
Self-Government for Aboriginal People

by Christopher McCormick

By examining some of the background factors surrounding the issue of Aboriginal self-government, we can isolate some of the problems that have surfaced in the discussions and negotiations of the last ten years.

A series of First Ministers' Conferences on Aboriginal matters were held between 1982 and 1987. That process arose out of the patriation of the Canadian constitution and the agreement made between national representative Aboriginal organizations and the federal government. That agreement, which was constitutionalized in Section 37 at the time, agreed to hold a First Ministers Conference within a year of patriation in order to "identify and define Aboriginal and Treaty rights to be included in the constitution."

The agenda for the meeting, and the process leading up to it made it very obvious, that a single meeting could not even begin to deal with the many issues involved. The initial FMC on Aboriginal matters in 1983 could only agree to amend the constitution so that three further conferences would be held over the next five years. Two years later, the lack of progress on any of the substantive issues on the agenda forced all of the participants to agree to temporarily alter the agenda.

Because so many of the agenda items fell under the category of jurisdiction and political decision making, it was agreed the last two years would be spent developing an amendment on Aboriginal self-government which might resolve many of the other outstanding agenda items.

Thus an amendment on Aboriginal self-government was expected to become a kind of umbrella clause which would absorb some of the more contentious issues on the table. That attempt failed. It failed because the governments involved simply did not have the political will to do what needed to be done, and I will talk about that again later. And it failed because those same

governments considered, in spite of promises in 1982, that the concerns of Quebec had a greater priority on the national agenda. In short, all attempts to achieve a constitutional base for aboriginal self-government have failed. The question to be explored is why that is so.

Let's take a hard look at what is really happening when Aboriginal Canadians talk about self-government to non-Aboriginal Canadians. Over the years a kind of pattern has surfaced over and over again.

There are three elements in this pattern. The first deals with perceptions, with the way the two communities – Aboriginal and non-Aboriginal – see each other and how they each see the issue of self-government. The second is more structural in that it deals with the political environment in which these perceptions interact. The third group, relates specifically to the Canadian constitution and its legal technicalities, including legal perceptions and political realities. We separate these things out into groups so we can talk about them in a clear and understandable way, but they are very much inter-related and interactive.

In my experience, one of the most prolific problem-generating factors in this situation is the difference in how Aboriginal and non-Aboriginal people see, or think they see, each other. These differing perceptions often go unspoken and can easily become a kind, unintentional breeding ground for misunderstanding. Three of these kinds of problem-creating perceptions strongly influence how both the Aboriginal and non-Aboriginal community perceive the issue of Aboriginal self-government.

The first of these perceptions has been the basis of government policy toward Aboriginal peoples since long before Confederation. It is the simple but incredibly destructive assumption that Aboriginal people are, or will eventually become, extinct.

Government policy has always been designed to eliminate by assimilation the Aboriginal peoples of Canada. This is a very persistent theme in non-Aboriginal thought and literature dealing with Aboriginal people. Just think of how many times you have read in school text books or heard in documentary films, the phrase "vanishing race" or "disappearing

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redman" applied to Aboriginal North Americans. To put it another way, how is that we don't hear the phrase "vanishing Englishman" or "disappearing Frenchman."

The fact is, the Aboriginal population is growing at four times the rate of the general population, while English and French populations are becoming increasingly outnumbered by other ethnic populations.

Yet somehow the notion persists that Aboriginal people in Canada are a temporary anomaly in the Canadian mosaic, while French and English are recognized as founding peoples. It is very difficult to convince people who have this "vanishing race" perception locked into their minds that Aboriginal people in Canada have the right to ongoing and permanent forms of self-government. On the other hand, Aboriginal people are convinced they have an obvious right to self-government because they—unlike the English and French immigrants—belong on this continent, the Creator placed them here.

That brings us to the second "problem perception" which is related to a political numbers game. Most of you think of Aboriginal people in Canada as a demographically insignificant minority, and you may have seen statistics that Aboriginal peoples are only two percent of the Canadian population. That particular number is a reflection of the number of Aboriginal people in Canada who are registered under the *Indian Act*—somewhere between five and six hundred thousand. A small number indeed next to 25 or 26 million other Canadians!

By the same token, if we were to count English and French populations in Canada on the basis of those whose only predecessors are registered as being born in France or England, how many "Status" French and English Canadians would we have? In Canada, some people who were illegally deprived of their status under the *Indian Act* are able to apply for reinstatement under federal legislation—Bill C-31. To qualify those people must have documentary evidence that they are descended from registered Indians or Indians who were entitled to be registered. Wouldn't it be interesting to pass a European Bill C-31 and include only those who could prove they were descended from French and English passenger lists to the "new World"? My guess is that the number would be surprisingly small.

Most Aboriginal people in Canada are not now and never will be registered under the *Indian Act*. There are

thousands of Indian people who are not registered under the *Indian Act*. A conservative rule of thumb we have used for years is three unregistered Indians for every Indian registered under the *Indian Act*. Figures in Ontario indicate that for every person who applies for registration under Bill C-31, there are four others who do not. There are Metis people all across Canada who have no relationship to the *Indian Act*. The Prime Minister tells us there are 80,000 Metis in Manitoba alone. I would suggest there are at least that many more in the rest of Canada. And there are the Inuit, at least 25,000 of them, who are quite distinct from the *Indian Act*.

How many people who call themselves French or English in Canada can actually name an ancestor who lived in England or France? Yet the rights of those people to govern themselves in the context of an English or French culture is never questioned. In fact, it is constitutionalized! When Aboriginal people and their descendants propose they receive the same treatment in terms of self-government for their cultural communities, they are asked to "prove" that they are Indian, Inuit, or Metis, and define what is meant by self-government.

Some years ago, the federal Secretary of State commissioned a study on the demographic characteristics of Metis and non-Status Indian peoples. In the context of his report in 1978 Christopher Taylor estimated that as many of 15% of the Canadian population had some Aboriginal ancestry, whether they knew it or not, or whether they admitted it or not.

The point is that if the same criteria that has been and is now applied consistently to English and French people were similarly and equitably applied to Aboriginal people, we would comprise at least 15% of the population. And, as any politician knows, come election time 15% is a force to be reckoned with.

The real issue here is not so much a question of numbers as it is a question of the basic human right to self-determination. Aboriginal people in Canada are unique peoples, distinct on the north American continent.

By that fact alone, we have the right to self-determination and to self-government. By using numbers against us, those who oppose Aboriginal self-government simply admit their denial of basic human rights.

The third of the perceptual problems deals with the issue of capability in the context of self-government. Within our own lifetime, Indian people in Canada were considered to be wards of the state and, as such, were seen as primitive savages incapable of handling their own affairs. Unfortunately, that kind of thinking is still very much alive in government bureaucracies who deal

with Aboriginal people in Canada and still very much a part of the *Indian Act*.

Keep in mind that our children were deliberately and systematically divorced from their own cultures, and Indians were consciously excluded from the social, economic, and political life of Canada until 1962. Because of this, there was a period when bureaucrats could rationalize the idea that Aboriginal people were not ready to govern themselves, in spite of thousands of years of evidence to the contrary. On the one hand, Aboriginal peoples were kept in ignorance of the modern political system, and on the other non-aboriginal peoples were at least as ignorant of the modes of Aboriginal political process.

Rationalizations based on mutual ignorance can no longer stand up to scrutiny. As George Erasmus of the Assembly of First Nations said at the FMC in 1985, considering the socio-economic demographics of so many Aboriginal people today, we couldn't possibly do a worse job than non-Aboriginals have done on our behalf over the last 100 years.

And thanks to the hundreds of presentations made by various Aboriginal groups in the FMC process, the political leaders of this country can no longer plead ignorance about the Aboriginal aspiration for modern self-government. Many Aboriginal peoples, particularly in the west and north still govern themselves, even if they have to "go underground" to accomplish it. Many other communities have educated themselves to the point where they are fully prepared to re-assume the functions of self-government that were arbitrarily and unilaterally stripped from their grandfathers. Still others are beginning the process of assessing and asserting their long-denied human and political rights.

The bottom line is that "capacity" for self-government, or the lack of it, should not be an overriding factor in the development of Aboriginal self-government. It might be a factor in terms of training and education issues in a self-government agreement – but it must not be allowed to become a determining or dominant factor in whether or not self-government should exist and be accommodated in the Canadian political system.

If conceptual problems are hard to isolate because they are difficult to identify and describe, political problems are difficult to deal with because the opposite is true. They are so obvious! As a result people take them for granted and apply them unthinkingly in situations where they are not even remotely appropriate. In a political system where survival depends on the number of voters an individual politician can attract on a given election day, we can expect corresponding distortions of attitude and political positioning.

On election day, politicians want to attract the greatest number of voters. Even this simple situation often works against the interest of Aboriginal peoples. Apart from those few politicians who come from areas where the greatest number of voters are Aboriginal people, most politicians hold two ideas which tend to marginalize Aboriginal people in the Canadian political system.

Some think that Aboriginal people are too few and too widely scattered to be significant in any final vote count. This is particularly true at the national level. Others believe that most Aboriginal people, even where they may be a majority of voters, don't actually vote. When these two perceptions are combined with the attitudes I mentioned earlier, it's not much wonder that one of the most serious obstacles to Aboriginal self-government is the lack of political will on the part of current federal and provincial governments to create a framework in which Aboriginal self-government can become a reality. It is simply not a high enough political priority among Canadian governments to make it happen.

Only the most die-hard, neo-colonialist would deny that the indigenous people of a country today have the international human right to self-determination. Polls tell us that most Canadians support the principle that Aboriginal people in Canada should be self-governing, at least on their own territories. It seems Aboriginal people are being asked to wait for Canadian politicians to catch up with public opinion.

A little earlier I briefly outlined the process that resulted in the recognition of Aboriginal people and their Aboriginal and treaty rights in the Canadian Constitution. Aboriginal leaders supported the patriation of the Constitution on the constitutionally entrenched condition and promise that Aboriginal and treaty rights would be identified, defined, and included in the constitution. This was the minimum degree of assurance that we required to remove our opposition to patriation and risk the loss of our original relationship with the British Crown.

This minimum was made necessary for the very reasons we have already discussed. It is precisely because both Federal and Provincial laws have been, and are being, used to marginalize and oppress the political aspirations of Aboriginal people, that Federal and provincial legislation is now suspect as a basis for establishing our self-government. It is because the current political system in Canada is so heavily geared toward large voter blocks, that guaranteed representation in current political institutions is seen as insufficient to accommodate Aboriginal self-government requirements.

It is precisely because Aboriginal people are perceived by the current political system as being insignificant, that

the full weight of constitutional law is necessary to counter that perception. To put it simply, if the patriated Canadian constitution is to be the highest law of the land, then it becomes critically necessary to recognize and to accommodate the political reality of the First Peoples of Canada in that law. That necessity, inevitably, raised a whole new set of problems.

Without getting too technical or legalistic, I want to identify three areas in the constitutional reform process that are obstacles to achieving constitutional entrenchment of Aboriginal self-government. Two, deal with the current wording and structure of the existing constitution and the other deals with the constitutional reform process itself.

There are many problems, certainly, but there are just as many ways to solve them. The Aboriginal people of Canada have the answers to these problems. The real question now is, do Governments have the ears to listen?

When the Fathers of Confederation drafted the British North America Act of 1867, it never occurred to them to include Aboriginal people in the process. In fact there are only seven words in the original Constitution which even refer to Aboriginal people. That wording is in paragraph 24 of section 91 which gives the federal government exclusive jurisdiction to legislate for "Indians and Lands reserved for Indians." Indians were considered to be such a minor issue at the time that the first government budget estimates didn't even include money for the Department of Indian Affairs.

The major intent of the original constitution was to take all available legislative and governing powers (except for

amending the Constitution) and divide them between the Federal government on the one hand, and provincial governments on the other. That is what section 91 and section 92 of the *BNA Act* does. The problem it creates is obvious. There is no room in the current Canadian constitution for a third order of government. Every governing power in Canada within the scope of the Canadian constitution must derive either from the Federal or a Provincial government. For many of those governments, any other arrangement, such as a third order of Aboriginal government, would mean destroying the fabric of Canadian constitutional law, if not Canada itself. And that is exactly the line that governments opposed to Aboriginal self-government took during the FMC process on Aboriginal matters.

Anyone who has studied the Constitutional reform process in Canada since patriation in 1982, knows that the amending formula to change the Constitution is clumsy, ambiguous and unworkable. Unanimity is quite impossible. Any mechanism which requires unanimity on anything among 11 or 12 or 17 players—depending on which constitutional reform process you are talking about is impossible. The process of holding First Ministers Conferences, and the dozens of officials and Ministers meetings they require, as a mechanism for trying to achieve agreement even between seven out of ten provinces has only worked once. Clearly this process itself is part of the problem and not the solution.

In closing, let me repeat that most of the so-called problems with Aboriginal self-government exists primarily in the minds of those people who are looking for a rationale to avoid it. Indeed, if one were to concentrate exclusively on the misconceptions far too many Canadian politicians have of Aboriginal people, self-government would appear to be both impractical and unnecessary.*