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**CANADIAN DEMOCRACY AND FEDERALISM :
A DEEPLY FLAWED REALITY**

By Ghislain Picard

Regional Chief, Assembly of the First Nations of Québec and Labrador

The world is in sore need of the role model Canada might yet become.

But for now, its credibility as both a federation and a democracy, is very fragile indeed. For the past decade, the country has careened from one constitutional disaster to another, all of which raise fundamental questions about the legitimacy of its very constitutional structure and democratic federalism.

In 1990, Elijah Harper, a First Nations MLA in Manitoba, broadsided and sunk the Meech Lake Accord, one of the most significant constitutional events in modern Canadian history, for the reason that First Nations were ignored at the constitutional table.

That same summer, several thousand troops with tanks and helicopters laid siege to tiny Kanesatake Reserve in Québec, where a handful of First Nations protesters challenged the legitimacy of Canada's power over them, as they sought to protect their sacred land from the construction of a golf course.

In 1992, yet another effort at constitutional reform was rejected by the majority of Aboriginal leaders in Canada. Even though we were « let in » as participants to the constitutional discussions this time, the vast majority of Aboriginal peoples who voted, rejected the Charlottetown Accord. Their clear message to the federal and provincial governments was lack of trust in the constitutional amending processes.

Three years after that, the entire country stood at the edge of the abyss waiting for the final few votes in a referendum to see whether Québec would stay in Canada. In that vote, the yes and no forces in the non-Aboriginal community were almost evenly split, while the First Nations vote was overwhelmingly against separation. This scenario underscored the point that as much as First Nations people did not trust the federal government to protect their interests, they had even less trust in the provincial government of Québec to do so.

In 1998, the constitutional bandwagon started up again, with, evidently, few lessons learned. The Calgary Declaration, drafted behind closed doors by an elite few provincial premiers, managed to offend and trivialize all the First Nations in Canada not only by excluding us from the constitutional discussions, but by describing us as a « gift » to the larger Canadian mosaic.

In October 1999, as I speak, violence and threats of violence against First Nations peoples in Atlantic Canada are polarizing the country along racial lines. All of this because the Supreme Court of Canada ruled last month that First Nations fishers have a constitutionally protected treaty right to fish for a moderate living, year round.

....This is not usually the stuff from which federalist, democratic role models are made.

My presentation this morning will deal with two questions:

- 1) Why is Canadian federalism so flawed?
- 2) What can be done to make it strong?

The first question cannot be answered exclusively from contemporary conditions. The problems with Canadian federalism started a long time ago. Speaking from my own personal experience in all of the constitutional events just described and others, I think the past decade's disasters have more to do with the long-standing failure of the government and the people of Canada to understand and come to terms with their own history over the past several hundred years, than anything else. It is trite but true that failure to understand history inevitably dooms us to repeat it.

A major part of Canadian history is the story of Canada's dysfunctional relationship with First Nations. The two societies have never shared a common perspective on their relationship, but instead of trying to accommodate the differences, (which was entirely possible) the government of Canada instead tried to forcibly displace our perspectives with the values and culture of Western society.

The profound damage this caused to First Nations was exacerbated by the imposition of Western administrative systems which attempted to control the lifestyle of our people and isolate us from mainstream society and the larger physical environment. All of the efforts to destroy us ultimately failed, but the attempt had disastrous results which all of us experience to this day.

For example, until very recently, it was official government policy to actively and consciously promote racial inequality between Aboriginal and non-Aboriginal peoples. In other words, it was against the law for us to be equal to non-Indians

in Canada. It was perfectly legal and acceptable for the state to discriminate against us in every conceivable way.

Moreover, legally imposed inequality was a cumulative thing. Since the time of colonial contact, discrimination kept growing – it was a continuous work in progress. An array of legal restrictions on First Nations grew and adapted to changing circumstances over the years to maintain our subordinate status in the provision or access to services, housing, employment, development opportunities, natural resources, education, health benefits, pension, wages, criminal justice, voting, holding public office, hiring lawyers. You name-it, and we didn't get it, or if we got it, it was inferior to that which non-Aboriginal Canadians got.

Hundreds of years of racist laws had effects much deeper than visible poverty and powerlessness. It eventually affected our thinking – the way we view ourselves and others, and our « common » sense. For First Nations and non-First Nations alike, racist laws, policies, and practices have limited not only the answers we propose, but even the very questions we ask about ourselves and the Canadian federation.

As long as the patronizing and paternalistic « Indian Agent » colonialist mentality still prevails, true democratic federalism, including self-government for our Nations, will continue to elude us. Until Canadians genuinely confront the racism embedded in our structures there will be no urgency to correct it. Similarly, interpretations of history which ignore the role and contributions of First Nations in the development of the country will obstruct the track we are on, and may give wrong directions in our continuing journey towards the just society I believe all Canadians want to have.

But Canada has never found it easy to confront the larger issues of our existence. It has developed and practiced a culture of avoidance that allowed Canadians to put off to some time in the future questions of who they are, what their place in Canada is, and what relationship the country should have with its First Nations. We have a multicultural, tri-national nation-state, made up of three well-defined national identities – aboriginal, culturally diverse French-speaking and culturally-diverse English speaking – and it is time we came to terms with this reality.

We can't return to old formulas, but as a country, we do need to embark on a kind of soul searching to find new ones. The government's apology for the horrors of residential schools was a start, but only a first step on this road to strengthening our federation.

It is only a first step because the residential schools were only one part of the overall strategy to exclude our people from equal citizenship within the federation. Our exclusion from citizenship meant that at its most basic, Canada was undemocratic. Our exclusion also meant that Canada ignored the basic

principles of true federalism which is that authority must be shared and the interests of smaller communities acknowledged. Our struggle for self-determination within confederation required recognition of our worth and the worth of our culture to the country. Unequal citizenship made this quest next to impossible.

So in looking in the past, we can learn not only what happened, and what it is that clutters up our current field of vision, we can see how it happened, the intentions, the tactics, the limitations and the successes of our predecessors.

It is in the how of history that we can begin to understand the contemporary problems of self-government, the renewal of treaty relationships, sharing of land and resources, and the revitalizing of our cultural identities. If we still don't have the answers, perhaps it's partly because we're still not asking the right questions.

Take for example the answers to the Donald Marshall decision of the Supreme Court of Canada just a few weeks ago. The Court decided that First Nations on the east coast of Canada have a treaty right to make a moderate living from fishing.

The immediate response from non-Aboriginal fishers and their supporters was to deny the legitimacy of the right. The tactic was to engage in violence -- destroy the lobster traps of the First Nations fishers, intimidate individual fishers and vandalize packing plants so that no treaty rights could be enjoyed or exercised. Another tactic was to demand that the First Nations fishers immediately stop exercising their rights or there would be no negotiations to stop the violence.

What was the federal government's response to this outrageous behaviour? One would have thought that at the very least, mob rule and anarchy would have been condemned, and the First Nations treaty rights and the rule of law affirmed in the strongest of terms. Not so. The Prime Minister's response was to merely ask for calm and to suggest that the solution to the problem may be a suspension of the treaty rights for a period of six months or so, to enable both sides to sit down and negotiate – presumably for something less than the treaty right articulated by the Supreme Court of Canada.

For the Prime Minister to fail to comment on the obvious threat the behaviour of the hostile non-Aboriginal protesters pose to the rule of law and the whole concept of rights upon which our democracy and federation are built, can likely be explained by a mentality which assigns our Charter rights much less weight and importance than the rights of others. The Atlantic fisheries dispute is another snapshot of Canadian federalism and democracy failing yet again in the ways it has for hundreds of years.

So what are some of the historical realities every Canadian should know in order to properly understand and evaluate the relationship between Aboriginal peoples

and the government in our federal system?

In the beginning, relationships between the French and British settlers and the First Nations were governed by two fundamental principles, accepted by all sides.

The first principle was the recognition of Aboriginal peoples were autonomous political units capable of having treaty relationships with the Crown.

The second principle was that Aboriginal nations were entitled to the territories in their possession, unless or until, they ceded them away.

In 1763, these principles and others were committed to writing in the Proclamation of 1763, otherwise known as the Indian Bill of Rights. Justice Emmert Hall of the Supreme Court of Canada stated that the statutory force of the Proclamation was analogous to the status of the Magna Carta.

The Proclamation portrayed Indian Nations as autonomous political units living under the Crown's protection while retaining their inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement. The document affirmed that these territories should not be granted or appropriated by the British without consent of the Aboriginal peoples. In a word, the constitutional framework, set up by the proclamations, was a confederal one. First Nations have never varied from their position that their relationship with Canada is a nation-to-nation relationship.

The Proclamation also set up a constitutional framework for the settler colonies. This relationship was much different than the Crown's relationship with the First Peoples, underscoring the notion that Aboriginal nations were distinct entities with internal constitutions and laws different than those of the settlers. The fundamental difference between the two was that for the settlers, the power to govern themselves came from proclamations, grants and acts of the British Parliament. The Aboriginal Nations on the other hand, derived their power from their own internal arrangements and philosophies. In other words, from the very start, Aboriginal constitutions were rooted within their own communities.

As time went on, other legal arrangements, namely treaties, augmented the principles set out in the Proclamation.

Treaties are not all the same. They deal with different groups at different times and address different needs of both sides. But to First Nations, all treaties share some common characteristics, not the least of which being the understanding that treaties are entered into to reach political accommodations, to live in peaceful co-existence, and to share the land and resources of Canada.

It must be remembered that the use of treaties was common far before the Europeans arrived. Indigenous nations had well-established diplomatic processes

amounting to a continental treaty system which governed external matters of trade, peace, neutrality, alliance, the use of territories and resources, and protection. Internal autonomy was respected by the treaties.

Because of the subject matter they dealt with, indigenous treaties, by their nature, were considered to be vital living instruments of relationship, requiring constant attention to adapt as circumstances change.

To the First Nations, treaties also have a spiritual quality inseparable from their political and business purposes because of our spiritual connection to the land. Although treaties dealt with land, it was basic to the culture and spirituality of the people that neither title in the land, nor submission of First Nations peoples to the British monarch, were ever part of the agreements.

Treaty-making was also not new to the Europeans. They had their understandings and conceptions of treaties that were unique to their history and culture. The European experience with treaties on their continent, had much to do with establishing new boundaries and consolidating small communities into larger ones. As a result, treaties were seen as unchangeable and not growing and adapting to new needs as the Aboriginal treaties were. The British view in particular, was that once a treaty was signed it would remain in effect in a steady state until action was taken by one or both sides to change it.

In addition to the different views about the purpose and flexibility of treaties between the Aboriginal and non-Aboriginal treaty makers, there was also large differences in interpretation of the actual content of them. The two critical areas of difference were with respect to the concept of possession of the land and authority over the people on it. Unlike the understanding of the First Nations, the European understanding was that the treaties gave the Crown sovereignty over both the land and the people on it.

The effects of downgrading the importance of the treaties is to downgrade the importance of the stature of Aboriginal peoples as nations and their contribution to Canada. It also downgrades Canada, its integrity and credibility as a democratic country which has human rights at its constitutional core. To strengthen the federal state, and to prevent further deterioration of relations between First Nations and the government of Canada, what is needed is not a downgrading of the treaties but rather a return to them, so their unique and incomparable contributions, historical depth and practical significance can inform the Canadian federation of its origins, and strengthen the relationships between the First Peoples and the rest of the population.

After confederation in 1867, a much more aggressive downgrading took place with the imposition of the Indian Act, whose purpose it was to extinguish Aboriginal rights and assimilate Aboriginal people into the larger population. Coercive legislation took away the rights to dance, participate in potlatch or

appear in traditional costume at festivals. The Department of Indian Affairs regulated all economic activity on reserves through the pass system which disallowed any barter or sale of goods without the Indian agent's permission. Normal sources of funding were cut off, making First Nations wholly dependent on the funding whims of government. Our communities were denied the use of natural resources when jurisdiction over them was transferred by the federal government to the provinces, which had no responsibility to First Nations. Layers of regulation were created, designed to remove access by First Nations to their use. The Marshall case is the current and most dramatic example of this to date, as it was the myriad of regulations and costs associated with them that drove the First Nations out of the fishery, contrary to their treaty right.

The centerpiece of the assimilationist policy, however, was the residential school program which eventually drew children from almost every Aboriginal community across the country. Beginning in 1849, the stated policy of the schools was to « change their views and habits of life » so that the children could « take their place anywhere among the people of Canada ». The children were separated from their parents, forbidden to speak their languages and punished for practicing their spiritual beliefs. The schools never had sufficient funding, and bad management, unsanitary conditions, and sexual and physical abuse of the children was commonplace. These abuses were compounded by lack of basic care – adequate food, clothing, medical services and a healthy and safe environment.

First Nations problems today -- of poverty, unemployment, health disorders, family dysfunction and poor community development -- are directly traceable to the residential policy, the dispossession of our land, deliberate violations and downgrading of treaty rights. The conditions endured by Aboriginal peoples in every category of the standard of living index – housing, health, employment, and education – made us socially what we already were constitutionally – second class citizens.

Despite a half century of well-intentioned programs and policies, racial inequality continues to be a deeply rooted flaw in the structure of Canadian democracy and federalism. Racial inequality for Canada's Aboriginal population is the most deep flaw of all. The « equal citizenship principle » which began in 1944 with the passage of the Racial Discrimination Act of Ontario, was the grandparent of a range of policies and legislation which, taken together, define Canada in the eyes of many as a nation of social justice. The Canadian policies and practices of multiculturalism, humanitarian immigration laws, human rights codes and commissions, constitutionally entrenched rights and freedoms, labour codes, minimum wages, gender equity requirements, affirmative action and anti-hate laws which followed, are models much of the rest of the world tries to emulate, yet few of these protections reach First Nations peoples, most of whom live in third-world conditions. The reason they do little if anything to correct the systemic problems of First Nations is because in many ways, they are the wrong answers to the wrong questions.

So how can Canada become a stronger and more credible democratic federation?

I will continue to argue that the deep flaws in the Canadian federation cannot be corrected by anti-discrimination measures or other human rights initiatives that do not address the underlying cause of the disease that ails us. First and foremost, the Canadian federation must recognize the nation-to-nation relationship articulated in the Proclamation of 1763 and in the treaties with First Nations. Recognition and respect for Indigenous peoples must be restored through recognition of our distinctive cultures and historical traditions and our own systems of government.

It is instructive to look at indigenous forms of democracy which existed far before Benjamin Franklin and others crafted the American Bill of Rights, or the Canadian « Fathers of Confederation » put pen to paper to draft the BNA Act.

Historians are increasingly of the view that representative democracy and the confederal form of government developed by the Indigenous populations were far more advanced than those the Europeans unsuccessfully tried to establish. For example, historians now agree that the Iroquois forms of democratic government predated the US Constitution by thousands of years and were a major influence on the ideas which shaped it. The Five nations confederacy of the Mohawk, the Oneida, the Onondaga and the Cayuga also established federal systems of government whereby each of the nations retained autonomy in internal affairs and had a central council to decide matters of trade, alliances and treaties, externally. Consensus decisions were reached by a process of consultation and what we would call today « transparency ». Women played a major role in governance and careful checks and balances were in place to maintain quality of leadership and accountability. Power rested solely on the respect of the community and the skill in weaving consensus from many different positions. The point here is, First Nations are not new to democracy and federalism. We have a rich and diverse history of self-government which we would like restored.

It is time for Ottawa to put its full resources behind the task of reconciliation, and to rebuild the federation on a durable basis. The national government should pursue genuine negotiations with all the provinces and First Nations to improve the economic and social condition of our people: job creation, new understanding with business and labour.

All the provinces should think of practical ways to engage the First Nations communities is serious dialogue: more people-to-people and community-to-community exchanges, and more efforts to break the isolation that gives rise to fears, hatreds and misunderstandings about how the other thinks and feels.

The Prime Minister of this country needs to be clearer about his government's willingness to accept the changes that will clearly accommodate a healthy pride

within the First Nations communities. He needs to be bolder in his affirmation of partnership with First Nations, and be pro-active in building on the spirit behind the apology to First Nations citizens for the abuses of residential schools. He must not betray that apology through lack of imagination or insecurity of leadership. And he needs to signal to the federal government that, on this issue, partisanship counts not at all.

We now have an unprecedented opportunity to learn from the mistakes of the past and to set out on a new course, both as governments and peoples. If Canada has a meaningful role to play on the world stage then it must first set its domestic house in order. A national policy of reconciliation and regeneration with the full participation of the federal government, provincial governments and the First Peoples would bring us to that place where we would all be proud to be a role model for the world.

Meegwetch

Forum of Federations / Forum des fédérations
forum@forumfed.org
