Are Aboriginals Canadian?*

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The modern period of aboriginal policy in Canada began with the election of Pierre Trudeau's Liberal government in 1968. Pursuing an ambitious agenda of social reform under the slogan of the "Just Society," Trudeau wanted to accelerate the assimilation or integration of natives into Canadian society. Such intentions were in line with the American civil rights movement that dominated the thinking of the day. But when Trudeau's government issued its famous "White Paper" in 1969, proposing policies to promote integration, there was a terrific backlash from aboriginal peoples and their white supporters. The government retracted the White Paper, and since then the pendulum of policy has swung wildly away from assimilation and integration towards aboriginal nationalism.

Although Canadian developments have their own internal causes, they are part of a larger trend affecting the whole world. Everywhere in the last 30 years indigenous peoples have been asserting separate identities and demanding special rights, ranging from measures of affirmative action in employment to recognition of national status. In that perspective, aboriginal demands in Canada are very similar to those made by Indians in the United States, Maori in New Zealand, and Aboriginals in Australia. Indigenous politics, in turn, is part of the flowering of "micro-nationalism," as some authors call it – the assertion of identity by ethno-linguistic or racial minorities that once were thought to be part of the nation-state but now demand recognition as separate entities. This paper focuses on six different aspects of these recent developments in Canada. They are, of course, interrelated, but I will discuss them separately for purposes of clarity.

The Rebirth of Aboriginal Rights and Title

In our legal system, aboriginal rights and title are the rights to land that flow from prior occupancy by aboriginal peoples. "Aboriginal title" has recently been defined by the Supreme Court of Canada as a kind of ownership, whereas "aboriginal rights" are lesser claims such as the right to hunt, fish, and gather the wild produce of the land. The traditional view of the Canadian government was that aboriginal rights and title were extinguished when land-surrender treaties were signed. The government's 1969 White Paper proposed that there would be no further treaties, that aboriginal rights in those parts of Canada without treaties would be considered extinguished.

The reaction against the White Paper led to a new round of treaty-making. Since 1975, modern land-surrender agreements have been signed in northern Quebec, the Northwest Territories, and the Yukon. Some of the sub-agreements have not yet been finalized, but broadly speaking the process can be said to be successful in certain respects. It has been expensive, and some conflicts remain; but it has brought a degree of clarity to property rights in these parts of the country, making possible some huge economic developments, such as the James Bay hydroelectric project and the new diamond mines in the Northwest. However, clarity about property rights may not be a permanent achievement since Native leaders are increasingly rejecting the notion that any treaty, whether old or new, brings about a final assignment of property rights. They see treaties more as open-ended agreements to share the land. No matter what these treaties say on the printed page, the reality is that native leaders will claim that they have not in fact surrendered their aboriginal rights and

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title to the land, that they are in effect continuing co-owners of all the land, not just of the specific parts reserved to them by treaty.

To the extent that the treaty-making process has succeeded is in large measure due to the fact that Canada's north is almost a *tabula rasa*. The white population is small, Indians and Inuit are not settled on reserves, and property rights were largely unassigned before the treaties. Now, however, we are moving into a new phase – treaty-making in the provinces – where such favourable conditions do not apply. In the current battleground of British Columbia, there is a large white population, Indians have lived on reserves for over a century, and the entire province is either owned outright in fee simple or is encumbered with tenures such as mining and timber leases. In such circumstances, treaty-making is hugely expensive and fraught with political conflict. The Nisga'a treaty, concluded in British Columbia and ratified this year, cost $500 million dollars for about 6000 people. At that rate, completing the treaty process in British Columbia will cost at least $10 billion – maybe more, since there is a ratchet effect that tends to make each treaty a minimum for the next. The opposition Liberal Party of British Columbia, which seems almost certain to win the next election, opposed the Nisga'a treaty and seems unlikely to push the process forward if it comes to power. Meanwhile, the Supreme Court of Canada raised both expectations and anxiety with its 1997 *Delgamuukw* decision, in which it held that the absence of treaties means that aboriginal rights and title have never been extinguished in British Columbia. This decision cast a pall of uncertainty over land titles in the province and is proving to be a substantial deterrent to investment in mining and forestry projects.

In Quebec and the Atlantic provinces, land-surrender agreements were never signed because the British thought the government of France had already extinguished aboriginal rights and title in these former French colonies. The issues have not yet been fully litigated, but it is quite possible that the Supreme Court will eventually extend the *Delgamuukw* decision to Quebec and Atlantic Canada, thus creating further uncertainty about land titles that had been assumed to be secure for more than two hundred years.

Reinterpretation of Treaties

In addition to the movement to negotiate new treaties, there is also a drive to reinterpret existing ones. Federal and provincial governments have offered to enrich many of the existing treaties. Saskatchewan has gone the farthest by offering hundreds of millions of dollars to enable Indian bands to purchase land to enlarge their reserves. More, however, is happening through litigation than negotiation. In dozens of cases across the country, aboriginal litigants are attempting to persuade the courts to adopt novel readings of treaties. This usually involves arguments to the effect that treaties should be interpreted not simply as written, but in the light of an alleged aboriginal understanding found in historical documents or, increasingly, in oral traditions.

The most dramatic development in this area took place in 1999, when the Supreme Court held in the *Marshall* decision that a 1761 Nova Scotia treaty of submission afforded the Micmac and Maliseet Indians the right to draw a "moderate livelihood" from fishing. The treaty says nothing at all about fishing rights, but the Court based its ruling on an alleged oral understanding that the Indians would have had. The ruling touched off an outbreak of racial violence on the east coast as Indian fishermen started taking lobsters out of season and white fishermen retaliated by burning their boats. The federal government has tried to buy peace by appropriating $160 million to buy up the licences of white fishermen and purchase boats and nets for Indian fishermen in their place. Needless to say, concern for economic efficiency is absent from this scenario, in which tax money is being used to replace experienced fishermen with inexperienced fishermen, solely on racial grounds.

Similar cases are now arising that could jeopardize the future of the oil and gas, mining, and forestry industries of the resource-rich western provinces. I personally am involved as an expert witness in two cases in Alberta in which the aboriginal plaintiffs are claiming in effect to have a veto right over all economic-development projects on

their "traditional lands," even though they surrendered their rights to these lands by treaties more than a century ago. Their argument is based on an ingenious construction of treaty language, but even more on an appeal to so-called oral traditions about what the treaties really meant. If they are successful in these cases, provincial control of public lands will become almost meaningless, and no one will be able to run a seismic line, cut a block of timber, or dig a mine without first getting the permission of whichever Indian bands are in the vicinity. Companies may proceed with their projects by paying bribes to do whatever has to be done, but it will raise the cost of doing business and lower the general standard of living.

Judicial Policy-Making

Since 1867 we have had a federal system in which the courts are the final interpreters of the written constitution. But the influence of the courts was heightened enormously with the adoption of the Constitutional Act of 1982 which states that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This wording is vague in the extreme; it says nothing about what these aboriginal and treaty rights are, only that they exist and, by virtue of being mentioned in the constitution, are entrenched in the law beyond the power of legislatures to amend or overturn.

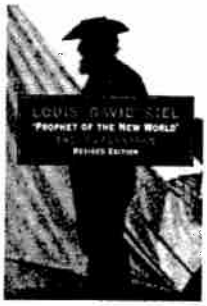
Since 1982, judges have been emboldened to fill in the blank space, to lay down their own view of what aboriginal and treaty rights are. Increasingly, they draw their inspiration not from legal precedents in the British common law tradition but from novel theories generated in law schools and published in academic journals. Once adopted in court decisions, these theories become in effect part of the constitution without ever having been ratified by legislators chosen by the people. The courts are now considering hundreds of cases involving aboriginal and treaty rights – indeed thousands of cases if we count the residential school claims, briefly discussed below. The sheer volume of these cases threatens to take policy-making out of the hands of elected representatives and put it into the hands of a small cadre of judges, lawyers, law professors, and expert witnesses. There are steps that the government could take to reassert control of the agenda, but up till now it has been paralyzed by the fear of criticism of "taking away rights," even though these are rights that had no existence before the latest legal theory conjured them into existence.

Compensation for "Historical Injustice"

Over the last three hundred years, there has been an enormous volume of transactions between aboriginal peoples, on the one hand, and French, British, and Canadian authorities, on the other hand. Researchers for aboriginal peoples are now going over this history with microscopic care, looking for anything that can be described as unjust according to contemporary standards of fairness. Needless to say, this anachronistic application of contemporary standards to the decisions of the past produces an infinite number of claims of unjust treatment.

One large category of claims involves the administration of Indian reserves. Over the years many reserves were relocated or underwent changes of boundaries. Sometimes the residents agreed to sell or exchange parts of their reserves; sometimes government acted unilaterally in pursuit of other purposes, such as locating military installations or promoting economic development. All such decisions are now under intense scrutiny, and hundreds of millions of dollars of compensation are being paid every year to successful claims. Some claims lead to negotiation, some end up in the courts, and some go to a special tribunal known as the Indian Claims Commission. This latter body has only the power to recommend, not to decide; but the Liberal government has pledged to replace it with another body equipped with the power to render binding decisions, perhaps up to a limit such as $5 million per claim.

Another category involves groups of aboriginal people who claim to have been missed when treaties were signed or reserves were being assigned. One striking instance is the so-called "Caldwell Nation" of southwestern Ontario, a group of a few hundred people whose ancestors have been living as ordinary Canadians for more than two hundred years but who have convinced the federal government that they should now get a



reserve. The government has appropriated $24 million to buy up some rich Ontario farmland, but the project is now stalled by local opposition. There are numerous other such cases across the country.

Then there are claims about deprivation of specific treaty benefits other than land. In one case in which I am involved as an expert witness, the plaintiffs argue, among many other things, that they did not get the right number of farm implements and livestock in the 1870s when their reserves were being established. Even if this claim were true (which I do not believe), is it really in anyone's interest to be arguing about such matters 120 years later? Litigation of this type encourages an obsession with what the American author Thomas Sowell calls "intergenerational group abstractions" at the expense of future self-improvement in the lives of real human beings.

A different, and now extremely important, category of claims has arisen out of attempts to provide education for aboriginal people. Until the 1980s, a large number of aboriginal people, though by no means a majority, attended residential schools funded by the federal government but run by Protestant and Catholic missionaries. The graduates of these schools now form a major portion of the leadership cadre of aboriginal people across the country. During the 1990s, claims that sexual and physical abuse were rife in the schools started to come to the fore. In 1997, the government of Canada issued an apology and appropriated $350 million as a so-called "healing fund," not to be distributed among those who attended the schools but to pay for programs for counseling and community improvement. Despite this gesture, more than 7000 individual claims for compensation have now been filed in court, and the number is increasing every day. Fewer than 10 percent of the claims involve charges of physical or sexual abuse; the vast majority involve charges such as "cultural genocide," loss of language, and so on. Churches are also named as defendants in these actions, and the Oblates, the premier Roman Catholic missionary order in Canadian history, are on the verge of declaring bankruptcy, as is the national organization of the Anglican Church.

While no one can tell how this particular story is going to end, it is unlikely that it will provide lasting benefit to anyone except to the lawyers feasting on the fees. It may transfer some money to some aboriginal people, but it also encourages them to see the problems in their own lives as the result of the actions of others rather than as challenges for them to overcome by their own initiative. The damage to the self-reliance of aboriginal people will, in my view, far outweigh the value of any possible settlement.

Aboriginal Self-Government

Self-government has also been a major theme in the last 30 years and it has entailed a great change in the way Indian reserves are run. Under the old system, all administrative authority was lodged in the Indian Agent, who was an appointed federal civil servant, while the elected band chief and council were merely advisory. Now the office of Indian Agent has been abolished, and the chief and council are responsible for running most programs on the reserve. More than 80 per cent of federal grants from the Department of Indian Affairs go to band governments to be spent with relatively loose supervision and reporting requirements.

The good news in this story is that Indians are now taking a much larger role in administering their local affairs, in everything from schools to policing. They are no longer simply passive recipients of federally administered services. The bad news is that the move to self-government has fostered a peculiar kind of politics that I call "familistic factionalism." On the typical reserve, the population is small and family ties are all-important. The band government is the *de facto* owner of all land, housing, and natural resources on the reserve. It is the only large employer, and runs the schools and social welfare services. All of this is paid for almost entirely by federal subsidies because reserves do not tax themselves to provide local services. Under these circumstances, politics inevitably becomes a contest of kin

groups to take over the band government and steer the benefits toward the friends and family of the winning faction.

Almost every day, Canadian newspapers publish stories about waste and corruption on Indian reserves. Patronage and nepotism flourish; standards of fiscal accountability are lax; large deficits are common; and federal oversight is weak. Some steps are being taken to impose administrative discipline, but I believe the problems will remain intractable until the residents of reserves are required to tax themselves to support the services they desire. Once they have the feeling that their own money is being spent, they may have some incentive to demand better performance from the chiefs and band councils they elect. Beyond the local level, there is now a welter of tribal, regional, and provincial organizations, capped by a national organization, the Assembly of First Nations. Most are supported by tax dollars; the AFN, for example, receives core funding from Ottawa of about $20 million a year, which enables it to maintain the largest, best funded office of all lobbies in the capital city.

There has also been a strong push to entrench aboriginal self-government in the constitution. In this context, three phrases that one hears frequently are "the inherent right of aboriginal self-government," the "third order of government," and "treaty federalism." By "inherent right," aboriginal advocates mean that they derive their governing powers not from the Canadian constitution but from their previous existence as autonomous political communities. The United States operates on this theory, but there it is understood that Congress is the sovereign lawmaker and can limit Indian governments in any way it chooses. Canadian advocates do not accept this limitation and point to the 1982 constitutional amendment as having entrenched their sovereign powers beyond the power of Parliament to override or abridge.

The "third order of government" means that aboriginal governments should be regarded as equal partners in the Canadian federal system, along with the ten provincial governments and the federal government. In this theory, each of the three orders of government would have its own prerogatives entrenched in the constitution. The more visionary proposals call for a separate aboriginal house of parliament, aboriginal seats on the Supreme Court, and an aboriginal veto over constitutional amendments. The concept of "treaty federalism" carries this line of thought a step farther by arguing that aboriginal governments participate in the federal system through voluntary treaties, just as sovereign nations relate to each other in the international sphere. In this perspective, aboriginal communities can presumably withdraw from the federal system, just as nations can abrogate treaties.

Underlying all of this is the theory that Indians constitute nations. Prior to about 1980, Indians were generally referred to as tribes or bands, but in the early 1980s a new terminology began to take hold. Indians began to refer themselves as nations, indeed "First Nations." Each of the 633 Indian bands in Canada is now referred to as a First Nation. Both federal and provincial governments quickly adopted the usage, so that the phrase "First Nations" is now almost *de rigueur* in public life. The word "Indian," even though it appeared in the constitutional amendments of 1982, is now politically incorrect and avoided by most people when they speak in public. It is close to becoming a racial epithet like "nigger".

Two things are implied in the First Nations terminology. First, that aboriginal communities constitute nations, not tribes or ethnic groups, and as such possess sovereignty and the right to self-government. That is precisely what the term nation means in modern political philosophy – a political community that is either actually or potentially self-governing. Second, that the aboriginal First Nations have special rights flowing from the fact that their ancestors lived in North America before the ancestors of other Canadians. Matthew Coon Come, the newly elected National Chief of the Assembly of First Nations, epitomized this philosophy when he recently made two provocative statements. First, he said, "I am not a Canadian." Second, he said that all of Canada still belongs to the First Nations. Mr. Coon Come's comments show how the nation-to-nation view of aboriginal affairs

could lead to the break-up of the nation-state. If aboriginal people are not Canadian citizens, and if as First Nations they enjoy an ownership of the land that they can never surrender, what remains of Canada as a sovereign nation-state? Canada in this tableau is merely "the goose that lays the golden eggs," a convenient source of transfer payments to maintain a high standard of living for tax-free aboriginal people.

The Aboriginal Economy

Canada is a wealthy and generous country, and its citizens would willingly pay large amounts of money to enable aboriginal people to become prosperous and self-supporting. The sad truth, however, is that the enormously expensive programs of the last 30 years have not ended aboriginal poverty; in fact, they may have made it worse. The increased flow of money to reserves has encouraged Indians to remain in remote, rural communities where there is little prospect of economic development. Almost half of Indians living on reserves depend on welfare payments, and that percentage rises above 80 per cent in many remote locations. While living on the reserve, Indians may get free housing, medical care, and education, but they are also trapped in communities with little economic future.

The response of aboriginal leaders is that they are poor because they are dependent. In their view, what they need is control over large amounts of land and natural resources, together with money to develop them without interference by the Canadian government. This strategy is built on an outdated view of the economy. Individual prosperity in a modern economy does not arise primarily from exercising control over land and resources but from offering goods and services that other people want to buy. In countries with a high standard of living, most people own very little in the way of land and natural resources. The typical way of becoming self-supporting and prosperous is to sell one's time, the value of which is enhanced by education, vocational training, and work experience, in the marketplace. Aboriginal peoples as collectivities can control enormous amounts of land and natural resources and yet their people will remain poor as individuals unless they acquire skills that can be sold in the marketplace.

The Canadian experience is quite enlightening on this issue. The vast expenditures of the last 30 years, combined with many land claim settlements, have enriched an elite among aboriginal people – the political leaders, the lawyers who handle the negotiations and the litigation, and the professional people who work with them. These are the people who manage the cash flow that accompanies government programs and who steer that cash flow to benefit themselves and their supporters, ensuring that the well-paid jobs, the lucrative contracts, and the unmonitored expense accounts go to their friends and relatives. Aggregate statistics show some improvement in the average income and material well-being of aboriginal people in Canada, but this improvement is largely concentrated among the elite. At the same time as members of the aboriginal elite are doing very well for themselves, aboriginal poverty and associated social pathologies remain acute and perhaps even growing. Welfare dependency is higher than ever, as is illegitimacy. About half of aboriginal children are born to single mothers and grow up without a father, and their chance of ending up either on welfare or in prison is frighteningly high.

In short, Canada's recent history of aboriginal policy confirms the general experience of mankind. Individual property rights and open markets bring prosperity and social independence for the largest possible number of people. Collective property rights and government control bring poverty and dependency even as they enrich the small elite that manages the system. The paradox of Canada is that, while individual property and open markets have worked well for our people as a whole, we continue to encourage aboriginal people to travel in collectivist directions that produce more poverty, despair, and political conflict. ■

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