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FIRST NATIONS STRATEGIC BULLETIN

BULLETIN OF THE FIRST NATIONS STRATEGIC POLICY COUNSEL

All Party Support to Ram Bill C-20 Through Parliament: *Imposes 'Fiscal Institutions' and Property Tax On-Reserve*

First Nations' Flags On Parliament Hill during protest against the Chrétien/Nault "Suite of Legislation", including the "Fiscal Institutions" Bill (now Bill C-20), May 23, 2002. (Photo by Don Bain)

by Russell Diabo

The Martin government has reached another milestone in their plan to eliminate the First Nations Tax immunity/ exemption. They did this by succeeding in getting all Party support to push Bill C-20 through the House of Commons before the House recessed for the Christmas break. Bill C-20 is now before the Senate and will likely pass through the Senate when Parliament returns in the New Year, since the Senate is dominated by Liberal's.

Even the so-called "progressive" New Democratic Party (NDP) voted with the Liberals, as their Aboriginal Affairs critic, **Pat Martin M.P.** (Winnipeg Centre), accepted the Liberal line that the new amendments would make Bill C-20 "optional" for First Nations.

The NDP support was likely a cynical trade-off with the Liberals' to get the Liberal's to support NDP policies on other issues. It just goes to show that First Nations cannot rely on any of the Parties, including the NDP to advocate for First Nation rights.

This should not be surprising to First Nations considering the record of various NDP provincial governments' (in B.C., Saskatchewan and Manitoba) ignoring and denying Aboriginal and Treaty rights.

This is the third time that Bill C-20, now entitled "**An Act to Provide for Real Property Taxation Powers for First Nations**" has been introduced into Parliament.

All of the Parties agreed not to hear from First Nation opponents to Bill C-20, and together the Parties pushed it though the Committee stage and the House.

The federal Liberals have been relentless in pursuing this legislation, not because there were a few First Nation proponents who bought into the municipal model of generating revenues for capital projects on-Reserve through a revolving loan fund and attracting outside investors by issuing municipal type bonds, but because Bill C-20 is consistent with the long-term federal Liberal goals of assimilating First Nations and the eventual termination of First Nation rights.

Some would say the federal Crown's real goal is the submission and conquest of First Nations by the federal Crown in order to obtain the exclusive sovereignty and title to the territory that is now known as Canada.

There are a small number of First Nation communities, or Bands, (perhaps 26 or so) from various provinces promoting property taxation on-Reserve as "own

Special points of interest:

- **Paul Martin's Tax Bill an Attack on First Nations**
- **Racist Doctrines used in Court Against Traditions**
- **Tlicho Agreement Sets Precedent for New Technique of Surrendering Rights**
- **Liberal Collaborators Take-Over AFN Meeting**

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source revenue", along with the formal establishment of the following four National Fiscal Institutions:

- ***The First Nations Tax Commission.***
- ***The First Nations Financial Authority.***
- ***The First Nations Management Board, and***
- ***The First Nations Statistics Institute.***

The main First Nation proponents of Bill C-20 are from three urban based bands in British Columbia, the **Kamloops Indian Band, the Westbank Indian Band** and the **Squamish Nation** located in North Vancouver. The Leadership of the **Musqueam Band**, located in Vancouver, has also been a prominent supporter of the previous versions of what is now Bill C-20.

These First Nation proponents are collaborating with the federal government seeking their own fiscal gains by treating their Reserve lands as real estate for long-term zoning and leasing to non-Indians for residential, commercial and utility land-uses.

Meanwhile, the federal government is using the First Nation proponents of Bill C-20 to advance the federal objective of eliminating First Nation tax immunity/status so that eventually all "***Indians and lands reserved for the Indians***" will be subject to tax.

This is contrary to the final recommendations of the **Royal Commission on Aboriginal Peoples (RCAP)**, which specifically recommended (**2.3.19**) that:

Financial arrangements provide greater fiscal autonomy for Aboriginal governments by increasing access to independent own-source revenues through a fair and just redistribution of lands and resources for Aboriginal peoples, and through the recognition of the right of Aboriginal governments to develop their own systems of taxation. [emphasis added]

Contrary to this RCAP recommendation, Bill C-20 amends section 87 of the **Indian Act**, by inserting the four National Fiscal Institutions into that section of the **Indian Act**.

Section 87 is the part of the **Indian Act**, which provides that Indian property situated on-Reserve is exempt from seizure and taxation. The courts have subsequently interpreted that income earned on-Reserve by status Indians is "property" on-Reserve and is thus non-taxable income.

Another dangerous aspect of Bill C-20, is that it elevates the federal government's **Band Intervention policy** into federal law.

The First Nations Management Board is charged with providing "***co-management and third-party management services***" to those First Nations opting into the C-20 Property Tax regime and institutions.

However, during his December 7th, 2004, appearance before the **Standing Committee on Aboriginal Affairs**, **Minister of Indian (and Aboriginal) Affairs, Andy Scott**, testified that:

The second institution, the First Nations Financial Management Board, will certify the standards of financial management of first nations that wish to gain access to the borrowing pool. However, its services are not restricted to just those first nations who choose to participate in the taxing or borrowing regimes established under Bill C-20. In fact, any first nation will be able to approach the board for advice and guidance on any issue of financial management. [emphasis added]

Does this mean the federal government intends to use the First Nations Management Board to implement its **Band Intervention Policy** for those Bands in deficits over 8% of their total budget, who do not choose opt into the Bill C-20 Property Tax Regime and institutions? Remember it is the federal government that decides who the 'third party manager' is for a Band.

While Bill C-20 is focused on promoting property taxation on-Reserve, let's not forget that the federal government also has its **self-government** and **comprehensive claims** policies, which set out federal negotiation positions that seek to remove the tax immunity/status from First Nations by having First Nations entering into agreements/settlements under these federal policies, which include paying not only property taxes, but sales and income taxes

Logo of the First Nations Tax Commission

Logo of the First Nations Finance Authority

"the federal government is using the First Nation proponents of Bill C-20 to advance the federal objective of eliminating First Nation tax immunity/status so that eventually all "***Indians and lands reserved for the Indians***" will be subject to tax."

Logo of the First Nations Management Board

Logo of the First Nations Statistics Institute

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on 'treaty settlement lands' (former Reserves).

The federal government's **1995 Aboriginal Self-Government** policy—Paul Martin, as the then Finance Minister in Cabinet, also approved it—makes it clear that financing 'self-government' is a "shared responsibility" and "Aboriginal governments and institutions" who must raise "own source revenue", meaning taxation. A couple of good examples of this are the **Yukon Umbrella Agreement** and the **Nisga'a Final Agreement. [These two agreements can be viewed on the Indian Affairs website for those with internet access]**

In addition to the two agreements cited above, the B.C. based **First Nations Summit**, an organization that represents First Nations negotiating "modern treaties" under the **B.C. Treaty Commission** process, set up a Fiscal Relations Secretariat who did a study in 2003, looking at the elimination of the section 87 tax exemption provision of the **Indian Act**—this is a federal pre-condition to reaching a final treaty settlement—the objectives identified by the First Nations Summit are, in part, as follows:

- ***Seek the ability to exercise taxing authority over members, non-members and businesses on treaty settlement lands.***
- ***First Nations will measure the potential elimination of the s. 87 tax exemption against treaty benefits; and***
- ***Looking for a longer transition period. [to phase in paying the taxes]***

So Bill C-20, is consistent with the goals of the B.C. First Nations negotiating 'modern treaties'. By negotiating under the B.C. Treaty Commission process they have already agreed to compromise their (section 35) constitutionally protected rights. This would explain the First Nations Summit's consistent support for the legislation.

It is widely known that **Paul Martin**, as federal **Finance Minister**, was intent on eliminating the First Nations tax immunity/status, in addition to overseeing the "capping", eliminating or off-loading of First Nations programs and services in the 1990's, through his first "expenditure review" process; Paul Martin was part of the decision to make "own source revenue" a requirement for self-government. Under Paul Martin's watch, the Finance Department was responsible for placing a "cap" on specific claims, even though these are legal obligations. The "cap" is now legislatively entrenched in the "**Specific Claims Resolution Act**" (previously known as Bill C-6).

In fact, as Minister of Finance, Paul Martin—after cutting funding to First Nations programs and services—offered to negotiate taxation arrangements on listed products (alcohol, tobacco & fuel) with interested First Nations in the **1997 Federal Budget**.

In 1997, the **Westbank Indian Band** entered into an agreement with **Revenue Canada** to impose a value added tax on tobacco products sold on-Reserve.

In 1998, then Chief of the Kamloops Indian Band, **Manny Jules** (Spokesperson, Fiscal Institutions), took Paul Martin up on his offer and negotiated with Revenue Canada to replace the federal **Goods and Services Tax (GST)** with a 7% **First Nations Tax (FNT)** on Alcohol, Tobacco and Petroleum products sold on the **Kamloops Reserve**.

As of June 2004, the following Bands have agreed to impose a 7% First Nations Tax (FNT) replacing the Federal Goods and Services Tax (GST), the Bands are listed in the order they adopted the sales tax system:

- ***Westbank, B.C. (Alcohol, Fuel, Tobacco)***
- ***Kamloops, B.C. (Alcohol, Fuel, Tobacco)***
- ***Sliammon, B.C. (Fuel, Tobacco)***
- ***Chemainus, B.C. (Alcohol, Fuel, Tobacco)***
- ***Buffalo Point, Man. (Alcohol, Fuel, Tobacco)***
- ***Adams Lake, B.C. (Alcohol, Fuel, Tobacco)***
- ***Tzeachten, B.C. (Alcohol, Fuel, Tobacco)***

Prime Minister Jean Chrétien and Finance Minister, Paul Martin entering House of Commons to deliver Budget 2000. (Photo by Tom Hanson/CP)

"It is widely known that **Paul Martin**, as federal **Finance Minister**, was intent on eliminating the First Nations tax immunity/status"

Treaty Medal

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Robert Nault, former Liberal Minister of Indian Affairs, confirmed that Paul Martin was part of Cabinet decisions approving the "Suite of Legislation", including the 'Fiscal Institutions' Bill.

"Paul Martin was part of a federal Liberal government intent on coercing or convincing First Nations to give up their tax immunity/ status in order to have First Nations paying sales, property and income taxes"

- ***Shuswap, B.C. (Alcohol, Fuel, Tobacco)***
- ***Cowichan, B.C. (Alcohol, Fuel, Tobacco)***
- ***Whitecap Dakota, Sask. (Alcohol, Fuel, Tobacco)***

So based on Paul Martin's record as federal Finance Minister, it should not be surprising that as Prime Minister, Paul Martin wants to tax First Nations' post-secondary and adult training funding, as has recently been reported.

As a key Minister in the Chrétien Cabinet during the 1990's up until 2002, Paul Martin was part of a federal Liberal government intent on coercing or convincing First Nations to give up their tax immunity/status in order to have First Nations paying sales, property and income taxes as "Aboriginal-Canadians", but as "Canadians" nonetheless.

Reconciliation = Conquest

The recent Supreme Court of Canada **Haida** decision referred--almost in passing—to the fact that "***Canada's Aboriginal peoples were here when Europeans came, and were never conquered.***" However, it is becoming clearer and clearer that the intent of the federal self-government and land claims agreements/settlements are to conquer First Nations and force them to submit to the assertion of exclusive Canadian Crown sovereignty and title.

This appears to be the case for those First Nations that have already agreed to compromise their (section 35) constitutionally protected rights through self government/ land claims agreements.

The most recent examples of this are **C-11** "**An Act to give effect to the Westbank First Nation Self-Government Agreement**" and **C-14** "**An Act to give effect to a land claims and self-government agreement among the Tlicho, the Government of the Northwest Territories and the Government of Canada, to make related amendments to the Mackenzie Valley Resource Management Act and to make consequential amendments to other Acts**".

While proceeding with his legislative agenda to set precedents for use on other First Nations, the Martin government has created an elaborate diversion in the form of the **Canada-Aboriginal Policy Roundtables Consultation process** currently underway, but in the end it will be the federal **Cabinet Committee on Aboriginal Affairs**, which is Chaired by **Prime Minister Paul Martin**, who will unilaterally decide what they will negotiate and what they won't, as well as, the terms of the negotiations. This is why Phil Fontaine and AFN don't have any real strategy post-February 2005.

After all, the federal government controls most of the funding that First Nations receive, which is why it has been easy for the federal government to purchase the alliance and support of certain First Nations individuals and organizations, such as AFN, to assist with implementing the federal goals and objectives of assimilation/ termination/conquest.

Paul Martin is acutely aware of this phenomenon, because he knows who the Aboriginal Liberals are across Canada who are collaborating with him and the **Liberal Party of Canada**.

The **Aboriginal Peoples' Commission of the Liberal Party of Canada** has assisted in attracting many Aboriginal individuals into the Party, and as of the last federal election, a number of Aboriginal Leaders have publicly declared support for the Liberal Party of Canada, notably, the **Métis Nation of Ontario**, the **Anishinabek Nation (Union of Ontario Indians)**, the **Manitoba Métis Federation** and the **Assembly of Manitoba Chiefs** to name a few.

AFN National Chief, **Phil Fontaine**, stopped short of publicly endorsing the federal Liberals during the last federal election when he encouraged First Nation citizens to go out and vote in the federal election, but it is widely known that Fontaine has been cozy with the federal Liberals throughout his career.

Former Prime Minister Jean Chrétien, appointed Phil Fontaine as **Co-Chair of the Indian Claims Commission**, a position that allowed him to keep in touch with First Nations across Canada, spending $182,143

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for travel over 19 months, right up until when he resigned to officially run for the position of AFN National Chief a second time in 2003. Moreover, during the last federal election, on June 21st, 2004, the Liberal Party of Canada issued a press release quoting Fontaine's support for Paul Martin and the Liberals' platform, Fontaine never distanced himself from that public statement by the Liberal Party of Canada.

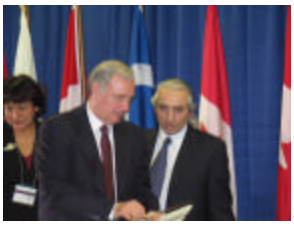
Fontaine's Role-Martin's Plan

There is no question that Phil Fontaine has proven himself a moderate, compromising First Nation Leader who has always been willing to collaborate with the federal Liberals and the bureaucracy, as his record shows:

- In the late 1970's, Fontaine served as **Regional Director General of the Department of Indian Affairs and Northern Development**, in the Yukon.
- In the 1980's, Fontaine was appointed as a Board Member to the Liberal's **Native Economic Development Fund**.
- In 1990, Fontaine was one of the key First Nation Leaders behind **Elijah Harper's** decision to refuse to give consent to passage of the **Meech Lake Accord** in the Manitoba legislature. **Jean Chrétien**—who was Leader of the Opposition at the time—also opposed the Meech Lake Accord.
- In 1994, Fontaine helped the Liberals along with what would be come their **1995 Aboriginal Self-Government policy** by entering into a "**Framework Agreement Initiative**" to dismantle the federal Department of Indian Affairs in the Manitoba Region.
- In 1996-1997, Fontaine would work with the Liberals to undermine then AFN National Chief, **Ovide Mercredi's** opposition to Bill C-79 the "**Indian Act Optional Modification Act**". **Elijah Harper** who had become a federal Liberal M.P. also supported Bill C-79.
- In 1997-2000, Fontaine in his first term as AFN National Chief: 1) cut a deal with the Liberals on the federal response to the RCAP Report, which included a **Statement of Reconciliation on Residential Schools**, a policy called "**Gathering Strength**" and "**Agenda for Action**" with First Nations, 2) initiated a series of joint AFN-DIA processes, which ended up as the Chrétien/Nault unilateral "Suite of Legislation", including the 'Fiscal Institutions' Bill.
- In 2001-2003, Fontaine after losing his position as AFN National Chief to **Matthew Coon Come**, was appointed by then Prime Minister Jean Chrétien as **Co-Chair of the federal Indian Claims Commission**.
- In 2003, Fontaine developed an election platform as a candidate for AFN National Chief, which is consistent with federal Liberal policies. Fontaine is publicly endorsed during the campaign by then **Minister of Indian Affairs, Robert Nault**, during a newspaper interview in Saskatchewan.
- In 2003-2004, Fontaine as AFN National Chief has sidelined the 'rights-based agenda' to collaborate with Paul Martin in the **Canada-Aboriginal Roundtable Consultation Process**. Moreover, the December **Parliamentary schedule** was coordinated to coincide with the AFN December **Special Assembly**, to ensure that there is a large contingent of Fontaine (and Liberal) supporters mainly from the NWT, Yukon and B.C. regions, but also the Prairies, Ontario and the Atlantic. [As a result, **Bills C-14 (Tlicho)** and **C-20 (Property Tax)** pass with First Nation proponents present, while Fontaine gets a mandate from the AFN Special Assembly for the Roundtable process and AFN participating in the next federal election].

With Phil Fontaine's help, the federal Liberals have established several "National Institutions" that now play a role in assisting the federal government in the incremental implementation of a municipal model of community economic development on-Reserve.

As these federal assimilation/termination/conquest initiatives gather momentum in the New Year, the question remains: Will First Nations simply submit to their apparent fate or will they fight back to protect their rights and interests?



Prime Minister Paul Martin with AFN National Chief Phil Fontaine during Canada-Aboriginal Roundtable, April 19,2004. (Photo by R. Diabo)

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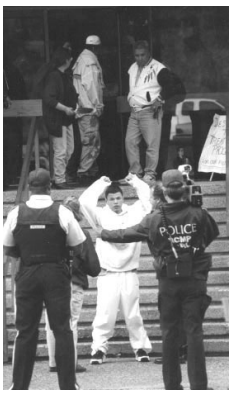

In 1988, Native Youth Movement protests B.C. Treaty Commission process by occupying Westbank Indian Band Office.

Dr. John Paul Murdoch, Cree Nation, Waskaganesh, Quebec. (Photo courtesy of Gowling, Henderson)

Aboriginal Oral Traditions are the Target of the Crown's Use of Racist Social Doctrines

By Dr. John Murdoch

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Since the narrow court victory of **Calder v. Attorney General of British Columbia**, [1973] S.C.R. 313 over the Nisga'a, followed by the decisive loss of **Quebec & Canada v. Kanatewat** *[1973]* to the James Bay Crees, both federal and provincial governments have needed to maintain teams of lawyers and expert witnesses in order to oppose and attack ever increasing assertions of Aboriginal rights in lower courts throughout Canada.

During the weeks before a court case where the issues being judged include Aboriginal title (a legal interest in land use) or other rights, the federal or provincial Crowns usually survey the academic community for 'experts' willing to support their contention that the subject Aboriginals are not part of an 'organized', 'occupying' society or that the right claimed was not an 'integral' part of the subject Aboriginals' culture.

These three criteria prove the existence of Aboriginal title or a right claimed and are part of a test which has evolved through a series of such court cases which were eventually resolved by the Supreme Court of Canada. Central to the Aboriginal defense or assertion of title or rights are the history and customs maintained within the community.

Because Aboriginal history and customs have usually been maintained orally rather than in writing or printed form, Aboriginal testimony was often ruled inadmissible as hearsay.

The courts' attitudes eventually changed, treating Aboriginal oral traditions with greater tolerance. First, in the judgment of **Kruger v. The Queen**, [1978] 1 S.C.R. 104, then in **R. v. Van der Peet** [1996] 2 S.C.R. and more decisively in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 the Supreme Court of Canada declared that Aboriginal oral traditions were admissible as evidence in court assertions or defense of Aboriginal rights.

Notwithstanding the admissibility of Aboriginal oral traditions, their 'weight' or credibility during each court case remains to be determined by the judge. Thus, the 'weight' or credibility of Aboriginal oral traditions has become the target of the Crowns' litigating strategy and their litigating teams have needed experts able to reduce the weight or credibility of Aboriginal traditions in court.

Cultural anthropologists who had considerable field experience among the subject Aboriginals would be the most suitable members of the academic community to provide expert testimony about Aboriginal occupation, social organization or cultural behaviour. However, even as early as **Bear Island Foundation v. Ontario Attorney General** *[1984]*, deciding Temagami Ojibway Aboriginal rights, neither federal nor provincial Crowns were able to present in court, formally trained experts with field experience among the subject Aboriginals.

The formally trained experts with field experience declined or chose instead to support the Temagami Ojibways. Lacking the field experience, the expert witnesses for the Crowns have presented only opinion evidence, mainly drawn from textbooks, journals and lectures, citing the opinions of such authorities as **Robert Lowie**, **Julian Steward**, **George P. Murdock**, **Elman Service**, **Harold Hickerson** and **Bruce Trigger**.

A closer examination of the writings of these authorities reveals a clear and continuing identification by these authorities with a school of thought called 'social (or cultural) evolution'.

Essentially, this school of thought holds that all societies or cultures evolve through similar stages of maturity, for example, an early stage often called savagery or primitivism normally associated with hunting, nomadism and being stateless; through intermediary stages normally associated with forms of agriculture, finally attaining the most socially or culturally mature stage of civilization or industrialism, normally associated with non-Aboriginal societies of European origin.

"the 'weight' or credibility of Aboriginal oral traditions has become the target of the Crowns' litigating strategy and their litigating teams have needed experts able to reduce the weight or credibility of Aboriginal traditions in court."

Statue at the Supreme Court of Canada. (Photo by Chris Wattie/ Reuters)

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Few experts still use the term 'savage' whereas use of the term 'primitive' is widely used to describe an alleged Aboriginal situation of cultural immaturity.

Faithful to this model, Aboriginals, most often hunters and gatherers, are characterized as 'stateless', demonstrating little or no societal organization. The adjective used by social evolutionist expert witnesses which has proven often ruinous to Aboriginal assertion of rights in court is the modifier 'nomadic'. Merriam-Webster's Collegiate Dictionary, 10th Edition (2001), defines nomadic as, "roaming about from place to place aimlessly, frequently, or without a fixed pattern of movement".

For instance, in **Delgamuukw v. British Columbia** [1997] 3 S.C.R. paragraphs 138 through 143, the Supreme Court of Canada acknowledges that 'nomadic peoples' occupation and use of the land are often not sufficient to prove Aboriginal title due to "the fact that aboriginal peoples were non-sedentary". Indeed, the term 'nomadic' is only used in Canadian court judgments to describe Aboriginals as a society or non-Aboriginals with no fixed address.

Portrayed by social evolutionist theory as primitive, Aboriginal knowledge is presented as naive and mythical compared with rational non-Aboriginal science and history. Whenever the court has accepted a social evolutionist portrayal of Aboriginal people, Aboriginal people have been stripped of their title to their lands as well as rights to survival with integrity.

Ironically, at paragraph 93 in **Delgamuukw** the Supreme Court justices recognized that with Gitksan oral traditions, "***dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax***", but the testimonies of the Crowns' social evolutionist expert witnesses rarely face similar challenges. Moreover, authentication of most Aboriginal oral traditions of an historical or scientific purpose are authenticated each time Aboriginal people travel through their territory or conduct routine subsistence or religious activities where they have meaning.

Fabrication of oral traditions is virtually impossible where complimentary geographical, subsistence and religious details would also have to be fabricated without distorting the existing integration of geographical, subsistence and religious knowledge shared and authenticated by dozens if not hundreds or thousands of other people. Actually, the social evolution foundations underlying the testimonies of the Crowns' expert witnesses cannot be authenticated and during the past thirty years have been abandoned by formally trained experts with personal knowledge of the subject Aboriginals.

As a case in point, the remarks made by **Charles Bishop** and **Arthur Ray**, that "even when employed carefully, memory ethnography can only provide totally accurate information for relatively short time spans, usually one hundred years at the very most" were included by **Justice Allan McEachern** in his judgment of **Delgamuukw v. British Columbia** [1991] BC Supreme Court. These remarks are not the result of personal knowledge of any particular Aboriginal people but rather the result of reading and accepting the opinion of a **Harold Hickerson** as they appear on page 33 in his 1970 book, **The Chippewa and Their Neighbors: A Study in Ethnohistory**. By his own admission on pages 7 through 9, Hickerson confirms that these remarks are not the result of personal knowledge but rather acceptance of the opinions of others referencing and suggesting further readings including **Robert Lowie**, **Julian Steward**, **George P. Murdock**, **Elman Service** and other notable social evolutionists.

This negative view of the reliability of Aboriginal traditions can be traced back to an article by Robert Lowie (1915:598) in which Lowie alleges a Nez Percé oral tradition which 'grossly misrepresents events barely more than a hundred years old' proves 'native memory has preserved or failed to preserve knowledge'. The Nez Percé oral tradition, Lowie read in the *Journal of*

Allan McEachern, former Chief Justice, Court of Appeal, B.C. & former Chief Justice Supreme Court of B.C. issued the judgment in **Delgamuukw v. B.C. [1991].** (Photo courtesy of Fasken, Matineau)

"Portrayed by social evolutionist theory as primitive, Aboriginal knowledge is presented as naive and mythical compared with rational non-Aboriginal science and history."

GITXSAN, Gitanyow, Memorial Pole Section, 1910. (Photo by George T. Emmons)

Stith Thompson, a Folklore Professor at Indiana University, Bloomington. (Photo courtesy of IU Archives)

"the federal and provincial Crowns have exploited the stereotype promoted by the institutions for which they are responsible and have recruited 'experts' who represent a minority among their academic peers in order to bolster prejudice in court."

Robert Lowie, Austrian born American Anthropologist, 1883-1957. Noted for "Salvage Ethnography"

'Traditions Targeted' continued from page 7

American Folk-Lore. Lowie had no personal knowledge of the subject Nez Percé, the story teller or the story itself.

When oral traditions appear to have survived more than one hundred years, their strength or capacity to survive is attributed to the notion that these stories are actually European traditions introduced by a stronger more robust culture against which Aboriginals are poorly prepared to compete. Notably, Stith Thompson (1929) and Robert Lowie (1915) draw their proofs from the stories collected by others, while more recent scholars such as A. Irving Hallowell (1939) and John Honigmann (1953) collected stories in the field from non-Aboriginal or culturally marginal sources with little attention to a scientific field methodology. Simply, the stories were collected to illustrate an opinion that was developed outside of personal knowledge of the subject Aboriginals.

One of Lowie's contemporaries Alanson Skinner (1914:100) did personally collect Aboriginal oral traditions in a careful scientific manner from as far east as northern Quebec and as far west as the Canadian prairies and found that "the folk-lore is wholly Indian, with rare exceptions, which are always obvious". This author has collected oral traditions over a period of more than thirty-five years, throughout Canada's boreal forest. Care was always taken to assure that the informant is respected in his or her community, with the result that European borrowing or any other kind of flaw have never occurred. This researcher has compared versions collected with those collected in a careful manner well over a hundred years ago over thousands of kilometers and without exception has found them quite stable and faithful to those personally collected.

Moreover, the label 'nomadic' and the 'roaming about from place to place aimlessly' implied is a function of Eurocentric ignorance of Aboriginal decision making process. For example, the Cree Aboriginal decision to move from a place of scooping up fish in August to a place for goose hunting in late September is considered and finally made with careful precision based on numerous, constantly varying factors such as weather, tides, rate of water temperature and level changes, behaviour of flora and fauna, availability of food and equipment. Any less care or precision in deciding timing and direction of movement usually proves disastrous in the sparsely resourced, climatically challenging homeland of the James Bay Cree.

Canadian non-Aboriginal farmers' title to their lands and their rights to their livelihood are not called nomadic in spite of a comparable strategy of not farming in winter or for their taking seasonal jobs off the lands they cultivate. Nor are Canadian farmers subjected to a public stereotype of their cultural and technological ignorance, bolstered by a public education system and media in the manner that Canadian Aboriginals are.

It is a scientific fact, proven repeatedly by ministers of education and human rights commissions throughout Canada, that school textbooks, published literature and media in general, that a powerful stereotype of Aboriginal cultural and social inferiority persists with no basis in fact, but rather in non-Aboriginal ignorance and prejudice. This stereotype speaks directly to the issue being judged in Aboriginal title or rights court cases, that is, whether or not Aboriginal people comprise organized, occupying societies with customs of land tenure.

Under normal circumstances, Canadian courts react to such stereotyping or prejudice with measures to protect the fact finding and judgment processes, for example, by conducting court in a location where fairness is more likely to prevail or by being more vigilant in determining the admissibility of evidence.

Especially during the last ten years, the federal and provincial Crowns have exploited the stereotype promoted by the institutions for which they are responsible and have recruited 'experts' who represent a minority among their academic peers in order to bolster prejudice in court.

Canadian lower courts have generally not responded with changes in venue, or in any

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fashion to protect the fact finding or judgment processes from prejudicial opinion being substituted as fact. More simply, the federal Crown in collaboration with provincial counterparts has been able to employ in Canadian courts, the fruit of its control over and responsibility for Aboriginal people to extinguish the very rights the federal Crown has a legal obligation to protect.

Few trained experts on Aboriginal history and culture are willing to support these extinguishment efforts. The few that are, present no personal knowledge of the facts upon which their opinions are based. Rather, these experts present hearsay knowledge collected from other authorities whose opinions are not shared by their majority, their peers who do base their opinions on personal knowledge gathered in the course of fieldwork among the subject Aboriginals.

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"the federal Crown in collaboration with provincial counterparts has been able to employ in Canadian courts, the fruit of its control over and responsibility for Aboriginal people to extinguish the very rights the federal Crown has a legal obligation to protect."

Grand Council of the Crees (of Quebec) Logo

Prime Minister Jean Chrétien and Minister of State, Ethel Blondin, attend signing of Tlicho Agreement, in August 2003. (Photo courtesy of www.tlicho.com)

"NOTE: All references to Dogrib means Tlicho, they changed their name in 2002. The legal technique referred to in this submission is included in Bill C-14 (Tlicho Land Claims & Self-Government Act), currently before the Senate. The Martin government intends to use this 'technique' on other First Nations."

Robert Nault, as Minister of Indian Affairs, agreed to use the 'legal technique', which the Martin government also agrees with. (Photo by CBC)

FEDERAL GOVERNMENT'S PROPOSED "NON-ASSERTION/FALL-BACK RELEASE TECHNIQUE": A PRELIMINARY ASSESSMENT

By Paul Joffe, December 11, 2000

Prepared for the Assembly of First Nations

[**NOTE: All references to Dogrib means Tlicho, they changed their name in 2002. The legal technique referred to in this submission is included in Bill C-14 (Tlicho Land Claims & Self-Government Act), currently before the Senate. The Martin government intends to use this 'technique' on other First Nations.**

This submission is also based on a document entitled: "Approach for Dealing with Section 35 Rights: Ministerial Recommendations to Cabinet - November 24, 2000".]

Introduction

1. It is important to underline that, in view of the short delays provided for its preparation, this opinion should only be viewed as a preliminary assessment. Clearly, the importance of the overall issue merits further analysis and reflection.

2.It is my understanding that what is being requested here by the Assembly of First Nations is solely a brief commentary on, or overview of, the federal government's proposed new technique in addressing s. 35 rights (i.e. rights of Aboriginal peoples under s. 35 of the **Constitution Act, 1982**). This new approach is characterized by the feds as the "**non-assertion/fall-back release technique**". See document entitled "**Approach for Dealing with Section 35 Rights: Ministerial Recommendations to Cabinet - November 24, 2000**" (hereafter referred to as "Ministerial Recommendations").

3. The following opinion is in no way a criticism of the positions that have been, or may be, taken by the Dogrib First Nation or Council. This is reinforced by the fact that I have not studied the Dogrib Agreement. Nor am I familiar in any way with Dogrib positions or circumstances. However, it is highly commendable that the Dogrib First Nation is seeking to find a viable alternative to the federal policy of "surrender" or "extinguishment".

4.The approach taken in this opinion will include the following:

i) General comments as to the need for a ***principled approach***. Certain key factors contribute to imbalanced and devalued perspectives relating to s. 35 rights. These imbalances and inequities are evident among federal, provincial and territorial governments, as well as many business people and members of the public.

ii) specific comments on the notions of "certainty" and "finality"; and

iii) specific comments on the so-called "non-assertion/fall-back release technique", being proposed by the federal government.

5. Kindly note that many of the general comments made in this opinion (e.g. self-determination, human rights approach) are elaborated more fully in the law article by Paul Joffe, **Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec, (2000) 45 McGill L.J. 155**.

6. In this opinion, First Nations will often be referred to as "Aboriginal peoples", as used in s. 35 of the **Constitution Act, 1982**. In light of the significance of the term "peoples" in the context of self-determination, including self-government, it is most useful to emphasize this term.

A. Need for a Principled Framework

7. As illustrated in the following paragraphs, there are a number of aspects that need to be addressed in creating a principled framework for "Comprehensive Claims" and other treaty negotiations. Ideally, this framework should be established on a national level. Often, individual First Nations do not have the human and financial resources - or perhaps the political leverage - to negotiate an adequate framework. In the absence of a principled framework, there may be few if any common reference points by which to measure any federal or other government proposals.

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8. **Status of Aboriginal peoples**. It is essential to begin any analysis on s. 35 rights by recognizing and respecting the status of Aboriginal peoples as "peoples". As long as analyses on the fundamental rights of Aboriginal peoples proceed in the absence of appropriate consideration of their status, it is likely that these rights will continue to be underestimated, devalued or denied.

[Note: It is no coincidence that the Ministerial Recommendations generally do not refer to Aboriginal peoples as "peoples". Instead, terms such as "Aboriginal groups" or "Aboriginal people" are used. However, since these Recommendations deal with s. 35 rights and s. 35 of the **Constitution Act, 1982** refers to "Aboriginal peoples", surely the federal government should use the same term.]

9. **Significance of right of self-determination.** As "peoples", Aboriginal peoples have the right to self-determination. In this regard, the international human rights Covenants are clear: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." If this right were fairly considered and respected in any federal approach to s. 35 rights, the outcome would likely be significantly different and more favourable to First Nations.

10. **Right of self-determination applicable to Canadian law.** To date, there is too little emphasis placed by First Nations on the right of self-determination in specific negotiations with non-Aboriginal governments. Yet, this crucial right is applicable "unquestionably" to Canadian domestic law. For example, in the **1998 Québec Secession Reference**, the Attorney General of Canada expressed the following position before the Supreme Court of Canada:

"***...the principles of customary law relating to the right of self-determination are applicable in the present case, because they do not conflict with the applicable Canadian domestic law. Since these principles of customary law can be 'incorporated' into domestic law by Canadian courts, it is respectfully submitted that Canadian courts unquestionably have jurisdiction to apply them.***"

11. **Aboriginal perspective not accorded equal weight.** In examining existing or new techniques of the federal government in relation to s. 35 rights, it would be most difficult to conclude that the perspectives of First Nations are being considered **equally** with those of others. However, Chief Justice Lamer has ruled in **Van der Peet** and reiterated in **Delgamuukw** that "***the only fair and just reconciliation is ... one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.***"

12. **Aboriginal rights as human rights.** It can be strongly argued that the Aboriginal rights of Aboriginal peoples are human rights (primarily of a collective nature). Therefore, it is critical to analyse Aboriginal rights in a manner that fully includes a human rights perspective. Experience has repeatedly shown that when Aboriginal rights are not treated as fundamental human rights, infringements or denials of Aboriginal rights are often addressed too casually by governments and the courts.

13. **Human rights not subject to extinguishment.** It is also important to note that human rights have been declared repeatedly by the international community to be **inalienable**. Clearly, these rights are not intended to be extinguished or otherwise destroyed. Human rights instruments generally include provisions for some limitation or derogation, but not the destruction of fundamental rights. If it were clearly recognized that Aboriginal rights are human rights, non-Aboriginal governments could not devise "techniques" that would seek to "extinguish", "surrender" or otherwise eliminate Aboriginal rights.

14. **Supreme Court's "solution" regarding "irreconcilable uses" is highly questionable.** In **Delgamuukw**, Chief Justice Lamer concluded that "***the lands pursuant***

Tlicho Agreement Medal

"If it were clearly recognized that Aboriginal rights are human rights, non-Aboriginal governments could not devise "techniques" that would seek to "extinguish", "surrender" or otherwise eliminate Aboriginal rights."

Tlicho delegates arrive for 12th Annual Assembly for Agreement signing. August 2003. (Photo by Georgina Frank/Fenley)

Tlicho girls with their bikes in Whati, Northwest Territories. (Photo by Georgina Franki Fenley)

"Since the central objective of the federal government here is to achieve the same effect as "surrender", the alternatives being sought are one-sided and self-serving and they have no real legitimacy."

Laiza Koyina, sits outside a community centre in Rae-Edzo, approximately 100 km west of Yellowknife, NWT, July 2003. (Photo by Adrian Wyld/ CP Archive)

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to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands". Lamer added that "***if aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then <u>they must surrender those lands</u> and convert them into non-title lands to do so***".

15. The Supreme Court's objective appears constructive - that is, to ensure adequate protections for Aboriginal peoples against land uses that may be destructive of their relationship with the land. Yet the Court's approach must be seriously questioned. According to the Court's own prescription, the harmful activity could still proceed, as long as the land is surrendered and Aboriginal title is extinguished. This approach would be most difficult to justify under a human rights analysis.

16. These limitations to Aboriginal title also appear to be paternalistic and inflexible. They may inadvertently contribute to undermining Aboriginal societies and legal systems by restricting future options. It would be unfair to demand that Aboriginal peoples, the original occupiers and possessors of the land, choose between relinquishing their Aboriginal title or else foregoing certain activities or ventures on their traditional lands. Such judicial perspectives are inconsistent with the human right to self-determination.

B. Government Notions of "Certainty" and "Finality"

17. There are numerous problems associated with the federal government's notion of "certainty" and "finality". Above all, these notions are defined in the context of "***achieving substantially the same certainty and finality for land-based rights***" as purported to exist in the "***surrender technique***" (Ministerial Recommendations, p. 1, para. 1(c)).

18. Since the central objective of the federal government here is to achieve the same effect as "surrender", the alternatives being sought are one-sided and self-serving and they have no real legitimacy.

As concluded in the December 4, 1998 Report of the U.N. Committee on Economic, Social and Cultural Rights:

"***The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by the RCAP, and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. Certainty of treaty relations alone cannot justify such policies.***"

19. "Certainty" and "finality" are being defined for the most part from the viewpoint of non-Aboriginal governments, developers and people. Little or no effort is made to balance such notions with the realities, needs and rights of Aboriginal peoples.

20. For example, the human rights recognized in the **Canadian Charter of Rights and Freedoms** are not subjected to such certainty and finality. Rather, these human rights are permitted to evolve on a continual basis, according to human rights law. As Madame Justice L'Heureux-Dubé (Supreme Court of Canada) has indicated in 1993 in **Attorney General of Canada v. Mossop**:

"***Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time.***"

21. Similarly, Aboriginal rights as collective human rights should be able to evolve. The treaty-making process should not seek to virtually "freeze" such rights, as suggested by current government notions of "certainty" and "finality".

22. Otherwise, any future evolution of Aboriginal rights through court cases or other means is likely to have little significance for those Aboriginal peoples whose rights are "preserved" in treaties. Similarly, the **U.N.**

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Declaration on the Rights of Indigenous Peoples, if adopted by the General Assembly, may also be of little consequence for Aboriginal and other rights in First Nations' treaties.

23. Although there are numerous problems with the 1995 federal "**Inherent Rights Policy**", the policy is said to have been "***designed to be flexible to accommodate the growth and evolution of self-government arrangements and intergovernmental relations***" (Ministerial Recommendations, p. 3, para. 12). If principles of evolution and growth are possible in respect to self-government, then surely they are possible in regard to other Aboriginal rights of First Nations.

24. The federal government claims that "***finality can be justified as a requirement for the development of land and other natural resources***" (Ministerial Recommendations, p. 4, para. 15). However, specific resource developments should be negotiated on a project-by-project basis with those First Nations on whose traditional territory such proposed developments are located. This would be consistent with the principle of Aboriginal consent for projects affecting Aboriginal peoples and their territory. In this way, the circumstances that exist at such time could be appropriately taken into account. Is that not the way that federal, provincial and territorial governments consider approval for proposed developments?

C. Proposed "Non-Assertion/ Fall-Back Release Technique"

25. In regard to the **"non-assertion" aspect**, it is said that the "***Aboriginal group would make a commitment not to exercise or assert a section 35 land-based right which is not set out in that Aboriginal group's treaty***" (Ministerial Recommendations, Annex A, para. 2). This provision is clearly one-sided. It favours solely non-Aboriginal governments and third parties.

26. As repeatedly confirmed by the Supreme Court of Canada, all existing Aboriginal rights are "pre-existing" rights. They are not dependent on any executive order or legislative enactment for their existence. Why then should those s. 35 land-based rights that are not in a treaty be unexercisable? The reasons that these rights may not be included in a treaty may well be a result of unreasonable demands by the federal or territorial government.

27. If federal or territorial governments know that any s. 35 land-based rights with which they do not agree will not be able to be asserted or exercised, there is little incentive for them to agree to these rights in the treaty.

28. A further problem with the non-assertion clause is that s. 35 land-based rights that are not set out in the treaty appear to **never** be exercisable. **Should the federal or territorial government violate a fundamental treaty right of the Dogrib First Nation in the future, why should s. 35 land-based rights that are not in the treaty continue to be unexercisable?** This type of one-sided certainty, in favour of non-Aboriginal governments and people, helps to ensure that there is no incentive for these governments to respect the terms of the treaty.

29. For example, as evidenced in the case of the James Bay Crees under the **1975 James Bay and Northern Québec Agreement (JBNQA)**, millions of dollars have been spent by them in order to compel the federal and Québec governments to honour the terms of the treaty. Since 1975 when this treaty was signed, the Crees have been in court against these governments virtually every year for the past 25 years for non-compliance with the treaty.

30. In the Ministerial Recommendations (Annex A, p. 25, para. 3(c)), it is said that one of the purposes of the non-assertion clause is to "***permit government and others to exercise all their authorities, jurisdictions, rights and privileges as if the rights covered by the commitment did not continue to exist.***" This appears to have the same effect as if a surrender clause were inserted in the treaty (unless a new treaty

Wolf with Cariboo. (Photo by CP)

"it is said that one of the purposes of the non-assertion clause is to "***permit government and others to exercise all their authorities, jurisdictions, rights and privileges as if the rights covered by the commitment did not continue to exist.***" This appears to have the same effect as if a surrender clause were inserted in the treaty"

Sports fishing on Great Slave Lake, NWT. (Photo courtesy of "Sports Fishing on the Fly")

Prime Minister Jean Chrétien displaying Tlicho Agreement at Tlicho Assembly August 2003. (Photo by CBC)

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were entered into or the Dogrib treaty were amended). As in the case of a surrender clause, there is no indication that the Aboriginal rights concerned would ever be exercisable.

29. According to the Ministerial Recommendations (Annex A, p. 25, para. 4), the main purpose of the **"fall-back release" aspect** of this new "technique" is to provide additional insurance that a s. 35 land-based right that is not in the treaty will not be able to be asserted or exercised:

"***If it was found that the non-assertion commitment was not enforceable or did not achieve its purposes for a particular section 35 land-based right, a "fall-back release" of that land-based right would apply. The release would apply whether or not the land-based right was characterized as a "self-government right"***.

30. As made clear in the Ministerial Recommendations (Annex A, p. 25, para. 5):

"***The Aboriginal group would provide a release for past infringement of section 35 land-based rights and for any infringement of section 35 land-based rights alleged to have occurred while the non-assertion commitment applied.***"

31. In regard to **a section 35 right which is not land-based and which is not set out in the Dogrib Agreement**, similar restrictions apply as described above for s. 35 land-based rights (see Ministerial Recommendations, Annex A, p. 26, paras. 8 et seq.).

32. However, should the Dogrib wish to exercise such a s. 35 right that is not land-based, it would be obliged to comply with the following:

i) Attempt to negotiate an amendment to the Agreement in order to define, in the Agreement, what the Dogrib wished to exercise; and

ii) if required by the government, obtain a judicial affirmation of the existence of any such Aboriginal right and its scope, as a condition of such negotiations. (See Ministerial Recommendations, Annex A, p. 26, paras. 11 & 12.)

33. These proposed conditions appear far too onerous and one-sided. They could have the effect of compelling the Dogrib to seek a judicial affirmation of their s. 35 right that is not land-based - even if the Dogrib did not wish to litigate this issue in the courts. In any given circumstance, the Dogrib may not wish to risk a judicial determination or may not wish to devote the necessary financial resources to litigate the particular right in dispute. Yet, if the Dogrib refuse to initiate legal proceedings, the only alternative according to the "new technique" is not to assert or exercise the right concerned.

34. Should the Dogrib succeed in the litigation of the disputed s. 35 right and the Dogrib Agreement were not amended, then they still "***could not exercise the Aboriginal right described in the affirmation in any way that would be inconsistent with any provision of the Dogrib Agreement.***" (See Ministerial Recommendations, Annex A, p. 26, para. 13(b).)

35. In regard to the negotiation of **self-government**, similar one-sided and onerous conditions are said to apply as described in the preceding paragraphs of this opinion.

36. For example, it is said that **a new self-government treaty, that is not a comprehensive land claims agreement**, shall not prejudice the certainty and finality achieved with respect to s. 35 land-based rights recognized in existing land claims treaties or historic treaties. (See Ministerial Recommendations, Annex B, p. 27, para. 3.) This requirement is highly restrictive. It seeks to limit or freeze self-government rights, in a manner that remains consistent with treaties signed at an earlier period of time. This seeks to severely restrict the right of Aboriginal peoples to self-determination. Yet all of this is proposed in the interests of "certainty" and "finality", in favour of non-Aboriginal governments and people.

37. **If a new self-government treaty is also a comprehensive land claims agreement**, then the same certainty and finality requirements as found in the Com-

"the main purpose of the **"fall-back release" aspect** of this new "technique" is to provide additional insurance that a s. 35 land-based right that is not in the treaty will not be able to be asserted or exercised"

Delegates to the Tlicho Assembly, August 2004 (Photo by CBC)

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prehensive Claims Policy shall apply in relation to section 35 land-based rights. This would be the inflexible rule, regardless of whether the rights would be characterized as self-government rights. (See Ministerial Recommendations, Annex B, p. 27, para. 2.)

38. In virtually all of the above cases where the s. 35 rights are not included in a treaty, the new technique of the federal government seeks to ensure that there will be no unilateral exercise of these rights by First Nations. Instead, the government seeks to subject these rights to prior negotiations before they can be exercised.

39. However, s. 35 rights are pre-existing rights safeguarded by the **Constitution Act, 1982** and they should not be compelled to be subjected to prior negotiation. Rights of First Nations that are **inherent** do not require the prior approval or recognition by others. If the federal government seeks to prevent **unilateral** exercise of government powers (see Ministerial Recommendations, p. 18, para. 46) then equivalent rules should also apply to non-Aboriginal governments in favour of First Nations.

40. Clearly, during the long and continuing history that non-Aboriginal governments have unilaterally exercised their powers in Canada, non-Aboriginal governments have inflicted great suffering and damage upon First Nations. Much of this damage has never been appropriately redressed. In view of this tragic history, it is most curious that the federal government now seeks to limit the unilateral exercise of inherent rights and powers by First Nations governments instead of policing itself.

41. The denial of the human rights of Aboriginal peoples has left an indelible black mark throughout Canada's history. Therefore, it makes little sense to currently adopt federal policies that seek to "***de-emphasize the focus on rights***". Yet this is precisely what the federal Inherent Rights Policy has sought to date to attain:

"***The inherent right policy sought to de-emphasize the focus on rights in favour of developing practical governance arrangements that would improve conditions in Aboriginal communities and provide a framework for new intergovernmental relationships.***"

42. Despite what the federal Inherent Rights Policy might provide, "***practical governance arrangements***" and "***new intergovernmental relationships***" can hardly be accomplished in a fair and just manner if it is "practical" in a one-sided manner in favour of non-Aboriginal interests. Moreover, new governmental relationships are most unlikely to be successful, if First Nations jurisdictions are to a large degree restricted in ways that are not applied equally to non-Aboriginal governments.

Conclusions

43. The proposed new technique - the "***non-assertion/fall-back release technique***" - is yet another federal government attempt to unjustly restrict the recognition and natural evolution of the Aboriginal rights of Aboriginal peoples in Canada.

44. As the Ministerial Recommendations (p. 6, para. 26) concede, the "***lack of consistency in techniques for land claims Agreements may cause confusion and raise concerns about the effectiveness of the techniques.***" There is a great deal of truth in this statement.

45. In order to negotiate treaty arrangements, First Nations should not be compelled to accept whatever techniques the federal government has approved for achieving what is basically the same effect as "***surrender***". It is especially unconscionable for the federal government to suggest in its "***Communications Overview***" (Ministerial Recommendations, page 8, para. 6) that a "***Dogrib Agreement would establish a template for other NWT outstanding land claims.***"

46. It is also dishonest on the part of the federal government to refuse to carry out a national consultation on its proposed new technique since it could have far-reaching impacts on the rights of any First Nations affected. Instead, the government intends to wait until a Dogrib Agreement is finalized, before announcing that this new tech-

Tlicho Leaders pose with Prime Minister Jean Chrétien, Minister of State Ethel Blondin-Andrew and NWT Premier Steve Kakfwi, August 2003. (Photo by Tlicho)

"It is also dishonest on the part of the federal government to refuse to carry out a national consultation on its proposed new technique since it could have far-reaching impacts on the rights of any First Nations affected."

Matthew Coon Come, former AFN National Chief. The Paul Joffe submission was prepared under Coon Come's tenure. (Photo by CBC)

L to R: Elder, Elmer Courchene conducting a cleansing ceremony on Paul Martin before he was sworn-in as Prime Minister of Canada, Dec. 12, 2003. (Photo by Reuters)

"With respect to section 35 land-based rights, the new technique would achieve substantially the same certainty and finality as either the modification/ release technique approved for the Nisga'a Agreement or the up-front surrender provided by other land claim agreements, and would therefore meet the certainty and finality requirements of the comprehensive claims policy."

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nique has been approved by the federal Cabinet. (See Ministerial Recommendations, Communication Plan, Annex C, p. 29, para. 1.)

47. In regard to the "***non-assertion/fall-back release technique***", currently being proposed by the federal government, it would be most difficult to conclude that this technique is significantly different in **effect** from "***surrender***" of Aboriginal rights. In fact, the Ministerial Recommendations (p. 14, para. 24) confirm that the central objective is to achieve the same effect:

"***With respect to section 35 land-based rights, the new technique would achieve substantially the same certainty and finality as either the modification/release technique approved for the Nisga'a Agreement or the up-front surrender provided by other land claim agreements, and would therefore meet the certainty and finality requirements of the comprehensive claims policy.***"

48. A further problem in treaty-making is that there is still no genuine concern, on the part of the federal and other governments, to fully safeguard Aboriginal and treaty rights. For example, in the Ministerial Recommendations (p. 21, para. 57), it is said that "***all rights in the Dogrib Agreement would be protected under section 35 of the Constitution Act, 1982.***" Regrettably, the actual effects could prove to be quite different.

49. What is not disclosed by these governments is that they do not necessarily consider that **all** of the provisions in the treaty would be considered to be "***rights***", although these provisions favour the Aboriginal people concerned. For example, in the case of the **1975 James Bay and Northern Québec Agreement (JBNQA)**, the federal and Québec governments take the position that only certain provisions of this treaty contain "***rights***" - other sections are said to be only "***privileges***" or "***benefits***" that have no constitutional protection. This is clearly not the understanding of the First Nations that are parties to the **JBNQA**.

50. In view of all of the problems and challenges described in this opinion, it would appear critical to establish a flexible and principled framework for any future treaty negotiations. Ideally, this should be done at a national level.

51. This framework should be wholly consistent with the principle that Aboriginal peoples are "***peoples***" with the right to self-determination. In addition, it would appear most advantageous to underline that the Aboriginal rights of Aboriginal peoples are collective human rights that are inalienable. In particular, these basic rights are not subject to "***surrender***" or "***extinguishment***", or other forms of destruction.

52. In light of these human rights principles, it is not a valid objective for the federal, provincial or territorial governments to continue to seek "***surrenders***" - or any alternatives that seek to attain substantially the same effect as these "***surrenders***".

53. To date, federal alternatives to "***surrender***" fail to fully respect the obligation in s. 35 of the **Constitution Act, 1982** - namely to recognize and affirm the Aboriginal rights of Aboriginal peoples in Canada.

54. Instead, notions of "***certainty***" and "***finality***" have been introduced that are clearly one-sided and self-serving. These notions are not being applied to non-Aboriginal governments in any equivalent manner. In many instances, these notions would stifle the growth, evolution and exercise of Aboriginal rights.

55. In the current intersocietal context, the perspectives of Aboriginal peoples are to be given equal weight to those of others in Canada. Yet it must be concluded that this principle is not being respected by the federal government. This is especially evident in federal government "***techniques***" and other related approaches and policies that profoundly impact upon Aboriginal peoples and their fundamental status and rights.

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Fontaine's 'Achieving Results' for Martin Government: *Liberal Collaborators Take-Over AFN Special Assembly*

On-Screen, Chief Tom Bressette, speaks in favour of Bill C-20, with Manny Jules and Herb "Satsan" George in the background, during the AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

By Russell Diabo

The high degree of collaboration between Phil Fontaine's AFN and Paul Martin's federal government was quite evident during the **AFN Special Assembly** and the **proceedings of the House of Commons**, during the week of December 4, 2004.

The Martin government, with the help of the other political Parties, appears to have engineered the legislative agenda of the House of Commons to have **Bill C-20 (Fiscal Institutions)** rammed through Standing Committee and the House of Commons, and to have **Bill C-14 (Tlicho Self-Government & Land Claims Act)** passed in the House of Commons, while the Chiefs-in-Assembly were meeting simultaneously in a downtown hotel in Ottawa.

The passage of the two Bills not only fulfills some election promises of Phil Fontaine to support the issues of the Chiefs who voted for him, from the B.C. and N.W.T. regions, but the timing of the Bills passage also afforded the opportunity for Fontaine to get his supporters from those regions, among others, into Ottawa as delegates to the AFN Special Assembly, in order to ensure he got support for participating in the Martin government's Canada-Aboriginal Roundtable process. There were about 230 Chiefs or delegates in attendance.

The other draw for Chiefs, delegates and others who support Fontaine, to come to Ottawa, was the large and expensive AFN Christmas Party, which had headliner Aboriginal talent performing, not to mention the AFN party afforded the opportunity to lobby the various Liberal Ministers, Members of Parliament and Senators in attendance. The X-mas Party happened on the evening of the third day of the Special Assembly.

The agenda of the first day of the Special Assembly consisted of a long opening speech by National Chief Fontaine that took most of the morning. The afternoon began with a number of reports on the Canada-Aboriginal Roundtables by each sector. At the end of the afternoon, the **Haida** and **Taku River Tlingit** presented an update on the recent Supreme Court of Canada decisions affecting their First Nations.

The second day of the Special Assembly began with National Chief Fontaine trumpeting the two-year moratorium that **Revenue Canada** announced on taxing First Nations students post-secondary funding. Fontaine then launched into a speech about the impacts that **Bill C-31 (Membership/ Indian Status)**, was having in First Nation communities. There are a growing number of individuals not entitled to be registered as 'status Indians' due to 'marrying-out' rates.

However, Fontaine failed to explain the linkages of the 'membership/status' issue to the federal government's **1995 "Aboriginal Self-Government" policy**, which sets out what subjects the federal government will negotiate with First Nations and on what terms, including membership.

The afternoon of the second day started with an update on the "**Recognition and Implementation of First Nations Governments**" by **Co-Chairs, Shawn Atleo, B.C. Regional Vice-Chief** and **David Nahwegahbow, an Ojibway lawyer**. Their presentation focused on the process of consultation underway, within and among First

Phil Fontaine, AFN National Chief, speaking at the AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

"The high degree of collaboration between Phil Fontaine's AFN and Paul Martin's federal government was quite evident during the **AFN Special Assembly** and the **proceedings of the House of Commons**, during the week of December 4, 2004."

AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

"Fontaine can claim he has been raising the First Nation concerns with the federal government, but he is in too deep to pull out of the process now, regardless of the outcome, AFN has no other real strategy other than to 'follow the money'."

L to R: Rick O Brien, AFN-VC, Yukon, Charles Fox, AFN-VC, Ont., Alphonse Bird, AFN-VC, Sask., AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

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Nations and the proposed draft instrument (possible Order-in-Council) for formal discussions with the federal government regarding self-government matters.

The details of issues, such as, 'membership/status' were not addressed in the presentation of the Co-Chairs.

Following the presentation of Atleo and Nahwegahbow, **AFN Legal Counsel, Roger Jones**, presented a "**legislative update**" on the various Bills before the House and the Senate, including Bill C-20 (Fiscal Institutions).

This led to a debate on the role of the National Chief and AFN regarding Bill C-20, which carried on for the rest of the afternoon. There were no new motions or resolutions on the subject.

The third day, as usual, consisted of passing numerous resolutions. Some of the program and services subjects covered are as follows:

- **Establishment of a Police Training Centre.**
- **First Nations Child Care.**
- **Child Poverty in Canada.**
- **Implementation of National Housing Strategy.**
- **Health Roundtable—New Funding for Early Childhood Development.**
- **Health Sectoral Session and Blueprint on Aboriginal Health.**
- **Non-Insured Health Benefits—Medical Transportation Funding, Reporting Requirements and Interim Framework.**
- **Life-long Learning Roundtable.**
- **Full Jurisdiction and Resourcing for National First Nations Education and Lifelong Learning Initiatives.**
- **Cultural Education Centre Program Funding.**
- **Support for BC Aboriginal Network on Disability Society's (BCANDS) Efforts to Create a National Organization for Aboriginal People with Disabilities.**

In his **December 2004 AFN Bulletin** to the Chiefs on the outcome of the December Special Assembly, Phil Fontaine emphasized the adoption of a resolution by the Chiefs rejecting the "***pan-Aboriginal***" approach of the federal government currently being used in the **Canada-Aboriginal Roundtable process**.

The only subject of an AFN press release coming out of the Special Assembly was on a resolution the AFN adopted, supporting a second United Nations "***Decade of Indigenous Peoples***", since the first decade ended with little progress.

This is classic Fontaine posturing on both counts, in terms of the rejection of the "Pan-Aboriginal" approach of the Martin government, this is just a symbolic statement so Fontaine can claim he has been raising the First Nation concerns with the federal government, but he is in too deep to pull out of the process now, regardless of the outcome, AFN has no other real strategy other than to 'follow the money'.

As for the **U.N. Second Decade on Indigenous Peoples**, this is another symbolic statement by Fontaine, he doesn't mention how the wording of the '**Draft Declaration on the Rights of Indigenous Peoples**' is in danger of being gutted by various State governments. There was no mention of the "hunger strike" by Indigenous delegates in Geneva, when State government representatives tried to empty out the 'Draft Declaration' of any meaning. None of this was presented before the Chiefs-in-Assembly, even though Fontaine had a representative in Geneva who witnessed the whole event.

What was really telling about the AFN Special Assembly was that most of the Resolutions were about program and service issues feeding back into the Canada-Aboriginal Roundtable process.

The Canada-Aboriginal Roundtable proc-

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ess culminates in a February 2005, joint retreat between the National Aboriginal Leaders and the Cabinet Committee on Aboriginal Affairs, which is chaired by Prime Minister Paul Martin.

All of the Resolutions don't really focus beyond the February retreat with the Cabinet. The only issue for the spring of 2005 is holding a housing conference because Fontaine seems to believe (or know) that housing funding will be forthcoming.

There were two other Resolutions that were also telling about the mood of this Special Assembly, one was a carry over from the AFN AGA in Charlottetown on the **First Nations Governance Centre** and the other was on a new item on "**Electoral Reform and Increased Voter Turnout**".

A piece of leftover business from Charlottetown was a draft resolution entitled "**First Nations Control of Governance Centre**", which had **Assembly of Manitoba Chiefs, Grand Chief Dennis Whitebird (proxy for Rolling River First Nation, Manitoba)** moving the resolution and **Chief John Martin, Gespegiag, Quebec** seconding the resolution.

The preamble of the draft resolution recites the sorry history of how **Jane Stewart** agreed to set up the First Nations Governance Centre (FNGC) at **Long Plain First Nation in Manitoba**, only to have **Bob Nault** come along and close it, only to re-establish the 'Governance Centre' in Vancouver. The draft resolution also expressed concern that "***the federally-controlled FNGC continues to expend funds and develop plans without accountability to the First Nations***". The draft resolution resolved:

⇒ ***That the Chiefs-in-Assembly call on the Minister of Indian Affairs to withhold any further support of, or spending on, the First Nations Governance Centre, and that such be in effect until further notice from the Chiefs-in-Assembly; and***

⇒ ***That this Assembly mandates the creation of a broadly representative Chiefs' Committee to review the FNGC, and develop draft terms of a First Nations controlled Governance Institute, and that such committee report the draft terms for approval of the Special Chiefs' Assembly in January or February 2005; and***

⇒ ***That the Chiefs' Committee mandate include consideration of the diversity of First Nations by ensuring that any federal resources to support the implementation of First Nations Government be made equally available to individual First Nations, regions and to a National First Nations Governance Institute.***

Although the above version of the draft resolution on the FNGC was included in the December kits for AFN delegates, and National Chief Fontaine mentioned it as an outstanding issue to be addressed.

There was obviously a deal struck between the Manitoba and B.C. regions, because the version that was put to the Special Assembly and adopted was moved by **AMC Grand Chief Dennis Whitebird (proxy for Garden Hill First Nation, Manitoba)**, and **seconded by FNS Executive Member, Ed John (proxy for Tl'azt'en First Nation, B.C.)**, which was watered down to simply resolve that:

⇒ ***The AFN Chiefs-in-Assembly give political support to the Manitoba First Nations in reinstating and/or establishing a governance centre in Manitoba.***

It seems the Manitoba region's concerns about the lack of the FNGC accountability to First Nations was dropped in exchange for AFN (and B.C.) support to have a Manitoba regional office of the FNGC being opened up.

The remaining issue that was so telling about the mood of this Special Assembly was the resolution that was adopted by the Special Assembly on the third day, entitled "**Electoral Reform and Increased First Nation Voter Turnout**", moved by **Chief Lyle Sayers, Garden River First Nation, Ontario**, and seconded by **Chief Dave Harper, Garden Hill First Nation, On-**

AFN 'Head Table' during the AFN Special Assembly, Dec. 2004. (Photo by R. Diabo)

"the federally-controlled FNGC continues to expend funds and develop plans without accountability to the First Nations"

Earl Commanda, one of the AFN Special Assembly Co-Chairs', his role was to try and help control the meeting in Fontaine's favour, Dec. 2004. (Photo by R. Diabo)

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Russell Diabo, Publisher and Editor, First Nations Strategic Bulletin.

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tario.

The resolution laments the lack of First Nation participation in the federal election process, and resolves that:

⇒ ***The AFN Chiefs-in-Assembly direct the AFN Secretariat to pursue dialogue with appropriate Parties with respect to an education or awareness campaign for First Nations people about the significance of voting; and***

⇒ ***That the AFN Secretariat also be directed to develop a position paper on electoral reform for presentation to the Chiefs-in-Assembly at their next session.***

National Chief Fontaine stood at the podium and said that it wasn't about supporting one Party, but the Party with the best platform. It is doubtful that Fontaine and AFN will find that the Conservative Party of Canada, or the New Democratic Party will have the "best" platform for First Nations.

Anyone watching from 1993 until now knows that the Liberals usually have the best platform, but then they break their promises when they are put in office.

With this mandate, Fontaine will be involving AFN in the next federal election. Is this in the best interests of First Nations? Especially since it seems the Liberals aren't too popular outside of Ontario.

AFN is planning two Special Assemblies before the Annual General Assembly set for Yellowknife, NWT, in July 2005, one in February 2005, on the "**Recognition and Implementation of First Nations Governments**", and one in the spring on "**AFN Renewal**".

These two upcoming Special Assemblies, will likely be a test for Fontaine and the AFN's survival as an organization.

Logos of AFN and the Liberal Party of Canada. The symbols of a 'New Relationship'