

NEGOTIATIONS FOR SELF-GOVERNMENT

THOUGHTS ON CONSTITUTIONAL AMENDMENTS RECOGNIZING AN
INHERENT ABORIGINAL RIGHT TO SELF-GOVERNMENT

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INTRODUCTION

This brief paper outlines what I consider the *minimum position of the Canadian state ought to be* with respect to Aboriginal political rights. It should be seen as providing a basis for negotiations between Canada and Aboriginal Nations as to the development of confederation. It is the position I believe ought to have been taken by Canada in the federal government's original proposal, but was not. In fact, it is my view that, were the federal government and other governments to accept the kind of proposal developed here freely and quickly, there would be time to develop a negotiated position amongst the parties between now and the time final constitutional proposals are tabled. So I am calling for quick action.

At the same time, I recognize that Canada, at least under the present federal government, is not likely to take the route of unilateral change toward the ideas put forward here. Thus, they will need to be advanced by others. In this context, it would be especially helpful to see support from non-Aboriginal citizens and other political parties. In fact, what is advanced here is a position that I have thought through as a non-Aboriginal Canadian and I provide it as a voice from this "side" in what must, ultimately, be a dialogue between non-Aboriginal Canadians, Aboriginal Nations, and the Canadian state.

BACKGROUND

It is clear that Canada is founded on the premise that, before the arrival of Europeans, no organized societies were in existence. This is reflected in the manner in which the Canadian constitution, both of 1867 and 1982, describe the founding of the country, in government policy and in court decisions, including recent decisions of the Supreme Court of Canada (*R. v. Sparrow*).

This proposition means that Canada is founded on a premise that devalues people it describes as fellow citizens and one that follows a line of reasoning quite common during the colonial period. It is a line of reasoning that Canada itself has attacked most strongly in the international arena, as for example, in its denunciation of apartheid in South Africa. It must be

changed if we are to be a people who have built a constitution on the basis of fundamental values of political morality, such as the assumption of the inherent equality of all peoples.

In short, we must seek to change fundamentally the basis upon which Canada defines its legitimacy in the face of claims by Aboriginal Nations (these include the First Nations, the Metis Nation and the Inuit). This change, in my view, includes two fundamental components. The first is to unreservedly accept the premise that Aboriginal Nations were sovereign at the time Europeans first arrived. This is, of course, self-evidently the case and, indeed, it is supported by the approaches taken to early treaties and other documents that indicate relationships between the British, Dutch, French, and Americans and Aboriginal Nations. It is reflected in interpretations of later treaties, such as Treaties 8 and 11.

Second, it is important to accept the consequence that, given the first proposition, the only constructive way to conceptualize the joining of two independent nations into a confederation is through the free will of each. Thus, it is necessary to acknowledge that, notwithstanding the existence of Canada, Aboriginal sovereignty cannot be modified except through their own "free will", and thus would most likely be the result of a process of negotiations out of which flows an agreement in the form of a treaty between nations. As a matter of historical interpretation, it is important to understand that the language of the written treaties in those places where they state an Aboriginal Nation has "ceded" sovereignty is not generally accepted as correct by Aboriginal Nations. Rather, in general, they would suggest, as a very recent discussion paper of the Assembly of First Nations that was addressed to "Elders, First Nations Citizens, Chiefs and Canadians", said (1991:23):

First Nations are sovereign peoples within Canada and within its provinces and territories, including Québec... . We never surrendered this sovereignty; it continues today... . First Nations have always related to the other co-founding nations of Canada on a sovereign, equal nation-to-nation basis.

This is a proposition with which I agree.

CONSTITUTIONAL AMENDMENTS

I believe that an appropriate approach to a constitutional amendment on the topic would be based on Canada replacing what is now on the table with language something similar to what is contained in the following clauses:

1. Canada recognizes and affirms that Aboriginal Nations were sovereign at the time of first European contact.
2. Canada recognizes and affirms that, notwithstanding the existence of Canada, Aboriginal Nations retain, at the minimum, an inherent right to self-government.¹

Given that I believe these amendments (or ones like them) should have been on the table at the outset along with the other proposals brought forward by the federal government, it follows that they need to be passed immediately and should not be subject to a ten year negotiations framework, or any other process, that would delay their implementation.

DISCUSSION

Two important values of this approach are that it provides clarity upon which to build a relationship and it builds this on the basis of a thesis of equality of peoples. As such, it moves Canada clearly away from the colonial theses which up to this point have driven our constitutional ideology and, thus, provides a more appropriate way to construct our future relationship than now exists.

The proposal does not include more specifics because I do not wish to preempt what is to be negotiated. However, I advocate strongly that among the implications that flow from these proposals are guarantees of an adequate land base, just settlement of outstanding claims, and sufficient funding to enable the governments to function. Without such guarantees, the proposed amendments would be hollow and merely symbolic.

At the same time, I recognize that there will be many questions raised about implications that flow from the free acceptance of these propositions by the people of Canada and the Canadian state. Such matters will have to be addressed through negotiations and possibly by further constitutional amendment. Until they are completed, the unknowns are likely to produce many fears among non-Aboriginal Canadians, including those who have good will towards their resolution. I believe that these fears should be expressed and put on the table to discuss with Aboriginal Nations in a spirit of good will.²

I also believe that many Canadians, even those with good will, will avoid supporting these kinds of amendments because of a fear that the result might lead to the deligitimization of Canadian sovereignty. For example, the government has apparently propounded this viewpoint when it expressed concern that acceptance of "an inherent right" to self-government might lead to claims for international recognition. I believe it is important to support amendments such as these, regardless of this or any other consequence, as they clarify that we are prepared to proceed in the construction of our constitution in an honourable manner; one that is respectful of others and true to our early history.

At the same time, I think that these fears are likely unfounded. Aboriginal Nations, as the quote cited above attests, have repeatedly asserted that their goal is to achieve recognition of their rightful place as co-founders of Canada and not to overturn Canadian sovereignty.

In short, as I read it, evidence from history as well as from today clearly indicates that Aboriginal Nations are not seeking to destroy Canada or devalue non-Aboriginal people, but, rather, are seeking to ensure recognition of their rightful place as co-founders of this country. In this sense, the goal of Aboriginal Nations is to build confederation. It is my view that support for amendments such as the ones proposed here can help to foster this approach and thus be of benefit to all of us.

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1. At the moment, the key term in the discourse is "inherent". The proposition that devalues Aboriginal Nations and which is now promoted by governments in Canada is that their rights are "contingent" in the sense that they depend on affirmation by Canada in order to be brought into existence. I chose to use the language "*at minimum an inherent right to self-government*" rather than any other phrase (such as "an inherent right to sovereignty") because I believe that any such proposal is only properly advanced by Aboriginal Nations. This, of course, does not mean that such a proposition is wrong, inappropriate or out-of-bounds. As well, I accept the premise that Aboriginal Nations have an inherent right to self-determination which is founded on the principles of the United Nations charter documents on colonial peoples (United Nations Resolution of 14/12/60 which was passed without dissent).

2. One such matter is likely to be the status of privately-held lands in territories that would now fall within Aboriginal jurisdictions. Another might be fears related to the question of the relationship between individual and collective rights and, in particular, the application of a charter of rights within Aboriginal jurisdictions. These and other matters can be addressed in discussions with Aboriginal Nations.