

RESULTS-BASED APPROACH TO NEGOTIATION OF S.35 RIGHTS TABLE ENGAGEMENT PROCESS

CONTEXT

On September 4, 2012, Minister Duncan announced a results-based approach to the negotiation of section 35 rights. The goal of this new approach is to better align Canada's investments in negotiations with results by focusing resources on the most productive tables, promoting the use of alternative measures, where appropriate, and streamlining federal mandating processes.

As a first step, Minister Duncan announced that Canada will be conducting a formal engagement process with Aboriginal and provincial/territorial partners from September to November 2012. Discussions will take place at the national level with Aboriginal organizations, such as the Assembly of First Nations, at the regional level with provincial/territorial partners and provincial aggregate organizations and at individual negotiation tables across Canada. The objective of the table engagement is to help ascertain whether there is common ground among the parties to move towards the conclusion of a Final Agreement. More specifically, through this engagement process, Canada hopes to obtain a better sense of the parties' interests and of any impediments that could prevent the conclusion of a Final Agreement. Canada is cognizant, however, that the level of discussions that will occur at each table will vary, depending on the unique circumstances of each table, including the stage of negotiations.

To help launch discussions among the parties at individual negotiation tables, Canada has prepared this paper which outlines some of its key interests in the negotiation of section 35 rights.¹ Canada invites the other parties to also raise their interests as part of this discussion, and to provide their views on any issue they may see as an impediment to the negotiations, including any tool or approach they would propose to help address such impediments.

¹ Please note that, although this paper does not include the issue of taxation, this is an important issue for Canada in the negotiation of section 35 rights. Given the complexity of this topic, and the stage of negotiation this particular table is at, Canada proposes to postpone the discussion on taxation until a later time.

KEY FEDERAL INTERESTS

A. CERTAINTY

Final Agreements must provide finality and certainty with respect to an Aboriginal group's claimed Aboriginal and treaty rights (including title), as well as clarity with respect to Aboriginal, federal and provincial/territorial jurisdictions and responsibilities. An agreement can be considered to have achieved certainty when it provides a legally effective full and final settlement of past obligations and a clear and predictable legal framework for the future exercise of s. 35 rights and fulfillment of related roles and responsibilities, while minimizing the risks of unintended judicial interpretations.

Questions:

1. What are initial thoughts around certainty?
2. Do you agree that a Final Agreement requires provisions on certainty?
3. Are you supportive of the federal approach to certainty? If not, do you have an alternative approach to propose?

B. LAND / TITLE

It is expected that existing reserves will form part of the land component of the Final Agreement. For the most part, Crown lands discussed in negotiations will be those under provincial jurisdiction. Typically, of the total settlement package, the province will provide the bulk of the land and Canada will provide the bulk of the cash.

The Final Agreement must clearly identify the lands that will be owned by the Aboriginal group as well as its rights and responsibilities over these lands. The Final Agreement will provide that the Aboriginal group will hold their lands in fee simple (i.e. will not be reserve lands). Third party interests on Aboriginal lands will need to be addressed.

Questions:

1. Are you supportive of Final Agreements addressing outstanding claims to title/lands?
2. Are you supportive of Aboriginal lands being held in fee simple?
3. Does the province expect to be in a position to transfer lands to the Aboriginal group under the final agreement? If not, what might the province be able to offer in lieu of lands?
4. What are your thoughts on third party interests that may remain on your lands?
5. Do you expect that you will have overlapping claims to lands with other Aboriginal groups? If so, what is the likelihood of resolving those claims and within what timeframe?
6. Has the Aboriginal group given consideration to land selection and quantum?
7. Do you agree that federal/provincial laws respecting land management must be reconciled with Aboriginal self-government powers over lands in the Final Agreement?

C. SELF-GOVERNMENT

The Final Agreement must contain the following elements:

- provisions that outline the key requirements for the Aboriginal group's internal constitution, including provisions that Aboriginal constitutions will provide for transparent and democratically accountable governments and that constitutions will be ratified by the Aboriginal group prior to federal ratification of the Final Agreement;
- provisions ensuring that the Final Agreement will operate within the framework of the Canadian Constitution, including the application of the *Charter of Rights and Freedoms*;
- provisions for the application of federal and provincial/territorial laws, including provisions to resolve conflict of laws (i.e., rules of priority determining which law is paramount in case of conflict);
- provisions setting out detailed descriptions of the Aboriginal government's law-making powers.

Canada will not negotiate Aboriginal law making over national interest powers and powers over national sovereignty, defense or external relations. Aboriginal law making in some subject areas will be subject to federal or provincial/territorial laws in the event of a conflict.

Questions:

1. Canada is unable to negotiate matters related to Canadian sovereignty, defense, external relations, and other matters of national interest. Are you supportive of Canada's position on matters it is not able to negotiate?
2. Aboriginal jurisdictions and authorities will operate within the framework of the Canadian Constitution which means working in harmony with jurisdictions that are exercised by other governments and ensuring that the Final Agreement includes provisions to ensure the harmonious relationship of laws. Are you supportive of this principle?
3. Final Agreements will need to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities. Are you supportive of this federal interest?

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4. Final Agreements must address the rights and interests of non-members residing on Aboriginal lands, clearly indicating if Aboriginal jurisdiction or authority will be exercised over non-members. Agreements must set out mechanisms for the input of non-members in decisions that may affect their rights. Are you supportive of this proposition?

D. FUNDING OF SELF-GOVERNMENT

Questions:

1. Canada's funding of self-government arrangements includes a funding base established by existing *Indian Act* program funding levels, some implementation funding, as well as incremental funding related to new governance-related responsibilities, with an offset based on the capacity of the Aboriginal group to generate own source revenues. Do you support this approach?
2. Canada's funding of self-government arrangements will be offset by a portion of the capacity of the Aboriginal group to generate its own source revenues. This offset will be phased in over time leading to a gradual reduction of reliance on federal funding and greater self-sufficiency. Do you support this approach?
3. The financing of self-government is a shared responsibility among federal, provincial and territorial governments, and Aboriginal governments and institutions. Do you agree with this principle?
4. Canada has announced that it is developing a new harmonized approach to fiscal arrangements, moving from the current approach of separate, case-by-case negotiations with each Aboriginal government to a national framework based on a formula to determine funding and an ongoing advisory forum to discuss policy matters. Are you aware of this?

E. RATIFICATION

Canada requires clear and adequate evidence that members of the Aboriginal group have approved the Final Agreement that has been negotiated. Ratification processes can be negotiated, but Canada must be satisfied that all members have an opportunity to participate, that all relevant information is available to eligible voters, and that ratification procedures are transparent, fair, democratic and recognized as binding.

Question:

1. Have the First Nations undertaken activities around community engagement and awareness of matters under the negotiation process?

F. OTHER MATTERS

Questions:

1. In order for Final Agreements to be constitutionally protected there must be provisions for full and final certainty around all s. 35 rights, including rights stemming from historical treaties. Do you agree with this principle?
2. The Aboriginal legal entity and its capacities, powers and privileges as a natural person under the law must be addressed in the Final Agreement. Do you agree with this principle?
3. Final Agreements must address the liability, immunity and indemnification of the Aboriginal government and its employees or subordinate bodies. Do you agree with this principle?
4. Final Agreements must provide for clarity regarding the transition from existing legal arrangements (e.g., operations under the *Indian Act*), to the new legal framework to ensure the transition does not create legal uncertainty. Do you agree with this principle?
5. Final Agreements may include provisions for a dispute resolution framework. Are you supportive of dispute resolution mechanisms?
6. A separate implementation plan must be developed by the parties to the agreement and must be presented for approval along with the Final Agreement. Implementation plans must identify the activities, timeframes and agreed-upon resources associated with the fulfillment of activities. Although the implementation plan is not constitutionally protected, it is an important element of the treaty relationship. Are you supportive of negotiation such implementation plans?
7. Understanding that certain fisheries rights have been affirmed by the courts, would there be any consideration of fisheries matters being addressed outside of a Final Agreement while remaining matters are negotiated?