The Gap Between Historic Treaty Peoples and Everyone Else

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HOPE, DESPAIR

It is an exciting time to be working on Aboriginal issues in Canada—as exciting as any time as I can remember, and I am no spring chicken. There is a resurgence afoot in Aboriginal communities, and it is 40 years in the making.

In Labrador, the Innu Nation is signing agreement after agreement with mining companies to share revenues and hire locals. The terms of economic development are finally being negotiated, not imposed. It wasn't very long ago that Newfoundland and mining companies got all the benefits, and Innu were left with the environmental impacts.

In the Yukon, over 15 First Nations have negotiated self-government agreements that put the fate of Aboriginal groups back in their own hands. They pass their own legislation. They control their social spending. They design school programming. They create justice systems. They levy their own taxes. They have a say in the pace and extent of extraction of their natural resources. And, crucially, they have relatively large land bases.

There are more modern treaties that cover Nunavut and parts of the Northwest Territories and British Columbia. All told, there are now 26 “modern” agreements.

This is what the future between Canada and Aboriginal peoples looks like: a respectful devolution of power following a troubled relationship. The success stories of communities reclaiming control over their land and their economic future are not isolated. They are a trend. In these communities, there is reason for hope.

But there is a problem, a major problem, that not enough people seem to be noticing. And it will get worse until we do something about it.

The problem is this: the positive trends towards self-government and resource sharing are largely absent from much of the country, notably Ontario, Manitoba, Saskatchewan, Alberta. In these provinces, self-government in any meaningful sense remains a distant dream. Revenue-sharing with companies extracting natural resources is barely on the table. In Aboriginal communities in these provinces, the hope we see in many parts of the country is still far away.

THE GAP: HISTORIC TREATIES vs. EVERYONE ELSE

The divide I want to talk about today is between those Aboriginal people in lands covered by what I will call the historic treaties, and those Aboriginal people with modern treaties or no treaty at all.

It is a gap that is 40 years in the making. And it is widening. Every major step forward in the last 40 years has left too many people another step behind.

There are what amount to two completely different legal regimes applying to Aboriginal peoples in Canada. In Ontario, Manitoba, Saskatchewan, Alberta and parts of British Columbia, Aboriginal people live under treaties mostly signed between the second half of the 19th century and the early 20th century. We call these the "historic" treaties. We are now standing on land covered by Treaty 6, for example. The majority of Aboriginal people today are connected to land related to historic treaties.

These treaties were signed as the imperial Canadian state marched ever westward, clearing the way for a National Railway and the economic development of the Prairies and beyond.

A lot of Canadian land is covered by these treaties, but not all. Yukon, the Northwest Territories, Nunavut, Québec, the eastern provinces and most of British Columbia never had treaties that purported to address land. This is a major difference. And it has major consequences.

A relatively recent study on community well-being that looked at 25 years of data on outcomes in education, employment, income and housing showed that between 1981 and 2006 "Modern Treaty First Nations" improved at nearly twice the pace of "Historic Treaty First Nations." Of all First Nations with treaties, Prairie First Nations had the lowest well-being scores.

WHY A GAP?

There are a couple ways to explain this growing inequality. The first is that the historic treaties were rotten deals for Aboriginal communities, and they remain rotten deals to this day. I will return to this point shortly.

The other source of the divergence is 40 years of Supreme Court judgments and the related shifts in the approach of federal and provincial governments toward areas without historic treaties.

In 1973, shortly before I went to law school, the Supreme Court acknowledged in a case called *Calder* that Aboriginal people still had some rights ("Aboriginal title") to land that was not ceded to the Crown. This changed everything, because before then governments had acted as if Aboriginal people had no land rights to areas they had traditionally occupied for hundreds or thousands of years.

In response to the *Calder* decision, there was a seismic shift in the government's approach. It had to acknowledge and deal with Aboriginal claims to land. All of a sudden, Aboriginal groups had enormous leverage in negotiations over land and self-government. The era of comprehensive land claims began. This is why we have 26 modern treaties today, and more are on their way.

More Supreme Court decisions followed that further strengthened the hand of Aboriginal people with respect to their traditional lands. The *Delgamuukw* case fleshed out the legal tests for proving Aboriginal title. A few months ago, the *Tsilhqo'tin* case gave Aboriginal communities even more leverage.

All these Supreme Court decisions and policy changes were welcome and significant developments. But here's the thing: they had far less impact on lands covered by historic treaties. In those areas, the government considered the issue of land resolved. Ontario, Manitoba, Saskatchewan and Alberta went on with business as usual.

Aboriginal people in these provinces have been left with little power or capacity in their own homelands. They are consigned to tiny reserves. It is almost impossible for most people to make a decent living hunting, trapping, fishing and gathering anymore, in large part because of widespread impact of industrial development projects. These First Nations are being denied their rightful share of revenue from major extraction projects in their traditional homelands. The fact is that with no land base and no revenue these communities have limited futures apart from depending on the begging bowl. Anyone who wants First Nations to be more prosperous and less dependent should be in favour of fundamental changes.

REVISITING THE TREATIES

So we have this gap, and it is growing. We are leaving a huge number of Aboriginal people behind. It is impossible to justify the divergence between historic treaty areas and everywhere else. What's to be done about it?

The first step is to take a long hard look at the historic treaties: how they were negotiated and under what circumstances. And the closer one looks at the history, the uglier and more dubious these treaties look. There is a growing body of

historical evidence that, in fact, some written treaties were forced on First Nations. They were, for the most part, take-it-or-leave-it documents signed under pressure by Aboriginal people with different languages and legal concepts, and there was never a common understanding about what they actually mean.

Treaty 6

Let's take a look at Treaty 6, which covers a lot of the Prairies, including much of Saskatchewan.

In 1878, the Conservative party under John A. Macdonald won the national election. The cornerstone of their platform was the construction of a railway to the Pacific Ocean. The trouble, of course, was that there were a lot of Aboriginal people living on this land. The federal government wanted to build the National Railway as quickly as possible. To do that, it decided to get the Indians out of the way—or “clearing the plains,” as the scholar James Daschuk has put it.

The government approached Aboriginal groups offering a treaty. Many were not interested. But the bargaining positions of the parties were hugely unequal.

At the time, a famine had struck the prairies. The bison, upon which Aboriginal people had relied on for food and trade for thousands of years, had gone nearly extinct within a decade. Aboriginal people were dying en masse of starvation.

The federal government used the famine to strike a favourable deal for itself. It decided that it would withhold emergency food rations from communities that did not sign the treaty. A Liberal MP critic at the time, Malcolm Cameron, called this approach “a policy of submission shaped by a policy of starvation.”

This was brutal, and it was effective. One after the next, Aboriginal leaders signed the treaty. One of them, Chief Thunderchild promised that one day he would “retain a first-class lawyer.” But he signed, and the government got what it wanted.

Honour of the Crown

When our Supreme Court looks back at Canada’s treaties with Aboriginal people, it calls them “solemn agreements.” The Supreme Court tells us that the “honour of the Crown is always at stake” when dealing with Aboriginal people. It is always to be presumed that the government acts in good faith. The court says “sharp dealing” is not to be tolerated, now or in retrospect.

So what are we to make of Treaty 6? Was it honourable for the Crown to starve people into signing a treaty? Is it honourable for the Crown to enforce today a bad deal that it coerced people to sign over 100 years ago? No. The answer is plainly no. If you put a gun to someone's head and force them to make a deal, this is not called a bargain. It is called robbery.

Treaty 9

Now let's talk a bit about Treaty 9, which covers the enormous expense of Northern and Western Ontario. Since Halloween is tomorrow, it is more appropriate than most days to ask: was it a trick, or a treaty? (There is actually a new film about Treaty 9 with that title, by Alanis Obomsawin.)

In 1905, a group of Treaty Commissioners from Ottawa set off in canoes to get Aboriginal groups to sign a treaty. One of them was a man named Duncan Campbell Scott, who later became infamous as the architect of residential schools. Scott's motivation for the negotiations was quite simple. Canada needed this treaty to get access to, as he later put it, "many million feet of pulpwood, untold wealth of minerals, and un-harnessed waterpower sufficient to do the work of half the continent." The historical record makes clear that Canada wanted Aboriginal people to completely surrender their title to the land. But it is far from clear that this is what they negotiated.

Here's how negotiations for Treaty 9 worked: The terms of the treaty were pre-drafted—cooked up between Ottawa and Ontario. The Commissioners could not alter them. The Aboriginal people approached to sign spoke limited or no English. They could not read the treaties they were asked to sign. Aboriginal leaders who signed the Treaty could not write, so they were asked to put their hands on the top of pens as a government official signed an "X" for them.

What were these people told, in these very brief sessions along this canoe trip, to get them to mark that "X"? Today the terms of Treaty 9 govern the lives of about 40,000 Aboriginal people. There are very real and troubling questions about what was actually agreed upon.

Two Narratives

There are two completely different narratives of what the historic treaties actually mean.

From the perspective of the government of Canada and of provinces, what the treaties said was this: First Nations give up all claim to the land, surrender

absolutely any claim to the land, in exchange for which they would get, depending on the treaty, either 4 dollars of 5 dollars a year, the right to continue to live on a reserve, the right to continue to hunt on traditional territory and some sense that they were being protected by the crown. The treaties were set up to create the space for development.

The Aboriginal view, generally speaking, was that the treaties were about sharing land, protection and peace, and a promise of undiminished hunting and harvesting.

Oral history as it is been passed down in Aboriginal communities does not conform with the Crown view of treaties. There is also no evidence from notes taken by the commissioners or their staff that surrender of land was ever discussed or explained. There is no evidence that restrictions on hunting and harvesting were ever explained.

In an article Duncan Campbell Scott published a year after the treaty was signed, he wrote this about the Indian understanding of the treaty negotiations:

> "What could they grasp of the pronouncement on the Indian tenure which had been delivered by the law lords of the Crown, what of the elaborate negotiations between the Dominion and the province which had made the treaty possible, what of the sense of traditional policy which brooded over the whole? Nothing. So there was no basis for argument."[1]

When Scott says "there was no basis for argument," we must then ask whether there was any basis for *agreement* at all. Or was the misunderstanding so fundamental as to make the treaty meaningless?

Three Possibilities

Today, looking back at a historic treaty like Treaty 9 or Treaty 6, there are only three ways to view things, logically speaking:

1. The deal is dishonourable
2. The deal is different
3. There never was any deal.

[1] He added: "The simpler facts had to be stated, in the parental idea developed that the King is a great father of the Indians, watchful over their interests and ever compassionate."

1) Dishonourable deal

The first option is to recognize that the deal is unfair. It is dishonourable to enforce agreements hastily discussed with people who could not read the language in which the terms of the treaty were written, people who received no legal advice or support even as they signed away almost all of their rights. In the case of Treaty 6, it was obviously dishonourable to starve people into agreement.

No one who takes a serious look at history can in good conscience support the Crown's current interpretation. It's ridiculous to think people would say: I have all this land, millions and millions and millions of acres of land, and I'm giving it to you for a piece of land that is 5 miles by 5 miles and a few dollars a year. To put it in terms of a real estate transaction, it's preposterous. It doesn't make any sense.

2) Different deal

The second option is to take seriously the evidence that suggests that the Treaty Commissioners promised things orally that do not appear in the text. The Supreme Court has said that it is "unconscionable to ignore oral terms." We could take Aboriginal people seriously when they speak about what they really agreed to and what the treaties really mean. It will turn out that the real deal is a different deal.

3) No deal

The third option is to say there was never any deal at all. There is a basic principle in contract law which says that a contract is void if parties never truly agree on the terms in the first place. There has to be a basic "meeting of the minds" for there to be a deal. Let's say there are 2 people negotiating over a piece of fruit, and they sign a contract. If one person thinks they bought an apple but the other thinks they agreed to share an orange, there is no deal. Here, if the Crown thought they were buying land, but Aboriginal people thought they were sharing their territories, there was no basic meeting of the minds. There can be no treaty under such circumstances. Back in 1996, the Royal Commission on Aboriginal Peoples wrote: "In light of the history of many of the treaties…it is remarkable that a repudiation of the treaties has not been asserted with greater vigour."

<u>The *Paulette* Case</u>

Back about 40 years ago, in 1973, some people in the Northwest Territories went to court to raise doubts about the terms of historic treaties. They asked a judge named William Morrow to weigh evidence about Treaty 11, which was signed 50 years earlier, in 1921. Sixteen Aboriginal chief said to the Crown: our rights to

400,000 square miles of land were never extinguished, no matter what you think that treaty says.

Here's the extraordinary thing: there were still people alive who had participated in and witnessed the negotiation and signing of Treaty 11. Many of the witnesses were very old. One of them was a hundred and one years old. But they could remember the events of fifty years previous, and their version of events was quite different from how the Crown understood them. Witnesses testified that the land had never been sold or given to the government. Oral promises were made that simply could not be reconciled with what the text of the treaty says.

Justice Morrow concluded there was a lot of doubt about whether the treaties were effective in terminating Aboriginal rights to the land. This case, the *Paulette* case, is another major reason, combined with the *Calder* decision, why the federal government went into land claims negotiations in that part of the country despite Treaties 8 and 11. Four modern treaties in the Northwest Territories followed, with the Tlicho, Sahtu, Gwich'in and Inuvialuit.

Looking back at historic treaties, if we decide the old deals were dishonourable, or that the actual deals were different from what was written down, or that there never were deals in the first place—then it is time for new deals. We have to go back to the bargaining table to negotiate the kind of modern agreements that we are seeing transform Aboriginal communities for the better.

WHERE DO WE GO FROM HERE?

I am not someone who believes we should only rely on courts and judges to sort all these issues out. Much of the work must be done through negotiations and through politics. But the provincial governments of Alberta, Ontario, Saskatchewan and Manitoba have shown little interest in revisiting the terms of the historic treaties, and neither has the federal government. But this needs to change.

In 2013, Premier Wall said that no government in Saskatchewan would *ever* share revenue with any other stakeholder: "Our position will remain unchanged as long as I am premier, as long as this government is in office, that there will be no special deals for any group regardless of that group in terms of natural resource revenue sharing."

In the summer of 1992, when I was Premier of Ontario, all the Premiers agreed with the federal government that they would start self-government negotiations with First Nations. This became one of the key elements of the Charlottetown

Accord. We all know this series of proposed amendments to the Constitution— including Senate reform— was defeated in a national referendum.

But surely it can also be argued that if self-government and new governance arrangements with all first Nations made sense to governments 22 years ago, it is about time we made progress today.

In Ontario, a group of nine First Nations are negotiating for a say in how development occurs in the mineral rich region that has been called "the Ring of Fire." I work for them. We now have a framework agreement in which the province says we will have revenue sharing, enhanced environmental assessment process and improvements in education, healthcare, infrastructure and social conditions on reserve. Is it perfect? No. Does it go far enough? No. It took a year to get that far. But it's also a sign that if people get together and assert authority and jurisdiction, this is a dialogue that can begin.

Saskatchewan, like Ontario, cannot afford to leave its Aboriginal people behind. In 2006, 16% Saskatchewan residents were of Aboriginal descent. By 2031, it will be up to 24%.

The status quo is unacceptable, and it is costly. Whatever money the province may feel like it is losing with revenue sharing will be more than paid off by the revitalization and empowerment of Aboriginal communities. To put matters of dignity in blunt economic terms: healthier communities cost less to taxpayers.

The historic treaties must be renewed and updated in line with the principle of sharing. There is a fear out there that renewing treaties means stopping economic development altogether. This fear is misplaced. It is, for the most part, a bogeyman. Conceding a fair share of the pie to First Nations will not mean an end to the feast. But it will mean a more equitable sharing of benefits.

We already have a model in the approach taken in Labrador. In this part of Canada, on land covered by a modern treaty with the Innu Nation, mining companies must reach mutually beneficial deals with the Innu. And in cases where the parties cannot come to an agreement on conditions for development, the matter is subject to compulsory arbitration. At the end of the day, a deal is always done. There is no reason we cannot take a similar approach in areas covered by historic treaties.

As things stand today, the gap between people living under historic and modern treaties is widening. And it is unjustifiable.

The worse this gap gets, the more the governments of Canada, Ontario, Saskatchewan, Alberta, and Manitoba should be shamed into action. It is also likely that more litigation will attack the terms of the historic treaties, just like the *Paulette* case did. And the status quo is certain to lead to more blockades and civil disobedience unless the provinces come to the table.

Since the *Calder* case 40 years ago, the courts have been delivering an unmistakable message. *Settlers do not rule the land. They must share. And we are all here to stay.*

So the process of accommodation, of negotiation, and of coming together, must happen. It is the chapter in our national reconciliation that we must write together.