First Nations' View

Government policy and indigenous peoples

APPEALS/ *There is no forum in which arbitrary decisions by the Canadian government can be appealed.*

by Kathy Makela

Understanding the present and future problems involved in the resolution of the indigenous rights issue in Canada requires an understanding of the federal government's policy regarding indigenous peoples. I will attempt to give a brief summary of what I interpret to be the government's policy regarding indigenous peoples, with particular reference to their policy regarding aboriginal title to land.

Before the 1970s there were few indigenous political organizations in Canada and "Indian policy" was determined by the dominant society through the federal government. Until recently, four major policy elements have been evident in Canadian Indian policy since Confederation, their explicit purpose being to destroy the indigenous way of life while preparing Indians for assimilation into the larger society. The first two policy elements, conversion to Christianity and treaty-making, were largely completed by the turn of the century, with the latter of the two being accompanied by the establishment of reserves and the subsequent confinement of Indians to the reserve systems. The third element was compulsory schooling of Indian children in government-financed religious residential schools, and the fourth element was the outlawing of indigenous customs of governance and leadership selection and the imposition of the Indian Act elective system of government.

Under this policy each Indian government was created by federal officials under parliamentary authority. Title to land was claimed for the Crown while aboriginal title was denied. The powers granted to Indian governments were delegated and limited in scope with the exercises of these powers subject to the control of the federal government. There was no autonomy for indigenous communities, many of whom were financially dependent upon the federal government. Within the indigenous communities, the elective system of government promoted factionalism in the population, instability in leadership, and inconsistency in public policy, problems which are still evident in many (but not all) band governments today.

Indigenous political organization at the provincial and national level emerged in the late 1960s with the release of the 1969 White Paper. This major policy initiative of the Trudeau government proposed to terminate all relationships with Indians that fostered "segregation" and "discrimination" and was to be replaced by policies which encouraged rapid integration of the indigenous population into the dominant society. Moreover, federal responsibility under s.91(4) of the Constitution was to be eliminated. Indigenous leaders strongly opposed the White Paper policy and, as a result of much lobbying, the federal government abandoned it.

Since 1970 government Indian policy was evolved into: (1) comprehensive and specific land claims policies; (2) the devolution of programs and services; (3) community-based self government negotiations; and (4) constitutional talks on the entrenchment of aboriginal rights. At the core of any attempt to deal with indigenous peoples is the conflict of federal and provincial interests and jurisdiction. These conflicts center around three important issues: land claims, self-government, and financial liability.

In January, 1973, the Supreme Court of Canada handed down its decision in the appeal of the *Calder* case in which it held that the Nishga Indians had an aboriginal title to their land at the time of contact, although the court split on the question of whether that aboriginal title still existed. In light of such a directive, the government undertook its new "comprehensive claims" policy which acknowledged the principle of unextinguished aboriginal "interest" and a federal "willingness" (obligation would be the correct legal term but "willingness" is the terminology used by the government" to negotiate settlement with indigenous peoples based on that principle.

Initially, this claims process was viewed by the government as compensation for a lost way of life; the indigenous entity had lost thier way of life and the claims were to provide a means to resolve the cultural, social and economic problems which had resulted due to the loss. By 1978, however, the federal perspective as to the objective of the claims process changed to that of translating the concept of 'aboriginal interest' into 'concrete and lasting benefits in the context of contemporary society'. These specific benefits were to allow the indigenous people "to live in the way they wish" and were to include a small land base owned by the indigenous peoples themselves; harvesting rights; and , representation on administrative boards concerned with land use and wildlife management.

This comprehensive claims policy has been the subject of much criticism by indigenous peoples for it has not only proven ineffective but also it leads to the extinguishment of the aboriginal title to the land. The terms contained in the final agreement signed in 1976 with the Cree and Inuit of the James Bay region in Northern Quebec are consistent with the kinds of provisions respecting lands and economy in the 1978 comprehensive claims policy. This agreement, known as the *James Bay and Northern Quebec Agreement (JBNQA)*, had been the source of much embarrassment for the government and has been called Canada's "most famous broken treaty" by Chief Ted Moses, Grand Chief of the Grand Council of the Cree (of Quebec). In his 1988 address in Yellowknife, Chief Moses stated: "The JBNQA is a good agreement. We made one mistake; we trusted the federal government to respect the spirit and intent of the Agreement; and because of that we had to fight for the very things that were recognized in the Agreement. Promised programs and services, self-government rights and other benefits that were specified in the Agreement were withheld, delayed or refused until we fought."

This statement was supported by the conclusion reached by the legislative commission established by the Government under Orders of Council: "In the course of history, a notion persists that governments make promises to induce natives to surrender their lands and other rights and then routinely break these promises, frequently hiding behind legal technicalities. Regrettably, the evidence supporting this notion is extensive."

When the government first broke the JBNQA, a federal review concluded that Canada had not violated any legally binding commitments, although it had not respected the "spirit and intent" of the Agreement. The bottomline is that the Canadian government refused to be bound to any specific language within the JBNQA. The federal government is able to do so because in any negotiating process with indigenous peoples, the government is in the position to threaten to cut off negotiations if the indigenous peoples do not comply with their demands. Furthermore, there is no forum in which arbitrary decisions by the Canadian government can be appealed, short of resorting to the courts. The obvious problem here is that these jurisdictional issues are of a political nature and the courts are ill-equipped to deal with them. It is for this reason why for many indigenous peoples the constitutional forum remains the preferred method for obtaining recognition of indigenous (aboriginal) rights. While the rejection of the Charlottetown Agreement may have been interpreted as a failure to some Canadians, it was a good introduction for Canadians and aboriginal peoples alike of the new direction "Indian policy" in Canada will take in future years.

Positively Pink

Bread and circuses or what?!

POLITICIANS/ *None of them like to fight on ground chosen by someone else.*

by Adrian Park

Ever get the feeling the debate has been commandeered and its course diverted? That a series of quite logical developments have been quietly hijacked and a civilized discourse has been plunged into an arena dominated by noisy demagogues playing the gallery as though their lives depended on it?

The story so far. Way back in the mists of time, around 1984 or so, though it may well have been the Jurassic, a nascent and aspiring leader of the Opposition, one Brian Mulroney, made a pledge. Stuck somewhere between promises relating to the Saskatchewan heavy oil converter, the PEI fixed link and the Hibernia project was a comment about including sexual orientation as proscribed basis for discrimination in the Canadian Human Rights Act. Later that same year the dinosaurs rose to pre-eminence following the defeat of less well adapted life forms at the polls. Somewhat naively, those to whom the promises had been made expected at least lip service to ward their realization. John Crosbie, then Justice Minister, even repeated the promise, but nothing happened beyond those words.

From 1985 a long silence fell over the issue of any amendments to the Human Rights Act–silence, but not inactivity. Too many issues were at stake. Another Federal election came and went. The dinosaurs were reaffirmed at the top of the heap. Still no action–indeed, when pressed on the matter, spokesdinosaurs seemed embarrassed about ever having brought up the subject. Other lobby groups, especially those for the physically disabled became deeply perturbed, as they too had received promises of protection, but the gay and lesbian issue had the government paralyzed with fright. Opening any debate on any amendment to the Human Rights Act was going to open the whole debate in a very public way, on an issue the government sincerely hoped would go away.

Between the spring of 1991 and the fall of 1992 a series of cases worked their way into provincial higher courts. Firstly, in Nova Scotia, the provincial courts ruled that the outlawing of "discrimination on the basis of sex" in the provincial human rights code should be read as though it included "sexual orientation" - the ice began to break. In the fall of 1991 the Nova Scotia government amended their human rights code to specifically include sexual orientation as a proscribed form of discrimination. Within nine months three other provinces had followed Nova Scotia's lead, leaving only Alberta, PEI and Newfoundland as provinces where discrimination in housing, employment and the provision of services is still legal.

In the summer of 1992 the courts reached decisions in the Mossop case (same-sex spousal benefits), the Haig and Birch case (regarding gays and lesbians in the military) and the Douglas case (ditto). The Ontario Supreme Court, ruling in the Mossop case, suggested that the Federal Human Rights Act should be read as though it already included sexual orientation as a prohibited basis for discrimination. The federal government's hand had been forced–advised that further cases in the courts were likely to go to the plaintiffs unless the government fought expensive appeals, a series of panic measures followed. Military regulations were struck down following Michelle Douglas's victory, and an impasse in an immigration case in BC was pre-empted by the granting of landed immigrant status to a local lesbian's non-Canadian companion without any of the usual procedure being followed.

The dinosaurs handed the torch to Kim Campbell, while in the backwaters of the Federal swamp other things stirred.

The Blenkarnosaurus and its cohorts, having formed the Conservative Family Caucus, began to make angry noises about opposing any amendment. The air began to fill with the flatulent rumblings of large reptilian ruminants. Campbell's task was simple, rather than devise an amendment that would honour previous promises, an amendment was required to limit the advances being granted by the courts.

No politician likes to fight on ground chosen by someone else, or on an issue they haven't had a hand in framing. Kim Campbell, no fool, was no exception. Suddenly, a new issue, a savoury tid-bit for press and public alike, was raised–same-sex marriage. The intent was to define "spouse" legally as a person of the opposite sex before anyone challenged federal regulations concerning pension-rights and survivor benefits with a high expectation of winning. However, announcing this intention of changing the rules mid-way through a game the Federal government looked like loosing was far too blatant a maneuver. Instead, the "spouse" definition Campbell released in proposed legislation last December was presented as "protecting the sanctity of marriage and the family." From the depths of the swamp came a satisfied bellowing, the great sauropods were pleased, and the press ran with it. Visions of bearded body-builders flouncing down the aisle in a billowing flood of white organza were paraded as a camp nightmare adroitly avoided. The terms of debate had non-too-subtly shifted. Opinion polls had suggested up to 75% support for extending human rights legislation. Now the issue was shifted from the field of human rights into the fetid realm of over-heated rhetoric - an atmosphere conducive to dinosaur comfort, but lethal to rational discourse.

It's unlikely Campbell's successor in the Ministry of Justice will do much now before the expected Federal election, unless the amendment is dressed up as "saving the Canadian family from the folly of the courts." After eight years of dither and procrastination we are to be left with an object lesson in the cynical politics of embarrassment, evasion and panic.

Sixty five million years ago two dinosaurs chomped contentedly on the swamp vegetation of the Yucatan. One looked up and saw something hurtling across the sky, and said: "What's that big bright thing heading this way?!" Its companion replied: "Dunno! You tell me....." SPLAT!!!

We can only hope.