

Land claims and self-determination: assessing the past and looking to the future.

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I am honoured to have been invited to address this conference. It is somewhat daunting to attempt a worthwhile contribution to the debate of this learned association of social scientists. I shall attempt to derive some degree of comfort, however, from the perception that the issue of land, which is the vital issue to be debated at this meeting, is one that not only attracts the attention of various disciplines, but forms a crucial element in the large comparative questions that are being asked by scholars in a growing number of countries. The issue of land in the context of the study of Aboriginal peoples lies at the root of problems that can provide insights into fundamental questions of pluralism. In various countries around the world, and particularly in North America, Aboriginal peoples are caught as enclave populations within the political boundaries of powerful States. As the world community witnesses the passing of the decolonization process associated with the expansion of European empires, it turns its attention to the interests of these Aboriginal peoples who are also living in colonial situations. The challenges posed by their situation excite the interest of scholars concerned with the prospects for increasing not only human knowledge but human solidarity and harmony. In this age where small societies are struggling to maintain their group identity in the face of the increasing trends towards globalization brought about by the new technological and economic order, these must be goals that are shared very widely.

Permit me now to describe the focus of my presentation. Canada is now undergoing a sort of identity crisis. One of the ways in which it is manifested is a difficult process of constitutional renewal. The constitutional order established in 1867, and founded on the assumption of providing for the interests of the French and English peoples is being revised. In this great debate the voice of the Aboriginal peoples is being heard. They challenge the legitimacy of the existing order and assert that a true vision of Canada must include the vision of the Aboriginal peoples. Central to the Aboriginal vision is the concept of Aboriginal self-government. Although great strides have been made, considerable difficulties remain. The existence of a land base for Aboriginal peoples, or, on the other hand, its absence, is of critical importance in assessing the feasible options for political and economic self-determination of Aboriginal peoples in Canada. A review of the North American situation shows that Aboriginal peoples have not only been largely dis-

possessed of their ancient homelands, but that they have been deprived of control over those lands which they have retained. Land claims in this era of self-determination in Canada can be fairly described as claims for a homeland for cultural, economic, and political survival. In assessing the future prospects for self-determination, however, it is important also to assess the future prospects, not only of homelands, but also of landless political structures that are able to sustain and nurture culturally, economically, and politically viable Aboriginal enclaves. The assessment is one that should provide useful insights for all scholars and disciplines interested in the issues introduced earlier.

A reference to my dictionary informs me that ethnology is "the comparative scientific study of human peoples." (*The Concise Oxford Dictionary 1990: 402*) I am encouraged by that reference to "peoples". It is important that Aboriginal peoples around the world and certainly in North America, be considered as peoples equally entitled to liberty, dignity, and respect as all peoples. Certainly that has not been the approach of the law and policy which has rationalized the dispossession of the Aboriginal peoples in North America.

The consequences of dispossession are not very pretty, when looked at too closely. The basis for scholarly exercises of all sorts dealing with notions such as Aboriginal land claims and self-determination consists of every day experiences that take place outside, sometimes very far, from the scholarly forums. It is in these places that one can find both the reasons for despair and the reasons for hope for a better day. Allow me to illustrate. The following is an extract from a recently published letter to the editor of a Winnipeg newspaper in Canada:

When I get up in the morning I have to remember that I'm an Indian. I have to remember the circumstances in which I find myself in Canada today. I have to maintain an extra strength. My mental state has to be continually reinforced to a positive attitude.

If I don't do this, then I could be vulnerable to others and to myself.

I am not really sorry for myself. I can cope quite well. It's my little innocent grandchildren I feel sorrow for. I am also sorrowful for Canada and the makeup of our population. We have an impediment where there should not be one in this great country. (Thomas 1992: 12)

This was written by a professional man well into the mid-years of his life. The everyday experiences

of Indians on reserves in Canada have been likened to the conditions prevailing in Third World countries. (Manuel and Posluns 1974) Surrounded by the glittering attractions of the First World but denied the hope of ever participating in it meaningfully, many young people cannot muster the positive attitude required, and statistically, they commit suicide at a rate several times the national average.

It is not only the oppressed who must rationalize their condition. The policy makers of the incoming European settlers have always needed an explanation for the sake of their own soul and conscience regarding the way they treated Aboriginal people. The belief that Aboriginal people were less than human was an integral part of federal land policies from the very beginning in North America. That was so in the days of British colonial policies, and later on in the policies of the federal governments of both the United States of America and of Canada. The wrong of dispossession was one so great that it required such a rationalization to permit the perpetrators to continue believing in their own humanity. As soon as the European settlers came to North America a confrontation over land and resources was inevitable. In the colonial era treaties were signed which recognized Aboriginal peoples as foreign nations. As settlement progressed and European power was secured, however, relations changed. Treaties were signed but the ancient homelands were appropriated, and the treaty signatories were gradually forced to reside on reserved parcels of land that grew smaller and smaller as the needs of settlement expansion were met at the expense of honouring early treaty promises. The historical and policy details of the United States and of Canada differ in some respects, and are well known to scholars. In each case, the end result was the same. The Aboriginal interests in land gave way to the interests that were articulated in favour of the public interest by governmental and judicial officials. The dispossession and its ugly consequences were all rationalized in the name of the common good by people convinced that the modern state can do anything to anybody if it convinces itself that this is for the common good. Allow me to illustrate the point by citing from Professor Chamberlin's work:

[It] was for the common good that the Indians were herded like cattle, treated like children, swatted like flies and quarantined like animals suspected of having rabies. Meanwhile, it was little wonder that the cry of the lamentation was everywhere heard, above the hum of the engines of civilization. Our inheritance is turned to strangers, our houses to aliens. We are orphans and fatherless, our mothers are as widows. We have drunken our water for money; our wood is sold unto us ... They took the young men to grind, and the children fell under the wood. The elders have ceased from the gate, the young men from their music. The joy of our heart is ceased; our dance is turned into mourning. (Chamberlin 1975: 9)¹

Today in both the United States and in Canada the ancient societies are striving to make homelands of

¹ The reference in Chamberlin is taken from Lamentations 5: 2-4, 13-16. It is used as the motto of a *History of the Indians of Connecticut from the Earliest Known Period to A. D. 1850* by John deForest. (Chamberlin 1975: 206)

small areas that appear as neat splotches on the national maps of countries that are now ruled by strangers. These specks on the map comprise less than two per cent of the land mass of the United States. (Barsh 1983: 7-8) In Canada, excluding the recent and current appropriations in the northern Territories, the area of land set apart in the provinces for the Aboriginal peoples ranges from 0.06 per cent in Newfoundland to two percent in Alberta. (Bartlett 1990:215) In both countries significant proportions of the Aboriginal populations do not reside on these areas set aside for exclusive occupation of Aboriginal peoples. In the United States in 1980, 36.2 per cent of the Indians lived inside identified Indian areas, with heavy concentrations of populations on reservations occurring in some areas. For example, in New Mexico, Arizona, South Dakota and Oklahoma, over seventy per cent of the Indians lived in Indian areas. (Durham, Jr. 1986: 2: 93-112) In Canada, there are over half a million persons registered as Indians for the purposes of federal Indian policy and administration. There are over 30,000 Inuit who are not included in the federal government's Indian Act provisions.

In addition, there are many Metis and Indian individuals who are not caught by the terms of the federal Act. The numerical estimates for the latter two groups range from 260,000 to 850,000. (Bartlett 1990: 215) Only the registered, or "status" Indians are entitled to live on the reserves in Canada, and the result is a significant "off-reserve" population, much of it concentrated in the cities where many have migrated in search of better living conditions in the last two decades. It is the circumstances and the activities of the Aboriginal peoples in Canada that shall be the focus of the remainder of this brief presentation.

The traditional way of life on the land is still of great significance in Canada, especially in northern areas of the country, where hunting, trapping, and fishing employ a significant proportion of the labour force and provide a significant portion of the income or income in kind. (Knoll 1980: 1: 9-10) The importance of the land is not restricted to purely economic reasons. It is related also to the essential sense of identity and culture of the Aboriginal peoples who live by the land, as illustrated by this statement by Richard Nerysoo:

It is very clear to me that it is an important and special thing to be an Indian. Being an Indian means being able to understand and live with this world in a very special way. It means living with the land, with the animals, with the birds and fish, as though they were your sisters and brothers. It means saying the land is an old friend and an old friend your father knew, your grandfather knew, indeed your people always have known... we see our land as much, much more than the white man sees it. To the Indian people our land really is our life. Without our land we cannot- we could no longer exist as people. If our land is destroyed, we too are destroyed. If your people ever take our land you will be taking our life. (Minister of Supply and Services Canada 1977: 1: 94)

In Canada, the control of the land that is reserved for the exclusive use and occupation of the Aboriginal peoples is vested in the governments, and not in

the "First Nations" people who live on the reserves. The same is true of the everyday affairs of life on these reserves.² The following is a brief summary of the legal position concerning the powers of governments on Indian reserves in Canada. It is important to emphasize that the law in this area is far from settled, and the description is not detailed or complete. The legal uncertainty surrounding life on reserves is another significant indicator of the marginal position of Indian life in Canada historically.

The federal Constitution gives the federal Parliament the exclusive power to make laws respecting all matters coming within the subjects of "Indians" and "Lands Reserved for the Indians." These are two distinct heads of power. Addressing the subject matter of land, first, it can be stated that essentially, the federal power permits legislation over the use and possession of the land. The federal policies have generally been carried out pursuant to the Indian Act since 1876, and concern such as the purposes for which the land may be used, the rights of individual Indians in possession of reserve lands, trespass on reserves, surrenders of reserves, management of reserves and surrendered lands, and other matters. (Woodward 1989: 88) With respect to the subject "Indians", it has been said that the jurisdiction extends to all matters affecting their welfare and civil rights. This power has been used to determine the property rights of Indians, to outline their civil rights, to shape their local governments on reserves, and to define who has status in law as an Indian for federal policy purposes. (Woodward 1989: 89) There are some particular constitutional limits on the federal powers established by various provisions in the agreements that set up the western provinces which joined the Canadian federation subsequent to the original union in 1867. (Woodward 1989: 92) Turning now to the power of provincial Legislatures to make laws affecting Indians and Indian lands, a basic rule is that provincial laws apply unless they are ousted by one of the rules that are now being developed by the courts, and which I will not provide in detail here.³ Among the constitutionally protected rights are treaty rights and "Aboriginal rights." The rules with respect to the application of

laws to Indians so defined by federal law apply both on and off reserve since the courts have decided that reserves are not enclaves which exclude provincial legislation.

The above summary should indicate the nature and scope of governmental control over the lives and destiny of the Aboriginal peoples who live on reserves in Canada. It is difficult to avoid the conclusion that, rather than being homelands, these reserves have been used to maintain the subjugation of the First Nations. The true value of a land base should be the creation of a homeland, not a capital asset. Having a home should mean having real control over the everyday affairs of the neighborhood; over the building of a safe and healthy environment for families. Where they have a land base but no control over it, the First Nations in Canada have a place to live, but their destinies are still in the hands of strangers. It is the bureaucracy of the Department of Indian Affairs which makes the decisions about their everyday lives. This is not a circumstance where people can determine their own destiny.

In large areas, especially in the north and west of Canada land claims are being made respecting lands that have never been surrendered to the government by treaty. One of the difficult issues arising here is the issue of the extinguishment of Aboriginal rights over such lands. The fear of many Aboriginal people is that a "final settlement" in the perspective of the government means providing compensation to pave the way for the inevitable absorption, territorially and politically, into the national non-Aboriginal structures. This object contrasts with the notion of self-determination that is generally propounded as inhering in all historically and culturally distinct peoples. This right of self-determination has a dynamic, continuing nature. Land claims are a continuing fertile forum for disputes about the most basic issues of human rights. The protection of human rights depends very much upon who governs; when a community is ruled by an alien government or by a government not of its own choosing, the protection of its human rights is in the hands of strangers. The right of self-determination, if it were exercised by free choice, would include the right of a people to choose its political status. Its options would include complete independence to complete integration or assimilation, and include options such as association with an existing state or participation in a federal system of partly-self-governing political entities. (Barsh 1988: 69-82 and Crawford 1988) It is apparent that the theoretical notion of the right of self determination must be reconciled with the feasible options that are available to any particular self-determining people. In this process, the issue of land is critical. The degree of control and autonomy that is available upon a discrete geographical land base is not possible in its absence. In Canada there are many Aboriginal people who have no land base.

Those who live anywhere but on the Indian reserves are treated in law as all other citizens. Their different status is not legal. In practice they are marginalized as the poorest and least powerful group, one whose voice at the ballot box still counts for

² In recent years there has been a movement on the part of the Aboriginal peoples in Canada to throw off the cloak of colonialization. This has included the rejection of the name "Indian", a colonizer's term, and the adoption of "First Nations" by the spokesmen of those who are defined as "Indians" by federal legislation. Similarly, most spokesmen for other Aboriginal groups have adopted the term "Aboriginal" as a generic term rather than "Indian." Of course, the term "Indian" continues to be used generally by both Aboriginal and non-Aboriginal persons who are less involved or less concerned with the issue.

³ Woodward lists the judicially developed exceptions as follows: 1. provincial laws cannot derogate from constitutionally protected Indian rights; 2. provincial laws may not affect "Indianness" - the status and capacity of Indians; 3. provincial laws may not single out Indians for special treatment; 4. provincial laws may not affect the Indian interest in the land; 5. provincial laws are subject to paramount federal legislation. It should be emphasized that the effect of the second exception varies from reserve community to reserve community, according to the essential elements of the culture of the relevant community.

little.⁴ During the last two decades there has been a significant political resurgence among the Aboriginal peoples in Canada, but the movement has derived its power mainly from reserve and other rural communities. Generally, the Aboriginal people living in the cities have had relatively little to say in the national debates on Aboriginal rights, including the constitutional reform debates of the 1980s and 90s. Those who have spoken for the urban people have been mostly concerned with exploring integrationist solutions and designing new ways of delivering public services which are provided by existing government programs. For the more than fifty percent of the Metis and Aboriginal people who do not live on reserved lands, the options for self-determination through self-government are very different from those available on reserves. (Morse and Groves 1987: 2: 139-163) They are not as well represented in the national political forums where Aboriginal issues are debated. These factors complicate the prospects for achieving meaningful forms of self-government in the short term. Before turning to a consideration of the options which have in fact been considered in contemplating the implementation of self-government for both Aboriginal peoples on and off a land base, it is useful to describe briefly the main political events of the last decade.

In 1982 there were major constitutional amendments to the Canadian Constitution. Included were certain provisions which gave recognition to "existing aboriginal and treaty rights" but these rights were nowhere defined. Instead, another provision required a meeting of government leaders and Aboriginal representatives to determine the identification of the rights. The result of that process, which came to take place over four meetings between 1983 and 1987, did not include any agreement on the nature of the rights that received recognition in the Constitution in 1982. During this course of public events, which included many meetings of officials and which heightened public awareness over Aboriginal issues, the key demand of the four Aboriginal groups who were invited to participate in the national constitutional deliberations were self-government, and a land base for those who did not have one. There was bitter disappointment over the failure of the constitutional process of the 1980s, particularly among the Metis, who were left without the benefit of systematic access to the ear of government through the institutions of federal Indian policy. When, a few months later, an agreement was reached by all government representatives on new constitutional amendments to deal with the aspirations of the province of Quebec, most Aboriginal leaders were either enraged or inclined to point out the continuance of the Canadian policies of treating Aboriginal people as either incidental or irrelevant. In June 1990 the so-called Meech Lake Accord was blocked by a lone Aboriginal member of the Manitoba legislature who relied on a technical point requiring unanimous consent of that Legislature to the proposed amendments. Elijah Harper instantly became a cult figure not only to Aboriginal people

who believed that the occasion should be seized to emphasize the relevance of Aboriginal participation in Canadian statecraft, but also by opponents of the Meech Lake Accord and the process by which it was reached. With the proposed accord defeated, the federal government set about designing a new process for agreement on basic constitutional reform. In this latest round, Aboriginal representatives have scored historic gains. The demand for the constitutional recognition of an "inherent right of Aboriginal self-government" has gained solid public acceptance and appears likely to form a part of any agreement that is expected to be reached in 1992. In this contemporary atmosphere, the question is often heard, "What will self-government mean in practice?" The answer lies in the future. The immediate concern of Aboriginal leaders is to assert the legitimacy of their claims and to secure its formal acceptance in the constitutional order. This is particularly important in Canada where constitutional symbolism has been increased by recent events, and where peaceful change is heavily reliant upon constitutional rules. Once formal acceptance of the legitimacy of their claims to political autonomy within Canada has been secured, it is expected that then Aboriginal people will begin the difficult process of putting flesh on the bones of the principle of self-determination through self-government. In contemplating that future event, it is notable that analysts have developed models of political structures that include both land based structures, such as an Aboriginal province comprised of territorially based islands, and a model of treaty federalism, and also non-territorial models, such as an Aboriginal province that would not be territorially based. (Elkins: 1992) The road to self-determination for Aboriginal peoples in Canada will not be easy. Institutional models on a land base will present their peculiar advantages and disadvantages, including the unavoidable conflicts over land-based resources such as minerals, and hunting and fishing rights which are already being felt. For those Aboriginal people who have been integrated into non-Aboriginal society outside a land base, there will be a different set of advantages and disadvantages, although there will be considerable overlap in the case of both models. For example, Aboriginal communities within city boundaries will not enter conflicts over mineral rights and hunting rights. They will probably, however, be involved in debates over the funding of discrete Aboriginal school boards out of public funding sources.

In August 1991 the Prime Minister of Canada moved to fulfill a promise he had made in the heat of the Meech Lake debate, to establish a Royal Commission to examine the circumstances of Aboriginal peoples and to make policy recommendations to the federal government. The Royal Commission on Aboriginal Peoples was given a broad and comprehensive mandate to consult widely and to report to Parliament. The mandate includes consideration of both land based communities, and of the circumstances of Aboriginal peoples who do not live on a land base. Although its establishment has been greeted with some skepticism, there are indications it might play a significant role in charting the future direction of Aboriginal policy in Canada.

4 Given the relative youth of the national Aboriginal population, this situation will change significantly over the next decade or two.

A confrontation over land and resources was inevitable from the day that Columbus stepped on the shores of the continent of North America. Since that time, Aboriginal peoples have retreated before the advance of settlement. Everywhere they have been marginalized and deprived of their ancient heritage, both of land and of culture. As one Inuit elder said in a presentation to the Royal Commission in late April 1992; "We were treated like dogs; ...we were defeated in every way." In contemplating future prospects for providing Aboriginal peoples with an opportunity to take their place among the

self-determining peoples of the world, it is now necessary to consider the alternative possibilities that are presented by both those who have been marginalized in the cities and towns, and those who still cling to cultural survival on reserve lands. In doing so, it will be good to listen to the views of the Aboriginal peoples. The conquest of the Aboriginal peoples that was heralded by the arrival of Columbus should continue to act, as an eternal reproach to human arrogance about the nature of our knowledge and to the uses to which it can be put to promote the good of society.

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