Federal Indian Affairs Policy

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I have been asked to talk to you today about the current federal position on Aboriginal self-government. I would like to start with a brief history of the federal government's involvement in self-government.

As many of you are aware, the achievement of Aboriginal self-government has been a policy objective of the Government of Canada for at least a decade. Early attempts centred on changing the *Indian Act* to give more powers to bands, rather than on removing First Nations from the purview of the Act. Later attempts have involved a more radical restructuring of the relationship between First Nations and the Government of Canada, in effect dissolving some of the many ties that have bound First Nations to the federal government, and particularly to the Department of Indian Affairs.

For quite some time, the federal government has been pursuing a "two-track" approach. By this I mean that there have been initiatives aimed at amending the Constitution of Canada in order to recognize and entrench Aboriginal rights, and at the same time there have been other initiatives that would increase the powers of First Nations, lessen their dependency on government and enable them to chart their own futures, all within the current constitutional framework.

On the constitutional side, the repatriation of the Constitution to Canada through the *Constitution Act, 1982* included the recognition and affirmation of existing Aboriginal and treaty rights. The *Constitution Act, 1982* also provided for a series of first ministers' conferences on Aboriginal constitutional matters.

Nineteen eighty-three was a pivotal year, with the first of the first ministers' conferences and the tabling of a report from the Special Committee on Indian Self-Government. The 1983 First Ministers' Conference resulted in an amendment that confirmed modern-day land claims agreements as treaties, guaranteed Aboriginal and treaty rights equally to male and female persons, and provided for additional constitutional conferences. The special committee's report, known as the Penner Report, recommended federal legislation to support self-government, and the constitutional

entrenchment of a right to self-government.

But the government's response to the Penner Report—framework legislation to assist First Nations in realizing their self-government objectives—failed to gain sufficient First Nations' support and died on the order paper in June 1984.

At the 1985 First Ministers' Conference, the Prime Minister affirmed the government's commitment to a constitutional amendment on self-government for Aboriginal Peoples, but agreement was not reached on an acceptable amendment. During the First Ministers' Conference of 1987, Aboriginal leaders had proposed recognition and implementation of an inherent, pre-existing right, while the federal and provincial governments favoured a constitutional amendment that would have recognized a freestanding right, given effect through negotiations.

The governments and Aboriginal leaders, however, were unable to reach agreement on the specifics of that right. The Meech Lake Accord did not include direct reference to Aboriginal constitutional matters and resulted in considerable opposition among Aboriginal people, centred on two points: many felt that their participation had been limited, and there were fears about the substance of the proposals—that they might negatively affect Aboriginal rights, increase provincial power over federal areas of jurisdiction and that they did not recognize Aboriginal Peoples explicitly as a "distinct society."

The collapse of the Meech Lake Accord, due at least in part to Aboriginal opposition, set the stage for more careful consideration of Aboriginal interests in the discussions leading to the Charlottetown Accord. The consensus proposals saw an entrenched justiciable right to self-government, recognizing the inherent right of Aboriginal people within the Canadian federation, along with a constitutional commitment to negotiate agreements. But that Accord, too, was seen as flawed and inadequate by many Aboriginal people—and other Canadians—and was ultimately rejected by a narrow majority in a national referendum.

Where does that leave us now on constitutional matters? There are a number of key issues to examine. The first, and clearly the most prominent, is the question of recognizing an inherent right of self-government. The federal government has for a long time had a commitment to recognize a right of self-government. With the demise of the Charlottetown Accord, we lost an immediate opportunity to recognize an inherent right in the Constitution of Canada.

It is the federal view that a constitutional amendment will still be required for constitutional recognition of the right of self-government. Political recognition of an inherent right, in and of itself, would not change the legal relationship between federal, provincial, territorial and Aboriginal

governments. The view of the federal government continues to be that a framework for negotiations is required in order to define the scope of authorities of Aboriginal governments and the territorial limits of their jurisdiction.

Another important constitutional issue is constitutional protection of self-government agreements. The federal position is that self-government agreements do not enjoy constitutional protection, even if they are negotiated within the context of comprehensive claims that do gain such protection as treaties.

I am aware that Aboriginal leaders are eager to have constitutional protection extended to self-government agreements, and we would not need to be worrying about this issue if the Charlottetown Accord had succeeded.

But the Government of Canada must proceed with caution in this area. It is certainly possible that extending constitutional protection to self-government agreements would be seen to interfere with the division of powers under sections 91 and 92 of the Constitution and could thus be interpreted as circumventing the constitutional amendment formula. There are various interests that have to be taken into account, and therefore it might be expected that the federal government would not take a decision on this matter without extensive public consultation.

Recognizing that any constitutional change would be complex and time consuming, and that many First Nations wished to keep moving toward self-government in the meantime, the government has undertaken a number of initiatives that fall within the current constitutional framework. In 1985, the Government of Canada affirmed its full support for initiatives representing the second "track" of its self-government strategy. A number of community-based self-government initiatives were commenced in the expectation that they would result in increased local control and decision-making capacity, that they would recognize the diverse needs and circumstances of Indian people and that they would assure greater accountability of Indian governments to their own electors rather than to the federal bureaucracy.

We have made considerable progress in facilitating the development of self-government models. The *Cree-Naskapi (of Quebec) Act, 1984* put in place a regional government, and the *Sechelt Indian Band Self-Government Act, 1986* established a working example of community governance arrangements. Under the current community-based self-government process, there are some fifteen sets of negotiations taking place with communities to establish governance capacities and administrative arrangements that meet community needs. (One of those sets of negotiations is with the Meadow Lake Tribal Council here in Saskatchewan.) Elsewhere, legislation is being drafted to bring the Sawridge Agreement into effect in Alberta, and other

negotiations are coming to a close.

No additional communities are commencing negotiations for the moment, although there are a number of others who are negotiating governance arrangements at the same time as they are negotiating a comprehensive claim. This kind of arrangement is found in the Yukon, where legislation to bring into effect four community self-government agreements is being drafted. While in British Columbia, a "made in B.C. approach" to self-governing arrangements and comprehensive claims has been put in place, and the two are being negotiated together as treaties. Through the independent British Columbia Treaty Commission, with federal, provincial and First Nations representatives, communities will receive funding to develop and put forward their comprehensive claims and community-governance proposals for negotiation. The guidelines established through the community-based self-government process will apply to agreements negotiated within this process.

The B.C. Treaty Commission's job is to facilitate negotiations. It will co-ordinate and monitor the negotiations that take place between the two levels of government and the First Nations. I am certain that under this process there will be significant breakthroughs, both in the number of agreements and in the nature of those agreements.

Within the community-based self-government process across Canada, communities are required, once their proposals have been accepted, to negotiate eight essential elements of governance. These eight are as follows:

1. Legal status and capacity.
2. Structures and procedures of government.
3. Membership/citizenship.
4. Land title and the management of lands and resources.
5. Financial arrangements.
6. Application of the *Indian Act.*
7. Environmental assessment regime.
8. Implementation plan.

In addition, there are other, optional, elements that First Nations can choose to negotiate. These elements can include the administration of justice. I will briefly outline the principles underlying the federal approach.

Although the administration of justice is assigned to provinces under the *Constitution Act, 1867,* the administration of justice in any province involves two levels of government jurisdiction—federal and provincial. The involvement of two levels of government makes the negotiation and implementation of administration of justice arrangements under a self-government agreement quite complex.

From the federal perspective, there are three main principles that guide negotiations about the administration of justice: the current constitutional framework is to be respected, provinces are to be involved in the negotiations and the Canadian *Charter of Rights* will continue to apply. Although there is considerable argument on this last point, there is still scope for progress. Federal negotiators must also strive to reach agreements that will encourage the devolution of greater responsibility to First Nations communities and, at the same time, respect the social and cultural needs of those communities.

It is the view of the Government of Canada that a range of options regarding Aboriginal control over justice can be, and are being, developed generally within the framework of the existing justice system, from the appointment of Aboriginal justices of the peace to the establishment of non-legislated dispute-resolution mechanisms.

The federal government has come to a number of conclusions about Aboriginal self-government over the past few years. First of all, we recognize the critical need for continuing focused consultations with First Nations as we move ahead in the area of self-government. Second, we must continue to heed the fact that flexibility in processes and arrangements is essential if we are to accommodate the rich diversity among First Nations—put simply, progress will accelerate if there are a number of models of Aboriginal self-government. We fully expect that communities will continue to suggest innovative ways in which their self-government aspirations can be realized, and we will respond to those proposals in what I hope will continue to be a fair and open fashion. Finally, there is a continuing federal commitment to the achievement of self-government that is now and will continue to be the bedrock of our policy decisions. We know that the job is far from complete and that the task ahead is a difficult one, but we intend to keep working in co-operation with First Nations to reach our individual and mutual goals.