Self-government: Part of a New Vision for Canada

by Keith Goulet, MLA

One of the outstanding issues confronting Canadians today is the right of self-government by the Indian, the Metis and Inuit. While the government of Canada has signed international agreements and covenants relating to its respect for the self-determination of nations within nations, it has not, in my opinion, dealt justly with the Aboriginal peoples of Canada in this context. While steps have been taken towards giving some responsibility to Aboriginal peoples, the substance and processes of recent government policy and practice still lie in the realm of outdated colonial concepts.

Regarding process, the following ideas have been stated many times by Indian, Metis and Inuit leaders; first, that the tremendous lack of concerted and genuine political will and political action by elected parliamentarians and legislators to resolve the outstanding issues of Aboriginal peoples will inevitably lead to greater and greater dependence; and second, that this condition of dependence will lead to greater disrespect amongst people and the beginnings of particular cases that end in crisis, and even violence.

With political will and determined action, Canada could become the country where the democratic rights of Aboriginal peoples would be a leading example in the international community.

Indian, Metis and Inuit want to be heard. They want to be given the freedom to govern themselves based on the acceptable international norm of self-determination or self-government. I strongly believe that it is time for Canadian politicians to reassess the situation and make a genuine and sincere effort, not only to acquire a knowledge and understanding of self-government, but to take leadership and action in a concerted way with Aboriginal peoples.

Indian Treaties

Prior to the arrival of the Europeans, the indigenous nations of Indian and Inuit governed themselves according to their national norms and customs. They also made international alliances with other indigenous nations and carried on their international trade through treaties and agreements.

When the Europeans first arrived things did not change that much except for the exchange of new trade goods. Initially, the Europeans debated whether Indians were really "people" and whether they could ever be converted. A Papal Bull was finally released in 1537, stating that Indians were indeed "truly men".

The first phase of Indian-European relations established political and economic connections. With the onset of settlement in the 1600s, things began to change. By this time, trade goods from the South and the fur trade in the North were combined with the large scale accumulation of silver and gold from the middle Americas. This massive influx of gold and silver formed much of the basis for financing the major joint stock and chartered companies of the world. Many of the early agreements between Indian and European nations were made with these companies who were granted charters from the European countries. While some of these agreements exist in written record, many more have remained unrecorded. Some writers have stated that much land in the northeastern seaboard was improperly acquired during this period. The illegal and improper takeover of Indian land led to many conflicts during the 1600s.

The disputes led to the process of treaty-making which began in the 1600s and continued on into the 1900s. In 1664 the Two Tow Wampum Treaty with Haudenosaunee, (Iroquois) stated that each nation should coexist side by side in their own vessels and that neither nation would steer the other nation's vessel. Just prior to the *Royal Proclamation* of 1763, a Treaty with the Hurons was made in 1760. Other pre-Confederation treaties included Six Nations, 1784; Mississauga, 1784-1822; Chippewa, 1790-1854; the Robinson Huron and Robinson Superior, 1850; the Manitoulin Island Treaty, 1862; the Selkirk Treaty, 1817; and the Vancouver Island Treaties of 1850, 1852 and 1854. In the post Confederation period, the numbered Treaties were settled beginning with Treaty 1 in 1871 and culminating with Treaty 11 in 1921.[1]

Treaties, agreements and proclamations were also made with the Mic Mac in Nova Scotia in 1725, 1728, 1752, 1761 and 1762. Both the Treaty of 1713 and the Treaty of

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1752 explicitly stated that the Indians would have the free liberty of hunting and fishing. In addition to treaties of peace, friendship and the free liberty of economic pursuits, there was a provision for the payment of provisions on a half yearly basis. The Treaty of 1752 states: "That a Quantity of bread, flour, and such other provisions, as can be procured, necessary for the Familys and proportionable to the Numbers of the said Indians, shall be given them half yearly ...Receive Presents of Blankets, Tobacco, some Powder and Shott..."

The Indians of the day therefore agreed that the English could pursue their economic goals provided they made a reciprocal payment in the tradition of Indian nations. The fraudulent and illegal takeover of Indian lands was also recorded: "...the said Indians have made and do still continue to make great complaints that Settlements have been made and possession taken of lands, property of which they have by Treaties reserved to themselves by persons claiming the said lands under pretence of deeds of Sale and Conveyance illegally, fraudulently and surreptitiously obtained of the said Indians."

The Treaty therefore further stated: "...to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them. Do hereby strictly enjoyn and command..."

By these words, the representatives of the Crown demonstrated the strong position taken that treaties with Indians were not to be violated or broken. In recent Supreme Court decisions, the judges have ruled that the words of the Crown's representatives in treaties must be honoured and fulfilled, and a re-examination of these treaties will need to take place.

The *Royal Proclamation* was famous for its reaffirmation of principles related to treaty settlements. Just prior to this period, much of Indian land was taken illegally and fraudulently. Some of these agreements were done in secret, without public gatherings, with selected and co-opted "leadership". The Royal Proclamation states:

> And whereas Great Frauds and Abuses have been committed in purchasing lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any lands reserved to the said Indians, within those parts of our Colonies, where, We have thought proper to allow Settlement; but, that if at any time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our name, at some public Meeting or Assembly of the said Indians....

It was agreed that individuals could no longer purchase Indian lands in secrecy and that all land transactions would entail public meetings and assemblies in the tradition of Treaty-making processes based on nation to nation.

Metis and Inuit

During the early 1800s, the Metis emerged as a new Nation in western Canada. Although mixed bloods were born prior to this period, most were simply accepted into Indian society. Others became bilingual/bicultural and even multilingual, while still others became assimilated into the French or English traditions. The introduction of a more authoritarian and hierarchical society laid the groundwork for a greater degree of intolerance. Because many of the "mixed bloods" played a key role in the fur trade economy, a sense of new national identity was developing and, with the need for a sense of belonging that arises as a response to discriminatory treatment, the new Metis Nation was born.

By the time Confederation was formed, the Metis were an important force in western Canada. Riel and the Metis became involved in the creation of Manitoba as a province. A special provision, Section 31 of the *Manitoba Act*, provided 1,400,000 acres of land in order to extinguish the Indian title of the Metis. When the process of giving out the land was completed, 1,500,000 acres were given out, and approximately 80-90% of the land ended up being owned by speculators. These speculators were able to acquire land due to legislative changes that were improperly made without the consent of Parliament.

Over 100 years later, the Metis are still trying to find justice in our court systems. Apparently when the *Manitoba Act* was passed, it was given the official stamp of approval by the United Kingdom Parliament. If changes were to be made to the Act it would therefore require an amendment back in the British Parliament. Section 6 of the *Constitution Act, 1871* provided: "Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament insofar as it relates to the Province of Manitoba..."

Subsequent legislative changes on a number of federal and provincial statutes and orders-in-council passed between 1871-1886 made it possible for even children to transfer the title of land to speculators. The *Manitoba Act* has therefore been challenged. The plaintiffs have alleged that the legislation went beyond mere regulation and that

this alteration was contrary to the provisions of Section 6 which required Parliamentary consent. This case is still before the courts. The Court of Queen's Bench has rejected the initial position by the federal government and the federal Attorney General has appealed.

Traditionally, many Metis had been accepted into Indian societies so that when treaties were signed, many "half breeds" were signed in as part of the Indian Band. Treaty 3 negotiations went a step further and an Adhesion to Treaty 3 was made with the Half Breeds of Rainy River. Does this adhesion have implications for Aboriginal rights of the Metis today? Do Metis rights include the creation of adhesions to treaty? There has always been debate whether the Metis were considered, within the meaning of Indian, in a similar fashion to the Inuit under Section 91(24).

In 1982, the Metis were recognized as Aboriginal peoples and included at the federal level through Section 35. The present Manitoba case may put some substance behind the recognition and affirmation for Aboriginal rights as they relate to the Metis. Other than the *Metis Betterment Act* of 1938, and its updated revision in 1989 in Alberta, no other province has passed major legislation regarding the Metis. The future jurisdictional separation of powers by the federal, provincial and Metis people will be another unique challenge to our Canadian federation.

Of the three Aboriginal peoples, the Inuit were dealt with last in the Canadian context. It was not until 1939 that a Supreme Court decision made a ruling which included the Inuit within the meaning of the word "Indian" in Section 91(24) of the *Constitution Act, 1867*. The federal government's responsibility has been limited to the delivery of social and economic programs through the Department of Indian Affairs and Northern Development. In addition to a 1984 Agreement, another Agreement in Principle with the Inuit has recently been negotiated. The Inuit are demanding their Aboriginal rights be constitutionally entrenched.

Delegated Authority and Recent Policy

One of the most consistent and persistent features of federal Canadian policy is the colonial management of delegated federal municipalities under Section 91(24) of the *Indian Act*. Indians are asking for constitutionally entrenched self-government and the federal government continues to treat them simply as federal municipalities. This process has been taking place for some time. In 1871, the Deputy Superintendent of Indian Affairs stated: "...establishing a responsible for an irresponsible system, this provision, by law was designed to pave the way to the establishment of simple municipal institutions."

Following the signing of the Prairie Treaties, this objective was again confirmed in the *Indian Advancement Act of 1884* granting: "...certain privileges on the more advanced Lands of Indians of Canada with a view to training them for the exercise of municipal process."

The Special Joint Committee of the Senate and House of Commons on the *Indian Act* held hearings in 1946 and 1948. The goal of delegated federal municipalization was again confirmed: "...and that band councils be granted powers to conform roughly to those of a rural municipality."

It appears that things have not changed much in over 100 years. The key policy concepts relating to land revenue and trusts, along with devolution and alternate funding arrangements without the constitutional backing of self-government, still puts everything in a colonial framework. What Aboriginal people are asking for is constitutionalized self-government, not just self management.

Two major policy developments which helped mobilize Indian people in defence of their rights were the White Paper of 1969 and the Nielsen Task Force Report of 1985. Both wanted DIAND dismantled and the services transferred to provinces. Cutbacks to Aboriginal peoples and their organizations, along with an attack on their communications system and the right to education, have created a lot of hardship. This has occurred even though there were clear statements that the Nielsen recommendations would not be followed.

Recent Supreme Court Decisions

The major bright spots in the past few years have been the passage of Section 35, along with the recent Supreme Court decisions. Section 35, which has laid the groundwork for recent decisions, states: "35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada."

At the level of the Supreme Court, the Guerin or Musqueam case was decided in 1985. In 1958, the Crown had leased 162 of the 417 acres of the Musqueam Indian Reserve to the Shaughnessy Heights Golf Club for a term up to 75 years. The terms of the lease negotiated by the Crown were much less than those approved by the Band at the surrender meeting. The Supreme Court ruled that the Crown had a fiduciary or trust obligation to the Indians with respect to the land. It also stated that the recognition and affirmation of Aboriginal rights must be defined in light of this historic trust relationship. The source of this fiduciary obligation included the *sui generis* nature of Indian title and the historic powers and

responsibilities assured by the Crown. Sui generis means having its own origin and not originating with the Crown or Parliament.

Another recent case was the Sparrow decision of May 1990. In May 1984, Ronald Edward Sparrow was charged with using a drift net that was longer than that permitted under *The Fisheries Act*. He was convicted at trial and his appeal dismissed at County Court. In 1987, the Court of Appeal agreed that Mr. Sparrow was exercising his Aboriginal right. The Supreme Court agreed with the Court of Appeal. It was made clear that a liberal interpretation was demanded and that the first consideration was the trust relationship and responsibility of the government. The decision states that the word "existing" in Section 35 means "unextinguished" rather than exercisable at a certain time in history. In other words, these existing rights are affirmed on a contemporary basis rather than being "frozen" in time.

The Sparrow case also gave priority to the Indian food fishery over other user groups. It was also made clear that the Aboriginal right is not to be confused with the method by which the right is exercised. The Aboriginal right is not to take fish by any particular method, but to take fish for food purposes. The decision also placed a measure of control over government conduct and a strong check on legislative power. The decision furthermore states: "Historical policy on the part of the Crown can neither extinguish existing aboriginal rights without clear intention nor, in itself, delineate that right."

Therefore, the decision brings new challenges and direction to Parliament and provincial Legislatures.

Another very important decision was the Sioui case. Chief Conrad Sioui and his three brothers were charged under a Quebec law for cutting down trees, camping and making fires in undesignated places in a park. The Siouis argued that the treaty document of 1760 protected their ancestral customs and religious rites. They stated that the Quebec law did not apply because of Section 88 of the *Indian Act*. In Section 88, one of the important exceptions on laws of general application which apply to Indians in a province is that they are "subject to the terms of any treaty..."

It seems clear that politicians are behind the times when it comes down to the issue of Treaty Aboriginal rights and self-government. The Supreme Court decisions have been forcing governments to try and catch up ever since the question of Aboriginal rights was brought to the forefront by the Supreme Court in the Calder case in 1973. The future challenge for politicians is to develop the political will to act in constitutionalizing self-government.

Issues Relating to Self-government

The central issue in the debate on self-government is jurisdiction. On the one hand, the federal government and the provinces see Aboriginal governments as delegated, dependent authorities, On the other hand, Aboriginal Nation governments see their jurisdictional authority to govern as inherent and independent. A discussion paper at the Chiefs Summit II in Winnipeg, August 12-15, 1990, states: "Self-government does not necessarily imply national independence but rather a new (or reaffirmed) structure within the Canadian system."

It is clear that in the context of self-government, the Chiefs are not talking about absolute sovereignty, but of a third order of government for First Nations with a unique jurisdiction to be recognized and affirmed.

Aboriginal people have made it clear that the existing delegated dependent system of a federal municipality is too much in keeping with the old colonial order. Providing a few extra duties and responsibilities does not alter the fact that the authority is delegated and can be taken away or modified by the federal or provincial governments at any time. The record of this colonial dependent model has been largely a failure. It has appeared successful in certain cases because Indian governments have decided to assert their inherent right to govern. This inherent right to govern now requires a new constitutionally entrenched process of co-operation by the governments.

The record of Aboriginal control on institutions such as education has been highly successful. The number of university graduates in many colleges has increased substantially ever since a certain level of Indian, Metis and Inuit control was established. Joint co-operation or co-determination between Aboriginal peoples and public governments has reaped benefits for both sides. Building on success that is based on democratic principles will require nothing less than greater control and jurisdiction by Indian, Metis and Inuit. The position taken by the First Nations at the Chiefs Summit in Winnipeg is stated clearly in Discussion Paper #1: "The essential teaching of the (Meech Lake) Accord's death is that never again can non-aboriginal governments practice the politics of exclusion. Never again can they deny the legitimacy of the governments of the First Nations. First Nations asserted, and will continue to assert their inherent right of self determination."

The development of Aboriginal governments across Canada is varied. There are discussions of various options. A background paper entitled "Methods of Formal Amendment to the Constitution" August 9, 1990 outlines four possibilities:

- Multilateral negotiations through First Minister's Conferences;
- Binational negotiations between the First Nations and the Federal government;
- Trilateral negotiations between First Nations, Canada and a province; and,
- Bilateral negotiations between First Nations and provinces.

Because Canada is a federal nation, where the main divisions of power between the federal and provincial governments are outlined in Sections 91 and 92 of the *Constitution Act of 1867*, nothing less than a challenging process of negotiation will be required. A combination of the above four processes with variations based on the historical precedents and practices in each situation will determine what will happen in the future.

It is clear that Treaty Indian governments view their jurisdiction over reserve land as sovereign Indian territory. In a report to the Chiefs of the Federation of Saskatchewan Indians, Nations and Northern Affairs Canada in June, 1990, The Lands, Revenues and Trusts Review Response Unit, states: "Indian leaders represent the existence of Indian law and Indian government in the International Accord and discussions with the Crown must not permit encroachment by Canada upon sovereign Indian territory or jurisdiction."

Treaty Indian governments are also very strong on the issue that treaties are bilateral agreements between Treaty Indians and the federal government.

Other issues that have been raised with respect to self-government include citizenship, language and culture, land and resources, economic development and environment, taxation, finance and fiscal relations, as well as education, health and social services.

Conclusion

Recent decisions by the Supreme Court of Canada will require immediate and long-term action on new policy development with regard to Indian, Metis and Inuit peoples. Federal and provincial governments will have to sit down and meet with Aboriginal leadership to deal with the new changes. The recent changes at the highest court in our land are extremely important and need to be reinforced by positive government action. The recognition and affirmation of Treaty and Aboriginal rights has been established in our *Constitution Act of 1982* and reaffirmed in Supreme Court of Canada decisions. I believe that, as political leaders in this country, we can begin to build and develop the new phase that was started in 1982.

We need to be reminded from time to time of the tremendous need to improve the lives and living conditions of Aboriginal people. Let us not be defensive about the mistakes that we have made. Let us accept this as a challenge, not only to our political abilities, but also to our humanity.

The existing rights, agreements, covenants and treaties must be honoured and respected. We also need to work together in a more positive, practical and co-operative manner. We must not allow the seeds of despair and disrespect to arise simply because of insufficient action or lack of interaction. Positive leadership is required.

Parliamentary democracy requires democratic input from all its citizens. The First Peoples of this land cannot be excluded from the important decisions that directly or indirectly affect their lives. With due respect to Treaty and Aboriginal rights, Canada as a Parliamentary democracy and as a federal state, must work toward the full constitutional entrenchment of self-government for the Indian, Metis and Inuit. We need to work together toward this goal, so that our own grandchildren will be able to live with greater respect and good will. Constitutionalized self-government with full democratic participation by the Indian, Metis and Inuit, must be part of the new vision for Canada.

Many Aboriginal people feel very strongly about the issue of Aboriginal rights and constitutional entrenchment of self-government. A statement made by Elijah Harper, an Aboriginal parliamentarian from Manitoba, at the Chief Summit on July 4, 1990, generally reflects these sentiments. He emphasizes the need for Aboriginal involvement in every aspect of Canadian society, along with the affirmation and promotion of Aboriginal culture and values. "...I've been honoured to represent my People in the Legislature. We should take every opportunity to become involved in every aspect of Canadian society to advance our own interests; whether it be the Provincial Legislature, whether it be Parliament, whether it be municipal government..., whether it be in reserves, and also internationally...."

Mr. Harper furthermore stated: "In order to defend yourself, you have got to know how the system works, why it works, and why it does things the way it does. And do not be afraid when you go to these institutions to become involved, because your roots, your culture, your beliefs and values will carry you through."*

Notes

1. A few of the early treaties, proclamations and agreements are reproduced in the book written primarily by Douglas Sanders in 1970 and reprinted and co-edited by Peter Cumming and Neil Mickenberg in 1972. This book, *Native Rights in Canada*, published by the Indian-Eskimo Association of Canada in association with General Publishing was the first major accessible work on Aboriginal rights and early treaties in Canada.