

**IMPLEMENTATION OF
INHERENT RIGHT AND
NEGOTIATION OF
SELF-GOVERNMENT**

INHERENT RIGHT POLICY

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RED BOOK COMMITMENTS

- **To build a new partnership with Aboriginal people and strengthen Aboriginal communities by enabling them to govern themselves**
- **To act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right**

ANNOUNCEMENT

- federal policy “Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” approved by Cabinet in June 1995
- federal policy framework announced by Ministers Irwin and McLellan in August 1995

INHERENT RIGHT POLICY FRAMEWORK

- all major stakeholders were consulted and provided input into the inherent right policy framework
- the federal policy framework was also developed in consultation and was approved by all federal departments and central agencies
- the inherent right policy framework represents a government-wide corporate policy framework for the implementation of the inherent right and the negotiation of Aboriginal self-government

FEDERAL MANDATE

- the Minister of Indian Affairs and Northern Development has the mandate to enter into negotiations with First Nations, the Inuit, and Métis groups north of 60°
- the Federal Interlocutor for Métis and Non-Status Indians has the mandate to enter into negotiations with Métis south of 60° and Indian people who reside off a land base
- the Ministers of other federal departments have the mandate to enter into sectoral negotiations in their respective areas of responsibility

FEDERAL APPROACH

- **based on the view that Aboriginal people have the right to govern themselves in relation to matters internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and resources**
- **Aboriginal self-government must operate within the constitutional framework and harmonize with other governments**

FEDERAL APPROACH

- **focuses on developing practical arrangements and recognizes that different circumstances of Aboriginal groups have to be accommodated**
- **ensures that self-government authorities are exercised by Aboriginal governments and institutions accountable to their citizens**
- **will give Aboriginal people tools to make own decisions and run their lives -- fiduciary relationship will evolve as federal control diminishes**

KEY PRINCIPLES OF FEDERAL APPROACH

- **inherent right is an existing Aboriginal right under section 35 of *Constitution Act, 1982* (legal and policy view)**
- **to be exercised within framework of Canadian *Constitution***
- ***Canadian Charter of Rights and Freedoms* will apply, as it does to other governments in Canada**
- **due to fiscal restraint, all federal funding achieved through reallocation of existing resources**

KEY PRINCIPLES OF FEDERAL APPROACH

- **where all parties agree, rights in agreements may be protected in new treaties under section 35, in addition to existing treaties, or as part of comprehensive land claim agreements**
- **federal, provincial, territorial, and Aboriginal laws must work in harmony; laws of overriding federal and provincial importance (e.g. Criminal Code) will prevail**
- **interests of other Canadians to be taken into account as agreements are negotiated**

SCOPE OF NEGOTIATIONS

- **Two categories of subject matter for self-government:**
 1. matters integral to Aboriginal cultures, internal to communities or necessary for governance (in whole or in part)
 2. matters not internal nor integral, but in which the government is prepared to negotiate
- **Some matters where law-making powers would not be the subject of negotiation**
- **What is negotiated will differ according to the specific circumstances of Aboriginal groups**

SCOPE OF NEGOTIATIONS

- **List 1: Matters central to self-government because integral to Aboriginal cultures, internal to communities or necessary for governance (in whole or in part) might include:**

- governing structures, internal constitution, elections
- membership
- marriage
- adoption and child welfare
- Aboriginal languages, cultures and religions
- taxation for local purposes
- education
- health
- management of monies
- hunting, fishing, trapping on Aboriginal lands
- administration and enforcement of Aboriginal laws
- policing
- property rights
- public works
- housing
- local transportation
- licensing and regulation of businesses on Aboriginal land
- land management
- agriculture

- **Where jurisdictions/interests affected, provincial/territorial governments must be party to negotiations and agreements**

SCOPE OF NEGOTIATIONS

- **List 2: Matters that may go beyond matters integral and internal to Aboriginal groups but for which the government would negotiate practical arrangements:**
 - divorce
 - labour/training
 - administration and enforcement of laws of other jurisdictions
 - penitentiaries and parole
 - environmental protection, assessment and pollution prevention
 - fisheries co-management
 - gaming
 - emergency preparedness
 - migratory birds co-management

- **In these areas, Aboriginal governments could have law-making powers, but federal or provincial laws would prevail in the event of conflicts**

MATTERS NOT SUBJECT TO NEGOTIATION

1. Powers Related To Canadian Sovereignty, Defence and External Relations

e.g.: - immigration, international trade

2. Other National Interest Powers

- management and regulation of the national economy
- maintenance of national law and order and substantive criminal law
- protection of health and safety of all Canadians
- federal undertakings:
 - e.g.: - broadcasting and telecommunications
 - national transportation system
 - navigation and shipping
 - postal service

GENERAL GUIDELINES ON HEALTH

SUBJECTS FOR NEGOTIATIONS:

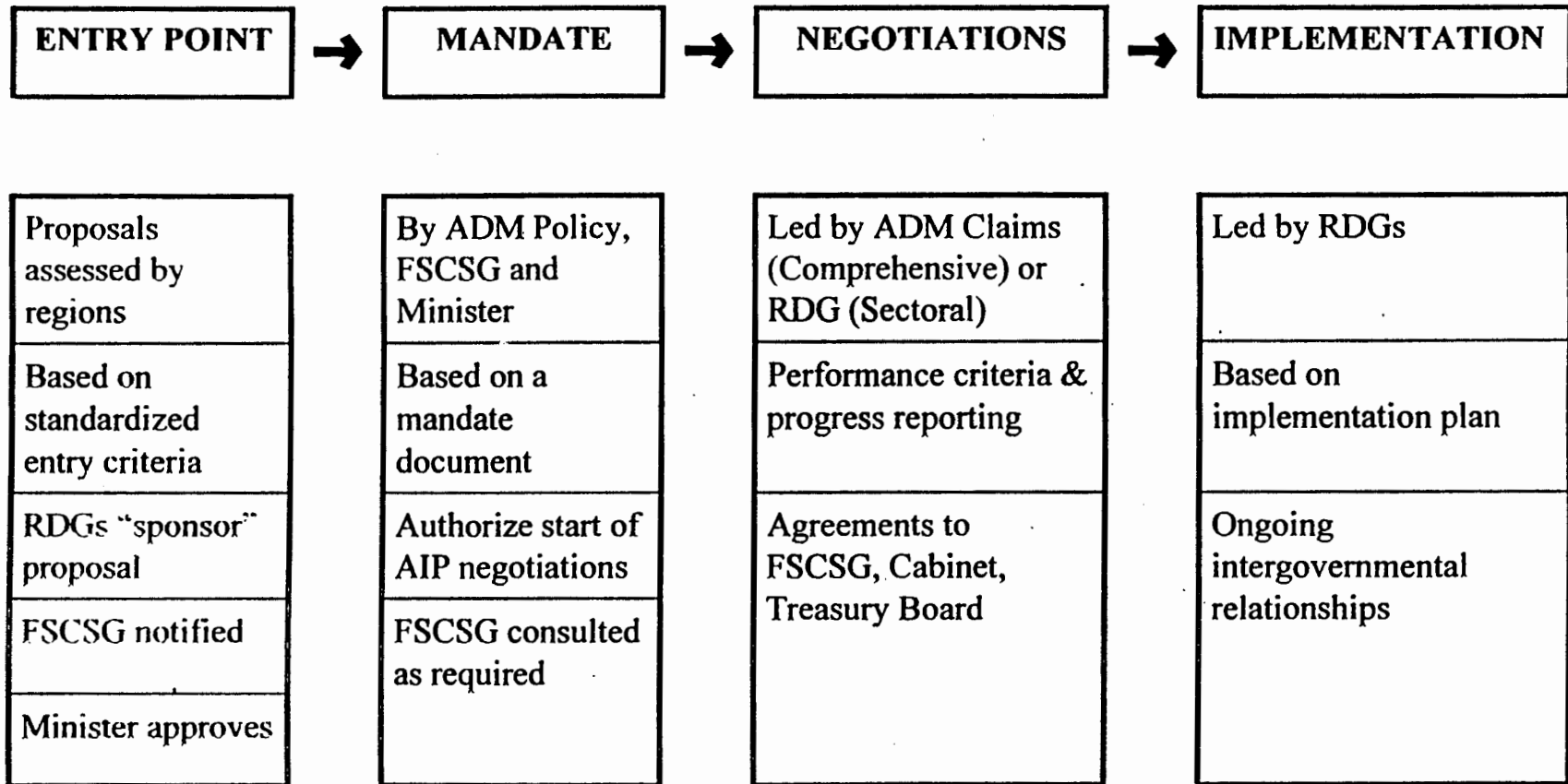
- **regulation of the practice and the practitioners of traditional medicine by Aboriginal governments on Aboriginal lands** (cannot extend to health professionals, such as physicians, who require licensing or certification under provincial or federal laws)
- **transfer of existing federal community health programs and corresponding resources on reserve**
- **administration of federal non-insured health benefits program**
- **cooperative enforcement agreements concerning *Tobacco Products Control Act***

GENERAL GUIDELINES ON HEALTH

- **devolution of some food inspection and surveillance activities under the *Food and Drugs Act***
- **development and enforcement of section of *Drinking Water Safety Act* concerning water quality on Indian lands**
- **potential for future intergovernmental arrangements concerning programs for immunization, communicable disease control and environmental health services**
- **where feasible, some Health Canada programs to off-reserve status Indians, non-status Indians and Métis**

REGULATORY REGIMES DESIGNED TO PROTECT HEALTH AND SAFETY OF ALL CANADIANS ARE NON-NEGOTIABLE

OVERVIEW OF PROCESS



NEGOTIATION PROCESSES

- “one-size-fits-all” model is not feasible
- will take a variety of forms
- tripartite processes are most practical, effective, efficient way (e.g. federal/provincial/Aboriginal)
- double-bilateral processes may be employed if parties agree (e.g. federal/Aboriginal, provincial/Aboriginal)

TYPES OF AGREEMENTS

- comprehensive -- covering a range of subject areas
- claims-related -- in conjunction with comprehensive claim negotiations
(e.g. Nisga'a)
- sectoral -- one jurisdictional area
(e.g. education, training)
- public government -- self-government within larger public government arrangements
(e.g. Nunavut)

MECHANISMS FOR IMPLEMENTATION

- **General mechanisms to implement self-government can include a treaty, legislation, or contract**

- **Self-government rights can be protected under section 35 in negotiated agreements where federal and provincial governments and Aboriginal groups agree:**
 - in new section 35 treaties
 - as part of comprehensive land claim agreements
 - as additions to existing treaties

MECHANISMS FOR IMPLEMENTATION

- **Matters of a technical or temporary nature are not appropriate matters for constitutional protection**
- **Treaties must be ratified formally**
 - Parliament will approve for the federal government
 - Provinces and Aboriginal groups will follow their own ratification processes

FINANCING

- **Financing will be negotiated and is a shared responsibility of governments and Aboriginal peoples**
- **Federal costs will be accommodated within existing expenditures**
- **Aboriginal groups should be able to raise their own revenues where possible**

ACCOUNTABILITY

- **Aboriginal governments must be politically and financially accountable to their people**
 - comparable to requirements for other governments
 - respect principles of transparency, disclosure and redress

- **Aboriginal governments to be accountable to Parliament for funding received from federal government**
 - must be able to assure Parliament that monies are spent on the objective for which they were voted

- **Public accounts must be made available with provision for annual public audits**
 - financial records should comply with generally accepted accounting practices for governments of a similar size

DIAND'S SELF-GOVERNMENT NEGOTIATION SCENARIO

COMPREHENSIVE NEGOTIATIONS:

- DIAND hires federal negotiator and leads all comprehensive self-government negotiations
- federal negotiator receives advice from all affected departments
- DIAND covers its own direct costs plus negotiation support funding for the Aboriginal group(s)
- all affected departments cover their direct costs (travel) to attend meetings

OTHER GOVERNMENT DEPARTMENTS SELF-GOVERNMENT NEGOTIATION SCENARIO

SECTORAL NEGOTIATIONS

- affected departments responsible for hiring their own federal negotiator
- each department covers its own direct costs plus negotiation support funding for the Aboriginal group(s)
- DIAND provides policy support, as required

MACHINERY

Federal Steering Committee On Self-Government (FSCSG)

- **Composition: ADMs, Central Agencies and OGDs, in particular those with Aboriginal programs**
- **Chaired by ADM Policy and Strategic Direction (DIAND)**
- **Responsibilities:**
 - **Approve specific negotiation mandates**
 - **Review AIPs and Final Agreements and federal strategies**
 - **Policy elaboration and advice**
 - **Ensure participation of federal departments**
 - **Performance indicators and monitor progress**
- **Inherent Right Directorate acts as Secretariat**
- **Ad hoc working groups established as required**

CURRENT ACTIVITIES ACROSS CANADA - DIAND

- **Presently involved in self-government negotiations/ jurisdictional negotiations at 81 tables in most provinces and territories**
- **50% of all First Nations involved in negotiation tables**
- **Sizeable activity creates a strain on resources and specific choices must be made to focus on successful initiatives**
- **One approach is to focus on existing processes which may result in effective use of resources**

EXISTING SELF-GOVERNMENT NEGOTIATIONS (TOTAL: 81)

PROVINCE/ TERRITORY	COMPREHENSIVE	SECTORAL	CLAIMS RELATED	PUBLIC GOVERNMENT
NFLD.	-	-	2	-
P.E.I.	-	-	-	-
N.S.	-	1	-	-
N.B.	-	-	-	-
QUE.	-	2	4	1*
ONT.	1	3	-	-
MAN.	1	1	-	-
SASK.	2	-	-	-
ALTA.	-	-	-	-
B.C.	2	-	48	-
YUKON	-	-	10	-
N.W.T.	-	-	-	3*
TOTAL	6	7	64	4

* some also claims related

January 1997

STAGES OF SELF-GOVERNMENT NEGOTIATIONS (81) January 1997

Province/Territory	Towards Framework Agreement	Towards Agreement-in-Principle	Towards Final Agreement
Newfoundland	-	2	-
Prince Edward Is.	-	-	-
Nova Scotia	-	-	1
New Brunswick	-	-	-
Quebec	3	4	-
Ontario	-	4	-
Manitoba	-	2	-
Saskatchewan	1	1	-
Alberta	-	-	-
British Columbia	28	20	2
Yukon	-	2	8
N.W.T.	-	3	-
TOTAL	32	38	11

DEVOLUTION VERSUS THE TRANSFER OF JURISDICTION

- the devolution of programs to local control and Community-Based Self-Government negotiations represented the delegation of authority only
- in 1993 the Liberal Government decided to act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right under section 35 of the *Constitution Act, 1982*

Under the Inherent Right Policy Framework:

- “**Authority**” means any authority, other than a law-making authority, such as the authority to deliver or administer programs or services, or to enforce the laws of other governments.”
- “**Jurisdiction**” means law-making authority.

DEVOLUTION VERSUS THE TRANSFER OF JURISDICTION

(continued)

- the “**scope**” of Aboriginal jurisdiction or authority likely extends to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution
- “**health**” which is both “internal” and “integral” has been identified as one of the subject matters for negotiation
- some Aboriginal groups may pursue limited delegated authority under the inherent right policy framework
- other Aboriginal groups are fully intent on negotiating the fullest possible transfer of jurisdiction available under the inherent right policy framework