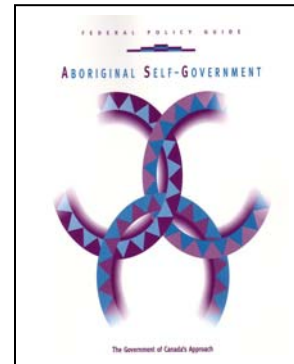


If the Federal Policies Are A Violation of Law, Why Are We Negotiating Under Them?

By: Lynn Gehl



Olthuis and Townshend (RCAP 1996) provide a legal analysis of the federal government's land claim policies that many First Nation peoples will find interesting and that can be generalized to the Inherent Right Policy. Olthuis and Townshend argue that the land claim policies "can be challenged as a violation of the common law rules of natural justice, as a violation of the constitutional obligations as well as a breach of the Crown's fiduciary obligations towards Aboriginal peoples and their lands" (68). I provide a summary of their analysis here.

Natural justice is defined by two principles: First, "no person shall be adversely affected without a hearing"; and second, "any decision affecting a person must be made by a tribunal which is impartial and not biased" (70). Not only has the federal government unilaterally drafted these policies, it is the federal government who judges whether a statement of land claim will proceed, against itself no less, versus through a hearing that is impartial. Further, consequent to the reality that it is the federal government who has drafted and finalized these policies, they are biased in the Crown's favour. Thus, clearly the federal government has violated the principles of natural justice.

In moving along, equity law is "a form of justice that is administered according to fairness as contrasted with the strict rules of common law" (76). In short, equity law "seeks to restore the wronged party to the situation that would have existed if the breach of the constitutional responsibility and/or fiduciary duty had not occurred" (77).

In addition, it is said that, "fiduciary responsibilities have their origins in equity law and arise in the context of a trust" where "a fiduciary is a person who stands in a position of trust to another" (77). According to Olthuis and Townshend, "the person relying on the fiduciary expects that the fiduciary acts not merely with care and skill (non-negligence), but also, and by way of extension, with a degree of loyalty and honourable conduct that transcends the ordinary test of care and skill" (79). Fiduciary responsibilities clearly extend to policy-making. Given this, unilaterally drafted policies which construct several limitations and restrictions on First Nation peoples in their attempts to live better are in violation of the Crown's fiduciary responsibility and are in breach of the Crown's constitutional responsibilities.

Notwithstanding these violations, Olthuis and Townshend also raise the question of whether the compensation amounts awarded First Nations fall within legal guidelines. According to equity law, Olthuis and Townshend proceed to explain:

- The general principle behind compensation is that the actual loss caused to the trust estate is to be made good;
- Compensation is to be assessed with reference to the value of the assets at the date they are restored and not at the day at which they were improperly taken;
- Any increase in the market value of the assets is the responsibility of the trustee;
- In assessing lost opportunities, it is also presumed that the beneficiary would have made use of its assets in the most advantageous way;
- And finally, in assessing compensation, the loss is to be calculated with the full benefit of hindsight (84).

Although these are the legal guidelines that a fiduciary is required by law to follow when compensating First Nation peoples, the federal government clearly falls short. Nothing crystallizes this point more clearly than an appreciation of the Nisga'a Nation's settlement. Apparently, the Nisga'a placed a high priority on compensation and they therefore hired the firm of Price Waterhouse to establish an estimate of the economic opportunities that they lost out on, during the previous 110 years when others extracted resources from the territory. Which included timber, fish and minerals. The calculation of loss Price Waterhouse provided was estimated to be \$4.3 billion. The Nisga'a received a mere \$240 million (Robinson 2002).

Given the knowledge presented here, it does not seem to me that the Crown's constitutional and fiduciary obligations were met in this matter. Does it to you? Finally, does it surprise you to know that Canada has yet to sign the United Nations Declaration of Indigenous Rights?

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Lynn Gehl, Algonquin is an Indigenous Studies PhD student at Trent University.