

Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation.

The very recent “Idle No More” movement speaks of restructuring the relationship between First Nations people in such a way that will allow and make possible First Nations people access to, and use of, their homelands in culturally and economically beneficial ways. This movement includes a pamphlet titled, “Resetting and Restoring the Relationship between Indigenous Peoples and Canada”. Among other things, Idle No More calls for an “unrestricted modern treaty process”. This process would begin, it says, with the recognition of the right of Aboriginal self-determination found in s. 35 of the Constitution. Does this make sense, or is it merely “sloganism”?

For my talk, I want to begin here and briefly examine the question of what is the relationship that is to be restored or reset.

I think that many Canadians who hear such comments wonder – what does this mean; what are Aboriginal people really talking about?

Recently, former Prime Minister Paul Martin was quoted as saying:

“We signed treaties with many First Nations because their co-operation and their land were essential to the growth and success of our communities. And then, when our economic and military needs changed, and the peoples with whom we had contracted solemn oaths had been enfeebled by us, we simply abandoned our honour, ignored our agreements, and did what we damned well pleased. It is our national disgrace.”

Is this true? Did Canada at some point in time “abandon its honour and ignore its agreements” with Aboriginal people? The agreements Paul Martin speaks about are, of course, the historic and founding treaties and while most Canadians intuitively believe the treaties were probably not honoured,- or as they might say, “they were broken” - I don’t think they know what it means beyond that.

One of the earliest and original treaties is the “Two Row Wampum”. This treaty was entered into in 1613 between the Iroquois Confederacy and the Dutch. It is interpreted as a treaty of respect for the dignity and integrity of the other nation. It stresses the importance of non-interference of one nation in the business of the other. This treaty was later repeated with the British.

It is within the intention of this earliest treaty that subsequent treaties are said – certainly by Aboriginal people - to record the meaning of the agreements between settlers and North American first inhabitants that followed. That is, to declare peaceful coexistence between the two.

Bruce Erickson, an assistant professor at York University recently published an article in the Toronto Star outlining a bit of history that supports the Aboriginal view. Allow me to paraphrase some of what he wrote.

In the mid-1700s Britain - through the Seven Years War - had won the European claim to much of the North American interior. As a result England set out to govern the interior trading posts by their own rules instead of those that had been negotiated over the past century with indigenous groups. The British were making changes in colonial power along the St. Lawrence and the Great Lakes region. Suddenly - because they had been cut out of the decision-making process and out of the established terms of alliance - Aboriginal people broke the alliance in order to remake it with their input.

In 1763, a co-ordinated attack by indigenous groups lead by Chief Pontiac on the English forts of the Upper Great lakes region — from Niagara to Sudbury — unsettled the new reign of the British in the interior. This was not, however, an attempt to rid the region of Europeans. Rather, this uprising was an attempt by Chief Pontiac and those who agreed with him to reassert the terms of alliance in the region. Chief Pontiac wanted a partner, not a ruler — this co-ordinated attack was just the means to deliver the message.

Out of this came King George the Third’s *Royal Proclamation of 1763*, which mandated negotiations with Aboriginal people for use of the land they occupied was. The *Royal Proclamation*, in other words, was a recognition that the peace of the colony depended upon securing consent

for its presence. That, as we shall see, has been forgotten in the mists of time.

As flawed as they may seem to some, Mr. Erickson says that treaties are a permanent reminder that Aboriginal people were brought into the agreement of occupation of Canada as partners, as invested nations. In other words, this was the beginning of the Aboriginal/European settler relationship - based on equality; mutual respect and shared occupation. This was the original intent.

Today any Canadian will tell you that what I just described hardly reflects the relationship that exists today. What Canadians do know generally is that the current Aboriginal/Canadian relationship – such as it is – is one of distrust and anger and it certainly does not include mutual respect, nor does it exhibit equality. Whatever it is; it's broken, and as I think history will demonstrate, beyond repair.

The next questions than are – what happened to that original intent? What is this broken and unworkable relationship that Canada ultimately adopted?

Since the *Royal Proclamation* and into the early 1800s, Aboriginal communities gradually became viewed as obstacles to European economic objectives. Aboriginal use of lands was seen as a barrier to economic development. In addition, there are demographic factors, which included widespread illness that depleted Aboriginal populations in the late 19th century, which reduced government's fear of Aboriginal peoples.

It is at this stage of the settlement of Canada that the intention of non-Aboriginals changed from that of mutual respect, shared occupation and assistance to that of dispossession and removal of the First Nations from the territories. Government's intention shifted to one that viewed the treaties legalistically; that is, as contracts specifying the minimum it was obligated to do. It also now overtly recognized Aboriginal people as savages in need of religion and requiring the constant care and control by the state. In other words, not as equal founding partners; rather, Indians became "wards of the state". And, all of this was supported by law.

I recently read a marvelous book written by Lindsay G. Robertson, titled *Conquest by Law*,¹ where he writes about how the Aboriginal people of the United States were effectively “conquered by law”. It is essentially this same legal journey that Mr. Robinson describes in his book that finds its way into Canada with the same devastating results.

To properly understand how Aboriginal people in Canada - through the operation of law - moved from being equal partners to dependents of the state – one begins with the doctrine of Discovery.

The doctrine of discovery originated in 1452 when the Catholic Church granted Portugal the right to claim and conquer lands in West Africa. The Pope issued instructions called “papal bulls” authorizing the King of Portugal to “search out...and subdue all Saracens, pagans, and other enemies of Christ...and reduce their persons to perpetual slavery...for the monarch’s use and profit.” The Vatican next issued a papal bull encouraging Catholic monarchs across Europe to “restrain the excesses of the Saracens and other infidel enemies of the Christian name...situated in the remotest parts unknown to us”. Thus began the campaign of the doctrine of discovery and the colonization of foreign lands around the world.

About 370 years after the papal bulls, a dispute arose in the United States because Thomas Johnson, in 1774, had purchased land from the Illinois Indian Nation. However, William M’Intosh purchased the same lands some years later from the United States Government. In 1823 the *Johnson v. M’Intosh* dispute found its way to the United States Supreme Court. The decision, written by Chief Justice John Marshall, held that the United Kingdom had taken title to the lands which constituted the United States when the British “discovered” them. The Indians, therefore, did not have any title to sell.

Thus, the doctrine of discovery was also a right of the British Crown. Significantly, a document relied on by Chief Justice Marshall as support for his decision was the *Royal Proclamation, 1763*. Apparently, Chief Pontiac’s uprising and subsequent reaffirmation of alliance failed to make its way into the record.

¹ *Conquest by Law*, (Oxford: Oxford University Press, 2005).

Let's move on to Canada

Jurisprudence in Canada before the *British North America Act* (the "BNA Act") in 1867 had begun the legal path of refusing to recognize Indian tribes as legal or political entities. For example, the Chief Justice of Upper Canada, John Beverley Robinson, in a land fraud case in 1853 held that pursuant to the *Royal Proclamation* "Indian lands" were Crown lands and, therefore, could not be alienated without the consent of the Crown.

In 1867 Britain passed the *British North America Act* (the "BNA Act") to unite provinces into a confederation, resulting in the formation of Canada, a federal dominion. The powers of government were divided between the provinces and the federal government. Section 91 lists matters of federal jurisdiction; s. 92 lists those of provincial jurisdiction. Section 91(24) vests federal jurisdiction in "Indians, and Lands reserved for the Indians". It was now open to the government of Canada to define, through legislation, the legal identity of Indians and their rights and interests in Canada. Never mind the treaties and whatever their original intent was.

The legal foundation for the current Aboriginal/Canadian relationship becomes virtually complete when in 1888 the Judicial Committee of the Privy Council rendered its decision in *St. Catherine's Milling and Lumber Co.* In that case the Privy Council held that Aboriginal title over land was allowed only at the Crown's pleasure, and could be taken away at any time. Moreover, the *Royal Proclamation* was the source of this law, which Lord Watson described, as giving Indians "a personal and usufructuary right, dependent upon the good will of the Sovereign".

An important feature of *St. Catherine's Milling* as it moved through the courts was the reliance on United States jurisprudence such as *Johnson v. McIntosh*, which was grounded on the discovery doctrine. Indeed, in its 1984 decision in *Guerin v. The Queen*, the Supreme Court of Canada, after relying on *Johnson v. McIntosh*, held that

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the

land is personal in the sense that it cannot be transferred to a grantee ...

Thus, the reasoning in the Canadian jurisprudence asserts that the discovery doctrine, evidenced by the *Royal Proclamation*, was a fundamental legal foundation of Aboriginal/Canadian relations. The original intent of the Aboriginal/Canadian relationship was a fading memory. The Two Row Wampum; the treaties that followed; and Pontiac's uprising resulting in the British response through the *Royal Proclamation* were ignored.

So, the next question is: what is the relationship that arises from this unilateral change by Canada of the original intent and the law that supports it?

As just outlined, a relationship of equality, mutual respect and joint occupation of the land through the operation of law evolved into a relationship of Aboriginal dependency on the good will of Canadian government. Indians became "wards of the state". In law, a ward is someone placed under the protection of a legal guardian. The state takes responsibility for the legal protection of an individual, usually either a child or incapacitated person, in which case the ward is known as a ward of the state.

In Canada, the *Indian Act* is the central tool by which the federal government rendered to itself the authority – under s. 91(24) of the BNA Act - to completely manage the affairs of Indians, thus, making hundreds of thousands of Aboriginal people "wards of the federal state". The *Indian Act* was heavily influenced by the legislative foundation established prior to its passage, which again included the *Royal Proclamation* and legislation created in the mid-1800s.

Enfranchisement was a term adopted by the state and considered as a privilege for Aboriginal people. Through enfranchisement they could gain their freedom from the protected Indian status and gain the rights of full colonial citizenship, such as the right to vote. Aboriginals were encouraged to forgo their Indian status and move into the larger colonial society as regular citizens and, hence, become "civilized".

To complete the dependency relationship we turn to the 1986 case of *Simon v. The Queen* the Supreme Court, which defined a treaty – just as it did in describing Indian title - as being "unique" and "an agreement *sui generis* which is neither created nor terminated according to the rules of international law".

In sum, the relationship that evolved under Canadian law was one in which: (i) Indians were defined as “wards of the state”; (ii) their legal interest in their original territory was “one of a kind” and amounted to a mere burden on Crown title – not ownership; and (iii) the treaties were also “one of a kind” and amounted some form of contract – not international in nature.

To understand what movements such as Idle No More are speaking of, the next question must be: how has the current Aboriginal/Canadian relationship worked out?

The legal rights and the relationship of Aboriginal people in the Canadian constitutional framework invites – perhaps even mandates - policies and laws such as those which fostered the following:

- The *Indian Act*, which started in the 1800s and continues to this day to define who is an Indian and what rights and interests he or she may have from birth to death. The affairs of Indians continue to be administered by a department of government. Under this Act, Aboriginal people of “Indian” status continue to this day to remain wards of the state.
- Also in the 1800’s, the Canadian government established a policy to “aggressively assimilate” Canada’s first inhabitants into English speaking Christian Canadians. To accomplish this, the government developed a policy to be carried out at church-run, government-funded industrial schools, later called residential schools. The government believed that children were easier to mould than adults, and the concept of a boarding school was the best way to prepare them for life in mainstream society. In other words, the intention of the policy was – to use the language of the state - “to kill the Indian in [the child] and save the man”. In all, about 150,000 Aboriginal children were removed from their communities and forced to attend the schools. The last school closed in 1996.

- In addition, there is the “sixties scoop”, which refers to the Canadian policy that began in the 1960s and continued until the late 1980s - of apprehending unusually high numbers of Aboriginal children and fostering or adopting them out, usually into white families. It's estimated that up to 18,000 thousand First Nation, Inuit and Metis children were adopted or fostered to non-native homes under this policy. A substantial number of these adoptees face cultural and identity confusion issues as the result of having been socialized and acculturated into a euro-Canadian middle-class society. As one author put it, the identity issues of adoptees may be compounded by being reacquainted with one of the most marginalized and oppressed group in North American society.
- And finally, while Aboriginal people make up about 3 per cent of the overall population of Canada; they also make up about 20 per cent of the total prison population. In 1999, our Supreme Court in the case of *Gladue* found that there was a drastic overrepresentation of Aboriginal people within both the Canadian criminal population and the criminal justice system. It labeled this reality “a crisis in the Canadian criminal justice system.” In 2012, in the case of *Ipeelee*, the SCC again examined the effects of its decision in *Gladue*; it found the statistics were growing worse. *Gladue* and *Ipeelee* both acknowledge that “excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the Aboriginal peoples from the Canadian criminal justice system is concerned”.

I believe that the current relationship that I've just described has always - and will continue to - banish Aboriginal people in Canada to the poorest of poor in their own land. They will continue to live shorter and less healthy lives than other Canadians and be less educated and less employed as compared to others. And, they will continue to be systemically discriminated against by the criminal justice system and imprisoned at a significantly higher rate than other Canadians. Their lives will remain bleak and offer little hope of improvement in the future. The consequences of having been conquered by what legal scholars describe as a fiction based law, is harsh and apparently permanent.

While the public desire may well be that Canada should never again repeat such disastrous policies and law as I just described, the ability of the

government of Canada to lawfully do so continues. What is particularly offensive is this: Canada, consciously and expressly chose this current relationship with Aboriginal people. It decided, for reasons of economic gain and political expediency to make Indians “wards of the state” who exist under the care and control of the state.

Now, after centuries of administering this specifically chosen path – and failing in all its severe assimilation efforts - Canada finds the Aboriginal/Canadian relationship unworkable and extremely expensive. The response from many quarters - sadly, regrettably, and wrongly - is that somehow the Aboriginal people are to blame for this broken relationship and the question is too often raised: why can't Aboriginal people speak with one voice and provide the solution?

It must first be recalled that the current relationship is the one that was unilaterally made and explicitly selected by the Crown in right of Canada and legitimized in the jurisprudence. More specifically, however, it must be understood and appreciated that this current relationship only exists because of what is universally defined as a legal fiction and a refusal to honour history.

The current Aboriginal/Canadian relationship grew from the roots of Canada's constitutional tree, which in turn – as I've noted - is founded on what scholars term the “legal fiction” called the doctrine of discovery. These scholars go on to conclude that:

The doctrine of discovery, when defined as an exclusive principle of benevolent paternalism or, as it was in the *McIntosh* decision, as an assertion of federal ownership of fee-simple title to all the Indian lands in the United States, is a clear legal fiction that needs to be explicitly stricken from the federal government's political and legal vocabulary...

In Canada it would be *St. Catherines Milling* and all its progeny.

Scholars and writers have noted that the impact of discovery, as it made its way through the Americas, included the bringing of disease to Native tribes and peoples, sometimes wiping out entire civilizations. It also provided legitimacy for slavery and shipping of Africans to the new world, and the

oppression of other ethnic groups. Always it was justified on two major premises: (i) bringing Christianity to the savages and heathens of the New World; and (ii) the belief that one race had the divine right and superiority to civilize the world and expand their reach.

Canada's history of its relationship with Aboriginal people would seem to illustrate the truth of this.

This takes me to the final question, which of course is: where can we go from here?

Chief Justice McLachlin in the *Haida* case observed that: "... a basic purpose of s. 35(1) -- [is] the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it; we are all here to stay". There are two possible interpretations of this statement: (i) was the court using the term reconciliation to mean repairing or restoring the relationship or did it mean aboriginal societies reconciling themselves to reality; or (ii) does it mean the Crown is sovereign and Aboriginal societies are subject to and subjects of the Crown. I want it to be the former.

Ian Desjardins in his article, *Sovereignty and Diversity: The New Relationship Between Canada and Indigenous Peoples*, submits that reconciliation:

... entails two main initiatives: creating positive relationships, and the merging of two or more distinct sovereignties through the thought of compatibility. When these two initiatives operate together, it creates a sovereign bonding that highlights and succors one another in mutual respect. This idea can then produce social and political autonomy.

In its broadest sense reconciliation should refer to the bringing together of Aboriginal and non-Aboriginal Canadians. It should permit the overcoming of the reasons for the division and inequality between them. Importantly, it should include a process to ensure that Canada and its first inhabitants are in agreement on the rightful place of Aboriginal people in the Canadian constitutional framework.

In June 2008 Prime Minister Stephen Harper, spoke about “forging a new relationship between Aboriginal peoples and other Canadians” and described it as being:

... a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.

We do know this: the foundation of Aboriginal law or the relationship of Aboriginal people in the Canadian constitutional framework has probably been founded upon a legal fiction. In other words, the roots of the Aboriginal law tree are rotten and are incapable of bearing anything that is sustainable. Our attempts to graft new and creative branches on to this tree - as we have witnessed since 1982 - will not bring health to the tree's roots. I believe that nothing less than a new approach is required, which includes discarding the false discovery doctrine and all that grew out of it; and especially that Canada's first inhabitants are wards of the state.

Whether s. 35 can provide the means for a shift in the Aboriginal/Canadian relationship to reverse the historic and continuous dire consequences of the existing one is the issue. In fashioning a solution, I would make two observations: First, the courts have repeatedly said that this relationship issue should not be resolved through the courts. Given the history of our jurisprudence, I would concur.

Second, I know that if the federal and provincial governments are around a table with representatives of Aboriginal societies, the totality of jurisdiction necessary for change is also present. In such a scenario reconciliation becomes very possible. That is to say, with good will and an honest effort, modern treaties could be fashioned to define the Aboriginal and treaty rights that are to be “recognized and affirmed” such that the original intent of the Aboriginal/Canadian relationship can be re-established and honoured. Canadians, I believe, are owed nothing less. Idle No More – it would appear – has it right.

Thank you (Miigwetch)