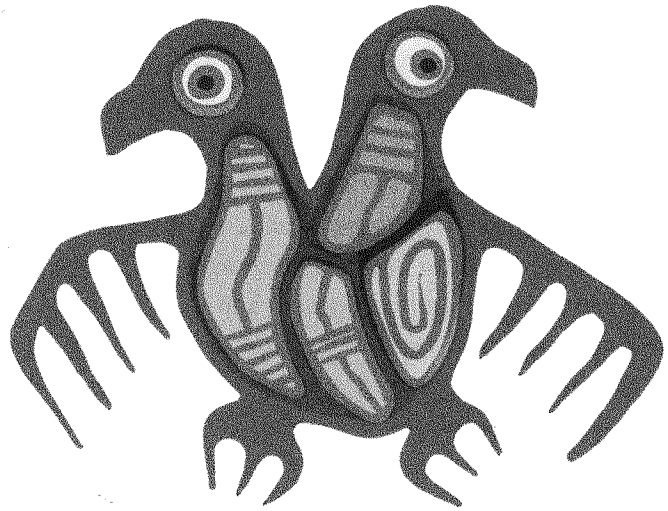
Unit I

Historic Overview: Original Sovereignty and the Colonial Experience



Canadian History: An Aboriginal Perspective

By Georges Erasmus and Joe Sanders

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ABORIGINAL SOVEREIGNTY

When non-native people first came to this continent some 500 years ago, Indigenous people lived all across the Americas. It is a matter of historical record that before the arrival of Europeans, these First Nations possessed and exercised absolute sovereignty over what is now called the North American continent. Hundreds of tribal communities, made up of a variety of nations and representing at least ten linguistic groups, lived in what is now known as Canada, from Newfoundland to Vancouver Island.

It was not possible to find "empty" land in the Americas. All the land was being used by the First Nations. Our people decided their own citizenship. They had a wide variety and diversity of governmental systems, almost all of them regulating their activities and the relations among their members with a degree of formality. The way they dealt with the Europeans is ample proof of their capacity to enter into relations with foreign powers: they made a number of treaties with the French and British crowns, and many of the colonies survived because of the assistance First Nations gave to the European settlers.

Our people knew how to survive in this part of the world. They knew all of their valleys and mountains and rivers. They had names in their own languages for all of these places. They believed that all things had their place, from even the smallest insect and the smallest leaf. And they were taught to respect life and all living things. Our people were living lives that must have been of a much higher quality than people now live in Canada.

It was unfortunate that early Christian leaders believed that our people did not understand why human beings were here on earth. Our people did not think there were gods in every leaf. But they did think that everything around was given by the Creator. They believed that there was one supreme being, that there was purpose in all of this, and that the purpose did not end when we died.

Our people were not a war-like people, but they did defend their interests. Our territorial boundaries were clearly defined. Although First Nations had many disputes with neighbours in their history, they eventually arrived at peaceful arrangements with one another.

Our people understood what the non-native people were after when they came among our people and wanted to treaty with them, because they had done that many times among themselves. They recognized that a nation-to-nation agreement, defining the specific terms of peaceful coexistence, was being arranged.

BROKEN AGREEMENTS

When our people treatied with another nation, each nation's interest, its pride, and its word were at stake. The word of the agreement, the treaty, was given in a very sacred way. And it was not very easily broken.

So it was quite amazing to our people — and it took them a long, long time to realize — that they could sit with other people whose religious leaders were present, and who would be virtually lying to our people as they were executing the treaty. Even before the document reached London or Paris or Ottawa, they were already forgetting the solemn promises they had made. That never happened on the side of the Indigenous peoples.

It didn't help that the European interpretation of a treaty, often differing radically from the First Nation's interpretation or understanding, significantly altered the intent of the original agreement. For example, ownership of land in the Anglo-Canadian "fee simple" sense of title was foreign to the thinking and systems of First Nations. Land was revered as a mother from which life came, and was to be preserved for future generations as it had been from time immemorial. Land was used for common benefit, with no individual having a right to any more of it than another. A nation's traditional hunting grounds were recognized by its neighbours as "belonging" to that nation, but this was different from the idea of private ownership. For the most part, the boundaries were not delineated, although some nations in British Columbia had systems of identifying their boundaries and passing on custodial responsibilities. First Nations peoples, then and now, believe that they live with the land, not simply on it.

As our people understood it, they had agreed to allow peaceful settlement by non-native people in large parts of their valleys and mountains and on rivers. But at the same time, native people would retain large tracts of land on which they would govern themselves; on which our institutions would continue to survive; where we would nurture our children; where our languages and our culture would flourish; where we could continue our lives; where we could hunt if we wished, plant crops if we wished, fish if we wished. And where, if we wanted to, we could also be educated in a formal way to become doctors, lawyers or whatever we wished.

The history of the settlement of Canada shows that non-native people, represented by federal, provincial and local governments, have continued to break the original agreements. Hunting, fishing, trapping and gathering sections of treaties that were intended to protect the Aboriginal way of life have continued to be changed by Canadian government policies, regulations and legislation. The original land base agreed to at treaty time has continued to be expropriated for bridges, municipal expansion, military exercises, and railway and highway right-of-ways, generally without compensation. In many cases, First Nations are still waiting to have the land entitlement of one-hundred-year-old treaties fulfilled.

REWRITING HISTORY

Non-native people have even distorted history. It is very difficult to find a history textbook in any province of this country that accurately tells the story of how our two peoples came together. Instead, there are books in which we are still being called pagans and savages, without an accurate reflection of the solemn agreements that were made and indicate that Indigenous people were to continue to govern themselves.

Native people have the enormous job of tapping people on the shoulder and saying, "This is not the way it's supposed to be. This is not the way we are supposed to be coexisting. We aren't supposed to be the poorest of the poor in our land." Our people have an understanding of the early agreements that the school books tend to ignore.

In 1763, three years after the French and British resolved their differences in Canada and recognized Britain as the European power here, the Crown of Great Britain laid down a process in the Royal Proclamation that set forth the Crown's policy on land negotiations. That policy has never been revoked. In the Royal Proclamation, the Crown recognized that any lands possessed by First Nations in what was then British North America, would be reserved for them, unless or until they ceded that land to the Crown.

The Proclamation could be regarded as the first major legal link between First Nations and the British Crown. And by virtue of that Proclamation, it can be said that First Nations became protected states of the British, while being recognized as sovereign nations competent to maintain the relations of peace and war and capable of governing themselves under that protection. Under international law, a weaker power does not surrender its right to self-government merely by associating with a stronger power and accepting its protection.

Between 1781 and Canadian Confederation in 1867, some First Nations signed treaties with the Crown under which they ceded rights and privileges to certain lands. In return, they were to obtain certain treaty rights. These treaties represented further legal links between those nations and the Crown. But again, there is no evidence that sovereignty was surrendered.

Canadian courts, since the latter part of the nineteenth century, have relegated the First Nations' treaties with the Crown almost to the level of private law contracts, thereby denying their status as treaties in the sense

of international law. Yet the Supreme Court of Canada repeated in the *R.* v. *Simon* case that First Nations' treaties are unique and share some of the features of international treaties. If the agreements were "treaties among sovereign nations" in the eighteenth and nineteenth centuries, how could their status be changed without the consent of First Nations?

In 1867, the British North America Act (later renamed the Constitution Act 1867) provided for internal self-government in Canada by European settlers. First Nations were not a party to the Confederation that was established, nor to the drafting of the British North America Act. Nevertheless, subsection 91(24) provided that the federal Parliament would have the authority to legislate for "Indians and lands reserved for the Indians" to the exclusion of the provincial legislatures. By virtue of that subsection, the First Nations were placed under the legislative power of the federal government as agent of the Crown, but not under its territorial jurisdiction.

Certain other treaties were executed between some of the First Nations and the Crown after Confederation. In many cases, it is evident that treaties were imposed upon First Nations and that their leaders had little choice but to consent. The treaties were written in English and the Crown's negotiators often misrepresented the contents.

Today it may be argued that many of those treaties are "unequal" or "unconscionable" or "unfair" in both substance and procedure. Even so, First Nations did not perceive the treaties as surrender of sovereignty.

THE INDIAN ACT

In 1876, the federal government passed its first Indian Act, "the first consolidation of the laws pertaining to Indians." The Indian Act was passed by the federal government because it had exclusive legislative responsibility for Indians and lands reserved for Indians, but First Nations themselves had no input into it. Neither did First Nations' citizens have any part in electing the politicians who legislated the Indian Acts, since native people were not allowed to vote federally until 1960.

In the early days of European settlement, it is likely that native self-government continued for some time because First Nations had the numbers and the strength at that time to warrant recognition. But as time went on, that

changed. During the first sixty years of the twentieth century, our people were in the most despicable, colonizing, racist situation imaginable. Under the control of Indian agents, they could not leave their reserves without passes. They were not legally in charge of a single thing that happened on their land.

The same Department of Indian Affairs that controlled our lives through Indian agents until only recently still exists today. It has 4,000 civil servants, and its primary function is to maintain control over native people.

The Indian Act still controls every facet of our lives. It allows a certain amount of local self-government, but there is not a single issue on which we can make a law that does not have to go to a department official for approval. These officials are usually bureaucrats whose faces we've never seen and who have never seen the community. And yet these officials have total power to pass or not to pass a dog law, a local development law, a garbage law or any law requiring departmental approval. They don't have to give a reason; they can just deny it. No other municipal government in this country is up against that kind of control. Surely it only exists in those parts of the world where an occupying army wants to ensure that the population remains completely submissive.

RETAINING OUR RIGHTS: THE ONGOING SAGA

Despite all of this, the Royal Proclamation of 1763 is still alive and well. It means that where there are no treaties, the land belongs to the First Nations, and no Canadian government — whether provincial or federal — should be developing our resources and extracting royalties and taxes from them. On such lands, there should be Indigenous governments and institutions for Aboriginal people.

In some cases in this country, we have treaties over one hundred years old by which, very clearly, original land was to have been set aside for native people. After one hundred years and more, the land still has not been put aside. Meanwhile, governments have repeatedly invited people from all over the world to come in to cut down our trees and get a square kilometre ... two square kilometres ... ten square kilometres of land.

Even while everyone acknowledges that our people have lived here for thousands of years, because the federal government has not recognized First Nations' title, there is not a square centimetre that is recognized as Indigenous territory.

First Nations regularly confront governments with their claims to entitlement, and the governments cannot deny the validity of such claims. But instead of recognizing land as Indigenous territory, they seek to "settle" claims by exchanging historic rights for "fee simple" ownership, so the land can be treated like every other piece of private property in Canada.

Take, for example, the territory we call Denendeh, otherwise known as the western Northwest Territories. The Dene know they have always owned this land, but the federal government refuses to acknowledge their Indigenous title. In 1992, the smallest group of Dene, the Gwitch'in, negotiated an agreement with the federal government to get property title to a portion of the land in exchange for extinguishing historic claims. Outside of this one agreement, no Dene land has ever been surrendered. Yet there is not one small piece of the vast remaining territory that a Dene can use to build a home. Instead, our people must use a foreign system of government to obtain a building permit.

At the same time, it is clear that the Canadian public has always been on the side of some kind of just, equitable recognition and implementation of both Aboriginal rights and treaty rights.

Despite the irony of this state of affairs, First Nations were not even party to the drafting of the renewed Constitution of 1982. The governments did agree, however, that First Nations leaders should be invited to participate in subsequent constitutional conferences to identify and define their rights for inclusion in the Canadian Constitution.

That was the first time in their relationship with the Crown that First Nations were consulted about the Constitution, albeit only to a very limited degree. They were, in effect, merely invited to establish and defend their rights. If First Nations had not participated, it is conceivable that non-native governments would have unilaterally identified and defined those rights.

FINDING A GENUINE SOLUTION

What is it that our people are after? Simply this: We want to sit down across the table from the leaders of this country and come up with a genuine solution that will be acceptable both to Indigenous nations and to the people who have come here from elsewhere.

We think there are sufficient land and resources in this country to allow First Nations to retain enough of their original territory where their own institutions can be sovereign.

We do not want to scare Canadians with our terminology. No one is scared in this country by the fact that Ontario or Manitoba can make laws in education and not a single power in the world can do anything about it. They are sovereign in their area of jurisdiction. We, likewise, want to have clear powers over our territories.

Canada is already set up for it, because we have a confederation that easily lends itself to what our people are asking for. We have the federal government, we have federal powers. We have provinces, we have provincial powers. We have some areas where the two overlap. We could easily have a third category of First Nation powers.

We are prepared to negotiate. But we definitely need enough control over our lives so that we can grow, we can flourish, we can prosper. Our people no longer want to be in a situation where you can have a mine located right outside your door, but the resources from that mine go to someone else, the employers come from somewhere else, the employees come from somewhere else, the caterers come from somewhere else, and the decision as to when that mine is going to be developed is made somewhere else. This kind of development leads to social disruption. The mobile out-of-town workforce, continuing high unemployment, racism, pollution and the disturbance of hunting, fishing and trapping grounds all take their toll when we don't have the power to make the decisions that affect our people.

There has to be a peaceful way to share. And if we can't do it in Canada, with the few people we have here, how will any other part of the world ever be able to settle their situations?

But native people are losing their patience. It is clear that our people are not going to sit back and take the treatment we have had to take in the past. That much is guaranteed.

The Canadian people must continue to push their governments to sit down with First Nations and to negotiate a just and acceptable solution, to reflect what the Canadian polls say Canadian people want. Native people by themselves, it is obvious, are not going to get the Canadian government to take that step.