

CANADA'S WAR ON FIRST NATIONS

By

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CANADA'S RESIDENTIAL SCHOOL APOLOGY

- On June 11, 2008, Prime Minister Stephen Harper issued a scripted apology to Residential School Survivors.
- Prime Minister Harper also received much public support for his government's apology regarding the negative impacts of the Indian Residential School "*system*".
- Then AFN National Chief Phil Fontaine heralded the federal apology as a "new relationship" between First Nations and the federal government.

CONTEXT OF FEDERAL APOLOGY

- The Indian Residential Schools were part of the historic **Indian Act** system. The **Indian Act** was developed in the mid-1800's as a national colonial law to transform the legal-political status of First Nations by assimilating First Nations into the Canadian mainstream as individual citizens while preparing the Reserves to eventually become municipalities.

CONTEXT OF FEDERAL APOLOGY

- The situation changed in 1982, as First Nations pushed for and obtained the entrenchment of Aboriginal and Treaty Rights into Canada's new constitution. However, during talks in the 1980's, representatives of First Nations and Canada's First Ministers' failed to reach agreement on the meaning of section 35 of the new constitution.
- The failure to reach a constitutional consensus on the meaning of section 35 in the 1980's has created legal—and political—uncertainty about the constitutional definition of Aboriginal and Treaty Rights of First Nations.

CONTEXT OF FEDERAL APOLOGY

- The legal-political uncertainty of the meaning of section 35 rights is the basis of the “war” being waged upon First Nations by Canada. The overall federal objective is to coerce First Nations into signing Self-Government/Land Claims Agreements that will compromise their Aboriginal and Treaty Rights for significantly reduced rights and a few token “benefits”.

CONTEXT OF FEDERAL APOLOGY

- Thus, the federal government is coercing First Nations consent, band by band, group by group, to surrender First Nations pre-existing sovereignty in order to accept the assertion of Crown sovereignty over “Indians and lands Reserved for Indians”, which contributes to the federal objective of emptying out section 35 of Canada’s constitution of any real or significant meaning. There are a number of First Nations in Canada who have already compromised their section 35 rights.

CONTEXT OF FEDERAL APOLOGY

- Canada intensifies its “war” on a First Nation when a First Nation resists and tries to assert Aboriginal or Treaty Rights over lands and resources beyond what the Crown governments will allow under their restrictive, one sided, self-government and land claims policies.

IRS SETTLEMENT AGREEMENT

- In terms of the Prime Minister's apology, let us remember the "*Indian Residential School Apology*" is part of a out of court negotiated settlement between the previous federal Liberal government, and the AFN National Chief, Phil Fontaine, who has described himself as a survivor of sexual abuse while attending a Residential School as a child.
- The federal apology is part of National Chief Fontaine's political legacy, which explains in part, his exuberant and accepting response to the Prime Minister's apology.

IRS SETTLEMENT AGREEMENT

- The fact is, over the last number of years, the federal government was under significant pressure from class action lawsuits launched by Residential School Survivors in various parts of Canada.
- There was fear within the federal government that they might be held liable for a far larger amount of money than what was being negotiated under the **IRS Settlement Agreement**, so the federal government settled with AFN.

IRS SETTLEMENT AGREEMENT

- The **IRS Settlement Agreement** required that a majority of the Residential School Survivors in the various class action lawsuits accept the terms of the negotiated **IRS Settlement Agreement**.
- Many of the Residential School Survivors are elderly and they decided to accept the lesser amount offered in the **IRS Settlement Agreement**, rather than to wait for the lengthy outcome of the judicial process.

IRS SETTLEMENT AGREEMENT

- There still remains a significant number of Residential School Survivors who do not accept the **IRS Settlement Agreement**. Many of these individuals are victims of severe abuse while attending the Residential School “*system*” and remain openly hostile to National Chief Fontaine and the federal-AFN **IRS Settlement Agreement**.

IRS SETTLEMENT AGREEMENT

- As the Prime Minister's website proclaims, the **IRS Settlement Agreement** includes: a **Common Experience Payment**; an **Independent Assessment Process**; **Commemoration Activities**; measures to support healing; and the **Indian Residential Schools Truth and Reconciliation Commission**.

IRS SETTLEMENT AGREEMENT

- All Prime Minister Harper did was to fulfill a component of the **IRS Settlement Agreement**, which was to deliver an apology to the Residential School Survivors on behalf of the Government of Canada for the federal role in the Indian Residential School “*system*” as a “*measure to support healing*”. Although by most accounts, the Prime Minister delivered the apology with sincerity and uncharacteristically for him, with humility. However, we should remember the apology is just a snapshot in the tenure of Harper’s Conservative government.

TRUTH & RECONCILIATION (TRC)

- One of the last components of the federal-AFN **IRS Settlement Agreement** now being implemented is the establishment of a '**Truth and Reconciliation Commission**'.
- The main purpose of the **TRC** is to try and put the Indian Residential School experience into Canada's past and try to build a future in Canada based upon "*reconciliation*", which is what the Supreme Court of Canada has ruled, is the main purpose of section 35 of Canada's constitution.

TRUTH & RECONCILIATION (TRC)

- The mandate of the **TRC** is limited, for example, under the “**powers, duties and procedures**” of the **TRC**, the Commissioners:
- " *... shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process;*
- " *... shall not possess subpoena powers, and do not have powers to compel attendance or participation in any of its activities or events. Participation in all Commission events and activities is entirely voluntary;*

TRUTH & RECONCILIATION (TRC)

- The **TRC “Terms of Reference”** go on to further limit the mandate of the **TRC Commissioners** to not name any individual responsible for the Indian Residential School “*system*” abuses unless the individual has already been identified in a criminal court proceeding.
- The **TRC** mandate is quite limited since it depends on voluntary participation and statements by those Priests, Nuns, and others, including Church staff and federal bureaucrats, who are still alive and culpable for the abuses carried out against former students in the Crown’s name. With such a limited mandate it is questionable if the **TRC** will achieve any significant findings, results or recommendations.

CANADA'S WAR ON FIRST NATIONS

- The TRC won't address the real Crown agenda.
- My belief--which is based upon my policy experience and observations over the past three decades of First Nations-Canada relations--is that the federal government (with provincial and municipal support) is attempting to empty out (limit & restrict) the meaning (scope & content) of Aboriginal and Treaty Rights in section 35 of Canada's constitution until it is empty or **“spent”**.

CANADA'S WAR ON FIRST NATIONS

- Instead of being recognized and affirmed as a '**distinct order of government**' in Canada, under the current federal policy approach First Nations will eventually become '**ethnic municipalities**'.
- It is not a "**conventional war**" that Canada is waging against First Nations, and it is not covert, although there is a sophisticated propaganda machine in Ottawa to generate Crown public spin against First Nation interests in any dispute. The Crown war is essentially a legal-political-fiscal conflict over the interpretation/assertion/implementation of Aboriginal and Treaty Rights over lands and resources by First Nations.

CANADA'S WAR ON FIRST NATIONS

- The **Indian Act** is still used as the primary statute of control and management over “**Indians and lands reserved for Indians**”, along with the coercive federal-provincial fiscal arrangements.
- So when **Prime Minister Harper** says “[t]oday, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.” He is only referring to the historic Indian Residential School “system”.

CANADA'S WAR ON FIRST NATIONS

- **Canada's self-government and land claims policies**, which the Harper government is continuing to implement, are designed to achieve the surrender of First Nation pre-existing sovereignty and territory to be replaced by First Nations' acceptance of the assertion of Crown sovereignty over "**Indians and lands reserved for Indians**". Even though the **RCAP Report** recognized that "*Aboriginal governments*" have jurisdiction over "**core areas**" of responsibility, or in other words, a degree of "**internal sovereignty**".

CANADA'S WAR ON FIRST NATIONS

- The **RCAP Report** also recognized there are “**shared areas**” of jurisdiction between “*Aboriginal governments*” and Crown governments, which are to be negotiated between the parties.
- Let's not forget the **failed constitutional reform process** of the 1980's until the **1992 Charlottetown Accord**, the **shelved 1983 Penner Report on Indian Self-Government**, the **broken promises of the 1993 Liberal Red Book**, the **shelved 1996 Report & Recommendations of the Royal Commission on Aboriginal Peoples**, not to mention the **broken Treaties and Agreements with various First Nations across Canada**.

CANADA'S WAR ON FIRST NATIONS

- The **TRC** is looking at only a few provisions within the **Indian Act**, while in my estimation the impact of the whole **Indian Act** on First Nations should be examined. The **1996 RCAP Report** did a thorough analysis of the **Indian Act**, but the **RCAP recommendations** have been ignored and buried by the federal politicians and bureaucracy.

FEDERAL SELF-GOVERNMENT POLICY

- Contrary to the RCAP recommendations, the **federal 1995 Aboriginal Self- Government policy**, which is the umbrella policy for First Nation negotiation tables across Canada and the operating policy of federal departments and agencies, does not provide for “**sharing**” federal jurisdiction in many matters including matters that involve trade and commerce.
- The **provincial governments have a veto in self-government or land claims negotiations** that affect matters of provincial constitutional jurisdiction or lands and resources. Even what **RCAP** called the “**core areas**” of First Nations jurisdiction like child and family law are subject to a provincial veto.

CROWN POLICES, PRACTICES, LEGISLATION

- In addition to the federal government advancing unfair, unequal policy terms and conditions in negotiations with First Nations, the federal and provincial governments use fiscal arrangements to coerce, control and manage First Nation in order to assimilate them into existing federal, provincial and municipal systems. So, instead of promoting a **'distinct order of government'** representing **'peoples'** with **'distinct'** constitutionally protected collective rights, the federal policy approach continues to promote assimilation despite the Prime Minister's Residential School apology.

DOMESTIC vs. INTERNATIONAL

- The federal government won't sign onto the **United Nations Declaration on the Rights of Indigenous Peoples** because Canada's domestic '*Aboriginal*' policies don't meet the minimum international standards contained in the **UN Declaration on the Rights of Indigenous Peoples**.
- Some examples where Canada's policies fail to meet international standards are: **the denial of self-determination under the Covenant on social, political and economic rights; non-recognition and extinguishment of Aboriginal Title; and rejection of various other rights to prior informed consent and control over development on traditional territories.**

FIRST NATIONS NEO-COLONIALISM

- In Canada, it seems First Nations and their organizations, are so dependent on funding from the federal and provincial governments that they seem to be compromised in their ability to protest or resist Crown legislation, policies or practices.
- The result over the past few decades, is that more and more First Nations and their organizations, are lining up to compromise their peoples constitutionally protected, but as yet undefined, Aboriginal and Treaty Rights for some program and service dollars.

MODERN TREATY GROUPS

- There are those First Nations who have signed the so-called “**modern treaties**”. These groups came together in 2003, as the “**Land Claims Agreements Coalition**” to protest the lack of implementation of their “**modern treaties**” from 1975 to now. These groups are:
- **Grand Council of the Crees (Quebec)**
- **Council of Yukon First Nations**
- **Gwich’in Tribal Council**
- **Inuvialuit Regional Corporation**
- **Makivik Corporation**
- **Nisga’a Nation**
- **Nunatsiavut Government**
- **Nunavut Tunngavik Incorporated**
- **The Sahtu Secretariat Incorporated**
- **Tlicho Government**

SELF-GOVERNMENT AGREEMENTS

- There are also those First Nations that have compromised their constitutionally protected rights through **self-government agreements** like the **Sechelt** and **West Bank Bands** in British Columbia. The **Union of Ontario Indians** have also announced their intention to enter into a final self-government agreement in the next year or two. The results of these self-government agreements are acceptance of Crown delegated jurisdiction and authority **NOT** recognition of pre-existing First Nations sovereignty.

EMPTYING OUT S.35

- If one looks at the final self-government and land claims agreement legislation over the last few decades, the evidence shows the trend of concessions those compromised First Nations have made to achieve the few benefits and little delegated authority they have obtained by defining their section 35 rights within the restrictive policy frameworks, along with the coercive fiscal arrangements of the Crown governments. Thus, these First Nations are contributing to the Crown objective of emptying out section 35 of any significant legal or political meaning.

WHY NEGOTIATE?

- For those First Nations negotiating under the federal policies of self-government and land claims, the question remains, after seeing the federal government renege on signed agreements, or how little there is to gain by compromising rights, why continue to negotiate under these current policies?

HISTORIC TREATIES

- Those with historic Treaties shouldn't feel too smug either! The federal self-government and land claims policies also affect negotiations and federal operations surrounding the interpretation and implementation of historic Treaties. Before his 2006 electoral win, **Prime Minister Harper** showed his hand regarding the **interpretation of historic Treaties** when he responded to the **Congress of Aboriginal Peoples** in a letter stating “[b]y taking treaty, *Indian Nations surrendered their lands*”. Meanwhile, the federal self-government policy applies to First Nations with historic Treaties as well as those without historic Treaties.

THE COURTS WEIGH IN

- When the constitutional talks of the 1980's regarding Aboriginal Peoples ended in failure in 1997, the matter fell to the Canadian courts to define the meaning of section 35 of the new Constitution. While the courts have been fairer than governments in addressing section 35 rights, the courts have also made it harder for First Nations to achieve justice because of the burden of proof being placed upon First Nations requiring costly collection of evidence and lengthy court processes that most First Nations can't afford. This leaves the governments "take it or leave it" offers as almost the only option for many First Nations.

LEGAL TESTS & PROCESS

- The Supreme Court of Canada's (SCC) **Sparrow** decision of 1990, was the first ruling on the meaning of section 35. The SCC ruled that Aboriginal rights were not absolute and could be "**justifiably infringed**" for "**valid legislative objectives**". This was the first of several SCC decisions that would set out a court directed legal "**justification framework**" for analyzing the assertion or claims of Aboriginal or Treaty rights by "**Aboriginal groups**".
- The Canadian courts have placed a large burden of proof upon First Nations who assert their Aboriginal or Treaty Rights. Under these legal tests First Nations have to produce historical, ethnographic and other evidence, which can cost millions of dollars to produce at a professional standard, not to mention the legal and court costs themselves.

SYSTEMIC RACISM

- Remember, the Crown governments do not generally allow First Nations to use Crown funds for First Nations to take the Crown to court. This is not to say there is no First Nations discretion, but it is limited by federal administrative fiat.
- The judicial system is still part of the Crown's assertion of sovereignty over First Nations.
- There are numerous examples of the Crown governments taking advantage of First Nations as they allow corporations and others to exploit First Nations lands and resources without compensation.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- If First Nations are to change the status quo in the war with Canada then the community members and leaders need to wise up on a community-by-community basis. First Nation members need to get organized to make sure their Chief and Council, and the band staff, are not surrendering constitutionally protected (although undefined) Aboriginal and Treaty rights for program and service dollars, which First Nations are entitled to anyway.
- The **Indian Act** and federal funding for bands and First Nation organizations is designed to keep First Nations peoples from organizing at the “**Nation**” level.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Each First Nation community needs to find its way out of the **Indian Act** system into their own constitution, which the membership and leadership both support, probably through a referendum.
- This will be difficult a difficult process probably relying federal and/or provincial dollars.
- Given the legal and political challenges First Nations face in asserting Aboriginal or Treaty Rights, priority should be given to doing the proper research to prove the local Aboriginal and/or Treaty Rights. I know there will be many First Nation individuals who will argue they do not need to prove their rights. I suggest you look at the results of land use conflicts across Canada to see what happens to community members or leaders who assert their rights to lands and resources in the face of Crown opposition without any documented facts.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Many First Nation people have gone to jail asserting their rights to lands and resources without making the proper preparations of collecting evidence regarding their connection to the lands or resources.
- Doing research doesn't mean that First Nation people won't go to jail, but if the facts are collected for all to see, it does strengthen the cause and credibility of a First Nation before the public, the courts, industry and governments.
- Taking political action without preparing for negotiations or court action, from my experience is foolish. First Nations also need to beware of lawyers who come preaching that they will launch court actions against the white governments for violating First Nations sovereignty or committing genocide against First Nations. This type of lawyer should be avoided like the plague that they are.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Although many First Nation community members and leaders may like the sound of these types of arguments, you should have a careful look into how the Canadian courts have dealt with lawyers who have advanced these types of arguments in court before. You will see that the First Nation clients of these ‘**wingnut**’ lawyers, who promote impractical legal strategies often wind up in jail doing time.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Having collected your community's historical and legal facts and acquired good professional advice helps First Nations succeed through the legal and political swamp that Aboriginal and Treaty Rights have become. It doesn't guarantee success but it helps improve the odds.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- If in the end if you still do not believe that the Crown is conducting a legal-political-fiscal “war” on First Nations, look at the recent media reports of the **Canadian Security and Intelligence Service (CSIS)** spying on the “**Native Youth Movement**” and the “**Native 2010 Resistance**”, the inclusion of “**radical Indigenous groups**” in **Canada’s draft counterinsurgency manual**, and the revelations about the **Ontario Provincial Police Commissioner, Julian Fantino**, using wiretaps and threatening the use of deadly force against the **Mohawks of Tyendinaga**, including making it his personal vendetta against **Shawn Brant**.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Even the more conservative among the First Nations should be worried about the security and police agencies of the federal government targeting First Nations people for simply asserting their rights to lands and resources.
- If First Nations political action is met by police and/or military action such as in 1990, the conflict will be viewed nationally and internationally on the facts of the dispute. As such, First Nations need to document their historic and contemporary treatment by the Crown for public use in Canada and internationally.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- To beat Canada's termination-extinguishment policies, fiscal coercion and neo-colonialism, it will take First Nations people on and off-reserve networking and organizing to resist and counter the Crown's termination efforts. My advice is to do it peacefully and base your political actions on the facts, which should be documented, and if possible seek professional advice.

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- Remember, Ottawa has a war machine made up of compromised National Aboriginal Organizations and leaders who can support or denounce your political actions depending on their own interests. There are also the federal politicians that can support you or turn against your cause.
- The federal public service outlasts the politicians and can conduct a long lasting “**ground war**”, meaning:
- **they can inflict punishment locally by withholding funds,**
- **they can foment dissent between community factions, or between leaders and members.**
- **they can put important capital projects from the top of the pile to the bottom of the pile, among other things.**

FIRST NATIONS COMMITMENT, DISCIPLINE & ORGANIZATION

- This is often why local Chief and Councils often denounce their own people for doing political actions that anger the federal and/or provincial governments who are the funding agents for First Nations. Those First Nations who are collaborating with the federal termination agenda are well funded and organized. It is the unfunded, impoverished (and likely rural or isolated) First Nations who are the most disorganized and vulnerable. This situation is not new. It has been an ongoing problem.
- The future for First Nations is within our youth. As the adults, we should be providing guidance on how First Nations got into this situation and what are our options for getting out of it. The first step is learning that the overall federal objective is to eliminate the political and legal status of First Nations, in their ongoing war on First Nations collective rights.

CONCLUSION

- **First Nations demands as alternatives to the Crown agenda could include** – the recognition and affirmation of Aboriginal Title and Rights, making accommodations for historical, economic, cultural differences among First Nations and communities; replace manipulative loans for land claims negotiations with funded court challenges allowing First Nations the opportunity to pursue their claims fairly; support recognition of a ‘distinct’ order of First Nations government and co-management of traditional lands and resources. Honour the spirit & intent of historic Treaties.