

Remarks of the Right Honorable Beverley McLachlin, P.C. Chief Justice of Canada

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Aboriginal Rights: International

Perspectives Introduction

Aboriginal rights ranks as one of the prime pre-occupations of Canadian social policy, governance and law as we begin the twenty-first century. Three centuries (more or less depending on the region) have passed since our country was first colonized. Two full decades have elapsed since aboriginal rights were entered in the Canadian Charter of Rights and Freedoms. Yet to look at our newspapers or our court rosters, one might think that we are just beginning to work out the relationship between our first nations and those who came to Canada as settlers.

Completing the task of working out this relationship promptly and on fair and equitable terms will provide the basis for lasting national peace, stability and economic and individual growth. Canada, the provinces and aboriginal people are directing enormous energy and effort to this end. Still, the complexity and breadth of the task seem bewildering. It may come as some comfort to know that we are not alone with these issues or in our efforts to find an equitable and durable solution.

Taking up this theme, I would today like to look at aboriginal rights from the international perspective. As we will see, Canada is not alone in facing these matters. Nor are these matters confined to North America. The product of the age of colonization, they resonate throughout the world, both historically and on the contemporary front. Aboriginal rights from the beginning have been shaped by international concepts. The Canadian approach to aboriginal rights was initially shaped by British colonial policy and the common law. More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter. Different countries may take different approaches to particular problems. But underlying the differences, one finds considerable consensus on the fundamental principles.

The British Influence

The British policy was to leave the law of conquered peoples in place, with the exception of "matters involving the relationship between the conquered people and the new British sovereign". Put simply, this meant that upon British conquest, the native population kept existing rights and legal systems, subject to change by British rulers. In Canada and the rest of British North America, this policy found expression in the Royal Proclamation of 1763. The Proclamation, never repealed and still in effect, brought the common law to the new colony of Quebec and its French-speaking and Aboriginal peoples. Its effect extended farther. It recognized that the Indian "Nations or Tribes" owned "all the Lands and Territories lying to the Westward" of the Atlantic watershed. It further provided that these territories could not be ceded or sold except to the Crown. This prevented individual settlers from taking aboriginal lands, except through the actions of the Crown. In practice, the Crown would enter into a "treaty", a negotiated agreement between the Crown and a particular aboriginal group. Typically, the aboriginal group would agree to give up claims for extended territory in

exchange for a reserved territory, or reservation, and other specified rights and benefits. Settlers were *then free* to move into the territory acquired by the Crown outside the reservation.

Thus in most of Canada, aboriginal interests were reconciled with European interests, through the negotiation - treaty process. However, in some parts of the country, notably British Columbia, the treaty process was not carried to fulfillment. Reservations were created, but they were not *the* product of a government allotment rather than negotiated settlement with aboriginal communities. The result is that British Columbia is faced with the task of negotiating treaties today, centuries after European settlement.