

Renewal of Policies and Processes for Addressing Aboriginal and Treaty Rights

**Federal Background Paper for the
Negotiations Sectoral Roundtable
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* The objective for the negotiations sectoral session is to share views and discuss options for establishing more effective policies and processes for addressing Aboriginal and treaty rights. This paper has been prepared to provide background on major achievements and challenges in addressing Aboriginal and treaty rights. It is not a government position paper; its purpose is to encourage open dialogue in the spirit of the Canada-Aboriginal Peoples Roundtable process.

Negotiations Sectoral Roundtable

I. Renewal of Policies and Process for Addressing Aboriginal and Treaty Rights

The February 2, 2004 Speech from the Throne committed to see “Aboriginal Canadians participating fully in national life on the basis of historic rights and agreements – with greater economic self-reliance, a better quality of life.” The Government of Canada recommitted itself to this objective in the October 5, 2004 Speech from the Throne, in which the importance of the Canada-Aboriginal Peoples Roundtable to the “new path of partnership” between Aboriginal people and the government of Canada was highlighted.

At the Canada-Aboriginal Roundtable on April 19, 2004, the Prime Minister stressed that finding more efficient ways of concluding self-government and land claims negotiations would give the parties (both government and Aboriginal groups) the opportunity to define their relationships, instead of leaving it to the courts. As a result, a sectoral follow-up table on expediting land claims and self-government negotiations was established. The Speech from the Throne and the establishment of a sectoral table on land claims and self-government reflects the reality that establishing cooperative relationships with Aboriginal peoples on quality of life issues must be underpinned by effective policies and processes for addressing Aboriginal and treaty rights.

Finding more efficient ways of concluding self-government and land claims agreements is linked to the larger issue of how Canada as a country should address Aboriginal and treaty rights in a manner consistent with the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982* (s. 35). Since 1982, some 40 Supreme Court of Canada (SCC) decisions have significantly changed and expanded our understandings of the nature and scope of Aboriginal and treaty rights, and government powers and obligations with respect to those rights. Evolving constitutional law and the changing public and economic environment is challenging governments and Aboriginal peoples to develop more effective approaches for addressing Aboriginal and treaty rights.

The negotiations sectoral roundtable provides a unique opportunity for reflection on the developments in constitutional law and public policy since the recognition of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982* and on the lessons learned through negotiations processes. Such reflection could facilitate the development of a common understanding on constitutional and relationship principles for addressing Aboriginal and treaty rights. This, in turn, could suggest direction and options for renewal of policies and processes for effectively dealing with Aboriginal and treaty rights, which would expedite land claims agreements and implementation of the inherent right of self-government.

II. Reconciliation as a Framework for Policy Renewal

While existing processes for addressing Aboriginal and treaty rights have

generated significant agreements and pioneered innovation in policy and process, there is continuing pressure for change in the following areas:

Aboriginal Land Rights

There is need for a wider range of approaches for resolving conflict over Aboriginal land rights and claims. Pressure is mounting for treaty models based upon recognition and coexistence of rights (rather than the surrender or final settlement of Aboriginal rights) and for incremental approaches which would provide interim certainty and benefits for all parties as they negotiate treaties. The 2003 *Powley* decision by the SCC, the first to recognise Métis as a rights bearing Aboriginal people, has created urgency for policy and processes to address Métis Aboriginal rights.

SCC decisions in *Haida* and *Taku* have provided new direction with respect to government duties to consult and, where appropriate, accommodate Aboriginal interests 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. These decisions will require the development of approaches and processes to meet these obligations.

There is also pressure for more effective processes to oversee the implementation and measure the performance of land claim agreements.

The Inherent Right of Self-Government

The implementation of the inherent right of self-government requires new approaches to address governance capacity, issues of aggregation, and financial resources. There is a need to consider more streamlined approaches for taking up self-government powers which reduce the need for lengthy negotiations and for separate implementing legislation for each self-government agreement.

With respect to Métis, self-government processes have been largely limited to tripartite negotiations of service delivery arrangements and institutions. There is a need to consider approaches which would support the development of intergovernmental relationships with Métis.

Historic Treaties

There is currently an absence of process to resolve differences over interpretation and implementation of historic treaties. Exploratory treaty discussion tables have been established with treaty First Nations to identify and assist in resolution of treaty issues. While they provide an effective forum for discussion, they are not mandated to negotiate or resolve disputes over treaty implementation. In historic treaty areas, First Nation access to economic benefits from their traditional territories is emerging as a major issue with significant

economic consequences for First nations, government and resource development.

Policy renewal must be grounded in the recognition of existing Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982*. Since 1982, developments in constitutional law have generated a paradigm shift with respect to how Aboriginal and treaty rights operate within the Canadian constitutional framework. Just as the *Charter of Rights and Freedoms* has created a new dynamic between citizens, governments and the courts in shaping social policy, s. 35 has created a new interface between policy and constitutional law as a vehicle for addressing Aboriginal and treaty rights. The SCC has encouraged negotiations as the best means for achieving reconciliation between the Crown and Aboriginal peoples. However, it has also indicated that these negotiations will be informed by judgments of the court and that the contours of Aboriginal rights will be clarified both through court decisions and negotiations.¹

Reconciliation has become the key organising principle that the Courts have used in addressing issues related to Aboriginal and treaty rights. The SCC has stated that the basic purpose of s. 35 of the *Constitution Act, 1982*, is the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown:

- “s. 35 (1) provides the constitutional framework through which aboriginal peoples, who lived on the land in distinctive societies with their own practices, traditions and cultures, are acknowledged and reconciled with the sovereignty of the Crown.” (*Van der Peet*, 1996)
- “The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and promise of s. 35 with respect to Métis Aboriginal rights is to protect practices that are historically important features of distinctive communities and that persist in the present day as integral elements of Métis culture.” (*Powley*, 2003)

The concept of reconciliation represents a cornerstone for renewing policy approaches for addressing Aboriginal and treaty rights. There is now a substantial body of constitutional law that provides significant guidance as to how reconciliation should be achieved in the Canadian constitutional context.

The concept of reconciliation was also adopted by the Royal Commission on Aboriginal Peoples (RCAP) as the key theme for renewing relationships with Aboriginal peoples within the Canadian federation. It articulated the relationship principles of mutual recognition, mutual respect, mutual benefit (sharing), and mutual responsibility as the basis for renewed relationships with Aboriginal peoples. These relationship principles have been endorsed by most Aboriginal groups and have become central for much of the academic and public-policy dialogue on Aboriginal and treaty rights.

Reconciliation is an ongoing process of establishing and maintaining a framework

for living together. It involves the commitment to recognising Aboriginal rights and the preservation of the cultural distinctiveness of Aboriginal peoples within Canada. The principles of reconciliation (recognition, respect, sharing and responsibility) are, however, mutual. Their application and the process of reconciliation requires give-and-take on all sides and balancing of the rights and interests of Aboriginal and non-Aboriginal Canadians in a way that promotes shared citizenship and respect for shared values, predictability for government relationships in the federation, clarity with respect to the application of laws, and security for management regimes and rights to land and resources.

Given the vastly different circumstances of Aboriginal peoples throughout Canada, it is recognized that reconciliation may take different forms - a “one-size-fits-all” approach is not practical for addressing the Aboriginal and treaty rights of different groups in different parts of the country. Policy renewal will need to be pursued in different forums through engagement with appropriate Aboriginal groups and/or Aboriginal governments, and provincial/territorial governments.

Aboriginal groups across the country have very different views about how their rights and claims should be addressed, and on the form self-government should take. The concerns of First Nations, Inuit and Métis are significantly different. Provincial and territorial governments also have their own views with respect to the law regarding s. 35 rights, and they take significantly different positions on their roles and responsibilities for resolving land claims and accommodating self-government.

A major challenge in renewing policy approaches for addressing Aboriginal and treaty rights and in expediting agreements is the lack of public understanding of the nature of Aboriginal and treaty rights and fluctuating support for negotiation processes.² The special historic and constitutional status of Aboriginal peoples is not well understood by the Canadian public. There is a perception that claims processes and self-government are based on giving a particular ethnic or racial group (Aboriginal people) new special rights that are not enjoyed by other segments of the Canadian population, as opposed to achieving reconciliation of existing constitutional rights.

The concept of reconciliation offers a potential organizing framework for renewal of policies and processes for addressing Aboriginal and treaty rights. Annex A sets out a number of key principles for reconciliation as reflected in the constitutional principles articulated by the SCC and the relationship principles set out in RCAP.

Dialogue on guiding principles of reconciliation at the negotiations sectoral table could identify common ground for:

1. renewing relationships with Aboriginal peoples in a manner consistent with the constitutional purpose of the recognition and affirmation of Aboriginal and treaty rights in s. 35 (1) of the *Constitution Act, 1982*;
2. articulating clear constitutionally-based principles and objectives for explaining

Canada's policies with respect to Aboriginal and treaty rights to the Canadian public; and

3. subsequent engagement by Canada, appropriate Aboriginal groups and provincial/territorial governments in renewing policy approaches.

There is a need to discuss whether a statement of principles for addressing Aboriginal and treaty rights – reflected in, for example, a policy statement, proclamation, or legislation – could contribute to creating a more positive environment for addressing Aboriginal and treaty rights and renewing associated processes.

III. Pressures/Directions for Policy Renewal and Engagement

1. Comprehensive Land Claims

The Comprehensive Land Claims Policy was established in 1973 to achieve certainty with respect to lands and resources in areas of Canada where Aboriginal rights were not resolved by treaty or other lawful means. The policy was designed to obtain a full and final settlement of all Aboriginal land rights, including Aboriginal title, through the negotiation of modern treaties (comprehensive land claims agreements) that exchange “undefined” Aboriginal rights for “defined” treaty rights.

Since 1973, sixteen comprehensive land claim agreements have been negotiated and brought into effect and three more are currently in ratification. These modern treaties (mostly in northern Québec and the three territories) cover approximately 40% of Canada's land mass. They involve over 90 Aboriginal communities with over 70, 000 members. Under these agreements, the Aboriginal parties have secured ownership rights to over 600, 000 square kilometres of land, over \$2.4 billion (2003 \$) in fiscal transfers, protections for their traditional way of life, access to benefits from future resource development and participation in land resource management decisions.

Comprehensive land claims are currently outstanding in approximately 20% of Canada (most of British Columbia, all of the Maritimes, much of Labrador, over a third of Québec, the Ottawa Valley in Ontario, and continuing residual claims in all three territories). These remaining claims involve some 270 First Nations and Inuit communities with approximately 190 000 members. Negotiations are currently proceeding in approximately 60 processes across the country. In British Columbia where negotiations are overseen by the tripartite British Columbia Treaty Commission, 55 claims have been accepted for negotiation at 44 tables. Some 20 negotiation processes in other provinces and territories involve a comparable number of participants.

Resolution of outstanding Aboriginal land claims will not be a short-term process. The claims settled in the past thirty years were primarily in northern and remote regions with limited third party interests and in the territories where the federal government controlled the land and resources. The remaining claims are mainly in the provinces,

often in populated areas with extensive third party interests and greater competition for access to land and resources. This creates a much more complex public environment for achieving settlement. Addressing these remaining claims will be very strongly influenced by provincial government policies and public attitudes.

At the same time, jurisprudence with respect to Aboriginal rights is creating pressure for new approaches to resolving Aboriginal land claims. Due to major SCC pronouncements since 1982, our understanding of Aboriginal rights has evolved from Aboriginal rights as an “undefined” burden on Crown title to substantive rights, that, in the case of Aboriginal title, are equivalent to ownership rights.³ Since 1982, these rights cannot be unilaterally extinguished or nor can they be infringed without justification. Justification includes consultation and protection of the Aboriginal right in a way that balances competing rights and interests.

In the absence of a mutually acceptable negotiation process, Aboriginal groups are increasingly turning to the courts for the recognition of their rights or to ensure the protection of their rights during negotiations. The courts, frustrated with the slow pace of negotiations, are increasing their role in overseeing negotiations, and in providing protection for Aboriginal interests during or in the absence of a negotiation process.

Court decisions are creating increased uncertainty for government and industry in proceeding with resource development. The result is increased pressure to find ways to accelerate claims settlements and to establish interim mechanisms to satisfy consultation and accommodation requirements.

While there has been no formal review of the Comprehensive Land Claims Policy since 1986, a number of significant adjustments have been made in response to legal and political developments:

Certainty Canada has approved new approaches to certainty which do not require the surrender or extinguishment of Aboriginal rights, such as the modification of rights approach in the Nisga’a treaty and the non-assertion approach in the Tli’cho agreement. Other approaches are under development and review.

Incremental treaty agreements: While the federal policy continues to seek a “full and final” treaty settlement of Aboriginal land rights, in 2002, Cabinet approved the concept of negotiating incremental treaty agreements which would provide interim certainty for land and resource matters pending the negotiation a larger treaty. Such agreements can build capacity and provide economic benefits in Aboriginal communities during the negotiation process.

Self-government: Since 1995, Canada has agreed that self-government can be negotiated as part of a comprehensive land claim agreement, giving focus to the ongoing political relationship established by modern treaties.

Despite these adjustments in federal policy, the current comprehensive land claims policy does not adequately respond to the current legal and political environment. There is pressure for change in the following areas:

- i. Recognition of Rights: The Comprehensive Claims policy currently does not provide for recognition of Aboriginal rights in advance of a final settlement. Supported by the directions of the SCC, Aboriginal groups insist that negotiations cannot be based solely on government policy. They seek recognition that Aboriginal peoples come to the negotiation table with rights. They also insist that treaty negotiations should be directed at reconciliation based on recognition of rights rather than surrender of rights. New approaches to certainty in the Nisga'a and Tlicho treaties have moved significantly in this direction and further work is continuing in other negotiations processes.
- ii. Consultation and Accommodation: Aboriginal groups insist that negotiation processes must provide mechanisms for protection of rights and claims while negotiations are proceeding. The SCC decisions in *Haida* and *Taku* have confirmed Crown obligations to consult Aboriginal groups and, where appropriate, seek accommodation in areas subject to assertions of Aboriginal rights. Federal, provincial, and territorial governments will need to consider mechanisms to address these duties, both in the context of land claim negotiations or in areas subject to assertions of Aboriginal rights where negotiations are not yet proceeding.
- iii. Co-existence/Finality Certain Aboriginal groups are pressing for an alternative treaty model based on co-existence of rights, rather than a final settlement of rights. Such negotiations would be premised on the recognition and coexistence of rights with evolving agreements (and periodic negotiations) for sharing of management decisions and benefits from the development of lands and resources in areas subject to claim.
- iv. Process Issues: The process for negotiating comprehensive claims also requires reassessment. The pressure to achieve a final settlement of all Aboriginal land rights creates a lengthy and costly negotiation process. On average, it has taken fifteen years to achieve a final agreement. Aboriginal parties finance their participation in negotiations through loans, which can absorb a significant portion of eventual settlement. Given the different environment for settlement in the various territories and provinces, there has been limited templating of agreements. In most cases, separate federal legislation is required to give effect to each agreement. Where negotiations become deadlocked, there are no effective alternative dispute resolution mechanisms. Where disputes result in litigation, negotiations are often suspended on all issues.
- v. Métis Aboriginal rights and claims: In September 2003, the SCC (*Powley*) found that the Métis community in and around Sault Ste. Marie, Ontario has an Aboriginal right to hunt for food under section 35. While the decision is site and

fact specific, it provided general guidance for identifying Métis rights holding communities. In altering the test for Métis Aboriginal rights, to make it appropriate to their circumstances, the SCC required rights and practices to have existed at the time of effective European control. The *Powley* decision has resulted in initiatives among Métis organizations, federal and provincial governments for interim approaches to avoid conflict over Métis harvesting. The decision has also raised the need for research and policy development to assess how to effectively address Métis Aboriginal rights and claims. This will involve research into identification of Métis rights-bearing communities, discussion of federal and provincial roles, and examination of whether the comprehensive claims process or other processes are the appropriate means for dealing with Métis claims. The fact that Métis assert rights within historic treaty areas also raises specific challenges.

- vi. Implementation: Aboriginal groups with modern treaties have raised the need for improved mechanisms to manage the broader Crown/Aboriginal relationship established by treaties. In addition, Aboriginal groups and the Auditor General have identified the need for more results based approaches to measuring the performance and impact of modern land claim agreements in achieving their broader objectives, including certainty for resource development and improvement of socio-economic conditions in Aboriginal communities.

2. Self-Government

As with comprehensive land claims, views on the nature of Aboriginal self-government and its place within Canada's constitutional framework have evolved dramatically since 1982. While existing Aboriginal and treaty rights were recognized and affirmed in the *Constitution Act, 1982*, no consensus was reached to specifically recognize self-government as a constitutional right.

Four constitutional conferences were held between 1983 and 1987 in an attempt to further define Aboriginal constitutional rights, but a definition of Aboriginal self-government eluded participants. The 1992 Charlottetown Accord included a constitutional amendment expressly recognizing the inherent right of self-government for Aboriginal peoples, including Métis. When the Charlottetown Accord was not ratified, efforts to address self-government through constitutional reform came to a halt.

In August 1995, the federal government formally announced the Inherent Right Policy (IRP) which provided general recognition of the inherent right of self-government as an existing Aboriginal right that is protected under s. 35. With the IRP, the government explicitly sought to avoid legal debate over the definition of the inherent right, in favour of negotiated self-government arrangements with Aboriginal peoples addressing government structures, law-making powers and program and fiscal arrangements.

The RCAP's report in 1996 identified Aboriginal nation-building and self-

government as key elements for a renewed relationship. RCAP recommended that the federal government pass recognition legislation that would enable Aboriginal groups to develop their constitutions and citizenship codes and thereby lead to their recognition as self-governing. RCAP also made a large number of Métis-specific recommendations in its final report to put the Métis on the same plane as the other two Aboriginal peoples mentioned in s.35, and urged the federal government to address the historic claims of Métis. The federal government's response to RCAP – the 1998 policy document *Gathering Strength* – broadened the IRP's initial focus on jurisdictional arrangements to place more emphasis on the broader capacity and fiscal issues that underlie the achievement of legitimate and sustainable Aboriginal governments for First Nations and Inuit, and kept on the same path of practical program and service arrangements for Métis.

At present, Canada is engaged in negotiations at 72 tables on either full or sectoral/incremental self-government. These tables represent 437 communities, including 414 First Nations, 25 Inuit communities and some Métis locals (some communities are represented at more than one table). Of these tables, sectoral/incremental initiatives are underway with over 100 First Nations across Canada, focussing primarily on education and child and family services. In addition to the negotiation of comprehensive or sectoral self-government agreements, the transition to self-government is also being advanced through a continuum of other initiatives, such as the *First Nations Land Management Act*, which support First Nations in building governance capacity and moving out from under restrictive provisions of the *Indian Act* to assume greater control of reserve lands and band assets.

In addition to the above mentioned processes, the Office of the Federal Interlocutor currently manages ten tripartite negotiation processes with Métis and non-status Indian organizations at the provincial level across the country, mainly in British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. These tripartite processes are unique in their nature (in that they involve off-reserve groups). These processes have contributed to improved governance capacity of Métis and non-status Indian (MNSI) political organizations, as well as their institutional and service delivery capacity, in areas such as child and family service, health, culture, employment, training and education.

Approximately 50 First Nation and Inuit communities have approved final self-government agreements or agreements-in-principle associated with land claim agreements. The economic benefits of land claim agreements provide greater security and capacity for communities to make the transition to self-government. Over 300 First Nations are involved in comprehensive or sectoral self-government negotiations which are not linked to land claim agreements. The Westbank First Nation Self-Government Agreement was approved by Parliament in May 2004 and nine Miqmaq First Nations in Nova Scotia are operating under a sectoral education agreement which was approved in 1994. A number of Agreements-in-Principle (AIPs) have been negotiated; however, the pace of stand-alone self-government negotiations is affected by community concerns that they will not have adequate resources for effective implementation of self-

government.

Preliminary measures using Census data indicate that self-governing communities, that is, almost all communities with a comprehensive claim and those communities with stand-alone self-government agreements (no land component), enjoy better outcomes than registered Indians on-reserve in respect of education, economic situation, integration and participation in the broader community and overall community and cultural well-being.

While progress has been made, there are impediments to further progress:

- i. Recognizing the Inherent Right: Aboriginal groups feel that the IRP is not sufficiently grounded in the recognition of an Aboriginal right of self-government. While the IRP provides a general recognition that self-government is an existing Aboriginal right, policy currently precludes acknowledgement that any specific group possesses the right of self-government. Instead, negotiations are predicated on setting aside the question of rights to focus on the negotiation of practical self-government arrangements or program service delivery.
- ii. Historic treaty issues: Many treaty First Nations view self-government as part of the existing treaty relationship which should be addressed through treaty implementation. Canada does not, however, acknowledge that historic treaties recognised an inherent right to self-government, nor does it have mechanisms to address treaty implementation. In addition there is pressure to address access to resources and economic benefits from traditional territories to support implementation of self-government.
- iii. Government structures and capacity: Most self-government negotiations are occurring with aggregations of First Nations who recognize that the establishment of new regional governance structures and institutions will be necessary to implement self-government. Involving off-reserve members raises additional issues. There are, however, significant political challenges in securing community support for sharing power through new structures. Moreover, there are significant challenges in identifying the human and financial resources for establishing and operating new regional or province-wide structures and institutions. At the other end of the spectrum there are a significant number of small First Nations (mostly in British Columbia) who are negotiating self-government on a wide range of powers some of which they could not exercise except in partnership with other First Nations or adjacent communities.

For Métis, negotiations have focussed on tripartite service delivery negotiations. The processes that have been established to date do not, however, respond to Métis aspirations for self-government premised on recognition of Métis governments and jurisdictions. There are particular challenges relating to lack of a Métis land base for most Métis communities, identification of Métis and Métis communities, development of Métis government structures, the implementation

of self-government in a more integrated public government context, and differing views on federal and provincial responsibilities for Métis.

Inuit have largely focussed on addressing self-government through public government. This requires innovation in public government structures and processes, clarification of linkages to Inuit organizations and poses significant challenges in relation to capacity and training.

- iv. Fiscal sustainability: Aboriginal groups require incremental resources to assume increased responsibilities associated with self-government and to ensure that their citizens have access to programs and services comparable to other Canadians. Most communities have limited potential to generate significant own source revenues. On reserve there is concern that taxation and the taking into account of own source revenues would result in a decrease in existing levels of federal funding for programs and services.
- v. Federal/provincial/territorial issues: The IRP does not permit negotiation of jurisdictions normally under provincial jurisdiction without provincial participation. Moreover, jurisdiction and programming arrangements with Inuit, Métis, and other Aboriginal people off-reserve requires provincial or territorial government involvement. This means that jurisdictions such as child and family services, social assistance, or administration of justice are not negotiable unless these governments come to the table. Most provinces and territories are participating in negotiations, but there continue to be issues relating to their roles, jurisdictions and costs.
- vi. Process impediments: There is no standard template for self-government agreements. Each agreement requires separate federal legislation. This results in protracted negotiations over description of jurisdictions, limitations, priority of laws and other issues. There is a need to consider whether self-government could be accelerated by development of a Recognition Act that would develop criteria for recognition and facilitate access to self-government powers without the need for protracted negotiations and individual implementing legislation.
- vii. Implementation issues: Self-government agreements establish the framework for ongoing “government-to-government” relationships. New mechanisms will be required within the Canadian federation to manage these intergovernmental and fiscal relationships and to allow comparable access to program and services consistent with the principles of the Social Union Framework Agreement.

Historic Treaties

Historic treaties, for the purposes of this paper, refer to those treaties concluded between the Crown and Aboriginal peoples prior to 1973. There are approximately 70 recognized historic treaties. These treaties involve 369 First Nations. They are not uniform in nature and reflect the times and circumstances in which they were negotiated

and the differing objectives of the parties. Treaty First Nations view these treaties as foundational agreements for contemporary relationships between themselves and the Crown.

The recognition and affirmation of existing treaty rights in s. 35 of the *Constitution Act, 1982*, and subsequent jurisprudence respecting the interpretation of treaty rights has called upon Canada to reassess both its views on, and interpretations of, treaties. This has involved consideration not only of specific obligations and rights, but also of the relationships established by treaties.

In its 1998 *“Gathering Strength: Canada’s Aboriginal Action Plan”*, Canada stated its intention and commitment to commemorate historic treaties, affirm the treaty relationship and pursue exploratory treaty discussions with treaty First Nations (TFNs). Canada has created four Exploratory Treaty Discussion Tables (ETTs) with TFNs. Tables are established with the Federation of Saskatchewan Indian Nations (FSIN), Treaties 6 and 8 First Nations in Alberta, and with the Nishnabe Aski Nation in northern Ontario. Discussions are non-rights based. They seek to identify TFN and Crown understandings of treaties and how the parties should proceed in the future on key treaty issues. Canada provides research in support of ETTs and policy development initiatives; conducts and supports public and professional education activities; and supports treaty commemoration celebrations (e.g. centennials of Treaty 8 in 1999, and of Treaty 9 in 2005).

Canada has also jointly created the Office of the Treaty Commissioner (OTC) in Saskatchewan with FSIN to facilitate exploratory discussions and to assist in the resolution of treaty issues. Subjects currently being addressed by the OTC include: justice; health; livelihood; lands and resources; and hunting, fishing and trapping. Work is proceeding on the establishment of treaty commissions in Manitoba and Alberta.

Consensus documents and recommendations which are produced by ETTs provide an opportunity for Canada and TFNs to clarify their views together. Such documents are often insightful and valuable products which can indicate an alignment of views and, equally, can serve to demonstrate where positions and opinions diverge. These materials can serve as the basis for agreements and policy/program initiatives.

While there has been some success in exploring treaty issues through the ETTs, there is need to address the following issues, which are currently impeding further progress:

- i. Lack of dispute resolution mechanisms: ETT mandates do not enable them to negotiate or resolve disputes over treaty interpretation and implementation. The specific claims process is mandated to deal with certain lawful obligations related to treaty entitlement, but does not cover the broad range of treaty related claims. The lack of an effective process for addressing historic treaties is reflected in the steady increase in the amount of treaty-related litigation since 1990. There are approximately 300 cases before the courts involving treaties, around 10% of

which are active.

- ii. Access to traditional territories: In historic treaty areas, First Nations are seeking access to economic benefits from their traditional territories and a role in resource management. This is emerging as a major issue with significant economic consequences for First Nations, government and resource development.
- iii. Linkage to self-government and comprehensive claims: TFNs have expressed a desire to see their treaty implementation issues considered and negotiated as part of their self-government agreements. In Saskatchewan, while a link between the ETT and ongoing self-government negotiations does exist, Saskatchewan First Nations wish this link to be much stronger and more dynamic, providing for consideration of ETT products at the self-government negotiations table. No such link to self-government exists at the Alberta and Ontario ETTs.

The SCC decision in *Marshall*, recognized commercial fishing rights for First Nations in the Maritimes based upon historic treaties of peace and friendship. It is now leading to processes in three Maritime provinces and the Gaspé region in Québec to address both the implementation of historic treaty rights and unresolved Aboriginal rights. Combined historic treaty and Aboriginal claims are also being negotiated with the Douglas treaty First Nations in British Columbia and with Treaty 8 and 11 First Nations in the Northwest Territories.

Cross-cutting Issues: Inclusiveness and Overlapping Rights

Processes for addressing Aboriginal and treaty rights raise challenges with respect to inclusiveness. This involves cross-cutting issues related to involvement of Aboriginal women, urban Aboriginal people, non-status Indians and rural and remote communities. Overlapping rights and claims are also a significant issue. Effective mechanisms are required for addressing these matters.

Conclusion: Reconciliation as a Framework for Living Together

It is essential to find ways to move forward with more effective and expeditious processes for addressing Aboriginal and treaty rights and for implementing self-government. The process of policy renewal must be informed by the constitutional objective of reconciliation, which reflects the central purpose of section 35 of the *Constitution Act, 1982*.

Developing and maintaining processes for addressing Aboriginal and treaty rights is an essential part of the ongoing relationship between Aboriginal peoples, the Crown and other Canadians. As the Supreme Court of Canada noted in *Haida*, reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by section 35(1) of the *Constitution Act, 1982*. Processes for addressing

section 35 rights offer the key to establishing a framework for living together. Rights may be clarified by the courts, but the courts cannot build relationships, "people do – by working together on the basis of mutual respect and trust."⁴

The sectoral table on negotiations offers the opportunity for dialogue on the underlying principles, objectives and challenges for renewing our policy approaches for addressing Aboriginal and treaty rights in a manner consistent with the recognition and affirmation of these rights in the *Constitution Act, 1982*. Reconciliation involves a balancing of Aboriginal rights with the powers and responsibilities of the Crown and the rights and interests of other Canadians, in a manner which reinforces constitutional federalism, cultural pluralism and shared citizenship.

Given the diverse historical cultural, social and economic circumstances of Aboriginal peoples in different parts of the country, reconciliation will not be achieved with a "one-size-fits-all" approach. Policy renewal will need to be pursued in different fora through engagement with appropriate Aboriginal groups and provincial and territorial governments. Policy renewal and innovation is occurring through existing processes. It will be important to continue to support existing processes which are supporting reconciliation and contributing to policy renewal. The sectoral table and its breakout sessions for First Nations, Inuit and Métis are expected to identify differing perspectives on the challenge of reconciliation and directions for policy renewal and areas for follow-up to be pursued with appropriate Aboriginal groups and provincial and territorial governments.

1. *Delgamukw v. B.C.*, [1997] 3 S.C.R., *R v. Powley*, [2003] 2 S.C.R.

2. In polls done for the Centre for Research and Information on Canada's *Portraits of Canada*, 2003 (see November 26, 2003 News Release "Canadians Want Strong Aboriginal Cultures But are Divided on Aboriginal Rights") 49% of Canadians reported that they "believe few or none [of the land claims made by Aboriginals] are valid." Dr. Parkin of the CRIC notes that "previous studies have shown that public support for Treaty rights rises when people are informed that these rights are constitutionally protected."

3. Key cases include *R.v. Sparrow* (1990), *R.v. Van der Peet* (1996) and *R v. Delamuukw* (1997), which, in particular provided some clarification on the nature of Aboriginal title.

4. The Right Honourable Paul Martin, *Opening Speech* at the Canada-Aboriginal Peoples Roundtable, April 19, 2004.