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EDITORIAL
ABORIGINAL RIGHTS AND THE CANADIAN POLITICAL AGENDA

By Drs. Scott McAlpine and Duff Crerar

Managing Editors, 2003-2006

Between 2003 and 2006, it became clear to the editors of Lobstick that issues of land use, treaty entitlements and the perpetual nature of the Treaties in Canada continually arise owing to the general populations’ misunderstanding of the history, process and legal nature of treaty rights. This applies especially in the Peace River District (since Treaty 8 was negotiated), as the economy and society of the region depends on extensive agriculture and resource extraction, particularly forestry, natural gas and oil production. Enjoying for the past few years an economic boom not seen since the late 1970s, many in the Peace region continue to question the treaty rights which impede or limit access to the remaining resources, apparently based on a complete misunderstanding of the nature of treaty entitlements. Events will show over the next few months whether or not the new Federal Government will improve on the generally slow, expensive and bureaucratic attempts to honour treaties shown by its predecessor. Perhaps at no time since the 1980s have Canadians in general needed to be more fully informed on the issues surrounding treaty rights and the government of Canada’s need to honour them, for, as the Courts of the nation have ruled, the “Honour of the Crown” is at stake.

Recently, the topic of Aboriginal rights has re-emerged on the political agenda of Canada, Alberta, and, indeed, locally in Northern Alberta. Whether the issue at hand is Treaty rights in British Columbia, the state of Health Care funding, or hunting and fishing rights, there is a need for some degree of clarification and discussion of what Aboriginal rights are and to dispel some misconceptions.

Quite obviously, the existence of Aboriginal rights is not in question. This has been settled in Treaties, in the Canadian Constitution and in the Courts. The Treaties (including Treaty 8 in North-Western Alberta) typically outline certain rights to Canada's First Nations peoples. Treaties were and are negotiated settlements between the Crown and the Aboriginal peoples. Historically, in exchange for a right of access to and settlement of the lands, the British Crown made certain promises to Canada's First Nations. Often, these included health care, social assistance in times of need, and education as well as a freedom from federal taxes while on reserve. Hunting and fishing rights on Crown lands were also typically protected or implied.

The Constitution of Canada recognizes Aboriginal rights dating back to the Treaties and the Royal Proclamation and, to the extent that such rights are part of the Treaties, they are also a part of the Constitution. The protection of Aboriginal and Treaty rights in the Constitution is a result of a lobbying effort by Canada's Aboriginal leadership in 1980/81 as the Charter of Rights was being developed. In the final analysis, Treaty rights and other Aboriginal rights were to become entrenched in the Charter.

With protection in the Charter, the courts in Canada have ruled on a number of cases dealing with Treaty rights. Here, the Treaties have generally been upheld – particularly of late. So, the long and short of it is that the existence of
Aboriginal rights in Canada is not in question. They exist and are upheld in the Constitution and by the Courts. Moreover, whatever benefits are associated with Treaty were clearly understood to be in perpetuity. There was no expiration date. The alternative to “benefits” of Treaty extending in perpetuity was, of course, for the Crown to pay market value for the lands in question. This had been considered by the Crown during the years of massive British immigration after the wars with France, though, recognizing the costs of purchase outright, little had been done. This raised questions of present or future value, surveys of resource potential and so on and was abandoned at that time as an impractical approach.

In fact, the Crown was guided out of its colonization dilemma by aboriginal leaders, who proposed that it acquire the land through annual benefits and payments, as annuities, for access to land and resources which could never be purchased outright by any institution of that or any other time – one half of a continent. The purpose of these benefits, as native leaders themselves argued, was to provide the education, economic and technological implements and expertise, as well as health care, for their people to become equal participants in the new society. Thus the “benefits” of Treaty as an “annuity” in perpetuity were, by and large, accepted by those taking Treaty as a reasonable solution. Since the land was forever, so were too be the benefits and rights.

Most Canadians appear to misunderstand or misrepresent as “welfare” the binding nature of these mutual commitments. This, of course, may be either out of ignorance or a general resentment of any group with entitlements other than their own, but these attitudes do not change history, or law.

Further, as a matter of historical record, it is also clear that many Canadians have not, been informed that the official presiding over the government’s negotiations with Aboriginal peoples in the Peace District in 1899, David Laird, had drafted one of the most controversial federal laws in Canadian history, the Indian Act of 1876. Whatever else was left unsaid or unwritten at the Grouard negotiations of 1899, there is no record that all Aboriginal participants understood the significance of their taking Treaty – that as soon as their agreement was secured, they entered under the jurisdiction of the Indian Act thereby becoming wards of the Crown, barred from commercial use of their former lands, fisheries or forests, and subject to an expanded spectrum of encroachments on their cultures, spiritualities, family structures, economies and subsistence. In many ways, what the Treaty gave, the Indian Act took away. Here too, whatever contemporary attitudes and declarations may be, history and law remind all Canadians that the spirit and intent of the treaties have not been honoured by the Crown. Although on a very few occasions the Supreme Courts of Canada restricted the application of not only the historical record but also of reason and natural justice to some cases involving Aboriginal rights, by and large the overwhelming precedent set by the highest courts in Canada has been to order governments to restore land, protect rights and make restitution for treaty rights which have not been honoured.

The current struggle of Aboriginal peoples is therefore not for Aboriginal rights in general. These exist. The struggle is for them to be recognized and adhered to by governments and by the rest of the population. This is an on-going challenge for Canada’s Aboriginal population and for those who respect the rule of law. It is here that the assertion of rights becomes important. If rights exist but are not being recognized or adhered to, as is often the case, there is little that can be
done in a democracy except to protest. Of course, protest is often taken as whining and/or as disruptive to those who would prefer not to recognize the rights in the first place. Yet, freedom of speech and association are also part of democratic rights available to all and are also protected in the Constitution and by the courts. This is to the extent that they do no harm to others nor spread hatred against an identifiable group.

What then are the Aboriginal and Treaty rights in question that exist and/or are being fought for?

**Education**

The right to elementary and secondary education is available to all Canadians up to age 16. This is, in fact, legislated (the law). Treaties make this right, by and large, available to Canada’s Aboriginal peoples. Yet the “right” of Canada’s First Nations to post-secondary education is not available to all but is frequently contingent upon Band funding, federal criteria, and a host of other factors. Three realities need to be considered here. First, there are few post-secondary educational institutions on reserves. Second, “status” is normally required as a registered “Indian” under the Indian Act as a Band membership. Third, the Aboriginal population is, by and large, less able to access post-secondary education than the non-Aboriginal population. These factors combined lead to the conclusion that the existence of funding for some persons of Aboriginal origin for post-secondary education can hardly be taken as excessive or abusive. In fact, there is an obvious case to be made for more funding to be provided by the Crown. Many non-Aboriginal persons (those in need due to finances, etc.) also receive some funding for post-secondary education. The principle is equality of opportunity and the assumption at the time of Treaty was exactly that. Moreover, individual First Nation students can only apply for support through their respective Band. There is a ceiling on that funding, and not all applicants are successful.

**Health Care**

The “right” of universal health care is (or was) also guaranteed to all Canadians under the Canada Health Act, among other pieces of legislation. While guaranteed in Treaties, the accessibility of Health Care for Canada’s First Nations is a concern given remote locations and sparse populations. This was addressed in the Romanov report and again, the principle was equality of access. Nonetheless, “benefits” are limited. Aboriginal communities continue to have some of the most unhealthy water supplies in North America. Early death is a common phenomenon.

Yet Canadian aboriginal people continually encounter the attitude that their treaty health care benefits are “welfare”.

**Social Benefits**

The duty of a society to care for those with insufficient means to care for themselves is well-recognized, and was a predominant ethical principle in aboriginal societies. “Welfare” is, in the non-Aboriginal community, normally a last resort after employment insurance has run out. Welfare income levels are
below any recognized poverty lines and welfare is not a lifestyle nor income level which is likely to be chosen by those with a choice. Where economic opportunities are limited because of disabling conditions in the individual or because of a severely depressed economy, choice does not exist in any meaningful way. For aboriginal people, isolation, the lack of economic opportunity on most reserves, and the systemic racism practised in many quarters of Canadian society severely limit their opportunities. While many have, of course, overcome such barriers, the fact remains that many have not. Welfare is nothing to be jealous of nor to be sought. In the light of the systematic exclusion of aboriginal people from the economic life of the nation for several generations after taking treaty, the inferior levels of education delivered in school systems of such varying quality that while a few maintained reputations for basic humanity, many are now remembered as well-document institutions of child abuse and cultural eradication, and decades of miserly delivery of all treaty benefits by the Crown, the many claims for benefits made today are only inevitable and long overdue.

Taxes

Treaties were Nation to Nation agreements. One Nation does not tax another. Accordingly, by and large, First Nations peoples living on reserve have tax exempt status. Those off-reserve generally do not. Given the often limited economic opportunities on reserve, the impact on federal revenues is not substantial. The written record of Treaty 8 was, arguably perhaps, even more specific on taxation. Commissioner Laird reported in print to his authorities in Ottawa that he had specifically promised signatories of the Treaty that they would never be taxed in any way (as well as promising that their families and spirituality would never be interfered with). Even after legal challenge, taxation off reserve is the law. Yet taxation based on residence was not stated in the Treaties, and taxation continues in the face of written official record that such was not accepted by those who signed Treaty.

Land

Three types of land come into question. These are reserve land, crown land, and land ceded/for settlement under Treaty. Treaties, where signed, allowed Aboriginal rights of exclusive use to reserve land if reserves were established. Treaties also, arguably, allowed for off-reserve and/or non-Aboriginal ownership and exclusive use of lands held in private. Lands held in common (Crown lands) are typically taken to be joint-use by both Aboriginal and non-Aboriginal peoples. Here, traditional activities (hunting, fishing, etc.) are often in conflict with other economic pursuits (forestry, oil and gas, etc.) In situations of conflicting uses, the issue is which set of rights takes precedence or wins? Since reserves were seldom, if ever, taken to be of sufficient size to accommodate the entire set of needs of the First Nations, the right to pursue traditional activities on Crown land is often assumed and upheld by the Courts. However, the use of resources on the Crown land by non-Aboriginal peoples is also possible and contemplated in the Treaties. It is here that negotiations and, inevitably, competing claims are made. When settled, these claims become the law.
Why does any of this matter? In the final analysis, the level of knowledge about treaties, the Constitution, the law and Aboriginal realities is far too low. Systemic racism, intolerance, and ignorance are far too high. Opportunities for education, for bridging the gaps between peoples, and for promoting genuine understanding are often not taken and when they are, those taking them feel at risk. Indeed, when the South Peace Social Planning Council, the Multicultural Association, Immigrant Settlement Services, the Friendship Centre and many others partnered on a Human Rights Conference at Grande Prairie Regional College four years ago, it was a risk but a start. When 

Lobstick (http://www.lobstick.com) published a volume on Treaty 8 from Grande Prairie Regional College, it was an innovation. When the Integrated Research Unit and the South Peace Social Planning Council released a report on the experience of racial discrimination in Grande Prairie, the results were disturbing but not surprising. When Grande Prairie Regional College and this community celebrated Douglas Cardinal and Henry Anderson as partners in building the dream of the College, it was time.

And yet the misperceptions and stigmatizing remain. The denial of opportunities for real partnership continue. In the Peace River Country of North-Western Alberta, and perhaps in many other regions of Canada, few have considered the underlying issue of the nature of law and society in general which lies at the heart of many discussions about Treaty and entitlements. If the Crown does not honour the Treaties, then the Crown has no honour. What does this mean to a society when its government has not honoured its commitment to a growing and increasingly politicized founding component of its population? Indeed, it is about understanding and getting along but it is also about so much more. It must also become about alliances and vision. The editors ask 

Lobstick readers to consider that the issues surrounding Treaty and Treaty rights are more than technical matters or ones which are “merely” political/economic. The broader systemic issue is perhaps the barometer of Canadian social and political integrity for our day. Failure to resolve or make progress on the many complaints and cases in hand and those to come will only magnify the growing cynicism and outright nihilism towards political participation in future.

This is not an “Aboriginal” problem. We all own it.

- 17 July, 2006