



CONGRESS OF ABORIGINAL PEOPLES

Background Paper for the Canada Aboriginal Roundtable Negotiations Sectoral Session

CHALLENGES TO CAP CONSTITUENCY

The “Negotiations Sectoral Session” addresses an important and crucial issue for CAP. It deals with the most fundamental human and constitutional rights of our constituency. It deals with our right to the land and resources as well as the right to govern ourselves as a holder of a right to self-determination.

In that context, what are the unique challenges facing off-reserve status Indians, non-status Indians and Metis peoples living in urban, rural and remote communities when it comes to addressing the issue of Land Rights/Treaties or Self-Government Negotiations (LRT & SG Negotiations)?

This is not an attempt to identify all of the challenges, but rather a general idea of some of the difficulties faced by our constituency in actual negotiations with the federal or provincial governments be it in a bilateral or tripartite processes.

Lack of recognition

Off-reserve status Indians, non-status Indians and Metis peoples living in urban, rural and remote communities have always had a difficulty in getting the recognition in their status as members of an Aboriginal group. There exist general stereotypes in society relating to off-reserve band members. People have often been only seen as "truly Aboriginal" if they live on reserves.

Lack of access to the actual processes

As a consequence of the lack of recognition by others, it is more difficult for off-reserve status Indians, non-status Indians and Metis peoples living in urban, rural and remote communities to have access to actual negotiation processes. For Metis, the actual Comprehensive Land Claims policy (CLCp) by its definition and design excludes them from any land rights negotiation process. The CLCp deals with Aboriginal Title rights prior the arrival of Europeans. As for non-status Indians, evidence of Aboriginal ancestry is needed and demanded by governments, and most of the time denied by Aboriginal peers.

Delays in the process

The land rights process, through CLCp, is a lengthy and costly process. Many Aboriginal groups are frustrated with the slow pace of negotiations and when they become deadlocked, there are no effective alternative dispute resolution mechanisms. It is not unusual for Aboriginal groups to spend over 25 years before they see an actual settlement or agreement on their rights.

A new dynamic is therefore needed between Canada and Aboriginal Peoples in terms of LRT & SG Negotiations. Parties need to find alternatives to factors that are impediments to negotiated agreements.

Jurisdictional Issues

Off-reserve status Indians, non-status Indians and Metis peoples living in urban, rural and remote communities live in a no man's land zone in terms of jurisdiction or responsibility when it comes to dealing with their Sections 35 rights.

Most of the time, the federal government will avoid assuming full responsibility on these matters, even when historically, and to a certain point, legally, it has the primary responsibility or jurisdiction on our issues.

It will defer lands and resources issues to the provincial government and the latter will invoke that it is not its responsibility to address the resolution of conflicts on Aboriginal or treaty rights matters.

Nevertheless, this should not be an impediment to the inclusion of non-status Indians and Metis peoples in any negotiation processes since these jurisdictional issues are actually many of the issues faced by other Aboriginal groups

Scope of the negotiations

Because of jurisdictional issues, another difficulty faced by non-status Indians and Metis peoples living in urban, rural and remote communities in LRT & SG Negotiations is the scope of options available to them. Unlike many other Aboriginal groups, members of CAP and its affiliates do not have access to the scale of options available in modern-treaty agreements whereby they can, in a single accord, deal with all their concerns related to self-government, land base, economic development, revenue-sharing, Aboriginal rights, environment etc.

The implementation of the inherent right to self-government in relation to the CAP constituency is more than difficult. Current policy on this is that for non-reserve based Aboriginal peoples, self-government negotiations can only occur in a tripartite process with the province and only after the province has agreed to come to the table and provide funding for the process. While this process may work quite well in provinces where the provincial government is quite progressive on Aboriginal issues, there are many parts of the country in which self government negotiations have either ground to a halt or never gotten off the ground in the first place.

A proposed option would be for non reserve based Aboriginal peoples living in rural and remote communities to enter into agreements bilaterally with either the provincial or the federal government on a limited number of issues: co-management authorities, agreements on wildlife, administrative agreement on specific issues (employment, justice, health, economic development).

Lack of resources

LRT & SG Negotiations deal with complex issues: economic, fiscal, environmental, jurisdictions and authorities, land tenures, legal techniques on certainty, etc. This demands a variety of expertise that most of the time a single community or organization cannot afford to provide due to a lack of funding or a lack of human or material resources.

THE CONGRESS OF ABORIGINAL PEOPLES' NEGOTIATIONS PRIORITY

A key priority for the Congress of Aboriginal Peoples is the inclusion of our people in all stages of negotiations, equal access to benefits from the results of these negotiations and full and equal participation in future governance structures, regardless of status and residency.

The Congress of Aboriginal Peoples believes that Section 35 of the *Constitution Act, 1982*, requires that, before any unilateral change of Aboriginal or Treaty Rights, consent is required from the concerned Aboriginal community.

In future LRT & SG Negotiations, it is our assertion that, as part of its fiduciary duty, Canada must ensure that specific measures be undertaken in order to insure that all Treaty beneficiaries and off-reserve Aboriginal people have a full and effective participation in all stages of negotiations, and in future governance structures.

As indicated by the former Justice of the Supreme Court of Canada, Claire L'Heureux-Dubé, in an important decision for Aboriginal people living off-reserve, the *Corbière Case*, the principles of democracy, equality and respect for human rights are the grounds for insuring that in any future land rights agreements with Aboriginal peoples, rights and interests of all members of that Aboriginal Nation are taken into account.

A PROPOSED SOLUTION

The Federal Government and the Congress of Aboriginal Peoples must agree to work jointly on the development and implementation of a strategy or a process that targets the unique situation of Aboriginal peoples residing off-reserve. Such discussions would necessarily encompass input from grass roots Aboriginal people regarding their experiences with current negotiations policies, the difficulties they have encountered and their suggestions in developing a Federal policy on negotiations on issues of concern for CAP's constituency, including its affiliates, in matters related to negotiations: lands and resources, self-government arrangements, Aboriginal rights, revenue-sharing rights, consultation rights and co-management authorities etc. This would imply, at all levels, access to research funding on the same basis as other Aboriginal groups.

DISCUSSION OF THE ISSUES OF THE AGENDA

What type of policy changes are required to achieve results in the process?

Canada's policy on certainty and its impact on land rights negotiations

The Congress of Aboriginal Peoples believes that a new policy on certainty, based on recognition of rights rather than a full and final settlement of rights in any future agreements, would uphold the honour of the Crown, respect Canada's international human rights obligations and would definitely send a message of reconciliation to all Aboriginal Peoples in Canada.

Under the current CLCp process the issue of certainty with respect to lands and resources where Aboriginal rights have not been resolved by treaty or other means (i.e. unilateral extinguishment before 1982) is addressed by obtaining full and final settlement of all Aboriginal land rights, including Aboriginal title, through comprehensive land claims agreements that exchange “undefined” Aboriginal rights for defined “treaty rights”.

But for a number of reasons Aboriginal groups have always denounced, with a certain measure of success, this policy of extinguishment of Aboriginal rights through “full and final agreements”. Various international human rights bodies from the United Nations have slammed Canada on this policy, indicating that such a drastic measure to address Aboriginal Peoples’ rights to their lands and resources was a violation of international human rights law.

“18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.”

Committee on Economic, Social and Cultural Rights : Concluding observations of the Committee on Economic, Social and Cultural Rights : Canada. 10/12/98. E/C.12/1/Add.31.

See also: Human Rights Committee: Concluding observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, 7 April 1999

Committee on the Rights of the Child: Concluding observations: Canada : 27/10/2003. CRC/C/15/Add.215.

With such an enormous support from well-established and credible institutions, Canada had no alternatives but to change its positions on the issue of certainty in LRT & SG Negotiations. Canada confirmed its new approach in August 2002, in its presentation of its periodic report to the Committee on the Elimination of Racial Discrimination (CERD).

“331. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their land, as recognized by the Royal Commission. The Committee notes with appreciation the assurance given by the delegation that Canada would no longer require a reference to extinguishment of surrendered land and resource rights in any land claim agreements. The Committee requests that in the next periodic report, information be provided on the significance and consequences of limitations imposed on the use by Aboriginal people of their land.”

Canada has conveyed this assurance into new land claims agreements by omitting the word “extinguishment”. However in return the Aboriginal party must now agree that the Treaty itself defines the totality of their rights and that they can never assert their rights granted from any previous treaties or from any violations of Aboriginal title that may have occurred in the past. Under this arrangement, the Canadian government is also indemnified against all violations of Aboriginal or treaty rights in perpetuity. This is known as the non-assertion/fall back release policy. The terms of such agreements limit the exercise of Aboriginal rights to such an extent that they have in essence extinguished their inherent rights. Aboriginal parties retain only an inconsequential form of Aboriginal title on what always amounts to a drastic reduction of their traditional territories.

Recent land claims agreements illustrate this new extinguishment regime precisely. Both use euphemisms for extinguishments. Aboriginal parties are required to “cede, release and surrender” all land rights not set out in the agreement” or “to cede and release to Canada and the Province all aboriginal rights which Inuit ever had, now have or may in future claim to have within Canada”. Both agreements are notable for their insistence that the rights set out in the agreements comprise the totality of Aboriginal rights that can ever be asserted.

One could conclude that the new term and language employed in land claims agreements amounts to anything less than extinguishment, and in many respects the new policy is even more restrictive.

Coexistence of rights with evolving agreements for sharing of management decisions and benefits from the development of lands and resources are certainly principles that can be taken into account if Canada wants to address, in good faith, Aboriginal rights in the context of LRT & SG Negotiations.

Parties may look on mid-term treaty agreements (50 to 99 years) or incremental treaty agreements that could provide interim certainty for lands and resources while at the same time building capacity and insuring economic benefits in Aboriginal communities.

What processes and mechanisms are required to achieve success?

The duty to consult and accommodate Aboriginal rights and interest in any land rights negotiations with Canada

While parties are at negotiations, an interim measure agreement could be concluded between Canada – and preferably with the province – and the Aboriginal group concerned.

The principles contained in that interim measure agreement would define in concrete terms the duty of the Crown to consult and accommodate Aboriginal rights and interests during any LRT & SG Negotiations.

As prescribed by the Supreme Court of Canada in the two landmark cases, *Haida Nation v. BC* and *Taku River Tlingit First Nation v. BC*, delivered on November 18, 2004:

“...the source of the federal, provincial, and territorial governments’ duty to consult with Aboriginal peoples and accommodate their interests is the principle of the honour of the Crown, which must be understood generously.

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. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
(...)

[T]he duty to consult and accommodate arises before final claims resolution and is an essential outcome to the honourable process of reconciliation that section 35 of the Constitution Act, 1982, demands. The duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”

Merle Alexander in *The Scrivener*, vol.13, number 4, winter 2004: *Taku River Tlingit and Haida II: The Honourable Duty to Consult?*

An interim measure agreement could prescribe the scope of the duty of the Crown to consult and accommodate in various matters of concern for an Aboriginal Nation in negotiation. This may include, *inter alia*, consultation prior the creation of national parks, options of withdrawal of areas from development, early implementation of co-management mechanisms, potential benefit-sharing from development activities that proceed in advance of a final claims settlement, accommodation of Aboriginal interests prior the granting of transferring Tree Farm Licenses, the permitting, approval and licensing process, as well as the land use strategy, including mining etc.

What are the unique challenges facing urban Aboriginal peoples, non-status Indians, Aboriginal women and Aboriginal peoples living in rural and remote communities?

The fiduciary duty of the Crown in regard to all members, without discrimination, of an Aboriginal Nation in LRT & SG negotiations processes

It is essential that any future Aboriginal governance structures, whether derived through Treaty arrangements or by legislation, take into account the rights and interests of Status Indians, non-status Indians and Metis peoples living in urban, rural and remote communities.

It is part of Canada's fiduciary responsibility to insure that in LRT and SG Negotiations, specific measures be undertaken in order to provide all treaty beneficiaries and off-reserve Aboriginal peoples with the opportunity for full and effective participation in all stages of negotiations, and in future Aboriginal governance structures.

This responsibility is laid out in section 35 of the *Constitution Act 1982*, which demands that unilateral change of Aboriginal or treaty rights requires consent from the concerned Aboriginal community.

This position is further supported by the decision of former justice of the Supreme Court of Canada, Claire L'Heureux-Duvé in the *Corbière Case*, which stipulates that the principles of democracy, equality and respect for human rights are the grounds for insuring that future land rights agreements are inclusive of all Aboriginal peoples.

Non-status Indians and Metis peoples living in urban, rural and remote communities form part of a "discrete and insular minority", defined by both race and residence, which is vulnerable and has at times not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society.

Decision makers have not always considered the perspectives and needs of non-status Indians and Metis peoples living in urban, rural and remote communities, particularly their Aboriginal identity and their desire for connection to their heritage and cultural roots.

Moreover, mainstream Aboriginal organizations have the power to affect directly the cultural interests of those Aboriginal peoples. The Royal Commission on Aboriginal Peoples stated that sources of traditional Aboriginal culture *include "contact with the land, elders, Aboriginal languages and spiritual ceremonies.*

BACKGROUND ON THE CONGRESS OF ABORIGINAL PEOPLES AND ITS CONSTITUENCY

The Congress of Aboriginal Peoples (CAP) was founded in 1971 as the Native Council of Canada (NCC). It was originally established to nationally represent the political interests of Métis and non-status Indians, a population that out-numbered all other native people combined. In essence, the principle of the NCC's organization at that time was to address the lack of recognition of Métis and non-status Indians as Aboriginal peoples and to challenge the exclusion of our constituency from federal responsibility.

In keeping with the significant Aboriginal political changes that have occurred over the years, such as the constitutional recognition of Aboriginal peoples, the passing and implementation of Bill C-31, the negotiation of land claims and self-government agreements, and the separation of Prairie Métis from affiliation with non-status Indians and other Métis in 1983, the NCC's name was changed to the Congress of Aboriginal Peoples (CAP) and its mandate has evolved to the representation nationally of the political interests of off-reserve Indian and Métis peoples regardless of status under the Indian Act and residency (for more information on CAP's historical background please visit the following page of the CAP website: www.abo-peoples.org/background/background.html).

CAP's constituency not only stretches across Canada from sea to sea to sea, but consists of a wide variety of Aboriginal peoples with very different historical backgrounds, and current environments. Most of these peoples share common problems in terms of exclusion from policies and programs for other Aboriginal peoples. As a result of their varying histories and circumstances, several of these peoples have different priorities in terms of achieving a solution to those common problems. These priorities provide one useful way by which CAP's constituency can be identified. They can be described in terms of:

- the Indian Act system and its consequences; particularly for those who are excluded from registration, band membership, residency on reserve, or related programs and benefits and want to address those concerns.
- the constituency's Aboriginal and/or treaty rights; particularly for those who live in comprehensive claims areas, those who have been excluded from treaty benefits, or who are pursuing modern treaty as a vehicle for addressing their rights.
- the population's socio-demographics; particularly for those who are seeking economic parity or equity of access to policies, programs and services designed to serve the Aboriginal population; and,
- the simplicity or complexity of the Tribal/Nationality identities within regional organizations; particularly for those organizations whose membership maintains tribal affiliations, or who includes different groups who are associated with different tribal groupings.

Each approach carries with it implications for the relations between CAP and the federal government, and each is valid in its own context.

**Aboriginal Ancestry Population*

Total Aboriginal Population

- 1.3 million (4.4% of Canadian population)
- 79% - **4 out of 5 live off reserve**

Registered (Status) Indian Population (a.k.a. “First Nations citizens”)

- 558,175
- **51% live off reserve**

Off Reserve Aboriginal Population

- 283,960 Off reserve Registered (Status) Indian
- 399,470 Non Status Indian
- 266,020 Métis
- **Total 949,450** (excluding Inuit)

(*Statistics Canada – 2001 Census)

***Aboriginal Ancestry Population Size
Canada, Province and Territory
2001 Census***

	Population Size	Percent OFF Reserve
Canada	1,319,890	78%
Nfld/Lab	28,065	98%
PEI	2,720	86%
NS	33,415	78%
NB	28,465	79%
Que	159,905	80%
Ont	308,105	87%
Man	160,250	68%
Sask	135,035	65%
Alta	199,015	81%
BC	216,110	80%
YK	6,990	72%
NWT	18,955	30%
NU	22,665	100%

Source: Statistics Canada 2001 Census

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