TREATY FEDERALISM

Andrew Bear Robe

INTRODUCTION

First Nations maintain that our right to self-government emanates from our own sense of aboriginality, from our "Indianness", from our sense of justice, spirituality, customs, values and socio-political conscience. We believe that the Creator pre-ordained the orderly existence of the various nations of the earth, including their political systems, their laws and the situs of their homelands. Whenever one nation imposes itself upon another nation, as was the case in North America, the transgressor must respect the sovereignty and laws of the nation imposed upon. For this reason, mankind instituted international law to conduct the intra-relations of the nations of the earth whenever they came into contact with one another either through war, treaty-making or international cooperation. First Nations in Canada formed treaty relations with several European nations which governed their intra-relations. Part of those intra-nation undertakings included the continuance of the right of First Nation governance. This First Nation right of self-government emanates from Indian sovereignty which the transgressor nations must uphold and respect under international law precepts. We cannot deviate from this principle as ordained by the Creator himself.

I firmly believe that this can be realized within Canada through the concept of treaty federalism. The concept may be briefly explained as follows: just as First Nations entered into treaties with the British and other European powers, and subsequently with the American and Canadian governments, for the sharing of Indian lands and resources, so we can now enter into modern day treaties or agreements to share Canadian sovereignty and jurisdiction. The fifteen major land-sharing treaties in Canada dealt primarily with the land, beginning with the Robinson Treaty of 1850, which dealt with the lands of the Ojibwa First Nations of Lake Huron and Lake Superior, and ending with the 1923 Treaty with the Chippewa and Mississauga First Nations of south-western Ontario. Under the concept of treaty federalism, we can now complete the other half of that Canadian-made process by recognizing the legitimate civil and political rights of First Nation governments. That is Canada's constitutional challenge for the 21st century after 500 years of Aboriginal-European contact in North America.

First Nations of Canada had no input into the constitutional division of powers in 1867 nor in 1982. We have no sense of ownership regarding the federal and provincial laws that apply to us simply because those laws were forced upon us without our consent, consultation or input, especially the much despised federal *Indian Act*. We now have a unique opportunity to carve out our own rightful place within the Canadian federation, perhaps through treaty federalism. The concept is not foreign and falls within the political and egalitarian ideals of western democracy.

FIRST NATION GOVERNMENTS

Let me state what First Nation governments will not be like in practical terms. They will not create their own armed forces, nor create their own currency, nor establish their own High commissions in foreign countries or foreign trade offices, nor create a completely independent legal system from the Canadian system. Most importantly, they will not attempt to break up Canada. Many of our grandfathers, fathers, brothers and sisters fought voluntarily in the Two Great World Wars to preserve British and Canadian sovereignty even though our treaties guaranteed that we did not have to go to any foreign war. First Nation governments will not seek to destroy the integrity of Canadian nationhood, nor the integrity of our federal bilateral treaties, nor the integrity of our original homeland itself.

First Nation governments, whether they are established through inherent rights, the constitutional entrenchment process or through special federal legislation, will enact laws, regulations and formulate policies similar to any other responsible and democratically elected government. The laws enacted and the jurisdiction exercised will be for our own people, our resources and our lands, nothing more and nothing less. However, non-First Nation peoples, organizations and businesses operating within our lands would be subject to our First Nation jurisdiction. The areas of jurisdiction to be covered will include federal, provincial and municipal spheres of authority. First Nation legislative competence will likely resemble a microcosm of the totality of Canadian governments as we now know them; First Nation governments will exercise separate and concurrent jurisdiction in relation to the federal and provincial governments. In addition, traditional forms of governing structures and values will be incorporated into First Nation governments.

Two concrete examples of First Nation governments have been operating within Canadian federalism for a number of years now. Both are Indian local community governments which were created by special federal legislation: the *Cree-Naskapi (of Quebec) Act* (1984) and the *Sechelt Indian Band Self-Government Act* (1986). The former resulted from two historic agreements, the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978), which involved the Canadian government, Quebec government, three provincial Crown corporations, plus the Cree, Inuit and Naskapi First Nations. The *Cree-Naskapi Act* was the first Indian local community government legislation in Canada. It replaced the federal *Indian Act* and

thereby removed much of the direct authority of the Minister of Indian and Northern Affairs over James Bay Cree, Inuit and Naskapi affairs. The Act restored a limited form of First Nation sovereignty to the aforementioned peoples via legislative fiat. It allowed those First Nations to establish their own legal and governing structures to implement their business of government. Those governments are directly accountable to the will of their citizens rather than to the Minister. The negative feature of the *Cree-Naskapi Act*, from a First Nations' point of view, is that the James Bay Cree, Inuit and Naskapi exchanged their aboriginal title and rights for a complex stratified system of land title and holdings some of which still remain subject to federal and provincial jurisdiction.

The *Sechelt Indian Band Self-Government Act* resulted from eighteen years of unwavering determination by the Sechelt First Nation to be freed of the shackles of the *Indian Act*. The Sechelt peoples' primary objective was to convert the Crown's underlying title to their lands to fee simple ownership and to oust the federal Department of Indian and Northern Affairs as an intermediary between themselves and third party interests such as non-Indian lessees using Sechelt lands. The second objective of the Act was to enable the Sechelt First Nation to negotiate directly with both the federal and British Columbia governments regarding the delegation of federal and provincial powers in order to establish the Sechelt's local community government. The delegated powers were incorporated into the *Sechelt Band Constitution*. The Act does not profess to deal with the Aboriginal rights of the Sechelt people and is viewed merely as an interim step on the road to the entrenchment of the inherent right to aboriginal self-government in the Canadian Constitution.

Legislated First Nation local community governments, such as the James Bay and Sechelt models, are recent forms of government that came into existence through federal or provincial fiat. The Band Council governments under the federal *Indian Act* are the oldest form of legislated and delegated Indian Band local community governments. Both models, the old and the new, are subject to federal/provincial manipulation, control and coercion. They do not receive their authority by way of protected Indian sovereignty, aboriginal title, aboriginal rights, or by way of treaty. Although the *Cree-Naskapi* and *Sechelt* Acts have allowed those First Nations under those respective Acts to distance themselves from the paternalistic provisions of the *Indian Act*, they nonetheless create federal municipalities. Regarding their newly bestowed authority, the community governments are limited to whatever the legislation permits them to do provided that either the federal or provincial governments (Quebec or British Columbia in this case) agree to such jurisdiction. Their new fiscal arrangements are not much different from the status quo under the current *Indian Act*; for example, they are subject to federal and provincial financial discretion as the James Bay Agreement has shown. As far as their legislative interface with the federal and provincial governments is concerned, there are no departures from what the *Indian Act* Band Council governments currently have. Their relationship with the dominant governments is still characterized by paternalism and coercion. They do not enjoy nation-to-nation nor government-to-government *modus operandi*.

There are many *Indian Act* Band Council governments in Canada that already exercise local government jurisdiction in areas such as social assistance, child welfare, education, health, policing, taxation, citizenship and immigration, local trade and commerce, and a limited form of administration of justice. The Siksika Nation Tribal Council and Administration has already taken control of the aforementioned areas of jurisdiction with the exception of the administration of justice. Under its proposed *Siksika Indian Government Act* and the companion *Siksika Indian Government Fiscal Arrangements Act*, the Siksika Nation proposes to exercise legislative and regulatory competence in the following areas:

- Siksika Nation membership
- transportation
- election code and procedures
- health
- social services and child welfare
- education
- financial powers, accountability and fiscal arrangements
- land title, land use and land management
- renewable and non-renewable resources
- environment
- water
- public works and undertakings
- language, heritage and culture
- administration of justice
- intra-tribal transfers of membership and economic resources
- local trade and commerce

Therefore, it is apparent that the practical aspects of First Nation governments at the community/district/regional levels, whether they are established through the constitutional amendment process or through some other treaty or federal channels, and whether they are established pursuant to s. 91(24) of the *Constitution Act, 1867* or s. 35(1) of the *Constitution Act, 1982*, would simply formalize what is already being done informally by many *Indian Act* Band Council governments. In comparing provincial powers and *Indian Act* Band Council powers, Donna Lea Hawley concludes:

> It can be seen that bands have similar powers of self-government as the provinces in eleven of the fifteen areas of control under Section 92 [i.e. *Constitution Act, 1867*]...extension of provincial laws does not apply to Indian lands. The jurisdictional areas of legislative authority on reserve lands approximate those currently controlled by the provinces under Sections 92 and 93. The main difference between them is that the exercise of powers on reserves rests in the hands of the federal minister rather than a self-governing body.

> Thus it would be only a short step to transfer his authority to local Indian governments so that the latter would have legislative powers similar to those now held by the provinces.[1]

Although there remain a number of areas of jurisdiction that have never been exercised by any First Nation in Canada - for example, environment, water and air quality - without a doubt those areas will come up for discussion and negotiation sooner or later in any new First Nation self-government arrangement. In this era of increased awareness of, and evolutionary political development towards, First Nations' self-determination, it is now *passé* that federal and provincial laws of general application be simply foisted upon First Nations without any prior consultation, discussion and input. Those types of unilateral dominant government decrees contravene U.N. self-determination principles, the treaties, the principle of representative democracy, the ideologies of "consent of the governed" and the "will of the people", and certainly contravene the spirit of increased First Nation self-determination principles within a renewed Canadian federation.

Regarding the practical aspects of implementing First Nation governments, I do not envisage that all 600 (more or less) existing *Indian Act* Band governments throughout Canada will individually opt to exercise self-government arrangements if Canada and the First Nations come up with a workable arrangement. A large tribe such as the Siksika Nation certainly can undertake a separate and autonomous self-government arrangement in its own right considering the size of its land holdings, population and resources. Smaller First Nations may opt to join regional or district governments depending upon their geographical proximity to each other, their historic tribal affiliations and their common political and economic agendas. Still others may wish to remain under the paternalistic and coercive controls of the federal government via the *Indian Act* or some other derivative legislation. In any case, I anticipate that each individual First Nation will opt for its best available option as it perceives it, considering all independent variables and circumstances.

In my view, though, the federal *Indian Act*, and the federal Department of Indian and Northern Affairs Canada that administers that Act, must cease to exist as they are public administration anachronisms from a different era of First Nation-Canada relations. Robert A. Reiter sums it up nicely when he observes:

> ...The *Indian Act* is a Victorian piece of legislation. The original policy underlying the *Indian Act* was to assimilate Indians — in essence, to strip Indians of their traditional social, economic, and political systems ... The Act is essentially an administrative document for the Department of Indian and Northern Affairs Development's purposes, and provides no real definition of Aboriginal rights.[2]

THE CONCEPT OF TREATY FEDERALISM

The current push toward the recognition of the inherent right to aboriginal self-government in Canada comes just when we have witnessed the dismantling of autocratic state control over suppressed and dispossessed nationalities in the Soviet Union and Eastern Europe. The task before all Canadians today is to find the ways and means to make true aboriginal self-government a political reality within Canadian federalism in accordance with the aspirations of the First Nations. The political concept of treaty federalism may be one option worthy of our collective consideration. Treaty federalism, as a workable concept, would be a process for negotiations and discussions to be implemented after the entrenchment of the inherent right to Aboriginal self-government.

Treaty federalism is essentially an argument for the notion of "protected sovereign status", especially for those First Nations who signed land-sharing treaties either with the British or the Canadian government. Those First Nations who have never signed any land-sharing treaties, as in British Columbia, Quebec and the Northwest Territories, also have a claim to protected sovereign status due to the general protective clause offered in the Royal Proclamation of 1763. Treaty federalism stands for "Indian consensus" and "Indian consent" in regard to the manner and form of our co-existence with the Queen's white children under the Canadian constitutional framework. It builds upon what already exists within First Nation-Canada relations, for example, bi-lateral treaties, s. 35 of the *Constitution Act, 1982*, and s. 91(24) of the *Constitution Act, 1867*, which are the root sources of federal obligations toward First Nations. Treaty federalism will not disturb the existing division of powers under ss. 91, 92 and 93 of the *Constitution Act, 1867*. However, it will fill the gaps where the federal government has failed to act on its responsibilities to First Nations and, at the same time, will make the necessary adjustments to existing provincial intrusions into otherwise exclusive First Nation jurisdiction. I first read about the concept of treaty federalism in a book written by two American Indian lawyers, Russell Lawrence Barsh and James Youngblood Henderson.[3] According to the authors, the primary object of treaty federalism would be to secure internal tribal sovereignty under long-established constitutional principles governing U.S. federal-Indian relations, which would be consistent with liberal and democratic principles that characterize Western political ideology, for example, consent of the governed, being judged by one's peers, political representation, political pluralism, and the paramountcy of the "will of the people". The concept can be implemented via agreements, legislation or by way of treaty. Although those procedures are not defined in the U.S. constitution, they are nonetheless standardized in constitutional practice.

In essence, treaty federalism is a way of restating the unique First Nation-Crown relations since earliest colonial times. It translates those historic principles and under-

standings into twentieth century political thought and expression. The concept is available for the creative establishment of protected and internally sovereign First Nation governments empowered to exercise jurisdiction in circumstances where conventional provincial government status in Canada would be either geographically, politically or constitutionally inappropriate.

In the words of the authors, treaty federalism:

> ...is not an entirely novel idea. It simply re-interprets the sources of federal Indian law to be more consistent with our [U.S.] general political and ideological heritage, and in a way reconcilable with the realities of tribal survival today... The [Indian nation] in its treaty submits to federal supremacy, ceding a portion of its sovereignty. What it cedes is somewhat more or less than a new state [or a new province in Canada], perhaps also somewhat different. In any event, the acceptance of the cession requires no compensatory alteration of the general government.[4]

ABORIGINAL RIGHTS PRINCIPLES

If the theory of treaty federalism is going to work within Canadian politics as a means of bringing First Nations into the constitutional framework, there are a number of aboriginal rights principles which must be acknowledged and affirmed by Parliament and by the Canadian polity in order to facilitate progress. Those principles are as follows:

Principle One

First Nations, from time immemorial, have had and enjoyed political sovereignty, albeit now in a more limited form under the Canadian Constitution. It otherwise may be referred to as "protected sovereign status"; it is co-equal, co-existing, concurrent and reserved within Canadian federalism.

Principle Two

First Nations, from time immemorial, have had and enjoyed certain fundamental inherent powers and rights which have never been voluntarily ceded nor extinguished by any treaty or agreement with any foreign power; they are therefore "reserved". Chief among these are:

(i) the right to determine who is a member and who is entitled to become a member of the nation according to customary law or newly enacted First Nation laws;

(ii) the right to govern their own affairs for the good government of the nation according to their freely chosen aboriginal systems of government and law (now, within Canadian federalism);

(iii) the right to access and exercise separate and concurrent jurisdiction over their traditional lands and territories in order to ensure the survival and continuance of the nation (i.e. hunting, fishing and trapping);

(iv) the sovereign right to sign treaties and enter into bilateral agreements and relations with other First Nations and with sovereign European powers (now also Canada and the United States of America); and,

(v) the right to retain and exercise their culture and language.

The above mentioned inherent powers and rights should now provide the foundation for First Nation-Canada negotiations regarding renewed bilateral treaties under the Canadian constitution.

Another way of describing First Nation inherent powers and rights is in reference to David Getches' definition of "reserved rights". He explains as follows:

> Federal Indian law is characterized by certain abiding principles: (a) tribal sovereignty, (b) federal power and obligations, [and] (c) reserved rights. ... Reserved Rights [mean s]o long as Indian rights are not voluntarily ceded by the tribes in treaties or in other negotiations which are approved by Congress, or they are not extinguished by Congress, they continue in their aboriginal state. Important rights not specifically ceded in a treaty or agreement are considered to be reserved, consistent with the purpose of the United States and the Indians in entering into the transaction. And when cessions are made or rights are extinguished they are to be construed narrowly as affecting only matters specifically mentioned. Thus, the doctrine of reserved rights dictates that a treaty silent on whether the Indians retained hunting and fishing rights which were important to their survival should be read as implying the continued existence of such rights ... Treaties and agreements which expressly reserve rights to Indians even outside reservations are read to fulfil ancient promises as Indians would have understood them....*The right of self-government may be the most valuable reserved right* and one which certainly was within the purposes of Congress and the tribes as they negotiated their future rights and relations. ... A tribe's *sovereignty exists as a reserved right* and its exercise in Indian country is protected by a preemptive exercise of federal power in establishing the reservation. Likewise, *fishing rights are reserved* under a treaty, may be regulated under a tribe's sovereignty and any state laws affecting the right are preempted by the exercise of federal power which preserved the rights. (emphasis mine)[5]

Getches includes water resources, oil, gas, uranium and other minerals as falling within the doctrine of Indian reserved rights.

Principle Three

Sovereign Aboriginal rights, meaning those rights existing prior to European contact, emanate from the paramount and supreme Indian title to the North American soil and they encompass not only land-based rights such as hunting, fishing, and trapping, but also include political and social rights such as education, health and self-determination. In other words, Aboriginal rights mean that bundle of rights which ensures the continuing survival of the nation, the people and their land-based rights. Those rights emanate from only one source: the supreme and paramount Indian title as ordained and given by the Creator.

Principle Four

First Nation self-governing powers emanate from the Creator and from *the will of the people*, whose membership comprise the Aboriginal political society and who freely choose to form a government. Such societies always had and continue to have all those powers and rights whether they are inherent, reserved, residual or protected.

Principle Five

Indian sovereignty is separate and concurrent, but nonetheless co-equal in status with Canadian sovereignty just as federal sovereignty is co-equal with provincial sovereignty under Canadian federalism. The bilateral nature of First Nation-Canada relations has been acknowledged, affirmed and entrenched by the various pre- and post-Confederation treaties and land claims agreements signed by the respective sovereignties. This principle is otherwise referred to as "divided sovereignty" or "popular sovereignty".

The above five Aboriginal Rights Principles should form the foundation of any negotiation between First Nations and Canada regarding the Aboriginal right to self-government. A clear understanding and agreement regarding those principles must be achieved before proceeding any further. Failure to achieve such a consensus of understanding and agreement would continue to result in the now familiar questions: "What is meant by First Nation self-government?" or "What is meant by First Nation sovereignty?"

THE PROCESS OF TREATY FEDERALISM

Treaty federalism is not only a concept but is also a process. *It is a process proposal for the entry of Indian First Nations into the Canadian federation.* Even though Aboriginal and treaty rights, including those "rights that now exist by way of land claims agreements", are now entrenched in the constitution, the ability of First Nations to govern, legislate and enforce those sovereign rights (for example s. 35 Charter rights) has yet to be constitutionally affirmed. First Nations now possess potentially strong constitutional and legal powers; however, the governing structures and institutions required to exercise, enforce and protect those rights have not yet been realized. Here, I am suggesting the introduction and operationalization of the concept and process of treaty federalism as a way of dealing with these substantive matters.

For greater clarity, treaty federalism should not be equated with the Quebec proposals for sovereignty-association. The latter advocate complete political independence while maintaining economic ties with the rest of Canada. First Nations do not aspire to carve out separate nation states within Canada, but rather, they desire a process for their direct participation in the way Canada is governed based on their treaties, the Royal Proclamation of 1763, land claims agreements and the five Aboriginal Rights Principles listed above. Treaty federalism is a credible option because it springs from age-old understandings and undertakings between the various Indian nations and Imperial Britain, and subsequently with Canada.

IMPLEMENTATION OF TREATY FEDERALISM

Regarding the practical aspects of the implementation of treaty federalism in Canada, the process could begin immediately following the entrenchment of the inherent right to aboriginal self-government in the Canadian Constitution. Should the constitutional entrenchment process fail in the "Canada Round," similar to the F.M.C's of the 1980's, the treaty federalism process could stand alone as a viable alternative or remain as a safety valve option. For negotiation purposes only, Canada would be divided according to the existing major treaty areas where the major signatory parties to the original treaties would convene to discuss and negotiate pertinent matters of First Nation powers, rights and jurisdiction. Although, the Province of Alberta is not an original party to Treaties 6, 7 and 8, that government should now be involved by virtue of the constitutional amendment formulas entrenched in Part V of the *Constitution Act, 1982*. However, its role would have to be somewhat different from the federal role due to the exclusive federal power embodied in s.91(24), and to the treaty and fiduciary obligations of the federal Crown.

The primary purpose of the proposed fifteen separate treaty area discussions and negotiations is two fold:

(i) to arrive at a general consensus regarding the spirit and intent of the particular treaty in question and what the treaty rights and obligations mean in a modern First Nation society within the larger Canadian society; and,

(ii) to arrive at a constitutional consensus regarding the clarification of First Nation inherent powers, jurisdictional spectrum, and reserved rights with or without the en-

trenched right to First Nation self-government.

The treaty area discussions and negotiations may proceed simultaneously or proceed whenever the interested parties deem it advisable and necessary to begin the process. Also, it would be advantageous to craft a standard set of First Nation powers that would approximate a provincial model in order to avoid wide variations in jurisdictional spectrums which would create problems for intra-government relations. The five Aboriginal Rights Principles outlined earlier should provide guidelines for such discussions.

The presumption of the federal power to unilaterally abrogate power from or delegate power to First Nations should be absent from such discussions and negotiations. The playing field should be level such that the First Nations will either agree or not agree to voluntarily surrender certain portions of their concurrent sovereignty to the central federal government, for example jurisdiction in areas of paramount national importance, national interest, national security and international relations. The substance of the negotiations likely would centre around what has already been delineated in the portion of this paper regarding the proposed *Siksika Indian Government Act*.

CONCLUSION

When these discussions and negotiations are concluded and consensual agreements have been reached between the parties, new formal treaties would be drawn up to be signed by the interested parties and to be ratified by their respective governments. Those new treaties could be added as schedules to the Canadian Constitution or as addendums to the original treaties and would delineate the inherent powers, reserved rights and legal jurisdiction of the consenting First Nations. Hence the process of treaty federalism would complete within Canada what was started with the land sharing treaties made between 1850-1923. Treaty federalism would breathe life into the new political and legal relations between Canada and the First Nations.

Andrew Bear Robe, B.A., M.A., Division Manager for Indian Government, Land Claims and Membership, Siksika Tribal Administration.

1. Donna Lea Hawley, "A Comparison of Provincial Powers and the Powers of Indian Bands under the Indian Act" in M. Asch, ed., *Home and Native Land, Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) 124.

2. R.A. Reiter, "Part II the Indian Act" in *The Fundamental Principles of Indian Law* (Edmonton: First Nations Council, 1990) 1.

3. *The Road: Indian Tribes and Political Liberty* (Berkely: University of California Press, 1982).

4. *Ibid.* at 275 and 277.

5. D. H. Getches, *et al, Federal Indian Law: Cases and Materials* (St. Paul, Minn.: West Publishing Co., 1979) at 18, 21 and 22.