Assembly of First Nations

NEGOTIATONS BACKGROUND PAPER

Issue Statement

The commitments made by this government to make real progress on First Nations issues are very important and much needed. However, these commitments can not be realized without a close examination of how negotiations are currently undertaken, particularly the policy framework and the assumptions underlying that policy framework.

The path that connects First Nations rights and progress on development is the negotiation process and the relationship between the negotiating parties. In other words, we are unlikely to achieve healthy, economically vibrant First Nations communities without the implementation of our collective rights to resources and government and we are unlikely to achieve implementation of rights without attention to the fairness of the negotiation process.

1. Introduction

Canada and First Nations relations have not improved to any significant degree despite constitutional reform, significant court decisions supporting Aboriginal and treaty rights, policy and program tinkering, and increased spending. Likewise the unacceptable socio-economic conditions experienced by First Nation peoples persists. The gap in the quality of life between First Nations and Canadians as a whole is not closing quickly enough by any standard. These are facts on which Canada and First Nations agree.

The Prime Minister has stated that negotiations between First Nations peoples and the Crown is the preferred approach for defining their relationships, instead of leaving it to the courts. Indeed, as recently as November 18, 2004, the Supreme Court of Canada made the same point that they have been repeating since rendering their first decision on section 35, *Constitution Act, 1982* in the *Sparrow* case in May 1982. In the recent decision the SCC emphasized that honourable negotiations was the standard and process to achieve reconciliation:

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

supra, at para. 186, quoting Van der Peet, supra, at para 31." (Haida Nation v. British Columbia, para. 17)

"Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and too define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and it is always assumed that the Crown intends to fulfil its promises" (Badger, supra, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests." (Haida Nation v. British Columbia, para. 20)

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Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. (Haida Nation v. British Columbia, para. 25)

From a First Nations perspective, there are issues of fairness to address that affect the honour of the Crown.

- First of all, existing policies have not changed in any way to reflect the many significant developments in the law since key policies such as the claims and self-government policies were first devised.
- Second, existing policy frameworks and negotiation processes reflect an old-fashioned and discredited win-lose adversarial way of thinking.
- Further, existing policies assume an equality of bargaining position. They do not take into account in their design or policy framework the actual power imbalance between the parties and how this affects both process and outcomes. The slow progress of negotiations is a symptom of this fundamental problem.

It is a conviction of many First Nations that we are fundamentally at a disadvantage by negotiating in processes where the ground rules are controlled by the other side and where the process aims to avoid rather than embrace the clear recognition of important constitutional rights. A forum is needed in which to squarely face these issues. Otherwise, there cannot be fairness, there cannot be reconciliation and there cannot be a just resolution.

It is no wonder, then, that the process has become extremely adversarial with a "winner-loser" scenario. Of course, no one wants to be the "loser" especially the government and the

ability to control the outcome of so called negotiations can be assured by ignoring constitutional and legal developments and maintaining the power imbalance.

Negotiations need to produce real outcomes including the implementation and protection of rights. Endless negotiations and lack of agreement is not an acceptable outcome. Therefore, the negotiation process, as between the Crown and First Nations, must be redesigned and has to be mutual in design and adherence.

2. Abandoning the Colonial Status-Quo

As history shows, the relationship between First Nations and the Crown has been adversarial, with mistrust and a lack of a level playing field inhibiting the successful negotiation of issues. This relationship must be cast aside. In its place, a new relationship which recognizes the unique place of First Nations in Canada must be developed and nurtured.

Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.

Based on experience and analysis of negotiation results thus far, it is obvious that principles and practices which create impasses, and long and costly processes, must be abandoned. Such principles and practices include:

Canada's Role in Treaty Negotiations

- Under Section 91(24) the Government of Canada has the constitutional authority to address the continued existence of First Nations' Aboriginal title, rights and other interests in, and to, their respective traditional territories. However, rather than assuming the leadership role that this constitutional authority entitles it to, Canada has been deferring it to the provincial governments.
- This is not to say that the tri-partite negotiations should be abandoned, but rather that it is essential for Canada to assert its leadership role in negotiations.
- Federal negotiating mandates are developed, approved and implemented in secret and primarily to advance federal interests at the expense of First Nations needs and aspirations. The federal negotiating mandate should reflect the advancement of both First Nations and Crown interests.

Comprehensive Claims Policy

- The federal comprehensive claims policy is outdated and inconsistent with the common law in that it aims to achieve finality with respect to 'land-based' Aboriginal rights.
- Furthermore, there is a fast growing body of case law, primarily focusing on consultations and accommodations that articulate the Crown's fiduciary duty to protect First Nations' Aboriginal rights, title and interests.

- It is beyond doubt that Canada's current 'one size fits all' approach is neither just nor workable. Such an approach simply cannot accommodate the diversity among First Nations in Canada, therefore, the federal negotiating mandates must respond to such diversity.

Certainty

- For First Nations the desire for certainty on the part of the crown is interpreted as finality which is contrary to Canadian constitutional and common law that embraces the constitution as a living tree capable of change, modernization and evolution.
- The governments are proposing certainty models that are incomplete and, therefore, unworkable. In particular, they do not provide for the resolution of potential issues that conceivably may arise. Each and every right or area of jurisdiction and exercise of power cannot be contemplated at the time that a treaty is being negotiated and there are legal mechanisms that can enable a treaty to evolve in response to legal or other changes without formal amendment, such as when replacement rights are need due to the diminishment of a negotiated right.
- First Nations are concerned that Canada and the provinces are trying to eliminate the current legal interpretive principles that First Nations fought hard to gain through the proposed certainty provisions. Another concern is that First Nations governance powers may be set out in separate agreement that is not protected under section 35.
- Canada must abandon its policy of requiring a blanket release from "'all claims in relation to past infringements of any Aboriginal rights, which infringement occurred before the effective date of an agreement", currently found in AIPs. This captures both land and non-land based infringements and raises serious concerns, given the governments are seeking agreements that are not protected under section 35. It is unreasonable to expect First Nations to release their section 35 rights for agreements that are not protected under section 35, while also seeking a release for claims of past infringements without compensation.

Self-Government

- The existing inherent right policy was developed unilaterally by the federal government contrary to what the Supreme Court of Canada has been declaring with respect to consultation, the fiduciary relationship and reconciliation.
- The policy has been rejected by First Nations and has not produced the desired results, therefore, needs to be revisited in its entirety.

Lands and Resources

- The focus of effort on the part of the federal government appears to be to minimize First Nations control of, access to and benefit from lands and resources; however, it is such denial of sharing of resources that deprives First Nations communities of their economies and economic rights that can enable self-sufficiency.

- The inclusion of First Nations interests and participation in decision making about lands and resources external to reserve boundaries within traditional territories is a requirement that must be addressed immediately not merely upon the conclusion of an agreement.

Fiscal Relations

- Canada's existing fiscal policy with respect to First Nations is embodied, for the most part, in the pursuit of contribution agreements and cash settlements.

- New fiscal models that would reflect government to government relationships must be explored and implemented.

Federal Loan Funding

- The control and overall policy concerning the provision of federal loan funding to First Nations negotiating groups places the federal government in a huge advantage. On the other hand, First Nations are further disadvantaged by the prospect that failure to arrive at a negotiated settlement will result in indebtedness.

- Addressing the power imbalance situation requires changes in the federal loan funding policy and program.

Process and Structural Changes

- The Department of Indian Affairs was established to administer the *Indian Act* and Indian Affairs. Mandating the DIAND to develop and implement negotiation policies contrary to their purpose is illogical. Policies and processes aimed at removing First Nations out of the *Indian Act* and the DIAND reality should not be in the hands of officials whose responsibilities are directed at maintaining the colonial relationship.

3. Getting to Reconciliation

In order to move forward and address the fundamental problems with the current negotiations processes, there are a series of matters to be addressed. The first deals with establishing clear expectations of the process.

First Nations and the Crown must engage in a joint undertaking directed at achieving reconciliation of First Nations' and Crown interests through the process of ***fair, efficient and honourable negotiations.***

Reconciliation must be defined as "… *not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35 (1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people.*" (Haida, para. 32)

Fair, efficient and honourable negotiations can only become a reality with a significant and dramatic change in the status quo that can advance a more level playing field: such dramatic change requires the federal government to recognize First Nation sovereignty (as the Supreme Court of Canada recently did in stating that "*Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982.*"); and focus negotiations on economic rights to enable self-sufficiency.

The negotiation process in key areas such as claims, self-government and resources, as well as the federal policy frameworks that shape those processes, must be examined in a thorough way and must take advantage of the many advances in the field of conflict resolution and cross-cultural communication over the past thirty years. This will necessarily require an examination of the role of power imbalances in negotiation processes and how they can affect outcomes and behaviours.

4. Effective Policies and Processes

Policy reform with respect to the existing comprehensive, specific claims and inherent rights policy, and policy development with respect to treaty implementation (historical and modern day), is necessary.

Policy reform should include the elimination of hard positions. More importantly, such policies must clearly embrace power sharing and the relinquishment of absolute control. Public officials must be instructed and assured that their "responsibility" as public officials is

not merely about serving the interests of the Crown, but also about maintaining the honour of the Crown by advancing and achieving mutual outcomes with First Nation peoples.

Adopting a Negotiation Concept/Approach

- First Nations and Crown negotiators must be guided by a common understanding and approach to negotiation such as the consensus based approach, or any other, as the means of minimizing the adversarial nature of the relationship and process.

Common Purpose

- First Nations and Crown negotiators must work jointly to identify the desired consensual outcomes. In other words, what are the needs that each party wishes to address in the outcome? This promotes the idea that you help others to help yourself.
- In essence, a pre-negotiation stage that should also address the ground rules, agenda setting, timelines, etc. This approach should minimize aimless, costly and time consuming meetings masked as negotiations.

Common Information Base

- The parties should engage in joint information gathering, analysis and forecasting to enable trust and understanding.

Dispute Resolution

- It is absolutely necessary for the parties to have access to efficient, competent and trust worthy facilitation, mediation and/or arbitration to benefit the process generally and, especially, in situations of impasse.

Communications/Public Education

- It is essential that the parties engage in a joint effort at educating Canadians about First Nations rights and the process of reconciliation to gain public support for visionary and transformative change.

Private Sector

- The parties have to acknowledge and utilize the power of the private sector to enhance the range of options and solutions.

4. Key Initiatives to Drive Transformative Change

1. First Nations Bilateral **Process**
   - A discussion on the distinct rights of First Nations and how government policy should support those rights must be held. It is the uniqueness of First Nations rights which drives the need for the creation of innovative and unique approaches to policy development to address the unique characteristics relationships and approaches to negotiations as opposed to those of other Aboriginal groups recognized by Canada (Inuit and Métis). The distinct rights of First Nations cannot be compromised in order to satisfy a uniform Aboriginal Policy approach by the federal government.
2. Treaty Policy
   - Canada must reaffirm its respect and adherence to the historic treaties and to develop policy concerning implementation and modernization.
3. Legislative, **policy and program audit and harmonization**
   - After the inclusion of the recognition and protection of aboriginal and treaty rights in the Canadian Constitution, Canada never officially undertook a review of its laws, policies and programs to ensure compliance and harmonization with section 35 aboriginal and treaty rights. It is long overdue and such an exercise would benefit reconciliation and relations.

5. Key Considerations

Recognition and implementation of First Nation government:

- Any new system or structure must be developed in the context of First Nation governments. Therefore, it will be critical for First Nations to develop an effective process to engage their full citizenry. **Urban, women's, youth and elders perspectives** will all play an integral role in developing a coherent and success strategy through negotiation and implementation. Federal policies and processes must accommodate and support this need as an integral aspect of developing, confirming and implementing First Nation governments.

Adequacy of resources:

- As referenced previously, resolving the power imbalance in negotiations is in part a question of resources. New approaches must be found toe ensure First

Nations are fully equipped to effectively and fairly participate in the negotiation process.

Machinery of Government Changes:

- In order to move accomplish transformative change as envisioned in this paper, the Federal Government must be re-organized and re-structured to accommodate the realities of a renewed relationship.

Options for Provincial/Territorial Involvement:

- Discussions must be undertaken to confirm the role of the provinces in negotiations and to determine appropriate ways in which they can and should be part of the renewed relationship.

6. Results

First Nations have expressed very high expectation for the Canada-Aboriginal Peoples Roundtable Sectoral Discussions on Negotiations. A summary of anticipated results, to be set in motion following the session, include:

Short term

Policy reform and policy development in the areas of:

- land and resource rights;
- self-government; and
- treaty implementation.

Long Term

- Effectively recognizing and implementing Treaty and Aboriginal rights to land through appropriate processes to efficiently, fairly and effectively address land claims that will provide an adequate land base for First Nations governments and reduce the backlog
- Processes to implement Treaties, renewing the relationship and creating opportunities for effective partnership