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Surveys, Parcels and Tenure on Canada Lands

Edited by Dr. Brian Ballantyne

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SURVEYS

Foreword

This handbook is a beacon for those working on or with Canada Lands, and for those curious about the myriad of responsibilities of the Surveyor General for Canada Lands and the Surveyor General Branch (SGB) of Natural Resources Canada. It captures well the salient aspects of land tenure on Canada Lands, which lands include First Nation Reserves, national parks, the offshore and the north (Northwest Territories, Nunavut and Yukon).

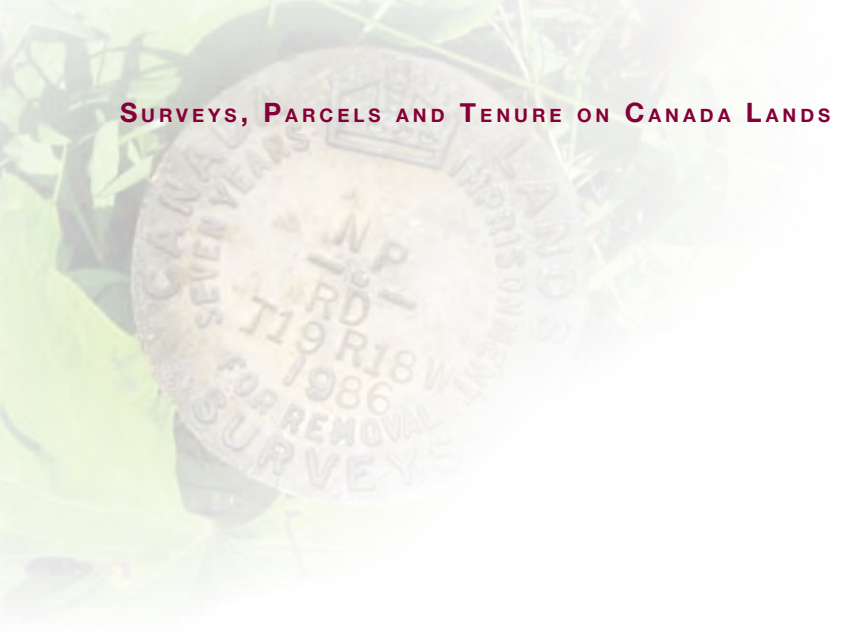
The handbook will be made widely available on the web-sites of the SGB and the Association of Canada Lands Surveyors (ACLS). It will be revised periodically to incorporate changes to legislation, case law, policy and practice. Such ongoing relevance means that the handbook will remain invaluable to surveyors, land administrators, students, Aboriginal peoples, resource extractors, land developers, other government departments; indeed, to anybody with an interest in Canada Lands.

The text is not intended to be the definitive word on each topic, nor does it fully analyze each piece of supporting legislation. It is, however, a well-researched, informative and entertaining account of the various land tenure regimes on Canada Lands and of the effect of the *Canada Lands Surveys Act,* as of mid-2010. The reader is encouraged to delve deeper into the references provided in the many footnotes. The handbook also compiles many superb photographs and other pictures.

Finally, the handbook acknowledges both a partially-drafted book on property rights from the 1980s and a more recent effort from the ACLS. Given the complexity of the project, I would like to thank all those who reviewed, critiqued and proofread various drafts of the text. Although the SGB has strove for accuracy, please let us know if you find any errors or omissions and we will amend the text accordingly.

Special thanks to Brian Ballantyne, Steve Rogers and Gord Olsson for wrestling this project to submission over the last year. I hope that you enjoy the read and find the handbook useful.

Peter Sullivan
Surveyor General for Canada Lands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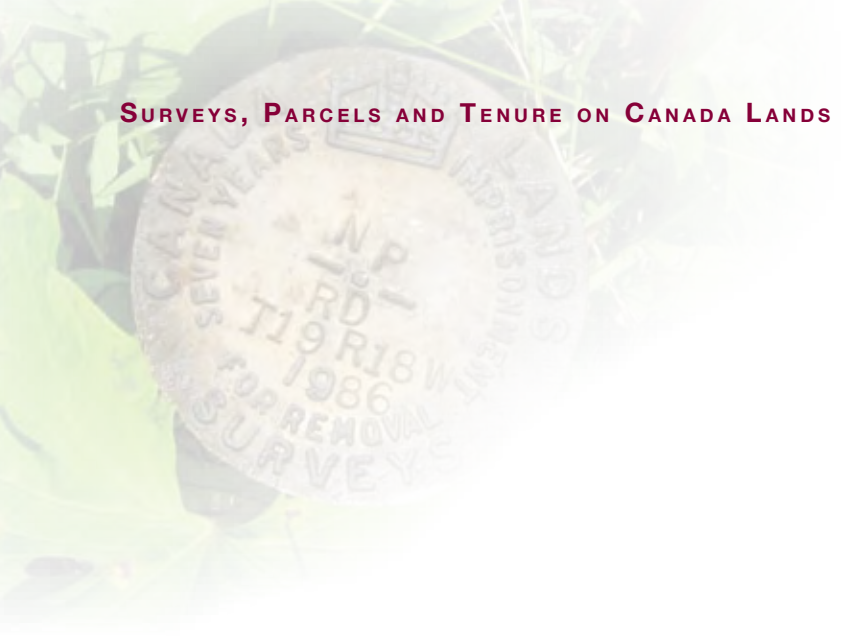
Preface

"There is property at stake; it is not a matter for affection," exclaimed Lord Caversham while selecting a suitable spouse for his son, in *An Ideal Husband*, Wilde's take on marriage, morality and artificial watercourses. This handbook refutes Lord Caversham, for it is about property and it is infused with affection. Rather, it is about the parcel fabric that allows land to become property and its writing was driven by affection; affection for the subject matter and affection for the finished product. Or, if not driven by affection then by money, for we were all paid handsomely. Despite my two colleagues - Steve and Gord - being seduced by the power and glory that accretes to all successful writers, it was, indeed a pleasure to work with them. They each brought a distinctive style and work ethic to the exercise. Such distinctiveness also characterized the efforts of the publishing gang.

However, our collective efforts over these many months, sustained by a very supportive patron, some 730 footnotes and questionable dim sum will have been for naught if the handbook is not read. Admittedly, Dostoevsky and Joyce might have been unperturbed that few people read *Crime and Punishment* and *Ulysses*. I, however, shall be perturbed if this handbook is not read by the hordes of Canadians who have long professed a keen interest in Canada Lands. To that end, it has been written so as to be read, if you have the gumption.

And to that end, I strongly recommend that you stop dithering around in the preface and move on to other parts of the handbook. Chapters 1 and 4 are particularly stellar, but it would be churlish of me not to mention the charms of the other eight chapters. As you read, think about the purpose of the handbook – to assist in the mighty and ongoing enterprise of surveying a few acres of snow, to paraphrase Voltaire's 1759 description of Canada.

Dr. Brian Ballantyne
Editor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1 Context

What is the purpose of the handbook?

This handbook has two broad objectives. First, it describes the various types of Canada Lands, and sets out how boundaries and parcels are created and administered on Canada Lands. This description should be of use to land surveyors across Canada (not necessarily limited to Canada Lands Surveyors); to First Nations and other Aboriginal peoples who live on Reserves or in the North; to those who have property rights (possession or use) on Canada Lands; to the government departments who administer those rights; to those with an interest in land tenure on Canada Lands; and to candidates before the Canadian Board of Examiners for Professional Surveyors (CBEPS).

The second broad objective is to inform a diverse audience about the roles of the Surveyor General (SG) and the Surveyor General Branch (SGB) of Natural Resources Canada (NRCan). This audience includes various levels within NRCan; other government departments with whom SGB works closely (such as Indian Affairs, Parks, Fisheries & Oceans, Public Works and Justice); Chiefs, Councils and Lands Managers within First Nations and Inuit communities; and land surveyors and administrators within other levels of government (such as the provinces and the territories).

Of course, the handbook must tell a good story, for all styles are good, except the boring.[1] To that end, it is sprinkled with colourful vignettes, winsome quotations and cutting-edge analyses, and it answers the

[1] Voltaire. *L'Enfant Prodigue.* Preface. 1736: "Tous les genres sont bon hors le genre ennuyeux."

pressing questions, such as: How did the first post-Confederation Surveyor General behave during the Fenian raids?[2]

What is the purpose of this chapter?

This chapter sets the context for the rest of the handbook by defining some terms and concepts, such as Canada Lands, cadastral surveys and Canada Lands Surveyor; boundaries, parcels and land tenure on Canada Lands; and the mandate of the SGB. The chapter also sets the stage for the substantive chapters that follow, which elaborate upon boundaries, parcels, surveys and tenure on each of the various types of Canada Lands.

What is the relationship between the Minister of Natural Resources and the Surveyor General?

The Minister of Natural Resources has the administration, direction and control of surveys under the *Canada Lands Surveys Act* (CLS Act). There are seven other sections of the CLS Act that speak to the role of the Minister; all deal with the circumstances in which Canada Lands or any federal Crown lands shall be surveyed and the methods of such surveys.

However, much discretion is afforded the Surveyor General (SG). Subject to the direction of the Minister, the Surveyor General has two very broad responsibilities:

- the management of surveys under the CLS Act; and
- the custody of all the original plans, journals, field notes and other papers connected with those surveys.[3]

In addition, the SG has responsibilities under land claim agreements between Aboriginal peoples and Canada. For example, the Nunavut Agreement sets out that surveys of Inuit Owned Lands shall only be conducted in accordance with the instructions of the SG and the CLS Act.[4] Similarly, the Tlicho Agreement sets out that the boundaries of Tlicho lands shall be surveyed in accordance with the instructions of the SG and the CLS Act.[5]

[2] See chapter 2 for the full story.
[3] *Canada Lands Surveys Act*, s.3.
[4] *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada*. s.19.8.11. 1993.
[5] *Land Claims and Self-Government Agreement among the Tlicho and the Government of the Northwest Territories and the Government of Canada*. s.18.4.1. 2003.

What is the mandate of the Surveyor General Branch?

The Surveyor General Branch (SGB) mandate is the maintenance of parcel fabric on Canada Lands – the management of surveys. Indeed, surveys of Canada Lands shall only be made in accordance with the instructions of the SG.[6] SGB focuses on setting standards, developing policies, issuing instructions for and examining plans of survey, recording plans in and providing information from the Canada Lands Surveys Records (CLSR), proffering boundary opinions, advising other government departments, liaising with First Nations and managing contracts (some $7 million per year). Each year:

- 13,500 monuments are established;
- 2,000 documents are registered in the CLSR;
- 5,000 km of boundaries are surveyed.

What are Canada Lands?

Canada Lands are defined in the *Canada Lands Surveys Act* (CLS Act). In the terrestrial environment, they are any lands belonging to the federal Crown (Canada) or of which Canada has power to dispose, that are situated in Yukon, the Northwest Territories, Nunavut or in any National Park and any lands that are

(i) surrendered lands or a reserve, as defined in the *Indian Act*,

(ii) Category IA land or Category IA-N land, as defined in the *Cree-Naskapi (of Quebec) Act*, chapter 18 of the Statutes of Canada, 1984,

(iii) Sechelt lands, as defined in the *Sechelt Indian Band Self-Government Act*, chapter 27 of the Statutes of Canada, 1986,

(iv) settlement land, as defined in the *Yukon First Nations Self-Government Act*, and lands in which an interest is transferred or recognized under section 21 of that Act,

(v) lands in the Kanesatake Mohawk interim land base, as defined in the *Kanesatake Interim Land Base Governance Act*, other than the lands known as Doncaster Reserve No. 17, or

(vi) Tlicho lands, as defined in section 2 of the *Mackenzie Valley Resource Management Act*.

[6] *Canada Lands Surveys Act*, s.24(2).

In the aquatic environment, Canada Lands are any lands under water belonging to the federal Crown (Canada) or in respect of any rights in which Canada has power to dispose.[7]

How do lands become Canada Lands?

Canada Lands are merely a subset of federal Crown lands, which includes all land held by the federal Crown for whatever purpose (defence, airports, post offices)[8] So, Canada Lands come into being either:

- by the federal Crown designating federal real property as Canada Lands (such as a National Park, First Nation Reserve);
- by the federal Crown first acquiring lands as federal real property which are then designated as Canada Lands.

Lands are acquired through purchase (from a willing seller), by the transfer of administration and control from a provincial Crown to the federal Crown, or by expropriation (from an unwilling seller). Administration and control of land is passed between governments (as from provincial to federal Crown). Within the federal Crown, only administration is passed between ministers. There are various mechanisms used, including Orders in Council, Ministerial Orders, agreements, legislation and court orders. For an example of the latter, the Ontario Superior Court of Justice recently granted to various islands in Lake of the Woods the same status as that of all the lands of Kenora Indian Reserve 38B.[9]

What is cadastral surveying?

In a nutshell, surveying determines the shape of the earth or the position of boundaries, points and things in relation to the surface of the earth (either on the surface, below the surface or above the surface). Of course, surveying also involves getting and using "spatially related information pertaining to the earth." Cadastral surveying is a subset of surveying that focuses not on the shape of the earth but on boundaries, so as to:

- identify, establish, document or describe a boundary, or anything in relation to a boundary; and
- generate, manipulate, adjust, store, retrieve or display spatial information that defines a boundary.[10]

[7] *Canada Lands Surveys Act*, s.24.
[8] *Federal Real Property and Federal Immovables Act*.
[9] *Kakeway (Rat Portage Indian Band) v. The Queen (Canada and Ontario)*, April 13, 2005. (Ont SCJ).
[10] *Canada Lands Surveyors Act*, s.1.

Cadastral surveys are merely a means to an end; they are not an end in themselves. A preliminary end is to establish boundaries on the ground. A secondary end is to establish parcels on the ground. The ultimate end is to allow for the efficient, productive and economically-viable use of land.

Who can survey boundaries on Canada Lands?

In general, only a Canada Lands Surveyor (CLS) shall survey boundaries on Canada Lands. This certainly applies in NWT, Nunavut, Yukon and the offshore. However, a CLS or any other surveyor authorized by the SG may survey Canada Lands that lie within the boundaries of a province. If such surveys are likely to affect the rights of landowners of adjoining parcels that are not Canada Lands, then the surveys shall be made by a surveyor of that province.[11]

What is a boundary?

A boundary is a natural feature or artificial line which indicates the spatial extent of the legal interest in land.[12] A parcel is the polygon of land to which legal rights apply; land is defined broadly to include upland, watercourses, water, airspace, natural resources and structures. Commonly shown as a two-dimensional area on the surface of the earth (depicted on survey plans as having only width and length, but no height/depth) many parcels are volumes consisting of sub-surface and air rights. Think of the carrot (or sno-cone) as metaphor, with the volume of the parcel converging in the depths of the earth and diverging in the heights of the sky.

The boundary is the two-dimensional plane at the edge of the parcel. A boundary has length (as long as the sides of the parcel) and height (as high as the rights extend and descend) but no width. It might well be an invisible plane that is not marked on the surface of the earth; it is certainly not an "imaginary line."[13] Boundaries are defined by the parties who have an interest in the land.

How common are boundaries?

Boundaries are ubiquitous, because parcels are ubiquitous; the desire for bounds is innate in our species.[14] People value a thing, such as a parcel of land - "it's mine, I tell you" – more when they have possession

[11] *Canada Lands Surveys Act*, s.26.
[12] *Canada Lands Surveyors Act*, s.1.
[13] Despite the unsubstantiated assertion of Blomley: Making private property: Enclosure, common right and the work of hedges. *Rural History*. V.18 – n.1. p. 14. 2007.
[14] Jones & Brosnan. Law , biology and property: A new theory of the endowment effect. *William and Mary Law Review*. v.49 – n.6. p. 1935. 2008.

than when they don't have possession.[15] The limits of such possession are represented by boundaries. All peoples across all cultures (diverse in time and space) mark the boundaries of their parcels on the ground. Crakers – a group of genetically modified humans who eat grass, have a greenish hue and are rather naive – daily demarcate the extent of their territory by urinating along the boundary.[16]

Boundaries serve economic, social and security purposes, depending on the type of parcel. Boundaries between countries (states) help to secure property rights, signal much greater jurisdictional and policy certainty and thereby reduce costs associated with international economic transactions.[17] Within states, parcels tend to be controlled by individuals, families or groups. For the latter, a common-pool resource (such as pasture) can only be well allocated if clear boundaries define the appropriated resource.[18] This is not to say that the boundaries of the parcel are necessarily fixed in place across time, because community access to shared resources often requires "fuzzier social or geographic boundaries." Fluid spatial boundaries allow parcels to adjust to resource mobility (such as migratory species) and seasonal availability.[19]

When do boundaries assume more significance?

Boundaries assume more prominence when there are competing demands for scarce resources within a country or region. Boundaries can be explained as a function of property rights, when the gains of defining, demarcating and maintaining boundaries become larger than the cost of doing so.[20] Conversely, access is less restricted and exclusion and governance costs are higher when rights and parcels are ill-defined.[21] The enclosure movement in England in the early 1800s, for example, meant that the benefits of enclosing the moors (more productive use) exceeded the costs of enclosure (bounding, fencing, draining and policing).[22] The advent of the fur trade in eastern Canada meant that both the value of furs and the scale of hunting activity increased. There were more people hunting more intensively for more

[15] *The Economist*. p. 95. June 21, 2008.
[16] Atwood. *Oryx and Crake*. 2003. Of course, Crakers are also wary of pigoons and racunks (hybrid pig/raccoon and raccoon/skunk animals, respectively) and fornicate but once every three years.
[17] Simmons. Rules over real estate: Trade, territorial conflict and international borders as institution. *Journal of Conflict Resolution*. v.49 – n.6. pp. 823–848. December 2005.
[18] Ingram & Hong (eds). Property rights and land policies. *Proceedings of the 2008 Land Conference*. Lincoln Institute of Land Policy. 2009.
[19] Cox, et al. Design principles are not blue prints, but are they robust? A meta-analysis of 112 studies. *Working Paper – Lincoln Institute of Land Policy*. p. 6. 2009.
[20] Demsetz. Towards a theory of property rights. *The American Economic Review*. v.57 – n.2. p. 352. May 1967.
[21] Anderson & Swimmer. Some empirical evidence of property rights of first peoples. *Journal of Economic Behaviour and Organization*. v.33 – n.1. p. 13. May 1997.
[22] Eastwood. Communities, protest and police in early 19th century Oxfordshire: The enclosure of Otmmor reconsidered. *The Agricultural History Review*. v.44 – n.1. pp. 35–45. 1995.

fur-bearing animals within the same traditional territory. Aboriginal peoples were therefore forced to constrain each band's hunting to parcels of four square leagues, an area of some 32 square km. Such parcels had their boundaries monumented – trees on the boundaries were blazed.[23]

What of boundaries as topography?

A precise territorial boundary must be permanent and easily seen.[24] The first parcels in Canada used natural features, such as watersheds, watercourses, and lines between topographic features. They were the most suitable boundaries by virtue of being visible, physical barriers. However, increasing population and burgeoning technology meant that these "insufficiently precise"[25] topographic boundaries led to disputes:

> Simon: "I took the shortcut over the cliffs and followed one of the old smugglers' paths through the treacherous swamps that surround this strangely inaccessible house."
>
> Mrs. Drudge: "Yes, many visitors have remarked on the topographical quirk in the local strata whereby there are no roads leading from the manor, though there are ways of getting to it, weather allowing."[26]

A case in point is the current boundary between the provinces of Alberta and British Columbia. When the latter entered Canada in 1871 its easterly boundary was the watershed of the Rocky Mountains. By the early 20th century the location of the watershed was difficult to locate through many of the passes, and so surveyors replaced sections of the imprecise watershed with a series of straight lines between monuments. These new monuments were sanctioned as the boundary through legislation.[27]

What is the link between parcels, tenure and economic development?

Parcels are a necessary, albeit not a sufficient condition for economic development. Land tenure must also allow for efficient property rights, which answer four questions:

- Who has the right (person, family, corporation)?

[23] Leacock. Quoted by Demsetz. p. 352. 1967.
[24] Sjasstad & Bromley. The prejudices of property rights. *Development Policy Review.* v.18. p. 18. 2000.
[25] Poole. The boundaries of Canada. *Canadian Bar Review.* v.42. p. 139. 1964.
[26] Stoppard. *The Real Inspector Hound.* 1968.
[27] *Report of the Commission Appointed to Delimit the Boundary between the Provinces of Alberta and British Columbia. Part I – From 1913 to 1916.* Office of the Surveyor General, Ottawa. 1917.

- What type of right exists (certificates of possession, long-term leases, short-term leases, licences, customary uses, fee simple, Aboriginal title)?
- How much is the right worth? What is its value? (cash is often used as a proxy for value, but land, of course has cultural value as well);
- Where is the right? THIS is the role of the parcel – to locate the right, and to define the spatial extent of the right through boundaries.

However, that is only half the equation. Defining property rights is important, but managing such rights is equally important. This includes transferring the rights; mortgaging the rights; subdividing the rights; and land use planning. Land use planning, by definition, requires parcels. For example:

- separation between dwellings for fire protection;
- turning radii for emergency vehicles;
- massing (density of construction) for infrastructure access and aesthetics;
- zoning, so as to reduce negative externalities from the apocryphal glue-factory;
- geo-technical considerations - not creating parcels on areas prone to erosion, landslides, subsidence or earthquakes;
- environmental considerations – parcels along watercourses to protect fish habitat.

Does the SG have much discretion as to how Canada Lands are surveyed?

Yes, Canada Lands may be surveyed, laid out and defined in any manner, by any method of surveying and with any description that the Minister of Natural Resources considers desirable in the circumstances affecting those lands.[28] SGB's discretion extends to three goals. The first is ensuring that the survey fabric on Canada Lands meets or exceeds abutting provincial standards. The second is integrating the parcel fabric with land use planning and land registries. The third is building capacity within First Nations to deal with thorny boundary issues, sensitive to the biophysical, economic and cultural environment:

- in the Qu'Appelle Valley SGB is assisting First Nations by using imagery to re-establish water boundaries;

[28] *Canada Lands Surveys Act*, s.27.

- in Nunavut, SGB uses a combination of natural features (such as watercourses) and monuments to survey some 1,100 land claim parcels.

The General Instructions for Survey (e-Edition) includes administrative requirements and survey standards for surveys. These general requirements are often augmented by specific survey instructions for each parcel or project.[29] They may be obtained from the SGB Client Liaison Office serving the region in which the lands are to be surveyed.

What of commercial efficacy?

SGB regulates two types of surveys – direct and indirect. Direct surveys are paid for and contracted by the Crown (as for re-establishing the external boundaries of a Reserve). The request for survey instructions generally comes from the administering government department, such as Indian and Northern Affairs Canada (INAC). Indirect surveys are paid for by a party other than the Crown (as by a First Nation wanting to establish internal parcels on a Reserve). Survey instructions are generally sought by the CLS retained by that party.

What of federal Crown lands that are not Canada Lands?

Section 47 of the CLS Act allows a survey to be made of any lands belonging to the federal Crown (Canada) or of which Canada has power to dispose. However, this section is only applicable when federal Crown land (registered in a provincial land registry) is to become Canada Lands or to be managed as Canada Lands. In these cases there will be an agreement between the administrating department and SGB.

In eastern Canada, this section is used regularly.[30] In western Canada there were only three such surveys between 2001 and 2009, because:

- the provincial registry might reject a CLS survey of the parcel;
- it is not meant to circumvent municipal regulations pertaining, for instance, to subdivision, because "Federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries."[31]

One such survey was of a parcel of foreshore in Esquimalt Harbour (federal Crown land), so as to transfer the parcel to the New Songhees First Nation (Canada Lands) as an addition to the Reserve.

[29] See chapters 7 and 8 for surveys that do not require specific instructions.
[30] For the period Jan 1, 2008 to March 1, 2010, 28 plans were recorded under section 47 for the Rideau Canal, and 14 plans for the Trent – Severn waterway
[31] *Construction Montcalm Inc v. Quebec*, [1979] 1 SCR 754, at 778 (SCC)

What of the SG's responsibility on non-Canada Lands?

Parts of the CLS Act apply to surveys under any other Act of Parliament, or under any territorial legislation (NWT, Nunavut, Yukon) if the Act or legislation requires the surveys to be made by a Canada Lands Surveyor.[32] This means that, as required by the SG, the CLS must verify all plans of survey and file field notes in the CLSR for fee simple land in the North that are not Canada Lands.[33] As another example, federal legislation pertaining to Dominion water-powers requires that the SG issue survey instructions.[34]

What of plans of survey?

The SGB has two broad categories of plans. Section 31 allows the SG to make plans of public lands for administrative purposes. Such plans are sometimes surveyed on the ground, and are sometimes compiled in the office from other sources.

Section 29 allows for fully surveyed, monumented, confirmed plans of Canada Lands. The effect of the SG confirming a plan is manifold, and includes sanctioning the surveyed lines to be the "true" boundaries of the parcels,[35] even if different from those shown on the plan. This is the fundamental principle of boundary surveys: "Neither the words of a deed nor the lines and figures of a plan, can absolutely speak for themselves. They must in someway or other be applied to the ground."[36]

[32] *Canada Lands Surveys Act*, s.22.
[33] See chapters 7–9 (on NWT, Nunavut and Yukon) for the full story.
[34] *Dominion Water Power Act - Regulations*, s10.
[35] *Canada Lands Surveys Act*, s.32.
[36] *Equitable Building & Investment Co. v. Ross* (1886), 5 NZLR 229 (SC); *South Australia v. Victoria*, [1914] AC 283 (PC); *Okanagan Radio v. Dunlop*, 1996 BCSC 2954 (CanLII).

2

History of the Surveyor General Branch

Whence comes the title of Surveyor General?

The title of Surveyor General has a rich history. A preserved writ has been found from King James V appointing Sir James Nycholay to the post of Surveyor General of Work to the Crown of Scotland in 1529.[37] This post in Scotland appears to have been synonymous with the Surveyor General of the King's Works (or essentially, the King's Architect) in England. The two were merged upon absorption into the Office of Works in Great Britain 1768. In England, early records indicate the post of Surveyor General being occupied as early as 1597,[38] and include notables such as Sir Christopher Wren to its ranks.[39]

Early holders of the title were often the privileged who attended the court of the monarch. Sir James Hamilton of Finnart (Surveyor General of Scotland in 1539), for example, was the second cousin and close childhood friend of King James V of Scotland. Given Hamilton's hasty execution for treason in 1540, however, they appear to have had a falling out.[40] Sir David Cunninghame of Robertland was considered a collaborator in the murder of the Earl of Englintoun in 1585,[41] exiled to Denmark, rehabilitated, knighted by King James, and made Surveyor

[37] Mylne. The Masters of Work to the Crown of Scotland, from 1529 to 1768. *Proceedings of the Society of Antiquaries of Scotland.* 1896
[38] Colvin. *A biographical dictionary of British Architects, 1600–1840.* Yale. 2008
[39] Wren was well known for his outstanding architecture work, but is perhaps best remembered for his innocent wager with two other scientific luminaries of the time, Robert Hooke and Edmund Halley, on the movements of celestial objects. Stumped by the oval movement of these objects, they turned to a little known professor at Cambridge, Isaac Newton, who in turn published one of the most revered pieces of scientific lore, *Principia*. Bryson. *Short History of Nearly Everything.* Broadway. 2004
[40] McKean. Hamilton, Sir James, of Finnart (1495–1540). *Oxford Dictionary of National Biography.* 2004
[41] Robertson. *A genealogical account of the principal families in Ayrshire.* Cunninghame Press. 1823

General in 1604.[42] Sir John Denham, the poet, served as Surveyor General for nine years (1660–1669) despite having little aptitude for architecture.[43] Interspersed among these political appointments, however, we see some truly gifted architects. Inigo Jones served as Surveyor General for nearly three decades (1615–1643), and is credited with bringing Italian renaissance designs to England.[44] Wren spent nearly his entire adult life as Surveyor General (1669–1718) designing some of the most notable buildings in England, including St. Paul's Cathedral in 1710.[45]

In Canada, the Surveyor General did little overseeing or designing of architectural wonders, and much measuring and settling of land. The shift represents an adaptation to a changing environment. Having a position for repairs to "royal palaces…and preparation of noblemen's houses"[46] was superfluous here. The shift also represents a more global adaptation in the surveying profession. In England, prior to the late sixteenth century, the role of the surveyor was that of an "estate steward" or "overseer" and he was "expected to examine records of tenure and receive tenants for their performance of homage and fealty".[47] With increasing demand for available land (caused itself by increasing populations), the release of large tracts of land from church ownership, and great advances in optical technology,[48] surveyors' roles changed to being technical experts. Their focus was accurately measuring property lines[49] to alleviate "discontented tenant farmer"[50] complaints.

This environmental determinism and professional change is best illustrated by some of the earliest Surveyors General in the new world. Thomas Holme, the first Surveyor General of Pennsylvania in 1682,[51] had the primary function of laying out the city of Philadelphia, surveying townships and manors, and producing the first accurate maps of settlement and topography.[52] William Claiborne, Surveyor general of Virginia in 1621, had the task of "prescribing of bounds…to prevent

[42] McKean. *The Scottish Chateau.* Sutton. 2001
[43] Kelliher. Denham, Sir John (c. 1614–1669). *Oxford Dictionary of National Biography.* 2008
[44] Anderson. *Inigo Jones and the Classical Tradition.* Cambridge. 2007
[45] Jardine. *On a grander scale: The outstanding career of Sir Christopher Wren.* Harper Collins. 2003
[46] Milne. *The age of Inigo Jones.* Batsford. 1953
[47] McRae. To know one's own: Estate surveying and the representation of the land in early modern England. *The Huntington Library Quarterly.* Pg. 336. 1993
[48] McRae. pg. 339
[49] Blomley. Law, property, and the geography of violence: the frontier, the survey, and the grid. *Annals of the Association of American Geographers.* 93(1), pp. 121–141. 2003
[50] McRae. pg. 341
[51] William Penn actually appointed his cousin William Crispin first, but he perished on the trip from England. Munger. *Pennsylvania Land Records.* Rowman and Littlefield. 1993
[52] Corcoran. *Thomas Holme, 1624–1695.* Diane Publishing. 1992

future uncertainties and disputes" to a vast array of plantations.[53] In Canada the position has never been that of an architect, but has long concentrated on the survey and settlement of Crown land.

Who were the early Surveyors General in Canada?

The first individual to hold the title in what is present day Canada was Charles Morris, who was appointed to the position of Surveyor General of Nova Scotia in 1749. His appointment was largely based on the strength of his 1748 survey of Acadian communities.[54] He held the position for over three decades, and was succeeded by his son, grandson, and great grandson. Thus, the Morris family held a monopoly on the title in Nova Scotia for over a century.[55]

Morris' influence is visible even today. After Edward Cornwallis founded Halifax in 1749, Morris was one of its first settlers, and helped lay out the lots and roads. He helped found the town of Lunenburg by aiding in the selection of the site, and laying out the lot structure. He had a similar role in the establishment of what are present day Truro, Windsor, Liverpool, and Yarmouth.[56] Despite these achievements, Morris is also remembered for his strong advocacy of the removal of the Acadians. He believed the British settlement of the area was impossible with the Acadian presence and even went so far as to suggest that the most effective removal method was to "destroy all these settlements by burning down all the houses, cutting the dykes, and destroy all the Grain now growing".[57]

To the west, Samuel Holland was appointed Surveyor General of Quebec in 1763, but offered to assume the larger position of Surveyor General of the Northern District of North America at no increase in salary (an offer the authorities, not surprisingly, accepted).[58] He was instructed to survey all crown possessions north of the Potomac River (present day Maryland/Washington, D.C.) to facilitate settlement. He started at St. John's Island (Prince Edward Island),[59] the Magdalene Islands, and Cape Breton Island because of the economic importance of these areas due to thriving fisheries. Holland subdivided St. John's Island in a highly accurate manner using new instruments (astronomical

[53] Hatch. *The first seventeen years, Virginia, 1607–1624.* University of Virginia. 1957
[54] Faragher. *A great and noble scheme.* W.W. Norton. 2005
[55] Blakeley. *Morris, Charles. Dictionary of Canadian Biography.* 2000
[56] Morris. Description and state of the new settlements in Nova Scotia in 1761. *Report Concerning Canadian Archives for the year 1761*
[57] Morris. Remarks concerning the removal of the Acadians. *Nova Scotia Historical society.* 1753
[58] Thorpe. Holland, Samuel Johannes. *Dictionary of Canadian Biography.* 2000
[59] St. John's Island was ceded to the British by the *Treaty of Paris (1763)*

clock and refracting telescope), and referencing to astronomic observations of latitude and longitude.[60]

Holland's handiwork, in many ways, shaped the development of this part of the world. He advocated for the separation of Maine from Massachusetts, he suggested the Saint John River as the international boundary, he directed the survey of the international boundary between Quebec and New York (45th Parallel), he suggested a search for a northwest passage between the Atlantic and the Pacific (and was ignored), and he compiled countless high accuracy maps of the townships of Upper and Lower Canada. He also found time to tutor many in surveying and mapping, including a young James Cook.[61]

In 1791, Upper and Lower Canada were created via the Constitution Act of 1791. Holland continued to serve as Surveyor General for both, but openly advocated that they should be separate posts.[62] When Holland's health began to fail in 1801, the duties of Surveyor General for Lower Canada fell to his assistant[63] and half-nephew Joseph Bouchette. Bouchette had a notable career himself. He performed extensive topographic and hydrographic surveys of the St. Lawrence, he advocated for the accurate survey of the Quebec - New York/Vermont boundary, he was special surveyor to the King in implementing the *Treaty of Ghent* to resolve the boundary between New Brunswick and Maine,[64] he served in the War of 1812,[65] and he published three celebrated topographic volumes on Lower Canada.[66]

While Bouchette served for 37 years firmly and capably as Surveyor General in Lower Canada, the history of the equivalent position in Upper Canada was a little more turbulent. Holland had recommended that William Chewett take over from him but John Graves Simcoe chose David William Smith to be acting Surveyor General of Upper Canada in 1792 (he was subsequently officially appointed to the position in 1798). Smith, by all accounts, was untrained in land surveying but this did not stop him from launching an extensive system of surveys throughout Upper Canada. Smith became dissatisfied and formally resigned from his appointment as Surveyor General in 1804.[67]

[60] Holland. Observations Made on the Islands of Saint John and Cape Briton, to Ascertain the Longitude and Latitude of Those Places. *Transactions of the Royal Society.* Vol. 58. pp. 46–53. 1768
[61] Beaglehole. *The life of Captain James Cook.* Stanford. 1974
[62] Thomson. *Men and Meridians.Vol 1* . Government of Canada. 1966
[63] Holland actually wanted his son John Frederick as his assistant but was overruled by the Lieutenant Governor Robert Shore Milnes. Thorpe 2000.
[64] Boudreau & Lepine. Bouchette, Joseph. *Dictionary of Canadian Biography.* 2000
[65] At the termination of the war he held the rank of Lieutenant Colonel, and was fond of mentioning his military exploits in petitioning for a higher government wage. Boudreau and Lepine. 2000
[66] Bouchette. *A topographical description of the provinces of Lower and Upper Canada.* London. 1832
[67] Mealing. Smith, Sir David William. *Dictionary of Canadian Biography.* 2000

Figure 1–Samuel Holland's survey of St. John's Island (PEI). *Library and Archives Canada*. NMC 23350. 1765

In the interim, the previously overlooked Chewett and Thomas Ridout jointly held the position until 1805 when Charles Burton Wyatt was appointed. Wyatt, it became immediately obvious, was not going to work out. He accused Chewett of performing poor work, fired Ridout's son, complained about wages, and was accused of forging his name on a plan which he had not surveyed. He was suspended in 1807. Ridout took over as Surveyor General and held the position until 1829.

The position cycled through four individuals in the following 13 years, with corruption becoming rampant within the office. For instance, Chief Clerk John Randenhurst bid for Crown lands for his friends (for a small fee, of course), lost numerous survey records, issued faulty land descriptions, and requested illegal fees to fix any resulting problems.[68] As a result, in 1845, the Office of Surveyor General was abolished by Provincial statute from the Province of Canada.[69]

Who was the first Surveyor General of Canada?

John Stoughton Dennis was appointed the first Surveyor General of Canada in 1871.[70] Highlighting Dennis's appointment seems almost anticlimactic given that the orderly survey and settlement of British North America was already in full swing under men such as Morris, Holland, Bouchette, and a multitude of individuals in Upper Canada. As a result of their efforts, a good chunk of Ontario (single-front, double-front, and 1000 acre systems[71]) and Quebec (seigniorial lots[72]) were already subject to fairly rigid systems of survey. However, given the Confederation of Canada and the purchase of Rupert's Land and the Northwestern Territory, the work of surveying western Canada was just beginning.

A few weeks prior to Dennis' appointment, the control and administration of all Dominion Lands were transferred to the Department of the Secretary of State and the Dominion Lands Branch was formed.[73] The Surveyor General's office (with Dennis at the helm) within the new Branch was responsible for all surveys.

Dennis himself was a bit of an oddity. Outside of surveying circles, he is often a footnote in history texts as a bungling military leader who

[68] Ladell. *They left their mark: Surveyors and their role in the settlement of Ontario.* Dundurn. 1993
[69] Statute 8 Victoria, c. 11, s.1. 1845
[70] Order in Council 1871–721
[71] Harris. *Canada before Confederation.* McGill-Queens. 1991
[72] Colebrook. *The seigneurial system in Early Canada.* University of Wisconsin. 1966
[73] Order in Council 1871–708

abandoned his men in a Fenian attack.[74] Although he was exonerated by the courts, one of the judges published a highly critical dissenting opinion.[75] His surveying career was of higher esteem, but he was chastised for his role in the escalation of the Red River rebellion by what Sir John A. Macdonald called "exceedingly injudicious" pressure, adding that Dennis was "a very decent fellow and a good surveyor" but quite without a "head". Despite this rather inauspicious start, he found his calling as an administrator while Surveyor General. He would later assume an even larger role as Deputy Minister of the Department of the Interior (with Lindsay Russell taking over as Surveyor General), and hold the post until his retirement.[76]

Why was the Dominion Lands Branch formed?

The main goal of the Branch was the survey of the land newly purchased from the Hudson's Bay Company (HBC). The expanse of this new territory was mind-boggling. Newman has noted that the HBC at its peak comprised "nearly a twelfth of the earth's land surface and an area ten times that of the Holy Roman Empire."[77] Dennis calculated that there were 1.4 billion acres of land available for settlement.[78] The task was not only to survey such a monumental expanse, but to also do so expediently, owing to fear and ambition. The fear was that of American expansion and is reflected in John A. MacDonald's 1870 remark that the Americans "are resolved to do all they can short of war, to get possession of our western territory, and we must take immediate and vigorous steps to counteract them."[79] The Americans were fresh off the purchase of Alaska from Russia in 1867, and the man who orchestrated the purchase, W.H. Seward (U.S. Secretary of State), said that the Canadian colonists "are building excellent states to be hereafter admitted to the American Union."[80] The ambition is reflected in the goal of having a nation that stretched from Atlantic to Pacific and is embodied in Canada's national motto *A Mari Usque Ad Mare* (from sea to sea).[81]

[74] The Fenian goal was to free Ireland from the British, so they attacked Canada: "Don't try to figure this out. Their plan defies logic". Ferguson. *Canadian history for dummies*. Wiley. 2005
[75] Read. The Red River rebellion and J.S. Dennis. *Manitoba History*. No. 3. 1982
[76] Read. Dennis, John Stoughton. *Dictionary of Canadian Biography*. 2000
[77] Newman. *Empire of the Bay*. Penguin. 1989
[78] Crossby. *Lovell's Gazetteer of British North America*. Lovell. 1875
[79] Stacey. The Military Aspect of Canada's winning of the West, 1870–1885. *Canadian Historical Review*. 21. pp. 1–24. 1940
[80] Bancroft. Seward's Ideas of Territorial Expansion. *The North American Review*. v. 167, pp. 79–89. 1898
[81] Creighton. *The road to Confederation: the emergence of Canada, 1863–1867*. Macmillan. 1964

Figure 2–Typical DLS survey plan (Saskatchewan). 95699 CLSR. *Surveyor General Branch*. 1901

Fortuitously, an expedient system of survey was in use in the United States. Indeed, the Canadian Government approved Dennis' suggestion of a very similar survey system in 1869.[82] The proposed system had as its foundation the American design, but was also influenced by Dennis' surveying career in Ontario which led to the inclusion of an allowance for public roads in the overall area (sections were to be 200 acres each). It was also influenced by the view of the Lieutenant-Governor of the Northwest Territories, William McDougall that adopting and adapting the American system was necessary. Most of the settlers would come from the United States so it was "advisable to offer them lots of a size to which they have been accustomed."[83] The first use of this survey system was proposed for Manitoba but was halted by the Red River rebellion.[84] In April of 1871, the survey system received an overhaul consisting mainly of the road allowances being one and a half chains around each section.[85] The first edition of the Manual of Instructions was issued two weeks later,[86] and a month subsequent the first official Dominion Land Surveys monument was placed by Milner Hart on the principal meridian at 97°27′28.[87]

What are some of the historical achievements of SGB since 1871?

Thomson has suggested that the expanse of the Dominion Lands Survey System across Canada is: "one of the greatest civil engineering triumphs of all time" and that it is "unsurpassed for precision of execution, permanence of marking, and absence of subsequent litigation over property boundaries."[88] The expanse of this uniform grid across Canada is remarkable; it was certainly applied on a massive scale. Some 178 million acres[89] are estimated to have been subdivided to the quarter section level.[90] The establishment of the grid, and the subsequent adherence to it had a big impact on the movement of people in western Canada, relations between First Nations and government, and on the allocation of resources in general.[91]

The best illustration of the Branch's achievements is in the distinctive checkered pattern of land development. The grid began at the prime

[82] Order in Council 1869–699
[83] McDougall. Letter to Dennis, July 10, 1869. *Public Archives of Canada*. 1869
[84] Dennis. *A short history of the surveys performed under the Dominion Lands System.* Canada. 1892
[85] Order in Council 1871–874
[86] *Manual of Instructions for the Survey of Dominion Lands.* 1871
[87] McColl. Address on the occasion of the unveiling of the Dominion Land Survey historic monument. *The Canadian Surveyor.* 1930
[88] Thomson. *Men and Meridians Vol 2.* Canada. 1967
[89] For comparison purposes, this is the same area as France, and much, much larger than Great Britain.
[90] Dennis. The work of the topographical survey of Canada. *Scottish Geographical Journal.* 41:2, pp. 89–97. 1925
[91] Spry and McCardle. *The records of the Department of the Interior and research concerning Canada's western frontier of settlement.* University of Regina. 1993

meridian, just west of Winnipeg, and was defined by township lines running east-west, and range lines running north-south. Each of these grid squares or 'townships' was approximately 36 square miles in size. The township was further subdivided into 36 sections, each being approximately one mile by one mile square (640 acres). Typically, each section was subdivided into quarter sections which, as the name suggests, makes four quarters out of every section comprising 160 acres each. Survey monuments were usually placed at section and quarter section corners, or approximately every half-mile.[92]

Figure 3–Shenanigans in a survey camp in Township 47, Range 27, W 5th Meridian (Alberta). *Library and Archives Canada / PA-023022*. 1913

The widespread naming of topographic features across the country also exemplifies the impact of the Branch. As but a small sample, the regional municipality of Russell in Manitoba is named after the second Surveyor General of Canada, Lindsay Russell; Mount McArthur and McArthur Lake in Yoho National Park are named after J.J. McArthur, one of the first Dominion Land Surveyors in the Rocky Mountains; Peters Lake, Alberta and Mount Peters near Banff National Park are named after F.H. Peters, Surveyor General of Canada from 1924-48. Branch surveyors were often the first mapmakers to an area, so the naming of many topographic features fell to them. Unnamed features were so plentiful that a nomenclature manual was introduced in 1888.[93]

There were also many notable individual contributions. Lindsay Russell would preside over some of the most productive years of the Department of the Interior, including 1883 when over 27 million acres

[92] This is a very general overview and applying an orthogonal grid to a spherical world is not so simple; hence we see entities such as correction lines, base lines, jogs, and partial sections. McKercher and Wolfe. *Understanding Western Canada's Dominion Land Survey System*. University of Saskatchewan. 1986

[93] Dominion Land Surveyors Association. *Memorandum regarding geographical nomenclature and orthography*. Lovell. 1888

were surveyed,[94] more than double any other year on record.[95] Edouard Deville was Surveyor General for almost four decades (1885–1924), and received worldwide acclaim for his practical adaptation of photography for mapping purposes.[96] Today we call it photogrammetry. Otto Klotz was employed by the branch as a surveyor on the prairies and in the railway belt in British Columbia. He became the first president of the Dominion Lands Surveyors, established the Dominion Land observatory,[97] and wrote some 100 publications.[98] William Ogilvie spent nearly his entire career as a surveyor for the branch, mostly in the prairies, but also established the boundary between Yukon and Alaska (141st meridian),[99] laid out Dawson City, and served as the second Commissioner of the Yukon during the height of the gold rush.[100] Again, these examples are merely scratching the surface.

Figure 4–Enjoying a –25°C lunch along a freshly cut line. *Library and Archives Canada / PA-023034*. 1913

The expanse of the Dominion Land Survey system remained the main focus of the Branch for some time. The administration of a large portion of these lands was retained by the federal government even after the provinces entered Confederation. The eastern provinces (New Brunswick, Nova Scotia, Quebec, and Ontario) were given autonomy over their lands (except as required for fortresses and purposes of defense) when they signed on in 1867. Likewise, British Columbia kept control of its Crown lands when it entered Confederation in 1871, but ceded a 40 mile swath along the length of the proposed railway line.

[94] Department of the Interior. *Annual Report of the Surveyor General.* 1883
[95] Department of the Interior. *Report of the Topographical Survey of Canada*. 1924
[96] Andrews. Edouard Gaston Daniel Deville. *The Canadian Surveyor.* 30(1). pp. 36–40. 1976
[97] Hodgson. *The heavens above and the earth beneath: A history of the dominion observatories*. Government of Canada. 1994
[98] Jarell. Klotz, Otto Julius. *Dictionary of Canadian Biography.* 2000
[99] Green. *The boundary hunters: surveying the 141st and the Alaska Panhandle.* UBC. 1982
[100] Ogilvie. *Early days on the Yukon*. Read. 1913

Manitoba, only about one-twentieth of its present size at this point, was not given control of its crown lands when it signed on in 1870, nor when it was later enlarged in 1881 and 1912 (despite the fact that Ontario and Quebec were given this control automatically when they were enlarged). Saskatchewan and Alberta were also denied control of their ungranted lands when they entered Confederation in 1905. British Columbia was also not pleased about the federal government retaining control of the railway belt lands long after the railway was completed. Finally in 1930, and after much controversy, the Prairie Provinces were put on equal footing with their eastern counterparts, and railway belt lands were given back to British Columbia.[101] This effectively ended the Dominion Land Survey era of the branch.

Figure 5–Cook preparing Easter Sunday supper for DLS survey camp. *Library and Archives Canada / PA-023040. 1913*

The amount of work that was undertaken between 1871 and 1930 is illustrated poignantly in the amount of paper transferred from the federal government. The initial influx of documents, maps, plans, memos, and letters to the provinces filled some 200 railway cars. This did not include the closed or dormant files which filled another 9000 file cabinets, and weighed a hefty 227 tons.[102]

What is the historical relationship between SGB and Indian Affairs?

At the inception of the Department of the Interior[103] in 1873 and for seven years thereafter, the Surveyor General Branch and the Indian Affairs Branch were both under one umbrella. Surveys of Indian Reserves were arranged by the Surveyor General at the request of the Indian Affairs Branch.[104] This arrangement ended in 1880 with the

[101] Gates. Canadian and American Land Policy Decisions, 1930. *The Western Historical Quarterly.* v. 15. no. 4. pp. 389–405. 1984

[102] Given the complexity of cataloguing such a volume of information, the debate as to what to do with these files continued until 1956 when the Provinces took them. Spry and McCardle. pg. 9

[103] Statute 36 Victoria, c. 4. 1873

[104] Dominion of Canada. *Report of the Indian Branch of the Department of the Minister if the Interior, for the year ending 30th June 1873.* Library and Archives Canada. 1873

creation of the Department of Indian Affairs, and its own internal surveys branch. Shortly thereafter, all existing records of surveys of Indian Reserves housed with the office of the Surveyor General were transferred to Indian Affairs.[105] The split was not entirely clean, for Indian Affairs continued to borrow surveyors from the Surveyor General.[106]

Figure 6–Surveyors supply cache on the 21st baseline near the Athabasca River (Alberta). *Library and Archives Canada / PA-020500.* 1913

After the 1880s the two offices had limited coordination. Some interaction was necessary where the Dominion Land Survey system adjoined a Reserve, in which case a one-chain road allowance was surveyed around the outside of the Reserve (except along a watercourse). Likewise, coordination was necessary for the correct plotting of Reserves on township plans, which required the exchange of survey information. Overall, however, the two offices were preoccupied with two very different ends. The Surveyor General Branch was pushing the survey grid westward, and the Department of Indian Affairs was allocating and surveying Reserves.

The Surveyor General Branch and the Department of Indian Affairs were reconstituted under a single umbrella in 1936 when both became part of the Department of Mines and Resources. The cycle was completed when an arrangement similar to the 1873 period developed. Surveys of Reserves were requested by the Indian Affairs Branch and carried out by the Surveyor General. This relationship continued for 14 years, when in 1950 the Indian Affairs Branch was transferred to the Department of Citizenship and Immigration, and the Surveyor General was transferred to the Department of Mines and Technical

[105] Abbott. *The administration of Indian Affairs in Canada.* Read Country Books. 2008
[106] Dominion of Canada. *Report of the Indian Branch of the Department of the Minister if the Interior, for the year ending 31st December 1880.* Library and Archives Canada. 1880

Surveys.[107] The responsibility for all surveys on Reserves was finally given to the Surveyor General in 1951 with the passing of the *Canada Lands Surveys Act*.[108]

Figure 7–Commemorative plaque placed at the principal meridian (starting point of the DLS system) at 97°27'28 W longitude. *Surveyor General Branch*. 1963

[107] Hawkins. *Canada and immigration*. McGill-Queens University Press. 1988
[108] R.S.C.1985, c. L-6. See chapter one for a discussion of the relationship between the Surveyor General and the Minister of Natural Resources.

3

First Nation Reserves

Who manages Reserves?

Indian and Northern Affairs Canada (INAC) provides land management services to 584 First Nations on 3,049 Reserves.[109] The goals of the land management program of INAC are to manage land-related statutory duties under the *Indian Act*, to transfer land management services to First Nations and to develop First Nation land management capacity.[110] This chapter deals primarily with land-related statutory duties on Reserves.

There are over 40 statutes pertaining to First Nations and Reserves for which the Minister of INAC has sole responsibility. The Minister also shares responsibility for many other statutes. The main legislation pertaining to First Nations in southern Canada and Reserves is the *Indian Act*. Other legislation deals with First Nations rights in surrendered lands; land claims and self-government agreements; oil, gas and mineral rights and First Nations rights in a province or a particular Reserve.[111]

What is a Reserve?

Under the *Indian Act,* Reserve is defined as:

> A tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a First Nation

[109] National Framework, Canada Lands Administrative Boundaries, Level 1. Natural Resources Canada, Geogratis website. Accessed Oct. 7, 2010.
[110] Land Management: INAC Website. Accessed Oct. 7, 2010.
[111] For a complete list of legislation pertaining to Reserves see: Acts, Bills and Regulations: INAC Website. Accessed Oct. 7, 2010.

Figure 8 –Map of Canada showing location of First Nation Reserves. *Surveyor General Branch*. 2010

Reserve also includes designated lands.[112] The Act defines "designated lands" as:

> A tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the First Nation for whose use and benefit it was set apart as a Reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

What was the nature of the early treaties?

Beginning in the late 15th century the British and French explored and started to settle land in the eastern part of Canada. The English influence was mainly in Newfoundland and in the area of land known as Rupert's Land. The French settled along the St. Lawrence River and around the Great Lakes. Early relations between the First Nations and both the French and the English focused on developing the fur trade and creating military alliances.

Figure 9–Surveying in unusually high water on Bushe River IR (Alberta). *Surveyor General Branch*. 1957

The Government of France entered into written treaties with First Nations which were peace treaties. For example, treaties with the Haudenosaunee (Iroquois) in 1624, 1645 and 1653 and the Great Peace of Montreal in 1701 were essentially non-aggression pacts.[113] However, the Jesuits, (French Catholic missionaries) coming to the New World to seek converts, established First Nation settlements at their missions. The early First Nation settlement of Sillery was established by the Jesuits near Quebec City

[112] Subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 of the *Indian Act* and the regulations made under any of those provisions are excepted.
[113] *Report of the Royal Commission on Aboriginal Peoples* (RCAP), Vol.1, Part One, Chap. 5 - Stage Two, 3.3 Pre-Confederation Treaties in Canada, para. 6. 1996

in 1638.[114] Later in the century, several similar settlements were established along the St. Lawrence River by the Jesuits, some of which became Reserves.

Starting in 1725, a number of treaties, called the peace and friendship treaties, were made between the British Crown and the Micmac Nation. The Micmac tribal territory included all of what are now Nova Scotia and Prince Edward Island, the Gaspe Peninsula of Quebec, the north shore of New Brunswick and inland to the Saint John River watershed, eastern Maine, part of Newfoundland, the islands in the Gulf of St Lawrence, and St. Pierre and Miquelon.[115] The main thrust of the treaties was to obtain the loyalty of the Micmac to the British, and to proclaim King George as the rightful possessor of the land. However, an additional treaty of peace that was signed on November 22, 1752, contained the provision that the tribe shall "have free liberty of hunting and fishing as usual".[116]

What of the Royal Proclamation of 1763?

When the Seven Years War ended with the *Treaty of Paris* (1763), the British obtained control of most of France's land in North America; present day Canada was firmly under Great Britain's control. The islands of St. Pierre and Miquelon were ceded by Great Britain to France, to serve as a shelter to the French fishermen. The *Royal Proclamation of 1763* provided direction for the management of Great Britain's acquisitions in North America and stabilized relations with the First Nations. Under the Proclamation:

- Nations or Tribes living under the protection of the British Crown were not to be disturbed in the possession of land that had not been ceded to or purchased by the British.
- The "Sovereignty, Protection and Dominion" of the British Crown was reserved for the use of the Indians of: "All the Lands and Territories not included within the Limits of Our said Three new Governments[117] or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."

[114] *The Jesuit Relations and Allied Documents: Travels and Explorations of the Jesuit Missionaries in New France, 1610—1791*, Vol. XIV, Hurons, Quebec, 1637–1638.
[115] Johnson. The Mi'kmaq. In: *The Encyclopedia of North American Indians*. Houghton Mifflin: New York. pp. 376-78. 1996
[116] Indian Treaties Collection: Government of Nova Scotia Website. Also see *1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste Cope.*
[117] The three governments referred to were Quebec, East Florida and West Florida.

- The purchase or settlement of lands within the lands and territories described above was forbidden without the British Crown's "especial leave and licence".
- Persons who had already settled upon the reserved lands and territories were to "remove themselves from such Settlements".
- No private person was allowed to purchase from the First Nations any lands reserved for them within the colonies. If the First Nations should wish to dispose of the lands reserved for them they could only be purchased by the British Crown at a public meeting or assembly of the community, to be held for that purpose.

Provisions in the *Royal Proclamation* regarding First Nation lands were honoured more in the breach than the observance in Nova Scotia (which at that time also included present day Prince Edward Island and New Brunswick). The Treaty of 1725 had been deemed sufficient to transfer sovereignty of Nova Scotia to the British Crown and the Colony had been making laws and arrangements for First Nation lands and for Indian protection for several years.[118] Few people removed themselves from the lands and territories that they had already settled on. Nevertheless the *Royal Proclamation* encouraged treaty making and guided future relationships with the First Nations.

What was the effect of the American Revolution?

After the start of the American Revolution in 1775, great numbers of United Empire Loyalists flowed into Nova Scotia. Grants of land were given to these Loyalists and this put additional pressure on the government to reserve lands for the First Nations.[119] In 1783 the Nova Scotia government gave several licences, or tickets of location, to the Indians. These were not outright grants and only confirmed the existence of already established settlements or were given on the strength of promises to engage in agriculture.[120]

United Empire Loyalists also flowed into Quebec (which at that time included parts of present day Quebec and Ontario). Most headed to present day Ontario,[121] but before they could settle on First Nation territory the British Crown had to purchase land from the local First Nation community.

[118] For a discussion on the application of the 1763 Royal Proclamation in the Maritimes see Surtees. *The Original People,* 1971, pp. 59,60. Also see *Native Rights in Canada – second edition,* pp. 30,31,101.
[119] Cumming; Mickenberg (co-editors). *Native Rights in Canada – second edition,* 1972, pp. 102,103.
[120] McGee Jr. *The Native Peoples of Atlantic Canada: A history of ethnic interaction,* 1974, pp. 75,76.
[121] Mackenzie. *A Short History of the United Empire Loyalists,* 1998. The United Empire Loyalists' Association of Canada Website. Accessed Oct. 8, 2010.

Land was also required for dispossessed members of First Nations who had been loyal to the British, such as the Six Nations Confederacy - comprised of the Mohawks, Oneidas, Onondagas, Cayugas, Senecas and Tuscaroras. In 1784 a tract of land along the Grand River was granted by Governor Frederick Haldimand to the Mohawk Indians of the Six Nations,[122] comprising some of what had been surrendered to the British Crown by the Mississaugas Indian Nation.[123] This surrender would eventually be known as surrender #3 of the Upper Canada or pre-Confederation Treaties.

How did the pre-Confederation treaties affect future negotiations?

The government purchased several other tracts of land from the First Nations which were deemed to be surrenders or treaties. By 1840 most of what is now southwestern Ontario had been ceded by First Nations for settlement purposes.[124] It is estimated that there were at least 30 major treaties signed during the pre-Confederation period between 1764 and 1862.[125]

Figure 10–Setting a monument on Chapel Island IR (Nova Scotia). *Surveyor General Branch*. 1960

To accommodate mining interests, the Robinson Treaties were negotiated with the Chippewa First Nations in 1850 for the north shores of Lake Superior and Lake Huron. Several aspects of these treaties set a precedent for future treaty negotiations.[126] In return for surrendering their territory, Canada paid an initial settlement, provided for a perpetual annual annuity, and reserved tracts of land that

[122] Grant, Governor Haldimand to the Six Nations. ILR Instrument Number X15173. Also see *Indian Treaties and Surrenders, Volume 1*, 1891, p. 251.
[123] Indenture made at Niagara between the Mississauga First Nation and the British Crown: ILR Instrument Number X15173.
[124] Patterson. *Land Settlement in Upper Canada 1783–1840*, 1921, (Ontario Archives 1920), p. 232.
[125] Ontario Treaties, Upper Canada Treaties – establishing a foundation for the future, p. 5: INAC Website. Accessed Oct. 8, 2010.
[126] Morris. *The Treaties of Canada with the Indians*, (Toronto, Prospero Books, 2000), p. 285.

had been selected by the chiefs. The Robinson-Superior Treaty listed three "reservations" and the Robinson-Huron Treaty listed 17 "reservations". The First Nations were also allowed to hunt over the territory ceded by them and to fish in the waters that they traditionally had fished in, except in areas that were sold or leased by the Crown.[127]

Figure 11–Surveying near irrigation channel on Siksika IR (Alberta). *Surveyor General Branch*. 1963

By the early 19th century, Reserves for First Nations (in many forms: lands in trust, licenses of occupation) had been established. The transition from hunting, fishing and gathering to an agricultural lifestyle on Reserve was difficult for some First Nations.[128] On the Reserve they suffered from poverty and disease, they were isolated and they depended on the Crown for subsistence. There were also problems with encroachment onto and adverse possession of Reserve land. As well, by 1830 the military, who had the responsibility of Indian affairs, were questioning the value of alliances with First Nations from a military perspective, as the need for allies and the threat of war had lessened.[129]

In 1842 the Government of Nova Scotia passed an *Act to Provide for the Instruction and Permanent Settlement of the Indians*[130] which was intended to help the Micmac. It provided assistance to construct housing and for education and economic development. In the Province of Canada, the Bagot Commission was established to study and report on the problem. Its 1844 report included provisions recommending centralization of control over all Indian matters. It also recommended that Reserves be properly surveyed.

[127] Morris. *The Treaties of Canada with the Indians*, (Toronto, Prospero Books, 2000), pp. 16–21,302–309. Although 17 reservations were listed in the Robinson Huron Treaty, there were 21 tracts of land, three of them islands. Also see Surtees, The Robinson Treaties (1850), The Making of the Robinson Treaties: INAC Website and Canada's First Nations, Treaty Evolution, Terms of the Prairie Treaties: University of Calgary Website.
[128] McMillan. *Native Peoples and Cultures of Canada*, 1988, p. 51.
[129] Surtees. Development of Reserve Policy in Canada. *Ontario History, Vol. LX1*, June 1969, No.2. p. 87.
[130] First Nation History: Daniel N. Paul Website. Accessed Oct. 8, 2010.

In order to promote a spirit of free enterprise and to eventually obtain the goal of full citizenship, the Bagot Commission report recommended that First Nations be encouraged to adopt individual ownership of parcels of land. They were to be encouraged to buy and sell their parcels among themselves as a way of learning more about the non-First Nations land tenure system and to promote a spirit of free enterprise. The elimination of the Reserve system was to be gradual - in the meantime, no sales of First Nations land to non-Indians were to be permitted. Individual ownership never materialized as the First Nations feared it would lead to the loss of their lands. However, many of the recommendations of the Bagot Commission were adopted in one form or another in later provincial legislation and continue, to a great extent, in legislation today.[131]

What was the effect of the Indian Act, 1876?

Under Section 91(24) of the *Constitution Act, 1867 (The British North American Act, 1867)* the Parliament of Canada obtained exclusive legislative authority for "Indians, and Lands reserved for the Indians". The *Indian Act* of 1876 essentially consolidated two pre-Confederation acts,[132] and applied to all the provinces and the North-West Territories. It defined the system of Reserves to be set aside for members of First Nations who adhered to a treaty. Under the Act a First Nation member could obtain lawful possession of land. There was provision for compensation for damage to Reserve land as a result of any railway, road or public work on a Reserve. Also, no Reserve or portion of a Reserve could be "sold, alienated or leased" until a release or surrender of the land to the Crown was assented to by the First Nation. Such provisions remain in some form or another in the current *Indian Act*.[133]

What was required after 1867 before the prairies could be settled?

Once Rupert's Land was part of the Dominion of Canada the priority of the government was to open the land for settlement. However, Canada first had to make treaties with the First Nations. In 1871 the first numbered treaty was signed. The numbered treaties ceded the territory the First Nations inhabited, and continued the right to hunt and fish over ceded territory "excepting such portions of the territory as pass from the Crown into the occupation of individuals or otherwise". They

[131] *RCAP*, Vol.1, Part Two, Chapter 9 - The Indian Act, 4.Civilization to Assimilation: Indian Policy Formulated.
[132] *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands* (1868); *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act* (1869). Historical Legislation: INAC Website. Both of these Acts to a great extent were based on previous Colonial legislation.
[133] R.S.C. 1985, c.17.

promised a Reserve in proportion to population. They also promised annuities (annual cash payments), agricultural implements, stock and seed grain to encourage ranching and farming and they provided for the establishment of schools.[134]

Figure 12–Surveying on the prairies through Siksika IR (Alberta). *Surveyor General Branch*. 1965

Alexander Morris wrote in 1880: "Since 1870, no less than seven treaties have been concluded, with the Indian tribes, so that there now remain no Indian nations in the North-West, inside of the fertile belt, who have not been dealt with."[135] In 1889, eighty-six Reserves, within the areas covered by Treaties 4, 6 and 7, and part of Treaty 2, were confirmed by Order-in-Council (OIC). The 1889 OIC is accompanied by plans and descriptions of 86 Reserves all bound in what is called 'Nelson's Book', named after J.C. Nelson, who was responsible for surveys for the Department of Indian Affairs.[136]

By 1921, eleven numbered treaties had been ratified between the First Nations and the Government of Canada on behalf of the British Crown. Regions affected by the treaties included all of Alberta, Saskatchewan and Manitoba and parts of British Columbia, Ontario and the Northwest Territories.

How were First Nations in British Columbia addressed?

Between 1850 and 1854 Sir James Douglas, governor of the Colony of Vancouver Island, entered into 14 agreements (called the Douglas Treaties) with the First Nations of southern Vancouver Island. However, he was not able to obtain funds from the British Colonial Office to

[134] Morris. *The Treaties of Canada with the Indians*, (Toronto, Prospero Books, 2000), pp. 285–292.
[135] Morris. *The Treaties of Canada with the Indians*, 1880. p. 10.
[136] P.C. 1151 (May 18, 1889) accompanied by Descriptions and Plans of Certain Reserves in the Province of Manitoba and the North-West Territories, 1889, ILR Instrument Number 4000.

continue to purchase First Nations lands. As well, there was a growing unwillingness among the settler population to recognize First Nations' rights to land. While no further treaties were made after 1854, Douglas continued to assign Reserves to First Nations which included areas of land used as settlements, graveyards, gardens, hunting lodges, berry patches, or fishing stations.[137]

Figure 13–Cow eating photo control target on Six Nations IR (Ontario). *Surveyor General Branch*. 1965

In 1866 the Colony of Vancouver Island was united with the Colony of British Columbia. British Columbia's policy is found in an 1870 memorandum from Joseph Trutch, then Surveyor General of British Columbia, to the Colonial Governor: "The title of the Indians . . . . . has never been acknowledged by the Government, but, on the contrary, is distinctly denied." He goes on: "But these claims have been held to have been fully satisfied by securing to each tribe … the use of sufficient tracts of land for their wants for agriculture and pastoral purposes."[138]

When British Columbia joined Confederation in 1871, Canada requested information on Reserves that had been established in British Columbia. A list of 76 Reserves was subsequently submitted to Canada; however, many Reserves in the province were not included in the list.[139] After 1871, acreage allocation and the establishment of reserves for the remaining First Nations was a matter of considerable controversy. Canada requested much larger areas for each family than the province was prepared to offer. In 1876 the federal and provincial governments agreed to the formation of the Joint Allotment Commission to set aside Reserve lands.[140] The process included consulting with each First

[137] Cail. *Land, Man and the Law – The Disposal of Crown Lands in British Columbia, 1871–1913*, 1974, pp. 171–175.
[138] Cail. *Land, Man and the Law*, p. 184.
[139] Cail. *Land, Man and the Law*, pp. 189,190. *Papers Connected with the Indian Land Question, 1850–1875* (Victoria: Queens Printer 1875), pp. 136, 138, 141.
[140] Cail. *Land Man and the Law*, p. 207.

Nation, sketching the location of the Reserve, followed by a survey and approval of the survey.[141]

In response to settlers' pressure for agriculture land, the McKenna-McBride Commission, established in 1913, re-examined the size of every Reserve and made recommendations to add new Reserves, to add land to existing Reserves, to confirm existing Reserves or to reduce acreage and cut-off portions of existing Reserves.[142] The total number of Reserves was 1,559 with each member having an average of 3.6 acres.[143] Additional changes were made, including the disallowance of some reserves, by W.E. Ditchburn, representing Canada, and Major J.W. Clark, representing the province, before joint provincial and federal Orders-in-Council were passed in 1923 and 1924 which approved the Reserves.[144]

Finally in 1938, by Provincial Order-in-Council 1938-1036, Reserves listed in an attached schedule were conveyed to Canada. The conveyance included most of the Reserves in British Columbia outside of the Railway Belt.[145] The 1938 Order-in-Council did not include five Reserves in the Northeastern part of the province which had been established pursuant to Treaty Number 8; they were transferred to Canada in 1961.[146] The 1938 Order-in-Council also contained the reversionary interest that if any of the Reserves became extinct the lands would revert to the province. In 1969 the province waived its reversionary interest.[147]

In 1984 Canada passed the *British Columbia Indian Cut-off Lands Settlement Act,*[148] which allowed First Nations to make agreements with Canada and British Columbia for resolving and extinguishing claims to cut-off lands referred to in the 1916 report of the McKenna-McBride Commission. Lands had been cut-off from 22 Reserves. By 2008 all claims were resolved with First Nations receiving original cut-off lands or equivalent provincial lands (if the cut-off lands were not available), along with financial compensation.[149]

[141] Cail. *Land, Man and the Law*, pp. 217–227.
[142] Report of the Royal Commission on Indian Affairs for the Province of British Columbia, 1916
[143] Cail. *Land, Man and the Law*, pp. 233–237.
[144] OC (British Columbia) 1923-911 and Federal OCPC 1924 – 1265. See: Cail, *Land, Man and the Law*, p. 237.
[145] OC (British Columbia) 1938-1036 and PC 1930-208.
[146] OC (British Columbia) 1961-2995.
[147] OC (British Columbia) 1969-1555.
[148] S.C. 1984, c.2.
[149] Key Agreements, Cut-off Claims. British Columbia, Ministry of Aboriginal Relations and Reconcillation Website. Also see: Cut-off Lands Specific Claims of Seton Lake, Gitwangak, Metlakatla and Lax Kw'alaams. INAC Website. Accessed Oct. 8, 2010.

Where is land interest information maintained?

There is provision for a land registration system in section 21 of the *Indian Act*:

> There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a Reserve.

The Indian Land Registry (ILR) is located in Gatineau, Quebec. The ILR will only accept documents for registration that conform to the *Indian Act*.[150] It will not register unauthorized transactions or transactions which it does not recognize or administer, such as customary allotments, leases and permits (buckshee agreements), all of which are granted outside the *Indian Act*.[151]

Figure 14–Black fly conditions on Chicken IR 225 (Saskatchewan). *Surveyor General Branch*. 1968

In recent years considerable resources have been spent modernizing the system and developing on-line access. Now, virtually all ILR data is obtained on-line from the ILR System accessed through INAC's Electronic Services Website. A Land Status Report may also be obtained from INAC. The report contains pertinent information regarding encumbrances and/or interests on a particular parcel of Reserve land from the ILR and, if available, from appropriate departmental files. It identifies existing registered interests or possible encu mbrances such as cardex holdings or designations.[152]

The Act also provides for a register for transactions related to surrendered and designated lands. Surrenders and designations are entered into the ILR. INAC's Electronic Services Website also includes

[150] Agreements under the *Indian Oil and Gas Regulations* are also accepted for registration.
[151] Land Management Manual, Chapter 2, Directive 2-3, Part 2.3, p. 29.
[152] Land Management Manual, Chapter 7, Directive 7-1, Part 2.2(c), p. 4.

a Lands Sales System for information pertaining to lands which have been surrendered for sale.

Some lands may have been in provincial jurisdiction prior to becoming a Reserve. In these cases older land transaction documents pertaining to the lands may be found in provincial or territorial land titles offices, land registration offices and offices maintaining public lands records.

How are land surveys and land transactions coordinated?

An important reference document for those involved with surveys or land transactions on Reserves is the 2009 Interdepartmental Letter of Agreement "A" between SGB and the Lands Branch of INAC. It sets out the specifications and standards of land descriptions for Reserve lands to be registered in the three INAC registries – ILR, First Nations Land Registry, and Self-Governing First Nations Land Registry.[153] It applies to Reserves, designated lands, surrendered lands, and any other lands held and administered by INAC for the use and benefit of First Nations. Of particular value is Chart A in the schedule to the agreement. This chart gives the minimum requirements for land surveys and land descriptions for the various land transactions.

The Interdepartmental Agreement refers to two types of survey plans, "Official Plans" and "Registration Plans" (the latter are also known as Administrative Plans). Some short term land transactions may only require textual descriptions as set out in the Interdepartmental Agreement and under guidelines set out in the ILR Manual.[154] The dimensions of

Figure 15–Surveying on Becher Bay IR 2 (British Columbia). *Surveyor General Branch*. 2003

[153] Effective November 17, 2009. See Chart A to the Letter of Agreement.
[154] INAC. Indian Land Registry Manual. Appendix L. 2006.

the parcel of land must be mentioned in the textual description or be clearly shown on an attached sketch.

Figure 16–North boundary of Brochet IR (Manitoba). *Surveyor General Branch*. 2006

In general, official plans are required where the boundaries defined by the plans are jurisdictional boundaries, such as additions to a Reserve and resurveys of a Reserve's external boundaries. They are also required for certain dispositions, such as where rights to exclusive use of the land are transferred, as for highways. They are confirmed pursuant to Section 29 of the *Canada Lands Surveys Act* and are based on a fully monumented survey carried out by a Canada Lands Surveyor.

As a general rule, registration plans are used for subdivisions within Reserves or for surveys required for allotted interests in a Reserve – Certificates of Possession (CPs), certificates of occupation, leases, and permits. They are also used to define lands for surrender and designation votes. Registration Plans are approved pursuant to Section 31 of the *Canada Lands Surveys Act*. They might not require a field survey. The Interdepartmental Agreement provides guidance as to when field survey work is required.[155]

What are additions to Reserve?

Reserves have been created by a variety of methods. Some were set aside by religious orders, some were created as refuges by imperial or colonial authorities for First Nations fleeing other areas of Canada, some were created by treaty with the Crown, some were purchased from private individuals or from a colonial or provincial government,

[155] See the General Instructions for Survey, e-Edition, Part B – Agreements: SGB Website. Accessed Oct. 8, 2010.

some were created by provincial governments after Confederation, and some were simply recognized as Reserves by the Crown.[156]

Even today there is no statutory procedure under the *Indian Act*, or any other federal legislation, to set aside land as a Reserve. A landmark case dealing with the conditions required to create a Reserve is *Ross River Dena Council First Nation v. Canada*, 2002.[157] The Ross River First Nation had settled in a village in the Yukon and a dispute arose concerning the status of the village. The Court determined that the village was not a Reserve, because:

- the Crown must have had an intention to create a Reserve;
- the intention must be possessed by Crown agents holding sufficient authority;
- steps must be taken in order to set apart the land for the benefit of Indians;
- the First Nation concerned must accept the setting apart and must have started to make use of the lands.

The most common and clearest procedure, once the land is held by the federal Crown, is to grant the land Reserve status by federal Order-in-Council (OIC), or by ministerial order, pursuant to the Royal Prerogative.[158] All land interests may not be included in the federal title. For example, mines and minerals may not be included or the interest may be only a usufruct (a right to use and enjoy the land).[159] There are three reasons to add land to a Reserve:[160]

- Legal obligations: Land claim settlement agreements, court orders and legal reversions of former Reserve land.[161]
- Community additions: Based on a need from an increase in on-IR population; from geographic enhancements to an existing Reserve; from small adjustments, such as road right-of-way corrections, accretion and unsold surrendered land.
- All proposals for additions to Reserves or new Reserves not covered by the other two categories.

[156] RCAP, Vol.1 Part Two, Chapter 9 - The Indian Act, See note 17. Also see: La Forest. *Natural Resources and Public Policy under the Canadian Constitution*, 1969, p. 121.
[157] SCC 54, [2002] 2 S.C.R. 816.
[158] "Royal Prerogative" means the power of the Crown, as represented by the Governor in Council, to take action as an exercise of its executive power. Setting aside Reserves is one such power. See the Land Management Manual, Chapter 10, Directive 10-1, Part 2.1, p. 7, and Part 3.12, p. 9.
[159] For an example of an usufruct see P.C. 1979-2178 which accepted a transfer as set out in Quebec executive Order-in-Council 1851-79 (ILR Registration Nos. 65619, 65618) for the James Bay and Northern Quebec Agreement. It described the nature of the lands transferred as: "administration, management and control . . . . . for the exclusive use and benefit of the Cree First Nations . . . "
[160] Land Management Manual, Chapter 10, Directive 10-1, pp. 5–14.
[161] See chapter 4 for a discussion of the comprehensive and specific claims processes.

Can Reserve lands be sold?

Under Section 37(1) of the *Indian Act,* lands in a Reserve shall not be sold or title to them conveyed until they have been absolutely surrendered to Her Majesty. Surrenders must be assented to by a majority of First Nation members eligible to vote. However, First Nations are reluctant to absolutely surrender Reserve lands since they do not wish to lose their land base. In the past, whenever possible, surrenders were conditional. Only limited rights were surrendered, or the surrender contained a condition that when the land was no longer needed it reverted to the First Nation.

Figure 17–Natural boundary of Cowessess IR 73 (Saskatchewan). *Surveyor General Branch*. 2005

The *Indian Act* was amended in the late 1980's to include the designation provisions which lessened the need for surrenders. The Kamloops Amendment ensures that designated lands are still part of the Reserve and are subject to a First Nation's bylaws, and that First Nations are able to levy taxes on the designated lands.[162] Prior conditional surrenders of land are considered designations. This provision is significant for leases, permits, easements, rights-of-way or other interests granted to a person other than a First Nation member.

Now, when surrenders occur, they are normally part of a claim settlement or a land exchange.[163] For a surrender vote by the First Nation, a registration plan of the land is required. The registration plan is also used for the land description in the federal OIC accepting the surrender. An official plan is required for the land transfer.[164]

[162] *Henderson's annotated Indian Act*, Notes on the *Indian Act*. 1996 and INAC. Land Management Manual. Directive 5.01, Part 4.4, Pg. 4. 2003.
[163] Land Management Manual, Chapter 2, Directive 2-2, Part 3.13c), p. 11.
[164] Sections 31 and 29, respectively, of the CLS Act.

What is a Special Reserve?

The *Indian Act* defines a special Reserve as a tract of land that has been "set apart for the use and benefit of a First Nation and legal title thereto is not vested in Her Majesty." The purpose of this section was to bring within the authority of the *Indian Act* lands held by churches or charitable organizations in trust for Indian communities. Under INAC policy no new special Reserves will be created.[165]

What is a Certificate of Possession (CP)?

A CP is documentary evidence of the highest form of land holding available to an individual First Nation member. It differs from fee simple title in that there are restrictions on transfer. It is permanent, as it can be inherited or transferred to other First Nation members.[166] However, it also has limitations. Mortgages require First Nation or government guarantees as the land is immune from seizure. It cannot be transferred to non-First Nation members. If a CP holder ceases to be entitled to reside on the Reserve, she (or he) may transfer her (or his) right to possession to the First Nation or another member of the First Nation. If not, then within six months or such further period as the Minister may direct, the right to possession of the land reverts to the First Nation.[167]

Before a CP is issued, possession of the land must be allotted by a Band Council Resolution.[168] Also, the parcel must be defined, as a minimum by a registration plan. If the Minister approves the allotment it is registered in the Indian Land Registry (ILR) and a CP is issued as evidence of lawful possession.[169] Some Reserves have no CPs, some no longer allow CPs, and some (such as the Six Nations Reserve in Ontario) have over 10,000 CPs.[170]

Evidence of lawful possession of land prior to 1951 was by location tickets. Under Section 20(3) of the *Indian Act* any person who, on September 4, 1951, held a valid and subsisting Location Ticket is lawfully in possession of the land and holds a CP with respect thereto. Cardex Holdings and Notices of Entitlement are also recognized as lawful possession. They have been created by an allotment by the First Nation Council and approved by the Minister under c.20 (1) of the *Indian Act*. However, their land descriptions are vague and often

[165] Land Management Manual, Chapter 10, Directive 10-6, Part 3, p. 70.
[166] *Indian Act*, RSC 1985,c.I-5, ss.24 & 49.
[167] *Indian Act*, RSC 1985,c.I-5, s.25(1,2).
[168] *Indian Act*, RSC 1985,c.I-5, s.20(1).
[169] Land Management Manual, Chapter 3, Directive 3-2, Part 2.7, p. 7.
[170] Flanagan and Alcantara. *Individual Property Rights on Canadian Reserve*, Fraser Institute, 2002, p. 7.

inaccurate. A registration plan of the land must be prepared before any further transactions can take place.

What is a Certificate of Occupation?

Where possession of land in a Reserve has been allotted to a First Nation member by the council of the First Nation, it may decide that conditions should apply before the CP is approved. In such cases the Minister may withhold his approval for a CP and approve occupation of the land for a period of two years. As for CPs, the land must be defined, as a minimum by a registration plan. Upon approval the allotment is registered in the ILR and a Certificate of Occupation is issued. A Certificate of Occupation is documentary evidence of a grant of temporary occupation of land to an individual First Nation member. It identifies any conditions that are to be met before a CP can be issued. It can be renewed for a second term of two years. It cannot be transferred. However, it can be inherited, in which case the heirs must fulfill the conditions to be eligible to receive full possession.[171]

What are customary or traditional land allotments?

Many First Nations, especially those located in the Prairie Provinces, follow a customary or traditional land holding system. These informal systems are prevalent because First Nations have a communal culture with regard to land and resisted legal allocation under the Indian Act in the early years, and because the Crown did not actively promote allocation. Nevertheless individual First Nation members had to live somewhere and they also needed land to farm and ranch. After First Nation members have lived on the land for a long period of time, the occupation remains respected even though land may have become scarce and more valuable on the Reserve. The First Nation may simply allow individuals to remain undisturbed on the land or it may more formally grant occupational rights by a First Nation council resolution. INAC does not administer these interests and the holdings are not registered in the ILR.[172]

How is land set aside for the general welfare of the First Nation?

Reserve lands may be set aside for "the general welfare of the First Nation" under Section 18(2) of the *Indian Act*. The use of the land must benefit the entire community and not just a restricted group within the community. Appropriate uses include community infrastructure

[171] *Indian Act*, RSC 1985, c.I-5, s.20(4,5,6). Land Management Manual, Chapter 3, Directive 3-3. Part 4.6, p. 22.
[172] Land Management Manual, Chapter 3, Directive 3-2. Part 2.7, p. 7. Also see Flanagan and Alcantara. *Individual Property Rights on Canadian Reserve*, Fraser Institute, 2002, pp. 5–7.

projects (roads, sewers, airports), schools, community halls, health offices and burial grounds. Section 18(2) is not used for commercial or economic development purposes. A person who had possession of the lands, prior to a Section 18(2) taking, is entitled to compensation for loss of use.[173] The parcel must be defined, as a minimum by a registration plan.

What rights in land can non-First Nation members obtain?

Designations, under Section 38(2) of the *Indian Act*, are used where a First Nation wishes to grant an interest in Reserve land to a person other than a First Nation member. A designation is made to Her Majesty and must be assented to by a majority of First Nation members eligible to vote. Although leases are the most common type of interest granted, permits, easements, or rights-of-way may also be granted. A designation does not extinguish the First Nation interest, but it does extinguish the individual (locatee) interest.[174] The parcel must be defined, as a minimum by a registration plan.

A lease grants an interest in and exclusive possession of Reserve lands. It is granted for a specific period of time, often for a long term. Commercial, residential and recreational developments leases are normally issued pursuant to Section 53(1), following designation.[175] The parcel is normally defined by a registration plan, although specific circumstances may require a higher product.

Figure 18–Membertou IR (Nova Scotia). *Surveyor General Branch*. 2007

[173] *Indian Act*, RSC 1985, c.I-5, s.18(2). Land Management Manual, Chapter 2, Directive 2-2, Part 3.18, pp. 16,17, Chapter 4.
[174] Land Management Manual, Chapter 2, Directive 2-2, Part 3.14, p. 12.
[175] Land Management Manual, Chapter 2, Directive 2-2, Part 3.15, p. 13. Also see Chapter 7.

A locatee lease is a lease of allocated land (land held by a CP or Certificate of Occupation) to another First Nation member, the First Nation, or a third party where the benefit of the lease goes to the locatee. Locatee leases are issued under section 58 of the *Indian Act*. Under INAC policy, First Nation councils must have the opportunity to express their views on this type of lease prior to ministerial approval. As a long-term lease may be seen as conflicting with the designation provisions of the *Indian Act,* a vote of First Nation members is required for all locatee leases of more than 49 years.[176] A registration plan is only required if the lease is for a period of 10 years or longer. Like all leases, a locatee lease grants an interest in and exclusive possession of the land for a specific period of time. For agricultural or grazing purposes, a permit under Section 28(2) of the Act is preferred.[177]

Under Section 58(1)(c) of the Act, where land in a Reserve is uncultivated or unused and where the land is not in the lawful possession of any individual, the Minister may grant a lease for the purposes of agriculture or grazing. This type of lease is rare; a section 28(2) permit is preferred for agricultural or grazing purposes.[178]

Figure 19–Surveying on Piikani IR 147 (Alberta). *Surveyor General Branch*. 2007

Under Section 28(2) of the *Indian Act* the Minister may permit any person for a period not exceeding one year (or with the consent of the council of the First Nation for any longer period) to occupy, use or otherwise exercise rights on an Reserve. These permits are used for utility services to the Reserve and for grazing or agricultural purposes where exclusive use is not required.[179] Since a permit does not grant

[176] Land Management Manual, Chapter 2, Directive 2-2, Part 3.16, p. 14.
[177] Land Management Manual, Chapter 2, Directive 2.2, Part 3.16, p. 14.
[178] Land Management Manual, Chapter 2, Directive 2.2, Part 3.15, p. 13.
[179] Land Management Manual, Chapter 2, Directive 2.2. Part 3.17, p. 15.

exclusive possession, more than one permit for a parcel of land may be issued to different parties for different purposes, as long as the uses do not conflict. A registration plan is only required if the permit is for a period of 10 years or longer.

Permits are also issued under Section 58(4) of the Act. Under this Section, the Minister may, without an absolute surrender or a designation, dispose of wild grass or dead or fallen timber. With the consent of the council of the First Nation, the Minister may dispose of sand, gravel, clay and other non-metallic substances.

It is common in some communities for individual First Nation members or the First Nation itself to enter into agreements for others to use Reserve land outside the provisions of the *Indian Act*. Such agreements are commonly referred to as buckshee leases and vary in the sophistication of their documentation. They normally depend on the trust and goodwill of the parties to the agreement. Since buckshee agreements are not authorized under the *Indian Act,* INAC neither recognizes them nor collects rents or other compensation related to them.[180]

Can Reserve land be expropriated?

If Reserve land is required for a public use such as a highway, a hydro transmission line, or a railway, and the province, municipal local authority or corporation that requires the land has statutory expropriation powers, then the land may be taken or used under Section 35 of the *Indian Act.* The First Nation and affected locatees receive compensation for the loss of land or their interest in the lands.

It is the policy of INAC to first obtain the consent of the First Nation council. The only exception may be where the national interest is paramount. Also, before using Section 35(3), the possibility of using a surrender or designation of the land or a permit under Section 28(2) of the Act should be investigated. The Crown is obligated to ensure that the interest transferred is the minimum required to fulfill the required public use.[181]

Are the exterior boundaries of all Reserves surveyed?

Initially, parcels of land set aside for First Nations were defined by land description. For instance, the description of the land in the 1680 Grant from Louis XIV, King of France to the Ecclesiastics of the Company of

[180] Land Management Manual, Chapter 8, Directive 8-2, Part 2, pp. 12–14.
[181] Land Management Manual, Chapter 2, Directive 2-2, Chapter 9-1. Part 2.4, p. 5

Jesus residing in la Nouvelle France for the use of the Iroquois reads as follows:

> Were we not pleased to grant them the land called the Sault, containing two leagues of frontage, beginning at a point opposite the St. Louis Rapids, ascending along the lake in similar depth, with two Islands, Islets and the Beach, lying opposite and adjoining the lands of the said Prairie de la Magdelaine[182]

The land described above is for the present day Kahnawake Reserve No. 14 near Montreal. The first recorded survey of this Reserve in the Canada Lands Survey Records is dated 1880.[183] Now most rectilinear boundaries of Reserves in Canada have been surveyed. However, not all water boundaries have been surveyed, and even if they have been there may be substantial changes as a result of erosion or accretion.

What of internal parcel fabric?

Interior subdivisions vary from Reserve to Reserve. The type of interior subdivision is often influenced by adjacent provincial systems. For example, in Quebec, Reserves are likely subdivided into river lots (seigneuries). In Ontario many Reserves have been subdivided into lot and concession survey systems as used in provincial lands. In Manitoba, Saskatchewan and Alberta, many Reserves have been subdivided in the same manner as the original township surveys carried out at the end of the 19th and beginning of the 20th centuries in these provinces. In the Atlantic Provinces and in British Columbia, where there is no distinct homogeneous survey system, interior subdivisions are often determined by land holdings and topography.

In some Reserves there is a disconnection between actual occupation (as evidenced by improvements), the surveyed parcel and the land descriptions in the ILR. In other cases, engineering surveys are used, particularly in Reserves that have customary or traditional land allotments. Analysis by the Surveyor General Branch to determine the relationship between internal parcel fabric, community well-being on Reserves and the location of Reserves, found a strong positive correlation:

[182] *Indian Treaties and Surrenders (Ottawa). Vol.1*, p. 13. 1680 Grant, The Grant is also registered in the ILR, Registration Number 5481-169.
[183] Indian Lands History in Quebec: SGB Website. Accessed Oct. 8, 2010.

- between good parcel fabric (where improvements conform to the surveyed parcels) and community socio-economic well-being, and
- between good parcel fabric and proximity to urban areas, owing to the economic opportunities (markets and employment) provided by the latter.[184]

What is the statutory authority for surveys?

Surveys are made under the *Canada Lands Surveys Act* on the request of the Minister of INAC. Section 19 of the *Indian Act* sets out that the Minister may:

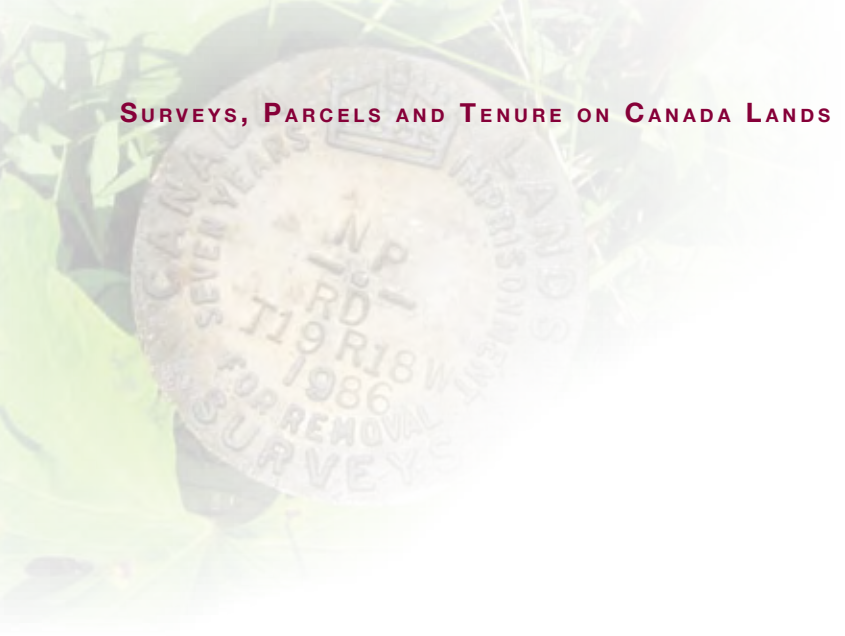
- authorize surveys of Reserve and the preparation of plans and reports with respect thereto;
- divide the whole or any portion of a Reserve into lots or other subdivisions.

How are surveys managed?

Prior to undertaking a survey on a Reserve, a surveyor requires the approval of the First Nation council. A person seeking to acquire a parcel of Reserve land must provide funding for any surveys required. Usually the First Nation or individual First Nation members fund surveys of land allotted by the council. Once approval from the First Nation is obtained, specific survey instructions are required from the Surveyor General. After the survey is completed a plan of the survey is submitted to the First Nation council and to INAC for approval. It is then reviewed by the Surveyor General Branch (SGB) to ensure that it meets survey standards. If it is satisfactory it is approved (registration plans) or confirmed (official plans) and recorded in the Canada Lands Surveys Records.

In addition to its regulatory function, the SGB provides survey related support including contract management for INAC. The SGB also is involved in arranging for surveys of provincial lands which are to become Reserves. In those cases, surveys are carried out in accordance with provincial legislation. Standards for the survey of Canada Lands are also followed if the provincial Crown agrees and there is no conflict with provincial legislation and survey standards.

[184] *Marginalia*, Office of the Surveyor General of Canada, Issue 01, December 2008.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4

Initiatives on Aboriginal lands

Yet another chapter?

Yes. There are various initiatives that affect the boundaries and parcels of Canada Lands in which Aboriginal peoples have an interest, and that occur outside of the *Indian Act*[185] and in southern Canada.[186] Some of these initiatives are driven by Aboriginal peoples, some by judgments of the courts, some by legislation, and some by federal government policy.

What is Aboriginal title?

Aboriginal title recognizes the fundamental truth that Aboriginal peoples lived in (what is now) Canada for many millennia before other peoples arrived.[187] The first Canadians are thought to have migrated over a land bridge (Beringia) between what is present day Asia and Alaska in the Late Pleistocene era.[188] Such long-term use and occupation of the land meant that Aboriginal peoples had title to the land – it was theirs. In the absence of cession, the land remains theirs. In a 1979 claim to a portion of land at Baker Lake in (what is now) Nunavut, the court found that the Inuit were the exclusive occupants of a parcel at the time of Crown sovereignty, described as "the portion of the barren lands extending from the vicinity of Baker Lake north and east toward the Arctic and Hudson Bay to the boundaries of the Baker Lake R.C.M.P. detachment area as they were in 1954."[189]

[185] The *Indian Act* is comprehensively covered in chapter 3.
[186] Thus, the initiatives are not captured by chapters 7–9.
[187] *Calder v. British Columbia (A-G)* [1973] SCR 313.
[188] Brace et al. Old World sources of the first New World human inhabitants: A comparative craniofacial view. *Proceedings of the National Academy of Science (USA).* 98:10017-22. 2005
[189] *Baker Lake v. Canada*, (1979) 107 DLR (3d) 513 (FCTD).

Although much of Canada has been ceded through treaties and agreements, British Columbia is largely bereft of treaties, meaning that Aboriginal peoples there are at the cusp in defining Aboriginal title. The theory is that an Aboriginal group, which occupied land (in what is now British Columbia) at the time that British sovereignty was imposed (in 1846) and which never ceded its right to the land, continues to enjoy title to it.

In the 1997 *Delgamuukw* decision of the Supreme Court of Canada,[190] the Gitksan and Wet'suwet'en First Nations claimed Aboriginal title to 133 parcels of land in north-western BC. At trial, the claims were rejected for various reasons, one of which was that the boundaries of the parcels had not been defined. On appeal, the court held that "… there was significant difficulty with the delineation of specific boundaries for the claim. It is clear that no one can own an undefined non-specific parcel of land." At the Supreme Court, the First Nations tried to amalgamate the 133 parcels into two large parcels that encompassed the same area, such that "the external boundaries of the collective claims therefore represent the outer boundaries of the outer [133] territories." This argument was rejected.

So, boundaries and parcels are important in asserting Aboriginal tile?

Yes, the boundaries of the parcels being claimed must be well defined, as set out in the *Tsilhqot'in* decision of the British Columbia Supreme Court (2007).[191] The Tsilhqot'in Nation claimed Aboriginal title to 420,000 ha of land in central BC, south-west of Williams Lake. There was no doubt that the First Nation had occupied lands since before the arrival of non-Aboriginal peoples, and certainly since before the assertion of British sovereignty in 1846. Nor was there any doubt that the First Nation had never ceded their lands to the Crown. There was doubt, however, as to what lands were being claimed; the location and spatial extent of the lands was very much in doubt.

The court scorned both the Crowns' and the First Nation's approach to parcels. The Crowns (both BC and Canada) argued for a "postage stamp" approach, in which each specific site and trail was to be described as a unique parcel. The First Nations argued for vaguer approach to parcels. For instance, the southerly boundary of the claimed area was described differently by three Aboriginal witnesses. That is, the character and the location of the boundary were inconsistently defined. Such ambiguity

[190] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.
[191] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

extended to there being First Nation sites both inside and outside the claimed area. Thus, the court was unable to conclude that there was sufficient occupation of the claimed area as a whole.

If the spatial extent (and thus, the boundaries) of the parcels had been defined, then the First Nation would have been granted Aboriginal title to some 190,000 ha. In the absence of such a grant of title (floundering on boundaries, as it was), the First Nation was granted Aboriginal rights in the claimed area: to hunt and trap birds and animals for specified purposes, and to trade in skins and pelts. Moreover, the court held that the Tsilhqot'in Nation's Aboriginal rights in the claimed area had been unjustifiably infringed by forestry activities.[192]

What are Aboriginal land claims?

Some of Canada is blanketed by Treaties which deal with the cession of land and rights by the First Nations for the promise of alternate lands (Reserves) or other provisions. Other parts of Canada have never dealt with the issue of Aboriginal land claims. This splits federal policy on the issue 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 claims generally, refers to claims made by a First Nation against the federal government which relate to the administration of land and other First Nation assets and to the fulfillment of Indian treaties, although the treaties themselves are not open to renegotiation."[193]

What of comprehensive claims?

The treaty negotiation process did not include all Aboriginal groups in British Columbia and northern Canada (NL, Quebec, Nunavut, NWT and Yukon). Morse asserts that the treaties themselves became perceived as "anachronistic documents that had outlived their purpose and were to neither be renewed nor replicated elsewhere".[194] Additionally, the treaties were not regarded as legally binding documents.[195] Although this view has been debunked more recently, in the early 20th century it undermined the treaty-making process for all parties. Indeed, as late

[192] In February 2009 the two Crowns were given the right to appeal the trial judgment.
[193] INAC. *The Specific Claims Policy and Process Guide.* Ottawa. 2009
[194] Morse. Indigenous-Settler Treaty Making in Canada in Langton et al. *Honour among Nations? Treaties and Agreements with Indigenous People.* Melbourne University Publishing. pg. 61. 2004
[195] *R v. Syliboy,* [1929] 1 D.L.R. 307 (N.S. Co. Ct) at 313

as 1969, comprehensive claims were regarded as being so vague as to be incapable of any specific remedy.[196]

In 1973, Canada enacted a new policy in which comprehensive land claims agreements would be negotiated for areas where Aboriginal title had not been extinguished.[197] Since then, 23 comprehensive land claims have been settled:

- *James Bay and Northern Quebec Agreement* (1975) and *Northeastern Quebec Agreement* (1978) – Quebec;
- *Inuvialuit Final Agreement* (1984) – western Arctic;
- *Gwich'in Agreement* (1992) – Yukon and NWT;
- *Nunavut Land Claims Agreement* (1993) – Nunavut;
- Eleven *Yukon First Nation Final Agreements* (1993 through 2008) – Yukon;
- *Sahtu Dene and Metis Agreement* (1994) – NWT;
- *Nisga'a Final Agreement* (2000) – BC;
- *Tlicho Agreement* (2003) – NWT;
- *Labrador Inuit Agreement* (2005) – Newfoundland and Labrador;
- *Nunavik Inuit Land Claims Agreement* (2006) – Quebec;
- *Tsawassen First Nation Final Agreement* (2007) – BC;
- *Maa-nulth First Nations Final Agreement* (2009) – BC.[198]

The scope of the comprehensive land claims has evolved over time. Early agreement (such as *James Bay)* had "more limited land rights, hunting rights and financial compensation" and "outright self-government provisions were not included".[199] More recently, in the *Nunavut* agreement over 350 000 km^2 of land in fee simple was granted, $1.17 billion in compensation was given, and the creation of a Nunavut government was agreed to. In the *Nisga'a* agreement, over 1900 km^2 of land in the Nass River Valley was granted in fee simple, $190 million was paid, subsurface rights were granted, and the Nisga'a Central Government (and village governments) was established.

What of specific claims?

Unlike comprehensive claims, specific claims were regarded in the 1969 *White Paper* as being capable of specific remedy, meaning that "lawful obligations must be recognized". Specific claims generally relate to:

[196] *Statement of the Government of Canada on Indian Policy, 1969* (White Paper).
[197] INAC. *Statement of claims of Indian and Inuit People.* Ottawa: Queen's Printer. 1973
[198] Hurley. Settling comprehensive land claims. *Library of Parliament.* PRB 09-16E. 2009
[199] Dalton. Aboriginal Title and Self-Government in Canada: What is the true scope of comprehensive land claims agreements?. *Windsor Review of Legal and Social Issues.* Vol. 22, 29-78. 2006

- failure by the government to fulfill treaty promises;
- the breach of obligations under the *Indian Act* or other legislation;
- mismanagement of reserve lands, Indian moneys and other assets; and
- the illegal lease or disposition of reserve lands.[200]

In the 1990s, the specific claims process was criticized as being weighted too favorably in Canada's favor, such that settlements were infrequent and First Nations dissatisfied.[201] In 2007, Canada announced an action plan to speed up resolution of specific claims,[202] by completing steps in the specific claims process within three years. Canada has three years to assess a filed claim to determine whether it will be accepted for negotiation and three years to negotiate accepted claims to settlement. If this time-frame is not met, then the First Nation has the option of sending the claim to an independent Specific Claims Tribunal for binding resolution.[203] As of September, 2009, 728 specific claims have been concluded with only 623 filed claims remaining in the inventory.[204]

How does Treaty Land Entitlement (TLE) fit into the mix?

Many of the historic Treaties made land promises. In the numbered Treaties across the prairies the promise was of one square mile for a family of five, or 128 acres per individual Indian.[205] Historically, however, there have been significant shortfalls in the allocation of land. Compounding the problem is that this simple formula (population x area) has become riddled with interpretation questions.[206]

Enter TLE. In 1992, a framework agreement was signed by Canada, Saskatchewan, and 25 First Nations to fulfill outstanding land debts.[207] A similar agreement was signed with 19 First Nations in Manitoba in 1997. The agreements provide for a "specified amount of Crown Lands … and/or a cash settlement … so that a First Nation may purchase federal, Provincial/territorial, or private land to settle the land debt".[208]

[200] Compensation for damaged lands and fraud by agents of the Crown are also grounds for a specific claim: INAC. *The Specific Claims Policy and Process Guide.* Ottawa. 2009
[201] Henderson et al. Survey of Aboriginal Land Claims. *Ottawa Law Review.* Vol 26:1. 1994
[202] INAC. *Specific Claims: Justice at last.* Ottawa. 2007
[203] As set out in the *Specific Claims Tribunal Act*. 2008, c.22
[204] INAC. *Resolving specific claims – results from March 31, 2008 to September 30, 2009.* 2009
[205] With the exception of Treaty 5 which provides for 160 acres per family of 5, or 32 acres per person.
[206] "Who is eligible to be counted, when is the counting to begin, when is it to end or be completed, and what is to be done if not everyone was counted when the first counting occurred." – Metcs et al. Land Entitlement under Treaty 8. *Alberta Law Review.* Vol. 41(4). 2004
[207] *Saskatchewan Treaty Land Entitlement Framework Agreement.* Signed September 22, 1992
[208] INAC. *Frequently Asked Questions – Treaty Land Entitlement.* 2009

Presently, over 90% of all TLE claims are in Manitoba and Saskatchewan. In Saskatchewan, 22 of the original 25 First Nations have had their TLE claims settled. As of October 2009, some 759,191 acres attained Reserve status.[209] In Manitoba, over 1.3 million acres will be converted to Reserves, of which some 335 000 acres had been allocated by early 2010.[210] TLE has also provided the opportunity for First Nations to acquire land within urban areas, thus enhancing access to economic opportunities. An example is Muskeg Lake Cree Nation's Asimakaniseekan Askiy 102A, a 35 acre Reserve in Saskatoon that is home to 45 businesses and organizations.[211]

SGB is involved in the TLE process by providing advice and consultation, carrying out historical land title searches, managing survey contracts (surveys are made under provincial acts and regulations) and preparing and reviewing legal descriptions of the land for orders-in council.

What of legislative initiatives?

There are at least four pieces of federal legislation that are coloured by INAC's 1990 policy of devolution, such that First Nations and other Aboriginal peoples assume greater control over their affairs and thereby increase their self-sufficiency. Three of them deal directly with boundaries and parcels of Canada Lands – FNLMA, FNCIDA and FNOGMMA.[212]

What is the First Nations Land Management Act (FNLMA)?

The FNLMA was enacted in 1999 to allow First Nations to manage lands within their respective Reserves. It was the result of some 10 years of discussions between First Nations and Canada about how to make the devolution policy meaningful, and had two sets of precedents. The first set involved co-management and delegation under the Indian Act. Co-management was allowed through the Regional Land Administration Programme, although accountability for land management functions continued to reside with the Minister of Indian Affairs. The Land Management Delegation Programme allowed First Nations some responsibility for land management on Reserves.[213]

[209] *Treaty Land Entitlement Fact Sheet.* Government of Saskatchewan. October 16, 2009
[210] INAC. *TLE Report for Completed Land Conversions.* March 22, 2010
[211] Backgrounder - Urban IR: A Quiet Success Story and Canada Invests in Muskeg Lake Cree Nation's Commercial Development in Saskatoon: INAC Website.
[212] The fourth is the *First Nations Fiscal and Statistical Management Act,* S.C. 2005, c.9.
[213] Pursuant to ss.53 and 60 of the *Indian Act*.

Figure 20–In green: 420 000 ha claimed by the Tsilqot'in Nation. In Black dashed: 190 000 ha that the court would have granted to the First Nation had it been claimed. *Surveyor General Branch*. 2009

However, the more significant precedent was the *Framework Agreement on First Nation Land Management*, signed between Canada and 14 First Nations in February 1996. The *Framework Agreement* allowed First Nations to opt out of the land management sections of the *Indian Act* by assuming such responsibility themselves. The FNLMA ratified the *Framework Agreement* three years later.

The FNLMA requires that participating First Nations develop a land code, which deals with a myriad of issues: revenues from lands and natural resources, conflicts of interest and dispute resolution, existing and new interests granted on Reserve, marriage breakdown, First Nation's laws, and the use (occupation and protection) of the lands. The lands subject to the land code must be legally described, using either a metes and bounds (written) description or a parcel on a plan of survey (graphical description).[214]

A portion of a Reserve may be excluded from the application of a land code if surveyed under Part II of the *Canada Lands Surveys Act*.[215] Excluded land must be:

- in an environmentally unsound condition that cannot be quickly remedied;
- subject to litigation that cannot be quickly resolved;
- uninhabitable owing to a natural disaster; or
- justified by the First Nation and the Minister.

A portion of a Reserve may not be excluded from a land code if the effect of the exclusion is to place the administration of an interest in two regimes. For example, a parcel of Reserve land that is leased cannot be partially within (subject to the FNLMA) and partially outside (subject to the *Indian Act*) the land code area.

A First Nations Land Registry – essentially a sub-set of the Indian Land Registry – has been established to record instruments from those First Nations that have enacted a land code.[216] Of the 14 First Nations who signed the Framework Agreement, six now operate under the FNLMA, meaning that they have enacted land codes. Since 1999, another 44 First Nations have entered the FNLMA, 25 of which are operational.

FNLMA lands continue as Reserves, meaning that they continue to be Canada Lands. Sometimes a First Nation has the use and benefit of

[214] FNLMA, s.6.1.
[215] FNLMA, s.7.
[216] *First Nations Land Registry Regulations*, pursuant to s.25(3) of the FNLMA. October 2007.

only one Reserve (one parcel of land);[217] other times it has the use and benefit of many Reserves.[218] A legal description is required for each Reserve that is to be subject to a land code. SGB prepares a Legal Description Report (LDR) that contains the legal description, a sketch (often comprising aerial photographs), and the instruments and plans of survey that were used, and that identifies boundary and title issues. Although an opinion is rendered on the boundary of the Reserve (or the portion subject to the land code), title issues (such as the status of roads or the extent of minerals) are referred to INAC. Sometimes the Reserve must be surveyed; at other times existing surveys and imagery suffice. Surveys (and re-surveys) are usually contracted to Canada Lands Surveyors in the private sector.

What is the First Nation Commercial and Industrial Development Act (FNCIDA)?

FNCIDA is a mechanism by which a First Nation can request that Canada develop regulations for a specific commercial or industrial development on Reserve. It does not extend provincial regulations onto Reserve, but it tends to mimic such regulations. This gives potential partners and private sector investors greater certainty by "ensuring that they are dealing with regulations and regulators that they know and understand".[219]

It also bridges a regulatory gap, where federal laws do not match the needs of commercial activity on reserve, and where provincial regulations are not permitted on Reserve for constitutional reasons. As of June 30, 2010, Bill C-24 to amend FNCIDA had passed through Parliament and had received Royal Assent. It entitles First Nations to request that the:

> Government of Canada make regulations respecting the establishment and operation of a system for the registration of interests and rights in reserve lands that would replicate the provincial land title or registry system.[220]

[217] The Mississaugas of Scugog Island First Nation, which has enacted a land code, has the use and benefit of one Reserve.
[218] The Scia'new First Nation, which has enacted a land code, has the use and benefit of eight Reserves.
[219] INAC. *Frequently Asked Questions – First Nations Commercial and Industrial Development Act.* 2008
[220] *Bill C-24: First Nations Certainty of Land Title Act.* 2010.

Figure 21–Map showing overlapping claimed areas in British Columbia. *Government of Canada and British Columbia*. 2007

Bill C-24 allows for a consequential amendment to section 24 of the Canada Lands Surveys Act,[221] such that Canada Lands would not include Reserve lands described in regulations made under section 4.1 of FNCIDA. The effect is to retain the lands as Reserve, while surveying the lands to provincial standards, thus allowing the parcels to be registered in a provincial land titles system.

What is the First Nations Oil and Gas Moneys Management Act (FNOGMMA)?

FNOGMMA, enacted November 2005, enables the devolution of the management and regulation of oil and gas exploration to First Nations which accede to the new management regime. Management authority currently resides with Indian Oil and Gas Canada, a special operating agency of INAC.[222] The purpose of FNOGMMA is to improve the economic efficiency of First Nations.[223]

What is the duty to consult and the honour of the Crown?

Recent judgments of the courts have highlighted the necessity of rigorous, meaningful consultation with Aboriginal peoples by the Crown. The key Supreme Court of Canada (SCC) message motivating the duty to consult is the need to reconcile Aboriginal rights with those of all other Canadians.[224] The *Taku River*[225] judgment set out that "the Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown."

The duty is incumbent on the Crown when it has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." The duty rests with the Crown, meaning that it is also incumbent upon provincial governments. The scope of consultation depends on the strength of the assertion of Aboriginal interests, and on the "seriousness of the potentially adverse effect on the right or title claimed."[226]

[221] See chapter 1 for a full exposé of s.24.
[222] See chapter 5 for a full discussion of how oil and gas rights are managed and surveyed on Reserves.
[223] Black. Devolution of oil and gas jurisdiction to First Nations in Canada. 45 *Alberta Law Review* 537, 2007-08.
[224] *Mikisew Cree First Nation v. Canada,* [2005] 3 SCR 388, 2005 SCC 69.
[225] *Taku River Tlingit First Nation v. British Columbia* 2004 SCC 74, [2004] 3 SCR 550.
[226] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 SCR 511.

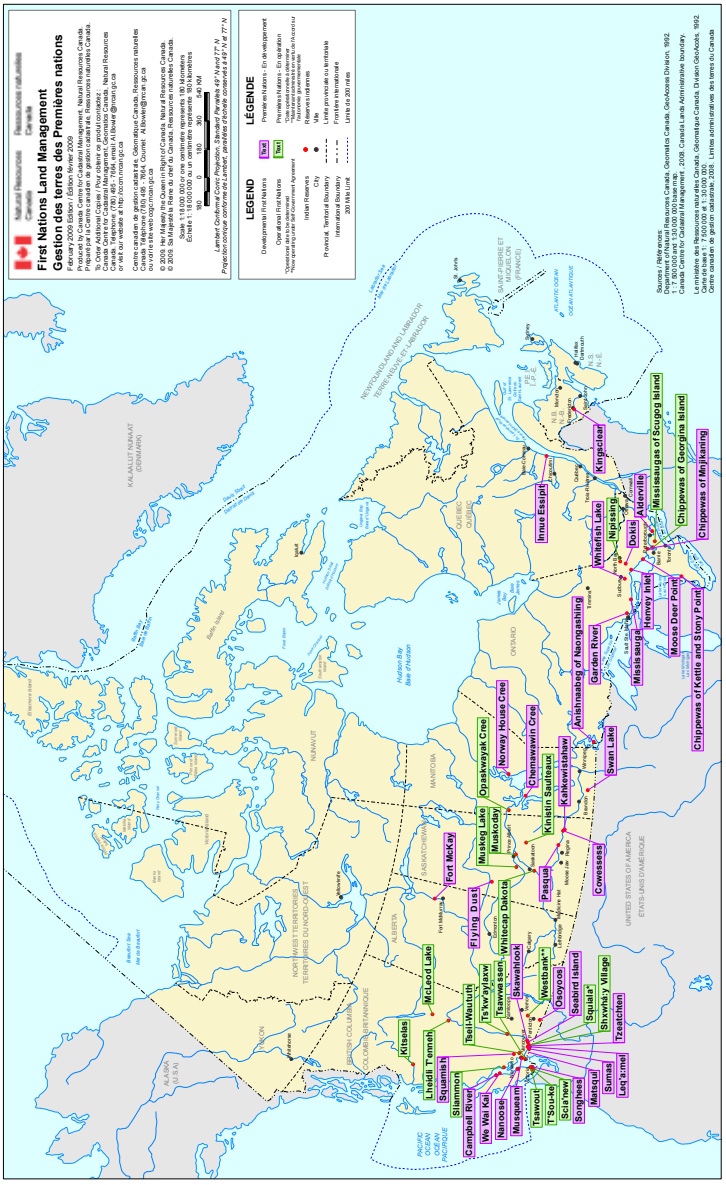

Figure 22–Map of First Nations in the *First Nation Land Management Act* process. *Surveyor General Branch*. February 2009

5

Subsurface south of 60

How deep is the subsurface?

We often think we have some mastery of what lies beneath our feet. The truth, as Feynman notes is that "we understand the distribution of matter in the interior of the Sun far better than we understand the interior of the Earth".[227] Most mining efforts rarely extend beyond a quarter mile, with the deepest gold mines in South Africa only extending to about two miles.[228] Even the most dogged scientific efforts to drill through the crust to the upper mantle have ended in failure.[229]

Despite this rudimentary knowledge of the earth's interior, we talk of property rights extending "not merely to the surface, but of everything that lay beneath…down to the center of the earth."[230] Such extravagances of ownership are clearly inaccessible. However, as for airspace rights, we are now on the threshold of a paradigm shift in how we view the subsurface. Carbon storage in deep subsurface layers[231] and geothermal energy systems[232] are two promising examples of technology which might change the current view. Given these advancements, the Crown will most likely have an interest in the ownership of the deep subsurface in the future.[233]

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[227] Feynman. *Six easy pieces.* Helix Books. 1995
[228] Schultz. Two miles underground. *Princeton weekly bulletin.* 89(12). 1999
[229] There have been some innovative suggestions for getting to the centre of the earth. Stevenson suggests launching a small object made of liquid iron (and attached sensors) with a nuclear explosion. Stevenson. Mission to Earth's core: A modest proposal. *Nature.* 423 (239). 2003
[230] *Elwes v Brigg Gas Co.* (1886) 33 ChD 568
[231] US Department of Energy. *Carbon Sequestration Technology Roadmap and Program Plan.* 2007
[232] MIT. *The future of geothermal energy.* 2-15. 2006
[233] Sprankling. Owning to the center of the earth. *UCLA Law Review.* 55(979). 2008

Subsurface ownership refers to four things, providing they are humanly accessible:

1) groundwater,
2) disposal of waste,[234]
3) objects embedded in the soil,[235] and
4) minerals. It is only minerals that are the focus of this chapter.

What are the general principles for mineral ownership?

Determining mineral ownership is tricky. In general, it is a matter of determining the intent of the original documents.[236] It is important, therefore to understand how minerals are described in these documents. In theory, any specific sub-surface resource can be reserved by the Crown.[237] In practice, however, minerals are usually subdivided into three main categories: 1) base minerals, 2) precious (or royal) minerals, and occasionally 3) hydrocarbons. Historically, precious minerals referred to gold and silver, base minerals referred to everything else, and hydrocarbons referred to coal, petroleum, and gas. Hydrocarbons are considered to be base minerals unless specifically mentioned.[238]

The precious minerals (gold and silver) are considered reserved to the Crown unless specifically granted:

- Gold and silver "until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as…incidents of the land in which they are found".[239]
- It has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words.[240]

Base minerals (including hydrocarbons) go with the grant of land unless specifically reserved by the Crown:

[234] Most groundwater and waste disposal rights in the subsurface are restricted by environmental legislation for clean drinking water. See *Canada Waters Act*. R.S. 1985, c-11, *Clean Water Act*. S.O. 2006, ch 22
[235] In *Elwes* (note 5) an excavated 2000 year old boat was granted to the surface owner. In most jurisdictions, however, surface owners have no rights to disturb cultural artifacts under their property. Hutt. Control of Cultural Property as Human Rights Law. *Arizona State Law Journal*. 31(363). 1999
[236] Bartlett. Mineral Rights on Indian Reserves in Ontario. *The Canadian Journal of Native Studies*. III, 2. 1983. pg. 245–275
[237] The distinct ownership of minerals beneath the surface appears to have been long contemplated: *Cox v. Ghee* (1848) 5 CB 533 and *Re Haven Gold Mining Co.* (1882) 20 ChD 151
[238] Ingraham. The meaning of minerals in grants and reservations. *Rocky Mountain Law Review*. 343. 1958
[239] *Attorney General of British Columbia v. Attorney General of Canada*. 1889, 14 A.C. 295
[240] *Wooley v. A.G. of Victoria* (1877) 2 AC, see also *R v. Earl of Northumberland (Case of Mines)* (1568) 1 Plowden 310, and *A.G. v. Great Cobar Copper Mining Co.* (1900) NSWLR 351

- There is no doubt that prima facie the owner of the surface is entitled to the surface itself and all below it…[241]
- A freeholder…is entitled to take from his land anything that is his…except those minerals which belong to the Crown, the soil and everything naturally contained therein is his.[242]
- It is beyond doubt that at common law minerals are under the effective control of the landowner in that access…can only be obtained by the surface landowner…or with consent. Thus, minerals may be said to be effectively, if not legally, in the ownership of the surface landowner.[243]

Who owns the minerals on Quebec Indian Reserves?

The first Reserves for First Nations in Quebec were allotted under French sovereignty, long before Confederation, by grants to Jesuit missionaries in the late 16th and early 17th centuries.[244] The restrictions on the ownership of the land were strict. Bands were described as owning the lands but with the caveat that if they were to "leave the place or give up the religion or pass under another control…the land granted to them will revert to the said Reverend Fathers". The band was not allowed to "sell, alienate, give, exchange, lease, or rent" the land; and was only to "make use of and cultivate for their own profit and advantage…as they have been enjoyed hitherto".[245]

In 1850, responsibility for all such Reserves passed to a Commissioner of Indian Lands in whom "all lands and property in Lower Canada which are or shall be set apart….for the use of any Tribe or Body of Indians shall be and are hereby vested".[246] In 1851, another statute[247] provided for the creation of Reserves in the more remote portions of the province where European settlement was approaching traditional territories, and where there were outstanding grievances by the First Nations.[248] The land would again be "vested in and managed by the Commissioner of Indian Lands for Lower Canada".

[241] *Rowbotham v. Wilson* (1860) 8 HL Cas 348, see also *Wilkinson v. Proud* (1843) 11 M & W 33 and *Williamson v. Wooten* (1885) 3 Drew 210.
[242] *Wade v New South Wales Rutile* (1969) 121 CLR 177
[243] Bradbrook. The relevance of the cujus est solum doctrine to the surface landowner's claims to natural resources beneath the land. *Adelaide Law Review.* 11. pp. 462–483. 1988
[244] Stanley. The first Indian 'Reserves' in Canada. *Revue d'Histoire de l'Amerique Française.* 4, 178, 1950
[245] Government of Canada. *Indian Treaties and surrenders, from 1680 to 1890.* 1997
[246] *Act for the better protection of the Lands and Property of the Indians in Lower Canada.* S.C. 1850, c.42
[247] *Act to authorize the setting apart of Lands for certain Tribes in Lower Canada.* S.C. 1851, c.106
[248] Bartlett. *Indian Reserves in Quebec.* University of Saskatchewan. 1984. pg. 13

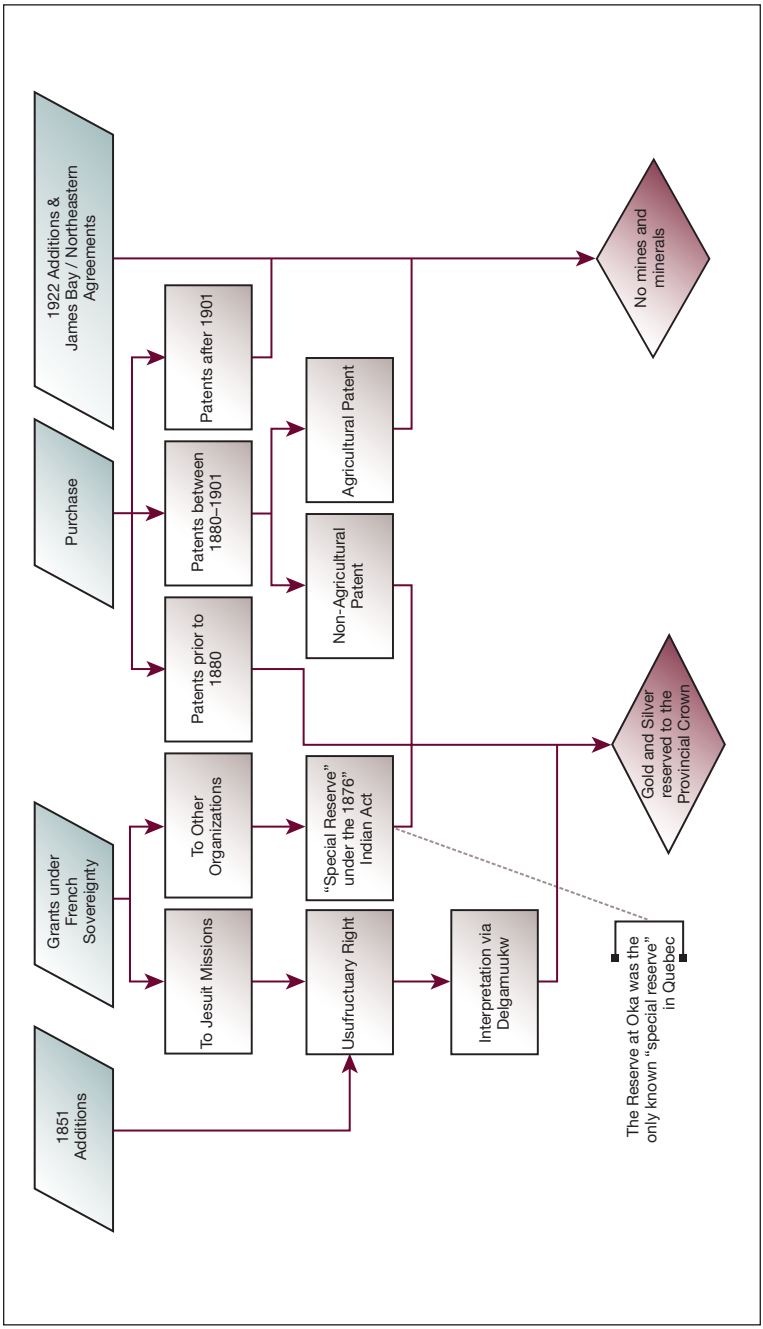

Figure 23–Overview of minerals on Quebec Reserves

Star Chrome Mining[249] found that at Confederation in 1867, all title that vested in the Commissioner of Indian Lands passed to the provincial Crown. This meant, effectively, that if Indian lands are surrendered they revert to Quebec. Indeed, this has led INAC to refuse any surrenders on Quebec Reserves established in this manner, for fear of a provincial reversionary interest.[250] The court further elaborated on the nature of the Indian interest in those lands. The effect was to categorize all lands vested in the Commissioner of Indian Lands before 1850 (the Jesuit Mission Reserves) and those set apart by the 1851 Act (the remote Reserves) to be of a "usufructuary right".[251]

For mineral ownership, then, it is crucial to understand what is meant by a "usufructuary right" and how it has evolved. Historically, the Canadian courts have emphasized the traditional use of the land: "a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams…occupying as their forefathers have done for centuries".[252] In 1997 in *Delgamuukw*[253] the majority of the Supreme Court of Canada declared, quite explicitly, that "Aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation".[254] The approach adopted in *Delgamuukw* "allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the Aboriginal title in that land".[255]

Commentators have noted that this definition allows a First Nation to exploit the natural resources under their lands, even if this is not a historic use.[256] The applicability of *Delgamuukw* to Quebec Reserves seems apt. Indeed, the Supreme Court of Canada held that, vis-à-vis a Reserve rather than unrecognized Aboriginal title in traditional tribal lands, "the Indian interest in the land is the same in both cases".[257] Given these considerations, the conclusion is that Quebec Reserves set aside in this manner include base minerals.[258]

[249] *Attorney General for Quebec v. Attorney General for Canada (Star Chrome)* (1921), 1 A.C. 401 (P.C.)
[250] Indian Oil and Gas Canada file CAL-E 5855-1 PRB
[251] Bartlett. 1984. pg. 23
[252] *Calder et al. v. Attorney General of British Columbia* (1973), SCR 313
[253] *Delgamuukw v. British Columbia*, (1997) 3 SCR 1010 - Para 138
[254] *Delgamuukw*. Page 7
[255] *Delgamuukw*. Para 132. See chapter 4 for an analysis of the nexus between Aboriginal title, parcels and boundaries.
[256] McNeil. Aboriginal title and aboriginal rights: what's the connection? *Alberta Law Review 36. 117. 1997;* Bartlett. Native title includes minerals! *Australian Mining and Petroleum Law Journal. 17, 43. 1998*
[257] *Guerin v. The Queen* (1985) 1 C.N.L.R. 120 (S.C.C.)
[258] To throw another wrench in the gears, not all grants under French sovereignty for the Indians were to the Jesuits. Specifically, Oka (Kanesatake) was founded by the Seminary of St. Sulpice. This made it a "special reserve" under the Indian Act. In 1945, Canada purchased the title from the Seminary.

To complicate matters, however, in 1922 Quebec enacted legislation,[259] in which the decision in *Star Chrome Mining* was restated and further elaborated that "mining rights shall not be included in such concessions". The statute authorized the setting aside of 330 000 acres, of which only a small portion was ever allocated as Reserves. Good examples of Reserves that were set apart pursuant to the 1922 statute are at Sept Iles and Obedjiwan. While the provisions apply to those Reserves set aside under it (no minerals), it is inapplicable to all other Reserves.

Still other Reserves in Quebec were created via purchase of land in fee simple. The ownership of minerals is then dependant on the original grant. Base minerals in grants prior to 1880 (unless explicitly removed) passed as an implicit incident of the land;[260] after 1880, base minerals were reserved from all grants for agricultural purposes;[261] after 1901, all base minerals were reserved from all grants.[262] The Whitworth Reserve, for example, was purchased by Canada in 1877 (pre-1880) so it includes base minerals. The Natashquan and Romaine Reserves were purchased in 1949 (post-1901), so all base minerals are reserved to the Province.

Mineral ownership also differs pursuant to agreements. In the *James Bay and Northern Quebec Agreement,* Quebec retained "ownership of the mineral and subsurface rights over such lands."[263] Mineral development may occur on these lands only after consultation with and compensation to the First Nation. Similarly, in the *Northeastern Quebec Agreement*, all mineral rights were retained by the Province. As compensation for renouncing any claims in the lands and minerals, the Cree (James Bay Agreement), and the Naskapi (Northeastern Agreement) received $75 and $3 million, respectively.

Who owns the minerals on Reserves in Atlantic Canada?

Like Quebec, the extent of the ownership of the minerals on Reserves in Atlantic Canada depends on the instruments which established the Reserve. Pre-Confederation Reserves are the most problematic. Most were granted under licenses of occupation (and subsequent orders-in-council) by the Nova Scotia and New Brunswick Governments. Good examples are Eel Ground (1784), Richibucto (1802) and Pokemouche (1809). The extent of what interest the First Nations held in these lands was first considered by the courts in Nova Scotia in 1890: "Title to the

[259] *Act respecting lands set apart for Indians*. S.Q. 1922, c. 37
[260] Bartlett. 1984. pg. 40
[261] *Mines Act,* S.Q. 1880, c. 12
[262] *Mines Act,* S.Q. 1901, c. 13
[263] James Bay and Northern Quebec Agreement, s. 5.1.2

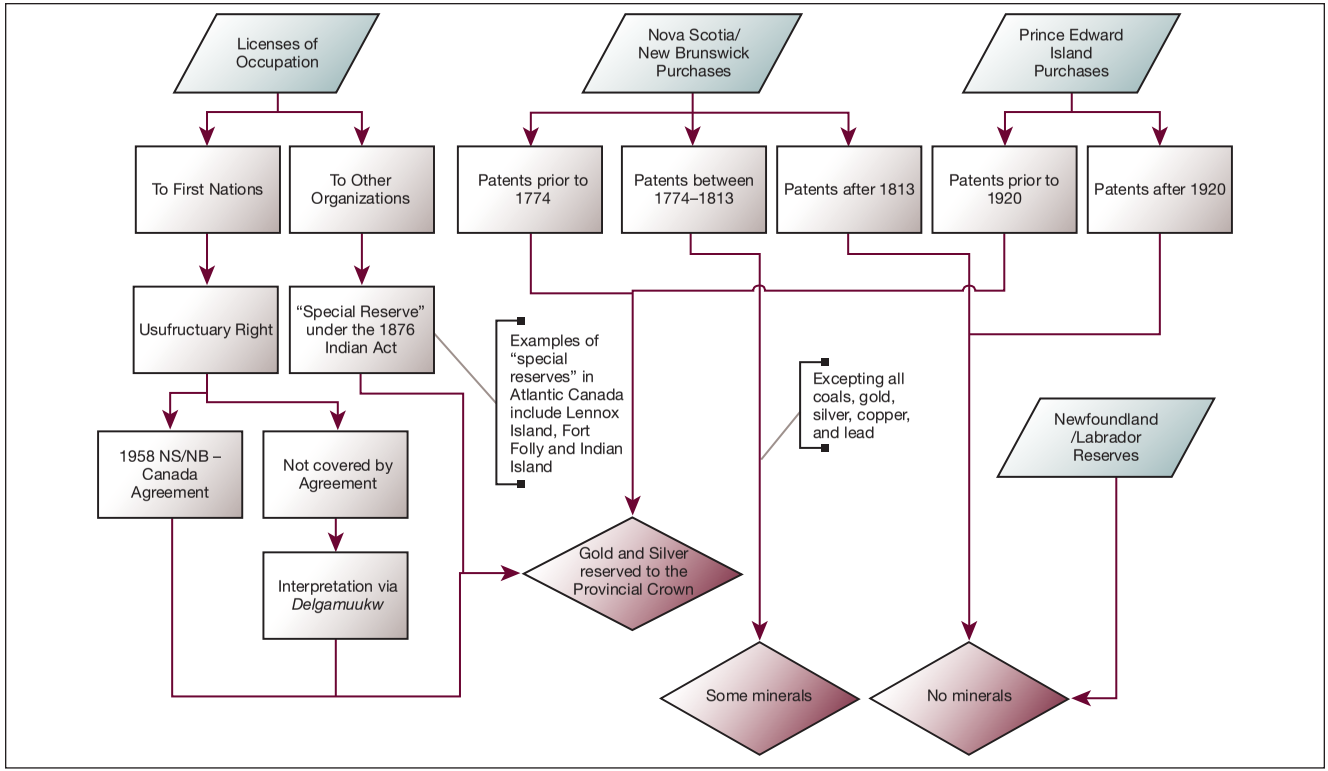

Figure 24–Overview of minerals on Atlantic Canada Reserves

land in the Province reserved for the use of the Indians, remained - like all other ungranted lands – in the Crown, the Indians having, at most, a right of occupancy."[264]

In 1958, the New Brunswick Supreme Court relied on the Royal Proclamation[265] and the *St. Catherine's Milling*[266] decision to find that the Richibucto Reserve had "only a personal and usufructuary interest… which interest was dependant on the goodwill of the Sovereign".[267] This decision was affirmed by the Supreme Court of Canada in 1983, where it was stated that "the right of the Indians to the lands …as a personal a usufructuary right".[268]

In 1958, New Brunswick and Nova Scotia transferred to Canada "all rights and interests of the Province in reserve lands except…under public highways and minerals".[269] This is not an acknowledgement that the Provinces own the mineral rights, only that they do not relinquish their underlying interest.[270] The agreements acknowledge that the minerals are to be developed for the benefit of the band and that they are to be governed by federal legislation. All Reserves purchased post-Confederation in Nova Scotia and New Brunswick, however, were excluded from the agreements, meaning that the agreement does not have blanket authority.

Quite a few Reserves in Atlantic Canada were created from the purchase of fee-simple title from the Provinces. In these cases, ownership of the minerals is dependant on the timing and wording of the grant. Prior to 1774, all grants from Nova Scotia[271] included base minerals with the implicit reservation of gold and silver. From 1774–1784 base minerals were still included, but "all mines of gold, silver, or precious stones" were reserved to the Crown. From 1784–1813, "all coals, and also all mines of gold, silver, copper and lead" were reserved. Finally by 1813, "all coals, and also all gold and silver, and other mines and minerals" were reserved.[272] In Prince Edward Island, Lennox Island[273]

[264] *Burk v. Cormier* (1890), 30 N.B.R. 142 (N.B.C.A.)
[265] *Royal Proclamation of 1763,* R.S.C. 1985, App. II, no. 1
[266] *St. Catherine's Milling and Lumber Co. v. The Queen* (1889) 14 A.C. 46 (JCPC)
[267] *Warman v. Fracis* (1958), 20 D.L.R. (2d) 627 (N.B.S.C.)
[268] *Smith v. The Queen* (1983) 3 C.N.L.R. 161 (S.C.C.)
[269] *Agreement between Canada and New Brunswick respecting Indian Reserves.* S.C. 1959, c.47; *Agreement between Canada and Nova Scotia respecting Indian Reserves.* S.C. 1959, c. 50
[270] Bartlett. 1986. pg. 68
[271] Which included New Brunswick at that time; NB wasn't partitioned until 1784.
[272] Labaree. *Royal Instructions to British Colonial Governors 1670–1776.* Octagon Books. 1967. – as quoted in Bartlett. *Indian Reserves in the Atlantic Provinces of Canada.* University of Saskatchewan. 1986
[273] Lennox Island has a long history. It was overlooked in the original survey of PEI and subsequently granted to the adjoining property owner in 1772 who granted permission to the Indians to live there. The land was purchased by the Anti-slavery and Aborigines Protections Society of London in 1870, which made it a 'special reserve' (Lands owned by a corporation who hold it in trust for the Indians) under the original Indian Act. It was finally transferred to Canada in 1912. Bartlett. 1986. pg.6

and Rocky Point Reserves were granted when base minerals were included (prior to 1920).[274]

The three Reserves in Newfoundland and Labrador (NL) were only recently established. NL entered Confederation in 1949, at which point the federal Aboriginal policy was heavily criticized for its ineffectiveness. The Terms of Union were thought to be identical to the other Provinces, with the federal government assuming responsibility for First Nations, but "at the eleventh hour this arrangement was set aside in favour of some form of provincial administration, the details to be decided later".[275] The Micmac had settled at Conne River in Newfoundland well before Confederation. Indeed, a Reserve appears to have been contemplated as early as 1870. The Executive Council made reference to an application "for a grant of land to the Indians of Conne River, Bay d'Espoir" and that the Council "concurred in the propriety of the application".[276]

However, the Conne River band was not officially recognized as a Band until 1984,[277] and the current Reserve was only established by agreement and set aside in 1987.[278] The agreement reserved all minerals to the Province. The two Reserves for the Labrador Innu were established in 2003 and 2006, and also reserved all minerals to the province.

Who owns the minerals on Reserves in Ontario?

There is much variation in the documents setting aside Reserves in Ontario. Some are explicit and contain reservations for things like gold, silver, and white pine trees.[279] Others are less clear. The Six Nations Indians, for example, were granted "the full entire possession, use, benefit, and advantage of the said district…to be held and enjoyed by them in the most free and ample manner".[280]

The most common method of Reserve creation in Ontario was through Treaty. When Ontario's mining industry was still in its infancy, a grant of land carried with it base minerals (unless specifically reserved).[281] Minerals were not explicitly mentioned because they were either not contemplated, or were considered of little consequence. This changed

[274] Bartlett. 1986. pg. 49
[275] Tanner. The Aboriginal Peoples of Newfoundland and Labrador and Confederation. *Newfoundland Studies*. 14, 2, 1998
[276] *Minutes of the Executive Council.* PANFLD, GN 9/1 Vol. 5, May 27, 1870
[277] Order in Council 1984-2273
[278] Order in Council 1987-1294
[279] Letters Patent No. 21769. Mnjikaning Reserve 32
[280] *Logan v. Styres* (1959) 20 D.L.R. (2d) 416 (Ont.H.Ct.) – Bartlett 1983, pg. 255
[281] Bartlett 1983. pg. 255

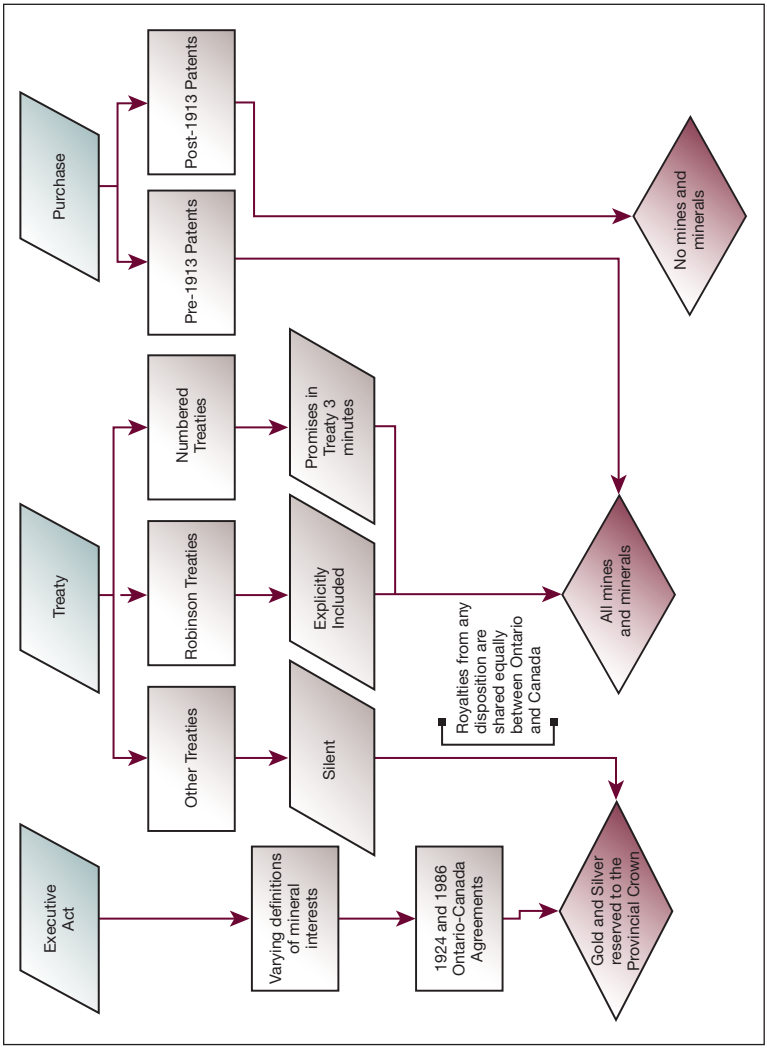

Figure 25–Overview of minerals on Ontario Reserves

in the 1840s with the discovery of copper and silver.[282] The Robinson Treaties of the 1850s were established as a "consequence of the discovery of minerals on the shores of Lake Huron and Superior",[283] and made explicit provision for the disposal of subsurface rights on Reserves:

> Should the said Chiefs and their respective Tribes at any time desire to dispose of any part of such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs.[284]

The granting of mineral rights continued into Treaty 3. Lieutenant Governor Morris was very explicit, in the minutes of the Treaty 3 negotiations: "If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent". Morris also advocated that "to prevent complication, no patents should be issued, or licenses granted, for mineral or timber lands…until the question of the reserves has first been adjusted".[285] The promises in the minutes of the Treaty negotiation are binding, even if omitted from the final written version.[286] Similar terms to Treaty 3 were used in Treaties 5 and 9, leading to the conclusion that all minerals, including gold and silver, were included in most Treaties.

Reserves created through executive act are the most variable. Most, however, entail an agreement for the use of the lands by the Indians. Bartlett has suggested that minerals form part of this definition, with the surface owner owning everything beneath the parcel.[287] Following the same logic as the Treaty Reserves, base minerals would not have been reserved during this time period. Gold and silver, however, are more problematic. The courts have declared that gold and silver pass if the agreement was "an independent Treaty between the two governments,"[288] meaning that the ownership of gold and silver in these Reserves hinges on how liberal the wording of the grant was.

Purchased fee simple Reserves are, generally speaking, the easiest to interpret. Like the Treaty Reserves and those created under executive act, early grants included all base minerals unless specifically reserved.

[282] Notzke. *Aboriginal Peoples and Natural Resources of Canada*. Captus. 1994
[283] Morris. *The Treaties of Canada with Indians of Manitoba and the North-west Territories*. Belfords and Clarke. 1880. pg. 16
[284] Robinson Treaty with the Ojibeway Indians of Lake Huron. 1964 (copy). pg. 3
[285] Morris. 1880. pg. 70
[286] *R v. Taylor and Williams* (1981), 62 C.C.C. (2d) 228 (Ont. C.A.)
[287] *Wilkinson v. Proud* (1843) 11M & W33; *Rowbotham v. Wilson* (1860) 8 H.L. Cas. 348
[288] *A.G. of British Columbia v. A.G. of Canada*. (1889) 14 A.C. 297 (P.C.)

Indeed, this concept is acknowledged in section 61 (1) of the Ontario *Public Lands Act:*

> In the case of land patented before the 6th day of May, 1913, the minerals therein shall be deemed to have passed to the patentee by the letters patent, and every reservation thereof contained in the letters patent or by statute is void.[289]

Gold and silver were originally reserved on all patented land by Ontario, but this was altered in 1869 by Provincial Statute: "All reservations of gold and silver mines contained in any patent…are hereby rescinded and made void".[290]

The provincial claim to minerals on Reserves is based on section 109 of the *British North America Act:* "All lands, mines, minerals, and royalties…shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick". When the numbered Treaties were established in Ontario, the Dominion of Canada did not have ownership of the land to grant to the Indians.[291] Canada and Ontario agreed to the terms of Treaty 3,[292] and acknowledged that all future Treaties required Ontario's approval. The agreement, effectively, affirmed federal ownership of all minerals on Reserves pursuant to Treaty 3 by virtue of having Ontario's stamp of approval.

The ownership of gold and silver, however, was questioned for those Reserves set apart under executive act: "It remains that the Indians had no interest, and the Dominion had no competence quoad[293] these royal mineral rights".[294] In 1924, Canada and Ontario entered into an agreement to settle this question (among others).[295] The agreement affirmed that surrenders of land do not revert to Ontario, but if mineral development were to proceed, a 50% percent royalty on all minerals was payable to Ontario.[296]

Who owns the minerals on Reserves in the Prairies?

The Prairie Provinces gained control over their lands and natural resources in 1930, which simplifies the subsurface problem. The Dominion of Canada had ownership of all natural resources across

[289] *Public Lands Act.* R.S.O. 1990, c. P43
[290] *General Mining Act.* S.O. 1869, 32 Vic, c. 34
[291] *St. Catherine's Milling and Lumber Co. v. The Queen* (1889) 14 A.C. 46 (JCPC)
[292] *Agreement with respect to lands encompassed by Treaty 3.* S.O. 1894, s. 4, Vic, c.3
[293] Quoad means 'so far as."
[294] *Ontario Mining Co. v. Seybold* (1899), 31 O.R. 386
[295] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands.* S.C. 1924, c.48 and *Indian Lands Agreement (1986) Act.* 1988, c. 39
[296] The reasoning for the inclusion of all minerals in the 50% royalty, and not just gold and silver, was that base and precious minerals often form together geologically. – Bartlett. 1983. pg. 264

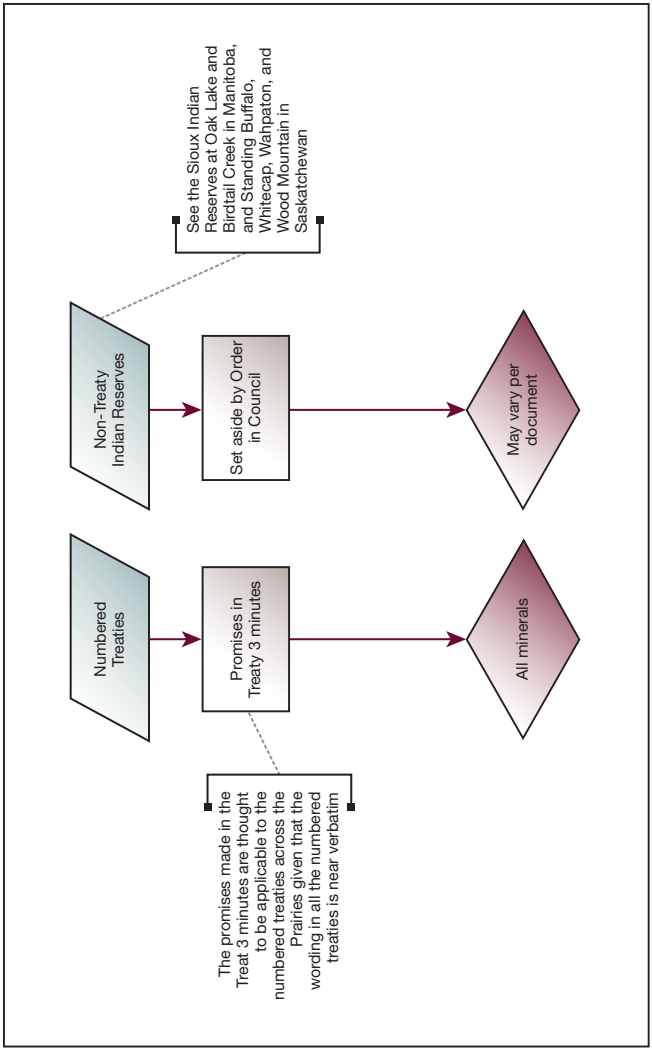

Figure 26–Overview of minerals on Prairie Reserves

the Prairies when it negotiated the numbered Treaties. The numbered Treaties make no reference to minerals despite the fact that the Robinson Treaties "shaped the course" of the numbered Treaties development.[297] Treaty commissioners, however, did give oral promises of minerals to the First Nations.[298]

Additionally, the 1876 *Indian Act* explicitly defined a Reserve as including "all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein".[299] The definition remained in the Act through revisions in 1886, 1906, and 1927, before being altered to the current definition in 1951: "A tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band".[300] Reserves across the Prairies established pursuant to the numbered Treaties prior to 1930 include all base minerals and all precious metals (gold and silver), unless specifically excluded.

After 1930, with the Natural Resources Transfer Agreements, the waters get a little muddier. Base minerals still passed to the Reserve, as clause 11 in the Manitoba agreement and clause 10 in the Saskatchewan and Alberta agreements stated that future Reserves are "administered by Canada in the same way in all respects as if they had never passed to the Province".[301] Precious metals, however, passed to the Prairie Provinces in 1930 in a similar manner as to how they passed to Ontario in 1867, via section 109 of the *British North American Act*.[302] Clause 12D of the Manitoba agreement and clause 11 of the Alberta and Saskatchewan agreements specifically apply the provisions of the 1924 Ontario Agreement. That is, they allow for Reserves to include base minerals, and declared a 50% royalty to the province on any mineral thereon.

It has been argued that the setting aside of Reserves in the Prairie Provinces after 1930 differs from the setting aside of Reserves in Ontario after 1867, and therefore the 50% royalty is inapplicable to the Prairies. The argument is based on clause 10 (Manitoba), and clause 11 (Saskatchewan and Alberta) of the transfer agreements obligating the Provinces to: "Enable Canada to fulfill its obligations under the Treaties". Ontario never had such an obligation. As the numbered Treaties

[297] Morris. 1880. pg. 16
[298] See notes 284 and 285
[299] *Indian Act.* S.C. 1876, c. 18
[300] *Indian Act.* R.S. 1985, c. I-5
[301] *Constitution Act,* 1930, 20-21 George V, c. 26 (U.K.)
[302] *Constitution Act,* 1867, 30 & 31 Victoria, c. 3. (U.K.)

promised all resources, both precious and base, to the First Nations, Bartlett argues that the Prairie Provinces might be obligated to transfer these interests with the land to fulfill the terms of the agreement.[303]

This obligation was recognized in Saskatchewan where it is acknowledged that minerals can be transferred from Provincial Crown to Federal Crown "for the purpose of assisting Her Majesty the Queen in right of Canada to satisfy or discharge any obligations…to Indian bands in Saskatchewan".[304] The inapplicability of the Ontario provision is further bolstered by Saskatchewan's 1976 declaration that "it does not agree to renounce any rights it has to one-half royalties…but does not assert that right".[305] Likewise, Manitoba has never formally renounced the right, but has never made a claim either.[306] Additionally, both Saskatchewan and Manitoba relinquished any claims to royalties under the Treaty Land Entitlement agreements in the 1990s.[307]

The situation across the Prairies is not without exception. The Sioux who fled from the United States and took up residence in Manitoba and Saskatchewan were not party to any of the numbered Treaties. Reserves were created by Orders-in-Council in the areas the Sioux had settled.[308] The establishment of the Sioux Reserves was noted to be "a matter of grace and not of right",[309] so the extent of mineral possession is dependant on the original Order-in-Council (OIC) which set the Reserves aside.

Who owns the minerals on Reserves in British Columbia?

Prior to Confederation there existed several Reserves in British Columbia.[310] These comprised those Reserves made up of "village sites" and "enclosed fields" set aside by the Douglas Treaties (1850s) on Vancouver Island and those reserves created pursuant to surveys by colonial officials.[311] Governor Douglas commented that "the areas thus partially defined and set apart…are to be held as the joint and common property of several tribes, being intended for their exclusive use and benefit".[312]

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[303] Bartlett. Indian Reserves on the Prairies. *Alberta Law Review.* 243. 1985
[304] *Crown Minerals Act.* 1985, C-50.2, Sec. 3(4)(C)
[305] Bowerman. Letter to Chief Ahenakew, August 23, 1976 – as quoted in Bartlett pg. 262
[306] Manitoba Aboriginal Justice Implementation Commission. First Quarterly Report. March 31, 2000
[307] See - section 11.05 Manitoba TLE Framework Agreement, signed May 29, 1997; pg 3 of the Saskatchewan Natural Resources Transfer Agreement (TLE) Act, effective June 22, 1993
[308] See Reserves at Oak Lake and Birdtail Creek in Manitoba, and Standing Buffalo, Wahpaton, Whitecap, and Wood Mountain in Saskatchewan.
[309] Morris. 1880. pg. 279
[310] Cail. *Land, Man, and the Law: The disposal of Crown Lands in British Columbia.* UBC. 1974
[311] *Papers Connected with the Indian Lands Question 1850-75 – Conveyance of Land to Hudson's Bay Company by Indian Tribes.* Archives of Canada. 1850.
[312] B.C. Legislative Council. *Journals.* 1rst Parliament. 1864

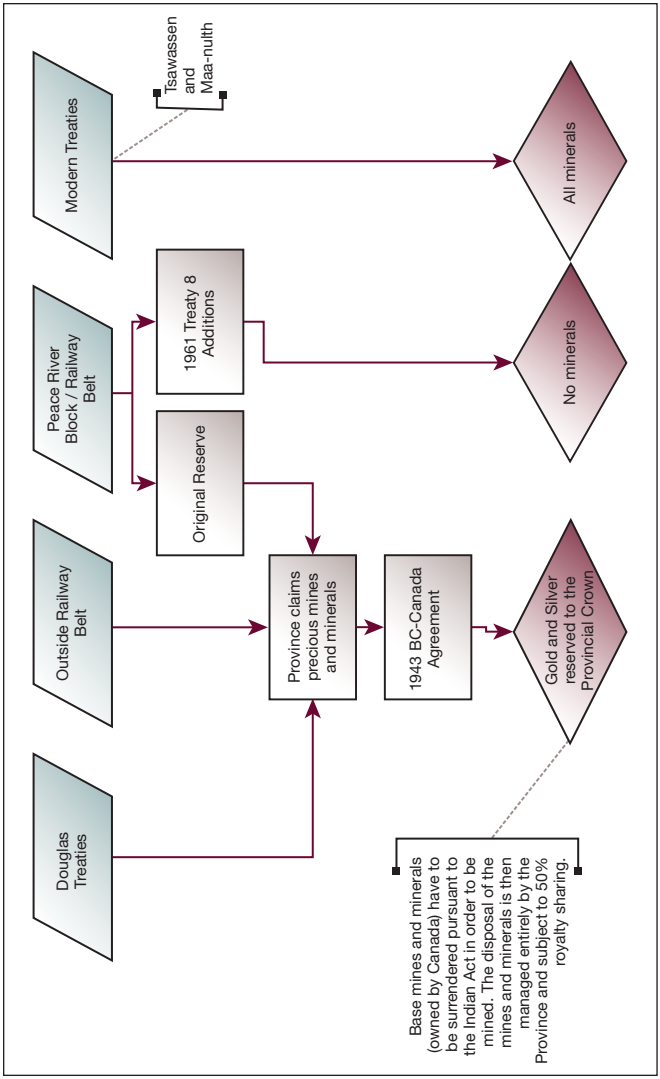

Figure 27–Overview of minerals on British Columbia Reserves

When British Columbia entered Confederation in 1871 it was subject to Article 13 of the Terms of Union, which required "tracts of land… conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians". The Provincial requirement to convey "tracts of land" is normally construed to include base minerals.[313] Gold and silver are generally reserved to the Province except where explicitly granted; they could also be ceded where the grant "contemplated the cession by the Province of all its interests in the land, royal as well as territorial to the Dominion Government".[314]

It was not until 1938, however, that BC conveyed most Reserves to the federal government.[315] There was no mention of any reservations of minerals in the 1938 Order in Council. The other reservations in the OIC (1/20th of land for public works, water for adjacent mining and agriculture, construction materials, and existing highways) are verbatim from the forms of Crown grants under the *Crown Lands Act,*[316] but the clause to "raise and get minerals, precious or base" was removed. This indicates that base minerals were explicitly contemplated, and are thus included in the Reserves transferred to Canada in 1938.[317] This situation encompasses nearly all Reserves in British Columbia, with the exception of those on Vancouver Island covered by the aforementioned Douglas Treaties and colonial surveys, those purchased in fee simple, and those covered by the Railway Belt and Peace River Block.

As part of the Terms of Union in 1871, British Columbia agreed to convey a 40 mile swath along the proposed railway line to the Dominion government. In 1884, British Columbia agreed to transfer 3.5 million acres to Canada for railway purposes in the Peace River District.[318] Many of the First Nations of the area signed an adhesion to Treaty 8 with Canada. The numbered Treaties included both base and precious minerals. The nature of the 1871 and 1884 agreements with Canada, however, did not result in the ceding of the precious minerals.[319] Therefore Canada could not have granted them pursuant to any Reserve in the Railway Belt or in the Treaty 8 adhesion.

In 1930, the Railway Belt and the Peace River block were transferred back to BC, with the Reserves removed.[320] Base minerals should be

[313] Bartlett. *Resource Development on Indian Reserve Land.* in Saunders. Managing Natural Resources in a Federal State. *Papers Presented at the second Banff Conference on Natural Resources Law.* 1985
[314] *Attorney General of British Columbia v. Attorney General of Canada.*(1889), 14 A.C. 295
[315] Provincial Order in Council 1938-1036
[316] *Crown Lands Act,* R.S.B.C. 1924, Forms 9,11 – Bartlett. 1985. pg. 198
[317] Bartlett. 1985. pg. 198
[318] *Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province.* 1884, c. 14
[319] Bartlett. 1985. pg. 196
[320] *Constitution Act,* 1930, Schedule (4)

considered part of the Reserves established in the Railway Belt, and the Peace River Block, as Canada held ownership of the base minerals when the Reserves were created. In 1961, to fulfill the provisions of Treaty 8, British Columbia conveyed an additional 24,448 acres to Canada but reserved all minerals.[321]

Canada and British Columbia entered into an agreement in 1943 regarding the development of minerals on all Reserves.[322] The disposition of most minerals came under the administration and control of the Province (coal, oil, gas, and a few others are not included[323]). The Provincial control of minerals on Reserves is conditional on the base minerals being surrendered pursuant to the *Indian Act*. Upon such surrender, and with any mineral development, "one-half of all the revenue collected…shall belong to the Province of British Columbia and one-half…to the Receiver General of Canada". The Province had claimed all gold and silver underlying Reserves, which claim justified the agreement: the "development of all the minerals…is presently impractical since the precious and base metals are closely associated and cannot be mined separately". The agreement was further extended to include all coal, oil, and gas rights in the Fort Nelson Reserve in 1977.[324]

Modern day Treaties affirm the First Nation interest in minerals. In 1998, the Nisga'a Nation was recognized as owning all "mineral resources on or under Nisga'a Lands", defined to include all minerals (including gold and silver).[325] In 2007, the agreement with the Tsawwassen First Nation confirmed the First Nation ownership of all the minerals underlying their lands (excepting English Bluff), for which they were given $2 million in compensation.[326] The Maa-nulth First Nation also owns the mineral rights, pursuant to their final agreement in 2006.[327]

Who manages mineral rights and under what authority?

Mineral rights on Reserves are administered by Indian and Northern Affairs Canada (INAC), with three exceptions. In Quebec and Prince Edward Island, no agreements were ever reached with Canada regarding disposal of minerals on Indian Reserves, and in British

[321] Provincial Order in Council 1961-2995
[322] *British Columbia Indian Reserves Mineral Resources Act, 1943-44*. R.S.C., c. 19
[323] Not included are: "peat, coal, petroleum, natural gas, bitumen, oil shales, limestone, marble, clay, gypsum, or any building stone when mined for building purposes, earth, ash, marl, gravel, sand or any element which forms part of the agricultural surface of the land"
[324] *Fort Nelson Indian Reserve Minerals Revenue Sharing Act*. 1980-81-82-83, c. 38
[325] *Nisga'a Final Agreement*, 1998
[326] *Tsawwassen First Nation Final Agreement*, 2007
[327] *Maa-nulth First Nations Final Agreement*, 2006

Columbia an agreement with Canada subjects minerals on Reserves to Provincial legislative control. In all other jurisdictions the federal government manages the mineral rights on Indian Reserves and the *Indian Mining Regulations*[328] provide the framework.

What rights are granted for mineral development?

A First Nation must surrender, or designate, to Canada rights to minerals underlying a Reserve, if development is to take place.[329] The elective surrender process was established as a function of the interpretation of Aboriginal title in Canada, in that: "…aboriginal title precludes alienation of the reserve land base of the band without consent of the band members".[330] For mineral development, though, the surrender is considered to be conditional, in that the minerals continue to be "lands reserved for Indians",[331] and under the exclusive legislative jurisdiction of the federal government.

Once a surrender has been accepted, two types of rights can be granted pursuant to the *Indian Mining Regulations*: 1) permits and 2) leases. A permit grants the right to explore for minerals within a specified area. A permit does not convey the rights to the minerals found in the land, and is issued for no more than one year with provisions for extensions. A lease, issued pursuant to the regulations, grants the right to explore, develop, and produce minerals within the lease area. Leases are typically for a 10-year period, with a provision for renewal.

Where are mineral rights registered?

Documents granting mineral interests are registered in the Indian Lands Registry. A search of the Registry shows that over 1800 mineral related permits, leases and/or agreements have been recorded. About half are still active.[332]

What surveys are required for mineral development?

Under Sections 21 and 22 of the *Indian Mining Regulations,* if a survey is deemed necessary by INAC, the Surveyor General issues survey instructions to a commissioned land surveyor to survey the boundaries of proposed or existing lease sites. In practice, few surveys are done

[328] *Indian Mining Regulations.* C.R.C., c. 956
[329] *Indian Act*, R.S., 1985, c. I-5 - Sections 37 to 39, and 93.
[330] Bartlett. Indian Act of Canada. *Buffalo Law Review.* 27(581). 1978
[331] *The Constitution Act,* 1982, s. 91(24)
[332] Based on Instrument Reports from the Indian Land Registry System (ILRS) constrained to: Instrument type = 'Permit or Lease', and Purpose = 'Minerals'

for this purpose. A search of the Canada Lands Survey Records (CLSR) indicates less than a dozen surveys have been done.[333]

Who manages oil and gas rights and under what authority?

Indian Oil and Gas Canada (IOGC), an agency of INAC, has the responsibility for the management of oil and gas rights on Reserves. This authority is described in detail in the *Indian Oil and Gas Act*[334] and the *Indian Oil and Gas Regulations*.[335] It is no small task either, as there is substantial oil and gas development on Indian Reserves in Alberta and Saskatchewan, and to a smaller extent in British Columbia. In 2007, there were over 200 new wells drilled on 68 Indian Reserves. This resulted in over $200 million being collected by IOGC on behalf of the First Nations.[336]

Pipelines or other facilities unrelated to oil and gas development sometimes will cross a Reserve. These situations are relatively rare. A search of the Canada Lands Survey Records reveals that between 1893 and present day there have been only 212 crossings.[337] In such situations, rights are issued under the *Indian Act* and are administered INAC.

What rights are granted for development for oil and gas?

As for mineral development, a First Nation must surrender to Canada all rights to oil and gas underlying a Reserve, if development is to take place. The basic elements of tenure under the *Indian Oil and Gas Regulations* "involve an exploration tenure in the form of a permit, and a production tenure in the form of a lease."[338] A permit gives the permittee the right to drill for oil and gas within the permit area for one year (or a negotiated term). A lease gives the holder the right to drill, produce, treat, market, and sell the oil and gas. Traditionally, leases have been for 20 or more years, but recently this has been reduced to five years. Generally, leases can be renewed when a well continues to be productive past five years, but can also be renewed at the discretion of the Band Council and IOGC.[339]

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[333] Based on Plan Query of the Canada Lands Surveys Records (CLSR) constrained to: Region = 'BC, AB, SK, MB, ON, QC, NS, NB, PEI, NL/LA', and Title must contain the word 'Mineral'.
[334] *Indian Oil and Gas Act,* R.S.C, 1985, c. I-7
[335] *Indian Oil and Gas Regulations,* 1995 SOR/94-753
[336] *Indian Oil and Gas Canada 2007–2008 Annual Report.* pg. 22–23. See chapter 4 for a discussion of new initiatives relating to oil and gas development on Reserve.
[337] Based on Plan Query of the Canada Lands Surveys Records (CLSR) constrained to: Purpose = 'Right of Way', and Title must contain the word 'Pipeline'.
[338] Bankes. Recent Cases on the Calculation of Royalties on First Nations' Lands. *Alberta Law Review.* Vol. 38(1). 2000
[339] Webb. Indian Oil and Gas: Control, Regulations and Responsibilities. *Alberta Law Review.* 77. 1987

In addition to the lease, before drilling commences, a well license and surface rights contract are required. The well license is issued by the Province. Surface rights contracts give the holder the right to use or occupy the surface of the land. If the operations require an exclusive right to use or occupy the land, such as for the well site itself, a surface lease is required. If the operations only require a right to cross over the land, such as for a pipeline, a right-of-way agreement (easement) is required.

What are spacing units?

In Alberta, the normal spacing unit[340] is either a quarter section (160 acres –oil wells) or a section (640 acres –gas wells).[341] This is defined on the ground by survey monuments, thus making a direct connection between the land and the interest granted. The spacing unit normally comprises a surface area and the subsurface vertically beneath that area. It is also possible to have a spacing unit with respect to a specified geological formation or zone.[342]

Figure 28–Wellsites on Stony Plain IR 135 (Alberta). *Surveyor General Branch*. 2008

Where are oil and gas rights registered?

Although the *Indian Oil and Gas Act* and the regulations are silent on the registration of subsurface and surface agreements, they are recorded in the Indian Lands Registry (ILR). A search of the ILR reveals over 3200 registered permits and leases for well sites.[343]

[340] The term "spacing unit" is used in Alberta. The term used in Saskatchewan is "drainage unit" and in British Columbia "spacing area".
[341] *Oil and Gas Conservation Regulations*. (Alberta), 151/71, Sec 4.020(1)(2)
[342] *Oil and Gas Conservation Regulations*. (Alberta), 151/71, Sec 4.010(1)(1),*Oil and Gas Conservation Regulations* (Saskatchewan). 1985. O-2 Reg 1. *Drilling and Production Regulation*. B.C. Reg. 362/98
[343] Based on Instrument Reports from the Indian Land Registry System (ILRS) constrained to: Instrument type = 'Permit or Lease', and Purpose = 'Wellsite or Wellsite and Access Road'

What surveys are required for oil and gas?

Surveys are required for surface rights. General survey instructions are issued by the Surveyor General, and plans are recorded in the CLSR.[344] There are also provisions for a survey to be made if a dispute arises regarding the location of a well, facility or boundary.[345] A review of the CLSR indicates over 4200 registered well site survey plans.[346] Surveys for oil gas must be performed by a Canada Land Surveyor (CLS), who also holds the relevant provincial land surveying commission. The reasoning for the dual commission is two fold: 1) the *Canada Lands Surveys Act* stipulates that only a CLS can survey on Canada Lands,[347] 2) Provincial oil and gas regulations require surveys by Provincial Lands Surveyors.[348]

Who owns the minerals on National Parks?

Canada holds title to the underlying minerals. The *Canada National Parks Act*[349] requires that Canada have clear title to lands to be included in a National Park. Historically, mining has been allowed in National Parks. The Bankhead mine in Banff National Park was still in operation as late as 1922.[350] Now, however, explicit permission from Parks Canada is required for the removal of any "natural object".[351]

So, what's the bottom line?

As is readily apparent from the foregoing discussion, subsurface rights are very complex, and surveyors are well-advised to marry their opinions on the parcel's spatial extent with external legal analysis and advice. This chapter is merely an introduction to the issues; each fact situation must be assessed on its own merits.

[344] *NRCAN. General Instructions for Surveys of Canada Lands, e-Edition.* 2008
[345] *Indian Oil and Gas Regulations.* 1995 SOR/94-753, Sec. 40(2)
[346] Based on Plan Query of the Canada Lands Surveys Records (CLSR) constrained to: Index = 'CLSR' and Type = 'Oil and Gas Wells and Facilities'
[347] *Canada Lands Surveys Act.* R.S., 1985, c. L-6, s. 26(1)
[348] *Oil and Gas Conservation Regulations.* (Alberta), Sec 3.1(C); *Oil and Gas Conservation Regulations.* (Saskatchewan), Sec. 10(a)(ii)
[349] *Canada National Parks Act.* 2000, c.32, s.5(1)(a).
[350] Gadd. *Bankhead: The Twenty Year Town.* Coal Association of Canada. 1989
[351] Natural object is defined as "any natural material, soil, sand, gravel, rock, mineral, fossil or other object of natural phenomenon". *National Parks General Regulations*, SOR/78-213

6 National Parks

Who manages lands in the national parks?

The Parks Canada Agency (hereinafter Parks Canada), established by the *Parks Canada Agency Act,*[352] is responsible for the implementation of policies of the federal Crown that relate to natural or historical significance. With regard to national parks, Parks Canada ensures that there are long-term plans in place for establishing systems of national parks and is responsible for negotiating, and recommending to the Minister of Environment, the establishment of new national parks. As well, it is responsible for the administration and enforcement of legislation dealing with areas of natural or historical significance, including the *Canada National Parks Act*.[353]

The Realty Services Section, Infrastructure and Real Property Directorate of Parks Canada (located in Gatineau, Quebec) has overall responsibility for policy and regulation of realty activity. Day to day realty operations are carried out by staff in the four service centres (Atlantic, Quebec, Ontario and Western) and in several field units.

When was the first national park in Canada established?

In 1885, some 10 square miles which included the hot springs at Banff were reserved "from sale, settlement or squatting".[354] Two years later the *Rocky Mountains Park Act,* 1887[355] established a park of 260 square miles, which enclosed the 10 square miles originally set aside in 1885. The park eventually became Banff National Park.

[352] S.C. 1998, c.31.
[353] S.C. 2000, c 32.
[354] 1885 P.C. 2197.
[355] S.C. 1887, c.32.

Figure 29–Map showing locations of National Parks. *Surveyor General Branch*. 2010

What was the first piece of legislation that applied to national parks?

The Dominion Forest Reserves and Parks Act[356] 1911 was a dual purpose act in that it provided for Dominion forest reserves and for Dominion parks. The Governor in Council could, by proclamation, designate Dominion parks from lands comprising Dominion forest reserves. Less than a month after the Act was passed, Glacier, Yoho, Rocky Mountains, Jasper and Waterton Lakes were established as Dominion parks.[357]

It was soon realized that it was also desirable to set aside areas outside of Dominion forest reserves as Dominion parks.[358] Later parks were also established in the central and eastern provinces, including the St. Lawrence Islands National Park which is located in the Thousand Islands. In 1904 nine islands were transferred from the administration and control of the Superintendent General of Indian Affairs to the Minister of the Interior for park purposes. The $9,150 paid for the islands was credited to the Mississauga Band of Alnwick. Later additional islands were acquired and all of these were eventually incorporated into the St. Lawrence Islands National Park.[359]

What was the significance of the 1930 National Parks Act?

The National Parks Act[360] was important as it provided national parks with its own legislation. It removed the administration of parks from the authority of the Dominion *Forest Reserves and Parks Act* and designated the parks as national parks of Canada. The 1930 legislation coincided with the C*onstitution Act, 1930* which confirmed the natural resource transfer agreements with the Western provinces. Under the C*onstitution Act, 1930* national parks would continue to be vested in and administered by Canada.

How are national parks established?

Parks Canada policy is to establish new national parks in accordance with a national parks system plan. The plan divides Canada into 39 distinct natural regions with the objective of having at least one national park in each region.[361]

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[356] S.C. 1911, c.10.
[357] June 8, 1911 referred to in Lothian. *A History of Canada's National Parks, Volume II*, 1977, p. 12.
[358] *An Act to amend The Dominion Forest Reserves and Parks Act*, S.C. 1913, c.18, s.4. Section 4 amended s.18 of *The Dominion Forest Reserves and Parks Act*, S.C. 1911, c. 10.
[359] Lothian. *A History of Canada's National Parks, Volume I*, 1976, pp. 82–83.
[360] S.C. 1930, c.33.
[361] Parks Canada Guiding Principle and Operational Policies (Date Modified 2009-04-15) Part II, National Parks Policy, Section 1.

How is the National Parks Act amended to establish new national parks?

A national park may be established by adding the name and a description of the park to Schedule 1 of the *Canada National Parks Act* by order-in-council. Similarly a national park may be enlarged by amending the description of the park in Schedule 1. Two conditions are that the federal Crown has clear title to or an unencumbered right of ownership in the lands to be included in the park, and the provincial Crown has agreed to their use for a park.

What are national park reserves?

There is provision in the *Canada National Parks Act* for establishing national park reserves where lands proposed for national parks are subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada.[362] The *Canada National Parks Act* applies to a park reserve as if it were a park.[363] Park reserves have thus been surveyed as if they were parks.

Park reserves are listed in Schedule 2 of the *Act*. The name and description of the park reserve may be removed from Schedule 2 and added to Schedule 1 by order-in-council once all land claims are settled and the federal Crown has clear title to or an unencumbered right of ownership in the lands.[364]

Can land be removed from national parks?

Land can be removed in only two ways. Either a court finds that Canada does not have clear title to, or an unencumbered right of, ownership in lands within the park;[365] or the *Canada National Parks Act* is amended.

How is land use activity managed?

Activity is controlled by a zoning system in order to protect national park lands. There are five zones:

- I Special Preservation: areas or features that deserve special preservation.
- II Wilderness: areas that are to be conserved in a wilderness state.
- III Natural Environment: areas for outdoor recreation activities with very minimum services and if vehicle access is allowed it is controlled or limited.

[362] *Canada National Parks Act*, S.C. 2000, c. 32, s. 4(2).
[363] *Canada National Parks Act*, S.C. 2000, c. 32, s. 39
[364] Parks Canada Guiding Principles and Operational Policies, Part II, National Parks Policy, Sections 1.4 and 1.5.
[365] *Canada National Parks Act*, S.C. 2000, c. 32, s. 6(2)

- IV Outdoor Recreation: areas that can be accessed by private vehicle, while still limiting environmental impact to the smallest extent possible.
- V Park Services: communities in existing national parks which contain a concentration of visitor services and support facilities.

Figure 30–Crossing the Saskatchewan River, Banff National Park (Alberta). *Library and Archives Canada* / PA-023174. 1935

Parks Service communities include national parks towns, visitor centres and resort subdivisions.[366] Parks Canada has established limits to growth in Parks Canada communities but there is still considerable existing business and residential tenure in Parks Service communities. On January 1, 1990, the Town of Banff was incorporated as a town with municipal taxing, utility and planning authority.[367] The Town of Jasper became an Alberta municipality on July 20, 2001 with municipal taxation and utility authority. Planning for Jasper was retained by Parks Canada.[368] The designation visitor centre is given to national park communities that provide a focus for and concentration of visitor activity, services and facilities. Waterton in Waterton Lakes National Park, Wasagaming in Riding Mountain National Park, Waskesiu in Prince Albert National Park and Lake Louise in Banff National Park are visitor centres. Field - in Yoho National Park - is a largely residential community accommodating the administrative centre for the park with some commercial services such as a hotel, hostels, restaurants, retail and a visitor information center. Also, resort subdivisions were established early in the

[366] Parks Canada Guiding Principle and Operational Policies (Date Modified 2009-04-15) Part II, National Parks Policy, Section 2.2. Also see *National Parks of Canada Wilderness Area Declaration Regulations*, SOR/2000-387 and *National Parks Town, Visitor Centre and Resort Subdivision Designation Regulations* SOR/91-8.
[367] The Government of Canada and the Government of Alberta, Town of Banff Incorporation Agreement.
[368] Alberta Order-in-Council #279/2001.

history of some parks such as Jasper, Wood Buffalo, Prince Albert and Riding Mountain.[369]

Development of additional lands is not allowed for new communities, private cottages, camps or seasonal camping areas or for new, or expansion of existing, golf courses or ski areas under provisions in the *Canada National Parks Act*.[370]

How has land tenure evolved?

The *Rocky Mountains Park Act,* 1887 had provision for the establishment of regulations for leasing of land. After initial attempts by the Department of the Interior to issue leases for a mere 21 years were objected to by citizens of Banff, terms of leases of 42 years with covenants for perpetual renewals were made available in 1890.[371] The granting of these leases, called perpetual leases, were discontinued in the early 1960's,[372] however many are still in existence in Banff and Jasper and in several other national parks in Western Canada.[373]

Figure 31–Survey of the North boundary of Yoho National Park (BC). *Surveyor General Branch*. 1955

The perpetual renewal provisions were tested in the 1960's when Canada attempted to substitute new leases without the right of perpetual renewal. However, the Supreme court of Canada held that Canada renew the existing leases by honouring the right of perpetual renewal.[374] Under current policy, tenure may be granted in national park lands in the form of leases, licences of occupation or permits for

[369] Parks Canada Guiding Principle and Operational Policies (Modified 2009-04-15), Part II, National Parks Policy, Sections 5.1.
[370] R.S.A. 2000, c. C-22, ss. 16(4) & 36(1).
[371] Lothian. 1977. pp. 56–57.
[372] Lothian. 1977. p. 64.
[373] The total number of perpetual leases in 1985 was; Banff: 631, in Jasper: 335, in Waterton: 128, in Yoho: 23, in Prince Albert: 84 and in Riding Mountain: 248. Statistics provided in 1988 by E. Desrochers, Registrar, Parks Canada.
[374] *The Queen v. Walker,* [1970] S.C.R. 649.

the provision of essential services and facilities for park visitors and for authorized residential uses.[375]

What of leases and surveys for leases?

Under the *National Parks of Canada Lease and Licence of Occupation Regulations*[376] the Minister may grant a lease for any period of time not exceeding 42 years. The lease may also contain provision for renewal however there are restrictions with regard to the term. There are also restrictions which depend on the purpose of the lease and the location of the land leased. Leases may be granted for residential purposes in the towns of Banff and Jasper, in visitor centres and in resort subdivisions. They are also issued for essential services and facilities for park visitors within the national parks.

Survey requirements for leases are specified in Section 3(2) of the Regulations. No lease of public lands shall be granted:

(a) until the public lands have been surveyed in accordance with the *Canada Lands Surveys Act* and unless the description of the lands in the lease is based on an official plan or plans under that Act; or

(b) unless, where the Minister so directs, the lease describes the public lands by

  (i) reference to an explanatory plan approved by and in the custody of the Surveyor General, or

  (ii) a metes and bounds description, or the equivalent thereof, prepared under the direction of and approved by the Surveyor General.

The only national parks in which condominiums are recognized in the *National Parks of Canada Lease and Licence of Occupation Regulations* are in Alberta. Condominium plans are registered in the Alberta Land Titles Office.[377] Parks Canada issues one lease (commonly called the head lease) for the entire condominium development to the new leasehold owner, normally a developer. After the condominium survey plan is registered and title opened for each unit the leasehold owner (developer) will issue assignments to purchasers of individual units. After these assignments are registered in the Land Titles Offices (with consent from the Minister), leasehold title to individual units may be transferred to the unit purchasers.[378]

[375] Parks Canada Guiding Principle and Operational Policies (Modified 2009-04-15), Part II, National Parks Policy, Sections 6.1.1.
[376] SOR/92-25, P.C. 1991-2469. Leases: s.3 to 17.
[377] Section 87 of the Alberta *Land Titles Act* R.S.A. 2000, c. L-4.
[378] Pralow, Dianne. Parks Canada, 2006.

For the purpose of surveying condominium subdivisions in Alberta, the Alberta *Condominium Property Act*[379] is used insofar as it can apply for leasehold interests in national parks in Alberta. In addition Part D4 of the General Instructions for Survey (of the Surveyor General of Canada) e-Edition has instructions for condominium surveys.

What of licences of occupation and permits?

Under Section 18(1) of the *National Parks of Canada Lease and Licence of Occupation Regulations*, the Minister may grant licences of occupation for any period of time not exceeding 42 years. They are issued for a specific purpose and do not give the licensee any leasehold estate or other estate or interest in land.

Figure 32–Marking the Alberta-BC boundary in Banff National Park. *Surveyor General Branch*. 1968

They are generally used for such purposes as administrative space in buildings or in areas outside of towns and visitor centres for purposes such as visitor accommodations, trails, corrals and alpine huts where land conflicts are unlikely to occur and where exclusive use of the land is not required. Surveys are not normally required for licences of occupation. The land is usually described by sketch, site plan or in remote areas reference to a topographic map.

Under the *National Parks General Regulations*[380] permits may be granted for a variety of activities in national parks ranging from camping to the use of water. Surveys are not required for permits.

What of rights-of-way for public purposes?

There is provision under Section 15(1) of the *Canada National Parks Act* for the Minister to enter into leases of, and easements or servitudes

[379] R.S.A. 2000, c. C-22.
[380] SOR/78-213.

over, public lands in a park that are used for rights-of-way of existing railway lines, oil and gas pipelines, telecommunication or electrical transmission lines and for related facilities. The lands remain part of the park and if they cease to be used for the purpose intended the right or interest reverts to the Crown.

As a general rule, rights-of-way for public purposes under Section 15(1) require a survey in accordance with the *Canada Lands Surveys Act*. In some situations an explanatory plan approved by and held in the custody of the Surveyor General or, at the discretion of the Surveyor General, a metes and bounds description or the equivalent may be used to describe the lands.[381]

Figure 33–Surveying in Gulf Islands National Park (BC). *Surveyor General Branch*. 2005

Where can land interest information be obtained?

There is no legislation specifically requiring a land registration system for national parks. Nevertheless a system referred to as a land registry has been in place since the first federal national park was created. The land registry located in Gatineau, Quebec consists of hard copy and electronic records of all acquisitions, disposals and alienation of all Parks Canada lands.[382] It contains original documents such as orders-in-council, land transfer agreements, sale agreements, leases, licences, land use agreements and related correspondence. Copies of some documents may also be available from service centres and field units.

[381] Chapter B1-1 - Interdepartmental Agreement re Description of Canada Lands, 1955 (Excluding Indian Lands), General Instructions for Surveys, e-Edition: Surveyor Generals Branch (SGB) Website. Accessed Oct. 8, 2010.
[382] Marlow, Lorrie. Parks Canada, December 21, 2009.

What is unique about national parks land interests in Alberta?

As early as 1890, copies of executed leases were sent by the Department of Interior to the Land Titles Office in Calgary. The Registrar recorded the lease and issued a certificate of title to the lessee.[383] Alberta is the only province in Canada where leases of land in national parks are registered in a provincial land registration system. Purchasers arrange to have their assignments, mortgages and leases registered. Certainly, lending institutions require it. Currently nearly all leases in the towns of Banff and Jasper and in the visitor centre of Waterton are registered in the provincial land titles system.[384]

What of internal parcel fabric?

Under Section 33 of the CLS Act confirmed plans of resurvey are to be substituted for the former official plans of the land affected under the Act. A study carried out in 1987[385] of 42 leasehold titles in Banff townsite found that:

- complex metes and bounds descriptions of land were used when confirmed plans of survey for the same parcel were available, in 12 instances – 29% of the sample.
- in nearly all these 12 cases the boundary dimensions in the descriptions did not agree with the measurements shown on the survey plan.
- where a reference to a survey plan had been used, the description referred to an original plan even though a more recent confirmed plan was available, in 16 instances.

Since then, when leases are being renewed, Parks Canada require a statutory declaration by a surveyor stating that the land referred to in the old legal description is the same as the land referred to in the new legal description based on the plan of resurvey. As well the Alberta Land Titles Office procedure manual specifies that when a lease is being renewed, the old legal description may be replaced with a new legal description based on a registered plan of resurvey under the CLS Act. The renewal must be accompanied by the statutory declaration.[386]

[383] Internal memorandum, T.G. Rothwell to Mr. Harkin, Ottawa, dated 17th January, 1914. Department of the Interior, File: 572713 D.P.
[384] Section 30 of the Alberta *Land Titles Act*.
[385] Olsson. Resurveys in Banff townsite and their effect on title as registered in the Southern Alberta Land Titles Office. 1987. Energy Mines and Resources.
[386] Land Titles Procedure Manual, Alberta Government Services, Land Registration and Services, Land Titles Office, Procedure LEA-1.

Are exterior boundaries surveyed?

Many national parks are defined by reference to surveyed boundaries and natural boundaries. A review of Schedule 1 shows features such as lines of watersheds, ridge lines, heights of land, banks of rivers, centre of channels, lines of mean high tide and low water marks defining boundaries. Other parks are not defined by surveyed boundaries and natural boundaries. Wapusk National Parks in Manitoba is based on theoretical section and township corners and many national parks in the territories are based on points of latitude and longitude. Some of the older parks in the Eastern provinces are based on old metes and bounds descriptions with no reference to survey plans; for example Forillon National Park in Quebec and Fundy National Park in New Brunswick.

Figure 34–Monument in Glacier National Park (BC). *Surveyor General Branch*. 2008

What is the statutory authority for surveys?

The *Canada National Parks Act* contains provision for the Governor in Council to make regulations for:

> 16(1) the surveying of public lands, the making of plans of surveyed lands, the delimitation in such plans of the boundaries of park communities, existing resort subdivisions and cemeteries, their designation as towns, visitor centres, resort subdivisions or cemeteries and the subdividing of lands so designated.

Figure 35–Surveying in Glacier National Park (BC). *Surveyor General Branch*. 2008

Section 3(2) of the *National Parks of Canada Lease and Licence of Occupation Regulations* outlines the requirements for surveys for leases. There is also provision for surveys in Section 4 of the *National Parks General Regulations*. The Minister may, from time to time, arrange to have public lands in a Park surveyed or resurveyed:

(a) into lots in townsites or other subdivisions;
(b) for any right-of-way;[387]
(c) for the purposes of schools, hospitals, churches and the entertainment of persons visiting the Park; and
(d) for the purposes of a cemetery.

How are land surveys and land transactions in national parks coordinated?

The Interdepartmental Agreement regarding surveys and land description applying to national parks is dated 1955.[388] This agreement, when it was executed, applied to territorial lands, national parks, and Indian reserves and to certain other federal public lands. Much of this agreement is now outdated and discussions have started to prepare a new version for lands managed by Parks Canada.[389]

What about surveys for other lands managed by Parks Canada?

Parks Canada also manages:

- 155 national historic sites; 53 of which have been set apart as national historic sites of Canada pursuant to Section 42 of the *Canada National Parks Act*.[390]
- National marine conservation areas, which are established through amendment to the *Canada National Marine Conservation Areas Act*[391] in a process similar to that in establishing national parks. As for national parks, Canada must have title to or an unencumbered right of ownership in the lands.
- National marine conservation area reserves where the land is subject to a land claim.[392]
- Heritage canals, ordnance lands and admiralty lands.

[387] *Canada National Parks Act* S.C. 2000, c.32, is now 15(1).
[388] Chapter B1-1 - Interdepartmental Agreement re Description of Canada Lands, 1955 (Excluding Indian Lands), General Instructions for Surveys, e-Edition: SGB Website. Accessed Oct. 12, 2010.
[389] Gagnon, Jean. Surveyor Generals Branch, August 12, 2009.
[390] See: National Historic Sites of Canada: Parks Canada Website. Accessed Oct. 12, 2010. The National Historic Sites of Canada Order, C.R.C., c.1112, lists and gives the legal description of the national historic sites of Canada.
[391] S.C. 2002, c.18.
[392] Parks Canada Guiding Principle and Operational Policies (Updated to 2003-10-14) Part II, National Marine Conservation Areas Policy, Section 1.5.2.

These lands are Canada Lands only if they are in the Northwest Territories, Nunavut, Yukon or the offshore. The Surveyor Generals Branch (SGB), in addition to providing advice, consultation, regulating surveys, and issuing contracts for surveys on Canada Lands, is involved in a wide spectrum of survey related activities for these lands, even though they may not be Canada Lands.[393] For example the SGB prepares land descriptions and arranges for surveys for land acquisitions for new parks, park reserves and marine conservation areas. For heritage canals the SGB researches encroachments and arranges for surveys which may result in land transfers or encroachment agreements. Any surveys required that are not on Canada Lands, but are federal lands, are made under the authority of section 47 of the *Canada Lands Surveys* Act and will meet both federal and provincial standards for surveys.

Figure 36–Surveying control markers near Lake Louise (Banff National Park). *Surveyor General Branch*. 2009

[393] As allowed by s.47 of the CLS Act; see chapter 1 for more discussion.

7

Northwest Territories

What are Canada Lands in the Northwest Territories (NWT)?

The NWT is Canada's oldest territory. Only about 43,000 people, half being Aboriginal, live in the 1.2 million square kilometres of its land mass.[394] The lands and resources are managed by the federal government, the territorial government, and by several Aboriginal organizations.

Most of the Canada Lands in the NWT are under the administration and control of the federal Government. These lands, commonly referred to as federal lands, are called "territorial lands" in the applicable acts and regulations. Other Canada Lands include Commissioner's lands and Tlicho lands. Even though the Commissioner has the administration and control of Commissioner's lands they are Canada Lands as they have remained vested in Her Majesty in right of Canada.[395] Lands in which the fee simple interest is vested in the Tlicho government are also Canada Lands.[396]

What events led to the current land area?

Rupert's Land and an additional area, the North-Western Territory, was formally admitted into the Dominion of Canada on July 15, 1870,[397] and became known as the North-West Territories.[398] In 1880 the Arctic islands were transferred to Canada by Great Britain and made part

[394] Facts, Government of the NWT Website. Accessed Oct. 12, 2010.
[395] *NWT Act*, R.S.C, 1985, c. N-27, s.44(1), R.S.C. 1985, c.L-6, s.24(1)(a).
[396] *Canada Lands Surveys Act*, R.S.C., 1985, s.24.(1)(vi); Tlicho Agreement, c.1 definitions.
[397] *Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory into the Union*, 23rd day of June, 1870. Date of admission, July 15, 1970, see paragraph 10
[398] *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, 1869, c.3, s.1.

of the North-West Territories. The land areas: of Manitoba in 1881, Ontario in 1882 and Quebec in 1898 took parts of the North-West Territories and the discovery of gold led to the creation of a separate Yukon Territory in 1898. In the 20th century land continued to be carved out. In 1905 the provinces of Alberta and Saskatchewan were created. In 1912 the boundaries of Manitoba, Ontario and Quebec were further extended into the NWT (as it was renamed in 1906)[399] and in 1999 the territory of Nunavut was created in the eastern Arctic.[400] The remaining land constitutes the present day NWT.

How did the land management regimes evolve?

The *Dominion Lands Act*,[401] 1872 provided for the settlement of the lands and a system of survey. *The North-West Territories Act, 1875*[402] provided for a Lieutenant-Governor to administer the government in such matters as taxation, private property and civil rights, justice and health. One of the provisions in the *Act* was for a Registrar of Deeds "who shall register all deeds and other instruments relating to lands situate in any part of the North-West Territories and which have been laid out and surveyed by the Crown".[403] This provision was replaced by *The Territories Real Property Act,*[404] which brought in a land titles system for private lands.

The seat of the territorial government was first in Battleford and after 1883 in Regina.[405] However, the responsibility for Dominion Lands remained firmly in Ottawa with the Department of the Interior. In 1905, provision was made for a Commissioner to administer the remaining part of the North-West Territory.[406] The early Commissioners held senior positions or were deputy ministers of departments involved in the North and they carried out their duties from Ottawa. It was not until 1967 when Yellowknife became the capital that Commissioner Stuart Hodgson resided in the NWT.[407]

In 1908, the *Dominion Lands Act* was consolidated and updated. The new *Dominion Lands Act*[408] applied to Dominion lands in Manitoba, Saskatchewan, Alberta, to a portion of the Peace River district in

[399] *NWT Act*, RSC 1906, c.62. Also see *History of the Name of the NWT:* The Prince of Wales Northern Heritage Centre Website. Accessed Oct. 12, 2010.
[400] *Canadian Confederation, The NWT*: Collections Canada Website. Accessed Oct. 12, 2010.
[401] S.C. 1872, c.23.
[402] S.C. 1875, c.49.
[403] *The North-West Territories Act*, S.C. 1875, c.49, s.54.
[404] S.C. 1886, c. 26.
[405] Phillips, *Canada's North*, 1967, pp. 244.
[406] *An Act to amend the Act respecting the North-west Territories*, 1905, c.27, s.4.
[407] *Office of the Commissioner of the NWT, Past Commissioners*; *NWT Data Book*, 1990/91, p. 42, 43;. Phillips, *Canada's North*, 1967, p. 244.
[408] S.C. 1908, c.20.

British Columbia and to the NWT. Because the provisions regarding surveys were deemed separate from the provisions of the *Dominion Lands Act* they were removed and incorporated into a new *Dominion Lands Surveys Act*.[409] The *Act* applied to the public lands that the *Dominion Lands Act* applied to and also to the public lands of the Dominion of Canada in the Yukon.[410]

In the 1920s, economic activity in the NWT picked up. Oil was discovered at Norman Wells and there was mining development around Great Bear and Great Slave lakes in the 1930's. The introduction of northern bush flying facilitated the development.[411] Despite this activity there was no ground swell of support to advance the political development of the NWT.[412] World War II projects such as the building of the Alcan highway (now the Alaska highway) and the Canol project (a project that built a pipeline and a road from Norman Wells to Whitehorse) and post war activity, such as the Distant Early Warning (DEW) line, brought additional economic activity.[413]

In the early 1950's the main purpose of the *Dominion Lands Act*, the orderly development of the west, had long since passed. In 1950 it was repealed and replaced by the *Territorial Lands Act*[414] which was more suited to conditions in the NWT and the Yukon. Several changes were also made to the *NWT Act*, including granting the Commissioner in Council greater responsibilities[415] one of which, in 1955, was the "right to the beneficial use or to the proceeds thereof" of lands that were required for territorial purposes.[416] These lands became known as Commissioner's Lands.

In 1974 Justice Thomas Berger was engaged by the Government of Canada to inquire into terms and conditions that should be imposed if a pipeline was to be built through the Northern Yukon and the Mackenzie Valley.[417] Berger obtained input from representatives of industry, environmentalists and government and he traveled to 35 communities to hear the views of Aboriginals and other northerners. As a backdrop to his inquiry, during the 1970s aboriginal political organizations in the North began to assert their Aboriginal land

[409] 1908, c.21. *Debates, House of Commons*, February 15,1907, p. 3093
[410] *Dominion Lands Surveys Act*, S.C. 1908, c.21, s.3. S.C. *Dominion Lands Act*, 1908, c.20, ss.3,5.
[411] *History of Bush Flying*: Ontario Ministry of Natural Resources Website.
[412] Phillips, *Canada's North*, 1967, pp. 244–246.
[413] *The Canadian North: Embracing Change*. June 2002, Centre for Research and Information on Canada, pp. 10–11; *The Canadian Indian, Yukon and the NWT*, 1973, Indian and Northern Affairs, pp. 38,39.
[414] S.C. 1950, c.22. *Debates, House of Commons*, May 10, 1950, pp. 2364-5
[415] *NWT Data Book*, 1990/91, p. 42.
[416] *An Act to amend the Acts respecting the NWT* 1954, c.8, s.114. (It came into force on April 1, 1955).
[417] Mr. Justice Thomas R. Berger. *Northern Frontier, Northern Homeland - The Report of the Mackenzie Valley Pipeline Inquiry: Volume One*. 1977.

rights.[418] In his 1977 report, *Northern Frontier Northern Homeland*, he recommended that no pipeline be built along the Northern Yukon route and that the Mackenzie Valley pipeline be delayed for ten years to allow time for Aboriginal land claims to be settled.[419] The report was significant because it raised awareness of northern Aboriginal rights

What is being done to protect the land and resources?

Extensive consultation is undertaken to ensure compliance with land use plans, where they exist, and to address environmental concerns. The *Canadian Environmental Assessment Act*[420] applies to the Inuvialuit Settlement Area and the *Mackenzie Valley Resource Management Act*[421] applies within the Mackenzie Valley. Authorizations for land and water use are given by the various land and water boards established under the comprehensive land claim settlement agreements and the *Mackenzie Valley Resource Management Act*. Each board consists of representatives from the Aboriginal organization responsible for each settlement area, the Government of the NWT and the Government of Canada. The Gwich'in Land and Water Board, The Sahtu Land and Water Board and the Wekeezhii (Tlicho) Land and Water Board issues land use permits and water licences within their respective settlement areas. The Mackenzie Valley Land and Water Board will issue land use permits and water licences in the unsettled claims area in the Mackenzie Valley until the balance of the land claims are settled.

What is the status of devolution?

The territorial government and Aboriginal organizations have received considerable control of responsibilities from the federal government over the past several years and negotiations are now underway to transfer the administration and control of lands and resources to the Government of the NWT. The latest significant development was the signing of the *NWT Lands and Resources Devolution Framework Agreement* in 2004 by the Government of Canada, the Government of the NWT and by Aboriginal organizations.

[418] Elijah Smith, 1973, *Together Today for our Children Tomorrow: by the Yukon Indian People*. The formation of the Inuit Tapirisat of Canada (ITC) in the Western Arctic in 1971.
[419] Mr. Justice Thomas R. Berger. *Northern Frontier, Northern Homeland - The Report of the Mackenzie Valley Pipeline Inquiry: Volume One*. 1977. p.p. xxvi-vii.
[420] S.C. 1992, c.37.
[421] SC 1998, c. 25, s.46. The Mackenzie Valley as defined in the *Act* includes all of the NWT, with the exception of the Inuvialuit Settlement Region and Wood Buffalo National Park.

What are territorial lands?

The *Territorial Lands Act*[422] defines territorial lands as "lands, or any interest in lands, in the NWT or Nunavut that are vested in the Crown or of which the Government of Canada has power to dispose." Land as defined in the *Act* "includes mines, minerals, easements, servitudes and all other interests in real property."

The *Territorial Lands Act* only applies to territorial lands under the administration of the Minister of Indian Affairs and Northern Development (INAC).[423] Over the years many tracts of territorial lands have been withdrawn from disposal under the *Act* or their administration has been transferred to others. For example, lands have been withdrawn under Section 23(a) of the *Act* to facilitate settlement of land claims, for the establishment of national parks, to allow land remediation and to allow for development.[424] Lands are administered by other government departments such as the Departments of Transportation and National Defense. Lands may also be under the administration of Crown corporations to be used only for specific government or Crown Corporation purposes.

The *NWT Act* provides for the transfer of administration and control of territorial lands by order-in-council from INAC to the Commissioner.[425] Similarly under the *Act* the Commissioner may transfer, with the approval of the Governor in Council, the administration and control of Commissioner's lands to any minister of the Government of Canada.[426] The *Federal Real Property and Federal Immovables Act*[427] governs transfers to other federal ministers and the sale and leasing of lands administered by other federal ministers. However it does not affect the application of the *Territorial Lands Act* or other legislation applying to national parks and First Nations Reserves, or the rights of Crown corporations as defined under their own Acts.[428]

[422] R.S.C., 1985, c. T-7. Definitions s.2
[423] *Territorial Lands Act*, R.S.C., 1985, c. T-7. s.3
[424] R.S.C., 1985, c. T-7, s.23. See various regulations under the Territorial Lands Act. Order Respecting the Withdrawal from Disposal of Certain Lands in the NWT (Giant Mine) (SI/2005-55) and Order Respecting the Withdrawal from Disposal of Certain Subsurface Lands in the NWT (SI/2003-36).
[425] *NWT Act*, R.S.C., 1985, c. N-27, s. 44.1
[426] *NWT Act*, R.S.C., 1985, c. N-27, s.44.(3).
[427] S.C. 1991, c.50
[428] *The Federal Real Property and Federal Immovables Act*, S.C. 1991, c.50. s.16(1)(g). *Guide to the Federal Real Property Act and Federal Real Property Regulation*, Treasury Board of Canada Secretariat.

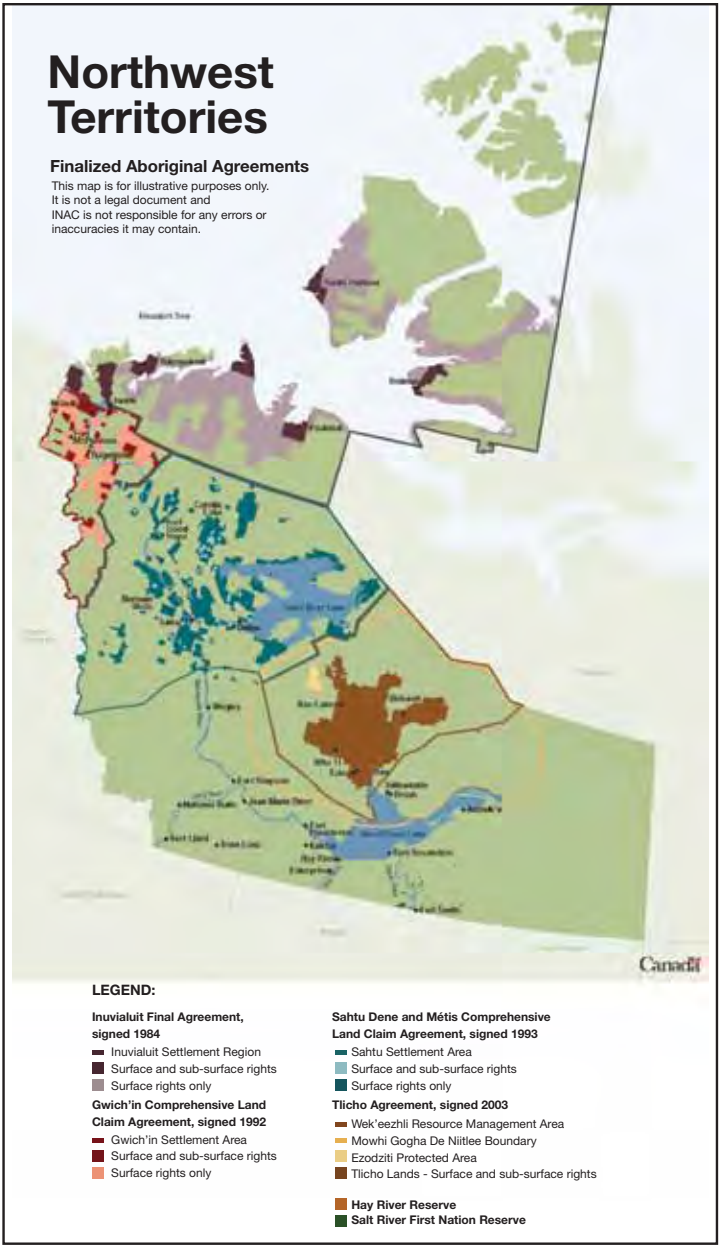


Figure 37–Map of Finalized Aboriginal Agreements in the Northwest Territories. *Indian and Northern Affairs Canada*. 2005

How are surface rights managed?

The Land Administration Office of INAC in Yellowknife manages surface land activities on territorial lands including disposition of surface rights and maintenance of the Land Administration Registry. The Registry contains leases, permits and other instruments of territorial lands.[429] Some 76% of the surface land area in the NWT is estimated to be under the administration of INAC; this percentage will decrease as the remaining comprehensive land claims are settled.[430]

Both the *Territorial Lands Act* and *Territorial Lands Regulations*[431] contain provisions regarding the sale of territorial lands.[432] Under Section 9 of the *Act* the granting of lands by letters patent in fee simple is carried out by notification issued to a registrar directing the issuance of a certificate of title to the person named in it. Reservations from grants, given in Section 13-16 of the *Act*, include:

- a strip of land one hundred feet in width where the land extends to the sea, to the shore of navigable waters and to provincial, territorial or international boundaries;
- the bed, below ordinary high water mark of bodies of water;
- mines and minerals; and
- rights of fishery and fishing.

Letters patent (by notification) for territorial lands are not issued until a plan of survey has been approved and confirmed by the Surveyor General and registered in the land titles office. The survey of all unsurveyed territorial lands must be made by CLSs under the instructions of the Surveyor General.[433] Specific survey instructions are required.

INAC rarely sells land; most dispositions granting exclusive use of land to individuals is by lease. Terms of leases are 30 years or less, with provision for renewals. There are also several reservations from leases, such as mines and minerals, which includes oil and gas, and the right to enter the lands to extract the minerals.[434] There are no statutory requirements for leases to be surveyed.

[429] A "Spatially Integrated Dataset" (SID) is accessible online that contains information on INAC surface dispositions and permits. INAC Website. Accessed Oct. 12, 2010.
[430] Areas based on settlement agreements to date (approximately 14%). As well, National Parks, Territorial Parks, other lands withdrawn from disposal and Commissioner's land are estimated to comprise 10% of the land and water area.
[431] C.R.C., c. 1525.
[432] *Territorial Lands Act*, R.S.C., 1985, c. T-7. ss.3(2), s.9, 12-16, 23(k).
[433] *Territorial Lands Regulations*, C.R.C., c. 1525, s. 9(1)(2).
[434] *Territorial Lands Act*, R.S.C., 1985, c. T-7, ss.8, 11(2,3), 19. *Territorial Lands Regulations*, C.R.C., c. 1525, ss.10, 12.

The *Territorial Land Use Regulations*[435] regulate the issuance of permits for land use operations. Two types of permits can be issued under the *Regulations*: Class A and Class B. Class A permits are for more extensive and longer term operations. A preliminary plan showing the lands proposed to be used and a final plan after the completion of the land use operation are required.[436] These plans have not been considered as legal survey plans and as such are not required to be prepared by a CLS. The *Territorial Land Use Regulations* do not apply to land use operations in the Mackenzie Valley as operations in that area are dealt with under the *Mackenzie Valley Resource Management Act*.[437]

The *Territorial Quarry Regulations*[438] authorize the issuance of permits and quarry leases for the taking of material such as sand, gravel, or stone. Permits are normally valid for a maximum of one year and specify the amount and location of material to be removed. Terms of leases can be up to 10 years. Applications for quarry leases require a sketch showing clearly the position of the parcel in relation to a survey monument, prominent topographical feature or other known point.[439]

Mineral leases or licences to develop oil or gas do not include the right to occupy and use surface lands. Surface areas required; for example, for roads, camps, airstrips, well sites, pipelines and other facilities must be acquired through a lease, permit or other agreement with the Land Administration Office of INAC.

How are mineral rights managed?

The *NWT and Nunavut Mining Regulations*[440] defines minerals as naturally occurring inorganic substance found on or under any surface of land. The definition excludes non-metallic substances such as stone, clay, gravel and soil. The taking of these substances are normally dealt with under quarry regulations. In the NWT oil and gas is dealt with separately. The term mineral rights are often used in the same context as the term subsurface title.

There are four operating mines in the NWT: the North American Tungsten Cantung mine located in the Nahanni area of the NWT

[435] C.R.C., c. 1524.
[436] *Territorial Land Use Regulations*, C.R.C., c. 1524, s.22(2).
[437] *Territorial Land Use Regulations*, C.R.C., c. 1524, s.6(f). There are exceptions; for example, land-use operations authorized by a permit issued prior to the coming into force of Part 3 of the *Mackenzie Valley Resource Management Act*.
[438] C.R.C., c. 1527
[439] *Territorial Quarry Regulations*, C.R.C., c. 1527, ss.6(1)(c), 5-12.
[440] C.R.C., c. 1516.

and three diamond mines: the Diavik mine; the BHP Billiton Ekati mine; and the De Beers Canada Snap Lake mine all located about 250 km northeast of Yellowknife. Together these mines employ over 3,000 people and in 2007 they produced over $1.5 billion worth of minerals.[441]

The Mining Recorder in Yellowknife manages mining activity on territorial lands for INAC including dispositions and maintenance of mineral disposition records.[442] It is estimated that INAC has subsurface rights to some 87% of the land area in the NWT.[443] Again, the percentage will decrease as the remaining comprehensive land claims are settled.

Prospecting permits and leases are issued under the *NWT and Nunavut Mining Regulations*. A prospecting permit allows prospecting in a large area without competition for a period of three or five years, and gives the holder the exclusive rights to stake a mineral claim within that area. If the holder of a mining claim wishes to produce minerals from the claim, or to hold it for more than ten years, the holder must apply for a lease of the claim. A survey of the claim must be recorded with the mining recorder before a lease can be granted.[444] The *Regulations* contain survey requirements for surveys of claims,[445] and the mining recorder may also have a survey made in the event of a dispute.[446] Surveys are carried out by CLSs under the general instructions of the Surveyor General.[447] Specific survey instructions are not required.

The mining recorder is also responsible for issuing exploration licences and permits and leases for coal mining under the *Territorial Coal Regulations*[448] and for issuing leases under the *Territorial Dredging Regulations*.[449] There are no provisions for surveys in the *Territorial Coal Regulations*. The *Territorial Dredging Regulations* require surveys to be carried out under the instructions of the Surveyor General when directed by the Minister.[450] Specific survey instructions are required.

[441] NWT & Nunavut Chamber of Mines (2008) and mining companies websites. Accessed Oct. 12, 2010.
[442] The "Spatially Integrated Dataset" (SID) also contains information on mineral dispositions.
[443] Areas based on settlement agreements to date (about 5%). As well, National Parks and Territorial Parks and other lands withdrawn from disposal is estimated to comprise 8% of the subsurface area.
[444] *NWT and Nunavut Mining Regulations*, C.R.C., c. 1516, ss.29, 58.
[445] *NWT and Nunavut Mining Regulations*, C.R.C., c. 1516. ss.54-57.
[446] *NWT and Nunavut Mining Regulations*, C.R.C., c. 1516. s.53.(2)(b).
[447] General Instructions for Surveys, e-Edition: Surveyor General Branch, Website. Accessed Oct. 12, 2010.
[448] C.R.C., c. 1522.
[449] C.R.C., c. 1523.
[450] *Territorial Dredging Regulations*, C.R.C., c. 1523, s.8.

How are oil and gas rights managed?

The NWT is rich in oil and natural gas. The Norman Wells oil field, the fourth largest in Canada, has been in production since 1943. It produces between 6 and 7 million barrels (valued between $450 and $500 million dollars) per year. To date over 1900 wells have been drilled north of 60, most in the NWT. There are an estimated 6 trillion cubic feet of discovered gas reserves and an additional 55 trillion cubic feet of likely gas reserves within the Mackenzie Delta / Beaufort Sea region which can be marketed when the proposed Mackenzie Valley Gas Pipeline is completed.[451]

The regulatory responsibility for oil and gas on territorial lands is shared by the Minister of INAC and the Minister of Natural Resources Canada (NRCan). Documents that pertain to oil and gas interests are registered in INAC's Canada Frontier Lands Registration System in Gatineau, Quebec.[452] There are two primary *Acts* that apply. The *Canada Petroleum Resources Act*[453] deals with oil and gas interests and is managed by INAC. The *Canada Oil and Gas Operations Act*[454] applies to oil and gas operations such as exploration, drilling, production, conservation, processing and transportation[455] and is managed through the National Energy Board.

Three types of dispositions may be issued by INAC under the *Canada Petroleum Resources Act*:

- an exploration licence gives the right to explore for and the exclusive right to drill and test for petroleum and to develop the lands in order to produce petroleum;[456]
- a significant discovery licence, in addition to the rights under an exploration licence, gives the exclusive right to the lands in order to produce petroleum;[457]
- a production licence, in addition to the rights under a significant discovery licence, gives the exclusive right to develop

[451] Mining oil and gas facts: Department of Industry, Tourism and Investment, NWT website. Accessed Oct. 12, 2010.
[452] *Frontier Lands Registration Regulations*, SOR/88-230 made pursuant to the federal *Canada Petroleum Resources Act*. Copies of documents are available from the Office of the Registrar, Northern Oil and Gas Directorate in Gatineau, Quebec. The "Spatially Integrated Dataset" (SID) also contains information on mineral dispositions.
[453] R.S.C., 1985, c. 36 (2nd Supp.)
[454] R.S.C., 1985, c. O-7.
[455] Frontier Oil and Gas: National Energy Board Website. Accessed Oct. 12, 2010. Also see *Oil and Gas Approvals in the NWT - Gwich'in Settlement Area*, 2002. Erlandson & Associates Consultants.
[456] *Canada Petroleum Resources Act* R.S.C., 1985, c. 36 (2nd Supp.) s.22.
[457] R.S.C., 1985, c. 36 (2nd Supp.) s.28.

petroleum and confers title to the petroleum produced where a commercial discovery has been made.[458]

The Norman Wells Proven Area Agreements, first entered into in 1944, between the federal government and Imperial Oil Limited, grants Imperial Oil the exclusive right and privilege to drill for, mine, and extract petroleum and natural gas from the Norman Wells oil and gas field. As a partner, the Government of Canada receives one-third ownership interest in the gross production. In order to allow the agreements to continue they have been excluded from application of the *Canada Petroleum Resources Act*.[459]

Legal surveys approved by the Surveyor General are required for exploratory wells and for development wells.[460] The *Canada Oil and Gas Land Regulations*[461] under the *Territorial Lands Act* deals with survey requirements and defines the grid area system used for spacing wells. The positions of wells are to be shown on the survey plan in relationship to grid areas, sections, and units; all referenced to the North American Datum of 1927.[462] However, both datums – NAD 27 and NAD83(CSRS) - are now being shown on survey plans, given that industry is comfortable working in the latter datum.

When the Surveyor General approves a plan of survey pursuant to the *Regulations*, the positional information shown on the plan is confirmed. If the plan is the first plan approved in a grid area, then the positional information shown on the plan fixes all the boundaries of the grid area for subsequent surveys.[463] Although general instructions are available for these surveys CLSs should also contact the SGB in Yellowknife for additional instruction and guidance (particularly for surveys in the higher latitudes).[464]

[458] R.S.C., 1985, c. 36 (2nd Supp.) s.37.
[459] R.S.C., 1985, c. 36 (2nd Supp.), s.114(5). House of Commons Debates, Sept. 23, 1994. Agreements: P.C. 1944-5594, P. C. 1983-3132 and P. C. 1994-1939).
[460] *Canada Oil and Gas Land Regulations* C.R.C., c. 1518, s.20, 21.
[461] C.R.C., c.1518, ss.10-22. Some provisions in the *Regulations* have been replaced by provisions in the *Canada Petroleum Resources Act,* although the *Regulations* remain in force to the extent that they are not inconsistent with that *Act;* see *Canada Petroleum Resources Act,* R.S.C., 1985, c. 36 (2nd Supp.) s.112.
[462] *Canada Oil and Gas Land Regulations* C.R.C., c. 1518, s.9. As of July 2010, the regulations have not yet been replaced by regulations to be enacted pursuant to the *Canada Petroleum Resources Act*, which will adopt the NAD83(CSRS) datum.
[463] General Instructions for Survey, e-edition, Part D7, Chapter E-1, s. 4.
[464] Anita Lemmetty, Senior Surveyor, SGB, NWT/Nunavut, Telecon: March 2, 2010.

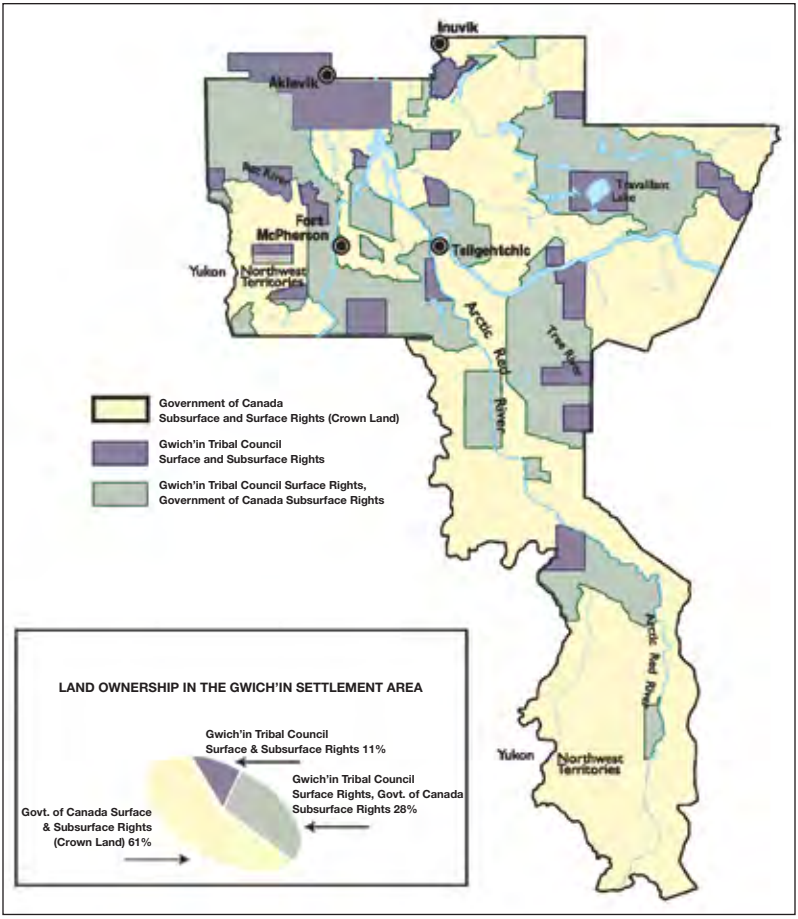


Figure 38–Gwich'in Land Use Plan. *Gwich'in Land Use Planning Board (GLUPB)*. 2003.

What are Commissioner's lands?

Commissioner's lands are lands that, while they remain vested in Her Majesty the Queen in right of Canada, are under the administration and control of the Commissioner and managed by the territorial government. Commissioner's lands are defined in the *NWT Act*[465] and the *Commissioner's Land Act*.[466] The majority of Commissioner's lands consist of large tracts of land (not including mines and minerals) in and adjacent to communities and roads, streets, lanes and trails on public land. The administration and control of these lands are transferred by order in council from the federal government to the territorial government for community development. Prior to the 1990's the transfer of large tracts of land, called block land transfers, were described by written description. Now the lands transferred are for smaller parcels and surveys under the *Canada Lands Surveys Act* are required.[467] Commissioner's lands comprise only 2% of the landmass in the NWT.

How are Commissioner's lands managed?

The Lands Administration Division of the territorial Department of Municipal and Community Affairs (MACA) in Yellowknife administers Commissioner's lands. The Division also maintains a registry that contains leases, permits and other instruments of Commissioner's land.[468]

Under the *NWT Act* and the *Commissioner's Land Act* the Commissioner may use, sell or otherwise dispose of Commissioner's land and retain the proceeds.[469] Sections in the *Territorial Lands Act* that apply to the sale of territorial lands equally apply to the sale of Commissioners lands: for example, notifications under Section 9 and reservations from grants under Section 13-16.[470] As for territorial lands, the Commisioner's lands to be sold must be surveyed. Under Section 3(3) of the *Commissioners Land Act* "No Commissioner's land shall be sold until a duly approved plan of survey of the land has been filed in the land titles office for the registration district in which the land is located."

[465] R.S.C, 1985, c. N-27, s.44(1)
[466] R.S.N.W.T. 1988, c.C-11, s.2.
[467] Beverly Chamberlin, Manager Lands, Government of the NWT, Telecon: Nov. 23, 2009.
[468] Graphic and textual information about parcels of land located within the boundaries of Community Governments can be accessed online through ATLAS: Government of the NWT Website. Accessec Oct. 12, 2010.
[469] R.S.C, 1985, c. N-27, s.44(2). R.S.N.W.T. 1988, c. C-11, s.3.
[470] Under s.3.(2) of the *Territorial Lands Act*, R.S.C, 1985, c. T-7, Sections 9 and 12 to 16 and paragraph 23(k) apply to territorial lands under the administration and control of the Commissioner of the NWT or of the Commissioner of Nunavut.

Surveys must be in accordance with the specific survey instructions of the Surveyor General.[471]

The *Commissioner's Land Regulations*[472] contain provisions for leases (including quarrying) and for hay permits. The term for a general lease shall not exceed 30 years and for a quarry lease the term shall not exceed ten years. There are provisions for renewal. There are no requirements in the *Commissioners Land Act* or the *Regulations* for surveys for leases. A sketch of the land to be leased is required but this is not a legal survey plan and is not required to be prepared by a CLS.

What are municipal lands?

A municipality is a defined area managed by a local government body that has corporate status and self government rights. Municipal corporations in the NWT include cities, towns, villages, hamlets, chartered communities and Tlicho community governments established by the *Tlicho Community Government Act*.[473] There are 24 municipal corporations in the NWT including four Tlicho community governments.[474]

Figure 39–Survey camp near Hudson's Bay height of land (NWT). *Library and Archives Canada / PA-020023*. 1923

The territorial government may transfer to a municipal corporation the administration of Commissioner's land that fall within municipal boundaries. This is carried out under the *Commissioner's Land Act*.[475] Once transferred and registered in the land titles office, the lands are called municipal lands. The municipality may use, hold, develop or dispose

[471] *Territorial Lands Regulations*, C.R.C., c. 1525, s. 9(1)(2).
[472] R.R.N.W.T. 1990, c.C-13.
[473] *Cities, Towns And Villages Act*, S.N.W.T. 2003,c.22, *Hamlets Act*, S.N.W.T. 2003, c.22, *Charter Communities Act*, S.N.W.T. 2003,c.22, *Tlicho Community Government Act*, S.N.W.T. 2004,c.7, s.47.(1).
[474] Community Contacts Listing: Government of the NWT, MACA Website. Accessed Oct. 12, 2010.
[475] R.S.N.W.T. 1988, c. C-11, s. 3(1)

of the lands.[476] Since the lands are registered in the land titles office they must be shown on a filed or registered plan of survey approved and confirmed by the Surveyor General.

What of Aboriginal land tenure?

Early treaties in the NWT were initiated when it appeared that the Aboriginal interest in the land would interfere with development. The catalyst for Treaty No 8, signed in 1899, was the need to cross over Aboriginal lands to reach the Yukon during the Klondike gold rush and to reach mineral deposits in the Great Slave Region. For Treaty 11, signed in 1921, the catalyst was the discovery of oil at Norman Wells along the Mackenzie River.[477]

Only two Reserves were established, both in the Treaty 8 area. Salt Plains No 195 Reserve was set apart in 1941[478] and Hay River Dene No.1 Reserve was set apart in 1974.[479] A treaty settlement agreement with the Salt River First Nation signed in 2002 set aside "not less than" 102,400 acres (160 square miles) of land comprising several parcels to become "one or more Reserves" in and around the Town of Fort Smith and in Wood Buffalo National Park.[480] Salt River Reserve No. 195 was established in 2008.[481] Other First Nations within Treaty 8 and 11 have opted to renegotiate through the comprehensive land claims process.[482]

What comprehensive land claims have been negotiated?

In the NWT to date there are four comprehensive land claim agreements:

- Western Arctic (Inuvialuit) Final Agreement (June 1984).[483]
- Gwich'in Comprehensive Land Claim Agreement (April 1992).[484]
- Sahtu Dene & Métis Comprehensive Land Claim Agreement (September 1993).[485]
- Tlicho Land Claims and Self-government Agreement (August 2003).[486]

[476] *Cities, Towns And Villages Act*, S.N.W.T. 2003, c.22, s.53(1),54. NWT Policy 21.02, Municipal Lands
[477] *Treaty Research Report - Treaty No. 11* (1921), INAC Website.
[478] PC 8761. ILR Reg. #8761.
[479] PC 1974-387, PC1974-2789, PC1975-399. ILR Reg. # 39404
[480] Salt River First Nation Treaty Settlement Agreement, 2002.
[481] PC 2008-1666. ILR Reg. #359301.
[482] For example: Sahtu Dene & Métis (Treaty 11) Comprehensive Land Claim Agreement, Preamble.
[483] Made effective by the *Western Arctic (Inuvialuit) Claims Settlement Act* S.C.1984, c.24.
[484] Made effective by the *Gwich'in Land Claim Settlement Act* S.C.1992, c.53)
[485] Made effective by the *Sahtu Dene and Metis Land Claim Settlement Act* S.C. 1994, c. 27.
[486] Made effective by the *Tlicho Land Claims and Self Government Act* S.C. 2005, c.1. This is a combined comprehensive land claim and self-government agreement.

A number of other Aboriginal Groups are in the process of negotiating agreements including the Akaitcho Territory (Treaty 8) Dene First Nations; the Deh Cho First Nations; and the Northwest Territory Métis Nation.[487]

What are settlement areas?

Each comprehensive land claim agreement defines a settlement area - the area traditionally used or occupied by the Aboriginal group. There can be several types of land within settlement areas: settlement lands, territorial lands, Commissioner's lands, municipal lands and private lands. Within settlement areas the Aboriginal group has certain rights and benefits, such as the right to gather, hunt, trap and fish. As well, Aboriginal organizations have strong representation and influence over land-use planning, use of water, environmental regulation, wildlife management and many other matters related to land and resources in their settlement areas.[488]

What are settlement lands?

Settlement lands are land for which Aboriginal groups have received title under their land claim settlement agreements. Some 14% of the total area of NWT (1.34 million sq km) is settlement land:

Land and water area in the NWT	Surface lands excluding subsurface sq. kms.	Surface lands including subsurface sq. kms.	Total surface lands sq. kms.	% of land in the NWT
Inuvialuit	77,700	12,950	90,650	7%
Gwich'in	16,264	6,056*	22,320	2%
Sahtu	39,624	1,813	41,437	3%
Tlicho	0	39,000	39,000	3%
Total	133,588 (10%)	59,819 (4%)	193,407 (14%)	

* Gwich'in: not included is an additional area of 93 sq kms of mines and minerals only.

What laws, with regard to land, apply to settlement lands?

Settlement lands are private (titled) lands so legislation dealing with territorial lands, Commissioner's lands and Canada Lands such as the *Territorial Lands Act, Commissioner's Land Act* and *Canada Lands Surveys Act* are not applicable. However, since settlement lands are registered in the land titles office they are under the provisions of the *Land Titles Act* for any interests that are registered. Tlicho lands (lands

[487] *Plain Facts,* 2004, Negotiations about land, resources and self-government in the NWT.
[488] In the Tlicho Agreement the traditional use area is known as Môwhí Gogha Dé Nîîtâée.

in which the fee simple interest is vested in the Tlicho government) are Canada Lands.[489] Therefore the Tlicho Government might include requirements for surveys to be carried out under provisions of the *Canada Lands Surveys Act*.[490]

What land interests are available?

Figure 40–Topographic survey of Fort Simpson (NWT). *Library and Archives Canada / PA-020380*. 1929

As a general rule, settlement lands may not be conveyed (sold) to any person except to the Government of Canada or the Government of the NWT in exchange for other lands or to an organization of the Aboriginal group. Also, the lands are not subject to seizure and cannot be mortgaged.[491] There are a few exceptions; for example, the Gwich'in and the Sahtu Dene & Métis Agreements have provisions for holding lands within municipal government boundaries so that land may be available for Aboriginals for residential, commercial, industrial and traditional purposes. These lands may be sold to any person and thereupon cease to be Gwich'in or Sahtu Dene & Métis municipal lands. Under the Inuvialuit Agreement there is provision for selling, leasing or otherwise disposing of land to municipal governments where there is a demonstrated need.[492] The Tlicho Agreement provides that after the 20th anniversary of the Agreement (in 2023), fee simple in Tlicho community lands may be conveyed if authorized by referendum.[493]

Each Aboriginal group has the option of implementing a system for recording dispositions of its lands and resources. Most have

[489] *Canada Lands Surveys Act*, R.S.C., 1985, c.L-6, s.24.(1)(vi); Tlicho Agreement, c.1 definitions
[490] Tlicho Agreement, paragraph 7.4.2 (a).
[491] Sahtu Dene & Métis Agreement, paragraphs 7.1.2, 19.1.5, 19.1.7, 19.1.8. Other agreements have similar provisions.
[492] Gwich'in Agreement, paragraphs 22.1.1, 22.2.2. Sahtu Dene & Métis Agreement, paragraphs 23.1.1, 23.2.2. Inuvialuit Agreement, paragraph 7.(61).
[493] Tlicho Agreement, paragraph 9.3.6.

requirements with regard to granting surface, mineral and oil and gas rights on their settlement lands. For example, the Gwich'in Lands, Resources, and Implementation Department has established guidelines and fees for the use of Gwich'in lands including commercial, residential, oil and gas and other development.[494] While not compulsory, organizations having leases (or other interests) on settlement lands often have them surveyed and registered in the Lands Titles office.[495]

For mineral or oil and gas development, where the Aboriginal organization has title to the surface lands but not the subsurface rights, the right to occupy and use surface lands for roads, camps, airstrips, well sites, and other surface activities must be obtained from the Aboriginal organization. For settlement lands there is provision in some of the land claim settlement agreements for arbitration panels to deal with access and compensation disputes.[496]

What are the requirements for the survey of boundaries of settlement lands?

Parcels of settlement lands may use graphical (maps) or written (metes and bounds) land descriptions. When boundaries of settlement lands are surveyed and the survey plans are registered in the land titles office they replace the previous description of the boundaries. The Western Arctic (Inuvialuit) Agreement says that "Canada shall, at its expense, undertake to complete the necessary ground surveys if and as needed as quickly as possible following the execution of the Agreement."[497] Surveys on settlement lands are carried out under the *Canada Lands Surveys Act* and the instructions of the Surveyor General.

Since the boundaries of settlement lands are extensive and remote, and seldom in locations that conflict with other land interests, the requirements for spacing of boundary monuments were relaxed from 1 km to about 6km for the earlier land claim agreements (focusing on deflection points). For more recent land claim agreements; for example, the Tlicho Land Claims and Settlement Agreement, boundary surveys are monumented every km.[498]

The survey of comprehensive land claim lands in Canada is the largest survey undertaking since the settling of western Canada from the

[494] Lands, Resources, and Implementation Department: Gwich'in Tribal Council Website. Accessed Oct. 12, 2010.
[495] Mardy Semmler, Gwich'in Lands Administration Manager, Telecon: November 30, 2009.
[496] Gwich'in Tribal Council. Understanding the Gwich'in Land Claim, p. 50. 2000.
[497] Western Arctic (Inuvialuit) Agreement. paragraph 7.(7).
[498] Nancy Kearnan, Deputy Surveyor General NWT/Nunavut, SGB, Telecon: March 1, 2010.

1870s. Between 1975 and 2009, 612 large parcels have been surveyed, which translates to:

- some 44,000 km of boundary; and
- almost 100 million ha in area.[499]

How are private interests in land registered?

The *Land Titles Act*[500] provides the legislative framework for the territorial Department of Justice to register land related documents that affect legal rights in property for lands in the private domain. Under the system the department has custody of all original titles, documents and plans pertaining to title of land and creates certificates of title providing evidence of ownership. The land titles office for the NWT is in Yellowknife.

Figure 41–Survey of the 34th base line in NWT. *Surveyor General Branch*. 1954

Before a certificate of title can be issued, when bringing lands under the *Land Titles Act*, the lots or parcels must be shown on a filed or registered plan of survey made in accordance with Part II of the *Canada Lands Surveys Act*.[501] There are exceptions. Titles established by land claim settlement legislation[502] and some titles created prior to the adoption of the *Territorial Lands Regulations* in 1960 are based on maps or written land descriptions.

Provisions in the *Land Titles Plans Regulations*[503] capture the Surveyor General's regulatory role with regard to surveys of titled land. Under

[499] Survey Programs, Comprehensive Land Claims. SGB Website. Accessed Oct. 12, 2010.
[500] R.S.N.W.T. 1988, c.8 (Supp.) in force since July 19, 1993.
[501] *Land Titles Act*, R.S.N.W.T. 1988, c.8 (Supp.), s. 58. *Commissioner's Land Act* R.S.N.W.T. 1988, c. C-11, s.3. *Territorial Lands Regulations*, C.R.C., c.1525, s.9(2).
[502] For example, for the Gwich'in Comprehensive Land Claim Agreement (s.18.3.5) title is registered based on (non-surveyed) legal descriptions. Any surveys subsequently registered replace the previous description.
[503] R-067-93

the *Regulations* a CLS is required to submit a sketch of a proposed survey to the Surveyor General who may then give instructions to the CLS. Normally only lot or parcel designations are given. If the lands dealt with in the survey include territorial or Commissioner's lands, specific survey instructions are required since these lands are Canada Lands under the *Canada Lands Surveys Act*. After the survey and survey plan is completed, approval by the Surveyor General is required before it is registered. The *Regulations* also include provisions for placing boundary monuments after the plan is registered and for preparing plans compiled from previous filed or registered plans. Surveys by CLSs are required for condominiums plans to be registered under the *Land Titles Act*. Survey requirements are given in the *Condominium Act*[504] and in general instructions. Specific survey instructions are not required.

Figure 42–Going over notes in a survey camp on the NWT/ Saskatchewan boundary. *Surveyor General Branch*. 1956

Planning approvals are required where a plan of survey or a descriptive plan being filed or registered in the land titles office has the effect of subdividing or consolidating lots or other parcels of land. The *Planning Act*[505] is the umbrella legislation for planning for municipal authorities. A plan of survey of the subdivision or consolidation, or in some cases a descriptive plan, is required.[506] Descriptive plans are plans of lots or parcels where some or all the boundaries have not been defined by monuments and the plan has been prepared from prior survey plan or other information.[507]

[504] R.S.N.W.T. 1988, c. C-15.
[505] R.S.N.W.T. 1988,c.P-7
[506] *Land Titles Act*, R.S.N.W.T. 1988,c.8(Supp.), s. 80(1), s.88.
[507] *Land Titles Act*, R.S.N.W.T. 1988,c.8(Supp.), s.1, Definitions.

There is provision in the *Land Titles Act* for the Registrar to deal with and recognize plans prepared and sent to the Registrar in accordance with the provisions of an Act of Canada.[508] This provision permits the filing of plans of land in the NWT sent to the Registrar under Sections 30 and 45 of the *CLS Act*.

What is the role of the Surveyor General Branch in Yellowknife?

Surveys of Canada Lands in the NWT are made under the *Canada Lands Surveys Act* on a request of a minister of any department of the Government of Canada or a Commissioner administering the lands.[509] The Surveyor General Branch (SGB) in Yellowknife provides a wide range of advice and consultation services on survey related matters to INAC, other federal government departments, territorial government departments, Aboriginal organizations and CLSs. The Cadastral Surveys Unit of the SGB regulates surveys in the NWT and Nunavut by issuing survey instructions, providing lot numbers, reviewing and processing survey plans, reviewing land descriptions for transfers of administration and control and for orders in council. The Land Claims Unit manages the survey programs in the NWT and Nunavut, the largest of which are surveys of settlement lands.

What is the quad lot system?

Outside of communities, surveyed parcels have been indexed to quad lots since 1977. A quad is the area of land depicted on a 1:50,000 National Topographic Series (NTS) map. Every parcel surveyed is given a sequential number within the quad. The quad number (the 1:50,000 NTS map sheet number) forms part of the parcel designation. The sequential lot numbers for quad lots (and for lots and blocks in communities) are issued by the Surveyor General Branch's regional office in Yellowknife. Lot numbering within each quad starts at 1000 to avoid any confusion with prior lot numbering systems. The quad lot system is also used in Yukon and Nunavut.

Prior to the quad lot system, group lot systems were used to index surveys. Under the first group lot system all of the NWT was regarded as Group 1. Lots surveyed in this group were numbered sequentially upwards from one as they were created. Eventually, this system became very cumbersome. In a later variation the NWT was divided into groups based on the (unsurveyed) DLS survey system. Each group was eight townships (48 miles) in latitude and fifteen ranges (120 miles)

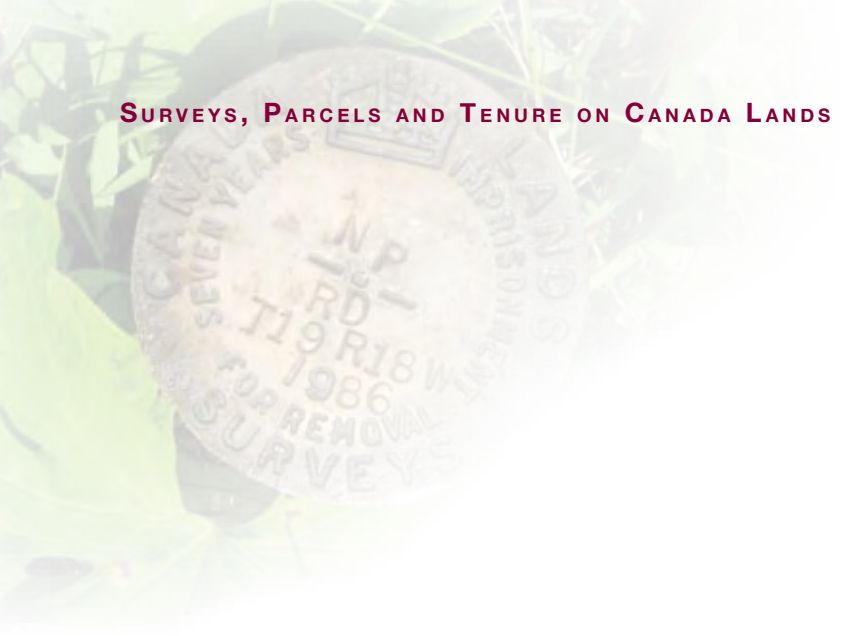
[508] *Land Titles Act*, R.S.N.W.T. 1988, c.8 (Supp.), ss.103-105.
[509] *Canada Lands Surveys Act*, R.S.C. 1985, c.L-6, s.25

in longitude. Lots created in each group were numbered sequentially upwards from one as they were created. Eventually groups in which there were many lots became difficult to manage and indexing problems similar to those encountered in the first group lot system began to appear.

Figure 43–Awkward instrument setup in Fort Simpson (NWT). *Surveyor General Branch*. 1968

Acts and regulation relating to lands in NWT

Type of Transaction	Survey Requirements (Statutory or other Authority)
TERRITORIAL LANDS	
SURFACE RIGHTS	
Sales (fee simple)	*Territorial Lands Regulations. s.* 9.1.
MINES AND MINERALS	
Mineral claim leases	*NWT and Nunavut Mining Regulations*, s.54-57 surveys, s.53.(2)(b) disputes.
Dredging leases	*Territorial Dredging Regulations*, s.8
OIL AND GAS	
Exploratory wells and development wells,	*Canada Oil and Gas Land Regulations*, ss. 10-22.
COMMISSIONER'S LAND	
Transfer of administration of Commissioner's land to a municipal corporation	*Commissioner's Land Act*. s. 3(3).
Sales	*Commissioner's Land Act*. s. 3(3). *Territorial Lands Regulations*, s. 9(1)(2).
TITLED LAND	
Issuance of title on receiving a grant (notification)	Both the *Commissioner's Land Act* and the *Territorial Lands Regulations* require that a plan of survey be filed or registered in the Land Titles office.
Registration of title in name of Her Majesty in right of Canada or the Commissioner	*Land Titles Act*, s. 58.
Other surveys under the Land Titles Act.	*Land Titles Act*, ss. 80-106. *Land Titles Plans Regulations*
Condominium Surveys under the Condominium Act	*Condominium Act*, s.6
SETTLEMENT LANDS	
Settlement lands registered in the land titles office.	Provision in the *Land Titles Act* and *Land Titles Plan Regulations* apply. Lands in which the fee simple interest is vested in the Tlicho government are Canada Lands.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FOR REMOVAL
SURVEYS

8 Nunavut

What are Canada Lands in Nunavut?

Nunavut (the Inuktitut word for "our land") is the largest and newest territory of Canada. It has an area of two million square km and a population of 30,000 people, of whom 85% are Inuit.[510] The lands and resources are managed by the Government of Canada, the Government of Nunavut, the Nunavut Tungavik Incorporated (NTI) and three Regional Inuit Associations (RIAs). Most of the Canada Lands in Nunavut are territorial lands under the administration and control of the federal Government. Other Canada Lands include Commissioner's lands which, even though the Commissioner has administration and control of them, are Canada Lands because they remain vested in Her Majesty in right of Canada.[511]

What events led to the establishment of Nunavut?

The land area of the Mackenzie and the Eastern Arctic is a land of two distinct physical geographic areas and peoples. The east is an almost treeless region where most of the people are Inuit. It was natural that this division would form the basis for land claim settlement areas and the creation of the separate territory of Nunavut in 1999.

The Northwest Territories (NWT) council discussed division in the early 1960's which led to the introduction of a bill in 1963 to create two territories. However, there was little support. In 1966 the Carrothers Commission, set up to study the future of government in the NWT,

[510] *Our Land:* Government of Nunavut Website. Accessed Oct. 12, 2010.
[511] *Nunavut Act*, S.C, 1993, c. 18, s.49(1), *Canada Lands Surveys Act*, R.S.C. 1985, c.L-6, s.24(1)(a).

concluded that while division was probably inevitable, discussion of the idea should be delayed for ten years. It stated that the Inuit would be isolated, with little if any political power, if division were carried out immediately.

Figure 44–Surveying around racks used to dry meat in Grise Fiord (Nunavut). *Surveyor General Branch*. 1968

In 1982, a territory-wide plebiscite supported division.[512] After the Tungavik Federation of Nunavut (TFN), acting on behalf of the Inuit of Nunavut, and government agreed on the location of the boundary, another plebiscite approved it in May 1992.[513] The establishment of a new territory of Nunavut and its government was assured in 1993 when Parliament gave its assent to the *Nunavut Act*.[514] The *Act* came into force on April 1, 1999, creating the territory of Nunavut.

How did the Inuit land regime evolve?

In 1971 the Inuit Tapirisat of Canada (ITC) was formed and began talks with the federal government about Aboriginal rights:

> Explaining to the older generation why it was necessary to "claim" our homeland was not an easy task. The Inuit leadership also had to face hostile governments and a Canadian population largely ignorant of Inuit, their homeland, and their history. Inuit negotiators also had to break new ground in their land claim talks. Governments did not have any policy in many areas that Inuit felt had to be part of any final deal.[515]

[512] *Towards Confederation, Provinces and Territories, Nunavut Entered Confederation: 1999*: Library and Archives Canada Website. Accessed Oct. 12, 2010.
[513] *The Road to Nunavut: A Chronological History*: Government of Nunavut Website. Accessed Oct. 12, 2010.
[514] *Nunavut Act* S.C. 1993, c.28, s.79(1)
[515] John Amagoalik, *Nunavut 99 - What Price Nunavut:* Website. Accessed Oct. 12, 2010.

A land claim presented by ITC to the federal government, early in 1976, was accepted for negotiation.[516] In 1982, the Tungavik Federation of Nunavut (TFN) was created to pursue the negotiations on behalf of the Inuit of Nunavut. In November 1992, the Inuit by petition approved the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Nunavut Agreement). In December 1993 it was ratified by the *Nunavut Land Claims Agreement Act*.[517] Under the Nunavut Agreement the Inuit ceded, released and surrendered "all their aboriginal claims, rights, title and interests in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty of Canada.[518] In exchange they obtained defined rights and benefits such as subsurface and surface title to certain land, the right to participate in decision-making concerning land, water and resources, harvesting rights and financial compensation.

TFN was succeeded by the NTI in 1993.[519] NTI, located in Iqaluit (the executive) and Cambridge Bay (the lands and resources people) is responsible for ensuring that the Nunavut Agreement is implemented fully by the Governments of Canada and Nunavut and that all parties fulfill their obligations. It has assumed a very broad mandate for the Inuit fostering economic, social and cultural well-being.[520] NTI has designated the RIAs; the Qikiqtani (formally Baffin Regional) Inuit Association in Iqaluit, the Kivalliq Inuit Association in Rankin Inlet, and the Kitikmeot Inuit Association in Cambridge Bay to provide the link to Nunavut communities and to carry out some of the obligations under the Nunavut Agreement.[521]

What is being done to protect the land and resources?

Because there is only one comprehensive land claim agreement in Nunavut the regulatory regime for protecting land and resource is not as complex as that for the NWT. The Nunavut Impact Review Board, established under Article 12 of the Nunavut Agreement, is responsible for the environmental assessment of projects.[522] Other institutions related to land and resources established under the Nunavut Agreement include the Nunavut Planning Commission, the Nunavut Water Board

[516] Keith Crowe, *Nunavut 99 - The Road to Nunavut*. Website. Accessed Oct. 12, 2010.
[517] S.C.1993, c.29, s. 4(1). Assented to on June 10, 1993 and came into force on December, 31, 1993.
[518] Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Nunavut Agreement), s. 2.7.1(a).
[519] NTI is the organization representing the Inuit in the *Nunavut Act*, S.C. 1993, c. 28.
[520] About NTI, Programs and Benefits: Nunavut Tunngavik Incorporated (NTI) Website. Accessed Oct. 12, 2010.
[521] NTI Organizational Chart, About NTI. Nunavut Agreement, Article 39.1.3
[522] Nunavut Agreement, Article12. Clarification that the *Canadian Environmental Assessment Act* does not apply was provided by an amendment to the Nunavut Agreement by Order in Council 2008-977. The process to amend the Nunavut Agreement is given in Article. 2.13.1 of the Agreement.

and the Nunavut Wildlife Management Board. NTI and the three RIAs are represented on these bodies, and participate in decision making and policy development.

What is the status of devolution?

The government of the NWT had gained considerable control of responsibilities from the federal government prior to the creation of Nunavut and these responsibilities were assumed by the new territorial government of Nunavut. As well, considerable responsibilities were obtained by the Inuit under the Nunavut Agreement. After 1993, federal and territorial governments and Inuit organizations were fully occupied in implementing policies and programs and establishing new highly decentralized organizations to carry out the goals of the Nunavut Agreement and the *Nunavut Act*.[523]

In September 2008, a Protocol agreement for devolution was signed by the Minister of Indian and Northern Affairs Canada (INAC), the Premier of Nunavut, and the President of NTI. It is to serve as a framework to guide all three parties in future devolution negotiations. Included are onshore Crown lands, mineral management and a commitment to discuss oil and gas resource management at a future phase of negotiations.[524]

Are there any differences in the management of Territorial lands from the NWT?

Not really. Provisions in the *Nunavut Act* regarding land are substantially similar to those in the NWT Act except for some additions required to enable certain laws of the NWT to apply to Nunavut and for the transfer of administration and control of lands in Nunavut to the Commissioner of Nunavut. The *Territorial Lands Act*[525] and the Regulations under the *Act* for surface lands, minerals and oil and gas continue to apply in Nunavut as in the NWT.

How are surface rights of territorial lands managed?

The Land Administration Office of INAC in Iqaluit manages surface land activities on territorial lands (including disposition of surface rights) and maintains the Land Administration Registry, which contains leases, permits and other instruments of territorial lands in Nunavut.[526]

[523] Mike Vlessides, *Nunavut 99 - A Public Government*: Website. Accessed. Oct. 12, 2010.
[524] Lands and Resources Devolution Negotiation Protocol; INAC Website. Accessed Oct. 12, 2010.
[525] R.S.C., 1985, c. T-7
[526] Nunavut Regional Office, Land and Environment, Land Administration: INAC Website. Accessed Oct. 12, 2010. A "Spatially Integrated Dataset" (SID) is also accessible online that contains information on INAC dispositions.

Some 75% of the surface land and land area in Nunavut is under the administration of INAC.[527] Disposition of surface rights is carried out under the *Territorial Lands Act*, the *Territorial Lands Regulations,*[528] the *Territorial Land Use Regulations*[529] and the *Territorial Quarrying Regulations*.[530] Reservations from grants, the nature of dispositions and survey requirements for territorial lands are the same in Nunavut as in the NWT.[531]

How are mineral rights managed?

Figure 45–Western side of Cumberland Sound, Baffin Island, Nunavut. *Surveyor General Branch*. 2001

The Mining Recorder in Iqaluit manages mining activity on territorial lands and the maintenance of mineral disposition records for Nunavut.[532] INAC has administration of mines and minerals for approximately 90% of the land area of Nunavut.[533] Although there is significant mining exploration in Nunavut only one mine is currently in production. The Agnico-Eagle Meadowbank gold mine began production in 2010.[534] The Mining Recorder is responsible for issuing dispositions under the *NWT and Nunavut Mining Regulations,*[535] *the Territorial Coal Regulations*[536] and the *Territorial Dredging Regulations*.[537] The nature of mineral dispositions and

[527] Area based on IOL in the Nunavut Agreement estimated to be 18% and Commissioner's land, municipal lands and national parks estimated to be 7% of the land area.
[528] C.R.C., c. 1525
[529] C.R.C., c. 1524.
[530] C.R.C., c. 1527.
[531] See Chapter 7 - NWT, or the legislation itself. Also see Land Administration, Land and Environment, Nunavut Regional Office: INAC Website. Accessed Oct. 12, 2010.
[532] The "Spatially Integrated Dataset" (SID) also contains information on mineral dispositions.
[533] Area based Inuit owned mines and minerals lands in the Nunavut Agreement being approximately 2% and National Parks being about 6% of the land area.
[534] Agnico-Eagle Mines Ltd. website. Accessed Oct. 12, 2010.
[535] C.R.C., c. 1516
[536] C.R.C., c. 1522.
[537] C.R.C., c. 1523.

survey requirements for territorial lands are the same in Nunavut as in the NWT.[538]

How are oil and gas rights managed?

INAC has administration of oil and gas rights for approximately 90% of the land in Nunavut. Currently there is no oil and gas production in Nunavut, partially owing to the high costs of development. However, there is tremendous potential. Estimates place the reserves in the Sverdrup Basin, west of Devon Island, at 11 per cent of Canada's total crude oil resources and 20 per cent of Canada's natural gas resources.[539]

Figure 46–Helicopter in Akbat Bay, Baffin Island. *Surveyor General Branch*. 2000

The same statutory regime in the NWT applies to oil and gas interests and operations in Nunavut. Under the *Canada Petroleum Resources Act*[540] interests are managed by INAC and under the *Canada Oil and Gas Operations Act*[541] oil and gas operations are managed by the National Energy Board. Registration of oil and gas interests, the nature of dispositions and survey requirements are the same in Nunavut as in the NWT.[542]

Did the Nunavut Act result in changes to the management of Commissioner's lands?

There was little change to the land management system for Commissioner's lands. The laws and regulations of the NWT were "duplicated to the extent that they can apply in relation to Nunavut, with any modifications that the circumstances require."[543] Over 200 Acts of the NWT were amended or adopted with little change.

[538] See Chapter 7 - NWT, or the legislation itself. Also see Nunavut Regional Office, Land and Environment, Mining Recorders Office: INAC Website. Accessed Oct. 12, 2010.
[539] Oil and Gas, Department of Economic Development & Transportation: Look Up Nunavut, Website. Accessed Oct. 12, 2010.
[540] R.S.C., 1985, c. 36
[541] R.S.C., 1985, c. O-7.
[542] See Chapter 7 - NWT, or in the legislation itself.
[543] *Nunavut Act*, S.C. 1993, c. 28, ss.29,76.

The Community Planning and Lands Section of the Department of Community and Government Services in Kugluktuk manages Commissioner's lands[544] including the disposition of surface rights and maintenance of a lands registry which contains leases, permits and other instruments of Commissioner's lands. Commissioner's Airport lands are managed by the Department of Economic Development and Transportation.

Generally the same provisions apply in Nunavut regarding land interests and land surveys as apply in the NWT. Under the *Commissioner's Land Act* (Nunavut)[545] the Commissioner may use, sell or otherwise dispose of Commissioner's land and retain the proceeds.[546] Sections of the *Territorial Lands Act* that deal with notification of title and reservations from grants apply to sales.[547] The *Commissioner's Land Regulations*[548] also have provisions applying to the sale of Commissioner's lands along with provisions for leasing. The nature of dispositions and survey requirements for Commissioner's lands in Nunavut are the same as in the NWT.[549]

To what extent are municipalities affected by the Nunavut Agreement?

The Nunavut Agreement has provisions that support strong municipalities through the transfer of lands to 25 municipal corporations.[550] The Nunavut Agreement requires that the Commissioner convey the fee simple lands within a municipality's built-up area and subsequently, on request, convey surveyed land within the municipal boundaries to the municipal corporation.[551] Certain lands are excluded from the conveyance including beds of water bodies and lands within a 100 foot strip along the shoreline. The Commissioner cannot alienate or create any interest in this strip without the permission of the municipal corporation.[552] Once conveyed and registered in the land titles office, the municipality may use, hold, develop or dispose of the lands.[553] However, the territorial government held a referendum on April 10, 1995 to determine if municipal voters were in favour of a

[544] Community Planning and Lands: Department of Community and Government Services, Nunavut.
[545] R.S.N.W.T. 1988,c.C-11.
[546] R.S.C, 1985, c. N-27, s.44(2); R.S.N.W.T. 1988, c. C-11, s. 3.
[547] R.S.C., 1985, c. T-7. ss.3(2), s.9, 12-16, 23(k).
[548] R.R.N.W.T. 1990,c.C-13
[549] See Chapter 7 for a fulsome discussion. Or, see Nunavut Regional Office, Land and Environment, Land Administration: INAC Website. Accessed Oct. 12, 2010.
[550] *Nunavut Agreement*, Schedule 14-1, p. 134.
[551] *Nunavut Agreement*, Article 14.3.1, 14.3.2. Also see: *Book Three, NWT Nunavut Settlement Area Lands, Jurisdictional Responsibilities for Land Resources, Land Use and Development in the Yukon Territory and NWT,* 1997, s.3.5.1.
[552] *Nunavut Agreement*, Article 14.1.1.(b)(ii), 14.5.2.
[553] *Cities, Towns And Villages Act* (Nunavut), R.S.N.W.T. 1988, c.C-8, s.53.4. *Hamlets Act* (Nunavut), R.S.N.W.T. 1988, c.H-1, s.53.4.

20-year restriction on alienation of municipal lands. Without exception, a lease-only option was chosen by all municipalities.[554]

What is the Nunavut Settlement Area?

The Nunavut settlement area includes an Area A and Area B which are described in Article 3 of the Nunavut Agreement. Area A includes a portion of the Arctic Islands and mainland of the Eastern Arctic and adjacent marine areas, Area B includes the Belcher Islands, associated islands and adjacent marine areas in Hudson Bay. The Inuit have a right of access to harvest and to participate in planning and development within the whole settlement area. Restrictions to harvesting are few; for example, the Inuit are not able to harvest on private lands (lands held in fee simple) or on leased lands.[555]

What are Inuit Owned Lands?

Inuit Owned Lands (IOL) are the lands to which the Inuit received fee simple title. They received approximately 37,000 square kilometres of land in fee simple, including surface and sub-surface rights; and 315,000 square km of land in fee simple of surface rights only.[556] The total surface area represents approximately 18% of the area of Nunavut.

NTI has designated the three RIAs as title holders of the surface IOL in each of their regions. Each RIA has policies and procedures for the disposition of surface land rights.[557] Mineral rights for all IOL are held and administered by NTI. NTI grants a mineral exploration agreement and a mineral production lease through its own mineral tenure regime.[558] NTI also holds and administers oil and gas rights.

For sub-surface development of IOL lands to which the RIA only has title to the surface, the right to occupy and use surface lands for roads, camps, and other surface activities must be obtained from the RIA. In the case of disputes regarding access, the Nunavut Surface Rights Tribunal can authorize use and occupation of land and determine compensation for surface land right holders.[559]

[554] 1995–1996 Annual Report on the Implementation of the Nunavut Land Claims Agreement, p. 18.
[555] Nunavut Agreement, Articles 5.7.16 - 5.7.22.
[556] *Book Three, NWT Nunavut Settlement Area Lands, Jurisdictional Responsibilities for Land Resources, Land Use and Development in the Yukon Territory and NWT,* 1997, s.3.3.1.3.
[557] For example see: Guide to Applying for Inuit Owned Land Surface Rights, Kitikmeot Inuit Association.
[558] Nunavut, Overview, 2008, Mineral Exploration, Mining and Geoscience, INAC.
[559] *Nunavut Waters and Nunavut Surface Rights Tribunal Act,* 2002, c. 10, Nunavut Agreement, Article 21.

Are there other comprehensive land claim agreements in Nunavut?

The Nunavut Agreement covers most of the area of Nunavut. However, the 2006 Nunavik Inuit Land Claims Agreement[560] with the Nunavik Inuit, who inhabit the Northern region of Québec, overlaps a small portion of the Inuit of Nunavut settlement area. Both the Nunavut Agreement and the Nunavik Agreement includes arrangements for continuation of harvesting and joint ownership of lands traditionally used and occupied by both groups.[561]

What are the requirements for the survey of boundaries of Inuit Owned Lands?

The provision in the Nunavut Agreement for the preparation of descriptive map plans for IOL initially alleviated the urgency for legal surveys normally associated with a large land claim settlement agreement. Surveys under the *CLS Act* were still required:

- to avoid or resolve conflicts with another title or interest holder;
- for any purpose at Government's discretion;
- to define boundaries of Crown lands to be excluded from IOL; and
- to define boundaries of IOL within municipal boundaries.[562]

The government and NTI agreed that descriptive map plans were inadequate and that all parcels should be surveyed using isolated boundary standards, which allowed for less frequent monumentation. A 10-year program to survey 1,155 parcels of IOL began in 1994,[563] and has resulted in some 105,000 km of boundary, and an area of 190 million hectares, being surveyed.[564] As of 2009, most of the surveys have been completed[565] with approximately 75% of the plans registered in the Land Titles Office[566] and the remainder going through the regulatory process.

What is the system for registering private interests in land?

Private lands in Nunavut are registered in the Land Titles Office in Iqaluit and administered under the *Land Titles Act* (Nunavut)[567] by the Nunavut Department of Justice. Other legislation, such as the

[560] Ratified by the *Nunavik Inuit Land Claims Agreement Act*, 2008, c. 2.
[561] Nunavut Agreement, Article 40 and Nunavik Inuit Land Claims Agreement, Article 27.
[562] *Nunavut Agreement*, Article 19.8.8., 19.8.11 and schedules 19-12, 19-13.
[563] Ballantyne & Strack. *Property Rights Study for Nunavut*, NRCan. 2003, p. 7.
[564] Survey Programs, Comprehensive Land Claims. SGB Website. Accessed Oct. 12, 2010.
[565] David Rochette, Head Nunavut Client Liaison, SGB, Telecon: Nov. 30, 2009
[566] Stan Hutchinson, Nunavut Land Specialist, INAC, January 08, 2010.
[567] R.S.N.W.T. 1988, c.8.

Planning Act (Nunavut)[568] and the *Condominium Act* (Nunavut)[569] and associated Regulations have been adopted from NWT legislation. Survey requirements in these Acts and Regulations remain the same as in the NWT.

IOL are private (titled) lands so legislation dealing with territorial lands, Commissioner's lands and Canada Lands are not applicable. However, IOL are registered in the land titles office and provisions in the *Land Titles Act* apply to interests in IOL that are registered. The Registrar is required to record the vesting of title in the Designated Inuit Organization as soon as possible after the date of ratification of the Agreement. A certificate of title is only issued for a parcel of IOL after a descriptive map plan of the parcel has been delivered to the land titles office and the Registrar has received a notification pertaining to the parcel.[570] If any boundaries of IOL are surveyed, then the plan becomes the parcel description once deposited with the Registrar.[571]

What is the role of the Surveyor General Branch in Nunavut?

The Nunavut Client Liaison Unit in Iqaluit is the contact organization for the Surveyor Generals Branch (SGB) in Nunavut. It provides a wide range of advice and consultation services on survey related matters to INAC, other federal government departments, territorial government departments, Aboriginal organizations and CLSs. The Unit also issues survey instructions, provides lot numbers, processes survey plans and confirms and approves plans under the *CLS Act*, the *Land Titles Act (Nunavut)* and the *Condominium Act (Nunavut)*. The SGB's office in Yellowknife reviews plans, manages land claim surveys and maintains geographic information.

Figure 47–Ptarmigan on tail of helicopter, Nunavut. *Surveyor General Branch*. 2001

[568] R.S.N.W.T. 1988, c.P-7.
[569] R.S.N.W.T. 1988, c.C-15
[570] *Nunavut Agreement*, Articles 19.3.1 to 19.3.4., 19.8.1 to 19.8.5.
[571] *Nunavut Agreement*, Articles.19.8.12., 19.8.8., 19.8.11 and schedules 19-12 and 19-13.

9 Yukon

What are Canada Lands in Yukon?

Stories of the Klondike gold rush, Jack London's novels and the poems of Robert Service have all contributed to the fascination that people have with Yukon. Yukon has an area of 483,450 km^2 and a population of 34,000 people, 26% of whom are Aboriginal.[572] The lands and resources are managed by the Yukon Government and by Yukon First Nation Governments (YFNs). Even though most of the lands in Yukon are under the administration and control of the Commissioner of the Yukon they are Canada Lands because they remain vested in Her Majesty in right of Canada.[573] Other Canada Lands include settlement lands as defined in the *Yukon First Nations Self-Government Act*[574] and land held by the Government of Canada for government departments and for public purposes (such as national parks).

How did the land management system evolve?

At the peak of the Klondike gold rush in 1898 the Parliament of Canada passed the *Yukon Territory Act* [575] which established Yukon as a separate territory from the North-West Territories (NWT). Under the *Act* a Commissioner in Council was granted the same powers to make ordinances as was possessed by the Lieutenant Governor of the North-West Territories.[576] Legislation such as the *Dominion Lands Act*[577] and

[572] (2008) Yukon Bureau of Statistics. Yukon Fact Sheet.
[573] *Yukon Act,* S.C.2002, c.7, s. Interpretation 2, definition of public real property. Also the prior *Yukon Act* R.S.C, 1985, c.Y-2,s.47.
[574] *Canada Lands Surveys Act,* R.S.C. 1985, c.L-6, s.24.
[575] S.C.1898, c.6.
[576] Mary C. Hurley. Bill C-39, The *Yukon Act*, 2002, Parliamentary Research Branch, Library of Parliament.
[577] S.C. 1872, c.23.

The Territories Real Property Act continued to apply to Yukon.[578] In 1908, the *Dominion Lands Act*[579] ceased to apply to Yukon; however, the new *Dominion Lands Surveys Act,*[580] applied to public lands in Yukon.[581]

By 1950, a new *Territorial Lands Act*[582] applied to Yukon. Changes were also made to the *Yukon Act* which included granting the Commissioner in Council greater responsibilities one of which was the authority to hold land for territorial purposes such as for public buildings, schools, hospitals, roads and other works.[583] These lands became commonly known as Commissioner's Lands.

[578] S.C. 1886, c. 26. It was felt at the time that provisions in the *Act* were not applicable to the Yukon. Debates, House of Commons, March 14, 1907, pp. 4643,4644.
[579] S.C. 1908, c.20.
[580] S.C. 1908, c.20. s.4.2. S.C. 1908, c.21. Debates, House of Commons, February 15,1907, p. 3093
[581] S.C. 1908, c.21, s.3. S.C. 1908, c.20, ss.3,5.
[582] S.C. 1950, c.22.
[583] S.C. 1953, c.53, s.45. Debates, House of Commons, April 1, 1953, p. 3510.

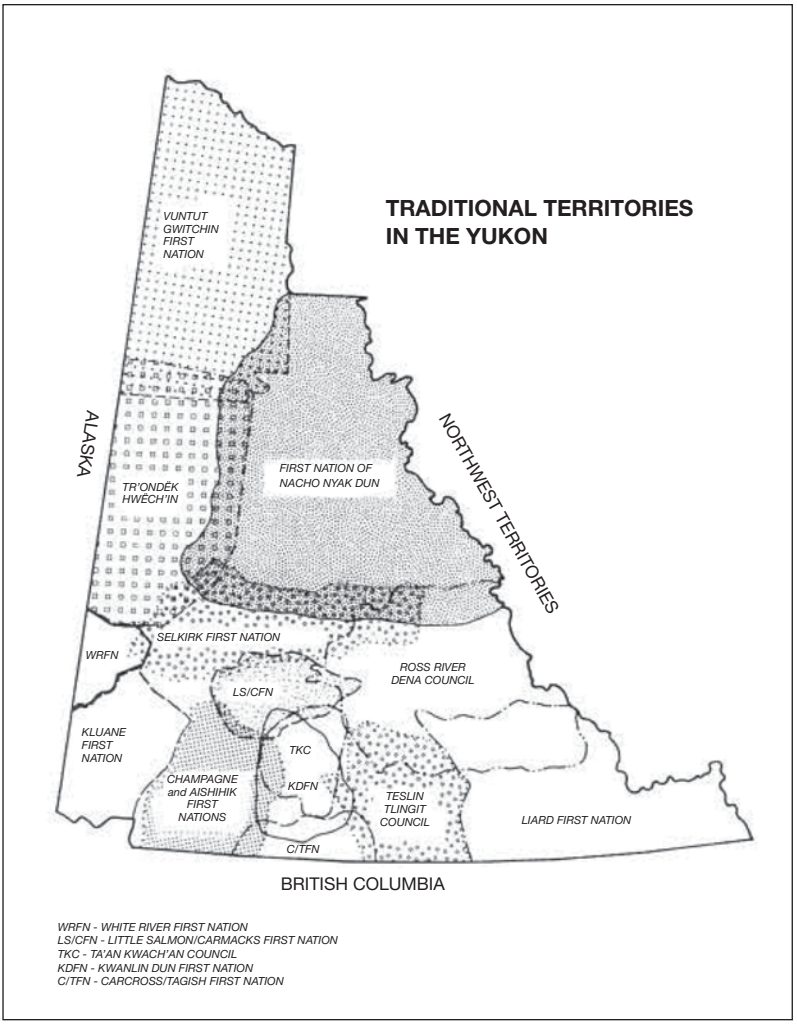

Figure 48–Map of Traditional Territories in the Yukon. *Indian and Northern Affairs Canada*. 2002

What is the status of devolution?

The devolution of federal responsibilities to territorial governments became a priority in the 1980s. Land management responsibilities transferred since then include fisheries, intra-territorial roads and oil and gas.[584] The process and responsibilities in carrying out the latest transfer was provided in the Yukon Northern Affairs Program Devolution Transfer Agreement signed by Canada, Yukon and the Council of YFNs in 2001. With the coming into force in 2003 of the *Yukon Act,*[585] Yukon obtained administration and control of public land in Yukon, including mines and minerals, water and an area of oil and gas, called the adjoining area, which is landward of the ordinary low water mark of the northern coast including coastal indentations.[586]

What lands remain with the Government of Canada?

Under the *Yukon Act* the Governor in Council was required to list public real property that is excluded from the administration and control of the Commissioner. Over 300 parcels of land are excluded and remain under the administration of various departments of the Government of Canada, mainly for government operations. As well, Canada retained administration and control of Kluane National Park, Kluane National Park Reserve, Ivvavik National Park and Vuntut National Park and the Nisutlin River Delta National Wildlife Area.[587]

There is also provision in the *Yukon Act* for the future taking of administration and control of public real property from the Commissioner if such taking is in the national interest. Such interests include national defence, establishing or changing the boundaries of national parks or historic sites, the welfare of Indians and Inuit, and settling Aboriginal land claims.[588]

What lands are managed by the Yukon Government?

Since the transfer of lands and resources in 2003 there are two categories of Canada Lands in Yukon under the administration and control of the Commissioner of the Yukon:

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[584] Mary C. Hurley. Bill C-39, Legislative Summary, the *Yukon Act*, 2002, Parliamentary Research Branch. Oil and gas was transferred by the *Canada-Yukon Oil and Gas Accord Implementation Act* S.C. 1998, c. 5. The actual transfer occurred by PC 1998-2022, November 19, 1998.

[585] S.C. 2002 c.7.

[586] *Yukon Act,* S.C. 2002 c.7, s.2 definition of public real property, s.45(1), 48. The adjoining area is defined in s.2 definitions and in Schedule 2.

[587] *Yukon Act*, S.C. 2002 c.7, s.45(2), PC 2003-397. Carcross Indian Reserve No. 4 was also included in the list of retained land (p.4); however, pursuant to Order-in Council SOR/2005-403 under the *Yukon First Nations Self-Government Act*, 1994, c. 35, s.5(2) and the Carcross/Tagish First Nation Self-Government Agreement, 2005, s.29 the Reserve became Category A Settlement Lands.

[588] *Yukon Act*, S.C. 2002 c.7, s.49(1).

1. Yukon lands[589] (lands known as Commissioner's lands prior to April 1, 2003) are lands whose beneficial use or proceeds are appropriated to the Yukon Government. These lands are regulated by the *Lands Act,*[590] and the *Lands Regulations*, *Quarry Regulations* and *Grazing Regulations*.[591] Yukon lands do not include territorial lands
2. Territorial lands[592] (commonly known as Crown lands[593]) are lands under the administration and control of the Commissioner on or after April 1, 2003. These lands are regulated by the *Territorial Lands (Yukon) Act,*[594] and the *Territorial Lands Regulation*, *Land Use Regulation*, *Coal Regulation*, and the *Dredging Regulation*.[595] This *Act* mirrors the federal *Territorial Lands Act*.

To facilitate land administration a 2003 amendment to the *Lands Act* provided that Yukon lands may be dealt with as territorial lands under the *Territorial Lands (Yukon) Act*.[596] For example, Order-in-Council 2003/151 specifies that sections of the *Territorial Lands (Yukon) Act*, dealing with sales and leasing, apply to all Yukon lands.[597] As well, under Order-in-Council 2003/77 the *Land Use Regulation* applies to all Yukon lands.[598]

How are surface rights managed?

The Land Branch of the Department of Energy Mines and Resources, Yukon Government administers most surface land activities on territorial lands including disposition of surface rights and maintenance of a lands register.[599] The Agriculture Branch deals with the disposition of land for agriculture or grazing purposes. Approximately 85% of the surface land area in Yukon is under the administration and control of the Yukon Government.[600]

[589] *Lands Act*, R.S.Y. 2002, c. 132, ss. Interpretation 1, 2(1).
[590] R.S.Y. 2002, c. 132. An amendment made by the *Territorial Lands (Yukon) Act*, 2003, c.17, s.33(2) to R.S.Y. 2002, c. 132, s.2.1 excluded territorial lands from the lands that the *Lands Act* applies to.
[591] Y.O.I.C. 1983/192; Y.O.I.C. 1983/205, 2003/76, 2005/38, 2006/124; Y.O.I.C. 1988/171.
[592] *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17, ss. Definitions, 1, 2(1).
[593] Colin Beairsto, Lands Branch, Yukon Government. Telecon: January 12, 2010.
[594] S.Y. 2003, c. 17.
[595] Y.O.I.C. 2003/50, Y.O.I.C. 2003/51, Y.O.I.C. 2003/54, Y.O.I.C. 2003/55.
[596] See *Territorial Lands (Yukon) Act*, S.Y 2003, c.17, s.33(2). Addition made to *Lands (Yukon) Act*, R.S.Y. 2002, c. 132: ss.2(1), 2(3,4).*Lands (Yukon) Act*, R.S.Y. 2002, c. 132.
[597] Y.O.I.C. 2003/151. "For the purposes of sections 7 and 10 to 14 and paragraph 21(k) of the *Territorial Lands (Yukon) Act*, all Yukon lands shall be dealt with as territorial lands under the *Territorial Lands (Yukon) Act*."
[598] Y.O.I.C. 2003/77. "The *Land Use Regulation* applies to all Yukon lands in the same way as it applies to territorial lands under the Territorial Lands (Yukon) Act. . . . "
[599] The Commissioner is required to maintain a register under the *Lands Regulations* Y.O.I.C. 1983/192, s.5.
[600] Areas based on settlement agreements to date (approximately 9%). As well National Parks are estimated to comprise an additional 5% of the land and water area.

For Yukon and territorial lands the nature of dispositions, reservations from grants and survey requirements are generally similar to that in the NWT.[601] The *Territorial Lands (Yukon) Act*, the *Lands Act* and associated regulations contain provisions for the sale and leasing of Yukon lands. The *Land Use Regulation*[602] regulates the issuance of permits for land use operations such as: site clearing or earth work; constructing new roads or trails; clearing or installing utility rights-of way. The *Quarry Regulations*[603] deal with the issuance of permits and quarry leases. Grazing Agreements by lease or licence for the purpose of grazing livestock are issued by the Agriculture Branch under the *Grazing Regulations*.[604]

Figure 49–Survey team crossing the Tatshenshini River near Dalton Post (Yukon). *Library and Archives Canada / PA-023127.* 1900

Quartz mining leases and placer mining grants give the right to enter on the land and engage in miner like activities; however, they do not include an exclusive right to the surface of the land or convey any tenure in the surface rights of the land.[605] Tenure for associated surface infrastructure such as roads and airstrips must be acquired from the Land Branch under the *Territorial Lands (Yukon) Act and* the *Lands Act*.[606] Similarly surface tenure for well sites and for other oil and gas related infrastructure such as roads and pipelines must also be acquired from the Land Branch.

What are municipal lands?

The cities of Whitehorse and Dawson City, the towns of Watson Lake and Faro and the villages of Mayo, Teslin, Carmacks and Haines

[601] See Chapter 7 - NWT, or Yukon legislation itself.
[602] Y.O.I.C. 2003/51.
[603] Y.O.I.C. 1983/205, 2003/76, 2005/38, 2006/124.
[604] Y.O.I.C. 1988/171.
[605] Mark Stephens, Mineral Development and Planning, Yukon Government, January 27, 2010.
[606] *Quartz Mining Act*, SY 2003, c.13, s.78(1). *Placer Mining Act*, SY 2003, c.13, s. 48(1)(c).

Junction all are municipal corporations[607] and may use, hold and dispose of land. They all have community planning responsibilities. The cities of Whitehorse and Dawson have subdivision approval authority as well.[608] Municipal lands are held by municipalities as private lands.

How are mineral rights managed?

Mining legislation in Yukon goes as far back as 1897 when the first regulations for placer mining were made under the *Dominion Lands Act*.[609] Until April 1, 2003, when the *Yukon Act* came into force, mining in Yukon was under administration of the federal government. Now it is administered by the Minerals Resources Branch, Department of Energy Mines and Resources, Yukon Government under the *Placer Mining Act*[610] and the *Quartz Mining Act*.[611] These *Acts* mirror the previous federal Acts.[612]

Yukon is divided into four mining districts with mining recorders in Watson Lake, Whitehorse, Mayo and Dawson City. The mining recorders grant and record mining interests and provide information on the ground open for staking.[613] The Yukon Government has mineral rights to approximately 90% of the land area in Yukon.[614]

Quartz mining refers to hard rock mining. An individual or company may prospect and stake a mineral claim in Yukon under the *Quartz Mining Act*. Once a claim has been staked it must be recorded with the Mining Recorder. After work has been completed on the claim and a certificate of improvement has been granted, a lease of the claim may be obtained which entitles the owner to all subsurface minerals along with the right to enter on and use and occupy the surface for miner like operation.[615] Terms of leases are for twenty-one years with provision for renewal for further twenty-one year terms.[616]

The recorded owner of a mineral claim is required to have a survey of it made by a duly qualified CLS under general instructions from the Surveyor General within one year from the date on which notification by the Minister to do so is sent to the owner.[617] Specific survey

[607] Villages established as municipal corporations by Y.O.I.C.'s; 1984/145, 1984/219, 1984/272. 1984/309.
[608] Summary of Land Management Authorities within Yukon Municipalities, Edition 1, October 2007: Government of Yukon.
[609] Lambrecht, *The Administration of Dominion Lands* 1870 -1930, p. 375
[610] S.Y. 2003, c.14.
[611] S.Y. 2003, c.13.
[612] *Yukon Act*, S.Y. 2002, c.7, s.45. Yukon Northern Affairs Program Devolution Transfer Agreement.
[613] Yukon Mining Recorder, Energy Mines and Resources: Yukon Website. Accessed Oct. 12, 2010.
[614] Area based on the area of all land in Yukon less that covered by settlement agreements to date (approximately 5%) and National Parks (approximately 5%) of the subsurface area.
[615] *Quartz Mining Act*, S.Y. 2003, c.14, s.74, s. 78(1).
[616] *Quartz Mining Act*, S.Y. 2003, c.14, s.103.
[617] *Quartz Mining Act*, S.Y. 2003, c.14, s.86(1).

instructions are not required although lot numbers must be obtained from the Surveyor Generals Branch (SGB) in Whitehorse.

Placer mining is the technique of recovering gold from gravel. Anyone over the age of 18 may prospect and stake a placer claim in Yukon under the *Placer Mining Act*.[618] Once a placer claim has been staked it is recorded with the Mining Recorder and if it is approved the mining recorder may issue a grant. Grants of placer claims give the holder the exclusive right to enter on the claim for miner-like work and to the proceeds realized from it.[619] These grants can be issued for a period of one to five years depending on the fees paid in advance.[620]

There are two types of surveys made under the *Placer Mining Act*: surveys of base lines and surveys of placer claims. A base line of a creek or river is a surveyed line following the general direction of the centre bottom lands of a valley of a creek or river, established to control and reference the location of placer mining claims.[621] For base line surveys specific survey instructions are required. Surveys of placer claims do not require specific survey instructions although lot numbers must be obtained from the SGB in Whitehorse.

The mining recorder is also responsible for issuing leases under the *Dredging Regulation*[622] and exploration licences and permits and leases for coal mining under the *Coal Regulation*.[623] The *Dredging Regulation* requires surveys to be carried out under the instructions of the Surveyor General when directed by the Minister.[624] Specific survey instructions are required. There are no provisions for surveys in the *Coal Regulation*.

How are oil and gas rights managed?

Rights to oil and gas are administered by the Oil and Gas Management Branch of the Department of Energy, Mines and Resources, Yukon Government. Copies of documents pertaining to oil and gas in rights in Yukon are available from this Branch in Whitehorse.

The *Oil and Gas Act*[625] came into force in 1998 when the administration of oil and gas was transferred to Yukon. Under the *Act* two types of dispositions may be granted. An oil and gas permit gives the right to

[618] S.Y. 2003, c.13, s. 17(1).
[619] *Placer Mining Act,* S.Y. 2003. c.13, s. 48(1).
[620] *Placer Mining Act,* S.Y. 2003. c.13, s. 41(1).
[621] *Placer Mining Act,* S.Y. 2003, c.13, ss. Part 1, Definitions, 2(1), 40.
[622] Y.O.I.C. 2003/55
[623] Y.O.I.C. 2003/54.
[624] Y.O.I.C. 2003/55, s.7.
[625] R.S.Y. c. 162.

explore, drill and test for oil and gas in the subsurface area described in the permit.[626] An oil and gas lease grants the right to the oil and gas.[627]

Figure 50–Packs of survey supplies and other necessities for the Silver Hill Mineral Claim survey. *Surveyor General Branch*. 1953

Licences are also required which give authority to carry out oil and gas activities such as geoscience exploration, drilling wells and building pipelines.[628] A legal survey is required to confirm the surface location of every well and to define the surface area of land required for the site of a field facility.[629] The positions of wells are to be shown on the survey plan in relationship to grid areas, sections, and units; referenced to the North American Datum of 1983.[630] The *Oil and Gas Disposition Regulations* defines the grid area system.[631] Surveys made to determine the position or boundaries of a well or other oil and gas facility must be made by a CLS in accordance with the specific instructions of the Surveyor General.[632]

What is being done to protect the land and resources?

A number of boards and councils have been established in Yukon which encompass land use planning, surface rights, water, fish and wildlife and renewable resources. Yukon First Nations (YFNs) are guaranteed membership on the boards and councils.[633] An

[626] R.S.Y. c. 162, s.30.
[627] R.S.Y. c. 162, s.38
[628] R.S.Y. c. 162, ss. Interpretation 1(1), 64(1). Yukon Oil & Gas Licensing Process, Yukon Government.
[629] *Oil and Gas Drilling and Production Regulations*, Y.O.I.C. 2004/158, ss.17, 24.
[630] *Oil and Gas Disposition Regulations*, Y.O.I.C. 1999/147, ss. Interpretation 1. 4(5). *Oil and Gas Licence Administration Regulations*, Y.O.I.C 2004/157, s.32.
[631] Y.O.I.C. 1999/147, ss. 2-4. These sections basically mirror those in the *Canada Oil and Gas Land Regulations*, the federal legislation applying to the NWT and Nunavut.
[632] *Oil and Gas Licence Administration Regulations*, Y.O.I.C 2004/157, ss.32-34. Part D7, Oil and Gas Surveys in the Territories and Offshore in the General Instructions for Survey, e-edition are not applicable since they only apply to surveys under the *Canada Oil and Gas Land Regulations*.
[633] Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, 1993.

environmental assessment process applying to all lands in Yukon was achieved in 2003 with the passage of the federal Yukon Environmental and Socio-economic Act.[634] The Yukon Environmental and Socio-Economic Assessment Board established under the Act is responsible for delivering the assessment process. Of the seven members of the Board three are nominated by the Council of YFNs.[635]

Are there treaties and Indian reserves?

A search of the Canada Lands Survey Records shows survey records for less than 10 Reserves in Yukon. Several of these, for example: Carcross No. 4, Lake Laberge No. 1, McQuesten No. 3, and Moosehide Creek No. 2 were established before 1905. Although Treaty 11, signed in 1921, included the southeast corner of Yukon - no Reserves were established. All Reserve lands in the Yukon are now settlement lands and the *Indian Act* no longer applies to such lands.[636]

How did land claims evolve?

In 1973 Elijah Smith, the first chairman of the Council for Yukon Indians, and a delegation of YFN chiefs traveled to Ottawa to present "Together Today for our Children Tomorrow" a statement of grievances and principles for negotiating a land claim. This was not the first time concerns about YFN traditional areas had been expressed, but it was the start of the negotiation process. Negotiations culminated in the 1993 Umbrella Final Agreement (UFA) between the Government of Canada, the Yukon Government and YFNs as represented by the Council of YFNs. The UFA is a common template under which each YFN negotiates its final agreement. It includes provisions dealing with land, financial compensation, land use and planning and with YFN involvement in government institutions, harvesting, forestry and water conservation.[637]

What are First Nation final agreements?

The *Yukon First Nations Land Claims Settlement Act* came into force in 1995. It acknowledged that the provisions in the UFA are to be incorporated into the final agreements with each YFN.[638] The *Act* also approved and gave effect to four final agreements:[639]

[634] S.C. 2003,c.7.
[635] Yukon Environmental and Socio-economic Assessment Board Annual Report, 08/09.
[636] See the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c.34, s.12, the individual First Nation Final Agreements, s.4.1.0., and the *Yukon First Nations Self-Government Act,* 1994, c. 35, s.5(1)(2) and the individual First Nation Self-Government Agreements, s.29.
[637] History of Land Claims, Council of Yukon First Nations. What's In a Final Agreement? Yukon Government.
[638] UFA, preamble. Also see *Carcross/Tagish First Nation v. Canada* (C.A.), 2001 FCA 231.
[639] S.C. 1994, c. 34. Also approved by the Yukon Government: *An Act Approving Yukon Land Claim Final Agreements* S.Y. 1993, c.19.

- Champagne and Aishihik First Nation;
- First Nation of Nacho Nyak Dun;
- Teslin Tlingit Council; and
- Vuntut Gwitchin First Nation.

Subsequently, seven final agreements were approved:

- Little Salmon/Carmacks First Nation (1997);
- Selkirk First Nation (1997);
- Tr'ondëk Hwëch'in (1998);
- Ta'an Kwäch'än Council (2002);
- Kluane First Nation (2004);
- Kwanlin Dün First Nation (2005); and
- Carcross/Tagish First Nation (2006).

Three First Nations have not settled land claims: Liard First Nation, Ross River Dena Council and White River First Nation.[640]

What are transboundary agreements?

Some Aboriginal uses of land have traditionally crossed territorial boundaries; other areas have been shared among Aboriginal groups.[641] Transboundary agreements deal with the rights of Aboriginal Peoples in matters such as harvesting, land access, land use planning and development. The Gwich'in and the Inuvialuit of NWT have transboundary agreements for lands and traditional use rights in Yukon. Other Aboriginal Groups that will likely have transboundary agreements for land in Yukon are the Dene/Metis in the NWT and the Kaska Dena Council, Tahltan Tribal Council and Taku River Tlingits First Nations in British Columbia.[642]

What are settlement lands?

Each First Nation's final agreement identifies the settlement land to be received. Under the UFA the 14 YFNs will receive 41,595 km^2 of settlement land to be divided amongst them. This is approximately 9% of the total land area of Yukon. The following types of land become settlement lands on the effective date of each YFN's settlement agreement:[643]

- Category A (25,900 km^2 of surface and sub-surface land),
- Category B (15,540 km^2 of surface land only),

[640] Yukon Today, Government of Yukon Website. Accessed Oct. 12, 2010.
[641] UFA, c.1, definitions, p. 7 and c.25.
[642] Roles and Responsibilities of Governments, Yukon Energy Mines and Resources. Yukon Northern Affairs Program Devolution Transfer Agreement, definitions
[643] UFA, c.1, definitions, c.5.3.1., 7.5.2.8.

- Fee simple lands. These are lands for which there is already a certificate of title on the effective date of the YFN final agreement. The area of these lands is included in Category B.

Proposed site specific settlement lands are lands which at the time of the effective date of each YFN settlement agreement are only proposed to be settlement lands. The area of site specific land is included in the allocation for Category A and B lands. They become settlement lands when the plan of survey of the lands is confirmed.[644]

Figure 51–A rather unhelpful chainman. *Surveyor General Branch*. 1994

YFNs may select additional land including: Reserves which are to become settlement lands; Reserves to be retained; and land set aside. Land set aside are lands that by notation in the property records of INAC have been set aside for the use of First Nations' peoples. The total area for these lands is 155.40 km^2 to be allocated amongst the YFNs.[645]

YFNs have retained Aboriginal title to their settlement lands.[646] A First Nation is to register their title to their fee simple settlement land as soon as possible after the effective date of their settlement agreement.[647] Other settlement lands are not registered because of uncertainty about the effect of registration on Aboriginal title. However, if a First Nation wishes to sell a portion of its settlement land, it will have to register that portion; upon registration the land becomes the same as other fee simple titled land in Yukon.[648]

[644] UFA, c.5.14.1., 5.14.2.
[645] UFA, c.4.3.0., Schedule A.
[646] UFA, c.2.5.1.1.
[647] UFA, c.5.2.3.
[648] *Understanding the Yukon Umbrella Final Agreement*, Chapter 5, Tenure And Management Of Settlement Land, p. 11,12.

What are special management areas?

Special management areas are areas identified and established within a YFN's traditional territory and include areas such as national wildlife areas, national parks, territorial parks, bird sanctuaries and heritage sites. The objective of dealing with special management areas in the UFA is to maintain important features of Yukon's natural or cultural environment while respecting the rights of Aboriginal peoples and YFNs. They may be established in accordance with the UFA pursuant to an YFN's final agreement or pursuant to laws of general application, such as the *National Parks Act*.

How are settlement lands managed?

The *Yukon First Nations Self-Government Act* and YFN self government agreements provide for YFNs to enact laws for management and administration of their settlement lands and for allocation or disposition of rights and interests.[649] Under the UFA, each YFN as owner of settlement land, may:

- enact bylaws for the use of and occupation of its settlement land;
- develop and administer land management programs related to its settlement land;
- charge rent or other fees for the use and occupation of its settlement land; and
- establish a system to record interests in its settlement land.[650] In each YFN's final agreement, each YFN is required to establish and thereafter maintain a public register identifying all rights, obligations and liabilities held on its behalf.[651]

Settlement lands are Canada Lands therefore YFNs in their laws may include a requirement for surveys to be carried out under provisions in the *Canada Lands Surveys Act*. Such a requirement provides quality assurance for boundary definition to those obtaining land rights and interests. To date, several YFNs have opted to have surveys carried under the instructions of the Surveyor General and to have them recorded in the Canada Lands Survey Records.[652]

For sub-surface development by a non First Nation entity where a YFN has title to the surface lands, the surface rights must be acquired

[649] *Yukon First Nations Self-Government Act, 1994,* c.35 Schedule III, Part III, YFN self government agreements, s.13
[650] UFA, c. 5.5.0.
[651] First Nation final agreements, c.2.11.7.2.
[652] Brian Thompson, Head Cadastral Services, Yukon, SGB. January 13, 2010.

from the YFN. In the case of disputes regarding access, an order of the Yukon Surface Rights Board made under the federal *Yukon Surface Rights Board Act*[653] can authorize entry and use of the surface of the land and determine compensation for surface land right holders.

What are the requirements for the survey of settlement land boundaries?

Parcels of settlement land, on the effective date of the individual YFN settlement agreement, are defined by maps and written descriptions. Under the terms of the UFA, the boundaries of settlement land shall be surveyed in accordance with the instructions of the Surveyor General and dealt with by an official plan.[654] When plans of survey of settlement lands are confirmed they replace the prior maps and descriptions.[655]

Settlement land committees are established under the final agreements. Under the terms each YFN identifies and selects site specific settlement land out of proposed site specific land, survey priorities are determined and portions of boundaries of special management areas which should be considered for definition by survey are identified.[656] Site specific lands become settlement lands when the plans of survey of the lands are confirmed.[657]

Although isolated boundary standards have been used for the survey of settlement lands, all boundary surveys must now be monumented every 1 km. As of 2009, approximately 90% of the boundaries of settlement lands for approved final agreements had been surveyed. This includes 1,986 parcels with 16,820 km of boundary. The boundaries of special management areas may be defined by administrative or explanatory plans.[658] As of 2009, 30,750 km of such boundaries were surveyed.[659]

What is the system for registering private interests in land?

Private lands in Yukon are registered in the Land Titles Office in Whitehorse and administered under the *Land Titles (Yukon) Act*[660] by the Yukon Department of Justice. The *Land Titles (Yukon) Act* originated from earlier federal land titles legislation applying to all the territories. As a result, the survey provisions when bringing lands under the Act and when dealing with transfers and other transactions are similar to land titles legislation in the NWT. Other Acts applying

[653] S.C. 1994, c.43.
[654] UFA, c. 15.2.1.
[655] UFA, c. 5.3.4
[656] UFA, c. 15.3.0.
[657] UFA, c. 5.14.1., 5.14.2.
[658] UFA, c. 15.2.2.
[659] Bob Gray. Deputy Surveyor General, Yukon. Telecon December 14, 2009
[660] R.S.Y. 2002, c.130.

to private lands in Yukon include the *Subdivision Act*[661]- which is the umbrella legislation for planning for municipal authorities - and the *Condominium Act*.[662] The *Land Titles Plans Regulations*[663] clearly specify the role of the Surveyor General with regard to surveys. Under the *Regulations* the Commissioner may only approve a plan of survey if it has been examined by the Surveyor General and found to have been carried out in accordance with both the practice prescribed for CLSs and a previously approved sketch plan.[664]

How are surveys managed?

Surveys of Canada Lands in Yukon are made under the *Canada Lands Surveys Act* on a request of a minister of any department of the Government of Canada or a Commissioner administering the lands.[665] SGB - Whitehorse provides a wide range of advice and consultation services on survey related matters to the Yukon Government, the federal government, YFNs and CLSs. The Cadastral Surveys Unit of the SGB regulates surveys in Yukon by issuing survey instructions, reviewing and processing survey plans, and reviewing land descriptions for transfers of administration and control and for orders in council. The Land Claims Unit manages the survey programs, the largest of which is the survey of settlement lands.

Figure 52–GPS work in the Yukon. *Surveyor General Branch.* 2003

[661] R.S.Y. 2002, c.209.
[662] R.S.Y. 2002, c.36, s.6.
[663] Y.O.I.C. 2003/74.
[664] *Land Titles Plans Regulations*, Y.O.I.C. 2003/74, ss.2-6.
[665] *Canada Lands Surveys Act*, R.S.C. 1985, c.L-6, s.25

Acts and regulations relating to lands in Yukon

Type of Transaction	Survey Requirements (Statutory or other Authority)
TERRITORIAL LANDS (LANDS TRANSFERRED ON APRIL 1, 2003)	
SURFACE RIGHTS	
Sales (fee simple)	*Territorial Lands Regulations, s.8*
MINES AND MINERALS	
Quartz claim leases	*Quartz Mining Act*, several sections.
Grant of placer claims	*Placer Mining Act*, s. 39.
Base Lines	*Placer Mining Act*, s. 40.
Dredging leases	*Dredging Regulations*, s.7.
OIL AND GAS	
Exploratory wells and development wells and other oil and gas facility sites.	*Oil and Gas Drilling and Production Regulations*, ss.17, 24. *Oil and Gas Disposition Regulations*, ss.2-4. *Oil and Gas Licence Administration Regulations*, ss.32-34.
YUKON LANDS (PRIOR COMMISSIONER'S LAND)	
Sales	*Lands Regulations*, ss.1(2),34(1)(2), 61(2)i), 63(a), 75(4). Dealt with as territorial lands.
Leases with option to purchase or is for agriculture land	*Lands Regulations*, ss. 60(2)b)i), 75(5 Dealt with as territorial lands
TITLED LAND	
Issuance of title on receiving a grant (notification),	*Land Titles Act*, s. 47(4). *Territorial Lands Regulations*, s. 8(1)(2).
Registration of title in name of Her Majesty in right of Canada or the Commissioner	
Other surveys under the Land Titles Act.	*Land Titles Plans Regulations*
Condominium Surveys under the Condominium Act	*Condominium Act*, s.6.
SETTLEMENT LANDS	
Fee simple settlement lands registered in the land titles office.	Provisions in the *Land Titles Act* and *Land Titles Plan Regulations*.
Settlement lands (not registered in the land titles office).	*Canada Lands Surveys Act*.

10 Offshore

What about rights in the offshore?

The definition of property in the offshore has been a matter of contention since the oceans were capable of being exploited. This chapter explores the origins of boundary definitions in Canada's offshore, through its evolution in early claims by maritime powers, through historical and United Nations treaties, to its present state.

What is the offshore?

When we speak of the offshore, images abound of: secretive financial institutions, wire transfers, and James Bond movies. For the purposes of this chapter, however, the term has a whole other meaning. It involves far more water, and far fewer laser beams. The accepted definition of the offshore is: "the submerged lands and the subsoil below it, the water column and the air above it, seaward from the low water line of the State's mainland and islands."[666]

Canada Lands in the offshore comprise some 6.4 million square kilometers[667] and are defined as: "any lands under water belonging to Her Majesty in right of Canada … which the Government of Canada has power to dispose."[668]

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[666] Calderbank et al. *Canada's Offshore: jurisdiction, rights, and management.* 3rd ed. ACLS-CHA. 2006
[667] Calculated from "Offshore" and "Exclusive Economic Zone" polygons in: Atlas of Canada. *National Frameworks Data, Administrative Areas.* v.6.0
[668] *Canada Lands Surveys Act* .R.S.C. 1985. c. L-6, sec 24(1)(b)

What is the international law of the sea?

The international law of the sea is a compilation of various sovereign nations' agreements, customary practices, general principles, and judicial decisions.[669] The law of the sea has a long history. Much of it dates back to early merchants, as trade between nations has historically been of pivotal importance.[670] One of the first examples of public international law in the oceans came about in 1023: the monks of Canterbury were granted salvage rights in front of the port of Sandwich in the *Charter of King Cnut*.[671]

Two of the early European maritime powers, Spain and Portugal, divided the oceans amongst themselves in a series of Treaties. The *Treaty of Tordesillas* in 1494, for instance, created a boundary at 45° west longitude, with the Portuguese controlling everything to the east of the line, and the Spanish controlling everything to the west.[672] Thirty years later, owing to large scale expeditions into the Pacific Ocean, Spain and Portugal ratified the *Treaty of Saragossa* to resolve disputes over influence in Asia. This created a second meridian at about 142° west longitude, with the Portuguese controlling everything to the west of the line, and Spain controlling all to the east.[673]

Such vast expanses of ocean ownership, however, were clearly untenable, even for maritime powers like Portugal and Spain. When Sir Francis Drake circumnavigated the globe (1577–1580) for the English,[674] it illustrated poignantly the inability of the Portuguese and Spanish to control all the seas. Coupled with strong colonies being established by maritime powers like France and the Netherlands, it was clear that delimitation as defined in the *Treaty of Tordesillas* and *Saragossa* was little accepted.

Another cornerstone of the international law of the sea, the territorial sea, appears to have been contemplated as early as the fourteenth century.[675] The territorial sea was defined by the doctrine of effective control, in that a state can claim sovereignty over an area in which it can demonstrate control. To define the territorial sea, this doctrine was made manifest typically in three ways: 1) how far a cannon could shoot from shore, 2) line of sight, or 3) some fixed distance. Three nautical

[669] *Statute of the International Court of Justice.* Article 38
[670] Anand. *Origins and Development of the Law of the Sea.* The Hague. 1982
[671] Tanja. *The legal determination of International Maritime Boundaries.* Deventer. 1990
[672] Swarztrauber. *The three mile limit of territorial seas.* Annapolis. 1972
[673] Elton. *The new Cambridge modern history.* Vol. 2 (1520-1559). Cambridge University Press. 1990
[674] See Bawlf. *The secret voyage of Sir Francis Drake.* Douglas and McIntyre. 2003
[675] Tanja. 1990. pg 1–20

miles (Nm)[676] was, to a large extent, considered an international standard by the early 1800s, but some nations continued to claim territorial seas of up to nine Nm.[677]

The acceptance of the existence of territorial seas inevitably led to overlap and conflict among nations. The first attempt to resolve such overlaps came in The Hague Codification Conference in 1930. An equidistant line to resolve territorial sea overlaps was proposed, but ultimately not ratified. With the participating nations' unwillingness to agree on a single territorial sea limit, the three mile nautical sea was called into question as international law.[678]

Larger expanses of nation's coastlines began to be claimed, beginning with the United States in 1945. The Truman Proclamation was the first claim to "the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", and was based on the justification that "…the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it."[679] The U.S. claim to the continental shelf was defined to be all that area "covered by no more than 100 fathoms of…water".[680] Several other nations followed suit, with continental shelf claims ranging from 5 to 300 Nm.[681] With vaster expanses of the ocean being claimed as sovereign territory, it was clear that the concept of the "free sea" was not so free anymore. The international law of the sea was a hodgepodge of individual nations' claims and assertions.

What is UNCLOS?

The United Nations Convention on the Law of the Sea (UNCLOS) is an international agreement outlining the extent of rights and responsibilities in the world's oceans. UNCLOS went through three iterations, aptly named UNCLOS I, II and III.

UNCLOS I took place in Geneva in 1958. Eighty-six delegates attended, and four conventions (and one optional protocol) were signed.[682] The

[676] Historically a nautical mile (Nm) was equal to one minute of arc along a meridian, but as this distance changes depending upon your location on the planet, the International standard is that a Nm = 1.15 miles. National Bureau of Standards. *The International Nautical Mile.* Appendix 4. 1954

[677] Swarztauber. 1972. pg. 23–50. The modern day territorial sea limit of 12 nautical miles was not reached by cannon fire until the early 1900s.

[678] Sanger. *Ordering the Oceans.* University of Toronto Press. 1987. pg. 14

[679] *Truman Proclamation on the Continental Shelf.* Proclamation 2667. 1945

[680] Verma. *Introduction to Public International Law.* PHI. 2004

[681] Anand. 1982. pg. 165

[682] *Convention on the Territorial Sea and Contiguous Zone, 1958.* U.N. Treaty Series, vol. 516, p. 205; *Convention on the Continental Shelf, 1958.* U.N. Treaty Series, vol. 499, p. 311; *Convention on the High Seas, 1958.* U.N. Treaty Series, vol. 450, p. 11, p. 82; *Convention on Fishing and Conservation of Living Resources of the High Sea, 1958.* U.N. Treaty Series, vol. 450, p. 82

convention was largely deemed to be an enormous success in that the signed conventions included agreements on the continental shelf, the territorial sea, conservation of living resources, and the high seas. Two notable omissions were problematic, however: the actual extent (in numbers) of the territorial sea, and how far fishing rights extended past the territorial sea.

As the ink was still drying on the UNCLOS I conventions, the "Cod War" between Iceland and Britain was in full swing. Iceland had claimed a territorial sea (and exclusive fishing rights) of 12 Nm. Britain refused to recognize the international legitimacy of such a limit and continued fishing within 4 Nm of Iceland. Several confrontations followed. On September 4, 1958, an Icelandic patrol boat attempted to seize a British fishing vessel inside the 12 Nm limit, but was prevented from doing so by a British navy frigate. A month later, an Icelandic patrol ship fired three shots across another British fishing vessel, forcing a British retreat. A month after that, shots were again fired at a British fishing vessel within the 12 Nm Icelandic claim. The British navy arrived and threatened to sink the Icelandic patrol ship, and the British fishing vessel escaped.

Ultimately Britain and Iceland conceded that any future disputes in regards to fishing zones would be sent to the International Court of Justice (ICJ)[683] for resolution. The "cod war", however, highlighted the importance of a specific territorial sea limit.[684] The United Nations passed a resolution in December of 1958 for a second convention on the law of the sea (UNCLOS II) to tackle the unresolved issues.

Meeting again in Geneva, UNCLOS II took place in 1960, with the goal of addressing the territorial sea limit. A joint Canada/U.S. proposal for a six mile territorial sea and a further six mile exclusive fishery zone was defeated by one vote. UNCLOS II, therefore, was considered a failure as it produced no tangible results. Following UNCLOS II, it became increasingly clear that competing and conflicting interests in the oceans would never cease until the failures of UNCLOS II could be addressed.[685]

In 1967, Arvid Pardo (then a UN ambassador for Malta) proposed to the UN that the ocean and the ocean floor beyond national jurisdiction be part of the "common heritage of mankind", and that any wealth

[683] The International Court of Justice (ICJ) is the "principal judicial organ of the United Nations". *Statute of the International Court of Justice.* Article 1

[684] Johannesson. How 'cod war' came: the origins of the Anglo-Icelandic fisheries dispute, 1958-61. *Historical Research*. Vol. 77, pp. 543–574. 2004

[685] Anand. 1982. pg 185–189

accrued in that area should be used to help bridge the gap between wealthier and poorer nations.[686] Pardo's speech led to the establishment of a UN ad-hoc committee to study his suggestions, and eventually to the acceptance of the "common heritage of mankind" as a crucial component of the law of the sea.[687]

The same committee tasked with examining Pardo's suggestions was also tasked with preparing for the third Conference on the Law of the Sea (UNCLOS III). The preparations themselves took five years (1967-72), and the conference itself took nine years (1973-82) before it was concluded. On its completion, UNCLOS III was regarded as "possibly the most significant legal instrument of the century".[688] The convention itself was a "package deal" to be accepted as is, or not at all. The breadth of the convention was impressive, dealing with (among others):

- navigational rights,
- territorial sea limits,
- economic jurisdiction,
- legal status of resources on the seabed beyond the limits of national jurisdiction,
- passage of ships through narrow straits,
- conservation and management of living marine resources,
- protection of the marine environment,
- a marine research regime and,
- a binding procedure for settlement of disputes between States

When a government signs the convention it agrees not to take any action which might be in conflict with the purposes of the conference. While being a signatory to the conference is relevant, the more pertinent action is that of ratification (or accession). Once a government ratifies the conference it agrees to be bound by all its terms. UNCLOS III required 60 ratifications before it became effective, and it came into force in November 1994. Some 159 countries have ratified UNCLOS III. Canada became a signatory to UNCLOS in December 1982, and ratified it in November of 2004.[689]

[686] The actual use of "common heritage of mankind" was adopted in UNCLOS III. *United Nations Convention on the Law of the Sea*. Article 138. U.N. Treaty series 397. 1982
[687] *Declaration of Principles Governing the Seabed and Ocean Floor.* U.N. G.A. Res. 2749. Dec. 12, 1970
[688] U.N. Division for Ocean Affairs. *The United Nations Convention on the Law of the Sea (a historical perspective)*. 1998
[689] U.N. Division for Ocean Affairs. *Chronological list of ratifications, accessions and successions to the Convention and the related Agreements*. 2009

What are the accepted boundaries in the offshore?

The accepted boundaries in the offshore come from UNCLOS. There are few nations in the world who do not accept the boundary specifications in the conference as binding.[690]

Almost all the boundaries in the offshore are a function of the baselines of coastal nations. UNCLOS provides for two types of baselines: normal and straight. Normal baselines are defined in Article 5 as the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal state";[691] essentially, the line of average low tide. Straight baselines are defined in Article 7 to be used "in localities where the coastline is deeply indented or cut into, or if there is a fringe of islands along the coast in its immediate vicinity".[692] Simply put, if the low-water line is too sinuous or there are large openings or obstacles (river mouths, bays, islands) then a straight line can be used for practical purposes.

From the established baselines, "all the waters on the landward side… form part of the internal waters of the State".[693] Internal waters are considered to be under absolute control of the state, and are effectively treated as land covered by water. On the seaward side on the baseline, the territorial sea extends out 12 Nm. Within the territorial sea, the authority of the coastal nation is absolute. Any activities such as resource extraction, fisheries, navigation, or scientific research require the express permission of the State. The authority extends over not only the water in this 12 mile limit, but also over the ocean floor, the subsurface of the ocean floor, and all the airspace above the water.[694] Other nations do have a right of innocent passage through the territorial sea, so long as it is not "prejudicial to the peace, good or the security" of the coastal nation.[695]

The contiguous zone extends up to an additional 12 Nm past the territorial sea, making it at a maximum 24 Nm from the baseline. Within the contiguous zone, the coastal nation has the power to enforce laws in four regards: customs, immigration, taxation, and the environment (pollution).[696]

[690] The United States is perhaps the most notable in not ratifying UNCLOS – See Kogan. What goes around comes around: how UNCLOS ratification will herald Europe's precautionary principle as U.S. Law. *Santa Clara Journal of International Law*.1. pp. 23–176. 2009
[691] UNCLOS – Part II, Article 5
[692] UNCLOS – Part II , Article 7, para 1
[693] UNCLOS – Part II, Article 8, para 1
[694] UNCLOS – Part II, Article 2, para 2
[695] UNCLOS – Part II, Article 19, para 1
[696] UNCLOS – Part II, Article 33

Extending out 200 Nm, and encompassing both the territorial sea and contiguous zone is the exclusive economic zone (EEZ). The EEZ was originally introduced to attempt to mitigate conflicting claims to fisheries. Other nations have the right of navigation, over flight and the right to lay pipelines and cables on the seafloor in the EEZ, with the coastal nation having:

> Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[697]

Geologically, the continental shelf is the natural prolongation of the continental land mass, until it drops off (continental slope) to the abyssal plain (flat areas of the ocean floor). Like any geological feature, the continental shelf varies geographically. Recognizing this, UNCLOS defined the continental shelf pragmatically as:

> The seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines.[698]

Nations have a right to a minimum 200 Nm continental shelf, regardless of the actual width of its geological continental shelf. A claim to a continental shelf beyond 200 Nm is possible, but requires delineation "by straight lines not exceeding 60 Nm in length" by the coastal nation.[699] Continental shelf claims, however can not exceed 350 Nm or 100 Nm from the 2500 m isobath (the line connecting an ocean depth of 2500 m).[700]

How do we determine offshore boundaries?

Delineating both the territorial sea (12 Nm) and the contiguous zone (24 Nm) can be done in one of three ways: a) replica line, b) conventional line, and c) envelope line.[701] The replica line is a duplicate of the baseline offset out at sea. The replica line, however, is impractical on very sinuous baselines because it makes the line at sea

[697] UNCLOS – Part V, Article 56, para 1(a)
[698] UNCLOS – Part VI, Article 76, para 1
[699] UNCLOS – Part VI, Article 76, para 7
[700] UNCLOS – Part VI, Article 76, para 5
[701] Shalowitz. *Shore and sea boundaries.* USGS. 1962

far too erratic to locate. A direct copy can also result in the territorial sea or contiguous zone boundary being too close to the baseline at multiple points (fig. 53).

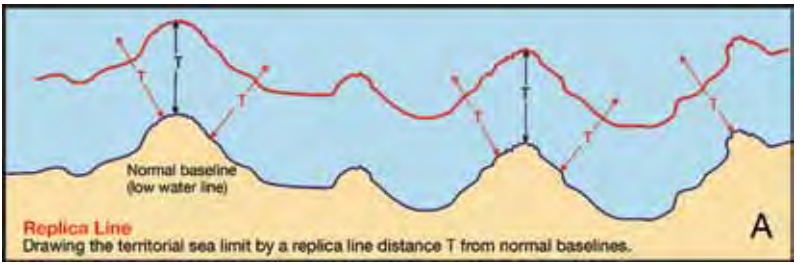

Figure 53–Replica line. *Association of Canada Lands Surveyors*. 2006

Conventional lines vary by the nature of the baseline, but generally involve a combination of straight and curved segments. Depending on how it is laid out a conventional line can also result in multiple locations being the incorrect distance from the baseline (fig. 54).

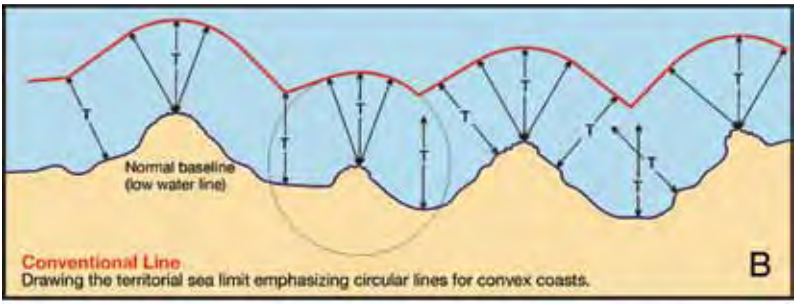

Figure 54–Conventional line. *Association of Canada Lands Surveyors*. 2006

The envelope line is defined as "a line every point of which is at a distance equal to the breadth of the territorial sea from the nearest point of the baseline."[702] In practice this is typically done by the drawing of a series of intersecting arcs, with the radius of the arcs being equal to the distance of the territorial sea and contiguous zone (fig. 55). Where the baseline is straight, the arc is ignored and replaced with a straight line segment (fig. 56).

[702] Calderbank et al. 2006. pg. 76

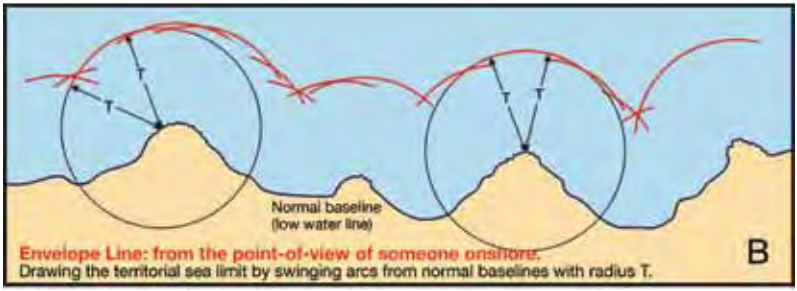

Figure 55–Envelope line. *Association of Canada Lands Surveyors*. 2006

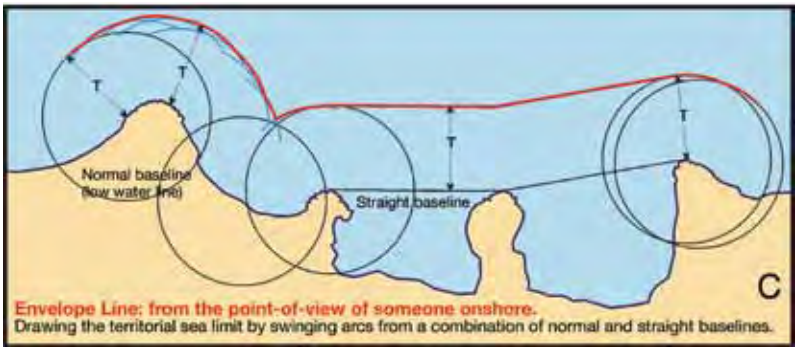

Figure 56–Envelope Line. *Association of Canada Lands Surveyors*. 2006

The exclusive economic zone (EEZ), as it is 200 Nm distant from the baseline, cannot use the same delineation principles as the territorial sea or contiguous zone. If one were to use the same principle (replica line, for instance), the EEZ limit would be incorrectly located due to distortions caused by map projections. Instead, geodetically computed points are computed (and then plotted) for the outer limit of the EEZ.

If no extended continental shelf is claimed by the coastal nation, then the limit of the continental shelf is the same as the EEZ (200 Nm). If an extended continental shelf is claimed, it is up to the coastal nation to map the physical limit of the continental shelf beyond 200 Nm. The continental shelf boundary is to be drawn as a series of straight lines between the greater of:

1) the point where the thickness of sedimentary rocks is at least 1% of the shortest distance to the foot of the slope, and
2) 60 Nm from the foot of the slope[703]

[703] UNCLOS – Part VI, Article 76, para 4

However, the limit of the continental shelf is also constrained to 350 Nm from the baseline or 100 Nm from the 2500 m isobath, whichever is greater (see fig. 57).[704] Determining the extended continental shelf is both laborious and expensive endeavor that requires mapping of: a) the gradient rate of change near the area at the foot of the continental slope, b) thickness of the sedimentary rocks at (and beyond) the foot of the slope, and c) locating the 2500 m isobath.[705] These features must be mapped at intervals not exceeding 60 Nm between observations,[706] and then must be reviewed and approved by the *Commission on the Limits of the Continental Shelf*.[707] The Commission meets twice a year at the UN headquarters in New York to consider submissions.[708]

What are Canada's offshore boundaries?

In principle, Canada's offshore boundaries are those defined by the parameters in UNCLOS (12 Nm territorial sea, 200 Nm EEZ, for instance) and set out in federal legislation in the *Oceans Act*.[709] However, there are often many historical, political and economic factors at play. If Canada's boundaries were drawn strictly from the parameters in UNCLOS, we would share overlaps with the United States, Denmark, Russia, and France. Some of the overlaps have been resolved by agreement or international adjudication while others are still unresolved.

In 1846, for instance, the 49th parallel boundary between the United States and Canada was extended out to sea off the west coast. Vancouver Island, however, was in the way, so the boundary had to be redirected south. The U.S. and Great Britain (for Canada) agreed that the boundary would run through "the middle channel which separates the Continent from Vancouver's Island".[710] Unfortunately, the boundary was drawn based on outdated maps, with the result that the line actually ran through a series of islands. One of these was San Juan Isle, and in 1859 a pig belonging to the Hudson Bay Company (on the Canadian side of the island) began routing around in a potato crop of an American farmer (on the American side). Thus began the "Pig War". The farmer shot the HBC pig, refused to reimburse for damages, over 400 U.S. troops were brought in to "protect American citizens",

[704] UNCLOS – Part VI, Article 76, para 5
[705] Calderbank et al. 2006. pg 87
[706] UNCLOS – Part VI, Article 76, para 7
[707] UN. *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf.* para 7.2.11. 1999
[708] UN. *Commission on the Limits of the Continental Shelf (CLCS) – Purpose, functions, and sessions.* 2009
[709] *Oceans Act.* 1996, c.31
[710] *Treaty Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains.* Signed at Washington, June 15, 1846

and a British Naval attack was only called off at the last second.[711] The standoff lasted until 1872 when both parties agreed to accept the arbitration of the Emperor of Germany on the location of the boundary, whose decision coincided with the American claim through the "Canal de Haro".[712]

Other less dramatic adjudications include the *Gulf of Maine* case, in which the ICJ decided in 1984 that four latitude and longitude points connected by three geodetic lines were the Canada-U.S. EEZ boundary in the Gulf of Maine and Georges Bank area.[713] In 1992, the maritime boundary between Canada and France around the French islands of St. Pierre and Miquelon was decided by arbitration. This left an area of French control in Canada's territorial sea and EEZ off of Canada's east coast.[714] Canada has also resolved some of its offshore boundaries through agreement. In 1973, for example, Denmark and Canada agreed on the limit of the continental shelf between Greenland and the Canadian Arctic to be a series of geodesic lines between latitudes of 61°N and 75°N.[715]

Areas of contention still do exist. Where the Canada/U.S. boundary extends into the Beaufort Sea, for instance, has been a source of competing claims mostly due to potential resource revenues. Canada has claimed the extension of the 141st meridian into the Beaufort, while the U.S. has claimed an equidistant line - the two locations differ substantially.[716] Hans Island, a small uninhabited rock between Greenland and Canada in Kennedy Channel is claimed by both Canada and Denmark. The continental shelf boundary agreed to by both countries in 1973 stops within a few hundred metres on either side of the Island.[717] Claims to an extended continental shelf in the Atlantic will most likely require negotiation to resolve overlaps with both Denmark (in the Labrador Sea), and with the United States (on Georges Bank). Resolution of overlapping claims to an extended shelf in the Arctic will most likely require agreements with the United States, Denmark, and Russia.[718]

[711] Ferguson. *Canadian History for Dummies*. Wiley. 2005
[712] *Protocol of a Conference at Washington, March 10, 1873, Respecting the Northwest Water-Boundary*
[713] ICJ. *Case concerning delimitation of the maritime boundary in the Gulf of Maine Area*. Judgment of October 12, 1984.
[714] de la Fayette. The Award in the Canada-France Maritime Boundary Arbitration. *The International Journal of Marine and Coastal Law*, v 8 - n1, pages 77–103. 1993
[715] *Agreement relating to the delimitation of the continental shelf between Greenland and Canada*. Signed at Ottawa December 17, 1973. U.N. Treaty 13550
[716] Rothwell. *Maritime boundaries and resource development: options for the Beaufort Sea*. Calgary: Institute of Research Law. 1988
[717] Calderbank et al. 2006. pg. 165
[718] DFAIT. *Defining Canada's Extended Continental Shelf*. 2009

What is the extent of Canada Lands in the offshore?

The general rule is that provincial jurisdiction ends at the ordinary low water mark (OLWM), and federal jurisdiction (Canada Lands) takes over.[719] Much like the application of the UNCLOS principles, however, things can get murky with competing claims between the provinces and Canada. The Department of Justice is responsible for giving Canada's official position on federal jurisdictional matters, and the Privy Council Office is responsible for negotiating these matters with the Provinces. As examples:

1) In 1866 the United Kingdom established the Colony of British Columbia to be bounded "to the west by the Pacific Ocean".[720] In 1984, the Supreme Court of Canada held that the meaning of "Pacific Ocean" was the open sea to the west of Vancouver Island (not the mainland). In doing so, the land covered by the waters in the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait was deemed to be internal waters of British Columbia.[721]

2) Hecate Strait, between the BC mainland and the Queen Charlotte Islands, is asserted to be Canada Lands, in that "administrative responsibility for the management of natural resources in that area lies with the federal Minister of Natural Resources".[722]

3) Hudson's Bay and James Bay are considered to be Canada Lands as the boundaries of Manitoba, Ontario, and Quebec terminate at the OLWM. Where there are rivers or estuaries, closing lines are drawn from headland to headland, and everything downstream is considered Canada Lands. Nunavut consists only of islands south of 60°N in Hudson's and James Bay. The islands, by definition, must reside above the line of OLWM.

4) The Bay of Fundy is likely internal waters of New Brunswick and Nova Scotia because the original description of Nova Scotia in 1621 included the Bay: "and then towards the North by a direct line, passing Entrance or mouth of that Great Bay … to a River commonly called by the name of St Croix". New Brunswick was described in 1786 as also including part of the Bay: "to the South by a Line in the Center of the Bay of Fundy from the

[719] *Reference re: Offshore Mineral Rights of British Columbia,* [1967] SCR 792
[720] *British Columbia Act*, [1866] (U.K.), 29-30 Vict., c. 67.
[721] *Re Attorney-General of Canada and Attorney-General of British Columbia: Reference re Ownership of the Bed of the Straight of Georgia and Related Areas ,* [1984], 1 S.C.R. 388
[722] NRCAN. *Draft offshore renewable energy in Canada: A federal policy perspective.* OREG fall symposium. 2007

River St Croix aforesaid to the Mouth of the Musquat River."[723] When Nova Scotia and New Brunswick entered Confederation they were to "have the same limits as at the passing of this Act."[724]

5) The Gulf of St. Lawrence is considered by Canada to be internal waters and under federal jurisdiction.[725] There are a few exceptions within the Gulf, though: The Bay of Chaleurs is considered Provincial jurisdiction and is divided by a median line between Quebec (to the North) and New Brunswick (to the South);[726] Miramichi Bay (and other smaller Bays in the area) might be considered internal waters of the Provinces;[727] Iles de la Madeleine and Anticosti Island are both considered part of Quebec; and the St. Lawrence River is considered part of Quebec as it is enclosed in the boundary description of Quebec in the *Royal Proclamation of 1763*: "…crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John."[728]

What of resource development?

Most resource development is taking place off the coasts of Newfoundland/Labrador and Nova Scotia. The first offshore oil production in eastern Canada was the Cohasset/Panuke project off Nova Scotia in 1992; the Hibernia Development project followed 5 years later off the Newfoundland coast; and the first offshore gas production started in 1999 with the Sable Offshore Energy Project.

[723] La Forest. Canadian inland waters of the Atlantic provinces and the Bay of Fundy incident. *The Canadian Yearbook of International Law 1963.* p. 156
[724] *Constitution Act,* 1867, 30 & 31 Victoria, c.3 (U.K)
[725] Prime Minister St. Laurent declared in 1949 that he hoped the Gulf would become "an inland sea" and "territorial waters of Canada" (Debates of the House of Commons, February 8, 1949). This sentiment was affirmed in 1957 by the Diefenbaker government (Debates of the House of Commons, November 14, 1957) and again by the Trudeau government in 1975 (Debates of the House of Commons, March 7, 1975)
[726] *An act for the settlement of the boundaries between the Provinces of Canada and New Brunswick,* 1851, 14 & 15 Victoria c.63 (U.K.)
[727] La Forest. 1963. p. 149
[728] *Royal Proclamation of 1763.* para 2

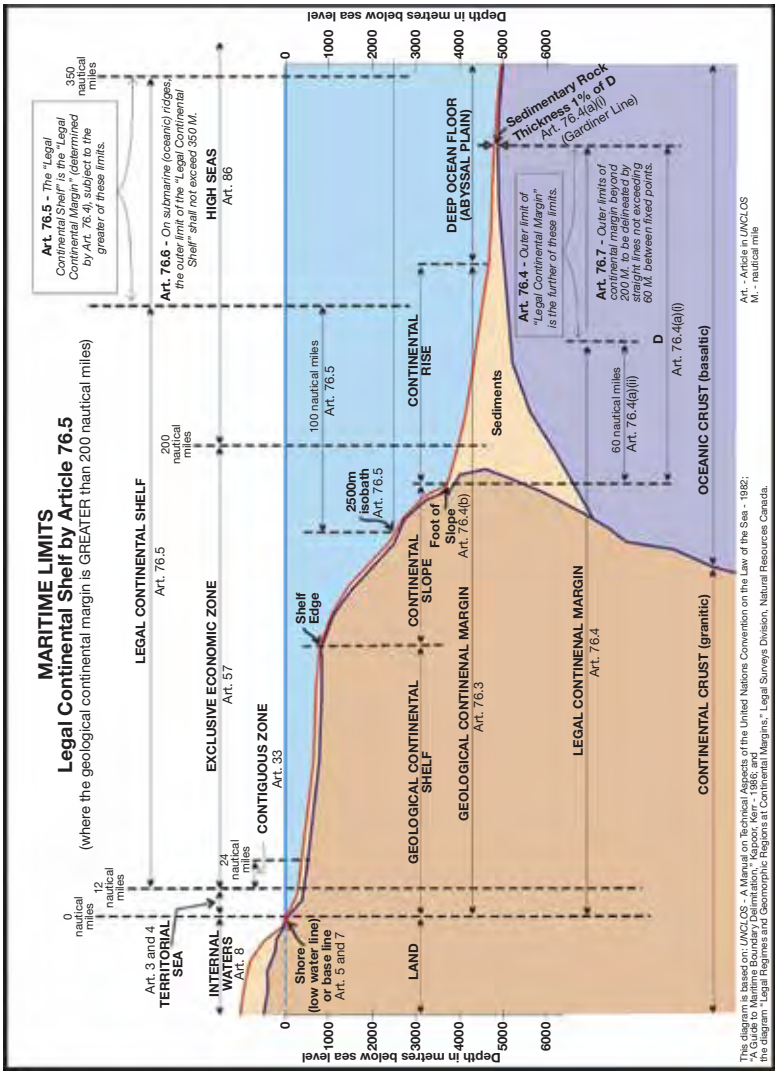

Figure 57–Offshore limits as defined in UNCLOS. *Association of Canada Lands Surveyors.* 2006

The administration of the offshore resource development began with a dispute between Newfoundland and Canada regarding the rights to the continental shelf. In 1984 the Supreme Court of Canada held that "Continental shelf rights arise as an extension of the coastal State's sovereignty, but it is an extension in the form of something less than full sovereignty".[729] Or, in effect, neither Canada nor Newfoundland owned the Continental Shelf. This decision led to the signing of Accords between Canada and Newfoundland in 1985,[730] and between Canada and Nova Scotia in 1986.[731] Both Accords note that the Government of Canada cedes most of its authority (although not ownership) to the offshore petroleum boards[732] and the Provincial governments. In this sense, the accords ignore the constitutional division of powers between federal and provincial governments and set up a joint management structure for offshore resource development.[733] The accords were implemented by enacting federal and provincial legislation.[734]

What is the role of the Surveyor General Branch in the offshore?

The Surveyor General Branch (SGB) sets standards and manages surveys for development (such as exploration for, and extraction of, oil and gas) on Canada Lands in the offshore. SGB is also leading – in a partnership with Fisheries and Oceans Canada – a study into the need for, and application of, a marine cadastre in Canada's offshore.

Administrative responsibility for oil and gas and for minerals is divided between Indian and Northern Affairs Canada (INAC) to the north and Natural Resources Canada (NRCan) to the south of a line of administrative convenience.[735] Two directorates of INAC – Northern Oil and Gas and Mining, respectively - administer resources north of the line; petroleum and minerals south of the line are administered by the Energy Sector and the Mineral Policy Sector, respectively, of NRCan.

Surveys for oil and gas development are captured by the *Canada Oil and Gas Land Regulations*, which are not yet supplanted by regulations

[729] *Reference by the Governor-in-Council concerning property in an legislative jurisdiction over the seabed and subsoil of the continental shelf offshore Newfoundland.* [1984] 1 S.C.R. 86
[730] *The Atlantic Accord Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on offshore oil and gas resource management and revenue sharing.* February 11, 1985
[731] *Canada-Nova Scotia Offshore Petroleum Resources Accord.* August 26, 1986
[732] Canada-Newfoundland Offshore Petroleum Board (CNOPB) and Canada-Nova Scotia Offshore Petroleum Board (CNSOPB)
[733] Pettie. Are royalty agreements required for Canada east coast offshore oil and gas. *Dalhousie Law Journal.* 24 (151). 2001
[734] *Canada-Newfoundland Atlantic Accord Implementation Act*. S.C. 1987 c. 3; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementaion Act*, S.C. 1988, c.28
[735] *Canada Oil and Gas Land Regulations*, ss. 2 & 36 and Schedule VI.

to be enacted pursuant to the *Canada Petroleum Resources Act*.[736] Whereas the existing regulations refer to the NAD 27 datum (s.9), the proposed regulations refer to the NAD83(CSRS) datum. Specific instructions are not needed for oil and gas surveys in the offshore, with one exception. Specific survey instructions are required for control surveys in support of surveys of oil and gas rights.[737] Although mineral rights are granted pursuant to the *Federal Real Property Act*, there is little legislative mandate for surveys of offshore mineral rights.

[736] As of July 2010.
[737] See chapter C4 of the SGB *General Instructions for Surveys, e-Edition*.