Nault's Presentation to the Reference Group

Renewing Treaties, Claims and Self-government Negotiation Processes to Support a "Quality of Life" Agenda

Reference Group of Ministers on Aboriginal Policy- February, 2002

Outline

- Renewing our Claims, self-Government and Treaties Processes to Support a Quality of Life Agenda
- Achievements and Challenges
- Concurrent Approaches: Managing for Results "Inside the Box": Putting our Current Process in Order
- Concurrent Approaches: Moving "Outside the Box": Renewing our Negotiation Policies and Approaches
- Closing Considerations
- Annex A: Policy Approaches, Policy Evolution and Business Lines

Purpose

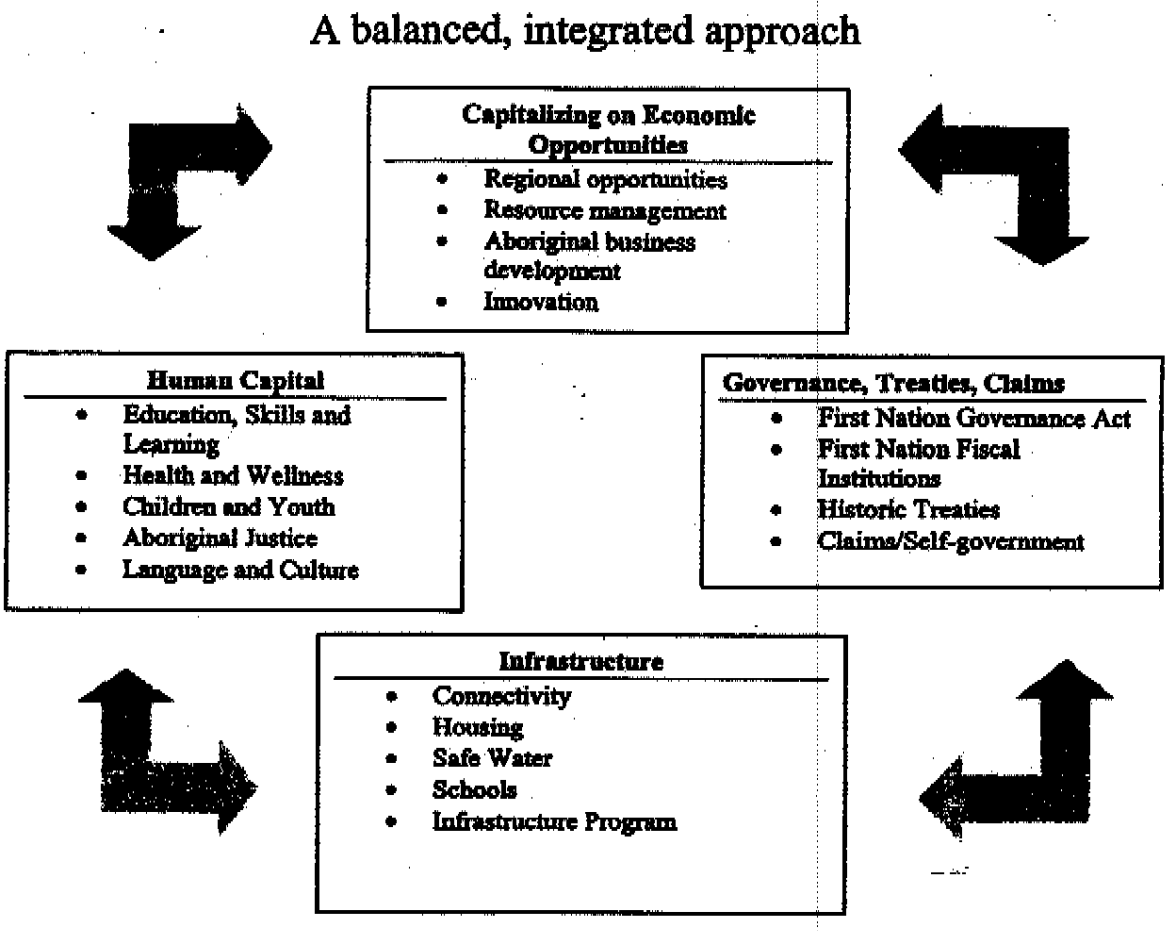
The reconciliation of pre-existing rights of Aboriginal peoples with Crown sovereignty has been, and continues to be, a major political, legal/constitutional and socio-economic challenge for the Canadian federation.

- For over 200 years, reconciliation was addressed by historic treaties and the *Indian Act*.
- Over the past 30 years, the Government of Canada has created a number of negotiation policies and processes to address reconciliation with Aboriginal peoples and to offer alternatives to the courts:
  - Comprehensive Land Claims policy (modern land claim treaties);
  - Self Government policy;
  - Specific Claims policy.
- This presentation provides an opportunity to assess how these negotiation policies and processes can better achieve both a reconciliation of rights and the socio-economic objectives of the Government of Canada and Aboriginal peoples.

Themes

RGMAP has identified some key themes which have significant implications for Canada's current processes for addresses comprehensive claims, self-government and specific claims:

- Improving the socio-economic status of Aboriginals at the same time as progressing on the rights agenda;
- Promoting community development plans that integrate initiatives related to economic and social development, infrastructure, governance and claims/treaties/self-government;
- Developing new approaches to governance to reflect the small size if most Aboriginal communities and developing an inventory of governance models



Challenges

- Claims and self-government processes are essential to and part of a quality of life agenda. They:

- Provide a forum for constructive engagement to redirect the rights agenda from litigation and confrontation and to move beyond the grievances of the past towards social cohesion;
- Promote stable community governance, social and economic opportunity and investor confidence through agreements which provide resource access, lands, authority, capacity and capital;
- Break down old models and patterns of dependency in moving beyond the *Indian Act*.

- Constitutional rights and legitimate claims and grievances cannot be put on hold to focus exclusively on quality of life issues.

- But, despite major successes, it is clear that existing processes are not as effective as they should be and that fundamental changes may be required.

Approach: Managing for Results "Inside the Box"

In the short term we need to put our existing negotiation processes in order:

- Give priority to those negotiation tables that can achieve agreements;
- Suspend non-productive processes and redirect our energies to address capacity and economic needs of affected communities;
- Streamline mandating and approval processes and address mandate issues that are blocking agreements;
- Institute results based reporting to demonstrate social and economic impacts of claims and self-government agreements.

Approach: Moving "Outside the Box"

But managing "the Rights Agenda" to more effectively support social and economic goals will require a willingness to consider some fundamental changes to our current policy approaches:

- New approaches to certainty in land claim and self-government treaties;
- Development of incremental and framework approaches to treaty-making;
- Re-engineering the BCTC process;
- Investing in new governance models;
- Greater integration of specific claims settlement and community development.

Together, theses" inside the box" and "outside the box" measures will set a significant agenda for change to improve performance and renew our claims and self-government processes by providing a more strategic focus on community development.

ACHIEVEMENTS & CHALLENGES

Treaty, claims and self-government processes are essential.

- **To maintain a climate for a quality of life agenda by managing social and economic risk:**
  - Provide a means of constructive engagement, as an alternative to litigation;
  - Reduce confrontation and civil unrest;
  - Promote economic participation, social harmonization and respect for culture.

- **To manage the legal, economic and security risks associated with unresolved claims and unfulfilled treaty obligations:**
  - $80M to litigate current historic treaty inventory; $150B claimed in damages;
  - Cost to British Columbia economy of unresolved Aboriginal title claims estimated in 1991 at 1B per year and 1500 jobs in the forestry and mining sectors alone;
  - Security costs associated with the Oka crisis were approximately $100M.

Negotiated settlements demonstrate that Aboriginal people and governments can work together to reduce the sense of grievance, promote positive relationships and generate economic development.

The federal government has achieved significant success in meeting its stated policy goals through agreements.

- Comprehensive claims agreements have resolved Aboriginal title claims in:
  - Virtually all of Nunavut;
  - 60% of NWT;
  - Over 50% of Yukon;
  - Approximately 50% of Quebec;
  - Nass Valley in British Columbia;
  - Resulted in Aboriginal control of 4 million sq km and $2 billion in capital for economic development.

- Specific claims has:
  - Resolved 40% of the claims received to date;
  - Fulfilled the majority of Canada's outstanding TLE obligations in the Prairies;
  - Provided $1.2B in capital and will result in 16,000 sq km in land to First Nations.

- Self-government negotiations:

  - Have shown that the Inherent Right can be negotiated within the Canadian constitutional framework (e.g., Nisga'a);
  - Are pioneering the establishment of modern, stable, political relationships for the management of governance powers and rights (with provincial involvement).
  - Have created an environment in Yukon where self-governing First Nations are moving from dependency to strategic governance and program delivery with YTG on a "government to government" basis.

Negotiated settlements are showing demonstrable benefits

- **Creation/Expansion of Aboriginal businesses:**
  - First Air acquired by Makivik Corporation from compensation funds; First Air now contributes $40M to Canada's northern economy annually; likewise, Air Creebec put together and purchased out of Cree settlement funds;

- **Corporate structures and stable management arrangements:**
  - Inuvialuit Regional Corporation, established in 1985 to manage the cash compensation after the 1984 land claim settlement, has assets of more than $278 million; Inuvialuit Corporation Group realized an after-tax income of $52.5 million in 2000;
  - Nisga'a manage third largest salmon-producing river in Pacific Northwest.

- **Employment:**
  - 75% of firefighters in Yukon are First Nation citizens.

- **Community Investment**
  - Most specific claims settlement funds are committed to community economic development trusts.

- **Spin-off effects due to clarity over land and resources:**
  - In 2000, Hydro-Quebec's net income topped $1B and $539M went to the Government of Quebec in dividends;
  - MOU signed between Mackenzie Delta producers(Conoco, Imperial Oil) and Aboriginal Pipeline Group (Inuvialuit, Gwich'n, Sahtu, Dogrib and Akaitcho)

But after almost 30 years of effort, it is clear that emerging challenges must be addressed.

Challenges

Our existing negotiations processes are overextended.

- We have engaged at many tables as a means of managing conflict, establishing dialogue and avoiding litigation, without always having a clear long term vision of expected results.

- As a result:
  - Agreements are often difficult to conclude as the parties disagree on the objectives of negotiations;
  - There has been little rigor in applying readiness and capacity criteria before engaging in negotiations;
  - A number of negotiations have become self-perpetuating processes dominated by consultants, without clear mandate and community direction;
  - There has been little willingness to suspend or terminate processes for lack of performance and results.

We need to apply appropriate performance management frameworks.

Our internal mandating and approval systems are overburdened and time consuming.

- There are numerous sets of negotiations, often supported by small federal teams;
- Most agreements require Cabinet approval at every stage; many processes could require up to 10 Cabinet submissions over the course of negotiations;
- Federal departments have limited resources to devote to overview of negotiations;
- Key pieces of policy development or tools that are required to advance negotiations need to be completed or are missing(e.g., historic treaties);
- In seeking to fill the policy void, tables may devise unique solutions which set new precedents;
- Federal departments are thus overburdened and, as a result, become reluctant to endorse new approaches, promoting a tendency towards no-risk options which undermine policy objectives and reasonable risk management;

We need to streamline mandating processes and address gaps without losing checks and balances.

Aboriginal parties are increasingly critical of existing policies and slow results

- We have engaged with some groups who reject certain fundamental aspects of federal policies.
- Some are unable to conclude agreements or secure ratification:

- "All or nothing" approach to achieving certainty in comprehensive claims makes ratification an insurmountable challenge for many groups;
- Mounting negotiation loans as a percentage of potential capital transfer is a disincentive to closing some agreements.

- Some lack the readiness to negotiate or the capacity to conclude or implement agreements.

- Some use negotiations processes as a substitute for other purposes:
  - Try to use claims and self-government processes to address implementation of a historic treaty or achieve a treaty claims for access to natural resources in the province, or avoid cuts to social programs.

- For some, participation in processes may become an end in itself, providing employment, access to Government and funding:
  - Pressure to wait for change in government policy;
  - "Forum shopping", e.g., if a specific claim rejected, a First Nation may resubmit claim, may seek an ISCC inquiry or may litigate.

There is a need for more realism on what our processes can or cannot achieve and joint commitments to results.

<u>Engaging other levels of government and securing public support continues to be a challenge both for negotiation and implementation.</u>

- Provincial/territorial governments have differing views on jurisdiction, liability, certainty and recognition of the Inherent Right;
- BC and Quebec pressing for new treaty models for comprehensive claims to accelerate settlement and development of resources;
- Cost-sharing arrangements are difficult to achieve;
- Provinces/territories tend to be more politically controlled by local third party interests and uneven in management of municipal government roles;
- Fluctuating public support; dissatisfaction with slow progress on claims, but more support when linked to improvement in social and economic conditions for First Nations;
- Facing " not in my back yard" reaction to some specific claims settlements;
- Major lack of public understanding of goals, objectives and benefits of self-government.

Maintaining a climate for settlement of claims and self-government agreements requires increasing attention to provincial roles and public perceptions.

The fiscal sustainability of our processes is in question.

- The claims envelope ($400 million per year) would not support a major acceleration of comprehensive claim agreements.
- The current allocation of $75M for specific claims settlements cannot address the mounting legal liability of claims recommended for acceptance by DOJ as lawful obligations.
- Mounting comprehensive claims negotiations loans are becoming a disincentive to settlement.
- Existing A-bases of Federal Departments could not absorb the incremental costs of implementing self-government agreements currently under negotiation (to date DIAND is the only department absorbing any real costs).

There is a need to ensure that our investment in negotiations and settlements is compatible with the results we want.

MANANGING FOR RESULTS "INSIDE THE BOX": PUTTING OUR CURRENT NEGOTIATIONS PROCESSES IN ORDER

Putting Our Current Negotiations Processes in Order

Canada is making a significant political and financial investment in our existing claims and self-government processes.

- We have established a claims envelope of over $400M a year for comprehensive and specific claims;
- INAC is investing over $110M a year to support negotiations processes, as follows:
  - $16 million-Comprehensive Claims outside of B.C;
  - $29 million-Federal Treaty Negotiation Office B.C;
  - $38 million- Self-government;
  - $25 million-Specific claims;
  - $2 million-Implementation.

- This does not include costs being absorbed by the Department of Justice and other government departments.

Despite significant resources, it is clear that our processes are not as successful as we expected or as efficient and effective as they should be.

Putting our current negotiations processes in order

- Over the past months, "I" have signaled to First Nations, Standing Committee and Federal Negotiators a fundamental shift in the federal approach to negotiations:

  - **We are signaling that we are not prepared to stay at the negotiation table for the sake of staying at the negotiation table.**

- "I" have instituted a review of all our tables to determine:

  - **where results can be obtained in a reasonable timeframe;**
  - **where new mandates are required;**
  - **where processes should be suspended and redirected into other activities that will more effectively address economic and social needs of First Nations and Inuit communities.**

Reducing overextended Processes

  - Strategic review of all negotiation tables by March 2002 with the view to fixing or suspending unproductive processes, e.g.

- Strategy for concluding or suspending comprehensive claim and self-government negotiations in Yukon.

➢ Completion of formative evaluation and new funding and readiness criteria for self-government negotiations by March 2002.

Streamlining mandating Processes and Addressing Gaps

➢ Streamline role of Federal (ADM) Steering Committee on claims and self-government and use Cabinet annex system more efficiently.
➢ Identify mandate gaps and set priorities for mandate development.
➢ Streamline specific claims by more use of templates for negotiations and settlement.

Address Aboriginal Dissatisfaction with Current Processes

➢ Legislate Independent Claims Body to improve transparency and effectiveness of the Specific Claims process.
➢ Refocus energies on capacity building/economic development and encouragement of aggregation, where current negotiation processes are unable to proceed because of capacity issues.

Engage other levels of Government and Manage Public Perceptions

➢ Use regional partnering strategies to lever provincial cooperation and settling claims and implementation self-government.
➢ Institute results-based reporting framework to demonstrate social and economic impacts of claims settlements (Response to Auditor General).

Fiscal Sustainability

➢ Complete review of fiscal sustainability pressures for self-government and reassess pressures on claims envelope.

Independent Claims Body (ICB)

Context:

- Over the past four decades, there have been numerous calls for the establishment of an ICB (Parliamentary Committees, independent reports, AFN/INAC Joint Task Force on Special Claims).

- Red Books 1 and 11 included federal commitments to create an ICB in consultation with First Nations.

- Consultation with AFN revealed support.

Underlying Issue:

- ICB will address serious issues re: perception of lack of transparency and fairness in specific claims research; assessment and negotiations which contributes to:

    - Inefficiency in resolving grievances:
    - Claimants do not accept Canada's rejection decisions, resulting in re-submissions and increase in litigation; extends time for negotiations and requires multiple research studies;
    - And an unstable environment for FN-Canada relationship, economic and political development.

ICB Structure and Functions:

The ICB will have two parts:

- The Specific Claims Resolution Committee will:

    - **Register all specific claims, supervise validation/rejection process;**
    - **Administer research and negotiation funding, provided a shared information base;**
    - **Facilitate negotiations and offer a full range of alternative dispute resolution (ADR tools).**

- The Specific Claims Tribunal will:
    - **Make binding decisions when ADR has been exhausted;**
    - **Apply to procedural issues, validation and compensation;**
    - **Be available only when claims are valued at less than $5 million.**

- ICB: Purpose:

The ICB will underpin an effective process meeting the interests of all parties ensuring

- That negotiations remain the method of choice to resolve disputes;
- Fairness/transparency of research, assessment, negotiations;
- Independent decision-making where appropriate;
- Resolution of outstanding specific claim-type lawful obligations.

More generally, the ICB will build First Nation capacity in negotiations, ADR and intergovernmental relations, and contribute to the long-term goal of self-sufficient and more stable First Nations communities. But it will not address more fundamental policy and funding challenges.

Summing UP

- "Inside the box" measures should bring improved performance, effectiveness, cost savings and results within our current policy approaches.
- But to institute more fundamental reforms of our current policies, we need to move **"outside the box".**

MOVING "OUTSIDE THE BOX":
RENEWING OUR NEGOTIATION POLICIES AND APPROACHES

Renewing our negotiation policies and approaches: Evaluation Framework

Changing the direction and outcomes of our negotiation processes will require and evaluation and renewal of our policy approaches.

Objectives/Outcomes:

- What are the outcomes (legal, social and economic) we are seeking to achieve through our negotiations policies?

Policy Approach:

- Do our current policy approaches support those outcomes or do they need to be changed?

Negotiation Processes:

- How do we conduct our negotiation processes in a more effective and efficient way to achieve timely results?

Changing Objectives/Outcomes:

There is a need for new approaches which:

- Improve the socio-economic status of Aboriginals;
- Promote community, regional and province –wide development plans that integrate initiatives related to economic and social development, infrastructure, governance and claims/treaties/self-government, and;
- Foster new approaches to governance that take into account the small size of most Aboriginal communities and therefore promote development of an inventory of aggregated governance models.
- But existing claims policies are designed primarily to achieve legal outcomes, releases of resolution of rights with limited flexibility to focus on socio-economic outcomes for Aboriginal people, and;
- Our current processes and authorities do not lend themselves to integrated and holistic resolution of grievances linked to community development.

Emphasis on quality of life outcomes and Aboriginal participation in the economy will require changes in our policy approaches.

Comprehensive Claims

New legal techniques are required for achieving certainty for lands and resources.

- The current comprehensive claims policy approach is based on the land cession-surrender treaties of the 1800's.

- Most Aboriginal groups have rejected 19th century legal techniques for achieving certainty (the surrender of Aboriginal rights in exchange for rights set out in the treaty).

- Cabinet has authorized consideration of alternate legal techniques provided they achieve the same degree of certainty and finality for lands and resources:

- The Nisga'a Treaty used a medication of rights technique;

- Other techniques are currently under development with Dogrib in the NWT, with the Innu in Quebec and with the Inuit in Labrador.

While significant in securing ratification of treaties, these new legal techniques still leave only one policy approach- a full and final Treaty settlement of all Aboriginal land rights.

Comprehensive Claims and Self-Government

A policy decision is required on the degree of finality we need to achieve in the treaties that include self-government rights not related to lands and resources.

The Inherent Right Policy is silent on this issue.

- We will not achieve treaties which require a final settlement of all self-government rights.

- At the same time, treaties need to provide predictability and clarity for the exercise of federal national interest powers.

- I will be coming to Cabinet shortly for a decision on the acceptability of an approach providing certainty for those non-land rights set out in the treaty and establishing an orderly process for additional rights to be proven in court and brought into the treaty.

Is the primary focus of self-government treaties to build the foundation for stable, predictable political and jurisdictional relationships or to achieve a final legal resolution of rights?

Is it good public policy to have only one vehicle for managing risk and settling Aboriginal rights and claims?

- Negotiation of constitutionally protected treaties requiring a one-time full and final settlement of all Aboriginal rights creates high stakes for all parties:

- Most settlements have taken over 15 years;
- Many Aboriginal groups have fragmented internally under the pressure;
- Mounting negotiation loans are becoming a disincentive to settlement.

- Economic and social development for Aboriginal parties and third parties is often put on hold during negotiations and interim measures tend to freeze, rather than promote development.

- British Columbia and Quebec are pressing for new treaty models and alternatives that will facilitate development of provincial resources without a final resolution of all rights.

- In Atlantic Canada, agreement for implementation of treaty rights (post Marshall) cannot wait 10-15 years for final settlement of all Aboriginal claims.

New risk management alternatives and settlement vehicles are required.

<u>Re-engineering the British Columbia Treaty Process</u>

- We have invested heavily in the BC treaty process- a unique tripartite process established by legislation;
- 52 First Nations, representing 120 Indian Act bands and over 70% of the Indian population in BC have participated. 43 are negotiating Agreements in Principle;
- After 7 years of negotiations, all parties are concerned that the progress is too slow and that costs are mounting with limited results;
- The process is unsustainable in terms of internal and legislative approval processes;
- The BC Treaty Commission Annual Report highlights the need to (a) improve the process in BC to achieve more results; and (b) develop alternatives to comprehensive treaties;
- On January 17, the BC government said it would shift its focus away from comprehensive treaties to a more incremental approach.

I met with BC and the First Nations Summit of BC in the fall. We directed our officials to commence "blue sky" discussions on how to renew BC treaty negotiations.

Comprehensive Claims

Given the volume of claims and the slow pace of settlement, the parties need a new approach to achieve results in BC. Ideas being explored by federal, provincial and First Nation Summit officials include:

- Legislation which could set out key elements of Canada's vision of a modern treaty at the outset of negotiations;

- BC wide negotiations with BC and the First Nations Summit on key province-wide treaty topics, e.g., certainty, fiscal relations;

- Incremental and/or sectoral approaches to treaty making – Section 35 treaty on a more limited range of issues than a comprehensive treaty, providing full and final settlements on certain sectors (e.g., fisheries, forestry);

- Non-treaty arrangements-time limited, contractual arrangements providing predictability of land and resource use;

- Formal codes of conduct to fulfill federal obligations (Delgamuukw, Sparrow) regarding land and resource use where treaty negotiations are underway or pending;

- New criteria to commence, measure progress of and prioritize negotiations.

I will return to Cabinet in the spring of 2002 to seek a mandate to negotiate ways to improve the treaty negotiation process in BC Negotiations would commence immediately after the provincial referendum.

Self-Government

Based on six years of experience, there is a need to consolidate and mature the policy framework.

- A positive aspect of the Inherent Right policy framework is its flexibility:

- Responsive to the need for different strategies to address varying circumstances of Aboriginal communities or groups e.g. permits sectoral and comprehensive agreements, non-treaty/treaty arrangements; incremental approaches;

- As a result, participation has been high (some 80 tables representing various groupings of over 400 Aboriginal communities and participation of most provinces);

- The policy has been successful in achieving the Nisga'a Treaty, a significant number of Aips and pending final agreements.

- However, there is now a need to stop "reinventing the wheel" at various tables and to achieve greater standardization in certain areas where we have good knowledge.

We need to distill an inventory of standard frameworks, models and legislation approaches and design capacity building initiatives and stricter entrance criteria to promote effective implementation of these models.

Self- Government

<u>Addressing the challenge of creating aggregate levels of government for effective program delivery:</u>

- RCAP advocated the "rebuilding of Nations as a pre-requisite to negotiation of self-government" (jurisdiction at the "nation" level rather then community level).

- While the Inherent Right policy approach allows for self-government negotiations with single communities, it provides for negotiations with tribal councils or a "nation" and for voluntary aggregation.

- Most negotiations involve groups of First Nations through tribal councils, treaty groups or province wide tables (apart from Yukon and some BC tables) there are very few single First Nation negotiations)

- Since RCAP, federal negotiators have encouraged development of aggregate models or regional or province-wide Aboriginal governance.

- But the current policy framework provides limited guidance or capacity support for addressing this challenge of designing and implementing the aggregate levels of government required for effective programming.

New approaches and tools are required to support evolution of aggregate levels of government with the capacity for effective governance and program delivery.

Self-Government

<u>Using Saskatchewan province wide framework for self-government to lever socio-economic development:</u>

- "Demographic is Destiny" – First Nation workforce essential to economic future of the province;

- Unique opportunity to use development of a new province –wide First Nation governance arrangement contribute to broader initiatives to address social disparities that marginalize Aboriginal participation in economy;

- Provincial participation in negotiations offers chance to break down on-reserve/off reserve/urban splits in program delivery (e.g., implement province wide First Nation education and Child and Family Services arrangements operating on and off-reserve);

- New governance and program capacity building offers a way to implement treaty relationship (shift focus from treaty rights and settlement to capacity building and social outcomes). However, this will present unique policy challenges.

Provides a unique opportunity for tripartite investment to promote good governance and improve social outcomes.

Self-Government

Ensure that self-government is fiscally sustainable.

Unlike comprehensive and specific claims, there is no "envelop" for the incremental cost of implementation of self-government agreements.

The 1995 Inherent Right Policy states that incremental costs of implementing self-government shall come from the existing A-bases of affected departments.

This includes an increment of up to 8% of existing program expenditures to cover cost of governance. To date, DIAND has absorbed the bulk of these costs (88M in 2000/01)

This approach is no longer sustainable, as A-bases of affected federal departments cannot absorb incremental costs.

I will return with recommendations on how to finance self-government in a fiscally sustainable manner that supports the governance and socio-economic outcomes we are seeking.

Specific Claims

Move towards a more integrated risk-management approach.

- The current policy results in dealing with claims one by one based on lawful obligation.

- Should we continue to settle specific claims one by one based on lawful obligation, forcing rejected claims into litigation and out-of-court settlement mechanisms?

- Should specific claims use a modern risk-assessment approach to accept claims on business as well as legal risk?

- Would federal and First Nation interests be better-served by integration of specific claims, out-of-court settlements, and litigation management authorities?

Should the goal be the settlement of First Nation grievances through one process?

Specific Claims

Add a focus on development

- The primary objective of settlements is to achieve a legal release with little, if any flexibility to focus on community social or economic objectives.

- Can and should we impose more requirements on how First Nations use the proceeds of settlements?

- Should we manage processes to optimize needed economic development outcomes e.g. give priority to resolving claims based on need or economic development opportunities available to First Nations?

- Can we integrate claim resolution and economic development without undermining the foundation of each policy?

Can we turn the 2.1 billion liability to First Nations for claims in our current inventory into a driver for economic development?

Specific Claims

How do we turn the corner on the growing inventory?

- The current policy approach encourages a grievance industry and a forensic audit of past land transactions.

- The research funding ($7M/year) Canada provides generates more new claims that we can process.

- Current settlement resources ($75M/year) are not adequate to reduce the growing liability of accepted claims.

- Canada can settle only about 14 claims per year.
- The backlog exceeds 550 cases and is growing at 10% per year.

- The 1991 decision to accept pre-Confederation claims produced historically and legally complex and expensive claims without general federal-provincial agreement on costs.

Should we and can we suspend our current research funding to focus on the existing backlog of accepted claims and increase settlement funds to reduce the backlog?

NEGOTIATION PROCESSES

Mandating and approval systems for comprehensive claims and self-government agreements are cumbersome and time-consuming for Cabinet and Parliament.

Cabinet

- Individual mandates require Cabinet approval at every stage (Framework, Agreement-in –Principle, Final Agreement) as well as mandate extensions or revisions

- Most comprehensive claims processes will require up to 10 Cabinet submissions over the course of negotiations.

Parliament

- The legislative burden can be significant:

- Each agreement requires separate legislation and claims may require additional regulations to establish land management boards.
- Parliament is concerned with ratification of "fait accompli" settlements.

Pre-approved template mandates and framework legislation could reduce the burden while respecting the role of Cabinet and Parliament.

CLOSING CONSIDERATIONS

Maintaining the viability of our treaty, claims and self-government policies and processes is essential for managing risk and legal liabilities as well as creating conditions to advance our quality of life agenda.

Canada's policies have achieved significant success but are showing increasing strain and producing slow results.

Claims and self-government processes need to be more closely integrated in to a quality of life agenda, and respond to external pressures for change from provincial government, Aboriginal parties and the public.

There are measures we can take "inside the box" to put our existing processes in order:

- Accelerate processes which can achieve results;
- Suspend or re-orient processes where agreements do not appear to be achievable;
- Address mandate and policy gaps that are delaying progress;
- Institute performance management frameworks for our negotiation processes;
- Institute evaluation frameworks to measure the results and impacts of the agreements we achieve;
- Introduce the ICB to bring greater transparency and rigor to the specific claims process.

Steps are currently being taken to implement all of these measures.

But maintaining viable processes to manage our treaty relationships, address Aboriginal claims and legal liabilities and implement self-government will require that we move "outside the box" of our existing policies.

- Rebalance the focus between legal objectives and socio-economic objectives;
- Provide additional policy instruments and incremental approaches to manage the risk associated with comprehensive claims and promote development;
- Develop new approaches and authorities to support evolution of aggregate levels of government for effective governance and program delivery; and,
- Decompartmentalize and better integrate our authorities for addressing specific claims, out-of-court settlements and economic development.

POLICY APPROACHES, POLICY EVOLUTION AND BUSINESS LINES

To institute improvements to our negotiations processes, it is important to understand the different policy approaches that Canada has adopted to address:

Comprehensive claims
Self-government
Specific claims

While there are generic issues affecting all our negotiation processes, each of our policy approaches involves unique challenges that need to be addressed to advance our aboriginal agenda.

Comprehensive Claims

The policy was initiated in 1973 to resolve claims to Aboriginal rights and title in those parts of Canada where no historic land surrender treaties were concluded.

Objectives:

- Legal certainty and finality with respect to Aboriginal rights, title and claims to land and resources;
- Clarity of ownership, use and regulation of land and resources for governments, third parties and Aboriginal people;
- Contribute to social and economic self-sufficiency of Aboriginal people.

Policy Approach:

- Negotiation of a land claim agreement (constitutionally protected) to achieve a full and final settlement of Aboriginal rights claims to land and resources;

- Aboriginal parties required to "cede, release and surrender" Aboriginal rights to land and resources in exchange for the rights set out in the treaty;

- "Alternative to surrender" technique approved for Nisga'a Treaty and further legal techniques being explored that achieve equivalent certainty and finality.

Since 1983, land claim agreements are protected under Section 35 of the Constitution Act as modern treaties.

Comprehensive Claims Policy Evolution

1973- Comprehensive claims policy announced, as response to the Calder decision of the Supreme Court of Canada, which acknowledged the possible existence of unextinguished Aboriginal title.

1982- Recognition of Aboriginal and treaty rights in the Constitution Act, 1982 (amendment in 1983 recognized that treaty rights include rights acquired through land claims agreements).

1986- Policy review:
instituted Cabinet approval of negotiating mandates;
Required development of implementation plans;
Expanded negotiation options for resource co-management and resource revenue sharing

1992-British Columbia treaty Commission (BCTC) established to address the unique situation of claims in that province.

1995- Inherent Right policy allowed for self-government to be negotiated as part of a land claims treaty.

2000_ Nisga'a treaty "alternative to surrender" technique approved.

Modern treaties provide for the participation of Aboriginal peoples in resource management and development, promoting self-sufficiency.

Land:

- Land ownership (surface/subsurface)
- Co-management of land and resources (e.g. environmental assessment, land use planning)

Economic Development

- Harvesting rights
- Economic Benefit Agreements (e.g. employment, contracting opportunities concerning mayor projects)

Revenue

- Resource revenue sharing
- Capital transfer

Structures

- Corporate structures and since 1995, Aboriginal governance structures and jurisdiction

Implementation

- Negotiation/ renegotiation of implementation plans
- Capacity Building/Transition
- Implementation management/committees
- Ongoing fiscal arrangements

The relationship established by comprehensive claims agreements sets a framework for socio-economic development, benefiting governments, third parties and Aboriginal people.

Comprehensive Claims North of 60

Region	Completed	In negotiations
NWT	Inuvialuit (1984) Gwich'in (1992) Sahtu (1994)	Dogrib (final Agreement)-pending federal policy decision on certainty Deh Cho (initial AiP stage) Akaitcho(initial AiP stage) South Slave Metis (initial AiP stage)
Yukon	8 land claims and self-government agreements completed (1995-2002)	6 remaining YFN's –negotiation will be completed by March 2003; Processes which are not substantially complete by March 2002 to be suspended.
Nunavut	Nunavut Land Claim Agreement (1993)	Cleaning up Transboundary Claims (Man./Sask. Denesuline, James Bay Cree and Inuit offshore)
British Columbia	Nisga'a (2000)	52 tables with a number at advanced AIP stage; pressure to re-engineer BCTC process (e.g., consider sectoral treaties, non-treaty resource agreements or framework treaties; unclear how self-gov't will be addressed)
Que	James Bay and Northern Quebec Agreement (1975) Northeastern Quebec Agreement (1978)	Atikamekw (AiP phase) Mamuitun and Mammit (AIP phase) both pressing for new treaty approach Algonquins (Scoping out) Mi'kmaq and Maliseet (Scoping out)- post Marshall
Ont		Algonquins of Golden Lake (AiP stage) - progress depends on provincial mandate and resolving beneficiaries issues.
Atlantic		Labrador Inuit (AiP concluded) with a final Agreement anticipated in 24 months Innu Nation (AIP stage)-ongoing Mi'kmaq-Nova Scotia-discussion of possible new approach underway Mi'kmaq and Maliseet- New Brunswick-discussion of possible new approach underway

Self Government

1995- Recognition of the Inherent Right to self-government as an existing Aboriginal right necessitated a negotiation process to implement self-government

Objectives:

To strengthen Aboriginal communities by enabling them to govern themselves in respect of matter internal and integral to their communities and reducing transparency;
To provide an alternative to unilateral exercise of self-government and subsequent litigation over Inherent Right;

Policy Approach:

The Inherent Right Policy provides for a variety of types of agreements:

- Agreements can cover a single jurisdiction or a broad range;
- Can be negotiated as part of a comprehensive land claim or in a stand alone arrangement;
- Can be negotiated as non-treaty arrangements or as Section 35 treaties.

- But all agreements ensure the application of the Canadian Charter of Rights and Freedoms and federal laws of overriding national importance.

- Federal national interest powers are not open for negotiation.

The focus is on the negotiation of practical and workable arrangements to implement self-government within the Canadian constitutional framework.

1982- Aboriginal and treaty rights protected under Section 35 of the Constitution Act 1982; self government not referenced.

1982-92- Aboriginal people sought a constitutional amendment to recognize the Inherent Right of self-government, until the failure of the Charlottetown Accord in 1992.

1985- Canada introduced Community- Based Self-Government policy; lack of ability to constitutionally protect self-government agreements hindered progress at both self-government and comprehensive claims negotiations tables.

1995- Federal government recognized Inherent Right as within meaning of section 35 and introduced the Inherent Right policy, setting stage for including self-government rights in modern land claims treaties or in non-treaty arrangements.

1996- Report of Royal Commission on Aboriginal Peoples (RCAP).

1998-2001 - Shifting focus from rights to capacity situating inherent right negotiations within a continuum of initiatives to strengthen Aboriginal governance.

Self Government

Self-government agreements establish the framework for new government-to-government relationships.

Governance Structures:

- Legal recognition of an Aboriginal government;
- Provisions for development of First Nation constitutions and governing structures;

Jurisdiction:

- Descriptions of jurisdiction (matters internal to First Nation communities , not including national interest powers);
- Rules of priority to resolve conflicts between federal; provincial/territorial and Aboriginal laws;
- Mechanisms for dispute resolution.

Financial Arrangements:

- Financial transfer arrangements and own source revenue.

Implementation/Programming

- Implementation plans for new governance structures/program delivery;
- Capacity development/transition;
- Harmonization of programs and services with surrounding jurisdictions;
- Ongoing management of government-to-government relationship.

The relationship established by self-government agreements replaces the Indian Act relationship with modern, political, jurisdictional, and fiscal relationships.

Self Government

Negotiations under the Inherent Right Policy are part of a continuum of initiatives to strengthen Aboriginal governance.

- The update on First Nations Governance and Related Institutions outlined a continuum of initiatives to strengthen Aboriginal governance:

- The First Nation Governance Initiative will strengthen governance for First Nations who remain under the *Indian Act*.

- Other governance initiatives are building capacity and institutional support for the transition to self-government:
- First Nations Fiscal Institutions;
- First Nations Land Management Act;

- Investing in professional development and an Aboriginal public service (e.g. .. Aboriginal Financial Officers Association).

But the First Nations Governance Initiative and other capacity building initiatives are not a replacement for negotiations under the Inherent Right Policy.

<u>Self Government –Achievements</u>

Implementation of the Inherent Right Policy has made significant progress in six years (participation by over 300 Aboriginal communities and most provincial and territorial governments).

- The 2000 Nisga'a Final Agreement is the first treaty which includes self-government under the Inherent Right Policy.

In Yukon:
- Implementing 7 self-government agreements and 7 more to be completed.

In British Columbia:
- Self-government is negotiated as part of all comprehensive land claims;
- 43 at Agreement-in-Principle stage;
- But the provincial government is reconsidering the whole approach of including constitutionally protected self-government arrangements within treaties, promoting delegated alternatives.

In the rest of Canada:
- There are 30 self-government negotiation processes, covering all regions:
- 9 negotiation tables are part of comprehensive land claims negotiations;
- 21 tables are negotiating stand-alone self-government arrangements (sectoral or comprehensive);
- 12 tables are at advance AIP or Final Agreement stage

Potential to conclude up to 10 self-government final agreements, involving some 50 communities over the next 5 years.

Specific Claims

The policy was established in 1973 to provide an out-of-court dispute resolution process to address federal lawful obligations, arising from the non-fulfillment of treaty obligations or improper administration of lands and other assets under the Indian Act.

Objective:
- To fulfill lawful obligations and reduce outstanding legal liabilities through negotiated settlements.

Policy Approach:

- Research into claim
- Acceptance of claims for negotiation based on Department of Justice determination of lawful obligation;
- Full and Final settlement, requiring a release;
- Compensation is based on legal principles.

Specific claims processes address grievances of the past.

Specific Claims Policy Evolution

Prior to 1951- Provisions in the *Indian Act* made it virtually impossible for First Nations to engage legal representation in land disputes.

1973- Announcement of specific claims policy.

1982- Expansion and clarification of the specific claims policy to include fraud as a basis for acceptance and a clear statement of policy (Outstanding Business)

1991- Further revisions to resolve claims more quickly, efficiently and fairly (e.g., "fast-track" process for small claims, lifted bar on pre-Confederation claims) in response to the 1990 Oka crisis as well as growing criticism about the slow pace of claims settlements.

1991- Creation of the Indian Specific Claims Commission (ISCC). Mandate to provide recommendations to the Minister on whether to accept previously rejected claims or on compensation criteria. Intended as an interim measure until a more permanent body could be jointly developed with First Nations.

1998- Authority to resolve claims relating to the provision of land under treaty was clarified as an acceptable basis for negotiation.

1998-2001- Development of Independent Claims Body.

Why we negotiate specific claims:

- **Settling specific claims resolves legal liabilities.**

Settlements also provide:

- Resources which First Nations can use to improve social and economic conditions.
- A more stable environment for investment in First Nation and other communities due to clarify of tenure on and off reserve.
- Safeguards to ensure the bulk of funds is used to benefit community for future years by way of trust fund arrangements.

- Capacity building to support First Nations governance i.e. planning, mandating, accountability, managing benefits.
- Experience for First Nations in working with Canada on basis of equality.
- Closure to historical grievances, removing barriers to development of effective relationship for future.

Achievements 1973-2001:

230 Claim Settlements, Total Value 1.2B and addition of 16,000 sq km to reserve land base

YK- 2.7M (0.22%)
NWT/Nunavut-$29.9M (2.42%)
NS-$1.1M (0.10%)
NB- $9.8M (0.79%)
QC-$26.4M (2.14%)
ON-$80.8M (6.55%)
MB-$105.7M (8.56%)
SK- $511.3M (41.44%)
BC-$114.6M (9.29%)
AB- $351.3M (28.48%)

To date, over 80% of settlements have been less that $5M each

Specific claims settled to date:

- Will double the reserve land base, primarily TLE's in the Prairies;
- Have transferred$1.2B to First Nations.

In the current negotiating environment, there are currently:

- 116 claims in negotiation;
- 432 claims in research and legal review;
- 20 claims under consideration by the ISCC;
- Contingent liability is $2.1B

Under current conditions, over the next 5 years:

- Possibility of 70 more claims settled (total 300)
- Backlog grows by 140;
- More claims move to litigation.

At current rates, it would take 28 years to settle specific claims currently in the system.

Implementation

Policy context

1986- Comprehensive Land Claims Policy

The Comprehensive Land Claims Policy (1986) states that final agreements must be accompanied by implementation plans which set out the understanding of how obligations contained in the agreements will be fulfilled. The implementation plans are intended to ensure efficient and timely implementation of the various elements of settlement agreements.

1995-The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government

The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (1995) requires that each self-government agreement be accompanied by a separate implementation plan. The policy stipulates that the implementation plan must identify the activities, time frames and resources that have been agreed upon to give effect to the agreements or treaties. The policy further states that issues related to affordability, efficiency, capital requirements, and duplication of services, feasibility and capacity will have to be addressed.

Approaches to Implementation Planning and Negotiation

- Implementation planning is a joint planning exercise among the parties, but it involves a considerable element of negotiation
- The planning exercise contributes to the negotiation of the final agreement by clarifying the understandings and expectations of the parties
- Implementation planning is not a forum for negotiating the final agreement
- Operational details are better left to the implementation plan, rather than burdening the final agreement
- The greater the detail included in a plan, the greater the contribution to the implementation of the final agreement, however, the plan cannot create new obligations or derogate from existing obligations
- The implementation plan can become the framework for the on-going relationship between parties

Approaches to Implementation Management

- Three-party Implementation Committee
- Information exchange; issues resolution

- Monitoring of Progress
- Appointments to and Funding of Implementing Bodies
- Joint Annual Report on Implementation Distributed Widely and Tabled in Parliament
- Five-year Review of Implementation(including adequacy of funding)

Implementation management practices have developed primarily in the context of Comprehensive Land Claims. Self-government implementation is a relatively new business line for Implementation Management and is mostly concerned with establishing a new government-to-government relationship as opposed to monitoring obligations.