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Canada: Prime Minister Harper Launches First Nations "Termination Plan"

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On September 4th the Harper government clearly signaled its intention to:

> 1) Focus all its efforts to assimilate First Nations into the existing federal and provincial orders of government of Canada;
>
> 2) Terminate the constitutionally protected and internationally recognized Inherent, Aboriginal and Treaty rights of First Nations.

Termination in this context means the ending of First Nations pre-existing sovereign status through federal coercion of First Nations into Land Claims and Self-Government Final Agreements that convert First Nations into municipalities, their reserves into fee simple lands and extinguishment of their Inherent, Aboriginal and Treaty Rights.

To do this the Harper government announced three new policy measures:

- *A "results based"* approach to negotiating Modern Treaties and Self-Government Agreements. This is an assessment process of 93 negotiation tables across Canada to determine who will and who won't agree to terminate Inherent, Aboriginal and Treaty rights under the terms of Canada's Comprehensive Claims and Self-Government policies. For those tables who won't agree, negotiations will end as the federal government withdraws from the table and takes funding with them.
- First Nation regional and national political organizations will have their core funding cut and capped. For regional First Nation political organizations the core funding will be capped at $500,000 annually. For some regional organizations this will result in a funding cut of $1-million or more annually. This will restrict the ability of Chiefs and Executives of Provincial Territorial organizations to organize and/or advocate for First Nations rights and interests.
- First Nation Band and Tribal Council funding for advisory services will be eliminated over the next two years further crippling the ability of Chiefs and Councils and Tribal Council executives to analyze and assess the impacts of federal and provincial policies and legislation on Inherent, Aboriginal and Treaty rights.

Imposed Legislation

These three new policy measures are on top of the following unilateral federal legislation the Harper government is imposing over First Nations:

- Bill C-27: *First Nations Financial Transparency Act*
- Bill C-45: *Jobs and Growth Act, 2012* [Omnibus Bill includes Indian Act amendments regarding voting on-reserve lands surrenders/designations]
- Bill S-2: *Family Homes on Reserves and Matrimonial Interests or Rights Act*
- Bill S-6: *First Nations Elections Act*
- Bill S-8: Safe Drinking Water for First Nations
- Bill C-428: *Indian Act Amendment and Replacement Act* [Private Conservative MP's Bill, but supported by Harper government]

Then there are the Senate Public Bills:

- Bill S-207: *An Act to amend the Interpretation Act* (non derogation of aboriginal and treaty rights)
- Bill S-212: *First Nations Self-Government Recognition Bill*

The Harper government's Bills listed above are designed to undermine the collective rights of First Nations by focusing on individual rights. This is the "modern legislative framework" the Conservatives promised in 2006. The 2006 Conservative Platform promised to:

"Replace the Indian Act (and related legislation) with a modern legislative framework which provides for the devolution of full legal and democratic responsibility to aboriginal Canadians for their own affairs within the Constitution, including the Charter of Rights and Freedoms."

Of course "modern" in Conservative terms means assimilation of First Nations by termination of their collective rights and off-loading federal responsibilities onto the First Nations themselves and the provinces.

One Bill that hasn't been introduced into Parliament yet, but is still expected, is the *First Nations' Private Ownership Act* (FNPOA). This private property concept for Indian Reserves – which has been peddled by the likes of Tom Flanagan and tax proponent and former Kamloops Chief Manny Jules – is also a core plank of the Harper government's 2006 electoral platform.

The 2006 Conservative Aboriginal Platform promised that if elected a Harper government would:

"Support the development of individual property ownership on reserves, to encourage lending for private housing and businesses."

The long-term goals set out in the Harper government's policy and legislative initiatives listed above are not new; they are at least as old as the Indian Act and were articulated in the federal 1969 White Paper on Indian Policy, which set out a plan to terminate Indian rights at the time.

Previous Termination Plans:
1969 White Paper and Buffalo Jump of 1980s

The objectives of the 1969 White Paper on Indian Policy were to:

- Assimilate First Nations.

- Remove legislative recognition.
- Neutralize constitutional status.
- Impose taxation.
- Encourage provincial encroachment.
- Eliminate Reserve lands and extinguish Aboriginal Title.
- Economically underdevelop communities.
- Dismantle Treaties.

As First Nations galvanized across Canada to fight the Trudeau Liberal government's proposed 1969 termination policy the federal government was forced to consider a strategy on how to calm the Indian storm of protest.

In a memo dated April 1, 1970, David Munro, an Assistant Deputy Minister of Indian Affairs on Indian Consultation and Negotiations, advised his political masters Jean Chrétien and Pierre Trudeau, as follows:

"… in our definition of objectives and goals, not only as they appear in formal documents, but also as stated or even implied in informal memoranda, draft planning papers, or casaul conversation. We must stop talking about having the objective or goal of phasing out in five years… We can still believe with just as much strength and sincerity that the [White Paper] policies we propose are the right ones…

"The final [White Paper] proposal, which is for the elimination of special status in legislation, must be relegated far into the future… my conclusion is that we need not change the [White Paper] policy content, but we should put varying degrees of emphasis on its several components and we should try to *discuss it in terms of its components rather than as a whole*… we should adopt somewhat different tactics in relation to [the White Paper] policy, but that we should not depart from its essential content." [Emphasis added]

In the early 1970s, the Trudeau Liberal government did back down publicly on implementing the 1969 White Paper on Indian Policy, but as we can see from Mr. Munro's advice the federal bureaucracy changed the timeline from five years to a long-term implementation of the 1969 White Paper objectives of assimilation/termination.

In the mid-1980s the Mulroney Conservative government resurrected the elements of the 1969 White Paper on Indian Policy, through a Cabinet memo. In 1985, a secret federal Cabinet submission was leaked to the media by a DIAND employee. The Report was nicknamed the "Buffalo Jump of the 1980s" by another federal official. The nickname referred to the effect of the recommendations in the secret Cabinet document, which if adopted, would lead Status Indians to a cultural death – hence the metaphor.

The Buffalo Jump Report proposed a management approach for First Nations policy and programs, which had the following intent:

- Limiting and eventually terminating the federal trust obligations;
- Reducing federal expenditures for First Nations, under funding programs, and prohibiting deficit financing;
- Shifting responsibility and costs for First Nations services to provinces and "advanced bands" through co-management, tri-partite, and community self-government agreements;
- 'Downsizing' of the Department of Indian Affairs and Northern Development

(DIAND) through a devolution of program administration to "advanced bands" and transfer of programs to other federal departments;
- Negotiating municipal community self-government agreements with First Nations which would result in the First Nation government giving up their Constitutional status as a sovereign government and becoming a municipality subject to provincial or territorial laws;
- Extinguishing aboriginal title and rights in exchange for fee simple title under provincial or territorial law while giving the province or territory underlying title to First Nations lands.

The Mulroney government's "Buffalo Jump" plan was temporarily derailed due the 1990 "Oka Crisis." Mulroney responded to the "Oka Crisis" with his "Four Pillars" of Native Policy:

- Accelerating the settlement of land claims;
- Improving the economic and social conditions on Reserves;
- Strengthening the relationships between Aboriginal Peoples and governments;
- Examining the concerns of Canada's Aboriginal Peoples in contemporary Canadian life.

In 1991, Prime Minister Brian Mulroney also announced the establishment of a Royal Commission on Aboriginal Peoples, which began its work later that year; the establishment of an Indian Claims Commission to review Specific Claims; the establishment of a B.C. Task Force on Claims, which would form the basis for the B.C. Treaty Commission Process.

In 1992, Aboriginal organizations and the federal government agreed, as part of the 1992 Charlottetown Accord, on amendments to the *Constitution Act*, 1982 that would have included recognition of the inherent right of self-government for Aboriginal people. For the first time, Aboriginal organizations had been full participants in the talks; however, the Accord was rejected in a national referendum.

With the failure of Canadian constitutional reform in 1992, for the last twenty years, the federal government – whether Liberal or Conservative – has continued to develop policies and legislation based upon the White Paper/Buffalo Jump objectives and many First Nations have regrettably agreed to compromise their constitutional/international rights by negotiating under Canada's termination policies.

Canada's Termination Policies Legitimized by Negotiation Tables

It has been thirty years since Aboriginal and Treaty rights have been "recognized and affirmed" in section 35 of Canada's constitution. Why hasn't the constitutional protection for First Nations' Inherent, Aboriginal and Treaty rights been implemented on the ground? One answer to this question is, following the failure of the First Ministers' Conferences on Aboriginal Matters in the 1980s, many First Nations agreed to compromise their section 35 Inherent, Aboriginal and Treaty rights by entering into or negotiating Modern Treaties and/or Self-government Agreements under Canada's unilateral negotiation terms.

These Modern Treaties and Self-Government Agreements not only contribute to emptying out section 35 of Canada's constitution of any significant legal, political or economic meaning. Final settlement agreements are then used as precedents against other First Nations' who are negotiating.

Moreover, Canada's Land Claims and Self-Government policies are far below the international standards set out in the Articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada publicly endorsed the UNDRIP in November 2010, but obviously Canada's interpretation of the UNDRIP is different than that of most First Nations, considering their unilateral legislation and policy approach.

Canada voted against UNDRIP on Sept. 13, 2007, stating that the UNDRIP was inconsistent with Canada's domestic policies, especially the Articles dealing with Indigenous Peoples' Self-Determination, Land Rights and Free, Prior Informed Consent. Canada's position on UNDRIP now is that they can interpret it as they please, although the principles in UNDRIP form part of international not domestic law.

The federal strategy is to maintain the Indian Act (with amendments) as the main federal law to control and manage First Nations. The only way out of the Indian Act for First Nations is to negotiate an agreement under Canada's one-sided Land Claims and/or Self-Government policies. These Land Claims/Self-Government Agreements all require the termination of Indigenous rights for some land, cash and delegated jurisdiction under the existing federal and provincial orders of government.

Canada has deemed that it will not recognize the pre-existing sovereignty of First Nations or allow for a distinct First Nations order of government based upon section 35 of Canada's constitution.

Through blackmail, bribery or force, Canada is using the poverty of First Nations to obtain concessions from First Nations who want out of the Indian Act by way of Land Claims/Self-Government Agreements. All of these Agreements conform to Canada's interpretation of section 35 of Canada's constitution, which is to legally, politically and economically convert First Nations into what are essentially ethnic municipalities.

The first groups in Canada who have agreed to compromise their section 35 Inherent and Aboriginal rights through Modern Treaties have created an organization called the Land Claims Agreement Coalition. The Coalition Members are:

- Council of Yukon First Nations (representing 9 land claim organizations in the Yukon)
- Grand Council of the Crees (Eeyou Istchee)
- Gwich'in Tribal Council
- Inuvialuit Regional Corporation
- Kwanlin Dun First Nation
- Maa-nulth First Nations
- Makivik Corporation
- Naskapi Nation of Kawawachikamach
- Nisga'a Nation
- Nunavut Tunngavik Inc.
- Nunatsiavut Government
- Sahtu Secretariat Inc.
- Tlicho Government
- Tsawwassen First Nation
- Vuntut Gwitchin First Nation

The Land Claims Agreement Coalition members came together because the federal

government wasn't properly implementing any of their Modern Treaties. So the Coalition essentially became a lobby group to collectively pressure the federal government to respect their Modern Treaties. According to members of the Coalition Modern Treaty implementation problems persist today.

The fact that Canada has already broken the Modern Treaties shouldn't inspire confidence for those First Nations who are already lined up at Canada's Comprehensive Claims and Self-Government negotiation tables. According to the federal Department of Aboriginal Affairs there are 93 Modern Treaty and/or Self-Government negotiation tables across Canada. Those First Nations who are negotiating at these 93 tables are being used by the federal government (and the provinces/Territories) to legitimize its Comprehensive Claims and Self-Government policies, which are based upon extinguishment of Aboriginal Title and termination of Inherent, Aboriginal and Treaty rights.

The First Nations who have been refusing to negotiate and are resisting the federal Comprehensive Claims and Self-Government negotiating policies are routinely ignored by the federal government and kept under control and managed through the Indian Act (with amendments).

Attempts by non-negotiating First Nations to reform the federal Comprehensive Claims and Self-Government policies aren't taken seriously by the federal government because there are so many First Nations who have already compromised their Inherent, Aboriginal and Treaty rights by agreeing to negotiate under the terms and funding conditions of these Comprehensive Claims and Self-Government policies.

For example, following the 1997 Supreme Court of Canada Delgamuukw v. British Columbia decision, which recognized that Aboriginal Title exists in Canada, the Assembly of First Nations tried to reform the Comprehensive Claims policy to be consistent with the Supreme Court of Canada Delgamuukw decision. However, the then Minister of Indian Affairs, Robert Nault on December 22, 2000, wrote a letter addressed to then Chief Arthur Manuel that essentially said why should the federal government change the Comprehensive Claims policy if First Nations are prepared to negotiate under it as it is? A fair question: why do First Nations remain at negotiation tables that ultimately lead to the termination of their peoples Inherent and Aboriginal rights, especially since it appears that Modern Treaties are routinely broken after they are signed by the federal government?

Many of these negotiations are in British Columbia where despite the past twenty years of negotiations the B.C. Treaty process has produced two small Modern Treaties, Tsawwassan and Maa'Nulth. The Nisga'a Treaty was concluded in 2000, outside of the B.C. Treaty process. All of these Modern Treaties have resulted in extinguishing Aboriginal Title, converting reserve lands into fee simple, removing tax exemptions, converting bands into municipalities, among other impacts on Inherent and Aboriginal rights.

The Harper Government's Termination Plan

Aside from the unilateral legislation being imposed, or the funding cuts and caps to First Nation's and their political organizations, the September 4, 2012, announcement of a "results based" approach to Modern Treaties and Self-Government negotiations amounts to a "take it or leave it" declaration on the part of the Harper government to the negotiating First Nations.

Canada's Comprehensive Claims Policy requires First Nations to borrow money from the federal government to negotiate their "land claims." According to the federal government:

"To date, the total of outstanding loans to Aboriginal groups from Canada to support their participation in negotiations is $711-million. This represents a significant financial liability for the Aboriginal community. In addition, the government of Canada provides $60-million in grants and contributions to Aboriginal groups every year for negotiations."

It is Canada's policies that forced First Nations to borrow money to negotiate their "claims," so the "financial liability" was a policy measure designed by the federal government to pressure First Nations into settling their 'claims' faster. As the federal government puts it, the Comprehensive Claims negotiation process has instead "spawned a negotiation industry that has no incentive to reach agreement."

This accumulated debt of $711-million along with the $60-million annual in grants and contributions have compromised those negotiating First Nations and their leaders to the point that they are unable or unwilling to seriously confront the Harper government's termination plan.

Over 50% of the Comprehensive Claims are located in B.C. and the First Nations Summit represents the negotiating First Nations in B.C., although some negotiating First Nations have now joined the Union of B.C. Indian Chiefs (UBCIC), thus blurring the historic distinctions between to two political organizations. The latter organization previously vigorously opposed the B.C. Treaty process, but now the UBCIC remains largely silent about it.

These two main political organizations – the First Nations Summit and the UBCIC – have now joined together into the B.C. First Nations Leadership Council, further blending the rights and interests of their respective member communities together, not taking into account whether they are in or out of the B.C. Treaty process.

This may partially explain why the Chiefs who are not in the B.C. Treaty process also remain largely silent about the Harper government's "results based" approach to Modern Treaties and Self-Government negotiations.

First Nations in British Columbia are failing to capitalize on that fact, that since the Delgamuukw Decision, the governments have to list unresolved land claims and litigation as a contingent liability. Such liabilities can affect Canada's sovereign credit rating and provincial credit ratings. To counter this outstanding liability, Canada points to the British Columbia Treaty Process as the avenue how they are dealing with this liability, pointing to the fact that First Nations are borrowing substantive amounts to negotiate with the governments.

Another recent example of how disconnected B.C. First Nations and their organizations are on international versus domestic policy and law, is the First Nations' outcry over the recent Canada-China Treaty.

The B.C. Chiefs and their organizations are publicly denouncing the Canada-China Foreign Investment Promotion and Protection Agreement as adversely impacting on Aboriginal Title and Rights, yet they say or do nothing about Harper's accelerated termination plan. It seems the negotiating First Nations are more worried about the Canada-China Treaty

blocking a future land claims deal under the B.C. Treaty process.

The Chiefs and their organizations at the B.C. Treaty process negotiation tables have had twenty years to negotiate the "recognition and affirmation" of Aboriginal Title and Rights, but this continues to be impossible under Canada's policies aiming at the extinguishment of collective rights. As a result only two extinguishment Treaties have resulted from the process. Even Sophie Pierre, Chair of the B.C. Treaty Commission has said "If we can't do it, it's about time we faced the obvious – I guess we don't have it, so shut her down."

By most accounts the twenty year old B.C. Treaty process has been a failure. It has served the governments' purpose of countering their contingent liabilities regarding Indigenous land rights. Yet it seems the negotiating First Nations are so compromised by their federal loans and dependent on the negotiations funding stream that they are unable or unwilling to withdraw from the tables en masse and make real on the demand that the Harper government reform its Comprehensive Claims and Self-Government policies to be consistent with the Articles of the UNDRIP.

The same can also be said for the negotiating First Nations in the Ontario, Quebec and Atlantic regions.

The Chiefs who are not in the B.C., Quebec or Atlantic negotiating processes have not responded much, if at all, to Harper's "results based" approach to Modern Treaties and Self-Government. The non-negotiating Chiefs seem to be more interested in managing programs and services issues than their Aboriginal Title and Rights. As one federal official put it, the Chiefs are involved in the elements of the 1969 White Paper on Indian Policy like economic and social development while ignoring the main White Paper objective – termination of First Nations legal status.

Conclusion

Given their silence over the Harper government's "results based" "take it or leave it" negotiations approach, it seems many of the negotiating First Nations at the Comprehensive Claims and/or Self-Government tables are still contemplating concluding Agreements under Canada's termination policies. This can only lead to further division among First Nations across Canada as more First Nations compromise their constitutional and international rights by consenting to final settlement agreements under the terms and conditions of Canada's termination policies, while undermining the political positions of the non-negotiating First Nations.

In the meantime, Harper's government will continue pawning off Indigenous lands and resources in the midst of a financial crisis through free trade and foreign investment protection agreements, which will secure foreign corporate access to lands and resources and undermine Indigenous Rights.

Some First Nation leaders and members have criticised AFN National Chief Shawn Atleo for agreeing to a joint approach with the Harper government, including the Crown-First Nations Gathering (CFNG), but to be fair, the Chiefs across Canada did nothing to pressure Prime Minister Harper going into the CFNG. Instead, many Chiefs used the occasion as a photo op posing with the Prime Minister.

The negotiating First Nations who are in joint processes with Canada seem to be collectively heading to the cliff of the "Buffalo Jump" as they enter termination agreements with Canada emptying out section 35 in the process.

Much of the criticism of AFN National Chief Atleo has come from the Prairie Treaty Chiefs. Interestingly, if one looks at the federal chart of the 93 negotiation tables not too many First Nations from historic Treaty areas are involved in the Self-Government tables, except for the Ontario region where the Union of Ontario Indians and Nisnawbe-Aski Nation are negotiating Self-Government agreements.

As a result of the September 4, 2012 announcements regarding changes to Modern Treaties and Self-Government negotiations, cuts and caps to funding First Nations political organizations and unilateral legislation initiatives, it is obvious that Prime Minister Harper has tricked the AFN National Chief and First Nations by showing that the CFNG "outcomes" were largely meaningless.

One commitment that Prime Minister Harper made at the CFNG – which he will probably keep – is making a progress report in January 2013. The Prime Minister will probably announce the progress being made with all of the negotiating tables across Canada, along with his legislative initiatives.

It appears First Nations are at the proverbial "end of the trail" as the Chiefs seem to be either co-opted or afraid to challenge the Harper government. Most grassroots peoples aren't even fully informed about the dangerous situation facing them and their future generations.

The only way to counter the Harper government is to:

- have all negotiating First Nations suspend their talks; and
- organize coordinated National Days of Action to register First Nations opposition to the Harper government's termination plan;
- Demand Canada suspend all First Nations legislation in Parliament, cease introducing new Bills and
- Change Canada's Land Claims and Self-Government Policies to "recognize and affirm" the Inherent, Aboriginal and Treaty Rights of First Nations, including respect and implementation of the Historic Treaties.

If there is no organized protest and resistance to the Harper government's termination plan, First Nations should accept their place at the bottom of all social, cultural and economic indicators in Canada, just buy into Harper's jobs and economic action plan – and be quiet about their rights. •

Russell Diabo is the Publisher and Editor of First Nations Strategic Bulletin where this article first appeared.

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