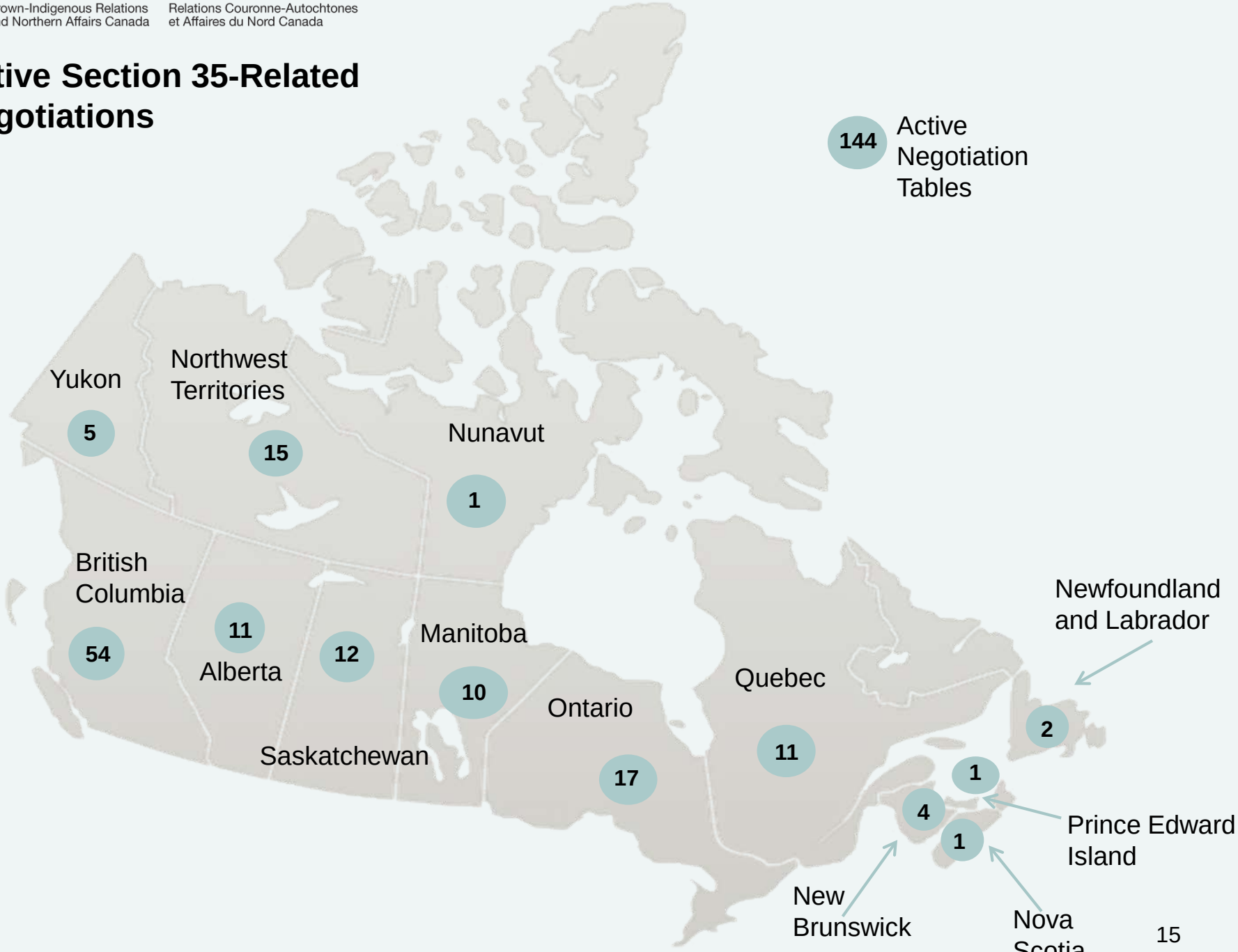
- Discussions are premised on the **recognition that Indigenous rights exist**, regardless of whether or not they have been recognized by Canada
- Discussions are based on **community-identified interests and needs** + shared priorities
- Discussions lead to negotiation mandates and agreements that are **co-developed** before being approved internally
- **140+** section 35-related negotiation tables are underway
- **480+ First Nation** communities, **44 Inuit** communities and **9 Métis** groups are involved across the country
- The total implicated population is **890,000+ Indigenous people**



RESULTS OF THE CURRENT APPROACH

- ✓ Major increase in negotiation activity
- ✓ **Accelerated progress** on reaching agreements and settlements (**45+** preliminary-type agreements signed to date)
- ✓ More supportive environment for **advancing self-determination**
- ✓ Opportunities to **narrow socio-economic gaps** and build **capacity**

Active Section 35-Related Negotiations



CANADA'S POLICY DIRECTION ON THE WAY FORWARD FOR SPECIFIC CLAIMS

SHARED GOAL: In light of the shared recognition by First Nations and Canada that resolving historic grievances supports an ongoing relationship and contributes to achieving reconciliation, ensure that specific claims are mutually resolved whenever possible

Moving From…	To…
• Canada developing, implementing and operationalizing specific claims policy • Criticisms related to credibility of process: Canada's perceived conflict of interest in the resolution process, slow pace of resolution, inadequate funding for First Nations to develop and negotiate their claims, adversarial approaches and lack of transparency	• Indigenous-led engagement on specific claims reform • Co-development of an independent resolution process with a high level of credibility for both parties • Co-developed independent process that may include neutral third party clarifying expectations for parties and overseeing assessment, negotiation and funding

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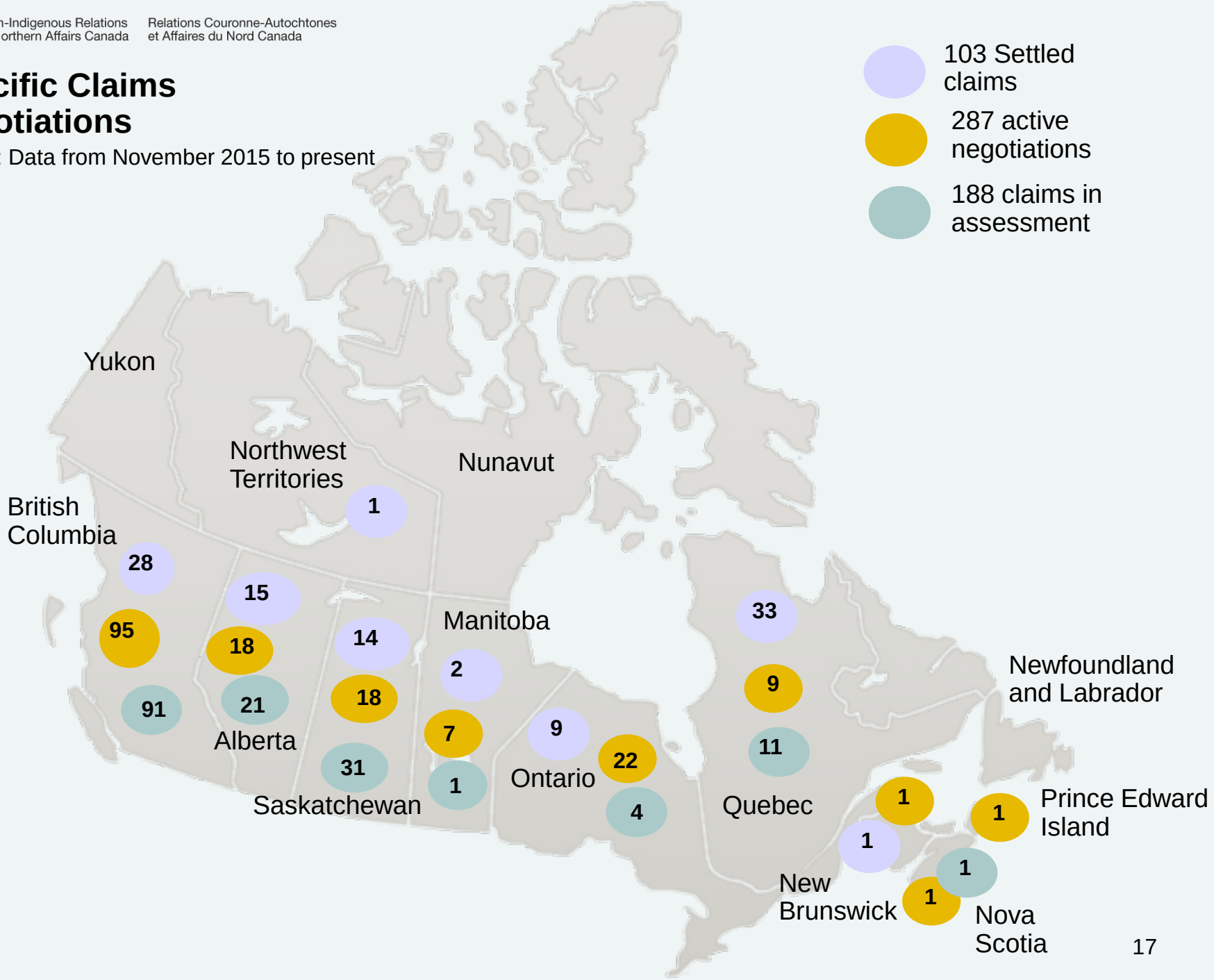
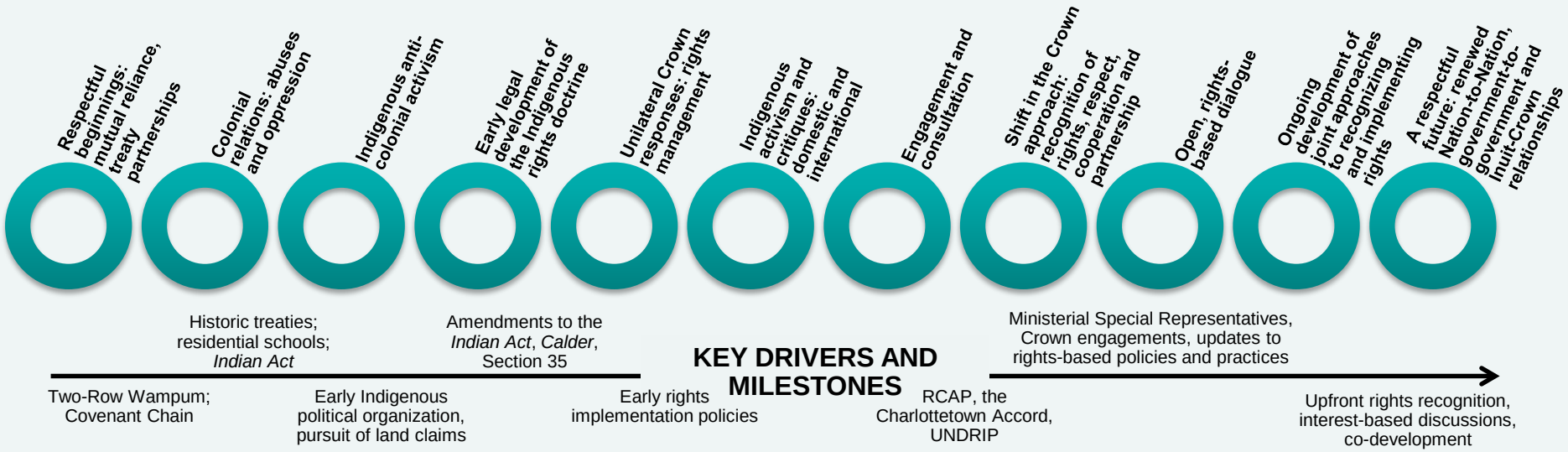
Specific Claims Negotiations

NOTE: Data from November 2015 to present



THE CROWN-INDIGENOUS JOURNEY: RENEWING A LONGSTANDING RELATIONSHIP



ROLE OF THE JUDICIARY: MOTIVATING CROWN PROGRESS IN THE MODERN ERA

- → *Calder v British Columbia* (1973)
- → *R v Sparrow* (1990)
- → *R v Van der Peet* (1996)
- → *Delgamuukw v British Columbia* (1997)
- → *R v Marshall* (1999)
- → *Haida Nation v British Columbia* (2004)
- → *Beckman v Little Salmon/Carmacks First Nation* (2010)
- → *Tsilhqot'in Nation v British Columbia* (2014)
- → *Daniels v Canada* (2016)
- → *Mikisew Cree First Nation v Canada* (2018)

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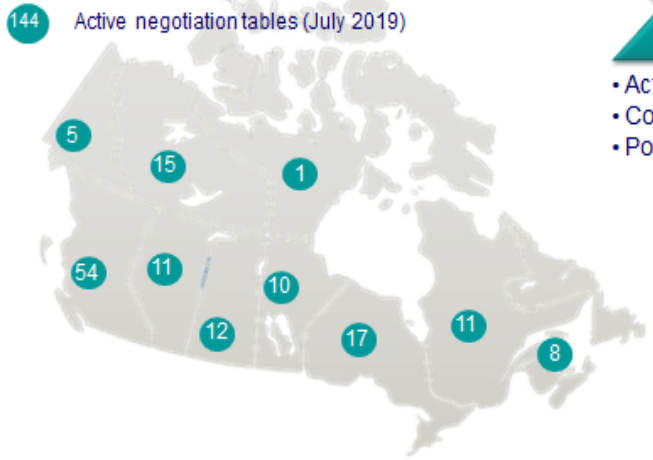
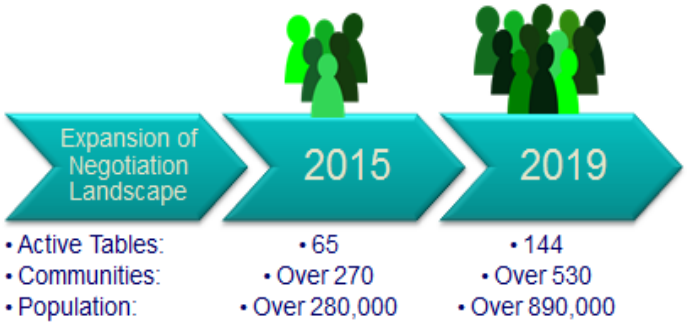
Active Section 35-Related Negotiations

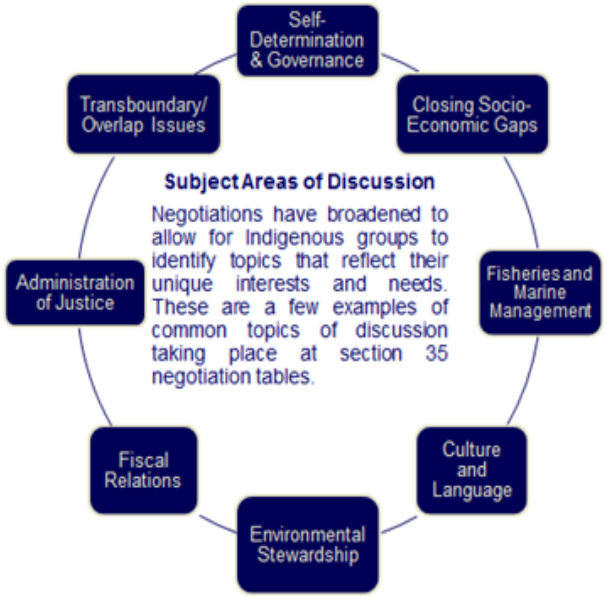
Canada has committed to renewing the relationship with First Nations, Inuit and Métis based through rights-based discussions and exploring new ways of working together to advance rights recognition and self-determination. This has fundamentally changed the way in which Canada engages in Section 35-related negotiations with its partners. This transformed approach has increased negotiation activity and accelerated the process for reaching agreements and settlements.

Negotiation tables across Canada

These tables include Self-Government, Modern Treaty, Recognition of Indigenous Rights and Self-Determination and other processes.







Key features of negotiations include:
Co-developed mandates
Broad-ranging subject areas of discussion
Accelerated progress towards agreements
Avoidance of litigation
Non-extinguishment of title

Achievements since 2015

- ✓ 3 out-of-court settlement agreements reached with Williams Treaties First Nations, Ahiarmut Lake and Lubicon Lake
- ✓ 2 apologies delivered to the Williams Treaties First Nations and Ahiarmut People and 2 exonerations for Chief Poundmaker and six Tsilhqot'in Chiefs.
- ✓ Signing of 3 Self-Government Agreements (Cree Nation, Deline Government, education self-government agreement with 23 Anishinabek First Nations)
- ✓ 9 co-developed mandates
- ✓ Joint action plan for advancing reconciliation with Manitoba Métis Federation
- ✓ Métis Government Recognition and Self-Government Agreements with the Métis Nation of Alberta, the Métis Nation of Ontario and the Métis Nation-Saskatchewan
- ✓ 5 Agreements-in-Principle
- ✓ 50 Preliminary-type agreements