

DEMOCRACY

Irreconcilable differences

First Nations and the Harper government's energy superpower agenda

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TO MANY CANADIANS, the prime minister's apology for residential schools in June 2008 appeared as true statesmanship. Most political observers regard the day as a high point for Stephen Harper's public image. Reconciliation between the Crown and First Nations even seemed a possibility. But in the end, as the policy record shows, it was only words. The government has forsaken the more difficult road to reconciliation, partially laid out by previous Progressive Conservative and Liberal governments, for the well-trodden path of assimilation. Ironically, the prime minister's insincerity on the day of the apology may prove the greatest obstacle to the achievement of one of his government's highest ambitions: getting natural resources out of the ground and to markets.

First Nations have the means, the motive and the opportunity to significantly impede about \$650 billion worth of new investment in natural resource development over the next decade. Harper's tactics on this file, and others described below, are generating more resistance than co-operation. Bolstered by the rise of the Idle No More movement and an impressive winning streak in court, Indigenous resolve against the Harper government agenda is deepening. Ideological differences underlie the discord, while the prime minister's inability to change course prevents progress. As a result, many of the government's economic promises re-

lated to oil and gas expansion in particular may never occur. As long as true reconciliation is not an option, First Nations will almost certainly use their new political and legal clout as a lever for change.

The policy of assimilation

The belief that the interests of Canada and of Indigenous peoples are best served by the assimilation of the latter into the “mainstream” socioeconomic culture is as old as the country itself. Residential schools are the best-known tool of assimilation, aimed at “killing the Indian in the child,” so that future generations would come to behave like the colonialists, but they are not the only one.¹ The *Indian Act* itself perpetuates federal government control over the lives of First Nations citizens and the actions of First Nations governments. This control is justified through frequent government insinuations about corruption and incompetence designed to undermine the legitimacy of First Nations governments.

The simplest and most direct tool used to implement assimilation policy has always been the impoverishment of First Nation communities. Denying funding for education, housing, health care, economic development, accountability and self-government diminishes the capacity of First Nations governments to care for their citizens on reserve. The consequent hardship encourages people to leave. As with the residential schools experience, First Nations citizens are more likely to assimilate when forced to live outside their own communities. Ironically, this is the opposite of the 19th century policy of deliberately starving First Nations people in order to get them to accept living on reserve in the first place.²

Assimilation was the plainly stated objective of the 1969 Trudeau-Chrétien White Paper, which outlined a plan for removing all rights specific to Indigenous peoples, erasing the relevance of history and law to that point.³ The frankness of its intentions led to a surge in Indigenous activism, which included the creation of the forerunner of the Assembly of First Nations (AFN) and the use of litigation to advocate and enforce the rights Trudeau wanted to take away. Where diplomacy and the law failed, direct action sometimes took their place. The government was forced to back down.

Over the next four decades, federal governments became less overtly hostile and the acknowledgement of Indigenous rights grew. This shift in attitude, if not direction, was driven by political, practical and legal pressure from First Nations, marked by events such as the inclusion of Sections 25 and 35 in the *Constitution of Canada, 1982*,⁴ the Royal Commission on Aboriginal Peoples (RCAP) in 1996⁵ and the Kelowna Accord in late 2005.⁶

The minority years

And then Canadians elected a Conservative government led by a prime minister who would later say, “We also have no history of colonialism,”⁷ and tell a U.K. business meeting, “I know it’s unfashionable to refer to colonialism in anything other than negative terms.... But in the Canadian context the actions of the British Empire were largely benign and occasionally brilliant.”⁸ This is a prime minister mentored by Tom Flanagan, the man who wrote, “Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen.”⁹ These are views from which Stephen Harper has refused to distance himself.¹⁰

During the campaign that elected the first Harper government, the Conservatives made clear they would seek to maintain First Nations in poverty by breaking yet another promise of the Crown to Indigenous peoples. That promise, made by the previous prime minister and all thirteen provincial and territorial leaders, was known as the Kelowna Accord.¹¹ Less than two weeks before election day, future cabinet minister Monte Solberg described the accord as having been “crafted at the last minute on the back of a napkin.”¹² In fact, eighteen months of consultation and negotiation had gone into the agreement. Plans made during that time, notably the Accountability for Results initiative,¹³ were unceremoniously dropped.

The new Conservative government insisted no agreement had been reached in Kelowna, despite the unanimous views of the participants at the meeting. It also said that investment in First Nations communities would only be of use if accompanied by “systemic reforms” that the Harper government would dictate — not those developed during the consultation process that preceded the Kelowna Accord.¹⁴

One of the new government’s first pieces of legislation, *The Federal Accountability Act*, included a section that would give the auditor general of Canada responsibility for auditing First Nation government finances.¹⁵ First Nations did not object to the idea of such a position (having proposed a First Nations Auditor General as part of the Accountability for Results initiative under the Kelowna Accord), but that an officer of Parliament would exercise this authority. First Nation governments are not simply administrative agents of the federal government; therefore, a First Nation authority should carry out audits.¹⁶ The Harper government argued the point strenuously in committee hearings, but with the help of the three opposition parties the disputed clause was deleted from the final bill.

This would be the first of many attempts over the next eight years to paint First Nations governments as illegitimate. In each case, the Harper government deployed the same tactics, which can be broken down as follows:

- Suggest that First Nations governments are corrupt or incompetent. In the case of the *Accountability Act*, opposition to being audited is presented as evidence.
- Poison the waters with unacceptable conditions, such as undermining the right of self-determination by trying to subordinate First Nation governments to the level of administrators for the Minister of Indian Affairs (now Aboriginal Affairs).
- When First Nations object to the second issue, spin it as more evidence of incompetence to support the claim that the lack of co-operation from First Nations governments justifies maintaining reserves in abject poverty (because additional money would be wasted).

Other even more contentious bills died on the order paper, in part due to elections and prorogations and in part because the minority status of the government prevented it from sticking to its own timelines. But some legislation pertaining to First Nations did pass during the government's first five years, the following examples being the most notable:

- The *Specific Claims Tribunal Act* (2008) passed with the support of the AFN, reflecting that both Indian Affairs Minister Jim Prentice and AFN National Chief Phil Fontaine were former Indian claims commissioners and shared some perspectives on the issue. The AFN was even given a role in helping to draft the bill, a practice that has not been repeated.
- Also in 2008, decisions under the *Indian Act* were made subject to the *Canadian Human Rights Act*. Like with the *Accountability Act*, the bill was objectionable to some First Nations because it made decisions by their governments subject to an outside body's review. In typical form, the Harper government suggested those objections were driven by the desire of corrupt chiefs to abuse human rights. After significant amendments were brought by opposition parties to improve the bill, and in recognition of the opportunity to finally challenge federal government decisions on human rights grounds, most First Nations withdrew their objections to the legislation.
- Amendments to the *Indian Act* were passed in 2010 to address gender discrimination in the granting of Indian status. This legislation was mandated by a B.C. Court of Appeal decision in *McIvor v. Canada*. The result, however, has been criticised, including by the plaintiff, for addressing only part of the gender discrimination problem and leaving in place provisions that diminish the number of people born to First Nations parents who are eligible for status.¹⁷

The minority years were also marked by three critical events: the vote on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the 2009 federal budget negotiations, and the residential schools apology.

United Nations Declaration on the Rights of Indigenous Peoples

On September 13, 2007, the General Assembly of the United Nations passed UNDRIP by a vote of 144 in favour to four against. As article 43 of UNDRIP states, the rights recognized therein “constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.”¹⁸

The declaration was 20 years in the making, with the intimate involvement in Canada of previous Progressive Conservative and Liberal governments as well as First Nations. The Harper government, however, cast one of the four votes against UNDRIP.

Canada’s internationally embarrassing stand against the survival of Indigenous peoples received approbation at home, with mainstream news outlets parroting the government’s claims that UNDRIP was “incompatible with Canada’s constitutional framework,”¹⁹ that the requirement for free, prior and informed consent concerning decisions affecting Indigenous rights would be unworkable, and that clauses pertaining to Indigenous land title and compensation for lands taken illegally would cause economic chaos.²⁰

Opposition parties saw no merit in the government’s arguments. A New Democratic Party motion acceding to UNDRIP, which was supported by the Liberals and Bloc Québécois, passed in the House of Commons in April 2008, with the Conservatives continuing their objections.²¹

But by 2010, when elections and policy changes in the United States, Australia and New Zealand — the other three UNDRIP holdouts — made it clear that Canada would be standing alone against the declaration, the Harper government capitulated. The notion that accession to UNDRIP was incompatible with Canada’s constitution was revealed as the fiction it had always been.²² However, the impression that the Harper government does not support the survival, dignity and well being of Indigenous peoples lingers.

Budget 2009

The power of the opposition in the minority government was never clearer than during the run up to the budget bill of 2009. Fresh off the prorogation crisis that nearly

brought the Harper minority down in late 2008, the government was forced to address the global economic crisis and Canada's ailing infrastructure in its next budget.

Part of the negotiations included the only meeting Stephen Harper has held with the 13 provincial and territorial leaders as well as the leadership of the four largest national Aboriginal organizations: the AFN, the Métis National Council, the Inuit Tapariit Kanatami, and the Congress of Aboriginal Peoples. That meeting, in January 2009, led to the single largest investment ever made for First Nations housing and infrastructure, worth \$915 million.²³

Prime Minister Harper, who had rejected a similar investment in housing, water and infrastructure under the Kelowna Accord, was forced by political circumstance to abandon his objections. His government's insistence that the money identified in the Kelowna Accord to improve life on reserves would be wasted unless accompanied by undefined "systemic reform" disappeared. Political expediency trumped ideology.

The apology

Like UNDRIP and the Kelowna Accord, the out-of-court settlement with the survivors of residential schools was unfinished business inherited from the previous government. Although a formal apology was not specified in the legal documents, former AFN national chief Phil Fontaine, as the named plaintiff in the court case, had made it a priority in discussions with the Martin government, from which a firm commitment had been received.

Fontaine also pressed the reluctant Harper government to honour that pledge. The entirety of factors that went into the decision to provide the apology cannot be fully known, but Harper himself, in informal remarks immediately prior to the apology, credited former NDP leader Jack Layton with helping him to see that it would be the right thing to do.

June 11, 2008 was a solemn, uniquely powerful day. It was a profound moment in the history of Indigenous relations in this country. When Stephen Harper said, "Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country," it was an important step toward reconciliation, or so it seemed.²⁴

In light of the actions of the government before and since, especially the legal battles the Truth and Reconciliation Commission faced in pursuing its mandate, one must wonder whether the prime minister did not understand the words he spoke.²⁵ Perhaps, having been cajoled into giving the apology, he was uncommitted to its implications or had not considered their full implications.

Whatever the case, the clear impression over Harper's nine years in office is that he remains firmly committed to the policy of assimilation and the apology was, at best, insincere.²⁶

The majority years

The majority won in the May 2, 2011 election unleashed the Harper government from parliamentary restraint. It would now be able to craft legislation, refuse amendments to it and gain passage within timelines that the government controls.

What the majority of seats in the House of Commons did not guarantee were compliant courts or public complacency. On Indigenous issues, the contrast between parliamentary power and growing vulnerability outside the House of Commons is the story of Harper's majority years.

The zombies

With its majority government, the Conservatives were able to reintroduce and pass four bills they had been unable to get through previous Parliaments: *The First Nations Accountability Act*, *The Matrimonial Real Property Act* (MRP), *The Safe Drinking Water for First Nations Act* and the *First Nations Elections Act*.²⁷ Each of these had died on the order paper at least once during the minority years, but experienced a zombie-like resurrection over objections from First Nations and opposition parties.

During hearings, First Nations argued that each of these bills undermines constitutionally enshrined Aboriginal and treaty rights. In fact, it is likely that none would survive a court challenge based on the Crown's duties to consult and accommodate First Nations rights and interests. Provisions to incorporate provincial regulations for application on reserve (water and MRP) and increase ministerial control over band operations (elections) brought more specific objections as they undermine the right to self-government.

The accountability bill, which resumed the battle lost by the government with C-2, was clearly designed to embarrass First Nations leadership and fuel allegations of corruption. The Conservative government is even considering a bill to allow for the private sale of reserve lands — an idea suggested by none other than Tom Flanagan — which would undoubtedly inspire even greater anger among First Nations.

More broadly, each of these bills was a sign that the Harper government would continue to dictate from Ottawa how First Nations should operate, displaying the same paternalistic, colonialist disregard for the autonomy of First Nations that had

been the hallmark of the Crown's approach since Confederation and lay behind the residential schools policy.

It was the reintroduction of this suite of legislation, compounded by two omnibus budget implementation bills (C-38 and C-45), which gave rise to the Idle No More movement in late 2012.

Idle No More

As seen by the movement's founders, the unimpeded and unilateral imposition of the Harper government's agenda on First Nations, along with its familiar paternalistic tone, was certainly part of the problem. But the rolling back of protections for water and land contained in the budget implementation bills was the final straw. Amendments to the *Canadian Environmental Assessment Act*, the removal of protections for all but a few navigable waters, changes to the definition of the Aboriginal fishery, and amendments to how land might be surrendered under the *Indian Act* were among the many objectionable provisions hidden away in these two mammoth bills.

In the words of the Idle No More founders:

What began as a series of teach-ins throughout Saskatchewan to protest impending parliamentary bills that will erode Indigenous sovereignty and environmental protections has now changed the social and political landscape of Canada... The impetus for the recent Idle No More events lies in a centuries old resistance as Indigenous nations and their lands suffered the impacts of exploration, invasion and colonization. Idle No More seeks to assert Indigenous inherent rights to sovereignty and reinstitute traditional laws and Nation to Nation Treaties by protecting the lands and waters from corporate destruction. Each day that Indigenous rights are not honored or fulfilled, inequality between Indigenous peoples and the settler society grows.²⁸

It is clear that the federal government was unprepared for a grassroots, broadly based and entirely peaceful uprising. The fact that this did not look like other protests, using round dances and educational seminars rather than blockades, prevented the usual demonization of Indigenous protest in the media and among the general public.

In addition, social media allowed the message to spread in a new and powerful way. Idle No More was able to grow unimpeded among Indigenous people and to win over non-Indigenous supporters, particularly within the environmental movement and others opposed to the Conservative agenda.

The subsequent hunger strike of Chief Theresa Spence, to bring attention to a housing crisis in her Attawapiskat community, became linked to the movement and

garnered international attention for both causes, with sympathy protests in dozens of countries around the world. The Harper government used Spence's strike as another opportunity to smear of First Nations leadership as corrupt.

The early release of an audit and mainstream media manipulation of its findings²⁹ sullied Chief Spence's personal reputation and undermined public support for both her community's housing battle and for the broader Idle No More movement. But the frustration of First Nations and their non-Indigenous allies was not to be quelled.

The tale of two summits

The Crown–First Nations Gathering held on January 24, 2012 was supposed to address the deteriorating relationship between First Nations and the government of Canada. The attendance of the prime minister, AFN National Chief Shawn Atleo and other leaders from both sides created an impression of great significance. The five “immediate steps for action” listed in the meeting's outcome statement included working on the relationship itself, removing barriers to First Nations governance, advancing land claims resolution and treaty implementation, and furthering education reform and economic development.³⁰

At the time, some Indigenous observers criticized the gathering as largely symbolic. With little progress on the gathering's outcomes a year later, many concluded the critics were right. The failure to achieve tangible progress greatly weakened National Chief Atleo's credibility among First Nations citizens and leadership alike. Ironically, the only one of the five immediate steps for action to produce any result – education reform – would prove to be his undoing.

First Nations control of First Nations education

Bill C-33, *The First Nations Control of First Nations Education Act*, introduced in April 2014, might have gained First Nations support under different circumstances. On a substantive level, it went further than any of the Harper government's other legislation, with the possible exception of the *Specific Claims Act*, to address the concerns of First Nations. And it came with a commitment to provide funding to address those concerns.

Although some argue the \$1.9 billion promised is insufficient to create full equity between First Nations and provincial schools, it does represent an admission of the funding inequity the government had to that point denied. The bill also fails to resolve the issue of reciprocal accountability that chiefs had made a condition of approval, and that had been the foundation of the Accountability for Results initia-

tive under the Kelowna Accord.³¹ Nonetheless, the progress it represents over the current situation might have won support had it not been for the poisoned atmosphere in which the legislation was launched.

Eight years of hostility from the Harper government and the consequent loss of patience among First Nations had made it unlikely that any government proposal would find much support. But when a hastily called press conference to announce the legislation and funding included claims of a “deal” with First Nations, the national chief was accused of betraying his obligation to obtain the consensus of constituent First Nations before promising their agreement.³²

On top of this, the sensitivity with regard to the education issue due to the harsh legacy of residential schools meant the negative reaction would be swift and angry. National Chief Atleo, who regarded the bill as his best and only opportunity to address the priority issue of his administration, clearly misread this context. As a result, he yielded to calls for his resignation, saying he did not want to be a personal obstacle to the legislation’s chances.

Although Bill C-33 has passed second reading, the majority of First Nations have rejected it. Because the government will not provide the promised funding without support for its legislation, it also means the inequality between the funding available for the education of First Nations children compared to children in provincial schools will continue.³³

The battle over resources

If the battle over assimilation revolves around investment in First Nation communities and control over governance, its flipside is found in the battle over resources. As First Nations gain control over resource governance, the uncertain business climate discourages investment.

Meanwhile, despite the economic value of the projects at stake, the decisions of the courts, the advice of supporters and the vows of First Nations, Prime Minister Harper is inclined to dictate rather than negotiate. That personal inflexibility and commitment to ignore the rights of First Nations makes the stakes high and the room to manoeuvre slim.

Canada’s economic future

In its 2014 Budget Plan, the federal government estimated there would be \$650 billion in new investment in resource development projects over the next 10 years.³⁴ This number represents all resource sectors (oil and gas, forestry, mining), but re-

fers only to potential investment rather than revenues, which can be measured by the contribution of projects to gross domestic product (GDP).

The mining and mineral manufacturing sector represented 3.4% of Canada's GDP in 2012–13,³⁵ while the oil and gas sector was responsible for just over 6% of GDP that year.³⁶ Suffice it to say, natural resource development projects are an important part of Canada's economy.

Prime Minister Harper wants to see their importance increase even further. Not long after coming to office in 2006, he trumpeted his intention to make Canada an “energy superpower,”³⁷ comparing the development of Alberta's oil sands to “the building of the pyramids or China's Great Wall. Only bigger.”³⁸

Former finance minister Jim Flaherty understated this goal in his 2014 budget speech when he said “[m]aking sure that Canadian energy remains available to markets around the world is a priority for this government.”³⁹ It would be more accurate to say no issue is a higher priority. From Canada's withdrawal from the Kyoto Protocol to reducing regulatory barriers to spending millions on advertising and lobbying foreign governments to demonizing pipeline opponents as “radicals”⁴⁰ trying “to undermine Canada's national economic interest,”⁴¹ there has been intense focus on this issue from the outset.

And it is this fixation on resource development that drives much of the Harper government's conflict with First Nations. As noted, the changes to environmental protection legislation and resource project assessment processes in the budget implementation bills in 2012 were the final trigger for Idle No More protests.

Given that First Nations have the ability to delay, disrupt or, in fact, stop resource development projects, the question is why more effort has not been put into building constructive dialogue rather than adversarial positioning. It's a question only Stephen Harper can answer.

Winning in court

Over the past 30 years, the Supreme Court of Canada has insisted repeatedly that the Crown has a duty to reconcile its sovereignty with the rights of First Nations.⁴² But the avalanche of First Nations litigation, and the overwhelming record of wins for First Nation litigants on these issues, makes it clear that the Crown is not listening.

Bill Gallagher's 2011 book, *Resource Rulers*, describes the effect of what he estimated to be well over 150 wins for Indigenous litigants in court, concluding that “until we have true resource power-sharing with natives, the fate of Canada's resource sector will be in the hands of native strategists in their new capacity as Resource Rulers.”⁴³

The 2014 decision in *Tsilhqot'in Nation v. British Columbia*⁴⁴ makes it even more explicit that First Nations can prove that they have title to land, that they must be

compensated where that title was seized improperly by the Crown,⁴⁵ that where title is proven the Crown must obtain the First Nation's consent before making decisions that affect their land,⁴⁶ and that the First Nation holding title has "the exclusive right to decide how the land is used and the right to benefit from those uses."⁴⁷ The ruling has applicability wherever title has not been ceded, which covers most of British Columbia, Atlantic Canada and several areas of the country between the coasts, such as the Algonquin territory in Ontario where Parliament resides.

Even where full title is not demonstrated, the Supreme Court has made it clear that there is a duty on the Crown to consult with the First Nations whose rights may be affected by its decision and, possibly, to accommodate their interests, depending on the strength of the First Nation's claim.⁴⁸

First Nations have also shown that, in addition to litigation, they are ready, willing, and able to use political pressure, market pressure and all manner of protest to protect the land.

In the 1990s, the James Bay Cree successfully used all of these tools to block the Great Whale Hydro Electric project until the Quebec government offered a better deal.⁴⁹ In 2013, protests by the Mi'kmaq of Elsipogtog delayed a fracking project in New Brunswick and made fracking a key issue in the provincial election there.⁵⁰

Cliffs Resources cancelled its Ring of Fire project in Ontario due to the general atmosphere of uncertainty created by unresolved Indigenous interests.⁵¹ And lobbying by Indigenous people on both sides of the border has contributed to President Obama's delay in approving the Keystone XL pipeline.⁵²

Whether through the courts, through lobbying Canada's resource clients, or through direct action, First Nations have the capacity and the will to stop the government's energy superpower plans. In this context, it is incredible Stephen Harper continues to generate more anger and resentment, making co-operation and reconciliation impossible.

The consensus

It is unusual to see the level of consensus that currently exists among activists, academics, developers and politicians concerning where the risk lies and what needs to be done to address it. With few exceptions, there is overwhelming support for the prescription that First Nations must be brought onside to diminish uncertainty and the risk of project delay, disruption or termination.

Jim Prentice, Harper's former minister of Indian affairs, even warned that pipeline projects were threatened by the failure to consult and accommodate First Nations rights and interests.

“[T]he constitutional obligation to consult with [F]irst [N]ations is not a corporate obligation. It is the federal government’s responsibility,” he told the Business Council of B.C. in a June 2012 speech. “Finally, these issues cannot be resolved by regulatory fiat — they require negotiation. The real risk is not regulatory rejection but regulatory approval, undermined by subsequent legal challenges and the absence of ‘social licence’ to operate.”⁵³

Think-tanks friendly to business and the Conservatives have echoed Prentice’s apprehension. As one of many examples, the Macdonald-Laurier Institute launched a three-year project to recommend ways to bring First Nations onside.⁵⁴ The work to date indicates deep concern over the risks that Indigenous opposition presents to natural resource development and the economic value of persuasion and negotiation over increasing confrontation, a view echoed by most other studies on the matter.

Those studies include the report by Doug Eyford, commissioned by the prime minister to provide advice on facilitating Indigenous co-operation in resource development. Eyford outlined “three themes that help focus action: building trust, fostering inclusion, and advancing reconciliation.”⁵⁵ The fact that Harper has pursued none of these should only heighten concerns about the effect his policies are having on an economically critical industry.

Indigenous people have made their voices clear, whether through the leadership or grassroots movements like Idle No More. They will be heard, they will exercise their rights, and they are willing to put themselves at risk to do so. The message could not be any clearer.

Conclusion: Irreconcilable differences

Because of objections from First Nations, the Enbridge Northern Gateway Pipeline project has been delayed,⁵⁶ while many now believe that it, like the Mackenzie Valley Pipeline, may never be completed. Hundreds of projects across the country — in mining, forestry, oil and gas — face similarly uncertain futures, rattling investor confidence in the ability of industry and governments to deliver on promised developments.

The courts and commentators are in agreement: there must be a significant shift in the federal government’s approach if First Nations interests are to be accommodated. Without that shift, billions of dollars in new investment and billions more in production may be lost. More broadly, Indigenous peoples will continue to be marginalized economically, socially and politically. The litany of negative outcomes in education, employment, health and well-being, which beset so many com-

munities, will continue — the product of poverty and exclusion, of colonialism and the policy of assimilation. Canada will suffer the consequences of being a country divided, having failed to come to terms with its history, its laws and its citizens.

Endnotes

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