



Federal Comprehensive Claims Policy vs. Recognition of Aboriginal Title & Rights

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Background to CCP

- ▶ The first time the Supreme Court of Canada (SCC) ruled on Aboriginal title in Canada was 39 years ago (1973), in the *Calder* case.
- ▶ The Nisga'a Tribe lost the *Calder* case.
- ▶ The Court ruled in favor of Aboriginal title; but the bench was split on whether Aboriginal title was extinguished – three for, and three against
- ▶ The 7th ruled against the Nishga'a on a technicality.

1973 Statement of Policy

- ▶ The federal government responded to the *Calder decision* by way of a “*statement of policy*”, issued by the then Minister of Indian Affairs, Jean Chretien.
- ▶ The federal policy was to negotiate three types of claims; 1) Comprehensive Claims, 2) Specific Claims, and 3) Claims of another nature.

Evolution of CCP

- ▶ Over the years, the 1973 “*statement of policy*” has undergone a number of changes, the biggest of which involved separating Comprehensive Claims and Specific Claims into discrete policies with additional definition.
- ▶ The original statement on Comprehensive Claims was amended in 1981 when Canada released “*In All Fairness*”.

1985 Coolican Report

- ▶ Early in 1985, David Crombie, then Minister of Indian Affairs and Northern Development, put reform of the Comprehensive land claims policy on his political agenda, he announced the appointment of a five-person task force, headed by Murray Coolican, to: "review all aspects of the current comprehensive claims policy and make recommendations as to future policy".

1985 Coolican Report (cont'd)

- ▶ Recommended 4 main principles: (1) recognition and affirmation of Aboriginal rights; (2) negotiation of Aboriginal self-government; (3) shared Aboriginal + government responsibility for land and resources management and (4) third party interests be treated fairly.
- ▶ Also recommends shift from cash and land deals, and broadening of the land claims policy to permit negotiation of economic, social, political and cultural issues. It recommended that rather than extinguish Aboriginal rights, land claims settlements should affirm them.

1986 CCP

- ▶ In response to the Coolican Report this policy was changed again in 1986, and renamed the “Comprehensive Land Claims Policy” (emphasis added). The word “Land” was added to clarify that from the federal government’s perspective, “self-government” was a separate issue to be negotiated in accordance with the federal 1985 Community-Based Self-Government Policy.
- ▶ The 1986 Comprehensive Land Claims Policy has essentially remained in effect as the federal negotiation position regarding Aboriginal title up to today, except “extinguishment” has been replaced with the notion of “certainty”, as well as some changes to the process.

1990 Mulroney's Post-Oka Four Pillars Policy

- ▶ Accelerating settlement of Land claims;
- ▶ Improving the economic and social conditions on Reserves;
- ▶ Strengthening the relationships between Aboriginal Peoples' and governments;
- ▶ Examining the concerns of Canada's Aboriginal Peoples' in contemporary Canadian life.

RCAP Report

With regard to new treaties and agreements, the Commission recommends that

2.2.6

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

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RCAP (cont'd)

- (a) The blanket extinguishment of Aboriginal land rights is not an option.
- (b) Recognition of rights of governance is an integral component of new treaty relationships.
- (c) The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.
- (d) Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown

RCAP (cont'd)

In relation to all treaties, the Commission recommends that

2.2.11

The following matters be open for discussion in treaty implementation and renewal and treaty-making processes:

- ▶ governance, including justice systems, long term financial arrangements including fiscal transfers and other intergovernmental arrangements;

RCAP (cont'd)

- ▶ lands and resources;
- ▶ economic rights, including treaty annuities and hunting, fishing and trapping rights;
- ▶ issues included in specific treaties (for example, education, health and taxation); and
- ▶ • other issues relevant to treaty relationships identified by either treaty party.

1997 *Delgamuukw* Decision

- ▶ The Supreme Court concluded that Aboriginal title is a real property right, which enjoys constitutional recognition and protection via s.35 of the *Constitution Act, 1982*.
- ▶ *It held* that, where Aboriginal title exists, and where it has been infringed, the Crown must justify its infringement and reconcile its assertion of Crown title with Aboriginal title. The Court identified two steps in the justification test: (1) claimant proves infringement; and (2) Crown proves justified with fiduciary duty.

1997 *Delgamuukw* Decision

Justification Test – consistent with fiduciary duty:

- ▶ Consultation
- ▶ Compensation - acknowledging the value inherent in Aboriginal title lands and resources, the Court indicated that diminished rights would normally require “valuable consideration”.
- ▶ Surrender/extinguishment of Aboriginal title - only required when extreme measures are proposed by the First Nation, ones which would sever the connection between future generations and the land.

1997 *Delgamuukw* Decision (cont'd)

In *Delgamuukw*, the Supreme Court of Canada elaborated on nature of Aboriginal title:

- ▶ The right to **exclusive use and occupation of the land**.
- ▶ **The right to choose to what uses the land can be put, subject to the ultimate limit that those uses cannot destroy the ability of** the land to sustain future generations of Aboriginal peoples.
- ▶ Lands held pursuant to Aboriginal title have an **inescapable economic component**.

1997 *Delgamuukw* Decision (cont'd)

Reconciliation:

- ▶ In short, the Supreme Court of Canada has recognized that Aboriginal title is a **real property right, and that has a value. The Court has also recognized that other** governments must justify any infringement of that property right, and **reconcile the** assertion of Crown title with the reality of Aboriginal title.

CCP inconsistencies with *Delgamuukw*

- ▶ CCP says **compensation** is available, but not part of the actual negotiations because the Crown takes the position that negotiations should be future looking and not focus on compensation for past infringements.
- ▶ Yet, the April 28, 2000 *Statement on Certainty Principles* speaks to reconciling past infringements. Ironically, compensation is payable to third parties. To add insult to injury, First Nations are asked to release the Crown from any future claims to compensation.

CCP inconsistencies with *Delgamuukw*

The CCP alternatives to extinguishment, are still forced and are not “recognition and affirmation” i.e.,:

- certainty and finality;
- modified and released; and
- Non-assertion of rights.

CCP inconsistencies with *Delgamuukw*

- ▶ In BC, the treaty model requires that settlement lands become fee simple lands and no longer under the jurisdiction of the federal government pursuant to section 91(24) by providing that upon the coming into force of the treaty, “there will be no more lands reserved for the Indians within the meaning of the Constitution Act, 1867”.

CCP inconsistencies with *Delgamuukw*

Other inconsistencies with Principles of Fiduciary Duty, Honour of the Crown and Reconciliation:

- Loan funding to negotiate, while development on title lands is ongoing;
- Forced elimination of tax exemption /immunity;
- OSR – own source revenues affect program and services funding levels

UN Declaration on the Rights of Indigenous Peoples

- ▶ Article 3 & 4 – IP have right to self-determination and self-government;
- ▶ Article 10 – IP have right not to be forcibly removal from their lands;
- ▶ Articles 25 & 26 – IP have rights to their traditional lands and requires states to give recognition and protection;
- ▶ Article 27 & 28 – States shall establish fair and independent processes to adjudicate rights, and IP have right to redress and compensation

Previous Efforts at CCP Reform

- ▶ **Coolican** - 1985 Task Force on Comprehensive Claims known as the Coolican Report met with limited success but failed to obtain removal of extinguishment of Aboriginal Title. The 1986 CCP merely changed the wording from extinguishment to “certainty”. The intent remained the same eliminate Aboriginal Title.
- ▶ **DISC** - 1999-2000 AFN *Delgamuukw* Implementation Strategic Committee (DISC). The federal response was why change the CCP if First Nations are ready to negotiate under the existing CCP.

Previous Efforts at CCP Reform

- ▶ **DISC** – Six point strategy:
 1. Public education,
 2. Political negotiation/pre-litigation strategy,
 3. Litigation,
 4. Policy development,
 5. Direct action/exercise of Aboriginal rights, and
 6. International campaign

Previous Efforts at CCP Reform

RIFNG Committee – Confederacy Resolution May 2004 in Regina:

- ▶ Post- FNGA;
- ▶ RIFNG Committee Report March 2005 – identified need for policy reform in 5 areas:
 1. Comprehensive claims policy,
 2. Treaty implementation,
 3. Inherent right of self-government,
 4. Specific claims, and
 5. Code of conduct for honour of the Crown

Previous Efforts at CCP Reform

RIFNG (cont'd)

- ▶ Under PM Paul Martin's Roundtable process – towards “transformative” reform;
- ▶ Cabinet Retreat – May 31, 2005
- ▶ First Nation-Federal Crown Accord Political Accord on RIFNG signed – provided for recognition and implementation approach in joint action and cooperation on policy change in areas identified in RIFNG Report
- ▶ Change of government and Harper government refused to honour RIFNG Accord

Previous Efforts at CCP Reform

Common Table: in 2007 process established under BCTC to address common (policy) obstacles to progress

▶ 6 key topics identified:

1. Recognition/certainty,
2. Constitutional status of lands,
3. Governance,
4. Co-management of traditional territory,
5. Fiscal relations, ie., OSR and taxation, and
6. Fisheries

Previous Efforts at CCP Reform

Federal Response: mainly negative

1. Insist on certainty, no to recognition, stay with existing models, but willing to explore;
2. Constitutional status of lands – not willing to change federal mandates;
3. Governance – concurrent law model and harmonization, not exclusive FN jurisdiction,
4. Co-management – area and resource specific solutions, third party interests need to be balanced;
5. Fiscal relations, ie., OSR and taxation – no change
6. Fisheries – no but will explore fish arrangements

Previous Efforts at CCP Reform

BC Response: less negative – two avenues:

1. Re certainty, recognition, and constitutional status of lands – complicated, more study required not willing to change federal mandates;
2. Re governance, co-management, fiscal relations, ie., revenue sharing and taxation, fisheries – address in specific negotiations at individual tables

Federal Results Based Assessment – Sept. 4, 2013

Assess acceptance of Harper government's **core negotiating Comprehensive Claims/Self-Government mandates** and desired results, which are comprised of the following key tenets:

- ▶ ***Accept the extinguishment (modification) of Aboriginal Title;***
- ▶ ***Accept the legal release of Crown liability for past violations of Aboriginal Title & Rights;***
- ▶ ***Accept elimination of Indian Reserves by accepting lands in fee simple;***

Federal Assessment (cont.)

- ▶ *Accept removing on-reserve tax exemptions;*
- ▶ *Respect existing Private Lands/Third Party Interests (and therefore alienation of Aboriginal Title territory without compensation);*
- ▶ *Accept (to be assimilated into) existing federal & provincial orders of government;*

Federal Assessment (cont.)

- ▶ ***Accept application of Canadian Charter of Rights & Freedoms over governance &***
- ▶ ***institutions in all matters;***
- ▶ ***Accept Funding on a formula basis being linked to own source revenue;***

Other measures too, essentially accepting to become Aboriginal municipalities.

Conclusion

What's it going to take to bring about a change in the CCP?

- ▶ Crown engagement?
- ▶ More litigation?
- ▶ Lobbying?
- ▶ Direct action?
- ▶ International efforts?