ABORIGINAL SELF-GOVERNMENT

BEADS AND TRINKETS TAKE ON NEW FORM IN FEDERAL CONSTITUTIONAL PROPOSALS FOR ABORIGINAL PEOPLES IN CANADA

Larry Chartrand

INTRODUCTION

Notwithstanding the changes in form from beads and trinkets to that of written words, one thing remains perfectly clear, Canada continues to bargain in bad faith. The latest round of Constitutional proposals by the federal government demonstrates this more clearly than ever before.

Unless the federal government makes a serious attempt to revise its position on the fundamental aspects of the proposals, the outcome of this round of constitutional reform will again be a deadlock. The question will then become: to what extent will Canadians put up with living in a country which, on the international stage, remains in the dinosaur age as regards the recognition of aboriginal rights?

This commentary will focus primarily on what I perceive to be the most contentious issue in the federal proposals. Self-government is likely to prove to be the most divisive issue of all the recommendations regarding aboriginal peoples.

I. PARTICIPATION OF ABORIGINAL PEOPLES IN CONSTITUTIONAL REFORM

Before I begin to look at the substantive proposal relating to self-government, it will be helpful in understanding the federal government's position if we examine proposal three. It reads as follows:

3. Aboriginal participation in current constitutional deliberations:

The Government of Canada is committed to ensuring that aboriginal peoples participate in the current constitutional deliberations.¹

Besides the apparent vagueness of the proposal as to the manner of participation (consultation vs. negotiation), the proposal assumes that the federal government has a legitimate choice not to be committed to aboriginal participation. One gets the distinct impression that Ottawa is simply doing a favour for aboriginal peoples. This attitude on the part of the government ignores the fact that aboriginal consent to the *Constitution Act, 1982* was contingent "not only upon the recognition and

affirmation of their rights, but also upon their participation in defining those rights."² In other words, commitment or no commitment, the aboriginal peoples have a right to participate in constitutional discussions: it is not an issue. First Nations regard themselves as equal partners with the federal and provincial governments. Proposal three should not even exist. One does not see a proposal stating that the Government of Canada is committed to ensuring that Newfoundlanders participate in the current constitutional deliberations. Thus proposal three is offensive and redundant. It represents an attitude that runs throughout the entire package of proposals. Ottawa views aboriginal peoples as nothing more than a special interest group. This attitude must change if there is going to be any chance of reaching an acceptable agreement.

II. ABORIGINAL SELF-GOVERNMENT PROPOSAL

Proposal four contains the proposal regarding aboriginal self-government. The provision reads as follows:

4. Aboriginal Self-government.

The Government of Canada proposes an amendment to the Constitution to entrench a general justiciable right to aboriginal self-government within the Canadian federation and subject to the *Canadian Charter of Rights and Freedoms*, with the nature of the right to self-government described so as to facilitate interpretation of that right by the courts. In order to allow an opportunity for the Government of Canada, the governments of the provinces and the territories, and aboriginal people to come to a common understanding of the content of this right, its enforceability would be delayed for a period of up to 10 years. The Special Joint Committee should examine the broad parameters of the right to be entrenched in the Constitution and the jurisdictions that aboriginal governments would exercise.³

Aboriginal peoples regard self-government as an "inherent" right based on the "historical reality that aboriginal peoples have been here, living in Canada since

long before the Europeans arrived. An amendment which cannot recognize this reality is *flawed and offensive*.⁴ The right to inherent self-government has not been extinguished. There is nothing in Canadian law to suggest that the right has been extinguished.

The fact that the federal government has authority under s. 91 (24) of the constitution to legislate with respect to Indians does not mean that Indians lost their right to self-government. Indeed, it would be inconsistent with the views of the Fathers of Confederation to suggest otherwise. The original purpose behind s. 91 (24) was to legislate for the benefit and protection of Indians.⁵ No doubt, it would not be beneficial to the Indians for the federal government to unilaterally extinguish the Indian right to self-government.

Nor have the treaties resulted in the extinguishment of the right to self-government. Rather, they reaffirmed the "protective" relationship of the Crown and the continuing right of Indians to govern themselves. Treaty six, for example, provide that the "Chiefs would continue to 'maintain peace and good order between each other, and also between themselves and other Tribes of Indians, and between themselves and others of Her Majesty's subjects'".⁶

Thus, if the right has not been extinguished, it continues to exist. Since it continues to exist, it is a constitutionally protected right under s. 35 (1) of the *Constitution Act, 1982*. Section 35 (1) reads as follows:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Aboriginal peoples argue that the right to self-government already exists in the constitution and that the content of that right is not a mystery. The content can be determined by a careful unbiased analysis of the historical relationship between aboriginal peoples and the colonial powers. Recognition of this fundamental relationship does not prevent the parties from re-negotiating the relationship to conform with modern conceptions of the relationship that Canadian and aboriginal peoples now desire.

However, re-negotiation of an existing right is entirely contrary to the federal government proposal that the right to self-government should be entrenched into the constitution. If it already exists under Canadian and international law, why must it be entrenched?⁷

Although the federal government has recognized that aboriginal peoples were historically self-governing, the position appears to be that Ottawa does not now

consider aboriginal peoples to have a right to self-government. This view is obvious throughout the federal proposals by the very language used. For example, "Aboriginal government" is recognized in the proposals both in the past tense⁸ and in the future tense,⁹ but nowhere does the federal government use the wording of "aboriginal government" in the present tense. When speaking of the present tense, the proposals use the wording aboriginal peoples, not aboriginal governments or First Nations. This use of language supports the view that aboriginal people are simply regarded by the federal government as a special interest group; possessing no greater powers than ordinary Canadians. The following paragraph found in the federal proposals confirms this view:

Like all Canadians, aboriginal peoples look to the Constitution for a reflection of their vision of Canada and for a definition of their place within the Canadian federation...¹⁰ (emphasis mine)

Obviously, there is a considerable gulf between the federal proposals and the aboriginal position. These differences are so fundamental that any agreement will require considerable compromise.

Considering recent events, such a compromise seems unlikely. The federal government, speaking through Joe Clark, has stated that there is some room to negotiate, however, the basics of the proposals will remain as they stand.¹¹ On the other hand, the Chiefs of the Assembly of First Nations rejected the federal proposals to entrench the legal right to self-government in the Constitution. Instead, the immediate recognition by Ottawa of an inherent right to self-government is required.¹² Recently, it was reported that Ottawa may consider agreeing to inherent self-government, but it must be described within the Canadian federation.¹³ Does this statement by Ottawa suggest progress is being made? It depends on what Ottawa means by describing the right "within the Canadian federation". Does this mean that the existing division of powers scheme contained in sections 91 and 92 of the Constitution will be maintained? If so, this "progress" does not recognize aboriginal government as a legitimate third order of government in Canada. This would be unacceptable to aboriginal peoples.

Aboriginal people have a moral and legal right under Canadian and international law to require Canada to recognize an inherent right to self-government of Aboriginal peoples as equal partners in the federation.¹⁴ The federal government's position is nothing short of a simple re-affirmation of colonial superiority, an attitude which has been time and time again discredited as pure racism.

The self-government issue may be one of the most contentious problems that will be faced by Canadian and aboriginal peoples in trying to come to an agreement. However, it is by no means the only problem with the federal proposals. The double standard between Québec's distinctiveness and Aboriginal peoples' distinctiveness is going to be a major issue. The "justiciability" of a self-government right is also of considerable concern to Aboriginal peoples as "Canadian courts have not been overly sympathetic or understanding of our traditions and culture."¹⁵

These, and other, contentious issues will no doubt require considerable effort and negotiation before a consensus is reached. The number of issues and the gulf between them leads one to wonder whether the federal government is serious about reaching an agreement at all. Why else would there be so many contentious issues and such great gulfs between respective positions placed in the federal proposals in the first place? Is it because the federal government is not serious about aboriginal rights?

There must come a time when the Canadian government and Canadian people come to respect the First Nations of this land. We can wait no longer for non-native society to become "aware" of Aboriginal people and their history, culture and indispensable role in building the Canadian state, a state which is esteemed throughout the world as one of the great pillars of human rights and democracy.

To continue to ignore the fundamental role of First Nations as equal partners in Confederation is to continue to bargain in bad faith as has so often been the case since the blundered attempt by Columbus to locate India in 1492.

LARRY CHARTRAND, Director, Indigenous Law Program, Faculty of Law, University of Alberta.

1. Canada, *Shaping Canada's Future Together: Proposals* (1991) at 11.
2. Ira Barkin, "Aboriginal Rights: A Shell Without the Filling" (1990) 15 *Queens L.J.* 307 at 321.
3. Canada, *supra*, note 1 at 11.
4. Indigenous Bar Association (Constitutional Committee), *Presentation to Joint Parliamentary Committee on a Renewed Canada* Dec. 18, 1991, at 2 [unpublished].
5. Barkin, *supra*, note 2 at 309, 312.
6. Indigenous Bar Association, *supra*, note 4 at 3 - 4.
7. For a review of recent international law changes regarding aboriginal self-determination see: Russel L. Barsh, "Aboriginal Rights And Canadian Credibility" (1991) 2 *Human Rights Forum* 5.
8. Canada, *supra*, note 1 at 12.
9. *Ibid* at 11. (proposal 4)
10. *Ibid* at 6.
11. Cooper Langford, "Ottawa prepared to listen says Clark" (1991) 9 *Windspeaker* at 2.
12. Jack Aubry, "Native Separation 'an Option'", *Edmonton Journal* (27 October 1991).
13. Peter O'Neil, "Terms of Native Self-Rule Open to Debate", *Edmonton Journal* (30 December 1991) A3.
14. Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People, Vol. 1* (Winnipeg: Queen's Printer, 1991) at 115-188.
15. Indigenous Bar Association, *supra*, note 4 at 7.

Some authors include:

J.P. Meekison on Canada's Constitutional Options

Charles Taylor on Can Canada Survive the Charter?

Greg Craven on The Crisis of Constitutional Literalism in Australia

Michael Asch on Aboriginal Self-Government and the Construction of Canadian Constitutional Identity

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