THE RIGHT TO PROPERTY

Under Canadian Law

The ultimate conceit of the whiteman is that they discovered North America the land we know as Turtle Island. So conceited is the whiteman that he believes that English common law is the source of Anishinabe rights and so called aboriginal title in the land. Our children are taught in white schools that the source of our rights lies not in our own customary law, our own use and occupation of the land, but rather in the benevolence of an English law system that is prepared to recognize and confer upon us certain rights and privileges as a matter of its law.

It is true that recognition in English common law of the concept of aborginal title has some benefits for First Nations. As a result of a very early French and English policy developed as they occupied our lands in the 17th and 18th centuries, it is now Canadian law that whatever that aboriginal title is, it constitutes a burden or fetter on the Crown's ultimate ownership of the land. It was once the law of this country that, under the Proclamation of 1763, no settler could occupy "Indian" land without our "aborginal" title first being surrended to the Queeen. Hundreds of treaties have been signed between the First Nations and Canada delivering up this white definition of our rights to Canada in exchange for a few dollars a year and a few acres of our own land. Hugh tracts of Canada have not yet been treated and the "Indian" interest in the land remains. Nonetheless, settlement and occupation has taken place, contrary to the spirit and intent of the Royal Proclamation of 1763 which remains part of Canada's constitution. At this most fundemental of levels, Canada fails to honour its constitutional obligations to the people of the First Nations. English law is pragmatic law. As a convenience, it permits the extinguishment of "aborginal" title by government action deemed to be inconsistent with an "aboriginal" title, for example, legislation permitting the clear cutting of timber in untreated land.

The whites of North America treated with First Nations in some cases out of necessity of war, knowing that miltary alliance with us meant victory or defeat. Later treaties became dusty documents fit only for occupying space in archives. By the late 1960s the then Prime Minister of Canada, Pierre Elliot Trudeau stated that treaties were "irrelvant" and that their promises were unworthy of keeping.

In a somewhat perverse manner, the First Nations became engaged in an effort to sustain the validity of treaties which were in themselves a matter of

convenience to the Crown and a reflection of an English law definition of what our rights consisted of. Eventually, the Supreme Court of Canada has described the nature of the "Indian" interest in land prior to the signing of a treaty and the nature of the "Indian" interest on land reserved to "Indians" in consquence of a treaty as being unique. It is not useful to describe those rights as a Frenchman would describe a usufructuary right-that is to say, a personal right of use and benefit. Nor is it useful to describe "aboriginal" title in terms of English property law rights. The Supreme Court of Canada says "aboriginal" title in untreated lands in Canada and First Nation interest in the land reserved to us are the same and they are **possessory in nature-not propietary.** Even lands recognized as reserved lands are defined in law as being **owned by Her Majesty and we, for whom the lands are specially protected, have merely the right of "use and benefit'.** In the language of the law applicable in Canada, this gives us no ownership. It gives us no rights in the soil. It gives us no rights to the minerals, to the gravel or the waters, to the timber. We may enjoy the fruits of these, we may use and derive benefit from Her Majesty's land held for us, but we may not have it and thereby we lose and do not have the right to make decisions for our future benefit in the same way as Canadians. We must always ask Her Majesty "May we do this with your land-nat we di that.

Despite being enfranchised under Canadian law in the 1950s, we are far from being emancipated. What are some of the solutions? International law has recognized three things. First that "aboriginal" title may not be extinquished except by treaty. Second, that interference with a First Nation's exclusive use and occupation of land prior to a treaty is compensable in damages as if the "aboriginal" title was a property right. Third, treaties must always be open for renogotiation so as to guarantee benefit equivalent to the value of the land surrendered to the European occupants of Turtle Island.

As long as there is respect for the right of property as understood by international laws ie; Article 17 of the Universal Declaration of Human Rights. Canada must negotiate with respect for the property rights of First Nations. Negotiation must be between equals, not one subservient to the other. Of prime importance is the economic equality of the participants. Treaties written in the 1800s were conducted after the buffalo was deliberately destroyed so that First Nations were no longer independant and thererfore would negotiate as beggars. We cannot be treated as beggars in our own lands. We must be able to negotiate in an atomsphere of mutual respect and mutual economic self sufficiency.

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