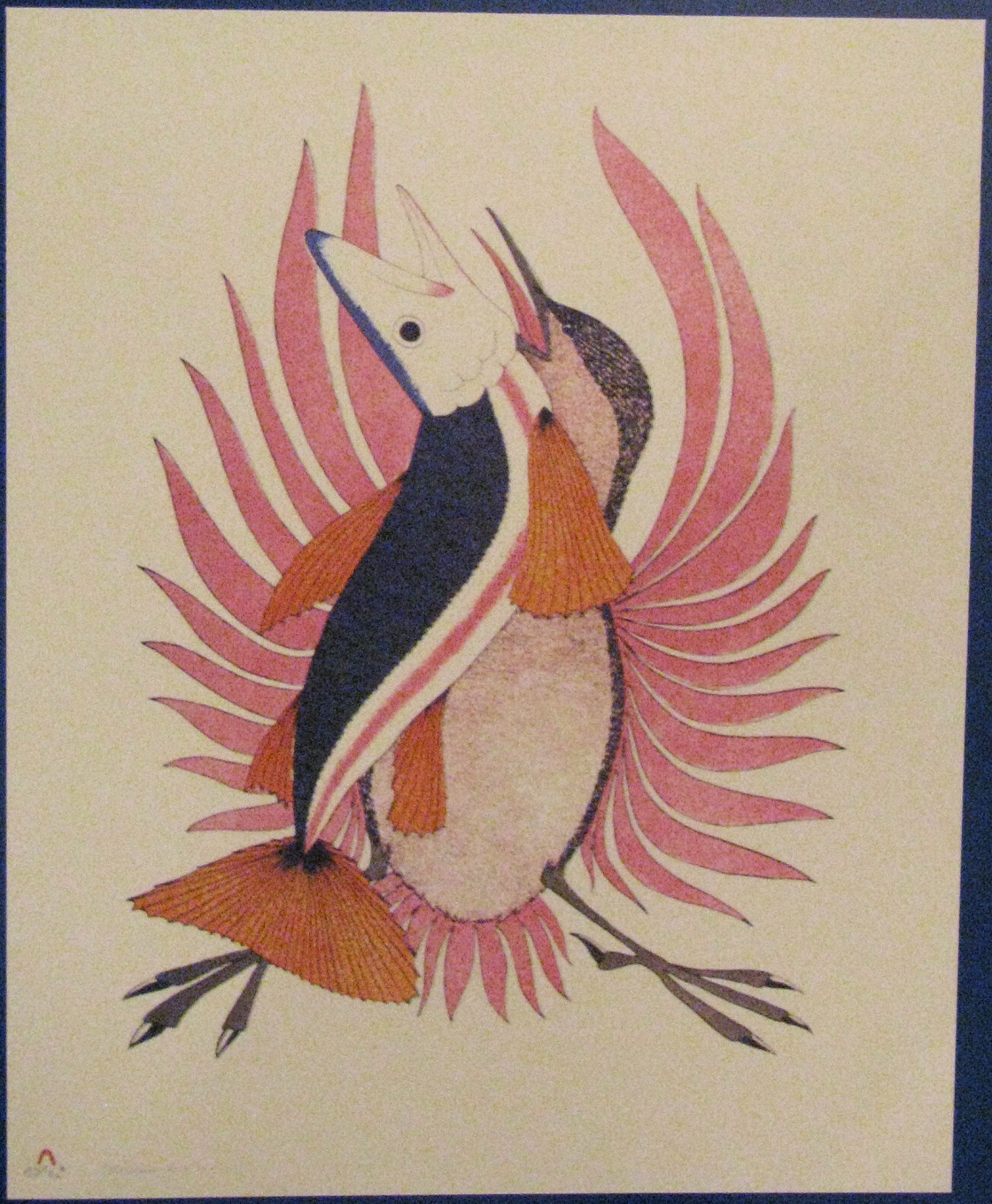
Living Treaties: Lasting Agreements

Report of the Task Force To Review Comprehensive Claims Policy



December 1985

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The Honourable David Crombie
Minister of Indian Affairs
and Northern Development
Ottawa, Ontario
K1A 0H4

December 1985

Dear Mr Crombie:

As chairman of the Task Force to Review Comprehensive Claims Policy, I am pleased to submit our report to you. As its name implies, the task force was charged with conducting a review of the federal government's policy on comprehensive claims. Since July we have travelled across Canada to consult with aboriginal groups, governments, and other parties.

During our work we were reminded that the land claims process dates back to the seventeenth century, when representatives of the British Crown entered into treaties with North American Indians. The first land claims policy was the Royal Proclamation of 1763. After Confederation, the Government of Canada continued the process of treating with Indians to clear title to land in the western territories for settlement. In 1973, a new policy was announced to settle outstanding land claims. This policy was revised in 1981 and was published under the title <u>In All Fairness</u>.

Just as the willingness of the British Crown to treat with the Indians for their land was unique in its time, Canada's modern policy, based upon the principles of negotiation and consent, has broken new ground in our relationship with aboriginal peoples. Nevertheless, our history of treaty making and claims negotiations has been the cause of significant bitterness and frustration for aboriginal peoples. Canada often has failed to live up to both the spirit and the letter of the treaties. Since 1973, the federal government and aboriginal groups have spent more than $100 million on negotiations, yet have produced only three agreements, while twenty-one claims are under, or await, negotiation. The comprehensive claims policy and the process for negotiation are clearly in need of reform.

When you appointed this task force, following your discussions with aboriginal groups, the terms of reference required that we consult with all aboriginal groups that have submitted comprehensive claims to the federal government. Chief Gary Potts of the Teme--Augama Anishnabai told us that "this...marks the first time since 1763 that government has made an effort to hear from the First Nations of Canada in a Treaty making policy form[ul]ation." It may seem unusual for one of two negotiating parties to consult with the other in the search for a new policy to guide it during the negotiations; however, if a new policy is to succeed, it cannot conflict with the fundamental objectives of the aboriginal groups. Thus, we need to find common ground upon which to build agreements.

The task force has received briefs from fifty-two aboriginal groups and has met with fifty. The representatives of the aboriginal groups were both eloquent and persuasive in their presentations. We were impressed by their willingness to look beyond their own needs and to address the interests of all Canadians.

The task force also has received briefs and letters from twenty-one non-aboriginal organizations and individuals, and has met with representatives of territorial and provincial governments. Officials from your department and from other federal departments also made important contributions. We thank all who participated for their interest and co-operation.

I also should like to thank the members of the task force and our staff. In just over five months the task force has held ninety meetings, has considered seventy-three submissions, and has prepared this report, which would have been impossible without their dedication and diligence.

Neither budget nor schedule permitted the task force to undertake independent research. Thus, we have developed neither recommendations on the administrative details for conducting negotiations nor detailed projections of the cost of our recommendations. Some groups remarked that we had an enormous task to complete in such a short time and recommended that we delay our report. We were determined not to do so. Already, too much time and too many resources have been wasted because of the lack of urgency given to negotiations in the past. The task force did not want to become yet another cause for delay in reaching agreements.

Some who read this report may ask why aboriginal peoples should have rights to which other Canadians are not entitled. The answer lies in our history and in our Constitution. The Royal Proclamation of 1763 and the treaties signed by the British Crown and the Government of Canada recognized the aboriginal interest in the land and offered protection to Indian fishing and hunting rights. Our Constitution recognizes a number of communal rights, among which are aboriginal rights. These rights are in recognition of the original inhabitants of Canada and the distinctive place that they have within Confederation.

Aboriginal groups want comprehensive claims agreements to affirm their rights. Under earlier policies the federal government sought to clear title to the land, and insisted that aboriginal rights be extinguished. The conflict in the objectives of the two parties has impeded successful negotiations. A new policy should not require aboriginal peoples to surrender totally rights that our Constitution has so recently recognized and affirmed. We therefore recommend that blanket extinguishment of aboriginal rights no longer be a pre-condition for settlement.

Comprehensive claims agreements can be a first step in building a new relationship with aboriginal peoples. To survive, relationships must be flexible, to allow for growth and to meet the changing needs of aboriginal communities and Canadian societies. The policy also should be flexible enough to be responsive to dramatic differences from one region of Canada to another in aboriginal economies and lifestyles, in the economic potential of the land and its resources, and in the policies of provincial or territorial governments. If a major goal of agreements is the building of self-sufficient aboriginal communities, each agreement should vary according to the needs and potential within each region. A national formula for land quantum or a single settlement model that establishes binding precedents for future agreements should <u>not</u> be considered.

Agreements should also provide a framework in which to promote the certainty about aboriginal rights that will encourage economic development. The new policy should encourage aboriginal communities not only to become economically self-sufficient but also to establish political and social institutions that will allow them to become self-governing. The two must develop together because political power is meaningless without the backing of financial resources. Thus, land without the power to manage what happens on it, or the right to fish without a say in the management of fish stocks, will only perpetuate the dependency of aboriginal peoples. The new policy also should enable aboriginal groups to share in the financial rewards of development on their traditional territories. We recommend that the policy should permit the negotiation of an aboriginal share of resource revenues and the establishment of a capital fund to enable aboriginal investment in economic development.

The federal government should encourage the provincial and territorial governments to participate in negotiations. Recent history in British Columbia shows the importance of provincial participation if aboriginal claims are to be settled through negotiation rather than through litigation. Consultation with the provinces before a decision on a new policy will be an important step in seeking their co-operation. If federal leadership fails to encourage provincial participation, we recommend that the federal government negotiate vigorously matters that fall within federal jurisdiction.

The current comprehensive claims process is not open to all aboriginal groups. The claims policy limits access to aboriginal groups that have never signed a treaty with Canada and whose rights have not been extinguished in legislation or "superseded by law."

We recommend that the process should be open to all aboriginal groups that continue to use and to occupy traditional lands and whose aboriginal title to such lands has not been dealt with by land-cession treaty or by explicit legislation. We cannot accept that aboriginal peoples should have their land rights taken or superseded without their consent.

We recommend a new policy based upon a relationship of sharing of power and resources. The previous pattern of land and cash settlements would be far simpler, because it is easier to negotiate and deliver terms related to cash or areas of land, in which amounts are quantified and dates are established for the transfer. A transfer of power, however, is far more difficult to achieve. To be prepared to give up jurisdiction and to change its own decision-making structures is one of the most difficult challenges for any institution the size of the Government of Canada. Such a change will require your support and that of your colleagues in Cabinet every day.

The alternative is to return to strictly land and cash deals and long delays in settlement, which both we and the aboriginal groups find unacceptable. The result will be a ticket into the lottery of litigation, which not only is expensive but also, by its adversarial nature, creates bitterness and frustration. Judicial decisions result in winners and losers. A loss for government could prove very expensive; a loss for an aboriginal group would indeed be a Pyrrhic victory for government. The federal government still would have to settle with the aboriginal peoples but, after victory in the courts, it would be as conquerors dealing with the vanquished. The results of such one-sided negotiations are all around us---they did not work 100 years ago and they will not work today. Agreements, fairly negotiated and entered into freely, with the consent of all parties, are far preferable to decisions imposed after lengthy, bitter, and costly court battles.

Negotiations during the last twelve years have had disappointing results, and seemingly endless time, energy, and resources have been spent. We recommend the appointment of an independent commissioner to monitor the claims process for fairness and progress, to assist in the negotiations if problems arise, and to report annually to the House of Commons Standing Committee on Indian Affairs and Northern Development.

We also recommend that, before formal negotiations begin, early agreement be reached on the agenda, the timing for negotiations, the funding for the aboriginal group, and the process of ratification. Such agreement, which we call a "framework agreement," should improve the climate for negotiations and would establish a schedule for their completion.

We were unable to undertake detailed projections of the cost of our recommendations, but, clearly, the proposed comprehensive claims policy has financial implications for the federal government. In spite of the current financial difficulties of the Government of Canada, we recommend broadening the criteria for access to the process and increasing the number of claims in active negotiation at any one time, which will increase costs in the short term. Other recommended

changes will, however, make the process more efficient and lower the cost of negotiations. Also, if the government is prepared to share the revenues from future development with aboriginal groups, the direct costs of settlements could be lowered.

Some of the responsibility for the failures of the last twelve years rests with the federal government. A new comprehensive claims policy and changes to the process of negotiation are only part of the solution. A firm commitment by the government is required if real progress is to be made.

We considered recommending legislation to enact the claims policy to give it the backing of Parliament. Although we believe parliamentary support would require government departments to give the policy a higher priority, we were persuaded that debate in Parliament at this time would take time and resources away from negotiations and would delay agreements further.

Action taken on other issues has shown that, when motivated, the federal government can co-ordinate action among departments and can get the job done in a timely fashion. However, similar action has yet to occur in land claims negotiations.

There are now six groups in negotiations, with fifteen waiting to begin. Seven others have submitted claims that have not yet been accepted for negotiation. At the current rate of settlement it could be another 100 years before all the claims have been addressed.

The complex mechanism of government tends to move slowly. Negotiations may involve several departments, and although the claims process is a priority for your department, it may not be for others. Even within your department, the issue of comprehensive claims is only one of many urgent issues demanding attention. The government, particularly those departments that are directly involved, must consider a new policy carefully. Time spent now to ensure the acceptance of a new policy throughout every department of the government will save years of wasted time and resources. Once a policy has been accepted, the government must state clearly its own commitment to it and must maintain the political will required to achieve settlements.

People may ask what a new comprehensive claims policy offers to all Canadians or why it is in the national interest. The answers are clear. Canada will be enriched if aboriginal peoples become contributors to Canadian life, rather than wards dependent upon the state. The economies of the regions of the country will be stronger if their aboriginal communities are strong and healthy. Economic growth often has been dampened or new development delayed by the uncertainty of unresolved land claims. Agreements will resolve the uncertainty and will allow both aboriginal and non-aboriginal Canadians to benefit from new economic development.

Throughout our history, federal government policies have encouraged the assimilation of aboriginal peoples into Canadian society, but these policies have failed. Aboriginal peoples have proved to be remarkably tenacious; their communities have persisted as distinct societies with their own cultures and traditions.

Statistics on health care, education, crime, or income levels tell a story of aboriginal peoples living at the lowest levels of our society. In spite of this reality, in meeting after meeting, aboriginal leaders spoke of their desire to build a new relationship with Canada---a relationship based upon sharing, respect, and a vision of the future. We believe that it is in Canada's interest to respond in a similar fashion. We should not forget history, for its lessons direct us to meet this challenge and to work together towards a new relationship based upon mutual respect and sharing.

To build this new relationship will require co-operative and creative negotiations; the parties will have to be prepared to share both power and resources. However, the results will make the cost and effort worthwhile. Aboriginal communities should have this opportunity to become contributors to Canada, as distinct, prosperous, and non-dependent societies within Confederation.

Yours sincerely,

Murray Coolican

Murray Coolican
Chairman

Comprehensive claims agreements are the continuation of a process that has been evolving for more than two centuries. At the heart of that process is an effort to work out mutually agreeable terms with the aboriginal peoples in Canada for sharing the country's land and resources and for participating in a common citizenship.

Our task force was appointed in July 1985 by the Honourable David Crombie, Minister of Indian Affairs and Northern Development, to "conduct a fundamental review of the federal comprehensive claims policy." This is our final report to the minister.

SCOPE OF THE REPORT

Our report begins by tracing the background of aboriginal claims agreements in Canadian history and law and by analysing the new constitutional context in which contemporary land claims policy must be made. Chapter 2 considers the connection between claims negotiations and other processes through which Canada's aboriginal peoples are seeking to establish a new relationship with Canada. Chapter 3 contains the framework of the policy that we believe should guide the federal government in reaching and implementing comprehensive claims agreements with aboriginal groups. Chapter 4 discusses in detail the substance of the proposed comprehensive claims policy, and chapter 5 focuses on the issues of process. Chapter 6 expresses our views on what is at stake for Canada in the successful resolution of aboriginal claims.

TERMINOLOGY

A number of terms in this report may require a word of explanation.

During our deliberations, we were impressed time and again by the diversity of the aboriginal peoples of Canada. These differences should be cherished, for they add immeasurably to the cultural richness of our country. Although we appreciate the significance of such differences, it is impossible to reflect them in this report in any detail.

We have used a variety of terms to refer to the descendants of the aboriginal inhabitants of this land---Indians, Inuit, and Métis. For the most part, we have used the general terms aboriginal, indigenous, and original people(s), inhabitants, nation(s), group(s), society(ies), and community(ies) interchangeably.

Throughout the report, we refer to land(s) and resources. Unless the context suggests otherwise, these expressions are used in a general way. The term land usually is intended to include waters, whereas resources usually refers to the products of both land and water.

The rights of aboriginal peoples are described in a variety of ways. As the report itself explains, the courts also have used several terms to refer to these rights. The following are used interchangeably: Indian title, interest; aboriginal title, right(s), land rights, interest, and claims; and original title.

The term aboriginal interest is used in two contexts. In the narrow context, described in the preceding paragraph, it is synonymous with aboriginal rights, title, and so on. In a broader context, it refers to the social, economic, and other concerns of aboriginal communities that go beyond legal conceptions of aboriginal rights.

Reference sometimes is made to the claims of the aboriginal groups. We are aware that many aboriginal people find this term offensive. Because their rights predate those authorized by colonizing powers, they resent the implication that they have the burden of establishing the validity of such rights. Nevertheless, we have sometimes used expressions such as claims, claimed area, claims process, and claimant groups. We have done so for two reasons. First, section 35(3) of the Constitution Act, 1982 uses the term land claims agreements. Because agreements negotiated pursuant to the proposed policy are entitled to constitutional protection under section 35(3), it seems appropriate to reflect this constitutional language. Secondly, the claims parlance is commonly understood, and we found it difficult to communicate our ideas succinctly without making occasional reference to it. Our use of these terms should not be taken as rejection of the view of their rights put forward by aboriginal groups.

Our report refers to land claims agreements at various stages. We do not mention final agreements because, as the report explains, we have approached land claims agreements as a method of defining the relationship between aboriginal peoples and other Canadians, and not as once-and-for-all arrangements. Instead, we describe framework agreements, sub-agreements, and complete agreements. Framework agreements (as explained in chapter 5) will set the agenda for substantive negotiations. Sub-agreements will deal with specific subjects that may be capable of implementation at an early stage of negotiation, and complete agreements will be determined at the end of substantive negotiations, and will provide the means for determining future arrangements.

Task Force to Review Comprehensive Claims Policy

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