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Native Sovereignty:

Does Anyone Really Want an Aboriginal Archipelago?

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"...words are wise men's counters, they do but reckon by them: but they are the money of fools...."

Thomas Hobbes, Leviathan (1651), I, 4.

In the spirit of Hobbes, before we can debate native sovereignty, we should be clear on what we are talking about. I have elsewhere defined sovereignty as "the authority to override all other authorities." More specifically, it is

> a bundle of powers associated with the highest authority of government. One is the power to enforce rules of conduct . . . . Another is the power to make law, [also the power of] raising revenue, maintaining armed forces, minting currency, and providing other services to society. Moreover, in the British tradition sovereignty implies an underlying ownership of all land. Finally, sovereignty always means the power to deal with the sovereigns of other communities as well as the right to exercise domestic rule free from interference by other sovereigns.[1]

That is the abstract meaning of sovereignty in the vocabulary of political science. In this sense, it is a conceptual property of the approximately 190 states that make up the international state system. Most of the entities that possess sovereignty belong to the United Nations or, like Switzerland, could belong if they should decide to apply for membership.

Sovereignty can only pertain to states. It makes no sense to speak of sovereignty unless there is, as in the classical definition of the state, an organized structure of government ruling over a population within defined territorial boundaries. Native societies in what is now Canada did not possess sovereignty before the coming of the Europeans; neither the concept nor the underlying institutions were part of the culture of their hunting-gathering societies. Of course, hunting-gathering societies have political processes that assign rank and dominance within communities and involve conflict between communities, but the political processes of stateless societies are not the same thing as statehood and sovereignty.

As a way of increasing their political leverage in contemporary Canada, native political leaders have adopted the classical language of statehood to describe their communities. What used to be called bands or tribes are now called "nations," and these nations are said to have possessed sovereignty from the beginning and to possess it still.[2] This strategic use of language has served native leaders well in their struggle for greater power within the Canadian polity, but politically effective assertions should not be confused with intellectually persuasive analysis.

When native leaders in Canada now claim to possess sovereignty, they typically mean one of three things, each of which is related to a particular political situation. In what follows, I will argue that all three of these meanings are incompatible with the continued existence of Canada and the maintenance of essential Canadian political traditions. It is not that words alone can destroy Canada; words in themselves do not accomplish anything. But words such as "native sovereignty" are the verbal symbols of political projects that cannot be reconciled with Canadian institutions.

1. Some native leaders, for example those from the Mohawk communities of Kahnawake and Kanesatake in Quebec, speak of sovereignty in the robust sense described above, that is, the international sense. They hold that the Mohawks on their territory constitute a sovereign, independent state not part of Canada or the United States. This sovereign state should be admitted to the United Nations and in other respects become part of the international community. A Mohawk elder told the Royal Commission on Aboriginal Peoples in March 1993: "You have no right to legislate any laws over our people whatsoever. Our lands are not yours to be assumed. You are my tenant, whether you like it or not."[3]

While I respect the honesty of this position, I do not take it seriously as a political proposition. In the ten provinces, Canada has over 600 Indian bands living on more than 2200 reserves, plus hundreds of thousands of Metis and non-status Indians who do not possess reserves. These scattered pieces of land and disparate peoples are not going to be recognized as independent sovereign states, now or ever. They are simply not viable as sovereign states paying their own way and defending their interests in the international community. Nor is there any practical way to weld them into a single sovereign state. Native peoples are deeply divided by language, religion, customs, and history and in no way constitute a single people. They are not seeking emancipation from the tutelage of Indian Affairs in order to lose their identitity in some supratribal bureaucracy.

2. The concept of sovereignty, as originally formulated by the philosophers Jean Bodin and Thomas Hobbes, was thought to be a set of powers located in a single seat of authority--perhaps the monarch, perhaps the parliament, but in any case one sovereign. However, sovereignty can also be divided. Indeed, the classical definition of federalism implies a system of divided sovereignty, in which two levels of government each have shares of sovereign power guaranteed in a constitution that cannot be changed unilaterally by either level of government acting alone. In such a context, it is at least verbally meaningful to speak of giving native peoples a constitutionally entrenched share of sovereign authority.

This is more or less the political theory contained in the Charlottetown Accord. According to that document, "The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada," and aboriginal self-goverments should be recognized as "one of the three orders of government in Canada."[4] Although the terms federalism and sovereignty were not used, the most straightforward way to interpret the scheme proposed by the Charlottetown Accord is as an extension of divided sovereignty in a federal system from two to three levels. Although none of the details were worked out, the Accord would have endowed Aboriginal self-governments with many of the attributes of provinces: an entrenched constitutional basis of authority, participation in constitutional amendment procedures, representation in the Senate, a role in fiscal federalism, broad legislative jurisdiction, and so on.

This proposal cannot be dismissed on a priori grounds. There is no self-evident reason why federalism must be based on only two levels of government. Why not a "third order"? There are in fact many reasons why not, but they are more practical than conceptual.

First, as mentioned above, there are in Canada over half a million status Indians belong to more than 600 bands on more than 2200 reserves scattered across all ten provinces. No one has proposed a workable mechanism by which this farflung archipelago could be knit together into a single political entity, or even a small number of such entities. On the contrary, it was widely assumed in the debate on the Charlottetown Accord that the focus of self-government would be the band, or perhaps small clusters of closely related bands organized into tribal councils. Indeed, one of the widely touted advantages of the third order of government is its alleged flexibility, which would allow different bands or groups of bands to have their own institutions of government, criminal justice systems, schools, and so on.

But surely realism must intervene at some point. We are talking about 600 bands with an average population of less than a thousand, mostly living on small, remote pieces of land without significant job opportunities, natural resources or economic prospects. There would be virtually no revenue base, let alone the pool of human skills necessary to operate modern public services. How are such small, isolated and impoverished groups of people supposed to support and operate an untried system of government incorporating a degree of complexity not seen since the medieval Holy Roman Empire?

However, this is only the initial objection. Hard as it would be to harmonize 2200 reserves into a workable third order of government in a multi-tiered federal system, the problem is actually much more difficult than that. At any given time, more than half of Canada's status Indians live off reserve. They reside almost everywhere in the rest of Canada, from remote wilderness areas to the city centres of Vancouver, Toronto and Montreal. Moreover, in addition to status Indians, there are perhaps another half million (the true number is impossible to ascertain) Metis and non-status Indians, i.e. people of partly Indian ancestry who are not registered under the Indian Act but have some degree of identity as native people. A small number of Metis live on territorial enclaves (the Metis settlements of northern Alberta), but most are mixed in with the general population of Canada. Again, there is every conceivable kind of

social situation. There are Metis hunters, trappers and fisherment in the northern forests; Metis farmers on the prairies; and Metis business owners, professionals, and workers in Winnipeg and other major cities.

How could one create a third order of government embracing all aboriginal people, as the Charlottetown Accord purported to do, when most of these people do not live in defined territories? Since no one, thank God, was talking of forcibly relocating populations to create separate territories, the only other approach would be to create a racially defined system of government for aboriginal people no matter where they live.

Now there is a historical model for such a system, namely the Ottoman Empire that ruled the Middle East and southeastern Europe from the fifteenth century until it was dismembered after World War One. Throughout this immense territory, members of numerous Christian churches (Maronite, Coptic, Chaldean, Greek Orthodox, Armenian Orthodox, etc.) lived alongside the adherents of several Islamic sects (Sunni, Shi'ite, Druze, etc.). There were also important Jewish populations in most parts of the empire. All these ethno-religious communities were allowed a substantial degree of autonomy, including not only religious freedom but also their own systems of private law, so that matters such as marriage, family and inheritance were regulated within their separate communities.

It was an admirable system in its way, ruling a colourful, polyglot population for five centuries--no mean achievement in itself. But I doubt it is a model Canadians want to imitate, for it was in no sense a democracy. There were no elections or other institutions of representative government. The Sultan was theoretically an autocrat, but in fact rule was carried out by the imperial bureaucracy. The empire existed to collect taxes, keep internal order, and wage war against the neighbouring Persian, Russian and Austro-Hungarian empires.

Like all liberal democracies, Canada is based on an entirely different set of political principles, most notably the twin concepts of the rule of law and equality under the law. The legal equality of all citizens is what makes democracy possible. As John Stuart Mill argued cogently in his Considerations on Representative Government, people cannot participate peacefully and cooperatively in one political system unless they feel themselves part of a single community: "Free institutions are next to impossible in a country made up of different nationalities."[5] A territorial definition of the polity is essential to this system

of liberal democracy. Political and civil rights must be contingent on residence within a specific territory, not membership in a specific race or ethnic group.

Admittedly, Canada as a liberal democracy is challenged by the linguistic cleavage between English and French as well as the ethnic diversity of our aboriginal and immigrant population. But, at least prior to the Charlottetown Accord, the solutions towards which we groped were always liberal democratic ones based on legal equality within defined territorial jurisdictions. The French fact in Canada was recognized by creating the province of Quebec, which, although it happens to have a French majority, is a province similar in principle to all the others. Similarly, the contemporary Northwest Territories, although it has a native majority, is a territorial, not an ethnic polity. The same will be true of Nunavut if and when it comes into being. It will be a territory within which an Inuit majority will control a liberal democratic system of government; it will not be an Inuit ethnic polity.

The aboriginal self-government provisions of the Charlottetown Accord would have changed this by authorizing an ethnically defined third order of government to sprawl across existing territorial jurisdictions. It was a departure from, not an extension of, our federal system of liberal democracy. It is so incompatible with our system that it probably would not have worked at all. But to the extent that it had any effect, it would have encouraged the segmentation of native people. Wherever there were appreciable numbers of Indians and Metis in our cities, they would have been encouraged to develop their own schools, welfare agencies, justice systems. elective assemblies and other paraphernalia of government. Instead of being encouraged to take advantage of the opportunities of Canada's urban society and economy, as so many immigrants from the Third World are now doing, native people would have been led to withdraw further into a world of imaginary political power and all too real dependence on transfer payments.

Finally, even if they could have been made to work in their own terms, the aboriginal-self-government provisions of the Charlottetown Accord would have set up unacceptable pressures to create segmentary arrangements for other groups. In addition to setting up the third order of government across the country, the Accord provided for unique aboriginal participation in national political institutions: aboriginal Senators, possibly with a "double majority" veto over legislation on aboriginal matters;[6] aboriginal members of the House of Commons;[7] and aboriginal nominations to the Supreme Court as well

as a special advisory role for an Aboriginal Council of Elders.[8] It would not have been long before other groups demanded similar treatment: women's organizations, visible minorities, the disabled, gays and lesbians, and so on. Indeed, demands of this type were heard during the referendum on the Accord. Reservation of Senate seats for women was a major issue in certain provinces, notably British Columbia; and Joe Clark promised to revisit the situation of the disabled once the Accord was passed. Even if Canada's liberal democracy could have survived the distinct society for Quebec and the third order of government for aboriginals, it could not survive if every identifiable group set out to entrench its political power in the constitution. It would be the end of equality before the law, and ultimately of liberal democracy itself.

3. A third possible meaning of native sovereignty is the assertion that selected aspects of Canadian law, whether federal or provincial, simply do not apply to Indian bands or other native communities. There have now been many incidents of this type, for example, the assertion by Manitoba and Saskatchewan bands that, regardless of provincial legislation, they can run gambling casinos on their reserves. Now the application of provincial legislation to Indian reserves is a complex and contentious area of the law. The general principle formulated by Douglas Sanders, one of the pre-eminent experts in the field of native law, is this: "Provincial laws apply to Indian reserve lands if they do not directly affect the use of land, do not discriminate against them and are not in conflict with federal Indian legislation."[9] It may well be that the capricious way in which provinces exploit gambling for their own purposes while forbidding private entrepreneurs to enter the field conflicts with The Indian Act, with section 91(24) of The Constitution Act, 1867, or some other constitutional protection of Indian rights. But this involves interpretation of the Canadian constitution; it has nothing to do with assertions of native sovereignty. The appropriate remedy, as in fact seems likely to happen in Saskatchewan, is to seek an interpretation of the constitution by bringing an action before the courts. Wrapping the issue in declarations of sovereignty only obscures the real question.

It is hardly consistent for Indian bands to continue to receive their full range of governmental benefits, including social assistance from provincial authorities, while maintaining that their "sovereignty"

allows them to ignore provincial legislation whenever they choose. This self-contradictory position is an obvious non-starter.

For the sake of clarity, let me repeat that I am not opposing the desire of Indian bands to open casinos on their reserves. Any form of legal entrepreneurship by anyone in Canada should be applauded (though there are serious concerns that in practice the gambling industry may tend to sprout criminal connections that will be as destructive for natives as for anyone else). My point is simply that, whatever the merits of Indians opening casinos on their reserves, it is not a matter of sovereignty.

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Up to this point, the tone of my essay has been unavoidably negative, because I was asked to argue the negative side in a debate about native sovereignty. Let me take the opportunity in closing to state my views in a more positive way.

Status Indians in Canada have suffered terribly under the regime of The Indian Act and the Department of Indian Affairs. Bureaucratic socialism has been a failure wherever it has been tried, whether in Eastern Europe or North America. As quickly as possible, Indian bands should receive full ownership of their reserves, with the right to subdivide, mortgage, sell and otherwise dispose of their assets, including buildings, lands, and all natural resources. As much as possible, they should assume the self-government responsibilities of small towns or rural municipalities. What happens afterwards should be up to them. This kind of devolution of power is already possible under federal legislation; it has taken place in a few cases, such as the Sechelt band of British Columbia, and is being negotiated by other bands across the country. It does not require an elaborate metaphysics of sovereignty.

However, a large and ever-increasing majority of native people do not live on reserves and never will, except for occasional visits. For this majority, neither self-government nor sovereignty can have any meaning except to the extent that they, as Canadian citizens, participate in the government of Canada. For them, the political illusion of self-government is a cruel deception, leading them out of, rather than into, the mainstream of Canadian life. Their future depends on fuller participation in the Canadian society,

economy and polity. They are, to all intents and purposes, internal immigrants, and for purposes of public policy their problems are fundamentally the same as those of other recent immigrants.

It is now 25 years since Pierre Trudeau became Prime Minister of Canada. One of his government's early projects was the famous White Paper on Indian affairs, which articulated an approach similar to the one stated here, namely to encourage the social, economic and political integration of natives into Canadian society. Sadly (as I see it), native leaders totally rejected the White Paper and set off along the opposite path of emphasizing separate institutions and political power, pursuing the elusive goals of land claims, aboriginal rights, self-government, and sovereignty. As far as I can see, a quarter century of this political approach has produced hardly any beneficial results. There are more native politicians and lawyers than there used to be, but economic and social conditions seem not to have improved at all. We still read every day about unemployment rates of 90% on reserves, of Third World standards of housing and health, of endemic alcoholism, drug addiction, violence and family breakdown.

What the black economist Thomas Sowell has written of the United States is equally true of Canada:

> Political success is not only relatively unrelated to economic advance, those minorities that have pinned their hopes on political action--the Irish and the Negroes, for example--have made some of the slower economic advances. This is in sharp contrast to the Japanese-Americans, whose political powerlessness may have been a blessing in disguise, by preventing the expenditure of much energy in that direction. Perhaps the minority that has depended most on trying to secure justice through political or legal processes has been the American Indian, whose claims for justice are among the most obvious and most readily documented . . . . In the American context, at least, emphasis on promoting economic advancement has produced far more progress than attempts to redress past wrongs, even when those historic wrongs have been obvious, massive, and indisputable.[10]

In the last analysis, the most harmful thing about the quest for sovereignty is the opportunity cost. The "brightest and best"--the leaders of native communities--are led to devote their talents to a cause that produces nothing except ever-growing levels of discontent and disappointment.

Notes

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[1]Mark O. Dickerson and Thomas Flanagan, An Introduction to Government and Politics: AConceptual Approach (Toronto: Nelson Canada, 1990; 3rd ed.), 35-36.

[2]See Menno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians," Canadian Journal of Political Science 17 (1984), 537-553; Thomas Flanagan, "Indian Sovereignty and Nationhood: A Comment on Boldt and Long," ibid., 18 (1985), 367-374; Boldt and Long, "A Reply to Flanagan's Comments," ibid., 19 (1986), 153.

[3]Debbie Hum, "Ottawa has no right to impose its law on natives: Mohawk," Montreal Gazette, March 18, 1993.

[4]Charlottetown Accord, s. 41.

[5]John Stuart Mill, Considerations on Representative Government (Chicago: Henry Regnery, 1962; first published 1861), 309.

[6]Charlottetown Accord, s . 9.

[7]S. 22.

[8]S. 20.

[9]Douglas Sanders, "The Application of Provincial Laws," in Bradford W. Morse, Ed., Aboriginal Peoples and Law: Indian, Metis and Inuit Rights in Canada (Ottawa: Carleton University Press, 1985), 453.

[10]Thomas Sowell, Race and Economics (New York: David McKay, 1957), 128.