DISCUSSION PAPER:

COMPREHENSIVE LAND CLAIMS POLICY / CANADA'S APPROACH TO REFORM


ASSEMBLY of FIRST NATIONS • ASSEMBLÉE des PREMIÈRES NATIONS

In September 2018, the Assembly of First Nations hosted a Policy Forum to more fully understand Canada's proposed *Recognition and Implementation of Indigenous Rights Framework.* At the conclusion of the two-day session wherein they shared information, listened and dialogued, First Nations Leaders voiced their strong criticisms of the approach taken by Canad [1]. In December 2018, the Chiefs-in-Assembly confirmed their September objections, and unanimously passed a resolution to reject Canada's Framework and called upon the Prime Minister to reassess and recommence the Nation-to-Nation relationship based upon the standards of International Law.

Yet, despite these objections, the Government of Canada is proceeding with its approach and has provided a new Draft Discussion Document entitled *Developing a New Rights-Based Policy: Summary of Current Approaches* [2].

This paper is a page-by-page read of Canada's new Discussion Document and seeks to identify a number of concerns which are highlighted in the right column.

Background

First Nations have repeatedly stated, the assertion and exercise of Treaty and inherent rights, title and jurisdiction in the First Nations-Crown relationship has endured for centuries and has been recognized in Canadian law since the *Royal Proclamation*, 1763 [3]. Nevertheless, the approach of the Government of Canada to the negotiation and implementation of Aboriginal title and rights, including Treaty rights has been mainly through policies: namely the *Comprehensive Land Claims Policy* ("CLCP" of 1973, 1986, 1993, 2014) and the *Inherent Right Policy* (1995) [5].

As has often been described, the CLCP was Canada's response in 1973 to the matter of Aboriginal title following Calder v. AG (BC) [6] when the federal Government announced that it "was prepared to negotiate comprehensive land claims with Aboriginal groups where their traditional and continuing interests in the lands concerned could be established." [7]

In 1982, Aboriginal and treaty rights were recognized and affirmed within s. 35 of the *Constitution Act*, 1982, and in 1984 the Supreme Court of Canada recognized for the first time a fiduciary relationship between First Nations and the Crown that gave rise to legally enforceable duties.[8] These legal advancements prompted Canada to revised the CLCP in 1986 whereby previous language to express extinguishment of rights was now expressed as "certainty"; political rights (of self-government) were now included as part of negotiations

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1 A Summary Report from the Assembly of First Nations National Policy Forum, September 11 and 12, 2018 was provided to each delegate.
2 A Discussion Paper was provided to each delegate prior to the Forum as Background.
3 AFN Resolution No. 67/2018.
4 Draft for Discussion Purposes Only, *Developing a New Rights-Based Policy: Summary of Current Approaches, February 2019.*
5 *Tsilhqot'in Nation* The current Specific Claims Policy, Justice at Last (successor to Outstanding Business) addresses outstanding historic treaty matters and the Additions to Reserve Policy addresses the creation of and adding lands to s. 91(24) reserve land.
6 Calder v. Attorney General (British Columbia)
7 CLCP, 1986, p. 6
8 Guerin

but as delegated authorities and greater effort was expressed to protect the interests of third parties over selected lands. [9]

Unfortunately, for the most part, the "new" CLCP did little to resolve early criticisms, and when revised again in 1993, the CLCP remained inconsistent with the evolving jurisprudence from the Supreme Court of Canada concerning s. 35 rights and title [10]. The policy and mandates have largely remained intact since 1993.

In 2012, a Senior Oversight Committee (SOC) on Comprehensive Claims was established between Prime Minister Stephen Harper and First Nations representatives for "high level dialogue on the issues of comprehensive claims and treaty implementation [11]." The SOC oversaw the development of draft federal *"Principles respecting the recognition and reconciliation of section 35 rights".* It was proposed that these principles would guide Crown conduct and other federal policies and assist in the reform of the CLCP. While there may be key elements missing from the SOC Principles [12], their creation was considered a sound basis upon which to rely for future reform. Yet, the federal Government's current engagement makes no reference to these principles or any other principles by which First Nations can be assured of the elements guiding Nation-to-Nation engagement.

In 2014, Canada chose not to renew the SOC and instead released an Interim CLCP and appointed Mr. Douglas Eyford to lead engagement. While this work was underway, the Supreme Court of Canada released its watershed decision in *Tsilhqot'in Nation* and in his 2015 Final Report, Mr. Eyford characterized the court's finding of Aboriginal title as a starting point for negotiations.[13] At the July 2015 Special Chiefs Assembly, the AFN delivered a 12-point analysis of the Eyford Report and while Canada publicly stating that it recognizes the importance of working jointly, the process did not live up to this commitment. [14] Substantively, the Eyford Report failed to incorporate any of the analysis of the effect Aboriginal title provided by the Supreme Court of Canada. As the AFN's 12-Point Analysis states, to have validity, "any comprehensive land claims policy reform must acknowledge the legal reality of Indigenous sovereignty and jurisdiction. [15]"

[9] Highlights from the AFN Legal Review of Canada's Comprehensive Land Claims Policy, 2002, Commissioned by the AFN Delgamuukw Implementation Strategic Committee (DISC).
[10] Sparrow, Van der Peet, Gladstone, Delgamuukw.
[11] Senior Oversight Committee, Draft Terms of Reference
[12] The FN Summit identified revenue and benefit sharing, shared decision-making and dispute resolution as "noticeably absent from the Ten Principles" and while could be arrived at through negotiations, they must be clearly identified and written into any process that is relied upon." (FN Summit submission to the Federal Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples, June 9, 2017, page. 14).
[13] Eyford Report at p. 30.
[14] AFN, AGA July 9, 2015, Comprehensive Claims Policy Renewal Panel: A 12-Point Analysis of the Eyford Report
[15] Ibid., p. 5.

In 2018, then Minister of Justice and Attorney General Jody Wilson-Raybould delivered this federal Government's *Ten Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* [16]. The official publication stated:

These Principles are a starting point to support efforts to end the denial of Indigenous rights that led to disempowerment and assimilationist policies and practices. They seek to turn the page in an often troubled relationship by advancing fundamental change whereby Indigenous peoples increasingly live in strong and healthy communities with thriving cultures. To achieve this change, it is recognized that Indigenous nations are self-determining, self-governing, increasingly self-sufficient, and rightfully aspire to no longer be marginalized, regulated, and administered under the Indian Act and similar instruments. The Government of Canada acknowledges that strong Indigenous cultural traditions and customs, including languages, are fundamental to rebuilding Indigenous nations. As part of this rebuilding, the diverse needs and experiences of Indigenous women and girls must be considered as part of this work, to ensure a future where non-discrimination, equality and justice are achieved. The rights of Indigenous peoples, wherever they live, shall be upheld.

These Principles are to be read holistically and with their supporting commentary. The Government of Canada acknowledges that the understandings and applications of these Principles in relationships with First Nations, the Métis Nation, and Inuit will be diverse, and their use will necessarily be contextual. These Principles are a necessary starting point for the Crown to engage in partnership, and a significant move away from the status quo to a fundamental change in the relationship with Indigenous peoples. The work of shifting to, and implementing, recognition-based relationships is a process that will take dynamic and innovative action by the federal government and Indigenous peoples. These Principles are a step to building meaning into a renewed relationship. [17]

Again, while First Nations may not view these Ten Principles as exhaustive, they do serve as *"a starting point for the Crown to engage in partnership and a significant move away from the status quo to a fundamental change in the relationship with Indigenous peoples."* Canada, once again, makes no mention of the Ten Principles in its current Discussion Document.

A final point made by the Chiefs-in-Assembly on Aboriginal title is that despite years of advocacy for reform, Canada's policy approach has essentially created three classes of Aboriginal title for First Nations:

i. First Nations that have entered into (final) comprehensive claims agreements, based upon the confines of the relevant policy and face challenges with full implementation;
ii. First Nations that were or have been in comprehensive claims negotiations
    (a) In British Columbia Treaty Commission (BCTC);
    (b) Outside of British Columbia; and
iii. First Nations that have never agreed to negotiate under the federal Comprehensive Land Claims Policy (CLPP). [18]

[16] file:///F:/Comp%20Claims/Canada/principles.pdf
[17] file:///F:/Comp%20Claims/Canada/principles.pdf
[18] AFN Resolution no. 30/2015

With modest variation, these confines have sought finality as a goal. This has required First Nations to release the Crown from future claims. The language of "extinguishment", "certainty" and non-assertion of rights has been a goal of government and has never been denounced.

Canada references its dialogue with the Land Claims Coalition as leading the institutional reforms to support the full implementation of existing modern treaty and self-government agreements.

For First Nations in British Columbia in particular, the current policy requires that any lands negotiated under a final agreement cannot be s. 91(24). What then is the constitutional status of settlement lands?

While the policy says compensation is payable, in reality the Government of Canada does not pay compensation to First Nations, but it is paid to third parties. Canada provides no explanation for this disparity.

If the quantum of compensation is an issues, it should be the subject of its own analysis and perhaps reference to the methodologies applied to quantifying compensation for land losses in the specific claims context may be informative.

There is a significant body of work developed by First Nations across Canada identifying the substantive criticisms with the current policy (AFN Delgamuukw Implementation Committee (2002); BC AFN (2013); Coalition for the Rights of Indigenous Peoples (AFN, 2014); UBCIC (2014)

Despite the express criticisms from First Nations on the restrictive and diminutive approach adopted by Canada,the fundamentals of the CLCP remain.

Review of Canada's Draft Document for Discussion

Today, the Government of Canada says that it is once again undertaking reform of the CLCP "to ensure the rights of Indigenous peoples promised under s. 35 of the Constitution Act, 1982 are recognized, affirmed and implemented."[19] Canada has also stated that this reform is consistent with the UN Declaration and that it is undertaking this work through "engagement sessions" along with its current approach to the negotiation of rights-based agreements in the 75+ discussion tables and 50+ modern treaty and self-government tables.[20]

Process concerns

Canada is the one party that is constant at each table and as such, is the only party positioned to provide a global view of the "lessons learned". To date, First Nations have not been made aware of these lessons and have been asked to trust in Canada's overview. Moreover, First Nations are asked to assume that these lessons are inherently positive however, without full transparency, there is no assurance that this is true.

In September 2018, Canada began to publicly communicate the status of its "engagement sessions" through a series of discussion papers [21]. During this time, the Assembly of First Nations hosted a Policy Forum [22] to facilitate dialogue on the "Protection and Affirmation of Rights and Title Framework". The Chiefs-in-Assembly met again in December 2018 [23] to communicate to the Minister of Crown-Indigenous Relations that the "engagement" documents did not accurately reflect First Nations views. In addition, Canada's process lacked clarity, precision and sometimes even the appropriate rights-holders. There was no information regarding the discussions Canada held with the provinces, territories, industry and other partners. First Nations are keenly aware that the interests of these third parties are critical to any substantive reform. First Nations' expressed their concerns about the validity of this process in informing a national policy discussion.

[19] Summary Document: February 2019,
[20] Summary document, p. 1
[21] What We Heard So Far, Engagement Document, The Overview of Recognition and Implementation of Indigenous Rights Framework.
[22] See Policy Forum Summary, September 11 and 12, 2018.
[23] AFN Resolution No. 67/2018

For decades First Nations have been critical of the CLCP and it is significant that Canada has so far failed to communicate what it sees are the fundamental challenges of its own policies – it has highlighted some of the criticisms raised by First Nations which only scratch the surface, nevertheless, these include:

- slow and cumbersome mandating that are pre-determined and unilateral;
- slow and agreement approval processes;
- focus on "certainty";
- time consuming nature of reaching (final) agreements results in exorbitant costs to Indigenous parties, with loan indebtedness becoming a disincentive to negotiations;
- (final) agreements are seen (by Canada) as static and not evolving; and
- lack of flexibility to address interests of Indigenous groups and failure to approach negotiations as a partner. [24]

What is significant about Canada's current approach to reform is that:

- It is designed unilaterally - a method with which First Nations are all too familiar. In 2013, Prime Minister Stephen Harper struck a joint Senior Oversight Committee Process [25] to review the CLCP. The work of the SOC was not renewed and in 2014 Minister of Aboriginal Affairs and Northern Development Canada, Bernard Valcourt appointed Mr. Douglas Eyford to study the matter of CLCP reform by leading a one-person task force. Mr. Eyford's work resulted in the Government of Canada unilaterally introducing an Interim CLCP in 2014 that failed to respond to the issues identified in the very joint dialogue undertaken in 2013;
- Despite its challenges, the SOC in 2013 created a measure of joint accountability and oversight that this policy reform requires. Canada's current approach has no such oversight and relies on self-reporting;
- There is no joint record keeping, analysis or tracking of progress. In the absence of shared reflection and information sharing, First Nations must entirely rely on Canada's information which creates a lack of full transparency;
- The Government of Canada states that it "currently negotiates outside the existing policy framework" and that this approach may provide a useful basis for interim or long-term policy changes. While this may appear to introduce greater flexibility to respond to the needs of the respective participating First Nations, it may also introduce greater risk. There appears to be no parameters guiding Canada's conduct, nor is there a process to establish a table for engagement;

[24] Developing a New Rights-Based Policy: Summary of Current Approaches, for discussion purposes only, draft document, p. 2. This list can in no way be exhaustive and Canada's document makes no reference to the previous effort of First Nations to advance reform of the CLCP based upon considered review analysis in 2002 through the Senior Oversight Committee in 2013 and in response to the Mr. Douglas Eyford in 2014.

[25] SOC TOR. SOC Principles

- The Government of Canada has not expressly defined what principles guide this reform. In 2013, while its work was not renewed, the SOC produced 10 principles [26] which were considered guidance for reform. In 2018, the Government of Canada through the Minister of Justice published Ten Principles regarding its relationship with Indigenous peoples. The current approach makes no reference to either.

Canada seems to have adopted different "approaches" at the discussion and negotiation tables however, fails to provide details on what the distinction is and why.

What is the trigger to engage at such a table? Who is a partner? Why is there a distinction between "discussing" and "negotiating" if all work is being conducted outside of the current policy?

The absence of a policy framework implies more flexibility however, are new risks introduced for the First Nations? What is the scope of these negotiations? Who is tracking progress? What is the goal? What is being discussed and/or negotiated that may have relevance to the national policy reform?

Can Canada provide examples? Are these negotiations something other than land and self-government? Are participating First Nations able to share information? Wise practices? Lessons Learned?

If negotiations are outside of the current policy framework, what is the scope of these discussions? Do these "negotiations" include land and what is the status of these lands (i.e., s. 91(24))?

Co-developed negotiation mandates can be "considered" but does Cabinet still ultimately decide?

Canada describes its "Lessons Learned"

In describing what is has learned, Canada states that "most of the lands and resources that are the subject of comprehensive land claim negotiations are under provincial and territorial government jurisdiction and that it has been the position of the Government of Canada that provincial and territorial governments should participate in the negotiation of agreements and contribute to the provision of benefits to Indigenous groups."[27] Canada provides no detail on the nature, scope or lessons learned from its engagement sessions with the provinces and territories - even though it has disclosed that these sessions have been held. This leads to the question of how Canada see its role in participating with the provinces and territories?

Canada includes global statements about the criticisms of the Inherent Right Policy (1995) in its Draft Discussion Paper but offers little substantive information or detail regarding the nature and scope of these discussions, if any.

Finally, Canada describes in its current approach how a specific treaty process was developed in British Columbia following a task force recommendation in 1991. The creation of the British Columbia Treaty Commission (BCTC) was a made-in-British Columbia negotiation process operating under the same policies.

Canada's Current Approaches

The Government of Canada is at discussion tables (or exploratory tables) with its "partners". These discussions are conducted outside the confines of the *Comprehensive Land Claims Policy and Inherent Right Policy.* They focus on the priorities of the respective First Nation through the co-development of mandates. Canada states that

[26] Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,
[27] Summary document, p.2

over 75 such tables have been created and 28 "preliminary-type agreements have been signed" with over $118 million allocated to support these discussions.

Canada asserts that the goal of these discussions is to "implement Indigenous rights and advance self-determination in a more collaborative and timely manner." The content varies depending on each "Indigenous group's needs and interests" but may involve:

- co-developing new ways to recognize rights and title in agreements;
- co-developing and building agreements incrementally;
- finding common ground to settle litigation out of court;
- using existing tools that are available government-wide outside of treaty and self-government processes to help address the unique needs of Indigenous peoples; and
- giving meaning to the treaty relationship.

Alongside these discussion tables, Canada explains that it has also made reforms to the way in which it negotiates modern treaties and self-government agreements, including internal mandating. These approaches have been co-developed with Indigenous partners, provinces and territories at negotiation tables or through collaborative policy processes.

Are these "discussion tables" a way to describe region specific analysis and search for solutions/processes (i.e., the FN Summit for example)?

Why does Canada avoid using the term "recognition" and instead uses the term "rights-based"? Canada makes no mention of being open to Indigenous law and dispute resolution mechanisms in its new arrangements.

Recognizing the evolving nature of negotiated agreements is a positive but what does "orderly processes to recognize and implement new rights" mean? Can Canada please provide examples?

Canada references the 2015 Cabinet Directive on the Federal Approach to Modern Treaty Implementation. The Directive advances "whole of government approach" measures but it is not clear if these remain unfilled promises or if the initiatives have been developed.

Canada references existing treaties, section 35 and the UN Declaration are the frameworks for reconciliation in Canada and are "essential components" for any federal rights-based policy developed to replace the Comprehensive and Inherent Right policies.

Canada's Description of Further Reforms

Canada states that these new approaches have resulted in innovative practices that will inform Canada's policies going forward. Reforms that include:

- Shifting away from full and final agreements: Canada's need to reach a "final agreement" had as its central interest the need to attain "certainty". To shift away from full and final agreements, in 2014, Canada introduced incremental and non-treaty approaches to addressing rights and title. In 2015, other changes included expanding "orderly processes to recognize and implement new rights into a concluded treaty, post-effective date";

The regular review of implementation has long been called for (e.g., Office of the Auditor General). Does this review also include an independent oversight beyond the Deputy Minister of Crown-Indigenous Relations?

In 2017, Indigenous and Northern Affairs Canada was dissolved and two separate departments created. What joint work is underway to inform the legislative authority for the new Indigenous-Crown Relations and Northern Affairs?

How did Canada implement this "suite of reforms" in 2017?

What is the source of the Minister's Agreement in Principle authority? If the Minister's authority is not legally binding, then what are these documents and what risk is transferred to the First Nation? What is the authority for spending under these documents?

Are these efforts to improve the BCTC exclusive to the proposals coming from FN Summit? What about BC AFN, UBCIC, other First Nations?

This shift to contribution funding in Budget 2018 included specific claims loan funding. Is this the same initiative? This is not loan forgiveness. What happens with this indebtedness?

How does a First Nation access the nation rebuilding program? What public communication has there been?

What is this "Collaborative Process? Who is involved? Who is the process accountable to? How is information publicly communicated?

Further, Canada is actively co-developing improved processes for the regular review of completed agreements to keep pace with changes in such areas as developments in law, federal legislation and policy, arrangements negotiated with other Indigenous groups, unforeseen circumstances and assessment of shared improved economic outcomes.

- achieving predictable intergovernmental arrangements;
- Accelerating Canada's internal mandating and approval processes: In 2017, Canada implemented a comprehensive suite of reforms to expedite its internal mandating and approval processes. The Minister of Crown-Indigenous Relations can now sign non-legally binding agreements, such as framework agreements and agreements-in-principle, sooner and without having to seek Cabinet approval. Two examples include the Northern Secwepemc te Qelmucw in July 2018 and Nishnawbe Aski Nation in December 2018; and
- Improving BCTC: In 2016 the Government of Canada, BC and the FN Summit committed to improve and expedite treaty negotiations with First Nations in BC. This included supporting a number of proposals and actions items developed by the FN Summit.

Canada's New Funding Approaches

Canada has:

- Eliminated the use of loans to support negotiations: As part of Budget 2018, the Government replaced the use of loans with non-repayable contributions to fund participation in the negotiation of treaties going forward. This does not mean forgiveness of loans but the Government is engaging with affected Indigenous groups on how best to address past and present negotiation loans;
- Established a new nation rebuilding program: As part of Budget 2018, $100 million over 5 years was secured to advance capacity development and support activities that facilitate the path to reconstituting Nations;
- Co-developing a new fiscal policy for self-governing Indigenous governments: In 2016 the Minister committed to developing a new fiscal policy through the Collaborative Fiscal Policy Development Process ("Collaborative Process").

In 2017, as a demonstration of commitment to the Collaborative Process, the Government of Canada announced that funding reductions would be suspended for up to three years while parties work toward a new self-government fiscal policy framework. Since then, self-governing Indigenous governments have worked on a number of specific methodologies that would form annexes to Canada's Self-Government Fiscal Policy. There were seven areas of expenditure need approved in June 2018.

Final Considerations

First Nations Leaders stated unequivocally to the Federal Government in September and again in December 2018 that is was necessary to work with them before adopting and implementing any legislative or administrative measures.

Canada's current "engagement process" has been the only mechanism through which the Government is communicating, and then only to the specific parties involved while at the same time, as we now learn, developing "lessons learned" which will shape its national policy reform. Such an approach sidelines important, national policy discussions, regarding Aboriginal title, treaty obligations, Indigenous law, dispute resolution, shared jurisdiction and access to natural resources.

First Nations have called for a First Nations-led process to determine the path of decolonization and self-determination. First Nations continue to call for processes with adequate time for engagement and decision making. First Nations continue to call for processes that are transparent.

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