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FIRST NATIONS STRATEGIC BULLETIN

BULLETIN OF THE FIRST NATIONS STRATEGIC POLICY COUNSEL

Canada Signs a Political Accord with AFN at Cabinet Policy Retreat: *The Rhetoric Versus Reality*

L to R: AFN National Chief, Phil Fontaine and Prime Minister Paul Martin at the start of the Aboriginal-Cabinet Policy Retreat, in Ottawa, May 31, 2005. (Photo courtesy of INAC)

By Russell Diabo

On May 31, 2005, the Prime Minister, members of the Cabinet Committee on Aboriginal Affairs and the leaders of five National Aboriginal Organizations met in Ottawa at a highly scripted four hour event, which was dubbed the "***Aboriginal-Cabinet Policy Retreat***".

At the end of the meeting the **Minister of Indian (and Aboriginal) Affairs, Andy Scott**, signed political accords with the five National Aboriginal Leaders. After the last accord was signed **Claudette Bradshaw, Minister of State for Human Resources Development**, led the Cabinet meeting room--including **AFN National Chief, Phil Fontaine**--in singing "O Canada".

Following the meeting, the Minister of Indian (and Aboriginal) Affairs, Andy Scott, described the policy retreat and the signing of political accords with the National Aboriginal Organizations as "***historic***", this sentiment was echoed by AFN National Chief Phil Fontaine who also trumpeted the meeting and signing was a "***historic step forward for First Nations in their relationship with the federal government***" yet an internal AFN document, dated May 13, 2005, shows just how tenuous the 'level' of commitment was from the Martin government going into the meeting, according to AFN's May 13th document, the "***[Prime Ministers' Office] is still determining [Prime Minister's] level of involvement.***"

Of course, the AFN document was prepared before the confidence vote happened in the House of Commons on May 19, 2005. After surviving the vote, Prime Minister Paul Martin started listing of the work his government still has to do, and he cited the Aboriginal Policy Retreat as one item on his list.

At a press conference following the May 31st policy retreat, **Prime Minister Paul Martin** called the meeting and signing of the accords "***an important step in building a stronger and more positive relationship between the Government of Canada and Aboriginal Canadians***".

When asked at the press conference why there weren't any specific funding commitments for Aboriginal programs, the Prime Minister said he was waiting until after the First Ministers' Meeting scheduled for November 2005, before making any new Aboriginal budget commitments, Paul Martin also stated "***An integral part of what we want to do as a nation is going to involve the provinces and, indeed, in a number of our larger cities, it's going to involve municipal governments***".

Summary of the First Nations – Federal Crown Political Accord

The preamble, or introduction, of the AFN-Canada Political Accord sets out the intentions of the parties to the Ac-

Special points of interest:

- **Canada-AFN Sign Political Accord**
- **Read the Text of the Accord Inside**
- **What About Funding Commitments?**
- **Are Paul Martin & Phil Fontaine Accountable?**
- **A Commentary on Senate Bill S-16**

Inside this issue:

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Canada-Aboriginal Peoples Roundtable Logo

cord, which are;

- Agree on importance of the recognition and implementation of First Nation Governments consistent with constitutional principles;
- The principle of collaboration will be the cornerstone of the of a new relationship;
- Reconciliation is the basic purpose of section 35 of the Constitution Act, 1982.
- Recognize the evolving jurisprudence is creating pressure for new approaches for achieving reconciliation;
- New approaches must be grounded on the recognition and affirmation of Aboriginal and Treaty rights in section 35 of the Constitution Act , 1982;
- Policy development will also be informed by international level discussions and agreements involving Canada, with respect to the rights of Indigenous Peoples, including the rights of self-determination;
- Recognize the importance of strong First Nation Governments with self-government rights in achieving political, social, economic and cultural development and quality of life;
- Recognize that access to, sharing, and benefit from lands and resources contribute to sustainable governments, including First Nation Governments.
- Parties share a common interest in ensuring public understanding of, and support for self-government.

There are a couple of definition clauses in the Accord, which are as follows:

“**Parties**” means the Assembly of First Nations, directed by the Chiefs in Assembly, and Her Majesty the Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development (hereinafter referred to as “Canada”), as authorized by Cabinet.

For the purpose of this Accord, “**First Nations**” and “**First Nation peoples**” means the “**Indian**” peoples as referred to in **section 35(2)** of the **Constitution Act, 1982**.

“For the purpose of this Accord, “**First Nations**” and “**First Nation peoples**” means the “**Indian**” peoples as referred to in **section 35(2)** of the **Constitution Act, 1982**.”

The Accord then lists a number of principles for reconciling and implementing section 35 rights, which are as follows:

1. **Upholding the Honour of the Crown;**
2. **Constitutionalism and the rule of law;**
3. **Canadian Federalism, pluralism and First Nation Diversity;**
4. **Mutuality;**
5. **Recognition of the Inherent Right of Self-Government and Aboriginal Title;**
6. **Implementation of the treaty relationship;**
7. **Compliance with the Crown’s Fiduciary Responsibilities;**
8. **Human Rights;**
9. **Implementation of First Nation governments and socio-economic development;**
10. **Traditional forms of government, First Nation languages and traditional teachings;**

Canada

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11. The Special Relationship with the Land;

The Accord then spells out the commitments by the parties to establishing a "***Joint Steering Committee***" with representation from the parties. The AFN-Canada Joint Committee will:

- ***undertake and oversee joint action and cooperation on policy change, including the establishment of a framework or frameworks, to promote meaningful processes for the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments. The Committee will contribute to relationship renewal through consideration of . . . new policy approaches for:***

1. **Recognition and implementation of First Nation Governments;**
2. **Implementation of Treaties;**
3. **Negotiation of First Nation land rights and interests;**
4. **A statement of guiding principles for reconciling section 35 rights with in the context of ongoing relationships with First Nation peoples, their governments, and Canada;**
5. **Facilitate capacity building by working with First Nation communities and organizations, including program, policy, institutional and legislative initiatives;**
6. **To develop modalities on policy development as set out in "Appendix A" of this Accord.**

The Accord then ends with clauses obviously intended to give comfort to those First Nations already at a negotiations table of one type or another. These clauses are as follows:

1. ***This Accord does not abrogate or derogate from Aboriginal and Treaty rights, recognised and affirmed by s. 35 of the Constitution Act, 1982.***
2. ***This Accord will only apply to those First Nations who have consented to its application.;***
3. ***Discussions pursuant to this Accord are to enhance and support negotiations and processes and are without prejudice to, and not intended to replace or supersede any existing initiatives between the Government of Canada and First Nations, or provincial or territorial governments where they are involved, without the consent of the affected First Nations.;***
4. ***The actions contemplated in this Accord will begin on signing and the Joint Steering Committee shall report annually on progress to the Chiefs in Assembly and the Minister.***

There is an "***Appendix 1***" on "***Cooperative Policy Development***" attached to the Accord, which provides as follows:

The Minister and the Assembly of First Nations commit to undertake discussions:

- ***on processes to enhance the involvement of the Assembly of First Nations, mandated by the Chiefs in Assembly, in the development of federal policies which focus on, or have a significant specific impact on the First Nations, particularly policies in the areas of health, lifelong learning, housing, negotiations, economic opportunities, and accountability; and,***
- ***on the financial and human resources and accountability mechanisms necessary to sustain the proposed enhanced involvement of the Assembly of First Nations in policy development.***

Phil Fontaine and Paul Martin shake hands after signing of Political Accord. (Photo courtesy of Jim Young, REUTERS)

"The Accord then spells out the commitments by the parties to establishing a "***Joint Steering Committee***" with representation from the parties. The AFN-Canada Joint Committee"

Fontaine and Martin at Policy Retreat. (Photo courtesy of Jim Young, REUTERS)

Andy Scott, Minister of Indian (and Aboriginal) Affairs, at press conference during Retreat. (Photo by R. Diabo)

'Political Accord' continued from page 3

- **Nothing in this Appendix is intended to derogate or detract from the work of, or resources for, the Joint Steering Committee or the principles detailed in the *Accord*.**

What Does This Accord Mean? - Separating Rhetoric From Reality

The reality is that the Canada-AFN Political Accord is just a process agreement that will likely lead to AFN maintaining or increasing their funding to participate in the ongoing Canada-Aboriginal Roundtable process. The latest in a string of Liberal '***consultation***' processes.

There were no new policies announced, or old policies rejected, at the May 31st policy retreat. All AFN got was a commitment to dialogue on a Joint Steering Committee, headed by the federal Minister of Indian (and Aboriginal) Affairs, Andy Scott, and AFN National Chief, Phil Fontaine.

A policy reform process led by the federal Minister of Indian (and Aboriginal Affairs), Andy Scott, is not comforting, or convincing. History has shown that when the process of changing policies, or fundamentally restructuring the machinery of the federal-First Nations relationship, the Department of Indian Affairs and Northern Development, now known as Indian and Northern Affairs, assisted by the Department of Justice, always kills the reform process.

"History has shown that when the process of changing policies, or fundamentally restructuring the machinery of the federal-First Nations relationship, the Department of Indian Affairs and Northern Development, now known as Indian and Northern Affairs, assisted by the Department of Justice, always kills the reform process."

Remember what happened to the **Penner Report on Indian Self-Government** in 1983? The **Liberal Red Book promises** of 1993? What about the **Final Report and Recommendations of the Royal Commission on Aboriginal Peoples in 1996**?

Yes, Phil Fontaine in his first term as AFN National Chief in 1997, negotiated a deal to respond to the RCAP Report with the then federal Liberal government of his friend Jean Chrétien.

Remember the January 1998, '**Statement of Reconciliation**' on Residential Schools, or the '**Gathering Strength**' policies? What about the "**Agenda for Action**' between Canada and First Nations?

They can all be referred to as the '***gathering dust***' policies now thanks largely to the federal officials in both the Department of Indian Affairs and the Department of Justice.

The main policies that define the federal government's position on interpreting **section 35** of the **Constitution Act 1982**, and form the federal negotiation positions on self-government and land rights at negotiation tables with First Nations across Canada, are as follows:

- **The 1995 Aboriginal Self-Government Policy.**
- **The 1986 Comprehensive Land Claims Policy (as amended).**
- **The Specific Claims Policy.**
- **Creation of New Bands Policy.**
- **Additions to Reserves Policy.**

The federal government does not have a policy on historic Treaties. There are "***Exploratory Treaty Tables***" (***ETT's***), but as far as the federal government is concerned, these tables do not have a mandate to discuss '***rights***'. So the Treaty Commissions in Saskatchewan and Manitoba are more for public relations than anything else. This is why "***treaty implementation***" is in the Political Accord.

What Prime Minister Paul Martin and his partner, AFN National Chief Phil Fontaine have

Treaty Medal

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done is to buy more time to allow for the federal government to water down section 35 rights by getting agreements—and setting precedents-- at negotiation tables across Canada where First Nations have already compromised their constitutionally protected rights under existing federal policies.

The **Canada-AFN Political Accord** and the **Canada-Aboriginal Roundtable process** are also helping the federal government reduce First Nations expectations by getting them to water down their collective rights, by participating in a process with the Metis and urban "***Aboriginal Canadians***" for individual rights to programs and services.

The delay in making significant policy commitments or budgetary announcements, also gives the federal government time to perfect their off-loading strategy to the provincial and territorial governments.

The bottom line is that AFN can afford to participate in ongoing talks with the federal government, the AFN organizational budget is significant thanks to the Martin government. It is at the First Nation community level change in policy and increases in funding are needed.

Finally, as of the December 2004, AFN Confederacy Meeting, AFN had a mandate to participate in the next federal election, by encouraging First Nations citizens to vote.

Now, with the funding flowing from the Political Accord, AFN will likely have the money to travel and influence First Nations to vote for the '***best party***' in the next federal election, and can you guess which federal political party AFN will decide is the best one?

Phil Fontaine, AFN National Chief, answering questions at press conference during Aboriginal Policy Retreat. (Photo by R, Diabo)

ABOVE: National Association of Friendships Centres protest exclusion from Retreat.

BELOW: Leaders of the five National Aboriginal Organizations wait for the Prime Minister to arrive at Retreat.

(Photos by R. Diabo)

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AFN Logo

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Canada's Coat of Arms

A FIRST NATIONS—CANADA POLITICAL ACCORD on the Recognition and Implementation of First Nation Governments

Whereas First Nations and Canada agree on the importance of achieving recognition and implementation of First Nation governments through constitutionally consistent and principled approaches;

Whereas the Prime Minister, at the April 19, 2004 Canada – Aboriginal Peoples Roundtable, stated, "It is now time for us to renew and strengthen the covenant between us", and committed that "No longer will we in Ottawa develop policies first and discuss them with you later. The principle of collaboration will be the cornerstone of our new partnership.";

Whereas the Supreme Court of Canada has in numerous cases referred to reconciliation as the basic purpose of section 35 of the *Constitution Act, 1982*, including the following statements:

"S.35(1) provides the constitutional framework through which Aboriginal peoples who lived on the land in distinctive societies with their own practices, traditions and culture are acknowledged and reconciled with the sovereignty of the Crown." (Van der Peet); and,

"Treaties serve to reconcile preexisting Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s.35 of the Constitution A ct, 1982. Section 35 represents a promise of rights recognition. ... This promise is realized and sovereignty claims reconciled through the process of honourable negotiation." (Haida);

Whereas First Nations and Canada recognise that evolving jurisprudence is creating pressure for new approaches for achieving reconciliation;

Whereas First Nations and Canada agree that these new approaches must be grounded in the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, and the Supreme Court of Canada has stated;

"Section 35(1) of the Constitution Act, 1982, at the least, provides a solid constitutional base upon which subsequent negotiations can take place …. (Sparrow);

Whereas the Royal Commission on Aboriginal Peoples concluded that "the Aboriginal peoples of Canada possess the right of self-determination"; First Nations and Canada recognize that policy development will also be informed by discussions and agreements at the international level involving Canada with respect to the rights of indigenous peoples including the right to self-determination;

Whereas First Nations and Canada recognize the importance of strong First Nation governments with recognized rights of self-government in achieving political, social, economic and cultural development and improved quality of life;

Whereas First Nations and Canada recognize that access to, sharing, and benefit from lands and resources contribute to sustainable governments, including First Nations governments and that the Royal Commission on Aboriginal Peoples noted the importance of increased access to, and benefit from, land and resources in contributing to the implementation of First Nation governments; and

Whereas First Nations and Canada share a common interest in ensuring public understanding of, and support for self-government.

THE PARTIES AGREE AS FOLLOWS:

"**Parties**" means the Assembly of First Nations, directed by the chiefs in Assembly, and Her Majesty the Queen in Right of Canada, represented by the Minister of Indian Affairs and Northern Development (hereinafter referred to as "Canada"), as authorized by Cabinet.

For the purpose of this Accord, "First Nations" and "First Nation peoples" means the "Indian" peoples as referred to in section 35(2) of the *Constitution Act, 1982*.

'Text of Accord' continued from page 6

The intent and purpose of this Accord is to com mit the Parties to work jointly to promote meaningful processes for reconciliation and implementation of section 35 rights, with First Nation governments to achieve an improved quality of life, and to support policy transformation in other areas of common interest, affirming and having regard to the following principles.

Principles: Each of the principles below are to be read together, and are mutually supportive and interdependent.

1. Upholding the Honour of the Crown

Cooperation will be a cornerstone for partnership between Canada and First Nations. This requires honourable processes of negotiations and respect for requirements for consultation, accommodation, justification and First Nations' consent as may be appropriate to the circumstances. Upholding the honour of the Crown is always at stake in the Crown's dealings with First Nation peoples.

2. Constitutionalism and the rule of law

Section 52(1) of the *Constitution A ct, 1982*, provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The legislation, policies and actions of governments must comply with the Constitution, including section 35 of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights, and the rule of law.

3. Canadian Federalism, pluralism and First Nation Diversity

Canada is a federal state and in this regard Canada – First Nation relations and the respect for section 35 rights are important to the operation of the Canadian federation and to meeting the challenge of accommodating pluralism within the Canadian Constitutional framework. Accommodating pluralism requires respect for the diversity of First Nation peoples who have lived since time immemorial on the land in distinctive societies with their own culture, practices and traditions, including lawmaking powers.

4. Mutuality

The renewed relationship should be based on mutuality, taking into account the four principles expressed by the Royal Commission on Aboriginal Peoples:

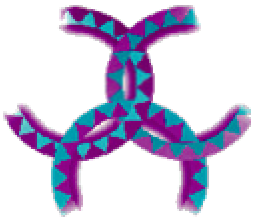
- Mutual Recognition;
- Mutual Respect;
- Sharing; and
- Mutual Responsibility.

5. Recognition of the Inherent Right of Self-Government and Aboriginal Title

The inherent right of self-government and Aboriginal title are existing Aboriginal rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. Aboriginal title together with the inherent right of self-government includes the right to make decisions respecting land, and the right to political structures for making those decisions.

6. Implementation of the treaty relationship

Implementation of the treaty relationship must be informed by the original understandings of the treaty signatories, including the First Nations' understanding of the spirit and intent.



Logo of Federal Aboriginal Self-Government Policy

"The inherent right of self-government and Aboriginal title are existing Aboriginal rights recognized and affirmed in section 35 of the *Constitution Act, 1982.*"

NAFC Protesters outside the bulding where the Accord was signed. (Photo by R. Diabo)

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7. Compliance with the Crown's Fiduciary Responsibilities

The Crown must uphold its fiduciary relationship with First Nation peoples and fulfill its fiduciary duties.

8. Human Rights

First Nations and Canada are committed to respecting human rights and applicable international human rights instruments. It is important that all First Nation citizens be engaged in the implementation of their First Nation government, and that First Nation governments respect the inherent dignity of all their people, whether elders, women, youth or people living on or away from reserves.

9. Implementation of First Nation governments and socio-economic development

Implementation of strong First Nations governments is important for sustainable economic and social development, and for improving the quality of life for First Nation peoples to standards enjoyed by most Canadians. Evidence from international development consistently points to good governance as a key component of developing strong, healthy and prosperous communities. Key factors in ensuring that First Nation governments in this respect include inherent jurisdiction, capable governing institutions and cultural match. The implementation of strong First Nation governments with appropriate capacity and resources results in communities that are the vehicle of development, and that partner with other governments and the private sector to improve social and economic conditions in their communities.

10. Traditional forms of government, First Nation languages and traditional teachings

Implementation of First Nation governments will require recognition of the importance of First Nation languages, traditional teachings and traditional forms of government in ensuring the vitality of First Nation cultures, societies and governments.

11. The Special Relationship with the Land

First Nation peoples have a special relationship with the land, which is a connection that is not just economic, but also social, cultural and spiritual. Based on their belief that their lands were a gift from the Creator that need to be protected for present and future generations, for First Nation peoples the special relationship with the land also implies a responsibility for environmental stewardship.

THE PARTIES COMMIT TO THE FOLLOWING:

1. Establishment of a Joint Steering Committee with representation from the Parties. The Committee will undertake and oversee joint action and cooperation on policy change, including the establishment of a framework or frameworks, to promote meaningful processes for the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments. The Committee will contribute to relationship renewal through consideration of:

    a) New policy approaches for the recognition and implementation of First Nation governments, including mechanisms for managing and coordinating renewed and ongoing intergovernmental relationships, and assessment of the potential for a '*First Nation Governments Recognition Act*';

    b) New policy approaches to the implementation of treaties;

    c) New policy approaches for the negotiation of First Nation land rights and inte rests;

"New policy approaches for the recognition and implementation of First Nation governments, including mechanisms for managing and coordinating renewed and ongoing intergovernmental relationships, and assessment of the potential for a *'First Nation Governments Recognition Act'*;"

Robert Nault, former Minister of Indian Affairs, promoted FNGA.

'Text of Accord' conclusion from page 8

d) A statement of guiding principles for reconciling section 35 rights in the context of ongoing relationships with First Nation peoples, their governments, and Can ada; and

e) New or existing opportunities to facilitate First Nations governance capacity-building, working with First Nations communities and organizations to jointly identify approaches that support the implementation of First Nations governments, including program, policy, institutional and legislative initiatives.

Discussions on these topics should draw, in part, upon the report *Our Nations, Our Governments: Choosing Our Own Paths, the "Penner Report" and the work of the Royal* Commission on Aboriginal Peoples on restructuring the relationship with First Nations.

2. To develop the modalities of a cooperative approach to policy development, as set out in 'Appendix 1' to this *Accord*.

THE PARTIES ACKNOWLEDGE THAT:

1. This *Accord does not abrogate or derogate from* Aboriginal and Treaty rights, recognised and affirmed by s. 35 of the *Constitution Act, 1982.*

2. This *Accord will only apply to those First Nations* who have consented to its application.

3. Discussions pursuant to this *Accord are* to enhance and support negotiations and processes and are without prejudice to, and not intended to replace or supersede any existing initiatives between the Government of Canada and First Nations, or provincial or territorial governments where they are involved, without the consent of the affected First Nations.

4. The actions contemplated in this *Accord* will begin on signing and the Joint Steering Committee shall report annually on progress to the Chiefs in Assembly and the Minister.

Signed in Ottawa on May 31st 2005

For Her Majesty The Queen In Right Of Canada

_____

The Minister of Indian Affairs and Northern Development

On behalf of the Assembly Of First Nations

_____

National Chief Phil Fontaine / Assembly of First Nations

[NOTE: A copy of the Canada-AFN Political Accord can be downloaded at www.afn.ca]

Phil Fontaine, speaks at AFN-AGA in Charlottetown, PEI, while Ministers Andy Scott and Ethel Blondin-Andrew listen. (Photo by R. Diabo)

"The actions contemplated in this *Accord* will begin on signing and the Joint Steering Committee shall report annually on progress to the Chiefs in Assembly and the Minister."

LEFT PHOTO: The Lester B. Pearson Building, site of the Aboriginal-Cabinet Policy Retreat.

RIGHT PHOTO: The Aboriginal-Cabinet Policy Retreat in session inside the Lester B. Pearson Building.

(Photos by R. Diabo)

Aboriginal Funding Commitments: *Business as Usual*

AFN National Chief Phil Fontaine signs Canada-AFN Political Accord, as Prime Minister Paul Martin and Minister of Indian (and Aboriginal) Affairs, Andy Scott, observe at the Aboriginal-Cabinet Policy Retreat held in Ottawa, May 31, 2005. (Photo by R. Diabo)

By Andrew Webster

A New Relationship - or Business as Usual?

With as much pomp as the Liberal Government could muster, five political accords were signed on May 31, 2005 between Canada and five national Aboriginal organisations. One signatory was the **Assembly of First Nations (AFN)**. The signing ceremony was ignored by the national media and hardly mentioned in any regional media. It was judged not newsworthy even though it had no particularly significant stories to compete with for column space. Let us ask "***why not?***" from a dollars and cents perspective. In fact, is there indeed a "***new relationship***" and can the appropriate funding be reasonably expected?

The intent here is not to analyse the merits - if any - of these non-binding and remarkably unspecific protocol agreements. We shall examine the fiscal history which brings us to where we are today. This is because today's Indian Problem is no longer that Indians will not assimilate; rather, that their shameful socio-economic and health circumstances are becoming an intolerable restriction upon the sort of investments which get Liberal Governments elected. At the moment the Liberals are engaged in an historically unprecedented spending spree with their survival foremost in mind. They hope that massive spending in targeted areas will buy votes otherwise lost due to the stink of corruption. In the course of this, let us ponder the extent to which the Liberals can be counted to invest in Aboriginal programmes according to their grandiose pledges of concern. It will be up to the reader to determine whether the unprecedented closeness between the AFN and the present Government is actually paying off.

The media assuredly did consider the news-worthiness of the "***Cabinet retreat accords.***" Their common conclusion was that there was no story because there was nothing new. The media have a good corporate memory for these things whereas the collective First Nations memory seems more fleeting and malleable. Far too many First Nations' people shape their world-view of federal politics by Liberal Party statements, or the news releases, bulletins, and briefings emanating from the AFN. For some time these have been notably uncritical of the Government, non-confrontational, and often insufficient for one to develop a sense of the actual big picture. Often what is not communicated is what is ***not*** happening.

What did *not* happen on May 31st is that the accords did not contain financial commitments which the National Chief might have preferred.

Accords in Historical Perspective

Since Aboriginal spending commitments were never in the cards, the best that could be achieved by the AFN and other stakeholders was promises about listening and consulting better. The unimpressed media remember that we have heard these before. The Mulroney Government periodically made statements about how bad Aboriginal conditions were. It wanted a "***new relationship***" but, alas, was unable to think outside the box or see the need to invest. The **1993 Liberal Red Book** identified the same areas of concern - health problems, unemployment, poor housing, minimal educational opportunities, unsafe drinking water - but failed to commit to specific re-

"Far too many First Nations' people shape their world-view of federal politics by Liberal Party statements, or the news releases, bulletins, and briefings emanating from the AFN. For some time these have been notably uncritical of the Government, non-confrontational, and often insufficient for one to develop a sense of the actual big picture."

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medial measures which would naturally come at the expense of more popular initiatives.

Indeed, the Liberals have made quite a few bold promises to Aboriginals. The Liberals' **1994 Throne Speech** promised - as had the Progressive Conservatives's previously - to forge a new partnership with Aboriginal peoples. Two years later the throne speech promised an incorporation of Aboriginal aspirations. A promise was made in 1997 to develop partnerships to build strong communities. Two years later came a promise to build stronger partnerships. The **2001 Throne Speech** promised to share the Canadian way with "***Aboriginal Canadians***" and another promise not to be deterred by the length of the journey through the obstacles. The promise in 2002 was to close gaps. A promise was made in 2004 to start to turn the corner on the shameful socio-economic conditions in reserve communities. Another promise followed in October to forge a new partnership.

Subsequently, discussions with federal representatives led most people connected with the AFN to expect a major spending package for Aboriginals in the Spring **2005 Federal Budget**. Yet this proved a bitter disappointment to Liberal-friendly First Nations. The National Chief expressed his disappointment in writing, albeit in restrained terms, and the national media described Aboriginals as among the "***losers***" in the Budget. Soon thereafter a damage control initiative began, with members of the AFN's leadership claiming that the Budget was "***a good start***". This terms has been used a great deal in recent years when deliverables have been well below expectations. "***A good start***" is also how the National Chief described the **$700 million health package** of September 2004 even though, unlike the provinces, the AFN made no attempt to negotiate more.

The Liberals are critically aware of the words of **George Bernard Shaw**: **A government which robs Peter to pay Paul can always depend on the support of Paul**. It is Paul not Phil who will keep them in power or mitigate their extermination. Thus, at this time of profound weakness they are more disinclined than ever to match Aboriginal promises with funding. They want Aboriginal leaders to stay quiet while priorities are reassigned:

Facing growing scepticism from natives, Indian Affairs Minister Andy Scott promised to announce a series of concrete policy changes within the next two months to all aspects of the federal government's approach to native issues. Mr. Scott is also pledging that the announcements, which will be made at a special cabinet retreat with native leaders, will include "much more money" to fund the new policies. He made the comments in a speech yesterday to the Liberal Party's aboriginal commission.[1]

The "***Cabinet retreat accords***" are presumably a disappointing manifestation of the elusive new partnership. The Minister's promise of "***much more money***" went on the back burner within eleven weeks while spending on other priorities skyrocketed. Something was conspicuously absent from the National Chief's effusive praise of the AFN's political accord and his far-sightedness of Mr. Martin and his Government.[2] The accords are devoid of any suggestion that the federal government has a constitutional, treaty, or fiduciary obligation to fund shared priorities or, indeed, to fund programmes and services of any sort to Indians. So what has changed? Not much. To the Liberals it is "***business as usual***".

"The accords are devoid of any suggestion that the federal government has a constitutional, treaty, or fiduciary obligation to fund shared priorities or, indeed, to fund programmes and services of any sort to Indians. So what has changed? Not much. To the Liberals it is "***business as usual***".

Business as Usual

The "***business***" in question started in 1963 when the Pearson Liberal Government reversed decades of historic federal policy by claiming that programmes and services to Indians, on and off reserves, are the administrative and fiscal responsibility of the provinces. In 1964, this idea was presented to the provinces at the first and last **Dominion-Provincial Conference on Indian Welfare**. Canada proposed gradually withdrawing from service delivery and gradually eliminating funding above what the provinces received through general application transfers. Thus began four decades of federal-provincial fiscal dispute and the emergence of a strong "***treaty right to federal services***"

Prime Minister Jean Chrétien with Finance Minister Paul Martin.

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policy among First Nations collectively. Several bitter waves of offloading events - each federal and unilateral - led us to the present on-off-reserve fiscal demarcation and the service gaps experienced today. The Progressive Conservative's, equally myopic, continued the Pearson "***no responsibility***" policy in the hope of avoiding expenditures. The Liberals continue - in court - to defend this position that the federal provision of programmes and services is on the basis of policy ("***humanitarian grounds***") because the provinces refuse to pay.

Upon assuming power in 1993, the Liberals commenced a series of "***business as usual***" initiatives to the consternation of First Nations. While proclaiming a new relationship as the goal, they completed and entrenched the off-loading onto the provinces - that began under the Progressive Conservative's in 1990 - of residual "***first year off-reserve***" social services. **Finance Minister Martin's** unprecedented reductions in transfers to the provinces yielded significant, and often poorly-designed, reductions in the provincial health services relied upon by First Nations people. **Health Canada** continued to resist urgently needed investments in capital construction, equipment, and personnel. Another wave of reductions to **Non-Insured Health Benefits (NIHB)** occurred.

"Upon assuming power in 1993, the Liberals commenced a series of "***business as usual***" initiatives to the consternation of First Nations. While proclaiming a new relationship as the goal, they completed and entrenched the off-loading onto the provinces - that began under the Progressive Conservative's in 1990"

One would think that the National Chief's optimism would be moderated by his own experience of what "***business as usual***" means to the Liberal Government. The **April 1994 MOU between the Assembly of Manitoba Chiefs and the INAC Minister** had a "***business as usual clause***":

...the Minister and the Grand Chief, for their respective governments, hereby agree...That during the continuation of the process, a relationship of "business as usual" shall continue to exist between DIAND and First Nations, with no reductions, disruption or delay in funding, programs, initiatives or services resulting from the process...

Over the following months, responding to the fiscal shock of recession and reduced federal transfers, the provinces contracted their social and health programmes. Recognising great potential to save money, INAC demanded that First Nations delivering programmes (e.g., social assistance) mirror these cuts. **Manitoba Chiefs** - among others - were outraged that "***business as usual***" meant that Indians are provincial fiscal responsibility. Indeed, it was impossible for INAC to avoid making the cuts because to do otherwise would suggest federal jurisdiction in an area claimed to be provincial.

Since 1994, the Liberals have reacted robustly to the **Auditor General's** criticisms by putting blame on First Nations. The **1994 Audit of INAC's Social Assistance Programme** was damning. An internal "***compliance review***" process identified serious systemic problems and massive First Nations non-compliance with programme requirements. As part of this process I authored five reports to INAC in which I observed - as others had - that much of the non-compliance is for the good reason that provincial rules often make no sense locally. In 1997 these reports - imprudently classified "***secret***" - created the first ill-fated **Minister Jane Stewart's** two parliamentary crises. The AFN had an opportunity to go on the offensive by exposing the status quo as indefensible: an archaic system of **Treasury Board directives**, which are tied to provincial rules because of a Cabinet decree against First Nations-specific programme legislation. To enact such legislation would acknowledge federal obligation - the Holy Grail of treaty responsibility.

House of Commons, Parliament of Canada

Yet the AFN stayed silent and thus fed into Liberal strategy of spinning the problems as "***Indian-hating***" on the part of the Reform Party. As a reward the Government skilfully manoeuvred First Nations under the "***lack of accountability***" spotlight whilst escaping with its own hide unblemished. A fiscal relations table was then struck while, on a separate track, compliance monitoring and enforcement consumed federal officials behind closed doors. At the fiscal table INAC refused to discuss the fundamentals of the "***departmental***

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non-compliance" side of problems identified by the Auditor General. The core issues were not on the table: federal legislation, federal responsibility, and First Nations ability to depart from provincial rules. The focus was changes to funding agreements and such accountability improvements as First Nationss themselves could make.

Meanwhile, compliance enforcement activities intensified from their 1996/97 levels: 167 out of 585 (28.5%) of bands in remedial action (up 8.5%); the INAC Business Plan set a goal of *only* 20% qualified audits by 1998; and total debt reached $139M (just for the 167 bands). Debt was concentrated in Prairies, where Compliance Review was most active (i.e., Saskatchewan known to be $50M, Alberta probably $40-50M). The current operating deficit was $29M (just for the 167 bands). The substantial savings enjoyed by INAC were re-absorbed so as to reduce requests for more money in other areas.

Other condemnatory audits followed (e.g., Capital Facilities, NIHB, Education, Funding Arrangements, etc.) with a predictable avoidance of departmental responsibility. The AFN sought to make positive change by accepting significant federal funding to participate in dialogue processes which tend towards permanence. Business as usual continued. Off-loading of costs continues to inflame federal-provincial relations and upset organisations like the **Federation of Saskatchewan Indian Nations**; e.g. in 2004:

i. INAC stopped its social assistance payments to Indian students attending provincial universities, even when these students came from a reserve household that qualifies.

ii. NIHB chiropractic coverage was stopped within weeks of Ontario de-listing chiropractics from its provincial medical plan. Ontario merely provided a reason to think that Health Canada could get away with this particular reduction.

iii. Health Canada stopped, after three months of travel, patient transportation funding when patients travel off-reserve for more than three months to access dialysis treatment that is not available locally.

In the third case, the province must pay for relocation, social housing, and welfare of these patients. By such means, Health Canada is able to divest itself of caseload burden at a time of vast and escalating out-migration of high-need chronic cases towards provincial hospitals. While the patient exodus can be maintained, Ottawa has little incentive for making substantial investments in diagnostic and curative services on reserves. Formerly the AFN was positively shrill in its protests over off-loading and failure to invest. Today the AFN has a more conciliatory approach..

Considering the Accords - Will the Liberals Deliver?

The accords do not change the fact that the federal Government does not feel legally compelled to invest the enormous sums necessary to equalise Aboriginal and non-Aboriginal socio-economic and heath conditions. Lacking a sense of obligation to provide services, or to set and attain targets such as health parity, Liberal Governments have always seen truly significant Aboriginal spending as something that can be delayed a while longer. They felt this when the AFN was in a combative frame of mind. They feel it even more so today, with an AFN too close to the Government and its agenda, and willing to wait patiently.

Consider this. The AFN leapt to the defence of the Government after the issue of continued off-loading was raised in a recent paper:

Federal-provincial off-loading: in reality provincial governments are off-loading to First Nations-straining their capacity to deliver services. The emergence of the acute care substitution sector of home care is one good example. First Nations home care programs are being pressured to accept increasingly higher acuity patients as hospitals

L to R: Ethel Blondin-Andrew, Minister of State, Northern Development, Dwight Dory, President of CAP, Phil Fontaine, AFN National Chief.. (Photo by R. Diabo)

"The accords do not change the fact that the federal Government does not feel legally compelled to invest the enormous sums necessary to equalise Aboriginal and non-Aboriginal socio-economic and heath conditions."

Prime Minister Paul Martin speaking to Retreat after signing of Accords. (Photo by R. Diabo)

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continue to discharge patients earlier...[3]

Coming to the defence of the Liberal Government is not unexpected. Yet to deny the historic off-loading issue - which suggests abandonment of the "***Treaty right to federal services***" policy - is enormity on the scale of Holocaust denial. Several months before Chief Fontaine regained the national office, his predecessor echoed the standing First Nations policy on federal responsibility:

Aboriginal health is constitutionally a federal responsibility. The Prime Minister and federal Minister of Health do not need the consent of the premiers in order address First Nations health and health-care issues. The federal government has extraordinary administrative and developmental know-how and capacity -- it's the government of a G8 state. It also has massive surpluses, and broad public support for solutions to the gross social disparities facing aboriginal peoples.[4]

"This missing of opportunities, and reluctance to negotiate from a position of strength, is becoming increasingly noticed amongst First Nations stakeholders. If for fear of weakening the Liberal reign the AFN is unwilling to apply pressure when pressure is needed, then the influence of the **Office of National Chief** is limited to the ability to keep the Indian masses quiet."

The AFN does not have a mandate to downplay or avoid the federal responsibility matter even if the Liberals are uncomfortable with it being raised. It could have been raised as a strong human rights issue at the **September 2004 Premiers Health Conference**, with every prospect of strong provincial support and historic media attention. It could have been demanded at the Cabinet retreat or else an accord would not be signed. It could have been demanded as the first agenda item on the 2005 Premiers Conference. There is no protest that the Liberal Government is approaching this meeting exactly as its predecessor did in 1964: it will challenge the provinces to take up more of the costs of programmes and services. When the federal position hardened on residential schools, the AFN avoided robust negotiation by agreeing to an "***Air India***" type face-saving inquiry lasting a year - during which time more Elders will die without compensation.

This missing of opportunities, and reluctance to negotiate from a position of strength, is becoming increasingly noticed amongst First Nations stakeholders. If for fear of weakening the Liberal reign the AFN is unwilling to apply pressure when pressure is needed, then the influence of the **Office of National Chief** is limited to the ability to keep the Indian masses quiet. Photo-ops with Natives can only influence several percent of the population - people who would likely vote Liberal anyway. One ought not to over-estimate this influence, considering that the government has delayed delivering for twelve years, it has much bigger fish to fry, and it is reaching the end of its fiscal capacity.

Following Prime Minister Martin's televised speech on April 21, 2005, regarding the Sponsorship scandal, his Government has spent close to $30 billion on post-Budget initiatives aimed at buying electoral support. When the **February 2005 Federal Budget** was announced, there was not enough fiscal freedom to support, say, a $1 billion multi-year on-reserve housing programme. Yet thirty times this sum has been allocated over a period of weeks, much of it to recipients and groups who unlike Indians are not within the federal realm of responsibility.

This raises two questions. First, it calls into serious doubt the Liberal claim of being the pro-Aboriginal party. Second, it is now extremely unlikely that the Government could afford Aboriginal investments on a scale able to make a real difference. The criticism of this agenda, by major economic observers and players, has become stinging. There is a strong probability that the limit is being reached or than roll-backs will be necessary. Most likely, something will have to give just to finance the existing commitments.

The Liberal Government is not above cannibalising programmes to pay for other priorities. Witness the manner in which Compliance Review savings helped bankroll the modest Aboriginal initiatives announced in the 1990's. Note also that there is not much meat left on the bone for further cannibalisation.

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Reduction Targets 2005/06 to 2009/10, Federal 2005 Expenditure Review - Main Agencies with Aboriginal Programme Mandates

Department	06/07	07/08	08/09	09/10	Total
INAC	45.0	65.0	65.0	65.0	**260.0**
Health	43.9	68.4	68.4	68.4	**269.1**
PCO - Resid. Schools	3.1	4.7	4.7	4.7	**18.8**
Social Devt	13.9	17.5	17.5	17.5	**77.6**
HRSD	20.0	20.0	20.0	20.0	**92.0**
Above Depts	125.9	175.6	175.6	175.6	**717.5**
All Depts	**631**	**947**	**987**	**1,021**	**3,923**

The table shows that $4 billion have been trimmed from programmes in order to fund the February 2005 Federal Budget. An amount equal to half of the recent $700 million in health funding was abstracted from Aboriginal programming. This means that the health funding is only about 50% new money (with $88.2M coming from NIHB savings in areas including patient transport and drugs).

Who then is the "***Indian giver***"? Is it the Liberals, who tend not to deliver or who cannibalise other Aboriginal programmes? Or would it be a Conservative Government, which the AFN would have one believe would undo all the progress made. Yet to undo progress one must first have progress. The Conservatives have abetted this fear-mongering by taking their time in providing details of their Aboriginal policy. What is known is that the main policy item is First Nations-specific legislation in the main programme areas: social assistance, health, and education. This would necessarily acknowledge federal obligation and sweep aside the complex system of spending authorities - upon which the Liberal's claims policies are based.

The Conservatives have also called for a review of federal Aboriginal spending - which the Liberals have already undertaken this year. In fact, a Conservative Government would find it impossible to reduce the total Aboriginal envelope because most of the costs are needs-driven. Having accepted legal responsibility for programmes and services, a Conservative Cabinet would be severely pressed to invest heavily, particularly in First Nations health and education.

Meanwhile, it is business as usual in terms of Liberal Aboriginal policy. The Liberal Party is in the business of getting itself re-elected, and Aboriginals are at present a most unwelcome challenge to this imperative.

Even before the accords, the political futures of the Liberal Government, and most of the AFN's leadership, were inexorably linked. The accords pledge that, henceforth, the Government will no longer make Aboriginal policies in isolation. They imply that Aboriginal leaders and Cabinet Members will periodically sit together and make policy. Thus it is increasingly difficult to see the difference between the AFN and the Government. This being said, First Nations do not have a Plan B if the Liberals fall. Plan A is to support them and continue to be patient.

ENDNOTES:

1. Globe and Mail, March 4, 2005.

2. E.g., see "First Nations-Federal Crown Political Accord and Cabinet Retreat Signal Steps Towards Self-Determination and Self-Government for First Nations". AFN press release June 1, 2005.

3. The quote is from the AFN's 8-page media response to "Fiscal Responsibility for Programmes and Services to Indians and the Forthcoming Premiers' Conference on Aboriginal Issues" by Andrew Webster, February 7, 2005. This pre-publication draft circulated rapidly and widely on the Internet.

4. Article by Matthew Coon Come in *Globe and Mail*, February 4, 2003.

Who will be Accountable?

AFN National Chief Phil Fontaine answers questions at closing Press Conference of Aboriginal-Cabinet Retreat, in Ottawa, May 31, 2005. (Photo by R. Diabo)

"Four First Ministers conferences failed to address the agenda adequately, several federal commissions and at least two constitutional amendment processes all failed as well. Now, we are to believe that a new process with the Minister of Indian Affairs will get results."

By Kheebahdzee

The AFN propaganda machine has churned out another agreement with the Minister of Indian Affairs. Although, the Prime Minister provided some photo ops, the agreement released by the AFN and Government of Canada is really nothing new, although one AFN Executive member questioned the fact that its contents were not even revealed to him the weekend prior to the event called a "***Cabinet Retreat***". Although touted as an unprecedented and significant achievement, Canada's media barely mentioned it and it certainly wasn't at the top of any newscasts.

The biggest concern First Nation peoples should have about this process is the lack of transparency and accountability that characterizes the new AFN craze about "***getting results***". It appears to mean results at any cost. Perhaps, its really a fire sale, "***Everything must go!***" or "***We will not be undersold!***".

The announcements emanating from a three or four hour "***retreat***" were really about process. A super-size process to address all those outstanding issues that have been on the First Nations agenda for decades since the patriation of Canada's Constitution in 1982 and its recognition of "***aboriginal and treaty rights***". Four First Ministers conferences failed to address the agenda adequately, several federal commissions and at least two constitutional amendment processes all failed as well. Now, we are to believe that a new process with the Minister of Indian Affairs will get results.

What kind of results can we expect? Well, seeing how transparent and accountable this bunch, with **Phil Fontaine** are, we should know just when they are darn good and ready to tell us. They want us First Nations people voting in federal elections. They want to confuse individual rights and freedoms with the all-important collective rights of First Nations. They want you to believe that you can get involved in party politics and still represent a nation of Indigenous Peoples.

It is recommended you not be fooled by their rhetoric. Just listen to those few voices that have dared to question the Liberal Party-Indian Affairs takeover of our national organization. One Regional Vice-Chief on the Executive Committee questioned the credibility of any decisions to be made regarding this initiative at the **upcoming AFN Annual Assembly in Yellowknife NWT**. Since many delegates from east of Manitoba will have difficulty making it to Yellowknife, the Vice-Chief cast doubt whether these initiatives can be adequately sanctioned at such a forum, where many cannot participate.

This really added fuel to some of the rumors that were already flying around. Some had said that **Ontario Chiefs** couldn't get rooms in Yellowknife, which has limited capacity, because pro-Phil supporters had already booked up all the rooms. This kind of rumor was further expanded upon when it came to light that AFN is using some kind of housing agency for Chiefs to book rooms. Not only does the national organization no longer help out our Chiefs, it refers them to some non-native agency it has contracted to deal with the doling out the bad news to Chiefs who don't support the great Liberal National Chief. The depths our politics are falling to is astounding.

In any case, the fact that at least one Executive Member questions the validity of any decisions to be made in Yellowknife con-

'Accountable' conclusion from page 16

cerning important national direction on this particular process should give great cause for concern. Not only about the mandate for this initiative, but for the ability of changing course should the plot thicken. Although there is plenty of high-sounding language in the AFN and other accords, there is no substantial content or money backing it up. I'm sure everyone will be happy to hear the AFN is getting even more money on your behalf. I'm sure they will be even happier to realize that someone will be representing them on a "***Joint Steering Committee***" with the Minister. Oh yes, Phil will be there, so why worry.

If the "***Joint Steering Committee***" is to be stacked with the **Friends of Phil Fontaine**, **Paul Martin** and the like, is no one concerned about transparency or accountability? Perhaps it doesn't matter to most, as it doesn't appear that Phil Fontaine has much of an opposition. Where he first faced opposition to many of his supporters proposed resolutions at AFN meetings at the beginning of his current term, it appears he gets everything he wants through now, especially with the strategic staging of national meetings to best favor his supporters. Thus we see Yellowknife will be the locations for the Annual Assembly. Before Christmas, the Annual Assembly was held in Ottawa during the same week the federally financed supporters of the **Liberal Financial Institutions Bill** were all in town. This is not mere coincidence my friends.

So, those who want to applaud the accords and the retreat can do so. However, consider this road is paved in doublespeak. Watch as it leads away from community involvement. Watch as big leaders and their henchmen who control organizations structured to flow federal funds into their own designs control the process. Watch out as those who are buying into federal party politics sacrifice collective rights for the sense of personal power they get for playing the white man's game.

One must still ask though, where is the transparency and accountability? It certainly doesn't seem to be felt out here on the rez. Heck, with very little new coverage, the whole thing is not even a blip on the screen. One Executive member at least has the guts to stand up and say there is a lack of transparency. He asks the big question for those who care, how can there be any legitimacy at a meeting most cannot get into or find accommodations at even if they did get there? It's been suggested there may need to be a further Assembly to address these issues. There should be no problem, if the Liberals will flow some dollars our way.

Liberal Party of Canada Logo

"Although there is plenty of high-sounding language in the AFN and other accords, there is no substantial content or money backing it up. I'm sure everyone will be happy to hear the AFN is getting even more money on your behalf. I'm sure they will be even happier to realize that someone will be representing them on a "***Joint Steering Committee***" with the Minister. Oh yes, Phil will be there, so why worry."

L to R: Prime Minister Paul Martin and Minister of Indian (and Aboriginal) Affairs, Andy Scott at Retreat press conference. (Photo by R. Diabo)

OPINION: Bill S-16: Who Defines the Meaning of First Nations Self-Government?

Senate of Canada

"Historically, DIAND was created for the explicit purpose of displacing the self-governing institutions of First Nations. In recent years, DIAND ministers have spoken in favour of self-government **so long as they are the ones who define both the scope of First Nations' autonomy and the nature and structure of First Nations political institutions**."

By Michael Posluns, PhD

The purpose of Bill S-16 of the current session of the Canadian Parliament is to set out a formula by which Canada would recognize those First Nations that drafted and adopted a constitution that met with certain minimal requirements. S-16 was introduced by **Senator Gerry St. Germain**, a Conservative from British Columbia who has Métis roots in Manitoba.

The **Senate Committee on Aboriginal Peoples** began to hold hearings on S-16 on May 3, 2005. The course of the first day's hearings served to demonstrate that the **Indian Affairs Branch** continues to be haunted by the attitudes of colonialism and paternalism that have characterized its operations since Confederation and before.

Sadly, Senator St. Germain was a few minutes late. The Chairman, Senator Nick G. Sibbeston, used the opportunity of St. Germain's delay to invite two Indian Affairs witnesses to take the floor while the committee awaited the sponsor's arrival. In the sponsor's absence, at the point when might normally be setting the stage for his bill by reviewing the bill's overall structure in terms of the bill's purpose, senior officials from Indian Affairs were able to take control of the proceedings and set the stage for viewing this bill as an unconstitutional adventure that would foster division within Confederation and work against the well being of First Nations and other Aboriginal Peoples in Canada.

The two government witnesses were **Maureen McPhee**, and **Allan Cracower**. McPhee and Cracower followed a classic move of Indian Affairs officials testifying before parliamentary committees: they defined the terms by which the bill would be understood. Even their titles announce that their job is to control the discourse on First Nations self-government. McPhee is the **Director General, Self Government Branch, Indian and Northern Affairs Canada**. Cracower was billed as **Counsel, Indian and Northern Affairs Comprehensive Claims, and Northern Affairs Self-Government and Strategic Direction, Department of Justice Canada**.

The idea of two senior officials from Indian Affairs with titles suggesting that they are in a position to define the nature of First Nations self-government ought to be sufficient to set alarms ringing. If self-government meant, within the discourse of First Nations autonomy what it means in any other political discourse the insult embedded in the idea of the Canadian government defining what constitutes First Nations self-government would be obvious even to the novices on a Senate Committee on Aboriginal Peoples. At the end of their testimony, however, they were each unable to furnish the Senators with anything in writing, neither a policy statement nor a legal opinion. The closest thing to anything in writing is whatever the **Hansard** clerks took down from their oral testimony.

McPhee began her remarks by saying that DIAND "***has been an ardent supporter of identifying and developing new approaches that can facilitate and promote self-government.***" Historically, DIAND was created for the explicit purpose of displacing the self-governing institutions of First Nations. In recent years, DIAND ministers have spoken in favour of self-government **so long as they are the ones who define both the scope of First Nations' autonomy and the nature and structure of First Nations political institutions**. For example, **former Minister of Indian Affairs Bob Nault** introduced four bills in 2002-3 including a **First Nations Governance Act**, a **First Nations Fiscal Institutions Act** and a **Specific Claims Resolution Act**, which would have defined the nature of First Nations institutions, the scope of First Nations taxation powers on leased lands, and establishing a board appointed by the federal minister which would oversee the financial and fiscal policies of all First Nations governments in Canada. It would be an interesting Political Science 101 exercise to compare band powers under the present **Indian Act** with the powers under **Nault's Bill C-7** with a view to determining whether there was a net gain or a net loss.

To claim that DIAND has been an ardent supporter of self-government flies in the face of the entire history of DIAND and of successive parliamentary and public inquiries have stressed that Indian Affairs. A **Special Commons Committee on Indian First Nations Self-Government (Penner)**

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in 1983, a Royal Commission on Aboriginal Peoples in 1996 and a Senate Committee Report in 2000, all concluded that DIAND has historically been so much a part of the problem that it can not now become the government's key to a solution.

Indian Affairs officials, however, have been eager to reinvent their own department in an effort to contradict the conclusions of every known independent inquiry. Indeed, their determination to dominate proceedings, as exemplified by McPhee's co-option of the Senate Committee goes to the very heart of the problem.

Describing a government department as "***an ardent supporter of identifying and developing new approaches***" is curious on a number of grounds. If a government department (or a corporation) were capable of emotions we would still need to ask whether **ardour** would be one that would head a list.

If federal officials were to genuinely support First Nations self-government, the first evidence of good faith on their part would be an adoption of a **no-policy**, i.e., DIAND would cease to adopt policies which they believed to be in the interests of First Nations beyond supporting First Nations capacity to make such decisions for themselves.

McPhee said that "***the number of self-governing Aboriginal groups continues to grow.***" She carefully avoided the term "***First Nations***" while adopting the view that each bill ratifying a land claim and self-government agreement in recent years has, in fact, constituted a self-governing First Nation. A careful look at the bills ratifying agreements between Canada and such First Nations as the **Tlicho** or **Westbank** quickly demonstrates that the capacity of these communities to govern themselves is confined to measures that are consistent with the policies of the province/territory surrounding them as well as with any relevant federal law. In short, the "***self-government***" granted (not recognized) under these agreements is conditional upon the policies of those First Nations governments conforming to **both** federal and provincial law.

Having said that S-16 was, in principle, "***a part of the solution***" (as though Indian Affairs were in a position to say just what the solution might be when they have historically been so much a part of the problem), Ms. McPhee proceeded to challenge the constitutionality of the bill and to suggest that the bill stood to threaten First Nations relations with the provinces.

McPhee went on to say that "***although the department agrees with the overall goal of the bill, we believe that First Nations, provincial and territorial governments, as well as the general public should have an opportunity to have meaningful input" into this bill.***" No one asked why the departments own recent bills had been rammed through Parliament with indecent haste. Or why First Nations self-government – a concept First Nations leaders and elders say is implicit in the recognition and affirmation of Aboriginal and treaty rights in **s. 35** of the **Constitution Act, 1982** – should require either provincial approval or the input from the general public. Even those provinces and municipalities which rake in money by admitting students from neighbouring First Nations (reserve) communities do not reciprocate that kind of input.

More surprising was McPhee's contention that First Nations jurisdiction over off-reserve education "***is not consistent with the Constitution.***" This is not the place to argue the subtleties of the Canadian Constitution. However, in the list of exclusively federal powers is **section 91(24)** "**Indians and lands reserved for the Indians.**" The Government has, when it was convenient read these two provisions –(1) Indians and (2) lands reserved -- as though they were one. I think Ms. McPhee would be hard pressed to find a legal scholar not in the pay of the federal government who would agree with her view, or the government's view of s. 91(24). Indeed, the federal government has long provided some health benefits to persons living off reserve. And, the current practice in respect to post-secondary education is for the government to give funds to First Nations communities to allocate in support of their members attending universities or colleges, clearly a move to support off-reserve education when it is convenient.

Prime Minister Jean Chrétien at Tlicho Agreement signing ceremony.

"A careful look at the bills ratifying agreements between Canada and such First Nations as the **Tlicho** or **Westbank** quickly demonstrates that the capacity of these communities to govern themselves is confined to measures that are consistent with the policies of the province/ territory surrounding them as well as with any relevant federal law."

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Canada-Aboriginal Roundtable, held in Ottawa, April 19, 2004. (Photo by R. Diabo)

The real crux of DIAND's concern is that under bill S-16, "***a First Nation can designate territory it acquires as Aboriginal lands.***" In other words, if a reserve acquires money and then uses the money to buy lands it can declare those lands to be part of their reserved lands and, therefore, not subject to provincial taxation. Most of the lands a First Nation is likely to acquire would be the result of land claims negotiations. In other words, they would be getting back lands that were rightfully theirs all along. Why is the department that supposedly is the lead federal agency in respect to the federal fiduciary duty to First Nations be more concerned about the loss of revenue to provincial treasuries than the reduction of poverty in First Nations communities?

Much was made of the **Canada-Aboriginal Roundtable**, a phenomenon that I will explore further in another article. What is critical here is that these round tables involve multiple federal departments negotiating concurrently with Inuit, Métis and First Nations leaders. The trouble is that for the most part, especially outside the northern territories (Nunavut, North West Territories and Yukon) it is only First Nations that have treaties with the Crown in right of Canada. While these round tables foster an illusion of federal good will when they occur on television, the First Nations leaders see them as a means for diluting treaty obligations by focusing on federal government priorities. Once again the federal government sets the agenda and decides which policies will be pursued by supposedly self-governing First Nations.

"While these round tables foster an illusion of federal good will when they occur on television, the First Nations leaders see them as a means for diluting treaty obligations by focusing on federal government priorities. Once again the federal government sets the agenda and decides which policies will be pursued by supposedly self-governing First Nations."

Cracower began by commending "***Senator St. Germain and others for this important initiative,***" surely an indication that Mr. Cracower's view of the Constitution does not have him, as a public servant and a lawyer in the federal Justice Department answering to a parliamentary committee. Cracower then urged that such an important matter "***should be realized in a legally sound and practical way.***" Civil servants in Canada who view themselves as "***the permanent government***" typically see the **Parliament of Canada** and its committees as needing to be brought into line with what is *practical*.

Senator St. Germain, who had just arrived, observed that he wished that he might have received written submissions from the witnesses in advance. By the end of the proceedings it would become clear that they were not about to provide written materials either before or after. Indeed, the sole basis for Cracower's legal opinions is that (a) his say-so and (b) the convenience of his opinions to the interests and viewpoints of his client, the

Minister of Indian Affairs and Northern Development.

St. Germain pointed out that his bill had been drafted by a committee of Aboriginal scholars, teachers, elders and leaders and that "***Aboriginal nations themselves have asked us to do this.***"

Both we and the Aboriginal people are looking for a way of not spending 10 years in negotiations. ... The Aboriginal First Nations that are seeking this type of enabling legislation have an established land base, a fact that the paternalistic attitude of government goes not recognize.

He pointed out that he was carrying on a work that had been initiated by the late **Senator Walter Twinn**.

I do not believe that there is a quick fix to this problem, but I do believe that there should be some form of legislation n place that would allow those who are in a position to take advantage of the legislation to have a vehicle that will allow them get on with their lives.

St. Germain pointed to hearings on economic development in which **Professor Stephen Cornell** from the **Harvard Project** had observed that genuine self-government had been found to be a consistent prerequisite to economic development. Holding up self-government until communities become self-supporting inhibits economic development, it does not foster it.

The late Senator Walter Twinn, was the original proponent of what is now Bill S-16.

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St. Germain made the tactical effort of asking Ms McPhee "***How do we expedite this without going through a seven-year study followed by a seven year evaluation?***" Predictably, she assured the committee, "***I do not think we need a seven year study.***" Instead, she proposed "***expediting self-government at the sectoral negotiation session of the round table process,***" something that sounds close to a seven year process from where I am sitting.

Most revealing was her next statement, "***That was an opportunity for participation by all Aboriginal groups to discuss.***"

The essence of bill S-16 is that each First Nation that succeeds in writing its own constitution, providing that constitution meets certain minimal requirements will be recognized by Canada. The essence of **Prime Minister Martin's Round Table process** is, as McPhee observed, to provide a forum in which "***all Aboriginal groups***" might discuss. Why exactly the **Nisga'a** on the west coast or the **Inuit** in the High Arctic should need to agree to a constitution or a land claim for the **Mi'kmaq of Nova Scotia** is not at all clear, unless, of course, the goal is to delay decisions making for seven years or more as Senator St. Germain feared.

Senator Charlie Watt, an Inuit Senator from northern Quebec challenged McPhee's assertion that the bill is unconstitutional. He reminded her that s.35, the section that "***recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada***" is not a part of the **Canadian Charter of Rights and Freedoms**. Watt was, however, concerned that S-16 is not "***the way to develop harmony between Aboriginals and non-Aboriginals.***" He noted that "***the system is structured [so as to] create a power struggle between the federal, provincial and territorial governments.***" However, he did want to see Aboriginal governments being able to propose laws to which others would be obliged to respond within 60 days or some other limited time.

Cracower latched on to Watt's concerns and emphasized that, as a lawyer his "***focus is, of course, on the law and not on policy.***" He then went on to make the case for provincial participation in developing First Nations self-government, but, at the end of his speech he was not able to agree to provide any kind of written material in support of the analysis he had just offered.

This is a line that Justice lawyers have followed for many, many years. If an Indian organization becomes sophisticated enough to offer a legal opinion of their own, or, in certain cases where parliamentary committees have their own legal counsel, the Justice Department will offer a verbal opinion contrary to that of a First Nation or of counsel for a parliamentary committee. What they will not do is to offer a reasoned opinion complete with references.

At the end of the first day's hearing the Chairman, Senator Nick Sibbeston, tried to have something for everybody. He asked Ms. McPhee if the department might not prepare a comparison of C-7, the department's bill on **First Nations Governance** of two sessions previous and S-16.

Why, exactly, he would not have asked for such a comparison from the parliamentary library staff whose job it is to provide support for parliamentary committees remains a mystery.

There was, at the end of the day, no mention of further meetings.

The way in which the Chairman handed the proceedings on S-16, a private senator's bill over to two government officials took me back to a joint committee studying a **land claim petition from the Interior Tribes in 1927**. The Minister of Indian Affairs came to the first hearing and asked to speak first. Neither petitioner, **Andrew Paull**, the leader of the Interior Tribes or his lawyer ever got to speak, or to call their own witnesses or in any way to make their case. The Chairman **Hewitt Bostock**, who was, in fact, the **Speaker of the Senate**, at the minister's request turned normal procedure on its head, and allowed the minis-

Senator Gerry St. Germaine is now the sponsor of Bill S-16.

"The essence of bill S-16 is that each First Nation that succeeds in writing its own constitution, providing that constitution meets certain minimal requirements will be recognized by Canada."

Parliamentary Mace, symbol of Parliament's authority.

BULLETIN OF THE FIRST NATIONS STRATEGIC POLICY COUNSEL

Advancing the Right of First Nations to Information

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

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ter to make a lengthy statement about all the wonderful work being done by his department for the poor Indians while the Indians who had brought their petition to Parliament were never properly heard.

The ultimate outcome of that committee was an amendment to the **Indian Act, s. 149A**, making it an offence to raise funds for the purpose of pressing land claims.

Granted the comparison is very limited: the Chairman of this committee simply wanted to be efficient in the use of time by having witnesses who were present to speak first and others to speak later. Whether the comparison holds beyond that remains to be seen.

One can only hope that the sponsor of S-16, Senator St. Germain, and any friends he has in the various corners of the Senate, will press for a schedule of hearings from interested First Nations leaders, elders, and teachers as well as from legal scholars and policy studies scholars. One could also hope that interested policy and legal scholars will take an interest in this bill as an alternative to the neocolonial bills put forward by the department in 2002 and 2003.

ENDNOTES:

i. Copies of bill S-16 may be downloaded at http://www.parl.gc.ca/38/1/parlbus/chambus/senate/bills/public/pdf/s-16_1.pdf.

ii. Proceedings of the Standing Senate Committee on Aboriginal Peoples may be found at http://www.parl.gc.ca/common/Committee_SenHome.asp?Language=E&Parl=38&Ses=1&comm_id=1.

iii. The actual name of the department in Canada, is, as McPhee stated, the Department of Indian Affairs and Northern Development. Most of her colleagues have taken to referring to the department as INAC, Indian and Northern Affairs Canada, a name for where there is no legal authority.

iv. For a more in-depth analysis of the Nault bills see Posluns' articles in this Bulletin for 2002 and 2003.

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